Ruling 201303313/1/A4

Date of ruling: Wednesday 19 February 2014
Against: the Minister of Economic Affairs
Nature of proceedings: First instance - multiple
Jurisdiction: General Section - Environment - Nuclear Energy
A press release has been issued with this ruling.
201303313/1/A4.
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DEPARTMENT OF
ADMINISTRATIVE JURISDICTION
Ruling in the proceedings between:
1. the Stichting Nederland foundation, based in Amsterdam, the Vereniging World Information Service on Energy Amsterdam association (hereinafter: Vereniging WISE), based in Amsterdam, the Vereniging Zeeuwse Milieufederatie association, based in Goes, the Stichting Noordelijke Ondergrond Afvalvrij foundation (hereinafter: Stichting No-A), based in Midden-Drenthe, and [appellant under 1E], residing in Middelburg,
2. [appellant under 2] and others, appellants,

By a decision of 18 March 2013, the Minister has granted a licence as meant in Section 15, preamble and b of the Nuclear Energy Act, to the company limited by shares Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ for the requested changes to the Nuclear Energy Act licence for the extension of the design lifetime of the Borssele nuclear power plant (hereinafter: KCB).
Greenpeace, Vereniging WISE, Vereniging Zeeuwse Milieufederatie, Stichting No-A and [appellant under 1E] and [appellant under 2] and others have lodged an appeal against this decision. Admissibility of [appellant under 2] and others
2. [appellant under 2], together with the Stichting Laka foundation, based in Amsterdam, and 34 other persons have lodged an appeal.
2.1. The Minister and EPZ argue that Laka has no interest in the disputed decision, because the disputed decision has no relation to any activity that falls within the scope of the objectives of its articles of association. They also state that a large number of persons with whom [appellant under 2] has lodged an appeal reside outside a radius of 20 kilometres from the KCB, so that they too cannot be designated as parties with an interest in the disputed decision.
2.2. According to its articles of association, Laka seeks to inform society as widely as possible of energy problems in general and nuclear energy in particular. The foundation attempts to achieve this goal by:
- providing information:
a. during demonstrations;
b. on request by third parties;
c. through its own publications;
- making information available:
a. on request by third parties;
b. through publicity and through the publication of documentation;
- by giving publicity to energy problems;
- other means for achieving its stated objectives.
2.3. During the hearing, Laka stated that one of the ways in which it meets its objective

according to its articles of association – “to inform” – is to campaign. It also stated that its articles of association should be updated.
2.4. With regard to the question whether a legal person is an interested party as meant in Article 1:2, first and second paragraph, of the General Administrative Law Act, the determining factor is whether the legal person in particular represents a direct general or collective interest according to the objectives of its articles of associations and as apparent from its actual activities. The motives of the legislators behind Article 1:2, third paragraph, of the General Administrative Law Act, according to the history of the formation of said Act (Parliamentary Documents II 1988/1989, 21 221, no. 3, pp. 32-35) were apparently to ensure that associations or foundations could act as interested parties, provided that they sought to represent a general or collective interest on the basis of their articles of association, and to which end they actually worked, with respect to decisions with which they are directly involved. Laka’s objectives according to its articles of association, which are not territorially limited, relate solely to informing society about energy problems in general, and nuclear energy in particular. In the light of this objective, Laka does not in particular represent any direct interest related to the disputed decision. The position taken by Laka during the hearing, i.e. that it seeks to obtain and disseminate information by campaigning, does not alter this. For this reason Laka cannot be designated as an interested party as meant in Article 1:2 of the General Administrative Law Act. The appeal is, to the extent that it is lodged by Laka, inadmissible.

4.1. According to its articles of association, the scope of the Stichting No-A covers the three northern provinces of Groningen, Friesland, and Drenthe, plus the area situated outside these provinces to the extent that this area is affected by the storage of nuclear waste and other hazardous waste in the topsoil and subsoil, as well as by the presence of companies that produce or process the aforementioned waste to the extent that the waste and/or the company is situated in the three provinces. The waste produced by the KCB in Zeeland is removed to COVRA, which is also in Zeeland. The disputed decision therefore has no relation to any activity that takes place within the scope of the articles of association of Stichting No-A. In view of this, Stichting No-A has no interest in the disputed decision. To this extent, the appeal is inadmissible.
Licence
7. By a decision of 18 June 1973, EPZ was granted a licence to commission the KCB and keep it in operation. This licence is valid for an indefinite period. The disputed decision entails the granting of a licence for an update of the Safety Report. This extends the lifetime of the KCB from 40 to 60 years. The application to this effect was submitted because the original design and construction of the KCB were predicated on a lifetime of 40 years, and this lifetime has served as the starting point in the Safety Report that forms part of the Nuclear Energy Act licence. When making the disputed decision, the Minister also officially attached a provision to the licence concerning the investigation into previously unnoticed laminar defects in the wall of the reactor vessels in the Belgian Doel-3 and Tihange-2 nuclear plants. In addition, he revoked the licence provisions II.B.29, II.E and II.H, under 2, regarding the security and dismantling of the KCB.
8. Greenpeace, Vereniging WISE, Vereniging Zeeuwse Milieufederatie and [appellant under 1E] (hereinafter: Greenpeace and others) argue that the Minister neglected, contrary to Article 3:11 of the General Administrative Law Act, to make the security plan and dismantling plan available for viewing. They state that, as a result, they were unjustly denied the opportunity to investigate the extent to which the security and dismantling of the KCB are assured following the revocation of licence provisions II.B.29, II.E and II.H, under 2. In

this connection, others argue in relation to the revocation of licence provision II.B.29 concerning the dismantling of the KCB that, among other things, the Minister has wrongly failed to assess whether EPZ will be sufficiently financially secure at the end of 2033. They also state that the revocation of licence provisions II.E and II.H, under 2 has resulted in it being unclear whether the KCB is sufficiently secure, because it is not clear whether the measures taken in accordance with the Regulation on the security of nuclear establishments nuclear fuel (hereinafter: Security Regulation) have been adapted to the extended lifetime of the KCB. The drawing up of a dismantling plan and a security plan is now subject to the decision-making procedures set down in the Nuclear Facilities, Fissionable Materials and Ores Decree (hereinafter: Bkse), the Safety Regulation, and the Regulation on the decommissioning and dismantling of nuclear facilities (hereinafter: Decommissioning Regulation). The Decommissioning Regulation also contains rules relating to the financial security for covering the costs resulting from the dismantling of a nuclear power plant. The dismantling plan and the security plan, as well as the regulations upon which they are based, are not the subject of assessment in these proceedings. The dismantling plan and security plan are not documents as meant in Article 3:11 of the General Administrative Law Act, so there are no grounds for the opinion that the Minister acted incorrectly in not making these documents available for viewing when taking the preliminary decision.

Environmental Impact Assessment (hereinafter: EIA)

9. Greenpeace and others and [appellant under 2] argue that before the disputed decision was taken, an EIA should have been made, because the licensed amendments relating to the disputed decision will have severely deleterious effects on the environment. To substantiate this position, Greenpeace and others refer to Article 4, second paragraph, of directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 concerning the environmental impact assessment of certain public and private-sector projects (OJ 2012 L 26; hereinafter: EIA directive), read in connection with Appendix II, under 13, to this directive and with Chapter 7 of the Environmental Management Act. When interpreting these provisions, account should be taken, in their opinion, of the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25-02-1991 (hereinafter: Espoo Convention). The failure to draw up an EIA is, according to [appellant under 2], contrary to the Espoo Convention. Greenpeace and others state that the ‘Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context’ (hereinafter: the Implementation Committee) set up under the Espoo Convention recently judged that the extension of the lifetime of a nuclear power plant that is not accompanied by any other physical intervention should be regarded as a considerable alteration requiring an EIA. [appellant under 2] also argues that it follows from the disputed decision that Article 11, first paragraph, preamble and under c of the Bkse applies, thereby establishing that the application relates to an alteration to the plant. Greenpeace and others and [appellant under 2] state that the circumstance that various components of the KCB may have to be replaced in due course also confirms that far-reaching changes are being made in the KCB. Greenpeace and others and [appellant under 2] also take the position that category 22.3, under 5° of section D of the appendix to the Environmental Impact Assessment Decree (hereinafter: EIA Decree) applies, because the disputed decision will also result in a change to the time at which operations at the KCB will be terminated. On the grounds of this provision, too, they believe there was an obligation to draw up an EIA. Greenpeace and others also take the position that, in the context of an extension to the lifetime of a nuclear power plant in the United States, it is usual for an environmental impact assessment report to be drawn up there. As there is more experience

of this area in the United States than in Europe, the Minister should, they believe, have included the procedures taken there in his assessment.

9.1. As well as the Netherlands, the European Union is also a party to the Espoo Convention. This brings Directive 85/337/EEC of the Council of 27 June 1985, concerning the environmental impact assessment of certain public and private-sector projects, into line with amending Directive 97/11/EC of the Council of 3 March 1997. These directives have since been revoked and replaced by the EIA Directive. This directive has been implemented in the Environmental Management Act. It is not disputed that the EIA Directive has been correctly implemented. The EIA Directive is not directly applicable.

9.2. Pursuant to Section 7.2 (1) of the Environmental Management Act, by order in council those activities are designated:
a. that could have significant deleterious effects on the environment;
b. with regard to which the competent authority must assess whether they could have significant deleterious effects on the environment. Pursuant to the fourth paragraph, the categories of decisions, in relation to the activities meant in the first paragraph under b, will be designated in the context of which the competent authority must assess, in accordance with Section 7.17 or 7.19, whether these activities have the effects meant in that section, and if that is the case, whether during the preparations an environmental impact report should be made. Pursuant to Article 7.17, third paragraph, the competent authority should take account of the criteria listed with the EIA Directive in Appendix III when taking his decision. Pursuant to Article 2, second paragraph, of the EIA Decree, insofar as it is relevant here, activities meant in Section 7.2, first paragraph, under b, of the Act are designated as those activities that belong to a category described in section D of the appendix.
Section D of the appendix to the EIA Decree, category 22.3, under 5°, designates the establishment of, alteration to, or expansion of one or more interrelated installations for treating and storing radioactive waste in cases where the activity relates to a change to the time of the decommissioning or dismantling by more than five years. Pursuant to section A, second paragraph of the appendix to the EIA Decree, the following definitions are used in this appendix:
alteration: a reconstruction or other type of change to built structures, furnished areas or existing facilities;
expansion: using built structures, furnished areas or existing facilities again;
establishment of a facility: an expansion of a facility through the establishment of a new installation.
Pursuant to Article 11, first paragraph, preamble and under c of the Bkse, the application for a licence for an alteration to a facility as meant in Article 6, 7, 8 or 9 in any case, if the application relates to a structure as meant in Article 6, 7 or 8 and the proposed alteration affects one or more of the factors mentioned in the safety report or risk analysis, meant in Article 6 under h, submitted for the purpose of obtaining the licence meant under a, contains a supplement to this effect.

9.3. By a decision of 18 June 1973, EPZ was granted a licence to commission the KCB and keep it in operation. This licence is valid for an indefinite period. It is stipulated in provision I.1 of this licence that the KCB should be equipped and operated in accordance with the provisions of paragraph 1.1 and Chapters 3 to 21 inclusive of the Safety Report VR-KCB93, as amended and added to with revisions numbered VR-KCB93 REV.1, VR-KCB93 REV.2, VR-KCB93 REV.3, VR-KCB93 REV.4, VR-KCB93 REV.5 and VR-KCB93 REV.6. In this

Safety Report, a number of design analyses have assumed a design lifetime of 40 years. The Borssele Nuclear Power Plant Covenant entered into force in 2006. This covenant stipulates, among other things, that the lifetime of the KCB shall be continued until 31 December 2033 inclusive at the latest. This objective is included in Article 15a of the Nuclear Energy Act. The requested changes relate to the updating of the Safety Report. These changes are set out in the document revision accompanying the application, VR-KCB93 REV.7. The update of the Safety Report is related to the extension of the design lifetime from 40 to 60 years.

9.4. The requested changes will not result in any actual alterations taking place inside the KCB. They relate solely to the updating of the Safety Report. The requested changes do not constitute an activity as meant in section D, category 22.3, under 5° of the appendix to the EIA Decree, because the change requested is not an alteration, expansion, or establishment as meant in section A, second paragraph, of the appendix to the EIA Decree. The fact that what is being requested could result in components of the KCB having to be replaced at some point in the future does not alter the foregoing. Contrary to what is stated by [appellant under 2], from the fact that the Minister has assessed the licence application with respect to Article 11, first paragraph, preamble and under c of the Bkse, it cannot be inferred that actual alterations will take place inside the KCB. From the recent judgement of the Implementation Committee, quoted by others, it cannot be inferred that an actual alteration is taking place. There is no grounds for the view that, in the context of the Dutch licensing procedure, the Minister should have involved the procedure used in the United States for the granting of such a licence. In the light of the foregoing, there is no grounds for the view that the Minister was incorrect in taking the position that, prior to taking the disputed decision, no EIA was required.
The grounds for the appeal are rejected.

10. To the extent that what has been requested does not require an EIA, Greenpeace, and alternatively other parties, argue that the introduction of Section 15a, first paragraph, of the Nuclear Energy Act results in a change to the time of the decommissioning as meant in section D, category 22.3, under 5° of the appendix to the EIA, thereby creating an obligation to perform an EIA. They believe that the adoption of the change to the time of decommissioning by law results in the creation of an obligation to perform an EIA at the time when any subsequent decision on a subsequent alteration is taken. To substantiate this position, they refer to the ruling by the Court of Justice of 17 March 2011, C-275/09, Brussels-Capital Region (www.curia.europa.eu). They believe that the requested changes should be regarded as a phase in a procedure consisting of different phases, for which an EIA is ultimately required.

10.1. Pursuant to Section 15a, first paragraph of the Nuclear Energy Act, the licence granted under Section 15, preamble and under b, for maintaining in operation the KCB, which was commissioned in 1973, to the extent that such operation involves the release of nuclear energy, lapses with effect from 31 December 2033.
10.2. In the ruling of 17 March 2011 quoted by Greenpeace and others, the Court of Justice considered that a licence that does not formally relate to an activity that requires an EIA as meant in Appendices I and II to Directive 85/337 (now the EIA Directive), nonetheless may on the basis of case law require an EIA to be carried out, if the measure forms a phase of a procedure that is ultimately aimed at approving an activity that is a project as meant by Article 2, first paragraph, of Directive 85/337. According to the same case law, if national law

prescribes that the licensing procedure runs in different phases, the EIA of a project should in principle be carried out as soon as it is possible to distinguish and assess all the environmental effects that the project could have. What has been requested does not form a phase in a licensing procedure consisting of different phases that is ultimately aimed at carrying out activities for which an EIA is required.

The alternative grounds for appeal are also rejected.

11. To the extent that Greenpeace and others have adopted the position that the Minister, when assessing what has been requested, should also have assessed, in the light of the aforementioned ruling, whether during the preparation of the security plan and the dismantling plan an EIA should have been performed and that, if this was the case, such an EIA should have been carried out in the context of the requested changes, the Department considers, in reference to what has been considered under 8.2, that the security plan and the dismantling plan are not subject to an assessment in this procedure.

III. declares the appeals otherwise unfounded.