

“The Arctic is Ground Zero for Climate Change.”

- UN Secretary-General Ban Ki-moonⁱ

The People vs. Arctic Oil

With the adoption of the *Paris Agreement* the world came together, and with “ambitious efforts” agreed to take action to reduce the urgent threat of climate change. Furthermore, developed countries bound themselves together in their commitment to take on obligations and responsibilities.

On the 18th May 2016, the Government of Norway resolved to offer 13 companies ten production licenses for oil and gas in the *23rd licensing round*. The production licenses were awarded by Order in Council on the 10th June 2016 (Licensing Decision). For the first time in more than 20 years, Norway opened new acreage to the oil and gas industry in the Arctic Barents Sea.

Ten days later, on the 20th June 2016, Norway became the first developed country to ratify the *Paris Agreement*, which enters into force on the 4th November 2016.

The licensing round covers parts of the Barents Sea, and will open up petroleum production in more northerly and easterly areas than in the past. The licensing round thus establishes production in an area with very little existing infrastructure and partly in an area that has never before been explored. This case relates to the constitutional and procedural validity of the Licensing Decision. It concerns the integrity of Norway’s commitments to the international community and its duty of care to our children, our grandchildren and generations to come.

The petroleum production Licensing Decision will have serious environmental repercussions.

In the first instance, by issuing new production licenses in previously untouched areas, Norway will continue to contribute major greenhouse gas emissions and thus exacerbate global warming.

Research in the last few years, and in particular the latest report from 2014 by the United Nations Intergovernmental Panel on Climate Change (“the IPCC”), makes it absolutely clear that man-made global warming is a real problem. In order to avoid irreversible and devastating climate damage, the world *must* restrict global warming. All nations who signed the 2015 Paris Agreement pledged to work towards this goal. As a result of political negotiations and compromise, the Paris Agreement states that the world must limit global warming to a maximum of 2 °C and most likely to 1.5 °C.

In order to achieve this goal, Norway must contribute to a reduction in global greenhouse gas emissions. It is impossible to reconcile the petroleum production permitted by the Licensing Decision with the reduction in emissions that Norway must contribute in order to avoid devastating and irreversible climate change.

Consequently, the climate impacts of the Licensing Decision constitute an infringement of the fundamental constitutional right to a healthy environment (including a stable climate) for present and future generations enshrined in the Norwegian Constitution Article 112. The Licensing Decision also places in jeopardy a number of human rights protected by, among others, the European Convention of Human Rights. The issue of whether the Licensing Decision is compatible with fundamental constitutional rights or international human rights obligations, or with the absolutely essential reduction in greenhouse gas emissions was not discussed, even once, prior to the Licensing Decision.

The Licensing Decision also has a number of other serious environmental consequences. Some of the petroleum production will take place in previously unaffected areas which also impact the important polar

marginal ice zone. This could have particularly devastating environmental consequences in the event of any oil spill, even on a scale far lower than the *Deepwater Horizon* catastrophe.

Together, the harmful environmental effects of the Licensing Decision are sufficiently serious to render their content incompatible with the safeguards against environmental encroachments mandated by Article 112 of the Norwegian Constitution. In any case, the critical issue of the importance of the people's right to a healthy environment has not been considered, and the decision is thus also invalid because it violates legal due process requirements.

For the reasons stated above, Nature & Youth together with Greenpeace Nordic is filing a lawsuit against the state of Norway with the purpose of keeping the world within its environmental boundaries in order to safeguard all life on Earth and to secure a peaceful and sustainable future.

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ⁱ Address to the Arctic Circle Assembly, Reykjavik, 8 October 2016

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Oslo, October 18 2016

WRIT OF SUMMONS
IN
OSLO DISTRICT COURT

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The case relates to: The validity of the award of production licences in the
23rd licensing round

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1 INTRODUCTION

On 18 May 2016, the Government of Norway represented by the Ministry of Petroleum and Energy (MPE) resolved to offer 13 companies ten production licences (the licences) for petroleum (oil and gas) in the “23rd licensing round”. The production licences were awarded and ratified by Order in Council on 10 June 2016 (“The Licensing Decision”).

Ten days later, on 20 June 2016, Norway was the first developed country in the world to ratify the Paris Agreement.

The Licensing Decision grants petroleum production rights in parts of the Barents Sea, and opens it up for petroleum production in much more northerly and easterly areas than in the past. The Licensing Decision thus ratifies petroleum production in an ocean area in which petroleum activities have not previously been performed and in which no infrastructure exists.

This case relates to the validity of the Licensing Decision.

The petroleum production Licensing Decision will have serious environmental repercussions:

In the first instance, by issuing new production licences in previously untouched areas, Norway will continue to contribute to major CO₂ emissions and thus to global warming.

Research in the last few years, and in particular the latest report from 2014 by the United Nations Intergovernmental Panel on Climate Change (“the IPCC”), makes it absolutely clear that man-made global warming is a real problem. In order to avoid irreversible and devastating climate damage, the world *must* restrict global warming. All nations who signed the 2015 Paris Agreement pledged to work towards this goal. As a result of political negotiations and compromise, the Paris Agreement states that the world must limit global warming to a maximum of 2 °C and most likely to 1,5 °C.

In order to achieve this goal, Norway must contribute to a reduction in global CO₂ emissions. The petroleum production permitted by the Licensing Decision is hard to reconcile with the reduction in emissions that Norway must contribute in order to avoid devastating and irreversible climate changes.

In consequence, the climate impacts of the Licensing Decision represent an infringement of the fundamental constitutional rights of every person, including future generations, to a healthy environment (including a liveable climate). The issue of whether the Licensing Decision is compatible with the absolutely essential reduction in CO₂ emissions has not once been discussed prior to the Licensing Decision.

Secondly, the Licensing Decision also has a number of other serious environmental consequences. Some of the petroleum production will take place in previously unaffected areas, which also impact the important polar marginal ice zone. This could have particularly devastating environmental consequences in the event of an oil spill.

Judicial review of Norway's contribution to greenhouse gas emissions through further petroleum production has parallels in other jurisdictions.¹ Among others things, a Dutch court held recently that the Dutch state, by 2020, is committed to reducing its greenhouse gas emissions by 25% compared to the emission level in 1990 (judgment under appeal). This decision is one of several examples of states being held legally liable for their obligations to reduce global greenhouse gas emissions.

Together, the harmful environmental effects of the Licensing Decision are sufficiently serious to render them incompatible with the safeguards against environmental encroachments established under Article 112 of the Norwegian Constitution. In any case, the critical issue of the importance of the individual's right to a healthy environment has not been considered, and the decision is alternatively invalid for this reason.

2 MATTERS OF PROCEDURE

This action is brought before the Oslo District Court as legal venue against the Government of Norway represented by the Ministry of Petroleum and Energy. Since the Government of Norway is the counterparty and the action concerns the validity of an administrative decision, no arbitration arrangements shall take place, see Section 6–2 (1) b of the Norwegian Dispute Act.

Notification of legal action was sent to MPE on 9 August 2016.

Exhibit 1: Notification of legal action dated 9 August 2016.

MPE responded to the notification of legal action on 7 September 2016.

Exhibit 2: Response to notification of legal action of 7 September 2016.

No action is being brought against the licence holders. The requirement for a legal interest in accordance with Section 1–3 (2) of the Norwegian Dispute Act is also satisfied when action is taken against the state alone, see the decision included in Rt. 2015 p. 641.

3 THE PLAINTIFFS

3.1 Greenpeace Nordic Association

Greenpeace Nordic Association (“Greenpeace Nordic”) is a regional environmental organisation headquartered in Sweden. Greenpeace Nordic covers Greenpeace's activities in Sweden, Finland, Denmark and Norway.

Greenpeace Nordic is an independent entity, part of the Greenpeace network, which has over 3.1 million supporters and a presence in 55 countries.

¹ The University of Columbia keeps track of pending climate suits around the world, see: <http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Resources/>

Greenpeace's objective is to ensure the ability of the earth to nurture life in all its diversity. For a more detailed description of the organisation's objectives and activities, please see the attached excerpts from Greenpeace Nordic's website:

Exhibit 3: Excerpts from Greenpeace Norway's website

Greenpeace has existed in Norway since 1988. The organisation has existed in its current form, as a joint organisation for the whole of the Nordic region, since 1998. Greenpeace Nordic (along with all Greenpeace International's global activities) is financed through contributions from individual persons. The organisation is independent of any state or commercial interests, and does not receive any state or commercial contributions.

Greenpeace has legal standing under Section 1–4 of the Norwegian Dispute Act.

3.2 Natur og ungdom

Natur og ungdom ("Nature and Youth") is Norway's largest environmental organisation for young people. The organisation was founded in 1967 and is an independent youth organisation with an independent board, national assembly and national congress. As of 31 December 2015, the organisation had 7,672 members and 88 local chapters throughout Norway. One of the organisation's objectives is to strive to ensure far-sighted utilisation, protection and fairer distribution of the world's resources. In accordance with its Articles of Association, the organisation has resolved to base its work on the premise that the future of the human race is dependent on the preservation of the natural environment's functions, productivity and diversity.

For a more detailed description of objectives and activities, please see excerpts from the organisation's website and Articles of Association.

Exhibit 4: Printout from Nature and Youth's website

Exhibit 5: Nature and Youth's Articles of Association

Nature and Youth also has legal standing under Section 1–4 of the Norwegian Dispute Act.

4 PRIMARY ARGUMENTS

Article 112 of the Norwegian Constitution reads as follows:

"Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles."

In connection with the revision of the Constitution in 2014, Article 112 (previously Article 110 b) was defined as one of the key human rights and included in Chapter E of the Constitution concerning human rights. The third paragraph of the provision was amended

(from “The authorities of the state issue further provisions...” to “The authorities of the state *shall* take measures...” in order to strengthen the rights of the people to a safe environment, and the state's obligations under the provision.²

The Environmental Organisations argue that the Licensing Decision contravenes the state's duty to take account of environmental considerations, including climate considerations.

The plaintiffs allege that the provision essentially constitutes *an absolute threshold* governing the extent of the damage and risk to which the environment can be exposed; some environmental encroachments are so serious that they cannot be justified for any purpose, and in any case never for economic purposes.

In *addition*, the provision establishes proportionality requirements for decisions that negatively impact the environment; if a decision represents a disproportionate environmental encroachment compared with the decision's benefit, the decision will contravene Article 112 of the Constitution.

In interpreting Article 112 of the Constitution, significant importance must be attached to the international obligations that Norway has assumed under the international law treaties and agreements it has entered into concerning the global challenges facing the planet. Here the “precautionary principle” is a key element.

In assessing the constitutionality of the Licensing Decision, the generally negative impacts of increased petroleum production must be viewed in the context of the particularly negative impacts of petroleum production in the area in question. The plaintiffs’ principal argument is that the sum of these negative environmental impacts will mean that the absolute limitation in Article 112 of the Constitution renders the decision invalid.

Alternatively, it is argued that these negative impacts at the very least are sufficiently serious to constitute a disproportionate environmental encroachment in contravention of Article 112 of the Constitution. In this balancing, it must be required that there be a preponderance of concerns to permit production activities that in isolation obviously have strong negative consequences and create a risk of environmental damage.

As will be demonstrated, the costs relating to production, including exploration costs, development costs and infrastructure costs, viewed alongside the uncertainty associated with the future value of the production, mean that the positive aspects of the Licensing Decision do not outweigh the particularly serious impacts associated with the Licensing Decision.

The Environmental Organisations will argue in the alternative that the decision is invalid because of procedural errors, see Section 17 of the Norwegian Public Administration Act, Section 3–1 of the Norwegian Petroleum Act and Article 112 of the Constitution. There has not been a proper proceeding regarding the importance of climate and environmental considerations, and this must have influenced the decision, see Section 41 of the Norwegian Public Administration Act. The procedural requirements must be made more rigorous in light

² See, Constitutional Proposal 31 (Doc12:31 (2011-12)), proceedings (187 S (2013-14)) and Storting decision 13.05.2014

of an irreversible decision being taken which works against the considerations Article 112 of the Constitution is intended to safeguard.

Even though the Environmental Organisations are arguing that the entire Licensing Decision is invalid, there are some individual differences among the various production licences. For the record, it is therefore noted that the Court could decide that the decision is only partly invalid, should the Court decide that the assessment is different for one or more of the production licences.

We also find reason to emphasise that even if the Licensing Decision formally only grants the licence holders a legal right to exploration and an exclusive right to develop discoveries, it is evident at this stage that the administration is in a position to carry out an overall assessment of whether the areas should be made available for production, and thus it is the Licensing Decision that must be challenged in order to protect the considerations intended to be safeguarded by Article 112 of the Constitution. From the preparatory works of the Petroleum Act of 1985:

“The importance of the petroleum business and its consequences for society and other industries must be assessed and a position must be taken on this before the authorities decide to open an area for petroleum activity. Only then will there be sufficient time to investigate all controversial questions, gather the required materials and statements and analyse and assess all aspects of the issues. Once an area is opened for petroleum activities, all experience shows that a number of factors easily result in pressure to start the activities as quickly as possible or to expand such activities.” Proposition to the Storting No. 72 (1982–83) page 43-44.

For the sake of context, it should be noted that the areas in question only became legally available for production as a result of the Licensing Decision. Prior review in the Storting is not an individual decision that can be legally challenged.

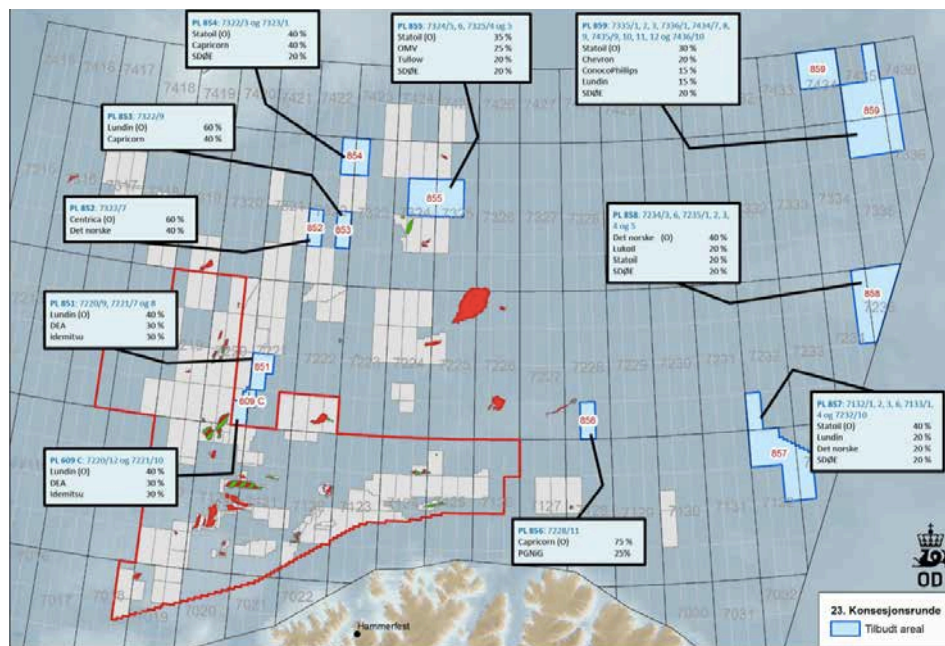
5 FACTS OF THE CASE PARTICULARS REGARDING THE LICENCES AND THE GEOGRAPHICAL AREAS THEY INVOLVE.

5.1 Geographical circumstances

In its press release of 18 May 2016, MPE announced that the Ministry had decided to offer 13 different companies 40 blocks, allocated to ten production licences in the Barents Sea South (BS) and the Barents Sea South-East (BSE). The decision is a result of the 23rd licensing round.

The individual licences are divided into geographic “blocks”. For each licence, the licensed petroleum companies have the right and duty to carry out exploration drilling, seismic surveys and other activities. The types of obligations imposed vary slightly for the different licences. In all cases the licence holders get a *right to* production of commercially exploitable discoveries, and they become *owners of* the petroleum they find, see Section 3, third paragraph of the Norwegian Petroleum Act.

The following illustration is taken from the MPE's press release relating to the award and shows the location of the licences and the blocks.



Well before the decision to award the production licences, the Parliament resolved in a plenary session that the maritime areas in question should be opened for petroleum production. In accordance with Section 3–3 of the Norwegian Petroleum Act, the King in Council has decided where in the maritime area in question production shall take place and has allocated the licences into blocks etc.

Following a Freedom of Information Act access request, the Environmental Organisations have been provided the Order in Council dated 10 June 2016. The decisions to which this action relates appear in this.

Exhibit 6: Order in Council dated 10 June 2016 including a list of the licences that have been awarded, details of the petroleum companies to be allocated individual licences and which blocks these licences make up etc.

Exhibit 7: Work plan for the licensed companies including requirements for activities under the licences.

The ten licences to which this action relates are located in the ocean areas Bjørnøya East and Bjørnøya South, through Lopparyggen and the Nordkapp Basin towards the Norwegian-Russian border. I.e. between 20° 40' easterly latitude, to the border with Russia (defined as the line between 70° 16' 28.376" N, 32° 04' 26.591" E and 73° 41' 9.620" N, 37° 00' 3.089" E and 74° 30' N 37° E³. The area is bounded to the South by 71° 30' and North by 74° 30' latitude.

³ Report to the Storting 36 (2012-2013) New opportunities for Northern Norway – Opening up Barents Sea South-East for petroleum production – Exhibit 17.

Exhibit 8: The Ministry of Petroleum and Energy’s map of the Norwegian Shelf: The Norwegian Continental Shelf, as of 20 June 2016.

Five of the awarded licences, which cover 20 of the 40 blocks, are located north of 73° N. The exploration and production activities based on these licences will be among the northernmost yet worked in the petroleum industry. This is the first time ever that Norway has issued licences for the petroleum industry that geographically overlap the floating marginal ice zone, see the illustration included in point 5.2 and are otherwise located near this zone, see more detailed account of this below.

Three of the awarded licences, which cover 26 of the 40 blocks, are located east of 32° E. This area overlaps the Nordbanken and Nordkappbanken fishing waters. The area from 20° 40’ E to 32° E is BS. The area from 20° 40’ E to 32° E is BSE.

The MPE map presented above shows that the licences in BSE are all located in an area previously unaffected by the petroleum industry. This means that there is no existing infrastructure for production of petroleum, either onshore or offshore.

The distance from the Norwegian mainland to the most north-easterly licence areas is around 450 km. This equates to the distance, as the crow flies, between Oslo and Steinkjer, or the breadth of the North Sea, from Karmøy to the Scottish port of Peterhead. For purposes of comparison, the distance between Sleipner, one of the most westerly licence areas in the North Sea, and the Norwegian mainland is around 220 km. The licences thus establish a new record in terms of distance from land.

The fact that all infrastructure (platforms, helicopter pads, shipping facilities, emergency response facilities, any pipes for delivery to the mainland and onshore processing facilities) needs to be established will in itself have a significant negative environmental and climate impact. Emergency response and oil spill measures will also become significantly more complex due to the distance from the shore and demanding climate conditions. When it is also established that this area is a record distance from land, this exacerbates still further these negative impacts.

5.2 The marginal ice zone

The marginal ice zone is the place where the sea ice meets the open water. The location and extent of the area varies throughout the year and from year to year, including depending on temperature changes.

The Norwegian Polar Institute describes the marginal ice zone at www.npolar.no (see Exhibit 9):

“The marginal ice zone is the transition between the open ocean and sea ice. Depending on factors like wind direction and ocean currents, it may consist of anything from isolated, small and large ice floes drifting over a large area to a compact edge of small ice floes pressed together in front of solid pack ice. The marginal ice zone is very dynamic due to the influence of the weather and rapid changes. Changes in its extent may take place over hours or days. Ecological

vulnerability is also greater in the marginal ice zone because of high production in spring and summer, and the high density of vulnerable environmental elements in some parts of the year.”

Exhibit 9: The Norwegian Polar Institute’s description of the marginal ice zone, printout from www.npolar.no from 24 September 2016.

The exact location of the ice varies from year to year. The Norwegian Polar Institute describes the marginal ice zone as the area between the maximum and minimum extent over the last 30 years (30 years is the normal calculation period for climate calculations).

Exhibit 10: Map from the Norwegian Polar Institute of the ice extent in the Barents Sea 1984–2013

The exact location of the “Arctic” on the map depends on which definition of the Arctic is used. The “Arctic” area is defined differently by the Arctic Council’s Arctic Monitoring and Assessment Programme (AMAP), Conservation of Arctic Flora and Fauna (CAFF), Arctic Human Development Report (AHDR), and others. The most common political-geographical definition is north of the Arctic Circle. The most common climatological definition is north of the 10 °C isotherm (the area with an average temperature below 10° C in the warmest month of the year). It is not important in this case to decide which definition is correct. It is the proximity to the ice zone and the importance of the ice that are cited as the salient facts. For information purposes, we enclose a list of some definitions of the Arctic:

Exhibit 11: Excerpt from the article “One region – multiple definitions” from Nordic Centre for Spatial Development

The average temperature in the Arctic is increasing significantly more quickly than the average temperature of the planet as a whole.

The “Marginal Ice Zone Report” (see Exhibit 12) makes a number of particular statements concerning the marginal ice zone, including the following;

“When the ice melts and moves northwards during the spring and summer, this creates the particular light and feeding conditions in the marginal ice zone that result in a concentrated blooming of phytoplankton. Ice algae on the underside of the ice start to grow up to two months before phytoplankton, as soon as the light conditions are conducive in the spring. This helps to extend the productive season in areas with sea ice, and some grazing species have adapted themselves to this environment. Together with the important role the sea ice plays as a feeding, resting and breeding habitat for many species, this makes the marginal ice zone a biologically important and valuable area.”(p. 23)

“In the event of an accident, oil pollution in the marginal ice zone could impact both the high concentrations of sea birds and sea mammals present there, as well as plankton, ice algae and fish larvae present in the water column and under the ice. Polar bears, which can be present in high numbers in the marginal ice zone, could also be affected if any part of the marginal ice zone were polluted following such an oil spill. It is the major concentrations of sea birds and sea mammals in particular

which make the ecosystem in the marginal ice zone vulnerable to acute oil pollution.”
(p. 29)

“While there are many gaps in our knowledge regarding the potential harmful effects of oil pollution on the ecosystems in the marginal ice zone, vulnerability is deemed to be high. These ecosystems are of key importance for large swathes of life in the Barents Sea, meaning a major, acute spill in the marginal ice zone could potentially have serious consequences.”(pp.29-30)

The Marginal Ice Zone Report was reviewed by the Storting but not adopted, It is nonetheless relevant as a source of up-to-date knowledge and descriptions of the areas along the marginal ice zone:

Exhibit 12: Report to the Storting. 20 (2014–2015) “Update of the integrated management plan for the Barents Sea – Lofoten area including an update of the delimitation of the marginal ice zone.” Report to the Storting from the Ministry of the Climate and the Environment (“The Marginal Ice Zone Report”)

The Licensing Decision differs from other production licences on the Norwegian Shelf in that it facilitates petroleum production much closer to the variable marginal ice zone than in the past. The special risks that this presents are discussed in point 6.5.2 below.

5.3 The facts of the case – More details on the case proceedings

The Storting reviewed the question of allowing petroleum production in BS as long ago as 1989. The question of permitting petroleum production in BSE was reviewed by the Storting in 2013.

The main elements of the case proceedings that resulted in the adoption of the decisions are shown in the following Exhibits:

Exhibit 13: Report No. 40 to the Storting (1988–1989) with proposal to open up BS for petroleum production

Exhibit 14: Minutes from the debate in the Storting 7 June 1989 (plenary session) to permit petroleum production in BS and the recommendation of the Standing Committee on Energy and the Environment on the case.

Exhibit 15: Impact Assessment for BS Troms II, Troms III and the southern area of Finnmark Vest, June 1988

Exhibit 16: Proposed programme for Impact Assessment for BSE from MPE for consultation, dated November 2011, with consideration of consultation comments received (undated).

Exhibit 17: Report to the Storting No. 36 (2012–2013) to permit petroleum production in BSE, dated 26 April 2013, and additional report to the Storting 41 (2012–2013), dated 7 June 2013 (“Opening up report”)

Exhibit 18: Impact Assessment for BSE (“The Impact Assessment” – undated, establishes a consultation deadline of 16 January 2013), including the report "Income from petroleum activities at the national level"

Exhibit 19: Minutes from debate in the Storting 19 June 2013 (plenary session) to permit petroleum production in BSE, and the recommendation of the Standing Committee on Energy and the Environment on the case.

Report to the Storting No. 10 (2010–2011) is called the Integrated Management Plan for the Marine Environment of the Barents Sea – Lofoten Area. The document establishes a multidisciplinary knowledge base for further management of BS and Lofoten, and could therefore also be deemed to be part of the case proceedings on which the Licensing Decision is based. The Management Plan for BS and Lofoten is discussed in more detail in point 6.5.2. The Marginal Ice Zone Report, see Exhibit 12, was submitted to the Storting as a proposed update of the Management Plan for BS and Lofoten, but as already mentioned, has not been adopted by the Storting.

For the sake of perspective, a schematic list of the process leading up to the award of the licences is presented below:

Extract 20: Schematic list of review of the 23rd licensing round by the Storting and Government. The process leading up to the final award

Exhibit 21: Schematic list of reports to the Storting concerning Norwegian petroleum policy and Norwegian climate policy between 1989 and 2016.

6 THE HARMFUL EFFECTS OF THE LICENSING DECISION

6.1 Introduction

Below we will explain how the earth's climate is currently being exposed to irreversible damage as a result of global warming. There is a broad consensus that there will be serious climate consequences if global warming is not drastically restricted. We also emphasise that a rapid reduction in the world's petroleum consumption is required in order to prevent the extreme consequences global warming will entail.

The Paris Agreement's negotiated limits for temperature rise of 2 °C and 1,5 °C reflect what has been possible to agree on through negotiations in the United Nations. There is no evidence to guarantee that irreversible damage can be avoided if these temperature limits are maintained.

We will show, by reference to the Impact Assessment (Exhibit 18), how the Licensing Decision facilitates petroleum production well into the future, starting at the earliest 10 years in the future, and much later for most of the blocks to which the Licensing Decision relates. At a time when there is a serious need to restrict the average temperature rise on the earth, the Licensing Decision essentially facilitates petroleum production in a period when this resource should be being significantly phased out. This very matter also casts doubt on whether the Licensing Decision will contribute the socio-economic benefits on which the Impact Assessment is based, see point 7 below.

With close to all countries agreeing that they are pledged to take measures to ensure that global temperature increases are restricted to the necessary extent, see the Paris Agreement as discussed in point 6.4.4. The Licensing Decision is incompatible with the need to take these measures. The Licensing Decision has the opposite effect; it facilitates petroleum production that will contribute extremely high CO₂ emissions where petroleum is used, far into the future.

In addition to the fact that the effects of activities based on the Licensing Decision directly oppose the planet's current needs, the decision has clearly negative impacts on the local environment and in particular the area around the marginal ice zone. This is explained in point 6.5.

6.2 Knowledge basis – starting points

Assessment of the need for emission reductions, and the contributions Norway needs to make in this context, must initially be based on established, scientifically based knowledge of the earth's current climate. The main sources for such knowledge are the IPCC's Fourth and Fifth Assessment Reports from respectively 2007 and 2014. Parts of these reports are submitted below.

“The IPCC” is an abbreviation of “The Intergovernmental Panel on Climate Change (IPCC)” (“the IPCC”). The IPCC was established by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988. The purpose was to provide the world with the best possible scientific basis for understanding climate changes and their potential effects on people, the environment and society. 195 countries are members of the IPCC. More than 800 experts from 85 countries provide the Panel's expert core and compose the IPCC's reports that are announced at around five-to-six-year intervals.

The IPCC does not perform any research, but summarises the status of current knowledge, in accordance with recognized research, in its reports. All assessments must be politically neutral and include all literature that satisfies standard documentation requirements for scientific publications.

Exhibit 22: From www.miljodirektoratet.no: “What is the IPCC” and “The Convention on Climate Change”, excerpt as of 22 September 2016

Exhibit 23: From www.miljodirektoratet.no “**Fifth Assessment Report from the IPCC**”, excerpt as of 22 September 2016

The IPCC's reports provide the actual basis for climate negotiations under the United Nation Framework Convention on Climate Change (UNFCCC), or the UN Convention on Climate Change. The UN Convention on Climate Change provides the central framework for international collaboration to combat climate changes and to make adaptations to climate changes. Norway ratified the Convention on Climate Change on 9 July 1993, and the Convention entered into force on 21 March 1994. The Convention on Climate Change is ratified by 197 countries.

Exhibit 24: Excerpt from https://unfccc.int/essential_background/convention/items/6036.php, as of 22 September 2016

The supreme decision-making body of the Convention on Climate Change is the “Conference of the Parties” – COP, which is a conference for member countries where decisions are taken in the form of negotiated addenda to the Convention on Climate Change. The Twenty-first Convention – COP 21 – was held in December 2015, where the Paris Agreement was negotiated (see point 6.4.4 below).

6.3 Further information on the environmental impact of the Licensing Decision

Petroleum production in BS and BSE impacts: 1) the planet’s *climate* and 2) *the environment* in the ocean areas in which production is due to take place, as well as in the surrounding seas and land. Some emission elements affect both climate and environment.

The following section 6.4 addresses *the climate impacts* from petroleum production in BS and BSE. Point 6.5 deals with *the environmental impacts*.

6.4 Climate

6.4.1 Climate status – what does the science-based knowledge basis show?

Any use of petroleum results in emissions of greenhouse gases. The proposed petroleum production in BS and BSE is no exception.

However, new petroleum production in new areas must be evaluated in the light of scientifically based knowledge on climate status and the measures that need to be taken to restrict warming at the time such production is ratified (time of the award of the production licences).

One part of the IPCC’s Fifth Assessment Report (2014), the so-called “Synthesis Report”, states:

“Delaying additional mitigation to 2030 will substantially increase the challenges associated with limiting warming over the 21st century to below 2°C relative to pre-industrial levels” (p. 24)

“There are multiple mitigation pathways that are likely to limit warming to below 2 °C relative to pre-industrial levels. These pathways would require substantial emission reductions over the next few decades and near zero emissions of CO₂ and other long-lived greenhouse gases by the end of the century.” (p. 20)

The IPCC’s Fourth Assessment Report Working Group III noted:

“Under most equity interpretations, developed countries as a group would need to reduce their emissions significantly by 2020 (10–40 per cent below 1990-levels) and to still lower levels by 2050 (40–95 per cent below 1990-levels) for low to medium stabilization levels.” (p.90)

The above-cited report presents two scenarios for climate change. In these two scenarios, to avoid more than 2 °C warming the percentage reductions will have to be respectively “25-40% before 2020” or “80-95% before 2050.”⁴

Exhibit 25: The IPCC’s Fifth Assessment Report – IPCC Assessment Report 5: Synthesis Report (SYR), with “Summary for Policymakers”, included in the report (SPM)

Exhibit 26: The IPCC’s Fourth Assessment Report – IPCC Assessment Report 4: Synthesis Report (SYR), and report of Working Group 3 (WGIII), with “Summary for Policymakers”, included in the report (SPM)

The IPCC’s Assessment Reports are several thousand pages long. Exhibit 25 and 26 comprise those parts of the reports we see as most central to this case.

On behalf of the Norwegian Climate Foundation, Eystein Jansen of the Bjerknes Centre has prepared the following report:

Exhibit 27: Climate change and Climate risk Knowledge status 2016. Climate background memorandum Eystein Jansen, 2016

The report outlines the main conclusions of the IPCC’s Fifth Assessment Report, in addition to highlighting particular Norwegian circumstances and more recent research than used in the Fifth Assessment Report.

Eystein Jansen will appear as a **witness**. Jansen (PhD, Dr. Sc.) is a Professor at the University of Bergen, climate researcher and a contributor to the IPCC's Fifth Report. He will explain his report.

6.4.2 Climate status – the consequences of not basing emission reductions on agreed reduction needs

Between 2002 and 2010 global greenhouse gas emissions rose by an average of 2.2% a year.⁵ Subsequently, emissions continued to rise until 2014, for which provisional figures suggest the increase has levelled out.

The IPCC assumes in its Fifth Report that “business as usual”, which means that we continue as today and do not take additional measures, will lead to a warming of the earth's climate by 3.7–4.8 °C. The estimates are uncertain. Introducing greater uncertainty to the models changes this estimate to 2.6–7.8 °C. This is explained in the Fifth Assessment Report “Summary for policymakers” (“SPM”), and “Synthesis Report” (“SYR”) see Exhibit 25 p.20 (in “SYR-SPM”)

The IPCC's temperature estimates make it relevant to research how the world could look with a warmer climate.

In a report prepared for World Bank, the Potsdam Institute cited the following consequences of a 4° C rise in global temperatures:

⁴ See IPCC AR4 WGIII – Exhibit 26, p.776

⁵ IPCC Report 2014, Synthesis Report "SYR-SPM" – Exhibit 25, s. 5

“... unprecedented heat waves in many regions, especially in the tropics; substantially exacerbated water scarcity in many regions; increased frequency of high-intensity tropical cyclones; and irreversible loss of biodiversity, including coral reef systems

And most importantly, a 4°C world is so different from the current one that it comes with high uncertainty and new risks that threaten our ability to anticipate and plan for future adaptation needs” (p. IX)

Exhibit 28: The report “Turn Down the Heat. Why a 4 C world must be avoided” Executive summary (2012)

6.4.3 Cumulative CO₂ emissions, 2012–2100. “Carbon budgets”

Calculations of how much more CO₂ the atmosphere has “room for” or can “accommodate” within given temperature thresholds are denoted using the established terminology of “carbon budgets.” Carbon budgets refer to the world's total emissions, and do not differentiate between individual countries.

The carbon budgets must be compared with the time when the petroleum produced based on the Licensing Decision is expected to be available. One extremely relevant issue is whether there is “room for” the petroleum that will be produced within the relevant carbon budgets.

In the Impact Assessment for BSE, see Exhibit 18, it is stated that the average lead time from discovery to production on the Norwegian continental shelf is ten years and that alternative production start times have been assumed for respectively 2026 and 2029 (see the Impact Assessment, Section 2.1.2 and 2.1.3.). The life of Norwegian oil and gas fields varies from 4 to 80 years, where sidewells of larger fields generally constitute the lower end of the scale.⁶ Ekofisk field has estimated potential operation up to 2050, which would mean a total recovery period of nearly 80 years.⁷ The Troll field's lifespan has been extended from 50 to 70 years.⁸ Production based on the Licensing Decision must be expected to last for up to 50 years or more, depending on the size of discoveries. The Licensing Decision consequently lays the groundwork for *future* petroleum production.

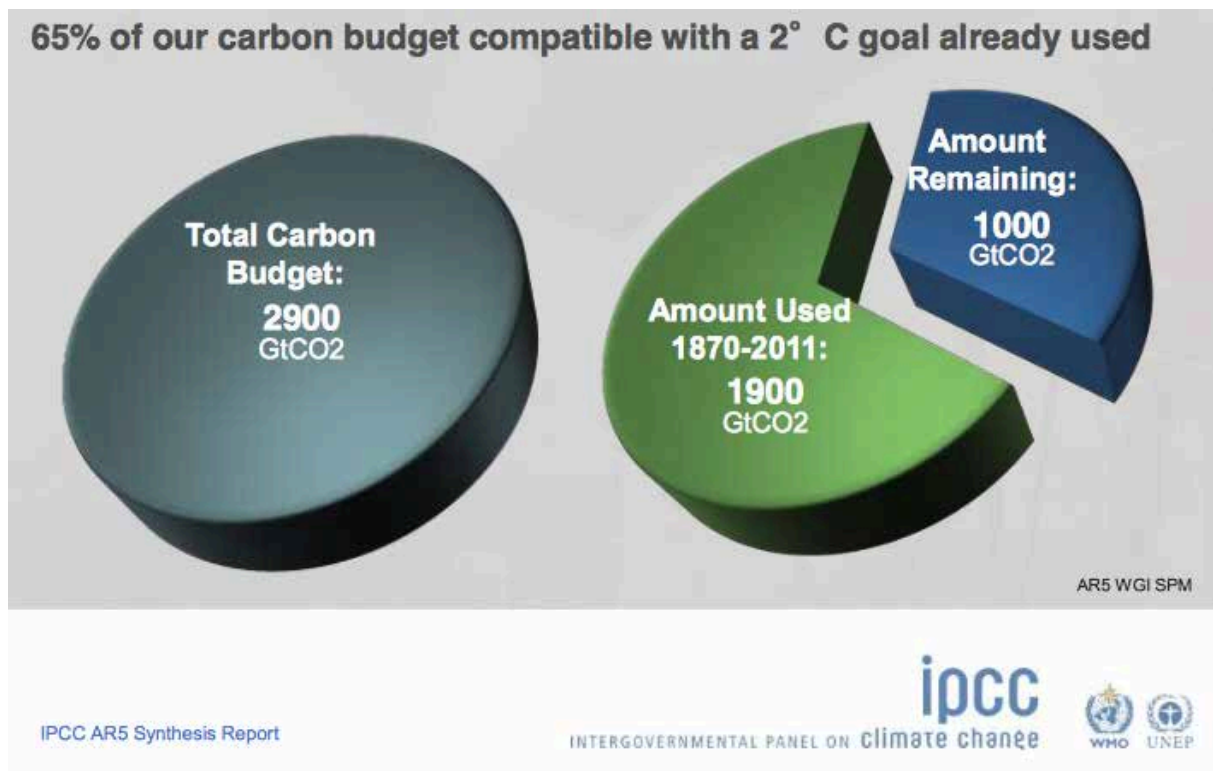
How much more CO₂ emissions there is “room for” in the atmosphere determines how much more petroleum it makes sense to produce. The time of expected start-up and later phasing out of production based on the Licensing Decision must be compared with the available knowledge regarding carbon budgets.

In the official presentation of the Fifth Assessment Report, presented at the “Lima Climate Action High Level Session” in Peru, December 2014, the IPCC's carbon budget is presented in the following manner:

⁶ See <http://www.norskpetroleum.no/fakta/felt-norsk-sokkel/>, downloaded 6 October 2016

⁷ See www.regjeringen.no/no/dokumenter/prop-113-s-20102011/id642310/?ch=1&q=, downloaded 6 October 2016

⁸ See <http://www.npd.no/no/Publikasjoner/Presentasjoner/OD-40-ar/Trollet-som-ble-temmet/>, downloaded 6 October 2016.



The illustration shows that within a limit of 2°C increase in temperature, as of 2011, it is possible to emit another 1000 gigatonnes (Gt) CO₂ to the atmosphere.

Exhibit 29: Official presentation of Fifth Assessment Report at the conference “Lima Climate Action High Level Session, Lima, Perú”, December 2014

If 1.5 °C is used as a limit for acceptable increase in temperature, the carbon budget is reduced dramatically. The Fifth Assessment Report (IPCC AR 5 SYR, Figure 2.2) shows that if the temperature limit is 1.5 °C, the carbon budget is reduced to 400 Gt CO₂.

A calculation performed in July 2016 by Schellnuber et al. supports this conclusion.

Exhibit 30: Schellnuber et al., published in “Nature”, July 2016

A recently published report from Climate Analytics GmbH (August 2016) also examines the implications of a 1.5 °C limit. The report “The Sky’s Limit”, published by the organisation Oil Change International (September 2016), does the same:

Exhibit 31: Bill Hare, et al., August 2016 “Implications of the 1.5 °C limit in the Paris Agreement for climate policies and decarbonization.”

Exhibit 32: Oilchange International, September 2016: “The Sky’s Limit”

The last-mentioned report includes the following conclusion:

“The reserves in currently operating oil and gas fields alone, even with no coal, would take the world beyond 1.5 °C” (p.5)

The knowledge that a substantial part of the world's petroleum resources could never be produced has been known for a long time, and among other things it appears in a report prepared by Rystad Energy on behalf of the Ministry of the Environment in 2013:

Exhibit 33: “Petroleum Production under the two degree scenario (2DS)”, Ministry of the Environment and Rystad Energy (2013).

The Arctic is discussed in this report in particular. Various assumptions are the basis for various conclusions. Regarding production in northern areas, it is stated on page 33:

“Exploration areas that are most likely to be suitable for exploration under 2DS: Mature Areas. Frontier areas with non-Arctic conditions, close to shore and sufficient size: Barents Sea South, Lofoten.”(p.33)

University College London has also assessed which resources must remain in the ground given a temperature limit of 2 °C:

Exhibit 34: Un-burnable oil: An examination of oil resource utilization in a decarbonised energy system.” (McGlade and Ekins, University College London (2013))

The following is said about “Arctic oil” on page 10 in the report:

“These results suggest that the development of the Arctic regions is largely inconsistent with an evens (sic) chance of limiting average global temperature change to 2 °C and that it may be reasonable to classify Arctic resources as 'un-burnable'; this therefore calls into question the rationale for ongoing exploration efforts in Arctic regions, if stated commitments to emission reduction are to be taken seriously.”

The plaintiffs allege that planning for petroleum production far into the future is not consistent with the reduction in CO₂ emissions required to avoid damaging climate changes.

6.4.4 Climate status – The Paris Agreement – a response to the IPCC’s Fifth Assessment Report

The IPCC’s Fifth Assessment Report created the basis for negotiations pursuant to the Convention on Climate Change in November 2015, COP 21. The Paris Agreement was negotiated at COP 21. In addition to the Paris Agreement itself, the parties agreed a “decision document”, (see Exhibit 36) which elaborates on the Paris Agreement on several points.

The Paris Agreement was opened for signature in April 2016 and ratified by Norway on 20 June 2016. As of 14 October 2016, it had been ratified by 79 countries, including the U.S. and China. The Paris Agreement will enter into force on 4 November 2016.⁹ The Agreement will then constitute an international law obligation for Norway.

⁹ See: http://unfccc.int/paris_agreement/items/9444.php, downloaded 6 October 2016

The Paris Agreement establishes the international consensus on what must be done based on the knowledge basis represented by the IPCC's reports. In addition to its legal content, the Paris Agreement and the decision document for the Agreement represent a *factual basis* in the case.

Exhibit 35: Storting Proposition 115 S (2015-2016 containing the Paris Agreement)

Exhibit 36: Decisions related to the Paris Agreement (“COP 21 decisions”)

The quotations below are from Proposition No. 21 to the Storting, which contains the Paris Agreement in English and the official Norwegian translation.

The Paris Agreement shows that the countries which have signed the agreement agree on

«Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.» (Article 2.1.a)

The countries also agree “[to aim] to reach global peaking of greenhouse gas emissions as soon as possible,” (Article 4.1), that “ambitious efforts” are required by the countries (Article 3) and that an individual country's obligations must be differentiated in light of national circumstances (Article 4.3 in conclusion).

The requirement for ambitious efforts was in fact introduced by Norway at a negotiation session in Geneva in February 2015, according to an article by University of Oslo Professor Christina Voigt, who was the legal advisor to the Norwegian delegation to the negotiations¹⁰.

The above-mentioned decision document in which the Paris Agreement was adopted (Exhibit 36), records that all the plans by the world's countries regarding reduction of emissions of greenhouse gases going forward to 2030 *will not be sufficient* to attain the necessary emissions reductions in an appropriate manner, see Section 17 of the document:

“[The Conference of the Parties,] (...) notes with concern that the estimated aggregate greenhouse gas emissions levels in 2025 and 2030 resulting from the intended nationally determined contributions do not fall within least-cost 2 °C scenarios (...)

The Paris Agreement and decision document record that there is agreement in the world today that the use of petroleum as a fossil fuel must be reduced dramatically and that this must be done as soon as possible.

6.4.5 Climate status – new task for the IPCC

As a consequence of the Paris Agreement, the parties to the Convention on Climate change have asked the IPCC, and the IPCC has agreed by a resolution, to prepare a special report

¹⁰ Christina Voigt in *The Paris Agreement: What is the standard of conduct for Parties* (2016), available at http://www.qil-qdi.org/wp-content/uploads/2016/03/03_COP21_VOIGT_FIN-2.pdf, see the table on page 23.

regarding the consequences of the Paris Agreement's limit of 1.5°C. The report will be available in 2018.

The following is quoted from page 11 of the IPCC's resolution on preparing the 2018 Special Report:

“In the context of the Paris Agreement, to accept the invitation from the UNFCCC to provide a Special Report in 2018 on the impacts of global warming of 1.5 °C above preindustrial levels and related global greenhouse gas emission pathways, and decides to prepare a Special Report on this topic in the context of strengthening the global response to the threat of climate change, sustainable development and efforts to eradicate poverty.” (p.11)

Exhibit 37: “43rd SESSION OF THE IPCC”, 11-13 April 2016, Nairobi, Kenya. Decisions adopted by the Panel

6.4.6 Climate status – Norway's contribution and Norway's target

6.4.6.1 In general

Norwegian authorities quite clearly understand and accept that it is of great importance to significantly reduce the emissions of CO₂, among other things. In the following we will describe Norwegian emissions of greenhouse gases, what emissions reductions Norwegian authorities consider necessary, and inadequate compliance with the requirements for emissions reductions that have been established.

6.4.6.2 Norway's emissions of greenhouse gases

Norway's emissions of greenhouse gases in 2015 were 53.9 million tonnes CO₂ equivalents.¹¹

Annual emissions as of 2015 have increased by 3.9 % since 1990. The increase from 2014 to 2015 was 1.5 per cent.

In 2007, Norwegian greenhouse gas emissions were 10.8 % above the 1990 level.¹²

Accumulated over the years between 1990 and 2015, the total emissions from Norway have been 1398 million tonnes CO₂ equivalents.

Exhibit 38: Printout of tables from Statistics Norway (“SSB”) SSB.no/ Greenhouse gases – Norway’s annual emissions, downloaded 6 October 2016, calculations based on figures from Norway Central Statistics Bureau databank – annual emissions from Norwegian territory, total emissions 1990-2015.

¹¹ See www.ssb.no/klimagassn, downloaded 6 October 2016

¹² See <https://www.ssb.no/natur-og-miljo/statistikker/klimagassn/aar-endelige/2009-02-09>, downloaded 6 October 2016

6.4.6.3 Inadequate follow-up on Norwegian requirements for reduction of greenhouse gas emissions

One question that can be raised is whether reduction of greenhouse gases in Norway compensates for the emissions Norway exports when petroleum produced on the basis of the Licensing Decision is sold to recipients in other countries.

The Storting has initially in 1989 and thereafter in 2007, 2012 and 2015¹³ established requirements for reduction of greenhouse gases. These are requirements without sanctions and are described as “climate targets”. These climate targets are the nation's requirements to itself as regards taking care of the planet's climate.

It is absolutely clear that the targets are not being met and that the discrepancy between the targets and the actual numbers is very large.

Even though inadequate target attainment has not resulted in nor will result in sanctions, the targets represent the authorities' own assessment of what has been considered appropriate and necessary at given points in time.

Norwegian authorities' adjusted opinions of what is necessary must be assessed in relation to what the world otherwise finds necessary.

The first Norwegian requirements for emissions reductions appear in:

Exhibit 39: Storting Report No. 46 (1988-1989) Environment and Development : programme for Norway's follow-up of the report of the World Commission on Environment and Development.

The Storting's clear assumption was that Norwegian greenhouse gas emissions would be stabilised at the 1989 level by the year 2000 and that the emissions would then be reduced.

As Exhibit 38 shows, Norwegian greenhouse gases declined early in the 1990s. Since 1996 the emissions have been consistently above 1990 the level.

In 2008, new requirements were set – as a follow-up to Report No. 46 to the Storting (1988-89) – for reduction of Norwegian greenhouse gas emissions by 30 per cent by 2020, compared to the 1990 level:

Exhibit 40: St. Report No. 34 (2006-2007) to the Storting, “Norwegian climate policy”, and recommendation from the Storting's Energy and Environment Committee, dated 14 February 2008, which was adopted

The Storting thus decided in 2008 that a reduction of 15-17 megatonnes (Mt) of greenhouse gas emissions must be made, measured against the emissions pathway in the national budget

¹³ See Report to Storting 46 (1988-1989) p.10, recommendation 273 (1988-89) p.23, Report to Storting 34 (2006-2007) p. 6, recommendation 145 (2007-2008) p.15, Report to Storting 21 (2011-2012) p.9, recommendation 390 S p.10, Report to Storting 13 (2014-2015) p.6, recommendation 211 S pp. 1 and 4

of 2007 on Norwegian territory, see page 51 of the Report to the Storting and page 15 of the recommendation.

This target was reiterated by the Parliament in 2012, with the same wording.

Exhibit 41: Storting Report 21 (2011-2012) Norwegian climate policy, with recommendation from Storting's energy and environment committee, dated 8 June 2012, as adopted.

The Norwegian Environment Agency has stated the following regarding Norway's target attainment:

“Based on an overall assessment, we estimate that the gap between the adjusted extrapolation and the target will be 8 million tonnes CO₂ equivalents in 2020 when we assume that the emissions will decrease to 47 million tonnes CO₂ equivalents by 2020” (emphasis added) (pp. iii and 7)

Exhibit 42: Norwegian Environment Agency: Faglig grunnlag for videreutvikling av den nasjonale og internasjonale klimapolitikken - Klimatiltak mot 2020 og plan for videre arbeid (“Technical basis for development of national and international climate policy. – Climate measures up to 2020 and plan for further work”) (2014).

There is little doubt that Norway is lagging behind with regard to reduction of its own emissions of greenhouse gases. As of today, Norway has approximately four years to “close” the gap the Norwegian Environment Agency describes if the requirements set in 2007 are to be achieved, see Exhibit 42.

An indication that the means for reducing Norwegian emissions are not effective appears in a study conducted by Statistics Norway in 2013:

“An alternative supply side policy, e.g., combined with a more limited production tax, could be to have a more restrictive practice when it comes to opening new areas for oil exploration. At least it seems reasonable to take a global perspective similar to the one in this paper when undertaking impact assessments of opening new areas for exploration.”, (p.27 of the report).

Exhibit 43: “Climate policies in a fossil fuel producing country. Demand versus supply side policies” Taran Fæhn, Cathrine Hagem, Lars Lindholt, Ståle Mæland and Knut Einar Rosendahl (2013)

For the sake of context, it will be noted that Norway has reported to the institutions of the Paris Agreement that 40 per cent of the emission reductions on Norwegian territory will occur in cooperation with the EU in 2030.

Exhibit 44: Submission from Norway to the ADP. Norway's Intended Nationally Determined Contribution

6.4.6.4 Total emissions from petroleum originating from BS and BSE:

The Licensing Decision lays the groundwork for petroleum production far into the future. It is irrelevant to the planet's climate whether the petroleum is used in Norway or other places in the world. It is therefore appropriate to look at the quantity of CO₂ emissions the petroleum expected to be produced based on the Licensing Decisions will generate.

Nature and Youth has calculated this. The calculations are published in the report, "Climate consequences of oil and gas production in the Barents Sea", dated June 2016. The calculations are based on the Norwegian Petroleum Directorate's resource estimates for Barents Sea South and Barents Sea South-East. The emissions from petroleum originating from BS and BSE are estimated at 4767 million tonnes of CO₂.

Exhibit 45: "Klimakonsekvenser av olje- og gassutvinning i Barentshavet" ("Climate consequences of oil and gas production in the Barents Sea"), Nature and Youth, June 2016

Based on the estimate and carbon budget as presented in the IPCC report of 2014 (see Exhibit 25), a simple calculation shows that the petroleum in BS and BSE will take up between 0.5% (avoiding 2 degrees warming) and 1.2% (avoiding 1.5 degree warming) of the "world wide" carbon budget as it was calculated in 2011.

6.4.6.5 The effects on a worldwide basis of a reduction in Norwegian petroleum production

It has been claimed that if Norway foregoes extracting portions of its petroleum resources, this will still not contribute to reduced CO₂ emissions because other countries will nevertheless produce their petroleum or possibly produce more. Put another way: other countries will then take up the remaining part of the carbon budget. The Environmental Organisations deny that this is factually correct.

The error in the reasoning is evident in an assessment carried out by Statistics Norway as early as 2013. Based on model studies and calculations, Statistics Norway found that only half of any reduction in production volume would be replaced by production other places and concluded:

"Our calculations suggest that for each per cent decline in Norwegian oil production, global CO₂ emissions fall by approximately one million tonnes." See page [] in the report:

Exhibit 46: Fæhn, Rosendahl et al. (2013): *Norwegian oil and gas production effects on global CO₂ emissions and the energy situation in Less Developed Countries*

6.4.7 Summary: Climate status and consequences

If the emission of CO₂ to the atmosphere is not reduced, according to the IPCC the world will on average become a 3.7-4.8 °C warmer place, see Exhibit 25, p.20 (in "SYR-SPM"). A four-degree warmer world is so different from our world that it is difficult to make appropriate plans for development, see the report from the Potsdam Institute (see Exhibit 28).

Key research demonstrates that climate change requires an immediate reduction in global emissions of CO₂, as well as phasing out of fossil fuels. The IPCC's Fifth Assessment Report indicates that global greenhouse gas emissions must be reduced by 41-70% by 2050 if there shall be a good chance to limit the temperature rise to 2 °C (see Exhibit 25 page 22 (“SYR-SPM”)).

CO₂ emissions from the resources found in fields that are already in operation are sufficient to “warm up” the world more than 1.5 °C on average. See Exhibit 32 above, the report “The Sky’s Limit.” However, the Licensing Decision lays the groundwork for petroleum production far into the future, possibly into the next century. By that point in time, the use of fossil energy must have been phased out according to the IPCC.

The carbon budgets, whether they are based on a 2 °C limit or a 1.5 °C limit, indicate that there is no “room for” petroleum produced pursuant to the Licensing Decision.

Norwegian emissions of CO₂ have increased dramatically since the 1990 level, and none of the nation's quantified requirements for emission reductions have been met. With regard to emission-reducing measures in Norway, the lag is considerable and such measures can in no way compensate for the exporting of CO₂ emissions which occurs when Norwegian petroleum is used elsewhere in the world. It is nevertheless irrelevant to the planet's climate where the use of petroleum occurs. Reduced production of Norwegian petroleum will, however, reduce the quantity of petroleum offered in the world and thus global CO₂ emissions.

6.5 Petroleum production pursuant to the Decision – unacceptable local environmental effect

6.5.1 Introduction

The plaintiffs allege that the negative local environmental effect from petroleum production in BS and BSE is so great as to be unacceptable.

In order to assess the environmental effect, it is appropriate to start with the management plan for BS, which is submitted below as Exhibit 47. The management plan provides a cross-disciplinary accounting of the available knowledge regarding the maritime area when the plan was drafted. There is no management plan for BSE.

Half of the licences are within areas defined in the management plan as a “particularly valuable and vulnerable area”, see below. One of the things that make the area particularly valuable and vulnerable is that the marginal ice zone is an area of great ecological importance.

The knowledge we have about these maritime areas must be weighed against the risk factors involved in petroleum production, both generally and particularly in such sensitive areas as are involved here. We will account in the following for the most important of these risk factors.

6.5.2 The management plan

A report to the Storting has been prepared for BS regarding the management of the maritime area. The report to the Storting defines itself as a “management plan”.

The applicable management plan for BS is:

Exhibit 47: Report No. 10 to the Storting (2010-2011) First update of the Integrated Management Plan for the Marine Environment of the Barents Sea – Lofoten Area. (“The Management Plan”)

The Management Plan describes its purpose on page 5 of the document:

“The purpose of this management plan is to provide a framework for the sustainable use of natural resources and benefits derived from the Barents Sea–Lofoten area and at the same time maintain the structure, functioning, productivity and diversity of the area’s ecosystems. The management plan is thus a tool for both facilitating value creation and maintaining the high environmental value of the area.” (p.5)

As mentioned, the Management Plan defines parts of the licence area as a “particularly valuable and vulnerable area”. According to the Management Plan at page 22, “particularly valuable and vulnerable areas” are:

“areas that on the basis of scientific assessments have great importance for biodiversity and for biological production, including outside the areas themselves.” (p.22)

The fact that an area is defined as a “particularly valuable and vulnerable area” indicates that the area needs to be managed especially carefully.

The Impact Assessment, see Exhibit 18, neither mentions nor discusses the significance of parts of the area proposed to be opened to petroleum production being within areas which under the Management Plan (Report to the Storting No. 10 (2010 – 2011)) are defined as “particularly valuable and vulnerable areas”.

One of the things that the Norwegian Polar Institute has pointed out is that the proximity to particularly valuable and vulnerable areas indicates that a number of the proposed blocks should not be awarded:

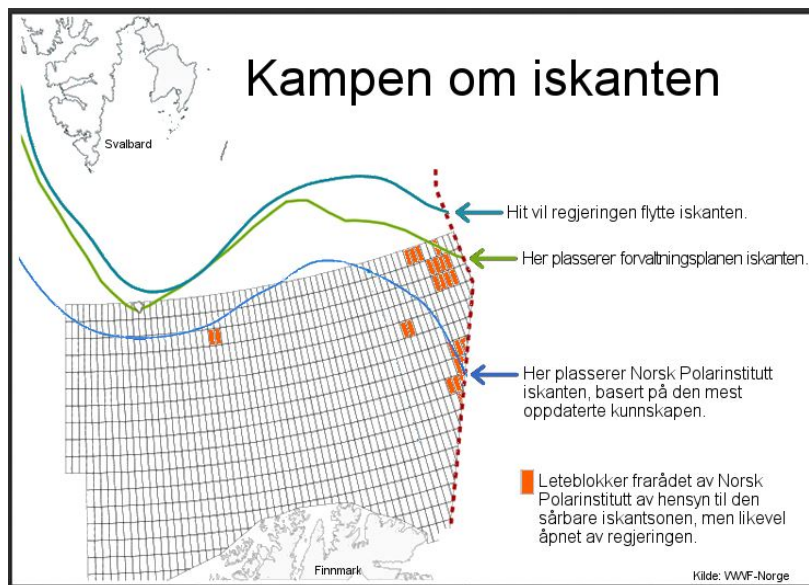
The letter from the Polar Institute to the Ministry of Petroleum and Energy of 14 February 2014 states on page 3:

“Some of the proposed blocks in northern parts of the Barents Sea South-East directly overlap with particularly valuable and vulnerable areas [identified in the Management Plan.] This involves blocks 7335/3,7435/10-12, 7436/1 and 7435/9. The possibility for such influence and effects from this must therefore be assessed before any activities are started in areas bordering on areas established as particularly valuable and vulnerable which can affect the value of these in a negative way.” (p.3)

Exhibit 48: Letter of the Norwegian Polar Institute to the Ministry of Petroleum and Energy of 14 February 2014 (consultation statement).

The additional assessments called for by the Norwegian Polar Institute have not been carried out, to our knowledge.

The Worldwide Wildlife Fund has made an illustration showing which blocks the Norwegian Polar Institute advised against and where these are located in relation to various ice edge definitions¹⁴:



The Norwegian Environment Agency pointed out the need for a clear boundary for the ice edge, which also included years with a large ice extent, as an essential part of the justification for advising against announcing a number of the blocks. In the same document, the Norwegian Environment Agency further pointed to the inadequate knowledge base regarding the areas that will be affected and the difficulties that will arise in the event of oil spills and other accidents so far to the north

Exhibit 49: Letter from the Norwegian Environment Agency of 27 March 2014 to the Ministry of Petroleum and Energy (consultation statement).

There is no management plan for BSE. This affects the basis of knowledge regarding BSE. The fact that the twenty-third concession round includes maritime areas not covered by a management plan is a break with previous management practice.

The Norwegian Polar Institute recommended that 14 of the 40 awarded blocks - two of the ten licences awarded - not be awarded. The Norwegian Environment Agency advised against awarding 20 of 40 blocks, corresponding to five of the licences awarded. It was persistently the northernmost blocks that were advised against.

Exhibit 50: Map of blocks advised against by (1) the Environment Agency and (2) the Norwegian Polar Institute – joint position in the consultation on allocation requirements.

Seen as a whole, the Norwegian Polar Institute and the Norwegian Environment Agency opposed issuing half of the licences that were awarded. This means that concerns raised by

¹⁴ Available at <http://www.wwf.no/?46725/--Send-den-oljesmurte-iskantmeldingen-tilbake#>, as of 28 September 2016

the institutions with the most extensive knowledge regarding the relevant environmental issues have not been given weight.

6.5.3 Risk factor – “black carbon”

Any combustion of carbon releases soot emissions, the finest particles of which are often referred to as “black carbon”, hereinafter “BC”. This means that all forms of activity involving such combustion, including drilling, construction activity (for example, platforms), ship traffic, helicopter traffic and the like involves emissions of BC. In addition, it is particularly related to emissions caused by "flaring", ie incineration to get rid of excess oil and gas by platforms and processing plants.

Emissions of BC represent *both* an environmental problem (threat to the ice edge, the ecology) *and* a separate climate problem which is in addition to the climate problems represented by emissions of CO₂.

The negative climate effect of BC is related to the earth's albedo. As the Norwegian Polar Institute describes it on its website www.npolar.no on the albedo effect: *“Albedo is an expression of the ability of surfaces to reflect sunlight. Bright surfaces reflect a large part of the sun's rays back into the atmosphere (high albedo). Dark surfaces absorb the rays from the sun (low albedo).”*

When ice and snow become dirty due to emissions of soot, the heat from the sun is absorbed by the ice and snow, as it now has a lower albedo. This will lead to a quicker melting of the ice and snow.

Exhibit 51: Printout from the Norwegian Polar Institute's website concerning “Albedo”, downloaded 6 October 2016

BC is among the so-called “short-lived climate drivers”. These have a shorter lifespan in the atmosphere than CO₂, but the immediate negative climate effect is stronger than for CO₂.

Regarding emissions of BC, it is known that

- 1) the climate effect is strongly negative because of a reduction in the earth's albedo, (see Exhibit 55) and
- 2) the further north and closer to the Arctic BC emissions occur, the greater the negative climate consequences will be (see Exhibit 52).

Research on the climate consequences from BC has progressed less than the research on the consequences from CO₂, and the “SYR” therefore contains little about BC. However, in any event knowledge about the strong negative effect from BC dates back to 2013.

CICERO - the Center for International Climate and Environmental Research – issued in December 2013 a report entitled: “Climate impact of Norwegian emissions of short-lived climate forcers” on assignment from the Norwegian Environment Agency. The following appear on pages 25–26 and 32, respectively:

“(…) Norwegian emissions lead to [a] relatively higher contribution from the albedo effect than for global emissions (77-146 per cent). The reason for this is that some of

the Norwegian emissions are transported to the Arctic[.] (...) Emissions in the Arctic (with a definition ... where very little of mainland Norway is included) will have a much stronger relative albedo effect ..., since the locations of Norwegian emissions are much further away from snow and ice covered areas in the Arctic.” (pp.24-25)

“Emissions in the Arctic lead to a warming at the surface in the Arctic five times as strong (per kg emissions) [as] emissions from mid-latitudes.” (p.31)

In other words, emission of BC is worse for the planet's climate the further north it occurs.

Exhibit 52: CICERO report, "Climate impact of Norwegian emissions of short-lived climate forcers" of December 2013.

During the same period, the Norwegian Environment Agency published the report "Summary of proposed action plan for Norwegian emissions of short-lived climate forcers":

Exhibit 53: Report of the Norwegian Environment Agency, "Summary of proposed action plan for Norwegian emissions of short-lived climate forcers", dated December 2013.

On page 19 it states:

“Norwegian BC emissions have approximately a 1.5 times higher climate effect per tonne than the global average ... and may contribute to melting in the Arctic.” (p.19)

The significance of BC has also been described in a more recent report:

Exhibit 54: Arctic Monitoring and Assessment Programme, 2015

It is also recognised that reduction of the short-lived climate forcers, including BC, is essential for gaining a quick enough benefit for the climate. Burning off excess gas is a significant contributor to emissions of BC.

Exhibit 55: Graph from p.12 UNEP: Integrated Assessment of Black Carbon and Tropospheric Ozone – Summary for decision makers.

The plaintiffs allege that the emission of short-lived climate forcers which petroleum production in BS and BSE will generate represents both an unacceptable environmental risk and an unacceptable climate impact.

The plaintiffs also allege that Norway, as one of the world's very few petroleum-producing countries with resources in areas north of 70 degrees north, has a special responsibility for administering the marginal ice zone and the ice in the Arctic.

6.5.4 Risk factor – oil spills

Any petroleum activity involves a risk of spilling oil to a limited or extremely large extent. Even though this involves a risk, and oil spills will not occur with certainty, the consequences of oil spills in these maritime areas will be very great. This is because it is difficult to remove

oil from ice, but on the other hand it can be encapsulated and thus leak out gradually over a long time.

The northernmost blocks are in an area which at times will come in contact with the ice edge. For blocks further south, the ocean's movements will be able to bring oil slicks northward.

The risk of oil spills in the marginal ice zone must be seen in the context of oil spill response in the area being particularly difficult, because the fields are far from land, in areas where for large parts of the year the climate is extremely demanding and parts of the area are ice-covered at times. Oil spill response will be significantly more demanding in these areas than in other, established areas on the Norwegian continental shelf.

The consideration for the ice edge, in combination with special challenges related to oil spill response in the area, was an important part of the advice from the Norwegian Environment Agency and the Norwegian Polar Institute against proceeding with a total of more than half of the awarded licences, see Section 6.5.2 above.

As stated under Section 5.2 above, this subject is also touched on in the Ice Edge Report, where it is stated that oil spills in these areas can end up being completely destructive for a number of species. As pointed out earlier, this can affect "seabirds and marine mammals" in addition to "plankton, ice algae and fish larvae in the water column and under the ice." (Ice Edge Report, page 32).

The consequences oil spills can have for Arctic cod is an illustrative example, which has been studied at the University of Tromsø. The research project defines Arctic cod as "an Arctic keystone species." In summary, the project's recently published (2016) research report concludes, *inter alia*, that:

"Our results imply that the viability and fitness of polar cod early life stages is significantly reduced when exposed to extremely low and environmentally realistic levels of aqueous hydrocarbons, which may have important implications for Arctic food web dynamics and ecosystem functioning." (p.1, "Abstract")

Exhibit 56: Nahrgang et al. 2016: Early life stages of an Arctic keystone species (*Boreogadus saida*) show high sensitivity to a water-soluble fraction of crude oil.

7 SOCIO-ECONOMIC CONSIDERATIONS

Legal and economic matters are integral parts of natural resource management. Even though most people will agree that the Licensing Decision has undesirable harmful effects on the environment, it is the socio-economic benefit from the production which results in the authorities nevertheless deciding that the production is desirable.

Assuming that the harmful effects on the environment of the Licensing Decision can be accepted in principle (provided that the benefit is great enough), the assessment of whether the decision *ought* to be taken (is proportionate) depends on whether the benefit from the

decision exceeds the harmful effects.¹⁵ It can therefore be very important to identify the socio-economic benefit the Licensing Decision leads to.

The benefit the Ministry of Petroleum and Energy is pursuing with the Licensing Decision is primarily

- 1) the revenue received by the Government of Norway from the production and
- 2) employment effects in a broad sense, see, among other things, section 3 of the Impact Assessment (see Exhibit 18 above).

As a result of the tax regime for petroleum production, the Government of Norway bears in reality the majority of the economic costs connected with exploration and investments, while at the same time the Government (through taxes and direct ownership shares) receives the majority of the revenues when these are eventually realised, beginning in 10–20 years and going forwards in time.

The Government consequently incurs major expenditures in the initial exploration phase. This only makes economic sense if it leads to sufficient actual production to at least cover the expenditures.

This means that if there is a risk that the exploration does not lead to petroleum production, the economic effect of the Licensing Decision could be negative (major exploration costs without revenue).

It is thus appropriate to assess *whether* there is a risk that the production licences will not lead to sufficiently profitable petroleum production, and in such case *how large* this risk is. This opens the way, therefore, for an assessment of whether an inadequate future return means that the benefit from the Licensing Decision (with the risk taken into consideration) compensates for the negative environmental impacts of the decision.

The Environmental Organisations will argue that there is a *risk* of the Licensing Decision not leading to revenues and that this risk is large.

There is nothing in the Impact Assessment which addresses the issue, and the question must therefore be assessed independently of the report.

The central reason there is a risk for the economics in the 23rd licencing round being very doubtful is that a number of factual circumstances, accounted for under Section 6 above, indicate that the world's need for emission reductions means that there is no "room" for these petroleum resources throughout the lifespan of the fields.

It is also symptomatic that several of the world's largest oil companies chose not to participate in the twenty-third concession round.

The Environmental Organisations reserve the right to elaborate upon the arguments on this point.

¹⁵ Hans Chr. Bugge "Lærebok i miljøforvaltningsrett", (Textbook on Environmental Administrative Law) 4th Edition, p.59 fig.

8 PARTICULARS REGARDING THE PROCEEDINGS BEFORE THE DECISION WAS TAKEN

8.1 In general

According to Section 3-1 of the Norwegian Petroleum Act:

“ (...) an evaluation shall be undertaken of the various interests involved in the relevant area. In this evaluation, an assessment shall be made of the impact of the petroleum activities on trade, industry and the environment and of possible risks of pollution, as well as the economic and social effects that may be a result of the petroleum activities.”

The provision is amplified by the Regulations to Act relating to petroleum activities, Section 17 of the Public Administration Act and Article 112 of the Constitution.

The serious environmental consequences the Licensing Decision can result in mean that particularly stringent requirements must be imposed on the proceedings.

As will be evident, a number of questions of critical importance for the environment and thus of critical importance for the assessment which needs to be carried out before the Licensing Decision is taken have not been discussed. These are important questions which might have affected the decision.

8.2 Inadequate assessment of the relationship to Norway's climate obligations

A key objection in connection with sending the programme for the Impact Assessment out for consultation was that the Impact Assessment did not arrange for any discussion of how the opening of the areas in question related to Norway's national GHG emission reductions targets and international obligations. The Ministry noted in response to this that "Regulation of emissions of CO₂ from the petroleum sector is an integrated part of applicable climate policy, see Report to the Storting 21 (2011-2012). (See Exhibit 18, "Impact Assessment", page 16). In accordance with this, the relationship to Norway's national targets and international climate obligations is not discussed in the Impact Assessment.

It is consequently the White Paper on Climate Change (Report No. 21 to the Storting (2011-2012) – see Exhibit 41 above) which represents the assessment work regarding the climate effect of the Licensing Decision.

The assessment work from *April 2012* represents the only consideration of the question of whether production licences issued in *BS and BSE in 2016* are consistent with the available knowledge about the planet's climate and the need for large emission reductions. This is in itself astounding.

The White Paper on Climate Change was written before the IPCC's fifth report in 2014 and before all United Nations countries signed the Paris Agreement in 2015. The Fifth Assessment Report and the Paris Agreement are absolutely critical grounds for assessing whether further petroleum production in line with the Licensing Decision can be carried out at the same time as Norway's obligation to combat global warming is being realised.

As shown in Section 6.4 above, there are a number of circumstances indicating that the production opened up by the Licensing Decision is not consistent with the contributions Norway is required to make to counteract global warming to a sufficient degree. It is consequently a clear procedural error that this question has not been discussed in particular.

8.3 Inadequate economic proportionality assessment

To the extent an environmentally harmful measure can be accepted in principle, the authorities, as mentioned (Section 7 above), must at least carry out an assessment of whether the measure's harmful environmental effects can be accepted on the basis of the benefit the measure has.

Even though the administration has conducted assessments related to the benefit, there is no evidence of any discussion of whether the benefit is sufficiently great to compensate for the environmental damage the production entails.

As shown under (Section 9.2.7), there is reason to question whether the Licensing Decision can be justified under such a proportionality assessment. The fact that no such assessment has been done at all is thus also a clear procedural error.

In connection with this, there is also reason to note that the economic review in the Impact Assessment (sub-report: "Revenues from petroleum activity at national level" (Exhibit 18)) looks at the revenue potential, based on an expected oil price that appeared utopian at the time the Licensing Decision was taken. The assessment uses a long-term oil price expectation of approximately USD 80–150 per barrel; in other words, a "worst-case" scenario with an oil price nearly twice as high as the actual price of oil at the time the decision was taken. Despite this, there is no discussion of whether this has any significance for the Licensing Decision.

8.4 Inadequate assessment of the relationship to particularly valuable and vulnerable areas

A report to the Storting regarding the management of the maritime area has been prepared for BS, described as a "Management Plan" (see Exhibit 47 above).

As mentioned under Section 6.5.2 above, some of the blocks included in the Licensing Decision directly overlap particularly valuable and vulnerable areas, and in consultation statements from both the Norwegian Polar Institute and the Norwegian Environment Agency, it has been pointed out that activity should not be started in these areas before further studies have been performed (see Section 6.5.2 above). The Norwegian Polar Institute emphasised in particular that some of the blocks "directly overlap identified particularly valuable and vulnerable areas" and that the possibilities for "such influence and effects from this must therefore be assessed before any activity is started which can affect the value of these in a negative manner".

The additional assessments called for by the Norwegian Polar Institute have not been carried out, to our knowledge, and we cannot see that the Impact Assessment or other available documents discuss the relationship to those particularly valuable and vulnerable areas affected and the impact the activity in association with these areas will have. This is a question of great environmental importance and inadequate assessment also represents a procedural error.

9 LEGAL ARGUMENTS

9.1 Introduction

The Environmental Organisations allege primarily that the Licensing Decision is substantively contrary to Article 112 of the Constitution: the decision has such a negative effect on the environment that Article 112 prohibits the decision. The decision is thus invalid.

Alternatively, it is alleged that the environmental impacts of the Licensing Decision have not been assessed to an adequate degree. Section 3-1 of the Petroleum Act, Section 17 of the Administrative Procedure Act and Article 112 of the Constitution require the rational basis for administrative decisions to be transparently reasonable. Several of the serious negative climate and environmental impacts from the Licensing Decision have not been assessed – or not to an adequate degree – in advance of the decision. If these circumstances had been adequately illuminated, the decision would not have been taken – in any event in the current form. Consequently, the decision is alternatively invalid on this basis.

In the following, we will first deal with the Environmental Organisations' principal argument that the Licensing Decision is substantively contrary to Article 112 of the Constitution. Then we will explain the Environmental Organisations' alternative argument that the basis for the decision has not been adequately informed.

9.2 The issue of invalidity

9.2.1 Article 112 of the Constitution as a limitation on administrative decisions

The plaintiffs allege that Article 112 of the Constitution grants the Court jurisdiction to assess whether the Licensing Decision – and the discretionary assessments that are the basis for the decision – can be accepted on the basis of environmental considerations.

Article 112 of the Constitution reads as follows:

“Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.

“In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

“The authorities of the state shall take measures for the implementation of these principles.”

Up until 2014, the Constitution contained a similar provision in Section 110 b, but in 2014 the provision was moved to Article 112 at the same time as it was placed in the Constitution's new Chapter E on human rights.

The constitutionally established environmental protection – at the time through Section 110 b of the Constitution – first appeared in the Constitution in 1992. The provision led to extensive

debate in jurisprudence, especially with regard to whether the provision must be considered a declaration of policy or granted individuals rights which could be enforced in the courts.¹⁶

The discussion was complex, but it seems to have reached consensus that the provision did not providing grounds for overruling legislation, while influential theorists asserted that Section 110 b of the Constitution already provided a basis for quashing administrative decisions¹⁷ – such as this case involves - but not all agreed with this.¹⁸

The discussion of whether Section 110 b of the Constitution provided a basis for judicial review, and the fact that the provision was not used as an independent legal basis by the courts, contributed to the provision being moved to Article 112 in 2014. The provision was also strengthened by the wording in the third paragraph being changed:

Section 110 b, paragraph 3 of the Constitution read as follows:

“The State Authorities issue further provisions for the implementation of these principles”

This wording was changed with Article 112 of the Constitution as follows:

“The State Authorities *shall* take measures for the implementation of these principles.”

It is clearly evident from the legislative history of Article 112 of the Constitution that the purpose of the change in wording was to clarify that the provision granted individuals concrete rights.¹⁹

Against this background, it now appears clear that Article 112 of the Constitution not only represents a limitation on ordinary administrative decisions, but that it also imposes obligations on the legislature. This means in part that legislation may also now be reviewed based on Article 112 of the Constitution.

When it is thus clear that Article 112 of the Constitution expanded the Court's jurisdiction compared to Section 110 b of the Constitution, there can be no doubt that Article 112 of the Constitution grants the Court jurisdiction to review administrative decisions based on Article 112 of the Constitution. As mentioned, this is presumably already a consequence of Section

¹⁶ See *inter alia* Inge Lorange Backer, *Domstolen og miljøet*, (The Courts and the Environment) LoR 1993 p. 451, Carl August Fleischer *Miljø- og ressursforvaltning. Grunnleggende forutsetninger*, (Environmental and resource management. Basic assumptions) 3rd Edition 1999, and Fauchald, *Forfatning og miljøvern – en analyse av Grunnlovens § 110 b*, (Constitution and Environmental Protection - analysis of the Constitution's Article 110 b) TfR 2007 p. 1.

¹⁷ See Hans Chr. Bugge, *Juss eller Politikk? Gasskraftsakens rettslige sider* (Law or Politics? The legal sides of the Gas-fired power case), FEST-2002-nn-471 (p. 485) and Carl August Fleischer, *Miljø- og ressursforvaltning. Grunnleggende forutsetninger* (Environmental and resource management. Basic assumptions), 3rd edition 1999 p. 58 and 59. See the legal department's opinion of 6 March 2000 in the gas-fired power case, Subsection 4.3.

¹⁸ See for instance Inge Lorange Backer, *Introduction to natural resource- and environmental law*, 5th edition 2012 p. 61.

¹⁹ See Document 16 (2011-2012), *Report to the Storting from the Presidency of the Human Rights Commission on Human Rights in the Constitution*, pp. 245-246 and recommendation 187 S (2013-2014) pp. 25-26

110 b of the Constitution and must in any event be a consequence of the recently strengthened environmental paragraph.

In keeping with this, Hans Chr. Bugge writes the following in *Lærebok i Miljøforvaltningsrett* (“Textbook on Environmental Administrative Law”):

“After the amendments to the provision's third paragraph and the statements of the Storting in connection with that, there is hardly any doubt remaining that Article 112 is an independent rights and obligations provision which, if necessary, can be enforced with the aid of the courts. It is primarily a 'limitation' on the state's exercise of authority, in that decisions may not be taken which mean that the rights in the first and second paragraphs are violated.”²⁰

In addition, he follows up by emphasising that Article 112 of the Constitution:

“is a legal 'limitation' by imposing requirements on the administration when deciding individual matters. The first paragraph means that environmental considerations in the short and long term are mandatory considerations when decisions are taken which may have environmental impacts and that they will be given the weight necessary for fulfilment of the rights in the weighing against other goals and considerations. This must be the case regardless of whether there is an express requirement for this in the wording of the act in question. The provision has this meaning throughout the legislation. (...)

“If the state authorities take decisions resulting in violation of the rights in the first or second paragraph, the courts can declare the decision invalid as unconstitutional. Examples of such decisions include granting a permit for a polluting activity which results in a health risk being imposed on people in the vicinity, or opening the way for a major encroachment on the natural environment which leads to a threatened species being eradicated or seriously impaired or increases the risk of this”.²¹

Accordingly, it may be safely concluded that Article 112 of the Constitution grants the Court jurisdiction to declare the Licensing Decision invalid because the decision infringes on the rights Article 112 of the Constitution is intended to protect.

9.2.2 What substantive protection does Article 112 of the Constitution provide?

The interests protected by Article 112 of the Constitution appear in the first paragraph of the provision:

“Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.”

²⁰ Hans Chr. Bugge "Lærebok i miljøforvaltningsrett", (Textbook on Environmental Administrative Law) 4th Edition, p.155

²¹ Hans Chr. Bugge "Lærebok i miljøforvaltningsrett", (Textbook on Environmental Administrative Law) 4th Edition, p.156

In other words, the provision is intended to protect the right of every person to a healthy and sustainable environment, where consideration for future generations also enjoys protection. There is accordingly no doubt that the Licensing Decision infringes on the core of the interests Article 112 of the Constitution protects.

At the same time, not every environmental encroachment is in conflict with Article 112 of the Constitution. The central question this case raises is therefore *when* does an environmental encroachment represent a violation of Article 112 of the Constitution.

Despite the fact that environmental protection was constitutionally established as early as 1992, to date there have been no legal cases where the courts have set aside a decision as invalid under Article 112 of the Constitution (or the previous Section 110 b). Nor are the actual limitations Article 112 sets discussed specifically in the preparatory works for the provision – neither the new one nor the earlier provision. Thus there is a limited amount of clear and specific guidelines for the application of Article 112 of the Constitution.

The presumption principle, which calls for Norwegian law to be interpreted in accordance with international law, makes international law rules and fundamental principles of international law a part of our national legal system. This means that the Climate Convention, the Paris Agreement and international human rights and environmental principles are relevant sources of law when the limitations in Article 112 of the Constitution are to be determined.

It must be clear that some environmental encroachments could never be accepted under Article 112 of the Constitution. For example, there can be little doubt that Article 112 of the Constitution functions as an absolute limitation against administrative decisions which impair the environment in such a way that it leads to serious harm to human health – in any case if the decision has only been justified on the basis of economic objectives.

In line with this, the Environmental Organisations will primarily argue that the combined climate and environmental impacts the Licensing Decision represents in total are so serious that it cannot be justified on the basis of economic considerations – Article 112 of the Constitution functions as an absolute limitation against the impacts the Licensing Decision leads to if the decision is only justified on an economic basis.

It is also clear that the Licensing Decision exclusively pursues economic objectives (in a broad sense), and consequently the decision violates Article 112 of the Constitution and is invalid. This will be explained in more detail under Section 9.2.5 below.

In addition to such absolute limitations, the constitutionality of an environmental encroachment depends on a proportionality assessment – the question is whether the advantages of the decision are sufficiently great to compensate for the environmental disadvantages of the decision. Article 112 of the Constitution grants the Court jurisdiction to review this proportionality assessment as well. Below under Section 9.2.7, the Environmental Organisations will state the reasons why the combined negative environmental impacts of the Licensing Decision cannot be accepted when compared to the economic gain the Licensing Decision entails.

Before we go into more detail on the specific bases for invalidity, we will recount briefly the national and international environmental principles that are controlling for the application of Article 112 of the Constitution.

9.2.3 The precautionary principle and consideration of burdens of proof

In the assessment of whether Article 112 of the Constitution has been infringed on, there is uncertainty for several matters with regard to the scope of the actual climate and environmental impacts the Licensing Decision involves. The same applies to assessments related to which economic benefits the decision will entail.

For such questions, the environmental "precautionary principle" has central importance. This principle has long traditions in Norwegian and international environmental law²² and must be regarded as embedded in Article 112 of the Constitution. The principle has two legal implications in particular in this case.

In traditional international environmental law, the principle is usually formulated as requiring the authorities not use a lack of knowledge as a justification for failing to limit or prevent a risk of serious or irreversible harm.²³

This means that if there is a real risk of serious or irreversible harm to the environment as a result of the Licensing Decision, the lack of sure knowledge cannot be used as a justification for not refraining from the measure. The combined possible environmental encroachments the decision leads to will come into play here. The degree of risk that is sufficient depends on how large the negative environmental impacts might be.

Secondly, the principle may be understood as a more general rule that reverses the burden of proof. The principle means that if, after an overall assessment of the evidence, there is a reasonable likelihood that the Licensing Decision will have a given negative environmental impact, it must be assumed that the decision will have this impact if the state cannot prove the opposite is more likely.

9.2.4 Transboundary environmental harm

Several of the negative environmental impacts of the Licensing Decision encroach entirely upon or partially affect the environment outside Norwegian territory. It is therefore necessary to understand clearly that Article 112 of the Constitution also sets limitations for decisions where the negative environmental impacts of the decision entirely or partially come to bear outside Norway.

This follows particularly from the principle of non-discrimination which is embedded in Article 112 of the Constitution and which is expressed in Section 2, no. 6 of the Pollution Control Act :

²² See for example Hans Chr. Bugge, Textbook of Environmental Law, 4th Ed. 2015, p.145 et seq..

²³ Bergen Declaration 1990; UNFCCC 1992; Convention on Biological Diversity 1992; Rio Declaration 1992; OSPAR Convention 1992; Maastricht Treaty 1992; Stockholm Convention on Persistent Organic Pollutants 2000; International Law Association Legal Principles Relating to Climate Change, Draft Article 7B 2014; Oslo Principles 2015.

“Pollution and waste problems resulting from activity in Norwegian territory shall be counteracted to the same extent irrespective of whether the damage or nuisance arises within or outside Norway.”

The Environmental Organisations will argue that the rule in Section 2, No. 6 of the Pollution Control Act is a reflection of the general non-discrimination principle and that this means that the environment enjoys just as great protection regardless of whether the environmental impacts arise in Norway or outside Norway.

Similarly, this rule can be supported by the “no harm principle”, which means that Norway is obligated to take all possible measures to reduce the risk of causing significant environmental harm in other countries. The principle is solidly embedded in international environmental law, see among other things the decision of the International Court of Justice in *Pulp Mills*²⁴, and the presumption principle calls for the principle to be relied on in Norwegian law as well through Article 112 of the Constitution.

As stated in *Pulp Mills*, only a possibility of *significant* harm is required and a risk of *very serious* or *irreversible* harm is not required.²⁵

The measures required depend on the degree of risk and how serious the impacts can be and must be assessed on the basis of the most recent scientific knowledge and methods. The principle thus imposes stringent requirements that Norway avoid environmental harm to other countries.

Consequently, environmentally harmful effects which affect countries other than Norway will have equally great importance for the assessment under Article 112 of the Constitution, as environmentally harmful effects that occurs in Norway.

9.2.5 Right to Climate Protection under Human Rights Law

Article 112 of the Constitution must also be interpreted in the light of Norway's human rights obligations. Climate change and the serious consequences actualize the fundamental human rights enshrined in the European Convention on Human Rights Article 2 (and Article 8) and the International Covenant on Economic Social and Cultural Rights ("ICESCR") Article 12.²⁶

²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I).

²⁵ *Pulp Mills*, para. 101.

²⁶ The United Nations Committee on the Rights of the Child has also recently emphasised that the UN Convention on the Rights of the Child, article 24 requires all member states to address climate change as one of the biggest threats to children's health, *See* UN Committee on the Rights of the Child, 17. april 2013 (U.N. Doc. CRC/C/GC/15), para. 50.

In relation to the above, the UN Human Rights Committee recently issued a statement (A/HRC/32/23 - 6 May 2016), concerning the relationship between ICESCR Article 12 and climate change, where it is clear that this provision imposes obligations to combat climate change. Among other things, it concludes as follows:

“Since climate change directly contributes to the violation of human rights, States have an affirmative obligation to take measures to mitigate climate change (...).”
(Paragraph 54)

9.2.6 Application of the law to the facts: Article 112 of the Constitution as an absolute limitation

The Environmental Organisations allege primarily that the environmentally harmful effects of the Licensing Decision are so serious that they can never be justified based on economic gain, see Article 112 of the Constitution. Because the Licensing Decision has only been justified by economic considerations (in a broad sense), the decision is invalid.

The Licensing Decision lays the groundwork for industrial activity which clearly will increase the warming of the planet's climate, especially through emission of CO₂ from the petroleum that is produced and through increased emission of BC in far northerly areas, where such emissions have a negative effect five times stronger than equivalent emissions other places. Even though other countries also produce petroleum, the Licensing Decision results in entirely new petroleum activity in what will be the world's northernmost oilfield. With that, the Licensing Decision lays the groundwork for use of petroleum far into the future, and as the first licences for areas close to the sea ice, it also lays the groundwork for accelerated melting of sea ice. A barrier is broken, and other Arctic states will have fewer second thoughts about doing the same.

The fact that the climate threat must be taken seriously, and that changes are urgently required to quickly reduce the climate threat can hardly be denied after the IPCC's report from 2014 – see Exhibit 25 – and after virtually all UN Member States signed the Paris Agreement in December 2015. Calculations of the carbon budget show that there probably will not be “space for” petroleum produced in the maritime areas in question. The Licensing Decision has been taken *despite* these facts.

The planet's natural resources, including its climate, are protected by Article 112, first paragraph of the Constitution. No territorial limitations apply here.

The Constitution contains an *absolute limit* on the risk the natural environment can be exposed to. The fact that a far warmer climate not only puts material values at risk, but also life and health in many places in the world, is well known. Article 112 of the Constitution provides protection against this. Article 112 of the Constitution grants Norwegian citizens a right to demand that the state do its absolute best to contribute to limiting the warming of the planet as much as possible, in order to protect the natural environment not only for those who are alive today, but also for their descendants. However, the Licensing Decision lays the groundwork for the opposite: a further warming of the climate far into the future. It is not

possible to compensate for this arrangement through measures in other places in the world or in Norway.

The Licensing Decision thus violates the absolute prohibition of climate and environmental harm entailed in Article 112 of the Constitution.

9.2.7 Application of the law to the facts: The decision represents a disproportionate encroachment

If the Court should conclude that Article 112 of the Constitution opens the way for the negative environmental impacts of the Licensing Decision to be justified based solely on economic considerations (in a broad sense), it is argued that the decision represents a disproportionate lack of consideration for environmental impacts when measured against the economic advantages of the Licensing Decision.

As regards the scope of the extensive environmentally harmful impacts the Licensing Decision leads to, see Sections 6.4 and 6.5 above. These are very serious. If, contrary to expectation, the climate and environmentally harmful effects *in principle* can be justified on the basis of other favourable effects, such positive effects must be extremely positive.

As shown under Section 7 above, the positive economic effect of the Licensing Decision is highly doubtful and the Government's (as well as the Norwegian people's) exposure is greater than for any other previous petroleum project on the Norwegian continental shelf. With regard to the negative climate and environmental impacts accounted for under Section 6 above, the harmful effects of the Licensing Decision are so serious that, when compared to the limited economic value of the decision, they represent a disproportionate environmental encroachment. Consequently, the decision is invalid, see Article 112 of the Norwegian Constitution.

9.3 Invalid as result of procedural error – inadequate assessment

In order to ensure effective protection of the environment, Article 112 of the Constitution imposes strict requirements for the proceedings and assessment work in advance of measures which may have negative environmental impacts. Such an assessment obligation is also a consequence generally for administrative decisions from Section 17 of the Administrative Procedure Act and for decisions on petroleum production from Section 3-1 of the Petroleum Act and Chapter 2a of the Petroleum Regulation.

Based on Article 112 of the Constitution, and the strong environmental protection this provision lays down, strict assessment requirements are imposed for decisions which may have serious environmental impacts. If possible negative environmental effects have not been assessed well enough, it will quickly lead to invalidity, see presumably Rt. 2009, page 661.

The Licensing Decision has as shown a number of negative environmental impacts which have only partially been assessed in advance of the Licensing Decision. Which matters are of central importance for the environment and the degree to which these have been dealt with appear in chapter 6 and 8 above. What is most significantly missing in the proceedings is as follows:

- There has been no discussion of whether the Licensing Decision is consistent with the world's and Norway's need to reduce emissions of greenhouse gases in order to reduce global warming and irreversible environmental harm.
- There has been no real discussion of the profitability of the Licensing Decision in light of the world's carbon budget and the significance this has for whether the benefit from the Licensing Decision justifies the environmental impacts.
- There has been no discussion of the harmful effect of the fact that the Licensing Decision affects the particularly valuable and vulnerable areas and the marginal ice zone and whether this harmful effect can be justified in such event.

As things look, the Licensing Decision affects the environment in a number of ways which create a real risk of extreme negative impacts for the environment. Despite this, these matters have only been discussed to a limited degree in the assessment work leading up to the decision. This is a clear procedural error. If these circumstances had been adequately illuminated, that decision would not have been taken. Consequently, the decision is alternatively invalid on this basis.

10 CLAIM

Subject to a reservation of rights for additional allegations and evidence, we submit the following

Claim:

1. The decision of The Government of Norway through the Ministry of Petroleum and Energy on awarding production licences in the twenty-third concession round, laid down in the Royal Decree of 10 June 2016, is invalid.
2. The Government of Norway through the Ministry of Petroleum and Energy is ordered to compensate Greenpeace Nordic and Nature and Youth for their legal costs at the District Court.

* * *

This writ of summons has been sent to the Court electronically by means of uploading into the "Actors' portal". It is also sent to The Government of Norway through the Ministry of Petroleum and Energy electronically and my mail. The attachments to this writ of summons is delivered to Oslo District Court by means of electronic storage medium, for direct upload into the Actors' portal.

Wahl-Larsen Advokatfirma AS

Advokatfirmaet Glittertind AS

Cathrine Hambro
Counsel

Emanuel Feinberg
Counsel