

New act aims to minimise gas production from Groningen Field

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Introduction

The government aims to terminate the gas production of the large-scale Groningen Field – the proceeds of which have greatly contributed to the Dutch welfare state – as soon as possible. The reason for this decision is the Zeerijp earthquake of January 2018. In order to bring back the demand for low-calorific Groningen gas, measures will be taken to:

- acquire extra nitrogen capacity to convert high-calorific gas into low-calorific gas;
- switch large-scale users to high-calorific gas;
- minimise the export of low-calorific gas; and
- increase the sustainability of the built environment and greenhouses.

The Groningen Field will continue to produce gas until these measures have been implemented in full (which is forecast for 2030). Until the end of 2022, production is expected to continue to exceed 12 billion cubic metres per year – the maximum level advised by the State Supervision of Mines (SodM), which is the competent safety agency. Immediately reducing production from the Groningen Field to a much lower level would lead to safety and security risks in the Netherlands and neighbouring countries. As such, the next few years will be used to decide on a safe production level and simultaneously safeguard the security of supply.

Because the Gas Act and the Mining Act did not reflect the above situation, they were amended by the Act to Minimise the Gas Production from the Groningen Field, which was introduced on 17 October 2018. On 1 January 2019 a large part of the act entered into force, together with an implementing ministerial decree.

New procedure

The act provides for a new procedure, under which gas production from the Groningen Field must be reduced when less gas is needed as a result of the above measures (the so-called 'never more than necessary' principle). Conversely, the minister of economic affairs and climate policy is authorised to require Nederlandse Aardolie Maatschappij BV (NAM), the field's production licence holder, to produce the required minimum amount of gas. This signals the end of the current practice which enabled a pre-determined production level to be produced in its entirety, even where such volume was not required for that year. On the other hand, the act introduces a production obligation for NAM, which must execute gas production from the Groningen Field in accordance with the operational strategy implemented by the minister.

Under the new gas production procedure, the operator of the national high-pressure transportation network, Gasunie Transport Services BV (GTS), must first estimate the demand for gas from the Groningen Field. Next, the minister will request NAM to propose an operational strategy, taking into account:

- GTS's estimate;
- the interest in minimising the Groningen Field's production; and
- the anticipated soil movement.

The risk analysis is an important part of the operational strategy. Before the minister sets the

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operational strategy, he will request the advice of:

- SodM (with regard to earthquakes and the impact above ground);
- the Netherlands Organisation for Applied Scientific Research (with regard to the impact above ground in combination with reinforcement and mitigation measures); and
- the Mining Council and regional governments.

ECHR and balance of interests

The nature and scale of the impact of gas production are such that many fundamental rights are at stake, including the right to life, privacy and the peaceful enjoyment of one's possessions – as set out in Articles 2 and 8 of the European Convention on Human Rights (ECHR) and the First Protocol thereto (among other statutes). In setting the operational strategy, the minister must reasonably balance the interest of citizens protected by these fundamental rights with general interests.

The act states that the minister must consider the safety and societal interests associated with an inability to supply end-users with the required amount of low-calorific gas. In particular, the minister must consider:

- the extent to which the safety norm of 10^{-5} (ie, the chance of a deadly incident as a result of a building's collapse is no more than one in 100,000 per year) can be safeguarded;
- the extent to which the security of supply of various categories of end-user is safeguarded;
- the pace of the phase-down of demand;
- the pace of building reinforcement;
- societal disruption as a result of earthquakes resulting from gas production from the Groningen Field; and
- societal disruption as a result of shutting gas off for various categories of end-user.

The minister must determine, in a transparent and reproducible manner, whether a substantial interest has been attached to the safety risks for local residents as a result of earthquakes caused by the production of gas from the Groningen Field. This last requirement was added to the act as a result of the 23 May 2018 advice of the Advisory Division of the Council of State, which recommended prioritising the safety interests of local residents over the security of supply.

Liability

In its advice, the Council of State addressed the liability for damages caused by earthquakes. Section 6:177 of the Dutch Civil Code (DCC) imposes strict liability on operators of mining facilities for damages as a result of earthquakes resulting from mining activities. It follows from the explanatory memorandum to the bill that, despite the introduction of the production obligation for the licence holder, the legislature does not aim to change the licence holder's strict liability. The act therefore states that Section 6:178(c) of the DCC, which provides that strict liability does not apply when damages are caused exclusively by the fulfilment of an order or binding requirement of the government, is not applicable. The legislature does not deem this unreasonable because the damage that will manifest itself in the coming years will be a result of the production of the past 60 years. The Council of State considers that it is difficult to determine the exact consequences of the introduction of the production obligation for the liability for damages. It is up to the civil courts to decide on the settlement of damage to third-party property which is caused by gas production.

In this context, one question that has arisen is who is responsible or liable for the reinforcement of buildings. The reinforcement of buildings to meet the 10^{-5} norm has previously been the licence holder's responsibility. However, the legislature considered it appropriate to deal with the duty of care and the corresponding reinforcement in the public domain because it will be the minister who determines the level of gas production by setting the operational strategy. The duty of care in the act entails that the minister must take the measures that can reasonably be required to prevent risks to safety as a result of gas production from the Groningen Field. The legislature has left the liability for the costs for the reinforcement of buildings with the licence holder; therefore, the licence holder must bear the costs of the reinforcement operation.

What's next?

Many appeals have been lodged with the Administrative Jurisdiction Division of the Council of State against the old ministerial decision for the gas year 2018/2019 (which runs until 1 October 2019), which set the annual maximum production level at 19.4 billion cubic metres. The Groningen Province, one of the appellants, has indicated that it does not dispute the production level as such, but rather:

- the lack of substantiation if gas is shut off for end-users;
- the lack of assessment under the ECHR and the United Nations Convention on the Rights of the

Child; and

- the slow process for damage repair and reinforcement.

All of these appeals are expected to be addressed in the second half of April 2019.

The outcome of these proceedings will likely impact the minister's operational strategy under the new act. Under the act, which prescribes the uniform public preparation procedure for the ministerial decision, any party can submit an opinion against that decision. Since reducing gas production from the Groningen Field is a delicate subject which requires the balancing of various interests, many parties are expected to take up the opportunity to submit opinions.

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