Independent quality control

How does it work in the Netherlands?

By Gijs Hoevenaars

The Netherlands now has several decades of experience with a system of independent quality control of Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) reports. The recent revision of the EC - EIA Directive pays more attention to the quality of EIA reports.
This article reflects on how the Dutch system works, the role or the NCEA and in which ways the revised EIA Directive will affect the system of quality control in the Netherlands.

Established by law

Quality control in the Dutch EIA and SEA system is ensured by an independent commission of experts: the Netherlands Commission of Environmental Assessment (NCEA). The NCEA is an independent body established by the Dutch Environmental Management Act (EMA), which briefly stipulates its composition and working methods. The Act provides for a private institution that is not part of government to have a vital role in quality control of EIAs and SEAs in the Netherlands. The NCEA used to be subsidised by central government on the basis of the number of projects it reviewed each year, but since 2014 the Commission has been paid by the competent authority requesting the review, as the Dutch government has decided that the cost of review should be borne by the entity benefiting from the review. In 2018, the cost per review varies between €6750–€36,000, depending on the competent authority (municipality, provincial authority or central government), complexity of EIA/SEA procedure and the type and frequency of our advice.

Under the current EMA it is mandatory for a competent authority to request all SEAs and EIAs for certain complex projects to be reviewed by the NCEA. In effect, this means the NCEA has the monopoly for independent quality review of these SEAs and EIAs. It may also be requested to review scoping documents and EIAs for other projects, but such requests are voluntary. In 2017 the NCEA reviewed about 140 projects, 50 of which had been requested voluntarily.
The NCEA checks the completeness and correctness of the information in EIAs and SEAs. In 2017 for example, 70% of the assessments reviewed proved to lack essential information.
In the case of a scoping document, it will specify which information is needed for the EIA or SEA concerned. The main criterion for 'needed' is that all information to enable stakeholders to take the interests of the environment fully into consideration in the decision making process should be available in the EIA or SEA.

"From the interviews it appears that NCEA's status and authority, and the extent to which it is seen as an expert, remain great. The added value of the advisory report for the quality of the decision making is generally estimated as high. Furthermore, there is broad agreement that NCEA's advisory report contributes to predictable development of the subsequent decision making. This is largely because this advisory report is seen as a kitemark assuring that an environmental assessment report can withstand scrutiny (including by the administrative court)."
External evaluation of the Environmental Management (tariffs for NCEA) Act 2018 by Berenschot.

Independent

It is important to specify what is meant by 'independent'. It means that NCEA experts have no involvement or interest in the project for which they are reviewing an SEA, EIA or scoping document, in terms of their employer, colleagues, private (e.g. partner), city of residence or additional jobs. It is the responsibility of both the NCEA and its individual experts to verify this before starting the review. Furthermore, the competent authority is given the opportunity to provide arguments against involving a given expert on the grounds that the expert is in some way involved in the project. The final decision lies with the NCEA itself.

The NCEA's independent status is emphasised by the fact that the NCEA never expresses an opinion on the desirability of a project. It is only concerned with the information that is needed for the decision making with regard to a project.

Closely related to independence is the notion of transparency. By working in public, the NCEA avoids appearing to have conflicting interests. The NCEA only works on the basis of public information that is accessible to all. In its review reports it explicitly mentions the specific documents consulted. Moreover, our website discloses which projects are currently undergoing review. Last but not least, all review reports are published on the website, together with the names of the experts who were the reviewers. It is therefore quite common for NCEA reports to be quoted in court proceedings.

For some years now the NCEA has published a press release to accompany the publication of a review report. By doing so, it brings its report to the attention of local and national media.

Working groups

In effect, the NCEA is a large group of about 350 experts that is supported by a secretariat. When a review is requested the chair of the NCEA appoints a vice-chair and technical secretary, who will select the experts (the number varies between two and ten) needed to carry out the review. Together they form a working group.

The technical secretary then draws up a timetable to ensure the review is completed within the statutory time limit of six weeks. If the NCEA is voluntarily requested by the competent authority to take the views of the public into account, the time-frame is extended by three weeks.

The experts read the documents and send their preliminary remarks and questions to the technical secretary. These questions are passed on to the competent authority to facilitate the preparation of a site visit. During this visit the competent authority is expected to answer the questions posed by the NCEA, show the NCEA where the project will take place and point out challenges or opportunities relating to the environment. At the request of the competent authority, the developer and affected parties may take part in the site visit. In some cases, the technical secretary will visit a public hearing to receive more local information about the project and its surroundings.

After the site visit the working group withdraws for discussion. On the basis of this discussion the technical secretary prepares a first draft of the report, which is then discussed at the next meeting, after which a second draft is prepared. Meanwhile, the draft is co-read within the secretariat, to check its coherence with earlier reports on comparable projects and ensure that the language is non-technical.
The final draft is sent to the competent authority, which then usually accepts the invitation to attend a meeting at the NCEA for further explanation of the report. After this meeting the report is finalised and the press release is drawn up. Both will be published a few days after the meeting.

How does the revised EIA Directive affect quality control?

In 2014 Directive 2014/52/EU amending EIA Directive 2011/92/EU was adopted. The revision of the Directive was required to be transposed into national legislation by 16 May 2017. The revision had several objectives: to strengthen the quality of the EIA, to align that procedure with the principles of smart regulation, and to enhance the coherence and synergies with other EU legislation and policies as well as with strategies and policies developed by Member States in areas of national competence. For the purpose of this article, I will focus on the amendments related to the first objective, how they have been implemented in Dutch legislation and ways in which this influences quality control in the Netherlands.

Article 5(3)a of the Revised Directive states that the developer shall ensure that EIA reports are prepared by 'competent experts'. For the transposition of this provision the Netherlands considered introducing a system for accreditation of these experts. However, this was not adopted, for various reasons – one being that it would make the EIA procedure too costly. Moreover, the legislator noted that in Dutch practice EIA reports are usually prepared by consultancy firms. As these consultants can be assumed to be sufficiently knowledgeable, the legislator decided that it was unnecessary to insert a specific provision relating to the competence of experts.

Article 5(3)b obliges the competent authority to ensure ´that it has, or has access as necessary to, sufficient expertise´ to examine EIA reports. As this obligation is already covered in Dutch administrative law, the Dutch legislator referred to the appropriate codified principle (in article 3:2 of the General Act on Administrative Law) that obliges a competent authority to thoughtfully prepare its decisions. Nevertheless, the revision led to a slight change in Dutch law. The EMA now explicitly mentions the possibility of requesting review by the NCEA as a way of obtaining sufficient expertise. That option had always been available, but now it is explicitly stated. In practice, however, the costs of review by the NCEA seem to be a burden, especially for smaller municipalities. It is therefore questionable whether access to sufficient expertise is guaranteed in practice.

Last but not least, article 9bis of the revised Directive introduced an article that is somewhat related to quality control. The article states that where the competent authority is also the developer, ´Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive´. In the Netherlands, this provision has been transposed almost verba-

tim into article 7.28a of the EMA. To facilitate EIA practice, guidelines for appropriate separation for EIA have been prepared and are awaiting parliamentary approval. The guidelines contain suggestions on how to organise such appropriate separation. The separation should be at least on a personal level within the administration but might need to be extended to heads of departments. Furthermore, the guidelines suggest separation at government level too, e.g. two different local authority councillors or ministers. In any case, it is expected that the requirement for separation will generate much case law. To avoid any appearance of a conflict of interests within an administration, independent quality control by the NCEA may be requested.

Summing up: the revised EIA Directive will not have a significant influence on the way in which quality control is dealt with in the Netherlands. The amendments in Dutch law do strengthen the position of the NCEA somewhat in EIA practice. However, the formulation of the articles on quality control are rather vague and leave room for interpretation. It will be up to the judges of the European Court of Justice to specify how these articles should be interpreted.

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