



Session III | Legal Issues | time available: 30 minutes

Working group 3.a) Compensation and mitigation – Compulsory measures

Moderation: Kristijan Čivić

1. From your experience: What type of restoration measures in estuaries can be classified as obligatory standard measures?
 - **This is site specific based on situation and goals (FSC) – no universal answer/list**
 - Is restoration compensation from the past?
 - What the difference: restoration vs. compensation

2. From your experience: Which measures count as compensatory measures for infrastructure projects?
 - **Compensation/restoration: type of measure can be the same, but compensation is in addition**
 - Compensation is response to infrastructural development
 - Measures to restore structure and functions lost by infrastructural projects



Working group 3.b) Dealing with restoration measures: Change and the legal perspective

Moderation: Prof. Mike Elliott

1. May restoration measures lead to a change in European protective goods in a Natura 2000 area?
 - More flexibility to natural processes
 - The monitoring is often too sensitive to ecological dynamics

2. How can this be dealt with from a legal perspective?
 - **The law has to be able to cope with the uncertainties and dynamics in estuaries**
 - The law cannot cope with ecological unsharpness
 - Cope with the flexibility of the system
 - **The habitat directive is more suited to terrestrial systems than dynamic estuarine systems (written by lawyers, who don't understand the complexity of the system)**
 - Using terrestrial law to manage wetlands
 - Written by lawyers often confused to ecologists (different languages)
 - **The member state should develop a favorable conservation state (national law <-> directive)**
 - **Overlapping objectives e.g. bird versus habitat (directives)**
 - The way of implementation is too complicated, not the directive itself



Working group 3.c) Dealing with restoration measures: Change and the legal perspective

Moderation: Roger Morris

1. May restoration measures lead to a change in European protective goods in a Natura 2000 area?
 - Should the lists of priority species and habitats change over time?
 - Range of estuary habitats gives some freedom of action
 - Do restoration measures work?
 - Do restoration measures achieve positive outcome? Sometimes!
 - Types of estuaries across Europe differ: Spain – short; Germany – long
 - Systems are dynamic: we should expect change.

2. How can this be dealt with from a legal perspective?
 - **Way: forward strategy with milestones + review**
 - **Providing you are making progress you are working within the law.**
 - Are restoration measures allowed to fail? What is the consequence?
 - Change the law!
 - Are we following the directions of the Habitats directive?
 - Natura 2000 is a tool. If there is a change, maybe change the tool.
 - Milestones – adaptive responses



Working group 3.d) How effective must a compensatory measures be?

Moderation: Bernd-Ulrich Netz

1. How specifically must a compensatory measure be stipulated?
 - **Leave space for dynamics**
 - **Confine clear objectives and a good monitoring**
 - **We need a positive objective for the Natura 2000 network**
 - Measures have to be specific for legal reasons
 - Measures have to be specific in case of rare or endangered species
 - Compensation means “like for like”
 - Measures could be less specific if the compensation area is larger

2. Examples: Where/why have compensatory measures not been able to fulfil their purpose?
 - Elbe/Hahnöfer Sand successful in general, but not for the shoveller

3. How should one react if the objective of the measure is not met? What is the legal framework? Who is to take action? (The project developer or the competent authority?)
 - **It needs a body with long-term responsibility for measures**
 - Measures need management (in general)



Working group 3.e) How effective must a compensatory measures be?

Moderation: Emma Hawthorne

1. How specifically must a compensatory measure be stipulated?
 - **Very specific definition (reducing theoretical uncertainty)**
 - Consensus of targets
 - Sensitivity = previous analyses of suitability (modelling)
 - Advance-modelling
 - Trial & error?
 - 2-steps-specification? “Ground/Minimum Achievement” and “Best Possible Achievement”
 - Specific / extensive monitoring
 - Not species as they can change due to offsite factors

2. Examples: Where/why have compensatory measures not been able to fulfil their purpose?
 - **Not taking account of (or knowing) wider estuary systems + dynamics**
 - Silting up of shallows, mudflats, etc. (Elbe)
 - Rapid silting up on Elbe => not self-sustaining, remedial measures necessary
 - Locations chosen for pragmatic or political reasons rather than for estuary requirements (e.g. Hamburg)

3. How should one react if the objective of the measure is not met? What is the legal framework? Who is to take action? (The project developer or the competent authority?)
 - **Importance of what was agreed beforehand, specific objectives. If not met, clearly set out what happens + who**
 - Depends on the consensus of the initial decision



Working group 3.f) The legal framework for “temporary nature” projects

Moderation: Hendrik Shoukens

1. “Temporary nature”: examples from the European countries
 - **Examples: In the Netherlands (2000ha) and in the Flemish region (as part of compensation plan).
Has not been used in Germany, since lawyers deem it to be contradictory to German nature conservation law.**

2. What legal solutions have been found in the past?
 - **Apply for a derogation in advance (Netherlands), grant legal certainty before nature is allowed on the land.**
 - **Difficult issue: what if unexpected species settle => a generic derogation could address this scenario, but legally contested.**
 - **Make a distinction between mitigation, compensation and temporary nature.**



Working group 3.g) Referring to current ECJ Judgements: Nature inclusive design of projects

Moderation: Frank Neumann

1. In case different types of measures are taken up in an integrated plan or nature inclusive design in relation to a plan or project for development, is it not safer to always implement article 6.4 HD or is it still possible to include mixed type of plans under 6.3 HD?
 - **When in doubt, if a measure is mitigation or compensation, apply Art. 6.4!**
 - **Opportunities for proper mitigation and effect avoidance should be seized however!**