UNECE

Secretary to the Aarhus Convention Compliance Committee

Fiona Marshall

In connection to the questions contained in your letter dated 27 May 2020, please find our responses herein.

Response to question 1

The Utrecht Regional Plan 2005-2015 was adopted by resolution of the States Provincial of Utrecht on 13 December 2004.

The Draft Utrecht Regional Plan 2005-2015 and the accompanying environmental impact assessment (EIA) for the large-scale wind locations were available for inspection for four weeks, from 20 January up to and including 16 February 2004, during which period public responses could be submitted to the States Provincial. As already indicated in the complaint, an appeal to the administrative court is excluded by law under Article 8:5 of the General Administrative Law Act.

Response to question 2

The Provincial Spatial Structural Vision 2013-2028 (PSSV - Provinciale Ruimtelijke Structuurvisie) depicts the spatial policy for the period up to 2028. Among other things, it indicates which objectives are considered to be of provincial importance, which policy is associated with these objectives, and how it is to be implemented.

The legal nature of a PSSV can be described as an outline of objectives with associated policy that has a solely self-binding effect on the province. Other parties, such as the municipality or citizens, are therefore not bound to it.

The Structural Vision thus mainly serves an internal structuring function. Nor is there a hierarchical relationship between a PSSV or a structural vision of a municipality or the national government.

It can be said that the PSSV portrays a policy and development framework. In order to bring about the legal effect of the aforementioned spatial policy from the PSSV for the municipality, a Provincial Spatial Regulation (PSR - Provinciale Ruimtelijke Verordening) was adopted at the same time as the PSSV. The PSR is in fact binding for municipalities. The PSR contains both general rules that the municipalities must observe when drawing up their spatial plans, such as zoning plans, and rules that are necessary for safeguarding provincial interests. There is also no legal protection available to the administrative court against the adoption of the PSR.

Response to question 3

Attached are the relevant pages, accompanied by an English translation (**Appendix 1**). The most striking passage is on page 48 and subsequently appears in the responses for each location on the following pages, and is underlined in the English translation for the sake of convenience:"

Based on this, from our management philosophy and from the desire to carefully weigh up the various interests, we will narrow the search areas in comparison to the draft PSSV. We will include areas for which we know in advance that we can agree on possible placement variations, and for which there is consensus with the municipality. The PSSV will therefore focus on the search areas for which there is municipal support and which we consider acceptable with regard to spatial planning. Consequently, after the PSSV has been enacted, there is administrative support for these areas to actively develop actual placement options together with municipalities and initiators. [p. 48]

The municipal administration of De Ronde Venen (169) has stated that it does not support realisation. [p. 49]

The municipal administration of Stichtse Vecht (284) has stated that it does not support realisation. [p. 49]

We consider the Lage Weide location to be suitable for the placement of wind turbines. Further research and elaboration of the search area will be carried out by the municipality and market players. We are aware that realisation at this location is not an easy task. We consider administrative support to be vitally important in this regard. [p. 50]

Etc.

Combined response to questions 4, 5a, 5b, 5c, 5d

The cabinet made arrangements with the provinces, including the province of Utrecht, to increase the objectives/ambitions (6,000 MW in 2020). These arrangements were laid down in the National Energy Agreement (SER, Energy Agreement for Sustainable Growth, September 2013), from which it is apparent (see the signature of the Association of Provinces of the Netherlands on page 137, the umbrella organisation of the provinces in the Netherlands which represents their interests in the Netherlands and Brussels) that the provinces, along with other parties, assume joint responsibility (page 133 of the aforementioned agreement). Realising 6,000 MW in 2020 is therefore a shared responsibility of the Government, provinces, municipalities and market players as ratified in the National Energy Agreement, enclosed as **Appendix 2**.

On 18 June 2013, on behalf of the provinces, the Association of Provinces informed the Ministers of Infrastructure and the Environment and of Economic Affairs that the provinces had succeeded in distributing the full 6,000 MW among the individual provinces. For the province of Utrecht, the agreement was to achieve 65.6 MW of wind energy in the province of Utrecht by 2020.

On 28 March 2014, the cabinet adopted the Structural Vision for Onshore Wind Energy (SVOWE) with the accompanying EIA plan. By doing so, the spatial policy for the realisation of at least 6,000 MW of onshore wind energy by 2020 came into force. The arrangement for the province of Utrecht to achieve 65.5 MW is shown repeatedly ('reconfirmed'), see the attached **Appendix 3**, in the diagram on page 19 of the Structural Vision for Onshore Wind Energy (with the accompanying EIA plan), which shows a distribution across all provinces. The Structural Vision states (on page 19):"

Government and provinces have concluded an agreement for the realisation of 6,000 MW (54 PJ) operational wind capacity by 2020. Realising the 6,000 MW is a shared responsibility of the Government, provinces, municipalities and market players as ratified in the National Energy Agreement.

On 18 June 2013, on behalf of the provinces, the Association of Provinces informed the Ministers of Infrastructure and the Environment and of Economic Affairs that the provinces had succeeded in distributing the full 6,000 MW among the individual provinces. The distribution among the 12 provinces is shown in Table 2.

[table 2]

The arrangements that were made between the Government and provinces in 2013 were reconfirmed in the administrative consultation between the Government and the Association of Provinces on 27 January 2014 and formulated as follows.

• The first performance target is that every province must have laid down the spatial planning for its share of the 6,000 MW (provincial target) in provincial structural visions by 30 June 2014 at the latest.

• The second performance target is that the provinces and the Government will actively endeavour to develop the initiatives for wind energy that contribute to their provincial target by starting the required EIA procedures, permit procedures, zoning plan procedures/integration plan procedures and coordination arrangements on time, so that the construction of the wind farms can start on 1 January 2018 at the latest.

• The third performance target is that the Government and the provinces will set out the conditions necessary for the development of wind farms in the areas designated by the provinces. To this end, a core team of Government, provinces and industry association has been formed that focuses on progressing the performance targets and resolving bottlenecks.

• The fourth performance target is that the National Coordination Scheme will be deployed in provinces that do not deliver what has been agreed.

Page 4 of the accompanying EIA plan (see **Appendix 4**) states:"

The cabinet's ambition is to make those 6,000 MW possible in collaboration with the provinces in 2020 and has made arrangements with the provinces in this regard. The areas that the provinces

consider suitable for wind energy have been used as the starting point for the Structural Vision for Onshore Wind Energy and the EIA plan.

No opinions could be submitted against the National Energy Agreement and the further agreed distribution of the full 6,000 MW (with 65.6 for the province of Utrecht), as confirmed by the Association of Provinces to the Ministers of Infrastructure and Environment and of Economic Affairs on 18 June 2013.

The proposal to draw up the SVOWE (with accompanying EIA plan) was made available for inspection by the general public between 14 September and 12 October 2012 with an invitation to submit opinions. These opinions have been included in the draft SVOWE, which was made available for inspection from 19 April up to and including Friday 31 May 2013, once again with an invitation to submit opinions. The SVOWE was then definitively adopted by the States General on Friday 28 March 2014 (see the letter to the States General dated 31 March 2014, enclosed as Appendix 5). Although this has not been requested, it is noted for the sake of completeness that the SVOWE (also) refers to the agreements that have already been made, such that in the context of submitting views against the SVOWE, there can be no real input against those agreements already made.

As a response to the SVOWE, the province of Utrecht drafted the Provincial Spatial Structural Vision 2013-2028 (reviewed 2016), which was made available for inspection between 31 May and 11 July 2016. During this period, it was possible for anyone to submit opinions. The definitive Provincial Spatial Structural Vision 2013-2028 (reviewed 2016) was adopted by the States Provincial of Utrecht on 12 December 2016. On page 42, enclosed **as Appendix 6**, it states:"

Nationwide, the ambition has been set at 6,000 megawatts (MW) of onshore wind energy, to be reached by 2020. Within this, via the Structural Vision for Onshore Wind Energy (SVOWE, Lower House, 28 March 2014), the province of Utrecht has made a commitment to achieve 65.5 MW of wind energy by 2020. To this end, in consultation with municipalities and partly based on previous policy, we have designated areas where this can be realised. Part of the assignment is supposed within the red contour without specific indication of the actual construction location. In order to achieve the 65.5 MW, locations outside the contour will also be necessary, in addition to the locations we have designated. We are inviting municipalities and initiators for this purpose. It goes without saying that the statutory restrictions, especially with regard to the environment (noise, shadow, safety) and nature legislation (Natura 2000), must also be taken into account. With this invitation for initiatives, we are offering municipalities more room for manoeuvre when considering wind energy. The spatial considerations take place in consultation with the municipalities concerned. We are willing to cooperate with municipalities on these spatial considerations.

Article 7 of *the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (hereinafter: Convention) states that each Party must endeavour "to provide opportunities for public participation in the preparation of policies relating to the environment". Article 4 of the Convention adds that each Party must provide for early public participation: "when all options are open and effective public participation can take place". The participation procedure with regard to the Provincial Spatial Structural Vision 2013-2028 (reviewed 2016) was only completed after the arrangements between the province of Utrecht and the Government to realise 65.5 MW by 2020 had already been made. There is also no legal protection

available to citizens against those previously made arrangements. All options were therefore no longer open at the time when it was possible to submit opinions against the aforementioned Structural Vision, or this at least cannot be described as real public participation. A procedure in the civil court would remain in theory, but should not be considered expedient. In the first place, a citizen is not a contracting party to the agreements made between the province and the Government. The citizen would also have to prove to the civil court that the agreement is unlawful towards him and that he will suffer damage as a result, pursuant to Article 6:162 Dutch Civil Code. Furthermore, as has already been posited in the complaint, in a civil procedure of this kind the citizen is obligated to be assisted by a lawyer, which is very expensive. The court fees are also considerably higher than in administrative proceedings. It therefore follows that no effective legal protection was available. The participation procedure did not fulfil the conditions under Article 7 in conjunction with Article 4 of the Convention.

As far as is known, the agreement has not been contested.

The arrangements made in the National Energy Agreement and the further agreed distribution of the full 6,000 MW (with 65.6 for the province of Utrecht), as confirmed by the Association of Provinces on 18 June 2013 and reconfirmed in the SVOWE, are 'performance targets', not obligations of best efforts. Those are performance obligations that must be complied with. In the absence of compliance by the province, the Government can apply the National Coordination Scheme and thereby effectuate compliance (see also the '*fourth performance target*' above). In the National Coordination Scheme, the Government then draws up an integration plan (and becomes the competent authority) and coordinates the permit-issuing process.

For the implementation of the aforementioned objectives to integrate wind energy into the Dutch landscape, it is illustrative that, based on the Crisis and Recovery Act, the Electricity Act (hereinafter "EA") was amended via the addition of a new article, Article 9e EA. Because of the great emphasis that the Government is placing on the actual realisation of turbines, the realisation of wind farms with a capacity of between 5 and 100 MW has been assigned to the provinces, and thus not to the municipalities. The fact that the province of Utrecht is also aware of this responsibility is apparent from the PSSV; page 30 of the PSSV states:

"*for initiatives between 5 and 100 MW, wind energy may be automatically appointed as a provincial interest*".

Article 9e EA therefore aims to keep control of the integration of these wind farms with the provinces and to remove it from the municipalities, with the intention of ensuring that the wind farms are actually realised, notwithstanding any municipal resistance. The explanatory memorandum (Parliamentary Papers II 2009/10, 32 127 no. 3 p. 70), clarifies this by stating that in many cases, the zoning plan does not approve the construction or expansion of a production installation as referred to in this paragraph. For that reason, this article stipulates that the States Provincial can – and, in the cases in paragraph 2, fundamentally must – enforce the realisation of a wind farm at a location by means of integration plan. Indeed, Article 9e paragraph 2 EA stipulates that they must in any case apply the power specified in paragraph 1 (i.e. the power to designate land for the construction or expansion of a wind energy farm between 5 and 100 MW and the adoption of an integration plan for this purpose) if a producer has informed the province of a proposal to construct a wind farm and the

municipality concerned has refused a request to adopt or amend the zoning plan. The only exception to this obligation is in paragraph 5 of Article 9e EA, which states that paragraph 2 does not apply

"*if the realisation standard that has been set for that province pursuant to paragraph 6 has been met*."

For the province of Utrecht, this standard has been set at 65.5 MW.

It follows from the explanatory memorandum to the Crisis and Recovery Act (Parliamentary Papers II 2010/11, 32 588, no. 3, p. 6-7) that paragraph 2 is without prejudice to the fact that the province can only decide not to adopt an integration plan on grounds of proper spatial planning. In a ruling dated 19 December 2012 (ECLI:NL:RVS:2012:BY6671), the Council of State decided:

"*3.5. Furthermore, it follows from the history of the creation of the Crisis and Recovery Act (Parliamentary Papers II 2009/2010, 32 127, no. 3, p. 62) that the obligation stated in Article 9e paragraph 2 of the Electricity Act 1998 relates to the application of the power as such, and not to the location, form or other substantive considerations, such that provincial councils will still have to make a decision that is acceptable from the perspective of proper spatial planning (underlined by Energie-U). Now, considering what has been discussed in 3.4., provincial councils could reasonably have taken the position that the realisation of wind turbines at the intended location is not in accordance with the principles of the Environmental Vision nor with the Environmental Regulation, because the realisation of wind turbines does not preserve or strengthen the local characteristics of the area, provincial councils were not reasonably required to make use of their power to draw up an integration plan for the intended location*.

There are thus only limited grounds for the province to refuse to draw up an integration plan and to overrule a disagreeable municipality. This illustrative amendment to the act makes it clear that the Government has thereby provided the province with further 'tools' to realise the agreements

for 65.5 MW in this case. In the relationship between the Government and the province, the Government has the option of overruling the province.

The foregoing therefore indicates that the agreement is 'enforceable' by the Government, or at least that there may be consequences if the province fails to fulfil the agreement. Moreover, the province has been given (additional) legal means and powers to be able to fulfil its agreement.

Only in a few cases (see above) can the province refuse to make use thereof.

Response to question 6

Utrecht Regional Plan 2005-2015

Appeals to the Administrative Jurisdiction Division of the Council of State could only be made against the 'specific policy decisions' that were present in the Utrecht Regional Plan 2005-2015. Article 1 of the Spatial Planning Act offered the possibility of including specific policy decisions in a regional plan. Page 10 of the Regional Plan states:"

No specific policy decisions are included in this regional plan."

The Spatial Planning Act was drastically amended on 3 April 2000 as a result of the entry into force of the Act of 1 July 1999 (Official Gazette 302 amending the Spatial Planning Act, Parliamentary Papers 25 311). The adoption, revision and withdrawal of regional plans, among other things, are not appealable. To avoid any misunderstanding, regional plans have also been put on the negative list (Parliamentary Papers II 1996/97, 25 311, no. 3, p. 20). However, the 'specific policy decisions' are appealable. On the basis of Article 1 Spatial Planning Act, such decisions must be explicitly indicated as such in the plan.

According to the Explanatory Memorandum (Lower House 1996-1997, 25311, no. 3, p. 14), a specific policy decision is understood to mean a decision whereby a 'knot is tied' concerning the spatial development of a particular area. Mentioned as an example is the inclusion in a spatial planning key decision (SPKD) of a contour within which housing construction is not permitted. On the basis of Article 3 paragraph 1 Spatial Planning Decree, a specific policy decision must be indicated in the text or on the map of an SPKD. Until the entry into force of the Spatial Planning Decree in 2008, a spatial planning key decision was a plan of the Dutch Government for the layout of the Netherlands or parts of the Netherlands. Under the new Spatial Planning Act (2008), SPKDs can no longer contain specific policy decisions.

The present Regional Plan could therefore not be contested directly before the administrative court.

Provincial Spatial Structural Vision 2013-2028

The same applies for this. A provincial spatial structural vision is not appealable. The legislator had the explicit intention of giving these visions an indicative nature. Specific policy decisions and vitally important decisions can therefore no longer appear in structural visions.

First and Second Partial Revision of Provincial Spatial Structural Vision 2013-2028

The same applies for this. A revision of a provincial spatial structural vision is also not appealable.

Response to question 7

None of the documents referred to in question 6 are intended to have (external) legal consequences as they do not contain binding standards and are not intended to have external legal consequences, i.e. a decision that is intended to have legal consequences which arise in the relationship between the administrative body (the province) and a citizen, and are thus not decisions within the meaning of Article 1:3 paragraph 1 General Administrative Law Act. A revision of such a document by the competent administrative body (the province) does not change this and does not result in an appealable decision. Should reference be made to the provisions of Article 9 paragraph 1 of the Convention, it should be noted that such a possibility is not regulated in Dutch law.

Response to question 8

As indicated earlier, the documents contain policy provisions that are self-binding for the province. The documents do not contain any decision that is intended to have legal consequences which arise in the relationship between the administrative body (the province) and a citizen and are thus not decisions within the meaning of Article 1:3 paragraph 1 General Administrative Law Act. Admittedly, there is case law in which the court rules that in a specific case, a binding statutory provision should not be applied to citizens. In that case, the court can decide to have that statutory provision rendered inapplicable with regard to a party to the proceeding or – more extensively – to declare the entire regulation non-binding. Nonetheless, the aforementioned documents do not contain 'statutory provisions' that are binding for citizens, such that a civil court is not expected to do so if it were to find that the documents had been created in conflict with the Convention. Thus, all conceivable or hypothetical remedies of the civil court have in all probability been exhausted within the framework of contesting the aforementioned documents at or after the moment of adoption.

The civil court may indeed play a role at a subsequent stage, namely at the time of the subsequent decision-making process, such as the adoption of a zoning plan and the granting of the permit that enables the construction and use of wind turbines. However, this is still unexplored territory. In the Netherlands, note has been taken of some relevant recent judgments of the Court of Justice of the European Union. Among others, the judgment delivered on 25 June 2020 (ECLI:EU:C:2020:503) is significant, from which there follows a fundamental obligation for the civil court to intervene.

The Court thereby gave a summary of, among other things, the SEA Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment in Flanders. In this regard, the Court's judgment dated 3 March 2020 in the case numbered C-24-19 (ECLI:EU:C:2020:143 is also important. Among other things, the SEA Directive concerns plans and programmes adopted by a Member State. Translated to the Dutch situation, this specifically concerns the standards/regulations from the Activities Decree/Regulation (Regulation of general rules for environmental management facilities dated 9 November 2007, DJZ2007104180 and the Decree of general rules for environmental management facilities dated 19 October 2007) specifically for wind turbines: the standards regarding cast shadow, safety provisions and noise emissions. The aforementioned Activities Decree/Regulation should therefore have been tested against an EIA on the basis of the aforementioned case law, which did not occur. This has (most probably) violated EU law. Permits or decisions based on this may therefore have to be withdrawn/declared invalid, or at least suspended, until the aforementioned EIA evaluation has taken place. The established case law of the Division of the Council of State seems to be in conflict with this and should consequently no longer be followed (such as, for example, ECLI:NL:RVS:2019:1064). In that context, it could be argued

that permits are (also) in conflict with the law or with mandatory statutory obligations of EU law and as such are unlawful under Article 6:162 Dutch Civil Code. Among other things, the Court states:"

If it appears that an environmental assessment within the meaning of Directive 2001/42 should have been conducted prior to the adoption of the decision and the circular letter that form the basis for a permit for the construction and operation of wind turbines which has been contested before a national court, and such actions and permits are therefore incompatible with EU law, that court <u>may only enforce</u> the consequences of these actions and permits if this is permitted by national law in the context of the proceeding pending before it and the invalidation of the permit could have significant consequences for the electricity supply throughout the Member State concerned".

And, later on (in ground for decision 89):

According to the principles cited in point 83 of the present judgment, that invalidation should also take place if it appears that the implementation of the wind turbine project has already started or has even been completed".

If the civil court were to determine that the search locations have already been established (settled by authorities and/or with market players) and that environmental information was insufficiently adequate and there has been no or insufficient public participation in this regard, and for this reason finds that the requirements of Article 7 of the Convention have not been met, because in that case – in summary – no participation or no effective participation has taken place regarding the plans, programmes and policies with regard to the environment, this finding could likewise be a reason for the court to, for example, overturn or suspend a permit.

The Administrative Jurisdiction Division of the Council of State has so far ruled (see, among others, the ruling dated 21 February 2018, ECLI:NL:RVS:2018:616) that Article 6 paragraph 4 of the EIA Directive has been correctly implemented in national law, because the national regulations (such as the Environmental Management Act, the Spatial Planning Act and the General Administrative Law Act) provide that anyone can put forward opinions on the draft plan, including an environmental impact assessment.

This means that no decision has yet been made about that draft and it is still a case of early participation at a time when all options would still be open. That judgment is erroneous when locations are laid down in structural visions or in the aforementioned 3 documents and incontestable situations in the field of environmental decisions made, such as the 65.6 MW contribution. The civil court can ask itself the question of whether, when a structural vision and/or the choice of the positioning of a (search) location has already been given as referred to within the meaning of Article 2 paragraph 1 of Directive 2011/92/EU, it can still be said of the situation that citizens have real opportunities to participate at any early stage within the meaning of Article 6 paragraph 4 of the Convention, before the decision regarding a permit application is made.

However, the question is therefore whether, considering the described nature of the aforementioned 3 documents, a civil court would consider there to be sufficient legal basis to also render such documents inapplicable. There do not seem to be possible remedies available in that context.

Response to question 9

(a) The wind farm (called 'Windpark Autena') was made possible from a planning perspective by means of the zoning plan adopted by the municipal council of Vianen on 30 September 2014. Opinions were submitted against the adoption decision and were subsequently appealed to the Division of the Council of State, which declared the appeals unfounded (ECLI:NL:RVS:2015:1702), after which the zoning plan became irrevocable on 27 May 2015. An appeal against the permit which authorised the construction was also lodged with the Division of the Council of State, which declared the appeals unfounded (ECLI:NL:RVS:2016:3331), after which the permit became irrevocable on 14 December 2016. The wind farm was already permitted (from 14 December 2016) and has now been completed and put into operation.

(b) The wind farm comprises 3 wind turbines with a permitted maximum capacity of three times 4.5 MW (13.5 MW).

(c) The wind farm was subject to a free-format EIA evaluation. It was concluded that there are no 'significant adverse environmental impacts'. The municipality of Vianen therefore did not consider it necessary to draw up an EIA.

(d) The Windpark Autena Draft Zoning Plan was subject to a public participation procedure before it was permitted. The zoning plan was made available for inspection from 18 June up to and including 29 July 2014, during which period opinions could be submitted. Afterwards, appeals could be lodged with the Division of the Council of State, which various citizens have done. In our opinion, the public participation procedure regarding this wind farm has not met the conditions of Articles 6 and 7 of the Convention, in particular the provisions of Article 6 paragraphs 3, 4 and 8 and of Article 7. After all, it had been established that the wind farm would be constructed – as is also apparent from the announcement by the province that the Structural Vision would be amended – at the moment when the municipality and the initiator reached agreement on this wind farm and the province subsequently agreed to this.

On page 44 of the Memorandum of Reply to the PSSV dated 4 February 2013, hereby enclosed as **Appendix 7**, it states:"

Summary: *Petitioners ask for new wind energy search locations to be included at the Everdingen junction. This location is also very suitable in landscape terms. The request in principle for this location was positively received by the municipality of Vianen and it will soon be submitted to the municipal council. The PSSV asks for support from the municipal administration and concrete elaboration via initiatives from the market. Both conditions apply at this location and it would be a shame for this to not be possible on the basis of provincial policy. (62) The possibilities for realising wind turbines are much less extensive in this PSSV than in the previous. On the basis of the province's*

previous wind energy policy, the petitioner (municipality of Vianen) has decided to cooperate in the construction of three wind turbines in the south-eastern cavity of the Everdingen junction. Considering the municipal support and that a market player wants to realise turbines here, the request is to include a possibility for wind energy for this location in the PSSV. Moreover, it is clearly indicated that wind turbines are being encouraged in urban areas, but this has not been concretely elaborated under the heading of 'activity'. (113)

SP response*: In addition to specifically named locations, the Structural Vision 2005-2015 also provided well-defined search areas for a limited number of configurations. These search areas covered almost the entire*

rural area of the province, regardless of specific core qualities in each sub-area.

We believe that, dependent on the sub-area and its core qualities, limited configurations can also have a major influence on the landscape and have therefore opted for specific search areas and, as a counterweight, areas without wind turbines. The broad search areas (regions) from the Structural Vision 2005-2015 provided too few tools for further deliberation. See also the response to opinions 016, 053, 056, 059, 076, 126, 189, 210, 236 above under 4.2.2.1 wind energy in general.

The location proposed by the municipality fits within our general vision for the acceptability of a location. It is located on the flank of landscapes, near major infrastructural works, near urbanisation and outside of nature values that already constitute an obstacle in advance. An environmental impact assessment at implementation level should provide certainty in this regard. An important component of our consideration is that, in addition to areas with turbines, there are also areas free from turbines. For this reason, not all of the theoretically possible areas, such as Everdingen, have been provided with search areas, but choices have been made, partially on the basis of feasibility. We consider the success rate of a search area near Everdingen to be higher than elsewhere within the Green Heart. By scrapping the other search areas in the Green Heart, we maintain the wish to develop areas with and areas without wind turbines. A complicating factor at the Vianen location is that it has been stipulated in the Green Heart Frontrunner that no new initiatives for wind energy locations will be included. However, this location can be seen as an alternative to the locations in the Green Heart that will now be scrapped, at Woerden, Abcoude and Breukelen. That is why we feel positive about this location. This positive spatial assessment does not mean that we are already including this new location as a search location in the PSSV and PSR. After all, this concerns a substantial modification of the spatial policy in comparison to the Draft that was made available for inspection. Wind energy locations can certainly lead to public reactions. We have not been able to test to what extent there is sufficient public support for this location. Residents have not yet been able to express their opinions. We therefore propose starting a partial revision for this search location immediately after the PSSV/PSR has been adopted. Public support can be determined within that framework. In the PSSV, we will articulate the positive fundamental attitude and announce the procedure now proposed. We will also indicate the positioning of the location in the PSSV, by including an explanatory object on the map in the PSSV.

[…]

SP resolution: *Modify the PSSV by announcing a partial revision procedure for a wind energy search location in Vianen in the south-eastern cavity of the Everdingen junction and recording the location as a potential future wind energy location in the explanatory notes in the PSSV.*

At the later moment that the draft of the revision of the structural vision required for this park was made available for inspection (from 22 October up to and including 2 December 2013 and adopted on 10 March 2014), it was in fact a fait accompli. The municipal administration of Vianen and the administration of Eneco had already made agreements about the placement and the location of the turbines in 2011/2012 before the plans were made public, which is apparent from, among other things, a letter enclosed as **Appendix 8** from the municipality dated 20 June 2012:"

On 14 September 2011, we received your request in principle for cooperation for the realisation of 3 wind turbines along the A2 near Autenasekade. (…) On 3 April [2012] we decided in principle to cooperate with your request. It is only possible to cooperate with your plan if a new zoning plan is drawn up for the wind turbines. Due to the political sensitivity surrounding wind turbines, we have also submitted your plan to the council and asked them to make a decision… The council decided in its meeting last night that the zoning plan can be drafted. So you can now get started on the preliminary zoning plan. (…) We will prepare a draft anterior agreement and send it to you."

The province was aware of this, as is apparent from the aforementioned quote from the memorandum of reply. In the memorandum of reply, the province indicated earlier that public support could be weighed on the occasion of the partial revision. However, at the time of the partial revision, it is apparent from the memorandum of reply (at the bottom of page 5) that in a response, hereby enclosed as **Appendix 9**, the province states:

On 11 May 2012, the Municipal Executive of the municipality of Vianen requested the inclusion of the location for wind energy via an opinion on the draft structural vision 2013-2028 (PSSV). The partial revision of the PSSV that is now under review is a result of this. On 19 June 2012, the Municipal Council of Vianen decided to cooperate with Eneco's initiative and decided to amend the zoning plan. On the basis of these decisions, we presume administrative support from the municipality.

(e) On page 6 of the memorandum of reply regarding the partial revision, the province tellingly adds:"

The utility and necessity of wind energy has been established nationwide. It was also thereby established that for the realisation of this, the provinces are the competent authority for locations between 5 and 100 MW and that they are assigned the task in this regard. They can leave the provision of the planning space (the zoning plan) to the municipality. The conflict between Government policy and the Aarhus Convention concerning the utility & necessity of wind energy and the scope of the task is not addressed in this partial revision of the PSSV.

The province therefore did not want to wait and see how citizens would actually react when they were able to submit opinions against the draft zoning plan (which was only available for inspection

from 18 June up to and including 29 July 2014). From the minutes (page 21) of the council meeting, hereby enclosed as **Appendix 10**, when a vote had to be taken on the Municipal Executive's proposal to adopt the zoning plan, it is apparent that 1,000 (!) objections had been submitted regarding the wind turbines at the location in Vianen. The same minutes (page 27) also tellingly reveal the response of the alderman to a question from a municipal councillor as to why the residents had no say in the location and choice of the turbines:

"*that the location of the turbines was already established in the PSSV*".

It follows from the foregoing that arrangements had already been made and the location was established at the start of 2012. The province was aware that the municipality had joined forces with an operator. Reference is made once again to the earlier quote:"

Petitioners ask for new wind energy search locations to be included at the Everdingen junction. This location is also very suitable in landscape terms. The request in principle for this location was positively received by the municipality of Vianen and it will soon be submitted to the municipal council. The PSSV asks for support from the municipal administration and concrete elaboration via initiatives from the market. Both conditions apply at this location and it would be a shame for this to not be possible on the basis of provincial policy. (62) The possibilities for realising wind turbines are much less extensive in this PSSV than in the previous. On the basis of the province's previous wind energy policy, the petitioner (municipality of Vianen) has decided to cooperate in the construction of three wind turbines in the south-eastern cavity of the Everdingen junction. Considering the municipal support and that a market player wants to realise turbines here, the request is to include a possibility for wind energy for this location in the PSSV.

The PSSV was subsequently revised by the province as if on a silver platter.

(f) As already indicated above, the municipal administration of Vianen and the administration of Eneco had already made agreements about the placement and the location of the turbines in 2011/2012 before the plans were made public, which is apparent from, among other things, the letter quoted above, from the municipality dated 20 June 2012:"

On 14 September 2011, we received your request in principle for cooperation for the realisation of 3 wind turbines along the A2 near Autenasekade. (…) On 3 April we decided in principle to cooperate with your request. It is only possible to cooperate with your plan if a new zoning plan is drawn up for the wind turbines. Due to the political sensitivity surrounding wind turbines, we have also submitted your plan to the council and asked them to make a decision… The council decided in its meeting last night that the zoning plan can be drafted. So you can now get started on the preliminary zoning plan. (…) We will prepare a draft anterior agreement and send it to you."

The further establishment of the municipality's promised cooperation to provide all required public-law cooperation is evident from the anterior agreement that was concluded. The contractual obligation for the municipality to provide all necessary spatial planning cooperation in the form of

decision-making concerning zoning plans and permits is stated in Article 4 of the agreement. The agreement and Article 4, which has been separately translated into English, is hereby enclosed as **Appendix 11**.

The agreement does, however, offer an escape in the event of obstacles as a result of legal proceedings. This is stated in Article 4 paragraph 2 of the agreement. Nonetheless, if these obstacles are not present, the municipality is contractually obliged to do what is necessary as described in Article 4 paragraph 1. This is also confirmed in the preamble on page 3 under 1 of the anterior agreement:"

'the Operator has rights for the development of a wind farm with appurtenances on the land located at the Autenasekade,…".

(g) Some of the communicants and others have brought legal proceedings against Windpark Autena. Both the procedure against the zoning plan and against the environmental permit were rejected in the highest instance. The rulings of the Division of the Council of State concerning the zoning plan and the environmental permit are hereby enclosed as **Appendix 12** and **Appendix 13** respectively. Relevant grounds for decision are:

<u>Zoning plan proceeding</u>:

(Aarhus)

6.4. It has been established that the draft plan was available for inspection for six weeks from 18 June 2014. A free-format EIA evaluation formed a part thereof. The notification of placement for public inspection was published in the Dutch Official Journal and in a door-to-door paper. The draft plan and related documents could be consulted at the town hall and on the internet. It has been established that this complies with the statutory requirements concerning the notification of placement for public inspection, such that anyone had the opportunity to submit their response to the draft plan by submitting an oral or written opinion.

(Support)

8.2. The council rightly takes the position that the fact that there would be no support for the plan among the population, be that as it may, does not mean that the council was unable to reasonably adopt the plan. This fact does not mean that the plan is not in accordance with proper spatial planning. The argument fails.

(Violation of prohibition of bias pursuant to Article 2:4 General Administrative Law Act)

9.5. Insofar as [appellant under 4.]. and others argue that Alderman Meurs invoked the anterior agreement in order to convince the council to adopt the zoning plan, this does not mean that the prohibition stated in Article 2:4 of the General Administrative Law Act has been violated. The council rightly takes the position that in spatial planning projects, it is not uncommon that prior to the adoption of the plan, agreement has already been reached between the municipality as a legal entity under public law and the initiator of the project. The Division therein also takes into account the fact

that the initiative to stipulate a condition for the benefit of the quality fund, according to the council proposal, did not come from Alderman Meurs or the Municipal Executive, but from the council itself. That the council included in the decision-making process the fact that Eneco Wind also entered into obligations in the anterior agreement regarding the limitation of noise nuisance and cast shadow likewise does not mean that the council acted in violation of Article 2:4 of the General Administrative Law Act. These arrangements are relevant in spatial planning. The council was allowed to include them in its considerations. The argument fails.

9.6. The fact that the municipality of Vianen as a legal entity under public law holds shares in Eneco likewise does not mean that the prohibition stated in Article 2:4 paragraph 1 of the General Administrative Law Act has been violated. It has neither been stated nor demonstrated that this circumstance has influenced the decision-making process. The argument fails.

(Wind turbine locations/alternative locations)

10.2 (…)

The council also rightly states that the intended location in the Provincial Spatial Structural Vision Regulation has been designated as a location for wind turbines. In light of this, the council was reasonably able to choose the location for the wind turbines provided for in the plan. The argument fails.

(Noise)

17.5. Article 3.14a of the Activities Decree prescribes the noise standards that a wind turbine must satisfy. When assessing the noise nuisance that the council deems acceptable within the context of proper spatial planning, the council was reasonably able to adhere to these standards.

(Cast shadow)

When assessing the nuisance from cast shadow that the council deems acceptable within the context of proper spatial planning, the council was reasonably able to adhere to the standard prescribed in Article 3.12 paragraph 1 of the Regulation of general rules for environmental management facilities pursuant to the Activities Decree.

(Acceptable living environment and conditions)

19.3. Insofar as [appellant under 4]. and others argue that due to the noise nuisance and cast shadow of the envisioned wind turbines in the vicinity of their homes, an acceptable living environment and conditions cannot be achieved. As has already been discussed in 17.5 and 18.4, it is the case that the standards set by or pursuant to the Activities Decree can be met for these aspects. In light of this, as has also already been discussed, the council could reasonably take the position that these aspects will not lead to unacceptable nuisance.

(Anterior agreement)

21.1. The anterior agreement concluded prior to the adoption of the plan does not form part of the plan. This agreement is therefore not currently under review. Insofar as [appellant under 4.]. and others argue that this agreement is in conflict with Article 6:24 of the Spatial Planning Act, this therefore fails.

The mere fact that it has been arranged in the agreement that Eneco Wind will make an annual contribution to the quality fund does not mean that the council adopted the plan purely because of financial interests. As has also already been discussed in 17.5 and 18.4, the council could reasonably take the position that the plan will not lead to unacceptable nuisance due to noise pollution and cast shadow. Contrary to what [appellant under 4]. and others argue, there is therefore no reason for the opinion that the council should also have included in the plan what was included in the anterior agreement on the use of the Danish standard for low-frequency noise and a zero standard for cast shadow. The argument fails.

Environmental permit procedure:

(Aarhus)

5.2 Contrary to what [appellant] argues and as the court has rightly considered, the foregoing is not in conflict with the right to adequate and effective legal protection, as laid down in, among other things, Articles 6 and 7 of the Aarhus Convention. It is thereby taken into account that within the context of the zoning plan proceeding, in which proceeding the possibility of public participation is offered, [appellant] took legal action concerning the (environmental) aspects which she considers important for answering the question as to whether the living environment and conditions are acceptable. In the Division's ruling of 27 May 2015, ECLI:NL:RVS:2015:1702, it was considered that the council could reasonably take the position that the plan will not lead to unacceptable nuisance due to noise pollution and cast shadow. In the aforementioned ruling, the Division declared the appeal against the decision of the council of the municipality of Vianen of 30 September 2014 in which the zoning plan was established unfounded. To this end, the Division considered, among other things, that the council rightly took the position that the wind turbines provided for in Article 4.2 of the plan rules comply with the Activities Decree.

The anterior agreement is not the subject of this proceeding, nor is it a decision of general scope that forms the basis for the decision to grant the environmental permit. An (exception) assessment as to whether the agreement can be equated with a plan or programme as referred to in Article 7 of the Aarhus Convention, and as to whether sufficient opportunities for public participation have been offered in the preparation thereof, is therefore not addressed.

Insofar as [appellant] wished to argue that the court wrongly considered that what she has argued about the anterior agreement does not lead to the judgment that Article 2.10 of the Act on general provisions for environmental law should be set aside, the Division considers as follows. Contrary to what [appellant] poses, she possessed and utilised the opportunity to raise the issues of noise nuisance and cast shadow in the courts. While it is true that she does not have the option to take legal action before the administrative court regarding what has been determined in this regard in the agreement that goes beyond what is required by virtue of the Activities Decree, in the aforementioned ruling on the zoning plan, the Division already gave an irrevocable judgment about the noise nuisance and cast shadow and found no ground for invalidation therein.

Response to question 10

In addition to the Vianen Autena wind farm, the Wieringermeer wind farm was indeed mentioned as an example in 5.4 of the communication, in respect of which there is conflict with

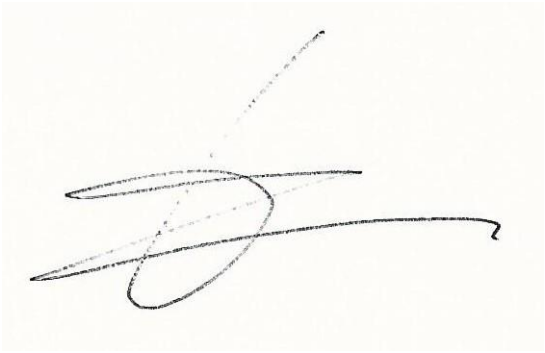
Article 6. Footnote 12 mentions the location of the legal proceeding with the Division of the Council of State, namely ECLI:NL:RVS:2016:1228. Nevertheless, the Wieringermeer wind farm does not fall under the territorial jurisdiction of the province of Utrecht.

Response to question 11

Other wind farms are not mentioned in the communication, meaning that question 11 does not require any further response.

Kind regards,

René Dercksen



Summary of Appendices (with partial English translation):

Appendix 1: page 47 – 50 of Memorandum of Reply **with translation of page 47-50**

Appendix 2: National Energy Agreement, September 2013

Appendix 3: Structural Vision for Onshore Wind Energy

Appendix 4: Structural Vision for Onshore Wind Energy EIA Plan

Appendix 5: Letter to the States General dated 31 March 2014

Appendix 6: Provincial Spatial Structural Vision 2013-2028 (revised 2016)

Appendix 7: Memorandum of Reply to the PSSV dated 4 February 2013 **with translation of page 44**

Appendix 8: Letter from municipal council of Vianen dated 20 June 2012

Appendix 9: Memorandum of Reply to first partial revision of PSSV

Appendix 10: minutes (see page 21) of the council meeting of the municipality of Vianen

Appendix 11: Anterior agreement **with translation of Article 4**

Appendix 12: Council of State ruling concerning Vianen zoning plan

Appendix 13: Council of State ruling concerning Vianen environmental permit