

Efta Surveillance Authority
Case handler: Mathias Thorkildsen
mathias.thorkildsen@eftasurv.int
copy: registry@eftasurv.int

Bergen 01 August 2024

Rune Birger Nilsen
runebirger@yahoo.no

Subject: Norway has failed the WFD and water bodies Case 92388 revised edition

As a basis for this complaint, I refer to the letter of 15 June 2023 in which ESA has created case 91458.

Overall question to the recipient of this complaint and notice of concern:

How can the Norwegian authorities prove that the aquaculture industry practises within the framework of the WFD when the Norwegian Water Regulations do not reflect the WFD?

Water Framework Directive 2000/60/EC (WFD) is based first and foremost on a one-way clause, namely "**reduction**", "**cessation**", "**phasing out**", "**avoiding deterioration**".

2. Principle of polluter pays.
3. Principle of source control.
4. Achieve good surface water status no later than 15 years after the date of entry into force of WFD.

The aquaculture industry must be assessed as a whole and not just as individual cases. The reasoning is simple. The aquaculture industry practises largely the same with the same technology. The common denominator is that the deterioration of water bodies is linked to the following points:

- **Mixed waste** is added to the sea (feed residues, plastic residues, heavy metals, medicine residues, chemicals, nitrate compounds and phosphorus).
- **Salmon lice**. The salmon lice are a parasite that kills wild fish such as wild salmon, sea trout and arctic char.
- **The spread of disease such as infections, bacteria and various types of viruses**. Both farmed and wild fish are affected.
- **Escapes**. Escapes lead to farmed genes being mixed into wild salmon and sea trout. Among other things, the farmed genes lead to poorer survivability. Hybrids also occur. It should be noted that anadromous blacklisted rainbow trout (an alien species from North

America) is a spring spawner, which disturbs the wild salmon's eggs that have already been laid in the river gravel. Escaped fish compete for the same food dish.

- **Animal welfare.** Animal welfare inside the cages is generally poor. Wild wrasse and farmed wrasse are added to the cages to eat salmon lice. Wrasse have a very short and stressful life in the cages and are regarded as consumables. The animal welfare of all life in the cages is sometimes very poor, with exceptions. The mortality rate is high.
- **Climate change and other influencers.** Climate change is an X-factor to be reckoned with. Climate change contributes to further pressure on the ecology and its ability to adapt. Other man-made influences such as runoff from agriculture, hydropower, sewage, various land works and mining are other factors that also contribute to pressure on the ecology. These factors do not exempt the aquaculture industry from solving its own man-made influences.

Government measures and/or permits can only result in improved water quality, and not aggravate it with the one exception as entitled in WFD 4 no 6. Article 1 sets out the scope of action of the national state when it is to take decisions affecting water treatment and quality nationally. The WFD - when adopted nationally - sets the line in that all degradation and aggravation that have been found up to and including 2000 should gradually cease. This means that measures that are initiated hereafter and which directly or indirectly infuse the coastal water shall only improve the aquatic environment. Emissions in progress shall cease or be phased out. Work, conditions or measures that aggravate the aquatic environment should not be able to continue, much less be initiated. According to the WFD, it is forbidden to take measures that cause a water resource to deteriorate from good to poor water quality. This is often referred to as the prohibition of deterioration. Exceptions to the prohibition on deterioration require that the interference is for "overriding public interest" and must be anchored in Article 4(7).

Pure financial considerations do not qualify for the application of Article 4(7). Economic considerations are not covered by the wording "overriding public interest". The wording "public" delimits against private and individual interests in the implementation of a measure. The interests of the company's, shareholders' and employees' income are private interests, and can therefore not constitute an "overriding public interest". When assessing socially critical measures that may qualify for exemption, I refer to 2006/123/EC "On service in the internal market" article (40) and CIS Guidance No. 36 "Exemptions to the Environmental Objectives according to Article 4(7)". There are no exceptions that deal with purely financial considerations. It is only socially critical measures that provide an opening to apply exceptions from Article 4(7).

The purpose of the Water Directive is to facilitate a comprehensive protection and sustainable management of water bodies. Any commercial measure will be justified by an expectation of future income. If the purpose of the directive is to have an effective effect, it must be withdrawn a limit to such general beneficial effects of a measure.

"The consideration and argument for wage earners, shareholders and income to the state and municipality does not qualify for application of WFD 4(7)".

I find no evidence that the aquaculture industry's practices are qualified under the WFD as a whole and Article 4(7). Consequently, there is reason to question why the aquaculture industry has been authorised to degrade water bodies? When WFD was implemented in the Norwegian Water Regulations, this provision was translated as "public benefit". This may have resulted in the state having too low a threshold to authorise the deterioration of water quality. The

Norwegian government has interpreted the WFD in such a way that exceptions can be made based on an ordinary cost-benefit value assessment. This is a socio-economic method for comparing the consequences of public measures. Basic questions are asked as an introduction to this complaint and concern report:

What does it take to allow a good water resource to deteriorate? Prohibition against the deterioration of water resources in the WFD is important. The threshold for making exceptions to the ban is high. Authorisation cannot be granted simply because the project is profitable. Purely economic considerations cannot constitute "overriding public interest".

Concerns and complaints have been submitted to Norwegian authorities and ESA over a 10-year period. Individuals and a number of organisations are behind this work. The cases that ESA is now shedding light on have been raised previously and have been sent to ESA. I have highlighted the common denominator of administrative follow-up and technology. For its part, ESA rejects the complaints and points out that only individual cases can be pursued. I have taken ESA at its word and submitted evidence of a single case (heavy metals in crab meat), but this was also rejected? I ask ESA to once again read and familiarise themselves with previous concerns and complaints. Take note of the answers that ESA has given.

<https://www.vannportalen.no/organisering2/europeisk-vannsamrbeid/norge-og-esa-rapportering-klager-og-tilbakemeldinger/klagesaker-og-brev-til-esa-om-norges-gjennomforing-av-vanndirektivet/klagesaker-til-esa-om-vanndirektivet-og-oppdrett-2014/>

The Norwegian authorities and ESA have rejected previous complaints, despite the fact that the evidence is fact-based and overwhelming. It must be emphasised that the burden of proof lies with both Norway and ESA. A possible positive sign is that ESA has established Case 87599, 88013 and Case 86194. These cases are ongoing and the undersigned has contributed to the process. There is reason to hope for results. The interests of business earnings are often prioritised over the health of water bodies (e.g. overriding public interest). Are the Norwegian authorities and the ESA asking the same questions about lost income related to making a living from what nature provides? An example is the loss of income for river owners, indigenous peoples and traditional industries that have been passed down from generation to generation? What about the needs of future generations? And not least the health of the water bodies themselves.

The aquaculture industry, hydropower, agricultural runoff, sewage leakage and mining constitute a formidable combined load. In addition, there are roadworks, construction activities, land development and more. The X-factor of climate change doesn't make matters any better, as animal welfare in and around fish farms is exposed. Climate change won't be solved quickly, but technical solutions can quickly be put in place within the aquaculture industry. It is worth noting that British Columbia has decided to ban open fish farms. "On Wednesday evening, Canada's Department of Fisheries and Oceans Canada announced a ban on open-cage salmon farming in British Columbia from 30 June 2029" <https://e24.no/hav-og-sjoemat/i/6365M3/canada-forbyr-aapen-lakseoppdrett-paa-vestkysten-noedt-til-aa-skje-i-norge-ogsaa>

ESA must consider all influencers and take action on a broad front. Everything is interconnected, and the WFD is the most central directive here. For the aquaculture industry, individuals and

organisations have repeatedly warned of the crisis that has now hit Norway with full effect. Norway's wild salmon stocks have now collapsed and we should not forget the corresponding effect on sea trout, arctic char and other species. The Norwegian Environment Agency has closed salmon fishing in 33 rivers and in the sea from the Swedish border in the south up to and including Trøndelag. The reason for this is that there are very few salmon this year – “We've seen this trend for a long time”. The fish stock entering the rivers has only become smaller and smaller every year. The following rivers were closed to fishing in June 2024 due to insufficient inflow of salmon:

Glomma m. Aagardselva, Tovdalselva, Otra, Mandalselva, Lygna, Figgjo, Hjelmelandsåna, Nordelva (Åbøelva), Vikedalselva, Uskedalselva, Steinsdalselva, Oselva, Nærøydalselva, Sogndalselva, Daleelva, Gaula i Sunnfjorden, Nausta, Åelva og Ommedalselva, Gloppenelva, Strynseelva, Hjalma, Austefjordelva, Korsbrekkelva, Rauma, Eira, Surna, Orkla, Gaula, Nidelva, Stjørdalselva, Verdalselva, Steinkjerelva og Byaelva, Namsen.

<https://www.nettavisen.no/norsk-debatt/laksefiske-i-krise-viktige-elver-stengt-pa-ubestemt-tid/o/5-95-1893200>

The WFD purpose, direction and requirements are carried through the words PROTECT, PRESERVE, IMPROVE. It is undisputed that that the WFD according to the EEA Agreement Article 7 litra (b) is binding upon Norway. The control basis is the WFD and the undersigned has presented repeated evidence that Norway has not correctly transformed and implemented the WFD into the Norwegian Water Regulations. It started with Article 1. On 21 June 2021, ESA's case manager Navin-Jones, Marcus responded with the following assessment of article 1 against paragraph 1 of the Norwegian water regulations:

“The WFD does not seek to achieve complete harmonisation of the rules concerning water and is, instead, a framework directive. However, the implementation of directives into domestic law does not necessarily require the provisions of a directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient provided that it actually ensures the full application of the directive. Thus, the EEA EFTA States, including Norway, enjoy to a certain extent discretion as to how exactly they fulfil their obligations under Article 7 of the EEA Agreement when the EEA Act in question is a directive, provided, however, that the implementing measure chosen is for example clear, precise and satisfies requirements of legal certainty”.

The response clearly showing signs of superficial case management without taking the complainant seriously. The case manager has neglected to emphasize the following:

“The Norwegian water regulations must, in terms of content, correspond to the directive. Norway's only freedom of action is that we can "determine the form and means of implementation" (EEA agreement article 7 letter b)”.

Over time, it turns out that it is not only Article 1 that is a misrepresentation of the wording in the Norwegian Water Regulations. Now the same case concerns articles 4(1), 4(4), 4(7), 11(3) and 11(5). And who knows, there might be more here. The Norwegian Water Regulations deviate so much from the WFD that I propose that ESA requires Norway to implement the WFD

in its entirety and translate it into Norwegian. Furthermore, ESA must check whether the translation is correct. In previous complaints, the undersigned has pointed out the shortcomings in administrative follow-up and adjustment of the Norwegian water management plans (RBMPs) and the lack of technical implementation capacity with clear objectives.

The question now is whether it is already too late to correct the damage that the aquaculture industry has inflicted on water bodies since the early 1970s. ESA must act faster and more decisively towards the Norwegian authorities. Time is working against the water bodies. Norwegian water bodies and their ecology simply do not have time to wait for bureaucratic antics that involve years of case processing. The time has come for action. The farming industry must stop its deterioration of the water bodies.

Case handler: Rune Birger Nilsen
Mathopen