

Findings and recommendations with regard to communication ACCC/C/2014/124 concerning compliance by the Netherlands

Adopted by the Compliance Committee on 26 July 2021¹

I. Introduction

1. On 22 December 2014, non-governmental organization Stichting Greenpeace Netherlands (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure by the Netherlands to comply with the Convention's provisions on access to environmental information in connection with the permitting of two power plants.
2. Specifically, the communicant claims that the Party concerned failed to comply with its obligations under article 2(3), in conjunction with article 4, and article 4(3)(c) of the Convention by wrongly refusing access to information that has a direct effect on environmental decision-making and by falsely characterizing the information requested as "internal communications of public authorities".
3. At its forty-eighth meeting (Geneva, 24-27 March 2015), the Committee determined on a preliminary basis that the communication was admissible.
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 28 June 2015.
5. The Party concerned provided its response to the communication on 27 November 2015.
6. On 20 January 2016, the communicant provided comments on the response of the Party concerned.
7. On 3 June 2016, the Party concerned provided additional information.
8. The Committee held a hearing to discuss the substance of the communication at its fifty-fourth meeting (Geneva, 27-30 September 2016), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.
9. On 5 October 2018, the Committee sent questions to the Party concerned, which provided its reply to most of the questions on 2 November 2018 and its reply to the remaining question on 22 November 2018.
10. On 2 August 2019, the Party concerned provided an update, and on 13 September 2019, the communicant submitted comments thereon. On 5 November 2019, the Party concerned provided comments on the communicant's comments and on 4 February 2020, the communicant provided comments on the comments of the Party concerned.
11. The Committee completed its draft findings through its electronic decision-making procedure on 13 June 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 14 June 2021. Both were invited to provide comments by 23 July 2021.
12. The communicant and the Party concerned provided comments on the Committee's draft findings on 15 and 23 July 2021, respectively.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

13. The Committee proceeded to finalize its findings in closed session, taking account of the comments received and adopted its findings through its electronic decision-making procedure on 26 July 2021. The Committee agreed that the findings should be published as a formal pre-session document to its seventy-second meeting.

II. Summary of facts, evidence and issues²

A. Legal framework

Access to information

14. Section 3(5) of the Government Information (Public Access) Act of 31 October 1991 (the WOB) provides that an application for information shall be granted with due regard for the provisions of section 11.³

15. Section 11 WOB provides that:

1. Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein.

2. Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form that cannot be traced back to any individual. If those who expressed the opinions in question or who supported them agree, information may be disclosed in a form that may be traced back to individuals.

...

4. Notwithstanding subsection 1, in the case of environmental information, the interests of protecting personal opinions on policy shall be weighed against the interests of disclosure. Information concerning personal opinions on policy may be disclosed in a form that cannot be traced back to any individual. Subsection 2, second sentence applies *mutatis mutandis*.⁴

16. Section 1(c) WOB defines an “internal consultation” as a “consultation concerning an administrative matter within an administrative authority or within a group of administrative authorities in the framework of their joint responsibility for an administrative matter”.⁵

17. According to the Explanatory Memorandum to the WOB, the “internal consultation” exemption is designed to deal with:

the problem of involving external experts and advisory and other bodies in forming an opinion on documents which, according to the administrative authority, are still the subject of internal deliberation.

The internal character of a document is determined by the purpose for which it is drawn up. Internal consultation may therefore occur even where external persons or bodies are involved in collecting data, developing policy alternatives and/or completing the consultation within the administrative authority. Such involvement may, however, negate the internal character of the consultation if it qualifies as advice or structured deliberation rather than consultation. Likewise, the number of parties involved in the consultation may mean that it is not internal. In our view, it is not possible to define this term by reference to objective, clear-cut criteria that hold good for all cases.⁶

18. The Explanatory Memorandum to the WOB gives the following examples of documents drawn up for internal consultation within the meaning of section 11(1) of the WOB:

² This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

³ Party’s response to the communication, para. 19, and annex 2, p. 3.

⁴ Party’s response to the communication, annex 2, p. 3.

⁵ Party’s response to the communication, annex 2, p. 1.

⁶ Party’s response to the communication, annex 7, p. 1.

Papers drawn up by civil servants for politicians and higher-ranking officials, correspondence between the different parts of a ministry and between different ministries, drafts of documents, diaries, minutes of meetings, summaries and conclusions of internal discussions and reports of civil service advisory committees.⁷

19. Section 1(a) WOB defines a “document” as a “written document or other material containing data which is deposited with an administrative authority”.⁸
20. Section 1(f) of the WOB describes the term “personal opinion on policy” as “an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments they advance in support thereof”.⁹
21. Section 1(g) applies the definition of “environmental information” contained in section 19(1)(a) of the Environmental Management Act.¹⁰
22. Section 19(1)(a)(1) of the Environmental Management Act provides that “environmental information means all information set down in documents on [...]” and goes on to provide a non-exhaustive list of examples.¹¹
23. Section 19(1)(a)(2) of the Environmental Management Act provides that “section 1, opening words and (a) of the Government Information (Public Access) Act apply mutatis mutandis”.¹²
24. Section 7(2) WOB states that, “the administrative authority shall provide the information in the form requested by the applicant, unless:
 - a. it cannot be reasonably expected to provide the information in that form;
 - b. the information is already available to the public in other form which is easily accessible to the applicant.”¹³

Permitting activities that may impact Natura 2000 sites

25. Section 19(d)(1) of the Nature Conservancy Act 1998, which implements the European Union Habitats Directive,¹⁴ provides in relevant part that:

Without a permit issued by the Provincial Executive ... it is prohibited to carry out projects or perform other activities which ... can worsen the quality of the natural habitats and the habitat of species in a Natura 2000 nature protection area or have a significantly disruptive impact on the species for which the area has been designated.¹⁵

26. Section 19(f)(1) of the Nature Conservancy Act requires that:

before the Provincial Executive makes a decision on any application for a permit as referred to in section 19d, subsection 1 in respect of projects ... which can have significant effects on the area concerned, the initiator must make an appropriate assessment of the effects of the area.

27. Finally, section 19(g)(2) provides for a derogation in line with article 6(4) of the Habitats Directive in cases where negative impacts cannot be avoided, according to which:

in the absence of alternative solutions for a project, a permit as referred to in section 19d, subsection 1 ... may be granted by the Provincial Executive only for imperative reasons of overriding public interest, including those of a social or economic nature.¹⁶

⁷ Party’s reply to the Committee’s questions, 2 November 2018, p. 2.

⁸ Party’s response to the communication, annex 2, p. 1.

⁹ Party’s response to the communication, annex 2, p. 2.

¹⁰ Party’s response to the communication, annex 2, p. 2.

¹¹ Party’s response to the communication, annex 6, p. 1.

¹² Party’s response to the communication, annex 6, p. 1.

¹³ Party’s response to the communication, annex 2, p. 5.

¹⁴ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

¹⁵ Party’s response to the communication, annex 1, p. 1.

¹⁶ Party’s response to the communication, annex 1, pp 2-3.

B. Facts

28. The communication concerns requests for information regarding permits issued to RWE and Nuon (together “the energy companies”) for two power plants located in Eemshaven, a port area at the edge of the Waddenzee, which is a “Natura 2000” protected area.¹⁷

29. By decisions of 14 August 2008, the Minister of Agriculture, Nature and Food Quality and the Executive Councils of the Provinces of Groningen and Friesland had granted two permits: one to RWE for a coal power station and one to Nuon for a coal and gas power station. Both permits were issued in accordance with section 19(d)(1) of the Nature Conservation Act.¹⁸

The proceedings to challenge the permits

30. The communicant filed notices of objections against both permit decisions of 14 August 2008, which were rejected by the Province of Groningen on 5 December 2008 and by the Province of Friesland on 13 March 2009.¹⁹ The communicant then challenged the permits up to the Council of State (*Raad van State*), the highest administrative court of the Party concerned.²⁰

31. Nuon withdrew its permit application relating to the coal-fired part of the power plant, whereupon the communicant withdrew its objection to the permitting decision. Accordingly, the proceedings concerning Nuon were closed without judgment. The part of the decision concerning Nuon’s permit for a gas-fired plant remained and became irrevocable as uncontested at the end of 2011.²¹

32. With respect to the permit granted to RWE, the Council of State ruled that the communicant’s appeal was well-founded and annulled the permit on 24 August 2011.²² As a result, RWE filed an application for a new permit, which was granted on 19 June 2012 and, after an unsuccessful challenge by the communicant, became irrevocable on 9 September 2015.²³

33. During the proceedings before the Council of State, the Province of Groningen commissioned the Dutch Energy Centre (ECN) to prepare an expert study on the necessity of selecting the Eemshaven as the location for the two power plants.²⁴

The proceedings concerning access to information

The information request and administrative complaints

34. On 1 June 2011, shortly prior to the end of the litigation concerning the 2008 permits on 24 August 2011, the communicant submitted an access to information request to the Province of Groningen requesting the disclosure of all documents related to the development and granting of the permits granted to RWE and Nuon from the period of 1 January 2005 until 1 June 2011 (the date that the information request was submitted).²⁵

35. In its reply of 19 July 2011, the Province informed the communicant that the request concerned 1,724 documents and disclosed 1,127 of these. Access to the remaining 597 documents was refused.²⁶ There were a number of different reasons for refusal to disclose documents.

36. In explaining its reasons, the Province described how it had classified the communication between the Province and the energy companies and their advisors into two time periods: phase 1, the period up to and including the issuing of the confirmatory decisions regarding the permits granted to RWE and Nuon; and phase 2, the period starting on the date these confirmatory decisions were issued and court proceedings began. The Province held that the documents produced during phase 1 did not qualify as “internal consultation” under section 11(1) of the WOB. By contrast, the Province considered that the documents produced during phase 2 were to be treated as “internal consultation”.²⁷ With regards to the latter category of documents, the Province stated that:

¹⁷ Party’s response to the communication, para. 4, and communication, p. 2.

¹⁸ Party’s response to the communication, para. 5, and communication, p. 5.

¹⁹ Party’s response to the communication, para. 6.

²⁰ Party’s response to the communication, para. 7.

²¹ Party’s response to the communication, para. 7.

²² Party’s response to the communication, para. 7.

²³ Party’s response to the communication, para. 9.

²⁴ Party’s response to the communication, para. 8.

²⁵ Communication, annex 1, and Party’s response to the communication, para. 11.

²⁶ Communication, p. 2; Party’s response to communication, para. 13.

²⁷ Communication, p. 3, Party’s reply to Committee’s questions, 2 November 2018, pp. 2-3.

Where the documents were sent to or received from permit holders (exclusively or otherwise) and date from after the granting of the permits, they relate to consultation that took place between the administrative authorities and companies concerned in connection with preparation for the defence of the permit before the courts. Unlike the situation in the phase before the granting of the permit, the companies can be regarded in that phase as third parties involved in the preparation of the final decision. This is why the documents are treated as intended for internal consultation and containing personal opinions on policy.

Disclosure of those documents is refused pursuant to section 11, subsection 1 of the WOB. In so far as those documents include environmental information that has not been disclosed elsewhere, we invoke section 11, subsection 4 of the WOB. We do not consider that it would be in the interests of effective governance for these documents to be nonetheless disclosed under section 11, subsection 2 of the WOB. The importance of properly preparing the defence of the decisions before the courts outweighs the public interest in disclosure of this information.²⁸

37. The Province also justified some of its refusal to disclose information by stating on two instances that “the information in question does not add anything of real value to what is already known about the state of the environment from public sources, the permits issued under the Environmental Management Act and Nature Conservancy Act, and the public files on which they are based.”²⁹

38. Following administrative complaints, the Province decided in a confirmatory decision of 15 August 2012 (followed by further decisions of 6 November 2012, 4 December 2012 and 15 January 2013) that of the remaining documents, 304 should be disclosed and 87 documents should only be partly disclosed.³⁰ This left around 200 documents undisclosed.

39. In its statement of reasons for the confirmatory decisions, the Province confirmed that some of the undisclosed documents were to be regarded as “internal consultations”, notwithstanding that they involved communication between the Province and the energy companies and their advisers (lawyers, ecologists, engineers) about the issuing and defending of the permits granted to these companies.³¹ In its reasoning in the confirmatory decisions, the Province stated that it had been agreed with RWE and Nuon in advance that these communications would remain confidential.³²

40. In addition, the decision of the Province that certain of the withheld documents did not qualify as “environmental information” within the meaning of section 19(1)(a) of the Environmental Management Act, as incorporated by section 11(4) of the WOB was upheld.³³

Appeals to the court of first instance

41. On 18 July 2013, the District Court found that the refusal to disclose communications with RWE and Nuon on the basis of the “internal consultation” exception was unjustified.³⁴ RWE and Nuon were permittees and therefore third parties with their own interests, meaning that communications with them and their advisers could not be internal. The court thereby rejected the Province’s distinction between the two time phases. These were external communications regardless of whether they took place during the permitting procedures or subsequent litigation.³⁵

42. With respect to documents exchanged between the Province and ECN only (see para. 33 above), the court came to a different conclusion. Noting the Explanatory Memorandum to the WOB and “settled case-law”, the court said that documents shared with persons forming part of other administrative authorities can be regarded as internal consultation, given the scope and complexity of the decision-making concerned.³⁶ Moreover, third parties such as ECN that are under the direction of

²⁸ Party’s reply to Committee’s questions, 2 November 2018, annex B2, p. 2.

²⁹ Party’s reply to Committee’s questions, 2 November 2018, annex B2, p. 2 and p.3.

³⁰ Party’s response to the communication, para. 14; Communication, p. 2; Additional information from the Party concerned, 3 June 2016, annex; Party concerned’s reply to the Committee’s questions, 2 November 2018, annex C, p. 2.

³¹ Communication, p. 2; additional information from the Party concerned, 3 June 2016, annex, pp. 7-10, 12.

³² Communication, p. 3; additional information from the Party concerned, 3 June 2016, annex, pp. 6-7.

³³ Additional information from the Party concerned, 3 June 2016, annex, pp. 9, 12.

³⁴ Party’s response to the communication, para. 16.

³⁵ Communication, p. 3, Party’s response to the communication, para. 16, and annex 4b, paras. 5.7-5.8.

³⁶ Party’s response to the communication, annex 4b, para. 5.3.

administrative authorities and have been engaged for a project could also be described as participants in internal consultation.³⁷

43. The court concurred with the Province's view that certain information exchanged between the Province and its advisors was not "environmental information".³⁸ This was information about the imperative reason of overriding public interest (*dwingende reden van openbaar belang*, DROB) under section 19(g)(2) of the Nature Conservation Act that justified the 19(d)(1) permits, despite adverse impacts on a protected area that could not be excluded.³⁹ The court held that, since these documents (the DROB documents) were not environmental information, section 11(4) WOB and its balancing of interests did not apply and the information could be withheld.⁴⁰

Appeals to the highest administrative court

44. The communicant, the Province and RWE all appealed the ruling of the District Court to the Council of State. In its judgment of 16 July 2014, the Council of State ruled that the lower court had erred by finding that the involvement of third parties representing their own interests in communication with public authorities precluded such communication from constituting "internal consultation". It further noted that the Province and the permittees had agreed that the shared information would remain confidential and that this was necessary for the Province to develop its legal position to defend the permits that it had granted to RWE and Nuon.⁴¹

45. The Council of State ruled this situation was distinguishable from an earlier judgment that concerned a request for disclosure of drafts of an environmental impact assessment: that information had been drawn up for preliminary consultations between an administrative authority and an interested party as part of its application for a permit. The documents at issue in the present case did not relate to the preparation and submission of such documents, but rather concerned the exchange of information with an administrative authority to enable it to determine its position on another administrative matter, namely defending the granting of the permits in a legal action.⁴² Thus the Council of State found the "internal consultation" exception should not have been rejected by the District Court.⁴³

46. The Council of State did however order the Province to better explain its reasons for refusal. In doing so, the Council of State agreed with the communicant's claim that, even if the documents in question did constitute internal consultation, the Province had failed to recognize that some documents contained information relating to emissions and so required consideration under section 11(4) WOB.⁴⁴ As a result, a number of documents were in the end released following a reconsideration by the Province.⁴⁵

47. On the other matter, the Council of State confirmed the earlier ruling of the District Court that the DROB documents do not qualify as environmental information.⁴⁶ The Court stressed that:

Only documents that actually contain [information relating to the state of elements of the environment or to factors that harm or are likely to harm elements of the environment] are covered by the definition [of environmental information]. Documents that merely refer to such information without actually containing it themselves do not come within this definition.⁴⁷

48. The Council of State thus held that the District Court was right to find that the majority of the DROB documents did not require further assessment under section 11(4) WOB since they only "referred to" the study to ascertain whether there was an imperative reason of overriding public

³⁷ Party's response to the communication, annex 4b, para. 5.4.

³⁸ Party's response to the communication, para. 16 and annex 4b, para. 7.4.1.

³⁹ Communication, p. 5.

⁴⁰ Party's response to the communication, para. 16, and annex 4b, para. 7.4.1.

⁴¹ Party's response to communication, para. 17 and annex 5b, paras. 6.3-6.4.

⁴² Party's response to the communication, annex 5b, para. 6.3.

⁴³ Party's response to the communication, annex 5b, para. 6.4.

⁴⁴ Update from the Party concerned, 2 August 2019, p. 2; Party concerned's reply to Committee's questions, annex C, paras. 15-17, 20.2.

⁴⁵ Party's response to communication, para. 17.

⁴⁶ Communication, p. 5.

⁴⁷ Party's response to communication, annex 5b, para. 12.3.

interest for the coal-fired power stations in Eemshaven. The environmental information on which that study was based had not been included in the documents.⁴⁸

49. The Council of State did consider that three of the documents did in fact contain environmental information. However, the court did not overturn the Province's decision in relation to those documents because "the part of the document containing [environmental] information had been made public and furnished to Greenpeace [and] that all environmental information contained in the above-mentioned documents has now been furnished to Greenpeace".⁴⁹

50. At none of the above stages was the "materials in the course of completion" exemption expressly invoked as a justification for withholding the requested information.⁵⁰

New line of jurisprudence on the "internal consultation" exception

51. In a separate judgment of 20 December 2017, the Council of State held "that – unlike in the past – it is of the opinion that a consultation loses its internal character if it involves an external third party that is promoting its own interest and, as such, plays a role in the consultation."⁵¹ Specifically, the Council of State ruled that:

With regard to the consultation concerning the [...] decision regarding the zoning plan "Rhijnbeek" and Hornbach's project to request a building permit, Hornbach has an interest of its own. For this matter Hornbach is not an external party giving advice solely in the interest of the administrative body and not serving any other interest than giving its opinion based on its experience and expertise.⁵²

52. The Council of State has since affirmed its ruling of 20 December 2017, including in a judgment of 24 October 2018.⁵³

Subsequent litigation concerning the information requests

53. On 16 August 2017, the Council of State declared its judgment of 16 July 2014 as final and unappealable.⁵⁴ At the same time the Council of State held that some of the requested documents contained information relating to emissions.⁵⁵ The Province thereafter decided, after weighing the interests anew, to disclose the documents containing information on emissions insofar as this had not already been done.⁵⁶

54. RWE sought judicial review of the Province's decision to disclose further documents containing information relating to emissions following the Council of State's judgment of 16 August 2017.

55. At the hearing of RWE's judicial review proceedings on 23 November 2018, the communicant raised the new line of jurisprudence concerning internal consultation.⁵⁷ At the hearing, the Council of State took the position that its judgment of 16 July 2014 was final and unappealable and so its considerations on internal consultation in those proceedings could not be reopened.⁵⁸

56. In its judgment of 3 July 2019, the Council of State held that it was permissible for the Province to decide that the importance of public disclosure of the information on emissions outweighed the confidentiality agreement that it had with RWE, and upheld the disclosure of the documents insofar as they concerned information relating to emissions.⁵⁹

⁴⁸ Party's response to communication, annex 5b, para. 12.3.

⁴⁹ Party's reply to the Committee's questions, 2 November 2018, annex C, para. 12.4.

⁵⁰ Reply to Committee's questions, 2 November 2018, p. 1.

⁵¹ Update from the Party concerned, 2 August 2019, p. 2.

⁵² Communicant's comments on the update from the Party concerned, 13 September 2019, p. 1.

⁵³ Update from the Party concerned, 2 August 2019, p. 2.

⁵⁴ Update from the Party concerned, 2 August 2019, p. 2.

⁵⁵ Update from the Party concerned, 2 August 2019, p. 2.

⁵⁶ Update from the Party concerned, 2 August 2019, p. 2.

⁵⁷ Update from the Party concerned, 2 August 2019, p. 2.

⁵⁸ Update from the Party concerned, 2 August 2019, p. 3.

⁵⁹ Update from the Party concerned, 2 August 2019, p. 2.

C. Domestic remedies

57. The communicant's use of domestic procedures is described in paragraphs 41-46 above. The Party concerned did not comment on the use of domestic remedies in this case.

D. Substantive issues

Article 4 in conjunction with article 2(3) – environmental information

58. The communicant claims that some of the requested documents were wrongly withheld on the grounds that they were not environmental information. The communicant states that these documents, the so-called DROB documents, "were compiled by the Province, RWE or their advisers" during the court proceedings regarding the 2008 permits. Their purpose was to demonstrate that the permit for RWE's project fulfilled the criteria justifying an article 19(d)(1) permit, namely that in spite of a negative assessment of the implications for the Natura 2000 sites concerned and in the absence of alternative solutions the project needed to nevertheless be carried out for imperative reasons of overriding public interest.⁶⁰

59. The communicant stresses that the Province had to prove these criteria existed as a legal precondition of the permit. The communicant submits that the Province, District Court and the Council of State erred in finding that these documents did not constitute environmental information and access to these documents should not have been refused.⁶¹

60. The communicant submits that the imperative reasons of overriding public interest test concerned an administrative measure to protect nature in the sense of article 2(3)(b) of the Convention. It submits further that the right to access environmental information under the Convention encompasses all documents that contain environmental information, regardless of whether this information is considered complete or correct by the public authorities and regardless of whether it has therefore been included in the final versions of the documents that are disclosed.⁶²

61. The communicant states that it is clear from the judgment of the Council of State and the subjects covered by the documents as stated by the public authorities that the withheld documents contain environmental information.⁶³ The communicant submitted a non-exhaustive list containing the titles or descriptions of a number of withheld documents in support of its view that they were environmental information, including information in an email purportedly on the ecological effects of nitrogen deposits from the coal plants on protected sites, which was exchanged between Nuon, RWE, advisers and the Province, and emails from those the communicant surmises are ecological experts.⁶⁴

62. The Party concerned submits that only some of the withheld documents relate to the imperative reasons of overriding public interest, of which only a few relate to communications with the Province's external adviser ECN in connection with the court proceedings on the permits. It observes that these and all documents were disclosed to both the District Court and the Council of State and that these courts found the documents did not include environmental information as defined under the Convention.⁶⁵

63. The Party concerned states that the documents refer to studies as to whether the power plants serve an imperative reason of overriding public interest. On that matter, the Province exchanged information with ECN preceding the preparation of a report on the assets of Eemshaven from an economic and administrative perspective, but that all actual studies on the imperative reasons of overriding public interest contained in the final ECN report were made public.⁶⁶

64. The Party concerned claims that other documents referring to imperative reasons of overriding public interest that were not disclosed are "question and answer" documents and reactions to the grounds of appeal as presented by the communicant, which were used in preparation for the

⁶⁰ Communication, p. 5.

⁶¹ Communication, pp. 5-6, and communicant's comments on the Party's response to the communication, 20 January 2015, paras 29-31.

⁶² Communicant's comments on the Party's response to the communication, 20 January 2015, para. 6.

⁶³ Communicant's comments on the Party's response to the communication, 20 January 2015, para. 7.

⁶⁴ Communicant's comments on the Party's response to the communication, para. 5.

⁶⁵ Party's response to the communication, para. 52.

⁶⁶ Party's response to the communication, para. 52.

District Court hearing.⁶⁷ While granting that imperative reasons of overriding public interest can be considered to be environmental information, the Party concerned submits that documents merely referring to these reasons are not.⁶⁸

65. The Party concerned states that email messages which refer to another document which contains environmental information and an internal legal analysis which refers to environmental information described elsewhere in another document are examples of documents that only “refer to” but do not “contain” environmental information.⁶⁹

Article 4(3)(c) – internal communication

Submissions before the new line of jurisprudence

66. The communicant submits that the Party concerned failed to comply with article 4(3)(c) of the Convention by incorrectly characterising part of the withheld documents as internal communications of public authorities.⁷⁰ The communicant submits that these documents contained communication between the Province and the energy companies and their advisers, including lawyers, ecologists and engineers.⁷¹ It states that from the overview of the denied documents it was clear that the Province had been in frequent contact and had closely collaborated with RWE and Nuon in the preparation of its defence of the permits in the court proceedings.⁷² The communicant submits that documents were drawn up collaboratively and with extensive consultation between the Province and the energy companies.⁷³

67. The communicant claims a number of undisclosed documents are reports commissioned by RWE and Nuon to further substantiate the ecological conclusions in the original ‘appropriate assessment’ of the permits granted to them.⁷⁴ It states that these documents included draft versions of documents issued by the Province and minutes and reports of roundtables and meetings between the Province and RWE and Nuon and their external experts on air quality, sea water protection and ecology.⁷⁵

68. The communicant submits that this communication between the Province and commercial parties cannot be characterised as internal communication under article 4(3)(c) of the Convention because it involved third parties which furthermore had their own private economic interest in their communication with the Province as they sought to convince the Council of State to reject the communicant’s challenge of the permits.⁷⁶ It submits that documents drawn up with third parties or otherwise disclosed to or exchanged with third parties cannot be considered internal communications as they have lost their internal character.⁷⁷

69. The communicant points to an “extensive interpretation” of the internal communication exemption by Dutch administrative courts and claims that the Council of State’s judgment in its case concerning the power plants at Eemshaven was the first application of this line of case law to environmental information.⁷⁸

70. The communicant finally submits that the public authorities not only denied access to environmental information but also advantaged the operators in these judicial proceedings while weakening the communicant’s procedural position by deliberating with and taking advice from the

⁶⁷ Party’s response to the communication, para. 53.

⁶⁸ Party’s response to the communication, para. 54.

⁶⁹ Party’s reply to the Committee’s questions, 2 November 2018, p. 3.

⁷⁰ Communication, pp. 2-4.

⁷¹ Communication, pp. 2-3.

⁷² Communication, p. 2 and communicant’s comments on the response of the Party concerned to the communication, 20 January 2015, para. 17.

⁷³ Communicant’s comments on the Party’s response to the communication, 20 January 2015, para. 17.

⁷⁴ Communicant’s comments on the Party’s response to the communication, 20 January 2015, para. 17.

⁷⁵ Communicant’s comments on the Party’s response to the communication, para. 19.

⁷⁶ Communication, p. 3.

⁷⁷ Communicant’s comments on the Party’s response to the communication, paras. 18-19.

⁷⁸ Communicant’s comments on the Party’s response to the communication, paras. 11-13.

operators for the legal defence of the permits in court. It submits that this illustrates the gateway function of the right to access to documents for the right to access to justice.⁷⁹

71. The Party concerned confirms that the withheld documents predominantly concern communications between public authorities and external actors, namely the energy companies and advisers consulted by them.⁸⁰ It submits that these documents were internal communication in the context of the judicial review of the permit decisions and the parties intended them to be used by themselves or others within the administrative authority. It states that the documents predominantly consist of emails with text suggestions, explanations of technical or legal matters, drafts of documents lodged in the proceedings, such as memoranda of oral pleadings and statements of defence with comments, as well as “question and answer” documents used in preparation of the District Court hearing. The Party concerned submits the final versions of most of these documents, such as the pleadings and other procedural documents, became public afterwards, on top of all phase 1 documents that had already been disclosed, and therefore all environmental information was disclosed.⁸¹

72. The Party concerned contends that the term “internal communications” is not defined in the Convention and that the text of the Convention does not exclude the involvement of external actors in internal communications.⁸² It submits that the documents do not relate to decisions on a permit but to allow the authority to determine its position in its defence of the granted permit before court. It submits involvement of the permit holder was necessary to be able to use their technical and legal expertise because of the complexity of the case.⁸³

73. The Party concerned states that the fact that the permit holders had interests of their own does not automatically mean that the documents cannot be internal communications and that it must be possible for documents that have involved the contribution of external actors to be kept confidential.⁸⁴ Referring to the judgment of the Council of State, it submits the purpose is decisive.⁸⁵ The Party concerned highlights the Explanatory Memorandum to the WOB on this point and states that this rule is confirmed by well-established case law.⁸⁶

74. The Party concerned also refutes that the communicant was denied access to environmental information or that the permit holders had been advantaged over the communicant, as all environmental information was disclosed in the final versions.⁸⁷

Submissions after the new line of jurisprudence

75. The communicant confirms the Party concerned’s view that the Council of State in its judgment of 20 December 2017 took a new direction with respect to its case law regarding the interpretation of internal communication under article 11(1) of the WOB and that this new interpretation has been confirmed in more recent judgments (see paras. 51-52 above).⁸⁸ It submits that had this new line of jurisprudence been applied by the Province or the Council of State in the proceedings regarding its information requests, including for documents concerning deliberations with RWE and its experts, the outcome would have been that all the documents concerning deliberations with RWE and Nuon would have been disclosed.⁸⁹ However, the communicant submits that the situation in the Party concerned is still problematic in two respects.

76. Firstly, the communicant claims that there is no indication in the new jurisprudence that third parties other than permit holders or permit applicants would be considered as “third parties having an own interest in the outcome of the internal deliberations”, as was the case of Hornbach in its exchanges with a municipality in the judgment of 20 December 2017.⁹⁰ The communicant submits therefore, that even if the new line of case law were applied to its requests, the Province would have been under no obligation to disclose all the documents concerning the communications of other third

⁷⁹ Communication, p. 5.

⁸⁰ Party’s response to the communication, para. 55.

⁸¹ Party’s response to the communication, para. 56.

⁸² Party’s response to the communication, paras. 30-31.

⁸³ Party’s response to the communication, paras. 39, 57.

⁸⁴ Party’s response to the communication, para. 57.

⁸⁵ Party’s response to the communication, paras. 35, 57.

from the Party concerned, 3 June 2016, p. 1.

⁸⁶ Party’s response to the communication, paras. 34-39.

⁸⁷ Party’s response to the communication, para. 58.

⁸⁸ Communicant’s comments on the update from the Party concerned, 13 September 2019, p. 1.

⁸⁹ Communicant’s comments on the update from the Party concerned, 13 September 2019, p. 1.

⁹⁰ Communicant’s comments on the update from the Party concerned, 13 September 2019, para. 5.

parties with the Province on the project to realize the coal plants, including those with advisers such as ECN, as well as other provinces and public bodies.⁹¹

77. In this regard, the communicant claims that a large part of the documents requested by them concerned exchanges of information or correspondence between the Province and external experts hired by the energy companies or the Province itself. The communicant claims that the Province has still not released these documents, and so their allegation of noncompliance as stated in its original communication has not been addressed.⁹²

78. Secondly, the communicant observes that, although application of the new jurisprudence to the communications between the Province and the energy companies would have resulted in disclosure of the requested documents, to date the requested documents concerning communications directly between these parties have not been disclosed. Accordingly, the communicant claims that the Party concerned is still in noncompliance in this respect.⁹³

79. The Party concerned submits that, in light of the developments in jurisprudence, the communications between the Province and RWE cannot be designated as internal.⁹⁴ It concedes however that “this does not change the fact that Greenpeace’s request for information has since resulted in a final and conclusive decision”.⁹⁵ The Party concerned submits, however, “it is clear how future information requests involving third parties will be assessed. It is up to the parties concerned, in so far as they still have an interest in the matter, to determine whether they wish to take action in light of this new case law.”⁹⁶

Article 4(3)(c) – materials in course of completion

80. The Party concerned further alleges that the requested information constituted “material in the course of completion” and that this is a recognised basis for exclusion under section 11(1) of the WOB. It states that, in accordance with case law, drafts are considered to be documents drawn up for internal consultation. As such, disclosure of draft documents was refused, but the actual environmental information became available later.⁹⁷

81. Whilst acknowledging that the “material in the course of completion” exception is not recognized in these words in its domestic legislation, the Party concerned claims that the Province, District Court and Council of State all attach importance to the fact that many of the documents were drafts and accordingly in the view of the Party concerned they were “materials in the course of completion”. It submits this is relevant to the question of whether they constitute personal opinions on policy within the context of internal consultation (see para. 15 above).⁹⁸ The Party concerned states that the Explanatory Memorandum to the WOB gives “drafts of documents” as one of the examples of documents drawn up for internal consultation within the meaning of section 11(1) of the WOB.⁹⁹

82. The communicant did not comment on the Party concerned’s submission regarding materials in the course of completion.

III. Consideration and evaluation by the Committee

83. The Netherlands deposited its instrument of ratification of the Convention on 29 December 2004, meaning that the Convention entered into force for the Netherlands on 29 March 2005, i.e. ninety days after the date of deposit of the instrument of ratification.

Scope of consideration

84. At the outset, the Committee clarifies that article 2(3) of the Convention provides that environmental information means any information “in written, visual, aural, electronic or any other material form”. This definition is clearly not limited to information set down in “documents” which is the term used in section 1(a) of the WOB and article 19(1)(a) of the Environmental Management

⁹¹ Communicant’s comments on the update from the Party concerned, 13 September 2019, para. 4.

⁹² Communicant’s comments on the update from the Party concerned, 13 September 2019, para. 6.

⁹³ Communicant’s comments on the update from the Party concerned, 13 September 2019, p. 1.

⁹⁴ Update from the Party concerned, 2 August 2019, p. 3.

⁹⁵ Update from the Party concerned, 2 August 2019, p. 3.

⁹⁶ Update from the Party concerned, 2 August 2019, p. 3.

⁹⁷ Additional information from the Party concerned, 3 June 2016, pp. 1-2.

⁹⁸ Party’s reply to the Committee’s questions, 2 November 2018, p. 1.

⁹⁹ Party’s reply to the Committee’s questions, 2 November 2018, p. 2.

Act (see paras. 19 and 22 above). However, since the communicant has not made an allegation on this point and since the Committee has no evidence before it that this point is causing a problem in practice, the Committee will not examine it further in the context of the present case.

85. In its comments of 13 September 2019, the communicant submits that the change in jurisprudence stemming from the Council of State's decision of 20 December 2017 would still not require disclosure of all the documents within the scope of its information requests, as much of the requested information concerned communications exchanged not between the Province and RWE and Nuon, but between the Province and other third parties, such as ECN (see paras. 76-77 above). In this regard, since the communication does not allege noncompliance with article 4(1) and 4(3)(c) of the Convention with respect to communications with third parties other than RWE and Nuon, the Committee will not examine issues related to communications with other third parties in the context of the present case.

Article 4(1) in conjunction with article 2(3)(b) - documents concerning imperative reasons of overriding public interest

86. The communicant alleges that in its judgment of 16 July 2014 the Council of State wrongly held that the so-called DROB documents were not environmental information within the scope of article 2(3) of the Convention. These documents were prepared by the Province and ECN during the court proceedings to demonstrate that the permit for RWE's project fulfilled the criteria justifying an article 19(d)(1) permit, namely that in spite of a negative assessment of the implications for the Natura 2000 sites concerned and in the absence of alternative solutions, the project needed to nevertheless be carried out for imperative reasons of overriding public interest.¹⁰⁰

87. The Party concerned acknowledges that imperative reasons of overriding public interest can be considered to be environmental information. It states, however, that all these reasons were disclosed in the final ECN report.¹⁰¹

88. The definition of "environmental information" in article 2(3)(b) of the Convention includes "any information ... on ... administrative measures ... affecting or likely to affect the elements of the environment". A permit is an administrative measure and it follows that any information on a permit affecting or likely to affect the elements of the environment is environmental information within the meaning of article 2(3) of the Convention.

89. In the present cases, the imperative reasons of overriding public interest were the basis for the decision by the Province to exceptionally grant permits for projects which were assessed to have negative impacts on a protected Natura 2000 site. The wording of section 19(g)(2) of the Nature Conservancy Act makes clear that these reasons were prerequisites for the permits to be issued.

90. Based on the above, the Committee considers that, information concerning the imperative reasons of overriding public interest regarding a Natura 2000 site are environmental information within the meaning of article 2(3)(b) of the Convention.

91. The Committee examines below whether the Convention requires (i) the disclosure of that information if it has already been made available in other documents; and (ii) the disclosure of documents that "refer" to that information.

Environmental information already made publicly available in other documents

92. With respect to the statement by the Party concerned that all the imperative reasons of overriding public interest were made available in the final ECN report (see para. 87 above), the Committee makes clear that the fact that particular environmental information may have been disclosed in one document does not mean that there is no requirement to disclose another document that may contain the same environmental information.

93. The Committee reminds the Party concerned that article 4(1) requires that, where requested, "copies of the actual documentation containing or comprising" the requested environmental information be made available to the public. Therefore, if copies of the documentation are requested, compliance with article 4(1) cannot be achieved by "extracting" pieces or fragments of environmental information from those documents and making only the extracted environmental information available but not the underlying document. Nor can a request for a particular document containing environmental information be refused simply because another document that contains the

¹⁰⁰ Communication, p. 5.

¹⁰¹ Party's response to the communication, para. 54.

same environmental information has already been made available to the public. Rather the requested document itself, including all environmental information it contains, must be made available. This of course does not preclude the application of any relevant exceptions in article 4(3) and (4) of the Convention prior to the document being made available.

Documents “referring to” environmental information

94. The Committee next examines the claim by the Party concerned that the only documents related to the imperative reasons of overriding public interest that were not disclosed were documents that merely “referred to” those reasons.¹⁰²

95. The Party concerned provided the following general examples of documents that it considered do not contain environmental information but do “refer to” it :

documents such as email messages which do not themselves contain environmental information but refer to another document containing it, such as an environmental impact statement. Another example is an internal legal analysis which refers to environmental information described elsewhere in another document.¹⁰³

96. As noted in paragraph 88 above, the definition of environmental information in article 2(3)(b) of the Convention includes any information on administrative measures affecting or likely to affect the elements of the environment. The above documents were prepared in the context of litigation to defend permits for projects in a Natura 2000 site. They were thus information prepared in order to defend administrative measures (i.e. permits) affecting or likely to affect the elements of the environment. The Committee accordingly concludes that the documents listed in paragraph 95 above are “environmental information” within the meaning of article 2(3)(b) of the Convention.

Concluding remarks

97. In light of the above, the Committee finds that, by refusing to disclose documents relating to, or referring to, the imperative reasons of overriding public interest regarding a Natura 2000 site on the basis that those documents were not “environmental information”, the Party concerned failed to comply with article 4(1) in conjunction with article 2(3) of the Convention.

Article 4(1) and 4(3)(c) – internal communications

98. The Committee next considers whether documents exchanged between the Province and the energy companies and their respective advisors, in the context of preparing for court proceedings to uphold RWE and Nuon’s permits, should be considered internal communications under article 4(3)(c) of the Convention.

99. The Party concerned does not deny that these documents contained environmental information within the meaning of article 2(3) of the Convention. Rather, it claims that all environmental information contained in these documents was subsequently disclosed, in the final, publicly available versions of these documents.¹⁰⁴ As the Committee pointed out in paragraph 93 above, the fact the information was disclosed subsequently in another document is irrelevant.

Communications exchanged between the Province and RWE and Nuon

100. Whilst the Province may have chosen to seek assistance from RWE and Nuon in the preparation of the litigation defending the permits, this does not render their communications internal. Nor does the fact that the Province and RWE and Nuon may each have had an interest in defending the permits in court or that they agreed that their communications should remain confidential make their communications internal within the meaning of article 4(3)(c) of the Convention. In this regard, the Committee clarifies that the “purpose” of the communications is not determinative as to whether communications are “internal” or not.

101. The communications between the Province and RWE and Nuon were communications between the regulating body and the permit holders and their representatives. It is clear to the Committee that communications between a public authority and a permit holder cannot be considered internal. Likewise, communications exchanged between a public authority and any persons acting on the permit holders’ behalf cannot be internal either. Accordingly, the Province was not entitled to apply the exception for internal communications in article 4(3)(c) of the Convention to environmental

¹⁰² Party’s response to the communication, paras. 53 and 54.

¹⁰³ Party’s reply to Committee’s questions, 2 November 2018, p. 3.

¹⁰⁴ Party’s response to communication, para. 58.

information exchanged with RWE and Nuon, or their advisors, in preparation for the court proceedings regarding RWE and Nuon's own permits.

102. Based on the above, the Committee finds that, by applying the exception for internal communications in article 4(3)(c) of the Convention in order to exempt from disclosure environmental information exchanged between a public authority and the permit holders, including the latter's representatives, the Party concerned failed to comply with article 4(1) in conjunction with article 4(3)(c) of the Convention.

Subsequent developments

103. The Committee notes that the parties agree that, following the 20 December 2017 judgment of the Council of State, the jurisprudence of the courts of the Party concerned regarding internal communications has changed and that the internal communications exception would no longer apply to communications such as those between the Province and RWE and Nuon (see paras. 51-52 above), a development which the Committee welcomes.

104. Since it is the view of both the communicant and the Party concerned that the noncompliance with article 4(1) in conjunction with article 4(3)(c) identified in the present case should not occur again in the future, the Committee refrains from making a recommendation on this point.

Article 4(3)(c) – materials in the course of completion

105. The Party concerned acknowledges that the "materials in the course of completion" exception found in article 4(3)(c) of the Convention is not recognized in these words in its domestic legislation.¹⁰⁵ It submits however that the Explanatory Memorandum to the WOB gives "drafts of documents" as one of the examples of documents drawn up for internal consultation within the meaning of section 11(1) of the WOB.¹⁰⁶

106. The Committee notes that the "materials in the course of completion" exception was not invoked by the Province at the time of refusing to disclose the requested information, but rather has been raised by the Party concerned in its submissions to the Committee as a possible further ground under which the documents would have been entitled to be withheld.

107. The Committee considers that the mere status of something as a draft alone does not automatically bring it under the exception of "materials in the course of completion". The words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority. Once the requested documents are no longer "in the course of completion" they must be disclosed, even if they are still unfinished and even if the decision to which they pertain has not yet been taken. "In the course of completion" suggests that the document will have more work done on it within some reasonable time frame.¹⁰⁷ As the Committee held in its findings on communication ACCC/C/2010/51 (Romania), the phrase "material in the course of completion" relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared."¹⁰⁸

108. Accordingly, since the information that was the subject of the communicant's request was no longer being actively worked on, the Party concerned was not entitled to invoke the "materials in the course of completion" exception in article 4(3)(c) as a ground for not disclosing the requested information within the scope of the communication.

109. Since the Province did not refuse access to the requested information on the basis of this exception, but it has rather been raised by the Party concerned in its submissions before the Committee as a possible further ground under which the documents were entitled to be withheld, the Committee does not make a finding on this point.

¹⁰⁵ Party's reply to the Committee's questions, 2 November 2018, p. 1.

¹⁰⁶ Party's reply to the Committee's questions, 2 November 2018, p. 2.

¹⁰⁷ The Aarhus Convention: An Implementation Guide, 2014, p. 85.

¹⁰⁸ ECE/MP.PP/C.1/2014/12, para. 85.

IV. Conclusions and recommendations

110. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

111. The Committee finds that:

(a) By refusing to disclose documents relating to, or referring to, the imperative reasons of overriding public interest regarding a Natura 2000 site on the basis that those documents were not “environmental information”, the Party concerned failed to comply with article 4(1) in conjunction with article 2(3) of the Convention;

(b) By applying the exception for internal communications in article 4(3)(c) of the Convention in order to exempt from disclosure environmental information exchanged between a public authority and the permit holders, including the latter’s representatives, the Party concerned failed to comply with article 4(1) in conjunction with article 4(3)(c) of the Convention.

B. Recommendations

112. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 36 (b) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative, regulatory and administrative measures to ensure that public officials, including the judiciary, are under a legal and enforceable duty to ensure that documents relating to or referring to the imperative reasons of overriding public interest regarding a Natura 2000 site are considered to be environmental information within the meaning of article 2(3)(b) of the Convention.
