BORGARTING LAGMANNSRETT

Dok 31

EFTA Court
1, rue du Fort Thüngen
L-1499 Luxembourg
Luxembourg

Request for an Advisory Opinion in Case No 24-036660ASD-BORG/01, civil case, appeal against judgment: Friends of Earth Norway and Young Friends of the Earth Norway – The Norwegian Government, represented by the Ministry of Climate and Environment and the Ministry of Trade, Industry and Fisheries

1. Introduction

Borgarting Court of Appeal (*Borgarting lagmannsrett*) hereby requests an Advisory Opinion from the EFTA Court in Case No 24-036660ASD-BORG/01, see Section 51a of the Norwegian Courts of Justice Act (*domstolloven*) and Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

The case currently pending before the Court of Appeal concerns the legality of four permits granted by Norwegian authorities to the mining company Nordic Mining ASA and its subsidiary Engebø Rutile and Garnet AS (previously "Nordic Rutile AS"; collectively "Nordic Mining"). The permits give Nordic Mining permission to operate a mine at Engebø in Sunnfjord municipality (previously Naustdal municipality) and conduct submarine tailings disposal in the Førdefjord.

The submarine tailings disposal will lead to a deterioration of the water status in the "Førdefjorden-ytre" surface water body contrary to Article 4(1)(a)(i) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ("WFD" or "the Directive"). The case before the Court of Appeal concerns whether the derogation granted by the Norwegian authorities can be justified due to "reasons [...] of overriding public interest", cf. Article 4(7)(c) of the WFD.

The request seeks clarification on the interpretation of the notion of «reasons […] of overriding public interest» in Article 4(7)(c) of the WFD. In addition, the request seeks to clarify whether certain justifications such as those that have been invoked before the Court of Appeal may constitute "reasons […] of overriding public interest".

2. Parties to the case

The parties to the case before the Borgarting Court of Appeal are:

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Appellant 1:	Friends of the Earth Norway (*Norges Naturvernforbund*) Mariboes gate 8 0183 OSLO
Counsel:	Advokat Asle Bjelland CMS Kluge Advokatfirma AS P.O. Box 1548, Vika 0117 OSLO
Appellant 2:	Young Friends of the Earth Norway (*Natur og Ungdom*) Torggata 34 0183 OSLO
Counsel:	Advokat Amund Noss CMS Kluge Advokatfirma AS
Respondent:	The Norwegian Government represented by (i) the Ministry of Climate and Environment (*Klima- og miljødepartementet*); and (ii) the Ministry of Trade, Industry and Fisheries (*Nærings- og fiskeridepartementet*) P.O. Box 8013 Dep 0030 OSLO
Counsel:	Office of the Attorney General (Civil Affairs) (*Regjeringsadvokaten*) Advokat Henrik Vaaler P. O. Box 8012 Dep 0030 OSLO
Assisting counsel:	Advokat Karen Mellingen Office of the Attorney General (Civil Affairs)

3. Facts of the case

3.1 The current proceedings before the Norwegian courts

In 2022, the two Norwegian environmental NGOs, Friends of the Earth Norway (*Norges Naturvernforbund*) and Young Friends of the Earth Norway (*Natur og Ungdom*), took legal action against the Norwegian Government before the Oslo District Court, arguing that four permits granted to Nordic Mining were invalid:

(i) The King in Council's Royal Decree of 19 February 2016.

The decision gives Nordic Mining a pollution permit pursuant to Section 11 of the Pollution Control Act of 1981 (*forurensningsloven*). The permit gives Nordic Mining the right to deposit 250 million tons of mining waste in the fjord.

(ii) The Ministry of Climate and Environment's decision of 23 November 2021.

The decision is a minor revision of the pollution permit due to changes in the planned use of chemicals.

(iii) The Ministry of Trade, Industry and Fisheries' decision of 6 May 2022.

The decision concerns the granting of an operating license pursuant to Section 43 of the Mining Act of 2008 (*mineralloven*).

(iv) The Environment Agency's decision of 23 June 2023.

The decision concerns approval of the waste management plan pursuant to Chapter 17 of Regulation no. 930 of 1 June 2004 on Recycling and Treatment of Waste (*avfallsforskriften*), and a revision of the existing pollution permit. The most important revision is the reduction in the total permitted quantity of tailings to be disposed in the fjord, which is reduced from 250 to 170 million tons.

The Royal Decree, which is the original pollution permit, is of particular importance. In this decision, the Norwegian Government sets out the reasons for applying the "overriding public interest" exception. Decisions (ii) and (iv) are subsequent adjustments to the original pollution permit. The current pollution permit is thus a result of decisions (i), (ii) and (iv).

Decision (iii) does not affect the pollution permit as such. The validity of this decision is disputed because the environmental organisations contend that it is based on the premise that the pollution permit is valid.

By judgment of 10 January 2024, the Oslo District Court dismissed the application in full. Both organisations have appealed the judgment to the Borgarting Court of Appeal.

The case before the Court of Appeal is limited to the question of whether the requirement of "reasons […] of overriding public interest" in Article 4(7)(c) of the WFD is fulfilled. The parties agree that the other conditions in Article 4(7) of the WFD are satisfied.

3.2 The Engebø mine

The Royal Decree describes Nordic Mining's project as follows (unofficial translation):

> The planned project involves the extraction and processing of rutile (titanium dioxide) from Engebøfjellet in Naustdal municipality. The operation will be based on the extraction and further processing of eclogite ore from Engebøfjellet. To access the eclogite ore, waste rock will be removed and placed in a separate landfill on land. The eclogite ore is estimated to contain around 4 per cent rutile. This results in large quantities of tailings, which are mainly planned to be deposited in the outer part of the Førdefjord. Mining of the ore is planned as open pit mining for the first 15 years. The area covered by the open pit is approximately 200 acres (0.2 km2). The extraction in the open pit will include drilling and blasting, pigging (splitting of rock with spike hammers), loading and transport in dump trucks. Both a coarse crushing plant and a fine crushing plant are planned to be located in the underground facility, both in the open pit and underground phases.

Processing of ore includes crushing, grinding and various separation processes for the extraction of rutile and garnet. According to preliminary calculations, up to 20 per cent of the ore input will go to flotation, where chemicals are used to extract fine-grained rutile. Flotation of the fines will increase the yield of titanium dioxide. Flocculant will be used in the recovery of fresh water from the thickeners to achieve sufficiently good water quality in the recycled water. The flocculant will also help to bind (clump) the fines in the effluent so that the sinking rate increases, thereby preventing the spread of fine particulate material during sea disposal.

After dewatering, waste material from the separation process will be transported to a mixing chamber down by the seashore. In the chamber, the tailings will be mixed with seawater and aerated to remove air bubbles before the diluted slurry is fed into the pipeline down the rock face and discharged over the seabed. The seawater, with its salt content, helps further flocculate fine particles flocculate further, so that they sink more quickly to the seabed and spreading is limited.

3.3 The environmental impact on the "Førdefjorden-ytre" water body

Tailings from the mine will be disposed within a 4.4 square kilometre area at the bottom of the Førdefjord. Under the terms of Nordic Mining's revised pollution permit, up to 170 million tonnes of tailings (at maximum rate of 4 million tonnes per annum) may be disposed at a depth from approximately 320 up to a limit of 220 metres. The disposal area is highlighted on the map below.

The parties disagree on how serious the environmental impacts will be, but it is undisputed that the deposit of mining waste will cause the ecological status to change from good to poor. The Royal Decree refers to section 4.6.7 of the Ministry of Environment's decision and the assessment made by the Ministry under the Water Framework Directive. In the Ministry of the Environment's decision, it is assumed that (unofficial translation):

> The condition of the water body Førdefjorden-ytre will deteriorate from good ecological status to poor status as a result of the physical changes in the seabed conditions. The condition of the water body is expected to be bad for the duration of the disposal and for a long time thereafter. It is therefore necessary with a derogation pursuant to Section 12 of the Water Regulation for disposal to be permitted. The Minstry asseses that the conditons for derogation are fulfilled.

The consequence of the deposit is that the benthic fauna in the deposit area will disappear. The Ministry has described the impact of the disposal on the seabed conditions as follows (unofficial translation):

> The deposition of the tailings causes the seabed conditions in Førdefjorden-ytre to change. It is therefore necessary to assess whether this change leads to a deterioration of the ecological status of the water body. Benthic fauna is the quality element that is most sensitive to the disposal of tailings. The benthic fauna in the deposit area will disappear as long as the disposal continues. The measure is therefore considered to cause the ecological status of the water body to deteriorate to poor status. The requested measure cannot therefore be permitted unless the conditions in section 12, second paragraph of the Water Regulations are met.

3.4 The Norwegian Government's justification for allowing a degradation of the water resource

The deterioration in surface water status means that the project is contingent on a derogation pursuant to Section 12 of Regulation no. 1446 of 15 December 2006 on a Framework for Water Management (*vannforskriften*, "the Water Regulation") which implements Article 4(7) of the WFD.

Derogation was granted by the Ministry of Climate and Environment in a decision of 5 June 2015 and affirmed by the King in Council (*Kongen i statsråd*) by Royal Decree of 19 February 2016 upon administrative appeal. The Royal Decree summarises the advantages of the project on pp. 11–12 (unofficial translation):

> 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 project. 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 undertaking 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 project is expected to have a major positive effect on settlement locally, not least Naustdal, which is a relatively small municipality that has long been in a slightly declining population trend.

The Royal Decree states that "the future revenues from mining activities are the dominant benefit". Furthermore, it stated that these revenues consist of three components:

- income for employees
- income for shareholders
- tax revenue for the state and municipality

Before the courts, the Norwegian Government has argued that the pollution permit, in addition to the economic justification mentioned above, also can be justified on the following grounds:

- employment effects (increased local business activity, employment and settlement)
- global supply of rutile
- ensuring Norway and Europe access to critical minerals

The parties disagree as to what interests are relevant in the case at hand, what interests the Royal Decree is based upon, and whether the national courts are entitled to also consider interests that are not set out the Royal Decree.

Several complaints concerning the Ministry of Climate and Environment's decision and the Royal Decree were received by the EFTA Surveillance Authority («ESA»). In Decision No 009/17/COL of 18 January 2017, ESA decided to close the complaint case. ESA has later closed another case regarding the disposal of mining waste in the Førdefjord, see Decision No 273/21/COL of 8 December 2021.

4. Relevant Norwegian law

4.1 The Pollution Control Act (forurensningsloven)

The Norwegian Pollution Control Act of 1981 applies to all pollution within the confines of Sections 3-5, including pollution of water resources.

Pursuant to Section 7 of the Pollution Control Act, it is unlawful to do or initiate anything that may entail a risk of pollution unless this is lawful pursuant to Section 8 or 9, or permitted by a decision made pursuant to Section 11 of the Act. Under Section 16 of the Pollution Control Act, it is possible to impose conditions in a permit in order to counteract or limit damage caused by the activity in question. These conditions are binding on the permit holder.

Section 11 of the Pollution Control Act authorises the pollution control authority to issue pollution permits. The conditions for granting such permits are set out in the fifth paragraph of the provision:

> When the pollution control authority decides whether a permit is to be granted and lays down conditions pursuant to section 16, it shall pay particular attention to any pollution-related nuisance arising from the project as compared with any other advantages and disadvantages so arising.

4.2 The Water Regulation (vannforskriften)

The WFD is transposed into Norwegian law through the Water Regulation, which entered into force on 1 January 2007.

Section 4 of the Water Regulation establishes the obligations to prevent deterioration of surface water bodies, as well as the objective that all water bodies shall have good ecological and chemical status. Article 4(7) of the WFD is transposed through Section 12 of the Water Regulation and the Regulation shall be interpreted in light of the Directive. It is a requirement for the granting of a permit under Section 11 of the Pollution Control Act, in relation to a water body, that the conditions set out in Section 12 of the Water Regulation are met. Section 12 of the Water Regulation reads (unofficial translation):

> New activity or new interventions in a water body can be carried out even though the environmental objective in section 4 to 6 will not be obtained or that the status is deteriorated if the cause is;
>
> a) New modifications to the physical characteristics of a surface water body or alterations to the levels of bodies of groundwater, or
> b) New sustainable activity causes deterioration in a water body from high status to good status
>
> In addition these requirements have to be fulfilled:
>
> a) All practicable steps have to be taken to limit an adverse development in the status of the water body
> b) The benefits for society of the new intervention or activities shall be greater than the loss of environmental quality
> c) The beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.
>
> Where new modifications or alterations are implemented during a plan period, the reason for this shall be included in an updated river basin management plan. If permission is given to new activity or new interventions, this shall also transpire of the river basin management plan.

In 2021, ESA opened a case concerning the implementation and application of the WFD in Norway (Case No 86194).

In a letter of 26 October 2021, ESA raised several questions to the Norwegian Government. Question 2 reads as follows:

> Please explain how Article 4(7)(c) of the WFD is transposed into Norwegian national law in full. Please explain whether the text and wording of Article 4(7)(c) WFD is transposed into Norwegian national law, or whether Norway has elected to adopt requirements which do not precisely reflect the wording and text of Article 4(7)(c) WFD. Please explain whether, under Norwegian national law, the exemption or exclusion set out in Article 4(7)(c) WFD is limited to those situations where there is a modification or alteration which has benefits – only and solely relating to: (1) human health; (2) the maintenance of human safety; and/or (3) sustainable development. 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.

In a letter of 15 December 2021, the Norwegian Government responded that:

> The Water Regulation section 12, second paragraph, subclause (b) is intended to reflect both the alternative criteria listed in Article 4(7) (c), i.e. both reasons of overriding public interest and benefits to human health, the maintenance of human safety or to sustainable development.
>
> […]
>
> The interpretation of Norwegian national law is guided by a number of interpretation principles. Among these is the presumption principle, stating that Norwegian national law transposing EEA legislation (or other international law) is presumed to be in accordance with that legislation. If the wording of the national provision leaves any room for interpretation, the national provision shall be interpreted in such a way that a uniform application of the EEA rule is achieved. This principle is applied by the authorities and courts of law in Norway when practising national law, and the principle therefore applies also to the Water Regulation section 12, second paragraph, subclause (b).

In response to the dialogue with ESA, the Ministry of Climate and Environment on 30 August 2023 presented a proposal to amend Section 12(2)(b) of the Water Regulation for public consultation. The proposal has not yet been adopted. The proposed new wording of Section 12(2)(b) reads (unofficial translation):

> The modifications or activities shall be based on overriding public interests, or their benefits to human health, safety or to sustainable development shall be greater than the benefits to the environment and to society of achieving the environmental objectives.

The wordings of the WFD article 4(7)(c) and the Water Regulation Section 12(2)(b) are compared in the table below:

WFD **Article 4(7)(c)**	**Water Regulation** **Section 12(2)(b)** **Current version**	**Water Regulation** **Section 12(2)(b)** **Proposed version**
the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by	*The benefits for society of the new intervention or activities shall be greater than the loss of environmental quality*	*The modifications or activities shall be based on overriding public interests, or their benefits to human health, safety or to sustainable development shall*

the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and		*be greater than the benefits to the environment and to society of achieving the environmental objectives.*

5. Relevant EEA law

5.1 The Water Framework Directive

The WFD was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 125/2007 of 28 September 2007, and is referred to at point 13ca of Annex XX (Environment). The Decision entered into force on 1 May 2009. Together with the Decision of the EEA Joint Committee, the Contracting Parties adopted a Joint Declaration by the Contracting Parties:

> The Contracting Parties recognise the diversity of anthropogenic pressures and impacts on waters across Europe. Consequently, the measures and efforts to achieve the environmental objective of the Directive might vary from region to region. The Water Framework Directive takes account of these diversities. It allows authorities responsible for the implementation of the Directive to select measures and efforts adapted to the pressures and impacts prevailing, whilst achieving the environmental objectives.

The WFD sets out a common framework for the protection of surface and ground water bodies in the EEA, see its Article 1. The Directive sets out common principles and an overall framework for action in relation to water protection. However, the Directive does not seek to achieve complete harmonisation of the rules of EEA States concerning water, compare the judgment in *Commission* v *Luxembourg*, C-32/05, EU:C:2006:749, paragraphs 41 *et seq.*

5.2 The obligation in Article 4(1)(a) of the WFD

Pursuant to Article 4(1)(a) of the WFD, EEA States shall:

> i. implement necessary measures to prevent deterioration in the status of all surface water bodies (obligation to prevent deterioration); and
> ii. protect, enhance and restore such waterbodies with the aim of achieving "«good surface water status" within 15 years of the Directive's entry into force (obligation to enhance), cf. the judgment in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, paragraphs 37–39.

In other words, the WFD sets out two closely linked substantive requirements relating to water management. The first requirement concerns preventive measures and is referred to as *the prohibition of deterioration* by the Court of Justice of the European Union ("CJEU"). The second requirement concerns active measures to improve the environmental status of water bodies with a view to achieving "good surface water status" during the current planning period.

"Good surface water status" is defined by Article 2(18) of the WFD as the combination of good ecological status and good chemical status. The criteria for determining ecological status are set out in Annex V to the Directive. Ecological status is divided into five status classes, with high being the highest and bad the lowest. The quality element with the lowest status class determines the ecological status of a surface water body, cf. the judgment in *Bund für Umwelt und Naturschutz Deutschland*, cited above, paragraph 59 (the so-called "One Out All Out Rule").

The obligation pursuant to Article 4(1)(a)(i) of the WFD has binding effect, see the judgments in *Bund für Umwelt und Naturschutz Deutschland*, cited above, paragraph 43; and *Commission v Austria ("Schwarze Sulm"),* C-346/14, EU:C:2016:322, paragraphs 53–55. The obligation also applies to specific projects causing a deterioration in the status of a water body, see the judgment in *Schwarze Sulm*, cited above, paragraph 57. EEA States are required to refuse authorisation for a project that results in deterioration of the status of the concerned water body or jeopardises the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the WFD, see the judgment in *Schwarze Sulm*, cited above, paragraph 64.

During the procedure for approval of a project, and before a decision is taken, competent authorities in the EEA States are thus required to check whether the project may have adverse effects on water which would be contrary to the requirements to prevent deterioration and to improve the status of bodies of surface water and groundwater, see the judgment in *Association France Nature Environnement*, C-525/20, EU:C:2022:350, paragraph 26. If the project has such effects, the competent authority must review whether the conditions in Article 4(7) of the WFD are satisfied, see the judgment in *Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:391, paragraph 75.

5.3 Derogation pursuant to Article 4(7) of the WFD

Article 4(5)–(7) of the WFD set outs the various derogations from Article 4(1). The derogations are also mentioned in recital 32 of the preamble to the Directive, which give no further direction as to the interpretation of Article 4(7).

Article 4(7) of the WFD applies to "new modifications"/"new […] activities" and sets out cumulative conditions for when derogation to such modifications/activities may be granted. The English language version of Article 4(7) reads:

> 7. Member States will not be in breach of this Directive when:
> — failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or
> — failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities
> and all the following conditions are met:
> (a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;
> (b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and (d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

Article 4(7)(c) of the WFD sets out two alternative conditions, and it suffices that one is fulfilled. The relevant alternative in the case at hand is the existence of "reasons […] of overriding public interest".

In other language versions the condition is formulated as for example "un intérêt general majeur" (French), "übergeordnetem öffentlichem Interesse" (German), "begrundet i væsentlige samfundsinteresser" (Danish) and "allmänintresse av större vikt" (Swedish). In the Norwegian language version published in the EEA Supplement to the Official Journal of the European Union, cf. Article 129(1), third subparagraph, of the EEA Agreement, it is required that "årsakene til endringene er tvingende allmenne hensyn". In some language versions, different terms are used in Article 4(7)(c) and recital 32 to the preamble to the WFD.

The notion of overriding public interest is also used in other areas of EU law, notably on restrictions on free movement. In the realm of free movement, the EFTA Court has held that a "requirement of a purely economic nature cannot be regarded as a reason of overriding public interest. Therefore, it cannot be relied upon to justify a restriction on the exercise of a fundamental freedom», see Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 33.

5.4 Case law of the CJEU concerning Article 4(7)(c) of the WFD

The notion of «overriding public interest» in Article 4(7)(c) of the WFD has previously been interpreted through three judgments by the CJEU. However, none of these judgments provide sufficient guidance on the questions raised by the present case.

The notion was first interpreted by the CJEU in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560. The case concerned the partial diversion of the upper waters of a river in Greece. The CJEU held in paragraphs 64–66.

> 64 While it is true that, as stated in paragraph 56 of this judgment, Article 4(7) is not applicable, as such, to a works project adopted on 2 August 2006, without prior production of river basin management plans for the river basins affected by that project, the conditions governing the project cannot be more rigorous than those pertaining if it had been adopted subsequent to Article 4 of Directive 2000/60 having become applicable to it.
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> 65 In the case of such a project, the criteria and conditions laid down in Article 4(7) of Directive 2000/60 may, in essence, be applied by analogy and, where necessary, *mutatis mutandis*, as setting the upper limit for restrictions on the project.
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> 66 As stated in recital 15 of the preamble to that directive, the supply of water is a service of general interest. As regards the production of electricity and irrigation, it is

clear from Article 4(3)(a)(iii) of the directive that they also in principle serve a general interest.

Article 4(7)(c) of the WFD was later interpreted in the judgment in *Schwarze Sulm*, cited above. The case concerned the construction of a hydropower plant on the Schwarze Sulm river in the Austrian region of Styria. The establishment of the hydropower plant could lead to a deterioration of the river's environmental status. The precise content of "overriding public interest" did not come to the fore in the case. The key question in the case was whether Austrian authorities had carried out a sufficient assessment and provided sufficient justification for the existence of an "overriding public interest". Nevertheless, the CJEU stated that measures that promote energy supply and the transition to renewable energy sources "may" constitute an "overriding public interest".

Article 4(7)(c) of the WFD was also interpreted by the CJEU in the judgment in *Association France Nature Environnement*, cited above, paragraph 43. The judgment has little bearing on the case at hand.

5.5 Case law from the CJEU concerning Article 6(4) of the Habitats Directive

In Guidance Document No 36 (2017), drawn up as part of the Common Implementation Strategy for the Water Framework Directive ("CIS"), a process established by the EU Member States, Norway and the European Commission, it is stated that when interpreting "overriding public interest" in the WFD, reference may be made to case law on the corresponding conditions in Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive").

It should be borne in mind that the aforementioned guidance document is not legally binding, see the judgment in *Association France Nature Environnement*, cited above, paragraph 31. Moreover, the Habitats Directive is not incorporated into the EEA Agreement.

Nevertheless, Article 6(3)–(4) of the Directive reads:

> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
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> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public

safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

The notion of "imperative reasons of overriding public interest" in Article 6(4) of the Habitats Directive has been interpreted in various judgments by the CJEU.

The judgment in *Commission v Spain*, C-404/09, EU:C:2011:768, concerned several authorisations given by Spanish authorities to mining operations and extension of existing mining operations in the "Alto Sil", a designated SPA and Site of Community Importance. The CJEU found that the permits were given in violation of Article 6(3) of the Habitats Directive and were thus invalid. The question of whether the measure was justified by an "overriding public interest" thus did not arise. The CJEU made a general remark, which was not necessary for the result, about the importance of mining for the local community:

> 109 The Kingdom of Spain, which has invoked the importance of mining activities for the local economy, needs to be reminded that, whilst that consideration is capable of constituting an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive, that provision can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive.

In her Opinion in that case, Advocate General Kokott pointed out that the measure, in principle, could be justified on the following grounds:

> 154. Consequently, the Spanish authorities cannot, in principle, be criticised for assuming that the continued operation of the mines was supported by imperative reasons of overriding public interest – namely security of energy supply, jobs and the final nature of authorisations – and for ruling out alternatives.

The judgment in *Solvay and Others*, C-182/10, EU:C:2012:82 concerned various building permits that the Walloon Parliament had decreed were of "overriding reasons in the public interest". Among other things, permission had been granted for infrastructure intended to accommodate a management and training centre within a Natura 2000 site. In Question 6 the CJEU considered (paragraph 71):

> [W]hether Article 6(4) of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate the management centre of a private company may be regarded as an imperative reason of overriding public interest.

The CJEU held in paragraphs 75–78:

> 75 An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora.
>
> 76 Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances.

77 It cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions.

78 In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive

6. Submissions by the Parties

6.1 The appellants

6.1.1 "Overriding Public Interest" is a narrow exception

Regarding question 1, the environmental organisations will argue that "overriding public interest" in Article 4(7)(c) is a narrow exception. The exception must also be interpreted in light of the precautionary principle. Good water resources are a valuable and limited resource. The purpose of the WFD is to ensure that these resources are not degraded unless absolutely necessary to meet essential societal needs. Examples of public interests that, after a specific and detailed assessment, could constitute an overriding public interest are: drinking water supply, flood protection, energy supply, etc.

A distinction must be drawn between public interests and private interests. An example of the latter could be the private shareholders' desire to achieve a profitable return on their investments.

Furthermore, a distinction must be drawn between overriding public interests and ordinary public interests. Firstly, this implies that only particularly important public interests are relevant. Secondly, there must be a clear and qualified preponderance of interests, i.e. the benefits of realising the public interests must be significantly greater than the disadvantages of not achieving the environmental goals.

6.1.2 Economic interests cannot constitute an Overriding Public Interest

Regarding question 2, the environmental organisations will argue that "overriding reasons in the public interest" delimits against purely economic interests.

This exception has been delineated by the CJEU, serving as a justification for interference with the fundamental freedoms, notably under the name "mandatory requirements" and "matters of overriding public interest". It is clearly established that purely economic interests, such as commercial income, financial returns to private stakeholders, and government tax revenues, cannot constitute an overriding public interest. As the corresponding exemption in the WFD has to be interpreted in line with the EU law in general, the delineation against purely economic interests is equally applicable in this context. The concept of overriding public interest was already developed in CJEU case law at the time when the WFD was adopted.

For the directive to be effective and for the distinction between ordinary and overriding public interest to be upheld, economic considerations cannot constitute an "overriding public

interest". There is no case law from the CJEU – neither from the WFD nor the Habitats Directive – that indicates otherwise.

The expected gross income from the mining operations is a private interest and an economic interest. Therefore, this interest clearly falls outside the "overriding public interest" exception. The expected income for private shareholders and wage income for employees are also private and economic interests. Therefore, these interests clearly fall outside the "overriding public interest" exception.

The expected tax revenues for municipalities and the state constitute a public interest. However, it is not "overriding". Any profitable commercial activity will generate tax revenues for the municipality and the state. Tax revenue is an economic interest, and there are a number of judgments from the CJEU stating that purely fiscal considerations cannot justify an exception to the prohibition of discrimination, see C-136/00 and C-340/22.

6.1.3 Comments on the Norwegian Government's alternative justifications

Question 3 concerns three justifications that the Government has invoked during the court proceedings.

First, the Government has referred to employment effects. These effects are also mentioned in the royal decree, but the "dominant benefit" is clearly stated to be "the future revenues from mining activities". The unemployment rate in the area was low. The effect of increased employment is essentially an economic consideration, and it is an entirely ordinary effect of facilitating industrial activity. Hence, the effect of increased employment cannot constitute an overriding public interest. To the extent that there are exceptions to this rule, they must be limited to exceptional cases involving the closure of a business on which the local community is based, which could lead to mass unemployment and social unrest.

Secondly, the state has emphasised that the measure will contribute to the global supply of rutile. This effect is also mentioned in the royal decree, but not as an independent objective. It is only mentioned to support the conclusion that the project will be profitable for many years to come. Increased supply of a raw material to the global market cannot in itself constitute an overriding public interest. Norway is already a net exporter of titanium raw materials and has no strategic interest in contributing to a reduced price of rutile on the world market.

Thirdly, the state claims that the project can contribute to securing Norway and Europe access to critical minerals. It is not disputed that such considerations, after a specific and detailed assessment, may constitute an overriding public interest for certain mining projects. However, this consideration was not mentioned in the royal decree and the Norwegian Government has never examined whether the project in question could have been justified on these grounds. The parties disagree as to whether the project is of strategic importance. It is our understanding that the end product will be white colour pigment and that most of the production will be exported to Asia.

6.2 The respondent

As the King in Council's Royal Decree of 16 February 2016 authorising the granting of a pollution permit to Nordic Mining was made prior to the deadline in Article 13(6) of the WFD, cf. Article 1(1)(b) of the EEA Joint Committee Decision No 125/2007, Article 4 of the

WFD is not directly applicable to the case. However, at the time of the Royal Decree, Section 12 of the Water Regulation applied to the project, and the Government was under an obligation to refrain from taking measures liable to seriously compromise the attainment of the objective provided for by Article 4 of the WFD. Article 4(7) may therefore be "applied by analogy and, where necessary, mutatis mutandis, as setting the upper limit for restrictions on the project", see the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, cited above, paragraphs 65 and 69; and section 5.2 above.

Question 1: The notion of "overriding public interest" in Article 4(7)(c) of the WFD qualifies the types of interests that may justify a derogation from Article 4(1)(a)(i), i.e. that are "overriding", but does not in addition require a balance of interests being carried out. This transpires especially clearly from the English, German and Danish version of the text which all allude to the quality of the relevant interest, while not saying that this interest is to be balanced against other objectives. The same transpires from the context, cf. the second alternative in Article 4(7)(c) of the WFD which holds that the benefits to the environment must be "outweighed" by the benefits of the new modifications – a criteria which is not used in the first alternative. The purpose of the Directive also does not necessitate a balance-of-interest test being carried out, given the other cumulative requirements in Article 4(7) of the WFD. In the judgment in *Schwarze Sulm*, cited above, paragraph 71, the CJEU made no reference to a balance-of-interest test when interpreting "overriding public interest". This stands in contrast to paragraph 74 in the judgment, which concerns the second alternative in Article 4(7)(c) of the WFD.

Question 2: If a balance-of-interest test is required, there is no support for an interpretation whereby the eligible public interests must extensively outweigh the adverse impact to the status of the water body. Such an interpretation has no basis in the wording of Article 4(7)(c) of the WFD, see in particular the Swedish language version. The assertion that a simple balance of interest is sufficient also finds support in the case law of the CJEU regarding Article 6(4) of the Habitats Directive, where the Court uses the term "weighing up against" or similar terms, see the judgments in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, cited above, paragraphs 114 and 121; *Solvay*, cited above, paragraph 75; and *Inter-Environnement Wallonnie ASBL*, C-411/17, EU:C:2019:622, paragraph 150. Reference is also made to the preparatory works, see in particular A5-0027/2000 page 47, and CIS Guidance Document 36 page 59–60, quoted above, which both speak of the benefits of the project "outweighing"/ "overriding" the benefits of achieving the objectives in Article 4(1) of the WFD.

Question 3: The Norwegian Government is of the opinion that a mining project producing rutile and garnet may be of an overriding public interest, especially when the expected production level is significant. Such a project will produce a strategic and critical raw material and, if planned today, would be eligible for recognition as a Strategic Project pursuant to Section 5 of the Critical Raw Materials Act. Section 10(2) and recital 26 of the preamble CRMA hold that Strategic Projects shall be considered as being of public interest, and may be considered as having an overriding public interest for the purposes of Article 4(7) WFD. [1]

ESA has previously held that the Norwegian Government is entitled to conclude that generation of significant long-term employment in a remote region, tax income for society,

[1] See the text adopted by the EU Parliament at first reading (P9_TA(2023)0454.

and profits for owners give rise to benefits which are of overriding public interest.[2] This is supported by interpreting Article 4(7) of the WFD in light of Article 4(3)(a) and 4(5)(a) of the WFD, which acknowledges that economic objectives may justify derogations from Article 4(1)(a)(i) of the WFD. It also finds support in the case law of the CJEU regarding Article 6(4) of the Habitats Directive quoted in section 5.6 above.

The notion of "overriding public interest" serves a different purpose under the WFD and Habitats Directive than in the realm of free movement. Justifying derogations from Article 4(1)(a) based on economic aims entails no risk of protectionism, on the contrary. The CJEU has therefore consistently not interpreted the notion in light of the case law on free movement, when applied to Article 6(4) of the Habitats Directive.

7. The need for an Advisory Opinion

As to the general interpretation of the notion of "overriding public interest" in Article 4(7)(c) of the WFD, the parties disagree whether the notion only denotes the types of interests that may justify a derogation, or whether it also calls for a balancing of interests between the advantages of a project causing a deterioration in the status of a water body and its negative impact on the water body. In case a balancing of interests is required, the parties disagree whether the advantages of the project must weigh extensively in favour of the project.

Furthermore, the parties disagree as to whether certain justifications that have been invoked before the Court of Appeal may constitute "reasons […] overriding public interest".

As mentioned above, Article 4(7)(c) of the WFD has previously been interpreted by the CJEU. However, in the view of the preparatory judge, existing case law does not sufficiently resolve the questions of interpretation raised by the case at hand.

The preparatory judge assumes that it will be difficult to answer exhaustively which considerations that, on a general basis, may constitute "reasons […] of overriding public interest". It is therefore appropriate to ask specifically about the considerations that, according to the parties' submissions, are relevant.

The parties disagree as to what interests are relevant in the case at hand, what interests the Royal Decree of 19 February 2016 is based upon, and whether the national courts, pursuant to Norwegian law, are entitled to also consider interests that do not transpire from the Royal Decree. Notwithstanding the request for an Advisory Opinion, it remains for the Court of Appeal to decide these questions.

[2] See 009/17/COL, case 80570 and case 78448.

8. Questions

In light of the foregoing, Borgarting Court of Appeal has decided to refer the following questions to the EFTA Court:

1. What is the legal test when determining whether there is an "overriding public interest" within the meaning of Article 4(7)(c) of Directive 2000/60/EC?

- **a. Is a qualified preponderance of interest required and/or are only particularly important public 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 economic considerations constitute an "overriding public interest" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?

- **a. Purely economic considerations (i.e. the expected gross income generated by the planned mining operations)**
- **b. That a private undertaking will generate income for shareholders**
- **c. That a private undertaking will generate tax revenue for the state and municipality**
- **d. That a private undertaking will provide wage income for employees**

3. Can the following considerations constitute an "overriding public interest" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?

- **a. That a private undertaking will generate employment effects (increased local business activity, employment and settlement)**
- **b. Global supply of rutile**
- **c. Ensuring Norway and Europe access to critical minerals**

Oslo, 8 May 2024

Thomas Chr. Poulsen
Court of Appeal Judge