EFTA Court Registry
1, Rue du Fort Thüngen
L-1499 Luxembourg

Oslo, 26 August 2026

WRITTEN OBSERVATIONS
TO
THE EFTA COURT

submitted pursuant to Article 90 (1) of the Rules of Procedure of the EFTA Court

represented by
attorney Jenny Sandvig and associate Eivind H. Midtgård

IN CASE E-11/26

WORLD WIDE FUND FOR NATURE NORWAY

v.

THE NORWEGIAN STATE

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1 INTRODUCTION

1. On 8 June 2026, Borgarting Court of Appeal ("**the Referring Court**") submitted a Request for an Advisory Opinion to the EFTA Court in Case No 25-062553ASD-BORG/01 between World Wide Fund for Nature Norway ("**WWF-Norway**") and the Norwegian State ("**the State**"). The case regards the validity of the Ministry of Energy's[1] decision of 12 April 2024 to open 281,200 square kilometres of the Norwegian continental shelf – an area exceeding the United Kingdom's land area – for exploration and extraction of deep seabed minerals ("**the Decision**").

2. The Decision rests on an impact assessment which the Ministry itself acknowledges is built on assumptions and limited knowledge.[2] The State's own environmental expert bodies warned that the impact assessment could not serve as a basis for decision-making;[3] that there is no knowledge to compile on 99% of the assessed area;[4] that knowledge in all areas is too inadequate;[5] and that the Ministry's geological assessment of the mineral resource potential is "out of step with the known reality".[6]

3. The assessment procedure was further compromised by the suppression of onshore effects. One of the reports commissioned by the Norwegian Offshore Directorate[7] initially found that onshore processing impacts would be one of the most significant environmental effects

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[1] Named the Ministry of Petroleum and Energy until 1 January 2024, see the press release here.

[2] Meld. St. 25 (2022–2023), available here, p. 60: "[…] the assessment of impacts associated with exploration, extraction, and decommissioning of seabed mineral activities represents an assumed picture of environmental consequences. […] There is no actual knowledge or experience from comparable activities. In addition, there are substantial gaps in knowledge about environmental conditions and the distribution of vulnerable habitats within the assessment area, which makes it difficult to evaluate the consequences, as pointed out by the Norwegian Polar Institute. The assessment of impacts is therefore, in addition to the knowledge available from relevant international research and other comparable activities, based on different subject-specific premises and assumptions." (The Referring Court's translation)

[3] Amongst others, the Norwegian Environmental Agency, comment of 27 January 2023, available here, p. 1.

[4] Institute of Marine Research (2022), Impact Assessment of Opening Areas for Deep Sea Mineral Activities on the Norwegian Continental Shelf, p. 3

[5] The Norwegian Environmental Agency, comment of 27 January 2023, available here, p. 4.

[6] The Geological Survey of Norway, comment of 27 January 2023, available here (our translation).

[7] Named the Norwegian Petroleum Directorate until 1 January 2024, see the press release here.

of the opening decision, only for the Directorate to order that information deleted.[8] The Norwegian Radiation and Nuclear Safety Authority (DSA) likewise warned that deep seabed mineral extraction would lead to radioactive pollution from processing on land, and that the State must assess such effects.[9] The State did not.

4. Taken together, these features describe a process in which the State sought to assess what could not yet be assessed and excluded from the assessment what could.

5. Against this background, the Referring Court asks, in essence, whether the effects that the Offshore Directorate demanded removed, and the effects that the DSA warned about, are "effects" of implementing a plan to open an area of the continental shelf for exploration and extraction of deep seabed mineral activities under Article 5(1) of Directive 2001/42/EC ("**the SEA Directive**").

6. WWF-Norway argues that those effects are "effects" within the meaning of Article 5(1) of the SEA Directive. WWF-Norway relies on the wording, objective, and context of the SEA Directive, as well as on consistent case law of the EFTA Court and the Court of Justice, in particular the judgment of 21 May 2025 in *Greenpeace Nordic*, E-18/24, and the judgment of 28 April 2026 in *Redd Ullevål Sykehus*, E-17/25.

7. Conversely, the State advances a restrictive interpretation of the Directive, inconsistent with its wording, objective, and CJEU case law, for the incorrect proposition that such inevitable effects are not "effects" of implementing the plan for the purposes of Article 5(1).

2 FACTUAL BACKGROUND

8. Deep seabed mining, as envisaged in this case, has two inherent dimensions – an offshore dimension and an onshore dimension. The offshore dimension concerns extraction at depths from 200 to 4,000 metres below sea level in the least understood and one of the most

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[8] AkvaPlan-Niva/IKM Acona, *Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities* (draft version with comments from the Norwegian Offshore Directorate), available here, pp. 42-50. The Norwegian Offshore Directorate commented, amongst other things, that "[l]and-based disposal shall not be discussed here", see p. 47 (our translation).

[9] The Norwegian Radiation and Nuclear Safety Authority (DSA), comments of 16 February 2021, available here and 23 September 2023, available here.

vulnerable marine environments on Earth.[10] The onshore dimension concerns the consequences on land that inevitably follow from the deep seabed activity. Mineral-bearing material will be brought ashore for further processing and refinement.[11] This processing produces residues — including naturally occurring radioactive substances — that will be disposed of on land.[12]

9. As regards the offshore dimension, scientists across the world agree that knowledge on the deep sea is lacking.[13] Hence, the European Commission has stated that States and the scientific community broadly agree that knowledge of the deep-sea environment and the impacts of deep seabed mining is not comprehensive enough to enable evidence-based decision-making to allow exploitation to proceed safely.[14] The European Parliament has held that the current state of scientific knowledge does not allow for an accurate assessment of the environmental impact of deep seabed mining, and that premature exploration and mining could cause permanent and irreversible damage to ecosystems.[15] For those reasons, a growing number of States, currently 46 (including now 17 EU Member States), the

[10] See e.g. European Parliament resolution of 7 February 2024 on Norway's recent decision to advance seabed mining in the Arctic (2024/2520(RSP)), available here, p. 3 and Meld. St. 25 (2022–2023), available here, p. 43

[11] See e.g. The Ministry of Petroleum and Energy, *Impact Assessment*, p. 44, available here, which *inter alia* states: "Overall, the extraction is expected to consist of the following production stages: […] 5. Transport of the ore to an onshore facility for treatment and/or further processing" (our translation). See also The Norwegian Ministry of Petroleum and Energy, *Proposal for impact assessment program pursuant to the Norwegian Seabed Minerals Act*, available here, pp. 25-26; DNV, *Technology report seabed minerals*, available here, pp. 14, 61, 64 and 85; AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, p. 41; Akvaplan-Niva/IKM Acona, *Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities*, available here, pp. 15 and 46.

[12] See e.g. The Norwegian Environmental Agency, comments to the proposal for impact assessment program, available here, p. 23; The Norwegian Radiation and Nuclear Safety Authority (DSA), comments of 16 February 2021, available here and 23 September 2023, available here; AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, pp. 42-50.

[13] See e.g. the synthesis of the peer-reviewed literature and consultations with deep-seabed mining stakeholders in Amon et. al. (2022), *Assessment of scientific gaps related to the effective environmental management of deep-seabed mining*, available here.

[14] The European Commission, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Setting the course for a sustainable blue planet - Joint Communication on the EU's International Ocean Governance agenda*, available here, p. 4

[15] The European Parliament resolution of 7 February 2024 on Norway's recent decision to advance seabed mining in the Arctic (2024/2520(RSP)), available here, p. 3

European Commission and the European Parliament support a moratorium, a precautionary pause, or a total ban on deep seabed mining.[16]

10. The onshore dimension stands in contrast. Existing knowledge provides a significantly more solid basis for assessing the environmental effects of mineral processing, even though the limited availability of applicable processing technologies gives rise to uncertainties.[17]

11. Moreover, deep seabed mining, as envisaged in this case, will *inevitably* give rise to onshore effects. Extracted ore is not an end product. Only a small proportion of the extracted material consists of metals that can be utilized.[18] The Ministry therefore states that the ore will be brought to land for processing.[19] Processing involves crushing the ore into fine-grained particles and further treating it to separate and recover those metals.[20] That process produces waste streams, potentially in the order of millions of tons.[21] Much of the waste will be radioactive, as manganese crusts[22] contain significant naturally occurring radioactive

[16] European Commission, *Joint Communication To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Setting the course for a sustainable blue planet - Joint Communication on the EU's International Ocean Governance agenda*, available here, pp. 2, 4 and 5; The European Parliament resolution of 7 February 2024 on Norway's recent decision to advance seabed mining in the Arctic (2024/2520(RSP)), available here, pp. 3–4.

[17] See e.g. The Norwegian Environmental Agency, comments to the proposal for impact assessment program, available here, p. 23; The Norwegian Radiation and Nuclear Safety Authority (DSA), comments to area proposal, available here, p. 2; AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, pp. 42-50.

[18] AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, p. 41.

[19] See e.g. The Ministry of Petroleum and Energy, *Impact Assessment*, p. 44, available here, which *inter alia* states: "Overall, the extraction is expected to consist of the following production stages: […] 5. Transport of the ore to an onshore facility for treatment and/or further processing" (our translation). See also The Norwegian Ministry of Petroleum and Energy, *Proposal for impact assessment program pursuant to the Norwegian Seabed Minerals Act*, available here, pp. 25-26; DNV, *Technology report seabed minerals*, available here, pp. 14, 61, 64 and 85; AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, p. 41; Akvaplan-Niva/IKM Acona, *Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities*, available here, pp. 15 and 46.

[20] AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, pp. 40-50.

[21] Ibid., pp. 42 and 48.

[22] A type of mineral assumed to occur in the deep seabed on the Norwegian continental shelf.

substances that will be enriched by a factor of 3 to 10 during smelting.[23] All this waste will be disposed of on land, requiring enormous terrestrial footprints and giving rise to large-scale environmental consequences.[24] New radioactive deposits onshore may also have to be established, as no existing facility in Norway is currently able to receive such volumes of waste, which will be subject to mandatory deposition owing to its level of radioactivity.[25]

12. Still, when initiating the opening process in 2020 and 2021, the Norwegian Government proposed to exclude the onshore dimension from the assessment of environmental effects. The proposed assessment was confined to offshore effects,[26] even though current scientific knowledge does not allow for assessments of such effects.[27] This narrow approach was adopted against the backdrop of the State's position that the SEA Directive did not apply to deep seabed mineral activities on the Norwegian continental shelf under Article 126 of the EEA Agreement, a position maintained throughout the process.[28]

13. The State's own expert authorities responded with criticism, including the Norwegian Environment Agency, which is responsible for the SEA Directive.

14. On the offshore dimension, the Environment Agency stated that it is impossible to assess the area, covering more than one quarter of Norway's sea area, and that knowledge on the

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[23] Bergfald Environmental Consultants, Comments on selected issues regarding the Environmental Impact Assessment for deep-sea minerals, available here, p. 10-11.

[24] AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, pp. 40-50. See also the Norwegian Environmental Agency, comments to the proposal for impact assessment program, available here, p. 23 and the Norwegian Radiation and Nuclear Safety Authority (DSA), comments of 16 February 2021, available here and 23 September 2023, available here;

[25] Bergfald Environmental Consultants, Comments on selected issues regarding the Environmental Impact Assessment for deep-sea minerals, available here, p. 10-11; the Norwegian Radiation and Nuclear Safety Authority (DSA), comments of 16 February 2021, available here and 23 September 2023, available here.

[26] The Norwegian Ministry of Petroleum and Energy, proposal for impact assessment program, available here, p. 33.

[27] The European Commission, *Joint Communication To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Setting the course for a sustainable blue planet - Joint Communication on the EU's International Ocean Governance agenda*, available here, p. 4; The European Parliament resolution of 7 February 2024 on Norway's recent decision to advance seabed mining in the Arctic (2024/2520(RSP)), available here, p. 3.

[28] See e.g. the preparatory works to the Norwegian Seabed Mining Act, where the Ministry states: "[t]he EEA Agreement applies out to 12 nautical miles, that is, out to the border of the territorial waters" (our translation), see Proposition 106 L (2017-2018) p. 59.

environment in this vast area is "very lacking".[29] The Agency also emphasized that knowledge on the environment is a condition for assessing consequences.[30] Similarly, the Institute of Marine Research noted that "for more than 99% of all conceivable areas within the assessment area, there will be no knowledge available to compile". [31] It further noted that "approximately 90% of the species in the study area have not been [scientifically] described".[32]

15. On the onshore dimension, several environmental authorities insisted that onshore effects had to be assessed. The Norwegian Environment Agency stated that the assessment had to include possible onshore effects, including waste disposal, as disposal of waste has been associated with major area-related problems on land.[33] The Norwegian Radiation and Nuclear Safety Authority (DSA) warned that the State must assess radioactive pollution, as naturally occurring radioactive materials are present in the deep seabed.[34] DSA later reiterated that warning, stating that it had reason to believe that "[management and processing] facilities must be established *on land*, which again will cause risk for radioactive pollution to the environment" (emphasis added).[35]

16. The State chose to ignore these warnings. It adopted the proposal to assess offshore effects in the vast area without scientific basis, and to exclude onshore activities on the made-up criterion that they need only be assessed if they systematically differed from effects of processing land-based ore.[36] The final consultancy impact assessment report, which the authorities had redacted, ultimately erroneously assumed that there were no such

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[29] The Norwegian Environmental Agency, comments to the proposal for impact assessment program, available here, p. 1 (our translation).

[30] The Norwegian Environmental Agency, comments to the proposal for impact assessment program, available here, p. 1.

[31] The Institute of Marine Research, *Impact assessment for opening of areas for mineral activities on the Norwegian continental shelf*, p. 3.

[32] Ibid.

[33] The Norwegian Environmental Agency, comments to the proposal for impact assessment program, available here, p. 23.

[34] The Norwegian Radiation and Nuclear Safety Authority (DSA), comments of 16 February 2021, available here.

[35] The Norwegian Radiation and Nuclear Safety Authority (DSA), comment of 23 September 2023, available here, p. 2 (our translation).

[36] See the Ministry of Energy's assessment of consultation responses to the proposed impact assessment programme, row 71, 168 and 333, available here.

differences. It failed to consider, for instance, the fact that new radioactive deposits onshore may have to be established.[37] Onshore waste was on this basis excluded.[38]

17. Only later during the court hearing did it emerge that the exclusion of onshore effects had evolved into deletion of material information. The underlying report on environmental effects commissioned by the Norwegian Offshore Directorate initially identified onshore processing impacts as one of the largest effects.[39] The report documented, *inter alia*, that "[d]ue to the volumes of waste involved, amounting to several million tonnes, disposal will have a large terrestrial footprint, which may also affect surrounding wildlife"; that "[f]or waste placed in piles or natural depressions, there will also be a risk of spreading of waste particles as dust"; that "[f]rom the onshore waste deposit at the Titania mine in Tellnes, it has been estimated that approximately 88,000 kg of tailings are transported by air currents 2.8 km downwind from the deposit each year."; that disposal in dams may cause metre-high floods, spreading metallic waste across large surrounding areas; and that "for example, waste was released as a result of a dam failure in Ajka, Hungary, in 2010, with approximately 700,000 m^3 of waste being spread over an area of 40 km^2".[40] The Norwegian Offshore Directorate then essentially instructed the authors to delete that information and the entire chapter relating to onshore effects, stating that "[l]and-based disposal shall not be discussed here".[41] Material environmental information was thereby omitted from the material made available to the public, other authorities, and the Storting (the Norwegian Parliament).

18. The deletion was one of several edits by the authorities that altered the report's presentation of environmental findings. The Norwegian Offshore Directorate – which is not an environmental authority – also added "could" and "possible" in front of environmental

[37] Bergfald Environmental Consultants, Comments on selected issues regarding the Environmental Impact Assessment for deep-sea minerals, available here, p. 10-11; the Norwegian Radiation and Nuclear Safety Authority (DSA), comments of 16 February 2021, available here and 23 September 2023, available here.

[38] Akvaplan-Niva/IKM Acona, *Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities*, available here, pp. 58–59.

[39] AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, pp. 42-50.

[40] Ibid. (our translation)

[41] Ibid. (our translation). See also the news article published by VG here.

impacts, commented that "'Possible' should be included in all headlines!", criticized the authors for "thin argumentation" where effects were described as more than "small" or "insignificant", wrote that "this can look very dramatic the way it's described" and commented that "a concerned attitude is apparent a bit too often".[42]

19. What remained within the narrowly scoped and redacted assessment was, on the State's own account, an *assumed* picture rather than a documented one.[43] The underlying report on environmental effects itself noted that "[d]ue to a lack of knowledge regarding the composition and distribution of fauna in the study area, it is not suitable to assess the overall impact of seabed mineral extraction activities".[44] On 27 October 2022, the Ministry of Energy nevertheless published the impact assessment together with a draft opening decision for public consultation.[45] The assessment assumed, on no documented basis, that exploration and the cessation of operations would have only "minor" environmental impacts.[46]

20. Again, the State's own expert authorities responded with criticism. The Norwegian Environment Agency stated that the impact assessment did not provide a decision-making basis for opening for deep seabed mining.[47] As an overall comment, it stated that "[k]nowledge in all areas is inadequate".[48]

21. On the offshore dimension, the Environment Agency stated: "Since there is very limited actual knowledge and experience, the descriptions of the environmental effects in the impact assessment are based on a number of premises, assumptions, and references to knowledge concerning related issues for which the transferability is unclear."[49] Further, it

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[42] Ibid. (our translation).

[43] Meld. St. 25 (2022–2023), available here, p. 60.

[44] Akvaplan-Niva/IKM Acona, *Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities*, available here, pp. 8 and 61 (our translation).

[45] The impact assessment and proposal for opening was published here.

[46] The Ministry of Petroleum and Energy, *Impact Assessment*, pp. 11, 104 and 106, available here (our translation).

[47] The Norwegian Environmental Agency, comment of 27 January 2023, available here, p. 1.

[48] Ibid., p. 4 (our translation).

[49] Ibid., p. 4 (our translation).

criticized the assessment for being skewed, stating that "[p]otential, yet uncertain, positive effects are highlighted, whereas uncertain negative effects are rarely or not at all mentioned."[50]

22. On the onshore dimension, the Environment Agency maintained that onshore effects had to be assessed.[51] The Geological Survey of Norway likewise stated that "[p]rocessing of deep seabed minerals on land may necessitate a land-based disposal" and that "disposal needs and plans must […] be included in the assessment."[52] Bergfald Environmental Consultants noted that the processing of manganese crusts will give rise to radioactive waste subject to mandatory disposal, that no existing deposit can receive the volumes of radioactive waste that will arise, and that new deposits will therefore have to be established.[53]

23. The criticism extended beyond the environmental effects and into the geological assessment. The Geological Survey of Norway stated that the scenarios were "out of step with the known reality"; that there were *no* data, observations, experience, or analogous land-based documentation supporting the scenarios on which the assessment was based; that the assessment seems "unbalanced and not sufficiently oriented towards facts"; that the Ministry of Energy's samples "cannot in any way, as it is being claimed, be used to give a resource assessment by extrapolation"; and that the language use in the impact assessment is "agitative".[54]

24. The Ministry of Energy nevertheless maintained its approach. In the White Paper presented to the Storting on 20 June 2023, the Ministry itself acknowledged that there was a significant lack of environmental knowledge.[55] Further, it acknowledged that the assessment represented an *assumed* picture of environmental consequences, based on

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[50] Ibid., p. 4 (our translation).

[51] Ibid., p. 13.

[52] The Geological Survey of Norway, comment of 27 January 2023, available here (our translation).

[53] Bergfald Environmental Consultants, Comments on selected issues regarding the Environmental Impact Assessment for deep-sea minerals, available here, p. 10-11.

[54] The Geological Survey of Norway, comment of 27 January 2023, available here (our translation).

[55] Meld. St. 25 (2022–2023), available here, p. 60.

limited knowledge and a series of premises and assumptions.[56] The Ministry nevertheless proposed opening for both exploration *and* extraction. Rather than heed the environmental authorities' even stronger warning against opening for extraction, the Ministry rejected an exploration-only approach on commercial grounds, stating: "It is not an option to only open for exploration activities, as some proposed. It is the prospect of profitable extraction that will drive commercial actors' seabed mineral activities."[57]

25. The European Parliament reacted with criticism after the Storting voted in favour on 9 January 2024.[58] Specifically, it adopted a resolution on 7 February 2024, with overwhelming majority, noting, amongst other things, that "the current state of scientific knowledge does not allow for an accurate assessment of the environmental impact of seabed mining"; that "premature exploration and mining could cause permanent and irreversible damage to ecosystems"; and that "a growing number of states", now 17, "have expressed support for a moratorium, a precautionary pause or a total ban on deep-seabed mining".[59] The Parliament also called "on all countries to apply the precautionary principle and support an international moratorium on deep-seabed mining".[60]

26. The criticism did not lead to a change of approach. On 12 April 2024, the King in Council adopted the Decision, opening 281,200 square kilometres of the Norwegian continental shelf for both exploration and extraction.[61]

27. WWF-Norway instituted legal proceedings against the State on 23 May 2024, to quash the Decision on the ground that the SEA failed to identify, describe and evaluate the likely significant environmental effects of implementing the plan, including onshore waste generation and radioactive pollution, as required by Article 5(1) of the SEA Directive. By judgment of 13 February 2025, Oslo District Court found in favour of the State, and WWF-Norway appealed on 13 March 2025. On 1 October 2025, the Court of Appeal decided to

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[56] Ibid., p. 60.

[57] Ibid., p. 70-71 (our translation).

[58] The European Parliament resolution of 7 February 2024 on Norway's recent decision to advance seabed mining in the Arctic (2024/2520(RSP)), available here.

[59] Ibid.

[60] Ibid.

[61] Royal Decree of 12 April 2024, Case No. 24/213.

request an Advisory Opinion from the EFTA Court on the question of EEA law raised by the case. The Court of Appeal ultimately withdrew its questions concerning the geographical applicability of the SEA Directive or the legal consequences of a breach of the Directive, as the Court's questions regarding these issues were resolved in the judgment of 19 February 2026 in *Saga Subsea,* E-6/25, and the judgment of 28 April 2026 in *Redd Ullevål Sykehus*, E-17/25.

3 APPLICABLE EEA LAW AND DOMESTIC LAW

3.1 The SEA and EIA Directives

28. EEA law requires environmental assessments in two stages. The SEA Directive requires a strategic environmental assessment (SEA) for *plans and programmes* which are likely to have significant environmental effects, cf. Article 3(1). The EIA Directive requires an environmental impact assessment (EIA) before giving consent to *projects* which are likely to have significant environmental effects, cf. Article 2(1).

29. The SEA and EIA requirements are concurrent obligations. The objective is to ensure the highest possible level of environmental protection through informed public participation in the decision-making process, thereby giving effect to the core objective of Article 191 of the Treaty on the Functioning of the European Union, as reflected in Article 73 of the EEA Agreement. Consequently, an EIA under the EIA Directive is not capable of calling in question the need to carry out a SEA under the SEA Directive and vice versa (see, *inter alia*, the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraphs 44 and 45 and the judgment in *Redd Ullevål Sykehus*, E-17/25, cited above, paragraphs 61 and 62 and case law cited).

30. Article 2(b) of the SEA Directive defines an SEA as a process at least consisting of i) the preparation of an environmental report, ii) the carrying out of consultations, iii) the taking into account of the environmental report and the results of the consultations in decision-making and iv) the provision of information on the decision in accordance with Articles 4 to 9.

31. Article 5(1) states that the environmental report shall identify, describe and evaluate "the likely significant effects on the environment of implementing the plan or programme".

Annex I footnote 1 states that these effects should include "secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects".

32. Article 6(1) states that "the draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public." These shall be given an "early and effective opportunity within appropriate time frames" to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme, see Article 6(4).

33. Article 8 states that the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 "shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."

34. Article 9 states that the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 shall receive certain information when a plan or programme is adopted. This information includes *inter alia* "a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with."

3.2 Relevant domestic law on SEAs

35. The SEA Directive is not transposed in the Norwegian Seabed Minerals Act, nor the Seabed Mineral Regulations. This is because the Norwegian Government, when drafting the Act, held that "[t]he EEA Agreement applies out to 12 nautical miles, that is, out to the border of the territorial waters" (our translation), and hence not on the continental shelf where deep

seabed mining may occur, see Proposition 106 L (2017-2018) p. 59. The State still maintains this view.[62]

36. That erroneous position is rejected by the EFTA Court, which has confirmed that the EEA Agreement applies on the continental shelves of EFTA States (see the judgment of 19 February 2026 in *Saga Subsea,* E-6/25, paragraphs 84 and 96). Furthermore, it follows from consistent Norwegian case law that Norwegian law must be interpreted in accordance with EEA law to the extent possible, see *inter alia* Rt-2000-1811, *Finanger*, p. 1826. Norwegian courts are therefore obliged to interpret the Seabed Minerals Act in accordance with the SEA Directive.

37. Thus, the requirements of the SEA Directive must be read into relevant provisions of the Seabed Minerals Act, including section 2-2 (1) and (2), which provide:

> *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.*[63]

38. As evidenced by this wording, the Seabed Minerals Act does not transpose the SEA Directive with the unquestionable binding force and with the specificity, precision and clarity required under Article 7 EEA (compare the judgment of 3 March 2011 in *Commission v Ireland*, C-50/09, ECLI:EU:C:2011:109, paragraph 46).

39. Opening an area for "mineral activities" under section 2-1(1) entails opening it for both exploration *and* extraction. The term "mineral activities" is statutorily defined to include both, see sections 1-5(a) and 1-2(1). Furthermore, based on equivalent provisions in the Petroleum Act, which the Seabed Minerals Act is modelled on, the plenary of the Supreme Court has stated:

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[62] The State holds that there are "strong and weighty reasons to deviate from the EFTA Court's interpretation [in *Saga Subsea*, E-6/25]" (our translation), see the article here.

[63] The Norwegian Offshore Directorate's translation, available here.

Section 3-1 subsection 1 of the Petroleum Act, which I have already quoted, requires a broad assessment and balancing of various interests and possible effects of the petroleum production: commercial effects, environmental effects, risk of pollution and economic and social effects. The assessment must include all stages of the petroleum production, see section 1-6 (c), from exploration to development, extraction, transport, exploitation and termination.[64]

40. Once an area is opened for mineral activities, the Ministry can award extraction licenses. Section 4-1(1) reads:

The King may grant exploitation licences pursuant to specific conditions. An exploitation licence gives the licensee the exclusive right to conduct surveys for and exploitation of all mineral deposits in the area covered by the licence.

41. The Seabed Minerals Act does not require a new environmental assessment, such as an EIA under the EIA Directive, before extraction licences can be awarded.

4 THE QUESTION IS ADMISSIBLE UNDER ARTICLE 34(1) SCA

42. By its question, the Referring Court asks:

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?

43. The EFTA Court is not asked to determine whether the plan will, as a matter of fact, likely lead to onshore waste generation or radioactive pollution. The Referring Court has assumed the likelihood of those effects as a premise of the question. What the Court is asked is whether such effects, given that they likely will occur, qualify in law as "effects" of implementing the plan within the meaning of Article 5(1).

44. That is a question of interpretation of Article 5(1). As the legal analysis in Section 5 demonstrates, it can be answered without entering into any factual assessment of the plan or its effects.

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[64] HR-2020-2472-P (official translation), available here, paragraph 186.

45. The point holds on either of the two competing approaches to Article 5(1).

46. On WWF-Norway's approach, Article 5(1) requires an assessment of all significant effects likely to occur if the plan is implemented. On that approach, the question admits of only one answer: Onshore waste and radioactive pollution are causal effects of implementing the plan, and therefore "effects" of opening for deep seabed mining.

47. On the State's approach, Article 5(1) requires an assessment only of the likely significant effects of implementing the projects for which the plan "sets the framework", cf. Article 3(2)(a). On that approach, the question becomes whether onshore waste generation and radioactive pollution are "effects" of implementing these projects. As Section 5.6 sets out, a literal, teleological, and systematic interpretation of Article 5(1) leads to the conclusion that they are.

48. On either approach, therefore, the question is one of interpretation of Article 5(1), and one that the EFTA Court can answer in the affirmative.

49. The question is also materially equivalent to the question that the State itself invited the Court of Appeal to refer in *Greenpeace Nordic*, E-18/24, cited above, and which the EFTA Court affirmed:

> *Where a project is listed in Directive 2011/92/EU Annex I point 14, are the greenhouse gas emissions that will be released from the extracted petroleum and natural gas, environmental "effects" of the project under Article 3(1)?*

50. Similarly, the Court of Justice also held admissible and affirmed the following question in the judgment of 28 February 2008 in *Abraham and Others*, C-2/07, EU:C:2008:133:

> *Since a projected increase in the activity of an airport is not directly referred to in the annexes to Directive 85/337 ..., must the Member State in question nevertheless take account of that increase when examining the potential environmental effect of modifications made to the infrastructure of that airport with a view to accommodating that increase in activity?*

51. The question referred is accordingly admissible under Article 34(1) SCA.

5 LEGAL ANALYSIS

5.1 Introduction

52. WWF-Norway submits that the question must be answered affirmatively. The wording of Article 5(1) requires that conclusion. The context and objective confirm it. The case law of the Court of Justice and the EFTA Court reinforces it. Each of these legal sources are addressed in turn below.

5.2 The wording of Article 5(1) of the Directive

53. Article 5(1) of the Directive reads (emphasis added):

> *Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant <u>effects on the environment of implementing the plan or programme</u>, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, <u>are identified, described and evaluated</u>. The information to be given for this purpose is referred to in Annex I.*

54. The word "effect" is defined by the Cambridge Dictionary as "the result of a particular influence; something that happens because of something else".[65] An effect of implementing a plan is thus a result of the plan, or something that happens because the plan is implemented.

55. On that ordinary meaning, the present case is straightforward.

56. If deep seabed minerals are extracted for commercial use in line with the Decision, waste will arise on land. The point follows from three simple facts. Extracted ore is not an end product. It must undergo processing, which will take place onshore. And because only a small proportion of the ore can be utilized, processing necessarily leaves large amounts of residue that must be disposed of somewhere. It follows that waste is an effect of the plan.

57. The ordinary meaning is enough. But if any doubt remains, the Directive eliminates it.

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[65] See the definition in the Cambridge Dictionary, available here.

58. Footnote 1 to Annex I provides that the assessment must cover "secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects" (compare the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraphs 82 and 83). As the UK Supreme Court observes in relation to the equivalent provision in the EIA Directive, it "would be hard to devise broader wording than this."[66]

59. Each of these descriptors confirms how broad the concept of "effects" is.

60. "Secondary" extends the obligation beyond direct and immediate effects to all effects that occur as a consequence of a primary effect or as a result of a complex pathway.[67]

61. "Cumulative" extends it to effects that the implementation of the plan will produce together with other plans, programmes, or projects (compare, *mutatis mutandis*, the judgment in *Greenpeace Nordic,* E-18/24, cited above, paragraph 71).[68]

62. "Short, medium and long-term" extend it temporally. It accordingly does not matter when the effects will occur, nor whether that is uncertain (compare, *mutatis mutandis*, the judgment in *Greenpeace Nordic,* E-18/24, cited above, paragraphs 83 and 84).

63. The wording includes no geographical limitations or requirements. What matters according to the wording is that the effects likely will occur and be significant, not where they will materialize or whether that is uncertain (compare, *mutatis mutandis*, the judgment in *Greenpeace Nordic,* E-18/24, cited above, paragraphs 83 and 84).

64. The drafters thus deliberately adopted the broadest available formulation. Article 5(1), read together with footnote 1 to Annex I, captures every likely significant effect that may follow from the implementation of the plan, whether direct or indirect, immediate or delayed, isolated or cumulative, near or far.

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[66] [2024] UKSC 20 Finch, para. 83.

[67] See the European Commission, *Guidance on Integrating Climate Change and Biodiversity into Strategic Environmental Assessment* (2013), available here, p. 8.

[68] See also the European Commission, *Guidance on Integrating Climate Change and Biodiversity into Strategic Environmental Assessment* (2013), available here, p. 6.

65. On that wording, onshore waste generation and radioactive pollution arising from the processing of extracted deep seabed minerals fall squarely within the scope of Article 5(1).

5.3 The context of Article 5(1) of the Directive

66. The literal interpretation set out above is furthermore supported by the context of Article 5(1).

67. *First*, Article 7(1) shows that the State cannot exclude onshore effects from an SEA merely because they may materialize at a geographically distant location. The provision reads:

> *Where a Member State considers that the implementation of a plan or programme being prepared in relation to its territory is likely to have significant effects on the environment in another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the plan or programme is being prepared shall, before its adoption or submission to the legislative procedure, forward a copy of the draft plan or programme and the relevant environmental report to the other Member State.*

68. The provision presupposes that likely significant effects in another Member State must be identified, described and evaluated. It does not matter that the effects occur far away. If that were the case, the provision would be deprived of its practical effect.

69. *Second*, Article 11(1) shows that the State cannot exclude onshore effects from an SEA merely because they may later be assessed at project level. The provision states:

> *An environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.*

70. As the Court of Justice and the EFTA Court have confirmed, it follows that an EIA under the EIA Directive does not dispense with the obligation to carry out an SEA under the SEA Directive. The two regimes are intended to operate in parallel, not sequentially as substitutes for one another (see the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraphs 44 and 45 and the judgment in *Redd Ullevål Sykehus*, E-17/25, cited above, paragraphs 61 and 62 and case law cited). Hence, the fact, if it be a fact, that environmental effects will be more readily identifiable at a later project stage, cannot exclude their initial assessment in the SEA.

71. The context of Article 5(1) thus confirms that it must be applied according to its terms. If a significant effect is likely to occur if the plan is implemented, it must be assessed in the SEA.

5.4 The objective of the Directive

5.4.1 *Introduction*

72. The interpretation set out above is furthermore supported by the objective and general scheme of the SEA Directive.

73. The objective of the SEA 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.*

74. That objective is broad. The Court of Justice has consistently held, in respect of the equivalent wording in the EIA Directive, that the scope of that directive is wide and its purpose very broad (compare, *mutatis mutandis*, the judgment of 24 October 1996 in *Kraaijeveld and Others*, C-72/95, ECLI:EU:C:1996:404, paragraph 31 and the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 62). The same is true for the SEA Directive (compare the judgment of 22 March 2012 in *Inter-Environnement Bruxelles ASBL,* C-567/10, ECLI:EU:C:2012:159, paragraph 37 and the judgment in *Redd Ullevål Sykehus*, E-17/25, cited above, paragraph 37).

75. Four features of that objective support WWF-Norway's interpretation of Article 5(1) in the present case.

5.4.2 *The earliest possible stage*

76. *First*, the SEA Directive requires environmental effects to be considered at the earliest possible stage in the decision-making process, cf. Article 6(2). This is indeed the very rationale of the Directive.

77. As the EFTA Court states in *Redd Ullevål Sykehus*, E-17/25, the adoption of the SEA Directive was motivated by the recognition that, when projects were assessed under the EIA Directive, significant effects on the environment had already been determined by earlier planning measures. It was still possible to identify those effects at the project stage, but it was no longer possible to take them fully into account. It was therefore considered more sensible to examine such effects at the time of the preparatory measures, where the various alternatives could still be analysed and strategic choices made (see the judgment in *Redd Ullevål Sykehus*, E-17/25, cited above, paragraph 57 and case law cited).

78. This rationale is crucial to the present case. Once a plan for deep seabed mineral activities was adopted, the strategic choice to proceed with an activity that will cause onshore effects, including radioactive waste, is locked in. The ore must be processed, and processing leads to onshore waste, potentially in the order of millions of tons. Furthermore, as all existing deposits for radioactive waste in Norway are at capacity, the opening for deep seabed mining may even necessitate the establishment of new radioactive deposits onshore. None of these effects were identified, described or assessed. The strategic choice of locking in large-scale waste onshore from deep seabed mining was thus made whilst the public and decision-makers were kept in the dark.

79. WWF-Norway's interpretation takes account of this fact. The State must assess these consequences while the strategic choice is still open. The State's interpretation disregards this. On its view, assessment may be postponed until after the State has already decided to proceed with a course of action that will necessarily give rise to such effects.

5.4.3 *Preventing the splitting of measures*

80. *Second*, because effects are to be considered at the earliest possible stage, the SEA Directive precludes interpretations that would allow strategies designed to circumvent its obligations by splitting measures (see the judgment in *Redd Ullevål Sykehus*, E-17/25, cited above, paragraph 58 and case law cited).

81. WWF-Norway's interpretation forecloses such strategies. The State's interpretation invites them. On the State's approach, the competent authority may, at its own discretion, delimit

the formal scope of a plan and thereby exclude from assessment significant effects that will inevitably follow from the implementation of that plan.

82. In the present case, the State has done precisely that. It has excluded onshore processing effects on the alleged ground that they fall outside the formal scope of the Decision, even though they are an inevitable consequence of implementing it. In substance, the State has written those effects out of the Decision.

83. The State also argues that onshore effects fall outside the SEA obligations on the premise that the Norwegian Seabed Minerals Act applies only at sea, and not on land. That argument is tantamount to saying that the State's obligations under the SEA Directive depend on the scope of national legislation. It would allow the State to circumvent the Directive's requirement to assess causal environmental effects through the way it delimits that legislation.

84. An interpretation that permits this outcome cannot be reconciled with the objective of the Directive.

5.4.4 *Assessment and public hearing in a relevant context*

85. *Third*, the SEA Directive requires that the assessment of onshore effects be carried out, and made available for public consultation, in a context in which the assessment serves the purpose of the Directive, cf. Articles 4(1) and 6(1)-(2).

86. The State's interpretation cannot guarantee this. The State has itself illustrated the point in a letter to the Court of Appeal of 23 April 2026, in which it wrote:

> *Whether a new environmental impact assessment is required when using an existing facility depends, among other things, on whether the use entails an expansion or modification covered by item 32 of Annex I to the EIA Regulations. <u>If there is no basis for requiring a new environmental impact assessment, this is because the activity, namely the processing of minerals, has already been subject to an environmental impact assessment</u>.*[69]

[69] The Attorney General, Letter to the Appeals court, 23 April 2026, p. 3 (our translation). Original wording: «Hvorvidt ny konsekvensutredning er påkrevd ved bruk av et eksisterende anlegg, beror bl.a. på om bruken innebærer en utvidelse eller endring omfattet av KU-forskriften vedlegg I punkt 32. Dersom det ikke er grunnlag for å kreve ny konsekvensutredning er det fordi aktiviteten – prosesseringen av mineraler – allerede er konsekvensutredet.»

87. Under that approach, inevitable significant effects of implementing the plan need not be assessed if the processing activity was, for example, assessed in general terms decades ago, in this or another country, in connection with the construction of a facility that may now be used to process the extracted deep seabed minerals.

88. However, that would not suffice to achieve the objective of the Directive. The assessment must be conducted so that the decision-maker and the public are properly informed *when* deciding whether to adopt the plan in question, cf. Article 6(1) and (2).

89. This point is made sharper still by the fact that processing may take place outside the EEA altogether. One of the reports prepared in the assessment procedure states:

> *A number of factors are likely to influence the choice of location for processing, including transportation costs, the operating costs of processing facilities, and the availability of relevant knowledge, expertise, and labour related to processing. Ore from the extraction site may, in theory, be transported to other parts of the world for further processing. For that reason, it is not a given that processing will generate economic effects and spillover effects in Norway. […] Taken together, it is not a given that processing will take place in Norway […]*[70]

90. On the State's interpretation, nothing therefore guarantees that any environmental assessment under EEA law has been or ever will be carried out in respect of the processing of the extracted deep seabed minerals (compare, *mutatis mutandis*, the judgment in *Greenpeace Nordic*, E-18/24, paragraph 74).

5.4.5 *Transparency and public awareness*

91. *Fourth*, the SEA Directive seeks to increase the accountability and transparency of the decision-making process, and to contribute to public awareness of environmental issues and to public support for the decisions taken, cf. Recital 15, compare Recital 16 of the EIA Directive (see the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 54).

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[70] AsplanViak & Norwegian University of Science and Technology, *Report on Economic and Social Effects of Seabed Mineral Activities*, p. 26, available here (our translation).

92. WWF-Norway's interpretation gives effect to that objective. The public must be informed of all significant effects that are likely to occur, so that it can meaningfully participate in the decision-making process and influence the outcome. The State's interpretation would undermine the Directive's democratic function.

5.4.6 *Conclusion*

93. Each of the four features identified above points in the same direction. The Directive's objective is to ensure that all likely significant environmental effects of implementing a plan are identified, described, and evaluated at the earliest possible stage, in a context that is meaningful, transparent, and accessible to the public. WWF-Norway's interpretation gives effect to that objective. The State's interpretation does not. Effects in the form of onshore waste generation and radioactive pollution arising from the processing of extracted deep seabed minerals are accordingly "effects" within the meaning of Article 5(1) of a plan whose implementation will produce them.

5.5 Case law of the Court of Justice and the EFTA Court

5.5.1 *Introduction*

94. The interpretation set out above is supported by the case law of the Court of Justice and the EFTA Court. Two strands of authority bear directly on the present case.

5.5.2 *The case law of the Court of Justice*

95. *First,* the Court of Justice has consistently taken the view that Article 3(1) of the EIA Directive requires the assessment of all significant effects that are likely to occur if the project is realized, including effects not caused by the works involved in the project itself. In the judgment of 16 September 2004 in *Commission v Spain*, C-227/01, EU:C:2004:528, the Court held that a project to double an existing railway track can have a significant effect on the environment because it is likely to produce significant noise effects. The noise effects were not produced by the works involved in doubling the railway track, but by the foreseeable increase in rail traffic. Similarly, in the judgment in *Abraham and Others*, C-2/07, cited above, the Court held that the authorities must take account of the projected increase in the activity of an airport when examining the environmental effects of alterations of that airport.

96. In *Abraham*, the Court of Justice explained that approach by a reasoning that applies equally to the SEA Directive.

97. *First*, the Court of Justice observed that the scope and purpose of the EIA Directive are very broad (paragraph 42). The same is true of the SEA Directive (compare, *mutatis mutandis*, the judgment in *Kraaijeveld and Others*, C-72/95, cited above, paragraph 31).

98. *Second*, the Court of Justice observed that the EIA Directive seeks an overall assessment of the environmental impact of projects or of their modification (paragraph 42). The SEA Directive is similarly designed. Article 5(1), read with footnote 1 to Annex I, requires the assessment to cover “secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects”. Recital 15 likewise emphasizes that the information supplied for the assessment shall be “comprehensive”.

99. *Third*, the Court of Justice observed that the list of environmental factors to be taken into account under Article 3 of the EIA Directive shows that the environmental impact the assessment is designed to enable is not only the impact of the works envisaged, but the impact of the project to be carried out (paragraph 44). The same applies under the SEA Directive. Article 5(1), read with point (f) of Annex I, requires the assessment to address the likely significant effects on a list of environmental factors, including biodiversity, population, human health, fauna, flora, soil, water, air, and climatic factors.

100. The case law of the Court of Justice therefore confirms that the State cannot, under Article 5(1) of the SEA Directive, confine its assessment to the effects of the works involved in the projects for which the plan sets the framework. It must identify, describe, and evaluate all likely significant effects of implementing the plan.

5.5.3 *The case law of the EFTA Court*

101. Second, and more directly, the EFTA Court has already applied that same logic to a question closely analogous to the present one. In *Greenpeace Nordic*, E-18/24, cited above, the Court held that combustion emissions are “effects” of a petroleum extraction project under Article 3(1) of the EIA Directive. The core of the reasoning is found in paragraph 69:

> *As noted by the respondents in the main proceedings, the release of greenhouse gas emissions is very likely to follow the antecedent action of extracting petroleum and natural gas in a project such as that at issue. If not for the project, the embedded greenhouse gases would stay below ground. As such, the extraction of the petroleum and natural gas represents a necessary precondition of burning it as fuel, thereby releasing emissions with an impact on the climate. It follows that the combustion of the petroleum and natural gas extracted and subsequently sold to third parties are likely effects of the project. […]*

102. That reasoning applies equally here. Onshore waste generation and radioactive pollution from the processing of extracted deep seabed minerals will inevitably follow the State's antecedent action of opening an area of the continental shelf for the exploration and extraction of those minerals. Indeed, the question referred presupposes as much. If not for the plan to extract such minerals, those minerals would remain in the deep seabed. The extraction of the minerals is a necessary precondition for their processing, and that processing produces onshore waste and radioactive pollution. It follows, by the same reasoning, that onshore waste generation and radioactive pollution are "effects" of implementing the plan.

103. The State has nevertheless advanced arguments in the present case that are materially the same as those rejected by the EFTA Court in *Greenpeace Nordic*. The State contends that the implementation of the plan will not, of itself, cause onshore waste generation or radioactive pollution, and that those effects require intermediate steps that fall outside the plan. Those arguments are, in substance, the same as the arguments that combustion emissions are not effects of the petroleum project because the project does not itself combust the extracted hydrocarbons, and that combustion requires intermediate steps such as refining (see the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraphs 70 to 84).

104. The Court cannot consistently reject those arguments under the EIA Directive and accept them under the SEA Directive. The four grounds on which the EFTA Court rejected them apply with equal force in the present context.

105. *First*, the EFTA Court relied on the requirement that cumulative effects be assessed. This requirement entails that the assessment must include effects that the plan or project may produce if considered jointly with other projects (see the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 71). That requirement is equally present in the SEA

Directive; Article 5(1), read in conjunction with footnote 1 to Annex I, expressly requires "cumulative" effects, as well as "secondary" effects, to be assessed.

106. *Second*, the EFTA Court observed that nothing in the text of the EIA Directive precludes a particular effect from being considered in environmental impact assessments relating to multiple projects (paragraph 72). The same is true under the SEA Directive; nothing in its text precludes a particular effect from being considered in environmental assessments relating to multiple plans or programmes.

107. *Third*, the EFTA Court noted that part of the extracted petroleum may be refined outside the EEA, so that no further environmental impact assessment under EEA law would take place in respect of the subsequent refining (paragraph 74). As set out in Section 5.4.4 above, the same concern arises in the present case. Nothing guarantees that the extracted deep seabed minerals will be processed within the EEA, and therefore nothing guarantees that the effects of processing have been or will be subject to any environmental assessment under EEA law.

108. *Fourth*, the EFTA Court emphasised that an environmental impact assessment must be carried out as soon as possible and that public participation must take place at an early stage, when all options remain open (paragraphs 75 and 76). The same logic governs the SEA Directive, the very purpose of which is to ensure that environmental considerations are addressed at the earliest possible stage (see the judgment in *Redd Ullevål Sykehus*, E-17/25, cited above, paragraph 57), and the participation provisions of which require the public to be given an "early and effective opportunity" to express their opinion, cf. Article 6(2).

109. Each of those four grounds applies equally under the SEA Directive. The arguments rejected in *Greenpeace Nordic* must therefore be rejected here as well. The case law of both the Court of Justice and the EFTA Court thus points in the same direction.

5.6 The question must be answered affirmatively even on the State's interpretation of Article 5(1)

110. The question must be answered affirmatively even if the EFTA Court were to accept the State's interpretation of Article 5(1) – that is, even if Article 5(1) required only an

assessment of the likely significant effects of the projects for which the plan "sets the framework", cf. Article 3(2)(a).

111. *First*, it is undisputed that the Decision sets the framework for development consent for deep seabed mineral extraction. Such extraction is covered by point 2(c) of Annex II to the EIA Directive. The implementation of the plan therefore includes, on any view, the extraction of deep seabed minerals.

112. *Second*, onshore waste generation and radioactive pollution are "effects" of that extraction within the meaning of Article 5(1). The reasons set out in Sections 5.2 to 5.5 above apply with the same force whether one asks about the effects of implementing the plan as a whole, or about the effects of implementing the extraction for which the plan sets the framework.

113. In particular, Article 5(1), read with footnote 1 to Annex I, requires secondary and cumulative effects to be assessed. The likely significant effects that extraction will produce jointly with the subsequent processing of the extracted deep seabed minerals are accordingly within the scope of the assessment (see, by analogy, the judgment in Greenpeace Nordic, E-18/24, cited above, paragraph 71).

114. The objectives of the SEA Directive — to integrate environmental considerations into the adoption of plans, to increase the accountability and transparency of decision-making, and to contribute to public awareness of and support for the decisions taken (Article 1; recital 15; see also recital 16 of the EIA Directive) — point in the same direction (see, by analogy, the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 54).

115. Furthermore, the conclusion follows from the very reasoning the EFTA Court applied in *Greenpeace Nordic*, E-18/24, cited above. The processing of extracted deep seabed minerals, with the onshore waste generation and radioactive pollution that processing produces, is inevitable — and, on the premise of the question, presupposed — to follow the State's antecedent action of extracting those minerals. If not for the extraction, the minerals would remain in the deep seabed. The extraction is a necessary precondition for the processing, and the processing is what produces onshore waste and radioactive pollution.

116. Onshore waste generation and radioactive pollution are accordingly "effects" of implementing the extraction for which the Decision sets the framework, within the meaning of Article 5(1) (compare the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 69).

5.7 Article 5(2) does not permit exclusion of likely significant effects from the assessment

117. The State has argued that Article 5(2) of the SEA Directive permits the exclusion of the onshore effects in this case. It alleges that the effects "cannot be meaningfully assessed at this stage" because it is uncertain where they will occur, which processing methods would be applied and what secondary effects may follow.[71] That is wrong both as a matter of law and on the facts.

118. As a matter of law, Article 5(2) does not confer any discretion to exclude likely significant effects from the SEA.

119. Article 5(1) requires the likely significant effects on the environment of implementing the plan to be identified, described and evaluated. On its terms, that provision turns on two questions only: whether the effects are likely to occur if the plan is implemented, and whether they are significant. It does not turn on whether their precise location, processing method or further pathway is already known. If the effects are likely significant, they must be assessed (compare, *mutatis mutandis*, the judgment in *Greenpeace Nordic,* E-18/24, cited above, paragraphs 83 and 84).

120. Article 5(2) offers no exception to that obligation. It merely specifies the extent and level of detail of the information that must be provided. It states:

> *The environmental report prepared <u>pursuant to paragraph 1</u> shall include <u>the information that may reasonably be required</u> 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.*

[71] See the Court of Appeal's Request for an Advisory Opinion, p. 14, available here.

121. Article 5(2) is thus a provision about the depth of the assessment, not about its scope. It regulates how much information may reasonably be required about effects that fall within Article 5(1). It does not permit the competent authority to remove such effects from the SEA altogether.

122. This point is well illustrated by the European Commission's SEA Guidance, which states, in comment to Article 5(2), that:

> *[…] in the environmental report for a broad-brush plan or programme, very detailed information and analysis may not be necessary, (for example, a plan or programme at the top of a hierarchy which descends from the general to the particular); whereas much more detail would be expected for a plan or programme that itself contained a higher level of detail. So the environmental report for a national plan might not need to assess the effects of the plan on, say, every river in the country; but the environmental report underpinning a town plan would certainly be expected to address its implications for rivers or other waterbodies in or near the town.*[72]

123. The wording of Article 5(2) accordingly affords no discretionary power to omit likely significant effects from the assessment based on where or how they will materialize. The State's reading conflates two distinct questions – which effects must be assessed, and in what detail. Article 5(1) governs the former, while Article 5(2) governs only the latter.

124. The State's position is furthermore wrong on the facts. The draft report on environmental effects commissioned by the Norwegian Offshore Directorate demonstrates that the onshore effects could be meaningfully assessed at the plan level. The draft report initially identified and described onshore waste generation as an inevitable and major effect.[73] It further documented, *inter alia*, that "[d]ue to the volumes of waste involved, amounting to several million tonnes, disposal will have a large terrestrial footprint, which may also affect surrounding wildlife"; that "[f]or waste placed in piles or natural depressions, there will also be a risk of spreading of waste particles as dust"; and that disposal in dams may cause metre-high floods, spreading metallic waste across large surrounding areas.[74] The problem is thus

[72] The European Commission, Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, available here, p. 26.

[73] AkvaPlan-Niva/IKM Acona, Effects for Nature, Environment and other Commercial Activity Related to Impact Assessment for Opening of the Norwegian Continental Shelf for Deep Seabed Mineral Activities (draft version with comments from the Norwegian Offshore Directorate), available here, pp. 42-50.

[74] Ibid. (our translation)

not that the onshore effects could not be meaningfully assessed at the plan level. The problem is that, when these effects were identified and described, the State ordered the deletion of the resulting information, and now it must defend that choice.

125. During the SEA procedure, the Ministry itself also proceeded on the basis that the onshore effects could be assessed at plan level. Indeed, it stated that "[t]o the extent that there is knowledge indicating that the environmental effects associated with processing ore extracted from the continental shelf differ systematically from the environmental effects of processing ore extracted on land, that issue will be assessed on a general basis."[75] While the criterion introduced by the Ministry lacked any legal basis, it clearly presupposed that onshore effects could be assessed at plan level.

126. The same is confirmed by the State's own environmental expert bodies. The Norwegian Environment Agency stated that the assessment had to include possible onshore effects, including waste disposal, as disposal of waste has been associated with major area-related problems on land.[76] The Norwegian Radiation and Nuclear Safety Authority (DSA) warned that the State must assess radioactive pollution, as naturally occurring radioactive materials are present in the deep seabed.[77] DSA reiterated that warning, stating that it has reason to believe that "[management and processing] facilities must be established *on land*, which again will cause risk for radioactive pollution to the environment" (emphasis added).[78]

127. For these reasons, the State cannot invoke uncertainty as to where and how the onshore effects will arise, or what secondary effects they may produce, as a basis for omitting them from the SEA.

[75] See the Ministry of Energy's assessment of consultation responses to the proposed impact assessment programme, row 71, 168 and 333, available here (our translation, emphasized here).

[76] The Norwegian Environmental Agency, comments to the proposal for impact assessment program, available here, p. 23.

[77] The Norwegian Radiation and Nuclear Safety Authority (DSA), comments of 16 February 2021, available here.

[78] The Norwegian Radiation and Nuclear Safety Authority (DSA), comment of 23 September 2023, available here, p. 2 (our translation).

5.8 Conclusion

128. For the reasons set out above, the question referred by Borgarting Court of Appeal must be answered affirmatively.

129. The wording of Article 5(1) of the SEA Directive, read with footnote 1 to Annex I, requires the identification, description, and evaluation of all likely significant effects on the environment of implementing the plan, including secondary, cumulative, and synergistic effects, whether short, medium, or long-term, permanent or temporary, and positive or negative.

130. A literal interpretation of the wording is supported by the context of Article 5(1). Articles 7(1) and 11(1) confirm that it does not matter where likely significant effects will occur, nor whether they will be assessed later at project level.

131. The objective of the Directive supports a literal interpretation as well. The Directive aims to ensure a high level of environmental protection and to integrate environmental considerations at the earliest possible stage in the preparation and adoption of plans and programmes, cf. Article 1 and Article 6(2). It also aims to increase the accountability and transparency of decision-making, and to contribute to public awareness of and support for the decisions taken, cf. Recital 15. Each of those objectives would be defeated if a Member State could exclude inevitable significant effects from the assessment by splitting measures.

132. The case law of the EFTA Court and of the Court of Justice confirms the same. The reasoning of the EFTA Court in *Greenpeace Nordic*, E-18/24, applies directly to the present case: onshore waste generation and radioactive pollution are inevitable to follow the State's antecedent action of extracting deep seabed minerals, and the existence of intermediate processing steps does not place those effects beyond the scope of Article 5(1). The case law of the Court of Justice on the equivalent provisions of the EIA Directive points in the same direction.

133. The conclusion holds even on the State's own interpretation of Article 5(1). On any reading, the Decision sets the framework for deep seabed mineral extraction. Onshore waste

generation and radioactive pollution are effects of that extraction, of which processing is the necessary and inevitable consequence.

134. Article 5(2) does not alter that conclusion. It governs the level of detail of the assessment of identified effects, not the question of which effects are to be assessed. It cannot be relied upon to omit likely significant effects from the assessment altogether.

6 LEGAL CONSEQUENCES OF BREACHES OF THE DIRECTIVE

135. For the sake of completeness, WWF-Norway points out that the unlawful consequences of a breach of the SEA Directive must be nullified under Article 3 EEA. The competent authorities must therefore take all measures necessary to remedy the failure to carry out an SEA, by revoking or suspending the plan or programme adopted in order to carry out such an SEA (see the judgment of 29 July 2019 in *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 170, the judgment of 25 June 2020 in *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 83, the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 103 and the judgment in *Redd Ullevål Sykehus*, E-17/25, cited above, paragraph 66).

136. The State argues in the national proceedings following *Greenpeace Nordic*, E-18/24, that it can freely regularise operations and measures in breach of the EIA Directive *while* maintaining the effects of the development consent, *without* there being any exceptional circumstances, and without an open process whereby the ultimate decision can lead to revocation. On its view, it is sufficient simply to carry out an *ex post* assessment and declare the operations regularised. To WWF-Norway's understanding, the State adopts the same approach in respect of breaches of the SEA Directive.

137. On the Government's approach, the SEA and EIA Directives would be bypassable in practice. The State or a developer could in any case omit any material environmental information from the SEA or EIA, adopt the plan or programme or obtain development consent, and only later assess the omitted effects in the unlikely event that an environmental organization brings validity proceedings, potentially after implementation has progressed to the point that the effects are already locked in. In practice, non-compliance would become a risk-free means of increasing the likelihood of a favourable decision without proper consideration of the environmental effects concerned.

138. That is obviously not the law.

139. The State's approach is irreconcilable with the case law of the Court of Justice and the EFTA Court. This case law provides that competent authorities may maintain the effects of the unlawful plan, programme or development consent *only* under certain exceptional circumstances determined by the Court of Justice, and only for as long as strictly necessary to remedy the breach *ex post* (see the judgments of 29 July 2019 in *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, ECLI:EU:C:2019:622, paragraphs 178 to 182, and of 25 June 2020 in *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraphs 90 to 95).

140. As the EFTA Court has pointed out, such circumstances exist only (1) if an overriding consideration relating to the protection of the environment is at issue, and there is a risk that the annulment of the measure could create a legal vacuum that is incompatible with the EEA State's obligations concerning the protection of the environment, or (2) where annulment or suspension of the measure in question would cause a genuine and serious threat of disruption to the electricity supply of the EEA State concerned, which could not be remedied by any other means or alternatives, particularly in the context of the internal market (see the judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 118 and case law cited).

141. Under the State's approach, these requirements can be set aside whenever convenient. The State claims essentially discretionary power to maintain the effects of an unlawful plan, programme or development consent without any exceptional circumstances, if it initiates an *ex post* assessment.

142. The State's approach is unlawful for yet another reason. The Court of Justice and EFTA Court have repeatedly stated that regularisation is subject to the condition that it does not offer the parties the opportunity to circumvent or disapply EEA law (see judgment in *Greenpeace Nordic*, E-18/24, cited above, paragraph 109). Any regularisation procedure must therefore, so far as possible, restore the requirements that the Directive was meant to secure in the first place: a lawful SEA "before" adoption under Article 4(1), and an "early and effective" opportunity for the public to express its views on the draft plan "before"

adoption under Article 6(2). Those requirements cannot be meaningfully restored if the State maintains the effects of the unlawful plan throughout the regularisation procedure.

143. The conclusion is confirmed by the judgment of 3 July 2008 in *Commission v Ireland*, C-215/06, ECLI:EU:C:2008:380. In Ireland, EIAs had to be carried out, and planning permission obtained, before any development could commence. However, if the EIA Directive was breached, the developer could conduct an *ex post* EIA and apply for retention permission. That retention permission had the same effects as a lawful planning permission and could be given without any exceptional circumstances. The Court of Justice held that that system of regularisation was contrary to the Directive.

144. The central reason was that Ireland's system of regularisation was liable to encourage developers to circumvent the requirements of the EIA Directive (see the judgment in *Commission v Ireland*, C-215/06, cited above, paragraph 58). That concern applies with even greater force here. On the State's approach, the effects of an unlawful plan, programme or development consent may be maintained without any exceptional circumstances, merely because an *ex post* assessment is carried out after the event. That approach preserves the practical advantage obtained by adopting the measure first and assessing the omitted effects only later.

145. The obligation to annul or suspend the plan or programme is not an alternative to regularisation. It is a *precondition* for regularisation. As Advocate General Pitruzzella stated in his Opinion of 13 June 2019 in *Commission v Ireland*, C-261/18, ECLI:EU:C:2019:493, point 36:

> *Where national law allows, the competent national authorities are <u>required to suspend or set aside the consent</u> already granted, <u>so as to enable it to be regularised</u> or a new consent to be granted that meets the requirements of the directive.*

146. Any other approach would turn the Directive on its head. It would allow the decision to take effect first and the assessment meant to shape it to follow only later. That is not lawful regularisation. That is circumvention.

7 PROPOSED ANSWER TO THE REFERRING COURT'S QUESTION

147. For the reasons set out above, WWF-Norway invites the Court to answer the Referring Court's question as follows:

> *Where a plan to open an area of the continental shelf to deep 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), effects in the form of onshore waste generation and/or radioactive pollution arising from processing of extracted deep seabed minerals qualify as "effects" of implementing the plan within the meaning of Article 5(1) of that Directive.*

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Oslo, 26 August 2026
Advokatfirmaet Simonsen Vogt Wiig AS

Jenny Sandvig
Attorney – admitted to the Supreme Court

Eivind H. Midtgård
Associate