PROSESSKRIV

til

Borgarting lagmannsrett

Oslo, 26. april 2024
Vår ref.: 326672-001

Borgarting lagmannsretts sak 24-036660ASD-BORG/01

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1 INNLEDNING

Vi viser til partenes utkast til spørsmålsskriv og dagens prosesskriv fra staten.

I vårt prosesskriv av 19. april presenterte vi miljøorganisasjonenes syn på utformingen av spørsmål nr. 2 og 3. Denne argumentasjonen er gjentatt og oppdatert i dette prosesskrivet. I tillegg har vi inntatt bemerkninger til utformingen av spørsmål nr. 1, samt de øvrige delene av utkastene til spørsmålsskriv. Dette prosesskrivet erstatter derfor prosesskrivet av 19. april.

Utkastene til spørsmålsskriv er allerede sendt retten i word-format pr. e-post. For at ordens skyld fremlegges begge utkastene, og to ulike sammenligninger av utkastene, som bilag til dette prosesskrivet.

Bilag 1: Miljøorganisasjonenes utkast til spørsmålsskriv

Bilag 2: Statens utkast til spørsmålsskriv

Bilag 3: Sammenligning nr. 1

Bilag 4: Sammenligning nr. 2

I statens prosesskriv blir det fremhevet at «staten påtok seg ansvaret med å skrive førsteutkast». Vi vil bemerke at det var miljøorganisasjonene som formulerte de spørsmålene som er sitert i foreleggelsesbeslutningen. Staten ønsket ikke å bidra til spørsmålsutformingen før spørsmålet om foreleggelse var avklart. Det hadde vært ønskelig at staten på et tidligere stadium hadde tilkjennegitt sitt ønske om å gjøre betydelige endringer i spørsmålsutformingen.

Staten har i prosesskrivets punkt 4.1 gitt en rekke bemerkninger til miljøorganisasjonenes utkast. Selv om miljøorganisasjonene har innvendinger til samtlige bemerkninger, vil vi nøye oss med noen kortfattede kommentarer til enkelte av bemerkningene.

2 UTFORMINGEN AV SPØRSMÅL 1

Partene ble ikke enige om et omforent forslag til spørsmål 1.

Miljøorganisasjonenes syn er at lagmannsretten allerede har besluttet at spørsmålet skal stilles. Vi antar derfor at det ikke er aktuelt med vesentlige endringer av hovedspørsmålet. I engelsk oversettelse lyder dette slik:

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

Formålet med vårt forslag til spørsmål 1 er først og fremst at EFTA-domstolen skal få anledning til å si noe generelt om vurderingstemaet. EFTA-domstolen vil selv vurdere hvor detaljert svar den skal gi. Jo lengre EFTA-domstolen går i å utpensle vurderingstemaet, jo mer sannsynlig er det at uttalelsen også vil gi veiledning for andre saker.

Formuleringen av hovedspørsmålet er tilnærmet identisk med den engelske oversettelsen av Høyesteretts spørsmål i sak E-3/16 *Ski Taxi*. Den norske versjonen ligger på side 31 i veilederen. På side 18 i veilederen er dette spørsmålet løftet frem som et eksempel på hvordan spørsmål kan stilles.

Årsaken til at partene ikke har blitt enige om utformingen av spørsmål 1, er at staten insiterer på å fjerne hovedspørsmålet som er sitert ovenfor. Så vidt vi forstår, begrunner staten dette med at deres forslag dekker alle relevante spørsmål om tolkningen av unntaksvilkåret, slik at hovedspørsmålet er overflødig. Staten ønsker altså en mer lukket formulering av spørsmålet, hvor det bare stilles et begrenset antall konkrete underspørsmål.

Miljøorganisasjonene vil bemerke at underspørsmålene ikke er uttømmende, verken i statens eller miljø-organisasjonenes forslag. I utkastet til spørsmålsskriv punkt 6.1, som gir en sammenfatning av miljø-organisasjonenes anførsler, pekes det på flere problemstillinger som ikke er dekket av statens forslag til spørsmål 1. Dette gjelder for eksempel forholdet til føre var-prinsippet og grensen mellom private interesser og samfunnsinteresser.

Vi oppfatter det slik at statens forslag til spørsmål 1 og 2 langt på vei er sammenfallende med vårt forslag til underspørsmål a. Vi er åpne for å endre eller fjerne dette.

Vårt forslag til underspørsmål b er – etter vår vurdering – ikke strengt nødvendig så lenge de etterfølgende spørsmålene eksplisitt spør om de konkrete hensynene som partene mener er relevante i saken. Vi er derfor åpne for å endre eller fjerne dette underspørsmålet.

Våre anførsler i spørsmålsskrivet punkt 6.1 er utformet med sikte på å besvare hovedspørsmålet slik det er sitert ovenfor. Dersom dette fjernes, vil det være behov for å redigere anførslene.

3 UTFORMINGEN AV SPØRSMÅL 2 OG 3

3.1 Det bør spørres om de konkrete hensynene som er relevante i saken

Miljøorganisasjonene ønsker å spørre om de konkrete hensynene som partene mener er relevante i saken. Retten har allerede gitt sin tilslutning til dette, jf. tredje siste avsnitt på side 3 i beslutningen om foreleggelse:

> *Forberedende dommer er enig med ankende parter i at spørsmålet om hvilke hensyn som på generelt grunnlag kan utgjøre en «overriding public interest», vanskelig vil kunne besvares uttømmende. Det er derfor hensiktsmessig at det spørres om de konkrete hensynene som partene mener er relevante i saken. Som nevnt oppfattes partene å være uenige om hvilke hensyn tillatelsene bygger på. Den endelige avgjørelsen av hvilke hensyn tillatelsene bygger på, hører under den dømmende rett.*

Ved at spørsmålene utformes på denne måten, øker sannsynligheten for at svarene vil gi konkret veiledning for lagmannsretten. Dette er også i tråd med oppfatningen i juridisk teori, hvor det er argumentert for at spørsmålene må utformes så enkelt, konkret og direkte som mulig. I domstolens egen veileder er det også fremhevet at spørsmålene bør helst formuleres så klart og presist at spørsmålet kan forstås uten å lese hele foreleggelsesskrivet, jf. veilederen s. 17.

Partene er ikke enige om hvilke hensyn tillatelsen bygger på. Partene er også uenige om hvorvidt tillatelsen kan opprettholdes med en annen begrunnelse enn den som fremgår av vedtaket. Det er lagmannsretten som skal ta stilling til dette, etter at EFTA-domstolens uttalelse foreligger. På foreleggelsesstadiet bør det spørres om alle de hensyn som partene mener er relevante. Miljøorganisasjonene pretenderer at tillatelsen er begrunnet med de hensynene som er nevnt i spørsmål 2. Staten pretenderer at tillatelsen er eller kunne ha vært begrunnet med de hensynene som er nevnt i spørsmål 3, jf. punkt 3.1 i statens anketilsvar.

For Miljøorganisasjonene er det spesielt viktig at det spørres særskilt og eksplisitt om de hensynene som er nevnt i spørsmål 2, bokstav b, c og d. Hovedformålet med å be om foreleggelse var nettopp å få avklart disse spørsmålene. Vi minner om at tingrettens dom bygger på en direktivtolkning hvor alle disse tre hensynene ble ansett å være relevante.

På side 38 i tingrettens dom heter det:

> *«Resolusjonen anså den samlede samfunnsnytte ved gruvevirksomhetens fremtidsinntekter fordelt mellom lønnstakere, aksjonærer og kommunale og statlige skattemottakere som den dominerende nytteeffekten for det norske samfunn som helhet. Tingretten finner ikke grunnlag for å konstatere at hensynet til de samlede fremtidsinntekter faller utenfor art 4 nr 7.»*

3.2 Innledende bemerkninger til statens argumentasjon

Staten har i prosesskriv 16. april punkt 4 redegjort for sitt syn på spørsmålsutformingen.

Miljøorganisasjonene er enige i de tre første punktene (prosesskrivet side 4), nemlig at:

- «Spørsmålsutformingen bør innrettes slik at EFTA-domstolen inviteres til å uttale seg om de omtvistede tolkningsspørsmålene som kan være avgjørende for saken»
- «Det er ikke grunn til å stille mer generelle spørsmål enn nødvendig»
- «Det bør ikke stilles flere spørsmål enn det som er nødvendig»

Miljøorganisasjonen er ikke enige i de resterende punktene (prosesskrivet side 5).

3.3 Spørsmålene er ikke for omfattende

I det første kulepunktet på side 5 hevder staten at spørsmål 2 og 3 inneholder 14 underspørsmål. Så vidt vi forstår, bygger dette på et resonnement om at det stilles to spørsmål til hvert underspørsmål, nemlig om hensynet er relevant, og i så fall under hvilke omstendigheter. Det faktiske antall underspørsmål, som er syv, multipliseres derfor med to.

Etter vårt syn er ikke spørsmålslisten spesielt lang. I domstoladministrasjonens veileder er det inntatt et eksempel på et spørsmålsskriv fra Høyesterett hvor det stilles 11 selvstendige spørsmål. Vi oppfatter heller ikke foreleggelsesbeslutningen slik at det er påkrevet å gjøre spørsmålene kortere.

Miljøorganisasjonene fastholder derfor forslaget til utforming av spørsmål 2 og 3. Dersom det skulle være behov for å forkorte spørsmålene, vil miljøorganisasjonene prioritere å beholde spørsmål 2 uendret. Det vil da være en bedre løsning å fjerne underspørsmålene til spørsmål 1. Uansett hvordan øvrige spørsmål utformes, er det helt avgjørende å beholde spørsmål 2, bokstav b, c og d.

I det samme kulepunktet hevder staten at «det store antallet spørsmål øker risikoen for at EFTA-domstolen ikke gir et klart svar på det tvisten faktisk gjelder, samt at det gis en rekke ulike svar som kan være vanskelig å forene».

Miljøorganisasjonene vil bemerke at underspørsmålene ikke er overlappende. De gjelder ulike hensyn. Et mulig unntak er spørsmål 2, bokstav a. Om det skulle anses nødvendig kan bokstav a strykes. Systematikken i spørsmål 2 er imidlertid enkel å forstå, og den åpner for at EFTA-domstolen kan bygge opp sitt svar slik den

mener det er hensiktsmessig. Som påpekt i veilederen, er EFTA-domstolen uansett ikke bundet av spørsmålsoppbygningen. Listen gir et tydelig signal om hvilke avklaringer lagmannsretten ønsker.

3.4 Spørsmålene er konkrete, og svarene vil gi god veiledning for lagmannsretten

I det andre kulepunktet på side 5 hevder staten at spørsmålene er for generelt utformet:

> *«Det spørres ikke bare om de aktuelle hensynene generelt kan være relevante, men også generelt "under what conditions"».*

Miljøorganisasjonene vil bemerke at spørsmålene er eksplisitt knyttet til de ulike hensyn som er aktuelle i saken. Det spørres om disse hensynene kan utgjøre en «overriding public interest». Det er ikke gitt at EFTA-domstolen kan svare kategorisk «ja» eller «nei» på alle underspørsmålene. Det kan for eksempel tenkes at domstolen kategorisk vil avvise at fiskale hensyn og hensynet til kapitalavkastning for private eiere kan være relevant, men at domstolen ønsker å gi et mer nyansert svar for så vidt gjelder lønnsinntekter til arbeidstakere. Et tenkelig svar på det siste spørsmålet kan være at domstolen åpner for at lønnsinntekter kan være relevant i helt ekstraordinære tilfeller hvor det er tale om massearbeidsledighet i en sterkt underutviklet region. Det er derfor hensiktsmessig å åpne for at EFTA-domstolen kan gi et mer utfyllende svar.

3.5 Spørsmålene er knyttet til partenes pretensjoner

I tredje kulepunkt, første avsnitt, foreslår staten å «knytte spørsmålsstillingen opp mot faktum i saken».

Miljøorganisasjonene vil bemerke at lagmannsretten skal ta stilling til gyldigheten av et forvaltningsvedtak. Partene er uenige om hvordan dette vedtaket er begrunnet. Partene er også uenige om hvorvidt lagmannsretten kan opprettholde vedtaket med en begrunnelse som ikke fremgår av vedtaket.

Lagmannsretten skal ta stilling til partenes anførsler. Miljøorganisasjonenes anførsel for lagmannsretten er at tillatelsen er ugyldig dersom de hensynene som er nevnt i spørsmål 2, bokstav b, c og d *ikke* utgjør en «overriding public interest».

EFTA-domstolen skal ikke foreta selve subsumsjonen og det er derfor ikke et mål å knytte spørsmålene direkte opp mot faktum. Målet må være å identifisere og formulere de tolkningsspørsmålene som oppstår som følge av partenes pretensjoner og anførsler for lagmannsretten. Spørsmålene er utformet i tråd med dette.

3.6 Oppdelingen i to spørsmål er hensiktsmessig, men ikke strengt nødvendig

I tredje kulepunkt, annet avsnitt, hevder staten at «ankende parters inndeling i spørsmål nr. 2 og 3 forutsetter at det går et skille mellom "økonomiske interesser" og "ikke-økonomiske interesser"».

Det er riktig at spørsmålet 2 bruker uttrykket «economic considerations», mens punkt 3 bruker uttrykket «considerations». Formålet er å presisere at alle underspørsmålene til spørsmål 2 gjelder økonomiske hensyn. Dette fremgår også eksplisitt av hvert enkelt underspørsmål.

Ifølge staten er partene uenige om hvorvidt det går et skille mellom økonomiske interesser og ikke-økonomiske interesser. Det er skal også være uenighet om «hvordan skillet eventuelt skal trekkes».

Miljøorganisasjonene vil bemerke at skillet er velkjent i EU-retten. Man kan gjenfinne dette skillet i juridisk teori som oppsummerer den domstolskapte læren om «overriding public interest» (tvingende allmenne hensyn), se f.eks. Sejerstedt m.fl., EØS-rett (3. utg., 2011) s. 334 hvor det heter:

> *«EU-domstolen har gjentatte ganger understreket at det traktatbestemte unntaket i TEUF art. 36 (EØS art. 13) omfatter hensyn av ikke-økonomisk art. Bakgrunnen for dette er åpenbar. Det ville stride mot målsetningen om et integrert marked, med samme karakteristika som et hjemmemarked, dersom medlemsstatene kunne tilsidesette hensynet til den frie bevegelighet på bekostning av sine egne økonomiske interesser. Det tilsvarende gjelder selvsagt i EØS. Hensynet til avtalestatenes egne investeringer, motvirkning av arbeidsløshet og inflasjon, hensyn til budsjettbalanse osv. faller med dette klart utenfor de hensyn som omfattes av oppregningen i EØS art. 13.»*

Et av sakens hovedspørsmål er om økonomiske hensyn bedømmes på samme måte ved anvendelse av det likelydende uttrykket i vanndirektivet.

Miljøorganisasjonene vil fastholde at oppdelingen i to spørsmål er mest hensiktsmessig. Det er imidlertid mulig å samle spørsmål 2 og 3 i ett spørsmål, samtidig som henvisningene til økonomiske hensyn fjernes:

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. *That a private undertaking will generate income for shareholders*
    b. *That a private undertaking will generate tax revenue for the state and municipality*
    c. *That a private undertaking will provide wage income for employees*
    d. *That a private undertaking will generate employment effects (increased local business activity, employment and settlement)*
    e. *Global supply of rutile*
    f. *Ensuring Norway and Europe access to critical minerals*

Dersom retten beslutter en annen redigering av spørsmål 2 og 3, eventuelt slår dem sammen til ett spørsmål, er det ønskelig at miljøorganisasjonenes anførsler i punkt 6.1 blir omredigert slik at de samsvarer med spørsmålene.

3.7 Spørsmålene er ikke «løsrevet fra situasjonen på Engebø»

I det fjerde kulepunktet uttaler staten at:

> *«En rekke av underspørsmålene ankende parter foreslår er løsrevet fra situasjonen på Engebø – f.eks. skal spørsmål nr. 2 tilsynelatende besvares uten hensyntagen til at det gjelder tillatelse til gruvevirksomhet. Det er derfor ikke gitt at spørsmålene vil kunne avklare tolkningsuenigheten i saken.»*

Miljøorganisasjonen vil bemerke at EFTA-domstolen selvsagt vil besvare spørsmålene i visshet om at saken gjelder et gruveprosjekt. Dette vil fremgå av spørsmålsskrivet. Spørsmålene er heller ikke formulert på en måte som hindrer EFTA-domstolen i å ta dette i betraktning. Dersom EFTA-domstolen – mot all formodning – skulle mene at økte skatteinntekter ikke er et relevant hensyn, men at dette stiller seg annerledes ved skatteinntekter fra en gruvevirksomhet, så vil EFTA-domstolen selvsagt stå fritt til å svare slik, jf. også formuleringen «under what conditions» i hovedspørsmålet.

Den siterte uttalelsen indikerer for øvrig at staten vil anføre at offentlige og private inntekter fra gruvevirksomhet står i en annen stilling enn inntekter fra annen næringsvirksomhet. Det er ikke spor av noe

slikt synspunkt i vedtaket, og det ble heller ikke anført for tingretten. Dersom en slik anførsel vil bli gjort gjeldende for lagmannsretten, bør staten formulere presise underspørsmål som reflekterer anførselen, jf. punkt 4.2.4 siste avsnitt ovenfor.

Miljøorganisasjonens syn er for øvrig at de økonomiske hensynene som er nevnt i spørsmål 2 er ulovlige hensyn, og at dette gjelder uavhengig av om inntektene kommer fra gruvevirksomhet eller annen nærings-virksomhet.

3.8 Statens henvisning til Solvay (C-182/10)

I siste kulepunkt hevder staten at «statens forslag til formulering er best i tråd formuleringen i sak C-182/10 *Solvay* spørsmål nr. 6».

Miljøorganisasjonene kan ikke se at sammenligningen med *Solvay* gir noen støtte til statens forslag. I den aktuelle saken var det avklart hvilke hensyn som eventuelt kunne gi grunnlag for unntak. Saken er altså ikke sammenlignbar med vår sak, hvor partene har vist til en rekke ulike hensyn.

Dersom staten hadde vært enig i miljøorganisasjonenes tolkning av vedtakets begrunnelse, og unnlatt å lansere alternative begrunnelser for vedtaket, ville det ha vært tilstrekkelig å spørre om de samlede inntektene fra gruvevirksomheten kan rettferdiggjøre et unntak fra forringelsesforbudet. Under en slik forutsetning ville spørsmålet altså hatt en utforming som minner om spørsmål nr. 6 i *Solvay*-saken.

Det finnes en rekke eksempler på tilfeller hvor nasjonale domstoler har valgt å stille mer detaljerte spørsmål enn i *Solvay*-saken. Tidligere foreleggelser har vist at det ikke er hensiktsmessig å nøye seg med å spørre generelt om hvilke momenter som er relevante, se EFTA-domstolens uttalelse E-2/21 N*orep AS mot Haugen Gruppen AS*, særlig avsnitt 24 og 52. Det bør spørres om de hensyn som er gjort gjeldende i saken. Spørsmålene bør utformes i tråd med anvisningene på side 19 i veilederen, nemlig med «et generelt hovedspørsmål som presiseres i ett eller flere underspørsmål».

4 UTFORMINGEN AV SPØRSMÅLSSKRIVET

Nedenfor gis det noen løpende bemerkninger til de ulike punktene i spørsmålsskrivet.

4.1 Innledning

Etter vårt syn bør det komme tydelig frem, allerede i innledningen, at foreleggelsen ikke gjelder et særspørsmål knyttet til EØS-avtalen, men et spørsmål som har stor betydning i hele EØS-området, nemlig terskelen for å gjøre unntak fra vanndirektivets forbud mot å forringe vannressurser. Vanndirektivet er blant EUs mest helhetlige og ambisiøse direktiver på miljøområdet. Forbudet mot å forringe vannressurser er en av de viktigste miljøbestemmelsene i Europa.

4.2 Sakens parter

Her er det fullt samsvar mellom utkastene.

4.3 Faktum

Partene er svært uenige om utformingen av dette punktet. Dette henger sammen med uenigheten som er beskrevet ovenfor i punkt 3.5.

Partene er uenige om faktum og hvilket faktum det er grunn til å fremheve. EFTA-domstolen skal ikke foreta subsumsjonen, og det er derfor ikke behov for å gi noen detaljert redegjørelse for faktum.

Saken for norske domstoler gjelder gyldigheten av et forvaltningsvedtak. EFTA-domstolen vil ikke ha tilgang til dette vedtaket eller andre underliggende saksdokumenter. Det er derfor hensiktsmessig at de viktigste passasjene i vedtaket blir sitert i spørsmålsskrivet. Det er spesielt viktig at *begrunnelsen* i vedtaket blir sitert. Det er denne begrunnelsen, kombinert med statens alternative begrunnelser angitt i anketilsvaret, som forklarer hvorfor spørsmål 2 og 3 er relevante for løsningen av saken. Det er riktig som staten fremhever, at EFTA-domstolen ikke skal tolke vedtakene. Spørsmålene må derfor ta utgangspunkt i partenes pretensjoner om hvordan vedtaket skal tolkes.

Miljøorganisasjonene stiller seg uforstående til at staten mener at beskrivelsen av tvistegjenstanden og sammenhengen mellom vedtakene i vårt spørsmålsskriv punkt 3.1 verken er presis eller nøytral. Gjengivelsen og beskrivelsen av vedtakene har vi holdt nøytral og til et minimum. Det vil være forvirrende dersom det bare opplyses at saken gjelder gyldigheten av fire vedtak, uten at sammenhengen mellom disse vedtakene blir forklart.

At staten mener at faktum helst skal beskrives i prosa, betyr ikke at «faktum» kan forankres i alle andre kilder enn vedtakene. Staten har blant annet vist til opplysninger som fremgår av presentasjoner laget av personer i ledergruppen i Nordic Mining, jf. f.eks. fotnote 13 og 14 i statens spørsmålsskriv. Partene er svært uenige om faktum, både beskrivelsen av gruveprosjektet og miljøkonsekvensene. Det som ikke kan bestrides, er hva som står i vedtakene. Slik spørsmålene er formulert, er det ikke behov for en detaljert fremstilling av faktum.

I EU-domstolens veileder er det fremhevet at den foreleggende domstol skal beskrive «[…] the relevant findings of facts as determined by the referring court […] or, at the very least, an account of the facts on which the questions referred are based». Ettersom det er vedtakene som danner bakgrunnen for de EØS-rettslige spørsmålene, er det tilstrekkelig og hensiktsmessig at det tas utgangspunkt i hvordan de faktiske forhold er beskrevet i vedtakene.

Det er ikke riktig, som staten hevder, at saken for tingretten ikke nevnes i spørsmålsskrivet. Tingretts-avgjørelsen er kort omtalt på s. 4:

> *«By judgment of January 10, 2024, the District Court dismissed the application in full. Both organisations have appealed the judgment to the Borgarting Court of Appeal, which has decided to request an Advisory Opinion from the EFTA Court»*

Det er liten grunn til å redegjøre i detalj for tingrettens vurderinger. Tingrettens avgjørelse er påanket og ikke rettskraftig.

4.4 Relevant nasjonal rett

Etter vårt syn er det hensiktsmessig å få frem at det ikke er forurensningsloven som er ment å sikre at vanndirektivet gjennomføres i norsk rett. Loven ble gitt lenge før vanndirektivet ble vedtatt, og ordlyden i forurensningsloven ble ikke endret i forbindelse med at vanndirektivet ble gjennomført. Forurensningsloven gjelder all forurensning, ikke bare forringelse av vannressurser, og vurderingstemaet etter § 11 femte ledd er en ordinær kost nytte-vurdering. Dette fremgår eksplisitt av ordlyden. Vi er derfor kritiske til at staten ikke vil ta med dette.

Partene er enige om at den relevante bestemmelsen i vanndirektivet må siteres. For en utenlandsk leser, vil det være forvirrende at vilkåret i vannforskriften avviker så mye fra ordlyden i direktivet. Etter vårt syn er det viktig at dette omtales. Det må også fremgå tydelig at det er en åpen ESA-sak om dette, og at norske myndigheter tydelig har sagt at presumsjonsprinsippet gjelder, slik at saken koker ned til en tolkning av vanndirektivet.

Staten er kritisk til at det ikke gjengis mer fra andre ESA-saker. Samtidig foreslår staten å kutte kraftig i omtalen av den åpne saken som gjelder generelle spørsmål knyttet Norges oppfølgning av vanndirektivet. Gitt at det er begrenset hvor detaljert omtalen av ESA-saker skal være, mener vi at man bør prioritere omtalen av den sistnevnte saken.

4.5 Relevant EØS-rett

Hva og hvor mye av EØS-retten som skal gjengis i spørsmålsskrivet, er opp til forberedende dommer. Det er naturlig at det gis *kort* beskrivelse av relevant EØS-rett, jf. domstolens veileder s. 15. Det er derfor ikke nødvendig at alle mulige primær- og sekundærrettskilder tas med i spørsmålsskrivet. Den klare hovedregelen er at det kun er nødvendig å omtale relevante primærrettskilder.

Miljøorganisasjonen har utelukkende vist til primærkilder i spørsmålsskrivet med ett unntak. I punkt 5.1 er det inntatt en henvisning til juridisk teori.

CIS Guidance Document no. 36 har ingen rettskildevekt, og gir heller ingen ytterligere føringer enn det som allerede kan utledes av primærkildene. Det er derfor ikke nødvendig at flere avsnitt fra CIS Guidance Document no. 36 siteres. Dersom staten mener dette er viktig, står staten fritt til å sitere avsnittene i deres skriftlige innlegg som skal inngis til EFTA-domstolen. Tilsvarende må gjelde for statens ønske om å innta C-44/95 *Lappel Bank* og EFTA-komiteens beslutning 125/2007 i spørsmålsskrivet.

Hva gjelder uenigheten om hvorvidt det foreligger rettspraksis tilknyttet vanndirektivet artikkel 4(7)(c) som er relevant for vår sak, er dette noe forberedende dommer må avgjøre. Vi viser til lagmannsrettens beslutning av 5. april 2024 s. 3. Miljøorganisasjonen mener derfor at det ikke er nødvendig å sitere flere avsnitt fra rettspraksis enn nødvendig. Vi har derfor begrenset oss til en kortere gjengivelse av faktum i C-346/14 *Commission v Austria* («*Schwarze Sulm*»).

4.6 Behovet for foreleggelse

Vi antar at retten vil arbeide videre med dette punktet. Vårt forslag er blant annet inspirert av formuleringer i foreleggelsesbeslutningen.

4.7 Partenes anførsler

Partene har avtalt at det i utkastet settes av ca. 2 ½ side til hver av partene og at partene utformer egne anførsler uten innblanding fra den annen part.

4.8 Spørsmål til EFTA-domstolen

Spørsmålslisten i vårt utkast punkt 8 er ment å være en ren oversettelse av de spørsmålene som ble foreslått i vårt prosesskriv av 20. mars, og som er sitert i lagmannsrettens foreleggelsesbeslutning.

Miljøorganisasjonene har brukt mye tid og krefter på å formulere spørsmålene. Eksterne eksperter har også blitt involvert i arbeidet. Grunntanken er at spørsmål 1 skal gi generell veiledning om vurderingstemaet, mens spørsmål 2 og 3 skal sikre at uttalelsen gir konkret veiledning om betydningen av de hensynene som er aktuelle i saken. I spørsmål 2 har vi tatt inn de hensynene som vedtaket, ifølge miljøorganisasjonenes pretensjoner, er basert på. I spørsmål 3 har vi nevnt de hensynene som staten har hevdet at vedtaket er eller kunne ha vært begrunnet med, jf. punkt 3.1 i statens anketilsvar.

* * *

Prosesskrivet lastes opp i Aktørportalen av advokat Amund Noss på vegne av begge prosessfullmektiger for de ankende parter.

* * *

Oslo, 26. april 2024
CMS Kluge Advokatfirma AS

Asle Bjelland
advokat

Amund Noss
advokat

Bilag 1

26.04.2024

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 Borgarting 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"). The proceedings before Borgarting Court of Appeal concerns whether the derogation granted by Norwegian authorities can be justified due to "reasons [...] of overriding public interest", cf. WFD article 4(7)(c).

The request seeks clarification on the general interpretation of the "overriding public interest" exception in the WFD. In addition, the request seeks to clarify whether certain justifications that have been invoked before the Court of Appeal may constitute an "overriding public interest". The request thus concerns the threshold for making exceptions to a key provision in EU environmental law, namely the prohibition against the deterioration of water resources.

2 PARTIES TO THE CASE

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

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*), filed a lawsuit 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 February 19, 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 November 23, 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 May 6, 2022.*

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

(iv) *The Norwegian Environment* Agency's *decision of June 23, 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 January 10, 2024, the District Court dismissed the application in full.[1] Both organisations have appealed the judgment to the Borgarting Court of Appeal, which has decided to request an Advisory Opinion from the EFTA Court.

The case before the Court of Appeal is limited to the question of "overriding public interest" pursuant to Article 4(7)(c) WFD. The parties disagree on whether there are other violations of the WFD, but this will not be decided in the current case before Borgarting Court of Appeal.

3.2 The mining project

The royal decree describes Nordic Mining's project as follows (unofficial translation):[2]

> *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*

[2] The royal decree of February 19, 2016 p. 1-2.

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 fjord

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 shown as the shaded area in 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.[3] In the Ministry of the Environment's decision, it is assumed that (unofficial translation):[4]

> *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 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): [5]

[3] The royal decree of February 19, 2016 p. 10.
[4] The Ministry of the Environment's decision of June 5, 2015 p. 22.
[5] The Ministry of the Environment's decision of June 5, 2015 p. 20.

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) WFD.

Derogation was granted by the Ministry of Environment by Decision 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:[6]

[6] The response to the appeal (*anketilsvaret*) section 3.1.

- 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.

4 RELEVANT NORWEGIAN LEGISLATION

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 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.

Section 11 of the Pollution Control Act authorises the pollution control authority to issue permits, i.e. to grant exceptions to the general prohibition against pollution. 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.*

As stated in this paragraph, the pollution control authority is authorised to grant permission based on a cost-benefit assessment.

4.2 The Water Regulation (*vannforskriften*)

The Water Framework Directive is transposed in Norwegian law through the Water Regulation which entered into force 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) 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:[7]

> *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*

[7] The translation of the first and second paragraph is provided by ESA in letter July 16, 2021, in case 80570. The third paragraph was added in December 2018 and previously transpired from Section 14 and Annex VII of the Water Regulation.

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 general case concerning the implementation and application of the Water Framework Directive in Norway (case 86194).

In a letter of October 26, 2021, ESA raised several questions. Question no. 2 was:[8]

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

8 Letter from ESA to the Norwegian government, October 26, 2021.

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 December 15, 2021, the Norwegian government responded that:[9]

> *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 August 30, 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):[10]

> *The modifications or activities shall be based on overriding public interests, or their benefits to human health, safety or to sustainable*

9 Letter from the Royal Norwegian Ministry of Climate and Environment to ESA, December 15, 2021.

10 The proposal is available here (in Norwegian).

development shall be greater than the benefits to the environment and to society of achieving the environmental objectives.

The wording of the Water Framework Directive article 4(7)(c) and the Water Regulation section 12(2)(b) is compared in the table below:

WFD art. 4(7)(c)	**Water Regulation s. 12(2)(b) Current version**	**Water Regulation s. 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 of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and	*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 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 Water Framework Directive was adopted on October 20, 2000, and the "overriding public interest" derogation was included in the original version.

The WFD was incorporated to Annex XX (Environment) to the EEA Agreement by EEA Joint Committee decision no. 125/2007 of 28 September 2007. The directive entered into force on May 1, 2009.

The WFD is one of the EU legal acts that provides the most far-reaching protection of Europe's water resources.[11] The directive is designed to promote sustainable water use based on long-term protection of available water resources.[12] It also aims to prevent further deterioration and protect and enhance the status of water bodies.[13]

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

Pursuant to Article 4(1)(a) 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.[14]

In other words, the Water Framework Directive 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 European Court of Justice.[15] 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) 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

11 David Langlet and Said Mahmoudi, *Environmental Law and Policy*, (2016) p. 224.
12 See Article 1 (b) WFD.
13 See Article 1(1)(a) WFD.
14 Pursuant to Article 1(1)(b) of the EEA Joint Committee Decision no. 125/2007, the deadline for EEA States runs from September 28, 2007.
15 See C-461/13 *Bund für Umwelt und Naturschutz Deutschland*, paragraph 39.

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) 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) 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) 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) WFD

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

Article 4(7) 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) WFD sets out two alternative conditions, and it suffices that one is fulfilled. The relevant alternative in the case at hand is “overriding public interest” as per the English language version.

In other language versions the condition is formulated as for example «un intérêt general majeur» (French), «übergeordnetem öffentlichem Interesse» (German), «sono di prioritario interesse pubblico» (Italian), «interés público superior» (Spanish), «nadrzędny interes społeczny» (Polish), «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 WFD.

The exemption “overriding public interest” is also used in other areas of EU law, notably on restrictions on free movement and in Directive 2006/123/EC of the European Parliament of the Council of 12 December 2006 on services in the internal market. In the realm of free movement, the CJEU has held that “reasons of a purely economic nature cannot constitute overriding reasons in the public interest”, see the judgment in *Andreas Ingemar Thiele Meneses*, C-220/12, EU:C:2013:683, paragraph 43.

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

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

The exemption 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 part of the Greek river Acheloos into the river Pinios. The diversion of the river entailed a deterioration of the river's environmental status, and the implementation of the measure was conditional on the fulfilment of the derogation conditions in Article 4(7) WFD. The CJEU stated 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.

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.

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) 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 the Austrian state 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".[16]

Article 4(7)(c) 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.

[16] C-346/14 *Schwarze Sulm*, paragraph 69.

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

In CIS Guidance Document No 36 (2017), 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 the Directive 92743/ECC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"). The Habitats Directive is not incorporated into the EEA Agreement.[17] 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.*
>
> *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*

[17] See also Article 1(1)(a)(iii) of the EEA Joint Committee Decision no. 125/2007.

> *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 exemption "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 for continued mining operations and further planned projects in "Alto Sil", a designated SPA and Site of Community Importance.[18] 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:[19]

> *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.*

The Advocate General stated that the measure, in principle, could be justified on the following grounds: [20]

> *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 -*

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18 For a more detailed account of the various mines, please refer to the Opinion of Advocate General Kokott, chapter III, in particular paragraphs 26 onwards.

19 C-404/09 *Commission v Spain*, paragraph 109. See also paragraphs 153 and 154.

20 Opinion of Advocate General Kokott in C-404/09 *Commission v Spain*, paragraph 154.

namely security of energy supply, jobs and the final nature of authorisations - and for ruling out alternatives.

The expansion and the authorisation to continue operating the mining activities could in principle be justified on two grounds: energy supply and maintaining already established jobs. These two considerations are referred to by the European Court of Justice in paragraph 109 as "the local economy".

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 24):

6. In the event of a negative reply to Question 5, must Article 6(4) of [the Habitats] Directive ... be interpreted as permitting the creation of infrastructure designed to accommodate the management centre of a private company and a large number of employees to 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 Submission by 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.

Firstly, 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 Submission by the respondent

7 THE NEED FOR AN ADVISORY OPINION

Borgarting Court of Appeal may, inter alia, review whether the “overriding public interest” exception was applied correctly.

The parties disagree on the general interpretation of the "overriding public interest" exception in the WFD. Furthermore, the parties disagree as to whether certain interests that have been invoked before the Court of Appeal may constitute an “overriding public interest”.

There are a few decisions from the ECJ regarding the interpretation of the relevant provision. However, in the view of the preparatory judge, existing case law does not 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 an "overriding public interest". It is therefore appropriate to ask about the specific considerations that the parties believe are relevant.

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, pursuant to Norwegian law, are entitled to also consider interests that do not transpire from the Decision. Notwithstanding the request for an Advisory Opinion, it remains for Borgarting Court of Appeal to decide these questions.

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" under Article 4(7) of the Water Framework Directive?
    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) of the Water Framework Directive, 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) of the Water Framework Directive, 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

26.04.2024

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 Borgarting 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"). Norwegian authorities have granted a derogation, cf. Article 4(7) WFD.

The request for an Advisory Opinion concerns the interpretation of the notion of «overriding public interest» in Article 4(7)(c), first alternative, WFD. Namely whether:

i. The notion necessitates a balance of interest between the benefits to the environment and the benefits of the new modifications to the water body, and whether the balance of interest then has to be extensive in favour of the project.

ii. The interests served by the Engebø project may constitute an «overriding public interest».

2 PARTIES TO THE CASE

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

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, Norges Naturvernforbund and Natur og Ungdom, lodged an application against the Norwegian Government at the Oslo District Court, arguing that four permits granted to Nordic Mining were invalid. These are:

i. The King in Council's Royal Decree of 19 February 2016[1] confirming the pollution permit granted by the Ministry of Climate and Environment 5 June 2015[2] pursuant to Section 11 of the Pollution Control Act of 1981 (*forurensningsloven*).
ii. The Ministry of Climate and Environment's decision of 23 November 2021 confirming the revised pollution permit granted by the Environment Agency pursuant to Section 11 of the Pollution Control Act of 1981.
iii. The Ministry of Trade, Industry and Fisheries' decision of 6 May 2022[3] confirming the operating license granted by the Directorate of Mining pursuant to Section 43 of the Mining Act of 2008 (*mineralloven*).
iv. The Environment Agency's decision of 23 June 2023 approving Nordic Mining's waste management plan pursuant to Chapter 17 of Regulation no. 930 of 1 June 2004 on Recycling and Treatment of Waste (*avfallsforskriften*).

By judgment of 10 January 2024, the District Court dismissed the application in full.[4] Both organisations have appealed the judgment to the Borgarting Court of Appeal, which has decided to request an Advisory Opinion from the EFTA Court.

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[1] The Royal Decree is available here (in Norwegian).

[2] The Decision is available here (in Norwegian).

[3] The Decision is available here (in Norwegian).

[4] The District Court's judgment is available here (in Norwegian).

The case before the Court of Appeal is limited to the question of whether the Engebø-project is of «overriding public interest» pursuant to Article 4(7)(c) WFD. The parties agree that the other conditions in Article 4(7) WFD are fulfilled.[5]

3.2 The Engebø mine

The Engebø deposit is one of the largest unexploited rutile (TiO_2) deposits in the world.[6] Rutile, along with ilmenite, is the main source for production of titanium metal. Titanium metal has since 2020 been on the European Commission's list of critical raw materials.[7] Titanium metal is included as both a «Strategic Raw Material» and a «Critical Raw Material» in the recently adopted Critical Raw Materials Act (CRMA),[8] primarily due to its importance for aerospace and defence industries, and a very concentrated production.[9] Annual production at Engebø is forecasted at 35 000 tonnes of rutile and 180 000 tonnes of garnet.[10] This equates to approx. 8% of global rutile demand in 2023 and approx. 20% of Europe's rutile demand in a normal year.[11]

Nordic Mining has started extraction of ore at Engebø, and production of rutile and garnet is planned to commence in the latter half of 2024. Production is scheduled to last for at least 39 years and probably longer (perhaps up to 130 years).[12] Nordic Mining has entered into off-take agreements for the first five

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[5] The derogation is based on Article 4(7) WFD, first alternative, ("new modifications to the physical characteristics of a surface water body"). Before the District Court, the parties also disagreed whether Article 4(7)(d) WFD was complied with. This is no longer contested.

[6] The Royal Decree of 19 February 2016 p. 11.

[7] COM (2020) 474.

[8] COM (2023) 160, see ST 7993 2024 INIT.

[9] EU Commission, *Study on the Critical Raw Materials for the EU 2023* (2023), pages 36 and 39.

[10] See the description of the parameters of the project in the District Court's judgment 10 January 2024 p. 4. The parameters are based on the current reserve estimates based on the JORC-standard.

[11] Global rutile demand was approx. 420kt in 2023. On average Europe consumes about 170–190kt of rutile annually, while demand was significantly down in 2023 (97kt).

[12] The District Court's judgment 10 January 2024 p. 45–46. 130 years is the number provided by Kenneh Angedal during his presentation before the District Court (slide 8).

years of production whereby some volumes of rutile will be sold to a customer in the EU and remaining volumes to a customer in Japan.[13]

In the current mine plan, the mine is scheduled to directly employ 105 persons the first 13 years, and 145 persons the following 27 years.[14] Indirect employment effects are in an early production phase calculated at 0.48–0.78 per directly employed in the Engebø region and 1.93 at the national level. Indirect employment effects are expected to increase over time.[15]

Naustdal municipality is located in in Western Norway and had a population of 2793 in 2019. In 2020, Naustdal joined three other municipalities in forming Sunnfjord municipality which had a population of 22 450 in 2023.[16] Sunnfjord municipality is designated as a 'c' area in Norway's regional aid map, most recently approved by ESA through Decision No. 276/21/COL.

3.3 The mine's 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.[17] 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.[18] The disposal area is shown as the shaded area in the map below.

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[13] Presentation by Kenneth Angedal before the District Court (slide 6). Information about the location of the buyers is provided by Nordic Mining.

[14] The Ministry of Trade, Industry and Fisheries' Decision of 6 May 2022 p. 21–22. Updated numbers were provided by Kenneth Angedal during his presentation before the District Court (slide 8).

[15] Sintef, *Økonomiske ringvirkninger av mineralbrudd i Engebøfjellet* (2013), page 72 (U 1411) (in Norwegian). The calculations are based on an earlier mine plan where annual production and the number of directly employed persons were higher.

[16] Numbers from Statistics Norway (SSB).

[17] The District Court's judgment 10 January 2024 p. 2.

[18] Nordic Mining's pollution permit is available here (in Norwegian). See Sections 3.1.1 and 9.4.2.

The disposal area covers approximately 10% of the "Førdefjorden-ytre" surface water body.[19] Before the District Court the parties agree that the submarine tailings disposal will cause the ecological status of the water body to deteriorate from «good» (*god*) to «poor» (*dårlig*), cf. Section 1.2 of Annex V WFD.[20] The composition and abundance of benthic invertebrate fauna (*bunnfauna (virvelløse dyr)*) is the quality element that will be most negatively affected, and thus determine the ecological status of the water body.[21] The benthic invertebrate fauna in the area where tailings disposal will take place will be buried, and thus eradicated, while disposal is in progress.[22] Benthic invertebrate fauna is expected to be fully restituted within 10 years of disposal ending in most of the deposit area, but may then have a different composition.[23]

The ecological status of both the surface waters above and the submarine areas outside the deposit area are not expected to be negatively affected. To ensure that the ecological status of these areas does not deteriorate to a class below «good», Nordic Mining's pollution permit sets out maximum thresholds for the concentration of particles in the water above and at the edge of the disposal

[19] The District Court's judgment 10 January 2024 p. 2. The Førdefjord is divided in to three water bodies pursuant to the WFD.

[20] The District Court's judgment 10 January 2024 p. 21.

[21] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 19-20.

[22] The submarine disposal system is described in Nordic Mining's Waste Management Plan pp. 85-87 (in Norwegian).

[23] The Ministry of Climate and Environment's Decision 5 June 2015 p. 10.

area, and for the annual rate of sedimentation at the edge of the disposal area.[24] The particle concentration is to be monitored continuously, and disposal is to halt if the thresholds are exceeded.[25] The tailings are inert, and the chemical status of "Førdefjorden-ytre" will remain «good».[26]

[Vi kan ikke se at det er nødvendig å ta inn et sitat fra KLDs vedtak, slik de ankende parter ønsker, i tillegg til beskrivelsen av faktum over. I den grad det skal tas inn sitat, bør hele sitatet tas inn:] The Ministry of Climate and Environment summarises the mine's effect on the ecological status of the water body in its decision 5 June 2015 p. 22 (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.*
>
> *We refer to the Environmnent Agency's assessment that it is only the physical changes that lead to a deterriaotion of the water body and that no other effects of the project will deterioate the ecological status.*

3.4 The derogation granted by Norwegian authorities pursuant to Article 4(7) WFD

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) WFD.

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[24] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 20–21 and 22.

[25] See Sections 2.2, 9.4.2 and 11 of Nordic Mining's pollution permit.

[26] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 21-22.

Derogation was granted by the Ministry of Climate and Environment by Decision 5 June 2015 and affirmed by the King in Council (*Kongen i statsråd*) by Royal Decree of 19 February 2016 upon administrative appeal.

[Vi kan ikke se at det er nødvendig å sitere fra den kongelige resolusjonen, slik de ankende parter legger opp til. I den grad det skal siteres, mener vi følgende oversettelse bør brukes:] 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 enterprise is therefore elegible to 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.*

Several complaints concerning the Ministry of Climate and Environment's decision and the Royal Decree were received by the EFTA Surveillance Authority («ESA»), which rejected the complaints in a decision 18 January 2017 (009/17/COL).[27]

Both decisions by the Norwegian authorities were made prior to the adoption of the first river basin management plan for Sogn og Fjordane water region, which includes Engebø, cf. Articles 4(1) and 13 WFD.[28] The derogation is described in the former and the current river basin management plan for Vestland water region (which includes former Sogn og Fjordane).[29]

3.5 The permitting process for the Engebø mine

Pursuant to Norwegian law, mining projects of Engebø's scale require multiple permits. Nordic Mining applied for the first permit in 2007.[30] From 2007 to 2014 various environmental impact assessments were carried out, of which a majority dealt with the environmental impact of the submarine tailings disposal and in particular the risk of particles spreading from the disposal area.[31]

Nordic Mining today have all required permits. This includes the four permits listed in section 3.1 above, as well as a zoning plan pursuant to Section 27-2 of the Planning and Building Act of 1985 (*plan- og bygningsloven*) and a detailed zoning plan pursuant to Section 12-12 of the Planning and Building Act of

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[27] The Decision is available here. ESA has later closed a further case about the disposal of mining waste in the Førdefjord (case 78448). In addition, ESA has closed a case concerning other submarine tailings disposals in Norway (case 80570).

[28] The Ministry of Climate and Environment approved the first river basin management plan for Sogn og Fjordane 4 July 2016 prior to the deadline of 28 September 2016, cf. Section 13(6) WFD, cf. Article 1(1)(b) of the EEA Joint Committee Decision no. 125/2007.

[29] See Regional Water Management Plan for Sogn og Fjordane 2016–2021 pp. 58-59 and Regional Water Management plan for Vestland region 2022-2027 pp. 28 and 133.

[30] Nordic Mining Planning Program 25 October 2007 (U 77).

[31] The District Court's judgment 10 January 2024 pp. 48-51 and overview of Nordic Mining environmental reports (U 3541-3548).

2008.[32] The latter two permits are not part of the case currently pending before Norwegian courts.

All six permit applications, including the environmental impact assessments, have been subject to public consultations.[33] All permits, apart from the confirmation of the waste management plan in 2023, have been subject to administrative appeal pursuant to Section 28 of the Public Administration Act of 1967 and have been confirmed on appeal (some conditions in the permits have been amended in the appeal decisions).

4 RELEVANT NORWEGIAN LEGISLATION

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 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*

[32] U 1779 og 3379.

[33] The District Court's judgment 10 January 2024 pp. 38-39.

project as compared with any other advantages and disadvantages so arising.

4.2 The Water Regulation (*vannforskriften*)

The Water Framework Directive is transposed in Norwegian law through the Water Regulation which entered into force 1 January 2007.[34]

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) 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):[35]

> *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*

[34] The regulation is available here (in Norwegian). See Section 34.

[35] The translation of the first and second paragraph is provided by ESA in letter 16 July 2021 in case 80570. The third paragraph was added in December 2018 and previously transpired from Section 14 and Annex VII of the Water Regulation.

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 general case concerning the implementation and application of the Water Framework Directive in Norway (case 86194). 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):[36]

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.

5 RELEVANT EEA LAW

5.1 The Water Framework Directive

The Water Framework Directive was adopted on 20 October 2000 and incorporated to Annex XX (Environment) to the EEA Agreement by EEA Joint Committee Decision no. 125/2007 of 28 September 2007. Joined to the Decision is a Joint Statement by the EEA Contracting Parties:

[36] The proposal is available here (in Norwegian).

> *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 Water Framework Directive 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, but does not aim for complete harmonisation of the rules of EEA States concerning water, see 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) WFD

Pursuant to Article 4(1)(a) 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.[37]

«Good surface water status» is defined by Article 2(18) 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.

[37] Pursuant to Article 1(1)(b) of the EEA Joint Committee Decision no. 125/2007, the deadline for EEA States runs from 28 September 2007.

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) 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) 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) WFD are satisfied, see the judgment in *Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:391, paragraph 75.

Article 4 WFD first applies once a river basin plan covering the relevant river basin has been adopted, see the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560. The CJEU held that the project in question was not covered by Article 4 WFD as it was authorised prior to the publication of a river basin management plan within the deadline prescribed by Article 13(6) WFD (paragraphs 52–56). Greece was however obliged to «refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by Article 4 of that directive» (paragraphs 57–

60). Also in the judgment in *Schwarze Sulm*, cited above, the project was authorised prior to the expiry of the time limit in Article 13(6) WFD, see paragraphs 49–51 of the judgment. The CJEU here repeated its position from the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*.

5.3 Derogation pursuant to Article 4(7) WFD

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

Article 4(7) 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) WFD sets out two alternative conditions, and it suffices that one is fulfilled. The relevant alternative in the case at hand is «overriding public interest» as per the English language version.

In other language versions the condition is formulated as for example «un intérêt general majeur» (French), «übergeordnetem öffentlichem Interesse» (German), «sono di prioritario interesse pubblico» (Italian), «interés público superior» (Spanish), «nadrzędny interes społeczny» (Polish), «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 WFD.

The notion of overriding public interest is also used in other areas of EU-law, notably on restrictions on free movement and in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. In the realm of free movement, the CJEU has held that «reasons of a purely economic nature cannot constitute overriding reasons in the public interest», see the judgment in *Andreas Ingemar Thiele Meneses,* C-220/12, EU:C:2013:683, paragraph 43.

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

The notion of «overriding public interest» in Article 4(7)(c) WFD has previously been interpreted through three judgments by the CJEU.

The notion was first interpreted by the CJEU in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, cited above. The case concerned the partial diversion of the upper waters of the 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.*
>
> *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.*
>
> *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) 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. While Article 4 WFD did not apply at the time when the decision authorising the project was made on the national level, the obligation to refrain from measures liable seriously to compromise the attainment of the objective provided for by Article 4 did apply, and the CJEU assessed whether the project was liable to be covered by a derogation in Article 4(7) WFD

(paragraphs 51–52). Regarding «overriding public interest», the CJEU held in paragraphs 69–71:

> *69 Next, it should be noted that the construction of a hydropower plant, such as the one envisaged through the contested project, may in fact be an overriding public interest.*
>
> *70 In that regard, the Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest. Directive 2000/60, which was adopted on the basis of Article 175(1) EC (now Article 192(1) TFEU), establishes common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and the structures for protection and sustainable use of water in the European Union. Those principles and that framework are to be developed subsequently by the Member States by means of the adoption of individual measures. Thus, the directive does not seek to achieve complete harmonisation of the rules of the Member States concerning water...*
>
> *71 As part of that margin of discretion, the Republic of Austria was entitled to consider that the contested project, the aim of which is to promote the production of renewable energy through hydroelectricity, is an overriding public interest.*

Article 4(7)(c) 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 CIS Guidance document 36 (2017) on Article 4(7) WFD

The notion of «overriding public interest» is interpreted in CIS Guidance document 36 (2017). The document is not legally binding, see the judgment in *Association France Nature Environnement,* cited above, paragraph 31.

It transpires from the Guidance Document 36, pages 59-60:

In EU legislation the public or general interest can serve as a ground for justifying derogations. A range of "public interests" exist within the EU and at national level of a social, economic or environmental nature. Since not all public interests can automatically be "overriding", it is important to distinguish between "public interest" and "overriding public interest" which is addressed by Article 4(7)(c). "Overriding" practically means that the other interest overrides achieving the objectives of the WFD. Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest. Public participation can contribute considerably in determining overriding public interest.

In elaborating on the notion of «overriding public interest», CIS Guidance Document 36 further points to case-law from the CJEU in relation to Article 6(4) of Directive 92/43/ECC (the Habitats Directive).

5.6 Practice from the CJEU concerning Article 6(4) of the Habitats Directive

The Habitats Directive is not incorporated into the EEA Agreement.[38] 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.

[38] See also Article 1(1)(a)(iii) of the EEA Joint Committee Decision no. 125/2007.

> *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 *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds ("Lappel Bank")*, C-44/95, EU:C:1996:297, concerned the decision by British authorities to exclude Lappel Bank from the Medway Estuary and Marshes Special Protection Area (“SPA”) due to the planned expansion of the port of Sheerness on to the Bank (see paragraphs 10–14). The first question concerned whether Member States were entitled to take account of «economic requirements» when designating SPAs pursuant to Article 4(1) and 4(2) of the Habitats Directive. The CJEU answered the question in the negative, but held in paragraph 41:

> *Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission has rightly pointed out, mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.*

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. Furthermore the Court held in paragraph 109 (see also paragraphs 153–154):[39]

> *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…*

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*

[39] See also the Opinion of Advocate General Kokott paragraph 154.

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.

5.7 The rules on best available technique

Submarine tailings disposal is neither included nor excluded as best available technique ("BAT") in the BAT Reference Document for the Management of Waste from Extractive Industries in accordance with Directive 2006/21/EC (the Mineral Waste Directive) (2018), see pages 81–84 and 488.

6 SUBMISSIONS BY THE PARTIES

6.1 Submission by the appeallants

[Inntatt i ankende parters forslag].

6.2 Submission by 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) 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 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*, paragraphs 65 and 69; and section 5.2 above.

Question 1: The notion of «overriding public interest» in Article 4(7)(c) 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) 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) 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) 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) 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 travaux préparatoires, 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) 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 to 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.[40]

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, and profits for owners give rise to benefits which are of overriding public interest.[41] This is supported by interpreting Article 4(7) WFD in light of Article 4(3)(a) and 4(5)(a) WFD, which acknowledges that economic objectives may justify derogations from Article 4(1)(a)(i) 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*

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

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

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

[Vi holder det åpent om retten ønsker å si noe her, og eventuelt hva. Det siste avsnittet er det en fordel om omtales].

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

Furthermore, the parties disagree as to whether certain interests that have been invoked before the Court of Appeal may constitute an «overriding public interest».

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 Borgarting Court of Appeal to decide these questions.

8 QUESTIONS

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

1. Is the notion of «overriding public interest» in Article 4(7)(c) of Directive 2000/60/EC to be interpreted as referring to the types of interests that may justify a derogation, or does it also include 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?

2. If the answer to question 1 is that a balancing of interest is required: is it sufficient that the negative impact is outweighed by the advantages, or must it be extensively outweighed?

3. May a mining project producing rutile (TiO_2) and garnet for the global market, generating income for the owners, workers and society (through taxation) and creating jobs in a remote region be of an «overriding public interest» pursuant to Article 4(7)(c) of Directive 2000/60/EC?

   [Alternativ til spørsmål nr. 3:]

   3. May a mining project by a private undertaking producing rutile (TiO_2) and garnet for the global market, generating income for the shareholders as well as tax revenue for the state and municipality, providing wage income for employees and generating employment effects (increased local business activity, employment and settlement) in a remote region, be of an «overriding public interest» pursuant to Article 4(7)(c) of Directive 2000/60/EC?

Sammenligning nr 1

Statens forslag er benyttet som utgangspunkt.
Miljøorganisasjonenes forslag er merket med "spor endringer"

26.04.2024

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 Borgarting 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"). The proceedings before Borgarting Court of Appeal concerns whether the derogation granted by Norwegian authorities ~~have granted a derogation,~~can be justified due to "reasons [...] of overriding public interest", cf. WFD article 4(7~~)~~ ~~WFD.~~)(c).

Sammenligning nr 1

Statens forslag er benyttet som utgangspunkt.
Miljøorganisasjonenes forslag er merket med "spor endringer"

The request ~~for an Advisory Opinion concerns~~seeks clarification on the general interpretation of the ~~notion of «~~"overriding public interest~~»~~" exception ~~in Article 4(7)(c), first alternative,~~ the WFD. ~~Namely~~In addition, the request seeks to clarify whether~~:~~

~~i. The notion necessitates a balance of interest between the benefits to the environment and~~ certain justifications that have been invoked before the ~~benefits of the new modifications to the water body, and whether the balance of interest then has to be extensive in favour of the project.~~

~~The interests served by the Engebø project~~Court of Appeal may constitute an ~~«~~"overriding public interest~~».~~". The request thus concerns the threshold for making exceptions to a key provision in EU environmental law, namely the prohibition against the deterioration of water resources.

2 PARTIES TO THE CASE

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

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

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	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*~~, lodged an application~~), filed a lawsuit against the Norwegian Government ~~at~~before the Oslo District Court, arguing that four permits granted to Nordic Mining were invalid~~. These are~~:

(i) The King in Council's *royal decree of* ~~19~~ *February 19, 2016*[1] ~~confirming the~~.

The decision gives Nordic Mining a pollution permit ~~granted by the Ministry of Climate and Environment 5 June 2015~~[2] 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 23, 2021* ~~confirming the revised pollution permit granted by the Environment Agency pursuant to Section 11~~.

[1] ~~The Royal Decree is available here (in Norwegian).~~

[2] ~~The Decision is available here (in Norwegian).~~

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The decision is a minor revision of the pollution ~~Control Act~~permit due to changes in the planned use of ~~1981~~chemicals.

(iii) *The Ministry of Trade, Industry and* Fisheries' *decision of ~~6~~ May 6, 2022*[3] ~~confirming the~~.

The decision concerns the granting of an operating license ~~granted by the Directorate of Mining~~ pursuant to section 43 of the Mining Act of 2008 (*mineralloven*).

(iv) *The Norwegian Environment* Agency's *decision of June 23 ~~June~~, 2023 ~~approving Nordic Mining's~~.*

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 10, 2024, the District Court dismissed the application in full.[4] Both organisations have appealed the judgment to the Borgarting Court of Appeal, which has decided to request an Advisory Opinion from the EFTA Court.

[3] ~~The Decision is available here (in Norwegian).~~

[4] ~~The District Court's judgment is available here (in Norwegian).~~

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The case before the Court of Appeal is limited to the question of ~~whether the Engebø-project is of «~~"overriding public interest~~»~~" pursuant to Article ~~4(7)(c) WFD~~. The parties ~~agree that the~~ disagree on whether there are other ~~conditions~~violations of the WFD, but this will not be decided in ~~Article 4(7) WFD are fulfilled.~~[5]the current case before Borgarting Court of Appeal.

3.2 The ~~Engebø mine~~mining project

~~The Engebø deposit is one of the largest unexploited rutile (TiO_2) deposits in the world.[6] Rutile, along with ilmenite, is the main source for production of titanium metal. Titanium metal has since 2020 been on the European Commission's list of critical raw materials.[7] Titanium metal is included as both a «Strategic Raw Material» and a «Critical Raw Material» in the recently adopted Critical Raw Materials Act (CRMA),[8] primarily due to its importance for aerospace and defence industries, and a very concentrated production.[9] Annual production at Engebø is forecasted at 35 000 tonnes of rutile and 180 000 tonnes of garnet.[10] This equates to approx. 8% of global rutile demand in 2023 and approx. 20% of Europe's rutile demand in a normal year.[11]~~

~~Nordic Mining has started extraction of ore at Engebø, and production of rutile and garnet is planned to commence in the latter half of 2024. Production is scheduled to last for at least 39 years and probably longer (perhaps up to 130~~

~~[5] The derogation is based on Article 4(7) WFD, first alternative, ("new modifications to the physical characteristics of a surface water body"). Before the District Court, the parties also disagreed whether Article 4(7)(d) WFD was complied with. This is no longer contested.~~

~~[6] The Royal Decree of 19 February 2016 p. 11.~~

~~[7] COM (2020) 474.~~

~~[8] COM (2023) 160, see ST 7993 2024 INIT.~~

~~[9] EU Commission, *Study on the Critical Raw Materials for the EU 2023* (2023), pages 36 and 39.~~

~~[10] See the description of the parameters of the project in the District Court's judgment 10 January 2024 p. 4. The parameters are based on the current reserve estimates based on the JORC-standard.~~

~~[11] Global rutile demand was approx. 420kt in 2023. On average Europe consumes about 170–190kt of rutile annually, while demand was significantly down in 2023 (97kt).~~

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~~years).[12] Nordic Mining has entered into off-take agreements for the first five years of production whereby some volumes of rutile will be sold to a customer in the EU and remaining volumes to a customer in Japan.[13]~~

~~In the current mine plan, the mine is scheduled to directly employ 105 persons the first 13 years, and 145 persons the following 27 years.[14] Indirect employment effects are in an early production phase calculated at 0.48–0.78 per directly employed in the Engebø region and 1.93 at the national level. Indirect employment effects are expected to increase over time.[15]~~

~~Naustdal municipality is located in in Western Norway and had a population of 2793 in 2019. In 2020, Naustdal joined three other municipalities in forming Sunnfjord municipality which had a population of 22 450 in 2023.[16] Sunnfjord municipality is designated as a 'c' area in Norway's regional aid map, most recently approved by ESA through Decision No. 276/21/COL.~~

~~The mine's~~The royal decree describes Nordic Mining's project as follows (unofficial translation):[17]

> *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*

~~[12] The District Court's judgment 10 January 2024 p. 45–46. 130 years is the number provided by Kenneh Angedal during his presentation before the District Court (slide 8).~~

~~[13] Presentation by Kenneth Angedal before the District Court (slide 6). Information about the location of the buyers is provided by Nordic Mining.~~

~~[14] The Ministry of Trade, Industry and Fisheries' Decision of 6 May 2022 p. 21–22. Updated numbers were provided by Kenneth Angedal during his presentation before the District Court (slide 8).~~

~~[15] Sintef, *Økonomiske ringvirkninger av mineralbrudd i Engebøfjellet* (2013), page 72 (U 1411) (in Norwegian). The calculations are based on an earlier mine plan where annual production and the number of directly employed persons were higher.~~

~~[16] Numbers from Statistics Norway (SSB).~~

[17] The royal decree of February 19, 2016 p. 1-2.

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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.

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

Tailings from the mine will be disposed within a 4.4 square kilometre area at the bottom of the Førdefjord.[18] 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.[19] The disposal area is shown as the shaded area in the map below.

~~The disposal area covers approximately 10% of the "Førdefjorden-ytre" surface water body.[20] Before the District Court the parties agree that the submarine tailings disposal will cause the ecological status of the water body to deteriorate from «good» (*god*) to «poor» (*dårlig*), cf. Section 1.2 of Annex V WFD.[21] The composition and abundance of benthic invertebrate fauna (*bunnfauna (virvelløse dyr)*) is the quality element that will be most negatively affected, and thus determine the ecological status of the water body.[22] The benthic invertebrate fauna in the area where tailings disposal will take place will be buried, and thus eradicated, while disposal is in progress.[23] Benthic invertebrate fauna is~~

[18] ~~The District Court's judgment 10 January 2024 p. 2.~~

[19] ~~Nordic Mining's pollution permit is available here (in Norwegian). See Sections 3.1.1 and 9.4.2.~~

[20] ~~The District Court's judgment 10 January 2024 p. 2. The Førdefjord is divided in to three water bodies pursuant to the WFD.~~

[21] ~~The District Court's judgment 10 January 2024 p. 21.~~

[22] ~~The Ministry of Climate and Environment's Decision 5 June 2015 pp. 19-20.~~

[23] ~~The submarine disposal system is described in Nordic Mining's Waste Management Plan pp. 85-87 (in Norwegian).~~

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~~expected to be fully restituted within 10 years of disposal ending in most of the deposit area, but may then have a different composition.[24]~~

~~The ecological status of both the surface waters above and the submarine areas outside the deposit area are not expected to be negatively affected. To ensure that the ecological status of these areas does not deteriorate to a class below «good», Nordic Mining's pollution permit sets out maximum thresholds for the concentration of particles in the water above and at the edge of the disposal area, and for the annual rate of sedimentation at the edge of the disposal area.[25] The particle concentration is to be monitored continuously, and disposal is to halt if the thresholds are exceeded.[26] The tailings are inert, and the chemical status of "Førdefjorden-ytre" will remain «good».[27]~~

~~[Vi kan ikke se at det er nødvendig å ta inn et sitat fra KLDs vedtak, slik de ankende parter ønsker, i tillegg til beskrivelsen av faktum over. I den grad det skal tas inn sitat, bør hele sitatet tas inn:] The Ministry of Climate and Environment summarises the mine's effect on the ecological status of the water body in its decision 5 June 2015 p. 22 (unofficial translation):~~

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.[28] In the Ministry of the Environment's decision, it is assumed that (unofficial translation):[29]

~~[24] The Ministry of Climate and Environment's Decision 5 June 2015 p. 10.~~

~~[25] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 20-21 and 22.~~

~~[26] See Sections 2.2, 9.4.2 and 11 of Nordic Mining's pollution permit.~~

~~[27] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 21-22.~~

[28] The royal decree of February 19, 2016 p. 10.

[29] The Ministry of the Environment's decision of June 5, 2015 p. 22.

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> *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.*~~

~~We refer to the Environmnent Agency's assessment~~ The consequence of the deposit is that ~~it is only~~ the ~~physical changes that lead to a deterriaotion of the water body and that no other effects~~benthic fauna in the deposit area will disappear. The Ministry has described the impact of the ~~project will deterioate~~disposal on the seabed conditions as follows (unofficial translation): [30]

> *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 ~~derogation granted by~~ Norwegian ~~authorities pursuant to Article 4(7) WFD~~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) WFD.

[30] The Ministry of the Environment's decision of June 5, 2015 p. 20.

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Derogation was granted by the Ministry of ~~Climate and~~ Environment by Decision 5 June 2015 and affirmed by the King in Council (*Kongen i statsråd*) by royal decree of ~~19 February~~ 2016 upon administrative appeal.

~~[Vi kan ikke se at det er nødvendig å sitere fra den kongelige resolusjonen, slik de ankende parter legger opp til. I den grad det skal siteres, mener vi følgende oversettelse bør brukes:]~~ 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 ~~enterprise is~~undertaking could therefore ~~elegible to~~ 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*

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Naustdal, which is a relatively small municipality that has long been in a slightly declining population trend.

Several complaints concerning the Ministry of Climate and Environment's decision and the Royal Decree were received by the EFTA Surveillance Authority («ESA»), which rejected the complaints in a decision 18 January 2017 (009/17/COL).[31]

Both decisions by the Norwegian authorities were made prior to the adoption of the first river basin management plan for Sogn og Fjordane water region, which includes Engebø, cf. Articles 4(1) and 13 WFD.[32] The derogation is described in the former and the current river basin management plan for Vestland water region (which includes former Sogn og Fjordane).[33]

3.5 The permitting process for the Engebø mine

Pursuant to Norwegian law, mining projects of Engebø's scale require multiple permits. Nordic Mining applied for the first permit in 2007.[34] From 2007 to 2014 various environmental impact assessments were carried out, of which a majority dealt with the environmental impact of the submarine tailings disposal and in particular the risk of particles spreading from the disposal area.[35]

Nordic Mining today have all required permits. This includes the four permits listed in section 3.1 above, as well as a zoning plan pursuant to Section 27-2 of

[31] The Decision is available here. ESA has later closed a further case about the disposal of mining waste in the Førdefjord (case 78448). In addition, ESA has closed a case concerning other submarine tailings disposals in Norway (case 80570).

[32] The Ministry of Climate and Environment approved the first river basin management plan for Sogn og Fjordane 4 July 2016 prior to the deadline of 28 September 2016, cf. Section 13(6) WFD, cf. Article 1(1)(b) of the EEA Joint Committee Decision no. 125/2007.

[33] See Regional Water Management Plan for Sogn og Fjordane 2016–2021 pp. 58-59 and Regional Water Management plan for Vestland region 2022-2027 pp. 28 and 133.

[34] Nordic Mining Planning Program 25 October 2007 (U 77).

[35] The District Court's judgment 10 January 2024 pp. 48-51 and overview of Nordic Mining environmental reports (U 3541-3548).

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~~the Planning and Building Act of 1985 (*plan- og bygningsloven*) and a detailed zoning plan pursuant to Section 12-12 of the Planning and Building Act of 2008.[36] The latter two permits are not part of the case currently pending before Norwegian courts.~~

~~All six permit applications, including the environmental impact assessments, have been subject to public consultations.[37] All permits, apart from the confirmation of the waste management plan in 2023, have been subject to administrative appeal pursuant to Section 28 of the Public Administration Act of 1967 and have been confirmed on appeal (some conditions in the permits have been amended in the appeal decisions).~~

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:[38]

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

~~[36] U 1779 og 3379.~~

~~[37] The District Court's judgment 10 January 2024 pp. 38-39.~~

[38] The response to the appeal (*anketilsvaret*) section 3.1.

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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.

4 RELEVANT NORWEGIAN LEGISLATION

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 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 permits, i.e. to grant exceptions to the general prohibition against 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.*

As stated in this paragraph, the pollution control authority is authorised to grant permission based on a cost-benefit assessment.

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4.2 The Water Regulation (*vannforskriften*)

The Water Framework Directive is transposed in Norwegian law through the Water Regulation which entered into force 1 January 2007.[39]

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) 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):[40]

> *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*

[39] The regulation is available here (in Norwegian). See Section 34.

[40] The translation of the first and second paragraph is provided by ESA in letter 16 July 16, 2021, in case 80570. The third paragraph was added in December 2018 and previously transpired from Section 14 and Annex VII of the Water Regulation.

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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 general case concerning the implementation and application of the Water Framework Directive in Norway (case 86194).

In a letter of October 26, 2021, ESA raised several questions. Question no. 2 was:[41]

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.

41 Letter from ESA to the Norwegian government, October 26, 2021.

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In a letter of December 15, 2021, the Norwegian government responded that:[42]

> *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 30, 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):[43]

> *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.*

[42] Letter from the Royal Norwegian Ministry of Climate and Environment to ESA, December 15, 2021.
[43] The proposal is available here (in Norwegian).

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The wording of the Water Framework Directive article 4(7)(c) and the Water Regulation section 12(2)(b) is compared in the table below:

WFD art. 4(7)(c)	**Water Regulation s. 12(2)(b) Current version**	**Water Regulation s. 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 of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and	*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 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 Water Framework Directive was adopted on ~~20~~ October 20, 2000, and the "overriding public interest" derogation was included in the original version.

The WFD was incorporated to Annex XX (Environment) to the EEA Agreement by EEA Joint Committee decision no. 125/2007 of 28 September 2007. ~~Joined to the Decision is a Joint Statement by the EEA Contracting Parties:~~The directive entered into force on May 1, 2009.

> ~~*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*~~

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~~*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 Water Framework Directive 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, but does not aim for complete harmonisation of the rules of EEA States concerning water, see the judgment in *Commission* v *Luxembourg*, C-32/05, EU:C:2006:749, paragraphs 41 *et seq*.~~The WFD is one of the EU legal acts that provides the most far-reaching protection of Europe's water resources.[44] The directive is designed to promote sustainable water use based on long-term protection of available water resources.[45] It also aims to prevent further deterioration and protect and enhance the status of water bodies.[46]

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

Pursuant to Article 4(1)(a) 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.[47]

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44 David Langlet and Said Mahmoudi, *Environmental Law and Policy*, (2016) p. 224.

45 See Article 1 (b) WFD.

46 See Article 1(1)(a) WFD.

47 Pursuant to Article 1(1)(b) of the EEA Joint Committee Decision no. 125/2007, the deadline for EEA States runs from ~~28~~ September 28, 2007.

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«In other words, the Water Framework Directive 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 European Court of Justice.[48] 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) 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) 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) 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*

[48] See C-461/13 *Bund für Umwelt und Naturschutz Deutschland*, paragraph 39.

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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) WFD are satisfied, see the judgment in *Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:391, paragraph 75.

Article 4 WFD first applies once a river basin plan covering the relevant river basin has been adopted, see the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560. The CJEU held that the project in question was not covered by Article 4 WFD as it was authorised prior to the publication of a river basin management plan within the deadline prescribed by Article 13(6) WFD (paragraphs 52–56). Greece was however obliged to «refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by Article 4 of that directive» (paragraphs 57–60). Also in the judgment in *Schwarze Sulm*, cited above, the project was authorised prior to the expiry of the time limit in Article 13(6) WFD, see paragraphs 49–51 of the judgment. The CJEU here repeated its position from the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others.*

5.3 Derogation pursuant to Article 4(7) WFD

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

Article 4(7) 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*

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— 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) WFD sets out two alternative conditions, and it suffices that one is fulfilled. The relevant alternative in the case at hand is «"overriding public interest»" as per the English language version.

In other language versions the condition is formulated as for example «un intérêt general majeur» (French), «übergeordnetem öffentlichem Interesse» (German), «sono di prioritario interesse pubblico» (Italian), «interés público superior» (Spanish), «nadrzędny interes społeczny» (Polish), «begrundet i væsentlige samfundsinteresser» (Danish) and «allmänintresse av större vikt» (Swedish). In the Norwegian language version published in the EEA Supplement to the Official

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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 WFD.

The notion of exemption "overriding public interest" is also used in other areas of EU- law, notably on restrictions on free movement and in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. In the realm of free movement, the CJEU has held that «"reasons of a purely economic nature cannot constitute overriding reasons in the public interest»,", see the judgment in *Andreas Ingemar Thiele Meneses*, C-220/12, EU:C:2013:683, paragraph 43.

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

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

The notionexemption was first interpreted by the CJEU in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, cited above.C-43/10, EU:C:2012:560. The case concerned the partial diversion of the upper waterspart of the Greek river Acheloos into the river Pinios. The diversion of the river entailed a deterioration of the river's environmental status, and the implementation of the measure was conditional on the fulfilment of the derogation conditions in Greece.Article 4(7) WFD. The CJEU heldstated 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.*
>
> *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) 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~~. While Article 4 WFD did not apply at the time when the decision authorising the project was made on the national level, the obligation to refrain from measures liable seriously to compromise the attainment of the objective provided for by Article 4 did apply, and the CJEU assessed whether the project was liable to be covered by a derogation in Article 4(7) WFD (paragraphs 51–52). Regarding «overriding public interest», the CJEU held in paragraphs 69–71:~~ 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 the Austrian state 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".[49]

> ~~*69 Next, it should be noted that the construction of a hydropower plant, such as the one envisaged through the contested project, may in fact be an overriding public interest.*~~

[49] C-346/14 *Schwarze Sulm*, paragraph 69.

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> ~~*70 In that regard, the Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest. Directive 2000/60, which was adopted on the basis of Article 175(1) EC (now Article 192(1) TFEU), establishes common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and the structures for protection and sustainable use of water in the European Union. Those principles and that framework are to be developed subsequently by the Member States by means of the adoption of individual measures. Thus, the directive does not seek to achieve complete harmonisation of the rules of the Member States concerning water...*~~
>
> ~~*71 As part of that margin of discretion, the Republic of Austria was entitled to consider that the contested project, the aim of which is to promote the production of renewable energy through hydroelectricity, is an overriding public interest.*~~

Article 4(7)(c) 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 CIS Guidance document 36 (2017) on Article 4(7) WFD~~

~~The notion of «overriding public interest» is interpreted in CIS Guidance document 36 (2017). The document is not legally binding, see the judgment in *Association France Nature Environnement,* cited above, paragraph 31.~~

~~It transpires from the Guidance Document 36, pages 59-60:~~

> ~~*In EU legislation the public or general interest can serve as a ground for justifying derogations. A range of "public interests" exist within the EU and at national level of a social, economic or environmental nature. Since not all public interests can automatically be "overriding", it is important to distinguish between "public interest"*~~

~~*and "overriding public interest" which is addressed by Article 4(7)(c). "Overriding" practically means that the other interest overrides achieving the objectives of the WFD. Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest. Public participation can contribute considerably in determining overriding public interest.*~~

~~In elaborating on the notion of «overriding public interest», CIS Guidance Document 36 further points to case-law from the CJEU in relation to Article 6(4) of Directive 92/43/ECC (the Habitats Directive).~~

~~5.6~~5.5 Practice from the CJEU concerning Article 6(4) of the Habitats Directive

In CIS Guidance Document No 36 (2017), 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 the Directive 92743/ECC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive"). The Habitats Directive is not incorporated into the EEA Agreement.[50] 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.*

[50] See also Article 1(1)(a)(iii) of the EEA Joint Committee Decision no. 125/2007.

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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 «~~exemption "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 *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds ("Lappel Bank")*, C-44/95, EU:C:1996:297, concerned the decision by British authorities to exclude Lappel Bank from the Medway Estuary and Marshes Special Protection Area ("SPA") due to the planned expansion of the port of Sheerness on to the Bank (see paragraphs 10–14). The first question concerned whether Member States were entitled to take account of «economic requirements» when designating SPAs pursuant to Article 4(1) and 4(2) of the Habitats Directive. The CJEU answered the question in the negative, but held in paragraph 41:~~

> ~~*Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission has rightly pointed out, mean that they cannot be taken into account at a later*~~

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> ~~*stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.*~~

The judgment in *Commission v Spain,* C-404/09, EU:C:2011:768, concerned several authorisations given by Spanish authorities ~~to~~for continued mining operations and ~~extension of existing mining operations~~further planned projects in ~~the "~~"Alto Sil", a designated SPA and Site of Community Importance.[51] The CJEU found that the permits were given in violation of Article 6(3) of the Habitats Directive and were thus invalid. ~~Furthermore the Court held in paragraph 109 (see also paragraphs 153–154):~~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:[52]

> *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~~...~~.*

The Advocate General stated that the measure, in principle, could be justified on the following grounds: [53]

> *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.*

[51] For a more detailed account of the various mines, please refer to the Opinion of Advocate General Kokott, chapter III, in particular paragraphs 26 onwards.

[52] ~~See also the Opinion of Advocate General Kokott~~ C-404/09 *Commission v Spain,* paragraph 109. See also paragraphs 153 and 154.

[53] Opinion of Advocate General Kokott in C-404/09 *Commission v Spain*, paragraph 154.

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The expansion and the authorisation to continue operating the mining activities could in principle be justified on two grounds: energy supply and maintaining already established jobs. These two considerations are referred to by the European Court of Justice in paragraph 109 as "the local economy".

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 7124):

> *[W]hether 6. In the event of a negative reply to Question 5, must Article 6(4) of [the Habitats] Directive must... be interpreted as meaning thatpermitting the creation of infrastructure intendeddesigned to accommodate the management centre of a private company mayand a large number of employees to 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.

~~**5.7 The rules on best available technique**~~

~~Submarine tailings disposal is neither included nor excluded as best available technique ("BAT") in the BAT Reference Document for the Management of Waste from Extractive Industries in accordance with Directive 2006/21/EC (the Mineral Waste Directive) (2018), see pages 81–84 and 488.~~

6 SUBMISSIONS BY THE PARTIES

6.1 Submission by 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.

Firstly, 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

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understanding that the end product will be white colour pigment and that most of the production will be exported to Asia.

6.2 Submission by 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) 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 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*, paragraphs 65 and 69; and section 5.2 above.

Question 1: The notion of «overriding public interest» in Article 4(7)(c) 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) 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) 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) WFD.

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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) 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 travaux préparatoires, 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) 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 to 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.[54]

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, and profits for owners give rise to benefits which are of overriding public interest.[55] This is supported by interpreting Article 4(7) WFD in light of Article 4(3)(a) and 4(5)(a) WFD, which acknowledges that economic

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

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

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objectives may justify derogations from Article 4(1)(a)(i) 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

~~[Vi holder det åpent om retten ønsker å si noe her, og eventuelt hva. Det siste avsnittet er det en fordel om omtales].~~

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

Borgarting Court of Appeal may, inter alia, review whether the "overriding public interest" exception was applied correctly.

The parties disagree on the general interpretation of the "overriding public interest" exception in the WFD. Furthermore, the parties disagree as to whether certain interests that have been invoked before the Court of Appeal may constitute an ~~«~~"overriding public interest~~».~~".

There are a few decisions from the ECJ regarding the interpretation of the relevant provision. However, in the view of the preparatory judge, existing case law does not resolve the questions of interpretation raised by the case at hand.

Sammenligning nr 1

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The preparatory judge assumes that it will be difficult to answer exhaustively which considerations that, on a general basis, may constitute an "overriding public interest". It is therefore appropriate to ask about the specific considerations that the parties believe 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~~Decision. Notwithstanding the request for an Advisory Opinion, it remains for Borgarting Court of Appeal to decide these questions.

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 ~~notion of «~~legal test when determining whether there is an "overriding public interest~~» in~~" under Article 4(7~~)(c~~) of the Water Framework Directive ~~2000/60/EC to~~?
   a. Is a qualified preponderance of interest required and/or are only particularly important public interests relevant?
   b. What will be ~~interpreted as referring to~~key factors in the ~~types~~assessment of whether the public interests that ~~may~~ justify ~~a derogation, or does it also include 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?~~measure are "overriding"?

~~1. If the answer to question 1 is that a balancing of interest is required: is it sufficient that the negative impact is outweighed by the advantages, or must it be extensively outweighed?~~

Sammenligning nr 1

Statens forslag er benyttet som utgangspunkt.
Miljøorganisasjonenes forslag er merket med "spor endringer"

~~May a mining project producing rutile (TiO_2) and garnet for the global market, generating income for the owners, workers and society (through taxation) and creating jobs in a remote region be of an «~~2. Can the following economic considerations constitute an "overriding public interest~~» pursuant to~~" under Article 4(7~~)(c~~) of the Water Framework Directive ~~2000/60/EC~~, and if so, under what conditions?

~~[Alternativ til spørsmål nr. 3:]~~

~~3. May a mining project by~~a. Purely economic considerations (i.e. the expected gross income generated by the planned mining operations)

b. That a private undertaking ~~producing rutile (TiO_2) and garnet for the global market, generating~~will generate income for ~~the~~ shareholders ~~as well as~~

c. That a private undertaking will generate tax revenue for the state and municipality~~, providing~~

d. That a private undertaking will provide wage income for employees ~~and generating~~

3. 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. That a private undertaking will generate employment effects (increased local business activity, employment and settlement) ~~in a remote region, be of an «overriding public interest» pursuant to Article 4(7)(c) of Directive 2000/60/EC?~~

b. Global supply of rutile

c. Ensuring Norway and Europe access to critical minerals

Sammenligning nr 2

Miljøorganisasjonenes forslag er benyttet som utgangspunkt. Statens forslag er merket med "spor endringer"

26.04.2024

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 Borgarting 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"). ~~The proceedings before Borgarting Court of Appeal concerns whether the derogation granted by~~ Norwegian authorities ~~can be justified due to "reasons [...] of overriding public interest",~~have granted a derogation, cf. ~~WFD~~ Article 4(7~~)(c).~~) WFD.

Sammenligning nr 2

Miljøorganisasjonenes forslag er benyttet som utgangspunkt. Statens forslag er merket med "spor endringer"

The request ~~seeks clarification on~~for an Advisory Opinion concerns the ~~general~~ interpretation of the ~~"~~notion of «overriding public interest~~" exception~~» in ~~the~~ Article 4(7)(c), first alternative, WFD. ~~In addition, the request seeks to clarify~~Namely whether ~~certain justifications that have been invoked before~~:

i. The notion necessitates a balance of interest between the benefits to the environment and the ~~Court of Appeal~~benefits of the new modifications to the water body, and whether the balance of interest then has to be extensive in favour of the project.

~~i.~~ii. The interests served by the Engebø project may constitute an ~~"~~«overriding public interest~~". The request thus concerns the threshold for making exceptions to a key provision in EU environmental law, namely the prohibition against the deterioration of water resources.~~».

2 PARTIES TO THE CASE

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

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

Sammenligning nr 2

Miljøorganisasjonenes forslag er benyttet som utgangspunkt. Statens forslag er merket med "spor endringer"

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~~), filed a lawsuit~~, lodged an application against the Norwegian Government ~~before~~at the Oslo District Court, arguing that four permits granted to Nordic Mining were invalid. These are:

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

i. ~~The decision gives Nordic Mining a~~[1] confirming the pollution permit granted by the Ministry of Climate and Environment 5 June 2015[2] 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 ~~*23,*~~ 2021~~.~~

ii. ~~The decision is a minor revision~~ confirming the revised pollution permit granted by the Environment Agency pursuant to Section 11 of the

[1] The Royal Decree is available here (in Norwegian).

[2] The Decision is available here (in Norwegian).

Sammenligning nr 2

Miljøorganisasjonenes forslag er benyttet som utgangspunkt. Statens forslag er merket med "spor endringer"

Pollution ~~permit due to changes in the planned use of chemicals.~~Control Act of 1981.

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

iii. ~~The decision concerns the granting of an~~ [3] confirming the operating license granted by the Directorate of Mining pursuant to Section 43 of the Mining Act of 2008 (*mineralloven*).

~~*(iv)*~~ The ~~*Norwegian*~~ Environment Agency's decision of 23 June ~~*23,*~~ 2023~~.~~

iv. ~~The decision concerns approval of the~~ approving Nordic Mining's 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 ~~10,~~ 2024, the District Court dismissed the application in full.[4] Both organisations have appealed the judgment to the Borgarting Court of Appeal, which has decided to request an Advisory Opinion from the EFTA Court.

[3] The Decision is available here (in Norwegian).

[4] The District Court's judgment is available here (in Norwegian).

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Miljøorganisasjonenes forslag er benyttet som utgangspunkt. Statens forslag er merket med "spor endringer"

The case before the Court of Appeal is limited to the question of "whether the Engebø-project is of «overriding public interest"» pursuant to Article 4(7)(c) WFD. The parties disagree on whether there are agree that the other violations of the WFD, but this will not be decidedconditions in the current case before Borgarting Court of Appeal.Article 4(7) WFD are fulfilled.[5]

3.2 The mining projectEngebø mine

The royal decree describes Nordic Mining's project as follows (unofficial translation):[6]

> *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.*

[5] The derogation is based on Article 4(7) WFD, first alternative, ("new modifications to the physical characteristics of a surface water body"). Before the District Court, the parties also disagreed whether Article 4(7)(d) WFD was complied with. This is no longer contested.

[6] The royal decree of February 19, 2016 p. 1-2.

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> ~~*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.*~~

~~The environmental~~The Engebø deposit is one of the largest unexploited rutile (TiO_2) deposits in the world.[7] Rutile, along with ilmenite, is the main source for production of titanium metal. Titanium metal has since 2020 been on the European Commission's list of critical raw materials.[8] Titanium metal is included as both a «Strategic Raw Material» and a «Critical Raw Material» in the recently adopted Critical Raw Materials Act (CRMA),[9] primarily due to its importance for aerospace and defence industries, and a very concentrated production.[10] Annual production at Engebø is forecasted at 35 000 tonnes of rutile and 180 000 tonnes of garnet.[11] This equates to approx. 8% of global rutile demand in 2023 and approx. 20% of Europe's rutile demand in a normal year.[12]

Nordic Mining has started extraction of ore at Engebø, and production of rutile and garnet is planned to commence in the latter half of 2024. Production is scheduled to last for at least 39 years and probably longer (perhaps up to 130 years).[13] Nordic Mining has entered into off-take agreements for the first five

[7] The Royal Decree of 19 February 2016 p. 11.

[8] COM (2020) 474.

[9] COM (2023) 160, see ST 7993 2024 INIT.

[10] EU Commission, *Study on the Critical Raw Materials for the EU 2023* (2023), pages 36 and 39.

[11] See the description of the parameters of the project in the District Court's judgment 10 January 2024 p. 4. The parameters are based on the current reserve estimates based on the JORC-standard.

[12] Global rutile demand was approx. 420kt in 2023. On average Europe consumes about 170–190kt of rutile annually, while demand was significantly down in 2023 (97kt).

[13] The District Court's judgment 10 January 2024 p. 45–46. 130 years is the number provided by Kenneh Angedal during his presentation before the District Court (slide 8).

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years of production whereby some volumes of rutile will be sold to a customer in the EU and remaining volumes to a customer in Japan.[14]

In the current mine plan, the mine is scheduled to directly employ 105 persons the first 13 years, and 145 persons the following 27 years.[15] Indirect employment effects are in an early production phase calculated at 0.48–0.78 per directly employed in the Engebø region and 1.93 at the national level. Indirect employment effects are expected to increase over time.[16]

Naustdal municipality is located in in Western Norway and had a population of 2793 in 2019. In 2020, Naustdal joined three other municipalities in forming Sunnfjord municipality which had a population of 22 450 in 2023.[17] Sunnfjord municipality is designated as a 'c' area in Norway's regional aid map, most recently approved by ESA through Decision No. 276/21/COL.

3.3 The mine's impact on the ~~fjord~~"Førdefjorden-ytre" water body

Tailings from the mine will be disposed within a 4.4 square kilometre area at the bottom of the Førdefjord.[18] 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.[19] The disposal area is shown as the shaded area in the map below.

[14] Presentation by Kenneth Angedal before the District Court (slide 6). Information about the location of the buyers is provided by Nordic Mining.

[15] The Ministry of Trade, Industry and Fisheries' Decision of 6 May 2022 p. 21–22. Updated numbers were provided by Kenneth Angedal during his presentation before the District Court (slide 8).

[16] Sintef, *Økonomiske ringvirkninger av mineralbrudd i Engebøfjellet* (2013), page 72 (U 1411) (in Norwegian). The calculations are based on an earlier mine plan where annual production and the number of directly employed persons were higher.

[17] Numbers from Statistics Norway (SSB).

[18] The District Court's judgment 10 January 2024 p. 2.

[19] Nordic Mining's pollution permit is available here (in Norwegian). See Sections 3.1.1 and 9.4.2.

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~~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.[20] In the Ministry of the Environment's decision, it is assumed that (unofficial translation):[21]~~

The disposal area covers approximately 10% of the "Førdefjorden-ytre" surface water body.[22] Before the District Court the parties agree that the submarine tailings disposal will cause the ecological status of the water body to deteriorate from «good» (*god*) to «poor» (*dårlig*), cf. Section 1.2 of Annex V WFD.[23] The composition and abundance of benthic invertebrate fauna (*bunnfauna (virvelløse dyr)*) is the quality element that will be most negatively affected, and thus determine the ecological status of the water body.[24] The benthic invertebrate fauna in the area where tailings disposal will take place will be buried, and thus

~~[20] The royal decree of February 19, 2016 p. 10.~~
~~[21] The Ministry of the Environment's decision of June 5, 2015 p. 22.~~
[22] The District Court's judgment 10 January 2024 p. 2. The Førdefjord is divided in to three water bodies pursuant to the WFD.
[23] The District Court's judgment 10 January 2024 p. 21.
[24] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 19-20.

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eradicated, while disposal is in progress.[25] Benthic invertebrate fauna is expected to be fully restituted within 10 years of disposal ending in most of the deposit area, but may then have a different composition.[26]

The ecological status of both the surface waters above and the submarine areas outside the deposit area are not expected to be negatively affected. To ensure that the ecological status of these areas does not deteriorate to a class below «good», Nordic Mining's pollution permit sets out maximum thresholds for the concentration of particles in the water above and at the edge of the disposal area, and for the annual rate of sedimentation at the edge of the disposal area.[27] The particle concentration is to be monitored continuously, and disposal is to halt if the thresholds are exceeded.[28] The tailings are inert, and the chemical status of "Førdefjorden-ytre" will remain «good».[29]

[Vi kan ikke se at det er nødvendig å ta inn et sitat fra KLDs vedtak, slik de ankende parter ønsker, i tillegg til beskrivelsen av faktum over. I den grad det skal tas inn sitat, bør hele sitatet tas inn:] The Ministry of Climate and Environment summarises the mine's effect on the ecological status of the water body in its decision 5 June 2015 p. 22 (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.*

[25] The submarine disposal system is described in Nordic Mining's Waste Management Plan pp. 85-87 (in Norwegian).

[26] The Ministry of Climate and Environment's Decision 5 June 2015 p. 10.

[27] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 20–21 and 22.

[28] See Sections 2.2, 9.4.2 and 11 of Nordic Mining's pollution permit.

[29] The Ministry of Climate and Environment's Decision 5 June 2015 pp. 21-22.

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~~The consequence of~~ We refer to the ~~deposit is~~ Environmnent Agency's assessment that it is only the ~~benthic fauna in the deposit area will disappear. The Ministry has described the impact~~physical changes that lead to a deterriaotion of the water body and that no other effects of the ~~disposal on the seabed conditions as follows (unofficial translation):~~ [30]

> ~~*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*~~*project will deterioate 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 derogation granted by Norwegian ~~Government's justification for allowing a degradation of the water resource~~authorities pursuant to Article 4(7) WFD

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) WFD.

Derogation was granted by the Ministry of Climate and Environment by Decision 5 June 2015 and affirmed by the King in Council (*Kongen i statsråd*) by Royal Decree of 19 February 2016 upon administrative appeal.

[Vi kan ikke se at det er nødvendig å sitere fra den kongelige resolusjonen, slik de ankende parter legger opp til. I den grad det skal siteres, mener vi følgende

~~[30] The Ministry of the Environment's decision of June 5, 2015 p. 20.~~

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oversettelse bør brukes:] 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~~enterprise is therefore elegible to 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:~~

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- ~~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:[31]~~

- ~~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»), which rejected the complaints in a decision 18 January 2017 (009/17/COL).[32]

Both decisions by the Norwegian authorities were made prior to the adoption of the first river basin management plan for Sogn og Fjordane water region, which includes Engebø, cf. Articles 4(1) and 13 WFD.[33] The derogation is described in

[31] ~~The response to the appeal (*ankotilsvaret*) section 3.1.~~

[32] The Decision is available here. ESA has later closed a further case about the disposal of mining waste in the Førdefjord (case 78448). In addition, ESA has closed a case concerning other submarine tailings disposals in Norway (case 80570).

[33] The Ministry of Climate and Environment approved the first river basin management plan for Sogn og Fjordane 4 July 2016 prior to the deadline of 28 September 2016, cf. Section 13(6) WFD, cf. Article 1(1)(b) of the EEA Joint Committee Decision no. 125/2007.

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the former and the current river basin management plan for Vestland water region (which includes former Sogn og Fjordane).[34]

3.5 The permitting process for the Engebø mine

Pursuant to Norwegian law, mining projects of Engebø's scale require multiple permits. Nordic Mining applied for the first permit in 2007.[35] From 2007 to 2014 various environmental impact assessments were carried out, of which a majority dealt with the environmental impact of the submarine tailings disposal and in particular the risk of particles spreading from the disposal area.[36]

Nordic Mining today have all required permits. This includes the four permits listed in section 3.1 above, as well as a zoning plan pursuant to Section 27-2 of the Planning and Building Act of 1985 (*plan- og bygningsloven*) and a detailed zoning plan pursuant to Section 12-12 of the Planning and Building Act of 2008.[37] The latter two permits are not part of the case currently pending before Norwegian courts.

All six permit applications, including the environmental impact assessments, have been subject to public consultations.[38] All permits, apart from the confirmation of the waste management plan in 2023, have been subject to administrative appeal pursuant to Section 28 of the Public Administration Act of 1967 and have been confirmed on appeal (some conditions in the permits have been amended in the appeal decisions).

[34] See Regional Water Management Plan for Sogn og Fjordane 2016–2021 pp. 58-59 and Regional Water Management plan for Vestland region 2022-2027 pp. 28 and 133.

[35] Nordic Mining Planning Program 25 October 2007 (U 77).

[36] The District Court's judgment 10 January 2024 pp. 48-51 and overview of Nordic Mining environmental reports (U 3541-3548).

[37] U 1779 og 3379.

[38] The District Court's judgment 10 January 2024 pp. 38-39.

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Miljøorganisasjonenes forslag er benyttet som utgangspunkt. Statens forslag er merket med "spor endringer"

4 RELEVANT NORWEGIAN LEGISLATION

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 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 ~~permits, i.e. to grant exceptions to the general prohibition against~~ 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.*

~~As stated in this paragraph, the pollution control authority is authorised to grant permission based on a cost-benefit assessment.~~

4.2 The Water Regulation (*vannforskriften*)

The Water Framework Directive is transposed in Norwegian law through the Water Regulation which entered into force 1 January 2007.[39]

Section 4 of the Water Regulation establishes the obligations to prevent deterioration of surface water bodies, as well as the objective that all water

[39] The regulation is available here (in Norwegian). See Section 34.

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bodies shall have good ecological and chemical status. Article 4(7) 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):[40]

> *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*

[40] The translation of the first and second paragraph is provided by ESA in letter 16 July 16, 2021, in case 80570. The third paragraph was added in December 2018 and previously transpired from Section 14 and Annex VII of the Water Regulation.

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> *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 general case concerning the implementation and application of the Water Framework Directive in Norway (case 86194).

~~In a letter of October 26, 2021, ESA raised several questions. Question no. 2 was:~~[41]

> ~~*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 December 15, 2021, the Norwegian government responded that:~~[42]

> ~~*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*~~

~~41 Letter from ESA to the Norwegian government, October 26, 2021.~~
~~42 Letter from the Royal Norwegian Ministry of Climate and Environment to ESA, December 15, 2021.~~

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> ~~*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 ~~30,~~ 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):[43]

> *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 wording of the Water Framework Directive article 4(7)(c) and the Water Regulation section 12(2)(b) is compared in the table below:~~

~~**WFD art. 4(7)(c)**~~	~~**Water Regulation s. 12(2)(b) Current version**~~	~~**Water Regulation s. 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 of the new modifications or alterations to human health, to the maintenance of human*~~	~~*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 be greater than the benefits to the environment and to society of achieving the environmental objectives.*~~

[43] The proposal is available here (in Norwegian).

~~safety or to sustainable development, and~~		

5 RELEVANT EEA LAW

5.1 The Water Framework Directive

The Water Framework Directive was adopted on 20 October ~~20,~~ 2000~~,~~ and ~~the "overriding public interest" derogation was included in the original version. The WFD was~~ incorporated to Annex XX (Environment) to the EEA Agreement by EEA Joint Committee Decision no. 125/2007 of 28 September 2007. ~~The directive entered into force on May 1, 2009.~~ Joined to the Decision is a Joint Statement by the EEA Contracting Parties:

> ~~*The WFD is one of the EU legal acts that provides the most far-reaching protection of Europe's water resources.*[44] *The directive is designed to promote sustainable water use based on long-term protection of available water resources.*[45] *It also aims to prevent further deterioration and protect and enhance the status of water bodies.*[46]~~ *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 Water Framework Directive 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, but does not aim for complete harmonisation of the rules of

~~[44] David Langlet and Said Mahmoudi, *Environmental Law and Policy*, (2016) p. 224.~~
~~[45] See Article 1 (b) WFD.~~
~~[46] See Article 1(1)(a) WFD.~~

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EEA States concerning water, see 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) WFD

Pursuant to Article 4(1)(a) 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.[47]

~~In other words, the Water Framework Directive 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 European Court of Justice.[48] 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) 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").

[47] Pursuant to Article 1(1)(b) of the EEA Joint Committee Decision no. 125/2007, the deadline for EEA States runs from 28 September ~~28,~~ 2007.

[48] ~~See C-461/13 *Bund für Umwelt und Naturschutz Deutschland*, paragraph 39.~~

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The obligation pursuant to Article 4(1)(a)(i) 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) 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) WFD are satisfied, see the judgment in *Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:391, paragraph 75.

Article 4 WFD first applies once a river basin plan covering the relevant river basin has been adopted, see the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560. The CJEU held that the project in question was not covered by Article 4 WFD as it was authorised prior to the publication of a river basin management plan within the deadline prescribed by Article 13(6) WFD (paragraphs 52–56). Greece was however obliged to «refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by Article 4 of that directive» (paragraphs 57–60). Also in the judgment in *Schwarze Sulm*, cited above, the project was authorised prior to the expiry of the time limit in Article 13(6) WFD, see

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paragraphs 49–51 of the judgment. The CJEU here repeated its position from the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*.

5.3 Derogation pursuant to Article 4(7) WFD

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

Article 4(7) 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*

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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) WFD sets out two alternative conditions, and it suffices that one is fulfilled. The relevant alternative in the case at hand is "«overriding public interest"» as per the English language version.

In other language versions the condition is formulated as for example «un intérêt general majeur» (French), «übergeordnetem öffentlichem Interesse» (German), «sono di prioritario interesse pubblico» (Italian), «interés público superior» (Spanish), «nadrzędny interes społeczny» (Polish), «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 WFD.

The ~~exemption "~~notion of overriding public interest~~"~~ is also used in other areas of EU--law, notably on restrictions on free movement and in Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. In the realm of free movement, the CJEU has held that "«reasons of a purely economic nature cannot constitute overriding reasons in the public interest"~~,~~», see the judgment in *Andreas Ingemar Thiele Meneses,* C-220/12, EU:C:2013:683, paragraph 43.

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

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

The exemptionnotion was first interpreted by the CJEU in the judgment in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, C-43/10, EU:C:2012:560.cited above. The case concerned the partial diversion of the upper partwaters of the Greek river Acheloos into the river Pinios. The diversion of the river entailed a deterioration of the river's environmental status, and the implementation of the measure was conditional on the fulfilment of the derogation conditions in Article 4(7) WFD.Greece. The CJEU statedheld 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.*
>
> *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.*
>
> *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.*

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Article 4(7)(c) 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 the Austrian state 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".~~[49] . While Article 4 WFD did not apply at the time when the decision authorising the project was made on the national level, the obligation to refrain from measures liable seriously to compromise the attainment of the objective provided for by Article 4 did apply, and the CJEU assessed whether the project was liable to be covered by a derogation in Article 4(7) WFD (paragraphs 51–52). Regarding «overriding public interest», the CJEU held in paragraphs 69–71:

> *69 Next, it should be noted that the construction of a hydropower plant, such as the one envisaged through the contested project, may in fact be an overriding public interest.*
>
> *70 In that regard, the Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest. Directive 2000/60, which was adopted on the basis of Article 175(1) EC (now Article 192(1) TFEU), establishes common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and the structures for protection and sustainable use of water in the European Union. Those principles and that framework are to be developed subsequently by the Member States by means of the adoption of individual measures. Thus, the directive does not seek to achieve*

[49] ~~C-346/14 *Schwarze Sulm*, paragraph 69.~~

> *complete harmonisation of the rules of the Member States concerning water...*
>
> *71 As part of that margin of discretion, the Republic of Austria was entitled to consider that the contested project, the aim of which is to promote the production of renewable energy through hydroelectricity, is an overriding public interest.*

Article 4(7)(c) 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 CIS Guidance document 36 (2017) on Article 4(7) WFD

The notion of «overriding public interest» is interpreted in CIS Guidance document 36 (2017). The document is not legally binding, see the judgment in *Association France Nature Environnement,* cited above, paragraph 31.

It transpires from the Guidance Document 36, pages 59-60:

> *In EU legislation the public or general interest can serve as a ground for justifying derogations. A range of "public interests" exist within the EU and at national level of a social, economic or environmental nature. Since not all public interests can automatically be "overriding", it is important to distinguish between "public interest" and "overriding public interest" which is addressed by Article 4(7)(c). "Overriding" practically means that the other interest overrides achieving the objectives of the WFD. Member States must be allowed a certain margin of discretion for determining whether a specific project is of such interest. Public participation can contribute considerably in determining overriding public interest.*

In elaborating on the notion of «overriding public interest», CIS Guidance Document 36 further points to case-law from the CJEU in relation to Article 6(4) of Directive 92/43/ECC (the Habitats Directive).

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~~5.5~~5.6 Practice from the CJEU concerning Article 6(4) of the Habitats Directive

~~In CIS Guidance Document No 36 (2017), 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 the Directive 92743/ECC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive").~~ The Habitats Directive is not incorporated into the EEA Agreement.[50] 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.*
>
> *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*

[50] See also Article 1(1)(a)(iii) of the EEA Joint Committee Decision no. 125/2007.

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

The ~~exemption "~~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 *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds ("Lappel Bank")*, C-44/95, EU:C:1996:297, concerned the decision by British authorities to exclude Lappel Bank from the Medway Estuary and Marshes Special Protection Area ("SPA") due to the planned expansion of the port of Sheerness on to the Bank (see paragraphs 10–14). The first question concerned whether Member States were entitled to take account of «economic requirements» when designating SPAs pursuant to Article 4(1) and 4(2) of the Habitats Directive. The CJEU answered the question in the negative, but held in paragraph 41:

> *Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission has rightly pointed out, mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.*

The judgment in *Commission* v *Spain*, C-404/09, EU:C:2011:768, concerned several authorisations given by Spanish authorities ~~for continued~~to mining operations and ~~further planned projects~~extension of existing mining operations in ~~"~~the "Alto Sil", a designated SPA and Site of Community Importance.~~51~~ 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~~

~~51~~ ~~For a more detailed account of the various mines, please refer to the Opinion of Advocate General Kokott, chapter III, in particular paragraphs 26 onwards.~~

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~~mining for the local community:~~Furthermore the Court held in paragraph 109 (see also paragraphs 153–154):[52]

> ~~*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~~.…

~~The Advocate General stated that the measure, in principle, could be justified on the following grounds:~~ [53]

> ~~*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 expansion and the authorisation to continue operating the mining activities could in principle be justified on two grounds: energy supply and maintaining already established jobs. These two considerations are referred to by the European Court of Justice in paragraph 109 as "the local economy".~~

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 ~~24~~71):

> ~~*6. In the event of a negative reply to Question 5, must*~~ *[W]hether Article* ~~*...*~~ *6(4) of* ~~*[*~~*the Habitats*~~*]*~~ *Directive* ~~*...*~~*must be interpreted as* ~~*permitting*~~*meaning that the creation of infrastructure* ~~*designed*~~*intended to*

[52] ~~C-404/09 *Commission v Spain*,~~ See also the Opinion of Advocate General Kokott paragraph ~~109. See also paragraphs 153 and~~ 154.

[53] ~~Opinion of Advocate General Kokott in C-404/09 *Commission v Spain*, paragraph 154.~~

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> *accommodate the management centre of a private company ~~and a large number of employees to~~may be regarded as an imperative reason of overriding public interest~~?~~2…*

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.*

5.7 The rules on best available technique

Submarine tailings disposal is neither included nor excluded as best available technique ("BAT") in the BAT Reference Document for the Management of Waste from Extractive Industries in accordance with Directive 2006/21/EC (the Mineral Waste Directive) (2018), see pages 81–84 and 488.

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6 SUBMISSIONS BY THE PARTIES

6.1 Submission by 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.

Firstly, 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

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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 Submission by 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) 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

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provided for by Article 4 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*, paragraphs 65 and 69; and section 5.2 above.

Question 1: The notion of «overriding public interest» in Article 4(7)(c) 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) 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) 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) 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) 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 travaux

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préparatoires, 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) 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 to 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.[54]

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, and profits for owners give rise to benefits which are of overriding public interest.[55] This is supported by interpreting Article 4(7) WFD in light of Article 4(3)(a) and 4(5)(a) WFD, which acknowledges that economic objectives may justify derogations from Article 4(1)(a)(i) 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.

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

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

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7 THE NEED FOR AN ADVISORY OPINION

[Vi holder det åpent om retten ønsker å si noe her, og eventuelt hva. Det siste avsnittet er det en fordel om omtales].

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

Furthermore, the parties disagree as to whether certain interests that have been invoked before the Court of Appeal may constitute an "«overriding public interest"~~.~~».

~~There are a few decisions from the ECJ regarding the interpretation of the relevant provision. However, in the view of the preparatory judge, existing case law does not 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 an "overriding public interest". It is therefore appropriate to ask about the specific considerations that the parties believe 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 ~~Decision~~Royal Decree. Notwithstanding the request for an Advisory Opinion, it remains for Borgarting Court of Appeal to decide these questions.

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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 "~~notion of «overriding public interest~~" under~~» in Article 4(7)(c) of ~~the Water Framework~~ Directive~~?~~

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

1. ~~b. What will~~ 2000/60/EC to be ~~key factors in~~interpreted as referring to the ~~assessment~~types of ~~whether the public~~ interests that may justify ~~the measure are "overriding"?~~a derogation, or does it also include 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?

2. ~~2. Can the following economic considerations constitute an "~~If the answer to question 1 is that a balancing of interest is required: is it sufficient that the negative impact is outweighed by the advantages, or must it be extensively outweighed?

~~2.~~3. May a mining project producing rutile (TiO_2) and garnet for the global market, generating income for the owners, workers and society (through taxation) and creating jobs in a remote region be of an «overriding public interest~~" under~~» pursuant to Article 4(7)(c) of ~~the Water Framework~~ Directive~~, and if so, under what conditions~~ 2000/60/EC?

~~a. Purely economic considerations (i.e. the expected gross income generated by the planned mining operations)~~

~~b. That~~[Alternativ til spørsmål nr. 3:]

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3. May a mining project by a private undertaking ~~will generate~~producing rutile (TiO_2) and garnet for the global market, generating ~~income for~~ the shareholders

~~c. That a private undertaking will generate~~as well as tax revenue for the state and municipality

~~d. That a private undertaking will provide~~, providing wage income for employees

~~3. 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. That a private undertaking will generate~~ and generating employment effects (increased local business activity, employment and settlement)

~~b. Global supply of rutile~~

~~c. Ensuring Norway and Europe access to critical minerals~~

in a remote region, be of an «overriding public interest» pursuant to Article 4(7)(c) of Directive 2000/60/EC?