HOUTHOFF

District Court of The Hague orders Dutch State to make significant nitrogen deposition cuts by 2030

On 22 January 2025, the District Court of The Hague ("**Court**") handed down a landmark judgment, initiated by Greenpeace, ordering the State of the Netherlands to significantly reduce nitrogen deposition in Natura 2000 sites by 2030 and prioritise the most vulnerable sites. This is the first time that the Dutch State has been ordered to reduce nitrogen emissions in the Netherlands by a specific percentage by a specific year with a view to protecting nature.

This News Update starts with a brief background to the judgment and an introduction to the nitrogen problem in the Netherlands (§1), and the Court's principal findings (§2). Next, we present some observations on the judgment (§3) and the relationship between the court system and the legislature (§4). We finish with an exploration of the potential implications for the business sector (§5).

1. Background to the judgment, introduction to the nitrogen problem

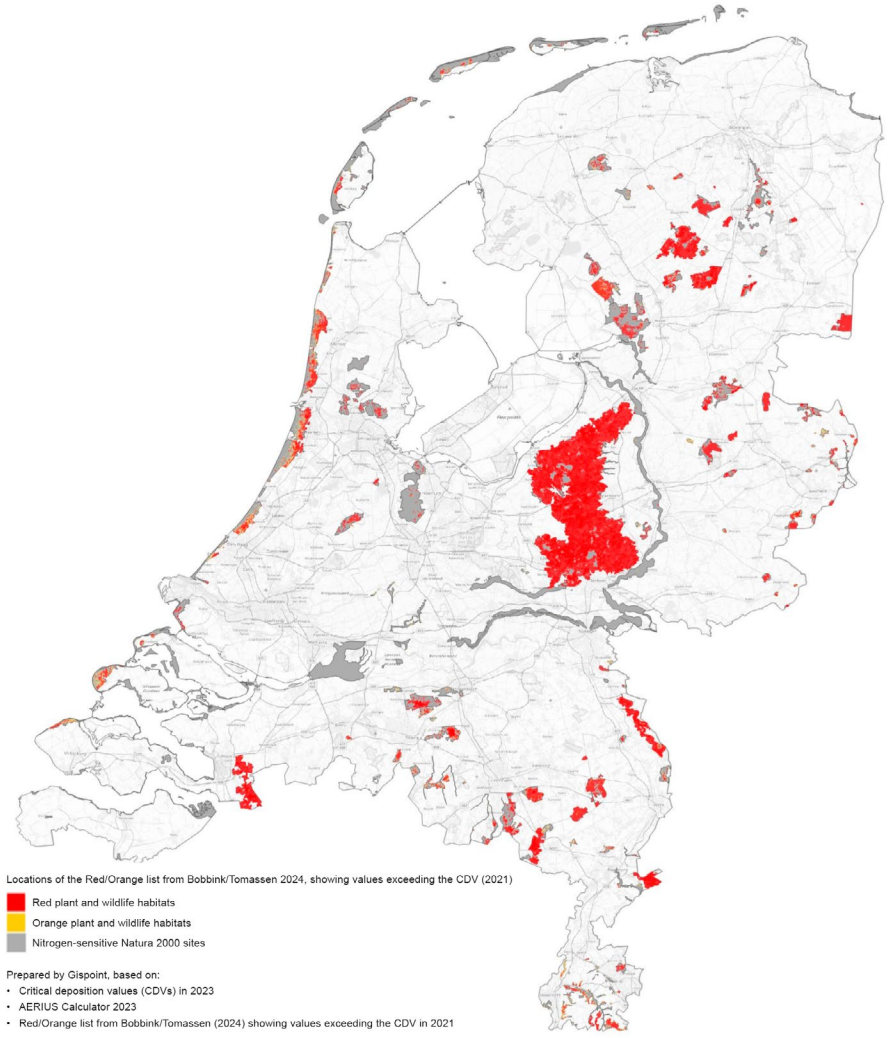
The judgment is concerned with the impact of nitrogen deposition on nature. Nitrogen deposition causes soil acidification and over-fertilisation, disrupting the balance of nutrients in the soil and causing nitrogen-sensitive plant species to die or decline in quality. Animals that depend on those plants also come under threat, which leads to biodiversity losses. A key concept here is the critical deposition value ("**CDV**"), which expresses what volume of nitrogen deposition nature can handle every year without suffering significant levels of harm. Where the nitrogen deposition exceeds the CDV, it is generally assumed that natural sites will suffer harm.

This case revolved around the question of whether the Dutch State's actions are compatible with the European Birds Directive and Habitats Directive. Those Directives have designated large numbers of Natura 2000 sites in the Netherlands, which protect specific types of plant habitat and/or species of bird or animal and their wildlife habitats. The various plant habitats and species are recorded for each Natura 2000 site, together with their conservation objectives. Many of the habitats in the designated sites are sensitive to nitrogen deposition and have a poor or very poor conservation status.

Two obligations are important in this respect. First, under the **conservation obligation** of Article 6(1) of the Habitats Directive, Member States must establish whatever measures are necessary to maintain or restore the favourable conservation status of the types of plant habitat and species for which a Natura 2000 site has been designated. Second, under the **non-deterioration obligation** of Article 6(2) of the Habitats Directive, Member States must take appropriate measures to avoid deterioration of or disturbances in Natura 2000 sites. Member States have a margin of discretion for taking these measures, as long as it is assured that the sites do not suffer any deterioration or disturbances.

The obligations under the Habitats and Birds Directives have been implemented at the national level in the Dutch Environment and Planning Act (*Omgevingswet).* Article 2.15a of the Environment and Planning Act also sets out the principal objectives for nitrogen reduction, as environmental and planning values. The target is for at least 40% of the nitrogen-sensitive surface area of Natura 2000 sites to be brought below the CDV by 2025, and at least 50% by 2030. These targets are made explicit in the Act, as obligations of result.

Although the nitrogen reduction target has been established at the national level, the relevant professional literature increasingly also considers the need for a site-specific approach to the nitrogen problem. Following a series of studies, an “Urgent List” has been drawn up of plant habitats where nitrogen needs to be reduced by 2025 (very urgent) or 2030 (urgent). At this time, the Urgent List contains sixteen types of plant habitat and three wildlife habitats that are considered to require immediate action in order to prevent loss of nature. The image below shows the natural areas included on the Urgent List, marked in red (very urgent) and orange (urgent).



Various recent reports show that the nitrogen targets for Natura 2000 sites will be difficult to achieve under the current policy. The Dutch National Institute for Public Health and the Environment (RIVM) has also presented the conclusion that the nitrogen targets for Natura 2000 sites will not be achieved under the current policy. Even if Dutch emissions are reduced entirely, many sites will still suffer excessive nitrogen loads, in part as a result of emissions from other countries. According to the Netherlands Environmental Assessment Agency (PBL), the proposed measures are not enough to achieve the targets for 2030. The PBL has highlighted a “target shortfall”.

Against this background, Greenpeace brought legal proceedings against the Dutch State. The relief sought in the summons included that the Court issues a declaratory judgment that the State’s current failure to reduce nitrogen deposition sufficiently is tortious, and order the State to reduce nitrogen deposition significantly by 2025 and 2030, giving priority to the most urgent natural sites.

2. The Court's principal findings

Relationship between politics and the court system: First and foremost, with reference to the Urgenda judgment, the Court found that it is not the role of the court system to prescribe political decisions, but that it is in fact the role of the courts to review whether the Government and Parliament have adhered to their decisions within the parameters of the law, which is binding on them. In performing that review, the courts may not become involved in political decision-making on the expediency to bring about legislation with a particular and concrete substance, nor may they give the legislature orders to establish such legislation. The Court found that, where the Dutch State fails to fulfil its obligations under European or national law, the courts may instruct the State to fulfil those obligations, and in fact to achieve objectives that are required under those laws, as long as the courts do not give any orders to establish legislation with a particular and concrete substance (par. 5.6-5.7).

The State's actions are tortious: Under Article 6:162 of the Dutch Civil Code, an act or omission to act is tortious if it is incompatible with a legal obligation. An act or omission to act may also be tortious if it is in conflict with what is generally accepted according to unwritten law (the "standard of due care"). Greenpeace argued that the Dutch State's actions were tortious by being incompatible with the non-deterioration obligation. For an act to be incompatible with the non-deterioration obligation, it must fulfil two conditions: the state of the nature must have deteriorated relative to the "reference dates" (i.e. the dates on which the Natura 2000 sites were designated), and the Member State must have failed to establish appropriate measures to prevent that deterioration. The Court ruled first of all that various research reports show that nitrogen deposition has not diminished significantly since the reference dates, and that ongoing nitrogen deposition is an important cause of the deterioration. The Court also found that, in light of those research reports, it was for the State to remove any reasonable doubt that its acts or omissions to act are not causing harm to protected plant habitats or species. The State failed to put forward such evidence, and the Court consequently assumed that deterioration has occurred (par. 5.20-5.25). The Court proceeded to find that the State has not established any appropriate measures to avoid deterioration since the reference dates. The Court considered that this was illustrated by the fact that, during the period from 2019 to 2022, only around 5-7 mol/ha/year of nitrogen deposition reductions was reported to have been realised, which is "a drop in the ocean" given the extent of the nitrogen problem. The State could not argue its freedom of policy for counteracting the deterioration: that freedom of policy extends only to what measures should be established, not the timing or scope of those measures, which need to be established without delay. The conclusion was that the Dutch State's actions are incompatible with the non-deterioration obligation (par. 5.28, 5.46).

The State carries blame for the deterioration: The Dutch State argued that, for various reasons, it could not be held to blame for the insufficiency of the measures to avoid the deterioration. The Court rejected the grounds put forward by the State, and instead found that it was foreseeable that the Integrated Approach to Nitrogen (*Programma Aanpak Stikstof*, "**PAS**") was incompatible with European law and would be declared invalid, and it was foreseeable that the CDV values would become stricter in 2023. Nor could the State hide behind the fact that nitrogen deposition from surrounding countries is an important cause of the nitrogen problems, given that the Netherlands exports considerably more nitrogen emissions than it imports, and as such cannot demand that other countries reduce their emissions. Lastly, the circumstance that the provincial authorities play a major part in putting the nitrogen reduction policy into practice does not diminish the State's ultimate responsibility, nor is it relevant that other "pressure factors" besides nitrogen are also causing nature to deteriorate. The Court issued a declaratory judgment that the State's actions are

tortious by its omission to act in time to halt the deterioration, including the impending deterioration of the habit types on the Urgent List (par. 5.46).

The State must achieve the objectives established for it at law: The minimum relief sought by Greenpeace was fulfilment of the legal nitrogen targets for 2025 and 2030 under Article 2.15a of the Environment and Planning Act. The Court ruled that the Dutch State can be held to its legislation, and that the legal nitrogen targets are absolute minimum values from which deviation is not permitted without a compelling reason. The Court's conclusion was that various studies and pronouncements by the State show that, with the present policy, the 2025 targets will not be achieved, nor most probably the 2030 targets either. The Court first issued a declaratory judgment proclaiming that the Dutch State's actions are tortious by its failure to achieve the 2025 nitrogen target and by its very probable failure, through the current insufficient measures, to achieve the 2030 legal nitrogen target (par. 5.53). As discussed below, the Court also ordered the State to achieve the legal nitrogen target for 2030.

Priority for Urgent sites in pursuing the legal nitrogen targets: Greenpeace argued that the approach to the nitrogen problem should prioritise the plant and wildlife habitats with the greatest excessive nitrogen loads, as presented on the Urgent List. According to Greenpeace, the current efforts to pursue the nitrogen targets have precisely the opposite effect, with the sites suffering the greatest loads not being brought below the CDV until further into the future. The argument is that the legal goal is to bring 50% of the total surface area of nitrogen-sensitive nature below the CDV, and it is easier to achieve the CDV for natural sites where the loads are not as great (and which are already close to their CDV). The Court also held that it is evident from experts' reports that the sites with the worst deterioration must be restored first in order to avoid further and irreparable harm to those vulnerable sites. The Court's conclusion was that the Habitats and Birds Directives and the Environment and Planning Act should be interpreted as requiring prioritising the natural sites with the greatest loads. The Court issued a declaratory judgment that the Dutch State's actions are tortious through the failure of its approach to nitrogen deposition to prioritise the plant and wildlife habitats where it is most urgent, from an ecological perspective, to reduce nitrogen deposition. The Court then ordered the State to prioritise the sites on the Urgent List in its efforts to achieve the legal target of 50% of the surface area by 2030. In other words, a 'site-specific' approach is required. Effectively, this means that by the end of 2030 32% of the surface area of nitrogen-sensitive nature on the Urgent List must have been brought below the CDV (par. 5.77-5.78).

No higher reduction percentages: Greenpeace also sought a number of higher reduction targets than the legally established 2030 target of 50%, including that by 2030 the Dutch State should bring the entire surface area (100%) of plant and wildlife habitats on the Urgent List (orange) to below the CDV, or else that the higher target of 74% from the 2021 Coalition Agreement should be established. The Court turned down the stricter relief sought, for reasons including that Greenpeace had failed to present a sufficiently plausible case that the very urgent sites were at risk of reaching a point of no return in the immediate future. The Court also found that the State cannot be required to achieve the impossible, or near impossible, the allocation of responsibilities between the legislature and the court system prevents the Court from establishing those percentages by itself, given that it cannot derive any basis for doing so from rules under European law or incontestable minimum values commonly accepted in science, and the Court cannot determine whether awarding the relief sought would prejudice any third-party rights or compelling societal interests. As such, the Court turned down the relief sought by Greenpeace that went beyond the percentages established by law (par. 5.81-5.88).

Penalty to enforce compliance: The Court imposed a one-time penalty of 10 million euros to enforce compliance, which is linked to achieving the legal nitrogen target for 2030. It is common practice in case law not to impose penalties to enforce compliance on government agencies, based on the principle of "constitutional courtesy": essentially, that government agencies may be expected to comply with court judgments on their own initiative, without the pressure of any penalties to enforce that compliance. In the present case, however, the Court found particular cause to impose a penalty to enforce compliance, given the earlier tortiousness of the PAS, the failure of the previous government to establish sufficient measures and the current government's decision to abolish important nitrogen measures (par. 5.93-5.97).

Provisional enforceability notwithstanding appeal: The judgment was declared provisionally enforceable notwithstanding appeal. This means that, as soon as the judgment is served, the Dutch State is immediately obliged to comply with it, and at appealing the judgment will not "suspend" its effect. The Court found cause for this in the urgent environmental interest served by its order. However, the order concerns only the legal target for 2030 (not for 2025 as well), meaning that, according to the Court, the State has more than five years to comply (par. 5.98-5.100).

3. Initial observations on the judgment

- The Court expressed its awareness of how socially and politically sensitive the judgment was. As in *Urgenda*, therefore, the Court explicitly found that although it could not become involved in the political decision-making it had a constitutional duty to review whether the Dutch State's actions are compliant with the law, and that the proceedings concerned such a review.
- Unlike in the Shell judgment of 12 November 2024, for example, this case was not concerned (at least not primarily) with the unwritten standard of due care as a basis for reviewing whether specific actions are tortious; instead, the dispute was far more concerned with an issue of interpreting national legislation implementing the Habitats Directive against the backdrop of that Directive's phrasing and purpose. Only in so far as the Court was required to review whether the Dutch State's actions are in conflict with a standard of due care observed in society should it perform that review against the specific circumstances and objective standards such as legislation, general legal principles, case law and experts' reports. An argument based directly on incompatibility with the Habitats Directive was rejected (par. 5.17). The Court also held that the non-deterioration obligation under the Habitats Directive has also been correctly implemented in Dutch law (par. 5.13).
- The Court imposed a remarkably heavy onus on the State to prove that no deterioration has occurred. If scientific data reveal a general pattern that a particular course of action leads to ongoing deterioration of natural sites, the State should present scientifically underpinned data to remove all reasonable doubt about whether its acts or omissions to act have harmful consequences. If the State is unable to do so, the Court argued, it appears safe to assume that its actions are incompatible with the non-deterioration obligation (par. 5.20-5.25).
- The State is also – again similar to *Urgenda* – bound by its own objectives as recorded in the Environment and Planning Act. The Court applied those objectives to answer the difficult question of precisely what appropriate measures the State may be expected to establish, and how fast. This highlights that the State does not have the option of simply abandoning objectives that it has substantiated and established (par. 5.48-5.53).
- The Court found that the Dutch State may be held to its own legislation, and that the legal nitrogen targets may be considered to form absolute minimum values for what the State may be expected to do to comply with Article 6 of the Habitats Directive, and that deviation "from this" is not permitted without a

compelling reason. This raises the question of how "hard" the obligation is to achieve the target defined in the Environment and Planning Act, and what constitutes a "compelling reason" that justifies deviating from the legal target.

- The Court applied an innovative interpretation to the obligations under the Habitats and Birds Directives by requiring the State to adopt a site-specific approach. As the Court itself already found, the Directives do not state (at least not unambiguously) that restoration of the most deteriorated plant and wildlife habitats should be prioritised. As such, this is an interesting interpretation – and one that has far-reaching implications for the practice – of what the State may be expected to do (par. 5.54-5.60).
- The Court held that abolishing the legal objectives (including the nitrogen targets) is not a solution, and that doing so would render the State vulnerable "*if the European Commission initiated non-compliance proceedings, particularly if it was not balanced by robust measures*". It should be noted that – as the Minister of Agriculture, Fisheries, Food Security and Nature announced in her initial reaction – the nature restoration obligations are separate from the legal objectives and nitrogen targets. If those goals and targets are abolished, therefore, this will trigger a new debate about what goals and targets should be established instead in order to achieve the nature restoration that is needed (par. 5.70-5.72).
- The Court has imposed a relatively high penalty on the Dutch State to enforce compliance, in deviation from the principle of constitutional courtesy, under which it is assumed that government agencies will comply with court judgments. This is a clear signal that the Court does not trust the State to automatically comply with the judgment.
- The fact that the deterioration of plant habitats is caused not only by nitrogen deposition but by other factors as well – for example how well the water system functions – does not diminish the State's obligation to reduce nitrogen deposition. One reason for this is that nitrogen deposition is a pressure factor in no less than 96% of the sites, and irrespective of any other considerations nitrogen reduction appears a necessary step to avoid deterioration (or further deterioration) of most of the natural sites. The water system's functioning is frequently put forward alongside nitrogen deposition as one of the principal causes for habitat deterioration. It will therefore be necessary to study whether this judgment might also have indirect implications for the need to realise a good standard of water quality.

4. Relationship between the court system and the legislature

After the judgment in *Urgenda*, the Dutch State is now again forced by a court to realise environmental goals. This will undoubtedly trigger a new surge in the debate about where the line is between judicial decisions and judicial activism. The judgment appears to anticipate this:

- In paragraphs 5.3 to 5.7, the Court provides a detailed explanation of how the respective responsibilities of the legislature and the court system relate to each in legal terms.
- The background to that explanation lies in the State's defence that awarding the relief sought by Greenpeace would constitute impermissible interference in the political and administrative decision-making process, and would essentially form an impermissible legislative order:
  - The State argued that it is the legislature's task to establish legislation and determine what the substance of that legislation is. The European Habitats Directive, which formed the basis of Greenpeace's arguments in these proceedings, offers the legislature a margin of discretion: the Directive does not specify what measures are appropriate, nor does it set out a deadline by which Member States must achieve a "favourable conservation status". The legislature may decide this for itself, therefore.
  - The State argued that the legislature has in fact given shape to those decisions by establishing national legislation on nitrogen deposition reduction in accordance with the Directive, including legal nitrogen

targets and concrete reduction measures. That legislation does not include giving priority to specific sites. The relief sought by Greenpeace was essentially that specific sites should in fact be given priority (the Urgent List sites). If that relief was awarded, the law would need to be amended and the Court would effectively be issuing a legislative order, for which it does not possess the authority, according to the State.

- The State also argued that nitrogen reduction requires a complicated consideration of societal interests, and the proceedings did not involve representatives of all the various stakeholders, which highlights that decisions on that consideration fall under the sole authority of political representatives at the national and provincial levels.
- Greenpeace conversely argued that, with the nitrogen policy advocated by the political representatives, the actions of those political representatives were not compliant with legal standards. The court system is perfectly suited to fulfil the role of correcting this.

- *Urgenda*, which concerned an order for the Dutch State to reduce carbon emissions, involved a similar debate. In that case, the Dutch Supreme Court defined limits for the courts to observe for relief such as that sought by Greenpeace in these proceedings. The Court in this case found that the limits defined in *Urgenda* were as follows in these proceedings:
  - The Dutch Government and Parliament are responsible for making decisions about reducing nitrogen emissions, and have a wide margin of discretion to make the necessary complicated considerations, bearing in mind that the nitrogen reduction policy impacts the agricultural sector, the residential construction sector and the energy transition.
  - The Court found that it is not the role of the court system to prescribe political decisions, but that it is in fact the role of the courts to review whether the Government and Parliament have adhered to their decisions within the parameters of the law, which is binding on them. Those parameters are defined by various sources, including European law and the laws that the Government and Parliament themselves have adopted.
  - The Court found that this task assigned to the courts to offer legal protection, including against the government, is an essential feature of a constitutional democracy. In performing that review, the courts may not become involved in political decision-making through the opportunity to bring about legislation with a particular and concrete substance, meaning that it is correct that they may not issue legislative orders.
  - In so far as the State neglects its obligations under European law and its own national legislation, the courts may determine that a legal rule should be set aside or that a legal rule should be interpreted against the backdrop of a Directive under European law, or order the State to comply with its own legislation. The courts may also order the State to establish measures in order to achieve a specific goal or target that arises from those obligations; the assumption here, however, is that it must be sufficiently certain that awarding relief that involves such an order will not substantially prejudice other societal interests or fundamental rights. The courts must be cautious in matters involving a consideration of separate societal interests that in principle should be made by the legislature, and moreover the courts may not give any concrete legislative orders (par. 5.73), nor establish reduction percentages beyond those defined by law (par. 5.80, 5.86).
  - It is, accordingly, not the place of the courts to essentially order the State to establish legislation with a particular and specific substance.
  - Lastly, the allocation of duties between the legislature and the court system does not prevent the courts from issuing a declaratory judgment about non-compliance with the obligations meant above.

5. Potential implications for the business sector

Although the order is addressed exclusively to the Dutch State, it may indirectly impact the business sector as well:

- The Court explicitly found that the State could have foreseen that the PAS could not be upheld, and found that the State's actions were culpably tortious when it established regulations that were incompatible with higher European legislation. This finding also appears to have potential relevance for the State's liability to compensate companies reporting their nitrogen loads under the PAS (par. 5.30-5.35).
- The Court determined that the State's approach to nitrogen deposition must prioritise the most vulnerable plant and wildlife habitats. This means that the measures that the State establishes to reduce nitrogen deposition should focus first on the sites suffering the greatest harm. This could lead to a reconsideration of the current nitrogen policy, with the focus shifting to the most urgent sites (par. 5.54-5.65).
- The Court ruled that the State's actions were tortious in its failure to achieve the 2025 legal nitrogen target of 40%, and its very probable failure to achieve the 2030 nitrogen target of 50%. This means that the State is obliged to establish additional measures to as yet achieve those targets. Based on current case law about internal set-offs and application of the additionality test, this could potentially impact the substantiation of permitting, refusal to cancel permits and accelerated enforcement/termination of non-enforcement situations for private parties (par. 5.48-5.53).

If you have any questions about the impact of the recent nitrogen judgment, please contact our litigation specialists Albert Knigge and Nadir Koudsi or our environment and planning specialists Marloes Brans and Ronnie Bloemberg for further information and advice. We are a frontrunner, in the Netherlands and abroad, for climate-related projects and cases. Our multidisciplinary team of thirty attorneys, including specialist partners, are ready to apply their expertise in the area of climate change to various core disciplines, including energy, litigation, competition, investment management, environment and planning law and ESG reporting. Our team's advice on permitting, supervisory and regulatory aspects and subsidies often provides the key to success for our client's projects. Whether the matter concerns the implementation of regulations in connection with the European Green Deal, ESG due diligence or advising large enterprises on the possibilities to achieve their Paris climate goals: Houthoff always adopts an integrated approach that comprehensively covers all the relevant factors.

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