



ROYAL NORWEGIAN MINISTRY OF
CLIMATE AND ENVIRONMENT

EFTA Surveillance Authority
Avenue des Arts 19H
1000 BRUSSELS
BELGIUM

Your ref
80563

Our ref
17/2763-

Date
8 December 2021

Reply to letter regarding management of waste from extractive industries

Dear Madam/Sir,

1. Introduction

Reference is made to the letter from EFTA Surveillance Authority ("The Authority") dated 6 October 2021 concerning the implementation of the Mining Waste Directive¹ into the Norwegian legal order.

The Ministry of Climate and Environment ("The Ministry") has considered the Authority's preliminary assessment of the Norwegian implementation of the Mining Waste Directive. The Ministry takes note of the Authority's preliminary assessment, and we acknowledge that clarification of the national legal framework can be beneficial. The Ministry will conduct a thorough review of the Waste Regulation, including the implementation of the Mining Waste Directive and make the necessary and appropriate amendments to the regulation. We will initiate the revision process immediately and expect to have a draft regulation by the fall of 2022.

In the following we have addressed the preliminary assessments made by the Authority. However, since the Ministry will initiate a thorough review and amendment process the assessment in this letter is of a briefer character.

¹ Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC.

2. The basis for the Ministry's preliminary assessment

In light of the Authority's letter and the upcoming review of the Waste regulation, the Ministry will give a brief account of its view on the EEA requirements on the implementation of directives.

Pursuant to Article 7 of the EEA Agreement, acts referred to or contained in the Annexes to the Agreement shall be, or be made, part of the Contracting Parties' internal legal order. It is up to the authorities of the Contracting Parties to decide the form and method of implementation of directives, such as the Mining Waste Directive, cf. Article 7 b).

As stated by EFTA Court in Case E-15/12, the implementation of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient provided it actually ensures the full application of the directive, cf. para. 50. The transposition must however be sufficiently clear and precise where the directive is intended to create rights for individuals. When transposing such provisions into the national legal order the authorities must ensure that individuals have full access to their rights and full access to relevant information regarding these rights. Provisions that do not intend to create such rights may be given full effect without similarly specific and corresponding provisions.

The provisions in the directive must be assessed to determine the degree of precision and clarity required in order to ensure full application of the directive into domestic law. Thus, in the Ministry's view, there is no general obligation for the authorities to follow the structure of the directive or to ensure that all provisions are transposed into just one act or regulation or governed by one competent authority. However, dependent on the content and purpose of a directive and its provisions, such measures may be necessary in order to ensure full application of the directive.

3. Scope of application - Article 2(2)

The Ministry recognizes the Authority's preliminary assessment regarding the implementation of Article 2(2) of the Mining Waste Directive in Section 17-2 of the Waste Regulation, and we will consider this in the upcoming revision of the Waste Regulation in order to ensure full compliance with the Mining Waste Directive.

4. Definitions - Article 3

With reference to section 2 above, the Ministry holds that directive provisions that set out definitions may be given full effect without introducing corresponding legislative definitions in national law, cf. Case C-427/07 para. 54–60 *mutatis mutandis*. However, the Ministry takes note of the Authority's assessment and will assess the definitions in the Mining Waste Directive in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

5. Waste management plan - Article 5

5.1. Objectives of the waste management plan - Article 5(2)

With reference to section 2 above, the Ministry holds that there is no general obligation for the authorities to implement all directive provisions in one act or regulation. Further, there is no general obligation to provide cross-references between relevant national acts or regulations, provided that the legal framework as a whole guarantees the full application of the directive as previously mentioned. However, the Ministry takes note of the Authority's assessment of the implementation of Article 5(2). We will assess the implementation of the article in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

5.2. Review of the waste management plan - Article 5(4)

The planned amendment of section § 17-7 of the Waste Regulation covering article 5(4) was adopted on 3 December 2021. The amended paragraph reads as follows (unofficial English translation):

The operator shall review the waste management plan every fifth year after the plan is approved for the first time. If substantial changes are done to the operation of the waste facility or to the waste deposited, the waste management plan shall be amended. Any amendments shall be notified to the competent authority.

6. Application and permit - Article 7

6.1. Requirements to apply for permits - Article 7(1)

Pursuant to Section 17-4 of the Waste Regulation all operators of waste facilities are required to apply for a permit when their facilities “may cause pollution or have an unsightly effect”. The permit shall be an integral part of the permit issued pursuant to Section 11 of the Pollution Control Act. The threshold for causing pollution or having an unsightly effect is low, meaning that in practice all mining waste facilities will be required to apply for a permit. For the sake of clarity, and to ensure that there are no formal discrepancies between the Mining Waste Directive and the Waste Regulation, the Ministry will include an assessment of the implementation of Article 7(1) in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation

6.2. Approval of the mining waste management plan in the permitting process- Article 7(2)(c)

As described in the package meeting on 29 November 2021 (see also letter of 7 June 2019), we understand that the Ministry might have miscommunicated the circumstances regarding the alleged two-step approach for the application for a permit to operate a waste facility and the approval of the waste management plan. The two-step approach previously described by the Ministry and by the Authority in the letter of 6. October 2021 refers to the process carried out in the two specific cases of Nordic Mining (Førdefjorden) and Nussir (Repparfjorden). In these cases, the applications for a permit to operate the waste facilities were received in 2009 and in 2011, prior to the implementation of the Mining Waste Directive. In these cases, the Norwegian Environmental Agency considered that Nordic Mining and Nussir provided the necessary information regarding waste management during the application process, which

will be a part of the final waste management plan. The permits also stipulate that the waste management plans must be finalised and approved by the Norwegian Environmental Agency before the operators will be permitted to start depositing mineral waste. Hence, the operators must have an approved waste management plan in place before they can start the mining activity. This was considered to be in accordance with the provisions and overall objectives of the Mining Waste Directive.

However, there is no such two-step approach in the current Waste Regulation, after the Mining Waste Directive was implemented (see also our letter of 15 January 2018). Pursuant to Section 17-5 c) of the Waste Regulation all applications to operate waste facilities must include a proposed waste management plan. When the permit is granted it must contain an approved waste management plan, cf. Section 17-6 c) of the Waste Regulation. The Norwegian legislation also requires public participation in the application and permit process, cf. the Pollution Regulation chapter 36, section 36-5 to 36-9.

For the sake of completeness, the Ministry will reassess the implementation of Article 7(2) of the Mining Waste Directive in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

6.3. Review of the permit – Article 7(4)

The Ministry is of the understanding that Article 7(4) of the Mining Waste Directive impose obligations upon the competent authorities to reconsider and update permit conditions. As demonstrated under section 2 above, provisions that impose obligations only upon the national authorities are generally not required to be implemented formally and verbatim. However, the Ministry takes note of the Authority's assessment of the matter and will include an assessment of the implementation of Article 7(4) in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

7. Construction and management of waste facilities – Article 11(3)

With reference to section 2 above, the Ministry holds that there is no general obligation for the authorities to implement all directive provisions in one act or regulation, or that these acts and regulations must be governed by one competent authority. Further, the Ministry holds that there is no general obligation to provide cross-references between relevant national acts or regulations, provided that the framework as a whole guarantees the full application of the directive in a sufficient and clear manner.

The Ministry takes note of the Authority's preliminary assessment of the implementation of Article 11(3) and will include an assessment of this in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

8. Closure and after- closure procedures for waste facilities- Article 12(6)

The Ministry takes note of the Authority's preliminary assessment of the implementation of Article 12(6) of the Mining Waste Directive. We will include an assessment of this in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

9. Financial guarantee- Article 14(1)

The Ministry takes note of the Authority's preliminary assessment of the implementation of Article 14(1) of the Mining Waste Directive. We will include an assessment of this in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

10 Inspections by the competent authority - Article 17(1)

The Ministry is of the understanding that Article 17(1) of the Mining Waste Directive impose obligations upon the competent authorities to conduct inspections. As demonstrated under section 2 above, the Ministry is of the understanding that provisions that only impose obligations upon the authorities are generally not required to be implemented formally and verbatim. However, we will consider the implementation of Article 17(1) in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

11. Cross-references to environmental requirements of relevant EU/EEA law

The Ministry holds that there is no general obligation for the authorities to provide-cross references between national acts or regulations, provided that the implementation ensures the full application of the directive, cf. section 2 above. However, for the sake of completeness and clarity, The Ministry will consider this in the upcoming revision of the Waste Regulation and investigate whether it is necessary and/or beneficial to make amendments in the regulation.

12. The Norwegian Government's administrative practices for managing mining waste

The Ministry takes note of the Authority's preliminary assessment regarding the Norwegian administrative practices, and this will be considered in the upcoming revision of the Waste Regulation, including whether amendments are needed and/ or beneficial in order to ensure a full application and compliance with the Directive.

Yours sincerely

Ida Juell
Deputy Director General

Ida Røstgaard
Adviser

This document is signed electronically and has therefore no handwritten signature