This is an office translation from Norwegian of the Government's written closing submission of 6 Nov 2017 in the case of Greenpeace and Nature and Youth against the Government of Norway.

# WRITTEN CLOSING SUBMISSION

# TO

# OSLO DISTRICT COURT

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| **Case no:** | 16-166674TVI/OTIR/06 |
| **Plaintiff 1:** | Greenpeace Nordic Association |
| **Plaintiff 2:** | Natur og Ungdom (Nature and Youth) |
| **Intervener:** | Besteforeldrenes klimaaksjon |
| **Counsel for the plaintiffs and the intervener:** | Advocate Cathrine Hambro<br>Advocate Emanuel Feinberg |
| **Defendant:** | The Government of Norway represented by the Ministry of Petroleum and Energy |
| **Counsel:** | Attorney General Fredrik Sejersted |
| **Co-counsel:** | Advocate Anders F. Wilhelmsen<br>Associate Ane Sydnes Egeland |

## Prayer for relief

1. The Court finds in favour of the Government of Norway, represented by the Ministry of Petroleum and Energy
2. Costs are awarded in favour of the Government of Norway, represented by the Ministry of Petroleum and Energy

**The factual and legal grounds upon which the prayer for relief is based**

The case concerns the validity of the decision made 10 June 2016 by the King in Council, awarding production licenses in the 23rd licensing round. The plaintiffs submit that the decision is invalid as it is in breach of Section 112 of the Constitution. In the writ of summons the plaintiffs argue that the environmental consequences of the decision are so severe that they constitute a breach of a substantive limit under Section 112. In the alternative, the plaintiffs argue that the decision rests on inadequate assessments of environmental impacts and economic prospects, in breach of the requirements under Section 112 of the Constitution and Section 17 of the Law on Administrative Procedures.

In the Government's opinion, the decision to award production licenses in the 23rd licensing round is valid. The decision has a clear legal foundation, and was made following extensive processes of scientific, administrative and political nature, carried out in accordance with the requirements under the Constitution as well as statutory law. Section 112 of the Constitution does not contain such a substantive threshold as invoked by the plaintiffs, and even if this were the case, the decision in question would not constitute a breach. The administrative procedure has complied with all requirements regarding assessments set forth in statutory law as well as established practice in this field, which elaborate the content of the principles enshrined in Section 112 of the Constitution.

The consideration of the present case rests predominantly on the interpretation of Section 112 of the Constitution. The plaintiffs argue in favour of a broad, politically motivated interpretation which lacks support in authoritative sources of law and which clearly goes far beyond the legislative intentions behind Section 112 of the Constitution. If the plaintiffs' far-reaching opinions on the interpretation of Section 112 are not shared by the Court, they no longer have a case. The legal relevance of most of the factual grounds invoked by the plaintiffs would be significantly reduced, and the Government takes the view that the impugned decision would have to be considered valid.

The Government's submissions before the Court will therefore concentrate on the interpretation of Section 112 of the Constitution, examining its particular wording, its object and purpose and the preparatory works, as well as other sources of law, including equity considerations and substantive arguments ("reelle hensyn"). Section 112 must be interpreted within the context of the general principles pertaining to interpretation of constitutional texts, separation of powers and constitutional review. The so-called "environment provision" has deliberately been formulated differently than provisions in the Constitution regarding individual rights and must be interpreted autonomously, having regard to the special character of Section 112 and the sources of law pertaining to it.

According to the third paragraph of Section 112 of the Constitution, the authorities of the Government have a duty to "take measures" to implement the "principles" declared in the first and second paragraphs. It is apparent from the wording of the provision, its context, the preparatory works as well as equity considerations and substantive arguments, that this duty to institute measures is the central legal content of Section 112. This moreover follows from the historical background and broader context of the adoption of the provision in 1992 and its amendment in 2014, when the third paragraph was revised to clarify the duty to implement measures and make it more operational. Section 112 has not been formulated to provide individual rights in the traditional sense. Instead, the first and second paragraphs express societal aims with regard to environment,

conservation of nature and management of natural resources. The *legal* content follows from the link between the first two paragraphs and the third paragraph, formulating a constitutional duty addressed to the authorities of the state – the parliament (Storting), the government and the public administration. As a matter of principle, this duty exists irrespective of whether corresponding rights are provided to private individuals and whether these may be enforced and reviewed by the courts.

Accordingly, the question before the Court in the present case is not whether the impugned decision is in breach of a (vague) substantive threshold set forth in the first paragraph of Section 112, but rather whether the authorities (the Storting and the government) have implemented relevant measures to the extent required by Section 112. This in turn raises questions as to the scope of the duty to institute measures, the nature of the actions required to comply with it, and the extent to which the courts may and should review the parliament's and government's compliance.

In this respect, the Government will demonstrate that Section 112 does not prohibit decisions authorizing activities that may have adverse effects on the environment or the climate, but rather require that relevant authorities institute measures to remedy adverse impacts. Relevant measures could be to ban or limit certain kinds of emissions, or compensate adverse environmental impacts through measures in *other* areas. Although this applies generally, it is particularly clear when Section 112 is invoked on the basis of concern over climate change. This is a field where potential adverse impacts caused by the authorization of activities in one sector typically are sought compensated through mitigating measures in other sectors.

Statutory laws and regulations constitute the most significant measures implemented by the Norwegian parliament and government in compliance with Section 112. Norwegian legislation encompasses acts specifically aimed at protecting the environment and climate (the Pollution Control Act, the Nature Diversity Act, the Climate Act etc.), as well as provisions regarding environmental concerns in legislation on other matters. In the legislation on petroleum, Section 112 has been operationalized through, *inter alia*, the provisions on environmental impact assessments in Sections 3-1 and 4-2, and through complementing provisions in regulations as well as established administrative practice. Section 112 may be of relevance when interpreting these provisions, but besides that, the legislation itself should be considered as observance of the duty to institute measures under Section 112. With regard to the case at hand, this implies that no new separate (unwritten) procedural requirements may be deduced from Section 112 beyond those incorporated in the petroleum legislation.

Norwegian authorities moreover fulfil their duties under Section 112 through actively pursuing environment and climate policies, as has been the tradition through many years of changing majorities of parliament and different governments, through the shaping of new policies, decisions and activities of public authorities. Which concrete measures are given priority, varies over time and depends on many factors of both scientific and political nature. Disagreements of both political and scientific nature often arise with regard to which measures are best suited to solve an environmental challenge. Other debates may concern economic feasibility. Not uncommonly, environmental and climate considerations must be balanced against other legitimate concerns and interests of society.

In this context the courts are, in principle, competent to review whether the authorities have instituted any measures in a specific area – especially in sectors where licenses are awarded to allow activities that could have adverse impacts on the environment or the climate. However, if the authorities have implemented measures, it is an open question whether Section 112 allows for further review by the courts with regard to the suitability and adequacy of the measures preferred by the parliament and/or government. In the Government's view, the relevant legal authorities are most naturally understood as implying that this aspect of Section 112 was not meant to be subject to review by the courts.

Should the judiciary consider itself competent to carry out such judicial review, the threshold must be considered very high and sufficient regard must be paid to both the legitimate need for administrative and political scope of action, as well as taking into account the multiple scientific and political considerations made – both by the competent administrative authorities, the Government, and not least by the elected majority in the parliament.

In that respect, the Government refers to the fact that there was broad support in the Norwegian parliament with regard to opening the Barents Sea South in 1989, and to open the Barents Sea South-East in 2013, and also with regard to the operations that have subsequently been carried out there. Although the decision to award licenses in the 23rd licensing round was formally made by the Government (the King in Council), the award has been voted over three times in the Norwegian parliament – in 2014, 2015 and 2016. During the last year, the parliament has voted on several proposals for changes in the relationship between the general policies regarding petroleum and the environment, including climate change. Currently a proposal to stop the ongoing 24th licensing round is being debated. All the facts and figures brought forward by the plaintiffs in the present case have been or are being discussed in the parliament as part of the democratic debate. In the Government's opinion, this is a strong argument against the interference by the judiciary sought by the plaintiffs through a review of the 2016 decision to award licences in the 23rd licensing round.

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If the Court concurs with the Government's interpretation of Section 112 of the Constitution, the examination of the facts of the case and their application to the law may be relatively brief. It should then be fairly clear that the decision to award licences in the 23rd licensing round is valid, as it neither materially nor procedurally violated the duty to implement measures under Section 112.

In the light of the plaintiffs' arguments, the Government will necessarily have to enter into a quite detailed discussion regarding some of the factual grounds called into question by the plaintiffs, even where these elements in the Government's view cannot be decisive for the validity of the impugned decision. The Government will for instance provide the District Court with a thorough presentation of the processes relevant to the award of production licenses on the Norwegian Continental Shelf – both in general and in relation to the present case in particular. This includes the opening of the Barents Sea South ("BS") in 1989 and of the Barents Sea South-East ("BSØ") in 2013 as well as the process leading to the decision to award licences in the 23rd licensing round in 2016. The Government aims to explain how the Norwegian continental shelf regime functions, with emphasis on the assessments and evaluations which are made at different stages of the process. Further, we will show how the petroleum regime is linked to Norway's policies with regard to the environment and climate change in general, including the management plan for the Barents Sea – and how this is reflected in the policies of the parliament and other relevant authorities.

As the case has been framed by the plaintiffs, the question is not whether Norwegian authorities fulfil their duty under Section 112 with regard to Norwegian petroleum policy in general, or in relation to the Barents Sea in particular. Some of the plaintiffs' arguments do indeed suggest that they seek a review of these broader issues. However, the lawsuit is formally and legally confined to the validity of the specific June 2016 decision to award licences in the 23rd licensing round, and thus limited to the ten production licenses and the forty blocks comprised therein. The lawsuit thus provides a framework within which not all factual and legal arguments will be of relevance.

In the writ of summons, the plaintiffs claim that the decision to award licences in the 23rd licensing round could have multiple impacts on the environmental and climate, which "in total" breach a substantive limit in Section 112. As explained in the Government's response, the plaintiffs mix together environmental issues of different character, both legally and factually. In the event that the Court assumes competence with regard to reviewing whether the authorities have instituted adequate and relevant measures, it will be of importance to distinguish between the following three categories:

(i) "Traditional" environmental consequences resulting from potential exploration, development and production of fields under the production licenses comprised by the 23rd licensing round, including issues related to spills and leakages, the ice edge, especially vulnerable areas etc.;

(ii) Norwegian (national) emissions of $CO_2$ and other greenhouse gases that may affect the climate as a result of potential future development and operation of fields comprised by the production licenses awarded in the 23rd licensing round;

(iii) Global emissions resulting from consumption in other countries of exported oil and gas produced under the impugned production licenses sometime in the future.

As to category (i) the Government submits that traditional environmental consequences have been analysed in depth and thoroughly considered in the processes that led to the disputed decision, both with regard to the Barents Sea in general and the Barents Sea South-East in particular, including the blocks announced in the 23rd licensing round. Both the competent scientific, administrative and political authorities have agreed that the risk of "traditional" environmental damage in the exploration and potential production phases in the Barents Sea is not of a nature that should hinder awards of licences. The risk will be handled within the framework of the Norwegian regulatory regime pertaining to health, safety and the environment. And if commercial discoveries were to be made within the blocks comprised by the 23rd licensing round, new impact assessments will be carried out according to the requirements in Section 4-2 of the Petroleum Act prior to the potential development and operation. The Government's objective is for Norway to be a global leader with regard to health, safety and the environment in the petroleum sector. Both the applicable regulation and the supervision regime have been developed through extensive and long-term experience with petroleum-related activities under harsh conditions.

Regarding category (ii), the Government observes that the issue of national emissions of greenhouse gases from petroleum production has been placed high on the agenda for many decades. This issue has been thoroughly analysed, considered and regulated. Today, emissions from petroleum activities are part of the EU quota system. In addition, the petroleum sector has been subject to a high $CO_2$-tax since 1991, along with other restrictions, resulting in lower emissions from the petroleum activities on the Norwegian Continental Shelf than what is the case for corresponding production in most other countries. As to the areas comprised by the 23rd licensing round it is, in any case, too early to say what amount of emissions may result from exploration and potential development and production. It will depend on the discoveries and the conditions established for potential future developments.

Regarding category (iii), the Government refers to the international cooperation with regard to climate change, including the treaties under the auspice of the UN, the latest being the Paris-accord in 2015. These international agreements are based on the fundamental principle that the legal and political responsibility for emissions rests with the state wherein the emissions (the consumption) occur, and not with the state producing products such as coal, oil or gas. The Norwegian regulatory regime also relies on this principle, both with regard to climate change issues and petroleum production issues. Consequently, the fact that the decision-making process did not take into account global emissions resulting from consumption elsewhere of petroleum produced in Norway, may not be construed as a procedural error. Norway as a nation has an extensive and ambitious policy on climate change, involving both broad international cooperation and national measures. However, the efforts to achieve the global climate change goals, including the objectives of the Paris Agreement, takes place within the framework of the international regime of which Norway forms part. There is no legal basis for arguing that Section 112 of the Constitution changes this, nor requires Norwegian authorities to unilaterally reduce emissions for which Norway has no responsibility under international law.

In this respect, the Government also refers to how Norway has fulfilled all its international climate obligations, and how Norwegian authorities are working to establish a policy to ensure that the Paris Agreement and other obligations are complied with in the years to come, *inter alia* through the new Climate Act adopted by the parliament (the Storting) in June 2017.

On this basis, the Government submits that Norwegian authorities have taken measures within all the three categories to attend to environmental and climate concerns, in line with their duty under Section 112 of the Constitution. Consequently, no constitutional duty has been breached in this case – and in any case no breach that could affect the validity of the decision to award the 23rd licensing round.

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As regards the claim by the plaintiffs that an error has been made in the administrative procedure leading up to the impugned decision, the Government observes that all the requirements of the Petroleum Act with regulations, as well as those of the Law on Administrative Procedures, have been complied with. Moreover, there are no grounds for claiming that Section 112 includes unwritten, additional requirements. The Government refers to the system established under the Petroleum Act Sections 3-1 and 4-2, and more concretely to the impact assessments that were carried out before the opening of the Barents Sea South in 1989 as well as in subsequent rounds in these areas, and thereafter before the opening of the Barents Sea South-East in 2013. Further, reference will be made to other relevant assessments and considerations undertaken with regard to the relevant areas, including in connection with the management plans for the Barents Sea. The management plan also includes requirements with regard to tackling environmental challenges. And in the event that fields comprised by the 23rd licensing round should be developed some time in the future, new impact assessments will be carried out under Section 4-2 of the Petroleum Act.

In their subsequent written submissions, the plaintiffs have emphasised questions regarding *economy*, both as a substantive argument – that production in the Barents Sea is unprofitable from a societal point of view – and as an argument of procedural character, namely that the economic analyses carried out before the opening of the Barents Sea South-East were incorrect. The Government disagrees. Regarding the substantive argument, the Government, *inter alia*, submits that based on a correct interpretation of Section 112, this criterion lacks legal relevance. Regarding the procedural issue the Government refers, *inter alia*, to the fact that the numbers presented to the

parliament (the Storting) as part of the decision to open the Barents Sea South-East were correct, and that the assumptions were in any case subject to reservations. Further, the Government observes that the plaintiffs' arguments in reality address the broader debate on the economic aspects of Norwegian petroleum policy. This is an issue which is continuously being debated on the political arena, but which lacks legal relevance with regard to the judgment sought in the present case, and which is not suited for judicial review.

Shortly before the main hearing three submissions have been received in accordance with Section 15-8 of the Dispute Act (so-called *amicus curiae*) from The European Law Alliance Worldwide (ELAW), The Allard K. Lowenstein International Human Rights Clinic Yale Law School, and the Center for International Environmental Law (CIEL), which partly discuss issues that have not been previously brought up within the framework of the present lawsuit. This both applies to the extensive comparative material that has been submitted, and the relatively detailed arguments in favour of stating that the decision to award the 23rd licensing round is not only in breach of Section 112 of the Constitution, but also in breach of international human rights, including both UN treaties and the European Convention on Human Rights, *inter alia*, Article 2 on the right to life and Article 8 on the right to protection of privacy and family life.

It is the Government's view that these newly presented arguments cannot succeed. The sparse case law from the European Court of Human Rights regarding the application of Article 8 on environmental matters concern cases of a different character than the case at hand and, moreover, that the threshold for finding a violation of Article 8 is very high in such matters, where a very wide margin of appreciation is awarded the signatories to the convention. To the best knowledge of the Government, there are no decisions yet by the European Court of Human Rights wherein it is stated that greenhouse gas emission may constitute a violation of the Convention. As regards the further comparative material provided, it has no bearing on the interpretation of the Norwegian Constitution. It moreover illustrates that the main trend internationally is that the sparse attempts to turn climate change policy into a legal matter under judicial review have not been successful.

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Finally, the Government observes that although the lawsuit formally concerns the validity of the June 2016 decision to award licences in the 23rd licensing round, it is apparent from the plaintiffs' arguments before the Court and in the media that the lawsuit has been brought as a test case. The plaintiffs seek a general assessment of the limits of Section 112 of the Constitution, while at the same time to draw attention to the broader relationship between Norwegian petroleum policy and Norway's policy with regard to the environment and climate change. This is apparent from their presentation of both the facts and the law.

With regard to the facts, some of the plaintiffs' arguments are related to the 23rd licensing round. However, other facts are related to production of petroleum in the Barents Sea in general, and yet other facts relate to any and all decisions that could potentially entail emissions of greenhouse gases through activities on the Continental Shelf or on the mainland. The plaintiffs' principal argument would potentially concern any new decision to award licenses for petroleum activities on the Norwegian Continental Shelf, and could potentially also affect any other new decision or measure that could lead to climate gas emissions, whether within the commercial sector, the transport sector, the agricultural sector and other sectors.

As regards the law, the plaintiffs invoke a politically charged, expansive interpretation of Section 112 of the Constitution that lacks foundation in relevant sources of law, including the wording of the provision, the preparatory works as well as significant considerations on equity and important substantive arguments. With this lawsuit, the plaintiffs are seeking a transfer of power from the

political arena of democratically elected officials to the courts, with regard to issues of vital societal importance, on the basis of a brief constitutional provision of general character which was not designed to that end. Concurring with such an interpretation of the Constitution would neither be a correct application of the law nor in line with the principles of democracy and separation of powers.

**Evidence**

The documents that have been submitted during the preparatory stages will be produced as evidence during the hearing to the extent to which they directly or indirectly shed light on questions of relevance with regard to the validity of the impugned decision.

As the case in the Government's view mainly concerns the interpretation of the Constitution, and as the relevant facts of the case may be fully discussed on the basis of the documents submitted, the Government does not consider it necessary to call witnesses.

Oslo, 6 November 2017
**THE ATTORNEY GENERAL – CIVIL AFFAIRS**

Anders F. Wilhelmsen, advocate
on behalf of
Fredrik Sejersted, Attorney General