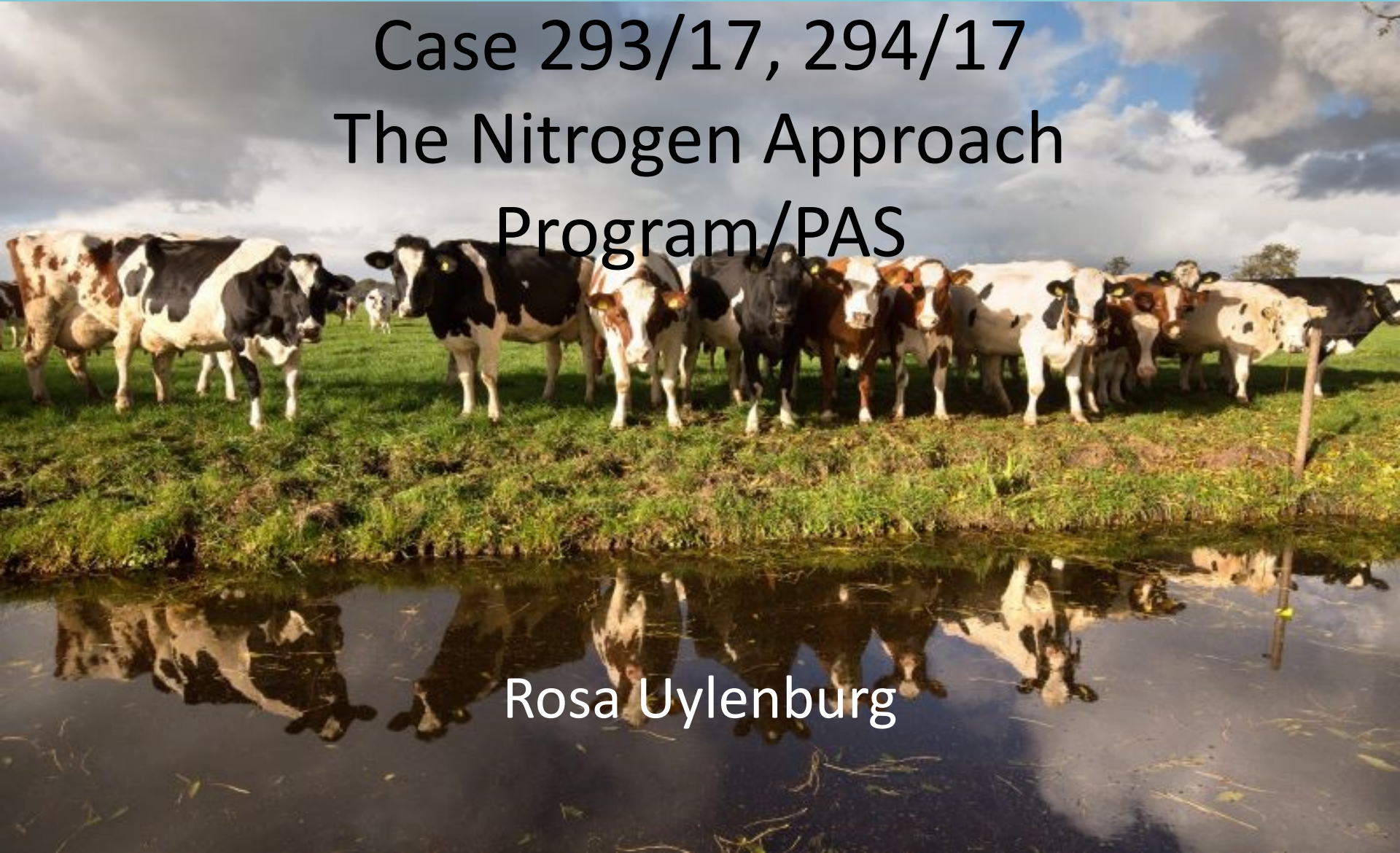


Case 293/17, 294/17 The Nitrogen Approach Program/PAS

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Outline

1. Background: Habitats-directive
2. Background: Nitrogen as a problem for nature
3. Background: the Nitrogen Approach Program
4. The case: 6 permits for life stock-firms
5. Preliminary questions
6. Answers
7. Evaluation of the coöperation

Habitats directive, art. 6, par 1

For special areas of conservation, Member States shall establish the **necessary conservation measures** (...) which correspond to the ecological requirements of the natural habitat types

Habitats directive, art. 6, par 2

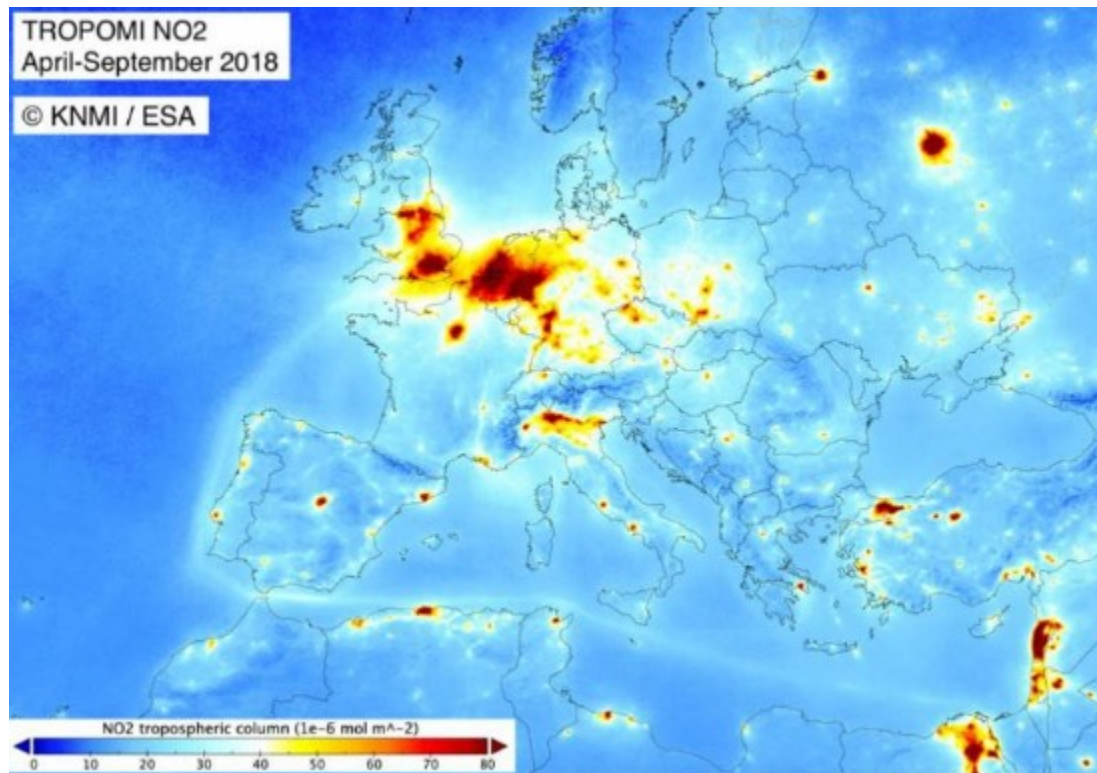
Member States shall take **appropriate steps** to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

Habitats-directive, art. 6, par 3

Any plan or project not directly connected with or necessary to the management of the site but **likely to have a significant effect** thereon, either individually or in combination with other plans or projects, shall be subject to **appropriate assessment** of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, 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** and, if appropriate, after having obtained the opinion of the general public.

Nitrogen-emissions in the Netherlands

- Dutch nitrogen emissions are the highest in Europe: we emit about 4 times as much as the EU average. 60% of Dutch emissions consist of ammonia (NH₃) and 40% of nitrogen oxides (NO_x).
- Ammonia (NH₃) mainly comes from agriculture and livestock. It comes from the manure and urine of animals.
- Nitrogenoxides (NO_x) mainly comes from traffic and industry.
- Agriculture is responsible for the biggest part of (61%) nitrogen emissions (from manure, but also from greenhouses and agricultural vehicles).



Effects of nitrogen

- Fertilization: loss of biodiversity
- acidification



The Netherlands Locked?

- 118 of the 161 designated Natura 2000 sites in the Netherlands are too heavily loaded with nitrogen: Critical Loads are exceeded.
- Critical Load for Nitrogen: indicates a limit above which sustainable preservation of the ecosystem is not possible.
- The expansion of roads, industrial estates, but especially the expansion of livestock farms are projects that do not exclude the possibility of significant effects. Permits can only be granted to a limited extent.

Nitrogen Approach Program/PAS; double objective

The long-term realization of the
conservation objectives in Natura 2000
areas



Enabling economic developments
that cause nitrogen deposition on
those Natura 2000 areas



Main elements of the Program (I)

- For the areas with overloaded nitrogen-sensitive natural values/exceeded CL (118 of the 161 areas): a maximum amount of deposition of nitrogen has been determined for economic activities for a period of 6 years (July 2015 - July 2021).
- An appropriate assessment has been made: for each area is investigated whether the deposition that took place in 2014 (starting position) added to the deposition in accordance with the maximum deposition allowed in the program period, will not affect the natural features of the Natura 2000-sites.

Main elements of the Program (II)

The appropriate assessment takes into account:

- The autonomous reduction in nitrogen as a result of generic measures separate from the program.
- Measures to reduce nitrogen-emission (including requirements for stable emissions, low-emission manure application) as part of the program.
- Restorative measures in the Natura 2000 areas (including hydrological measures, management etc.) also as part of the program.

These measures are considered together as measures as referred to in art. 6, paragraph 1, paragraph 2 and paragraph 3 of the Habitats directive.



Main elements of the Program (III)

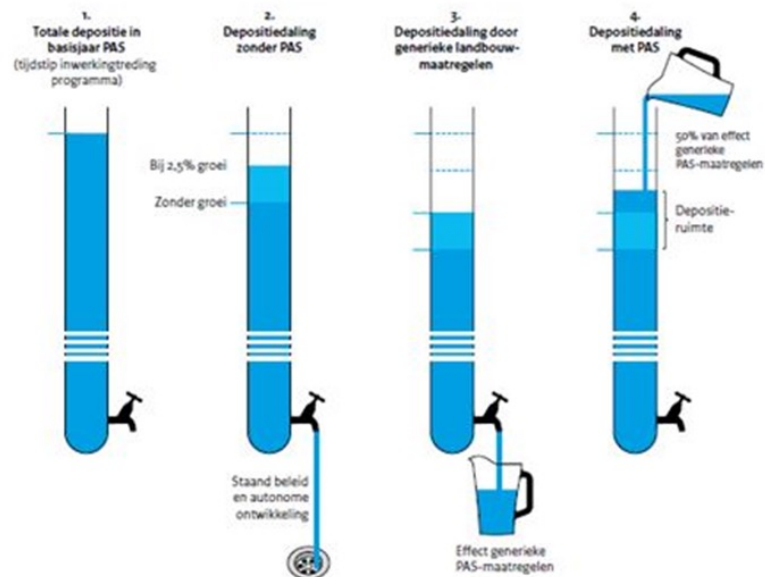
A system for the distribution of the maximum amount of deposition has been made

For livestock farms: 60% of the maximum available deposition may immediately be spent on new developments.

40% may only be spent in the second period (after 3 years).

For other projects (roads, industry) the available deposition may be spent immediately without restriction.





The difference between the situation without and with the Nitrogen Approach Program is 50 mol/ha/yr. of NO₂ in 2020 and 75 mol/ha/yr. in 2030.

The case at the Council of state:

- Appeals against 6 livestock-farm permits close to a Nature conservation site in the south of the Netherlands
- The permits were granted with reference to the appropriate assessment made for the Nitrogen Approach Program; no individual assessments
- it was argued by environmental organizations that the permits had been granted in violation of the Habitats Directive

To ask preliminary questions or not?

- A case with major social consequences
- Many cases that have to wait for the outcome of the procedure
- Acte clair? Based on an expert report, it was established that there was no certainty which measures would be implemented, when they would be implanted and the results of the measures were also uncertain.

Judgment Council of State 17 May 2017
(ECLI:NL:RVS:2017:1259)

- Partly a referral judgment :
 - Questions about the Nitrogen Approach Program
 - Questions about what elements (which measures) may be taken into account when making an appropriate assessment under art. 6 par 3
- Partly interim judgment: (in the case that the EU Court of Justice does not see a violation of the Habitats Directive), the Program is contrary to Dutch law; in conflict with legal certainty.

Preliminary questions (I)

The result of the Program is that projects that lead to an increase in nitrogen deposition are partly:

1. not subject to an individual permit requirement, but have been appropriately assessed in conjunction, and in part are
2. individually subject to a permit requirement, but are only appropriately assessed in conjunction.

Is this contrary to art. 6, paragraph 3 Habitats directive?
("For any plan or project etc.")

Preliminary questions (II)

May the measures be included in the appropriate assessment of the Program, insofar as it concerns:

- Positive consequences of measures pursuant to art. 6, paragraphs 1 and 2 Habitats directive?
- Positive consequences of autonomous reduction of nitrogen?
- Positive consequences of measures even if these measures have not yet been implemented and their positive effect has not yet been realized?

In the ruling we stated that the Council of State can imagine that there is no conflict with the Habitats Directive:

- Because it does not matter whether many projects are assessed simultaneously or all separately;
- Because the program results in many positive measures being taken.

Judgment of the Court of Justice of the EU of 7 November 2018 (ECLI:EU:C:2018:882)

Answers of the Court of Justice:

1. Consent on the basis of a program does not in principle conflict with the Habitats Directive.

“An assessment at such a level of generality makes it possible to examine better the cumulative effects of various projects”,

“however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain. “

Conclusion: an appropriate assessment of a program is possible, but must meet the same requirements as an appropriate assessment of an individual project.

Measures (I):

The benefits of conservation measures (based on art. 6(1) HRL), appropriate measures (art. 6(2) HRL) and autonomous developments should **not** be taken into account in the question whether negative consequences of plans or projects can be prevented or limited. They can only play a role in assessing the conservation status of an area.

Measures(II):

Positive consequences of measures that are not necessary (additional) in the light of art. 6, par. 1 and 2 may be used to mitigate the negative consequences of a plan or project, provided that:

- the measure is **linked to** the plan or project and
- when, in view of the conservation status and the objectives, the measure is **not necessary** for conservation or prevent deterioration/disruption with significant effects
- When, in view of the conservation status and the objective, recovery or the improvement objective is also possible in another way.

Measures (III)

All measures may only be included in an appropriate assessment **if the benefits are certain during the assessment.**

This means:

- Measure/development must already been carried out at the time of the appropriate assessment (exception: technical measures associated with the project);
 - the benefits of the measures must been achieved ór the level of scientific knowledge must allow that those benefits can be mapped or quantified with certainty;
- It must be ensured that the measures and autonomous developments have results before the plan or project will have negative consequences

Conclusion:

The appropriate assessment underlying the Program conflicts with the requirements of the Habitats Directive. The permits for projects based on the appropriate assessment of the PAS have been granted in violation of the Habitats Directive.



- The Court of Justice has fully understood how the PAS works.
- All questions were answered.
- The answers were not surprising, but strict.
- The questions were answered within a year and 5 months (we requested that the cases be dealt with as a matter of priority).
- Because we have asked questions, the Council of State has been held responsible to a lesser extent for the major social consequences of the ruling.