

# Temporary nature, permanent gains

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For further information, see also the following articles in the press:

- Hier woont de rugstreppad, even – de Volkskrant, Saturday 11 March 2006
- Tijdelijke Natuur, de ecologische betekenis van braakliggende terreinen – Boomblad, first edition 2006

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# Foreword

In the Netherlands between 35,000 to 40,000 hectares of land lie unused every year. Though already earmarked for residential, infrastructure, industrial or excavation purposes, it can take many years before this land is actually developed. Meanwhile the public or private developers who have purchased the land often take measures, such as regular ploughing, to avoid nature developing on these unused sites. This is understandable, because any protected species that establish themselves can obstruct the development of the site into its intended use as a port facility or residential area. *That is a risk even nature-loving entrepreneurs are unable and unwilling to take. Which is a pity, because numerous species, including protected ones, can ultimately benefit from temporary nature.*

In the present report Bureau Strooming and Stichting Ark explain how temporary nature areas can make an ecological contribution to the development and reinforcement of many pioneer plant and animal species. In addition, Prof. C. Backes (Utrecht) and the IMI in Brussels look at the legal aspects of temporary nature areas. The essence of the legal advice is to remove the obstacles that currently discourage entrepreneurs from allowing temporary nature to develop on their land by granting 'advance dispensation'.

With this and other publications InnovationNetwork aims to feed the debate about the desirability of temporary nature areas. As a next step InnovationNetwork will start up test case projects together with landowners in a bid to resolve the obstacles that still exist.

Dr G. Vos,  
Director of InnovationNetwork



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# 1. Introduction

## 1.1 Construction sites as magnets

What do common tern colonies around IJburg (new residential development at Amsterdam), natterjack toads along the Betuwe Line (new Rotterdam-Germany rail link) and orchids on the Maasvlakte (port development site near Rotterdam) have in common? They are all magnetically attracted to construction sites, temporary sand deposits and other man-made sites in transition. These are species that benefit from human dynamics. We could turn that to our and their advantage, and thus achieve a perfect balance between the interests of man and nature.

## 1.2 Ploughing, mowing and spraying

Reality, as it now stands, is different: nature conservationists tend to ignore these 'ugly duckling' areas. Unless, of course, a protected species sets up its home there. Then the conservationists spring into action and, with the law book in hand, seek to exploit its presence to block the development of homes, industrial facilities or roads. Well aware of this threat, landowners and developers anxiously keep nature off their sites, using a rich armoury of intensive mowing, regular

ploughing and even poison. The result of this ‘cooperative’ approach is that the Netherlands is littered with areas, both large and small, lying in a desolate condition awaiting development.

## 1.3 The potential prospects

Is there an alternative? Certainly. The long period of time that often lapses in the Netherlands between decision-making and action-taking is usually seen as a problem, but in this case it is actually an opportunity – an opportunity for the spontaneous development of spectacular temporary nature areas. The potential prospects:

- An enormous extra area for nature, nature lovers and walkers, covering an estimated 38,000 hectares, twice the size of Texel;
- These areas lie scattered across the Netherlands. Often situated on urban peripheries, temporary nature areas make ideal (temporary) walking and rambling areas;
- These nature areas are temporary because nature must make way as soon as the development of the site starts. But the gains are permanent, because when one site starts to be built up, the next is already being reclaimed. At least, that has been the pattern in the past decades. So the availability of nature and walking areas is permanent, only they happen to change location from time to time;
- The gains for nature are also permanent, because rare species are able to build larger populations in the temporary nature areas and use these as jumping-off points for colonizing new areas. So this has a beneficial ripple effect, with an impact far beyond the boundaries of the temporary nature area itself.

All this is easy to realize in principle. Many private and public developers will be happy to give nature a temporary home, provided they know for certain that they will not be punished with lengthy court proceedings, negative publicity, extra costs and delays when the time comes to send in the bulldozers. It’s as simple as that. But, as we all know, legal and practical obstacles often lie between dream and reality. And this situation is no exception. In the present brochure we show how these problems can be overcome. And... that this is a cause well worth pursuing.

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### The gravel extractor

A gravel extractor is taking part in a project to restore a river to its natural character by lowering the gravelish banks. To secure its position in this project, the company has already bought several hundreds of hectares of riverside land. The project will certainly take 10 to 15 years to complete. Meanwhile a fantastic nature area can develop on the unexcavated sites, featuring young riparian forests and river dunes, riverside grasslands and underwood teeming with flowers. Dozens of protected species are sure to establish themselves in such a habitat, and that is precisely what the gravel extractor wants to prevent. Because in this case, as soon as the gravel extraction starts, he will run afoul of the Flora and Fauna Act.

So to keep special species from making themselves at home, he rents the land to a farmer who uses it for all sorts of agricultural purposes, such as maize cultivation, manure spreading or pasturing. The rental that the gravel extractor receives is a bonus, but he would happily exchange that income for a green image, even if only because he knows that a green image can come in very handy when applying for new permits.



*The Grensmaas River at Meers. After the extraction of gravel, the area will be developed as a nature area. Gravel extraction has already started on a limited scale, but all the other land is still used for intensive farming. Nature will only get its turn once the gravel extraction is completed. Because the lands are already owned by the gravel extractor, the nature development process could already start now, temporarily in combination with gravel extraction in (part of) the area. That way, many extra years would be gained for nature and nature lovers.*

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## 1.4 Reader's guide

Chapter 2 of this brochure takes a closer look at the 'temporary nature' concept. The effects of temporary nature on protected species and nature are outlined in chapter 3. One important question concerns the legal feasibility of temporary nature under national and European law. The results of a study into the legal aspects are outlined in chapter 4. Finally, chapter 5 describes where we propose to go from here.

## Without temporary nature

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### Starting situation.

*A recently reclaimed site. The small pool in the middle has arisen due to the compacting sand. The site is designated for industrial use.*



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### Year 1.

*To avoid special animals and plants establishing themselves, the site is mown six times a year*



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### Years 2-7.

*The mowing regime is relentlessly continued year in, year out. The common species that used to exist here have now also disappeared.*



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### Year 8.

*The site has been given its definite use.*





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*Starting situation.  
A recently reclaimed site. The small pool in the middle has arisen due to the compacting sand. The site is designated for industrial use.*



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*Year 1.  
Numerous pioneers establish themselves. Walkers and rambblers have also discovered the area.*



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*Years 2-7.  
The early arrivals have received company from – and have partly made way for – other species. The diversity has increased. The adjacent area has already been reclaimed for the next expansion. The development of temporary nature is also getting underway there.*



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*Year 8.  
The site has been developed. Ousted species have moved elsewhere, such as to the adjacent site. Temporary nature has thus become a permanent asset: constantly present but always on the move.*



# 2. Temporary nature in the Netherlands

## 2.1 What is temporary nature?

All over the Netherlands lie many tens of thousands of hectares of land purchased by public or private developers for residential, road building, industrial or excavation purposes. This often concerns former agricultural land or raised or excavated sites with scant natural value at the time of purchase or construction. And once the planned projects have been carried out, these sites usually still have little natural value. Which stands to reason, because none of these sites have been zoned for development as 'nature areas' in regional spatial plans.

Unfortunately, pending their development, these sites usually paint a desolate picture. By resigning ourselves to this situation, we are doing nature and ourselves a disservice. Because in this pre-development period, which can last as long as ten years or more, nature can develop in a spectacular manner and provide an attractive place to visit for recreationists. Admittedly, it is only temporary and one day the bulldozers will inevitably move in and destroy that fragile paradise. Which is not a pleasant thought, but should we deny ourselves years of pleasure for that reason?

That is not a question you need to ask nature. In fact, a dynamic delta like the Netherlands is an ideal abode for many hundreds of plant and animal species that have the ability to quickly establish themselves and thrive for several years before packing up and moving on to make way for the next stage of succession. To these species, temporary nature is the essence of their existence. And even for less mobile



species, a temporary nature area can be a welcome addition to the other, more static, part of Dutch nature.

To guarantee that temporary nature truly yields something extra, we adhere to the following principles:

- Temporary nature exclusively refers to areas not designated for use as permanent nature areas in e.g. a zoning plan or regional plan. The (policy and legal) space that we want to create for temporary nature is confined to these areas<sup>1</sup>;
- Assuming that the future use of the area was determined taking due account of the applicable nature protection rules (EU Directives, Flora and Fauna Act), all or most of the areas in question will have little or no natural value at present. Otherwise, no permission would have been given to construct roads, industrial facilities or homes in the area;
- With temporary nature, natural values are allowed to develop and – in due course – are removed in what is, essentially, a single continuous operation. That is the ‘deal’. The underlying idea is: temporary gains for nature are better than no gains whatsoever. Besides, these gains for nature are less temporary than would appear at first sight (see chapter 3).

A further pillar of our philosophy is that temporary nature areas must develop spontaneously and be freely accessible to people who want to enjoy its benefits. This must be taken into account in the lay-out and management of the area.

Designation of an area as a temporary nature area means that the current management activities (drainage, clearing ditches, ploughing, mowing, spraying) are stopped, lands are no longer rented out and all agriculture is discontinued: plants and animals are given free rein to establish themselves. If desirable from an ecological viewpoint, some initial measures can be taken to give temporary nature the best start possible, but in principle the development must be wholly spontaneous.

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<sup>1</sup> *A special situation occurs with mineral extraction projects. After the extraction work, these sites are often turned into nature areas and are designated as e.g. ‘post-extraction nature’. In such cases, temporary nature refers to the situation during the mineral extraction work.*



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## The Port Authority

A port authority has many hundreds of hectares of land awaiting industrial development. Situated in the food-rich coastal zone, these unused sites exercise an enormous magnetic attraction on coastal and marine birds. Dune plants glide in on the wind and for many special insects the unused lands represent a veritable eldorado. The port authority would like to offer these plants and animals a temporary home, while society is rightly demanding that the port activities are harmoniously fitted into the existing ecological environment. All agree that bird colonies between the terminals would suit that picture. Reality, however, obstructs this ideal. The Flora and Fauna Act stipulates that nature that has developed spontaneously on unused land cannot simply be removed after a number of years – not even if the land has been designated for industrial use. Before proceeding with their plans, the project developers must then apply for dispensation for flora and fauna removal as well as provide compensation and mitigation. To avoid this procedural hassle, the port authority makes sure that no nature of any value can develop spontaneously on the unused land.



*Seagull colony on the Maasvlakte. A port area, with all its natural and human dynamics, exercises a strong attraction on pioneers like seagulls.*

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*Exchange lands which, like here in the province of South Holland, were purchased to realize the Ecological Main Structure are often intensively managed for years. A missed opportunity for nature.*



## 2.2 Twice Texel

Each year the Netherlands has a great many hectares of land with potential for temporary nature. Data from Statistics Netherlands (the CBS) for 1996-2000 shows the following picture:

- **Construction sites:** the area varies between 22,000-33,000 ha, of which a substantial part (an estimated 10,000 ha) lies unused for years before the residential/industrial construction actually starts;
- **Mineral extraction:** each year about 3,000 ha are designated for mineral extraction. An estimated half of this is suitable for temporary nature. In addition, clay, sand and gravel extractors own over 5,000 ha awaiting extraction activities (oral info). Most of this land is currently rented to agricultural entrepreneurs;
- **Semi-hardened other sites:** These sites account for some 5,500 ha in the Netherlands. This concerns dykes and piers, disused rail lines and unused sites not earmarked for construction. An estimated 2,500 ha of this is suitable for temporary nature;
- **Large infrastructure projects:** also 'contribute' in excess of an estimated 1,000 ha of unused land annually;
- **Exchange lands for the EHS.** These are a different case. Nature protection funds are used to buy arable and pasture land in the vicinity of an envisaged nature area, with a view to exchanging this for arable land within the future nature area. However, this exchange process can take years to complete. In view of the underlying idea of these land purchases, it would make sense to use these exchange lands as temporary nature areas; for instance, by allowing the fields to temporarily lie fallow or through more extensive meadow management. In practice, however, the exchange land is invariably given to farmers for normal agricultural use. In other words, economic gain (rental income, agricultural value of the land) is given precedence over the primary objective of the land purchase: namely, to improve the quality of nature in the Netherlands. In 2002 this concerned about 18,000 ha (source: Natuurbalans 2003, RIVM).



All in all, therefore, the Netherlands annually has about 38,000 ha of land with temporary nature potential: that's over twice the size of the island of Texel.

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*Temporary nature offers abundant opportunities for rambling and playing. Especially when it lies close to a city.*

## 2.3 Triple gain!

Creating room for temporary nature yields gains on several fronts:

### **Nature**

Temporary nature areas obviously create extra opportunities for nature to develop. That, of course, is the primary objective of the exercise. Chapter 3 looks in depth at the positive effects of temporary nature areas on (protected) species and nature in general.

### **Residents and recreationists**

Temporary nature areas are often near built-up areas, where spatial developments tend to be concentrated. The type of nature that springs up on unused and fallow land is usually rugged, robust and resilient – which means that in temporary nature areas visitors can roam freely and discover nature without the constraint of marked paths and roads (which are usually absent). The Netherlands was once full of places just outside the city where people could ramble through fields, pockets of nature and undefined stretches of land. We still feel a need for such unregimented places, particularly children. Special rambling areas are therefore being laid out all over the Netherlands and the Ministry of Agriculture, Nature and Food Quality (LNV) is also keen to promote 'rambling'. Temporary nature caters to this need.

So it is important to give the public access to temporary nature areas. In some cases, such as hazardous industrial locations, that will not be possible. And at times when temporary nature is highly sensitive to disturbances, such as during the breeding season for seagulls and terns, access can be restricted. But in all other cases free public access should be the norm, because that greatly multiplies the positive impact:

- Temporary nature areas offer opportunities for a form of recreation (rambling) that is not permitted in most nature areas;
- By letting people experience temporary nature close to home, more people will be inclined to support nature preservation in general.

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*If given enough space (right), nature soon generates a varied area where many plants and animals feel at home. A stark contrast with the situation of intensive agricultural management (left).*



### **Entrepreneurs**

Temporary nature also has a lot to offer landowners/project developers:

- It gives the project developer a greener image and creates broader support for their projects. This makes it easier to obtain permits;
- It reduces the costs and effort of keeping the project area 'nature-free' (felling, mowing, ploughing, clearing ditches, drainage, spraying). Against this, there is a possible loss of rental income.

Another consideration is that in the current situation, despite all precautionary measures, the entrepreneur stills runs the risk that a protected species might establish itself on his construction site. Such sites, after all, provide an ideal habitat for some species. If this happens, the contractor must apply for dispensation under the Flora and Fauna Act – which can be a lengthy process involving additional studies, negative publicity, extra costs and delays. By willingly giving plants and animals a temporary home, the entrepreneur can pre-empt this situation.





# 3.

## The ecological rationale

### 3.1 Introduction

Lots of animals and plant species feel at home in temporary nature areas, including rare and protected species. And that is precisely the problem: European and Dutch laws forbid the straightforward 'removal' of rare and protected species. So that also applies to temporary nature areas: such actions may not have any effect that is detrimental to the 'favourable state of maintenance'<sup>2</sup> of rare and protected species. Nor, of course, is that the intention of the temporary nature concept: our aim is precisely to improve the chances of plants and animals to survive and develop – at least temporarily, and preferably permanently. But good intentions alone are not enough for the legislator. That's why this chapter looks at the effects that temporary nature areas are expected to have on the plants and animals that are protected under the Dutch Flora and Fauna Act and the European Habitats and Birds Directives.

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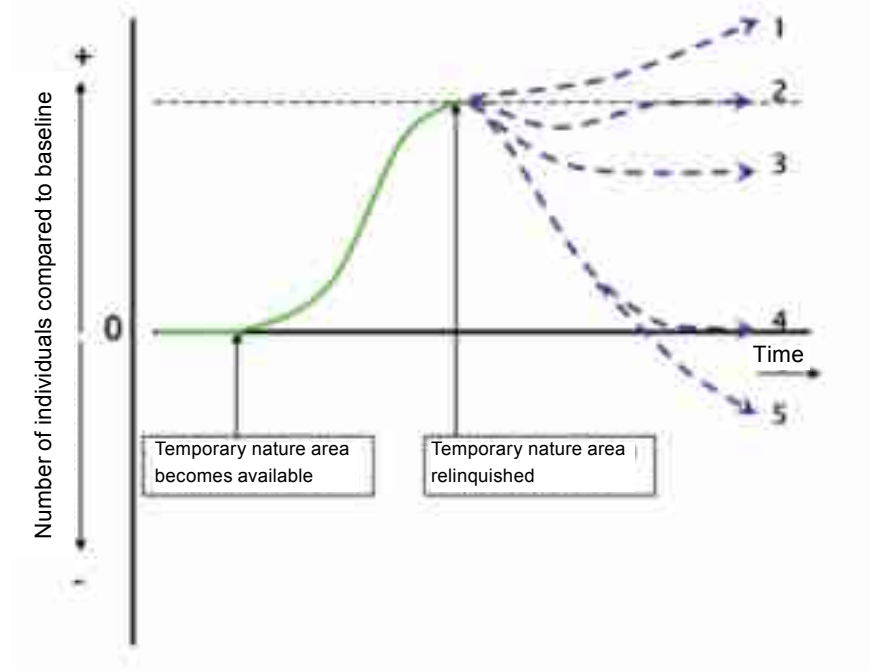
<sup>2</sup> *This is the terminology used in the nature protection laws.*

### 3.2 Possible effects of temporary nature

When a temporary nature area becomes available, the numbers of certain species will increase in that area. However, after a certain period of time, the temporary nature must be removed. What is the net effect of all this expected to be?

Figure 1. The possible effects of temporary nature for the population of a single species.

The 1st arrow indicates the moment when the species colonizes the area, the 2nd arrow marks the moment when temporary nature is bulldozed away. See the text for a further explanation.



In theory five possible consequences for the population of a species can be identified (figure 1). ‘Once the bulldozer has done its job’, the species can:

1. Continue growing (elsewhere), because the population has strengthened (in number/age) and/or has become more genetically diversified (quality). The temporary nature area has become a distribution centre from which new areas are colonized. In this case, the population of the species has definitely benefited from temporary nature;
2. Decline briefly but then grow back to the level before the temporary nature area was terminated, because the various species/ individuals find another (temporary or permanent) habitat;
3. Decline permanently, but remain at a higher level than in the initial situation. In this situation, too, the population has derived a definite benefit from temporary nature. The species finds a new location, but this is smaller or less suitable than the temporary nature area;
4. Decline permanently to the initial level. The species obtains no long-term benefit from temporary nature. No new sites become available and existing sites offer no room;
5. Decline permanently to below the initial level. The habitat conditions have meanwhile also worsened for this species, which consequently suffers an overall deterioration.

How a species responds to the availability and subsequent disappearance of a temporary nature area depends on various factors such as the type of area (bare sand, old field, meadow) and the period of time that nature is given to settle and grow before the site is developed. Another key factor is the colonization strategy of the species. Some species can respond quickly and appear to be ‘purpose-made’ for rapidly spotting and taking advantage of new opportunities, while other species depend on more stable habitats.



## 3.3

# Something for everyone, but a little more for some

Initially, few species are present in temporary nature areas: plants and animals must still discover the area.

**Pioneers** rapidly appear when conditions are good and then disappear in due course as a result of natural succession. They have a strong reproduction and distribution capability, which allows them to locate and colonize new areas. In entirely natural conditions large-scale natural processes (erosion, weather impacts, flooding) give rise to new pioneering habitats consisting of bare stretches of land. However, in the absence of such natural dynamics, temporary nature areas will also attract a wealth of pioneer species. The available time is used to the full, resulting in a substantial temporary population whose offspring fan out in all directions. Every temporary nature area can thus give an impulse to pioneer populations and act as a temporary stepping stone between nature areas. By offering more temporary sites, the populations of pioneer species will permanently increase in the Netherlands (curve 1-3 from figure 1).

*Examples: Kentish plover, ringed plover, little plover, little tern, common tern, natterjack toad, Siberian bugseed and rue-leaved saxifrage.*



**Early species** are species that are bound to young succession stages, but respond less quickly than pioneers. Due to a lower reproduction speed or reduced mobility, they need more time to build a population. Just like pioneers, early species stand to benefit from large-scale, preferably natural, dynamics. But temporary nature areas are also suitable, provided they exist for several years; these then act as a stepping stone and source area (figure 1, curve 2-3).

*Examples: all orchid species (including the fen orchid), spotted crane, black tern and black-headed gull.*

**Late species** only arrive with the passage of time and then gradually dominate an area. They are often less mobile and bound to late succession stages. In the Dutch landscape, where natural dynamics are virtually non-existent, many late species are not rare. But they will only appear in temporary nature areas that are allowed to develop over

*Picture left: Some species, such as Siberian bugseed, are actually very common on industrial estates that are regularly redeveloped.*

*Picture right: Marsh helleborine, an early species, only appears when the correct soil fungus is present and disappears again when its habitat is overgrown by thicket.*

a period of many years. The effect of temporary nature areas on the populations of late species will therefore be limited (figure 1, curve 3-4).

*Examples: all tree species, all forest plants, all forest birds and numerous forest edge birds. Sea eagles and black woodpeckers are two good examples, because they nest in large, and therefore old, trees.*

**Migrants.** In the autumn and spring, millions of birds migrate across the Netherlands. Particularly former and fallow meadows of a watery and marshy character exercise a strong attraction on migrant waterbirds and waders. Migrants can benefit from temporary nature during a short period of time, when the area is still bare, as an extra foraging area (figure 1, curve 2-3). Examples are migrant songbirds and butterflies that are attracted by the abundance of flowers and seeds in brushwood. Migrant bats profit from the increased wealth of insects in temporary nature areas. Fish migrating between the sea and rivers are (again) found in the Netherlands, but their biotope usually lies outside temporary nature areas; so these will not benefit.

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*Throughout the first winter temporary nature on former fields attracts geese who feed on the harvest residues.*



**Hibernators.** Food-rich grass meadows and watery and marshy sites can attract large numbers of hibernating birds. These species are welcome in temporary nature areas and are not chased away. However, as the brushwood gradually increases in temporary nature areas, food becomes less abundant, thus reducing their ability to support grazing birds (figure 1, curve 2-4).

*Examples: various swan species, geese, wigeons and other geese, coots and waders.*

## 3.4 Zero hour

Ultimately, the time comes for the temporary nature area to be developed and the bulldozers move in. For most pioneers, this is not a problem. They have already left because the natural cycle of succession

has made the site less attractive to them. But the plants and animals that have succeeded them will lose their habitat. When zero hour arrives, mobile species will move out. Most non-mobile species (such as plants) will perish, with a small number possibly surviving on the edge of the site. But their seeds or offspring will have already distributed themselves over a larger area. The fate of most species lies somewhere between these two extremes: part of the population will leave, another part will be lost.

That some species can derive permanent benefits from temporary opportunities became clear during the drainage of the North East Polder and Eastern and Southern Flevoland. The populations of many marsh birds, such as the greylag goose, marsh harrier and bearded reedling, grew greatly in these young marshland areas and when the land was developed they simply moved to the next young marshland. These, in turn, served as source areas for populating nature areas in other countries, leading to substantial population growth throughout Western Europe. The gull-billed tern and dotterel fared less well. Though these birds benefited temporarily, they were ultimately unable to maintain their presence in the area. Consequently, the (European) populations of these species fell back to the pre-drainage level.

In theory the entire population of a species in a temporary nature area could be lost when the site is developed (figure 1, curve 4). But that is not likely. After a few years of successful reproduction in a temporary nature area, the chances of colonizing other areas have increased, and this ultimately benefits the overall population.

An even bleaker scenario (figure 1, curve 5) would be an initial population increase in the temporary nature area and a subsequent decline to below the initial level when the site is developed. This can only occur if the species' habitat outside the temporary nature area has become less suitable or accessible. The animals will then seek more favourable conditions in the temporary nature area, but subsequently have no home to return to. In this case the 'favourable state of maintenance' will in fact deteriorate, but temporary nature is not the cause of this.

The only situation which could possibly lead to a negative effect is when mobile species select a temporary nature area for reproduction (in preference to a sub-optimal location elsewhere) and are disturbed during the breeding season because of the start of the (construction) project. In this case, the species may have been able to reproduce in the suboptimal area, but have now lost their breeding season by establishing themselves in the temporary nature area. This, however, can be simply avoided by stipulating that the clearance of temporary nature is only permitted outside the breeding season.

## 3.5 Permanent gains

Depending on the length of existence of a temporary nature area, numerous species, especially the real pioneers, will have long since departed before the bulldozers move in. But even a short stay can give a major impulse to the population as a whole. After a single successful season, pioneer plants send enormous numbers of seeds into the world. Amphibians can dispatch thousands of offspring into the world after a successful breeding season. Birds take it a little easier, but even in their case a single successful breeding season can help swell population numbers in the following year.

Like all pioneer species, numerous early species may also have disappeared or decreased in numbers before the site is developed. Others, of course, will be 'cleared'. But even these species will draw permanent gains – via the seeds and offspring that spread out into the wide world.

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*Entrepreneurs who make room on their land for temporary nature help to promote nature and can thus also reap the fruits of positive publicity and a greener image.*



Late species benefit the least. In many temporary nature areas, they will not even have enough time to establish themselves. If they do, the benefits will only be temporary: they will disappear from the area as soon as the site is developed.

In short: temporary nature has many ecological winners, but no losers. As a general rule, temporary nature yields permanent gains.





# 4.

## Legal aspects of temporary nature

### 4.1

#### What laws are applicable?

An essential characteristic of temporary nature areas is that the nature that develops in these areas is actively removed in due course. This aspect entails that the initiator of a temporary nature area will inevitably come into contact with nature protection laws: the Dutch Flora and Fauna Act and the European Habitats and Bird Directives. The two directives, incidentally, are incorporated into Dutch law; so the project developer only deals directly with the Flora and Fauna Act.

The nature protection laws break down into two parts: area protection (which protects certain areas) and species protection (which protects certain species, also outside protected areas). The area protection laws will generally not cause any problem. Construction plans, port expansions and so forth usually take place outside nature conservation areas or special protection zones.

The species protection laws do have a bearing on temporary nature. The Flora and Fauna Act distinguishes between three categories of animals and plants:

- **General species.** When only species from this category are present in a temporary nature area, there is no problem: an exemption already exists for clearing these species as long as the work is carried out for spatial planning or development reasons;
- **Other protected species.** If these are present, an exemption can be used provided that there is an LNV-approved code of conduct stipulating how the entrepreneur must behave in respect of certain

species (e.g. no work may be carried out in the breeding season). At present, however, few of these codes of conduct exist, so the presence of a category 2 species basically entails that exemption must be applied for before starting the project;

- **Strictly protected species:** including species protected under the Habitats Directive/Birds Directive. The entrepreneur cannot make use of the exemption arrangement, and must apply for dispensation to remove these species.

If category 2 or 3 species establish themselves in a temporary nature area, then the entrepreneur must wait and see whether dispensation is actually granted and what conditions are attached.

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*Scarce large blues can benefit from temporary nature development in former meadows. They appear in areas where large burnet grows with nests of myrmicine in the immediate vicinity.*



The most important criterion for the Ministry of Agriculture, Nature and Food Quality (LNV) in deciding to grant dispensation or not is whether the favourable state is maintained for the species in question. Though it is not literally mentioned in the Act, this in principle means 'the favourable state of maintenance within the natural distribution area of the species'. A site designated to be an industrial estate that has been unused for four years does not fall within this definition. In most cases therefore the ministry will grant dispensation for the removal of species from a temporary nature area. This dispensation can be legally challenged, but the work cannot be suspended for this reason. Consequently, such legal challenges generally do not cause any significant delays. However, court proceedings do often cause negative publicity surrounding the project. In addition, the dispensation can be made subject to conditions that have (major) consequences for the project. For instance, the plan may have to be adjusted in such a manner that the protected species is able to survive on the site after all, for instance by setting up part of the site as a permanent habitat.



## 4.2

# Why do entrepreneurs avoid temporary nature?

Many landowners are perfectly willing to admit temporary nature to their sites, either because it makes good business sense (see chapter 2) or because they are sympathetic towards nature. In practice, however, they avoid becoming involved. There are two reasons for this.

First of all, there is the bad image surrounding the Flora and Fauna Act, Habitats Directive and Birds Directive. In the past years the newspapers have been full of projects that have incurred delays or additional costs due to the presence of protected species (European hamster, great crested newt, Desmoulin's whorl snail). Rightly or wrongly, these reports have definitely caused many entrepreneurs to steer clear of nature and protected species.

In addition, a project developer runs a number of real risks if he admits temporary nature to his site (see also previous section):

- In most cases dispensation is granted when protected species are present in a temporary nature area. However, there is a (small) risk that dispensation is either not granted or challenged and revoked;
- The granting of dispensation is often preceded by a legal struggle, leading to negative publicity that can damage the entrepreneur's reputation;
- If dispensation is granted, this may be subject to conditions with (major) consequences for the developer's project (plan must be adjusted, delays, extra costs).




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*Temporary nature development on reclaimed sites and sandy fields offers new opportunities for the sand lizard, a strictly protected species. This species, incidentally, only appears after temporary nature has reached a more mature age and a richly structured landscape has formed.*

The project developer has no guarantees, does not know in advance what risks he runs by admitting temporary nature and what the consequences will be. That's why he prefers not to get involved. After all, he has a much less risky alternative where he is in control of the process: namely by keeping his site nature-free.

Temporary nature can only be an attractive option for project developers if the consequences of this choice are clear in advance.

## 4.3 Advance dispensation

The uncertainty for entrepreneurs can be removed by applying for advance dispensation under the Flora and Fauna Act before any protected species have established themselves. This dispensation should apply to the development and subsequent clearance of nature as a single continuous operation.

The dispensation should be requested 'in the interests of the protection of flora and fauna', one of the grounds for dispensation applied in the Flora and Fauna Act. The underlying reasoning here is that the dispensation is in the interests of nature. After all, if no dispensation is granted, no temporary nature will get a chance to develop as the project developer will then opt to keep his sites 'nature-free'.

The ecological analysis (see chapter 3) showed that temporary nature offers great opportunities for a number of specific protected species, namely pioneer species and early species, even if nature is subsequently removed. These species have a very hard time establishing themselves in the current Dutch landscape because of the general absence of the natural dynamics on which they depend. Whilst certain (mainly late) species draw little or no benefit from temporary nature, no species are adversely affected. So 'advance dispensation' clearly serves to protect flora and fauna and should be granted for that reason.

There is no way of knowing in advance what protected species will be present in a temporary nature area at zero hour. That's why the dispensation must cover all possible protected species, with the exception of exempt species (for which no dispensation is required). It is, however, advisable to specifically mention in the dispensation application which protected species can be expected. As it is often impossible to say with certainty when a (construction) project will actually commence, the dispensation application should also not mention a specific term within which the project will be carried out.

The dispensation can contain requirements designed to maximize the gains for nature, such as a ban on construction work during the breeding season.

The great advantage of this approach is that the project developer knows where he stands in advance and can make a well-considered choice whether to allow temporary nature development or not. If no 'advance dispensation' is granted, this has no consequences for the realization of the intended use as the project developer can then still opt to keep his site nature-free. And if the 'advance dispensation' is granted but subject to strict restrictions, he can simply opt not to make use of the dispensation.





# 5.

## Where to go from here?

The solution proposed in chapter 4 is new; it is not provided for in any legal arrangement and has not yet been discussed in the literature. For this reason, we cannot say with certainty whether the ministry of Agriculture, Nature and Food Quality (LNV) or a court will accept the reasoning as outlined above. We want to obtain clarity in this matter via a test case project, submitted by an entrepreneur, and thus promote the temporary nature path as an attractive option for entrepreneurs. The test case project must be sufficiently representative for the situations confronting Dutch entrepreneurs. In addition, the test case project must meet the following conditions:

- The project area is not situated in (or in the vicinity of) a protected nature area;
- No protected species occur in the project area at the present moment. It is crucial to ensure in the proposed dispensation application that the development of temporary nature is an integral part of the action for which dispensation is applied for. If protected species are already present in the area, it will be difficult to maintain that the dispensation is 'in the interests of the protection of flora and fauna';
- The project area is earmarked for a non-nature use. This must be formally laid down in a land use plan at the time of applying for the dispensation.

It must be clear from the outset that nature development is only an interim phase until the actual use is realized.

The following test case procedure is foreseen:

First of all, an entrepreneur applies for 'advance dispensation' for a specific site. If the ministry of Agriculture, Nature and Food Quality grants the dispensation, an appeal is lodged against the dispensation (by a third stakeholder) to find out whether the court upholds the

ministry's opinion. If the ministry refuses the dispensation, then an objection and appeal will also be lodged (this time by the entrepreneur) to get the court to issue a ruling on the matter.

If the court does not accept the reasoning in the dispensation application, then the entrepreneur can simply resort to the old strategy of keeping nature off the site. However, if the court rules that 'advance dispensation' for temporary nature can be granted, then the entrepreneur can make his site available for temporary nature development without running any risk.

We are seeking to start up at least two test case projects. The reason for this is that the court may not answer all questions in a single case. In addition, there is also always the possibility that a test case project, for whatever reason, is discontinued or delayed. The ultimate aim is to obtain an irrevocable dispensation from the Flora and Fauna Act which has been tested by the court and offers the project developer sufficient certainty to make a well-founded decision in favour of temporary nature.