

Environment - Netherlands

RWE power plant struggle reaches final legal stages

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In the past few months the Administrative Jurisdiction Division of the Council of State has issued five further decisions regarding the construction of the Netherlands' largest coal-fired (and biomass) power plant, intended to be situated in Eemshaven, in the northernmost point of the Netherlands and close to the German border (for further details please see "[Completion of RWE power plant thrown into doubt](#)").

In these recent decisions the Council of State ruled, firstly, that a third permit based on the Nature Conservation Act 1998 was insufficiently reasoned and was thus annulled. Secondly, a request from Greenpeace and the Society for Nature and Environment (SNM) for enforcement measures against German corporation RWE Power AG was dismissed, which led to two separate interlocutory decisions. Thirdly, a permit pursuant to the old Pollution of Surface Waters Act was mostly upheld. Finally, the appeals against the environmental permit for the power plant were dismissed.

Nature Conservation Act 1998

On August 24 2011 the Council of State ruled that the assessment of two permits pursuant to the Nature Conservation Act 1998 should have been inextricably linked with the assessment of the construction of the power plant itself. These two permits were annulled because such a link was missing. As a result, RWE must file for new permits and conduct new research in this regard.

The third permit pursuant to the Nature Conservation Act 1998 – granted to RWE by the minister of economic affairs, agriculture and innovation and by the provincial executive of Groningen – relates to the redevelopment, deepening and maintenance dredging of Eemshaven. In accordance with the two previous decisions, the Council of State ruled that this third permit should also have been linked with the construction of the power plant itself, and should therefore be annulled.

Enforcement measures

On August 26 2011 Greenpeace and SNM filed a request with the provincial executive of Groningen to take immediate enforcement measures, in the form of a building freeze, against RWE. In a first interlocutory appeal, Greenpeace and SNM argued that the provincial executive of Groningen should have decided on this request within four days; failing this, Greenpeace and SNM requested the Council of State to order a freeze on the building of the power plant. On September 2 2011 the Council of State dismissed this interlocutory appeal, ruling that four days was insufficient time to assess such a request, taking into account the fact that RWE had stated that for the time being it would not build the cool-water intake or sink piles.

On September 23 2011 the provincial executive of Groningen dismissed the request for a building freeze, and decided not to take enforcement action against RWE regarding the construction of the power plant itself for nine months following. However, office and storage spaces may not be constructed until all Nature Conservation Act permits have been granted; RWE is also not allowed to operate the power plant until then.

On November 23 2011 the Council of State dismissed a second interlocutory appeal by Greenpeace and SNM. The Council of State ruled that the construction of the power plant for nine months is unlikely to have significant effect on Waddenzee and Duinen Ameland, which are 'special protection areas' pursuant to the EU Directive on the Conservation of Wild Birds (79/406/EEC) and the EU Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (92/43/EEC). This follows from new

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research findings. RWE has stated that a new application for Nature Conservation Act permits will be filed before March 24 2012. The Council of State also ruled that a building freeze cannot have any *de facto* results for the conservation of the habitat and forage areas of three bird species, since the construction of the power plant has so far already made most of these areas unsuitable for these birds. Furthermore, the Council of State considered the fact that RWE has significant financial interests in continuing construction to be important. Lastly, the Council of State ruled that the Habitats Directive did not compel the provincial executive of Groningen to take enforcement measures in this case.

Pollution of Surface Waters Act and environmental permit

On November 30 2011 the Council of State ruled on two further permits regarding the power plant. One decision pertains to the permit pursuant to the Pollution of Surface Waters Act for discharging waste water from the power plant to Eemshaven and Wilhelminahaven. All grounds for appeal from Greenpeace and SNM were dismissed except for those regarding the duration of the permit. Since the permit pertains to the discharge of mercury and cadmium, it may be valid for only 10 years (not indefinitely) pursuant to policy regulations from the minister of infrastructure and environment.

The other decision pertains to the environmental permit for the power plant granted by the provincial executive of Groningen in 2007. The European Court of Justice gave a preliminary ruling in May 2011 on questions from the Council of State regarding the EU Directive on National Emission Ceilings (Cases C-165/09 to C-167/09). The court ruled that member states are not required to take into account national emission ceilings (pursuant to the EU Directive on National Emission Ceilings) in the assessment of an application for an environmental permit. The Council of State ruled that the regulations of the permit regarding emissions are sufficiently strict, and that the permit prescribes the best available techniques regarding emissions. All other grounds for appeal from Greenpeace and SNM were also dismissed.

Comment

Following these five decisions, RWE has a positive outlook for finishing construction of its power plant. The new research into the plant's effect on nature and wildlife, as required by the new Nature Conservation Act permits, seems to have positive results, so the final permits should be obtained in the coming year. Several years of legal struggles between Greenpeace, SNM, neighbouring private persons and RWE regarding the plant will then finally come to an end.

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