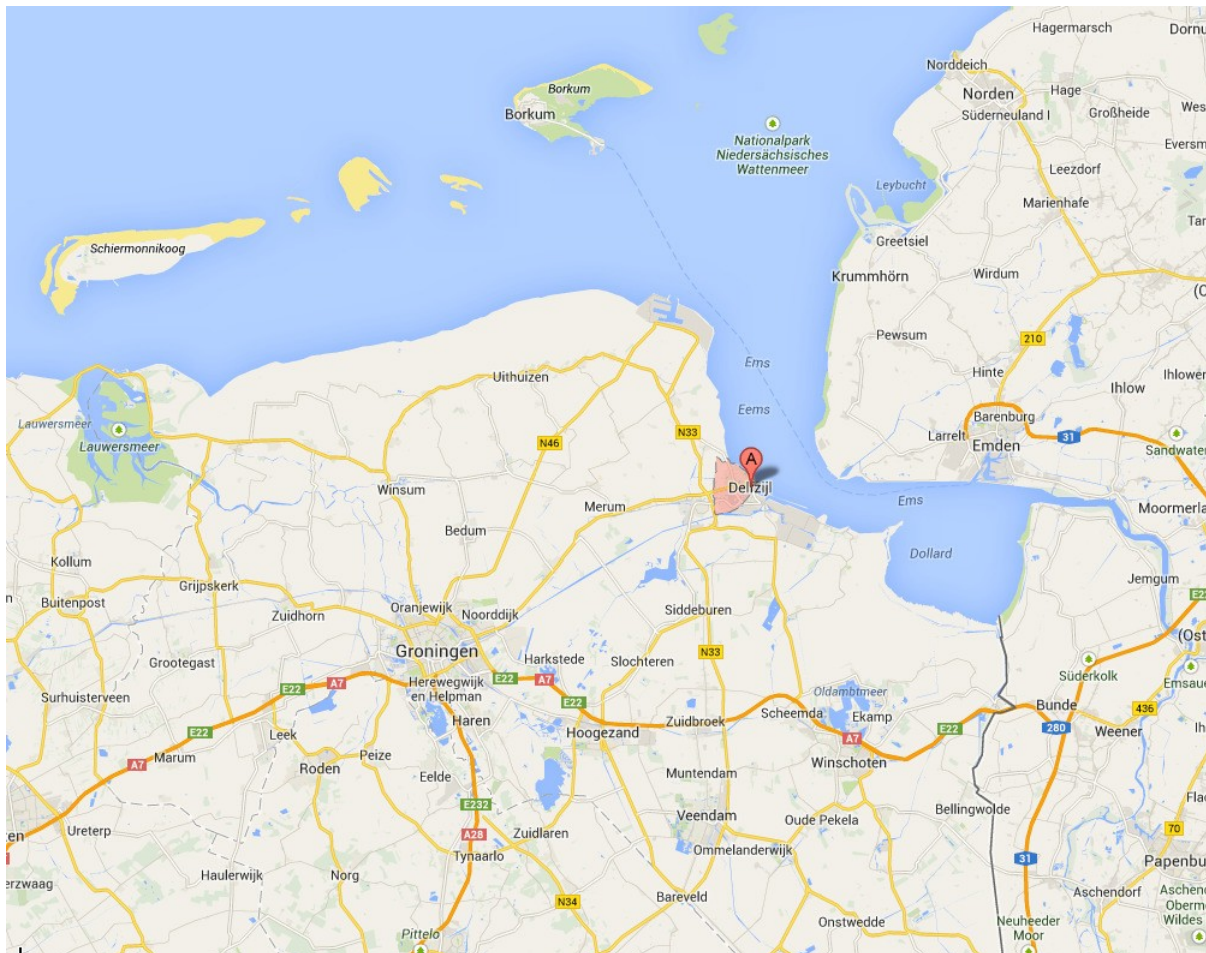


## Case Study ERA workshop Interaction between EIA and Nature Directives

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In the beautiful city of Delfzijl, in the province Groningen in the north of the Netherlands, the energy company EON applied to the regional authorities for a permit for the extension of an existing so called 'multi-fuel' power plant. Multi-fuel power plants are based on engines that are able to run on coal, natural gas, light fuel oil, heavy fuel oil or a number of other liquid fuels, offering the ultimate in fuel flexibility.



The location of the plant itself borders to the Waddenzee. The Waddenzee stretches from the Netherlands to Denmark, forming a shallow body of water with tidal flats and wetlands. As we all know the Waddenzee is a Natura 2000 site protected under the Habitats Directive. Both the Habitats and EIA Directive have been implemented in the Dutch nature conservation and environmental legislation. No infringement proceedings are pending at the moment. The regional authorities have carried out an environmental impact assessment and decided that although the EIA showed negative consequences for the habitat of in particular the avocet decided to approve the permit application. However, in order to comply with the Habitats Directive, and to mitigate the environmental consequences they attached the condition that under no circumstances "coal" may be used in the plant.



The permit was subsequently challenged before the Dutch administrative court, the Council of State by: a Dutch NGO called "Groningen Society for the Protection of Avocets" and the neighbouring German city of Borkum. The Dutch NGO argued that, in view of the consequences for the Avocet, the permit was granted in violation of both the Habitats and EIA Directive. In particular, they argue that the negative environmental consequences outweigh the economic benefits for EON. The regional authorities, however, argue that the way they have balanced the various interests at stake cannot be challenged in judicial review.

The NGO also announced to start proceedings against the Dutch state to sue for damages as a result of the permit.

The city of Borkum argued that the Dutch regional authorities failed to consider the environmental consequences of the power plant outside Dutch territory in general and for Borkum in particular. They also argued that the decision-making procedure was faulty, as the draft-permit was notified and made public in the Netherlands only. The regional authorities argue that the directives do not require cross-border consultation and participation. But even if that is the case, such a consultation would not have changed the final outcome of their decision and therefore this argument cannot result in the annulment of the permit by the court.

The permit was also challenged by EON; they considered that the prohibition for the use of coal is in violation of Dutch environmental law. EON argues that the authorities can only apply Dutch law and cannot rely on the directives in order to impose obligations on them. Please note that Dutch law does not contain a legal basis for a prohibition to use coal in power plants.

The case is heard before the Dutch Council of State, the highest court dealing with permits like these. The judge-rapporteur has identified the following issues:

1. To what extent are the Habitats and EIA Directive applicable to the facts of the case and which provisions are relevant in particular?
2. Both Directives have been transposed into Dutch legislation; does this prohibit the applicants to rely on their provisions?
3. Are the regional authorities in compliance with the Directives to approve the permit application, although the EIA showed negative consequences for the habitat of the avocet?
4. Are regional authorities allowed to prohibit the use of coal in order to mitigate the consequences?
5. Does the German city of Borkum have standing before the Dutch Council of State?
6. Does the fact that the draft-permit was notified and made public in the Netherlands only lead to the annulment of the permit?
7. Does the fact that the Dutch regional authorities failed to consider the environmental consequences of the power plant outside Dutch territory make the permit problematic?
8. What are the chances for the NGO for a successful claim for damages from the Dutch state?
9. What is the role of the Council of State in assessing the substantive arguments of the NGO (inappropriate balancing of interests)?
10. Is the Council of State required to refer the case to Luxembourg for a preliminary ruling?