ACCC/C/2014/124

REPLY from the Communicant

to the 'Statement of the Government of the Netherlands concerning communication ACCC/C/2014/124' of 26 November 2015

From: Jan Haverkamp (communicant), Bondine Kloostra (legal council)
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Case: ACCC/C/2014/124

Some additional observations regarding the facts of the case

1. With the response to Greenpeace's access to documents request it became clear that a continuous and very intensive exchange of information had taken place between RWE and NUON and the competent authorities that had been granting permits for the power plants pending the appeal proceedings that Greenpeace and other parties started with regard to the coal plants' nature permits before the the Administrative Jurisdiction Division of the Council of State (hereinafter: the Council of State), the highest Dutch administrative appeal court.

2. As the Government of the Netherlands (hereinafter: the Netherlands) observed in their communication, 1724 documents were identified by the Dutch authorities falling within the scope of Greenpeace's application for access to documents of 1 June 2011. After Greenpeace launched confirmatory applications the public authorities took three confirmatory decisions, the decisions of 15 August 2012, 6 November 2012 and 4 December 2012. After the final verdict of the Council of State in the appeal proceedings in this case 300 documents remained undisclosed, including 87 documents which were only to be partly disclosed.
   The appeal procedures concerning the nature permit granted to NUON was withdrawn by Greenpeace and other parties in 2011. The nature permit for RWE's project was annulled by the Council of State on 24 January 2012[1]. This excludes procedural interest on the side of the Netherlands in non-disclosure of the

1. Judgement of the Council of State of 24 August 2011, case number 200900425/1/R2, available on the website of the Council of State: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=58814&summary_only=&q=+200900425%2F1%2FR2

documents, as the last confirmatory decisions in this case were taken after the legal procedures on the nature permits in question were closed by then.

3. All documents concerned relate to the construction and exploitation of power plants by the companies RWE and NUON in the Eemshaven in the north of the Netherlands. The undisclosed documents regard the exchange of information and discussions between the public authorities and RWE and NUON and other private organisations pending the appeal proceedings before the Council of State on the nature permits granted for the building and exploitation of the power plants.

4. In the proceedings regarding the non-disclosure of documents the public authorities have explicitly claimed – before the District Court, and in appeal before the Council of State – that the exchange of information with RWE and NUON and other parties was meant to adjust the arguments and facts that could be put forward by the public authorities, and by RWE and NUON in the proceedings regarding the permits granted to these companies for the coal fired power plants in question. According to the representative of the public authorities in the legal proceedings regarding the Greenpeace application for access to documents, the public interest in defending the permits in court were 'parallel' to the companies' interests in upholding the granted permits. Both, the public authorities and RWE and NUON, were parties to the proceedings that were started by Greenpeace and other parties with regard to these permits.

5. The 300 documents that were not or only partly disclosed concern various sorts of information exchanged between the public authorities and the private companies concerned. Hereunder we describe some examples with the aim to clarify the discussion (numbering corresponds to the initial numbering of documents by the Dutch public authority, that was also used in the judgement of the Council of State):

- **document 34**: e-mail from: NUON, to: NUON, RWE, subject: '*Memo Erik Stab Advies Onderdeel Geluid'* (Memo by 'Erik' on the Advice of the Council of State Advisers, section Sound);
- **document 40**: e-mail from: NUON, to: *'RWE, NUON, Adviesbureau, Advocaat NUON, LNV, Landsadvocaat, Provincie Groningen'* (RWE, NUON, advisers, NUON's lawyer, provinces laywer, province of Groningen), subject: *'meelezen stuk NUON voor de StAB'* (reading of NUON's document for the Council of State's advisers);

- **document 41**: e-mail from: *advocaat NUON* (NUON's lawyer), to: *NUON, RWE, adviesbureau, LNV, Landsadvocaat, provincie Groningen* (NUON, RWE, advisers, ministry of Agriculture and Nature, province's lawyer, province of Groningen), subject: '*StAB Nbw: DROB en Alternatieven'* (Advisers of the Council of State re proceedings on the nature permit 'imperative reasons of overriding interest' and alternatives');
- **document 220**: e-mail from: the province of Groningen, to: NUON, RWE, advisers (probably the ecological experts from companies Arcadis or Bakker, working for NUON and RWE), province of Groningen (*NUON, RWE, adviesbureau, provincie Groningen*), subject: 'Overleg N-depositie 28 01 agenda en stukken' (*Meeting on nitrogen deposition 28/01 Agenda and documents*). The document(s) contain information on the ecological effects of nitrogen deposition from the coal plants on protected nature;
- **document 292**: e-mail (and annexes?) from: province of Groningen, to: NUON, RWE, Ministry of Agriculture, province's lawyer, subject: 'Re: meelezen stuk NUON voor het STAB Projectcode P09015 *(Reading of document NUON for the Council of State advisers Project code P09015);*
- **document 646**: e-mail from RWE's lawyer, to: NUON, Province of Groningen, RWE, lawyer NUON, Ministry of Agriculture, Province's lawyer (*NUON, provincie Groningen, RWE, advocaat NUON, LNV, landsadvocaat*), subject: 'Re: Reading along with document NUON for STAB (advisers of the Council of State, Project code P09015' *('RE: Meelezen stuk NUON voor het STAB, Projectcode P09015*);
- **document 1699**: e-mail from: NUON, to: province of Groningen, RWE's lawyer, NUON and/or RWE's advisers (probably ecological bureau Arcadis or Bakker), province's lawyer, RWE, NUON's lawyer, Groningen Seaports, Ministry of Agriculture (*provincie Groningen, advocaat RWE, adviesbureau, landsadvocaat, RWE, advocaat NUON, GPS en LNV*), subject: Working group deposition (of nitrogen) (report of meeting 11.1.11) *(Werkgroep stikstof (verslag overleg 11.1.11).*

The 300 documents not (completely) disclosed contain environmental information

6. The Netherlands have held in their communication to the Aarhus Compliance Committee, submitted by letter of 26 November 2015, that 'all the environmental information' in this case 'has been disclosed', because the final versions of reports and pleadings have been disclosed. This reaction of the Netherlands is completely

incorrect and shows the serious misinterpretation of what is the very basis of the right to environmental information as laid down in the Aarhus Convention. The right of access to environmental information concerns all documents that contain environmental information, whether this information is or is not considered complete or correct by the public authorities and therefore has not been included in the final versions of the documents that are disclosed.
This clearly follows from Articles 2(3) and 4 of the Aarhus Convention, with the exceptions as defined in Article 4(3) and 4(4).

7. It is clear from the judgement of 16 July 2014 of the Council of State that the 300 documents in question contain environmental information. It also follows from the subject covered by the documents in question as published by the public authorities in this case. For this reason the Netherland's claim that these documents would not contain environmental information should be rejected as unfounded.

General legal observations

8. Disclosure of environmental information is the main rule, exceptions to that rule may thus not be interpreted in an extensive way. The Dutch interpretation of Article 4(3)(c) of the Aarhus Convention is not only extensive, it is contrary to the exemption regarding 'internal communications'.

9. What is understood by "internal communications of public authorities" in Article 4(3)(c) of the Convention is not further defined in the Aarhus Convention, but it is clear from the wording of the provision that it concerns communications *of public authorities* and that it concerns *internal* communications, not communications of or with other external parties. The Aarhus Convention Implementation Guide states that this ground for refusal is intended to protect the personal opinions of government staff :

> "It does not usually apply to factual materials even when they are still in preliminary or draft form." (Implementation Guide 2014, p. 85).

Disclosure of internal communications cannot be refused as far as it contains factual data. The Implementation Guide contains furthermore the following observation:

> "Opinions or statements expressed by public authorities acting as statutory consultees during a decision-making process cannot be considered "internal

communications". Neither can studies commissioned by public authorities from related, but independent, entities." (Implementation Guide 2014, p. 85).

It further follows from the Implementation Guide (p. 85) that once information has been disclosed by the authority to a third party, that information cannot qualify as "internal communications", the information loses its 'internal' character.

10. Directive 2003/4 of the European Parliament and of the Council[2] implements the Aarhus Convention in European Union law. Directive 2003/4 has been implemented in the Netherlands in the Public Access Act (Wet openbaarheid van bestuur – or WOB), as the Netherlands correctly observed, and Article 19.1 to 19.6 of the Environmental Management Act (Wet milieubeheer). As has been rightly pointed out by the Netherlands, Article 11(1) of the Public Access Act provides that where an application for access to information concerns information from documents drawn up for internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein. Article 1(f) of the Public Access Act contains the definition of a 'personal opinion on policy' as 'an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments the advance in support thereof'. As a result of the implementation of Directive 2003/4, Article 11(4) of the Public Access Act has been adopted, providing that with regard to environmental information falling under Article 11(1) of the Public Access Act the interest of protection of personal opinions on policy shall be weighed against the interest of disclosure of the information. Article 11(4) of the Public Access Act is to be considered the implementation of the ground for refusal regarding 'internal communications' as laid down in Article 4(3)(c) of the Aarhus Convention.

More than extensive interpretation of the 'internal consultation' exception

11. In the case-law of the Dutch administrative courts, including the highest administrative court, the Council of State, that was developed over the last decade the interpretation of what can be considered 'internal consultation' in the sense of Article 11(1) of the Public Access Act under the general disclosure regime, not concerning environmental information, has been more and more extended.

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2 Directive 2003/4 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

Information regarding consultations with or advice from entities which are completely independent from public authorities were judged to fall under the 'internal consultation' exception of Article 11(1) of the Public Access Act, even in cases where such private entities have an own interest in supplying the information concerned or in the outcome of the consultation.

12. Outside the scope of the legal framework laid down in the Dutch Public Access Act, which provides that the 'internal consultation' exception can be applied to consultations within a public authority, on policy – thus: opinions of staff, not being information on facts – this Dutch case-law, not concerning environmental information, extended the concept of 'internal consultation' to consultations with external third parties, with possibly an own interest in the exchange of information with the public authority, resulting in for example the following information falling under that exception:

- an advise addressed to the Dutch Minister of Education, written by the administrators of the 'Foundation Islamic Primary schools Amsterdam', regarding whether the islamic schools of the Foundation would be able to fulfil the requirements for schools of the ministry[3].
- e-mail correspondence between the municipality of Leiden and Foundation Ons Doel, a housing Foundation, regarding an eventual sale of specific real-estate by the municipality to the Foundation[4].
- advise and consultation of third parties, including private companies, requested by the mayor of Rotterdam regarding safety issues in relation to an application for a permit for the organisation of a music event in the harbour of Rotterdam[5].

13. Further it is important to note that until the judgement of the Council of State of 16 July 2014 in the current case regarding Greenpeace's request for information on the coal fired power plants in the Eemshaven, there was no case law of the

3 See Council of State, Judgement of 18 February 2009, ECLI:NL:RVS:2009:BH3251, available on the website of the Council of State: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=33912&summary_only=&q=200804345%2F1

4 See Council of State, Judgement of 19 January 2011, ECLI:NL:RVS:2011:BP1316, available on the Council of State's website: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=51928&summary_only=&q=201002672%2F1%2FH3

5 See Council of State, 22 mei 2013, ECLI:NL:RVS:2013:CA0664, available on the Council of State's website: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=74030&summary_only=&q=201108747%2F1%2FA3

Council of State in which this – more than – extensive interpretation of the ground for refusal of 'internal consultation' was applied to environmental information. To the contrary, the Council of State held in a judgement of 8 February 2006[6] regarding draft reports on environmental impacts of activities of the company ENCI that these did not fall under the 'internal consultation' exception, but were drawn up and addressed to the public authorities to get advice to come to a complete and sufficient Environmental Impact Assessment report that could be submitted by ENCI with an application for an environmental permit.

14. The Council of State held in its judgement in the before mentioned ENCI-case that in this context the exchange of information between ENCI and the public authorities did not enable the public authority to 'take a position' on a policy issue, but was meant to enable ENCI to draft and submit a complete and correct document. For this reason the Council of State judged that the exception of 'internal consultation' did not apply to these draft reports.

15. In the Greenpeace-case, the Dutch authorities took the position that the documents submitted by RWE and NUON with or in support of their applications for permits for the concerned power plants could, in accordance with the ENCI-judgment, not fall under the ground for refusal of 'internal consultation', but that this ground for refusal did apply where it concerned information exchanged between the Dutch authorities and RWE and NUON after Greenpeace and other parties instituted proceedings regarding these permits. The Council of State approved this interpretation and appliance of the 'internal consultation' ground and rejected Greenpeace's argument that this interpretation is violating the Aarhus Convention.

16. As was set out above, the documents that were not disclosed all contained environmental information and were exchanged between RWE and NUON and the Dutch authorities with the aim of further substantiating the 'appropriate assessment' prescribed by the European Habitats Directive[7] and the defence of the permits granted to RWE and NUON in the appeal proceedings that Greenpeace and other parties launched before the Dutch Council of State.

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6 Council of State, Judgement of 8 February 2006, case number 200505098/1, available on the Council of State's website: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=12834&summary_only=&q=200505098%2F1

7 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

17. The Dutch authorities admitted that they exchanged information with RWE and NUON to adjust their argumentation in the proceedings to try to uphold the permits in those proceedings. From the description of the non-disclosed documents it is clear that during the appeal proceedings extensive consultations took place between RWE and NUON and the Dutch authorities, as well as between the lawyers and ecologists working for RWE and NUON and the Dutch authorities. A large number of non-disclosed documents are (ecological) reports commissioned by RWE and NUON to further substantiate the ecological conclusions in the original 'appropriate assessment' of the permits granted to them. Reports were for example submitted to the Dutch authorities and commented by the Dutch authorities before these reports were submitted by NUON or RWE in their definitive versions to the Council of State in the pending appeal proceedings. And the other way around, documents were drawn up by the Dutch authorities and their internal or external advisers, where the draft versions of such documents were submitted to NUON or RWE or their lawyers or ecological advisers, before final versions were drawn up for submission as procedural documents in the pending appeal proceedings.

18. It is clear that the information drawn up and submitted by RWE and NUON and/or their external advisers to the Dutch authorities does not and cannot in any way qualify as 'internal communications' in the sense of Article 4(3)(c) of the Aarhus Convention, because these documents were not issued by the concerned Dutch authority for consultation with that authority.

19. For the documents issued by the Dutch authorities and sent to and/or exchanged with RWE and NUON and their external advisers or other third parties, for example the Dutch private company owning the Eemshaven port, Groningen Seaports, it is clear that these cannot fall under the exception of Article 4(3)(c) of the Aarhus Convention either, as these were drawn up in consultation with or were issued to independent third parties, the companies RWE and NUON and other third parties, with an own interest in the consultations/receiving of information. The fact alone that this information has been exchanged with third parties, RWE and NUON and others, some of which companies on top of that had private interests in receiving/exchanging this information, makes that this information cannot be considered as 'internal communications'. Moreover, as the information concerned, for example the draft versions of documents issued by the Dutch authorities, or the minutes and reports of round tables and meetings

between the Dutch authorities and RWE and NUON and external experts hired by these companies (air quality, see water protection, ecology) has been disclosed to these third parties, RWE and NUON and the experts working for them, this information cannot be kept confidential under the 'internal communications' exception towards other third parties like Greenpeace; that information has indeed lost its internal character due to the disclosure to RWE and NUON.

20. Further, it should be noted that a considerable amount of the information that was not disclosed, concerns ecological reports, not containing any staff opinions on policy, but only ecological appreciations and estimations. This therefore concerns information that cannot fall under the 'internal communications' exception of Article 4(3)(c) of the Aarhus Convention.

Balancing of interests

21. Article 4(3)(c) of the Aarhus Convention requires public authorities to take into account the public interest served by disclosure. In the Dutch legal framework this requirement has been implemented in Article 11(4) of the Public Access Act, where balancing of interests, between the interest of protecting 'internal consultation' and the public interest served by disclosure of information is prescribed.

22. The Netherlands have put forward in their communication to the Aarhus Compliance Committee in this case that they balanced the interests regarding the (non-)disclosure of the documents concerned, and whether the exchanged documents could be presented in a form 'that could not be traced back to any individual'.

23. The balancing of interest has been very rudimentary, just mentioning the interest of the public authorities in keeping the adjustment of the strategical approach confidential (presentation of facts and arguments) in the appeal proceedings with RWE and NUON, the permit holders. The interest served by the exchange of information with RWE and NUON was the interest of the public authorities to keep confidential that they collaborated narrowly with the companies to try to uphold in court the permits that were granted. But, it should be kept in mind that upholding granted permits in court in itself does not serve the public interest. The public interest can be equally served by the annulment of permits by an

independent judge, especially where it concerns nature permits which have the aim to guarantee that protected nature will not suffer severe damage from industrial activities, as was the case here.

24. In the balancing of interests, the Dutch authorities, later on approved by the Council of State, did not take into account that the permits granted were highly controversial because they concerned the building and exploitation of coal fired power plants at the edge of one of Europe's top nature protection sites, the Natura 2000-area and current UNESCO world heritage site of the Waddensea. The balancing of interests should have resulted in the disclosure of the requested documents, because non-disclosure did not serve a general interest and the information cannot be considered 'internal communications'. Disclosure would have served the existing wide debate on whether coal fired power plants could and should be built in this area, close to unique and protected nature.

25. Furthermore the Netherlands have put forward that for every non-disclosed document, the Dutch authorities would have considered whether each and every document could have been disclosed in a form 'that could not be traced back to any individual'. This is not true. According to Dutch case law, the authorities are not under the obligation to take into account whether the information requested can be or cannot be traced back to any individual. Blacking out the names of public staff or of staff working for RWE and NUON has not been taken into consideration. The Dutch authorities did not substantiate for any document whether blacking out names in it would make it possible to disclose the document in question.

26. Further, the confirmatory decisions were taken on 15 August 2012, 6 November 2012 and 4 December 2012. The public authorities wrongly did not take into account that the appeal proceeding regarding RWE's nature permits had come to an end, at the time of the two last confirmatory decisions were taken, with the judgement of the Council of State of 24 August 2012[8] annulling the permits granted to RWE. The appeal proceeding regarding the nature permit granted to NUON had been withdrawn by Greenpeace and other parties in already in 2011 after that project was cancelled. The documents thus concerned a permit that had been annulled and a permit that had become definitive because of the withdrawal

8 Judgement of the Council of State of 24 August 2011, case number 200900425/1/R2, available on the website of the Council of State: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=58814&summary_only=&q=+200900425%2F1%2FR2

of appeal. The Dutch authorities did therefore have no actual procedural interest in the non-disclosure of the documents concerned. They wrongly did not take into account this absence of interest.

27. The balancing of interests has been insufficient and should have led to the disclosure of the 300 documents that remained undisclosed. The Council of State wrongly approved the decision-taking of the Dutch authorities. For this reason it is clear that the Netherlands violated Article 4(3)(c) of the Aarhus Convention.

Documents relating to the 'absence of alternative solutions' and 'imperative reasons of overriding public interest'-test under the Habitats Directive

28. Because significant negative impacts of the coal plants of RWE and NUON could not be excluded, permits for the building and exploitation of these plants could only be granted after a so-called 'alternatives' and 'imperative reasons'-test was carried out, as prescribed in Article 6(4) of the Habitats Directive. This provision prescribes the following:

> If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

29. Part of the undisclosed documents were draft reports of ECN, an independent private research institute, and communications between ECN and the Dutch authorities and RWE and NUON on the subject of this 'alternatives and imperative reasons'-test.

30. According to the Netherlands, the information in this case that concerns the 'alternatives and imperative reasons'-test would not qualify as environmental information. This vision is wrong and in contradiction with the definition of environmental information in the Aarhus Convention art. 2(3). For the protection of Natura 2000-sites, the European Union legislator has prescribed that when negative effects of a project on protected nature cannot be excluded, a permit for the project can only be granted where no alternatives for the project are available and when it is established that the project serves so-called imperative reasons of overriding public interest. This is a precondition that has to be fulfilled before a nature permit can be granted under the Habitats Directive. The 'alternatives and

imperative reasons'-test concerns thus an administrative measure to protect nature. The information exchanged between the public authorities and ECN and between the public authorities and the permit holders, was produced **during** the phase of the appeal proceedings in order to substantiate with additional proof that the power plants of RWE and NUON would serve imperative reasons of overriding interest and that there would not exist any alternative solutions for these power plants. This information thus regards the fulfilment of an administrative measure in the sense of Article 2(3)(b) of the Aarhus Convention and is to be qualified as environmental information that should have been disclosed.

31. By denying that this information qualifies as environmental information under the Aarhus Convention, the Dutch authorities and the Council of State thus violated Article 2(3)(b) of the Aarhus Convention.

Conclusion

The arguments of the Netherlands should be rejected. The 300 documents concerned do contain environmental information. Disclosure of these documents was refused on the ground of refusal of 'internal consultation', where it did not concern internal communications but communications and exchanges with external private third parties, having an own interest in the exchange of information, in the form of upholding their nature permits in the pending proceedings before the Council of State. The Netherlands therefore wrongly applied Article 4(3)(c) of the Aarhus Convention. Furthermore, the balancing of interests was insufficient, and, against the claim of the Netherlands that this happened otherwise, the public authorities did not take into consideration whether the information could be adapted in such a way that it could not be traced back to specific persons. The documents relating to the 'alternatives and imperative reasons'-test were not considered environmental information in violation with Article 2(3)(b) of the Aarhus Convention.