



The challenge of legitimizing spatially differentiated regulation: Experiences from the implementation of the Danish Buffer zone act



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ABSTRACT

Differentiating regulation is a promising approach to agri-environmental regulation that may potentially reduce the environmental impact of agriculture at the lowest possible costs for the farmers and society, but also possesses a number of challenges. In this article, we explore the challenges to the legitimacy of agri-environmental regulation that occurs when the regulatory regime changes from general regulation to differentiated regulation. The analysis is based on a case study of the implementation of the Buffer zone act in Denmark – a regulation that prevents agricultural production in a 10 (later 9) meter fringe around selected waterbodies. We distinguish between two different ways of legitimizing: Producing knowledge and participation. We conclude that to harvest some of the obvious benefits of differentiated regulation a number of challenges must be resolved, 1) ensuring legitimacy of differentiated regulation is crucial, 2) differentiated regulation imply that farmers are also differentiated, 3) differentiated regulation implies new uncertainties, 4) the current knowledge regime need to be reconfigured, 5) stakeholders feel that they are unevenly treated and 6) it is difficult to establish a win-win solution for all farmers on an individual level.

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1. Introduction

In theory, differentiated regulation is a promising approach to agri-environmental management that may reduce the environmental impact of farming at the lowest possible cost for the farmers and society, but it is also challenging to implement in practice.

Since the beginning of the 1990's the Danish agri-environmental regulation has become increasingly diversified, but the policy instruments applied today are still primarily based on general measures (Dalgaard et al., 2014). Although the use of national policies and general regulation has been successful, the environmental impact of farming in Denmark is still apparent and beyond the targets set in the European Water Framework Directive (WFD) (Børgesen et al., 2013; Jespersen, 2013; Van Grinsven et al., 2012). Hence, further reductions in the environmental impact of agriculture using general measures will incur significant expenses (Dalgaard et al., 2014; Jacobsen, 2014). Among scholars it is increasingly stipulated that differentiated regulation theoretically is the most cost-effective way to reduce the environmental impact of

agriculture, as there is a huge geographical variation in nutrient loss within the same catchment area and because the effect of regulatory measures differ depending on the geographical location (Christen and Dalgaard, 2013; Tomer et al., 2009).

Based on a cost calculation of a national reduction of 7.773 tons N Jacobsen (2014) notes that differentiating measures will reduce cost by 25% and in a different paper (Jacobsen and Hansen, 2016) find that the average farm would gain approximately 14–21 €/ha/year. Furthermore, Hasler et al. (2015) in a scenario study of a particular catchment find that the cost of reducing N load by 810 and 1016 N pr. year, incur a cost ranging between 2.5–8 €/kg N using general measures whereas differentiated measures only incur a cost ranging between 1.5–2.5 €/kg N. Hence, differentiated regulation is increasingly appraised as the future regulation regime and potentially it is a win-win solution for stakeholders and society. Environmental impact may be restricted in the most vulnerable areas, while agricultural production in general is not burdened (Jespersen, 2013). Furthermore the idea of differentiated regulation is emphasized in several EU directives that define the framework for development of national agri-environmental regulation, such as the WFD, Nitrate Directive and the Habitat Directive (EC, 1991, 1992, 2000). Differentiating regulation imply that: "The agricultural production on the resilient areas can be adapted and optimized while the most vulnerable areas may be less intensive or

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taken out of production. Simultaneously a more targeted environmental effort is initiated in which the conditions and vulnerability of each recipient is taken into account in the development of policy instruments [Our translation] (Jespersen, 2013).” In practice, there are various ways of differentiating the regulation, by either a voluntary scheme or mandatory instruments. However, most importantly a distinction is drawn between areas where a particular measure applies and areas where it does not, based on an assessment of environmental, social or economic impact of a given activity, in our case farming. However, in practice it is difficult to clearly distinguish between differentiated and general regulation, hence, it is more accurate to talk about the degree to which the regulation is differentiated. This new mode of regulation give rise to a range of different challenges such as, locating focus areas, managing the uncertainties in the scientific assessments, distributing the costs and benefits associated with the new regulation regime and involving stakeholders in the regulatory development and implementation.

In this article we will explore how the legitimacy of agri-environmental regulation is challenged when the regulatory regime change from general to differentiated regulation. The challenges are explored in a case study of the Danish implementation of the Buffer zone act, which was developed to differentiate agri-environmental regulation in Denmark. The act prevents agricultural production in a 10 (later 9) meter fringe in the riparian zone around selected waterbodies (whether this is essentially a general or a differentiated measure has been debated much throughout the implementation process). The act was adopted as a measure to reduce nitrate, phosphorous and pesticide leaching, prevent soil erosion and protect biodiversity. However, the Buffer zone act was met with opposition from different stakeholders, in particular farmers, and resulted in several lawsuits towards the Danish government and vice versa.

The WFD require an integrated approach to river basin management and differentiated regulation is claimed to be the future regulation regime, however, very little research has focused on the challenges of changing the regulation regime. Most previous research is science based studies documenting the differentiated environmental impact and differentiated effect of measures (Christen and Dalgaard, 2013; Refsgaard et al., 2014; Tomer et al., 2009; Townsend and Davidson, 2006; Vidon et al., 2010) or economic studies assessing the profitability and cost-effectiveness of differentiated regulation (Farrow et al., 2005; Goetz and Zilberman, 2000; Jacobsen, 2015; Kuwayama and Brozović, 2013). Refsgaard et al. (2007) provides an integrates science based modeling with a land rent mode, however, hitherto, sociological aspects of differentiating regulation are unexplored, such as, how differentiated regulation attains legitimacy. Legitimacy is important in regulation because it concerns how the regulation is perceived by the stakeholders and in turn how they behave towards the regulation. Regulation without legitimacy will result in frustration, coercion and potentially non-compliance (Beetham, 2013; Rothstein, 2003; Roussel, 2015).

The challenges, stemming from the development and implementation of the Buffer zone act are examined in several steps. Initially we will explore the concept of legitimacy and the relationship between legitimacy and successful agri-environmental regulation. Secondly, we will apply this framework in an analysis of the implementation of the Buffer zone act. The implementation is explored using legislative documents, court case documents, press announcements and statements from key stakeholders and policymakers. Third, we will discuss the challenges concerning legitimizing differentiated regulation and the implication of these challenges regarding the possibilities for implementing differentiated regulation.

2. Legitimacy

Legitimacy is an old concept in the sociological literature and discussions date back to Weber (1978, 1922), who focused on legitimacy in relation to power and explored when power is legitimate and on which basis legitimacy was established. Weber therefore stressed that the prerogative of any regulation is legitimacy in the exercise of power, as a willingness to comply with a system of rule, to recognize decisions as lawful, just or rightful (Beetham, 2013; Morris, 2002). Hence, a legitimate governing authority is essential to democracy and it has an important function, increasing stakeholders accept of regulation and reduce their discontent and non-compliance (Rothstein, 2003; Scharpf, 1999). In relation to modern agri-environmental regulation this is important as the farming practice is restricted on farmers private property and one of the ways to secure that they accept these limitations is by developing regulation that is perceived as legitimate (Held, 2006).

Legitimacy is a perception that the stakeholders have towards the regulating authority or the regulation (Suchman, 1995). Consequently, legitimacy is not something that can be earned, by particular deeds, but it is granted by the stakeholders and the process is to some extent uncontrollable, therefore it is a phenomenon that requires constant considerations and negotiations among different stakeholder groups (Holmström, 2010). Moreover, each stakeholder will have different perception of what constitute legitimate regulation. Legitimation takes place in various arenas, such as scientific communities, the courtroom, in the regulatory process and in the general public. Moreover legitimization is influenced by different stakeholders, who try to influence these different arenas in various ways, such as by their engagement and participation or by producing and introducing knowledge or new interpretations. Each stakeholder perceives events in their own perspective what counts as an argument for legitimacy in one arena may not count in another or may be in opposition. Policy-makers should take this difference into account and balance the interests and knowledges of each stakeholder (Davies and Hodge, 2006; Schneider and Ingram, 1990).

The law is the basis of public regulation and the means for implementing policy decisions, but whereas law primarily concerns the legality of particular actions, legitimacy concerns how these actions are justified. However, to be effective the law must also be seen as legitimate, hence, there is a complex relationship between legality and legitimacy. Several factors are stated as important for establishing legitimacy of the law, 1) a regulatory framework must be substantiated by standards of rationality, knowledge and justice, hence, regulatory measures must be designed according to prevailing law, but the legitimacy cannot be reduced to a question of correct jurisprudence or knowledge alone (Bekkers and Edwards, 2007). 2) Legitimacy claims are always made by reference to a particular value system, hence, legitimizing relates to a particular ordering of worth (Boltanski and Thévenot, 2013). Consequently, there is a relationship between stakeholders' perception of regulation and their values, perspectives and stakes. If stakeholders in a political system share the same beliefs, values and norms, it is easier for them to accept binding collective decisions than it would be in a situation where such consensus does not prevail (Beetham, 2013).

2.1. Legitimizing regulation

For decades the instruments that governments have applied to achieve policy goals have been changing, not only reflecting changes in agricultural technology, but also advancements in knowledge and the evolution of values. Legitimation has undergone significant change as the social environment has become much more complex, dynamic and ambiguous due to the fluidity of social

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