

EFTA Surveillance Authority (ESA)

Your ref

Our ref

Date

24/1828-

9. June 2026

Reply to letter of formal notice from the Authority concerning the implementation and application of Article 4(7) of the Water Framework Directive (2000/60/EC)

Dear Madam/Sir,

1. Introduction

Reference is made to the letter of formal notice dated 23 April 2026 from EFTA Surveillance Authority (the Authority) regarding the implementation and application of Article 4(7)(c) of Directive 2000/60/EC establishing a framework for Community action in the field of water policy (“Water Framework Directive” or “WFD”) into Norwegian law, and the application of the WFD with regards to two projects entailing the disposal of mining waste into water bodies.

In the following, the Ministry of Climate and Environment (the Ministry) addresses the two conclusions from the Authority as presented in the letter of formal notice:

- (i) *Norway has failed to correctly and completely implement Article 4(7) WFD into its national legal system.*
- (ii) *Norway has incorrectly applied Article 4(1) in conjunction with Article 4(7) WFD by authorising, and maintaining in force the authorisation of, projects entailing the disposal of mining waste in Førdefjorden-ytre, Repparfjorden indre and Repparfjorden ytre without a valid derogation.*

As the Authority points out in the letter of formal notice, the central issues raised in the letter are currently subject of ongoing legal proceedings in Norway. The Førdefjord case was heard by the Supreme Court 27 April – 5 May. The court’s decision is expected shortly. The Supreme Court decision will likely provide key clarifications both in the Førdefjord case and

more generally for the interpretation of the Norwegian Water Regulation, implementing the WFD. In the Ministry's view it is appropriate to await legal clarification from the Supreme court before considering any further steps in the matter, including the question of implementation of Article 4(7). This view was explained to the Authority at the Package Meeting in November 2025, see below. Prior to receiving the Authority's letter of formal notice, the Ministry had not received any indications from the Authority that they had a differing view on this approach.

Consequently, the Ministry will limit itself to a few brief observations in response to the letter. Should the Supreme Court conclude that the decisions concerning Førdefjorden are affected by errors that render the decisions invalid, the State will follow this up promptly and assess the implications for the implementation of the WFD and for other cases, if warranted. The Ministry will keep the Authority informed of developments without undue delay.

2. The implementation of Article 4(7) of the WFD into national law

The Ministry refers to point 6.2.3 in the letter of formal notice. As demonstrated in this section, the Authority and the Ministry have engaged in continuous dialogue regarding the implementation of Article 4(7) and the proposed amendments, most recently at the annual package meeting last November. The Ministry had previously acknowledged that the wording of section 12 of the Water Regulation could be more precise in regards to reflecting the content of WFD article 4(7). Accordingly, the Ministry submitted proposed amendments of the Water Regulation for public consultation in 2023.

However, the proposed amendment has been put on hold pending national judicial proceedings regarding the mine tailings disposal in Førdefjorden. The Ministry informed the Authority of this position at the annual Package Meeting in November 2025. It is still the Ministry's view that it is appropriate to await the outcome of the proceedings before the Supreme Court before reaching a final conclusion on how the wording of the regulations ought to be formulated. That way we may ensure that the amendments reflect the interpretation of the Norwegian Supreme Court. In the Ministry's view, introducing a regulatory amendment at this stage, prior to final legal clarification, would create unnecessary uncertainty for stakeholders as well as for authorities applying the regulation and the directive. We continue to underline that ensuring effective implementation of EEA law in our regulatory framework is continually of importance for Norway, and that we will consider the amendment promptly once the Supreme Court has rendered its decision in the case.

The Ministry would like to emphasise that the question of implementation of article 4(7) of the WFD has not affected the application of this article in decisions authorising disposal of mining waste in Førdefjorden and Repparfjorden. As will be elaborated further below, it is our view that these decisions are consistent with the requirements set out in WFD Article 4(7).

In this connection the Ministry would also like to refer to the Authorities earlier decisions of 2017 and 2021 where the Authority concluded that the conditions for exemption as set out in

article 4(7) have been met, and that accordingly Norway was not in breach of its obligations under Article 4.7.

3. The application of Article 4(7)(c) of the WFD with regards to mine tailings disposal in Førdefjorden and Repparfjorden

The Ministry's view is that both the permits regarding mining disposal in Førdefjorden and Repparfjorden are valid. In both cases a derogation has been granted in accordance with WFD art. 4(7), building on a detailed and specific assessment of the projects in question which substantiated that they were indeed of overriding public interest. Both permits have also been subject to public consultation where required, both during the planning stage and the permitting stage under the Pollution Control Act¹ and the Mineral Act².

The WFD art. 4(7) requires a case-by-case assessment to determine if the requirement of "overriding public interest" is fulfilled. In the Ministry's view, this is a two-part process. Firstly, the reason(s) for considering the project to be in the "public interest" must be identified. This means that reasons that are, for instance, purely private in nature are not relevant. Secondly, Article 4(7) of the WFD requires a balancing of the public reason(s) as a whole against the deterioration in question, in order to determine whether the public interest(s) in the project are "overriding", cf. C-346/14 *Schwarze Sulm* para 77 and 80 and opinion of Advocate General Kokott in Case C-43/10 para 89-90. According to the EFTA Court, in this "weighing exercise", national authorities "(...) will be obliged to weigh the expected benefits of the contested project against the resulting deterioration of the status of the body of surface water in question".³ In the Ministry's view, a case-by-case balancing of interests requires an assessment of the actual environmental impacts of the project for which a derogation is sought. It is not clear from the Authority's letter, which states that Article 4(7)(c) entails a "strict threshold," whether the Authority takes a different view. The Ministry further notes that the environmental impacts on Førdefjorden and Repparfjorden are not explained in the Authority's letter. As held by the EFTA court in its advisory opinion E-13/24 para 31, the EEA states must be allowed a certain margin of discretion for determining whether a specific project is of such overriding public interest. Furthermore, the court stated that it is not possible to state whether only particular important interests may be relevant, cf. para 36.

In the Ministry's view, the EFTA Court's advisory opinion in E-13/24 leaves room for interpretation and must be understood in the context of the referred questions. The EFTA Court concludes in para 45 that it "cannot be excluded that a project may be authorised pursuant to Article 4(7) of Directive 2000/60 for reasons related to the need to generate employment effects and thereby ensure settlement in regions experiencing significant depopulation and social deprivation". In the Ministry's view, this must be understood as an example and not a minimum requirement nor a threshold. The Ministry refers to para 30 in

¹ Act of 13 March 1981 No. 6 Concerning Protection Against Pollution and Concerning Waste

² Act of 19 June 2009 No. 101 Relating to the Acquisition and Extraction of Mineral Resources

³ EFTA Court Advisory Opinion E-13/24, para 33

the written observation from the European Commission to the EFTA Court in the case in question:

It should also be acknowledged that certain considerations linked to the social or economic situation of a particular area may, in certain circumstances, constitute reasons of overriding public interest. This can be seen, for example, in C-404/09 *Commission v Spain*: the CJEU considered – in the context of the Habitats Directive, which contains a provision similar in scope and effect to Article 4(7) of the Water Framework Directive – that **the importance of mining activities for the local economy is capable of constituting an imperative reason of overriding public interest**. Similarly, the CJEU has held that “*reasons of an economic nature in the pursuit of an objective in the public interest or the guarantee of a service of general interest may constitute an overriding reason in the public interest capable of justifying an obstacle to one of the fundamental freedoms enshrined in the Treaties*”. On that basis, it cannot be excluded that a project is authorised pursuant to Article 4(7) of Directive 2000/60/EC for reasons pertaining to the need to ensure employment and settlement in regions experiencing depopulation, **for instance, and going beyond a simple desire to generate/increase employment**. (emphasis added)

Following the EFTA Court’s advisory opinion, the Ministry carried out a renewed assessment of whether the conditions in Article 4(7) WFD were met. This was considered appropriate in light of the advisory opinion from the EFTA Court, and in particular, to ensure predictability for the permit holder. In the Royal Decree of 23 May 2025, the conclusion was that there were no grounds for reversing the permit and that the conditions in Article 4(7) WFD were met both in 2016 and in 2025. The Ministry agrees that the 2016 decision could have been clearer regarding the description of public interests the project serves. Consequently, the Royal Decree from May 2025 provided additional reasoning based on information concerning public interests present in the 2016 case. At the time the permit was granted, it was clear that the Engebø deposit constituted a large and significant resource, both in European and a global context. As set out in section 2.3.3 the Royal Decree from 2025, this was described in documents pertaining to the case prior to the 2016 decision.

Further, it was also evident in 2016 that Norway and Ukraine are the only producers of titanium raw materials in Europe with resources of significant scale. The Ministry also underlines that mineral extraction depends on private capital, the market is global, and the value chains from raw materials to end products are complex. Mineral operations require planning involving extensive surveys and impact assessments that may extend over many years. At the project and permitting stage of mineral extraction, it is unlikely that all potential future applications of the extracted minerals can be fully identified.

However, given the long operational lifespan of the Engebø project, it was clear that the operation would be a stable supplier of rutile. By enabling rutile extraction to take place in Norway, the project would contribute to securing the EEA’s access to titanium ore suitable for further processing into a range of titanium products. As described in the Royal Decree from 2025, the geopolitical developments since 2016 only emphasises the importance of Norway and Europe’s need to access the rutile in Engebø.

In light of the above, the Ministry does not share the Authority's view that the 2025 Royal Decree constitutes an ex post facto justification for the project. The Ministry cannot see that the WFD precludes clarification and elaboration of reasons stated in decisions granting derogations in accordance with article 4(7). In our view, recent guidance from the European Commission regarding art. 4(7) supports this.⁴

In addition, the Ministry refers to the enclosed documents, which sets out in greater detail the States view on the interpretation of Article 4(7) WFD and the application in the Førdefjord-case.

The Førdefjord case was heard by the Supreme Court 27 April – 5 May, where the central issues raised by the Authority in its letter will be determined, provided that the case is not dismissed. As part of its assessment, the Supreme court shall consider the EFTA Court advisory opinion and its implications for the validity of the permits granted in the Førdefjorden case, as well as for the Norwegian Water Regulation more generally. These are important clarifications for the present case, as well as more generally for interpreting Norwegian Water Regulation, implementing the WFD. Thus, the judgement from the Supreme Court may also deliver important regulatory clarifications. The claim for temporary injunction against the ongoing disposal of tailings in Førdefjorden is no longer pending, as the NGOs chose to only appeal the issue of legal costs to the Norwegian Supreme Court.

In the Ministry's view, it is appropriate to await legal clarification from the Supreme Court before taking any further steps in the matter, if warranted. Should the Supreme Court conclude that the permit in the Førdefjord case is invalid, the Ministry will adhere loyally to the judgement and reassess the matter in accordance with any guidance provided for in the Supreme Court decision.

Should a judgement from the Supreme Court in the Førdefjorden case require renewed assessments from the Ministry in the Førdefjorden case, or be of significance for other cases such as the Repparfjorden case, the Ministry will take this into account in the follow-up of the judgment. If that is the case, we will ensure that an update on this subject is communicated to the Authority without undue delay.

Yours sincerely

Lindis Nerbø
Deputy Director General

Ida Røstgaard
Senior Policy Adviser

This document is signed electronically and has therefore no handwritten signature

⁴ C/2026/3216 *Guidance for the implementation of the Water Framework Directive during the permitting of new projects and existing activities with a particular focus on the mining sector*, section 5