Abstract

In 1979 with the Bird Directive, the EU adopted its first nature legislation. Since then various other directives were introduced, which all have an effect on urban development. This paper deals with the effect of the national implementation of the Bird and Habitat Directives in the Netherlands and their effects on urban development in and around the Lake Marker/Lake IJ area near Amsterdam. The paper shows that at first the influence of these Directives was underestimated and that possibly developments have been realized alien to the Directives. Moreover it took several years before Dutch courts came to an unequivocal interpretation of the Directives. So a period of ignorance was followed by a period of (legal) confusion. From approximately 2000 onward this changed and it looked like that the Directives would seriously hinder or even block further urban development in Lake IJ due to a more unequivocal interpretation of these Directives. However from this year onward various governments and non-governmental organizations tried to contextualize the Directives in such a way that new urban development could continue. By various co-evolutionary arrangements they explored alternatives to combine urban and nature development in a innovative way by reframing the problem through a widening of the spatial as well as temporal scope of these developments.

Keywords: Urban development, EU nature conservation directives, Transposition
1. Introduction

Large-scale urban development projects operate in a tension between local aspirations and central regulations. In particular when realised in the urban fringe nature and landscape concerns become pertinent, leading to traditional land use conflicts between open space preservation and development (Amati 2007; Zonneveld 2007). The core of these conflicts are the ambitions of local governments to expand the urban areas and the increasing amount of legal norms and rules issued by a national or supra national government to protect nature. These legal rules to protect nature are general and apply to a country as a whole, whereas there is a large disparity in local ambitions and situations. So, can central regulation be matched with interactive local policies in such a way that it enables legitimate and effective strategies of collective action with regards to sustainable urban development projects. We call this matching process contextualisation.

A complex question in this perspective is how general rules can elaborate generalised meaning in such a way that it still makes sense and gives normative hold in new specific situations. It requires a great deal of creativity to establish general legal rules under such seemingly paradoxical requirements (Salet and De Vries, 2013). Understanding the potential of contextualisation of legal norms requires equal appreciation of on the one hand the quality of legislation and central policy-making and on the other hand the local aspirations of decision-making. According to Fuller (1964) to the quality of legislation and central policies should be of a generic and durable nature. Generic means that legislation should avoid detailed specification, but it should still be principal. Durable means that it should be avoided that the legislator has to produce new rules for every specific problem. With regard to the local context of decision-making it is required that local practices of decisionmaking – in their inventive processes of interaction and negotiation – pay tribute to the meaning of central principles.

In this paper we focus on the dynamics of contextualization in the case of the European Birds and Habitats directives and a large local housing development project in and around the IJmeer. The IJmeer is a lake at the eastern fringe of Amsterdam in The Netherlands. The municipality of Amsterdam wants to build 18,000 houses several artificial island in the IJmeer. At the moment about half of these houses are already build. At the eastern shore of the IJmeer the municipality of Almere, backed by the national government, wants to build another 60,000 houses. The IJmeer is part of the larger Markermeer. Together they form one ecological system and are a habitat of several protected waterbirds.

By taking a large time frame we hope to find out how local (but also regional) government struggle with contextualization. The main challenge regarding contextualization in in the IJmeer-case is to enact a required land use plans that met the demands set by the Birds and Habitats directives. In this paper we argue that this contextualisation was problematic not only due to the demands in the directives themselves, but also due to the legal uncertainty caused by the shifting interpretation of these demands in the case law of the Council of State (Afdeling bestuursrechtspraak Raad van State, or ABRvS in Dutch), the supreme administrative court in the Netherlands. Although legal uncertainty still exists local and regional authorities seem to have found ways to contextualize the European nature conservation directives in such a way that both urban and nature development can take place.

This paper is structured as follows. In section two we define the general legal context for our case study. We focus on the required land use plans and nature conservation. Issues related to noise and air quality are left aside although contextualization is also an issue. In section three we will analyze the governance and decision-making process about the urban development in the IJmeer. Section four deals with the
various stages of contextualization in our case study and analyses how the contextualization of the Birds and Habitats Directives took place in the IJmeer case. Section five contains our conclusions.

2. Defining the challenge of contextualisation

An important legal precondition for urban development is that the building plans are in accordance with a so-called land-use plan. A land use plan is formed on the basis of the Dutch Spatial Planning Act, ‘Wet ruimtelijke ordening’ or ‘Wro’ in Dutch). Art. 3.1 of this act prescribes that the municipal council lays down one or more land use plans for the whole of the municipal territory. A land-use plan divides an area of land into different zones (‘bestemmingen’ in Dutch), each with a specific function. For example, a zone can be designated for ‘housing’, ‘nature’ or ‘economic activity’. Furthermore, the land use plan contains specific rules for each function, in which the restriction on the use of the land that is allowed within the zone is elaborated in more detail. For example, if an area is designated for ‘housing’, which implies the land use plan allows houses to be build, the land use plan can specify how high these houses may be, the maximum volume the houses may have and which percentage of the area may be covered by houses. A land-use plan is legally binding; land may only be used in accordance with the function assigned to it. Using land contrary to the land-use plan can result in an administrative sanction or even a criminal charge. Moreover, when a building permit is needed, the application for the permit needs to be tested against the land-use plan. If the land-use plan doesn’t allow the intended project, the building permit has to be denied. Therefore, it is clear that in order to realise housing in the IJmeer the municipal council of Amsterdam needed to agree one or more land-use plans in which the intended development

The Markermeer-IJmeer area is protected by nature protection regimes in both national and international law. It is part of the national Ecologische Hoofdstructuur (EHS). Moreover, the lake is a Natura 2000-site, which means the European Birds- and Habitats Directives apply to the lake. As we shall see, the forming of the required land use plans was hampered by the European obligations laid down in the Bird- and Habitats Directives.

In 1993, the Markermeer-IJmeer area was designated as a ‘core-area’ of the EHS (‘Ecological Main Structure’) in a national policy document called Structuurschema Groene Ruimte (‘Green Area Structure Scheme’). The EHS-policy is aimed at maintaining the characteristics and values essential for the protection, recovery and development of nature sites. The policy doesn’t allow any interference or development to take place with negative effects on these characteristics and values. However, the policy allows an exception to be made if an overriding public interest is involved and no reasonable alternatives present themselves. In that case, the negative effects on the site must be mitigated or compensated if mitigation isn’t possible.

The aim of Natura 2000 is to form a coherent European ecological network. The first step towards this policy goal is formed by the Birds Directive, which was enacted in 1979. This directive is aimed at the protection of birds, mainly through special conservation measures concerning their Habitat. The directive obliges the Member States to designate Special Protection Areas (SPAs), and take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be ‘significant’. The Member States do not have much discretionary power to identify the areas that are to be protected on the basis of the Birds Directive. According to the case law of the European Court of Justice only ornithological criteria count. In it’s case law, the ECJ presumes the Member States are
obliged to designate the areas listed as Important Bird Areas (IBAs) on the ‘Inventory of Important Bird Areas in the European Community’, which was drafted by the International Council for Bird Preservation in the European Community in 1989, because it sees this list as the best available scientific evidence on bird areas.

The protection regime of the Birds Directive was very strict. The directive didn’t allow pollution, deterioration or disturbances with significant effects to be justified through economic or social motives. This changed with the introduction of the Habitats Directive in 1992. Article 7 of the Habitats Directive replaces the protection regime of the Birds Directive with its own, which is a little more lenient towards developments with significant negative effects.

The Habitats Directive is the second step towards the creation of Natura 2000. The scope of this directive is much broader than that of the Birds Directive, in that its protection regime not only covers birds, but a whole scala of habitats and species. However, the basic concept of both protection regimes is the same. Just as the Birds Directive, the Habitats Directive obliges the Member States to appoint SPAs. The site protection regime of the Habitats Directive is laid down in Article 6. The second paragraph obliges the Member States to take appropriate steps to avoid the deterioration of habitats in an SPA, as well as disturbance of the species for which the area has been designated, in so far as such disturbance could be significant. According to paragraph three, any plan or project not directly connected with or necessary to the management of an SPA but likely to have a significant effect on that site, must be subjected to an appropriate assessment of its implications for SPA in view of the site’s conservation objectives. The competent authority can only agree with the plan or project after having ascertained that it will not adversely affect the integrity of the SPA concerned. However, the fourth paragraph contains an exception. In the absence of alternative solutions, a plan or project with negative effects on an SPA can be carried out for imperative reasons of overriding public interest. Contrary to the original protection regime of the Birds Directive, Article 6, Paragraph 4, of the Habitats Directive explicitly allows these reasons to be of a social or economic nature. The exception can only be used if all compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.

The site protection regime of the Habitats Directive has important implications for the forming of land use plans. After all, this protection regime is based on a spatial concept: the directives prescribe that the member states designate the appropriate SPAs, which together should form a coherent ecological network. The land use plans for these SPAs must safeguard the specific ecological requirements of the site concerned and in principle cannot allow land use with potential significant negative effects on the SPA. Therefore, to prove that the land use allowed by the land use plan won’t have significant effects on sites protected by the Habitats Directive, research has to be carried out. According to the case law of both the European Court of Justice and the Administrative Court of the Council of State, the standards to be met by this research are rather high. The official wording is that “[…] no reasonable scientific doubt remains as to the absence of [significant] effects” and that “the best scientific knowledge in the field” should be applied. If either the methods, the findings and/or the exact wording of research reports leave open some uncertainty regarding the potential negative effects caused by the intended land use (“negative effects up to a certain magnitude cannot be fully excluded”), in principle the land use plan cannot be enacted.

1 Case C-127/02, Cockle Fishing, 61.
3. Decisionmaking in times of shifting legal interpretations

The first plans to build in the IJmeer date from the 1960s. In 1981 housing development in the IJmeer appeared in the Amsterdam Structure Plan under the name ‘Nieuw Oost’ (New East). The plan became more serious during the 1988 after ‘Nieuw Oost was mentioned in the National Fourth memorandum on Spatial Planning (Vino). In the 1991 Amsterdam Structure Plan the dimensions of ‘Nieuw Oost’ were adjusted to the new ideas and in the following years various more detailed designs were made. One of these plans was made in relation to the negotiations with the national government about the funding of new residential estates as part of the national Fourth memorandum on Spatial Planning Extra (Vinex). In 1994 a covenant was signed between the municipality of Amsterdam and the national government about the building of 100,000 houses in the Amsterdam region. 18,000 of these houses had to be built in ‘Nieuw Oost’, which from that time was called IJburg. In 1996 the municipality published the main principals for the design of IJburg. This plan can be seen as a master plan and shows the outline of what IJburg should look like.

The plans of Amsterdam to build houses in the IJmeer were influenced by Dutch national spatial planning policy in two ways. First, there were targets for the number of houses to be built which Amsterdam only could realise by building in the IJmeer (Van der Valk, 1996; Lupi, 2008). Obtaining these targets was also important for the funding for the new housing developments by the national government. Secondly, environmental aspects started to become more important in planning new urban developments. In the Fourth memorandum on Spatial Planning the ROM-policy was introduced which intended to integrate spatial and environmental developments at the project level. Already 1989 the IJmeer was selected as a ROM-project in which all layers of government (national, regional and local) should work together to develop the housing development and compensate environmental losses in IJmeer’s fragile ecology. In 1996 plans were revealed to realise several compulsory nature compensation developments due to the fact that the IJmeer became part of the EHS.

Already in 1994 the action group ‘Red het IJmeer’ (Save the IJ-lake) started to campaign. This protest cumulated 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. Especially when some national environmental organisations joined the protests, the strength of the movement increased. In spite of a large campaign however, they did not succeed (Neijens & Van Praag, 2006).2

During the debates before the referendum the legal status of the IJmeer was unclear. According to the legal advisors of Natuurmonumenten the EHS is not a law, but policy: developments within the EHS are only allowed when there is a ‘considerable public necessity’ (Van den Heiligenberg & Lulofs, 1999). This implied that there were no legal instruments related to nature conservation which could be used. Instead the protest movement contested several permits and decisions related to the development of IJburg on other grounds, such as the land use plan for IJburg which was approved by the municipal council in 1996 and a permit to extract sand for the development of the islands of IJburg. In 1998 the land use plan for the first phase of IJburg was accepted by the town-council and in 2000 the land use plan for the first phase of IJburg became legally irrevocable.

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2 Although a majority of the voters voted against IJburg, the total number of voters was below the level requested by the municipality of Amsterdam.
In the same year the IJmeer was designated as a special protection zone (SPA) according to the EU Bird Directive. However, the Ministry of Agriculture, Nature and Food quality (LNV) kept the area where IJburg 2 was planned out of the SPA. The boundary of the SPA was around the planned built up area of IJburg 2. During the preparations for the land use plan for IJburg 2 (around 2002) the municipality of Amsterdam assumed that both the EU Bird and Habitat Directives were not relevant for the development of IJburg 2 (Zonneveld, et al., 2008). There were plans for nature compensation in the form of 130 hectares of mussel beds, but not because of these directives, but in relation to the EHS. There were also thoughts about a clause for the development of a marina; in case the ships destined for this marina would disrupt the SPA than the marina will not be developed.

In 2004 the proposed land use plan for IJburg 2 was annulled by the ABRvS because there are no objective arguments which excludes the development of IJburg 2 of having negative effects on the SPA (see also section 4). The ruling by the RvS came as a surprise to both the municipality. It took the municipality several years to come up with a new land use plan (including new research) which became legally irrevocable in 2009. The consequence of the ruling was that the new land-use plan is for more detailed than the rejected one and the land use plan for IJburg 1.

Until the turn of the century urban development in the municipality Almere had hardly effected discussions about the IJmeer, although urban development on the shores of the IJmeer was already part of Almere municipal structure plans since 1978. In 2000 the municipality of Almere started preparing plans for the development of Almere Poort, its next urban and most western situated district which borders the IJmeer. Later also plans were made to make a bridge over the IJmeer between IJburg and Almere. After several non-public actors (including Natuurmonumenten) took the imitative for what eventually became the TBES [toekomst bestendig ecologisch system]. This TBES concept was presented in 2004 and is a nature inclusive development strategy on a larger spatial and temporal scale than the development of IJburg. It includes the IJmeer and the adjoining Markermeer and will last for several decades to implement. After 2004 several programmes were established to make the TBES concept more concrete by elaborating the plans (especially the nature development plans) and to bring together the large amount of public stakeholders (nation, regional and local authorities) who all have to work together. This governance process is still going on. Several financial and legal risks are at stake. The legal risks are about the amount and timing of nature development to mitigate the urban development. Until now no urban developments as part of the TBES concept have taken place because the economic recession has slowed down housing development. However the first nature development project in the Markermeer is going to start in the near future.

A TBES is deemed the best option to cater for 1) the demands of the Natura 2000 network and (to a lesser extent) the Water Framework Directive and 2) room, literally and figuratively, for developing the city of Almere, a transport connection linking between Almere and Amsterdam as well as for a variety of lower scale demands related to leisure and recreation, including enlarging marinas, in particular along the North Holland coast.

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3 TBES literally translates as ‘Future proof ecological system’, but in this report we refer to it as a robust ecological system in a sense that the system is resilient and adaptive to changing conditions in the future, such as climate change.
4. Shifting Interpretation as an obstacle to contextualisation

The transposition and actual implementation of the Bird Directive has been rather problematic in many EU member States (Van den Brink, 2004: 66). Initially legislators but also policy makers often 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.

During the materialisation of the Bird en Habitat directives the Dutch government was very active. The Netherland saw a possibility to introduce the Dutch Ecological Network approach into Europe. To a certain extend the Dutch succeeded because a Nature 2000 Network of nature protection areas was established under the 1992 Habitat Directive. Through this active involvement the ministry of LNV was of the opinion that the existing Dutch laws already did comply to the Bird Directive (De Boer et al., 2010).

According to Slepcevic (2008), the interpretation of the site protection regime laid down in the Birds and Habitats Directives evolved gradually in the case law of the ABRvS. Slepcevic distinguishes three phases,
the first of which lasted until about 1996/97. In this first phase, the protection regime was almost completely neglected. The implementation of the Birds and Habitats directives didn’t attract too much attention, and the enforcement of their site protection regimes through the national courts wasn’t perceived as a viable option.

The fact that the IJmeer was not designated as a SPA was contested by Natuurmonumenten in 1998 before the Dutch Raad van State (the supreme court of the Netherlands) after the land use plan was published. It was put forward that the IJmeer should have been designated as a SPA because it was in the IBA list of 1994 and therefore failed to take the Article 6 of the Bird Directive into account when the land use plan was approved by the competent authority (in this case the province of Noord-Holland). According to Slepevic (2009: 193) the Raad van State had a “…..rather ambiguous opinion.” about this issue. “…..it evaded the question whether Article 6 would create direct effect by using an ‘even if’ argumentation: even if the IJmeer had had to be designated as SPA and there were significant negative effects, the requirements of the Directives would have been satisfied as the construction of about 15,000 apartments were an overriding reason of public interest. …. In addition, it implied a rather shallow understanding of Article 6 (3) and (4) - the obligation to carry out an environmental impact assessment that could lead to the stop of a project if it failed to meet the substantial criteria for authorisation.” In general until 1988 the Dutch administrative courts were reluctant to apply the Directive’s site protection regime directly. Instead they applied the national legislation only (Slepcevic, 2009: 212).This meant that house building according to the Vinex policy was seen as an overriding reason of public interest and infringement to the EHS could be compensated. This compensation is a form of contextualization, although not related to the Bird or Habitat Directives (see also Zonneveld et al., 2008).

In Slepevic’s second phase, which ran from 1998 until 2000, the first references to the protection regime begin to appear, but these are still rather ambiguous. Although the ABRvS avoided explicitly answering the question if Article 6 was directly applicable to areas that were factual SPAs, but weren’t designated as such, the court argued in several cases that even if the protection regime of Natura 2000 would sort direct effect in areas that should have been designated as an SPA, the decision concerned could not be nullified because the plan or project was an overriding reason of public interest. The court’s understanding of the assessment prescribed by Article 6, paragraph 3, and of the necessary compensatory measures prescribed by Article 6, Paragraph 4, appears to be very narrow at the time. Therefore, it seemed that the exception Article 6, Paragraph 4 of the Habitats Directive could easily be applied to carry out a plan or project with significant negative effects on an SPA. The land-use plan for IJburg 1 was such a project. Its land-use plan was contested at the ABRvS but it ruled that the municipality had followed the appropriate procedure according to the Bird and Habitat Directives⁴. At the time of this ruling the IJmeer was not designated as an SPA.

In 2000 almost all of the IJmeer was designated as an SPA, with the exception of the areas in which IJburg 1 and 2 should be developed (approximately the municipal boarders of Amsterdam). According to Struiksma it is hardly conceivable that this was allowed because according to the Bird Directive and the European jurisprudence an SPA may only be defined on the basis of ornithological considerations and not on the basis on economic arguments as seems to be the case with the SPA IJmeer.⁵ Later in 2003 it proved that Struiksma was right when the ABRvS began to provide rulings on substantial grounds when it

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⁴ This is the so called ADC-procedure. This is a king of sequential test in which has to be proven (1) that the plan is of overriding reason of public interest, (2) there are no alternatives and (3) compensation will not fail.

was dealing with issues about SPA site designation (Slepcevic, 2009: 201-2020). However, the border of SPA IJmeer remained as it was and excluded the space in which IJburg would be developed. This can be characterised as a kind of contextualisation, although the border of the SPA IJmeer was never contested.

Figure 2  Protected areas in the Markermeer–IJmeer in 2009; 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.

Slepcevic’s third phase, started in 2000, and is characterized by an intensive dealing with the directives. In this period, the ABRvS slowly but surely required that the key provisions of the protection regime were taken seriously by the administrative authorities in order for their decisions to pass the judicial review. After the European Court of Justice declared Article 6 (3) of the Habitats Directive directly applicable, in September 2004, the ABRvS accepted this as well. The direct effect of Article 6 (4) followed in January 2005. The first substantial testing of a decision against the protection regime of Natura 2000 appeared in July 2003, the first case in which the ABRvS nullified a decision on the ground that the assessment of the potential effects on an SPA was insufficient only in January 2004. The land-use plan for IJburg 2 was annulled on four grounds (Zonneveld, et al., 2008):

- The borders of IJburg as used by the municipality of Amsterdam did coincide with the borders of the SPA.
• The calculation about possible influence of the new land uses in IJburg 2 on the SPA were rejected because a detailed configuration of these land uses were not included in the land use plan. This meant that deviations from the land use configurations used in the calculations for the effects on nature were possible, which means that negative effects on the SPA could not be excluded.
• The development of the islands for IJburg 2 would cause sludge sediment, which could lead to endangering mussels (these mussels are food for several species of waterbirds in the SPA).
• There was still a possibility to build a marina, whereas there are no objective arguments which demonstrate that such a marina will not influence the SPA.

A consequence of this ruling was that the municipality of Amsterdam had to make a new land-use plan which was more detailed than the previous one. A detailed plan was necessary to calculate the possible influence on the SPA. It took the municipality several years to come up with a new land-use plan. In 2008 this new plan became legally irrevocable in 2009.

In 2010 the ABRvS did another ruling about the relation between IJburg 2 and the nature conservation law. It concluded that the mussel beds should not be seen as compensation for IJburg 2, but as mitigation because there is no harmful effect on the waterbird itself on behalf of which the area is designated as a Nature 2000 area. At that time it was already concluded that the mussel beds were very successful, because the number of waterbirds increased.

At the time the land-use plan for IJburg 2 was annulled, it became also clear that IJburg was not the only threat to the SPA IJmeer. Also the plans to expand Almere and its additional infrastructure endangered the SPA IJmeer. Increasingly the various governments (local, regional and national) became aware of the legal aspects of the various urban development plans surrounding the IJmeer. Due to initiatives of various non-governmental organisations (among which Natuurmonumenten) various studies were conducted which concluded the an integral approach of urban and nature development in a wider area than the IJmeer alone could be the solution because (see also Freriks, 2012):
• The nature conservation objective (instandhoudingsdoelstelling in Dutch) can be considered as a national objective instead of a project objective.
• The Markermeer-IJmeer area should be seen as an ecological system instead of list of habitats for individual species.

This concept, better known as TBES, contains urban development around the IJmeer until the year 2040 and at the same time developing nature in the Markermeer. With TBES it should be possible to comply with the nature conservations objective and to develop enough nature to mitigate the effects the urban development around the IJmeer. Also, the time span of TBES will be larger than an normal urban project as IJburg. So the TBES-concept contextualizes the urban development on a spatial and temporal level.

Although TBES seems the solution it also creates legal uncertainty, especially in the eyes of the regional governments. This despite of the fact that various legal studies have been conducted and the regional government of Flevoland even wrote a letter to the EU to ask for their opinion about the TBES. In its replay the EU called the TBES a nature inclusive development and was in general supportive to the idea.

6 Only in 2010 the Markermeer-IJmeer area was designated as a Natura 2000-area, which meant that conservation objective did become into effect. Because the various governments did not know how to satisfy this conservation objective the Markermeer-IJmeer was not designated as a Natura 2000-area for several years.
However, it was also clear that this reply could not bring the legal certainty Flevoland was looking for. The TBES-concept consists of various urban and nature development projects. These projects are all linked to each other both temporarily and/or financially. A number of the nature development project have to developed before urban development project can start because the conservation objective and because mitigation should be ahead of the urban development. However, the nature development have to be financed by the urban development, so financially it is sound that nature development should not be too much ahead of the urban development. Also, it is still unknown which urban development will take place in the future. Will Almere build 60,000 houses (or less) and will there be a direct infrastructure link between Almere and Amsterdam that will cross the IJmeer?

Whether TBES is ‘Natura 2000 proof’ is still to be seen. However, in preparation of a spatial structure plan, legal advice implies that, under condition of a clear, well-founded picture of the future aimed at active improvements of the ecological values and supported by appropriate monitoring and commitment to adjustment in case insufficient ecological results, the plans will probably satisfy the Nature 2000 requirements.

5. Conclusions

Our case study of the Markermeer-IJmeer shows that contextualization is not a straight forward process, because legal regimes often change. This legal regime change has two components:

1. The introduction of a new law or the transposition of a EU directive
2. The interpretation of these new laws or EU directives by the Dutch courts

This makes it difficult for the actors involved to act according to these laws and directives.

The actors involved are not always aware of the fact that some legal requirement apply to their project. In such a case in their eyes there is no need for contextualization. Quite remarkably this also applies to the courts. It took the Dutch courts several years to come up with a unambiguous interpretation of the EU Bird and Habitat directives. As we saw in the in our case study this made it possible to develop IJburg. At a later stage when most of the actors where aware of the legal requirements, contextualization only was possible by making a very detailed land-use plan. Only in this way it was possible to calculate the effect to the SPA and to design mitigating measures which are (in ecological terms) more successful than expected.

Contextualization seems also possible (in our case study) by taking a larger area and time frame into consideration than by a regular (urban) project like IJburg. However, this also creates legal uncertainty because it is unknown what level of detail is required in the spatial plans to satisfy the legal requirements. For the regional governments this is difficult to deal with because they find it hard to produce detailed plans which shall not be developed in the near future. A solutions seems to be found in an appropriate monitoring system and commitment by all layers of government to make adjustments to the plans in case the nature conservation objective is jeopardized.
6. References


