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SPECIES PROTECTION
Report: the Netherlands

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I. General background

All aspects of environmental law in the Netherlands are nowadays related to the enormous legislative project that the Dutch government is working on and will fundamentally change the structure of Dutch environmental law. This is also true for nature protection and conservation law. The legislative project concerns the introduction of the Environment and Planning Act (hereafter EPA). The EPA has already been adopted (Official Government Gazette 2016, 156) and has recently been translated in English (here), but has not yet entered into force. The legislator and government is still working on all the necessary implementing legislation and delegated and implementing acts that need to be adopted before the EPA can enter into force, which is anticipated in 2019. One of the main reasons for the fundamental change in the structure of environmental law is the idea that current and future challenges concerning the use and protection of the environment cannot be tackled effectively using the current legal instruments, which are scattered all over a large range of statutory regulations. At the national level there are approximately 4700 provisions spread over 35 Acts, 120 governmental decrees (Orders in Council), and 120 ministerial decrees. The transition towards a sustainable society requires a structural change since current legislation and instruments do not focus sufficiently on sustainable development (Parliamentary Papers II, 33962, No. 3, p. 6). Another important aspect of this legislative action is the desire to restructure all regulations concerning the (physical living) environment in one act. The EPA will replace at least fifteen existing legislative acts concerned with environmental law, including the General Act on Environmental Permitting, the Water Act, the Spatial Planning Act and the Crisis and Recovery Act, and incorporate the area-based components of eight other acts, such as the Environmental Management Act (Parliamentary Papers II, 33962, No. 186). The key objective of the proposed legislation is protection and exploitation of the environment with a view to sustainable development.

The Dutch legislator's desire to provide for an integral or integrated act for environmental law is also relevant for nature conservation law (for both area and species protection). On 15 December 2015 a new Nature Conservation Act (NCA, *Wet Natuurbescherming*) was adopted by Parliament; it replaces the two acts that were the key legislative acts to implement both the Habitats and the Birds Directive in the Netherlands: the Nature Conservation Act 1998 (NCA 1998, *Natuurbeschermingswet 1998*) which was predominantly relevant for area protection (Natura2000), and the Flora and Fauna Act (FFA, *Flora- en faunawet*) that was primarily concerned with species protection. The NCA also incorporates the Forest Act

(FA, *Boswet*). The new NCA entered into force on 1 January 2017. The legislator has already announced – and is working hard to realise – that the NCA will be revoked in the future and will be merged with/replaced by (an amendment of) the proposed Environment and Planning Act (EPA) at the exact moment the new EPA will enter into force. As a consequence many of the substantive norms now laid down in the NCA will be stipulated in a delegated act based on the EPA after 2019.

The new Nature Conservation Act (NCA) regulates both species protection and area protection. It also regulates the trade and possession of plants and animals and the hunting of animals. Provisions regulating fishing (at sea and in coastal areas) can be found in a specific act: the Fisheries Act 1963 (*Visserijwet 1963*). Furthermore there is a specific act concerned with animal husbandry: the Animals Act (*Wet Dieren*). Under the new NCA the following species are designated as protected: a) all species of birds occurring naturally in the territory of the European Union; b) all types of Habitats Directive Annex IV (a), Bern Convention Annex II and Bonn Convention Annex I; c) all native mammalian species in the Netherlands (except the black rat, the brown rat and the house mouse); d) all native amphibians and reptile species in the Netherlands and a number of other native species. The main objectives of the NCA are the standardisation and simplification of the legal framework used in nature conservation law. The NCA 1998, FFA and FA were introduced to achieve national objectives but had to be extended and amended as a result of the expansion of environmental legislation emerging from the European Union and international conventions. Therefore, the new NCA is designed to effectively implement EU directives and regulations in the Dutch legal order and the goal is to not go beyond what is expected by EU regulations (no gold plating). By adding – in many places in the NCA – a more direct link to the relevant articles and Annexes of the Habitats and Birds directives the legislator aims to put a stop to all discussions about proper implementation of those Directives.

Another relevant objective of the new NCA is a further decentralisation of powers and responsibilities in the field of nature conservation of rural areas, in particular to the level of the (12 Dutch) provinces. At the central level the Government remains responsible for providing the framework and setting goals but the provinces are responsible for completing and implementing the policy(goals). This decentralisation is in line with the management agreements 2011-2015 between the Netherlands, the provinces, the municipalities and the water boards. Decentralisation concerns first the (provincial) responsibility for the realisation (in 2021) of the Netherlands Nature Network, which is (a new name for) the Dutch equivalent to the European Natura2000 network, and second the competence to grant generic and/or individual exemptions from the prohibitions that relate to both area protection and species protection; the competence to grant exemptions in the regime for species protection is transferred from the secretary of state of Economic Affairs, who was the competent public authority under article 75 of the FFA until 1 January 2017, to the executive boards of the provinces. The provinces therefore are the primary government tier responsible for species (and area) protection in the Netherlands.

II. Introductory question

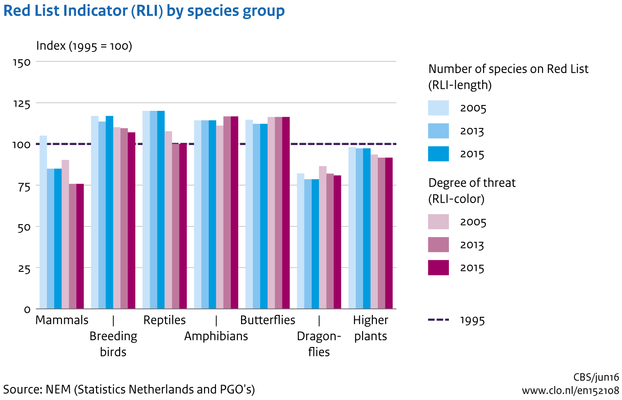
What are the main risks for protected species? Legal scholars and the government are to a large extent focused on project development (infrastructure and housing). It could be identified as one of the (national) risks for biodiversity in the Netherlands. Research has shown that the risk is also influenced by the lack of knowledge of ecology and environmental law at the level of competent authority for approval of these developments. The general act on environmental licencing (Wabo, *Wet algemene bepalingen omgevingsrecht*) has put more responsibility for the safeguarding of the protected species on the municipalities. Since research has shown that knowledge, for example, about both the presence of species in the plan area and the likelihood of a harmful effect on protected species of an activity, is only present in about half of the municipalities, there is reason for concern. A recent report therefore states that there is a need to invest in developing,[1] exchanging and properly applying available knowledge on passive and active species protection on municipal, but also on a provincial and a European level.

Another important challenge in the Netherlands as far as nature conservation is concerned is the sustainability of agricultural areas. A recent report on the challenges of sustainable development ('*Opgaven voor Duurzame Ontwikkeling*', July 2016) from the Council for the Environment and Infrastructure (*Raad voor de Leefomgeving en de Infrastructuur*, http://en.rli.nl/) describes the need for sustainability for all types of agricultural companies and states that further separation between nature and intensive agricultural activities could provide room for increase in production. The Council recommends placing nature in the middle of society and connecting it with other social tasks, such as health care, food supply and economic functions. To ensure that ecosystems and landscapes can develop in the right direction, nature areas need to be enlarged, improved, and better connected. Agrarian nature management offers those possibilities for a better connection between nature and agriculture.

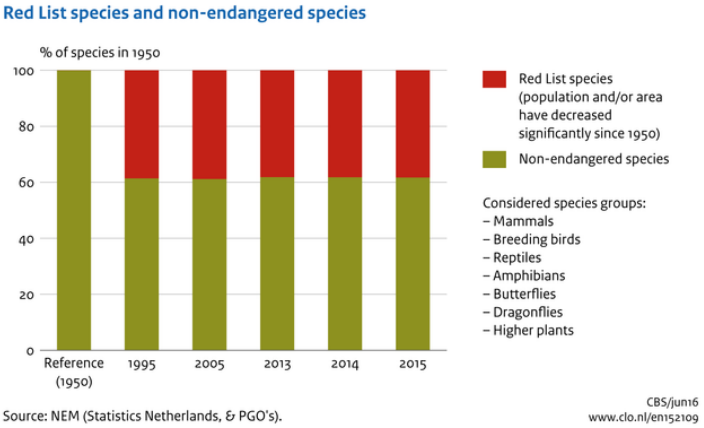
When one is looking for information on species protection and the (trends in) conservation status of different species, relevant information is disclosed and available on the website of the Environmental Data Compendium (*Compendium voor de leefomgeving*, www.clo.nl). The Environmental Data Compendium is basically a website with facts and figures about the environment, nature and space in the Netherlands. It discloses the combined information from the Netherlands Environmental Assessment Agency (*Planbureau voor de Leefomgeving*), the Statistics Netherlands (*Centraal Bureau voor de Statistiek*) and the Wageningen University and Research Centre.

[1] A.S. Adams, C.W. Backes & A. Drahmann, *Een betere implementatie van de VHR in Nederland. Bevindingen van experts*, The Hague: 2017.

As an example we could take a look at this figure from the website of the Environmental Data Compendium on endangered species in the Netherlands. It shows the so-called Red List Indicator by species group; it concerns both the number of species on the Red List and the degree of threat in 2005, 2013 and 2015.



Source: NEM (Statistics Netherlands and PGO's)



Source: NEM (Statistics Netherlands, & PGO's).

Another example is the figure on the left. Between 1950 and 1995, populations of many species decreased, but the years after 1995 showed some improvement. Since 1995, the number of endangered species of mammals, dragonflies and vascular plants has been reduced, and since 2005 a slight reduction in levels of threat can be reported for breeding birds and reptiles. Other species groups show very little or no signs of recovery. In short the Dutch policy aims at making the Red Lists of Endangered Species shorter and 'less red'. After 2005, the number of species on the Red Lists has declined slightly, as well as the extent to which they are threatened. In recent years however, the decline does not seem to continue.

Of course there is also information on specific species. The numbers of farmland birds, which are characteristic of agricultural areas, are in decline in the Netherlands. Since 1990 the indicator has fallen by about 30%. A historical reconstruction of populations of farmland birds shows that the decline since 1960 is even more than half. The decline has recently diminished, but has not yet been reversed to a recovery, despite the use of agrarian nature management. 20 of the 27 species of farmland birds monitored have declined in number, 5 have increased and 2 remained the same. Some of the species that have declined in number, such as the corn bunting and the ruff, were also rare in 1990. But many more common species like black-tailed godwit, northern lapwing and oystercatcher have lost a lot of terrain. European stonechat and goldfinch are the species that have grown most. Instead of large numbers and a large variety of farmland birds, large groups of geese today represent the bird's image in the agricultural area. The numbers of geese in the winter have increased sharply over the past few decades, and a large breeding population has evolved.

Principles of species protection

The new NCA aims to a) protect and develop nature, partly because of the intrinsic value, and the preservation and restoration of biological diversity, b) effectively manage, use and develop nature for the fulfilment of social functions, and c) ensure a coherent policy aimed at the conservation and management of valuable landscapes, due to their contribution to biodiversity and their cultural historical significance, also for the fulfilment of social functions (Art. 1.10). For species conservation, the regulations aim at achieving or restoring a favourable state of conservation of these species. The act allows for a programmatic approach to that effect.

Are there any specific principles formulated in Dutch law, in court decisions or in the academic debate? Since the legal debate is mostly focused on the (strict) application and implementation of the EU Directives, I'm not aware of any specific principles. The species-by-species approach is associated with the preservationist perspective, which tends to single out individual species for protection. It has been criticized for offering too narrow a model of natural resource management. Using another, more ecosystem approach however seems contrary to relevant nature conservation treaties and the European Directives. The fact that a protected species is in a very favourable state of conservation can however play a part in the assessment of whether an exemption may be granted. A condition for granting exemptions, for example, is not to jeopardize achieving and maintaining the favourable state of conservation of the species.

III. Habitats Directive (92/43/EEC)

Surveillance of conservation status – (art 11, art. 14 HD)

There has been some discussion in the past (under the legislation in force before 1 January 2017) as to whether article 11 Habitat Directive had been properly implemented in the Netherlands. Questions by the House of Representatives have been answered by explaining that the actual surveillance and monitoring by the government is sufficient and that the Netherlands therefore is obeying the obligation laid down in the provision. Although the actual surveillance by the Network on Ecological Monitoring (see www.netwerkecologischemonitoring.nl; an important network of several agencies and private organisations) seems sufficient, the obligation of article 11 Habitat Directive itself was not explicitly stipulated in legislation. However, with the introduction of the new NCA article 11 Habitat Directive is implemented in article 1.9 in the sense that the Minister for Economic Affairs is responsible for the monitoring referred to in this provision of the directive. Implementation of elements article 14 of the Directive is scattered over the NCA but can be recognised clearly in article 2.4, 2.5 and 2.6 of the new NCA.

Conservations of species and birds (art. 12 - 16 HD and art. 5 - 9 BD).

Duty of care

A provision that is indirectly relevant here is article 1.11 NCA. It provides a general obligation for anyone to take adequate care of Natura 2000 areas, special national nature reserves,

and wildlife and plants and their direct living environment. This is the so-called general duty of care for all people; it is not new since the legislator also used these kinds of provisions in the former legislation. This duty of care in the NCA is relevant for area and species protection. It also concerns not only animals and plants of species for which the Birds Directive and the Habitats Directive require specific protection measures, but all wildlife and plants. The duty of care is formulated as an open standard in the first paragraph of Article 1.11. In the second paragraph, the duty of care is somewhat clarified by stipulating that the duty of care implies in any case that anyone who knows or reasonably suspects that his actions or omissions may cause adverse effects on wildlife and plants will omit such acts or, if the act cannot reasonably be avoided, take the necessary measures to prevent these consequences, or insofar as these consequences cannot be prevented, minimize or undo them.
In practice the effects of this provision will be limited. The duty of care serves as a safety net for the protection of species for which there is no specific prohibition on the basis of the NCA. For species (protected under Chapter 3 of the Act) the explanatory memorandum states that it is – in principle – sufficient to meet the requirements of that specific protection regime. For the protection of animals and plants species for which no specific protection regime is stipulated in Chapter 3, the duty of care is self-relevant. Under the duty of care, in principle, malicious acts should be omitted or measures must be taken to prevent harmful effects (as much as possible).

Three regimes of species protection in NCA
The NCA distinguishes three protection regimes for species, implementing the Birds Directive, the Habitats Directive and also the Bern and Bonn Conventions. Also additional provisions are stipulated for species that are not covered but need protection. The protections regimes are stipulated in three separate sections of Chapter 3 NCA. Each section defines which prohibitions apply and under which conditions exemptions may be granted. All birds protected by the Birds Directive are protected in accordance with the provisions in section 3.1 NCA. All animals and plants listed in the annexes to the Habitats Directive and the Bern and Bonn treaties are protected by the provisions in section 3.2 NCA. Other species, listed in the annex to the NCA and which are not protected in section 3.2, are subject to the provisions stipulated in section 3.3 NCA.
The prohibitions and derogations listed in sections 3.1 and 3.2 have been directly taken (copied) from the aforementioned directives and treaties. These provisions therefore apply only to the species for which they were written and are immediately derived from these directives and treaties. This way of regulating species protection allows for a better and strict implementation of European legislation. The same is true for the prohibition and derogation provisions of the Birds and Habitats directives in the NCA.

Derogations (16 HD and 9 BD)
The NCA provides ample opportunities for granting generic exemptions, also for birds and strictly protected species. These exemptions should always be granted in general binding rules at the provincial level. When the province introduces a generic exemption the same conditions must be met as when the province grants individual exemptions. It is believed that for strictly protected species and birds an individual exemption (case-by-case review) is

more aligned with the mandatory frameworks of the Bird and Habitats Directive than generic exemptions in advance.

An exemption on the basis of article 3.1 NCA (for protected birds) can only be granted if (I) there is no other satisfactory solution available; (II) there is no deterioration in the state of conservation of the species (the so-called ORNIS criterion or 1% criterion is mostly used. Nowadays also for bats); and (III) one of the specifically stipulated grounds for granting an exemption is applicable. Killing agents may be used which are legally stated as authorized means. This follows from Article 9(2) Birds Directive in conjunction with the prohibition on the use of non-selective catches as set out in Article 8 Birds Directive. Where derogation from a prohibition clause is allowed, the exemptions shall determine what type of derogation is granted, which means, installations or methods of capture or killing are allowed and what conditions are required to limit the risks.
The compulsory and restrictive grounds for granting an exemption for birds under de NCA (article 3.3(4) NCA are: (I) in the interests of public health and public security; (II) in the interests of air traffic safety; (III) to prevent major damage to crops, livestock, forests, fisheries and waters; (IV) for the protection of flora and fauna; (V) for research and education purposes, and the expulsion and reintroduction of species and for the cultivation associated with these purposes; and (VI) to allow the capture, keeping or any other wise use of certain birds in small quantities selectively and under strictly controlled conditions.

For the protected species under the Habitat Directive (Annex IV) the exemption is granted only if each of the following conditions is met: I) there is no satisfactory alternative solution; II) the exemption is needed for any of the grounds mentioned in article 16(1) HD, and III) the goal of maintaining the populations of the species in their natural habitat in a favourable state of conservation is not impaired.

Looking at the provisions for granting exemptions in the new NCA will prove the intentions of the Dutch legislator for strict transposition and no gold plating. The NCA does not go beyond the specific grounds described in article 16 HD and 9 BD.

Deliberate
One of the changes the new NCA brings to Dutch nature conservation legislation is the introduction of the ‘intentional/deliberate’ requirement in the NCA, although the *Flora and Faunawet* already prohibited the deliberate disturbing of protected native animals and the ‘intentional’ requirement does not apply for deterioration or destruction of breeding sites or resting places of protected species (in accordance with Article 12(1)(d) Habitats Directive). The new act prohibits intentional violations and is therefore a strict(er) implementation of the Birds and Habitats Directives. The addition of ‘intentional’ to the prohibition should lead to less actions being subject to a prohibition since less acts will be covered by the prohibition provision. However, the change might lead to more discussion about the question whether a violation was committed intentionally. How is the new requirement interpreted? Dutch law will consider so-called ‘conditional intent’ as ‘intentional’; when someone consciously accepts the significant chance that his behaviour leads to violation of the prohibi-

tion then, even if bad intention is lacking, the act is considered 'intentional'. For the interpretation of the 'intentional' requirement, the European Commission's Guidance Document on the Strong Protection of Animal Species and the case law of the ECJ are relevant. A well-known ruling is the Commission v Greece case (ECJ 30 January 2002, C-103/00): riding mopeds on the beach where turtles nest and a sign stipulates that riding your moped is prohibited is, according to the Court, intentionally disturbing protected species.
Often an act clearly indicates that there is intent. For example, deliberately disturbing (chasing) seagulls as part of an investigation into ways to prevent and limit the hindrance caused by seagulls. This Dutch case was discussed in the Administrative Judicial Division of Council of State in a judgment of 17 August 2016. However, in some cases it is less clear but Dutch courts seem to rule that the general level of knowledge is (about the presence of species and the way they could be disturbed) is of importance in determining whether there is an intention.

Article 14 and 15 HD
Generic or individual exemptions for either protected birds or species mentioned in annex IV of the HD shall include rules concerning a) the means, installations or methods of capture or killing, using only the resources, installations or methods designated by the relevant delegated act, b) the time and place for which the exemption applies, and c) the manner in which the risks for the conservation of wild birds is limited. In any case the means, installations or methods that are prohibited by the HD and the BD are prohibited explicitly in the new NCA.

Concerning species designated in annex V of the HD the NCA stipulates that a delegated act will give rules regarding the removal or exploitation of animals or plants, if necessary for maintaining or achieving a favourable state of conservation of those species. These rules may restrict or prohibit access to certain areas; restrict or prohibit the removal from the wild or the exploitation of animals or plants in a particular area; the manner of removal of animals or plants from nature; limiting the number of animals or plants that may at most be removed from nature; buying, selling, offering for sale, having it and transporting for sale of animals or plants; the breeding of animals in captivity or the artificial propagation of plant species. The rules may include a prohibition without permission to remove animals or plants from nature, or to extract animals or plants from nature in a certain period of time.

The NCA defines hunting as the taking, deliberate killing or for that same purpose the detection of wildlife and also the intent to do so. Legal hunting is basically limited to 5 species, namely the pheasant, wild duck, wood pigeon, rabbit and hare (art. 3.20(2) NCA). Hunting other species is not allowed. Hunting may only be exercised on a field intended or suitable for the hunt (art. 3.20 NCA) and *only* by way of the means mentioned in the relevant delegated act: rifles, hunting dogs, hawks, peregrine falcons and buzzards. If a gun is used, the hunter must have a hunting deed/license (art. 3.26(1) NCA). This hunting license is granted by the police chief police officer (art. 3.28(1) NCA). Without this deed it is forbidden to have a gun in the field.
Those who are entitled to hunt are the owner(s) of the land, the landlord and the one who obtained the hunting rights by means of a lease agreement (art. 3.23(1) NCA). However, the

hunt is only open between 15 October and 31 December with regard to the (male) pheasant and hare and between 15 October and 31 January with regard to the (female) pheasant, the wood pigeon, the rabbit and the wild duck (art. 3.5 of the Nature Conservation Regulation). During these time periods, you can only hunt after dawn and before sunset. Hunting must be distinguished from management and damage control. Exercise of the hunt takes place mainly from the point of view of utilization. However, it may also be deemed necessary to chase or kill animals in the event of these animals causing damage or if the management of the animal species requires this. The provisions for damage control and population management are laid down in section 3.4 NCA and those for the hunt in section 3.5 NCA.
Fauna management units (‘*Faunabeheereenheden’*) have the legal form of an association or a foundation and consist of hunters and others such as organisations that manage nature sites. Fauna management units establish one or more fauna management plans for their area of work (art. 3.12 NCA): all damage control, population management and hunting should be done in accordance with these fauna management plans. Wildlife management units function in accordance with these fauna management plan (art. 3.14(1) NCA); a wildlife management unit is a partnership of those with a hunting license and others in the form of an association that aims to promote hunting, fauna management and damage control, in cooperation with and at the service of land users or land managers. Provinces may set general binding rules to which active wildlife management units must comply. These rules, in any event, relate to the extent and boundaries of the area in which the wildlife management unit can work and the instances and conditions under which hunters may deviate from the fauna management plan.

Article 16 HD
See above

Article 22 HD
The NCA explicitly forbids the re-introduction of animals or eggs from animals (art. 3.34 NCA). This prohibition however does not apply to ‘fish’. Also a generic or individual exemption may be granted by the provincial authorities. Furthermore it is prohibited to plant or sow the exotic plants that are designated in the Nature Conservation Regulation. The minister may grant exemption from certain prohibitions for the re-introduction of species, or for the expulsion, planting or sowing of exotic species. The deliberate introduction of non-native species of plants is therefore not prohibited entirely.

IV. Birds Directive (2009/147/EC)
See above

V. Enforcement
The most important innovation the new Nature Conservation Act (NCA) introduces to enforcement is the administrative fine in cases of non-compliance with certain provisions of the NCA. Enforcement of the NCA is governed by Chapter 7 NCA. This includes appointing the administrative authorities responsible for supervising compliance and enforcement:

in most cases the administrative authorities at the provincial level. Like in the previously applicable nature protection acts (the Natural Protection Act 1998, the Flora and Fauna Act and the Forest Act), criminal and administrative enforcement is continued under the NCA. New is the introduction of the possibility of imposing an administrative fine for certain violations. An administrative fine may be imposed for violations of the regulations on the trade in animals and plants of protected species and products thereof and on the trade of illegally harvested timber and products thereof (art. 7.6(1) NCA). The legislator has introduced the fine because it is desirable that violations are quickly punished. The fine can amount to a maximum of € 410 for natural persons and € 4,100 for legal persons (art. 7.6(4) NCA). The Nature Conservation Decree (a delegated act) lays down detailed rules for the specific fines that can be imposed and the maximum amounts.
These violations can alternatively be punished by criminal law. Violation of art. 7.6 (1) NCA is for instance regarded as an economic offense in the Economic Crimes Act (*Wet Economische Delicten*). Practically all violations of the rules laid down in the NCA are designated as an economic offense under this act. Criminal penalties for violations of the NCA therefore remain unchanged, with a few exceptions. For example, the penalty for non-compliance with the prohibition to intentionally capture or kill animals protected by, inter alia, the Bird and Habitats Directive is increased.
The various administrative sanctions that could previously be imposed under the nature conservation legislation also apply under the NCA. This means that failure to comply with the NCA can (also) lead to, inter alia, an order for incremental penalty payments, administrative enforcement action and the revocation of licenses, exemption and certificates.

VI. SEA, EIA, Appropriate Impact Assessment and species protection

The appropriate impact assessment is regulated by the NCA and the EIA and SEA is regulated in the Environmental Management Act (*Wet milieubeheer*). An EIA/SEA could very well also include the appropriate impact assessment. The appropriate impact assessment is then merged with the (procedure for the) EIA. The EIA (and/or SEA) needs to clarify what the consequences of a certain development on nature is. The assessment will paint a general picture of the current situation, the autonomous development and the effects on nature in the area. An appropriate Impact Assessment is mainly aimed at clarifying the consequences of a development for a Natura2000 site.
In the EIA it is not necessary to describe every square meter of the area and include a complete list of species. The report needs to indicate which characteristic habitats and species are present in the area and motivate the choices made for the project/development; it will describe the autonomous development of nature in the area and check the action-effect relationship between the intended activity and the natural values already present in the area. The assessment indicates which of these animals and plants are expected to be significant, what the nature of the effects is and what these consequences mean for the populations. Also a description of mitigating measures that can limit or prevent the consequences.

Courts will typically check whether the EIA was carried out with due care, whether research into the consequences for protected species is representative and the data is not too old. Also

it could review whether the mitigating measures are indeed sufficiently safeguarded in the decision made by the administrative authority.

VII. Agricultural or forestry activities with foreseeable impact on protected species

Mostly at the provincial level there is both the possibility for a generic exemption (general exclusion) and for an individual exemption. See above.

VIII. What are exactly the roles of citizens and NGOs in species protection?

Citizens will be subject to the normal provisions concerned with the careful preparation of decisions by administrative authorities that have for the most part been laid down in the General Administrative Law Act. Any citizen who is an interested party (article 1:2(1) GALA) is certainly allowed to participate in the decision-making procedure and is legally allowed to request for enforcement action by the competent administrative authority. This citizen may however not represent the interest of the protection of the environment in general or the protection of species. Any citizen could however state that the (planned) actions/developments in the direct vicinity of his property influence his living environment and that he is therefore an interested party. Interested parties may lodge complaints and appeal against decisions made by administrative to the administrative to and that he is therefore an interested party with the possibility to participate and go to court. The question whether the role of these individual citizens is relevant, is hard to answer. In local developments (housing; infrastructure) case law proves they are. More relevant for species protection however are the legal actions of NGOs, either because of their work for specific species (bats and badgers) or their concern for nature conservation in a local area. These NGOs can be an interested party (article 1:2(3) GALA: as regards legal entities, their interests are deemed to include the general interests which they particularly represent in accordance with their objectives and as evidenced by their actual activities (see: Tolsma, De Graaf & Jans).

One important issue in recent years has been the introduction in 2013 of the so-called 'relativiteitsvereiste' (article 8:69a GALA), a relativity-related requirement (*Schutznorm*), in judicial review by administrative courts. It stipulates that claimants are only allowed to invoke rules that are specifically intended to protect their interests. The purpose of the introduction of the 'relativity' principle in administrative procedural law for specific projects is to prevent decisions of administrative bodies being annulled by the court on grounds that have no relation to any interest of the interested party that brought forward that ground for appeal. The 'relativity' principle therefore requires interested parties to lodge an appeal strictly on grounds that are related to their interests. Although questions were raised on the conformity of the new requirement with Community law and especially with the Aarhus Convention, the administrative courts have argued that introducing the 'relativity' principle isn't in breach of any (inter)national law. Legal scholars now claim that courts should take the Aarhus Convention into account when deciding whether a rule is specifically intended to protect the interest of the claimant. As long as the relativity-related requirement is interpreted not to strict, it will not be contrary to the Aarhus Convention.

In a recent judgment (18 May 2016, ECLI:NL:RVS:2016:1296) the Council of State had to answer – in a case about a zoning plan – whether the EU Habitats Directive gives rights to individuals. The court ruled that this depends on the personal scope of the relevant Union regime according to settled case-law of the Court of Justice, which scope should be determined on the basis of the content of that scheme and its objective. The Habitats Directive aims to maintain habitats and species in areas that are part of Natura 2000 and thus aim at a general interest: the protection of nature conservation. Nothing in the provisions of the Habitats Directive indicates that the directive is intended to protect the rights or interests of individuals. The provisions of the Habitats Directive, which cover the general nature conservation interests do not serve to protect the interests of individuals. The Habitats Directive does not stipulate that it – in addition to the protection of the general interest – also aims at protecting the health of human beings or the (improvement of the) quality of their existence. The claimant (an interested party) is therefore not covered by the personal scope of the Habitats Directive. Therefore, this directive does not entitle him to enforce court proceedings. There is no doubt that the question of compatibility of the application of the relativity-related requirement with EU law can be answered.

IX. Are EU provisions on species protection directly applied in case of improper transposition?

One of the reasons for the legislator to introduce a new Nature Conservation Act was the idea that the previous legislation wasn't originally intended to transpose EU Directives. Amending the existing legislative acts in order to implement the Habitats Directive and the Birds Directive was effective to a certain point but the structure of the legislation was not tailor made for transposition. The effect was a very complex structure and in certain cases improper transposition of the directives. Therefore there have been many discussions on the proper transposition of the Habitats and Birds directives under the previously applicable legislation (*Flora- en faunawet, Natuurbeschermingswet 1998, Boswet*). The new NCA is meant to be a strict transposition and should be better aligned with EU legislation. The NCA entered into force on 1 January 2017 and has to my knowledge not yet led to any judgment by the highest administrative court.

A very important issue in environmental law and in nature conservation law (specifically the protection of Natura2000) concerns the so-called *programmatic approach* that Dutch environmental law implements for achieving (EU) goals in several policy areas, such as air quality, water quality and the protection of Natura2000 sites. On 17 May 2017 the Council of State (Administrative Jurisdiction Division) has asked the ECJ for a preliminary ruling on the issue of conformity of the Dutch programmatic approach to Nitrogen deposition (*Programmatische Aanpak Stikstof*) with the Habitats Directive. The judgments by the Dutch court can be found at www.raadvanstate.nl with the case-numbers 201600614/1/R2, 201600617/1/R2, 201600618/1/R2, 201600620/1/R2, 201600622/1/R2 and 201600630/1/R2 and 201506170/1/R2, 201506807/1/R2, 201506815/1/R2, 201506818/1/R2 (in Dutch).