

RESEARCH ARTICLE



# A case for granting legal personality to the Dutch part of the Wadden Sea

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## ABSTRACT

This article proposes that the Dutch Wadden Sea, a tidal wetland, can be protected by recognizing that it can own itself, in keeping with the emerging international trend of granting rights and legal personality to important ecosystems. Under Dutch law, legal personality could be granted to the Wadden Sea in the form of a 'natureship' (*natuurschap*), a legal form that perfectly fits into the Dutch legal system. The legal objective of the Wadden Sea Natureship could be to focus on maintaining the ecosystem in a healthy condition.

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## Introduction

The Wadden Sea is the largest unbroken system of intertidal sand and mud flats in the world, with natural processes undisturbed throughout most of the area. It is rich in biological diversity. This World Heritage area encompasses over a million hectares and covers a multitude of transitional zones between land, sea and freshwater environments (UNESCO.org, n.d.). The Wadden Sea is shared between the Netherlands, Germany and Denmark. Below, any reference to the Wadden Sea is to the Dutch part of it only (except where the contrary is evident).

The people of the Netherlands highly value the Wadden Sea. It was voted the most beautiful nature area of the Netherlands (UNESCO, 2016; NRC, 2016b). The Dutch Wadden Islands, the Wadden coast and the Wadden Sea draw millions of tourists every year, who enjoy its vastness and tremendous biodiversity. The Wadden island of Texel made it into the Lonely Planet 2016 Top 10 Europe Destinations List (NRC, 2016a; NL Times NL 2016) for its 'unspoiled dune landscapes', 'wildlife reserves', 'gloriously deserted white-sand beaches' and 'pine forests'. A natural area that is both beautiful and unique, the Wadden Sea is alive. Twice a day it breathes in and out, with high and low tide.

Dangers such as economic activity and splintered governance are threatening the area. In response, two of us were involved in a proposal made last year to grant legal personality to the Dutch Wadden Sea (Van de Venis, Lambooy, & Berkhuisen, 2018). The objective of that proposal was to maintain the ecosystem in a healthy condition for future generations.

The proposal was inspired by an emerging international trend of granting rights and legal personality to important ecosystems such as a river or mountainous area. 40

More recently, on 20 June 2019, the Dutch Government presented an initiative for rapid improvement of Wadden Sea management. It proposes the creation of a Wadden Sea Management Authority (Beheerautoriteit Waddenzee) to enhance cooperation and mutual consultation between various authorities involved with the Wadden Sea. As welcome as this first step may seem, it may not suffice to address the Wadden Sea's 45 challenges in the middle and longer term. On 12 July, the municipality council of Noardeast-Fryslân, which encompasses and borders a large part of the Wadden Sea, adopted a motion calling for more rights for the authority. The motion calls for the Wadden Sea to be granted its own and independent identity and place in the Dutch legal system, similar to a municipality or company (Omrop Fryslan, 12 July 2019). 50

With all this in mind, the following will be discussed below. First, we provide some more background on the Wadden Sea, its attractions, protection and challenges and highlight some international precedents on the granting of rights to nature. After that, we explore the concept of legal personality under Dutch law and make the case for a novel type of legal person – we call it a ‘natureship’ (*natuurschap*). This type may be well suited 55 for both the Wadden Sea and other Dutch natural areas deserving a similar level of protection and governance. In the concluding part of the article, we summarize our findings and discuss the opportunity and need for further research on this topic.

## World Heritage site, protection and challenges

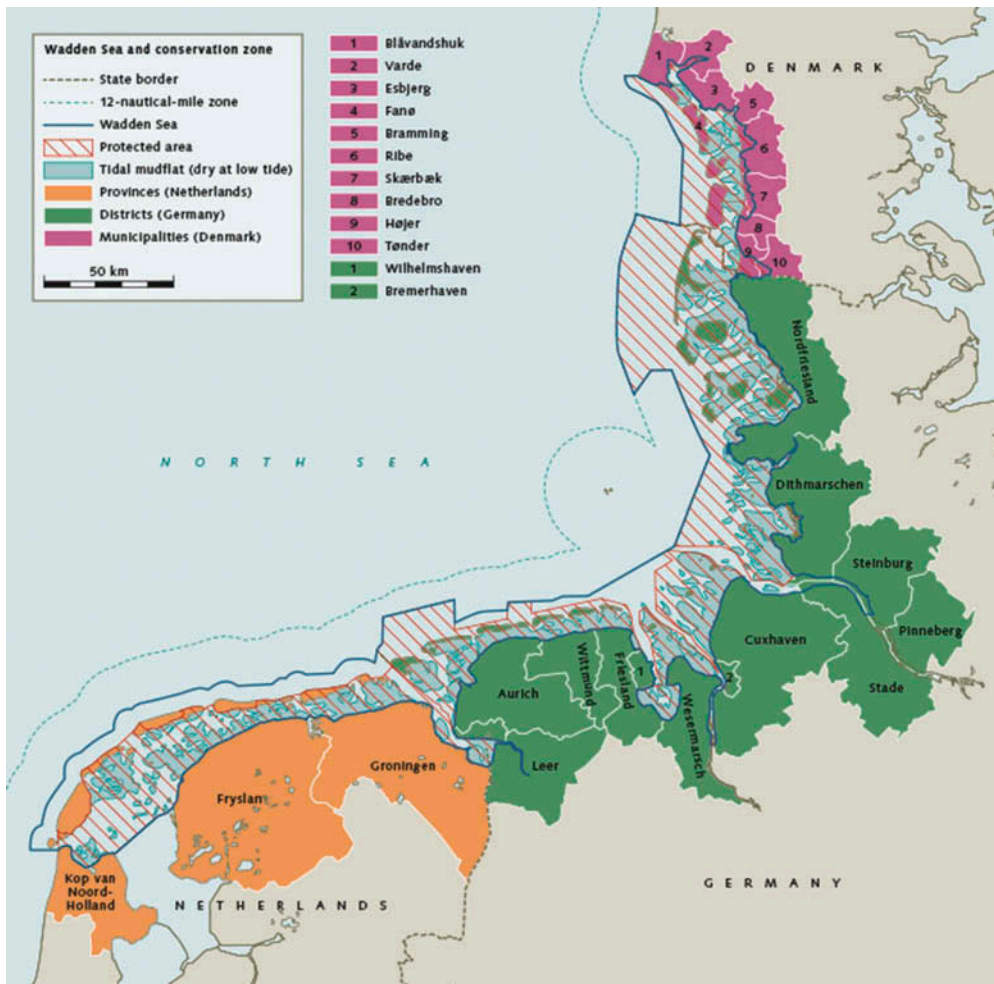
### *World Heritage site*

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The Wadden Sea is in the northern part of the Netherlands, between the coast of the Dutch mainland in the south and the range of low-lying Wadden Islands and the North Sea in the north (Figure 1). A 32-kilometre coastal dike built in the 1930s (the Afsluitdijk) separates the Wadden Sea from the IJsselmeer, a large lake inside the Dutch mainland (until the construction of the Afsluitdijk, the IJsselmeer was an inland sea). The Wadden 65 Sea stretches from the North Sea coastal city of Den Helder in the West to the German border in the East.

The word *wad* is Dutch for ‘mud flat’. The landscape of the Wadden Sea has been created for a great part by storm tides, overflowing and carrying away former peat land behind the coastal dunes. On the North Sea side, the Wadden Islands have dunes and wide sandy beaches, and towards the Wadden Sea they have a low, tidal coast. The impact of waves and currents carrying away sediment is slowly changing both land masses and coastlines. Many of the Wadden Islands offer popular seaside recreation facilities and activities. Mudflat hiking (walking on the sandy flats at low tide) has become popular in the Wadden Sea. It is also a popular region for pleasure boating. 70 75

As the Wadden Sea comprises wetlands and a large shallow body of water with extensive tidal mud flats divided by deep tidal trenches, the area is rich in biological diversity. It is the home of various species of seals, and very important for migratory birds. Hundreds of thousands of waders, ducks and geese use the area as a migration stopover or wintering site. It is also a rich habitat for gulls and terns. Up to 6.1 million 80 birds can be present at the same time in the Wadden Sea (including its German and



**Figure 1.** Map of the Wadden Sea in the Netherlands, Germany and Denmark.

Danish parts), and an average of 10–12 million pass through it each year. The area provides a habitat for up to 10,000 species (estimated) in the form of single-cell organisms, plants, fungi and animals.

In 1986, the entire Wadden Sea area was declared a biosphere reserve by UNESCO (n.d.). In 2009, the Dutch and German parts of the Wadden Sea were inscribed on UNESCO's World Heritage list, and the Danish part was added in June 2014. But this World Heritage designation has not changed anything in terms of protective measures.

### **Protective regulation**

Protection of the Wadden Sea's natural values is regulated by various laws, directives, treaties and agreements. They are all interconnected. Worldwide regulation includes the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, which replaced the earlier treaties of Oslo and Paris, and the 1971 Convention on Wetlands

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of International Importance especially as Waterfowl Habitat, which was signed in the Iranian city of Ramsar. 95

European regulation comes in the form of directives providing guidelines with specific ultimate goals which the member states must meet within an established number of years. The member states of the European Union (EU) make their own laws to accomplish these goals. EU directives relevant to the Wadden Sea are the EU Water Framework Directive (2000), the EU Habitats Directive (1992) and the Birds Directive. The Birds Directive dates back to 1979 and was amended in 2009 and renamed the EU Directive on the Conservation of Wild Birds (2009). The Habitats Directive and the Directive on the Conservation of Wild Birds form the basis for the EU's Natura 2000 ecological network. 100

The Netherlands, Germany and Denmark cooperate within the framework of the Trilateral Wadden Sea Cooperation. The cooperation is based on the Joint Declaration on the Protection of the Wadden Sea, first signed in 1982 and last amended by the Leeuwarden Declaration in 2018. The Netherlands, Germany and Denmark also entered into the 1990 Agreement on the Conservation of Seals in the Wadden Sea (under the aegis of the Convention on Migratory Species). They meet every four years to discuss the forming or upgrading of the protective policy for the Wadden Sea area. In 1997, the three countries signed the first trilateral Wadden Sea Plan (WSP). Their cooperation is supported by the Common Wadden Sea Secretariat. Its work includes initiating, coordinating and carrying out the activities of the Trilateral Cooperation. It also prepared the UNESCO World Heritage nomination. General management of the Wadden Sea is described in the WSP, which is the common policy and management plan for the protection and sustainable management of the Wadden Sea area, as well as the common management plan for the Wadden Sea World Heritage area. The most recent WSP dates back to 2010. It describes aims such as achieving the full scale of habitats, which belong to a natural and dynamic Wadden Sea, and targets concerning each of these habitats in terms of natural dynamics, absence of anthropogenic disturbance, and absence of pollution. The common policy outlined in the WSP is monitored by the Trilateral Monitoring and Assessment Programme. 105 110 115 120

On the Dutch national level, protection of the environmental integrity of the Wadden Sea mainly derives from the Wadden Sea zoning framework established by the national government and parliament (Dutch Ministry of Housing, Spatial Planning and the Environment, 2007). The main purpose of this regulatory framework is the sustainable protection and development of the Wadden Sea as a natural area and preservation of the unique open landscape. It also provides that there must be room for co-usage, which in practice means intensive human activity in the form of shipping (including ports), recreation, agriculture, military activity, mining (gas and salt), and fishing. Unlike the Danish and German parts of the Wadden Sea area, the Dutch part does not have national park status under local law. The western and northern dunes on the island of Texel, almost the entire island of Schiermonnikoog, and Lauwersmeer are national parks in the region. The Dutch Wadden Islands are outside the World Heritage area. 125 130

## Challenges 135

The recent initiative of the Dutch government to set up a Wadden Sea Management Authority was already mentioned. In acknowledgement of a widely held belief that a step

up in protection is urgently needed, the plan for a management authority was already announced when the current government was formed in 2017. The government has commissioned an advisory report from consultancy firm AT Osborne (2018) to help determine the exact features, duties and powers to be given to such a management authority. 140

Based on their desktop research, AT Osborne determined that since 1984, in terms of nature quality, preservation goals have been fulfilled, but improvement goals have not. The number of fish has sharply declined, and less migratory birds are being counted. Seal numbers, however, have increased. Other species have seen their numbers remain steady. The number one cause for the failure on nature improvement goals, according to AT Osborne, is policy decisions: the co-usage of the Wadden Sea for human activity in the form of fishing, gas and salt extraction, dredging, recreation, military activity, the extension of ports, passenger transport from and to the Wadden Islands, et cetera. Other causes, according to the report, are some major historic interventions (such as the building of the Afsluitdijk), external factors (such as climate change and rising sea levels), causes which are as yet insufficiently understood (due to the complex dynamics of the ecosystems), and flaws in the current nature management. 145 150

After this general analysis of the challenges facing the Wadden Sea, the AT Osborne report zooms in on the issue of current management. It asserts that: (1) the current management efforts are insufficient for reaching the nature improvement goals set out in the national framework regulation; (2) the current Wadden Sea governance in the Netherlands is complex, ineffective and inefficient (a multitude of competent authorities with splintered powers); and (3) the competent authorities lack the culture needed for sound cooperation. The problems in effective governance (with respect to the management issues at stake) particularly relate to nature, the report explains. There is clear central management from the Ministry of Infrastructure and Waterworks on water-related issues (water quality, water safety, shipping and accessibility). The Ministry of Agriculture, Nature and Food Quality offers clear central management with respect to the interests of the fishing industry. But with respect to protecting and improving nature, management duties and powers are splintered, with no clear central steering. At the highest level, it is mainly the responsibility of the two ministries just mentioned to jointly provide such central steering. 155 160 165

To address these management issues, AT Osborne proposes six alternative ways in which a management authority could be set up. And having considered these alternatives, the government has chosen a rather 'light' version. In it, the management authority will be a unit in which the most relevant authorities will cooperate. Within this unit, an integrated management plan is to be agreed (covering nature, water and fishing). The unit will have two directors, but no legal personality and no budget or powers of its own. It is intended that the management authority will start before the end of 2019 (Dutch Government, 2019). 170 175

As the new set-up will leave the current duties and powers of management unaffected, splintered as they are, one may doubt that it will be effective. We should also reiterate that this management authority is focused on management only. Therefore, it will not be concerned with wider policy making on issues of prioritizing nature protection and nature improvement or the co-usage of the Wadden Sea for fishing, shipping, mining, recreation, military activity, etc. 180

We expect that the newly proposed Wadden Sea Management Authority will offer only limited, short-term improvements, as the two Dutch ministries remain the ‘captains of the Wadden Sea ship’, implying that they will continue to prioritize the interests of their stakeholders, including the gas and salt extractors, dredging companies, the Dutch military, the recreation industry, the ports and shipping industry, and the fishery sector. As the AT Osborne report revealed, Wadden Sea governance has failed to protect nature values or to achieve ecological goals as defined in the various international treaties and declarations and Dutch policy goals. We therefore need to think about new solutions and approach the challenges in an innovative way. As the proposed management authority will be a unit without legal personality and without budget or powers of its own, it can be expected to serve only as a coordination tool for the two ministries. Our proposal – as developed below – has a further-reaching middle-and-long-term ambition, to safeguard the Wadden Sea and ensure a healthy ecosystem for future generations. Basically, we propose that the Wadden Sea be granted its own rights and the ability to act as a legal person with a well-defined purpose stipulated in its articles of incorporation (articles of association or bylaws), rather than being managed by two ministries and a management authority. The statutory purpose of the legal person will provide clear direction to the board of the legal entity when it has to make decisions regarding the Wadden Sea. Of course, it will have to take the concerns of the two ministries into account and cooperate with them, but ultimately it will make its own decisions and bring into the governance equation its own interests, in a legally enforceable way. The motivation for adding legal personhood to the current spectrum of governance is to give rights to a wetland in the interest of nature and future generations, as apparently such interests are not fully taken into account in the current set-up, nor will they be fully taken into account by introducing a management authority as now proposed by the Dutch government.

## The concept of granting rights to nature

### *Christopher Stone’s idea*

Christopher D. Stone’s seminal article, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects,’ was published back in 1972. Yet, it is perhaps more provocative and relevant today than it has ever been. It suggested that pieces of nature could be granted legal standing, and that the rising public concern for the protection of nature should lead to the recognition of rights of nature. The idea got some traction. The question ‘Is it time to give our river rights?’ was displayed on banners at a March 2018 community rally near the Margaret River in Australia. The article about this protest in the *Guardian* was headed ‘It’s Only Natural: The Push to Give Rivers, Mountains and Forests Legal Rights’ (Gleeson, 2018). This and more recent articles (*Guardian*, 2018) herald new and inspiring thinking on giving rights to nature.

Giving rights to groups of people, creatures or constructs that had no rights always sparks debate. Just think about women, children, people of colour, slaves and prisoners. Society and law progress, and such groups now have rights they were once deprived of. More recently, even our future generations obtained constitutional rights. According to Article 112 of the Norwegian Constitution, ‘Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and



diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.'

Non-human living beings, like animals, have been granted constitutional rights. For example, Paragraph 20a of the German Constitution states that animals, like humans, have the right to be respected by the state and to have their dignity protected (German Constitution, n.d.). Via the legal construct of 'legal personality', society has also given rights to non-living entities and bodies such as states, provinces, business corporations and charities. Legal personality is generally understood as the capability to be 'the bearer of legal rights and obligations' (Brölmann & Nijman, 2017, p. 16). New perspectives have opened the legal imagination to the possibility of giving legal personality to rivers and ecosystems for their protection.

The idea of nature, rivers, ecosystems or trees having rights or legal personality may be hard to grasp. Many will hesitate to extend rights to anything non-human. As Stone put it, 'There will be resistance to giving the thing "rights" until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it "rights" – which is almost inevitably going to sound inconceivable to a large group of people' (Stone, 1972, p. 3). Granting rights to a 'thing' goes with recognizing its intrinsic value, with respecting it as having value in its own right. Just like underage children, nature needs human representatives empowered to stand up for its rights when they are violated.

### ***Recognition from international organizations***

Today, no global treaty recognizes rights of nature, but the 2016 UN General Assembly Resolution, 'Sustainable Development: Harmony with Nature' (Resolution 71/266, 1 August 2016, A/71/266), affirms that

- Some countries do recognize the rights of nature, referring to New Zealand, the US (municipal ordinances), Ecuador and Bolivia (paras. 1, 44–46).
- A first step in recognizing the rights of nature took place in June 2012 at the UN Conference on Sustainable Development. Heads of state and government adopted the outcome document 'The Future We Want', which affirms that the Earth and its ecosystems are our home and that some countries recognize the rights of nature in the context of the promotion of sustainable development. They also agreed that, to achieve a just balance among the needs of present and future generations, it is necessary to promote harmony with nature (para. 2).
- Experts from around the world are making recommendations for Earth-centred law and policy to ensure a flourishing Earth, expanding on the current Sustainable Development Goal strategies. They say that a first step is to include the rights of nature in our governance systems, not by advancing its interests within the capital system as resources to be exploited, but by recognizing the fundamental legal rights of ecosystems and species to exist, thrive and regenerate. These rights are not in opposition to human rights: as part of nature, our rights are derived from those same rights. The human right to life is meaningless if the ecosystems that sustain us do not have the legal right to exist (paras. 35–37).

In 2012, the International Union for Conservation of Nature (IUCN) adopted a resolution on the rights of nature. This non-governmental organization with thousands of expert partners offering scientific, legal and other expertise has observer and consultative status at the United Nations. Its 2012 resolution referred to existing national frameworks which recognize the rights of nature. It also recommended that the 'Rights of Nature' be considered by the IUCN at 'all levels and in all areas of intervention'; that a 'strategy for dissemination, communication and advocacy concerning the Rights of Nature' be created; and that a Universal Declaration of the Rights of Nature be developed as a 'first step towards reconciliation between human beings and the Earth as the basis of our lives, as well as the foundations of a new civilizing pact'.

Another example of international recognition of the rights of nature, resembling the structure of the Universal Declaration of Human Rights, is the Universal Declaration of Rights of Mother Earth. It was adopted in 2010 at the World People's Conference on Climate Change and the Rights of Mother Earth, in Bolivia. It acknowledges the 'inherent rights of Mother Earth' to the natural world's 'life, liberty and security of person'. These include the rights of the Earth and of all beings to 'life and to exist', to 'integral health' and to 'identity and integrity'. The declaration added that those rights, like human rights, 'arise from the same source as existence'. It was endorsed by the Sami Parliament of Sweden on 25 May 2018 (Intercontinentalcry, 2018; Rights of Mother Earth, n.d.). It has been signed by almost one million people around the world (Rights of Mother Earth, n.d.).

### **Indigenous people**

Indigenous peoples have inspired the basic thinking and the realization of many of the practical examples and new laws, because they often regard themselves as part of nature. In their customs and culture, they have sets of unwritten rules that confirm the reciprocal relation with and responsibilities towards nature. An example of that is giving thanks to nature – to water, springs, lakes, maize, fruits, medicinal herbs, forest trees, animals (which serve as food and give their pelts for clothing), and to the winds, the sun and the moon (Constitution of the Iroquois Nations, para. 7 (Indigenouspeople.net, n.d.)) – before starting a council meeting.

As another example we refer to the 'seven generation' stewardship principle. It requires people to consider the impact on the seventh generation ahead in every deliberation. According to Oren R. Lyons Jr., chief of the Onondaga Nation, 'We are looking ahead, as is one of the first mandates given us as chiefs, to make sure and to make every decision that we make relate to the welfare and well-being of the seventh generation to come... But you must consider in the process and in choosing the direction of your life: how will this affect the seventh generation?' (qtd. in Vecsey & Venables, 1980, pp. 173–174; Erikson & Vecsey, 1980).

For many indigenous people it is a non-indigenous concept to have rights in relation to nature (such as property rights on land), but also to give rights to nature. They are, however, increasingly adapting to the non-indigenous legal systems they are subject to. An example is the Ponca tribe in Oklahoma. In October 2017 this tribe, which had been severely affected by pollution caused by fracking, introduced 'rights of nature' into tribal law. Casey Camp Horinek, an elder and tribal councilwoman of the tribe, commented: 'To restore Mother Earth – her nature's balance, the world needs to shift from a philosophy of



control and dominion over nature, and its legal system of property rights regimes, to a relationship of understanding and respect for the Natural Laws and love for the beauty of the creative female energy of Mother Earth' (Rights of Nature Ethics Tribunal, 2014). 315

In the case of the Wadden Sea, the initiative for legal action to give the sea rights came from the people and representatives of the Noardeast-Fryslân Municipality. This community may be considered indigenous, when defined as 'naturally existing in a place or country rather than arriving from another place'. 320

## Granting rights to nature in some specified cases

### South America: Ecuador, Bolivia and Colombia

Ecuador was the first country to add rights of nature to its constitution. Since 2008, its constitution proclaims nature 'to exist, persist, maintain and regenerate its vital cycles' (Constitución Política de la República del Ecuador, n.d.). Nature is given its rights by analogy to people (art. 71). 325

Bolivia followed suit in 2010. In the Act of the Rights of Mother Earth, it imputed certain rights to Mother Earth, ensuring protection for her and her life-systems. The act defines nature as a legal entity that 'takes on the character of collective public interest' (Ley de Derechos de la Madre Tierra, ch. II, art. 5, Dec. 2010). 330

An important judgement in this field came from the Supreme Court of Colombia on 6 April 2018 (STC4360-2018). In this case, a group of 25 young plaintiffs, some as young as seven years old, charged that the government's failure to stop the destruction of the Amazon jeopardized their futures and violated their constitutional rights to a healthy environment, life, food and water. In its ruling, the court confirmed the importance of protecting the rights of future generations and recognized Colombia's Amazon area as an 'entity subject of rights', with the same legal rights as a human being (Reuters, 2018). 335

### India

In India, there is no written law on the rights of nature. But that did not stop the High Court of the state of Uttarakhand from ruling that the rivers Yamuna and Ganga (Ganges), the glaciers that provide the water, and the adjoining ecosystems have the same rights as humans (Judgements India, 2017). In both cases the court invoked *parens patriae* (Hayden, 2014), the principle that authority carries with it the responsibility to protect citizens unable to protect themselves. In its judgement of 20 March 2017, the court wrote: 340

Accordingly, while exercising the *parens patrie* jurisdiction, the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and [river] Yamuna. 350

A second judgement, of 30 March 2017, considered that the Ganga originates from the Gangotri Glacier and the Yamuna from the Yamunotri Glacier. Both glaciers are receding at an alarming rate due to pollution and climate change. The court argued that urgent remedial steps were required to stop the recession of these glaciers. It also stated that the

Ganga and Yamuna are revered by Hindus as deities and that glacial ice is the largest reservoir of freshwater on earth. Furthermore, the court referred to many international commitments to safeguard the earth for future generations, including the Stockholm Declaration of the UN Conference on the Human Environment (5–16 June 1972), Principle 2 of which stipulates: ‘The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.’

Hence, the court expanded the legal personhood of the two rivers to the glaciers and all other related ecosystems: ‘the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls’ in the Himalayan state are legal persons (‘legal entity/legal person/juristic person/juridical person/moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/legal rights’) (Judgements India, 2017; Writ Petition (PIL) No. 140 of 2015, p. 64). The granting of legal rights entails that polluting or damaging the rivers is just as bad from a legal point of view as harming a person. And as legal entities, the rivers themselves could be party to legal disputes. Similar wordings were used in another order from the same High Court (Judgements India, 2017; Writ Petition (PIL) No. 126 of 2014, para. 19).

However, after an appeal by the State of Uttarakhand to the Indian Supreme Court, the latter subsequently ruled in July 2017 that, no matter how important these rivers are, it is not up to judges to designate them as legal persons (BBC, 2017). The Supreme Court then issued a stay of the High Court’s order. No final Supreme Court judgement in the appeal procedure has been issued yet.

Meanwhile, in July 2018, in another case, the Uttarakhand High Court accorded the status of legal personhood to animals as well: ‘The Corporations, Hindu idols, holy scriptures, rivers have been declared legal entities and thus, in order to protect and promote greater welfare of animals including avian and aquatic, animals are required to be conferred with the status of legal entity/legal person’ (Judgements India, 2018; Writ Petition (PIL) No. 43 of 2014, para. 99, p. 50).

### ***New Zealand***

In New Zealand, three natural areas have been granted legal personality. Most recently, in December 2017, this status was given to the volcanic Mount Taranaki (also known as Mount Egmont). It had already been granted to the Whanganui River (earlier in 2017) and to Te Urewera National Park (in 2014). All three cases originate from settlements of disputes between the Crown and the Māori (Boyd, 2017). The acknowledgement of legal rights for nature served as a mechanism for balancing conflicting interests (Solimeo, 2018). The Whanganui River Claim Settlement Act marked the end of a long conflict between the government and the indigenous people of Whanganui Iwi over the ownership of the river. Based on their customary laws, they consider themselves an integral part of the river biotope (Solimeo, 2018, p. 19).

Although the Crown and Māori had different legal starting points, the resolution of these disputes – attributing legal personality to parts of nature – fits both very well. The

Western legal system focuses on rights and responsibilities. That is essential to healthy relationships between people. For Māori that is true too, but for them there is more. There must be healthy relationships between humans and nature as well. As Boyd (2017) observed, this notion of binding responsibilities to the natural world could turn centuries of human exploitation of ‘natural resources’ on its head. It requires us to place nature, rather than only humans, at the heart of sustainability. 400

The Whanganui Act recognizes ‘an indivisible and living whole entity, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements’ (art. 12). The river ‘is a legal person and has all the rights, powers, duties, and liabilities of a legal person’ (art. 14). But nothing in the act limits any existing private property rights in the river, unless provided otherwise (art. 16). 405

Humans will have to act and speak on behalf of the river, promote and protect its health and well-being, and claim its rights or stand up against violations of its rights. Hence, the river is represented through the office of Te Pou Tupua, the ‘human face’ of the river (art. 18.2). The office is two people, one representative of the indigenous community (directly nominated by the Whanganui Iwi) and one of the government (following nomination by the Crown), to represent the River’s interests (art. 20). As a result, this river is the first on Earth that can go to court if its interests are violated, just like a qualifying public body, a private company or a charitable foundation can in most countries, including the Netherlands. 410 415

## Legal personality under Dutch law

### *Legal rights versus legal personality*

In response to the observation that many people find it difficult to consider granting rights to non-humans (mentioned earlier), we point out that most corporate law systems in the world recognize legal persons in the form of companies, corporations, limited liability companies, foundations, et cetera. They too are non-human but are usually governed and represented by human beings. Corporations can manage themselves, and their legal personality allows them to own assets and have bank accounts, to enter into contracts, to file lawsuits, to appoint directors and other legal representatives, and to hire employees. Corporations must also file tax returns and pay taxes, obey the law, and fulfil their contractual obligations. 420 425

Under Dutch law, humans and legal persons are not the only entities recognized by law as holders of rights and obligations. For example, although private partnerships do not have legal personality, in many jurisdictions, including England and the Netherlands, they are acknowledged as collective entities which are capable of entering into contracts, to sue and to be sued, and to enjoy certain human rights (e.g., the right to a fair trial). Partnerships can also hold certain public licences (e.g., a building permit) and be taxpayers (Blackett-Ord & Haren, 2015; Mathey-Bal, 2016; Stokkermans, 2017). Boards of corporations and works councils are deprived of legal personality but can enter into certain contracts and have standing in certain court proceedings. The same goes for many public entities. Dutch law vests certain regulatory powers in municipality councils, though such councils do not qualify as legal persons. 430 435 440

Where Dutch law confers the status of ‘legal person’ on an entity, it means that this entity is deemed legally capable of holding property (in a broad sense, including assets and liabilities). As section 2:5 of the Dutch Civil Code puts it: for the purposes of property laws, legal persons are on the same footing as natural persons. Legal persons have or may have standing in many other respects. They can act in court, be held criminally liable, and enjoy human rights. But they have this extra capacity of property rights. 445

### **Legal persons in public and private law**

Section 2:5 of the Dutch Civil Code applies whether a legal person derives its status from public or private law. Public law legal persons include the State, provinces, municipalities and waterships. Private law legal persons include associations (clubs), companies and foundations (sections 2:26, 2:64, 2:175, 2:285). Most public powers are exercised through public law entities and their bodies, there are exceptions. The Dutch Authority for the Financial Markets (AFM) is a foundation, which is a private law legal person, though with (public) regulatory powers. One of the reasons for the AFM being formed under private law is procedural. Setting up a private law legal entity and establishing its articles of association (which include its purpose and governing rules) is easy. Doing the same for a public entity involves a complicated legislative process. Legislation and policies have been put in place to discourage public authorities from exercising public powers through private law entities, unless the public interest clearly requires otherwise (sections 29 and 34 of the Dutch Government Accounts Act; section 160 of the Dutch Municipalities Act; section 158 of the Dutch Provinces Act (2014); Scheltema & Scheltema, 2013). 450 455 460

A public law legal person combines the powers of a public institution, such as imposing regulation (and in the event of infringements, levying fines), with private powers such as owning assets, and claiming reparation for damages from a party that acted wrongfully. 465

Certain public law legal persons have broad responsibilities and are geographically defined, such as municipalities. Others have been given a specific function without being confined to a certain territory, e.g., the Authority for Consumers and Markets. It is a public law legal person charged with supervising businesses operating in consumer markets in the Netherlands. 470

### **Waterships (*waterschappen*)**

Yet another category of public law legal persons under Dutch law is defined both geographically and functionally. This category includes *waterschappen* (waterships). The main regulatory framework of waterships is contained in the Dutch Waterships Act (*Waterschapswet*). 475

*Waterschap* is often translated as ‘water board’, which puts the focus on the body governing the entity (the board). To preserve the Dutch emphasis on the underlying entity itself, we prefer ‘watership’ as a translation. A linguistic note: the suffix *-schap* (-ship) refers to something existing, something created. It is common in both the English and Dutch languages (*maatschap* means *partnership*). 480

Waterships are among the oldest public institutions in the Netherlands, the first watershed having been created in the thirteenth century. The oldest, and still very important, functions of a watershed are to protect a certain territory from flooding and to determine and preserve suitable groundwater level in its territory. It does these things by building and maintaining dikes and drainage systems. These two functions (water security and water quantity) are still the core business of watersheds. A third function nowadays is about water quality: watersheds are charged with water treatment and impose and enforce anti-pollution regulations. Currently, the territory of the Netherlands is divided into 21 watersheds.

Watersheds deal with politically sensitive issues, such as groundwater levels. Farmers, homeowners and environmentalists may have different priorities. Watership governance reflects this. The board members are elected by the landowners, land users and inhabitants of the watershed's territory. Private environmental organizations may also be given the power to appoint one or more board members (sections 12 and 14, Dutch Watersheds Act). Specifics per watershed are set out in lower-level regulations. Watership board elections occur every four years. A watershed has independent powers to grant certain permits and to levy taxes on the landowners, land users and inhabitants in its territory. Each watershed has operating agreements with other public institutions (such as municipalities) within or adjoining its territory. These provide a framework for aligning policies.

### **Towards the naturesship: a novel type of legal entity suited for the Wadden Sea**

A legal framework for the Wadden Sea could build on the watersheds precedent created in Dutch culture and codified in Dutch law. This line of thinking was already hinted at by an advisory committee in 1976 (Commissie Toekomstige Bestuursstructuur Waddengebied, 1976), but it was never explored in detail.

#### ***The Wadden Sea Naturesship: building on the watersheds precedent***

We suggest introducing a new type of public law legal person, to be called a naturesship (Dutch: *natuurschap*). Like a watershed, it would be a public institution as well as a legal person. These features are needed for an appropriate level of independence from outside interests. Like a watershed, a naturesship can be geographically and functionally defined. The statutory purpose of a naturesship would be to protect and support the ecological integrity of a specified geographical area, in our case the Wadden Sea, and to regulate human activity in it so that the area's ecological integrity is not jeopardized. This would be in line with the Dutch state's duties pursuant to international treaties and European law, as mentioned earlier. As a consequence, this statutory purpose will be central to the naturesship's interests. The board members are charged with pursuing those interests. The act in which the Wadden Sea Naturesship is to be created can also set out that the Wadden Sea has the right to see its natural environment preserved and protected.

The public powers to be vested in a naturesship can be determined on a case-by-case basis. The Wadden Sea Naturesship could hold powers (under both public and private laws) to protect and support the ecological integrity of its territory. It would not be a new

political layer in the Wadden Sea governance but a new actor that represents the interests of the Wadden Sea itself and that takes part in deciding its future.

In recognition of the national interest, the Wadden Sea Natureship could cooperate with the national government, and after consultation with other bodies within the Natureship, it could be charged with determining the Natureship's main policy framework. The national government could be represented in the Natureship through for instance a Wadden Council composed of the cabinet ministers most involved. As mentioned, these are the Minister of Infrastructure and Waterworks and the Minister of Agriculture, Nature and Food Quality. Their ministries can be involved at other levels as well. Thus, their current involvement with nature, water and fishing management could be continued to a large extent, albeit within a new governance framework.

Other bodies within the Natureship, including its board, could be charged with lower level policy making and other powers and duties. This includes the provision of nature management through a management organization of its own and/or by outsourcing the same. In addition to the national government's involvement in the natureship, regional authorities, such as the provinces concerned, and certain non-governmental organizations can be given appropriate roles. The provinces of Noord-Holland, Friesland and Groningen each have part of the Wadden Sea in their territory. Some element of direct involvement of citizens can be explored, too, if deemed appropriate.

In terms of financing, because of the national interest in the Wadden Sea, funding should mainly come from the national government, with possible additions from provinces and other public bodies directly involved. The Wadden Sea Natureship could also levy taxes of its own. It has no inhabitants to charge, but it could charge its users. Moreover, the natureship could charge fees for the granting of licences. It could impose penalties for regulatory infringements, and it could claim damages for pollution suffered within its territory and other irregularities.

### ***Protecting the natureship's interests***

A balance must be struck between the ministries' powers and the natureship's independence. This is key to ensure that policy making at the natureship level is solely based on the natureship's own interests and not unduly tainted by wider policy concerns the ministries or the larger government may have. Several precedents for ways to deal with this type of dilemma exist.

One example is presented by the AFM. As mentioned, the AFM has legal personality pursuant to private law, not public law. But that is not relevant here, as an appropriate level of independence can be created under public and private law alike. Under the AFM's governing rules, its board will not take instructions from the ministry concerned (in this case, Finance). Also, the AFM has a dual board structure: a supervisory board and an executive board. Executive members are appointed by the minister of finance; supervisory board members are appointed by royal decree (on a nomination by the minister of finance). The royal decree requirement means that the appointment is taken out of the narrow context of ministerial policy making. The main governance rules of the AFM are set out in its articles of association (*statuten*), which are published on the AFM website ([www.afm.nl](http://www.afm.nl)). Nomination processes are guided by composition profiles for the executive and supervisory boards. These include independence and other criteria.



Similar arrangements can be provided with respect to the Wadden Sea Natureship, and any other natureships for that matter. In addition to board seats reserved for appointment by ministers concerned with nature and environment, some can be reserved for provinces and municipalities involved with the Wadden Sea and for certain ecological organizations and citizens. 570

## Conclusions and suggestions for further research

The Dutch government rightfully intends to set up a governing entity for the Wadden Sea. As set out in our introduction, it is intended that this entity be set up later this year, in the form of a ‘management authority’. That may alleviate some of the current flaws in nature management, but seems devoid of potential to reach the stated goals in nature quality. Therefore, with an eye on the middle and long term, we suggest a path to actually reach those goals. It involves the creation of a novel form of legal personality under Dutch law. We call it a natureship and have built the idea on innovative thinking about granting rights and legal personality to nature, as well as on the precedent of waterships, which have been legal persons under Dutch public law for over 800 years. 575

A natureship could be set up for the Wadden Sea (the Wadden Sea Natureship) and for any other piece of nature in the Netherlands deserving the same level of protection. The statutory purpose of a natureship would be to prioritize the ecological integrity of a specified geographical area, in line with the Dutch state’s obligations pursuant to international treaties and European law. The natureship would also provide a clear and robust framework in which human activity can be allowed and facilitated without that ecological integrity being jeopardized. Conferring legal personality on a natureship will, *inter alia*, allow it to claim damages for itself in the event any damage (e.g., pollution) is unlawfully inflicted on it (*Northern Times*, 2019; Stenden, n.d.). The relevance of this was demonstrated in 2019 by the accident of the container ship *MSC Zoe*, which caused enormous ecological damage to the Wadden Sea. 580

The public powers and duties of the natureship, as well as its governance, its financing structure and the manner in which it organizes nature management, can be adjusted to need. Exactly how those features should best be set up in the specific case of the Wadden Sea Natureship deserves further research and consideration. In addition to further desktop research, various governance ideas could be tested with relevant stakeholders in an action research project (qualitative study). 595

We also recommend further international research. Representatives of Germany and Denmark could be invited to investigate whether these countries would be interested in joining cooperative research on the idea of granting legal personality to the Wadden Sea. Various NGOs involved in the governance of the Wadden Sea and in addressing current ecological issues have indicated their interest in participating. The research department of the EU Commission has also expressed interest in further research on this topic. Another opportunity is to conduct a comparative legal study concerning the New Zealand model and similar developments elsewhere. It could provide Dutch policy makers valuable information on how those governance models are set up and work, and what challenges have been experienced in those contexts. 600

This article should be considered a think piece. It offers innovative ideas aimed at ensuring that the natural treasures of the Wadden Sea are preserved and developed for 610

the joy and well-being of nature itself and, as part thereof, current and future generations of humans. As stated in the Earth Charter (p. 6), 'Let ours be a time remembered for the awakening of a new reverence for life, the firm resolve to achieve sustainability, the quickening of the struggle for justice and peace, and the joyful celebration of life' (Earth Charter, n.d.).

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