Council of State

Judgment 201307984/1/A3

Date of judgment:	Wednesday 16 July 2014
Against:	the Provincial Executive of Groningen
Type of proceeding:	Appeal
Sector:	Administrative law

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A press release was issued with this judgment.

201307984/1/A3.

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ADMINISTRATIVE JURISDICTION DIVISION

Judgment on the appeals of:

1. the Provincial Executive of Groningen,

2. the foundation known as Stichting Greenpeace Nederland, having its seat in Amsterdam,

3. RWE Eemshaven Holding B.V., a private limited company, having its seat in ’s-Hertogenbosch,

appellants,

against the judgment of the North Netherlands District Court of 18 July 2013 in case no. 12/796 in the action between:

Greenpeace

and

the Provincial Executive.

Course of proceedings

By decision of 19 July 2011 the Provincial Executive partially refused an application from Greenpeace for public disclosure of all documents relating to the granting of a permit for the construction of power plants by Nuon/Vattenfall and Essent/RWE in Eemshaven and for changes in and around Eemshaven to the port and fairway for colliers.

By decision of 15 August 2012 the Provincial Executive upheld the objections made by RWE and Nuon Power Projects I B.V., a private limited company, to its earlier decision in so far as these objections concerned the public disclosure of 25 numbered documents, revoked the decision in this respect and directed that the documents in question should not be made public.

By decisions of 6 November 2012, 4 December 2012 and 15 January 2013, the Provincial Executive upheld the objections made by Greenpeace to its decision of 19 July 2011 and disclosed 304 documents in full and 87 documents in part, thereby overturning its own decision of 19 July 2011 to this extent.

By decision of 28 May 2013 the Provincial Executive decided to disclose a further 11 documents.

By judgment of 18 July 2013 the District Court held that the application for judicial review lodged by Greenpeace was well founded, quashed the decisions of 15 August 2012, 6 November 2012, 4 December 2012 and 15 January 2013 in so far as they concerned 228 numbered documents, directed that the Provincial Executive should take a new decision on the disclosure of these documents within eight weeks (taking into account what had been held on this subject in this judgment), and held that the application for review of the decisions of 15 August 2012, 6 November 2012, 4 December 2012 and 15 January 2013 was in other respects unfounded and that the application for review of the decision of 28 May 2013 was unfounded. This judgment is appended.

The Provincial Executive, Greenpeace and RWE all appealed against this judgment.

By decision of 11 September 2013 the Provincial Executive took a new decision on six numbered documents, thereby complying with the judgment of the District Court. It also stated that as regards the other numbered documents specified by the District Court, a provisional

measure had been taken which meant that the Provincial Executive was not required to make a fresh decision on the disclosure of these documents until the Division had ruled on the appeal.

By letters of 29 October 2013, 23 October 2013, 28 October 2013 and 26 November 2013 Groningen Seaports, RWE, Greenpeace and Nuon respectively gave consent to the Division as referred to in section 8:29, subsection 5 of the General Administrative Law Act.

RWE and Greenpeace have responded to the decision of 11 September 2013.

The Provincial Executive, RWE and Greenpeace have lodged statements of defence.

The Division considered the case at its hearing on 9 January 2014, where the Provincial Executive was represented by N.J. Lobbezoo Vermaak, employed by the Province of Groningen, assisted by M.L. Batting, lawyer practising in The Hague, Greenpeace was represented by A. ten Kate, employed by Greenpeace, assisted by B.N. Kloostra, lawyer practising in Amsterdam, and RWE was represented by H. Krinkels, employed by RWE, assisted by J.J. Peelen, lawyer practising in Amsterdam.

Grounds

1. Under article 4, paragraph 1 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Dutch Treaty Series 2001, no. 73, referred to below as ‘the Aarhus Convention’), each party must ensure that public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation.

Under paragraph 2, the environmental information referred to in paragraph 1 must be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant must be informed of any extension and of the reasons justifying it.

Under paragraph 3, a request for environmental information may be refused in the cases referred to in points a to c of this paragraph.

Under paragraph 4, a request for environmental information may be refused if the disclosure would adversely affect any of the matters referred to in points a to h of this paragraph. These grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the requested information relates to emissions into the environment.

Under article 4, paragraph 1 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, referred to below as 'the Directive'), the member states may provide for a request for environmental information to be refused in the cases listed in points a to e of this paragraph.

Under paragraph 2, the member states may provide for a request for environmental information to be refused if disclosure of the information would adversely affect one of the matters referred to in points a to h of this paragraph. The grounds for refusal referred to in paragraphs 1 and 2 have to be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case the public interest served by disclosure must be weighed against the interest served by the refusal. Member states may not, by virtue of paragraph 2 (a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on environmental emissions.

Under section 1 of the Government Information (Public Access) Act (referred to below by its Dutch acronym WOB), the terms employed in the Act and the provisions deriving from it are defined as follows:

[…]

c. internal consultation: consultation concerning an administrative matter within an administrative authority or within a group of administrative authorities in the framework of their joint responsibility for an administrative matter;

[…]

f. personal opinion on policy: an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments they advance in support thereof;

g. environmental information: that which is defined as such in section 19.1a of the Environmental Management Act;

[…].

Under section 3, subsection 1, anyone may apply to an administrative authority, or to an agency, service or company carrying out work for which it is accountable to an administrative authority, for information contained in documents concerning an administrative matter.

Under section 10, subsection 1, opening words and (c), the disclosure of information pursuant to this Act must not take place in so far as the data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons.

Under subsection 2, opening words and (g), the disclosure of information must also not take place under this Act in so far as its importance does not outweigh the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.

Under subsection 4, subsection 1, opening words and (c) and (d), subsection 2, opening words and (e), and subsection 7, opening words and (a) do not apply in so far as the disclosure concerns environmental information related to environmental emissions. Moreover, notwithstanding subsection 1, opening words and (c), disclosure of environmental information must not take place if the interests of disclosure do not outweigh the interests stated there.

Under subsection 6, the second subsection, opening words and (g) does not apply to the disclosure of environmental information.

Under section 11, subsection 1, where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information must be disclosed concerning personal opinions on policy contained therein.

Under subsection 4, notwithstanding subsection 1, in the case of environmental information the interests of protecting personal opinions on policy are weighed against the interests of disclosure. Information concerning personal opinions on policy may be disclosed in a form that

cannot be traced back to any individual. Subsection 2, second sentence applies *mutatis mutandis*.

Under section 19.1a, subsection 1 of the Environmental Management Act, environmental information means all information set down in documents on:

a. the state of the various elements of the environment, such as air and atmosphere, water, soil, land, countryside and nature areas including wet biotopes, coastal and marine areas, biodiversity and its components, including genetically modified organisms, and the interactions between these elements;

b. factors such as substances, energy, noise, radiation and waste, including radioactive waste, emissions, discharges and other releases of substances into the environment which harm or probably harm the elements of the environment referred to in point a;

c. measures, including administrative measures such as policy measures, legislation, plans, programmes, environmental agreements and activities which affect or may affect the elements and factors of the environment referred to in points a and b, and measures or activities to protect these elements;

d. reports on the application of environmental legislation;

e. cost-benefit and other economic analyses and assumptions used in connection with the measures and activities referred to in point c;

f. […].

2. RWE and Nuon have applied for various permits for the construction, commissioning, operation and routine maintenance of a coal-fired or multi-fuel power plant on the Eemshaven industrial estate. Greenpeace and others have appealed to the Administrative Jurisdiction Division against the granting of these permits.

By letter of 1 June 2011 Greenpeace requested the Provincial Executive, by virtue of the WOB, to furnish it with all documents and data relating to the granting of the permit for the construction of the power plants of Nuon/Vattenfall and Essent/RWE in Eemshaven and the changes in and

around Eemshaven to the port and fairway for colliers. Greenpeace has also stated that its request covers information throughout the period from January 2005 to the present day.

3. By decision of 19 July 2011 the Provincial Executive stated that it had 1,724 documents in its possession that were covered by Greenpeace's request. With that decision it provided a list showing that it intended to grant the request for disclosure of 1,127 documents and refuse it in respect of 597 documents. It also indicated that a large proportion of the documents which would not be made public had been exchanged in preparation for the hearings by the Division in the cases referred to in ground 2 or concerned correspondence between the Provincial Executive and the permit holders in relation to the questions asked in those proceedings by the Administrative Jurisdiction (Environment and Spatial Planning) Advisory Foundation (referred to below as 'the Foundation').

4. By decision of 15 August 2012 the Provincial Executive ruled that the objections raised by RWE and Nuon were well founded in so far as they related to the disclosure of documents nos. 42, 84, 103, 269, 401, 540, 542, 559, 571, 576, 587, 701, 868, 874, 954, 969, 984, 1035, 1045, 1100, 1136, 1395, 1436, 1625 and 1629, and that it accordingly revoked the decision of 19 July 2011 to this extent and refused to disclose these documents after all.

In its decisions of 6 November 2012, 4 December 2012 and 15 January 2013, the Provincial Executive ruled that Greenpeace's objection was well founded. In reconsidering the request for disclosure of 604 of the 1,724 documents, it stated that a further 391 documents would be made public (87 of them partially). The Provincial Executive once again refused to provide access to 213 documents.

5. The District Court held that the Provincial Executive could not invoke section 11 of the WOB in relation to the documents that had been the subject of consultations involving not only representatives of the administrative authorities concerned and their advisers but also representatives of either of the permit holders. According to the District Court, the Provincial Executive had wrongly taken the position that consultation with persons taking part on behalf of the permit holders could be construed as internal consultation, since a consultation in which the administrative authority uses external persons to gather data, formulate policy alternatives or complete that consultation, whether or not resulting in the adoption of a position on an administrative matter, in principle constitutes an internal consultation only if those external persons took part in the consultation without representing their own individual interests. Where

external third parties clearly represent their own interests in the consultation, the consultation does not, according to the District Court, come within the definition of internal consultation if the legislator expressly provides for the third parties to have joint responsibility for decision-making intended to arrive at a position on an administrative matter. Nor, in the view of the District Court and contrary to what the Provincial Executive believes, is the situation any different if the administrative matter involves not the granting of a permit but the defence of an existing permit that has been challenged in law by a third party such as Greenpeace. According to the District Court, the Provincial Executive was therefore wrong to make this distinction.

As regards the documents which the Provincial Executive had refused to disclose pursuant to section 11 of the WOB, Greenpeace indicated in the hearing before the District Court that it particularly wished to have access to the documents exchanged with permit holders RWE and Nuon. In so far as this concerns documents that come within the definition of internal consultation, Greenpeace stated that it did not require access to documents involving an exchange of views between an administrative authority and the state advocate, and that as regards the other documents that come within the definition it merely wished to have access to the environmental information they contain. The District Court held on this point that the application for review related to the documents listed in the first paragraph of ground 6.2 of the appealed judgment to the extent that they contained environmental information, since these documents were not shared with persons other than the administrative authorities and the advisers consulted by them. As regards these documents, the District Court held that the Provincial Executive had taken the position that the documents numbered 1190 and 1393 contained environmental information, but had not made sufficiently clear to what extent these documents contained personal opinions on policy and why the interests served by protection outweighed those served by disclosure. The District Court also held that the Provincial Executive had wrongly taken the position that the documents numbered 665, 1171 and 1181 did not contain environmental information. It directed that these documents should be reassessed by the Provincial Executive after the latter had made known to what extent they contain personal opinions on policy and also whether the interests served by protection should outweigh those served by disclosure.

As regards the email correspondence, the District Court held that the passages from the documents referred to in ground 8.1 of the appealed judgment which had remained internal did not need to be discussed either because they did not contain environmental information or because they were addressed to the state advocate. As regards the passages from those

emails and any accompanying attachments which had been divulged to persons outside the administrative authorities and their advisers, the District Court held in ground 8.4 of the appealed judgment that the Provincial Executive could not refuse disclosure by invoking section 11 of the WOB.

The District Court also held that as the documents and accompanying attachments listed in ground 9.2 had been exchanged outside the circle of administrative authorities and their advisers, the Provincial Executive could also not refuse to disclose them by invoking section 11 of the WOB.

Appeals by the Provincial Executive and RWE

6. The Provincial Executive and RWE contend that the District Court wrongly held that the documents exchanged with RWE, Nuon, Groningen Seaports and the advisers consulted by them cannot be deemed to have been drawn up for the purpose of internal consultation and that the Provincial Executive cannot therefore invoke section 11 of the WOB. The Provincial Executive and RWE argue that the District Court, in grounds 5.2-5.7 of the appealed judgment, wrongly interpreted the term internal consultation and thus applied an incorrect assessment criterion. It wrongly held that documents could not be said to have been drawn up for internal consultation if external third parties clearly representing their own interests had taken part in the consultation, unless the legislator expressly provides that these third parties are jointly responsible for decision-making intended to arrive at a position on the administrative matter. According to the Division's settled case law, external third parties may take part in internal consultation as referred to in section 1, opening words and (c) of the WOB. RWE refers in this connection to the WOB's legislative history (Parliamentary Papers, House of Representatives, 1986/87, 19 859, no. 3, p. 13). The Provincial Executive and RWE argue that the purpose for which the relevant documents were drawn up is decisive. In this case, the documents concern consultation to enable the Provincial Executive to make a decision on an administrative matter in circumstances where it had agreed with the persons concerned that the consultation would remain confidential. The Provincial Executive and RWE therefore submit that the documents referred to in grounds 8.4 and 9.2 of the appealed judgment were drawn up for the purpose of internal consultation. According to the Provincial Executive, the District Court, in ground 5.7 of the appealed judgment, misinterpreted the Division's judgment of 8 February 2006 (in case no. 200505098/1). The Provincial Executive argues that it follows from the latter judgment that prior consultation with third parties for the purpose of drafting and submitting a document required by

law does not come within the definition of internal consultation. This is why the Provincial Executive made a distinction between documents relating to the period from before the granting of the permit up to and including the objection procedure and documents relating to the period from the judicial review proceedings onwards. According to the Provincial Executive and RWE, the latter documents were drawn up for the purpose of internal consultation as they contained information on consultation intended to enable the Provincial Executive to take a position on an administrative matter, which is something the District Court failed to recognise. Nor, according to the Provincial Executive and RWE, is this altered by the fact that the third parties were in this case private law bodies. The Provincial Executive contends that the District Court also misinterpreted the Division's judgment of 30 November 2011 (in case no. 201008458/1/H3). The District Court wrongly held that consultation including the participation of third parties could qualify as internal only if they do not represent their own interests. The Provincial Executive argues that no such criterion can be found either in the Division's case law or in the legislative history of the WOB. The Provincial Executive and RWE refer to the Division's judgments of 24 November 2004, 18 February 2009, 19 January 2011 and 22 May 2013 (in cases nos. 200308272/1, 200804345/1, 201002672/1/H3 and 201108747/1/A3), in which documents were deemed to have been drawn up for the purpose of internal consultation although third parties who had taken part in them had, according to the Provincial Executive, represented their own interests. The Provincial Executive and RWE saw no basis for the view that where third parties take part in the consultation, the documents can be deemed to have been drawn up for the purpose of internal consultation only if the legislator has expressly provided for the third parties concerned to have joint responsibility. Under section 3:2 of the General Administrative Law Act, the administrative authority has a duty to collect information about the relevant facts and the interests to be considered. According to the Provincial Executive and RWE, this includes obtaining information from third parties.

6.1. The District Court rightly held that it follows from the legislative history of section 11 of the WOB (Parliamentary Papers, House of Representatives, 1986/87, 19 859, no. 3, p. 13) that the internal character of a document is determined by the purpose for which it has been drawn up. The person who drew up the document must have intended it for their own use or for the use of others within the government sector. The District Court also rightly held, with reference to the judgment of the Division of 22 May 2013 in case no. 201108747/1/A3, that documents obtained from third parties who do not belong to the government sector may be designated as documents drawn up for the purpose of internal consultation if drawn up for that reason. However, the

consultation ceases to be of an internal character if it must be deemed to have the character of advice or structured consultation.

6.2. Pursuant to section 8:29 of the General Administrative Law Act, the Division has taken note of the relevant confidential documents lodged by the Provincial Executive.

6.3. The documents referred to in paragraphs 8.4 and 9.2 of the appealed judgment are annexes to emails received from or sent to RWE, Nuon, Groningen Seaports and the advisers consulted by them, and documents with annexes concerning consultation with permit holders RWE and Nuon, which have been shared with parties other than the administrative authorities and their advisers. These are often drafts of documents lodged in the action, such as memorandums of oral pleading and statements of defence as well as ‘question and answer’ documents. The District Court wrongly held that the documents could not be deemed to have been drawn up for the purpose of internal consultation as referred to in section 11, subsection 1 of the WOB. It is important to note first of all that the documents were drawn up for the purpose of internal consultation since it had been agreed with the parties concerned that the deliberations would remain confidential. As the Provincial Executive and RWE have rightly argued, the District Court was therefore wrong to hold that the documents could nonetheless not be deemed to have been drawn up for the purpose of internal consultation if the external third parties who had taken part in the deliberations had represented their own interests and the legislator does not expressly provide for such third parties to have joint responsibility for decision-making intended to arrive at a position on an administrative matter. There is no basis in law for this finding. Moreover, it can be inferred from the Division’s judgment of 18 February 2009 (in case no. 200804345/1) that even if persons or institutions represent their own interests in consultations, the documents drawn up for these consultations by the person or institution concerned can still be deemed to have been drawn up for the purpose of internal consultation. In so far as the parties have referred to the Division’s judgment of 8 February 2006 (in case no. 200505098/1), the Division holds that the situation in that case is not comparable to the situation in the present case. That case concerned a request for disclosure of draft versions of an environmental impact assessment which had been submitted by Enci B.V., a private limited company, to the Provincial Executive of Limburg, and belonged with the permits it had applied for. Those documents had therefore been drawn up for the preliminary consultations on a document to be submitted by an interested party to the administrative authority for the purpose of applying for a permit. The documents referred to in paragraphs 8.4 and 9.2 of the appealed judgment do not relate to the preparation and submission of such a document, and instead

concern the exchange of information with an administrative authority to enable it to determine its position on an administrative matter, namely defending the granting of the permits in a legal action.

6.4. In view of the above, the District Court was incorrect in holding that the Provincial Executive wrongly took the position that the documents which had been exchanged with RWE, Nuon, Groningen Seaports and their advisers must be deemed to have been drawn up for the purpose of internal consultation. Since there is also no ground for the finding that those documents did not contain personal opinions on policy, the Provincial Executive rightly refused to disclose them pursuant to section 11, subsection 1 of the WOB.

7. In ground 2.3 of the appealed judgment, the District Court held that although disclosure of the documents numbered 224, 231, 599, 656, 730, 731, 744, 754, 755, 756, 1155 and 1187 had been refused, in view of the lists belonging with the individual decisions, no reasons had been given. It also held that it did not have access to those documents and that the Provincial Executive should take a new decision on their disclosure based on the assessment criterion included in the appealed judgment. The Provincial Executive has sent the documents to the Division. In marginal number 5.2 of its notice of appeal, it has stated that it will study what further decisions need to be taken and will inform the Division of this.

The Division notes that the Provincial Executive has not taken a new decision on the disclosure of these documents as required in the appealed judgment. Contrary to what the Provincial Executive submitted at the hearing, what is said about this in marginal note 5.2 of the notice of appeal, when read in conjunction with the letter accompanying the decision of 11 September 2013, and the explanation given at the hearing that those documents were refused by invoking section 11, subsection 1 of the WOB, cannot serve this purpose. The Provincial Executive has accordingly failed to provide sufficient reasons for its refusal to disclose the documents, contrary to section 7:12 of the General Administrative Law Act.

8. As regards the documents numbered 210 and 446 referred to in ground 6.3 of the appealed judgment, the Division notes that disclosure had already been refused in the decision of 6 November 2012 on the grounds of section 11, subsection 1 of the WOB. The District Court observed that it did not have access to these documents. It also held that the Provincial Executive should ascertain whether the documents are still in its possession and should then decide on the matter anew and apply the assessment criterion specified in the appealed

judgment. The District Court took into account in this connection that there were already sufficient grounds for quashing the decisions of the Provincial Executive in which it refused to disclose a large number of documents, citing section 11, subsection 1 of the WOB. The Provincial Executive has sent these documents to the Division. The Division has taken note of these documents in accordance with section 8:29 of the General Administrative Law Act.

The document numbered 210 contains a memo of 29 September 2009 from an official of the province of Groningen about how an increase in the height of a chimney stack at the Nuon site would affect the deposition of SO_2, NO_x and NH_3 over nature conservation areas. The Provincial Executive rightly took the view that this document should be deemed to have been drawn up for the purpose of internal consultation and contained personal opinions on policy. The document contains opinions, proposals, recommendations or conclusions of the official concerned, and its disclosure may be refused because officials should have the freedom to make an unfettered contribution to the preparation or implementation of decisions and, for this purpose, freely to study, brainstorm, consult, write memos and so forth. However, contrary to what the Provincial Executive has submitted, the Division considers that the document contains environmental information related to environmental emissions. At the hearing, the Provincial Executive stated that these data were already in the public domain. However, the Division considers that the Provincial Executive failed to adequately substantiate this submission since it was unable to show where and how the information was previously made public. It follows that the decision of 6 November 2012 is not based on sound reasons, contrary to section 7:12 of the General Administrative Law Act.

The document numbered 446 concerns an exchange of emails between an official of the province of Groningen and the state advocate on the draft statement of defence to be entered in the proceedings for judicial review of the decision to grant a permit to Nuon. The Provincial Executive once again rightly took the view that this document was drawn up for the purpose of internal consultation and contained personal opinions on policy. The document contains views and proposals of the official concerned and a lawyer consulted by the province of Groningen on a draft statement of defence. The Provincial Executive rightly refused to disclose these personal opinions on policy, invoking section 11, subsection 1 of the WOB.

9. As the District Court wrongly held that the Provincial Executive could not invoke section 11, subsection 1 of the WOB as a ground for refusing to disclose the documents referred to in grounds 8.4 and 9.2 of the appealed judgement, there is no need to give further consideration to

RWE's submission that the District Court incorrectly weighed the different interests for the purposes of section 10, subsection 2, opening words and (g) of the WOB. The same is true of the submission by the Provincial Executive that the District Court wrongly failed to endorse its view that the large quantity of documents justified the application of a less rigorous test.

10. The Provincial Executive has also contended that in directing that a new decision should be taken the District Court wrongly stated that the Provincial Executive had argued that many of the documents referred to in ground 9.2 of the appealed judgement did not contain environmental information. The Provincial Executive states that this was wrong since the position it took on many of these documents was actually that they do contain environmental information, but that this information was already in the public domain since it was included in the documents that had been drawn up for the opinion prepared for the court by the Foundation, the final version of which had already been published. The Provincial Executive has also submitted that in so far as this concerned other documents containing environmental information which had been drawn up, in its view, for the purposes of internal consultation, it had in each case weighed the different interests on the basis of section 11, subsection 4 of the WOB.

10.1. This submission relates to ground 11.5 of the appealed judgment. This paragraph was included as an indication of the need for a new decision, following the opinion of the District Court that the documents referred to in grounds 8.4 and 9.2 of that judgment could not be refused under section 11 of the WOB and that the individual decisions should to this extent be quashed. As this finding of the District Court cannot be upheld in view of ground 6.3 above, this submission needs no further discussion. However, this does not alter the fact that the question of whether the relevant documents contain environmental information is of importance in assessing to what extent the disclosure of these documents under section 11 of the WOB might be refused and Greenpeace's submission that the Provincial Executive was in many cases wrong to take the position that the documents referred to in grounds 8.4 and 9.2 did not contain environmental information. Whether the relevant documents contain environmental information will therefore be assessed in the context of Greenpeace's appeal.

11. In view of what has been held above at 6.3, the appeals of the Provincial Executive and RW are well founded.

Greenpeace's appeal

12. Greenpeace argues that the District Court wrongly held that the Provincial Executive was right to have taken the view that the documents dealing with the issue of whether coal-fired power plants in Eemshaven constituted an imperative reason of overriding public interest did not contain environmental information. It submits that section 19g of the Nature Conservancy Act 1998 means that protected natural values may be adversely affected only in very specific cases and for an overriding public interest. Greenpeace submits that this criterion is therefore a measure for protection of the environment within the meaning of section 19.1a, subsection 1, opening words and (c) of the Environmental Management Act, and that documents from which it is apparent whether or not the conditions set in section 19g of the Nature Conservancy Act have been fulfilled in relation to a particular project should therefore be deemed to be environmental information.

12.1. The Division understands Greenpeace's submission to be directed against ground 7.4.1 of the appealed judgment, in which the District Court held that the Provincial Executive was right not to have designated the documents referred to in ground 6.2 of that judgment (in so far as they relate to information exchanged internally with the Dutch Energy Research Centre (referred to below as ECN) about the imperative reason of overriding public interest referred to in article 2, paragraph 3, opening words and (e) of the Protected Animal and Plant Species (Exemption) Decree) as environmental information and that those documents were not documents requiring further assessment by virtue of section 11, subsection 4 of the WOB. This was confirmed by Greenpeace at the hearing before the Division.

12.2. In accordance with section 8:29 of the General Administrative Law Act, the Division has taken note of the documents handed over by the Provincial Executive in confidence.

12.3. What is not disputed is that the documents concerned were drawn up for the purpose of internal consultation as referred to in section 11, subsection 1 of the WOB. If such documents contain environmental information, a different assessment criterion is applied pursuant to subsection 4 of that section. Pursuant to section 1, opening words and (g) of the WOB, environmental information has the same meaning as in section 19.1a of the Environmental Management Act. That section was introduced by the Act of 30 September 2004 to amend the Environmental Management Act, the WOB and several other statutes (Bulletin of Acts and Decrees 2004, 519). The purpose of the Act was to introduce the measures needed to

implement the Aarhus Convention. The definition of the term ‘environmental information’ in section 19.1a of the Environmental Management Act is derived from and virtually a literal translation of article 2, paragraph 3 of the Aarhus Convention. In so far as relevant here, environmental information has the following meaning. It follows from the text of point a of section 19.1a, subsection 1 that information relating to the state of elements of the environment can be deemed to be environmental information within the meaning of this provision. Pursuant to point b, information about factors that harm or are likely to harm the elements of the environment referred to in point a also constitutes environmental information. It is important to note in this connection that only documents that actually contain that information are covered by the definition. Documents that merely refer to such information without actually containing it themselves do not come within this definition. The District Court rightly referred in this connection to the Division’s judgment of 4 November 2009 (in case no. 200900317/1/H3). It follows from the text of points c and e of section 19.1a, subsection 1 that measures, including administrative measures such as policy measures, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors of the environment referred to in points a and b, as well as measures or activities designed to protect these elements must be classified as environmental information. The same is true of cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in section 19.1a, subsection 1, opening words and (c). Pursuant to section 19.1a, subsection 1, opening words and (d) of the Environmental Management Act, reports on the application of environmental legislation are also treated as environmental information.

After studying the relevant documents and having regard to the considerations set out above, the Division considers that the District Court rightly held that, in so far as the documents relate to information exchanged internally with ECN about the imperative reason of overriding public importance referred to in article 2, paragraph 3, opening words and (e) of the Protected Animal and Plant Species (Exemption) Decree, they do not contain environmental information, with the exception of the documents mentioned below. A factor taken into consideration here is that, contrary to what Greenpeace has argued, these documents do not contain information relating to the state of elements of the environment or to factors that harm or are likely to harm elements of the environment. The documents concerned refer only to the study instituted to ascertain whether there is an imperative reason of overriding public importance for the coal-fired power plants in Eemshaven. The environmental information on which that study is based has not been

included in these documents. Nor do the documents contain environmental information as referred to in section 19.1a, subsection 1, opening words and (c) to (e) of the Environmental Management Act. The District Court therefore rightly held that those documents do not require further assessment under section 11, subsection 4 of the WOB.

12.4. However, the District Court failed to recognise that the Provincial Executive wrongly took the position that the documents numbered 374, 580 and 610 do not contain environmental information. These documents mainly contain information about factors which harm or probably harm elements of the environment and information about activities which affect or may affect such factors as referred to in section 19.1a, subsection 1, opening words and (b) and (c) of the Environmental Management Act. In view of what has been held above, however, this does not mean that the appealed judgment should be set aside.

At the hearing before the Division, the Provincial Executive conceded that the above-mentioned documents do contain environmental information and stated that the environmental information contained in the documents numbered 374 and 580 had already been made public in a report by ECN. It then read out the following text from the third paragraph of those documents: 'If the new coal-fired power plant were to displace from the merit order a gas-fired power plant with an efficiency of less than 46%, this would yield a slight benefit in terms of NO_x. However, emissions of SO_2 and fine particulate matter would be higher than those of the displaced gas-fired power plant.' As regards the document numbered 610, the Provincial Executive, while acknowledging that it had failed to recognise that the document in question contains environmental information, stated that the part of the document containing this information had been made public and furnished to Greenpeace. The Division accepts this submission and notes that all environmental information contained in the above-mentioned documents has now been furnished to Greenpeace.

12.5. The submission fails.

13. Greenpeace's appeal is unfounded.

14. The appealed judgment should be set aside in so far as the District Court held that the refusal to disclose the documents referred to in grounds 8.4 and 9.2 of the appealed judgment could not be based on section 11 of the WOB and that the reasons for this decision should therefore be explained in more detail. In view of what has been held above at 12.3 and 12.4, the

judgment should in other respects be upheld, in so far as it has been appealed. Doing what the District Court should have done, the Division will consider Greenpeace's application for judicial review of the decisions of 6 November 2012, 4 December 2012 and 15 January 2013, in so far as they relate to the documents referred to in grounds 8.4 and 9.2 of the appealed judgement, in the light of the grounds for review presented by Greenpeace at first instance, in so far as they still need discussing.

15. Greenpeace submits that the Provincial Executive has provided insufficient reasons for its refusal or partial refusal to disclose the documents referred to in grounds 8.4 and 9.2 of the appealed judgment. It argues that the majority of the documents contain environmental information, including information relating to environmental emissions, which the Provincial Executive has not recognised in all cases. In those cases which concern such information, the Provincial Executive may not refuse to disclose that information, in view of article 4 of the Aarhus Convention and article 4 of the Directive. Greenpeace argues that in the cases in which documents concern other environmental information the Provincial Executive wrongly failed to weigh the interests of protecting personal opinions on policy against the interests of disclosing the environmental information.

15.1. As regards the documents numbered 34, 631, 973, 1136, 1332 and 1679, the Provincial Executive, in the opinion of the Division, wrongly took the position that they contain no environmental information. These documents do contain environmental information as referred to in section 19.1a, subsection 1, opening words and (b) of the Environmental Management Act. Greenpeace therefore rightly submits that, in refusing to disclose the personal opinions on policy included in those documents, the Provincial Executive wrongly failed to weigh the different interests as required by section 11, subsection 4 of the WOB.

As regards the documents numbered 122, 969, 1027, 1043, 1075, 1104, 1114, 1411, 1563, 1686 and 1722, although the Provincial Executive has acknowledged that they contain environmental information, it has wrongly failed to recognise that they also contain information relating to environmental emissions as referred to in section 19.1a, subsection 1, opening words and (b) of the Environmental Management Act. At the hearing before the Division, it transpired that both Greenpeace and the Provincial Executive have assumed, in view of the provisions of the Aarhus Convention and the Directive, that there are no grounds on which disclosure of information relating to environmental emissions can be refused under the WOB. In view of the special position which information concerning environmental emissions has under article 4,

paragraph 4 of the Aarhus Convention and article 4, paragraph 2 of the Directive, the Provincial Executive, in giving reasons for its refusal to disclose environmental information contained in the above-mentioned documents, should in any event have made a distinction between the information relating to environmental emissions in those documents and other environmental information. As the Provincial Executive failed to do so, the Division takes the view that it did not provide sufficient reasons for its refusal to make these documents public, in so far as this concerns the environmental information contained in them, contrary to section 7:12 of the General Administrative Law Act.

15.2. The submission succeeds.

16. Greenpeace's application for review is well founded.

17. It follows from what has been held above at 15.1 that the decisions of 6 November 2012, 4 December 2012 and 15 January 2013 were not properly reasoned, contrary to section 7:12 of the General Administrative Law Act, in so far as these decisions concerned the documents numbered 34, 122, 631, 969, 973, 1027, 1043, 1075, 1104, 1114, 1136, 1332, 1411, 1563, 1679, 1686 and 1722. The decisions in question are therefore eligible to be quashed on this ground.

Decision of 11 September 2013

18. In so far as the documents numbered 103, 665, 1171, 1181, 1190 and 1393 are concerned, the Provincial Executive took a new decision on 11 September 2013, as required by the appealed judgment. In view of section 6:24 of the General Administrative Law Act, when read in conjunction with section 6:19, subsection 1 of that Act, this decision is deemed by operation of law to be the subject of this action.

19. In the above-mentioned decision, the Provincial Executive disclosed the document numbered 103 and, after giving additional reasons, once again refused to disclose the documents numbered 665, 1171, 1181, 1190 and 1393. In doing so, the Provincial Executive took the position that the documents were drawn up for the purposes of internal consultation and only contained either environmental information which had already been made public when the permit was granted or key figures which are generally accessible through the website of the National Institute for Public Health and the Environment (RIVM). According to the Provincial Executive, the documents also contain personal opinions on policy which are so closely

interwoven with the environmental information that the interests of protecting personal opinions on policy should, in its view, outweigh the interests of disclosure.

Greenpeace's application for review

20. Greenpeace submits that the Provincial Executive once again wrongly refused to disclose the above-mentioned documents. In its view, the Provincial Executive wrongly ruled that the documents concerned had been drawn up for the purposes of internal consultation since they contain drafts of the oral pleadings of RWE and Nuon.

Greenpeace also submits that if the Division considers that the Provincial Executive rightly took the position that the documents concerned were drawn up for the purposes of internal consultation, the Provincial Executive provided insufficient reasons as to why in this case the interests of protecting personal opinions on policy contained in them outweigh the interests of disclosure. It adds that the interests of disclosure are great here, if only because of the public debate on the impact of RWE's coal-fired power plant on the human and natural environment. Moreover, Greenpeace argues that it is not apparent why the environmental information could not be disclosed without revealing personal opinions on policy. Nor has the Provincial Executive assessed whether the documents concerned contain information about environmental emissions. According to Greenpeace, disclosure of this information cannot be refused by virtue of section 11, subsection 4 of the WOB and article 4, paragraph 2 of the Directive.

20.1. In ground 6.2 of the appealed judgment, the District Court expressly and unreservedly held in relation to various documents, including those numbered 665, 1171, 1181, 1190 and 1393, that as they had not been shared with persons other than the administrative authorities and their advisers they should be deemed to have been drawn up for the purposes of internal consultation. This finding has not been disputed on appeal. As there is also no evidence of a close interconnection between this finding and what has been submitted on appeal, the Division must now assume that this view of these documents is correct. In so far as Greenpeace has argued that the Provincial Executive wrongly took the position that these documents could not be deemed to have been drawn up for the purposes of internal consultation, this submission therefore fails.

20.2. Greenpeace rightly submits that the Provincial Executive has given insufficient reasons for its refusal to disclose the documents numbered 665, 1171, 1181, 1190 and 1393. It should be

noted that the Provincial Executive's submission that the environmental information contained in these documents is already in the public domain through inclusion in various documents and on the internet has been interpreted by the Division as meaning that the Provincial Executive believes that the interests of disclosure have already been sufficiently served. However, the Provincial Executive has referred only in general terms to certain documents and a website where environmental information has been made public, but it cannot be inferred from this what environmental information has been made public and where and how this has happened. There is therefore no basis for the view that the interests of disclosure have already been sufficiently served. As the interests of disclosure have not already been sufficiently served, the mere assertion that personal opinions on policy are in this case so closely interwoven with the environmental information as to be inseparable is an insufficient basis for the view that the Provincial Executive could reasonably have concluded that the interests of protecting personal opinions on policy outweigh the interests of disclosure. Another factor taken into account here is that the Provincial Executive stated in the hearing before the Division that it could have provided the relevant environmental information as it was already in the public domain, but that this would have been so time-consuming that it decided not to do so and instead merely to refer to the documents and website where the environmental information had previously been made public.

The submission succeeds.

21. Greenpeace's application for review of the decision of 11 September 2013 is well founded. This decision is eligible to be quashed as being contrary to section 7:12 of the General Administrative Law Act.

22. In order to resolve the dispute efficiently, the Division believes it necessary to provide, pursuant to section 8:113, subsection 2 of the General Administrative Law Act, that any application for review of the new decision to be taken by the Provincial Executive on Greenpeace's objection, in so far as it relates to disclosure of the documents numbered 34, 122, 210, 631, 665, 969, 973, 1027, 1043, 1075, 1104, 1114, 1136, 1171, 1181, 1190, 1332, 1393, 1411, 1563, 1679, 1686 and 1722, may be lodged only with the Division.

23. The Provincial Executive should be ordered to pay Greenpeace's legal costs in the action in the manner referred to below. There is no ground for making an order for Greenpeace to pay the costs of the Provincial Executive and RWE since Greenpeace has made no unreasonable use of its rights under procedural law.

Moreover, the Division considers that it would not be reasonable to order the Provincial Executive to reimburse the court fee paid by RWE for the hearing of its appeal, since the appeals brought by the Provincial Executive and by RWE were against the same part of the appealed judgement and both these appeals have been held to be well founded on that point. The Division will therefore direct the secretary of the Council of State to repay the court fee paid by RWE.

Decision

The Administrative Jurisdiction Division of the Council of State:

I. declares the appeals of the Provincial Executive of Groningen and RWE Eemshaven Holding B.V., a private limited company, to be well founded;

II. declares the appeal of the foundation known as Stichting Greenpeace Nederland to be unfounded;

III. sets aside the judgment of the North Netherlands District Court of 18 July 2013 in case no. 12/796, in so far as it quashed the decisions of 15 August 2012 (reference 2012-36.523/32, LGW), 6 November 2012 (reference 2012-48.845/45/A.14, LGW), 4 December 2012 (reference 2012-53.722/49/A.19, LGW) and 15 January 2013 (reference 2013-00818/3/A.17, LGW), to the extent that they related to the disclosure of the documents numbered 34, 40, 42, 45, 49, 84, 122, 123, 138, 170, 172, 173, 174, 207, 210, 220, 230, 269, 279, 292, 294, 313, 319, 360, 375, 378, 394, 469, 496, 510, 513, 522, 525, 527, 528, 534, 540, 548, 550, 557, 558, 560, 562, 565, 566, 568, 569, 570, 577, 578, 579, 607, 617, 621, 623, 624, 625, 629 (annexe to 1685), 630, 631, 635, 638, 645-648, 651, 653 (is 510), 657 (is 496), 659 (is 968), 685, 692, 694, 696, 697, 699, 725, 727, 728, 732, 733, 735-741, 745, 746, 748, 749, 752, 753, 757-762, 764, 765, 766, 774, 823, 859, 874, 893, 894, 899, 947, 954, 963, 964, 968, 969, 973, 984, 1025, 1027, 1031, 1035, 1038, 1039, 1040, 1043, 1045-1050, 1053, 1058, 1059, 1067, 1068, 1069, 1071, 1072, 1074, 1075, 1076, 1078, 1079, 1080, 1095, 1099, 1100, 1101, 1104, 1115 (annexe to 1114), 1136, 1149, 1151, 1169, 1193, 1203 (is 496), 1209, 1319, 1320, 1321, 1331, 1332, 1340-1344, 1350, 1351, 1352, 1395, 1401, 1405, 1406, 1407, 1411, 1413, 1429, 1436, 1457, 1461, 1508, 1510, 1513, 1524, 1563, 1618 (is 635), 1625, 1629, 1634 (is 496), 1635, 1636, 1661, 1679, 1681-1684, 1686, 1687, 1690, 1693, 1699, 1718 and 1722;

IV. declares the application for judicial review lodged by Stichting Greenpeace Nederland with the District Court to be well founded;

V. quashes the decisions of 6 November 2012, 4 December 2012 and 15 January 2013, in so far as they concern the disclosure of the documents numbered 34, 122, 210, 631, 969, 973, 1027, 1043, 1075, 1104, 1114, 1136, 1332, 1411, 1563, 1679, 1686 and 1722;

VI. upholds any other parts of the judgment that have been disputed;

VII. declares the application by Stichting Greenpeace Nederland for review of the decision of the Provincial Executive of Groningen of 11 September 2013, reference MB/JE/10036191, to be well founded;

VIII. quashes that decision;

IX. directs that any application for review of the new decision to be taken by the Provincial Executive of Groningen on the objection of Stichting Greenpeace Nederland may be lodged only with the Division;

X. orders the Provincial Executive of Groningen to reimburse the legal costs incurred by Stichting Greenpeace Nederland in connection with the proceedings for review of the decision of 11 September 2013 amounting to €487 (four hundred and eighty-seven euros), which are entirely attributable to legal assistance provided professionally by a third party;

XI. directs that the secretary of the Council of State should repay to RWE Eemshaven Holding B.V., a private limited company, the court fee of €478 (four hundred and seventy-eight euros) paid by it for the handling of the appeal.

Judgment given by J.C. Kranenburg, presiding judge, and E. Steendijk and C.M. Wissels, members of the Division, in the presence of A.J. Veenboer, Officer of the Council of State.

(signed by Kranenburg and Veenboer)

Officer of the Council of State

Delivered in public on 16 July 2014

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