Public Environmental Law in the Netherlands

§ 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 will be set out in this first section. First of all we will offer an insight into the constitutional basis of public law (§ 1.A.). After that some remarks will be made on the General Administrative Law Code (Algemene wet bestuursrecht-Awb) which is of utmost importance for understanding Dutch administrative law and has direct relevance to public environmental law (§ 1.B.). Furthermore, it must be stressed that in this chapter the term environmental law is used only to describe the law that concerns the 'health' of the environment.¹ The law on urban planning and the law on the conservation of nature are not included in this definition.²

A. 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.

1. That is to say, health within the three main elements of the environment: water, air and soil (including protection against nuisance).

2. This does, of course, not mean that these two areas of law are of no relevance to environmental protection against pollution. One may say that 'real' protection of, for instance, natural habitats should almost automatically exclude possibilities for environmental polluting activities. Urban or physical planning, which aims at zoning for specific land-use, also has an environmental impact. In industrial zones, for instance, prevention from (too much) environmental pollution becomes evident.
The second, third and fourth chapters of the Constitution respectively deal with the monarchy, government, Parliament (both its chambers) and the primary advisory bodies. In the fifth chapter, legislative and administrative competences are described. According to Article 81 Gw, statutory competence lies with the Crown—that is to say the king and his cabinet—and both chambers of Parliament; Crown and Parliament are supposed to be one legislative body. Naturally the fifth chapter deals with the procedure for introducing new legislation (Wetten in formele zin). Article 89 Gw deals with lower levels of legislative decision, such as the royal decrees (Algemene Maatregelen van Bestuur—Ambt) and other decisions from the central government that are generally binding, such as ministerial decisions. The fifth chapter also deals with the relation between statutes and treaties or (other) decisions of international bodies. According to Article 93 Gw provisions of international treaties and of international bodies, which according to their content are generally and directly binding, are binding from the moment they are published. Article 94 Gw goes on to state that statutory provisions of national law are non-binding if their application would be in conflict with the content of generally and directly binding provisions of treaties and international bodies.

Furthermore—still within the fifth chapter—Article 107 Gw states that after specific statutes on civil and penal law, the general provisions of administrative law are to be set out in a specific statute. The General Administrative Law Code (Awb), as mentioned earlier, which was introduced in 1994, is meant to fulfill this legislative obligation (the Awb will be discussed further under § 1.3).

Returning then to the Constitution, we must point out that in Chapter 6 thereof the basic provisions for the judicial branch of government are laid down, amongst which Article 112 Gw allows for the establishment, by statute of specific administrative courts to decide on administrative cases. As we showed earlier, an example of this can be found in the General Administrative Law Code.

Last but not least, it must be pointed out that the Dutch nation is a ‘decentralized unitary state’ (decentral eeneheidstaat). 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 the basic legislative and administrative competence of decentralized authorities is laid down. Article 124 Gw deals with the main competences of the provinces and municipalities. The first section stipulates that both provinces and municipalities are autonomous in their legislative and administrative competence for dealing with their own ‘public housekeeping’. These competences 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’ competences, the latter are described as mededeelend (‘delegated governing’). Most of the decentralized legal competences are based on central legislation (‘delegated governing’). After this provision for the provincial and municipal competences, Chapter 7 describes the specific decentralized bodies, 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. Chapter 7 also mentions and describes the District Water Boards (Waterschappen—Article 133 Gw) and gives general rules for the formation of other public bodies (Article 134 Gw). In Figure 1 an overall picture of the organization of the state is offered.

Figure 1: State organization

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any definite standards on whether or not a potentially environmentally harmful activity can take place. If it concerns an activity for which a permit is required, a number of rules will have to be considered in order to find out whether the activity is permissible. 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 considered. Only by weighing up and sometimes adding up the standards from these rules and regulations, can a definitive decision on the permissibility of the activity in question be taken.

B. THE GENERAL ADMINISTRATIVE LAW CODE

The General Administrative Law Code (Awb) is an attempt to set 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. Next to the abundance of administrative statutes for specific areas of government care, such as the environment, all that could be referred to as general administrative law were the general principles of proper administration and some principles of natural justice, and even those had to be deduced from case law. In the 1990s, with the arrival of the Awb, for the first time there has been such a thing as a 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), 'parties concerned' (belangehebbenden), administrative decision (besluit), specific kinds of administrative decisions, such as non-general decisions (beschikkingen), such as, for instance, permits vergunningen, general policy rules (beleidregels) and subsidies, as well as administrative courts, administrative review and administrative appeal. The Awb goes on to state general principles of proper administration. 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 standard procedures that can be applied, if it is prescribed in a specific statute for the application of an administrative competence, or if the designated authority so decides.

After these provisions Chapters 6, 7 and 8 Awb deal with general provisions for administrative and judicial review. The basic procedure is that a concerned party (belangehebbende) can appeal against the decision of an administrative body at the Administrative Court (rechtbank). After 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, besluit). After appealing to the administrative 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 out-rank other administrative statutes. Therefore it is always possible that, more specific, later administrative codes contain provisions different from those in the General Administrative Law Code.
§ 2. Legal Basis for Environmental Protection

A. ARTICLE 21 GRONDWET

The basis for government 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 raise a claim on the basis that the government had violated this social right. However, the 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.

B. ENVIRONMENTAL LAW BEFORE THE INTRODUCTION OF 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, at first considered to offer only a public law counterpart of private law governing relations between neighbours. Gradually, after several amendments, the Nuisance Act became more important, offering a more general protection against ‘danger, damage and nuisance’. It was not until the 1960s that central government became truly active in introducing environmental regulation. In 1958 the Act on Marine Oil Pollution was introduced – an implementation of the Oil Pollution Treaty (Londen, 1954). In 1962 the Pesticides & Herbicides Act (Bestrijdingsmiddelenwet) and in 1963 the Nuclear Energy Act (Kernenergiewet) were introduced. By the end of the 1960s and at the beginning of the 1970s legislative activities were based on the idea of a compartmental approach to the environmental problem: by introducing legislation for each of the environmental elements - water, soil and air – it was believed that a comprehensive system of environmental protection could be achieved. On this basis in 1969 the Water Pollution Act (Wet verontreiniging oppervlaktewateren) and in 1970 the Act on Air Pollution (Wet inzake de luchtverontreiniging) appeared. Preparations on an act on Soil Pollution soon made it clear that waste pollution warranted a specific approach. Therefore, in 1976 the Act on Chemical Waste (Wet chemische afvalstoffen) and in 1977 the Act on Waste Products (Afwalstoffenwet) came into being. It also became clear that nuisance through noise required specific regulation and so in 1979 the Noise Nuisance Act (Wet geluidhinder) was introduced.

Gradually, with these and other environmental statutes, it became clear that in order to start a possibly environmentally harmful activity, entrepreneurs would have to ask for a number of environmental permits and subsequently would have to go through a number of different procedures. Not until the last of the permits required was handed out would the entrepreneur be certain that the proposed activity could go ahead (and under what specific conditions). However, some statutes gave rise to rules that were meant to avoid several quite similar permits having to be issued for one and the same activity, but these rules did not improve the transparency of the system as a whole. Furthermore, at some points existing statutes did not complement each other as they should do, and thus in some cases not all of the environmental effects where considered together. For the sake of co-ordinating procedures and thus creating greater unity within environmental regulation, in 1979 the Act containing general provisions on environmental health (Wet algemene bepalingen milieuhygiëne-Wbh) was introduced. This statute offered a set of procedures for granting environmental permits that were required according to specific environmental acts. Within these procedures, apart from provisions for co-ordination between procedures, public participation and judicial review were of paramount importance. The standard procedure for granting environmental permits first offered each and every person the opportunity to state his or her views in the light of the application for a permit. Secondly, for those who had previously put their views forward, it gave the opportunity to lodge a complaint again in the light of the outline decision of the administrative authority in question; and, thirdly, to seek judicial review against the definitive decision on the application for an environmental licence.

C. ENVIRONMENTAL LAW AFTER THE INTRODUCTION OF ARTICLE 21 GRONDWET

1. Preliminary Remarks

All of these regulations came into being after the introduction of Article 21 Gw. In fact, 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 – a point that can be made for probably all of the social rights that were introduced in the constitutional amendment of 1983.

The early 1980s were dominated by the idea that in order to tackle the economic recession it would – amongst other measures – be necessary to deregulate environmental legislation by skipping time-consuming procedures and stimulating self-regulation within industry itself. The idea of self-regulation also fitted with the notion that environmental protection required ‘internalization’ of environmental care within the private household, both within and outside industry.

In the end the main accomplishment of the deregulation operation 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 (thus favouring 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 standards that only set out the amount of nuisance or pollution permitted, instead of meticulously regulating the production process so as to ensure that no unacceptable nuisance or pollution would occur. In tune with the attempt to improve ‘internalization'
of environmental care, instead of unilateral regulation more use was made of gentlemen's agreements between (central) government and specific branches of industry (and sometimes even together with environmental interest groups). Last but not least, in a number of places a general duty of environmental care was introduced in legislation. 5

A general duty of care provision was introduced in the Environmental Management Act (Wet milieubeheer-Wmb), that was introduced in March 1993, which is the name that was given to a fully renewed version of the act containing general provisions on environmental health (Wbuh). In Article 1.1 Wmb 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 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 can reasonably be expected to do so, or to take any measure that he can reasonably expect will avoid 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. 6 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.

2. Environmental Management Act

We conclude this section with a summary of the content of the Environmental Management Act. Some of the subjects will be discussed further in the subsequent sections. At this point we would like to make it clear that in contrast to the act containing general provisions on environmental health, the Environmental Management Act has integrated a number of specific acts in the previously diversified permit system, thus improving the transparency of decision making and ensuring that no element escapes from the process of weighing the interests involved. The main subjects of the Environmental Management Act are set out in twenty chapters dealing with advisory bodies, international affairs, planning, quality standards, environmental zoning, environmental impact assessment, permits and general rules for 'establishments' (inrichtingen), substances and products, waste products, measuring and registration of environmental effects, procedures for permits, financial arrangements, disasters, enforcement, public openness and, finally, judicial review. All in all the Environmental Management Act is meant to offer general provisions regardless of the specific environmental issue involved, such as noise, water, air pollution and others - acts on these specific 'sectors of environmental care' are still partially in place. General provisions such as provisions for decision making on applications for permits are made applicable for sectoral statutes through a system of cross-references, such as Articles 13.1 and 13.2, as well as Article 20.1 Wm demonstrate. There are also cross-references within the Environmental Management Act itself, such as Article 8.8 Wm that determines various standards, based on other articles of the Environmental Management Act (for instance, the articles on planning: Articles 4.3 to 4.4.24 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. Some have argued that as a whole the corpus of environmental regulation is overcomplicated. Others say that this type of complexity is due to the character of public law. Anyway, one should not forget that for many matters it is still necessary to take notice of the regulations set out in sectoral environmental statutes.

To sum up, it can be repeated that Article 21 Gw, although in 1996 the ultimate legal basis for the involvement of government in environmental care, has had no specific, clearly marked influence on the content or size of this involvement, at least no influence apart from being a 'landmark' stating a generally accepted view on government involvement. Secondly, one should be aware of the prominent role that the Environmental Management Act plays in Dutch environmental law of the 1990s. It should be noted that the Environmental Management Act is not yet completed. Some of the subjects mentioned above, such as Environmental Zoning (Chapter 6), Substances and Products (Chapter 9) and Measuring and Registration (Chapter 12) have not yet been worked out. Gradually, these chapters will be filled in and new subjects will be added, thus making the Environmental Management Act even more important than it is already. In conclusion, Figure 3 presents an overview of environmental legislation.

D. GENERAL PRINCIPLES

After that, it will not come as a surprise that there is no specific place in any Dutch environmental code that states the main principles of environmental law. The ideal place for doing this (outside the Constitution) would have been the Environmental Management Act. Considering the fact that in this statute we find a number of legal instruments and general provisions applicable in all or most of the specific areas of environmental care. Now, all that we can do is to try and derive general environmental principles from specific general provisions and from the practical experience of environmental law (government reports, case law, etc.). An important number of principles that also apply to Dutch environmental law are those contained in Article 130R, section 2 of the Treaty of the European Community: the precautionary principle, the principle of preventive action, the principle of tackling problems at the source, and the 'polluter pays' principle. In addition to these, one could also refer to the stand-still principle (Article 5.2, section 3 Wm) and the ALARA-principle (as low as reasonably achievable) (Article 8.11, section 3 Wm). Apart from these typical environmental principles, the principle of public participation,
as a more general principle of administrative law, that has a significant meaning when it comes to its application in environmental law, should not be forgotten. Again it must be stressed that finding a legal basis in positive law for the principles mentioned, is not easy, apart from the ALARA and stand-still principle. The strongest bases for most of the principles are government policy documents and instructions that come with new environmental standards.

Figure 3: Environmental legislation

- Sectinal Environmental Act
  - Pesticides & Herbicides Act (1967)
  - Nuclear Energy Act (1943)
  - Waterpolution Act (1965)
  - Act on Air pollution (1970)**
  - Act on Chemical Waste (1970)*
  - Act on Waste-products (1977)*
  - Noise nuisance Act (1970)**
  - Soil Protection Act (1966/1994)
  - Act on Environmental Hazardous Waste (1985)
  - Act on Production of Matar (1966)
- Fully integrated in the Environmental Management Act 1993

- Partially integrated in the Environmental Management Act

- Environmental Management Act:
  - General terms (Ch. 1)
  - Advisorybodies (Ch. 2)
  - International affairs (Ch. 3)*
  - Planning (Ch. 4)
  - Quality Standards (Ch. 5)
  - Environmental zoning (Ch. 6)*
  - Environmental impact assessments (Ch. 7)
  - Environmental establishments (Ch. 8)
  - Substances & Products (Ch. 9)*
  - Waste-products (Ch. 10)
  - Other activities (Ch. 11)*
  - Measurements & registration (Ch. 12)*
  - Procedures for permits (Ch. 13)
  - Co-ordination (Ch. 14)
  - Financial certainties (Ch. 15)
  - Calantries (Ch. 16)
  - Enforcement (Ch. 17)
  - Public openness (Ch. 18)
  - Judicial review (Ch. 19)
- (*not filled in yet)

§ 3. Legal Instruments of Environmental Policy

In this section brief insight will be given into the major ideas behind environmental legislation in terms of instruments of environmental policies in the Netherlands. Two elements will be discussed: the policy cycle (§ 3.A) and types of regulation (§ 3.B).

A. THE POLICY CYCLE

The Environmental Policy Cycle offers a general viewpoint for environmental policy making. On the one hand, within this cycle a distinction is made between four phases of policy development, whilst – on the other hand – for each of the phases the amount of conflict between the persons and groups involved and the political relevance of the issue is set out. Graphically, this can be depicted as in Figure 4.7

Figure 4: Policy cycle 8

7. Although this policy cycle applies primarily to the central government, it is also applicable to decentralized authorities.
In the first phase the debate on whether or not certain activities can cause or are causing environmental harm is started. Gradually participants, such as environmental groups, government agencies, scientific researchers and specific branches of industry, enter the 'arena'.

When the problem has become widely recognized, especially by the government, the latter will start to undertake action to formulate a specific policy to solve the problem. Again there may be discussion about the way to go about it, but – all being well – at some point the debate will cease and some form of consensus on or connect to the government plan of action is reached.

In the next phase (solution), the government sets out effectively to take the measures necessary. Hopefully, the consensus on the plan of action will hold and then gradually the issue will lose its political significance.

Finally the problem is solved, but then, in most cases, it will be necessary continuously to control the factors that caused the problem in the first place.

B. TYPES OF REGULATION

On the basis of this viewpoint, which perhaps is shared with other European countries, we can turn to the regulatory process. Generally a distinction is made between three types of regulation: direct regulation, indirect regulation and self-regulation:

1. Direct regulation implies that the legislative branch of government unilaterally sets out provisions and standards. For this type of regulation, in the Dutch situation, the so-called regulatory chain shows how government regulation is brought into practice. The regulatory chain consists of six steps: planning, legislation, setting standards, handing out permits, implementing permits and enforcement. Graphically the chain can be presented as shown in Figure 5. 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. On the basis of statutory competences specific environmental standards are set, in most cases by royal decree ('general rules'). In many cases, however, the definitive determination of rights and obligations takes place in a permit that is handed out for a specific activity at a decentralized authority level. The next step is that these specific activities are undertaken in compliance with the standards set out. In many cases this step in the process also involves government 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.

2. Indirect regulation aims at changing behavioural patterns by making choices, that favour the environment more attractive or – by contrast – by making environmentally harmful options less attractive. Financial incentives, such as subsidies or taxes, can effectively be applied as a means of changing conduct indirectly.

3. In 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).

Figure 5: Regulatory chain

Generally speaking it can be said that in Dutch public environmental law an attempt has been made to make more use of indirect regulation and self-regulation, most clearly by applying gentlemen’s agreements. Nevertheless, direct regulation is still the dominant approach to environmental problems. Within direct regulation, policy planning has had more attention and there is a shift from a strict permit system to a system in which permits and general rules operate alternatively and sometimes even side-by-side. In this respect there is a centralizing tendency.

C. DESCRIPTION OF IMPORTANT ENVIRONMENTAL LAW INSTRUMENTS

In this section a description will be given of environmental planning, environmental quality standards, permits and general rules and – finally – some other instrumentsfavoured in the Environmental Management Act.

1. 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:

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 on the Crown (Article 4.3 Wm) and the twelve provincial councils (Article 4.9 Wm). The municipal councils are not obliged to make 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 motivation, the authorities are obliged to make allowance for the EPs of higher authorities.\(^{10}\)

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’\(^{11}\) 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 the general interest so demands, as in the case of major infrastructural 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 like the ‘water management plan’ (waterhuishoudingsplan) and as far as urban planning is 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 periodical renewal of these other plans in turn the EPs are adjusted and so on.

2. The operational environmental programme

After the EPs, Chapter 4 also describes the so-called operational environmental programmes (EPRs). Both on the central level of government and on the level of the provinces and municipalities, every year an EPR has to be brought out. In the national EPR (NEP) a list is presented of environmental policy activities for the coming four years. After that the NEP 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 NEP 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. Amongst the list of actions 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 of course the municipal council would have to make allowance for the content of that MEP in the MEPR. Again, the financial aspects would 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:\(^{12}\)

- in some cases 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 of the Environmental Management Act also mentions the making of a so-called municipal sewerageplan (Articles 4.22-24 Wm).
- last but not least, Article 4.2 Wm demands that the Minister for the Environment sees to it that once every four years a report on the state of the environment is brought out and presented to Parliament and made available to the public.

2. 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

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\(^{10}\) See for instance the Judicial Department of the Council of State (Afbiding bestuursrechtersprak van de Hoge Raad van State-ABHR) 29 April 1994, N en R 1995/2, 18 and 19.

\(^{11}\) Of the Environment, of Transport and Waterworks, of Agriculture, Conservation of Nature and Fisheries, and of Economic Affairs (Article 4.1 Wm).

\(^{12}\) In §3.C.3.a we will show how the EPs and EPRs relate to the permit system.
standards are applicable only in specific areas. Some of these areas desperately need an initiative to upgrade the level of environmental standards to 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 certain substances on the environment, is 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.

Within Chapter 5 Wm a framework of competences for setting quality standards is presented. Three authorities are found to be competent: the Crown, by introducing standards in a royal decree (Article 5.1 Wm – AmvB), by decision of a provincial council (Article 5.3 Wm), or by a ministerial regulation (Article 5.4 Wm) in the case of standards that, although normally set by the Crown (Amvb), are a strict implementation of binding standards set by treaty or by an international or supranational body.

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, as mentioned above, 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 (lesser) 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 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 aspirational standards. ‘Strict standards’ have to be avoided in decisions concerning the maximum pollution that a certain category of activity (activities) may cause. When it concerns ‘reasonable standards’, the authorities involved can deflect from the standards but need ample arguments to make their case. ‘Aspirational standards’ have a somewhat different function. They are not included in the system of Chapter 5 Wm. One could expect to find aspirational 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 in case will have to indicate where and to what extent the standard would have 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 quality standards, so far no use has been made of the competences involved.

3. Permits and General Rules

a. The Permit System in the Environmental Management Act

Definition and obligation

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, employed 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 Ivb). The list of establishments is included in an appendix to this decree. According to Article 8.2, section 1 Wm the council of the Mayor and the Aldermen is the competent authority to issue a Wm permit. However, the following section makes it clear that the Board of Deputies of the provinces or the Minister of the Environment is competent if this is stipulated in the Establishments and Licences Decree.

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 setting 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 setting 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.

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

13. It must be noticed that on the basis of Article 8.19, section 2 Wm no permit is required for changes, of which reasonably may be assumed that they have either no impact or positive impact on the extent of already existing negative consequences for the environment. Such changes only have to be reported to the authority, which has to give public notice.
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 like destruction 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.

Criteria
As far as the criteria for granting a Wm permit are concerned, Article 8.10, section 1 Wm sets the limit: an application can only be denied if the interest of protecting the environment so requires. On the one hand, this is to say that other grounds for denial are unlawful. On the other hand, this implies that even if there is some amount of pollution, that does not necessarily mean that the request would have to be denied. The authority in question should weigh the interests involved. The second section of the article 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) in the Environmental Management Act or in acts that are specifically named in Article 13.1 of the Environmental Management Act (as mentioned in Article 8.9 Wm).

A crucial role is played by Article 8.8 Wm. In this article the framework of assessing an application for a permit is laid down. 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 limitations and provisions in the permit, Articles 8.11 and further set the ground rules. As far as permit provisions are concerned the ALARA principle is applied. 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 way in which to achieve these limits to the permit holder. Special permit provisions can be applied for establishments in which waste is processed (Article 8.14 Wm).

Finally, it must be added that there are still several kinds of permit systems outside the Environmental Management Act, like in the Water Pollution Act. We will not discuss these 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.

b. General rules on the basis of the Environmental Management Act
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 application for permits, the permit system could cause inequalities and thus disturbances in 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 since many of these cases involved establishments which, although strictly speaking in need of a regulation through a permit, cause little harm to the environment, instead of handing out permits one could regulate by setting general rules. General rules would suit nicely 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 has become clear that although general rules play a useful role, in many cases additional regulation for each establishment is still required and manpower for enforcement is still a huge problem.

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. 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

14. 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 asked for or when a better insight into the effects of an establishment is required, which is (more) frequently the case with establishments dealing with waste products.

15. Chapter 14 Wm holds specific rules regarding co-ordination where more than one permit is necessary.
a general rule is given on the basis of Article 8.40, a permit is not required. Within the decree in question it must – according to Article 8.41 Wm – be stated that there is an obligation to report when an establishment is built or commences operation, or if the setup or mode of operation is changed. This report should then be made public by the proper administrative authority. In setting the general rule 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, should be considered (Article 8.40, section 2 Wm). 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 for taking 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. This procedure involves the opportunity for every citizen to give his or her opinion 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 to apply the statutory procedure on the subject-matter of the decree, within a period of four weeks, the decree will automatically enter into force. As far as the ‘obligation to report’ 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. If an authority responds to a report by saying that the establishment falls under a specific general rule and hence there is no need for a permit (and that the set up and modus operandi of the establishment is in accordance with the relevant general rule), then this reply is considered to be an administrative decision against which it is possible (for a third party) to ask for judicial review. If the authority in question were to reply that, contrary to the beliefs of the person reporting, the establishment does require a permit, then the ‘reporting person’ (say, the entrepreneur) can appeal against that decision. He could also decide simply to ignore this reply, go on with his business and await possible enforcement action from the administration. In response to the decision to apply sanctions, he or she can then react by appealing against that decision. 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 (Nadere eisen). Thus it is possible to consider the peculiarities 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:

- 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 and 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 case of the former general rules (Article 8.44, par 1 Wm).

- 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 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 case of the before-mentioned general rules.

Up to now about thirty general rules (especially based on Article 8.40 Wm) have entered into force, and about 350,000 establishments are covered by them. It concerns establishments like bakeries, offices, shops, fuel stations, restaurants, bars, certain farms, etc.

D. OTHER WM INSTRUMENTS

Finally, we wish to comment briefly on a few other public environmental law instruments.

1. Policy Rules and Guidelines

Because many of the competences 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 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 will be introduced into the General Administrative Law Code (Article 13, section 20. Apart – of course – from the special parliamentary procedure in the case of royal decrees (Article 21.6 Wm).
clear that these conventions may be binding between parties but they cannot stand in the way of the normal legal procedures for issuing permits. 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 gentlemen’s agreements, but also to applying tort law. This matter will be addressed further on in this chapter.

In short, one could say that gentlemen’s agreements have become increasingly important. Perhaps at some point in the future in the Environmental Management Act (or in the General Administrative Law Code) a chapter will be introduced offering a framework for this type of instrument.

3. Measures in Case of Unusual Incidents

Chapter 17 of the Environmental Management Act contains four provisions related to unusual incidents (ongevoerde voorvalen) which are occurring or have occurred in Wm establishments, such as explosions, leaking pipes or tanks, etc. 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 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 authorities (those competent to deal with disasters). Article 17.3 Wm states that the competent body has an obligation to prevent the repetition of unusual incidents (for instance, by altering the Wm licence). Article 17.4 Wm contains special provisions for unusual incidents with dangerous substances or waste products. It provides for administrative competences such as imposing prohibitions and obligations. In principle, the violation of provisions in Chapter 17 Wm can be enforced by the government by imposing administrative or penal sanctions (see elsewhere in this chapter).

4. Environmental Impact Assessment

Chapter 7 Wm contains the basic rules for environmental impact assessment (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

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22. In some cases even environmental organizations were party to the agreement. Apart from that, there have been cases in which industries have reached certain (leg) agreements and one or more environmental organizations have been party to a gentleman’s agreement without any governmental participation.
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 (Besluit milieueffectrapportage 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, like 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 surpassed, 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) EIAs would have to be made 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 made 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’. For many listed activities this is applicable 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 made although the activity concerned is named on 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 making of an EIA. As well as the list of activities for which making an EIA is compulsory, there is a list of activities for which, according to Articles 7.8a to 7.8c Wm making an EIA is recommended. An EIA would have to be made by the person or persons who wish to initiate the designated activity (the initiator). Article 7.10 Wm gives the EIA 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 these 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 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 board, consisting of (independent) experts in the specific environmental areas (both legal and technical) involved. Once again, the public can comment, but on this occasion only with respect to the accuracy and adequateness 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 come out. Should the findings of the EIA board be neglected, then 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 7.28 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. 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 reduct unforeseen ill effects on the environment. These evaluative provisions not only protect the environment in the case of the specific activity for which an EIA was made, 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.

5. Waste Products

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 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), then to allow only those products that

28. The activities listed under no. 22.1 and nos. 22.2/22.5 of supplement C of the royal decree on EIA.
29. Listed in supplement D of the royal decree on EIA.
can be used more than once (product re-use), then - if this approach would also 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.

In Chapter 10 Wm certain specific matters are dealt with:
- preventive provisions (title 10.2);
- removal of waste products at source (title 10.3);
- removal of domestic waste (solid and fluid), wrecked motor-cars and business 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, permits, duties of care, intermunicipal co-operation, duties to inform, etc., are being used. For instance, the provincial environmental ordinance (provinciale milieuwet) holds many provisions in this respect. This provincial bye-law is of relatively great importance within the environmental legislation as a whole. It is based on Article 1.2 Wm.

§ 4. Public Participation and Legal Protection Concerning Wm Acts

It has already been mentioned that the General Administrative Law Code (Algemene wet bestuursrech-d-Awb) 32 provides general rules for administrative decision making and gives uniform rules for administrative procedure concerning administrative decisions. Chapter 8 of the General Administrative Law Code deals with the jurisdiction over administrative decisions by the administrative section of the court (rechtsbank). 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 a 'decision'. 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 an request for the latter. In the following, both are referred to as decision/administrative act. In principle on every decision fulfilling this definition the general rules of the General Administrative Law Code concerning preparation and complaint/appeal are applicable. Therefore, it is also the case for decisions based on environmental legislation, such as the Environmental Management Act. The Environmental Management Act contains a variety of (Awb) decisions. It must be noticed that in this respect exceptions/additional rules to the general rules of the General Administrative Law Code can be made in specific legislation (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. 33 Also, 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 most relevant Wm acts are indicated (see § 4.4) as well as the Awb rules concerning a complaint or an appeal against Wm acts (see § 4.8). Also the most relevant additions or exceptions from the Wm regime to the Awb regime will be indicated. Finally, there is a summary (see below § 4.C).

A. PREPARATION PROCEDURES FOR Wm ACTS

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, etc. There is a standard procedure in Chapter 4 Awb, the public preparation procedure in Chapter 3.4 Awb (openbare voorbereidingsprocedure) and the extensive public preparation procedure in Chapter 3.5 Awb (uitgebreide openbare voorbereidingsprocedure). The (enlarged) procedures of Chapter 3.4 and 3.5 Awb are applicable when this is expressed by a specific legal act or by an administrative act of the competent body (Articles 3.10 and 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 (especially sections 3.2.5 - 3.5.5) are related to publication, advice, the (non)applicability of draft acts, public participation by those who have an interest or by everybody (actio popularis) and the (in)possibility of raising complaints against the decision of the competent body. The procedure in Chapter 3.4 Awb is somewhat between that of Chapter 3.5 and Chapter 4 Awb. For instance, in Chapter 3.4 Awb only participation by parties who have an interest is admitted and furthermore the procedure is shorter in time than that allowed in Chapter 3.5 Awb (but more extensive than that in Chapter 4 Awb).

1. Granting Wm Licences

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 grant-

32. This General Administrative Law Code came into effect on 1 January 1994.
33. The competences for taking these decisions are based on specific legal acts, such as the Environmental Management Act.
34. The difference between bestuursrech and beschikking is reflected in the General Administrative Law Code in the way that for the latter additional rules apply: each beschikking is a decision but not every decision is a beschikking.
ing the licence in Article 8.1 Wm is incorporated in the General Administrative Law Code. Sections 3.5.2-3.5.5 Awb are applicable concerning the application for a licence (this is stated in Article 3.14 Awb juncto Article 8.6 Wm). As already pointed out, the applicability of this so-called extensive public preparation procedure means that there are more possibilities for public participation (actio popularis) than in the standard procedure for administrative acts in Chapter 4 Awb. Apart from the procedural requirements in sections 3.5.2-3.5.5 Awb, additional provisions can be found in the Environmental Management Act itself and in the Establishments and Licensing Decree (Arendt en vergunninggezichten kl.).

In short, the procedure for the Wm licence in Article 8.1 Wm is 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 (section 3.5.2 Awb juncto Chapters 4 and 5 Awb), the draft of the Wm licence is published and everyone has the opportunity to make objections against this draft (Article 3.25 Awb). 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 undertaken (when the local government is not the competent authority) and every other administrative authority that has the legal power to advise (Article 8.7 Wm juncto Chapter 7 Awb juncto Article 3:19 Awb). For the various phases in the procedure time limits are given. 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 (Article 3:28 Awb). It is possible to extend this period (Article 8:29 Awb).

2. Altering or withdrawal of Wm Licences

The procedure for altering or withdrawing a Wm licence varies, depending on who is asking for the alteration or withdrawal of the Wm licence (the licence holder, the competent body or a third party). For instance, in the case of altering the Wm licence at the request of the licence holder, the procedure is described in sections 3.5.2-3.5.5 Awb, as applicable (Article 8.24, section 3 Wm). In the Articles 8.22, section 5 Wm, 8.23, section 4 Wm and 8.25, section 7 Wm, 3.5.6 Awb is declared applicable for the alteration of a Wm licence ex officio (updating the licence), the alteration of this licence at the request of a third party or the withdrawal (as a reconstruction measure) of this licence at the request of a third party or ex officio. The procedure of section 3.5.6 Awb is less extensive than that of sections 3.5.2-3.5.5 Awb. It goes beyond the scope of this chapter to elaborate further on this.

Figure 6: Extensive public preparation procedure (sections 3.5.2-3.5.5 Awb)

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

3. Enforcing the Wm Act

Chapter 18 Wm deals with the enforcement. Three methods of enforcement are available when someone 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 authority can issue a penalty (dwangsom) on the basis of Article 18.9 Wm. In case of non-compliance, the offender has to pay a sum of money for the duration of the violation or for each violation of the Environmental Management Act. Secondly, there is the possibility of an administrative act from the competent administrative body stating that the illegal violation of the activity has to be put in order by the owner of the Wm establishment (bestuurwanged). If he does not, the competent body can do this and recover the costs from the owner of that establishment. For decentralized authorities this competence is based on Article 18.8 Wm 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 (Gemeentewet, Provinciewet, Waterschapswet). When none of these authorities is competent, the Minister for the Environment has the compen-

38. This procedure is also applicable to the revisionary permits that is based on Article 8.4 Wm.
39. In some cases other permit may be required next to the Wm permit, such as a building permit on the basis of the act dealing with housing (Woningwet) or a permit on the basis of the act dealing with water pollution (Waterverontreiniging oppervlaktewateren). For the procedural co-ordination these acts, as well as the Environmental Management Act, contain provisions.
40. For the withdrawal of the licence (as a measure of enforcement), in principle the procedure of Chapter 4 Awb is applicable.
42. Chapter 18 Wm is also applicable to other environmental legislative acts (mentioned in Article 13.1, section 2 Wm) when this is indicated in these environmental acts, which is generally the case.
tence to issue such an act (Article 18.7 Wm). The most severe administrative sanction is the withdrawal of the Wm licence under Article 18.12 Wm.

Chapter 18 Wm 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 goods. All these competences can be exercised insofar as this is necessary for a reasonable fulfillment of the duty of these officials to enforce the Environmental Management Act. In the near future a specific section dealing with these supervisory provisions (as well as many procedural provisions related to the mentioned administrative enforcement acts) will be incorporated in the General Administrative Law Code.

In principle the competences for enforcement and supervision related to the environmental legislation primarily lie with the licensing authorities. However, the Inspection of the Department of Health and the Environment has, in a general way, supervisory tasks (regarding the decentralized authorities).

In the legal provisions dealing with the enforcement of the Environmental Management Act, no reference is made to the applicability of the extensive public preparation procedure of Chapter 3.5 (or the extensive preparation procedure of 3.4 Awb). It is possible that for Wm enforcement acts the administrative authority decides about the applicability of Chapter 3.4/3.5 Awb (under Article 3.14 or 3.10 Awb). If not, the standard procedure for administrative acts under Chapter 4 Awb is applicable. In this respect there is one important difference. Everyone can ask for administrative enforcement acts under Article 18.14 Wm, though under the normal procedure of Chapter 4 Awb only an interested party can ask for a decision.

Figure 7: Standard preparation procedure (Chapter 4 Awb)

<table>
<thead>
<tr>
<th>Periods</th>
<th>Phases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Possible application</td>
</tr>
<tr>
<td>4 weeks</td>
<td>Hearing</td>
</tr>
<tr>
<td></td>
<td>Decision</td>
</tr>
<tr>
<td>6 weeks</td>
<td>Publication</td>
</tr>
<tr>
<td>6–10 weeks</td>
<td>Complaint</td>
</tr>
<tr>
<td>6 weeks</td>
<td>Decision</td>
</tr>
<tr>
<td></td>
<td>Appeal</td>
</tr>
</tbody>
</table>

4. Other Wm Acts

The Wm acts already mentioned (licensing, alteration or enforcement acts) do not have general but particular application (beschikingen). Other acts of this kind are decisions of the Minister for the Environment in the general interest (Article 8.27 Wm), this Minister’s certificate of no 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, etc. 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 competences for decisions of general application, for instance, provincial regulation 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 voor-schrift). 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).

Where the Environmental Management Act contains competences 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 (beleid-regels). So far, an 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 competences 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 under Chapter 4 Wm (which contains general policy rules) the Environmental Management Act contains specific rules of preparation. Though of a general character as such, it is not impossible that in these general rules, such as environmental plans, individual Awb decisions are incorporated. 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 mentioned Awb procedures and possibilities for Awb appeal are applicable. On 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 entirely lacking).

43. The judicial department of the Council of State has, for instance, decided that in cases where the Wm permit is replaced by just reporting the activity (on the basis of Articles 8.19, section 2 Wm or 8.41 Wm) the acceptance by the administrative body of the report can be equated with an Awb decision. For instance ABRS 17 March 1995, Gerechtshof 7012, 5.

44. This is planned to be changed in 1999.

45. In 1997 a specific section dealing with these general rules of policy will be incorporated in the General Administrative Law Code. It is planned that in 1999 appeal will be possible against these policy rules.

46. These plans are explicitly excepted from the possibility of Awb appeal. This is stated in Article 20.2, section 1 Wm in combination with the annex section C.3 to the Awb.
B. COMPLAINT AND APPEAL AGAINST WM ACTS

As already pointed out the General Administrative Law Code contains general rules for legal protection against Awb decisions. This mainly concerns Awb decisions with particular application (beschikkingen). 47 One of the general rules of the General Administrative Law Code in this respect 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 is possible to the administrative court (rechtbank) against the decision of the competent body on this complaint. 48 In general the complaint has to be raised within six weeks after the administrative act 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 from the president of the court (Article 8:81 Awb). One can only ask for such a temporary arrangement when an appeal is lodged to 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 acts (which are Awb acts). Where the extensive public preparation procedure is followed no complaint against the administrative decision or act of the competent body may be brought forward. 49 A direct appeal is possible (Article 7:1, sub d Awb). As already pointed out this is the case for Wm licences. For Wm acts of enforcement in principle the standard procedure of Chapter 4 Awb applies. This means that a complaint has to be brought forward to the administrative body that made the act. For all Wm acts under 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). 50 In the legal 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 asked for a provisional arrangement (Article 8:81 Awb jurecito Article 36 WRvS).

The right of 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 act, the advisors who took the opportunity to advise on the draft act, those who have objections against alterations of the act made to the draft act and interested parties who cannot reasonably be blamed for not making objections against the draft act (Article 20.6 Wm). In the case of the applicability of section 3.5.6 Awb, similar rights of appeal exist (Article 20.10 Wm). Against all other Wm acts an appeal can only be lodged 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, 51 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. 52 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 also the access to Awb procedures is quite easy.

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, etc., it is important to indicate some competences of the court, e.g. the judicial department of the Council of State. 53 They can (partially) nullify the administrative act and have the competence to settle the dispute (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 advice from an adviser dealing with environmental appeals (Adviseur Beroepen Milieuberoep). 54 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 condemned to pay certain legal costs made by the appellant (Article 8:75 Awb). It is also important to repeat here the possibility of a provisional relief from the president of the court (Article 8:81 Awb) in Wm cases the chairman of the judicial department of the Council of State.

An important difference between the Environmental Management Act and the General Administrative Law Code, which has to be mentioned here, concerns the coming into force or suspension of acts. Under the General Administrative Law Code, acts come into force on the moment of publication by the administrative body (Article 3:40 Awb). Suspension of Wm acts is only applicable when this is ruled in the provisional relief

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51. Under the former (and similar) Article 7 of the Judicial Review of Administrative Action Act (this ARGB Act is now absorbed in the General Administrative Law Code), the decisions of the ARGB judge implied that groups having no legal personality (in the meaning of Book 2 of the Civil Code) could not be admissible. It was, for instance, considered sufficient that such groups had undertaken actual activities such as reunions, etc. It is not entirely clear whether this is still the case under Article 1:2 sub 3 Awb.
52. In environmental matters they have to pay a court fine that is twice as high as that of natural persons.
53. For the court procedure this is f 400. For the procedure of provisional relief under Article 8:81 Awb, they have to pay the same fine as natural persons, namely, f 225.
54. For more detailed information on Chapter 8 Awb, see A.Q.C. Tak, Hoofdlijnen van het Nederlands bestuursrechtswezen, 3rd ed., 1995.
procedure. To put it another way: a complaint or an appeal does not suspend the Awb act (Article 6:16 Awb).\textsuperscript{37} Wm acts 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 acts are suspended until the chairman of the Council of State has lifted the suspension and/or given another provisional arrangement (Article 20.3 Wm). For Wm acts related to a complaint the general rule of Article 3:40 in combination with Article 6:16 Awb applies.\textsuperscript{38}

C. SUMMARY

Concerning the procedural aspects of the preparation of Wm acts (which are Awb acts) 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 acts are applicable to the preparation of Wm acts unless the Environmental Management Act contains exceptions or gives additional rules. One can say that the procedural preparation of Wm acts is quite complicated due to the fact that the various Wm acts have different (and often amended) Awb procedures. For instance, for the Wm licence another procedure can apply than for a Wm act of enforcement. The (im)possibility of raising complaints is also related to the preparation procedure followed: there is no right of raising a complaint when the extensive public preparation procedure has been followed. In principle all Awb rules related to the appeal against Awb acts 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 regulations 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).

§ 5. Public versus Private Environmental Law

Once it is certain that the development of environmental law in the past twenty years has for the most part had a public law character. Despite the extensive growth of public environmental law, civil law has played an important role, especially in the field of civil liability. In the following, some private environmental law topics will be addressed, namely the civil law status of (Wm) licences (§ 5.A), the possibilities for action groups, i.e. legal personalities (§ 5.B) and especially the government (§ 5.C) to start civil law proceedings. In § 5.D a summary is given.

51. The Environmental Management Act makes it possible for the competent authority to give immediate force to Wm acts (Article 20.3 Wm). By doing this the 'normal' Awb rule of Article 6:16 Awb will apply. In practice administrative bodies have, so far, not often made use of this competence.


A. 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 for the (un)lawfulness of 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 is described when the harmful activities are in accordance with the environmental permit (§ 5.A.1). Secondly, the civil liability regarding activities without or contrary to the licence will be addressed (§ 5.A.2).

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-HR), it is based on the general legal provisions of torts. Here the relation between the permit holder and a third (civil) party is addressed.\textsuperscript{39} When a permit is irrevocable (after the period of appeal in a case nobody when appealed or after the ruling of an administrative court in the case of appeal), the civil courts assume the civil lawfulness of the permit.\textsuperscript{40} This means that the civil (un)lawfulness in the case of environmentally harmful activities in accordance with an 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 civil (un)lawfulness for causing harm in accordance with a licence.\textsuperscript{41} The essential requirements for the successful application of Article 6:162 et seq in the Dutch Civil Code are:

59. In this respect the licensing authority cannot be held liable on the basis of civil law for damage caused by the permit holder 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 for granting or altering the permit. When an administrative compensation is granted by an administrative court against the licensing authority towards a third party, it is likely that the civil court, in a case of that third party against the permit holder, will consider the fact that financial compensation has already been granted to that third party.

60. This theory of irrevocability (in Dutch, formele rechtskracht) also implies that in the case that there was no appeal to the administrative court, the permit holder may assume the lawfulness of the permit, unless the provisions are clearly violating legal provisions or for instance the permit holder gave incorrect information when applying for the permit. This irrevocability also implies the civil unlawfulness of the permit when this is nullified by the administrative court (after an appeal).

61. In principle, this applies to every permit holder, including an administrative authority that acts in accordance with a licence, HR 19 October 1990, NJ 1994, 138 (Nistelrode).
unlawfulness, accountability (culpa in re), 62 (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. 63 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 concerning 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 Knol-Joostens the Supreme Court ruled that a violation of property rights can be unlawful, despite an existing environmental permit (under the Nuisance Act). 64 It concerned a violation of the normal use of property resulting in a nuisance because of a lot of heavy 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 (Hinderbewezen) did not imply that the rights of owners of neighboring properties are so restricted that harm or nuisance that need not be endured in general has to be endured from 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 warehouse with rubble. 65 In the case Stikke Tui, 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). 66 Finally the case of Kalinijnen 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 of torts. 67 It was concluded that the salt pollution of the River Rhine by the Alscammen mines 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, to get an injunction a serious breach of subjective rights or considerable harm must be at stake. The character and seriousness of the harm or damage are of significant importance. A severe violation of, for instance, living conditions will be received differently from the preservation of, for instance, 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 an account of their important social interests. However, financial compensation is still possible.

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 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 Schuldwraak is applicable. The courts have to investigate whether the violated legal provision or regulation is intended to protect the interests that have been injured. 68 However, in this respect the civil courts weigh 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. The civil court can always react by giving a financial compensation or even less. It all depends on the outcome of the weighing of the interests in the light of Article 6:168 of the Dutch Civil Code whether or not a claim is fully granted.

B. CIVIL LAW ACTIONS BY GROUPS

It has already been mentioned that environmental action groups or legal persons who want to protect the environment can fairly easily be declared admissible in Awb procedures or an Awb appeal 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 tort cases). At first the possibility under civil law of bringing (collective) actions to protect environmental interests or values was only based on case law of the Supreme Court. In the case Nieuwe Meer the Supreme Court ruled that an organization in such a case has legal

62. One can say that in the past ten years there has been a shift from culpa in re towards risk in case law. In this respect 1995 for instance Article 6:175 BW introduced a strict liability for harm caused by dangerous substances.

63. The Dutch Civil Code is 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.

64. HR 30 January 1914, NJ 1914, p. 497. The Nuisance Act (Hinderbewezen) preceded the current Environmental Management Act (Wet milieubescherming). The scope and meaning of both legal acts are the same in this respect.

65. HR 10 March 1972, NJ 1972, 278.


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. 69 This is confirmed in the cases Kuinders and Borcea. 70

For about a year Article 3:305a BW has dealt with collective actions. 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 states explicitly that financial compensation is not possible. 71 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 ‘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 of a cession (by law) of individual claims to an organization (for which no individual authorization is required).
- the ‘environmental action’ based on Nieuwe Meer, Borcea and Kuinders, 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, etc. So far these interests can only be invoked in law 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 own interest of the organization. 71

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, e.g. 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 leaves the way open only for an injunction, a judicial statement about the unlawfulness of violations to environmental values, etc.

C. CIVIL LAW ACTIONS BY THE GOVERNMENT

It has been pointed out that governmental bodies can be fairly easily declared admissible 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 Staats/Kabayel. 72 This opens the way to giving the government an almost unlimited power of raising 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 competences under civil law parallel to or instead of public law competences, 73 the Supreme Court has given some limitations. One of the leading cases concerning the possibility of using private law competences parallel to or instead of public law competences in order to realize public aims is the Windmill case. 74 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 competences parallel to or instead of public law competences – 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 competences 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 judgments 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 penalties (for instance, under Article 18.9 Wm) the use of the civil law competence to do this in combination with an action for injunction is not allowed. The government has to follow the public law provisions. 75 It also implies that where, for instance, the Soil Protection Act contains explicit provisions for governmental 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. 75

D. SUMMARY

In this chapter three important subjects have been addressed concerning private environmental law. 76 Firstly, the private law status of Wm licenses has been discussed. In the case of determining civil liability in relation to the lack of or use of permits one has to examine whether the permit holder knew about the possible unlawfulness of the permit

70. HR 18 December 1992, M en R 1993/4, 24 (Kuinders); Rechtsbank Rotterdam 15 March 1991, TMA, 1991 I, p. 27 (Borcea).
71. In the Borcea case, see the previous footnote, it was ruled that financial compensation is possible under some circumstances.
72. However, it is still necessary for the protection of these general interests to be laid down in the articles of the organization.
73. HR 18 February 1994, NJ 1995, 718.
74. For instance, making agreements, exercising property rights and starting procedures under the law of torts.
75. HR 26 January 1990, AL 1990, 408.
76. HR 22 October 1993, M en R 1994/1, 1 (Staat/Magnus).
77. This is the case in Article 75 of the Soil Protection Act. It goes beyond the scope of this chapter, but it has to 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.
78. For a description of Dutch private environmental law, see: R.J.J. van Acht, E. Bauw, Milieurechtsrecht, 2nd ed., 1996.
Depending on the outcome of this research, case law is applicable either to the situation in which the harmful activities are in accordance with the permit or to the activities which are outside the legal permit system. In the latter case, civil liability (unlawfulness) can easier be assumed (breach of legal duties). For the former case, Dutch case law acknowledges the possibility of civil liability, the question is only one of extent. It seems that harm or damage for at least a great part has to be accepted (socially accepted risks). In that respect, licences do more or less influence civil unlawfulness (especially the due care provision). In that respect the difference in liability between acting in accordance with a permit and acting without or contrary to it may not be that great: in either case, paying compensation is the most likely outcome. The common or general interest of (polluting) activities is a kind of justification for an injunction. The larger the scope of a licence perhaps the more the civil law on tort is embedded in the legal system of permits. As long as no explicit legal provisions deal with this matter, it is up to the civil court to decide whether or not this is the case and whether or not the action is (un)lawful in the view of civil law. In this respect, the civil court plays an important (supplementary) role to the administrative court. Apart from the private law status of Wm licences the admissibility under civil law of collective or general interest actions has been described. Especially in the last few years the possibility of such action by legal persons such as environmental organizations and the government has been enlarged, though it is not entirely clear how far these possibilities exactly extend.

§ 6. Administrative versus Penal Environmental Law

Just like the relation between public and private environmental law, the relation between public 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 § 4 of this chapter the enforcements acts of administrative bodies under Chapter 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 a penalty payment, an administrative order and the withdrawal of the Wm licence. These administrative enforcements acts are also applicable if several other environmental regulations have been violated. In Article 18.1 Wm in combination with Article 13.1 Wm these other environmental acts are enumerated; 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. Apart from these administrative law competences to enforce the law against the violation of environmental legal provisions, there are also penal law competences to enforce 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 sanction the violation of environmental law provisions. They are not obliged to do this.

It goes beyond the scope of this chapter to address the whole area of 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, etc.). Attention will be focused on three items. Firstly, the place of penal environmental law in relation to public (administrative) environmental law will be described (§ 6.5A). Secondly, the character of penal environmental law will be described (§ 6.5B). Thirdly, the possibility of liability under criminal law of legal persons and government bodies will be outlined (§ 6.5C). Finally, there is a summary (§ 6.5D).

A. PENAL ENVIRONMENTAL LAW AS ULTIMUM REMEDIUM?

For many years the use of penal environmental law was thought to be the ultimum remedia. 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. 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 own responsibility to enforce laws against environmental pollution contrary to penal law provisions. 80 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, etc., is complete and the enforcement stage has been reached and needs to be activated on all fronts.

B. PENAL ENVIRONMENTAL LAW

Penal law enforcement of environmental law offences mostly falls within the Economic Offences Act (Wet economische delicten-Wed). 81 Article 1a Wed contains an enumeration of public environmental law provisions 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 (etc.). The Economic Offences Act contains a standard regime for punishment, for competences related to investigating and prosecuting and also for the competences of the judge concerning the penal enforcement of public environmental law offences. 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 administrative

79. This could be placed in the light of the fact that the undertaking of activities is a civil right. See, for instance, in this respect ECtHR 23 October 1999, AB 1990, 334 (Jacobsen), in which the right to build is, despite the legal prohibition on building, considered as a civil right under Article 6 ECtHR.


81. To date the category of criminal offences that are only based on the sectoral environmental legislative laws is very small.
law's dependence on penal 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, etc.).

C. LIABILITY TO PUNISHMENT 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. In the Supreme Court such legal persons are regarded as the committers of the offence 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 legal persons cannot be liable to criminal punishment when pursuing public law interests. In this respect, especially in Article 7 of the Dutch Constitution, public bodies (openbare lichamen), like provinces and municipalities, cannot be prosecuted when acting in this way. The state as such is not mentioned in Article 7 of the Dutch Constitution. Since (among other things) ministers are responsible to Parliament, it is not possible that the state itself is criminally responsible for its acts. In a case in which the public prosecutor wanted to prosecute the state for polluting the soil (on a military airport for which the Ministry of Defence could be held responsible) the state was considered not liable.

D. SUMMARY

In recent years penal environmental law has played a more important part in environmental law. Its place within the field of environmental law is certainly of growing interest. Especially in penal law (with its many safeguards), problems can exist because of its dependence on public environmental law. These public law provisions are not always suitable for use in penal law proceedings. Apart from technical problems with proof, complications exist in the case of offences committed within companies with complicated legal structures. Who is responsible? Can a legal person be punished in dolus offences, etc. Another problem is related to the criminalization of the acts of government bodies. So far they cannot be prosecuted for acts they carried out in performing the public interest. Is there a boundary between acting in the public interest and acting as a natural person or other legal person?

It is not the purpose of this chapter, which is focused on the public environmental law dimensions of the protection of the environment, to elaborate further on this. But the foregoing illustrates the (complicated) relations between the various law areas in this respect.

§ 7. 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) 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 (terechtingen) that (may) pollute the environment (pollute the air, the soil and cause (noise) nuisances). The integration is not complete. In this regard, we mention 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 as the most important act for the protection of the environment. Apart from the licence regime for establishments, the Environmental Management Act contains chapters on environmental planning, environmental impact assessment, enforcement of Wm violations, unusual incidents, etc. 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. 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 Code, for instance, concerning the competent administrative court for Wm licences.

It seems that at this moment public environmental law is quite a complex system, that is not easy accessible to the general public. Maybe it is because of this complexity that there is a trend towards deregulation and more efficiency. For instance, general rules are being introduced to replace permits, self-regulation is being promoted and, increasingly, the use of private environmental law instruments can be seen. This protection of the environment on all fronts has certainly contributed to an improvement in the quality of the environment – to what extent is difficult to say.