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ESPO

ESPO Code of Practice on the
Birds and Habitats Directives



European Sea Ports Organisation
VZW / ASBL

ESPO Code of Practice on the Birds and Habitats Directives

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Foreword

Foreword by Giuliano Gallanti, Chairman of ESPO

I am very pleased to present this Code of Practice on the EU Birds and Habitats Directives, ESPO's newcomer in a long-standing series of environmental publications.

I am grateful to the ESPO secretariat, and to Roel Hoenders in particular, for editing this extensive document as well as to the ad-hoc group of the Environment Committee for providing invaluable input and advice.

ESPO has provided guidance to its members on the implementation of European environmental law almost since the first day of its existence. In 1994 we published the very first Code of Environmental Practice, which was fully revised and adapted to changes in EU law in 2003. Through these codes port managers were encouraged to implement environmental plans and manage environmental issues. ESPO has also been the main driving force behind the ECOPORTS project which has meanwhile developed into a network of environmental port managers across Europe.

Despite the considerable investments made to achieve high environmental standards, legal uncertainty and ambiguity created by EU nature conservation legislation continues to put an increased strain on vital port development plans and causes substantial delays. Between 5 and 10 years, and even more, can easily elapse between the conception of a project and the actual start of construction works.

Especially the Birds and Habitats Directives rank high in the list of environmental legislation causing implementation problems. Despite the difficulties many port authorities experienced with the Directives during the last decade, different approaches and initiatives have however led to more acceptable solutions for port authorities and regulators which respect the spirit and the goals of the Directives.

Based on the positive experience of our previous, general, Codes of Practice, we therefore decided to gather these experiences of port authorities with the Birds and Habitats Directives and extract some generic recommendations and guidelines demonstrating what can be done with a positive approach within the existing legal framework.

However, a proactive and positive approach of port authorities is not enough to overcome all difficulties related to the provisions of the Directives and is no guarantee to avoid delays and extra costs without producing a general environmental benefit. Therefore this Code of Practice also lists a number of unresolved issues which can only be tackled at policy or legislative level.

I hope that this Code will achieve its multiple aim of providing a useful guidance tool to port authorities, port planners and local regulators, contributing to better dialogue with NGOs and stakeholders and attracting the necessary attention of EU policy makers to outstanding problems and questions.



Executive summary

Chapter I – Environmental Performance of European Seaports

Chapter I describes the difficulties port authorities in the EU continue to experience with regard to spatial planning related issues. Seaports need to operate in coastal regions which are typically characterised by a fierce competition for space. Ports, however, feel that neither the vital role they play in European trade, economy, cohesion and welfare nor policy priorities (aimed at promoting a switch from land transport to water transport (modal shift) and increased use of Short Sea Shipping) are adequately considered when decisions are taken on the use of space in coastal areas.

This general problem is particularly frequently manifested in the difficulties related to the implementation of the Birds and Habitats Directives but there are also concerns that legislation which has not yet been adopted (such as the proposal for a Directive on Ambient Air Quality and for a Marine Strategy Directive) is failing to provide a practical approach for seaports.

Best practice from port authorities across the EU has shown that a positive and proactive attitude towards the provisions of the Birds and Habitats Directives can lead to flexible solutions and reduce delays and/or legal uncertainty. Therefore ESPO decided to collate, share and disseminate knowledge gained to date on the practical implications of these Directives by setting up an ESPO Code of Practice specifically on the Birds and Habitats Directives.

This document therefore sets out recommendations to port managers working with the Birds and Habitats Directives on a daily basis or planning future developments. The experience of other port managers also suggests, however, that some issues cannot be avoided simply by a proactive approach and these therefore require more guidance. Such outstanding issues are listed at the end of the document.

Chapter II – Scarcity of Space

Seaports need additional space to develop in order to cope with the continuing growth of short sea shipping and global container traffic. Growth aspirations can, however, be limited by the provisions of EU nature protection legislation and by conflicting policies on transport and environmental protection. Coastal areas often constitute rich ecosystems. However, they are also the ideal location for residential development and they are essential in port development plans.

This ongoing battle for space in coastal areas is reflected in the difficulties caused by the notification/designation of areas under the Birds and Habitats Directives. While this process might have surprised port authorities in past years, they should now be able to make a better estimation of the effects.

Despite outstanding issues regarding the (often) unrealistic approach of the notification/designation process, this chapter aims to provide port authorities with recommendations on how to better position themselves in discussions dealing with the different demands for space in coastal areas and to increase their involvement in spatial planning exercises.

Concretely the following recommendations can be derived from this chapter:

- It is recommended that port authorities become more involved in all relevant spatial planning exercises;
- It is recommended that port authorities participate in Integrated Coastal Zone Management activities;
- It is recommended that port authorities draw attention to EU Trans-European Network priorities and other EU Transport Priorities;
- It is recommended that port authorities play an active role in harmonising different uses in the wider port area;
- It is recommended that port authorities be actively involved in the designation process affecting navigation channels.

Chapter III – Conservation Measures and Management of Sites

Whereas Chapter II contains recommendations which can be used by all port authorities when dealing with spatial planning and coastal zone management initiatives, Chapter III specially focuses on port authorities which have part of their area situated in or adjacent to a protected area. If port activities are being carried out in, or affecting, a protected area, it becomes important to actively participate in the management plan for such a site.

If ongoing port activities are included in the management plan for a site, this could mean that the provisions of Article 6 of the Habitats Directive related to exemptions, paragraphs 6(3) and 6(4), do not need to be followed.

Chapter III therefore provides the port authority with recommendations on how to become involved in management of Natura 2000 sites.

Concretely the following recommendations can be derived from this chapter:

- It is recommended that port authorities encourage the establishment of an appropriate management plan in the recognition that they could benefit from it;
- It is recommended that port authorities work with the environmental agencies to determine the status of dredging works and to find an appropriate regulatory solution;
- It is recommended that port authorities refer to guidance from the European Commission in discussions regarding management plans with national administrations;
- It is recommended that port authorities use the guidance forthcoming from projects such as Paralia Nature and New!Delta;
- It is recommended that port authorities try to be involved in the management plans before conditions of contractual measures are agreed;
- It is recommended that port authorities, especially those situated in estuaries, actively participate in management plans;
- It is recommended that port authorities carry out active management of ecologically valuable sites within the port area and, in so doing, try to facilitate stakeholder engagement;
- It is recommended that port authorities promote the regular review and updating of management plans.

Chapter IV – Appropriate Assessment of a Plan or Project

Chapter III describes the possibilities of including certain port activities within the scope of the management plan.

Plans or proposed projects which could have a significant effect on a European site cannot, however, be integrated into the management plan for a site. Article 6(3) of the Habitats Directive requires that these be subject to an appropriate assessment. The terminology ‘appropriate’ seems to cause considerable problems, meaning that the exact scope of such an assessment is unclear. The questions thus arise as to how such uncertainty can be avoided, what an appropriate assessment should contain, and to what extent the assessment can anticipate the requirements of Article 6(4).

Chapter IV therefore aims to reduce the difficulties relating to the obligation to carry out an appropriate assessment as required by Article 6(3) of the Habitats Directive for a plan or project.

Concretely the following recommendations can be derived from this chapter:

- It is recommended that port authorities clearly determine the scope of the potential effects of the plan or project that need to be assessed;
- It is recommended that port authorities invest sufficient time and money in the obligation to carry out an appropriate assessment;
- It is recommended that port authorities develop a clear idea of both the range and impacts of alternatives and mitigation measures;

- It is recommended that stakeholders are involved when defining the requirements of the appropriate assessment;
- It is recommended that if maintenance dredging needs to be assessed, port authorities use the assessment for creating more awareness about the necessity of dredging for ports.
- It is recommended that port authorities aim to deliver a project which will not have any significant likely effects.

Chapter V - Assessing Alternative Solutions and ‘Imperative Reasons of Overriding Public Interest’

It should be kept in mind that Article 6(4) specifically addresses exceptions to the general rule in Article 6(3) that, in principle, authorisation can only be granted to plans or projects which do not affect the integrity of the sites concerned.

The negative decision on the port expansion plans for Dibden Bay in Southampton showed the port sector the impact of the assessment of alternative solutions and ‘imperative reasons of overriding public interest’ (IROPI). The complete development process was cancelled because the assessment could not fulfill all requirements of Article 6(4). This decision was also the starting point of renewed criticism of the Birds and Habitats Directives from the port sector. Importantly, the Dibden decision followed on from the experiences of the Le Havre Port 2000 project, where the requirements for mitigation and compensation had already marked the beginning of a more proactive approach towards the provisions of the Directives from the port sector and the beginning of cooperation with national and regional authorities.

The aim of this chapter is to provide recommendations on how to carry out Article 6(4) assessments in an efficient way. The focus will be on how to ensure that alternative solutions are properly assessed and how to demonstrate the presence of IROPI.



Concretely the following recommendations can be derived from this chapter:

- It is recommended that port authorities aim to develop an agreement on the Article 6(4) assessment;
- It is recommended that port authorities offer all consultees the chance to be fully involved in the process and ensure they have the ability to influence changes;
- It is recommended that port authorities determine the objectives of their project or plan proposal comprehensively and precisely;
- It is recommended that port authorities determine and clearly state the need for port expansion;
- It is recommended that port authorities identify an extensive range of alternative solutions;
- It is recommended that port authorities assess all identified alternatives as thoroughly as possible;
- It is recommended that port authorities formulate and evaluate a comprehensive range of alternative techniques for dredging;
- It is recommended that port authorities formulate clear and well established imperative reasons of overriding public interest;
- It is recommended that port authorities place more emphasis on transport policy priorities.

Chapter VI - Compensation

The delivery of compensation requirements can cause considerable problems for many port authorities.

In cases where compensation is needed to offset the negative impacts of a project or plan, the predominant view is to compensate like for like. Whilst reaching agreement on acceptable compensatory measures is often no longer an issue, the actual delivery of such measures can become a difficult task. However, the difficulties related to the delivery of compensation measures can be very detailed and site-specific, and this document therefore only deals with the more general difficulties.

The aim of this chapter is to provide recommendations on questions related to compensation provision/delivery, in particular ensuring that compensation conforms to Article 6(4).

Concretely the following recommendations can be derived from this chapter:

- It is recommended that port authorities establish an early and open dialogue on questions of compensation;
- It is recommended that port authorities keep in mind that an agreement on the compensation obligation is no guarantee of the absence of a legal challenge;
- It is recommended that port authorities aim at close cooperation with environmental agencies and nature protection NGOs in the selection of locations for compensation;
- It is recommended that port authorities support the existing or remaining uses of compensation land;
- It is recommended that port authorities seek the biggest possible compensation project wherever possible, working in collaboration with others if appropriate;
- It is recommended that port authorities explore the possibility of flexible compensation approaches;
- It is recommended that port authorities encourage the set up of a compensation management committee.

Chapter VII - Outstanding Issues

Despite all the practical and policy recommendations provided in the previous chapters, it is also clear throughout the document that, in some cases, the goodwill and proactive behaviour of port authorities is still not enough to arrive at practical solutions and legal certainty. Port authorities still face (legal) uncertainties which can cause delays and extra costs despite there being no clear environmental benefits. These difficulties are mainly caused by a lack of scientific data and/or the reticent approach towards the Directives by certain competent authorities, environment agencies and national administrative courts who do not accept flexibility and new initiatives with regard to achieving the goals of the Directives.

Moreover, experience suggests that the Directives are often (ab)used for the purpose of blocking the process, potentially leading to significant costs being incurred. Port authorities often invest a lot of time and money in wide public consultation and finding agreement at an early stage in the process. Unfortunately, such agreements do not have a clear status in the Directives and other parties to this agreement than the port authority can back out of it at any time. Moreover, more radical parties who are not willing to find solutions and do not participate in reaching an agreement can make the efforts of others worthless by filing legal complaints with the result that national administrative courts have to scrutinize the assessment. The same national courts may employ a very strict interpretation of the text of the Directives and leave no space for the more flexible solutions promoted by port authorities, environment agencies, competent authorities and NGOs which actually might lead to a win-win situation for both port and nature.

ESPO would like to see more guidance and clarification on the outstanding issues identified which may, eventually, also lead to a possible review of the Directives. To this end, ESPO will try to resolve these issues by facilitating dialogue at the European level.

Concretely the following recommendations on outstanding issues can be derived from this chapter:

- Transport policy priorities and port capacity should to be more clearly integrated into spatial planning exercises;
- Novel spatial planning concepts which aim at improving the balance between economic and ecological objectives should be studied in the future;
- National Transport Ministries should consult all ports concerning new environmental legislation which might affect them;
- More guidance should be developed on how to incorporate initiatives of industry itself;
- More guidance should be developed on how a proactive approach of the plan or project developer could lead to more legal certainty;
- More guidance should be prepared on acceptable ways of carrying out human activities in designated areas and how these can be included in a management plan;
- More guidance should be developed on how costs can be shared amongst all the relevant stakeholders who can benefit from general initiatives aimed at integrating all the human activities potentially affecting designated areas;



- At a certain point, it should be concluded that a plan or project developer has carried out an ‘appropriate assessment’ and that sufficient studies have been carried out to prove this;
- More guidance should be developed on how it can be avoided that individual interests block the process of finding proactive solutions by port authorities together with environmental agencies, NGOs and competent authorities;
- More guidance should be developed on how plan or project developers can best discuss their approach with competent authorities at an early stage;
- More guidance should be developed on how it can be determined, objectively, that enough alternative solutions have been assessed;
- More guidance should be developed on how IROPI can be proved and on how transport policy priorities can play a role when determining IROPI;
- More guidance should be developed on how to address the compensation requirements in a more flexible manner and how plan or project developers can cooperate with environmental agencies and NGOs on this issue;
- The European Commission should actively disseminate initiatives taken by industry to the relevant national authorities to demonstrate what can be achieved by taking a proactive approach.

The Birds and Habitats Directives

The European Birds Directive (79/409/EC) dates from 1979. The Birds Directive aims at providing long-term protection and conservation of all bird species naturally living in the wild within the European territory of the Member States. The impact of the Birds Directive was rather limited until the Habitats Directive (92/43/EEC) was enacted. This Directive absorbs the Birds Directive to a large extent as far as the decision making procedures are concerned.

The aim of the Birds Directive to establish a general scheme for the protection of all bird species was strengthened by the objective of the Habitats Directive to help maintain biodiversity in the Member States by defining a common framework for the conservation of wild plants and animals and habitats of Community interest.

The Habitats Directive establishes a European ecological network known as “Natura 2000”. The network comprises “special areas of conservation” designated by Member States in accordance with the provisions of the Directive, and “special protection areas” classified pursuant to the Birds Directive.

The network is given coherence by other activities involving monitoring and surveillance, reintroduction of native species, introduction of non-native species, research and education.

Special areas of conservation are designated in three stages. Following the criteria set out in the annexes, each Member State must draw up a list of sites hosting natural habitats and wild fauna and flora. On the basis of the national lists and by agreement with the Member States, the Commission will then adopt a list of sites of Community importance. No later than six years after the selection of a site of Community importance, the Member State concerned must designate it as a special area of conservation.

Member States must take all necessary measures to guarantee the conservation of habitats in special areas of conservation, and to avoid their deterioration.





Chapter I – Environmental Performance of European Seaports

1. Introduction

Seaports are the motors of the European economy. Almost all of the Community's external trade and almost half of its internal trade enters or leaves through the more than 1,200 seaports of the European Union. Ports are one of the main growth sectors in Europe, which is especially significant for deep-sea container trade with ports boasting annual growth rates of 5 to 10 %, but also for short sea shipping which has grown considerably over the last years¹.

If no new investments are made to accommodate this growth, serious congestion problems will emerge in European seaports thus making them the weak link in the global logistics chain. This would be contrary to the objectives of the Lisbon agenda and pose a serious threat to the European economy and the welfare of European citizens.

Solving this problem means finding new port capacity as well as developing adequate maritime access and hinterland connections. Potential port expansion areas are however just as scarce as nature conservation areas.

Despite the considerable investments made to achieve high environmental standards and despite the fact that the vital role of seaports is recognised by EU policy-makers², ports have to deal with resistance of local communities and cities which tend to focus on the negative externalities of seaports and are not aware of the added value and positive contributions ports make to society and welfare. This negative perception went hand in hand with the growing estrangement between cities and ports which set in as from the early 20th century.

Ports are – so to speak – caught in between the ecological and human habitat which causes often a conflict of interest.

More importantly, the legal uncertainty and ambiguity created by EU nature conservation legislation, and in particular the Birds and Habitats Directives³, puts an increased strain on vital port development plans and causes substantial delays.

It is often ignored that seaports can, although for obvious reasons, only be located and operate in coastal regions, including estuaries, which are characterised by fierce competition for space. Moreover, seaports are often subject to conflicting transport and environmental policy objectives, be it at European, national or regional level.

2. Lessons learned from the past

Reducing or removing environmental impacts is already high on the agenda of Europe's seaports. To achieve better results, one of ESPO's key objectives is to encourage ports to be proactive in protecting the environment. In this regard, ESPO published its Environmental Code of Practice in 1994 and a second one in 2003. Through this provision of practical recommendations to port

1 European Commission, Mid-term review of the 2001 transport White Paper, 2006, p. 12

2 European Commission, Mid-term review of the 2001 transport White Paper, 2006, p. 12

3 Van Hooydonk 2006, p. 113 – 158, The impact of the Directives on port operations is described in the 10 *causes célèbres* of the Birds and Habitats Directives in which ports were involved: Leyburcht (Port of Greetsiel), Lappel Bank (Port of Sheerness), Seine Estuary (Port of Le Havre and Rouen), Severn Estuary (Port of Bristol), Deepening of the River Scheldt, Deurganckdok (Port of Antwerp), Dibden Bay (Port of Southampton), Western Scheldt Container Terminal (Port of Flushing) and the Maasvlakte 2 (Port of Rotterdam).

managers all ESPO members were urged to draw up and implement their own environmental plans and to manage environmental issues⁴. Since then considerable and tangible improvements in the environmental performance of seaports have been made.

At the same time ESPO encouraged the creation of the ECOPORTS organisation⁵. ECOPORTS' main goals are: to harmonise the environmental management approach of port administrations in Europe, to exchange experiences, and to implement best practices in respect of port-related environmental issues. ECOPORTS is based on the idea that the implementation of EU environmental legislation should not cause European seaports to operate on an uneven level playing field. To achieve this, ECOPORTS developed a number of tools specifically for port communities, enabling them to learn more about their environmental performance and how to improve this through the use of measures such as the self-diagnosis method (SDM) and port environmental review system (PERS).

The ESPO Environmental Surveys of 1996 and 2004 report on the progress of seaports' environmental performance and show a clear improvement⁶. ESPO fully accepts that port undertakings must act in environmentally responsible ways and believes that commercial activity and sound environmental practice must co-exist. At the same time, public policy must also acknowledge both the need for ports to operate effectively and their struggle to seek a balance between conflicting policies.

ESPO believes that the implementation to date of the Water Framework Directive (WFD) (2000/60/EC) represents a positive step in the direction towards co-existence of commercial activity and sound environmental practice.

The WFD is a major piece of legislation aimed at sustainable management of waterways which was and still is regarded as a possible threat to ports activities around the EU insofar as it could have implications for sediment management and thus dredging activities. Furthermore the WFD could affect and potentially hinder new developments such as the construction of quays and docks. As a result of the difficulties experienced by ports with the Birds and Habitats Directives, European seaports decided to participate very actively in the Common Implementation Strategy (CIS), the process which aims to harmonise and streamline implementation of the WFD, and in this way reduce its possible threats.

Besides attending the so-called Strategic Coordination Group and participating in several working groups, ESPO, PIANC and other industry organisations decided to set up the Navigation Task Group. This group tries to coordinate and establish a common view on the topics related to the implementation of the WFD and to carry a uniform message from the ports and navigation industry to water policy makers.

Seaports appreciate the coordination and the efforts to harmonize WFD implementation and believe that offering industry groups the opportunity to input to these discussions is a useful and realistic approach which was clearly lacking when the Birds and Habitats Directives were implemented

Moreover, the knowledge of the port community about the effect of port activities on the natural system and the quantity, quality and distribution of material within rivers and coastal waters is often not recognized and ports still encounter many regulatory problems related to the carrying out of essential activities such as dredging. Port authorities believe that some Member States (environmental) authorities seem to lack a proper understanding of the effects of port activities but realize that they also need to be proactive themselves to make their knowledge available⁷.

⁴ ESPO Environmental Code of Practice, 2003

⁵ See: <http://ecoports.com>

⁶ ESPO Environmental Survey 2005, considerably more port authorities have an environmental plan, carry out environmental monitoring and have an environmental manager.

⁷ Thereto ESPO actively works together with organisations such as EUDA (European Dredging Association), PIANC (International Navigation Association), CEDA/IADC (international dredging organisations) and SEDNET (Sediment Network).

3. Conflicting policies

Seaports are vital for European trade, economy, cohesion and welfare⁸. Moreover, the EU has a policy of promoting a switch from land transport to water transport: modal shift. As shipping remains by far the most energy-efficient form of transport, this is one of the reasons why Short Sea Shipping and Motorways of the Sea will continue to be promoted within an integrated EU transport system. Ports contribute to sustainable development as they facilitate the use of maritime transport which, per tonnage transport, is less damaging to the environment than road or air transport. However, in order to accommodate the demand for an increased use of Short Sea Shipping, port and waterway infrastructure needs to be refurbished or newly built⁹.

Besides the increased intra-EU traffic passing through seaports, the fast growing global container traffic also demands additional port capacity¹⁰. If no additional space for port activities is made available, economic growth will be limited because of increased congestion in ports and the slowing down of new investment in port development projects¹¹. ESPO is pleased to see that this demand has also been recognized in the Maritime Green Paper¹²⁺¹³.

ESPO accepts and endorses that in the process of finding the right balance between ports and nature, it should be kept in mind that the aim of the protected sites under Natura 2000 is to halt the decline of biodiversity by 2010. Environmental legislation, however, should not have the counter-productive effect of discouraging investments in ports. Moreover, ESPO is of the opinion that policy priorities like increasing the use of Short Sea Shipping and promoting a modal shift should also play a role when deciding on the use of space in coastal areas¹⁴.



- 8 European Commission, Maritime Green Paper, 2006, p. 30: 'One of the most obvious examples of the role of coastal regions in connection with land and sea-based activities is that of ports. They are an essential element in the worldwide logistics chain, they are the location of business activities, and they provide residential space and tourist facilities. From being dedicated largely to one activity, they have now become multifunctional settlements.'
- 9 European Commission, Mid-term review of the 2001 transport White Paper, 2006, p. 17: 'The expected growth of sea transport will need to be absorbed through the EU's ports infrastructure. Increased investment within ports and towards the hinterland is necessary in order to improve and extend services so that ports become poles for growth instead of potential transshipment bottlenecks.'
- 10 Ocean Shipping Consultants 2006: Recent forecasts predict that, in North Europe, container traffic will grow overall between 45 and 55 % up to 2010 and a further 26-36 % between 2010 and 2015. For South Europe and the Mediterranean growth forecasts are even more impressive, between 62 and 74 % up to 2010 and a further 41-55 % between 2010 and 2015.
- 11 Lloyd's List, 6 June 2005: 'The paradox is that it takes eleven months to build a container vessel but probably ten years to expand a box terminal, let alone the inland infrastructure to support the quayside handling and supply chain needs of the 8.000 plus TEU box carrying giants of the seas. This represents the mismatch of worldwide container vessel demand – accelerated by the economic boom in China – with congested landside facilities in Europe (and the US).'
- 12 European Commission, Maritime Green Paper, 2006, p. 31: 'The development of EU shipping in the context of growing world trade, which has consistently grown faster than the world economy for the last six decades, is dependent on efficient port capacity. The planning process and the public policy framework will have to achieve this against the background of increasing competition for space in and around ports, not least for environmental reasons.'
- 13 See also ESPO position on the Maritime Green Paper: http://www.espo.be/Active_Policy_Issues/Future_Maritime_Policy_for_the_Union.aspx
- 14 See also ESPO position on the Maritime Green Paper, 2006

Seaports feel that the importance of seaports for the EU economy and as multi-modal transport hub is underestimated. This is not only the case with respect to the implementation of the Birds and Habitats Directives, but also for legislation in preparation such as the proposal for a Directive on Ambient Air Quality (COM(2005)0447)¹⁵ and the Marine Strategy Directive (COM(2005)0505)¹⁶.

ESPO is, however, happy to see that the Maritime Green Paper highlights the need for a possible reconciliation of the development of maritime transport and environmental conservation, against the background of the constraints imposed by EU regulations under Natura 2000¹⁷ and the Birds and Habitats Directives at the same time as accommodating the need to extend ports to facilitate the further development of intermodal transport services¹⁸⁺¹⁹. ESPO believes that also the port sector itself could play an active role in this reconciliation process and has therefore drafted this document.

4. Seaports and the Birds and Habitats Directives

Already in 2002 ESPO organised a workshop on how to improve awareness of the effects of the Birds and Habitats Directives on port operations²⁰. ESPO also held discussions with responsible officials of the European Commission on how to improve the practicality of these Directives. The European Commission representatives showed their awareness of the ports' concerns and were prepared to find solutions. Directorate General Environment of the European Commission stressed that a level playing field in the implementation of the Directives is essential, but on the other hand, Member States can use the subsidiary principle and be even more stringent than required by the Directives. DG Environment also made clear that port development could not occur at the expense of the environment and that economic arguments could not stand alone.

A number of different court cases and Commission decisions have highlighted the problems related to port activities or development and the protection of habitats and species in and around port areas. The difficulties seaports experience with the provisions of the Birds and Habitats Directives is not only due to a lack of experience with the Directives but is exacerbated by the fact that EU legislation is not yet fully implemented in some Member States. As such it is not easy for seaports to comply with European nature protection legislation. Terminology is still often arbitrary and subject to interpretation²¹ – sometimes leading to very serious delays in port expansion projects. Courts will almost always rule against the port project, be it only from the point of view of the 'precautionary' principle. In particular, the lack of scientific knowledge seems to provide an open invitation for disputes in the courts.

15 While seaports obviously understand the ambition to improve ambient air quality for human health purposes, the proposal for a Directive does not take into account that certain zones, such as seaports, are confronted with a wide variety of emissions which cannot be easily reduced. Seaports have the unique function of bringing together different kinds of traffic modes: maritime, road, rail and inland navigation and industry - which all benefit from each others presence. Obviously this also creates a lot of emissions. However, setting only reduction targets without also requiring effective source control measures, as in the Commission proposal, would mean that the only option in such zones to comply would be to stop economic activity.

16 The proposal for a Marine Strategy Directive aims at achieving good environmental status for all marine waters while the Water Framework Directive aims at achieving good chemical and ecological status. Even though the main focus of the WFD is on fresh water, it is also directly applicable to coastal waters (see article 2(7) Water Framework Directive). As coastal waters can extend, in places, out to tens of kilometers offshore, the WFD is therefore of direct importance for seaports. Seaports worry about the implications of the Marine Strategy Directive for especially these coastal waters and possibly even estuarine waters and tidal waters (i.e. transitional waters) once it comes into force. What will be the effect of the different objectives of the Directives and what will be the administrative effect of such a clear geographical overlap? ESPO fears that possibly all the work seaports have done under the Common Implementation Strategy of the WFD and developing an improved understanding of port activities amongst the Water Directors might be significantly devalued if yet more new objectives for coastal waters are introduced.

17 The European wide network consisting of special protection areas (SPAs) according to the Birds Directive and special areas of conservation (SACs) according to the Habitats Directive.

18 European Commission, Maritime Green Paper, 2006, p. 31

19 Neptune Orient Lines 2005: A study carried out by Neptune Orient Lines (NOL) on the substantial cost in both time and money of developing more port capacity in Europe to ease congestion shows that the planning process alone for 12 north European terminal developments is costing an estimated € 540 million (including the cost of public inquiries, official planning submissions and legal fees), while delays and cancellations have meant that a planned extra 11 million TEU's of capacity due to be available in 2005, has not been built.

20 ESPO Seminar on Sustainable port development, 2002

21 Interpreting the following terminology in for example a complex environment such as an estuary is far from straightforward: "... likely to have a significant effect thereon, ...", "... it will not adversely affect the integrity of the site concerned. ...". See Article 6(3) of the Habitats Directive.

How can port authorities anticipate the exact nature of concepts of the Birds and Habitats Directives such as ‘conservation objective’ or ‘imperative reasons of overriding public interest’ if there is still a lot of uncertainty with respect to these definitions? This issue urgently needs to be acknowledged and addressed.

Moreover, it remains difficult to compare the benefits generated by port facilities (which are often more obvious on a national or even European scale) with the benefits for European nature conservation objectives as the latter, even though they compromise part of the (trans-European) Natura 2000 network, are often measured on a strictly local basis.

Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

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

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

5. Conclusion

Seaports have learnt much about the Birds and Habitats Directives from experience. Different practical approaches and initiatives have led to more acceptable solutions for many port authorities and regulators whilst also taking into account the spirit and goals of the Directives²².

Different ESPO members are actively participating in cross-border projects such as the Paralia Nature project (which has been running since 2000) and the New!Delta Interreg IIIB project which aim to exchange best practices on very detailed questions related to the implementation of the Birds and Habitats Directives. ESPO will encourage other European ports to adopt the outcomes of these projects²³.

To ensure that the knowledge gained as a result of this proactive approach is used and shared, ESPO decided to draft this Code of Practice document which is similar to the existing ESPO Environmental Code of Practice. This additional Code specifically relates to the implementation of the Birds and Habitats Directives, drawing on the experiences of port environmental managers who have successfully worked with the Directives.

In this guide ESPO sets out recommendations to port managers working with the European Birds and Habitats Directives during daily or in planned future operations. Different issues are covered and practical information on how to deal with these is offered. It should be kept in mind, however, that every case is different and that the approaches in this guide are recommendations which provide a starting point for further work to be carried out at the local level.

The document does not explicitly aim to propose possible amendments to the Directives but rather focuses on how to make the existing provisions more 'workable' and 'manageable'. Nevertheless, at the end of the document some outstanding issues are listed which require further guidance from the European Commission and/or a possible review of the Directives.

It remains to be seen whether this active approach will provide sufficient legal certainty for port authorities to be able to avoid new constraints or NIMBY (Not In My Backyard) inspired challenges. Neither is it clear whether the adequate coordination of policies will be possible, without having to go through a review of the Directives. However, in either case, this document represents an important step towards achieving a sustainable transport system and securing the goals towards biodiversity through the conservation of natural habitats and of wild fauna and flora in the EU.

²² See also Grant Lawrence 2006: "Today, I would propose that we try to set our preconceptions aside and constructively consider the way forward in the interaction between seaport development and environmental policy. I believe that we will discover that environmental and seaport development interests can often be reconciled and even be mutually supportive."

²³ See Paralia Nature (Run by the Brussels based Institute for Infrastructure, Environment and Innovation IMI)) and New!Delta. An important element of the projects is that its cases include particularly proactive actors, trying to make a difference, not contesting the Directive, but working with it and succeeding in doing so, even if processes and procedures are not always easy. See also: Paralia Nature 2006, p.6: 'One of the most important findings is that a considerable progress has been made by port and governmental organisations in terms of co-operation with other stakeholders such as nature conservation groups, NGOs and local actors in the area of integration of nature protection in decision-making and implementation of port extension projects.'





Chapter II - Scarcity of Space

1. Aim of this chapter

This chapter provides recommendations on the general issue of dealing with claims for space in coastal areas.

Many of the problems related to the Birds and Habitats Directives result from the failure of national, regional and/or local authorities to take seaport growth and development properly into account when preparing spatial plans.

Problems have been exacerbated where there has been a direct loss of capital assets to port authorities. This has occurred because areas of land which were reserved for future port use became worthless due to the designation of such areas as Special Protection Area (SPA) under the Birds Directive or as Special Area of Conservation (SAC) under the Habitats Directive²⁴.

The discussion over space also illustrates the conflicts between EU policy priorities for transport and for nature protection.

This chapter provides recommendations to port authorities on how they can better position themselves in discussions regarding spatial planning in order to avoid or reduce problems related to the provisions of the Birds and Habitats Directives at a later stage.

2. Background

Space in coastal areas is scarce. At the same time, Europe's coastlines constitute some of the world's richest ecosystems in terms of the number and variety of plants and animals²⁵. Coastal zones are also attractive places to live - which in its turn leads to residential sprawl²⁶. Both nature and people feel at home in the areas suited for waterway or port improvement/expansion projects, which are typically located in or near coastlines, estuaries or the courses of rivers and canals²⁷.

This situation inevitably leads to conflicts of interests, clashes of policy objectives, legal battles and other tensions which are simply provoked by geographical facts. The designation processes of the Birds and Habitats Directives and the consequences of such designations reflect this battle for space in coastal areas (see figure 1).

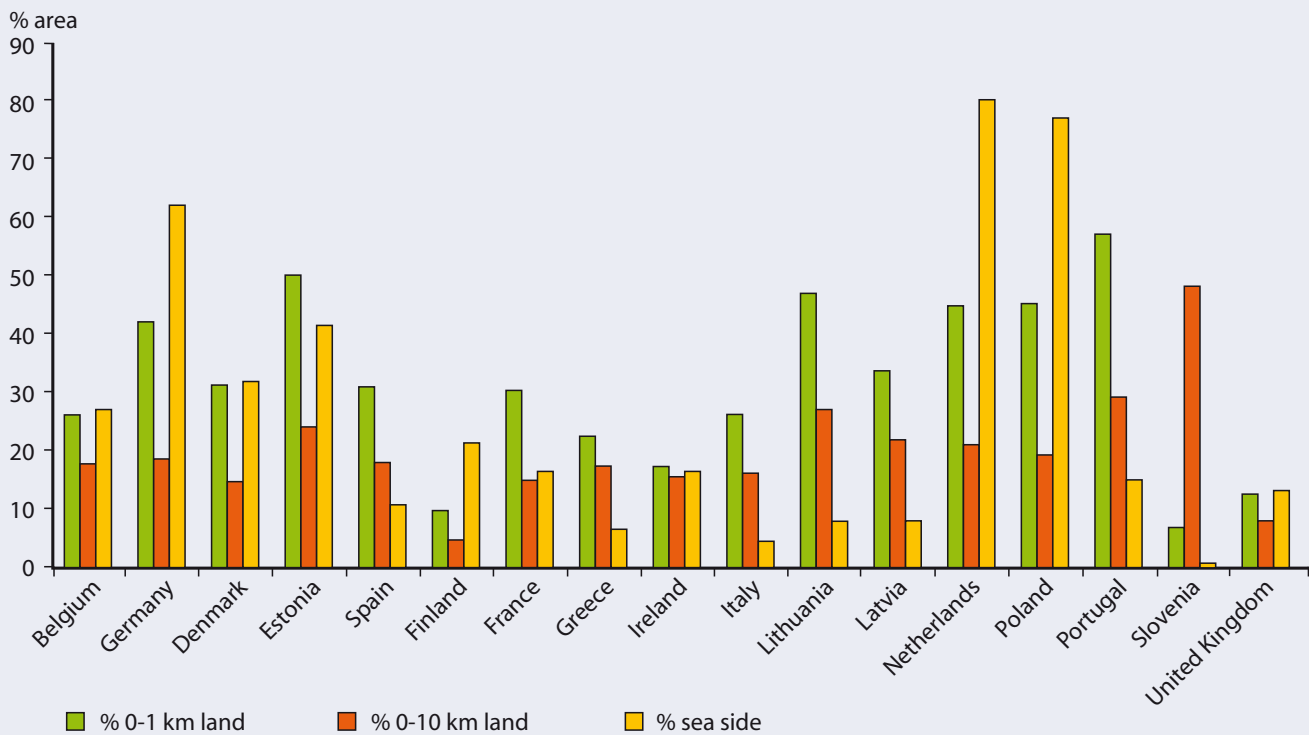
24 For instance a large development project in the port of Szczecin in Poland could not go through as the World Bank announced the withdrawal of a necessary development loan for the port of Szczecin after the expansion site was designated based on the Birds and Habitats Directives.

25 European Environment Agency 2006

26 Ministerie van Verkeer en Waterstaat 2006: A recent study in The Netherlands indicated that four Dutch port authorities are also restricted in their activities because of political pressure to increase residential areas closer and closer to the port area. As a first step residential areas are developed in vicinity of the port area and secondly the new inhabitants start to complain about nuisances of the port.

27 European Commission, Maritime facts and figures, 2006: 'Almost half of the Union's population lives less than 50 km from the sea, although the population is concentrated in urban areas along the coasts.'

Figure 1: National coastal zones covered by Natura 2000 sites (2005)



Source: EEA, 2005, based on Natura2000 database.

Article 4 of the Birds Directive requires Member States to designate Special Protection Areas (SPAs) for the threatened species listed in Annex I as well as for migratory birds. Under Article 4(1) of the Habitats Directive, Member States are required to propose national lists of sites that are important for the conservation of habitat types or fauna and flora species and to notify them to the Commission as Special Areas of Conservation (SAC). In some Member States, port authorities were confronted with these proposals and notifications without any consultation. Although in principle consultation was not necessary at this stage (because the designation of areas is to be based solely upon the ecological criteria laid down in Annex III of the Habitats Directive²⁸ and economic concerns do not have to be taken into account), consultation would nonetheless have been welcomed by those affected.

With respect to the designation process, the Commission establishes a list of Sites of Community Importance (SCIs) (Article 4(2) of the Habitats Directive), in agreement with the Member States concerned and on the basis of the national lists. The Member State must then (as soon as possible and within six years), designate the sites on this list as Special Areas of Conservation (SAC's) (Article 4(4) of the Habitats Directive). Together with the SPAs classified by the Member States pursuant to the Birds Directive (Article 3(1) of the Habitats Directive), these designated sites form the coherent European ecological network called Natura 2000.

Designated areas are often close to or even within areas owned by ports and/or targeted for port expansion²⁹. This has led to designation of areas which had previously been designated differently by national administrations, but the European Commission and case law of the European Court of Justice fully support the fact that economic considerations are not to be taken into account at the

28 When proposing areas under the Habitats Directive, Member States may not take either into account economic, social or cultural requirements, or regional or local specificities.

29 For instance 95% of the port area of Milford Haven, UK, has been designated as SAC.

site selection stage³⁰⁺³¹. As designation limits the possible future uses of the areas (Article 6 of the Habitats Directive sets out the legal consequences of the designation of a SPA), port authorities can be financially affected by these designations³².

A general complaint of port authorities during the site designation process has been that they are not adequately consulted in national, regional and local spatial planning exercises and that their socio-economic interests in relation to demand for space are not well reflected, especially in the site designation process. Whether this is a legitimate complaint or not, the following recommendations set out how the involvement of a port authority in spatial planning exercises can be enhanced.

3. Guidance

3.1 It is recommended that port authorities become more involved in all relevant spatial planning exercises

- *Port authorities could actively challenge the negative image by promoting their positive externalities*

As mentioned above, many seaports struggle with a negative perception. The positive socio-economic benefits of ports are largely ignored by local communities and socio-economic arguments cannot be taken into consideration during the proposition and notification processes of the Habitats Directive and the designation process of the Birds Directive.

Seaports can however counterbalance this ecological argumentation by actively promoting their positive, non socio-economic externalities, e.g. in the field of tourism, recreation, landscape, heritage and culture in general. Promoting the “soft values” of ports can be an effective means of creating a more even balance with ecological reasoning. The Birds and Habitats Directives even explicitly impose as a legal requirement that cultural values should be taken into account³³

- *Sustainable spatial planning could be included in corporate policy objectives*

A port authority could include in its corporate policy objectives promoting sustainability - including port development and spatial issues³⁴. A port authority's high standard of environmental performance and willingness to implement possible restoration and mitigation measures can be a starting point for early discussions on spatial planning. For certain port development projects which are environmentally and socially compatible with other coastal activities and which are within the environmental carrying capacity of the area, the result might be less resistance to the proposed project.

30 E.g. Designation of the zones in or adjacent to the port- and industrial area on the left bank of Antwerp, Belgium, as Bird and Habitat areas. These zones were previously reserved, by a specific law of 19 June 1978 and the regional plan for future expansion of the port and industrial activities. The designation of a large part of the “achterhaven” in Zeebruges, Belgium, as Bird and Habitats Area while this part of the port was designated in 1977 by the regional plan for future port development.

31 Leybucht, Lappel Bank and Severn Estuary Court Cases. See for a more in depth analysis of these cases.: Van Hooydonk 2006

32 The applicable texts are applied mechanically, on the basis of environmental values only: pre-existing legislative reservations, international rights of use, zoning schemes, property rights, rights of use and national and local transport and port policies etc. are completely ignored. See for more information: Van Hooydonk 2006, p. 199 - 208

33 For an extensive overview on the soft values of seaports see Van Hooydonk 2006b

34 See for instance: Associated British Ports (ABP) Policy: To look for opportunities to promote sustainable transport and distribution through the development of our business whilst ensuring that port developments contribute to sustainable development. ABP Policy objectives: to maintain an open and constructive dialogue with the main conservation bodies over the issue of port development.

- *Port authorities could use spatial planning networks to disseminate information about the role of ports in society*

Port authorities should aim to build long-lasting and sustainable relationships with local, regional and even national administrations, with NGOs and with other stakeholders, even when no specific expansion plans are foreseen³⁵. In many cases the nature protection NGOs have put a great deal of effort into such relations and have been willing to make their interests and concerns more publicly known³⁶. It is now up to port environmental managers to do the same and to disseminate *inter alia* information about the rise in world container traffic, congestion problems in ports, the opportunity to reduce road traffic and the added value of ports for society³⁷⁺³⁸.

The extent to which port interests are considered clearly depends on the efforts of the port authorities themselves. It is important to create greater awareness amongst both public institutions and the general public, both about port and harbour development, and about ports' potential to contribute to the national economy.

A port authority can, of course, use and further disseminate their existing national or regional port and harbour development plans to help identify port development areas, (including the type, scale and intensity of development) and to further underline the importance of seaports for the local, regional or national economy.

- *Port authorities could set up a more permanent structure to facilitate information flow about port activities*

Port authorities could opt for a permanent conduit for information flow using (existing) estuary stakeholders' groups and/or regular meetings with the local population. The magnitude of future (public) investments within the port sector depends in part on public understanding of the economic and social importance of ports to the community. Stakeholders also need to understand how the environmental impacts associated with port development are already being effectively managed in order to promote greater support for development. Port authorities need to recognise issues of community concern in their early stages, and to work to resolve them prior to these becoming causes for wider public concern.

Such initiatives should not only be related to the 'management' (plan) for a Natura 2000 site: it is essential for all seaports to establish better long-term relationships and to improve awareness of the port and maritime industry³⁹.

35 Clements 2002, Dr. Andy Clements of English Nature during Greens/EFA Natura 2000 conference, 12 December 2002: "We believe that there is the strong possibility that positive long-term partnerships can be forged. Through these partnerships, we believe that the era of conflict management will give way to strategic planning and development of truly green credentials within the ports industry. Our objective is to secure not only environmental sustainability in its broadest sense, but also a move towards nature conservation friendly policies within the ports industry."

36 Dewicke 2006, It is interesting to mention is that not only industry or trade organisations try to inform the public. In the Scheldt estuary a group of nature protection NGOs works together to develop a public awareness environmental programme because they believe that the Scheldt is mainly known for its industrial aspects but not for its unique nature

37 Belgian National Bank 2006, A recent study of the Belgian National Bank proves that the direct added value of the Belgian ports is 15,35 billion euros. Such studies could be used by the port authority to prove their economic relevance.

38 A project development website is perhaps a minimal requirement. See: Maasvlakte 2 project website

39 So information exchange should not specifically focus on possible development alternatives, mitigation or compensation measures as determined in Article 6(3) and (4) of the Habitats Directive.

3.2 It is recommended that port authorities participate in Integrated Coastal Zone Management activities

- *Participating in Integrated Coastal Zone Management activities could create more awareness of the future needs of port authorities amongst other coastal stakeholders*

Integrated Coastal Zone Management (ICZM) is a strategy for an integrated approach to planning and management, in which all policies, sectors and – as far as practicable - individual interests are properly taken into account with thorough consideration given to the full range of temporal and spatial scales, and the involvement of all coastal stakeholders in a participative way. ICZM demands good communication between governing authorities (local, regional and national) and promises to address all three dimensions of sustainability: social/cultural, economic and environmental. It thus provides management instruments that are not per se included or foreseen in individual policies and Directives in such a comprehensive way⁴⁰.

The EU's Integrated Coastal Zone Management (ICZM) Recommendation⁴¹ is a good instrument for disseminating information as it specifically invites Member States and Community institutions to examine the need for a European Coastal Stakeholders forum, in order to facilitate progress towards a common approach to integrated coastal zone management⁴².

As part of the EU ICZM Recommendation of 2002, eight principles of good ICZM were agreed. Principle six stipulates that all parties concerned need to be involved in the management process, for example by means of agreements and based on shared responsibility. Principle eight requires a use of a combination of instruments designed to facilitate coherence between sectoral policy objectives and coherence between planning and management. These principles could both help to introduce transport policy priorities into spatial planning considerations and increase the involvement of port authorities.

The Evaluation of ICZM in Europe carried out by a consultant indicated that no country has yet implemented an ICZM National Strategy as prompted by the EU ICZM Recommendation⁴³. Whilst the work that has been completed has been beneficial already for coastal management in Europe in that it has initiated a rethinking of traditional planning approaches by promoting a reconciliation of economic, social and environmental interests, the actual involvement of stakeholders is still unsatisfactory⁴⁴. It might therefore be useful for port authorities to encourage for the establishment of national ICZM strategies and to help improve implementation by stressing the recommendations of the evaluation report carried out by the consultant.

⁴⁰ Rupprecht Consult for DG Environment 2006, p. 6

⁴¹ Recommendation of the European Parliament and of the Council of 30 May 2002 concerning the implementation of Integrated Coastal Zone Management (2002/413/EC)

⁴² The implementation of the recommendation in the Member States is now under review by the European Commission, followed by the submission of an evaluation report by the end of 2006 with possible further Community action. See: <http://ec.europa.eu/environment/iczm/>

⁴³ Rupprecht Consult for DG Environment, p. 9

⁴⁴ Rupprecht Consult for DG Environment, p. 10: 'At the same time, the evaluation concludes there is wide scope to improve the implementation of ICZM along the European coasts; these include improved regional cooperation within the regional seas, stronger exchange of expertise and information, better stakeholder participation, monitoring of implementation through common methodologies and a long-term funding perspective for regional ICZM initiatives.'

3.3 It is recommended that port authorities draw attention to EU Trans-European Transport Network priorities and other EU Transport Priorities

- *Port authorities should realise that many (local or regional) stakeholders may not be aware of Trans-European Transport Network Priorities or other EU Transport Policy Priorities*

As part of the exchange of information mentioned above, port authorities should ensure that both local and regional politicians and also civil society groups and NGOs are adequately informed about Trans-European Transport Network Status or other EU Transport Priorities (e.g. policy priorities as described in the EU Mid-Term Review of the Transport White Paper).

Port authorities often highlight the inadequate coordination between EU environment and transport policies. However, this might be explained by the fact that transport policy priorities are not widely known when compared to environmental policy priorities. Seaports should therefore take any available opportunity to inform stakeholders about exactly what Trans-European Transport Network Status means, as some of these parties might not be aware of this. Further, and irrespective of whether or not it is a task of the port authority also to inform the public on these issues, such action might reinforce the port authority's position in the spatial planning processes.

- *Port authorities could explain that TEN-T status also requires environmental objectives*

The Trans European Transport Network (TEN-T) Guidelines contain a lot of objectives which need to be fulfilled before TEN-T status can be granted to a project. In particular, these relate to achieving the Community's objectives with regard to the environment and competition, and contribute to strengthening economic and social cohesion (Article 2(2))⁴⁵. The Guidelines further stipulate that the development and implementation of TEN projects should take into account environmental protection by applying the Environmental Impact Assessment Directive and the Habitats Directive⁴⁶.

Again, the dissemination of this specific information could be beneficial to a port's own position in discussions regarding spatial planning. However, whilst it is important to inform interested parties about EU transport policy priorities and TEN-T status, it must be repeated that these facts do not have any significance during the designation process for areas under the Birds and Habitats Directives⁴⁷. ESPO therefore believes that more guidance should be developed on the integration of such transport policy priorities into legislation affecting spatial planning.

3.4 It is recommended that port authorities play an active role in harmonising different uses in the wider port area

- *Port authorities could contribute to the identification of the various social and economic uses in the wider port area or estuary*

Good examples of building long-term partnerships can already be found in many European estuaries. Initiatives for drawing up a vision for an estuary can be initiated by regional or national authorities. Seaports should stress the importance of cooperation between different ministries when national level estuary management initiatives are being developed. By preparing an overview of all the different uses in an estuary with all relevant stakeholders (e.g. scientists, administrative authorities, port authorities, fishing, navigation, ornithologists, biologists, recreation, tourism and environmentalists), an early analysis can be made of which parts of the estuary have the best potential for the different uses as part of developing a shared long-term vision⁴⁸.

⁴⁵ European Parliament and Council Regulation nr. 1692/96/EC of 23 July 1996 regarding Community guidelines for the development of a Trans-European Transport Network

⁴⁶ See also: Van Hooydonk 2006, p. 65 – 76

⁴⁷ See also: Van Hooydonk 2006, p. 202

⁴⁸ See: Ministère des Transports 2006, The French Ministry of Environment and the Ministry of Transport drafted together the document "La gestion des estuaires dans une approche communautaire" (Estuary management in a Community framework), May 2006

Such an estuary management vision could cover many different aspects, including maintenance dredging, capital dredging for deepening of navigation channels, improving flood protection and promoting nature conservation⁴⁹.

- *Port authorities could carry out or become involved in active management programmes for the conservation or restoration of nature in or near ports*

If there are no national or regional initiatives to identify different uses in the wider port area, the port authority itself could try to achieve a better understanding of the relationship between port operations and nature in or near ports by carrying out (or becoming involved in) active management programmes for the conservation or restoration of nature in or near ports⁵⁰.

The port authority could actively participate in drafting a nature development scheme for the wider region or for the port area (and adjacent areas) focusing on identifying new and innovative ways to promote coexistence between industrial activities, port infrastructure and habitats⁵¹. Work is being carried out within the New!Delta project on the development of tools to develop such ideas⁵².

A long-term vision could also represent an effective starting point for the development of a more detailed management plan under Article 6(1) of the Habitats Directives.



⁴⁹ It was agreed that an official working party, ProSes, with representatives of both The Netherlands and Belgium would examine the social and ecological aspects of the river Scheldt and submit a report enabling the political authorities to make a decision on further deepening of the Scheldt before the end of 2004. The Dutch government and the Belgian region Flanders signed in 2005 the third Memorandum of Understanding on the Western Scheldt. The most important part of this memorandum is the further deepening of the Scheldt to permit tide-independent navigation with draught of up to 43ft at the lowest tide to reach the port of Antwerp.

⁵⁰ Paralia Natura 2002b, p. 34: 'Port 2000 was the first large infrastructure project in France to hold a public debate on the issue. The Minister of Public Works, Transport and Housing requested an overview of the various studies on the estuary from a Committee of independent experts. On the basis of this overview, the committee drafted the guidelines for an overall ecological management plan for the estuary that went far beyond the impact of Port 2000'.

⁵¹ Port of Rotterdam 2004, In August 2004 the port of Rotterdam established the so called 'Haven Natuur Plan' (port nature plan) which lays down an overall vision as regards nature development in the whole port area without specifically aiming at designated areas. The plan focuses on reinforcing nature where possible, an open dialogue with stakeholders and authorities, a dynamic and transparent nature policy but also increasing the Port of Rotterdam as a business location.

⁵² Under the New!Delta Theme 3, Creation and restoration of coastal and estuarine habitats, two major projects will deliver more information and guidance on this. Restoration of a dynamic dune area on the Dutch coast (De Zilk Dunes) will demonstrate how a large scale nature area can be improved, to restore it to its role as part of a coherent dune ecosystem, and as a source area and refuge for migratory birds. Within the Antwerp (Belgium) port area a project aims at realizing a network of small-scale nature entities which can enhance to the value of larger nature areas in the port's vicinity.

Port expansion in the port area of Göteborg, Sweden

The Torsviken area, owned by the Port of Göteborg and a future development area for the port, is one of the few conflict areas in Sweden between industry and Natura 2000.

However, through an increase in dialogue with the stakeholders by the Port of Göteborg, the situation has changed to a potential common development project. Local green and ornithological groups have publicly confronted the Municipality of Göteborg and the port on the current disposal of dredged material on the site, and have put forward alternative future plans for the area.

It is now an area of interest for expansion for the port of Göteborg, and has simultaneously been selected by the Swedish government as a Natura 2000 area. It was suggested that bringing in an independent facilitator could help to find a less confrontational way forward. This suggestion was supported by all stakeholders, providing that a suitable candidate could be accepted by all.

The first year of the project was focused at establishing an open dialogue, trusted by all. The different parties were interested to move on, and took up this open debate relatively quickly. An agreement was found for borders for the Natura 2000 area. Parallel to this, the representative of the port invited the local groups to discuss and develop an ecological alternative to terminating and reforming the dumping area in the southern part of Torsviken.

Through a series of meetings, different alternatives were discussed in a constructive way. In the end a suitable compromise was reached by all parties. This solution was slightly more expensive for the port than what was originally intended.

Currently there is a cooperative spirit prevailing in discussions regarding the future of Torsviken, where benefits can be seen in local industries involvement in the development of the area.



3.5 It is recommended that port authorities be actively involved in the designation process affecting navigation channels

- *Port authorities could disseminate available data on the presence of ecological interests thus contributing to better informed decisions about which part(s) of the port area or estuary should or should not be designated*

Many estuarine areas were not designated at a large enough scale or their navigation channels were explicitly left outside the area notified as (marine) SACs as clear ecological information on the estuary and coastal waters was missing.

Port authorities can contribute information from their own studies containing ecological data proving that designation is not required or that the parameters of the proposed sites need to be put forward for consultation⁵³. The situation where a complete estuary is being designated for its ecological values while there are outstanding concerns about the ecological data should be avoided if possible.

Nevertheless, as more information became available, excluding navigation channels from (marine) SAC's seemed increasingly difficult⁵⁴⁺⁵⁵. Member States risked legal actions by the European Commission and possible action by the European Court of Justice for insufficient designation of sites. Moreover, whether or not the (whole) navigation channel is included in the designated area, also the likely significant effects of port activities on adjacent sites must be assessed.

Port authorities should also realise that blocking the designation process could impede (future) good relationships and cooperation with conservation agencies, thus potentially interrupting port operations or future developments. On the other hand notification and designation should also be realistic and could at least be subject to more involvement of stakeholders. ESPO is happy to see that the Commission recognized this paradox and set up recently an ad-hoc group on estuary management existing of Member States' representatives and stakeholders.

53 The Port of Bordeaux, together with local governments and other users of the Gironde Estuary were not in agreement with the proposals for sites to be integrated into Natura 2000 as no data or specifications and proposals were based on a general framework without detailed scientific reasoning. The Port of Bordeaux suggested in early 2003 that a scientific committee was set up to make a synthesis of available scientific knowledge and to carry out further surveys.

54 In December 2005 the Commission decided to pursue legal action against Germany by sending a final warning for not taking sufficient action to comply with a 2001 Court Judgment which found that Germany had not submitted an exhaustive list of designated nature conservation sites. The Commission is concerned that since the 2001 Court Judgment Germany still had not proposed sufficiently large areas in 4 important river estuaries – the Weser, Elbe, Ems and Trave as SCIs (Case 71/99 of 11 September 2001). The Commission finally decided to close the infringement procedure. Since the final warning in December 2005 Germany proposed further designations and the Commission considers that these now allow it to close the infringement procedure.

55 Interpretation note on "Estuaries" (Habitat type 1130): 'No important part of the habitat complex should be excluded. Therefore, shipping lanes should not be excluded from sites containing the "estuaries" habitat as they are an integral part of them.'

4. Conclusion

Many of the problems port authorities have experienced in relation to the Birds and Habitats Directives can be traced back to lack of space available for development in coastal areas. To reduce such problems in the future, it is recommended that port authorities become more actively involved and participate in any national, regional or local spatial planning exercises dealing with land use in coastal areas. The implementation of the Integrated Coastal Zone Management Recommendation could prove to be a good remedy, enabling port authorities to become involved anyway.

More specifically as regards the proposal and notification procedure under the Birds and Habitats Directives, it is possible that problems might arise during future reviews of already designated areas or be experienced in the new Member States. Whilst no attention can be given to economic criteria during the initial process, more consideration should be paid to compensating for economic loss arising from the designation process.

Establishing good relationships with administrations and other stakeholders at an early stage could be helpful insofar as future designations are concerned (e.g. if new areas are proposed or existing areas extended based on ecological criteria). With greater cooperation, the boundary of an area could be slightly different or reshaped depending on the interpretation of ecological information. A more positive approach from the environmental agencies as regards initiatives taken by the industry (such as the creation of buffer areas) would be helpful: such initiatives should not automatically be rejected.

The above mentioned guidance and experiences do not necessarily have a tangible immediate effect, but rather require long term commitment from the port authority. In the longer term however, such an approach, can lead to better understanding of the port community's interests and expectations - which could, in turn, lead to port interests being better reflected in spatial planning policy.

Zeebrugge Tern Island





Chapter III – Conservation Measures and Management of Sites

1. Aim of this chapter

The Birds and Habitats Directives do not only affect port authorities when major port expansion projects or capital dredging projects are being planned. They can also affect day-to-day operations such as maintenance dredging. Court cases have shown that even routine maintenance projects in waterways and ports may need to be subject to recurrent obligatory assessment procedures under the Habitats Directive⁵⁶.

If port operations such as maintenance dredging are not part of a larger preceding project (e.g. capital dredging or port expansion), and consequently have not been subject to a prior appropriate assessment according to Article 6(3) of the Habitats Directive, such an assessment may be required if it is likely that the operation will have a significant effect - even if its operation has been carried out for years.

However, it is possible that by actively participating in the establishment of conservation measures and/or the development of a management plan for the site, the impact of the Directive on routine operations can be reduced.

This chapter therefore aims to provide recommendations on how a port authority can actively participate in the establishment of a management plan for a Natura 2000 site. This type of proactive approach can also lead to improved understanding of the impact of these activities amongst other stakeholders and hence may increase the flexibility for port authorities to carry out such activities.

2. Background

According to the Birds and Habitats Directives Member States shall lay down conservation measures for the special protection areas (SPAs) classified under the Birds Directive (Articles 4(1) and (2)) and for the special areas of conservation (SAC's) designated under the Habitats Directive (Article 6(1)).

The conservation measures that Member States have to take are aimed at maintaining or restoring the natural habitat types and species at a favourable conservation status. Favourable conservation status is defined in Article 1 of the Habitats Directive. However, the definition appears complicated because of the many ecological requirements which can be subjective and undefined. This document will not, however, further elaborate on that but as it could play an important role when determining compensation requirements, ESPO recommends that more guidance be provided.

Unlike Articles 6(2), (3) and (4) of the Habitats Directive, Article 6(1) does not apply to the SPAs. However, by analogy, the provisions can apply to SPAs by virtue of Article 4(1) and (2) of the Birds Directive.

According to Article 6(1) of the Habitats Directive, conservation measures for protected sites could include the preparation of appropriate management plans specifically designed for the purpose, and appropriate statutory, administrative or contractual measures⁵⁷. In this way

⁵⁶ The Cockle Fisheries (ECJ 7 September 2004, C-127/02) and Seed Mussels cases (Dutch Council of State, 22 March 2006, nr. 200505040/1).

⁵⁷ Article 6(1) Habitats Directive: 'For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites'.

Article 6(1) aims to achieve the general objective of the Directive: the need to promote biodiversity by maintaining or restoring certain habitats and species at favourable conservation status within the context of Natura 2000 sites by positive measures. The other paragraphs of Article 6 provide for preventive measures to avoid deterioration, disturbance and significant effects in the Natura 2000 sites.

Article 6(3) of the Habitats Directive also shows the importance of Article 6(1) as it stipulates that only plans or projects not directly connected with or necessary to the management of the site shall be subject to an appropriate assessment.

Article 6(1) furthermore relates to Article 2(3) which specifies that ‘the measures should take account of economic, social and cultural requirements and regional and local characteristics’⁵⁸.

The European Commission clearly identifies that amongst the measures involving positive action, there are examples illustrating how socio-economic requirements can be taken into account according to Article 2(3)⁵⁹. The European Commission further mentions that regular dredging works as maintenance measures, not intended to deepen the shipping lane, can be included in the management plan for the respective Natura 2000 site⁶⁰.

The European Commission also indicates that the management plan should address all foreseen activities: unforeseen/new activities need to be dealt with through Articles 6(3) and (4)⁶¹.

The above examples confirm that it is becoming increasingly important for port authorities to actively participate in the development of management plans and to agree appropriate measures therein in order to avoid procedures under Articles 6(2), (3) and (4). Moreover, unlike Article 6(2), 6(3) and 6(4) which apply when a site becomes an SCI, Article 6(1) only applies when an SCI has been actually designated as an SAC. Therefore in many Member States much can be achieved by port authorities taking a proactive approach as conservation measures have not been established for a number of SACs.

Special attention should be paid to maintenance dredging works in this chapter and, in particular, how strict the requirement of including only foreseen activities in a management plan applies.

3. Guidance

3.1 It is recommended that port authorities encourage the establishment of an appropriate management plan in the recognition that they could benefit from it

- *A management plan could provide a port authority with a margin of free space in which to carry out certain management/maintenance operations*

The European Commission states that management plans may not always be necessary⁶². However, it has also been stressed that the management plans could constitute an effective means by which to fulfil the obligations required by the Habitats Directive. To ensure a multidisciplinary and professional approach, all key actors should be involved. However, as a port authority could benefit significantly from the preparation of a management plan, it is recommended that they take a leading role if necessary.

A management scheme works on the assumption that important habitats can be sustained alongside many of the human activities that have been ongoing since the site was designated, and that such activities should be able to continue unless it can be proved that they are

⁵⁸ European Commission 2000, p. 17

⁵⁹ European Commission 2000, p. 20 - 21

⁶⁰ European Commission September 2005: ‘For dredging works in the tidally influenced part of the Elbe that have been designated as Natura 2000 sites the Directive applies. However, regular dredging works as maintenance measure – not intending to deepen the shipping lane – can be included in the management plan for the respective Natura 2000 site and would in this case not be considered to be a plan or a project according article 6 of the Directive.’

⁶¹ European Commission 2000, p. 20

⁶² European Commission 2000, p. 20

incompatible with the nature conservation objectives for the site⁶³. If necessary, port authorities should point out to the environmental agencies that designation does not automatically preclude all human activity in a designated area.

By careful consultation and prior discussion during the preparation of (or based on the provisions of) the management plan, a port may be able to determine a margin providing them free space to carry out certain management/maintenance operations. Within this margin, ports would not be obliged to go through a complete Article 6 of the Habitats Directive assessment as they will have the prior agreement of the regulatory authorities.

3.2 It is recommended that port authorities work with the environmental agencies to determine the status of dredging works and to find appropriate regulatory solutions

- *By initiating cooperation with environmental agencies, a more realistic approach and a clearer regulatory status for maintenance dredging work could be established to better reflect the actual impact of maintenance dredging on the conservation objectives of the site*

The process described above will be especially interesting for many port authorities if it also addresses maintenance dredging. Maintenance dredging activities (excluding those linked to a capital dredge which has taken place after the site was designated), have been carried out ever since ports existed and typically long before designation under the Birds and Habitats Directives took place. Therefore ports believe such maintenance dredging should automatically be included in the management plan as ongoing activity on the site and should not be regarded as a project or plan subject to Article 6(3) or 6(4).

For capital dredging projects, which were subject to the Article 6(3) and 6(4) procedure, subsequent dredging works may be needed to maintain the required depth. As these subsequent maintenance dredging works were part of the Article 6(3) and 6(4) procedure, their impact should already have been assessed and provision will often have been made for monitoring systems and any other initiatives required as part of a compensation package. Seaports believe that, after a 6(3) and 6(4) procedure consent is given to such a project or plan, it should be possible to carry out the associated maintenance dredging works without requiring these to fit into a management plan.

To determine which regulatory solution would be the most appropriate in a particular situation, port authorities could discuss the status of the dredging works with the appropriate environmental agencies.

- *Port authorities could disseminate more information about new and sustainable dredging techniques to show this could be part of a management plan*

Port authorities have a lot of potentially valuable knowledge and scientific data about the activities they carry out in designated areas and particularly about the effects of dredging.

The nature of the licensing process for dredging activities is often such that stakeholders neither have a good understanding of why dredging is required nor how decisions are made. Even though there may be no evidence of a particular adverse impact, data to prove this is often missing – especially when a port authority has carried out research and monitoring in isolation from the wider community. Problems associated with this might be partly overcome if more attention is given to information sharing and exchange, something which might also make it easier to include maintenance dredging in the management plan⁶⁴.

⁶³ Morris 2003

⁶⁴ The Port of London Authority thereto set up a neutrally-facilitated ‘dredging liaison group’. In addition a web-based GIS ‘information exchange system’ was set up, enabling stakeholders to better understand the location and scale of dredging activity, and share information they wanted the port authority to consider in making decisions on dredging licence applications. Overall the framework resulted in better communication and shared understanding with stakeholders as well as reduced conflict and associated delays.

3.3 It is recommended that port authorities refer to guidance from the European Commission in discussions regarding management plans with national administrations

- *The port authority could strengthen its negotiating position with competent authorities by using the recommendations of the European Commission*

The guidance prepared by the European Commission on how to manage Natura 2000 sites was primarily aimed at Member States' administrations as they are responsible for implementing the measures of the Bird and Habitats Directives. However, by taking proper account of such documents as a stakeholder, the port authority can ensure that the recommendations in such guidance support its own position.

With regard to the methodology for drafting the management plan, clarification could be sought on various points such as what is important about the site (both its natural and socio-economic values), what are the main threats and what should be achieved⁶⁵. A stakeholder such as the port authority could encourage such elements to be taken into account whilst also referring to the guidance from the European Commission.

3.4 It is recommended that port authorities use the guidance forthcoming from projects such as Paralia Nature and New!Delta

- *The Paralia Nature and New!Delta projects could provide the port authority with a wide range of very detailed management options for port activities in a designated area*

The reports of the Paralia Nature and New!Delta projects provide a wide range of information on management perspectives relevant to port development projects in the designated area. These can be used both to help manage port projects or plans and to reduce any associated risks to nature⁶⁶.

3.5 It is recommended that port authorities are involved in the management plans before conditions of contractual measures are agreed

- *The management plan could provide both the wider context and a useful starting point for conditions of contractual measures*

The Commission stresses that, if management plans are to be prepared for a site, it will often make sense to establish them before concluding the other measures mentioned in Article 6(1), particularly with regard to any contractual measures⁶⁷. If this is not the case, stakeholders such as port authorities could refer to the responsible national administrations to establish a management plan⁶⁸.

The management plan, by focusing on all aspects of the site, will provide a legal framework and certainty which ports need to operate in. Its contents could provide a useful starting point for the specific details of any contractual measures⁶⁹. The management plan could further be the starting point for determining a management agreement for example on how a defined area of land will be used, protected or managed in the future. More specific guidance on the interrelation between the management plan and a management agreement for part of the protected site is welcome.

⁶⁵ European Commission 2000, Annex II: Considerations on management plans and Annex IIA: Examples of LIFE-Nature projects that have involved management plans or statutory, administrative or contractual measures.

⁶⁶ See: <http://www.newdelta.org/navigatie/frameset.asp>

⁶⁷ European Commission 2000, p. 20

⁶⁸ See also European Commission 2005

⁶⁹ European Commission 2000, p. 20

An internal ESPO survey carried out in July 2002 showed that port authorities were often consulted during the preparation of and/or were involved in the implementation of a management plan (through various arrangements, but often through cooperation between the port authority, relevant authorities and specialised environmental agencies). This survey also showed that, in some cases, port authorities pay a significant proportion of the costs related to the management of the protected zone.

- *Based on the management plan conditions of contractual measures for maintenance dredging, dumping of dredged material, capital dredging, hydraulic works and port development could be established*

The management plan could be particularly important insofar as port plans/projects are concerned (maintenance dredging, dumping of dredged materials, capital dredging, hydraulic works, port development, etc.) because the principles set out in the plan could provide a basis for defining contractual measures, e.g. as part of a construction contract and could determine possible contractual measures. Contractual measures will often involve a relationship between the port authority and/or its contractors, the competent authorities and individual landowners and will be limited to individual land-holdings which are normally smaller than the total site⁷⁰.

Increasing experience with the type of arrangements mentioned above has led to positive results and these types of measure therefore deserve more attention from port authorities. It is not necessary to carry out a public inquiry before a management plan is approved (indeed, this could hamper the development of the plan), but the management plan should be made public once approved. Further, the sustainable relationships developed through processes such as the preparation of management plans will increase mutual understanding which could have real benefits when making decisions on contractual measures and/or management agreements.



70 European Commission 2000, p. 20

UK protocol on maintenance dredging

UK Government lawyers made clear that future applications for licences for maintenance dredging should be treated as a 'plan or project' for the purposes of the Habitats Directive. They have always taken the view that, in principle, maintenance dredging is potentially subject to the Habitats Directive and believe this view is consistent with the guidance given by the European Commission. Consequently, although the activity is ongoing, it is subject to the requirement under the Habitats Directive for an assessment to be made if there is going to be an environmental impact.

English Nature (now Natural England, the UK Government Agency and Statutory Service responsible for looking after UK's biodiversity) considers all dredging to be an action that could potentially affect Natura 2000 sites, thus subject to the elaborate regime of assessment provided for in Article 6(3) of the Habitats Directive.

Even though English port authorities believe this approach is not right and maintenance dredging does not automatically have to be interpreted as a plan or project, they agreed to work closely with the regulators to develop an approach which would allow the effect of maintenance dredging on a European Marine Sites to be assessed without placing a disproportionate burden on those who commission or approve maintenance dredging operations.

The Protocol aims to provide a methodology within which a robust but appropriate level of assessment can be made of the implications of the ongoing process of maintenance dredging activity without imposing an undue burden on port and harbour operators.

The approach is that each port will produce a baseline document bringing together existing data which it largely routinely collects about the status of the site. If the conservation agencies are satisfied that the scale of any proposed continuing maintenance dredging operation is not going to have a detrimental effect on the site it is unlikely that any further assessment will be needed.

3.6 It is recommended that port authorities, especially those situated in estuaries, actively participate in management plans

- *A management plan for a designated estuary could contribute to the harmonization of the different uses in this area*

Estuaries contain even more unique habitats and species than other coastal zone areas. Most of Europe's estuaries are therefore designated areas under the Birds and Habitats Directives. Their often relatively protected waters also make them ideal locations for seaports - resulting in a clear potential for conflicts of interests (nature conservation, shipping, port activities, etc.)⁷¹.

Preparing a management plan and agreeing conservation measures for an estuary as designated site could make a positive contribution towards avoiding such conflicts of interest⁷². The port authority can initiate a management scheme if the conservation agencies do not take the initial steps⁷³. However, such work can require substantial staff resources from all parties involved and a

71 Ministère des Transports 2006, Four main observations were indicated: 1. An insufficient scientific knowledge on the functioning of the environment in estuaries, 2. A compilation of many different policies which are difficult to coordinate, 3. Numerous actors making a single manager impossible, 4. Instable administrative rules on management.

72 Grant Lawrence 2006: "The Commission has encouraged Member States to develop management plans for Natura 2000 sites, especially where there are competing and potentially conflicting resource uses at stake as is the case in many estuaries. Management plans also provide an excellent tool to help reconcile existing uses with environmental protection and for engagement of the port authorities and other stakeholders in this process."

73 Morris 2003: 'Some management schemes have been initiated by ports e.g. for the Humber Estuary SPA and Stour & Orwell Estuaries SPA.'

dedicated project officer may be needed. Port authorities must therefore stress the importance of making funding available for these management schemes.

- *An estuary management plan should focus on the promotion of different uses in different areas of the estuary whilst also maintaining or restoring the natural habitat types and species at a favourable conservation status*

An area-specific management plan for the estuary as a designated area could potentially include the stimulation of habitat restoration or creation in some areas whilst in others, a certain succession stage of nature development could either be tolerated if it does not prevent further port development. Where this is ideally not possible (for example on lands owned/purchased for port development by the port authority), it needs to be prevented. In this way port authorities could work together with nature conservation bodies to identify opportunities to deliver environmental enhancements on and around port land, whilst also taking into account future development needs.

It would be beneficial, as part of the management plan, to develop a general methodological framework for long-term port and estuary visions with a special focus on dredging in designated navigation channels⁷⁴⁺⁷⁵.

3.7 It is recommended that port authorities carry out active management of ecologically valuable sites within the port area and, in so doing, try to facilitate stakeholder engagement

- *If a designated area is large enough, the port authority could also use a management plan to ensure the integrity of conservation objectives*

If part of the designated area consists of land owned/managed by the port authority, a management plan could also be the starting point for the port authority to actively contribute to the overall conservation concept of a designated area. A clear framework of conservation objectives for the site is therefore indispensable.

This does not necessarily need to be connected to compensation obligations (as further discussed in Chapter VI) but could exist of management focused at reassembling the otherwise fragmented nature in the port area in a bigger and connected entity – for example, by creating corridors⁷⁶. Effective management could mean that, within the site, certain areas are reserved for bird breeding while other areas of the site can be more dedicated to port activities. However this is dependent on the size of the site and the designation, i.e. the integrity of the conservation objectives

Designation as a Natura 2000 site does not imply that human activities are no longer possible, rather that the conservation objectives must be maintained. Port authorities can contribute to this.

74 When the French government decided to designate navigation channels (see Chapter II) it committed itself to the ports to do everything possible with other Member States and under the aegis of the Commission, to draw up a management guide for all European estuary ports. The GEODE group consisting of the Ministries of Ecology, Transport and Defence, scientists and the ports together drafted an inventory of best practices that would minimize the impacts of dredging during navigation channels maintenance on Natura 2000 sites species and habitats.

75 One of the New!Delta Project objectives is to develop cross-sectoral long term port and estuary visions defining the future status and management of these areas. See: New!Delta

76 Port of Antwerp 2006 and Tessier 2006: The 'Raamplan' provides a new protocol between public actors aiming at long term sustainability of the SPA/SAC in the port area on the Left Bank of the Scheldt by implementing and translating maintenance ecological objectives. The scenario building consists of consulting environmental NGOs, resident farmers and their organizations and public actors. The basic outlay of the Raamplan consist of 3 pillars; network of ecological infrastructure inside port area, network of ecological infrastructure inside agricultural area and natural structure (among others: brackish meadowland): full priority to ecological objectives.

- *The establishment of conservation objectives could provide more clarity for the management options in a designated area*

More guidance is needed on the setting of conservation objectives. These are important in determining management options, but they are nevertheless continuing to prove difficult to define⁷⁷.

- *An active management of ecological valuable sites within the port area could be further developed if more clarity is available on such flexible approaches*

The Commission mentioned that a management plan could only include existing uses. Port authorities believe however that a management plan could also be the starting point for new approaches to nature management in port areas with a clear focus on the future.

For instance, port authorities might become involved in helping to create more resilient nature within the framework of a management plan for a designated area⁷⁸. A management plan could also give more attention to concepts such as the development of buffer zones in certain areas of a designated area (or adjacent area) to reduce the impact of human activities. The legal status of such concepts is, however, still unclear and more guidance on this would be welcome.

3.8 It is recommended that port authorities promote the regular review and updating of management plans

- *Experiences with existing management plans could be interesting when drafting new management plans*

Now that some management plans have already been in place for a number of years, there may be tangible results and new plans will be able to take on board the lessons learned from experience. It is important that the performances of these management plans (which are for a large part, based on a voluntary regulation) are regularly evaluated⁷⁹.

4. Conclusion

The above described model for the management plan of protected areas offers many opportunities for port authorities to become more actively involved in site management. Nevertheless ports believe that especially the European Commission should stress that designation does not make all human activities impossible as rigid approaches of some environmental agencies make it difficult for port authorities to be actively involved.

As management plans can be beneficial for all users and stakeholders in a designated area, enough funding should be available to support their establishment.

Seaports also believe that more guidance should be developed for active management which can be carried out by port authorities together with NGOs, environmental agencies and other stakeholders in a designated area. Nature could benefit of such a proactive

⁷⁷ The port of Rotterdam organised a workshop on 18 September 2006 specially aiming at the role of conservation objectives in relation to ongoing activities in the management plans. The port authority thereto invited other Dutch port authorities and the ministry charged with setting up the legal framework implementing the obligation to determine conservation objectives. The aim of the workshop was merely focused on an information exchange of views between port authorities and the ministry as the effect of establishing the conservation objectives is still unclear. See also: Ministerie van Landbouw, Natuur en Visserij

⁷⁸ The port of Antwerp signed a cooperation agreement with Natuurpunt (a nature NGO) in 2001. Natuurpunt elaborates for the port of Antwerp a proposition in which ecological infrastructure in the port can be developed and saved where it is possible and acceptable also from the economic point of view.

⁷⁹ Paralia Natura 2006, p. 7

approach and of a clear development framework. Also for such flexible solutions a lot depends of the attitude of environmental agencies and their approach towards the management of designated areas.

Finally, ESPO stresses the fact that maintenance dredging is an ongoing activity in all seaports in the EU. Therefore only when new maintenance dredging projects are proposed, these could be possibly seen as a plan or project in the sense of the Habitats Directive and subject to an Article 6(3) assessment. For all other maintenance dredging activities (excluding those linked to a capital dredge) a direct inclusion in a management plan should be possible.

The same concerns apply to the setting of conservation objectives as management plans should aim to restore or maintain these conservation objectives. Even for ongoing activities, it is sometimes difficult to predict the effects on nearby habitats and species. Therefore, even for activities which do not have to go through the appropriate assessment process, a lot of scientific work may be needed. More effort is therefore required to improve understanding of coastal dynamics and the ecosystem approach should also be developed further - however, this is mainly the task of the competent nature conservation authority.

Humber Management Scheme – Humber Memorandum of Understanding

Associated British Ports (ABP) is directly involved in the protected area of the Humber estuary as a Relevant Authority (RA) through the Humber Management Scheme. Other RA's include, the Environment Agency, Natural England, local authorities, Internal Drainage Boards, etc. . .

All relevant authorities pay towards managing the protected zone and spend time and resources on the management.

ABP continued to maintain their close partnership with Natural England on the Humber Estuary with the agreement of a Memorandum of Understanding. The agreed Memorandum promotes high environmental standards for the Humber Estuary as a SAC but reduces the regulatory process associated with the designation and developing port operations.

A working group from ABP and Natural England identified and agreed the range of activities which ABP can undertake on a routine basis, and a series of thresholds against which any activity can be examined. The Memorandum agrees that activities that fall within these thresholds will not require further contact with Natural England.





Chapter IV – Appropriate Assessment of a Plan or Project

1. Aim of this chapter

This chapter focuses on how to avoid or minimise the difficulties which can arise from the requirement in Article 6(3) of the Habitats Directive to carry out an appropriate assessment for a plan or project which will have a likely significant effect but is not directly connected with or necessary to the management of the site.

2. Background

Chapter III describes where there is potential to comply with the requirements of the Birds and Habitats Directives by dealing with certain port activities in the management plan for the site. This approach is not, however, valid for proposed plans or projects which are likely to have a significant effect on a designated site. In this case Article 6(3) of the Habitats Directive requires an appropriate assessment of the likely significant effects.

The European Commission has confirmed that the term ‘project’ should be given a broad interpretation, to include both construction works and other interventions in the natural environment. The term ‘plan’ also has a broad meaning, including land-use plans and sectoral plans or programmes, but not general broad policy statements⁸⁰. Most port development or expansion plans and capital dredging along with any maintenance activities which have not been either assessed during a prior project or included in the management plan, will fall under this definition of a project or plan. Such plans and projects include not only those taking place within a designated area, but also those carried out outside the protected area but possibly having a significant effect thereon.

Article 6(3) of the Habitats Directive lays down that: ‘any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications of the site and subject to the provisions of paragraph 6(4), the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.’

The implicit assumption of Article 6(3) is that individual sites would generally need to achieve their conservation objectives, for a habitat/species to be at favourable conservation status.

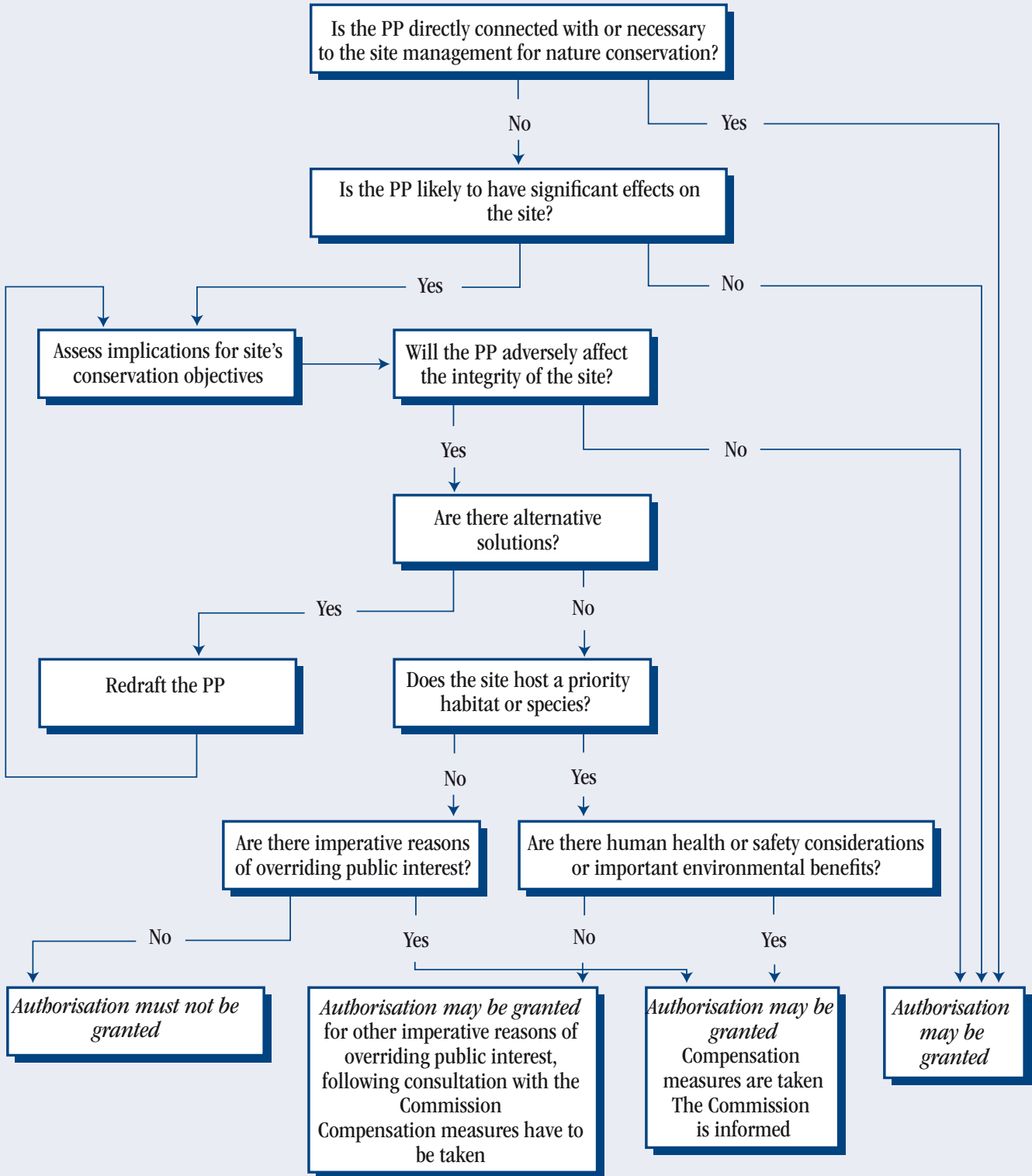
The assessment of alternative solutions, possible imperative reasons of overriding public interest (IROPI) and compensation do not form part of the Article 6(3) appropriate assessment as they are requirements of Article 6(4). Article 6(4) only applies when the appropriate assessment indicates that there will be significant adverse effects on the integrity of the site. Where no adverse effect on integrity is anticipated, the provisions of Article 6(4) should not apply (see figure 2).

⁸⁰ European Commission 2000, p. 33

Figure 2

Flow chart of the Article 6(3) and (4) procedure (from MN2000) in relation to the stages of the guidance

CONSIDERATION OF A PLAN OR PROJECT (PP) AFFECTING A NATURA 2000 SITE



In the experience of port authorities, the term ‘appropriate assessment’ itself can lead to various problems and interpretations. The allegation (for example by an interested party) that an assessment is not, in fact, ‘appropriate’ can jeopardise the plan or project as the assessment may then need to be scrutinised by a court with various possible consequences. The uncertainty about the exact meaning of an ‘appropriate assessment’ leading to legal procedures has caused delays and significant extra costs for several plans and projects.

The question then arises as to how these problems can be avoided, what an appropriate assessment should contain, and to what level the assessment should anticipate on the requirements of Article 6(4) when it can be foreseen that the integrity of the site will be adversely affected.

The preparation of a comprehensive appropriate assessment requires time and money - but not doing it properly may result in longer planning procedures, delays and additional costs.

3. Guidance

3.1 It is recommended that port authorities clearly determine the scope of the potential effects of the plan or project that need to be assessed

- *The terminology ‘significant effect’ can have a very extensive meaning*

The provision ‘likely to have a significant effect’ related to the proposed plan or project contains the two rather vague words: ‘likely’ and ‘significant’. The Commission has stated that the notion of what is significant needs to be interpreted objectively. But at the same time, the significance of effects should be determined in relation to the specific features and environmental conditions of the protected site concerned by the plan or project, taking particular account of the site’s conservation objectives⁸¹.

This does not provide the necessary clarification - leaving the plan or project developer with the very difficult task of gathering information on all possible effects (and cause-and-effect relationships)⁸². It should also be borne in mind that the project or plan might potentially also affect other, less obvious or distant, protected sites and that these effects could also be part of the appropriate assessment⁸³.

- *Establishing a clear understanding of the conservation objectives for the site could help establishing the scope of the appropriate assessment*

Port authorities need to keep in mind that the scope of the Article 6(3) assessment is narrower than that for an assessment under Directive 85/337/EEC, the Environmental Impact Assessment Directive (EIA Directive) and Directive 2001/42/EC, the Strategic Environmental Assessment Directive (SEA Directive). In particular, the appropriate assessment is confined to assessing the implications for the site in view of its conservation objectives. Notwithstanding that appropriate assessment follows an exclusive conservation focus, it can nonetheless in its methodology usefully draw on the methodology envisaged by the EIA Directive⁸⁴.

As mentioned above, Article 6(3) sets out that significant effects need to be assessed in view of the site’s conservation objectives. Therefore it is desirable for the plan or project developer to have a clear idea of what the conservation objectives are. The setting of the conservation objectives is the task of the competent nature conservation agencies, but the port authorities should seek to be actively involved in this process and should liaise closely with the conservation agencies to ensure a common understanding of the objectives.

81 European Commission 2000, p. 34

82 As for the Maasvlakte 2 port expansion project in Rotterdam the repaired assessment possibly also needs to assess effects of the project on (regional) air quality even though this was not one of the reasons on which the initial appropriate assessment was nullified.

83 The assessment of the constructing of the Maasvlakte 2 project in Rotterdam did not contain enough information on the impact of the construction on the SPA of the Waddenzee (which is located far, over 100 km, to the north of the project area).

84 European Commission 2000, p. 37

- *Organizing an early meeting with the competent authorities to determine their view on what the appropriate assessment should contain could be beneficial*

The port authority as plan or project developer could organise a discussion with the competent (national) authorities on the scope of the required assessment, their view on the conservation objectives and any required data not already held by the competent authorities.

- *There may be benefits in carrying out an early ‘screening’ exercise to provide an initial idea of the extent of all potential effects*

After an exchange of views with the competent authorities a quick ‘scan’ or ‘screening’ exercise could be carried out to determine the range of possible effects of the plan or project proposal⁸⁵. In this respect, a qualitative assessment should be sufficient (listing all possible effects) while the quantitative assessment (the exact extent of each effect) would be carried out at a later stage. It could be useful to have the agreement of the competent authorities and environmental agencies to such a qualitative assessment.

3.2 It is recommended that port authorities invest sufficient time and money in the obligation to carry out an appropriate assessment

- *Despite difficulties in obtaining information, the appropriate assessment could have far-reaching implications*

Even though the competent authority needs to carry the appropriate assessment, the developer will, however, need to provide the information necessary to inform the assessment. Obtaining information on all likely significant effects can be very expensive and will not always provide scientifically indisputable answers, partly because the necessary ecological data is not always available in marine or estuarine ecosystems⁸⁶. Data also need to be capable of standing up to scientific and expert scrutiny to curb possible later abuse of the Directives by individual interests⁸⁷.

Port authorities should nonetheless take the scope of this requirement very seriously as missing ecological data on likely significant effects can mean delays⁸⁸.

⁸⁵ See also: Ministerie van LNV 2006, p.11

⁸⁶ One of the New!Delta Project objectives is to develop best practice guidance for undertaking cause-effect analysis of projects, plans and activities related to ports and harbours that have the potential to affect Natura 2000 sites. The purpose of this R&D theme is to bring together this experience at a European level and to develop a common science based methodology and toolkit for cause-effect assessment that can be applied to projects and plans or activities. See: <http://www.newdelta.org>

⁸⁷ For the Vuosaari Harbour project in Helsinki, Finland, no less than six different field studies were conducted in order to provide basic data on the natural values in question and the impacts of the project on the Natura 2000 area.

⁸⁸ The assessment of the Maasvlakte 2 project in Rotterdam did not contain enough information on the stability of a process of alternating silting-up and erosion, caused by the transport of silt and the postulated effect on the food supply in the Waddenzee from the southern part of the North Sea along the Dutch coast. Even though it proved to be very difficult to determine these effects, it was one of the main reasons for the Council of State to decide that the assessment was not appropriate. It should be mentioned that the Commission considered that possible effects had been investigated as much as current scientific knowledge and assessment techniques allowed, but that the margin of error in the results of this assessment remained considerable.

3.3 It is recommended that port authorities develop a clear idea of both the range and impacts of alternatives and mitigation measures

- *If the project or plan does not have an adverse effect on the integrity of the site, it may not be necessary to go through to the Article 6(4) procedure*

In principle, the assessment should be as objective as possible; the competent authority must therefore first consider the project or plan in the absence of any mitigation measures that are designed into a project⁸⁹. On the other hand, the Commission recommends that an examination of possible alternative solutions and mitigation measures may make it possible to ascertain that, in the light of such solutions and mitigation measures, the plan or project will not adversely affect the integrity of the site⁹⁰. If this can be demonstrated, it would clearly be beneficial for the plan or project developer as the Article 6(4) procedure would then be avoided.

The comments of the Commission indicate that mitigation measures and alternative solutions should be integrated into the project through an iterative process which seeks to improve the siting and design of a plan or project at the earliest stage, thus working to avoid any significant effect on the site's conservation objectives.

Alternative solutions which are part of the Article 6(3) appropriate assessment should thus be regarded as technical alternatives which could act as quasi 'mitigation measures' aimed at avoiding likely significant effects. Investigation of site alternatives, when an adverse effect on integrity remains, is part of the Article 6(4) assessment.

The investigation of mitigation measures should be part of the design from project conception onwards, not an afterthought. There may then be further mitigation measures that can be incorporated (e.g. to deal with outstanding or consequential impacts) but these may be of a secondary order compared to the impacts arising from the physical presence of a development.

- *In general, mitigation measures could be easier and cheaper to implement than compensation measures*

It is important to distinguish between mitigation measures and compensatory measures. Carefully selected and implemented mitigation measures will limit the extent of the compensatory measures required by reducing the damaging effects which require compensation.

It is further recommended that one of the Paralia Nature project conclusions is considered: given that the implementation of compensatory measures can be a lengthy and often complex task, it is worthwhile looking carefully at methodologies or strategies that encourage and facilitate further mitigation⁹¹.

Finally, it needs to be recognised that including different mitigation measures and alternative technical solutions in the appropriate assessment can mean extra expenditure relating to the identification of likely significant effects based on more ecological data. There are also an increasing number of models and techniques available to measure and model effects, but again high costs can be involved⁹².

89 Mitigation measures are measures aimed at minimizing or even canceling the negative impact of a plan or project, during or after its completion. Mitigation measures may cover data and the timetable of implementation (when not to operate) or the type of tools and operations to be carried out (which technique can be used where and when).

90 European Commission 2000, p. 37

91 Paralia Natura 2006, p. 6

92 Including different mitigation measures and alternative solutions in the appropriate assessment does imply of course more costs related to identifying likely significant effects of more ecological data. There is an increasing number of expensive models and techniques available to measure this but high costs are involved. In Hamburg a mathematical model was developed to predict the hydromorphological impacts of the Mühlenberger Loch reclamation project. The shape of the reclamation area had strictly to address the production requirements of a new factory for Airbus Industries. The model was used to assess the effects of the extension area and develop appropriate mitigation measures (see also Paralia Nature 2006, p.6).

3.4 It is recommended that stakeholders are involved when defining the requirements of the appropriate assessment

- *The wider the range of likely effects which is assessed, the fewer difficulties could arise in the form of legal questions or challenges against the appropriate assessment*

In addition to initiating early discussions with conservation agencies and competent authorities, port authorities should also aim to involve other stakeholders or interested parties before the appropriate assessment is carried out. This is of particular importance as these parties could raise legal challenges with regard to the appropriateness or otherwise of the assessment.

Significant progress on environmental issues can be reached when all parties agree on the issue of likely significant effects. Other parties might identify possible significant effects which the port authority had not considered. Such effects can then be assessed in the proposal and, if necessary, mitigated. Port authorities should be honest about potential impacts and demonstrate that all efforts are being made to mitigate them. The effort made to identify and mitigate likely impacts should be made very visible as it may be used to defend the final plan or project proposal. Such an approach is also beneficial in that it ensures stakeholders are not confronted with a plan or project which might have an impact on a protected area without having been involved in early discussions. Early discussions with NGOs may similarly help to identify options for mitigation, alternatives and/or agreements related to further project development, thus reducing the possibility of legal actions.

- *An extensive appropriate assessment could help to avoid a court case but this is not a guarantee*

Notwithstanding the best efforts of the port authority, other parties could of course raise an unlimited number of possible effects which cannot all be realistically assessed, leaving in doubt the final decision on whether or not the assessment was appropriate. Moreover, parties can always make complaints about the assessment and potential effects despite the efforts of the port authority to reach an early agreement on the scope of the assessment.

Another potential problem lies in the question whether possible compensation measures should be discussed at this stage if it is clear that significant effects will remain.

The Rotterdam Mainport Development project

The Rotterdam Mainport Development project does not focus solely on the constructing of the Maasvlakte 2 port expansion area but is also a government response to improve the quality of living environment in the Rijnmond region. The Rotterdam Mainport Development Project (PMR) was launched at the end of the 1990s to create space for the port and industry in mainport Rotterdam to develop. Simultaneously with this spatial development, PMR aims to improve the quality of the environment in and around the port. This dual objective characterises the Rotterdam Mainport Development Project.

The Rotterdam Mainport Development thus focuses on both the expansion of the port and on improving the social climate of the entire area. It is therefore of national importance for The Netherlands and thus subject to the statutory Key Planning Decision (PKB) procedure, which results in a government decision.

In May 1998 the decision making process for the plan for port extension was started including Environmental Impact Assessment (EIA) for the construction and set up of Maasvlakte 2 and made part of the PKB.

The development procedure was supported by a proactive contribution of seven regional nature and environmental NGO's working together in one organisation, Consept.

The port authority received the 'Best Practice Award for PRINCE2 2005' for the project management of the Maasvlakte 2. PRINCE stands for Projects In Controlled Environment. As one of the most used project management techniques in the world, it was used by the port authority for construction of Maasvlakte 2.



3.5 It is recommended that if maintenance dredging needs to be assessed, port authorities use the assessment for creating more awareness about the necessity of dredging for ports

- *Port authorities could disseminate very basic information about dredging and environmental improvements which have already been made*

Maintenance dredging which arises from new capital dredging projects or other (port) expansion projects affecting a designated area should have been part of the Article 6(3) assessment for these capital projects. If this has not happened and maintenance dredging is not covered by the management plans (as described in chapter III) either, it may need to go through an appropriate assessment to determine whether it is likely to have a significant effect on a Natura 2000 site.

Scientific data is needed to assess the effects of dredging. To encourage this ports are already using and sharing good practices. But the importance of dredging for the port sector is often misunderstood. Statutory consultees and regulatory administrators often lack adequate understanding of the dredging process per se, do not know specific details of the individual site (dredge methods, material types, amounts to be dredged and the times required) and may lack understanding of the natural environment and its inherent variability.

Such misunderstanding can potentially lead to misguided assessments, delays and additional work: in extreme cases it could stop shipping, temporarily close a port and/or increase the risk of marine accidents. A better information flow as part of the Article 6(3) assessment could improve understanding of the required dredging operations.

- *Carrying out an appropriate assessment could lead to the subsequent inclusion of maintenance dredging works in the management plan for the site*

The Article 6(3) appropriate assessment can be a means of improving knowledge and understanding, reducing or eliminating existing misconceptions, and can possibly lead to the future inclusion of maintenance dredging works in the management plan for the site. Port authorities may also be able to use scientifically justified data to exclude parts of the area which need to be dredged from the obligation to be included in the appropriate assessment.

- *Mitigating the effects of dredging activities could result in fewer likely significant effects*

Where maintenance dredging is identified as having adverse effects, mitigation measures could be investigated to select alternative techniques to identify operations which minimize the effect. For instance, mitigating the net loss of inter-tidal flats or of fine silty material could be achieved by a change of dredging practices⁹³. Port authorities need to inform the competent authority that in many cases there is no alternative to undertaking maintenance dredging but that slight changes in dredging practices can be implemented (such as dredging in certain seasons at certain locations, relocation at different places, etc.). Port authorities could therefore refer to existing projects like New!Delta, the GEODE Group⁹⁴, PIANC working groups, SEDNET and others which are already actively experimenting with techniques to mitigate the negative effects of dredging.



⁹³ For the Poole Harbour channel deepening different experiments with various methods of agitation dredging and seeking of disposal points for fine material within the harbour in positions where natural current will tend to redistribute the material back to the mudflat areas. This course of action was agreed with the regulating authorities as suitable mitigation for the potential adverse effects to the SPA.

⁹⁴ The GEODE group brings together ports, French ministries for environment, for transport and for defence, and scientific experts. The group is studying the impact of dredging on the environment. It is currently elaborating a technical guide on good practices and recommendations about governance in estuaries.

3.6 It is recommended that port authorities aim to deliver a project which will not have any significant likely effects

- *If it can be shown that no likely significant effects will occur, this could remove the obligation to go through an Article 6(4) assessment*

As Article 6 contains a sequential series of steps which need to be followed, the provisions of Article 6(4) apply only when the results of the preliminary assessment under Article 6(3) show that an adverse effect on site integrity remains⁹⁵. In case of doubt the precautionary principle should be applied and the procedures under Article 6(4) also need to be followed.

Reaching this goal (i.e. demonstrating no adverse effect on integrity) can be extremely difficult and in some cases probably impossible. Moreover, it should be kept in mind that the provisions of Article 6(3) are not restricted to plans and projects which occur exclusively in or cover a protected site; they also target developments situated outside the site but which are likely to have a significant effect on adjacent or even remote sites⁹⁶.

- *Even if the Article 6(4) procedure is not avoided, its scope/complexity could be reduced*

It remains difficult to determine whether or not broad consultation with interested parties at an early stage and incorporating different mitigation measures into the project proposal will relieve the developer of going through the Article 6(4) procedure, but in any case it could significantly reduce the length and complexity of the latter.

⁹⁵ European Commission 2000, p. 43

⁹⁶ European Commission 2000, p. 31

Vuosaari Harbour, Port of Helsinki

The example of the Vuosaari port development showed that the planning of the construction of a new port area with a total of 23 berths, a total quay length of 3.6 kilometers close to a protected area led to no impacts on the site. The Vuosaari Harbour project aims to replace the two existing main cargo harbours in the Helsinki metropolitan area. The project is socio-economically extremely profitable and logistically well based. The building of the harbour started in the summer of 2003 by dredging, soil removal and construction work. The harbour itself will not be situated in a Natura 2000 area but its railroad connection passes the nearest sea inlet (called the “Porvarinlahti” bay) at its narrowest point through a 200 m long bridge.

Mainly because of the aim of minimising the impact on natural values in general, a land connection with double tunnels and one rail road bridge was chosen. The entire road connection passes through the Natura 2000 area in a tunnel, which means that it has no impact whatsoever on the area. The railroad goes into a tunnel immediately after the Porvarinlahti bay and comes to the surface at the north border of the Natura 2000 area. This expensive double tunnel solution is based solely on the significance of the nearby Natura 2000 area.

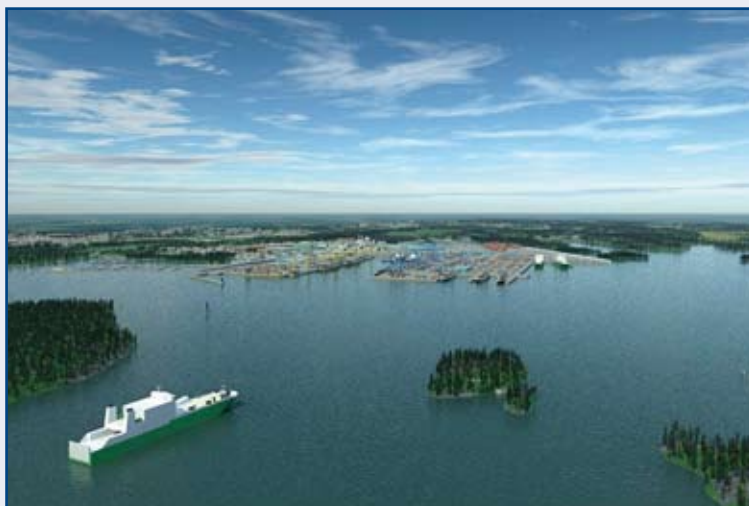
Also in this case, planning of the project had already started in 1992 - well before the relevant zones were designated (1998). By means of very close cooperation with the environmental authorities, the surrounding nature was well taken care of in planning and constructing the new port.

Despite the considerable efforts made to mitigate any possible effects on the Natura 2000 site, however, the Vuosaari Harbour project led to 20 administrative procedures in Finland, and complaints against it have also been lodged with the European Commission and the Committee of Appeals in the European Parliament.

Some of the complaints were a tool for achieving individual economic goals of two landowners and enjoyed the support of nature protection organisations. The arguments relating to Natura 2000 were presented in every process but have been rejected by the Finnish Supreme Administrative Court. The underlying problem, however, was the possibility for anyone seeking personal benefits to use Natura 2000 as a tool achieve them by relying on it in every possible administrative process related to major infrastructure projects.

Finally the Supreme Administrative Court decided that the project has an insignificant impact on the Natura 2000 site and its conservation objectives. Therefore the decisions were rightly taken without a need to refer to an overriding public interest, alternative solutions and compensatory measures as set out in Article 6(4) of the Habitats Directive.

It should however be kept in mind that this decision was the result of extremely expensive mitigation measures.



4. Conclusion

This chapter has illustrated different ways of increasing the port authority's involvement during the Article 6(3) appropriate assessment to indicate how a proposed plan or project will affect a protected site. It has also demonstrated that this may come with a very high price. Problems remain, however, in obtaining sufficiently rigorous ecological data (i.e. which can stand legal procedures), even when it is clear that investigations have been carried out according to the best currently-available scientific knowledge and assessment techniques.

Outstanding uncertainty over some of the provisions and terminology of Article 6(3), particularly the setting of conservation objectives, and the terms 'likely' and 'significant effects' continue to make it difficult for the port authority to have any clear expectations about the outcome of the assessment despite its best efforts. Attempts to reach early agreements with different parties, whilst of great value, do not completely remove the risk to the project developer of legal complaints upon which a court must decide.

In the ideal situation it should be determined and agreed beforehand, using a qualitative assessment, which impacts need to be assessed. Efforts should also be made to identify possible distant effects on perhaps less obvious designated areas. The plan or project developer could then make every effort to appropriately assess all these likely effects, avoiding the risk of new likely effects being brought forward before a court. More guidance should be developed, however, on how this problem can be addressed. Until then, port authorities as plan or project developers will always be confronted with the question of whether the appropriate assessment was enough.

In any case, making all possible efforts to obtain adequate scientific data will both increase the wider knowledge needed by similar plan or project developers across the EU and help to reduce the length of possible Article 6(4) procedures where these are required.



Chapter V - Assessing Alternative Solutions and ‘Imperative Reasons of Overriding Public Interest’

1. Aim

The aim of this chapter is to provide guidance to port authorities on how to be properly prepared for the Article 6(4) assessment. In particular, this chapter focuses on how a port authority can put forward alternative solutions as correctly as possible and how to convince the competent authorities of the presence of imperative reasons of overriding public interest, ‘IROPI’.

2. Background

Article 6(4) specifically addresses exceptions with regard to the general rule of Article 6(3) which stipulates that authorisation in principle can only be granted to plans or projects not affecting the integrity of the sites concerned. Further, the provisions of Article 6(4) have to be interpreted in a sequential way and approval to a plan or project can only be obtained in circumstances where all the necessary conditions are satisfied.

The first step in Article 6(4) is to determine whether there are alternative solutions or solutions with fewer negative environmental effects on the site concerned with regard to the conservation aims of the Directive. The second step involves the competent authority examining the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation of the plan or project in question⁹⁷.

The negative decision on the port expansion plans for Dibden Bay in Southampton (April 2004) provided a real eye-opener for the port sector as the assessment of alternative solutions and IROPI by the authorities resulted in a complete cancellation of the project proposal. This decision was also the starting point of renewed criticism by the port sector of the Birds and Habitats Directive. Importantly, the Dibden decision followed on from the experiences of the Le Havre Port 2000 project, where the requirements for mitigation and compensation had already marked the beginning of a more proactive approach towards the provisions of the Directives from the port sector and the beginning of cooperation with national and regional authorities⁹⁸.

In its guidance documents the European Commission sets out that before a project or plan (that either alone or in combination with other projects or plans has adverse effects which cannot be mitigated) on a Natura 2000 site can proceed, it must be objectively concluded that no alternative solutions exist. In line with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons between alternative solutions. The Commission stresses that the reference parameters for such

⁹⁷ European Commission 2000, p. 44

⁹⁸ Clements 2002 : “The experience at Dibden Bay has strongly influenced our approach to big port development. We have acknowledged that the ports industry is unusual in that it cannot realistically avoid a nil impact on nature conservation: we are an island nation and rely on shipping for around 90% of our trade. Our ports are largely at the mercy of the shipping lines which dictate the size of shipping visiting our ports and the sort of infrastructure that needs to be provided to service them. Furthermore, all studies into the industry (including one commissioned by RSPB & English Nature) indicate that there is a genuine need for additional capacity. Thus, the issue is to secure a sustainable development solution. The Habitats Directive is the tool that gives us the opportunity to secure sustainable development.”

comparisons deal with the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, are not allowed to overrule ecological criteria⁹⁹.

The question therefore arises as to the type of situations in which it can be concluded that there really are no alternative solutions, and consequently when imperative reasons of overriding public interest can be proved. This chapter provides guidance based on the experiences of the sector, but it is already clear that more guidance on this difficult question would be welcome.

Finally, despite the fact that compensatory measures form a clear part of the provisions of Article 6(4), compensation is treated separately in the next chapter. This is because, according to Article 6(4), compensation only becomes an issue when IROPI has been demonstrated.

3. Guidance

3.1 It is recommended that port authorities aim to develop an agreement on the Article 6(4) assessment

- *A basic agreement with the environmental agencies and competent authorities regarding the assessment of alternatives and reasons which can be brought forward as IROPI could increase public support for the plan or project proposal*

Towards the final stages of the Article 6(3) appropriate assessment (or even earlier if it is already clear that significant adverse effects will remain), port authorities could begin discussions with the environmental agencies and competent authorities aimed at reaching agreement on the further requirements of Article 6 of the Habitats Directive.



⁹⁹ European Commission 2000, p. 43

In addition to setting out the scope of alternatives¹⁰⁰ which need to be assessed, such an agreement should examine possible IROPI and determine the type of compensation measures that might be required to ensure the overall coherence of the Natura 2000 network¹⁰¹. By entering into such an agreement, the plan or project developer both concedes that significant effects remain and shows a willingness to seriously assess possible alternative solutions that may have fewer significant effects.

As with the recommendation to seek agreement regarding the Article 6(3) appropriate assessment, it is also the case for the Article 6(4) assessment that an early agreement with the environmental agencies and competent authorities could reduce the chance of legal challenges at a later stage.

It could be beneficial if any agreement on possible alternative solutions and IROPI is reached first with the environmental agencies and competent authorities. Once a solution is found, the port authority will have a more constructive foundation for wider public consultation and in the public inquiry process as the agreement indicates to other stakeholders that the port authority is prepared to work towards ecologically acceptable solutions. This may also help to reduce both the number of alternative solutions which are brought forward by others and any complaints against the final decision taken by the competent authority.

Once the initial agreement is made public, other stakeholders will have the opportunity to bring forward further alternatives, some of which might need to be assessed.

Seeking an early agreement can have other benefits in terms of increasing public support - which is often necessary for a plan or project proposal. Further, once other national, regional or local administrations or authorities are aware of the efforts of the developer to seriously discuss alternative solutions, their support in principle might also grow¹⁰².

Of course, all of the abovementioned benefits are entirely dependent on the willingness of environmental agencies and/or competent authorities to cooperate with the plan or project developer. Indeed, the ability of the plan or project developer to reach an early agreement at all depends on the willingness of these parties: despite the fact that the port authority as plan or project developer may be keen to find a sustainable solution, progress can be slowed down by reticent environmental agencies or competent authorities.

3.2 It is recommended that port authorities offer all consultees the chance to be fully involved in the process and ensure they have the ability to influence changes

- *Involving all consultees could be very time consuming and costly but it might reduce legal challenges in the future*

During negotiations with the environmental agencies and competent authorities and during any public inquiry, it is important to ensure that all consultees are fully involved and that they have the opportunity to influence the decisions and design processes. Engagement with other parties can be a vital element of the assessment of alternatives. Problems such as delays to schemes and licenses for port projects can be caused not only by a lack of clear guidance but also by a lack of information on the proposed development provided to government organisations and other stakeholders.

The development of any agreement can take a great deal of time, require a substantial amount of scientific data, and involve negotiation with a range of organisations. The port authority needs to be committed to trying to find a potentially environmentally

¹⁰⁰ In Chapter IV the assessment of alternatives is also mentioned under the Article 6(3) appropriate assessment. These alternatives are merely technical/construction alternatives aimed at reducing any likely significant effects. The Article 6(4) alternatives are alternative solutions for the plan or project once it has been determined that likely significant effects remain.

¹⁰¹ Clements 2002: "Whilst consent has yet to be given, we and ABP (the developer of the project for the Immingham Outer Harbour) have been able to make significant advances in agreeing a potentially acceptable solution that we could recommend to the Secretary of State as satisfying the requirements of the Directive should the development be of imperative reasons of over-riding public interest." See also English Nature 2001: "Where port expansion is deemed to be in the public interest we will look to work with the port to secure a sustainable development solution."

¹⁰² One of the reasons behind the negative decision on Dibden Bay was the lack of public support. Dibden Bay 2004, nr. 31: "The Inspector considered that a project satisfying a test of public interest might reasonably be expected to attract a substantial degree of support from bodies representing the public interest. However, he noted that with the exception of the Southampton City Council, no public body had expressed support for the Dibden Terminal project at public inquiries. The weight of public opinion, as expressed at the Inquiries and in the written presentations, was heavily against the proposed development."

acceptable solution with all parties. Indeed, a benefit of this might be a reduction in legal complaints and challenges later in the course of the development process.

- *Despite reaching an early agreement and/or undertaking public consultation on the Article 6(4) assessment, a port authority as plan or project developer could be faced with legal obstacles in the future as all these efforts do not guarantee the absence of a challenge*

Once achieved, an early agreement can provide an insight into all the possible alternative solutions which have to be assessed, identify acceptable IROPI reasons, and contain a commitment to the package of measures needed as compensation. The difficulty remains, however, that such agreements are not mentioned in the Directives and do not have a clear legal status. Thus, it remains unclear whether or not such agreements can be enforced and to what extent signatory parties are bound by it.

For the plan or project developer, such an agreement can serve as a blueprint for the Article 6(4) assessment with the aim of reducing future legal obstacles. It would therefore be useful if this could be acknowledged. The Commission mentions that it must be ‘objectively’ concluded that no alternative solutions exist before a plan or project can proceed¹⁰³. However, even with an agreement in place, the uncertainty of the assessment and the fact that an administrative court can overrule the assent of a competent authority makes it very difficult to determine ‘objectively’ when no alternative solutions exist. Therefore, ESPO recommends that more guidance is developed to overcome this problem.

3.3 It is recommended that port authorities determine the objectives of their project or plan proposal comprehensively and precisely

- *Once the objectives of the plan or project proposal have been clearly described, it could be easier to identify the alternative solutions which need to be assessed*

Before identifying alternative solutions, it first needs to be determined exactly what kind of ‘problem’ the project or plan proposal is attempting to resolve. It is essential to clearly define the objectives of the project or plan, before a range of alternative ways of achieving these objectives can be identified.

A very important factor is that many port projects are aimed primarily at increasing port capacity and consequently creating new employment and economic growth. In some cases an additional objective may be contributing to the general improvement of a city, region, country or even cross-border.

The alternative solution assessment needs to be in line with both the specific and wider objectives of the project and to demonstrate alternative ways of achieving these objectives.

It is clear that such objectives can be achieved in many other ways. Moreover, such objectives touch upon the criteria for defining ‘imperative reasons of overriding public interest’ including those of a social or economic nature. As mentioned elsewhere, however, other criteria for the alternative assessment, such as economic criteria, cannot be seen as overruling ecological criteria (but these can of course be mentioned)¹⁰⁴.

Finally, it is important to note that a wide variety of alternatives should be considered regardless whether such alternatives are realistic from a project costs point of view.

The assessment of alternatives can, therefore, be quite extensive.

¹⁰³ European Commission 2002, p. 33

¹⁰⁴ European Commission 2000, p. 43

If the competent authority has not already been consulted (e.g. as part of reaching an early agreement), it is recommended that such consultation takes place in order to secure agreement on the objectives of the plan or project: this is essential as these objectives determine the alternative solutions assessment.

Westerscheldt Container Terminal, Flushing, The Netherlands

Zeeland Seaports together with PSA Hesse-Noord Natie (PSA HNN) proposed already in 1998 a new container terminal, Westerschelde Container Terminal (WCT) situated on the Westerscheldt. The proposed plans envisaged a terminal with a 2M TEU capacity. The construction works which were planned for end 2008 and early 2009, consist of a new deep-water quay of 1850 meters; 41 hectares of existing harbour property and 141 hectares in a part of the Westerscheldt that is designated as SPA under the Birds Directive.

The proposed works would strengthen the economic infrastructure of the area and would reduce regional unemployment.

The Dutch Council of State rejected the proposed plans in June 2004 demanding a broader assessment of alternatives. The original alternative assessment had been limited to the Province of Zeeland, which did not match the scope of the project proposal even though the preferred alternative, the zero-option and the most environmental friendly alternative (a shorter quay) had been assessed.

The assessment of alternatives was based on the following problem description: in what ways can the industrial and port area of Flushing East try to prepare for any opportunities the growth in container traffic might bring for the regional economy by changing the current industrial character of the port into an all round port?

The Council of State concluded that the alternative assessment did not include alternatives for other developments which could have a similar impact on employment in the region nor did the alternative assessment include alternative locations for the development of the port of Flushing East or other activities that could increase or reinforce the position of the port.

In August 2006 new alternatives were put forward by the left ecologist party in The Netherlands in the existing port. They believed that an un-used part within the existing port could be used but Zeeland Seaports considers this not as a real alternative for the proposed Westerschelde Container Terminal.



3.4 It is recommended that port authorities determine and clearly state the need for port expansion

- *The need for additional port capacity could constitute a possible imperative reason of overriding public interest*

The 'need' for the port expansion, whilst closely related to the objectives of the plan or project, could prove to be important in demonstrating an imperative reason for overriding public interest.

According to Article 6(4), only in the absence of alternative solutions, the competent authority should examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature which require the realisation of the plan or project in question, however, it is recommended that an assessment of the need element is made before examining the question of alternative solutions¹⁰⁵.

This indicates that despite the apparently sequential order of Article 6, identifying generic alternatives meeting defined need could best be considered as part of inception planning.

- *The port authority could disseminate available studies on (container) growth predictions to demonstrate why the development is needed*

The need for additional (deep sea container) capacity is often demonstrated by studies undertaken on a national basis. Such studies could play an important role when deciding on the existence of IROPI. To be of greatest value, the conclusions of such studies should, ideally, be supported, acknowledged and confirmed by the national authorities (ministries), environmental agencies and NGOs. Unfortunately, however, there are often similar studies with contradictory outcomes.

The fact that additional demand is often expressed on a national basis implies that other (port expansion) projects could also have the potential to meet this demand. The question therefore arises as to whether, in such cases, the need for additional port capacity on a national scale is sufficient to demonstrate an imperative reason of overriding public interest (i.e. whether and how one proposal can be distinguished from other national port development projects)? Whether or not the national forecast demand is sufficient to justify one or a number of different projects could be based inter alia on the appropriate assessment period, the utilization rate of ports, levels of transshipment and productivity gain¹⁰⁶.

A particular project proposal could also demonstrate that the terminal concerned would be commercially viable and capable of attracting the necessary funding to prove IROPI¹⁰⁷.

The factors determining the national forecast demand often seem to be rather subjective and national authorities can rely on their own interpretation of the studies¹⁰⁸⁺¹⁰⁹. However, the 'need' element often proves to be of particular importance in the early stage of the Article 6(4) assessment, and it can therefore be of vital importance to the project overall¹¹⁰. As a result, further guidance on this matter would be welcomed by port authorities

105 Bathside Bay 2006, nr. 57: The Secretary of State agrees with the Inspector that an assessment of the need element of the imperative reasons of overriding public interest must be made before examining the question of alternative solutions and proceeding through the decision making steps in the Habitats Regulations.

106 Bathside Bay 2006, nr. 59

107 Dibden Bay 2004, nr. 22

108 Bathside Bay 2006, nrs. 60,61 and 62: The Secretary of State agreed with the Inspector that an appropriate assessment period for need is to at least 2030 and that an efficient port industry benefits from having a utilization rate not significantly above 85% and agrees with the Inspector that meeting demands for transshipment is in the national interest.

109 In the Dibden Case it is interesting to see that under the Secretary of State's Consideration alternative means of serving the public interest are discussed before the consideration of alternatives.

110 Dibden Bay 2004, nr. 33: 'The key question for the Inspector in the Dibden Bay case determining IROPI was whether without the proposed terminal there was a reasonable prospect of sufficient capacity being provided at UK ports to handle the expected growth in the UK's container trade in the foreseeable future.'

- *Port authorities could seek industry partners to help demonstrate the need for additional port capacity*

It is recommended that ports seek the support of the (container) industry, including maritime and land-based carriers, as well as importers, exporters and related service providers in making clear the need for additional (container) handling capacity. Such involvement will also help the port authority to demonstrate that projects are well thought out and that they are critical to economic growth in the local region, throughout Europe and internationally¹¹¹.

Related to this, it is again recommended that adequate attention is paid to properly establishing the project or plan objectives and to determining the ‘need’.

3.5 It is recommended that port authorities identify an extensive range of alternative solutions

- *A port authority could bring forward a wide variety of alternatives even if some might seem unrealistic because of much higher projects costs*

It should be kept in mind that the conservation objectives and status of the Natura 2000 site will have a strong influence during the process of assessing other arguments such as the costs, any delays or other relevant aspects of an alternative solution. The competent authority should not, therefore, limit its consideration of alternative solutions to those suggested by the project or plan proponents. As a result, it is recommended that a plan or project developer prepares well by assessing a wide range of alternatives.

The previous paragraph (3.4) illustrates the somewhat vague boundary between the timing of carrying out the assessment of alternative solutions and undertaking the first assessments of elements justifying the proposed project or plan (need).

Port authorities as plan or project developer should identify alternatives at their preferred location and at other locations under their control. Furthermore, wherever possible plan or project developers should also consider the alternatives for creating additional port capacity which could be provided by rival port authorities within a relevant area of search.

Given that the process of justifying need for additional container capacity may have to be determined on a national level (or at least the national situation should be taken into consideration), alternative solutions should also follow this national scope.

Alternative solutions could involve alternative locations or routes, different scales, size or designs in the development, or alternative processes. Other means of meeting the objectives (e.g. demand management), methods of construction, decommission methods at the end of a project’s life or scheduling and timescale proposals may also be relevant and should be considered¹¹².

It is also important to ensure that the ‘zero-option’ (the do-nothing alternative: no project or plan at all) is considered¹¹³. The zero-option has to be assessed by determining whether the future of the port would be put at risk in the event of permission for the new development (e.g. container terminal) being refused, even though it would miss out on some benefits for additional traffic¹¹⁴.

Re-configuration or better management of existing port facilities within the existing port should also be considered too as an alternative¹¹⁵.

111 See also: Neptune Orient Lines 2005

112 It should be mentioned that some of these alternatives are more likely to be mitigation measures and are used to reduce the adverse impact of the project or plan proposal. Such alternatives should better be assessed in the Article 6(3) assessment.

113 European Commission 2002, p. 35

114 Dibden Bay 2004, nr. 23

115 Dibden Bay 2004, nr. 21

Other alternatives may follow from the process of achieving agreement on the objectives (see the textbox on the Westerscheldt Container Terminal Case) of the project or plan¹¹⁶.

- *It could be necessary to identify alternatives for port expansion projects in different parts of the country or region*

Based on the aforementioned remarks by the Commission in relation to the objectives of a plan or project along with the recommendation to assess the national need for additional port capacity, it appears that alternatives for port expansion projects in different parts of the country/region have to be identified¹¹⁷.

When determining alternatives at other ports, the geographic scope can be limited to a certain region if studies indicate that additional capacity is required there¹¹⁸⁺¹¹⁹. However, this also needs to be reflected by market demand: relevant market partners should therefore confirm this by stating their needs of what a port can offer including substantial facilities such as essential cluster benefits, logistical services and the rail connections, necessary for deep-sea container traffic¹²⁰. However, a problem is that limiting geographic scope can be rather subjective and could be questioned by other interested parties¹²¹.

It is the Member State's responsibility to consider alternative solutions, which could be located even in different regions/countries¹²².

- *Despite both the available guidance on how to determine all alternative solutions which need to be assessed and port authorities' experience to date, it remains very difficult to be sure that 'enough' alternative solutions have been identified*

Port authorities must take a broad approach to the identification of alternative solutions. Even so, it is very difficult for the project developer to conclude that sufficient alternatives have been assessed (although the early agreement may help)¹²³. However, even though the Commission stresses that the conservation objectives and status of the Natura 2000 site will outweigh any consideration of costs, etc., economic aspects such as need and market demand can help to limit the geographical scope of possible alternative locations which need to be assessed¹²⁴.

116 Dibden Bay 2004, nr. 21: the Inspector noted the favourable contribution the applicant's proposals would make to the development of the port of Southampton and to local and even national economy. He considered that there were no realistic alternatives within the locality which would meet the needs of the port of Southampton for additional container handling capacity. The Inspector also considered the adverse effect upon the local economy and local employment, beyond the foregoing of direct opportunities (nr. 23) but considered that this would be little if the project did not go ahead.

117 Part of the reasoned opinion of the European Commission to Flanders as competent authority in relation to the construction of a new container dock (Deurganckdok) was the absence of motives why a new dock was necessary in Antwerp while in Zeebruges there was available capacity. The alternative assessment for Maasvlakte 2 and the development of Mainport Rotterdam explicitly mentioned as project objectives both reinforcing the position of the port of Rotterdam as well as improving the quality of the environment in the Rijnmond region. Already in 1996 a study was carried out regarding the lack of space in the port of Rotterdam which resulted in a national discussion regarding lack of space.

118 As regards additional port capacity in The Netherlands it became clear that the only area for possible port development was limited to the south-west of The Netherlands and no other port in The Netherlands could serve as alternative.

119 Bathside Bay 2006, nr. 66: Based on market demand, it would be unrealistic, considering whether there are alternatives to port capacity at Bathside Bay, to conclude that alternatives outside the South East area would be reasonably capable of meeting that demand to an acceptable extent. The Inspector could not predict whether the other developments in the South-East (London Gateway, Bathside Bay and Felixstowe) would proceed but nor was he able to rule them out not proceeding.

120 Bathside Bay Decision letter 2006, nr. 66

121 As for the UK, even though generally presumed that the south-east quadrant of the UK is the correct location for new container port capacity, northern ports in the UK commented that 60% of southern ports traffic is destined for the North, growing road and rail congestion in the south is increasing the costs of using southern ports and land around the northern ports is significantly cheaper. See: <http://www.thenorthernway.co.uk>

122 European Commission 2002, p. 33

123 Besides national authorities and the European Commission also Members of the European Parliament increasingly put plan or project proposals in question. This was the case for the Granadilla port project on the Canary Island of Tenerife. Although the Spanish authorities decided that the assessment was carried out appropriate and that there were no other alternatives Members of the European Parliament raised questions on the Spanish decision. See: <http://www.europarl.europa.eu/QP-WEB/home.jsp?language=en>

124 European Commission 2002, p. 33

3.6 It is recommended that port authorities assess all identified alternatives as thoroughly as possible

- *The plan or project developer should treat all information with care and keep careful track of the assessment process and timing as this information could play a role during any future legal challenges*

Once all possible alternative solutions have been identified, they need to be assessed and compared. The Commission has set out that, as part of the assessment, relevant agencies and other bodies should be consulted and the information gathered to complete the screening and appropriate assessment stages of the Article 6 assessments should be used to provide as much information as possible. In addition it will be important to acknowledge gaps in information, and provide the sources of the information used. Each alternative should be assessed against the same criteria used in the appropriate assessment to assess the impact on the conservation objectives of the site, and the precautionary principle should be applied to the assessment of all alternatives.

The Commission requires that, for each alternative, there must be a description and an explanation of how it was assessed. Once all potential alternatives have been identified, they need to be assessed to determine their relative impact upon Natura 2000 sites¹²⁵.

As part of the process of assessing alternative solutions, it is recommended that a careful record should be kept of which agencies and other bodies were consulted and when; their responses to the consultation; why particular assessments have been made of alternatives (i.e. adverse, positive or neutral), and details of who carried out the assessments.

- *The alternatives assessment could also provide an important insight into possible cost-effective solutions*

The alternative solutions assessment could lead to the identification of useful, innovative and/or more cost-effective solutions. It should not therefore be considered as an unnecessary obligation¹²⁶. Part of the assessment could also involve comparing commercial viability between different schemes¹²⁷.



¹²⁵ European Commission 2002, p. 35

¹²⁶ The port of Mussalo in Kotka, Finland planned a port expansion plan by taking soil for filling material from the surrounding coastal area, which is protected as SPA. Although the expansion was supposed to be carried out in a way to minimise the impacts for the sea ecosystem, impacts could not be avoided and the local authorities recommended that an alternative solution for soil taking should be made. This led to innovation as the dumping was made using excavated and dredged clean filling material from the port site instead of taking soil from the surrounding coastal area. Finally the project did not have an impact on Nature 2000 sites and even resulted in cost savings.

¹²⁷ Dibden Bay 2004, nr. 22 : The assessment could even involve the disclosure of financial information even though other schemes should have nothing to do with the obligations of the other proponents obligations to assess.

3.7 It is recommended that port authorities formulate and evaluate a comprehensive range of alternative techniques for dredging

- *When dredging projects need to go through an Article 6(4) assessment there could be significant delays if no serious alternative solutions for the dredging have been assessed*

If it is concluded that dredging activities also need to be subject to an Article 6(4) assessment as part of the project proposal, an alternatives assessment also has to take place. As dredging projects are likely to be limited in their geographical scope, alternative solutions need to be sought via the application of different dredging and disposal techniques. In the past, it has proved to be rather difficult to demonstrate the impact of alternatives solutions to competent authorities, and this in turn has led to delays and even a fear that shipping may have to be stopped completely¹²⁸. Therefore the competent authority should be informed about the fact that alternatives for dredging often only exist in slight changes of the operations such as dredging in certain seasons at certain locations or relocation at a different place.

3.8 It is recommended that port authorities formulate clear and well established imperative reasons of overriding public interest

- *Imperative reasons of overriding public interest could include those of a social or economic nature requiring the realisation of the plan or project in question*

As mentioned earlier, in the absence of alternative solutions (or if the alternative solutions have an even greater negative environmental effect on the site concerned), the next step for the competent authority is to examine the existence of imperative reasons of overriding public interest (IROPI).

As indicated in paragraph 3.4 the distinction between assessing alternatives and IROPI can be rather vague - for example, it is preferable to address the 'need' question before assessing alternatives even though it can be considered as a part of IROPI.

Imperative reasons of overriding public interest include those of a social or economic nature which require the realisation of the plan or project in question¹²⁹. The concept of IROPI is not defined in the Directive but where IROPI reasons are of a social or economic nature, it is clear from the wording that only public interests - promoted either by public or private bodies - can be balanced against the conservation aims of the Directive. Thus, projects that lie entirely in the interest of private companies or individuals cannot be considered to be covered¹³⁰.

In order to back up an argument in favour of IROPI, it could help to make a clear cost-benefit analysis of the plan or project proposal.

128 The need to carry out studies and assessments for a maintenance dredging project in Milford Haven delayed the decision-making procedure so much, that the operations of the facility which required dredged access would have to be reduced or even closed down..

129 European Commission 2000, p. 44

130 European Commission 2000, p. 44

- *The guidance of the Commission suggests that IROPI could be proved fairly easily, however some Member States seem to make IROPI much more difficult to prove*

The Commission identifies that it is reasonable to consider that IROPI (including those of a social and economic nature) refers to situations where the plans or projects envisaged are proved to be indispensable:

- within the framework of actions or policies aiming to protect fundamental values for citizens’ lives (health, safety, environment);
- within the framework of fundamental policies for the State and society;
- within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service¹³¹.

If no alternative solutions exist, regional or local economic benefits could already prove imperative reasons of overriding public interest¹³²⁺¹³³. Article 6(4) refers to ‘imperative reasons of overriding public interest’. It does not mention national interest.

However, some courts in Member States seem to make the IROPI assessment much more burdensome with much more requirements without clear reasons for this. This development clearly causes an unbalanced level playing field within the EU for seaports when they have to prove IROPI for a plan or project proposal and causes legal uncertainty.

- *Only a long-term interest or other interest which can be shown to outweigh the long-term conservation objectives could be an IROPI*

It should be kept in mind when formulating arguments supporting IROPI that the public interest must be overriding (not every kind of public interest of a social or economic nature is sufficient). It also has to relate to a long-term interest (short-term economic interest or other interests which would only yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive¹³⁴).

When proposing a port development project because of the need to develop container capacity, for example, it could not be argued that the temporary lack of handling capacity would override the protection of internationally designated sites. There need to be clear and proved signs of a long term, potentially damaging lack of capacity¹³⁵.

The zero-option alternative seems to be closely linked to IROPI justification as the former considers what happens to the local community in the event that the project does not go ahead.

The difficulty, however, is that the process remains rather subjective¹³⁶. Experience seems to indicate that the need for additional container capacity can play an important determining factor in decisions on port expansion projects and could be useful for future projects. On the other hand, if a maintenance project (which has not been subject to an assessment via the licensing of a prior project) has to go through an Article 6(4) assessment, the need for additional container capacity will not help to prove IROPI. Moreover, if the port in question is small, it may also be difficult to prove IROPI. More guidance would therefore be helpful in such situations

131 European Commission 2000, p. 45 and also in relation to the ‘service of general economic interest’ as activities of commercial fulfilling missions of general interest, and subject consequently by the Member States to specific obligations of public service. It is the case in particular of services in transport, energy and community networks.

132 Bathside Bay: Transport Minister Derek Twigg said that the expansion in port capacity is justified by the economic benefits it will bring regionally and nationally for UK industry and the economy.

133 For the Granadilla port development project in the South of Tenerife an important consideration was that the construction of a new port in the South would relieve the pressure of the island’s roads as now most goods need to be transported from the North of the island to the South where most tourist facilities are located.

134 European Commission 2000, p. 44 - 45

135 Dibden Bay 2004, nr. 38: The Inspector considered it a reasonable prospect that any shortfall in national container handling capacity would be short-lived and there were no imperative reasons of overriding public interest to support the Dibden Bay Terminal project, sufficient to outweigh its adverse impacts.

136 Dibden Bay 2004, nr. 38: The Inspector recognised that his conclusion was based on a finely-balanced judgment on which others might conclude differently and that a different conclusion might be drawn if certain other proposed developments failed to materialise.

3.9 It is recommended that port authorities place more emphasis on transport policy priorities

- *TEN-T principles could fall within the scope of the IROPI assessment*

Even though the TEN-T status of an infrastructure project is not routinely taken into account when IROPI are assessed, the IROPI criteria do not exclude the policy priorities of TEN-T Networks¹³⁷. Indeed, if TEN-T could be discussed or considered when assessing IROPI, EU transport and environment policies could be better coordinated and integrated. ESPO therefore recommends that in case TEN-T status is involved, it should automatically constitute an imperative reason of overriding public interest¹³⁸.

In some exceptional cases the European Commission has taken into account the TEN-T status of transport-related projects and it may, therefore, be beneficial to raise these instances in discussion with the competent authorities¹³⁹.

- *Port authorities could be proactive in promoting shipping as environmental friendly transport mode*

Even though it is not a main role of seaports, it is recommended that ports make both competent authorities and other stakeholders aware of transport policy related issues such as the need for improvement in connections by sea and to the national road and rail networks, and modal split policy objectives¹⁴⁰. In Chapter II it was indicated that TEN-T objectives should be disseminated more widely (i.e. not only in situations where a specific project or plan conflicts with a Birds or Habitats-protected site). In this way, transport policies should become more widely known. If TEN-T priorities or objectives still have to be made clear to competent authorities at this final stage of the Article 6(4) assessment, it might be too late to influence the decision.

4. Conclusion

This chapter provides a great deal of information of relevance to the Article 6(4) assessment. It suggests, based on experience, practice and jurisprudence, how the formulation of alternative solutions should be approached. This experience confirms that it can be very difficult for a plan or project developer to identify all the possible alternative solutions which might need to be assessed. However, port authorities as plan or project developers could improve their understanding of possible alternatives by discussing and agreeing this issue at an early stage with environmental agencies, competent authorities and other stakeholders. In this way all interested parties can put forward the alternative solutions they believe need to be assessed, in turn reducing the number of 'surprises' in the form of legal challenges to the objectivity of the assessment.

However, such a proactive approach is entirely dependent on the cooperation and commitment of the environmental agencies and/or competent authorities. Even when port authorities are committed to such openness, problems can still arise because the Directives do not stipulate the need for active cooperation with the plan or project developer.

It is similarly important to be aware that, even if an agreement is formulated, parties could still renege on the agreement and bring forward legal complaints which need to be assessed by an administrative court. Port authorities are thus concerned that, despite their willingness to be proactive (including accepting the associated time implications and extra costs), the guarantees for this approach are not sufficient. More should be done to avoid the situation where individual interests could delay a major project.

Like the Article 6(3) appropriate assessment, the Article 6(4) assessment seems to be very subjective and it is difficult for plan or project developers to know in advance whether the alternative solutions brought forward by them are sufficient. Measures are required to help

¹³⁷ As for the Bathside Bay project the Transport Minister, Derek Twigg, indicated that sustainable distribution is something the UK government committed itself to. This new project would play a large part in securing that aim.

¹³⁸ See also : Van Hooydonk 2006, p. 215

¹³⁹ See also: Van Hooydonk 2006, p. 217

¹⁴⁰ Dibden 2004, nr. 23: The Inspector concluded that the construction of the new terminal would ease the burden on the road network, in line with Government policy for modal transfer of freight.

reduce this insecurity. In an ideal situation, agreement on suitable alternative solutions should be reached in advance of the assessment taking place. The plan or project developer could then prepare for this and gather information accordingly. Legal complaints could then only be made if not enough information had been gathered to facilitate an objective assessment. An administrative court could only overrule the assessment carried out if it did not match with the initial agreement. The Court itself should not be able to propose new alternative solutions.

Also for the Article 6(4) assessment it has become clear that the procedure and legal requirements can be quite confusing and some do not have a clear order. For example, elements of IROPI (such as the need for additional port capacity) could also play a role when determining all available alternative solutions.

Finally, as regards proving IROPI, uncertainty also exists insofar as it remains unclear which elements can be decisive and vital. While the Commission has provided some guidance, Member States seem to make the assessment more difficult.





Chapter VI - Compensation

1. Aim

The aim of this chapter is to provide recommendations on questions related to the implementation of the obligation to compensate once the Article 6(4) assessment has confirmed the presence of IROPI. Special attention is paid to identifying and where possible avoiding unnecessary costs (for example with respect to legal advice), creating adequate natural values (with like-for-like compensation) and to, where possible, discuss how compensation could be targeted towards achieving broader favourable conservation status.

2. Background

Article 6(4) lays down that if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest (IROPI), the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

Although the overall objective of the Habitats Directive is to ensure that development does not adversely affect the integrity of the network of Natura 2000, Article 6 refers to the implications of a development for the conservation objectives of a site. Maintaining the overall coherence of the Natura 2000 network should be the overall objective of the competent authority but when it comes to individual schemes, projects are assessed in relation to the conservation objectives. Where the effect on these is adverse, it is then necessary to look at alternatives, IROPI and compensation. Therefore the current assumption is that the compensation provided should primarily aim to address the negative impacts on the site's conservation objectives (like-for-like compensation).

It is important to recognize that, on its own, compensation cannot be used as justification for undertaking a damaging development. Projects must also fulfil the no-alternatives and IROPI criteria: therefore it is essential to read the previous chapters before addressing the question of compensation. However, experience has shown that it is important from the very beginning of a project proposal and it is therefore recommended that the development proposal is clearly linked to compensation works.

In cases where compensation is needed to offset the negative impacts of a project or plan, the predominant view is that compensation should be like-for-like. Whilst reaching agreement on acceptable compensatory measures is often no longer an issue, the actual delivery of such measures can become a difficult task¹⁴¹. However, the difficulties related to the delivery of compensation measures can be very detailed and site-specific, and this document therefore only deals with the more general difficulties.

That said, it should be mentioned that a great deal of work has been completed and continues to be carried out by port authorities cooperating in the Paralia Nature and New!Delta projects on very detailed questions related to the implementation of compensation obligations. It is therefore recommended that all port authorities using this Code of Practice consult the outcomes of these studies, notably the exchange of best practices as regards the technical questions of compensation.

Uncertainty about compensation requirements can endanger the overall progress of the project as compensation must be available and in place before the project can be implemented¹⁴².

¹⁴¹ Paralia Natura 2006, p. 6

¹⁴² European Commission 2000, p. 46: 'The result has normally to be operational at the time when the damage is effective on the site concerned with the project unless it can be proved that this simultaneity is not necessary to ensure the contribution of this site to the Nature 2000 network.'

3. Guidance

3.1 It is recommended that port authorities establish an early and open dialogue on questions of compensation

- *Active cooperation could provide more understanding of sites where creation and/or restoration of habitats have the greatest potential value*

Chapter V recommends that port authorities reach an early agreement with agencies and authorities, both on the possible alternative solutions which need to be assessed and on the facts that could help to establish imperative reasons of overriding public interest. It was also mentioned that compensation opportunities could be included in these discussions. Irrespective of whether such prior discussions took place, whenever a requirement for compensation is identified it is recommended that port authorities engage in an early and transparent dialogue with environmental agencies, NGOs and other authorities in order to identify and investigate possible compensatory measures and to aim to reach an agreement on a specific compensation option.

Active cooperation with environmental agencies and NGOs is also needed to help the port authority understand more about how and where the creation and restoration of coastal (and estuarine) habitats will have the most potential. Such cooperation could even result in joint initiatives such as the purchase of lands¹⁴³.

- *Careful consideration of the location for compensatory measures could help bring the overall coherence of the Natura 2000 network to a higher level*

Thinking in advance about the location for compensatory measures could not only replace what will be lost due to the plan or project; it could also aim to raise the overall level of the Natura 2000 network. Identifying such potential win-win situations should be a clear objective¹⁴⁴.



¹⁴³ LEI 2005, p. 31: In the best practices document developed on behalf of the Dutch Ministry of Agriculture, Nature and Food quality, it is recommended to do something 'extra' as in many cases for little extra money considerable things can be done for nature development. This can consist of extra compensation, extra vegetation or the development of very specific habitats but also creating recreational facilities or opening the area for the general public. In this way the project can have larger support and the developer can improve its image.

¹⁴⁴ In Rotterdam as part of the project Rotterdam Mainport Development project a stakeholder agreement on compensatory measures for the Maasvlakte 2 project was reached on 29 November 2001. In this agreement with municipalities, water body managers, recreational and nature conservation organisations extra measures on top of the required compensation measures were discussed.

This would imply though that more consideration is given to the ability of project and plan developers to contribute by their compensation obligation to establishing a favourable conservation status for habitats and species in a wider region besides focusing solely on the conservation objectives of one site. In this way the overall coherence of Natura 2000 could be served by allocating financial resources in a more effective way. This would however require more guidance of the European Commission.

3.2 It is recommended that port authorities keep in mind that an agreement on the compensation obligation is no guarantee of the absence of a legal challenge

- *Despite early stage agreements regarding the implementation of compensation, active cooperation could still be stopped by legal challenges*

Despite the potential advantages of an early agreement with stakeholders such as environmental agencies and NGOs, this is not a guarantee that there will not be appeals against project decisions at a later stage. As with the potential agreements regarding Article 6(4) assessments, more legal certainty should be sought in this regard. Whilst the port authority, competent authorities and some NGOs may actively cooperate to find good solutions, it is still possible for other parties (e.g. more radical NGOs) to block the process by making complaints. This obviously constrains the process of finding flexible solutions and identifying win-win situations.

It should further be borne in mind that the implementation of compensation measures can be stopped or slowed down by physical planning procedures, or as a result of the resistance of particular interest groups e.g. farmers or the local population.

3.3 It is recommended that port authorities aim at close cooperation with environmental agencies and nature protection NGOs in the selection of locations for compensation

- *A good relationship with the environmental agencies and NGOs could provide access to available knowledge about the ecological potential of different locations and could thus avoid difficulties associated with unclear requirements*

Establishing a good relationship with key players could not only create more legal certainty, reduce complaints and minimize possible delays in the implementation procedure; it could also provide access to available knowledge about the ecological potential of different sites, facilitating the choice of well defined locations for compensation¹⁴⁵.

The value of this approach is however subject to the nature of the affected site and very much depends on local circumstances. Moreover, the Commission has determined that compensatory measures should relate to the same biogeographical region, in the same Member State, and be in as close proximity as possible to the habitat that has been adversely affected by the project or plan¹⁴⁶. The terminology thus lacks clarity and clearly leaves a lot of room for different interpretations.

If the affected site is large enough, it seems that compensation should be implemented in the same immediate area. In case of a large site with different sub-areas, there may be more possibility for natural habitat migration and conservation objectives may be easier to achieve. Otherwise (and more often the case) adequate compensatory measures have to be conceived outside the port area.

¹⁴⁵ Paralia Nature 2002, p. 24: Project Mainport Rotterdam: The consultation of stakeholders and participants at an early stage of the decision making process has played a major role in developing the compensatory measures.

¹⁴⁶ European Commission 2002, p. 41

Compensation on the Humber Estuary, UK

Associated British Ports, together with the Environment Agency and English Nature, purchased a large site on the Humber Estuary, the Alkborough Flats. This area will not only serve as a compensation area for future port development but it will also contribute to the flood defence strategy. The Humber Estuary contains four ports, industrial areas and large centres of population. It is also one of the top ten estuaries in Europe for migratory wildfowl.

The flat consists of 440 hectares of low-lying agriculture land. In allowing the Alkborough Flats to flood, the project will help to safeguard land throughout the Humber Trade Zone by reducing high water levels elsewhere within the Humber Estuary and its tidal tributaries. It will constitute one of the largest habitat creation projects in England and will become saltmarsh, reedbeds, mudflats and grazing marshes.

Large parts of the estuary have been recommended as a possible Special Area of Conservation. This unique exercise created the opportunity for extensive cooperation and discussion on the effect of possible compensatory measures and conservation objectives.



In cases where the port authority already has a good relationship with the environment agencies and/or relevant NGOs - for example based on the active management of the existing ecological values of a site (see chapter III), a good knowledge of ecological potential of different locations might already be available¹⁴⁷.

In the optimal situation, nature should also 'win' as a result of the compensation project. Compensation implies that nature neither wins nor loses. However, active thinking could perhaps provide an actual gain for nature¹⁴⁸.

A remaining issue is that the obligation to look for possible compensation sites in close proximity to the damage or loss could mean that sites with more ecological development potential could be left out. A related aspect affecting the practical implementation of compensation measures is the ownership of the land. Land in close proximity to the site could be privately owned while other land, located further away, might be publicly owned and therefore the costs of land purchase could be much lower¹⁴⁹.

- *Port authorities could be confronted with different levels of administration which could, in turn, complicate the compensation requirements*

When implementing the compensation requirement for a project, the port authority could be faced with the practical difficulty of dealing with several layers of governance and authorities which really need to cooperate with each other. Ensuring effective implementation may therefore be outside the ability of the plan or project developer. Despite the goodwill of the port authority, this might complicate the procedure causing delays and extra costs¹⁵⁰.

3.4 It is recommended that port authorities support the existing or remaining uses of compensation land

- *A proactive approach in reaching agreement with other (non-nature conservation) stakeholders could reduce the risk of future legal complaints during the course of the development process*

When compensation sites are being developed, the port authority should endeavour to identify measures which accommodate the remaining uses of the land to be used for compensation. Such an approach should help to reduce the opposition to the project which is often experienced. As compensatory measures might cause existing users (e.g. fishermen, farmers) to be limited in their activities, a lot of resistance can be expected, often leading to legal complaints and delays in the process¹⁵¹. If however the compensation site can be designed to facilitate continued but adjusted use (e.g., more sustainable forms of fishing or agriculture) this resistance might be reduced¹⁵². Of course, such an approach is no guarantee that those users will refrain from legal complaints.

147 The huge compensation area on the Humber Estuary the Alkborough Flats (see textbox above) is also used as learning tool for children to get to know more about the effect of rising sea levels. See : Cool kids for a cool environment project

148 For instance during the Immingham Outer Harbour development. An area significantly greater than the area which would be lost to the proposed harbour works would be used for realignment of agricultural land.

149 As for the compensation measures of the CT 4 extension of the container terminal in Bremerhaven most of the land in question was publicly owned. Therefore the representatives of Bremen and Lower Saxony were able to agree on the availability relatively quickly.

150 A counter example for this was the CT4 extension in Bremen/Bremerhaven. As for the compensation measures of the CT 4 extension of the container terminal in Bremerhaven there was not enough suitable compensation potential inside the Federal Land of Bremen. A joint task force set up by the Federal Länder of Lower Saxony and Bremen drew up a framework concept for the compensation measures. The experience in this case showed good cooperation but in other cases such a constellation example could also become an administrative nightmare.

151 However it should be clear that in various cases the installation of natural processes is the most favourable compensation hence no uses could be supported in these cases.

152 CT 4 container terminal Bremen, although the impact of agriculture was already limited in the compensation area, the compensation measures will continue to offer scope for certain uses.

Cooperation of the port of Antwerp with the NGO Natuurpunt

The Port of Antwerp actively cooperated with the Belgian branch of Birdlife, Natuurpunt, to draw up a regional management plan for the long term sustainability of the Special Protection Area. This included the need to develop well-thought out compensatory measures (including phased and temporary compensation with accompanying monitoring).

Natuurpunt believes that realising the favourable status of species can be of greater interest for nature protection than compensating like-for-like. If such flexibility could be realised nature protection NGOs may be more willing to cooperate as this could lead to an actual win-win situation.

As part of this exercise, the port was forced to start thinking about what kind of port development would be necessary 25 years hence, to translate this into habitat needs and to consider reaching the favourable status of species so that compensation measures could be taken at the right place for the right species or habitat.

This cooperation brought novel ideas for the cohabitation of nature and seaports, the maintenance of a network of ecological sites within the larger port infrastructure, and the contribution of manpower and expertise for site management to maintain the ecological function of intertidal reserves.



3.5 It is recommended that port authorities seek the biggest possible compensation project wherever possible, working in collaboration with others if appropriate

- *By opting for a big compensation project, a more ecologically valuable area could be developed and costs could be shared*

Wherever practicable, port authorities should work together with the environmental agencies and nature protection NGOs to determine whether a possibility exists to jointly develop a compensation project (e.g. jointly with other projects or plans which require compensatory measures)¹⁵³. This should not be considered as habitat banking or natural asset creation but merely as the coincidence of similar compensatory measures which need to be carried out at the same time¹⁵⁴.

In this way a larger and more valuable area can be developed and the costs for compensation can be shared. As well as the presence of other developments requiring compensation, the viability of such an approach may depend on the attitude of the competent authority - for example, such a project might be available but it may not be situated in close proximity. This again illustrates the subjectivity of Article 6. A number of options available to the developer may depend on the competent authority's - and indeed, at a later state, the court's - views on compensation. For example, on whether a better result overall might be obtained by taking a flexible approach than by compensating strictly on a like-for-like basis. On this issue it seems that the guidelines and clarification provided by the Commission are still fundamentally different from the interpretation of these provisions at a national level.

3.6 It is recommended that port authorities explore the possibility of flexible compensation approaches

- *Active management of ecologically valuable spots in the port area could be beneficial in terms of meeting future compensation obligations*

As compensation must be available and in operation before projects can be implemented there could be considerable added value in having already created reserve compensation. It could be better to create (large) compensation areas in advance as this could increase the value for nature rather than providing compensation for individual plans or projects. The fact that this should happen in advance (and not once the Article 6(4) assessment is completed) means that the initiative merely forms part of the active management of ecologically valuable sites in the port area and adjacent areas as described in chapter III). However this is dependent on the size of the site and the designation, i.e. the integrity of the conservation objectives. In general it seems logical though that compensation on ad hoc basis is less effective for nature and for costs than when compensation in advance and in a planned manner.

Within the framework of an overall conservation concept, it is possible that areas could be reserved as compensation for future port planning developments requiring an Article 6(4) assessment. However, as with possible joint initiatives, much will depend on the benevolence of the competent authority which has to approve the scheme.

- *It could be beneficial if more guidance is developed on how to approach the development of resilient nature*

Part of the active management of ecologically valuable sites in the port area could be the development of 'resilient nature'. DG Environment has stressed the importance of 'ecological resilience' in the past. This also seems to require an active management aimed at restoring and/or strengthening of the site's conservation objectives. However, more guidance is needed to determine how this should be established and what it would mean for individual compensation obligations.

¹⁵³ The compensatory measures of the CT 4 container terminal in Bremen were part of compensatory measures with other project organisations assuming a share of the costs.

¹⁵⁴ The legal status of habitat banking remains unclear. Although it could lead to larger nature areas, it could also lead to compensation areas located relatively far away from the affected designated site and/or could liberalize the compensation obligation in general. See also: Paralia Nature 2005.

However, it should be kept in mind that like-for-like compensation of coastal and/or estuarine ecosystems can already be quite difficult when taking into account the dynamics and unpredictability of their development. Therefore, new approaches regarding the compensation obligation deserve more guidance but clearly depend on local conditions.

- *It could be beneficial if port authorities determine whether the provision of ‘temporary nature’ is possible*

Similar to the previous paragraph, port authorities should explore with the environmental agencies and/or NGOs whether there are any possibilities for creating ‘temporary nature’ as part of the compensation scheme. Temporary nature development could relieve the obligation for a plan or project developer to have all required compensation in place before the actual works of the project start. Despite the fact that the status of ‘temporary nature’ is still unclear, it could nonetheless be beneficial to work with the environmental agencies and NGOs to determine what might be acceptable. More guidance on this can be derived from the experiences under the Paralia Nature and New!Delta projects¹⁵⁵.

3.7 It is recommended that port authorities encourage the set up of a compensation management committee

Once an agreement has been established on suitable compensation measures, it is recommended that a compensation management committee be established involving both public actors and stakeholders. Together they should be responsible for the overall supervision of the compensation plan and for producing monitoring and update reports¹⁵⁶⁺¹⁵⁷.

4. Conclusion

This chapter shows that it is no longer the principle of compensation itself that is the core issue for port authorities but rather that the implementation process can be difficult. Good experiences of cooperation with the environmental agencies and NGOs have led to very high quality, ecologically appreciated solutions. On the other hand a lot questions remain about the variability of local circumstances. Mainly due to the absence of European guidance on the issue¹⁵⁸ certain agencies and authorities are more reluctant to come to flexible approaches and solutions with regard to compensation provision. This issue needs to be resolved - not only from an industry point of view but also in the interests of nature development. Given that compensation is required, more can be done with the same amount of money if new and flexible approaches are embraced.

Such questions mainly relate to what kind of solutions and options are possible - in particular the option of aiming to develop ecologically more valuable areas rather than simply achieving like-for-like compensation. It would thus be to the benefit of the overall Natura 2000 network if more guidance becomes available. In the meantime, otherwise valuable initiatives might be refused because of a conservative and restrictive interpretation by competent authorities.

The need for greater flexibility and openness about the application of the Directives to incorporate new ecological theories needs to be further explored - in particular a dynamic systems view of the development of coastal ecosystems is required. As mentioned earlier the projects Paralia Nature and New!Delta have both addressed this. The European Commission should acknowledge and use this expertise to help make good practices known to national environmental agencies - thus helping to overcome the prevailing inflexible approach taken by some agencies.

¹⁵⁵ Paralia Nature 2005

¹⁵⁶ As was done for the compensatory measures for the construction of the Deurganckdok in Antwerp.

¹⁵⁷ Environment NGOs have become an important ally in developing solutions. For example in Antwerp and in Rotterdam they have clearly steered the compensation package. In the case of Le Havre NGOs are structurally involved in the monitoring of effects (see also Paralia Natura 2006, p. 37)

¹⁵⁸ It should be mentioned that at the moment of writing this document the European Commission was preparing specific guidance on the compensation requirement.





OOCL

VII – Outstanding Issues

1. Introduction

Notwithstanding its considerable contribution to society as a whole, Europe's port community continues to suffer from a negative image. Seaports are often presented as potential polluters and destroyers of the natural environment. Seaports realise that they must deal with this image and with declining public support. ESPO has therefore placed the reduction of the environmental impact of Europe's seaports high on the agenda and has already published two Environmental Code of Practices. These documents urge ports to draw up and implement their own environmental plans and effectively manage their environmental performance.

However, an important problem which still causes problems for many port authorities is the battle for space in coastal regions and, more specifically, the relationship between port activities and nature protection. This general problem is often highlighted by the difficulties seaports experience with regard to the Birds and Habitats Directives. However, there are also many examples of good practices: a number of port managers who have had to deal with the implications of the Directives have indicated that it is possible to find workable solutions. ESPO therefore decided to gather together these experiences and use them to prepare guidance for all European seaports by means of this Code of Practice. The guidance arising from this process is set out in the recommendations of the previous chapters.

Nevertheless throughout the document a number of problems have been highlighted as 'outstanding issues'. Despite a proactive approach based on best practice some of these issues continue to cause legal uncertainty and associated additional costs for port authorities as plan or project developers. By using the recommendations in this Code of Practice, the legal uncertainty can be reduced but ESPO anticipates that more guidance and perhaps a review of the Directives would be necessary to overcome this legal uncertainty.

This is underlined in the recent study on the impact of EU environmental law on ports and waterways which was sponsored by the European Commission (DG TREN) in the context of its Maritime Transport Coordination Platform (MTCP) project. The results of the research, which was carried out by the Antwerp Professor of Law Eric Van Hooydonk, elaborate on the unresolved problems and the legal uncertainty related to the provisions of the Directives but also bring forward well described recommendations for changes to the existing legal framework¹⁵⁹.

2. Integrated Coastal zone management

Port authorities themselves need to be more proactive in participating in spatial planning exercises, both within and outside the Natura 2000 network. Moreover, it has been indicated that ports need to take steps to make EU transport policy priorities such as the promotion of Short Sea Shipping, Motorways of the Seas and Trans European Transport Networks (TEN-T) more publicly known.

On the other hand, it could be argued that such policy priorities could also be more clearly reflected as part, for example, of the implementation of the Commission's Integrated Coastal Zone Management (ICZM) Recommendation which is currently being reviewed. This Recommendation could be changed to require more consideration (or even mandatory integration) of Transport policies and TEN-T principles in national ICZM Strategies. The increased use of ICZM as tool has also been indicated by the Maritime Green Paper.

In addition to ICZM more efforts should be made to better integrate transport policy objectives into other regional or local spatial planning exercises, including in estuary management initiatives.

¹⁵⁹ Van Hooydonk 2006

Van Hooydonk even goes as far as to suggest that Member States should be obliged to designate certain areas as port areas which would be part of a coherent EU network of strategic port development areas, under the name “Portus 2010”, mirroring the Natura 2000 network of ecological sites protected under the Birds and Habitats Directives¹⁶⁰.

The network would have to be set up through a specific European Directive and would invite port authorities, possibly in conjunction with Member States, to designate strategic seaport development areas on the basis of economic criteria only (the designation of Natura 2000 areas is solely based on ecological criteria). By leaving the designation to individual port authorities, centralised planning would be avoided. The designation would however have to be done on the basis of a commonly accepted and objective economic methodology.

Within the designated zones, routine maintenance activities and regular port operations should be carried out undisturbed and without further assessments. Port development plans and projects in the designated zones would have to comply with the provisions of applicable environmental law, but would benefit from the automatic status of “(imperative) reason of overriding public interest” under the Birds, Habitats and Water Framework Directives and influence the “alternative solutions” tests under these Directives.

An interesting feature of Portus 2010 is that, to generate support from the general public, port and waterway authorities would be asked to set up a “Soft Values Management Plan” covering the conservation and exploitation of specific waterway and port-related heritage, the management of port-city relationships and the accessibility of waterways and port areas to the general public. Member States and port authorities would retain the possibility to launch plans and projects outside “Portus 2010” areas but in such case the current legal regime would apply, with all its deficiencies.

- *ESPO recommends that transport policy priorities and port capacity be more clearly integrated into spatial planning exercises. The obligatory involvement of transport industry stakeholders during such exercises could help to reduce difficulties with the Birds and Habitats Directives at a later stage. Novel spatial planning concepts which aim at improving the balance between economic and ecological objectives should be studied in the future.*

3. Cooperation between national ministries

Ports believe that the national transport ministries should be much more involved in discussions related to port activities and the constraints caused by environmental legislation, in particular the implications for ports of the Birds and Habitats Directives.

ESPO refers to the fact that, in France, both the Ministry of Environment (Ecology) and the Ministry of Transport were equally involved in drafting a national estuary management scheme. Both ministries are also involved in the GEODE Group: this Group, which also comprises representatives from the ports, the Ministry of Defence and various scientific experts, aims to find solutions for reducing the environmental impact of dredging. Ports feel that in such discussions - which could have considerable implications for the operations of ports - the port sector should be represented by a national ministry which is fully aware of its interests.

Seaports believe that this involvement of Transport Ministries is often lacking when important decisions are made about the implementation of environmental legislation which does not directly seem to address seaports. The impacts of new legislation for seaports are sometimes underestimated at a national level whilst seaports are trying to understand how it could affect them.

- *ESPO recommends that national Transport Ministries need to consult all ports concerning new environmental legislation which might affect them. The Transport Ministries should, in turn, be consulted and involved by the Environment Ministries dealing with such initiatives.*

¹⁶⁰ Van Hooydonk 2006, p. 272

4. Designation of areas under the Birds and Habitats Directives

The designation process of areas under the Birds and Habitats Directives has led to a direct loss of capital assets to port authorities because areas which had been reserved for future port development area have become less useful due to their designation as Special Protection Area (SPA) under the Birds Directive or as Special Areas of Conservation (SAC) under the Habitats Directive.

During the first phase of identification and classification of such sites, port authorities did not fully realise the potential (financial) implications of such designation. Moreover, as the designation was solely based on ecological criteria, existing port boundaries were not taken into consideration.

A major complaint of seaports relates to the fact that they never received any compensation for the limitation of uses of port areas due to the designation of protected sites. Pre-existing legislative reservations, (international) rights of use, zoning schemes, property rights and national and local transport port policies were all completely ignored.

Seaports understand that designation should mainly be based on ecological criteria, but if designation leads to clear financial losses especially for areas that were privately owned and reserved for future port use at the time of the designation, certain compensation should have been offered.

Furthermore, port authorities believe that consideration could be given to some economic activities even under the designation process. Sometimes the boundary of a protected area could be slightly changed or moved to ensure that it would not have such a big impact on port operations compared to the boundary set only by ecological criteria. Furthermore, the proper consideration of the ecological characteristics in specific parts of areas put forward for designation might even prove that this designation was not justified (for instance the designation of navigation channels).

- *ESPO recommends that more consideration be given to providing compensation for economic losses resulting from site designation. ESPO believes that for these cases funds should be made available to cover the losses. Furthermore, ESPO recommends that the European Commission should be more active in promoting the message that designation does not automatically mean that all human activities in such areas have to be stopped. This could help to avoid the inflexible approaches of certain environmental agencies and competent authorities. Finally, with regard to the identification and classification procedure, ESPO recommends that more guidance be developed on how a proactive approach of the plan or project developer could lead to more legal certainty.*

5. Costs

Very often, reference is made in this document to the possible role of the port authority as the facilitator of initiatives - such as developing agreement on a long term estuary vision, preparing an estuary management plan, or initiating a management plan for the protected site under Article 6(1) of the Habitats Directive. Port authorities could clearly benefit from such initiatives as they could also lead to improved understanding of port activities and the role of ports in society as well as to better integration of all different uses in a certain area.

Nevertheless it remains to be seen whether or not it should be the role of the port authority to do this or whether it is, in fact, the task of other authorities to initiate such actions. Other authorities/bodies could be tempted to wait until a port authority has started up such initiatives and has borne the majority of the related costs while they also benefit of such an initiative.

The same arguments apply to the requirements under Articles 6(3) and 6(4) of the Habitats Directive. It has been indicated several times that reaching early agreement on the scope of the assessments required to meet Articles 6(3) and 6(4) can be beneficial for port

authorities - enabling them to get a clearer idea about the requirements in relation to the project or plan proposal. Such agreements obviously involve numerous stakeholder meetings, public inquiries etc. Nowhere in the text of the Directive does it state that such early stage agreements are required, however it is becoming a general rule. This practice, whilst undoubtedly useful, does cost a lot of money - and there is no guaranteed result as such agreements do not have any legal status. Furthermore, they relate to as yet unclear terminology on which exhaustive discussions are needed.

- *ESPO recommends that more guidance be developed on how costs can be shared amongst all the relevant stakeholders who can benefit from general initiatives aimed at integrating all the human activities potentially affecting designated areas. Furthermore, more guidance should be developed for the plan or project developers on how a proactive approach could lead to more legal certainty.*

6. Scientific data

The availability of scientific data on coastal dynamics and information on the functioning of coastal, estuarine or transitional ecosystems can largely determine the impact of the Birds and Habitats Directives on the plans or projects of port authorities.

The designation process itself, the setting of conservation objectives, the appropriate assessment, mitigation measures and compensation are all influenced a great deal by such data. It has however been indicated a number of times that such data are not always available. Moreover, the available data may be put in question by studies ‘proving’ the contrary, despite the significant sums invested in such work.

The requirement to carry out an appropriate assessment is therefore often difficult to fulfil. It is unclear when ‘enough’ likely impacts have been assessed and when a port authority has carried out sufficient studies to avoid being confronted by a legal challenge claiming that the appropriate assessment is not appropriate enough.

- *Given that scientific data is not always available or is sometimes contradictory ESPO recommends that, at a certain point, it should be concluded that a plan or project developer has carried out an ‘appropriate assessment’ and that sufficient studies have been carried out to prove this. This could be set out in an initial agreement based on wide public consultation. In this way it may be possible to achieve greater legal certainty without the fear that subsequent legal challenges might be brought forward.*

7. Management plans

More guidance is needed on how human activities can be included in the management plan for a protected site. A whole chapter of this Code of Practice is dedicated to increasing the participation of port authorities in the preparation and implementation of such management plans but it still remains unclear what kind of activities can and cannot be included. ESPO believes that maintenance dredging - especially that which has been carried out since long before the protected areas were designated - should automatically become part of the management plan (i.e. such dredging should not have to be addressed as plan or project in the sense of the Birds and Habitats Directives).

ESPO further believes that the European Commission should be more active in disseminating the message that site designation does not automatically mean that human activities cannot be carried out anymore.

In some Member States, discussions regarding management plans are still in their initial phase. Greater clarity would therefore be welcome - especially in relation to the difficulties in agreeing conservation objectives which in turn largely determine the management options. Furthermore, if a designation includes an area owned or managed by a port authority, such organizations should always be involved and consulted.

Additional guidance would also be appreciated on how best to facilitate effective cooperation with NGOs and/or environmental authorities with regard to the management of habitats within the protected area.

Finally, particularly if the protected area includes waterways which are dredged frequently, the often extensive scientific and ecological information held by port authorities should be referred to in the drafting of the management plan.

- *ESPO recommends that more guidance be prepared on acceptable ways of carrying out human activities in designated areas and how these can be included in a management plan. In this way more can be done to enhance active cooperation between port authorities, environmental agencies and NGOs and to find flexible solutions enabling the reticent approach of some environmental agencies and competent authorities to be reduced.*

8. Article 6 procedure

Despite the fact that Article 6 of the Habitats Directive seems to contain a very logical order of steps and to set requirements which need to be followed, in practice the sequence of application is not so clear. In order to arrive at the best solutions, all the requirements (the scope of the appropriate assessment, mitigation, alternatives, IROPI, and possible locations for compensation areas) need to be considered in advance. This approach has even been recommended by the guidance document of the European Commission.

Moreover, it is not always clear what the difference is between a mitigation measure and an alternative solution, or where the exact boundary lies between an alternative and an imperative reason of overriding public interest.

These examples demonstrate the lack of clarity that can affect the whole procedure and hence the legal uncertainty for the project or plan developer.

- *Given that the Article 6 procedure is still proving to be rather unclear, ESPO recommends that more guidance be developed on how plan or project developers can best discuss their approach with competent authorities at an early stage.*



9. Status of agreements

It has been mentioned a number of times that early stage agreements (for example covering the scope of the appropriate assessment, the scope of the alternatives or IROPI assessments, or the range of possible compensation measures) could help to reduce the number of legal challenges at a later stage by enabling stakeholders to agree a common approach to the project or plan proposal.

Port authorities are willing to invest money, time and staff in the establishment of such agreements. However, these agreements do not have any legal status in relation to the provisions of the Birds and Habitats Directives. Thus, even though many such agreements have proved to be extremely beneficial, there are also examples of parties backing out, thus invalidating the agreement.

Port authorities would like to see a situation in which such agreements cannot easily be dissolved. If port authorities are expected to be bound to their commitments, and to keep their promises, the same should be expected of other parties.

Port authorities feel that, despite all their efforts and the associated costs and time, more legal certainty is needed. In particular, whilst the more radical NGOs and individuals are not obliged to cooperate, at the present time they have the ability to invalidate the work of others.

- *Port authorities should be willing to be proactive and willing to invest time and money in wide public consultation, offering all stakeholders involved a chance to participate in the procedure. Individual interests can, however, block efforts to reach early agreements and guidance should be developed on ways to avoid this.*

10. Alternatives and IROPI assessment

Regarding the difficult assessment of Article 6(4) of the Habitats Directive, it became clear in chapter V that some additional clarity has now been provided by court cases with respect to the scope of alternatives and the IROPI assessment. Nevertheless, it is also clear that the range of possible alternatives is very broad and that it is closely related to the demand for additional port capacity.

Alternatives need to be assessed not only locally but also in other parts of a Member State and could also include alternative ways of creating employment other than through port expansion. Even though this may now seem obvious, there remains a difficulty in understanding when 'enough' alternative options have been assessed.

It would be very beneficial if the scope of the alternatives assessment could be determined beforehand, thus providing all relevant stakeholders with an opportunity to propose possible alternatives (which will be investigated) but ensuring that there is then no opportunity for legal challenge once an overview of all the assessed alternatives has been made public.

As for IROPI decisions, more consideration should be given to how transport policy priorities can be incorporated into decision making. This was also identified as being an important issue during spatial planning exercises. The Commission could provide more guidance on such Community policy priorities and thus create a more balanced level playing field regarding the obligation to prove its presence.

In this regard, TEN-T priorities in particular should play a much prominent role. The Trans European Transport Network (TEN-T) Guidelines contain a number of objectives which need to be fulfilled before TEN-T status can be granted to a network: such criteria include helping to achieve the Community's objectives, particularly in regard to environment and competition, and contributing to strengthening economic and social cohesion (Article 2(2)). It is further stipulated that the development and implementation of TEN projects should take into account environmental protection by applying the Environmental Impact Assessment Directive and the Habitats Directive.

- *ESPO recommends that more guidance be developed on how it can be determined objectively that enough alternative solutions have been assessed. Port authorities as plan or project developer still experience a lot of legal uncertainty on this point. Furthermore, the European*

Commission could prepare more guidance on how IROPI can be proved. Some Member States appear to exaggerate this requirement. More guidance should also be prepared on how transport policy priorities can play a role when determining IROPI.

11. Compensation

In general, it is no longer the principle of compensation that is the core issue for port authorities; rather it is that the implementation process can be a difficult task.

Seaports would appreciate more guidance on questions related to requirement to compensate on a like-for-like basis and the requirement to compensate as close as is geographically possible to the habitats which have been adversely affected. Related to this, there are questions as to the acceptability of possible innovative ways of delivering compensation - for example creating an 'actual win' situation for nature and not a like-for-like (which implies that nature does not gain anything).

- *ESPO recommends that more guidance be developed on how to address the compensation requirements in a more flexible manner and how plan or project developers can cooperate with environmental agencies and NGOs on this issue. The European Commission should also promote a more flexible approach as this could lead to more win-win situations. In this way, the inflexible approaches of some environmental agencies and NGOs could be reduced.*

12. Good practices coming from the sector

Finally, European seaports would like the Commission to acknowledge the various good practices which have been developed by the port industry itself.

In particular, ESPO refers to the projects Paralia Natura and New!Delta which have provided considerable guidance for the sector based on good practices from the sector. ESPO furthermore calls on the Ecoports Foundation to set up any further required activities related to the implementation of the provisions of the Directives to increase harmonization and a level playing field for port authorities in the EU on nature protection legislation.

It would be beneficial for the port sector if such good practices could be endorsed by the European Commission so that port authorities could, in turn, reinforce their position with national, regional or local authorities.

- *ESPO recommends that the European Commission actively disseminates information on initiatives taken by industry to the relevant national authorities to demonstrate what can be achieved by taking a proactive approach.*



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Colophon

The European Sea Ports Organisation (ESPO) represents the seaports of the Member States of the European Union and has observer members in several other European countries.

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