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Brussels, 4 June 2014
Case No: 69544
Event No: 709494



EFTA SURVEILLANCE
AUTHORITY

Ministry of Climate and Environment
Postboks 8013 Dep
N-0030 Oslo
Norway

Dear Sir/Madam,

Subject: Clarifications regarding the implementation of the Water Framework Directive in respect of heavily modified water bodies

1 Introduction

As you will be aware, on 10 March 2011, the EFTA Surveillance Authority received a complaint against Norway concerning the implementation 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 (“Water Framework Directive”) as concerns water courses.

The complaint alleges that Norway has failed to correctly implement the Water Framework Directive in so far as regulated water courses used for hydropower production, which appear to have been classified as “heavily modified water bodies” (“HMWB”), are not subject to the procedures foreseen in Articles 4 and 11 of the Water Framework Directive.

The case was discussed at the package meeting which took place in Oslo on 10-11 November 2011. A request for information was sent to the Norwegian government on 22 February 2012¹ and the Authority received a response to this request by letter dated 31 May 2012². On 5 October 2012, the Authority forwarded a list of supplementary questions to the Norwegian Government by e-mail³, which were discussed at the package meeting in Oslo on 25-26 October 2012. A pre-31 letter was sent in the case on 13 May 2013⁴ and a response was received on 31 July 2013⁵. The case was further discussed at the package meeting which took place in Oslo on 21-22 November 2013. A follow up letter to that meeting was sent by the Norwegian government, dated 20 December 2013⁶.

The Authority’s Internal Market Affairs Directorate (“the Directorate”) has recently received copies of two communications; one issued by the Ministry of Petroleum and

¹ Letter from the Authority dated 22 February 2012 (Event No 607006).

² Letter from the Norwegian Ministry of the Environment dated 31 May 2012 (Event No 636436, Ref. No 2012/00001).

³ E-mail of the Authority dated 5 October 2012 (Event No 649052).

⁴ Event No 671404, Ref No.12/3553.

⁵ Letter from the Norwegian Ministry of the Environment dated 31 July 2013 (Ref. No 12/3553).

⁶ Letter from the Norwegian Ministry of the Environment dated 20 December 2013 (Ref. No 12/3553).

Energy together with the Ministry of Climate and Environment⁷ (dated 24 January 2014) and the other by Norwegian Water Resources and Energy Directorate⁸ (dated 19 March 2014). The Directorate's understanding is that these communications are intended as input into the ongoing work on the river basin management plans ("RBMPs") and programmes of measures ("POMs") which are currently being prepared.

Having examined these letters, the Directorate now seeks the views of the Norwegian authorities on a number of issues, set out in detail below, where there appear to be contradictions between the information previously provided by the Norwegian authorities and the guidelines issued by Norway to the municipalities which have responsibility for drawing up the RBMPs and POMs.

2 Screening Report potentially precluding measures required for ecological improvements

In its letter of 13 May 2013⁹, the Directorate expressed concerns that the screening process being conducted by the Norwegian authorities in relation to the revision of hydropower licences, which aimed to establish a list of priorities, would potentially exclude a number of licences (i.e. those that were not prioritised) from the full scrutiny with a view to possible review as required by Article 4(1)(a)(iii) of the Water Framework Directive.

In its response of 31 July 2013, the Norwegian government stated that "*environmental objectives for heavily modified water bodies will be set case-by-case, based on an assessment of significant adverse effect*". The letter continued: "[t]his screening is being conducted independently of the Directive, and will not replace any part of the national implementation of the Directive in Norway.....The characterisation, the development of the Programme of Measures and individually set environmental objectives will be carried out regardless of whether minimum flow is prioritised in the screening or not. Minimum flow will be considered as a measure in the River Basin Management plan, even if the water body is not given priority in the screening".

The letter of 24 January 2014 referred to above from the Ministry of Petroleum and Energy together with the Ministry of Climate and Environment, appears to contradict the Norwegian government's position. In particular it states that "*[w]ater release/ reservoir restrictions should be linked to the high-priority rivers (category 1:1 of the report 49:2013), because society benefits will be the greatest weighed against the cost in terms of reduced power and controllability. Measures which lead to water release/ reservoir restrictions will therefore, as a starting point, only form the basis for environmental objectives in the high-priority water courses*"¹⁰. According to the letter, where water

⁷ Letter from the Norwegian Ministry of Climate and Environment and the Ministry of Petroleum and Energy, dated 24 January 2014, entitled "Vannforvaltningsplaner i vassdrag med kraftproduksjon – nasjonale føringer" (Ref. No 12/3553).

⁸ Letter from the Norwegian Water Resources and Energy Directorate dated 19 March 2014, entitled "Innspill til arbeidet med vannforvaltningsplaner og tiltaksprogram", (Ref. No 200709992-78).

⁹ Letter from the Authority dated 13 May 2013 (Event No 671404).

¹⁰ Letter from the Norwegian Ministry of Climate and Environment and the Ministry of Petroleum and Energy, dated 24 January 2014, page 1, third bullet point reads: "Vannslipp/ magasinrestriksjoner knyttes opp mot de høyt prioriterte vassdragene (kategori 1.1 i rapport 49:2013), fordi samfunnsnyten vil være størst vurdert opp mot kostnadene i form av redusert kraftproduksjon og regulerbarhet. Tiltak som vannslipp/magasinrestriksjoner legges derfor som utgangspunkt bare til grunn for miljømålid de høyt prioriterte vassdragene".

release is considered for those water bodies which do not fall into category 1:1, this must be justified in the RBMPs.

While the Directorate understands that the letter of 24 January 2014 is intended to serve as guidance for the municipalities when establishing environmental objectives for the RBMPs, it is clear that it will carry great weight, in particular as any changes to hydropower licences must be approved by the Norwegian government.

The Directorate invites the Norwegian government to explain this apparent conflict in the official advice from the Ministries of Energy and Petroleum and Climate Change and Environment and the requirements of Articles 4(1)(a)(iii) and 5 of the Water Framework Directive.

Specifically, the Directorate would like to understand in practice how the technical analysis required by Article 5 of the Water Framework Directive, which forms the basis for establishing the specific measures to be taken to achieve good ecological potential, will be achieved for those bodies of water which do not fall into category 1:1 in the screening report. The Directorate is particularly interested to understand how guidance which effectively imposes a restriction on any water release/ reservoir restrictions for bodies of water outside category 1:1 can be reconciled with the statement of the Norwegian government, in its letter to the Authority of 20 December 2013 that “...environmental objectives will be based on an individual assessment of costs and benefits for the society”¹¹.

3 Systematic use of exemptions under Article 4(4) of the Water Framework Directive

According to Article 4(4) of the Water Framework Directive, the achievement of good ecological potential can be delayed for one or several of the following reasons:

- The scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of technical feasibility.
- Completing the improvements within the timescale would be disproportionately expensive.
- Natural conditions do not allow timely improvement in the status of the body of water.

As Norway will be aware, exemptions from the requirements of the Water Framework Directive should only be used in exceptional circumstances. At the package meeting which took place in Oslo on 21-22 November 2013, the Authority received assurances from the representatives of the Norwegian government that, despite the suggestion in the Screening Report to the contrary, there was no plan to systematically postpone the achievement of environmental objectives through the use of the exemption provided for in Article 4(4) of the Water Framework Directive.

Having examined the letter from the Norwegian Water Resources and Energy Directorate (“NVE”), dated 19 March 2014, it appears that Norwegian government has conceded that there is insufficient time to conduct the assessments required by the Directive¹². In the

¹¹ Letter from Norwegian Ministry of the Environment dated 20 December 2013, page 3, paragraph 5.

¹² Letter from the Norwegian Water Resources and Energy Directorate of 19 March 2014, page 2, paragraph 8 reads “NVE is aware that the deadline for the hearing of the river basin management plans is short, and it

letter, the NVE observes that many of the draft POMs include proposals (such as the introduction of minimum water flows) that will require a revision of the existing licences or other tools. Given the time taken for such revisions (estimated to be approximately 4-5 years) it is clear that such measures will not be feasible under the timing required by the Water Framework Directive. On that basis, according to the letter, “*NVE believes that it is more realistic to postpone the time for achievement of environmental objectives until 2027 for water courses open for revision until 2022 and until 2033 for water courses open for revision after 2022, unless it is necessary to use other means during the period¹³*”.

This statement appears to contradict the information previously provided by the Norwegian government. It is also by no means clear that the exceptions set out in Article 4(4) of the Water Framework Directive can be applied in such a systematic matter as appears to be suggested by NVE. It is also to be noted (as previously highlighted by Directorate in its letter of 13 May 2013), that any use of the exemptions set out in Article 4(4) is restricted to a maximum of two periods of 6 years each.

Moreover, the expressed wish to postpone the achievement of environmental objectives on such a wide scale raises fresh concerns, already expressed by the Directorate, that the existing legal framework in Norway cannot guarantee the effective implementation of the Water Framework Directive.

The Directorate invites the Norwegian government to clarify its intended use of exemptions under Article 4(4) of the Water Framework Directive and to explain how it intends to achieve the environmental objectives mandated by the Water Framework Directive in those watercourses where the relevant licenses are to be reviewed in 2022.

4 Concluding remarks

The Directorate’s reading of the letters of 24 January and 19 March 2014 indicates that the Norwegian government has already adopted a finalised position on the setting of environmental objectives for HMWB as regards water release/ reservoir restrictions, as well as on the use of exemptions to postpone the achievement of the aims of the Water Framework Directive. These statements, which have been circulated to all the relevant municipalities, would seem to contradict the information previously provided by the Norwegian government to the Authority.

In addition, the letters from the Ministry of Petroleum and Energy together with the Ministry of Climate and the Environment and from the Norwegian Water Resources and Energy Directorate cast serious doubts on the capacity of the Norwegian government to carry out the necessary technical analysis to both establish and implement specific measures to be taken to achieve the necessary environmental objectives under the Water Framework Directive.

will therefore be difficult to conduct sufficient assessment of all the relevant water bodies”. In the original Norwegian version it is stated “*NVE er kjent med at fristen frem til høring av forvaltningsplanene er kort og at det derfor vil være krevende å gjennomføre tilstrekkelige vurderinger for alle aktuelle vassdrag.*”.

¹³ Letter from the Norwegian Water Resources and Energy Directorate of 19 March 2014, attachment, page 6 paragraph 5 reads “*NVE mener derfor at det er mest realistisk å utsette tidspunktet for miljømåloppnåelsen til 2027 for vassdrag som kan åpnes for revisjon før 2022 og til 2033 for vassdrag som kan åpnes for revisjon etter 2022, med mindre det er aktuelt å bruke andre virkemidler i perioden.*”

In light of the above, the Norwegian government is invited to submit its observations on the content of this letter by *5 July 2014*.

Yours faithfully



Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate