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Reconciliation ecology in practice: Legal and policy considerations when implementing temporary nature on undeveloped lands in the European Union

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ABSTRACT

Strict regulations, such as the EU Nature Directives, remain pivotal for halting the downward spiral for some protected species. In recent years, though, it has become clear that nature protection rules, are also generating perverse incentives, especially when rigidly applied to areas that have already been transformed by human use, such as agricultural land, quarries and port sites. With the arrival of novel incentive concepts, such as temporary nature in several EU Member States, an unprecedented window of opportunity exists to reframe current nature protection rules. Temporary nature fosters private landowners, ranchers and project developers to actively participate in the recovery of endangered species, also in urban and industrial environments. In return for allowing nature to develop on their undeveloped and vacant lands, the project developers are provided with the legal guarantee that they can still subsequently develop their lands at a later stage. These newly founded conservation policies, which are increasingly endorsed by stand out as striking illustrations of the recently emerged branch of reconciliation ecology, since they aim at increasing biodiversity by opting for win-win scenarios in human-dominated landscapes. It is concluded that a more reconciliatory approach towards nature conservation, which goes beyond the ambit of protected areas, can serve as a catalyst for biodiversity recovery across the wider landscape. Further research will need to underpin whether the ambitious presumptions with regard to these well-intentioned and innovative approaches to nature conservation are justified.

1. Introduction

Restrictive environmental legislation such as European Union's Habitats and Birds Directives (Birds Directive, 2009; Habitats Directive, 1992), which protect endangered species and habitats, is widely considered as a key tool to stave off the ongoing biodiversity decline (Schoukens and Cliquet, 2016; Chapron et al., 2014; Donald et al., 2007). As is the case in other parts of the word, however, biodiversity within the European Union (EU) is suffering from a major decline over the past decades (Petrovan and Schmid, 2016; European Environment Agency, 2015). In the past few years, though, the prohibitive nature of the EU Nature Directives is being singled out by some authors as one of the main causes for the limited success of the nature protection efforts so far (Kistenkas, 2013). Whereas all too harsh criticism on the alleged rigidity of the protection rules appears to be misplaced in view of the poor enforcement of the EU Nature Directives in several Member States (Milieu Ltd. et al., 2016; López-Bao et al., 2015), the implementation of the protection rules might still yield counterproductive results in some contexts.

Especially in the EU Member States with a relatively low implementation deficit (Beunen and Duineveld, 2010), the tight application of the EU Nature Directives is giving way to perverse incentives in terms of the management of fallow plots of lands which are to be economically developed in the years to come (Schoukens, 2011). Since the accidental presence of protected species on a parcel of land is capable of effectively impeding a further economic development thereof, even when the project zone is not as such located within the boundaries of a protected Natura 2000 site (Schoukens and Bastmeijer, 2015), project developers have, understandably, grown weary of opening up their lands for nature conservation measures. At the same time, though, recent research revealed that in the Netherlands alone, an impressive 30.000–40.000 ha of land lie fallow awaiting their residential, infrastructural or industrial destination in accordance with the applicable zoning plans (Gies and Agricola, 2015). And while the necessary caution is in order when drawing precise conclusions from such 'raw figures', especially given the fact that national spatial planning policies are inevitably in flux and no concrete indications are provided about the factual reference situation *in situ*, a similar picture

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emerges in other Member States, such as Belgium (Flemish Region) (Tritel et al., 2012).

Notwithstanding their location in urban or industrial zones, such undeveloped lands might be able to support indigenous biodiversity due to their structural or functional resemblance to natural ecosystems (Lundholm and Richardson, 2010). Yet precisely the fear of a future deadlock scenario when developing these sites culminated in the implementation of management practices primarily aimed at pre-emptively destroying habitat to prevent protected species from occupying it in a later stage at all cost. For instance, intensive mowing, the use of pesticides and fencing practices, directed at avoiding the establishment of valuable natural habitats and excluding protected species from land which is awaiting further development, are becoming increasingly popular amongst project developers and landowners (Schoukens, 2015; Paulich, 2010). At present no exact data are currently available to demonstrate that these bad practices go beyond anecdotal evidence. Still it remains undeniable that opening up these temporary available lands to nature might help to halt the further biodiversity loss within the EU, as demanded by the EU's 2020 biodiversity targets (European Commission, 2011a). Given the increasing importance of urban and industrial environments for the preservation of several endangered species (e.g. the Fen Orchid (*Liparis loeselii*), the Natterjack Toad (*Bufo calamita*) and the Common Tern (*Sterna hirundo*)) and ordinary biodiversity (Lundholm and Richardson, 2010), missing out on those opportunities for extra nature conservation actions because of the fear of additional land use restriction is no longer an option.

In order to foster conservation efforts on these undeveloped lands, the Dutch government started to promote an innovative and pragmatic policy approach towards temporary nature development on undeveloped lands in 2007 (Reker and Braakhekke, 2007). This novel conservation policy allows temporary habitats to autonomously develop and be used by protected species without there being a need to carry out additional compensation or mitigation measures when the lands are subsequently economically developed. At the heart of this approach is the position that future conservation actions are balanced with providing the project developers additional legal guarantees for future economic development. In doing so, such new policy approaches stand out as a remarkable example of reconciliation ecology, aimed at creating win–win scenarios for 'wandering' nature in human-dominated landscapes (Couvet and Ducarme, 2014; Rosenzweig, 2003).

An important question, however, is whether such innovative conservation policies are in line with the strict protection duties included in the EU Nature Directives, which seem to leave little room for derogations for damaging planning developments. In a first section of this article, the legal and policy context in which these more reconciliatory conservation strategies have emerged are outlined. Subsequently, the ecological and legal underpinnings of the recent policy developments, which have also been followed up in other Member States, such as Belgium (Flemish Region) and the United Kingdom (Natural England, 2016; Schoukens, 2015), are examined more in detail. In a final section, the use of temporary nature is critically assessed in light of the applicable legal standards and possible other relevant policy considerations. The potential strengths and weaknesses of the instrument are outlined.

2. Methodology

Starting from the legal texts of the EU Nature Directives and their practical implementation in project development cases, this article analyzes the most prominent scientific literature, official reports, guidance documents, a selection of the relevant administrative practices, judicial decisions and relevant academic output on the topic of temporary nature. The main purpose of this article is twofold. First, it aims to analyse the main legal and policy-related context in which the recent collaborative approaches to nature conservation, such as temporary nature development on private lands, have come to surface. Second, it outlines and critically assesses the ecological and legal rationale of the concept of temporary nature as well as the opportunities and possible risks that are associated therewith.

The bulk of the subsequent analysis zooms in on the recently emerged policies to boost nature conservation actions on private lands that currently lack a protected status and await further development or may be subject to staged developments, such as quarries and mines. Since the Netherlands and, to a lesser extent, Belgium (Flemish Region) have to be seen as frontrunners in finding regulatory solutions to overcome deadlock scenarios (Schoukens, 2011; Woldendorp, 2009), the article's main focus will be on the regulatory practices in these two EU Member States. These practices are discussed in view of the current challenges for nature conservation law. Possible answers to some of the major deficiencies are pondered in the final section of this article. However, since some of these recent regulatory developments, aimed at a better alignment nature conservation strategies with future development plans, have been preceded by similar policy approaches in the United States (Bean et al., 2001; Kishida, 2001), concise references are also made to more collaborative policies within the context of the U.S. nature conservation laws, such as the so-called 'safe harbor agreements' (Trainor et al., 2013; Bean, 2001). This allows the article to take a broader approach to a situation of dynamic biodiversity in urban and/or industrial environments.

While the broader policy and ecological context in which these innovative, regulatory instruments have been drafted and developed is tackled throughout the analysis, the article's approach is essentially a legal one, in which the compatibility of these novel incentive mechanisms with the EU Nature Directives is looked into, among other things. This approach is justifiable in light of the fact that the stringent application of the applicable legal standards as to nature protection are key to understand the need for more reconciliatory approaches in the first place. The relevant rulings of the Court of Justice of the EU (CJEU, before 2009: ECJ), which is principally tasked with interpreting the EU Nature Directives and ensuring its equal application across all EU Member States, are given a prominent place in this analysis, given their major impact on the development of national practice and case-law. However, on a higher level, this paper also aims to address the major policy risks and uncertainties that are inherently tied to the use of concepts such temporary nature are outlined, even those that are located outside the strict legal sphere. As the Dutch approach to temporary nature has only recently entered into force, this paper does not aim to extensively review its concrete application in the field. Nor does it target an exhaustive review of the potential ecological shortcomings of the more lenient approaches to temporary nature.

3. Command and control: a focus on what is bad for nature?

The EU Nature Directives are widely regarded as one of the hallmarks of EU environmental law (Born et al., 2015; Wandesforde-Smith and Watts, 2014; Jones QC, 2012). In essence, both Directives require EU Member States to take measures to maintain or restore natural habitats and wild bird and animal species listed in the Annexes to the Nature Directives to a favourable conservation status. In order to achieve the main objectives of the EU Nature Directives, which have been reinforced by the 2020 EU Biodiversity Strategy (European Commission, 2011a), they lay down a set of robust protection and restoration duties. By and large, the protection schemes contained by the EU Nature Directives heavily rely on a so-called 'command and control'-approach, whereby activities that might significantly impair protected habitats or species should be principally prohibited, unless they are covered by a specific derogation.

3.1. Area protection (Natura 2000): strict scrutiny for unsustainable project developments

The 'first pillar' of the Habitats Directive requires the Member States