COUNTRY REPORT: NETHERLANDS
Big Changes in Environmental Planning Law On The Way

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Introduction

In the Netherlands, dozens of Acts, some 150 Orders in Council and hundreds of Ministerial Orders regulate environmental and/or planning issues regarding, water, soil, nature protection and so forth. As a consequence of this fragmentation, the current Dutch system is particularly complex, decision-making is (regarded to be) slow, and research expenses are (regarded to be) high. The Ministry of Infrastructure and Environment therefore intends to draft one *Environmental Planning Act* (*EPA*) (Omgevingswet) in which all (or most) environmental and planning regulatory systems will be integrated, to make future environmental planning decision-making more transparent, simpler, faster and cheaper. The aim of this future *EPA* is to integrate consents in one procedure, for which one application suffices, that will be handled by a 'one-stop-shop' government body.

Preparatory operations are in full swing to ensure that the *Bill* will be sent to Parliament in 2013. Meanwhile, and in anticipation of the future *EPA*, the Government tabled the 'Bill to change the *Crisis and Recovery Act* (*CRA*) as well as some other acts in order to extend the operation of the CRA indefinitely and also to make some improvements in the area of the human environment' (hereafter referred to as '*Bill CRA'*). As some of these (so-called) improvements extend over virtual all environmental and/or planning decision-making procedures and even administrative law in general, they have been extracted from the *Bill* following the advice of the Council of State (in the Netherlands, the Council of State advises on all bills before they are sent to Parliament). In the (nearby) future, the Government will probably propose to include them either in the future *EPA* or in the *General Administrative Law Act* (*GALA*). Despite these extracted provisions, the remaining provisions of the *Bill CRA* are still worth discussing.

In this Country Report I will therefore first address the *Bill CRA*, followed by an outline of the future *EPA*. Next, attention will be paid to the provisions of the *Bill CRA* that probably will be

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enacted either in the future *EPA* or in the *GALA*. In the concluding section, I will discuss whether or not the environment will benefit from the changes foreseen.

The Bill to Change the Crisis and Recovery Act

In response to the financial and economic crisis, in 2010 the Netherlands drafted a special Act to reduce delays in both decision-making procedures and court procedures in order to boost economic developments. Various projects fall under the scope of this *CRA*, most notably regarding infrastructure and large-scale construction, as well as projects in the area of sustainability, energy and innovation. The *CRA* waives many norms of existing legislation and creates new opportunities for an accelerated onset and implementation of these projects.[1] As a result, public participation and access to justice have been reduced, international and European law are possibly being infringed, and environmental protection may have been lowered. These consequences have been justified by the exceptional and urgent economic situation as well as the temporarily duration of the *CRA* (only five years).

As the financial and economic crisis still lasts, and the *CRA* would expire on 1 January 2014, the Government tabled the *Bill CRA*.[2] One of the two pillars of this *Bill* was to make the *CRA* permanent. The Council of State responded critically to this proposal.[3] Not only because at that time, the legally obliged evaluation of the *CRA* had not yet been taken place, but also because an extension of the five years period could prevent transitional problems as well. The Government then combined the 'best' of both worlds: it extended the duration of the *CRA* for an unlimited period of time, and it expressed its intention to include the *CRA* in the future *EPA* (or the *GALA*); hence making it permanent after all.[4]

The other pillar of the *bill CRA* is called 'quick wins'. These quick wins are grouped along three lines: (a) less costs; (b) rapid, flexible and careful decision-making; and (c) elimination of problems in practice. The proposed changes include (but are not limited to) the following:

Reducing Costs

Authorities shall rely on data and research that is not older than two years. The aim of this provision is to prevent ongoing preparation procedures due to new data and recalculation.

[1] See critically, J. Verschuuren, 'The Dutch Crisis and Recovery Act: Economic Recovery and Legal Crisis?' (2010) 13 *Potchefstroom Electronic Law Journal*, 5.
[2] Tweede Kamer der Staten Generaal (TK) 2012, 33 135, 2-3.
[3] TK 2012, 33 135, 4.
[4] Ibid.

According to the Government, the continuous updating of research data or research methods is a major course of delay and extra costs in the decision-making procedure regarding infrastructural projects. A similar provision is already enacted in the *CRA*, but its scope will now be extended to environmental and planning law in general. Such a provision is contrary to general administrative law that obliges authorities to collect the necessary knowledge of relevant facts and to weigh interests when preparing a decision. In environmental law in particularly, this general administrative law rule is important as environmental data is subject to rapid changes.

Rapid, Flexible and Careful Decision-Making

A less onerous decision-making regime will be applicable to temporary deviations from development plans. The regular preparation procedure of 8 weeks will apply, instead of an extended preparation procedure of 26 weeks. The maximum duration of such a deviation will be increased from 5 to 10 years.

Elimination of Problems in Practice

Government bodies responsible for the decision-making on an application to change an environmental permit will no longer be bound by the basis of the original application. According to settled Dutch case law, an authority will be bound by the basis of the application. The industrial sector supports this approach wholeheartedly because, as they put it aggrievedly, otherwise one might end up with a permit for a bakery instead of the desired permit for a butcher's shop. The reason to enact this 'quick win' is to remove barriers to update environmental permits with regard to best available techniques and/or if its deemed necessary for the quality of the environment. This (environment protective!) provision has not been plucked out of thin air: the 2010 European *Industrial Emission Directive* contains a similar duty. This *Directive* has to be implemented in national law by 7 January 2013.

Environmental Planning Act

The agreement of the former coalition stated that the Government would propose to integrate and simplify the legal and regulatory system of environmental and planning law. According to this Government, one integrated Environmental Planning Act would not only lead to faster and better decisions, but would also create better conditions for the sustainable development of the human environment. In its notice to Parliament of March

2012, the Government traced the outlines of this future *EPA*.[5] As this future *EPA* remained on the agenda of the new Government (installed last October), I will briefly consider this government notice, as well as the information the Council of State produced in response of this notice.[6]

All parties involved (including the central Government, decentralized government bodies, business and/or citizens) acknowledge the lack of coherence in the field of environmental planning law due to the various legal frameworks that have been developed for specific environmental and/or planning issues. These legal frameworks – consisting of numerous Acts, Orders in Council and Ministerial Orders – are constantly changing and may also interfere with one another. Besides, they have their own distribution of competences, procedures, and deadlines. The resulting complexity not only leads to lengthy lead times but also to high (research) costs partly due to multiple research duties. Furthermore, it blocks innovation. By making environmental planning law more coherent, providing scope for regional and local initiatives, and creating a basis for flexible instruments, the EPA is meant to contribute to the strengthening of the economy and to the quality of the human environment, according to the Government.

One of the many aims is to integrate around 15 current Acts in the *EPA*, such as the *CRA*, *Water Act*, *Noise Abatement Act*, *Environmental Management Act* and the *Planning Act*. Around 25 other Acts will partly, later or possibly be integrated in the *EPA*. Many of these Acts contain environmental and/or planning elements as well as provisions regarding other issues, such as the organization of the market. They include the *Gas Act*, *Housing Act*, *Railway Act* and the *Nature Conservation Act*.

The list of both categories of Acts being published does not mean all questions regarding integration have yet been answered. For example, it is not yet clear whether or not the *EPA* will only provide for procedural integration or whether it will extend to include substantive integration. The aim of procedural integration is to combine different procedures in order to come up with one procedure for decision-making based on the various relevant legal frameworks. In order to achieve this objective, one opportunity for public participation and one opportunity for access to justice are provided. Procedural integration is already partly provided for by the *Environmental Licensing (General Provisions) Act* (ELA) (Wet Algemene bepalingen omgevingsrecht) (2010). This Act replaced some 25 systems for issuing permits, licenses and exemptions by a single 'environmental planning permit'

[5] See www.rijksoverheid.nl.
[6] Ibid.

(omgevingsvergunning). The aim of material integration on the other hand, is to create a single normative framework for the protection of all environmental and planning interests. Either rigid norms or open (so-called vague) norms would be the result. As flexibility is one of the aims of the *EPA*, and vague norms may conflict with European Directives, it is not very likely that the *Government* will strive for material integration.

Procedural integration will probably also be achieved by introducing six legal instruments as the successors to dozens of current environmental and planning law instruments. These new instruments intend to give shape and structure to norms, standards, development of planning, and decision-making in the area of environmental planning. These are:

Environmental Planning Vision

The *Environmental Planning Vision* is meant to be a strategic plan. Based on integrated choices for the human environment, central Governments and provincial government bodies will have to develop an integrated policy on the human environment. This policy will provide the basis for the consistent use of the other five instruments. Local government bodies will have an option to develop such a vision.

Programs

Programs are intended for parts of the human environment that need active government commitment to meet (environmental and planning) standards. A program will contain policy statements and legal measures. As a minimum, programs will be obligatory where European standards are (likely to be) exceeded, or if European Directives require a plan or program. Only the government body that produced a program will be bound by it; hence, programs will not contain normative statements that are legally binding on other administrative bodies, business or citizens. The duty to produce a program may stem from a specific environmental or planning interest, or due to specific environmental or planning norms, such as enacted in Dutch law and European Directives. Integrating programs will therefore not always be feasible. As a minimum, programs will need to be aligned and coordinated.

Integration of Orders in Council for Activities

Nowadays, some 150 permit-replacing Orders in Council are in force in the area of environment and planning. The Government intends consolidating these into several dozens of Orders. This should make it easier for business and citizens to have access to these

Orders, and for authorities to keep them up to date. The Government tends to be ambiguous whether or not it also intends to replace permit regimes with Orders in Council. Although business and relevant government bodies may benefit from Orders in Council (due to less preparatory time and therefore costs), monitoring and enforcement needs to be intensified. Legal security may also be affected as instead of relying on a focused permit, one would need to look at the Order(s) in Council and the corresponding Act(s) to trace rights and duties.

Area-Wide Environmental Planning Regulation

The Government also intends to oblige decentralized government bodies to prescribe single area-wide environmental planning regulations. At the local level, such regulations should replace a large amount of current development plans (in some cities there are more than 100) and regulations. An area-wide environmental planning regulation will contain the decentralized rules for the area and each location, region or district within that area, as well as decentralized permit conditions.

Environmental Planning Permit

For those projects that need an environmental planning permit, the *EPA* will ensure a single procedure that leads to a single permit (or its rejection). In addition to the procedural integration of the *ELA*, the Government intends to add more Acts to the *EPA* (see above). As a result of procedural integration, the execution of Government's responsibilities with respect to specific environmental interests may be jeopardized. The *ELA* therefore already makes sure a permit can only be granted if other relevant government bodies provide a 'statement of no objection'. According to the Cabinet Notice, the procedure regarding this statement of no objection turned out to be complicated and will require a considerable workforce to administer. Another way of dealing with these responsibilities will therefore be considered.

Project Decision

A project decision provides a general set of rules for decision-making regarding public projects, such as the construction of infrastructure and water works; as well as for private projects that serves a public interest, such as projects for the supply of energy and raw materials. Currently, many decision-making procedures are triggered to construct or install such projects. In contrast, project planning would benefit from one instrument. The emphasis in the procedure for project decisions would be at the early stage: to gain support, including

through consultation of stakeholders. Experience with the *Route Act* (Tracéwet) shows this investment in the initial stage can be recovered in the subsequent stages of the preparation of the project.

Postponed Provisions (Possibly Foreseen in Either the EPA or the GALA)

If all these changes have not made your head spin by now, I will continue by highlighting the provisions that did not make it to the final *Bill CRA*, but instead are foreseen to be (possibly) implemented in either the future *EPA* or the *GALA*. I will only focus on three of over ten "omitted" provisions below.

a) Decentralized government bodies cannot appeal against specified central government decisions that are not directed to them (for example, a local community has no legal standing if the central government has taken a decision to construct a high way that crosses the boundary of that community). Contrary to existing administrative law, an Order of Council based on the *CRA* already designates the projects for which such a limitation of legal standing applies. In the *Bill CRA*, the Government intended expanding the projects for which this limitation applies. An Order of Council based on the *GALA* would have provided for this. Disapproved by the Council of State, the Government has now passed this topic on.

b) Courts have to reach their decision rule within six months of the start of the appeal term. Such an exemption to the existing administrative law provision ('reasonable term') is already enacted in the *CRA*. In the *Bill CRA*, the Government intended expanding the scope of this exemption to environmental and planning appeal procedures in general. Instead of an exemption it would therefore become a rule, the Council of State responded critically. This topic was therefore also postponed.

c) Following the annulment of a decision by a court ruling, a new decision may be based on the facts on which the annulled decision was based, if these facts were not the reason for the annulment. Contrary to existing administrative law, the *CRA* already contains such a provision. In the *Bill CRA*, the Government intended to make it permanent and to extend its scope to all administrative decisions. Following criticism of the Council of State, this topic will be dealt with during the preparation of the future *EPA* or the intended change of the *GALA*.

Concluding Remarks

The explanatory memorandums to the *CRA* and the *Bill CRA* do not deny the fact that in this time of financial crisis, economic development is the Government's priority. One can be for or against this priority, but at least it is clearly stated. The *Cabinet Notice* regarding the *EPA*, on the other hand, gets a bit carried away. Although both the strengthening of the economy and the quality of the human environment (or even the creation of better conditions for a sustainable development) are formulated as the main aims of the *EPA*, it seems the emphasis is on the economy. Indeed, Dutch environmental and planning law is particularly complex. Initiatives to make it easily accessible should therefore be welcomed. But to state the environment will be better off due to the future the *EPA*, in my opinion is a bridge too far.

This is even more so as the *Cabinet Notice* regarding the future *EPA* introduces the term 'human environment' (gezond en veilig milieu – literally: 'a health and safe environment'). This would appear to be a step backwards from both anthropocentric and ecocentric environmental protection to anthropocentric environmental protection alone. Fortunately, Dutch law is bound by international and European law, and this will hopefully prevent such a backward step.