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Comments on the Norwegian authorities' letter to ESA regarding hydropower affected waterbodies and the implementation of the Water Framework Directive (case 88013).

1 Introduction

This letter refers to previous correspondence regarding the implementation of the Water Framework Directive (WFD), particularly the letter from EFTA Surveillance Authority (the Authority) dated the 6th of May 2022 and the letter from the Norwegian Ministry of Climate and Environment (the Ministry) dated the 29th of September 2022.

In this letter, we will comment on the Ministry's answers to the Authority's inquiries on how the WFD is implemented into Norwegian law. Our focus is on how compliance with the WFD is practiced. It is our view that the WFD is not correctly and effectively implemented by the Norwegian authorities. Although there are legal tools available that can be applied to fulfil the obligations set out in the directive, these tools are not being applied. Therefore, we deem it necessary to submit this letter with further comments on the directive's implementation.

We have structured the letter into five chapters. In *chapter 2*, we will give a description of how the legal tools listed by the Ministry in their letter are applied in practice. It is our view that the legal tools in question are not utilised in a satisfactory manner and that the Norwegian authorities therefore fail to comply with the WFD. In *chapter 3* we will take a closer look at the revision of terms, which is the most important instrument in the process of reaching the environmental objectives set out in the RBMPs. In the subsequent *chapter 4*, we will go through some examples on how the legal tools are utilised in practice, and this part is therefore closely linked to chapter 2. Lastly, we will in *chapter 5* make some comments on the interpretation of WFD 4(7), before we present our concluding remarks.

2 In practice, the legal tools do not ensure compliance with the WFD

2.1 General observations

Under the Ministry's answer to question 1, they give an overview of the available legal tools in the Norwegian licencing system. 13 different tools are listed which, according to the Ministry, can be used to achieve the environmental objectives in WFD art. 4. The listed tools are described below in Table 1.

Table 1: Description of legal tools

Numbered according to the Ministry's letter, with Norwegian terms in parentheses

1. The license to construct and operate a hydropower facility (*konsesjon*)
2. "Specific terms" – individually set for the specific watercourse (*konsesjonsvilkår*)
3. Standard environmental (management) terms (*standard naturforvaltningsvilkår*)
4. Rules of manoeuvring (regarding reservoir water levels and water release and, "where relevant", river water flow) (*manøvreringsreglement*)
5. Standard term for changing the rules of manoeuvring - section 16 of the Watercourse Regulation Act
6. Test manoeuvring programme (*prøvereglement*)
7. Revision of terms - for hydropower facilities with licenses according to the Watercourse Regulation Act or the Industrial Licensing Act (*vilkårsrevisjon*)
8. Modification of licenses - section 28 of the Water Resources Act (*omgjøring*)
9. Preconditions for not being subject to a license obligation pursuant to current legislation
10. Duty to act with due care - section 5 of the Water Resources Act (*aktsomhetsplikt*)
11. Common lowest water flow - section 10 of the Water Resources Act (*alminnelig lavvannføring*)
12. Summoning of old unlicensed hydropower facilities for licensing - section 66 of the Water Resources Act (*innkalling*)
13. Reversal of authorities' decision - Public Administration Act section 35 - (*omgjøring av vedtak uten klage/ugyldig vedtak*)

The 13 tools listed above can be divided into three groups. The first group contains the tools which can be applied to licensed hydropower facilities. These are legal tool no. 1-8. The second group contains tools applicable to unlicensed hydropower facilities. These are legal tool no. 9, 11 and 12. The third group contains tools which are applicable to both licensed and unlicensed hydropower facilities. These are tool no. 10 and 13.

The Ministry reiterates in their answers to the Authority that the WFD and its obligations are binding on national authorities, and that the operators of hydropower are not directly responsible under the WFD. We would like to point out that although this is true, the national authorities are obliged to have the sufficient legal tools available to impose measures on the operators in order to ensure that the obligations under WFD art. 4 are complied with. The main problem with the Norwegian authorities' implementation of the WFD is not that operators are acting contrary to their licence or licence terms, but rather that power stations can operate according to the licence, or legally without a licence, despite damaging nature. In other words, the main problem is not the operators acting unlawfully, but rather that the Norwegian authorities are not utilising the tools they have available to

impose measures on the operators to ensure their compliance with the WFD. Or as the Norwegian Broadcasting puts it in an article (our translation): *“The power company is not the villain. The Ministry of Petroleum and Energy (OED) has allowed it all. It is all allowed, even though the watercourse is permanently protected against power development. It is allowed, even if endangered fish are lost.”*¹

The ministry claims that all new licenses comply with the WFD. We are not convinced of this and there are several points that indicate otherwise. For instance, the applied «common low flow», which is a key concept in licences, is simply very low from an aquatic point of view, and several of the most recent licenses only have water release in the «summer season» (approx. April – September). We question this to be in line with the WFD and the prerequisite of having a functioning ecosystem. The Norwegian guidelines on Article 4(7) was not presented until in 2021 and Norway still lacks updated HMWB-guidelines that correspond with the Common Implementation Strategy (CIS) Guidance Document No. 37, «Steps for defining and assessing ecological potential for improving comparability of Heavily Modified Water Bodies».

While our focus is on the authorities not making use of the tools to ensure environmental improvements where there is potential for it, a study by L'Abée-Lund et al (2022) showed low correction levels after audits revealed nonconformity (our translation):

*«We analysed nonconformity, documented in 153 audits of 113 Norwegian hydropower and aquaculture companies. Twenty companies were audited 2–12 times during 2012–2020. There were no indications that an audit resulted in improved awareness in the company. A major part of nonconformity is connected to financial interest, likely of significance to the company itself. In addition to the environmental consequences, the failure to uncover, correct, and prevent nonconformity is alarming, seen both from a risk governance and a financial perspective. Our study of water resource management and regulation shows that merely performing audits have no significant effect on improvement.»*²

In the subchapters below, we will give our view on the Norwegian authorities' utilisation and application of the legal tools. This will be described in more detail below. First, we will address the application of tools on licensed hydropower facilities (tool no. 1-8, 10 and 13) and second, we will address the application of tools on unlicensed hydropower facilities (tool no. 9-13).

2.2 Legal tools applicable to licensed hydropower facilities

Legal tool no. 1 and 2 in the listing of tools part of the Norwegian licensing system, present the licence itself and the terms that the licence holds.

The licence terms can be revised (legal tool no. 7) after 30 years. In addition to the revision tool, the Ministry mentions several other tools, which according to their description of the licensing system, can be applied when it is necessary to alter or supplement the existing terms. To our knowledge, it is the revision of terms which is the legal tool that is applied in practice when it is necessary with mitigation measures to achieve the environmental objectives set out in the RBMP.

Unless they have undergone revision, licences issued before the WFD was implemented into Norwegian law in 2007, lack reference to the environmental objectives according to Article 4(7) of the WFD. Such can only be included through revision of the terms.

All new licences are provided with standard environmental management terms (legal tool no. 3). As stated in the Ministry's letter, these terms give the authorities the mandate to impose different types of mitigation measures regarding fauna, flora, wildlife and recreation. Noteworthy, licences issued before 1990 lack standard environmental management terms. Adding the set of standard environmental management terms to an existing licence requires revision of the licence terms (legal tool no. 7). This could however be solved by adopting a regulation introducing standard environmental management terms in all licenses.

Introducing standard environmental management terms to all licences has long been proposed as an important step to get past the hold-up of having to wait for revision of all of the old licenses. This would also give an opportunity to impose environmental measures in approximately 50% of the hydropower licenses where such are lacking. Two White Papers from 2015-2016^{3,4} established that the government should investigate how the current standard environmental terms, or other effective tools, more effectively could be applied to rivers that are negatively affected by hydropower.

To ensure progress without having to wait for revision processes, a handful of updates to the River Basin Management Plans, proposed by local basin management to the government for national approval, request the introduction of standard environmental terms into all licenses⁵. As an example, the RBMP for Vestfold and Telemark, for 2022-2027, states⁶ (our translation):

“Many older hydropower licenses lack or have very limited terms for nature management. In order to ensure sufficient knowledge of regulatory effects, bottlenecks, and to be able to issue orders for necessary mitigating measures, the current standard terms must be introduced in all licences. In many older licenses, one will still be prevented from carrying out knowledge-based management with targeted measures if these are not given modern environmental management terms in the updated plan.”

To our understanding, the government can introduce standard environmental management terms into all existing licenses by simply adopting a new regulation to this end. This would provide the environmental authorities with the mandate to impose surveys, monitoring, and mitigating measures where necessary.

However, although standard environmental management terms are requested by many to be introduced in all licences, this would not ensure the implementation of mitigating measures necessary to improve the environmental status. The standard environmental management terms merely provide a legal basis for the Norwegian Environment Agency (for anadromous watercourses) or the County Governor (for inland watercourses) to impose monitoring and surveys if necessary. These imposed surveys or mitigating measures may also be appealed by the licence holder. There may for instance be doubt raised as to whether a proposed habitat improvement measure will improve the environmental status under the current water flow regime.

Also, standard environmental management terms provide for a fragmented approach, because the different categories of terms are placed under different sector authorities without any requirement to coordinate their efforts. For instance, measures related to fish fall under the Norwegian Environment Agency, while barriers, habitat improving measures and erosion control belongs to the Norwegian Water Resources and Energy Directorate (NVE) and measures relating to pollution belongs to the County Governor. These three categories are closely linked and often intertwined, and

therefore the measures that are necessary under each category should logically be assessed together.

Licences according to the Watercourse Regulation Act or the Industrial Licensing Act hold rules of manoeuvring (legal tool no. 4), which set restrictions for the water level in the reservoirs within the frames of the minimum and maximum water level. As the Ministry points out, there is a legal basis for changing the rules of manoeuvring in Section 16 of the Water Regulation Act (legal tool no. 5). According to this Section, the rules of manoeuvring can be changed at any time. It appears that the Ministry fails to mention that, at least to our knowledge, this Section has only been applied once (see chapter 4.4 for example). The obstacle here is that this Section requires that the problem or harmful effects of the hydropower facility/operation were not assessed or otherwise foreseen during the licensing process. Although Section 16 of the Watercourse Regulation Act includes the possibility to change the rules of manoeuvring “at any time”, and this is flagged as a “safety valve” by the Ministry, it remains a hypothetical tool as it is neither in use, nor is there any way to change the manoeuvring rules without a full revision of terms.

A test manoeuvring programme (legal tool no. 6) is rules set for temporary manoeuvring. The Ministry refers to this tool as a measure that can be used as to test different levels and duration of minimum water flow to provide new knowledge about the hydropower production’s effects on the environment. The Ministry fails to mention that a test manoeuvring programme is a tool that the Norwegian authorities no longer apply. A recent example where the Norwegian authorities express this view, is the decision on a permanent manoeuvring programme for Lake Randsfjorden (see Chapter 4.2 for further details).

The Ministry has made reference to Section 28 of the Water Resources Act (legal tool no. 8), which allows for imposing new or supplementary terms to an existing licence. Special circumstances are required in order for such to be justified. In practice, the government’s criteria for “special circumstance” are so strict that the Section has almost never been applied. In the preparatory work of the law⁷, it is expressed that the Section does not give a basis for a standard modification of all or most of the active licences that are currently in practice. This means Section 28 can only be used in exceptionally rare cases. Also noteworthy is that although the criteria for modification are fulfilled for a specific licence, the authorities are not obliged to undergo modification of that licence.

In annex 3, the Ministry has given an overview of when Section 28 has been applied. The list shows that Section 28 has only been applied two times, of which one case is still in process. This illustrates how this tool is not a sufficient tool for achieving the objectives in WFD art. 4 in practice. If this is a legal tool that should be deemed as more than a hypothetical instrument in implementing the WFD, the Ministry must demonstrate the actual extensive application of this tool. See Chapter 4.1 for examples illustrating the application of Section 28 of the Water Resources Act.

The Ministry has also mentioned Section 35 of the Public Administration Act (legal tool no. 13), which gives ground for reversal of the authorities’ decision. We have no experience with this Section being used to alter or supplement the terms of a hydropower licence, and we encourage the Authority to ask the Ministry to provide a list of when this Section has been applied in such capacity. If Section 35 was to be applied, it sets a high threshold for when a decision can be reversed. The authorities have to undertake a balancing of interests, and there must be a substantial predominance of interests indicating reversion to be lawfully decided.

The duty to act with due care is also listed by the Ministry in their letter as legal tool no. 10. The duty to act with due care does not give the authorities any legal ground for imposing measures and cannot be seen as an important tool in ensuring the implementation of, and compliance with, the WFD.

The revision tool is not a sufficient tool when implementing the obligations set out in WFD, and specifically the 6 years cycle the directive set forth. This is because the terms of a licence are in practice only being changed when they are revised. As the Authority has been informed, a licence can, as a general rule, be revised only after a minimum of 30 years. A detailed description of the process for when terms are revised is given in chapter 3.

2.3 Legal tools applicable to unlicensed hydropower facilities

The Ministry has referred to the operator's obligation to construct the facilities in line with the presented design (legal tool no. 9). This obligation does not give the authorities any right to impose measures on the operator other than that the operator cannot deviate from the presented plan for the hydropower plant. If the presented design does not comply with the obligations set out in WFD Article 4, legal tool no. 9 cannot mitigate damage inflicted on the environment.

The duty to act with due care (legal tool no. 10) does not give the authorities a right to impose mitigating measures even if necessary to meet the obligations in WFD Article 4. As with the duty to act with due care, Section 35 of the Public Administration Act applies to both licensed and unlicensed hydropower facilities. The threshold for using this Section is however high and we see no evidence of cases related to the WFD where this Section has been applied. For further details, see the mentioning of legal tool no. 10 and 13 above under subchapter 2.2.

The Ministry makes reference to Section 10 of the Water Resources Act (legal tool no. 11). This Section does not apply to facilities constructed before the Water Regulation Act and the Industrial Licencing Act were passed in 1917, but only applies to more recently constructed hydropower facilities, of which there are few in comparison. Facilities constructed before the licensing acts came into place have no obligation to adhere with Section 10 and its rule on common lowest water flow. Even when undergoing significant development or modernisation, such as replacing an old power station with a new, slightly relocated, such a facility will not necessarily require a license (see example in chapter 4.3). Therefore, unlicensed hydropower facilities can still operate in violation of the environmental objectives set out in the WFD, i.e. by having no minimum water flow. In order for the authorities to impose mitigating measures, the facility in question must be summoned for licensing. However, as shown below and as the lists provided by the Ministry reveals, new licensing is a tool that is very rarely applied.

According to the Ministry, the Water Resources Act Section 66 is applicable for imposing licensing when there are substantial environmental concerns (legal tool no. 12). In annex 3, the Ministry has listed the cases when Section 66 has been applied. The list shows seven cases, whereas two of the cases have been completed and the remaining five cases are still in process. The threshold for applying Section 66 has been high, rendering Section 66 of the Water Resources Act an unfit legal tool in regard to implementing the obligations set out in WFD.

The Ministry writes that key to whether a new hydropower facility requires licensing, is if it "may cause significant damage or inconvenience to any public interests", which includes derogation of the river ecosystem. We wish to point out that this however does not dictate whether or not an old

hydropower facility lacking licence can be summoned, but only applies to new projects. It also does not apply when an old hydropower facility is upgraded or expanded.

We note that this question was brought up in the Package Meeting between the Authority and Norwegian authorities on 27-28 October 2022⁸, the notes explaining how representatives of the Norwegian Government stated that there would need to be legal grounds to summon operators who are not currently required to have a licence to obtain one – specifically there would need to be a danger to the environment. Whereas further derogation, as was problematized by the Authority, is one issue, we wish to point at the authorities' inability to impose measures to improve the environmental status, or even demand monitoring or environmental investigations. See Chapter 4.1 for examples illustrating the high threshold for summoning unlicensed facilities.

Thus, the Norwegian authorities do not have and/or do not apply the tools necessary to ensure that the obligations in WFD are being sufficiently implemented for unlicensed hydropower facilities every six years.

2.4 Lack of a sufficient mechanism for legal review

According to certain requirements set out in the Public Administration Act⁹, *individual decisions* may be appealed. *Administrative decisions* are however not subject to legal review. According to Section 66 of the Water Resources Act, a decision to summon an unlicensed hydropower facility for licensing is an individual decision, subject to legal review. However, if the authorities decide that an unlicensed hydropower facility should not be summoned for licensing, this is an administrative decision, and thus not subject to legal review.

Similarly, modification of a licence is an administrative decision that is not possible to appeal. Only when the authorities decide to modify a licence is this an "individual" decision and thereby subject to legal review.

In chapter 4.1 we will illustrate the threshold for summoning unlicensed hydropower facilities for licensing and the threshold for modifying an existing licence with a description of the Lake Gangåsvatnet-case.

The lack of public access to request legal review of the decisions the authorities make where relevant to applying the legal tools of the Norwegian licence system is a highly problematic in light of how the Authorities almost never apply the tools in question. It is not possible for affected interests or parties to make the authorities review their decision, rendering legal tools such as Section 28 and 66 of the Water Resources Act even less effective.

3 A closer look at environmental objectives and revision of terms

3.1 The process of opening a revision case

A licence is not automatically made subject to revision simply by reaching "revision age" after 30 years. Hydropower license revisions rely primarily on municipalities and local NGOs requesting a revision to be opened based on their "experienced inconveniences" of the hydropower operation, such as a reduction in sportsfishing catch. The government's guidelines on revision of hydropower licenses from 2012¹⁰ have been upgraded to include that River Basin Districts may also recommend candidates for license revision, and NVE may also open a revision process by own initiative. The

general rule is however still that municipalities and NGOs need to submit at request for revision to the Norwegian Water Resources and Energy Directorate.

This entails that there is no guarantee that terms are revised, even if the operation is damaging to nature and knowledge and technology is available for mitigating measures of the negative impact.

In its reply to Q1.7, the Ministry writes that: “If the specific environmental objectives require revision of the license terms, that is sufficient for opening a revision case.” However, this is not their reasoning in practice for opening a revision of terms. The Norwegian authorities can revise the terms without initiation from municipalities or NGOs, but this is almost solely in cases where a licence owner applies for upgrading or expansion of a facility, which requires a revision (if the powerplant has a licence). To our knowledge, it is very rare that NVE takes initiative to open a revision process solely based on the need to repair the environmental status of affected waterbodies.

Instead, the environmental objective for an HMWB is commonly set after conducting a cost-benefit analysis which concludes that the public interest of the power production justify the associated environmental costs, thus ruling out achieving environmental the objectives when such imply a reduction in power. In practice this means that environmental objectives which require a license revision will never be set unless the government has previously approved measures that result in reduced power production¹¹.

We have made the authorities aware of the lack of consistency between how hydropower revisions are based on “experienced inconvenience”, and how the WFD looks at ecology weighed against societal needs (including user aspects).

3.2 The scope of a revision case

In their reply, the Norwegian authorities explain in detail how licenses are only granted if the societal benefits of the production exceed the environmental disadvantages, while specific terms and standard terms function to secure that the production is not in breach of the WFD. This only applies to new licenses, and it is noteworthy that the revision of an old license does not have the same requirement for investigating the environmental impacts as with totally new licenses.

In a comment dated 12 September 2022, regarding a proposal from the Norwegian parliament’s energy and environment committee concerning a proposed license revision, the Norwegian Minister of Petroleum and Energy, Terje Aasland, wrote¹² (our translation):

“The proposals put forward by a Member of the Parliament seem to assume that there is a significantly wider access to change or add new license terms than what follows of the legally binding frames of the revision system. Proposals no. 1, 2 and 3 seem to assume that water course authorities should treat revision of licensing terms equivalent to new licences for hydropower stations or in cases of renewal of an expired license (...)

In comparison with ordinary licensing cases or cases with updating expired licenses, the authorities do not have the same possibilities to use ‘the strict environmental requirements that apply to new hydropower development today’ in cases of revision of licenses. This is evident from, among others, the ‘Guidelines for revision of license conditions for watercourse regulations’ where the legal framework for revision cases is explained.”

3.3 The processing time of a revision case

A challenge in relation to the revision tool, is the time it takes to complete a revision of terms. As the Ministry has answered under question 3b(iv)(dd), it took 11 years *in average* to complete the 22 cases with revised terms. This processing time implies that many of the cases took significantly longer time to complete, and that revision is not a realistic tool that can be applied within the 6-year cycle, even when the derogation act in WFD Article 4(4) is applied. As the revision process often requires substantial input from the environmental organisations as well as municipalities and other local bodies, our wish to speed up the number of licenses with modern environmental terms is accompanied by awareness that we will struggle with capacity for involvement in the large number of revisions ahead of us.

In any case, it is obvious that the case processing time entails that revision of licence terms is not a suitable for the WFD 6-year cycles.

3.4 National authorities' overruling of regional authorities' decisions

A problematic issue with how the environmental objectives are determined, is that the national authorities overrule regional authorities. Regional authorities set the environmental objectives through RBMPs, and is a long and thorough process involving multiple sectors. After the regional decision, there is an approval at national level.

There are case examples where this has been done in spite of thorough and well-founded assessments made by the local authorities as part of preparing the RBMPs. The WFD has focus on regional and local authorities being involved in the process that the directive sets out¹³, yet when the regional authorities are overruled, the regional involvement is rendered futile.

The revision of terms in the Aura River is an excellent example of this. Here, the regional authorities had set the environmental objective to good ecological potential (GEP) in the RBMP for 2016-2021. Minimum water flow from the dam was a realistic measure to reach GEP. The environmental objective was set after a thorough process, based on an assessment of all measures that could improve ecology and be more beneficial than costly. If the realistic measures combined lead to a functioning aquatic ecosystem, the objective is set to GEP. In 2021, the terms and conditions of the licence were revised, in which no water flow was imposed. Even though the environmental objective was decided at the regional level, and approved at the national level, the revision of the licence led to a different, environmentally less ambitious, result.

In the RBMP for 2022-2027, regional authorities again determined the environmental objective to GEP. Minimum water flow from the dam was set as a realistic measure to reach GEP. In the process of approving the RBMP on national level, the Ministry changed the status of the river to GEP. Thus, it was no longer necessary to impose mitigating measures concerning minimum water flow to achieve the environmental objective. The environmental objective was de facto already achieved by changing the status of the river. The revision process had taken precedence over the WFD process and the objectives set therein. The next possibility for revision is in 2051. Thus, the Ministry has succeeded in indirectly dictating the Aura river's environmental objective for the next five planning cycles.

4 Examples

4.1 The threshold for summoning an old license and modifying an existing licence - example

In its reply (Q1.8), the Ministry explains that § 28 of the Water Resources Act, for modification of licenses, will only be used in “*special circumstances*”. The same applies to summoning of old hydropower facilities according to the Water Resources Act § 66 (see Q1.12).

The threshold for what qualifies as “*special circumstances*” is extremely high and does not correspond with the intentions of the WFD. Annex 3 in the government’s letter reveals that these two sections have only been applied 2 and 7 times respectively. This is not due to lack of suggested cases to summon, but due to disproportionately high prioritization of diffusely defined “*societal benefit*” relative to loss of power production in association with updated environmental terms. We will illustrate this with [a couple of] recent examples.

A recent case in Trøndelag River Basin District is the modification and summoning of the licensing for Skjendal River power station regarding the regulation of Gangåsvatnet Lake and Våvatnet Lake.

In 2018, a local cabin owners association requested revision of the Gangåsvatnet Lake regulation, with support from Friends of the Earth. The Orkla River Basin Sub-District and Orkdal Municipality later filed their support for this request for revision and added that terms in the license for the Skjendal River required revised.^{14, 15, 16, 17}

When informing the owner of the power station about the requests for revision, NVE wrote the following (our translation):

“Upon further investigation, NVE has come to the conclusion that the license for Gangåsvatnet Lake, as granted by royal decree of 15 September 1922, is not subject to a revision. The reason being that the license was granted on the basis of the Act on the use of waterways etc. of 01.07.1887, which is the forerunner of the current Water Resources Act. The license for Gangåsvatnet Lake can only possibly be changed according to Section 28 of the Water Resources Act.”¹⁸

The County Governor of Trøndelag supports the proposed summoning and modification of licenses.¹⁹ In its statement to the NVE, the County Governor explains that they need guidance on the process since old facilities so seldomly are summoned. They also suggest that there should be a thorough investigation in line with an environmental impact assessment as in cases of a revision. The County Governor also suggests that all hydropower facilities in the river should be looked at in the process, including the Skjenald River and Våvatnet Lake, to ensure a watershed approach in line with the WFD.

After a field inspection with all stakeholders, during which NVE explained that Gangåsvatnet Lake was licensed under the royal decree of 15/09/1922, granted under the Watercourses Act of 1887, and thus not subject to revision of license terms, the County Governor concluded the following²⁰ (our translation):

“Modification of the license for Lake Gangåsvatnet needs to be done according to Section 28 of the Water Resources Act.”

It was also explained that if the claims are rejected, the decision cannot be appealed. A decision for modification or summoning can however be appealed.”

The County Governor continues (our translation):

“The first regulations in the Skjenald River came well over 100 years ago. The license for Lake Gangåsvatnet from 1922 is enshrined in the Watercourses Act from 1887. There is hardly any actor/sector in Norway which is allowed to run its business according to laws and regulations that have not been renewed since the end of the 1880s. Both national and international legislation is designed to make sure that the duty of care and the sustainability goals must be taken into account when using natural resources. If an old set of rules stands in the way of what is perceived as reasonable based on current international and national regulations, the Norwegian Water Regulation and the Nature Diversity Act, then the water authority must use the tools needed to bring this into a modern framework.”

The claimants have all pointed at several factors that would call for an improved revision of terms/modification of licenses/summoning of old licenses, regardless of applied tool. Because the summoning of an old hydropower facility requires “*special circumstances*”, the claimants, including the Municipality River Basin District, and the County Governor have provided NVE with a long list of relevant circumstances:

- The endangered (EN) catadromous European eel (*Anguilla anguilla*) was registered as late as in 2004 and included in an NVE report²¹ on water flow levels in heavily regulated rivers with “small” salmon. The Eel Pond “Åltjønna”, just above Gangåsvatnet Lake reveals that the known historical presence of eel.
- Near threatened Atlantic salmon (*Salmo salar*) and sea trout (*Salmo trutta* L.): Changes in the river course has a negative impact on migration of anadromous species. The population status for Atlantic salmon in the Skjenald River is poor.
- Arctic charr (*Salvelinus alpinus*): Important for local anglers, this specie’s population has declined.
- Waterfowl in adjacent Svorkmyran Nature Reserve. Friends of the Earth are concerned over effects of the regulation of Gangåsvatnet Lake on this nature reserve and its populations of various ground nesting birds. The County Governor writes that Svorkmyran Nature Reserve is a bogland with several types of bogs, which is comprising important for breeding sites for waterfowl, yet the number of breeding birds is in decline for several species. One of the main reasons is attributed to artificial flooding during the breeding season, due to the regulation of the lake. This was supported in the findings of Biofokus, published in a report on concerns regarding the regulation of Lake Gangåsvatnet.²²
- The vulnerable (VU) freshwater pearl mussel (*Margaritifera margaritifera*) is found in a watercourse (“Brandåstjønna-Sagbekken”) just south of Lake Gangåsvatnet. The riverbed in Skjenaldelva River has been modified and it is not clear whether there was freshwater pearl mussel in the river before it was regulated.
- Integrated water management: Looking at the whole watershed, in their letter of Oct 2021, the County Governor underlines the importance of integrated water management (in line with the WFD).
- Docks/piers and buildings near the lake are damaged due to the regulation.

The environmental status of the Skjenald River, a HMWB, in the database Vann-Nett²³ is moderate ecological potential (MEP), with high risk of not sustaining MEP, which is also the environmental objective, because the status is dependent on ongoing measures.

In this case, the municipality and the County Governor and competent authority in the river basin were all aware of the strict criteria regarding “*special circumstances*” and the requirement for strong environmental concerns for a facility to be summoned. Yet, in spite of the criteria and requirements being addressed in addition to other environmental and public interests, NVE decided in April 2022 that neither of the unlicensed facilities in question would be summoned for licencing and that the regulation of Gangåsvatnet Lake, licenced under the Watercourses Act of 1887, would not be modified²⁴. In accordance with what we explained in chapter 2.4, these facilities will remain unlicensed until when/if the authorities find it necessary to change that decision.

We need to mention that the Skjenald River power station, although NVE recently confirmed its status as unlicensed, is not included in Annex 8 to the government’s letter, listing the unlicensed facilities and those with exemptions.

In addition, the hydropower company applied for “*upgrading and expansion*” of the Skjenald River power station in 2009²⁵, which resulted in a new power station 150 m downstream. This upgrading may be positive in many aspects, but there were no environmental investigations or any other connection made to the WFD requirements, nor was the new power plant built with any licensing process. In one of their letters, the County Governor comments their regret over that the water management authorities missed an opportunity to impose mitigating and compensatory measures for the environment. This is an example similar to that under chapter 4.3, indicating a systemic allowance of old hydropower facilities being allowed to continue operation without evaluation of possible mitigating measures, connection to modern environmental standards, and the objectives of the WFD.

4.2 The threshold for setting a test manoeuvring programme – example

A test manoeuvring programme was implemented for Randsfjorden, Norway’s 4th largest lake, in 1995, and set with a duration of 5 years. However, the test manoeuvring programme remains in place today, almost 30 years later. The operator delivered a proposal for a permanent manoeuvring programme in 2013, which the Norwegian authorities distributed for public comment in 2016. However, since 2016, the Norwegian authorities let the matter rest until recently in December 2022 when they distributed a report in which they present their recommendations for the permanent manoeuvring programme, and opened for public comment on the matter. Based on the submitted comments, the Ministry of Petroleum and Energy will determine a permanent manoeuvring programme. In the report from December 2022, the authorities write that the administration today has essentially stopped using test manoeuvring programmes aside from exceptional cases.²⁶ The same view was expressed in NVE’s letter to the Parliamentary Ombud for Scrutiny of the Public Administration, dated 2 December 2021.²⁷ This letter was submitted in regard to a complaint under investigation by the Parliamentary Ombud relating to the extraordinary long time NVE is using on determining a permanent manoeuvring programme for Randsfjorden.

4.3 Application of Section 10 of the Water Resources Act – example

The power facility Nedre Fiskumfoss, in the Namsen River (with the status national salmon river) in Trøndelag, could serve as an example on the lacking application of Section 10 of the Water Resources

Act. Nedre Fiskumfoss hydropower facility is unlicensed, yet has undergone development and modernisation projects, including more than doubling the water intake.

In 2016, NVE made an assessment of whether or not the facility was obliged to apply for a licence under Section 8 of the Water Resources Act in relation to the facility undergoing a new development project.²⁸ NVE concluded that the facility did not need a licence to operate.

The decisive factor in determining whether a licence was necessary, is whether the development project would cause noteworthy damage or inconvenience to the public interests in the watercourse. The damages and inconveniences caused by the development project are compared to the watercourse's situation prior to the new development project, rather than before the facility was first constructed with relation to the ecological potential of the now affected watercourses. Since the facility is old and the operator has no terms to adhere to when operating the facility, the consequences of the development project were not seen as damaging to the public interests in the watercourse. Conveniently for the operators, this will almost always be the case when old facilities are being upgraded and modernised. Consequences of the modernisation are solely compared to the facility's impacts prior to the modernisation.

If the same facility was being constructed as a completely new project, instead of undergoing a modernisation, the damages would have to be held up against a situation with no operating facility. In such situation, a licence would be necessary according to Section 8 of the Water resources Act. In this way, old hydropower facilities can keep on operating without application of Section 10 in the Water Resources Act, as the facility likewise does not have to apply for a licence.

4.4 The threshold for changing the rules of manoeuvring outside of a revision case - example

In the regulation of the Åbjøra River in Nordland County, two licenses were granted in 1976 and 2000. In 2002, the first summer after the 2000 license came into force, there was a sudden mass die-off of salmon and trout smolt in the Åelva River, which is the name of the lower part of the river, from Åbjørvatnet Lake until the river mouth. With the exception of 2005, this repeated every summer up until 2011. This unexpected and high mortality of young fish was caused by low water flow resulting in an outbreak of proliferative kidney disease due to elevated water temperature. To address this matter, NVE sent a recommendation for updated license conditions to the Ministry of Petroleum and Energy in September 2012²⁹. Prior to this there was no requirement for a minimum water flow on multiple river sections in the licences. On the 7 November 2014, a royal decree set a requirement for an increased minimum water flow (7 m³/s) from Åbjøra Lake between the 1st of July to the 15th of September³⁰. This was the first time the Ministry of Petroleum and Energy used their authority to change the manoeuvring regulations for mitigating such harmful effects as caused by this license. A prerequisite for using this authority is that the harmful effects were not assessed or anticipated in any other way during the licensing process.

As far as we know, this is the first and only time the right to make necessary changes to the manoeuvring regulations has been used.

Whether this was sufficient is unclear, as Bindal Municipality submitted a request for revision of licence terms in 2021, asking for an overview of the of the manoeuvring regulations³¹.

5 The interpretation of WFD 4(7)

5.1 Norway's interpretation of sustainability

In Norway, Article 4(7) of the WFD, is implemented through section 12 of the Norwegian Water Regulation (vannforskriften). The guidelines for section 12 of the Norwegian Water Regulation³², states (our translation):

«3.4 What is meant by new activity, see first paragraph letter b?

“New activity” here means “new sustainable activity which causes deterioration of the environmental status in a water body from very good to good”, cf. section 12 first paragraph letter b.

(...)

According to section 12 first paragraph letter b, this activity must be “sustainable”. Neither the directive nor the regulation provides a definition of this term. In Norwegian regulations, however, there are usually several statutory and regulatory conditions that must be met in order for a permit to be granted. The ministry understands the term in such a way, that the sum of these regulations can be seen as an expression of national interpretations of what is sustainable for the particular type of activity. If an activity is carried out in accordance with a permit granted by a public authority, the requirement for sustainability is considered fulfilled.»

Please note the last sentence: “If an activity is carried out in accordance with a permit granted by a public authority, the requirement for sustainability is considered fulfilled.” In other words, the Norwegian government's sole criteria for deeming an activity sustainable is if the activity has a permit provided by the authorities. There is no requirement for permits to include specific and/or standardised sustainability criteria.

5.2 Environmental ambitions for hydropower

The government's interpretation of sustainability may explain the Norwegian hydropower sectors' position against the EU Taxonomy and its DNSH-criteria. Or rather, the position that any activity granted by the Norwegian authorities should be considered sustainable (see 5.1 above).

This may also explain why Renewables Norway (formerly Energy Norway) until recently promoted the idea that all activities allowed by Norwegian authorities are sustainable, even if allowed by use of exemptions from the WFD. Renewables Norway has now withdrawn their taxonomy reporting guide for Norwegian hydropower, with reference to the clarifications from the Commission³³.

Statkraft is state-owned and Europe's largest hydropower producer, and still claims that the production in Norway and elsewhere in Europe is sustainable. This is from Statkraft's 2022 annual report:

“Our hydropower operations in the EU comply with the Water Framework Directive. This Directive is binding for member states, and implementation can be adapted to national legislation. In Norway, the implementation of this Directive is done through the water regulations. The regulation is authorized in a number of sectoral laws, i.e. Water Resources Act and Nature Diversity Act. These sectoral laws provide the means to follow up the specific environmental objectives, which are set by the competent authorities in accordance with the Water Framework Directive.

(...)

Since we operate in line with concessions, and implement the measures aimed at achieving relevant environmental objectives in affected water bodies, we consider that our hydropower operations in the EU and Norway are in line with the DNSH criteria for water and marine resources.”

This is just an example of how an operator, state-owned at that, operating several large facilities without modern environmental terms communicates to the public.

Annex 8 to the government’s letter lists hydropower facilities with no license and license exemptions. Most are registered with an effect under 1MW. But the list shows that Norway has 16 unlicensed hydropower facilities each producing 100 –1500 GWh/year. They were typically built about 100 years ago, and the standard seems to be that these can be rebuilt, and sometimes even somewhat relocated, without environmental impact assessment or licencing. Being granted as licence free, they can continue operating without environmental or management terms and no possibility for the authorities to issue orders of monitoring or habitat improvement measures, see chapter 4.3. Without a licence, there is also no opening for a revision of licence terms even after 30 years.

5.3 Ecological potential and exemptions in heavily modified rivers

GEP requires that all realistic measures are carried out, and that the water body has a functioning aquatic ecosystem. When discussing the ecological status and ambitions for increasing it in HMWBs, we wish to refer to the Common Implementation Strategy (CIS) Guidance Document No. 37, «Steps for defining and assessing ecological potential for improving comparability of Heavily Modified Water Bodies».

The CIS guideline points out that in the review of MEP and GEP, the following should be considered:

- Taking on board emerging good practice on BQEs sensitive to the relevant hydromorphological alterations
- Could ambition level for GEP be increased, if more of the ecological impacts are possible to mitigate by "new" measures not previously considered/available?

The threshold for prioritizing HMWBs for improved environmental status is very high in Norway.

The Norwegian authorities, in the RBMP-process, clarified that the River Basin District Councils had the mandate to propose environmental objectives requiring revision/summoning/modification also for the coming RBMP, in addition to those water bodies that were approved for measures in the 2016-2021 RBMPs. Suggestions for prioritizing new water bodies needed to be made explicit and well founded in the RBMPs for 2022-2027.

In the government's approval of the RBMPs, it says (our translation):

"Appendix 2 lists the HMWBs that need to impose measures that convey power loss in order to reach the environmental objective of GEP. For those waterbodies which do not get environmental objectives requiring measures that convey power loss approved – the environmental objective remains today's status as of this approval.

(...)

In Appendix 2, the Ministry has listed the water bodies which have been approved with higher environmental objectives than the current state and which need new measures that may result in a loss of power in order to meet the environmental objective. Water bodies that have not been approved for the environmental objective, when based on measures that require power loss, will have the environmental objective changed to the current status upon this approval."

The River Basin competent authorities have requested a review of water bodies with exemptions, which resulted in the Environment Agency and NVE³⁴ setting GEP as the environmental objective for over 150 water bodies that had exemptions according to Section 10 in the Norwegian water regulation. The number of exemptions was further reduced by the government, in its approval³⁵.

This reduction in numbers of exemptions, is of course positive. The next step however is to make sure that these (and all other water bodies with GEP) actually reach their ecological potential, by introducing all reasonable measures that meet the criteria of a cost-benefit analysis.

It should also be noted that in the authorities' advice to the government regarding the approval of RBMPs, the authorities write that, out of the approved measures in the 2016-2021 RBMPs, in hydropower affected rivers that did not require water release/loss of power production, only 131 of the 365 measures were initiated in June 2022.

In the designation process of HMWBs, society's benefit of the activity that prevents the water body from reaching GES should be considered, such that the benefits outweigh the environmental costs. But whilst HMWBs are those that can't reach GES, they should be tried (in Norway's case, according to the Praha-method) to identify each water body's ecological potential. In Norway, this is not done according to the intended procedure of the WFD. The government, in its approval of the RBMPs, presents list for each RBMP ("*Annex 2*"), with the HMWBs that may have measures that require water release (=power loss). Maximizing power production may be one societal interest, but it obviously needs to be balanced against environmental costs of maximized power production, and the consequences of such costs for society. According to the WFD, a HMWB should receive all economically and technically feasible measures, that help it achieve its environmental potential.

Experience shows that the *estimated* power loss tends to be substantially higher than what turns out to be actually needed in order to meet the environmental objectives. That is, the environmental objectives can be met with a smaller release of water than the theoretical calculations indicate. This is also supported by a study by SINTEF Energy AS, which reduced the foreshadowed power loss caused by modern environmental terms in upcoming revisions, by about 45%³⁶. In our experience, manoeuvring programmes can play an important role in finding out how to improve the environmental status, and can help overcome the reluctance due to exaggerated estimates of powerloss.

We also wish to point to the need to review the ecological potential each RBMP cycle. In an HMWB, the ecological potential, whether GEP or lower, will not be static once set. Whenever new technology or knowledge indicates the possibility for environmental improvements for the biological quality elements, these should be evaluated and implemented, if not found unreasonably expensive or for other reasons not applicable according to the WFD.

6 Concluding remarks

We would like to underscore that while some of the legal tools can *in principle* be applied to achieve the environmental objective in WFD art. 4, many are *seldom or never applied* in practice. The Norwegian government may *formally* possess the tools necessary to review permits and impose new mitigation measures every six years, however most of the tools the government refers to are not made operative and have never if not rarely been applied. With the strict demands for “*special circumstances*” to be met, practice shows that these tools are not suited for the six-years cycles of the WFD. Experience shows that, for hydropower affected rivers, the licence terms are decisive for the state of the aquatic ecosystem. And the existing terms can only be altered or supplemented by applying the revision tool, which can only happen every 30 years at the shortest interval. This compounded by previous cases demonstrating that the revision process takes many years, leads to the conclusion that the Norwegian license system does not in practice ensure the implementation of WFD in hydropower affected rivers.

Best regards,

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- ³ «Natur for livet» (White paper) - [Meld. St. 14 \(2015–2016\) - regjeringen.no](#)
- ⁴ «Kraft til endring» (White paper) - [Meld. St. 25 \(2015–2016\) - regjeringen.no](#)
- ⁵ RBMPs requesting the introduction of standard environmental terms into all licenses:
- a) Regional plan for vannforvaltning i vannregion Nordland og Jan Mayen (2016-2021)
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 - b) Regional vannforvaltningsplan for vannregion Nordland og Jan, Mayen (2022-2027) - Vårt verdifulle vann
<https://www.vannportalen.no/sharepoint/downloaditem?id=01FM3LD2VBD4QEHG6WYJD2MS5E42ZA42H2>
 - c) Prosjektplan for Vannområde Vest 2022-2027
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 - d) Regional plan for vannforvaltning i vannregion Agder, 2016-2021
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- ⁶ Vårt verdifulle vann, Vestfold og Telemark Regional vannforvaltningsplan 2022–2027
https://www.vannportalen.no/globalassets/vannportalen/vannregioner/vestfold-telemark/dokumenter/plandokumenter/vestfold-og-telemark_vannforvaltningsplan-2022-2027.pdf
- ⁷ Ot.prp. nr. 39 (1998-1999) page 346. (Proposition to the then “Odelsting” chamber of the Parliament, regarding the Water Resources Act
<https://www.regjeringen.no/no/dokumenter/otprp-nr-39-1998-99-/id159706/>
- ⁸ https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Package_Meeting_Norway_2022_-_Follow-up_letters_merged.pdf
- ⁹ Public Administration Act: [Act relating to procedure in cases concerning the public administration \(Public Administration Act\) - Lovdata](#)
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https://www.regjeringen.no/globalassets/upload/oed/2012-0606_retningslinjer_for_revisjon_25mai_siste.pdf
- ¹¹ The government’s approval of the RBMPs for 2022-2027:
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see Annex 2 of each River Basin – with the waterbodies with environmental objectives that may convey reduced power production (Vedlegg 2 – vannforekomster med miljømål som kan medføre krafttap)
- ¹² Reply from Terje Aasland, Minister of Petroleum and Energy, to a proposal from the Norwegian parliament’s energy and environment committee regarding revision of the Røldal-Suldal hydropower facilities:
<https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2022-2023/inns-202223-150s-vedlegg.pdf>

(related to this case: <https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2022-2023/inns-202223-150s/>)

¹³ See point 13 of the preamble and art. 3 no 3 in the WFD.

¹⁴ NVFs krav: <https://webfileservice.nve.no/API/PublishedFiles/Download/201836332/2466180>

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¹⁶ Orkla river basin sub-district:
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¹⁷ Orkdal Municipality: <https://webfileservice.nve.no/API/PublishedFiles/Download/201836332/2632017>

¹⁸ NVE to the operator: <https://webfileservice.nve.no/API/PublishedFiles/Download/201836332/2565757>

¹⁹ County Governor March 2019:
<https://webfileservice.nve.no/API/PublishedFiles/Download/201836332/2702983>

²⁰ County Governor Oct 2021: <https://webfileservice.nve.no/API/PublishedFiles/Download/51eb8f4e-0750-471a-8648-2b1d61e47e1b/201836332/3426312>

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²³ Skjenald River in Vann-Nett: <https://vann-nett.no/portal/#/waterbody/121-489-R>

²⁴ NVE's decision regarding modification and summoning in the Skjenald River case:
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²⁵ Upgrading and expansion of the Skjenald power station - application in 2009
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²⁶ Letter to Ministry of Petroleum and Energy from NVE, "Foreningen til Randsfjords Reguleringen – Endelig fastsettelse av manøvreringsreglement for Randsfjorden – NVEs innstilling», dated 14 December 2022, page 3.
<https://webfileservice.nve.no/API/PublishedFiles/Download/3569e85c-f5b3-4c12-9fb1-0fe3dfb8a0e6/200800384/3430536>

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²⁸ Letter to NTE Energi AS from The Norwegian Water Resources and Energy Directorate, "NTE energi AS O/U av Nedre Fiskumfoss kraftverk i Grong kommune, Nord Trøndelag vurdering av konsesjonsplikt», dated 5 December 2016.
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³⁰ New manoeuvring regulations, by royal decree of 7 nov 2014, regarding the regulation of the Åbjøra River

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<https://webfileservice.nve.no/API/PublishedFiles/Download/185f126b-afbf-4594-99ed-911c5822dd06/202116221/3429355>

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The translated sections in Norwegian:

3.4 Hva ligger i ny aktivitet, jf. første ledd bokstav b?

Med "ny aktivitet" menes "ny bærekraftig aktivitet som medfører forringelse i miljøtilstanden i en vannforekomst fra svært god tilstand til god tilstand", jf. § 12 første ledd bokstav b.

(...)

Etter § 12 første ledd bokstav b må denne aktiviteten være "bærekraftig". Verken direktivet eller forskriften gir noen definisjon av dette begrepet. I norsk regelverk oppstilles det imidlertid gjerne flere lov- og forskriftsbestemte vilkår som må være oppfylt for at en tillatelse kan gis. Departementet tolker begrepet slik at summen av dette regelverket kan sees som et uttrykk for nasjonale vurderinger av hva som er bærekraftig for den enkelte typen aktivitet. Utføres en virksomhet i henhold til en tillatelse gitt av offentlig myndighet, anses kravet til bærekraft å være oppfylt.

³³ "DRAFT COMMISSION NOTICE on the interpretation and implementation of certain legal provisions of the EU Taxonomy Climate Delegated Act establishing technical screening criteria for economic activities that contribute substantially to climate change mitigation or climate change adaptation and do no significant harm to other environmental objective", Q 56-58

<https://ec.europa.eu/finance/docs/law/221219-draft-commission-notice-eu-taxonomy-climate.pdf>

³⁴ Direktoratets tilråding til departementenes godkjenning av oppdaterte regionale vannforvaltningsplaner for planperioden 2022 – 2027: hoveddokument

<https://www.vannportalen.no/sharepoint/downloaditem?id=01FM3LD2X3WOH3J7M4QFDI4J22EIDLZXOR>

³⁵ The government's approval of the RBMPs for 2022-2027

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Atle Abelsen 23 FEBRUARY 2023