



Environmental Assessment Across Borders

Gijs Hoevenaars

The effects of plans and projects do not stop at national borders. That is why there are European and international rules on environmental assessment (EA) that guarantee its operation across borders. This article describes how these rules have been adapted to the Dutch situation and illustrates practice with examples of environmental assessment where the Netherlands has worked together with its neighbours Germany and Belgium.

Many of the activities in the Netherlands, particularly in border regions, can have environmental effects that extend to other countries and vice versa. Projects themselves too can cross borders: waterways, railway lines and motorways often connect a country with the outside world, and many nature reserves and industrial estates are not confined by border markers. The fact that projects cross borders or that projects have transboundary effects play an important role in the screening and scoping stage of an environmental assessment procedure, as further illustrated below. It is because of these various international aspects that European and international legislation has been passed and procedural agreements on environmental assessment (EA) have been made between countries.

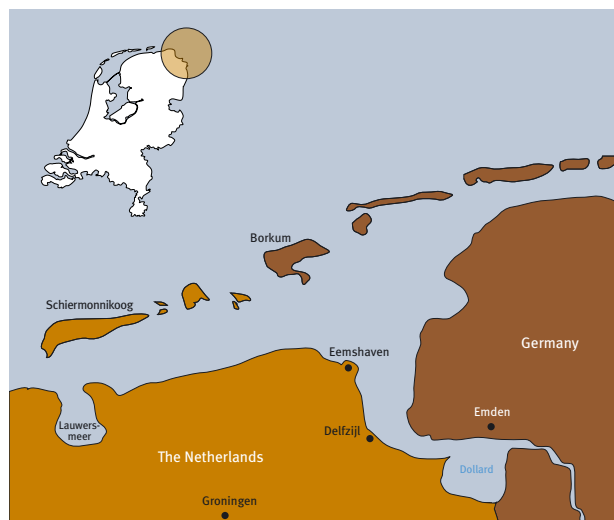
Screening and Scoping

The international aspects of an activity play a role, in the first place, in the question whether an EA is required. In the case of projects that actually cross the border (e.g. a road or an industrial estate) it is the length and location of the entire route or the total size of the estate that determines whether an EA needs to be carried out. The presence of sensitive areas on either side of the border should be equally included. In the case of projects that are sited entirely on Dutch soil, the possible cross-border effects and their nature are factors taken into account in deciding whether an EA is necessary. In other words, the entire plan or project has to be looked at at the screening stage, including the part situated in the neighbouring country.

Once it has been decided to carry out an EA, the question is how far it should extend. Here too, at the scoping stage, the range of an EA cannot be cut off at the border; it must also identify any cross-border effects. This was, for example, not done properly in the case of the Eemshaven coal-fired power plant. The Dutch administrative court ruled that the power plant's effects on natural assets of some of the German Wadden Islands had been insufficiently identified and rescinded the permit. Another example is the effects on Belgian Natura 2000 sites as a result of the construction of a new road (N69) on Dutch soil. Both examples are further outlined below.

The Eemshaven coal-fired power plant - a project with cross-border effects

Two permits granted in 2008 for the construction of a coal-fired power plant at Eemshaven, the largest seaport in the north of the Netherlands, were recently rescinded. The Dutch court ruled, in line with an advisory report previously produced by the NCEA, that insufficient research had been done into the effects of the increase in nitrogen from the power plant for which the permit had been granted on the German Wadden Islands (and Natura 2000 sites) of Borkum, Memmert, Juist, Norderney and Baltrum. Extensive research had been done into the effects on the Dutch Wadden Islands, but a glance at the map shows that some of the German areas would be closer to the projected power plant than the Dutch ones, so the cross-border effects should have been identified more clearly.



“All procedures should proceed under the assumption that there is no border.”

European legislation and international agreements

The European legislation knows two directives: Directive 2011/92/EU (of 13 December 2011) on the assessment of the effects of certain public and private projects on the environment, and the Directive 2001/42/EC (of 27 June 2001) on the assessment of the effects of certain plans and programmes on the environment. All European Union member states, including the Netherlands, have to comply with these directives.

The international legislation is determined by the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), signed in 1991, and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kiev Protocol), signed in 2003.

Once it is clear that a particular project or plan has transboundary effects, it is subject to additional procedural requirements pursuant to the UN Espoo Convention and the Kiev Protocol. The aim of these international agreements is to ensure that in the case of activities and plans that could have significant adverse cross-border environmental effects:

- An environmental assessment is carried out.
- The country where the activity or plan takes place informs the country that could be affected and the population concerned and involves them in the EA prior to making a decision on the activity.

Under the UN Espoo Convention and the Kiev Protocol all procedures should take place under the assumption that there is no border, which means that a public announcement is made and that documents are made available for public inspection in the potentially affected country. Government bodies and the public on both sides of the border must be allowed to participate in the procedures. There is also an obligation to consult with the affected country on the environmental assessment report. This process of informing and involving consequently takes place through the exchange of information and consultation.

The spatial plan for the N69 area development – a project with cross-border effects

The Dutch province of North Brabant would like to solve the accessibility and quality of life problems along the N69 provincial road. At the same time they would like to improve the quality of the landscape, natural environment, water, living and working conditions and recreation facilities, by revising the provincial spatial plan for the N69 Border Corridor. The problems on the N69 are caused mainly by local traffic, but also to some extent by road freight from Belgium passing through. Modifications to the N69 are expected to also affect traffic in Belgium. The NCEA reviewed this EIA report, noting that the impact description there did not take account of possible cross-border effects due to changes in transport structures. In order to provide additional information to supplement the EIA report the province carried out traffic analyses going beyond the Dutch transport structure, which showed that the cross-border effects on traffic would be small, but substantial environmental effects on protected Belgian natural assets could not be ruled out. This information was vital to the province, eventually enabling it to select a preferred option after proper consideration.

European and international legislation on EA has been adapted to the Dutch situation and incorporated in the Environmental Management Act, which, for example, includes provisions on announcements in and the sending of documents to the neighbouring country. It also lays down that the cost of translations is to be borne by the proponent.

The Netherlands and its neighbouring countries

Although all European Union member states have incorporated the European legislation and the international agreements into their national policies, the EA procedures in the Netherlands and its neighbours Germany and Belgium differ. Despite of the differences, these procedures can well be aligned to allow joint operation. Below, the differences in the legislation and the agreements for cooperation between The Netherlands and its neighbouring countries are outlined.

Differences

In Germany, a federal republic of 16 states, the EA procedures differ from one state to another. A major difference between the German and Dutch procedures is that the EA procedure in Germany is fully integrated in the parent procedure. Additionally, the authority concerned is responsible for assessing the quality of the EA report. In the Netherlands, the EA and the parent procedure can start independently. The Netherlands Commission for Environmental Assessment (NCEA) may advise the competent authority (mandatory or voluntary) on the quality of an EA report.

In Belgium, the procedures differ between the regions Flanders and Wallonia. This article focuses on the Flemish legislation, as the Netherlands mainly borders to this region. A major difference between Dutch and the Flemish legislation is that the Belgian authority, the *Dienst mer* plays a more decisive and less advisory role at an earlier stage in the procedures than the NCEA. First of all, the *Dienst mer* has to fully approve the announcement of the proposal before it is published. This is not strictly regulated in the Netherlands; in principle it is the duty of the competent authority. This is followed in Flanders by a public announcement, just as in the Netherlands. The *Dienst mer* draws up terms of reference based on public submissions and submissions by the authorities that need to be consulted, using Terms of Reference guidelines. In the Netherlands the competent authority lays down the terms of reference and the NCEA produces an advisory report. In other words, in Flanders the *Dienst mer* is responsible for the quality assessment of the EA report and takes over this duty from the competent authority.

In Flanders only certified researchers are allowed to draw up the EA report; there are no rules on this in the Netherlands. Once the report is complete the *Dienst mer* has to approve it, taking into account the submissions by the authorities that need to be consulted in response to a draft version of the report. These authorities include other government bodies and ministerial departments concerned. In the Netherlands the competent authority itself decides whether the quality of the EA report is sufficient, advised by the NCEA, which submits an advisory review to the authority. The NCEA can take the public submissions on the EA report into account in its review if the authority so requests. As in the Netherlands, time limits are laid down in Flanders for the various steps in the procedure.

The *Dienst mer* is the Flemish counterpart of the NCEA. The NCEA is an independent organization; the *Dienst mer* is part of the Environment, Nature and Energy Department of the Belgian Government.

“Investment in contact on both sides of the border at an early stage ensures that expectations and options can be properly aligned”

Bilateral agreements and coordination

With regard to the coordination of specific plans and projects, the Netherlands has various bilateral agreements with Flanders and Germany. When an activity is expected to have cross-border environmental effects, the authorities in the country deciding on the proposed activity are required to contact the designated authorities in the country that could be affected (the ‘point of contact’). The authorities that need to be informed are identified in joint consultation between the point of contact in the potentially affected country and the competent authority in the country where the proposed activity is to take place. In the Netherlands, the provinces are generally the point of contact. The provinces inform the Minister of Infrastructure and Environment. The Minister only gets involved in a specific procedure if the provinces themselves are unable to resolve matters.

In cases where projects are implemented across national borders: for example the deepening of the Scheldt estuary between The Netherlands and Belgium and the high voltage power line between The Netherlands and Germany (both examples are illustrated hereafter), the project is launched jointly with the competent authority of the other country. This has considerable advantages. The bilateral agreements also set out the arrangements on these matters with the neighbouring countries, thus guaranteeing that both countries’ statutory requirements are complied with.

The Scheldt estuary – Dutch-Flemish collaboration

The Netherlands and Flanders are working together in the Scheldt estuary to improve flood protection, increase access to the ports (especially Antwerp) and preserve and strengthen its unique estuarine nature. The collaboration has resulted in various cross-border SEA and EIA procedures, which have been tackled jointly taking into account the EA legislation in each of the two countries. A Flemish-Dutch expert working group has been set up, for instance, to advise jointly on terms of reference and the quality and comprehensiveness of the SEA report.

As the Belgian *Dienst mer* has a more decisive role, compared with the NCEA’s advisory role, it was decided to take plenty of time at the terms of reference stage to discuss the final draft of the terms of reference. Thus preventing the Dutch competent authority to have to amend the terms of reference after the event. At the review stage it was decided to have the working group carry out a preliminary review of the SEA report. If the joint working group did not review the report until the *Dienst mer* had already approved it, this would have limited the scope for requesting additional information. In this way the *Dienst mer* was able to make use of the findings of the preliminary review, thus reducing the risk of the working group still finding fundamental shortcomings in the final review.

None of this detracts from the fact that each country naturally has its own responsibilities: the Dutch authorities retain the right, for instance, to request additional information to supplement the SEA report if it considers this desirable, taking public submissions and the NCEA’s advisory report into account.

The high voltage power line between the Netherlands and Germany – a cross-border project

The Netherlands and Germany wanted to build a high voltage power line between Doetinchem in the Netherlands and Wesel in Germany. The line had to pass through both countries and various end-to-end routes were possible. The route that rated best from an environmental point of view for the Netherlands was not necessarily the best route for Germany. The situation on both sides of the border needed to be considered when deciding on the route. On top of this, the two countries have different statutory procedures for decision-making on the high voltage power line. The EA procedures and the nature and extent of the studies required for them are similar but not the same: in Germany, for example, a procedure can only consider one alternative route, whereas in the Netherlands alternatives routes must be considered.

The challenge was to find a route for the power line that suited both countries and to organize the procedures in such a way that the statutory procedures of both countries could be complied with. A joint baseline study of effects was therefore first carried out to identify the potential routes (in broad terms) between Doetinchem and Wesel. A landscape analysis was carried out and joint criteria were formulated for the potential routes, and their environmental impacts were assessed in general terms. A single route was then selected based on various criteria (e.g. number of new traverses, points where the line traverses Natura 2000 sites, number of homes affected), irrespective of the line's position vis-à-vis the border. The point where this potential route crossed the border was noted and taken as the spatial starting point for the detailed route and statutory procedures in both countries. This enabled the two countries to develop the route separately, comply with the requirements of both EA procedures and come up with a joint route for the Doetinchem-Wesel power line.

Lessons learnt

EA is not confined by borders. Our conclusions from our experience over the past few years are as follows:

- Effects do not stop at the border. Insufficient attention to this will inevitably result in the project being delayed (cf. the examples of the coal-fired power plant and the N69).
- Investment in contact between the authorities on both sides of the border at an early stage ensures that expectations and options can be properly aligned (cf. the example of the Scheldt estuary).
- Experience of the Scheldt estuary also shows that it is useful for experts from the countries concerned to work together on cross-border projects: this is the shortest way to achieving a successful EA process.
- Differences in requirements concerning procedure and content can be bridged by smartly telescoping these requirements, as was done in the case of the high voltage power line between the Netherlands and Germany, for instance.

In other words, transboundary EIA requires investments in time and people, but does lead to higher quality and swifter decision making.

Contact:

Gijs Hoevenaars

Legal secretary, NCEA
ghoevenaars@eia.nl