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COMMENTS TO THE DRAFT NORWEGIAN ALLOCATION PLAN FOR THE EMISSION TRADING SYSTEM IN 2008-2012

Reference is made to the Ministry's invitation to a public hearing, which was published on the Internet in the afternoon on 21. December 2007. NorFraKalk AS is invited to submit comments, and wishes to avail itself of this opportunity. On behalf of NorFraKalk, I respectfully submit the following comments:

The Ministry's invitation to the public consultation is severely delayed, and will, in turn, also delay the final decision by the EFTA Surveillance Authority (hereinafter "the Authority"). This prolongs the period of uncertainty for NorFraKalk and other enterprises which economy is seriously affected by Emission Trading System (ETS). Such delays imposes serious practical and economical strains on the industry and should be avoided. Since the proposal for a National Allocation Plan (NAP) does not add much to the system that was already presented in the Government's Bill for the 2007 amendments to the Emission Trading Act (Ot.prp. nr. 66 (2006-2007)), it is hard to see any legitimate reason for the delays.

This being said, the time limit for comments is extremely short. In practice the instances entitled to comment are given seven working days to prepare their comments. This is not in line with Criterion 9 – Involvement of the public, of Annex III to Directive 2003/87/EC. Reference is made to the Commission's guidelines of 7. January 2004, especially para. 95. This deficiency in the preparation of the plan is exacerbated by the fact that also the 2007 amendments to the Emission Trading Act were enacted after a very swift legislative process, in which the consultation period also was only three week. This was shorter that the minimum requirement according to Norwegian regulations.

Because of all this, and especially in order to avoid further strains on the industry, a main objective for the Ministry must now be to secure that the forthcoming evaluation process by the Authority can be undertaken without unnecessary delays. Accordingly, the Ministry should – as soon as

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possible – amend the plan on points that one can foresee will not be accepted by the Authority. Otherwise, the process before the Authority will be delayed, the Authority will in the end be forced to adopt a negative decision and the industry will continue to suffer indefinitely.

One element that the Ministry can foresee will not be accepted, is the system for allocation of allowances for 2008-2012, i.e. section 3.2 of the plan. The Norwegian system is incompatible with Criterion 5 of Annex III of Directive 2003/87/EC. NorFraKalk – as well as NHO – has lodged a complaint with the Authority regarding the state aid involved in the Norwegian ETS. These complaints were communicated to the Norwegian Government at an early stage. Further, the Ministry is well aware of decisions by the Commission that clearly prohibits discrimination between existing installation. Nevertheless, the Ministry does not field any new arguments in this regard and does, in fact, not discuss the said Criterion 5 at all. Under the present circumstances this is striking, and must be evidence of an inability to counter the allegations that the plan discriminates between installations, that potential state aid is involved and that that it contravenes Criterion 5 of Annex III to Directive 2003/87/EC.

The arguments presented in the plan – which are the same that can be found in the Government's Bill for the 2007 amendments to the Emission Trading Act – are completely incapable of justifying the discrimination.

First, it is argued by the Ministry that the system gives incentives for existing installations to reduce their emissions. In practice, however, the system works the other way around: *On the one hand*, modern, existing installations, like NorFraKalk, has already invested in BAT technology. Accordingly, the investment decisions has already been taken several years ago been and BAT technology is already in use. The consequence of the plan is not that sensible incentives are given a installation that is being planned, but rather a modern installation like NorFraKalk must discontinue its operations. *On the other hand*, old installations, with old technology and higher emissions, are subsidised by allocation of free allowances. The plan secure that these installations survive, at the cost of newer installations based on BAT technology with less emissions and at the cost of the environment.

Second, it is argued by the Ministry that a "moving base period" should be avoided. This argument is without merit. It must be recalled that the Directive require that all existing installations shall be treated equally, and that a new entrant is only a new entrant in the period of entry. In subsequent periods, it shall be treated as an existing installation. This rule – which is firmly based in the Commission's practice – makes a system of a fixed base period incompatible with the Directive, as long as allocations are based strictly on the actual emissions in that base period. Further, it is unnecessary, disproportionate and clearly unreasonable to deprive existing installations of allowances with a view to remove expectations that allegedly could lead to strategic behaviour. Again, it must be underscored that the actual existing installations, like NorFraKalk, made their investment decisions after they had actually been allocated allowances by the Government during the previous period, which at the same time created an expectation that the conditions of competition would not be dramatically changed. A retroactive legislation which now removes these allowances and thus in a discriminatory manner changes dramatically the economic premises for these decisions, cannot be said to serve any legitimate objective. If the Ministry wishes to

command the industry's expectations for the next trading period, it may very effectively do so through political guidance. This has also been done in a very clear way by the Ministry.

In the light of the fact that the system for allocation of allowances is clearly incompatible with Directive 2003/87/EC and since the Ministry has made no effort in the notification to defend the plan against the allegation that illegal state aid is involved, NorFraKalk urge the Ministry to amend the plan in order to avoid discrimination between existing installations and remove any element of state aid.

As an additional point, NorFraKalk will suggest that the new entrant's reserve should be open for all installations covered by the ETS. The proposed NAP seems to introduce an additional element of uncertainty that, under the circumstances, should be avoided. It follows from the Commission's practice[1] that sector specific new entrant's reserves unjustifiably discriminate between various groups of new entrants when certain groups of new entrants receive free allowances while others need to buy allowances in the market. According to Criterion 8 of Annex III of Directive 2003/87/EC and the said practice of the Commission, a separate reserve may be allocated, however, to e.g. combined heat and power installations, since their environmental benefits are recognised in established Community policy. The allocations must not, however, exceed the expected needs of the installation concerned as determined by the BAT-benchmark.

In the Norwegian NAP the reserve is limited to 9 Mt, which corresponds to 1,8 Mt per year. The Ministry's intention is to allocate free allowances to installations also before any environmental benefits exists. Even assuming that it is possible to have a reserve for new entrants in this category, it is uncertain whether allocations cannot be made before the facilities are actually in place. Reference is made to the Commission's guidelines on Criterion 8, which reads in para 88:

> *"...., the use of clean technologies, ..., should only be taken into account under this criterion with respect to installations using such technologies before the national allocation plan is published and notified to the Commission."*

This seems to contradict the suggestion that free allowances can be allocated to installations that, according to the Ministry's plans, will be equipped with CCS facilities sometime in the future.

To sum up: The notification is seriously delayed and the industry suffers from uncertainty as to their carbon costs in the trading period which now commences. It is urgent to obtain a decision by the Authority that accepts the Norwegian NAP and creates predictability regarding the framework for Norwegian industry. In this unfortunate situation it should be goal to avoid unnecessary conflicts with EEA law, which will only result in even further delays.

NorFraKalk urges the Ministry to undertake a realistic assessment of the state aid issues involved in the draft Norwegian NAP. On certain points, e.g. the arbitrary discrimination between existing installations that is at issue in NorFraKalk's complaint to the Authority, a realistic assessment of the situation must lead to the conclusion that the Authority will not accept this element of the NAP.

[1] See e.g. the Commission's decision of 29. november 2006 regarding the NAP notified by Ireland, para. 13 - 15.

Such elements of the NAP should be amended in order to avoid conflict with EEA law. To await the Authority's decision on this point will only lead to further complications and delays. This should be avoided.

Sincerely yours,
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