

# PROSESSKRIV

## til

### Borgarting lagmannsrett

Oslo, 8. mai 2025  
Vår ref.: 326672-001

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**Sak 24-036660ASD-BORG/01**

**Ankende part 1:** Norges Naturvernforbund  
Mariboegate 8, 0183 Oslo

Prosessfullmektig: Advokat Asle Bjelland, CMS Kluge Advokatfirma AS

**Ankende part 2:** Natur og Ungdom  
Torggata 34, 0183 Oslo

Prosessfullmektig: Advokat Amund Noss, CMS Kluge Advokatfirma AS

**Ankemothpart:** Staten v/Klima- og miljødepartementet og  
Nærings- og fiskeridepartementet  
Postboks 8013 Dep, 0030 Oslo

Prosessfullmektig: Regjeringsadvokaten v/advokat Henrik Vaaler

Rettslig medhjelper: Regjeringsadvokaten v/advokat Karen Mellingen

**Saken gjelder:** Gyldigheten av statlige tillatelser til deponering av gruveavfall i Førdefjorden

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**CMS Kluge Advokatfirma  
Stavanger**  
Olav Kyrres gate 21, Herbarium  
Postboks 277  
4068 STAVANGER

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

**CMS Kluge Advokatfirma Oslo**  
Bryggegate 6  
Postboks 1548, Vika  
0117 OSLO

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

**CMS Kluge Advokatfirma Bergen**  
Allehelgensgate 2  
Postboks 394 Sentrum  
5805 BERGEN

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

**Organisasjonsnummer**

913 296 117 MVA

**Bank**  
9685.27.21690 (driftskonto)  
8396.07.70946 (driftskonto EUR)  
9685.27.21755 (klientmidler)  
9685.27.54068 (eiendomsmegling)  
SWIFT: HANDNOKK

## 1 INNLEDNING

Miljøorganisasjonene vil gi noen korte løpende bemerkninger til statens prosesskriv av 30. april. For enkelhets skyld benyttes samme nummerering og overskrifter.

## 2 STATENS PRINSIPALE ANFØRSEL

I prosesskriv av 7. april 2025 varslet staten en ny prinsipal anførsel. Denne anførselen er nærmere beskrevet i prosesskrivet av 30. april:

*«Staten vil understreke at Norge hele tiden ment at gjennomføringen i norsk rett i vannforskriften § 12 oppfylder vanddirektivets krav. På vedtakstidspunktet var Norge imidlertid ennå ikke forpliktet etter direktivet til å ha godkjente forvaltningsplaner. Dermed gjaldt ikke plikten til å forebygge forringelse etter direktivet artikkel 4 nr.1 bokstav a, og følgelig var det ikke noe krav om at tillatelsen måtte oppfylle unntaksvilkårene i artikkel 4 nr. 7. Det var heller ikke i strid med EØS-retten å gi en slik tillatelse i denne «mellomfasen», jf. EU-domstolens uttalelser i C-43/10 Nomarchiaki Aftodioikisi Aitoloakarnanias avsnitt 57-60 og C-346/14 Kommisjonen mot Østerrike avsnitt 50-51.*

*Ved gyldighetsprøvingen lagmannsretten skal foreta, må man derfor falle tilbake på en alminnelig tolkning av vannforskriftens krav, uten at tolkningen av direktivets art. 4 nr. 1 og nr. 7 skal trekkes inn som tolkningsfaktor som kan begrunne at handlingsrommet etter forskriften er snevrere.»*

Anførselen bygger på et premiss om at Norge på vedtakstidspunktet ennå ikke var forpliktet til å forebygge forringelse. Dette er et nytt og overraskende synspunkt. Miljøorganisasjonene vil anføre at det gjaldt et forbud mot forringelse på vedtakstidspunktet, både etter direktivet og vannforskriften.

Det standpunktet staten nå gjør gjeldende, synes å være helt uforenelig med Norges skriftlige innlegg i sak C-43/10. Her ble det anført at nye tiltak som innebærer forringelse, må oppfylle vilkårene i artikkel 4 nr. 7, uavhengig av om tiltaket gjennomføres før eller etter tidsfristen for vedtagelse av vannforvaltningsplan:

*11. Hence, in the view of the Government, a modification may occur either before or after the plan has been published. Provided the criteria set out in Article 4(7) are fulfilled, such a modification will not be in breach of the Directive. This implies, inter alia, that hydropower permits may be issued even if there does not yet exist any plan, or even if such a plan has not foreseen the project in question, provided that Article 4(7) is duly implemented and applied.*

**Bilag 1:** Skriftlig innlegg fra Norge til EU-domstolen i sak C-43/10 av 21. mai 2010

Denne uttalelsen, som ble avgitt i 2010, forutsetter at artikkel 4 nr. 7 er korrekt gjennomført i intern rett («duly implemented») og at den skal anvendes («applied»), uavhengig av vedtagelse av vannforvaltningsplan.

Statens nye anførsel forutsetter at vannforskriften § 12 opprinnelig hadde et annet innhold med en lavere terskel for å tillate forringelse. Dette er i så fall i strid med det unntaksvilkåret som Norge argumenterte for i 2010. Det ville også være i strid med de opplysningene som ble gitt til Stortinget da regjeringen ba om samtykke til å innlemme vanddirektivet i EØS-avtalen. I St.prp. nr. 75 (2007-2008) står det på side 1:

*«Direktivet er allerede gjennomført i norsk rett ved forskrift om rammer for vannforvaltning av 15. desember 2006 (vannforskriften) som trådte i kraft 1. januar 2007.»*

I tråd med dette uttalte Energi- og miljøkomiteen i Innst. S. nr. 131 (2008–2009):

*«Komiteen viser til at direktivet allerede er gjennomført i norsk rett ved forskrift om rammer for vannforvaltning av 15. desember 2006, som trådte i kraft 1. januar 2007.»*

I statens siste prosesskriv blir det opplyst at «det aller meste av tiden» vil bli brukt på andre anførsler. Miljøorganisasjonene stiller seg spørrende til dette. Statens nye prinsipale anførsel er både prinsipiell, overraskende og belastende for Norge. Den innebærer at vannforskriften § 12 opprinnelig ikke var i samsvar med vandedirektivets artikkel 4 nr. 7, at regjeringen har gitt en uriktig beskrivelse av vannforskriften til Stortinget og at Norge i en skriftlig uttalelse til EU-domstolen i sak C-43/10 har argumentert for et uriktig vurderingstema. Anførselen vil uansett ikke få betydning for vurderingen av Nærings- og Fiskeridepartementets vedtak om driftskonsesjon av 6. mai 2022.

### **3 EFTA-DOMSTOLENS TOLKNINGSUTTALELSE**

Miljøorganisasjonene forstår det slik at staten aksepterer at EFTA-domstolens tolkningsuttalelse skal legges til grunn for lagmannsrettens vurdering. Det er ikke anført at det foreligger «gode og tungtveiende grunner» for å fravike uttalelsen. Prosesskrivet inneholder heller ingen innsigelser til uttalelsen som er av en slik karakter.

### **4 SAKSFREMSTILLINGEN**

Miljøorganisasjonene viser til bemerkningene i planmøtet 10. april 2025, gjengitt øverst på side i 4 i referatet.

### **5 BEVISFØRSELEN**

#### **5.1 Hva er relevant for lagmannsrettens gyldighetsprøving**

Miljøorganisasjonenes syn er at det er den faktiske situasjonen på vedtakstidspunktet som er relevant.

I statens siste prosesskriv gis det en redegjørelse for statens syn. Redegjørelsen munner ut i følgende konklusjon:

*«Staten har hittil ikke sett det nødvendig å ta et endelig standpunkt til dette all den tid statens syn er at den etterfølgende utvikling ikke er avgjørende for domstolenes gyldighetsprøving.»*

Vi forstår dette slik at det er enighet om at den etterfølgende utvikling ikke er avgjørende for lagmannsrettens gyldighetsprøving. Følgelig vil det ikke være relevant å føre bevis for den etterfølgende utviklingen.

#### **5.2 Sysselsettingshensynet**

Staten opplyser at det ikke er planlagt vitneførsel og at «staten vil om nødvendig inngi noe supplerende dokumentasjon». I punkt 5.1 opplyser staten at det vil bli ført bevis for «befolkningsutviklingen og prognosene om fremtidig utvikling med og uten Engebø-prosjektet som forelå i 2016».

Miljøorganisasjonene har tidligere bedt staten avklare om det vil bli anført at det var «betydelig fraflytting og sosial nød» i Naustdal. Basert på de opplysningene som er gitt i siste prosesskrivet, antar vi at svaret er nei.

**5.3 Hensynet til mineraltilgang mv.**

Staten tar forbehold om å fremlegge ytterligere bevis. Det opplyses også at det «arbeides med å avklare om det vil være behov for vitneførsel».

Det er ønskelig at det redegjøres for eventuell ytterligere bevisførsel i rimelig tid før fristen for avsluttet saksforberedelse.

\* \* \*

Oslo, 8. mai 2025  
**CMS Kluge Advokatfirma AS**



Asle Bjelland  
advokat



Amund Noss  
advokat



## ATTORNEY GENERAL – CIVIL AFFAIRS

To the Court of Justice of the European Union

Oslo, 21 May 2010

### WRITTEN OBSERVATIONS

BY

### THE GOVERNMENT OF THE KINGDOM OF NORWAY

represented by Ms. Ida Thue, advocate, Office of the Attorney General for Civil Affairs, and Ms. Kaja Moe Winther, Advisor, Ministry of Foreign Affairs, acting as agents, in

**Case C-43/10**

**Nomarchiaki Aftodioikisi Aitoloakarnanias e.a.**

in which the Simvoulio tis Epikratis (Council of State) has requested a preliminary ruling pursuant to Article 267 TFEU on the interpretation of Directives 2000/60/EC, 85/337/EEC, 97/11/EC, 2001/42/EC and 92/43 EEC, the Government of Norway hereby submits its written observations pursuant to the third paragraph of Article 23 of the Protocol on the Statute of the Court of Justice of the European Union.

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POSTAL ADDRESS:  
P.O. BOX 8012 DEP  
N-0030 OSLO, NORWAY

TELEPHONE: + 47 22 99 02 00  
DIRECT LINE: + 47 22 99 02 20  
TELEFAX: + 47 22 99 02 50

VISITING ADDRESS:  
PILESTREDET 19

## 1 INTRODUCTION

1. By a request lodged at the Court of Justice of the European Union on 25 January 2010, the Simvoulío tis Epikratis (Council of State) has requested a preliminary ruling pursuant to Article 267 TFEU on the interpretation of Directives 2000/60/EC, 85/337/EEC, 97/11/EC, 2001/42/EC and 92/43 EEC in a case concerning the lawfulness of a scheme to divert waters from a river basin district to a neighbouring river basin district for the purposes of drinking water-supply, irrigation and power generation.
2. The referring court has raised 14 questions related to the interpretation of the said directives. Questions 1 to 3 read as follows:
  1. *Does Article 13 (6) of Directive 2000/60/EC establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p.1) merely set an ultimate temporal limit (22 December 2009) for the drawing up of management plans for water resources or does it lay down, up until that date, a special time-limit for transposition of the relevant provisions of Articles 3, 4, 5, 6, 9, 13 and 15 of that directive?*
  2. *Is national legislation that permits the transfer of water from a particular river basin to another river basin, without the plans yet having been drawn up for the river basin districts within which the river basins from and towards which water will be transferred are located, consistent with Articles 2, 3, 4, 5, 6, 9, 13, and 15 of Directive 2000/60, given that, under Article 2 (15) of that directive, the main unit for management of a river basin is the river basin district to which it belongs?*
  3. *For the purposes of Articles 2, 3, 5, 6, 9, 13 and 15 of Directive 2000/60, is the transfer of water from a river basin district to a neighbouring river basin district permitted? Should the answer be in the affirmative, can the purpose of that transfer be only to meet water-supply needs or can irrigation and power generation also be served? Is it in any event a requirement, for the purpose of those provisions of the directive, that the administrative authorities have decided, stating reasons and on the basis of the necessary scientific study, that the receiving river basin district cannot meet with its own water resources the needs which it has in respect of water supply, irrigation and so forth?*
3. The observations from the Norwegian Government in Section 2 below are confined to these three questions concerning Directive 2000/60/EC establishing a framework for Community action in the field of water policy. The questions are to some extent mutually interrelated, and the observations should thus be read in conjunction. Without prejudice to the dispute before the national court, the Government will in Section 3 respectfully propose the answers the Court should give to these questions.

## 2 OBSERVATIONS TO THE QUESTIONS

### 2.1 Questions 1 and 2

4. Questions 1 and 2 from the referring court are, in the view of the Government of Norway, interrelated as they seem to deal primarily with the issue of permitting projects in the interim period between the implementation date of Directive 2000/60/EC (22 December 2003, *cf.* Article 24) and the date of publication of water management plans (22 December 2009, *cf.* Article 13(6)).

5. More specifically, the first question is whether the time limit in Article 13 (6) of the Directive must be interpreted as laying down a special time limit for the transposition of Articles 3, 4, 5, 6, 9, 13 and 15 of the Directive. This question must be answered in the negative.
6. The time limit in Article 13 (6) relates to the publication of river basin management plans only, and there are no indications in the Directive to the effect that this time limit should in some way supersede other parts of the Directive. On the contrary, the Directive establishes a comprehensive system of measures and obligations with separate time limits, partly prior to and partly subsequent to the time limit for the publication of the river basin plans.
7. Article 3(8) provides, for instance, that competent authorities should be designated and reported to the Commission at the latest *six months* after the implementation date set out in Article 24 (*i.e.* by June 2004). Articles 5(1) and 6(1) impose obligations as regards characterisation and review of all river basin districts within *four years* of the entry into force of this Directive in 2000 (*i.e.* by December 2004). Other time limits are set later than the 2009-time limit for river basin plans. In accordance with Article 4 (1) a)(ii), b)(ii) and c) Member States shall aim at reaching their environmental goals within *15 years* after the entry into force of the Directive (*i.e.* by December 2015). By 2010, the Member States shall have considered water-pricing policies and funding in accordance with the "polluter-pays principle", *cf.* Article 9. Finally, and logically, the time limits for updating the river basin plans (Article 13(7)) and for reporting on the plans (Article 15) are set *subsequent* to the time frame for the river basin plans themselves.
8. Hence, it follows clearly from the wording and structure of the Directive that Article 13(6) merely sets the time limit for publication of river basin plans. This implies that other parts of the Directive must be implemented into national law and applied also prior to the publication of the plans, whereas other provisions are relevant only after the publication of the plans. This also leads to the conclusion that national measures may be implemented before the publication of the relevant plan, provided that the environmental obligations under the Directive and under the other parts of EU environmental law are respected.
9. This brings us more specifically to the second question from the referring court, concerning the issue of permitting projects in the period between the time limit for implementation of Directive 2000/60/EC (22 December 2003) and the time limit for publication of river basin management plans (22 December 2009). As already indicated, it is the Norwegian Government's view that, as a general rule, Member States cannot be precluded from issuing permits to transfer water between different river basin districts prior to the publication of the relevant management plans.
10. At the outset, it should be emphasised that there may be a legitimate need to permit the transfer of water between river basin districts both before and after the publication of the management plans. Accepting such permits also prior to the publication of the relevant plan, does not prejudice the environmental considerations enshrined in the Directive. In particular, Article 4(7) of the Directive ensures acceptable standards. This provision deals with new modifications to the physical characteristics of a surface water body and provides the conditions that need to be met if such modifications (*e.g.* new projects) are to be considered compatible with the Directive. Article 4(7) applies without any particular time limit and should therefore, as the Norwegian Government sees it, be implemented in the EU by 22 December 2003 according to Article 24 of the Directive. The provision does not indicate that a modification following a new project will be in breach of the Directive simply because it occurs *before* publication of the plan. Neither does it exclude modifications occurring *after* the publication of the plan, even if the project has not been included into the plan (for instance because the modification was not foreseen when the relevant plan was published).

11. Hence, in the view of the Government, a modification may occur either before or after the plan has been published. Provided the criteria set out in Article 4(7) are fulfilled, such a modification will not be in breach of the Directive. This implies, *inter alia*, that hydropower permits may be issued even if there does not yet exist any plan, or even if such a plan has not foreseen the project in question, provided that Article 4(7) is duly implemented and applied.
12. The Commission clearly seems to share the view that permits for new projects may be issued prior to the publication of the management plans. In the communication *Towards sustainable water management in the European Union – First stage in the implementation of the Water Framework Directive* (COM (2007) 128 final) recommendations were made for the period leading up to the publication of the river basin management plans in 2009. Among other things, the Member States were encouraged to

*make sure that infrastructure and sustainable human development projects, which could cause deterioration of the aquatic environment, undergo an appropriate environmental impact assessment. In this respect, full transposition and appropriate, transparent and coordinated application of Article 4.7 is crucial; (page 10)*

13. The Commission thus presupposes that new projects may be initiated before the river basin management plans are published, provided that Article 4(7) is implemented in national law and the conditions in Article 4(7) are met.

## 2.2 Question 3

14. The third question essentially concerns two issues: whether the transfer of water between different river basin districts is permitted by Directive 2000/60/EC, and – if answered in the positive – whether such transfer may serve the purposes of irrigation and power generation.
15. In the opinion of the Government, Directive 2000/60/EC clearly does not preclude the transfer of water between river basin districts. Environmental consequences are not primarily dependent on whether water is transferred from another district or not. The consequences must be evaluated individually, and that is indeed what is ensured by the application of Article 4(7) of the Directive in cases of transferral of water between different river basin districts.
16. The Government further submits that Directive 2000/60/EC does not preclude the transfer of water between different river basin districts for the purpose of power generation. There is nothing to indicate that the transfer of water for this purpose would be in breach of the Directive, provided that the conditions in *i.a.* Article 4(7) are met. The transfer of water is commonly used in hydropower production. A general ban might therefore jeopardize the potential for such production.
17. Article 4(7) of the Directive provides that benefits “to human health, to the maintenance of human safety or to sustainable development” may legitimate new projects. These public interest objectives are not limited to ensuring drinking water supply, but may also include hydropower production as a means of ensuring human safety and sustainable development. In this regard, reference is also made to the EU target of increasing the production of renewable energy. On this background, it is the Government’s view that transfer of water from one river basin to another for the purpose of hydropower production is compatible with the Directive under the conditions set up in Article 4(7).

**3 ANSWERS TO QUESTIONS 1-3**

18. Based on the foregoing, the Government of Norway respectfully suggests that questions 1 to 3 from the referring court should be answered as follows:

1. *The time limit for the publication of river basin management plans in Article 13(6) of Directive 2000/60/EC does not lay down a special time limit for the transposition of other provisions of that Directive.*
2. *Directive 2000/60/EC does not preclude a Member State, prior to the publication of the relevant river basin management plans, from issuing permits to transfer water between different river basin districts, provided that Article 4(7) of the Directive is implemented and respected.*
3. *Directive 2000/60/EC does not preclude a Member State from permitting the transfer of water between different river basin districts for the purpose of hydropower production, provided that Article 4(7) of the Directive is implemented and respected.*

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Oslo, 21 May 2010

  
Ida Thue

agent

For:   
Kaja Moe Winther

agent