

Temporary nature as innovative approach to nature conservation: legal underpinnings and potential constraints

Embracing estuaries workshop
Hamburg – 16 September 2016

Overview

- I. Setting the stage
- II. Conventional approach
- III. Temporary nature as new instrument
- IV. Legal solutions
- V. Strengths and pitfalls
- VI. Main conclusions

I. SETTING THE STAGE







NATURE | COMMENT



E-alert RSS Facebook

Biodiversity: The ravages of guns, nets and bulldozers

Sean L. Maxwell, Richard A. Fuller, Thomas M. Brooks & James E. M. Watson

10 August 2016

The threats of old are still the dominant drivers of current species loss, indicates an analysis of IUCN Red List data by Sean Maxwell and colleagues.



PDF



Rights & Permissions

Subject terms: Conservation biology · Environmental sciences



Busting the billion-dollar m



How to slash the cost of drug

A non-profit organization is proving you don't have to cost a fortune. Can you do more broadly?



Share

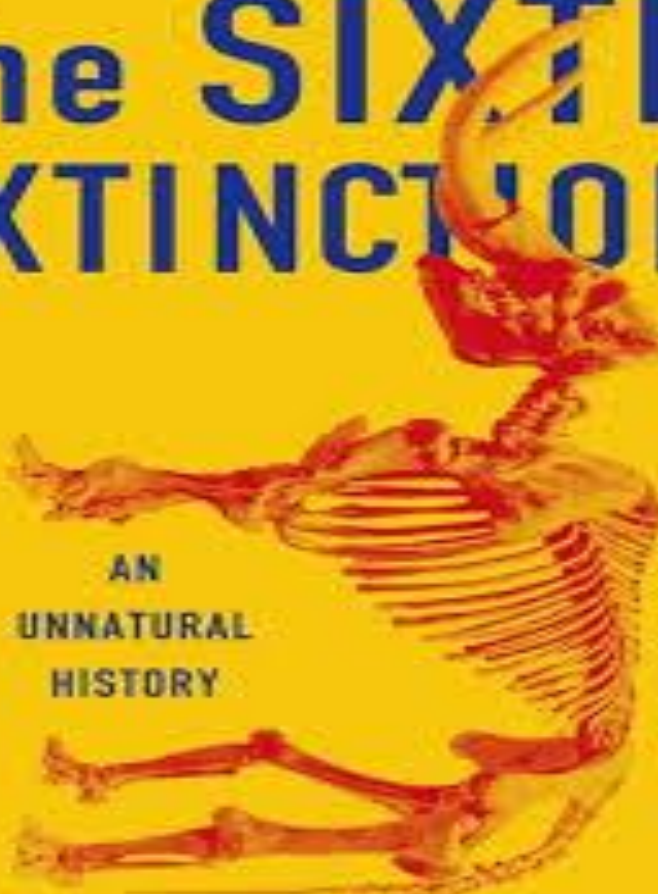
281k people like friends.

Recent

Read

1. [Floods, fires, Zika and a h](#)
Nature | 26 August 2016
2. [South African academics universities on the brink](#)
Nature | 26 August 2016
3. [Majority of mathematicians scientific 'families'](#)

The **SIXTH** EXTINCTION



AN
UNNATURAL
HISTORY

ELIZABETH KOLBERT

WINNER OF PULITZER PRIZE
FROM A CATASTROPHE



Reporting under the EU Habitats and Birds Directives 2007–2012

The State of Nature in the EU

Environment



UNIVERSITY

Policy ▶

Regulation ▶

Network ▶

Structure

Action ▶

Species

...

...

e ▶

▶

Strict Protection of Animal species



Guidance on Habitats Directive Articles 12 and 16

Up until now, most of the attention regarding the implementation of the Habitats Directive has focused on the establishment of the Natura 2000 network. This "1st pillar" of the directive refers to the conservation of natural habitats and of the habitats of species. The Habitats Directive however comprises a "2nd pillar", which is related to the protection of species. In particular, Articles 12 and 16 are aimed at the establishment and implementation of a strict protection regime for animal species listed in Annex IV(a) of the Habitats Directive within the whole territory of Member States.

A Working Group of Member States formed under the Habitats Committee, met eight times from June 2002 to February 2005 to discuss certain concepts and definitions used in Articles 12 and 16 which have caused implementation problems in member states. The groups' [final report dealing with "Species protection – Article 12 of the Habitats Directive"](#) (560 KB) can be viewed on the Commission's CIRCA platform.

Based on the work of the group, the Commission Services have elaborated a "**Guidance document on the strict protection of animal species**" (see hereunder). The document is intended to ensure a common understanding of the respective provisions among national and regional authorities, conservation bodies and other structures responsible for or involved in the implementation of the Habitats Directive. It should provide help for elaborating pragmatic and flexible ways of dealing with the provisions and making them effective and practical, while fully respecting the legal framework.

Open Guidance document:

"Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC" (final version Feb 2007 [de](#) [en](#) [fr](#), [pdf](#) ~600 KB).

USA (1978): Snail darter blocks construction of major dam?

- *“Mr. President, the awful beast is back. The Tennessee snail darter, the bane of my existence, the nemesis of my golden years, the bold perverter of the Endangered Species Act is back. He still is insisting that the Tellico Dam on the Little Tennessee River – a dam that is now 99% complete – be destroyed”* (Senator Howard Baker)



The Netherlands (2000): Mystery hamsters obstacle for crossboundary industrial zone?

Aanleg bedrijventerrein gestopt voor hamsters

Heerlen doet eerst natuuronderzoek

HEERLEN (ANP) - De gemeente Heerlen heeft de aanleg van het grensoverschrijdend bedrijventerrein (GOB) Heerlen-Aken tijdelijk stopgezet voor een natuuronderzoek. Bij voorbereidende werkzaamheden ontdekte de gemeente holen die vermoedelijk door de beschermde inheemse veldhamster zijn gegraven.

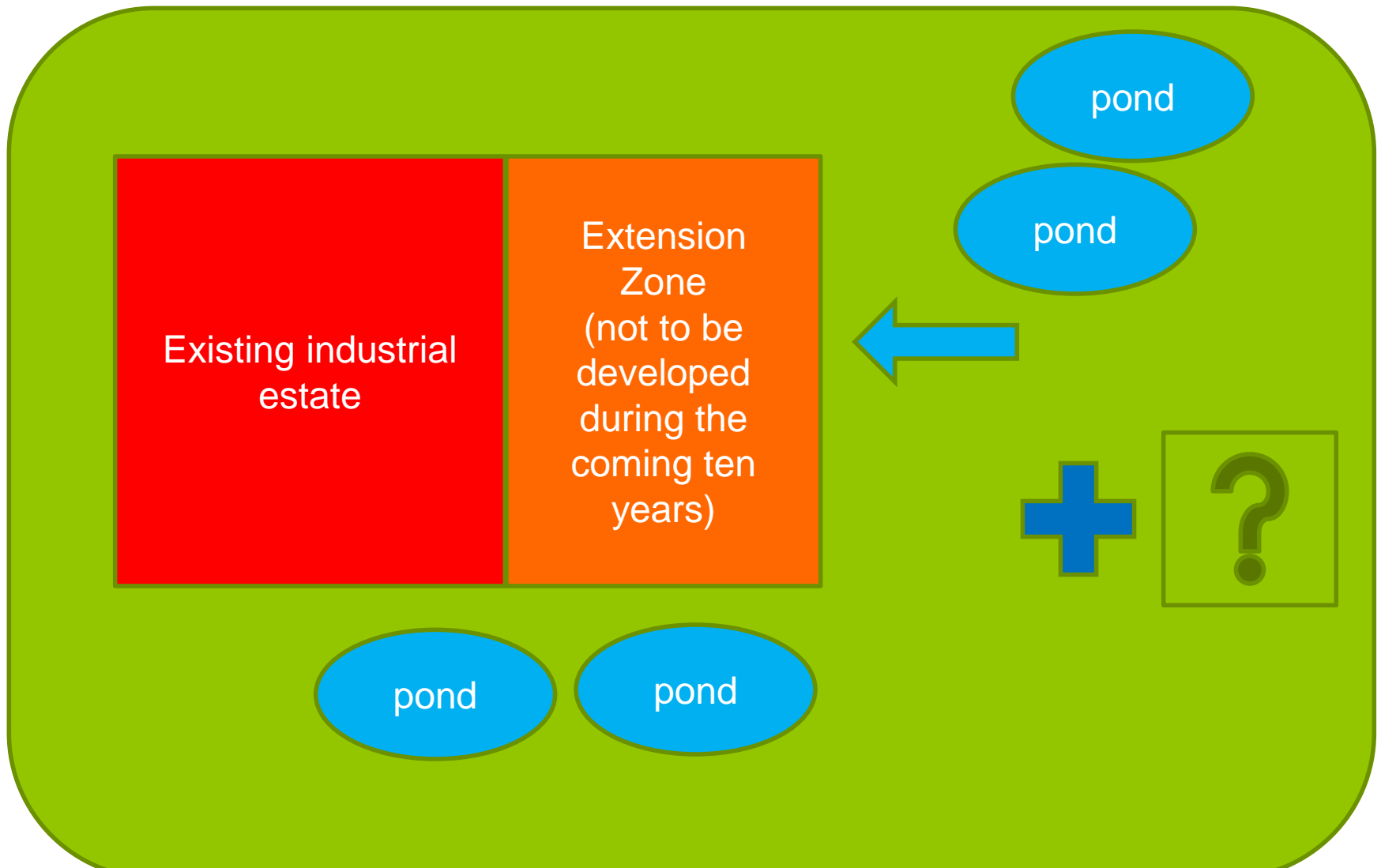


Belgium (2013): Ants blocking recreational zone

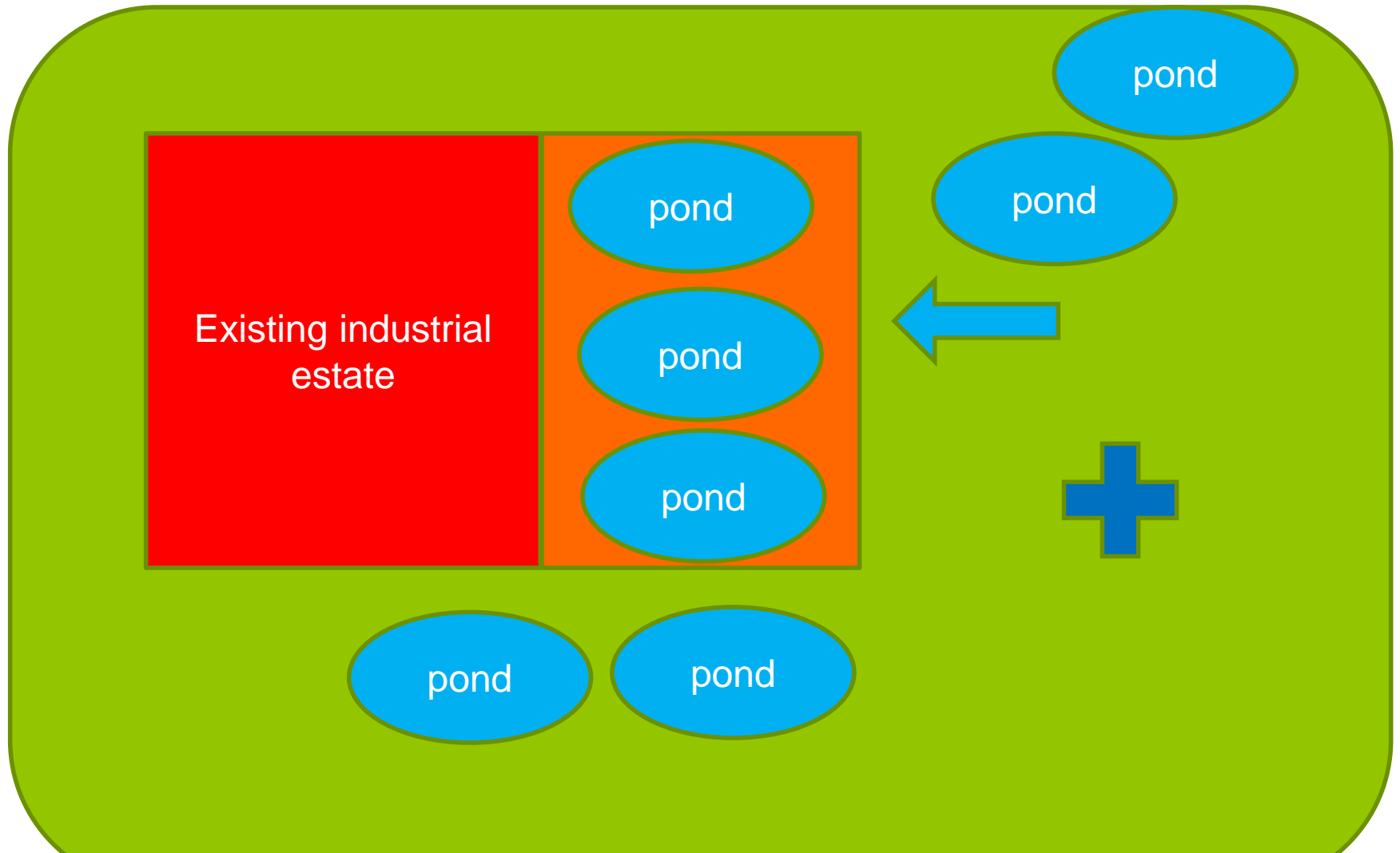


II. CONVENTIONAL APPROACH

Opportunities for pioneer species?



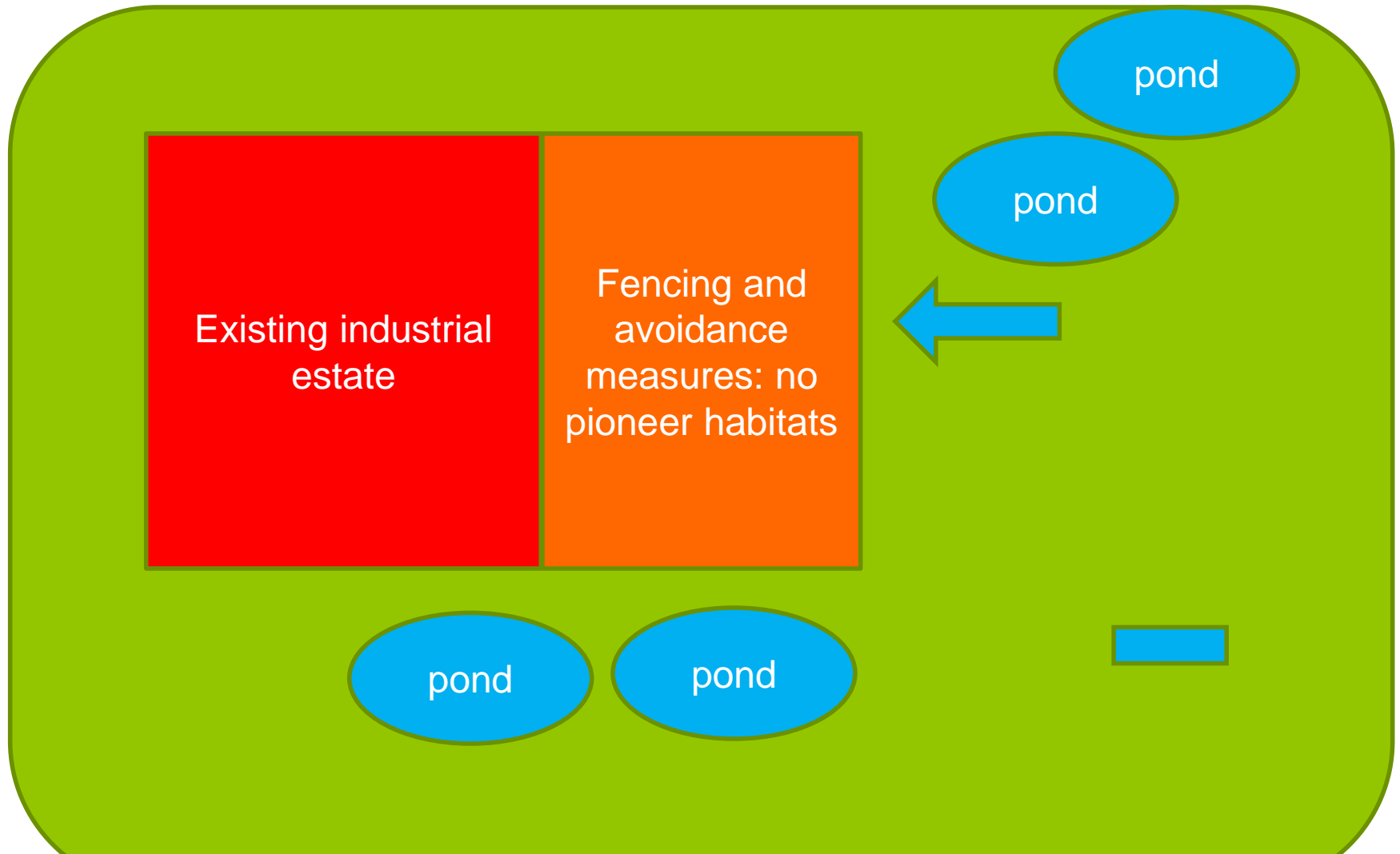
Ecological win-wins awaiting further development?





**SHOOT.
SHOVEL.
SHUT UP.**

Missed opportunities out of fear for legal scrutiny?



Conventional approach

Perverse incentives?

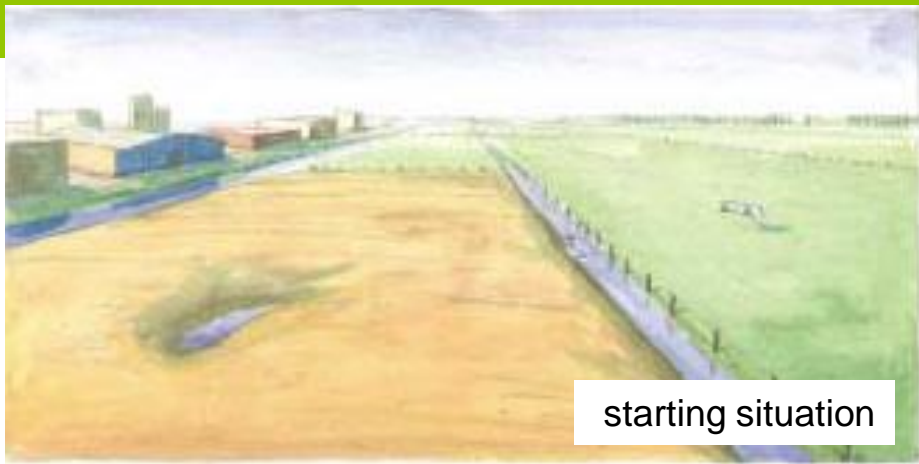


Conventional approach

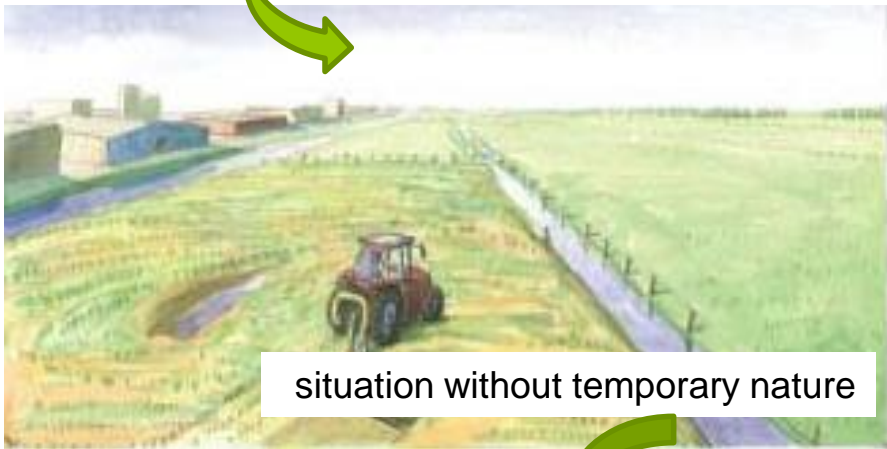
Increasing criticism? Command and control vs flexibility? A focus on what is bad?



III. TEMPORARY NATURE



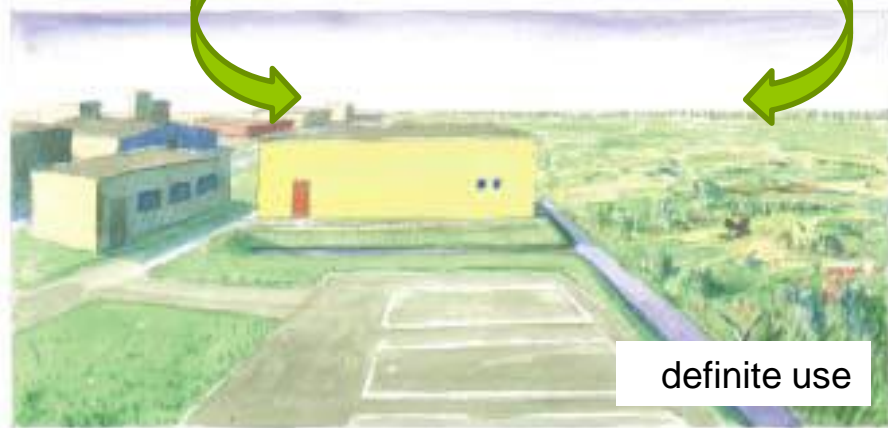
starting situation



situation without temporary nature

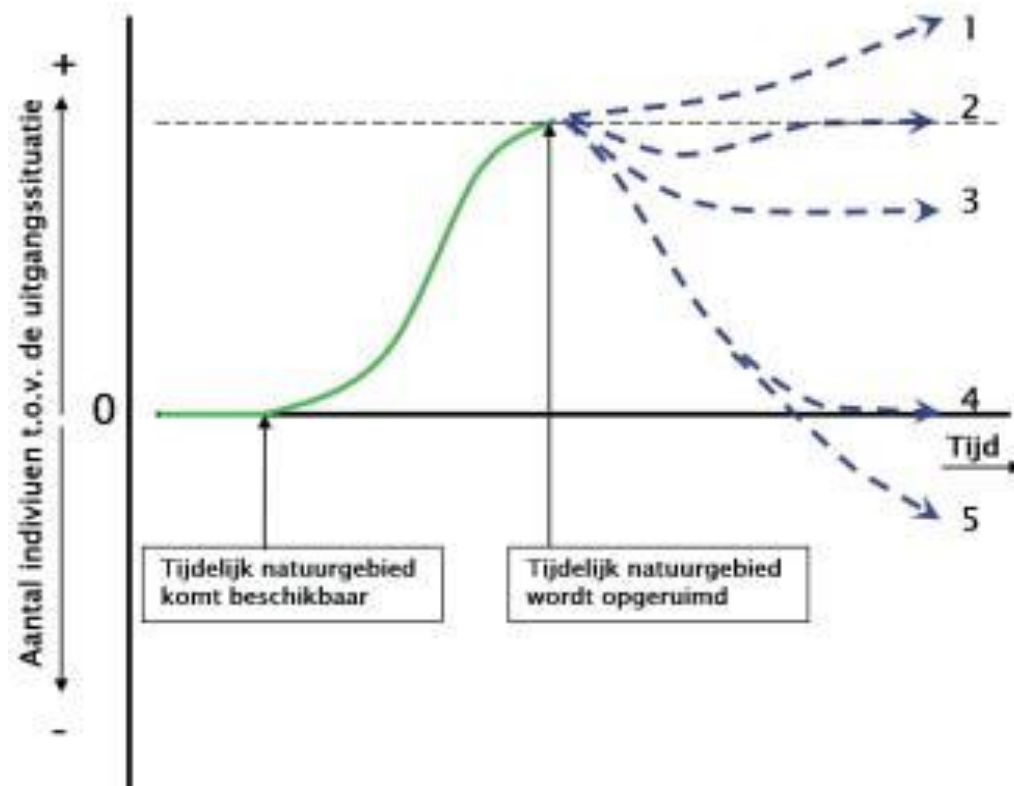


situation with temporary nature



definite use

Ecological benefits of temporary nature



New approach

Temporary nature?



- **Temporary nature** – as developed in the Netherlands – provides incentives for landowners to use their lands for ecological purposes awaiting development
- **Dutch roots:** 2006 – Innovation Network – how to reconcile nature conservation with urban development
- **Targets:** aimed at *pioneer species* that quickly colonise barren soil habitats, such as construction lands, sand heaps or reclaimed port areas – these conditions almost nowhere to be found in other parts of landscape

New approach

Legal certainty?



- **disturbance:** deliberately capturing and killing, deliberately and significantly disturbing the specimens of these animal species, particularly during their breeding, rearing, hibernation and migration periods is prohibited
- **destruction:** the destruction, deterioration and removal of the nests, breeding and resting places of the specimens of these animal species is prohibited
- **significance threshold (limited) – derogation?** if the project is linked to a ‘reason of overriding public interest
- **narrow margin left for the concept of temporary nature,** to offer the much-desired legal certainty to project developers?

IV. LEGAL SOLUTIONS?

Legal solutions?

Definition: *legal guarantees in exchange for additional nature efforts?*

- **Dutch Policy Note 2007** – Green deal Temporary Nature 2015
(*new guidance document*)
- **Territorial scope:** plots of land that have not been accorded a green destination in the applicable zoning plans, such as industrial estates or housing zones (Natura 2000?)
- **Temporary available for nature conservation purposes:** applicable spatial destination is awaiting its realization – primarily focuses on the settlement of pioneer species or early species
- **Baseline:** mostly zero, but not necessarily always the case

Legal solutions?

(1) 'derogation in advance'?

- legal guarantees *before* species settle: apply in advance for a derogation – **before the area is made available for biodiversity** – ask in advance the consent of the competent authority for the removal of temporary nature (more legal certainty) – if rejected, no liabilities ...<> if approved, permit defence
- legal underpinnings: Article 16(1)(a) of the HD: '*provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the population of the species concerned at a favourable conservation status, MS may derogate (...) in the interest of protection wild fauna and flora and conserving natural habitats*'



Legal solutions?

(1) 'derogation in advance'?

- **first legal** challenges: Dutch NGO claimed that no derogation could be issued since, at short term, no harmful activities were planned – only meaningful when nature is removed – incorrect use of derogation clause
- **Court of Amsterdam (2011) and Dutch Council of State (2012)** rejected the suits - providing legal certainty through a derogation was crucial to grant legal certainty to project developers – without legal certainty no additional benefits for pioneer species
- **EC (2014)** – in response to Flemish query – in principle no interference with Natura 2000 + in principle derogation can be granted if it is established that in the absence of such approach, no opportunities for species conservation would arise (no definite OK GO – CJEU?)



Legal solutions?

(1) Derogation in advance?

- A Safe Harbor Agreement is a **voluntary agreement** involving private or other non-Federal property owners whose actions contribute to the recovery of species listed Safe Harbor Program Signage as threatened or endangered under the Endangered Species Act (ESA).
- In exchange for actions that contribute to the recovery of listed species on non-Federal lands, participating property owners receive **formal assurances** from the Service that if they fulfill the conditions of the SHA, the Service **will not require any additional or different management activities by** the participants without their consent.
- In addition, at the end of the agreement period, participants may return the enrolled property **to the baseline conditions** that existed at the beginning of the SHA.

Legal solutions?

(2) Programmatic approach?

- focus less on individual species and more on population management at the level of an ecological unit (habitat banking in the context of port or quarry zones)
- 2009 Flemish Species Protection Regulation: “**species protection program**” – area oriented program aimed at obtaining a favourable status of conservation for one indigenous species or group of species in an area
- can include derogations from the species protection restrictions in advance: also feasible to **integrate temporary nature** in the program and frame it in an area-oriented approach
- **more legal certainty** for temporary nature in highly dynamic areas (areas for temporary nature can be mapped in advance) – less administrative burdens at the permit stage (exemption or not?)

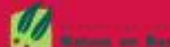


Foto: Natuur en Bos

HET SOORTENBESCHERMINGSPROGRAMMA ANTWERPSE HAVEN

- is het eerste gebiedsgericht programma dat per ministerieel besluit op 23 mei 2014 werd goedgekeurd door de Vlaamse minister van Leefmilieu. Het ministerieel besluit trad op 1 juni 2014 in werking en geldt voor 3 jaar.
- vindt zijn rechtsgrond in artikel 27, §1, tweede lid, van het Soortenbesluit dat sinds 13 mei 2009 in Vlaanderen van kracht is. Dit besluit bevat verbodsbepalingen en een lijst met alle beschermde soorten in Vlaanderen. Vele in de haven voorkomende soorten staan op deze lijst, enkele beschermde soorten kennen bovendien uitsluitend voor in het havengebied.
- is een bundeling van acties voor de ontwikkeling en de instandhouding van paraplu-soorten en hun leefmilieu. Het Gemeenschappelijk Havenbedrijf Antwerpen heeft zich in een overeenkomst met de Vlaamse overheid geëngageerd om borg te staan voor de uitvoering van de acties. Voor al je vragen kan je contact opnemen met het Havenbedrijf via soortenbeschermingsprogramma@portofantwerp.com of via +32 3 229 73 88.
- creëert een kader voor het bekomen van afwijkingen op de verbodsbepalingen van het Soortenbesluit. Voor het Antwerpse havengebied is er een formulier voor zulke afwijkingaanvraag opgesteld. Dit formulier kan worden gedownload via www.natuurenbos.be/SBPantwerpshaven. Via deze link kan je overigens het hele programma downloaden.

GEMEENTELIJK HAVENBEDRIJF ANTWERPEN
 Entrepotkaai 1 - 2000 Antwerpen
 België
 T +32 3 205 20 11 - F +32 3 205 20 28
info@portofantwerp.com
www.portofantwerp.com



De haven leeft!

Natuur en havenontwikkeling gaan hand in hand dankzij het Soortenbeschermingsprogramma.



ECOLOGIE EN ECONOMIE IN HARMONIE

De haven van Antwerpen is een harmonieuze combinatie van natuur en economie.

V. STRENGTHS AND PITFALLS?

Strenghts and benefits



- a prime example of a **more collaborative approach** towards recovery, which is capable of inducing much needed private nature management efforts with giving in to the demands to further relax or water down the existing protection rules (REFIT- in line with derogation clauses)
- new door are opened for nature conservation and restoration on lands that traditionally **remained off-chart for nature management actions**
- under temporary nature/SHA, landowners are no longer seen as the subject of protection rules, but rather as an **equal partner** at the negotiation table
- no panacea for all ills, yet useful **complementary tool** in the combat to halt the ongoing biodiversity loss?

Pitfalls and limits?



- **absolute legal certainty does not exist:** what if it eventually turns out that a TN-area harbors the last remaining population of a strict protected species <> failure linked to poor performance of the generic nature conservation policy (realistic scenario?)
- **ecological trap?** – additional guarantees to avoid protected species would resettle for ‘safe habitat’ to ‘unsafe areas’
- **downscale expectations:** no financial incentives (so far) – no duty to implement management actions – enough appeal?
- **scepticism amongst nature conservationists and neighbours :** especially in cases where the baseline scenario is not zero – cover up for mitigation efforts – vital to avoid confusion (!)
- **establishing a clear baseline scenario:** landowners eager to set baseline as low as possible (?) – strict monitoring

VI.CONCLUSIONS

V. Conclusions and outlook

- while nature conservation law has not gone astray by focusing on prevention and avoidance, it has created *some* **perverse incentives** and leads to missed opportunities for nature conservation on private lands
- TN – provide legal certainty for landowners will to go beyond the baseline on temporary available plots of land – present a useful, additional **opportunity** to create net benefits for nature
- legally speaking **additional assurances** need to be provided to landowners in advance (derogation in advance/agreement), which is not easy in view of the strict regulations <> no 100% legal certainty (but as close as possible) – new test cases might emerge (*learn by doing*)