

TEMPORARY NATURE: A USEFUL TOOL FOR SUSTAINABLE COMPANIES?

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I. Introduction

“Temporary nature” conservation is a relatively new nature conservation concept. It concerns areas where raised construction sites, temporary sand depots and the like become temporarily available at regular intervals. In most cases it takes a number of years before the spatial designation of such areas is finally implemented, and in the meantime these areas exert a strong attraction on certain rare pioneer species, such as Natterjack Toads and Terns. Instead of preventing the development of natural values from the very beginning (e.g. by ploughing such areas at regular intervals), the decision could also be taken to temporarily allow nature to develop on these parcels of ‘valuable’ land. Even though they are only temporarily available, these natural values may constitute a useful addition to the existing permanent ecological infrastructure of an existing port or reclamation area.

Using the concept of temporary nature inevitably implies its removal and/or destruction after a certain period. Recent ecological research has demonstrated that temporary nature conservation has in any case a favourable net impact on the status of conservation of pioneer species¹, although this – logically – depends to some extent on an adequate area-oriented nature policy as well. The availability of a site during several years can attract lots of protected species. Assuming that a project developer wants to start the actual construction of the site concerned four years later, nature will have benefited from this natural area for four years. A number of ecological processes will have started to take place. The ecological research therefore also indicated that these areas can constitute an important stepping stone between different and separated populations of protected species.

From a legal point of view, however, the use of the concept of temporary nature conservation raises quite a number of questions. In time it will be necessary to proceed to the irrevocable removal of these natural values, when the area is to be given its final designation as an industrial area, for example. Such actions may at first sight seem to conflict with the *standstill* principle and the conservation concept traditionally linked to the application of nature conservation law. It is feared that, if certain protected species settle in the area in question while it is used within the scope of temporary nature conservation, it may turn out to be very difficult and in certain cases even impossible to remove these species afterwards. It furthermore remains to be seen whether temporary nature conservation in the immediate vicinity of special protection areas (SPA) or special areas of conservation (SAC), which is mostly the case in port areas, is in accordance with Art. 6 of the Habitats Directive². At first sight it seems that the removal of such temporary natural values will lead to a troublesome derogation and/or permit procedure precisely as a result of the (possible) presence of protected species and/or biotopes.

The large number of judicial uncertainties explains the lack of enthusiasm for the concept of temporary nature within port communities and companies. In the present contribution it will be analysed what would be the results of the application of current nature conservation law on a

¹ BUREAU STROMING and L. LINNARTZ, *Tijdelijke natuur en beschermde soorten: permanente winst. Een ecologische onderbouwing*, p. 33-41.

² Directive 92/43/EEC on the Conservation of natural habitats and wild fauna and flora, [1992] OJ L 206/7.

situation of temporary nature conservation and what possible adjustments can be made to the general nature conservation law in order to promote the use of temporary nature by companies³. In addition, some recent case law with respect to temporary nature will be analysed. The focus will mainly lay on the Belgian (Flemish) situation, but, as temporary nature is already being applied in the Netherlands, referral will be made to this practice also. Given the fact that the applicable nature conservation law in both countries consists mainly in an implementation of the European Directives, the conclusions of this contribution can also serve as an example for other European countries.

II. The concept of temporary nature

Although temporary nature is a relatively new nature conservation concept, it has already been the subject of further ecological⁴ and judicial research⁵ in the Netherlands and Belgium. In 2009 the first pilot projects were started in the port of Amsterdam⁶. Since then, several other pilot projects were conducted in the Netherlands⁷. In Belgium, temporary nature has already served as a compensation measure for the construction of a dock in the Port of Antwerp⁸ and will be integrated in the draft version of the species protection programme for the Port of Antwerp, which will probably enter into force in 2012. Several spatial execution plans for port areas explicitly allow the development of temporary nature at sites with a general industrial destination⁹.

Although it is clear that port and reclamation areas are very suitable for temporary nature, its use is not limited to one specific kind of area. It is, for instance, even possible for an abandoned old military building to offer useful shelter for several protected bat species. In general the following two aspects seem crucial for temporary nature: *the nature is temporary by nature (in other words: temporary nature is essentially aimed at pioneer and early species); the area in which temporary nature is located is only temporarily available*. Temporary nature is primarily aimed at so-called 'dynamic' species and biotopes. In ecological terms these species are labelled as pioneer species and early species. These species depend on the permanent availability of large areas with sparse vegetation for their survival. Although temporary nature can also offer a useful addition for later species (e.g. bats), it is preferably aimed at pioneer and early species. Temporary nature is preferably limited to areas which do not have any protected status based on nature conservation law. However, the exclusion of protected areas from the field of application of temporary nature would imply that it would be of limited use for port areas of reclamation areas, as significant parts of these areas are designated as a

³ This contribution is based on earlier judicial research and recent jurisprudence on this topic, which has been conducted in the Netherlands and Belgium. See inter alia: H. WOLDENDORP and C. BACKES, *Tijdelijke natuur – Advies over de juridische aspecten*, 2006, rapportno. 06.2.136, 111p. (consulted on: www.innovatienetwerk.org/nl/bibliotheek/rapporten/); H. SCHOUKENS, A. CLIQUET en P. DE SMEDT, "Tijdelijke Natuur. Overtreft de dynamiek van de natuur die van het natuurbehoudsrecht", [2010] *Tijdschrift voor Milieurecht*, 23-55; H. SCHOUKENS, A. CLIQUET en P. DE SMEDT, "The Compatibility of "Temporary Nature" with European Nature Conservation Law", [2010] *European Energy and Environmental Law Review*, 106-131; H. WOLDENDORP, "Dynamische natuur in een statische rechtsorde", [2010] *Milieu en Recht*, 134-143.

⁴ BUREAU STROMING and L. LINNARTZ, *Tijdelijke natuur en beschermde soorten: permanente winst. Een ecologische onderbouwing*, 2006, rapportno. 06.2.134, 98p. (consulted on: www.innovatienetwerk.org/nl/bibliotheek/rapporten/).

⁵ H. WOLDENDORP and C. BACKES, *Tijdelijke natuur – Advies over de juridische aspecten*, 2006, rapportno. 06.2.136, 111p. (consulted on: www.innovatienetwerk.org/nl/bibliotheek/rapporten/).

⁶ More information can be found on: <http://www.innovatienetwerk.org/nl/bibliotheek/detail/1/1-1-5-N-38/>.

⁷ More information on recent pilots can be found on: <http://www.innovatienetwerk.org/nl/bibliotheek/detail/1/1-1-5-N-38/>.

⁸ More in detail: H. SCHOUKENS, A. CLIQUET en P. DE SMEDT, "The Compatibility of "Temporary Nature" with European Nature Conservation Law", [2010] *European Energy and Environmental Law Review*, 121.

⁹ This is for instance the case in the Regional Spatial Execution Plans for the ports of Antwerp and Ghent.

protected area on the basis of the Habitats and/or Birds Directive¹⁰. Therefore, the interaction between temporary nature and Natura 2000 will also be analysed.

III. The compatibility of temporary nature with European and regional nature conservation law

Notwithstanding the positive ecological effects of temporary nature conservation, the removal of temporary nature values seems at first sight contradictory with the principles of nature conservation law. In a case of 2002 the Antwerp Court of Appeal reached the conclusion that the fact that a marshland had been created in an artificial manner (by the presence of an artificial water corridor) did not exempt it from the application of the Flemish nature conservation law¹¹. This meant that the necessary exemptions and derogation still had to be obtained before the marshland could be destroyed. As nature conservation law is aimed at the sustainable conservation and development of ecosystems, it is feared that the removal of the temporary nature will involve a high administrative burden. For instance, it is not sure that removing temporary nature is in accordance with the general principles of nature conservation law and the specific derogation regimes for species and biotope protection. The question also arises to what extent a temporary nature area is not eligible for designation as a protected area on the basis of the Birds and Habitats Directive. In this part of the contribution the margins within Flemish and European nature conservation law for temporary nature will be analysed.

1. General principles and tools

When removing temporary natural values, the project developer will always have to take into account the general tools and obligations contained in national nature conservation law. These tools and obligations are normally not limited to the possible presence of protected species but have a wider scope. In a judgement of 15 February 2007 the Belgian Council of State suspended the execution of a building permit for a quarry in which some interesting natural values had spontaneously developed¹². The competent authority issued negative advice for the filling of the quarry, exactly because of the (temporary) presence of these valuable protected biotopes. Not only can the application of the *standstill* principle prove to be troublesome. In several countries nature conservation law also contains intervention schemes, which have to be applied in the whole territory whenever harmful interventions in nature take place, regardless of its spatial planning destination. For instance, Art. 16 of the Flemish Nature Conservation Decree, which is partially inspired by the intervention regime of Art. 18 of the German Federal Nature Protection Act, imposes the obligation on the competent authorities to ensure that activities which are subject to a permit (e.g. a building permit) or notification cause no avoidable damage to nature. The creation of temporary nature will in some cases lead to the development of several biotopes which are protected on the basis of national nature conservation law. According to the Flemish Nature Regulation¹³ it is prohibited to

¹⁰ Directive 79/409/EEC on the Conservation of Wild Birds, [1979] OJ L 103/1, replaced by Directive 2009/147/EEC, [2010] OJ L 20.

¹¹ Decision of the Court of Appeal of Antwerp, 24 June 2002.

¹² Belgian Council of State, 15 February 2007, no. 167.889.

¹³ Nature Regulation of 23 July 1998, *Belgian Official Journal* 10 September 1998. For an overview, see: H. SCHOUKENS, A. CLIQUET and P. DE SMEDT, "The Implementation of the Habitats Directive in Belgium (Flanders): back to the origins of species?", [2007] *JEEPL*, p. 133.

alter and/or destroy certain types of biotopes (e.g. swamps, semi-natural grassland, dunes, etc.) unless a derogation is obtained from the Minister for the Environment.

In this respect, the competent authorities will have to refuse the granting of a permit for an activity that entails avoidable damage to nature, or, alternatively, the competent authorities have to attach specific conditions to the permit which ensure that nature will not be impaired beyond what is avoidable. The application of the nature intervention scheme can prove to be troublesome in the case of removal of temporary nature that is situated in an industrial estate. However, recent case law of the Belgian Council of State demonstrates that the potential effect of it should not be overrated, as the intervention regime does not cover unavoidable damage¹⁴. It is arguable that the removal of temporary nature has to be regarded as unavoidable damage, given the fact that it is a necessary step for the realisation of the industrial destination of a site. More generally speaking, the case law of the Council of State acknowledges that the intervention regime cannot be used by the competent authorities in such a way that damage to nature can always be avoided by simply refusing to grant a permit for an activity¹⁵. Other case law indicates that, in general, competent authorities will not be able to refuse a permit or derogation when the necessary compensatory and mitigating measures are in place¹⁶. Recent decisions of the Belgian Council of State also indicate that the standstill principle can be applied in a pragmatic and flexible manner when issuing permits¹⁷. This is illustrated by a recent case in which the Belgian Council of State accepted that the construction of a road through marshland was not necessary in contradiction with the standstill principle. Not every single negative effect has to be forbidden on the basis of the standstill principle¹⁸. In any case, in order to be regarded as such, the violation of the standstill principle has to be manifest¹⁹. Thus, this case law implies that it will have to be proven that the intervention in question will lead to a serious degradation of the existing natural values. Temporary nature conservation, however, will be primarily aimed at the attainment of a good status of conservation of pioneer species which heavily depend on the availability of such sites.

In some countries a duty of care (in Dutch “zorgplicht”) towards nature is included in the applicable nature conservation law, which can possibly hinder the removal of temporary nature. Art. 14 of the Flemish Nature Conservation Decree contains such an obligation. In 2002 the Court of Appeal of Antwerp, concluded that the owner of the site where a marshland was created in an ‘artificial’ manner violated his duty of care towards nature because he should have known that by blocking the corridor, he would cause the degradation of the newly created biotope. If the duty of care is interpreted very strictly, it would imply a heavy burden for project developers who want to work with temporary nature. Nonetheless the application of the duty of care appears to be less problematic when the removal of temporary nature is allowed by a permit according to more specific Regulations. In that case the duty of care towards nature is incorporated into the application of the intervention regime on the permit and/or derogation in question. When the project developer respects the specific conditions included in the permit and/or derogation, this will normally be regarded as a correct application of the duty of care towards nature. Therefore, the conclusion

¹⁴ Belgian Council of State, 7 December 2006, no. 165.664.

¹⁵ Belgian Council of State, 7 December 2006, no. 165.664.

¹⁶ Belgian Council of State, 26 May 2008, no. 183.359; Belgian Council of State, 20 December 2010, no. 209.868.

¹⁷ Belgian Council of State, 9 April 2004, no. 130.211; Belgian Council of State, 24 February 2005, no. 141.217; Belgian Council of State, 9 January 2007, no. 166.439.

¹⁸ Belgian Council of State, 20 December 2010, no. 209.866.

¹⁹ Belgian Council of State, 26 May 2008, no. 183.356.

cannot be that the removal of temporary nature is in any case forbidden in view of the duty of care towards nature. Yet the application of the duty of care can in some cases impose additional obligations on the project developer, for instance by demanding that the removal of temporary nature not take place in the breeding season of the species concerned.

2. Species protection law

The possible presence of *protected species* in the areas where temporary nature will develop could imply the application of a strict protection regime, which is contained in the Habitats and Birds Directives²⁰, as implemented in regional nature conservation law. As it is in principle forbidden to destroy species' habitats, there is a fundamental conflict between temporary natural values and the protection regime resulting from the species protection regime. In Flanders these restrictions are included in the Flemish Species Protection Regulation of 15 May 2009²¹. The Flemish Species Protection Regulation includes several annexes relating to protected species. Annex I to the Flemish Species Protection Regulation more specifically contains five lists ('categories') of protected species. Each category of species is linked to a different kind of protection regime. The basic protection regime applies to all specimens of the species in the wild which are listed under category 1 of Annex I to the Species Protection Regulation. Category 1 contains the species which are only of regional importance (e.g. the Hedgehog, the Common Frog, the Common Toad, ...). It is prohibited to deliberately capture and kill, deliberately and significantly disturb the specimens of these animal species, particularly during their breeding, rearing, hibernation and migration periods²². The specimens of the plant species are protected against deliberate picking and collecting, deliberate cutting, deliberate eradication and deliberate destruction²³. The nests, breeding and resting places of the specimens of these animal species are protected against deliberate destruction, deterioration and removal²⁴. An analogue protection regime applies to all species of wild birds which are listed under category 2 of Annex I to the Species Protection Regime. The deliberate and significant disturbance of these species, in particular during their breeding, rearing, hibernation and migration periods, is prohibited²⁵. However, no general exemptions to this protection regime exist. The strictest protection system applies to the species of wild animals and plants which are listed under category 3 of Annex I to the Species Protection Regulation. Art. 14, §2 of the Species Protection Regulation not only prohibits all deliberate damaging activities, but also the unintentional destruction of the nests, breeding sites and resting places²⁶ of these species. Category 3 contains all animal and plant species which are listed in Annex IV to the Habitats Directive, like, for instance, the Natterjack Toad, the Wild Hamster, the Moor Frog, the Garlic Toad, ...

²⁰ See Art. 5 Birds Directive and Art. 12, par. 1 Habitats Directive.

²¹ *Belgian Official Journal* 13 August 2009.

²² Art. 10, §1 Flemish Species Protection Regulation.

²³ Art. 10, §2 Flemish Species Protection Regulation.

²⁴ Art. 14, §1 Flemish Species Protection Regulation.

²⁵ Art. 10, §1 Flemish Species Protection Regulation.

²⁶ These concepts are defined in Art. 1 of the Flemish Species Protection Regulation. The definitions of these concepts are analogue to the definitions which are presented by the Commission in its Guidance (cf. footnote 32).

Margin for temporary nature within the *protection* regime

The removal of temporary nature, whenever protected species are involved, seems to manifestly contradict the above mentioned provisions. Still this conclusion is not as straightforward as it seems. For instance, it may be upheld that a certain threshold has to be exceeded before an action is considered to be in contradiction with the species protection regime, and/or that the removal of temporary nature cannot be regarded as a deliberate destruction and/or disturbance of the protected species concerned. The above-mentioned regulations only deal with deliberate harmful behaviour towards protected species. The removal of temporary nature, at first sight, does not seem to qualify as an intentional or deliberate deterioration and/or disturbance of protected species. However, this reasoning is unconvincing, although in some recent Belgian case law a similar argument has already been accepted²⁷. The Guidance document on the Strict Protection of Animal Species of the European Commission clearly indicates that the word “deliberate” does not only cover situations where a certain result is directly intended, but also situations where the person committing an offence is aware of the consequences of his action but accepts them, even if it was not directly intended²⁸. This approach is justified in the light of the case law of the Court of Justice, where the Court seems to interpret the term ‘deliberate’ in the sense of conscious acceptance of consequences²⁹. In any case, a consistent reference to the use of the word ‘deliberate’ is definitely made impossible by the fact that unintentional deterioration or destruction of breeding or resting places of the species which are listed in Annex IV to the Habitats Directive is also prohibited³⁰. With regard to bird protection, it may be possible to circumvent the strict protection regime by organizing the removal of the temporary nature outside the breeding season. However, this way out does not seem to be very practical, either. It seems to be out of the question when the temporary nature consists of nests which will be used again the next year. Moreover, it offers no solution for birds that stay at the same place throughout the year.

In several cases the removal of temporary nature might not imply a significant deterioration of the population of a protected species. In some cases taking mitigating measures will ensure the continued ecological functionality of breeding sites or resting places of protected species, thereby also ensuring compliance with the strict protection prescriptions (and not requiring derogations). According to the European Commission, this approach seems to be – under certain conditions – reconcilable with the Habitats (and Birds) Directive³¹. Also within the framework of the Flemish implementation regime only the significant disturbance of protected species is prohibited. Small, insignificant disturbances will therefore not require the application of the derogation regime³². Yet, this way out will not offer a systematic solution for temporary nature. In most cases the removal of temporary nature will probably not be limited to the removal of a few pools, but will imply a serious intervention in nature (e.g. the removal of the entire pool area suitable for Natterjack Toads). Besides, such mitigating measures have to be distinct from compensatory measures in the strict

²⁷ Criminal Court of Dendermonde, 21 December 2007, [2008] *Tijdschrift voor Milieurecht*, 674.

²⁸ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, 2006 (thereafter: *Guidance Species Protection*), 35-36. This guidance document can be consulted at: http://forum.europa.eu.int/Public/irc/env/species_protection/library?l=/commission_guidance/final-completepdf/ EN 1.0 &a=d.

²⁹ Case C-221/04, *Commission v Spain* [2006], par. 71.

³⁰ Case C-98/03, *Commission v Germany* [2006], par. 55. See also: *Guidance Species Protection*, p. 39-40.

³¹ *Guidance Species Protection*, p. 47-48.

³² Rapport to the Flemish Government accompanying the Species Protection Regulation (thereafter: *Report to the Flemish Government*), p. 26.

sense. According to the European Commission, compensatory measures are independent of an activity/project, and aim to compensate or offset specific negative effects on a species³³. Compensatory measures thus imply the deterioration or destruction of a breeding site or resting place, whereas mitigating measures ensure that the continued ecological functionality of the breeding site/resting place remains fully intact. An approach in which the removal of temporary nature is compensated at area level (thus ensuring the maintenance of a population on the level of a port area) will therefore not be sufficient to avoid the application of the derogation regime in species protection law. Hence, such an approach will always have to be assessed in respect of the specific conditions of the existing derogation regime within the Species Protection Regulation.

The Flemish species protection regime provides for several grounds for exemption with respect to certain possible harmful activities and/or behaviour. When the conditions of the grounds for exemption are fulfilled, the above-mentioned regulations do not apply. In these cases no specific derogation scheme has to be respected. Art. 11, paragraph 1 and Art. 15 of the Flemish Species Protection Regulation provide an exemption for spatial development. It is stated that the measures and regulations for species protection may not entail restrictions on activities and/or acts which comply with spatial planning execution plans. This spatial clause could be applied to temporary nature as it allows for the realisation of the spatial destination of the site concerned, notwithstanding the presence of protected species. Nevertheless, its use is limited to species which are not listed in Annex IV to the Habitats Directive. Therefore it cannot be used when temporary nature is aimed at the conservation of “European” species.

Margin for temporary nature within the *derogation* regime

Although there is some margin for temporary nature within the species protection regime, a global framework for temporary nature will have to be assessed within the specific conditions of the derogation regime in species protection law. The Habitats and Birds Directive set three preconditions which have to be met before granting a derogation of the basic protection regime³⁴. These preconditions are implemented in the Flemish Species Protection Regulation. Firstly, the derogation must not be detrimental to the maintenance of the populations of the species concerned that enjoy a favourable conservation status in their natural range. As mentioned by the European Commission, an appropriate assessment of the impact of a specific derogation will in many cases, if not most, have to occur at a lower level than the biogeographical region in order to be meaningful in ecological terms (e.g. site level)³⁵. It is clear that this test will not be easily met for rare species. In the case of temporary nature it could be upheld that this test will always have a positive outcome (especially for pioneer species), given the above-mentioned ecological research³⁶. The competent authorities will also have to assess whether there is no satisfactory alternative before allowing derogation. The appraisal of whether an alternative is satisfactory or not in a given situation must be based on objectively verifiable factors, such as scientific and technical considerations. In the first Dutch derogation granted for temporary nature, this test is applied in a very flexible way. The alternative test is rather aimed at the execution level, more specifically at the measures which have

³³ Guidance Species Protection, p. 48.

³⁴ Art. 16 Habitats Directive; Art. 9 Birds Directive.

³⁵ Guidance Species Protection, p. 60.

³⁶ However, as stated above, these conclusions will probably only be justified when there is a well-functioning conservation policy. If this is not the case, the negative outcome of this test will require compensatory measures.

to be taken in accordance with the duty to care towards nature. It is clear that such a test is more easily performed at area level (e.g. at the level of a port area).

In principle, it is always feasible to obtain a derogation because of imperative reasons of overriding public interest (including those of social or economic nature). Nonetheless it will not be an easy task to prove the existence of such an imperative reason of overriding public interest in each case of temporary nature, unless the temporary nature concerned could be directly linked to major building and/or port projects³⁷. There are two other useful grounds for derogation which can offer a solution for temporary nature. The Dutch judicial research on temporary nature suggests that temporary nature should be qualified within the derogation possibility for the protection of wild flora and fauna and the conservation of natural habitats, which is present in Art. 16, par. 1 of the Habitats Directive³⁸. This reasoning is also upheld in the temporary nature policy concept of the Dutch minister competent for nature conservation³⁹ and in the first temporary nature projects. This approach is based on the conclusions of the above-mentioned ecological research, which indicate that temporary nature has positive effects for all species, even if it is removed after a while⁴⁰. Yet it is not clear whether this argumentation is sufficient to classify temporary nature within this ground for derogation. The European Commission, in turn, does not offer a lot of supplementary interpretation at this point in its Guidance⁴¹. In a recent judgement the Court of Amsterdam accepted this reasoning with respect to a derogation that had been delivered for the use of temporary nature in the Port of Amsterdam⁴².

However, there is also a second option for derogation that looks plausible for temporary nature. According to the Habitats and Birds Directive it is also possible to derogate from the strict species regime in order to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the capturing, picking or keeping of certain specimens of protected species in limited numbers, as specified by the competent national authorities⁴³. Although at first sight this derogation clause does not appear to be explicitly aimed at spatial interventions with implications for the habitats of species, it is probably not excluded to use this clause for temporary nature. Given the fact that the European Commission has already stressed that management plans for large carnivores, including strictly limited harvesting of the population by hunting is a good example of the application of this derogation clause, it is not inconceivable that this will also be the case for a species protection programme aimed at temporary nature. The European Commission noted that the implementation of this provision would involve some management, and that one way of making this happen would be through a species management/conservation plan. According to the European Commission, such plans should aim at the long-term conservation of a species and contain measures mainly concerning the viability of the population and the natural range and habitats of the species. Derogations could

³⁷ If only species of regional importance occur in a site with temporary nature, a derogation can be granted merely because of 'social and/or economic reasons'. In that case the presence of overriding reasons will not have to be demonstrated. However, this does not offer a general way out for temporary nature, as in most cases the project developer will probably be confronted with the presence of species of European importance.

³⁸ H. WOLDENDORP and C. BACKES, *Tijdelijke natuur, Advies over de juridische aspecten*, p. 46.

³⁹ J. REKER and W. BRAAKHEKKE, *Tijdelijke natuur, concept voor beleidslijn*, 2007. Consulted at:

<http://www.innovatienetwerk.org/nl/bibliotheek/rapporten/316/TijdelijkeNatuurconceptvooreenbeleidslijn>

⁴⁰ H. WOLDENDORP and C. BACKES, *Tijdelijke natuur, Advies over de juridische aspecten*, p. 47.

⁴¹ Guidance Species Protection, p. 54.

⁴² Decision of the Court of Amsterdam, 31 May 2011 (*not published*).

⁴³ See for instance Art. 16, par. 1, e) Habitats Directive.

be provided for in the plan and be part of the regulation concerning the species population, without affecting the favourable conservation status⁴⁴.

This approach is backed by recent case law⁴⁵ and jurisprudence⁴⁶, which underline that it has to be possible in any circumstances to grant derogations from the species protection regime when ecological research demonstrates that no ecological consequences are to be expected for the local population in question. The strict conditions, the selective basis and the limited extent of the removal of the breeding and resting places of the species which are confronted with temporary nature can be regulated in an area-linked species protection programme. Such a plan-based approach seems to be accepted within the Flemish species protection framework. The removal of pools for Natterjack Toads within a planning framework is mentioned in the interpretation guide as a specific example of the margins which are present within species protection law⁴⁷.

3. Temporary nature and the environmental damage regime

The Environmental Damage Directive⁴⁸, which is implemented in Flanders by an Environmental Damage Decree⁴⁹, aims at creating a common liability framework with a view to preventing and remedying damage to (amongst others) protected animals, plants and natural habitats. This administrative liability scheme applies to certain specified occupational activities and to other activities in cases where the operator is at fault or negligent. Regardless of its location, direct and/or indirect damage to species⁵⁰ and natural habitats⁵¹ protected at Community level by the Habitats and/or Birds Directive, falls under the scope of this regime. The application of the environmental liability scheme is limited to environmental damage caused by the occupational activities listed in Annex I to the Directive. Under this first regime, the operator may be held responsible, even if he is not at fault. However, the removal of temporary nature will not normally be the consequence of any of the occupational activities listed in Annex III. Nevertheless, the second liability scheme applies to all occupational activities other than those listed in Annex III to the Directive, but only where there is damage or imminent threat of damage to species or natural habitats protected by Community legislation. In this case, the operator will be held liable only if he is at fault or negligent. The removal of temporary nature can in some cases be regarded as an occupational activity within the meaning of Art. 2, 7 of the Environmental Damage Directive⁵². When a certain conflict exists between temporary nature and the Environmental Damage regime, this does not imply that the removal of temporary nature will necessarily trigger the application of the prevention and remedial measures. In this respect, it is important to highlight the fact that only significant damage falls under the scope of the Environmental Damage Directive. Hence, only damage to protected species and natural habitats that

⁴⁴ Guidance Species Protection, p. 57-58.

⁴⁵ Case C-342/05, *Commission v Finland* [2007].

⁴⁶ H. WOLDENDORP, "Vogelbescherming: de wettekst als vogelverschrikker", [2008] *Milieu en Recht*, p. 78.

⁴⁷ Report to the Flemish Government, p. 50.

⁴⁸ Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to prevention and remedying of environmental damage, OJ 30.4.2004 L 143/56.

⁴⁹ Environmental Damage Decree of 21 December 2007, *Belgian Official journal* 12 February 2008.

⁵⁰ More specifically (1) Bird Species listed in Annex I of the Birds Directive; (2) the animal and plant-species listed in Annex II to the Habitats Directive; (3) the animal and plant-species listed in Annex IV to the Habitats Directive.

⁵¹ The habitats-types listed in Annex II to the Habitats Directive.

⁵² Art. 2, 7 Environmental Damage Directive: "Occupational activity" means any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character.

has significant adverse effects on obtaining or maintaining the favourable conservation status of such habitats or species, falls under the application of this regime⁵³.

According to the Environmental Damage Directive, the significance of such effects is to be assessed with reference to the so-called baseline condition, taking into account the criteria set out in Annex I. The criteria set out in Annex I to the Environmental Damage Directive suggest that a static approach should not be adopted here. According to Annex I to the Environmental Damage Directive, damage to species or habitats cannot be classified as significant damage if it has been established that they will recover within a short time and without intervention to either the baseline condition, or a condition which, solely by virtue of the dynamics of the species or habitat, leads to a result deemed equivalent or superior to the baseline condition. This exclusion could offer a more gentle way out for temporary nature. With reference to the above-mentioned ecological research, one could argue that the removal of temporary nature cannot be regarded as a significant effect. However, this argumentation could be further strengthened by the creation of several alternative breeding and/or resting sites for the species concerned. In turn, this last approach could be classified under the second ground for exclusion mentioned in Annex I to the Environmental Damage Directive. This ground for exclusion reads as follows: *'negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators, can not be classified as significant damage either'*. It therefore seems plausible that any interference between temporary nature and the liability scheme of the Environmental Damage Directive can be avoided by means of an area-oriented plan- or programme-based approach in which the removal of temporary nature takes place within the framework of clear conservation objectives⁵⁴.

4. Temporary nature and the protection regime for protected areas (Natura 2000)

Obligation to designate an area as temporary nature?

Although temporary nature will preferably be created outside the Natura 2000-Network, it cannot be excluded that in some cases it will come in contact with the protection regime for these areas. It goes without saying that a project developer will not be tempted to create temporary nature on land which is eventually destined for industrial development if there is a risk that the land will be designated as part of the Natura 2000-Network. In its judgement of 23 March 2006 in the Case 209/04, the Court of Justice clearly stresses that this obligation must be regarded as a dynamic process which does not end with the entry into force of the Birds Directive. According to the Court, it would be hardly compatible with the objective of effective bird protection if outstanding areas meant for the conservation of the species that are to be protected were not brought under protection merely because the outstanding nature of a site came to light only after transposition of

⁵³ Art. 2, 1 Environmental Damage Directive.

⁵⁴ When adopting a plan- or programme-based approach, it may be preferable to apply the specific assessment regimes of Art. 6, (3) and (4) of the Habitats Directive (if, for instance, the area in question, is located within the vicinity of an SPA and/or SAC) and/or Art. 9 and/or 16 of the Birds and Habitats Directives (if damage will be caused to European protected species). By doing that, further application is made of the ground for exclusion mentioned in Art. 2 (1) of the Environmental Liability Directive

the Birds Directive⁵⁵. In that particular case the mere existence of three pairs of Common Snipe, six pairs of Northern Lapwings and eight pairs of Eurasian Curlews seemed to require the designation of the area concerned⁵⁶. Although the Court of Justice made it clear that the designation process on the basis of the Habitats and Birds Directives must be regarded as a dynamic process. The mere presence of protected species that are listed in the relevant annexes to these Directives does not, as such, necessitate the designation of the area concerned. In a landmark case in 2005, the Belgian Council of State clearly emphasised that the Birds Directive must be interpreted as follows: an authority is not obliged to designate every site where birds are present that are listed in Annex I to the Birds Directive, only the most suitable in number and size⁵⁷. The same interpretation was upheld within the framework of Art. 4 of the Habitats Directive.

At this point, referral can also be made to the conclusions of Von Daniels and Appel regarding the suitability of the classification of conversion areas as protected areas⁵⁸. With reference to a trend of (German) court decisions, these authors conclude that areas in which a sea change to the surface will occur as a result of already determined future use, will also have to be considered basically unsuitable for bird conservation if, as a result of such use, the ecological conditions for the conservation and development of the birds would no longer be ensured. A similar approach can be derived from a ruling of the German Federal Administrative Court. In that decision, the German Federal Administrative Court accepted the non-designation of a gravel pit as an SPA as lawful, arguing that the bird species inhabiting the area in question prefers gravel pits at an earlier succession stage, but that in the future the habitat at the birds' disposal in the areas that would be relevant if the subsequent activities to be determined continued to be developed, would be reduced. Thus, the court argued, there was no reason to object to the authority's decision that the gravel pit in question should not be designated as an SPA, but that the 'future-oriented concept' of only protecting habitats suitable for offering the bird species in question '*better chances and possibilities of development both at present and in the future*' should be implemented⁵⁹.

A recent Dutch case also acknowledges the margin of discretion of the competent authority in this respect. In this case a Dutch non-governmental organization (NGO) asked the competent authority to designate a site in the Port of Rotterdam as a special protection area on the basis of the Birds Directive. The site consisted in a piece of undeveloped land on which a colony of protected Spoonbills had settled. Spoonbills are listed in Annex I to the Birds Directive. The NGO in question argued with referral to Art. 4 of the Birds Directive and the case law of the Court of Justice that the site concerned had wrongfully not been designated by the Dutch competent Minister. While recognizing the presence of more than 1% of the Dutch population of Spoonbills on the site concerned, the Dutch Council of State still affirmed the validity of the decision of the Dutch Minister to not designate the site⁶⁰. The Dutch Council of State did not accept the reasoning based on the above mentioned judgement of 23 March 2006 of the Court of Justice. In this specific case the Council of State stressed that the five most suitable areas for the Spoonbill in the Netherlands had already been designated. Moreover, the site in question had only a limited surface and was not

⁵⁵ Case 209/04, *Commission v Austria* [2006], par. 43.

⁵⁶ Case 209/04, *Commission v Austria* [2006], par. 35.

⁵⁷ Belgian Council of State, no. 147.047, 30 June 2005, see also: Belgian Council of State, no. 166.511, 10 January 2007.

⁵⁸ G. VON DANIELS and M. APPEL, "SPAs and SACs in Conversion Areas", [2007] *JEEPL*, p. 106.

⁵⁹ BverW NVwZ 2004, 732-735, as referred to in: G. VON DANIELS and M. APPEL, "SPAs and SACs in Conversion Areas", [2007] *JEEPL*, p. 102.

⁶⁰ Dutch Council of State, no. 200907172/1/R2, 21 July 2010, [2011] *Milieu en Recht*, 238-241.

suitable for the long term survival of the species concerned (due to the presence of port activities). The case law presented above seems to confirm the conclusion that, notwithstanding the rather strict case law of the Court of Justice, the competent authority will not easily be compelled to designate a temporary nature area as a part of the Natura 2000-Network. This will only be the case when the site concerned has a large surface, contains a large population of species listed in the Annexes to the Birds and Habitats Directive and is suitable for the long term presence of these species. In other words, it will have to be proved that the site is one of the most suitable areas for the species and/or habitats. In any event, when temporary nature is included in a larger ecological network – for instance on port level – it will remain rather troublesome to argue that the non-designation of some areas of temporary nature is unlawful.

Exemption from the obligation to carry out an *appropriate* assessment?

If the temporary nature is located within or in the vicinity of an existing SPA and/or SAC, it is evident that it will be harder to obtain a permit for the removal of the temporary nature. Such a situation can be expected in port areas, where it is not uncommon that large areas are designated as a part of the Natura 2000-Network. The assessment regime referred to in Art. 6 (3) and (4) of the Habitats Directive will have to be applied. Pursuant to Art. 36ter, §3 of the Flemish Nature Conservation Decree, which implements Art. 6 (3) of the Habitats Directive, the obligation to conduct an appropriate assessment is limited to activities subject to a prior license or permit and to plans or programmes which can imply a significant effect on an SPA/SAC. The competent authority can only agree to any plan or activity which is subject to a prior permit and is likely to have a significant effect on the site after having ascertained that it will not adversely affect the integrity of the site concerned. This regime's safeguards are triggered by a likelihood of significant effect. This is in line with the strict case law of the Court of Justice⁶¹. Although the removal of temporary nature is, as such, not forbidden when it takes place within a Natura 2000-context, the application of the strict assessment regime of the Habitats Directive will urge the project developers concerned to more caution.

To circumvent a strict application of this strict intervention regime, it is recommended to include this as early as possible in the decision-making process. If the appropriate assessment with regard to the effects of the removal of the temporary nature is already carried out on plan level, for instance when drafting the species protection programme at area level, this will prevent the project developer from being confronted with a heavy administrative burden at permit level. It can be presumed that if the necessary compensatory or mitigating measures are provided for on area level, it will be easier to demonstrate that the removal of some temporary nature areas as such will not have to be regarded as a significant alteration of the habitats and/or species of the site concerned. Such an approach could be seen as a form of 'offsetting of natural values'⁶². However, the mere presence of a plan-

⁶¹ Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, [2004], paras. 56-57. See also: A.G. URETA, "Habitats Directive: precautionary principle and environmental assessment of plans and projects", [2005] *Env. Liab.*, 27; J. VERSCHUUREN, "Shellfish for fishermen or for birds? Art. 6 Habitats Directive and the precautionary principle", [2005] *Journal of Environmental Law*, 276.

⁶² Balancing/offsetting of natural values must be seen as a balancing of the negative effects of the project and/or plan concerned in such a way that the natural values on area level will be maintained or increased. This kind of offsetting of natural values may be considered a variant of the adoption of mitigation measures. Today, however, quite a few legal issues arise with regard to handling the netting approach on a broad scale.

based approach will in principle not exempt the developer from the obligation to carry out an appropriate assessment on project level. This conclusion can be drawn from a recent Court of Justice case. In the case C-241/08 the Court of Justice had to assess the validity of French Natura 2000-contracts. These specific instruments are concluded to implement the statement of objectives and to contain measures necessary for the management of the site. Works and developments provided for in Natura 2000 contracts are exempt from the assessment of implications procedure, and it is considered that Article 6(3) of the Habitats Directive does not require those works and developments to be subject to that assessment procedure since, in its view, they do not adversely affect the site in any significant way. The Court of Justice rejected such an approach in its judgement of 4 March 2010. The Court stated that in order to fully ensure the attainment of the conservation objectives referred to in the Habitats Directive, it is necessary to conduct an individual assessment of the implications of each plan or project that is not directly connected with or necessary for the management of the site, and is likely to affect the site⁶³. The mere fact that the Natura 2000 contracts comply with the site conservation objectives cannot be regarded as sufficient to allow the works and developments provided for in those contracts to be systematically exempt from the assessment of their implications for the sites⁶⁴. Somehow, this strict case law of the Court of Justice seems to lower the administrative gains that can be expected from a plan-based approach to temporary nature. This is no surprise. In our earlier research we already concluded that the plan-based approach will lead to a smoother application of the assessment obligation on project level but not to an exemption from it⁶⁵.

5. General conclusions

In most cases, working with temporary nature will give rise to an additional administrative burden and legal risks. Within the framework of the existing nature conservation law it will be hard to argue that the removal of temporary nature be exempted from the strict protection regime for species protection. Usually this administrative burden manifests itself in the obtainment of an additional derogation and/or permit, which may be appealed against, for instance by environmental associations. The application of the derogation procedures will imply an important legal risk. When creating temporary nature, the project developer concerned will in principle not have the certainty that he will be able to go ahead with the future spatial development on the site in question. Hence, it is entirely possible that the competent authority still chooses to refuse to grant a derogation and/or a permit for the removal of the temporary nature. Consequently, the project developer will never have full certainty that he will be able to remove the temporary nature and develop the area as an industrial estate.

IV. Concrete solution directions for temporary nature within the *existing* legislation

The analysis above showed that a plan-based temporary nature framework can offer legal guarantees with regard to temporary nature without exempting it from all administrative burdens.

⁶³ Case C-241/08, *Commission v. France*, [2010], par. 54.

⁶⁴ Case C-241/08, *Commission v. France*, [2010], par. 55.

⁶⁵ H. SCHOUKENS, A. CLIQUET en P. DE SMEDT, "The Compatibility of "Temporary Nature" with European Nature Conservation Law", [2010] *European Energy and Environmental Law Review*, 121.

This does not alter the fact that under certain circumstances there is probably less need to draft an area-oriented plan or programme. This might be the case if it can be presumed that no species listed on the Annexes to the Habitats and Birds Directive will occur on the land involved. Then the developer could make application of the existing grounds for exemption and more flexible tools for derogation in national nature conservation law. In other cases the draft of an area-oriented plan will not be useful from a practical point of view, or will be considered administrative overkill, for instance in view of the limited space on the parcel of land concerned. The available Dutch research advises a project-associated approach that grants exemptions in a nature-free situation. Developers are granted exemptions for the removal of temporary nature before they offer space for temporary nature. Both solution directions have up- and downsides. These will be listed below along with some recent case law regarding both solution directions. It will also appear that – in some cases – a combination of both approaches is possible.

1. An area-oriented programme-based approach to temporary nature?

Until recently Flemish nature conservation law, as in most other European countries, did not contain a useful tool which allowed a plan-based approach to species conservation, let alone to temporary nature. Despite of a clear legal framework, the Belgian Council of State already accepted an area-based approach to temporary nature in a spatial execution plan for the Deurganckdock in 2007⁶⁶. In this case the applicants claimed that the proposed *temporary* compensatory measures were not in accordance with Art. 6 (4) of the Habitats Directive as they were of an '*uncertain nature*'. The Council of State was not convinced by this argument as the conditions under which these temporary compensatory measures could be altered were strictly defined. According to the Council of State these conditions sufficiently guaranteed that as soon as a *temporary* compensation area was withdrawn, another compensation area had to be designated.

Within the newly Flemish Species Protection Regulation the species protection programme is undoubtedly the most suitable tool to deal with temporary nature, especially in port and mining areas⁶⁷. A species protection programme is a programme aimed at obtaining a favourable status of conservation for one indigenous species or group of species in an area where the programme is in effect⁶⁸. It must be regarded as a cohesive collection of actions, based on an extensive scientific report⁶⁹. Amongst others, this report needs to contain the concrete conservation objectives for the species involved, as well as a description of the concrete measures that might be taken to contribute to a favourable status of conservation of the individual species or group of species within the Flemish Region⁷⁰. It is of great practical importance that species protection programmes can contain derogations from the prohibitive clauses regarding species protection⁷¹. During the drafting of the programmes, a derogation from the provisions that might have an effect on the land where temporary nature will be provided can be given in advance. Based on the existing monitoring instruments it must be possible to predict with a certain degree of accuracy which species will be

⁶⁶ Belgian Council of State 9 January 2007, no. 166.439.

⁶⁷ Report to the Flemish Government, p. 50.

⁶⁸ Art. 1, 11° Flemish Species Protection Regulation.

⁶⁹ Art. 25 Flemish Species Protection Regulation.

⁷⁰ Art. 26 Flemish Species Protection Regulation.

⁷¹ Section 2, sub-sections 1 – 4, Flemish Species Protection Regulation.

able to settle at a certain location⁷². Thus, the derogation shall best be given for all protected species which might reasonably be expected to settle at the location involved, and for which the available exemptions from the Species Protection Regulation cannot be referred to. A second important feature of the species protection programme is that it can not only be initiated by the government. Individuals, companies or other administrative authorities may also take the initiative. A particular protection initiative can only be considered a draft of a species protection programme if it regards a functional ecological unit. A functional ecological unit is an area required for the conservation of a viable population of a certain species, which implies that the area offers the necessary qualitative and quantitative guarantees for long-term survival of the population, without it being necessary for the population to be connected to other populations for survival. The size of a functional ecological unit will vary from species to species. It is clear that in most cases a port or mining area meets these requirements.

The framing of temporary nature in the context of a species protection programme provides certain undeniable benefits to the actors involved. The approach to temporary nature in a species protection programme constitutes a framework that provides a greater degree of legal certainty. This framework enables working with temporary nature on area level in a relatively flexible manner. The planning instrument seems fit for temporary nature in highly dynamic interconnected areas, such as port and/or mining areas, where the available space is appropriate for a robust ecological infrastructure in which temporary nature can be framed. The land qualifying for temporary nature is mapped in advance in the species protection programme at hand. The derogations based on the species protection law that are necessary for the development of the temporarily available land where protected species will/might settle, can already be provided in this species protection programme. Provided that the limits set out in the species protection programme are respected, it seems improbable that the authorities involved – the same authorities that approved the species protection programme in the first place – will issue a negative advice on the removal of temporary nature in a later phase. Even if the concrete circumstances in which temporary nature is used cannot be properly described in a spatial or temporal way in the species protection programme, and consequently no prior derogations can be granted, a programme-based framework for temporary nature seems to be useful. An area-oriented policy on temporary nature in a port area that has already been approved by the competent authorities will probably lead to a smoother handling of subsequent derogation and permit procedures. By systematically integrating temporary nature into a framework, it also will be avoided that temporary nature falls within the scope of application of the prevention and restoration duties referred to in the Environmental Damage Directive. The damage to protected species originating from such systematic intervention is left out of the scope of application of this regime.

Notwithstanding the fact that with the species protection programme the Flemish Government explicitly had an instrument in mind that could cope with situations such as temporary nature in economically highly dynamic areas, certain boundary conditions, restrictions and disadvantages of this approach need to be pointed out. The drafting of a species protection programme itself will always be an administrative burden for the landowners and project developers involved. Opting for this systematic solution direction only makes sense if the temporary nature is situated in relatively large, homogeneous and dynamic areas that can be regarded as functional ecological units for one or

⁷² The Species Protection Regulation contains more specific provisions concerning how to draw up an inventory, cfr. Arts..6 and following of the Flemish Species Protection Regulation.

several types of habitats. In other circumstances the choice will rather have to be made in favour of the separate derogation procedure. The species protection programme also has to guarantee the presence of sufficient living space to preserve or restore the favourable status of conservation at all times in the future⁷³. To this end, the species protection programme needs to provide the necessary compensatory and mitigating measures, for instance possibilities for refuge to nearby lands in the port area. Therefore, it will probably not be possible to grant a broadly formulated derogation for the removal of temporary nature in the species protection programme⁷⁴. In addition, a monitoring system needs to be created to measure the evolution of target species' the status of conservation⁷⁵. The required level of detail may constitute an extra potential burden for temporary nature. Although practical experience is not yet available, Flemish legislation seems to demand that derogations with regard to temporary nature be described as strictly and as precisely as possible (on a spatial and on a temporal level). It is clear that this will not always prove to be easy in an economically highly dynamic environment. In certain cases it will not be possible to tell much in advance whether a parcel of land will or will not be a viable choice for temporary nature. It seems preferable to include a revision clause within a well-defined framework, providing for the adjustment of the derogations granted to the economic developments, without detracting from the conservation objectives involved.

It remains to be seen whether in other countries nature conservation law contains sufficient analogue planning instruments which allow an area-based approach to temporary nature or – on a more general level – species conservation and protection. Although until now temporary nature in the Netherlands has been the subject of a rather case-by-case approach, recent initiatives demonstrate a clear tendency towards a more area-based approach to species conservation. Recently, a general derogation (in Dutch “generieke ontheffing”) for two municipalities in the Province of Flevoland was granted for all possible construction works which might interfere with the Natterjack Toad and which can be included in the derogation reasons listed in the Habitats and Birds Directive⁷⁶. This general derogation was based on a management plan, which contained a framework aimed at the attainment of a good conservation status of the Natterjack Toad in the area concerned. This management plan not only included mitigating measures but also measures aimed at the restoration and/or extension of the permanent habitats of the Natterjack Toad in the area concerned⁷⁷.

2. Case-by-case approach to temporary nature (derogation in advance outside a plan-based approach)

A large part of the legal risks linked to following one or several derogation procedures during the final spatial development of a parcel of land containing temporary nature can be countered by a systematic or programme-based approach. However, drafting an area-oriented planning framework will not be possible and/or useful in certain circumstances. This might be the case when in the short

⁷³ Report to the Government, p. 50-51.

⁷⁴ On page 46 of the Report to the Government it is indicated that no comprehensive derogations can be given, because a derogation should always be sufficiently specific, aimed at a specific problem or situation, assuring effective review.

⁷⁵ Art. 26, first paragraph, 10° Flemish Species Protection Regulation.

⁷⁶ This derogation can be consulted on: <http://www.flevoland.nl/producten-en-diensten/rugstreepaddenmanagement/ontheffing-rugstreepadmanagementplan.pdf>.

⁷⁷ This management plan can be consulted on: <http://www.flevoland.nl/producten-en-diensten/rugstreepaddenmanagement/index.xml>.

term opportunities arise for temporary nature, and/or when the area suitable for temporary nature is situated in a relatively small-scale industrial area which is too small for a plan-based approach. In this hypothesis a plan-based approach will offer no practical outcome for temporary nature, as the drawing of it will take too much time or will not be useful considering the small surface of the area concerned. To circumvent such drawbacks the developer could apply in advance – i.e. before the area concerned is made available for nature development – for a derogation based on the regulations on species and biotope protection. If the derogation is not obtained in advance, one can still choose not to proceed with the development of temporary nature⁷⁸. The development of one or more parcels of land as temporary nature areas will only take place if the application for a derogation has been granted. The company or project developer concerned will have to address the competent authority and point out that, until the moment they start realising the project (i.e. the realisation of the destination), they are planning to provide space on the parcel of land in question for the development of temporary nature. By applying for a derogation in advance, they ask the competent authority's consent for the removal of this temporary nature (including protected species and vegetation that will appear on the land) upon starting the execution of the project before actually starting to develop nature elsewhere.

In the Netherlands, for the time being, this solution is opted for in order to make working with temporary nature more attractive. The creation of a policy line for temporary nature that currently highlights this derogation track is on the way⁷⁹. In this respect a few pilot projects on temporary nature have been created. On 19 February 2009 the Amsterdam Port Authority filed a formal request with the Minister competent for Nature Conservation for an 'in advance'-derogation for temporary nature⁸⁰. The request was made with a view to getting non-used lands in the port area of Amsterdam (with a destination of an industrial area) ready for construction. On 15 July 2009 the Minister of Nature granted a derogation based on Art. 75, paragraph 5 and 6 of the Dutch Law on Flora and Fauna for most of protected species concerned⁸¹. This occurred because, based on the inventory and monitoring data regarding the site involved, it could be ascertained that some six species did not appear at the site involved, and – given the expected ecological developments – were not going to appear at the site over the next 10 years, no exemption was considered necessary for these species. Reference to the favourable environmental effects of temporary nature was accepted. Nevertheless, the derogation was the object of a large number of conditions. For instance, when evacuating the plan area, an inventory needs to be conducted of the species that could possibly appear in the area and for which an exemption was granted. Moreover, when planning the works, the exemption holder needs to keep in mind the seasonal activities of the species that appear in the area or that are expected to appear in the area, so that any disturbance during the most vulnerable periods (breeding, hibernation) can be prevented. In the meantime several other derogations for temporary nature have been delivered.

Although granting derogation in advance, before starting the development of temporary nature, seems like a tempting general solution for landowners and building promoters because of the legal certainty, some legal objections do seem possible, especially when this occurs outside a systematic

⁷⁸ H.E. WOLDENDORP and C. BACKES, *Tijdelijke natuur – Advies over de juridische aspecten*, p. 47.

⁷⁹ *Ibidem*.

⁸⁰ See:

<http://www.innovatienetwerk.org/nl/bibliotheek/nieuws/377/Februari2009HavenAmsterdamvraagtontheffingaan.html>

⁸¹ The text of this derogation may be consulted at:

<http://www.innovatienetwerk.org/nl/bibliotheek/nieuws/375/Juli2009EersteontheffingTijdelijkNatuur.html>

framework. A major objection is that in a so-called 'nature-free situation' it will sometimes prove to be troublesome to estimate which species will settle on a specific parcel of land⁸². Although it will be possible in certain cases to make a good estimation of the species that will settle at a specific location, the risk remains that species other than those initially considered will do so as well. This will especially be the case for locations where little or no monitoring and/or inventoried data exists – and that per definition lack any systematic framework. In the Dutch pilot projects this posed no insurmountable problem as enough monitoring material was present. In other situations such a conclusion will not be that easy to attain. In that case, an alternative would be to apply for a derogation for *all* protected species, but this seems to hinder an *in concreto* assessment, which is needed according to the European law. The European Commission clearly underlined the *in concreto* character of the derogation regime of Art. 16, paragraph 1 of the Habitat Directive in its Guideline on strict species protection⁸³. As already mentioned above, the Court of Justice has already judged that a regulation establishing a prior, general assessment of the potential risks of activities in an area, violates the Habitat Directive because such a regulation contains the risk that certain projects liable to damage this area might fall outside the scope of the regulation⁸⁴. In any event, in the Flemish context a "catch all" derogation seems out of the question since an application for derogation not only has to indicate the protected species which may be deviated from, but also the circumstances of time and place under which the derogation may take place⁸⁵.

In general it can be upheld that it will remain very difficult to judge the concrete impact of the removal of temporary nature on certain species five, ten or twenty years in advance, especially when it is not yet clear which species will be settling over the course of the years. Also, it is not imaginary that the status of conservation of a specific species on a local or above-local level will deteriorate within a few years after a prior derogation has been granted, taking away the justification for the granting of the prior derogation⁸⁶.

Some of this criticism has been rejected by the Court of Amsterdam in a decision of 31 May 2011⁸⁷. The above mentioned derogation which had been granted at the Amsterdam Port Authority had been contested by a non-governmental organisation (NGO). The NGO argued that no derogation in advance could be given for temporary nature but that a derogation could only be granted when the realisation of the final destination of the area concerned took place, i.e. after (and not before) the nature development had occurred. Also the NGO was of the opinion that the derogation could not be granted for protecting wild fauna and flora when a conservation duty was not even included in the derogation. The Court however accepted the ecological benefits of temporary nature stating that by granting a derogation in advance the settlement of the species itself was made possible. This would not be the case when no derogation in advance was granted. The legal certainty obtained by the Port Authority could not be considered as a mere economic interest. Moreover, there was no need to link

⁸² This objection is probably less relevant for biotopes because, based on the characteristics of an area, normally a good estimation can be made of which biotopes might develop there.

⁸³ Guidance Species Protection, p. 61-62.

⁸⁴ Case 6/04, *Commission v Germany* [2006], par. 47. See also recently: Case C-241/08, *Commission v. France*, [2010], paras. 54-55.

⁸⁵ Art. 22, §3, 4° Flemish Species Protection Regulation.

⁸⁶ It is arguable that similar criticism seems possible for derogations anticipated in advance in a species protection plan. However, the criticism sounds less convincing in that case. Within a plan-based framework, conservation objectives will be the starting point, and the necessary mitigating and compensatory measures will always be provided in view of the (temporary) monitoring results, allowing that in the whole area the favourable status of conservation is attained.

⁸⁷ Decision of the Court of Amsterdam, 31 May 2011 (*not published*).

a conservation duty to the derogation, as the development of temporary nature implies a spontaneous development. The ecological research presented by the NGO to disprove the ecological benefits of temporary nature was not accepted by the Court either. Although in my opinion not all legal arguments “against” temporary nature have been invoked in this procedure and an appeal is still possible, this decision will undoubtedly give a boost to the Dutch policy on temporary nature.

V. General conclusions

Temporary nature might offer a useful addition to the existing nature conservation policy. In most countries, large areas of land lie undeveloped during many years. Most companies would prefer to have these areas regularly ploughed or grazed, in order to not allow protected species to settle and/or protected biotopes to develop. The concept of temporary nature offers these companies – which are mostly situated in port or reclamation areas – another solution. Instead of preventing the development of nature in these areas from the beginning, they allow spontaneous development of nature. Even though they are only temporarily available, these areas could constitute a useful addition to the existing ecological areas, especially for pioneer species.

Companies will only opt for the concept of temporary nature if they are offered sufficient legal certainty. They must have the certainty that the (possible) presence of protected species will not hamper the final realisation of the destination of the area, for instance as an industrial area. The present analysis showed that although nature conservation law offers enough margins for temporary nature, the required derogations and permits might form quite an administrative burden for the companies concerned. In general, it must be that temporary nature conservation efforts are best conducted within management plan at area level. This at least comprises the preparation of a plan outlining a framework for the biotopes, species and habitats that qualify for temporary natural values within a certain area, allowing the attainment of the good conservation for the species and habitats concerned. If national nature conservation law allows so, exemptions and/or deviations can in advance be provided for in this plan (if necessary, linked to compensating measures). For instance, this is the case for the Flemish species protection programme. Such a proactive approach can result in a considerable decrease of the administrative costs for the actors in question, as there is no longer any need for any additional deviation procedures. Drafting an area-oriented planning framework will not be possible and/or useful in certain circumstances. In some case a plan-based approach will offer no practical outcome for temporary nature as the drawing of it will take too much time or will not be useful considering the small surface of the area concerned. To circumvent such drawbacks the developer could apply for a derogation in advance– i.e. before the area concerned is made available for nature development – based on the regulations on species and biotope protection. If the derogation is not obtained in advance, one can still choose not to proceed with the development of temporary nature. Although it is subject to some legal criticism, this approach can offer the companies concerned a sufficient instrument for temporary nature. Recent Dutch case law seems to accept the legality of it.

Though it has been determined that working with temporary nature can be compatible with the existing nature conservation law, possible points of improvement have already been pointed out. In principle, a *derogation* needs to be requested in each individual case, unless the derogation is integrated into a species protection programme. Appeal against the decision granting the derogation

remains possible. An exemption, on the other hand, applies to all cases that fall under a category of cases for which exemption has been granted. No application needs to be filed and no separate decision needs to be taken⁸⁸. The advantage of an exemption in function of temporary nature is the absence of procedures. Thus, project developers know the score when they allow temporary nature to develop on their land⁸⁹. In the Netherlands the concept of “general derogation” (in Dutch “generieke ontheffing”) seems to offer a more flexible way out for temporary nature. Such a derogation exempts all construction works which might interfere with the protected species when a management plan is present that is aimed at the attainment of the good conservation status. Other authors seem to suggest that temporary nature should be exempted when it is conducted in accordance with a code of conduct (in Dutch “gedragscode”) specially aimed at temporary nature⁹⁰. For the authority concerned, a positive effect of such a code of conduct would be that the authority would not have to provide separate derogations for temporary nature time and time again. For the initiator, a large part of the procedural burden would be avoided. Yet, it remains to be seen whether general exemptions for temporary nature seems reconcilable with the Habitats and Birds Directive. The Dutch practice of issuing general derogations seems to go further than the derogation possibilities within the “Flemish” species protection programme where no general derogations seem possible. It is uncertain whether the Dutch programmatic approach is in line with the rather strict application of the Habitats and Birds Directive in the above mentioned case law of the Court of Justice. The Court of Justice also seems to reject a general derogation because derogations have to be limited to a specific case which offers no alternatives regarding the solution⁹¹. The recent decision of the Court of Justice in the case C-241/08 seems to indicate that the exemption from assessment for works and developments provided for in programmes will not be such an easy option, especially in cases where temporary nature will interact with Natura 2000.

The recent Dutch and Flemish initiatives with respect to temporary nature illustrate that the concept of temporary nature can be a good example of how nature conservation policy can take advantage of urban developments. It can be hoped that more practical examples in other countries will lead to a more established practice with respect to temporary nature and a clearer view of the compatibility with European nature conservation law. Temporary nature will in any event serve as a good test case for the margins for flexibility in European nature conservation law.

⁸⁸ H.E. WOLDENDORP and C. BACKES, *Tijdelijke natuur – Advies over de juridische aspecten*, p. 33.

⁸⁹ H.E. WOLDENDORP, “Dynamische natuur in een statische rechtsorde”, [2009] *Milieu en Recht*, p. 137.

⁹⁰ J. REKER and W. BRAAKHEKKE, *Tijdelijke natuur, concept voor een beleidslijn*, final version, August 2007, p. 13.

⁹¹ Case 247/85, *Commission v. Belgium* [1987].