

## The integration of the protection of nature conservation areas in Dutch spatial planning law and environmental management law

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### 1. Introduction

This article focuses on the integration of the protection of designated areas in Dutch environmental law or how area protection affects other parts of Dutch environmental law. We will be concentrating on area protection under the Dutch Nature Conservation Act 1998 and the role that area protection plays in spatial planning and environmental management. The Spatial Planning Act (*Wet ruimtelijke ordening*) and the Environmental Management Act (*Wet milieubeheer*), respectively, provide the statutory framework for these two areas. These two Acts regulate activities which are – or can be – of great significance in the protection of nature reserves intended by the Nature Conservation Act, namely the various forms of land use and the exploitation of establishments which have an environmental impact, respectively. The question concerning the integration of the protection of nature reserves is therefore particularly important where these two areas are concerned.

First we will examine the meaning which we attach to the two terms that are so crucial to this contribution, namely environmental law and integration, after which we will consider the influence of European and international law on the degree of integration within environmental law. This will be followed by a discussion of the Dutch Nature Conservation Act 1998, the Spatial Planning Act and the Environmental Management Act (EMA). Needless to say, this will focus on the parts of this legislation which are relevant to area protection and its integration. After these three Acts have been examined, the question then arises as to the extent to which the coming Dutch Environmental Licensing (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht (Wabo)*) can contribute to the integration of environmental law. We will close by making a number of conclusions.

### 2. The concepts of environmental law and integration

#### *Environmental law ('omgevingsrecht')*

In the 1990s the concept of environmental law (or *omgevingsrecht*) came into use in the Netherlands as an umbrella term for several fields of law concerning the protection of the physical

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environment, such as environmental management law (including pollution control), water law, land development law, building law and nature conservation law. This concept, which has been developed to emphasize the mutual relatedness of its components, is difficult to translate, since the Dutch word *omgeving* simply means environment or surroundings. In English, though, 'environmental law' is generally understood as the law protecting the quality of the environment and nature conservation law, thus excluding, at the very least, building law and land development law. The latter, however, is very important in area protection as well as in other forms of the protection of the environment in a broad sense. In this article, we will therefore use the concept of 'environmental law' in this broad sense. When we refer to the law concerning contamination or pollution control, we will use the term 'environmental management law'.

### *Integration*

The interrelatedness of the various parts of environmental law requires a certain degree of attuning, both in law and in practice. There are several methods of dealing with this need for attuning. The most far-reaching method is the substantive integration of all the different aspects of environmental law, for instance in one Act, plan or permit. Other methods which may be mentioned are adjusting the decisions involved, for instance by means of co-ordination, and harmonizing procedures or even procedural integration. In this article we will use the single term 'integration' as an umbrella term for all these methods of dealing with interrelatedness in environmental law.<sup>1</sup>

### **3. European and international impact on integration**

The influence of European and international law on the degree of integration within environmental law is twofold. On the one hand, certain regulations steer a course towards integration, in particular the principle of integration laid down in Article 6 of the EC Treaty, which is also to be found in, for example, the 1992 Rio Declaration on Environment and Development. This principle relates to external integration, *i.e.* the integration of environmental interests – the requirements with regard to environmental protection – in decision-making in fields other than environmental policy, in particular in the policy for the realization of the economic and social objectives of the Community.<sup>2</sup> The degree to which this principle is binding is limited, notwithstanding its imperative wording, but the integration principle is an important aim of Community – and often national – environmental policy. The integration of the various component parts of environmental policy with environmental hygiene law, nature conservation law, water law and, in certain circumstances, spatial planning law as relevant areas, is therefore – although it is maybe not compelled to do so – anyhow stimulated by the integration principle.

In addition to this, there are 'horizontal' directives, which regulate subjects relating to various activities and aspects, such as the E.I.A. Directive,<sup>3</sup> the S.E.A. Directive<sup>4</sup> and the

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1 See more on terminology in M.G. Faure, 'The Harmonization, Codification and Integration of Environmental Law: A Search for Definitions', 2000 *European Environmental Law Review* 6, pp. 174-182.

2 N. Dhondt, *Integration of Environmental Protection into other EC Policies. Legal Theory and Practice*, 2003, pp. 15-27.

3 Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, *OJL* 175, 5.7.1985, p. 40, as amended by Directive 2003/35/EC.

4 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, *OJL* 197, 21.7.2001, p. 30.

Environment Liability Directive,<sup>5</sup> and thus they have integrative effects. The IPPC Directive<sup>6</sup> is more specific; it imposes the obligation to make a coherent assessment of the environmental effects of large companies and installations, but its scope is confined to environmental hygiene aspects.<sup>7</sup> Furthermore, the protection of ecological values is influenced in particular by the Habitats and Birds Directives and various international treaties (notably Ramsar, Bonn and Bern<sup>8</sup>). The protection required by this European and international law is not restricted to environmental management law and so this law leads to a certain degree of integration.

On the other hand, the structure of European environmental law is largely sectoral. This can be seen in the separate arrangements made for nature, soil, water, air, waste, noise, products and materials. Regulation is very extensive – there are more than one hundred directives relating to the environment alone. The inherent coherence of this regulation is not always ideal, for instance, in the use of a standard terminology. Efforts are being made to harmonize and codify regulations for each sector or to organize them on the basis of thematic strategies in an attempt to improve this coherence at the European level.<sup>9</sup> Simplifying European rules and reducing administrative burdens are also high on the agenda of the European Commission at the present time,<sup>10</sup> but there are no current developments which will result in a more far-reaching integration of the various sectors of environmental law in a broad sense (such as environmental hygiene law and nature conservation law). In general, it cannot thus be argued that the structure of and the developments occurring in European environmental law support national attempts to integrate the regulation of the environment (in a broad sense).

## 4. The Nature Conservation Act 1998

### 4.1. Introduction

The Dutch Nature Conservation Act 1998 is an Act which centres on an area protection regime; it contains rules to protect nature and the landscape. In the light of the importance of this for the relationship between area protection based on this law and other policy areas, consideration will now be given to the so-called Nature Policy Plan, the Structural Vision of Nature and Landscape, the specific area protection regime and the coordination regulation embodied in the Nature Conservation Act 1998.

### 4.2. The Nature Policy Plan

Article 4 of the Nature Conservation Act 1998 requires the national government to adopt a Nature Policy Plan.<sup>11</sup> This plan must guide and focus government decisions which are made with a view

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5 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, *OJ L* 143, 30.4.2004, p. 56.

6 See also Art. 7 of Directive 96/61/EC of the Council of the European Union of 24 September 1996 concerning integrated pollution prevention and control, *OJ L* 257, 10.10.1996, p. 26.

7 The Dutch administrative court ruled for instance that the IPPC Directive does not oblige any attuning with the granting of the permit based on nature conservation legislation (ABRvS (Administrative Jurisdiction Division of the Council of State) 3 December 2008, no. 200706095/1).

8 Ramsar Convention on Wetlands of International Importance, especially as waterfowl Habitats (1971), Bonn Convention on the Conservation of Migrating Species of Wild Animals (1979), and the Bern Convention on the Conservation of European Wildlife and Natural Habitats (1979).

9 See the communication of the European Commission of 16 February 2006, *Evaluation of environmental policy 2005*, COM(2006) 70, p. 5. An example is the proposal for a directive on industrial emissions (COM(2007) 844 final), which aims at revising and recasting seven different directives into one single Act.

10 See also the communication of the European Commission of 24 October 2006, *Commission Legislative and Work Programme 2007*, COM(2006) 629, pp. 11 and 12.

11 See also for the Nature Policy Plan Ch.W. Backes *et al.*, *Hoofddlijnen natuurbeschermingsrecht*, 2009, Chapter 3, with further references.

to the sustainable conservation, restoration and development of natural and landscape values in the short, medium and long term. In this light, the Nature Policy Plan (according to Article 5 of the Act) must at least include the main principles of the policy aimed at matters such as the protection of the areas and area categories of particular natural and landscape value, as designated in the plan. The plan must also contain an indication as to how these aims and objectives will be put into practice over the period of eight years for which the plan must be drawn up, including the particular measures which are to be put in place, and an indication of the financial and economic consequences which may reasonably be expected to result from the policy to be implemented.

The character of the Nature Policy Plan implies that it fulfils a coordinating function with respect to the very diverse decisions which are taken – or which need to be taken – and which are specific to the field of nature and landscape protection. The statutory regulation shows that attuning with other policy areas is also intended, demonstrated primarily by the fact that the Minister of Agriculture, Nature and Food Quality, who is responsible for the nature policy, cannot adopt the Nature Policy Plan unilaterally. The plan must be adopted by the Minister of Housing, Spatial Planning and the Environment or the Minister of Transport, Public Works and Water Management too, for those matters within their competence in particular. The Nature Conservation Act 1998 also prescribes that the Nature Policy Plan must indicate the extent to which the prescribed policy for landscape and nature is attuned to, or leads to, an adjustment of the national environmental policy and national water management policy. In addition, these ministers must indicate the extent to which and the time scale within which they intend to review the National Environmental Policy Plan<sup>12</sup> and the National Policy Document on water management.<sup>13</sup> The Environmental Management Act and the Water Management Act contain analogous provisions. During the adoption of the National Environmental Policy Plan, the ministers involved must indicate the extent to which the proposed environmental policy is attuned to – or leads to – an adjustment of the national policy on water management and the national nature policy, and how far, and within which time frame they intend to review the policy document for water management, or the Nature Policy Plan, respectively.<sup>14</sup>

The Act provides for an effect that is somewhat different with regard to policy areas other than those of environmental policy and water management policy. In accordance with Article 6(2) of the Nature Conservation Act 1998, the Nature Policy Plan must be taken into consideration when government policy is adopted in these other policy areas, insofar as the importance of the sustainable conservation, restoration and development of ecological and landscape values are affected by this adoption. This prescription implies that, when policy in other policy areas is adopted, this must take place in a manner which is in tune with the Nature Policy Plan or, at any rate, that this other policy may not be in conflict with it; however, a deviation from the Nature Policy Plan *is* possible provided that there are good reasons for this.

For that matter, the procedure during which the Nature Policy Plan is formulated also contains a coordinating function. When the Nature Policy Plan is being drawn up, the ministers must include the administrative authorities, bodies and organizations which, in their opinion, have the greatest interest in the subjects being dealt with. The Act stipulates that the Provincial Executives (the executive committees of the provincial governments) must definitely be amongst those included. During the preparatory phase of the Nature Policy Plan concerning the draft of

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<sup>12</sup> Required under Art. 4.3 Environmental Management Act (EMA) (*Wet milieubeheer*).

<sup>13</sup> Required under Art. 3(1) of the Water Management Act (*Wet op de Waterhuishouding, Wwh*).

<sup>14</sup> See Art. 4.3(4) of the EMA.

this plan, it is open to anyone to submit their views. This implies that there is scope for the administrative authorities involved to put forward their point of view, even in relation to other policy areas, if these are affected by the Nature Policy Plan. The ministers are duty bound to include these points of view in their considerations when adopting the Nature Policy Plan, and to give a proper account of their reasons should they decide otherwise.

#### ***4.3. The Structural Vision of Nature and Landscape***

Unlike the National Environmental Policy and the National Water Management Policy, spatial planning is a policy area which is important in area protection and which is not specifically discussed in the regulation of the Nature Policy Plan described above. This does not imply that the legislator was unaware of the importance of spatial planning in nature conservation and the relationship between these two areas. In this respect, there is an implicit connection between the Nature Conservation Act 1998 and the framework of the Spatial Planning Act. This is achieved by prescribing a Structural Vision of Nature and Landscape which must provide insight into the spatial aspects of government policy with regard to nature and landscape and which, therefore, represents the spatial interpretation of the policy adopted in the Nature Policy Plan.<sup>15</sup> This structural vision is a structural vision as referred to in Article 2.3(2) of the Spatial Planning Act. In accordance with this provision, the Minister of Housing, Spatial Planning and the Environment or the minister concerned (in this case, the Minister of Agriculture, Nature and Food Quality, specifically), in consensus with the Minister of Housing, Spatial Planning and the Environment, can adopt a structural vision to cover aspects of national spatial policy which belong to his or her policy area. This structural vision must contain the primary aims and objectives underpinning the intended development of these aspects and must also examine the way in which the Minister of Housing, or the other minister involved, intends to realize the proposed development. All this therefore applies to the Structural Vision of Nature and Landscape as well.

Although the Spatial Planning Act attaches no specific legal obligation to adopt structural visions, and therefore the Structural Vision of Nature and Landscape, the law does not allow them to be bypassed altogether. The requirement of care and the principle of justification imply that a certain amount of consideration must be given to the policy formulated in a structural vision, in particular to the decisions based on the Spatial Planning Act 1998, where attention must first be given to the adoption of a zoning plan, which is itself binding in its provisions for the use of the land. This is not altered by the fact that there is no stipulation in the Spatial Planning Act itself which requires a structural vision to be taken into account, unlike the Nature Conservation Act 1998 with regard to the Nature Policy Plan.

#### ***4.4. Area protection under the Nature Conservation Act 1998***

With regard to area protection, the Nature Conservation Act 1998 distinguishes between nature reserves, Natura 2000 areas, rural conservation areas and other areas requiring protection.

##### *Nature reserves*

First, the protection of nature reserves.<sup>16</sup> A ‘nature reserve’ within the meaning of the Nature Conservation Act 1998 is an ‘area or water, or a composition of areas or water, that is of general importance because of its natural significance or natural beauty.’ In order to protect natural areas,

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<sup>15</sup> See also Ch.W. Backes *et al.*, *Hoofdlijnen natuurbeschermingsrecht*, 2009, Chapter 3.

<sup>16</sup> See also for the protection of nature reserves under the Nature Conservation Act 1998 Ch.W. Backes *et al.*, *Hoofdlijnen natuurbeschermingsrecht*, 2009, Chapter 4, with further references.

the Nature Conservation Act 1998 initially provides authority to designate a natural area as a nature reserve. This designation can be based partly on the Structural Vision of Nature and Landscape just discussed. Once a natural area has been designated as a nature reserve, there is a prohibition on – in brief – any activities being undertaken in the protected area which could be harmful to animals or plants in that area or could detract from the area's beauty. This prohibition also applies to activities which could be carried out outside the nature reserve and which are set down in the designation decision. This is termed the external effect of the prohibition.

The prohibition does not apply if a permit has been granted for these activities. Administrative authorities are given a great deal of freedom in their decision-making on applications. With regard to the decision on the application, the Nature Conservation Act 1998 suffices with the provision that the permit may only be granted if the application concerns activities which have a significant impact on the nature reserve or the animals in the reserve, if it is certain that these activities will not affect the natural characteristics of the nature reserve, unless there are imperative reasons of overriding public interest which necessitate the granting of a permit.

Pursuant to Article 17, the provincial authorities can draw up a management plan with the owner and the user of the nature reserve (or a part thereof), which is aimed at maintaining, restoring or developing the natural beauty or the scientific significance of the nature reserve. Activities within the scope of this management plan are not prohibited and a permit is therefore not required for undertaking such activities.

#### *Natura 2000 areas*

The Act provides, in principle, a power of designation with regard to Natura 2000 areas as well. After an area has been designated as a Natura 2000 area, realizing or carrying out projects or other activities which may have a harmful effect on the quality of the natural habitats and the habitats of species in the light of the conservation objective of the area (as defined by the Act) or which may have a significantly disruptive effect on the species for which the area has been designated are prohibited.<sup>17</sup>

Under certain circumstances, a permit may be granted for these activities. The Act states a number of factors which have to be taken into account in such cases. A more stringent regime applies to projects which are not directly connected with or necessary for the management of the area and which may have significant effects on the area. In these cases, an appropriate assessment of the consequences for the area is necessary, and a permit can in principle only be granted if the competent authority has ascertained that the natural characteristics of the area will not be affected. If the competent authority is not certain of this, then granting a permit is only possible if there are no alternative solutions for the project or its objective, based on imperative reasons of overriding public interest. In such a case, an obligation to provide compensation must be attached to the permit.

If an area has been designated a Natura 2000 site, the provincial authorities must draw up a management plan for it. This must include a description of the conservation measures which need to be taken and how this will be done, taking the conservation objective into account. The prohibition on carrying out activities which – in brief – can have harmful effects for a Natura 2000 area, as referred to above, does not apply to activities carried out within the framework of a management plan.

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<sup>17</sup> See also for the protection of Natura 2000 areas under the Nature Conservation Act 1998 in greater detail Ch.W. Backes *et al.*, *Hoofddijnen natuurbeschermingsrecht*, 2009, Chapter 4, with further references.

Furthermore, the prohibition does not apply, apart from one exception, to any existing use (in the sense of the Act) in the period before the first management plan for the Natura 2000 area in question has become irrevocable.

Article 19(j) of the Nature Conservation Act 1998 is a provision of great importance from the point of view of the effect of the protection of Natura 2000 areas on other policy areas. In accordance with this Article, an administrative authority must consider the consequences which a plan may have for the area and for the management plan for that area when they are making a decision as to whether to adopt a plan that may harm the quality of the natural habitats and the habitats of species in a Natura 2000 area or which, in view of the conservation objective of a Natura 2000 area, may have a significantly disruptive effect on the species for which the area has been designated, regardless of the relevant restrictions in the statutory provision which forms the basis of the decision. If the plan has no immediate connection with the management of a Natura 2000 area or if it is not necessary for that management regime, but may have a significant impact on the area in question, the administrative authority must draw up a proper assessment of the consequences for the area, taking into account its conservation objective, before the plan is adopted. In the same way, a ‘habitat test’ must also be undertaken in this case on the basis of this assessment, and the plan can only be adopted if the administrative authority has ascertained that the natural characteristics of the area will not be affected or, in the absence of any alternative solutions, because of imperative reasons of overriding public interest. In the latter case, an obligation to provide compensation must also be imposed.

The zoning plan is one of the plans to which Article 19(j) of the Nature Conservation Act 1998 refers. The regulation also applies to project decisions, *i.e.* decisions which signify that the zoning plan in question will not apply to the realization of a project which deviates from the current zoning plan (see Article 19(j)(6) of the Nature Conservation Act 1998).

#### *Rural conservation areas*

A competent authority can designate an area as a rural conservation area.<sup>18</sup> The Nature Conservation Act 1998 defines the term ‘rural conservation area’ as a ‘composition of non-built-up areas or of built-up and non-built-up areas which are of general importance in terms of the history and landscape because of their structures, patterns or elements or otherwise because of their external characteristics’. The municipal councils where the conservation area can be found must adopt a zoning plan such as the one referred to in the Spatial Planning Act for the protection of a rural conservation area. In the designation decision, it must be established whether, and the extent to which, applicable zoning plans may be regarded as protective plans.

#### *Other areas to be protected*

Finally, the Minister of Agriculture, Nature and Food Quality can designate areas to implement treaties or other international obligations in connection with nature and landscape conservation, in so far as this is required by these treaties or other obligations.<sup>19</sup> The Birds Directive and the Habitats Directive are not included among these treaties or other international obligations as their implementation is subject to their own regulations. The status of such a ministerial decision for other areas of policy is not immediately apparent. The Nature Conservation Act 1998 prescribes that a designation decision must be accompanied by an explanatory memorandum and that this must always state the way in which the conservation of the area will be realized in accordance

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<sup>18</sup> See also Ch.W. Backes *et al.*, *Hoofdlijnen natuurbeschermingsrecht*, 2009, Chapter 4.

<sup>19</sup> See also Ch.W. Backes *et al.*, *Hoofdlijnen natuurbeschermingsrecht*, 2009, Chapter 4.

with the stipulations in the obligations referred to. It might be possible to set rules to protect the area(s) in question by or pursuant to an order in council. This is not in itself excluded by Article 29 of the Nature Conservation Act 1998, which in general terms imposes an obligation to set further rules by or pursuant to an order in council with regard to the matters provided for in the Nature Conservation Act 1998, insofar as this is necessary for the implementation of treaties or other international obligations with respect to nature and landscape conservation. Such an order in council has not yet been laid down.

#### ***4.5. The coordination regulation***

The Nature Conservation Act 1998 also contains a coordination regulation, but this applies exclusively to Natura 2000 areas. If other decisions are required for realizing or carrying out a project or other activity, in addition to the permit referred to in Article 19(d)(1), then the administrative authority to which the initiator has submitted an application in connection with this project or activity must assist in informing this person of these other decisions which the authority may reasonably expect to be necessary. The initiator can also apply in writing to one of the administrative authorities concerned and request that the decision-making is coordinated – even if the information just referred to has not been provided. The mere submission of such a request obliges the administrative authorities concerned to appoint a coordinating administrative authority from among their members. If no coordinating administrative authority is appointed after a request for coordination has been submitted, the administrative authority which may be regarded as the higher authority will be assumed to be the coordinating administrative authority. The administrative authorities concerned may also officially agree on coordination after consultation and appoint a coordinating administrative authority. The coordinating administrative authority must encourage efficient and coherent decision-making. The other administrative authorities involved must provide the greatest possible cooperation which is necessary for efficient and coherent decision-making.

### **5. The Spatial Planning Act**

#### ***5.1. Introduction***

The regulation of land use – whether it is for the development or protection of areas – is pre-eminently part of the field of spatial planning. The way in which this takes place – in the legal-instrumental sense – will be discussed in the next two sections, 5.2 and 5.3, during which discussion a distinction will be made between the instruments which bind citizens and those which impose an obligation exclusively on the (lower) administrative authorities. This will be followed by a discussion of the manner in which decisions within the context of spatial planning – and in the zoning plan in particular – relate to the regulation of area protection as laid down in the Nature Conservation Act 1998. Section 5.4 will examine the relationship between the zoning plan and nature conservation law, while Section 5.5 will include several concluding remarks about the integrated character of spatial planning in the light of its relationship with other legislation in the field of environmental law.

#### ***5.2. Provisions in zoning plans (and annexes) which are binding on citizens***

Traditionally, the municipal zoning plan is the legal concept in spatial planning, which can be used to impose binding regulations on citizens relating to the *permitted* use of land in the legal-



planning sense.<sup>20</sup> Since the new Spatial Planning Act came into effect on 1 July 2008, the zoning plan has a provincial variant where *supra-municipal* interests are concerned and a national variant of the zoning plan, called the imposed land-use plan.<sup>21</sup>

In addition to the zoning plan – or to be more precise, prior to it – there is the possibility of allowing a spatial development project by means of a so-called project decision, which also has a national and provincial version.<sup>22</sup> Regulations can be attached to a project decision of this nature, in accordance with Article 3.10(3) of the Spatial Planning Act, which are in line with the subject-matter and legal implication of the zoning plan regulations.

As an alternative to a (conservation-oriented) zoning plan and the project decision, there is also the municipal management regulation which was introduced in Chapter 3A of the Spatial Planning Act or the possibility of a (municipal, provincial or national) decision to allow this regulation to be inapplicable, respectively.<sup>23</sup> The municipal council can make a preparatory decision as defined in Article 3.7 of the Spatial Planning Act to prevent actual developments from taking place which are permissible according to the zoning plan in force at the time, but which will hamper the realization of the new use or uses, or even make them impossible, during the *preparation or preparatory period* of the zoning plan.<sup>24</sup> A planning permission system<sup>25</sup> and a prohibition on making alterations to the existing use can be included in a preparatory decision of this nature (in accordance with Article 3.7(3 and 4) of the Spatial Planning Act). Provincial councils and the Minister of Housing, Spatial Planning and the Environment have the same powers when they wish to establish an imposed land-use plan and initiate the procedure for this.

In this discussion, the last category which imposes binding regulations on citizens in accordance with the Spatial Planning Act is the option, included in Article 4.1(3) and 4.3(3), of laying down rules in a provincial regulation or a government order in council respectively. The intention of this option is solely to prevent the realization of a use which is to be included in the zoning plan by the municipal council from being frustrated and is part of the intervention instruments of the general rules for the provinces and central government.<sup>26</sup> The rules referred to here may incorporate regulations concerning all types of land use, including building and construction work.

### ***5.3. Binding regulations on administrative authorities in accordance with the Spatial Planning Act***

Despite the fact that all government and administrative authorities involved are primarily bound by the municipal zoning plan (and the supra-municipally imposed land-use plan), the Spatial Planning Act contains various instruments which only legally bind the (lower) administrative authorities; to wit, the specific instruction and the general rule. These *intervention* instruments

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20 Spatial planning law in the Netherlands is regarded as permissive planning, because only the land use (according to a certain designated use) is stipulated in a zoning plan and the realization of this designated use (the land use) cannot be imposed by a mandatory provision.

21 Provided for in Art. 3.26 and 3.28 Spatial Planning Act, respectively.

22 The municipal project decision is provided for in Art. 3.10 *et seq.*, the provincial project decision in Art. 3.27 and the national variant in Art. 3.29 Spatial Planning Act.

23 Provided for in Art. 3.38 and 3.39, as well as 3.40 to 3.42 Spatial Planning Act, respectively. The concept of the management regulation will not be discussed here in the light of its (expected) minor significance for area protection.

24 One of the legal effects of the preparatory decision is that certain permit applications (applications for building permits, in particular) which fit in with the current zoning plan but not with the one under preparation may be 'postponed', *i.e.* they need not be dealt with until the new zoning plan has come into effect.

25 Planning permission, as provided for in Art. 3.3 Spatial Planning Act, implies that a permit requirement can be imposed in a zoning plan for activities, not building as such, which will affect the structure of the land. Examples of such activities include draining ground, deep-ploughing, planting or removing tall plantlife or filling in ditches.

26 In addition to the specific instructions, the general rules are the subject of Chapter 4 which regulates the intervention powers of Central Government and the provincial authorities regarding municipal spatial policy.

of the provincial authorities and Central Government are intended to oblige municipal councils by law to adapt their zoning plans to the wishes of the higher authority. The specific instruction from the Provincial Executive or a minister does this in relation to a certain subject in a certain zoning plan, and the general rule of the Provincial Council (the provincial regulation) or of the Crown (the order in council) establishes this duty of several municipal councils with regard to several zoning plans and to one or more subjects.<sup>27</sup> The so-called structural visions (of the provincial authorities and Central Government)<sup>28</sup> which must contain a description of the main features of the spatial policy to be implemented by the Central Government, provincial authorities and municipal authorities are intended by the legislator to be indicative and are explicitly meant to be not legally binding.

In connection with instruments which are binding on lower authorities, reference can be made here to the coordination regulations included in Chapter 3.6 of the Spatial Planning Act ('Coordination in the realization of spatial policy') with which the Provincial Executive or the appropriate minister can demand cooperation from the lower administrative authorities in taking the required implementation decisions (very often permits) and, if this cooperation is not granted in good time or in the correct manner, can act in place of the lower administrative authority itself, even to the extent of excluding the application of secondary legislation 'for compelling reasons'. In this way, lower administrative authorities are not only bound by the decision-making of a higher authority but there can even be a transfer of municipal powers if these duties regarding the regulation are neglected.

The latter situation can also occur with regard to municipal powers for the enforcement of the zoning plan. Article 7.8 of the Spatial Planning Act provides the Minister of Housing, Spatial Planning and the Environment with the authority to demand that the municipal executive takes an enforcement decision 'if this is in the interest of good spatial planning' in case of a breach of a regulation set out by or pursuant to the Spatial Planning Act; this is very often a zoning plan, in actual practice. If the ministerial demand is not complied with, the minister can make provision for the enforcement decision. The Provincial Executives have a weaker form of ministerial authority under Article 7.9 of the Spatial Planning Act: they can only *ask* the municipal administration to take an enforcement decision, and do not consequently have a substitution authority at their disposal.

#### **5.4. The zoning plan and nature conservation law**

As already outlined, it is now possible to adopt zoning plans (and to impose land-use plans) at three government levels since the new Spatial Planning Act came into force. In the sense of substantive law, the supra-municipally imposed land-use plans do not differ from municipal zoning plans. A discussion of the zoning plan in the following sections will also apply to the imposed land-use plan.

It is not only in the protection of isolated occurrences of ecological values where these values occur, but also those of larger areas demand that a particular use is laid down for the areas in the zoning plan which is fair to the interest of nature.<sup>29</sup> This need not necessarily be a use for 'natural purposes' or 'areas of outstanding ecological value' excluding other activities, but it can – depending on the circumstances – also be a so-called mixed use such as an 'agricultural area

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<sup>27</sup> In relation to the general rule, an exception must again be made for the case in which, based on the third paragraph of Art. 4.1 and 4.3 Spatial Planning Act, rules are imposed on citizens, which were discussed in the foregoing text.

<sup>28</sup> See Chapter 2 Spatial Planning Act.

<sup>29</sup> The natural interest is not only served by protecting existing ecological values but likewise by developing new ones. Both objectives can be served as part of one use called 'natural objectives' or a similar term.

with important ecological values', which means that it is possible to have various types of uses alongside each other and within the confines of one use.

The legislator has given the municipal council a great deal of freedom as to the content and structure of the zoning plan in Article 3.1(1) of the Spatial Planning Act. The guiding principle can however be found in the same paragraph of the Article in which it is determined that the permitted use of the land in the plan will be designated 'for good spatial planning'. When a zoning plan is drawn up, the cardinal norm of 'good spatial planning' is intended to restrict the policy-making freedom of the municipal council according to substantive law. A failure to recognize the significance of the ecological values present in the plan area would mean that the central norm of Article 3.1(1) of the Spatial Planning Act would be deviated from, if these values were insufficiently protected by the imposed use and the attached regulations for use. It may be said that the scope of the norm of 'good spatial planning' is so comprehensive because of its breadth that there must be room for a wide range of interests including those of the conservation and development of ecological values in likely areas. In other words, what 'good spatial planning' actually *means* in concrete circumstances and which choices need to be made in this respect are not only administrative questions but are legal ones, too. It can also be said that this far-reaching norm was intended to create a form of substantive-law integration.

A zoning plan may also contain a so-called planning permission system.<sup>30</sup> A planning prohibition subject to a permit can only be included in a zoning plan, according to Article 3.3 of the Spatial Planning Act, to prevent land included in the plan from becoming less suitable for the realization of the use to be laid down in the plan or to maintain and protect a use to be realized in accordance with the plan. It can be deduced from the case law that under the Nature Conservation Act 1998 a permit under this Act is required for certain activities which may have consequences for a nature reserve or a Natura 2000 area, and that this restricts the possibility of including a planning permission system in a zoning plan to protect the ecological values of an area. This is a consequence of the fact that the Spatial Planning Act only allows for a planning permission system if this is really necessary. There is – in general – no necessity for the requirement of planning permission in a zoning plan if a permit is specifically required for the activities in question under the Nature Conservation Act 1998.

Nature conservation law also influences the content of zoning plans in another way – in this case, the European nature conservation law as set out in the Birds Directive and the Habitats Directive, in particular. This aspect is related to the so-called transitional law which must be included in every zoning plan. Throughout the entire history of zoning plans, it has always been assumed in practice that a zoning plan can regulate any possible type of use of land and buildings but cannot oblige land users to realize the permitted use. The term 'permissive planning' is used in this context.<sup>31</sup> The foregoing implies that a municipality which wishes for whatever reason to give another use to a piece of land than its actual use will have to use transitional law which creates rules for the continuation of the use which the land had at the time of the new zoning plan's coming into effect. The transitional law must prevent the existing use from conflicting with the new plan or must prevent a situation in which it is impossible to maintain or alter an existing building which does not fit in with the new permitted use. This transitional law must take into consideration a land use which differs from the use laid down in the new plan. The transitional law serves as a way of allowing use which is incompatible with the permitted use and the

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<sup>30</sup> See Section 5.2.

<sup>31</sup> See also Section 5.2.

appropriate regulations to continue to exist in a lawful way when the use is different from that of the new or existing zoning plan.

It is self-evident that the continuation of a use may be undesirable from the point of view of nature conservation if that use could have harmful effects on a nature conservation area. An example would be the continued fertilization of an area if it has been designated for agricultural use. The Birds Directive and the Habitats Directive can imply that this use is inadmissible. In order to avoid a conflict with European nature conservation law, a zoning plan may not include transitional law which relates to a use which is not admissible according to the above directives (see Article 3.2(2) preamble to the Physical Planning Decree (*Besluit ruimtelijke ordening (Bro)*)).

Often a permit is required on the basis of Article 19(d) of the Nature Conservation Act 1998 for a use which is allowed under the zoning plan or the transitional law in the zoning plan but which may be incompatible with the requirements arising from the Birds Directive or the Habitats Directive. In that case, the acceptability of the use in the light of the interest of nature conservation must be considered in the context of the decision regarding the permit. If the permit is subsequently refused, such use may not be allowed. The fact that the zoning plan may nevertheless allow for this use does not alter the situation. The exception created by the Physical Planning Decree is superfluous to this extent. Insofar as the regime under the Nature Conservation Act 1998 is (incorrectly) not yet applicable, the exception to the transitional law on use allowed under the Physical Planning Decree is certainly useful, at least if the protection of ecological interests is given exclusive consideration.

The permit system under Article 19(d) *et seq.* of the Nature Conservation Act 1998 can and must be considered when uses are permitted, when accompanying zoning plan regulations are set and when project decisions are taken for areas designated as Natura 2000 areas. The case law indicates that no zoning plan may be adopted or project decision taken if and to the extent that the competent administrative authority should reasonably have already been aware of the fact that the Nature Conservation Act 1998 would obstruct the implementation of this plan or decision. The result is, on the one hand, that the question as to whether a certain activity, for example drilling for gas or oil, would receive a permit need not be answered fully in the procedure for the zoning plan or the project decision. This procedure is concerned with whether the activity can be allowed from the planning point of view. The question whether the drilling which is made possible from a planning point of view would eventually be permitted from the point of view of nature conservation needs to be answered in the application for and the decision-making concerning the permit based on the Nature Conservation Act 1998. On the other hand, it can be deduced from the case law that no planning permission may be given if the municipal administration (the municipal council or the municipal executive) could reasonably foresee that no permit would be granted under the Nature Conservation Act 1998.<sup>32</sup> To put it positively, the municipal council or the municipal executive needs to examine whether it is sufficiently likely – certainty is not required – that the permit would be granted based on the Nature Conservation Act 1998.

With ‘ordinary’ nature reserves, that is areas not designated as part of the implementation of the Birds and/or the Habitats Directive but which are designated as nature reserves under the

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<sup>32</sup> See ABRvS (Administrative Jurisdiction Division of the Council of State) 31 March 2000, *AB* 2000, 302 (with comment by Backes), ABRvS 27 March 2001, *AB* 2001, 281, ABRvS 24 December 2002, *JM* 2003, 67 (with comment by Van der Meijden) and ABRvS 16 July 2003, *AB* 2003, 336 (with comment by Backes). See also in this connection ABRvS 29 August 2007, *TBR* 2008, 71 (with comment by A.A.J. de Gier). With the exception of the last ruling, all these concern the decision of the Provincial Executive relating to the approval of the zoning plan and were given under the WRO, but there is no reason to assume that this case law will differ under the Spatial Planning Act, where the decision of the municipal council relating to the adoption of the zoning plan is a subject of discussion. On this point, we base our discussion on the case law with regard to species protection under the Flora and Fauna Act, in particular. See below.

Nature Conservation Act 1998, the underlying assumption should be that the same relationship exists as that between the Spatial Planning Act and the Nature Conservation Act 1998, in our opinion. In these cases, the test which must be carried out when a zoning plan is drawn up or a project decision taken must be whether it could have reasonably been foreseen or could have already been anticipated<sup>33</sup> that no Nature Conservation Act 1998 permit could be or can be granted. If this is the situation, then a designation as a nature reserve represents a legal obstruction to the possibility of making the desired planning change. In cases where this hurdle can be overcome, it is then a question as to whether or not the permit will be granted concerning the application and the accompanying regulations.

### ***5.5. The integral nature of area protection from a spatial planning aspect***

In the 1960s, it was initially claimed that spatial planning, and the zoning plan in particular, would have an integrating effect as instruments of government policy. This was expressed in the integrated character of the norm of ‘good spatial planning’ which formed the basis of the regulation of the zoning plan,<sup>34</sup> since this norm was intended to cover all things which are relevant from a spatial aspect, that is relating to the use of land and buildings. Over the course of the last two decades (approximately), a growing number of spatially relevant activities have acquired their own arrangements under administrative law, relating to their specific aspects. The most significant example of area protection is the Nature Conservation Act 1998.<sup>35</sup>

The foregoing discussion has shown that the occurrence of ecological values has necessitated the protection of these values in an adequate zoning arrangement, taking the norm of ‘good spatial planning’ as its premise. On the other hand, the regime of the Nature Conservation Act 1998 and, in particular, the permit requirement in designated areas, has made the planning permit requirement superfluous in many cases. We have also ascertained that transitional law in the zoning plan, which is so important in actual practice, must give way to nature conservation law which is derived from European law.

It could be said that, with this, one of the secondary objectives of the integrated norm of ‘good spatial planning’, namely the protection of ecological values in designated areas, has been overtaken by more specific legislation and the instruments provided by this. This is certainly true of those sections of spatial planning law which bind the citizen directly, but things are different at what we will call – for the sake of ease – the ‘policy level’. For some time now, developments have been taking place which have resulted in a large number of policy plans, sometimes not provided for by the law, and not just in the field of spatial planning but also in other related policy areas. It was because of this very interrelated nature of the various policy areas that increasing demands have been made to integrate all the policy plans, at provincial level in particular, and not just to bring them into line with each other. Many of the Dutch provincial authorities have already adopted so-called integrated environmental plans.<sup>36</sup> These are no more than plans which are incidentally binding on other administrative authorities and certainly not

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33 See also ABRvS (Administrative Jurisdiction Division of the Council of State) 30 June 2004, *JFf* 2004, 67.

34 At the time (and until 1 July 2008) in Art. 10(1) Spatial Planning Act and from that date in Art. 3.1(1) of the same Act.

35 There are more examples of similar specific legislation. Consider the Infrastructure (Planning Procedures) Act (*Tracéwet*) (the construction of the main infrastructure), the Water Defences Act (*Wet op de waterkering*) (construction and improvement of sea and river flood defences) and the High-Intensity Areas (Reconstruction) Act (*Reconstructiewet concentratiegebieden intensieve veehouderij*) (the restructuring of intensive livestock production branches (also from a spatial aspect)).

36 These environmental plans generally consisted of regional planning (under the Spatial Planning Act, the Environmental Policy Plan and the Water Management Plan (Water Management Act) (*Wet op de waterhuishouding*)), sometimes supplemented by other (extralegal) provincial plans. The extent to which these practices will continue under the Spatial Planning Act is as yet unclear, although the new concept of the structural vision included in Chapter 2 of the Spatial Planning Act seems to be suitable.

on citizens, and for this reason they are not discussed here, even though they may fulfil useful functions in policy practice.

Returning to the question of the extent to which spatial planning may impose binding obligations on citizens, it can be concluded that the zoning plan fulfils a prominent role in some permit systems as an imperative ground for refusal, in addition to the binding effect of the plan itself. This is true for building permission (Housing Act (*Woningwet*)) and – logically since it is itself a consequence of spatial planning – for planning permission (Spatial Planning Act). The content of the zoning plan is a facultative ground for refusing to issue a permit under the Environmental Management Act (EMA), among other things (see Section 6.3).

But developments in the last two decades seem to be moving towards a hollowing out of the – reputedly – integrated character of the zoning plan because sectoral decision-making has been taking over the function of the zoning plan (for instance, the Infrastructure (Planning Procedures) Act (*Tracéwet*)) or of the adoption of a permit system in addition to the regulation in the zoning plan which allows land use under a special law (for instance, the Spatial Planning Act), which is also related to the land use. The latter then results in the content of the zoning plan being influenced by the (expected) assessment to be made within the framework of special legislation on the ‘requirement of implementability’ because of the possibility of a permit being issued for the land use in question or not. This is, in essence, the opposite of the concept of integrality which was prominent when the zoning plan was introduced in the Spatial Planning Act.

## **6. Environmental management law and area protection**

### ***6.1. Points of intervention for regulation: establishments – other activities***

The most important point of intervention in Dutch environmental management law is the establishment (*inrichting*). The term establishment is defined in the Environmental Management Act (*Wet milieubeheer*, hereinafter EMA) as ‘any enterprise undertaken by man commercially, or of a size commensurate with a commercial enterprise, which is conducted within certain bounds’ (Article 1.1). The categories of establishments which may adversely affect the environment have been designated by an order in council. The line of approach adopted for many years was that an environmental permit was required to establish and operate an establishment of this kind, unless general rules applied to the category of establishment, and then these replaced the obligation to acquire a permit. The system was changed from 1 January 2008 partly due to the fact that over the course of time more establishments had been brought under such general rules. Currently, the permit requirement only applies unreservedly to IPPC establishments (Article 8.1(1) EMA). The permit requirement is only mandatory for other categories of establishments if they have been designated by an order in council (Article 8.1(2) EMA); approximately 100,000 establishments are concerned, but future legislation may even decrease that number. Most establishments (about 325,000) do not require a permit but must abide by the general rules applicable to them. These have been laid down in the Order of general rules for establishments (*Besluit algemene regels inrichtingen milieubeheer*). Some of these general rules also apply to (non-IPPC) establishments which are required to obtain a permit. Thus, activities carried out at these establishments are arranged partly by individual permit and partly by general rules.

Apart from operating establishments, there are many other activities which can have a harmful effect on the environment. For this reason, Dutch legislation also contains rules with regard to dealing with certain materials, such as plant protection products and fertilizers, the

transportation of harmful substances, work on or in the soil, for example for the infrastructure or extraction of raw materials, etc. The discussion in this article will be restricted, however, to the regulation of establishments which, because of their specific nature (attached to the site and permanent), may have a (very) extensive impact on an area.

## ***6.2. The regulation of establishments: the required level of protection***

Before addressing the question of how the protection of special areas is incorporated in the regulation of establishments, the substantive aspects of this regulation must first be outlined, in particular the intended level of protection and the interests to be protected. In the interest of achieving a high level of environmental protection, *all* establishments in the Netherlands must *at least* operate according to the best available techniques; this means, irrespective of whether an IPPC establishment is concerned or not (see Article 8.11(3) EMA which contains this central norm for granting permits) and irrespective of whether a permit requirement exists or not (*cf.* Article 8.40(3) EMA which declares that Article 8.11(3) of the EMA applies by analogy to the setting of regulations by general rules). The intended level of protection is therefore the same for all establishments in the Netherlands (and is clearly inspired by the IPPC Directive). The permit based on the EMA is an integrated environmental permit, which encompasses all possible harmful effects on the environment (odour, noise, air pollution, waste, vibration, energy and raw material consumption etc, even the effects relating to the transport of people and goods to and from the establishment). In principle, the environmental permit also regulates the discharges from establishments which require a permit; a separate permit for discharges applies to no more than roughly twenty categories of establishments, which are regarded as ‘heavy dischargers’ and which is granted by another administrative authority – the regional Water Boards; however, there is a requirement for cooperation to ensure an integrated approach. The general rules which are applicable to establishments are incorporated in one order in council. The provisions are linked to certain activities such as operating a heating or cooling plant, storing (dangerous) substances or fuels, processing wood, cork, synthetics or metals etc.; this is the reason that the Order of general rules for establishments is also called the Order of Activities (*Activiteitenbesluit*). Companies need not comply with all the provisions of the Order but must comply with all the regulations applicable to the specific activities they carry out (the ‘cafeteria model’).

### *Limitation because of the speciality principle*

A conscious choice was made to avoid a limitative description of ‘the environment’ or ‘the protection of’ and ‘harmful effects on’ the environment; the Dutch legislator had a wide scope in mind.<sup>37</sup> This can allow new, as yet unknown, effects on the environment to be brought within the current assessment framework without any problem.<sup>38</sup> There is one important limit: interests which are specifically provided for in legislation other than the EMA or secondary legislation cannot, in principle, also be protected by the environmental permit. This is linked to the speciality principle which is applicable in the Netherlands, on the basis of which a power may only be used in the interest for which it has been created;<sup>39</sup> terms used in this connection are purpose-linked powers or decision-making frameworks. This principle is regarded as a derivative of the legality principle, which requires that government actions, in particular the exercise of a power under public law, must be based on legislation and must be able to be traced back to that legislation.

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<sup>37</sup> *Kamerstukken II* (Parliamentary Documents) 1988-1989, 21 087, no. 3, p. 31.

<sup>38</sup> M.P. Jongma, *De milieuvergunning* (dissertation Utrecht University), 2002, p. 97.

<sup>39</sup> See J.H. Jans, ‘Europe and the Inapplicability of the “Speciality Principle”’, 2008 *REALaw* 1, no. 1, pp. 35-36.

A strict application of these principles would signify that interests outside the assessment framework of the power in question – in this case that of the environmental permit (Article 8.8 *et seq.* EMA) – may not be included in the assessment in any way. Case law has, however, adopted a more moderate course, which amounts to interests outside the assessment framework intended by the legislator being included in the balancing of interests, although possibly less importance is attached to those interests as their connection with the assessment framework becomes slighter. Case law with regard to the environmental permit refers to an ‘additional assessment’ in this connection.<sup>40</sup> The determinant factor for the question as to whether protection can be offered to these other interests within the framework of the issuing of environmental permits seems to be the extent to which the legislation involved can fully offer the necessary protection. Where this is not the case, the speciality principle does not act as an obstruction to the relevant provisions being included in the environmental permit, or the refusal of the permit if the setting of provisions fails to lead to an acceptable result. Interests which may play a role in the issuing of the environmental permit in this way include (the prevention or limitation of) visual nuisance, damage to flora and fauna and damage to ecological and landscape values. Within the framework of the weighing of interests in the environmental permit process, these kinds of interests can, and must, be included in the considerations under the denominator of the additional assessment, although these interests are primarily addressed within other assessment frameworks, as long as these interests originate in the (broader) interest of the environment and the specific assessment framework does not provide for the necessary protection. In practice, it will primarily concern protection with respect to specific aspects of the (operational) establishment, which are not, or not yet, taken into account in these other frameworks. A ruling by the Administrative Law Division of the Council of State on 19 September 2007, previously referred to, clarified that, although it was possible to provide some protection for the ecological values of an adjoining area which was part of the National Ecological Network within the context of spatial planning (separation of functions), the protection was not such that the specific harmful effects of (the amount of) ammonia emissions could be completely covered. In a case like this protective provisions may be incorporated in the environmental permit.<sup>41</sup>

### **6.3. The environmental permit and area protection**

#### *The role of area protection in the decision to issue a permit*

In the light of the individual nature of the environmental permit, this form of regulation is particularly appropriate to take the geographical location or the environmental characteristics of the establishment into account. Under Dutch law, the geographical location of the establishment is a factor that must at least be included in the decision-making procedure leading to the granting of a permit or the refusal thereof (*cf.* Article 8.8(1)(b) EMA). This is the least far-reaching degree of obligation: for certain other factors, stronger terms like ‘have regard to’ (for example, the applicable environmental policy plan) and ‘act in accordance with’ (for example, limit values in environmental quality requirements) are applicable. In concrete terms, this means that the competent authority must take the geographical location into account but is not obliged to attach consequences to this: in other words the decision-making power of the authority is not restricted by this factor. The purpose of this category of factors, which are also called ‘attention criteria’,

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40 ABRvS (Administrative Jurisdiction Division of the Council of State) 19 September 2007, AB 2008, 190 (comment by A.B. Blomberg).

41 See for an example with respect to visual nuisance ABRvS (Administrative Jurisdiction Division of the Council of State) 28 April 2004, no. 200306411/1.



is primarily to facilitate careful decision-making,<sup>42</sup> but there is an explicit obligation to provide a reasoned decision with regard to the attention criteria (Article 8.8(4) EMA).

For a certain category of establishments, there is an obligation to include the geographical location and the circumstances on the site in the issuing of the permit. For IPPC establishments, Article 3(3) of the Ammonia and Livestock Farming Act – a law which, in brief, ensures that there is no increase in the ammonia emissions in and around areas vulnerable to acidification (specially designated), by opposing the establishment of (new) livestock farms and attaching certain conditions to the expansion possibilities of existing livestock farms – prescribes that the permit must be refused if the regulations which should be attached to the environmental permit because of the geographical location or the local environmental circumstances cannot be complied with, but which cannot be achieved using the best available techniques.<sup>43</sup> This extra ground for refusal, however, applies exclusively to establishments situated in or within a zone of 250 metres around an area which has been designated as a vulnerable area and then only insofar as it relates to the sensitivity to ammonia deposition in that area.

Since the general aim is to achieve a high level of environmental protection, the geographical location should ideally be reflected in the permit conditions, especially when an establishment is located in or close to a vulnerable area or an area that has been given special protection in another way. Under certain circumstances this could even mean that more far-reaching provisions are included in the permit than those based on the best available techniques (see, for example, Article 9 of the IPPC Directive). The reality is different, however, because the extent to which the area in question is already protected by other means determines whether the conditions can be included in the environmental permit with a view to area protection. Where special protection has been allocated to an area, because it has been designated as a nature reserve for instance, the possibilities of regulation in the environmental permit are, in fact, limited.

As already outlined in Section 4, the Nature Conservation Act 1998 provides for the protection of special areas in the Netherlands. A permit on the basis of the Nature Conservation Act 1998 is required for activities which can have adverse effects on nature reserves or on plant or animal species in such an area, or which could detract from its beauty in addition to any other environmental permit. A similar requirement to obtain a permit also applies to activities which can diminish the quality of the natural habitats or the habitats of species in a Natura 2000 area or which can have a significantly disruptive effect on species for which the area has been designated, all this taking the conservation objective of this area into consideration. (See Section 4.4). Because of this specific regulation, the case law has concluded that there is no room for assessing the effects of activities with a permit on natural areas designated as nature reserves within the framework of granting environmental permits. These effects can in fact be dealt with in the question as to whether a permit is required in accordance with the Nature Conservation Act 1998 and, if it is, whether it is possible to grant this permit and under which conditions,<sup>44</sup> implying that Dutch courts do apply the speciality principle (see earlier Section 6.2). A permit under the Nature Conservation Act 1998 can stipulate, for instance, the maximum number of animals which may be kept at an establishment or the maximum permitted noise level. In this way, this permit determines the limits on the activity which requires a permit on the basis of the EMA, at least in theory, which are necessary with a view to area protection.

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42 M.P. Jongma, *De milieuvergunning* (dissertation Utrecht), 2002, pp. 109-110 (referring to older literature).

43 Cf. ABRvS (Administrative Jurisdiction Division of the Council of State) 28 May 2008, no. 200704876/1.

44 ABRvS (Administrative Jurisdiction Division of the Council of State) 28 May 2008, no. 200701617/1.

*Attuning the Nature Conservation Act 1998 permit and the environmental permit*

The distinction in assessment frameworks outlined above with regard to the adverse effects of establishments on the environment gives rise to the question about the way in which attuning can be guaranteed between the Nature Conservation Act 1998 permit, on the one hand, and the permit under the EMA, on the other. Aspects of legal certainty make it undesirable for one permit to allow something which is obstructed by another permit or for permits to contain otherwise contradictory provisions. Section 4.5 has already referred to the coordination provision in the Nature Conservation Act 1998 (Article 19ka). This provision means that, in order to allow for attuning with the environmental permit, the authority with regard to the Nature Conservation Act 1998 encourages the applicant to be aware of the fact that he needs a permit under the EMA, for instance. Administrative authorities may consult each other and decide to coordinate, but the initiator – in this example the applicant for the environmental permit – can also submit a written request for coordination. Coordination is then mandatory although the Nature Conservation Act 1998 does not define what this coordination should be. There is only the obligation to appoint a coordinating administrative authority which can facilitate ‘efficient and coherent decision-making’. This coordination obligation is restricted to permits granted for Natura 2000 areas and offers no solution to the need for attuning in the decision-making for other nature reserves.

The EMA also contains coordination provisions (Chapter 14). On the basis of these rules, Provincial Executives (the executive committees of the provincial authorities) can facilitate the coordinated consideration of applications with interrelated decisions in cases where various applications have been submitted for just one establishment and at least one of these decisions has been prepared by applying the uniform public preparatory procedure described in Section 3.4 of the General Administrative Law Act, if at least one of these applications has been addressed to them. Provincial Executives are empowered to grant environmental permits in a limited number of cases, very often heavy industrial establishments with a greater environmental impact. Provincial Executives are often authorized<sup>45</sup> to grant permits in accordance with the Nature Conservation Act 1998. Thus, in many cases where a permit is required under the EMA and the Nature Conservation Act, but not all, a permit from the Provincial Executive will be required and then the coordination regulation of the EMA comes into play.

The Provincial Executives can officially decide that coordination is necessary if, as already said, one of the applications has been addressed to them (Article 14.1(1) EMA). Coordination is *mandatory* if the applicant, or another administrative authority involved, applies to the Provincial Executive for this (Article 14.1(2) EMA), unless this is prevented by a statutory provision.<sup>46</sup> At the applicant’s request, coordination can also involve the preliminary phase (Article 14.1(3) EMA), that is the phase where there is, in practice, frequent consultation between the applicant and the authority. In contrast to the Nature Conservation Act 1998, the EMA contains several rules on the coordination procedure. Joint notice of the draft decisions must be given, joint oral representations must be submitted and the decisions concerned must be jointly publicised (Article 14.3(2) EMA). To facilitate this, the Provincial Executives can give the date of the last received application as the date of receipt for all applications received within a period

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45 With the exception of a number of cases, designated by an order in council, where the authorization lies with the Minister of Agriculture, Nature and Food Quality (see Arts. 16(6) and 19d(4) Nature Conservation Act 1998).

46 For example, a legal time-limit for a decision which is incompatible with the application of the preparatory procedure under Section 3.4 GALA.

of six weeks.<sup>47</sup> The Provincial Executives are even obliged to do this if they are so requested by another involved administrative authority or the applicant. More essentially, it is important that all involved administrative authorities consider the interrelated nature of the applications and the decisions based on this (Article 14.3(1) EMA) without overstepping the boundaries of their authority (for example, by encroaching on protection levels). The permit conditions can be fine-tuned within the context of this obligation.

In practice, the coordination provisions of the Nature Conservation Act 1998 and the EMA are very rarely used. There is the general impression that initiators usually apply for an environmental permit first, and only later submit an application for a permit in accordance with the Nature Conservation Act 1998, after the environmental permit has been granted or has even become irrevocable. The latter permit is then often in tune with the permissions granted in the environmental permit; this is also some form of integration, but whether it is the correct one, is another question altogether! Applications for a permit under the Nature Conservation Act 1998 regularly concern existing activities for which an environmental permit has already been issued at a (much) earlier date.<sup>48</sup> It is conceivable in theory that a permit issued later under the Nature Conservation Act 1998 must lead to adjustments being made to the environmental permit because part of the activity could be undesirable in terms of nature conservation or may only be carried out under restrictive conditions. However, no cases are known to us where this has occurred. There is every appearance that, when a permit is submitted under the Nature Conservation Act 1998, consideration is only given to the question as to whether the activities permitted in the environmental permit, or for which an application under the EMA was submitted, are admissible in terms of nature conservation. The danger exists that this assessment will be reduced to a kind of ‘all-or-nothing’ test because a decision requiring an adjustment to the environmental permit can meet with practical, financial or even environmental management objections. This may also come up for discussion even if no decision has yet been taken on the application, since the application determines what is, and what is not, possible in the permit (the Executive has to make its decision on the basis of the application). Attuning the environmental permit and the permit granted under the Nature Conservation Act 1998 therefore does not play a role in the decision-making process which is necessary for the best possible area protection.

*New: refusal of the environmental permit because of conflict with the zoning plan*

Partly against the background of the speciality principle, an environmental permit can in principle only be refused in the interests of the protection of the environment (Article 8.10(1) EMA). Since the coming into force of the new Spatial Planning Act on 1 July 2008, a new ground for refusal has been included in the EMA: on the basis of Article 8.10(3) of the EMA the permit – by derogation from the first paragraph – can also be refused if it conflicts with a zoning plan or other regulations which could restrict the permitted use (see Section 5.2). This is a discretionary power<sup>49</sup> intended to be explicitly facultative and the competent authority is therefore not obliged to refuse an environmental permit if it conflicts with the zoning plan. It remains to be seen how much discretionary power the courts will allow executives to exercise in such matters, for example, if third parties object to an environmental permit which has been granted despite the

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47 In ABRvS (Administrative Jurisdiction Division of the Council of State) 2 May 2007, no. 200604673/1 this post-dating led to a decision, for example, for which the application had in fact been submitted before 1 July 2005 being prepared with the application of the new Section 3.4 of GALA, which entered into force on that date!

48 For an example, see ABRvS (Administrative Jurisdiction Division of the Council of State) 20 June 2008, no. 200802323/1.

49 Cf. *Kamerstukken II* (Parliamentary Documents) 2008-2009, 31 750, no. 3, p. 7. See also ABRvS (Administrative Jurisdiction Division of the Council of State) 27 May 2009, no. 200806366/1/M2.

fact that it is in conflict with the zoning plan. According to the legislative history, the adoption of this ground for refusal can be partly attributed to the Enschede firework disaster.<sup>50</sup> This disaster could be blamed to a considerable degree on insufficiently cohesive attuning during the process of granting the environmental and building permits for a fireworks factory in a residential area.<sup>51</sup> With respect to the introduction of the new ground for refusal, insistence has been primarily placed on situations in which risks to the living environment may occur, with primary attention being paid to the protection of residential areas. The wording of the Act is, however, general in tone and in our view does not necessarily obstruct this ground for refusal being applied in other situations, such as the protection of valuable areas. This protection must then be couched in spatial rules. There are doubts, however, in light of the legislative history as to whether third parties can enforce the refusal of the environmental permit in court in such a situation.

#### **6.4. General rules and area protection**

The majority of establishments with detrimental effects on the environment fall, as has been said, under the general rules as set down in the ‘Order of general rules for establishments’. General rules by their nature are not usually differentiated on the basis of environmental characteristics but relate to the activity which is to be arranged regardless of its location. Nevertheless, there are also various ways in which general rules can take the surroundings where the activity is to take place into account. The Netherlands has variant norms if noise-sensitive objects or, in the context of external safety, vulnerable objects (such as houses, schools and care institutions) are located within a certain radius of an establishment.<sup>52</sup> Much more important, however, is the fact that the Dutch arrangement contains a system of tailor-made provisions: the possibility of setting supplementary requirements in individual cases with regard to certain matters which are designated in the Order of general rules for establishments or of even setting different, less strict requirements (but this will not be the case for *area protection*). Authorisation for this customization lies with the body empowered to deal with the establishment. This is usually the municipal executive – and always so in the case of establishments which do not require an environmental permit – but the provincial executive may also act as the competent authority. This power to customize is a discretionary one, which may be used officially as well as at the request of interested parties. If the administration wishes to set customized provisions, it is bound by the assessment framework of the EMA.<sup>53</sup> This stipulates in specific terms that an establishment must operate in a manner which is in conformity with the best available techniques; more stringent regulations are possible but must be particularly well reasoned. Although the legislator has called for some caution in its application,<sup>54</sup> it is not inconceivable that the power will be used in an actual instance because of environmental factors which demand greater stringency in the general rules. Article 8.8 of the EMA provides an explicit basis for this. Practice will have to show the extent to which the power of customization will be used to protect special areas. The same restriction will have to apply here as it did with the environmental permit, namely that the provisions may only be made more restrictive if the effects of the establishment have not already

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50 *Kamerstukken II* (Parliamentary Documents) 2006-2007, 30 938, no. 3, p. 16.

51 It was not possible to test this against the zoning plan in those cases where no building permit was required.

52 See Arts. 2.17 and 3.28, respectively, of the Order of general rules for establishments.

53 This ensues from Art. 8.40(2 and 3) of the EMA in which the assessment framework of Chapter 8 for the granting of permits is declared applicable by analogy to the general rules.

54 Note to the Bulletin of Acts and Decrees (*Staatsblad*) 2007, 415, p. 116 the motion by Spies/De Krom, respectively *Kamerstukken II* (Parliamentary Documents) 2006-2007, 30 483, no. 11.

been, or can be, included within the framework of the specific nature conservation regime. See thereon Section 6.2 and 6.3.

In addition to the power to set individual customized regulations, the EMA also offers a basis for generic customized regulations at a provincial or municipal level (Article 8.42(b) EMA). Insofar as is provided for by the order in council, municipal or provincial regulations may contain different rules from the order in council with regard to certain areas. The underlying concept is that such rules will enable an area-focussed policy to be pursued which is based on regional and local considerations, without the necessity of determining customized regulations for each establishment. It was anticipated that the greatest focus would be on light, noise, odour and air quality.<sup>55</sup> Article 2.19 of the Order of general rules for establishments is the only regulation at present which offers a provision for noise although this has not yet come into effect.<sup>56</sup> In time, setting lower noise levels for quiet rural areas or for silent areas may be common (or higher norms for concentrated areas such as hotels, cafes and restaurants, but then the discussion is no longer about area protection.)

### **6.5. Integration mechanisms**

As one may deduce from the foregoing, there are various ways, in theory, which are available for including the environmental characteristics in the regulation of establishments. First of all, the geographical location of the establishment is a factor which is part of the assessment framework for the granting of environmental permits, although the degree of obligation is weak – ‘to involve’. Moreover, the speciality principle is an impediment to provisions being attached to environmental permits to protect special areas, when their protection has already been secured elsewhere. The ‘additional assessment’ is the only context in which (limited) scope is sometimes possible to impose supplementary conditions. If the protection of a valuable or vulnerable area has been reflected in one or more environmental quality norms, matters are more complex; targets have to be taken into account and limit values must be complied with. Second, a permit under the Nature Conservation Act 1998 could be required for the setting up and operation of an establishment because of its location (in or close to a protected area). The protection of natural values may not be a ground for refusing an environmental permit; if the necessary Nature Conservation Act 1998 permit cannot be granted, the establishment may not be operated, despite a possible environmental permit. Attuning the two permits is often not optimal since it is not mandatory, so that a permit under the Nature Conservation Act 1998 is often issued after the environmental permit and in fact acts, at most, as a kind of right to veto. A third mechanism is the recently introduced extension of the EMA assessment framework with a review of spatial rules, in particular the zoning plan (the new – facultative – ground for refusal). Its success depends on the degree to which administrative authorities can and do apply this ground for refusal within the context of area protection.

Within the system of general rules for establishments, there are also only limited possibilities for area protection. The Order of general rules for establishments provides no rules which can be adapted for protected areas; several variant norms, at most, can be referred to with regard to sensitive or vulnerable objects. Although the power to customize regulations enables individual conditions in principle to be imposed on an establishment, any actual possibilities are

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<sup>55</sup> HR 2005-2006, 30 483, no. 3, p. 6 and *Informatieblad De nieuwe activiteiten-AMvB in hoofdlijnen*, p. 5.

<sup>56</sup> The reason for this delay – the Order has been in force since 1 January 2008 – is that the Association of Netherlands Municipalities wanted to draw up a model bye-law first. Only when this has been developed to a sufficient extent will the legislator find that the time has come for the implementation of this regulation (Note to the Bulletin of Acts and Decrees (*Staatsblad*) 2007, 472, p. 5).

considerably restricted by the speciality principle. It seems as if the greatest potential is likely to be the exercise of the generic power of greater stringency which decentralised authorities can use to realize a policy specifically for an area, although the only provision to provide this has not yet come into effect.

### **7. Is the Environmental Licensing (General Provisions) Act little more than a panacea?**

After a lengthy legislative process, the Environmental Licensing (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*) will come into force in the Netherlands in 2010. Its introduction will collate more than twenty-five permit systems relating to the physical social environment under a single Act. These systems regulate matters such as building permits, demolition permits, environmental permits and permits relating to monuments and historic buildings plus various exemptions from zoning plans and permits based on the Nature Conservation Act 1998. Instead, there will be one new, umbrella permit: the local environment permit.

The central aim is to make it possible for both private individuals and businesses to apply for permits from the authorities to carry out activities which have an impact on the physical social environment using a transparent procedure. At present, and this is clear from the foregoing, it is quite possible that various parallel permits have to be acquired from various government agencies before an activity can be carried out. The requirements for permits are also embedded in a wide range of sectoral regulations, each of which requires a particular procedure to be followed. It is therefore often very difficult for all the parties concerned (the applicant, the competent authority and any possible interested third parties) to ascertain which permits are required and which procedures are applicable. Moreover, the permits issued are often not even properly coordinated.

The Environmental Licensing (General Provisions) Act will make it possible to apply for a permit for any activity that affects the environment from a single government body. That will mean that applicants will need only one application, subject to just one set of submission criteria, and the application will be processed in a single procedure with a single decision as the result. There will also be only one procedure for legal protection or for an appeal against the decision. This will mean that there are no unnecessary differences in procedure and it will be easier to determine which permit or permits are actually needed. Even so, there will be no substantive integration; the individual checks and balances to which individual permits are subject – and which are currently embedded in various laws – will remain intact. The competent authority will, however, be obliged to harmonize the relevant conditions (see Article 2.22(2) of the Environmental Licensing (General Provisions) Act), with a view to protecting the interests of the various parties concerned.

It remains to be seen whether, in practice, this Act will lead to a higher level of attuning and a more integrated approach. In this connection it should be pointed out that, on the grounds of the Environmental Licensing (General Provisions) Act, the applicant retains the option to apply for separate permits in cases where the project could possibly be split into separate parts. Article 2.7 of the Act only requires that a single application be submitted when the *activity* itself falls within the scope of more than one requirement for a permit, for example the construction and operation of a large pig farm; the construction itself would require a local environment permit and the operation would also require a local environment permit (*cf.* currently the

environmental permit).<sup>57</sup> Signals have been received from the Dutch business sector that suggest that entrepreneurs will be applying for so-called split permits where possible. If that becomes a common trend, it will limit the integrating effect of the Environmental Licensing (General Provisions) Act.

## 8. Conclusions

In this contribution, we have examined whether area protection pursuant to the Nature Conservation Act 1998 has an effect on two other sectors of environmental law which are important and, if so, the extent of this effect or effects. After first explaining the meaning we attach to the terms 'environmental law' and 'integration', we examined this in the context of European and international law and came to the conclusion that this law fails to facilitate the integration of environmental law in general, and tends, in fact, largely because of its predominantly sectoral approach, to be a greater obstruction not least with regard to nature conservation. This was followed by a discussion of the coordination of the individual interests at policy level. At that level, the relevant laws, in this case the Nature Conservation Act 1998, the Spatial Planning Act and the EMA, require the adoption of strategic plans outlining the primary aims and objectives of government policy with respect to the policy area in question. One of the objectives of the legislator was the integration of these plans. In this connection, during the adoption of the Nature Policy Plan, an indication must be given of the extent to which it is being adjusted to or whether it will necessitate an adjustment of the National Environmental Policy Plan. A comparable obligation applies during the adoption of the National Environmental Policy Plan. The interests of nature are in principle, therefore, of equal status to the environmental interest when these two government plans are drawn up. When government policy is drawn up in other policy areas, the role of the Nature Policy Plan is organized in a different way. When other policy is drawn up, the Nature Policy Plan must be taken into account, according to the Nature Conservation Act 1998. This means that activities must take place in accordance with the Nature Policy Plan, unless there are good reasons for deviating from the policy formulated in this plan. Although the position of the Nature Policy Plan with regard to the National Environmental Policy Plan is different from its position with regard to other government policy, this does not necessarily mean that there is a difference in practice as to how much importance is attached to the Nature Policy Plan.

The relationship between the interests of nature and spatial planning has been provided for in yet another way, as the legislators in drawing up the Nature Conservation Act 1998 have more or less reserved their own spatial plan for the spatial implications of government nature policy: the Nature Conservation Act 1998 requires a Structural Vision of Nature and Landscape to be adopted, and this is a structural vision within the meaning of (Article 2.3 of) the Spatial Planning Act. This allows the spatial aspects of nature policy to occupy a prominent place within spatial planning. Even so, the interests of nature need not be a deciding factor when adopting other structural visions or when making other decisions in the field of spatial planning. The legal obligation of a structural vision goes no further than the requirement, which arises from the general requirement of care and the principle of justification, that it is taken into consideration when other decisions are taken.

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<sup>57</sup> See in more detail F.C.M.A. Michiels *et al.*, *Het wetsvoorstel Wabo, Preadviezen voor de Vereniging voor Bouwrecht* no. 35, 2007, pp. 37-40.

The importance of integrating the interests of nature in the field of spatial planning and environmental management is particularly apparent in the sphere of implementation and implementation decrees. Given the broad definitions in the norm ‘good spatial planning’ and the term ‘(protection of the) environment’, the interests of nature can – and must – certainly be taken into account, as the occasion arises, in the adoption of zoning plans and other (related) decisions based on the Spatial Planning Act and the granting of environmental permits; the protection of these interests can be expressed in the provisions incorporated in that decree. To this extent, the normative guidelines under these laws are of an integrated character. This is particularly relevant for the protected rural conservation areas and the other areas discussed in Section 4.4 which are designated as part of the implementation of international obligations. The areas designated as rural conservation areas are completely dependent on a protecting zoning plan, whose adoption is required under the Nature Conservation Act 1998. The Nature Conservation Act 1998 contains no other rules relating to the protection of protected rural conservation areas.

If the area protection relates to nature reserves or Natura 2000 areas, the importance of the protection of natural areas in the field of spatial planning and environmental management can be described as only being integrated to a limited extent, at least insofar as, according to the Nature Conservation Act 1998, a permit is required for activities which are regulated under the Spatial Planning Act and the Nature Conservation Act 1998. Insofar as the protection of the area is guaranteed by means of the permit requirements of the Nature Conservation Act 1998, a consequence of the speciality principle means that there is then no room for this protection within the framework of the zoning plan (in the form of a planning permission requirement) or in the environmental permit. If more than one administrative permit is required for one single activity, there is the risk of contradictory decisions being made and then the reciprocal attuning of these decisions becomes a real factor. The Nature Conservation Act 1998, the Spatial Planning Act and the EMA have various instruments available for attuning or coordination. In the Nature Conservation Act 1998 the legislator has paid specific attention to attuning decisions concerning Natura 2000 areas and, with regard to these decisions, to matching with the zoning plan and the project decision on the basis of the Spatial Planning Act, in particular. Pursuant to the Nature Conservation Act 1998, no zoning plan may be adopted or a project decision taken if they might have – to put it succinctly – adverse effects on a Natura 2000 area. The Nature Conservation Act 1998 has no similar regulation for protected nature reserves. It must be noted in this context that the requirement that a zoning plan (and we assume a project decision as well) must be enforceable – a requirement which according to the case law is derived from the Spatial Planning Act and the secondary Physical Planning Decree – results in a reasonably foreseeable refusal of a required permit under the Nature Conservation Act 1998, whether this refers to a Natura 2000 area or a protected nature reserve, preventing the adoption of a zoning plan or taking a project decision which enables an activity requiring a permit under the Nature Conservation Act 1998 to be carried out.

In addition to the regulation specifically relating to the zoning plan and the project decision, the Nature Conservation Act 1998 also contains a coordination regulation which, although it has a greater possible scope of application as it can also be used to coordinate decisions on the basis of Acts other than the Spatial Planning Act, for example the EMA, it refers (also) exclusively to decisions concerning Natura 2000 areas. In addition, this coordination regulation, in common with the Spatial Planning Act and the EMA, includes no guarantee that there will be any substantive attuning of the decisions. Applying the coordination regulation does not alter the application of the various assessment frameworks of the Nature Conservation Act 1998, the Spatial Planning Act and the EMA.



Reviewing the aforesaid, we may reach the conclusion that the effect of area protection under the Nature Conservation Act 1998 at policy level is limited, in the sense that this effect has only achieved a more specific, detailed regulation at government level and this relates by its very nature to the attuning of *primary aims and objectives*. This does not imply that nature conservation policy has no effect at all when decisions are taken at other government levels. Even so, this effect can only occur because of the link with the requirement of care of administrative law and the principle of justification.

The substantive integration of area protection under the Nature Conservation Act 1998 is hampered, if not obstructed, by the speciality principle. The coordination regulations contained in the legislation under discussion can only prevent possible problems arising from a lack of attuning to a partial extent, because their scope of applicability is limited (and their application is moreover (partly) facultative and not automatically obligatory) and because they guarantee only a procedural level of attuning, and a partial one at that. A factor which plays an important role in this guarantee is that the applicant for a permit often seems to have little interest in attuning and applies for the various permits separately. The regime under the Environmental Licensing (General Provisions) Act will probably have little influence on this problem. Even if the applications for the necessary permits are submitted collectively, we predict that this legislation will only make a limited contribution to greater integration. Despite the fact that the competent authority is obliged to attune proposed regulations with regard to the various interested parties involved, the individual reference frameworks remain unchanged as the permits or partial permits are still to be found in various pieces of legislation.

The integration of area protection under the Nature Conservation Act 1998 seems to be particularly problematical for the adoption of the general rules based on the EMA. The general rules laid down in the so-called Order of Activities relate to certain activities, as the name indicates, and as a result no EMA permit is required for the activities falling under these rules. These rules are an expression of the aim of achieving less regulation. As the general rules mean that no permit is required, the application of the cooperation regulations discussed in this article has no role to play. These regulations apply specifically to decisions on applications and therefore on permits. And as the general rules apply to activities, their very nature implies that they will not take environmental characteristics into account. The EMA and the Order of Activities offer only limited opportunities for considering area protection for activities which fall under the general rules. Viewed in this way, it seems as if striving for deregulation detracts from striving for integration.

If the aim is to achieve full, or at least fuller, integration in the field of environmental law, then the sectoral approach will have to be abandoned. This implies that a general reference criterion like 'protection of the physical living surroundings' will have to be chosen. The impediment that the speciality principle now represents for integration would have to be removed. The consequence of this approach would be that the interests of nature conservation, including area protection, would play – or continue to play – a full role in decision-making, but it would be more extensively weighed against other possibly conflicting interests than is the case at present. This would imply that the protection of ecological values would be less absolute. In other words, greater integration would in many cases lead to a reduction in the level of nature conservation. On the other hand, this kind of approach should make it possible to permit certain activities under conditions which aim not so much, or not only, at preventing damage to the interests of nature conservation, but could equally, or even more so, impede damage to other environmental interests, and possibly even contribute to a further development of these values. In this way, compensation for damage to the interests of nature conservation in another environ-

mental area could be guaranteed and perhaps even outweighed by the gains made in other areas. From this perspective, abandoning the 'all-or-nothing' approach could, on balance, lead to a greater degree of protection being given to the physical living surroundings.