

Secretary to the Aarhus Convention

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Conc.: Communication to the Aarhus Convention's Compliance Committee

Non-appliance with the Aarhus Convention on two occasions by the Kingdom of the Netherlands in relation to the Eemshaven coal power project

Amsterdam, 22 December 2014

Dear Members of the Aarhus Commission Compliance Committee,

Stichting Greenpeace Netherlands ("Greenpeace") seated in Amsterdam, the Netherlands, hereby files a complaint to the Aarhus Convention Compliance Committee concerning non-compliance by the Kingdom of the Netherlands in relation to access to environmental information.

This complaint contains two cases of alleged non-compliance with the Convention:

I. Non-compliance with art. 4(3)(c) of the Convention by refusing access to information on the grounds of "internal communication", whereby the documents requested contain communication of the responsible authority with external actors and communication of third parties to the responsible authority;

II. Non-compliance with art. 2(3) and art. 4 of the Convention by refusing access to information that has direct effect on environmental decision making.

Greenpeace has sought legal recourse in these cases over Dutch courts without success.

I. Non-compliance with art. 4(3)(c)

I.1 In June 2011 Greenpeace submitted an access to information request to the Province of Groningen, a local Dutch administration, regarding the disclosure of all documents related to the development and the granting of the necessary permits (EIA-permits, a permit under the Habitats Directive 92/43) for two new coal-fired power plants in the Eemshaven port area in Groningen by the energy companies NUON and RWE and to relating activities (see annex). These coal plants are foreseen at the edge of the Natura 2000 area Waddenzee, with possible adverse effects on Natura 2000 areas in the three Provinces in the north of the Netherlands and in Germany.

I.2 In a reaction, the Province indicated that this request involved 1724 documents. For 1127 documents the Province instantly granted Greenpeace's request. Following administrative complaints by all parties involved, the Province decided in confirmatory decisions of 6 November 2012, 4 December 2012 and 15 January 2013, that of the remaining documents, 213 should not be disclosed and 87 documents should only partly be disclosed.

I.3 Access to information was refused to Greenpeace on the ground of 'internal communications of public authorities' under Article 4(3)(c) of the Convention.

I. 4 In its statement of reason in the decisions on Greenpeace's request for information, the Province held that part of the undisclosed documents were to be regarded as 'internal communication', even though it involved communication between the Province and NUON and RWE and their advisers (lawyers, ecologists, engineers) about the issuing and defending of the permits granted to these companies.

I.5 Greenpeace and other parties earlier appealed the decisions regarding the issued permits in Court proceedings before the *Raad van State*. As a result, the Province had to defend the decision regarding these permits in Court.

I.6 During the appeal, the Province was preparing its defence of the permits in close collaboration with the permit holders NUON and RWE. From the overview of the denied documents it is clear that the Province was frequently in contact with the companies involved and that during the Court case all kinds of draft reports, correspondence, agenda's, notes, etc. were produced by the Province and by NUON, RWE and exchanged and discussed between these parties. It is for example clear that additional ecological reports that NUON and RWE submitted to the Court were prepared and written in close collaboration with the Province and its advisers. The Province received input from NUON and RWE, the recipients of the permits for the construction and operation of the coal fired power plants and NUON and RWE received input from the Province on all kinds of legal and factual issues

regarding the defence of the permits for the coal plants. Part of the documents that remained undisclosed were written by NUON and RWE and were sent to the Province with the purpose of defending the permits issued in the pending Court cases. This communication was designated as 'internal communication' by the Province. The Province motivated its reasoning in the confirmatory decisions regarding the access to documents request of Greenpeace by stating that it was agreed in advance between the Province and these third parties that communications would remain confidential.

I.7 The Province made a distinction between phase 1, the period until and including the issuing of the confirmatory decisions regarding the permits granted to NUON and RWE, in which phase the communication with the companies is not to be qualified as 'internal communication' and phase 2, the period as of the issuing of these confirmatory decisions regarding the permits issued (and the starting of the appeal cases before the *Raad van State*), in which phase the communication with the companies according to the Province should be considered as 'internal communication'.

I.8 In Greenpeace's view, communication in both phases between the Province and the commercial parties that requested the permits cannot and may not be qualified as falling within the internal communication exemption under the Convention, since this communication involved third parties, which furthermore, were private parties and had an economic, private interest in their communication and exchanges with the Province attempting to convince the *Raad van State* to not annul the permits granted and to reject the appeal of Greenpeace and others.

I.9 Greenpeace appealed the confirmatory decisions of the Province to only partly grant access to the documents concerned at the Court of first instance, the *Rechtbank Noord-Nederland*, which ruled that Greenpeace's objections were justified. The Court of first instance did not approve the reasoning of the Province regarding the distinction of two phases with different legal conclusions regarding the right of access to documents.

I.10 The Province and RWE appealed the ruling of the Court of first instance regarding the ground for refusal of 'internal communications' at the *Raad van State*. The *Raad van State* ruled in its Judgement of 16 July 2014 that the objections of the Province and RWE were justified and that the Province's reasoning that the invocation of the refusal ground 'internal communications' in phase 2 should not have been rejected by the Court of first instance.

I.11 In its Judgement of 16 July 2014, the *Raad van State* ruled that the involvement of third parties in communication with public authorities does not mean that such communication can never be entitled as 'internal communication'. 'The law provides no basis for this judgement', concludes the *Raad van State* in its

motivation. The *Raad van State* values that the Province and NUON and RWE had agreed that the shared information would remain confidential and that this was necessary for the Province to develop its legal position, that is, to defend the permits that the Province granted to NUON and RWE.

I.12 Article 4(3)(c) of the Convention foresees in a ground for the refusal of access to information based on the exemption of 'internal communications of public authorities' where such an exemption is provided for in national law or customary practice. The Netherlands law on Access to Public Information (*Wet openbaarheid van bestuur* or *Wob*) regulates requests for information held by any public authority. Directive 2003/4 on access to environmental information has been implemented in the *Wob*. This Directive, in turn, implements the Convention in the European Union. The *Wob* provides in exceptions to the right of access to information corresponding with the grounds of refusal laid down in Article 4 of the Convention. Article 10 of the *Wob* corresponds to Article 4(4) of the Convention and Article 11(1) and (4) of the *Wob* regarding the exemption of 'internal deliberation' correspond to the exemption of 'internal communications of public authorities' in Article 4(3)(c) of the Convention, including the instruction to interpret this exception restrictively regarding environmental information.

I.13 Case law in The Netherlands does not exclude third parties from confidential, so called internal, deliberation under Article 11 of the *Wob*, but confidentiality under this provision is restricted to situations in which third parties offer, for instance, specialised advice which the public body is not able to produce itself (i.e. external experts). In these cases in which the confidentiality of the 'internal deliberation' with third parties was recognised, the third parties concerned do not have any interest in the outcome of the deliberation, apart from eventually being paid for their services.

I.14 In Greenpeace's view, the extension of the exemption of 'internal deliberation' to communications in which commercially interested third parties are involved would severely restrict the right of access to documents under the Convention and contravenes Article 4(3)(c) of the Convention, since that provision only foresees in an exemption regarding the communication of public authorities and not the communication of third parties. Meanwhile, the exemption only applies to internal communications and thus does not apply to external communications. An extension of the exemption of 'internal communications' to third parties with a direct commercial interest in communicating with a public authority constitutes in our view an even more serious breach of the Aarhus Convention. Greenpeace concludes that documents exchanged with or addressed to third parties being private companies with an own private interest in communicating with a public authority cannot and should not fall under the exemption of 'internal communications of public authorities' in Article 4(3)(c) of the Convention.

I.15 The current case illustrates clearly the gateway function of the right of access to documents for the right of access to justice. The Province deliberated with and took advice from NUON and RWE for the legal defence before the *Raad van State* of the permits granted to these companies. Acting in this way, the Province did not only deny to Greenpeace access to environmental information in breach with the Convention, but also advantaged NUON and RWE in the proceedings regarding the permits granted, and weakened the procedural position of Greenpeace in these proceedings. It is clear that on top of that, the Province has infringed the obligation to balance the public interest in disclosure against the limited interest for public authorities in keeping their communications confidential.

I.16 Greenpeace for those reasons considers the Judgement of the *Raad van State* in this case in breach with Article 4(3)(c) of the Convention.

II. Non-compliance with art. 2 and art. 4

II.1 In its Judgement of 16 July 2014, the *Raad van State* endorsed the decision of the Province to not disclose the so called '*DROB* documents' (*DROB* = *dwingende reden van openbaar belang* – overriding public interest).

II.2 These documents were compiled by the Province or RWE or their advisers for the legal discussion about the permit of RWE regarding the impact of the coal plant on nature protected under the Habitats Directive. The undisclosed '*DROB* documents' are about the question whether RWE's coal plant meets the criteria of Article 6(4) of the Habitat Directive.

II.3 In the permit granted to RWE the Province took the position that adverse effects of the coal plant on protected nature could not be excluded. For this reason the Province had to defend in the proceedings regarding the permit before the *Raad van State* that 'in spite of a negative assessment of the implications' for the Natura 2000 sites concerned 'and in the absence of alternative solutions' the project of RWE 'must nevertheless be carried out for imperative reasons of overriding public interest'. In its Judgement of 16 July 2014 the *Raad van State* confirmed the earlier ruling of the Court of first instance in the access to documents case that the '*DROB* documents' would not qualify as environmental information and access to this information was denied. Greenpeace had appealed this conclusion from the Court of first instance and this appeal was in the mentioned Judgement rejected by the *Raad van State*.

II.4 In its Judgement of 16 July 2014, the *Raad van State* in our view wrongly did not take into account that documents regarding proof of the 'absence of alternative solutions' and of the existence of 'overriding imperative reasons of overriding public interest' were developed because of the legal precondition to granting a permit

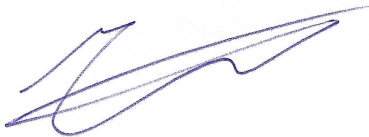
under the Habitats Directive for a project which possibly has negative implications for Natura 2000 sites. Article 6(4) of the Habitats Directive is a measure to protect nature in, among others, Natura 2000 areas from unnecessary negative implications and the 'DROB documents' are information regarding environmental decision-making. Documents regarding deliberations and communication with external advisers of the Province and with RWE and its advisers on this subject, with the purpose of defending the issued permit in Court, in our view do qualify as environmental information in the sense of Article 2(3) of the Convention and access under art. 4 of the Convention should not have been refused.

II.5 Greenpeace for those reasons considers the Judgement of the *Raad van State* in this case in breach with art. 2(3) and art. 4 of the Convention.

Greenpeace would appreciate the opinion of the Compliance Committee on these two matters because proper application and enforcement of the Convention is important to organizations like Greenpeace to be able to fulfil their role in society. Greenpeace therefore asks the Compliance Committee to investigate these potential breaches of the Convention by the Kingdom of the Netherlands.

You may consider this correspondence to be public.

Yours sincerely,



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