

The LULUCF-Regulation in Environmental Permitting Procedures: Does LULUCF Stop at the ‘Permit Door’? – A Flemish (Belgian) Analysis

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Submitted: 28 January 2026 Accepted: 07 February 2026 Published: 16 February 2026

Citation: Bocken, B. (2026). The LULUCF regulation in environmental permitting procedures: Does LULUCF stop at the ‘permit door’? – A Flemish (Belgian) analysis. *Journal of Agricultural, Earth and Environmental Sciences*, 5(1), 01-05.

Abstract

This article delves into the question of whether EU climate legislation can be (indirectly or directly) applicable to private parties in an environmental permitting context. The Flemish Council of Permit Disputes ruled negatively, stating the LULUCF-regulation (in particular) does not impose any obligations for private parties. This judgement serves as a starting point for the analysis. The author examines three potential ‘doorways’ through which LULUCF-regulation (and potentially, other EU climate legislation) could have implications for private parties, even when they are (in principle) excluded from the Regulation’s scope. The analysis is created from a legal perspective, specifically on Flemish spatial planning law, with references to EU law like the project-EIA-directive.

Keywords: LULUCF-Regulation, Impact on Private Parties, Direct Effect EU Climate Legislation, Environmental Permitting, Urban Planning Law, Good Spatial Planning, Environmental Impact Assessment

Introduction

On 7 March 2025 the Flemish Council of Permit Disputes [1], ruled, for the first time, on the (direct) applicability of the European LULUCF-regulation to private parties [2]. More specifically, the case regarded the potential annulment of an environmental permit. The applicant argued there would be a (potential) violation of the LULUCF-regulation if the construction works, which were approved by the environmental permit, were carried out. The Council of Permit Disputes ruled that the LULUCF-regulation is, in fact, not applicable to private parties but only to EU Member States. The goal of this research is to gain prima facie insights into the (direct) applicability of the EU’s climate legislation. Climate change demands urgent action. The EU draws up various climate policy plans, each with its own targets. It is expected that each Member State contributes its share; otherwise, reaching climate neutrality by 2050 is a utopia.

Even though obligations, like those described in this article, are

often directed at Member States, the question remains whether private parties (or individuals) can remain out of harm’s way, and thus not have to implement specific measures to reach climate goals directly? The author wishes to open academic debate on the (legal) applicability of climate goals and targets to private parties, be it in an indirect manner (e.g. specifically in an environmental permitting context), and the different approaches of States therein.

Methodology

This article is the result of qualitative legal research. It is important to mention that the case of the Flemish Council of Permit Disputes (‘Council’) was the starting point of the research. At the same time, it also forms the methodological limits of this research. Since the Council of Permit Disputes is a Flemish administrative court, the found and used literature focuses on local legislation (of spatial planning law), applicable to the Flemish Region of Belgium. This is also the reason why most of the refer-

ences are in Dutch. As stated previously, the goal is to gain prima facie insights. This analysis is merely a first attempt at unravelling the legal ‘enigma’ of the applicability of EU climate legislation in the context of environmental permitting procedures. The article is structured as follows: first up, an introduction to the LULUCF-regulation will be provided, followed by a summary of the legal case. In the following part, the author will, in light of the mentioned case, discuss three potential ‘gateways’ for the applicability of the LULUCF-regulation to private parties. The discussion will be followed by a (preliminary) conclusion.

The LULUCF-Regulation and the Flemish Case

An Introduction to the LULUCF-Regulation

The regulation applies to carbon sinks on land. These are associated with the acronym ‘LULUCF’, which stands for ‘land use, land use change, and forestry’. These carbon sinks offer considerable benefits. Carbon sinks remove greenhouse gas emissions from the atmosphere and store them, for example, in soil and trees. Given this function, terrestrial carbon sinks, and therefore the LULUCF-sector, are extremely interesting for the mitigation of greenhouse gas emissions. The EU provides three essential pillars as emission reduction policy initiatives, the LULUCF-regulation being one of them. Additionally, the Emission Trading System [3], and the Effort Sharing-regulation [4]. Also play a significant role. Together, they form an important strategy for reducing greenhouse gas emissions within the framework of the Green Deal [5].

The LULUCF-regulation knows two compliance periods: from 2021 to 2025, and from 2026 to 2030. Each compliance period has its own targets and obligations. During the first compliance period, Member States must achieve the no debit-target. This means that a net balance must be created between the amount of greenhouse gas emissions and removals within the LULUCF-sector. In other words, emissions are tolerated, provided that they are ‘compensated’ by the same amount of (net) removals. This way a net zero balance is achieved. To demonstrate this, Member States are required to have a ‘bookkeeping’ that keeps track of the emissions and removals for the different land use categories (as specified by the LULUCF-regulation).

During the second compliance period, the accounting method will change slightly (even if it is simply by changing the name of the obligation). Member States will only be required to report the emissions and removals. Bookkeeping is no longer necessary. The practical difference with the bookkeeping method of the first compliance period will have to be shown in the future. The submitted reports must prove that the Member States are complying with the binding annual LULUCF-budget. This LULUCF-budget is a linear trajectory that will ensure that the Member States are on track to meet their national emission reduction targets of the LULUCF-sector by the end, in 2030. These targets are separately set for each Member State. The sum of these individual net removal-targets should result in 310.000 kilotonne CO₂-eq. greenhouse gas removals at EU level by 2030.

It should be noted that during both periods, Member States may use various flexibility or compensation mechanisms to address (or compensate) for any shortfalls in the amount of greenhouse gas removals.

The use of these mechanisms is only possible under strict conditions. An important aspect of the LULUCF-regulation is that its scope applies to Member States. The above-mentioned targets must therefore be achieved at a Member State level. The Regulation does not (directly) impose any obligations on private individuals. This aspect will return in the Flemish case.

Summary of the Flemish Case

Facts

The judgment concerns a suspension in case of extreme urgency requested by Dryade vzw (the applicant). The applicant seeks the suspension and annulment of an environmental permit granted by the Flemish Region (the respondent) to Fluxys Belgium nv (the intervening party) on 24 January 2025. An urgent suspension procedure is characterised by the requirement of at least one serious ground that prima facie justifies the annulment of the contested permit decision. In addition, the extreme urgency of the case must be demonstrated.

The conditional permit allowed the intervening party to construct a new underground pipeline. This would be laid parallel to the existing underground infrastructure. The permit was also requested for some site development works, the deforestation of 3.542 m² and the felling of 142 tall trees. It is these activities that could have a noticeable impact on carbon removals under the LULUCF-regulation. This is because trees act as carbon sinks. Deforestation and felling would result in the stored carbon being (partly) re-emitted [6-7]. Also, peatlands play an important role as a carbon sink [8-9].

This is therefore one of the main arguments put forward in the applicant’s plea. The applicant submits that deforestation, through CO₂ emissions, will have an impact on the achievement of the national LULUCF-targets. This lost carbon storage (from cutting down the trees) will only be offset by sufficient afforestation elsewhere “over a period of many decades”. The same reasoning applies to the likely present peatlands, as drainage and disturbance cause the stored greenhouse gases to be re-emitted. According to the applicant, this would mean that the defendant, by granting a permit for the above-mentioned works, would be acting contrary to its own policy objectives. In the Environment Policy Memorandum for the 2024-2029 legislative period, the defendant states that in the event of deforestation, “the impact on the storage capacity of carbon sinks must be assessed”. This policy measure is indeed cited in the Policy Memorandum of the Flemish Minister for the Environment, Jo Brouns [10].

In addition, the applicant also provides an explanation as to why the forest compensation proposal is not sufficient to compensate for the annual carbon absorption capacity lost through deforestation. Furthermore, the applicant draws attention to the type of land on which the works will be carried out. This can, in all likelihood, be categorised as peat soil. Peat soils, known as ‘wetlands’ in the LULUCF-regulation, also play a role as carbon sinks. The applicant, therefore, argues that there is a “significant risk” that the works will damage the peat soils that are “in all likelihood” present. In this regard, the applicant refers to the Flemish ‘peat probability map. In conclusion, it can be stated that the applicant mainly relies on the LULUCF-regulation because the deforestation and the works in the suspected peat area would not be in line with the LULUCF-objectives. Furthermore,

the project-level environmental impact assessment ('EIA'), the forest compensation proposal, and the environmental permit do not assess the impact of the additional greenhouse gas emissions on humans and nature. Nor was this taken into account in the assessment of the Flemish element of 'good spatial planning'.

The defendant attempts to refute these arguments by relying primarily on the fact that the LULUCF-regulation sets out objectives that relate to the "entire territory of the Member State" and therefore not solely to the Flemish Region. In addition, it is argued that the Regulation does not apply at the individual permit/project level. According to the defendant, there is therefore absolutely no obligation to provide for an additional assessment of the CO₂ impact and the loss of CO₂ storage capacity. The intervening party concurs with these positions.

Judgement

Ultimately, the Council of Permit Disputes rejects the application for suspension on grounds of extreme urgency. The applicant has not provided sufficiently serious grounds. As the grounds are not sufficiently serious, the extreme urgency is not examined further. In summary, the Council considers that the applicant has not fulfilled its burden of proof, in particular that the construction of the pipeline is incompatible with the LULUCF-objectives. This is mainly due to the fact that those objectives apply to Member States, not to private parties. Furthermore, the applicant has failed to sufficiently demonstrate that the EIA wrongly failed to thoroughly examine the likely significant impact on the LULUCF-targets. Moreover, it has not been adequately demonstrated that CO₂ absorption capacity is an element that must be included in the calculation of forest compensation. Finally, the applicant fails to demonstrate that the CO₂ impact, and thus the impact on the LULUCF-targets, is a relevant element that must be taken into account in the assessment of good spatial planning.

Discussion

Direct Applicability of the LULUCF-Regulation

The objectives of the LULUCF-regulation are imposed on Member States. Private parties are excluded from the direct scope of the Regulation. In this regard, the Council of Permit Disputes also rightly refers to recital 11 of the initial LULUCF-regulation. This limitation of the scope was also already mentioned in the preparatory work for the Regulation. In itself, the Council has not added any new information to the existing knowledge about the scope. The Council clearly states that the LULUCF-targets should not be met at an individual project level. The Council therefore correctly interprets that the no debit-target (of the first compliance period) does not mean that a project should not cause additional emissions.

The Council continues: "(...) but that carbon stocks as a whole should not decrease." This requires some nuance; under the no debit-target, Member States must ensure that a net zero-balance is guaranteed. This means that, within the LULUCF-sector, at least as many (emission) removals must take place as there are greenhouse gas emissions. In practice, this means that it is possible for the amount of carbon stocks (in the sinks) to decrease, but still provide sufficient emission removals to cover the number of LULUCF-emissions. In this way, the net zero-balance is still respected, as there is at least an equal number of removals than emissions. It should be noted, however, that when revis-

ing the LULUCF-regulation in 2023 and introducing individual emission reduction targets, the European Commission did warn of possible indirect effects. The impact assessment accompanying the amending regulation noted that the more ambitious the national emission-reduction targets, the more national climate policy will need to align with them. National policy will then implement policy measures that may have consequences for actors such as farmers, land managers/owners and forest owners. In my view, it therefore seems impossible to guarantee private parties an impact-free LULUCF-policy. Where policy measures are taken, they are likely to feel an impact. This does not necessarily mean that this impact will be significant or immediate. Any inter- or supranational climate policy will have repercussions on national policy, some more noticeable than others. It is clear, however, that the LULUCF-regulation does not impose a direct climate assessment, but that does not necessarily mean that including LULUCF-targets as a non-binding assessment element in the environmental permit procedure is wrong. In short, it should indeed be understood that no direct obligations under the LULUCF-regulation can be imposed on private parties. However, it cannot be entirely ruled out that private individuals will not be affected by it in any way.

In my opinion, it is possible that the implementation of the LULUCF-regulation will have indirect consequences for private parties. Think, for example, of the agricultural sector, as the impact assessment of the amending regulation itself indicates. In addition, one could also consider the 'ordinary' citizen who, for example, would be less likely to be granted a permit to pave their front garden or cut down a few trees, taking into account Flemish urban planning policy, which is based on the LULUCF-regulation, or at least should take the LULUCF-regulation into consideration. By excluding the LULUCF-targets at the project level in this case, the Council appears to be backtracking on earlier decisions in which it seemed to tolerate a (cautious) 'climate test' [11-14].

On the other hand, caution must be exercised when directly passing on international and European climate targets to private projects in the context of environmental policy. The term 'climate test' refers to the assessment of permit applications based on their potential impact on the climate and environment, and the extent to which this is in line with the proposed climate objectives [15-18]. It is noteworthy that a few days after the annotated judgment, on 20 March 2025, the Council issued another judgment in which it stated that the permitting authority 'wrongly [upholds] that the European climate and energy targets are "not elements of assessment under permitting or urban planning law"' [19]. This is a very different view from that expressed in the annotated judgment. Later in 2025, the Council ruled again that the LULUCF-regulation, the Effort Sharing-regulation and the European Climate Law are not directly applicable to permit procedures of private parties [20].

Applicability of the LULUCF-Regulation via a Project-Level EIA

The permit applicant and intervening party, Fluxys nv, also had an EIA drawn up. The applicant party argues that the EIA does not consider the impact of the drainage works on the potential-

ly present peat soil in the project area. The draft EIA allegedly ignores the important value of the peat area as a carbon sink. Thus, the project EIA does not examine the impact of the additional greenhouse gas emissions on humans and the environment. However, the existence of this peat soil has not been fully established. The applicant refers to the peat probability map. The argument, therefore, does not appear to be sufficiently robust to be convincing as (part of) a serious ground in the urgency procedure.

The Council considers that ‘climate’ is an EIA factor, as is apparent from article 3, §1, c project-EIA-directive [21]. It is then up to the party contesting that the project EIA wrongly fails to investigate certain environmental effects, to substantiate that these effects are “likely to be significant”. In this case, the applicant party has failed to do so. Following the reasoning above, it can be stated that a project-EIA does indeed contain a kind of ‘climate test’. If a project-EIA is required, it must contain a description of the likely significant (direct and indirect) environmental effects that the project may cause (art. 3 project-EIA-directive). In this way, a climate test is hidden in the environmental permit procedure. Two comments should be made here. First of all, an EIA is not binding, and the government concerned may deviate from it provided that it adequately justifies its decision. Furthermore, not every project is subject to an EIA; a simple screening might be sufficient.

Applicability of the LULUCF-Regulation via the ‘Good Spatial Planning’-Element

Article 1.1.4 of the Flemish Spatial Planning Code (‘FSPC’) entails the definition of ‘good spatial planning’. The article stipulates that spatial planning should be geared towards sustainable spatial development that takes into account the needs of the current generation without compromising the needs of future generations. This involves weighing up different interests; the spatial needs of various social activities must be balanced against each other. Among other things, the impact on the environment is taken into account. The permitting authority has discretionary power in this regard. As a result, the Council of Permit Disputes can only exercise marginal supervision. Meaning, the Council can only intervene if the permitting authority has made a manifestly unreasonable or incorrect decision.

The mentioned ‘sustainable spatial development’ is an element that is taken into account when assessing good spatial planning. If a permit conflicts with good spatial planning, the permit application will in principle be refused. In this case, the Council states that the applicant has not demonstrated that the assessment of good spatial planning is incorrect or manifestly unreasonable. The indirect climate assessment via article 1.1.4. in conjunction with article 4.3.1., §1, first subclause, 1°, d) juncto §2, first subclause, 1° FSPC was unsuccessful here. Article 4.3.1, §1 FSPC stipulates that a permit shall be refused if it is incompatible with good spatial planning. The assessment of good spatial planning takes into account, among other things, the objectives set out in article 1.1.4 FSPC, including the consequences for the environment (art. 4.3.1, §2 FSPC). ‘Climate’ can fall under the broad heading of ‘sustainable spatial development’ (art. 1.1.4. FSPC). In terms of content, the article explicitly states that “the consequences for the environment” will be taken into account. Considering the minimal chance of success of an application for

annulment based on article 1.1.4. FSPC and the discretionary power of the permitting authority, it seems unlikely to me that a successful ‘climate test’ can be established in this case. However, the future may hold surprises.

Conclusion

Although in the annotated judgment the Council appears to be closing the door to the implementation of European climate targets in environmental permitting, it has issued other judgments, both earlier and later, that take a different view. A balance will have to be found between the impact of the LULUCF-targets and the rejection of any impact of these targets on citizens. It is utopian to suggest that private individuals will not experience any (indirect) impact whatsoever from the various climate targets. Climate policy has been outlined, and targets must be achieved.

In short, it can be said that, in Flanders, there is still no established case law on the impact of climate objectives in environmental permit litigation. Until now, this has been assessed on a case-by-case basis. It would be incorrect to conclude that the Council for Permit Disputes will never allow a ‘climate test’. The ‘permit door’ seems to be ajar with articles 1.1.4 and 4.3.1, §1, first subclause, 1°, d) in conjunction with §2, first subclause, 1° FSPC, but that door can easily slam shut. More case law will be needed to determine whether an actual climate assessment will become a reality in environmental permit litigation. A ‘light’ version does seem possible, at least through a few detours, such as in the EIA or via article 1.1.4 of the FSPC, but that does not necessarily mean it will be successful. In addition, it should be noted that the annotated ruling falls within the framework of a urgent suspension procedure. This requires some caution in drawing premature and general conclusions.

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