

Case handler: Marcus Navin-Jones
Tel: +32 2 286 18 11
e-mail: Marcus.Navin-Jones@eftasurv.int

Brussels, 6 May 2022
Case No: 88013
Document No: 1262901

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

Dear Sir/Madam,

Subject: Request for Information concerning WFD compliance and current Norwegian measures in place to eliminate or reduce the environmental effects of certain activities on water bodies in Norway to ensure the Article 4 WFD requirements, and other relevant requirements, are met

On 17 January 2022, Internal Market Affairs Directorate (“the Directorate”) of the EFTA Surveillance Authority (“the Authority”) opened an incorrect implementation/application case (Case 88013) to investigate the application of Directive 2000/60/EC establishing a framework for Community action in the field of water policy (“Water Framework Directive” or “WFD”) and concerns relating to the robustness of the current Norwegian measures in place to eliminate and/or reduce the environmental effects of hydroelectric power plants on water bodies in Norway and compliance with the WFD requirements.

In order for the Authority to further examine and assess the case, the Authority would be grateful if the Norwegian Government could reply to the questions set out below and provide any further information or input as the Norwegian authorities deem relevant.

From the outset, the Directorate notes that this Case 88013, and in particular this request for information, relates to a particular activity – namely hydroelectric power production in Norway. The Directorate notes that, in the past, the Authority has opened cases relating to the same activity, which include, for example, cases focused on compliance with Directive 2006/123/EC on services in the internal market (“the Services Directive”) and EEA Competition law.¹ For the avoidance of doubt, the focus of Case 88013, and of this request for information, does not relate to issues which have been the subject of investigation in past or previous cases. Case 88013, and this request for information, is focused on EEA Environment Law and compliance with the WFD, and in particular, how Norway eliminates or controls the environmental effects arising from the operation of hydroelectric power plants. As such, the Case 88013 is not concerned with hydroelectric power production in Norway per se, but the extent to which the environmental effects and impacts of hydroelectric power plants are controlled to ensure compliance with, amongst other requirements, the Article 4 WFD environmental objectives. For that reason, this letter has been addressed to the Norwegian Ministry of Climate and Environment.^{2,3}

Before setting out the questions, the Directorate sets out the general background and aims of this request for information.

¹ See, for example, Cases 69674, 83484 and 83485. See also, Judgment of the EFTA Court of 26 June 2007, *EFTA Surveillance Authority v Norway*, Case E-2/06.

² The Directorate understands that the Norwegian Ministry of Climate and Environment will liaise with other Norwegian Ministries, such as the Norwegian Ministry of Petroleum and Energy, before replying to this letter.

³ The Directorate notes that some previous cases examined by the Authority in the past have included an examination of some of the environment issues associated with hydroelectric power production (see, for example, Case 69544 – closed 15 May 2018). Case 88013 aims at assessing environmental issues, including WFD compliance, in light of the latest available information.

Part 1: Background and aims

Norway benefits from a large number of water bodies situated within its legal jurisdiction. EEA law, in particular the Water Framework Directive⁴ (“WFD”), requires Norway to ensure, amongst other things, that water bodies which fall within its legal jurisdiction achieve certain ecological and chemical outcomes, and do not deteriorate.⁵

Norway has developed an extensive and sophisticated hydroelectric power industry. A significant number of hydroelectric power plants have been developed and now operate within, or on, Norwegian water bodies. The hydroelectric power plants may have environmental effects and impacts on the water bodies where they are situated.

Water bodies where hydroelectric power plants are situated are not excluded from the scope of the WFD.⁶ The operation of hydroelectric power plants may cause environmental effects which are liable to be incompatible with the environmental objectives as laid down in the WFD. As such, Norway is required to, amongst other things, “...implement the necessary measures...”⁷ to ensure relevant water bodies where hydroelectric power plants operate, comply with the WFD and achieve good ecological and chemical status/potential. Norway is also required to ensure that, as regards these water bodies, there is no breach of the non-deterioration principle as codified in the WFD.

This request for information aims, amongst other things: (1) to verify that one of the legal means by which Norway has sought to identify, control and eliminate the environmental effects and risks posed by the operation of hydroelectric power plants on water bodies – is by requiring operators of hydroelectric power plants to obtain and retain licences; (2) identify any other legal means (excluding the licensing system) by which Norway controls and eliminates the environmental effects and risks posed by the operation of hydroelectric power plants on water bodies; and (3) assess the extent to which the current Norwegian system of licensing is sufficiently robust to ensure the operation of hydroelectric power plants in Norway does not cause environmental effects and harm which: (aa) result in deterioration of water bodies in breach of the Article 4 WFD environmental objectives and/or (bb) which prevents water bodies from achieving the ecological and chemical outcomes set out in the WFD by the relevant deadlines.

Part 2: Questions

1. Norwegian system of controls regulating and controlling the action and inaction of hydroelectric power plant operators

Please confirm that in order to ensure that the requirements set out in the WFD are met, Norway has adopted a number of legal measures which, amongst other things, regulate and control the action and behaviour of the companies and other entities which operate hydroelectric power plants in Norway, so that their actions and behaviour do not undermine, prevent or impede the Article 4 WFD environmental objectives from being achieved, or cause a breach of the principle of non-deterioration codified in the WFD. As regards the legal measures which Norway has adopted controlling the behaviour of hydroelectric power plant operators, please explain whether:

⁴ 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

⁵ See Article 4 WFD.

⁶ The Directorate notes that certain provisions contained within the WFD may be of particular relevance vis-à-vis hydropower production activities.

⁷ Article 4(1) and Preamble (26) WFD

- a. The Norwegian system of granting and revising licences (including the terms and conditions set out in licences) to operators of hydroelectric power plants in Norway constitutes the single most important legal measure to control the actions and behaviour of operators of hydroelectric power plants, and ensure their actions/inactions do not undermine, prevent or impede the Article 4 WFD environmental objectives from being achieved. Please confirm that, pursuant to this Norwegian licensing system, operators of hydroelectric power plants are legally required to obtain and retain licences, and must adhere to the conditions within their respective licences in order to retain their rights to operate their hydroelectric power plants.
- b. If Norway takes the view that the system of granting licences to operators of hydroelectric power plants in Norway does not constitute the single most important legal measure to control the actions and behaviour of operators of hydroelectric power plants and ensure their actions/inactions do not undermine, prevent or impede the Article 4 WFD environmental objectives from being achieved – please explain in detail: (i) why Norway does not believe this legal measure is the single most important legal measure to control the actions and behaviour of operators of hydroelectric power plants; (ii) what legal measure Norway believes is the most important legal measure to control the actions and behaviour of the operators of hydroelectric power plants and ensure the Article 4 WFD environmental objectives are not undermined, prevented and/or not achieved and why.
- c. If Norway takes the view that the system of granting licences to operators of hydroelectric power plants in Norway does not constitute the single most important legal measure to control the actions and behaviour of operators of hydroelectric power plants and to ensure their actions do not undermine, prevent or impede the Article 4 WFD environmental objectives from being achieved – please explain whether Norway would take the view that the system of granting licences to operators of hydroelectric power plants in Norway constitutes an important legal means of controlling the actions and behaviour of the operators of hydroelectric power plants and ensure their actions/inactions do not undermine, prevent or impede the Article 4 WFD environmental objectives from being achieved. If Norway takes the view that the system of granting licences to operators of hydroelectric power plants in Norway does not constitute an important legal measure in ensuring that water bodies where hydroelectric power plants operate, achieve compliance with the Article 4 WFD environmental objectives – please explain in detail why.

2. Other Norwegian legal measures which control the action and inaction of hydroelectric power plant operators and ensure they do not undermine, prevent or obstruct the Article 4 WFD objectives from being achieved.

In the event that Norway takes the view that there are a number of legal measures in Norway which have been adopted to ensure that the actions/inactions of hydroelectric power plant operators are controlled and do not undermine, prevent or obstruct the Article 4 WFD objectives from being achieved:

- a. Please provide an exhaustive list of these other legal measures (excluding the Norwegian system of licences) which Norway has adopted. In particular, please indicate what legal measures Norway has adopted which guarantee that there is sufficient and minimum water flow into water bodies by hydroelectric power plant operators to ensure: (i) the water body continues to exist; (ii) there is no relevant deterioration of the water body

particularly vis-à-vis ecology and biodiversity; and (iii) the Article 4 WFD environmental objectives relating to ecology, including biodiversity, and chemical status – are capable of being achieved in practice. In each case, please explain, in detail, how each measure ensures that Norway is able to control the actions and behaviour of operators of hydroelectric power plants to ensure they do not adversely affect the water bodies so as to cause deterioration in breach of the WFD requirements and/or prevent achievement of the Article 4 WFD environmental objectives – and that sufficient and minimum water flow into a water body is achieved, year-round, in practice.

- b. In each case please also explain in detail how often, in reality, these other legal measures has actually been employed and used by Norway since mid- 2009.⁸ For example, if Norway takes the view that Section 28 of the Norwegian Water Resources Act⁹ constitutes either the most important legal measure, or one of the most important legal measures, which Norway has adopted to control the actions and behaviour of operators of hydroelectric power plants to ensure the Article 4 WFD environmental objectives are achieved, please explain in detail: (i) how often Norway has invoked and relied upon Section 28 of the Norwegian Water Resources Act to take action against operators of hydroelectric power plants since mid 2009¹⁰ and (ii) how often Norway has invoked and relied upon Section 28 of the Norwegian Water Resources Act to legally compel operators of hydroelectric power plants to increase the water flow, and/or increase the amount of water, into a water body to ensure the Article 4 WFD environmental objectives are met. With regard to Section 28 of the Norwegian Water Resources Act please explain how long, in practice, it takes to alter or change the behaviour of an operator of a hydroelectric power plant to, for example, increase water flow, and/or the amount of water, to ensure there is sufficient water within the water body to achieve compliance with the Article 4 WFD environmental objectives and prevent

⁸ For example as from May 2009.

⁹ Official Norwegian text:

Lov om vassdrag og grunnvann (vannressursloven), § 28. (omgjøring og tilbaketrekking av konsesjon mv.)

I særlige tilfeller kan vassdragsmyndigheten oppheve eller endre vilkår eller sette nye vilkår av hensyn til allmenne eller private interesser. Det skal tas hensyn til det tap som en endring vil påføre konsesjonshaveren og de fordeler og ulemper som endringen for øvrig vil medføre. Bestemmelsen gjelder ikke for tiltak som er behandlet etter vassdragsreguleringsloven.

Vassdragsmyndigheten kan trekke tilbake en konsesjon eller annen tillatelse dersom rettighetshaveren har gitt uriktig eller ufullstendig informasjon av vesentlig betydning for vedtaket. Det samme gjelder dersom vedkommende ikke lenger anses skikket til å utøve virksomheten etter grovt eller gjentatte brudd på loven eller vedtak i medhold av loven

ENFIP Unofficial working translation:

Act relating to river systems and groundwater (Water Resources Act), Section 28. (modifying and withdrawing licenses, etc.)

In special cases, the water authorities can rescind or amend terms and conditions or set new terms and conditions in the public or private interests. Consideration shall be given to the losses that an amendment will impose on the licensee and the advantages and disadvantages that the amendment will otherwise entail. This provision does not apply to measures dealt with pursuant to Act No. 17 of 14 December 1917 relating to regulations of watercourses.

The water authorities may withdraw a license or other permission if the right holder has given incorrect or incomplete information of considerable importance to the decision. The same applies if the person concerned no longer is deemed fit to exercise the business after serious or repeated breaches of the Act or decisions under the Act.

¹⁰ For example as from May 2009.

any relevant deterioration, particularly vis-à-vis ecological damage/biodiversity loss.

- c. In each case where the measure was employed in the past, please explain the ultimate outcome including: (i) whether the actions and behaviour of the operators of the hydroelectric power plants was permanently and sufficiently altered; (ii) whether there is now sufficient water contained within the water body year-round to ensure it is able to support aquatic ecology and biodiversity as required under the WFD; and (iii) whether the water body now fully achieves the environmental objectives set out in Article 4 WFD and is, for example, of good ecological and chemical status.

3. The terms and conditions contained within Norwegian licences which control the actions and behaviour of the operators of hydroelectric power plants.

Please confirm that under the current Norwegian system of licences, the Norwegian authorities grant licences to operators where the licences contain requirements and obligations incumbent on the operators to ensure the water bodies are protected and enhanced, such that they will achieve compliance with the Article 4 WFD environmental objectives and there is no deterioration in breach of the WFD requirements. In this regard, please explain in detail:

- a. What standard terms and conditions are included in licences in Norway which oblige operators of hydroelectric power plants to protect and enhance the water bodies such that the water bodies will achieve compliance with the Article 4 WFD environmental objectives and to ensure there is no deterioration of the water bodies in breach of the WFD requirements. Please explain, for example, whether licences contain any provisions which explicitly and expressly mention the requirements contained under the WFD, in particular the Article 4 WFD environmental objectives.
- b. Please confirm that, as a minimum, operators are required, under the conditions in their licences, to ensure that: (i) the water body in question continues to exist; (ii) that there is sufficient water within the water body to support the relevant aquatic ecology including biodiversity; (iii) as such there is adequate and sufficient water flow into the water body during a defined period of time (i.e. each day or week) to support the relevant aquatic ecology in the short, mid and long term; and (iv) there are specific, express, clear limits set on the amount of water/water flow hydroelectric power plant operators are able to take or divert from a water body over a daily/weekly/monthly/yearly period taking into account rainfall and other climatic conditions. Please explain in detail the requirements contained in licences concerning: (aa) maximum limits of water taken from water bodies; (bb) minimum requirements for water flow; (cc) whether Norway is able to immediately or quickly alter or revise the conditions of a licence to ensure more water flow into a water body where necessary (due, for example, to climatic conditions such as reduced rainfall) to ensure compliance with the WFD; and (dd) explain how quickly, in practice, it normally takes for the Norwegian authorities to revise, alter or change the conditions within a licence to ensure water flow is increased so that the Article 4 WFD environmental objectives are fully achieved.
- c. Whether all licences currently active and in operation in Norway, contain these standard terms and conditions (referred to in 3a and 3b above). If not, please explain how many licences currently active and in operation in Norway, do not contain these standard terms and conditions (i.e. overall number, and percentage as compared to overall number of licences).

Please explain how long these licences, which do not contain these standard terms and conditions, will each currently endure.

- d. Please explain how many times, since mid-2009,¹¹ Norway has revised, reviewed or changed the terms of a licence, or annulled, cancelled or withdrawn a licence, in order to ensure the Article 4 WFD environmental objectives are achieved.
- e. Please provide an exhaustive list of the cases (including dates, names of companies, names of water bodies, and details of the action taken etc) where Norway has relied upon the conditions set out in a licence to legally compel an operator of a hydroelectric power plant to increase the amount of water, or water flow, into a water body to ensure the Article 4 WFD environmental objectives were met, since mid-2009.¹²

4. Norwegian authorities' monitoring of hydroelectric power plant operators compliance with the licensing conditions, and Norwegian enforcement action.

Please explain:

- a. Under Norwegian national law, which Norwegian authorities (i.e. Ministries, Departments, Agencies and/or other national or regional bodies) are responsible for ensuring that water bodies achieve the Article 4 WFD environmental objectives, including the ecological and chemical outcomes set out under the WFD, and that water bodies do not deteriorate. Please explain under Norwegian national law, which Norwegian authorities (i.e. Ministries, Departments, Agencies and/or other national or regional bodies) are responsible for granting and renewing licences to operators of hydroelectric power plants. Please explain how the Norwegian authorities which are responsible for granting and renewing licences to operators of hydroelectric power plants ensure the licences contain the relevant terms and conditions (tailored and adapted in light of any relevant specific factual circumstances) to ensure the behaviour and actions of hydroelectric power plant operators are controlled and regulated so that the Article 4 WFD environmental objectives are achieved. In those cases where it has been established that a minimum amount of water flow is necessary to ensure a water body is able to achieve the Article 4 WFD environmental objectives, please explain which Norwegian authorities are responsible for ensuring this happens in practice.
- b. How, in practice, Norway monitors and assesses the actions/inactions and activities of operators of hydroelectric power plants and their effects on the respective water bodies. In particular, please explain in detail if and whether operators of hydroelectric power plants are under legal requirements, in their licences or otherwise: to monitor water flow; ensure a minimum overall amount of water is retained in water bodies; ensure there is no deterioration of a water body (including its biodiversity) in breach of the WFD requirements; and/or, ensure that the water body achieves compliance with the WFD environmental objectives (good ecological/chemical status) by the relevant deadlines. Please also explain whether operators are under a legal requirement in Norway to notify or inform Norway where there is a negative impact on the water body due to their actions, including an impact on water flow above relevant limits.

¹¹ For example as from May 2009.

¹² For example as from May 2009.

- c. In those cases where there is a breach of the conditions in a licence (such as exceedance of a limit of the amount of water taken from a water body within a defined period of time), please explain what legal penalties or consequences exist under Norwegian national law. In particular, please explain whether, for example: (i) a licence can be immediately withdrawn, annulled or forfeited; (ii) the conditions of a licence can be immediately revised, changed or altered; (iii) whether the operator can be immediately required to stop or change their activities; (iv) whether Norwegian authorities can immediately require and compel the operators of hydroelectric power plants to increase water flow/quantity into a specific water body to ensure the protection and enhancement of the water body in accordance with the WFD, and under what conditions (i.e. whether Norwegian authorities can only require increased water flow/quantity for a certain period of time and/or only to the extent it does not significantly impact the financial or economic stability of the operator concerned); and (v) whether the operator can be legally required to ensure the water body is changed so that it reverts back to substantively the same form as it was in before the hydroelectric power plant was constructed / operated.
- d. Please provide an exhaustive list of the cases, since mid- 2009,¹³ where Norway has taken steps to legally require and compel operators of hydroelectric power plants to increase the amount of water/water flow so as to ensure that the requirements under the WFD, in particular the environmental objectives under Article 4 of the WFD, are met. In each case please explain:
 - i. on what legal basis Norway took such action, and whether, for example: (i) Norway relied upon the conditions contained in the licences to legally compel operators of hydroelectric power plants to increase the water flow; or (ii) Norway relied on other Norwegian national law to legally justify such action (and if so, what Norwegian national law).
 - ii. What specific action was taken by Norway and whether it involved enforcement action regarding a specific licence (e.g. forfeiture/annulment of a licence, revision of conditions in a licence, fines, legal orders or injunctive remedies for the operators to take action or refrain from taking certain action).
 - iii. whether the enforcement action taken by Norway has meant that the water body in question is now compliant with the WFD environmental objectives (good ecological/chemical status).

5. Revision of licences and licensing conditions

Please explain how the current Norwegian licensing system regarding hydroelectric power plant operators, in particular the revision and renewal of the terms and conditions of these licences, ensures that the Article 4 WFD environmental objectives are achieved in practice. In particular:

- a. According to Section 6 of the Norwegian Watercourse Regulation Act¹⁴, Norwegian authorities may grant licences to hydroelectric power plant operators for an unlimited period of time/duration (i.e. forever).
 - i. Please provide an exhaustive list of the active licences, currently in existence, which are for an unlimited period of time including: (i) the names of the water bodies where the hydroelectric power plants

¹³ For example as from May 2009.

¹⁴ <https://lovdata.no/dokument/NL/lov/1917-12-14-17?q=vassdragsreguleringsloven>

- are situated; and (ii) the names of the companies which benefit from these licences of unlimited time/duration.
- ii. Please explain whether, in the future, Norway currently intends to continue to grant licences to hydroelectric power plant operators of unlimited time/duration. If Norway does not currently have any intentions to grant a licence to a hydroelectric power plant operator of unlimited time/duration – please explain in what circumstances Norway would envision granting such a licence in the future.
 - iii. Please explain how, in those situations where the Norwegian authorities have granted a licence of unlimited time/duration (i.e. forever) - the Norwegian licencing system ensures fulfilment of the WFD Article 4 WFD environmental objectives and other WFD requirements: (aa) before the deadlines as set out in the WFD as adopted, and (bb) in line with the 6-year monitoring and development programme as envisioned under the WFD and the publication of River Basin Management Plans.
 - iv. Please explain how, in those situations where a hydroelectric power plant operator has been granted a licence to operate a hydroelectric power plant for an indefinite period of time (i.e. forever), Norway is able to sufficiently control the activities and behaviour of a hydroelectric power plant operator, for example, where there is, or may be, non-compliance with EEA law such as the WFD. In particular, please explain how Norway is legally able, for example, to immediately withdraw or annul a licence where a water body deteriorates in breach of the WFD requirements, and/or does not, or may not, achieve the Article 4 WFD environmental objectives. Please explain how Norway is legally able, for example, to immediately compel a hydroelectric power plant operator to increase water supply and flow into a water body to ensure compliance with the WFD. Please explain, giving an exhaustive list of examples since mid- 2009,¹⁵ whether – in practice – Norway has ever legally compelled a hydroelectric power plant operator, who has an indefinite term licence, to change its activities and behaviour (such as increasing water flow into a water body) to ensure the Article 4 WFD environmental objectives are achieved in practice.
- b. According to Section 8 of the Norwegian Watercourse Regulation Act, Norwegian authorities may revise the conditions set out in licences to hydroelectric power plant operators after 30 years.
- i. Please provide an exhaustive list of the active licences, currently in existence, for which the term/duration of the licence is for a 30-year period (or longer) including: (i) the names of the water bodies where the hydroelectric power plants are situated; (ii) the names of the companies which benefit from these licences of a 30-year period or longer; (iii) the term/duration of the licence in question; and (iv) when these licences are currently due to expire/terminate.
 - ii. Please explain whether, from Norway's perspective, it would be correct to state that, under Norwegian national law, there is no automatic legal requirement for conditions set out in a licence to be revised at least every 30 years. Please explain whether it is possible, under Norwegian national law, that the conditions in a licence may never be revised, and the licence may continue to endure forever under the same conditions as initially set out in a licence. Please explain when (i.e. under what legal circumstances) the conditions in a licence would/would not be revised.

¹⁵ For example as from May 2009.

- iii. Please provide an exhaustive list of the active licences, currently in existence, for which the term/duration of the licence is for a 30-year period (or longer) and where the conditions of the licence have never been revised.
 - iv. Please provide an exhaustive list of the licences of 30 years or more in length, whose conditions have been revised since the entry into force of the WFD, including a summary of: (i) how/which conditions were revised; (ii) whether the conditions were revised to include provisions explicitly relating to the Article 4 WFD environmental objectives; (iii) whether the provisions were revised to include requirements for the hydroelectric power plant operators to permit a minimum amount of water flow into a water body; (iv) and a description on how long it took, in practice, to revise the conditions in these licences.
 - v. Please explain how, in those situations where a hydroelectric power plant operator has been granted a long term licence (i.e. of 30 years or more in length) to operate a hydroelectric power plant, Norway is able to sufficiently control the activities and behaviour of a hydroelectric power plant operator, for example, where there is or may be non-compliance with EEA law such as the WFD. In particular, please explain how Norway is legally able, for example, to immediately withdraw or annul a licence where a water body deteriorates in breach of the WFD requirements, and/or does not, or may not, achieve the Article 4 WFD environmental objectives. Please explain how Norway is legally able, for example, to immediately compel a hydroelectric power plant operator to increase water supply and flow into a water body to ensure compliance with the WFD. Please explain, giving an exhaustive list of examples since since mid-2009,¹⁶ whether – in practice – Norway has ever legally compelled a hydroelectric power plant operator, who has a long term licence (i.e. of 30 years or more in length), to change its activities and behaviour (such as increasing water flow into a water body) to ensure the Article 4 WFD environmental objectives are achieved in practice.
- c. The WFD sets out a programmatic legal framework under which EEA States are required to adopt plans, and take relevant measures, in 6-year cycles to ensure certain ecological and chemical outcomes are achieved.
- i. Please explain whether Norway would concur that, in line with the 6-year cyclical programme envisioned under the WFD, EEA States must put in place measures to monitor and, where relevant, take relevant action – to ensure the status of water bodies (including the relevant ecological and chemical parameters of water bodies) is protected, enhanced and does not deteriorate in any 6-year period – and that there is no deterioration from one 6-year period to another. Please explain whether Norway would concur that where there is a deterioration in breach of the WFD requirements, it is important: (aa) to detect the deterioration as soon as possible – which implies a minimum frequency of monitoring on a weekly/monthly/yearly basis; (bb) for those with any information suggesting deterioration - to inform the national authorities as soon as possible; and (cc) for the national authorities to have sufficient legal powers to compel those responsible for such deterioration to cease or change their activities so no further deterioration occurs – which implies that national authorities have legal powers to, amongst other things, compel stakeholders to ensure there is

¹⁶ For example as from May 2009.

- sufficient or minimum water flow into a water body. Please explain how the current Norwegian legal framework achieves these outcomes in practice.
- ii. Please provide an exhaustive list of the active licences, currently in existence, which the Norwegian authorities have granted to operators of hydroelectric power plants, for which the term/duration of the licence is for a 6-year period (or longer) including: (i) the names of the water bodies where the hydroelectric power plants are situated; (ii) the names of the companies which benefit from these licences; (iii) the term/duration of the licence in question; and (iv) when these licences are currently due to expire/terminate.
 - iii. In those cases where operators have a licence which endures for a period of more than 6 years, please explain in detail how Norway is able to adequately, sufficiently and effectively assess, control or change the activities of hydroelectric power plant operators as a minimum every 6 years to ensure the relevant water bodies are protected, enhanced and do not deteriorate in accordance with the legal principles and framework set out under the WFD. Please explain, for example, how Norway is legally able to immediately compel a hydroelectric power plant operator to increase water supply and flow into a water body to ensure compliance with the WFD.
 - iv. Please explain, giving an exhaustive list of examples since mid-2009,¹⁷ whether – in practice – Norway has ever legally compelled a hydroelectric power plant operator, who has a licence (with a duration of 6 years or more in length), to change its activities and behaviour (such as increasing water flow into a water body) to ensure the Article 4 WFD environmental objectives are achieved in practice.
- d. In those situations where:
- i. There is a deterioration regarding the classification of a particular water body (or a fall vis-à-vis a particular quality element) in breach of the Article 4 WFD requirements **OR** it will not be possible for a particular water body to achieve good ecological / chemical status by the relevant deadline; **AND**
 - ii. The failure to comply with the Article 4 WFD requirements is due to the operation of the hydroelectric power plant; **AND**
 - iii. The operator of a hydroelectric power plant has been granted a licence which endures for a period which exceeds a 6 year period – with the consequence that the operator will not be required to change its activities to ensure the water body complies with the Article 4 WFD requirements before the relevant deadlines:
 - (i) Please explain how Norway can stop, intervene or otherwise change the actions/inactions and behaviour of the operator of the hydroelectric power plant in order to ensure that Norway complies with the Article 4 WFD requirements.
 - (ii) In the event that Norway cannot, per se, stop, intervene or otherwise adequately or sufficiently change the actions/inactions and behaviour of the operator of the hydroelectric power plant so that water body achieves good ecological/chemical status and/or does not deteriorate – please explain how Norway complies and will comply with its obligations under Article 4 WFD. More specifically, if Norway does not have a legal system in place which can sufficiently control, or control at all, the behaviour and activities of

¹⁷ For example as from May 2009.

operators of hydroelectric power plants – please explain how Norway has in accordance with Article 4 of the WFD “implement[ed] the **necessary measures**” to ensure the Article 4 WFD requirements are achieved before the relevant deadlines.

6. Situations where hydroelectric power plant operators are not legally required to obtain or retain a Norwegian licence

Please explain:

- a. Whether operators of hydroelectric power plants are legally required to obtain or retain a licence to operate a hydroelectric power plant in Norway in all situations without exception or, alternatively, whether there are situations where certain operators of hydroelectric power plants are not legally required to obtain or retain a licence. Please explain how many hydroelectric power plants operate in Norway today which do not require a licence, which water bodies they operate within, and who operate those plants (i.e. which companies).
- b. Please explain why these operators are not legally required to obtain and retain licences. Please explain, for example, whether that is because the hydroelectric power plant: (i) is considered too small (i.e. an installation, for example, below 10MWpa) to have any relevant effects on the water body; and/or (ii) was constructed and began to operate before 1905 (i.e. before the entry into force of Norwegian national licensing laws for hydroelectric power plants).
- c. Please provide a list of names of the companies which operate hydroelectric power plants in Norway and which are not currently required to obtain/retain a licence to operate the hydroelectric power plant. Please indicate where these plants are situated (i.e. what water bodies), how long they have operated without a licence, and when, in the future, if ever, these operators will be required to obtain/retain a licence.
- d. Please explain in detail how Norway is able to adequately, sufficiently and effectively assess, monitor, control and/or change the activities of hydroelectric power plant operators as a minimum every 6 years to ensure the relevant water bodies are protected, enhanced and do not deteriorate – in accordance with the legal principles and framework set out under the WFD – in those cases where operators are not required to obtain or retain a licence to operate their hydroelectric power plants at all.
- e. Please explain, giving an exhaustive list of specific situations since mid-2009,¹⁸ how Norway has legally compelled operators of hydroelectric power plants to take action (such as increasing water flow into a water body) to ensure the Article 4 WFD environmental objectives are achieved in practice in situations where the operator was not required to hold a licence, and how (i.e. on what legal basis) Norway took such action.
- f. In those situations where:
 - i. There is a deterioration regarding the classification of a particular water body (or a fall vis-à-vis a particular quality element) in breach of the Article 4 WFD requirements **OR** it will not be possible for a particular water body to achieve good ecological / chemical status by the relevant deadline; **AND**
 - ii. The failure to comply with the Article 4 WFD requirements is due to the operation of the hydroelectric power plant; **AND**
 - iii. The operator of a hydroelectric power plant is not required to obtain or retain a licence – with the consequence that the operator cannot be required to change its activities pursuant to the conditions of a

¹⁸ For example as from May 2009.

licence, to ensure the water body complies with the Article 4 WFD requirements before the relevant deadlines:

- (i) Please explain how Norway can stop, intervene or otherwise change the actions/inactions and behaviour of the operator of the hydroelectric power plant in order to ensure that Norway complies with the Article 4 WFD requirements.
- (ii) In the event that Norway cannot, per se, stop, intervene or otherwise adequately or sufficiently change the actions/inactions and behaviour of the operator of the hydroelectric power plant so that water body achieves good ecological/chemical status and/or does not deteriorate – please explain how Norway complies and will comply with its obligations under Article 4 WFD. More specifically, if Norway does not have a legal system in place which can sufficiently control, or control at all, the behaviour and activities of operators of hydroelectric power plants – please explain how Norway has in accordance with Article 4 of the WFD “*implement[ed] the **necessary measures***” to ensure the Article 4 WFD requirements are achieved before the relevant deadlines.

7. Reliance by Norway on exemptions and derogations regarding achievement of Article 4 requirements vis-à-vis water bodies where hydroelectric power plants operate

Please explain how many water bodies in Norway currently have hydroelectric power plants installed and/or operating within them. Of these water bodies, please explain:

- a. How many have been identified as benefitting from one of the exemptions set out in Article 4 of the WFD. In particular please explain:
 - i. How many of these water bodies have been declared and identified as being a ‘Heavily Modified Water Bodies’ under Article 4(3) WFD.
 - ii. How many of these water bodies have been identified as benefitting from the Article 4(5) WFD exemption regarding ‘less stringent environmental objectives’.
- b. Whether, in Norway’s view, it would be correct to state that, for the period 2016-2021, approximately 1,452 water bodies in Norway were identified as benefitting from the Article 4(5) WFD exemption and that this number would account for approximately 60% of the all the water bodies in the whole of the EEA, which benefit from this exemption.
- c. Please indicate whether the number of water bodies in Norway which have been identified as benefitting from an exemption to the requirement to achieve good ecological and chemical status – has, according to the River Basin Management Plans, increased since the entry into force of the WFD in Norway.
- d. Please provide a comprehensive breakdown of the water bodies, where hydroelectric power plants operate, that have now been identified by Norway as benefitting from an exemption to the requirement to achieve good ecological and chemical status. Please explain whether water bodies, where hydroelectric power plants operate, are normally or generally automatically regarded as benefitting from the requirement to achieve good ecological and chemical status in Norway. Please explain whether there are water bodies in Norway, where hydroelectric power plants operate, which, according to Norway, must achieve good ecological and chemical status. When Norway assesses and identifies water bodies, where hydroelectric power plants operate, as benefitting from an

exemption to the requirement to achieve good ecological and chemical status – please explain how this is done in practice, and whether the individual facts and characteristics of the water body in question are taken into account and, if so, how.

8. Norwegian Guidance Documents and CIS Guidance Documents

Please explain whether the Norwegian national guidelines concerning hydropower installations adopted and/or published in 2014, are still in effect and used in Norway. Please explain:

- a. Whether Norway would agree that the 2014 Norwegian guidelines concerning hydropower installations do not contain important elements to consider regarding the installation and operation of hydroelectric power plants – such as the hydromorphological quality elements set out in CIS Guidance Document No 37 (2019) “*Steps for defining and assessing ecological potential for improving comparability of Heavily Modified Water Bodies*”.
- b. Whether, in those situations where the Norwegian national guidelines concerning hydropower installations differ or are not the same as the guidance set out in more recent EU Guidance Documents – such as the CIS Guidance Documents – whether the older Norwegian Guidelines would be regarded as the primary measure and means of interpreting and implementing Norwegian law, or whether the CIS Guidance Documents, would be regarded as the primary measure and means of interpreting and implementing Norwegian law.
- c. Please confirm that Norway participates and actively contributes to the creation and adoption of the CIS Guidance Documents and whether the Norwegian Water Director, or another responsible person/body in Norway, has endorsed the CIS Guidance Documents.

9. Impact of hydroelectric power plants on biodiversity, including , for example, wild salmon

Please confirm that Norway recently added wild salmon to the list of endangered species in Norway. Please explain when and why Norway included wild salmon to the list of endangered species. Please confirm that this was due, in part, to the loss of natural habitat for wild salmon, including the loss of natural habitat due to the installation and operation of hydroelectric power plants. Please explain:

- a. How many water bodies have seen a significant decrease in the number of wild salmon since mid- 2009.¹⁹
- b. Of these water bodies, please explain how many have hydroelectric power plants installed and/or operating within them.
- c. Please explain how many of these water bodies have hydroelectric power plants operating within them where: (i) the operators are under no legal requirement to obtain or retain licences, due to, amongst other things the age of the hydroelectric power plant; and (ii) the operators have been granted indefinite or long-term (over 6-year) licences.
- d. Please explain how Norway intends to improve the statuses of water bodies where hydroelectric power plants operate, and to prevent and stop deterioration of those water bodies, to improve the ecological status of those water bodies, including the natural habitat for wild salmon.
- e. Please explain whether Norway would concur that:
 - i. The existence of a water body (including the amount of water within it) is of importance in the achievement of the Article 4 WFD environmental objectives and in ensuring, protecting and

¹⁹ For example as from May 2009.

- enhancing its aquatic ecology and biodiversity – including the ability for wild salmon to survive and thrive in practice.
- ii. The Norwegian system of legal controls which regulate the action/inaction and behaviour of hydroelectric power plant operators vis-à-vis water flow, is of legal importance in the achievement of the Article 4 WFD environmental objectives as this affects the amount of water in a water body, including its ecology and biodiversity, and the existence of the water body itself.
 - iii. The absence of sufficient and adequate legal controls over the action/inaction and behaviour of hydroelectric power plant operators vis-à-vis water flow directly affects the ecology and biodiversity of water bodies, including the existence and survival of wild salmon– which is now under threat in Norway.

10. Hydroelectric power plant situated on the Aura river

Please explain:

- a. Whether Norway would concur with the following points and, if not, why not:
 - i. In 1953, Statkraft was granted a licence to operate a hydroelectric power plant on the Aura river (Molde and Sunndal municipalities) for an unlimited period of time.
 - ii. At that time, and in 1953, the Aura river contained a notable amount of wild salmon and other aquatic species (such as eels and pearl mussels) and was an important habitat for these species.
 - iii. In 2016, Norwegian regional authorities concluded that, in order to achieve “Good Ecological Potential” by 2021, it was necessary to set minimum water flow rates from the hydroelectric dam on the Aura river (as set out in the relevant river basin management plans etc).
 - iv. In 2021, the terms and conditions of the licence allowing Statkraft to operate a hydroelectric power plant on the Aura river, were revised. On 23 June 2021, Norway adopted a Royal Decree setting out the revised terms and conditions of the licence.^{20,21} The revised terms did not include any requirements regarding minimum water flow/amounts of water to be released into the water body by Statkraft. Instead, the terms of the licence require that the Aura river achieve GEP within the next 30-year period.
 - v. Today, the amount of water in the Aura river (below and in the region of the hydroelectric dam) is significantly less, year-round, as compared to that in 1953 due to the operation of the hydroelectric power plant. This has had a significant negative impact on the ecology and biodiversity. Indeed, salmon and other aquatic species (such as eels and pearl mussels) are now at risk of becoming extinct in the Aura river.
- b. Please explain in detail how, under the requirements set out in the Royal Decree dated 23 June 2021, Norway has ensured that the hydroelectric power plant operator is legally required to ensure that its actions and inactions do not undermine, prevent or impede the Article 4 WFD environmental objectives from being achieved. More particularly, please explain in detail how, under the requirements set out in the Royal Decree dated 23 June 2021, Norway has ensured that the hydroelectric power

²⁰ <https://www.regjeringen.no/contentassets/a7e59a3623c24a95a78161d52c6beb09/20210623-kgl.res.-statkraft-energi-as-revisjon-av-konsesjonsvilkar-for-aurareguleringen-molde-sunndal-og-lesja-kommuner.pdf>

²¹ See press release: <https://www.regjeringen.no/no/dokumentarkiv/regjeringen-solberg/aktuelt-regjeringen-solberg/oed/nyheter/2021/reviderte-konsesjonsvilkar-i-auravassdraget/id2863326/> .

- plant operator is legally required to allow sufficient water flow into the water body to secure the ecological and chemical outcomes as set out under the WFD, and to ensure there is no deterioration of the water body.
- c. Please explain, in detail, what action, if any, the hydroelectric power plant operator is required to take over the next 6-year period, to ensure the water body achieves good ecological and chemical status. Please explain whether, in practice, the hydroelectric power plant operator will be required to take any action at all vis-à-vis improvement of the ecological status of the water body, including its biodiversity, before the expiry of the new licence (i.e. before 2051) – presuming that the water body is regarded, by Norway, as achieving good ecological potential.
 - d. Given the concerns regarding the endangered status of salmon and other aquatic species in the Aura river, and given the concerns of the endangered status of salmon in Norway more widely, please explain what action, if any, the hydroelectric power plant operator is legally required to take to improve the Aura river as a natural habitat for wild salmon, and/or at least ensure minimum water flow, at any time before 2051.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case. Given the length of this Request for Information, and the detailed nature of the questions set out within it, the Directorate has taken the position that, exceptionally, an extended period of time should be given to allow the Norwegian authorities to provide the information requested. For that reason, the Directorate sets the deadline for responding to this Request for Information at 6 September 2022.

Yours faithfully,

Marco Uccelli
Deputy Director
Internal Market Affairs Directorate

This document has been electronically authenticated by Marco Uccelli.