



**Ministry of Food, Agriculture and Fisheries**  
The Danish AgriFish Agency

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**Annulment of the Danish river basin management plans and consequences for the implementation of the compensation scheme to mandatory buffer zones**

On 6 December 2012 the Environmental Board of Appeal (*Natur- og Miljøklagenævnet*) annulled the Ministry for the Environment's decision of 22 December 2011 to adopt 23 Danish river basin management plans.

The annulment was based solely on the ground that the period of time fixed for a supplementary hearing (8 days) was too short and thus contrary to Section 30 of the Environmental Aims Act.

As a consequence, the Ministry will now carry out a supplementary hearing in accordance with the Environmental Aims Act, and, subsequently, adopt a new decision concerning new river basin management plans. This decision is expected in the first half of 2013.

Presently, several Danish authorities are involved in a thorough and complex examination of the potential legal consequences of the annulment.

In this note, the AgriFish Agency describes a particularly urgent problem relating to the continued application of the compensation scheme approved by the Commission concerning the establishment of buffer zones.

Based on the description below, the Agency hopes that the Commission will acknowledge the urgency of the matter, and that the Commission will therefore be willing to enter into a swift and constructive dialogue with a view to finding a practical solution in line with the aims and principles of both the Water Framework Directive and the Rural Development Programme for Denmark.

### **1. The buffer zones Act and the Compensation Scheme**

A key concern for the AgriFish Agency is whether the annulment of the river basin management plans will adversely affect the effective and timely establishment of buffer zones provided for in the Act on Buffer Zones (Act no 591 of 14 June 2011 as amended by Act No 563 of 18 June 2012).

In essence, the Act provides for the establishment of up to 10 meters of mandatory cultivation-, spraying- and fertilizer-free buffer zones along all open streams and ponds with a surface area of more than 100 m<sup>2</sup>. The Buffer Zone Act is an important part of the implementation of Article 11(4) of the Water Framework Directive.

The Act entered into force on 1 September 2012.

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The Environmental Board of Appeal's annulment of the decision to adopt the Danish river basin management plans does not affect the validity of the Act.<sup>1</sup>

However, for the Parliament, the introduction of the buffer zones was explicitly subject to the establishment of an appropriate compensation scheme for the affected farmers pursuant to Council Regulation 1698/2005. Accordingly, and in accordance with Articles 36(a)(iii) and 38 of Regulation No 1698/2005, the AgriFish Agency has applied for, and the Commission has approved, such a compensation scheme.

Under the approved scheme, farmers are to apply for compensation from February 2013, and payments are expected to fall due by the end of 2013. The approved measure provides for farmers to be eligible for compensation from the entering into force of the Act, i.e. from 1 September 2012.

### 2. The Problem and Three possible solutions

Due to the wording of some of the provisions in Council Regulation 1698/2005 and Commission Regulation 1974/2006, the Agency is uncertain about the extent to which the compensation scheme is linked to the existence of valid river basin management plans.

As a consequence, the AgriFish Agency is uncertain about whether the annulment of the river basin management plans might be considered to preclude the applicability of the compensation scheme, and, if so, how best to solve this problem without delaying the establishment of buffer zones.

Obviously, the effective and timely implementation of the buffer zones could be seriously undermined if the compensation scheme cannot be fully applied with effect from the entering into force of the Act, i.e. from 1 September 2012.

Generally, the Agency takes the view that in the specific situation, a practical solution must be found, which best reconciles and furthers the aims and content of, on the one hand, the Water Framework Directive, and, on the other hand, Regulation 1698/2005.

In this light, the Agency has developed three possible solutions, which can be summarised thus:

**First Solution:** The invalidity of the river basin management plans does not affect the validity and proper application of the compensation scheme relating to buffer zones.

**Second Solution:** The invalidity of the river basin management plans entails that the compensation scheme is (temporarily) no longer in compliance with Regulations 1698/2005 and 1974/2006. The adoption of new river basin management plans will "repair" this and restore the compensation scheme. It will be possible to apply for compensation throughout 2013, but payments will not be made before the new plans are in place.

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<sup>1</sup> The annulment of the river basin management plans has some derived effects on the scope of the obligation under national law to establish Buffer Zones. However, the geographical areas eligible for compensation under the scheme will not be extended.

**Third Solution:** The invalidity of the river basin management plans entails that the compensation scheme is no longer approved by the Commission. The Agency notifies and the Commission (re)approves the compensation scheme once new plans have been adopted. It will be possible to apply for compensation under the scheme throughout 2013, but payments will not be made before the new plans are in place.

### 2.1 First Solution

The first solution requires an interpretation of Regulations 1698/2005 and 1974/2006, which entails that the (temporary) invalidity of the river basin management plans does not have any consequences for the validity of the compensation scheme relating to the buffer zones.

This solution by which the validity of the river basin management plans is wholly detached from the application of the compensation scheme is obviously the simplest and preferred option, since it would cause the least damaging effects to the establishment of the buffer zones and the least uncertainty for the farmers.

This solution would also be in line with the aim and context of Article 38 of Regulation 1698/2005 and the Water Framework Directive, since it would create the best conditions for the continued establishment of buffer zones, which is an important part of the implementation of the Water Framework Directive. Moreover, in the Agency's view, there is no legal or factual interdependence between the river basin management plans and the buffer zones, and thus there is no reason to link the buffer zone compensation scheme to the existence of river basin management plans.

However, admittedly, some provisions in the relevant regulations could be read to the effect that the existence of river basin management plans is a precondition for the setting up of a compensation scheme pursuant to Article 38 of Regulation 1698/2005:

For example, Article 50(1) and (5) of Council Regulation 1698/2005 reads as follows:

*" 1. Member States shall designate the areas eligible for payments provided for in Article 36(a)(i), (ii) and (iii) as well as in Article 36(b)(i), (iii), (iv) and (vi), taking into account paragraphs 2 to 5 of this Article.*

...

*5. Natura 2000 agricultural areas designated pursuant to Directives 79/409/EEC and 92/43/EEC and agricultural areas included in river basin management plans according to Directive 2000/60/EC shall be eligible for payments provided for in Article 36(a)(iii)."*

Moreover, Articles 26a(2) and 34(1) of Commission Regulation 1974/2006 provide:

*"Article 26 a*

...

*2. Support pursuant to Article 38(1) of Regulation (EC) No 1698/2005 linked to Directive 2000/60/EC shall be provided only with regard to the cost incurred and the income foregone that result from disadvantages related to specific requirements that:*

- (a) were introduced by Directive 2000/60/EC, are in accordance with the programmes of measures of the river basin management plans for the purpose of achieving the environmental ob-*

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*jectives of that Directive and go beyond the measures required to implement other Union legislation for the protection of water;*

...

### *Article 34*

*1. Agricultural areas referred to in Article 50(5) of Regulation (EC) No 1698/2005, which are included in river basin management plans in accordance with Directive 2000/60/EC, shall be eligible for payments pursuant to Article 38 of Regulation (EC) No 1698/2005, if a relevant river basin management plan is established and implemented in those areas."*

If the Commission, on this basis, does not consider it possible to interpret the Commission's approval of the compensation scheme to the effect that it is unrelated to the validity of the river basin management plans, the Agency proposes the following Second Solution:

### **2.2 Second Solution**

If the invalidity of the river basin management plans entails that the compensation scheme is no longer in compliance with Regulations 1698/2005 and 1974/2006, the Agency takes the view that the adoption of new river basin management plans will "repair" this and restore the compensation scheme without the need for a new Commission approval of the scheme.

New river basin management plans will be adopted as soon as a proper supplementary hearing has been carried out. When these new plans are adopted, they will cover the period of 2010-2015. Thus, like the annulled plans adopted in December 2011, the new river basin management plans will cover the whole period in which the obligation to establish buffer zones (i.e. from 1 September 2012) has applied.

Accordingly, the approved compensation scheme will be fully functional and can be applied with effect from 1 September 2012 once the new river basin management plans are adopted.

Under this solution, farmers can apply for compensation throughout 2013, but no payments can be made before new valid plans are adopted.

In essence, the Second Solution entails that, even if the requirement of river basin management plans has not been complied with during the period in which the plans were invalid, the adoption of new river basin management plans would repair this temporary shortcoming without the need for a new Commission approval.

In particular, the scheme will comply with Article 50(5) of Council Regulation 1698/2005 and Articles 26a(2) and 34(1) of Commission Regulation 1974/2006 according to which the existence of valid river basin management plans appear to be a precondition for a compensation scheme based on Article 38 of Regulation 1698/2005.

It should be emphasised that the Agency has thoroughly considered whether, as a matter of principle, this Second Solution might give rise to concern because one of the conditions relating to the compensation scheme is complied with retroactively.

However, in the Agency's view, the regulations do not, as a matter of principle, preclude such a solution.

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Moreover, the Agency believes that a number of specific circumstances support the conclusion that, in this particular case, the requirement of existing river basin management plans can be complied with retroactively once the new plans have been adopted:

First, generally, the Second Solution would be in line with both the Rural Development Programme and the Water Framework Directive, since it would allow for the continued implementation of this part of the Water Framework Directive without compromising compliance with the eligibility criteria under the Rural Development Programme.

Second, the Buffer Zone Act remains valid irrespective of the validity of the river basin management plans, and the compensation scheme aims to facilitate the implementation of a part of Denmark's obligations pursuant to the Water Management Directive.

Third, the Commission has already approved the compensation scheme with reference to Article 38 of Regulation 1698/2005, and the substantive conditions for this approval would not be affected.

Fourth, the obligation to establish buffer zones and the compensation scheme are inextricably linked, and the establishment of buffer zones is, in turn, inextricably linked to the implementation of the Water Framework Directive.

Fifth, the grounds for annulment of the river basin management plans do not concern the content of the plans. It was due to a formal requirement in national law concerning the deadline for the supplementary hearing.

Sixth, undoubtedly new plans will be adopted, probably in the first half of 2013.

Seventh, the circle of beneficiaries under the compensation scheme will remain the same, regardless of the content of the new river basin management plans. Thus, overall, there is no possibility for the beneficiaries - or the Danish authorities - to abuse the compensation scheme through the enactment of measures (new plans) with retroactive effects.

Eighth, the Second Solution would also be in line with the rationale behind the Court's recent decision of 11 September 2012 in the case *C-43/10, Nomarchiaki Aftodioikisi Aitoloakarnanias and Other* (sixth question).

For these specific reasons, the AgriFish Agency takes the view that Regulations 1698/2005 and 1974/2006 do not prevent the continued implementation of the compensation scheme concerning buffer zones, as long as payments are not made before new river basin management plans are adopted.

Obviously, the Second Solution would cause some uncertainty among the affected farmers, because payment of compensation would depend on a future event over which they have no control, i.e. the Danish authorities' adoption of new river basin management plans.

If the Commission considers this Second Solution to be contrary to Regulations 1698/2005 and 1974/2006 and to the approval of the scheme, the Agency believes that, at the very least, the Third Solution must be acceptable:

### 2.3 Third Solution

The Third Solution assumes that the invalidity of the river basin management plans entails that the compensation scheme is no longer approved by the Commission, since a condition for the Commission's approval is the existence of the (now invalid) river basin management plans adopted in December 2011.

This solution requires that, once new river basin management plans have been adopted, the Agency will notify a modification to the approved compensation scheme in accordance with Article 6(1)(c) and 9 of Regulation 1974/2006.

On the basis of this notification, the Commission will (re)approve the original compensation scheme, including its application with effect from 1 September 2012. Thus, farmers will be able to apply for compensation under the scheme throughout 2013, but payments will not be made before the new plans are in place. This solution would ensure that the Commission has duly examined whether all eligibility criteria are complied with before the scheme is finally approved. Thus, as a matter of principle, this approach would clearly be in line with Regulations 1698/2005 and 1974/2006.

For the reasons provided above under the Second Solution, the Agency believes that in this specific situation, the Commission could approve the compensation scheme with effect from 1 September 2012, so that all farmers having incurred extra costs or foregone revenues as a result of the establishment of buffer zones since that date would be able to apply for compensation.

In the Agency's view, such an approach would be cumbersome and entail an even greater degree of uncertainty for the farmers, since compensation would depend on both the adoption of new river basin management plans and on the Commission's new approval.

If this third solution is, nevertheless, the preferred option by the Commission, the Agency would request from the Commission, already at this stage, a statement that, as a matter of principle, the Commission would be willing to approve a notification from the Agency, which entails applying the compensation scheme from 1 September 2012 once the new river basin management plans have been adopted.

A timely and effective implementation of the compensation scheme related to the establishment of buffer zones is a key concern for Danish farmers and the national authorities. Due to the urgency of the matter, We therefore hope that the Commission will be willing to enter into a swift and constructive dialogue based on the suggested solutions presented in this letter, and that arrangements be made without delay for a meeting to take place in the near future between the Commission and our Agency on this subject.

Best regards,



Steen Bonde  
Head of Unit