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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
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Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-13/24

Friends of the Earth Norway

v

Kingdom of Norway

in which Borgarting Court of Appeal (*Borgarting lagmannsrett*) requests an Advisory Opinion of the EFTA Court regarding the interpretation of Article 4(7) 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.

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1 INTRODUCTION

1. The case concerns the compatibility with EEA environmental law of a set of permits granted for planned mining activities in Førdefjord ("**the mining operation**"). It originates in a request of Borgarting Court of Appeal (*Borgarting lagmannsrett*, "**the Referring Court**") for an advisory opinion of the EFTA Court ("**the Request**") concerning the interpretation of Article 4(7) 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 ("**the Water Framework Directive**" or "**the WFD**"). Article 4(7)(c) thereof establishes a derogation from the objectives of the Directive *inter alia* for reasons of "overriding public interest".

2. The case concerns the interpretation of this "overriding public interest" exception. It provides an important opportunity for the EFTA Court to give an advisory opinion on the interpretation of fundamental principles of EEA environmental law, and their application in the field of water policy. Water being essential to life on earth, and its protection and good management being imperative to human health and prosperity, the EFTA Surveillance Authority ("**ESA**") welcomes this opportunity for the EFTA Court to clarify EEA law requirements in this field.

1.1 Facts of the Case

3. The facts of the case are summarised in the Request. The main facts are as follows.

4. On 19 February 2016, a King in Council's Royal Decree was issued granting Nordic Mining a pollution permit, pursuant to Section 11 of the Pollution Control Act,[1] to deposit 250 million tonnes of tailings (mining waste) in Førdefjord. That decision was slightly amended by a decision of the Ministry of Climate and Environment on 23 November 2021. On 6 May 2022, the Ministry of Trade, Industry and Fisheries granted Nordic Mining an operating licence for the mining operation. On 23 June 2023, the Environment agency approved a waste management plan for the mining operation. It reduced the total permitted quantity of tailings to be disposed in Førdefjord from 250 to 170 million tonnes. Together, these constitute "**the permit**".[2]

5. The mining operation will involve the extraction and processing of rutile (titanium dioxide) from eclogite ore from Engebøfjellet. The operation will result in large

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[1] In Norwegian: "*forurensningsloven*".
[2] Request, pp. 2-3.

quantities of tailings (mining waste) which will be disposed into the water of Førdefjord. A total of 170 million tonnes of tailings will be disposed within a 4.4 km^2 area at the bottom of Førdefjord, at a depth of 320 to 220 meters and at a maximum rate of 4 million tonnes annually.[3]

6. The deposit of mining waste will cause the benthic fauna in the affected area to disappear.[4] It is undisputed that this will degrade the ecological status of parts of Førdefjord (Førdefjorden-ytre) from "good" to "poor", although the parties disagree as to the seriousness of the full environmental impact.[5] The permit assumes as much, noting that "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" and that "the condition of the water body is expected to be bad for the duration of the disposal and for a long time thereafter".[6]

7. In 2022, two Norwegian environmental NGOs ("**the plaintiffs**") sued the Norwegian Government, challenging the permit for the mining operation. Unsuccessful before the Oslo District Court, the plaintiffs appealed to the Borgarting Court of Appeal, which proceeded to make the present Request.

1.2 ESA's work on the WFD and Norway

8. For completeness' sake, ESA notes that it has, both previously and currently, worked on the topic of the Water Framework Directive and mining waste in Norway.

9. As noted in the Request, ESA in 2017 closed a complaint case arising from an alleged failure by Norway to comply with the WFD by approving the project and the disposal of mining tailings which is the subject of the proceedings at national level.[7] On the basis of its limited review, ESA concluded that the Norwegian authorities had not committed a "manifest error of assessment" in granting the relevant permits.

10. As also noted in the Request, ESA in 2021 closed two complaint cases arising from an alleged failure by Norway to comply with the WFD by issuing, renewing and/or failing to withdraw permits allowing for the disposal of mining waste directly into

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[3] Request, pp. 3-4.
[4] Request, p. 5.
[5] See further Section 2.2 below.
[6] Request, p. 4.
[7] Decision No 009/17/COL in Case 77424 of 18 January 2017.

Norwegian fjords.[8] The cases concerned a number of operations in a number of fjords, and ESA's analysis used Ranfjorden and Repparfjorden as case studies which applied *mutatis mutandis* to the other instances.

11. Insofar as relevant for Førdefjorden, the complainants made three submissions. The first was that the disposal of mining waste including certain chemicals into a water body *per se* constituted a breach of the environmental objectives of Article 4 WFD. ESA dismissed this claim, finding that the WFD did not *per se* exclude such disposal. The second was that the planned activities would unavoidably cause changes not only in the physical characteristics of the water body, but also to the chemical status, and that they could therefore not fall under the scope of the derogation contained in Article 4(7) WFD. ESA also dismissed this claim, finding that the complainants had not sufficiently substantiated it. The third was that new information demonstrated that the environmental impact assessment underlying the Førdefjorden permits had been flawed. ESA concluded that there was insufficient evidence that Norwegian authorities had acted in breach of EEA law at the time of its decision-making.

12. In parallel, ESA opened an own initiative case to assess whether Norway had acted in breach of EEA law, in particular the WFD, by issuing, renewing, and/or failing to withdraw permits allowing mining companies to dispose of mining waste directly into Norwegian fjords.[9] This was done in light of the gravity of the allegations made by the complainants in the above cases and the insufficient evidence put forth to substantiate those allegations. The own-initiative case is still ongoing. It has led ESA to request information from Norway,[10] to issue an open call to all stakeholders and interested parties for information on the effects of mining waste on Norwegian water bodies,[11] and to commission an expert report on the same topic.[12]

2 EEA LAW

2.1 EEA Agreement and General Principles of EEA Law

13. The ninth recital of the preamble to the EEA Agreement provides as follows:

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[8] Decision No 273/21/COL in Case No 80570, and Decision No 274/21/COL in Case No 78448, both of 8 December 2021.
[9] Case No 86194.
[10] Document No 1227895, dated 26 October 2021.
[11] Document No 1264063, dated 18 February 2022, with a time limit of 18 March 2022.
[12] Work on the expert report is ongoing.

DETERMINED to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development, as well as the principle that precautionary and preventive action should be taken;

14. Article 73 of the EEA Agreement provides as follows:

1. Action by the Contracting Parties relating to the environment shall have the following objectives:

(a*) to preserve, protect and improve the quality of the environment;*

(b) to contribute towards protecting human health;

(c) to ensure a prudent and rational utilization of natural resources.

2. Action by the Contracting Parties relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Contracting Parties' other policies.

15. Article 73 EEA, read together with the ninth recital of its preamble, establishes the four basic principles of EEA law relevant to the field of environment.

16. According to the principle that preventive action should be taken, or the prevention principle, action should be taken at an early stage and, if possible, before environmental damage occurs.[13] Such action should involve preventive measures, meaning any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage.[14]

17. The precautionary principle requires competent authorities to take appropriate measures to prevent specific potential risks to public health, safety, and the environment, by giving precedence to the requirements related to the protection of

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[13] See Article 73(2) EEA and, *inter alia*, recital 2 to Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), incorporated into the EEA Agreement by Joint Committee Decision (JCD) No 229/1050 of 25 September 2015 (OJ L 85, 30.3.2017, p. 53). See also recital 11 of the preamble to the WFD, Article 191 of the Treaty on the Functioning of the European Union and, *mutatis mutandis*, judgment of 14 April 2005, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, C-6/03, ECLI:EU:C:2005:222, paragraph 28.

[14] See "preventive measures" as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, incorporated into the EEA Agreement by JCD No 17/2009 (OJ L 73, 19.3.2009, p. 55).

those interests over economic interests.[15] It may demand that precedence is given to public health and/or the environment, even in the absence of scientific certainty.[16]

18. The principle of rectifying the damage at source entails that it is for each region, municipality or other local authority to take appropriate steps to prevent and minimize pollution as close as possible to its source, taking into account the principle of proximity.[17] It prioritises addressing pollution at its source by regulating emissions over enforcing environmental quality standards, especially in the case of water and air pollution.[18]

19. The polluter pays principle dictates that the cost of pollution prevention and control measures should be borne by the polluter, thereby encouraging pollution reduction at its source.[19]

2.2 The Water Framework Directive

20. The Water Framework Directive was incorporated into the EEA Agreement by Joint Committee Decision ("JCD") No 125/2007 of 28 September 2007.[20] It entered into force in the EEA on 1 May 2009.

21. The Water Framework Directive is to contribute to the implementation of the EEA States' obligations under international conventions on water protection and management, including those which aim to prevent and eliminate pollution of the marine environment.[21] One of the core functions of the WFD is the system of River Basin Management Plans (RBMPs). Under Article 13 WFD, the EEA States are to ensure that RBMPs are produced for each river basin district lying within their territory. The RBMPs form the basis for monitoring and taking measures to achieve

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[15] See Case E-9/16 *EFTA Surveillance Authority v Kingdom of Norway*, judgment of 14 July 2017, paragraph 61, and judgment of 26 November 2002, *Artegodan GmbH and others v Commission*, Joint Cases T-74, 76, 83-85, 132, 137 and 141/00, ECLI:EU:T:2002:283, paragraph 184.

[16] See judgment of 26 November 2002, *Artegodan GmbH and others v Commission*, Joint Cases T-74, 76, 83-85, 132, 137 and 141/00, ECLI:EU:T:2002:283, paragraphs 181 and 186-187, and Case C-5/23, *Criminal Proceedings against LDL*, judgment of 21 March 2024, paragraph 84.

[17] See judgment of 9 July 1992, *Commission v Belgium*, C-2/90, ECLI:EU:C:1992:310, paragraphs 34-35.

[18] See Gyula Bándi: "Principles of EU Environmental Law Including (the Objective of) Sustainable Development, p. 47. In *Research Handbook on EU Environmental Law*, eds. Marjan Peeters and Mariolina Eliantonio, 2020.

[19] Idem, pp. 48-49.

[20] OJ L 327, 22.12.2000, p. 1.

[21] Recital 35 of the preamble to the WFD, and Article 1, second paragraph, third sub-paragraph WFD.

and maintain good status of water bodies in each EEA State.[22] The RBMPs are to be reviewed and updated at regular intervals.[23]

22. Under the WFD, the ecological and chemical status of surface water bodies is classified in accordance with its Annex V. The poorer of these determines the status of the surface water body.[24] Each status is affected by a number of elements. Ecological status is classified into 'high', 'good', 'moderate', 'poor', and 'bad'.[25] Chemical status is classified into 'good' and 'failing to achieve good'.[26]

23. The preamble to the WFD provides as follows, insofar as relevant:

> *(1) Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.*
>
> *(…)*
>
> *(11) As set out in Article 174 of the Treaty, the Community policy on the environment is to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources, and to be based on the precautionary principle and on the principles that preventive action should be taken, environmental damage should, as a priority, be rectified at source and that the polluter should pay.*
>
> *(…)*
>
> *(17) An effective and coherent water policy must take account of the vulnerability of aquatic ecosystems located near the coast and estuaries or in gulfs or relatively closed seas, as their equilibrium is strongly influenced by the quality of inland waters flowing into them. Protection of water status within river basins will provide economic benefits by contributing towards the protection of fish populations, including coastal fish populations.*
>
> *(…)*
>
> *(19) This Directive aims at maintaining and improving the aquatic environment in the Community. This purpose is primarily concerned with the quality of the waters concerned. Control of quantity is an ancillary element in securing good*

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[22] Article 13(1), Article 11(1), and Article 4(1) WFD.
[23] Article 13(7) WFD.
[24] Article 2(18) WFD.
[25] WFD, Annex V, chapter 1.4.2.
[26] WFD, Annex V, chapter 1.4.3.

water quality and therefore measures on quantity, serving the objective of ensuring good quality, should also be established.

(…)

(26) Member States should aim to achieve the objective of at least good water status by defining and implementing the necessary measures within integrated programmes of measures, taking into account existing Community requirements. Where good water status already exists, it should be maintained. For groundwater, in addition to the requirements of good status, any significant and sustained upward trend in the concentration of any pollutant should be identified and reversed.

(…)

(32) There may be grounds for exemptions from the requirement to prevent further deterioration or to achieve good status under specific conditions, if the failure is the result of unforeseen or exceptional circumstances, in particular floods and droughts, or, for reasons of overriding public interest, of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, provided that all practicable steps are taken to mitigate the adverse impact on the status of the body of water.

24. Article 1 WFD, entitled "Purpose", provides as follows, insofar as relevant:

The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

(a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;

(b) promotes sustainable water use based on a long-term protection of available water resources;

(c) aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances;

(d) ensures the progressive reduction of pollution of groundwater and prevents its further pollution, and

(e) contributes to mitigating the effects of floods and droughts

and thereby contributes to:

- the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use,

- a significant reduction in pollution of groundwater,

- the protection of territorial and marine waters, and

- achieving the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment, by Community action under Article 16(3) to cease or phase out discharges, emissions and losses of priority hazardous substances, with the ultimate aim of achieving concentrations in the marine environment near background values for naturally occurring substances and close to zero for man-made synthetic substances.

25. Article 4, entitled "Environmental objectives", provides as follows, insofar as relevant:

1. In making operational the programmes of measures specified in the river basin management plans:[27]

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential

[27] See further Article 13 WFD and Section 5.1 below.

and good surface water chemical status at the latest 15 years from the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

(iv) Member States shall implement the necessary measures in accordance with Article 16(1) and (8), with the aim of progressively reducing pollution from priority substances and ceasing or phasing out emissions, discharges and losses of priority hazardous substances

without prejudice to the relevant international agreements referred to in Article 1 for the parties concerned;

(…)

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. (emphasis added)

2.3 The Industrial Emissions Directive

26. Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions ("**the Industrial Emissions Directive**" or "**IED**") was incorporated into the EEA Agreement by JCD 229/2015 of 25 September 2015. It entered into force in the EEA on 1 August 2016.

27. Chapter VI of the IED applies to installations producing titanium dioxide, as per its Article 66.

28. Article 67 IED, entitled "Prohibition of the disposal of waste", provides as follows:

> *Member States shall prohibit the disposal of the following waste into any water body, sea or ocean:*
>
> *(a) solid waste;*
>
> *(b) the mother liquors arising from the filtration phase following hydrolysis of the titanyl sulphate solution from installations applying the sulphate process; including the acid waste associated with such liquors, containing overall more than 0,5 % free sulphuric acid and various heavy metals and including such mother liquors which have been diluted until they contain 0,5 % or less free sulphuric acid;*
>
> *(c) waste from installations applying the chloride process containing more than 0,5 % free hydrochloric acid and various heavy metals, including such waste which has been diluted until it contains 0,5 % or less free hydrochloric acid;*
>
> *(d) filtration salts, sludges and liquid waste arising from the treatment (concentration or neutralisation) of the waste mentioned under points (b) and (c) and containing various heavy metals, but not including neutralised and filtered or decanted waste containing only traces of heavy metals and which, before any dilution, has a pH value above 5,5.*

2.4 The Critical Raw Materials Act

29. Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU)

2018/858, (EU) 2018/1724 and (EU) 2019/1020 ("**the Critical Raw Materials Act**" or "**CRMA**") was adopted in the EU and entered into force on 23 May 2024. It has not, as of yet, been incorporated into the EEA Agreement.

30. The Critical Raw Materials Act aims to ensure the EU's access to a secure and sustainable supply of critical raw materials.[28]

31. Article 2, first paragraph, point (1) of the CRMA defines a 'raw material' as "a substance in processed or unprocessed state used as an input for the manufacturing of intermediate or final products, excluding substances predominantly used as food, feed or combustion fuel".

32. Under Article 3(1) CRMA, the "raw materials, including in unprocessed form, at any stage of processing and when occurring as a by-product of other extraction, processing or recycling processes, listed in Annex I, Section 1, shall be considered to be strategic raw materials". Under Article 4(1) CRMA, critical raw materials shall be similarly listed in Annex II, Section 1. "Titanium metal" is listed as both a strategic raw material and as a critical raw material.[29]

33. The CRMA establishes a system for applying for the classification of a project as a Strategic Project. Such a classification does not exempt a project from complying with environmental standards, and is without prejudice to any applicable permitting conditions, including under the WFD.[30] Recognition of a project as a Strategic Project is done by the European Commission upon application by the project promoter and following a procedure established in Article 7 CRWA.

34. Article 10(2) CRMA provides that:

> *With regard to the environmental impacts or obligations addressed in Article 6(4) and Article 16(1), point (c), of Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1), point (a), of Directive 2009/147/EC or in Union legislative provisions regarding the restoration of terrestrial, coastal and freshwater ecosystems, Strategic Projects in the Union shall be considered to be of public interest or serving public health and safety, and may be considered to have an overriding public interest provided that all the conditions set out in those Union legislative acts are fulfilled.*

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[28] Recital 4 of the preamble to the CRMA.
[29] Annex I, Section 1, point (p) and Annex II, Section 1, point (af) CRMA.
[30] Recitals 14, 16, 18, 19, 25, and 34 of the preamble to the CRMA, and Article 6(1)(c).

3 NATIONAL LAW

35. The national legal framework relevant to the case is summarised in the Request.[31]

36. The Norwegian Pollution Control Act (*forurensningsloven*) provides as follows, insofar as relevant:[32]

§ 7 Obligation to Avoid Pollution

No one shall have, do, or initiate anything that may pose a risk of pollution unless it is lawful under Sections 8 or 9, or permitted by a decision pursuant to Section 11.

When there is a risk of pollution in violation of the law or decisions pursuant to the law, the person responsible for the pollution must take measures to prevent it from occurring. If the pollution has occurred, they must take measures to stop, remove, or limit its effects. The responsible party is also obligated to take measures to remedy damages and inconveniences caused by the pollution or the measures to counteract it. The obligation under this paragraph applies to measures that are reasonably proportionate to the damages and inconveniences to be avoided.

The provision in the second paragraph also applies to pollution permitted under Section 11 if it is evident that the decision can be reversed under Section 18, first paragraph, numbers 1 or 2. The same applies if, for the same reasons, it is evident that an exception from regulations permitting pollution can be made under Section 9, third paragraph.

The pollution control authority can require the responsible party to take measures pursuant to the second paragraph, first to third sentences, within a specified deadline.

(…)

§ 11 Special Permission for Polluting Activities

The pollution control authority may, upon application, grant permission for activities that may result in pollution. In special cases, the pollution control authority may grant permission without an application and may impose conditions in such permission that replace the conditions under Section 16.

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[31] Request, pp. 6-7.
[32] The Authority's translation. Section 11, fifth paragraph, as translated in the Request.

[…]

The pollution control authority may issue regulations requiring that certain types of activities, which by their nature may cause pollution, must apply for permission under this paragraph.

Pollution issues should, if possible, be resolved for larger areas as a whole and based on comprehensive and zoning plans. If the activity would be in conflict with final plans under the Planning and Building Act, the pollution control authority shall only grant permission under the Pollution Control Act with the consent of the planning authority.

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.

(…)

§ 16 Conditions in Permits

In a permit granted under the law or regulations pursuant to the law, specific conditions may be set to counteract pollution that causes damage or inconvenience, and to promote the efficient use of energy used or produced by the activity. These conditions may include protective and purification measures, recycling, and that the permit is only valid for a certain period.

If pollution from the activity regularly excludes or makes it difficult to use the environment for a specific purpose, it can be a condition that measures are taken to accommodate this purpose or that contributions are made to such measures. It can also be a condition that the polluter, by agreement or expropriation, acquires or restricts areas that become heavily polluted.

37. The Norwegian Water Regulation (*vannforskriften*) entered into force on 1 January 2007 and transposes the Water Framework Directive into Norwegian law.[33] It provides as follows, insofar as relevant:[34]

§ 4 Environmental Objectives for Surface Water

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[33] Request, p. 7.
[34] The Authority's translation. Section 12 as translated in the Request.

The status of surface water shall be protected against deterioration, improved, and restored with the aim that the water bodies shall have at least good ecological and good chemical status, in accordance with the classification in Annex V and the environmental quality standards in Annex VIII. Substances numbered 34 to 45 in Annex VIII, Part A, are included in the assessment of chemical status from December 22, 2018.

The environmental quality standards in Annex VIII do not apply if it can be documented that exceedances of the environmental quality standards are due to long-range transboundary pollution.

(…)

§ 11 Temporary Deterioration Due to Unforeseen Circumstances

Temporary deterioration of the status of a water body is not in conflict with the environmental objectives in §§ 4–7 if the deterioration is due to extraordinary or unforeseen natural circumstances, such as extreme flooding and prolonged drought, or accidents that could not reasonably have been foreseen, provided that the following conditions are met:

> *a) All practicable measures are taken to prevent further deterioration of the status and to avoid deterioration of the status in other water bodies than those affected,*
>
> *b) The river basin management plan must explain the circumstances that make the conditions extraordinary or unforeseeable,*
>
> *c) The measures to be taken in such cases shall be included in the program of measures and shall not limit the possibilities for restoring the status as soon as the unforeseen situation is over, and*
>
> *d) The status of the water body is assessed annually with the aim of evaluating all practicable measures to restore the status of the water body as quickly as possible.*

(…)

When updating the water management plan, a description of the effects of the unforeseen circumstances on the water body and the measures that have been implemented or are planned to be implemented shall be included.

§ 12 New Activities or Interventions

New activity or new interventions in a water body can be carried out even though the environmental objective in section 4 to 6 will not be obtained or that the status is deteriorated if the cause is;

> *a) New modifications to the physical characteristics of a surface water body or alterations to the levels of bodies of groundwater, or*
>
> *b) New sustainable activity causes deterioration in a water body from high status to good status*

In addition these requirements have to be fulfilled:

> *a) All practicable steps have to be taken to limit an adverse development in the status of the water body*
>
> *b) The benefits for society of the new intervention or activities shall be greater than the loss of environmental quality*
>
> *c) The beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.*

Where new modifications or alterations are implemented during a plan period, the reason for this shall be included in an updated river basin management plan. If permission is given to new activity or new interventions, this shall also transpire of the river basin management plan.

4 THE QUESTIONS REFERRED

38. The Referring Court has asked the following questions of the EFTA Court:

    1. *What is the legal test when determining whether there is an "overriding public interest" within the meaning of Article 4(7)(c) of Directive 2000/60/EC?*
        a. *Is a qualified preponderance of interest required and/or are only particularly important public interests relevant?*
        b. *What will be key factors in the assessment of whether the public interests that justify the measure are "overriding"?*

2. *Can the following economic considerations constitute an "overriding public interest" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?*
   a. *Purely economic considerations (i.e. the expected gross income generated by the planned mining operations)*
   b. *That a private undertaking will generate income for shareholders*
   c. *That a private undertaking will generate tax revenue for the state and municipality*
   d. *That a private undertaking will provide wage income for employees*
3. *Can the following considerations constitute an "overriding public interest" under Article 4(7)(c) of Directive 2000/60/EC, and if so, under what conditions?*
   a. *That a private undertaking will generate employment effects (increased local business activity, employment and settlement)*
   b. *Global supply of rutile*
   c. *Ensuring Norway and Europe access to critical minerals*

5 LEGAL ANALYSIS

5.1 The function of the WFD

39. The WFD is the cornerstone of European water protection and water management policy. Its key aim is to ensure good quality of European water bodies, including inland surface waters, transitional waters, coastal waters, and groundwater.

40. The crucial tool for implementing the WFD and achieving its goals are River Basin Management Plans (RBMPs), which the EEA States are to draw up every six years.[35] These are intended to map the location and status of the States' water bodies and outline the measures they plan to take to achieve their environmental objectives under the WFD, including detailing any derogations from those objectives.[36]

41. In making operational their RBMPs, the EEA EFTA States' primary obligations are to take the necessary measures to prevent deterioration of the status of all bodies of water (obligation to prevent deterioration) and to protect, enhance, and restore

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[35] See Article 13 WFD.
[36] See Article 4(7)(b).

all water bodies with the aim of achieving good status (obligation to enhance).[37] These obligations are of a general nature: they place a negative obligation on EEA EFTA States not to authorise developments and facilities which will deteriorate the status of water bodies, as well as a positive obligation to take measures necessary to prevent such deterioration.[38]

42. The EU Member States are to achieve the environmental standards and objectives set by the WFD at the latest 15 years after the date of its entry into force, subject to the use of exemptions.[39] This deadline was 22 December 2015.[40] In the EFTA pillar, several deadlines were adapted to run from the entry into force of JCD 125/2007. Accordingly, the deadline for EEA EFTA States to achieve "good status" was 1 May 2024.[41] The States' time-limits to publish their first RBMPs were 22 December 2009 in the EU pillar and 1 May 2018 in the EFTA pillar, respectively.[42]

43. From the date of the entry into force of the WFD in the EFTA pillar and until the time-limit for achieving the environmental standards and objectives set therein, the EEA EFTA States were under an obligation to refrain from taking measures liable seriously to compromise the attainment of the objective provided for in Article 4 WFD.[43]

44. For completeness' sake, ESA notes that pursuant to the Industrial Emissions Directive, the disposal of certain categories of waste from installations producing titanium dioxide into any water body is prohibited. ESA assumes, subject to the verification of the national court, that the permit concerned in the present case does not permit the water disposal of any categories of waste covered by that prohibition. ESA moreover notes that that prohibition is without prejudice to the WFD, and that waste disposal which is not explicitly prohibited by the IED may still fall foul of the WFD.

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[37] See WFD, Article 4(1)(a)(i) and (b)(i), and Article 4(1)(a)(ii) and (b)(ii), respectively. See also judgment of 1 July 2015, *Weser*, C-461/13, ECLI:EU:C:2015:433, paragraph 39.

[38] See Article 11 WFD and judgment of 1 June 2017, *Folk*, C-529/15, ECLI:EU:C:2017:419, paragraph 32.

[39] See Article 4(1)(a)(ii) and (iii), 4(1)(b)(ii), and 4(1)(c), subject to Articles 4(4), 4(5) and 4(7) WFD.

[40] Article 25 WFD.

[41] Article 1(1)(b) of JCD No 125/2007, cited above.

[42] Article 13(6) WFD and Article 1(1)(b) of JCD No 125/2007, cited above.

[43] See judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias*, C-43/10, ECLI:EU:C:2012:560, paragraph 65; judgment of 1 June 2017, *Folk*, C-529/15, ECLI:EU:C:2017:419, paragraphs 32-33; and judgment of 4 May 2016, *Commission v Austria (Schwarze Sulm)*, C-346/14, ECLI:EU:C:2016:322, paragraph 49.

5.2 Preliminary issues pertaining to the application of Article 4(7) WFD

45. Prior to addressing the interpretation of “overriding public interest” within the meaning of Article 4(7) WFD, ESA will make short general observations on that derogation, in order to assist the Court in giving as complete and as useful a reply to the Referring Court as possible.

46. Article 4(7) WFD establishes a derogation from the general Article 4 WFD environmental obligations. It provides that EEA EFTA States will not be in breach of the WFD, despite not complying with their obligations to enhance and to prevent deterioration of their water bodies, if all the conditions of the provision are met. As a derogation to the general provisions of the WFD, Article 4(7) should be interpreted strictly.[44] Where the conditions for a derogation are not met, EEA EFTA States are required to refuse authorisation to projects which could jeopardise the attainment of their WFD objectives.[45]

47. Notably, Article 4(7) WFD does not solely concern projects subject to authorisation.[46] It applies to all situations of deterioration of bodies of water, whether due to a facility or not, and exempts States under certain circumstances from their general duty to take action to prevent such deterioration.[47]

48. Article 4(7) can apply in a number of different scenarios, as per the two items of its first subparagraph. According to the Request, the scenario relevant to the present case is “*when failure to prevent deterioration in the ecological status of a body of surface water is the result of new modifications to the physical characteristics of a surface water body*”.

49. However, ESA notes that it is not immediately evident that the deposit of mining waste at the bottom of Førdefjorden constitutes a “new modification to physical characteristics” of that water body. The deterioration which the operation foresees in the ecological status of Førdefjorden is due to the deposit of mining waste from Nordic Mining’s operation into the lower levels of the ocean, resulting in the death of benthic fauna on the seabed. The interpretation of the term “modifications to the physical characteristics” has not yet been addressed in the case-law of the Court

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[44] See, by analogy, C-411/17 *Inter-Environnement Wallonie*, paragraph 147, and C-81/14 *Nannoka Vulcanus Industries*, paragraph 73.
[45] Case C-461/13, *Weser*, 1 July 2015, para. 51.
[46] Case C-529/15, *Folk*, ECLI:EU:C:2017:419, 1 June 2017, para. 32.
[47] Ibid.

of Justice of the European Union ("**CJEU**") on Article 4(7). In the ordinary meaning of the words, this term can be understood as referring to projects which change the way in which a water body flows, change its delimitation, or similar. Indeed, a recurring theme of the CJEU's case-law on the topic is projects which in and of themselves unavoidably physically change the water body in question – such as the construction of a hydropower plant (C-346/14 *Schwarze Sulm,* C-529/15 *Folk*), diversion of the upper waters of a river (C-43/10 *Nomarchiaki*), and construction of a motorway (C-535/18 *I.L.*). Insofar as ESA can ascertain, none of the Article 4(7) WFD dealt with by the CJEU have involved the disposal of pollution into a water body.

50. In a guidance document on Article 4(7), it is noted that "*Article 4(7) does not provide an exemption if deterioration caused by inputs of pollutants from point or diffuse sources drives the water body to a status below good*".[48] It continues to note that "*this is because the first limb of Article 4(7) only addresses new modifications to the physical characteristics of a surface water body or alterations to the level of the bodies of groundwater, but not point or diffuse sources of pollution*". It continues to conclude that input of pollutants can only potentially be "*covered under the second limb of Article 4(7)*", which provides for a derogation for deterioration from "high" to "good" status due to new sustainable human development activities and is not applicable in the present case.

51. This guidance document is elaborated in collaboration between the EU Member States, the EFTA States, the European Commission, and other stakeholders. It is non-binding and does not necessarily reflect the official position of the drafting partners. Nevertheless, ESA finds it relevant to draw the Court's attention to its existence and the above remarks, which seem to support the understanding that the first point of the first subparagraph of Article 4(7) was intended as a derogation for construction projects or other similar situations affecting the flow, delimitation or level of a water body, and not for the disposal of pollutants.

52. Therefore, ESA considers it to be questionable whether pollution of the seabed such as that at stake in the present case can constitute a new modification to the

[48] Common Implementation Strategy for the Water Framework Directive and the Floods Directive: Guidance Document No. 36 Exemptions to the Environmental Objectives according to Article 4(7). Accessible at: https://circabc.europa.eu/sd/a/e0352ec3-9f3b-4d91-bdbb-939185be3e89/CIS_Guidance_Article_4_7_FINAL.PDF

physical characteristics of the water body in question, within the meaning of Article 4(7) WFD. If pollution cannot qualify as such a modification, it appears to ESA that the derogation pursuant to Article 4(7) WFD cannot apply to such activities.

53. However, provided that a case falls within that scenario or one of the other scenarios established in the first two indents of the first subparagraph of Article 4(7) WFD, the four cumulative conditions of the second subparagraph need to be fulfilled. One of these is Article 4(7)(c).

5.3 Procedural requirements for the applicability of Article 4(7)

54. Before proceeding to address the specificities of the Referring Court's questions, ESA finds it important to note the procedural requirements for applying Article 4(7).

55. As noted above, Article 4(7) being an exception to the general principles established by the WFD, its interpretation should be strict. Its application should be subject to thorough advance assessment and must comply with the procedural requirements laid down in the provision.

56. These include performing a sufficiently thorough assessment of the competing interests at stake.[49] In its assessment, the relevant competent authority must ensure that all conditions set out in Article 4(7) (a) to (d) are satisfied.[50] In making its assessment, the EEA State in question must be allowed a certain margin of discretion.[51]

57. The relevant competent authority must put forth the reasons for the modifications or alterations in the applicable RBMP and review the objectives for the water body at the same six-year interval as the RBMP itself.[52]

58. In *I.L. and Others*, the CJEU held that Article 4 WFD obliged EEA States to assess the compliance of a project with the standards set in that provision *prior* to its approval.[53] Thus, the reasons for the modifications or alterations justifying the

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[49] See judgment of 4 May 2016, *Commission v Austria (Schwarze Sulm)*, C-346/14, ECLI:EU:C:2016:322, paragraphs 68, 74, 80, and 82.

[50] See judgment of 28 May 2020, *I.L. and Others*, C-535/18, ECLI:EU:C:2020:391, paragraph 75.

[51] C-346/14 *Schwarze Sulm*, paragraphs 70.

[52] Article 4(7)(b) WFD.

[53] See judgment of 28 May 2020, *I.L. and Others*, C-535/18, ECLI:EU:C:2020:391, 2nd operative point.

derogation must be specifically set out and explained in the RBMP. These reasons must therefore be considered, and justification given, in advance.[54]

59. Consequently, ESA considers that an EEA State is prevented from invoking *ex post facto* justifications for applying Article 4(7) to derogate from its obligations under the WFD.

5.4 The first question: "overriding public interest"

60. Before addressing the first question posed by the Referring Court, for clarity's sake, ESA notes that it understands the Referring Court's phrasing of "qualified preponderance" as asking whether an overriding public interest must "significantly outweigh" any counteracting interest.

61. Article 4(7)(c) is itself one of the four cumulative conditions which must be fulfilled in order for the derogation under the second indent to be applicable. It is clear from the Request that the parties agree that the other three conditions are fulfilled.[55] Article 4(7)(c) is composed of two non-cumulative, non-mutually exclusive conditions. In order to fulfil the requirements of the provision, the modifications or alterations must fulfil *one or both* of the two conditions set forth.

62. The first is that the modifications or alterations be justified by *overriding* public interest. The second is that the benefits to the environment and to society of achieving the environmental objectives set out in Article 4(1) are *outweighed* by benefits of the modifications or alterations to human health, to the maintenance of human safety, or to sustainable development.

63. The reason for this two-part construction of Article 4(7)(c) is not directly evident from the preparatory materials. However, ESA considers it reasonable to deduce from the wording and construction of the provision that it was intended to give special consideration to the three objectives highlighted in the second part of the

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[54] See Article 4(7)(b) WFD; judgment of 4 May 2016, *Commission v Austria (Schwarze Sulm)*, C-346/14, ECLI:EU:C:2016:322, paragraphs 68, 74, 80, and 82; and C-535/18 *I.L. and Others*, paragraphs 75-76. See also, by analogy, judgment of 24 November 2011, *Commission v Spain*, C-404/09, ECLI:EU:C:2011:768, paragraph 109, and judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias*, C-43/10, ECLI:EU:C:2012:560, paragraphs 88-89.

[55] See Request, p. 3.

provision: human health, human safety, and sustainable development. These three objectives are integral parts of the aims of the WFD itself.[56]

64. As to the differences between these two parts, there may be little difference in the ordinary meaning between the terms *overriding* and *outweighing*, and case-law does not show any evident differences in the meaning to be given to these two terms. However, when read in the context of the special consideration to be given to the three objectives named in the second part of Article 4(7)(c), ESA considers that the threshold for that part of the provision may be placed slightly lower than the threshold for the first part. Thus, the EEA States might be granted a wider margin of appreciation for permitting modifications or alterations which serve to promote human health, human safety, or sustainable development, than those which serve other public interests.

65. This understanding is supported by other language versions of the WFD. For example, the French language version of the WFD uses respectively the phrasing "répondent à un intérêt general *majeur*" for the first part, and that the benefits to the Article 4(1) objectives "sont *inférieurs* aux bénéfices pour…" for the second part. Thus, only *majeur* public interests could justify derogation under the first part, while any interest the benefit of which ekes out over Article 4(1)'s objectives could justify derogation under the second part.

66. The same is true, for example, with respect to the Danish language version, which uses respectively the phrasing "*begrundet i væsentlige samfundsinteresser*", and that the benefits from Article 4(1) objectives "*er mindre end de nyttevirkninger (…)"*.

67. Consequently, ESA submits that any interest falling under the second part of Article 4(7)(c) WFD would only need to *slightly* or *only just* outweigh the competing environmental interest under Article 4(1) in order for the threshold to be met. Meanwhile, public interests falling under the first part of Article 4(7)(c) would need to be significant or major in order to possibly override the WFD's objectives.

68. Considering the above, ESA submits that application of either part of Article 4(7)(c) necessarily involves some weighing up of the competing interests.[57] In the case of

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[56] For the objective of human health, see Articles 1(1)(d), 2(33)m and 2(35) WFD. For the objective of human safety, see Article 1(1)(e) WFD. For the objective of sustainable development, see Articles 1(1)(b), 1(2), and 4(3)(a)(v) WFD.
[57] See judgment of 1 July 2015, *Weser*, C-461/13, ECLI:EU:C:2015:433, paragraph 68.

the first part of Article 4(7)(c), a public interest would need to significantly outweigh the competing environmental objective in order to be considered to "override" it.

69. As concerns the second part of the Referring Court's first question, ESA submits that the facts which impact the assessment of what constitutes an "overriding public interest" will depend on the reasons put forth. It is not possible to provide an exhaustive list of the factors which are important in making that determination, but some of the important factors might be the following:

- Whether the interest served is directly beneficial to the general public.
- Whether the interest served is sufficiently precisely defined.
- Whether the interest served is sufficiently impactful.
- Whether the reasons put forth are sufficiently detailed and supported by evidence.[58]
- Whether the reasons put forth are individually tailored to the specific context and circumstances of the case.
- Whether sufficient weight has been afforded the environmental objectives in the assessment.
- The level of scientific certainty regarding the benefits of the project and of the environmental impact, respectively.[59] In light of the precautionary principle, in the event of uncertainty, precedence should be given to environmental considerations.
- The reversibility of the environmental damage, taking into account the time and resources required to achieve good status or good potential of the water body in question.[60]
- Whether the interest served is compatible with the general aim and objectives of the WFD.[61]

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[58] See judgment of 1 July 2015, *Weser*, C-461/13, ECLI:EU:C:2015:433, paragraphs 76-77 and 80.
[59] See judgment of 1 July 2015, *Weser*, C-461/13, ECLI:EU:C:2015:433, paragraph 82.
[60] Pursuant to Article 4(8), if a project permanently excludes or compromises the achievement of the WFD objectives other bodies of water within the same river basin district, it should be refused.
[61] See judgment of 1 July 2015, *Weser*, C-461/13, ECLI:EU:C:2015:433, paragraph 74.

- Whether the interest served is generally compatible with the overall aim of EEA environmental legislation.[62]
- Whether the project is necessary for or contributes to environmental improvement in other areas, such as reducing emissions of greenhouse gasses.[63]

5.5 The second question: economic considerations

70. With reference to the analysis at Section 5.4 above, ESA considers that no category of interests, including economic interests, is as such precluded from being considered "overriding public interest" within the meaning of Article 4(7)(c). However, the starting point in interpreting Article 4(7) cannot be that it is applicable wherever it is profitable to invoke a derogation. Such an interpretation would wholly undermine the aim and objective of the WFD. In order to qualify as "overriding public interest", any economic considerations would, by definition, need to serve the *public* interest, and not merely private interests. Moreover, such economic objectives would need to be significant due to their context and/or other contributing factor which make their achievement especially important.

71. Placing a high threshold for economic considerations to constitute "overriding public interest" is further supported by Article 4(7)(d). In order for the Article 4(7) derogation to be applicable, Article 4(7)(d) requires that the beneficial objectives served by the modifications or alterations in question cannot be achieved by other, significantly environmentally better means, due to technical feasibility or disproportionate costs. In cases where, according to the justification for the derogation, the beneficial objectives which the project serves are purely economic, convincing reasons must be provided for why such general interests are in fact overriding and cannot be served by better environmental options.

72. ESA considers that the EFTA Court's case-law on restrictions on free movement is of limited relevance to the application of "overriding public interest" within the

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[62] See judgment of 1 July 2015, *Weser*, C-461/13, ECLI:EU:C:2015:433, paragraph 73.

[63] See also Article 16f of the Renewable Energy Directive (Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652), which has not been incorporated into the EEA Agreement. That provision establishes a presumption of overriding public interest within the meaning *inter alia* of Article 4(7) WFD for renewable energy plants until climate neutrality is achieved.

meaning of Article 4(7)(c) WFD. The four freedoms were construed broadly in order to create a unified single market which serves, *inter alia*, a common economic interest which would be wholly undermined if States could invoke their individual economic interests to restrict the freedoms. Moreover, ESA notes that the terminology used in Article 4(7)(c) ("overriding public interest") only corresponds to the terminology used in free movement case-law ("overriding reasons relating to the public interest") in the English language version of the WFD. In the French,[64] Danish,[65] German,[66] and Swedish[67] language versions, the terminology used does not overlap.

73. That said, ESA has not found any example in case-law on Article 4(7) WFD where the derogation was invoked to serve "purely economic" interests. A recurring theme of the CJEU's case-law on the topic, where that Court has endorsed, directly or indirectly, application of the derogation, seems to be that the public interest served is ultimately conducive of the obtention of the overall aims of European environmental policy. In *Schwarze Sulm*, a derogation for a hydropower plant was justified by sustainable energy considerations.[68] In *Association France Nature Environnement*, the Court of Justice indicated that a project aimed at protecting and enhancing the status of bodies of surface water could be considered to serve an overriding public interest.[69] In *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, in the context of the Habitats Directive, reasons relating to water supply for drinking water and irrigation were considered to possibly constitute overriding public interest.[70]

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[64] Article 4(7)(c) WFD uses "raison d'un intérêt général majeur", the 40th recital in the preamble to the Services Directive uses "raisons impérieuses d'intérêt general".
[65] Article 4(7)(c) WFD uses "væsentlige samfundsinteresser", the 40th recital in the preamble to the Services Directive uses "tvingende almene hensyn".
[66] Article 4(7)(c) WFD uses "übergeordnetem öffentlichem Interesse", the 40th recital in the preamble to the Services Directive uses "zwingenden Gründe des Allgemeininteresses".
[67] Article 4(7)(c) WFD uses "allmänintresse av större vikt", the 40th recital in the preamble to the Services Directive uses "tvingande hänsyn till allmänintresset".
[68] See judgment of 4 May 2016, *Commission v Austria (Schwarze Sulm)*, C-346/14, ECLI:EU:C:2016:322, paragraph 73.
[69] See judgment of 5 May 2022, *Association France Nature Environnement*, C-525/20, ECLI:EU:C:2022:350, paragraph 43.
[70] See judgment of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias*, C-43/10, ECLI:EU:C:2012:560, paragraphs 121-122. See also recitals 15 and 24 of the preamble to the WFD. ESA notes that the Habitats Directive is not incorporated into the EEA Agreement, but considers that case-law on the Habitats Directive can be relied on to some extent for the purposes of interpreting the WFD as these are Directives in the same field of law using similar terminology.

74. In light of this, ESA submits that only in exceptional circumstances could purely economic interests justify applying the derogation established in Article 4(7). The idea behind the WFD was not that it should be complied with except in circumstances where it would be profitable not to do so. In most circumstances, ESA considers that economic interests will be too general and too easily met by other means to qualify as “overriding public interests”.

75. As regards point a of the Referring Court’s second question, ESA submits that purely *private* economic considerations as such can, by definition, not be considered to be in the “overriding *public* interest”.

76. As regards point b of the Referring Court’s second question, ESA submits that shareholder income could only be considered to be in the “overriding *public* interest” if the state or municipalities are shareholders of the relevant companies. Even then, it would need to be convincingly shown that *those particular* economic interests were significant and particular enough able to override the environmental objectives of the WFD.

77. As regards these two points, although it might be considered that such private interests could positively impact the public interest by its indirect effect on general prosperity, it should be noted that *any* private interest could always be construed as having some effect, directly or indirectly, on public interests. ESA considers that by placing the threshold for derogations from the WFD at such a high threshold as “overriding public interest”, the legislator has excluded the possibility of taking into account knock-on effects of private interests on public ones. Otherwise, as noted above, any profitable venture could be classified as being in the overriding public interest, thereby seriously undermining the WFD. The interests justifying a derogation must therefore, in ESA’s submission, be *directly* beneficial to the public.

78. As regards point c of the Referring Court’s second question, ESA submits that such considerations can be considered to be in the public interest, but that in all but the most exceptional circumstances, such considerations would be too general and too easily achieved by other means to qualify as “overriding”. Indeed, ESA notes that any economic operation will normally generate tax revenue for national or municipal authorities. Given that this is the ordinary outcome of economic activity, such considerations will not, in the absence of other contributing factors or extenuating circumstances, be sufficient to qualify as “overriding” and reach the high threshold set in Article 4(7)(c) WFD.

79. As regards point d of the Referring Court's second question, ESA notes that, similarly to point c, such reasons are of a very general nature which can broadly apply to most economic operations. ESA finds that they can be considered to be in the public interest. However, in the absence of special circumstances linked to the reasons provided, such as persistent low rates of employment and similar serious socioeconomic issues which are sufficiently demonstrated in the particular circumstances, the fact that an operation provides wage income for employees should not be considered sufficient to reach the "overriding public interest" threshold.

5.6 The third questions: other considerations

80. As regards point a of the Referring Court's third question, similarly to the above, ESA considers that only in certain, particular circumstances could the generation of employment be considered to constitute reasons in the "overriding public interest". This could include, for example, persistently low rates of unemployment, regional poverty and/or socioeconomic problems, or underpopulation.

81. As regards points b and c of the Referring Court's third question, ESA notes that it does not consider the Critical Raw Materials Act ("CRMA") to be directly relevant to the present case, irrespective of the fact that the CRMA has not been incorporated into the EEA Agreement and is not applicable in the EEA at present. Firstly, because the mere fact that a project concerns a critical raw material does not automatically entitle that project to classification as a Strategic Project under the CRMA. Such classification is subject to a special procedure which takes into account *inter alia* the environmental impact of the project in question. Secondly, because even a project which is granted status as a Strategic Project does not, merely by virtue of that classification, qualify as being in the "overriding public interest" within the meaning of Article 4(7)(c) WFD, as per Article 10(2) CRMA.

82. Nevertheless, ESA acknowledges that, in general, the supply of critical raw materials could be considered a significant reason in the public interest, depending on the circumstances. Here, ESA is not convinced that the *global* supply of a particular raw material could be relied on to invoke the Article 4(7) derogation, especially under the CRMA, but does consider that a need to ensure national and/or European access to that material could be considered to be in the public interest. Whether such reasons could be considered to override the general public interest

in the WFD's environmental objectives would depend on a case-by-case analysis, taking into account elements such as those discussed in Section 5.4 above.

83. In the light of the facts of the case as described in the Referral, ESA finds it appropriate here to recall the overview of the WFD's procedural requirements for invoking the Article 4(7) derogation discussed in Section 5.3 above. The reasons which constitute "overriding public interest" must be put forth in the relevant RBMP and must be properly assessed and balanced against the competing interests prior to the decision-making. Justifications for derogations to Article 4(1) WFD cannot be made *ex post facto*.

6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to respond to the Request for an Advisory Opinion as follows:

1. The derogation provided for in Article 4(7) of Directive 2000/60/EC is to be construed narrowly. Reasons for applying that provision must be sufficiently detailed, be included in the River Basin Management Plan, and be established at the time of the decision-making.
2. In determining whether "overriding public interest" within the meaning of Article 4(7)(c) is present, a case-by-case assessment must be performed, taking into account the reasons put forth at the time of the decision-making in the decision and in the relevant River Basin Management Plan. In order to qualify as being in the "overriding public interest", the reasons put forth must significantly outweigh the general interest in achieving the environmental objectives set by Article 4.
3. Economic considerations can only qualify as "overriding public interest" within the meaning of Article 4(7)(c) in exceptional circumstances and if other contributing or linked factors make them especially important. Private economic interests cannot qualify as "overriding public interest".
4. The generation of employment can qualify as an "overriding public interest" within the meaning of 4(7)(c), depending on the circumstances of each case and the presence of other contributing factors, such as longstanding unemployment or other socioeconomic challenges.

5. Access to critical raw materials can in principle qualify as an “overriding public interest” within the meaning of Article 4(7)(c), provided that sufficiently precise reasons are put forth and balanced against the competing interests in achieving the environmental objectives of Article 4(1).

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