



Utrecht Centre for Water,
Oceans and Sustainability Law



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Renewable Energy Sources and Species Protection – How to ensure sustainable solutions

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RE-Projects and species protection: a challenge!



**Windparken in zee gevaar
voor zeezoogdieren**



Umi



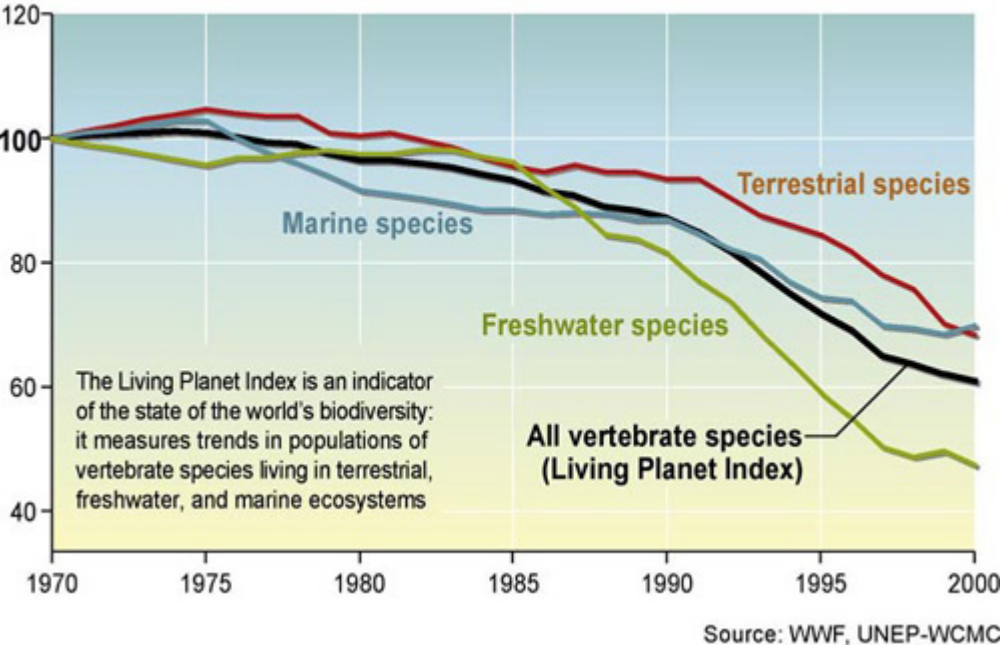
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A lot to do in RE-production in Europe; examples from selected countries

	Wind Energy Realized	Target Wind E 2020	% sust. Energy goal/realized (2016)
Germany	51,000 MW (off shore 4,700 MW)	?* (off shore 6,500 MW)	18/14
Netherlands	4,300 MW	10,400 MW	14/6
UK	20,000 MW	28,000 MW	15/9
Belgium	? (1,000 MW on shore)	3,800 MW	13/6
Denmark	50,750 MW	? (6,500 off shore)	30/31

* RE-electricity: 40-45% until 2025 (§ 1 II EEG)

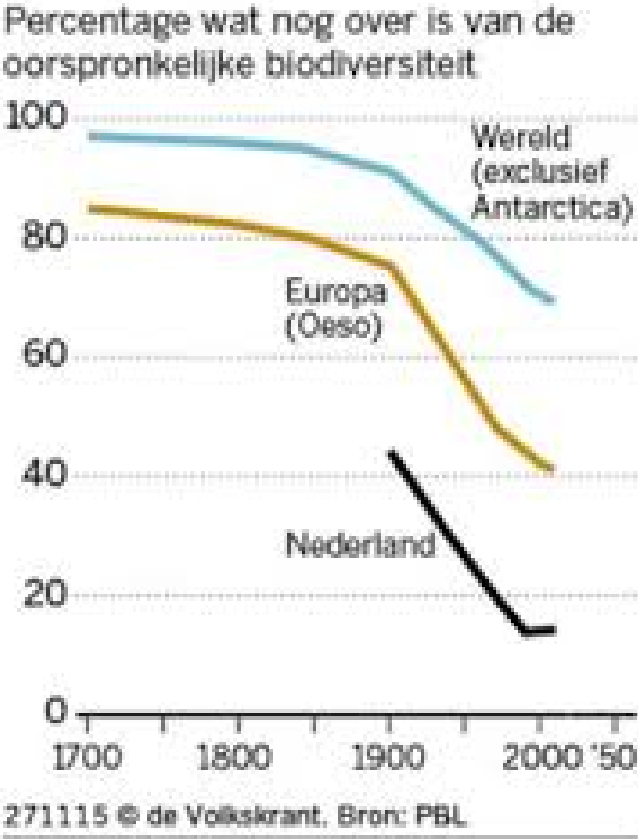
Population Index = 100 in 1970



Bad perspectives for biodiversity on several levels

RE-projects: not another threat for biodiversity, but for some protected species?
→ birds and bats

Biodiversiteit



(Research) Questions



- Is there a clash?
 - Do we have to fear a clash?
 - How is the EU legal regime applied?
 - Is it an effective regime?
 - Can we develop a better strategy?
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Legal Regime: Prohibitions



- Art. 5 Birds Directive: MS shall **prohibit**
 - (a) deliberate killing* ...
 - (d) deliberate disturbance* ...
- Art. 12 Habitats Directive: MS shall **prohibit**
 - (a) all forms of deliberate ... killing of specimens* ...
 - (b) deliberate disturbance of these species*
- ***“Deliberate”** actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.”
(EU-Commission, Guidance Document, 2007, p. 36.)

Legal Regime (2): Derogations



- Art. 9 Birds Directive: if **no other satisfactory solution**:
 - in the interests of **public health and safety**,...
 - to **prevent serious damage** to crops, livestock, forests, fisheries and water,
 - for the **protection of flora and fauna**;
- No other public interests!!**

Legal Regime (3): Derogations

Art. 16 Habitats Directive:



If there is **no satisfactory alternative** and not detrimental to the **maintenance** of the populations of the species concerned at a **favourable conservation status** in their natural range:

...(c) ...for other **imperative reasons of overriding public interest**,* ...

* very important for RE-projects

Deliberate Killing or deliberate disturbance – practice?



- NL: if foreseeable that ≥ 1 specimen will be killed
- B: in theory similar to NL, in practice (much) less strict, not often applied (yet)
- G: all killing forbidden; **significant higher risk of killing than other causes** → boils down to **distance criteria**
- UK: if an operator fails to co-operate in considering mitigation
- DK: not strictly applied, EIA is important

Derogations - practice



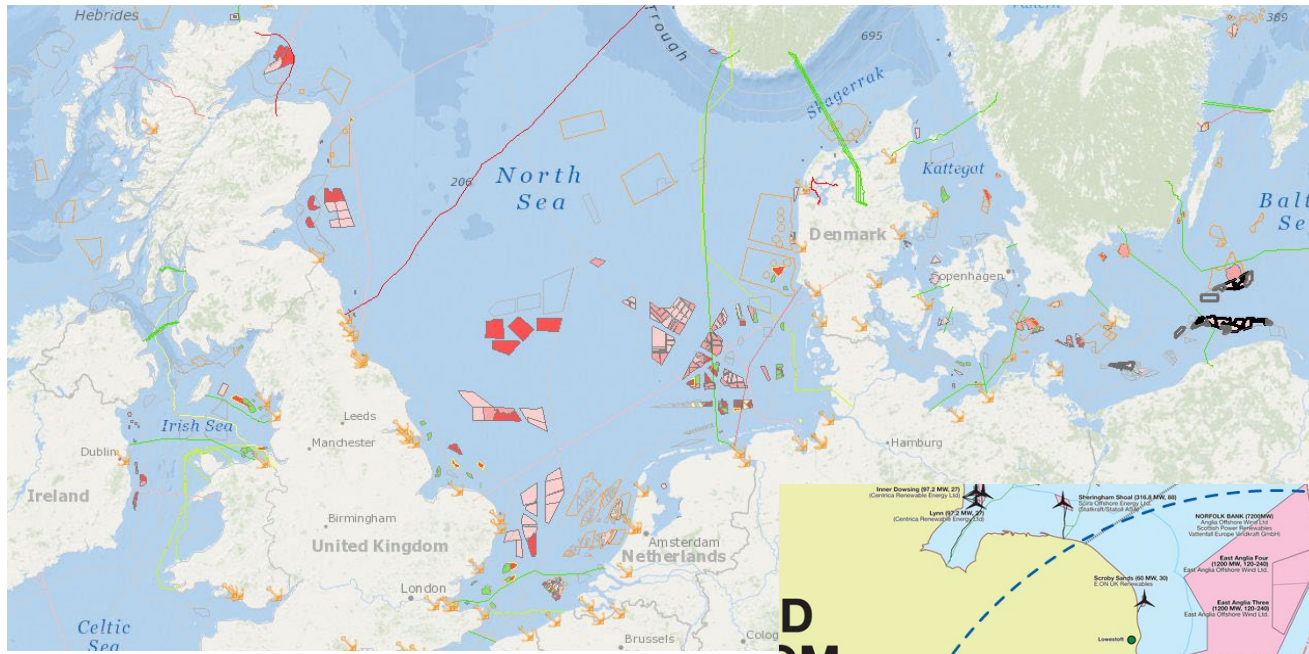
- Only needed and applied in NL!
- Different reasons accepted: “in the interests of public health and safety”, “in the interests of air safety”, “for the protection of flora and fauna”.
- Problem: the Birds Directive doesn't accept other public interests (hard to handle and hard to understand, because there is a difference to the Habitats Directive)



Conclusions 1

- EU law, common to all MS, is similarly transposed, but very differently applied!
 - Is there a right or wrong?
 - Partly non-application because “too strict”, “not adequate”
 - BVerwG: strict application does not make much sense
- **Legal regime does not seem to be adequate**
(for Germany: adaptation with a little help from the BVerwG)
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Cumulative effects



The need for RE to meet the RE-targets could lead to more risks for protected species, because cumulative effects will rise up



Cumulative effects



- Directive 2014/52/EU: analyse cumulative effects in EIA!
 - In practice partly done
 - Substantial differences
 - Many questions remain (which projects, geographical scope, ...)
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- ▶ **Discussion on EU level desirable!**
 - ▶ **EU Guidance?**

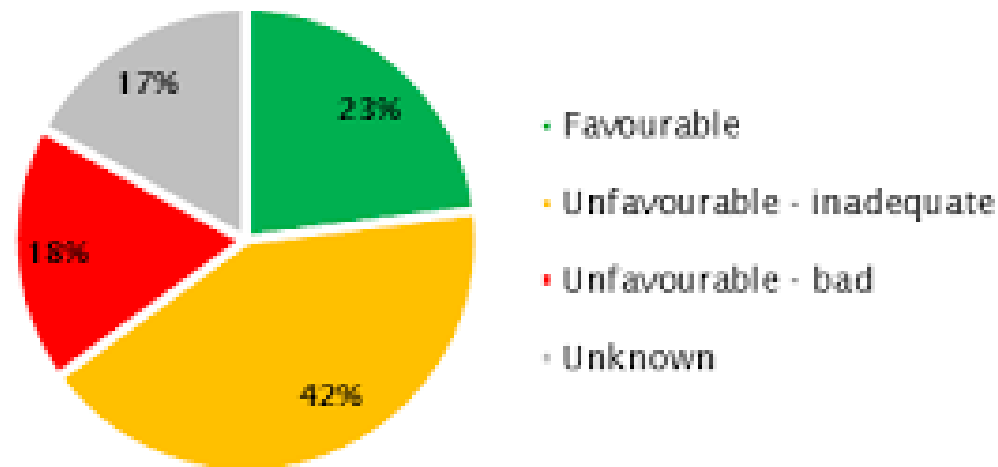


Conclusions 2

- Need of more exchange and discussion on EU level
 - Legal framework not adequate
partly too strict, for instance derogation regime Birds Directive
 - No strategy serving both: sustainable energy and species protection purposes, if there will be a tradeoff
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Strategic considerations for the future

Species conservation status 2007-2012



Derogations and conservation status

- **Starting point**
- **The increasing public demand for RE will lead to conflicts with the bans and restrictions of the EU habitat and species protection law**
NL: frontrunner; but also other MS are facing rising conflicts
- **New EIA-law puts more attention on cumulative effects** and will raise awareness to impacts on habitats and species
- **requirements for using the derogation regime** will get into the focus of interest (Art. 16.1 HD; also applicable for birds? → Art 9 BD; need for streamlining!)
 - overriding public interests
 - no satisfactory alternative
 - **maintenance of the populations of the species concerned at a favourable conservation status in their natural range**
 - crucial point
 - only task for developer or public programmatic approach needed?

Derogations and conservation status

- **Favourable conservation status (FCS), Art. 1 lit. i) HD**
- The conservation status will be taken as 'favourable' when:
 - population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats,
 - the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
 - there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;
- **ECJ, 14.6. 2007 (Rs. C-342/05) – Finnish Wolf**
 - derogation also possible if species are not at a favourable conservation status in its natural range, if there is evidence, that a project **will not lead to deterioration and will not hinder reaching the FCS** later
 - very important for balancing environmental and socio-economic aspects

Derogations and conservation status

What is needed to ensure, that there will be no deterioration?

- **the evaluation scale:** large-scale, not always the local scale; biogeographic level for member states and/or population level? something in between
Guidance Document (GD 2007): two step assessment → biogeographic and local

The **developers perspective:**

- Compensation measures on a local scale; species-specific; to be implemented before the project starts (GD 2007, No. 55 f.)
problem: how to get feasible land for compensation measures? Are there possibilities to use collective compensation sites, like in Germany: stocking of offsetting measures: so-called 'Ökokonto'-approach?
The German concept 'stocking of offsetting measures' (Ökokonto) could be helpful also for the purposes of EU derogations regime, if stocking activities are species-specific.
- Habitat-banking?

The **member state perspective:**

- Establishing **species conservation plans** for the most relevant species affected by RE-projects (GD, No. 54)

→ **developers contribution for implementing species conservation plans: payments for implementation**

Derogations and conservation status

- **Offset obligations:** a serious risk for RE developers, if they don't have suitable land for compensation measures
- **The german stocking of offsetting measures (Ökokonto) approach*:** a solution also for compensations within the species protection regime?
- **Species conservation plans:** a new partnership between public and developers (developers obligations for payments, also to avoid state aid issues)

***Article 16 Federal Nature Conservation Act**

Stocking of offsetting measures

(1) Nature conservation and landscape management measures that have been carried out with regard to anticipated interventions are to be recognised as compensation or substitution measures if

1. the prerequisites of Article 15 (2) are fulfilled,
2. they have been carried out at no legal obligation,
3. no public funding has been claimed for them,

(...)

Conclusions

- Legal regime not really effective, too less guidance for handling critical situations
- Project-related approach not efficient: developer is not the best actor for all kind of mitigation and compensation measures
- Programmatic approach needed: selected species protection plans with private implementation payments
 - German “Ökokonto”-approach not suitable for all kind of species protection problems (priority: habitat banking)
 - programmatic approach not full applicable for very rare species (need for local solutions)
- Programmatic approach is in compliance with directives, national legal basis needed (charges: “Ausgleichsabgabe”)

Thank you very much for your attention



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