

Merete Jeppesen (NaturErhvervstyrelsen)

Fra: Pernille Eva Agerskov (NaturErhvervstyrelsen)
Sendt: 7. marts 2013 16:36
Til: Kim Holm Boesen (DEP)
Cc: Lars Kolze (NaturErhvervstyrelsen); Per Faurholt Ahle (NaturErhvervstyrelsen); Steen Bonde (NaturErhvervstyrelsen); Sarah Børner (NaturErhvervstyrelsen); Morten Ejrnæs (DEP)
Emne: Materiale vedr. EU-Kommissionens svar angående randzonekompensation
Vedhæftede filer: Randzonekompensation EU Kommissionens svar.doc; Minister orientering af FLF marts 13.doc; EU giver grønt lys for randzonekompensation, endelig.docx; letter to Mr Pedro Tarno_reg compensation scheme to mandatory buffer zon....pdf; RDIS+Doc+-+Annulment+of+the+Danish+river+basin+management[1].pdf; Udtalelse af 7. marts 2013 (7250850_1).pdf

Kære Kim

Hermed materiale vedrørende EU-Kommissionens svar af 26. februar 2013 om accept af udbetaling af randzonekompensation via Landdistriktsprogrammet.

Materialet indeholder;

- Orienterende notat til Fødevarerministeren af 7. marts 2013
- Ministerens orientering af Fødevarerudvalget
- Pressemeddelelse om Kommissionens svar
- Kammeradvokatens udtalelse af 7. marts 2013
- NaturErhvervstyrelsens orientering af 15. januar 2013, om Natur og Miljøklagenævnets afgørelse
- EU Kommissionens svar af 26. februar 2013, på NaturErhvervstyrelsens henvendelse

Det bemærkes, at det ikke har været muligt at indhente bekræftelse fra Miljøministeriet på, at der inden årets udgang vil være nye gyldige vandplaner. Dette er dog forudsat i det vedhæftede materiale, hvorfor departementet anmodes om at dette cleares.

Med venlig hilsen

Pernille Agerskov
Fuldmægtig, Cand.Jur

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Fra: Morten Ejrnæs (DEP)
Sendt: 7. marts 2013 10:16
Til: Majken Lenskjold (NaturErhvervstyrelsen); Karin Møller-Olsen (DEP); Kim Holm Boesen (DEP); Per Faurholt Ahle (NaturErhvervstyrelsen); Steen Bonde (NaturErhvervstyrelsen)
Emne: SV: PM om svar fra Kommissionen

Kære alle

Vi skal have lavet en samlet forelæggelse til ministerbilen i dag med styrelsens notat, kommunikation/PM og oversendelsesbrev til udvalget. Det fremgår af styrelsens notat, at vi først har det endelige svar fra KA i morgen.

Vi skal have et citat fra MIM ind om at der selvfølgelig er vandplaner i år.

Kim er først på sin pind kl. ved frokosttid.

Per/Steen, laver I udkast til en sådan pakke?

Hilsen Morten

Fra: Majken Lenskjold (NaturErhvervstyrelsen)

Sendt: 7. marts 2013 09:14

Til: Karin Møller-Olsen (DEP)

Cc: Morten Ejrnæs (DEP); Jette Petersen (DEP); Jens Fuglsang Edelholt (NaturErhvervstyrelsen); Birgitte Lyhne Broksø (NaturErhvervstyrelsen)

Emne: PM om svar fra Kommissionen

Kære Karin

Vi har fået svar fra EU-Kommissionen om randzonekompensation, og den svarer positivt, at vi kan udbetale kompensation med tilbagevirkende kraft. Det er vi i gang med at skrive en pressemeddelelse om, som du får i eftermiddag.

Her vil vi også fortælle, at det omstridte forbehold i Tast selv-systemet nu bliver fjernet.

Vi snakkes ved

Vh

Majken

Med venlig hilsen

Majken Lenskjold

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NaturErhvervstyrelsen
Center for Arealtilskud, Bæredygtighed
Den 7. marts 2013
SBO

Orienterende notat til Fødevareministeren om EU-Kommissionens svar vedrørende muligheden for at yde randzonekompensation fra 1. september 2012

Kort resumé af EU-Kommissionens svar.

EU-kommissionen har i sidste uge svaret på NaturErhvervstyrelsens brev af 15. januar 2013 vedrørende muligheden for at yde randzonekompensation fra 1. september 2012 i lyset af Natur- og Miljøankenævnets annullering af de statslige vandplaner før jul. NaturErhvervstyrelsen er på baggrund af et møde d.d. med Kammeradvokaten af den opfattelse, at Kommissionen med sit brev har tiltrådt, at det vil være muligt, at anvende kompensationsordningen fra den 1. september 2012. Landbrugerne vil således som planlagt, kunne søge kompensation i løbet af 2013, men vil som forventet ikke kunne få udbetalt tilskud, før nye gyldige vandplaner er vedtaget.

NaturErhvervstyrelsen har anmodet Kammeradvokaten om, at få underbygget fortolkningen af EU-kommissionens brev i form af en skriftlig udtalelse, herunder en vurdering af de betingelser, som Kommissionen opstiller i sit brev. Kammeradvokaten har i udtalelse af 7. marts 2013 vurderet, at EU Kommissionen i sit svar har bekræftet, at der kan ydes randzonekompensation fra den 1. september 2012, og at kompensationen kan udbetales når der foreligge gyldige vandplaner.

Udbetaling af randzonekompensation i forbindelse med udbetaling af støtte efter Enkeltpetalingsordningen forudsætter således, at Miljøministeriet har fået vedtaget gyldige vandplaner inden december 2013.

Baggrund og problem.

I NaturErhvervstyrelsens brev af 15. januar 2013 til Kommissionen vedrørende konsekvenserne i forhold til randzonekompensationsordningen af annulleringen af de statslige vandplaner præsenterer NaturErhvervstyrelsen Kommissionen for den udfordring, som annulleringerne medfører for randzone-kompensationsordningen.

NAER oplyser i brevet, at styrelsen er usikker på, om annulleringen af vandplanerne kan anses for at udelukke anvendelsen af randzonekompensationsordningen, og hvis det er tilfældet, hvordan man så bedst løser dette problem uden at undergrave implementeringen af randzonerne.

NAER oplyser endvidere i brevet, at nye vandplaner uden tvivl vil blive vedtaget, formentlig i den første halvdel af 2013.

NAER opstiller endelig på baggrund af oplæg fra Kammeradvokaten 3 mulige løsninger på den beskrevne udfordring.

De tre scenarier, som NAER forelagde EU-Kommissionen er følgende:

Scenarie 1: Ugyldigheden af vandplanerne påvirker ikke gyldigheden og korrekt gennemførelse af kompensationsordningen vedrørende randzoner.

Scenarie 2: Ugyldigheden af vandplanerne indebærer, at kompensationsordningen (midlertidigt) ikke er i overensstemmelse med landdistriktsforordningerne. Vedtagelsen af nye vandplaner vil "reparere" og rette op på dette og gøre det muligt at anvende kompensationsordningen fra den 1. september 2012, når de ny vandplaner er vedtaget. Det vil være muligt at søge kompensation for hele perioden fra 1. september 2012. Landbrugerne vil kunne søge kompensation i løbet af 2013 men vil ikke kunne få udbetalt tilskud før nye gyldige vandplaner er vedtaget.

Scenarie 3: Ugyldigheden af vandplanerne indebærer, at kompensationsordningen ikke længere er godkendt af EU-Kommissionen. NAER skal fremsende ny notifikation til EU-Kommissionen, der på ny godkender kompensationsordningen, når vandplanerne er blevet vedtaget. EU-Kommissionen kan godkende kompensationsordningen med virkning fra 1. september 2012. Landbrugerne vil kunne søge kompensation i løbet af 2013 men vil ikke kunne få udbetalt tilskud, før de nye vandplaner er vedtaget.

EU-Kommissionens svar

EU-kommissionen, DG Agri, har i brev modtaget den 26. februar 2013 taget stilling hertil. Kommissionen afviser **scenarie 1** og oplyser vedrørende **scenarie 3**, at det generelt er muligt at ændre landdistriktsprogrammet for den resterende del af en programperiode principielt uden tilbagevirkende kraft. Sådanne ændringer af programmet vil efter fremsendelse blive vurderet af Kommissionens tjenestegrene på baggrund af den fremsendte ændring. Kommissionens vurdering af en sådan ændring kan ikke foregribes af Kommissionens svar på NaturErhvervstyrelsens brev.

Om scenarie 2 oplyser NAER i sit brev til Kommissionen, at denne løsning indebærer, at selvom kravet om vandplaner ikke har været opfyldt i den periode, hvor vandplanerne var ugyldige, kan vedtagelsen af nye vandplaner "reparere" denne midlertidige mangel, uden at det skaber behov for en ny godkendelse fra Kommissionen. NAER oplyser endvidere, at styrelsen omhyggeligt har overvejet, hvorvidt scenarie 2 ud fra et principielt synspunkt, ville indebære problemer fordi et af kravene, knyttet til kompensationsordningen, vil blive opfyldt med tilbagevirkende kraft. NAER oplyser dog, at styrelsen har vurderet, at forordningerne ikke principielt udelukker en sådan løsning. Styrelsen fremfører herefter 8 forskellige argumenter for, at kravet om eksisterende vandplaner kan opfyldes med tilbagevirkende kraft i dette særlige tilfælde.

Kommissionen resumerer i sit svar den danske forklaring af dette scenarie således, at kompensationsordningen midlertidigt ikke er i overensstemmelse med landdistriktsforordningerne, men at denne situation kan "repareres", ved vedtagelse af nye vandplaner. Kompensationsordningen kan anvendes for hele perioden fra september 2012. Ingen betalinger vil finde sted, før vandplanerne er på plads.

EU-Kommissionen oplyser, at scenarie 2 synes at være en mulig løsning på problemstillingen, hvis følgende betingelser er opfyldt:

1. At vandplanerne kan vedtages med tilbagevirkende kraft som beskrevet i NaturErhvervsstyrelsens brev.
2. At det sikres, at betingelserne for foranstaltningen (kompensationsordningen)¹ fastsat i de annullerede vandplaner, vil fortsætte i de nye vandplaner.
3. At de restriktioner, der fra september 2012 kompenseres for i kompensationsordningen, stemmer overens med, hvad der fremgår om randzonerne i både de annullerede og de nye vandplaner, og at der ikke har været afbrud i implementeringen af disse restriktioner.
4. At de kontroller, der er krævet i henhold til kontrolforordningen (KFO 65/2011) bliver gennemført i overensstemmelse med reglerne for hele perioden fra 1. september 2012.

EU-Kommissionen fastslår dog, at under delt forvaltning, er det medlemsstatens ansvar at tage alle nødvendige forholdsregler for at sikre, at støtte tildeles korrekt og at forebygge og håndtere uregelmæssigheder. EU-Kommissionen påpeger endvidere, at svaret er givet på basis af de oplysninger, som fremgår af NaturErhvervsstyrelsens brev, og at det i sidste ende er EU-domstolen, der autoritativt kan fortolke gældende EU-lovgivning. Det fremgår af NaturErhvervsstyrelsens brev til EU-Kommissionen, at de nye vandplaner vil dække perioden 2010-2015, og at de nye vandplaner således vil dække hele perioden i hvilken forpligtelsen til at etablere randzoner har eksisteret.

Formulering i ansøgningsmaterialet

I fællesskemaet for 2013 er efter anbefaling fra Kammeradvokaten indsat en formulering i forbindelse med randzonekompensationsordningen, der lyder således:

"Bemærkninger vedrørende randzonekompensation: På siden i markplan og enkeltbetaling har du for mark nummer xx søgt kompensation i kolonne "Kompensation for randzone". Bemærk dog at tildeling af støtte er betinget af, at området er omfattet af en gyldig vandplan, og at det EU-finansieringsmæssige grundlag på den baggrund kan reetableres".

Det er NaturErhvervsstyrelsens opfattelse, at forbeholdet kan ophæves. Der bør dog gives en servicemeddelelse om, at støtten først kan udbetales, når der foreligger gyldige vandplaner.

Udbetalingen af støtten forudsætter således, at Miljøministeriet iværksætter gyldige vandplaner inden december 2013.

Løsning og videre proces.

Kommissionen har vurderet, at det ligger inden for rammerne af landdistriktsforordningerne at gennemføre kompensationsordningen som planlagt, hvis de fire nævnte betingelser er opfyldt, men har samtidig tilkendegivet at ansvaret herfor alene er Danmarks. Erhvervet skal hurtigst muligt informeres om Kommissionens svar. Ligeledes kan der nu svares på en række folketings spørgsmål om randzonekompensation.

Folketingets Udvalg for Fødevarer,
Landbrug og Fiskeri

København, den
Sagsnr.:
Dok. nr.:

Orientering om EU-Kommissionens godkendelse af randzonekompensationen.

Som tidligere oplyst, vurderede Kammeradvokaten, at EU-Kommissionen skulle bekræfte, at der uanset de ugyldige vandplaner fortsat kunne ydes kompensation via Landdistriktsprogrammet.

Ved brev af 26. februar 2013 har EU-kommissionen bekræftet, at dette er tilfældet.

Kommissionen har således tiltrådt, at der vil kunne udbetales randzonekompensation med virkning fra 1. september 2012, når der foreligger gyldige vandplaner. Landmændene vil dermed kunne søge kompensation, som forudsat. Kompensationen udbetales samtidig med støtte efter Enkeltbetalingsordningen, hvor der vil være nye vandplaner.

Jeg har oplevet en usikkerhed hos landmænd og deres organisationer om kompensationen, men med meldingen fra EU-Kommissionen får vi manet den usikkerhed i jorden.

Jeg vedlægger til udvalgets orientering NaturErhvervstyrelsens brev af 15. januar 2013 til EU-Kommissionen, om Natur og Miljøklagenævnets afgørelse samt EU-Kommissionens bekræftelse af randzonekompensationsordningen af 26. februar 2013.

Med venlig hilsen

Mette Gjerskov

EU giver grønt lys for randzonekompensation

De danske landmænd får økonomisk kompensation for de 10 meter randzoner, de har udlagt. Det står klart, efter at EU-Kommissionen over for Fødevareministeriet har bekræftet, at kompensationsordningen for randzonerne er gyldig.

- Jeg er meget tilfreds med, at EU-Kommissionen som forventet har givet grønt lys for, at landmændene får kompensation for randzonerne. Jeg har oplevet en usikkerhed hos landmænd og deres organisationer om kompensationen, men med meldingen fra EU-Kommissionen får vi manet den usikkerhed i jorden, siger fødevareminister Mette Gjerskov.

Kompensationen er afhængig af gyldige vandplaner og forventes udbetalt sammen med landbrugsstøtten – hvor der vil være nye vandplaner. Kompensationen vil også kunne udbetales med tilbagevirkende kraft.

Svaret fra EU-Kommissionen kommer, efter Fødevareministeriet i januar i kølvandet på underkendelsen af vandplanerne bad om at få bekræftet, at der kan udbetales kompensation for randzonerne.

Godkendelsen fra EU-Kommissionen betyder, at NaturErhvervstyrelsen fjerner den formulering i Tast selv-service, som hidtil har fortalt, at man afventer en afgørelse fra EU-Kommissionen.

Ministry of Food, Agriculture and Fisheries
The Danish AgriFish Agency



Mr. Pedro Tarno
Head of Unit
European Commission
DG for Agriculture and Rural Development

The Danish Agrifish Agency /
Center for Agricultural Subsidies
15. January 2013

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 m². 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.¹

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.

¹ 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.

The Danish AgriFish Agency

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-*

The Danish AgriFish Agency

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.

The Danish AgriFish Agency

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:

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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.

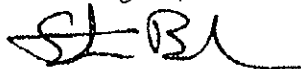
For the reasons provided above under the Second Solution, the Agency believes that in this specific situation, the Commission could approve the compensation scheme with effect from 1 September 2012, so that all farmers having incurred extra costs or foregone revenues as a result of the establishment 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



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR AGRICULTURE AND RURAL DEVELOPMENT

The Director General

Brussels,
TF/lvdz/D (2012) 207924

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

Dear Mr Bonde,

Reference is made to your letter of 15 January 2013 (Ares (2013)104770) in which you ask for the opinion of the Commission services on the possible consequences of a recent annulment of the Danish River Basin Management Plans (RBMPs) for the implementation of a measure in the Danish RDP under Article 38 of Regulation (EC) No 1698/2005.

In your letter the following background information is provided:

- The 23 RBMP under the Water Framework Directive (WFD) for Denmark were adopted on 22 December 2011.
- As part of the implementation of Article 11(4) of the WFD, 10-metre wide cultivation, spraying and fertiliser free buffer zones have been established along all watercourses and lakes above 100 m² in Denmark. The buffer zone requirement is implemented through an Act of Parliament which went into force on 1 September 2012.
- In order to provide compensation to farmers for the disadvantages resulting from the buffer zone requirement a measure was introduced into the RDP in 2012 in accordance with Article 38 of Regulation (EC) No 1698/2005. Under this measure farmers will be able to claim compensation for the period beginning at the entering into force of the requirement on 1 September 2012. Applications for compensation should be submitted in spring 2013 and payments are expected to fall due by the end of 2013.
- On 6 December 2012 the Environmental Board of Appeals (EBA) declared the RBMPs null and void. The Decision of the EBA was based solely on the fact that the

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1780 KØBENHAVN V
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time period fixed for a supplementary public hearing in 2011 (8 days) was too short and thus contrary to Section 30 of the Environmental Aims Act.

- As a consequence of the decision of the EBA, the Danish authorities will now carry out a supplementary public hearing and subsequently adopt a new decision concerning new RBMPs. This decision is expected in the first half of 2013.
- In the meantime the Buffer Zone Act remains in force, as the EBA's decision to annul the RBMPs does not affect the validity of the Act.

On this basis the question raised is to which extent the compensation scheme under Article 38 of Regulation (EC) No 1698/2005 is linked to the existence of valid RBMPs and, more specifically, if the annulment of the RBMPs might be considered to preclude the applicability of the compensation scheme.

In the letter three scenarios are presented:

- (1) No consequence: The measure can be applied irrespective of the existence of RBMPs.
- (2) Temporary non-compliance: The compensation scheme is temporarily not in compliance with the Regulations, but the situation can be repaired by the adoption of new RBMPs. The scheme can be applied as provided for in the RDP. Compensation can still cover the whole period from September 2012. No payments will be made before the new RBMPs are in place.
- (3) Annulment/need for resubmission: The compensation scheme is considered not to have been approved by the Commission. Denmark will have to resubmit a programme modification to reinsert the measure in the RDP. In this case the scheme can be applied as provided for in the new measure. Compensation can still cover the whole period from September 2012. No payments will be made before the new RBMPs are in place.

Reply:

The **first Scenario** would require that there is no legal link between the Article 38 measure and the existence of valid RBMPs. However, such a link clearly does exist. Indeed, your letter quotes several provisions of Regulation (EC) No 1698/2005 and Regulation (EC) No 1974/2006 to this effect.

Regulation (EC) No 1698/2005:

Article 50(5): 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)

Regulation (EC) No 1974/2006:

Article 26a (2)(a): 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 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 objectives 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.

In relation to the **second scenario**, it should first be recalled that under the principle of shared management, it is for the Member State to take all the measures necessary to ensure that subsidies are granted correctly and to prevent and deal with irregularities. In this context, your suggested approach would seem possible, provided the following conditions are fulfilled, i.e. that:

- the envisaged RBMPs can indeed be adopted with retroactive effect, as described in your letter;
- continuity of the conditions set out with regard to this measure in the annulled and the new RBMPs will be ensured;
- the restrictions for which compensation is paid under the measure remain in place, i.e. the requirements for which beneficiaries will be compensated as of September 2012 under the envisaged new RBMPs should be the same as those requirements for which beneficiaries would have been compensated as of September 2012 in the absence of an annulment of the RBMPs and that there was no interruption of implementation of these restrictions;
- and that the necessary controls are carried out as required under Regulation (EU) No 65/2011 for the whole period.

In relation to the **third scenario**, please note that Article 19(1) of Regulation (EC) No 1698/2005 establishes the general rule that rural development programmes can be adapted for the remainder of the programming period (i.e. in principle without retroactive effect). Any such adaptation would then be assessed by the Commission services on the basis of the information to be included in the modification proposal, and such assessment cannot be prejudged by the present letter.

The present opinion is provided on the basis of the facts as set out in your letter of 15 January 2013 and on the understanding that in the event of a dispute involving Union law it is, under the Treaty on the Functioning of the European Union, ultimately for the European Court of Justice to provide a definitive interpretation of the applicable Union law.

Yours sincerely,



José Manuel SILVA RODRIGUEZ