

ECLI:NL:RVS:2014:2089

Court

Council of State

Date of judgment

11 June 2014

Date of publication

11 June 2014

Case number

201307501/1/A4

Related proceedings

First instance: [ECLI:NL:RBAMS:2013:3954](#), Various means of disposal

Sector

Administrative law

Special features

Appeal

Nature of decision

By decision of 30 November 2011 the Minister for the Environment imposed an order on Greenpeace for violating the Water Act, together with a penalty in the event of non-compliance with the order.

Legislation cited

[Water Act](#)

[Water Act 6.3](#)

[Water Decree](#)

[Water Decree 6.8](#)

[Environmental Management Act](#)

[Environmental Management Act 1.1](#)

Sources

Rechtspraak.nl

JM 2014/87, annotated by T. van der Meulen

NJB 2014/1362

JOM 2014/593

AB 2014/352, annotated by S. Handgraaf, environmental law adviser and co-owner of Colibri Advies BV.

M & R 2014/139, annotated by J.J.H. van Kempen

Judgment

201307501/1/A4.

Date of judgment: 11 June 2014

ADMINISTRATIVE JURISDICTION DIVISION**Judgment on the appeal of:**

the foundation Stichting Greenpeace Nederland, having its seat in Amsterdam,
appellant,

against the judgment of Amsterdam District Court of 3 July 2013 in case no. 12/5061 in the
action between:

Greenpeace

and

the Minister for the Environment.

Course of proceedings

By decision of 30 November 2011 the Minister for the Environment imposed an order on
Greenpeace for violating the Water Act, together with a penalty payment in the event of non-
compliance with the order.

By decision of 10 September 2012 the Minister for the Environment held that Greenpeace's
objection to the order was partially well-founded and amended the order with the penalty
payment for non-compliance.

By judgment of 3 July 2013 the District Court held that the application by Greenpeace for judicial
review was well-founded, quashed the decision of 10 September 2012 and left intact the legal
consequences of the annulled decision. This judgment is attached.

Greenpeace appealed against this judgment. The Minister lodged a statement of defence. Greenpeace has lodged further documents.

The Division considered the case at its session on 22 January 2014, where Greenpeace was represented by R. H rchner, attorney-at-law in Breda, and T. Grijsen, and by the Minister by A.M. Nijboer, attorney-at-law in The Hague, and R.C.R. Meijerink and J. Ligtenberg.

Findings

1. By way of protest, Greenpeace sank a total of 27 large boulders (to three of which a wooden sculpture of a seahorse was attached) from its ship the *Sleipner* at 'Klaverbank' in the North Sea in June 2011.

In his decision on the objection the Minister took the view that Greenpeace had in this way violated section 6.3, subsection 1, opening words and (a) of the Water Act. The order imposed, as amended by the Minister's decision, meant that Greenpeace would forfeit a penalty payment of €200,000 on each occasion that it dumped pollutants into the North Sea (the Exclusive Economic Zone/EEZ) at the site of 'Klaverbank' or in its immediate vicinity.

In deciding on the objection the Minister chose not to follow the advice of the hearing committee of the North Sea Department of Rijkswaterstaat. The committee considered that the dumping of the large boulders had not been carried out solely with a view to discarding them. As the Minister had decided that the boulders could remain in situ and did not pose a danger to people or the environment, the positioning of the boulders was not, in the committee's opinion, contrary to the object of the Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, adopted in London on 29 December 1972. The hearing committee concluded that Greenpeace's action was in keeping with the exemption from the permit requirement referred to in article 6.8, paragraph 2, opening words and (b) of the Water Decree. According to the hearing committee, Greenpeace had therefore not violated section 6.3, subsection 1, opening words and (a) of the Water Act.

2. Greenpeace argues that the District Court was wrong to hold that it had violated section 6.3, subsection 1, opening words and (a) of the Water Act. Greenpeace maintains that the District Court wrongly held that it had disposed of pollutants as referred to in this subsection. The

District Court should in any event have held, according to Greenpeace, that sinking the boulders and wooden seahorses was exempted pursuant to article 6.8, paragraph 2 of the Water Decree from the prohibition contained in section 6.3 of the Water Act.

2.1. Pursuant to section 6.1 of the Water Act, chapter 6 of this Act defines pollutants as waste or contaminating or harmful substances. Pursuant to section 6.3, subsection 1, opening words and (a) it is prohibited, without a permit to this effect from Our Minister, to discard pollutants from a vessel or aircraft into the sea or to incinerate them at sea. Pursuant to article 1.1, paragraph 1 of the Water Decree, Protocol means in this Decree: the Protocol adopted in London on 7 November 1996 to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, adopted in London on 29 December 1972 (Dutch Treaty Series 2000, 27).

Pursuant to article 6.8, paragraph 1, a permit as referred to in section 6.3 of the Water Act may be granted only in conformity with the Protocol. Pursuant to paragraph 2, opening words and (a), exemption from the permit obligation referred to in section 6.3 of the Act is granted for placement of solid substances or objects in the sea for a purpose other than their mere disposal. Pursuant to paragraph 2, opening words and (b), exemption from the permit obligation referred to in section 6.3 of the Act is granted for leaving behind solid substances or objects initially placed in the sea for a purpose other than mere disposal thereof.

2.2. The District Court concluded that the boulders and attached wooden seahorses should be classified as pollutants under section 6.3, subsection 1, opening words and (a) of the Water Act, as the Protocol is applicable to them and section 6.3 of the Water Act contains the translation of the Protocol into Dutch legislation. According to the District Court, it makes no difference whether it concerns waste, contaminating or non-contaminating substances.

The District Court has therefore applied an incorrect criterion. Although section 6.3 of the Water Act is intended to implement, inter alia, the Protocol, this does not alter the fact that if section 6.3, subsection 1 (a) is to be applicable the definition of pollutant in section 6.1 of the Water Act must be fulfilled, namely waste or contaminating or harmful substances.

2.3. The fact that the boulders and wooden seahorses are not harmful substances is not in dispute. Nor is there any evidence that they are contaminating substances. It is therefore necessary to determine whether the boulders and wooden seahorses constitute waste.

2.4. The term waste is not defined in the Water Act. In keeping with its own precedents (judgment of 16 April 2014 in case no. 201309955/1/A4), the Division considers that the meaning of the term can best be based on section 1.1, subsection 1 of the Environmental Management Act, which defines waste as 'any substance, preparation or product which the holder discards, intends to discard or must discard'. The term waste as referred to in section 1.1, subsection 1 of the Environmental Management Act must be interpreted in accordance with the relevant case law of the Court of Justice.

2.5. As recently confirmed and summarised by the Court of Justice (judgment of 12 December 2013, C-241/12 and C-242/12, *Shell Nederland and others*; www.curia.europa.eu), the classification as waste, in accordance with settled case law, is to be inferred primarily from the holder's actions and the meaning of the term 'discard'. It also follows from this case law, according to the Court of Justice, that this term must be interpreted in the light of the aim of Directive 2006/12/EC (now Directive 2008/98/EC), which, in the words of recital 2 in the preamble to the directive, consists in the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, having regard to Article 191(2) TFEU, which provides that European Union policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. The term 'discard' may not, therefore, be interpreted restrictively. The existence of waste must be assessed in the light of all the circumstances, regard being had to the aim of that Directive and the need to ensure that its effectiveness is not undermined.

2.6. The 'Klaverbank' was formed as the terminal moraine of a glacier dating from the penultimate ice age. It is the only area of the Dutch section of the North Sea where considerable quantities of gravel and large stones lie on the seabed. These stones have a unique covering of calcareous red algae. Owing to the variety of marine bottoms, the area has great biodiversity, but is also very sensitive to disturbance of the bottom. The 'Klaverbank' was notified to the European Commission on 22 December 2008, and subsequently added by the Commission to the list of areas of Community importance for the Atlantic Biogeographical Region on 22 December 2009.

Greenpeace maintains that biodiversity on 'Klaverbank' has been seriously harmed by intensive fishing. According to Greenpeace, the State of the Netherlands has long failed to provide proper protection for this area. Greenpeace alleges that since the notification to the Commission little more has been done in practice and that virtually nothing has been done to prevent damage by fishing and shipping. To make a public gesture about this, Greenpeace sank 27 boulders at the site of the 'Klaverbank'.

It is not in dispute that Greenpeace purchased the boulders specially for this protest action from a garden supplies wholesaler and that they are natural Scandinavian boulders similar to those already present on the bed of the North Sea. Nor is it in dispute that the seahorses were made of untreated, non-impregnated wood bearing the Forest Stewardship Council (FSC) label and were attached to the boulders by natural hemp rope. Before Greenpeace started its protest, it also communicated the GPS locations of the boulders to the Coastguard for reasons of safety and due care. The boulders were intended as a symbolic demarcation of the area, with the wooden seahorses acting as watchmen which would protect the area. By depositing the boulders Greenpeace sought to do on a very modest scale what it believed the State should have done on a much larger scale, namely contribute to the restoration of biodiversity at the site of the 'Klaverbank'. In addition, Greenpeace intended its protest action to draw public attention to the failings of the State.

Given the nature of the materials which Greenpeace sank at the site of the 'Klaverbank', its notification of the exact location where they were sunk and the fact that it made clear the aim of this activity, the Division considers that, taking account of the aim of the Directive concerned, it cannot be held that the boulders and wooden seahorses were discarded as referred to in section 1.1, subsection 1 of the Environmental Management Act by Greenpeace, and the boulders and wooden seahorses cannot therefore be classified as waste.

2.7. In view of the above finding, Greenpeace did not violate section 6.3, subsection 1, opening words and (a) of the Water Act and therefore the Minister was not empowered to take enforcement action in this matter. The District Court failed to recognise this. The appellant's argument succeeds. The other grounds put forward by Greenpeace on appeal need not be considered.

3. The appeal is well-founded. The contested judgment should be set aside, in so far as the District Court left intact the legal consequences of the quashed decision of 10 September 2012. Giving judgment as the District Court should have done, the Division will, on its own initiative, revoke the decision of 30 November 2011 and direct that this judgment takes the place of the quashed decision of 10 September 2012.

4. The Minister should be ordered to bear the costs of the proceedings, as specified below.

Decision

The Administrative Jurisdiction Division of the Council of State:

I. declares that the appeal is well-founded;

II. sets aside the judgment of Amsterdam District Court of 3 July 2013 in case no. 12/5061, in so far as the District Court left intact the legal consequences of the quashed decision of the Minister for the Environment of 10 September 2012, reference MD/2012/1070;

III. revokes the decision of the Minister for the Environment of 30 November 2011, reference WSH/2011/1717;

IV. directs that this judgment takes the place of the quashed decision of 10 September 2012;

V. orders the Minister for the Environment to pay the legal costs of the foundation Stichting Greenpeace Nederland incurred in the processing of its objection, up to an amount of €487 (four hundred and eighty-seven euros), which are entirely attributable to legal assistance provided professionally by a third party;

VI. orders the Minister for the Environment to pay the legal costs of the foundation Stichting Greenpeace Nederland incurred in the processing of its appeal, up to an amount of €974 (nine hundred and seventy-four euros), which are entirely attributable to legal assistance provided professionally by a third party;

VII. orders the Minister for the Environment to reimburse the foundation Stichting Greenpeace Nederland for the court fee of €478 (four hundred and seventy-eight euros) for the hearing of the appeal.

Judgment given by T.G. Drupsteen, presiding judge, and B.J. van Ettekoven and R.J.J.M. Pans, members, in the presence of J.A.A. van Roessel, officer of the Council of State.

(signed)

T.G. Drupsteen

Presiding Judge

(signed)

J.A.A. van Roessel

Officer of the Council of State

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Delivered in public on 11 June 2014.