

201105967/2/R1.

Date of judgment: 8 August 2011

ADMINISTRATIVE JURISDICTION DIVISION

Judgment by the president of the Administrative Jurisdiction Division of the Council of State regarding the requests for provisional relief (section 8:81 of the General Administrative Law Act) in the dispute between, *inter alia*:

1. the non-profit body Stichting Beheerschap Boekelermeer, established at Alkmaar ('SBB'),
2. the Wijkvereniging Westvleugel ('Westvleugel community association'), established at Alkmaar, and others,  
applicants,

and

1. the Minister of Economic Affairs, Agriculture and Innovation,
2. the Minister of Infrastructure and the Environment,
3. the executive board of the Hollands Noorderkwartier District Water Authority,
4. the provincial executive of North Holland,
5. the municipal executive of Alkmaar,
6. the municipal executive of Schermer,
7. the municipal executive of Heiloo,  
respondents.

1. Course of the proceedings

By decision of 29 April 2011, the Minister of Economic Affairs, Agriculture & Innovation and the Minister of Infrastructure & the Environment adopted the imposed land-use plan for a natural gas storage facility in the Bergermeer area ('Gasopslag Bergermeer').

In accordance with section 3.35, subsection 1, opening words and (b) of the Spatial Planning Act (WRO), the respondents issued a total of 43 implementation

decisions in respect of the construction of the gas storage facility and associated works as set out in the imposed land-use plan.

SBB and others appealed against the imposed land-use plan and one or more implementation decisions in a letter received by the Council of State on 27 June 2011. The Westvleugel community association and others lodged an appeal in a letter received by the Council of State on 1 July 2011.

In a letter received by the Council of State on 27 June 2011, SBB lodged a request for provisional relief with the president of the Administrative Jurisdiction Division. In a letter received by the Council of State on 1 July 2011, the Westvleugel community association and others lodged a request for provisional relief with the president of the Administrative Jurisdiction Division.

The Minister of Economic Affairs, Agriculture and Innovation, the Minister of Infrastructure and the Environment and the provincial executive of North Holland submitted a statement of defence.

The private limited company Taqa Energy B.V. ('Taqa') submitted a written statement.

The president heard the requests at a hearing on 26 July 2011, at which appeared SBB, represented by [secretary], assisted by Y.A. van Baak and G. Kramer, lawyers established in Alkmaar, and K. Stassen-Flinzer and T.C. Kuiper; the Westvleugel community association and others, represented by J.F. de Groot, lawyer in Amsterdam, assisted by L.F. Klop, employed by Royal Haskoning, and F. Schermer, employed by Peutz; the Minister of Economic Affairs, Agriculture and Innovation, represented by J.H. Keinemans, J.C.Q. Bult, J.B. van Oosterom, E.R. van Staden, W.R.J.L van 't Hof and D.D. Voskuil, all employed by the Ministry; the Minister of Infrastructure and the Environment, represented by R.G.P. van Slijpe and N. de Bruijn, employed by the Ministry; and the provincial executive of North Holland, represented by P.C. Speelman, M. Hartman, M. Breuker-Veldhoen and P.H.M. Huijts, all employed by the province, assisted by E.C.M. Schippers, lawyer established in The Hague.

Taqa, represented by I. Kuyvenhoven, J.A.Th.J. Huijsmans, D.A. Nieuwland, H.F. Kolk, M.P. Gerver and S.F. Vroemen, all employed by Taqa, assisted by G.C.W. van der Feltz, lawyer established in The Hague, G.W. Nijboer, employed by DHV B.V., and A.J. Kerkers, employed by LBP Sight, was also heard as a party.

## 2. Considerations

2.1. The president's judgment is provisional and is not binding in the proceedings on the merits.

2.2. The imposed land-use plan provides for the construction of a natural gas storage facility in Bergermeer, consisting of a well site in the Bergermeer polder and a gas treatment and compression plant in Boekelermeer-Zuid-2 industrial park, connected by pipelines.

2.3. SBB and the Westvleugel community association and others argue that the imposed land-use plan and the implementation decisions they are contesting were respectively adopted and given erroneously. The purpose of their request is to prevent irreversible consequences as a result of these decisions' entry into force. To this end, they argue that insufficient account has been taken of the safety risks involved. They also have objections concerning the possible seismic impact and the way the safety region has been delineated. In addition, they contend that the natural gas storage facility and associated works will adversely affect the local landscape and natural environment. SBB further contends that a compression facility would obstruct regular operations at Boekelermeer-Zuid-2 industrial park, and that the decision not to opt for the alternative site, i.e. the nearby former military base, was wrong.

2.4. The president considers that section 8.3, subsection 1, opening words and (b) of the Spatial Planning Act read in conjunction with section 8.4 subsection 1 of that Act must be interpreted as meaning that a request for provisional relief lodged within the time limit for appeal against a decision suspends the entry into force of the decisions given in the context of the WRO's coordination provisions and that the rejection of such a request would mean that these decisions enter into force.

2.5. The president would first observe that a comprehensive examination of the objections raised by SBB and the Westvleugel community association and others is not appropriate in the current proceedings and considers that further investigation is necessary to resolve the complex legal issues at hand. The president also considers that it is important not to rule out in advance the possibility that the gas storage facility may have consequences for safety in the immediate vicinity. Therefore, having weighed all the relevant interests, the president sees grounds for granting provisional relief as described below. The president also considers that, in view of the applicability of the Crisis and Recovery Act, shorter time limits for the proceedings on the merits apply, and the Division will endeavour to comply with them.

2.6. With regard to Taqa's express interest in starting a number of construction activities, the president considers the following. The activities concern the preparation of the well site, including the driving in of sheet piling, the construction of concrete tanks, the installation of a drilling rig, and preparatory work for the construction of the compression plant. Taqa has indicated that it would experience severe delays in the completion of the gas storage facility if the decisions were suspended, since, if the proceedings on the merits are then decided in its favour, it would not be able to start construction activities until after the 2012 nesting season. As drilling the wells will take about two years, the storage facility would not be ready for use in the spring of 2014, as planned, but one year later, according to Taqa. As a result, it says, it will suffer losses because it will be unable to honour contractual agreements with gas suppliers and the drill supplier. The president nonetheless sees no grounds for concluding that these interests outweigh those of SBB and the Westvleugel community association and others with regard to the suspension of the decisions. The president also considers that the activities that Taqa wishes to carry out are not merely preparatory, but in fact involve the full installation of the drilling rig at the well site and the construction of the foundations of the entire compression plant at the Boekelermeer site.

In addition, it is not in dispute that inserting the conductors necessary for drilling into the ground at a depth of up to 60 metres is in fact irreversible. It has been established from the documents and was confirmed at the hearing that the scale and intensity of the activities proposed by Taqa (in any event at the Well site) are

such that people living or working in the vicinity will experience nuisance, in particular from noise caused by the pile drivers used to install the sheet piling and conductors. Regardless of whether, as the ministers and Taqa claim, the noise level for the homes closest to the site will remain under the preferred threshold limit value of 60 db(A) laid down in the 2010 Construction and Demolition Noise-level (Dispensation) Guidelines, the fact remains that the activities would cause noise nuisance over an extended period for people living or working in the vicinity, while the decisions in question are not yet irreversible. The construction and associated works will also affect the natural environment in the vicinity. Whether establishing a 'compensation area' would sufficiently offset the negative impact on grassland birds must be examined further in the proceedings on the merits. In the event of a negative outcome for Taqa, any construction activities undertaken thus far would have to be reversed, which would again cause nuisance for people in the vicinity and affect the natural environment. Under these circumstances, the president does not consider Taqa's contractual interests to be of overriding importance. At the hearing, the Minister of Economic Affairs, Agriculture and Innovation explained, with reference to the 2010 report on security of supply of natural gas (*'Voorzieningszekerheid Gas 2010'*) by Gas Transport Services, that there might not be sufficient flexibility to deal with periods of high capacity demand by 2015 if the Bergermeer storage facility is not made operational. According to the minister, there is no fixed turning point: it depends on the severity of the winter. According to the minister, the likelihood of a shortage is minimal during a normal winter with average temperatures; this is only a risk in severe winters which, statistically, occur once every twenty years. In view of this, the president sees no grounds for concluding that granting provisional relief with regard to the imposed land-use plan and the implementation decisions would seriously threaten the short-term supply security of natural gas in the Netherlands. The president has also taken account of the above report's finding that there is currently sufficient flexibility to meet capacity demand on both domestic and export markets.

In view of the interrelated nature of the implementation decisions and of the various construction and associated activities, the president sees grounds for granting provisional relief as described below.

2.7. The respondents should be ordered to pay the costs in the action in a manner to be specified.

### 3. Decision

The president of the Administrative Jurisdiction Division of the Council of State:

I. suspends, by granting provisional relief, the decision of the Minister of Economic Affairs, Agriculture and Innovation and the Minister of Infrastructure and the Environment of 29 April 2011, adopting the imposed land-use plan on natural gas storage in Bergermeer ('Gasopslag Bergermeer') and the 43 implementation decisions given in the framework of the WRO's coordination provisions;

II. orders the Minister of Economic Affairs, Agriculture and Innovation, the Minister of Infrastructure and the Environment, the executive board of the Hollands Noorderkwartier District Water Authority, the provincial executive of North Holland, the municipal executive of Alkmaar, the municipal executive of Schermer and the municipal executive of Heiloo to pay the costs in the action as follows:

a) to the non-profit body Stichting Beheerschap Boekelermeer: the sum of €874 (eight hundred and seventy-four euros) for professional legal assistance provided by a third party;

b) to the Westvleugel community association and others: the sum of €874 (eight hundred and seventy-four euros) for professional legal assistance provided by a third party, on the understanding that payment to one party named under (b) discharges respondents from the obligation to pay the others;

These amounts are to be paid by the Minister of Economic Affairs, Agriculture and Innovation, as the minister heading the project;

III. orders the respondents named under II to reimburse the court fees paid by the applicants for consideration of their requests, and thus to pay the Stichting Beheerschap Boekelermeer the sum of €302 (three hundred and two euros) and

Westvleugel community association and others the sum of €302 (three hundred and two euros), on the understanding that payment to one of the latter parties discharges respondents from the obligation to pay the other latter parties;

These amounts are to be paid by the Minister of Economic Affairs, Agriculture and Innovation, as the minister heading the project.

Done by M.G.J. Parkins-de Vin, president, in the presence of M.W. Wijers, officer of the Council of State.

(signed) M.G.J.Parkins-de Vin  
president

(signed) M.W. Wijers  
officer of the Council of State

Pronounced at a public hearing on 8 August 2011

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