Unofficial translation

APPEAL

to

Borgarting Court of Appeal

Oslo, February 12, 2024

Our ref: 326672-001

Oslo District Court case 22-165021TVI-TOSL/04

Appellant 1:	Norwegian Society for Nature Conservation Mariboes gate 8, 0183 Oslo
Legal counsel:	Attorney Asle Bjelland, CMS Kluge Advokatfirma AS
Appellant 2:	Nature and Youth Torggata 34, 0183 Oslo
Legal counsel:	Attorney Amund Noss, CMS Kluge Advokatfirma AS
Respondent:	Staten v/ Ministry of Climate and Environment and Ministry of Trade, Industry and Fisheries Postboks 8013 Dep, 0030 Oslo, Norway
Legal counsel:	The Government Attorney v/attorney Henrik Vaaler
Legal assistant:	The Government Attorney v/attorney Karen Mellingen
The case concerns:	Validity of state permits for disposal of mining waste in the Førdefjord

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CMS Kluge Advokatfirma Stavanger
Olav Kyrres gate 21, Herbarium
PO Box 277
4068 STAVANGER

Tel: 51 82 29 00
Fax: 51 82 29 01
E-mail: post@cms-kluge.com

CMS Kluge Advokatfirma Oslo

Bryggegata 6
PO Box 1548, Vika
0117 OSLO

Tel: 23 11 00 00
Fax: 23 11 00 01
E-mail: post@cms-kluge.com

CMS Kluge Advokatfirma Bergen

Allehelgensgate 2
PO Box 394 Sentrum
5805 BERGEN

Tel: 55 21 98 00
Fax: 55 21 98 01
E-mail: post@cms-kluge.com

Organization number

913 296 117 VAT

Bank
9685.27.21690 (operating account)
8396.07.70946 (operating account EUR)
9685.27.21755 (client funds)
9685.27.54068 (eiendomsmegling)
SWIFT: HANDNOKK

1 INTRODUCTION - DELIMITATION OF THE APPEAL

The case concerns the validity of four individual decisions where the company Engebø Rutile and Garnet AS has been granted permission for mining in Engebøfjellet and sea disposal in Førdefjorden in Sunnfjord municipality.

In Oslo District Court's judgment of 10 January 2024, the state was acquitted and awarded NOK 1.4 million in legal costs in the appellants' (hereinafter referred to as the environmental organizations) invalidity action.

The judgment was served on January 11. The deadline for appeals is February 12, cf. section 149 of the Courts of Justice Act.

The environmental organizations will, as before the District Court, claim that the four state permits are invalid.

The mining project in Engebø is planned with a sea disposal site where the residual masses after extraction of minerals (so-called tailings) will be deposited at the bottom of the Førdefjord. Tailings make up about 85% of the ore mined in the mountains, and the state has granted permission for the disposal of a total of 170 million tons of tailings in the fjord. The environmental organizations are not opposed to mining as such, but believe that any mining operations can and must be designed to avoid sea disposal. The ecological status of the relevant part of the Førdefjord is currently classified as good, and the parties agree that the sea dumping will cause the status to go from good to very poor for the duration of the dumping and for a long time thereafter. The environmental organizations also believe that the environmental consequences of the sea disposal site could be far more serious than the state assumes in its decisions.

In the view of the environmental organizations, there are several grounds for invalidity of the decisions. In the District Court, the claims included inadequate investigation of operating methods without sea dumping, unjustifiable forecasts of the environmental consequences of sea dumping and incorrect handling of the Mineral Waste Regulations' requirements for a waste management plan. Several of the submissions involved complex factual issues that required extensive evidence. The district court proceedings were relatively extensive, with a main hearing over 10 court days and a 97-page judgment.

The environmental organizations' lawsuits are financed by funds raised. The organizations have no financial opportunity to appeal the District Court's judgment in its entirety, even though they believe that the District Court's judgment contains a number of errors in both the application of the law and the assessment of evidence.

The appeal is therefore limited to the question of greatest importance in principle, namely the Water Directive's requirement that there must be an "overriding public interest" for the permits to be granted. In the District Court's judgment, the question is mainly dealt with on pages 21-39. This is purely a question of application of the law (substantive jurisdiction), which to a very limited extent will require evidence of facts.

The appeal also includes the District Court's decision on costs. This raises fundamental questions about the application of the Aarhus Convention and generally about environmental organizations' access to judicial review. It is announced that the issue of costs will therefore be litigated more broadly than is often the case.

Subject to the fact that we have not seen the state's response to the appeal, we estimate that it will be sufficient to set aside two to three days for the appeal hearing.

As the case is now delimited, it is clear that the Court of Appeal will have to consider the general interpretation of the Water Directive's requirement of "overriding public interest". The environmental organizations request that the Court of Appeal refer this question of interpretation of EEA law to the EFTA Court. This is explained in more detail in point 5 below.

2 THE APPEAL CASE IN A NUTSHELL

The parties agree on the following starting points:

- The ecological status of the outer part of the Førdefjord is currently classified as good.
- The deposit of mining waste will result in very poor ecological conditions for the duration of the project and for a long time afterwards.
- The Water Framework Directive is part of the EEA Agreement and is implemented in Norwegian law through the Water Regulations.
- In accordance with the presumption principle, the terms in the Water Regulations must be interpreted as having the same content as in the Water Framework Directive. The case therefore concerns the interpretation of the Water Directive.
- The Water Framework Directive sets out a general prohibition against such deterioration and specifies the conditions that must be met in order for exceptions to be made.
- The Water Framework Directive is aimed at all Norwegian sectoral authorities. Permits for the disposal of mining waste are invalid if the conditions of the Water Directive are not met.
- One of the conditions that must be met is that the measure is necessary due to "overriding public interest".

When interpreting the Water Regulations and the Water Framework Directive, it is essential to distinguish between ordinary societal benefits ("public interest") and particularly weighty societal considerations ("overriding public interest"). In the Norwegian Water Regulations, which implement the Water Framework Directive in Norwegian law, the requirement that the public interest must be "overriding" has not been included in the wording. This is the root cause of the permits being based on an incorrect application of the law.

The decisions are based on the assumption that the assessment under section 12, second paragraph, letter b of the Water Regulations is the same as under section 11 of the Pollution Control Act. This misunderstanding has arisen as a result of the inadequate implementation of the Water Directive. The error in the Water Regulations has thus affected the administrative decisions.

The environmental organizations will argue that the Water Regulation - interpreted in accordance with Norway's obligations under the EEA Agreement - requires a different and stricter assessment.

In the fall of 2023, the Norwegian authorities took the initiative to correct the water regulations. This was after prolonged pressure from ESA. In the consultation paper from the Ministry of Climate and Environment, it is proposed to change the wording of the Water Regulations so that it is similar to the wording of the directive.

The original and current wording of the condition reads as follows:

> *"the social benefit of the new interventions or activities should be greater than the loss of environmental quality"*

The current wording is proposed to be replaced with the following:

> *"The interventions or activities must be justified by overriding public interests, or their benefit to human health, safety or sustainable development must outweigh the benefit to the environment and society of achieving the environmental objectives."*

This proposal confirms the environmental organizations' view that only particularly weighty societal interests can justify impairment.

The permits are based on a legal opinion that ordinary societal benefit is sufficient. They are thus based on an incorrect understanding of the environmental requirements under EEA law pursuant to the Water Framework Directive. Consequently, the permits are invalid.

3 OVERVIEW OF THE CONSIDERATIONS THAT WERE EMPHASIZED IN THE PERMIT

The starting point for the assessment of the validity of the decisions is the circumstances at the time of the decision and the reasons given in the decision.

In the royal decree of February 19, 2016, the permit was justified as follows:

> *"The Ministry considers that the future revenues from mining activities are the dominant benefit for Norwegian society as a whole. The revenues are distributed between employees and shareholders, and as tax revenues to municipalities and the state. Naustdal municipality will receive increased tax revenues from the company through income and property tax, and from increased employment through taxes on general income, property tax and wealth tax. Other municipalities may receive increased revenue through income tax from employees who settle in their municipality. Corporate profits are taxed at 28%, which goes to the state. In addition, there is a state income from the employer's contribution, which for Naustdal is 10.6%.*
>
> *These increased revenues are considered to have a major positive effect. The mining operations will also generate employment. The price of rutile will vary over time, but these are factors that the company will take into account when assessing the profitability of the measure. Extraction from the deposit in Engebøfjellet will be able to meet the demand for rutile on the world market for many years, as the rutile deposit in Engebøfjellet represents one of the largest known deposits in solid rock. This business could therefore ensure increased employment in a long-term perspective. Locally, an increase in tax revenues and employment could have a significant impact. All in all, the measure is expected to have a major positive effect on local settlements, not least Naustdal, which is a relatively small municipality that has long been in a slightly declining population trend."* (U 1877, 1887-1888*)*

It is clear from the first paragraph that it is the future revenues from the mining activities that constitute the main justification for allowing the measure. As described in the decision, these revenues will be distributed between employees, shareholders and tax creditors.

The future revenues were also given decisive weight in previous instances. The Ministry of the Environment's decision is formulated as follows (U 1826):

> *"The future revenues from mining operations are the dominant benefit for Norwegian society as a whole"*

A similar formulation is included in the Norwegian Environment Agency's recommendation of February 13, 2015 (U 3766):

> *"It is clear that it is the future revenues from mining activities that will be the dominant benefit for Norwegian society as a whole."*

The second paragraph of the decree refers to the fact that the mining activities will increase employment and local settlement. It is also pointed out that the operations will be able to "meet the demand for rutile on the world market for many years". The parties disagree somewhat on the meaning of this formulation. In the view of the environmental organizations, this is not emphasized as an independent consideration. It appears from the quoted text that this element is only included in the justification that the activity could "provide increased employment in a long-term perspective".

4 THE REQUIREMENT OF "OVERRIDING PUBLIC INTEREST" IS NOT MET

4.1 Introduction

As mentioned, the environmental organizations request that an advisory opinion be obtained, cf. point 5 below. In that case, there will be an opportunity to explain the legal arguments in more detail in a submission to the Court. Therefore, only some brief comments on the District Court's judgment are provided below.

4.2 Test intensity

On page 22, the District Court takes as its starting point that it can review the application of the law and the assessment of evidence, but "not the administration's discretionary weighing of legal considerations". The court then gives some views on the right to give judgment on abstract questions of law, cf. section 1-3 of the Dispute Act. This last point has not been an issue in the case, nor is it before the Court of Appeal. It is therefore not commented on further.

It may appear somewhat unclear whether the District Court's statements on the right of review apply to Section 11 of the Pollution Control Act and/or Section 12 of the Water Regulations, cf. Article 4(7) of the Water Directive. The environmental organizations' view on the right of review is in any case the following:

The prerequisite for the administration to be able to issue a permit under section 11 of the Pollution Control Act is that the exemption condition in the Water Directive is met. The requirement of "overriding public interest" thus acts as a barrier to the administration's competence to issue permits pursuant to section 11 of the Pollution Control Act.

If the exemption condition in the Water Directive is met, it will be up to the administration's free discretion whether to grant a pollution permit pursuant to section 11 of the Pollution Control Act. The environmental organizations' appeal is limited to the administration's application of the Water Directive. The question of the court's right of review under section 11 of the Pollution Control Act does not need to be considered by the Court of Appeal.

The court may review all aspects of the administration's assessment of whether the Water Framework Directive's requirement of "overriding public interest" is met. This applies to both the application of the law and the specific subsumption, but there may be grounds for a lower intensity of review with regard to the subsumption. In the District Court, the state and the environmental organizations agreed that this is not a free discretion.

The central error in the administration's application of the Water Framework Directive is that the permit is based on an incorrect legal assessment. This has resulted in the permit being based on considerations that do not meet the requirement of an "overriding public interest". This must lead to the decision being revoked, so that the administration can make a new assessment based on a correct legal test.

4.3 The district court's application of law

The district court's application of the law consists of a two-part reasoning:

- First, the District Court concludes that "overriding public interest" does not entail a requirement of qualified or elevated overriding interest. The District Court understands "overriding public interest" to mean that the condition "delimits the nature and significance of the interest", and "draws an outer limit for the kind of considerations or interests that may be relevant".

- The District Court then discusses the more detailed content of the relevance requirement. On page 38, the court considers "whether any of the considerations on which the Permits are based fall outside the considerations that may constitute "overriding public interest" under Article 4(7)". The Court concludes that all these considerations will be relevant.

The requirement that the public interests must be "overriding" implies a qualification of, or threshold for, which public interests can justify degradation of water resources. It follows from the wording that "general" societal interests will not be sufficient. Whether this is regarded as a requirement for a qualified preponderance of interests or as a requirement that only qualified interests are relevant may be a matter of taste. In any case, the choice does not resolve the question of how important the societal interests must be in order to allow the impairment. In both variants, a distinction must therefore be made between societal interests that are sufficiently important and interests that are not.

The District Court has concluded that the provision entails a relevance requirement, and not a qualified overriding interest requirement. However, the District Court does not make any further qualification of the relevance requirement, but merely states that the dominant reason for the decision, namely "consideration of the total future revenues" from the mining activities, may constitute "overriding public interest" pursuant to Article 4(7).

One of the main purposes of the Water Framework Directive is to protect a limited resource, namely good water resources. Therefore, there is a general prohibition against impairing such resources. Exceptions can be made if it is absolutely necessary to solve high-priority social tasks. Examples of considerations that may be an "overriding public interest" are drinking water supply, flood protection, energy production and communication.

Under the District Court's interpretation, facilitating a profitable industrial activity - which provides a basis for commercial profit, tax revenues and jobs - will in itself be sufficient to meet the condition of "overriding public interest". The District Court's application of the law is incorrect because it means that good water resources can be degraded even if the project is not justified by important social tasks.

The result of the District Court's interpretation is that the Water Directive's explicit requirement that the public interest must be "overriding" is without content.

4.4 The district court's use of legal sources

In the view of the environmental organizations, the District Court's application of the law lacks a clear legal source basis without sufficient support in the wording, practice and theory. It is beyond the scope of this statement of appeal to provide a detailed account of the individual legal source factors. As mentioned, the environmental organizations also request that the Court of Appeal refer this question of interpretation of EEA law to the EFTA Court. In that connection, the environmental organizations will provide a detailed review of the relevant sources of law. However, five main points should be pointed out.

Firstly, it is a fundamental weakness that the District Court does not undertake a further qualification of the explicit requirement of "overriding" public interest in the wording. The wording "overriding" contains an express threshold requirement, regardless of whether the condition is regarded as a relevance requirement or a balancing standard. The fact that the District Court assumes that ordinary, economic effects of a profitable industrial activity constitute an "overriding public interest", results in such a low threshold that the "overriding" criterion becomes virtually meaningless. The District Court's interpretation violates a normal linguistic understanding of the wording, and it does not harmonize with the EU law principle that exemption conditions must be interpreted narrowly. The wording thus speaks strongly against the District Court's interpretation.

Secondly, the requirement of an "overriding public interest" must be interpreted in light of the fact that Article 4(7) contains two alternative exemption conditions. Alternative 1 requires an "overriding public interest", while alternative no. 2 applies to three particularly important public interests (health, safety and sustainable development) that outweigh the benefits of achieving the environmental objectives. The fact that these two alternatives are listed indicates that alternative 1 ("overriding public interest") is also limited to public interests of particular importance.

Thirdly, on page 38, the District Court appears to attach considerable weight to the European Commission's guidelines. When the District Court on page 38 finds that the total future revenues fall within "overriding public interest", great weight is given to the fact that the Commission's guidance no. 20/2009, section 3.5.2 mentions "activities of an economic or social nature, fulfilling specific obligations of public services" as within "overriding public interest". In the view of the environmental organizations, the District Court's interpretation of the guidelines is incorrect. The District Court seems to overlook that such measures according to the guidelines must be both indispensable ("indispensable") and suitable for fulfilling important public obligations ("fulfulling specific obligations of public services"), such as major infrastructure measures and water supply measures. When para. 3.5.2 of the Guidelines, read in its entirety, clearly indicates that the mining activities in this case fall outside, and not within, the requirement of "overriding public interest".

Fourth, the District Court's treatment of the case law of the ECJ is, in the view of the environmental organizations, unbalanced. It is correct, as the District Court points out, that there is no authoritative clarification of the question of interpretation of the case from the ECJ. However, the District Court appears to overlook the most important point that can be derived from the case law on Article 4(7) of the Water Framework Directive. The Schwarze Sulm decision, which is the only decision discussed by the District Court, concerned the establishment of a hydropower plant that was intended to promote the transition from non-renewable to renewable energy sources. This must be considered to be at the core of an "overriding public interest".

The interpretation decision C-43/10 Nomarchiaki, which the District Court mentions but does not discuss, concerned the diversion of the upper part of the Greek river Acheloos into the river Pinios. The measure was justified, among other things, by agricultural areas' water supply, electricity production and drinking water supply in urban areas. In the case preparation, the Advocate General stated in paragraph 85 that adequate access to drinking water is "as a rule, of overriding public interest". The other two public interest considerations - irrigation for agriculture and electricity production - were considered less fundamental, and that more is required for such public interests to justify an exception, cf. the Advocate General's Opinion, paragraph 86.

Both cases suggest that "overriding public interest" refers to fundamental, socially critical interests. The dominant benefit of the mining project, however, is the company's future revenues and their ripple effects. The mining project is neither justified by a specific societal need nor does it promote important socially critical functions.

In addition, the Advocate General has stated in case C-723/21 Stadt Frankfurt that the community interest must be of "particular importance and demonstrates an overriding public interest", cf. paragraph 137. The case was withdrawn before the Court of Justice of the European Union, but the statement nevertheless has legal source value.

Fifth, the District Court disregards rather unambiguous statements in legal theory. Of the available theory, the District Court only considers Inge Lorange Backer's statement on p. 293 in *Innføring i naturressurs- og miljørett*, 5th edition:

> *"Under the first alternative, a materiality requirement applies. The second alternative does not, but here there are only three types of societal benefit considerations that can justify the watercourse measure after a weighing process, namely health and safety-related societal benefit and sustainable development considerations. The wording in the Water Regulations, on the other hand, is completely general and without any materiality requirement."*

In line with the wording, Backer points out that the condition indicates a "materiality requirement". On page 36, the District Court nevertheless appears to disregard the statement with reference to the fact that it is considered uncertain whether Backer refers to a relevance requirement or (also) a balancing standard. However, as explained above, this choice is largely a matter of taste that cannot justify a disqualification of Backer's main point that a materiality requirement must apply in any case - in other words, that it is a strict requirement. The same has been unequivocally assumed in other legal theory.

4.5 Relationship to the water regulations and the administrative decision in the case

The District Court states on page 23 that it does not need to decide whether the condition in the Water Directive is stricter than the assessment topic in section 11 of the Pollution Control Act. However, it is this question that is at the heart of the case. The point is that the decisions are based on such a premise. The consequence is that the administration has incorrectly conducted an ordinary cost-benefit assessment, without any requirement for qualified overriding interest or delimitation of which public interests can be included in the justification. Although the District Court does not say it outright, it has in fact arrived at an interpretation of the Water Directive that corresponds to the current wording of the Water Regulations: "the social benefit of the new interventions or activities shall be greater than the loss of environmental quality".

ESA has for a long time pushed for the Norwegian authorities to change this wording. In a letter dated October 26, 2021, ESA wrote:

> *"Please explain whether, there is anything which expressly and clearly prevents interpretation of the Norwegian national law provisions transposing Article 4(7)(c) WFD as being wider in scope and application than the provisions in Article 4(7)(c) WFD."*

The reason ESA raised this issue is that the Water Regulations do not reflect the high threshold in the Water Framework Directive. As ESA points out, this creates a risk that the administration may make decisions based on an incorrect assessment.

Norway is now in the process of correcting the error in the water regulation itself. What remains is to correct the administrative decisions that have been affected by this error.

5 AN ADVISORY OPINION SHOULD BE OBTAINED FROM THE EFTA COURT

5.1 Introduction

It follows from section 51a of the Courts of Justice Act that if a Norwegian court in a case must decide on the interpretation of a provision of EEA law, it may refer the question of interpretation to the EFTA Court.

It is the preparatory judge who makes the decision on referral.

The Norwegian Courts Administration has prepared a separate guide on referral to the EFTA Court, hereinafter referred to as the guide. The purpose of the scheme is described as follows:

> *"The central purpose of the EEA Agreement is to establish an economic cooperation area based on the same rules and equal conditions of competition.*
>
> *A fundamental prerequisite for the EEA Agreement to function as intended is that the same rules are interpreted and applied equally by all EEA states (currently 28 EU states and three EFTA states).*
>
> *The possibility of referral to the EFTA Court is intended to contribute to this. The system is based on a principle of cooperation whereby the EFTA Court assists the national court in interpreting EEA law, while it is left to the national court alone to decide on the facts (assessment of evidence) and the content of national law. As a starting point, it will thus also be left to the national court to apply EEA law to the specific facts of the case."*

Section 5 of the guidelines provides an overview of the factors that are key in the assessment of whether a question should be submitted. These elements are commented on consecutively below in sections 5.2 to 5.6. In section 5.7, we have outlined how questions to the EFTA Court can be formulated.

5.2 The question concerns interpretation of EEA law

It is clear that the appeal case raises an important question of EEA law. The parties agree that the Water Regulations must be interpreted in accordance with the Water Framework Directive. The disagreement thus concerns the interpretation of the condition of "overriding public interest" in the Water Directive. This condition is intended to function as a common minimum standard throughout the EU and EEA.

5.3 The question does not concern the assessment of evidence or subsumption

Only the actual interpretation of EEA law can be referred to the Court. The EFTA Court cannot comment on the assessment of evidence. Nor is it the Court's task to apply the EEA rule to the specific facts of the case (subsumption).

As pointed out in the guide, the Court will nevertheless accept questions that are closely related to the facts of the case. In some cases, the Court will go far in expanding the interpretation of EEA law, so that in practice little is left for the specific subsumption. In HR-2016-2554-P, the Supreme Court stated (paragraph 78):

> *"What the EFTA Court shall rule on in advisory opinions is the interpretation of EEA law, see Article 34, first paragraph, of the SCA. The assessment of evidence is a matter for the national courts. The same applies in principle to the specific subsumption, but there is no sharp distinction here. How far the EFTA Court will go in elaborating EEA law in detail in an interpretative opinion depends, inter alia, on the questions posed by the national court and how detailed the facts are set out in the written question."*

As shown in section 5.7 below, questions may be asked that will clarify whether the District Court's interpretation of the Directive is correct. The EFTA Court will also be able to provide clarifying guidelines, for example by specifying factors that may be emphasized in the assessment. Such clarification of the requirement of "overriding public interest" will provide important guidance both for the case at hand and for future cases.

5.4 There are doubts about the understanding of EEA law

In section 4 above, we have shown that the District Court's application of the law has no clear basis in legal sources. The court's conclusions lack support in the wording, practice and theory. The District Court itself points out that there is no authoritative decision from the ECJ. Nor has the issue previously been considered by Norwegian courts.

5.5 The question is relevant to the resolution of the case

During the district court proceedings, the environmental organizations raised several alternative grounds for invalidity. It was therefore uncertain whether EEA issues would come to the fore.

For the Court of Appeal, the case is limited to the Water Framework Directive. It is therefore certain that an advisory opinion will be relevant to the resolution of the case.

5.6 It would be appropriate to submit the question

The environmental organizations have a strong desire to limit the use of resources for the Court of Appeal. By referring the question, it will be possible to clarify questions of principle related to the Water Framework Directive through a process that is mainly in writing. A referral will also allow the issue to be thoroughly examined with contributions from the European Commission, ESA and other Member States, without imposing significant costs on environmental organizations. It is likely that any appeal hearing in the Court of Appeal could be simplified. It will also be more likely that the case can be concluded in the Court of Appeal. The environmental organizations therefore consider that a referral would be cost-saving.

Submission should not be postponed until the case is to be heard by the Supreme Court. Such a postponement could increase both the costs and the overall time taken until the final judgment is delivered. The case is already sufficiently defined and clarified.

5.7 Suggested questions

It is desirable that the parties can jointly agree on a short list of appropriate questions. The questions should be formulated so that the answers provide as much concrete guidance as possible for the appeal.

The district court's judgment is illustrative of the questions of interpretation raised by the case.

The District Court first discusses, in section 1.6, whether a qualified preponderance of interest requirement applies (section 1.6). The conclusion is already stated at the beginning of the discussion:

> *"The District Court does not find sufficient legal evidence that the exemption rule in Article 4(7) should also require a qualified or elevated balance of interests, as the Environmental Organizations have argued. The District Court finds no evidence for a requirement of qualified overriding public interest either in the wording of the Water Directive, in the preamble to the Directive, in the Commission's Guide No 36/2017's discussion of the difference between "public interest" and "overriding public interest", or in any case law from the ECJ or any other court of importance."*

The District Court then discusses, on page 38, which considerations may constitute "overriding public interest":

> *"The crux of the matter is whether any of the considerations on which the Permits are based fall outside the considerations that may constitute "overriding public interest" under Article 4(7).*
>
> *The resolution considered the overall societal benefit of the mining activity's future revenues distributed between employees, shareholders and municipal and state tax recipients as the dominant benefit for Norwegian society as a whole. The District Court finds no basis for finding that the consideration of the total future revenues falls outside Article 4(7)."*
>
> *The District Court clearly finds that the consideration of employment and the establishment of new jobs in relatively sparsely populated areas in Vestland County does not fall outside the "overriding public interest" under Article 4(7). In the District Court's view, the Resolution emphasizes both the consideration of access to resources in itself and the fact that the strength and duration of the international demand for rutile indirectly underpins the value creation and employment considerations also in the long term. Nor is this indirect consideration found to fall outside the scope of Article 4 no. 7. "*

The Court of Appeal may ask the Court to provide guidance on the interpretation of "overriding public interest" by asking the following questions:

1) What is the legal test when assessing whether there is an "overriding public interest" under Article 4(7) of the Water Framework Directive?

    a. Is a qualified preponderance of interests required and/or are only particularly important societal interests relevant?

    b. What will be key factors in the assessment of whether the public interests that justify the measure are "overriding"?

2) Can the following considerations constitute an "overriding public interest" under Article 4(7) of the Water Framework Directive, and if so, under what conditions?

   a. Pure financial interests

   b. That a private business will generate income for shareholders

   c. That a private business will generate tax revenues for the state and municipality

   d. That a private business will provide wage income for employees

   e. That a private sector business will increase local business activity, employment and settlement

The wording of question no. 1 is closely aligned with the wording of the first question in E-3/16 Follo Taxi. The question from the Supreme Court is included on page 31 of the guide. The structure of question no. 2 is closely related to the second question in E-4/22 Stendi AS & Nordlandia Care Norge AS v Municipality of Oslo. It will be difficult to provide an exhaustive answer to the question of which considerations may constitute an "overriding public interest" on a general basis, see, for example, E-2/21 Norep AS v Haugen Gruppen AS, paragraph 52. In order for the advisory opinion to provide as much guidance as possible in the appeal case, it is in the environmental organizations' view appropriate that questions are also asked about the significance of specific considerations.

We assume that it is not relevant to ask the Court whether the decision could have been based on considerations other than those emphasized in the grounds. There is a risk that such questions will be considered hypothetical. We are nevertheless open to including additional questions in the reference if the state wishes to do so. Depending on the state's response, additional questions may also be relevant.

6 COMMENTS ON THE DISTRICT COURT'S DECISION ON COSTS

The appeal also includes the District Court's decision on costs.

The environmental organizations will characterize the District Court's decision on costs as incorrect and unfair.

It is not correct, as the District Court suggests, that the environmental organizations "have prioritized other interests than the proportionality principle in the delimitation and implementation of the lawsuit". On the contrary, the use of experts was limited to a minimum. The environmental impacts were highlighted by free expert testimony from government experts, while the question of alternative forms of operation was limited to a short expert report, combined with video testimony from Sintef. In the view of the environmental organizations, this is in stark contrast to the state's choice to fly in an expert witness from the USA in first class for a brief explanation. In the view of the environmental organizations, this testimony was of very limited value, as the expert had no concrete knowledge of mining in Norway or the project in question.

The District Court's application of the rules on costs in the Dispute Act is not in accordance with Norway's obligations under the Aarhus Convention. In the European Court of Justice's judgment of 11.01.2024 in case C-252/22, it is stated that the assessment cannot be made solely on the basis of the plaintiff organizations' financial situation, but must be based on an objective assessment of the costs for any potential plaintiff who has a legal interest in bringing fundamental environmental actions. Paragraph 74 states:

> *"In that context, account must be taken of both the interest of the person wishing to defend his or her rights and the public interest in the protection of the environment. Consequently, that assessment cannot be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since members of the public and associations are naturally required to play an active role in defending the environment. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable (see, by analogy, judgment of 11 April 2013, Edwards and Pallikaropoulos, C-260/11, EU:C:2013:221, paragraphs 39 and 40)."*

It is therefore very unfortunate that the District Court, on its own initiative, has obtained accounting information and drawn conclusions about the environmental organizations' financial ability to bring environmental lawsuits. These conclusions are incorrect and were not subject to adversarial proceedings.

The District Court has also emphasized that the environmental organizations have exercised their right to appeal and petition for reversal during the administrative proceedings. The environmental organizations will argue that this cannot be given weight in the assessment of reasonableness under section 20-2, third paragraph, of the Dispute Act.

7 FURTHER PROCESSING

It is desirable that the question of referral is clarified quickly. The environmental protection organizations therefore request that the state in its response clarifies and justifies its view on the referral issue, and that a separate planning meeting is then held on this topic before the court makes its decision.

8 CLAIM

This claim is submitted on behalf of the appellants:

1. The Royal Decree of February 19, 2016 is invalid.
2. The Ministry of Climate and Environment's decision of November 23, 2021 is invalid.
3. The Ministry of Trade, Industry and Fisheries' decision of May 6, 2022 is invalid.
4. The Norwegian Environment Agency's decision of June 23, 2023 is invalid.
5. Naturvernforbundet and Natur og Ungdom are awarded costs before the District Court and the Court of Appeal.

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The statement of appeal is submitted by attorney Amund Noss on behalf of both process representatives for the appellants. It is requested that attorney Asle Bjelland also be registered as counsel.

* * *

Oslo, February 12, 2024
CMS Kluge Advokatfirma AS

Asle Bjelland
lawyer

Amund Noss
lawyer