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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
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Sigrún Ingibjörg Gísladóttir, and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents,

IN CASE E-11/26

World Wide Fund for Nature Norway (WWF Norway)

v

Norwegian State, represented by the Ministry of Energy

in which the Borgarting Court of Appeal (*Borgarting Lagmannsrett*) requests an advisory opinion of the EFTA Court on a question concerning Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, and seabed mineral activities on the continental shelf.

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1 THE FACTS OF THE CASE

1. The present written observations were prepared with support from Ciarán Burke, Senior Legal Officer, and Frederik de Ridder, Legal Officer, of the Internal Market Affairs Directorate of the EFTA Surveillance Authority ("**the Authority**" or "**ESA**").

2. The present case originates in a request ("**the Request**") from the Borgarting Court of Appeal ("**the Referring Court**") to the EFTA Court for an advisory opinion concerning Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("**the SEA Directive**" or "**the Directive**") and seabed mineral activities on the continental shelf. For a full account of the case, the Authority refers to the Request.

3. The dispute in the main proceedings is between World Wide Fund for Nature Norway ("**the Plaintiff**") and the Norwegian State, represented by the Ministry of Energy ("**the Respondent**"). The Plaintiff challenges the validity of a decision adopted by the King in Council on 12 April 2024 to open a defined area of the Norwegian continental shelf for seabed mineral activities ("**the Challenged Decision**"). The Challenged Decision was based on the Norwegian Seabed Minerals Act (see paragraph 20 below).[1]

4. In 2020, the Norwegian Government initiated a process to enable exploration and potential exploitation of mineral deposits on the seabed.[2] According to the Request, the opening of an area constitutes a first phase in a broader licensing regime, allowing the authorities to grant exploration licences and, subsequently, exploitation licences, subject to further approvals.[3]

5. Prior to adopting the Challenged Decision, the Ministry of Energy conducted an impact assessment which was submitted together with a draft decision for public consultation between October 2022 and January 2023.[4] The assessment covered a large marine

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[1] Request, pages 3 and 6.
[2] Request, page 2.
[3] Request, page 2.
[4] Request, pages 3-4.

area[5] in the Norwegian and Greenland Seas and evaluated environmental, economic, and social impacts on the basis of available knowledge.[6]

6. The assessment was carried out against a background of significant scientific uncertainty, including recognised knowledge gaps concerning deep-sea ecosystems and the environmental effects of seabed mining.[7] Several public authorities submitted comments questioning whether the assessment provided a sufficient basis for decision-making, criticising the exclusion of certain environmental impacts, particularly the onshore processing of ore and the disposal of mineral extraction waste.[8]

7. Following consultation and the submission of a white paper, the Norwegian Parliament endorsed the opening of the area in January 2024, and the Government subsequently adopted the Challenged Decision.[9] In May 2024, the Plaintiff brought proceedings seeking annulment of that decision on the grounds that the environmental assessment underlying the decision was inadequate, in the context of which the present Request has been made.

8. In June 2024, the Ministry of Energy sent for public consultation a proposal for areas to be included in the first licensing round, covering 38% of the opened area.[10] This proposal was likewise criticised for lack of environmental knowledge and insufficient consideration of its impacts. According to the Request, these plans have been put on hold by the Norwegian Government for political reasons.[11]

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[5] The impact assessment covered an area of 592 500 km2 on the Norwegian continental shelf. The assessed area has an average depth of approximately 1500 meters, ranging from 100 to 4000 meters. Of this area, 281 200 km2 was opened for seabed mineral activities. Nearly 40 % of the opened area has been identified as a “particularly valuable and vulnerable area”, see the Request, page 3 and the judgment of 13 February 2025 by Oslo District Court in case 24-081980TVI-TOSL/04, page 4.

[6] Request, pages 3-4.

[7] The impact assessment was based on existing knowledge obtained through studies prepared by relevant experts. However, on 22 October 2022, the Institute of Marine Research reported to the Ministry that for more than 99% of the assessment area, there is no knowledge to compile, see the Request, page 4.

[8] Request, page 4.

[9] Request, pages 5-6.

[10] Request, page 6.

[11] Request, page 6.

2 EEA LAW

9. The preamble to the EEA Agreement reads, insofar as relevant:

(…) the CONTRACTING PARTIES; (…)

DETERMINED to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development, as well as the principle that precautionary and preventive action should be taken;

DETERMINED to take, in the further development of rules, a high level of protection concerning health, safety and the environment as a basis;

10. Article 73 EEA reads:

1. Action by the Contracting Parties relating to the environment shall have the following objectives:

(a) to preserve, protect and improve the quality of the environment;

(b) to contribute towards protecting human health;

(c) to ensure a prudent and rational utilization of natural resources.

2. Action by the Contracting Parties relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Contracting Parties' other policies.

11. Recitals 4-6 of the SEA Directive, read:

(4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The

inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

(6) The different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment.

12. The objective of the Directive is set out in Article 1:

The objective of this 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 and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

13. The definition of "plans and programmes" is set out in Article 2(a):

For the purposes of this Directive:
(a) "plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

> *- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and*
> *- which are required by legislative, regulatory or administrative provisions;*

14. The scope of the obligation to conduct environmental assessments pursuant to the Directive is set out in Article 3. It provides, insofar as relevant:

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*

(…)

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.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

15. Article 5 describes the reporting obligations linked to environmental assessments. It provides, insofar as relevant:

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.
(…)

16. Under the terms of Article 6, the draft plan or programme and the environmental report are to be made available to the public for comment.

17. Annex I lists the information which shall be included in the environmental report under Article 5(1). This includes, insofar as relevant:

(…)
(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;
(…)
(1) These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.

18. Annex II sets the criteria for determining the likely significance of effects referred to in Article 3(5). It provides:

Criteria for determining the likely significance of effects referred to in Article 3(5)
1. The characteristics of plans and programmes, having regard, in particular, to
- the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources,
- the degree to which the plan or programme influences other plans and programmes including those in a hierarchy,
- the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development,
- environmental problems relevant to the plan or programme,
- the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection).

2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to
- the probability, duration, frequency and reversibility of the effects,
- the cumulative nature of the effects,
- the transboundary nature of the effects,
- the risks to human health or the environment (e.g. due to accidents),
- the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),

- the value and vulnerability of the area likely to be affected due to:

- special natural characteristics or cultural heritage,

- exceeded environmental quality standards or limit values,

- intensive land-use,

- the effects on areas or landscapes which have a recognised national, Community or international protection status.

3 NATIONAL LAW

19. The SEA Directive was implemented into national law by the Norwegian Planning and Building Act.[12]

20. The Norwegian Seabed Minerals Act establishes the rules applicable to decisions opening areas of the continental shelf to seabed mineral activities.[13] Section 1-1 establishes the purpose of the Act:

This Act shall facilitate exploration for and exploitation of mineral deposits on the Continental Shelf in accordance with societal objectives, in such a manner that safeguards considerations such as value creation, environment, safety, other business activity, as well as other interests.

21. Section 1-3 of the Norwegian Seabed Minerals Act establishes the geographical scope of the Act, and provides in its first and third paragraphs:

The Act applies to mineral deposits in Norway's internal waters, Norway's territorial waters and on the Norwegian Continental Shelf.

By the continental shelf is meant the Norwegian continental shelf as stipulated by Act 18. June 2021 no 89.[14]

22. Chapter 2 of the Seabed Minerals Act lays down the requirements for opening an area for exploration and exploitation of seabed minerals, making such a decision contingent on a prior impact assessment. Section 2-2 of the Act provides:

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[12] See Section 4-2 and Chapter 14 of the Act, LOV-2008-06-27-71 (in Norwegian: Lov om planlegging og byggesaksbehandling (plan- og bygningsloven)).

[13] LOV-2019-03-22-7 (in Norwegian: Lov om mineralvirksomhet på kontinentalsokkelen (havbunnsmineralloven)). English translation available here: https://www.sodir.no/en/regulations/acts/act-relating-to-mineral-activities-on-the-continental-shelf-seabed-minerals-act/.

[14] LOV-2021-06-18-89 (in Norwegian: Lov om Norges kontinentalsokkel).

The Ministry is responsible for conducting an impact assessment prior to opening of new areas on the Continental Shelf for mineral activities.

The impact assessment shall contribute to shed light on the various interests that apply to the area in question, so that this can form a basis when decisions are made regarding whether, and on which terms, the area can be opened for mineral activities. The impact assessment shall highlight which effects a potential opening could have for the environment, as well as the expected impact on business, economic and social factors.

The King may issue regulations relating to impact assessments.

23. The applicable conditions for opening an area, and for subsequent licensing of exploration and exploitation operations, are described in the Request.[15]

4 THE QUESTION REFERRED

24. The Referring Court has referred the following question to the EFTA Court:

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?

5 LEGAL ANALYSIS

25. For the following reasons, ESA submits that the question referred to the EFTA Court should be answered in the affirmative.

5.1 Preliminary remarks

26. ESA proceeds on the basis that the Challenged Decision falls within the material scope of the SEA Directive, as the Referring Court's question seems to presume. ESA notes that established case-law confirms that the provisions delimiting the Directive's scope

[15] Request, pages 6-8.

are to be interpreted broadly.[16] This also aligns with case-law holding that EEA States cannot through national legislation exclude a particular type of plan or programme from the scope of the SEA Directive in general terms and without assessment of each case.[17]

27. ESA notes that the Referring Court has explicitly not referred a question regarding the application of the SEA Directive to the facts of the case,[18] referring to the EFTA Court's recent judgment in Case E-6/25 *Saga Subsea*.[19]

28. ESA concurs that the EFTA Court's finding in that case concerning the applicability of EEA law to activities carried out on, or connected with, an EEA State's continental shelf clearly translates to the present case. The present case concerns the prospect of exploiting natural resources on the continental shelf.[20] As in *Saga Subsea,* the scope of application of the SEA Directive is not subject to any express specific geographical limitation.[21] Accordingly, the Directive applies through the territorial scope of the EEA Agreement,[22] which, as the EFTA Court held in *Saga Subsea*, includes the exercise of activities taking place on the continental shelf.[23]

29. In any event, ESA notes that in E-8/19 *Scanteam*, the EFTA Court held that EEA law may apply outside the territory of the EEA to situations that have a sufficiently close link to the EEA.[24]

30. In the following ESA will therefore assume that the subject matter of the Challenged Decision and the affected area is within the Norwegian continental shelf for purposes

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[16] See Case E-17/25 Redd Ullevål Sykehus v the Norwegian State, represented by the Ministry of Local Government and Regional Development, judgment of 28 April 2026, paragraph 37, and Case C-290/15 D'Oultremont and Others, EU:C:2016:816, paragraphs 39-40.
[17] See Case C-295/10 Genovaitė Valčiukienė and Others v Pakruojo rajono savivaldybė and Others, EU:C:2011:608, paragraph 54.
[18] Request, page 2.
[19] Case E-6/25 Saga Subsea AS v Akselsen and Granlund, judgment of 19 February 2026.
[20] Compare Case E-6/25 Saga Subsea, paragraph 84.
[21] Compare Case E-6/25 Saga Subsea, paragraph 78. See also, in respect of the EIA Directive, Case E-18/24 Norwegian State v Greenpeace Nordic and Nature and Youth Norway, judgment of 21 May 2025, paragraph 84.
[22] Case E-6/25 Saga Subsea, paragraph 78. See also, in respect of the EIA Directive, Case E-18/24 Greenpeace Nordic, judgment of 21 May 2025, paragraph 84.
[23] Case E-6/25 Saga Subsea, paragraphs 84 and 96.
[24] Case E-8/19 Scanteam AS v Government of Norway, judgment of 16 July 2020, paragraphs 68-69

of application of EEA law, and in particular of the SEA Directive. In any event, ESA notes that the Challenged Decision has a sufficiently close link with the EEA.[25]

5.2 The purpose and structure of environmental assessments

31. The structure and function of EEA environmental law is to require a holistic, precautionary, and preventive approach to plans and projects which may impact the environment.[26] EEA environmental law rejects piecemeal assessments which minimise or underestimate the environmental impact of plans and projects.[27] Instead, decision-makers are required to begin with the end in mind – to consider potential environmental impacts in a fair, comprehensive, and informed manner *before* adopting programmes and approving projects.[28]

32. The SEA Directive is a key piece of this legislative framework. It aims to provide for a high level of protection of the environment by ensuring that significant environmental effects are taken into account in public decision-making already at the planning and programming stage.[29] This aims to increase foreseeability for economic operators,[30] prioritise the adoption of sustainable solutions,[31] and prevent environmentally harmful decisions from being taken based on sunk-cost logic.[32]

33. The SEA Directive operates alongside Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("**the EIA Directive**").[33] Their conditions are not alternative, but rather cumulative. In other words, the mere fact that a particular project would be assessed under the EIA Directive does not exclude the application of the SEA Directive to plans and programmes which constitute a prerequisite to authorising such projects.[34] On the

[25] Case E-6/25 Saga Subsea, judgment of 19 February 2026, paragraph 96; Case E-8/19 Scanteam, paragraphs 68-69.
[26] See Case E-18/24 Greenpeace Nordic, paragraphs 47 and 50.
[27] See Case E-17/25 Redd Ullevål Sykehus, paragraph 62, Case E-18/24 Greenpeace Nordic, paragraphs 71-72, and Case C-671/16 Inter-Environnement Bruxelles and Others, EU:C:2018:403, paragraph 65.
[28] See Recitals 9 and 10 EEA and Article 73 EEA, and Case E-18/24 Greenpeace Nordic, paragraph 50.
[29] See Article 1 SEA Directive and Case E-17/25 Redd Ullevål Sykehus, paragraph 63.
[30] SEA Directive, recital 5.
[31] SEA Directive, recital 5.
[32] SEA Directive, recital 4. See also Case E-17/25 Redd Ullevål Sykehus, paragraph 63.
[33] See Article 11 SEA Directive, which confirms that it is "without prejudice to any requirements under Directive 85/377/ECC", the predecessor to the EIA Directive. See also Case E-17/25 Redd Ullevål Sykehus, paragraph 68.
[34] See Case E-18/24 Greenpeace Nordic, paragraph 44.

contrary, this is precisely the function of the SEA Directive: to map out the potential environmental impacts of plans and programmes which set the framework for future development, including future projects which may be subject to the EIA Directive.[35]

5.3 The meaning of "effects"

34. It is settled case law that the interpretation of a provision of EEA law requires consideration of not only its wording, but also its context and the objectives and purpose pursued by the act of which it forms part. Furthermore, where a provision of EEA law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness.[36]

35. The EFTA Court and the CJEU have both held that the provisions of the SEA Directive delimiting its scope are to be interpreted broadly in light of its objective of ensuring a high level of environmental protection.[37] Such a teleological interpretation should also apply to the term "effects" within the meaning of Article 5(1) of the Directive, giving it a broad meaning encompassing a wide array of effects. A broad interpretation of the term "effects" also results from a textual interpretation, as the terms of the Directive itself establish that an SEA should encompass "secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects."[38] "Effects" are thus deliberately defined broadly.

36. In the context of the EIA Directive, the EFTA Court has held that effects need neither be proximal in a temporal or geographic sense in order to be able to qualify as "effects" for the purpose of an environmental assessment.[39] The Court also underlined that as the scope of application of the EIA Directive was not affected by the geographical scope of the territory of the competent authority, *a fortiori* such geographical limitations were not applicable in assessing the effects of projects under that framework.[40]

37. ESA submits that the same applies to assessments under the SEA Directive. Neither the text nor the objective of the SEA Directive indicate that geographic or temporal

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[35] See Article 3(2)(a) SEA Directive.
[36] See Case E-18/24 Greenpeace Nordic, paragraph 61.
[37] See Case E-17/25 Redd Ullevål Sykehus, paragraph 37, Case C-290/15 D'Oultremont, paragraphs 39-40. Compare Case E-18/24 Greenpeace Nordic, paragraph 62.
[38] Annex I SEA Directive.
[39] Case E-18/24 Greenpeace Nordic, paragraph 83
[40] Case E-18/24 Greenpeace Nordic, paragraph 84

proximity should be used to limit what impacts can qualify as "effects" within the meaning of the SEA Directive. ESA therefore submits that no such limitations exist. Indeed, a certain degree of geographic and temporal separation between the adoption of a plan or programme and the resulting effects is inherent in the logic and structure of the Directive.[41]

38. The SEA Directive applies to plans and programmes, rather than individual projects, and makes it incumbent on competent authorities to assess the effects of "*implementing*" the plan or programme, as opposed to the EIA Directive's requirement of assessing the effects *of* a project.[42] The effects of *implementing* a plan or programme are by definition not immediate, direct, or unavoidable; they may depend on a number of variables and choices subsequent to the adoption of the plan or programme. This is because an SEA is not concerned with the immediate impacts of a single project or a limited number of projects, but rather with the impact of a plan or programme. The adoption of such a plan or programme may *per se* not directly produce any effects, but instead create a framework for authorising projects which in turn will produce effects. Merely because variables and choices stand between the adoption of the plan or programme and the ultimate materialisation of the effects does not mean that they are not the effects of *implementing* the plan or programme. This is moreover reflected in the definition of effects as encompassing "secondary" effects of implementing the plan or programme.

39. ESA submits that it is not relevant for the determination of whether an effect qualifies as an "effect of implementing a plan or programme" whether the effect will take place onshore or offshore. The SEA Directive does not allow for the exclusion of an effect from the assessment merely because the effect may take place outside the area for which the plan or programme is approved.[43]

40. Nor is it determinative whether the effect will take place within or outside the EEA. If uncertainty as to whether certain downstream activities will take place within or outside the EEA justified excluding their foreseeable harmful effects from the assessment, the

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[41] See, *mutatis mutandis*, Case E-18/24 Greenpeace Nordic.
[42] Article 5 SEA.
[43] See, *mutatis mutandis*, Case E-18/24 Greenpeace Nordic, paragraph 84; Case C-531/13 Marktgemeinde Straßwalchen and Others, EU:C:2015:79, paragraph 46.

scope of an SEA could be significantly narrowed simply by leaving such matters unresolved at the planning stage. Such an interpretation would run directly counter to the preventive and holistic purpose of the SEA Directive.

41. Equally, it is not determinative whether an effect will take place shortly after the adoption of the plan or programme or only at a later stage. Like the EIA Directive, the SEA Directive explicitly encompasses both short-, medium- and long-term effects, both temporary and permanent, in the definition of "effects" in Annex I SEA.

42. While temporal and geographical considerations are not decisive in determining the effects of implementing a plan or programme, ESA notes that the fact that certain effects may be conditional or contingent on subsequent licensing or decision-making processes may affect the level of detail required in the environmental report under Article 5(2) SEA. That provision expressly provides that the information to be included in the environmental report shall include information that may reasonably be required taking into account a number of factors, including the level of detail in the plan or programme. The more certain and immediate an effect of implementing a plan or programme is, the higher the level of detail of information on that effect may be expected to be included in the environmental report. This does not, however, justify categorically excluding likely significant downstream effects from the scope of an SEA, merely because they are secondary or subject to additional licensing processes.

5.4 The meaning of "likely"

43. As regards how "likely" effects should be in order to constitute "effects" which should be assessed under Article 5(1) SEA, ESA submits that the threshold for likelihood is not a demanding one and that uncertainty as to the likelihood of effects should be interpreted in favour of their inclusion in an SEA, not their exclusion.

44. In the context of the EIA Directive, the CJEU's judgment in Case C-41/24 *Waltham Abbey Residents Association* provides helpful guidance.[44] There, the CJEU held that a project should be considered to be likely to have significant effects on the environment where, "by reason of its nature, there is *a risk* that it will cause a substantial and irreversible change in environmental factors, such as fauna and flora,

[44] Case C-41/24 Waltham Abbey Residents Association, EU:C:2025:140. See also Case E-18/24 Greenpeace Nordic, paragraph 90.

soil or water, irrespective of its size" (emphasis added).[45] It moreover held that doubt as to the absence of significant effects should lead to an assessment being conducted, rather than relying on that doubt to avoid conducting an assessment.[46] As to the standard of doubt, the CJEU held that a competent authority had to be able to "with *certainty* […] rule out *all reasonable scientific doubt* as to the possibility of the project having significant effects on the environment" (emphasis added) in order to justify not conducting an environmental assessment after receiving objective evidence from a third party as regards potential significant effects.[47]

45. ESA submits that this standard of likelihood is largely transposable to the present case. The differences between *Waltham Abbey* and the present case notwithstanding, namely the differences between the issue of *whether* to conduct an environmental assessment and *what effects to include* in an assessment, and the differences between the EIA and SEA Directives, the standard of *all reasonable scientific doubt* can serve as a guidepost for the level of certainty which a competent authority should have in order to exclude a hypothetical downstream effect of implementing a plan or programme from an environmental assessment. After all, had the legislator intended to impose a higher standard of likelihood for the inclusion of an effect in an environmental impact assessment under the SEA Directive, this could readily have been made clear by using stronger terminology such as 'proven significant effects' or 'demonstrable significant effects'.

46. ESA moreover submits that the special nature of the SEA Directive should be taken into account when interpreting the meaning of "likely". An SEA assesses the likely effects of *implementing* a plan or programme. As such implementation commonly depends on subsequent procedures and decisions as described above, a level of uncertainty and conditionality is inherent in the effects of implementing the plan or programme. Such conditionality and uncertainty should not be relied upon to exclude potential effects from the scope of an SEA, as this would undermine part of the

[45] Case C-41/24 Waltham Abbey, paragraph 46; Case C-526/16 Commission v Poland, EU:C:2018:356, paragraph 65. See also, *mutatis mutandis*, Greenpeace paragraph 91.
[46] Case C-41/24 Waltham Abbey, paragraph 48.
[47] Case C-41/24 Waltham Abbey, paragraph 50.

purpose of an SEA which is to map out viable alternatives already at the planning stage.[48]

47. The SEA Directive was partly adopted because experience showed that, by the time projects were assessed, significant environmental effects had already been determined by earlier planning choices, making it too late to take them fully into account when authorising individual projects.[49] Therefore, it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of the Directive.[50] For the same reason, the fact that multiple alternative pathways to implementation are envisaged is not in itself a reason to categorically exclude likely significant downstream effects from the scope of an SEA. On the contrary, an SEA is meant to serve as a tool for considering such multiple pathways and mapping out reasonable alternatives, as is called for in Article 5(1) SEA.[51]

48. The Challenged Decision was taken against the background of significant gaps in scientific knowledge concerning seabed mining, as both parties to the national proceedings seem to agree on and as seems to have been explicitly recognised by Norwegian authorities.[52] On this point, it is appropriate to recall the precautionary principle, a foundational principle of international and EEA environmental law in light of which the SEA Directive should be interpreted.[53] Under the precautionary principle, a lack of scientific knowledge should be interpreted in favour of the environment. Thus, a lack of scientific knowledge cannot be relied upon to underestimate or minimise the environmental impact of projects.[54]

49. As the Court has held, the precautionary principle "*may be invoked where the best available scientific information is so insufficient, inconclusive or imprecise as to make*

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[48] Compare Case C-671/16 Inter-Environnement Bruxelles and Others, paragraph 63.
[49] Case E-17/25 Redd Ullevål Sykehus, paragraphs 56-58.
[50] Case E-17/25 Redd Ullevål Sykehus, paragraphs 56-58.
[51] Case E-17/25 Redd Ullevål Sykehus, paragraph 62.
[52] Request, page 4.
[53] See Principle 15 of the Rio Declaration on Environment and Development, recital 9 to the EEA Agreement, Article 73 EEA, recital 1 to the SEA Directive, recital 15 to the EIA Directive, and *mutatis mutandis* Case E-18/24 Greenpeace Nordic, paragraph 90.
[54] See Principle 15 of the Rio Declaration on Environment and Development, recital 9 to the EEA Agreement, Article 73 EEA, recital 1 to the SEA Directive, recital 15 to the EIA Directive, and *mutatis mutandis* Case E-18/24 Greenpeace Nordic, paragraph 90, and Case C-127/02 Waddenvereniging and Vogelsbeschermingvereniging, EU:C:2004:482, paragraph 44.

it impossible to determine with certainty the risks or hazards that may arise".[55] If gaps in scientific knowledge are so significant as to prevent any meaningful assessment of a plan or programme's likely environmental impact beyond reasonable scientific doubt, it may be impossible to fulfil the obligations of the SEA Directive without first conducting further research. In such cases, it may be necessary for competent authorities to prioritise other reasonable alternatives to the plan or programme, which should have been considered as part of the SEA.[56] Where information is lacking, such reasonable alternatives might include research programmes to establish the necessary body of information and/or a plan or programme with a more limited material, temporal, or geographic scope for which more robust information is available.

50. It is for the Referring Court to assess whether the insufficiency, inconclusiveness, or imprecision of information available about the likely environmental effects of the Challenged Decision might make it impossible to fulfil the obligations of the SEA Directive in light of its objectives. Where the insufficiency of the available information is such as to make it impossible to fulfil the obligations of the SEA Directive, it is incumbent on the national court to draw the necessary consequences from that failure.[57]

5.5 The relevance of potential subsequent processes and assessments

51. For the following reasons, ESA considers that it does not impact the assessment of whether certain effects constitute "likely significant effects of implementing a plan or programme" that subsequent authorisation processes, including potentially other environmental assessments, may be necessary before the effects materialise.

52. It appears from the Request that the Challenged Decision enables the award of licences for commercial exploration and exploitation of seabed minerals. Exploitation itself may not occur until a later stage, following further procedures. Those features may be relevant for the level of detail required in the environmental report under Article 5(2). They do not, however, justify the categorical exclusion of likely significant downstream effects from the scope of Article 5(1).

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[55] See Case E-4/04 Pedicel, judgment of 25 February 2005, paragraph 60, where the principle was cited in the context of public health. See also Case E-18/24 Greenpeace Nordic, paragraph 90.
[56] Article 5(1) SEA.
[57] Case E-17/25 Redd Ullevål Sykehus, paragraphs 72-74.

53. As noted above, the SEA Directive differs from the EIA Directive in that the latter requires an assessment of the "effects of a project", whereas the former requires an assessment of the "effects (…) of *implementing* the plan or programme". Implementation of a plan or programme creating a framework for the exploration and exploitation of natural resources evidently encompasses also the resulting licensing of exploration and exploitation activities, although the impacts of these will not be able to be determined with the same level of detail and certainty at the planning (SEA) stage as at the authorisation (EIA) stage.

54. Moreover, this applies regardless of the fact that the different planning and authorisation processes may be undertaken based on different legal frameworks.[58] The holistic assessment at the outset of a plan or programme which the SEA Directive aims to ensure would be undermined if States were entitled to silo their planning processes into separate legal frameworks, excluding certain environmental effects from each of the planning processes, and thus avoid a process which comprehensively assesses all likely significant environmental impacts.

55. As the CJEU has held, an environmental impact assessment carried out under the EIA Directive "*cannot be used to circumvent the obligation to carry out the environmental assessment required under the SEA Directive in order to address environmental aspects specific to that directive"*.[59] Later authorisation procedures may supplement the strategic environmental assessment, but they cannot replace it where the likely significant effects are already foreseeable at the strategic stage.[60]

56. Finally, ESA considers that it is immaterial whether the potential projects for which a plan or programme may set the framework qualify as different project categories under the EIA Directive.[61] The SEA Directive's definition of "effects" explicitly includes secondary, synergistic and cumulative effects.[62] This definition would be deprived of much of its practical effect if the assessment were confined to effects arising from subsequent projects belonging to a single category under the EIA Directive.

[58] See Case C-671/16 Inter-Environnement Bruxelles and Others, paragraph 63.
[59] Case C-671/16 Inter-Environnement Bruxelles and Others, paragraph 65.
[60] Case 295/10 Valčiukienė and Others, paragraphs 60 to 62; Case C-473/14 Dimos Kropias Attikis, EU:C:2015:582, paragraph 58; and Case C-671/16 Inter-Environnement Bruxelles and Others, paragraph 65.
[61] Request, page 14.
[62] Annex I SEA.

Cumulative and synergistic effects may frequently arise from the interaction of different types of development, and the SEA Directive foresees an assessment capable of capturing environmental effects resulting from various developments which may result, directly or indirectly, from the implementation of the plan or programme.

5.6 Application of these considerations to the present case

57. As is set out above, ESA considers that “effects” should be given a broad interpretation and that the threshold for “likely” is relatively low. That threshold excludes only those effects which have been shown beyond reasonable scientific doubt not to result from the implementation of a plan or programme.

58. In the context of a decision which forms the basis for awarding licences for commercial exploration and exploitation of minerals on the continental shelf, ESA submits that onshore waste generation arising from processing extracted seabed minerals must clearly qualify as “effects” within the meaning of Article 5(1) SEA, unless it can be demonstrated beyond reasonable scientific doubt that no such waste will be generated. Many projects for commercial exploration and exploitation will inevitably result in the processing of extracted seabed minerals, whether onshore or offshore, to varying degrees. In order to determine commercial viability, it will likely be necessary to extract some amounts of seabed materials and process them. In ESA’s understanding, it is not disputed that such processing might take place offshore or onshore, and it would indeed seem logical that in an emerging industry whose activities attach to the continental shelf, offshore processing capacities are very limited. It is therefore reasonably foreseeable that projects may involve onshore processing of the extracted materials. Even if offshore processing were a reasonable alternative, it would precisely fit the purpose of an SEA as a strategic tool to map out such viable alternatives and compare their environmental impact.[63]

59. This is true both for the exploration and the exploitation stage, as exploration will likely entail initial extraction of seabed minerals on a smaller scale to assess commercial and scientific viability of exploitation. Processing of seabed minerals is therefore a reasonably likely and foreseeable result of the implementation of a decision such as the Challenged Decision. As is explained above, those effects cannot be categorically

[63] See Case E-17/25 Redd Ullevål Sykehus, paragraph 63.

excluded from an SEA because they may occur outside the licensed area or outside the EEA, nor can they be excluded because they are conditional on other licensing processes and decisions. The fact that onshore processing may involve separate licensing processes under different legal frameworks may affect the level of detail of information which the environmental report must include under Article 5(2) SEA, but it does not justify its exclusion from the scope of the SEA.

60. Moreover, if there are objective indications that this processing may entail radioactive pollution, that pollution must also be assessed as effects under Article 5(1), unless it can be demonstrated beyond reasonable scientific doubt that no radioactive pollution will be generated.

61. For these reasons, ESA considers that the EFTA Court should answer the question referred in the affirmative.

62. ESA finally observes that the exclusion from an environmental assessment of a category of effects of implementing a plan or programme within the meaning of Article 5(1) SEA would render the environmental assessment incompatible with the requirements of the SEA Directive. It is incumbent on a national court to draw the necessary consequences from that incompatibility, and to eliminate the unlawful consequences of a failure to carry out a full environmental assessment required under the SEA Directive.[64]

[64] Case E-17/25 Redd Ullevål Sykehus, Case E-18/24 Greenpeace Nordic.

6 CONCLUSION

Accordingly, the Authority respectfully submits to the Court that the answer to the Request should be as follows:

> Onshore waste generation and radioactive pollution arising from processing of extracted seabed minerals qualify as "effects" of implementing a plan to open an area of the continental shelf of an EEA State to seabed mineral activities, within the meaning of Article 5(1) of Directive 2001/42/EC.

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