

# Introduction to comparative legal study on compensation measures

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# Presentation outline

- Background
- Compensation in the SEABASED project
- Ecological compensation, compensation or offsets?
  - Legislation in Sweden and Finland
  - Åland Islands
- Interim conclusions

Background

# Background



**Svenskt vattenbruk**  
– en grön näring på blå åkrar  
Strategi 2012–2020

- Blue growth policies in the Nordics (EU)



# Background

- The Water Framework Directive
  - Good (ecological) status and non-deterioration
  - The 2015 Weser judgment
  - No explicit compensation or offsetting mechanism, however...
  - ...article 4(1)(a)(i) requires that Member States shall 'implement the necessary measures'
  - Application of the derogation under article 4(7) requires MS to take 'all practicable steps'
  - According to the Commission, mitigation measures may be carried out in other water bodies provided their effect occur in the water body for which article 4(7) is applied (CIS 36)
- The Marine Strategy Framework Directive and the BSAP
  - Member States shall 'take the necessary measures' to achieve good environmental status 2020
  - Helsinki Convention: "...eliminate pollution in order to promote the ecological restoration of the Baltic Sea" and BSAP: "the Baltic Sea should be unaffected by eutrophication".
- WFD much more precise, MSFD not yet considered legally binding but somewhat legal (normative) effect

# Background

- Revision of the Åland Water Act (1996:61)
  - Provisions on improvement surplus (förbättringsoverskott) obsolete
- Investigation on a new Water Act for the Åland Islands (Kymenvaara and Eklund 2016)
  - Compensation (kompensationsåtgärder) connected to permitting
- Draft Government Bill of 22 October 2019 on a new Water Act for the Åland Islands
  - Compensation (kompensationsåtgärder) 51 §
  - Improvement surplus (förbättringsoverskott) 52 §

# Legal aspects of ecological compensation in SEABASED

# Legal aspects of compensation in SEABASED

- WP1: will explore the regulatory frameworks on three levels; EU, national (Swedish and Finnish) and regional (Ålandic) and study the regulatory **challenges and possibilities** as regards the concept of compensation.
- WP1 will further **compare** the legal frameworks of the three different jurisdictions and obtain an understanding of their differences and the extent to which the **legislation of the Åland Islands could be further developed** in order to incorporate the concept of ecological compensation.
- The work will take account of legislation in countries where compensation has been taken into use.

Ecological compensation,  
compensation or offsetting?

# Ecological compensation in the "mitigation hierarchy"

4) Compensation or offsetting (ex situ)  
requires explicit legal mechanism

3) Remediation (in situ)

2) Minimisation (BAT)

1) Avoidance

The international cooperation 'Business and Biodiversity Offsets Programme' (BBOP).

- Mitigation hierarchy central role.
- Measures to avoid and minimize the impact of the exploitation **before** the need of compensation is established.
- Two step-assessment.
- Does not enjoy legal status, but can be considered "best practice".
- Different steps of the hierarchy depends on what is considered BAT/BEP.

# Ecological compensation, compensation or offsetting?

- What are we talking about?
  - **SOU 2017:34**
    - **Ecological compensation:** indemnification/offsetting (*gottgörelse*) of the **entire or partial damage to the environment or nature values** such as species, nature types, ecosystem functions and recreational values.
      - Indemnification is carried out by the actor responsible for the damage through the **supply of new values or through ensuring the continued subsistence of existing values** that are at risk.
      - These measures are taken **after** all other reasonable consideration has been given to the area of exploitation.
  - **Ds 1997:52**
    - **Compensation measures** refer to the **recreation of lost environmental values** as a first step, and thereafter, **managing and preserving** areas similar to the exploited resource at issue.

# Ecological compensation, compensation or offsetting?

- Laas (2016):  
**Ecological compensation:** should concern the recreation of valuable environments, which fulfill the corresponding function of a habitat destroyed or damaged by strictly *physical* pressures.
- Leino & Belinskij (2018):  
**Compensation measures** substitute/offset a damaged natural value. The starting point of compensation is that the deterioration of natural values caused by an activity are substituted by natural values at another place *ex situ*.
- Kymenvaara (2016):  
**Compensation:** any measure that clearly increase the possibilities to achieve a water quality standard when the reasonable mitigation and prevention measures have been **fully considered**.
  - Water quality standards specify the environmental objectives of MFD & MSFD.
  - Not limited to physical pressures/measures taken *ex situ*, the main focus is the effect in the water body in question!

# Ecological compensation, compensation or offsetting?

- The WFD governs the impact from activities with point sources, diffuse sources and activities with hydro-morphological (structural) impacts on waters.
- The different definitions of compensation do not fully apply to the pollution and reduction of nutrients.
- After the Weser judgment, a project may not be permitted if it risks leading to deterioration.
  - If declared unlawful in the first step, compensations cannot be used to make it lawful in a second step → conflict with the mitigation hierarchy?
- Yet 'implement necessary measures' (Art 4 WFD) and 'take the necessary measures' (Art 1 MSDF) seem to include all steps of the mitigation hierarchy including compensation/offsetting

# Swedish law

- National law aligned with conclusions in Weser judgment since 1 January 2019.
- Under 16:9 § of the Environmental Code, a permit may be combined with an obligation to carry out or pay for special measures to compensate.
- Compensation as an option, but no 'incentive'.
- All conditions necessary to meet the responsibilities should be taken by authorities in permits given. This could possibly include compensation measures (Prop. 2017/18:243, p. 193).
- NB. Swedish Land and Environmental Court of Appeal M 2620-16, M 8673-15, M 8882-15, M 8374-15:  
"Traditional net rearing cages questionable as BAT".

# Swedish study on ecological compensation

## Ekologisk kompensation

– Åtgärder för att motverka nettoförluster av biologisk mångfald och ekosystemtjänster, samtidigt som behovet av markexploatering tillgodoses

*Betänkande av Utredningen om ekologisk kompensation*

*Stockholm 2017*



- Codification of the mitigation hierarchy and a permit assessment in two steps (New 2:8a § MB).
- An obligatory requirement to assess the need of compensation measures (addition to 16:9 § MB).
- A possibility to consider compensation also in supervision of permits (addition to 22:25 § MB).
- Feedback/remissyttranden:  
Does not seem to apply fully to compensations in aquatic environments? This should be further investigated.  
Relevant only for Natura 2000 and land based environments?
  - Miljöbalken amended 1 January 2019 to comply with WFD. Not clearly stated that compensation measures could be used to improve the possibility to comply with water-EQS (as with other EQSs) (Amendment of 2:7 and new 5:4 MB).
  - Unclear if compensation can be used to comply with water-EQS.

# Finnish law

- Wording of national law not in line with WFD legally binding environmental objectives.
- Reliance on sectoral law ("significant pollution" (EPA) and evaluated as a part of the weight of the harm and benefit of a project (WA)).
- Case law after Weser: binding environmental objectives but granted permits KHO 26.4.2018 t. 1948–1953 on fish farming.
- No explicit regulatory mechanism for offsetting, would require voluntary commitment.

# Finnish study on ecological compensation

VALTIONEUVOSTON  
SELVITYS- JA TUTKIMUSTOIMINTA

Leila Suvantola, Lea Halonen, Laura Leino, Eija Miittinen, Aleksis Ahvensalmi

## **Ekologisen kompensaation ohjauskeinojen kehittäminen**

- Ecological compensation on land differs from compensation in aquatic environments
- Compensation only when minimisation and prevention has been fully considered.
- Would require amendments to relevant acts – EPA and WA
  - Define the concept of compensation
  - Further define in permit conditions what is compensation

# Åland: Government bill on new Water Act

- Gov't establishes water quality standards (vattenkvalitetskrav) for each water body in 33 §
- Codification of the mitigation hierarchy in 7 §

Harmful water impact should be avoided; thereafter any remaining damages should be restored (återställas) and lastly compensated

- Permitting: Reasonable mitigation and prevention measures (BAT)
- Deterioration of status and jeopardizing good status is prohibited under 47 §
- If activity contributes to non-achievement of a WQS:
  - I. Additional mitigation measures (48 §) fully considered
  - II. After which compensation measures:

# Åland: Government bill on new Water Act

- II. After which compensation measures:

A compensation measure should, as such, or jointly with other measures influence the water status or environmental status in a way that is deemed to increase the possibilities to meet a water quality requirement.

The provision allows compensation measures to be performed outside the activity's impact area (*ex situ*) if it influences the area /water body where the activity is located.

## Requirements:

- a long term benefit,
- provide an additional benefit in comparison with a situation where it would not have been carried out,
- the benefit may not have been accounted for in another context,
- The benefit of the measure must be reasonable in relation to the cost and supervision of carrying it out, and
- Verified in a reliable manner.

The benefit of a compensation measure may be transferred

# Interim conclusions

- EU law (WFD & MSFD) seems to allow compensation to achieve the environmental objectives.
- The two-step assessment under the mitigation hierarchy not fully applicable to nutrient compensations.
- Ålandic new water act codifies the mitigation hierarchy but allows compensation to achieve a WQS (WFD and MSFD objectives).
  - Flexibility and cost-effectiveness in permitting, recipient i.e. water quality in focus.
- Study includes reflections on USA's Clean water act and nutrient trading system in the Chesapeake bay...
  - No water bodies in CWA, but larger areas

# Thank you!

Upcoming article:

Jonas Nilsson, David Langlet, Antti Belinskij, Sara Kymenvaara, Niko Soininen and Ellen Margerete Basse, *Aquaculture – achieving blue growth in the Nordic Region in the age of non-deterioration* (2020)