

# The integrated approach to nitrogen: legal considerations in light of EU nature conservation law

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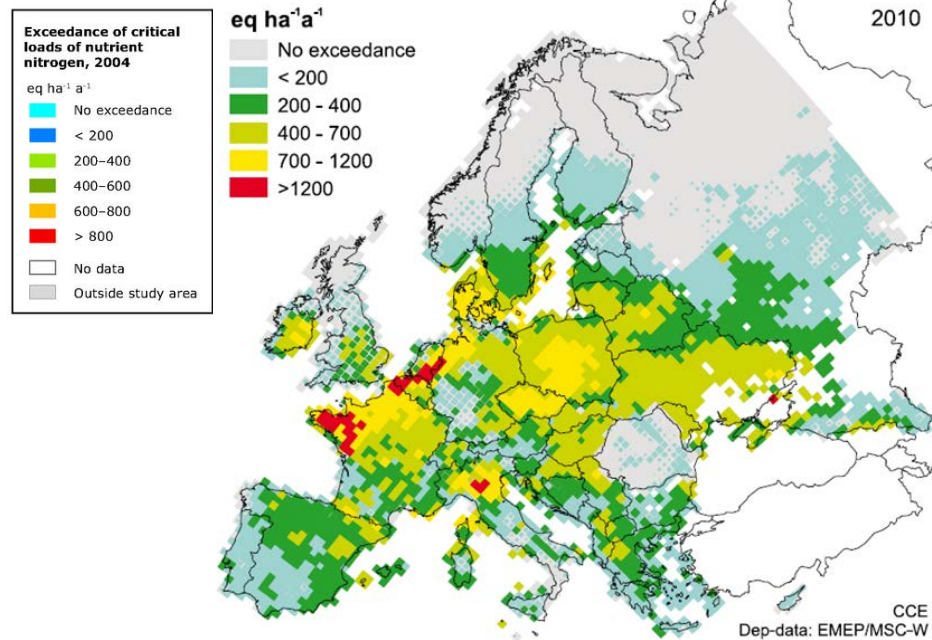
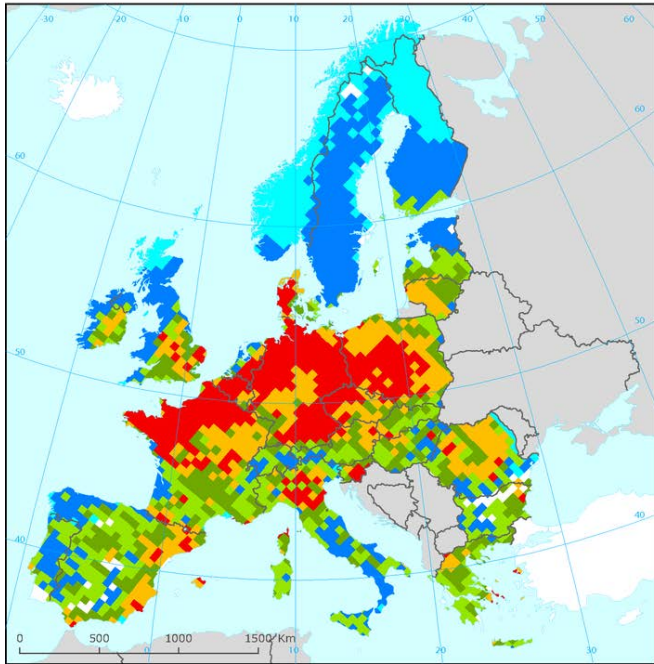
Appropriate measures against nitrogen-  
related effects

NecoV symposium 25 & 26 April 2016

# I. SETTING THE STAGE

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# Exceedances Critical Loads N



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# Air pollution still harming Europe's ecosystems, despite reduced emissions



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Topics: Air pollution Biodiversity Environmental scenarios

Emissions of nitrogen-containing pollutants continue to harm sensitive ecosystems, according to two new reports published today by the European Environment Agency (EEA). Nonetheless, both reports show a marked improvement over the last two decades.

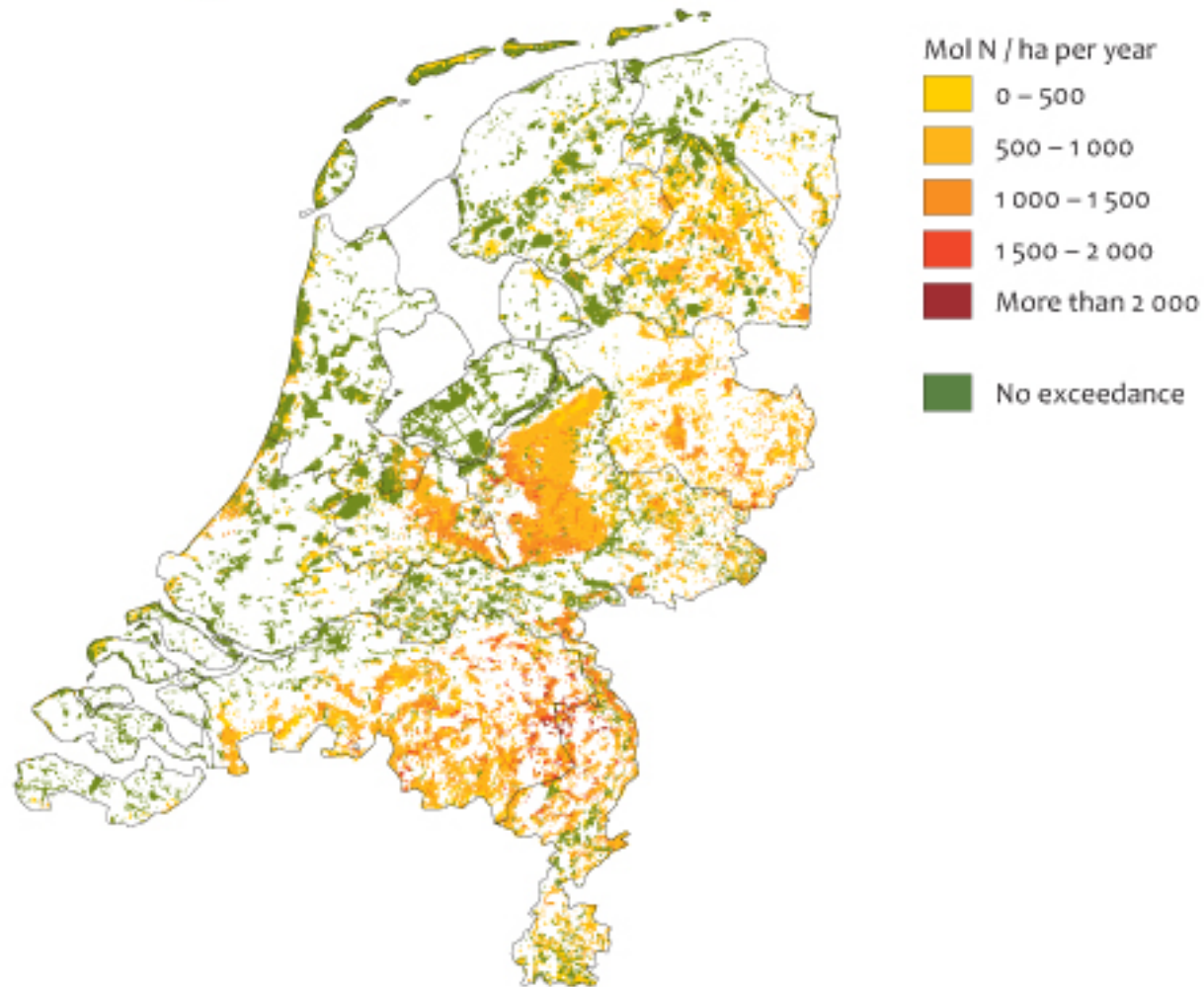


THE EUROPEAN ENV STATE AND OUTLO

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## Critical nitrogen load exceedance in nature, 2009



Source: PBL, GCN.

PBL/apr10  
[www.clo.nl/em142301](http://www.clo.nl/em142301)

## II. TOWARDS A DEADLOCK SCENARIO?

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## II. Deadlock?

### Habitats Directive



- **Art. 6(1)** duty to take positive management measures in order to attain good conservation status
- **Art. 6(2)** duty to avoid further deterioration of Natura 2000 sites
- **Art. 6(3)** duty to assess the acceptability of new plans and projects in light of a site's conservation objectives

## II. Deadlock?

### Article 6(1) – good conservation status

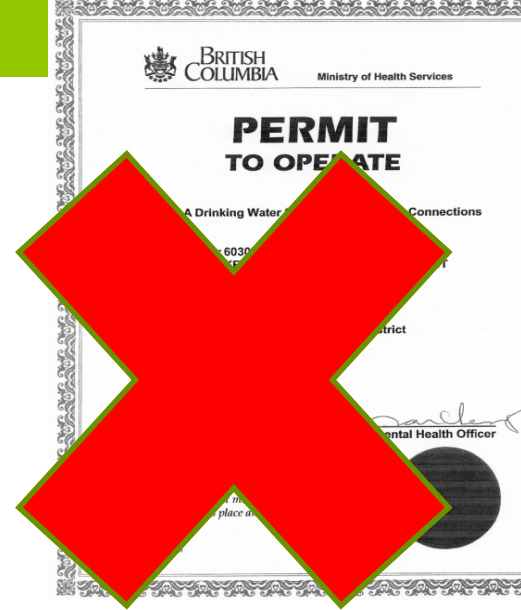
- MS are required to take **proactive conservation and/or restoration measures** aimed at the **achievement of the favorable conservation habitats and species** of annex I and II to the HD
- **critical deposition loads not explicitly mentioned** - however a seminal criterion in order to achieve or maintain the favorable conservation status
- legal obligation (C-508/04) – go beyond strict abatement policies towards restoration to **accelerate the natural process of N-removal**
- **no strict deadline** for the achievement of the FCS (<> WFD)





## II. Deadlock?

### Article 6(2) – non regression-obligation



- **no limitation** to plans and projects: also **authorized ongoing activities**: fall back-option (C-226/08 – *dredging* + C-404/09 – *open mining* + C-399/14 – partly constructed bridge)
- **not possible generally exempt categories of activities** liable to cause disturbance, e.g. agriculture (case C-241/08)
- **obligation of result**: positive duty to intervene on public and private activities directly or indirectly leading to further deterioration (C-117/00 – over grazing), implying e.g. withdrawal of permits (C-404/09)
- **limited room for economic considerations**: no declassification if linked to non compliance (C-301/12)
- **subsequent monitoring and review**, especially if turns out the project had not been subject to a prior adequate appropriate assessment (C-399/14)

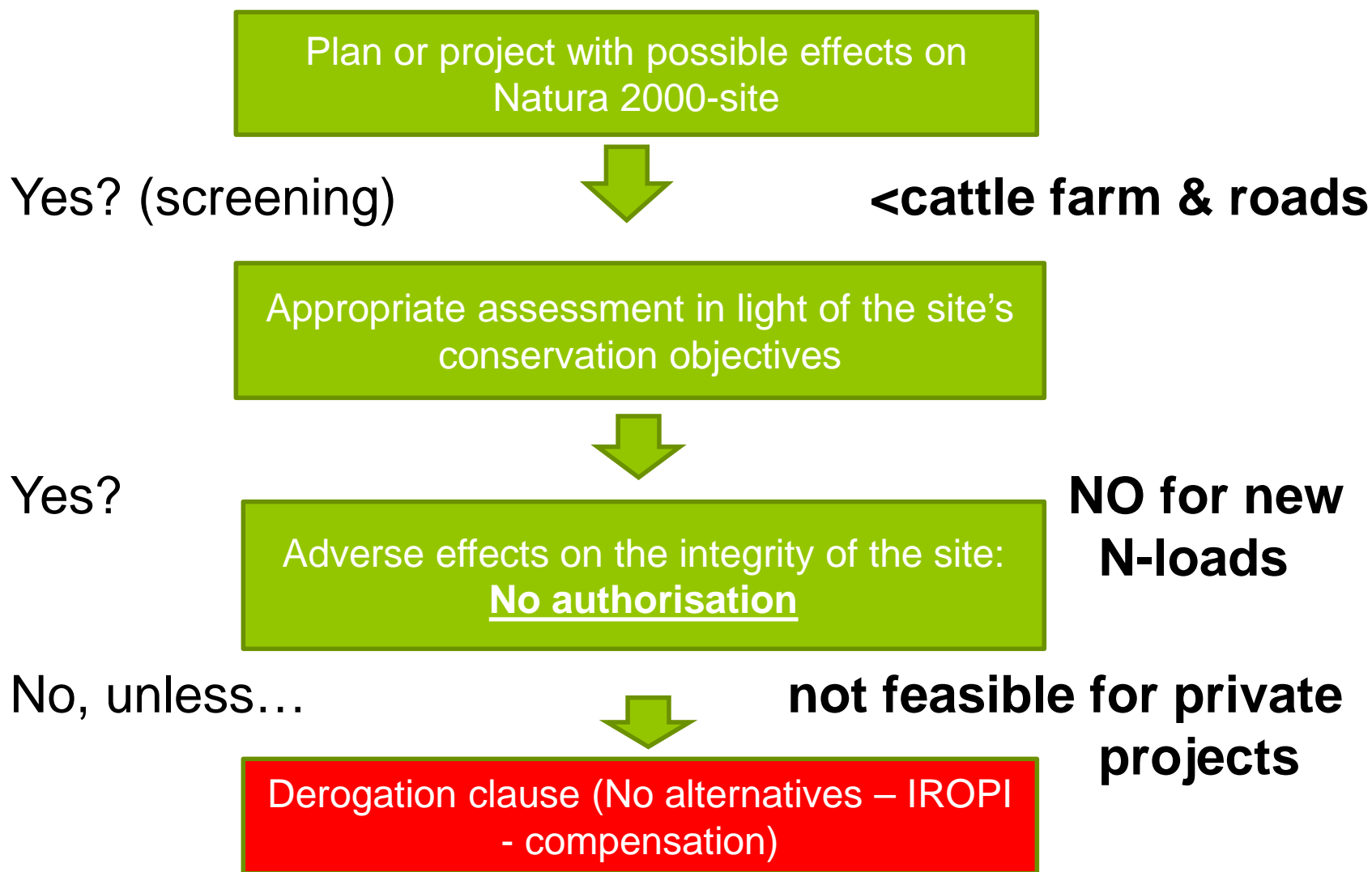
## II. Deadlock?

### Article 6(3) – habitats assessment

- project – interventions in the natural surroundings and **landscape**
- broad definition: **mechanical cockle fishing** (case C-127/02), **maintenance works** (case C-418/04), **dredging works** (case C-226/08)
- excluded: the **mere *renewal*** of an existing consent to operate an installation (e.g. an airport or dairy farm) (C-275/09)
- excluded: projects that have been **authorized prior** to the designation of the Natura 2000 and that are carried out under unaltered circumstances (C-226/08) – Art. 6(2)

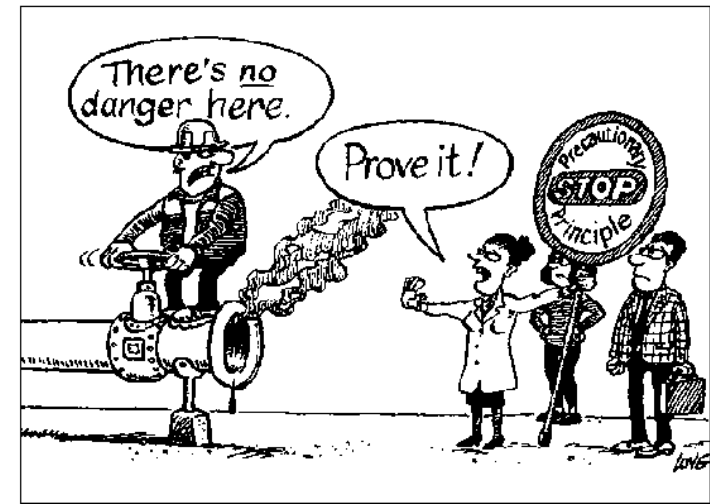


## II. Deadlock?



## II. Deadlock

In dubio pro natura!



*“The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity **only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects”***”

# Deadlock?



# III. LIMITED ROOM FOR MANOEUVRE

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# III. Limited room for manoeuvre



## I. Short term solutions

1. **de minimis thresholds** – alleviating the administrative burden for small-scale activities - Germany: 3% CL and UK: 1% <> **cumulative effects**
2. **exempt emissions ongoing** at the moment of the designation of Natura 2000-site (NL: 2004) are exempted from prior assessment obligation <> art. 6(2) HD?
3. **banking** with N-emissions between different permitted installations? (restricted scope + taking away room for improvement)

# III. Limited room for manoeuver



## II. Restoration as mitigation for extra N deposition?

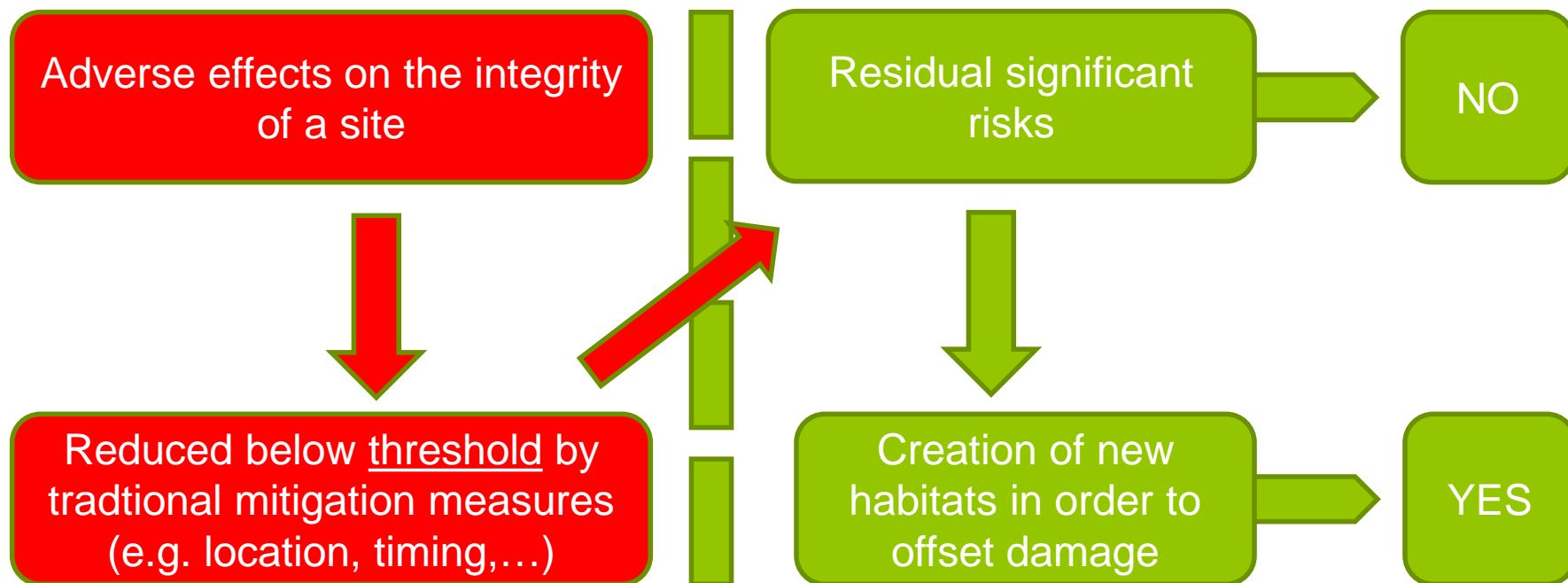
- relying on **restoration measures** could also be used as means to 'mitigate' the effects of new N-emissions on protected habitats - removal of nitrogen by stripping off the upper layer of the soil, mowing, measures aimed at hydrological restoration (more resilience)





# III. Limited room for manoeuvre

III. Restoration as mitigation for extra N deposition? – Going beyond the deplorable state of the EU's nature



### III. Limited room for manoeuver

#### IV. Dutch case law: YES?



- the creation of no less than **132 ha of new mussel beds** could qualify as a mitigation measure for the construction of a housing zone in the IJmeer which would affect a prime foraging area of protected birds (2010)
- system-based approach, measures such as **stripping off the upper layer of affected N-sensitive sites** as well as banning ongoing shrimp fishing in one of the affected Natura 2000 sites might render the affected sites capable of absorbing additional nitrogen deposition (2014)

# IV. PROGRAMMATIC APPROACH AS PANACEA?

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# Societal protest!

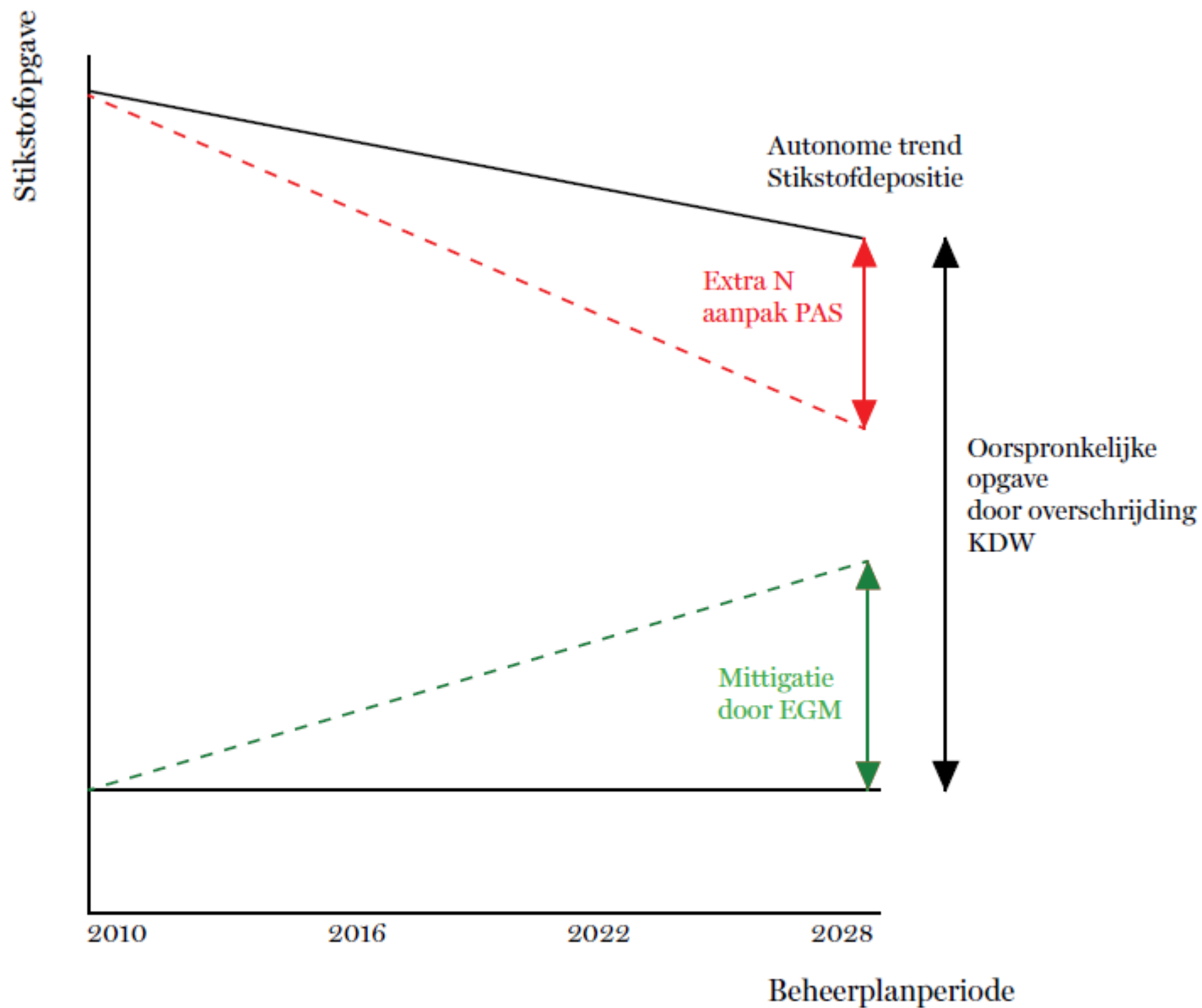


# IV. Programmatic approach



## I. Programmatic approach nitrogen (PAS – NL)

- a more **programmatic and integrated** approach to the issue of nitrogen deposition and over-burdened Natura 2000-sites
- PAS relies on **two pillars**: (1) generic source-based measures aimed at reducing N-emissions + (2) habitat restoration measures in N-sensitive Natura 2000-sites (generic level)
- by implementing restoration measures additional room for **economic development** is created, which can be allocated to different economic actors in the area at issue (AERIUS)



Figuur 3. Schematische weergave principe pas (uit: Voorlopig programma stikstof Nederland, 2010)

# IV. Programmatic approach

## III. Additional guarantees?



- Dutch programmatic approach is based on **extensive scientific research** on the effectiveness of restoration measures for over-sensitive N-habitats + specific area analyses
- restoration measures principally target the **habitats that will be affected by the new developments**
- **direct link** between program of measures and new economic developments

# IV. Programmatic approach

## IV. Adaptive management



- the implementation of the restoration measures is **legally underpinned** in the applicable regulatory framework which will accompany the implementation of the PAS
- gradual attribution of the room for economic development (60% in the first year)
- **additional monitoring requirements** - (adaptive management)



# V. LEGAL ISSUES?

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# V. Legal issues



Legal qualification of the restoration measures?

- Art. 6(1): autonomous restoration measures necessary to achieve conservation objectives (no clear deadline)
- Art. 6(2): measures aimed at averting further deterioration of N 2000 site
- Art. 6(3): restoration measures used to authorize new economic development projects

# V. Legal issues



## I. Additional delays for the attainment of the FCS?

restoration efforts



Art. 6(1): achieve good conservation status

Art. 6(2 and (3): create additional space for economic development

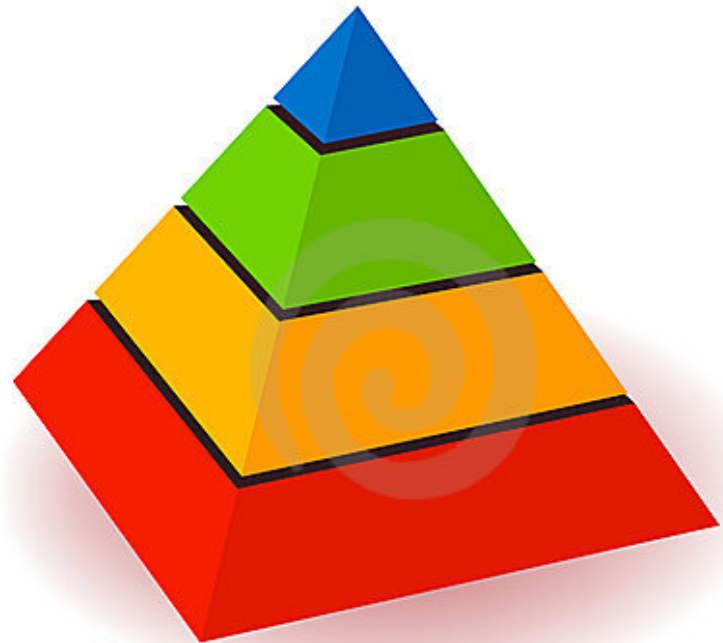
# V. Legal issues



## II. Legal qualification

- **basic assumption:** anticipating the positive effects of restoration measures in order to allow additional economic developments in the meantime (no time-lag is allowed)
- mitigation **not directly linked to concrete project development** and the to be affected habitats (?) – also future projects
- in some instances, area analysis explicitly acknowledges that **no certainty** has been reached about the effectiveness of some of the restoration measures that will be taken <> precautionary principle

# Mitigation hierarchy



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- 4 Compensation on a different location
- 3 Restoration on same location (compensation)
- 2 Minimisation (mitigation)
- 1 Prevention (mitigation)

# Briels-ruling (C-521/12)



- prevent or minimize effects of the project
- measures are part of the project
- effects not included in the screening
- effects included in Art. 6(3) HD
- effects of the project are not prevented
- elimination of effects on a different location
- not a part of the project
- linked to the project (consequence)
- not included in Art. 6(3) HD
- application of Art. 6(4) HD
- not linked to the project
- effects are relevant for
- conservation status N2000-site
- Taken into account in Art. 6(3) HD
- not directly balanced with effects of the project

**Mitigation**

**Compensation**

**Autonomous  
development**

# V. Legal issues



## III. Sufficient ecological underpinnings to avoid further deterioration?

- recovery from N-deposition is a **slow process**, in which a lot of substantial delays need to be taken into account, ranging from a few years to several decades
- **continued exceedances of N critical loads**, despite reduction in emission, prominent barrier for recovery
- in many Dutch Natura 2000-sites the levels of N-deposition have **not dropped significantly in recent years**
- several habitats do not **require further intensive management per se**
- applicable **safeguards not stringent enough** – risk of further deterioration?



# VI. CONCLUSIONS AND OUTLOOK

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# VI. Conclusions and outlook

- excessive nitrogen deposition one of the most **important impediments** for good conservation status - **deadlock scenarios for economic developments**
- recent CJEU-rulings require due caution: **uncertainties and time-lags** related to restoration measures limited the available leeway
- **programmatic approach** - best regulatory effort yet to reconcile economic aspirations with nature conservation interests – adaptive management (if strictly enforced)
- **ecological black-box**: no clear oversight, transparency and insufficient political incentives to revise ongoing operations in light of further deterioration