

VI.5. The Flemish groundwater-case: zero-tolerance for projects and plans having effects on protected areas in an unfavourable condition

Council of State, judgment *vzw Natuurpunt v. Deputatie van de Provincieraad van Antwerpen* n° 250.025 of 9 March 2021

Habitats Directive – Birds Directive – Groundwater extraction (permits) – Appropriate assessment – Special area of conservation – Good condition – Restoration – Significant effect – Thresholds (no *de-minimis*) – Precautionary principle

Summary

According to the Belgian Council of State any deterioration of one constitutive characteristic of a special area of conservation that is not in a good condition is not allowed under Article 6, § 3, of the Habitats Directive. In those circumstances there is definitely no room to apply de minimis-thresholds to allow certain plans or projects with a (presumed) limited effect. The lowering of the groundwater table with less than 5 cm can not be considered limited for a drought-prone protected habitat that is not in good condition. This strict assessment of the Belgian Council of State is in line with the precautionary principle and the effet utile approach applied by the European Court of Justice in its case-law on the Habitats Directive.

Extracts

24. Het eerste middelonderdeel is gericht op de toestand van de SBZ waarin het betrokken perceel is gelegen. De aanvraag diende te voldoen aan de vereisten gesteld in artikel 36ter van het natuurbehouddecreet. Dit houdt in dat bij de milieuvergunningaanvraag een passende beoordeling diende te worden gevoegd.

Het Hof van Justitie heeft reeds meerdere malen geoordeeld dat een dergelijke beoordeling inhoudt dat, op basis van de beste wetenschappelijke kennis ter zake, alle aspecten van het plan of het project die op zichzelf of in combinatie met andere plannen of projecten de instandhoudingsdoelstellingen van het betrokken gebied in gevaar kunnen brengen, moeten worden geïnventariseerd. Rekening houdend met de conclusies van de beoordeling van de gevolgen van het plan of project voor het betrokken gebied, mag de overheid dergelijk plan of project pas goedkeuren nadat zij zekerheid heeft verkregen omtrent het feit dat het geen schadelijke gevolgen heeft voor de natuurlijke kenmerken van het betrokken gebied. De zekerheid dat het plan of project geen schadelijke gevolgen heeft voor de natuurlijke kenmerken van het betrokken gebied is voorhanden “wanneer er wetenschappelijk gezien redelijkerwijs geen twijfel bestaat dat er geen schadelijke gevolgen zijn”.

Deze beoordeling mag geen leemten vertonen en moet volledige, precieze en definitieve constatering en conclusies bevatten die elke redelijke wetenschappelijke twijfel over de gevolgen van de geplande werkzaamheden voor het betrokken

beschermde gebied kunnen wegnemen. In de passende beoordeling moet dus melding worden gemaakt van alle mogelijke gevolgen van het plan of project die significant kunnen zijn voor het gebied, met inbegrip van cumulatieve en andere gevolgen die kunnen ontstaan door het plan of project dat wordt beoordeeld, met andere plannen of projecten. De passende beoordeling is geen loutere vormvereiste voor de vergunningsaanvraag maar vergt een specifiek onderzoek dat moet worden gevoerd vooraleer sommige vergunningen kunnen worden verleend.

Uit de administratieve procedure blijkt dat in graad van beroep de afdeling Gebiedsontwikkeling, Omgevingsplanning en -projecten – Milieu en de VMM – dienst Grondwater en Lokaal Waterbeheer - afdeling Operationeel Grondwaterbeheer voorwaardelijk gunstig hebben geadviseerd, mits het ANB eveneens gunstig adviseert. Naar aanleiding van het advies van de PMVC blijkt dat het ANB zich kritisch uitlaat over de voorgelegde passende beoordeling maar toch voorwaardelijk gunstig adviseert. Enkele dagen nadat de PMVC haar advies heeft gegeven blijkt, nadat het ANB een e-mail had verstuurd waarop de verwerende partij zich beroept, een eerder gevraagd advies van het ANB bij de provincie Antwerpen te zijn toegekomen, waarin het ANB duidelijk negatief adviseert. Dit advies is niet in het administratief dossier opgenomen, maar het bestaan ervan wordt niet betwist door de partijen. Noch uit de bestreden beslissing, noch uit enig ander stuk in het dossier blijkt dat met dit laatste advies rekening werd gehouden bij het nemen van de bestreden beslissing. Gelet op het negatieve karakter ervan dient alleszins te worden aangenomen dat de bestreden beslissing werd genomen terwijl er wetenschappelijk gezien redelijkerwijs twijfel bestaat over schadelijke gevolgen die beschermde soorten in gevaar kunnen brengen. Deze vaststelling klemt nog meer door het herstelbeleid dat te dezen wordt gevoerd en zoals dit wordt verwoord in de instandhoudingsdoelstellingen van de betrokken speciale beschermingszone. Elke ingreep die een achteruitgang betekent van de soorten die zich niet in een goede toestand bevinden dient immers als betekenisvol te worden beschouwd. Uit de stukken van het dossier blijkt dat de voorgenomen activiteiten een invloed hebben op het grondwaterpeil en de beschermde soorten bedreigen. Aldus moet uit de stukken en de bestreden beslissing duidelijk blijken dat de instandhoudingsdoelstellingen niet in het gedrang komen door de bestreden beslissing. Dat blijkt niet uit de bestreden beslissing.

25. Het eerste middelonderdeel is gegrond.

26. Het tweede onderdeel dient in het licht van de bespreking van het eerste middelonderdeel eveneens gegrond te worden geacht. Rekening houdend met het advies van het ANB van 22 december 2017, dat negatief was, diende de verwerende partij bij haar beoordeling des te duidelijker te verwoorden waarom zij toch de gevraagde activiteit vergunt. Te dezen klemt dat des te meer aangezien uit dit advies blijkt dat het pas op 4 december 2017 werd opgevraagd, dit is na de e-mail waarop de verwerende partij zich in haar beslissing beroept, ondanks het feit dat zijzelf een recentere adviesaanvraag aan het ANB heeft gericht. Dit advies, dat werd verstuurd ruim voordat de bestreden beslissing werd genomen, blijkt vervolgens te zijn genegeerd bij de verdere besluitvorming. In de gegeven omstandigheden kan alleszins niet worden aangenomen dat met zekerheid vaststond dat de beschermde waarden in de SBZ niet worden bedreigd door de vergunde activiteiten.

27. Het tweede onderdeel is eveneens gegrond.

28. In het derde en laatste onderdeel van dit middel acht verzoekende partij de waarborgen van het openbaar onderzoek geschonden doordat het aanvraagdossier een onvolledige passende beoordeling bevatte.

Noch het milieuvergunningsdecreet noch de uitvoeringsbesluiten ervan verzetten er zich tegen dat de aanvrager van de vergunning na afloop van het openbaar onderzoek, gebeurlijk op uitdrukkelijk verzoek van het bestuur, bijkomende stukken indient die, zonder het eigenlijke voorwerp van het aangevraagde te wijzigen, strekken tot verduidelijking, aanvulling of verbetering. Meer in het bijzonder sluit artikel 11, § 1, van het milieuvergunningsdecreet niet uit dat de vergunningverlenende overheid acht slaat op stukken die in de loop van de procedure door de aanvrager worden ingediend ter weerlegging van de bezwaren die tijdens het openbaar onderzoek kenbaar zijn gemaakt. Evenwel geldt die mogelijkheid niet voor stukken die essentieel zijn voor een volledige en correcte inschatting van de aan de exploitatie verbonden nadelen en risico's. Er is sprake van een uitholling van het openbaar onderzoek wanneer derden-belanghebbenden bij de uitoefening van hun inzage- en bezwaarrecht geen kennis kunnen krijgen van gegevens of documenten zonder dewelke de vergunning niet kan worden verleend.

Te dezen blijkt dat een passende beoordeling bij de vergunningsaanvraag werd gevoegd, doch dat deze volgens adviserende instanties in eerste aanleg onvoldoende informatie bevatte. In graad van beroep werd dan door de exploitant toelichting verschaft per e-mail van 5 september 2017. Uit de motivering van de bestreden beslissing blijkt daarnaast dat de exploitant "in graad van beroep alle noodzakelijke stukken heeft bezorgd". In die omstandigheden blijkt aldus dat tijdens het openbaar onderzoek niet alle noodzakelijke stukken aanwezig waren in het aanvraagdossier. De samenlezing van het advies in eerste aanleg waarin wordt aangenomen dat de passende beoordeling bij de aanvraag onvoldoende informatie bevat, en van de bestreden beslissing waarin wordt overwogen dat in graad van beroep alle noodzakelijke stukken werden bijgevoegd, doet besluiten dat tijdens het openbaar onderzoek een essentieel stuk ontbrak bij de vergunningsaanvraag. De verzoekende partij werpt in die omstandigheden terecht op dat het openbaar onderzoek werd uitgehold in haar nadeel.

29. Ook het derde onderdeel is gegrond.

30. Het eerste middel is in al zijn onderdelen gegrond.

Observations

A. Context and issues

1. On appeal by the environmental conservation organisation "Natuurpunt" the Belgian Council of State annuls an environmental permit granted to an agricultural farm for the extraction of groundwater. The permitted extraction was situated in a special area of conservation 'fens, heaths and marshes around

Turnhout' protected under the Habitats Directive¹ and the Birds Directive.² The permit had been refused by the municipality in first instance due to a negative advice of the Nature and Forestry Agency (ANB) that the appropriate assessment was incomplete. The permit was subsequently accorded by the Province of Antwerp at the level of administrative appeal. This decision was motivated by the fact that firstly, all necessary documents for the appropriate assessment had in the meantime been delivered at the level of administrative appeal and secondly, the province had attached special conditions to the permit which should guarantee that the groundwater extraction would not lead to a lowering of the groundwater table in the drought-prone protected areas that would exceed more than 5 cm. Under those conditions, the Province of Antwerp considered that this should allow the effects and hinderance of the exploitation on the special area of conservation to be limited to an acceptable level.

From the judgement it appears that in administrative practice a threshold of 5 cm was applied for the lowering of the groundwater table to protect drought prone vegetation.³ A lowering of the groundwater table of less than 5 cm was therefore considered to have a non-significant effect on the special area of conservation and the province therefore considered that the permit could be granted.⁴

2. Several essential legal questions are at stake in the Flemish groundwater case. The question is what is meant by Article 6, § 3, second sentence of the Habitats Directive that a plan or project can only be agreed to if it "will not adversely affect the integrity of the site concerned" for a site that is not in a good condition? Does that mean that no permit can be granted if there is *any* negative effect on the site? Which would e.g. mean that even a prolongation or a minor modification of an existing permit would not be possible, and newcomers would completely be left out. This could potentially lead to a permitting freeze in a large area if the effect is long ranging (e.g. pollution by air, like excess nitrogen deposition).

Or can a permit still be granted if it only has a *limited* impact on the site? This would allow for socio-economic activity with a limited *additional* impact, for example, to approve minor changes to an existing permit or to allow new permits with a minor impact. But what would then amount to a limited impact? And how should this limited impact be qualified and determined? Is an administrative practice that applies a quantitative *de minimis* thresholds (as in the case at hand) acceptable? Would such a practice not pose the risk of leading to a death by thousand cuts?

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

² Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

³ § 20, pp. 17 and 19 of the judgement.

⁴ §§ 11-13 of the judgement.

In the case at hand, the Council of State did not accept the administrative practice of quantitative *de minimis* thresholds that would have allowed socio-economic activity with a limited additional impact on the protected habitat.

The more fundamental societal question behind the groundwater-case is the distribution of scarce goods between humans and nature. Due to climate change, the Flemish region is increasingly suffering from drought and water scarcity. In these circumstances, the question arises which water use should be given priority. In the groundwater-case, the question was in practice whether priority should be given to groundwater for food production or for protecting nature? Without groundwater capture, the agricultural plot in question would have been unproductive, but the capture would have an impact on drought-prone protected habitats in poor condition. In the case at hand, the Belgian Council of State gave priority to the latter: protecting nature.

B. Essential content

3. The Council of State has annulled the permit for being contrary to Article 6, § 3, of the Habitats Directive, Article 36ter, §§ 3-4, of the Flemish Nature Decree (which transposes Article 6, § 3, of the Habitats Directive), the duty of formal and material motivation, the duty of care and the precautionary principle. According to Article 6, § 3, of the Habitats Directive an authority can only agree to a project after having ascertained that it will not adversely affect the integrity of the special area of conservation. With reference to the case-law of the European Court of Justice, the Council of State underlines that a permit can only be delivered if there is no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the area in question.⁵ This was not the case. Firstly, during the court proceedings it emerged that the permitting procedure had not been conducted in full transparency, as a prior, clearly negative advice of the Nature and Forestry Agency had not been included in the administrative file. This negative advice had been ignored in the decision, whereas the administrative file and the decision ought to have demonstrated clearly that the exploitation does not affect the conservation measures of the special area of conservation (§§ 24-27).

Secondly, the special area of conservation area is in an unfavourable conservation status as the conservation measures for the area provide for a restoration policy. Under those circumstances the Council of State held that *any* intervention which represents a deterioration in the status of protected species which

⁵ § 24, implicitly citing ECJ, 25 July 2018, *Edel Grace and Peter Sweetman v. An Bord Pleanála*, ECLI:EU:C:2018:593, C-164/17, § 41. See also e.g. ECJ, 26 May 2011, *Commission v. Belgium*, C-538/09, ECLI:EU:C:2011:349, § 52; ECJ, 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee a.o.*, C-127/02, ECLI:EU:C:2004:482, § 59; Belgian Council of State, 23 April 2015, N° 230.935, *de gemeente Beveren*, § 8; Belgian Council of State, 29 March 2012, N° 218.727, *de vzw Natuurpunt Beheer*, § 14 and Belgian Council of State, 13 August 2010, N° 206.911, *gemeente Borsbeek*, § 6.1.4.

are not in a good condition must be considered significant. As it appeared from the file that the exploitation affects the groundwater level and therefore threatens protected species, the permit could not have been granted (§§ 24-25).

Thirdly, the guarantees of the public consultation were breached as the application file contained an incomplete appropriate assessment. The public lacked essential information for a full and correct assessment of the disadvantages and risks associated with the exploitation, as essential documents had only been provided at the level of administrative appeal (§§ 28-29), i.e. after the public consultation had taken place.

C. Commentary

1. Article 6 Habitats Directive

4. According to Article 6, §§ 1 and 2, of the Habitats Directive Member States must preserve, protect or restore habitats and species for which the special areas of conservation have been designated: the first paragraph entails a positive obligation to protect or restore the necessary conservation measures which correspond to the ecological requirements of the natural habitats and species of Community interest present on the site, whereas the second paragraph entails a *standstill*-obligation to avoid deterioration of the natural habitats and the habitats of species as well as the disturbance of species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive.⁶

The only derogations from the obligation to preserve, protect and restore are provided for in Article 6, §§ 3 and 4 of the Habitats Directive for “any plan or project not directly connected with or necessary for the management of the site but likely to have a significant effect thereon”.

2. Cumulative, significant adverse effects

5. The judgement of the Council of State is remarkable for how it deals with the question of whether the groundwater extraction would have a significant effect on the integrity of the special area of conservation.⁷

Article 36, § 4 of the Flemish Nature Decree provides that the authority may only grant a permit if it has ascertained that the activity will not have a “significant” adverse effect on the natural characteristics of the special area

6 E.g. ECJ, 24 June 2021, *Commission v. Spain*, C-559/19, ECLI:EU:C:2021:512, §§ 152-174; ECJ, 20 September 2007, *Commission v. Italy*, C-388/05, ECLI:EU:C:2007:533, § 26; ECJ, 20 September 2007, *Commission v. Italy*, C-304/05, ECLI:EU:C:2007:532, §§ 91-97; ECJ, 20 October 2005, *Commission v. United Kingdom*, C-6/04, ECLI:EU:C:2005:626, § 33 and ECJ, 13 June 2002, *Commission v. Ireland*, C-117/00, ECLI:EU:C:2002:366, §§ 31-32.

7 In the case-law of the European Court of Justice “a plan or project [...] will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive” (ECJ, 11 April 2013, *Peter Sweetman a.o.*, C-258/11, ECLI:EU:C:2013:220, § 48). Compare also with the commentary of the Weser-judgement on the Water Framework Directive (title VI.2) in this book.

of conservation.⁸ The adjective “significant” does not figure in Article 6, § 3, second sentence of the Habitats Directive (which Article 36, § 4 of the Flemish Nature Decree is transposing). It merely states that the competent national authority has to ascertain that the plan or project “will not adversely affect the integrity of the site concerned”. Nevertheless, the adjective “significant” can be logically deduced from the context of Article 6 of the Habitats Directive as a whole⁹ and was also used by the European Court of Justice in its case-law on the second sentence of § 3 of Article 6.¹⁰⁻¹¹

According to that the first sentence of Article 6, § 3, of the Habitats Directive the likeliness of a significant effect of a plan or project should be assessed “in combination with other plans or projects”.¹² This in order to avoid that an accumulation of deteriorations or disturbances each with a limited impact, would collectively have a significant impact.¹³

8 Article 2, 30° of the Flemish Nature Decree defines “significant adverse effect” as “a deterioration that has measurable and demonstrable consequences for the natural characteristics of a Special Protection Area, to the extent that there are measurable and demonstrable consequences for the conservation status of the species or habitats for which the relevant Special Protection Area is designated or for the conservation status of the species listed in Annex III to this Decree to the extent that they occur in the relevant Special Protection Area”. This reading of the term “significant adverse effect” in the context of the conservation objectives and the conservation status of the special area of conservation seems in line with the case-law of the European Court of Justice (e.g. ECJ, 4 March 2010, *Commission v. France*, C-241/08, ECLI:EU:C:2010:114, § 44; ECJ, 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee a.o.*, C-127/02, ECLI:EU:C:2004:482, § 49 and *infra* N° 8) and with the administrative practice of the European Commission (Commission notice “Managing Natura 2000 sites. The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC”, Brussels 21 November 2018, C(2018) 7621 final, pp. 43-45). On the other hand, insisting on ‘measurable and demonstrated’ consequences would be contrary to the precautionary principle applied by the European Court of Justice (H. SCHOUKENS, K. DE ROO and P. DE SMEDT, *Handboek Natuurbehoudsrecht*, Mechelen, Wolters Kluwer, 2011, pp. 199-203).

9 According to the first sentence of Article 6, § 3, the decision must be taken in the light of the appropriate assessment that assesses the implications of plans or projects having a likely “significant” effect on the management of the site. Article 6, § 2, provides that Member States shall take appropriate steps to avoid “significant” disturbance of the species for which the area has been designated. In the light of this, the Court of Justice holds that the provisions of Article 6, §§ 2-3, of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive and that those provisions are designed to ensure the same level of protection of natural habitats and habitats of species, and it therefore holds that the review under both paragraphs must enable the competent authority to guarantee that the implementation of the plan or project will not cause deterioration or disturbance which could be “significant” in relation to the objectives of the directive (ECJ, 14 January 2016, *Grüne Liga Sachsen eV and Others*, C-399/14, ECLI:EU:C:2016:10, §§ 52-53).

10 ECJ, 11 April 2013, *Peter Sweetman and Others*, C-258/11, ECLI:EU:C:2013:220, § 39; ECJ, 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee a.o.*, C-127/02, ECLI:EU:C:2004:482, §§ 33-38 and *supra* footnote 9. See also: S. MÖCKEL, “The European ecological network ‘Natura 2000’ and the appropriate assessment for projects and plans under Article 6(3) of the Habitats Directive”, *Nature Conservation*, 2017, 1, pp. 22-24.

11 H.E. Woldendorp rather makes a distinction between a “significant effect” on the “management of the site” and the unqualified “not adversely affect” the “integrity of the site”, which means that it should not affect the conservation of protected species and habitats in the special area of conservation, in the light of the conservation objectives of the area (H.E. WOLDENDORP, “De PAS: geldige pasmunt om de habitattoets te passeren?”, in H. SCHOUKENS and I. LARMUSEAU (eds), *De Programmatorische Aanpak Stikstof (PAS)*, Brugge, Vanden Broele, 2017, (133) 150-151). We wonder, however, whether this textual distinction, would in practice lead to a different assessment (see also *infra* N° 8 and 13).

12 E.g. ECJ, 26 April 2017, *European Commission v. Germany*, C-142/16, ECLI:EU:C:2017:301, §§ 57-62; ECJ, 14 January 2016, *Grüne Liga Sachsen eV and Others*, C-399/14, ECLI:EU:C:2016:10, § 49; ECJ, 26 May 2011, *Commission v. Belgium*, C-538/09, ECLI:EU:C:2011:349, § 52 and ECJ, 13 December 2007, *Commission v. Ireland*, C-418/04, ECLI:EU:C:2007:780, § 245.

13 In the wording of Advocate General Sharpston the “‘death by a thousand cuts’ phenomenon” (Opinion of Advocate General SHARPSTON, 22 November 2012 in *Sweetman and Others*, C-258/11, EU:C:2012:743, § 67), in the wording of the Flemish Permits Tribunal: “many small things make a big one” (Raad voor Vergunningsbetwistingen, 25 February 2021, N° RvVb-A-2021-0697, *vzw Natuurpunt Limburg en vzw Limburgse Milieukoepel*, p. 33).

3. Disregarding mere numerical threshold

6. The Council of State completely ignores the threshold used in administrative practice that the lowering of less than 5 cm of the groundwater table would be insignificant.¹⁴

This is reminiscent of the landmark 'nitrogen programming approach'-judgement of the *Raad voor Vergunningsbetwistingen* (the Flemish Permits Tribunal) that had set aside the threshold used in administrative practice under which nitrogen depositions were considered as not significant, for lack of a scientific foundation.¹⁵ Also the Belgian Council of State had previously already expressed its disdain for mere numerical thresholds used in administrative practice.¹⁶ A threshold used should have clear scientific foundations (which was not demonstrated to be plausible in the present case),¹⁷ but even then it risks to be at odds with the obligation to assess cumulative effects.¹⁸

This is in line with the case-law of the European Court of Justice. In the Dutch nitrogen-case the court made clear that it would not accept numerical thresholds "unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other projects, may significantly affect those sites".¹⁹ The Court seems to require almost statistical impossibility that the cumulation of all projects that fall under the threshold could affect the protected sites. Nevertheless, the Court left an opening for thresholds within the framework of a general, programmatic approach on the condition that these thresholds had themselves been subject to an 'appropriate assessment' carried out in advance and meeting the criterion that there is no reasonable scientific doubt as to the lack of adverse effects of those plans or projects on the integrity of the sites concerned.²⁰

14 On the precedent value of this implicit ruling, see: H. SCHOUKENS, "Tot de laatste druppel: het grondwaterarrest als eerherstel voor de moerassen van een verdroogd Vlaanderen?", *STORM*, 2021/1, 16/05 and H. SCHOUKENS, "Grondwaterarrest duwt Vlaanderen richting debat over beperkte milieugebruiksruimte", *Juristenkrant*, 28 April 2021, (6) 7.

15 Raad voor Vergunningsbetwistingen, 25 February 2021, N° RvVb-A-2021-0697, vzw Natuurpunt Limburg en vzw Limburgse Milieukoepel, https://www.dbrb.be/sites/default/files/2021-08/RVVB.A.2021.0697_0.pdf (see also: Council of State, advice 71.598/1 and 71.599/1 of 8 July 2022, N° 8.1 and 8.4.1) citing the European Court of Justice that the appropriate assessment "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned" (ECJ, 7 November 2018, *Coöperatie Mobilisation for the Environment UA and Others*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, § 98). This consideration is also cited in § 24 of the annotated judgement.

16 E.g. on the assertion that less than 1 % of the territory of a special protection area of conservation was affected, it rebutted that this was a mere numerical limit, that does not in any way indicate that there would be no significant adverse effect on the natural characteristics of the special area of conservation (RvS, 12 mei 2017, n° 238.181, vzw *Natuurpunt Limburg*, § 10.2.5.1).

17 *Supra* footnote 5.

18 *Supra* footnote 12.

19 ECJ, 7 November 2018, *Coöperatie Mobilisation for the Environment UA and Others*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, § 120.

20 *Ibid.*, § 112.

4. No tolerance levels for sites with an unfavourable status

7. The Council of State holds that *any* intervention which represents a deterioration in the status of protected species which are not in a good condition must be considered significant. In other words, for the Belgian Council of State there are no tolerance levels for plans or programmes that have a negative impact on special areas of conservation with an unfavourable conservation status, where the conservation measures provide for a restoration. Put differently, the Council of State imposes a full degradation stop in respect of protected species and habitats for areas with an unfavourable conservation status, even where these degradations would be limited or minimal. The conservation measures may not be affected by the plan or project.

The underlying motivation of the Council of State copies the one from the Doñana-case of the European Court of Justice: it focusses on the distribution of proof between the parties and the quality of his proof. As in the latter case, the Council of State holds that in light of the apparent evidence that the groundwater capture affects the protected area that is not in a good condition, the competent authorities “should have submitted evidence to remove any reasonable doubt that, from a scientific point of view, continuation of the current practice of groundwater abstraction has no adverse effect on those protected habitats”.²¹ The perspective of both courts is however different: where the Doñana-case concerns state responsibility for failing to take appropriate steps to avoid significant disturbance of a protected site considered globally in the light of *standstill*-obligation of Article 6, § 2, of the Habitats Directive, the groundwater-case assesses the legality of one specific permit for a relatively limited water capture. Therefore, the groundwater-case focusses on the lack of motivation of the permit, presents quite some factual local flavour (with e.g. the story of the preceding regularisation of illegal exploitations and a missing negative advices of the Nature and Forestry Agency) and is less diplomatic and more direct in its formulation.

5. (Significantly) adverse in relation to the site

8. The Court of Justice uses the term “adverse” and “significantly adverse” effects interchangeably in the context of Article 6 Habitats Directive.²² The adjective “significant” in Article 6 of the Habitat Directive does not seem to have a quantitative meaning (inducing a higher threshold, as a synonym for e.g. noticeably, measurably).²³ According to the second sentence of Article 6, § 3,

21 ECJ, 24 June 2021, *Commission v. Spain*, C-599/19, ECLI:EU:C:2021:512, § 170. Compare with § 24, p. 28 of the judgement in the groundwater-case.

22 *Supra* N° 5.

23 Even if it were, it is interesting to note that the European Court of Justice's yardstick for assessing *significant* 'adverse effects' under Article 6, § 3, of the Habitats Directive is clearly a stricter test than the assessment of the – unqualified – 'deterioration' under Article 4, § 1 of the Water Framework Directive (ECJ, 24 June 2021, *Commission v. Spain*, C-559/19, ECLI:EU:C:2021:512). So what's in a name?

of the Habitats Directive, it is rather the way how the plan or project affects the special area of conservation that is relevant: i.e. the way how it affects the integrity of the site. The adjective "significant" should therefore rather be understood as having a relational meaning (significant as a synonym of "relevant"): the adverse effect is significant for whom or for what, instead of having the meaning of a *de minimis* threshold.²⁴

Compare with the analysis of AG Kokott based on a comparison of the different language versions of the Directive that the assessment of the implications should be "appropriate", meaning "proper" or "expedient": "The aim of the assessment is to establish whether a plan or project is compatible with the specified conservation objectives for the particular site. Accordingly, all the aspects of a plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of a site must be identified in the light of the best scientific knowledge in the field".²⁵ In analysing the case-law of the European Court of Justice Truilhé-Marengo concludes that "significant effect" is also a tool to take scientific uncertainty into account in the law, but applied in the context of a strict application of the precautionary principle: i.e. there should be no reasonable scientific doubts remaining as to the absence of adverse effects on the site.²⁶

According to the European Court of Justice's case-law the adverse effects should be assessed on the basis of the implications of the plan or project for the special area of conservation in view of the site's conservation objectives and taking into account the site's conservation measures.²⁷ Or as further clarified in the *Sweetman* case: "Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance

24 Compare also with our commentary of ECJ C-127/02, N° 11 (title VI.1) and the commentary of the Weser-judgement on the Water Framework Directive (title VI.2) in this book.

25 Opinion of AG Kokott, 3 February 2005, in *Commission v. the Netherlands*, C-441/03, ECLI:EU:C:2005:80, §§ 11-12.

26 E. TRUILHÉ-MARENGO, "How to cope with the unknown. A few things about scientific uncertainty, precaution and adaptive management", in Ch.-H. BORN *et al.* (eds), *The Habitats Directive in its EU Environmental Law Context*, Abingdon, Routledge, 2015, pp. 336-347; see also: F. HAUMONT, "L'évaluation des incidences, illustration du rôle du juge européen dans la mise en œuvre de Nature 2000", in Ch.-H. BORN and F. HAUMONT, *Natura 2000 et le juge. Situation en Belgique et dans l'Union européenne*, Bruxelles, Bruylant, 2014, (43) 53.

27 ECJ, 7 November 2018, *Coöperatie Mobilisatie for the Environment UA and Others*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, §§ 99-104; ECJ, 17 April 2018, *Commission v. Poland*, C-441/17, ECLI:EU:C:2018:255, §§ 115-121; ECJ, 12 April 2018, *People Over Wind, Peter Sweetman v. Coillte Teoranta*, C-323/17, ECLI:EU:C:2018:244, §§ 28-30; ECJ, 15 May 2014, *T.C. Briels and Others v. Minister van Infrastructuur en Milieu*, C-521/12, ECLI:EU:C:2014:330, § 28 and ECJ, 7 September 2004, *Landelijke Vereniging tot Behoud van de Waddenzee a.o.*, C-127/02, ECLI:EU:C:2004:482, §§ 46-49.

with the directive".²⁸ So, each individual conservation objective defines the concept of "site integrity".²⁹

In line with the *Sweetman* case, the commented judgement ruled that the groundwater table was a constitutive characteristic of protected species at the special area of conservation, and that lowering it put the protected species at risk, even though the groundwater extraction was relatively limited in absolute, quantitative term.³⁰

6. Cumulation in absolute terms

9. The underlying legal question in the judgement at hand is whether the cumulation of effects should be done in relative or in absolute terms. Where some argue that one should only assess whether the effects of the new activity – considered in the light of other plans and projects – have an *additional* significant effect (relative cumulation), the Belgian Council of State holds a firm line that all effects should be fully cumulated to assess the significant effect (absolute cumulation).³¹ As the special area of conservation already has an unfavourable conservation status, there is no more room for any additional disturbance or deterioration.³²

D. Encyclical effect: connection to other jurisprudential decisions and capacity to influence

1. First applied on direct habitat loss, now on indirect effects

10. This is not a new line in the case-law of the Council of State, but rather a confirmation of the pre-existing case-law, known as the *Orleans* case-law. In this notorious case-law on the extension-plans of the Harbour of Antwerp, the Council of State had already ruled that in a situation where a protected area is not in a good local conservation status any intervention that represents a degradation of the current natural state is in itself significant.³³ However, whereas

28 ECJ, 11 April 2013, *Peter Sweetman and Others*, C-258/11, ECLI:EU:C:2013:220, § 39.

29 *Ibid.*, §§ 36-46.

30 Maximum 17.500 m³/year.

31 On these two tests, see: M. STRUBBE, "Stikstof en vergunningverlening in het Vlaamse Gewest: aandachtspunten uit de rechtspraak", *TOO*, 2021, (136) 144.

32 This is in line with the substantive dimension of Article 6, §§ 3-4, Habitats Directive in terms of the conservation baseline to be maintained, see e.g.: "The Habitats Directive, by contrast, lays down *substantive* requirements regarding approval of a project, which are intended to be served by the procedure envisaged in Article 6(3) and (4) of the Habitats Directive involving an impact assessment, followed, if necessary, by the examination and consideration of alternatives. As a rule, this procedure prevents the integrity of a protection area from being adversely affected. Only in exceptional cases is an adverse effect permissible under Article 6(4) for imperative reasons of overriding public interest, including those of a social or economic nature, if no alternative solution is available. In these circumstances all necessary compensatory measures must be taken to ensure that the overall coherence of Natura 2000 is safeguarded. Thus, the protection provisions have a practical effect even when applied to procedures that are already under way" (Opinion of Advocate General Kokott, 27 October 2005, in *Commission v. Austria*, C-2019/04, ECLI:EU:C:2005:653, § 62). See also: N. DE SAELEER, "Assessment and authorisation of plans and projects having a significant impact on Natura 2000 sites", in B. VANHEUDESEN and L. SQUINTANI (eds), *EU Environmental and Planning Law Aspects of Large-Scale Projects*, Antwerpen, Intersentia, 2016, (279) 303-304.

33 Council of State, 20 December 2016, N° 236.837, *Orleans and Others*, § 8.2; Council of State, 20 November 2015, N° 233.000, *Orleans and Others*, § 11.2; Council of State, 3 December 2013, N° 225.676, *Orleans and Others*, § 14.5.

the previous case-law was concerned with direct habitat loss, the annotated judgement applies it for the first time to indirect, environmental pressure on the integrity of the protected area.

Doctrine highlights that the same reasoning can easily be transposed to nitrogen depositions above the critical load for nitrogen-sensitive habitats in special areas of conservation that are not in a good condition.³⁴ But one could probably also apply it to activities fostering climate change for climate change sensitive habitats in special areas of conservation that are not in a good condition.³⁵

2. The judgement in a European perspective

11. The Belgian Council of State follows the absolute cumulation-line (*supra* N° 9) of the Dutch courts,³⁶ whereas some other courts are willing to accept relative cumulation by accepting relevance thresholds for new activities. Under those thresholds it is accepted that a new activity, considered in isolation, may not have a demonstrable significant effect.³⁷ The latter approach leaves more room for socio-economic development. However, it is criticized for subjecting special areas of conservation to a death by a thousand cuts,³⁸ by failing to consider the *existing* pressure on a *specific* site and by diluting the precautionary principle. It therefore is at odds with Article 6, § 3, of the Habitats Directive and with the Court of Justice's case-law.³⁹

In the case on the Dutch 'National Programmatic Approach to Tackling Nitrogen Deposition' (PAS) the European Court of Justice has ruled that "where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited".⁴⁰ The Court of Justice demonstrates clear reluctance to have activities authorised that may affect natural

See also: Council of State, 9 October 2018, N° 242.577, §§ 5.8-5.10; Council of State, 12 May 2017, N° 238.181, *vzw Natuurpunt Limburg*, §§ 10.2.5.2-10.2.7.

34 M. STRUBBE, "Stikstof en vergunningverlening in het Vlaamse Gewest: aandachtspunten uit de rechtspraak", *TOO*, 2021, (136) 145.

35 Compare: L. SQUINTANI, "Balancing nature and economic interests in the European Union: On the concept of mitigation under the Habitats Directive", *RECIEL*, 2020, (129) 135.

36 For a thorough overview of the case-law of the Belgian courts further illustrating a strict cumulation stance, see: H. SCHOUKENS and M. STRUBBE, "De Habitattoets revisited in het licht van de recente rechtspraakontwikkelingen: de ecologische integriteit als bindend ankerpunt bij ruimtelijke besluitvorming? (deel 2)", *TROS*, 2020, (77) 95-104.

37 C. BACKES, "Ondertussen bij de Oosterburen: géén nood aan een PAS?", in H. SCHOUKENS and I. LARMUSEAU (eds), *De Programmatieke Aanpak Stikstof (PAS)*, Brugge, Vanden Broele, 2017, (259) 266-275 with extensive references to German case-law on nitrogen deposition. Schoukens and Strubbe, however, remark that this approach of the German courts should be understood in their context: the nitrogen depositions would be much lower in Germany (than in Flanders and in the Netherlands), and the German courts would only seem to favour more lenient thresholds if the generic reduction policies bear fruit (H. SCHOUKENS and M. STRUBBE, "De Habitattoets revisited in het licht van de recente rechtspraakontwikkelingen: de ecologische integriteit als bindend ankerpunt bij ruimtelijke besluitvorming? (deel 1)", *TROS*, 2020, (5) 25). See also: G. WANDERFORD-SMITH and N. WATTS, "Wildlife Conservation and Protected Areas: Politics, Procedure, and the Performance of Failure Under the EU Birds and Habitats Directives", *Journal of International Wildlife Law & Policy*, 2014, 62-80 on what they call the "deference" approach by British courts.

38 See quote AG Sharpston, *supra* footnote 13.

39 *Supra* footnotes 5, 12-13 and *infra* footnote 40.

40 ECJ, 7 November 2018, *Coöperatie Mobilisatie for the Environment UA and Others*, joined cases C-293/17 and C-294/17, ECLI:EU:C:2018:882, § 103.

habitats with an unfavourable conservation status, but it leaves the door ajar by using the adverb "limited". This opening must however be understood in the context of the ambition of the Dutch PAS to reduce excessive nitrogen depositions at a programmatic level which should subsequently leave room for additional socio-economic development. Moreover, as commentators have highlighted, the conditions that the Court attaches to this "limited" possibility are in practice so strict, that the opening left seems rather theoretical.⁴¹

3. A Waddensee encyclic

12. The groundwater-case of the Belgian Council of State is a clear and conform application of the case-law of the European Court of Justice. As is clear from the numerous references in this observation the commented judgement is a conform application of e.g. the ECJ's Waddensee,⁴² Sweetman and Doñana-judgements. The main difference is the change of perspective: the Belgian Council of State is to rule on the legality of one specific permit that allows for relative limited groundwater abstraction. Expressed in a more plastic way, the Council of State looks the local farmer straight in the eyes which claims that without this minor groundwater abstraction his agricultural plot would remain unproductive.⁴³

4. Effectiveness as a yardstick in a region whose nature is under severe pressure

13. Of course, in practice numerous questions arise when applying the vague and open wording of the 30 years old Habitats Directive to the facts of a particular case at hand, but as the European Court of Justice has underlined: in the end of the day the effectiveness of the instrument and of its objectives should be the yardstick in interpreting the directive.⁴⁴

41 E.g. L. SQUINTANI, "Balancing nature and economic interests in the European Union: On the concept of mitigation under the Habitats Directive", *RECIEL*, 2020, (129) 135, 136-137; R. KEGGE and A. DRAHMANN, "The Programmatic Approach: Finding the Right Balance between the Precautionary Principle and the Right to Conduct a Business", *Journal for European Environmental & Planning Law*, 2020, (76) 98; H.T. ANKER *et al.*, "Natura 2000 and the Regulation of Agricultural Ammonia Emissions", *Journal for European Environmental & Planning Law*, 2019, (340) 341 and 371. See also: H. SCHOUKENS, "Non-regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the EU Habitats Directive as an unusual ally to restore Natura 2000?", *Utrecht Law Review*, 2017, (124) 143 and 153 and H. SCHOUKENS and A. CUQUET, "Biodiversity offsetting and restoration under the European Union Habitats Directive: balancing between net loss and deathbed conservation?", *Ecology and Society*, 2016, (10) 17 ("In that regard, it is important to note that restoring degraded ecosystems is expected to be more likely to succeed, and more rapidly, than recreating habitats [...]. Still, given the persisting doubts on the adequacy of habitat restoration measures to reduce atmospheric nitrogen deposition on terrestrial habitats [...], demonstrating the effectiveness of the said measures will evidently remain crucial to align this approach with the substantive requirements of Articles 6(3) and (4)").

42 See our commentary of ECJ C-127/02 (title VI.1) in this book.

43 *Supra* N° 7.

44 E.g. ECJ, 15 May 2014, *T.C. Briels and Others v. Minister van Infrastructuur en Milieu*, C-521/12, ECLI:EU:C:2014:330, §§ 26 and 33. See also: our commentary of ECJ C-127/02, N° 12 (title VI.1) in this book and L. SQUINTANI and J. ZIJLMANS, "Mitigation and Compensation Measures under the EU Habitats Directive in Selected Member States", *European Energy and Environmental Law Review*, 2019, (2) 15 and 16.

The Belgian Council of State's clear line in the sand that *any* deterioration of a constitutive characteristic of the special area of conservation concerned that is not in a good condition is not allowed under Article 6, § 3, of the Habitats Directive, seems the logical consequence of the text of Article 6, § 3, of the Habitats Directive and of the European Court of Justice's case-law. However, this is not an easy message as it eliminates several options for further socio-economic development around the site. It blocks small scale plans and projects with sometimes only a limited impact on a specific factor of degradation. Blocking these plans or projects will moreover not be sufficient to improve the situation.⁴⁵ This explains why some other national courts might be hesitant to draw such a clear line.

The Belgian Council of State's stance can be understood in the light of the fact that most of the Flemish special areas of conservation are currently not in a good condition and that the remaining nature in this densely populated region is under high pressure.⁴⁶ The commented case is a telling example. The Flemish Region borders the sea and was historically covered with wetlands and wet nature; its capital was even built on a marsh. Yet, the region is currently undergoing a severe draught crisis that is not only affecting its nature, but also the lives of its citizens.⁴⁷ Flemish citizens may learn in school of the dramatic geopolitical shift from Bruges to Antwerp that occurred in middle ages due to the silting of the harbour of Bruges, caused by reclamation of land from the sea, but they appear oblivious to the rapid, dramatic aridification of their land in recent years due to *inter alia* massive drainage and cementing of the open spaces, and uncontrolled water capture. Whereas the permitted water extraction in the case at hand would have been relatively modest, it was to take place in an area with remarkable protected nature, that is at the same time particularly affected by the draught crisis and already subject to excessive capture of water, both legal and illegal.⁴⁸

45 On the need to address small projects and existing practices to obtain results as regards biodiversity preservation, and on the legal and practical hurdles to do so, see: M. CLÉMENT, "Global objectives and scope of the Habitats Directive. What does the obligation of result mean in practice? The European hamster in Alsace", in Ch.-H. BORN et al. (eds), *The Habitats Directive in its EU Environmental Law Context*, Abingdon, Routledge, 2015, (9) 14-16.

46 The 2020 *Nature Report Flanders* reveals that only 3 out of 44 habitats of European interest in Flanders have favourable conservation status, and only 18 of the 69 Habitats Directive Species that occur in Flanders have a favourable conservation status, see: INBO, *Natuurrapport 2020*, Brussels, 14, 69-74, https://purews.inbo.be/ws/portalfiles/portal/39640899/INBO_Natuurrapport2020_weblinks.pdf.

47 I. RENSON, "Onze natte natuur valt droog. Zo extreem is het nooit geweest", *de Standaard*, 2 July 2022; T. YESEBAERT, "Europa tikt Vlaanderen op de vingers wegens drainage rond natuur", *de Standaard*, 29 June 2022; D. VAN ROOY, "Merendeel Kempense en Mechelse bedrijven bezorgd over mogelijk watertekort", *vrt nws*, 6 July 2021; V. VERELST and N. NICLAES, "Een vierde van onze woning moesten we afbreken: waarom scheuren en barsten honderden huizen in Vlaanderen", *vrt nws*, 10 maart 2021; L. DE WITTE and M. TORFS, "Meer moerassen, meanderende waterlopen, lokale ontharding: Vlaanderen maakt 75 miljoen vrij voor strijd tegen droogte", *vrt nws*, 30 juli 2020.

48 According to the European Commission the current situation with widespread capture for which no permit (and hence no appropriate assessment) is required, is already in clear violation of the Habitats Directive. The Commission ensures that it will investigate the case further and considers an infringement procedure (COMMISSION, letter of 24 June 2022, *EU Doc. ARES(2022)4648209*, <https://dryade.info/wp-content/uploads/2022/06/220624-Beslissing-passende-beoordeling.pdf>). See also: T. YESEBAERT, "Europa tikt Vlaanderen op de vingers wegens drainage rond natuur", *de Standaard*, 29 June 2022 and <https://dryade.info/artikels/passende-beoordeling-vereist-voor-drainage-in-en-nabij-natura-2000-gebied>.

Against this backdrop, the Belgian Council of State did nothing more than reminding the authorities of the European and international commitments Flanders has undertaken.

Dries Van Eeckhoutte⁴⁹

Selective bibliography

SCHOUKENS, H., "Tot de laatste druppel: het grondwaterarrest als eerherstel voor de moerassen van een verdroogd Vlaanderen?", *STORM*, 2021/1, 16/01-16/08.

SCHOUKENS, H., "Grondwaterarrest duwt Vlaanderen richting debat over beperkte milieugebruiksruimte", *Juristenkrant*, 28 April 2021, 6-7.

SCHOUKENS, H., "Let's not drain the swamp: het vrijgevochten moeras als nieuw ijkpunt van het vergunningenbeleid in Vlaanderen?", *STORM*, 2021/4, 34/01-34/10.

⁴⁹ We want to thank Tim Corthaut and the editors for their valuable input on a draft version of this contribution.