EUFJE 2006
Helsinki, 15 – 16 September

# Impact of Natura 2000 sites on Environmental licensing

Delegates and observers are invited to answer this questionnaire and to return their contribution to the organisers no later than June 16th, 2006. For the convenience of the organisers, we ask you to answer freely but to recognisably adhere to the disposition and the questions below. The answers will be summarised and presented at the meeting. Those delegates wishing to present case examples of how possible effects on Natura 2000 sites have been taken into account in the environmental licensing process are invited to submit the topic of their talk and, preferably, a brief abstract no later than August 15th, 2006.

## A. Natura 2000 sites

1. Country or area

**Netherlands**

2. Number and area of sites

**162 sites have been proposed; total area about 1.000.000 hm², 2/3 of which is open water, including coastal waters. Herewith the Netherlands will nearly fulfil their EU obligations, only for the North Sea a supplementary proposal is foreseen in 2008 at the latest.**
**One of the sites has been proposed as a consequence of case-law of the State Council, Administrative Jurisdiction Division, concerning the inplementation of Directive 79/409/EEG (bird directive) concerning a special protection zone for the lesser white-fronted goose (anser erythropus) (LJN: AU9821, Raad van State, 18-01-2006).**

SCI/SAC
SPA

3. Which authority drafted the national Natura 2000 site list?

**Minister of Agriculture, Nature and Food quality**

4. How were the sites chosen?

Was there a screening of possible sites and field surveys of competing site candidates? Were existing conservation areas designated as sites? Which authorities participated in the screening process? Did NGOs have a say? Was there a public debate on the criteria for choosing sites? Did (or does) the public have access to the biological data, on the basis of which decisions were made?

- **The sites were selected in a way that as much as possible the existing national policy to realise an Ecological main infrastructure (EHS) was followed. This has been announced to the parliament, so there was a possibility for public discussion. Practically all proposed areas are within this EHS.**
- **The binding designation of the sites (which is foreseen to start in the autumn of 2006) has to be decided in accordance with the public preparation procedure of §§ 3:10-3:13 of the Algemene wet bestuursrecht (General act on administrative law). This means that a draft with all relevant written information has to be laid down for inspection by interested parties (e.g. NGO's).**
- **Furthermore, the Minister will consult with provincial boards, other public authorities and other parties involved about the content of the designation decisions, in particular about the exact boundaries of the sites and the conservation goals. This will – within the legal limits - give room for further balancing ecology and economy for a limited number of sites on which there still is discussion.**

5. Which authority decided which sites were to be included in the Natura 2000 network?

**The decision will be taken by the Minister of Agriculture, Nature and Food quality**

6. Appeals against the Natura 2000 national network decision

Which authority decided on the appeals, which parties had legal standing and on what grounds could appeals be lodged?

**The State Council, Administrative Jurisdiction Division, will decide on appeals against the designation decisions.**

7. Number and success of appeals

## B. Conservational status of Natura 2000 sites

8. Status of Natura 2000 sites
Do Natura 2000 sites also have the status of nature reserves, national parks or other nature protection areas?

**Natura 2000 sites are ex lege excluded from the status of Protected nature areas under national law (§ 15a Nature protection act). Reason of this is to prevent cumulating obligations.**

9. Protection of Natura 2000 sites

How has Article 6 of the Habitats Directive been transposed into national law in your country? By special national law implementing the Directive, by other national law, etc.
How is the protection of Natura 2000 sites ensured? Are there site-specific management plans or other rules of conduct regulating activities within the sites?

- **Article 6 has been transposed into national law by an act amending the existing Natuurbeschermingswet (Nature protection act).**
- **A number of provisions is dedicated to ensure the protection of Natura 2000 sites (§§ 19a-19l and 20-22 Natuurbeschermingswet). These provisions require the setting up of a site specific management plan by the provincial authorities or, if the site is wholly or partially managed by a ministry, by this ministry (§§ 19a, 19b).**
- **Other rules include**
    - **a licensing system for project or other activities that could negatively affect the quality of the site or disturb the protected species at the site, including projects or activities that could affect the natural properties of the site (§§ 19c-19i),**
    - **the requirement of approval by the provincial authorities or the minister of other government planning decisions than site management plans which could be detrimental to the quality of the Natura 2000 sites or could disturb protected species at that sites (§ 19j),**
    - **a notification obligation of provincial authorities to the minister (§ 19k),**
    - **a coordination provision (§ 19ka),**
    - **a general due diligence obligation (§ 19l),**
    - **the possibility to deny entry to the site (§ 20),**
    - **the possibility for provincial authorities to take factual protective measures in case of serious damage or risks for**

**a site, caused by negligence of the owner or the user of the site (§ 21)**

- **The possibility for the provincial authorities to put the necessary signs in a site for the purpose of making clear the status of the site and its legal consequences (§ 22).**

10. Coverage of implementation

Do national acts, plans and other rules implement the Habitats Directive fully? Are there types of enterprises, impacts on nature or licensing procedures where the requirements of the Directive are not altogether taken into account?

**There are no signs yet that there are loopholes in the implementation of the directive. Since there has been created a general licensing system for any project or activity that could be harmful for the site, in theory there are no types of enterprises, impacts or procedures excluded.**

11. Assessment of impacts

- Which authority decides on whether an assessment is to be made or not?
- If harmful effects on a Natura 2000 site are probable, which party is responsible for assessing the impacts: Applicant, Environmental authority, Licensing authority, etc?
- How is the appropriateness of the assessment ascertained?
- If the applicant is required to assess impacts, does he/she have access to the data that prompted the inclusion of the area into a Natura 2000 site?
- How is assessment of impacts caused by projects or plans in combination with other projects or plans safeguarded?

**The licensing authority has to decide whether an assessment has to be made. It is also this authority that is responsible for the assessing of the impacts. No special provisions have been taken to ascertain the appropriateness of the assessment. In appeal the State Council, Administrative Jurisdiction has to decide on appropriateness. An applicant is not required to assess impacts. Par. 19ka, the coordination provision, of the Nature protection act may be used to safeguard the combination of impacts by projects or plans and other plans or projects.**

## C. Case examples of how possible impacts on Natura 2000 areas is taken into account in the licensing procedure

12. Examples of licensing decisions regarding projects outside or inside Natura 2000 sites, where

- Assessment of impacts was not deemed necessary
- Impacts were assessed but not deemed adversely affect the integrity of the site concerned
- Impacts were assessed and deemed significant

13. Relevance of Community decisions
- What kind of influence has the judicature of the ECJ had on national decisions (e.g. the precautionary principle)
- Relevance of the Commission guidelines on Managing Natura 2000 sites?

14. Examples of licensing decisions concerning exemptions from protection (Article 6 para 4)
- Which authority decides on exemptions and which authority on appeals?
- Have exemptions been applied for and have they been granted?
- Grounds for refuting and allowing an exemption (alternative solutions, imperative reasons of overriding public interest, opinions of the Commission)
- In case an exemption has been granted, how has the incurred loss to protected values of nature been recompensated? How has the Commission reacted?

**Direct effect of art. 6, section 3 Habitat-directive**
**Two examples of Dutch case-law**

Thijs G. Drupsteen

***Introduction***
1. Untill okt. 1th 2005 art. 6 of the Habitat-directive was not implemented into Dutch national law. Even now Natura 2000-area's are not designated in the Netherlands in a binding way. Under these circumstances the question arose, how to deal with public decisions, such as environmetal license-granting or approving physical planning plans, that may have significant effects on already selected Habitat-area's.
Although the Administrative Jurisdiction Division of the State Council never openly and directly decided that art. 6, section 3 Habitat-directive has a direct effect, it applies this section in a number of cases in a rather direct way. These cases deal with both physical planning decisions, such as the decision about the second Maasvlakte (further enlargement of the Rotterdam-harbour into the North Sea) and environmental decisions, such as the granting of environmental licenses for mostly intensive farming plants.
Below I give two examples of State Council's case-law.

***The Goirle-case***
2. First example is a case decided on march 29th, 2006, nr. 200506396. The municipal board of Goirle (a municipality in the province Noord Brabant) granted a license for a chicken farm. One individual and a groupe of other individuals

appealed. One of the grounds for appeal was that the decision did not met the requirements of the Habitat-directive. The plaintiffs were concerned about a natural area called "Regte Heide and Riels Laag". The first plaintiff argued that the board had only taken into account the increase of ammonia-emmissions caused by the changes that were granted by the license without considering the whole amount of ammonia produced by the farm.
The license granted a amount of 130.020 chicken, while according to the foregoing licenses 81.420 chicken were allowed.
The board denied that the increase of ammonia-emmission and –deposition as a result of the granted changes of the farm would have siginificant effects on the natural area. The increase would stay below 1% of the critical deposition-standard for the forest-ecosystems concerned. The board referred to a letter of the Secretary of State of Housing, Physical Planning and Environmental Management and the Minister of Agriculture, Nature Protection and Food Quality of september 11th, 2003 stating that such an increase would be acceptable.
The Administrative Jurisdiction Division of the State Council considered that the natural area "Regte Heide en Riels Laag" was by decision of the Council of the European Communities of december 7th, 2004 placed on the list of area's of community interest, on which area's with one or more prioritary types of natural habitats or one or more prioritary species are designated. As soon as an area has been placed on this list, according to art. 4, section 5 of the Habitat-directive, the provisions of art. 6 , section 2, 3 and 4 of the Habitat-directive are applicable.
According to art. 6, section 3 of the Habitat-directive any plan or project not directly connected or necessary to the management of a special protecting-zone, but likely to have a significant effect thereon, either individual or in combination with other plans and projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.
According to the verdict of the Court of Justice of the European Communities of september 7th, 2004, case C-127/02, a national authority, in case it has to assess whether the approval of a plan or project as meant by art. 6, section 3 of the Habitat-directive has been given legitimately, may assess whether the competent national authority has taken its decision within the limits of discretion of this provision, even when the provision has not been implemented into domestic law although the term for implementation has passed.
The approved plan or project is not a plan or project directly connected or necessary to the managment of the natural area "Regte Heide en Riels Laag".
According to the same verdict of the European Court the next question is whether the authority could based on objective grounds exclude that the approved plan or project, either individual or in combination with other plans or projects could have siginificant effects for the site in view of the site's conservation objectives.
According to the verdict of the Administrative Jurisdiction Division of september 7th, 2005 the changes in relation to the earlier license for the plant are decisive for the answer on the question whether significant effects for the site in view of its conservation objectives, are at stake.

As appears from the files and from what has been discussed at the session of the Administrative Jurisdiction Division the distance between the plant and the site is about 1.500 meters, while the ammoniadeposition on the site increases as the result of the approved changes with about 8,5 mol per hectare a year (mol is a unity for the deposition of acid). The municipal board did not investigated the already existing total deposition of ammonia at the site (the backgrounddeposition). Furthermore, it did not take into account the conservation purposes of the site and its types of habitats, such as moist heather with bell-heather (4010) and dystrophic natural lakes and pools (3160). Only the statement that the increase of ammonia-deposition on the site will stay below 1% of the critical deposition-standard for the forest-ecosystems of the site has not been motivated by the board. For that reason it was not able to exclude that the approved changes either individual or in combination with other plans or projects could have siginificant effects on the site in view of its conservation objectives.
The decision to grant the license violates art. 3:2 of the General Act on administrative law requiring an authority to collect in the preparation of its decision the necessary knowledge about the facts of the case and it violates art. 3:46 of the same act requiring a due motivation of a decision.
The decision has to be nullified.

Remark. Although the site is rather remote form the chicken farm and the increase of ammonia-deposition is not that much, the decision to grant the license has been nullified. Important arguments for nullification are the lack of due preparation of the decision by the municipal board, having not investigated the already existing backgrounddeposition on the site, using a standard of below 1 % derived form a letter of the Secretary of State and the Minister but no further argumented and talking about forest-ecosystems, while the types of specific habitats of the site are heather- and lake-ecosystems. Furthermore, it is important to notice that nowadays, it is rather easy for a competent authority to get the right information about a site directly form internet.

***The Opsterland-case***

3. Second example is a verdict of the Administrative Jurisdiction Division of may 10th, 2006 in which the municipal board of Opsterland (a municipality in the province Fryslan) granted a license for a horse farm with a nature camping-place. The Association "Nature and Environment Ureterp and surroundings" went into appeal.
Among other grounds the Association feared that the license would violate art. 6, section 3 of the Habitat-directive. The increase of ammonia-emission and –deposition would have significant effects on the natural area "Wijnjeterper schar". The Association stated that the board illegally had only taken into account the increase of ammonia-emmission related to the existing license and not the total ammonia-emmission of the plant. Secondly, the board did not investigate possible other effects of the plan on the site.
Th Administrative Jurisdiction Division considered that the site was mentioned on the list of art. 4 Habitat-directive. This means that the protection-regime of art. 6, section 3 Habitat-directive is applicable.

The granting of the license is not a plan or project that is directly connected or necessary to the management of the site.
According to the files the ammonia-emmision of the animals of the site granted by the license is 180 kg a year. The increase of the emission related to the foregoing license is 134,4 kg a year. The deposition of ammonia on the natural area "Wijnjeterper schar", that is about 1.000 m remoted from the site, will increase with 0,6 mol. The total deposition caused by the plant on the site will be 1,4 mol. The board considers this deposition in relation to the backgrounddeposition in the year 2001 in Fryslan as neglectable. The board underlines that the actual deposition caused by the plant will propable be lower, because of the fact that the horses will stay outside, on the meadows for about six months a year.
Even the total amount of ammonia-emissions caused by the plant, that is 314,4 kg a year, would according to the municipal board not have significant effects on the natural area. The board refers to the same letter of the Secretary of State of Housing, Physical Planning and Environmental Management and the Minister of Agriculture, Nature Protection and Food Quality of september 11th, 2003. In this letter is stated that in an area of 500 till 1500 m around sensitive parts of Bird- and Habitatdirective-area's extensions of already existing plants will only be granted in cases in which the emissions do not increase over or stay below 2.000 kg a year. The letter assumes that increases of emissions untill 2.000 kg ammonia a year of an individual plant will exceed the average critical deposition-standard of sensitive areas with about 1% in average in the area of 500 till 1.500 m.
Referring to the verdict of september 7th the Administrative Jurisdiction Divison states again that the changes in relation to the foregoing license are decisive for the answer on the question whether significant effects on the site in view of its conservation objectives will be at stake.
According to the Division the board has not investigated whether the granted increase of ammonia-emission and –deposition can have significant effects on the natural area "Wijnjeterper Schar" in view of its conservation objectives. A comparison with the total backgrounddeposition in 2001 in the province Fryslan is too general. The existing backgrounddeposition on the position of the "Wijnjeterper schar" has not been investigated. Besides this the conservation objectives of the site and its types of habitats with their critical deposition-standards have not been established and assessed by the board. As far as the letter of the Secretary of State and the Minister concerns, the Division considers that in this case the average critical deposition-standard of the site mentioned in the letter has not been established, apart from the question whether this letter, its content and its arguments meet the explanation given by the European Court of Justice of art. 6, section 3 of the Habitat-directive.
The foregoing lead to the conclusion that the board did not investigated whether it can be excluded that the granted increase of ammonia-emmissions can have significant effects on the natural area 'Wijnjeterper schar" in view of its conservation objectives.
The decision violates art. 3:2 General act on administrative law and it violates art. 3:46 of this act.
The decision has to be nullified.

Remark. This case caused some discussion within the Administrative Jurisdiction Division. Some members asked whether our test would be too sharp. The increase of the amount of ammonia-deposition in this case is very small. Although the background-deposition in the province Fryslan will not be high compared with concentration area's of intensive farming in the eastern and southern parts of the country, it is unlikely that an increase of 0,6 mol will have a significant effect. Nullifying the decision would mean that the municipal board will be obliged to additional investigations, that probable will not be very usefull. On the other hand, the board of Opsterland did not use the test of art. 6, section 3 Habitat-directive, as explained by the European Court of Justitice, so it could not exclude the possibility of significant effects, while by using this test it probably could.

*Closing remark*

4. These two examples are under the regime of the former legislation. Since okt. 1th 2005 the new provisions of the Natuurbeschermingswet 1998 (Nature Protection Act 1998) are in force. As a result of this, according to art. 19d Nature Protection Act 1998 a license is required to realize a project or other activities that in view of the conservation objectives can decrease the quality of natural area's or may disturb the species for which the area has been designated. The provincial board is the authority to grant licenses; only for projects or activities or for area's mentioned in a governmental decree the Minister of Agriculture, Nature Protection and Food Quality will be the competent authority.
A legal relation between the license according to the Nature Protection Act and the licenses according to Environmental Management Act has not been established. This means that both these licenses are granted or refused independent from each other. It also means that by granting a license according to the Environmental Management Act nature protection interests are no longer involved; they are covered by the new Nature Protection Act