

# Naturvernforbundet i Orklaregionen

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## Comments on case 81512 regarding the oxbow lake Furumokjela

Thank you for the pre-closure letter, dated 1 October 2019 (Case No: 81512, Document No: 1089915), and thank you for giving us the possibility to submit our observations on the Authority's assessment and information that we think might not have been available to ESA in that assessment. Thank you for granting us a few extra days to reply as well, up until 4 November.

On page 3 of the pre-closure letter, it says that *"Since the body of surface water in this case was filled in, it is the view of the Directorate that the changes made to Furumokjela must be considered a new modification to the physical characteristics of a body of surface water. Thus, the first requirement of Article 4(7) of the Water Framework Directive is fulfilled."*

Filling the oxbow lake with gravel, and thereby removing it, is a modification of the water body, in the most ultimate of ways. Article 4(7) states that member states will not breach the directive if

*"all the following conditions are met*

*(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;*

*(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;*

*(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and*

*(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option."*

In this case

- a) there have been no practical steps taken to mitigate the adverse impact of the body of water

- b) the reasons for this modification are not set out or explained in the River Basin Management Plan
- c) we have not seen a thorough evaluation of environmental cost vs societal benefit arriving at the point of view that this chicken factory is of overriding public interest
- d) there are obviously quite simple ways of reaching the “beneficial objectives”, in this case a chicken factory, by simply locating the factory in a place which does not require the destruction of an oxbow lake.

### **We have the following comments**

#### **All practicable steps are not taken to mitigate the adverse impact (article 4(7, a))**

The space requirements for the factory have turned out to be significantly smaller than what was stated. The company Norwegian Chicken is owned by the Reitan Group (which is one of the largest companies in Norway). They claimed that they were not sure they could build the factory in two floors.

Looking at the municipality, county, or the river basin, as a whole, there were other possible plots available, that would have caused less environmental impact on the water environment. In our opinion, condition 4(7, a) cannot be considered fulfilled.

The objectives of the RMBP are legally binding, but there is no proper evaluation concerning how the objectives would be affected by this project.

The factory is now under construction. We include maps late in the letter, showing that:

1. It would have been possible to reorient/rotate the building within the land lot, thereby avoiding the removal of the oxbow lake.
2. It would have been possible to place the factory in another nearby lot.
3. Due to the factory’s significantly reduced building footprint, it should be possible to reconstruct the oxbow lake as a brackish lake, just south of the factory, inside the zoning plan designed for the factory.

#### **The reasons for the removal of Furumokjela are not set out or explained in the River Basin Management Plan**

From the preface of WFD:

*“(46) To ensure the participation of the general public including users of water in the establishment and updating of river basin management plans, it is necessary to provide proper information of planned measures and to report on progress with their implementation with a view to the involvement of the general public before final decisions on the necessary measures are adopted”*

In our opinion, this includes both measures to obtain better ecological status in a water body and measures/ projects that could worsen the status.

## Overriding public interests do not outweigh the benefits of reaching the environment objectives (article 4(7, c))

We understand the municipality's interest in getting the chicken factory as a new big employer. In the evaluation of the factory, it was also pointed at how the traffic measures induced by building the factory would improve the local road traffic safety.

The local municipality is entitled to make such assessments, but seen in a broader context, the local assessment is not sufficient to fulfil the requirements of WFD. The regional plan for the Trondheim Region, pointed out that new activities with large area requirements, should preferably be located to Sveberg, Torgård, Tulluan og Stormyra<sup>1</sup>. There was even a condition that IF new activities were to be placed in Orkdal, they should preferably be located in the area of Grønøra.

We think the municipality's evaluation of societal benefits vs ecological negative impact is extremely weak. There is no proper assessment, as we can see of how the benefits of the new factory placed at that specific place will override "the would be benefits" of reaching the environmental objectives.

In the final decision it is said that possible emissions to the river is what brings the WFD into the context, and that such considerations will be taken into account in the municipal master plan<sup>2</sup>.

It does not mention the ecological state of the river, or that the Orkla river delta is already highly devastated by human activity. The municipal master plan says that the consequences for the water environment should be evaluated on a more detailed level in the zoning plan, but that is not done, as far as we know.

There is little assessment with regards to the impact on the salmon and sea trout populations which, together with the rich soils in the delta, contributed to people settling here. Although we think that the salmon and sea trout, like all other species, should have a population management that secures the species own right to exist, we would like to point at the enormous economic values in the recreational salmon and trout fishing in the rivers around the Trondheim Fjord, including the Orkla river. In 2012, the Norwegian Institute for Nature Research, estimated that the recreational fisheries in the rivers of the Trondheim Fjord, created economic values in the order 81-105 million NOK per year, plus a turnover of 224-251 million NOK. This is despite the poor situation of the anadromous populations and the strict management regime for salmon fishing in the rivers<sup>3</sup>.

As we see it, the municipality has not assessed how neglecting the needs of the salmon and trout by allowing this new encroachment and other impacts along Orkla river, undermines the economic activities related to angling and the tourism it brings.

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<sup>1</sup> IKAP-2 Mål, strategier og retningslinjer for arealutvikling i Trondheimsregionen, 13. februar 2015, page 8, <https://www.trondheim.kommune.no/globalassets/10-bilder-og-filer/11-politikk-og-planer/planer/regionale-planer/interkommunal-arealplan-for-trondheimsregionen-ikap2.pdf>

<sup>2</sup> Kommunedelplan næring Orkdal Kommune 2017-29, Konsekvensutredning, revidert i henhold til vedtak i Formannskapet, Orkdal Kommune, den 20.06.2017, sak 42/17, <http://opengov.cloudapp.net/Meetings/STFKHist/File/Details/2523508.PDF?fileName=Vedlegg%201%20Furum%20-%20Konsekvensutredning%20kommunedelplan%20n%C3%A6ring.pdf&fileSize=546901>

<sup>3</sup> Elvene rundt Trondheimsfjorden. Laks og verdiskaping, Jon Kjelden & al, Nina temahefte 48, 2012. <https://www.nina.no/archive/nina/PppBasePdf/temahefte/048.pdf>

The EIA by the consultancy Multiconsult mentions that the sea trout population of the Orkla river is heavily depleted due to severe reduction in available habitats. Although there is a big habitat loss in brooks and smaller tributaries that have been physically modified, the EIA states that it is in the marine and brackish environments that the sea trout suffers most, due to habitat loss<sup>4</sup>.

The EIA says that Furumokjela probably has a big potential as habitat for sea trout, and the consultant doing the field work, saw several fishes rise on both days he was there. The EIA also makes clear that there is not enough knowledge on the trout's use of the oxbow lake as habitat to evaluate the value. The chemical status of the water was found to be very good.

In the Norwegian Red List for Ecosystems and Habitat types from 2011, oxbow lakes are classified as endangered (EN). The EIA states that the planned filling in of the oxbow lake is part of the gradual degradation of the Orkla river delta over the last 50 years. This encroachment is estimated to have large negative impact on biodiversity as it will entail even further habitat loss for birds and fish.

The EIA says that the consultancy was not given the task to evaluate §12 in the Norwegian Water Regulation (which translates to Article 4(7) in the WFD) but that if such an evaluation was to be done, it would be necessary to evaluate the encroachment against the total and accumulated impact on the river delta (with its oxbow lakes and flood plains). The evaluation of the total impact (in Norwegian: "samlet belastning") should be determining when evaluating the consequences of new encroachments in the Orkla river delta. The EIA also mentions the complexity of evaluating non-measurable nature values up against the measurable values of a chicken factory.

As far as we can see, none of this is followed-up by the municipality, or the County Governor.

We think it is important to remember that the WFD complies with the principle of sustainable development according to which '*the needs of the present generation should be met without compromising the ability of future generations to meet their own needs*'.

The municipality's, and later County Governor's, granting of this encroachment according to §12 of the Norwegian Water Regulation fits perfectly into the pattern of accepting exemptions, based on weak assessments of the environmental losses.

In a Key Issues Paper on "*Exemptions under Article 4(7) of the Water Framework Directive*" that was prepared for a Common Implementation Strategy Workshop in 2016, we find this statement; "*The gaps in the justification of exemptions have been identified as one of the areas that will need improvement in the WFD implementation*"<sup>5</sup>. (The source for the statement was the Commission implementation reports, in particular the 3rd and 4th published respectively in 2012 and 2015.)

## Alternative locations were not properly assessed (article 4(7, d))

The last of the conditionalities under which a member state can allow the status of a body of water to deteriorate without breaching the directive is that "*the beneficial objectives served by those*

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<sup>4</sup> Detaljreguleringsplan med konsekvensutredning av Furumoen, Planbeskrivelse med konsekvensutredning, 18.08.2017.

<http://opengov.cloudapp.net/Meetings/STFKHist/File/Details/2523512.PDF?fileName=Vedlegg%203%20Furumoen%20-%20utdypende%20konsekvensutredning.pdf&fileSize=5139290>

<sup>5</sup> Exemptions under Article 4(7) of the Water Framework Directive Common Implementation Strategy Workshop 13-14 December 2016, Brussels Key Issues Paper, <https://circabc.europa.eu/sd/a/d453b9ae-e001-461c-80cc-a056d308295e/Key%20Issue%20Paper%204.7%20-%20Final.pdf>

*modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.”*

In this case, there were several other locations that would have served the purpose of the chicken factory. We also consider the technology of building a factory in two or more floors as available technology.

Throughout the process, the company Norwegian Chicken stated that they needed enough space to build the factory in one floor and thus needed the full area of the oxbow lake. This has turned out to be false and the factory is now being built in two floors.

ESA states the requirements of article 4(7, d) were fulfilled because the County Governor accepted Orkdal as the location. We disagree with this. It is not the location that the County Governor accepts that should be the basis for assessing alternatives. The basis for the assessment should be whether an alternative location is “*a significantly better environmental option*”. This assessment was never done.

As we now see, the company’s need for space was significantly exaggerated – more than twice of the original “need of space”. The result is that the assessment of several alternative lots was excluded, and that the whole process was based on wrong facts.

Even if Norwegian Chicken were concerned about the costs, a two-storey building can hardly be seen as something out of reach, or impossible in terms of “technical feasibility” or “disproportionate cost”.

## Further comments

**The ecological status of the lower area of Orkla river** (HMWB) is moderate, according to the river basin management plan. Furumokjela is part of a body of water called “Orkla, bekkefelt vest, Fannrem – Orkdalsfjorden”, no. 121-47-R, in the Norwegian Water Information System “Vann-Nett”. This body of water constitutes of several small brooks/tributaries to the Orkla river. (One of the main WFD-related inputs to this case from the County Governor was actually that Furumokjela ought to have been a separate body of water, rather than part of a system of brooks.)

We would like you to note, that on 24 October 2019 we discovered that the body of water (no. 121-558-R), which Furumokjela was a part of, had been altered in “Vann-Nett” and the oxbow lake was removed. Of course, a vanished body of water will probably not show as deteriorated status in the future river basin management plans and reports. After we mentioned this to the competent authority of the river basin (which was unaware of this change), this now seems to be corrected in Vann-Nett.

In our complaint, we did not discuss the ecological status of Orkla, but this should be a part of the discussion of whether the benefits of destroying Furumokjela are greater than the loss of environmental qualities.

Furthermore, the sea trout depends on “nursery homes” like Furumokjela along the river. The situation for the sea trout is highly severe in the Trondheim fjord, and especially serious in Orkla. This is clearly laid out by for instance the Norwegian Institute for Nature Research (NINA)<sup>6</sup>.

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<sup>6</sup> Sjøørreten sliter i bekkene i Midt Norge, NINA, 21.06.2018, <https://www.nina.no/Aktuelt/Nyhetsartikkel/ArticleId/4531/Sjoorreten-sliter-i-bekkene-i-Midt-Norge>

The work of NINA concludes that 70% of the spawning grounds for the sea trout are lost due to modifications and alterations of small brooks and tributaries to the rivers that drain to the Trondheim Fjord. In addition, another 20% are considered lost due to agricultural activity, pollution and insufficient habitat qualities. In total, NINA concludes that 90 % of the productive area for sea trout is lost in these rivers.

For Orkla and several other rivers, the production numbers are close to a total collapse of the population for (sea) trout and also severe for salmon, and thus far from the environmental objectives of the WFD. For Orkla, the status of the sea trout is seen as critically endangered. The research institute NINA stresses the need for restauration projects, measures for habitat improvement and to reopen brooks and water ways that have been blocked, filled in, covered or that now run in tubes.

In our opinion, this has not been properly assessed in the Environment Assessment.

Removing such “nursery homes” along the river is a serious threat to the sea trout (and other species) and makes it more difficult to achieve good ecological status of the river, as required by WFD.

Furumokjela itself is not mentioned in the current river basin management plan, even if it was the last brackish water oxbow lake in the whole region. Several organisations have criticised the proposed industrial plans ever since they were made public.

In 2016, Orkdal Municipality published a management plan for oxbow lakes in the area, including Furumokjela. The management plan was intended to assist landowners, the municipality and the County Governor. The management plan, it says, was produced based on the strong need to focus on oxbow lakes as a type of ecosystem in decline on a national level and their value for biodiversity as well as ecosystem service in terms of flow mitigation<sup>7</sup>. The County Governor financed the management plan. It is therefore even more disturbing that the County Governor just a couple of years later neglects to protect Furumokjela from being destroyed.

As Sabima<sup>8</sup> informed ESA in January 2019, Furumokjela is an example of insufficient consideration of article 4.7 when new modifications are permitted in Norway. The result is that further deterioration of water status is continuing, insufficient mitigation measures are put in place, and other means to reach the objectives of the new activities are not assessed seriously.

We question whether it is the intention that Article 4(7) to have such weak legal status. It is difficult not to lose faith in the WFD if it is not intended and designed to prevent water bodies like Furumokjela, the last remaining brackish water oxbow lake in the river basins connected to Trondheim Fjord, from being destroyed. From WFD point of view, the only modifications that should have been allowed in Furumokjela should have been restoration of the oxbow lake.

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<sup>7</sup> Status og tiltaksplan for kroksjøer i Orkla Meldal og Orkdal kommune, Thomas Ruud, 2016, <http://www.vannportalen.no/globalassets/vannregioner/trondelag/trondelag---dokumenter/vannomrader---trondelag/orkla/rapporter/status-og-tiltaksplan-for-kroksjoer-i-orkla-1195806.pdf>

<sup>8</sup> Sabima is an umbrella organisation for 7 environmental NGO organisations: Norsk Ornitologisk foreining, Norges sopp- og nyttevekstforbund, Norsk entomologisk forening, Norsk Zoologisk Forening, Norske havforskere forening, Nordisk kulturlandskapsforbund, Norsk Biologforening, Norsk Botanisk Forening, [www.sabima.no](http://www.sabima.no)

## The proceedings, and the reduced room for objections from environment authorities

The County Governor writes that the municipality had evaluated §12 in the Norwegian Water Regulation (“Vannforskriften”) – which is the Norwegian implementation of Article 4(7) in the WFD. We have however not seen a thorough evaluation of the conditions in §12 in the Norwegian Water Regulation (or Article 4.7 of the WFD). We are thus critical of the municipality’s weak assessment of the conditions in Article 4(7) but the real concern lies with the weak handling of this case at the County Governor’s office.

When the County Governor concludes that they approve of the plans because no sector authority has appealed to the proposed plans, it is in fact the County Governor itself, as the sector authority for the environment, that ought to have submitted an objection. It is also wrong to say that there have not been any appeals to the plans, as several organisations have been highly critical to the plans ever since they were made public. The Chief County Executive (fylkesrådmannen) suggested to turn down the proposal because of the large negative impact on the environment and suggested to look for alternative plots, with a lower degree of environmental conflict, but the County Council nevertheless approved of the plans due to business development in the municipality.

In a statement dated 1.9.2017, the County Council, (n.b. not the County Governor) writes that the objectives according to the WFD for the body of water is minimum good ecological and chemical status by 2021, and that it is necessary to make probable that the proposed removal of the oxbow lake would allow the fulfilling of the objective<sup>9</sup>.

As the Norwegian Ministry of Climate and Environment points out in its letter to ESA, dated 1 Feb 2019, Doc No 1049953 (last section) “The County Governor does not explicitly refer to the status of the water body, before and after, the refilling of Furomokjela”. How can the WFD be considered properly if the environment authority does not even refer to the status of the water body?

On 7 Feb 2018, the environment organisation Sabima sent a complaint to Orkdal municipality regarding the zoning plan. The municipality forwarded the appeal to the County Governor, which resulted in the County Governor’s appeal decision on 22 March 2018.

In the pre-closure letter, ESA refers to the fact that there were no objections to the County Governor’s decision to uphold the municipality council’s decision. However, the reason why the case was lifted from the municipality to the County Governor, was that Sabima had submitted an appeal regarding the municipality’s zoning plan. And when the County Governor decides the outcome in an appeal case, that decision is final and cannot be appealed.

When the County Governor gave its support to the municipality’s decision, it was mentioned that they were not to intervene with local decision making. In fact, the county governor as the environment sector authority in Norway, has been severely weakened by the current government.

Friends of the Earth Norway have (together with Sabima, WWF Norway, the Norwegian Hunters’ and Anglers’ Association, The Norwegian Trekking Association and The Union of Outdoor Recreation Organizations in Norway) pointed out to the Standing Committee on Scrutiny and Constitutional

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<sup>9</sup> Høring om kommunedelplan for næringsarealer 2017 - 2029 for Orkdal kommune, Sør Trøndelag fylkeskommune, 01.09.2017.

<http://opengov.cloudapp.net/Meetings/STFKHist/File/Details/2523511.PDF?fileName=Vedlegg%20%20Furumoen%20-%20Fylkeskommunens%20uttalelse%2001.09.17.pdf&fileSize=115436>

Affairs of the Storting (Norwegian parliament) that the county governors' space to make objections to municipal zoning plans has been weakened as the Ministry of Local Government and Modernisation has instructed the county governors to be restrictive with submitting appeals.

The right and obligation of authorities to make objections when national interests are in question (in Norwegian: «Innsigelsesinstituttet») is a key in societal planning, not least in environment and land-use management. Therefore, **the reduced space for sectoral authorities to make objections** was a central point of criticism in the report by the Office of the Norwegian Auditor General<sup>10</sup>.

### Detailed discussion regarding the location (Article 4 (7, a and d))

It is now obvious that several alternative locations of the factory would have avoided the destruction of Furumokjela.

The official plans demanded 150.000 – 170.000 m<sup>2</sup> for the factory<sup>11</sup>

#### Forutsetninger for planprosessen

Arealkravene til en ny fabrikk for Norsk Kylling AS er et sammenhengende areal på 150 -170 dekar. Slike arealer er ikke tilgjengelige i Orkdal kommune per i dag. Om Orkdal kommune skal kunne tilby et næringsareal av en slik størrelse, er det nødvendig med ny detaljregulering. Orkdal kommune har ledige næringsarealer opp til 80-90 dekar, men dette tilfredsstiller ikke arealkravene til Norsk Kylling.

Today we see that about 63.000 m<sup>2</sup> is enough for both Norwegian Chicken and the factory Nutrimar, that is to be built close to Norwegian Chicken. As we see above, it was stated that Orkdal had vacant areas for such factories up to 80.000 to 90.000 m<sup>2</sup>. This was not enough for Norwegian Chicken, that needed up to 170.000 m<sup>2</sup>, according to the zoning plan and the Environment Assessment report.

The conclusion is that it was a very large discrepancy between the official area demand, and what has proven to be realistic for Norwegian Chicken. With an area demand of 63.000 m<sup>2</sup>, there would have been several alternative locations, both in Malvik and Midtre Gauldal, and other places in Orkdal. This was never assessed, due to the overrated need for space.

The destruction of Furumokjela could easily have been avoided, without large expenses.

ESA writes:

*“Furthermore the municipality stated that it did not have any other available areas that covered Norwegian Chicken’s needs.”*

As we have shown above, this statement was based on wrong area requirements, and the municipality should have been able to discover this very large exaggeration.

We suppose that the revealed extreme exaggeration of space needed for Norwegian Chicken is of interest to ESA in the assessment of this case. If the local authorities had taken the time to evaluate the actual space needed, the destruction of Furumokjela could have been avoided.

**Our conclusion is that WFD article 4(7, d) is violated.**

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<sup>10</sup> Riksrevisjonens undersøkelse av behandling av innsigelser i plansaker, Dokument 3:7 (2018–2019) [https://www.riksrevisjonen.no/globalassets/rapporter/no-2018-2019/innsigelser\\_plansaker.pdf](https://www.riksrevisjonen.no/globalassets/rapporter/no-2018-2019/innsigelser_plansaker.pdf)

<sup>11</sup> Planning (zoning plan) with Environment Assessment (Multiconsult 2017)

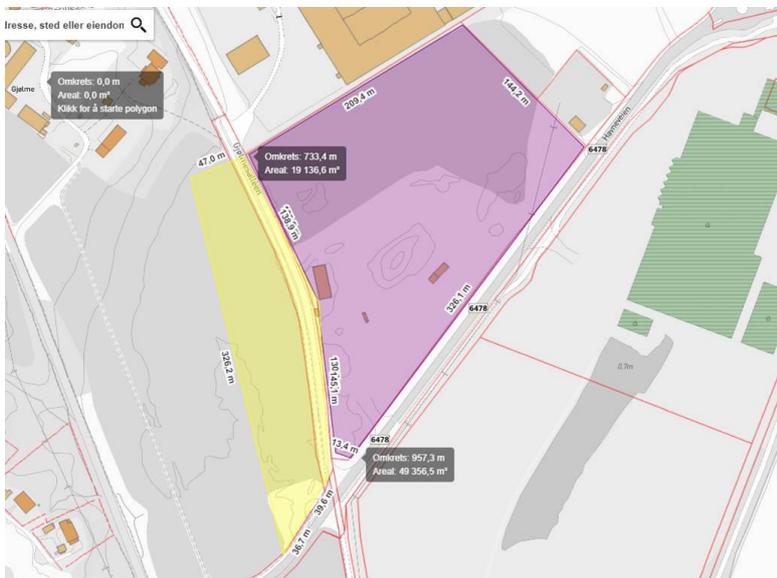


The location of the factory as it is being built today (green).

It would have been possible to reorient the factory buildings north/west to avoid Furumokjela.

It would also have been possible to locate the factory south of Furumokjela.

**As one can see, it should be possible to reconstruct Furumokjela as a brackish oxbow lake with a branch of water from the river to the remaining part of the oxbow lake, just south of the factory, but inside the zoning plan designed for the factory. This should be assessed as a realistic mitigation.**



There is an alternative, flat and sufficiently large area (light purple available on the other side of the road, close to where the factory is being built.

This area could have been extended by the yellow area, while moving the road to the west side.

The ongoing business activity on the light purple area is moving to another site, so the area would have been available for the new factory.

We look forward to your further comments on the case and sincerely hope that the WFD has some stamina, that the environment authorities must be expected to do more to find ways to mitigate the destruction of a body of water and to demand from the project owner to investigate available technology or alternative means (such as a different location) before granting a project according to Article 4(7).

Best regards,

Mads Løkeland-Stai

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