LANDVERND

Nefndasvið Alþingis
Austurstræti 8-10
101 Reykjavík

sent með tölvupósti á: nefndasvid@althingi.is

Reykjavík, 2. Febrúar, 2022

Umsögn Landverndar frumvarp til laga um framkvæmdaleyfi fyrir lagningu Suðurnesjalínu 2, 11. mál.

Stjórn Landverndar hefur kynnt sér ofangreint frumvarp. Stjórnin telur frumvarpið stórhættulegt fordæmi fyrir faglega ákvarðanatöku í málefnum sem varða umhverfið, fyrir sjálfstæði sveitarfélaga og fyrir lýðræðislegan rétt almennings til þess að koma að ákvörðunum sem varða hann sjálfan og umhverfið. Hún telur jafnframt að frumvarpið sé mjög alvarlegt brot á EES reglum um mat á umhverfisáhrifum og Árósasamningnum. Má í því sambandi minna á ákvörðun í október 2018 þegar Alþingi samþykkti einróma lög sem brutu gegn þessum reglum og ESA hefur úrskurðað um að brjóti gegn EES-reglum. Stjórn Landverndar hvetur því til að frumvarpið verði dregið til baka af flutningmönnum þess.

Ef frumvarpið yrði samþykkt væri með því kippt úr sambandi lögbundnu ferli um mat á umhverfisáhrifum sem sett hafa verið skv. innleiðingu á EES reglum. Um skýrt brot á EES samningnum væri því að ræða. Auk þess væri tekið fyrir möguleika almennings á að leita til úrskurðanefndar umhverfis og auðlindamála vegna brota á lögum sem varða umhverfi þeirra. Með samþykkt frumvarpsins yrði faglegu ákvarðanatökuferli kippt algjörlega úr sambandi. Ferlið eins og það er í dag hefur ekki alltaf verið náttúruverndarsjónarmiðum hliðhollt, en það er þó að einhverju leyti til mótvægis við sterk hagsmunaöfl sem oft á tíðum taka ekki tillit til áhrifa framkvæmda á umhverfi og náttúru.

Umhverfis- og samgöngunefnd er vinsamlegast bent á nýlegan úrskurð ESA um brot íslenska ríkisins á EES reglum um mat á umhverfisáhrifum sem m.a. byggja á Árósasáttmálanum. Úrskurðurinn varðar lagabreytingar sem íslensk stjórnvöld gerðu á lögum um fiskeldi og hollustuhætti og mengunarvarnir í október 2018 og stríddu gegn EES reglum. Niðurstaða ESA er viðbragð við kvörtun Landverndar og fleiri samtaka til ESA. Við lagabreytingarnar í október 2018 var úrskurður úrskurðanefndar umhverfis- og auðlindamála í raun ógiltur af Alþingi og eingöngu tekið tillit til hagsmuna framkvæmdaaðila, en á engan hátt til hagsmuna náttúrunnar eða almennings. Lagasetningin var afgreidd í skyndi án allrar umræðu eða aðkomu annarra en þeirra sem ríkisstjórnin kallaði sérstaklega til. Landvernd reyndi þó að koma að því áliti sínu að um væri að ræða skýrt brot á Árósasamningnum og að gildi úrskurðanefndarinnar rýrðist verulega með þessu.

Í úrskurði ESA sem fylgir með þessu bréfi kemur alveg skýrt fram að það er brot á EES reglum að veita leyfi til framkvæmda eða starfsemi sem heyrir undir MÁU lögin fram hjá ferlinu. Það gildir í máli 11 á 152. löggjafarþingi eins og þegar íslenska ríkið braut gegn EES reglum í október 2018 (sjá einnig bráðabirgðarúrskurð ESA frá 14 apríl 2020[1]).

Hvað varðar málið sjálft efnislega er það skýr niðurstaða Skipulagsstofnunar[2] að leggja beri Suðurnesjalínu 2 sem jarðstreng í vegöxl Reykjanesbrautar, þvert á það sem flutningsmenn frumvarpsins vilja. Sveitafélagið Vogar, sem fer með skipulagsábyrgð á meginhluta leiðarinnar vill að farið verði eftir áliti Skipulagsstofnunar og að Landsnet leggi línuna í jörð. Málið snýst ekki um það hvort Suðurnesjalína 2 verði lögð heldur hvernig. Landsnet þráskallast við að leggja línuna sem loftlínu þrátt fyrir alvarleg sjónræn áhrif hennar og neitar að leggja hana í jörð í vegöxl Reykjanesbrautar en þannig er hægt að takmarka jarðrask verulega. Vegna nánari umfjöllunar um málið vísar Landvernd til umsagnar Ungra umhverfissinna sem barst um málið þegar það var síðast lagt fyrir[3] og í kæru Landverndar og fleiri samtaka til úrskurðanefndar umhverfis- og auðlindamála. Nefndin felldi úr gildi framkvæmdaleyfi Hafnafjarðabæjar[4] en féllst á framkvæmdaleyfi sem Grindavíkurbær[5] og Reykjanesbær[6] veittu. Þá felldi nefndin úr gildi höfnun sveitafélagsins Voga[7] vegna línunnar þar sem sveitafélaginu var ekki heimilt að leggja eingöngu fram lögfræðilegt mat sem rökstuðning. Sveitafélagið hefur ekki veitt framkvæmdaleyfi fyrir línunni[8].

Með því að grípa inn í með þessum hætti er Alþingi að gagna gegn áliti Skipulagsstofnunar um að leggja beri línuna í jörð og vinna gegn skipulagsábyrgð sveitafélagsins Voga sem telur heillavænst að leggja línuna í jörð.

Virðingarfyllst,
f.h. stjórnar Landverndar

Auður Önnu Magnúsdóttir, framkvæmdastjóri

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[1] EFTA Surveilance Authority (2020) *Complaint against Iceland concerning the application of Directive 2011/92/EC to fish farming* . Bráðabirgðaákvörðun 14. apríl 2020, https://www.eftasurv.int/cms/sites/default/files/documents/gopro/5327-Pre-Article%2031%20letter%20-%20Complaint%20re.pdf

[2] 201901126.pdf (skipulag.is)

[3] https://www.althingi.is/altext/erindi/151/151-1118.pdf

[4] 46/2021 Suðurnesjalína 2 Hafnarfjörður - Úrskurðarnefnd umhverfis- og auðlindamála (uua.is)

[5] 57/2021 Suðurnesjalína 2 Grindavík - Úrskurðarnefnd umhverfis- og auðlindamála (uua.is)

[6] 41/2021 Suðurnesjalína 2 Reykjanesbær - Úrskurðarnefnd umhverfis- og auðlindamála (uua.is)

[7] 53/2021 Suðurnesjalína 2 Vogum - Úrskurðarnefnd umhverfis- og auðlindamála (uua.is)

[8] Föstudagspistill bæjarstjóra 21.1.2022 | Vogar

ESA | EFTA Surveillance Authority

Brussels, 15 December 2021
Case Nos: 82787 and 82819
Document No: 1196637
Decision No: 281/21/COL

Ministry for the Environment and Natural Resources
Skuggasund 1
101 Reykjavík
Iceland

Dear Sir or Madam,

Subject: Letter of formal notice to Iceland concerning two complaints regarding environmental impact assessments in the field of fish farm licences

1 Introduction

By letters dated 30 November 2018 (Doc No 1039774) and 4 December 2018 (Doc No 1041102), the EFTA Surveillance Authority ("the Authority") informed the Icelandic Government that it had received two complaints against Iceland regarding the application of Directive 2011/92/EU *on the assessment of the effects of certain public and private prcjects on the environment* ("EIA Directive")[1] and concerning fish farm licences. The complaints alleged, amongst other things, that the Icelandic Government had not properly or sufficiently implemented the requirement to carry out an environmental impact assessment ("EIA") as concerns certain fish farm licences.

Based on the information and documents provided by the Icelandic Government, the Authority must conclude that Iceland has failed to fully transpose, or has incorrectly transposed, certain provisions contained in the EIA Directive, and/or has acted in breach of those provisions. The Authority requests that the Icelandic Government submit its observations on the content of this letter within three months of its receipt.

2 Factual background

2.1 *Factual background regarding the grant of fish farm licences in this case*

In December 2017, the Icelandic Food and Veterinary Authority (*Matvælastofnun*) ("MAST") and the Icelandic Environmental Agency of Iceland (*Umhverfisstofnun*) ("UST") granted two companies[2] ("the Companies") operating licences permitting them to operate fish farms in certain Icelandic fjords.[3]

In September and October 2018, the Environmental and Natural Resources Board of Appeal (*úrskurðarnefnd umhverfis- og auðlindamála*) ("ÚUA") declared the initial operating licences invalid. The ÚUA declared the operating licences invalid as, amongst

[1] The Act referred to at point 1a of Annex XX to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 230/2012 of 7 December 2012.
[2] Arctic Sea Farm hf. and Fjarðalax ehf.
[3] EIA, Operating Licence (Arctic Sea Farm hf.), from 13 December 2017 (*Umhverfisstofnun, starfsleyfi vegna framleiðslu á laxi (Arctic Sea Farm hf.), frá 13. desember 2017*) and EIA, Operating Licence (Fjarðalax ehf.), from 22 December 2017 (*Umhverfisstofnun, starfsleyfi vegna framleiðslu á laxi (Fjarðalax ehf.), frá 22. desember 2017.*

other things, there was a failure to carry out EIAs in accordance with relevant EEA and Icelandic law. [4]

On 10 October 2018, i.e. six days following the ÚUA's decision on 4 October 2018, new Icelandic national legislation came into force.[5] The new Icelandic legislation established a new legal framework under which the Icelandic Ministry of Industry and Innovation ("ANR") and the Icelandic Ministry of Environment and Natural Resources, were granted legal powers to grant certain renewable, fixed-term fish farm licences, and certain exemptions from the requirement to hold fish farm licences, in situations where no EIA, carried out in accordance with EEA law, was in place - but where certain Icelandic national law conditions were met (see paragraph [2.2] of this letter). This new Icelandic national legislation applied retroactively.[6]

In November 2018, the Ministers exercised the legal powers afforded to them under the new Icelandic national legislation, and granted renewable, fixed-term fish farm licences to the fish farm operators who had had their licences repealed pursuant to the UÚA decisions of September and October 2018. As such, the two companies whose operating licences had been declared invalid by the ÚUA, were granted licences by the relevant Icelandic Ministries under the new legislative framework, despite the fact no valid EIA, carried out in accordance with EEA law, were in place.[7]

The relevant Icelandic Ministries granted the new licences primarily under Article 21(c)(2) of the Icelandic Fish Farming Act. That was because, in these cases, the initial operating licences had been revoked by the ÚUA due to flaws in the operating licence. More specifically, the analyses conducted prior to the grant of the licences and relating to the environment, did not constitute EIAs conducted in accordance with EEA and Icelandic law.

2.2 *Broader factual and legal context*

As explained in more detail in Sections 4 and 5 of this letter, the Icelandic legislative framework which currently governs how certain renewable fixed-term fish farm licences are granted in Iceland, and which contains certain exemptions to the requirement to contain fish farm licences, comprises of, amongst other provisions:

- Article 21c(2) of the Icelandic Fish Farming Act,
- Article 6(1) of the Icelandic Hygiene and Pollution Control Act, as amended by Act No. 66/2017[8], and

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[4] Decision No 4/2018 from 4 October 2018, Arctic Sea Farm hf. (*ÚUA, ákvörðun nr. 4/2018, frá 4. október 2018, Arctic Sea Farm hf.*) and Decision No 5/2018 from 27 September 2018, Fjarðalax ehf. (*ÚUA, ákvörðun nr. 5/2018 frá 27. september 2018, Fjarðalax ehf.*).

[5] Including Article 21(c) of the Icelandic Act on Fish Farming No. 71/2008 - *Lög nr. 71/2008 um fiskeldi* ("Icelandic Fish Farming Act") and Article 6(1) of the Icelandic Hygiene and Pollution Control Act No. 7/1998 ("Icelandic Hygiene and Pollution Control Act") - *Lög um hollustuhætti og mengunarvarnir nr. 7/1998* with amending Acts No. 108/2018 and 66/2017 respectively.

[6] , i.e. applicable to operating licences which had been annulled prior to that date - see Article 2 of Act No. 108/2018, amending the Icelandic Fish Farming Act.

[7] The Icelandic Ministry of Industries and Innovation, decision on granting operating licence to Arctic Sea Farm hf., cf. Article 21c(2) of the Icelandic Fish Farming Act No 71/2008, from 5 November 2018 (*Ákvörðun um útgáfu rekstrarleyfis til bráðabirgða fyrir Arctic Sea Farm hf. skv. 2. mgr. 21. gr. c. laga nr. 71/2008 um fiskeldi, frá 5. nóvember 2018*) and The Icelandic Ministry of Industries and Innovation, decision on granting operating licence to Fjarðalax ehf., cf. Article 21c(2) of the Icelandic Fish Farming Act No 71/2008, from 5 November 2018 (*Ákvörðun um útgáfu rekstrarleyfis til bráðabirgða fyrir Fjarðalax ehf. hf. skv. 2. mgr. 21. gr. c. laga nr. 71/2008 um fiskeldi, frá 5. nóvember 2018*).

[8] Act No. 66/2017 on Amending the Act on Hygiene and Pollution Control, No. 7/1998, with subsequent amendments (*lög um breytingu á lögum um hollustuhætti og mengunarvarnir, nr. 7/1998, með síðari breytingum*).

- Article 5(4) of the Icelandic Emission and Pollution Control Regulation No. 550/2018 ("Icelandic Emission and Pollution Control Regulation").

As also explained in more detail in Sections 4 and 5 of this letter, the EIA Directive is implemented into Icelandic national legislation primarily by way of Icelandic Act No. 106/2000 on environmental impact assessment as amended ("the Icelandic EIA Act")[9] and Icelandic Regulation No. 660/2015[10] on environmental impact assessments as amended ("the Icelandic EIA Regulation"). The Icelandic EIA Act was amended by Icelandic Act No. 96/2019 ("Icelandic EIA Amending Act").[11] The Icelandic EIA Amending Act was followed by Icelandic Regulation No. 1069/2019 amending the Icelandic EIA Regulation.[12]

The Authority notes that the Icelandic Government has recently adopted new legislation which entered into force on 1 September 2021.[13] This new legislation, namely the Icelandic Act on the environmental impact assessments of projects and plans ("New Icelandic EIA Act"),[14] seeks to change the way some, although not all, provisions in the EIA Directive are transposed and implemented in Icelandic national law. The New Icelandic EIA Act does not change the current Icelandic legislative framework governing the grant of these types of licences/exemptions for the establishment or operation of fish farms.

Therefore, pursuant to the current Icelandic legislative framework governing how certain licences for fish farms are granted in Iceland, the Icelandic Government is legally able to allow the establishment and operation of fish farms regardless of whether a valid EIA had been carried out in accordance with EEA law, albeit under certain conditions such as, for example:

- Pursuant to Article 21(c)(2) of the Icelandic Fish Farming Act:
  a. An operating licence must have been revoked due to flaws in the operating licence. There must, therefore, have been, for example: a failure to carry out any EIA; or a failure to carry out an EIA in accordance with EEA law;
  b. The decision to allow the fish farm to operate must be based on "*materials gathered in the process of granting the revoked operating licence*"; and
  c. The decision to allow the fish farm to operate cannot "*exceed the scope of the revoked operating licence*".
- Pursuant to Article 6(1) of the Icelandic Hygiene and Pollution Control Act and Pursuant to Article 5(4) of the Icelandic Emission and Pollution Control Regulation:
  a. There must be "*valid grounds*";
  b. There should be an "*opinion of the [Icelandic] Food and Veterinary Authority, and when applicable, from the local Board of Public Health*"
  c. A "*satisfactory operating licence application*" must have been submitted including "*when applicable*" a document which purports to be "*an environmental impact assessment*" but which is not required to be an EIA carried out in accordance with the EIA Directive and EEA law.

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[9] *Lög nr. 106/2000 um mat á umhverfisáhrifum.*
[10] Reglugerð No 660/2015 *um mat á umhverfisáhrifum.*
[11] The purpose of the Icelandic EIA Amending Act was to implement Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment.
[12] In addition to these Icelandic Acts and Regulations, the EIA Directive is also transposed and implemented under other Icelandic national legislation such as the Icelandic Local Government Act No. 138/2011 (*Sveitarsıjórnarlög nr. 138/2011*) ("Icelandic Local Government Act") and the Icelandic Zoning Act No. 123/2010 (*Skipulagslög nr. 123/2010*) ("Icelandic Zoning Act").
[13] https://www.althingi.is/altext/151/s/1809.html.
[14] *Lög um umhverfismat framkvæmda og áætlana.*

3 Correspondence

By letter of 7 December 2018, the Authority requested the Icelandic Government to provide information (Doc No 1041313) on the application of the EIA Directive in the area of certain types of fish farm licences in Iceland. The Icelandic Government provided information on 17 April 2019 (Doc No 1065562, 1065564 and 1065566) and on 26 April 2019 (Doc No 1066398, 1066400, 1066402 and 1066404).

The Authority and the Icelandic Government discussed the information provided by the Icelandic Government at the package meeting held on 4 June 2019, as stated in the follow-up letter (Doc No 1076000).

On 6 September 2019 the Authority sent a second request for information (Doc No 1085341) and invited the Icelandic Government to indicate whether the fish farms had been granted new operating licences.

By letter of 7 October 2019 (Doc No 1091349 and 1091347), the Icelandic Government provided certain information and confirmed that the relevant Icelandic authorities had granted the Companies new operating licences.

On 14 April 2020 (Doc No 1106260), the Internal Market Affairs Directorate of the Authority ("the Directorate") sent a letter to the Icelandic Government ("Pre-Article 31 Letter") informing Iceland that in the Directorate's preliminary view certain provisions of Icelandic national law contained in the Icelandic Fish Farming Act, the Icelandic Pollution Control Act, and the Icelandic Emission and Pollution Control Regulation did not comply with the EIA Directive. More specifically, the Directorate took the preliminary position that Article 21c of the Fish Farming Act, as amended by Act No. 108/2018,[15] Article 6(1) of the Hygiene and Pollution Control Act No 7/1998, as amended by Act No. 66/2017,[16] and Article 5(4) of the Icelandic Emission and Pollution Control Regulation were incompatible with the requirements of Articles 2 and 4 to 9 of the EIA Directive, and breached Article 11(1) and (3) of the EIA Directive. The Pre-Article 31 Letter informed Iceland that the Authority would consider initiating legal proceedings pursuant to Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and invited Iceland to submit its observations by 14 June 2020.

At the package meeting on 27 May 2020, the representatives of the Authority and of the Icelandic Government discussed the preliminary conclusions of the Authority as set out in the Pre-Article 31 letter (Doc No 1133598).

On 26 May 2021, the Authority received a letter dated 25 May 2021 (Doc No 1203031) in response to the Pre-Article 31 letter. In its reply, Iceland refutes the allegations and states that the Icelandic law, if properly construed, does not "*at least to a large extent*"[17] violate the EIA Directive. Iceland also states that the Icelandic Government will, nonetheless, propose new amendments to national law to ensure there are no "*potential discrepancies*".[18]

At the package meeting on 1 June 2021, these cases were further discussed, as summarised in the follow-up letter (Doc No 1204495). During that meeting the Icelandic

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[15] Act No. 108/2018 on Amending the Act on Fish Farming No. 71/2008 with subsequent amendments (*lög um breytingu á lögum um fiskeldi, nr. 71/2008, með síðari breytingum*), entry into force on 10 October 2018.

[16] Act No. 66/2017 on Amending the Act on Hygiene and Pollution Control, No. 7/1998, with subsequent amendments (*lög um breytingu á lögum um hollustuhætti og mengunarvarnir, nr. 7/1998, með síðari breytingum*).

[17] Doc No 1203031, Paragraph 43.

[18] Doc No 1203031, Paragraph 44.

Government informed the Authority that they intended to bring forward new legislative proposals regarding the requirement to conduct EIAs in relation to fish farms and the grant of certain types of renewable, fixed-term licences and exemptions in this area. The Icelandic Government confirmed, amongst other things, that if the legislative proposals were adopted the future legislation would not have retroactive effect.

4 EEA Law: EIA Directive

The EIA Directive, as amended by Directive 2014/52/EU,[19] requires that an EIA be carried out for projects that are likely to have significant effects on the environment.

Under Article 2 of the EIA Directive, EEA States are required to "*adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment*".

Article 4 of the EIA Directive lists the projects that are subject to an EIA.

Projects subject to an EIA in accordance with Article 4 of the Directive have to be made subject to an assessment with regard to their effects on the environment in accordance with Articles 5 to 10 of the EIA Directive.

Article 5(1) of the EIA Directive requires a project developer to prepare and submit an EIA report. Article 5 of the EIA Directive non-exhaustively lists the information to be contained in the report, including a description of: the project, the likely significant effect on the environment, and the measures envisaged to mitigate the effects on the environment and of considered alternatives.

Article 6 requires an EEA State to ensure that authorities likely to be concerned by the project and the public participate in the decision making procedure are given the opportunity to voice their opinion on the project. Public participation has to be effective and timely, and thus allow for comments when all options are still open or before the decision on the request for consent is taken.

Article 7 governs projects likely to have significant effects on the environment in another EEA State. It lays down the procedure to ensure participation of the authorities and public of the concerned States.

Article 8 requires that the results of consultations and the information gathered pursuant to Articles 5 to 7 are duly taken into account in the decision making procedure.

Article 8a sets out the information that must be contained in a decision to grant development consent, requires the EEA States to take such decision within a reasonable period of time and to monitor the project subject to the development consent.

Article 9 requires the competent authorities to inform the public when a decision to grant or refuse development consent has been taken. This provides parties who consider themselves harmed by the project to exercise their right of appeal within the applicable deadlines.

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[19] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 *amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment*. The act referred to at point 1a of Annex XX to the EEA Agreement. As incorporated into the EEA Agreement by Joint Committee Decision No 117/2015 of 30 April 2015.

Article 11 of the EIA Directive governs the right to challenge decisions that are subject to an EIA. Particularly, paragraphs 1 and 3 of this Article provide that:

> *"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*
> *(a) having a sufficient interest, or alternatively;*
> *(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;*
> *have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."*
> *(…)*
> *3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 to this Article."*

5 Icelandic national law

Article 4b of the Icelandic Fish Farming Act subjects the operation of fish farming to two operating licences: one issued by MAST and another one by UST. The Icelandic Fish Farming Act governs the operating licence issued by MAST. The Icelandic Hygiene and Pollution Control Act governs the operating licence issued by UST.

Article 21c(2) of the Icelandic Fish Farming Act, as amended by Act No. 108/2018,[20] allows ANR to issue renewable, fixed-term operating licences in the event the initial operating licence is revoked due to flaws in its issuance:[21]

> *"If an operating licence is revoked due to flaws in issuing the licence, the minister can, having received the opinion of the Food and Veterinary Authority, and if supported by valid grounds, issue a temporary operating licence valid for up to ten months, subject to the receipt of an application for such temporary licence from the holder of the revoked licence within three weeks from the date on which the operating licence was revoked. The application for a temporary operating licence shall be processed as quickly as possible, and no later than four weeks following the receipt of the application. The application shall describe the purpose of the temporary operating licence in a clear manner, the reasons for the application, and the measures expected to be undertaken in the duration of the temporary operating licence. Notwithstanding the first paragraph, the Food and Veterinary Authority shall not suspend the operation of a fish farm before the application deadline for a temporary operating licence has expired. If an application is received, the operations of the applicant shall not be suspended while the application is being processed by the minister. The scope of a temporary operating licence shall not exceed the scope of the revoked operating licence. The decision to grant a temporary operating licence can be based on materials gathered in the process of granting the revoked operating*

[20] Act No. 108/2018 on Amending the Act on Fish Farming No. 71/2008 with subsequent amendments (*lög um breytingu á lögum um fiskeldi, nr. 71/2008, með síðari breytingum*), entry into force on 10 October 2018.
[21] Unofficial translation.

> *licence. The minister can subject the granting of a temporary operating licence to conditions that are necessary to achieve the purpose of the licence, such as reduction of the current operations, deadlines for rectification, initiation of court proceedings or other judicial actions that are available to the parties. A temporary operating licence issued in accordance with this provision can be re-issued once. A temporary operating licence issued in accordance with this provision is a final decision at the administrative level."*[22]

Article 6(1) of the Icelandic Hygiene and Pollution Control Act, as amended by Act No. 66/2017,[23] allows the Ministry for the Environment and Natural Resources to grant certain exemptions to hold operating licences:[24]

> *"All business activities, in accordance with Annexes [I, II and IV], shall have a valid operating licence granted by the Environment Agency of Iceland or the local Board of Public Health, cf. however, Article 8. It is prohibited to start a business activity when an operating licence has not been granted or it has not been registered with the Environmental Agency of Iceland. All business activities for which an operating licence has been applied for shall be in accordance with a planning within the meaning of the Planning Act or the Act on Marine and Coastal Planning. The minister can, if supported by valid grounds, and having received the opinion of the Food and Veterinary Authority, and when applicable, from the local Board of Public Health, grant a temporary exemption from the requirement to hold an operating licence. An operating licence shall be granted for a business activity when it complies with the requirements under this Act and adopted regulations, and pursuant to other legislation."* [25]

Article 5(4) of the Icelandic Emission and Pollution Control Regulation further governs the granting of an exemption to hold an operating licence under Article 6(1) of the Icelandic Hygiene and Pollution Control Act:[26]

> *"The minister may, if supported by valid grounds, and having received the opinion of the Environment Agency of Iceland and, when applicable, from the local Board of Public Health, grant a temporary exemption from the requirement for an operating licence, under paragraph 1, provided that a satisfactory operating licence application has been submitted to the issuer of the operating licence and, when applicable, an environmental impact assessment or conclusion of the operation assessment is available. An exemption shall be limited to necessary elements in accordance with the principle that all business operations must have a valid operating licence. The operator shall comply with other provisions of the issued operating licence or the authorization proposal, and the companies' supervisory report to the issuer on progress of necessary improvements related to the exemption criteria, when an exemption is granted. The issuer of an operating licence shall publish the minister's exemption on its website and the companies' supervisory reports that operate on the exemption."*[27]

Pursuant to Icelandic Act 130/2011 on the Environmental and Natural Resources Board of Appeal, the ÚUA was established to act as an independent review body with competence to review decisions made at the administrative level in the field of

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[22] Unofficial translation.
[23] Act No. 66/2017 on Amending the Act on Hygiene and Pollution Control, No. 7/1998, with subsequent amendments (*lög um breytingu á lögum um hollustuhætti og mengunarvarnir, nr. 7/1998, með síðari breytingum*).
[24] Unofficial translation.
[25] Unofficial translation.
[26] Unofficial translation.
[27] Unofficial translation.

environment and natural resources, including those that relate to EIAs (see Article 4(3) of Icelandic Act 130/2011). Article 4(2) of the Icelandic Fish Farming Act and Article 65 of the Icelandic Hygiene and Pollution Control Act foresee that decisions relating to *inter alia* EIAs can be challenged in an administrative procedure before the ÚUA.

6 The Authority's assessment

6.1 Failure to transpose the requirements set out in the EIA Directive

Fish farms constitute projects likely to have significant effects on the environment according to, amongst other provisions, Article 2(1) of the EIA Directive. For that reason, Iceland has put in place a system of measures regulating the establishment and operation of fish farms in Iceland which, in general terms, takes into account the requirements under the EIA Directive. However, in some areas, Iceland has adopted national legislation which permits the establishment and operation of fish farms – where the provisions of the EIA Directive are not adhered to and where there is no national Icelandic legislation in place which transposes the content and objectives of the EIA Directive.

The EIA Directive is a Directive which has been incorporated into the EEA Agreement.[28] Article 7(b) of the EEA Agreement provides that: "*Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows [...] (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*" Iceland is therefore legally bound by the content of the EIA Directive and, more precisely, to the result to be achieved by the EIA Directive.[29] In particular, Iceland must ensure that the requirement to carry out EIAs, as set out at Articles 2-9 of the EIA Directive, is fully transposed into Icelandic national law, and that EIAs are conducted and carried out before consent is granted *vis-à-vis* the establishment and operation of fish farms.

The Authority notes that there is no specific requirement, under Icelandic law, which requires EIAs to be carried out in accordance with the provisions set out in the EIA Directive, as regards certain types of fish farm licences and exemptions. The Authority notes, for example, that the current legislative framework in Iceland concerning renewable, fixed-term fish farm licences, and the exemptions to the requirement to obtain fish farm licences, as set out in Article 21c(2) of the Icelandic Fish Farming Act, Article 6(1) of the Icelandic Hygiene and Pollution Control Act, and Article 5(4) of the Icelandic Emission and Pollution Control Regulation, allow the Icelandic authorities to grant licences without a prior EIA having been carried out in accordance with the EIA Directive. Pursuant to, for example, Article 21c(2), where "*an operating licence is revoked due to flaws in issuing the licence*" a Ministry/Minister is able to grant a licence which is "*valid for up to ten months*" and which "*can be re-issued once*" – without a requirement to ensure the content or provisions contained in the EIA Directive are complied with – in particular

[28] By Decision of the Joint Committee - No 230/2012 of 7 December 2012 with the amending Directive 2014/52/EU implemented by decision of the Joint Committee No 117/2015 of 30 April 2015.

[29] Case E-15/12 *Jan Anfinn Wahl v the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 49. See also the relevant Court of Justice of the European Union ("CJEU") case-law such as Judgment of the CJEU of 14 May 2020, *A.m.a. - Azienda Municipale Ambiente SpA v Consorzio Laziale Rifiuti – Co.La.Ri.*, Case C-15/19, EU:C:2020:371, paragraph 44. The EFTA Court has consistently maintained that EEA law must be interpreted in conformity with CJEU case-law. See to that effect, *Case E-9/07 L'Oréal Norge AS v Per Aarskog AS and Others* [2008] EFTA Ct. Rep. 259, paragraph 29.

the requirement to carry out an EIA in accordance with the EIA Directive.[30] In those situations where Iceland believes there are legitimate grounds for not implementing, or adapting the implementation, of the requirement to carry out a valid EIA in accordance with the EIA Directive due to, for example, financial or economic urgency, and/or an overriding financial or economic interest - the legal onus would be on Iceland to identify the legal basis and justification. Protecting the environment constitutes one of the essential objectives of the EEA and is fundamental in nature.[31] EEA EFTA States are legally required to ensure the result to be achieved by the EIA Directive is achieved under national law regimes.

The Authority concludes that, by failing to transpose the content of the EIA Directive, in particular the requirement to conduct EIAs when granting certain types of fish farm licences and certain exemptions to fish farm licences, Iceland has failed to fully transpose, or has incorrectly transposed, the provisions of the EIA Directive and has acted in breach of, amongst other requirements, Article 7(b) of the EEA Agreement.

6.2 Non-compliance with the requirements set out in the EIA Directive

6.2.1 Icelandic law and practice concerning the grant of renewable, fixed-term licences to operate fish farms, do not comply with the requirements set out in EIA Directive

Pursuant to the EIA Directive, Iceland is required to "*adopt all measures necessary*" to ensure that projects likely to have significant effects on the environment are assessed with regard to their environmental effects, subject to a requirement for development consent, and the development consent is only granted after an assessment of the likely significant environmental effects has been conducted.[32] It is settled case-law that the requirement to undertake an EIA *before* a relevant project is approved, is justified as: "*…it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to deal with their effects*".[33]

Article 21c(2) of the Icelandic Fish Farming Act, Article 6(1) of the Icelandic Hygiene and Pollution Control Act, and Article 5(4) of the Icelandic Emission and Pollution Control Regulation established a framework under which the Icelandic Government can grant certain fish farm licences, and which sets out certain exemptions from the requirement to hold licences for the operation of fish farms. However, these national law provisions are not sufficiently adequate, clear and/or precise to ensure that EEA law, in particular the requirement to carry out valid EIAs pursuant to the EIA Directive, is respected and complied with in practice.

These provisions render the requirement to carry out a valid EIA in accordance with the EIA Directive in some cases as obsolete. That is because these Icelandic provisions do not compel Icelandic authorities to ensure there is a valid EIA, conducted in accordance with EEA law, in existence prior to granting certain fish farm licences. Instead, these provisions facilitate and enable Icelandic authorities to grant certain fish farm licences and exemptions, even where no valid EIA has been carried out in accordance with the EIA Directive.

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[30] See in particular Article 21c(2) of the Icelandic Fish Farming Act and in addition the Icelandic legislative provisions set out in Section 5 of this letter.

[31] Judgment of the Court of Justice of the European Union ("CJEU") of 12 November 2019, *European Commission v Ireland*, Case C-261/18, EU:C:2019:955, ("Case C-261/18, *European Commission v Ireland*") paragraph 115 and the case-law cited therein.

[32] Article 2(1) EIA Directive, Recital 7 of EIA Directive.

[33] Judgment of the CJEU of 12 November 2019, *European Commission v Ireland*, Case C-261/18, EU:C:2019:955 (herein referred to as "C-261/18"), paragraph 73.

The Authority notes, amongst other things, that pursuant to Article 21c(2) of the Icelandic Fish Farming Act, Icelandic authorities are able to grant certain operating licences when the initial operating licence is revoked due to flaws in issuing the initial operating licence. It follows that Icelandic authorities are able to grant certain operating licences where, for example, no valid EIA has been conducted, or where an EIA has been conducted but not in accordance with the EIA Directive. In other words, these Icelandic national law provisions, allow Icelandic authorities to grant operating licences even where the requirements set out in the EIA Directive have not been satisfied albeit where certain national Icelandic law conditions apply – see paragraph [2.2] of this letter.

Icelandic national law must be sufficiently adequate, clear and precise to ensure that compliance with EEA law, including the EIA Directive, is achieved in practice. As such, Icelandic national law must ensure that Icelandic authorities are obliged to verify, amongst other things, not merely that there is a document which purports to assess the environmental effects of a project, but that there is an EIA, as defined and set out under the EIA Directive, and which has been carried out in compliance with the EIA Directive, and covers, for example, both future impacts and impacts at the time of completion.

The Authority therefore concludes that Article 21c(2) of the Icelandic Fish Farming Act, Article 6(1) of the Icelandic Hygiene and Pollution Control Act, and Article 5(4) of the Icelandic Emission and Pollution Control Regulation, and their application in practice,[34] do not comply with the requirements of Articles 2 and 4 to 9 of the EIA Directive.

6.2.2 Icelandic law and practice fail to establish and/or comply with the requirements concerning review procedures set out under the EIA Directive

The objective of Article 11 of the EIA Directive is to ensure broad access to review decisions subject to EIAs, especially as regards environmental non-governmental organisations ("NGOs").

The CJEU has ruled with regard to this article that "*whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled pursuant to Art. 10a of Directive 85/337 – [now Art. 11 of the EIA Directive], to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that Article*".[35]

As stated above in Section 5 of this letter, the ÚUA was established as a review body with competence to review decisions made at the administrative level in the field of environment and natural resources, including those that relate to EIAs (Article 4(3) of Icelandic Act 130/2011).

Article 21c(2) of the Icelandic Fish Farming Act, Article 6(1) of the Icelandic Hygiene and Pollution Control Act and Article 5(4) of the Icelandic Emission and Pollution Control Regulation deviate from this approach.

Article 21c(2) of the Icelandic Fish Farming Act provides that the renewable, fixed-term operating licence is a final decision at the administrative level.

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[34] As described in Section 2 above, in relation to the granting of renewable, fixed-term operating licences to the companies Arctic Sea Farm hf and Fjarðalax ehf. in 2018.

[35] Judgment of the CJEU of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, Case C-115/09, EU:C:2011:289, paragraph 42.

Article 6(1) of the Icelandic Hygiene and Pollution Control Act and Article 5(4) of the Icelandic Emission and Pollution Control Regulation are silent on the conditions for challenging decisions granting exemptions to hold operating licences. The Icelandic Government indicated in its letter of 17 April 2019[36] that the Ministry decisions can be challenged in a court of law by a person having a legal standing. It added that the decisions granting exemptions to hold operating licences are intermediate steps in the process for the granting of the final licences, and that the decisions granting the final licences can be challenged before the ÚUA by persons that have legal standing and by environmental associations with more than 30 members.

In application of these provisions, complaints against the decisions granting the measures could not be brought to the ÚUA, in contrast to regular challenges of decisions subject to EIAs. Complaints against the decisions granting the measures have to be brought to a judicial court, requiring the applicant to demonstrate a direct interest and effect.

This goes against the requirements of Article 11(1) and (3) of the EIA Directive.

The current provisions in the Icelandic legislation effectively limit the rights of NGOs to challenge decisions where the EIAs are subject to renewable, fixed-term operating licences.

The Authority is therefore bound to conclude that Article 21c(2) of the Icelandic Fish Farming Act, Article 6(1) of the Icelandic Hygiene and Pollution Control Act, and Article 5(4) of the Icelandic Emission and Pollution Control Regulation, do not comply with Article 11(1) and (3) of the EIA Directive.

6.3 Failure to take all measures necessary to remedy the absence of a valid EIA, and the unlawful consequences of the breach to carry out a valid EIA

As explained in paragraph [2.1] of this letter, in Cases 82787 and 82819 there was a failure to carry out EIAs in accordance with the EIA Directive. As a result, on 27 September 2018 and 4 October 2018 the UÚA repealed the operating licences.

It is settled case-law that:

(1) The EIA Directive does not contain provisions governing the consequences of a breach of the obligation to carry out a valid, prior EIA before development consent is granted,[37]

(2) Under the principle of sincere and loyal cooperation, EEA EFTA States are "*required to eliminate the unlawful consequences of* [a breach to carry out a valid EIA before development consent is granted]". This obligation: "*applies to every organ of the* [EEA] *State concerned and, in particular, to the national authorities*", and requires every organ of the EEA State to "*take all measures necessary, within the sphere of their competence, to remedy the failure to carry out a* [valid] *environmental impact assessment, for example, by revoking or suspending consent already granted, in order to carry such an assessment*",[38]

(3) The possibility of regularising the omission of a valid EIA does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in light of [EEA] law "*provided that such a possibility does not offer the persons concerned the chance to circumvent the rules of* [EEA] *law or to dispense with their application, and that it should remain the exception*".[39]

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[36] Doc No 1065562.
[37] Case C-261/18, cited above, paragraph 74.
[38] Case C-261/18, cited above, paragraphs 75, 90 and 117. Emphasis added.
[39] Case C-261/18, cited above, paragraph 76. Emphasis added.

(4) An assessment carried out in the context of a regularisation procedure, "*cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion*",[40]
(5) The EIA Directive does not permit EEA States to adopt national legislation which enables their national authorities to issue regularisation permissions approving projects for which no valid prior EIAs have been conducted, which have the same effects - and which are therefore similar or the same - as permissions approving projects for which a valid EIA was conducted in accordance with the EIA Directive,[41]
(6) Past projects which were not authorised in accordance with the EIA Directive as they, lacked a valid EIA, but which the time limit for bringing proceedings laid down in national legislation has expired - cannot simply be deemed lawfully authorised as regards the obligation to assess their effects on the environment.[42]
(7) There should not be an "*aggravating circumstance*" or a breach of the EIA Directive of a serious nature.[43]

In the two complaint cases in question, no valid EIA had been carried out. Iceland therefore had an obligation to take "*all measures necessary*", within the sphere of their competence, to remedy the failure to carry out a valid EIA in these two cases. Iceland was also required to ensure that any action it took, did not: "*offer the persons concerned the chance to circumvent the rules of* [EEA] *law*"; "*dispense with [the] application [of* EEA *law]*"; and/or enact law *"…which would ensure that not doing an environmental impact assessment would become the rule and not the exception*".[44]

In the Authority's view, Iceland did not take appropriate steps to remedy the failure to carry out valid EIAs. Instead, steps were taken which arguably exacerbated and aggravated the breach. That is because Icelandic national law was adopted which did not oblige an EIA to be undertaken in accordance with the EIA Directive *vis-à-vis* certain fish farm licences, but which, instead, allowed Icelandic Ministries to grant renewable, fixed-term licences without a valid EIA in place. The Minister of Industries and Innovation, and the Minister for Environment and Natural Resources, subsequently relied on those new legal powers in order to grant renewable, fixed-term fish farm licences to the operators who had recently had their operating licences revoked due to non-compliance with the EIA Directive and relevant Icelandic law. In the Authority's view, the adoption of new Icelandic law which granted legal powers to the relevant Icelandic Ministries to grant renewable, fixed-term licences to operators of fish farms without a valid EIA in place, which had retroactive effect, and which the Icelandic Ministries subsequently relied on to grant renewable, fixed-term licences vis-à-vis the fish farm operators in these cases in November 2018, "*offer[ed] the persons concerned the chance to circumvent the rules of* [EEA] *law*", "*dispense[d] with [the] application [of* EEA *law]",* and/or which sought to enact law *"…which would ensure that not doing an environmental impact assessment would become the rule and not the exception*".[45]

The Authority is therefore bound to conclude that Iceland has acted in breach of the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out a valid EIA as codified under the principle of sincere cooperation.

7 Conclusion

[40] Case C-261/18, cited above, paragraph 77. Emphasis added.
[41] Case C-261/18, cited above, paragraph 78 and the case-law cited therein.
[42] Case C-261/18, cited above, paragraphs 80 and 95 and the case-law cited therein.
[43] Case C-261/18, cited above, paragraph 120.
[44] Case C-261/18, cited above, paragraph 76
[45] Case C-261/18, cited above, paragraph 76

Accordingly, as the information presently stands, the Authority must conclude that by failing to fully transpose, and/or by incorrectly transposing, the provisions of the EIA Directive Iceland has failed to fulfil its obligation arising from, amongst others, Article 7 of the EEA Agreement. The Authority must conclude that Article 21c(2) of the Fish Farming Act, Article 6(1) of the Hygiene and Pollution Control Act and Article 5(4) of the Emission and Pollution Control Regulation do not comply with the requirements of Articles 2, 4-9, 11(1) and/or 11(3) of the EIA Directive. The Authority must also conclude that Iceland has breached the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out a valid EIA in these two complaint cases.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Icelandic Government submits its observations on the content of this letter within three months of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Icelandic Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority,

Bente Angell-Hansen President	Högni S. Kristjánsson Responsible College Member	Stefan Barriga College Member

Melpo-Menie Joséphidès,
Countersigning as Director,
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This document has been electronically authenticated by Bente Angell-Hansen, Melpo-Menie Josephides.