Utrecht Law Review

This article is published in a peer-reviewed section of the Utrecht Law Review

Habitat Restoration on Private Lands in the United States and the EU: Moving from Contestation to Collaboration?

Hendrik Schoukens*

1. Introduction

'The times they are a-changin'' is one of the lines of Bob Dylan's classic song from the 1960s, and it certainly applies when it comes to how nature conservation law is currently perceived by many politicians and policy makers. Once, the Habitats Directive,[1] with the earlier Birds Directive,[2] was hailed as one of the cornerstones of EU environmental law and a prime example of an effective international wildlife law.[3] Taking into account its ambitious objectives, aimed at halting the deterioration and the loss of the EU's most valuable biodiversity, this enthusiasm appears more than warranted.[4] Not only did the Habitats Directive lay down the foundations of the Natura 2000 Network, an ecological network of protected sites at present comprising almost 18% of the territory of the EU,[5] it also required the Member States to implement positive management measures in these sites aimed at conserving and, if necessary, restoring the natural habitats and the populations of species of wild fauna and flora to a favourable conservation status.[6] In addition, under the Habitats Directive, Member States are forced to apply a set of strict substantive and procedural requirements to be followed in respect of a plan or project which is not directly connected with or necessary for the management of a Natura 2000 site but which is likely to damage it.[7] By promulgating a supplementary set of rules on strict species protection, which are to be observed throughout the Member States, the Habitats and Birds Directives moreover obliged Member States to outlaw destructive hunting practices and scrutinize unsustainable forms of land management

* Hendrik Schoukens (e-mail: hendrik.schoukens@ugent.be), PhD Candidate, Department of Public International Law, Ghent University (Belgium).

1 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora (hereafter 'Habitats Directive'), OJ L 206, 22.7.1992, p. 7.

2 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Birds Directive), OJ L 103, 25.4.1979, p. 1, replaced by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (hereafter 'Birds Directive'), OJ L 20, 26.1.2010, p. 7.

3 G. Wandesforde-Smith & N.S.J. Watts, 'Wildlife Conservation and Protected Areas: Politics, Procedure, and the Performance of Failure under the EU Birds and Habitats Directive', 2014 *Journal of International Wildlife Law & Policy* 17, no. 1, pp. 62-64.

4 See for more on the links between EU nature conservation law and ecological restoration: J. Verschuuren, 'Climate Change: Rethinking Restoration in the European Union's Birds and Habitats Directive', 2010 *Ecological Restoration* 28, no. 4, pp. 436-438; A. Cliquet et al., 'Restoring nature in the EU: the only way is up?', in C.-H. Born et al. (eds.), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?*, 2015, pp. 265-283.

5 See: <http://ec.europa.eu/environment/nature/natura2000/> (accessed 30 November 2014).

6 Art. 6(1) Habitats Directive.

7 See for more on the scope and recent case law in this respect: H. Schoukens, 'The Ruling of the Court of Justice in Sweetman: How to Avoid a Death by a Thousand Cuts', 2014 *ELNI Review*, no. 1, pp. 2-11.

and development.[8] Hence the way was paved for a more sustainable approach of the EU's common natural heritage.

However, the heyday of environmentalism is long gone. In times when most politicians are preoccupied with economic recovery, the discourse has profoundly changed from ambitious environmentalism to deregulation. As a result, the EU nature directives are increasingly seen as a relic from the past. Rather than being a regulatory driver for ecological restoration, the directives are currently being criticised by business people for exclusively focusing on tools of a prohibitive nature ('command and control'). While recent research reveals that the picture of the EU nature directives as 'rigid pieces of EU legislation' capable of completely prohibiting landowners from developing their property, needs to be adjusted,[9] the mere threat of restrictions and constraints linked to the potential presence of a protected species on a construction site has sparked an intense debate on the desirability of such an allegedly rigid set of nature assessment rules. True as it may be that only a few plans and projects have actually been cancelled on the basis of EU nature directives,[10] the ever-growing stringent application of the restrictions contained in the EU nature directives in the sphere of development projects fostered considerable unease among business people and politicians. Over time, this criticism also found its way into legal literature, where doubts were cast on the effectiveness of these instruments. For instance, Kistenkas poignantly concluded that 'European nature directives are said to have until now mainly focused on safeguarding habitats and species in situ, apparently giving Natura 2000 a rather dogmatic, reactive and ad hoc image of deathbed conservation or nature conservation'.[11] Taking stock of recent case law developments in the UK, displaying a worrying degree of unwillingness amongst judges to scrutinize the merits of decisions in which substantive non-compliance with EU nature conservation law is alleged, other authors have voiced concerns about the added value of the Habitats Directive on the ground.[12]

Whilst recent academic research underlines the effectiveness of preventative instruments, such as the Habitats and Birds Directives,[13] the outlook for the EU's biodiversity remains bleak, with only 17% of the habitats in a favourable conservation status. For bird species 52% is favourable.[14] That, in itself, might not be surprising taking into account the glaring lack of proper enforcement of the EU nature directives in many Member States throughout the past decades. Other studies have revealed that, among others, the growing urbanisation is exacerbating the plight of the EU's biodiversity, by fragmenting the remaining habitats and populations of many threatened species.[15] A new Europe-wide study has indicated that, whilst some strictly protected species, such as marsh harriers and buzzards, have displayed some important increases in recent decades, the populations of most common species, such as house sparrows, starlings and skylarks, have plummeted dramatically.[16] In order to reverse the negative trend, the European Commission's Biodiversity Strategy to 2020 has set some ambitious policy targets.[17] Not only is it provided there that 50% more species assessments under the Birds and Habitats Directives show an improved status, Target 2 adds that 'by 2020, ecosystems and their services are maintained and enhanced by establishing green infrastructure and restoring at least 15% of degraded ecosystems'.[18]

Obviously, stricter enforcement of the EU nature directives on the ground might lead to better recovery chances for some of the EU's most threatened species. Curbing environmental degradation is

8 See more on this topic: H. Schoukens & K. Bastmeijer, 'Strict Species Protection in the European Union: How Strict is Strict?' , in C.-H. Born et al. (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?*, 2015, pp. 121-146.

9 See in this regard, as far as the application of the Habitats Directive in the UK is concerned: R.K.A. Morris, 'The application of the Habitats Directive in the UK: Compliance or gold plating?', 2011 *Land Use Policy* 28, pp. 361-369.

10 See for more extensive information on the Dutch experiences in this regard: R. Beunen & M. Duineveld, 'Divergence and Convergence in Policy Meanings of European Environmental Policies: The Case of the Birds and Habitats Directive', 2010 *International planning studies* 15, no. 4, pp. 321-334.

11 F. Kistenkas, 'Rethinking European Nature Conservation Legislation: Towards Sustainable Development', 2013 *Journal for European Environmental & Planning Law* 10, no. 1, p. 83.

12 Wandesforde-Smith & Watts, supra note 3, pp. 79-80.

13 P.F. Donalds et al., 'International Conservation Policy Delivers Benefits for Birds in Europe', 2007 *Science* 317, pp. 810-813.

14 European Environment Agency, *EU 2010 biodiversity baseline*, 2010, pp. 19-21.

15 European Environment Agency, *Landscape fragmentation in Europe*, 2011.

16 R. Inger et al., 'Common European birds are declining rapidly while less abundant species' numbers are rising', 2014 *Ecology Letters*, available at <http://onlinelibrary.wiley.com/doi/10.1111/ele.12387/full> (accessed 30 November 2014).

17 In a similar vein: J. Verschuuren, 'Climate Change: Rethinking Restoration in the European Union's Birds and Habitats Directive', 2010 *Ecological Restoration* 28, no. 4, pp. 436-438.

18 COM(2011) 244 final, OJ C 264, 8.9.2011.

evidently pivotal in the attempts to improve environmental protection. It is widely recognized that poor compliance with the assessment rules throughout the decision-making process, limited participation and fait-accompli scenarios seriously compromise the effectiveness of the EU nature directives.[19] Rather ironically, in the past few decades it has also become apparent that tightened compliance with nature protection rules might also prompt landowners for defensive management in order to avoid strict regulatory scrutiny.[20] This was especially so in the context of the 1973 Endangered Species Act,[21] which constitutes the cornerstone of conservation law in the United States. Throughout the nineties, some cases have been reported in which landowners threatened to clear-cut their property in order to prevent protected species from entering the area. In recent years, however, a similar trend could be detected in Member States like the Netherlands, a country renowned for its relatively high number of law suits initiated by environmental NGOs to enforce the Habitats and Birds Directive before court.[22]

It might be a hasty conclusion to apply these findings to the EU as a whole. Still, in the long run, there is an inherent risk that the EU nature directives might also push landowners into doing exactly the opposite of what is good for nature. Out of fear of new restrictions on the use of their lands, the prescriptions included in the EU nature directives could lead to management practices aimed at preemptively destroying habitat to prevent protected species from occupying it in a later stage.

In the absence of a more incentive-based approach to habitat and species conservation, protection rules might be counterproductive and many interesting opportunities for habitat restoration are missed out on. Since a significant part of the remaining biodiversity is located on private lands, such backlash might greatly compromise the achievement of the aforementioned biodiversity targets. Without the active involvement of private landowners, the recovery of many endangered European species will probably remain an unreachable goal for the next decades. Even through the most ambitious government acquisition programmes, which in most Member States primarily focus on Natura 2000 sites, only a tiny fraction of the ecosystems vital for the recovery of endangered species can be safeguarded. Knowing that the habitat of many species is primarily located outside Natura 2000 sites, additional restoration measures that go beyond these requirements are deemed crucial.

Thus finding appropriate tools to stimulate restoration efforts on private lands remains vital in order to achieve recovery for the many threatened species in Europe. The seminal question now is: how can we promote voluntary nature conservation and restoration efforts on private lands outside protected areas without subsiding into outright curtailment of the existing protection rules? In other words, is it possible to ensure a high level of protection for biodiversity whilst providing additional incentives and flexibility for conservation practice on private lands?

In search of answers, this paper will turn to the recent innovative regulatory approaches to nature conservation that have emerged in the United States, in the framework of the 1973 Endangered Species Act. Containing provisions on habitat and species protection similar to those that are included in the EU nature directives,[23] the former also has become the target of an increasing body of criticism, which not only referred to the administrative burden that was caused but also to the perverse incentives it might create among landowners and project developers. Interestingly, the US Fish and Wildlife Service has come forward with a set of new policy tools offering promising alternatives to the command and control regulation in the mid-1990s. Along with the 'No Surprises Rule' for Habitat Conservation Plans, the so-called 'Safe Harbor Agreement' became the new environmental buzzword in the mid-1990s.[24]

---

19 Milieu Ltd., *National legislation and practices regarding the implementation of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in particular Article 6*, 2009, available at <http://www.europarl.europa.eu/document/activities/cont/200910/20091013ATT62399/20091013ATT62399EN.pdf> (accessed 30 November 2014).

20 N. Paulich, 'Increasing Private Conservation Through Incentive Mechanisms', 2010 *Stanford Journal of Animal Law & Policy*, no. 3, p. 129.

21 16 USCA §1531 et seq.

22 H. Woldendorp, 'Dynamische natuur in een statische rechtsorde', 2010 *Milieu en Recht* 36, no. 3, pp. 134-143; H. Schoukens, 'Temporary Nature: Is European Nature Conservation Law Ready for It?', 2011 *ELNI Review*, no. 2, pp. 104-116.

23 For a comparison, see: J. Verschuuren, 'Effectiveness of Nature Protection Legislation in the European Union and the United States: the Habitats Directive and the Endangered Species Act', in M. Dieterich & J. van der Straaten (eds.), *Cultural landscapes and Land Use: The Nature Conservation-Society Interface*, 2004, pp. 39-67.

24 See more on this topic: M.J. Bean et al., 'Safe Harbor Agreements: Carving Out A New Role for NGOs', 2001 *Conservation Biology in Practice* 2, no. 2, pp. 9-16; D. Kishida, 'Safe Harbor Agreements Under the Endangered Species Act: Are They Right for Hawai`i?', 2001 *University of Hawaii Law Review* 23, pp. 507-539.

Under a Safe Harbor Agreement, landowners voluntarily propose to implement restorative and habitat management measures aimed at the conservation of threatened species. This newly coined concept does offer some interesting prospects for restoration efforts on privately owned plots of land. In return for restoring natural habitats of endangered species, the landowner is provided with a so-called 'safe harbor guarantee', ensuring them that no additional conservation measures will be required and no additional land, water or resource restrictions will be imposed if the number of listed species increases as a result of the landowner's actions.

This paper takes a fresh look at this cross-cutting regulatory approach, aimed at smoother alignment of species protection with economic aspirations, and attempts to draw some lessons from the experiences in the United States. Knowing that in some EU Member States, such as the Netherlands and Belgium, an approach similar to Safe Harbor Agreements has emerged, a comparative approach was considered appropriate for the present analysis. First, we set the stage by outlining the legal framework as regards species protection and conservation in the United States and the EU. Then focus will shift to roots and origins of Safe Harbor Agreements in the context of the 1973 Endangered Species Act. This will include a profound evaluation of the recent practices and experiences in the United States in relation to Safe Harbor Agreements. This analysis will, in turn, serve as a benchmark for an evaluation of the recent Dutch and Belgian (Flemish) policy developments in this regard. Finally, we will address the strengths and weaknesses of Safe Harbor Agreements and explore to what extent this instrument, which is often presented as a prime example of out-of-the-box-thinking in the context of nature conservation, can be reconciled with the strict protection requirements set out by the Habitats Directive and the Birds Directive.

2. A shared history of… opposition and disincentive?

In order to fully grasp the rationale underpinning the recent shift towards innovative regulatory instruments addressing nature conservation, it is necessary to take a step back and briefly examine the coming of age of nature conservation law, both in the United States and the EU. In spite of their many differences, it will be revealed that, in principle, both regulatory schemes have a similar approach in response to the dwindling numbers of species.[25] With a compelling degree of similarity, both regulatory instruments also fell prey to rising criticism, referring to their alleged failure to accommodate economic aspirations whilst protecting endangered species and their habitats. This criticism underscored the need for novel regulatory approaches capable of overcoming the perceived antagonism between property owners and land users on the one hand and nature conservation on the other hand.

2.1. The 1973 Endangered Species Act: From 'crown jewel' to 'environmental pit-bull'

2.1.1. A bold move toward recovery and… the halting of large infrastructure projects?

The 1973 Endangered Species Act (ESA) was passed in order to overcome the major deficiencies of the 1969 Endangered Species Conservation Act.[26] With the enactment of the ESA a statutory framework was created capable of protecting species on both public and private lands in the United States. By doing so, the ESA distinguishes itself from other legal instruments that aim to protect landscape diversity, such as the Wilderness Act, the National Wildlife Refuge System and the Wild Scenic Rivers Act. The ESA's clear goal was to allow the conservation of the species that were in danger of extinction. However, as was also the case with the EU Habitats Directive, the ESA's main objective is not limited to preventing the extinction of species. It also endeavours to let a species recover to the point where it may be delisted.[27] In spite of its nearly unanimous approval, the ESA became the target of vicious criticism. By some, the

25 See for more extensive information: Verschuuren, supra note 23, pp. 41-42.

26 See for more extensive information: M.J. Bean, 'Historical Background of the Endangered Species Act', in D.C. Baur & W.R. Irvin (eds.), *Endangered Species Act, Law, Policy and Perspectives*, 2009, pp. 9-14.

27 *Gifford Pinchot Task Force v. US Fish and Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

ESA was described as the 'pit-bull' of environmental law because it is 'short, compact, and has a hell of a set of teeth'.[28]

The main culprits for the controversy surrounding the ESA are Sections 7 and 9.

Under Section 7, federal agencies are required to consult with the US Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) to ensure that any action taken by the agency does not jeopardize the existence of a threatened or endangered species or cause the destruction or harmful modification to a listed species' designated critical habitat.[29] The notable 1978 ruling of the Supreme Court in *Tennessee Valley Authority v. Hill* (*TVA*),[30] which revolved around the survival of a small endangered fish, the snail darter, exemplified the 'strong teeth' of the procedural and substantial obligations laid down by Section 7. The plaintiffs in this case stated that TVA's construction would destroy critical habitat and endanger the population of snail darters. In spite of the many millions of dollars that had been already spent on the large-scale dam project, the Supreme Court halted the dam project development on the grounds of the failure to observe the 'no jeopardy' clause.[31]

Whilst the *TVA* ruling created chaos and upheaval among business people and politicians, the strongest criticism was provoked by Section 9. This section unconditionally prohibited the 'taking' of any species listed as 'endangered' or 'threatened' under the ESA.[32] By stretching the definition of 'take' to include habitat modifications that actually kill or injures listed species, by significantly impairing essential behavioural patterns, including breeding, feeding or sheltering, Section 9 could be used to restrict land use activities that are otherwise legal.[33] The true power of the 'take prohibition' was first illustrated by the decision of the Ninth Circuit in *Palila v. Hawaii Department of Land & Natural Resources* (*Palila*),[34] which held that habitat destruction caused by feral sheep and goats to the habitat of the endangered Palila bird was a take, based on the expert testimony that continued habitat loss threatened the bird's survival and recovery.[35] In its notable 1995 decision in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* (*Sweet Home*) the US Supreme Court reasserted the ruling of *Palila*, giving Section 9 and the corresponding definition of harm an expansive reading.[36]

2.1.2. The (false?) promise of more flexibility after the 1982 amendments

Conflicts like the *TVA* case illustrated the inflexible nature of the ESA.[37] The ESA, which at its inception had been hailed as the saviour of 'the rich array of animal life with which our country has been blessed',[38] had become increasingly unpopular among politicians. Even before the ruling of the Supreme Court in *Sweet Home* in 1995, it had dawned on many developers and landowners that the ESA can 'act as a vice grip, completely prohibiting landowners from developing their property'.[39] In order to overcome the fierce resistance among developers against Section 9's prohibition on habitat modification, the ESA was thoroughly revised in 1982, to include 'incidental take permits' which would grant the applicant immunity against Section 9 take prohibitions.

Under Section 10(a)(1)(B) of the ESA, non-federal landowners who plan activities on their lands that may 'incidentally take' a listed species may apply to the FWS or NMFS for an incidental take permit

28 T. Egan, 'Strongest US Environmental Law May Become Endangered Species', *N.Y. Times*, May 26 1992, as cited by N. Paulich. See: Paulich, supra note 20, p. 116.

29 Pursuant to Section 4 of the ESA, a critical habitat needs to be designated at the time of listing of a species or within one year. Critical habitat is defined as the specific geographical area that contains the physical and biological features essential to the species' conservation and that may require special management or protection.

30 437 US 153 (1978).

31 Kishida, supra note 24, p. 508.

32 P. Parenteau, 'The Take Prohibition', in Baur & Irvin (eds.), supra note 26, p. 147.

33 D.C. Baur & W.R. Irvin, 'Overview', in Baur & Irvin (eds.), supra note 26, p. 5.

34 *Palila v. Hawaii Dep't of Land & Nat. Res.*, 639 F2d 495 (9th Cir. 1981).

35 See for more extensive information: S.P. Quarles & T.R. Lundquist, 'Land Use Activities and the Section 9 Take Prohibition', in Baur & Irvin (eds.), supra note 26, pp. 160-191; S.G. Davison, 'Alteration of Wildlife Habitat as Prohibited Taking Under the Endangered Species Act', 1995 *Florida State University Journal of Land Use and Environmental Law* 10, no. 2, pp. 155-238.

36 515 US 687 (1995).

37 In the wake of the *TVA* case, the Endangered Species Committee chaired by the Secretary of the Interior, was soon added to the ESA. This Committee, dubbed the 'God Squad', is empowered to exempt, albeit under strict conditions, parties from the no jeopardy requirement under Section 7 of the ESA. In reality, however, the 'God Squad' exemption has only scarcely been applied.

38 Statement of President Richard M. Nixon, upon signing the Endangered Species Act, San Clamente, CA (December 28, 1973).

39 Kishida, supra note 24, p. 507.

that exempts the activity at issue from the prohibition against 'take'. In order for the exemption to apply, the taking is not the purpose of the harmful activity and the owner is obliged to minimize and mitigate their impact.[40] When amending the ESA, Congress made the issuance of an 'incidental take permit' conditional on the creation of a Habitat Conservation Plan (HCP).[41] Whereas the HCP was specifically designed for landowners who wish to develop their property but are prevented from doing so because of the ESA's take prohibition, the use of HCPs remained relatively 'modest' for over a decade. In legal literature, it was submitted that the unfamiliarity with the process of applying for an incidental take permit, along with the time and cost associated with the creation of an HCP, were among the main causes of the 'slow start' of this new exemption regime.[42]

2.1.3. A focus on what is bad

The most seminal element in the overwhelming scepticism about HCPs was linked to the looming prospect of liability for listed species that were not covered by the HCP and for unanticipated injury to habitat.[43] Another striking illustration thereof could be encountered in California, where the Delphi Sands Flowering-Loving Fly halted the construction of a $470 million earthquake-proof hospital.[44] Stories about businesses going bankrupt because of endangered species set the tone.[45] At the same time, environmental groups blamed the ESA for not going far enough. However, some authors argued that the relatively bleak track record of the ESA is directly linked to the fact that it 'punished those who do bad to species, but does nothing to make anyone do good'.[46] Still others state that the ESA has played a crucial role in saving hundreds of imperilled species from extinction, but, at the same time, link the limited recovery success to the fact that most of the populations are already seriously depleted by the time they receive ESA protection.[47]

Be this as it may, it is generally conceded by both critics and supporters of the ESA that its focus is mainly on measures that limit harm to species. With approximately two thirds of the land in the continental United States privately owned and up to three quarters of all threatened species' habitat being located on private lands, most commentators agree that achieving the recovery goal will largely depend on the incentives given to private landowners for habitat conservation and restoration.[48] But then again, it is a widely shared view that the ESA lacks genuine incentives to compel or encourage private landowners to restore the habitats whose loss led to the listing of the species at stake in the first place.[49] As for land acquisition, it is held that it would be unrealistic to have high hopes in this regard.[50]

2.1.4. Shoot, shovel, and shut up!

The criticism regarding the ESA has recently taken a new turn. In recent years, the ESA has been accused of creating perverse incentives to engage in activities harmful to listed species to avoid being subject to ESA restrictions. A notable illustration was provided by a North Carolina landowner, named Cone, who made the headlines in the early 1990s by threatening to clear most of his forested property so as to keep endangered red-cockaded woodpeckers – which occupied a small section of his property – from inhabiting the remainder.[51] The lack of reliable data does not allow us to conclude that such behaviour

40 See for more extensive information: D.P. Wheeler & R.M. Rowberry, 'Habitat Conservation Plans and the Endangered Species Act', in Baur & Irvin (eds.), supra note 26, p. 222.
41 See for an interesting overview of habitat conservation planning under the ESA: S.-L. Hsu, 'The Potential and the Pitfalls of Habitat Conservation Planning Under the Endangered Species Act', 1999 *Envtl. L. Rep.* 29, p. 10592.
42 D.P. Wheeler & R.M. Rowberry, 'Habitat Conservation Plans and the Endangered Species Act', in Baur & Irvin (eds.), supra note 26, p. 223.
43 Ibid., p. 224.
44 See: Paulich, supra note 20, p. 108.
45 See for more extensive information: K.P. Sheldon, 'Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act', 1998 *N.Y.U. Envtl. L. J.* 6, pp. 279-280.
46 J.B. Ruhl, 'Keeping the Endangered Species Act Relevant', 2009 *Duke Envtl. Law & Pol'y* 19, p. 289.
47 J. Kostyack & D. Rohlh, 'Conserving Endangered Species in an Era of Global Warming', in Baur & Irvin (eds.), supra note 26, pp. 375-376.
48 See for instance: Paulich, supra note 20, p. 117; M.J. Bean, 'Landowners' Incentives and the Endangered Species Act', in Baur & Irvin (eds.), supra note 26, p. 208.
49 Bean, supra note 48, p. 208.
50 Ibid.
51 Michael J. Bean referred to this story in the introduction of his chapter on landowners' incentives and the ESA. See: Bean, supra note 48, p. 208.

is widespread. Still, at least some authors have contended that this kind of undesirable behaviour is by no means an exception.[52] What is more, some developers associations, such as the National Association of Home Builders, have openly promoted such methods that seek out to preemptively destroy habitat.[53]

One of such practices is dubbed 'midnight bulldozing' and means that when a landowner or developer is notified of a species' imminent listing they destroy this species' habitat before its listing. In order to avoid subsequent restrictions, developers might indeed be tempted to 'shoot, shovel and shut up', as it is called by many legal authors.[54] Some landowners have been reported to have engaged in the similar practice of expelling or, in some cases, even killing the species itself before the species' listing under the ESA for the same reason.[55] Whereas killing listed species obviously constitutes an unlawful act, punishable under the provisions of the ESA, this is not necessarily the case for the preemptive habitat destruction that takes place on land which does not host listed species (yet). Such action might indeed frustrate the intention of the law but, strictly speaking, does not violate the letter of the law.[56]

2.2. The Habitats Directive: same story, different setting and timing?

2.2.1. A bright example of effective nature conservation

The recent history of the EU nature directives shows some important parallels with the creation and early reception of the ESA. Whereas the first binding EC law on nature conservation, the Birds Directive, was enacted in as early as 1979, it took until the beginning of the 1990s before a more comprehensive framework on the conservation and the protection of European wildlife and natural habitats was in place. As was the case with the ESA, there was, at the time, widespread consensus among politicians regarding the enactment of a more specified and comprehensive protection scheme for the EU's most threatened habitats and species.

The rise of environmentalism throughout the 1970s and 1980s and the growing concern about the plight of the EU's biodiversity set the scene for the adoption of what was, with the Birds Directive, widely seen as a 'poster child of potentially effective law and policy'.[57] As mentioned in the introduction, one of the most noteworthy accomplishments of the Habitats Directive, is the creation of the Natura 2000 Network, an EU-wide ecological network comprising the most ecologically valuable lands in each Member State.[58]

2.2.2. Leybucht and the cumbersome quest for more flexibility: TVA revisited?

In the early 1990s, the case law of the Court of Justice as regards the designation obligations of the Member States in relation to the Natura 2000 Network, which ranked conservation interests above economic considerations, led to some controversy among Member States about the concrete implications of the protection rules included in the Birds Directive.[59] In the Court's view, economic or recreational interests could not be relied on to encroach on an existing Special Protection Area (SPA).[60] In a similar way as the *TVA* ruling of the US Supreme Court did, the Court of Justice's 1991 *Leybucht* decision illustrated the many complications to which a rigid application of nature protection rules in the context of spatial development projects could give rise.

In order to avoid future deadlock situations, the Member States agreed to include in the Habitats Directive a specific derogation clause widening the range of grounds justifying encroachment on SPAs

52 Ibid., p. 209.
53 Paulich, supra note 20, p. 130.
54 Ibid., p. 129.
55 Ibid., p. 128.
56 Bean, supra note 48, p. 209.
57 The wording was used by Lyster to describe the Birds Directive in his first compendium of international wildlife law (see: S. Lyster, *International Wildlife Law*, 1985, pp. 67-74). Also the Habitats Directive is often quoted as a shining example of effective nature conservation, as was noted by Wandesforde-Smith & Watts in their recent paper on the strengths and weaknesses of EU wildlife law. See: Wandesforde-Smith & Watts, supra note 3, pp. 79-80.
58 In a certain way, this area protection scheme is comparable to the ESA's obligation to designate 'critical habitat'. See for more extensive information: Verschuuren, supra note 23, p. 59.
59 Case C-57/89, *Commission v. Germany*, [1991] ECR I-883, Para. 20.
60 See on Art. 6(4) of the Habitats Directive: R. Clutten & I. Tafur, 'Are Imperative Reasons Imperiling the Habitats Directive? An Assessment of Article 6(4) and the IROPI Exception', in G. Jones QC (ed.), *The Habitats Directive: A Developer's Obstacle Course?*, 2012, pp. 167-182.

and thereby allowing planning authorities to derogate from the general system of protection for reasons of overriding public interest. However, the application of derogation clause contained in Article 6(4) of the Habitats Directive never really took off. Whilst most Member States are not inherently opposed to it, they deem it to be of a too restrictive nature for many spatial developments, especially those that involved private businesses.[61] And even when effectively applied, it turned out economic factors often superseded a strict assessment of the intended compensatory measures. In particular, recent analysis has highlighted that even the European Commission, when issuing opinions under the second subparagraph of Article 6(4) of the Habitats Directive, often departs from the strict derogation conditions set forth by Article 6(4) of the Habitats Directive.[62]

Be this as it may, the habitat assessment requirement as included in Article 6(3) of the Habitats Directive was increasingly referred to by business people as a major barrier for project development in the context of Natura 2000 sites. Whilst, at first, national courts proved quite reluctant to scrutinize planning decisions in light of the procedural and substantive requirements set forth by Article 6(3) of the Habitats Directive, recent case law in some Member States, like the Netherlands and Belgium, seems to display greater willingness to apply a rigid standard of review.[63] The strict application of the precautionary principle, as put forward by the Court of Justice in the *Waddenzee* case, underscored the need for a more precise and meticulous assessment of the potential effects on Natura 2000 sites of plans and projects.[64]

Admittedly, in Member States, such as Ireland[65] and Greece,[66] the EU nature directives have been poorly enforced so far. Yet in other Member States, such as the Netherlands, the UK and Germany, where the implementation deficit is relatively low, the EU nature directives, regardless of varying degrees of review,[67] are increasingly referred to as 'obstacle course' for project development. In recent decades, the extension of port areas,[68] the creation of new industrial estates or the construction of major infrastructure works,[69] including renewable energy projects, have increasingly collided with Natura 2000.[70]

2.2.3. Hamsters, natterjack toads and bats… yet more obstacles?

In spite of the few 'hard cases' that have made the headlines in some Member States, the image of EU nature conservation law as 'ultimate bottleneck' needs some adjustment in light of the fairly limited amount of projects that ultimately had to be cancelled due to biodiversity-related concerns. Even in the Netherlands, a country renowned for its relatively high number of lawsuits in which the Habitats Directive was enforced before courts, only a few plans and projects have been cancelled due to biodiversity legislation. Still, the prevailing idea among many Dutch actors is that European directives frustrate almost every development in the Netherlands.[71]

Rather than tackling the lack of proper implementation, which is often the main cause of additional delays, focus recently shifted to the additional constraints to which the strict rules on species protection could lead in the context of project developments. Indeed, in the past ten years the rules on strict species protection have been referred to as yet another formidable threat to the viability of project developments. In contrast to the protection regime connected to Natura 2000 sites, the strict protection rules enshrined

---

61 See also in this regard: Opinion Advocate General Sharpston, *Sweetman, Peter Sweetman and Others v. An Bord Pleanála*, 2013, not yet published, Para. 65.

62 See for instance: D. McGillivray, 'Compensating Biodiversity Loss: the EU Commission's Approach to Compensation under Art. 6 of the Habitats Directive', 2012 *Journal of Environmental Law* 24, no. 3, pp. 417-450.

63 See among others: H. Schoukens & A. Cliquet, 'Mitigation and Compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Projects', 2014 *Utrecht Law Review* 10, no. 2, pp. 194-215.

64 Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, [2004] ECR I-7405, Para. 59.

65 See for instance: B. Laffan & J. O'Mahony, 'Bringing Politics Back In: Domestic Conflict and the Negotiated Implementation of EU Nature Conservation Law in Ireland', 2008 *Journal of Environmental Policy & Planning* 10, no. 2, pp. 175-197.

66 G. Kûtting, 'Nature Conservation Law in Context: The Limited Influence of European Union and Greek Designations on the Future of Cavo Sidero, Crete', 2012 *Journal International Wildlife Law & Policy* 15, no. 1, pp. 60-79.

67 See among others: Wandesforde-Smith & Watts, supra note 3.

68 See for more extensive information: Morris, supra note 9, pp. 361-369.

69 For an overview of the case law in the Flemish Region in this regard, see: Schoukens & Cliquet, supra note 63, pp. 194-215.

70 See: A.L.R. Jackson, 'Renewable energy vs. biodiversity: Policy conflicts and the future of nature conservation', 2011 *Global Environmental Change* 21, no. 4, pp. 1195-1208.

71 See for more extensive information: Beunen & Duineveld, supra note 10.

in Article 12(1) of the Habitats Directive, with its counterparts in Article 5(1) of the Birds Directive, cover a wide range of harmful acts and apply throughout the territory of a Member State.[72]

Additionally, they are also concerned with protecting individual animals rather than the population of a species vis-à-vis potential harmful activities. Whilst some business people might consider it reasonable to safeguard the most valuable natural sites within the EU, the prospect of seeing a development project, which is not located close to a designated Natura 2000 site, halted by the mere presence of two individuals of a listed bird or animal species, was an even more bitter pill to swallow.

In the wake of several apparently strict rulings of the Court of Justice it became apparent that merely transposing the protection rules in national or regional legislation, which sometimes also proved to be a daunting task,[73] was not sufficient in the Commission's eyes. Member States also had to ensure the concrete, precise and coordinated application and enforcement of these rules on the ground, as was strikingly illustrated by the Court's notable decision in the *Carretta Carretta* case.[74] For instance, in 2006 Greece was again convicted, this time for not having provided for sufficient protection measures on the island of Milos for the Cyclades blunt-nosed viper,[75] while France was held liable in 2011 for not having taken sufficient measures to halt the decline of its scattered populations of wild hamsters.[76] All these cases illustrated the possible restrictions for land use activities linked to the presence of European protected species.[77]

2.2.4. A new deadlock situation looming?

As was the case with the protection regime connected to Natura 2000 sites, planning authorities at first did not really bother to consider the impact of proposed plans or projects on protected species. This proved to be a risky strategy since even in the absence of national or regional provisions correctly transposing Article 12(1) of the Habitats Directive, it can still be relied on by private individuals and environmental NGOs before the national courts by virtue of the so-called 'direct effect' doctrine.[78] The notable Dutch '*hamster* case' serves as a good illustration of the lax attitude in the early 2000s and the dire consequences of not taking due regard of the provisions of EU nature conservation law in the context of planning law at the national or local level.[79] Initially, the Dutch municipality of Heerlen showed little appreciation for the likely presence of wild hamsters on the site that was designated to become a cross-boundary industrial estate. Ultimately, this approach proved faulty since the zoning plan was quashed by the Dutch Council of State given the fact that the planning authority had not considered its possible impact on the protected species.[80] At the same time, the exemption that had been obtained under the Dutch Flora and Fauna law for the project, was also revoked since no thorough investigation of other available alternatives had taken place.[81]

Despite the fact that the project was eventually approved, the so-called Dutch '*hamster* case' is often quoted as an important landmark case for EU species protection law in the Netherlands. Whilst it was in itself not capable of halting the further decline of the rodent species, it can be called a 'game changer' since it revealed the delays and burdens that could be caused whenever the likely presence of a protected species is disregarded during the determination of planning applications. Also in other Member States,

---

72 In order to avoid all too many inconsistencies when applying these rules and to bring them more into the spotlight, the European Commissions promulgated a set of additional guidelines on the interpretation of the strict protection regime for animal species in 2007: European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, 2007.

73 Case C-6/04, *Commission v. UK*, [2005] ECR I-09017.

74 Case C-103/00, *Commission v. Greece*, [2002] ECR I-01147.

75 Case C-518/04, *Commission v. Greece*, [2006] ECR I-00042, Paras. 20-21.

76 Case C-383/09, *Commission v. France*, [2011] ECR I-04869.

77 Some Member States have tried to downplay the significance of the strict rules on species protection, especially in order to protect their spatial planning policy against external interference. Yet these efforts have proved largely unsuccessful until now. For instance, in its case law the Court has clarified that the requirement of 'intent', as included in Art. 12(1)(b) of the Habitats Directive, also covers situations where the disturbance of protected species was only perceived as a mere side effect of an activity. Case C-221/04, *Commission v. Spain*, [2006] ECR I-04515, Paras. 72-74.

78 See for more extensive information: Schoukens & Bastmeijer, supra note 8, pp. 129-132.

79 See for more extensive information: Verschuuren, supra note 23, pp. 55-56.

80 Dutch Council of State, Case no. E01.97.0672 (1999).

81 Dutch Council of State, Case no. 199901039/1 (2000).

such as Belgium, the increased number of collisions between protected species and economic aspirations soon made it to the headlines of the national press. In 2013, a Flemish municipality had to reconsider its zoning plan for recreational facilities since throughout the preparation process it had not sufficiently taken into account the presence on the future construction site of a protected ant species.[82] In the UK, the 2011 decision of the U.K. Supreme Court in *Morge* highlighted, albeit on a more general note, that planning authorities have to take into account species protection law.[83]

2.2.5. Increasing criticism and a lack of incentives for robust habitat restoration efforts?

The scarce room for reconciliation of robust habitat restoration measures with the applicable protection rules has led many authors to conclude that EU nature conservation law is applied too dogmatically by judges to allow for a good balance between economic development and nature conservation.[84] It is argued that, given their rigor and vigour, the EU nature directives risk being perceived as nothing more than an obstacle course for developers.[85] Conversely, other authors detect the poor compliance with the procedural and substantive requirements as one of the major reasons for the limited success of EU nature conservation law so far.[86] The fact that many Member States still need to step up their Natura 2000 designation efforts, poignantly illustrates this point.[87] That said, in order to reverse the declining trend, more clear-cut restoration duties should be included in the EU rules. It is true that Member States, given the deplorable state of many Natura 2000 sites, will have to implement comprehensive management measures in these protected sites in order to attain the objectives of the Habitats Directive.[88] In a 2014 Guidance, the European Commission explicitly clarified that restoration measures are also to be envisaged pursuant to Article 6(1) of the Habitats Directive. Such measures could include works to restore the hydrology of a wetland, replant some species, and reintroduce or reinforce populations of endangered species.[89] In accordance with the subsidiarity principle, Member States are free to decide how to implement this provision in practice, provided that the overall objective of the Habitats Directive is not jeopardized.[90]

Unfortunately, the Habitats Directive does not lay down similar duties for habitats restoration outside these protected sites. The lack thereof might seriously jeopardize the survival of many endangered species, especially those whose habitat is not confined to Natura 2000 sites. This is the case for example for many farmland species, such as wild hamsters and skylarks. Also the rules on strict species protection are not capable of closing this loophole. Especially Article 12(1) of the Habitats Directive seems too preoccupied with laying down protection rules of a preventative nature. The lack of a clear-cut duty to restore has not refrained the Court of Justice from obliging Member States to adequately provide for the necessary recovery measures for endangered species, which include, among others, comprehensive species action plans.[91] Still, neither the Court nor the Advocate General has ever explicitly ordered the Member States to enact robust habitat restoration measures for strictly protected species.[92] Moreover, in a 2007 Guidance document the European Commission even explicitly underlined that proactive habitat management measures are not required under Article 12(1) of Annex IV species.[93]

Accordingly, as was partly the case with the ESA, also EU nature conservation law seems to fall short of laying down a comprehensive set of restoration rules or incentives for areas outside the Natura 2000 Network. This means that 80% of the EU territory is left outside the scope of the restoration approach

82 Belgian Council of State, Case no. 222.543 (2013).
83 *Morge (FC) (Appellant) v. Hampshire County Council* 2011 UKSC 2.
84 Kistenkas, supra note 11, p. 83.
85 Wandesforde-Smith & Watts, supra note 3, pp. 65-69.
86 See among others: Schoukens, supra note 7, pp. 11-12.
87 *Natura 2000 Newsletter*, no. 34, July 2013, p. 9.
88 A similar approach can be found in Art. 4(1) and 4(2) of the Birds Directive.
89 European Commission, *Establishing conservation measures for Natura 2000 Sites. A review of the provisions of Article 6.1 and their practical implementation in different Member States*, 2014, available at <http://ec.europa.eu/environment/nature/natura2000/management/docs/conservation%20measures.pdf> (accessed 12 January 2015).
90 Case C-508/04, *Commission v. Austria*, [2007] ECR I-03787, Paras. 75-76.
91 See among others: Case C-183/05, *Commission v. Ireland*, [2007] ECR I-00137, Paras. 14-15.
92 See for more extensive information: H. Schoukens, 'Going Beyond the Status Quo: Towards a Duty for Species Restoration Under EU Law?', in V. Sancin & M. Kovič Dine (eds.), *International Environmental Law: Contemporary Concerns and Challenges in 2014*, 2014, pp. 343-358.
93 European Commission, supra note 72, p. 20.

which implicitly underpins the EU nature directives.[94] The disparate and varying compliance rates at the national level make it hard to conclude that the prohibitive nature of the Habitats Directive is likely to create perverse incentives similar to the 'shoot, shovel, and shut up' examples that have emerged in the United States. Still, in recent literature it has indeed been noted that the tightening regulatory framework has compelled Dutch and Flemish landowners and property developers to refrain from opting for habitat restoration measures on their lands. Instead of choosing for habitat restoration, mostly intensive mowing and regular ploughing are opted for, excluding any benefits for endangered species.[95] Recently, a Belgian harbour company relied on similar avoidance practices in order to prevent that protected sea gulls settled on the plots of land intended for the enlargement of an industrial estate.[96] These actions were deemed legal according to a lower court ruling of 18 April 2014 since they did not target birds that actually roosted on the to-be developed land.[97]

3. Beyond the status quo: encouraging habitat restoration for species via the safe harbor approach?

3.1. Towards a more collaborative approach?

From the above analysis it can be concluded that, in order to make a tangible difference on the ground, conservation law should not confine itself to laying down a command and control approach, merely based on the prohibition of harmful activities. Granted, prohibitive regulation will remain seminal in safeguarding the survival chances of some endangered species. Protection and restoration therefore are not interchangeable in the approach towards the current biodiversity crisis. Moreover, whilst prohibitions are generally of a defensive nature, they can also help to restore or improve habitats insofar as they enable positive natural developments to take place. In the absence of additional threats, some endangered species may well recover by natural process.[98] However, given the fact that a large share of the remaining habitat of the endangered species in both the United States and EU is located on privately owned lands and taking into account the limited territorial scope of protected area legislation, the aforementioned prohibitive approach indeed might not suffice to halt and reverse the declining trend for many endangered species.

As was established above, both the ESA and the EU nature directives seem to 'punish' private landowners that have species habitat on their land by restricting future land development options. Hence landowners and property developers are, rather ironically, supported in their implementation of management strategies that prevent the presence of endangered species on their plots of land. Such behaviour, if applied on a wider scale, might cripple the already limited effectiveness of nature conservation law even further. In order to allow nature to bounce back a more collaborative approach needs to be promoted, aimed at rewarding private landowners for habitat conservation and restoration on their lands instead of punishing them. Recently, the momentum has been building for a more incentive-based approach toward nature conservation. In the United States the first seeds were sown for an alternative approach towards species recovery on private lands.

3.2. Safe Harbor Agreements (SHAs) in the United States: A new incentive for habitat restoration on privately owned lands?

3.2.1. No alarms and no surprises, please?

The fierce political opposition to the ESA, sparked by the 1973 *TVA* case and the rigid application of the take prohibition on private lands, urged the Congress to alleviate the strict restrictions on landowners by offering additional room for exceptions. As mentioned above, incidental take permits and HCPs, which mostly comprised additional mitigation strategies, were introduced as an additional exemption

94 Cliquet et al., supra note 4, pp. 280-283.
95 Woldendorp, supra note 22.
96 See (in Dutch): <http://www.demorgen.be/dm/nl/5381/Dieren/article/detail/1826587/2014/03/23/Rechter-zet-havenuitbreiding-Zeebrugge-on-hold-omdat-die-meeuwen-bedreigt.dhtml> (accessed 30 November 2014).
97 Ruling of 18 April 2014 of the President of the Court of First Instance of Bruges, Case no. 14/119/C.
98 See in a similar vein: Opinion Advocate General Kokott in *Commission v. France*, supra note 76, Para. 45.

ground to the ESA in 1983. The hope was that 'bargaining in the shadow of the law' might be more effective in reaching the biodiversity policy goals.[99] HCPs were promoted as examples of a 'win-win collaborative process' and seemed to offer an attractive blueprint by allowing landowners more flexibility in meeting conservation goals. In order to foster the success of HCPs, the so-called 'no surprises policy' was introduced in 1994.[100] In this approach, the FWS may grant the assurance that if a permittee fully complies with the terms of the HCP that adequately covers a species, the FWS will not require the permittee to take any further mitigation measures deemed necessary in the future.[101]

One could summarize this approach as follows: providing regulatory certainty in exchange for environmental commitments.[102] With the enactment of the no-surprises rule, the FWS sent out an important signal to private landowners: if they adhered to the terms of their HCPs, they would not be required to take additional mitigation measures, even if new species were to settle on the lands. Should unexpected circumstances require intervention and/or modification of the HCP, the additional expense is to be borne by the federal government or cooperating public entity, not the landowner.[103] The publication of the no-surprises rule actually managed to arouse the enthusiasm for HCPs among project developers in the United States. In its first eight years of application, a 13-fold increase in the number of approved HCPs was noted.[104] However, in spite of creating more incentives among landowners to enter into HCPs, the no-surprises rule did not remain unchallenged. In fact, only in 2007 did the District Court dismiss the claims that were brought against the no-surprises rule, holding that the issuance of incidental permits was not governed by a recovery-based standard.[105]

This being the case, HCPs still faced rising criticism. Many authors contended that in the end the HCPs did not really help achieve the recovery of listed species. In the HCPs, the FWS mostly settled for the more modest goals of only making sure that they did not appreciably reduce the likelihood of survival and recovery of the species in the wild.[106] One of the most prevalent points of criticism referred to the poor outcomes of the negotiation process for HCPs which, in many cases, did not differ substantially from the scenario in which no ESA restrictions were present. In other words, the FWS was criticized for conceding to landowners far more than necessary to obtain their consent to an HCP. And therefore, landowners and loggers were not really pushed to alter their harmful behaviour.[107] In some HCPs the mitigation requirements simply came down to ordering a project developer to do what was already required by state law. Moreover, studies have revealed that the long-term commitments under HCPs are hard to sustain in the face of ever-changing ecological, economic and political circumstances.[108] Some environmentalists have chastised the FWS for having been 'captured' by the interests that it must regulate, namely those of project developers and loggers. In addition, others have pointed to the lack of effective citizen participation under HCPs.[109]

Surely not all HCP examples make a grim reading for species conservation and recovery, and if properly prepared, HCPs might simultaneously address both economic and conservation or restoration interests.[110] That said, by and large HCPs remain a reactive instrument and, as such, do not actively promote conservation efforts that go beyond the status quo.

3.2.2. Safe Harbor Agreements: going beyond the status quo?

Arguably HCPs managed to promote habitat conservation and restoration among property developers and business people. They are indeed capable of making the best of a bad situation. However, in order

99 See more in detail: Wheeler & Rowberry, supra note 42, pp. 223-224.
100 Habitat Conservation Plans Assurances ('No Surprises') Rule, 63 Fed. Reg. P. 8859 (Feb. 23, 1998).
101 Ibid.
102 Wheeler & Rowberry, supra note 42, p. 225.
103 Ibid., p. 224.
104 Ibid., pp. 224-225.
105 *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, pp. 41-43 (D.C. 2007).
106 Hsu, supra note 41. See also: Sheldon, supra note 45, p. 279; J. Tasso, 'Habitat Conservation Plans as Recovery Vehicles: Jump-Starting the Endangered Species Act', 1998 *U.C.L.A. J. Envtl. L. & Pol'y* 16, no. 2, pp. 297-318.
107 Hsu, supra note 41.
108 Wheeler & Rowberry, supra note 42, pp. 236-237.
109 S. Vanderheiden, 'Habitat Conservation Plans and the Promise of Deliberative Democracy', 2001 *Public Integrity* 3, no. 3, p. 212.
110 Hsu, supra note 41.

to achieve recovery and restoration goals, a more ambitious policy tool is needed, aimed at encouraging habitat conservation efforts among landowners who do not necessarily want to develop their land in the short term but want to reserve the right to do so at a later stage. Without any effective incentive mechanisms, such landowners might still take recourse to the aforementioned 'shoot, shovel and shut up' strategy.

In the 1990s, the so-called 'Safe Harbor Agreements' were designed by the US federal government in order to solve this challenge.[111] Under a Safe Harbor Agreement (SHA) landowners voluntarily use their property to benefit species and, in return, are provided with a 'safe harbor', guaranteeing that no additional conservation measures will be imposed on their lands, even if the number of threatened or endangered species grows as a result of the actions of the landowner. In short, one could submit that, with this tool, the US federal government wanted to alter the impression that the ESA was there only to unfairly penalize private landowners who had 'the bad luck' of hosting threatened or endangered species.[112] By opting for a SHA, landowners are offered legal certainty in exchange for their commitment to creating a positive net outcome for the threatened and endangered species that are present on these lands. The agreement is concluded between cooperating non-federal property owners and the FWS or the National Oceanic and Atmospheric Administration (NOAA), which is responsible for most listed marine and anadromous fish species.

In exchange for their recovery actions, the participating landowners receive formal assurances from the FWS or the NOAA that the FWS will not require any additional or different management activities by the participants without their consent. More importantly, the participants may, at the end of the agreement period, return the enrolled property to the baseline conditions that existed at the beginning of the SHA. This will even be the case if such alterations result in the incidental removal of the listed species. By doing so, it is hoped that SHAs will further encourage proactive species conservation efforts by private and other non-federal property owners while at the same time offering the participating landowners certainty in relation to future land use restrictions, even if the management actions effectively result in listed species settling on the enrolled properties or lead to an increase in the number of individuals present on the lands. Landowners are completely free to enter into a SHA. A SHA may therefore be initiated either by the property owner, the FWS or a state agency. Evidently, state agencies may seek to encourage property owners to consider entering into a SHA.[113]

3.2.3. Policy instrument official from 1999

The first SHAs were initiated in 1995. Still, the SHA Policy only became officially effective according to the Federal Register of June 1999.[114] As far as the objective and purpose of the SHA are concerned, the 1999 Policy Document did not alter much. It reiterated that the basic objective of a SHA is to do away with the defensive management strategies of landowners and create a positive net benefit for the threatened and endangered species whose habitats are often exclusively confined to private owned lands.

In its 1999 Policy Document, the FWS effectively emphasised that, before entering into a SHA, the competent authorities have to issue written findings that all covered species will receive a net conservation benefit from management actions taken under the SHA. At the same time, it is acknowledged that the contribution toward recovery will vary from case to case, and, at any rate, the SHA does not have to provide permanent conservation for the enrolled property. Or, to use the words of the FWS: 'Net conservation benefits must contribute, directly or indirectly, to the recovery of the covered species. This contribution towards recovery will vary and may not be permanent'.[115] Possible conservation benefits may result from maintenance, restoration or enhancement of existing habitats, reduced habitat fragmentation and/or increases in habitat connectivity, stabilized or increased numbers or distribution,

111 See more on the roots and origins of the Safe Harbor Agreement policy approach: Bean et al., supra note 24; Kishida, supra note 24.
112 Kishida, supra note 24.
113 A SHA cannot only be entered into by a single property owner. Also more 'programmatic' SHAs can be developed, which involve multiple property owners. In such a scenario, the entity that has signed the SHA can transfer the assurances to the individual property owners which are eager to be involved in the SHA, thereby reducing the administrative hurdle to be taken.
114 64 Fed. Reg. 32, 706, 32, p. 717 (June 17, 1999) (hereafter 'SHA Policy Document').
115 Ibid., p. 723.

the creation of buffers for protected areas and opportunities to test and develop new habitat management techniques.[116] Although the benefits may only buy a little extra time, for many endangered species buying such a little extra time might be crucial to safeguard their long-term survival and recovery.[117] Missing out on these temporary benefits might be to the detriment for the survival chances of many listed species. The assurances offered by the SHA are connected to the enrolled lands and remain valid as long as the participating landowner complies with the SHA.[118] The 1999 Policy Document does not really rule out the possibility of revoking the permit implementing the SHA. However, this possibility is described as 'a last resort' option, for situations where continuation of the permitted activity would be likely to jeopardise a species covered in the permit.

The reliance on the creation of positive net effects on the populations of endangered or threatened species clearly sets the SHA apart from the HCP, in which project developers commit themselves to offsetting and mitigating the harm caused by future project developments to listed species. In the context of a SHA no reference is made to any concrete harmful activities. As stated above, SHAs in essence represent a voluntary process, whereas project developers involved in the HCPs process are required to consider mitigation actions in order to obtain an incidental take permit.[119] SHAs are not necessarily linked to harmful planning projects.

The 'net conservation benefits' which have to be established by a SHA also help explain the legal reasoning which has been used to reconcile SHAs with the ESA. The first series of SHAs was established under the provision that was also used to issue HCPs, thereby blurring the difference between the two tools. In its 1999 Policy Document, the FWS decided to link SHAs to Section 10(a)(1)(A) of the ESA, which allows for the issuance of permits to enhance the propagation or survival of affected species.[120] In order to avoid abuse, the participating landowner will have to demonstrate that the agreed baseline conditions were maintained and that the management activities listed in the SHA in order to achieve the net benefits have been carried out for the duration of the agreement.[121] For these reasons, the FWS considers it crucial to determine the so-called 'baseline conditions'. Also, from the landowner's perspective, establishing the baseline is decisive in order to assess the ambit of the assurances granted to him by virtue of the permit issued in the context of the SHA. Both the FWS and the participating landowners have an interest in clearly determining baseline conditions in order to avoid future disputes during the implementation of the SHA. In the FWS's view, the baseline conditions must reflect the known biological and habitat characteristics that support existing levels of use of the property by species covered in the SHA.[122]

In order to take into account natural fluctuations in species populations and avoid unreasonable outcomes for the participating landowners, the competent services will have to rely on population estimates to determine the degree of occupancy of the enrolled lands by covered species. In practice, the baseline conditions will take into account the amount and condition of habitat in the enrolled lands and not the exact number of individuals of the species present on the site at stake. Evidently, the baseline will have to be established at zero whenever no seasonal or permanent occupation by covered species on the enrolled property has been documented.[123] In order to effectively assess the compliance of the participating landowners with the SHA, a monitoring programme needs to be implemented. At the same time, the outcome of these monitoring activities will also allow the services to better evaluate the overall programme and ensure its continued development.

Since nature is not static, the 1999 Policy Document also needed to establish some additional guidelines for cases in which non-covered or newly listed species settle on the lands enrolled in a SHA. To this end it is noted that, if desirable, the SHA can be amended in order for the non-covered species to be included. In such a scenario, the involved parties will have to agree on the additional conservation and management actions that are needed for the recovery of the non-covered species. The participating

116 Ibid.
117 Bean, supra note 48, p. 210.
118 Ibid.
119 Kishida, supra note 24.
120 Bean, supra note 48, p. 210.
121 Ibid.
122 SHA Policy Document, supra note 114, p. 723.
123 Ibid., p. 724.

property owners are also encouraged to involve the public in the development of the SHA. Yet the discretion to opt for public participation is largely retained by the property owner. This being the case, the FWS will still make every SHA available for public review and comment as part of the evaluation process for issuance of the Enhancement of Survival Permit.[124]

3.2.4. First results on the ground?

Whilst obviously aimed at creating additional benefits for endangered species, by removing the existing disincentives for habitat management and restoration on private lands and replacing the 'us against them' mentality that has permeated nature conservation efforts these past decades, the SHA tool somehow remains controversial. In the end, the participating landowners are allowed to carry out harmful activities on the enrolled lands, thereby bringing them back to their baseline conditions. As a result, the landowners are allowed to 'take' the additional protected species that have settled on his lands. For some conservationists, such destruction might be a bitter pill to swallow.

Having said this, SHAs have already achieved some remarkable successes. According to the website of the Environmental Defense Fund, one of the first propagators of the concept of SHA, 'the owners of some four million acres nationwide are welcoming 63 rare species under Safe Harbor Agreements'.[125] Notwithstanding the impressive track record, the lack of comprehensive studies on the effectiveness of SHAs makes it hard to conclude whether this novel instrument has managed to fulfil its ambitious environmental goals without alienating the participating landowners. In fact, most SHAs have a short recent history and it therefore remains hard to draw general conclusions on the success of SHAs so far, especially taking into account the slow reproduction rate of many species. Luckily, the scarce literature on the topic provides us with a deeper analysis of the first three SHAs that were developed in the United States, being the 1995 North Carolina Sandhills SHA for protecting the red-cockaded woodpecker, the 1995 Texas Coastal Prairie SHA and the 1996 Texas Nothern Aplomado Falcon Reintroduction SHA.[126] These three agreements are not only the first three that were developed, they also cover bird species whose distinct features allow us to carry out a meaningful analysis of the effectiveness of the SHAs.[127] Interestingly, the SHAs for the aplomado falcon and the Attwater prairie chicken heavily focus on reintroduction efforts, whereas the SHA for the red-cockaded woodpecker focuses more on the preservation of the remaining habitats.[128]

Of the three SHAs mentioned, the results achieved by the SHA for the aplomado falcon are said to be most impressive, especially taking into account the deplorable status of this bird species in the United States throughout a bigger part of the 20th century. With the last aplomado falcon recorded in the United States in the 1950s, the situation appeared quite bleak by 1960. In the 1980s some captive breeding programmes had been initiated rather successfully. However, releasing the birds on privately owned lands became less evident, especially in light of the listing of this species under the ESA in 1986. Since 97% of Texas (the target state for the recovery of these birds) was private property, finding additional release sites on non-public lands was crucial for the recovery of the aplomado falcon. In the mid-1990s, the Peregrine Fund considered the establishment of a SHA in order to facilitate the ongoing reintroduction efforts for the aplomado falcon.[129] Compared to the two other SHAs, the Texas Nothern Aplomado Falcon Reintroduction SHA heavily relied on the reintroduction of both captive-bred and wild populations to recolonize existing habitats. As a result, the baseline population number for most landowners was zero. Several authors recorded the SHA as essential leverage to foster enthusiasm among landowners for these reintroduction efforts, resulting in more than one million acres being enrolled in the SHA merely two years after its inception.[130] Since the modest reintroduction efforts in the 1980s and early 1990s, the SHA was the framework for the release of no fewer than 672 birds in its first six years.

---

124 Ibid.
125 See: <http://www.edf.org/ecosystems/protecting-wildlife-right-incentives> (accessed 30 November 2014).
126 Bean et al., supra note 24; Kishida, supra note 24.
127 Kishida, supra note 24.
128 Ibid.
129 See for more extensive information on the background of this SHA: Bean et al., supra note 24; Kishida, supra note 24.
130 Ibid.

Arguably this SHA can be seen as a great success. Bean et al. concluded that 'The SHA helped to restore a once vanished species to the landscape of south Texas, and it has done so without the rancour and controversy that has sometimes accompanied reintroduction efforts of other species elsewhere'.[131] At the same time, Kishida warns that, whilst the biological accomplishments of the SHA cannot be ignored, a large part of the success can in effect be attributed to the ecological features of the aplomado falcon itself. It was noted that 'the high survival rate of reintroduced birds, the excellent mobility of the falcons, and the relatively low acreage requirements per individual bird perhaps represent a rare convergence of qualities, ones which most other endangered species do not possess'.[132]

Looking at the other two SHAs, the picture becomes more blurred. The 1995 North Carolina Sandhills SHA for protecting the red-cockaded woodpecker also appears to be a success story. This species was once thriving in the United States, its habitat extending from East Texas to Florida and New Jersey. The loss of old-growth pine forest is to blame for the sharp decline of the red-cockaded woodpecker. By the mid-1990s fewer than twenty of these birds remained in the state of Virginia, exemplifying their predicament. As was the case in Texas, many landowners in North Carolina were very wary of the ESA and its restrictions. Apparently, this attitude was altered by the SHA, which grew increasingly popular among landowners. The participating landowners agreed to carry out prescribed burns, artificial nest cavity drilling, hardwood undergrowth removal and forest rotation lengthening.[133] With these measures, the SHA also managed to reverse the negative trend for the red-cockaded woodpecker population.[134]

In sharp contrast with the aforementioned two SHAs, the Texas Coastal Prairie SHA could easily be qualified as a blatant failure. More than a century ago, the Attwater prairie chicken population was estimated to be up to a million birds. Intensive hunting and the loss of 97% of its suitable habitat brought this species to the brink of extinction. Almost all of the chickens live in two government-run wildlife refuges. In spite of the Attwater prairie chicken being one of the most endangered species in the United States, the SHA has reportedly fallen short of delivering the expected outcome. However, some authors have pointed out that, with the entry into force of the SHA, the decline of this species has been somewhat mitigated in comparison with earlier decades.[135]

Despite the positive appraisal of the above SHAs in the available literature, it remains hard to induce from this some general trends. Obviously, the SHAs should be given credit for increasing or at least stabilizing a covered species' population. As already referred to by Kishida, the unknown variable is how long these benefits are likely to last with none of the participating landowners yet having exercised their recognized right to return the enrolled property back to its original state.[136]

3.3. A safe harbor for temporary nature on private lands in the EU?

3.3.1. More opportunities for habitat restoration on private lands?

The quest for more flexibility in conservation law did not remain limited to the United States. Also in the EU both business people and planning authorities craved for more freedom to manoeuvre. One of the perceived rigidities of EU species protection law touched on in the previous part is the fact that it seems exclusively aimed at the protection of individual specimens of species, without taking into consideration the broader picture. Not surprisingly, recent years have seen a push from the protection of individual specimens to the preservation of larger populations. On the surface, such a shift appears sensible as it will allow more flexibility and leeway when issuing permits for spatial developments. Given the growing importance of the strict species protection rules, the attempts to implement more flexible approaches towards nature protection have increasingly focused on the room for weighing harmful interventions against the protection rules in Article 12(1) of the Habitats Directive.

Against the background of the alleged tight jurisprudence and guidelines, new ways were sought to better align spatial development and species protection. As was the case with the HCPs under the ESA, a

131 Bean et al., supra note 24.
132 Kishida, supra note 24.
133 Environmental Defense Fund, *Safe Harbor: Helping Landowners Help Endangered Species*, 1999, p. 2.
134 Ibid.
135 Kishida, supra note 24.
136 Ibid.

more strategic and consensus-driven approach towards mitigation grew more popular in Member States such as the Netherlands, the UK and Belgium. Whilst Article 16(1) of the Habitats Directive provides some limited room for derogation from the protection rules, most planning authorities did not want to align their projects with the strict requirements set out by this provision. As had been the case with Article 6(4), it was generally agreed that the adoption of more generic mitigation strategies aimed at reducing the impact of a harmful project below the significant threshold would suffice in order to bypass the application of Article 16(1) of the Habitats Directive. As long as these strategies relied on genuine mitigation measures little to no trouble arose. However, since the inclusion of such measures did not always succeed in effectively reducing the harm created by project developments, mitigation strategies increasingly tried to include the implementation of habitat creation or restoration measures close to an affected breeding or roosting site, mostly on privately owned lands.

Despite the attempts to create more flexibility in recent years, both national courts and the European Court of Justice have significantly tightened the room left for this more pragmatic approach towards mitigation. For instance, the Dutch Council of State has recently held that projects that result in the destruction of the breeding sites and nests of protected owls could only be allowed if the strict derogatory conditions under Article 16 of the Habitats Directive apply.[137] The fact that the mitigation strategy included the creation of new roosting sites in order to offset the damage did not alter this view. Belgian courts have also recently dismissed more flexible approaches towards mitigation.[138] The above discussion is largely reminiscent of a similar dispute that arose in the context of Article 6(3) of the Habitats Directive regarding the exact qualification of habitat restoration measures connected to project developments that encroach upon protected habitats.[139] In light of the recent outcome of the Briels proceedings, where the Court finally ruled that the creation of new habitats in order to offset the loss of other protected Natura 2000 habitat should be regarded as compensation only to be taken into consideration within the realm of the derogation clause, the aforementioned case-law developments do not appear faulty.[140]

Whereas this case law left a bad taste in the mouth of some property developers, it did not manage to completely crush the willingness to reach a more strategic and plan-based approach towards species conservation, especially in economically important zones, such as port areas. Some Member States effectively implemented such practices, in order to obtain better articulation between species protection and spatial development and, additionally, to foster proactive conservation and restoration efforts on private lands.

For instance, the 2009 Flemish Species Regulations[141] explicitly allow for the establishment of more area-oriented species protection programmes, aimed at the introduction of the necessary conservation measures for one or more listed species within a certain area which can be qualified as a 'ecological functional unit'. Only just recently, in May 2014, a species protection programme was adopted for the Antwerp Port Area by the Flemish government, which specifically aims to create more legal certainty for future port development. This is done by implementing a robust set of conservation and restoration measures on private lands for the protected species hosted by the Port Area, such as the natterjack toad and the common tern.[142] In the Netherlands, a similar approach was implemented for the conservation and recovery of the natterjack toad in the Dutch Province of Flevoland in 2010.[143] However, in contrast to the species protection programme for the Antwerp Port Area, the Dutch management plan is accompanied by a generic derogation, which releases the individual developers from the burdensome derogation procedure. The management plan includes a set of conservation and restoration measures, again aimed at the conservation of the species in the area.

137 See among others: Dutch Council of State, Case no. 201104545/T/T1/A3 (2012).

138 Schoukens & Cliquet, supra note 63, pp. 208-211.

139 See for more extensive information on this topic: J. Zijlmans & H. Woldendorp, 'Compensation and Mitigation: Tinkering with Natura 2000 Protection Law', 2014 *Utrecht Law Review* 10, no. 2, pp. 172-193.

140 Case 521/12, *TC Briels*, 2014 not yet published, Paras. 28-33.

141 Flemish Species Protection Regulation of 15 May 2009, *Belgian Official Journal* 13 August 2009.

142 Decision of the Flemish Government of 23 May 2014 (*Official Gazette* 21 August 2014). For more information on the species protection programme, see: <http://www.natuurenbos.be/nl-BE/natuurbeleid/soortenbeleid/bescherming/Soortenbeschermingsprogramma/SBP%20Antwerpse%20haven> (accessed 30 November 2014).

143 See for more extensive information: <https://www.flevoland.nl/producten-en-diensten/rugstreeppaddenmanagement/index.xml> (accessed 30 November 2014).

3.3.2. Temporary nature on the rise

The compatibility of these approaches with the EU nature directives remains undecided. Moreover, as was the case with the HCPs under the ESA, more flexible approaches toward mitigation can promote additional voluntary nature efforts on private lands in the EU. Yet, at best, such measures avoid additional losses for nature.

At present, relatively few instruments in EU and national nature conservation law are targeting landowners and project developers who do not necessarily want to develop their lands in the years to come. Depending on the available financial resources or the economic climate, such future economic developments might only be implemented over the course of ten or twenty years. In some cases, the economic use of an industrial land could even be abandoned.

Alarmed by the recent case law on the strict rules on species protection for EU-protected species, many project developers choose to subject these slivers of land to burning, spraying and regular ploughing in order to prevent protected species from settling. As a result, hundreds of thousands of acres of lands are currently lying unused, merely awaiting their residential, infrastructural or industrial purpose. For instance, in the Netherlands it has been reported that almost 40,000 acres of lands are lying temporarily vacant every year.[144] As a result, many useful opportunities for species conservation and restoration are missed, while the survival and recovery of pioneer species such as the natterjack toad and the common tern depend on the availability of such pioneer environments.

In recent years, both in the Netherlands and Belgium, two EU Member States whose territories are characterized by a high degree of urban sprawl and urban development, the concept of 'temporary nature' has emerged. This newly coined concept was used by policy makers to foster nature development on lands that have been set aside for future development. Whilst it make take years or, in many cases, decades before these slivers of lands are economically developed as industrial estates or housing zones, a wider application of temporary nature would allow protected species to thrive there in the meantime. The idea is that, even if the project developer or landowner is allowed to remove the species which have settled in the meantime, nature will profit from the temporarily available spaces. This was supported by Dutch ecological research, which showed that in spite of temporary nature being removed when the relevant site is developed it effectively increases the survival chances of many endangered species. Especially pioneer species, such as the natterjack toad and the common tern, would benefit from the availability of more suitable habitats which are not preemptively managed in order to prevent protected species from settling in the first place.[145] The large reproduction and dispersion capacity of the pioneer species allows them to colonise easily, to quickly form large populations with plenty of offspring able to disperse again. More recent Belgian (Flemish) ecological research has also underpinned these conclusions, additionally stressing that temporary nature could also be framed in the so-called 'metapopulation theory'.[146]

Meanwhile, temporary nature had already entered the legal scene via the backdoor in both Belgium and the Netherlands. In the Flemish Region, the concept gained some early approval from the Belgian Council of State, in a case where some sites had been zoned as 'temporary nature areas', in order to offset the damage that the development of a huge tidal dock would inflict on a Natura 2000 site.[147] However, in the latter proceedings, the focus was more on mitigation than on temporary nature itself.

A recent Dutch lawsuit also indirectly touched upon the topic. The proceedings centred on a tract of undeveloped land in the Vlissingen Port Area on which a colony of protected spoonbills had spontaneously settled in the previous year. A local environmental NGO sought the review of the decision of the Dutch Minister competent for the Environment not to classify the site concerned as an SPA, thereby referring to the many fears among business people in this regard. The Dutch Council of State dismissed the claims, holding that since the five most suitable areas for the spoonbill in the Netherlands,

144 J. Reker & W. Braakhekke, *Beleidslijn Tijdelijke Natuur*, 2007. Available at <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2009/07/15/concept-beleidslijn-tijdelijke-natuur.html> (accessed 30 November 2014).

145 Bureau Stroming, L. Linnartz, *Tijdelijke natuur en beschermde soorten: permanente winst. Een ecologische onderbouwing* (report no. 06.2.1342006), 2006. Available at <http://www.innovatienetwerk.org/nl/bibliotheek/rapporten/5/Tijdelijkenatuurenbeschermdesoortenpermanentewinsteenecologischeonderbouwing.html> (accessed 30 November 2014).

146 L. Vriens et al., 'Advies betreffende de ecologische effecten van tijdelijke natuur' (INBO.A.2012.168, 2013).

147 Belgian Council of State, Case no. 166.439 (2007).

along with six other sites that met the 1%-requirement, had already been designated, the long-term protection of the plot of land was unnecessary to reach the good conservation status of the spoonbill.[148] In essence, this ruling could be seen as an implicit endorsement of the concept of 'temporary nature' at times when the Dutch policy document had not yet been published.

In spite of the rather favourable treatment of spontaneous cases of nature development on industrial estates in some national case law, it soon became apparent that a more comprehensive policy approach was needed in order to render the concept attractive for a larger number of landowners and project developers, since one could not take the positive outcome of future proceedings as a given.

3.3.3. Toward a clear-cut definition

Without having obtained the certainty that the further economic development of their lands would not be hampered by the presence of protected species, temporary nature would never really win the favour of many landowners and property developers. In order to overcome the legal uncertainty, the Dutch government decided to issue a Policy Document on temporary nature in 2007.[149] This was officially supported by a motion that had been adopted in the Dutch Parliament in the same year.[150]

In the Dutch 2007 Policy Document, the concept of temporary nature is explicitly limited to plots of land that have not been accorded a green destination in the applicable zoning plans, such as industrial estates or reclamation zones. Another requirement is that the applicable spatial destination is still waiting to be realized. Hence the area is only temporarily available for nature development, which preferably focuses on the settlement of pioneer species and early species.[151] A similar approach is currently being drafted in the Flemish Region. In the draft versions of the Flemish Policy Document, it has explicitly been stressed that temporary nature must not be used as a replacement for the conservation and/or restoration of permanent ecological infrastructure.[152]

It can be expected that the baseline population in the context of temporary nature will be mostly zero, since the policy explicitly targets vacant plots of land which await the realization of their future economic destination. Still, in contrast to the United States, where the SHA approach also explicitly targets privately owned farms, ranches and forest lands, this seems to be off the chart for the Dutch and Flemish approach towards temporary nature, also because areas with a green destination in the applicable zoning plans are excluded. As a result, temporary nature will mainly remain limited to industrial estates, housing zones and reclamation areas in the Netherlands and Belgium (Flemish Region).

Merely establishing a clear-cut definition of the notion of temporary nature would have little effect if not coupled with additional measures aimed at providing additional legal certainty for the participating landowners. This raised the question on what grounds the final removal of the temporary nature can be reconciled with the derogation clauses in EU nature conservation law.

Interestingly, the solution that was finally opted for was quite similar to the SHA policy in the United States described above. In addition to framing temporary nature in a more programmatic approach towards species protection, as is for instance partly the case for the Antwerp Port Area, earlier legal research had suggested to base the derogations issued for temporary nature on Article 16(1)(a) of the Habitats Directive and Article 9(1)(a), second indent, of the Birds Directive. Both provisions allow the granting of derogations 'in the interest of protecting wild flora and fauna and conserving natural habitats'. With referral to ecological theory and research, which indicate that temporary nature has a neutral effect on all species and a positive effect on some, even if it is removed eventually, such reasoning might hold ground.[153] Regrettably, the European Commission does not offer a lot of supplementary interpretation on this point in its 2007 Guidance document on species protection.[154]

148 Dutch Council of State, Case no.200907172/1/R2 (2011).
149 Reker & Braakhekke, supra note 144.
150 *Kamerstukken II* 2006-2007, 30 690, no. 11.
151 Reker & Braakhekke, supra note 144, p. 3.
152 A. Van Kreveld & W. Braakhekke, *Voorbereiding op de invoering van het concept tijdelijke natuur. Deelrapport 2 – Natuurtypologie*, 2012.
153 Schoukens, supra note 22, p. 105.
154 European Commission, supra note 72, p. 54.

Be this as it may, this approach, which heavily relied on the positive benefits that are linked to temporary nature, was finally implemented in the 2007 Dutch Policy Document. In this respect, the approach towards temporary nature strikingly resembles the SHA concept under the ESA, which was also based on an Enhancement of Survival Permit. In order to further encourage the enthusiasm for temporary nature, the Policy Document offered the participating landowners to apply for the derogation before their plots were made available for the development of temporary nature. Ultimately, the 2007 Dutch Policy Document decided to qualify the development and subsequent removal of temporary nature as 'one single act', which can be the subject of an application for derogation well before the removal of the nature on the enrolled lands.[155] In a worst-case scenario, when the application for a derogation is rejected, for instance because the competent authority believes that the suggested site is not suitable enough to host protected species in a sustainable way, the landowner could still opt not to let nature freely develop on their site. In this approach a choice for temporary nature would make no difference whatsoever in terms of future development prospects for the relevant lands.

As was the case with the 1999 SHA Policy Document in the United States, the 2007 Dutch Policy Document also contained several practical guidelines on the procedures and practicalities that need to be observed in this context. Most importantly, and in sharp contrast with the SHA approach, no strict nature management requirements are to be included in the derogation. Although the participating landowners can obviously choose to implement certain management techniques, there is no strict legal duty to do so. Additionally, the participating landowners are also required to implement the appropriate mitigating measures when removing the species in the context of the realisation of the spatial destination. This might entail capturing and relocating the protected species that are left on the enrolled properties. Also due regard must be taken of the most vulnerable periods for the protected species that are present on the site.[156] These requirements are to be seen as a specific implementation of the general due diligence obligation, which is enshrined in Dutch nature conservation law.

3.3.4. First pilots and legal challenges in the Netherlands

In the Netherlands, the solution put forward in the 2007 Policy Document has been put into practice by the competent authorities in recent years. Several derogations have been granted allowing for the development and subsequent removal of temporary nature on industrial estates, housing zones and port areas.[157]

One of the first applications concerned a site located in the Port Area of Amsterdam. On 19 February 2009 the Amsterdam Port Authority filed a formal request with the competent Minister to obtain a derogation for a temporary nature project on unused industrial lands in the Port Area. On 15 July 2009 the Minister granted a derogation for the relevant protected species based on Article 75(5) and (6) of the Dutch Law on the Protection of Flora and Fauna. This list of species included the natterjack toad and several protected bird species. The derogation was the object of a wide range of stringent conditions, in order to mitigate, as much as possible, any avoidable damage to biodiversity when removing the temporary nature.

Soon after, a local Dutch environmental NGO filed a lawsuit against the derogation that was granted for the creation and removal of temporary nature on a site in the Port Area of Amsterdam, contesting the legality thereof in the light of the EU nature directives and national protection rules. The NGO claimed that no derogation could be issued in advance since, at least in the short term, no harmful activities were planned. In its view, a request for a derogation from the strict rules on species protection was only considered meaningful at the time that the nature is removed. In addition, it was alleged that the derogation could not have been based on the interest of 'protecting wild fauna and flora', especially in the absence of a clear-cut obligation upon the Port Authority to carry out certain management practices.

The proceedings allowed the Dutch courts to shed light on the compatibility of the 'temporary nature policy' with the EU nature directives. In its ruling of 27 May 2011, the District Court of Amsterdam

155 Reker & Braakhekke, supra note 144, pp. 13-14.

156 Ibid., p. 16.

157 For more information on recent applications of the concept of Temporary Nature in the Netherlands, see: <http://www.innovatienetwerk.org/nl/concepten/view/38/TijdelijkeNatuur.html> (accessed 30 November 2014).

proved willing to accept the legal soundness of the 2007 Policy Document.[158] It assumed that providing additional legal certainty to the project developers was a necessary prerequisite in order to obtain positive net outcomes for nature. In the absence of the possibility to apply for a derogation well in advance of the removal of temporary nature, few project developers would be found willing to let protected species settle on their lands. Likewise, the legal certainty obtained by the Port Authority could not be qualified as mere 'economic interests'. In addition, the Court emphasised that attaching strict management duties to the derogation was not necessary in this case given the fact that the establishment of temporary nature would take place spontaneously, without any specific human intervention. Equally, the ecological research presented by the Dutch environmental NGO to disprove the ecological benefits of temporary nature was rejected by the Court. Although the decision was appealed before the Dutch Council of State, the substantive arguments did not need to be addressed a second time as the appeal only concerned submissions that were raised by the beneficiary of the derogation.[159] While not all possible legal arguments against the Dutch approach were addressed in the aforementioned national proceedings, the outcome indicates that, when backed up by clear-cut policy documents, national courts tend to reassert the use of a concept like temporary nature. In hindsight, this approach, which is strikingly similar to the SHA approach under the ESA, appears to be a viable way of offering the necessary assurances to the participating landowners, who now 'know the score' before starting out with the concept of temporary nature. Obviously, the only court competent to provide us with definitive answers on the legal soundness of the approach would be the Court of Justice of the EU in Luxemburg. For the time being, however, it appears that the above reasoning might hold ground against judicial scrutiny, that is if applied in a strict manner.

In a letter of 21 February 2014 addressed to the Flemish government, who was also interested in a more widespread application of temporary nature, the European Commission seemed to agree with this opinion.[160] Questioned about potential incompatibilities between temporary nature and the EU nature directives, the Commission indicated that, in principle, the premises of temporary nature are compatible with the objectives of EU nature conservation law. Acknowledging that temporary nature could serve as a useful additional instrument in the attempts to recover the EU's most endangered species, the Commission is also of the opinion that it would probably not interfere with the designation duties for Member States in the context of the Natura 2000 Network. That is, as long as a the existing areas are sufficiently protected and managed.[161]

As far as the reconcilability with Article 6(3) of the Habitats Directive is concerned, the Commission emphasised that, whilst temporary nature projects cannot be generally exempted from the habitat assessment obligation,[162] the application of such assessment would not often give rise to insurmountable obstacles. It can indeed be expected that the removal of temporary nature, in the vicinity of a Natura 2000 site, is reconcilable with the substantive requirements of Article 6(3) of the Habitats Directive, whenever it is assured that the conservation goals of the site are achieved in the permanently protected core areas of the site. Temporary nature being merely an additional effort to spark species restoration efforts on privately owned lands therefore will not interfere with a site's conservation goals. Most importantly, the Commission also agreed that ad hoc derogations can be granted for temporary nature projects on the basis of Article 16(1)(a) of the Habitats Directive. By doing so, the Commission seemed to reassert the above-presented Dutch approach to temporary nature. However, the Commission added that such approach would only be justifiable if it could be maintained that, in the absence of such a proactive derogatory approach, project developers would indeed opt for proactive avoidance measures aimed at preventing protected species from settling on their lands. Be this as it may, the Commission did implicitly agree with what had been earlier concluded in literature, namely that, if applied in a reasonable manner, temporary nature is not at odds with the EU nature directives.[163]

158 Rechtbank Amsterdam 27 May 2011, *Stichting Milieucentrum Amsterdam en Haven Amsterdam v. Minister van Economische Zaken, Landbouw en Innovatie*, ECLI:NL:RBAMS:2011:BU4250, *JM* 2011/136.
159 Dutch Council of State, Case No. 201107589/1/A3 (2012).
160 Letter from the European Commission, 21 February 2014, FV/fl Ares2014 443595.
161 Schoukens, supra note 22, pp. 107-108.
162 Ibid., p. 108.
163 Ibid., pp. 111-112.

With the first legal challenges against the application of the concept of temporary nature having been successfully withstood, the Dutch government was eager to push for an even more wide-scale application. A so-called 'Green Deal', concluded in 2012 between the competent Minister of the previous Dutch government and the relevant actors, including both project developers, port authorities and nature conservation organisations, aimed to further bolster the application of temporary nature on the ground.[164] In the meantime, recent monitoring of a vacant lot of 100 acres on which the concept of temporary nature had been applied, revealed that most species indeed benefit from this instrument.[165]

4. The pros and cons of the safe harbor approach: no panacea for all ills?

This analysis shows that the SHA approach, which emerged in the 1990s in the United States, has undeliberately found its way to the Netherlands and Belgium (Flemish Region) in the guise of the single-act derogation for temporary nature. It is true, however, that the concept of temporary nature, as currently put forward in these two countries, has a narrower material and territorial scope than the SHAs that are implemented in the United States. Whilst the latter can also be applied on woodlands and farmlands, the former tends to focus on vacant lots that have been accorded an economic destination in the applicable zoning plans. Given the sheer size of the areas available in the United States, in comparison with countries like the Netherlands and Belgium, one can safely assume that the territorial scope will differ substantially. Yet also on other counts the approaches are not similar. Not only will the duration of a single-act derogation for temporary nature generally be shorter than most SHAs that are concluded under the ESA, the former concept also does not oblige the participating landowners to consider active land management actions. Consequently, the additional ecological benefits of temporary nature might be more uncertain than habitat restoration that is carried out in the context of a SHA.

That said, both approaches have in common that they depart from the traditional approach toward nature protection. Instead of stubbornly clinging to old paradigms, SHAs abandon the 'command and control approach' by offering additional incentives to species conservation and restoration on privately owned lands. By doing so, the above-featured SHA approach, both in the United States and the Netherlands and Belgium (Flemish Region), seems capable of silencing part of the criticism regarding the prohibitive nature of nature conservation law. The mechanism of SHA, which takes the form of a single-act derogation in the Netherlands and Belgium (Flemish Region), also commits private landowners to do a 'good deed' for nature, whilst, at the same time, it commits the government or competent authority not to punish them for it.[166]

4.1. Strengths and benefits

Before addressing its potential pitfalls and drawbacks, I will first recall the major benefits linked to SHAs. A big advantage of the SHA approach is that does not aim to compensate for future loss but merely aims at increasing endangered species habitat, either through active measures or by letting nature recover on its own.[167] Instead of focusing on the offsetting of harmful effects of future developments, SHAs, including the recent development of concepts such as temporary nature, proactively encourage private landowners to actively engage in the recovery of endangered species.[168]

This means that an increased use of SHAs might also take away some of the fuel of the increasing opposition against nature conservation law. They could be quoted as a prime example of a more collaborative approach toward recovery, which is capable of inducing private nature management efforts, without giving in to the demands to further relax the existing protection rules in order to allow more leeway for economic developments. Moreover, in contrast to market-based approaches, such as species

164 Green Deal Tijdelijke Natuur, *Staatscourant* No. 16772, 16 August 2012.

165 M. Zekhuis & A. de Gelder, *Het succes van Tijdelijke Natuur*, 2013. Available at <http://www.landschapoverijssel.nl/het-succes-van-tijdelijke-natuur-monitoringsrapport-vier-jaar-tijdelijke-natuur-eeserwold> (accessed 30 November 2014).

166 M.J. Bean, 'Four Sure Ways to Undermine a Good Idea… and Hut Endangered Species', 1998. Available at <http://www.umich.edu/~esupdate/library/98.11-12/bean.html> (accessed 30 November 2014).

167 Ibid.

168 J.G. Housein, Endangered Species and Safe Harbor Agreements: How Should They Be Used?, 2002, pp. 43-44. Available at <http://scholar.lib.vt.edu/theses/available/etd-05082002-121813/unrestricted/jhousein.pdf> (accessed 30 November 2014).

or conservation banking, protected species are not turned into a commodity.[169] Also, SHAs do not require development-related harm to sustain their existence. The fact that participating landowners may, in the end, not exercise their right to economically develop the enrolled properties will probably not affect its popularity.

By taking away the fear among landowners for additional restrictions when opting for more favourable nature management techniques on their lands, SHAs could open new doors for the recovery and reintroduction of endangered species on large acreages of land which traditionally remained off the chart for nature management actions. As is mostly the case with 'bottom-up approaches', the former are better equipped to ensure more tangible effects on the ground. SHAs can take away possible opposition to such actions by offering private landowners additional guarantees about so-called baseline responsibilities and removing the risk of any additional requirements stemming from the potential settlement of new species on their plots of lands.

Under a SHA, landowners are no longer seen as the subject of protection rules but rather as an equal partner at the negotiation table. In the end, it remains their free choice to decide whether or not to enrol their lands under a SHA statute or, in the Dutch context, to open up their lands for temporary nature. Thus, with SHAs, private landowners are invited to enter negotiations. In exchange for legal certainty they might be willing to consider additional actions aimed at combatting habitat fragmentation and restoring the habitats of endangered and threatened species. Whereas the traditional 'command and control approach' of nature conservation law might be sufficient, if properly applied, to achieve a standstill in the combat against biodiversity loss, SHAs could be an extra push for nature recovery, along with land acquisition by governmental authorities, conservation easements and additional financial incentives for conservation. Admittedly, in many cases, where landowners finally choose to exert their right to return to the baseline conditions, such benefits may be of a temporary nature. Yet, ultimately, such temporary efforts could still prove crucial, especially for the survival of pioneer species whose survival is almost exclusively dependent on the availability of vacant plots of land.

Whereas an increased use of SHAs or temporary nature will not be a panacea for all ills and represents only one of the potential incentives for fostering nature conservation efforts among landowners, it holds the promise of expanding the range of nature management beyond the confines of the protected lands that are currently managed by government and/or nature conservation organizations. By targeting these slivers of land that are traditionally hard to bring under the scope of nature conservation law, a more widespread application of SHAs, whether under the guise of the 'temporary nature'-concept or not, might prove a useful additional instrument in halting the biodiversity loss both in the United States and the EU.

4.2. Caveats and limitations

In spite of the potential benefits linked to an increased use of instruments like SHA and temporary nature, a few 'caveats' are in order. As will be explained below, SHAs might not be the appropriate tool for every situation and, in addition, will need to be subjected to certain scrutiny. Concerns about the potential unlawfulness of these approaches, for instance in light of the EU nature directives, will not be treated here as they have already been extensively dealt with above.

First and foremost, it is important to downscale expectations linked to the application of concepts such as SHAs. While such tools may create more enthusiasm among private landowners to embark on nature management, the removal of potential land use restrictions will probably not be sufficient to persuade the majority of the targeted landowners to opt for ambitious nature conservation or restoration measures on their plots of land. For some landowners, the assurances offered by SHA will succeed in sparking nature conservation efforts on their property. Others will probably only be willing to contemplate such actions if additional financial incentives are provided.[170] This raises the question whether additional financial schemes need to be set up in order to increase participation rates in SHAs. Some authors have

169 See for more extensive information: C.T. Reid, 'The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK', 2011 *Journal of Environmental Law* 23, no. 2, pp. 1-29.

170 Bean, supra note 48, p. 210.

considered this issue and recommend linking compensation schemes to voluntary nature management actions on private lands.[171]

Rewarding private landowners for active nature management is a current topic in the relevant American literature on nature conservation.[172] Proponents of more robust compensation programs contend that such voluntary programmes would partly eliminate the perverse incentives created by the prohibitive nature of nature conservation law.[173] Whilst, obviously, a good case might be built for providing additional financial incentives for lasting nature management measures on private lands, it might be less sensible to do so in the specific case of a SHA. After all, under a SHA, the enrolled landowners are allowed to remove the created habitat and thus do away with the additionally created benefits for the covered species. However, if it is assumed that SHAs are able to create lasting effects by temporarily providing additional patches of habitat, it seems rather sensible to attach additional funding for such actions. In fact, without additional funding, only landowners with sufficient means to pay for habitat improvements might be interested in considering such actions. Having said this, in a scenario where property owners do not have to implement specific management actions, which is true in the Netherlands in relation to temporary nature, such financial incentives might be perceived inappropriate.

Obviously, the persisting scepticism about the genuine ecological benefits of concepts such as SHAs and temporary nature cannot be left unaddressed. Regardless of the research referred to above, which showed that some of the SHAs in the United States, such as the Aplomado Falcon SHA, have significantly contributed to the recovery of some of the targeted species, some environmentalists still doubt the ecological soundness of SHAs. The unprepared spectator might find concepts such as temporary nature rather unsettling. This was also illustrated by the above-treated Dutch lawsuit against the first pilot project. It is worth bearing in mind that the above-examined SHAs in the United States only represent a small part of the existing practice. Therefore it remains to be seen whether the positive effects of some of them will be long-term. It remains unclear whether the benefits will persist whenever the right to return to the baseline conditions is exercised. In light of the limited research on the effects of the long-term effects of SHAs and temporary nature, some additional reluctance seems especially justified in cases where the baseline is not zero, e.g. in a scenario where the plots of land are not already hosting valuable habitats or foraging areas for protected species. In such cases, the risk of net biodiversity loss might indeed be looming around the corner.

In most cases, the setting of a reliable habitat baseline will prove vital for ensuring the effectiveness of SHAs.[174] Some landowners will probably be eager to set the baseline as low as possible, whereas conservationists will try to set it at a higher level, thereby preventing the use of SHAs from leading to net reductions for the covered protected species. Such discussions might culminate in a burdensome negotiation procedure and create additional disincentives for landowners and project developers that are willing to participate in SHAs. Especially when small degraded patches of habitat – that are not currently harbouring any protected species – are still present on the site, landowners will be more likely to set the baseline conditions at zero before introduction, whereas conservationists will advocate a higher baseline conditions. They will try to make sure that a SHA is not abused to create a net loss for biodiversity, resulting from the assurance that the remaining habitat slivers on the participating properties can be removed.

A similar discussion may arise in cases where populations are subject to significant natural fluctuations, which may possibly lead to unrealistic baseline scenarios. For instance, if the baseline is set when the population is strong, this might create an additional burden.[175] Conversely, underestimation of the population might lead to a negative net outcome for biodiversity. In its 1999 Policy Document, the FWS provided more guidelines in this regard. It states, among other things, that the FWS will take into account population estimates and, as much as possible, focus on the amount and condition of habitat

171 Paulich, supra note 20, p. 136.
172 Ibid., p. 137.
173 Ibid.
174 Housein, supra note 168, p. 40.
175 Ibid.

instead of the number of species present on the enrolled property.[176] Even so, the expectation is that negotiations about a SHA will need to tackle these issues in more detail and provide more clarity.

Still, even in cases where no protected species are present on the participating lands, the additional net benefits related to the use of concepts such as temporary nature are not always taken for granted by everyone. It is true, however, that the above-cited Dutch and Belgian ecological research seems to support the alleged net benefits of such instruments. These studies appear to debunk concerns regarding the added value of the temporary availability of newly developed, created or restored patches of habitat. Still, the question remains whether this refutes all possible counterarguments. For instance, some authors have stressed the risk that the plots of lands covered by a SHA could create a so-called ecological trap.[177] Ecological traps can be created when the attractiveness of newly created or restored habitat increases disproportionately in relation to its value for survival and reproduction. By preferring falsely attractive habitat over existing less-attractive but more qualitative habitat, species might become more vulnerable.[178] Obviously, such effects might also arise in the context of a SHA, where new temporarily available habitats are developing, sometimes merely because of the absence of harmful human activities (such as mowing). However, it is generally accepted that the risk of creating an additional ecological sink is not significantly larger in the context of a SHA than in the context of permanent nature management.[179] Moreover, in cases of new permanently created 'bad habitat', the negative effects might even be exacerbated. Still, with the right to return to the baseline conditions established, an additional sink effect could be created. In that regard, both in the United States and the Netherlands additional mitigating measures must be observed whenever the plot of land is returned to its original conditions. Rescuing and, if possible, relocating the remaining protected species to other available habitats, might take away the most adverse effects in some respects.

On the whole, the net ecological benefits of the use of SHAs should not be taken as a given. To some extent, they will depend on the number of landowners that effectively exercise their right to return to the baseline. As far as the Dutch policy in relation to temporary nature is concerned, the expectation is that in most cases the industrial estate will actually be constructed eventually. The protected species that might have settled on the lands in the meantime will therefore ultimately have to be removed. However, in the context of the SHAs under the ESA, some authors hold that SHAs might only be able to create lasting effects whenever the landowners refrain from implementing their right to return to the baseline conditions.[180] In the SHAs in the United States referred to above, apparently none of the enrolled landowners had exercised their right to remove the species.[181] Obviously, such a scenario might also unfold in the context of temporary nature. Also in this respect, it cannot be excluded that some of the enrolled industrial estates will not be constructed because of lack of available funds or the persisting economic downturn. Be this as it may, the Dutch policy seems to rely less strongly on such scenarios. It seems to assume that such scenarios would be exceptional and that, in most instances, nature will eventually have to give way to project development.

In order to avoid negative net effects on protected species, the 1999 Policy Document for SHAs included some additional safeguards, which might also prevent the ecological trap scenario mentioned above. More in particular, it states that 'if the Services can reasonably anticipate that a proposed Agreement would only redistribute the existing population of a listed species or attract a species from a habitat that has provided long-term protection to a habitat without such protection, the Services would not enter into an Agreement'.[182] In addition, in the situation where a species is so depleted or its habitat so degraded that considerable improvement of baseline conditions is necessary to result in a net conservation benefit, a SHA might not be appropriate according to the FWS.[183] Thus, the FWS, at least in theory, seems to

176 SHA Policy Document, supra note 114, p. 724.
177 See for more extensive information: J. Battin, 'When Good Animals Love Bad Habitats: Traps and the Conservation of Animal Populations', 2004 *Conservation Biology* 16, no. 6, pp. 1482-1491.
178 See also <http://en.wikipedia.org/wiki/Ecological_trap> (accessed 30 November 2014).
179 Vriens et al., supra note 146.
180 Kishida, supra note 24.
181 Ibid.
182 SHA Policy Document, supra note 114, p. 722.
183 Ibid.

underline that SHAs might not be the appropriate solution in all possible situations. By reserving the right to focus on the SHAs that are capable of providing the greatest possible net benefits for endangered species, the FWS makes it abundantly clear that in some cases, potential negative effects might be reason not to enter into a SHA. The Dutch Policy Document lacks such a statement (or any element thereof). This is regrettable since, in the framework of temporary nature, the participating landowners are not required to carry out active nature management measures. They merely have to let nature take its (natural) course. However, the Dutch Policy Document does explicitly underline the specific focus of temporary nature on so-called pioneer species.[184] This clear focus also has an ecological underpinning since, in the end, such species would also disappear due to natural succession on the covered lands. Hence the mere fact that the nature will be removed after some years is not likely to create significant adverse effects on the pioneer species since this species would also be replaced if no construction were envisaged on the terrain.

At the same time it must also be assured that SHAs are not abused as mitigation for negative impairment of biodiversity. SHAs should not be applied as mitigation for future project developments. This might occur when SHAs are used when landowners have an immediate intention to develop their properties. As stated above, the first SHAs in the United States were agreed in the context of traditional HCPs. In other words, some landowners that had the intention to immediately carry out a damaging activity were also provided additional guarantees for protected species that might settle on their lands in the near future. Some observers noted that the FWS, by agreeing with such a scenario, generated the risk of SHAs being increasingly perceived by landowners as part of a mitigation programme.[185] In theory, there is no reason to object to a landowner's proposal not only to mitigate for the immediate impairments to the environment but also to provide for additional conservation efforts thereafter.[186] However, in reality, such approach might indeed have a negative impact on the public perception of SHAs since the difference between mitigation measures and additional voluntary post-intervention nature conservation efforts might not be clear. In some cases 'double dipping' might take place. Accordingly, it might be feared that landowners will point to the SHA as an argument to keep the scope of the mitigation measures as limited as possible. Whilst the competent authorities might be tempted to agree with the landowner's demands, in order to avoid additional conflict and upheaval, the endangered species might be worse off in the long run. As a consequence, it is recommendable to limit the use of SHAs to scenarios where no immediate 'removal' of protected species is involved.[187]

Likewise, it also needs to be safeguarded that the measures provided under the SHA go beyond what is legally required. If a SHA might simply commit landowners to carrying out activities that they are already obliged to take under the existing nature conservation laws, much of its added value would be lost. In the context of the EU nature directives, temporary nature could, in theory, also be used as a proactive management measure in the context of existing Natura 2000 sites.[188] To avoid such 'double dipping' scenarios, both the current Dutch and the (future) Flemish policy exclude the use of temporary nature in the context of existing green areas (such as woodlands) in the zoning plan. Although the use of this concept in the context of Natura 2000 sites is not precluded, none of the policy documents proclaimed the intention to let these actions contribute to the attainment of the good conservation status for the EU's protected species. Or, to put it differently, the good conservation status will have to be achieved by permanent conservation efforts. The conservation actions under the framework of temporary nature merely serve as additional efforts, on top of the actions required under EU law. This prevents that widespread application of temporary nature would, in the end, lead to a net loss for nature.

Lastly, it should be highlighted here that, since SHAs aim at creating additional enthusiasm among landowners for efforts they are not legally required to take, they should not make the related administrative burden overly complicated. Accordingly, some authors point out that the competent authorities should be cautious with imposing too many monitoring and reporting requirements on the participating

184 Reker & Braakhekke, supra note 144, p. 8.
185 Bean, supra note 166.
186 Ibid.
187 Ibid.
188 Ibid.

landowners.[189] In the Netherlands, the idea has even been launched to issue generic derogations for temporary nature projects, thereby even further reducing the administrative burden for participating landowners.[190] Yet, whilst a complex permit system will obviously deter landowners from opting for voluntary conservation efforts, it might still be appropriate to at least provide for some basic regulatory rules in this regard. Given the relatively 'young age' of SHAs and the lack of reliable data regarding the long-term effects of SHAs, sound monitoring seems a defendable option for the first generation of SHAs. Moreover, as concluded in earlier research, general exemptions for temporary nature will, in any event, be at odds with the strict requirements of the EU nature directives, which insist on an individual assessment of the possible adverse effects of a harmful activity on protected species.[191] Obviously, this should not be interpreted as a plea for regulatory creep, but as a reference to the relevance of some basic safeguards as regards SHAs.

5. Outlook

Current nature conservation laws, which are still mainly based on a traditional 'command and control approach', are falling short in delivering the much-anticipated rebound for many of the imperilled species, on both sides of the Atlantic. Whilst the prohibitive nature of the statutory framework for species protection, if tightly observed, might be crucial in the halting of the downward spiral for some protected species, it seems inapt to bring many species back to a healthy conservation status. The reasons that recovery targets are not being reached are diverse and manifold, ranging from poor enforcement to lack of additional funding. The above analysis has shown that one of the main causes is linked to the inability of conservation law to convince private landowners to participate in the attempts to recover the most endangered and threatened species. Whilst it would be wrong to conclude that conservation law has gone astray by focusing on implementing the preventative approach, it has been revealed that, in some instances, the vigour of the rules might lead to undesirable outcomes.

The shocking state of our Planet's biodiversity does not allow us to disregard active cooperation of private landowners in the attempts for recovery. It is therefore rather ironic to note that both in the United States and the EU, private landowners and property developers are increasingly eager to opt for defensive management strategies on their lands, preemptively removing potential habitats. In the absence of protected species, such actions do not always violate the letter of the law. Still, they painfully emphasise the perverse incentives which might be fostered by current nature conservation laws. In the past two decades, some new incentive mechanisms have been developed in order to bring private landowners back to the negotiation table. This paper zoomed in on one of the most remarkable examples of these novel incentive mechanisms, being SHAs, and addressed it from a comparative point of view. Having been developed under the wings of the ESA, SHAs seem capable of overcoming the perverse incentives created by the traditional 'command and control approach'. SHAs have gained popularity in the United States, and a similar policy tool has been developed in the Netherlands and (recently) Belgium (Flemish Region), in particular targeting nature development on temporarily vacant industrial lands. In recent years, ecological studies have revealed that SHAs might indeed yield important net benefits for some endangered and threatened species, underlining its potential for species recovery.

Although the relatively recent date of most SHAs in the United States makes it difficult to draw definitive conclusions regarding their long-term effects for protected species, the increasing application of such tools holds the promise of a more collaborative approach to nature conservation, expanding its scope beyond the ambit of protected areas and 'classical' nature reserves. The same can be said about the temporary nature policy approach which, to a certain extent, is based on the same premises as SHAs. Surely, SHAs are but one of the many incentive-based approaches which might help promote restoration efforts on private lands. In addition, whether they will stand the test of time has yet to be seen. Yet, in comparison with more market-based tools, such as conservation banking, they do not depend on harmful spatial developments in order to be applied. Moreover, in itself the approach does not warrant a

189 Ibid.
190 Schoukens, supra note 22, p. 111.
191 Ibid.

relaxation of current nature conservation laws since, under certain conditions, it can be aligned with the derogation clauses present in both the ESA and EU nature conservation law. SHAs, if implemented in a sensible and reasonable way, might provide additional survival and recovery opportunities for pioneer species such as the natterjack toad, without leading to new deadlock scenarios. Of course, this would require the competent authorities to ensure that SHAs are not abused as a means to reduce mitigation obligations for immediate economic developments.

In conclusion, SHAs and temporary nature should not be welcomed as the ultimate saviours of our Planet's natural assets. Nor should they be used as justification for weakening the existing regulatory framework. One should indeed avoid such innovative regulatory instruments from becoming the proverbial red herring – the distraction that draws attention away from the real solution. Still, they might offer some additional opportunities for averting the extinction of our most endangered species. In times of mass extinction, every single opportunity to restore the habitats of endangered species needs to be seized with both hands. ¶