



NORSKE
LAKSEELVER



Norges
Naturvernforbund
Friends of the Earth Norway

EFTA Surveillance Authority

Re. Case No: 69544

Oslo, 11th of October 2013

COMMENTS ON THE NORWEGIAN GOVERNMENT'S REPLY TO THE ESA REGARDING THE CASE ON THE WATER FRAMEWORK DIRECTIVE AND REVISION OF LICENSING IN REGULATED WATERWAYS

With reference to the ESA's question to the Norwegian government in the letter dated 13 May 2013 and the Norwegian government's reply in the letter dated 31 July 2013, the undersigned find it necessary to comment on the Norwegian government's reply. The complainants maintain that the Norwegian regulations, as interpreted by the Norwegian government, still involve obstacles for the correct implementation and compliance with the Water Framework Directive in Norwegian law.

1 THE NORWEGIAN GOVERNMENT APPARENTLY WAIVES THE CLAIM THAT ENVIRONMENTAL OBJECTIVES SHOULD BE BASED ON EXISTING LICENSES

In our complaint in March 2011, it was stated that the first River Basin Management Plans (RBMPs) - pilot plans for selected river basins applicable until 2015 - were not in line with the Water Framework Directive. In the Royal Decree of 2010, it was determined that "*environmental objectives in regulated rivers should be based on existing conditions in the old hydroelectric concessions*". This meant that the environmental objectives, River Basin Management Plans and implementation of environmental measures in regulated rivers were controlled by the Norwegian revision framework regulations, with changes allowed after 50 or 30 years, and not by the Water Framework Directive. In the government's response letter this position seems to be abandoned, see letter page 3, first paragraph under Main point 2:

"The Decree (The Royal Decree of 2010) states that the environmental objectives should be set within the existing licencing conditions. This applies only to the environmental objectives that were set in 2009 for the voluntary planning period until 2015. For the first, ordinary planning period of 2015-2021, a new Royal Decree will be

passed in 2015. The environmental objectives for the coming periods will be determined prior to the competent authorities' decisions to impose new environmental measures. The environmental objectives for the heavily modified water bodies are set independently from existing conditions given in the water course regulation licenses."

The complainants consider that the statement in the reply letter that environmental objectives in regulated rivers "are set independently from existing conditions" is fundamentally different from the statement "is set within the existing licensing conditions", as is stated in the Decree from 2010.

In their reply letter, the Norwegian government is trying to establish two different interpretations of the law on the relationship between the Water Framework Directive and the Norwegian revision framework regulations: one for the first plan period and another for the subsequent plan periods. Such a distinction has not previously been expressed, and is not based on a correct legal understanding. On the contrary, the Norwegian government has reproduced the content of the Royal Decree in 2010 for the first planning period on the relationship between revisions and River Basin Management Plans in several contexts, including the Oil and Energy Department's "Guidelines for revising the licensing of watercourse regulation" from May 2012, and in the national review of hydropower revisions that may be revised in 2022 (screening) from October 2013. We deal with this in more depth in section 2.3 and section 2.4 below.

In its letter of 31 July, the Norwegian government states that licenses should be reviewed every six years in accordance with the Water Framework Directive's plan cycle, *regardless* of the existing legal framework, see page 6, second paragraph:

"The cycle for the revision is not an obstacle to the review of permits and imposing of mitigation measures every sixth years. Upon indication that the environmental objectives under Article 4 are unlikely to be reached, all relevant permits will be reviewed every sixth year in accordance with Article 11 (5) and with the planning cycles of the Directive. This will take place regardless of which legislation the license is pursuant to. Revision pursuant to the Watercourse Regulation Act can be carried out every thirtieth year. Revision is one of a range of instruments describes in the letter from the Ministry of 31 May 2012. Other instruments may be used in the period between revisions in order to ensure the fulfilment of the Directive."

This statement demonstrates an apparent willingness to comply with the Directive. We argue that this is not the case, seeing that the instruments that are discussed are neither suitable nor sufficient to meet the requirements of the Directive.

2 THE REGULATIONS ARE INADEQUATE AND FRAGMENTED

Although the Norwegian government in its letter of 31 July now states that one should consider the objectives and measures regardless of pre-existing conditions and revision date, this does not necessarily infer an implementation of environmental objectives in line with the Directive's requirements. Despite this, the Norwegian government maintains that

Norwegian legislation is adapted so as to ensure compliance with the Water Framework Directive. The Norwegian government has not indicated a need or plan for rule changes.

2.1 Water management and international obligations cannot be controlled by exemptions

In the letter to the ESA on page 5, the Ministry of the Environment states:

"The legal framework covering the hydropower sector is, as for many others sectors in the Norwegian legislation, associated with legal standards, such as «special circumstances». These legal standards can be adapted to reflect changes in social opinions or new international legal obligations. This is also ensured through the general principle of interpreting Norwegian legislation so that it matches with the EEA law.

As mentioned in the Ministry's letter to the Authority dated 31 May 2012, the criteria for using the Water Resources Act's Article 28 for amendment of the provision are available if the environmental objectives cannot be otherwise fulfilled. The fact that amendments are needed to fulfil the environmental in the Directive will be defined as a «special circumstance». The same applies to the rules for summoning old unlicensed hydropower according to the Water Resources Act's Article 66."

The provisions invoked for use in ordinary water management is under Norwegian law reserved for "special circumstances" and are regarded as safety valves for special circumstances. Reference is made to the detailed explanation of the Ministry's letter of 31 May 2012 and our comments on this in a letter to the Authority dated 29 June 2012. It further states in the Water Resources Act's legislative history that the conversion pursuant to section 28 is not intended to include cases the Ministry now interprets as "special cases", see note issue to the Water Resources Act , Brekken et al, p 154:

"The right to reversal because of changes in values and social perception comes in a different position."

The author continues as follows:

"If emphasis placed on general considerations, one would face a real statutory revision access, which the preparatory work expressly states is not intended."

Requirements for environmental improvements justified by a greater emphasis on environmental concerns today than at the time the license was issued is clearly outside the scope of the Water Resources Act section 28. When it comes to the need to capture the obligations in the Water Framework Directive, the complainants do not find the Ministry's interpretation of the rules in the Norwegian water management legislation reassuring. The obligations set in the Directive and established environmental objectives for the management of *all* regulated rivers cannot be based on rules which provide for revision only in "special circumstances" and where the express purpose of the rules is different than the purpose of the Water Framework Directive.

2.2 The framework is fragmented, unclear and ambiguous

In its letter to the ESA, the Ministry writes on page 5:

“The water management legislation is complicated and has been developed stepwise over many years. However, these rules are neither unclear for the authorities that manage them, nor for the stakeholders in the hydropower sector. Extensive information material and guidelines for the stakeholders have also been developed.

Although the instruments in the hydropower sector are to be found in several acts and permits issued pursuant to these acts, the available policy instruments are coherent and familiar to the stakeholders in the water sector.”

The complainants represent municipalities, NGOs and river owners affected by hydropower development, and are important players in the management of regulated rivers and the processes of revision of the old licenses. We share the view of the Norwegian government that the current legislation is complicated. But contrary to what is claimed in the letter, our experience shows that the rules for revision of older license are both *complex and incomplete*, they lack regulatory procedures, and regulations are subject to *various interpretations* and appear *unclear* to stakeholders. We do not recognise the Ministry’s description. We refer to the current Guidelines for revising licenses and the screening report that we will discuss below, which show a different interpretation of the central points than what the government now apparently presents to the ESA. The relationship between the different rules, screening and between participants in the management process is not only unclear to NGOs, municipalities and hydropower companies, but also to the administration itself. This was illustrated in a letter from the River Basin District Authority of Sogn og Fjordane to NVE dated 2 November 2012:

“It is not clear to us how the national review and the list of priorities for coming revisions of watercourse licences are to be used further on.(...)”

We kindly ask for a clarification of the situation between the management plan and the national list of priorities. The Norwegian Water Resources and Energy Directorate (NVE) have stressed that both the national review and the prioritisation of future watercourse licences and the management plan are to be incorporated into the basis for decisions in the revision case. We believe there should be better correlation between the Water Regulation/the management plan and future watercourse revisions.”

Based on this, our view is that the ESA’s criticism of the Norwegian framework as fragmented, incomplete and unpredictable is justified and necessary.

2.3 Guidelines for revising licenses are contrary to the government's claim to the ESA

The guidelines for the revision of licensing of watercourse regulation, published in May 2012, differ in significant respects from the interpretation the Norwegian government now states to ESA.

The guidelines for revisions from 2012 states on page 19 regarding the River Basin Management Plans and the relationship to revisions:

“The sector authorities are responsible for reporting on the premise for environmental objectives within their areas of responsibility (the Water Regulation Section 22) as part of the work on the management plans. If more thorough reports are made as part of the revision process and new conditions are set, the environmental objectives will be adjusted in the next planning phase. By way of a revision of the conditions in a hydro power license the basis for new environmental objectives and remedial measures will be thoroughly evaluated and established.”

As it is stated here, the Norwegian government confirms the opinion which was assumed by Royal Decree in 2010: The environmental objectives in regulated rivers should continue to be based on existing conditions in regulated rivers, and not be set independently of those. In other words, the guidelines gives precedence to the revision framework over the Water Framework Directive, which is the opposite of what Norway is now indicating in its reply to the ESA.

According to the Oil and Energy Minister's foreword (page 5), the guidelines form the basis for consideration of revision issues for years to come. The guidelines from 2012 are prepared for future revision matters. It therefore appears somewhat strange to the complainants that the Norwegian government in their letter to the ESA 31 July 2013 claim that it was only the first River Basin Management Plans drawn up for 2009-2015 which would base their targets on the existing license conditions, seeing that the right perception is also applied in the revision guidelines for *future* revision matters.

The current guidelines, which guide the many stakeholders in Norwegian water management, are not in accordance with the Ministry's letter to the ESA. Unless the guidelines are altered at this point, it will be the policy expressed therein, and not Norway's reply to the ESA, that will be practised.

It is further stated in the guidelines that the sector authority is not bound by the objectives and constraints the River Basin Management Plans assume, as the *energy sector is free* to emphasize their sectorial considerations (emphasis added):

“An approved regional plan will form part of the basis for the licensing authority's processing of a revision case. In this processing work further clarifications will be carried out as well as concrete assessments of the advantages and disadvantages of the various measures until a final decision is made on implementing the measures. The licensing authorities may therefore pass decisions that are not consistent with the plan. If during the revision work it becomes necessary to depart from the assumptions in the approved plan, the authority in question is to ensure that the river basin authority is informed. The reason why the plan has been departed from must be

described when reporting the implementation of the measures and the next time the plan is rotated. The management plan is to be updated every six years. New conditions that are provided through a revision are to be included in this updating and the environmental objectives in the management plan are to be adjusted in accordance with new conditions.

Measures and appurtenant instruments are to be considered every six years when updating the management plans. Instruments other than revision can be used irrespective of the time of the revision if environment-improving measures are to be given priority.

Topics that have not been covered complement in the management plan may be important considerations linked to user interests (e.g. transport and aesthetic aspects). National considerations such as supply security and national commitments linked to share of renewable energy could also be weighted differently in the revision. These may be some of the reasons why conditions imposed in connection with revision differ from those recommended in the management plan.

Norway is more dependent on hydro power than any other country in Europe. Reservoirs and power that can be regulated are essential to a safe supply of energy where the amount of water varies a lot through the year and from one year to the next. It is necessary to household the water strictly with water in order to obtain the greatest possible advantage. This requires thorough assessments of the licensing authority through the revision process.”

It appears from the above that the Norwegian revision framework, according to the Norwegian government, *will prevail over the Water Framework Directive*, and the energy sector authority may supersede requirements for increased water minimum flow as a tool for environmental improvements in River Basin Management Plans, for example with reference to the interests of security of supply.

It is the complainants' view that this approach is based on an incorrect interpretation of the law when it comes to Water Framework Directive's status in Norwegian law.

2.4 There is no correlation between the content of the screening report and the Water Framework Directive

The national review and proposed priorities for hydropower licenses which may be revised in 2022 (the so-called screening), were presented on 2 October 2013 by NVE and the Environment Directorate (formerly the Directorate for Nature Management) in report 49/2013.

The report points to the need for better environmental conditions in many regulated rivers, and the complainants appreciate that the government recommends the introduction of minimum water flow and restrictions on maneuvering in many regulated water bodies in the upcoming revision cases. But when it comes to the question that is the subject of this complaint - the relationship between the revision framework, environmental objectives and

River Basin Management Plans - the screening confirms that the Norwegian government plans for the revision framework to take precedence over the Water Framework Directive, and the fulfilment of environmental objectives in regulated rivers will be postponed pending revision.

It appears from the report summary on page 6 that the Ministry of Oil and Energy guidelines for revision from 2012 have been used for the screening, and that only those waterways which may be revised in 2022 under the Watercourse Regulation Act and the Industrial Licensing Act that have been considered. It is further stated in the fifth paragraph that the national review of watercourses will be an important input when determining the objectives for these watercourses, and that environmental objectives should be the basis for subsequent sector decisions. It is further emphasised that the results of the screening will not limit the scope for water region authorities and local stakeholders in the work of the River Basin Management Plans.

However, on page 11 of the report, the following is stated (emphasis added):

"For prioritised rivers, with important fish stocks and biodiversity, it would be natural to assume minimum water flow which, in combination with other measures, will be required to meet the environmental objective of good ecological potential (or good ecological status) in accordance with the Water Regulation (...) The date for revision for prioritised water bodies should have implications for which planning period the objectives should be achieved."

Section 4.5 (page 24-25) of the report describes the relationship between the water regulation and River Basin Management Plans (emphasis added):

"The planning must have realistic ambitions in each planning phase with respect to the number of challenges to take on. This means that the deadlines to meet environmental objectives can be extended with a view to gradual achievement, provided that there is no deterioration, cf Water Regulation section 9 regarding extended deadlines. (...) As an example, the time of revision to the relevant water bodies have a bearing when the objectives can be reached. (...)

(...) In order to achieve good ecological potential, remedial measures must be implemented, either pursuant to the existing license or to be established in the new conditions after the revision of the terms are completed. "

It is the complainants' view that lack of access to revision in accordance with watercourse law is not one of the circumstances that may justify an extended deadline in accordance with the Water Regulation section 9 (Article 4, paragraph 4), as the screening report states. Furthermore, the complainants assert that the Norwegian government is required to establish the necessary legal framework to make the changes in the licenses required for achieving environmental objectives within normal deadlines, ie at least every six years.

Moreover, the Norwegian government states the following regarding the water management plan's importance (emphasis added):

"It is in this context important to point out that the results of the revision project will not limit the scope for water region authorities and local stakeholders in their work on management plans. They are free to propose environmental objectives and environmental measures and to provide input as to which revisions should be prioritized in the regional work of water management plans and action programs."

It is the complainants' view that water region authorities through the preparation of River Basin Management Plans do not *propose* objectives and environmental measures, but *set* these, which are binding for the relevant sectorial authorities. Environmental objectives and appropriate action are thus not "*inputs*" to which revisions should be prioritized, but binding guidelines for energy authorities.

In its letter, the Norwegian government writes that the screening does "*not [affect] the requirement for custom environmental objectives that apply to all heavily modified water bodies.*" The assumptions made by the Norwegian government in relation to this are not fully expressed in the letter to the ESA, but in the screening report:

- The achievement of environmental objectives can be postponed until the next ordinary revision
- The River Basin Management Plans only *propose* objectives and environmental measures and provide *input* to which revisions should be prioritized

2.5 Mid-term reporting and the Norwegian government's view on relevant measures

The fact that the Norwegian government expresses completely different views on the right to incorporate measures that require new conditions between revision intervals under the Watercourse Regulation Act also appears from the mid-term report from May 2013 on the Program of Measures covered by the River Basin Management Plans for the planning period 2009-2015.

In the interim report called "Reporting of progress on the Implementation of the Programs and Measures in Norway (2009 River Basin Management Plans)," 11 percent of the Measures for 2009-2015 are regarded as not relevant. At page 4 some of the reasons for this are explained:

"Some of the measures listed in the programme were regarded as not relevant for implementation anymore, or not prioritized. (...) Some of the measures could not be implemented at the regional level due to lack of legal basis for their implementation.

(...)

For regulated rivers, some measures are registered as possible only by a revision of licenses at national level. At the time of this report there is an on-going national process on revisions of licenses and possible measures. The work is conducted by

relevant national CAs, with the National Environment Agency (NEA) and the Norwegian Water Resources and Energy Directorate (NVE) leading the process.”

In this mid-term report from May 2013, the revision framework is considered as an *obstacle* to action of the stimulus program unless there is revision access. The narrow exceptions which the Ministry refers to in its letter to the ESA as relevant provisions between the review dates are not mentioned. Instead, measures that require revision are regarded as irrelevant.

3 SUMMARY

The European Commission has, in its evaluation of the EU member states' River Basin Management Plans, pointed out the need for close coordination between the government sector and *a clear and consistent regulatory framework* that ensures plans have the actual intended effects. The Commission has also in its feedback to the EU member states pointed out that the legal status of the River Basin Management Plans are important to how water directive will be implemented in practice. It is the complainants' opinion that this will be required in order for the Norwegian government to ensure the implementation of the Water Framework Directive's requirements in respect of regulated rivers.

The complainants maintain that Norway has not made the necessary implementation of the EU Water Framework Directive into Norwegian law. The interpretation of the law as expressed in the "Guidelines for revising licensing in regulated rivers", reveals that Norway maintains that the national revision framework in case of conflict prevails over the Water Framework Directive. The guidelines further reveal that the energy sector authority considers itself elevated above other sector authorities in the management of regulated rivers. This view is confirmed in the latest report of the national review of revisions (screening), which was announced on 2 October 2013. It states that the time period for revision under the Watercourse Regulation Act is decisive when determining when environmental goals can be reached.

A different approach can only be expected in "exceptional circumstances". Our review shows that these other instruments referred to in the Ministry's letter are neither appropriate nor sufficient to constitute the necessary harmonization of the Water Framework Directive's requirements. The complainants argue that the Norwegian government, through a subtle art of interpretation, attempts to interpret the Water Framework Directive's requirements for environmental improvements as adequately implemented in the current Norwegian law.

The Norwegian government's handling of the complaint to the ESA, as the complainants see it, demonstrates the need for further action from the ESA.

If requested, we are also available to meet with ESA on the matter.

For any questions regarding this letter, please contact Tine Larsen (e-mail tl@lundogco.no, phone +47 99 11 99 31) or Stein Erik Stinessen (e-mail ses@lundogco.no, phone +47 99 11 99 12).

Best regards

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