

## **EU FORUM OF JUDGES FOR THE ENVIRONMENT**

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### **Questionnaire on Environmental Impact Assessment (EIA)**

#### **THE NETHERLANDS**

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#### **General Introduction**

The first regulation of environmental impact assessment in the Netherlands dates back to 1986.<sup>ii</sup> One would expect that by this regulation the European EIA-directive 85/337 was implemented. But this is not the fact. The regulation of 1986 has a history of 10 years. A recommendation on EIA was issued in 1976 by the Preliminary Central Council on Environmental Protection. In 1979 this recommendation was followed by a governmental Note on EIA and in 1981 by a draft-act. Parliamentary discussions took about five years to come to a new part in the Act General Provisions on Environmental Protection. But already from 1981 on EIA was practised on the basis of an informal policy decision. The new legal regulation on EIA was more inspired by the US and especially the Canadian legislation on EIA as by the EU-directive. As a result of this the Netherlands legislation on EIA has some elements that are not in the directive. On the other hand the legislation needed to be amended because it was on some points not in conformance with the directive.

Two specific Netherlands elements in the regulation of EIA were first the Commission on EIA and secondly the obligation to select and describe alternatives for the activity for which EIA has to be followed. The Commission on EIA was an advisory commission of over 100 scientists of different disciplines that are relevant for EIA. The Commission advised on every Environmental Impact Statement (EIS) as far as completeness and correctness concerns. For every EIS a small working group of about five members was composed. They were specialists of fields that are relevant for the specific EIS. The position and role of the Commission is abolished in July 2010. The legal regulation on the content of EIS describes that it does contain a description of the relevant alternatives to the project, among which the zero-alternative and the most environmental friendly alternative.

Amendments were needed because of the fact that the scope of EIA in the Netherlands regulation was not in conformity with that of the EU-directive.

The legal regulation of EIA is now in chapter 7 of the General Act on Environmental Policy. Chapter 7 contains the obligation to follow EIA for the activities that are mentioned in a governmental decree. It prescribes the procedure that has to be followed, the possibilities for public participation, the competent authorities, the role of the Commission on EIA, the

content of EIA and the evaluation of EIA-projects. The scope of EIA in the sense of the activities for which EIA is obliged are mentioned in the governmental decree on EIA. According to the Netherlands system this decree contains two lists of activities; the first one contains the activities for which EIA is compulsory; the second one contains activities for which an EIA-consideration procedure has to be followed. This means that for the projects on this list the competent authority has to consider in advance whether an EIA has to be followed because of the specific characteristics of the project or not.

## **Part A**

*1. How is the SEA-directive (Directive 2001/42/EU) implemented in your country? What is the scope of the implementation?*

The SEA-directive is implemented in Netherlands legislation by adding a number of new articles to chapter 7 of the Environmental Policy Act (EPA) and by completely renewing the governmental Decree on EIA. This is done by act of juli 5<sup>th</sup> 2006, Stb. 2006, 536..

Art. 7.2, first section EPA now holds that activities are designated by governmental decree that:

- a. may have considerable harmful consequences for the environment;
- b. of which the competent authority has to consider whether they may have these considerable harmful consequences.

Art. 7.2, second section holds that for the activities mentioned in the first section by governmental decree the plans are designated in the preparation of which an EIS has to be made. A plan is only designated when it is a framework for decision mentioned in the third and fourth section. A plan is in any case a framework when it

- a. holds the location or the track for these activities, or
- b. one or more locations or tracks for these activities are considered in it.

Art. 7.2, section 3 says that in relation to the activities mentioned in section 1 under a the decisions are mentioned in the preparation of which an EIS has to be made. For the activities mentioned in section 1 under b the same is mentioned for decisions of which the competent authorities have to consider whether they may have these harmful consequences and when they do have, an EIS has to be made.

So the scope of this legislation is the same as that of the legislation on EIA for project activities. The scope of EIA in the Netherlands is defined in the governmental decree on EIA. As already said, the decree holds two annexes. The first one holds a list of activities for which EIA is compulsory. The annex first mentions the activity, then for a number of activities the criteria under which the activity is under EIA, then the plans for this activity and then the decisions for the activity. For example: the construction of a motorway is an activity under

EIA, there are no criteria; this means that any building of a motorway is under EIA, the plans mentioned are a specific plan based on the Planning act traffic and transport, a so called Structurerevision based on the Act on physical planning and the destinationplans based on the same act. The decision under EIA is the so called trackdecision based on the Track act. The construction of a way with four lanes not being a motorway is also an activity under EIA, but this is only the case for a way with a track of over 10 km; so the criterium in this case is 10 km.; the plans under EIA are the same as for the decision to construct a motorway; the decision in the preparation of which an EIS has to be made is the same as for the motorway.

The second annex is the one with the activities of which the competent authority has to consider whether the consequences of the activity are that harmful that an EIS has to be made. The scheme of this annex is the same of that of the first one: activity, criteria, plans and decision.

Next to art. 7.2 is the scope of EIA enlarged by art. 7.2a. This article holds that an EIA has to be made in the preparation of a plan that has to be established by law and for which because of the activity that is in its content, a decent review has to be made based on an article of the Netherlands Nature protection act. In this article the obligation of the Habitat-directive implemented to make a decent review of activities that may cause a serious harm to Habitat-area's..

## *II. What types of public plans and programmes are subject tot a strategic environmental assessment in accordance with the SEA-directive?*

The scope of directive 2001/42/Eu is given in art. 3, section 2: an environmental assessment is made of all plans and programmes:

- a. that are prepared in relation to agriculture, forestry, fishery, energy, transport, wastepolicy, watermanagement, telecommunication, tourism and physical planning and that form a framework for the granting of future licenses for the projects mentioned in annex I and II of directive 85/337/EEG (EIA-directive), or
- b. for which , taken into account the possible effect on area's, a review according to art. 6 or 7 of directive 92/43/EEG (Habitat-directive) has to be made.

This means that the scope of directive 2001/42 is related to the projects of the annexes of directive 85/337 and to the plans or projects mentioned in section 6 or 7 of directive 92/43.

This rather general scope has got concrete form in annexes of the governmental decree on EIA by mentioning concrete plans for every activity that is under EIA. The plans mentioned in the annexes are

- structurevisions based on the Physical planning act,

- plans according to different acts like the Water act, the Planning act traffic and transport, the reconstruction act concentrationarea's, the Drinking water act, the Genrela Act on Environmental Policy etc.

- destinationplans according to the Physical planning act.

These are on the one hand rather concrete, operational plans such as the destination plans and on the other rather strategic plans such as the structurevisions.

*III. What kind of authority (local, regional, central) is responsible for performing the duties arising from the SEA-directive?*

Both the central government, the provincial boards and the municipal boards may be responsible for these duties. This depends of the plans to which the duty to make an EIS is linked. Structure visions according to the Physical planning act may be established by the municipal board, or the provincial board, or the minister of infrastructure and environment together with the minister involved. Destinationplans are in general local plans, established by the local board. The central government or the provincial boards may be responsible for the establishment of the plans of the specific sectoral legislation.

*IV. Does the competent authority normally ask other authorities on different administrative levels in the process of a strategic environmental assessment for their opinion or consultation?*

Art.7.8 EPA prescribes that before drafting an EIA the competent authority consults the advisors and other administrative authorities that according to the legal provision for the plan have to be drawn in the preparation of the plan, as far as the scope and the level of specification of the information that is of relevance for the plan and belongs tot the content of the EIS.

For example: the nationale waterplan and the regional waterplans according to art. 4.1 en 4.4 Waterwet are plans under EIA for a land reclamation, a land drainage or an embankment. (The criterium is 20 ha). According to art. 4.4 Waterdecree the minister of Infrastructure and Environment consults in the preparation of a national waterplan representatives form provinces, waterboards and municipalities, provincial boards and daily boards of waterboards of the areas of .....and the competent authorities of other countries in the districts.. of Rhine, Meuse, Schelde and Eems.

*V. What types of decision are resulting from a strategic environmental assessment proceeding?*

According to the Netherlands system of regulation these decisions may be only the decisions mentioned in the annexes of the Decree on EIS.

I do not have more specific information about this question. One may expect that the environmental information gathered in the EIS will be of influence on the content of the plan. The question is whether there would not be such influence without having an EIS. One may expect that in the Netherlands situation also without an EIS environmental consequences would be gathered and taken into account. The advantage of an EIS will be that this will take place on a systematic base.

*VI. How does the authority ensure the public access to environmental information in the proceedings based on the SEA-directive?*

Public participation is a common element in the legal proceedings for many plans in the Netherlands. For example: art. 3:11 and 3:12 of the General Act on administrative law are applicable. These articles are part of the so-called uniform public preparation procedure of this act. This procedure is applicable on f.i. the process of license granting in building and environmental cases. Art. 3:11 holds that the draft decision (on a plan) is made public by the competent authority, that art. 10 of the Act on openness of public administration is applicable, that the authority will supply copies of the files that are made public and that these files are made public for a period of six weeks. After this period the files remain public, but the period restricts the possibility to raise objections within six weeks. Art. 3:12 holds that the competent authority gives notice of the possibility to see the files in daily newspapers or local papers. In this notice the place where and the time within the files may be seen is mentioned, who will be entitled to raise objections, how this should be done and in some cases the time within a decision should be taken.

Besides this, the EPA and the Act on openness of public administration contain specific provisions on openness of environmental information. According to the Act on openness of public administration information will be given by public authorities in fulfilling their tasks. This information is given both on the own initiative of the public authority and on request. Art. 19.1 EPA gives a definition of environmental information. The Act on openness of public administration holds some specific provisions on environmental information. The act is amended on this point to meet the requirements of the Aarhus-convention. In addition to the Act on openness of public administration the EPA holds some specific articles on f.i. openness of files related to environmental licenses, the duty to give information on own initiative of public responsibilities, functions and public services related to the environment and it holds a specific regulation on confidentiality of information in an application for an environmental license.

*VI. Who is authorized to take part in a strategic environmental assessment proceeding? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional and national)? What legal rights do participants of the proceedings have?*

According to the Netherlands legislation everybody is authorized to take part in an environmental assessment procedure. This means people living in the neighbourhood, but also living on a big distances, NGO's and administrative authorities. It is not needed to have a specific interest. But the material possibilities are restricted. Compared with some years ago the procedure for EIS is streamlined; so there is only an indirect legal provision to give comments on a draft EIS. The EIS and the plan are rather strict related.

As already said art. 7.8 EPA holds the obligation for the competent authority to consult advisors and other public authorities. Art. 7.9 EPA holds that as soon as possible after the moment on which the competent authority has made up its mind to prepare a plan, but at least on the moment that it consults advisors and other authorities, it gives notice of this intention in daily or local newspapers. In this notice contains that files related to the intention will be made public, that there will be a possibility to give opinions about the intention and to whom, where and within which time this possibility will be given. To the files will belong a draft EIS. So there will be a possibility to comment on this draft, but there is no legal regulation about what should be done with this comments. The only provision is art. 7.10 EPA saying that the EIS should be ready on the moment on which the draft plan will be published. It may be part of the plan or an annex to the plan. One may expect that a competent authority conflicts the duty to take good care when it does not respond on serious comments on a draft EIS. This may be brought forward in an appeal against a plan, but not every regulation foresees in the possibility of appeal against plans.

The fact that everybody can take part in the EIS proceedings does not mean that everybody has a right of appeal against the decision to which the EIS is related. According to the general Netherlands system of the General act on administrative law one has a possibility to raise objections against a decision to the competent authority and to have the right of appeal in one or two judicial instances against the decision on objections. According the already mentioned uniform public participation procedure the scheme is a little different: a draft decision will be published on which everybody may comment; after that the decision will be taken en there will be a possibility of appeal in one or two judicial instances. The possibilities of objection or comment are open for everybody; there is no need to have an interest or a specific right, but the possibilities of judicial appeal are only open for those who have an interest in the decision.

*VIII. To what extend are the SEA and EIA procedures integrated in your country? If a new industrial project also needs a change of the building plan, can the same documentation be used for the assessment of both the project and the plan? Are there problems related to the*

*integration or the lack of integration for different actors (such as the public, the operator of the project, the municipality or authorities)? Can you give an example?*

SEA en EIA procedures are not integrated in the Netherlands. In the example of the new industrial plant and the building plan (in the Netherlands, destination plan) it will be different actors that are responsible to make the EIS's; the municipal authorities will be responsible for the EIS related to the building plan and the private operator for the EIS related to the license for the plant. The information of the EIS will only to a certain extent be of interest for the EIS for the license for the plant. In the EIS for the license for the plant information has to be gathered about production alternatives and methods and techniques to prevent or overcome emissions that will not be of much relevance for the EIS for the building plan. Of course, when some information for the EIS for the building plan will be important also for the EIS for the license for the plant, there is no legal or other obstruction to use it. But I suppose that taken into account the different nature of the two decisions and the different procedures for this decisions, this will only be an restricted part of the relevant information.

As far as I know the point of integration or non integration forms no specific problem in the Netherlands. EIS is not extremely popular by operators. When they see a possibility to evade an EIS procedure they tend to do so by formulating an application that will be just under the criteria for EIA. For example the establishment of a pig farm is under EIA, when it concerns a farm for 3.000 pigs. Applications for licenses for such farms of 2900 or 2950 pigs are often seen. Sometimes after a couple of years a new application to enlarge the farm will be send in. The question then raises whether the two application should be taken together or not.

## **Part B**

*I How is the EIA-directive implemented in your country? What is the scope of its implementation?*

As I explained before the EIA-directive is not really implemented in the Netherlands. We developed a EIA-regulation based on a Canadian example in about the same time in which the EIA-directive was developed. Later on the Netherlands regulation has been amended to get it in conformity which the directive. These amendments had mostly to do with the governmental decree on EIA in which the scope of EIA is regulated. Certain Netherlands criteria for activities under EIA were weaker than those of the directive. According to European law the criteria of the directive will than have priority over the domestic ones.

*II. What types of public and private projects are subject to an environmental impact assessment in accordance with the EIA-directive?*

The list of activities of the first annex to the Netherlands EIA-decree starts with

- infrastructure activities, such as the construction of a motorway or a highway, a national railway or an underground or overhead railway or the modification or enlargement of these projects, the construction or enlargement of a waterway or canal, the construction or enlargement of a navy or a civilian harbour or the construction of a in sea pier,
- activities on the sea or river bottom, such as the construction or enlargement of installations on the sea bottom, the heightening of the sea bottom and the construction of an island, the same activities on a river bottom,
- the construction, the lay-out and the use of an air field, the modification, enlargement or the modification of the use of a runway,
- the construction of a military practise-area,
- the construction, modification or enlargement of a pipe-line for the transport of gas, oil or chemicals,
- the lay-out of the rural area, the construction of recreation or touristic provision, the construction of a golf-link, the construction of a recreation harbour,
- the building of houses, the construction of an industrial area, of an area for horticulture under glass, of an area for the culture of flower-bulbs,
- the construction of a primary dike or dam or the modification or enlargement of a sea, delta- or river dike, reclamation of land, draining or making polders,
- the establishment, modification or enlargement of a farm for poultry or pigs,
- the infiltration of water into the soil or the withdrawal of water from the soil and the modification or enlargement of infiltrations or withdrawals, the construction of a water-basin or a dam,
- the mining of surface-minerals or the modification or enlargement of it on land or in the North Sea, the mining, modification or enlargement of a stone-pit or surface-mine, the mining of peat,
- the tracing of oil and natural gas, the mining of oil and gas,
- the decision about the policy for waste, the establishment of a plant for burning, chemical treatment, discharge or discharge into the deep soil of dangerous waste, the establishment of a plant for the discharge of mud, the establishment of a plant for the burning or chemical treatment of non-dangerous waste, the establishment of

a plant for the discharge or the discharge into the deep soil of non dangerous waste, the establishment of a plant for waste water purification,

- the execution of works to bring water from the one .....to the other either to prevent lack of water or not,
- the establishment of a plant to produce paper-pulp out of wood, the establishment of a paper or cardboard factory,
- the establishment, modification or enlargement of an oil-refinery, the establishment of a steel or iron factory, the establishment of a plant to get raw non-ferro metals from ore by using metallurgic, chemical or electrolytical techniques, the establishment, modification or enlargement of an asbestos-plant, the establishment of an integrated chemical factory for the production of organic or anorganic basic chemicals, phosphor, nitrogen or potassium nutrients, basic products for pesticides or biocides, pharmaceutical basic products or explosives,
- the establishment, modification or enlargement of a power-plant, the establishment of a nuclear power-plant including the dismantling of such a plant, the establishment of a plant for the enrichment or the production of nuclear materials,
- the establishment of a plant for the treatment, discharge or storage of radio-active materials,
- the construction, modification or enlargement of a high voltage track,
- the construction, modification or enlargement of an oil or chemical storage,
- the construction, modification or enlargement of a plant for coal-gasification,
- the modification of the water-level in several big enclosed sea-arms,
- an activity for which the assignment as an protected natural area will withdrawn.

Most of the activities are public, but a number will be private. For most of the activities the annex of the decree holds – as said - criteria.

*III. What are selection criteria that should be applied by the developer or the competent authority to identify projects requiring an EIA because of their potentially significant environmental effects?*

As explained before these criteria are in the governmental decree. They deal with the length of the track, the area in which the activity will take place, the growth of the ships that can make use of the waterway, the surface of the activity, the production power of the plant, the length of the runway, the number of visitors, the number of houses to be build etc.

*IV. What kind of authority (local, regional or central) is responsible for performing the duties arising from the EIA-directive?*

According to the Netherlands legislation it is the developer who is responsible for drafting the EIA. So when a local, regional or central authority will develop an activity under EIA each of them will be responsible for the drafting of an EIA.

For each activity under EIA the governmental decree appoints a decision to which the EIA will be linked. These decisions may be taken by each of the authorities depending of the kind and the importance of the activity. So for the building of more than 2.000 houses outside the built up area or 4.000 within this area two decision are mentioned, namely the structure-visions and the destination-plans. Destination plans will be established by municipal boards, while structure visions may be established by either the minister, or the provincial or the municipal board.

*V. When should an environmental impact assessment take place during the investment procedure?*

The Environmental impact statement will be published together with the draft about the activity under EIA. This means that all the environmental information about the consequences of the activity has to be gathered and analysed in advance. It is not quite clear what the relation is between EIA and the investment procedure. In general the decision to develop the activity will be taken before the EIA-procedure start, but the EIA-procedure may produce environmental information that will be of influence on the investment decision, especially on certain alternatives that may be or may be not taken into account.

I do not know example of activities on which the investment decision has been withdrawn because of the content of an EIS. In a case like that already in the preparation of the investment decision information about the harmful environmental consequences of the activity have been gathered and analysed.

*VI. Does the decision resulting from an environmental impact assessment grant the final development consent?*

According to the Netherlands legal system there will be no separate decision about the EIA. The EIS for the activity under EIA will be made public together with the draft decision about it. Public may react on both. Also in appeal against the decision one of the grounds may be that the EIS is insufficient, unreliable or untrue. In the past, when the Commission on EIA advised on every EIS about correctness and sufficiency, the judge could base his judgment on this advice. Nowadays the Commission is abolished and the judge has to find other contact points to survey an EIS. One may expect that he will do this in a rather reluctant way. It will be possible that the judge appoints some scientists to advise him about the EIS.

Once the decision about the activity under EIA will be taken and will be upheld in appeal, this also means that the EIS is considered to be complete and correct.

*VII. How does the authority ensure the public access to environmental information in the proceedings based on the EIA-directive?*

The answer is the same as that under VI, Part A. Environmental information is public according to provisions of the Act on openness of public administration and the Environmental Policy Act.

When a decision under EIA is taken according to the Uniform public preparation procedure of the General Act on administrative law this procedure has the obligation to publish the draft decision and all the files including the EIS that are related to it. During six weeks the public may comment. In addition to this art. 7.27 EPA holds the same obligation for decisions not taken under this procedure. Art. 7.30 EPA holds that when a procedure for decision taking prescribes the publishing of a draft-concept or a draft of the decision the EIS will be made public together with the draft concept or the draft.

*VIII. Who is authorized to take part in an environmental impact assessment proceedings? What about for example people living in the neighbourhood, NGO's and authorities on different administrative levels (local, regional, central)? What legal rights do participants of the proceedings have?*

The answer is the same as under VII Part. A. Everybody, including NGO's and administrative organs, do have the right to comment on a draft decision including the EIS. Once the decision is taken only those who have an interest in the decision may raise an appeal. This may be also NGO's or administrative authorities depending of their statutory aim and factual activities or their public responsibilities.

*IX. In what way are questions concerning the application of the EIA-directive brought to court? Please give one example of the proceedings and the judgement.*

As already said in the past cases are brought to court in which following domestic law no EIA was required while it was prescribed by the EIA-directive. This was because of the fact that the scope of EIA according to Netherlands law did not completely fit the scope of the EIA. According to the European law an applicant may ask for the direct application of the provision of the directive instead of the domestic provision.

Later on we had several cases in which an application was made for an activity smaller than the criterion for EIS for this decision. The applicants stated that this application should have been taken together with another one for the same activity in the direct neighbourhood, because of the fact that this was in reality one activity. This case dealt with applications for the building of windmills in the polder Wieringermeer. The establishment, modification or enlargement of one or more coherent installations for the production of electricity by wind

energy is mentioned in the second annex to the EIA-decree. This means that this is an activity for which the competent authority according to art. 7.2, section 1 under b and 7.17 has to consider whether an EIS has to be made or not. The criteria for this activity are a production power of 15 megawatt or 10 or more windmills. The application was done by a firm of farmers with support of the electricity company for 6 windmills, while half year later another application was done by another firm of farmers supported by the same electricity company for again 6 windmills along the same road along which according to the first application the windmills would be established. The representative of the first firm stated that it had nothing to do with the firm that did the second application. The suspicion was of course that this was a construction to prevent the risk of an EIA-consideration that may result in the obligation to draft an EIS.

Later on we had several cases in which a pig or poultry farm was enlarged. The applicants stated that the new enlarged farm together with the already existing part had more pigs or poultry than the criteria, so that an EIS was obliged together with the application for a new license for the enlarged farm. The representatives of the farmers stated that no EIS was required because of the fact that already a license was granted for a part of the farm and that the enlargement was less than the criteria. In these cases the Department of Justice of the Council of State decided that EIA is primarily connected to activities and secondly to decisions. So for the question whether an EIS is obliged the growth of the activity is decisive. When a farmer decides to pull down his old stable and to build a new one for a number of pigs or poultry that is over the criteria he is under EIA no matter that he has already a license for a part of his animals. When he decides to only build an additional stable for a number of pigs or poultry that is under the criteria he is not under EIA, no matter that the total number of animals in his two stables will be over the criteria. Situations may be complex for farms that have a number of stables of which some will be pulled down, others not, but the last ones will be enlarged or renewed.

Nowadays we do have cases resulting from the decision of European Court of Justice that the criteria for an activity under EIA are not fully decisive but that in every case the competent authority has to estimate whether there will be other circumstances because of which an activity that is under the criteria still will be under EIA. One of these circumstances may be that the activity will take place in an extraordinary sensitive area.

In the Netherlands case law cases related to EIA have mostly to do with the scope of EIA and not with the content of an EIS.

*X. What are the specific characteristics of the trans boundary environmental impact assessment of certain public and private projects?*

Trans boundary environmental impact assessment as such does not have specific characteristics. In this impact assessment environmental consequences of the activity under EIA in the neighbour country are taken into account, the government of the neighbour

country will be informed, the competent authority in that country will be given a draft plan and the EIS on the moment the draft is published in the Netherlands. The same for an application for a decision under EIA. Everybody, so also the people, NGO's and authorities in the neighbour country may react; when they do have an interest they do have access to court.

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<sup>i</sup> Thijs Drupsteen is retired from the Council of State; he is now extra-ordinary member of the Department of Jurisdiction of this Council.

<sup>ii</sup> Act of april 23th 1986, Staatsblad (Official Publication) 1986, 211.