



Université catholique
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UCL

LIFE in Quarries

Legal aspects of “dynamic biodiversity management” in quarries

I. Synthesis of the results



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Overview

Introduction

I. Key concepts

II. Hypotheses treated

III. Legal analysis: main results and solutions



1. Biodiversity and quarries

- General decline of biodiversity in western landscapes
- Quarries as substitution habitats
- Legal consequences of quarries attractiveness of biodiversity
- Possible reactions from the operator
 - Ignoring it
 - 'Shoot, shovel and shut up'
 - Making it an economic and ecological opportunity



→ LIFE in Quarries – Legal study



2. Aim, content and methods of the legal study

- Aim: analysing to what extent more flexible and less static approaches to species conservation are reconcilable with the preventative approach underpinning the EU and internal nature conservation law
- Content: 4 sections + conclusions
- Methods
- Comparative study: national reports from :
BE (FI); CH; DE; GB; SE; FR; NL; USA



1.1. Temporary nature (TN)

Definition

*“TN means that, in a given developable area, the **establishment of nature is temporarily allowed, pending development**, and that this nature **may later be removed to allow for development**, with (as far as possible) **legal certainty** for the landowner or project developer. In other words, TN is created where nature is allowed by a developer to establish on a site not primarily intended for nature conservation, secure in the knowledge that he may legally remove this nature when it comes to developing the site “ (Duke et al., 2012)*

I. Key concepts

Specific traits:

- Temporary absence of industrial activity before 'removal'
- Temporary character of biodiversity gains in view of the economic destination of the site
- Additionality of temporary nature (beyond baseline condition of the site)
- Provision of legal guarantees to the landowners / project developers
- Mostly related to pioneer / early species and habitats

1.2. Dynamic biodiversity management (DBM)

Definition

Concept according to which « *habitats and population of species present in the quarry or in certain parts of the quarry can be destroyed and / or displaced provided that the conditions allowing their survival are ensured (integration of a network and / or recreation of the environment)* » (CSC, p. 3)

Proposition de définition

“Collection of nature management and/or restoration measures taken in the context of quarry operation aimed at fostering the existing and/or new species on a site whilst at the same time offering the necessary legal guarantees to the developers concerned”

I. Key concepts

Specific traits:

- Aims at achieving recovery targets whilst providing legal certainty for operating the industrial activity on the site
- Wider scope than TN : includes
 - additional nature management / restoration measures (// TN)
 - measures aimed at the establishment of permanent nature, situated at the verges of ongoing quarry operations
 - compensatory measures for biodiversity loss offsetting
- Occurs in sites where the industrial activity is ongoing and takes a direct part to the creation of substitution habitats
- Removal may occur during or after operation but not specific (ecological rehabilitation of extraction sites after operation)

I. Key concepts

1.3. Other concepts

- Temporary nature vs Permanent nature



- Pre-existing nature (baseline) vs Additional nature



II. Hypotheses treated

2.1. Hypotheses treated in quarries

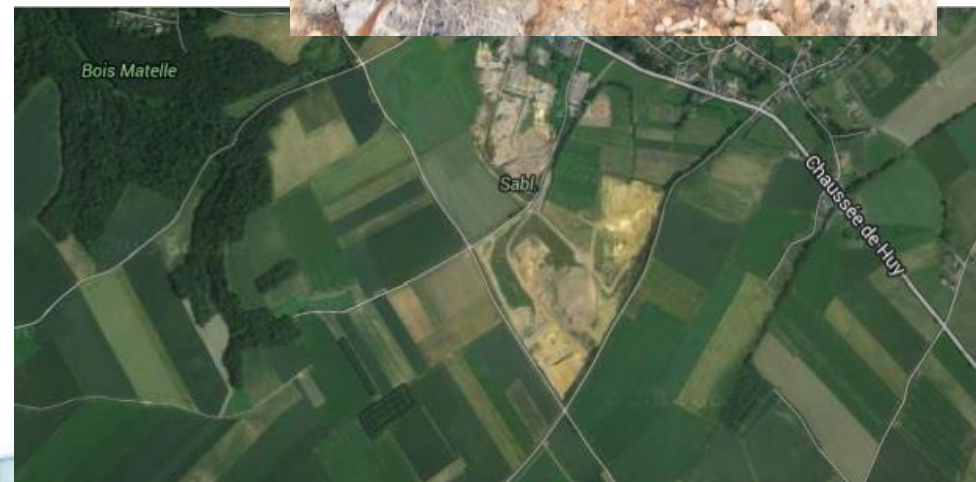
1) Pre-existing nature and quarries

- Ex PN (1a)
- Ex TN (1b)



2) Additional nature

- Add TN (2a)
- Add PN (2b)



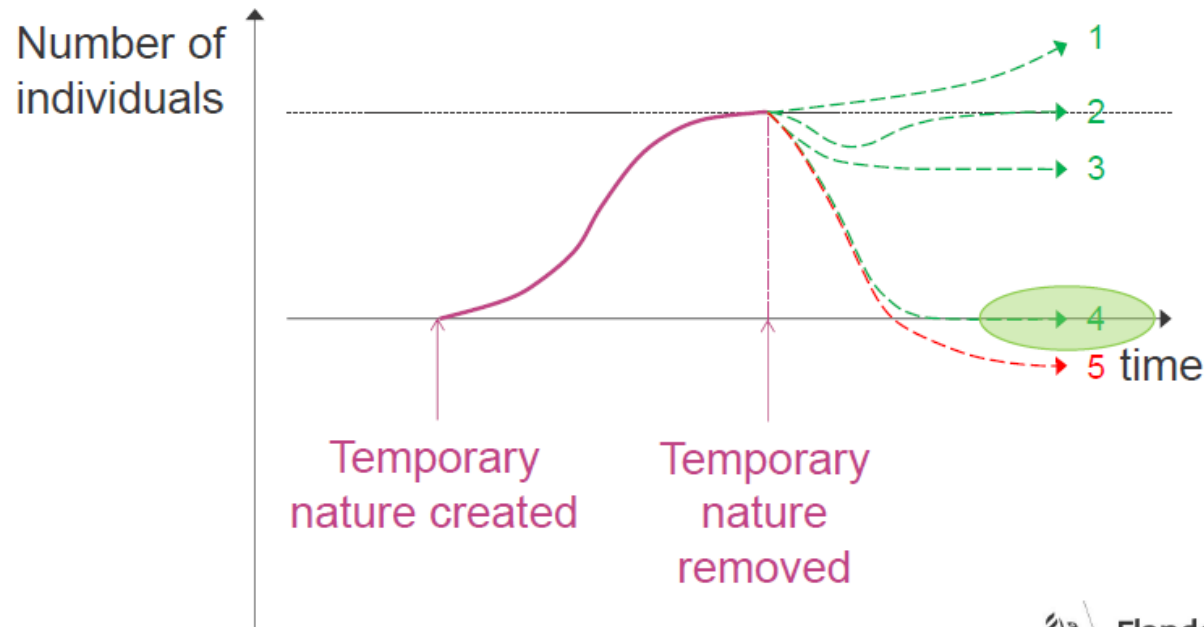
II. Hypotheses treated

2.2. Quarry operations, impacts on nature and DBM

- Extractive process initial phase
 - Destruction of Ex PN
 - Beginning of colonisation by Add TN
- Operation phase
 - Management and recovery measures for Add TN
 - Progressive disappearance of Ex PN along with extractive front
 - Restoration Add PN (PN offsets)
- Rehabilitation phase or conversion after operation
 - Add PN development and/or restoration
 - Decline of Ex/Add TN if no specific dynamic management is carried out anymore

II. Hypotheses treated

Potential effects of temporary nature on a population (*Linnartz 2006*)



II. Hypotheses treated

A quarry: from the operator perspective...



4. Crushing, screening



5. Rehabilitation



3. On-site transportation



1. Topsoil removal



2. Blasting



II. Hypotheses treated

From the biologist point of view ...



4. Invasives?



3. Temporary ponds



5. Rehabilitation



2. Screens



1. Cliffs



III. Legal analysis: main results

3.1. Legal context: the protection of species in EU Law

- Legal framework
 - Birds Directive: art. 5 and 9 (2009/147/EC)
 - Habitats Directive: art. 12, 13 and 16; 22 (92/43/EEC)
 - National species protection law (may have a wider scope)
- Other legal issues:
 - Natura 2000 (art. 6.3 HD) ?
 - Environmental Liability (Dir 2004/35/EC) ?
 - Invasive alien species (Reg 1143/2014) ?

III. Legal analysis: main results

- Material scope
 - Animal species:
 - all birds : : eagle owl, sand martins, little ringed plover,...
 - other species : annex IVa HD + national lists): crested newts, natterjack toad, European smooth snake,...
 - Plants (annex IVb HD): (?)
 - All species protected at national/regional level(s): orchids, insects, amphibians, reptiles,...
- Spatial and temporal scope

III. Legal analysis: main results

- Prohibitions likely to interact with quarry operations and DBM
 - Principle: prohibition of any kind of (significant) *harm* caused by deliberate activities
 - Covers any « deliberate » activity, including authorized ongoing activities; not natural processes (plant succession,...)
 - Specific prohibitions applicable in quarries
 - Destruction of specimens and their eggs
 - Deliberate disturbance of species (not specimens)
 - Deterioration or destruction of breeding sites and resting places
 - Introducing non native species and reintroducing native species
 - Any broader prohibition from national law

Protection of species

Article 12

1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV

(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.

III. Legal analysis: main results

- Leeway for economic activity in presence of protected species: the derogation clause (art. 9 BD; 16 HD)
 - Only for limited reasons
 - provided there is no satisfactory alternative
 - And there is no detrimental effect on the conservation status of the species

1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

- (a) in the interest of protecting wild fauna and flora and conserving natural habitats;
- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

III. Legal analysis: main results

3.2. Margin within the context of protection duties

- Limited leeway within the art. 5 BD/12-13 HD prohibitions
 - Destruction of specimens/eggs inevitable in most hypotheses (Ex/Add P/TN)
 - More flexibility for excluding DBM measures from « disturbance » or « deterioration » concepts for pioneer species (Add TN);
 - Much less for quarry operations that will qualify inevitably as disturbance of species /destruction of breeding site / resting place (Ex PN)

III. Legal analysis: main results

- Impossibility to take into account offsetting measures ?

CJEU *Briels ; Orleans; Centrale de Moorbург*

- « Deliberate » character of quarry operation demonstrated when the presence of species is known or should be known by the operator (e.g. through EIA)

→ A **derogation** is indispensable in some hypotheses

III. Legal analysis: main results

3.2. Margin within the context of derogation clause

- Real leeway within the art. 9 BD/16 HD derogation clause
 - Scenario 1: impacting Add TN → anticipated single act derogation
 - Reason: protection of fauna/flora and conserving natural habitats; reintroduction /re-population (art. 5, a, 4th indent ; b, BD; art. 16.1, a, and d, HD)
 - Conditions:
 - no detrimental effect on baseline;
 - need to prevent avoidable damage (less detrimental alternatives)

III. Legal analysis: main results

- Scenario 2: impacting Add PN (and, eventually, Add TN) → anticipated population-based management plan
 - Reason:
 - protection of fauna/flora and conserving natural habitats; reintroduction /re-population (art. 5, a, 4th indent ; b, BD; art. 16.1, a, and d, HD) (if **net gain**)
 - Taking of certain specimens in limited numbers, under strictly supervised conditions and on a selective basis (art. 5, c BD; art. 16.1, e, HD)(if no net gain)
 - Conditions:
 - no detrimental effect on baseline (Ex PN);
 - need to prevent avoidable damage (less detrimental alternatives)

III. Legal analysis: main results

- Scenario 3: impacting Ex PN (and, eventually, Ex TN) → anticipated population-based management plan
 - Reason:
 - Imperative reasons of overriding public interest (NOT in BD; art. 16.1, c HD) (if no net gain): **quarries don't always qualify for this reason** (but see CJEU Alto Sil)
 - Taking of certain specimens in limited numbers, under strictly supervised conditions and on a selective basis (art. 5, c BD; art. 16.1, e, HD)(if no net gain)
 - **Scenario 2 if significant net gains ?**
 - Conditions:
 - Need to demonstrate no net detrimental effect on baseline (Ex PN) through biodiversity offsets (compensatory measures)
 - need to demonstrate the absence of alternatives at the permit application stage → **more challenging**

III. Legal analysis: main results

Synthesis table: EU Law

	Destruct° de spécimens nids, œufs d'espèces animales Destruction, déracinement/ translocation de plantes	Perturbations d'espèces animales	Destruct° ou détérior° des sites de repr./aires de repos d'espèces animales	Réintroduc° / repeuplement <i>in situ</i>	Prise en compte des mesures de compensat° pour exclure la déroq° (sauf destruction de spécimens → tjs requise)	Motif(s) à invoquer en cas d'atteinte soumise à dérrogation	Valorisation du « surplus » restauré/ recréé pour l'octroi de la déroq°	Probabilité de refus de dérrogation	Forme de la dérrogation
NPEX (1a)	X	X	X	/	Non sauf si effectives (très peu probable sauf banking)	RIIPM si circonst. exceptionnelles et sauf oiseaux ; et/ou protection faune-flore (si gains >> pertes)	oui si NPAdd recruee/ restaurée	Fort à faible (selon la compensabilité ; parfois in- compensable → refus)	Dérrogation distincte ?
NTEx (1b)	X	(X)	(X)	/	Non sauf si totalement effectives (envisageable car rapide)	RIIPM si circonst. exceptionnelles et sauf oiseaux et/ou protection faune- flore si gains >> pertes ; et/ou petites quantités	Oui si NTAdd recruee/restaurée	Très faible à nul	Plan d'action valant dérogation
NPAdd (2a)	X	(X)	(X)	(X) (si capture de spéc. sauvages) + consult. public si ré-introduction	Non sauf si totalement effectives (très peu probable sauf banking)	Protection faune – flore ; et/ou petites quantités ; repeuplement si envisagé	Oui	Faible (selon la compensabilité ; valorisation du surplus créé ou restauré)	Plan d'action valant dérogation
NTAdd (2b)	X	(X)	(X)	(X) (si capture de spéc. sauvages) + consult. public si ré-introduction	Non sauf si totalement effectives (envisageable car rapide)	Protection faune – flore et/ou petites quantités ; repeuplement si envisagé	Oui	Très faible à nul (valorisation du surplus créé ou restauré)	Plan d'action valant dérogation

III. Legal analysis: main results

Synthesis table: Walloon Law

	Destruct° de spécimens nids, œufs d'espèces animales Destruction, déracinement / translocation de plantes	Perturbations d'espèces animales	Destruct° ou détérior° des sites de repr./aires de repos d'espèces animales	Réintroduc° / repeuplement <i>in situ</i>	Prise en compte des mesures de compensat° pour exclure la dérogo (sauf destruction de spécimens → tjs requise)	Motif(s) à invoquer en cas d'atteinte soumise à dérogation	Impact d'une suppression déf. de la population du site sur l'EC de l'esp.	Valorisation du « surplus » restauré/ recréé pour l'octroi de la dérogo	Probabilité de refus de dérogation
NPEX (1a)	Esp. ann. II,b/VI,b : X Esp. ann. III : X Esp. ann. VII : X	Esp. ann. II, b : X Esp. ann. III : X	Esp. ann. II, b : X Esp. ann. III (sites de reprod° mammifères uniquement) : X	Réintroduction interdite dans l'attente d'un AGW d'exécution Renforcement de populations : X	? (pas de jurisprudence spécifique, mais influence Briels/Orleans probable)	RIIPM; protection faune-flore si gains >> pertes	- - → nécessité d'une compensation stricte ; pas tjs possible !	oui si NPAdd recréée/ restaurée	Fort à faible (selon la compensabilité ; parfois incompensable → refus)
NTEX (1b)	Esp. ann. II,b/VI,b : X Esp. ann. III : X Esp. ann. VII : X	Esp. ann. II, b : (X) Esp. ann. III : (X)	Esp. ann. II, b : (X) Esp. ann. III (sites de reprod° mammifères uniquement) : (X)	Réintroduction interdite dans l'attente d'un AGW d'exécution Renforcement de populations : X	? (pas de jurisprudence spécifique, mais influence Briels/Orleans probable)	RIIPM; protection faune-flore si gains >> pertes ; repeuplement si envisagé	- / + → nécessité d'une compensation	Oui si NTAdd recréée/restaurée	Très faible à nul

III. Legal analysis: main results

Synthesis table: EU Law

NPAdd (2a)	Esp. ann. II, b/VI, b : X Esp. ann. III : X Esp. ann. VII : X	Esp. ann. II, b : X Esp. ann. III : X	Esp. ann. II, b : X Esp. ann. III (sites de reprod° mammifères uniquement) : X	Réintroduc° interdite dans l'attente d'un AGW d'exécution Renforcement de populations : X	? (pas de jurisprudence spécifique, mais influence Briels/Orleans probable)	Protection faune – flore si gains >> pertes ; repeuplement si envisagé	0 ou +	Oui	Faible (selon la compensabilité ; valorisation du surplus créé ou restauré)
NTAdd (2b)	Esp. ann. II, b/VI, b : X Esp. ann. III : X Esp. ann. VII : X	Esp. ann. II, b : (X) Esp. ann. III : (X)	Esp. ann. II, b : (X) Esp. ann. III (sites de reprod° mammifères uniquement) : (X)	Réintroduction interdite dans l'attente d'un AGW d'exécution Renforcement de populations : X	? (pas de jurisprudence spécifique, mais influence Briels/Orleans probable)	Protection faune – flore si gains >> pertes ; repeuplement si envisagé	0 ou +	Oui	Très faible à nul (valorisation du surplus créé ou restauré)

X : nécessité d'une dérogation dans tous les cas

(X) : nécessité d'une dérogation dans certains cas

- Possibility of conducting DBM projects under the current species protection legal framework, under strict conditions: low risk except for Ex PN
- Interference with the strict protection of species unavoidable
- Difficulty of taking into account compensatory measures to circumvent the derogation clause
- Securing legal certainty needs the granting of an individual derogation

- Conditions :
 - Reasons:
 - If net gain: protection of fauna and flora, conservation of natural habitats; reintroduction / repopulation (Add NT/NP)
 - If no net gain: IROPI ; Taking of certain specimens in limited numbers, under strictly supervised conditions and on a selective basis (Ex NP/NT)
 - Need to demonstrate the absence of less detrimental alternatives
 - Need to offset any net loss

Thank you for your attention

