



**Norges
Naturvernforbund**
Friends of the Earth Norway



**NORSKE
LAKSEELVER**

SABIMA
SAMARBEIDSRÅDET FOR
BIOLOGISK MANGFOLD



Oslo, 10th of March 2011

COMPLAINT TO THE EFTA SURVEILLANCE AUTHORITY (ESA) CONCERNING THE NORWEGIAN GOVERNMENT'S FAILURE TO COMPLY WITH THE PROVISIONS OF THE WATER FRAMEWORK DIRECTIVE 2000/60/EC (WFD) IN REGULATED WATER COURSES.

This complaint is filed on behalf of the following associations, representing the interests of local communities, nature conservation, biodiversity, outdoor recreation and river owners:

- **The Norwegian Association of Municipalities hosting Hydropower Plants (LVK)**
Consisting of 173 municipalities hosting hydropower plants, covering approximately 60 % of Norway's land area
- **Liaison Committee of Nature Conservation (SRN)**
Consisting of the World Wide Fund in Norway (WWF-Norway), Friends of the Earth Norway (Naturvernforbundet), the Norwegian Trekking Association (DNT) and the Norwegian Association of Hunters and Anglers (NJFF), with a total of 370 000 members.
- **The Union of Outdoor Recreation Organizations (FRIFO)**
An umbrella organization for 14 outdoor recreation organizations with a total of 600 000 memberships and about 3500 local groups around Norway
- **The Norwegian Biodiversity Network (SABIMA)**
SABIMA has 10 member societies, each specializing in a biological field, with a total of 18 500 members. The societies consist of botanists, entomologists, limnologists, ornithologists, zoologists, marine scientists, toxicologists and other biology specialist groups
- **Norwegian Salmon Rivers (Norske Lakseelver)**
Norwegian Salmon Rivers is a non-Governmental organization for river owners in Norway. The organization has 70 local member associations, representing the important salmon rivers all over the country.

1 INTRODUCTION

Hydropower production is the single most important influence factor on water courses in Norway - about 70 per cent of the waterways are regulated for electricity production. Norway is the largest hydropower producer in Europe. Among the negative impacts are drained rivers, erosion, damaged fish stocks and decreased biodiversity. More than 90 per cent of the shore-based energy production in Norway comes from hydropower, and the sheer magnitude of hydropower production means that environmental challenges are common for a large number of watercourses. All these hydropower regulations have a significant impact on the overall environmental status of water in Norway.

Construction of big dams and tunnels for hydropower purposes represent almost everlasting interventionsⁱ and impacts on the environment. Hydropower plants are long-lasting facilities with long- or everlasting production licenses. Old hydropower facilities still have licenses with operating conditions from the time when the licenses were granted, in many cases more than fifty years ago. License conditions are supposed to protect against environmental harm or mitigate the negative effects, but are in such cases obviously outdated and poorly drafted. In all other industrial undertakings, conditions would be revised when necessary to be in accordance with the current environmental requirements. The consequence of this situation is that hydropower production in older facilities is more harmful to affected waterways than hydropower production in newer facilities. The complainants are convinced that it is now overdue that conditions given in the older licenses should be updated and amended to the current standards of knowledge, environmental policy and environmental protection, applying the best available technology for environmentally sustainable hydropower production combined with state of the art measures for mitigation. The need for revising older hydropower licenses has been actualized through the inclusion of the Water Framework Directive (WFD) in the EEA-agreement, obliging Norway to comply with the objectives set in the directive.

In the complainants' view, the Norwegian Government has failed to comply with the provisions of the Water Framework Directive (WFD), by not including all applicable and reasonable measures for environmental improvements within the hydropower sector in the integrated water management regime that the WFD provides for.

According to existing legislation in Norway, revision of environmental conditions in hydropower licenses was established to give the authorities an opportunity to adjust conditions when a license reaches 50 years of age, and from then on every 30 years.

The Norwegian Government has made a decision granting the hydropower sector a general exemption, specifically stating that the hydropower sector is not obliged to change any existing conditions until the preset time of revision occurs (30/50 years intervals). Norwegian authorities even state that when a revision of conditions finally takes place, they are not obliged by the environmental objectives or measures set in the River Basin Management Plans (RBMPs) and Programs of Measures resulting from implementation of the WFD in Norway. Existing national legislation concerning the revision of conditions is given a priority that overrides the EEA obligations towards WFD plans, programs and objectives. The complainant's opinion is that the revisions of licensing conditions should be adapted to the new water management regime of the WFD, and not be used as an excuse to

postpone environmental improvements in regulated waterways to a later date that does not fit with the WFD schedule.

The complainants hereby ask the EFTA Surveillance Authority (ESA) to assess whether the Norwegian Government's decision concerning the relevance of the obligations and objectives in the WFD for older hydropower licenses are in compliance with the WFD and the EEA agreement.

The planning period for preparing the first RBMPs in Norway in 2009 was a voluntary exercise covering only selected pilot river basins, and the WFD does not impose binding objectives until the present planning cycle (2010-2015) and implementation period (2016-2021). However, the statement made by the Government on the hydropower license issue is stated to be a clarification for future plans that are now in preparation. If the Government's decision is left standing as a principle for the next plan period, it is the complainants' opinion that this will represent a breach of the WFD Articles 4 and 11.

2 THE GOVERNMENT'S DECISION ON THE LICENSING CONDITIONS IN REGULATED WATERCOURSES AND THEIR RELATION TO WFD OBJECTIVES

River Basin Management Plans (RBMPs) for selected water bodies (29 river basin sub districts) in Norway have been drawn up for the six year implementation period running from 2010 until 2016. The RBMPs have been adopted by the county Parliaments. The 11th of June 2010, the Norwegian Government approved the RBMPs in the Council of State. In the according Royal Decrees to each RBMP, the Government makes a statement on the relation between the binding environmental objectives of the WFD and revision of conditions in older hydropower licenses (our translation):

"The management plans must be comprehensive and ecosystem based. The management plans may suggest a future environmental condition that modifies the minimum environmental water flow. Environmental objectives for regulated watercourses in the 6 year period of the plan shall be based on existing conditions in the licenses. Amendments of the conditions in the licenses will be decided with binding effect by the authorities setting licenses upon revision of said conditions. The 6-year objectives will be reported to ESA as binding objectives."

Through the referred passage, the Norwegian Government has decided to apply the policy that the environmental objectives for regulated watercourses shall be based only on existing conditions in older hydropower licenses. This implies - as we see it - that RBMPs and environmental objectives of the WFD will have no impact what so ever on the conditions in hydropower facilities until conditions of license are revised through other processes. When the revision procedure in a regulated watercourse finally occurs, the RBMP has status only as "input", without binding effect on decisions influencing water flow and energy production.

Due to the magnitude of Norwegian hydropower production, the management of regulated watercourses is an important part of overall water management in Norway, and a key issue concerning environmental status in accordance with the WFD. In many watercourses, the amendment of conditions in existing hydropower licenses is fundamental to achieve good ecological potential (GEP), or any improvement at all, and avoid deterioration in the environmental status of those watercourses. The Government's policy however, indicates that condition amendments are not to be considered when environmental objectives are set

during RBMP development. As a result, one of the most important sectors influencing watercourses is granted a general exemption from WFD environmental objectives and sector integration principles.

2.1 The recommendation of Parliament

The standing committee on energy and environment in the Norwegian Parliament (Stortinget) emphasized in their recommendation on inclusion of the WFD into the EEA treaty that revision of terms in hydropower licenses had to be an indispensable part of the integrated water management, (Innst. S. nr. 131 (2008-2009), our translation):

“The standing committee is of the opinion that the programs of measures that will be drawn up on the basis of the directive must incorporate revision of hydropower licenses. In particular, it is important to attain significant environmental improvements in cases where there is no required minimum environmental water flow today. In the longer term, the revision of licenses has to be synchronized with the revision of management plans for the water regions, as required by the directive.”

The standing committee’s recommendation, approved by the Parliament, includes two important statements: Revisions of conditions of hydropower licenses are relevant and feasible measures to integrate into the RBMPs and programs of measures. Furthermore, the committee recommends that the procedures for revising hydropower licenses and for drafting RBMPs have to be synchronized.

The complainants agree with the Parliament’s conclusion, and cannot see that the statement made by the Government in the Royal Decrees is in accordance with this. The Parliament explicitly states that the revisions in regulated waterways shall be adapted to the new, integrated water management regime under the WFD, while the Government apparently has an opposite position letting the WFD be overruled by the existing, non-integrated system for revision of licenses.

3 ENVIRONMENTAL CHALLENGES IN REGULATED WATERCOURSES

Since the time when the older hydropower licenses were granted, our understanding of the environmental disadvantages of hydropower facilities has increased. The public opinion concerning environmental considerations and conservation of nature has also fundamentally changed over the last decades. The relevant legislation has improved, and new hydropower licenses have far stricter conditions based on a higher environmental standard and state of the art measures for mitigation, in order to meet the environmental requirements of today. Modern requirements ensure the protection of important objectives such as minimum environmental water flow and water levels in reservoirs. In some regulated waterways with old hydropower facilities, however, the environmental situation is deteriorating because there are no mitigating measures in place to counter the effects of typical new maneuvering regimes (“hydro-peaking”) of today. The maneuvering has fundamentally changed in the recent years as a consequence of a more open and international energy market, with increased import and export of electric energy as well as new production methods without storage capacity (e.g. wind-power).

In the following sections (3.1. and 3.2.) we describe the most important amendments that we believe should be introduced to the conditions in older hydropower licenses. We think there is great potential for considerable environmental improvements in many regulated

watercourses, with negligible or acceptable level of loss of energy production. Minimum environmental water flows and restrictions on the maneuvering of reservoirs are common and obvious conditions in almost all newer licenses, and should be introduced to the older licenses through amendments made as an integral part of the preparation of the RBMPs according to the WFD.

3.1 Minimum water flows

Among 500ⁱⁱ regulated rivers in Norway are *heavily* influenced by hydro-power because there are no requirements on minimum environmental water flow, and many river sections are completely drained (permanently or for significant periods of the year). Minimum water flow in a river is essential to environmental status in general, and especially to fish stocks. Lack of water is also a major esthetical consequence, with negative impacts on recreational and landscape values for the local population, trackers and tourists.

According to the Water Resource Act of 2000 section 10, the minimum environmental water flow in new licenses shall normally be equivalent to the annual lowest water stream under natural conditions. One purpose of revising old licenses is to incorporate new legal conditions and policy objectives into the conditions of the old licenses. We believe that when an old license is up for revision, it is appropriate to consider the introduction of requirements on minimum environmental water flow and mitigation measures adapted to up-to-date policy objectives and technology, as well as current legal conditions.

Requirements on minimum environmental water flow may result in some reduction of power production in the power plant. The authorities have to balance these different interests: environmental improvements in the watercourse may be in contradiction to the need for increased production of renewable energy. Small amounts of water for environmental flow can however, in many rivers, result in a significant and important improvement of the environmental situation in the water course, with only a small loss in energy production. For the public interest, the environmental gain often exceeds the disadvantage. Some “loss” of power production potential through minimum environmental water flow would normally have been accepted had the license for that particular river been given today.

The energy sector claims that introducing minimum water flows in regulated watercourses will result in an overall reduction of renewable energy production estimated to 5-12 TWh in Norway. This allegation however, is based on a scenario where “Q95” (a general minimum water flow) is imposed on all regulated watercourses. Q95 is the water flow level that would be exceeded 95 percent of time if the watercourse was not regulated. A loss of 5-12 TWh is not a realistic scenario, because minimum water flows like Q95 does not need to be introduced to all regulated waterways. There will have to be a specific and ecosystem based assessment in every single watercourse, and new flow requirements will only be introduced where the gains exceed the disadvantages. The amount of water required will have to be adapted to the specific needs of each watercourse. In many places the loss of energy production can even be overcome by adding a smaller hydro-electric generator that utilizes the minimum environmental water flow.

In section 7 below, the complainants call attention to the fact that hydropower production is rapidly increasing in Norway, and the new production and construction plans greatly exceeds

the modest reduction caused by introducing minimum environmental water flows to older licenses.

3.2 Maneuvering reservoirs – the problem of hydro peaking

Older hydropower licenses set a limit for the highest and lowest permitted water level in the reservoirs, without any restrictions on how to regulate the reservoir between these limits. Newer licenses, on the other hand, include provisions on reservoir drawdown. Newer licenses often require a higher water level in summertime due to public interest.

A new challenge in regulated waterways is “hydro peaking”. Hydropower stored in water reservoirs can meet consumption peaks through the day and balance unstable wind power production. A liberated energy market and import and export of electric energy, also makes it profitable to peak production when the spot market price is at its highest. Frequent and rapid changes in water levels in rivers and reservoirs can be harmful to life in the watercourses and increase erosion. These environmental challenges are expected to increase in the years to come due to increasing transmission of power to the European continent, with different peak hours and patterns of consumption.

When the older licenses were issued, there were no commercial incentives, nor was it technically feasible, to peak production in this way. The reservoirs were filled up during spring and early summer by the snow melting, and were not heavily drained during the summer. The water was stored in reservoirs for the purpose of power production during winter.

Accordingly, the external conditions for operating hydro power plants have fundamentally changed, and the general assumptions at the time when many licenses were granted are not viable anymore. The conditions of the old licenses are simply not adapted to the electricity market situation of today. The consequence is that the environmental situation in many regulated waterways is deteriorating.

4 THE LEGAL BASIS OF REVISION OF TERMS IN OLDER HYDROPOWER LICENSES

4.1 Existing legislation in Norway

The license to build, own, and operate a hydropower plant is regulated by three main Acts:

- Act relating to acquisition of waterfalls, mines and other real property (The Industrial Licensing Act), from 1917
- Act relating to regulations of watercourses (The Watercourse Regulation Act), from 1917 and
- The Water Resources Act, from 2000

Most of the hydropower licenses in Norway are everlasting. Accordingly, these licenses are not subject to renewal with the accompanying possibility of introducing new and stricter environmental conditions. However, pursuant to Section 10 (3) of the Watercourse Regulation Act and The Industrial Licensing Act section 5a, the conditions of such licenses may be revised after 50 years. Licenses granted after an amendment of the relevant sections in the acts in 1992, can be revised after 30 years. After a revision, there is normally another thirty year interval until the license may be revised again.

When a license has become 50 years of age, revision of conditions is not compulsory. A revision has to be initiated by actors representing public interests, and usually the affected municipalities file a request of revision to the Water Resources and Energy Directorate (NVE), which decides whether a revision of conditions will be started. NVE is not obliged to answer positively to the request for a revision.

Nearly 400 hydropower licenses are eligible for revisions before 2022 pursuant to the conditions mentioned above. There is no legal connection between the time of revision for existing licenses and the periods of preparation and implementation of the RBMPs pursuant to the Water Framework Directive. However, the possibility of license revision does coincide with the drafting of RBMPs for many regulated watercourses. In the preparatory works on the inclusion of the WFD into the EEA treaty (Proposition to the Parliament: St.prp. nr. 75 (2007-2008)) the Government did not discuss this issue, and the WFD was not expected to cause the need for any legislative amendments in existing legislation.

Only the *conditions* of a license – the provisions that regulate the license holders' operation of the power plant – may be amended through a regular revision based on the Watercourse Regulation Act section 10 no. 3 and The Industrial Licensing Act section 5a. The license itself cannot be changed or withdrawn. The lowest and highest regulated water level in the reservoirs are said to be the core of a license, and cannot be changed through a regular revision either. However, it is possible to impose restrictions on the maneuvering of the reservoir between the upper and lower threshold levels.

A revision based on the Watercourse Regulation Act section 10 no. 3, is meant to be a modernization and update of the conditions of the license, in order to meet the legal requirements of today. Based on consideration on public interest, the competent authority may impose new requirements through conditions intended to mitigate negative effects caused by the license holders' use of the water resources. Environmental obligations are one of the most obvious and relevant conditions that the authority may introduce, but the preparatory works (Proposition to the Parliament/Parliamentary bill - Ot.prp. nr. 50 (1991-1992)) mentions a broad specter of issues that may be considered. For example, environmental measures may include building sills or fish ladders in rivers to increase ecological connectivity in rivers, measures to prevent erosion, restoration of fish stocks and other measures to restore habitats. A particularly important measure in many waterways is the minimum environmental water flow, higher water levels in reservoirs (especially during the summer time) and stricter rules for management of the power plant. The most important measures that influence the water flow in a river and the water level in a reservoir may be imposed only through amendments of the conditions in the hydropower license.

The licensee may also be relieved of requirements and conditions that have become unnecessary or unsuitable for the operation of the power plant.

4.2 Updated guidelines for revision of terms in regulated waterways

The Norwegian Water Resources and Energy Directorate (NVE) recently drew up a proposal for updated guidelines to revision of hydropower license conditions. The guidelines have been intensely debated within the Norwegian civil service and are not yet adopted by the Ministry of Petroleum and Energy, but describe the directorate's view on the relation

between the revision of conditions and the RBMPs in line with the wording in the Royal Decrees mentioned earlier.

In the guidelines the relation between the revision of terms and the WFD is discussed in chapter 6 (our translation):

“A mitigating measure is realistic when specific circumstances are fulfilled, where the two most important are:

- *Necessary tools are available (primarily a legal basis) to carry out the measure within the plans implementation period.*
- *If the measure influences power production, the conditions of the license have to be changed through a revision or renewal of a license. A mitigating measure that changes the minimum environmental water flow or affects production or regulation of hydropower, can only be taken into account as a basis for the environmental objective in the aftermath of a revision or renewal of the license, done by the responsible authority (...). If this does not happen within the present planning period, the measure is not realistic. All measures which are not influencing on power production are realistic if revision is expected to be accomplished in the plans implementation period“*

As we interpret these guidelines, The Norwegian Water Resources and Energy Directorate (NVE) argues that introducing environmental water flows and maneuvering restrictions into existing licenses, *generally* are not realistic measures, not even when a revision of conditions is expected to be accomplished within the plans implementation period. These are often crucial measures to improve the environmental status in regulated watercourses, and we find the NVE’s argument to be poorly substantiated.

If the revision of conditions deviates from the management plan, the following is said in the proposed guidelines (on page 17):

“The adopted management plan will be a part of the basis to sector authorities’ decision, for example in a case of revision. In the treatment of the case there will be made additional clarifications and specific considerations of benefits and disadvantages before a decision of implementing a measure is made. Other interests will be emphasized than the interests emphasized in the management plans. The sector authorities therefore have the possibility to make decisions that are not in accordance with the plan (...)”

The proposed guidelines indicate that the energy authorities do not see themselves as obliged to impose environmental measures within the hydropower sector on the basis of environmental objectives of the WFD and the RBMPs.

4.3 The WFD as a legal basis for revising conditions in licenses

Our interpretation of WFD Articles 4 and 11 is that the objective set for a water body, including heavily modified water bodies, should represent the status expected in the water body once all measures that are feasible and not disproportionately expensive have been applied. Changing the conditions of existing licenses are often feasible measures.

As earlier mentioned, regular revision of hydropower licenses takes place every 30 or 50 years pursuant to the Watercourse Regulation Act section 10 no. 3 and The Industrial

Licensing Act section 5a. This may not be sufficient in order to address the need for higher environmental standards in hydropower production. The member states are obliged to achieve the environmental objectives in the water bodies within the timeframes of the RBMP 6-years implementation cycles, and the measures shall be made operational at the latest 3 years into each implementation period. In the complainants' view, the deadlines and the 6-year plan period in the WFD actualizes the need to assess such environmental standards on a more frequent basis.

Besides, from the intervals of time between the revisions in existing legislation, the *time of the procedure* is a problem when a revision starts up. Experiences with the first licenses that are up for revision, is that the case procedures take extremely long time. The Norwegian Government has accomplished to finish only one single case of revision (the Vinstra river), and this procedure took 12 years to complete. Another case has been going on since 1991 (Tesse) and two cases since 1998 (Årdal watercourse and Selbu lake), and the revisions are still not accomplished. There are no deadlines or other timeframes for the treatment of revisions, and the authorities can retard the cases without any reason or explanation. The time consuming procedures in the existing revision system are unacceptable, and the existing system as it works today will not keep up with the cycles and deadlines in the WFD.

According to Article 4.4. of the WFD, deadlines established in the directive may be extended if no further deterioration occurs in the body of water and the reason is that measures are technical infeasible, disproportionately expensive or natural conditions do not allow it within the deadlines.

As referred above, Norwegian Water Resources and Energy Directorate (NVE) argues that a measure is realistic only if it is a legal basis established within the plan period. However, we cannot find that lack of a legal basis in existing legislation is mentioned in the WFD as an acceptable cause to extend the deadline for applying measures in regulated watercourses.

In the complainants' view, the WFD gives the competent authority a supplementary legal basis for amending the conditions of hydropower licenses, and thus the conditions on which a hydropower facility is managed. In our view, the WFD actually obliges the competent authority to amend the conditions of a hydropower license, irrespective of whether the license in question is subject to revision pursuant to the Watercourse Regulation Act section 10 no. 3 and The Industrial Licensing Act section 5a, when such amendments are necessary in order to achieve the objectives set for that watercourse pursuant to the WFD.

As we read the WFD, the objectives for any watercourse shall be based on all relevant and feasible measures within all sectors. The Directive also says, in Article 11 (5), that the Member State shall ensure that licenses are examined and reviewed if necessary (our underlining):

"Where monitoring or other data indicate that the objectives set under Article 4 for the body of water are not likely to be achieved, the Member State shall ensure that:

- the causes of the possible failure are investigated*
- relevant permits and authorizations are examined and reviewed as appropriate*
- the monitoring programmes are reviewed and adjusted as appropriate, and*

- additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter standards following the procedures laid down in Annex V"

Due to the number of upcoming revisions in the years to come, the Government may argue that it is not necessary to include the revision of hydropower license in the RBMPs and the environmental objectives therein, because the environmental assessment will be carried out during those revisions. As mentioned above, energy authorities think they are exempt from obligations of the WFD when they consider a revision of terms in hydropower licenses. Anyway, this is a situational - and not a principal - objection against our interpretation of the WFD. If the first revision does not sufficiently improve the environment in the water course, this argument implies that there will be at least a 30-year interval before it is possible to impose new environmental obligations. The fact that many hydropower licenses are up for revision at approximately the same time, is rather an argument to include the revisions when setting environmental objectives and drawing up management plans pursuant to the WFD.

The regular revisions pursuant to existing legislation and the WFD have a common purpose, which is improving the environmental status of watercourses. The system of revision of hydropower licenses should be adapted to the new water management regime under the WFD, and not become an obstacle to fully integrate revision of hydropower licenses into the overall water management system.

4.3.1 Measures in heavily modified watercourses

Our interpretation of WFD Articles 4 and 11 is that the objective set for a given watercourse should represent the status expected in the water body once all measures that are feasible and not disproportionately expensive have been applied. Watercourses that are regulated for hydropower production will often be categorized as heavily modified water bodies with a less stringent objective pursuant to WFD article 4.5. This does not mean that all regulated water bodies are to be automatically classified as heavily modified water bodies, and there are many regulated watercourses that can achieve good environmental status instead of good environmental potential.

Classification as a water body with less stringent objectives does not entail that the authorities have a lesser obligation to carry out measures to improve the environmental status. The Common Implementation Strategy (CIS) for the WFD, Guidance document No. 20: Guidance Document on exemptions to the environmental objectives (Technical report - 2009-027) developed by the EU member states, Norway and the European Commission, states the following (CIS Guidance Document Exemptions page 21-22):

"In principle, a less stringent objective should represent the condition expected in the water body once all measures that are feasible and not disproportionately expensive have been taken. (...)

The achievement of a so called "less stringent objective" may require the implementation of measures that are stringent, if not more so, than the measures that are required for water bodies for which the objective is good status."

It is the complainants' view that the decision made by the Government through Royal Decree 11 June 2010 does not comply with the mentioned CIS guideline, since important and feasible measures within the energy sector are not included when setting the environmental objectives for a watercourse pursuant to the WFD Article 4. The hydropower sector is responsible for the single greatest impact on Norwegian water courses, and we think that this sector has a particular responsibility to carry out relevant measures to protect and enhance the environmental status of those watercourses.

In cases where improvement measures are technically infeasible or disproportionately expensive, the WFD itself offers opportunities to deviate from normal mitigating measures and is hence no argument for bypassing RBMPs in the way the Norwegian Government is attempting. Furthermore, the Government would still be obliged by Article 4 of the WFD to take action to *prevent further deterioration* of environmental status. This is also said in the CIS Guidance Document Exemptions on page 22:

"In some cases it may be technically infeasible or disproportionately expensive to make any improvements in the status of a water body within the period covered by the relevant river basin management plan or update. In such cases, Member States must nevertheless prevent further deterioration of status, subject to the application of paragraphs 6 or 7 of article 4 of the Directive."

The environmental status in some regulated watercourses is deteriorating as a consequence of hydro peaking, as described in section 3.2.

In the complainants' view, the WFD also contains an obligation for the competent authority to undertake mitigating measures to prevent excessive damages from hydropeaking, including the revision of existing licenses.

5 SECTOR INTEGRATION

According to the preparatory works of the implementation of the WFD (St.prp. nr. 75 (2007-2008)), the directive does not necessitate any legislative amendments in Norwegian law. The Government also decided that the WFD does not warrant any procedural or organizational changes with the competent authority, see section 4.4.1 on page 4 (our translation):

"... Sector authorities, county authorities and municipalities are, within their field of competence, responsible for considering and suggesting possible measures as well as the conditions on which an environmental objective is set. The authority responsible for adopting such measures will thus also be the principal provider of premises within its field of competence through the preparation of plans and programs pursuant to the regulation.

The final decision on the implementation of measures will be taken after the adoption of management plans by the competent authority in accordance with relevant legislation. Adopted management plans shall not be so specific that they significantly reduce the competent authorities' margin of discretion. The management plan is adopted by the county Parliaments, and approved by the Council of State.

The regulation forms the foundation for close cooperation and objective-oriented and coordinated effort across the involved sectors. The responsibility of affected authorities' for legislation and policy instruments will remain unchanged and in accordance with the current allocation of competence. The implementation therefore presupposes an extensive cooperation between affected authorities at all levels of administration. The legal basis for implementing environmental enhancing measures required by the WFD, is provided for in existing legislation."

The relevant sector authorities can keep their sector authority, but are obliged to contribute to the fulfillment of the objective in the watercourse. NVE or OED are not free to put aside the RBMP and the environmental objectives, and the content of their decisions will be guided by the management plans and the environmental objectives of the watercourse. Enhanced integration and cooperation between competent authorities and sectoral interests is crucial in order to comply with the WFD, and the Parliamentary bill reveals a fragmented sectoral approach that seems to be an obstacle to such a sectoral integration.

When it comes to revisions of hydropower licenses, these are normally *not* decisions of sector authorities alone. The Norwegian Water Resources and Energy Directorate (NVE) and Ministry of Petroleum and Energy (OED) prepare each revision case, but the final decision is adopted by the Government by Royal Decree in the Council of State.

6 CONSTITUTIONAL QUESTIONS

The Norwegian constitution Section 97 contains a prohibition against retroactive laws. The question is then whether this prohibition can be an obstacle to interfere with existing rights in hydropower licenses.

In the Parliamentary Bill Ot.prp. nr. 50 (1991-1992) on the Watercourse Regulation Act Section 10 no. 3, this problem is discussed on page 40-42, and the conclusion is (our translation):

"The interest of predictability is a principal concern behind the prohibition on retroactive acts. But even when the state has given a license with a right to carry out an activity, it has not given up its general authority to regulate the conditions for that activity. This applies irrespective of whether the license includes reference to the legislation in force at the time the license was granted. Within reasonable limits, the licensee must be prepared for new requirements imposed by the competent authority.

The content of the constitution's Section 97 will be influenced by change of opinions on what constitutes an unreasonable or random retroactive law. The general sense of justice at any given point in time plays an important role when interpreting the prohibition. Through ordinary revision, new conditions for the further exploitation of the water resources will be imposed. This is not a genuine retroactive effect. This concerns setting conditions that are necessary or desirable based on the opinion at the time of revision. The Ministry assumes that amendments that are relevant for a general revision will not entail any constitutional problems."

The preparation works also say on page 46 that the revisions have to take into consideration the economical consequences for the licensee, and protect against unreasonable changes in the conditions in an overall assessment:

“The regular revision is meant to modernize or update the conditions of the license. As mentioned above, this does not necessarily mean that all changes are in disfavor of the licensee. The revision is also an opportunity to abolish conditions that are unreasonable/unnecessary or inappropriate (...)

Under any circumstance, the interest of the licensee’s economy and socio-economic considerations are central issues in the consideration of what changes that may and should be made. In hydropower regulations where the facility is depreciated a long time ago, there is a good reason to go further in a revision compared to newer licenses. On the other hand one has to take into account that conditions may have established themselves over time. A breach of the constitutional prohibition on unreasonable and random retroactivity is not regarded as a relevant problem by the ministry.”

A leading professor of environmental and administration law at the University of Oslo, Inge Lorange Backer, writesⁱⁱⁱ that changes *for environmental reasons* are not limited by the constitutional prohibition of retroactive laws (here translated to English):

“Nobody will see the constitution’s section 97 as an obstacle to impose more strict environmental conditions for new activities. Also when it comes to existing activities, it is almost self-evident that the law can strengthen the environmental conditions. If not, real environmental improvements would be impossible. Often, the nature gives warning signals only when the continuous stress already has been heavier than nature can repair by itself.

This vision, that regulation of existing activities can be strengthened with an effect for the future – is basis for the legislation on air and water pollution given in the sixties, for example the recommendations of the Karlsrud committee for a new act on protection of water pollution in 1970. This is of course continued in the pollution act of 1981 and in the following regulations.(...)

It does not make any considerable difference whether the activity is based on a license or any other kind of special permission, regardless whether the license is based on an evaluation of the consequences of the activity for the environment.(...)

Strengthening environmental conditions can be, for example, requiring environmental impact assessment with a following consideration of a license, strengthening emissions and purification requirements, changes in operational methods, new technical installations and so on – also prohibitions. The Constitution Section 97 does not afford any protection against imposition of any such measures, at least not when the new requirements are environmentally motivated.”

As far as the imposed changes are proportional, there are no legal obstructions against imposition of new environmental standards and obligations for future.

7 THE WFD AND THE EU RENEWABLE ENERGY DIRECTIVE 2009/28/EC

The Ministry of petroleum and energy (and the energy companies) argues that the obligations of the renewable directive do not allow for reduction of electricity production from renewable resources by introducing minimum environmental water flow obligations and restrictions on reservoirs in existing licenses. The complainants do not agree there is a contradiction between the WFD and the obligations of the renewable energy directive

2009/28/EC and the EU 20-20-20 targets. The preamble of the directive 2009/28/EC says in paragraph 44:

“The coherence between the objectives of this Directive and the Community’s other environmental legislation should be ensured. In particular, during the assessment, planning or licensing procedures for renewable energy installations, Member States should take account of all Community environmental legislation and the contribution made by renewable energy sources towards meeting environmental and climate change objectives, in particular when compared to non-renewable energy installations.”

The WFD is one of the most important environmental directives of the Community, and the climate policy has to be in coherence with the environmental targets for protecting and improving the environmental status of water bodies. The demand for renewable energy cannot be an excuse for not pursuing environmental challenges in regulated watercourses. It is necessary to strike a fair balance between the environmental interests in play under the two directives.

Norway is in an exceptional situation concerning renewable energy. Because of hydropower, Norway is far above the EU average on renewable energy, and Norway is also well above the ceiling of 50 per cent established by the EU. Even in this situation, Norway wishes to endorse and adopt the Renewables Directive and contribute to the EU 20-20-20 targets. This is certainly supported by the complainants, as long as it is not used to impose major negative impact on nature.

A binding objective for Norway in the Renewables Directive is not yet determined, and the Norwegian Government is still negotiating this with the EU Commission. Because almost all electricity consumption in Norway is based on renewable resources, the targets of the Renewables Directive cannot be reached primarily by producing more electricity from hydropower. The challenge for Norway is to convert from fossil fuels to renewable energy for transport, heating and industry, combined with energy efficiency- and saving measures. There will still be a need for exporting electricity produced by hydropower, and this export will hardly be affected by better environmental conditions in older hydropower plants and licenses.

There is also an increase in new hydropower production in Norway. Since 2000, licenses have been granted to new hydropower plants and upgrading/expansion of existing facilities, allowing for a total increase in hydropower production of more than 7 TWh/7153,86 GWh^{iv}:

YEAR	GWh
2000	162.59
2001	869.43
2002	198.4
2003	1064.29
2004	622.21
2005	601.12
2006	593.4

2007	747.27
2008	741.97
2009	673.21
2010	879.57
TOTAL	7153.86

The renewable energy production from existing hydropower facilities is also increasing due to increased precipitation in parts of Norway over the last decades. The negligible loss of energy caused by applying new environmental conditions to existing license will not exceed the considerable quantity of new energy production - every year - based on renewable resources in Norway.

The complainants cannot see that there is a contradiction between the need for renewable energy and the need for environmental improvements in our regulated watercourses.

8 PUBLIC OWNERSHIP, EVERLASTING LICENSES AND NON-DISCRIMINATION

88 per cent of the Norwegian hydropower generation is publicly owned, and private ownership is strictly limited. The central Government owns around 36 per cent through the state enterprise Statkraft SF, while different municipalities and county authorities own around 52 per cent of the generating capacity. For historical reasons, the owning municipalities are mainly the larger cities, while the power plants are placed in rural areas. Public owners are granted everlasting licenses, while private owners have a time-limited license, normally for 60 years.

The system of everlasting licenses makes it even more necessary to revise the licenses because there is no possibility to impose new conditions through renewal. Besides environmental interests, there is also a non-discrimination aspect to the case. As regards non-discrimination of the competitive participants in the energy market, also electricity producers should compete under fairly comparable conditions set by the Government, independent of ownership and the license's duration. The Government should not be able to protect the publicly owned hydropower facilities against requirements that in principle should be generally applicable.

9 CONCLUSION

The complainants ask EFTA to make an assessment of whether it is in accordance with the obligations of the WFD to set environmental objectives for the water courses based on the existing conditions of old hydro power licenses only.

For questions regarding this complaint, please contact Tine Larsen:

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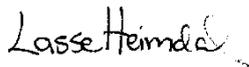
Best regards



Børre Rønningen
Chairman of the Norwegian Association of Municipalities hosting Hydropower Plants (LVK)



Rasmus Hansson
Chairman of the Liaison Committee of Nature Conservation (SRN)



Lasse Heimdal
Manager of the Union of Outdoor Recreation Organizations (FRIFO)



Rune Aanderaa
Manager of the Norwegian Biodiversity Network (SABIMA)



Torfinn Evensen
Manager of Norwegian Salmon Rivers (Norske Lakseelver)

Attached:

Pictures to illustrate environmental challenges in regulated watercourses at page 18-20

A copy of this letter is sent to:

The European Commission – DG Environment
The Ministry of Environment (MD)
The Norwegian Directorate for Nature Management (DN)
The Ministry of Petroleum and Energy (OED)
The Norwegian Water Resources and Energy Directorate (NVE)

ⁱ Rødsethutvalget NOU 1992:34 s. 162

ⁱⁱ Vann-nett: <http://vann-nett.nve.no/statistikk/>

ⁱⁱⁱ Jussens Venner 1991 s. 219

^{iv} NVE webpage www.nve.no



Reservoir, Tunhovdfjorden, summer 2006

Zone of erosion, Tesse/Ilva summer 2004 (Photo: Kari Sveen)





Erosion, Røyrvik, June 2008





Earth slip in Vikaengene, Selbu lake (Photo: Øyvind Bones)



Drained river, Hemsil June 2005 (Photo: Ola Granheim)