

Governance - Regulatory context

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Governance - Regulatory context

BwN alternatives should not only be appealing and effective; they also need to fit into the existing legal framework. BwN developers tend to be practical people with an ambiguous attitude towards bureaucracy and regulations. In particular, the Birds and Habitats Directives have created many negative feelings when they were called upon in national courts and a lot of projects were delayed or cancelled. However, ignoring legislation is not helpful. It can lead to a waste of time and money, and to damaged reputations and relations. Just like with the dentist, a rational and preventive approach will pay off.

This section informs on how to scan regulations and respond to emerging regulatory barriers. The guidance is based on the Dutch context, where regulations are generally followed but are often amended with consensus based policy making. In other countries regulations may be more strict and hierarchical; or there may be two different realities: the regulatory reality on paper and the behaviour in practice. In all cases and places it is worthwhile to check the most important legal frameworks; to hire legal expertise in an early stage (and not when a project has run to the ground); and to ask around how legislation is used in practice.

The section offers a general perspective on the **structure** of regulatory systems and the role of **perceptions** of regulations in project development processes.

>> [Read more](#)

How do regulations influence the BwN process?

In the basis, regulations reflect an effort of people to organise society. Laws are the most formal way available for people to express a common agreement. Laws are often designed to protect something that is valuable: human lives and health, economic assets, the quality of water, soil and landscape, nature and wildlife. For BwN-developers, regulations are a sign that something important is at stake that has to be included in the design.

*5 Basic steps towards
Building with Nature*

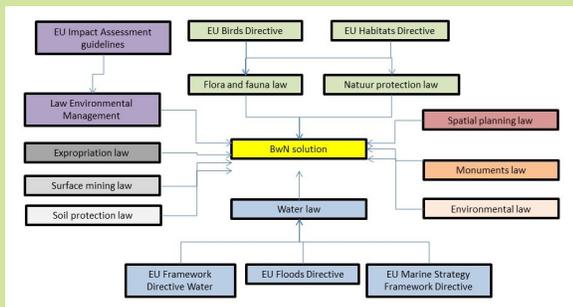
Tools

Projects

[Governance for sustainable restoration - Veluwe Randmeren, NL](#)

[Adaptive Management - Melbourne Port Extension, AUS](#)

Present-day regulatory systems are often organised by sector and therefore fragmented. Because of the sectoral organisation of laws, BwN initiatives are confronted with a large number of rules and standards at various levels. The figure below shows an example of a scan which Dutch and European laws and regulations can influence a BwN project. European legislation is generally taken up in the national laws but still the picture is very complex and 'food for experts'.



Three characteristics make scanning this regulatory context a demanding task:

- Even if a BwN-initiative is of a local nature, multi-level regulations will apply.
- BwN-alternatives often serve multiple interests, but regulations are often organised by sector. Inter-sector coordination and integration are often organised by procedural regulations.
- Procedures (when, what, how, who to involve) can be as important as content.

Nature regulations aim at conservation of ecological quality, and unfortunately they hardly ever take a dynamic developmental perspective. This is one of the new insights that have proved to be difficult to incorporate in nature legislation. Within the present legal system, BwN has to argue that it will protect existing values *and* will add new values. BwN-principles, if effectively advocated, are likely to eventually influence the institutional context in which decision making takes place.

Other well-known bottlenecks with regards to regulatory context are:

- Vague regulations
- Conflicting and overlapping regulations
- Unspecified regulations

These bottlenecks lead to diverging interpretations of legislation. In such cases, lawyers will venture into 'try-out court cases.' By going to court with a vague law, judges are forced to make a decision, and this way precedents are created for future decisions. This is the so-called 'case law'. Case law makes future interpretation of laws more predictable and helps developers to move on. A legal framework does not consist of 'laws of nature' but of 'laws by people'. Although a good deal of thinking has been put into every law, they still can use improvement, and everyone who uses a law can contribute to that process.

It is important for a BwN-developer to realise that regulations, which in the beginning are often viewed as *barriers* for development, may just as well be *opportunities* for development. Usually, this is a matter of perception. Different perceptions of regulations lead to different strategies to deal with them:

1. If a developer perceives regulations as barriers, he/she could try to have legislation revised according to BwN principles – this is a long-term strategy that requires examples of BwN attempts in the current regulatory setting. The EU policy process is well known for its slowness in absorbing change. It is not possible to initiate bold new plans and significant departures from the *status quo* and expect them to be accepted by all member states without being modified significantly.
2. If a developer perceives regulations as opportunities, he/she could try to make optimal use of them – this is a short-term strategy of working with the legislation in a pro-active manner.

An example of the EU Birds and Habitats Directives, which form the legal basis for Natura 2000 network of protected areas, illustrates the challenges of regulations as well as possible schemes to handle them. The application of the EU Environmental Directives by governments and project developers has not always been successful. Hence the Birds and Habitats Directives constitute perhaps one of the biggest perceived challenges for BwN in the European Union member states. Yet, there are several reasons to (try and) perceive these Directives as opportunities instead of barriers:

- Initial lack of attention, knowledge and awareness of the requirements of the Birds and Habitats Directives has been overcome since practical experience and case law increased;
- Guidance documents published by the European Commission encourage BwN in estuaries and coastal zones, port development and inland navigation (European Commission, 2011, 2012);
- Case studies and BwN pilot projects show that BwN-type developments are possible within the existing regulatory framework;
- The study of BwN feasibility in local arenas shows that outside protected areas BwN is more difficult to pursue, as there is no necessity to take the ecological system into account as much as in habitat areas (also see under Networks Guidance, lesson learned 5, [adaptive use of pro BwN arguments](#));
- In cases where funding for ecological project-components is limited, environmental regulations could serve to 'push' for a BwN-approach as a means to live up to environmental obligations (e.g. the goals of Natura 2000).

Guidance

In this section first a quick tour is given of how regulatory systems are structured. Next also provide guidance is given on how to map and monitor the legal aspects of BwN projects. It is also explained how to handle (perceptions of) regulations strategically in order to seize regulatory opportunities and prevent regulatory barriers. Most of the guidance presented hereafter is based on a study of the EU Birds and Habitats Directives. These nature directives aim at conservation of all species of naturally occurring birds in the wild state and natural habitats of wild flora and fauna in the European territory of the member states.

The section is structured along the following lines:

- [Structure of regulatory systems](#): >> Read more

In this section basic concepts are provided which are at the basis of most legal systems. Together these concepts provide a first rough 'map' of the jungle that legislation sometimes may seem.

Legislation has a **multilevel structure** connected to different levels of government: International – European – national – provincial/district – local /municipal. International law takes the form of negotiated treaties to which countries can 'subscribe'; the endorsement by more states strengthens the power of the treaties. Examples are the Universal Declaration of Human Rights, the Law of the Sea, trade laws, and the Kyoto Protocol. The European Union also has set out to create an extensive body of legislation which are binding for Member States. The most relevant level for BwN projects is the national level, because national laws are binding for all the citizens of a state. National laws incorporate the European laws and the international treaties that are endorsed by a country. Lower levels of administration such as provinces and municipalities work within the national framework.

The reason that the national level is dominant from the legislative perspective is the principle of the '**sovereign state**'. A sovereign state has a territory, a population, and one political authority. The political authority has a mandate to govern the people and the land within its territory, without interference of other states. All sovereign states are considered equal in international negotiations. A state needs to be recognised by other sovereign states to participate in international debates. The sovereign state principle was developed in Western Europe in for the 'Peace of Westphalia' in 1648 with the aim to end religious wars. In colonial times, the legal principle was imposed on other continents and today, the United Nations list of sovereign states includes 206 nations of which 190 are undisputed.

Every sovereign state has the right to develop its own legal framework, which usually consists of a **constitution** and a body of sectoral laws (administrative law). A constitution describes the rights of the citizens of a state (freedom of speech, and so on), and the way the political authority is organised (how elections are organised, the relation between higher and lower levels of government).

Most states use a democratic principle known as the '**Trias politica**'. This principle describes the division of power in a state between legislative, executive and juridical powers.

- Legislative power: A parliament and a senate which make laws and approve the overall national budget.
- Executive power: A cabinet of Ministers supported by a bureaucracy who execute the instructions of the parliament and spend the budget as was agreed.
- Juridical power: Courts and judges, who determine independently if laws and regulations have been applied correctly, settle disputes and convict perpetrators of the law.

A Trias politica system assumes that each of these three powers is equally important, but each has a separate role. A **balance of powers** is needed to keep government powers in check and to safeguard a fair and equal treatment of all citizens in a state. The exact configuration varies by country. Legislative and executive powers are present at each government level (national, provincial, and municipal level) while juridical power is usually present at regional and higher levels (in the Netherlands: eleven courts across the country, four courts of appeal, and one supreme court).

The juridical power has the final word on the interpretation of the law, thereby creating the so-called '**case law**'. Judges work within the existing legal system, and if other powers disagree, they will have to pass new laws through parliament first. If laws leave a lot of room for interpretation, court cases are needed to clear it up. Previous judgements will heavily influence new decisions of judges, again, to safeguard the equal treatment of each citizen.

This body of case law is relevant to predict future decisions in a court. BwN-relevant decisions will concern (nature) assessments, approval or rejection of projects and permits that specify conditions of approval.

Preparing and executing BwN projects is normally done by the executive power; i.e. the political leaders and the administration that supports them. However, it is wise to keep an eye on the legislative and juridical powers as well. Legislative powers, such as councils of municipalities and water boards, need to approve the budget of new infrastructure, and a BwN initiative will have a bigger chance of success if council members have been informed about a new approach before the final decision arrives. The legislative power comes into play when parties who oppose BwN alternatives go to court. The best way to deal with this is to try and prevent this kind of conflict.

- [How to keep regulation up to date? >>](#) Read more

Creating and updating laws in a democratic society is a labour-intensive process. Innovations in society can be fast and sometimes laws already are outdated before they are approved. One way to deal with the tension between the thoroughness of legal procedures and the agility of society is to create less detailed **primary laws**: to formulate overall goals instead of detailed measures ('good water quality'). The details can then be dealt with in annexes to the law which are regularly updated in **secondary laws** (for example, annexes with red list species).

A second option for keeping legislation up to date is to write framework laws that only describe a procedure towards a decision (like Dutch spatial planning laws). A consequence of procedural formal law (or 'hard law') is that it needs to be complemented with informal law (or 'soft law' or '**pseudo regulation**'). This soft law can take the form of policy plans, policy documents, covenants and so on. The plans and covenants contain detailed and specific agreements, but can be adapted every few years. In case law the public and accepted plans are often taken into consideration.

A third option for dealing flexibly with legislation is to act more in the 'spirit' of the law than according to its literal meaning. Dealing with regulation is navigating between two bad extremes: on one side, ignoring the regulations would result in complete arbitrariness and 'lawlessness'; on the other side, using regulations as a strict blueprint would freeze a society in one orthodox shape. Every country has its own way of dealing with regulation in terms of strictness and transparency. In the Netherlands, a promise of innovation and economic opportunity can be a reason to circumvent a law; but this would be described explicitly in a covenant-like document. Other countries have varying, culturally defined ways to deal with legislation (for example, strict enforcement, no enforcement, going to court at the slightest incident, avoiding a court case at any cost, and so on) and it is wise to study this attitude towards legislation in practice.

- [How to deal with regulations in practice?](#) >> Read more

A developer should monitor closely whether a BwN design fits into the prevailing legislation and regulations. The check on legislation and regulations includes obligatory approval procedures ([permits and licenses](#)), applicable [formal and informal](#) regulations, and the [planning system](#). Seen from a project perspective, the regulatory system determines how decisions will be taken, which procedures are in place and which standards will be applied to this case. In most legal systems, applicable standards can be found in primary and secondary laws and informal regulations on issues such as air quality, water and soil quality, the use of construction materials and interference with other economic activities. Especially relevant are the procedures and the required assessments, such as appropriate assessment of nature, multi-criteria analysis on costs and benefits and Environmental Impact Assessments.

Scans of regulations take time and require some expertise in this field. One might consider outsourcing this task to a capable and trustworthy specialist, or let such a person give a second opinion. Hiring expertise in an early stage can prevent a lot of legal trouble in later stages. In court cases, following the correct procedures is given a high value, and once an important step is omitted, it can be costly and time-consuming to repair it.

>> Read more

For the Birds and Habitats Directives, a scan could include:

- Identification of Natura 2000 areas designated in or around the proposed project site (Dutch maps of Natura 2000 are available here: <http://www.natura2000.nl/pages/kaartpagina.aspx>), in order to assess whether the corresponding regulations are applicable.
- Conservation objectives, conservation measures and management plans (if available) for these areas (found on the same website as above);
- National, federal or regional legislation implementing the Habitats Directive (in particular the crucial Article 6) in the Member State;
- The authority which is to approve the project (national, provincial, municipal or water authority); this authority may also provide further advice on how to proceed with the project in this particular area;
- [Case law and recent studies on Natura 2000](#) can provide useful insights and lessons learned.

- [Participatory arrangements and appeals in court](#) and appeals in court in the country concerned.

Awareness of case law can provide more precise guidance, as it gives insight into the interpretation of legislation in specific situations. In addition, documents such as explanatory memoranda are usually available for every piece of primary and secondary law, explaining intentions and goals. Sometimes additional guidance is issued later on, for instance the guidance document of the European Commission (European Commission, 2011). Such documents clarify how national primary or secondary legislation, for instance on water quality, should be implemented in a specific region. Further guidance may be available in handbooks and manuals.

>> Read more

Habitats Directive Article 6 (http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm)

"Article 6 is one of the most important articles in the Habitats Directive as it defines how Natura 2000 sites are managed and protected.

Paragraphs 6(1) and 6(2) require that, within Natura 2000, Member States:

- Take appropriate conservation measures to maintain and restore the habitats and species for which the site has been designated to a favourable conservation status;
- Avoid damaging activities that could significantly disturb these species or deteriorate the habitats of the protected species or habitat types.

Paragraphs 6(3) and 6(4) lay down the procedure to be followed when planning new developments that might affect a Natura 2000 site. Thus:

- Any plan or project likely to have a significant effect on a Natura 2000, either individually or in combination with other plans or projects, shall undergo an Appropriate Assessment to determine its implications for the site. The competent authorities can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site concerned (Article 6.3)
- In exceptional circumstances, a plan or project may still be allowed to go ahead, in spite of a negative assessment, provided there are no alternative solutions and the plan or project is considered to be justified for imperative reasons of overriding public interest. In such cases the Member State must take appropriate compensatory measures to ensure that the overall coherence of the N2000 Network is protected. (Article 6.4)".

- [How and where to find or create 'space for BwN' in existing regulations / legislation?](#) >> Read more

"You have to learn the rules of the game. And then you have to play better than anyone else." Albert Einstein

The BwN approach to match a BwN design with the Regulatory Context takes 3 steps:

1. Talk with the regulators to identify formal requirements: >> Read more

A first scan of regulations will give a general idea of the regulatory environment and perceived regulatory risks and opportunities. The actual texts of regulations could provide an initial idea of the requirements that BwN initiative has to meet; however, much legal text is rather descriptive; usually a few articles have the most impact on reality. Obtaining information which articles and aspects are the salient ones could be outsourced to a consulting specialist or could be done by seeking contact with authorities. See the brief description of [Birds and Habitats Directives](#).

2. Talk with the Authorities to identify implementation procedures: >> Read more

The actual implementation of regulations by the responsible authorities and the effect on development practice is not always evident from the text of the regulation. Therefore it is advisable to consult the authorities in charge of specific regulations and discuss whether the interpretation of the BwN developer is correct and complete, and whether creative options can be found to navigate the regulatory obstacles. The agenda of such a first meeting could be:

- the basics of the BwN idea, and the problem it intends to solve
- does such a project fit into the existing plans?
- what regulatory and other obstacles can be expected?

The culture regarding permits and the formal and informal regulatory setting differ strongly by region. Some countries have 'perfect' regulatory settings but hardly any implementation; other countries have flexible or irrelevant regulations that leave huge discretionary room to the authorities, but also include a high risk of arbitrary decisions.

BwN alternatives span geographical and time scales. This may increase complexity seen from a regulatory perspective, as uncertainty is seldom welcomed. Make clear that BwN is flexible and steerable if actual dynamics exceed legal standards. Do not hesitate to interact with regulators, who are often frustrated by counter-productive fragmentation of rules and are quite willing to look for solutions. After the first meeting, stay in contact with the authorities and update them of important steps in the BwN project development.

3. Adjust and fit the BwN design to the actual regulatory context: >> [Read more](#)

Once formal requirements and their practical implications are clear, possibilities can be sought to adjust and fit the BwN design to this regulatory context. Below we elaborate the possibilities of adjusting and fitting a BwN design to the requirements of the EU Birds and Habitats Directives; for other regulations similar procedures can be followed.

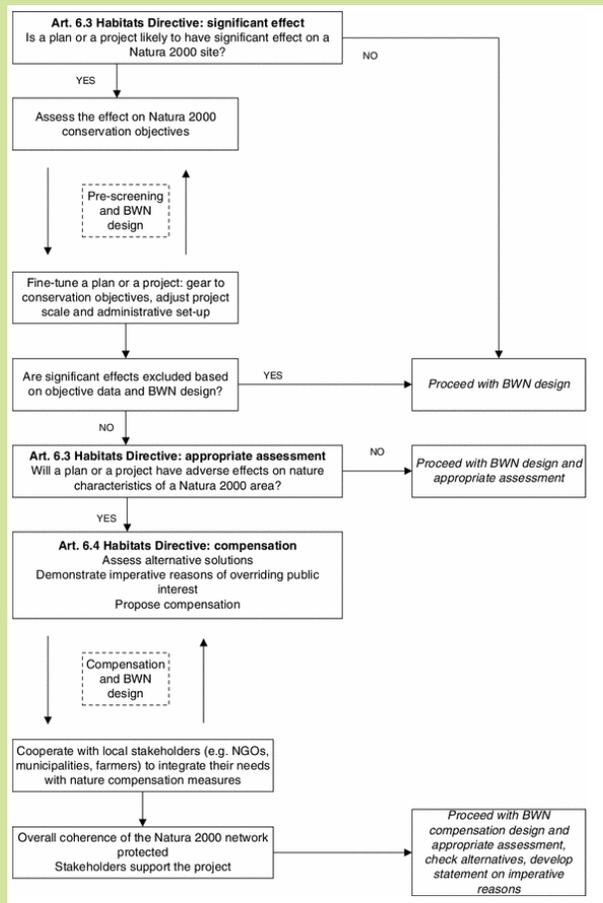
Once the regulation scan has identified Natura 2000 areas in or around the proposed project location, there are at least two possibilities to fit a BwN design into the corresponding regulatory requirements.

The first possibility is in the pre-screening phase of a project, when BwN can be helpful to exclude significant adverse effects on the Natura 2000 area. The following questions may be helpful at this stage:

1. Can we adjust the BwN design so that it contributes to the Natura 2000 conservation objectives?
2. Can we make our BwN initiative beneficial for the management of Natura 2000 sites?
3. Can we split the BwN design and realise it in separate stages (sub-projects), while keeping in mind the cumulative effect on Natura 2000?
4. Can we upscale or downscale the BwN initiative in order to safeguard overall coherence of the Natura 2000 network?

An outcome of such adjustments could be a BwN design that supports the favourable conservation status of the protected habitats and species. If this is the case, the chances of its approval by administrative court in case of appeal increase (see case [Veluwe Randmeren](#)).

The second possibility can be used if adjustments in the pre-screening phase still imply significant negative effects. This may be the case for intrusive developments of overriding economic interest (e.g. fairway deepening, port development). In the absence of



alternative solutions, possibilities could be explored to realise BwN principles alongside or as part of a compensation plan. The added value of BwN here may be that it generates local stakeholder support and/or creates new possibilities for spatial development. It may also provide a platform for cooperative interaction among stakeholders and prevent frustrations and legal fights later on. Such an interaction should start at the moment it becomes clear that compensation is unavoidable. The following questions may be helpful at this stage:

1. What are the possibilities for BwN as part of the compensation plan?
2. Can we adjust the BwN design to benefit local stakeholders' interests?
3. Can we use BwN to facilitate cooperative interaction among stakeholders?

The flow chart shows the main steps in decision-making in Natura 2000 protected areas according to art. 6 of the Habitats Directive. Examples of two possibilities of BwN intervention are indicated on the flow chart and elaborated in more detail in the next chapter.

For other pieces of legislation the feasibility assessment can be done in similar way. If a piece of legislation requires an Environmental Impact Assessment, or another kind of nature assessment, or a multi-criteria assessment, it is obvious that analogue reasoning can be used to assess whether BwN fits in.

- Do's and don'ts: >> Read more

To make a coastal development project successful in an ecologically sensitive area and avoid ending up in court, a BwN manager and/or project administration is advised to:

- Do not postpone the legal aspects because they seem complicated to you. If they are postponed they certainly will become complicated. Anticipate the regulatory trajectory at an early stage and take this into account as requirements for further project development.

- Be aware of the required information and data for applications and approvals; for BwN projects this can include multiple sectorial procedures (spatial planning, water management, environment) - integral procedures covering all interests will rarely be applicable.
- Do not trust local governments to know every detail of the correct licensing procedures: they often make mistakes too so make it your own responsibility to know the law.
- Do not rush to a decision. A good regulatory process might take time. Effort spent in the early stages of the decision making process will favour project development later on.
- Keep track of the multiple procedures that often have to be completed before a positive outcome can be reached. Forgetting and/or ignoring (parts of) procedures can lead to project delays or even termination.
- Anticipate the kind of legal requirements that could eventually come into play in case of legal appeal and the actors (stakeholders) who could potentially initiate the appeal (see [Networks Guidance](#), step 3).
- Ignore the difference between hard rules and soft rules. Hard regulations should always be complied with and imply that a certain decision is inevitable; the soft regulations leave some room to adapt to the situation.
- Make use of discretionary room if available, for instance to judge whether information and data in a procedure is sufficient.
- Do not expect your legal efforts to be perfect. Laws are constantly changing and not always for the best. If it comes to a court case, the judges will recognise the genuine efforts to do a good job from sloppiness and bad intentions.
- Keep in mind that there is also something that can be called the 'regulatory game'. In nature assessments, for instance, the exact criteria have to be agreed upon and settled early in the process. Actively participating in this may ultimately favour the BwN-approach.

Assessment of the legal viability of a BwN initiative is a recurring activity, the scope can vary from a first-order reconnaissance up to a very detailed assessment.

- Hand in adequate information required by the regulatory procedure. Handing over great data does not help if the required information is not provided. If the requirements of a procedure are not precisely known, for instance regarding the information that has to be delivered, it is advisable to clarify this first and then proceed with the investigation.
- Draw on previous experience in the working area with regard to applicable regulations. Assessment of expected ecological effects always comes with uncertainty. Sometimes more research can reduce uncertainty, but if phenomena or effects are unpredictable, even cutting-edge research does not help. In the Dutch context, assessment of effects *after* a zoning plan had been approved by a municipal council and a permit had been issued for construction works is evidence of inappropriate decision-making as ruled by the Dutch Administrative court (see court ruling in the example Zeewolde Harderwijk, below). For more info about handling uncertainty see [Knowledge Guidance](#).
- Be aware that the *complete* BwN design is presented in procedures, for instance approvals and permitting. Monitoring tends to be considered in a later stage, but the facilities and activities involved also need approval and permitting. Ignoring this will lead to unforeseen repairs and thus to unnecessary delay and additional costs.

Lessons learned with regard to specifically the EU habitats / species regulation and the appropriate assessment procedure:

- For areas with a special conservation status the overall positive ecological effects of BwN on protected species and habitats will usually exceed the (temporary) negative effects of the project measures (i.e. land reclamation), in line with the goals in the area. A well-founded case must be delivered, with explicit reference to the conservation objectives of the area.
- The assessment of ecological effects at pre-screening stage (see diagram: pre-screening and BwN design) must emphasise the BwN idea of a project. BwN measures do not threaten the favourable conservation status of habitats / species, and often even support their recovery and/or improvement. The purpose of a pre-assessment stage is to investigate the possibility of significant negative effect and determine whether appropriate assessment would be needed. If

significant effect could be avoided with the help of BwN design at this stage, the project can proceed.

- Once agreement on this positive effect of BwN has been established, the developer should be consistent in the use of terminology and avoid terms like 'appropriate assessment' and 'compensation', which come at a later stage but only in cases with a negative effect.
- If the pre-screening convincingly rules out significant effects or demonstrates that they are negligible, an appropriate assessment procedure is not necessary, even when a project implies the loss of Natura 2000 area (see example project Zeewolde, below).
- If there is a chance of significant negative effect, the project should proceed with an appropriate assessment (see diagram: Art. 6.3 Appropriate assessment) or further according to Art. 6.4 with alternatives assessment, compensation plan and Statement of Imperative Reasons of Overriding Public Interest (IROPI).
- An appropriate assessment procedure is often outsourced to a specialised consultant. More information on what it entails can be found in the Methodological Guidance, European Commission, 2001.

If Natura 2000 or comparable regulations are applicable, plans or projects should always be based on mutually beneficial strategies according to the 'working with nature' concept' (see Guidance document European Commission, 2011).

Practical applications - examples

Comparison Zeewolde and Harderwijk projects, the Netherlands

A comparison between two very similar projects demonstrates how management of the regulatory system during the initiation and planning phases can be decisive for 'success or failure'.

The Veluwe Randmeren, i.e. the shallow lakes between the polder Flevoiland and the mainland of the province of Gelderland, were designated as a protected area under the Birds and Habitats Directives in 2000 and 2003



(see Figure). Conservation objectives for Veluwe Randmeren were finalised in 2007. Two coastal developments took place in this area. The project in Harderwijk 'Waterfront Noord' included the relocation of an old industrial area, improvement of recreation and housing facilities, and strengthening the natural and water functions. The one in Zeewolde – on the other side of the lake – envisaged a park zone, two beaches, an island with recreational facilities connected to the shore by a bridge or a dam, and a row of islands that would create an open lagoon area between the islands and the shore.

Both municipalities argued that a loss of Natura 2000 protected area (8.5 ha in Harderwijk and 10 ha in Zeewolde) had no significant effect on the integrity of the relevant Natura 2000 site. Both authorities took into account the requirements of Habitat assessment, have argued that an appropriate assessment was not necessary and seemed to have integrated nature into their design. However, there was a slight difference on how they have done it, which eventually led the Supreme Dutch Administrative Court to reject the Harderwijk development in 2008 and approve the Zeewolde development in 2009.

>> Read more

The successful design was adjusted to Natura 2000 conservation objectives of the Veluwe Randmeren and contributed to achieving these objectives. The municipality of Zeewolde maintained that a permanent loss of 10 hectares of sanctuary and forage area for birds did not threaten the favourable *conservation status*, since the coastal lagoon, parts of which have shallow water, will *support the recovery or even improve the habitat* of the protected species.

The unsuccessful design tried to create new habitat to neutralise the loss of the existing one. The municipality of Harderwijk argued that the loss of 8.5 hectares of habitat and forage areas could be *neutralised by the creation* of a green zone and nature-friendly areas, which would be suitable as *new habitat* for birds, fish and mussels, while the transformation of a nearby area of pastureland into marshes would make the area attractive for water- and grassland birds and create a water retention area.

The successful development had a well-organised administration. The municipality of Zeewolde administratively separated coastal development from residential area development and carried out residential development first. This step-by-step approach allowed for the rapid realisation of the coastal zone project. The overall design of the coastal zone plan did not undergo any major changes, and in the short time span of development no significant legislative changes occurred. Early de-coupling of residential interests shifted attention towards the more prominent role of nature in coastal development and a more tailor-made design.

The unsuccessful design failed to provide solid scientific (ecological) argumentation. The new habitat creation proposed by Harderwijk was just a collection of existing nature development initiatives in the area. With no consistent nature development plan in mind, authorities also failed to provide solid scientific argumentation that no adverse effects were to be expected. Instead, they tried to investigate the ecological effects to the depth of the available knowledge.

In the successful project, on the other hand, BwN design indirectly contributed to the actors' confidence in their own project design and their certainty in the provided scientific underpinning (Zeewolde).

The comparison of these two projects illustrates that the actors' interpretation of when exactly the required level of certainty is reached is an important factor for implementation success. The interpretation of scientific data can be further strengthened by the following factors: consistent use of terminology (appropriate assessment or not), actors' prior experience and the exact wording of reports, conclusions and the interpretation thereof by the Court.

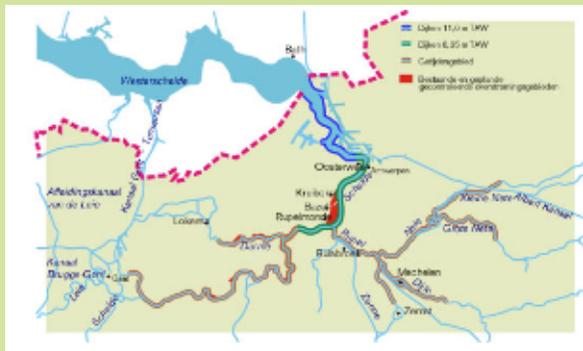
In the context of Natura 2000 implementation in the Netherlands, BwN design principles can increase the chances of project approval in case of appeal to the Supreme Administrative Court. BwN-developers should consider the following lessons:

- Lesson 1: Start by adapting the BwN-design to the Natura 2000 conservation objectives of the area.
- Lesson 2: Demonstrate that the proposed BwN-design contributes to the achievement of the conservation objectives, or even beyond.
- Lesson 3: Work on excluding any significant negative effect on the conservation objectives and provide scientific argumentation for this in the pre-assessment report.
- Lesson 4: If above mentioned steps can be completed successfully, no 'appropriate assessment' is necessary, even if the project implies some loss of Natura 2000 area, because it leads to an overall gain of nature.
- Lesson 5: If possible, consider splitting the project in stages (so called administrative de-coupling), but remain aware of possible cumulative effects.

With quite some delay the Harderwijk development ultimately did obtain approval for a new project 'Waterfront' (<http://www.waterfrontharderwijk.nl/>). To compensate for the impact of this housing development the municipality created two new resting zones for birds of about 20 and 50 hectares in 2014. These zones are closed for recreation vessels between September and April. The design and management of the new bird zones is described in a covenant between governments, nature organisations and other stakeholders.

Kruibeke, Bazel, Rupelmonde flood control area, Flanders (Belgium)

In 1988 the polders of Kruibeke, Bazel and Rupelmonde were designated a special protection area (SPA) under the EU Birds Directive and in 1996 they were designated a special area of conservation (SAC) under the EU



Habitats Directive (see Figure). However, the practical implications of these designations only became clear after another project, viz. the construction of a new tidal dock on the left bank of the river Scheldt (the Deurganck Dock) had been implemented.

Although Deurganck Dock received a lot of public and professional attention, the 35-year history of its compensation project – the Kruibeke, Bazel and Rupelmonde flood control area – is more interesting from a BwN-perspective. It illustrates how the actors' learning strategies gradually broadened the project goals from flood defence to nature, the development of Antwerp harbour, and the goals of local stakeholders. Partly as a result of the involvement of Natura 2000, the project evolved towards a BwN-type design which balanced the conflicting interests of the past.

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The Deurganck Dock project, implemented predominantly for economic benefit, was confronted with environmental requirements of Natura 2000. This required some adjustment to the project outline, but approval was relatively quickly obtained.

At the same time the local flood defence project (Kruibeke, Bazel and Rupelmonde flood control area) was accorded with low political priority. At the European level, workable approaches were sought to address the accumulated misunderstanding of the Birds and Habitats Directives by industry and the resulting case law. Placing ecological goals at the start of the planning process, as envisaged in BwN, could balance the previously conflicting interests and result in designs which are acceptable to most stakeholders. The BwN- approach can help the authorities to avoid conflicts of interests and speed up project implementation, provided that it is applied from early on in the planning and decision-making process.

The chronological analysis of Kruibeke, Bazel, Rupelmonde project implementation: 4 stages

Designation	Stage	Project objective(s)	Integration of socio-economic and nature goals	Use of nature dynamics and ecosystem	Improvement of ecosystem potential	Outcome of implementation
I.	1977-1991	Flood security	0	+	0	None
II.	1992-1999	Flood security Nature	+	++	++	Opposition
II I.	2000-2002	Flood security Nature as compensation for the project of overriding public interest	++	+	+	Forced cooperation

I	20	Flood security	+++	+	+	Cooper
V.	03	Nature as				ation
	-2	compensation for the				
	010	project of overriding				
		public interest				
		Local stakeholder				
		involvement				

The following lessons could be learned learned from the Kruikebeke-Bazel-Rupelmonde project

- Natura 2000 can be used to link different stakeholder interest (e.g. overriding economic interest of harbour development with nature and flood defence)
- The most obvious role of the EU Natura 2000 was in linking the flood defence project (Kruikebeke, Bazel, Rupelmonde) to the project of overriding public interest (Deurganck dock). This link moved project implementation from opposition into a forced cooperation stage. The next move to a cooperation stage was the initiative of the implementer. To some extent it was also made possible by the compensation requirements for the meadow birds, which offered an opportunity to introduce maintenance contracts by farmers. This would not be possible under design II, which relied on nature dynamics for maintenance.
- Gradual progression towards BwN --type projects can be traced in project chronology. Design IV, which will be implemented, combines most project objectives compared with previous designs: flood security, ecology, economy (via Deurganck dock) and local stakeholder interests (partly economic). It reflects a gradual progression of project objectives over the years:
 - in terms of flood security, design I would be sufficient.
 - In terms of ecology, the most optimal (dynamic and naturally maintained ecosystem) would be design II.
 - In terms of economy, Deurganck dock would rather be realised without extra costs for compensation (without design III) and legal fights. The biggest local stakeholder, the farmers of Kruikebeke, would opt for no flood control area at all, because even with the maintenance measures in place they suffer net economic loss. However, none of these designs could be implemented: authorities were cautious to proceed with design I, design II faced opposition, Deurganck dock faced a legal battle and no flood control area wasn't an option given the flood risk. The flood control area thus evolved towards a balance among the interests of flood defence, ecology, economy and local stakeholder interests.
- Interaction with the stakeholders in the project area (private and non-profit) early in the decision making process can generate new opportunities and combinations of activities (e.g. flood defence, nature, agriculture)

As for the relationship between Natura 2000 and project design, it should be noted that the project design already resembled Building with Nature before the effects of the Bird and Habitat Directives were put into place. Natura 2000 then linked the project of overriding economic interest in Antwerp with a less visible flood security and nature project in Kruikebeke, thereby forcing more cooperative interaction among the stakeholders. This cooperative interaction led to creative solutions and new opportunities, such as the combination of nature and agricultural activities in the area. Hence Natura 2000 does, albeit indirectly, encourage more integration of societal and ecological goals on a project level, which could take a form of a Building with Nature project.

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