

## **Bringing central regulation and local governance interaction together: the case of the Markermeer-IJmeer Natura 2000 area**

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### **ABSTRACT**

This paper draws attention to a case in which Natura 2000 regulation, problematic ecological conditions, governance congestion and the aim to develop large urban projects are to go hand in hand in the soft space of the Markermeer-IJmeer area, a 30 by 25 km lake in the centre of the Netherlands. The key interest is how central regulation is interpreted and bended to fit local interactive patterns. This is referred to as the contextualization of legal norms (Rijswick & Salet 2012). Contextualization aims to bring regulatory and governance steering philosophies together, rather than traditionally separating them. This requires certain characteristics from both the central legislation and the governance arrangements on the local level. By analyzing the case of the Markermeer-IJmeer, in which over 80 different stakeholders are somehow involved, this paper aims to show under what conditions central regulation can contribute to creative governance solutions.

## 1. INTRODUCTION

As part of a research project on the local contextualisation of central regulation, this paper draws attention to a case in which Natura 2000 regulation and the aim to develop large urban projects are to go hand in hand. The key interest is how central regulation is interpreted and bended to fit local interactive patterns. This is referred to as the contextualisation of legal rules (Salet & Rijswick 2012).

The case centres on the ecological system of the Markermeer-IJmeer (a 30 by 25 km lake in the centre of the Netherlands) being designated as Natura 2000 site. The key issue in the Markermeer-IJmeer is developing the so-called TBES (or *toekomst bestendig ecologisch systeem*), which translates as a 'robust ecosystem'. A TBES is deemed the best option to cater for 1) the demands the Natura 2000 framework and (to a lesser extent) Water Framework Directive, 2) the autonomous negative trend that the eco system of the lake is experiencing, and 3) room, literally and figuratively, for developing a 60.000 additional houses in the city of Almere, a transport connection linking Almere and Amsterdam as well as for a variety of lower scale demands such as recreation and enlarging marinas at the North Holland coast.

Traditionally, nature loss due to urban development is in the Netherlands compensated for individually for each and every project. What makes this case special is that a small selection of local and regional key stakeholders got to the conclusion the current ecological, spatial, regulatory and governmental conditions require a different approach. An alliance of public and private stakeholders therefore coined the innovative concept of developing a robust ecological system for the area that would go far beyond the minimum ecological requirements of Natura 2000. In this way the system ought to create room, literally and figuratively, for further urban and recreational development in the area, without harming its natural values.

As will become clear below the regional consensus to approach today's problems by heavily investing in nature development did not come about without a long history and economic and regulatory pressure. Nor is the concept of a robust ecosystem, which is surrounded by financial, technological, legal and governance uncertainties, automatically accepted by the wide range of other local, regional and indeed national stakeholders. Therefore, the contextualising of the central Natura 2000 regulatory framework has become a lengthy and complex process, which has not ended yet.

This paper mainly goes into this governance process and aims to identify a number of mechanisms that have enabled the contextualisation of central regulation. In doing so a distinction is made between governance and regulation which represent different steering philosophies that easily clash. Whereas often one steering philosophy is preferred above the other, the focus in this paper is on how the two can be combined and the added value this generates. The paper is work in progress. It only presents the latest version of ongoing work and awaits further theoretical interpretation.

The following will first elaborate on the concept of contextualisation of legal norms. Subsequently the main regulatory framework applying to the case will be outlined. Then a case description and, in a separate section, an interpretation of contextualisation from governance and regulatory perspective follows. The paper rounds off with brief conclusions.

## 2. THE CONCEPT OF CONTEXTUALISATION

The concept of contextualisation of legal norms has been described by Van Rijswick and Salet (2012). According to these authors contextualisation of legal norms refers to the craft of interpreting and applying central regulation in the context of local conditions. This imposes requirements on both the quality of the regulation and the abilities and competences of local governance arrangements. The quality of regulation refers to the formulations and the intrinsic flexibility of a legal norm or law. In order to allow for contextualisation a law or legislation needs to include a certain degree of discretion to the actors that need to implement and apply the legal norm. This is in particular true for regulation impacting on territories since territorial conditions and governance characteristics with them vary to great extent from place to place.

A problem with many laws and legislation is that they result from a preoccupation of the legislator aiming to control situations and solve perceived problems. Such instrumental goal oriented legislation imposed by top-down bureaucracies, often referred to as instrumentalism, generally contains no flexibility and room for local interpretation. Referring to the work of Hayek, Van Rijswick and Salet (2012) contend that this type of specific purpose driven legislation is grounded on a firm cause-effect belief that generally neglects the lack of knowledge and uncertainty of policy makers of the complex society (Hayek 1973). It often leads to situation in which local policy makers have to apply central legislation that does not or only partly reflect the local conditions and therefore leads to new problems, to be solved by the same local policy makers. Following Hayek (1976) a distinction can be made between responsive policies that exclusively and in detail focus on the specification of objectives and means, and on the other hand, normative rules or norms in function of enabling action in situation of uncertainty. Rijswick and Salet (2012) further explicate this point by stating that normative rules, or principle or value driven legislation, do not specify the aimed outcomes on a certain place and time. Rather "...they establish the conditions (codes of behaviour) that give people reliable expectations of each other: they inform what is appropriate to do and what not to do (March & Olsen 1989)" (Rijswick & Salet 2012: 3)

The potential of law in this sense can only be understood in the thinking of law and legislation in its conditioning role. "The law must set conditions: it organises the principle commitment of actors via the protection of important principles and via demarcation of protection levels, and it must arrange the rules of the action processes. Thus it offers substantive and procedural fairness and therefore legitimate policy." (Rijswick & Salet 2012: 3-4) Such legal norms allow local actors to organise purposeful action in their own way. Such action "...needs flexibility, it needs differentiation in different contexts, it needs adaptability to changing conditions, it needs inventive attitudes of public entrepreneurial minds, and it needs the changeability of learning by experiment, all this without losing its legitimacy." (ibid)

The problem obviously is for law makers to formulate such norms. To, in other words, abstract from direct involvement in purposeful action. Vice versa, local stakeholder arrangements must be able to understand the legal norms and requirements and obey to them, but at the same time interpret regulation in their own terms and be creative to find ways to deal with them whilst responding to local values and principles.

Dutch spatial planning that is characterised by balancing interests across sectoral, private and civic spatial demands, has little affinity in dealing with tight and inflexible norms. Spatial planning in this regard is quite different from environmental policies that often work with strict norms in terms of decibel, air quality, soil and water pollution and so forth. There is little flexibility in such norms which makes it hard to creatively work towards cross cutting local solutions. As such it is hard to find good examples of contextualisation in the context of Dutch spatial planning, something that is acknowledged by Van Rijswick and Salet. A regulatory

field they indicate, though, that might provide examples of contextualisation concerns international law and legislation. The reason being that such international legislation - and EU directives spring to mind - seldom is designed from the perspective of full sovereignty. Between international law and local application there is the nation state that is often granted significant discretion in terms of transposing the legislation to national legislation, implementing it in policies and applying it through domestic enforcement systems. It is therefore that the case of the Markermeer-IJmeer might potentially be a good example of contextualising legal norms.

### 3. REGULATORY FRAMEWORK: NATURA 2000 IN THE NETHERLANDS

It is in particular Natura 2000 which is of relevance to area. In order to being able to separate between the above mentioned governance and regulatory steering philosophies the following will briefly elaborate on the characteristics of Natura 2000 and its underlying directives. Important to realise is that EU directives bring with them the obligation to produce results but how to achieve this in a legal sense is up to member states.

The deadline for transposition is always explicitly mentioned in any EU directive. Member states often – for a variety of reasons – do not comply with such a deadline. This can result in an official notice of default by the Commission eventually followed by a condemnation by the European Court of Justice. This happened to the Netherlands in relation to the Bird as well as the Habitat directive. If deadlines are not met (or in the case of an improper transposition) EU directives directly apply to a national territory. All competent authorities on all administrative levels within a member state are obliged to apply the directive in question to their territory. This weighs heavily on the (judicial) expertise and adaptability of especially the lower levels of member state administration as in the early stages of application of a EU directive there will be no or hardly any experience and jurisprudence. At the same time – this counts for the Netherlands especially – there is a culture of bringing objections to courts of justice, for a great deal stimulated by the fact that Dutch courts tend to decide on cases rather speedily compared with many other EU member states (VROM-raad, 2008).

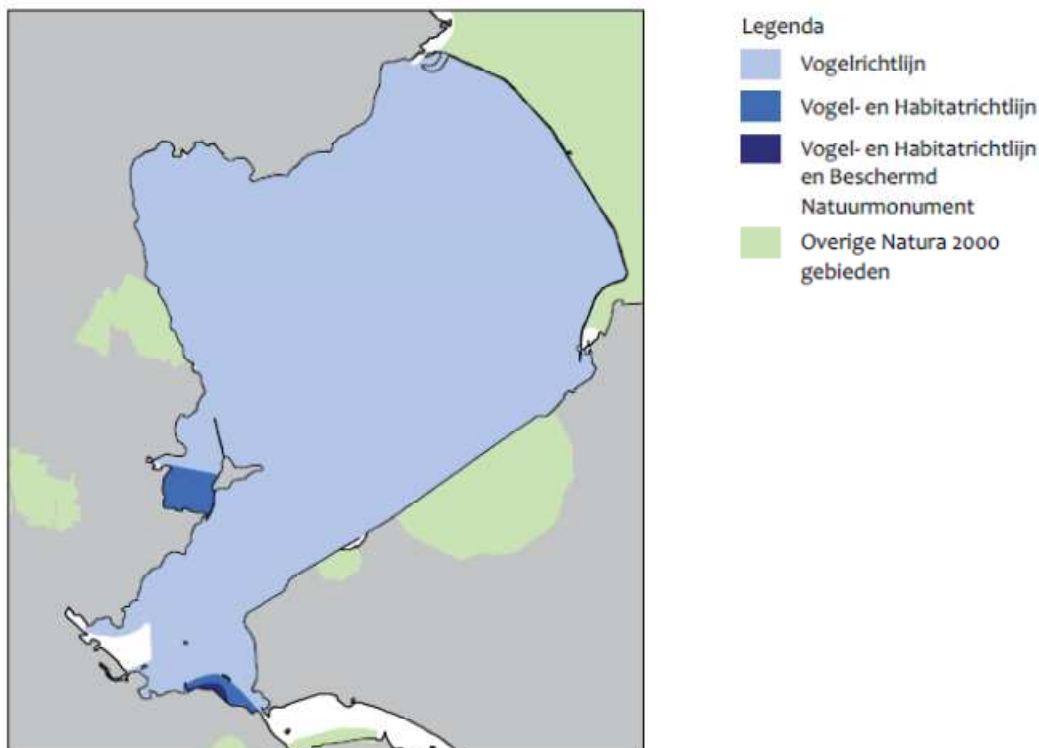
#### 3.1 Bird Directive

The 1979 Bird directive is the oldest form of EU nature legislation. The core of the directive is formed by article 3 which in essence follows an entirely territorial approach:

‘Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats [...]. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

- (a) creation of protected areas;
- (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;
- (c) re-establishment of destroyed biotopes;
- (d) creation of biotopes.’

Interestingly in the Dutch version of the Bird directive ‘management’ (see b) is translated as *ruimtelijke ordening* or spatial planning. Although the European Union does not have a spatial planning competence nevertheless by demanding that member states should carry out (proper) spatial planning in order to protect species and their habitats one can conclude that indirectly the European Union acquired such a competence.



**Figure 1: Protected areas in the Markermeer-IJmeer; light blue: Bird Directive; dark blue: Bird and Habitat Directives; darkest blue: idem as well as Protected Nature Monument according to Dutch law; light green: Natura 2000 areas surrounding Markermeer-IJmeer (Source: PBL, 2009)**

Also in another sense the Bird Directive implies a kind of spatial planning: due to the fact that many birds tend to migrate and/or rest and feed at different locations the required 'special conservation measures' need to be coordinated 'with a view to setting up a coherent whole.' This coherent whole is currently known as an ecological network or – since the Habitat Directive – simply Natura 2000.

The Bird and Habitat directives are often discussed together but the effects and implications are different up to a certain level. On the whole the Bird Directive is considered as more stringent because the Habitat directive opens the possibility for certain exceptions towards the protection of species and their habitats in cases of 'imperative reasons of overriding public interest, including those of a social or economic nature.' So, under certain but very strict conditions, the generic goal of nature conservation in relation to specific species and habitats could be adapted in relation to the local and regional context (see below). The Bird Directive is much more restricted in this sense. First member states do not have much discretionary power to identify protected areas. They are obliged to select the most appropriate areas. According to jurisprudence only ornithological criteria count (Beijen, 2010: 174). The possibility to reduce the size of protected areas once they have been designated are very small. This is only possible in those cases where there are interests that are more important than ecological interests. Reducing flood risks may count, but economic and recreational reasons certainly do not. According to Backes (Backes, 2000, p.11, in Beijen, 2010: 176) such a limitation towards competences to balance interests – which forms the heart of spatial planning, at least in the Netherlands – is rather exceptional. On top of that the European Commission does not need to show that a certain area should have been designated. If the Commission can show that a member state has designated far too few protected areas this will suffice to be sentenced by the European Court of Justice. This happened to several member states, including the Netherlands (Beijen, 2010: 176).

The transposition and actual implementation of the Bird Directive has been rather problematic in many Member States (Van den Brink, 2004: 66). National legislators but also policy makers often grossly overestimated the level of flexibility and regulatory freedom the directive offered. The Dutch national state has been condemned by the European Court of Justice for (seriously) breaching the deadline for transposition of the directive which was set for 1983. Eventually the directive was translated into the Flora and Fauna Act and the 1998 version of the Nature Conservation Act.

### 3.2 Habitat Directive

The 1992 Habitat Directive speeded up nature conservation policies of the European Union. Key objective is the realisation of an ecological network of protected zones known as Natura 2000. Member states have the obligation to designate so called special areas of conservation. The areas designated under the Bird Directive will be part of Natura 2000 as well.

The most important article of the Habitat Directive is article 6 which can be summarized as follows: Member states have a general protection obligation meaning that for the special areas of conservation, Member States shall establish 'the necessary conservation measures' which correspond to the 'ecological requirements' of the natural habitat types and species, both explicitly and exhaustively listed in two annexes:

'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.'

The obligation to avoid any deterioration is not limited. Any deterioration, whatever the cause, should be either avoided or restored. This also counts for changes resulting from for instance climate change or natural fluctuations in the population size of a particular population (Beijen, 2010: 187). At least in the Netherlands this has caused quite a lot of discussion. According to some there is an underlying conception of nature and ecological qualities which is rather static while nature, even in good condition, never is.

In terms of effects on spatial plans and spatial development paragraph 3 of article 6 is of importance:

'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 [...], 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 requirement that the absence of potential significant effects have to be demonstrated through an 'appropriate assessment' is known as the precautionary principle. It brings with it the obligation to carry out research. In the Netherlands in many cases the chosen form is through a statutory environmental assessment. The official wording is that '...no reasonable scientific doubt remains as to the absence of [significant] effects'. Also, when carrying out an appropriate assessment 'the best scientific knowledge in the field' should be applied. So the requirements which have to be met are rather strict: the European Court of Justice as well as the (Dutch) administrative court of the Council of State (jurisprudence) take the quality of the research seriously. If either the methods, the findings and/or the exact wording of research reports leave open some uncertainty ('negative effects up to a certain magnitude cannot be

fully excluded') this does not leave open the possibility of a positive decision in relation to a plan or project.

Paragraph 4 of article 6 is about the possibility to make exemptions in relation to the conservation objectives of the directive:

'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.'

The emphasis on the 'overall coherence of Nature 2000' is important. This seems to open up the possibility for a programmatic approach or a territorial upscaling of the conservation approach. The (potentially) negative impact of a development is then combined with a programme or plan which aims for the recovery of ecological conditions in a wider area. According to some (Adviesgroep Huys 2009: 7) this means that if the Natura 2000 programme or plan still aims to reach the conservation objectives at the end of the period in question it is not violating the Habitat directive. This is very important in relation to the Markermeer-IJmeer case. Nevertheless there are strict limitations to apply the above quoted first section of paragraph 4, because a second section states the following:

'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.'

Under this clause flood control measures ('public safety') for instance are permitted. An example of 'imperative reasons of overriding public interest' in the Netherlands is the objective to maintain and improve the mainport status of the port of Rotterdam through a major extension of the port area into the North Sea: the Maasvlakte II. Interesting and important is the role of the European Commission. To inform the Commission (first section of paragraph 4) gives a rather passive role to the Commission, whereas the second section however foresees a much more active role. There are examples (not only the Maasvlakte II case which is a national case) of regional and local cases where plan initiators went to Brussels to gain advice an important reason being that the national 'gatekeeper' of the Bird and Habitat Directives (presently the Ministry of Economic Affairs and before that the Ministry of Agriculture) thinks of itself as being unable to give advice on for instance how to make a plan ecologically or judicially robust. Seeking advice from the Commission in itself can be seen as a contextualisation tool within the regulatory frameworks. This has also happened at a certain stage in the Markermeer-IJmeer case, to which we return in the following sections.

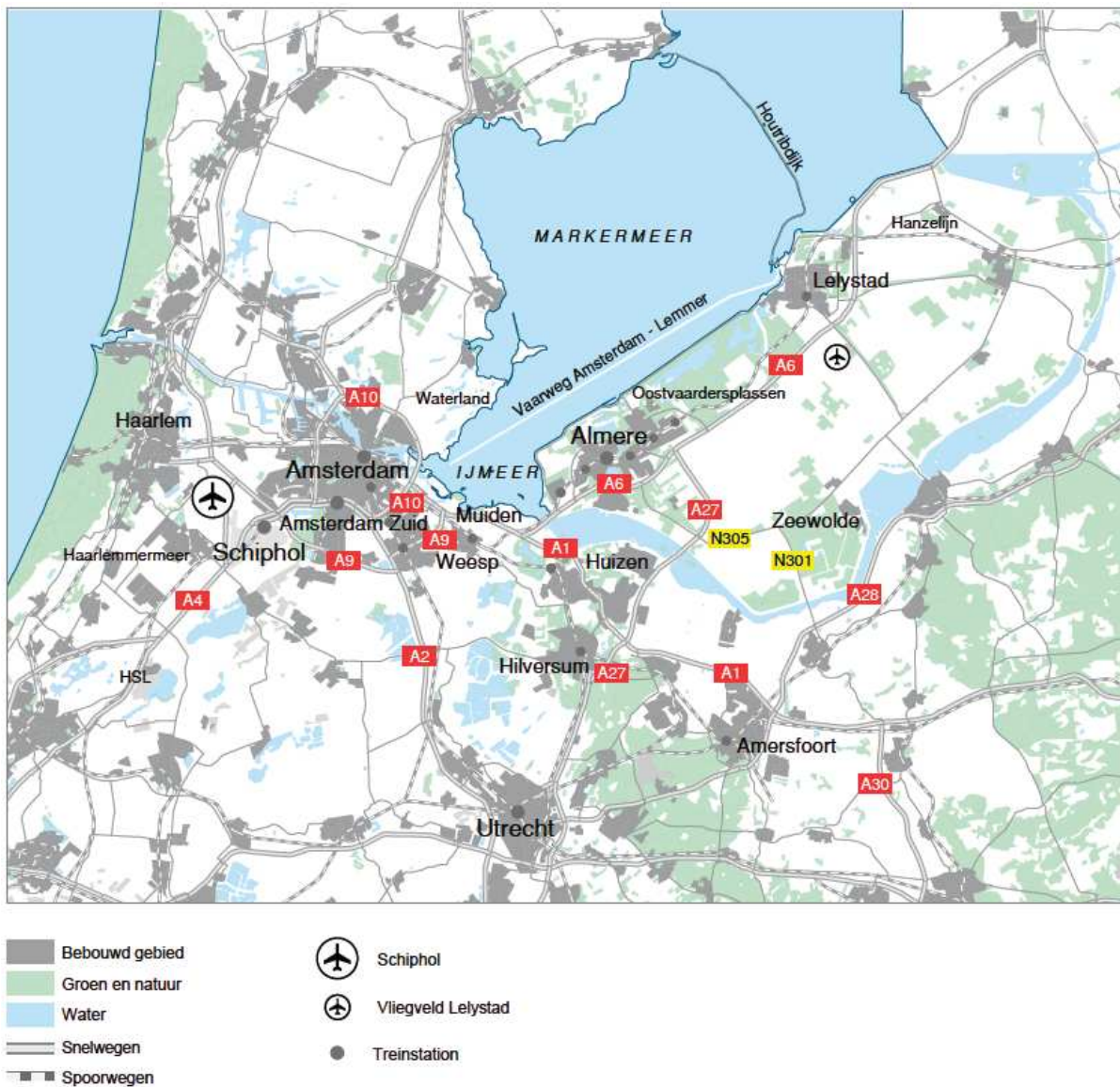
#### **4. CHRONOLOGY IMPLEMENTING INNOVATIVE CONCEPTS: WHAT HAPPENED?**

First ideas for what now is referred to as TBES, a robust ecosystem, have emerged around 2004. It was around this time that the formal planning process for IJburg 2, an Amsterdam housing location on artificial islands in the IJmeer, as well as plans for extending Almere on similar islands in the IJmeer were prepared (see figure 2). Both developments would heavily impact on the environmental and ecological conditions of the IJmeer lake, which had the status of a special protection zone under the Birds directive since 1994.

By 2005 this resulted in a document presenting a vision on the future development of the IJmeer, which was endorsed by seven civic and public organisations (ANWB et al. 2005).

Forwarding a regional development vision by a coalition of public and civic organisations was, and still is, quite exceptional in the governance landscape of the Netherlands, which still is dominated by a relatively strong public sector. That such a coalition reframes a situation in terms of developing and investing in an ecosystem and nature is even rarer. In line with the central interest of the paper, clearly what was at stake was overcoming the tension between a regulatory policy regime, put forward by the Natura 2000 framework, and a more usual governance approach that is characteristic for Dutch planning and in particular for a soft space such as the Markermeer-IJmeer for which the responsibility is blurry. The background to this and its development from there will be explained by referring to table 1 which shows per meta-governance period the main developments as regards stakeholders, governance conditions, products and role of Natura 2000 and public support.

Figure 2. Reference image for the case study area (Source: Ministerie I&M 2013: 2)





**Table 1. Markermeer-IJmeer process overview by meta-governance periods**

Period	Key stakeholders organisation +	Main Products cooperation +	Meta-governance conditions	Formal/informal commitment TBES	Natura 2000 awareness	Public support
<b>2004 - 2005</b>	Natuurmonumenten Staatsbosbeheer Amsterdam Almere ANWB Province North Holland Province Flevoland	Exploration IJmeer (2004)  Vision IJmeer (2005)  Focus on reframing the urban development objectives and developing consensus, led by Natuurmonumenten	None: focus on committing national government	No: merely principle agreement by key stakeholders	Varying: high under environmental groups, low under public stakeholders and ANWB	Unaware
<b>North Wing Letter 2005 - 2006</b>	Province Flevoland Province North Holland National government Natuurmonumenten Staatsbosbeheer Amsterdam Almere	No product  Cooperation splintered, no clear common objective	Vague: National government aims to participate in broad cooperation network to develop a long term vision on the Markermeer. Relations seen with Almere development, due to Natura 2000.	North Wing Letter expresses relevance for further elaboration  High: Flevoland and Almere high.  Hesitant: North Holland, Amsterdam	Yes, as well as WFD, in North Wing Letter reserving 25 million budget for ecosystem pilot.  Amsterdam, North Holland on the fence	North-Wing Conferences <sup>1</sup> + Civic societal platform <sup>2</sup> have discussed the North Wing Letter of which Markermeer is one of the many projects
<b>Randstad Urgent Programme 2007 – 2009</b>	TMJ Steering group, consisting of:  Province Flevoland Province North Holland National government - Ministry VROM - Ministry LNV - Ministry Transport	Ontwikkelings-visie Markermeer-IJmeer (2008)  Toekomstvisie Markermeer-IJmeer (2009)  Good cooperation led by Flevoland focus on ecology, initially hampered by	Procedurally clear: - Breaking through governance congestion - Provinces should take lead - Executive duo made up of state secretary and provincial executive - ANWB director as	Ambivalent: ecological challenge framed in context of expansion Almere, not as urgent independent objective in relation to Natura 2000.	Awareness of existence but not of consequences in Randstad Urgent Programme.  Flevoland and other key stakeholders highly aware.	Explicit focus on creating awareness and support of society. Newsletters, website, variety of expert workshops, broader conferences etc.  Involvement of many stakeholders and aim for

<sup>1</sup> Participants of the North Wing Conference are: provinces of Flevoland, Noord-Holland, the Regional Cooperation Platform Amsterdam (ROA), the municipalities Almere, Muiden, Weesp, Hilversum, Diemen, Ouder-Amstel, Amstelveen, Uithoorn, Aalsmeer, Haarlemmermeer, Haarlemmerliede-Spaarnwoude, Amsterdam, the city district councils Amsterdam-Noord, Osdorp and Zuidoost, Waterland, Purmerend, Edam-Volendam, Zeevang, Beemster, Wormerland, Landsmeer, Oostzaan, Zaanstad, Beverwijk, Velsen and Haarlem.

<sup>2</sup> Civic societal platform consists of employers' organisations (VNO-NCW), Chamber of Commerce Amsterdam, Staatsbosbeheer, Nature and Environment Association, Natuurmonumenten, Utrechtse Milieufederatie, ANWB, NV Airport Schiphol and Agriculture and horticulture organisation (LTO)

	<ul style="list-style-type: none"> <li>o DG Water</li> <li>o RWS</li> </ul> <p>Natuurmonumenten Staatsbosbeheer Amsterdam Almere Zuiderzeeland (representing Water boards) Lelystad Waterland (representing small municipalities along North Holland coast)</p>	unclear position national stakeholders	<p>project ambassador</p> <ul style="list-style-type: none"> <li>- Relation with Almere project recognised, but not in what sense</li> </ul> <p>Substantive vague:</p> <ul style="list-style-type: none"> <li>- No clear objectives, conditions, requirements and purpose</li> <li>- No clear commissioning authority</li> <li>- No clear purpose, long term commitment.</li> </ul>	Lead stakeholder Flevoland feels high sense of urgency in relation to Natura 2000 and shifts process to exclusively ecological objectives		consensus led to avoiding difficult issues and shifted focus to ecological issues.
<b>RRAAM 2010 - 2012</b>	<p>WMIJ working association, consisting of:</p> <p>Ministry I&amp;M Ministry EZ Province North Holland Province Flevoland</p>	<p>Optimalisation report (2011)</p> <p>Four TBES alternatives (2012)</p> <p>Cooperation smooth with clear stakeholder's roles</p>	<p>Clear procedural as well as substantive:</p> <ul style="list-style-type: none"> <li>- WMIJ one of four working association of RRAAM organisation</li> <li>- Decrease costs of TBES alternatives</li> <li>- Integration with infrastructure and Almere plans</li> <li>- Societal, civic and private stakeholders institutionalised within RRAAM organisation</li> <li>- Organise societal support</li> </ul>	TBES integrated in RRAAM as fourth concrete objective	<p>High among key stakeholders</p> <p>Reasonable among others</p> <p>Unawareness of binding status by some</p>	<p>Relatively high, through institutionalised stakeholders in RRAAM programme.</p> <p>Several workshops, symposia, consultation events, but still difficult to attract non-institutionalised stakeholders</p> <p>Protest against individual measures TBES such as sheltered zone Hoornse Hop by recreation sector</p>
<b>Draft National Structure Vision Amsterdam-Almere-Markermeer 2013</b>	Ministry I&M	Structure Vision	Not applicable: National government policy.	Government binding	High, main legitimization TBES	Unknown yet as public participation stage has not formally ended yet

#### 4.1 Reframing the Markermeer-IJmeer challenges: 1990 - 2005

Around 1990 national spatial policy, which favoured housing development in contiguous urban areas, created favourable conditions for developing IJburg. As the plans to build houses in the IJmeer became more tangible, so were the protests against it. This protest reached its climax in the 1997 IJburg-referendum in Amsterdam. For this referendum 18 environmental, nature and recreation groups and organisations joined forces in their effort to convince the population of Amsterdam to vote against the development of IJburg. In spite of a large campaign and intense public debates, however, they did not succeed (Neijens & Van Praag, 2006). In 1999 the first islands for IJburg were created and in 2002 the first new houses had been built.

Around the referendum the first signs of contextualisation began to appear: to find a balance or compromise between environmental policy frameworks –nature conservation – and urban development goals. The role of the Natuurmonumenten association (Nature Monuments) is of interest here.<sup>3</sup> Natuurmonumenten followed a two track policy: they participated in the campaign for the referendum, but at the same time, sensing that whatever its outcome the referendum would not be the end of the process, started negotiations with the municipality of Amsterdam and the province of North-Holland to alter the implementation of the housing programme (Heiligenberg & Lulofs, 1999).

After the referendum the opponents split into two groups (Zwanikken, 2001: 99). One group focussed on the protection of the existing natural habitat, and continued to oppose to IJburg and turned to legal actions wherever possible. In 2004 they succeeded to stop the planning process of the second phase of IJburg 2 and forced the municipality to develop a new land use plan. In 2010 this new plan became legally irrevocable.

A second group concentrated on the development of new ecological values in the IJmeer in combination with urban development. Natuurmonumenten joined this group and broke with the environmental preservationists in support of nature development to improve the IJmeer's ecological quality and resiliency (see Kinder, 2011). In 1998, shortly after the referendum, Natuurmonumenten together with the municipality of Amsterdam and the province of North Holland decided to establish an IJmeer Nature Development Fund.

According to Kinder (2011) the outcome of the referendum changed the attitude about nature development in local government in general and Amsterdam in particular. Based on interviews she concluded: "...without the vote, eco conscious planners had little political cover to devote time and money to nature-related undertakings beyond those with immediate utility for the real estate industry. But the referendum's outcome changed the playing field, leading to an official commitment of funds and manpower to make ecology a primary issue of concern alongside the housing objective in the IJburg expansion project" (Kinder, 2011: 2440).

In 2000 the municipality of Almere started preparing plans for next urban and most western situated district which borders the IJmeer. To prepare the planning for this new district, in 2003 the municipality started 'Atelier IJmeer' in which ideas about a 'watercity' in the IJmeer and a fixed link to Amsterdam were developed. In 2004 the municipality of Amsterdam joined this initiative. Also in 2003, inspired by the IJburg experience, Natuurmonumenten took the initiative to bring five governmental and non-governmental organisations together to find

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<sup>3</sup> Natuurmonumenten is a national association for preservation of nature monuments founded in 1905. It buys, protects and manages nature reserves in the Netherlands. The organisation had 355 sites under management in the year 2010, with a total area of 1029.51 km<sup>2</sup>. The organisation also owns 1700 buildings, of which 250 were provincial or national monuments. In 2010 the organization had 768,000 members, including many private companies.

creative solutions for their conflicting interests of nature preservation, recreation and urban development in the IJmeer (Soeterbeek & Rijckenberg, 2007: 8). The result was the '*Toekomstvisie IJmeer*' (2005) report coining the idea to combine urban development with ecological development at a large scale, later to be referred to as TBES.

Whereas undeniably the previous period has been of great importance to the contextualisation process that is taking place in relation to Natura 2000 regulation, it is striking that the Birds and Habitat directives have barely played a role in the decision making until the early 2000s. Due also to the above mentioned slow transposition of the Birds and Habitat Directives by the Dutch government, actors got slowly aware of the importance and reach of these directives and the status of protected zones. The ecological main structure (EHS) played a much more important role in the planning of IJburg 1 than the EU directives. With the planning of IJburg 2, whose land use plans were abolished by the Council of State in 2004 for not paying adequate attention to the requirements of the Birds Directive this would however change.

In order to get the TBES concept implemented a range of issues need to be clarified. This has happened in a sequence of what could be called meta-governance environments dictated by national funding schemes. Subsequently these are the Programmatic Approach North Wing, from 2006 to 2007, the Programme Randstad Urgent (PRU) from June 2007 to May 2010 and the Programme RRAAM from 2009 until 2012. As indicated, no national stakeholders were part of the seven party group that published the IJmeer Vision in 2005. However, due to the highly centralised budget in the Netherlands in combination with a hefty price tag of, initially, an estimated 1 billion euro for implementing the TBES, national assistance was deemed necessary.

#### **4.2 North-Wing Letter vagueness: 2006**

A first meta-governance scheme is provided by the so-called North Wing letter of August 2006 in which the national government asks the regional stakeholders to further develop a vision for the future development of the Markermeer-IJmeer area including Almere and the new infrastructure development. A key element is to address the ecological situation as the IJmeer suffers from an autonomous negative trend. Its status as special protection zone under the Bird and Habitat directives is recognised. Because many technical aspects of the TBES concept remain unclear a research programme and nature pilot, funded 25 million euro, is carried out in a separate track: Natuurlijk(er) Markermeer-IJmeer (NMIJ). The letter also indicates that crucial decisions regarding building in the IJmeer and constructing infrastructure will be postponed until 2010.

The TBES concept itself was surrounded by many uncertainties: financial, legal, process and technical. From a legal perspective it was unclear whether the plans are 'EU proof' and how this should be taken care of. Opinions varied. According to some this should be analysed further, whereas other contended that this problem has already solved itself and that the core of the problem is not located in Brussels but in The Hague. A dialogue with the ministry of Agriculture<sup>4</sup> is therefore considered important (see also below).

The stakeholders that signed the vision are still behind their decision, but clear differences in interpretation become visible. In general there is great support for the double ambition of the scale jump ecology and the scale jump urban development. However, there is a lot of

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<sup>4</sup> The ministry of Agriculture refers to the ministry of LNV (Agriculture, Nature and Food Quality). After two more national elections this ministry, and more crucially in the context of this paper the department of Nature Development, would become part of the ministry of ELI (Economic affairs, agriculture and innovation), later to become simply the ministry of Economic Affairs (EZ), which is its current name. In the meantime, however, the nature development budget has been decentralized to the provinces.

ambiguity concerning their mutual relation (Soeterbeek & Rijckenberg 2007). Amsterdam and Almere have little interest in the ecological element and do not see why this should precede urban development whereas this is regarded an absolute precondition by Natuurmonumenten and Staatsbosbeheer. Moreover some regard the double scale jump as a mere compromise whereas others regard it an innovative nature inclusive approach. A third group regard it as a way to circumvent the Bird and Habitat directives. The doubts regarding the vision's underpinning have now made place for a down to earth observation that the real work will yet have to start.

In general however, the North Wing letter essentially remains vague both with regard to procedures and substantively regarding the project objectives and requirements. However, there is no time to show the programme's qualities as the government has to resign.

#### **4.3 Programme Randstad Urgent aiming at procedures: 2007-2009**

A new government starts the Programme Randstad Urgent (PRU). The previous set-up with regional based programmes such as the North-Wing, NV Utrecht and South-Wing was deemed less appropriate and the focus is put on the Randstad as a whole. The same ministries take part. Both projects, the visioning for the Markermeer-IJmeer and the Scale jump Almere, are made part of the Randstad Urgent programme but developed separately.

One of the main objectives of the Programme Randstad Urgent was to break through the governance congestion that characterises many projects and ambitions in the Randstad. To this end the responsibility for each project was shared by a minister and a provincial executive, in this particular case the State secretary Tineke Huizinga of Transport and Water and executive of province of Flevoland Andries Greiner. Also each project got an ambassador from a civic organisation or private company, for TMIJ this was: ANWB<sup>5</sup> director Guido van Workum. In 2008 this results in the *Ontwikkelingsperspectief*, a development perspective on the area. On instigation of Huizinga this perspective document is further elaborated in 2009 in the *Toekomstbeeld Markermeer-IJmeer*: the Future Vision Markermeer-IJmeer. It is this vision that coins the concept TBES.

Despite the North-Wing letter and the Randstad Urgent programme there is little clarity as regards the role, commitment, involvement and responsibilities of the various national departments. According to some participants the national government has kept a distance from the project resulting in a weaker securing in its policies. In particular during the last stages of the project the national government wants to keep its hands off. This is illustrated by the decision not to be mentioned as author of the two reports. Still the Randstad Urgent project has been beneficial for the process because due to the dual responsibility of the state secretary and provincial executive it was easier for the province to get commitment of other regional bodies and the national departments. (B&A 2010; Ministerie V&W 2009, p.7)

A curious episode in the TMIJ project is the letter that Flevoland send to the European Commission in Brussels which explains the proposed TBES strategy for the Markermeer, which basically comes down to an programmatic approach<sup>6</sup>, and asks for an EU opinion whether this fits with the Natura 2000 approach. Curious because why did the Ministry of LNV, responsible for Natura 2000 in the Netherlands and participating in the steering group, not answer the questions? By a letter of April 2009 the Commission reacts positively to the

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<sup>5</sup> Established in 1883 and with 3.9 million members the Royal Dutch Touring Club ANWB is the largest club in the Netherlands.

<sup>6</sup> In relation to EU directives the Netherlands has established a practice of applying programming approaches. The programmatic approach that TBES basically is, seems comparable to the national air quality (NSL) and nitrogen programmes (PAS).

approach, but makes clear that their answer in no way bears any legal status and that the regulations of the Birds and Habitat directives have to be taken into account. (CEC 2009) As regards the passive position of LNV it can be indicated that this has changed over time.

In terms of meta-governance the Randstad Urgent Programme remains quite abstract as regards the conditions and terms that projects should comply with. It is clear that the provinces should take the lead, but the briefing does not come with clear objectives, conditions and requirements from the national government. The missing framework conditions cast their shadow over the TMIJ project for almost the whole period. Questions such as: who is actually commissioning this project, what is the purpose, what will happen with the outcomes, who is going to pay are left unanswered. As such, the province had a more or less free hand in organising the contents and process of the TMIJ project. (B&A 2010) Flevoland grasps the opportunity and firmly directs the process towards ecology.

The *Toekomstbeeld Markermeer-IJmeer*, which is the result of the project, underlines that the urgency of the TBES approach lies in the Natura 2000 status of the Markermeer-IJmeer, which prevents it from becoming part of the urban development ambition of the Amsterdam metropolitan area. Only a systems approach will lead to a satisfactory solution and that an ecological 'scale jump' is a precondition for the urban and infrastructure scale jumps relating in particular to foreseen development in Almere.

At the same time, however, whereas the direct stakeholders understand the urgency in relation to Natura 2000, there is still uncertainty regarding the support of the other over 80 stakeholders in the region. In particular the province of North Holland has difficulty with its position in the project. With the financial and economic crisis the North Holland provincial council doubts this expensive approach.

#### **4.4 RRAAM providing clear conditions: 2010 - 2013**

The *Toekomstbeeld Markermeer-IJmeer* document needs further elaboration and the vehicle for this is found in the RRAAM programme.<sup>7</sup> Much more than previous programmes, the RAAM brief recognises the urgency of a TBES. A key objective of RRAAM is to develop more cost-efficient alternatives for TBES. The Werkmaatschappij Markermeer-IJmeer (WMIJ), consisting of representatives of the ministries of I&M<sup>8</sup> and EL&I and the provinces of Flevoland and North Holland, is commissioned with this task. Initially, RAAM only foresaw in three working associations, two for Almere and one for the infrastructure connection between Almere and Amsterdam. Only at last, the WMIJ was added. It indicates the somewhat ambiguous position of the government towards the expensive TBES concept.

A key issue relating to the ambiguity of the WMIJ and its position in RAAM concerns the existence of nature objectives forced upon the project by regulation. At the national level there is high awareness of Natura 2000 and to a lesser extent Water Framework Directive. The appreciation of the regulation, in particular Natura 2000, varies however. Some ministries (in particular the former economic affairs (EZ) and transport (V&W) ministries as well as to some extent the former planning and housing ministry (VROM) because the strict regulation does not fit the balancing approach characterising Dutch spatial planning) complain about it whilst others (LNV) are content, proud even as founders of the regulation, with the possibility to finally protect vulnerable nature, something that was difficult under

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<sup>7</sup> RRAAM refers to *Rijk-Regioprogramma Amsterdam-Almere-Markermeer*.

<sup>8</sup> The ministry of I&M (Infrastructure and Environment) is the result of a merger between the former ministries of VROM (Spatial Planning, Housing and Environment) and V&W (Transport and Water). The ministry of ELI (Economic Affairs, Agriculture and Innovation) is a merger of the former ministry of EZ (Economic Affairs) and the ministry of LNV (Agriculture, Nature and Food Quality).

Dutch law. In such a context it is difficult to convince the ministry of Finance and claim large budget reservations for nature development like the TBES. Hence it is no surprise that the main task of the WMIJ working association is to fork out cost efficient TBES alternatives.

At the regional level there is ambiguity with regard to nature objectives too. Here, however, it has much more to do with the binding and hard character of the regulations. This is something that stakeholders, in particular from the small and medium enterprises and recreation sector, cannot get their minds around. Within the WMIJ, even long after its start, a surprising amount of time was spent on clarifying the inescapable or unavoidable status of Nature 2000 objectives. The binding status of nature objectives marks a significant departure from the Dutch spatial planning approach characterised by balancing various demands, but in which nature objectives now have become more dominant.

The WMIJ itself is different from the previous TMIJ organization and only consists of representatives of Flevoland and North-Holland, the ministries of I&M and EZ and RWS. It can be described as a network organization headed by a director and some staff and with a budget to hire external expertise. Officials from various sectors from the stakeholder organization could be called for just depending on what kind of expertise was necessary at a certain moment. Whilst operating in the context of the RRAAM programme, much effort is spent on co-ordination and cross-sectoral integration with the three other RRAAM projects. As within the WMIJ itself, also stakeholders of other working associations needed to be convinced by the necessity of including nature development objectives in the work package. Ultimately, according to its participants, the RRAAM meta-governance context has resulted in better and more cross-cutting solutions.

Another key element of the RRAAM programme is its objective to generate public support for its plans. To this end a large number of civic and private stakeholders are institutionalized in the programme by forming a sounding board to which the four working associations regularly report. On top of that conferences and workshops are organized to also provide opportunity to others to become informed about the plans. An important rationale behind this is to design an as complete and high quality plan development process as possible as this is a major criterion for the Council of State to assess cases on that are brought to court. As amongst others the Maasvlakte 2 case has shown, apart from assessing the quality of the research and whether it complies with the latest evidence and research methods, the key assessment issue for the Council of State concerns the quality of the plan process and whether stakeholders that have had the opportunity to become part of this process and include their interests. Investing in a high quality process allowing broad participation in other words buys a ticket to becoming 'Council of State proof'.

The WMIJ working association worked smoothly and by November 2011 a basic TBES alternative (Figure 3) is presented estimated to cost between 630 and 880 million Euros to be implemented in four phases until 2040. Parliament is not convinced and asks for more alternatives. And so by September 2012 three further TBES alternatives are presented ranging in costs from 350 to 518, 355 to 706 and from 422 to 880 Euros, with each alternative showing different grades of technical uncertainty.

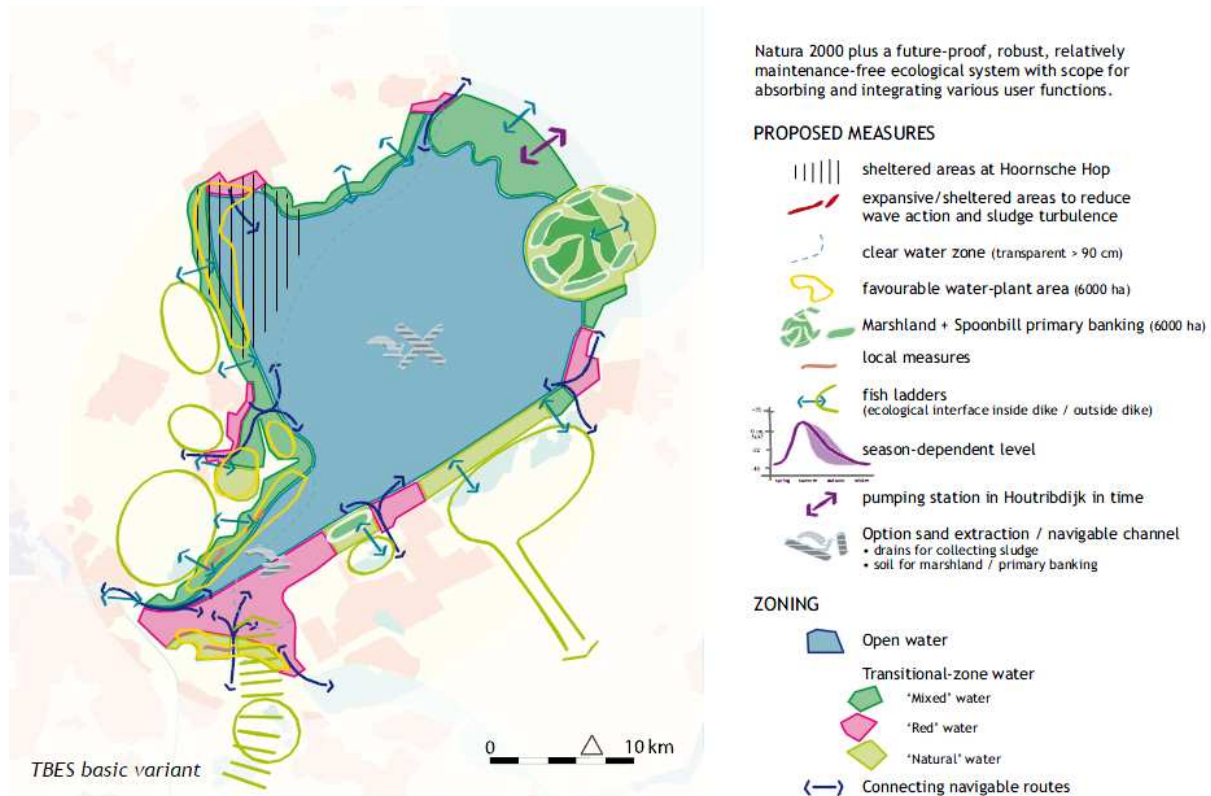


Figure 3. TBES concept and its components (Baseline Alternative July 2012)

On 25 April 2013 the Draft National Structure Vision Amsterdam-Almere-Markermeer (Ministry I&M 2013) has been presented indicating the national government's vision on the development of the Markermeer-IJmeer. Due to the economic crisis and uncertain housing market, the infrastructure connection has been postponed until 25.000 additional houses have been built in Almere since 2010. The commitment for developing the TBES has become more solid with reference to Natura 2000 and the Water Framework Directive and two concrete measures on the short term are indicated in the vision: the development of sheltered areas at the Hoornse Hop and of marshland or Marker Wadden (see figure 3 and 4).

Interestingly, whilst the work of the WMIJ was finished and the Structure Vision was in preparation, Natuurmonumenten received 15 million Euros from the National Postcode Lottery to be spend on a project called the 'Marker Wadden' (Natuurmonumenten 2012). Wadden refers to the islands north of the Netherlands and so Marker Wadden is a catchy name for developing what is indicated in Figure 3 and 4 as marshland and banks. However, the lottery only provided the money on the condition that public stakeholders would co-finance the project. In January 2013 the ministries of I&M and EZ contributed 30 million Euros, taken from a specific budget of 200 million to be spend on robust nature in the Netherlands in 2013. The unexpected private contribution has catalysed the development of the TBES.



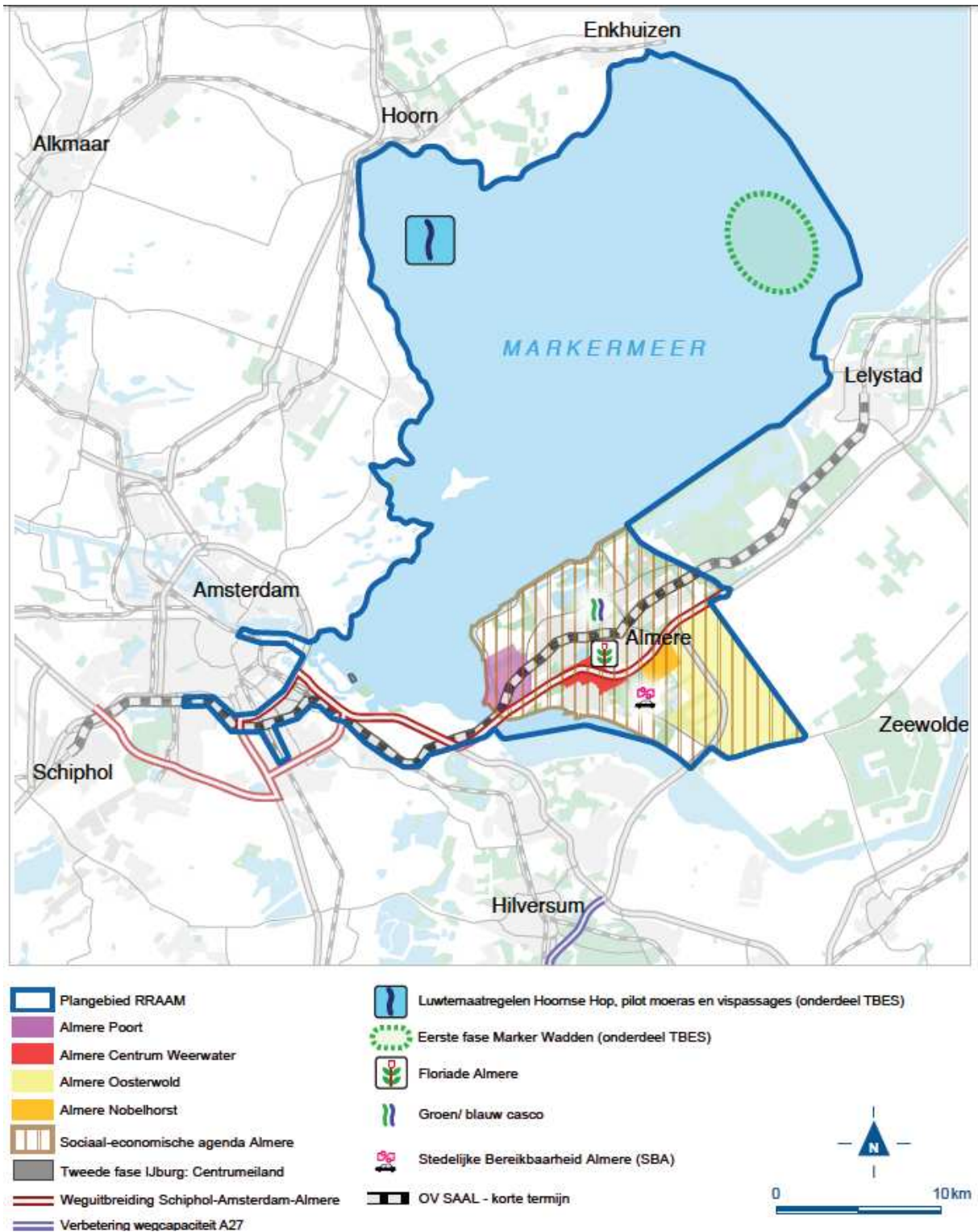


Figure 4. Short and medium term measures Amsterdam-Almere-Markermeer (Ministry I&M 2013: 10)

## 5. SIGNS OF CONTEXTUALISATION

In terms of contextualising legal norms the case Markermeer-IJmeer offers rich empirical material. Despite the complicated governance situation, which has only partly been addressed above, the meta-governance episodes clearly cast their shadow on the progress of the TBES development and conditions for contextualisation. It seems possible to identify some mechanisms at work referring to both the quality of the legal norms at stake, essentially Natura 2000 in this case, and the quality of the governance arrangements aiming to deal with legal norms in a creative way.

### 5.1 governance mechanisms to contextualisation

The process and governance situation can be described in terms of multi-level, pluricentric and meta-governance. Being a lake and essentially a soft space with no clear jurisdictional borders, there is no clear single problem owner for the area. In fact, most of the lake except for the North Holland coast line belongs to the territorial jurisdiction of the province of Flevoland, meaning that Flevoland has the formal competence of issuing permits. However, being a lake with national status, the maintenance and care of the lake is in the hands of Rijkswaterstaat (RWS) and executive arm of the ministry of I&M. RWS also coordinates the Natura 2000 maintenance plan for the Markermeer-IJmeer and is key stakeholder in the earlier mentioned NMIJ research programme (2009 – 2015). The result is that over time the central focus and the ownership of the project has shifted. Also there has been the somewhat difficult balance between the national government on the one hand and the regional stakeholders on the other, translating every now and then in an unclear picture of responsibilities and competencies. Nevertheless, in terms of contextualisation it can be observed that a number of mechanisms are used.

#### 5.1.1 (Re)framing: a nature inclusive approach

The TBES concept itself can be regarded a first step in the contextualising of regulation as it addresses multiple regulations, in particular Natura 2000. Regardless whether it is an expensive and perhaps overdone solution or a smart efficient catch all solution, it is clear that the development of a robust ecological system solves a number of regulatory issues and at the same time benefits a wide range of stakeholders. As such the perspective change in 2004 and 2005 as stimulated by Natuurmonumenten was crucial for the further process. By taking a 'nature inclusive approach', a concept borrowed from a discussion in the Netherlands on local and regional development starting from the perspective of nature and environment rather than treating this as a rest category, has been important for contextualising regulation. The reframing of a problem or situation however, should not be underestimated and requires continuous learning and re-institutionalisation. In the Markermeer case even during the latest stage within the RRAAM programme episode it was still not accepted by all stakeholders that nature development is a core objective within the programme.

#### 5.1.2 Meta-governance and process

In particular when the governance situation is complex from the outset the availability of clear governance conditions, requirements and substantive objectives are a key issue for network arrangements to embark on creative contextualisation of legal norms. The meta-governance episodes in the Markermeer case dictating the conditions under which stakeholder's networks have been operating show how influential the (absence) of clear rules of the game are in terms of their focus and mode of operating. Whilst for example the Randstad Urgent Programme put forward clear objectives as regards breaking governance congestion, the substantive focus of the project remained vague urging the province of Flevoland to spell out a substantive directions themselves. Partly also due to the earlier efforts leading to the

Toekomstbeeld Markermeer-IJmeer document, the RRAAM programme was much clearer, both procedurally and substantively.

A further mechanism that is important for contextualisation in this particular case is an inclusive plan development process. Because of the scale, the soft space characteristics of the area and the lack of a single problem owner, the quality and inclusiveness of the plan development process is a key element to contextualise and interpret the several policy alternatives. In this sense the promise of TBES concept in terms of opening possibilities for economically oriented projects by creating an ecological surplus and therewith relieving the pressure of Natura 2000 results in an agenda that can attract support. Turning the support into full commitment has proven to be a difficult step, but the importance of having an agenda that seems to hold something in it for everybody can hardly be underestimated. The support for the concept (but not necessarily for its implementation) has enabled the principle TBES agents, i.e. the provinces of Flevoland and North Holland, to pull off a governance process that included many relevant stakeholders, or at least did not exclude stakeholders beforehand. The quality of the process has been a key concern in the meta-governance frameworks. For example, RRAAM closely follows the recommendations 'Quicker and better' of the Committee Elverding. This committee, named after its chair, studied the slow and difficult implementation of large infrastructure projects in the Netherlands and in essence puts much emphasis on 'better' stakeholder involvement and consultation in the development stages of a project in order to make its implementation 'quicker'. A dedicated organisation provided assistance to this end. Part of this is a large number of symposia, meetings, workshops, presentations and so on.

There is another reason as well that explains the focus on the quality of the process and this has to do with the Council of State and how it assesses legal disputes. Importantly, in the context of EU Birds and Habitat directives the Council of State focuses on the quality of the research underpinning a policy decision. The research on ecological, as well as on other environmental, processes can be very complex and research reports often count hundreds of pages. Avoiding that stakeholders go to court, by including them in the process, is one way to deal with this. In case that for imperative reasons of overriding public interest (art 6 sub 4 of Habitat directive) a plan is still carried out and nature compensation will take place elsewhere, the compensation measures can become part of negotiation between initiative takers and environmental stakeholders, which also puts emphasis on the quality of the process. The Council of State does not allow that environmental stakeholders endlessly go to court, which is the case if it deems that their interests have been taken on board in the plan making process.

### *5.1.3 Programming approach*

A third and more direct way of contextualising Natura 2000 regulation concerns the earlier mentioned programming approach. A programming approach differs from usual mitigation or compensation measures in a sense that it comprises of a number of measures that are interrelated in time and effectiveness. The TBES concept can be regarded such a programmatic approach. In order to be juridical sound such an approach needs testing and legal assessment, something which the governance process should allow time and resources for and focus on. Whereas several stakeholders assisted in the process to deliver legally sound plans by lending their legal experts, the Natura 2000 practice required the involvement of external expertise as well.

Judging several advisory reports commissioned by the Markermeer-IJmeer working association, there is a number of problems in terms of its legal assessment and whether a programming approach can mitigate or compensate for economic development. First, with a plan horizon located somewhere between 2035 and 2040, the promise of the programming approach, or of the TBES as such, lies in a quite distant future. This means that no certainty

can be given as regards its effectiveness and indeed implementation. Second, the initiative taker for economic or urban development projects is not the same as the bodies that implement the TBES. A third problem is related to the timing and phasing and whether it is allowed to embark on urban development projects envisaged in the RRAAM context before or at the same time of implementing mitigating or compensatory measures. It goes too far here to elaborate on these issues in detail. However, the general impression is that, in particular in relation to the autonomous negative trend, it is questionable whether the Habitat directive and the Dutch Nature protection act allows the development of infrastructure and houses before taking any nature conservation/restoration measures. The postponing of infrastructure development and the housing crisis may as such come as a blessing.

## 5.2 Regulatory issues and contextualisation

From a regulatory perspective the question is whether the regulation, in this case relating to Natura 2000, has been of sufficient quality to allow processes of contextualisation to reflect local situations. In other words the question is whether the regulation casts forward sufficiently clear 'rules of the game' that inform local stakeholders within which bandwidth they can operate?

### 5.2.1 *Natura 2000 regulation*

In order to answer this question one first looks at the origin of the regulation, in this case the Bird and Habitat directives underlying the Natura 2000 programme. On the basis of this case one possible issue comes to the surface that may complicate the process of contextualisation. This relates to the static character of both the Bird and Habitat directive with regard to the dynamic of nature. Once established the special protection zones are set in stone if as regards both the borders of the areas and the (amount of) species to be protected. In particular in a dynamic, not fully matured, ecosystem this may lead to a situation in which questions can be raised regarding the purpose of the regulation and whether it is the objective to preserve a situation that under normal condition would disappear anyway. As regards birds, in particular migrating birds, it is moreover questionable to which extent it can be expected that same birds return to the same place each year. And what if they decide to land a few kilometres south of the protected zone?

### 5.2.2 *Transposition and implementation causing unclear rules*

Obviously in the case of the Natura 2000 programme the largest issues do originate at the domestic level and result from an interplay of the way that the Bird and Habitat Directives are transposed and implemented in Dutch legislation in combination with a enforcement system in which the Council of State interprets the law in a strict way and in which legislator is rather passive. The Dutch legislator has gone further than the original directive in a sense that the legislation has opened the way to require very detailed evidence proving that with certainty no significant effects will occur. At the same time the ministry provided little guidance as to how to prove this. As a result rapid growing jurisprudence by the Council of State, which interprets the legislation strictly, prescribes the actual requirements that research methodology and procedures should meet. Civil servants cannot be expected to follow this in detail, which results in a situation that only dedicated legal experts are able to provide up to date information. In the case of the TBES programming approach even for experts it is hard to provide Council of State proof advice.

Nevertheless at the moment the situation is already much clearer than a few years ago. Due to the late transposition of both the Birds and Habitat Directives the Dutch government had created a situation in which the rules of the game were totally unclear. In such a situation cases have to be assessed directly to the directive, leapfrogging the non-existing domestic legislation. This led to specific jurisprudence, but also to a situation in which stakeholders were not or barely aware of the regulatory regime and its binding power as the case of IJburg

2 showed. In the later stages of the Markermeer-IJmeer case the binding power of the Natura 2000 programme became clearly recognised and as such stimulated the stakeholders to engage in a creative process.

## 7. CONCLUSION

In terms of contextualisation of legal norms the Markermeer-IJmeer case offers interesting empirical evidence with regard to the question whether local governance dynamics and central regulation can match and how. The complex and lengthy governance process is influenced by amongst other things, such as national meta-governance frameworks, the central regulation of the Natura 2000 framework. If anything, whereas the national meta-governance frameworks, in particular North Wing and Programme Randstad Urgent, sometimes had a blurring effect on the objectives to be reached by the governance arrangements, the Natura 2000 framework had a far more powerful and compelling effect. In particular at stages in the process where stakeholders doubted which way to go, the clear and compulsory norms, even if not identified and valued by all stakeholders, put the process on a clear track.

An important element of principle of value driven norms according to Hayek is that they make clear how, along which rules of the game, these values need to be reached. So the question becomes whether indeed Natura 2000 casts sufficiently clear rules of the game? The answer is yes and no. No that in a sense of its norms the Natura 2000 framework suffers from too high level of rigidity. Its objectives refer to a static kind of nature whereas ecosystems always show dynamics, in particular ecosystems located in deltas. Also, no ecological decline is permitted, whereas in some case decline in one type of habitat may reflect autonomous trends and allows ecological improvement in other types of habitats. If the norm is to preserve a specific kind of species and conditions change in such a way that the ideal habitat cannot longer be preserved without major but in the end fruitless investments, it may perhaps be wiser to change the norm in preserving high quality nature without exactly prescribing the types of species that should find a home there.

In another sense yes, the Natura 2000 framework grants quite a lot of flexibility and room for interpretation as to how local stakeholders may respond to its objectives. In this sense the EU directives themselves are quite clear as regards the rules of the game. Depending on the transposition of the directives in national legislation and its implementation in policies and enforcement systems, in some member states the rules may remain clear or get blurred again. Obviously, in the Netherlands the rules of the game have become very detailed, which makes local stakeholders dependent on expert knowledge in order to guide them through the policy making process. Combined with the enforcement system offering generous entry to legal courts and a Council of State offering quick and detailed substantive as well as procedural assessments, this leads to substantial process costs for initiative takers. A blooming consultancy industry offering technical research and legal guidance in order to assist in making plan processes 'Council of State proof' is the result. The role of the coordinating ministry has in this respect been criticised as it initially did not offer much assistance to initiative takers and left the final interpretation of the domestic legislation to the rapidly growing body of jurisprudence, with each piece of jurisprudence changing the rules of the game.

In sum, the case Markermeer-IJmeer shows the positive role of regulation in terms of stimulating innovative policy solutions and the emerging of creative governance arrangements and in that sense forms a proof of the hypothesis of the contextualisation of legal norms. It also shows that regulatory frameworks tend to combine value and principle laden elements with some rather instrumental components, be they part of the original law or

implemented afterwards by decentralised legislators, and that this may result in a set of rules of the game that tend to steer the local governance arrangements in a certain direction, but at the same time puts them in front of difficult to manage requirements. Dealing with such regulation in a complex governance context requires generous investment in time and process. If anything, analysis from the perspective of contextualisation seems to offer a promising way to identify the advantages and shortcomings of a piece of legislation.

## REFERENCES (Not complete)

- Adviesgroep Huys (2009) *Meer dynamiek bij de uitvoering van nationale en Europese natuurwetgeving*; Perspectief voor een programmatische aanpak.
- ANWB, Natuurmonumenten, Staatsbosbeheer, Gemeente Almere, Gemeente Amsterdam, Provincie Flevoland & Provincie Noord-Holland, 2005, *Toekomstvisie IJmeer. Naar een waterpark IJmeer binnen het wetland IJsselmeer*.
- B&A groep (2010) *Procesevaluatie Toekomst Markermeer-IJmeer*, Deventer.
- Backes, Ch.W. (2000) *Veel habitat, weinig richtlijnen?* Enkele opmerkingen over interpretatie en rechtsgevolgen van de Habitatrichtlijn. In: Backes, Ch.W., Ponten, J.A.W.M. & Neumann, F., Gemeenten en de Vogel- en Habitatrichtlijnen, VMR 2000-4, Den Haag: Boom Juridische Uitgevers.
- Beijen, B. (2010) *De kwaliteit van milieuriichtlijnen*; Europese wetgeving als oorzaak van implementatieproblemen, PhD thesis Utrecht University, Utrecht: Boom Juridische Uitgevers.
- CEC – Commission of the European Communities, Directorate General Environment (2009) *Beoordeling van een strategisch natuurinclusief projectplan voor Markermeer en IJmeer*, in: Flevoland, Noord Holland, Almere, Amsterdam, Lelystad, Waterland, Zuiderzeeland, ANWB, Staatsbosbeheer, Natuurmonumenten, Randstad Urgent, Onderzoeksbundel – Achtergronddocument bij het Toekomstbeeld Markermeer-IJmeer, Lelystad: Provincie Flevoland: p.6-8.
- Hagens, J.E., 2010, *The performance of landscape concepts in spatial planning. Branding, bonding and bringing about*. Wageningen (Proefschrift Universiteit Wageningen).
- Heiligenberg, T. Van den & F. Lulofs, 1999, *Schatten van het IJmeer*. De campagne van de Vereniging Natuurmonumenten. In: Neijens, P. & P van Praag (ed.), *De slag om IJburg*. Amsterdam (Het Spinhuis), p. 45-60.
- Kinder, K., 2011, *Planning by intermediaries: making cities make nature in Amsterdam*. *Environment and Planning A*, 43(10), pp. 2435-2451.
- Ministerie I&M (2009) *Randstad Urgent, Randstad-Besluiten: Amsterdam-Almere-Markermeer*: RAAM-brief, november 2009, Den Haag: Randstad Urgent.
- Ministerie V&W (2007) *Een ander IJsselmeergebied*, Den Haag.
- Minister V&W, Ministerie VROM, Ministerie LNV (2009) *Beleidsnota IJsselmeer 2009-2015*, december 2009, Den Haag.
- Ministerie V&W, Ministerie VROM, Ministerie LNV (2009) *Nationaal Waterplan 2009-2015*.
- Natuurmonumenten (2012), 'Marker Wadden, sleutel voor een toekomstbestendig Markermeer' aangeboden aan de WMIJ op 13 juli 2012, opgesteld door Natuurmonumenten in samenwerking met advies- en ingenieursbureau DHV.
- Neijens, P. & P van Praag, 2006, *The dynamics of opinion. Formation in local popular referendums: Why the Dutch always say no*. *International Journal of Public Opinion Research*, 18(4), pp. 445-462.
- PBL, Planbureau voor de Leefomgeving (2009) *Berekening natuureffecten Markermeer*; Maatschappelijke kosten en baten van verstedelijkings varianten en openbaarvervoerprojecten voor Almere, Den Haag/Bilthoven: PBL.
- Rijswick, H.F.M.W. van, Havekes, J.J.M. , 2012, *European and Dutch Water Law*, Groningen: European Law Publishing.
- Rijswick, M. Van and Salet, W. 2012. *Enabling the contextualization of legal rules in responsive strategies to climate change*. *Ecology and Society*, 17(2), pp.18-25.
- RWS – Rijkswaterstaat (2009) *Programma Natuurlijk(er) Markermeer-IJmeer 2009-2015*, Lelystad: Rijkswaterstaat Dienst IJsselmeergebied
- Samenwerkingsverband Markermeer-IJmeer – provincie Flevoland, Noord Holland, gemeente Almere, Amsterdam, Lelystad, Waterland, waterschap Zuiderzeeland, Ministerie LNV, Ministerie V&W

- DG Water, Ministerie V&W RWS, Ministerie VROM, ANWB, Staatsbosbeheer, Vereniging Natuurmonumenten (2009), *Toekomstbeeld Markermeer-IJmeer, Natuurlijker ontwikkelen*, Lelystad: Provincie Flevoland.
- Soeterbeek, F. & A. Rijckenberg, 2007, *Een dubbele schaalsprong zonder vangnet. Visieproces IJmeer 2005-2006*. Gouda (Habiforum).
- VROM-raad, 2008, *Brussels lof*, Handreikingen voor ontwikkeling en implementatie van Europees recht en beleid, Advies 066, VROM-raad, Den Haag.
- WMIJ – Werkmaatschappij Markermeer-IJmeer (2012) Een toekomstbestendig Markermeer-IJmeer, Eindrapport Werkmaatschappij Markermeer-IJmeer, 27 September 2012.
- Zonneveld, W, Trip, J.J. & Waterhout, B., 2008, *Impact van EU-regelgeving op de Nederlandse ruimtelijke-ordeningspraktijk; vijf voorbeelden van gebiedsontwikkeling*. Delft (Technische Universiteit Delft, Onderzoeksinstituut OTB).
- Zwanikken, T.H.C., 2001, *Ruimte als voorraad? Ruimte als variëteit! De consequenties van discoursen rondom 'ruimte als voorraad' voor het rijks ruimtelijk beleid*. Nijmegen (proefschrift Katholieke Universiteit Nijmegen).