

The administrative judge and the  
involvement of experts in techno-scientific  
(environmental) matters  
The Netherlands

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The administrative judge and the involvement of experts in techno-scientific (environmental) matters in the NL

General administrative law aspects

Specific environmental law aspects

Summary / conclusions

# Access to the administrative judge (*bestuursrechter*)

- Appeals against written decisions (*besluiten*) of administrative authorities (*bestuursorganen*): Article 1:3 in combination with 8:1 General Administrative Law Act (*Algemene wet bestuursrecht*, Awb) (Mostly after a complaint procedure at the administrative authority against the decision in primo of that authority) (not always: sometimes direct appeal...)
- Basic rule: These administrative decisions should be carefully prepared (collect the relevant facts / what are the relevant interests) and well / adequately reasoned (Articles 3:2 and 3:46 / 7:12 Awb)
- In that respect: The administrative authorities can / should - in some areas explicit legal provisions exist to call in expert advice - make use of techno-scientific matters / call in expert advice (in-house or externally) and should verify that the relevant research is done carefully and properly
- Case law: The administrative authority may rely on the expert advice but it has to verify that the expert is objectif (independent and impartial) and the advice is concludent / transparant and complete

# The test of the administrative judge

- The claimant is either the *applicant* for the permit (the application for an environmental permit is often already based on many technical reports on noise / odour / effects on nature etc.) or a *third affected party* (sufficient interest): neighbours / ngo's or both
- The administrative judge tests the administrative decision in light of the grounds of appeal of the claimant(s) (Article 8:69 Awb) (judge *can* adjust facts and *should* fill in legal grounds)
- When techno-scientific aspects are not addressed in the grounds of appeal: in principle no judicial test
- There is a judicial test: in case of raising - in a more general way - sufficient doubts about the used techno-scientific data / research / advice (or the lack of it) e.g. by stating that the administration failed its duty to verify an advice and through - in a more concrete way - handing in a contra-expertise

# Option 1: The administrative judge can quash the decision

- The judge can quash the decision when it is not prepared carefully / well reasoned (related to the techno-scientific aspects / expert advice) and give the administrative authority guidelines how to make a new decision (Articles 8:70 onwards Awb)
- In this respect Article 8:41a Awb may come in, in which it is stated that 'the judge settles as much as possible the dispute definitively' (not referring case back to adm. authority but giving a 'final' ruling based on the advice of the appointed expert)

## Option 2: The administrative judge can appoint an expert

- The legal basis for the administrative judge to make use of experts is Article 8:47 Awb: 'the administrative judge can appoint an expert for an investigation'. There is some discretion but it is more likely in complex cases where already techno-scientific data / expert advices are used by the administrative authorities or the other parties. Parties can ask for it. (judge should decide on that)
- Article 8:47 Awb also holds some procedural guidelines. (mention these)  
In this respect case law of the European Court of Human Rights is relevant for instance in light of Article 6 ECHR: fair trial / equality of arms: Feldbrugge against the Netherlands (1996), Mantovanelli against France (1997), Korošec against Slovenia (2015), Letincic against Croatia (2016) (Often medical cases and only two parties but nevertheless)

# Pro's and contra's of appointing experts by the administrative judge

- Better insight in complex facts (objectif/full overview)
- More trust in judgement (independent/impartial expert)
- End of dispute (by following your own expert)

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- Extra time court proceedings
- Extra costs for the courts
- Dificult to find experts (independent and impartial)

# The use of experts by the administrative judge in environmental matters

Environmental cases are often very complex: reasons for appointing experts by the administrative judge

- Stating / structuring all relevant facts and circumstances
- Compensation for strong parties: administration and industry versus 'normal citizens'
- In case of two or more dissenting experts: who is right or wrong? The judge follows the appointed expert
- More controversial: giving an overview of all legal grounds etc. (for the judge and not for the expert?)



# The Foundation for advising the administrative judiciary in environmental matters (*Stichting adviserende bestuursrechtspraak / STAB*)

- Legal basis for this foundation for advising the judiciary: Par. 8.2 Planning Act, Par. 20.2 Environmental Management Act and Article 6.5b Act on Environmental Licensing and General Provisions
- PA: in case of appeals against land-use plans (Judicial Department Council of State) and financial compensation cases for land-use decisions
- EMA: very broad range: for all relevant environmental Acts (for instance Water Act / Nature Conservation Act)
- ELGP: environmental permits (prevention of pollution but also land-use permits / building permits) (since 2010: District Courts also competent for prevention of pollution permits; since 2017 also for nature permits based on Nature Conservation Act )

# STAB (Judicial Environment Experts)

- Independent / impartial court experts in environmental and planning law: legally formalised in 1996
- Sole purpose: supplying technical expertise on request by the administrative judge (District courts / Judicial Department Council of State)
- Especially technical (but also legal) experts in various fields: noise, air pollution, odour, nature, water, soil, construction etc.: in total 40/50. See last annual report 2017.
- Financed by the Dutch Ministry for Infrastructure and Water Management

(Further) advantages

- Directly finding an expert
- Advise within 3 months (appeals) or even a few weeks (in speedy provisional procedures)
- For free / no costs for the administrative courts or parties

# STAB (Judicial Environment Experts)

- Advising the administrative judge about the facts and technical issues within the legal framework
  - Some (procedural) differences depending: (which) District Court or the Judicial Department Council of State (Codes of Conduct for Experts / Court regulations / practice) (STAB-experts recognised in national register for experts of District Courts)
    - Based on general or more specific questions
    - Before or after the court session
    - Comments by parties on the draft report
    - STAB-Experts present during (a second) court session
- (case law about procedural consequences when involving StAB)

# STAB (Judicial Environment Experts)

- Some examples of own cases in which STAB was involved and made a report:
  - (water)power installation in the river Meuse: water permit / appeal by ngo's: most important issue: what are the best available techniques as to the amount of fish killed in the turbines.
  - helicopter area: land-use permit / appeal by neighbours: most important issue: are the noise-reports on which the permit is based correct and are the noise emissions in line with the relevant legal norms?
  - poultry-farm (various stables for more than one million chickens for meat production and various other installations): prevention of pollution permit / appeal by ngo's: most important issue: are the odour-reports on which the permit is based correct and are the permit-provisions concerning odour emissions complying with the relevant legal norms.
  - An annual music weekend festival with a temporary camping: planning permit / appeal by neighbours: do the various noise emissions (house and bass music / visitors of the camping) involve unacceptable nuisance (during the day and during the night).
  - Reconstruction of an area for approving nature protection (waterlevel): planning permit and water permit / appeal by farmer: are the reports in which the waterlevel is dealt with correct?

# STAB (Judicial Environment Experts) and Steps

- Asking for advice (report) by the administrative judge
- Acceptance by STAB (one or more experts / supervisor)
- Location visits, talking with all parties: what are the facts and circumstances
- (Draft) report to parties (with photo's, relevant documents for better understanding arguments of parties etc.)
- Maybe further advice based on reactions / court session (presence of STAB-experts possible)

# STAB (Judicial Environment Experts)

- Other activities
  - Weekly digital newsletter on case law in environmental matters
  - Digital knowledge dossiers
  - Organising workshops (in company = for the courts) (for instance recently within District Court of Limbourg: on noise and odour )

# STAB (Judicial Environment Experts)

- From time to time evaluated
- STAB involvement: proves to be very worthwhile for the administrative judge but also for the parties (equality of arms): impartial/independent/knowledge/fast and flexible and of course: no costs.
- Future: maybe some changes: (less) funding (by other ministry)?

# Summary / conclusions

- The review by the administrative judge of techno-scientific aspects is a matter of general administrative law and specific environmental law
- General: is the appeal leading, who has to deliver evidence, can the court appoint experts and in which circumstances and can the administrative judge set aside an administrative decision and replace it for a new one or merely quash a decision and it is up again to the administration?
- More specific: are (independent/impartial) environment experts available, what are and who carries the costs for the involvement of court experts?
- In the NL: STAB provides for (in many cases) essential technical expertise to help the judge in reviewing techno-scientific matters and making a good (legal) judgement!



# Questions

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