

Law & Tax





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Whitepaper Exploring solutions for the Dutch nitrogen impasse



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The rulings of the Administrative Law Division of the Council of State (ABRvS)¹ of 18 December have rekindled the debate on nitrogen deposition onto Natura 2000 areas. In the wake of the ruling in the *Greenpeace* case shortly afterwards², the Schoof-government decided to establish a Ministerial Committee on Economy and Nature Restoration. However, following the presentation of the governmental budget update on 18 April 2025, it appears that only an initial package of measures will be implemented at national level for now. It is expected that significant (additional) budgets will have to be found at a national level to tackle the current impasse around nitrogen deposition. As such, no further guidance or resolutions are to be expected on this topic from the central government for the time being.

To prevent the Netherlands from becoming increasingly locked up in the meantime, this whitepaper aims to provide several ecological, technical and legal solutions to steer towards a comprehensive approach to the nitrogen deposition challenges in the Netherlands in the short term. In our view, the provinces have a big role to play here. It is, in our view, not necessary to wait for further guidance from The Hague; the provinces themselves can already start taking concrete actions in the short term towards a solution. In this whitepaper, we have therefore deliberately chosen to emphasise ways in which more projects can be implemented in the short term while taking nature (preservation) interest into account, and without the need for legislative changes.

The aim of this whitepaper is to guide the discussion on nitrogen towards concrete and practical solutions, and towards taking at least the first step in the direction of a long-term solution. We will therefore refrain from reflecting on any legal shortcuts that might still be feasible at this point, nor will we provide an in-depth analysis of how the 18 December rulings relate to EU law. This is not an urgent action letter, like so many others that were sent by various industries that have been plunged into uncertainty as a result of the ABRvS's recent rulings, but a positive and optimistic document in which we examine how – within the confines of the existing legal framework – it may be possible to (partially) unlock the country in the short term.

¹ ABRvS 18 December 2024, ECLI:NL:RVS:2024:4923 (Rendac) and ABRvS 18 December 2024, ECLI:NL:RVS:2024:4909 (Amercentrale).

² The Hague District Court, 22 January 2025, ECLI:NL:RBDHA:2025:57 (Greenpeace).

A brief summary of the nitrogen deposition impasse

Nitrogen is everywhere. Most of the air we breathe consists of nitrogen. In the context of protecting Natura 2000 areas, nitrogen is relevant because it can affect the development of the Natura 2000 areas. In and by itself, nitrogen found in the air (N_2) does not directly pose a problem for Natura 2000 areas. However, when nitrogen is deposited on a Natura 2000 area it may have an ecological impact. Nitrogen oxides (NO_x) , mostly generated during combustion processes, and ammonia (NH_3) , mostly produced in agriculture, spread through the air and eventually settle on the to the soil (also known as nitrogen deposition). Nitrogen deposition affects the soil quality: excess nitrogen levels cause changes to vegetation and causes acidification of the soil. It therefore has an effect on which plants flourish in a particular area. Nutrient-poor ecosystems are particularly sensitive to the effects of nitrogen deposition.

To determine how much nitrogen deposition a Natura 2000 area can tolerate, a maximum amount of nitrogen deposition has been determined for each protected habitat type (in mol per hectare per year, or: the number of particles (molecules/atoms) per hectare per year).³ This 'critical deposition value' (or **CDV**) is the amount of nitrogen deposition, expressed in mol per hectare per year, above which there is a risk that a specific habitat may be affected by nitrogen deposition.

Other key ecological factors

Apart from nitrogen deposition, there are several other key ecological factors that are very important for determining the health and stability of an ecosystem. These are set out in profile documents. For each habitat type, a profile document is available describingkey factors, other than nitrogen deposition, that determine the quality of that habitat type. This includes water quality, nature management, natural processes such as vaporisation, inundation, land degradation, recreation, climate factors, and invasive exotic species.

Conducting ecological surveys of habitat types (and habitats) in Natura 2000 areas can provide an up-to-date picture of the condition of such area. This may also help determine whether a Natura 2000 area still has capacity' to permit new or modified activities in its vicinity. If an area actually scores very well on several key ecological factors, the effect of nitrogen deposition above the CDV may be very limited in practice. In other words, nitrogen deposition is not the only relevant variable that decides whether a habitat type in a Natura 2000 area is in a good or poor condition.

Possible solutions to the nitrogen deposition impasse

In our view, it is quite possible to create a much more comprehensive picture of the current condition of the habitat types of Natura 2000 sites in the Netherlands in the short term, and in doing so clarify whether, and if so, where, 'capacity' exists.

We also believe it relevant to provide more clarity in the short term as to what measures are already being taken by the government to reduce nitrogen deposition. In this regard it is not only essential that information on the measures already taken and yet to be taken is easily accessible, but also that the impact and (anticipated) effects of these measures are published in an easily accessible manner.

Through a combination of better knowledge of the current condition of protected habitat types and of the policies pursued in respect of them, it will be easier for market parties wanting to conduct nitrogen emitting activities to (i) estimate where in the Netherlands there may still be sufficient 'capacity' for new initiatives; (ii) assess the impact of a proposed new or to be modified project onto nearby Natura 2000 areas, and (iii) justify, given the additionality requirement and given the government's current policy, that any nitrogen deposition allowances would only need to be partially skimmed off, or not skimmed off at all when making use of internal or external netting off of nitrogen deposition.

³ Because of the difference in molecular weight between ammonia and nitrogen oxides, it is not possible to express nitrogen deposition in kilograms properly. For example, a kilo of ammonia contains much more nitrogen than a kilo of nitrogen dioxide. Therefore, calculations are made in mols to arrive at a properly measurable amount of nitrogen deposition.

Once the available data on the condition of habitat types in Natura 2000 areas is improved, and information about the areas and current policies is more easily accessible, the situation may present itself where it is ecologically justifiable that an activity that makes a small contribution to the overall nitrogen deposition will not significantly negatively impact nearby Natura 2000 areas. In these cases, however, a certain 'blind spot' may arise: such activities with justifiable minor nitrogen deposition contributions will have been assessed by the initiator of the project, but are only 'picked up' in data reporting when the (limited) deposition such project casuses is included in background deposition measurements. To avoid such blind spots', we believe it advisable to consider the introduction of an information requirement for activities in respect of which it is concluded, on the basis of a pre-evaluation (*voortoets*) or appropriate assessment (*passende beoordeling*), that those activities will not have a significant negative impact on nearby Natura 2000 areas and thus are not subject to a permit requirement.

We will elaborate on the aforementioned elements of our proposed solution to the current impasse surrounding nitrogen deposition below.

Element 1: improve available data on the current condition of Natura 2000 areas

Conducting additional ecological research regarding the current condition of the habitat types in Natura 2000 areas is, in our view, a first and very essential step towards a solution to the nitrogen deposition impasse.

A detailed study on available information on how the current condition of each habitat type within a Natura 2000 area relates to the conservation targets set for that area, combined with reflections on current exceeding of the CDV, current nature management activities and restoration measures, and the condition of the other key factors in that Natura 2000 area, can provide much clarity in that context. Such study need not require much more effort than the type of study already carried out as part of a proposed new activity (regardless of

whether this would be a pre-evaluation or an appropriate assessment). Also, for many habitat types and Natura 2000 areas such study can be carried out as a desk study, on the basis of available data.

The goal of these studies is to establish the actual and current condition of a Natura 2000 area. Such studies therefore cannot be carried out at meta-level, but must zoom in on specific areas, the habitat types found in those areas and the area-specific constraints.

Meanwhile, the provinces have carried out studies on most of the Natura 2000 areas in the Netherlands. These so-called 'natuurdoelanalyses' were reviewed by the Ecological Authority and an opinion was issued on each area-specific report. These reports are a good starting point for the additional ecological studies that are to be carried out. However, there are also some pressing gaps in these reports that would need to be resolved. Where nitrogen deposition has been identified in these reports as posing an obstacle for some habitat types, the relationship with other key factors - which also determine the quality of habitat types in a Natura 2000 site - has mostly not been detailed. Furthermore, many of the currently available reports do not reflect on the relationship between the quality of a habitat type and the current, local, background deposition. Within a Natura 2000 area, habitat quality can vary from good to moderate or poor, and a habitat type can be overburdened in some places, while not at all in other places within the same Natura 2000 area. In our view, additional research is therefore required to clarify for all Natura 2000 areas how the current condition of the habitat types relates not only to current background deposition, but to nature management, measures already implemented, and other key ecological factors as well. When taking this broader approach, it could then be indicated what the potential impact of any additional nitrogen deposition on the relevant Natura 2000 areas may be. Of further relevance in this regard is to also take into account studies into the sensitivity of specific habitat types.

In our view, these area-level studies should be updated with (greater) regularity, and should be available on an open-source basis to all specialists that work with these topics.

Open source access and regular updates ensure that the most up-to-date knowledge on Natura 2000 areas is available to ecologists and technical advisers at all times when assessing whether a new or modified activity is potentially permissible (with or without a permit).

Element 2: improve accessibility of policy and its effects

Put succinctly, the additionality requirement entails that netting against own deposition or another party's deposition can only be applied if this mitigating or protective measure⁴ is not already required (in full) as a positive conservation measure⁵ or as a preventive measure⁶. For anyone initiating a project to substantiate this, it is essential to have a clear overview of policies that are already being pursued at provincial and national level to improve a specific Natura 2000 site, and what the (expected) effects of those policies are.

As an initiation of a project, it is very difficult to substantiate how a (limited) addition of nitrogen deposition to the deposition already occurring onto a Natura 2000 area will not have a significant effect, if it is not clear which policies are already in place, how such policies lead to a downward trend in total nitrogen deposition; and how those policies also ensure a positive trend regarding the conservation objectives of the area in question.

This calls for setting up a well-organised database in one central location (per province or for all provinces collectively) in which the current policies (and relevant policy documents) regarding the management of Natura 2000 areas and the reduction of nitrogen deposition can be consulted, and in which the provinces and the national government make studies into the effects of those policies available.

Again, the effects of the policies should be regularly monitored and reports on must be regularly updated, to ensure that ecological and technical advisers can make an assessment of the potential impact of a new or amended initiative based on current data.

As part of the policy, we suggest that provinces do not need to apply the same standards to all Natura 2000 areas within their province. Precisely because Natura 2000 areas differ from each other, by their very nature and due to the protected habitats located within them, it stands to reason to tailor provincial policy to the area level. To make this a little less abstract: it may be provincial policy to use a skimming (*afroming*) percentage for external netting, but that percentage does not need to be the same for each Natura 2000 area. For example, an area with fewer nitrogen-sensitive habitats or with a more limited exceedance of the CDV might require less skimming off than an area that is more nitrogen-sensitive or where the CDV is exceeded to a greater extent (all of this, of course, also dependson the other key ecological factors and the overall condition of the Natura 2000 area).

We specifically point out that an area can be in good ecological condition either naturally or through the implementation of targeted restoration measures. In both cases, it can be argued on good legal grounds that a project that adds (limited) nitrogen deposition to an area that already receives nitrogen deposition in amounts exceeding the CDV for the designated protected habitats will still not experience a significant (negative) effects as a result of that project. Although from an ecological perspective it may be preferable for a Natura 2000 area to be in good ecological condition without interventions such as positive conservation measures, in our view that is not the legal standard that must be met. For the interim period, it is legally sufficient if the ecological condition of an area is good due to the measures taken.

⁴ Within the meaning of Article 6(3) of the Habitats Directive.

⁵ Referred to in Article 6(1) of the Habitats Directive.

⁶ Within the meaning of Article 6(2) of the Habitats Directive.

Element 3: imposing an obligation to provide information in provincial environmental regulations

The two elements mentioned above refer to improving the level of detail of available data and its accessibility. We expect that many projects that only contribute modestly to overall nitrogen deposition could be carried out without an environmental permit for a Natura 2000 activity on sound ecological, technical and legal grounds if the quality, currency and availability of this data improves. It would then be much easier to assess the effects of, for example, a temporary and limited increase in nitrogen deposition during a construction phase. Such (temporary) projects generally also contribute only a limited or very limited amount to background deposition, compared to other (structural) emission sources.

When assessing applications for environmental permits for Natura 2000 activities involving nitrogen deposition, the competent authority will usually also have to determine whether the project is likely to have a significant impact in combination with other projects. If the permit is granted, the conclusion will be that there are no significant cumulative effects. To prevent a large number of small projects that individually have no significant effect (and therefore do not require a permit) from collectively leading to a cumulative, significant effect, we propose introducing an information obligation in the provincial environmental regulations for projects that, based on a preliminary assessment or an appropriate assessment, do not require an environmental permit for a Natura 2000 activity. Not only will this enable provinces to closely monitor things, but it will also allow them to (i) monitor cumulative effects of permit-exempt activities (and thus close any 'blind spots' in the available knowledge), and (ii) improve the collectively available information on the ecological condition of Natura 2000 areas by making all the different appropriate assessments and pre-evaluations publicly available (anonymised) (pro-active disclosure within the meaning of the Open Government Act).

Element 4: ADC test

One option that currently seems to be little used in the Netherlands is the granting of permits for projects based on the *ADC test*.⁷ In our view, it is possible to use this option to still make certain projects possible that have a major and compelling overriding public interest (housing, energy supply, economy).

When the ADC test is applied, it may be worthwhile considering "overcompensation" to speed up the intended improvement of Natura 2000 sites.

In our view, the costs of such overcompensation should not be for the expense of the initiator, but could be financed with public means. This ensures that in cases where the (rather onerous) ADC procedure can successfully be applied, it is used as effectively as possible.

We immediately note that it will not be possible in all cases to implement generic (over) compensatory measures, but that in many cases this could still have a positive effect from which other projects and plans could also benefit. To bring this from the abstract to a more concrete reality: for some types of nitrogen-sensitive habitats, it may be possible to create ecological buffer zones that intercept nitrogen deposition before it can settle in the Natura 2000 area. This works particularly well, for example, in the case of creating a green buffer zone around nitrogen-sensitive forest areas. Such buffer zones may be created outside the Natura 2000 area, but can still produce positive effects within such area. These measures do not always clearly show up in 'numerical terms', due to the modelling limitations of the AERIUS model. In those cases, a sound ecological substantiation of the (over) compensation measures to be taken and their effects is very important.

⁷ Article 6(4) of the Habitats Directive, as implemented in Article 16.53c of the Environment Act and Articles 8.74b(2) and 10.24(2) of the Quality of the Living Environment Decree.

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