PUBLIC ENVIRONMENTAL LAW
IN THE NETHERLANDS

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In this contribution we will address the following issues. In § 1 we will provide a brief introduction to the Dutch legal system (especially with regard to the Dutch Constitution and the General Administrative Law Code). In § 2 we shall discuss several legal bases for environmental protection (such as the Constitution, the Environmental Management Act and Environmental Principles). We continue, in § 3, with an overview of the main legal instruments of environmental policy (starting off with three types of regulations, then with instruments such as the duty of care, planning, quality standards, permits and general rules, et cetera). In § 4 we address the matter of public participation and legal protection (especially with regard to permits and enforcement acts). The aspect of enforcing environmental law is discussed in § 5, at which point three types of enforcement (administrative, civil and penal) are presented separately. Finally, in § 6, we will present some conclusions on Dutch environmental law (in the light of recent and future developments).

1 INTRODUCTION TO THE DUTCH LEGAL SYSTEM

In order to provide a background for understanding Dutch public environmental law, the framework of public law in the Netherlands (about 16 million inhabitants/41.000 km²) will be set out in this first section. First we will offer an insight into the constitutional basis of public law (§ 1.1). Then some remarks will be made on the General Administrative Law Code, which is of utmost importance for understanding Dutch administrative law and has direct relevance to public environmental law (§ 1.2). Furthermore, it must be stressed that in this chapter the term environmental law is primarily used only to describe the law that concerns the environmental hygiene (= environmental law in a narrow sense) or, in other words, prevention of pollution caused by potentially harmful activities. The law on land use planning and the law on the conservation of nature are not included in this definition and will not be addressed, unless this is relevant from the perspective of the law on prevention of pollution. Nevertheless it should be mentioned that increasingly there are efforts to integrate these three areas more and more (= environmental law in a broad sense).

1.1 THE DUTCH CONSTITUTION

Public environmental law is rooted in the general framework of Dutch public law. The basis of this framework is laid down in a written constitution, called the Grondwet (Gw).

In the first chapter of this Constitution we find a number of constitutional rights, such as freedom of speech, the right to vote or to stand for office, freedom of belief and respect for privacy. This chapter also covers certain so-called ‘social-rights’, such as the right to social security, to work and to a public health service. In Article 21 Gw we find that the government has the obligation to conserve and improve the environment. Thus it can be said that the involvement of government with (the state of) the environment has a constitutional basis. The exact standing of this basis will be discussed in § 2.

The second, third and fourth chapters of the Constitution respectively deal with the monarchy, the central government, Parliament (both its chambers) and the primary advisory bodies. In the fifth chapter, legislative and administrative competencies are described. According to Article 81 Gw, statutory competence lies with the Crown (Kroon) - that is to say the King and his cabinet - and both chambers of Parliament (Tweede en Eerste
Kamer); Crown and Parliament are supposed to be one legislative body. The fifth chapter then deals with the procedure for introducing new legislation (Wetten). Article 89 Gw deals with lower levels of legislative decision, such as the royal decrees (Algemene Maatregelen van Bestuur, Amvb) and other decisions of the central government that are generally binding, such as ministerial decisions. The fifth chapter also deals with the relation between parliamentary statutes and treaties or (other) decisions of international bodies. According to Article 93 Gw provisions of international treaties and decisions of international bodies, which are generally and directly binding according to their content (self-executing), are binding from the moment they are ratified and published. Article 94 Gw goes on to state that statutory provisions of national law are non-binding if their application is in conflict with the content of these generally and directly binding provisions of treaties and decisions of international bodies. Of course the Netherlands also have to deal with the direct effect and supremacy of EC law.2

Furthermore - still within the fifth chapter - Article 107 Gw states that apart from specific statutes on civil and penal law, general provisions of administrative law are to be set out in a specific statute. The General Administrative Law Code is meant to fulfil this legislative obligation (this Code will be discussed further under § 1.2).

Last but not least, it must be mentioned that the Dutch nation is a decentralized unitary state (decentrale eenheidsstaat). This is to say that the primacy of legislative and administrative powers rests with the central government (Crown and Parliament, Crown, and individual members of the Cabinet of ministers). In Chapter 7 of the Constitution is set out the basic legislative and administrative competence of decentralized authorities. Article 124 Gw deals with the main competencies of the provinces (provincies) and municipalities (gemeenten). The first section stipulates that both provinces and municipalities are autonomous in their legislative and administrative competence for dealing with their own 'public housekeeping' (autonomie). These competencies are limited in the sense that - roughly speaking - they may not come into conflict with (the intentions of) acts of higher legislative or administrative authorities, such as those at the central government level. The second section of Article 124 Gw states that by statute, both legislative and administrative assistance can be requested or demanded from decentralized authorities. In contrast to the former ‘autonomous’ competencies, the latter are described as medebewind (delegated governing). In practice, most of the decentralized legal competencies are based on central legislation (delegated governing). After this provision for the provincial and municipal powers, Chapter 7 describes the specific organs of the decentralized authorities, such as the Royal Commissioner, the Board of Deputies and the Provincial Council within the provinces, and the Mayor, the Council of Mayor and Aldermen and the Municipal Council on the municipal level. The formation of these bodies (by election or appointment) and the way in which they should operate are also dealt with. The Councils have legislative powers, while the other organs have executive powers.

Chapter 7 also mentions and describes the (more functional decentralized) District Water Boards (Waterschappen, Article 133 Gw) and gives general rules for the formation of other public bodies in the field of (trading) corporations (Bedrijfs- en productschappen, Article 134 Gw).

In figure 1 an overall picture of the organization of the Dutch state is presented. In figure 2 an overview is given of the legislative hierarchy. With the exception of the legislation at the central level that has already been mentioned, the regulations (verordeningen) of the decentralized authorities are stated.

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2 See the chapter in this book on EU environmental law.
Returning to the Constitution, we must point out that in Chapter 6 thereof are laid down the basic provisions for the judicial branch of government, among which Article 112 Gw allows for the establishment, by statute, of specific administrative courts to decide on administrative cases. An example of this can be found in the General Administrative Law Code on the basis of which the (Administrative section of) District Court (Rechtbank) is the first instance court against most decisions in individual cases of administrative organs. While in first instance the District Court thus deals with administrative matters in addition to penal and civil cases, in appeal these cases are decided by administrative courts, either the Council for Appeal (Centrale Raad van Beroep) in social security matters or the Judicial Department of the Council of State (Afdeling Bestuursrechtspraak Raad van State, ABRS) in most other matters. It must be pointed out that this is the general rule. For administrative decisions for instance (permits and enforcement decisions) on the basis of the Environmental Management Act the Judicial

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3 In case of general regulations the civil courts are competent (based on tort law).
4 The competencies of these courts are based on the Appeals Act (Beroepswet) the Council of State Act (Wet op de Raad van State) respectively.
Department of the Council of State is (for historical reasons) the only competent court (in first and only instance)\(^5\) It is residing in The Hague. The system of the Dutch courts is indicated in Figure 3.

\[\text{Figure 3: Court organization (Articles 112 and 113 Constitution)}\]

<table>
<thead>
<tr>
<th>Court organization</th>
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<tbody>
<tr>
<td><strong>First instance</strong></td>
</tr>
<tr>
<td>• Sub district Courts (<em>kantongerechten</em>)(^*)</td>
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<tr>
<td>• District Courts (<em>Arrondissementsrechtbank</em>)(^**)</td>
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<tr>
<td><strong>Appeal</strong></td>
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<tr>
<td>• Court of Appeal (<em>Gerechtshof</em>)(^*)</td>
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<tr>
<td>• Administrative Courts (Awb decisions)</td>
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<tr>
<td><strong>Cassation</strong></td>
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<tr>
<td>• Supreme Court (<em>Hoge Raad</em>)(^*)</td>
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\(^*\) Only in civil or penal cases, as well as in taxation cases
\(^**\) In addition to this there is also the Corporations Tribunal (*College van Beroep voor het bedrijfsleven*) in cases of decisions of (trading) corporations.\(^6\)

Given the specific decentralized unitary system, an important feature of Dutch administrative law is that of ‘stratified regulation’ (*gelede normstelling*). This means that rights and obligations of citizens with regard to the interests paramount to a certain parliamentary statute are often not determined in the statute in question. But they are only gradually introduced, as different legislative and administrative decisions become clearer, until at some point, for instance in a permit, they are definitively determined. Take, for example, the Environmental Management Act (*Wet milieubeheer*, Wm see § 2.2.2). This act in itself does not provide definite substantive standards on the extent to which a potentially environmentally harmful activity can take place. If it concerns an activity for which a permit is required - this is stated in a Royal decree based on the Wm, namely the Establishments and Licences Decree (*Inrichtingen en vergunningenbesluit*, Ivb) - a number of rules will have to be considered. Specific environmental plans, quality standards and possibly certain general instructions that the Crown has set as (a guideline for) emission limits would have to be taken into consideration. Only by weighing and sometimes adding up the standards from these rules and regulations a definitive decision on the permissibility of the activity in question can be taken and the exact amounts of allowable emissions can be determined.

### 1.2 THE GENERAL ADMINISTRATIVE LAW CODE

The General Administrative Law Code (*Algemene wet bestuursrecht*, Awb) lays down the general ground rules of administrative law. Before 1994, the year in which this Code came into force, there was no general written administrative law. Apart from the abundance of administrative statutes for specific areas of governmental tasks, such as care for the environment, general administrative law consisted merely of the general principles of proper administration and some principles of natural justice, and even those had to be deduced from case law. Since the Awb took effect the Dutch legal system has a proper codification of general administrative law.

Let us consider some specific subjects that are dealt with in the General Administrative Law Code.

The Code first gives definitions of some of the basic terms of administrative law, such as ‘administrative bodies’ (*bestuursorganen*), ‘concerned parties’ (*belanghebbenden*), administrative decisions (*besluiten*), specific kinds of administrative decisions, such as non-general decisions (*beschikkingen*, like permits: *vergunningen*), general policy rules (*beleidsregels*) and subsidies, as well as administrative review by authorities and judicial review by the courts. The Awb goes on to state (some) general principles of proper administration (*algemene beginselen van behoorlijk bestuur*). Furthermore, procedural rules are determined for the preparation of specific kinds of administrative decisions. (General) public participation plays an important role in some of the procedures that can be applied, if it is so prescribed in a specific statute, or if a specific authority, competent to take administrative decisions, so decides (chapters 3 and 4 Awb). These chapters apply to the issuing of environmental permits (see Public Participation § 4).

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\(^5\) Although there is still discussion among scholars as to whether or not this is justified, a change is not to be expected soon.

\(^6\) Its competence is based on the Judicial Review Corporations Act (*Wet bestuursrechtspraak bedrijfsorganisatie*).
Chapter 5 offers provisions with regard to (instruments of) supervision and enforcement (toezicht en handhaving) of administrative law, such as shutting down activities with costs recovery or the issuing of a penalty. This chapter also applies to environmental administrative offences (see Enforcement § 5).

Chapters 6, 7 and 8 Awb deal with general provisions for administrative appeal and judicial review. The basic procedure is that a concerned party (belanghebbende) can appeal against the decision of an administrative body at the administrative section of the District Court (rechtbank). Before appealing the party concerned should - as a rule - ask for administrative review by the administrative body that took the decision in the first place (complaint: bezwaar). Next to an appeal to the administrative section of the District Court there is - generally speaking - the opportunity for a higher appeal. Where the appeal can be made depends on the specific decision. In later sections we will show that as far as most administrative decisions in environmental law are concerned, a somewhat different procedure is applicable. Having said that, it should be emphasized that the General Administrative Law Code does not outrank other administrative statutes. Therefore it is always possible that other, more specific or later, legislative acts (statutes) contain provisions different from those in the General Administrative Law Code (see also under § 4 and § 5).

2 LEGAL BASIS FOR ENVIRONMENTAL PROTECTION

The basis for governmental involvement in environmental law is laid down in Article 21 of the Constitution: 'The duty of care of the government is aimed at the inhabitation of the land and the protection and improvement of the environment'.

This article was introduced in the revision of the Constitution in 1983. As it concerns a social right, the article states an obligation on the government without actually serving as a basis for claims by civilians against the state. This conclusion can be drawn from the intention with which social rights were introduced into the Constitution, but also from attempts that were made to bring a claim on the basis that the government had violated this social right. On the other hand, the Dutch government has invoked Article 21 Gw when putting forward civil claims against civilians accused of polluting the environment, so that it could underpin its legal standing (see § 5). This was also accepted by the Supreme Court.

In this paragraph we will concern ourselves firstly with the statutory foundations from before the introduction of Article 21 Gw (in § 2.1), and then, somewhat more elaborately, with these foundations, among which mainly the Environmental Management Act, since the existence of Article 21 Gw (in § 2.2).

2.1 ENVIRONMENTAL LAW PREVIOUS TO ARTICLE 21 GRONDWET

It is clear that the Dutch government was involved in environmental policy-making before the introduction of Article 21 Gw. In 1875 the Nuisance Act (Hinderwet) was introduced, and much later, in 1958 the Act on Marine Oil Pollution - as an implementation of the Oil Pollution Treaty (London, 1954) - and shortly thereafter the Pesticides and Herbicides Act (Bestrijdingsmiddelenwet 1962) and the Nuclear Energy Act (Kernenergiewet 1963). By the end of the 1960s and at the beginning of the 1970s legislative activities were based on the idea of a compartmental legislation: one environmental statute for each of the elements water, soil and air. Thus in 1969 the Water Pollution Act (Wet verontreiniging oppervlaktewateren) and in 1970 the Act on Air Pollution (Wet inzake de luchtverontreiniging) came into being. Soil protection warranted an approach in conjunction with waste management: in 1976 the Act on Chemical Waste (Wet chemische afvalstoffen) and in 1977 the Act on Waste Products (Afvalstoffenwet) came into being. To cover the specific subject of nuisance through noise, the Noise Nuisance Act (Wet geluidhinder) was introduced in 1979. For more recent legislation, especially concerning the clean up of polluted soil, see below § 3.5.7.

With this diffusion of statutory environmental regulation, entrepreneurs would often need several permits and subsequently had to ‘undergo’ a number of procedures to acquire the necessary licences. Furthermore there was a considerable lack in transparency of the system as a whole. For the sake of co-ordinating procedures, the introduction of (proper) public participation and judicial review, and in order to facilitate environmental policy-making, in 1979 the Act containing general provisions on environmental hygiene (Wet algemene bepalingen milieuxhygiëne, Wabm) took effect.

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7 In Dutch administrative law (since the introduction of the Awb) the possibility to appeal to another (higher) authority before going to the administrative court has almost vanished.
2.2 ENVIRONMENTAL LAW SINCE ARTICLE 21 GRONDWET

2.2.1 Some Preliminary Remarks

One could argue that Article 21 Gw is a codification of a de facto existing opinion that government has an explicit task in protecting and improving the environment. This opinion prevailed through the economic recession of the 1980s; a recession which was fought by ‘deregulation’ among other instruments. One of the results thereof was the introduction of a general competence of the Crown for using general rules (royal decrees) instead of permits for specific categories of potentially harmful activities. This favours equality and legal certainty above public participation, and deciding on the merits of a specific case at a more decentralized level. Furthermore, within permits, preference was given to the use of so-called end-of-pipe standards rather than meticulously regulating the production process. In tune with the attempt to stimulate self-regulation (and thus ‘internalization’ of environmental care) gentlemen’s agreements (between government and specific branches of industry, and sometimes environmental interest groups) and in a number of statutes a general duty of environmental care, were introduced on a broader scale.

2.2.2 The Environmental Management Act

In 1993 the Environmental Management Act (Wet milieubeheer, Wm) was introduced. It is the name of a fully renewed and enlarged version of the Act containing general provisions on environmental health/hygiene (Wet algemene bepalingen milieuhygiëne) and an attempt to improve the internal (and external) integration of environmental protection. That is to say: internally to integrate dealing with pollution and several types of nuisance under one statute; and externally to ensure that environmental policies are also integrated in policies of urban planning for instance, and that there is proper co-ordination of environmental plans, quality standards and permits and relevant instruments in other areas of governmental care.

The Environmental Management Act has been devised as a statute that is not a complete codification from the outset but a statute of which the structural framework is filled in step by step. At this point the chapters on (1) Preliminary matters, (2) Advisory bodies, (4) Planning, (5) Quality standards, (7) Environmental impact assessment, (8) Permits and general rules, (10) Waste products, (12) Monitoring and registration, (13) Procedures for permits, (14) Co-ordination, (15) Financial arrangements, (17) Calamities, (18) Enforcement, (19) Public openness and, finally (20) Judicial review have taken effect. The designated chapters on (3) International Affairs, (6) Environmental Zoning, (9) Substances and products, (11) Other activities and (16) Financial security, have, however, not yet been brought before Parliament. In the spring of 2001 the Ministry for Housing, Land-use and Environment (Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, VROM) issued a proposal for discussion on the future of the Environmental Management Act. This proposal is for the reconsideration of the need for statutory provisions, particularly with regard to the matter of introducing more instruments for self-regulation (such as more deregulation in conjunction with more duty of care provisions and codification of principles of environmental law, as well as the introduction of tradable permits). It also focuses more on sustainable development (linking the chain of production, consumption and waste-pollution), external integration through planning and setting environmental quality standards (especially in relation to land-use planning), enforcement, and public participation and judicial review. The motive for reconsidering the issues of external integration and enforcement is, among others, that in 2000/2001 Dutch society was confronted with two major incidents: an explosion at a fireworks storage warehouse in the city of Enschede and a café fire in the town of Volendam, both causing many casualties and a considerable number of deaths. It became apparent that the care for public safety and the protection of public health was seriously lacking owing, among other reasons, to lenient permit-policies, insufficient supervision and an almost structural practice of condoning environmental offences (gedogen). It is simply too early to tell what changes will be made in the present Environmental Management Act, or how the plans for ‘completing’ this statute will be affected. It is however clear that changes, not only in legislation, will be put into force.

All in all, today’s Environmental Management Act is meant to offer general provisions regardless of the specific environmental issue involved (internal integration), such as noise, air pollution and permitting. This is especially the case regarding the permitting of industrial activities (establishments). General provisions such as provisions for decision-making on applications for permits, enforcement and judicial review are made applicable for the sectoral statutes (see below) through a system of cross-references, such as Articles 13.1, 18.1 and Article

10 The enactment of (new) legislation is ‘tested’ in this respect (Marktwerking, Deregulering en Wetgevingskwaliteit).
12 There are also chapters 21 and 22 dealing with ‘further provisions’ and ‘final provisions’ respectively, which are not further addressed here.
13 The website of this Ministry is: <http://www.minvrom.nl>.
14 See the Report Met recht verantwoordelijk, Parliamentary Documents Kamerstukken II 2000/01, 27664, nr. 2.
20.1 Wm demonstrate. There are also cross-references within the Environmental Management Act itself. Examples are Article 8.8 Wm that determines that various standards, based on other articles of the Environmental Management Act (for instance, the articles on planning: Articles 4.3 to 4.24 Wm, and the articles on quality standards: Articles 5.1 to 5.5 Wm) should be taken into consideration when a decision on an application for a permit is made. At present there are still a number of environmental matters regulated by specific sectoral environmental statutes, such as the Water Pollution Act (permit for surface water pollution), the Nuclear Energy Act (permit), the Act on Air Pollution (general rules and emergency competencies), the Noise-Nuisance Act (zoning), the Soil Protection Act (other actions than Wm-establishments and clean-up of polluted soil) and the Pesticides and Herbicides Act. One can find within the mentioned proposal for discussion on the future of the Environmental Management Act a number of initiatives to further integrate these regulations within the Environmental Management Act.\footnote{For instance, at present the Noise Nuisance Act is under serious revision and ‘modernization’ and it is expected that this revised Act will soon be incorporated in the Environmental Management Act.}

To sum up, it can be reiterated that Article 21 Gw has had no specific, clearly marked influence on the content or size of government involvement with the environment. It has been, and probably will be no more or less than a ‘landmark’ stating a generally accepted view on governments’ responsibility for a proper environmental policy. Secondly, one should be aware of the prominent role that the Environmental Management Act plays in Dutch environmental law at the end of the 20th and beginning of the 21st century. Within the next one or two years it will become clear which (major) changes this Act will undergo to offer a proper regulatory framework for future environmental policies and environmental protection. In conclusion, figure 4 presents an overview of Dutch environmental legislation.
2.2.3 General Principles of Environmental Law

At the moment, Dutch environmental law offers no general codification of the main principles of environmental law. As mentioned before this is now finally being considered. The main objectives of this are to offer some normative guidance for self-regulation and to underpin external integration of environmental protection by broadening the scope of non-environmental permit-systems with the objective of environmental protection (opening for instance the possibility to refuse a building permit, not only on grounds of land-use planning, but also on the grounds of infringing the principles of environmental protection). The idea is to sum up a number of these environmental principles in the Environmental Management Act.

Presently one can find some hidden and shadowy references to these principles in this Act, for instance: sustainable development (Article 4.3, section 2 Wm), the standstill principle (Article 5.2, section 3 Wm) and the ‘alara principle’ (the pollution should be as low as reasonably achievable (Article 8:11, section 3 Wm). In environmental policy documents frequent reference is made to principles contained in Article 174, section 2 of the Treaty of the European Community: the precautionary principle, the principle of preventive action, the

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**Figure 4: Environmental legislation**
principle of source-aimed regulation, and the ‘polluter pays’ principle, although these principles are not binding for EC Member States.

According to the proposal for discussion mentioned above, it is also intended to codify within the Wm: the precautionary principle, the prevention principle, the polluter pays principle, the principle of source-aimed regulation, the principle of sustainable development and the principle of external integration. At present it is unclear whether or not the principles, in future, can be regarded as legally binding and can or will be applied in a court of law.

3 LEGAL INSTRUMENTS OF ENVIRONMENTAL POLICY

In this section we wish firstly to point out briefly that in Dutch environmental law, as in many other states, distinction is made between three different categories of legal instruments: direct regulation, economic or indirect regulation and communicative or self-regulation.

- Direct regulation (command and control) implies that the legislative branch of government unilaterally sets out provisions and standards. It is the force of law that steers the conduct of citizens and of government into certain ‘environmentally sound’ directions or patterns. For this type of regulation, in the Dutch situation, the image of the so-called ‘regulatory chain’ shows how government regulation is brought into practice. This regulatory chain consists of six steps: planning, legislation, setting standards, issuing out permits, implementing permits and enforcement. The general idea is that policy planning forms the basis for regulation. Through planning, problems and possible solutions are described priorities, and targets are set. Then, within the regulatory process, new legislation is introduced. Specific environmental standards are set on the basis of statutory competencies, in many cases by Royal Decree (‘general rules’). In many cases, however, the definitive determination of rights and obligations takes place in a permit that is issued at a decentralized authority level for specific activities. The next step is that those specific activities are undertaken in compliance with the standards set out. In many cases this step in the process also involves governmental attention. At the end of the cycle, regulation is enforced by government and - if necessary - the application of sanctions. Then the cycle starts again: periodically, government re-evaluates whether or not the goals that were previously set out have been met.

Figure 5: Regulatory chain

- Indirect regulation aims at changing behavioural patterns by making ‘environmentally sound’ choices more attractive or - by contrast - by making environmentally harmful options less attractive. It is the prospective

16 See supra note 14, proposal nr. 3.
17 For an overall handbook on Dutch environmental law, see Ch. Backes, Th.G. Drupsteen, P.C. Gilhuis and N.S.J. Koeman (eds), Milieurecht (5th edn, 2001).
19 It is worthwhile noting that (permanent) evaluation committees exist for the Environmental Management Act as well as the General Administrative Law Code. On the basis of research by experts propositions can be made to change these statutes.
economic benefit or loss that steers conduct. Financial incentives, such as subsidies or fiscal regulations (taxes), can be applied effectively as a means of changing conduct indirectly.

- With communicative or self-regulation, government limits itself to educational programmes and applies only those instruments that require the explicit consent of the parties involved (for instance, gentlemen’s agreements, eco-audits et cetera). In this case it is not the force of law, or the force of economic incentives that influence conduct, but the personal conviction of those concerned or their (joint) personal commitment towards others.

Generally speaking it can be said that in Dutch public environmental law an attempt has been made to make more use of economic or indirect regulation and communicative or self-regulation. Although legal or direct regulation is still the dominant approach to environmental problems, presently an attempt is being made to stimulate other types of regulation, for example through duties of care and tradable permits. Within direct regulation, policy-planning has had much attention and will be promoted also as a means for internal and external integration. It is expected that more and more general rules will be put into force to reduce the administrative burden of licensing. In this section we shall now limit ourselves to an overview of the main environmental law instruments, such as the general duty of care (§ 3.1), environmental planning (§ 3.2), environmental quality standards (§ 3.3), permits and general rules (§ 3.4) and - finally - (in § 3.5) a selection of some other instruments inside or outside the Environmental Management Act.

### 3.1 Duty of Care

A general duty of care provision was introduced into the Environmental Management Act. In Article 1.1a Wm it is stated in the first section that ‘every citizen should take care of the environment’. In the second section, it reads that such care means that:

- each person who knows or can reasonably be expected to know that through his/her actions (or by refusing to take action) environmentally harmful effects will or could occur, is obliged to refrain from these actions in as far as he/she can reasonably be expected to do so, or to take any measure that he/she can reasonably expect will prevent the harmful effects or, in as far as the effects cannot be avoided, limit or eliminate those effects as far as possible.

Enforcement of this article by government bodies is possible by the means of administrative or civil law (see below § 4 and § 5), but not through penal action because the provision is considered to be too vague and thus (possibly) in conflict with the ‘lex certa’ principle. Some authors have argued that, even for administrative and civil enforcement, the provision will turn out to be too vague. Others have stated that the provision will only be invoked in clear-cut cases when vagueness will not give rise to dispute. Furthermore, they argue that the introduction of this general duty of care provision has a psychological impact that should not be underestimated. Although Article 1.1a Wm is in theory applicable to everybody it is, in practice, (so far, not too often) used as a kind of safety-net for tackling industrial activities in cases of enforcement. There are more specific duty of care provisions, and these are more frequently used as an enforcement tool. They can be found in the Environmental Management Act, sections 10.2 - waste - and 17.1 - calamities - but also in more specific environmental legislation. Very important and more frequently used in practice is the duty of care provision that is related to soil pollution, which is codified in Article 13 Soil Protection Act. Very recently, Parliament accepted a clarification in the legislation as to which authority is competent to enforce these duties of care, especially in cases where no Wm-permit is required because the activity at hand is not a Wm-establishment.

### 3.2 Environmental Planning

In Chapter 4 of the Environmental Management Act we find the framework for the environmental planning system. There are two types of planning, namely the strategic environmental plans and the operational environmental programs.

#### 3.2.1 The Strategic Environmental Plan (EP)

The strategic environmental plan covers overall objectives for a period of four years, and presents an outlook for the four-year period thereafter. Making an EP once every four years is an obligation for the Crown (Article 4.3 Wm) and the twelve provincial councils (Article 4.9 Wm). The municipal councils are not obliged to make

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21 In June 2001 the 4th National Environmental Policy Plan was published by the central government. It is for a large part a description of the (international) developments in this field. It states that in the coming years important measures must be taken as to: the loss of
such a plan but can do so if they so decide in which case a standard procedure within the Environmental Management Act is applicable (Article 4.16 Wm). The EPs are binding only for the authorities within the same level of government (central, provincial, municipal - Article 4.6, section 3, Article 4.12, section 3 and Article 4.19, section 3 Wm). There is no vertical, top-down binding of EPs. However, in the first place one should consider that under the general principle of proper administration, in particular the principles of deciding carefully and with adequate reasoning, the authorities are obliged to make allowance for the EPs of higher authorities. Thus lower authorities can decide to diverge from EPs made by higher authorities, but only if such a choice is properly and convincingly reasoned. Apart from this, it must be remembered that Article 4.13 Wm enables the ministers involved to instruct the provincial authorities on the content of a provincial EP (PEP). In giving such instructions these ministers make allowance for the national EP (NEP) that is in force at that moment. This type of instruction is given only in cases where general interests make this desirable, as in the case of major infra structural works. The general idea, however, is that the vertical tuning of the respective plans takes place through active exchange of information and deliberation (Article 4.2, section 2 Wm), as well as through the influence of central general rules (royal decrees), that limit the room for decentralized policy-making.

As far as other environmental plans, sectoral plans such as the ‘water management plan’ (waterhuishoudingsplan) and as far as land-use planning are concerned, specific provisions (Article 4.3, section 4 and Article 4.5, section 5 Wm) require that the authorities in question make allowance for these plans and give an indication at which point they intend to change these other plans if such is deemed necessary. This is called the ‘leap-frogging’ system: at some point a new EP will lead to adjustments in other plans, but as a result of the periodic renewal of these other plans in turn the EPs are adjusted, and so on. In practice ‘leap-frogging’ has proved to be a complicated technique that actually hampers external integration. Therefore it is now proposed to facilitate integrated planning (for the environment, nature conservation, urban planning, water management and other relevant interests) in one plan for the ‘human physical surrounding’ or - at least - to enable the planning authorities concerned to directly change one plan by changing the other.

3.2.2 The Operational Environmental Programme (EPR)

Chapter 4 Wm also describes the so-called operational environmental programmes. Both at the central level of government and at the level of the provinces and municipalities, an EPR has to be brought out every year. In the national EPR (NEPR) a list is presented of environmental policy activities for the coming four years. After that the NEPR includes a programme for defining and adjusting environmental quality standards, a financial analysis and budget report (linked to the overall national budget) and finally, a report on the implementation of the present NEP. In setting out the NEPR the ministers involved make allowance for the content of the present NEP (Article 4.7 Wm). The provincial EPR (PEPR) also contains a list of actions for the coming four years and is also linked to the EP, though it may be, as in this case, linked to the PEP. Among the list of actions to be taken, an overview would have to be given of cases under investigation and cases of serious pollution of the soil as described in the Soil Protection Act. What precise action is intended for these cases and on what date these actions are to be undertaken must be pointed out. Furthermore, the list of actions should include actions - for the coming four years - in the area of reducing nuisance caused by noise. Again the financial aspects of the environmental policies, in this case on the provincial level, would also have to be presented (Article 4.14 Wm).

Finally, the municipal EPR (MEPR) should also include a list of environmental policy activities in the next four years. If a municipal EP (MEP) is in force - again the municipalities are not obliged to make an EP (unlike central government and the provinces) - then the municipal council will have to make allowance for the content of that MEP in the MEPR. Again, the financial aspects will also have to be addressed in the programme (Article 4.20 Wm).

These are the most important plans and programmes. There are, however, some other ‘features’ that we want to point out just very briefly:

- In some cases regional public bodies are formed to jointly fulfil certain policies that would otherwise have to be carried out by lightly populated neighbouring municipalities. If such is the case for environmental policies, then these bodies are obliged to bring out an EP and EPR according to the set-up described earlier (Article 4.15 a and b Wm).

- Chapter 4 Wm also mentions the making of a so-called municipal sewerage-plan (Articles 4.22-4.24 Wm).

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23 For the Environment, for Transport and Water Works, for Agriculture, Conservation of Nature and Fisheries, and for Economic Affairs (Article 4.1 Wm).
24 For the relation between these plans and the Wm-permit, see § 3.4.
Last but not least, Article 4.2 Wm demands that the Minister for the Environment sees to it that once every four years a scientific report on the state of the environment and the expected developments thereof (for at least the next 10 years) is brought out and presented to Parliament, and made available to the public. The task of preparing this report is delegated to an official (independent) Environmental Planning Agency.  

3.3 Environmental Quality Standards

Whilst planning aims at achieving a certain environmental quality, and thus often encompasses the setting of quality standards, the need was felt to introduce standards with a more binding character than those in government plans. To that effect, Chapter 5 of the Environmental Management Act offers a useful framework. Quality standards contain the maximum concentration of certain substances allowed in the water, the air or the soil, or the maximum intake of a certain substance in each of these elements. In doing so, some standards can be binding for the entire territory of the Netherlands, in other cases the standards are applicable only in specific areas. Some of these areas desperately need an initiative to upgrade the level of environmental standards to meet the average - or general - level. In other cases, a (set of) quality standard(s) for a specific area is used in order to preserve the existing high environmental standard.

Naturally the quality standard, as a standard that focuses on the effects of (emissions of) certain substances to the environment, is in itself insufficient for actually improving or preserving the environment. Therefore, cross-references are made to the process of setting standards in permits and general rules that are aimed at directly regulating the (maximum) pollution caused by the sources of environmental harm.

A framework of competencies for setting quality standards is presented within Chapter 5 Wm. Three authorities are found to be competent: the Crown, by introducing standards in a Royal Decree (Article 5.1 Wm), by the decision of a provincial council (Article 5.5 Wm) or by a ministerial regulation (Article 5.4 Wm). The latter being in the case of standards that, although normally set by the Crown, are a strict implementation of binding standards set by treaty or by an international or supranational body (such as the EC). When setting a quality standard, the Crown or a provincial council should acknowledge available scientific and technical knowledge, information concerning the present state of the environment and the (autonomous) developments that are to be expected therein, the possibility - within reason - of reducing the level of environmentally harmful effects in as much as - reasonably - possible (alara), and the financial and economic consequences which can reasonably be expected to follow the setting of specific quality standards (Article 5.1, section 3 and Article 5.5, section 1 Wm). It should be remembered that in the use of quality standards, particularly if they are to be applied only to a specific, limited area, the stand-still principle should (according to Article 5.2, section 3 Wm) be respected: if the actual state of the environment in the area involved is cleaner than the standard in question requires, then the actual quality level will automatically be assumed to take the place of the (less) quality as prescribed in the decision. The particular section explicitly adds that it is not possible to make an exception to this rule in the decision in question.

Article 5.2 Wm states that the decision by which a standard is set should also include an instruction on how the standard would have to be taken into account when taking other decisions. In theory, three types of quality standards are distinguished: strict, reasonable and aspired standards. ‘Strict standards’ have to be abided by in decisions concerning the maximum pollution that a certain (category of) activity (activities) may cause. When ‘reasonable standards’ are concerned, the authorities involved can deflect from the standards but need ample arguments to make their case. ‘Aspired standards’ have a somewhat different function. They are not included in the system of Chapter 5 Wm. One could expect to find aspired standards in policy documents such as environmental plans. There they serve as a definition of the standards that have to be reached in the long run. Again, as far as strict and reasonable standards are concerned, the decision containing these standards will have to indicate where and to what extent the standard has to be taken into account. In the next section we will see how the quality standards are linked to the system of permits and general rules in the Environmental Management Act.

Last but not least, we have to mention the fact that although Chapter 5 of the Environmental Management Act presents us with a basis for setting binding general quality standards, so far only limited use has been made of the competencies involved - especially with regard to clean air, for example with a standard for sulphur dioxide and small particulates, for carbon monoxide and lead, as well as for nitrogen dioxide. At present there is a proposal to intensify the use of quality standards, and also that the external integration thereof, as in relation to land-use planning, should be improved. It should be said here that outside the Wm, especially in the field of water protection - based on the Water Pollution Act - standards are set.

3.4 Permits and General Rules

3.4.1 Permits

The main activities for which environmental legislation has long been in existence are industrial activities. Already in 1875 the first legislation in this respect saw the light and in all the sectoral acts a permit system for (certain) industrial activities was foreseen. At present the permit for most industrial activities with possible harmful effects is integrated and based on Article 8.1 Wm (noise, air, soil, waste). An additional permit on the basis of section 1 Water Pollution Act could be necessary only for the pollution of surface water.

3.4.1.1 Definition and Obligations

According to Article 8.1 Wm it is forbidden to set up, operate or change the set-up or operation of an ‘establishment’ (inrichting) unless one possesses a permit. The term ‘establishment’ is defined in Article 1.1, section 1 Wm: ‘any human business activity or activity that in size can be considered to be business-like, carried out within certain boundaries’. Furthermore, section 4 of Article 1.1 Wm states that establishments which belong to the same company or organization, which are intertwined technically, organizationally or functionally and are located near to one another, are considered to be one and the same establishment. This point is important specifically when it comes to an overall assessment of the environmental effects and effective remedies to limit the amount of pollution or environmental harm or nuisance. Section 4 of Article 1.1 Wm also points out that whenever the term ‘establishment’ is used in the Environmental Management Act, one is to read ‘establishment belonging to one of the categories of establishments as listed in the Royal Decree that is based on the third section of Article 1.1 Wm’. This decree is called the Establishments and Licences Decree (Inrichtingen en vergunningenbesluit milieubeheer, Ivb). The list of establishments is included in an appendix to this decree and consists of about 28 categories (for which either the council of Mayor and Elderman or the Board of Deputies is competent) and 9 categories for which the Minister of the Environment is competent.

According to Article 8.2, section 1 Wm the council of Mayor and Aldermen is the competent authority to issue a Wm permit. However, Article 8.2, section 2 makes it clear that the Board of Deputies of the provinces, for larger and possibly more dangerous establishments, or the Minister of the Environment, in specific cases such as national defence installations, is competent if this is stipulated in the Establishments and Licences Decree. For instance, often the Board of Deputies is competent for establishments dealing with dangerous waste.

As can be deduced from Article 8.1, section 1 Wm, there are several types of permits: a permit to set up an establishment, a permit to operate an establishment (often these two are combined, but strictly speaking these two ought to be viewed separately) and permits to change either the set-up or the operation - so in total four types of permits. In addition Article 8.4 Wm mentions the so-called revisionary permit: if a permit holder asks for a permit to change the set-up or operation of the establishment the proper authority (see above) can demand that a new application should be submitted for a revisionary permit for the establishment as a whole, as it will be set up and operated after implementing the requested changes. Thus an overall re-evaluation of the establishment’s effects on the environment is made possible.

It is interesting to note that a (request for) licence on the basis of Article 8.1, section 1, Wm is not required for all changes to an already established establishment. On the basis of Article 8.19, section 2, Wm a notification to the competent authority of the change will suffice, when the change does not fall within the existing permit and does not lead to other or greater consequences for the environment than the establishment already may cause on the basis of the existing permit. A few conditions have to be fulfilled, for example that the competent authority should issue a written agreement to the change within a certain period. This can be qualified as an Awb decision, which can be opposed in court (see below § 4).

In the year 2000, Article 8.1, section 3 Wm was added. On that basis it is now possible to issue a permit that in its provisions already leaves room for changes in the future (for instance a change in the production process that could have consequences for the environment). No new permit is required for that change. At present it is not clear whether or not there will be a practice of issuing this kind of licence, and what the view of the court will be in that respect.

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26 Prior to the introduction of the Environmental Management Act the Minister for the Environment was the licensing authority in cases of establishments dealing with toxic waste. For this reason on the basis of Article 8.35 Wm at present (mostly) the Board of Deputies still needs the authorization of the Minister before issuing the Wm permit for dealing with dangerous waste (these activities are listed in Annex 3 of the Establishments and Licences Decree).

27 Although this article exists from the moment of the coming into force of the Environmental Management Act, its application was hindered by a strict interpretation by the Judicial Department of the Council of State. For that reason the text was changed last year by the legislator. See next footnote.

28 For this new section of Article 8.1 Wm and the amendment of Article 18.9, Wm, see the Act of 25 April 2000, [2000] Staatsblad 188 (in force since 1 November 2000).
Finally, it should be taken into account that according to Article 8.22 and Article 8.23 Wm the competent authority can change a permit if technological developments make it possible to protect the environment more effectively against the ill-effects caused by the establishment or if a development in the quality of the environment so requires. Furthermore, a permit can be withdrawn on the request of the permit holder (Article 8.26) or by virtue of the proper authority in very specific situations. Amongst those situations listed in Article 8.25 Wm, we find grounds such as the demolition of the establishment, disuse and the situation in which the establishment is causing unacceptable harm to the environment which cannot be put right by applying the competence of changing the content of the permit.

3.4.1.2 Criteria for Issuing Permits

As far as the denial of a Wm permit is concerned, Article 8.10, section 1 Wm sets the limit: ‘the permit can only be denied if the interest of protecting the environment so requires’.

The second section of Article 8.10 Wm states that the request should definitely be denied if granting the permit would be in conflict with the relevant strict quality standards (as mentioned in Article 8.8, section 3 Wm) or other legal provisions and standards (as mentioned in Article 8.9 Wm), based on the Environmental Management Act or the acts that are specifically named in Article 13.1 of the Environmental Management Act. A crucial role is played by Article 8.8 Wm. In this article is laid down the framework of assessing an application for a Wm permit. The three main elements are:

- The authority in question should take a number of factual matters into account (according to section 1), such as: the present state of that part of the environment (and those elements thereof) that is likely to be influenced by the establishment; the effects of the establishment on the environment; the likely autonomous development in the state of the environment; advice given and complaints listed during the public preparation of the decision on the application; the possibilities of avoiding or reducing the ill-effects of the establishment on the environment.
- The authority in question should (according to section 2) make allowance for the relevant EP and the relevant ‘reasonable quality standards’.
- The authority in question should (according to section 3) in its decision on the request abide by the relevant strict quality standards, certain general rules (see below) and possible ministerial instructions (given on the basis of Article 8.27 Wm, if the general interest so requires).

When it comes to the granting of a Wm permit, Article 8.11 section 2 and 3 Wm are also relevant. They state respectively that ‘a permit can be restricted in the interest of the protection of the environment’ and that ‘provisions have to be made in the permit that are necessary for the protection of the environment’. It is also stated in Article 8.11, section 3 Wm that ‘if these provisions do not prevent negative consequences for the environment, provisions are necessary that give the highest degree of protection, unless that is not reasonable’ (alar principle).

On the basis of this (to be honest not too clear) framework it follows that even when there is some amount of pollution, that does not necessarily mean that the request for a permit would have to be denied. The contrary could also be stated. Most requests are granted, be it under limitations and provisions. Because of the word ‘can’ in Articles 8.10, section 1 and 8.11, section 2 Wm the authority in question should weigh the interests involved. For a few years now, the Judicial Department of the Council of State explicitly states this in relevant case-law in order to let the world know that the test of this court is not strict and that there is some freedom for the authority to decide. The question is whether or not this is really the case and the ‘subjective discretion’ for the authorities is not often limited, because of the fact that there are also objectifying elements in these two articles, such as ‘protection of the environment’ and ‘necessary’ in light of technical environmental views laid down in existing guidelines, circulars, policy rules, established case law, expert opinions, et cetera.

It is important to mention here that the term ‘consequences for or protection of the environment’ is defined in Article 1.1 Wm as also including the care for an efficient removal of waste, careful use of energy and raw materials as well as the care for the restriction of traffic of people and goods to and from the establishment.
The main types of permit provisions are those setting a certain standard for maximum emissions and those prescribing the means by which the emissions are to be avoided or reduced. If possible the competent government body should only give provisions that lay down the maximum emissions and leave the manner in which these limits will be achieved to the permit holder. Special permit provisions can be applied for establishments in which waste is processed (Article 8.14 Wm). Additional legislation and policy rules have been developed on the basis of the Environmental Management Act especially for this type of potentially harmful activities. This legislation is currently under substantial revision. It mainly deals with the emission of ammonia and smell from stables and the storage of manure, and should also be taken into consideration when issuing the Wm permit. General rules apply for less intensive farming activities (see under 3.4.2). Finally, it must be added that the Wm permit does not cover all aspects and that there are still a few permit systems outside the Environmental Management Act, as in the Water Pollution Act, that provides rules as regards the pollution of surface water. It is important to note that mainly because of the fact that the competent authorities differ, there are legislative provisions dealing with procedural and material co-ordination when a licence on the basis of both legislative acts is required. We will not discuss this further here, but it is important to be aware of the fact that the Environmental Management Act does not cover the entire domain of environmental permits. It should also be stated, as already mentioned, that the Environmental Management Act, because of its major focus on establishments, does not deal with all environmentally harmful activities. Additional legislation such as the Soil Pollution Act comes in, for instance in the case of the decontamination of (historical) soil pollution (see under 3.5.7). See for other aspects also Figure 4.

3.4.2 General Rules on the Basis of the Environmental Management Act

3.4.2.1 Introduction

As we mentioned earlier, at the beginning of the 1980s, in the deregulation boom, it was felt that the permit system was too dominant. The permit system stood in the way of investors who wanted to know beforehand whether or not an activity could actually be undertaken. Furthermore, because decentralized authorities had discretion in deciding upon applications for permits, the permit system could cause inequalities and thus disruption to the competition between businesses in different municipalities or provinces. Last but not least, several hundred thousand establishments that were in need of a permit had to do without because the competent authorities could not keep up with the workload (neither in working through the applications nor in enforcement). It was felt that many of these cases involved establishments which, although strictly speaking in need of regulation through a permit, caused little harm to the environment. Instead of issuing permits one could regulate them by setting general rules. General rules would be perfectly adequate because many of these ‘illegal’ establishments could be grouped in fairly homogeneous categories. In a moment of optimism it was said that by applying general rules setting emission standards or the means for reducing or avoiding emissions, competition between companies would be fairer, legal certainty improved and, last but not least, within the administration more emphasis could be put on enforcement. By the 1990s it became clear that although general rules do play a useful role, in many cases additional regulation for each establishment is still required and manpower for enforcement is still a huge problem. Nevertheless the Ministry for the Environment aims at bringing in total 75-80% of all Ivb-establishments under the regime of general rules.

34 The question is how far one can with this ‘self-regulation’ and ‘flexibility’ (bedrijfsinterne milieuzorg) and whether or not a permit should be very flexible and only dealing with the main items, leaving plenty of room for the operator to manage the environmental aspects. From the case-law of the (Chairmen of the) Judicial Department of the Council of State it becomes apparent that leaving too much room for the permit-holder through self-regulation and environmental management is contrary to the principle of legal certainty, see for instance Vz, ABRS 28 May 1999, [1999] Milieu en Recht 70 and ABRS 6 November 2000, [2001] Milieu en Recht 45. For a recent case in which ‘self-regulation’ was accepted, ABRS 24 October 2001, (2002) 3 Jurisprudentie Milieurecht. See about this topic of self-regulation and environmental care, R. van Gestel, Zelfregulering, milieuzorg en bedrijven (2000).

35 A Wm permit is usually granted for an indefinite period of time. Sometimes, however, such a permit can be granted for a maximum of five years, for instance when such a temporary permit is explicitly requested or when a better insight into the effects of an establishment is required, which is frequently the case with establishments dealing with (toxic) waste. For this kind of establishments not only the legality (rechtmatigheid) but also the efficiency (doelmatigheid) of the activity is a criterion for granting the permit.

36 The spreading of manure on the land is dealt with in specific legislation, and falls outside the scope of the Environmental Management Act. It is not addressed further here.

37 All in all one can say that the legislative framework dealing with environmental consequences of farming activities is extremely complex and not only because of the various proposed changes in legislation (that may restrict heavily the start or enlargement of these activities near certain conservation areas). It goes beyond the scope of this contribution to deal with this in further detail.

38 Chapter 14 Wm holds specific rules regarding co-ordination where more than one (environmental) permit is necessary.
3.4.2.2 Categories

In Articles 8.40 to 8.46 Wm a framework is laid down for setting general rules. Two main types of general rules can be distinguished:

1. General rules for establishments that need no permit when established and operated in accordance with the general rule.

According to Article 8.40 Wm, the Crown can set general rules by decree for specific categories of establishments. Article 8.1, section 2 Wm states that if an establishment belongs to a category for which a general rule is given on the basis of Article 8.40, a permit is not required.39 Within the decree in question it must - according to Article 8.41 Wm - be stated that there is an obligation to notify the competent authority when an establishment is set up or commences operation, or if the set-up or mode of operation is changed. This report should then be made public by the proper administrative authority. So far there are some 25 of these general rules, for example for: garages, retail trade, chemical laundries, manure basins, office buildings, liquid gas stations, et cetera.

In setting the general rule, according to Article 8.40, section 2 Wm, consideration should be given to the present state of the environment, the consequences to the environment caused by the specific category of establishments, the expectations as to the autonomous changes in the environment where the establishments in question are likely to be located, the possibilities for avoiding or reducing environmental harm, the relevant quality standards and the economic and financial effects of the rules. According to Article 21.6, section 1 Wm, the Crown would also have to account for the NEP. In contrast to the permit procedure, there is no requirement to take advice and/or complaints into consideration. There are, however, some special procedural requirements which, according to Article 21.6 Wm, are obligatory in the preparation of certain royal decrees, such as those setting general rules.40 This procedure involves the opportunity for every citizen to give his or her comment on the concept of a decree and also includes consultation with one or more advisory bodies. Furthermore, the definitive decree is presented to Parliament - the decree does not enter into force for at least four weeks after its presentation. If there is no request within a period of four weeks to apply the statutory procedure on the subject matter of the decree, the decree will automatically enter into force.

As far as the ‘obligation to notify’ is concerned, this enables the authority in question to effectively monitor whether or not the establishment is set up and operated in accordance with the relevant general rules. As to the written (non-) acceptance of the notification by the competent authority (Mayor and Aldermen) it must be said here that in the case-law of the Judicial Department of the Council of State at present this is not considered to be an appellate administrative decision.41 The only possibility to go to court is to ask for an enforcement decision (for instance by a third party that thinks that a permit should be granted where the competent authority thinks otherwise) or to act against the licence (for instance the operator who thinks a general rule is in place where the competent authority demands a request for a permit).

Last but not least, Article 8.42 Wm states that if the general rule in question explicitly says so, the thereby assigned authority has the competence to give additional provisions alongside those included in the general rule itself (nader eisen). Thus it is possible to consider the circumstances of a particular case and offer additional protection for the environment. It is possible to appeal against the decision involving additional provisions. One can also appeal against the refusal of the administrative authority to provide for the requested additional provisions.

2. General rules for establishments that do (still) need a permit.

Within this category we should in turn distinguish between two types of general rules:

a. general rules on the basis of Article 8.44 Wm, aimed at the public, giving provisions for certain aspects or elements of establishments of a certain category, thus regulating part of the establishment or modus operandi of the establishment, but leaving aspects or elements to be covered by an individual permit. In this case general rule provisions and the (individual) permit are complementary to one another. Again, just as in the case of the former general rules, the decree in question can open the possibility for an assigned authority to give additional provisions (Article 8.44, section 5 Wm). As for setting general rules of this type, (roughly) the same requirements apply as in the case of the former general rules (Article 8.44, section 1 Wm). In this category (so far about 10) rules were made for ‘large heating installations’, for ‘high external risk installations’, for ‘deposition of waste products’ and for ‘underground storage tanks’.

b. general rules that are not directly binding on the public but are intended to instruct the proper administrative authority to include certain provisions and limitations when a permit is issued for an

39 There is, however, the possibility that in certain cases, which would be mentioned in the decree, the general rules would not apply, although the establishment fell within the general category in question. In such a case a permit would still be required.
40 This also applies to royal decrees in which quality standards are set.
establishment that falls within a certain category (Article 8.45 Wm). Again the general rules are laid down in a royal decree. However, for this type of general rule, the provincial councils can also give general instructions in a provincial ordinance (Article 8.46 Wm). Naturally, these ordinances may not conflict with the general instructions given in a royal decree. As for the preparations for these provincial instructions, the same provisions apply as in the case of the aforementioned general rules. An example of this type of general rule is the rule on the deposition of waste (with regard to the protection of the soil). Incidentally, as this has not already been mentioned: the Provincial Environmental Ordinance (Provinciale milieuverordening) is of relatively great importance within the environmental legislation as a whole. It is based on Article 1.2 Wm and deals for instance with the zoning of areas to protect the groundwater and soil, as well as zones of silence.

3.5 SOME OTHER ENVIRONMENTAL INSTRUMENTS

Finally, we wish to comment briefly on a few other public environmental law instruments (within and outside the Environmental management Act), such as policy rules and guidelines, environmental agreements, financial instruments, possible measures in the case of unusual incidents, environmental impact assessment, instruments for waste products and soil protection, monitoring and registration, and international obligations.

3.5.1 Policy Rules and Guidelines

Because many of the competencies to set environmental provisions - in plans, quality standards, general rules and especially permits - are discretionary powers, policy rules and guidelines play a very important role. Many authorities have published their policy rules in order to make clear how they intend to make use of their discretion. A policy rule is considered to be self-binding on the authority in question. This is to say that the authority can only diverge from its own policy rule if the consequences of applying the rule in a specific case would be that persons involved would be disproportionately harmed. This clause was introduced into the General Administrative Law Code (Article 1:3, section 4 juncto Article 4:84 Awb) in 1998. Thus the basis for this clause is no longer to be found in general principles of proper administration (such as the principle of legal certainty and equal treatment) but in the Awb.

The difference between policy rules (beleidsregels) and policy guidelines (richtlijnen) is that the latter are not set by an administrative authority for its own discretion, but by other authorities, without a statutory basis and sometimes even by authorities together with participants from industry, environmental groups and scientific research groups or organizations. Although the guidelines cannot be self-binding, it has been decided in many cases that an administrative authority should make allowance for guidelines that are relevant to the decision in hand. In view of the principles of proper preparation and proper motivation, administrative courts have ruled that these guidelines have to be taken into consideration and that there must be a very good reason to diverge from them. In conclusion, it must be said that it seems to us that guidelines have become as important as policy standards - especially if the guideline is set by central government and if there is a clear scientific basis thereto.

3.5.2 Environmental Agreements

From the 1980s onwards the government decided to try to involve the industry as much as possible in setting the standards for environmental protection and improvement. The idea was that environmental care would have to be ‘internalized’ into the conduct of commercial and private households. On the basis of specific environmental themes, it was decided to approach the relevant target groups directly, such as specific branches of industry, and try jointly to lay down plans to tackle the current problem. Within this process, the approach was that there was a willingness on the government’s side to try to work out a collective plan of action, but at the same time it should be clear that if the branch of industry in question was not willing to co-operate in formulating an adequate joint approach, government would unilaterally set the targets and matching standards and general rules. If a joint plan of action could be formulated, it would be laid down in an environmental agreement, often a so-called ‘gentleman’s agreement’ describing the mutual obligations of the parties involved. The general opinion is that these agreements can be legally binding between the parties, but that often the specific obligations are formulated in such a way that no more than a serious attempt to achieve certain goals is required.

In short, one could say that environmental agreements have become important, but that one has to be careful about the exact relevance in light of the fact that the various agreements differ to a great extent and can not

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42 Apart of course from the special parliamentary procedure in the case of royal decrees (Article 21.6 Wm).
43 Differences in provincial regulations - the Netherlands has 12 provinces - may occur (although there is co-ordination possible within the Internal Provincial Organisation [Inter Provinciaal Overleg, IPO]).
ignore legislation (and provisions in permits). Perhaps at some point in the future a chapter will be introduced into the Environmental Management Act (or in the General Administrative Law Code) offering a framework for this type of instrument.45

Apart from the environmental agreements between government and certain branches of industry,46 in some cases a convenant was agreed upon between a specific company and an administrative authority, often entailing a plan of action (in the framework of enforcement) to reduce the pollution caused by the company. The content of such a - legally binding - agreement could, for instance, be that whilst the company would make a considerable effort to reduce pollution and thus, finally, bring its operation within the legal boundaries, the authority would agree to an expansion of the company by issuing the required permit(s). In such cases, it has become clear that these instruments may be binding between parties but they cannot stand in the way of the normal legal procedures for issuing permits.47 Apart from this problem there is the question of whether or not government is allowed to use private law instruments if there are public law instruments to reach the same goal. This question is relevant to the use of environmental agreements, but also to applying tort law. This matter will be addressed further on in this chapter (see § 5).

3.5.3 Financial Instruments

Under this heading a variation of topics can be mentioned (very briefly).

Of growing importance are subsidies, levies and taxation instruments to influence behaviour to be more environmentally friendly.48 For instance in the Netherlands in the field of water pollution the system of levies in addition to direct regulation (such as the permits and general rules mentioned above) is seen to be a good working mix of instruments. An Eco tax has been introduced recently for the use of energy by households. The question with environmental taxes is whether their goal is really the improvement of the environment or that they are just a way of collecting money. From the viewpoint of indirect regulation (see § 3) taxes would only be true environmental instruments if they were shaped to influence the choices of private persons (including companies) towards more environmentally sound options of conduct - tax systems would therefore have to allow for alternative behaviour (away from taxation) of a more environment-friendly nature. We shall not further elaborate here if and to what extent this idea is indeed realized by the sorts of taxes that exist.49

Other financial aspects have already been under consideration in the Netherlands for a longer period but have not yet been laid down in operational legislation. It concerns guarantees to make sure that environmental damage that occurs has to be paid for by the polluter, for instance the establishment of a bank deposit before starting up a potentially dangerous establishment or the obligatory taking out of an insurance policy.

Whilst this goes beyond the scope of this chapter it would be very interesting to carry out further research into all these financial aspects and also into the instruments of compensation by the government for the permit holder when an environmental permit can be considered unreasonable from a financial point of view but necessary from the environmental perspective (see Article 15.20 Wm). Alternatively for a third party who believes that he/she is not proportionally put at a disadvantage by the issuance of such a permit (Article 3:4 Awb).

3.5.4 Measures in Case of Unusual Incidents

Chapter 17 of the Environmental Management Act contains four provisions related to unusual incidents (ongewone voorvallen) that occur or have occurred in Wm establishments,50 such as explosions, leakages in pipes or tanks, et cetera. Article 17.1 Wm contains a duty of care for the operator of the Wm establishment to take all the necessary measures that can reasonably be expected to prevent or reduce the consequences of unusual incidents that cause or have caused environmental harm. On the basis of Article 17.2 Wm the operator of the Wm establishment is obliged to report the incident and to give all the necessary information to the competent authority (in general, the body that grants the Wm licence). That competent body has to inform other


48 See, for instance, the National Tax Plan 2000-Ill for Nature, Environment and Transport (Parliamentary Documents 28014).

49 In other legislation, more specific provisions regarding unusual incidents exist; for instance, in Articles 30-35 of the Soil Protection Act (Wet bodembescherming) and in Articles 34-36 of the Water Management Act (Wet op de waterhuishouding).
3.5.5 Environmental Impact Assessment (EIA)

Chapter 7 Wm contains the basic rules for environmental impact assessment (milieu-effectrapportage) (hereafter the provisions as a whole will be referred to as EIA). These rules also implement the EC directive on environmental impact assessment. According to Article 7.2 Wm an EIA would have to be made before an activity that can cause major damage to the environment is started. It has been pointed out in this article that a list of these activities is set out in a specific Royal Decree on EIA (Besluit milieu-effectrapportage 1994). This decree not only lists the activities but also points out for which decision concerning each of the activities an EIA would have to be produced and to which administrative body the EIA would have to be presented. In accordance with the EC directive, in some cases the activities within the list only require an EIA if certain standards, such as the size of the activity, the amount of certain substances that are used within the establishment or the amount of energy that is being used, are exceeded, or if the activity is located in a certain area.

When one looks at the specific activities and decisions mentioned, it becomes clear that in some cases two (or more) EIA’s would have to be carried out before a final decision could be taken. In the case of a nuclear power plant, first of all there would be an EIA linked to the national energy plan (that describes what types of energy are to be produced in what quantities and under which general conditions, and how the distribution of energy is to take place), and after that an EIA would have to be carried out concerning the specific permit for actually building the plant and starting production in it. Thus, firstly, there would be a ‘general policy EIA’ and finally an ‘implementation EIA’. This is applicable to many listed activities and in that respect the EIA is often related to local, regional or national land-use planning decisions, and not necessarily - or only in second instance - to an environmental permit under the Environmental Management Act.

Article 7.5 Wm mentions several cases in which an EIA would not have to be carried out although the activity concerned is named in the list: if there already is an EIA that is still adequate and accurate; when the general interest requires that a decision on the activity is taken immediately; and if the preparations for deciding on whether or not to allow the activity are at a stage at which the administration could not within reason request the carrying out of an EIA.

As well as the list of activities for which carrying out an EIA is compulsory, there is a list of activities for which, according to Articles 7.4 and 7.8a to 7.8e Wm, the obligation for carrying out an EIA is to be decided upon by the competent authorities on a case by case basis, in which cases the specific circumstances under which an activity is to take place are taken into consideration.

An EIA linked to a decision that is to be taken on request, has to be carried out by the person or persons who wish to initiate the designated activity (the initiator); in all other cases the competent public authority carries out the EIA (see Article 7.9 Wm). Article 7.10 Wm gives a description of the minimum content of the EIA. An important element thereof is the obligation to present not only the activity as originally planned, but also alternatives that should within reason be considered. Amongst those alternatives the initiator should present the alternative that is least damaging to the environment. The EIA should also present a comparison between the alternatives and point out the possible absence of expertise surrounding specific environmental aspects. The specific requirements for the EIA are laid down in guidelines set up by the competent administrative body (Article 7.15 Wm). Before these guidelines are issued, the public is given the opportunity to respond to draft guidelines.

After setting the guidelines, the initiator or competent authority draws up the EIA. Eventually, the assessment is presented to the competent authority, which immediately decides on its ‘admissibility’ (for which compliance with the above-mentioned guidelines is an important - though not decisive - factor). The EIA is then presented to the public and to an independent EIA commission (Commissie voor de milieu-effectrapportage), consisting of (independent) experts in the specific environmental areas (both legal and technical) involved. Once again, the public can comment, but on this occasion (according to Article 7.23 Wm) only with respect to the accuracy and

51 This concerns the authorities that have general competencies in this area, for instance on the basis of the Act dealing with disasters (Rampenwet), the Act dealing with fire brigades (Brandweerwet) and also the Acts dealing with the organization of municipalities and provinces (Gemeentewet en Provinciewet).
52 For a more detailed description of chapter 17 Wm, see R.J.G.H. Seerden, Commentaar Wet milieubeheer (loose-leaf, Vuga).
54 The activities listed under no. 22.1 and nos. 22.2/22.5 of supplement C of the Royal Decree on EIA.
55 Listed in supplement D of the Royal Decree on EIA. This procedure also involves public notice.
adequacy of the EIA - not on whether or not the activity should go ahead! The EIA board presents its findings in a special report. This is not a binding report, but generally speaking one could say that it plays an important role in further decision-making: on many occasions the EIA is amended after the report by the EIA board has been published. Should the findings of the EIA board be neglected, than one can expect that citizens opposed to the initiative will refer to the findings of the EIA board in their appeal against the competent authority’s decision to allow the activity. When making the decision, the competent authority is - in accordance with Article 7.35 Wm - obliged to take the EIA and all the environmental effects and aspects of the proposed activity into consideration.

As for the procedural linkage to the decision-making process, the idea is that the EIA procedure precedes the normal procedure (see § 4.1). In the case of the permit procedure this amounts to the presentation of the EIA and the application for a permit at the same time, after which moment the competent authority draws up a draft decision, public participation is organized and eventually a decision is taken. Thus the EIA can play an important role throughout the proceedings.

After deciding the EIA provisions, Articles 7.39 to 7.43 Wm require further monitoring and evaluation of the actual outcome. If necessary, additional measures will have to be taken in order to redress unforeseen ill effects to the environment. These evaluative provisions not only protect the environment in the case of the specific activity for which an EIA was carried out, but also build up expertise in setting up guidelines for and deciding upon an EIA.

Finally, as far as activities with possible cross-border effects on the environment are concerned, Articles 7.38a to 7.38g Wm implement the Espoo-Convention. The provisions ensure that information is exchanged and explicit instructions given by the competent authorities making the decision on how they have taken the cross-border effects and aspects into consideration.

3.5.6 Waste

The chapter on waste (products), Chapter 10 Wm, has a more material content than the other chapters of the Environmental Management Law. This of course is due to the fact that the earlier Act on Chemical Waste and the Waste Product Act were integrated in 1993 in Chapter 10. This material content is manifest even in Article 10.1 Wm. In this article the so-called ‘deposition scale’ is presented. In deciding on the proper ways of disposing of waste, each administrative body involved should first of all aim for quantitative limits on waste production (quantitative prevention). Then, if this is impossible or insufficient, for production processes in which the substances used do not leave a residue that can change the environment (qualitative prevention), to allow only those products that can be used more than once (product re-use). If this approach were also to be inadequate - to aim for recycling the product (material re-use), converting the product into energy (burning with the use of energy), or, if that is impossible or inadequate, burning the product without gaining energy, and, finally, depositing the waste product (controlled deposition).

Article 10.2 and 10.3 Wm are aimed at the individual citizen. Article 10.2 Wm prohibits the deposition of waste products on or in the soil outside an ‘establishment’. In Article 10.3 Wm two separate duty-of-care provisions are formulated, thus offering a safety-net for environmentally detrimental activities with waste products.

Certain specific matters are dealt with in Chapter 10 Wm, such as preventative provisions (title 10.2), removal of waste products at source (title 10.3), removal of domestic waste (solid and fluid), wrecked motor vehicles and industrial waste (title 10.4), removal of hazardous waste (title 10.5), transport of waste within the EC (title 10.5a). Within these titles a great variety of instruments, royal decrees, duties of care, inter-municipal cooperation, duties to inform, etcetera, are being used. For instance, the Provincial Environmental Ordinance holds many provisions in this respect.

3.5.7 Soil Protection and Clean-up of Polluted Soil

As already stated above, the issue of soil protection is for a large part regulated outside the Environmental Management Act. The main statute on the protection of soil is the Soil Protection Act (Wet Bodembescherming, Wbb) of 1987. At first the rules and regulations of the statute were limited to the protection of the soil against pollution. It was not until 1994 that provisions with regard to cleaning up polluted soil - up

57 The previous distinction between chemical and other waste products was, in line with EC legislation, replaced by the distinction between hazardous and other waste.
58 In the near future this will be decreasingly the case concerning additional regulations for waste, because of the centralization in this field of environmental protection through the ‘removal’ of provincial borders, the introduction of a national waste plan and the replacing of provincial competencies to legislate by central government (Crown) competencies (see Act of 21 June 2001, [2001] Staatsblad 346).
59 Not completely, in case of a Wm-establishment the aspect of prevention of soil pollution is dealt with in the permit or in the general rules replacing the permit or combined to the permit based on the Environmental Management Act.
until then addressed in a specific statute (*Interimwet bodemsanering*, Ibs 1983) - were integrated in the Soil Protection Act. Thus this (latter) statute now presents on the one hand a set of provisions to pro-actively protect against soil pollution and on the other hand offers provisions in case there is a need to re-actively clean up polluted soil and make sure that the polluter pays! As far as the preventive rules (often also based on the Environmental Management Act) are concerned the Soil Protection Act offers a specific duty of care in Article 13 and a basis for a number of (possible) Royal Decrees, consisting of general rules for certain types of activities that (potentially) pollute the soil. It concerns rules for the deposition of substances or fluids on the soil, for adding substances or fluids to the soil, for construction activities that may ‘harm’ the soil (such as laying major gas pipes), for the transport of certain substances across the soil, for carrying out activities, such as the spraying of salt on roads during winter, that could indirectly pollute the soil, for other activities that may cause harm to the structure of the soil, such as erosion, and for infiltration of water into the soil. Furthermore the Soil Protection Act offers rules for unusual accidents (see above for the general Wm rules on this subject).

Important at the moment are the Wbb rules (Articles 21-86 Wbb) that deal with the decontamination of polluted soil. They are mainly concerned with the following topics: cases where the decontamination of polluted sites is required, to what extent a polluted site should be cleaned up, the responsibility for cleaning up a polluted site and the question as to who has to pay the costs. In this field many circulars, policy rules and guidelines exist to fill the gaps in the legislation. It goes beyond the scope of this contribution to deal in detail with all the instruments (such as orders to investigate and decontaminate, competencies to recover costs et cetera) but one can easily say that the field of the decontamination of polluted soil can be seen as one of the environmental topics where in the last 5 years major developments have taken place and where administrative rules and civil law instruments (should) go hand in hand.

### 3.5.8 Monitoring and Registration

Since 1999, Chapter 12 of the Environmental Management Act offers some rules on the obligation for the holders/owners of a certain category of establishments to present an annual environmental report. These establishments are listed in a Royal Decree (*Besluit milieuverslaglegging*). This report consists of two parts: one for the general public (Article 12.2 Wm) and one for the government (Article 12.4 Wm). The first part should contain (at least) a presentation of environmental pollution or damage caused by the establishment, and of means by which the holder/owner is trying to limit the pollution of and/or damage to the environment. Furthermore this report should give an insight into present and possible future developments with regard to the establishment that seem relevant to the environment. As to the second - governmental - part of the report the guidelines for its content are set out in the aforementioned Royal Decree. These guidelines are aimed at ensuring that the authority that has issued one or more permits for the establishment, or has in some other way laid environmental restrictions on the establishment, has a proper insight in order to be able to re-evaluate the appropriateness of the provisions and/or restrictions that are in force.

Infringement of the obligation to present an environmental report is an offence that can incur administrative and penal enforcement. Residents can also go to the civil court to ask for enforcement of compliance with the duty to make a report. At present it is not yet clear how chapter 12 Wm really functions in practice.

### 3.5.9 International Obligations

Apart from EC law, Dutch environmental law is also influenced by international (intergovernmental) environmental law. As mentioned above, direct working provisions of ratified international treaties are in the hierarchy higher than provisions of the ‘normal’ legislation of Parliament. But international treaties often leave much leeway for the states and do not hold directly applicable provisions. This is not the place in which to study in detail when and which environmental treaties have been ratified by the Netherlands, what the exact legal status is (from a national or international perspective) and in what forum these treaties have been made (global, regional, bilateral). Just a few, in our view relevant, remarks are made here.

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60 The scope of these Wbb rules is linked to all accidents that cause soil pollution, while the scope of the Wm rules (see supra) is only linked to accidents in establishments. Sometimes these Wbb rules and Wm rules can be combined, sometimes they may conflict with one another.


62 [1998] Staatsblad 655. It concerns about 300 large heavily polluting enterprises. Enterprises that voluntarily have registered on the basis of Article 8 of the European EMAS-regulation are exempted from the obligation to make a report for the general public (Article 12.3 Wm).
• Especially in the field of nature protection (protection of habitats and species) one can say that international treaties have influenced Dutch legislation.63
• More and more international and EC laws relate to the same environmental topics or problems. One can see this in the field of environmental impact assessment, the prevention and tackling of environmental accidents, access to environmental information, shipments of waste, et cetera.64 Even in cases where EC law can be seen as the implementation of international treaties concluded by the EC,65 a conflict of rights and duties on the basis of international treaties and parallel EC environmental law may exist.66 We think that it would be worthwhile that more and extensive study be carried out in this respect.
• International law is not always implemented systematically. Often there is only a ratification of the treaty without implementation in existing or new legislation. In other words: International law is absent or at least invisible in national legislation.67
• To a greater extent than EC law, international law is hindered by long ratification procedures and longer periods for implementation. This seems to be due to the fact that there is a greater dependency on what other states do, and that the enforcement mechanisms are either absent or not working.

4 PUBLIC PARTICIPATION AND LEGAL PROTECTION CONCERNING WM DECISIONS

It has already been mentioned that the General Administrative Law Code (Algemene wet bestuursrecht, Awb), which in its original form came into effect on 1 January 1994, provides general rules for administrative decision-making and gives uniform rules for administrative procedures concerning administrative decisions.68 Chapter 8 of the General Administrative Law Code deals with the jurisdiction over administrative decisions by the administrative section of the court (rechtbank). Traditionally, this court was only charged with civil and criminal judicial review. One of the crucial elements for the application of the General Administrative Law Code is that, as already mentioned, there is the question of there being a ‘decision’ (or not). A decision is the written administrative legal act of an administrative body. According to Article 1:3 Awb it can have a general application (besluit van algemene strekking) or a particular one (beschikking), including the refusal of a request for the latter. In the following, both are referred to as decision/administrative act. In principle the general rules of the General Administrative Law Code concerning preparation and complaint/appeal are applicable to every decision fulfilling this definition - apart from decisions setting out policy guidelines or generally binding regulations, such as general rules for emissions). This ‘principle’ also applies to decisions based on environmental legislation, such as the Environmental Management Act. The Environmental Management Act contains a variety of (Awb) decisions. It must however be noted that exceptions/additional rules to the general rules of the General Administrative Law Code can be made in specific legislation (in view of the rule: Lex specialis derogat legi generali). For instance, Chapter 13 of the Environmental Management Act gives additional rules concerning licensing for which an environmental impact assessment is required - rules that add up when the rules of the

63 See the [UN] Convention of Ramsar on Wetlands of International Importance, especially Waterfowl Habitat and the (Council of Europe) Bern Convention on the Conservation of European Wildlife and Natural Habitats. See also the EC Wild Birds Directive (79/409) and the EC Habitats Directive (92/43). In the last two years the direct effect of this international and supranational legislation resulted in important court decisions prohibiting or limiting various activities, such as infra structural works, and triggering of compensation (in money or in natura) for the loss of nature. Note: the direct effect of international law (horizontally and vertically) and European law (only towards the state) in case of non-implementation differ.
65 Where international treaties have been approved by the EC their provisions with direct effect are in hierarchy supra the direct effect provisions of secondary EC legislation (see ECJ, Case 61/94 ECR 1996, I-3989 [International Dairy Arrangement]).
66 See, for instance, in the field of industrial accidents with environmental consequences, where the EC Directive 96/82 (Seveso II) and the (ECE) Convention of Helsinki concerning the Transboundary Effects of Industrial Accidents and the (International Labour Organisation) Convention of Geneva concerning the Prevention of Major Industrial Accidents, are applicable, R. Seerden and J. van Eekeren, ‘Industriële ongevallen; (ongelukkig) geregeld?!’ in M. Faure, K. Deketelaere and G. Verhoosel (eds), Grensoverschrijdende milieuproblemen; uitdagingen voor de nationale en internationale rechtsorde (1998), pp. 333-376.
67 This problem also applies more or less to the implementation of EC law, although in that respect progress has been made in the Netherlands in the last five years especially; for instance through periodical parliamentary overviews of the implementation of EC directives and the explicit reference in legislation to EC law, et cetera.
68 The (substantive) competencies for taking these decisions are based on specific legislative acts, such as the Environmental Management Act.
Awb are also applicable.\textsuperscript{69} Furthermore, Chapter 20 of the Environmental Management Act provides another system of appeal regarding the judicial review of Wm acts/decisions.

In the following, the Awb procedures for the preparation of the most relevant Wm acts are indicated (see § 4.1) as well as the Awb rules concerning a complaint or an appeal against Wm acts (see § 4.2). Also, the most relevant additions or exceptions from the Wm regime to the Awb regime will be indicated.\textsuperscript{70} Finally, there is a summary (see below § 4.3).

4.1 Preparation of Wm decisions\textsuperscript{71}

The General Administrative Law Code contains a variety of procedures for the making of administrative acts, especially decisions for particular cases (beschikkingen) such as licences, acts of enforcement, et cetera. There is a standard procedure in Chapter 4 Awb, a public preparation procedure in Chapter 3.4 Awb (openbare voorbereidingsprocedure) and an extensive public preparation procedure (uitgebreide openbare voorbereidingsprocedure) in Chapter 3.5 Awb. These latter two procedures are applicable when this is expressed by a specific legislative act or by an administrative decision of the competent body (Articles 3.10 or 3.14 Awb). The most important differences between the standard procedure of Chapter 4 Awb and the extensive public preparation procedure of Chapter 3.5 Awb (and more in particular paragraphs 3.5.2-3.5.5 Awb) are related to publication, giving advice, the draft decision, public participation by those who have an interest or by any member of the public (actio popularis) and the possibility of raising complaints against the decision of the competent body or of a direct appeal to the court. By the way, paragraph 3.5.6 Awb holds rules for some types of changes in decisions. It is nor further addressed here.

The most important Wm decision (being also an Awb decision in the meaning of Article 1:3 Awb) is the licence for an establishment in Article 8.1 Wm. The procedure for granting the licence in Article 8.1 Wm is incorporated in the General Administrative Law Code. Article 8.6 Wm states that the extensive public preparation procedure mentioned is applicable. This means that there are more opportunities for public participation (like the actio popularis) than in the standard procedure for administrative acts in Chapter 4 Awb (which is as a general rule applicable to enforcement decisions). Apart from the procedural requirements in the Awb, additional provisions can be found in the Environmental Management Act itself and in the Establishments and Licensing Decree (Inrichtingen- en vergunningenbesluit, lvb).

In short, the procedure for the Wm licence in Article 8.1 Wm works as follows. The extensive public preparation procedure starts with an application for this licence. After research by the competent administrative authority on the admissibility of the application the draft of the Wm licence is published and everyone has the opportunity to register objections to this draft. The competent authority is also obligated to ask advice from the Inspector of the Department of Health and the Environment (a body of the national Ministry for the Environment), the local government of the municipality in which the activity is to be undertaken (when the local government is not the competent authority) and every other administrative authority that is legally authorized to advise. Time limits are given for the various phases in the procedure. The competent body for licensing is expected to decide on the application for the licence within six months after the date of the acceptance of the application, but it is possible to extend this period (by written notice). For altering or withdrawing of Wm licences roughly the same procedure applies.

The Wm decisions already mentioned (licensing, alteration or enforcement acts) do not have general but particular applications (beschikkingen). Other acts of this kind are decisions of the Minister for the Environment in the general interest (Article 8.27 Wm), this Minister’s (non-) objection concerning waste processing companies (Article 8.36 Wm), decisions granting exemptions under Chapter 10 Wm, decisions awarding compensation or granting subsidies or contributions under Chapter 15 Wm, et cetera. For these (individual) acts, the preparation procedures as stated before apply. Often, however, the Environmental Management Act holds additions and exceptions to the general Awb procedural regime.

The Environmental Management Act also holds competencies for decisions of general application, for instance, the Provincial Environmental Ordinance under Article 1.2 Wm and the general rules under Article 8.40, et seq. Wm. This regulation is of general application and can also be qualified as a statutory act or generally binding regulation (algemeen verbindend voorschrift). This means that the way the General Administrative Law Code is applied differs from that in the case of (individual) decisions. For instance, at this moment no complaint or appeal is possible against such statutory acts or generally binding regulations (Article 8.2, sub a Awb). As far as the (actual) preparation of these statutory regulations is concerned, the General Administrative Law Code is only applicable ‘as far as there are no legal acts that oppose it’ (Article 3:1 Awb).

\textsuperscript{69} In extraordinary circumstances it is even possible that the procedure for the Wm licence (in §§ 3.5.2-3.5.5 Awb) need not be applied (Articles 13.10 and 13.11 Wm).

\textsuperscript{70} Chapter 13 and 20 Wm are also applicable to decisions (beschikkingen) based on other environmental legislative acts (mentioned in Article 13.1, section 2 Wm and Article 20.1, section 3 Wm) when this is indicated in these acts. Generally this is the case.

\textsuperscript{71} In the following ‘decisions’ and ‘acts’ are used as synonyms.
Where the Environmental Management Act contains competencies for acts of general application, which are not generally binding regulations, their legal character is not always very clear. There is certainly the question of so-called rules of policy (*beleidsregels*). So far, a direct appeal is not possible (and therefore no complaint is possible) against decisions containing such rules of policy (Article 8:2, section 1 Awb), since these are meant for use in exercising competencies for individual decisions. Where it concerns the (actual) preparation of these general rules, in principle only Chapter 3 Awb is applicable. Apart from these Awb rules, additional rules can be applicable on the basis of specific regulations. For instance, for environmental plans Chapter 4 of the Environmental Management Act contains specific rules of preparation. Though of a general character as such - the plans as such are exempted from appeal in Article 20.2 Wm - it is not impossible that individual Awb decisions are incorporated in environmental plans. It is up to the court to decide whether this is the case or not. If so, for these non-general Wm and Awb decisions the Awb procedures and possibilities for Awb appeal mentioned are applicable.

For Wm decisions that do not qualify as Awb decisions, the Awb rules do not apply. If in this respect the Environmental Management Act contains no provisions, there is always the possibility of appeal to the civil court (under the law of torts). The civil court offers supplementary legal protection (where administrative court procedures are not complete or are entirely lacking).

*Figure 6: Extensive public preparation procedure (Article 3:14 Awb)*

<table>
<thead>
<tr>
<th>Periods</th>
<th>Phases</th>
</tr>
</thead>
<tbody>
<tr>
<td>No time limit</td>
<td>Consultation</td>
</tr>
<tr>
<td></td>
<td>Request</td>
</tr>
<tr>
<td>Start of the procedure</td>
<td></td>
</tr>
<tr>
<td>12 weeks</td>
<td>Draft decision</td>
</tr>
<tr>
<td>2 weeks</td>
<td>Public notice</td>
</tr>
<tr>
<td>4 weeks</td>
<td>Public participation/advice</td>
</tr>
<tr>
<td>6 months</td>
<td>Decision</td>
</tr>
<tr>
<td>2 weeks</td>
<td>Publication</td>
</tr>
<tr>
<td>6 weeks</td>
<td>Appeal to court</td>
</tr>
</tbody>
</table>

Indirectly, for instance in an appeal against the Wm permit or an enforcement decision, they can be tested.
### 4.2 Complaint and Appeal Against Wm Acts

As already pointed out, the General Administrative Law Code (in addition to rules dealing with the preparation of Awb decisions) contains general rules for legal protection against Awb decisions. This mainly concerns Awb decisions with particular application (beschikkingen). One of these is that a complaint must be made by an interested party against the Awb decision - this complaint has to be forwarded to the administrative body that made the act - before an appeal to the (Administrative section of the) District Court (rechtbank) is possible against the decision of the competent body on this complaint. In general the complaint has to be raised within six weeks after the administrative decision has been published (Article 6:7 and 6:8 Awb) and the appeal has to be lodged within six weeks after the decision on the complaint has been published (Article 6:7 and 6:8 Awb). It is also important to mention the possibility of a provisional procedure on the basis of the General Administrative Law Code, namely a provisional relief (or a suspension of the decision) from the president of the District Court (Article 8:81 Awb). One can only ask for such a temporary arrangement when an appeal is lodged with the court or when a complaint is possible at the administrative body pending this complaint.

The above-mentioned general rule of complaint and appeal is not entirely applicable to (all) Wm decisions (which are Awb decisions). Where the extensive public preparation procedure (of the General Administrative Law Code) is followed, no complaint may be brought forward against the administrative decision of the competent body. A direct appeal is possible (Article 7:1, sub d Awb). As already pointed out, this is the case for Wm licences. In principle, the standard procedure of Chapter 4 Awb applies for Wm decisions of enforcement. This means that a complaint has to be brought forward to the administrative body that made the act. For all Wm decisions on the basis of Article 20.1 Wm, an appeal has to be entered (in the first and only instance) at the Judicial Department of the Council of State (Afdeling bestuursrechtspraak van de Raad van State). In the legislative act dealing with this Judicial Department of the Council of State (Wet op de Raad van State, WRvS), most of the rules of Chapter 8 Awb are declared applicable to the appeal at this department. The chairman of the Council of State can be also be asked for a provisional arrangement or suspension of the decision (Article 8:81 Awb juncto Article 36 WRvS).

Who can appeal depends on the preparation procedure that was followed. When the extensive public preparation procedure is followed an appeal can be made by those who raised objections against the draft decision (everybody can do that), the advisors who took the opportunity to advise on the draft decision, those who have objections to alterations to the decision made to the draft decision and interested parties who cannot reasonably be blamed for not making objections against the draft decision (Article 20.6 Wm). An appeal can only be lodged against all other Wm decisions by parties that have a direct and personal interest (Article 20.13 Wm in combination with Article 1:2 sub 1 Awb). As for the interests of legal personalities (f.i. environmental

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73 As indicated above, it is not possible to appeal against generally binding regulations (algemeen verbindende voorschriften) and policy rules (beleidsregels).
74 An appeal from the District court (rechtbank) to a higher court is possible. It is the specific legislative act that indicates this higher administrative court. See figure 2.
75 The reason for skipping the complaint procedure is that there already is the possibility to make objections against the draft of the administrative act.
76 Although it was proposed that as of 1 January 1999 in Wm cases the general Awb rule in this respect would be applicable - first instance to the district court and an appeal to the Judicial Department of the Council of State - this is not realized so far.
groups), they are regarded as the general and collective interests they protect on the basis of their aims and actual activities (Article 1:2 sub 3 Awb). In this way their admissibility in administrative legal proceedings is fairly easy. For government bodies it is stated that interests entrusted to them are regarded as Awb interests (Article 1:2 sub 2 Awb). This implies that for government bodies the access to Awb procedures is also quite easy. In case of enforcement of environmental legislation a broader approach is at hand (see under 5.1).

In Chapter 8 Awb the rules for appeal are given. It goes beyond the scope of this chapter to elaborate fully on this. Apart from aspects of procedural law, such as the submission of documents, et cetera, it is important to indicate some competencies of the court, e.g. the Judicial Department of the Council of State. This court can (partially) nullify the administrative act and have the competence to settle the dispute, but the latter is generally restricted to situations where only one solution is possible (Article 8:72 Awb). In complicated environmental matters the Judicial Department of the Council of State (or the chairman when asked to make a provisional arrangement) almost always asks the advice of an independent advisor dealing with environmental appeals (Stichting advisering bestuursrechtspraak). This advice is very often followed. The court, e.g. the Judicial Department of the Council of State, can also give compensation to the appellant when the act is nullified (Article 8:73 Awb). The administrative body can be ordered to pay certain legal costs made by the appellant (8:74 and 8:75 Awb).

So far, mediation or other alternative ways of dispute settlement in environmental law do not play a role in the Netherlands.

**Figure 8: Appeal against Wm decisions**

<table>
<thead>
<tr>
<th>Appeal to 2 types of Wm-decisions</th>
<th>Wm licences (Ch. 8)</th>
<th>Wm enforcement acts (Ch. 18)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Art. 8.6 Wm =&gt; Awb – see figure 6)</td>
<td>(Ch. 4 Awb - see figure 7)</td>
<td></td>
</tr>
<tr>
<td>Final Administrative Decision</td>
<td>Complaint (prior to Appeal - see figure 7) (provisional relief?)</td>
<td></td>
</tr>
<tr>
<td>Appeal to the Judicial Department of the Council of State (provisional relief?)</td>
<td></td>
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<tr>
<td>(Independent advice?)</td>
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<tr>
<td>Court decision</td>
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An important difference that has to be mentioned here between the Environmental Management Act and the General Administrative Law Code concerns the coming into force or suspension of decisions. Under the General Administrative Law Code, decisions come into force at the moment of publication by the administrative body (Article 3:40 Awb). Suspension of Wm decisions is only applicable when this is ruled in the provisional relief procedure. To put it another way: a complaint or an appeal does not suspend the Awb decision (Article 6:16 Awb). Wm decisions come into force after the period for complaint or appeal. When during the period of complaint or appeal a procedure for provisional relief is started, the Wm decision is suspended until the chairman of the Judicial Department of the Council of State has lifted the suspension and/or has given another provisional arrangement (Article 20.3 Wm). This specific provision does, however, not apply to Wm enforcement decisions or decisions on the basis of the EC regulation on waste transport (Article 20.4) or in cases where immediate coming into force is deemed of the utmost importance by the competent authority (Article 20.5 Wm). In these cases the general provisions of Article 3:40 jo Article 6:16 Awb apply.

### 4.3 Summary

Concerning the procedural aspects of the preparation of Wm decisions (which are Awb decisions) and the complaint or appeal against these acts, the General Administrative Law Code plays a very important role. In principle all Awb rules related to the preparation of Awb decisions are applicable to the preparation of Wm decisions unless the Environmental Management Act contains exceptions or gives additional rules. One can say

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77 Apart from the compensation of limited costs of legal representation, the costs for starting an appeal (griffierechten) - in the Netherlands these amount to € 102 for individuals and € 204 for legal entities - will be refunded in the event that the appeal is granted. By the way, legal representation by lawyers is not obligatory in administrative law court proceedings.
that the procedural preparation of Wm decisions is quite complicated owing to the fact that the various Wm decisions have different (and often amended) Awb procedures. For instance, a different procedure can apply for the handing out of the Wm licence than for a Wm decision of enforcement. The possibility of raising complaints is also related to the preparation procedure followed: there is no right to raise a complaint when the extensive public preparation procedure has been followed.

In principle all Awb rules related to the appeal against Awb decisions are applicable to the appeal against Wm acts unless the Environmental Management Act contains exceptions or gives additional rules. One of the most important differences from the general Awb regime is the competent court (in the first and only instance the Judicial Department of the Council of State) in Wm cases. Another important difference is that there is an extensive right of appeal against the licence under Article 8.1 Wm (not only for those who have a personal interest but also for everyone that followed the procedure of preparation for this licence). This applies also for environmental enforcement decisions (see under 5.1).

5 ENFORCEMENT OF ENVIRONMENTAL LAW

One can certainly say that the development of environmental law in the past thirty years has for the most part had an administrative law character. Nevertheless, next to administrative environmental law, to which in itself new instruments have been added, civil and penal law have become more important. In the following we shall address the features of administrative (§ 5.1), civil (§ 5.2) and penal (§ 5.3) enforcement of environmental law respectively - with an accent on the relation between these three types of enforcement. We will conclude in § 5.4 with some final remarks.

5.1 ADMINISTRATIVE LAW ENFORCEMENT

When we look at enforcement on the basis of the Environmental Management Act, we have to focus not only on Chapter 18 Wm, but also on Chapter 5 Awb. Both Chapters offer rules on enforcement: Chapter 5 Awb offers general rules on administrative instruments for supervision and sanctioning; Chapter 18 Wm offers specific administrative competencies for supervision and sanctioning related to environmental regulations and decisions.

There are three main methods of enforcement, available when somebody operates contrary to the provisions of the Environmental Management Act (for instance, acting without the necessary Wm licence or violating the Wm licence or a general rule that replaces the Wm licence). Firstly, the competent administrative body can issue an administrative order under penalty (dwangsom) on the basis of Article 5:32 Awb. In case of non-compliance, the offender has to pay a sum of money if he remains unwilling to end his violation of the Environmental Management Act in accordance with the administrative order that so requires. The administrative order under penalty should not be confused with the sanction of issuing an administrative penalty. With administrative penalties the aim of the sanction is not primarily to end the offence but to punish the offender. With that aim a change in conduct for the better will not (automatically) result in not having to pay the penalty - as with the administrative order under penalty, where the penalty is only applied if indeed the offender does not comply with the given order within a certain period of time. Presently, proposals are under discussion to introduce more broadly a set of rules on administrative penalties in the Awb. If this proposal goes ahead then it is expected that environmental law will be one of the areas where the administrative penalty will be introduced. The competence to issue an order under penalty is an accessory to yet another competence: the competence to issue an administrative act from an administrative body, competent on the basis of some statute, stating that the illegal violation of the activity has to be rectified by the owner of the Wm establishment (bestuursdwang). If the owner fails to do so, the competent body can by itself put a stop to the offending activity and recover the costs from the owner of that establishment.

For decentralized authorities this competence is based on Article 5:22 Awb in combination with parallel articles in the legal acts dealing with the organization of the various decentralized authorities, namely municipalities, provinces and district water boards. When none of these authorities is competent, the Minister for the Environment has the competence to issue such an act (Article 18.7 Wm). A combination of the two instruments mentioned above is not possible. The most severe administrative sanction is the withdrawal of the Wm licence under Article 18.12 Wm. The

78 In the near future the various procedures will be integrated into one comprehensive public participation (but ‘deregulated’) procedure in addition to the ‘normal’ procedure of chapter 4 Awb, (Parliamentary documents 27023).
79 For the topic of integrated enforcement of environmental law, see A.B. Blomberg, Integrale handhaving van milieurecht (2000).
80 Here the focus is on enforcement in concrete cases. It is interesting to mention that each half-year at a central level (between government and Parliament) - there is a discussion about the general aspects (and the progress) of the enforcement of environmental legislation (see Parliamentary Documents 22243).
81 Incidentally for recovering the costs an additional civil law case is needed and can lead to lengthy procedures.
factual shutting down of the establishment for which the permit was withdrawn can be realized by the issuing of an act (bestuursdwang) mentioned above.

These administrative sanctions are also applicable if several other environmental regulations have been violated. These other environmental acts are enumerated in Article 18.1 Wm in combination with Article 13.1 Wm; among others, the Soil Protection Act, the Air Pollution Act, the Water Pollution Act, the Noise Nuisance Act and the Act for Environmentally Dangerous Substances.

As was said earlier, Chapter 5 Awb also contains provisions concerning environmental supervisory powers. For instance, the officials appointed by the competent authorities have the power to ask for information, to ask for copies of various documents, to enter all places - except houses - with their equipment and to search vehicles and other property. All these competencies can be exercised insofar as this is necessary for a reasonable fulfilment of the duty of these officials to enforce the law. Supervisors are appointed by a procedure that has a statutory basis (Article 5:11 Awb); Article 18.4 and 18.5 Wm offer such a basis for supervision with regard to the Environmental Management Act.

In principle the competence for enforcement and supervision related to the environmental legislation lies primarily with the licensing authorities and for general rules with the local Board of Mayor and Aldermen. However, the Inspection of the Department of Health and the Environment (Inspectie milieuhygiëne) has, in a general way, supervisory tasks (regarding the decentralized authorities).

In the legal provisions dealing with the enforcement of the Environmental Management Act, both in this statute or in the General Administrative Law Code, there is no statutory link that compels the relevant public authorities to apply the more extensive (special) public preparation procedure of Chapter 3.4 or 3.5 Awb. Although the authorities themselves can decide to use these procedures (see Article 3:10 and 3:14 Awb) this is not a likely course of action, both because enforcement should be swift and also because the decision on enforcement should not be the moment to principally re-decide on the admissibility of the activity at hand. Naturally with administrative enforcement acts the standard procedure for administrative acts under Chapter 4 Awb is applicable. One should be aware of the fact that in the Environmental Management Act there is one special clause (that is not in the Awb): every person, regardless of having a personal interest, can ask for administrative enforcement acts - on the basis of Article 18.14 Wm. Once such a request is issued the person concerned is automatically held to be an interested party in a complaint or court procedure with regard to the administrative decision to apply a sanction (or not).

An important feature of administrative enforcement is ‘condoning’ (gedogen). Because competencies for administrative enforcement are discretionary powers, the competent authority has, in every case where an administrative sanction is applicable, the duty to weigh the interests involved - for instance the interest of the environment against the interest of the entrepreneur. If it should - for example - turn out that the illegal activity at hand can be legalized within a short period of time and this activity does no harm to third parties, one could argue that the offence be condoned on the condition that legalization will be effective shortly. Third parties can appeal at court against such a decision or the refusal to enforce. During the last decade the widespread practise of condoning has met with more critical appraisal. Much aided by case-law, condoning is now generally regarded as something to be applied only in exceptional cases. The prospect of legalization has to be clear and the principles of proper administration demand of public authorities that they offer proper motives. Or in other words: Third parties have in principle a right that a measure against a breach of legislative provisions is enforced.83

5.2 CIVIL LAW ENFORCEMENT

Under this heading we will discuss the civil law status of (Wm) licences (§ 5.2.1), the possibilities for action groups, i.e. legal persons (§ 5.2.2) as well as for government bodies (in § 5.2.3) to commence civil law proceedings.

5.2.1 Environmental Permits and Civil Liability

Environmental pollution or nuisance causing harm or damage can be unlawful under the general law of torts. In the Netherlands the Articles 6:162 et seq. in the Dutch Civil Code (Burgerlijk Wetboek, BW) deal with this non-contractual civil liability. One could argue that it makes a difference to the legality of causing environmental pollution or damage whether or not this is caused by activities in accordance with a necessary licence or contrary to or without the necessary permit. Firstly, the situation of civil liability (between private parties) is described when the harmful activities are in accordance with the environmental permit (§ 5.2.1.1). Secondly, the civil liability regarding activities without or contrary to the licence will be addressed (§ 5.2.1.2).

5.2.1.1 Civil liability for acting in accordance with the permit

In the Netherlands there is no legal provision explicitly dealing with the civil liability of the permit-holder for causing environmental harm as a result of activities that are covered by and are in accordance with a legally required environmental licence. In the case-law of the civil courts, in final instance the Supreme Court (Hoge Raad), it is based on the general legal provisions of torts. Here the relation between the permit holder and a third (civil) party is addressed. When a permit is irrevocable (after the period of appeal in a case in which no appeal was made or after the ruling of an administrative court in the case of appeal), the civil courts assume the legality under civil law of the permit. This means that the legality under civil law in the case of environmentally harmful activities in accordance with a environmental licence is related not to the licence itself but to the action or the activities of the permit holder (the facts).

As already pointed out, the general law of torts is applicable to the question of legality under civil law for causing harm in accordance with a licence. The essential requirements for the successful application of Article 6:162 et seq. in the Dutch Civil Code are: unlawfulness, accountability (culpa/risk), (impending) damage and a causal connection between unlawful actions and the damage. Concerning the civil liability for acting in accordance with the permit, the unlawfulness is the key element here. The other requirements will only be addressed when they are relevant in this matter. Article 6:162, section 2, BW points out that there is unlawfulness in the case of a breach of (subjective) rights, when the action (or lack of an action) violates legal duties or when a violation of unwritten law or failure to take due care (maatschappelijke onzorgvuldigheid) is at stake.

When acting in accordance with the licence (and therefore performing the legal duties), the breach of subjective rights and the due care provision are the main categories determining the unlawfulness. There are a few civil law cases in the Netherlands that deal with the problem of the (non)indemnifying character of a permit. In the case Krui-Joostens the Supreme Court ruled that a violation of property rights could be unlawful, despite an existing environmental permit (under the Nuisance Act). It concerned a violation of the normal use of property resulting in a nuisance because of severe shaking and serious vibrations caused by a bakery, cocoa and chocolate factory. Another major case is Vermeulen-Lekkerkerker. In this case it was stated that the relevant Nuisance Act (Hinderwet) did not imply that the rights of owners of neighbouring properties are restricted such that harm or nuisance that need not be endured in general has to be endured that has been caused by somebody who has obtained a licence under the Nuisance Act. It was added that it made no difference that complaints had been brought forward against the granting of the permit and these had been rejected by the competent administrative body. It should be noted that this case concerned a serious breach of property, namely the hindering of the use of an orchard resulting from the filling of a water pool with rubbish. In the Stikke Trui case, the Supreme Court ruled that causing environmental harm or nuisance could also be unlawful where it affected the enjoyment of general living (so not necessarily related to property or the owners of neighbouring houses). It was concluded that the action, in this case the use of a sand quarry as a refuse dump, was contrary to the due care provision of Article 1401 BW (now Article 6:162 BW). Finally the Kalimijnen case can be mentioned. Here also the civil unlawfulness regarded the breach of the due care provision under Article 1401 BW. It was ruled that the licence (in this case a French licence) did not allow the relevant interests to be weighed in such a way that the permit holder, when acting in accordance with the permit, would be free of civil liability.

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84 In this respect the licensing authority, in principle, cannot be held liable on the basis of civil law for damage caused by the operator to a third party. For the latter there is a possibility of financial compensation from this administrative body in the administrative procedure for granting or changing the permit (see Articles 8:72, section 4, and 8:73 Awb). It is also not possible under Dutch law for a third party to claim financial compensation from the permit holder in the administrative procedure of granting or altering the permit. When an administrative compensation is granted by an administrative court against the licensing authority in respect of a third party, it is likely that the civil court, in proceedings of that third party against the permit holder, will consider the fact that financial compensation has already been granted to that third party.

85 This theory of irrevocability (in Dutch, formele rechtskracht) also implies that in the situation in which there was no appeal to the administrative court, the permit holder may assume the lawfulness of the permit, unless the provisions are clearly violating the permit holder's rights and these had been rejected by the competent administrative body. So far no case law about Article 6:175 BW is available.

86 In principle, this applies to every permit holder, including an administrative authority that acts in accordance with a licence, HR 19 October 1990, [1994] Nederlandse Jurisprudentie 138 (Nistelrode).

87 One can say that in the past ten years there has been a shift from culpa towards risk in case law. In 1995 Article 6:175 BW introduced a strict liability for harm caused by (listed) dangerous substances. The advantage of this strict liability is of course that the plaintiff only needs to prove the causal link between the action or omission and the damage. A judge can in addition also shift this burden of proof to the person that caused the damage. Bear in mind that Article 6:175 BW can only be used for actions/omissions after the coming into force (so not retro-actively). So far no case law about Article 6:175 BW is available.

88 The Dutch Civil Code was amended in 1992. The actual Article 6:162 BW was preceded by Article 1401 BW. However, the scope and meaning of both articles are the same.

89 Hoge Raad (HR) 30 January 1914, [1914] Nederlandse Jurisprudentie 497. The Nuisance Act (Hinderwet) preceded the current Environmental Management Act (Wet milieubescherming). The scope and meaning of both legal acts are the same in this respect.


of torts.\textsuperscript{92} It was concluded that the salt pollution of the River Rhine by the salt-mines in the Alsace affected the use of water from this river by Dutch market-gardeners in an unlawful way.

It needs to be observed that, on the basis of the above-mentioned case-law, a serious breach of subjective rights or considerable harm must be at stake for an injunction (in stead of financial compensation for damage) to be granted. The character and seriousness of the harm or damage are of significant importance. For instance, a severe violation of living conditions will be received differently from the preservation of a facility for recreation. It seems that in the case of acting in conformity with a licence, Article 6:168 BW is of great importance. This article states that an application for an injunction can be rejected by the court because the harmful activities have to be accepted in account of their importance to social interests. However, financial compensation is still possible.

5.2.1.2 Civil Liability in the Case of Acting Without or Contrary to the Permit

In the Netherlands there is no legal provision that explicitly deals with the civil liability in the case of acting without the required environmental permit or in the case of violating the provisions of such a permit. The general law of torts is applicable here. In this respect, there is a clearer link with the legal act on which the permit is based, than in the situation of acting in conformity with the permit. In the case of acting without a permit or violating the licence, the civil courts assume in principle civil unlawfulness because of the violation of legal duties. When the other conditions are fulfilled, there is a civil tort liability. As to the breach of legal duties apart from the conditions already mentioned (accountability, damage and causal connection between unlawfulness and damage), the so-called Schutznorm is applicable. The courts have to investigate whether the violated legal provision or regulation is intended to protect the interests that have been injured.\textsuperscript{93} In this respect the civil courts consider the various interests. It is obvious that the interests of somebody acting without a permit are less important than those of somebody violating one or two minor provisions of a permit. However, acting without a licence or the violation of the provisions of the permit do not necessarily lead to the granting of an injunction. So also here it really comes up to the nature, seriousness and frequency of the nuisance (see above) under 5.2. The civil court can always react by giving a financial compensation or even less. Whether or not a claim is granted in full depends on the outcome of the weighing of the interests in the light of Article 6:168 of the Dutch Civil Code.\textsuperscript{94} So here also (see above under 5.2.1.1) it really depends upon the nature, seriousness and frequency of the nuisance.

5.2.2 Civil Law Group-actions

It has already been mentioned that environmental action groups or legal persons who want to protect the environment can be declared admissible in Awb procedures or an Awb appeal reasonably easily on the basis of Article 1:2 sub 3 Awb. One could say that much the same applies for the admissibility of action groups as a plaintiff in civil law proceedings (especially in tort cases).

At first the possibility of bringing (collective) actions under civil law to protect environmental interests or values was only based on case law of the Supreme Court. In the case De Nieuwe Meer the Supreme Court ruled that an organization in such a case has legal standing as long as this organization is a legal person, represents the (violated) interests in accordance with the articles of the association or foundation, and the interests can more or less be bundled together.\textsuperscript{95} This is confirmed in the Kuunders and Borcea cases.\textsuperscript{96}

For a number of years, Article 3:305a BW has offered a statutory basis for collective actions. According to this Article the legal requirements for admissibility of organizations in civil law proceedings are: being a legal person (under Book 2 BW), relevant objectives under the articles of association and similarity (bundling) of interests. Article 3:305a BW states explicitly that financial compensation is not an option - at least not for the sake of the general interest itself.\textsuperscript{97} One can, for instance, ask for an injunction. It is not entirely clear at this moment whether or not the case law under Nieuwe Meer is completely overruled by the provision of Article 3:305a BW. One can argue that there are two possible actions under civil law for the protection of environmental interests or values by organizations which are legal persons:

- The collective action as a ‘group action’ of Article 3:305a BW, in which the organization invokes (in a bundled way) the violation of individual interests that are enforceable at law. One could in this matter speak


\textsuperscript{94} For a recent case in which acting without a permit is not unlawful as such, see HR 3 November 2000, (2001) 2 Jurisprudentie Bestuursrecht.


\textsuperscript{97} In the Borcea case (see the previous footnote) it was ruled that financial compensation is possible under some circumstances.
of a cession (by law) of individual claims to an organization (for which no individual authorization is required).

- The collective action as a ‘general interest action’, such as the ‘environmental actions’ based on *Nieuwe Meer, Borcea* and *Kuunders*, in which the violation of environmental interests goes beyond individual interests. General interests of this kind could be the birds in the sky, the fish in the water, res nullius, the protection of vast natural areas, et cetera. So far these interests can only be invoked in legal proceedings by individuals if they are equal to their individual interests. For organizations these general interests (and not the bundling of individual interests) can be regarded as the interest of the organization itself.98

It has been discussed to what extent organizations have the power to raise such claims and to invoke interests that cannot be regarded as the interests of neighbouring individuals. In the coming years, the case-law of the Supreme Court has to decide on this. Where it concerns the admissibility, for instance the sustaining of claims in this respect, one can say that in most cases a financial compensation is out of order because the organization does not suffer financial harm (itself). This only leaves the way open for an injunction, a judicial statement about the unlawfulness of violations to environmental values, et cetera.

5.2.3 Governmental Civil Law Actions

It has been pointed out that governmental bodies can be declared admissible fairly easily in Awb procedures and on Awb appeal on the basis of Article 1:2 sub 2 Awb. For governmental actions under civil law, a similar system applies as to the civil law actions by action-groups. On the basis of Article 3:305b BW governmental legal persons can raise claims for the protection of interests of other persons as far as the promotion of these interests is entrusted to them. However, there is a legal action in which the government can raise any civil law claim on the basis of the promotion of the general interest (*algemeen belang*), as stated in the Supreme Court’s judgement in the *Staat/Kabayel* case; if there is a sufficient interest (a legal position or interest is at stake and the civil action can in fact serve to protect or compensate this interest).99 This case may well open up the way to give the government an almost unlimited power to raise civil law claims. But in situations in which the government, in order to promote or protect public aims and interests, wants to make use of competencies under civil law parallel to or instead of existing public law competencies, the Supreme Court has set some limitations.100 One of the leading cases concerning the possibility of using private law competencies parallel to or instead of public law competencies in order to realize public aims is the *Windmill* case.101 In this case the Supreme Court decided that when public law provisions do not deal with the matter - this is the use of private law competencies parallel to or instead of public law competencies - public law provisions may not be crossed out in an unacceptable way. In this respect, the content and meaning of the public law regulation and the way in which and the extent to which this public law regulation protects the rights of citizens (in the light of other written and unwritten rules of public law) has to be taken into account. Also important is whether the government could achieve a similar result by exercising the public law competencies as by exercising the civil law competence. If so, this is a major indication that there is no place for a civil law action by the government. After the *Windmill* case several other judgements were given by the Supreme Court in which the *Windmill* criteria were used. This implies that, for instance, where governments have a public law competence to give an order under penalty (for instance, under Article 5:32 Awb) the use of the civil law competence to do this in combination with an action for injunction based on tort law is excluded. The government then has to follow the public law provisions.102 This also implies that if, for instance, the Soil Protection Act contains explicit provisions for government action under civil law to seek compensation from the polluter for pollution of the soil that is or will be cleaned up by the government, the government is free to start a civil law action.103

5.3 Penal Law Enforcement

Just like the relation between public and private environmental law, the relation between public (in the meaning of administrative) and penal (criminal) environmental law is especially relevant where it concerns the enforcement of environmental law provisions, e.g. the liability for environmental pollution. In § 5.1 of this chapter the enforcement by administrative bodies under Chapter 5 of the Administrative Law Code and Chapter

98 However, it still is necessary for the protection of these general interests to be laid down in the articles of association of the organization.
100 For instance, making agreements, exercising property rights and starting procedures under the law of torts.
102 HR 22 October 1993, (1994) 1 Milieu en Recht (Staat/Magnus).
103 This is the case in Article 75 of the Soil Protection Act. It goes beyond the scope of this chapter nevertheless should be mentioned that, especially in the field of the protection of the soil, in the last five years important legislation has been passed and important case-law of the Supreme Court has been developed. See about this case-law and other aspects in the field of soil pollution and decontamination, supra note 61, pp. 289-340.
18 of the Environmental Management Act have already been pointed out. In a case of acting contrary to the Environmental Management Act, the competent administrative body can impose an order under penalty payment, an administrative order and the withdrawal of the Wm licence. Apart from these administrative law competencies to enforce the law against the violation of environmental legal provisions, there are also penal law competencies to enforce the punishment for such violations. It is not the competent administrative body but the public prosecutor (officier van justitie) who initiates the criminal prosecution. Just like the administrative bodies, the prosecutor has the competence to initiate the sanctioning of the violation of environmental law provisions. They are not obliged to do this, although a complaint can be made at the Court of Appeal (Gerechtshof) against a refusal (Article 12 Wetboek van Strafordering, Sv) by individuals and legal entities that have a direct interest in the matter. Is under administrative law only one administrative court competent, namely the Judicial Department of the Council of State, under administrative law (as is the case under civil law) the ordinary courts are competent (District Court, Court of Appeal and Supreme Court). In principle criminal courts also (see under 5.2.1 for the civil courts) rely on interpretations of the administrative court.

It goes beyond the scope of this chapter to address in depth the penal environmental law. The most important issues will be pointed out. No attention will be given to the following (procedural) aspects of penal environmental law: the organization of investigating and prosecuting, the problems related to evidence, international offences, et cetera. Attention will be focused on three items. Firstly, the place of penal environmental law in relation to public (administrative) environmental law will be described (§ 5.3.1). Secondly, the character of penal environmental law will be outlined (§ 5.3.2). Thirdly, the possibility of the liability under criminal law of legal persons and governmental bodies will be outlined (§ 5.3.3). Fourthly we make some final remarks about the future possibilities for administrative authorities to use penal law in addition to or instead of administrative law (§ 5.3.4).

5.3.1 Penal Enforcement as Ultimum Remedium?

For many years the use of penal environmental law was thought to be the ultimum remedium. The reason for this was that penal law was only considered to be applicable in very special cases, when other ways of enforcement were not sufficient. In this respect, the administration should have the principal responsibility for enforcing the law against violation of rules set by that administration: the administrative authority that gives the environmental licence is the first to take care of it by issuing administrative sanctions.

In recent years, this perspective on penal law as an ultimum remedium has become less dominant. The public prosecutor is more active and increasingly makes it his/her own responsibility to enforce laws against environmental pollution contrary to penal law provisions. One of the main reasons for this change of heart is possibly the fact that at this moment most of the administrative action in the field of environmental law, law making, licensing, et cetera, is complete and the enforcement stage has been reached and needs to be activated on all fronts.

5.3.2 Penal Environmental Law

Penal law enforcement of environmental law mostly falls within the Economic Offences Act (Wet economische delicten, Wed). Article 1a Wed contains an enumeration of public environmental law provisions, the violation of which can be regarded as Wed offences. There are several categories of Wed environmental offences of varying seriousness - a few examples of Wed offences are: offences against provisions stated in or on the basis of the Environmental Management Act, Article 8.1, section 1, Article 8.40, section 1, 8.42, section 2 (et cetera). The Economic Offences Act contains a standard regime for punishment, for competencies related to investigating and prosecuting and also for the competencies of the judge concerning the penal enforcement of public environmental law. Because the substantive provisions are found in public environmental law and not in the specific penal law provisions, one can in this respect speak of the penal law’s dependency on administrative law. Sometimes this causes problems because of the specific characteristics of penal law in general.

Apart from the Wed offences, the Penal Code (Wetboek van strafrecht, Sr) allows for the criminalization of a few environmental offences. The most important substantive provisions are found in the Articles 173a and 173b of the Penal Code. They deal with the (dolus and culpa) pollution of water, air and soil with dangerous substances.

Also general offences, such as committing forgery, can be the basis for the criminalization of environmental offenders. Sometimes the use of these general penal law offences leads more easily to a punishment than if the offences had had to be tackled with complicated or technical environmental law provisions (in regulations, in licences, et cetera).

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104 To date the category of criminal offences that are only based on the sectoral environmental legislative laws is very small.
The most important difference between the Economic Offences Act and the Penal Code is that for the applicability of powers for the prosecution et cetera in the latter case you need to be a suspect, while this is not the case for the Wed (broad scope of prosecution actions).

5.3.3 Penal Responsibility of Legal Persons and Government Bodies

Article 51 Sr states that criminal offences can also be committed by legal persons other than individuals. In principle this means private law legal persons. By the Supreme Court such legal persons are regarded as offenders when they ought to have had control of the act and ought to have been responsible for that act. Apart from these criteria, one has to take into account the description of the offence, the social situation, the circumstances of the case and the intention of the legislator.

The Supreme Court decided that public law legal persons could not be liable to criminal punishment when pursuing public law interests on the basis of exclusive public law competencies. Decentralized bodies can however be held criminally liable for acts or negligence performed in their capacity of a legal person acting as private legal persons can (for example on the basis of ownership-rights); however, the Dutch State cannot be held criminally liable for such ‘private’ actions. Since (among other things) ministers are responsible to Parliament, it is felt that the state itself should be criminally immune. In a case in which the public prosecutor wanted to prosecute the state for pollution of the soil (on a military airport for which the Ministry of Defence could be held responsible) the state was considered not liable at least could not be prosecuted. Presently there is a push towards enhancing the criminal liability of government bodies, mainly due to the poor performance of some of these bodies preceding the firework disaster in Enschede and the café fire in Volendam. Research into these calamities made it clear that the lenient policies of the authorities in these cases are everything but exceptional. The practise of licensing and of administrative supervision and enforcement is (still) seriously flawed - even in situations where the safety of the public is at stake. This has given rise to the opinion that public authorities should share in the responsibility for incidents and calamities - also along the line of criminal charges and also when it concerns the (non)use of exclusive administrative competencies.

5.3.4 Criminal Enforcement by Administrative Authorities

Last year an experiment was started in which a small number of administrative authorities (mainly municipalities) received the power to come to a transaction with the offender for simple and frequently occurring environmental offences. Normally this criminal law competence is only vested within the public prosecutor since it is related to penal law and more specifically the prevention of penal prosecution. This experiment will last 2-3 years and will be evaluated to see whether or not it will be made operational on a broader scale. The use of penal competencies by administrative authorities and vice versa can in our view give rise to certain problems, since in penal law more than in administrative law, certain safeguards are guaranteed (in the light of Article 6, European Convention on Human Rights). The same is applicable in the relation between more classic penal law and penal law as laid down for instance in the Economic Offences Act (Wet economische delicten), which is meant to be used in a more effective and efficient way (where for instance for many of the powers it is not needed that there is ‘suspicion’). While this goes beyond the contents of our chapter, we think that the possibilities and restrictions in this respect will become more clear in the years ahead.

6 CONCLUDING REMARKS

In the last ten years, public environmental law in the Netherlands has changed. The purpose of the introduction of the Environmental Management Act (Wet milieubeheer, Wm) in the beginning of 1993 was to integrate several (overlapping) sectoral environmental acts dating back to the 1960s and 1970s. This has resulted in an integrated Wm licence regime for establishments (inrichtingen) that (may) pollute the environment (pollute the air, the soil and cause (noise) nuisances). The integration is however not complete. In this regard, we mentioned the necessity for a separate licence, based on the Water Pollution Act, for the pollution of surface water by these establishments, and the fact that Wm licensing is limited to establishments and does not cover every environmentally harmful activity. Despite this, the Environmental Management Act can be considered to be the most important statute for the protection of the environment. Apart from the licence regime for establishments, the

108 For instance in the Netherlands in the field of (simple and frequently occurring) traffic offences the public prosecutor enforcing the relevant provisions not as a penal body but as an administrative authority.
Environmental Management Act contains chapters on environmental planning, environmental impact assessment, enforcement of Wm violations, unusual incidents, et cetera.

Most of the procedural aspects for decision-making by administrative authorities and the complaint and appeal against these administrative acts can be found in the General Administrative Law Code (Algemene wet bestuursrecht, Awb). Wm licences and other Wm decisions must be made in accordance with the relevant Awb rules. Exceptions to the general Awb regime are found in the Environmental Management Act, for instance, concerning the competent administrative court for Wm licences and enforcement decisions.

A debate on the future of the Environmental Management Act is underway at present. Aspects of internal and external integration, self-regulation, enforcement and of public participation and judicial review are particularly under discussion. It may be that new concepts and instruments are introduced. We will have to wait and see if these discussions will bring about a real change in policies and rights and, if so, how the courts will respond to these new rules - as at times the courts have shown to be cautious, as we have already seen in relation to the self-regulatory character of the Wm permit and with the possibilities to deal in a permit with the careful use of energy and raw materials.

Clearly, public environmental law offers a complex system of rules and regulations that is not easy accessible to the general public. Maybe it is also because of this complexity that there is a trend towards deregulation and more efficiency and flexibility. For instance, more and more general rules are being introduced to replace permits (centralization) and at the same time principles of environmental law and duties of environmental care are being suggested as a normative framework for self-regulation. At the same time, civil and penal environmental law have been ‘emancipated’ and now play a more important role in the protection of the environment. Although there are signs that the protection of the environment has been improved on many fronts (although how much is mostly difficult to say), a lot of issues still remain unsolved. Realistically one should be well aware of the fact that even the finest framework of environmental law cannot guarantee a clean environment, but it can serve to offer instruments to bring about improvements and to create a greater awareness of the need of environmental protection. In the last 5 years the changes on the level of legislation and also case law were not as big as in the five years before. Also in the coming five years we expect that on that level there will be only marginal differences. It then comes really to how accurate existing law is implemented in practice and whether or not there is adequate supervision and enforcement.