



# Reconsidering the habitats assessment

The compatibility of the habitats assessment with green infrastructure



Traditional understandings of the Natura 2000 habitats assessment may not be fully compatible with modern sustainability and EU Green Infrastructure demands. One criterion testing might obstruct such a green infrastructure and its sustainable multi-functionality. Also given the latest judgement of the European Court of Justice on the Galway bypass, a rethinking of the habitats assessment legislation might be needed.

## Prologue: Galway

In the Irish town of Galway plans for a bypass around the busy and dangerously jammed city centre were obstructed by the Natura 2000 habitats assessment as the N6 Galway City Outer Bypass road scheme should inevitably lead through the *Lough Corrib* Natura 2000 site, north of this seaside town. The planned motorway would result in a loss of less than one and a half hectares of limestone pavement (EU habitat type H8240) within a subarea of 85 hectares, forming part of a total area of 270 hectares of such limestone pavement in this Natura 2000 site.

Article 6 of the EU Habitats Directive demands an appropriate assessment. Whereas the first phrase of Article 6 (3) states that any plan or project likely to have a significant effect shall be subject to appropriate assessment in view of the site's ecological conservation objectives, the second phrase adds that in the light of the conclusions of that appropriate assessment the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned. Whilst the English-language version uses a rather broad and abstract term (integrity of the site) the Dutch version speaks of 'natural

characteristics' which might refer again to the limited, only ecological conservation objectives. In his opinion on a reference for a preliminary ruling from the Irish Supreme Court the Advocate General to the European Court of Justice (ECJ) recently underlines these linguistic differences, but still advocates the ecological conservation objectives are the paramount testing criteria, leaving no room here for a margin of appreciation or perhaps a full weighing process in which also other objectives than only ecological conservation might occur.

Recently in its final judgement on the Galway bypass the ECJ seems to follow this opinion, strongly linking the criterion of 'integrity of the site' to the site's conservation objectives. In its judgement the court considers that the constitutive characteristics of the site are connected to the presence of the natural habitats whose conservation was the objective justifying the designation of that site (ECJ, April 11, 2013, C-258/11 at paragraph 48). Then, despite the different language versions the natural characteristics with its limited conservation objectives do prevail, which seems to be a choice for the rigid Dutch version (*natuurlijke kenmerken*, or: natural characteristics).



The ECJ ruling may now result in the plans having to be dramatically scaled back or abandoned. Delivery of ecosystem services through multi-functionality, being key to the novel EU policy of *Green Infrastructure* (EC, 2013), then appears to become quite problematic in such a case (Kistenkas, 2014a). A relatively small part of limestone pavement prevails. Such an assessment tends to give an *a priori* preference to some narrow planet-considerations above people-, profit- and other remaining planet-considerations.

## Law questions

This Galway case could happen everywhere, especially in densely populated areas where a lot of functions (nature, agriculture, housing, industry, traffic) have to be accommodated. Sustainable land use and development, however, merely demands a balancing of ecology, economy and society. It is quite questionable whether this can be reached by the legal method of assessing some limited ecological criteria only. Some conservation objectives do *a priori* have a preferred position, as only they are within the criteria to be assessed. Not only during the first step of the habitats assessment (significance test) but also during the second step of appropriate assessment the rigid conservation objectives seem to be the only criteria to be tested. Such an assessment might be argued then as an instrument not really compatible with sustainable land use and an ecosystem services balance.

With the hypothesis that the Natura 2000 habitats assessment might not be fully compatible with sustainable growth demands, three law questions were analysed:

1. Does EU nature conservation law obstruct sustainable growth?
2. Are these obstructions caused by the legislative text or its translation or interpretation?
3. How could these law obstructions be altered?

## Nature conservation law and its possible obstructions

*First question: Does EU nature conservation law obstruct sustainable growth?*

Sustainable development is commonly understood as a development for which assets and impacts for ecology,

economy and society are in balance. This balancing approach is commonly called the *triple P* approach (people, planet, profit), or in short: 3P balancing. In terms of sustainable development and triple P demands, regulating and supporting ecosystem services might well be regarded as typical planet-services whereas provisioning services are mainly profit-linked. Cultural services obviously are largely people-related ecosystem services. Thus, sustainability could well be linked to the concept of ecosystem services. Ecosystem services could become a valuable tool to reach sustainable development through balancing. However, up till now ecosystem services are not *verbatim* mentioned in law instruments of current EU nature directives. The habitats assessment, being the very essence of the Habitats Directive, is not really based on a balancing approach.

In nature conservation law, when applying the *habitats assessment* of the European Habitats Directive (Article 6) during the significance test and the appropriate assessment, only a few strictly limited ecosystem services, i.e. only some narrowly defined *conservation objectives* of the site, could be taken into consideration, thus *a priori* excluding entire categories of other ecosystem services. Such a testing method could indeed cause legal obstructions to sustainable development and might block away sustainable function combinations in multiple land use.

Sustainable growth is also *expressis verbis* defined in EU law as a triple P balancing. Both EU treaty law and *Green Infrastructure* policy initiative indicate a triple P balance of social, economic and environmental benefits as key to multiple land use function combinations and smart growth in the green space. Multi-functionality (instead of single-purpose infrastructure) and delivery of ecosystem services lead to sustainable development (EC, 2013).

The habitats assessment focusses on only a few planet aspects, which might give rise to a law counterpoint: art. 3 (3) EU Treaty and art. 37 EU Charter versus art. 6 Habitats Directive. The *habitats assessment* only serves some limited planet aspects (the pre-defined and narrowly described conservation objectives of the site). The concept of ecosystem services, being key to *Green Infrastructure*, still is not referred to or made *de iure* relevant in the wording of the Habitats Directive. We could therefore argue that EU nature conservation law might not be fully compatible with modern sustainable growth demands, as it is likely to obstruct triple P weighing.

## Translation and interpretation

*Second question: Are these obstructions caused by the legislative text or its translation or interpretation?*

The habitats assessment has been implemented *verbatim* in domestic Dutch legislation. Linguistic interpretation

and translations by the ECJ recently in its *Galway bypass*-judgment (C-258/11 [2013]) affirmed the *habitats assessment* should stick to the rigid conservation objectives of the site, thus ignoring the delivery of ecosystem services, narrowing land use and potentially blocking sustainable multi-functionality. It is about one criterion testing (*Prüfung* on only planet desiderata) and not a weighing of economic, social and other ecological desiderata. When it comes to accommodating diverging interests and flexibility this directive might very well be an obstruction, as the *habitats assessment* only serves some limited planet aspects (the conservation objectives of the site) (Borgström and Kistenkas, 2014). The concept ecosystem services is not referred to or made *de iure* relevant in the wording of the Habitats Directive.

The second stage of the habitat assessment is the so-called *appropriate assessment*. Whereas the first phrase of Article 6 (3) states that any plan or project likely to have a significant effect shall be subject to appropriate assessment in view of the site's ecological conservation objectives the second phrase adds that in the light of the conclusions of that appropriate assessment the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned. Whilst the English-language version uses a rather broad and abstract term (integrity of the site) the Dutch version speaks of 'natural characteristics' which might refer again to the limited, only ecological conservation objectives. In his opinion on a reference for a preliminary ruling from the Irish Supreme Court (Galway bypass through Natura 2000) the Advocate General to the ECJ underlines these linguistic differences, but still advocates the ecological conservation objectives are the paramount testing criteria, leaving no room here for a margin of appreciation or perhaps a full weighing process in which also other objectives rather than only ecological conservation might occur.

Habitats assessment	
1. Significancy test	Testing conservation objectives
2. Appropriate assessment	In view of conservation objectives
3. Authorizing	Weighing the integrity of the site? Rejected by EU court (C-258/11)
4. AOC-test	Testing (A) alternatives, (O) overriding public interest (C) compensation

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language versions the natural characteristics with its limited conservation objectives do prevail, which seems to be a choice for the rigid Dutch version (*natuurlijke kenmerken*, or: natural characteristics). This also gives an *a priori* preference to some narrow planet-considerations above people-, profit- and other remaining planet-considerations.

Sustainable land use and development, however, merely demands a triple P weighing and an ecosystem services equilibrium. It is quite questionable whether this can be reached by the legal method of assessing limited ecological criteria only. Some conservation objectives do *a priori* have a preferred position, as only they are within the criteria to be assessed. Not only during the first step of the habitats assessment (significancy test) but also during the second step of appropriate assessment the rigid conservation objectives seem to be the only criteria to be tested. Such an assessment might be argued then as an instrument not really compatible to sustainable land use and a balance of ecosystem services.

It is true socio-economic aspects might play a role in the exemption regime of Article 6 (4) further on. Basically Article 6 (4) is an exceptive clause: "If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, *including those of a social or economic nature*, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected" (emphasis added). So the habitats assessment is not entirely blind for socio-economic aspects, but then they must qualify as imperative reasons of overriding public interest. It is not clear whether all relevant ecosystem services could be given adequate attention then. The appropriate assessment could then be a good opportunity to determine all relevant ecosystem services at an early stage already. Nevertheless, the ECJ ruled out such a triple P-balancing in the above mentioned Galway case.

## Possible alterations

*Third question: How could these obstructions be altered?*

A more principle-based law-finding method, with the sustainability principle as corrective, might perhaps be a solution, but such an open law principle might give way to more (quasi)legislation or extended procedures, taking away flexibility. Perhaps we could also learn from comparative law, like the hardship clause in Dutch taxation law and the correction-factor in Dutch labour law. A law principle might also be such a correction factor acting as a general hardship clause. First we start with traditional testing on conservation objectives only, but when the outcome does not comply with sustainability demands a triple P weighing might give solace

(sustainability principle as corrective). Such a double law finding combines legal certainty (testing as a first standard procedure) with flexibility (weighing as a sequel of and corrective to a non-sustainable testing result). Disadvantages are however: (a) extended procedures (b) expensive (double) law finding (after the habitats assessment a sustainability investigation has to take place) (c) more (quasi)legislation and case law.

## Alternative Galway-solution

It may perhaps be better to allow a weighing possibility *within* the habitats assessment instead of *after* this assessment. During the appropriate assessment the *integrity of the site*-criterion could be used to reach a triple P equilibrium. The ECJ, however, might have lost some momentum in its recent Galway-judgement ignoring this opportunity to broaden up the appropriate assessment criterion of 'integrity of the site' towards an integral ecosystem approach. The court could already have introduced the concept of ecosystem services and sustainable growth to the Natura 2000 habitats assessment. Starting with the significancy test (on limited conservation objectives) law finding broadens up during the second stage of the appropriate assessment towards sustainable land use under the *integrity of the site* criterion (Kistenkas, 2014b). Thus a triple P weighing takes over from and adjusts a limited and sometimes dogmatic planet testing.

## Conclusions

Current ECJ rulings confirm one-sided testing on narrow and pre-defined conservation objectives also when it comes to the integrity of the site, thus it might tend to obstruct sustainable growth. These obstructions are caused by the legislative text and its translation and ECJ interpretation. Whereas treaty law and the Green Infrastructure initiative are all about the delivery of ecosystem services and a balancing of social, economic and environmental benefits, the habitats assessment is not a triple P balancing but merely an one criterion test able to ignore entire clusters of ecosystem services (like provisioning and cultural services) and social, other ecological and economic benefits. Only planet (1P) testing might legally rule out triple P (3P) balancing.

A solution could perhaps be found in the legislative introduction of sustainability as a leading law principle (Kistenkas, 2013). Such a law principle may act as a corrective to (non-sustainable outcomes of) the rigidity of the 1P habitats assessment. If application of the sustainability principle is used as a second procedure after the traditional habitats assessment some disadvantages might occur: (a) extended procedures (b) expensive (double) law finding (after the habitats assessment a sustainability investigation has to take place) (c) more (quasi)legislation and case law.

Hence it may be better to choose the alternative Galway-solution: law finding broadens up during the second stage of the appropriate assessment towards sustainable land use and triple P weighing under the *integrity of the site* criterion (Kistenkas, 2014b). The ECJ, however, might have lost momentum in its recent Galway-judgement ignoring this alternative.

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## Colofon

The detailed information and results on which this paper is based can be found in the WOT-technical report 17: F.H. Kistenkas (2014). *Juridische aspecten van gebiedsgericht natuurbeleid (Natura 2000)*. WOT Natuur & Milieu Wageningen UR, Wageningen.

Author:

mr. dr. F.H. Kistenkas (Alterra Wageningen UR and the Forest and Nature Conservation Policy group, Wageningen University)

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Alterra Wageningen UR  
PO Box 47, 6700 AA Wageningen  
T +31 (0)317 48 07 00 | E info.alterra@wur.nl

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Statutory Research Tasks Unit for Nature & the Environment (WOT Natuur & Milieu)

PO Box 47 | 6700 AA Wageningen  
T +31 (0)317 48 54 71  
E info.wnm@wur.nl | I www.wageningenUR.nl/wotnatuurenmilieu

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