COUNTRY REPORT: THE NETHERLANDS
The Future Environment and Planning Act and the Impact of the Crisis and Recovery Act

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Introduction

This country report is concerned with developments in environmental law in the Netherlands and will discuss some of the topics that were the subject of previous Country Reports. Both the 2010[1] and 2013[2] country reports paid attention to *the Dutch Crisis and Recovery Act (CRA)* that was enacted in 2010 to alleviate the economic crisis in the Netherlands. The most important development in the Netherlands on environmental law however concerns a legislative proposal for a fundamental change in the structure of a large majority of regulations that concern the use and protection of the environment in the broadest sense. The reason for such a fundamental change is that current and future challenges concerning the use and protection of the environment cannot be tackled effectively using the current legal instruments, which are based on a large range of statutory regulations. At the national level there are approximately 4700 provisions spread over 35 Acts, 120 governmental decrees (Orders in Council), and 120 ministerial decrees. To reduce the sheer number of regulatory documents the government announced in 2010 a restructuring of the Dutch environmental and planning law into one *Environment and Planning Act* (hereafter EPA).[3] The first outlines of this ambitious legislative project were sketched by the Minister for

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[1] J. Verschuuren, Country Report: Netherlands, IUCN Academy of Environmental Law e-Journal issue 2010(1).

[2] K.D. Jesse, Country Report: Netherlands. Big Changes in Environmental Planning Law on the Way, IUCN Academy of Environmental Law e-Journal issue 2013(1).

[3] In Dutch: *Omgevingswet*.

Infrastructure and Environment in the spring of 2012 and discussed in the Country Report of 2013. Firstly this report will consider the findings with regards to the monitoring and evaluation of the effects of the provisions of the CRA that were discussed in the 2010 Country Report. Thereafter section 3 will highlight the new developments in the process of restructuring Dutch environmental law and will conclude with final considerations.

The Crisis and Recovery Act Revisited

When *the Dutch Crisis and Recovery Act (CRA)* was enacted in 2010 it was expected to be in force only for a specific period of 4 years in order to alleviate the economic crisis by introducing special provisions for specific projects. If the provisions proved efficient and effective they would be incorporated in *the General Administrative Law Act (GALA)* and the *Environmental Management Act (EMA).* On 25 April 2013 an Act amending the CRA formally extended the functioning of the CRA indefinitely; in practice, the Act will be revoked as soon as the new *Environment and Planning Act (EPA)* comes into force. A specific objective of the CRA is to ensure that the preparation of specific decisions that allow for the realisation of infrastructure, building, sustainability, energy and innovation projects, and also any appeal procedures against those decisions are conducted as efficiently as possible. To this end, Chapter 1 of the CRA contains several provisions relating to decision-making and legal protection that differ from the corresponding provisions in the Dutch GALA and – in the case of one provision – from the EMA. Chapter 1 contains provisions that alleviate certain obligations. This includes provisions that ease the obligation to produce an environmental impact assessment (art. 1.11), that ease the rules regarding the use of expert advice (art. 1.3) and that lower the burden of investigations in the renewed decision-making process after a decision has been declared invalid by an administrative court (art. 1.10).

Further provisions provide that all grounds of appeal must be submitted before the end of the appeals period (art. 1.6(2) and art. 1.6a), that local and regional government authorities have limited right of appeal (art. 1.4), that the court must expedite appeal procedures (art. 1.6(1)) and must pronounce judgment within 6 months after the appeal period has lapsed (art. 1.6(4)), and that the court if it appoints a specific expert (Stichting Advisering Bestuursrechtspraak, a foundation which gives expert advice to the court in questions relating to environmental and spatial planning disputes) to give expert advice in connection

with the appeal proceedings in question, that a time limit of 2 months applies for the expert to make its recommendations (art. 1.6(3)).[4]

The effects of the mentioned provisions of the CRA were evaluated in 2012 and again – building on that first evaluation – in 2014.[5] The study considered to what extent the instruments under Chapter 1 of the CRA help expedite the implementation procedures of the projects to which the CRA applies. The study also considered if the instruments assist in expediting the commencement of the projects themselves. With regard to the procedures that apply in the administrative court (Administrative Jurisdiction Division of the Dutch Council of State) it was found that the obligation to pass judgment within six months (art. 1.6(4)) has a positive effect on the speed with which CRA-cases are settled. Although the 6 month time limit for passing judgment was not met in 57% of cases, CRA-cases were settled on average in 7.4 months by the court, which is about 40% faster than the time in which comparable cases were settled.

A further issue that was considered was whether the CRA has an effect on the outcome of the appeal as well as on the speed with which it is settled. That could be the case if an administrative body was not allowed to appeal (art. 1.4) or if an appellant has failed to submit all grounds of appeal before the end of the appeals period (art. 1.6(2) and art. 1.6a). Evaluating the judgments that were analysed in the study, there is at most a very limited effect. In 1% of the cases an administrative body was not allowed to appeal, while in 4% of the cases a ground for appeal submitted after the time limit had expired was not considered. In these cases it is conceivable that the outcome of the proceedings might have been different but it is not certain. With regards to the provisions concerning decision-making procedures, there was no evidence that art. 1.3 CRA (that ease-rules on expert advice) has

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[4] Some of the provisions discussed in the 2010 country report that were originally included in the CRA already found their way to the Dutch GALA, e.g. on 1 January 2013 the so-called 'relativity'-principle (*Schutznorm*), meaning that claimants can only invoke rules that are specifically meant to protect their interests has been transplanted from art. 1.9 CRA to art. 8:69a GALA and the provision that introduced the possibility for the courts to condone small substantive illegalities if interested persons are not affected was transposed from art. 1.5 CRA to art. 6:22 GALA.

[5] K.J. de Graaf, A.T. Marseille & F.J. Jansen, 'Accelerating court proceedings with the Dutch Crisis and Recovery Act. Direct and indirect effects of procedural provisions', Journal of European Environmental and Planning Law 2013/3, p. 276-294. Also see A.T. Marseille, B.W.N. de Waard et al., *Crisis- en herstelwet. Evaluatie procesrechtelijke bepalingen*, Groningen: Vakgroep Bestuursrecht & Bestuurskunde 2012 and A.T. Marseille, B.W.N. de Waard et al., *Crisis- en herstelwet. Tweede evaluatie procesrechtelijke bepalingen*, Groningen: Vakgroep Bestuursrecht & Bestuurskunde 2014.

been applied by administrative bodies or that they benefit from it. It seems very likely that this provision makes no special contribution to expediting projects. The effectiveness of art. 1.11 CRA (that eases the obligations regarding EIA) could not be properly determined because a substantial number of cases were beyond the EIA process stage at the time that art. 1.11 CRA came into force. Furthermore it became evident that the decision by administrative authorities to make use of the provided possibility to ease certain EIA requirements is used almost as frequently as the decision not to make use of that possibility. With regards to art. 1.10 CRA (re-using evidence found previously for renewed decision-making after the invalidation of an earlier decision by an administrative court) not a single judgment was found in which the applicability of this provision was relevant.

One could say that the most important question is what relationship there is between the speed with which an appeal under the CRA is settled and the speed with which the project subject to the appeal proceedings is executed. The study shows that it varies widely. One important finding of the study is that the speed with which the procedures before the administrative court are settled are related only to a limited extent to the speed with which the project is actually executed.

The 2010 Country Report also discussed some of the new instruments that were introduced by Chapter 2 of the CRA such as the Experimental Rules on 'Development Areas' and the 'one stop shop' principle for the development of new residential areas, comprising anything between 12 and 2000 new houses. These provisions were not part of any official evaluation but have been the subject of ministerial progress reports, which claim that the effects of the instruments are positive. Legal scholars have responded to these provisions in both a predominantly positive and a predominantly negative manner and don't seem to be able to agree.[6] In any case the future EPA will be the reason for the government to revoke the CRA.

The Legislative Proposal for an Environment and Planning Act

In 2014 the legislative process regarding the introduction of an Environment and Planning Act (EPA) was taken to the next level. A legislative proposal for an EPA was submitted to

[6] Predominantly positive: E.C.M. Schippers, A.J. van der Ven & M.C. van der Werf, 'De Crisis- en herstelwet (deel II): een blijvertje!', *Gemeentestem* 2013/65, p. 360-368. Predominantly negative: K.J. de Graaf & H.D. Tolsma, 'Vier jaar ervaring met hoofdstuk 2 van de Crisis- en herstelwet. Over ontwikkelingsgebieden, de experimenteerbepaling en het projectuitvoeringsbesluit', *JBplus* 2014, p. 28-39.

Parliament in June 2014.[7] The EPA will – possibly in 2018 – replace fifteen existing legislative acts concerned with environmental law (including *the General Act on Environmental Permitting, the Water Act, the Spatial Planning Act and the Crisis and Recovery Act*) and incorporate the area-based components of eight other acts (such as the Environmental Management Act). Furthermore the government is working to introduce a new Nature Conservation Act that will be incorporated in the EPA once the latter comes into force. A Country Report is not suited to discuss all the details of this vast change in the structure of Dutch Environmental Law. To give an impression of the impact of this legislative project we could point out that the explanatory memorandum of the proposal amounts to 629 pages. In this Country Report we will highlight some of the important characteristics of the EPA and discuss the main issues that have received criticism. Firstly we will consider the structure of *the Environment and Planning Act* that has now been proposed. Secondly, the main goals for drafting the EPA will be evaluated. Lastly we focus on a few noteworthy aspects of the legal instruments.

Structure of the Proposed EPA

Framework Act

The proposed EPA consists of 23 chapters.[8] One important feature of the EPA is that the content mainly deals with introducing general provisions on the legal instruments which can or shall be used by the competent authorities and includes procedures with regards to implementing those instruments. Therefore the EPA can be classified as a framework act. Current substantive environmental standards will largely be delegated to implementing legislation. To be more specific: these rules will be clustered and streamlined in three governmental decrees instead of the current 120. The government's goal is to bundle many of the existing substantive environmental standards in just three governmental decrees in order to improve accessibility and consistency of the entire body of regulations that is currently considered part of Dutch environmental law. Also the streamlining and clustering at one level of legislation will improve the harmonization of rules, for example on procedures

[7] Parliamentary Papers 2013/14, 33 962, No. 2.

[8] 1. General Provisions, 2. Duties and powers of administrative authorities, 3. Environmental Planning Vision and Programs, 4. General rules on activities in the physical environment, 5. Environmental Permit and Project Decision, 6-9 reserved, 10. Toleration duties, 11. reserved, 12. Land development, 13. Financial provisions, 14. reserved, 15. Damage, 16. Procedures, 17. Advisory Bodies and Advisors, 18. Enforcement and execution, 19. Powers in special circumstances, 20. Monitoring and information, 21. reserved, 22. Provisions on transition and 23. Final provisions.

and measuring methods. Lastly, implementing regulations by governmental decree will allow for proper and timely implementation of European and international obligations.

Although the legislative proposal of the EPA was submitted to Parliament in June 2014, little is yet known about the secondary legislation that will be implemented on the basis of the EPA. Only the structure of the governmental decrees was outlined in a note by the Minister in July 2013. The three decrees will be: *the Environment and Planning Decree* (general and procedural provisions), *the Physical Environment Quality Standards Decree* (practical rules, standards and administrative instructions) *and the Physical Environment Activities Decree* (general binding rules with direct effect concerning activities in the environment). Furthermore the content of the EPA gives some guidance on the characteristics of the secondary legislation. For example the provisions that provide the basis for the delegation of rules indicate which binding rules shall or are allowed to be implemented to shape the assessment framework for applications for environmental permits (such as 'for the purpose of the safety and protection of the environment'). Currently the government is still working on the structure and content of the governmental decrees. One of the main points of critique in literature concerns the fact that little is known about the substantive norms that will be implemented in the decrees. For this reason it is at this stage impossible to assess the effects of the EPA on the existing level of protection of the environment. Also relevant in this respect is the criticism that there is no general codification of substantive principles (of environmental law) in the proposal. The proposal does however state the goal of the EPA in art. 1.3: 'This Act focuses, for the purpose of sustainable development, on the mutual coherence between a) achieving and maintaining a safe and healthy physical environment and a good quality of the environment, and b) managing, using and developing the physical environment to fulfil social functions effectively'. Of course the general principles of environmental law enshrined in international law are recognized and accepted but they will not be codified explicitly in the EPA.[9] With respect to the general principles that are at the core of European environmental law (see art. 3(3) TEU and art. 191 TFEU) the explanatory memorandum of the EPA states that the substantive scope of the EPA is actually broader than the principles of environmental law and that those principles are therefore not applicable to all subjects regulated by the legislative proposal for the EPA.

[9] The Dutch Constitution also does not identify any guiding principle of environmental law.

Main Reasons for Drafting the EPA

Flexibility

One of the reasons to draft the EPA was to introduce more discretion and flexibility in order to be able to tailor solutions to specific situations. The government holds the view that instruments that allow for flexibility should be built into the legal framework itself. The EPA therefore includes general provisions on a so-called 'programmatic approach' which enables competent authorities to pursue environmental objectives through specific programs without impeding the realisation or progress of individual projects. According to the government once the rules including the arrangements that allow for the flexible application are set, the possibilities to deviate from those environmental standards should be limited. To allow for more flexibility the EPA includes for example a generic provision on the principle of equivalence when applying generally binding rules (art. 4.7 EPA); this means that any mandatory measure that is intended to serve the public interests protected by the EPA can – after approval by the competent authority – be substituted by any measure that will protect that interest to an equivalent level. Also a provision that allows for experimental projects is incorporated in the proposal (art. 23.3 EPA).

In response to the draft proposal of the EPA the Advisory Division of the Dutch Council of State critically pointed out the risks that accompany a legal framework that allows for more discretion and flexibility. Such a framework may be less transparent and predictable and might consequently adversely affect the legal certainty of citizens and businesses.[10] In its reaction the government stated that these disadvantages of flexibility do not have to occur.[11] The government is of the opinion that the proposed EPA includes sufficient procedural and substantive provisions to safeguard careful application of discretion and flexibility by the competent administrative authorities. Comprehensibility and predictability are aspects that will receive explicit attention in shaping the implementation of the legislation and as was mentioned before the government is currently still working on the secondary legislation that will have to clarify how much flexibility is provided. It is therefore to a large extent impossible to assess at this stage in the legislative process the flexibility that will actually be offered in the future system of environmental law.

[10] Parliamentary Papers 2013/14, 33962, No. 4, 28-29.

[11] Parliamentary Papers 2013/14, 33962, No. 4, 46.

In Line with EU Legislation

Another point of departure in drafting the EPA is that the new system is more closely in line with EU legislation in terms of aims, terminology and instruments. The EPA has to ensure that environmental law is tailored for the implementation of EU legislation. An analysis of EU Directives revealed a number of building blocks that are now also part of the policy process (and is pictured as a continuous cycle) that underlies the structure of the proposal for an EPA. This cyclical process starts with a comprehensive strategy that describes the policy objectives and quality standards for the physical environment, which can be achieved through programmes, permits and general binding rules. These instruments will be monitored and enforced and as a result they may be tightened to ensure the achievement of the objectives.

Legal Instruments

Variety of Instruments

In the explanatory memorandum to the EPA the government presents six key instruments: the Environmental Planning Strategies, Plans and Programmes, Integrated Environmental Permits, Project decisions and General Binding Rules at national level (discussed in the country report for the IUCN AEL e-Journal of 2013).[12] These six main instruments are introduced as the successors to dozens of current environmental and planning instruments and should render the new system of environmental law as simpler and better. However, if we take a closer look at the legislative proposal for the EPA certain concerns become apparent. The Advisory Division of the Dutch Council of State also noticed a wide variety in legal instruments.[13] First, there exists variety within one type of instrument. For example the instrument known as Programmes, which contain concrete measures and describe how standards or area-based objectives will be pursued. In some cases the Programme is legally binding only for the administrative authority that adopted it and in other cases other administrative authorities are bound by it. In some cases administrative authorities are obliged to adopt a Programme (e.g. in order to satisfy EU requirements) and sometimes adopting a Programme is optional. The so-called programmatic approach is a special type of Programme. Furthermore, the legislative proposal of the EPA contains a wide variety of instruments, which are also determinative for the future structure of environmental law. For example the legislative act provides for competent authorities to adopt general binding rules

[12] Parliamentary Papers 2013/14, 33962, No. 3, 51-54.

[13] Parliamentary Papers 2013/14, 33962, No. 4, 19.

that stipulate the possibilities to elaborate on or deviate from those provisions. It also provides for national and provincial authorities to adopt general binding rules that apply to the power to adopt general binding rules at the local level. Lastly it allows for competent authorities to adopt general binding rules that will allow administrative authorities to set extra conditions that elaborate or deviate from the general rules. In our view the government paints a particularly rosy picture by presuming that by selecting six key legal instruments the future system of environmental law will be simpler and better.

Single or Separate Environmental Permits

The single environmental permit is currently regulated in *the General Act on Environmental Permitting* (hereafter GAEP).[14] Before the introduction of the GAEP in 2010 a wide variety of sectoral laws and regulations demanded sectoral permits for activities that could adversely affect the different aspects of the environment. Citizens and businesses seeking a permit were confronted with a range of procedures entailing a variety of different time limits, assessment criteria and legal remedies. The GAEP intended to address these problems through the procedural integration of permits: a one-stop-shop makes applications easier for citizens and businesses. An applicant is *obliged* to submit a single application when the activity itself falls within the scope of more than one requirement for a permit.[15] An often used example is the construction and operation of a large pig farm; both the construction itself and the operation of the farm would require an environmental permit. Besides this obligation, the applicant retains the *option* to apply for separate permits in cases where the project could possibly be split into separate parts. The first empirical data about the permitting system of the GAEP remarkably reveals that citizens and business seeking a permit prefer to apply for separate permits instead of one single permit. An application for a single permit for multiple activities is rare.[16]

In the legislative proposal for the EPA the applicant is allowed more leeway to apply for separate permits. The obligation to submit a single application when the activity itself falls within the scope of more than one requirement for a permit is not incorporated into the EPA. The government reasons that more freedom to apply for separate permits simplifies the

[14] In Dutch: Wet algemene bepalingen omgevingsrecht.

[15] Art. 2.7 GAEP.

[16] R. Uylenburg, 'De omgevingsvergunning in een nieuwe habitat', in: *Naar een nieuw omgevingsrecht* (Preadviezen Vereniging voor Bouwrecht nr. 40), p. 53-73.

procedure for the applicant.[17] However, it is questionable if the protection of the environment is secured in terms of this trend that allows for the application of separate permits. One of the advantages of a single permit application and assessment is that the various impacts of the activities on the environment can be assessed simultaneously and in close connection to another. Such an assessment could result in a better outcome for the environment as a whole. From this perspective it could be argued that the EPA should not provide more flexibility for applicants to apply for separate permits but rather encourage applicants to use the one-stop-shop strategy.

Final Considerations

The structure of environmental law in the Netherlands is changing rapidly. A proposal for an *Environment and Planning Act (EPA)* will restructure most regulations concerned with the use and the protection of the physical environment. The goals of this act, for the purpose of sustainable development, are both to achieve and maintain a safe and healthy physical environment and a good quality of the environment, and to effectively manage, use and develop the physical environment to fulfil social functions. It is indeed not a small task. It is estimated that Country Reports for the Netherlands in the coming years will have to address the developments of the future Environment and Planning Act.

[17] Parliamentary Papers 2013/14, 33962, No. 3, 161-162.