EUROPEAN COMMISSION

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TO THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court by the

EUROPEAN COMMISSION

represented by Inês MELO SAMPAIO and Dorota MILANOWSKA, Members of its Legal Service, acting as Agents, with an address for service at the Legal Service, Greffe contentieux, BERL 1/169, 1049 Brussels and consenting to service by e-EFTA Court, in

Case E-11/26

WWF Norway

v.

the Norwegian State

in which the Borgarting Court of Appeal (the "Referring Court") requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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I. Introduction

1. The European Commission (the "Commission") has the honour to submit the following observations in relation to the request for an advisory opinion at issue.

II. The factual and legal background

II.1. The factual background

2. The present request for an advisory opinion by the Borgarting Court of Appeal to the EFTA court was made in a case in which World Wide Fund for Natura Norway (WWF Norway, the Appellant in national proceedings) contests a plan by the Norwegian Government (the Respondent in national proceedings) for the development of projects related to exploration and exploitation of seabed mineral extraction, transport and fishing (hereinafter 'the plan') in an area of the Norwegian continental shelf.

3. In preparation of the plan, the Norwegian Ministry of Energy undertook a strategic environmental assessment which includes the drafting of an environmental report [1].

4. According to the Referring Court, the draft environmental report included potential impacts on landscape features, topography and benthic ecosystems, pelagic ecosystems, including marine mammals, seabirds as well as technology status, fishery activities and ship traffic in the area, as well as social and economic impacts related to exploration, exploitation and cessation of activities.

5. From January to April 2021, the draft environmental report underwent public consultation. In the contributions received during the latter, the topic of impact of activities on land, such as onshore waste were mentioned: however, these impacts were not included in the final environmental report.

([1]) To be noted that Norway does not use the term SEA but refers to 'impact assessment'. The present observations use the terminology in the SEA Directive.

6. On 27 October 2022, the Norwegian Ministry of Energy launched a consultation of public authorities on the draft environmental report, which was closed in January 2023 [2].

7. In their replies to this consultation, public authorities with specific environmental responsibilities reported that the draft environmental report lacked significant knowledge regarding natural and environmental conditions related to seabed minerals and the designated opening area, which was confirmed by the Norwegian Ministry of Energy in charge of developing the plan. Public authorities with specific environmental responsibilities also found that certain factors had been excluded from the draft environmental report, including, amongst others, management of radioactive pollution, onshore waste and other impacts of activities on land.

8. Based on the environmental report, the Norwegian Government presented a proposal for a plan to the Norwegian Parliament in June 2023, which was endorsed on 9 January 2024 with some amendments. The first projects to be developed stemming from that plan are foreseen for after 2029.

9. In the action against the Norwegian State dated 23 May 2024, the Appellant claims that the adoption of the plan by a Royal Decree of 12 May 2024 should be annulled for non-compliance with the Seabed Mineral Act section 2-1, which requires that a strategic environmental assessment be carried out. The parties further disagree on the scope of the plan and on whether the strategic environmental assessment that was conducted complies with Article 5(1) of Directive 2001/42/EC (SEA Directive)[3], which requires the strategic environmental assessment to identify, describe and evaluate all likely significant effects.

10. The first instance Court rejected WWF's claims. The Referring Court has referred to the EFTA Court for an Advisory Opinion.

([2]) To be noted that it is not very clear from the facts whether this is a consultation of public authorities only or if it concerns the public as well, and that there is no indication of a specific closing date of this consultation.

([3]) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001, p. 30.

II.2. The legal framework

11. Article 3(1)-(3) SEA Directive reads as follows**:**

> *1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.*
>
> *2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,*
>
> *(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC.*
> *(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.*
>
> *3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.*

12. Article 5(1)-(4) SEA Directive, reads as follows:

> *1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.*
> *2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.*

> *3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex*
> *4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which may be included in the environmental report.*

13. Annex I point (b), (c), (f) and (g) SEA Directive reads as follows:

> *The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:*
>
> *(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;*
>
> *(c) the environmental characteristics of areas likely to be significantly affected;*
>
> *(f) the likely significant effects(1) on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;*
>
> *(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme; […]*
>
> *(1) These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.*

14. Annex I (point 19) and Annex II (point 2) to Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (Environmental Impact Assessment Directive - EIA Directive)[4] read as follows:

([4]) Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) Text with EEA relevance, L 26, 28.1.2012, p. 1.

Annex I

19. Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

Annex II

2. Extractive Industry

(a) Quarries, open-cast mining and peat extraction (projects not included in Annex I);

(b) Underground mining;

(c) Extraction of minerals by marine or fluvial dredging;

(e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.

III. THE QUESTION REFERRED TO THE EFTA COURT

15. The Referring Court seeks an advisory opinion from the EFTA Court on the following question:

"*Where a plan to open an area of the continental shelf to seabed mineral activities – which forms the basis for awarding licenses for commercial exploration and exploitation falls within the scope of Directive 2001/42/EC on the effects of certain plans and programmes on the environment (the SEA Directive), do effects in the form of onshore waste generation and/or radioactive pollution arising from processing of extracted seabed minerals qualify as "effects" of implementing the plan within the meaning of Article 5(1) of that Directive?*"

IV. ANALYSIS

16. The Commission submits that in Case E-18/24 *Greenpeace* the EFTA Court has rejected the strict interpretation of the notion of 'effects' and determined that indirect effects of the project should be understood to encompass secondary, cumulative, transboundary effects, including those that are long-term or temporary([5]). It follows, *first*, from that ruling that, as long as such effects are both significant and likely, which must be determined on a case-by-case basis, they must

([5]) E-18/24, *Greenpeace,* para. 83.

be included in the environmental impact assessment and, *second*, that there is no requirement that the effects to be assessed in relation to a plan or programme have a close temporal or geographical proximity to the installation or scheme.

17. The Commission is of the view that if the effects to be assessed include those at stake in Case E-18/24 *Greenpeace (‘the impact on the climate from greenhouse gas emissions arising from combustion of the petroleum and natural gas extracted from the project and sold to third parties*’), it would seem justified that effects of exploration and exploitation offshore in the continental shelf to the shelf potentially within the same country/coastline, as those at issue in the present case, should be examined to a reasonable extent at the level of the SEA.

18. Moreover, whether a plan or programme has likely significant effects on the environment should be assessed in the environmental report, pursuant to Article 5(1) of the SEA Directive. The information to be provided to assess the effects is listed in Annex I of the SEA Directive. In this context, and most relevant to this case, the information to be provided shall include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects, as per Annex I, point (f), footnote 1 of the SEA Directive.

19. In this respect, whether the actual onshore effects related to the offshore projects materialise or not, does not exclude that the onshore likely effects must be included in the environmental report under the SEA Directive.

20. In Case C-41/24 *Waltham Abbey Residents Association*, the European Court of Justice has clarified that an effect is to be considered ‘likely’ if it *cannot be excluded* on the basis of objective evidence. The European Court of Justice referred to the precautionary principle, one of the foundations of the policy of protection of a high standard pursued by the European Union in the field of the environment, and in this context considered that a risk of significant effects exists *if it cannot be excluded* on the basis of objective evidence that the project is likely to have such effects[6]. It further stated that a project is considered to have significant effects on the environment where, by reason of its nature, there is *a risk* that it will cause a

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([6]) Judgment of the European Court of Justice in Case C-41/24, *Waltham Abbey Residents Association v An Bord Pleanála and Others,* ECLI:EU:C:2025:140, para. 41.

substantial or irreversible change in environmental factors, such as fauna and flora, soil or water, irrespective of its size[7].

21. Therefore, the Commission is of the opinion that the effects that a plan to develop activities off-shore, e.g. within the continental shelf, has on the management of radioactive pollution, onshore waste and other impacts of activities on land are to be considered secondary, cumulative and synergistic within the meaning of Annex I, point (f), footnote 1 of the SEA Directive, and need therefore to be assessed.

22. Bearing in mind the question as formulated by the Referring Court, it seems that the off-shore plan at hand sets the framework for development consent of future projects[8] in the seabed, part of which may be directly next to the seashore.

23. Although the Respondent claims that the plan does not set the framework for future development consent, as opposed to the consideration of the Appellant, this point is not raised or questioned by the Referring Court, which focuses on the notion of the 'effects' of the plan. The Commission therefore submits its observations under the premise that this requirement for the applicability of the SEA Directive has been verified in the case at hand.

24. In any event, it is for the Referring Court to assess whether the plan meets the two cumulative conditions of Article 3(2)(a) SEA Directive, namely that (i) they are prepared for the sectors referred to in that provision and (ii) they set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive. In this regard, the assessments under the EIA and SEA Directives are not mutually exclusive but rather should complement each other without duplications.

25. It is also important to recall that the objective of the SEA Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans, as laid out in Article 1 of the SEA Directive. The Commission is of the opinion that it would not be consistent with the objective of the SEA Directive to exclude indirect effects

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([7]) Idem, p. 46.

([8]) See in this context, the judgment of the EFTA Court of 28 April 2026 in Case E-17/25 *Redd Ullevål Sykehus* on the conditions to be fulfilled by plans and programmes to be subject to an environmental assessment under the SEA Directive.

on the onshore waste generation and radioactive pollution arising from a plan relating to the continental shelf.

26. It is therefore reasonable under such circumstances to consider that there may be likely environmental impacts that need to be assessed.

27. In the same vein, a general mention or a total lack of consideration of such effects in the environmental report leading to the adoption of the plan is likely to result in an insufficient assessment of the latter's environmental effects, especially when public authorities with specific environmental responsibilities have raised concerns on the level of information and the absence of consideration of certain effects on the environment during the public consultation.

28. It must also be stated that the level of detail of the assessment of the aforementioned effects must respect Article 5(2) of the SEA Directive, which determines that the environmental report shall include, among others, the information that *may reasonably be required* taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme.

29. Consequently, it is for the Referring Court to assess (i) whether the information on the effects of onshore waste and processing was reasonably required, and (ii) whether this information was indeed laid out in a sufficiently detailed manner in the environmental report.

30. Lastly, it is worth noting that if associated works to the offshore projects for which the plan sets the framework for development consent were to be undertaken onshore, those associated works could be considered part of the main project, and potentially be included in the EIA of the relevant offshore project. This would be the case, in particular, if those works were inextricably linked to the main project intervention, in which case their cumulative effects would have to be assessed.

V. CONCLUSION: THE PROPOSED RESPONSE

31. In the light of the preceding discussion, the Commission proposes to respond to the question from the Referring Court as follows:

Article 5 (1) and (2) of the Directive 2001/42 must be interpreted in the sense that information on the effects on the environment of onshore waste generation and *radioactive pollution arising from a plan setting the development consent of projects related to the exploration of seabed minerals must be included in the environmental report, taking into account current knowledge and methods of assessment, as well as the contents and level of detail of the plan, which it is for the referring court to ascertain.*

It is for the referring Court to assess whether the plan effectively assesses such effects in the required level of detail.

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