



ROYAL NORWEGIAN MINISTRY
OF THE ENVIRONMENT

EFTA Surveillance Authority
Rue Belliard 35
1040 Brussels

Your ref
69544

Our ref
12/3553

Date
20.12.2013

Regarding implementation of the Water Framework Directive as regards heavily modified water bodies: The Norwegian Government's observations on the issues raised at the package meeting of 22nd of November 2013, and the Norwegian Government's comments to the complainants' letter of 11th October 2013

Dear Madam/Sir,

The Ministry of the Environment (the Ministry) refers to the package meeting with the EFTA Surveillance Authority (the Authority), on 22nd of November in Oslo, and to the complainants letter to the Authority of 11th October 2013.

Part one. The Norwegian Government's observations on the issues raised at the package meeting

The Royal Decrees in 2010 and consequences for the implementation of the Water Framework Directive (the Directive), in particular for objectives already set in the first (test) phase

The Royal Decree of 2010 concerned the first voluntary plans. For regulated rivers, this Decree states that the environmental objectives ("good ecological potential") should be set within the existing licencing conditions. This was a temporary arrangement and a practical guidance on how to determine the environmental objectives at that point. Loss of balancing capacity was in 2010 considered to give "significant adverse effect" in Norway until the licences could be examined more thoroughly.

In October 2013 an analysis (the screening) commissioned by the Government was presented.

The screening suggested priorities where loss of energy due to environmental improvements, is relevant for the licenses due for revision. Revision is one of the most important legal tools for obtaining the objectives of the Directive, and the analysis is an important tool in the process of defining the “significant adverse effect” on hydro power production as a result of mitigating measures imposed in regulated water bodies in accordance with the Directive Article 4.3.

As stated before, Norway will carry out the processes that the Directive requires for all water bodies. This will also be reflected in the Royal Decrees of 2015. The environmental objectives for the coming periods will be determined prior to the competent authorities’ decisions to impose new environmental measures. Environmental objectives set in the voluntary plans will be considered, and if necessary, altered and set independent of existing conditions in licenses, as it will for all heavily modified water bodies (HMWBs) comprised by the first ordinary and binding RBMP as described in our letter from 31th of May 2012 (page 4). The management plans (2015) will form the basis for the individual revision cases and the other environmental measures.

The guidelines for revising the licensing of watercourse regulation

The Norwegian Government is of the opinion that there is no conflict between the guidelines and the obligations set out in the Directive.

The purpose of the guidelines is to clarify to the authorities and stakeholders what is expected at each stage of the revision process. These guidelines are not legally binding. The guidelines also describe values that are the most important to take into account in the assessment of revision of terms. Examples of such values are recreation and landscape, fish and fishing, endangered species etc.

It is expected that the guidelines will contribute to more predictability for all parties involved in the revision process. Along with the screening and management plans, the guidelines are expected to provide a better decision basis and more consistent and efficient processes.

The guidelines also describe the relation between the Directive and the revision process. Since this is a guideline for the revision process, and not a guideline for implementing the Directive, it does not go into details about the Directive. In spite of this, the guidelines still support a correct understanding and application of the Directive. Hence, the Norwegian Government considers that it is not in conflict with what has been communicated to the Authority earlier in our letters from 2012 and 2013;

- *The environmental objectives will be set based on updated knowledge (the Ministry’s letter of 31st July 2013).*
- *The objectives are set independently from existing conditions given in the licences (the Ministry’s letter of 31st July 2013).*
- *Other tools can be used in the period between revisions if environmental measures should be prioritized (the guidelines).*
- *The objectives and the programme of measures will be updated every six years and take into account new knowledge (the guidelines).*

- *Through the revising, the basis for setting the objectives and program of measures for the next planning period can be changed (the guidelines).*

It appears nowhere in the guidelines that environmental objectives should be based on the existing license conditions, as the complainants claim in their last letter. The revision process will most likely provide more knowledge about the potential for environmental improvements in the water course. The objectives for HMWBs might be adjusted based on new knowledge. The objectives may be adjusted to a lower or a higher level. The environmental objectives can only be adjusted based on the planning process for the RBMP every 6th year.

However, if the Authority finds a mismatch between the Directive and the guidelines, we will of course amend the guidelines accordingly. The guidelines can easily be adjusted by the Ministries if necessary.

An update on the ongoing revision process for licenses in Norway

About 30 cases of revision are now in process. The number of cases that will be processed and completed will increase in the coming years. So far, all cases where a local community or others have wanted to start a revision, are in process.

In order to prepare for the increasing number of revision cases in the years to come, the authorities have produced an overview (screening) of potential cases (about 400) and made priorities, as already mentioned. The priorities were made based on potential for environmental improvements and potential for loss of energy production. The screening will help to assess the environmental objectives for heavily modified water bodies.

The environmental objectives will be based on an individual assessment of costs and benefits for the society. The screening can be seen as a cost-benefit analysis, and an important input in defining a national “significant adverse effect” with regards to environmental objectives for regulated watercourses for the approximately 2000 heavily modified water bodies.

The screening will not replace any part of the national implementation of the Directive in Norway. It does not affect the requirement of individually set environmental objectives which applies to all heavily modified water bodies. Environmental objectives for water bodies that are not included in the screening will also be set in accordance with the Directive.

The screening will not influence when the objectives are to be met. Other tools than revision can be used between the revision periods. We are aware that this issue is somewhat inaccurate described in the screening report from the Directorates. The Government does not intend to use the screening as a way to postpone the achievement of the objectives. At this point, it is difficult to estimate the extent of exemptions that will be used.

Part two. The Norwegian Government's comments to the complainants' letter of 11th October 2013

We find part of the complainants' last letter to be a misrepresentation of the Norwegian Government's view, and we appreciate the opportunity to clarify this.

Amendments of a Royal Decree

The complainant's letter can be interpreted to the extent that there is no legal basis for amending a Royal Decree from one planning period to another. This is not correct. The Norwegian planning system implies that the RBMPs should be approved by Royal Decree every six years in accordance with the Directive. There is no need for legislative amendments in Norwegian law to adopt a Royal Decree with a different approach compared to the previous Decree.

Exemptions from the general rule

The implementation of the Directive will not be controlled by use of exemptions from the general rules in the water and energy legislation, as the complainants claim. Neither revision of terms, nor the imposed environmental improvements pursuant to the standard environmental terms are exemptions. These will be the most important tools to fulfil the obligations in the RBMPs. The standard environmental terms provide a legal basis for individually adapted environmental conditions. Such measures can for example be improvement of the natural reproduction of the native fish stocks, sustainment of the fish migration, physical mitigating measures such as improved spawning grounds etc. It is expected that these tools will have an important function in meeting the requirements of "good ecological potential" in accordance with the Directive. Summoning of unlicensed hydropower facilities and modification of terms in existing licenses will primarily be applied for older hydropower. The environmental objectives in the Directive are considered to be "special circumstances" as referred to in the relevant sections in the Water Resources Act.

Changes in the environmental objectives

The complainants argue that it appears in the guidelines as if Norwegian legislation will prevail over the Directive, inter alia by the fact that the relevant licensing authority can replace requirements of minimum flow release in the RBMP with reference to security of supply.

The guidelines state that "Through a revision of terms in a license the basis for new environmental objectives and mitigating measures will be thoroughly considered and determined."

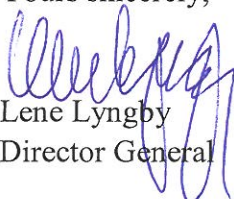
A revision could bring about the need for adjusting the environmental objectives, as the cost-benefit considerations may change over time, and new knowledge may appear. The assessments in the revision cases are more detailed than the assessments when setting environmental objectives in accordance with the Directive. This practice is in line with the intention of the Directive, as the environmental objectives for all exemptions and for HMWBs, may be updated every six years.

It appears clearly in the guidelines that environmental improvements can be done independently of the time of the revision.

If the loss of security of supply is considered to be a larger cost than the benefit of environmental flow, it is clear that security of supply may prevail over requirements of minimum flow release. Considerations regarding security of supply and other considerations must of course, as far as possible, be a part of the determination of the environmental objectives. According to requirements of legal protection in Norwegian law, it would be unacceptable that a plan should replace the rules concerning handling of individual cases according to Norwegian administrative legislation and relevant sector legislation. New politics, new knowledge and new assessments – which also are relevant considerations in terms of the Directive – can influence and be emphasised differently over time. This does not imply that Norwegian law will prevail over the Directive.

Please do not hesitate to contact us if the Authority finds need for further clarification.

Yours sincerely,


Lene Lyngby
Director General


Tor Simon Pedersen
Senior Adviser

