

COUNTRY / REGION REPORTS

The Netherlands

By *dr. K.J. de Graaf & dr. H.D. Tolsma*

(1) Introduction

This country report deals with issues of energy policy in the Netherlands and with developments of environmental law in general as far as it is relevant for implementing international environmental law. The Dutch judgments on liability of Shell for oil spills in Nigeria are also discussed as they are the first foreign direct liability claims in the Netherlands.

(2) Energy

In our country report over 2012 we stated that it was uncertain whether the Netherlands would by 2020 achieve the target of 14% renewable energy required by the European Union Directive on renewable energy (Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC). In 2012 renewable energy accounted for 4.4% of energy consumption in the Netherlands; biomass accounts for more than 70% of all renewable energy and wind power for slightly less than 20%, while other sources have only a small contribution.

In this years report we will elaborate on the newly forged National 'Energy Agreement for Sustainable Growth' that is closely related to the need to stimulate renewable energy generation. We will in this section also focus on the societal and environmental concerns about some recent developments in the Netherlands that effect the implementation and application of international environmental law, such as the streamlining of administrative procedures for large wind farms on land and the desire for a clear regulatory regime for the production of shale gas in both the EU and the Netherlands. We also touch upon the recent earthquakes as a result of the winning of natural gas in Groningen, in the North of the Netherlands.

(A) Agreement with civil society on Energy for Sustainable Growth

In September 2013 the Dutch *Energy Agreement for Sustainable Growth* was agreed upon by more than forty organisations (see www.ser.nl/en). The need to achieve a sustainable energy supply in the future and the desire to achieve that objective in a way that enjoys broad support has brought together the divergent interests of governments, employers' associations and unions, financial institutions, non-governmental environmental organisations and other civil-society organisations to agree on a basis for a new energy and climate policy and on a growth path defined by both energy and climate objectives as well as economic concerns. The agreement aims at saving in final energy consumption averaging 1.5% annually to comply with the EU Energy Efficiency Directive, resulting in a 100 petajoule (PJ) saving in the country's final

energy consumption by 2020. Furthermore it aims to increase the proportion of energy generated from renewable sources from 4.4% in 2012 (and 4.6 in 2013) to 14% in 2020 and to 16% in 2023. It also states that at least 15,000 full-time jobs will be created. This Energy Agreement for Sustainable Growth fits perfectly in the aim of the Rutte/Asscher government. The goal of the Dutch government and the agreement is to achieve, within the international context, a completely sustainable energy supply system by 2050. The success of the agreement is however dependent on continuous support from all parties involved and specifically that of the Dutch government and legislature. According to the agreement there are ten key points for achieving a sustainable energy supply. This report is not suitable to mention and discuss them all. It is no surprise that energy-savings is one of the important basic components mentioned in the agreement. However, there is the relevant component aimed at stimulating renewable energy generation in the Netherlands. Combined with the energy-saving measures, the agreement aims to achieve 16% renewables by 2023 and 14% by 2020. The latter target coincides with the EU mandatory target in the Renewable Energy Directive for the Netherlands. Scaling up both offshore wind power (to 4450 Mw, operational in 2023) and onshore wind power (to 6000 Mw by 2020) are the main instruments for achieving the targets set for renewables, accompanied by an existing financial support mechanism (in the Netherlands, the main support instrument for renewable energy is the so-called SDE+ premium feed-in scheme) and a robust regulatory regime to create legal certainty for investors. In case of the onshore wind farms another key issue in the coming years for the Dutch government and legislature, is local acceptance of these large-scale wind farms. In that perspective the parties agreed that wind farm investors will be legally bound to introduce a participation model enabling local residents to participate actively in the planning and operation of wind farms.

Although the Energy Agreement focuses on energy-savings measures and on stimulating the generation of renewable energy by large-scale wind farms and decentralised power generation (“consumers become producers”), fossil fuels will remain an important component in the Dutch energy consumption up to 2050. The agreement does however state that the capacity of the coal-fired power stations that were built in the 1980s will be minimised as an instrument of the transition to a sustainable supply of energy. This means that three coal-fired power stations will most likely be closed down with effect from 1 January 2016, and that two other power stations will close on 1 July 2017.

The Energy Agreement for Sustainable Growth also encompasses more or less detailed policy initiatives on energy-savings for the built environment, for industry, agriculture, and the commercial sector as a whole and for the transport and mobility sector.

(B) Streamlining and coordinating administrative procedures for renewable energy projects

Streamlining and expediting administrative procedures for renewable energy projects has been of growing importance in the Dutch national regulatory system and in the EU legislation. Administrative procedures have proven a potential obstacle to achieving the targets set by the EU in order to comply with international demands for climate change mitigation. European research showed that 10 years ago there was a lack of coordination between different authorization bodies and the time-consuming administrative procedures and administrative court

procedures hindered the timely realization of renewable energy generation projects in the European Union (see COM(2005) 627 final and COM(2008) 57 final). Therefore, the specific structure of the renewable energy sector should be taken into account when national, regional and local authorities review their administrative procedures for permitting the construction and operation of renewable energy projects. For this reason Article 13 of Directive 2009/28/EC on the promotion of the use of energy from renewable sources (Renewable Energy Directive) requires all Member States – including the Netherlands – to limit national rules concerning authorization, certification and licensing procedures to what is proportionate and necessary. Furthermore, Member States must take appropriate steps to ensure that the responsibility of national, regional and local administrative authorities are clearly coordinated and defined and that their authorization, certification and licensing procedures – including spatial planning – are subject to transparent timetables and are expedited at the appropriate government level.

In the country report for 2012 we discussed some of the procedural elements of the Dutch Crisis and Recovery Act that focuses on alleviating the economic crisis and accelerating decision-making processes and (administrative) court proceedings on a wide variety of economically relevant activities, especially in the fields of sustainability, green energy and innovation. We specifically mentioned that access to court for decentralised government bodies was restricted. Another element of the Crisis and Recovery Act is however to amend existing legislation, for instance to allow for – mandatory – coordinated decision-making for large-scale wind farms at the appropriate governmental level. The reason for this was the long lead times for realizing wind farms; often new zoning schemes were needed and many different permits required from different public authorities, against which any interested party could initiate appeal procedures separately. The Dutch Electricity Act was amended to clearly designate the appropriate governmental level for the realization of large wind farms. The competence to adopt a land use plan allowing for wind farms larger than 100 MW was attributed to the national government and the provincial level will be competent for wind farms larger than 5 MW and smaller than 100 MW. The municipality is competent to adopt a land use plan allowing for wind farms in other cases. The legislation also stipulates that for all decisions necessary for approving those wind farms coordination is mandatory. The provisions therefore introduce an obligation for the provincial government not just to coordinate the decisions required but also to take the required decisions for approval itself (articles 9e and 9f Electricity Act). By doing so, the Dutch legislature has introduced a sort of one-stop shop for spatial planning and permits for wind farms larger than 5 MW.

In practise however, finding suitable locations to allocate large wind farms on land in a densely populated country like the Netherlands has proven to be quite difficult. All provinces in the Netherlands were first asked to fairly distribute the overall target for 2020 (6000 MW) over the twelve Dutch provinces. Each province had to perform a study on locating the best possible sites for large wind farms. On the basis of the outcome of these studies the Dutch government decided on the 31st of March 2014 that 11 locations in the Netherlands are suitable for large-scale wind farms and have now been given cabinet approval. In light of the targets in both EU legislation and the Energy Agreement for Sustainable Growth it seems about time that The Netherlands is trying to make some swift progress towards sustainable energy targets.

(C) Earthquakes from onshore natural gas production

During the late 1950s a giant natural gas field was discovered in the Groningen countryside. Covering around 900 square kilometres, it is the largest gas field in Western Europe and the 10th largest in the world. The Netherlands have become one of the major suppliers of gas in Europe and most Dutch households depend on gas from the Groningen field. Slightly more than a quarter of the original amount of gas remains in the ground – an estimated 720 to 727 billion m³ is left in the gas bubble that once contained over 2,800 billion m³.

Subsidence has occurred as a result of the gas extraction and is sometimes accompanied by earthquakes. The first earthquake was reported close to the city of Assen in 1986. Since then over 1,000 have been listed. Nobody denies the relationship between gas production and the tremors. Onshore gas drilling in the ‘Groningen gas field’ has triggered earthquakes which in 2013 led to growing concern and public discontent. Expert reports indicate that the earthquakes are caused by the extraction of natural gas from shale rocks deep below the surface. Since 2002 the earthquakes are becoming more frequent in the Province of Groningen and have caused damages to houses and buildings. The government started re-evaluating the production and had new research done after an earthquake in 2012 registered 3.6 on the Richter scale. In 2013 the Royal Netherlands Meteorological Institute (KNMI) has registered over fifty earthquakes.

In November 2013 the *Nederlandse Aardolie Maatschappij* (NAM) that exploits the natural gas from the Groningen gas field, submitted its production plan for the next three years. This production plan requires approval from the minister of Economic Affairs (Article 34 Mining Act). On the 17th of January 2014 the minister announced measures to limit production from the Groningen field in order to diminish the risks of further earthquakes. These measures form the conditions for the minister’s approval for the production plan of the NAM. A final decision on the production plan is expected in August 2014. Furthermore the minister announced measures to reinforce buildings, houses and infrastructure and also a compensatory payment package will be made available to the region. Although the measures have been received sceptically by both the public in the province of Groningen and by Dutch Parliament, the latter after a long discussion agreed with the proposed measures.

(D) Shale Gas

Another issue that has been in the spotlights in 2013 is the possibility of shale gas extraction in the Netherlands. The high volume hydraulic fracturing technique ("fracking") that is used to extract unconventional hydrocarbons such as shale gas, has triggered concerns in the Netherlands and EU about public health and environmental effects. At the national level the Dutch Ministry of Economic Affairs published in August 2013 a report on the potential risks and effects of shale gas extraction. Environmental risks associated with extraction of shale gas are water contamination and earthquakes that respectively could be managed by regulation and would be minimal – according to the report. These conclusions have been discussed and criticised heavily by the public. Therefore the Minister requested the advice of the Netherlands Commission for Environmental Assessment which was published on 19 September 2013 and

reflected on the findings in the report. It furthermore recommended a mandatory (local) environmental impact assessment for each individual shale gas project. The advice also stated that fracking should be avoided in certain areas, like those areas where earthquakes are more likely to occur. In light of report and advice the Minister announced on 13 November 2013 that a strategic environmental assessment will be commissioned to allow for a long term (spatial) planning strategy in order to designate the most suitable locations in the Netherlands for the extraction of shale gas. It states explicitly that also social costs and benefits should be incorporated in the document which should be available by the end of 2014. Before mid 2014 the Dutch Mining Act should be amended to create legal certainty on the regulatory regime for fracking and also to allow the Minister to gain insight in new and innovative technologies that could possibly reduce the risks reported. Pending the strategic environmental assessment no new permits for the extraction of shale gas will be issued. A formal decision on shale gas extraction will only be made after all information is available and an appropriate compensation scheme for those affected is discussed and in place. No extraction of shale gas is therefore expected in the Netherlands at the moment. Even when all information is available, there is still the resistance from local communities and decentralised governments that have to be heard.

At the moment there is no EU regulatory regime for fracking. However, the EU hasn't been silent. Although the possibility of adopting a directive for introducing regulation on fracking was mentioned by the European Commission, it published in January of 2014 both a Communication (COM(2014) 23 final) and a Recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing (2014/70/EU). The Recommendation was chosen over the Directive as it could be of some influence in ongoing permitting procedures in several Member States. The intention of both documents is to ensure the environmental integrity of extraction of shale gas, and to ensure that risks that may arise from individual projects and cumulative developments are managed adequately in Member States that wish to explore or exploit such resources. The main suggestions of Recommendation are that both a Strategic Environmental Assessment and an Environmental Impact Assessment will be made available, that the suitability of the site and the existing environmental status is assessed. Furthermore the European Commission recommends that the public is informed about the fluid used for hydraulic fracturing, on wastewater compensation and monitoring results. To minimize the environmental risks of shale gas extraction there are a number of relevant recommendations: the well is properly insulated from surrounding geological formations; venting should be limited to most exceptional operational safety cases; flaring should be minimized; captured gas is subsequently used; the best available techniques are applied. In case the environment is affected, the provisions on environmental liability should be applicable to the shale gas extracting and related activities and financial guarantees should be provided.

(3) Developments on Environmental Planning Legislation

In the 2012 country report, it was mentioned that the government is working on restructuring Dutch environmental, spatial planning law and on integrating the existing legislative acts into one Environmental Planning Act (EPA). The EPA will – possibly in 2018 – replace fifteen

existing acts (including the General Environmental Law Act, the Water Act and the Spatial Planning Act) and incorporate the area-based components of eight other acts. In the future other acts may be incorporated, including a new Nature Conservation Act (for which a proposal was submitted to Parliament). On 12 July 2013 a first draft legislative proposal of the EPA has been approved by the Rutte/Asscher government and sent to the Advisory Division of the Dutch Council of State. The proposal for an EPA is expected to be submitted to Parliament in the summer of 2014. At that moment the text of the proposal and the advice of the Council of State will be published. However, on 28 February 2013 a first draft of the concept of the text of the proposal was presented to several institutions for formal consultation (*toetsversie Omgevingswet*). The text of this first draft, that was not officially published by the government, is available online for the general public.

One point of departure in drafting the new legislative act was to align the system's working method with EU legislation. An analysis of EU Directives revealed a number of building blocks that are now also part of the policy cycle that underlies the structure of the proposal for an EPA. This cyclical process starts with a comprehensive strategy that describes the policy objectives and quality standards for the physical environment, which can be achieved through programmes, permits and general binding rules. These instruments will be monitored and enforced and may be tightened to ensure the achievement of the objectives. The main instruments of the EPA are Environmental Planning Strategies, Plans and Programmes, Integrated Environmental Permits, Project decisions and General Binding Rules. The EPA can be qualified as a framework act. The content mainly deals with procedural aspects. The current substantive environmental norms will largely be delegated to implementing legislation. The outline of the three governmental Decrees planned, are sketched in a note by the minister in July 2013 (*hoofdlijnennotitie uitvoeringsregelgeving Omgevingswet*). These three decrees will be the Environmental Planning Decree (general and procedural provisions), the Physical Environmental Quality Decree (practical rules, standards and administrative instructions) and the Physical Environmental Activities Decree (general binding rules with direct effect concerning activities in the environment).

(4) Liability Shell for oil spills in Nigeria

On 30 January 2013 the district court of The Hague has reached a ground-breaking decision on five cases as regards Shell's liability for oil spills in Nigeria. The cases were initiated in 2008 by four Nigerian farmers and the Dutch Environmental Defense Organization (Friends of the Earth Netherlands, *Milieudefensie*). They hold Royal Dutch Shell (RDS) and Shell Petroleum Development Company of Nigeria (SPDC) accountable for damages from oil spills from its pipeline near the villages of Goi, Orumu and Ikot Ada Udo in Nigeria. Furthermore they demand that Shell clean up the oil pollution and allow for better maintenance and better security for the pipelines so that new spills can be prevented in the future. It is the first *foreign direct liability claim* in the history of the Netherlands. The claims seem to be part of an international trend to hold multinationals accountable in their home jurisdiction for damage that has been caused by the operations of one of their subsidiaries abroad (see L.F.H. Enneking, 'Zorgplichten van multinationals in Nederland. "Second best" zo slecht nog niet?', *Nederlands Juristenblad* 2013, p. 744-750).

In 2009 the district court of The Hague concluded that it was indeed competent to hear the case as it has international jurisdiction not only over the claims lodged against RDS, but also over the claims against SPDC (Case 330891 - HA ZA 09-579, 30 December 2009). RDS has its headquarters located in the Netherlands and therefore the court derives international jurisdiction from Article 2(1) in conjunction with Article 60(1) of Council Regulation (EC) no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The SPDC is domiciled in Nigeria. The answer to the question whether the Dutch district court has international jurisdiction is based on Article 7(1) of the Dutch Code of Civil Procedure. It follows from this provision that the crucial issue for jurisdiction is whether the claims against RDS on the one hand and those against SPDC on the other hand are connected to such an extent that reasons of efficiency justify a joint hearing. According to the court this close connection is demonstrated by the fact that RDS and SPDC are held liable for the same damages and therefore the same facts in Nigeria must be assessed.

In 2013 the court reached its final decision in the five cases. It dismissed the claims in four cases of oil spill nearby the villages of Goi and Orumu (Cases C/09/337058 / HA ZA 09-1581 and C/09/330891 / HA ZA 09-0579, 30 January 2013). The claims are substantively assessed under Nigerian Law, as this was the law of the place where the oil spills occurred and the damage was caused. It follows from Nigerian Law that an oil company is not liable for oil spills caused by sabotage. The court dismissed the claims in four cases because the oil spills nearby the villages of Goi and Orumu were not caused by poor maintenance by Shell, but by sabotage from third parties. Remarkable is that in one of the five cases the court has sentenced Shell Nigeria to pay damages to one of the Nigerian Farmers, named Akpan (Case C/09/337050 / HA ZA 09-1580, 30 January 2013). The court ruled that under Nigerian law SPDC committed a specific tort of negligence against Akpan by insufficiently securing the wellhead of the IBIBIO-I well prior to the two oil spills in 2006 and 2007 near Ikot Ada Udo in Nigeria. The sabotage near that village was committed in such a simple way that Shell could and should have prevented this sabotage easily by installing a plug, which it did not do until 2010, during the pending lawsuit.

The court dismissed all the claims initiated against the parent company RDS. The court concluded that under Nigerian law there is no general duty of care to prevent third parties from inflicting damage on others. This implies that parent companies like RDS in general have no obligation under Nigerian law to prevent their (sub-) subsidiaries such as SPDC from inflicting damage on others through their business operations. Such a duty may only be assumed in specific circumstances that were not at issue. The court also dismissed all claims initiated by Friends of the Earth of the Netherlands. The court established that Friends of the Earth of the Netherlands is authorized to defend the environmental interests in Nigeria. The claims are admissible because the requirements stipulated by Article 3:305a of the Dutch Civil Code have been satisfied. It follows from this procedural provision that a foundation or association with full legal capacity that according to its articles of association has the objection to protect specific interests, may bring to court a legal claim that intends to protect similar interests of other persons. However, the fact that Friends of the Earth can protect the interests of third parties in law, does not mean that any damage of those parties can be considered to be damage of Friends of the Earth itself. The oil spills in Nigeria do not infringe on the rights of

Friend of the Earth in the Netherlands and therefore Shell has not violated any duty of care in respect of Friends of the Earth.

On 1 May 2013 the Nigerian farmers who lost their case and Friends of the Earth of the Netherlands have lodged an appeal against the judgments before the Court of Appeal in the Hague.