

‘Overriding Public Interest’ to speed up permitting procedures for RES and grids?

A legal perspective on the application of ‘Imperative Reasons of Overriding Public Interest’ (IROPI) – and related risks under the EU Nature Directives

RGI Webinar

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Outline

- Background
- EU Nature Directives
- IROPI under Natura 2000 rules
- IROPI under species protection rules
- Approach NL: energy transition in the North Sea
- Conclusions

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN
ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE
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REPowerEU: Joint European Action for more affordable, secure and sustainable energy

REPowerEU communication

Enabling faster permitting:

“The Commission calls on Member States to ensure that the planning, construction and operation of plants for the production of energy from renewable sources, their connection to the grid and the related grid itself are considered as being in the **overriding public interest and in the interest of public safety** and qualify for the most favourable procedure available in their planning and permitting procedures.”

Questions

- What is the significance of qualifying RES and electricity grids as imperative reasons of overriding public interest (IROPI) and in the interest of public safety under the EU Nature Directives?
- Does it speed up permit procedures?
- Is it a way to sidestep planning and assessment requirements?

EU Nature Directives

- Birds Directive (BD): conservation of all species of naturally occurring wild birds and their habitats through area protection and species protection
- Habitats Directive (HD): maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest through area protection (Natura 2000) and species protection
- New nature restoration law: complementary to BD and HD, awaiting proposal
EC

IROPI in EU Habitats Directive

- Natura 2000 rules (art. 6 HD): IROPI is part of the exception (derogation) that can be made for plans and projects that have negative effects on species and/or habitats in Natura 2000-sites.
- Species protection rules (articles 12-16 HD): IROPI is part of the exception (derogation) that can be made from the prohibitions that apply to individuals of a protected species.
- NB: Birds Directive does not refer to IROPI, but art. 6 HD also applies to Natura 2000 sites designated for birds (SPAs).

Natura 2000: art. 6(3) HD

- All plans and projects: broadly interpreted, covers also all renewable energy and grid initiatives in and around Natura 2000-sites.
- Likely to have significant effects on Natura 2000-sites? Appropriate assessment (AA) required.
- Mitigation measures to avoid or reduce impacts or prevent them from happening can be taken into account in AA.
- Authorization (permits) only if AA establishes that plan or project will not have significant effects: precautionary principle applicable.

ANNEX II

Consideration of plans and projects affecting Natura 2000 sites

Screening

Is the Plan or Project (PP) directly connected with, or necessary to, the management of the site for nature conservation purposes?

NO

YES

Is the PP likely to have significant effects on the site?

YES

NO

Assess implications in view of the site's conservation objectives

Assess cumulative and in-combination effects with other plans and/or projects

Can it be concluded that the PP will not adversely affect the integrity of the site?

YES

Authorisation may be granted

NO

Can the negative impacts be removed e.g. through mitigation measures?

YES

NO

Authorisation must **not** be granted

Redesign the plan or project

Appropriate Assessment

Natura 2000: art. 6(4) HD

- Exception that can only be used after completion of AA procedure of art. 6(3) HD that results in negative assessment.
- Optional, not automatically applied (up to competent national authorities).
- Interpreted strictly
- Cumulative requirements:
 1. No alternative solutions
 2. **Imperative reasons of overriding public interest (IROPI)**
 3. Compensatory measures

Natura 2000: IROPI under art. 6(4) HD

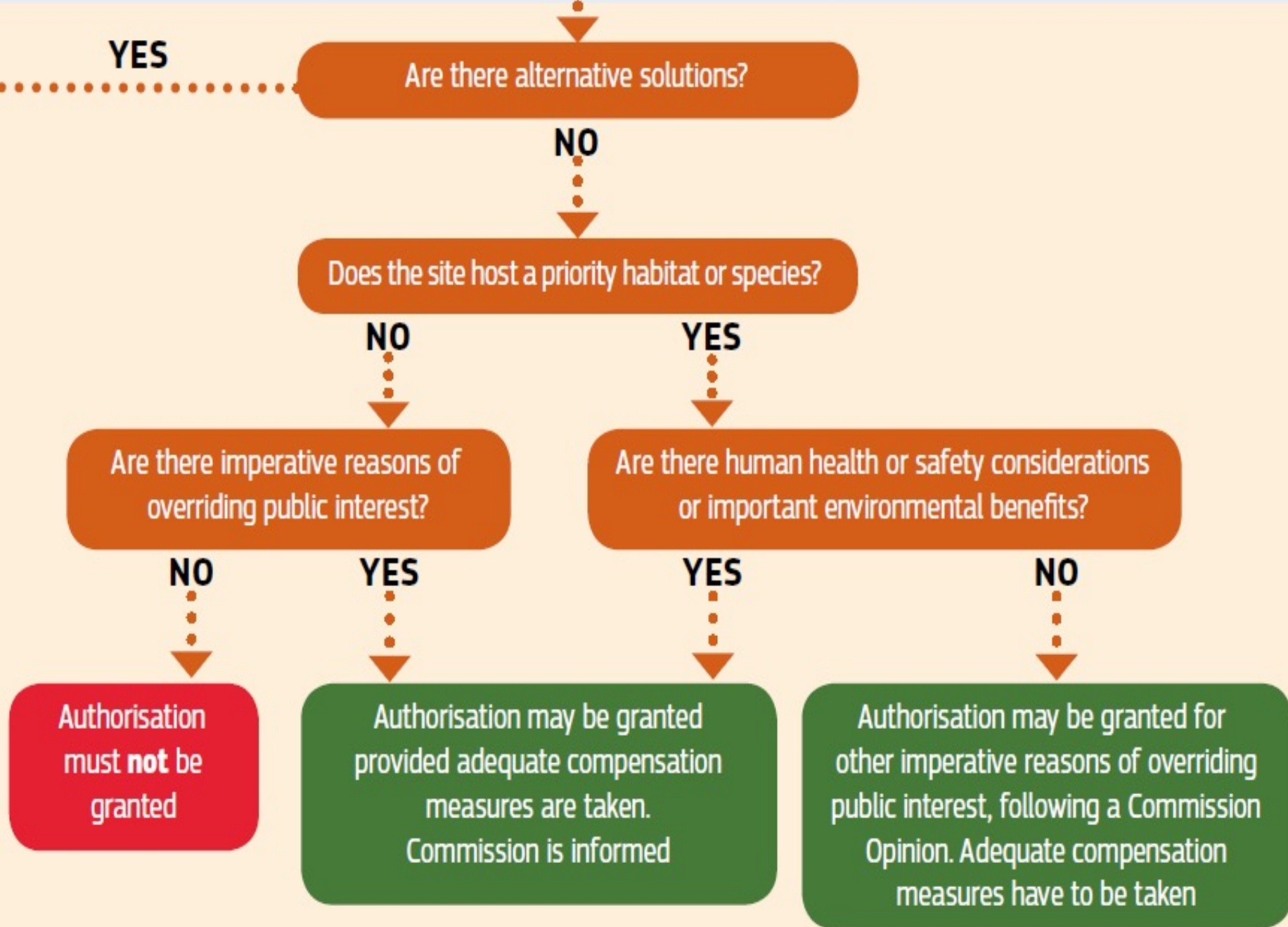
- Term used, but not defined in the Directive
- Interpretation by CJEU and national courts
- CJEU rulings (C-182/10, C-43/10) establish that:
 - Reasons must be ‘imperative’
 - Interest must be ‘public’
 - Interest must be ‘overriding’

Natura 2000: IROPI under art. 6(4) HD

Text states that:

- IROPI includes ‘those of a social or economic nature’
- For site hosting priority habitats and/or species: interest must concern human health and public safety or overriding beneficial consequences for the environment. If not, then EC opinion is to be requested.
- RES and grid projects may qualify as IROPI and may be regarded as in interest of public safety or overriding beneficial consequences for the environment, but this will depend on the project.
- EC opinion under art. 6(4) HD has never been requested for RES and grid projects.

Derogation: Article 6(4)



Source: Commission guidance on Article 6 of the Habitats Directive

Project Mainport Rotterdam

- AA: significant effects on Natura 2000 sites.
- Derogation granted under art. 6(4) HD:
 - No alternatives: different project approaches and different land reclamation designs examined and rejected
 - IROPI: socio-economic interests
 - Compensatory measures: creation of coastal habitat, large marine reserve (closed for bottom-trawling fisheries)
- Notification to EC in 2002, positive opinion in 2003
- Project was completed, but compensatory measures were largely ineffective (no improvement of habitats in marine reserve) > currently the subject of a national court procedure.

Species protection

- Prohibitions that apply to individuals of strictly protected species (art. 12 HD):
 - a) all forms of deliberate capture or killing;
 - b) deliberate disturbance, 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.
- Similar prohibitions apply to all wild bird species (art. 5 BD)

IROPI under species protection

Conditions for exception (derogation) under art. 16 HD:

1. No satisfactory alternative
2. Interest listed, which includes: “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”
3. Not detrimental to the maintenance of populations of the species involved at a favourable conservation status

Similar exception under art. 9 BD, but no reference to IROPI. Does include interest of “public health and safety”.



Utrecht Centre for Water,
Oceans and Sustainability Law

Renewable energy projects and species protection

A comparison into the application of the EU species protection regulation with respect to renewable energy projects in the Netherlands, United Kingdom, Belgium, Denmark and Germany



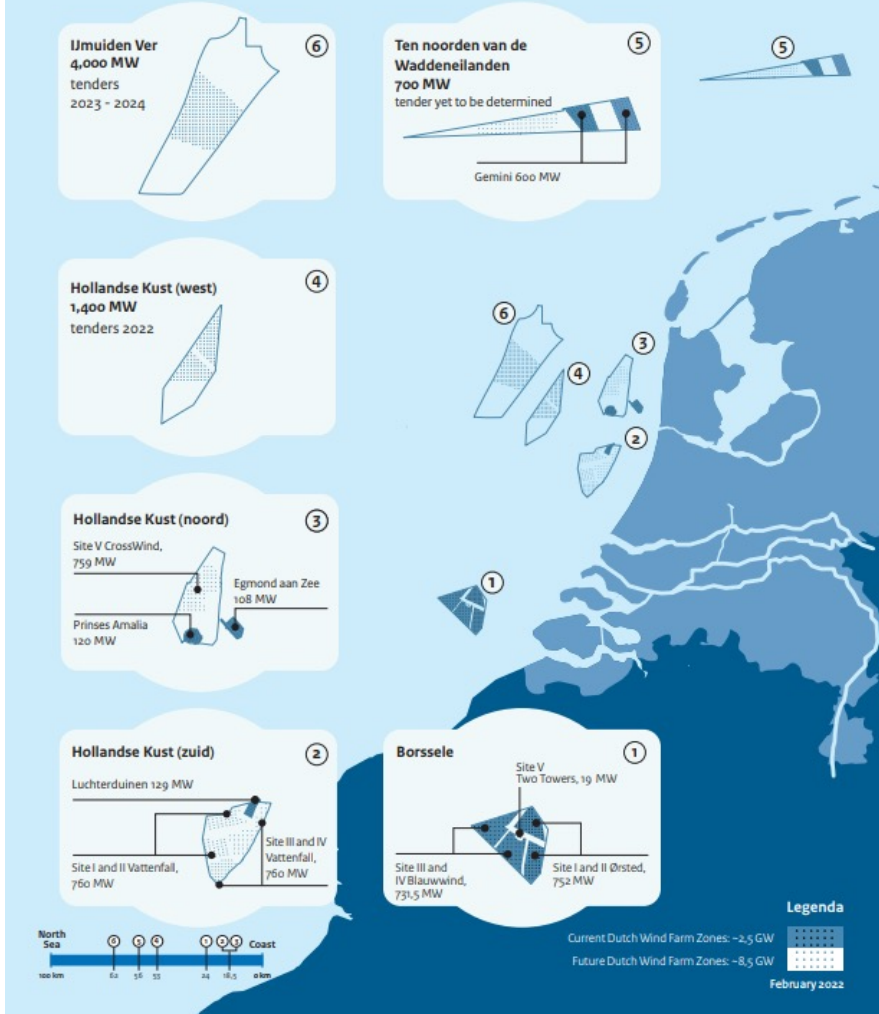
Report commissioned by the ministries of Economic Affairs and Climate and Agriculture,
Nature and Food Quality

Chris Backes and Sanne Akerboom (eds.), Julia Auer, Jana Bovet, Elissa Cavallin, An Cliquet,
Eva-Charlotte Holst, Wolfgang Köck, Donald McGillivray, Hendrik Schoukens, Helle Tegner
Anker
28 May 2018

Application species protection to renewable energy projects

- Different approaches in Member States
- Some consider that killing of birds/bats by wind farms and other renewables is not deliberate, but incidental and is therefore not prohibited. Systematic monitoring of incidental killing and mitigation measures to minimize impact.
- NL follows stricter interpretation: deliberate also covers “conditional intent” and authorities issue derogations for most wind farms.
- EC critical about Dutch approach.

Dutch Offshore Wind Farm Zones

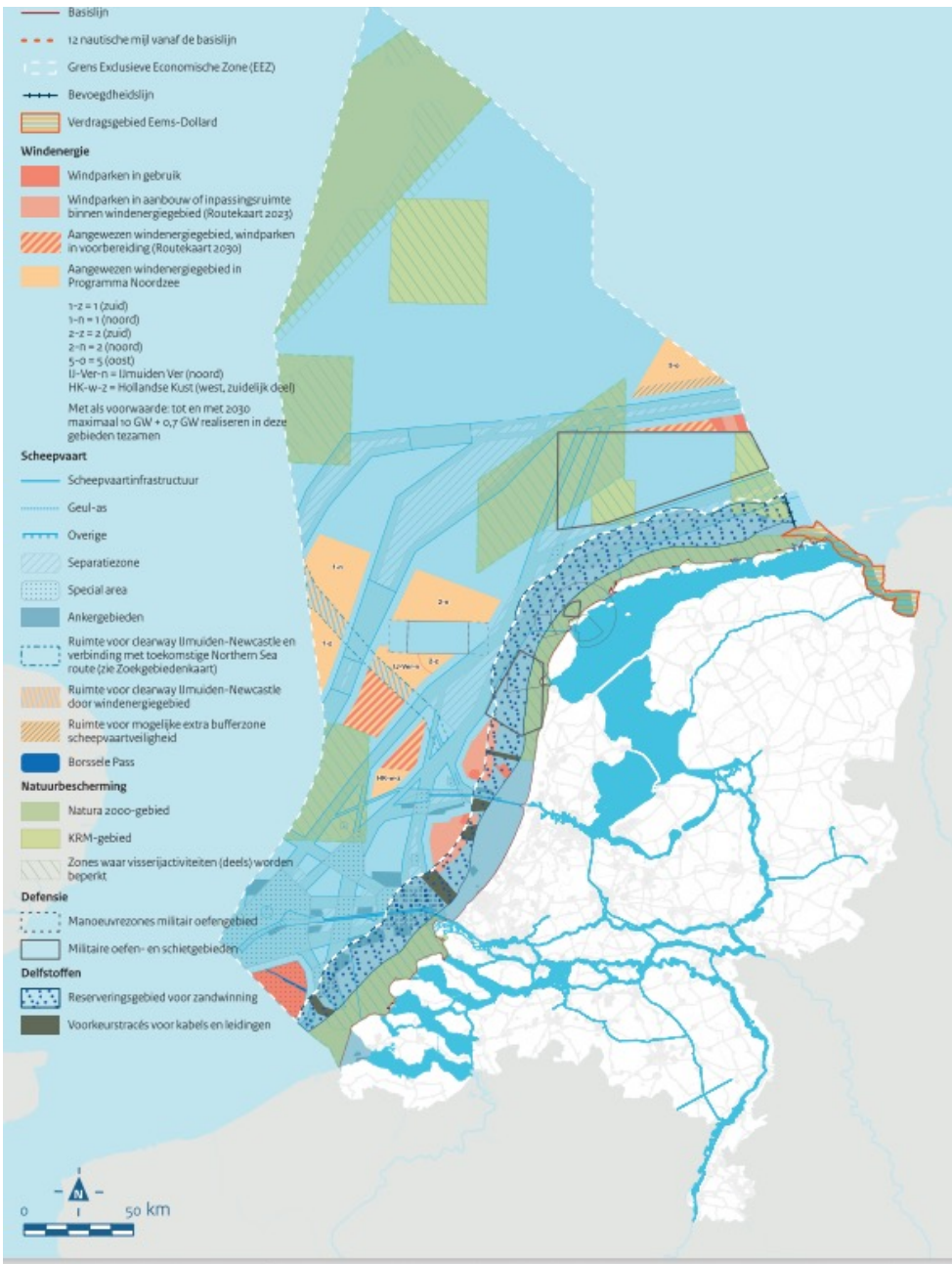


NL approach: energy transition in North Sea

- Offshore Wind Energy Act
- Legal basis for wind farm site decisions that also contain Natura 2000 permits and species derogations.
- Each site decision addresses conditions of BD and HD: based on AA and Framework for assessing ecological and cumulative effects (KEC).
- IROPI (HD) and public health and safety (BD) invoked for species derogations. No IROPI for Natura 2000 (AA establishes that there are no significant effects).
- Application of mitigation measures required.
- Wind farm site decisions take about two years to become final.

NL maritime spatial planning

- North Sea Programme 2022-2027
- Existing and new offshore wind farm zones for period up to 2030 (red and orange).
- No offshore wind farms in protected areas (green).
- The selection process of offshore wind farm zones is based on an integral approach, which includes ecological considerations.
- Adaptive process.



The North Sea Agreement



North Sea agreement 2020

- National agenda for North Sea policy up to 2030
- Facilitates energy, food and nature transitions
- Aims to avoid conflicts between stakeholders and promote cooperative approaches
- Establishes permanent North Sea Consultation (key stakeholders)
- Comprehensive research/monitoring programme
- Transition Fund (200 million euro)

Conclusions

- Qualifying RES and electricity grids as IROPI under the EU Nature Directives is one of the conditions to make an exception to the area and species protection rules, but that still requires that all other conditions are also met.
- Application of IROPI to RES and electricity grids under the EU Nature Directives will not speed up the permitting process, because the procedure for making exceptions is rigorous and time-consuming.
- It is not a way to sidestep the planning and assessment requirements under the EU Nature Directives (nor other EU legislation).
- The preferred option is to prevent the need to use these exceptions in the first place by following a structured spatial planning process.

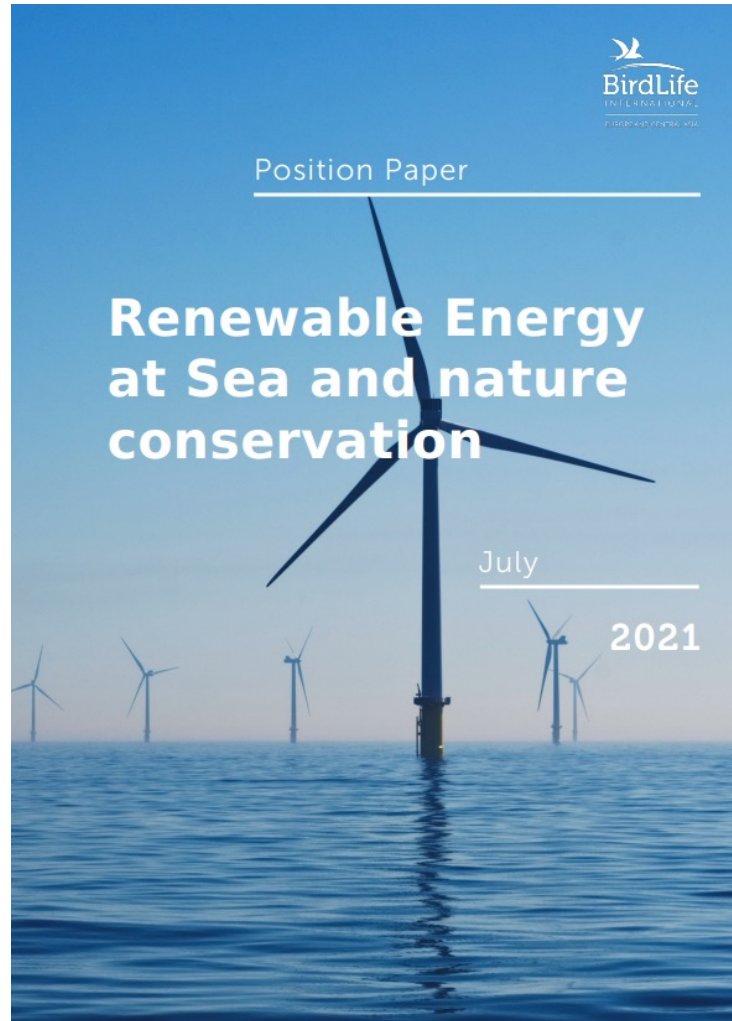
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REPowerEU: Joint European Action for more affordable, secure and sustainable energy

REPowerEU communication

- Member States should **swiftly map, assess and ensure suitable land and sea areas that are available for renewable energy projects.**
- The Commission will propose in the upcoming nature restoration law proposal that Member States should, when preparing their national plans to meet restoration targets, take into account limited and clearly defined areas as particularly suitable (**‘go-to’ areas**), **while avoiding as much as possible environmentally valuable areas.**
- Member States can use the **review of their plans under the Maritime Spatial Planning Directive** to further the deployment of renewable energy projects.



Want to know more?

- EC guidance documents:
 - [Guidance on wind energy developments and EU nature legislation](#)
 - [Guidance on the management of Natura 2000 sites](#)
 - [Guidance on species protection](#)