

Dredging the Westerschelde

Nienke Saanen
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Port of Antwerp

- Facts and figures:
 - ✓ 2nd largest port of Europe, 12th in the world
 - ✓ 2011: 187 mio ton, of which 105 mio ton containers / 8,5 mio TEU
 - ✓ 15.240 sea vessels per year
 - ✓ Largest lock in the world, Berendrechtsluis (1989)
 - ✓ Also accessible for the largest container ships
 - ✓ Access through the Westerschelde

Westerschelde

- Facts and figures:
 - ✓ Relatively young (12th century)
 - ✓ Caused many floodings
 - ✓ Many ships have sunk
 - ✓ Last open waterway (no dam or lock, no part of the Delta Works)
 - ✓ Natura 2000 site
 - ✓ Since 2003: Westerscheldetunnel (6.6 km long, 60 meters below sea level, 100% owned by Zeeland, toll is charged)

Location



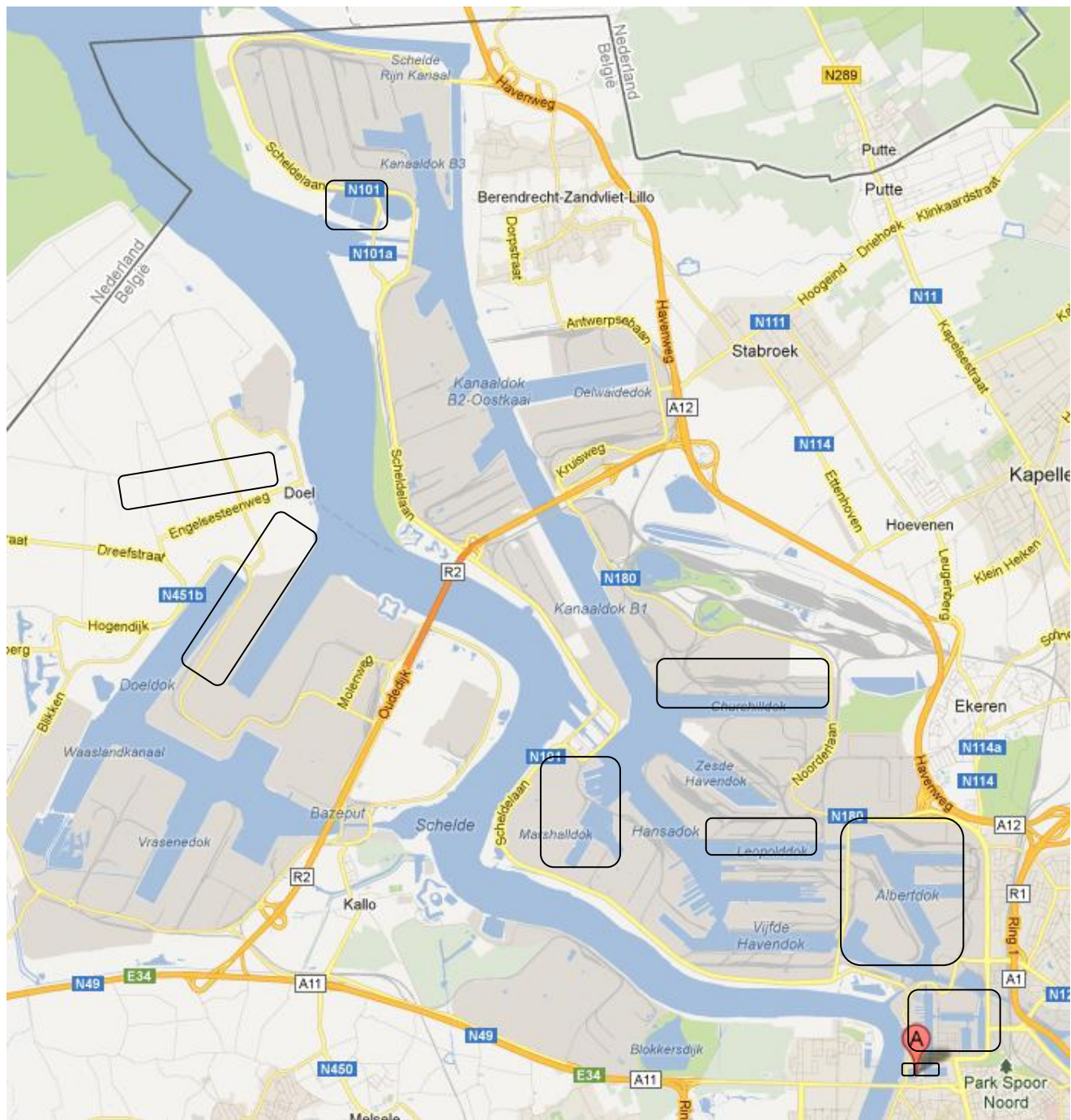
Maps.google.com

Ancient quarrels (1)

- 1585: Antwerp was conquered by the Spanish
- 1588: The 'Republic of the Seven United Netherlands' blocks the Westerschelde
- 1648: Treaty of Münster (peace of Westphalia) → Dutch republic negotiates that Antwerp remains unconnected to the sea
- 1715: Spanish reign replaced by the Habsburg reign (British blockade)
- 1792: Southern Netherlands conquered by the French; French lifted the blockade
- Under Napoleon the Northern and Southern Netherlands were united

Ancient quarrels (2)

- 1815: Napoleon falls and the Southern Netherlands came under the reign of king William I
- 1830: Belgian Revolution; again a blockade by the Dutch for some years
- 1839: Treaty of London → independence of Belgium; art. IX: NL guarantees free transit to the port of Antwerp, but NL was allowed to charge a toll for transit (also 'Iron Rhine')
- 1863: Competence to charge toll is abolished
- Since then, disputes about the costs of keeping the Westerschelde accessible for ships



1995 Schelde Treaty (1)

- Bilateral treaty → between NL and B
- 1995: agreement on deepening to 11.6 meters
- 1996: formation of the Westerschelde Commission to balance economic and environmental aspects
- Proceedings were brought before the national court, because the necessary permits for disposal of dangerous waste were not obtained and the underlying EIA was not conducted
- 17 June 1996: ABRvS rules that the project had to be put on hold

1995 Schelde Treaty (2)

- Dutch government was not happy with the judgment
 - Necessary environmental permit was granted by an Act → EIA rules were not applicable (only to permits granted by decisions)
 - Art. 1 (5) Dir. 85/337/EEC: This Directive shall not apply to projects, the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process
- The project could start

2005 Schelde Treaty (1)

- 1998: Flanders requested a further deepening
- Memoranda and 'visions':
- 2001: European Commission sends a letter of formal notice and request information on not conducting an EIA and a Habitat Assessment but decides not to push through because of the negotiations on a new treaty
- 2005: new Schelde Treaty (negotiated text)
- July 2008: adoption by the Dutch senate (parliamentary process)

Schelde Treaties (2)

- Approved of by Dutch Parliament!
- Obligations:
 - Deepening to 13.1 meters, start is 2007 at the latest, realization 2009 (but NL started in 2010)
 - Enlargement of het Zwin (between Knokke and Cadzand)
 - Development of 600 ha. 'new' nature on Dutch territory
 - Development of 1100 ha. 'new' nature on Belgian territory
 - Inundation of the Hertogin Hedwigepolder by cutting the dikes (440 ha.)
 - Inundation of part of the Prosperpolder

Schelde Treaties (3)

- Art. 4 (b): Flanders takes care of the preparation and execution of the projects mentioned in art. 3 (b) (het Zwin, Hertogin Hedwigepolder and Prosperpolder), including studies, research, public procurement and supervision (but not the purchasing of plots and expropriation)
- Art. 7 (7): Flanders bears the costs of these projects

Verdronken land van Saeftinghe



Maps.google.com

Parliamentary process

- 8 July 2008: senate accepts the Treaty
- But it requests the Minister to look for alternatives regarding the inundation of the H. Hedwigepolder and to make every effort to get this provision in the Treaty abolished
- Belgian Minister claims to be open to alternatives
- Nijpels Commission was formed to come up with alternatives
- 21 October 2008: report

What were the alternatives?

1. Inundation of Zimmermanpolder and part of Fredericapolder
 2. Reduced tide in Zimmermanpolder
 3. Inundation Molen- and Perkpolder with additional measures
 4. Various small inundations with additional measures
 5. Reduced tide with additional measures
- Criteria:
 - a) Natural quality
 - b) Public support
 - c) Term for realization
 - d) Costs

Conclusions

- Inundation of the H. Hedwigepolder by far the best option
- Especially very low costs (born by Flanders)
- Extra consideration: it is as such in an international Treaty
- EIA and Habitat Assessment were conducted → no barriers left?

Parallel processes (1)

- Legal:
 - 1) Decision to grant a permit to deepen and broaden the Westerschelde (start dredging)
 - 2) Decision to grant permission to intervene in a Natura 2000 site (Westerschelde)
 - 3) Proceedings against these decisions
- Social: lots of protest of farmers, environmentalists, inhabitants, local authorities

Parallel processes (2)

- 16 April 2009: Minister chooses to establish salt meadows (schorren) outside the dikes, no inundation; costs € 200 mio
- 1 July 2009: letter of the European Commission → doubts about the alternatives
- August 2009: New report Grontmij → no good alternative, best option still inundation of H. Hedwigepolder
- October 2009: decision to inundate H. Hedwigepolder

Parallel processes (3)

- 28 July 2009: ABRvS rules in an interim judgment that the Habitat Assessment was not conducted correctly → significant effects cannot be ruled out
- 13 January 2010: ABRvS rules that, taking into account the detailed reports of Oct. 2008 and Dec. 2009, the minister could assume that no significant effects would occur

And now?

- Dredging is done (end of 2010), but that is an ongoing process
- But.....
 - Regeerakkoord: government wants to look for alternatives for inundation of the H. Hedwigepolder
 - March 2011: current Minister has asked Deltares to draft a new report
 - June 2011: inundation of Welzingepolder and Schorerpolder as an alternative
 - Minister claims EU law gives the possibility for alternatives

The legal perspective



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International Treaty

- Obligation to inundate the Hertogin Hedwigepolder stems from an international Treaty, so it is a solid legal obligation
- Is the content of the Schelde Treaty, as such, incompatible with EU law?
 - ➔ MS violate EU Treaty obligations if they would close international agreements that go against EU Treaty provisions (individual Open Skies Agreements)
 - ➔ Those agreements would be null and void

EIA – project?

Article 1

1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.
2. For the purposes of this Directive:
‘project’ means:
 - the execution of construction works or of other installations or schemes,
 - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

Core provision

Article 2

1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

- Projects likely to have significant effects
- By virtue of their nature, size or location
- Made subject to development consent
- Before consent is given an assessment is conducted

Contents of EIA

Article 3

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora; → **Habitat assessment**
- soil, water, air, climate and the landscape;
- material assets and the cultural heritage;
- the interaction between the factors mentioned in the first, second and third indents.

Art. 6 (3 & 4) Habitat Directive

- Plans and projects that can have significant effects on SACs → Habitat assessment
 - Likely to have significant effects (individually or in combination with other plans or projects)
 - Appropriate assessment of implications
 - Only approval if the plan or project does not adversely affect the integrity of site (after obtaining opinion of the public)
- Negative assessment:
 - Alternative solutions?
 - Imperative reasons of overriding public interest?
 - Compensatory measures
 - Inform Commission

Smart move!

- Authorities could not rule out significant effects → appropriate assessment
 - They were aware of the difficulties to measure the effects on the environment in detail
 - They drafted 'mitigating measures' in order to be on the safe side
 - Those mitigating measures regarded het Zwin, H. Hedwigepolder, and Prosperpolder, plus the creation of extra nature
 - The European Commission was involved in this process, agreed to these measures and accepted that, with those measures, no significant effects would occur
- No further requirements under the Habitat Directive

But....

- If the Dutch authorities would replace the inundation with other measures, they:
 - Violate the Schelde Treaty (claims for damages)
 - Possibly violate the Habitat Directive because they cannot be sure that significant effects would be absent (because of the agreed mitigating measures there would be no significant effects)
 - Many alternatives (87!) have been examined and have been rejected
 - Commission monitors this closely

Alternatives?

- Inundation of two alternative polders: Welzingepolder and Schorerpolder near Vlissingen
- Also a notice of this change of plans was sent to the Commission
- Minister Bleker claims that EU law gives the possibility of alternatives
- True?

Letter of 13 October 2011 of the Commission

~~additional elements sent by Director General Hoogervorst on 15 July~~ Our conclusion is that we do not consider the measures as corresponding to the urgent ecological requirements of the ecosystem with its deteriorated habitats of Community interest and habitats of species of Community interest, or as representing an appropriate step to halt the still on-going deterioration of such habitats in the Natura 2000 site 'Westerschelde & Saefdinghe'.

Our doubts are mainly based on the difference between what your competent authorities had repeatedly assessed until November 2009 as corresponding to the ecological requirements of the site, and what has been decided in June 2011. ~~These are set out in~~

So...?

- 25 October 2011 (Volkskrant): Bleker will not reverse his plans
- Bleker wants to keep on negotiating with the Commission in order to convince the Commission of his plans
- 16 February 2012: meeting between Bleker and Commissioner Janez Potocnik → Commission will examine the proposed measures
- 19 April 2012: province Zeeland agrees to *partial* inundation of H. Hedwigepolder
- Belgium starts proceedings
- 29 October 2012: H. Hedwigepolder will be inundated
- 21 december 2012: start inundation in May 2016; fully inundated by 2019

Divergence between policy, politics and law

- Legal: all hurdles are taken, all permits are granted, international obligation → inundate H. Hedwigepolder
- Politics: protests, emotions, votes
- Policy: research (again and again) on effects and alternatives