



REPORT FOR THE HEARING

in Case E-13/24

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in the case between

Friends of the Earth Norway and Young Friends of the Earth Norway

and

The Norwegian Government, represented by the Ministry of Climate and Environment and the Ministry of Trade, Industry and Fisheries,

concerning the interpretation 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, in particular Article 4(7)(c) thereof.

I INTRODUCTION

1. The case pending before the referring court concerns the legality of four permits granted by Norwegian authorities to the mining company Nordic Mining ASA and its subsidiary Engebø Rutile and Garnet AS (previously Nordic Rutile AS) (collectively “Nordic Mining”). The permits give Nordic Mining permission to operate a mine at Engebø in Sunnfjord municipality (previously Naustdal municipality) and conduct submarine tailings disposal in the Førdefjord.

2. The submarine tailings disposal will lead to a deterioration of the water status in the Førdefjorden-ytre surface water body contrary to Article 4(1)(a)(i) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy. The case before the referring court concerns whether the derogation granted by the Norwegian authorities can be justified due to “reasons ... of overriding public interest”, in accordance with Article 4(7)(c) of Directive 2000/60/EC.

II LEGAL BACKGROUND

EEA law

3. 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 (OJ 2000 L 327, p. 1, and Norwegian EEA Supplement 2011 No 35, p. 589) (“the Directive”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 125/2007 of 28 September 2007 (OJ 2008 L 47, p. 53, and Norwegian EEA Supplement 2008 No 9, p. 41) and is referred to at point 13ca of Annex XX (Environment) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, and the decision entered into force on 1 May 2009.

4. Article 4(7) of the Directive reads:

7. Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater; or

— failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

National law

5. The Norwegian Pollution Control Act No 6 of 13 March 1981 (*Lov om vern mot forurensninger og om avfall (forurensningsloven)*) (“the Pollution Control Act”) applies to all pollution within the confines of Sections 3-5, including pollution of water resources.

6. Pursuant to Section 7 of the Pollution Control Act, it is unlawful to do or initiate anything that may entail a risk of pollution unless this is lawful pursuant to Section 8 or 9, or permitted by a decision made pursuant to Section 11 of that act.

7. Under Section 16 of the Pollution Control Act, it is possible to impose conditions in a permit in order to counteract or limit damage caused by the activity in question. These conditions are binding on the permit holder.

8. Section 11 of the Pollution Control Act authorises the pollution control authority to issue pollution permits. The conditions for granting such permits are set out in the fifth paragraph of the provision:

When the pollution control authority decides whether a permit is to be granted and lays down conditions pursuant to section 16, it shall pay particular attention to any pollution related nuisance arising from the project as compared with any other advantages and disadvantages so arising.

9. The Directive is transposed into Norwegian law through the Regulation No 1446 of 15 December 2006 on a framework for water management (*forskrift om rammer for vannforvaltningen*) (“the Water Regulation”).

10. Section 4 of the Water Regulation establishes the obligations to prevent deterioration of surface water bodies, as well as the objective that all water bodies shall have good ecological and chemical status.

11. Article 4(7) of the Directive is transposed through Section 12 of the Water Regulation. It is a requirement for the granting of a permit under Section 11 of the Pollution Control Act, in relation to a water body, that the conditions set out in Section 12 of the Water Regulation are met.

12. Section 12 of the Water Regulation reads:

New activity or new interventions in a water body can be carried out even though the environmental objective in sections 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, and

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.

III FACTS AND PROCEDURE

13. In 2022, two Norwegian environmental NGOs, Friends of the Earth Norway (*Norges Naturvernforbund*) and Young Friends of the Earth Norway (*Natur og Ungdom*), took legal action against the Norwegian Government before Oslo District Court, arguing that the four following permits granted to Nordic Mining were invalid:

- (i) The King in Council's Royal Decree of 19 February 2016 ("the Royal Decree").

The decision gives Nordic Mining a pollution permit pursuant to Section 11 of the Pollution Control Act. The permit gives Nordic Mining the right to deposit 250 million tonnes of mining waste in the fjord.

- (ii) The Ministry of Climate and Environment's decision of 23 November 2021.

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

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

The decision concerns the granting of an operating licence pursuant to Section 43 of the Mining Act of 2008 (*mineralloven*)

- (iv) The Environment Agency's decision of 23 June 2023.

The decision concerns approval of the waste management plan pursuant to Chapter 17 of Regulation No 930 of 1 June 2004 on Recycling and Treatment of Waste (*avfallsforskriften*), and a revision of the existing pollution permit. The most important revision is the reduction in the total permitted quantity of tailings to be disposed in the fjord, which is reduced from 250 to 170 million tonnes.

14. The Royal Decree, which is the original pollution permit, is of particular importance to the present case. In this decision, the Norwegian Government sets out the reasons for applying the “overriding public interest” exception. Decisions (ii) and (iv) are subsequent adjustments to that original pollution permit. The pollution permit at issue before the referring court is thus a result of decisions (i), (ii) and (iv).

15. Decision (iii) does not affect the pollution permit as such. The validity of this decision is disputed because the environmental organisations contend that it is based on the premise that the pollution permit is valid.

16. The Royal Decree describes the mining project at issue as follows:

The planned project involves the extraction and processing of rutile (titanium dioxide) from Engebøfjellet in Naustdal municipality. The operation will be based on the extraction and further processing of eclogite ore from Engebøfjellet. To access the eclogite ore, waste rock will be removed and placed in a separate landfill on land. The eclogite ore is estimated to contain around 4 per cent rutile. This results in large quantities of tailings, which are mainly planned to be deposited in the outer part of the Førdefjord. Mining of the ore is planned as open pit mining for the first 15 years. The area covered by the open pit is approximately 200 acres (0.2 km²). The extraction in the open pit will include drilling and blasting, pigging (splitting of rock with spike hammers), loading and transport in dump trucks. Both a coarse crushing plant and a fine crushing plant are planned to be located in the underground facility, both in the open pit and underground phases.

Processing of ore includes crushing, grinding and various separation processes for the extraction of rutile and garnet. According to preliminary calculations, up to 20 per cent of the ore input will go to flotation, where chemicals are used to extract fine-grained rutile. Flotation of the fines will increase the yield of titanium dioxide. Flocculant will be used in the recovery of fresh water from the thickeners to achieve sufficiently good water quality in the recycled water. The flocculant will also help to bind (clump) the fines in the effluent so that the sinking rate increases, thereby preventing the spread of fine particulate material during sea disposal.

After dewatering, waste material from the separation process will be transported to a mixing chamber down by the seashore. In the chamber, the tailings will be mixed with seawater and aerated to remove air bubbles before the diluted slurry is fed into the pipeline down the rock face and discharged over the seabed. The

seawater, with its salt content, helps further flocculate fine particles flocculate further, so that they sink more quickly to the seabed and spreading is limited.

17. The Royal Decree summarises the advantages of the mining project at issue as follows:

The Ministry considers that the future revenues from mining activities are the dominant benefit for Norwegian society as a whole. The revenues are distributed between employees and shareholders, and as tax revenues to municipalities and the state. Naustdal municipality will receive increased tax revenues from the company through income and property tax, and from increased employment through taxes on general income, property tax and wealth tax. Other municipalities may receive increased revenue through income tax from employees who settle in their municipality. Corporate profits are taxed at 28%, which goes to the state. In addition, there is a state income from the employer's contribution, which for Naustdal is 10.6%.

These increased revenues are considered to have a major positive effect. The mining operations will also generate employment. The price of rutile will vary over time, but these are factors that the company will take into account when assessing the profitability of the project. Extraction from the deposit in Engebøfjellet will be able to meet the demand for rutile on the world market for many years, as the rutile deposit in Engebøfjellet represents one of the largest known deposits in solid rock. This undertaking could therefore ensure increased employment in a long-term perspective. Locally, an increase in tax revenues and employment could have a significant impact. All in all, the project is expected to have a major positive effect on settlement locally, not least Naustdal, which is a relatively small municipality that has long been in a slightly declining population trend.

18. According to the request, the Royal Decree states that the future revenues from the mining activities at issue are the dominant benefit. Furthermore, it states that these revenues consist of three components, namely: (i) income for employees, (ii) income for shareholders, and (iii) tax revenue for the state and municipality.

19. The referring court explains that before national courts, the Norwegian Government has also argued that the pollution permit at issue in the main proceedings, in addition to the economic justifications set out in the Royal Decree, can also be justified on grounds of (i) its employment effects (increased local business activity, employment and settlement), (ii) increasing the global supply of rutile, and (iii) ensuring Norway and Europe access to critical minerals.

20. The parties to the case before the referring court disagree as to what interests are relevant in the case at hand, what interests the Royal Decree is based upon, and whether national courts are entitled also to consider interests that are not set out in that decree.

21. By judgment of 10 January 2024, Oslo District Court dismissed the application in full. Both organisations appealed that judgment to Borgarting Court of Appeal.

22. Against this background, the referring court decided to refer the following questions to the 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**

IV WRITTEN OBSERVATIONS

23. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Friends of the Earth Norway and Young Friends of the Earth Norway, represented by Asle Bjelland and Amund Noss, advocates;

- the Norwegian Government, represented by Henrik Vaaler and Karen Mellingen, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Hildur Hjörvar, Erlend M. Leonhardsen, Kyrre Isaksen, and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Lorna Armati and Eulalia Sanfrutos Cano, acting as Agents.

V PROPOSED ANSWERS SUBMITTED

Friends of the Earth Norway and Young Friends of the Earth Norway

24. Friends of the Earth Norway and Young Friends of the Earth Norway submit that the questions referred should be answered as follows:

As regards the first question:

a) The overriding public interest condition involves a two-step assessment:

A relevance test where a distinction is drawn against ordinary public interests and private interests. Only fundamental public interests are relevant.

A balancing test where the benefits of achieving the fundamental public interests is weighed against the disadvantages of not achieving the environmental objectives. In order to justify an exemption, the benefits of achieving the fundamental public interest must significantly outweigh the disadvantages of not achieving the environmental objectives.

b) Exemptions from the general prohibition against deterioration must be interpreted strictly, taking into account the precautionary principle.

As regards the second question:

a) Purely economic considerations (i.e. the expected gross income generated by the planned mining operations) can not constitute an “overriding public interest”.

b) Income for shareholders cannot constitute an “overriding public interest”. It is a private interest, not a “public” interest. Furthermore, it is a purely economic interest that does not qualify as “overriding”.

c) Tax revenue for the state and municipality cannot constitute an “overriding public interest”. This is a fiscal consideration. In line with case law from the CJEU in other areas of EU law, this public interest does not qualify as “overriding”.

d) Wage income for employees can not constitute an “overriding public interest”. It is a private interest, not a “public” interest. Furthermore, it is a purely economic interest that does not qualify as “overriding”.

As regards the third question:

a) Employment effects (increased local business activity, employment and settlement) are entirely ordinary effects of facilitating industrial activity. Such effects can, as a general rule, not constitute an overriding public interest. To the extent that there are exceptions, they must be limited to exceptional cases, such as the closure of a business on which the local community is based, which could lead to mass unemployment and social unrest.

b) Contributing to the global supply of rutile cannot constitute an "overriding public interest". For the project to be of public interest, it must be specifically stated and explained in the permit that the production is of strategic importance. A case-by-case assessment would then be required to ensure that the public interest served by the project overrides the adverse impact on the environment. Contributing to the global supply cannot be considered a project of strategic importance.

c) Ensuring Norway's and Europe's access to critical minerals may in principle be a relevant consideration, but the project must be designed to meet this objective and the reasons for the project must be specifically stated and explained in the permit. A case-by-case assessment is required to ensure that the public interest served by the project overrides the adverse impact on the environment.

Norwegian Government

25. The Norwegian Government submits that the questions referred should be answered as follows:

Question 1:

The reference to “overriding public interest” in the first alternative in Article 4(7)(c) of Directive 2000/60/EC refers to the types of interests that may justify a derogation from Article 4(1) of the Directive, without requiring a balancing of interests.

Questions 2 and 3:

Production of rutile and garnet for the global market, ensuring access to critical minerals, generation of income for owners, workers and society (through taxation) and creating jobs in a remote region may all constitute an “overriding public interest” pursuant to Article 4(7)(c) of Directive 2000/60/EC.

ESA

26. ESA submits that the questions referred should be answered 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).

European Commission

27. The Commission submits that the questions referred should be answered as follows:

1. The notion of reasons of overriding public interest, referred to in Article 4(7) of Directive 2000/60/EC, must be interpreted in the sense that it includes public interests of such an importance that they can outweigh the objectives pursued by the Directive. Ascertaining whether such reasons exist requires a case-by-case balancing of the advantages of a project causing a deterioration in the status of a water body and its negative impact on that water body.

2. Article 4(7) of Directive 2000/60/EC must be interpreted in the sense that:

- Income generated as a result of an economic activity, including for employees, shareholders or the State through taxes, cannot be considered*

to have an overriding public interest within the meaning of Article 4(7) of Directive 2000/60/EC;

- *certain considerations linked to the social or economic situation of a particular area, or the contribution of a project to the security of supply of strategic raw materials in the Union, may be considered to have an overriding public interest within the meaning of Article 4(7) of Directive 2000/60/EC, provided that all the other conditions set out therein have been fulfilled.*

Páll Hreinsson
Judge-Rapporteur