



The Environment and Planning Act of the Netherlands 2020

Explanatory Memorandum

Introduction and disclaimer

On 17 June 2014 the Netherlands Ministry for Infrastructure and Environment submitted the Bill for the Environmental Planning Act to the Dutch parliament. After adoption by Parliament the final Act was published on 23 March 2016. It is expected the Act will enter into force in 2023.

The Act seeks to modernise, harmonise and simplify current rules on land use planning, environmental protection, nature conservation, construction of buildings, protection of cultural heritage, water management, urban and rural redevelopment, development of major public and private works and mining and earth removal and integrate these rules into one legal framework.

The present translation was made on behalf of the Ministry for Infrastructure and Environment. Presently the Ministry for the Interior and Kingdom Relations is responsible for the Act. The translation covers parts of the Explanatory Memorandum which accompanied the proposal for a Bill as it was submitted to Parliament. The translation of the proposal can be found in an separate document.

It is emphasised that the translation was produced by a third party not affiliated with the ministry, that the translation is not officially approved and that no rights can be derived from it.

This translation aims to inform non Dutch speakers about the current reform in the Netherlands regarding the legislation on the protection and utilisation of the physical environment. It was published within the framework of the Make it Work project. Make it Work built a task force of Member States committed to improve the effectiveness and efficiency of EU environmental legislation through sharing Member State practices on legislative reform and exploring opportunities for regulatory simplification of EU environmental legislation.

Information on Make it Work can be found here: <http://www.ieep.eu/work-areas/environmental-governance/better-regulation/make-it-work>

For further information please contact: PostbusOmgevingswet@minbzk.nl

Explanatory Memorandum

Introduction

The physical environment¹ comprises buildings, infrastructure, water, soil, air, landscapes, the natural environment and cultural heritage, among others. Individuals, businesses and authorities carry out activities that affect the physical environment or change that environment. An activity by one party changes the usability, health or safety of the physical environment for another party. An activity also affects the value that society attributes to elements of the physical environment. This also often brings a conflict of interests to light. Those conflicts of interests have kept on reoccurring over the course of the centuries and they formed the reason for laying down rules relating to activities in the physical environment. Those rules have been repeatedly applied to social developments.

Background to the legislative bill

Environmental law as it currently stands is scattered and spread over numerous laws. There are separate laws relating to soil, construction, noise, infrastructure, mining, environment*, preservation of historic buildings and sites, the natural environment, spatial planning and water management. This scattering of legislation gives rise to agreement and coordination issues, as well as reduced accessibility and usability for all users. The Environment and Planning Act is necessary for two reasons.

First of all, the current legislation no longer reflects current and future developments. For example, the current statutory rules do not focus sufficiently on sustainable development, neither do they take sufficient account of regional differences, the need for solutions specific to particular projects or the importance of involving stakeholders early on in the project-related decision-making process.

The second reason for reforming environmental law is the current situation, in which initiators of activities are grappling with a multitude of different laws that each have their own procedures, planning processes and rules. Competent authorities do not assess an initiative in conjunction and an integrated policy is not created or is difficult to create. Over the past few years, some improvements have been made that have been successful, but do not always contribute towards achieving transparency in the system, due to the accumulation of legislation. Environmental law in its current form is therefore too fragmented and not transparent enough. What is more, the balance lies far too much in favour of certainty and too little in favour of growth that focuses on sustainable development.

The legislative bill provides a foundation on which to combine environmental law into a single Act, as the General Administrative Law Act has done in the case of general administrative law. The draft Environment and Planning Act integrates the area-specific* sections of the current laws into a single Act with one coherent system of planning, decision-making and procedures. The legislative bill immediately gives rise to better means of integrated policy, greater usability and substantial simplification of environmental law. Plans and permits will be combined as much as possible and procedures will run faster. An estimated 50,000 zoning plans and management regulations will become around 400 physical environment plans. This combining enables costs to be saved and investigation costs to be limited and will create better means for digital recording and availability of plans, decisions and studies.

The Environment and Planning Act makes it possible to achieve this, but most of the benefits will be gained by drawing up the associated orders in council and ministerial decrees. A shift in administrative culture is also needed: the knowledge and skills of administrators, officials and initiators are just as important as a new Act. The proposed Environment and Planning Act provides the foundation that enables us to deal with future social tasks in the physical environment. The legislative bill emphasises the internal relationship within the physical environment and provides the instruments to enable us to anticipate the dynamic in the physical learning environment more effectively. The legislative bill provides scope for development and safeguards quality.

¹ The Annex contains a list of frequently used terms. These terms are marked with an asterisk the first time that they appear in the text.

Goals

The new system is based on a paradigm shift: from protection of the physical environment by means of an approach that prevents activities towards a policy cycle in which continuous care for quality of the physical environment forms the focus and which creates scope for development. The new approach is based on trust, whereby it is possible to act quickly and effectively if that is necessary. With a view to achieving sustainable development, the interrelated social objectives of the draft Environment and Planning Act are: (a) to achieve and maintain a safe and healthy physical environment and good environmental quality and (b) to efficiently manage, use and develop the physical environment in fulfilling the social roles. The legislative bill allows scope for the activities of individuals and businesses to be realised and makes it possible to achieve international, national, regional and local policy objectives. Furthermore, the Act takes the simplest possible form, with the fewest possible administrative and governmental burdens.

With the Environment and Planning Act and the associated implementation regulations*, the government aims to achieve four improvement goals:

- improving the transparency, predictability and ease of use of environmental law;
- achieving a coherent approach towards the physical environment in policy, decision-making and regulations;
- more administrative discretion by means of an active and flexible approach in order to achieve objectives for the physical living environment ;
- improving and speeding up the decision-making with regard to projects in the physical environment.

Sustainable development is the key objective and is therefore also a binding element. The express inclusion of this aspect in Article 1.3 emphasises that not only the needs of the current generation but also those of future generations are important in the application of the Environment and Planning Act. The introduction to Article 1.3 also states that the Act is intended to achieve 'interrelated objectives'. This emphasises the importance of a coherent approach towards the physical environment in place of a sectoral one. 'Interrelated' therefore not only refers to the interrelationship between the two objectives of the legislative bill, but also to the interrelationship between underlying specific interests in the physical environment. It is important, when applying the Act, that the mutual relationships between elements of the physical environment, such as the natural environment and water, or infrastructure and landscape, are taken into consideration.

Instruments in the Environment and Planning Act

The legislative bill contains the bases for environmental values*, instructional rules* and instructions* that form the pre-conditions of action taken by the government, a planning system, bases for general rules* for activities and rules that apply to decision-making regarding projects and activities in the physical learning environment.

The methodology of the Environment and Planning Act corresponds with that of the directives of the European Union (EU). A policy cycle forms the core element of this Act that aims to actively achieve specific objectives in relation to the physical environment. In coordination with other actors in society, the government formulates the objectives relating to the physical environment and ensures that these are achieved. That requires clearly-defined pre-conditions within which individuals, businesses and the government are able to carry out activities such as laying roads and constructing energy farms, constructing dwellings, or operating a plant. The legislative bill provides a uniform range of instruments with which to manage activities properly. The means of doing this are instruments to support the creation of environmental policy, instruments that serve to implement policy and rules and permissions geared towards initiators.

Table 1: Type of instrument in the Environment Act

Policy development	Promulgation of policy	General rules	Permission
Environmental strategy* Programme*	Environmental value Instructional rule Instruction Assessment rule for a permit application*	Physical environment plan * General rules contained in the water board regulation* General rules contained in the environmental regulation* General government regulations*	Environmental permit* Project decision*

The legislative bill comprises six key instruments:

- the environmental strategy, a coherent strategic plan relating to the physical environment
- the programme, a package of draft plans and measures* that serve to meet environmental values or targets in the physical environment and to continue to meet them
- decentralised regulations, namely the municipality's environmental plan, the water board's regulation and the province's environmental regulation, in which the decentralised authority comprehensively lays down the general rules and obligations for obtaining permits
- general government regulations for activities within the physical environment
- the environmental permit, which an initiator can use to obtain permission for the entirety of the activities that it wishes to carry out, via an application to a single office
- the project decision, a generic arrangement for decision-making in relation to projects with a public interest according to the 'faster and better' approach*.

In addition to these key instruments, the legislative bill contains supporting instruments that are necessary to make decisions and implement them, such as procedural rules and regulations for supervision and enforcement.

Subsequent process

The legislative bill forms an important first step; it serves as a guide for the subsequent process of reforming the system by means of the Environment and Planning Act. It provides a consistent structure for environmental legislation. A number of elements of environmental law are addressed separately and incorporated into the Environment and Planning Act by means of individual legislative bills (soil, noise, land ownership, the natural environment, road management and the parts of environmental regulations that relate to non-location-specific* activities). It is envisaged that the Environment and Planning Act will ultimately replace:

- 26 laws, namely the Public Works (Removal of Impediments in Private Law) Act [*Belemmeringenwet Privaatrecht*], the Crisis and Recovery Act [*Crisis- en herstelwet*], the City and Environment Interim Act [*Interimwet stad-en-milieubenadering*], the Expropriation Act [*Ontheffingswet*], the Earth Removal Act [*Ontgrondingenwet*], the Traffic and Transport Planning Act [*Planwet verkeer en vervoer*], the Road Widening Emergency Act [*Spoodwet wegverbreding*], the Infrastructure (Planning Procedures) Act [*Tracéwet*], the Public Works Act 1900 [*Waterstaatswet 1900*], the Water Act [*Waterwet*], the Roads Act [*Wegenwet*], the Act providing for uniform provisions for managing the physical environment [*Wet algemene bepalingen omgevingsrecht*], the Ammonia and Livestock Farming Act [*Wet ammoniak en veehouderij*], the Public Works (Management of Engineering Structures) Act [*Wet beheer rijkswaterstaatswerken*], the Soil Protection Act [*Wet bodembescherming*], the Noise Abatement Act [*Wet geluidhinder*], the Livestock Farms (Odour Nuisance) Act [*Wet geurhinder en veehouderij*], the Redistribution of Traffic Management Act [*Wet herverdeling wegenbeheer*], the Hygiene and Safety (Bathing Facilities and Swimming Opportunities) Act [*Wet hygiëne en veiligheid badinrichtingen en zwemgelegenheden*], the Rural Areas (Planning) Act [*Wet inrichting landelijk gebied*], the Air Pollution Act [*Wet inzake de luchtverontreiniging*], the Nature Conservation Act [*Wet natuurbescherming*], the Environmental Management Act [*Wet milieubeheer*], the Spatial Planning Act [*Wet ruimtelijke ordening*], the Municipalities (Preferential Rights) Act [*Wet voorkeursrecht gemeenten*] and the Wrecks Act [*Wrakkenwet*].
- parts of the Monuments and Historic Buildings Act 1988 [*Monumentenwet 1988*] and the Housing Act [*Woningwet*]

- provisions from legislation concerning energy, mining, aviation and railways that play a role in decisions on developing the physical environment.

In order to achieve the aforementioned improvement objectives, it is essential that the implementation regulations are revised. At present, there are four orders in council in place. The Environment and Planning Order contains procedural rules that tie in with the Environment and Planning Act. The Quality of the Living Environment Order contains the revised substantive pre-conditions placed on government activities, such as environmental values, instructional rules and assessment rules for permit applications. The general rules on activities are likely to be combined in two orders in council, one for construction and one for the environment and water. The proposed legislative bill also provides an incentive for the administrative culture and official collaboration at the level of environmental law to change. The system of rules creates legal means, the incentives and the pre-conditions for coherent and area-specific solutions. What is essential is the way in which the instruments are handled in everyday practice. The procedures of the Environment and Planning Act and the basic principles of the system reform must also be of central importance when applying them.

The policy cycle as a conceptual model in relation to the Environment and Planning Act

The philosophy of "scope for development, safeguarding quality" forms the essence of the Environment and Planning Act. The structure of the legislative bill follows a policy cycle, as shown in Figure 1. That approach has been borrowed from EU directives in the area of environment and water.

The policy cycle was used when designing the legal system in order to indicate which instruments administrative bodies need to have at their disposal in the different stages of the cycle. In this regard, the relationship between administrative bodies and in turn, the relationship between administrative bodies and third parties such as individuals and businesses was examined. The quality of the physical environment as a whole forms the focus in the policy cycle. In the legislative bill, that is manifested in the aforementioned social objectives of the Act. All players in the physical environment, whether individuals, businesses and authorities, contribute towards these. In forming the system, the government began with the assumption that the quality of the physical environment is increasingly being determined by initiatives within society. Quality as a whole is placed at the centre of the legislative bill and administrative bodies are instructed to take account of the interrelationship between the relevant elements and aspects of the physical environment and the directly affected interests in the performance of their duties and exercising powers. This assumes a more integrated approach towards the physical environment, based on initiatives and tasks in the physical environment itself. It therefore no longer concerns a sum total of sectoral duties and powers.

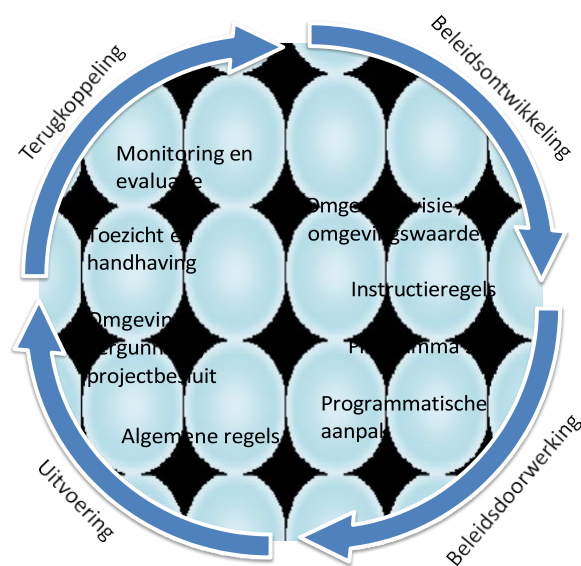


Figure 1: The policy cycle of the Environment and Planning Act.

On the left side of the cycle in the section indicated by 'implementation', the initiators of activities and projects form the focus: individuals, businesses or authorities that wish to develop something. This may be the expansion of a business or dwelling, the construction of a school, but could also be the construction of a nature conservation area, motorway or wind farm. Most important is the initiator's own responsibility, which takes the form of a general duty of care*. If it is necessary for the government to place activities within a legal framework, it does so as much as possible using general rules. In that case initiators do not need to request consent from the government in advance. If consent is required from the government, that is primarily obtained by means of an environmental permit. In addition, the legislative bill provides for the project decision, which enables a government body to act autonomously with regard to making a decision on a project for which it is responsible, such as the construction of a motorway or re-routing a dyke. That is also the case for private-sector projects of public interest, such as the construction of a wind farm or extracting raw materials. Supervision and enforcement form an important link in the cycle.

Care activities by the government aim to improve the physical environment where it falls short and to maintain qualities where these are favourable. This means that the Environment and Planning Act may place an obligation on the government to take measures if the quality of the physical environment falls short. This leaves as much scope as possible for initiatives from individuals and businesses, particularly for initiatives that on balance contribute towards the quality of the physical environment.

A strategic, integrated environmental strategy for the entire territory* is necessary in order to determine how the duties of an administrative body are performed and to formulate other objectives relating to the physical environment. The government formulates measures in the form of programmes, which result in the desired quality of an element of the physical environment, as aspect or an area. Often, these will concern elaborations of the environmental strategy, such as a programme relating to the main points in the development of an area. A programme is mandatory if it arises as result of EU directives or if the required level of quality is not achieved.

With regard to its content, the role of the government will be filled in and set out in more detail by means of standards that are geared towards administrative bodies: namely environmental values and instructional rules. An environmental value is a criterion for the condition or quality of the physical environment or a part thereof, or the permissible impact caused by activities or permissible concentration or deposition of substances in the physical environment or a part thereof. These concern quality requirements for water or air, for example, and parameters for protecting against flooding and the safety of water-retaining structures. An instructional rule is a rule concerning the execution of a duty or power by an administrative body. This might concern rules relating to the content, explanation or reasons of a decision in connection with external security, for example.

The activities in the physical environment give rise to developments in the actual situation. The government determines by means of monitoring whether environmental values are being complied with and what the condition or quality of the physical learning environment is. In a cyclical process, this results in the formation of a new strategy and, if necessary, new measures.

The instruments proposed in this regard are generic in nature, but complement instruments in the sectoral legislation as it currently stands. Acts such as the Water Act, the Environmental Management Act and the Nature Conservation Act² also contain provisions regarding standards, monitoring, visions, plans, general rules and permissions, although these instruments apply to a single sector. The Act providing for uniform provisions for managing the physical environment is broader in scope, but exclusively concerns the procedure for granting permission and the associated enforcement.

The cyclical approach is a manifestation of a paradigm shift: from preservation and protection towards an active approach in order to continuously strive towards good quality of the physical environment. The set environmental values and formulated quality levels must actually be achieved. In this regard, all stakeholders (other authorities, individuals, businesses, organisations) must easily be able to see what scope there is for development and what their roles and involvement are in the different stages of the cycle. It must also be possible for the responsible administrative bodies to be held to account by third parties with regard to whether or not environmental values and quality levels are being met and projects are being completed, and with regard to implementing the policy that is laid down in environmental strategies and programmes. Monitoring and the making available of data is essential in order to do this.

² Nature Conservation (Regulations) legislative bill (Nature Conservation Act) (Parliamentary Papers 33 348).

The cycle shows how administrative bodies relate to other players in the physical environment with regard to care for the physical environment. Activities in the physical environment are mostly undertaken by players other than the government. An important duty of the government is to link initiatives to one another and to monitor the overall quality level. The policy cycle forms the general conceptual model for situations in which authorities take up a task in the physical environment and formulate a policy to that end. An administrative body monitors the quality and, if this is deemed to be below standard, establishes a programme. If necessary, it also lays down rules that are meant to ensure that the overall quality of the physical environment remains at the desired standard.

The policy cycle therefore also forms the conceptual model for drafting the legislative bill. In many cases, the legislative bill makes it mandatory to apply elements from the policy cycle, such as when determining environmental values, drawing up a programme, laying down rules or taking account of an interest when granting a permit. Sometimes, it is desirable to make legal connections between instruments, but that is not appropriate or desirable in all cases in order to ensure the proper functioning of the policy cycle and therefore to achieve optimum quality of the physical environment. In most cases, there is therefore no legal relationship or effect between the legal concepts shown in the cycle. That would result in further juridification and therefore form an obstacle to efficient and effective care on the part of the government. An administrative body must therefore deliberately take the next step in the cycle.

In one case, the legislative bill provides for a complementary function of the cycle, in keeping with European obligations. If targets are to be expressed in measurable or calculable units or other objective terms, they may be laid down in the form of environmental values. An administrative body is obliged to monitor whether environmental values have actually been achieved. If monitoring demonstrates that an environmental value is not being complied with or will not be complied with, the administrative body is obliged to establish a programme. The programme contains the measures that ensure that environmental values are complied with permanently. The legislative bill also contains provisions to ensure that measures within the programmes are also actually taken and that a programme must be adapted if an environmental value is not being complied with.

Furthermore, effective preparation and involvement of third parties in the development of policy and decision-making with regard to activities is also important in ensuring the functioning of the policy cycle. In light of this, the legislative bill provides means of applying the 'faster and better' approach. In short, it is concerned with incentives that promote timely, comprehensive formation of visions and consideration of project initiatives, including the involvement of third parties in this. It is also concerned with embedding by means of effective monitoring and adjustment of policy programmes or projects.

Scope of the legislative bill

The government has opted for integration into a single new Act. It envisages an Environment and Planning Act that will ultimately contain legislation relating to spatial planning, water, the environment, the natural environment and building regulations, as well as parts of historic sites and buildings legislation. With this Act, the various sub-topics that currently comprise environmental policy will be linked to one another. This section examines the scope of the legislative bill.

The legislative bill provides for an integrated framework for site-specific activities carried out by individuals, businesses and authorities within the physical environment. Among other things, it provides regulations relating to the assignment of duties to authorities, standard setting, formation of visions and plans, general rules, decision-making, special circumstances, supervision and enforcement. These elements are necessary for the effective implementation of regulations in practice. Successful elements from existing permission-granting systems relating to activities and projects in the physical environment have been incorporated into the legislative bill, particularly elements from the Act providing for uniform provisions for managing the physical environment and the Infrastructure (Planning Procedures) Act. Regulations have also been combined from legislation relating to energy and infrastructure that focus on the activities of third parties, in other words, parties other than those involved in the sector. Regulations from energy and infrastructure laws that solely relate to the sector in question will not be incorporated into the Environment and Planning Act, but will remain in the sectoral legislation. For example, a regulation relating to the layout of a station may be ideally placed in the Railways Act, while a regulation on the use of land

alongside the railway is incorporated into the Environment and Planning Act. Nuclear activities, which occur relatively rarely, remain an exception.

Geographically speaking, the Environment and Planning Act covers the European part of the Netherlands and the exclusive economic zone in the North Sea. This is in keeping with the scope of several Acts that are being incorporated in full into the proposed Act. With regard to the public bodies of Bonaire, Saint Eustatius and Saba and the exclusive economic zone in the Caribbean Sea, specific legislation will continue to apply.

The legislative bill forms an initial important step in the shift towards a coherent system for environmental law. The legislative bill replaces:

- the Public Works (Removal of Impediments in Private Law) Act, the Crisis and Recovery Act, the City and Environment Interim Act, the Earth Removal Act, the Traffic and Transport Planning Act, the Road Widening Emergency Act, the Infrastructure (Planning Procedures) Act, the Act providing for uniform provisions for managing the physical environment, the Ammonia and Livestock Farming Act, the Livestock Farms (Odour Nuisance) Act, the Hygiene and Safety (Bathing Facilities and Swimming Opportunities) Act, the Air Pollution Act and the Spatial Planning Act
- the Water Act, except for the regulations relating to the Delta Programme and the financial chapter
- the Housing Act: building regulations
- the Environmental Management Act: regulations relating to site-specific activities³
- the Monuments and Historic Buildings Act 1988: permit relating to archaeological nationally listed buildings, protected village or urban conservation areas and archaeological heritage protection in zoning plans
- the Public Works (Management of Engineering Structures) Act: permit
- the Railways Act and the Local Railways Act: environmental system
- the Access and Mobility Act [*Wet bereikbaarheid en mobiliteit*]: spatial impact
- the Aviation Act: spatial restrictions
- the Mining Act: environment regulations relating to the exclusive economic zone and safety zone
- duties to tolerate from various Acts.

A modular approach has been chosen and the present legislative bill primarily focuses on the instruments for site-specific management and development of the physical environment. However, environmental law consists of a larger number of laws. Amendments of the Environment and Planning Act have been provided for in order to also enable the following topics to be integrated:

- soil (Soil Protection Act and Chapter 11a of the Environmental Protection Act)
- noise (Noise Abatement Act and Chapter 11 of the Environmental Protection Act)
- land ownership (Expropriation Act, Rural Areas (Planning) Act, Municipalities (Preferential Rights) Act)
- environmental regulations relating to non-area-specific activities, mainly regulations on substances, waste substances and products and emissions trading (Environmental Management Act)
- the natural environment (Nature Conservation Act)
- water (elements of the Water Act not involved in the present legislative bill, Wrecks Act)
- road management and public access of roads (Roads Act, Public Works Act 1900, Redistribution of Traffic Management Act).

Implementation regulations

The implementation regulations of the State relating to environmental law currently consist of a complex and interwoven system of around 120 diverse and often sector-orientated orders in council and a comparable number of ministerial decrees with more detailed and technical provisions. The scope of this set of regulations is far greater than that at the level of formal Acts. The establishment of a new system of implementation regulations is therefore even more important with regard to achieving the social objectives of the legislative bill and meeting the improvement objectives of the system reform and the legislative bill itself.

To the best of knowledge at this time, four orders in council are being laid down:

³ Chapter 1 (general, with the exception of definitions for topics remaining in the Act), 4 (plans), 5 (environmental quality requirements), 7 (environmental impact assessment), 14 (coordination) and parts of Chapters 2 (independent administrative bodies and advisory bodies), 8 (establishments), 11 (noise), 12 (reporting-, registration and measurement obligations) and 17 (measures in special circumstances).

- Environmental (procedural) Order. This will contain the general and procedural provisions in implementation of the instruments of the legislative bill that are of relevance to every party, whether authorities or individuals and businesses.
- Quality of the Physical Environment Order. This order in council contains the substantive standards for administrative activities and therefore exclusively concerns administrative bodies that will use the instruments of the legislative bill.
- Activities within the physical environment. This group of rules relates to individuals, businesses and authorities with regard to their actual actions. They consist of general, directly applicable rules that will be laid down at State level in relation to activities carried out within the physical environment. By virtue of the scope and diversity of subjects and target groups, it is expected that two orders in council will be laid down. The current Order in Council on Activities [Activiteitenbesluit milieubeheer] forms the core of one order, while the current Order in Council on Building2012 forms the core of the other order.

EU law and international law

Relationship between EU law and national law

As the EU does not make any comprehensive environmental policy due to the principle of conferral* and the principle of subsidiarity, Dutch environment law also comprises national law that is not implementation of EU regulations. Furthermore, much of EU law that is relevant to the legislative bill seeks to keep harmonisation to a minimum. The Environment and Planning Act therefore provides scope for national, regional and local policy. The necessity of this is also something that the advisory department of the Council of State emphasised in its recommendation.⁴ For example, national policy is necessary in the area of spatial planning; EU regulations have an indirect effect at the very most. The Environment and Planning Act also forms the basis for national, regional and local policy where EU regulations do not exist, are inadequately tailored to the local situation or where the EU directive obliges the country to make choices at national level.

EU law is geared towards the Member States and does not determine the administrative organisation within a Member State. It assumes a national context in which EU guidelines are implemented. The national government is required to implement directives in such a way that the duties and powers of administrative bodies are clearly defined.

EU law forms the building blocks of the Environment and Planning Act

A large proportion of Dutch environmental law, mainly in the area of environment, the natural environment and water⁵ consists of the implementation of regulations set by the European Union, such as EU directives. The legal obligations have been incorporated gradually into existing Dutch laws over the past few decades (see the Annex for an overview). In order to keep the regulations simple, the European background to a large proportion of environmental law forms one of the starting points in drafting environmental law in the Netherlands. Environmental and nature-related legislation laid down by the EU is wide-ranging, because it needs to reflect the diversity of issues and solutions that exist in the physical environment. The EU regulates a wide range of activities and operations, whereby sometimes targets are set, sometimes means are provided for and sometimes a combination of the two. The EU regulations also provide for standards relating to the physical environment, sometimes combined with instruments and sometimes providing freedom for Member States to choose instruments themselves.⁶

Despite this, a basic classification can be derived from the EU directives (see the next section on the policy cycle that has been distilled from the EU directives). This basic classification has been taken as the basis for drafting the internal structure of the legislative bill.

With regard to environmental directives, the principle that the EU endeavours to achieve a high level of environmental protection applies on the basis of the Treaty on the Functioning of the

⁴ Parliamentary Papers II 2011/12, 33 118, no. 3, Annex 4, p. 27.

⁵ The policy areas of environment, the natural environment and water come under the heading of 'environment' at the European Commission.

⁶ See also R. Uylenburg, Essay 'Het omgevingsrecht van de toekomst: kiezen en delen' [Environmental law of the future: choosing and sharing] in Ministerie van Infrastructuur en Milieu, Bezinning op het omgevingsrecht [Appraisal of Environmental Law], 2010, p. 209.

European Union⁷. This level of ambition is translated into the sector-specific targets and aims of the EU directives that are being re-implemented by the Environment and Planning Act.

Although the classification of the legislative bill is derived from EU law, it is also being used for national purposes. This uniform approach is in keeping with the desired simplification of the instrument set (no separate instruments for EU objectives and for national objectives).

The policy cycle as a common feature of EU directives

Many EU directives that are relevant to the Environment and Planning Act use the methodology of a policy cycle that is geared towards actively achieving objectives. The EU directives include the following stages:

- Determining the baseline situation, in other words, mapping out the existing situation in relation to an aspect of the physical environment, such as air quality, and recognising that a harmonised European approach is needed order to improve the situation.
- Determining objectives for the relevant aspect of the physical environment, such as a limit value for particulate as a minimum desired quality standard.
- Comparing the baseline situation with the set objectives. This may reveal a discrepancy. Numerous directives prescribe that, in that case, the objective must be brought within reach by means of general rules or permits, particularly if a harmonised approach is needed to provide a level playing field for businesses. Sometimes, the Member States enjoy greater freedom to choose measures: it is then sufficient to lay down measures, whether or not in the form of a programme, in order to achieve the desired quality within a certain period of time.
- Monitoring of the results of implementing the measures or the programme. The data from monitoring provide the basis for a new cycle, combined with new autonomous developments.

The directives stipulate that the Member State is responsible for caring for the physical environment. They require that the Member State's government works in a targeted and active way to comply with the set limit values and to achieve the set targets relating to quality of the physical environment.

The environmental values or targets that are set by EU directives vary in nature. They range from limit values on emissions at business level, values for the quality of environment compartments such as water and air, and emission ceilings at Member State level to qualitative targets such as 'a good state of maintenance'. A number of directives do not set any binding targets, but do oblige the Member State to set targets themselves.

The programmes required by the EU directives vary by name, required content and validity period and sometimes even by procedure. In any case, the required content includes plans for measures, the use of instruments and the organisation in order to achieve the objective.

The aim of monitoring is to determine the extent to which the objectives have been or will be achieved. If it emerges from the monitoring that the situation is not sufficiently closer to the objective, the measures need to be adjusted so that this does occur. A number of directives link environmental values to particular zones, such as special protection zones from the Habitats Directive⁸. The Member States are required to designate those zones on the basis of criteria stipulated in the directive, after which the aforementioned policy cycle is applied to those individual zones.

Implementation of EU directives

In implementing EU directives, Netherlands has, to date, opted to integrate the EU directives into the existing national legal methodology. This 'step-by-step' implementation has resulted in a fragmented picture, both in terms of content and procedures. The EU methodology will be adopted in the legislative bill. In the elaboration of the implementing regulations, the scope for consideration by the authorities in implementing the directives that is offered by the EU standards will be examined. The starting point in re-implementation is that consideration will always be made where there is scope to do so at a decentralised level, as well as taking account of what will be laid down at national level in accordance with the principle of subsidiarity. Regional and living environment quality levels will to a significant extent need to be formulated at local level. By allowing this consideration to take place at local level, it is possible to make the best possible

⁷ The Treaty on the Functioning of the European Union, Article 191, (consolidated version, Treaty Series 2008, 51), signed in Rome on 25 March 1957.

⁸ This Explanatory Memorandum uses the shortened names of directives and treaties as included in the Annex to the legislative bill.

consideration in consultation with local interest organisations, nature and environmental organisations, individuals and businesses, who after all are the most familiar with the field.

By adopting the EU methodology in the legislative bill, it becomes easier to meet the obligations that arise from those directives. The starting point of this is the subject governed by the EU directives; legislation lays down nothing other than or nothing more than what the EU directive prescribes, unless there is reason for this after having considered all interests. To the best of current knowledge, there are otherwise no topics for which this starting point is not being followed in the current regulations. In so far as the regulations extend further than the EU requires, that is the result of a deliberate choice on the part of politicians, which, in some cases was also prompted by the idea that a uniform national system constitutes less of an administrative burden than a system in which a difficult distinction has to be made between rules of EU origin and rules of national origin. If, after consideration, the decision is made to take a more far-reaching measure, this measure must be compatible with the EU Treaties, as stipulated by Article 193 of the Treaty on the Functioning of the European Union. In that case, the measure must comply with the provisions relating to freedom of movement and competition.

With regard to that which is not governed by EU directives, the EU principles are also followed as much as possible in order to keep the range of instruments limited and clear-cut. By doing this, not only does the Environment and Planning Act have a positive effect on the level playing field*, but future EU directives will also be easier to implement.

In addition to the EU regulations that are characterised by substantive standards, EU law also contains procedural obligations, such as public access to information, public participation or access to the court. The Environment and Planning Act also serves to implement these obligations, partly by making information concerning the physical environment accessible digitally and by means of provisions on public participation and appeals.

EU directives that are amended and whose final implementation date passes before the entry into force of the Environment and Planning Act will be implemented by means of an amendment to the current regulations. This applies, for example, in the case of Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, for which the final implementation date will be three years later than the directive's entry into force. In addition, the principle that Member States may not take any measures that would seriously endanger the realisation of the outcome prescribed by that directive, which applies based on the principle of sincere cooperation of the Community, has been and is being observed in creating the Environment and Planning Act and the implementing regulations.

Chapter □ of this Explanatory Memorandum will examine EU directives that are being (re-) implemented via the legislative bill in more detail.

EU regulations

EU regulations are directly applicable and generally do not require any implementation at national level. However, there are situations in which the national legislator is compelled to lay down specific rules, primarily regarding criminalisation, enforcement and the designation of implementation authorities. With regard to environmental law, many regulations apply whereby those regarding substances, products and waste substances will only become relevant at a later stage, because the relevant policy topics will only be integrated into the Environment and Planning Act at a later date. The legislative bill will, however, provide the bases of the regulations on topics that will be included in the bill where that is necessary for the aforementioned situations (enforcement and designation of implementing authorities). Any criminalisation will be provided for in the Act implementing the Environment and Planning Act.

International law

In addition to EU law, international conventions are also of relevance to the Environment and Planning Act. For example, conventions have been concluded under the auspices of the Council of Europe on the preservation of cultural heritage (the Granada Convention and the Valetta Convention) and landscape (the Florence Convention). These three conventions determine how the regulations on the preservation of cultural heritage are implemented in the legislative bill and how they will be implemented further in the implementing regulations. The Aarhus Convention (on access to information, public participation in decision-making and access to the court in relation to

environmental matters) and the Espoo Convention⁹ (on the environmental impact assessment in a transboundary context) were concluded under the auspices of the Economic Commission for Europe of the United Nations. These Conventions sometimes largely determine the specific procedural rules and information obligations that appear in the legislative bill. The reason for this is the implementation of the obligations of the Conventions in various directives by the EU (see Chapter □ of this Explanatory Memorandum) on the one hand and the fact that the Netherlands is itself a contracting party to the Aarhus Convention and the Espoo Convention on the other hand. What is more, the UN Convention on the Law of the Sea determines the operation of the Environment and Planning Act within the exclusive economic zone. It must also be possible to use the Environment and Planning Act for the preservation of world cultural heritage that has been or will be designated by virtue of the Convention Concerning the Protection of the World Cultural and Natural Heritage.

Principles of European and international law

Principles are frequently used when drawing up regulations. In addition to general principles of law, which usually apply to the whole of Dutch law, parts of law also make use of policy principles. These are fixed basic principles used in drafting regulations.

A variety of policy principles are of relevance to the Environment and Planning Act and the associated implementing regulations. For example, the environmental policy of the European Union is based on the precautionary principle, the principle of preventive action, the principle that environmental damage should as a priority be rectified at source, and the principle that the polluter pays. Other principles that are used in EU environmental policy are the principle that the best available technology is used, the principle of no rollback (standstill) and the proximity principle (no shifting of the burden). In addition to the environmental principles, other principles are relevant to the legislative bill. For example, international conventions on the preservation of cultural heritage contain a range of policy principles.

Such principles extend into policy-making and regulations at international and European level, and therefore in the decision-making at national level and the structure of the legal system. The Environment and Planning Act and the associated implementing regulations will therefore express these principles without these principles themselves forming part of the regulations. As these principles are of relevance in determining the policy and drafting regulations, they often appear in the recital of a directive or the explanatory memorandum to a regulation.

Occasionally, directives or conventions expressly stipulate that a specific principle must be involved in the performance of specific duties or exercising of powers, such as the principle of best available technologies when laying down general rules and granting permits for installations, and the principle of no rollback when drafting policy plans in relation to the environment. In view of the important guiding nature of principles, the legislative bill makes it clear in such cases that the principle must be applied in relation to that duty or those powers.

Similar level of protection

similar level of protection of health, safety and environmental quality

The government's starting point is that the level of protection of health, safety and environmental quality will be similar to the current level. The advisory department of the Council of State concurs with this standpoint in its recommendation¹⁰. In some cases, the protection may be implemented in a different way. To this end, the Environment and Planning Act uses two complementary approaches.

In the first instance, a standard that is laid down pursuant to the Environment and Planning Act must be realistic and achievable. If in certain cases a standard were to result in unreasonable outcomes, such as the discontinuation of developments at sites where these are desirable from a broader perspective, sufficient freedom would be provided in laying down that standard. Flexibility, which now often exists, is therefore integrated into the setting of a standard. This eradicates the situation in which one statutory regulation sets a stringent standard that is not achievable everywhere, while another regulation provides for the possibility of deviating from it if such a deviation can be substantiated. Under the Environment and Planning Act, the cases in which or circumstances under which it is possible to deviate from the standard will be indicated in the laying

⁹ The Convention on Environmental Impact Assessment in a Transboundary Context that entered into force on 25 February 1991 in Espoo (Treaty Series 1991, 104).

¹⁰ Parliamentary Papers II 2011/12, 33 118, no. 3, Annex 4, p. 18.

down of the standard. This is, of course, only possible in so far as this is permitted by international obligations.

In the second instance, the proposed Environment and Planning Act makes it possible to take an active and flexible approach to achieving targets relating to the physical environment. It is concerned with ensuring that activities as a whole remain in keeping with the standards. Protection of health and ensuring safety not only encompass the prevention of new activities, but also the management of existing ones. For example, the Environment and Planning Act obliges the government to take action in the event that the required quality levels are exceeded. Sometimes, reducing the impact of existing activities provides scope for new activities. The active role of the government and the freedom for third parties result in a greater dynamic, but must not result in a lower level of quality in the physical environment.

It is conceivable that in parallel policy processes, a decision may be made to change the level of protection. With regard to implementation in practice, it would be useful if the new standards enter into force at the same time as the Environment and Planning Act. One example is the new regulations relating to noise and soil. Such amendments are the result of a choice of policy in those parallel policy processes and not of the system reform of environmental law as such.

Preservation of the safeguarding of legal rights

The simplification of procedures for initiators does not result in a restriction of the rights of stakeholders. In the case of far-reaching decisions, they are involved at an early stage in the preparation of decisions by means of participation or procedure for expressing points of view. In the case of less far-reaching decisions, there is the option of filing an objection. Stakeholders are also entitled to the safeguarding of legal rights with regard to decisions that affect their interests. The government's starting point is that a loss of safeguards compared with the level of protection under the current legislation must not occur. Simplified procedures also make it clearer for local residents and stakeholders to see what will be decided and when, and how they can influence these decisions.

Flexibility: scope for consideration and situation-specific possibilities

The environmental regulations must facilitate the social dynamic of a society that takes an interest in the environment. The Environment and Planning Act is intended to enable society bring the physical environment to the desired level of quality, to maintain that level and at the same time allow sufficient freedom for the activities of individuals and businesses, all more simply and more effectively than is currently the case. Numerous interests play a role in this. Administrative bodies are expected to fully take account of the various interests concerned in policy-making and in decision-making in relation to initiatives and projects. They have discretionary choices in that consideration of interests. On the basis of their statutory duties and powers, that freedom for administrative bodies is determined by rules that are laid down by or pursuant to the legislative bill. In this way, the legal system and the framework itself to be set on this basis allow the flexible application of the statutory instruments. This flexibility forms a response to the increasingly complex tasks in the physical environment and aims to promote sustainable development.

Scope for consideration and possibilities for deviation

To begin with, the new system provides administrative bodies with the freedom 'at the front end' of the policy process in order to fulfil their role in relation to the physical environment as they see fit. This freedom is expressed in how they perform their duties and exercise their powers. The system provides scope in relation to determining policy and the instruments to be used. This forms an expression of the political primacy of administrative bodies in restricting activities. The freedom of administrative bodies to make considerations at the appropriate level is broad, but not unlimited. It is restricted in terms of procedure and substance by the objectives of the Act, the statutory definition of duties and powers and the bases for generally binding provisions. Furthermore, the way in which the administrative bodies apply their powers and make use of the scope for consideration that is offered at the outset of the policy process is linked to procedural requirements. That must ensure that consideration is carried out transparently and is subject to the necessary procedural guarantees.

Even so, some administrative scope for consideration at the end of the policy process sometimes remains necessary, in the form of possibilities for deviation by administrative bodies. That scope may be necessary in relation to special local situations, complex areas or cross-regional interests, for example. In these types of cases, it will be necessary for an administrative body to grant

exemption from an previously set requirement, to be able to impose a more or less stringent requirement than the one contained in the rule or set a more specific requirement. That may sometimes be desirable in order to enable a socially desirable activity to be carried out or to enable a situation-specific provision to be made in an individual case.

Division of administrative duties

Public administration in the Netherlands has been placed under the responsibility of municipalities, water authorities, provinces and the State. As soon as it is clear that part of the physical environment requires the attention of the government, the question arises as to which administrative layer is responsible. Public responsibility is expressed in legislation by assigning duties and powers to administrative bodies. Examples of duties include management duties relating to primary roads and the primary water system, which are assigned to the Minister of Infrastructure and Environment. Powers refer to a say in decisions, such as environmental permits. Often, the legislator provides the frameworks for the performance of duties and the exercising of powers. For that matter, municipalities and provinces have also assumed the care of elements of the physical environment on their own initiative, or due to local or regional circumstances or interests. An example of this is the municipality's care for the public space within the city. The legislative bill does not make any changes to the principle that the duties relating to the physical environment that the government is to look after are the responsibility of the municipalities in the first instance, and with regard to water management, these duties lie with the water authorities. The municipalities play the primary role in managing the development of the physical environment: they look after the public space, they assign scarce space to social functions and act as the competent authority for by far the most activities of individuals and businesses. The water authorities, bodies of functional administration, look after the management of the water system, which is something that is essential to the Netherlands.

Even so, the State and the provinces are active participants in the physical environment in addition to these primary players. The provinces perform an important administrative role in linking and managing the tasks within the physical environment, in order that the whole is more than the sum of its parts. The scale of some elements of the physical environment requires that the State or the provinces take responsibility for looking after these. These concern aspects such as part of the infrastructure, large bodies of water and the natural environment. There have sometimes been other arguments in favour of the role of the State or the provinces in the creation of the current legislation. For example, they are the competent authority for initiatives for reasons of scale, the social interest, the impact on the physical environment or the administrative complexity. Examples include the powers of the State government to issue permits for nuclear activities and mining activities or the powers of provinces to issue permits for activities such as extracting surface minerals or the storage of hazardous substances. In addition, the desire to concentrate knowledge and expertise in one place has often formed a reason for the State or the province playing a role, but this argument loses ground if environmental services are able to provide this.

Promulgation of policy: separation of policy and standard-setting

There are interests that require the powers of decentralised authorities to be placed within a framework or for the content of those powers to be oriented towards the performance of a duty by a decentralised government body. To this end, current environmental law offers two routes: a statutory obligation to 'take account of' a policy document, or placement within a framework by means of specific rules of law. In the legislative bill, placement within a framework does not take place by means of policy plans but by the legal route. The State and the Provinces may instruct other administrative bodies to perform their duties and exercise their powers in a specific way by means of rules of law. History has taught us that the implementation of rules by policy, in which case the vision of a province must have an effect in the plans of municipality, for example, costs a great deal of time, money and energy, because all of those plans, visions and policy require mutual agreement¹¹. Such policy documents with effect also involve lengthier and more carefully executed procedures, because legal consequences for other parties may be at play. The drafting of these therefore takes longer, which sometimes hinders an effective and proactive policy and may have a counter-productive and 'immobilising' effect. Such a system may form a hindrance in achieving the social objectives that are intended by the Environment and Planning Act. The basic principle for the

¹¹ Scientific Council for Government Policy, *Planning als onderneming; Voorstudies en achtergronden* [Planning as an enterprise; Preliminary studies and background] no. 34 According to the WRR, a hierarchical planning system results in an administration-focused system with the demonstrable risk of: "even more memoranda, structural outlines, structural diagrams, even greater coordination between authorities, yet more procedures for agreement of decision-making."

legislative bill is therefore to separate policy and standard-setting. That means that policy documents only place an obligation upon the administrative body that lays down rules. Placing legal obligations upon other authorities is only possible by setting rules of law or resolutions to this effect.

In the realisation of projects by the State and the provinces, it may sometimes be the case that duties or interests collide. In these types of cases, they have overriding authority at their disposal.

Trust/Enforcement

The starting point in the legislative bill is trust: trust in initiators, trust of individuals in the government and mutual trust between the authorities. Trust is closely associated with taking responsibility and calling one another to account regarding compliance with what has been agreed. Trust means that individuals, businesses and the government know what they can expect of one another. Individuals and businesses and the government can expect one another to adhere to the decisions and rules that have been adopted. This also entails that the government is able to hold those who do not comply with the established rules to account. Taking enforcement action contributes towards a level playing field and does justice to society's sense of justice, which requires that rules are complied with, that trust that is given is not broken and that no party causes irrevocable damage to a safe, clean and healthy physical environment or environmental quality.

If rules are violated and trust is broken, the government must intervene. The enforcement action must be tailored to the nature, severity and causes of the violation and the expected effect of the intervention. If the effects of a violation are limited, and the party responsible generally complies with the rules and unintentionally committed the violation, a mild intervention such as a warning will be sufficient. Conversely, if the effects of a violation are considerable or irreversible and there is evidence of intentional and systematic non-compliance, then relevant sanctions under administrative and criminal law must be imposed, whether or not in combination with tightened supervision.

In the case of the system reform, it is appropriate for outcome-oriented regulations to be used where possible instead of means-oriented regulations. The regulatory authority will need to be able to assess compliance with these and resist the temptation to 'top up' the regulation in question beforehand with policy rules. In its report entitled 'Toezien op publieke belangen' [Regulating on the basis of public interests]¹², the Scientific Council for Government Policy (WRR) also points out that standards often need to function in a complex reality with a strong international dimension and rapid technological developments. As a result, the regulations may cease to reflect reality at any time. In the view of the WRR, a regulatory authority must look beyond the limits of legislation and regulations to look for risks and threats to the system that the government is overseeing. Against this background, supervision and enforcement require a sufficient set of legal instruments and an expert and professional attitude from regulatory authorities and enforcement authorities. The government holds the view that the instrument set that can be used within the scope of enforcement is generally sufficient and therefore no far-reaching update is needed within the scope of system reform. Its view only differs with regard to imposing the so-called punitive (punishment) sanction. In the case of this instrument, the government considers it desirable to review the use of sanctions under criminal and administrative law to take place, with the aim of achieving a more transparent and consistent regulation.

The government will need to continue investing in the expertise and professionalism of the regulatory authority and the enforcement authority, in order that they are able to operate effectively and credibly in the dynamic arena. It is necessary that the regulatory authority provides transparency, independence and performs a proactive, alerting role in relation to policy makers. The government plans to work together with other authorities to guarantee on the basis of each party's own responsibility that supervision and enforcement within environmental law meet those stringent requirements. It considers it its duty to promote a situation in which supervision and enforcement are carried out everywhere at the desired level of quality, partly by jointly exploring with other authorities which organisation and efforts are necessary in order to achieve an effective level of supervision and enforcement that reflects the system reform. See section **Fout! Verwijzingsbron niet gevonden.** for further details. The further professionalisation of enforcement action in fact already forms an important objective of the legislative bill entitled

¹² WRR, *Toezien op publieke belangen*, WRR report no. 89, 2013.

Improvement to the procedure relating to the awarding of permits, supervision and enforcement, which is currently before the Lower House of Parliament.¹³

Duties and powers of administrative bodies

Article 21 of the Dutch Constitution charges the government with ensuring the habitability of the country and the protection and improvement of the living environment. This care is a collective duty that is shared by all administrative bodies together. Chapter 2 of the legislative bill contains general provisions relating to the promotion of that duty and provisions relating to the organisation of the government's duties, as part of which duties and powers are assigned to the various administrative bodies. Subsidiarity forms the basic principle in assigning duties. With regard to optional ('may') powers of an administrative body of a province or the State, these powers may therefore only be used if that is required for the purpose of a provincial or national interest that cannot be served efficiently and effectively by the municipal authorities, or if that is necessary in order to ensure the efficient and effective performance of duties and exercising of powers or compliance with an obligation under international law. With regard to the exercising of powers or performance of duties that are mandatory by virtue of the proposed Act, this consideration has already been made at the level of the formal law. If the legislator has made this consideration, it is no longer necessary to consider the principle of subsidiarity in the performance of duties or exercising of powers.

The regulation of duties and powers in the legislative bill has been based on the existing division of duties in the physical environment. With regard to tangible components such as the water system and infrastructure, this division of tasks has been laid down stringently by virtue of the necessary definition between general and functional administration. In the case of other tasks that are not restricted to local or regional boundaries, a system of co-actorship exists involving multiple authorities and a coordinating task performed by the Minister, such as in the case of air quality. Otherwise, the division of administrative duties relating to airports, roads and railways is provided for in the relevant sector laws; the Environment and Planning Act follows on from these.

Operation of the system

As indicated in Table 2, the instruments contained in the draft legislation can be subdivided into four types.

Table 2: Type of instrument in the Environment Act

Policy development	Promulgation of policy	General rules	Permission
Environmental strategy Programme	Environmental value Instructional rule Instruction Rule governing evaluation of environmental permit	Physical environment plan * General rules contained in the water board regulation* General rules contained in the environmental regulation* General government regulations*	Environmental permit Project decision*

As described in section 0, the proposed policy development instruments are only binding upon themselves. The promulgation of policy to a decentralised level will take place by means of the instruments intended to for the promulgation of policy. From the point of view of proper administration, administrative bodies must take account of one another's policies, tasks and powers. The general rules operated by the State and the decentralised government bodies ensure that activities are carried out in an appropriate manner. They also provide clarity with regard to what is and what is not permitted within the physical environment. Cases that do not fit within existing regulations can be addressed using the various instruments that exist in order to obtain consent.

¹³ Amendment to the Environmental Law (General Provisions) Act (improvement to the procedure relating to the awarding of permits, supervision and enforcement) (Parliamentary Papers 33 872).

In practical terms, the various instruments operated by the different administrative bodies for differing reasons must always ensure a seamless approach. General rules, instructional rules and consents granted will each have a binding legal significance in that regard. Table 3 and Figure 3 show the most important relationships that exist between the core instruments of the legislative bill.

Table 3: Relationships between the core instruments of the Environment and Planning Act [Omgevingswet].

Principal rule governing relationships	Exceptions
Environmental values determine the policy to be pursued, such as the setting up of a particular programme.	In the case of environmental permits, specific environmental values, in the form of instructional rules or assessment rules, shall directly determine whether or not consent is granted, for example, because EU Directives require this to be the case.
Instructional rules and assessment rules governing environmental permits are intended to be used by governments (they have an effect in areas such as physical environment plans, environmental permits and project decisions). They are not binding upon citizens or businesses.	The State is not bound to adhere to the instructional rules operated by a province.
Environmental strategies and programmes are binding upon the administrative body that determines them, are not subject to any hierarchy and do not have any legal effect, not even in dealings between different levels of government.	In its water management programme, a water board will take account of the water programme operated by the province in that region, in order to ensure compliance with EU regulations. The management plan for a Natura 2000 area will include exemptions from the environmental permit. A programme adopting a programmatic approach (see below).
As a means of satisfying an environmental value or other objective, a programmatic approach provides an alternative method of assessing decisions such as an environmental permit, a project decision or an amendment to the physical environment plan.	The State may decide to circumvent the programmatic approach adopted by a province or municipality, in the event that this disproportionately hinders a project decision. The same thing applies to a province, which may circumvent a programmatic approach adopted by a municipality.
Rules must not conflict with higher legislation, such as general rules issued by the State or a province.	Deviations must be possible in designated cases and in accordance with the experimentation clause.
Regulations contained in an environmental permit may not deviate from the general government regulations directed at everyone.	In the event that the government regulations expressly provide a facility thereto, deviation is possible in the form of situation-specific regulations. In the event that general government regulations governing the environment or discharges at an industrial plant are insufficient, the permit may include more stringent regulations.
A project decision must be in keeping with the general rules directed at everyone, but may amend the physical environment plan.	A project decision may circumvent decentralised regulations in event that these disproportionately hinder the project decision concerned.

GLOBALE TYPERING INSTRUMENTEN OMGEVINGSWET

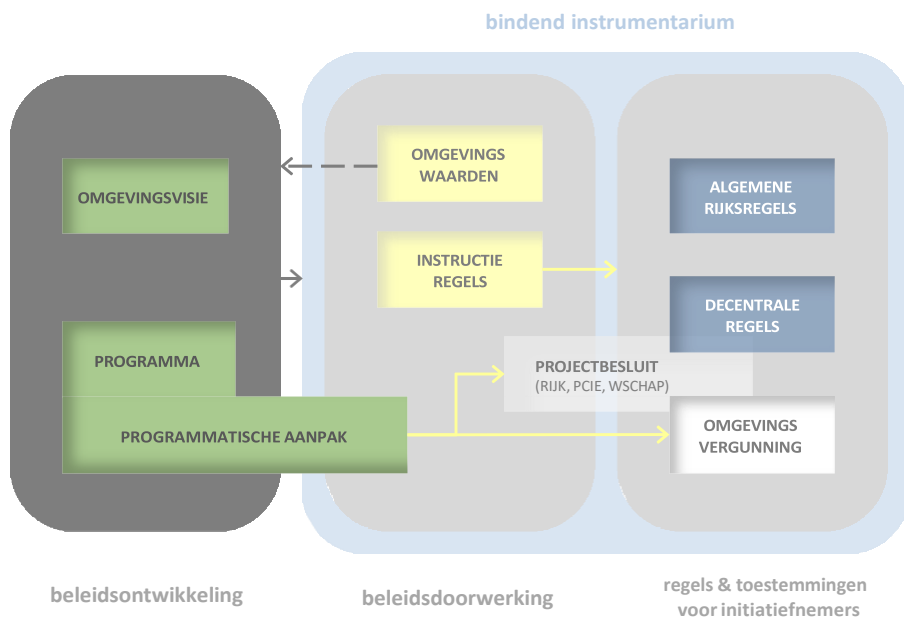


Figure 3: Overall types of instruments available under the Environment Act.

Summary of (parts of) the chapters of the Environment Act

Environmental values (Chapter 2 of the Environment Act)

Introduction

As the range of tasks undertaken by the government began to grow from the 1950s onwards, attention increasingly shifted towards the achievement of societal goals. Administrative bodies were increasingly assigned tasks and powers with that in mind. In the area of environmental law, this especially manifested itself from the 1970s onwards, following the approval of the first European environmental action programme in 1973, in the form of the Directives governing air quality (such as those addressing sulphur dioxide and suspended particles, followed by lead and nitrogen dioxide in the air) and water quality (the quality of surface water intended for the preparation of drinking water). This formed the foundation for a series of statutory regulations and standards, for the purpose of bringing about specific outcomes or applying the allocated administrative powers in such a way that the objectives will actually be pursued. The setting of standards in this way was further developed in the Environmental Management Act [Wet milieubeheer] and the Pollution of Surface Waters Act [Wet verontreiniging oppervlaktewateren] (subsequently came to form part of the Water Act). These involve establishing a specific quality or state of an element within the physical environment in the form of testable and qualitatively defined objectives. Examples of these include the maximum permitted load that may be exerted upon the physical environment arising from activities or the maximum permitted concentration or deposition of substances in the physical environment. During the past ten years in the area of spatial planning, we have also witnessed a trend towards defining the quality of the environment or other intrinsic qualities in an objective way, in order to protect, and where possible, improve them.

Section 2.3 of this chapter introduces a system of environmental values relating to the physical environment. Environmental values are standards that establish the desired state or quality of the physical environment or of a part of it, in the form of a policy objective. The environmental values are expressed in the form of measurable or calculable units, or otherwise in objective terms. These also include standards that establish the limits of deposition (immission) of a specific substance in the physical environment or standards that impose maximum levels with regard to the burden that may be placed upon the physical environment by particular activities. For example, it is possible that an environmental value specifies the maximum permitted concentration or deposition of one or more substances (into the air or surface water, for example) or the maximum permitted burden that may be placed upon the physical environment or part thereof by a group of sources or activities (such as the determining of an emissions ceiling). Environmental values may be determined with a view to ensuring the overall quality of part of the physical environment, but also in relation to a specific area or facility.

An environmental value describes the actual quality that must be achieved or maintained in a specific location or at a specific point in time. This will primarily be determined by adding together:

- the natural processes (especially in the case of environmental values);
- the effect of activities carried out by individuals and companies;
- the choices made by the various government bodies for the purpose of managing the physical environment.

Example: The environmental value relating to water quality describes the quality of the surface water and ground water. Water quality is determined by:

- the natural processes that are occurring at the time of testing, such as: the quantity of water present in the water system (are we undergoing a drought, or has there just been a lot of rain), how warm it is (chemical processes are somewhat temperature-dependent), what season is at the moment;
- the influence of activities carried out by individuals and companies on the water system, such as: the input of substances and heat into the water system as a result of those activities, the removal of water from or insertion of water into that water system and the carrying out of works that affect the flow;
- the choices made during the management of the physical environment, such as: how much space is assigned to the system, how that space limited and set up (banks, dikes), what measures are government bodies taking in order to collect and treat waste water and rainwater?; how intensive are dredging works that are carried out?

Environmental values may arise from European or other international obligations, but also as a result of national, provincial or local policy objectives. They may be established by a municipality, province or by the State. The purport of the majority of EU Directives is that the quality objectives stated therein must be achieved and that Member States are obliged to initiate efforts in order to bring that about. In the case of almost all of its Directives, the European Union adopts the principle that Member States must draw up and implement packages of measures. Only rarely is a direct link established between European objectives and specific decisions for new developments, projects or activities. A different situation applies in only a limited number of cases.¹⁴ Environmental values may also be established as a means of affording legal status to national, provincial or municipal quality objectives legal status.

What environmental values mean

Environmental values should be regarded as a statutory specification of the social objectives such as those in Article 1.3. They specify the way in which the government must take steps to secure the physical environment. Environmental values serve as a reference framework for the deployment of government powers and the manner in which tasks are carried out. They provide clarity with regard to the state or quality that must apply to parts of the physical environment at a specific time or that must be maintained or pursued. For the government that determined the environmental value, they constitute a legally binding qualitative policy objective that must be achieved or worked towards, by making use of or applying the powers assigned to the governmental body in question. A broad array of powers or tasks may be used for that purpose, including those that lie outside the scope of the Environment Act [*Omgevingswet*]. In this way, subsidies or awareness raising campaigns can be used to bring the target range closer. Government investments or the taking of measures are additional ways of making a contribution. Road traffic measures, or a concession in which buses driven on natural gas can be made compulsory form just two ways in which to contribute towards a reduction in the problem of fine particulate in a street or district. In order to achieve environmental values, specific actions may well be necessary. It may also be the case that the government is required to establish overall rules in relation to activities. After all, contributing towards the achievement or maintenance of environmental values not only the task of the government itself. Other social actors can also make a substantial contribution to the achievement and maintenance of a high-quality physical environment. This is also achieved by means of agreements between the government the relevant stakeholders. The government is however the only body that is accountable with regard to the achievement of the environmental value involved. Other social actors are not accountable in that regard. They will only be subject to a legally binding effect, once an environmental value has been translated into the regulations that form part of an environmental permit, general regulations, or a situation-specific regulation.

Environmental values are established by order in council, environmental regulations or by means of a physical environment plan and are laid down in legally binding terms (stating, for example, whether the value concerned is subject to the achievement of a specific outcome, or to a best efforts obligation), specifying the dates of commencement and the locations that apply.

Various types of environmental values are available:

- Item-specific environmental values, such as the safety requirements that apply to a primary flood defence. The environmental value (the 'safety standard' in the Water Act) is currently expressed in the form of the average probability that the high-water level will be exceeded in any given year, which the water-control structures must be designed to withstand, or the annual average probability of a flood in the area protected by the water-control structure.
- Environmental values can apply to the entire country or to a specific area. In that case, the environmental value is expressed in measurable units (quantities), such as a maximum concentration of substances in parts of the physical environment (water, soil or air) or, in the case of odour, maximum quantities of odour units per m³. The values can be focused on a particular type of area that fulfil a particular function that must be protected. These could include ground water protection zones, with a view to water extraction, or a nature reserve that fulfils specific functions or characteristics.
- Environmental values formulated in objective qualitative terms for objects or areas, in cases in which recording measurable units is not so easy, but clear measures can actually be applied. This could take the form of an object-specific description of the qualities that a natural habit must fulfil so that it is able to function as a biotope for a specific species.

¹⁴ Examples of this include the Seveso Directive, the Conservation of Wild Birds Directive and the Habitat Directive.

This will offer the possibility to adopt tailor-made approaches that will adhere closely to the requirements of the EU Directives (such as the Water Framework Directive, the Air Quality Directive and the National Emission Ceilings Directive).

Consequences of establishing an environmental value

The legislative bill attaches two consequences to the establishment of an environmental value. First of all, the Mayor and Aldermen of a municipality is, in principle, obliged to establish a programme, in the event that an environmental value is not fulfilled or is expected not to be fulfilled. That programme must consist of a package of policy and management measures that will enable the value to be fulfilled. The obligation will apply, irrespective of whether the environmental value was established by the municipality, a provincial authority or the State. This is also in keeping with the principle of subsidiarity. For that matter, whenever the State establishes an environmental value to be applied on a national level, in an area such as air or water quality, it may be the case that monitoring has shown that within a precisely demarcated, geographical area, it is impossible to fulfil the environmental value concerned or that this is likely to be impossible. An example of this would be a situation in which a specific, national environmental value (such as for fine particulate) is exceeded at certain locations in a municipality located within the Randstad conurbation. As a consequence, the Mayor and Aldermen will be required to put together a programme of measures to prevent the environmental value from being exceeded on a local level. The legislative bill also makes it possible to issue an environmental ordinance or order in council in order to assign another administrative body to put together a programme of that type. Stipulations governing such programmes can be found in Section 3.2 of the legislative bill.

Secondly, each environmental value that is established must be subjected to a programme of monitoring, in order to assess whether or not the environmental value is being fulfilled. Stipulations governing the monitoring of environmental values can be found in section 20.1. The two consequences referred to above are derived from the way in which the EU quality standards have been put together. From the viewpoint of the European Union, the legal security of citizens requires that provisions be put in place to ensure that environmental values are achieved. Programmes are therefore required to consist of measures that will be capable of ensuring that the values concerned will be met. In that regard, this does not simply a case of ensuring that a programme is created, but that it is also carried out.

In the absence of more detailed regulations, environmental values will not be taken into account when establishing decisions, such as environmental visions, physical environment plans or environmental permits. This is also the approach adopted by the European Union, which assumes that a quality requirement is primarily an effect-driven standard. If an environmental value established by the State must also apply to decentralised government bodies or must even be carried forward in specific decisions, that validity or ongoing effect must be configured by means of instructional rules or assessment rules relating to environmental permits. It will then be possible to stipulate the manner in which the environmental value must be incorporated into types of decision designated in relation thereto (such as an obligation, when establishing a programme, to achieve a specific result, the incorporation of an obligation to use best endeavours when establishing general rules or the inclusion of an element of testing whenever a permit is being issued, etcetera). Those instructional rules may also be used to regulate the way in which tasks are carried out, such as the creation of nature-friendly riverbanks. A detailed explanation of instructional rules as a legal device will be given below.

In this way, it is possible to ensure to maintain flexibility with regard to the effects of the environmental values, and where desired, the programme system can be applied as a means of achieving the environmental values and underpinning individual projects. It offers extensive scope when it comes to ensuring compatibility with the implementation of a system of statutory norms throughout Europe as a whole. The form of regulation applied to the environmental values, in combination with the instructional rules in section 2.5, the assessment rules for environmental permits by virtue of section 5.1.3 and the programme, the stipulations governing which can be found in section 3.2, all provide scope for situation-specific approaches. This duly creates scope for administrative bodies to enable development initiatives within a broader package of measures. In a specific case, it would also prevent a need for too stringent a legal link to be established between an environmental value and a decision. A strict link would simply prevent a project from going ahead, without improving the situation at all. As a result of the measures it contains, a programme will make a contribution towards improvement and will enable part of the scope for use to benefit socially-desirable developments. This method can currently be recognised in the Water Quality Requirements and Monitoring Order [*Besluit kwaliteitseisen en monitoring water*] of 2009 and the

ministerial decree governing monitoring derived from this, as well as in the National Air Quality Collaboration Programme [NSL].

Environmental values on a municipal, provincial or national level

Municipalities

Municipalities are authorised to establish environmental values in the environmental plan (if that has not already taken place at a higher level or in cases where it has been specifically determined that the municipality is authorised to establish non-standard environmental values), such as an environmental value governing odour, for example.

In the case of an environmental value that forms part of a physical environment plan, it is necessary to indicate whether this forms a binding framework for the powers of the Mayor and Aldermen to amend the physical environment plan or to grant environmental permits that deviate from the physical environment plan. Furthermore, it is possible to include general rules in the physical environment plan, in order to ensure that the environmental value is met. It is in these two ways, namely the assessment rules for environmental permits and the general rules, including any situation-specific regulations, that the environmental values manifest themselves in turn upon the activities undertaken by citizens and businesses.

Municipal environmental values are only useful in so far as local activities or sources that exist within the boundaries of the municipality largely or completely affect or determine the envisaged quality of the physical environment. Furthermore, those effects must be capable of being influenced or managed through the implementation of source or effect-oriented measures by administrative bodies that form part of the municipality.

Example: An environmental value governing noise that forms part of a physical environment plan, for which a noise value is selected for an area located directly adjacent to a busy provincial route with the intention of maximising the noise immission of that road should be deemed inadmissible if the Mayor and Aldermen of the municipality themselves have no facility to regulate the use of the road in question or the vehicles that make use of it and do not therefore have the ability to regulate the noise emission of the road or are themselves unable to bring about the envisaged noise quality (such as by means of installing sound screens or by applying noise-absorbing asphalt).

Provinces

Provincial authorities are also entitled to establish environmental values. In this regard, it is also the case that the environmental values will only be useful and effective if they relate to the effects of activities or sources located within the province in question upon the quality of the physical environment in the area. These must also be capable of being influenced or managed through the implementation of source-oriented measures or by means of effect-oriented measures carried out by municipalities or provincial authorities. A provincial authority cannot set any environmental values relating to aspects for which the State has set environmental values, unless the State has determined that additional or non-standard environmental values can be set by means of an environmental regulation.

The legislative bill includes a facility to issue an order requiring the establishment of environmental values within a province in relation to specific aspects. These relate to the safety of non-primary water-control structures and the annual average probability of floods that applies to the areas designated in the regulation.

The State

The State is also entitled to establish environmental values. The legislative bill includes a summary of the environmental values governing the environment that must be established by the State through the issuing of an order in council. This obligation forms the basis for the implementation of the Air Quality Directive, the National Emission Ceilings Directive, the Water Framework Directive and the Seveso Directive. At the present time, certain environmental values have been formulated in the form of legislation, whilst others have been issued in the form of an order in council. The legislative bill lays the foundations for a uniform and, wherever possible, a harmonised implementation of the EU requirements, in the form of an order in council. It is intended that the environmental values established by the State, the assessment rules for environmental permits and the system of monitoring should be brought together in the form of a single order in council.

The legislative bill also incorporates an obligation upon the State to establish environmental values in relation to water safety (the protection of land against floods).

If that State establishes an environmental value, for which the instruction has not yet been issued on a statutory level, the subsidiarity consideration in Article 2.3, paragraph three must be followed.

Substantiation

It is proposed that the current distinction between boundary, guideline and target values, as defined in the Environmental Management Act, should be abandoned. This would enable measures to be more closely related to the variation laid down in the EU Directives. EU Directives make use of all manner of diverse concepts and objectives. Without amending the framework of terminology and definitions used in the Environmental Management Act, the transposition of these Directives into national law gives rise to tensions and a high likelihood that the Directive will be implemented incorrectly. In the recent, bypasses have been incorporated into the law, in order to ensure correct transposition.

The benefit behind the abandonment of the concepts of boundary values, guideline values and target values is that attention can then shift towards the area to which the objective is to be applied. After all, the issue does not relate to the concepts themselves, but relates to the practical issue as to the outcome that will be achieved or to the effort that must be expended and who (acting jointly or separately) is most effectively able to provide this. This has been incorporated into the legislative bill in the form of a stipulation that when establishing an environmental value, it is necessary to determine whether the parameter involves an obligation to achieve a specific outcome, an obligation to use one's best endeavours or a different obligation, to be defined.

Instructional rules and instructions (Chapter 2 of the Environment Act)

General

Based upon their concern for the physical environment and to guarantee uniformity in the way in which tasks are undertaken on a decentralised basis, the provincial authorities and the State are entitled to impose conditions regarding the manner in which tasks are carried out or powers exercised by decentralised governments. Those conditions may be determined on the basis of:

- a specific task, assigned to the province or the State in this, or another Act (such as the protection of the State and the operation of the provincial or State infrastructure);
- the representation of 'the public interest' with regard to efficiency or effectiveness, or in the sense of the protection of citizens or providing a level playing field for businesses (such as in the case of construction legislation or external security legislation);
- a provincial or national interest for which the province or the State takes responsibility with regard to the protection and representation of those higher interests;
- international obligations, including EU legislation.

These relate to matters that transcend local or regional interests, or matters in which the interests of municipalities and provinces come into conflict.

Examples of the types of interest that exist at a state level include the restriction of new building and land reclamation in the IJsselmeer area or the designation and protection of compensatory areas in connection with the construction of the Tweede Maasvlakte in the context of the Project Mainport Rotterdam. This has since been settled in the Order in Council on general rules on spatial planning [*Besluit algemene regels ruimtelijke ordening*]. On a provincial level, examples include the supralocal issue of business parks, offices and programmes relating to the construction of residential dwellings, the protection of nature and the protection of the State and the operation of provincial infrastructure.

The provinces and the State are entitled to impose conditions relating to the carrying out of tasks or exercising of powers by the administrative bodies of decentralised governments. To that end, sections 2.5.1 and 2.5.2 of the legislative bill contain two powers: the power to impose instructional rules and the power to issue an instruction in the form of an instructional order.

Restrictions regarding the use of instructional rules and instructions

In application of the powers of provincial authorities and of the State to impose instructional rules and of the power to issue an instruction directed at a provincial authority, municipality or water

board, the legislative bill lays down a number of criteria intended to limit these powers and to ensure that they are used sparingly.

First of all, these take the form of the subsidiarity criteria in Article 2.3, paragraphs two and three. These powers may only be used in order to protect or realise an interest that exists on a national or provincial level, in the event that that interest cannot be represented in an efficient and effective manner by the municipal or provincial authorities. Or in the event that the exercising thereof is required in connection with the efficient and effective implementation of the tasks and powers provided under the Environment Act. Or due to the fact that EU legislation does not actually permit any other form. These will frequently involve social interests that transcend interests that exist on a local or regional level. This may also involve exercising control with regard to decisions or tasks undertaken by municipalities, water authorities or provincial authorities that may have undesirable effects that extend far beyond the boundaries of the municipality, water board or province (such as the development of new business parks).

Examples of interests that exist on a provincial level include: tasks expressly assigned to the provinces by law, such as those governing quiet areas, ground water protection areas or airports of regional significance. In addition, provincial authorities may themselves be of the opinion that an interest exists on a provincial level, in relation to which it would be efficient and effective to issue instructional rules or instructions in the form of an environmental regulation.

The existence of a national interest may also arise from tasks expressly assigned to the State by virtue of the Act. For example, the statutory task and responsibility of the State to ensure national security and the safety of air traffic authorises the State to impose restrictions regarding the construction of high-rise buildings so as to ensure that radar stations are capable of operating effectively. Another example is the international obligation, by virtue of the Water Framework Directive to impose measures in each river basin district. Or the obligation by virtue of the World Heritage Convention to protect cultural and natural heritage.

In addition, the criteria in Article 2.3 explicitly state that the form and content of instructional rules or instructions that form part of an instructional order may not extend beyond what is actually necessary in order to ensure the effective realisation of the envisaged objective. In the rationale accompanying the relevant order, it will be necessary to indicate which of the aforementioned criteria constitutes or constitute the reason to proceed to impose rules or to issue the instruction. The Advisory Department of the Council of State, the Parliament or the provincial authorities may then form an opinion as to the necessity thereof. Whether a provincial or national interest is involved or not will ultimately remain a political judgement, which the courts possess only marginal powers to test.

In addition to restricting the applicability of the criteria in Article 2.3, a second statutory restriction of the use of these instructional powers requires that they be limited to specifically designated tasks and powers assigned by law to the administrative bodies concerned. With regard to the power to issue instructions, the interest in relation to which instructions may be issued are limited to the balanced distribution of functions to locations and the coherent and efficient (regional) management of water.

Instructional rules

Instructional rules are intended to be used in situations, in which the rule or group of rules is directed towards various government bodies. In those cases, the rules involved will relate to the same party enjoying legal rights or to the same area (or territorial entity). A rule that forms part of an environmental regulation or general order in council will relate to the same time or legal fact. Instructional rules lend themselves for repeated application: the standard must always be adapted whenever the situation described or referred to in the regulation actually occurs. These instructional rules must be categorised as generally binding regulations addressed not to private individuals but to the administrative bodies designated within the rule. These instructional rules therefore provide no basis for the imposition of rules upon private individuals. The principles governing the imposition of rules with a binding effect upon private individuals - referred to in this case as "general rules" - can be found in section 4.1 of the legislative bill. Instructional rules may be issued by means of an order in council or a environmental regulation. These will relate to the content, explanation or rationale of a decision taken by an administrative body by virtue of the legislative bill. Instructional rules may also be imposed with regard to the exercising of a task assigned to an administrative body in the legislative bill. Restrictions governing the decisions and tasks in relation to which instructional rules may be issued are designated in the legislative bill.

The power to impose instructional rules is not limited to the framing of tasks and powers of decentralised government bodies alone. Instructional rules may also be issued in order to set out restrictions or to issue more detailed specifications regarding the exercising of powers within a body's own layer of government.

Rules directed at a decision

Restrictions governing the decisions in relation to which provincial authorities have the power to issue instructional rules are designated in the legislative bill. Instructional rules issued by a province with regard to the content, explanation or rationale of decisions may be directed towards a non-obligatory or an obligatory programme of the Provincial Executive or towards an obligatory programme implemented by the Mayor and Aldermen or by the board of a water board. In addition, rules may be issued that relate to a physical environment plan or a water board regulation. The province may also impose rules in relation to a project decision by the Provincial Executive, a project decision by a water board and the land registry or a level decision taken by a water board.

The power of the provincial authorities to issue instructional rules regarding physical environment plans and water board regulations is limited to the imposition of rules regarding the tasks assigned by law to municipalities and water authorities and the imposition of rules regarding the implementation of tasks assigned to the province. This means that instructional rules regarding or in relation to the implementation of those tasks must, in all cases, be capable of relating to the sections required by law to be included in the physical environment plan or water board regulation. In addition, provincial instructional rules relating to the physical environment plan may impose limitations with regard to the environmental values that municipalities include in the physical environment plan at their own initiative.

A province is entitled to issue both instructional rules by virtue of Article 2.22 of the legislative bill and assessment rules for applications for environmental permits in accordance with Article 5.18, paragraph two of the legislative bill, in order to uphold a single interest. An example of this is the protective regime of the National Ecological Network [*Natuurnetwerk Nederland*]¹⁵. Protective instructional rules are issued in the form of an environmental regulation that contain restrictions regarding the power of the municipal council to approve the physical environment plan. The restriction lies in the fact that the physical environment plan may not enable any activities that will affect the natural ecology. A comparable restriction must be capable of being applied to the granting of environment permits for deviating activities. For that reason, an environmental regulation may, by virtue of Article 5.18, paragraph two, contain assessment rules for deviating activities that affect the National Ecological Network. This shall apply in addition to conjunction with the national assessment rules for deviating activities that apply by virtue of Article 5.17 in conjunction with Article 5.20 of the order in council.

Restrictions governing the decisions in relation to which the state enjoys the power to issue instructional rules are designated in the legislative bill. Instructional rules issued by the State regarding the content, explanation or rationale of decisions may be directed towards the compulsory programmes put in place by municipalities, water authorities provincial authorities and the State, in addition to any programmes that adopt a programmatic approach. Such rules may also relate to a physical environment plan, a water board regulation or an environmental regulation. Rules may also be issued in relation to a project decision by the executive a water board, a Provincial Executive or a project decision taken by a Minister, or in relation to a land registry or level decision or the emergency plan drawn up by the controller of an installation operated by the Directorate-General for Public Works and Water Management.

The power of the provincial authorities to issue instructional rules regarding physical environment plans, water board regulations and environmental regulations is limited to the imposition of rules regarding the tasks assigned by law to municipalities, water authorities and provinces and the imposition of rules regarding the implementation of tasks assigned to the State. This means that instructional rules regarding or in relation to the implementation of those tasks must, in all cases, be capable of relating to those sections required by law to be included in the physical environment plan, water board regulation or environmental regulation. Instructional rules issued by the State that are imposed in relation to allocated tasks may also relate to environmental conditions included, or to be included, in the physical environment plan and in relation to activities, defined in

¹⁵ This was previously known as the 'national ecological body'.

the water board regulation and environment regulation, for which an environmental permit is obligatory. In addition, instructional rules issued by the State may impose limitations with regard to the environmental values that municipalities or provinces include in the physical environment plan or environment regulation at their own initiative. Furthermore, the State is entitled to issue instructional rules in relation to the environmental regulation and the assessment rules included therein with regard to applications for an environmental permit relating to an activity that is detrimental to the environment or a deviating activity relating to rules in the environmental plan regarding the allocation of functions to locations or the rules enacted for that purpose. Instructional rules may also be imposed with regard to the allocation of functions to locations and with regard to the rules established in that regard, in addition to the assessment rules applicable to environment permits for deviating activities or the situation-specific rules contained in a physical environment plan, water board regulation or environmental regulation.

When setting instructional rules in relation to decision, it will, if necessary, be a case of providing clarity regarding transitional law and the consequences of existing situations.

Rules directed at a task

Instructional rules may also be issued in relation to tasks. A province may impose rules regarding the exercising of the tasks allocated in Article 2.4 to the municipality, water board, or province or regarding the manner in which a measure that forms part of a programme with a programmatic approach, established by a Provincial Executive, is implemented. The State is entitled to impose instructional rules regarding the exercising of tasks allocated in Article 2.4 to the municipality, water board, province or the State, regarding the implementation of the powers of the Provincial Executive to institute a swimming ban or to issue a recommendation against swimming and regarding the manner in which a measure that forms part of a programmatic programme initiated by a Minister is implemented. No new tasks may be allocated in the form of instructional rules. It is possible, however, to itemise tasks allocated by law or express them in greater detail, as a result of which a 'more precise' task comes into existence, as it were.

Non-implementation of an instructional rule or a failure to implement it in good time

In the case of instructional rules, a deadline must be given, within which the rules must have been implemented. In the event that an instructional rule is implemented incorrectly, incompletely or not in good time, no instructional rule or instruction containing a further order may be issued. A 'demand for settlement or administration' may however be issued. In that case, the generic, inter-administrative supervisory instruments of suspension, cancellation and replacement* may be applied.

Incremental instructional rules

Due to the fact that the role of provinces is to act as a link between the State and the municipalities and water authorities, they also fulfil an indispensable role and function with regard to the development and specification of certain parts of national environmental policy in relation to national interests. For that purpose, a legal basis enabling staged instructional rules was also included: provinces may, subject to conditions to be included in the instructional rule and to be determined by order in council, issue regulations that supplement or tighten up the stipulations incorporated in the order in council containing instructional rules (by imposing more detailed rules). If specified within the measures, Provinces may also impose non-standard instructional rules or grant exemptions from the rules imposed by order in council. This arrangement corresponds to the existing arrangement for provincial co-administration, such as the one that is currently included in the Spatial Planning Act.¹⁶

Scope for consideration

The form and content of instructional rules may not extend further than what would be required in order to ensure an effective realisation of the envisaged objective. This follows from the applicability of Article 2.3, which contains criteria relating to the implementation of tasks and powers held by administrative bodies (subsidiarity). The principles regarding the imposition of instructional rules therefore offer extensive scope to provide flexibility, or a margin for appreciation to be used by administrative bodies to which the instructional rules are addressed. This means that instructional rules cannot only be formulated to be highly imperative and exhaustive, but it also means that they offer limited or extensive scope for the administrative body to consider to whom the instructional rule is addressed. The instructional rule may also stipulate that subject to

¹⁶ The Act of 21 June 2012 in amendment of the Spatial Planning Act [Wet ruimtelijke ordening] and a number of other Acts (providing a legal basis for provincial co-administration and a facility to derogate from general rules) (Netherlands Bulletin of Acts and Decrees 2012, 306).

conditions to be stated therein, any derogation, further development or supplementation of the instructional rule is possible in the decision to which the rule relates. This makes it possible for instructional rules to be set, depending upon the nature and weighting of the interest to be protected and in an optimum balance between protection and the importance of providing a margin for appreciation. The same thing applies to instructional rules relating to tasks. Depending on the nature and weighting of the interest to be protected, these may also offer more or less scope when it comes to making choices regarding the method of implementation. The manner in which administrative bodies apply their powers and make use of the scope for consideration offered ('from the outset', as stated in section 0) is linked to procedural requirements. These must ensure that consideration is carried out transparently, is subject to the necessary procedural guarantees in terms of participation and safeguarding of legal rights.

Exemption

The legislative bill also provides a facility to issue an exemption from the instructional rule (the derogation facility, designated in section 0). Although instructional rules may be formulated in a restrained and considered manner, policy practice shows that situations always arise, in which the application of the standard in its full force may give rise to unfairnesses or friction. The facility to issue exemptions exists in order to rectify this. This type of exemption is intended to be used in situations where the exercising of a task or power is disproportionately limited in relation to the importance being served by the rule concerned. This may occur in the event that developments within the physical environment could not reasonably have been predicted. For example, an exemption may be applied in order enable situation-specific solutions or innovative initiatives to be devised that will enable developments to be brought into line with the interests being served by the rule. An example of this type of exemption is an exemption for an amendment of the physical environment plan that deviates from the rules laid down in the Airport Zoning Decision or Airport Decision regarding the zoning of an airport or the restricted area relating to an airport. An exemption may be subject to regulations in order to protect the objective or interest that was originally envisaged, to which the instructional rule related.

Instructional rules obligatory by law

With regard to various matters, it is stated in law that imposing instructional rules is compulsory, due to the fact that they replace existing statutory obligations relating to the imposition of provincial standards or give rise to limitations of property rights of use, or because they arise from international obligations. For example, the State is obliged to impose instructional rules regarding rules that provinces are required to include in the environmental regulation with a view to the presentation of cultural heritage, the limitation of noise nuisance, the protection of the quality of regional waters from which drinking water is extracted and the protection of the state and the operation of the local railway infrastructure and public roads that are managed by the province.

The State is also obliged to impose instructional rules regarding the content of the compulsory programmes; these relate to the implementation of EU legislation. A further example is the obligation to impose instructional rules regarding the physical environment plan and project decisions for the airport zones and the restricted areas relating to airports. The State is also obliged, in the interest of the health and safety of swimmers and in execution of Bathing Water Quality Directive, to impose instructional rules regarding the tasks to be undertaken by the provinces in relation to bathing water. Furthermore, the State is obliged to impose instructional rules regarding physical environment plans and project decisions relating to the preservation of cultural heritage, the external safety regarding the storage, production, use and transportation of hazardous substances and the limitation of noise emanating from roads, railways and industrial estates, along with the protection of the state and the operation of infrastructural and other facilities in the interests of national defence or security.

It is also stipulated that the State is required to issue instructional rules regarding the design, construction and maintenance of public foul water sewers, in implementation of the Urban Waste Water Treatment Directive.

The instruction

Alongside the power to impose instructional rules, the legislative bill incorporates a power, held by the State and the provinces, to issue an instruction. The purpose of the instruction concerns the proactive coordination of government involvement with regard to matters that are subject to shared responsibility or closely interlinked responsibilities, the realisation of provincial or national interests or a proactive control or promulgation of policy.

An instruction may be directed at a single or a limited number of municipalities, provinces or water authorities and serves the purpose of tasks or powers allocated in a general way within the legislative bill to be expressed in more specific terms. Instructions create a new legal obligation upon the administrative or public body at which they are directed. This means that in the event that an instruction is not implemented satisfactorily, the body concerned will be deemed to have neglected its task.

One-off or ongoing application

Other than in the case of instructional rules, an instruction is not always suitable for ongoing application. In an instruction, it is possible to determine whether it has been completed after it has been carried out once. This will often be the case if the instruction includes an assignment to carry out a certain action or to take a certain decision. An instruction may also specify that the instruction shall continue to apply for a longer period of time.

Administrative agreements as an alternative tool for the promulgation of policy

Administrative agreements laid down in writing (in current practice, these are also known as covenants, administrative agreements, administrative, policy or competence agreements) form a useful tool for administrators and administrative bodies as a means of reaching agreement with one another regarding the policy to be pursued, the content or application of the statutory instruments or the implementation of tasks, before establishing or applying the instruments that form part of the legislative bill. In relation to the legislative bill, the administrative agreement can, in the first place, be designated as a 'meta instrument'. The administrative agreement provides a facility that enables the way in which the statutory powers and tasks contained in the legislative bill are implemented to be agreed.

In a limited number of cases, the administrative agreement may also be used as an alternative for the use of powers arising from the legislative bill. An administrative agreement may be used as an alternative instrument to ensure the vertical promulgation of policy: between two or more administrative bodies. An administrative agreement may be used in place of determining an instructional rule by means of an environmental regulation or order in council, or in place of issuing an instruction. An administrative agreement may also fulfil a useful role within the implementation of a programme. An important consideration when entering into an administrative agreement instead of imposing instructional rules or issuing an instruction is the fact that an administrative agreement is not imposed unilaterally, but is based upon mutual agreement.

Effects

- Reinforcement of the position of decentralised government bodies;
- Improvement of the integrated scope for control, consideration and decision-making by decentralised government bodies;
- Enhanced external integration of the domains that form part of environmental policy;
- A more effective insight and knowledge into the special tasks of the various government bodies;
- Smarter and more effective government policy, as a result of the lateral expansion and simplification of the instruments available;
- Improved and more rapid implementation of international obligations;
- A firm basis upon which to achieve the pooling and simplification of the implementation regulations;
- The pooling of rules that form part of physical environment plans, environmental regulations and water board regulations will make the rules much more accessible to businesses and private individuals alike.
- The physical environment plan will give rise to a substantial decrease in zoning plans and regulations on a municipal level and will enable the regulations to be more effectively coordinated.
- The physical environment plan will become much easier to understand, in view of the fact that the current version of the entire physical environment plan will be available in digital format.
- The integrated nature of the physical environment plan and the regulations will favour material integration. Sub-topics such as 'effective spatial planning' or 'the protection of the environment' shall no longer restrict the contents of a physical environment plan and environmental regulation.

- Government policy regarding the physical environment will become more effective as a result of integration: addressing a variety of problems and tasks in relation to the physical environment by means of mutual consultation is, after all, the most effective approach.
- A new policy can be implemented within a physical environment plan in a single operation, instead of having to revise a large number of zoning plans. This will bring about a considerable reduction in the administrative burden.
- Procedural benefits will also apply: instead of amending various regulations and a zoning plan, it will be sufficient in many cases to amend the physical environment plan.

Environmental strategies and environmental programmes (Chapter 3 of the Environment Act)

Introduction

Chapter 3 of the legislative bill governs the formation of policy by administrative bodies in relation to the physical environment. To that end, the chapter introduces the concepts of 'environmental strategy' and 'programmes' as tools to be used in policy planning. In those documents, administrative bodies are able to incorporate policy objectives relating to the quality of the physical environment, indicating how they can be achieved. In this way, an administrative body is able to fulfil its tasks and powers in accordance with the policy, thereby contributing towards the government's duty of care of the physical environment.

Range of instruments

Environmental strategy

The environmental strategy is an integrated strategy consisting of primary long-term strategic policy choices in relation to the living environment. This strategy is established by the State, the provinces and, wherever desired, by municipalities in relation to their budget and within their territorial boundaries. It takes the form of a political and administrative document that provides a comprehensive definition of the policy governing the physical environment. Comprehensive means that the strategy relates to all areas of the physical environment and corresponds in that regard to the scope of the legislative bill (reproduced in section 1.2). This forms a coherent strategic vision and is not merely an enumeration of policy strategies from different areas. A further reason why administrative bodies only establish a single environmental strategy lies in the fact that the approach involved enables the production of a single, recognisable and comprehensive policy document containing the entire strategic policy for the environment of the government that is responsible for that strategy. In that way, an environmental strategy is able to offer a coherent, policy-based foundation for the deployment of legal, financial or other instruments in order to pursue the policy objectives laid down in that strategy.

Programmes

Programmes play an important role when it comes to converting the policy objectives contained in an environmental strategy into specific actions.¹⁷ Municipalities, water authorities, provinces and the State make use of programmes in order to develop the policy in relation to specific components of the physical environment. In that way, an administrative body may draw up a programme in relation to a particular aspect of the physical environment, such as recreation or landscape, but a programme may also be directed towards the (spatial) development of a specific area. In addition, a programme may contain measures that will enable one or more environmental values to be fulfilled or as a means of achieving other objectives.

The primary focus of a programme lies upon implementation; the emphasis lies on the achievement of the objective within a manageable period of time, in relation to the relevant aspect of policy governing the physical environment. An administrative body is free to draw up programmes in relation to those aspects or for sub-areas, as the need arises. In a number of situations and in view of EU Directives, programmes are obligatory. This is the case, amongst others, in relation to noise management, river basin and flood risk management, water management and management of the natural environment. In addition, a programme must be drawn up if, as a result of monitoring pursuant to section 20.1, it is observed that certain environmental values such as those laid down in section 2.3, will (in the near future) no longer be

¹⁷ In the relevant EU Directives, the European Union applies both the term 'plan' and 'programme' in order to designate the legal concepts included in this chapter, without any demonstrable distinction having been made. In this document, those plans and programmes are designated using the term 'programme'.

fulfilled. A programme of this type must lead to a situation in which those environmental values are then fulfilled. A more detailed examination can be found of the various types of programme can be found in section 0.

In addition, a programme may be drawn up for certain situations, with which the permissibility of specific activities (projects and other initiatives) can be determined. Programmes of this type have a specific consequence in law and are designated as "programmes adopting a programmatic approach". A programme of that type is primarily intended to ensure that in complex situations involving a large number of new developments that place policy objectives under pressure, those policy objectives can still continue to be achieved. These take the form of policy objectives for which an environmental value has been established or in relation to which instructional rules or assessment rules have been set. The final category of objectives referred to primarily involve material policy standards, for which an instructional rule (by virtue of section 2.5) or an assessment rule (by virtue of 5.1.3) has been set.

Status and preparation

The environmental strategy and the programmes are solely binding upon the administrative body that establishes it with regard to its exercising of its powers (as is the case in the current structural strategy or other planning devices incorporated in Chapter 3 of the legislative bill).¹⁸ This arises from the principle of "separation of standard setting and policy", as explained in section 0. Policy rules in the sense of the General Administrative Law Act may be included in an environmental strategy or programme (these also are only binding upon the administrative body that draws them up). The uniformity and recognisability of the policy of that administrative body in relation to the physical environment form a primary component of environmental strategies and programmes; other instruments are available for the purpose of promulgating policy to other administrative bodies, private individuals or businesses. In view of the self-binding nature, it is not possible to appeal against a decision to establish an environmental strategy or programme.¹⁹ Administrative bodies that establish these must ensure that consultation takes place and they are prepared in accordance with section 3.4 of the General Administrative Law Act. As part of that process, viewpoints may be submitted by 'any person' (not only by stakeholders). Once an environmental strategy or programme is made public, private individuals, companies and organisations are able to see what they are able to expect from the government.

The law itself states that an environmental strategy must be comprehensive. Except where these are established by electronic means in accordance with digital standards and are also notified electronically, environmental strategies are not subject to any requirements in terms of form or content. In that way, administrative bodies enjoy the scope to structure their policy documents in whatever manner they see fit. In the case of various programmes, more detailed requirements regarding the content, form and creation procedure are set by means of an order in council. This is certainly the case with regard to compulsory programmes arising from EU Directives, but also with regard to programmes with a programmatic approach.

Coherent policy planning by an administrative body

The policy planning system provided introduces coherence into the policy with regard to the physical environment by *integrating* strategic planning devices into the environmental strategy, by *agreeing* (multi)sectoral programmes with more implementation-focused policy tasks, and by *coordinating* the implementation.

The intention is to achieve a balance between continuity and certainty on the one hand and flexibility on the other. The long-term environmental strategy provides the first of these, whilst the (multi)sectoral programmes place an emphasis on the second. This expressly does not mean, however, that a sectoral programme cannot include any strategic elements or that an environmental strategy cannot contain any implementation-oriented elements. What is more, a longer period of time is necessary in order to establish the further development of various EU Directives into programmes. It is, however, obvious that a programme will contribute towards the

¹⁸ There are, however, a few exceptions to this principle, such as the one that applies in relation to the management plan for Natura 2000 areas (see under that heading).

¹⁹ An exception to the primary rule applies in the case of sub-programmes that directly form the title of activities. No separate decision to grant approval will arise in relation to the aspect (the environmental value or other objective in relation to the physical living environment) that the programme seeks to address. A possibility to appeal does apply in the case of the parts of the management plan for Natura 2000 areas (see also paragraph 6 of the explanatory notes).

integrated development prospects that are incorporated within the environmental strategy. If desired, an administrative body is entitled to allow an environmental strategy to be accompanied by one or more programmes.

Strategic environmental policy within environmental strategies

The thinking of the government is that a sustainable development of the physical environment can only be achieved by seeking to ensure this coherence, by means of a single, overarching and indicative development prospect for the long term. That is why environmental strategy actually exists. Sustainability means taking account of the relations between human actions and (sectoral) qualities, which, together, for the physical environment. This requires forward thinking and the ability to anticipate developments that will take place in the future. Only then will it be possible to address the complexity of changes taking place within the physical environment.

In specific terms, this means that amongst other things, an environmental strategy will seek to address the connection that exists between space, water, the environment, nature, the landscape, traffic and transport, infrastructure and cultural heritage, in association with the scope of the physical environment as a concept.

Policy development by means of programmes

In the case of programmes, the effectiveness and scope for action offered by the policy are of primary importance. Coherence at that level is achieved by harmonisation and coordination between domains. Full integration is a less obvious step in that regard; each individual policy area has its own particular dynamics and characteristics. What is more, no direct coherence exists in all cases on an operational level. For example, it is not necessary for municipal policy governing air quality to be integrated on an operational level with municipal policy governing the sewerage system. Integration is therefore a useless requirement and the administrative burden it generates will be too great. That is why the implementation of the policy is pursued in the form of (multi)sectoral programmes or programmes for the development of sub-areas. Programmes can also be established at the same time as the environmental strategy. Whenever necessary, programmes must be harmonised with one another and implemented in a coordinated manner.

If desired, it is also possible, of course, to establish multi-sectoral programmes, such as in relation to nature or water. Whether the merging of programmes is desirable will depend on the situation and shall be at the discretion of the administrative body concerned. Administrative bodies may also establish joint programmes. This may involve administrative bodies from within the same, or different, levels of administration.

Instruments that form part of the legislative bill will be needed in order to carry out environmental strategies and environmental programmes. A description of these can be included in the environmental strategy or in the programme itself. In the case of programmes in particular, these will frequently involve active measures relating to the development, use, management, protection and preservation of the physical environment, such as proposed physical and policy measures. These measures may be of a more abstract nature, but may also be more specific. The package of measures will need to be sufficient in order to fulfil the environmental value or in order to achieve another objective relating to the physical environment. It is necessary to distinguish between measures that require a public decision-making process to take place and measures for which that is not required. Examples of that second category of measures include measures to stimulate the use of a certain type of fuel or the actual management of water levels.

Inter-relationship between the environmental strategy and programmes

The system outlined in Chapter 3 of the Act is set up in such a way that the implementation of the policy included in the environmental strategy primarily takes place within a programme.

The environmental strategy forms the integrating framework for the implementation policy adopted by an administrative body. In a generic sense, the boundary between an environmental strategy and a programme cannot easily be defined. The administrative body responsible will determine that boundary for itself, depending upon the situation and the management philosophy applied by the administrative body in question. This will provide maximum freedom in determining the precise form taken by an environmental strategy or programme.

The role of the environmental strategy and programme in regional development

When an administrative body wishes to initiate larger-scale regional development programmes, the first step may take the form of an environmental strategy. Having carried out a comprehensive

survey, choices can then be made with regard to the direction that the development of different parts of the territory will be required to take. In many cases, there will exist a need for an area-specific approach to be adopted. This can be achieved in the form of (spatial) policy programmes for individual sub-areas. The nature of these is often more comprehensive than purely sectoral programmes, but they do not cover the territory (of a municipality) in its entirety.

Relationship between policy planning and other instruments

The environmental strategy and programmes form important links within the policy cycle of an administrative body. As a result of this, an environmental strategy and programmes in particular play an important role when it comes to the fulfilment of environmental values. Furthermore, it is obvious that it be announced, as part of an environmental strategy or programme, that a project decision is in preparation or that an environmental plan or environmental regulation is being amended. These actions will follow in a logical manner from strategic policy choices made as part of the strategy. In that sense, an environmental plan also reflects those parts of the environmental strategy that require a direct commitment to be entered into by business and private individuals. The two form an important combination.

No legal link exists, however, between the environmental strategy and a programme, project decision or an amendment to the decentralised regulations. It is not the case that an environmental strategy needs to be adapted if a programme is amended or in the event that an item that needs to be addressed within an environmental strategy before a programme can be set up or other instruments can be deployed. That is why the subsidiarity clause in Article 2.3 also does not apply to environmental strategies and programmes.

Cases in which environmental strategies and programmes are compulsory, or not

Environmental strategies

The legislative bill obliges the State and the provinces to draw up an environmental strategy. In the case of municipalities, the use of an environmental strategy is voluntary. At the present time, municipalities are only obliged to draw up one or more structural visions encompassing the entire territory of the municipality; strategic plans in the areas of the environment, traffic and transport and nature and water are merely voluntary. The fact that drawing up an environmental strategy has not been made compulsory reduces the administrative burden upon the municipalities. Any obligation would also be difficult to enforce. This is reflected in current practice, in which a number of municipalities has not drawn up a comprehensive structural vision.²⁰ A compulsory requirement would also not in itself give rise to plans that are of a high quality, nor would it guarantee that the environmental policy that is established is satisfactory.

It was decided that an obligation should be placed upon the state and upon provinces, as it is important that 'lower' layers of government must be aware of what the environmental policy of a "higher" administrative body is actually about. This replaces the obligations that existed under the existing sectoral plan in the areas of water, traffic and transport and spatial planning. This corresponds to the trend that exists amongst provinces and the State to establish ever more plans that are increasingly integrated. Above all, this provides clarity to private individuals, businesses and other government bodies with regarding to the environmental policy adopted by a specific administrative body. The obligations requiring the drawing up of sectoral programmes frequently apply at provincial or state level; a compulsory environmental strategy ensures that such programmes are based upon a development perspective oriented towards the future.

Programmes

A programme contains specific measures for the development, use, management, protection or maintenance of the physical environment. A programme may focus either upon a sector or an area and will consist of a number of different elements. These may include programmes for the implementation of activities or measures serving the achievement of sectoral objectives. A programme may even set out the (obligatory) values relating to the carrying out of powers by the administrative body that determines the programme (for example, by incorporating policy rules). A programme contains a development of the policy relating either to the management or to the use of one or more parts of the physical environment. We can distinguish between different types of Various types of environmental values are available:

²⁰ Planning Office for the Living Environment [Planbureau voor de Leefomgeving], Ex-durante evaluation of the Spatial Planning Act [Wet ruimtelijke ordening]: second report, 2012 (Parliamentary Papers [Kamerstukken] I 2011/12, 30 938, item L, Annex).

- Compulsory programmes in the event that an environmental value has been (or may soon be) exceeded. Such cases shall at all times include those in which the European environmental values for air quality, but also environmental values determined by virtue of Article 2.3. It does not matter whether this involved an environmental value that required the deployment of best efforts, or that required a certain outcome to be achieved. In the case of an obligation to deploy best efforts, the consequences of whether the value required is achieved or not, however that does not release an administrative body from its obligation to work towards the achievement and justification of that outcome. In that regard, the monitoring of the environmental values (by virtue of section 20.1) plays an important role. The legislative bill also includes a duty to report monitoring results that enable us to determine a transgression of the programme in the event it is determined that a value has been exceeded (or may soon be exceeded).
- Compulsory programmes prescribed by law in implementation of the EU Directives. These shall definitely include the Action Plan on Noise (keywords "ambient noise"), the river basin management plan (Water Framework Directive), the flood risk management plan (Flood Risk Directive) and the Marine Strategy Framework Directive and marine strategy action plan, to be included in the national water programme). In some cases, programmes are not explicitly called EU Directives, but a programme obligation is certainly required in order to implement European requirements in a satisfactory and efficient manner. This predominantly involves water programmes operated by the State and provinces, and water management programmes carried out by the water authorities. In addition, we also must not forget the management plans for the Natural 2000 areas, which, for the most part, are to be established by the provincial government. The substantive and procedural requirements that apply to the programmes and which are taken from EU Directives, are implemented in the form of a order in council (by virtue of sections 2.5 and 16.8).
- A special (optional) programme consisting of measures in order to satisfy an environmental value or other objective relating to the physical environment that has been established within a material decision-making standard, based upon which 'management' is carried out within a given area in relation to activities that are still permitted. In that regard, we make use of the term "programmatic approach". The assessment of the activities will take place during the period in question within the territory concerned, in accordance with the programme itself. A physical environment plan, environmental regulation or order in council will be used in order to determine the manner in which activities in connection with an environmental value or other objective relating to the physical environment take place within the decision-making process regarding the permissibility of activities forming the basis of environmental permits, project decisions or physical environment plans. The aim is to ensure that an environmental value or other objective relating to the physical environment continues to be fulfilled. Section 0 examines programmes that incorporate this specific 'programmatic approach'.
- Optional programmes relating to a specific topic or the elaboration of the process of regional development in a specific area. A programme may also be drawn up in relation to a specific environmental value or other objective relating to the physical environment or to items in which no standards exist, such as local objectives (such as a municipal action plan for cycling).

The relationship between administrative bodies in policy planning

The relationship between environmental strategies of different administrative bodies

No hierarchy exists in the area of planning. The legislative bill consciously contains no provisions regarding the promulgation of environmental strategies or programmes into the environmental strategies or programmes (or other instruments) of other administrative bodies. With regard to legal promulgation, the legislative bill includes other instruments. Its self-binding nature is in keeping with the principle that standard-setting and policy should be kept separate. Legal promulgation could detract from the policy-related nature of an environmental strategy and could give rise to a juridification of environmental policy. This would bring with it a situation in which an administrative body would impose an environmental strategy or programme upon a 'lower-level' administrative body. The question as to whether administrative bodies have taken sufficient account of an environmental strategy or programme from a 'higher-level' administrative body may then predominate during the formulation of a strategy. This could give rise to drawn-out discussions and sluggish planning processes.

For that reason, the government therefore envisages an environmental strategy that will control the actions of the very body that establishes the strategy. The responsibilities and environmental

strategies from a 'higher-level' or adjoining administrative body will then form part of the context within which the relevant administrative body establishes its strategy.

For that matter, the general principles of proper administration, as set out in the General Administrative Law Act, require that decisions taken by administrative bodies be subject to careful preparation. Amongst other things, this means that when determining policy, the necessary information must be gathered and established policy be based upon sound reasoning. It is not permissible for an administrative body to wantonly disregard the policies of other administrative bodies that affect its territory. When preparing an environmental strategy, administrative authorities must, as a minimum, take cognizance of the policies of other administrative bodies.

Joint policy planning or combinations of environmental strategies and programmes

The legislative bill provides an opportunity to draw up a joint environmental strategy or joint programme. This may involve administrative bodies from within the same, or from different levels of administration. All of the administrative bodies involved will then be subject to an obligation, that extends at least as far as their task or powers. In such cases, a single administrative body may take the lead.

Programmes with a 'programmatic approach'

A 'programmatic approach' is a special programme that provides a specific means of fulfilling environmental values or other objectives (established in the form of a material decision-making standard)²¹ governing the physical environment. It focuses upon the control of the scope for use within a certain geographical area and serves as a framework for the assessment and permissibility of activities. In the recent past, experience has been gained in this regard in connection with the National Collaborative Programme for Air Quality [NSL]. The legislative bill introduces this approach as a generic tool. In essence, the proposed arrangement is that the government assesses the permissibility of activities on the basis of the applicable environmental value or another objective relating to the physical environment, in the manner designated for the programme in question. The assessment of activities may, in that regard, be carried out in a different manner to the one laid down in the assessment rules in section 5.1.3. The way in which the assessment of activities for that particular programme takes place, is laid down in a physical environment plan, an environmental regulation or an order in council (depending upon the case). This would then involve assessing an application for an environmental permit, including activities that deviate from an environmental plan, or the assessment of project decisions. Employing this method of assessment means that a specific legal consequence applies, which is not the case when assessing other programmes.

The objective is to balance the consequences of these activities with measures intended to fulfil a specific environmental value or to achieve another objective relating to the physical environment. Deviation from an environmental value or other objective governing the physical environment is not under discussion at this point. The nature of a programmatic approach is therefore not the same as that of a zoning plan for a development area²², as that can be established by virtue of the Crisis and Recovery Act [*Crisis- en herstelwet*]. In the case of a plan of that type, a (temporary) deviation from the stand is however possible.

In the legislative bill, the term 'programmatic approach' is used in a specific meaning, as defined above. The elaboration of a programmatic approach is always situation-specific and the specific effects will differ on a case-by-case basis, however a programme that has adopted an approach of this type will always function as a framework for the assessment of activities. As a result of this, a programme that adopts a programmatic approach will fulfil a specific legal function. In view of that specific effect in law, the legislative bill incorporates a set of quality requirements that a programmatic approach must fulfil.

In the legislative bill, the content of the provisions for the programmatic approach is not clearly delineated, but not all topics are suitable for the application of a programmatic approach. When drawing up a programme with a programmatic approach, it is necessary to carry out a critical examination of the benefits it will bring. After all, considerable effort may be involved in order to

²¹ We are referring here to the environmental values established by virtue of section 2.3 of the legislative bill, or other objectives governing the physical living environment, in relation to which instructional rules by virtue of section 2.5, or assessment rules by virtue of section 5.1.3 of the legislative bill are established. A programmatic approach only applies if one of these types of standards has been established.

²² In the original version of the Crisis and Recovery Act, this was known as an "area development plan".

set up a programme with a programmatic approach. This type of programme is primarily of use in the event that at national or regional level, a scope for use has been defined that is under pressure as a result of a specific environmental value or of another objective for the physical environment that has been established as a non-material decision-making standard. An assessment of activities following the standard procedure would give rise to a situation, in which further development would be impossible, due to the fact that the environmental value has been, or is likely to be, exceeded or the other objective for the physical environment is not being achieved. The area or region would then find itself in a 'deadlock' situation. A programmatic approach, however, enables an activity to be continued after all, due to the fact that the programme as a whole then makes it acceptable that sufficient measures are being taken, such that the environmental value will be satisfied or the other objective referred to in this context will be achieved. It is therefore a case of ensuring that the consequences of measures and (future) activities can be viewed together and programmed in a coherent manner. That type of approach is therefore especially useful for cases in which:

- the precise management of the scope for use is possible and desirable, and especially in cases in which an environmental value is not being fulfilled or is unlikely to be fulfilled in a given area or in the event that another objective (established as a material decision-making standard) for the physical environment is not achieved in a given area,
- that environmental value or other objective for the physical environment therefore stands in the way of socially desirable activities, and
- a case can be made for the fact that fulfilling that value or achieving that other objective for the physical environment and the achievement of those activities are both possible by bringing them together within a single programme.

One of the compulsory components of a programme that follows a programmatic approach is the monitoring of the scope for use and of the implementation of that programme. In the event that monitoring of the environmental value or the other objective for the physical environment or the monitoring of the programme itself shows that the relevant environmental value or other objective cannot be achieved, it will be necessary for the programme to be amended. Amending the programme, by means of the removal of certain activities or the addition of measures, a new activity relating to the assessment of permissibility will have recourse to the programmatic approach.

Management of the scope for use

Familiar examples of a programmatic approach are the National Collaborative Programme for Air Quality (NSL) and the Programmatic Approach to Nitrogen (PAS)²³. Though each of these operates in a very different way, activities and initiatives are essentially assessed in a manner determined in a physical environment plan, environmental regulation or order in council, in line with the environmental value or the other objective for the physical environment, for which the programmatic approach has been established. This does not apply solely to national programmes; a programmatic approach may also be followed on a local or regional level. The sole requirement is that there must be manageable scope for use that expresses the quality of the physical environment in the form of a specific value relating to a specified aspect. This could take the form of a programmatic approach for odour, noise and external security.

In complex areas, the scope for use - sometimes relating to different environmental values or other objectives relating to the physical environment - is under pressure. A programmatic approach in relation to noise may then provide a solution that will enable the desired innovation in that area to take place. In that way, the scope for use in a specific area can be managed in a coherent manner. This could be used, for example, in a port and industrial area, in which the scope for use has almost completely been taken up by existing companies, thereby constituting a brake upon the dynamism of the area, such as the development of existing businesses or the establishment of new ones. By taking measures to combat this, the scope of use can be freed up to enable new activities. The types of measures that could be introduced could involve imposing more detailed regulations with regard to permits or limiting the scope of existing companies to make use of the environment. A more detailed explanation of this can be found in section **Fout!**

Verwijzingsbron niet gevonden..

Another possible use of the instrument is the transformation of an outdated (industrial) area, which, in some cases, will involve developing new activities before the existing ones have ceased completely. In such cases, it is important to pay close attention to the available scope for use of

²³ Amendment to the Nature Protection Act [Natuurbeschermingswet] 1998 (programmatic approach to nitrogen) (Parliamentary Papers [Kamerstukken] 33 669).

those activities, which will be determined by environmental values, instructional rules and assessment rules. A programmatic approach may be suitable in cases, in which the development requires a staged process, in which the legally binding decisions regarding the various components of the area under transformation are taken at various different points in time. The programme established, together with the government's obligation to implement it demonstrates the fact that ultimately, all of the environmental values or other objectives regarding the physical environment will be fulfilled. Whether this way of applying the programmatic approach is possible will depend upon the scope and flexibility of the environmental value or of the objective relating to the physical environment (established in the form of a material decision-making standard). As an instrument, the programmatic approach does not, in itself, include a possibility to deviate from a value or other intended objective on a temporary basis.²⁴

Activation of the programmatic approach

As stated earlier, a programme that adopts a programmatic approach plays a part in the decision-making regarding activities in a specific area, in relation to a specific environmental value or other objective regarding the physical environment, for which instructional rules or assessment rules have been established. The administrative body that imposed a specific environmental value will therefore wish to be responsible for managing the deployment of an approach of that type. That is why a programmatic approach can only be included in a programme once this is activated by the administrative body that set the environmental value concerned. If an approach of that type relates to environmental values established by the State, it will be activated by means of an order in council. If, on the other hand, the environmental value was established by a province or a municipality, the programmatic approach can be activated by means of an environmental regulation or environmental plan respectively. This arrangement forms a guarantee that the instrument itself will be used in a satisfactory manner. In the event that initiatives should arise on a municipal or provincial level in order to deploy the programmatic approach in situations for which they have not set an environmental value, the cases concerned must be submitted to the State.

The same arrangement applies in the case of the other objectives relating to the physical environment, for which instructional rules or assessment rules have been established by the State or a province. By means of an order in council or environmental regulation respectively, it will also be necessary to indicate the extent to which the administrative body to which the instructional rule or assessment rule relates, is able to establish a programmatic approach in relation to those other objectives.

Various factors must be considered when setting up a programmatic approach.

Firstly, when setting up the programmatic approach, the government, municipal administration or provincial administration will determine whether the aspect for which the relevant environmental value or other objective relating to the physical environment is suitable for a programmatic approach. It must be possible for a scope for use to be managed in such a way that the consequences of measures and (permissible) activities can be associated with one another.

Secondly, when setting up the programmatic approach, it is necessary to examine whether the programme will come to an end at a specific time, or whether the time at which the programme comes to an end will be determined by the extent to which the objective has been achieved. In either case, it will be necessary during the planning phase for the balance between the consequences of the activities and the implementation of the measures to be closely monitored.

Thirdly, it may also be necessary to impose specific conditions. Those may take the form of substantive and/or procedural requirements. These will consist of additions to the requirements imposed with regard to certain programmes by virtue of section 2.5 or chapter 16. Specific requirements may also be required due to the origin of the value or other objective relating to the physical environment, for example, by virtue of stipulations contained in EU Directives. In the event that the State or a province takes the initiative to adopt a programmatic approach, it may then form a logical course of action to involve other administrative bodies in the realisation of the programme. That involvement may extend further than the standard, inter-administrative agreement or coordination; with regard to measures to be taken within the programme itself, the

²⁴ It is with regard to this particular point that the programmatic approach differs from the regulations governing zoning plans for development areas under the Crisis and Recovery Act, which does permit a temporary deviation from the environmental quality standards. In the legislative bill, the opportunities provided by that plan are implemented in a different way, such as in the formation of the environmental values and other objectives relating to the physical living environment. Details of this and the other forms of flexibility available can be found in section 5.3 of these explanatory notes.

cooperation of other government bodies will frequently be necessary. The types of measures involved could include the withdrawal of a permit or the amendment of a level decision.

Finally, it will be necessary to consider the area in which the programmatic approach is to be applied. In the case of an environmental value or other objective relating to the physical environment that has been determined by the State, this programme may encompass the territory of the Netherlands as a whole. That is not, however, a requirement. It is conceivable that the programmatic approach will focus upon a number of provinces or parts thereof, specifically those parts in which fulfilment of the environmental value or other objective relating to the physical environment will be difficult, but in which it will, at the same time, be desirable that (future) activities continue to take place. In other provinces, it would be sufficient to introduce a standard programme or even a number of free-standing measures.

Implementation of the programmatic approach by multiple administrative bodies

All measures that form part of a programme adopting a programmatic approach must be carried out. It is therefore obvious that an administrative body that sets out a programmatic approach should consult other administrative bodies of importance with regard to the implementation of that approach. In so far as those other administrative bodies are themselves required to implement measures, these must only be carried out if the administrative bodies concerned have entered into a commitment to do so. A number of possibilities exist in that regard, such as joint involvement in establishing the programmatic programme, an administrative agreement or the sending of a letter from the administrative body that will carry out the measure to the administrative body that will determine the programmatic programme. In order to ensure that the measures are actually carried out, an implementation obligation has been included in the legislative bill that is incumbent upon all administrative bodies that agreed to the measures.

Furthermore, The administrative body with responsibility for the environmental value or for the objective relating to the physical environment may, by virtue of section 2.5 of the legislative bill, may also impose an obligation upon the relevant administrative body to institute measures. This may form an appropriate course of action in the event that a programme with a programmatic approach has been drawn up in order to satisfy international obligations. In such cases, the approval of the administrative body that is carrying out the measures is not required. The application of the power to issue instructional rules or instructions to provinces, municipalities or water authorities is certainly limited: the subsidiarity criteria in Article 2.3 are applicable in this regard.

In reaching its own project decisions, the State is not obliged to adopt a programmatic approach of the type used by provinces or municipalities, if cases where such an approach would disproportionately hinder those decisions. When considering a project decision of that type, the relevant Minister will take into account the problems that exist on a regional level, including an environmental value that is under severe pressure, or another objective relating to the physical environment.

Ensuring the implementation of programmes

Programmes play an important role in the achievement of environmental values or other objectives relating to the physical environment and therefore form an important link in the policy cycle, as expressed in section **Fout! Verwijzingsbron niet gevonden.** This is especially true with regard to the implementation of measures that form part of a programme. Generally speaking, an administrative body is obliged to carry out a programme that it has established or measures to which it has agreed. In view of the fact that these are policy plans, it is the responsibility of representative organs (the municipal executive, provincial executive of the Second Chamber of the Dutch Parliament) to verify whether programmes are actually being carried out. In order to promote the implementation of programmes, it is possible, by virtue of section 3.11 of the legislative bill, to put in place a government bill in relation to compulsory programmes that introduces a duty to implement the measures included in the programme concerned. These will, as a minimum, take the form of programmes of measures from the Water Framework Directive and the Marine Strategy Directive. By virtue of Article 3.17, a specific duty to implement must be applied in the case of the management plans for Natura 2000 areas and, as indicated in the previous paragraph, for programmes that consist of a programmatic approach. After all, programmes of that type have a direct significance with regard to decisions whether or not to grant consent for activities included in the programme (project decisions, environmental permits or amendments to the physical environment plan). In addition and in accordance with section 2.5, a

higher-level administrative body is entitled, subject to certain conditions, to impose an instructional rule or issue an instruction to a lower-level administrative body regarding the carrying out of certain measures. The subsidiarity criteria expressed in Article 2.3, amongst others, relate to the application of that power.

In the case of programmes aimed at the fulfilment of an environmental value or that consist of a programmatic approach, monitoring must be carried out in accordance with section 20.1 in order to determine the extent to which the environmental value or the objective formulated within the programmatic approach is being achieved. If that is not the case, a programme must be adapted in such a way that the objective is actually achieved within the desired timeframe. If a programme is not amended or measures from a programme are not carried out, the representative body responsible is required to pursue this with the implementing body. In the case of compulsory programmes, programmes adopting a programmatic approach or in the case of a municipal sewerage plan, other administrative bodies may, in the context of inter-administrative supervision, be entitled to call the relevant administrative body to account in that regard and, if necessary, take the place of the administrative body tasked with the implementation. In relevant cases, stakeholders will be entitled to ask the relevant administrative body to implement or amend a programme. They will also be entitled to raise the issue with the representative body. A stakeholder may also initiate proceedings under civil law if it is of the opinion that an unlawful act has been committed.

Environmental impact assessment

By virtue of section 16.4 of the legislative bill, environmental strategies and programmes prescribed by virtue of legislation or administrative law and which form a framework for decisions for which an environmental impact assessment or environmental impact assessment report is compulsory will be subject to an obligation to carry out an environmental impact assessment relating to the plan. An environmental impact assessment relating to a plan will also be applicable if a strategy or programme envisages developments of which a 'suitable assessment' must be carried out in the case of Natura 2000 areas. Optional programmes may also require an environmental impact assessment if they fulfil the requirements of Article 16.34. If an environmental strategy or programme referred to in chapter 3 contains only minor amendments, stipulates the use of small areas on a local level, or forms the framework for a decision that is not subject to a compulsory environmental impact assessment, an environmental impact assessment ruling may be necessary. If an environmental impact assessment determines that considerable environmental effects apply, a compulsory environmental impact assessment must be carried out.

Amongst other things, this means that additional procedural requirements will apply. Those requirements relate, amongst other things, to the obligation to draw up a notification regarding the extent and level of detail of the relevant information, the reasonable alternatives to the proposed activity for which the environmental strategy or programme forms the framework, consultation with the administrative bodies and the issuing of recommendations by the Environmental Impact Assessment Committee.

Consequences for existing planning figures, changes with regard to the current situation

The environmental strategy includes existing sectoral planning figures at provincial or state level that, to a greater or lesser extent, have the same function. This involves the environmental policy plan, the strategic part of the water plan, the traffic and transport plan, the spatial development strategy and parts of the nature policy plan (the nature vision in the anticipated Nature Protection Act). The scope of the environmental strategy is therefore at least as large as these existing planning figures. This method of integration corresponds with the trend that has emerged in the provinces, where environmental plans are being established that combine various sectoral plans.

The majority of the existing statutory and non-statutory plans can be regarded as 'programmes'. This relates to numerous policy plans for various topics (such as roads, accessibility, landscape quality, cultural heritage or pipelines) or structural visions for a specific field. The category of 'programmes' also covers municipal sewerage programmes, the action plan for noise, the water management programme and the management plan for Natura 2000 areas. The revision of the planning system is intended to reduce administrative and research burdens. This is achieved by combining sectoral strategic plans to form one concise, integrated environmental strategy that can be created using a simple procedure and, if the framework does not need to be established, without the need for a plan EIA. This means, for example, that fewer plans have to be created on

national and provincial levels. The differences between the environmental strategy and the programmes are outlined in the table below.

Table 4: The differences between the environmental strategy and programmes

	Environmental strategy	Programmes
Character	Strategic, integral, political and administrative	Operational, (multi)sectoral, strategic elements possible
Content	Development, use, management, protection and maintenance of the physical environment as a whole	Development of policies for certain sectors or fields
Approach towards coherence between domains	A single, integral development policy for the physical environment	(Multi)sectoral, focus on harmonisation, coordination of different domains. Can relate to a domain or a part of the territory for which an administrative body is responsible.
Horizon	Long term	Short term, and long term where planning of investments and management are concerned.
Operation	Basis for action of the body that establishes the strategy and programmes. Low-dynamic: amendment of fundamental policy choices by revision of the development image	Basis for deploying measures from the body that establishes the programme relating to the subject in question. High-dynamic: adjustments to policy by programme amendments.
Legal status	Only binding for the body that establishes the strategy	Only binding for the body that establishes the programme. An impact is possible for management plans for Natura 2000 areas and programmes with a programme-based approach. For obligatory programmes, the programme-based approach and the management of Natura 2000 areas, a legal obligation for the implementation of measures can apply.
Obligation	Environmental strategies from the State and provinces (one area-wide strategy per administrative body)	<ol style="list-style-type: none"> Programmes arise directly from EU law or for the implementation of European policy requirements: <ul style="list-style-type: none"> River basin district management plans Flood risk management plans Air quality plan (State) Action plan for noise (State, province, municipality) National water programme Marine strategy action plan Regional water programme Water management programme Management plan for Natura 2000 areas Programmes that do not comply with certain environmental values (or where there is a danger of non-compliance) by virtue of Section 2.3
Optional	Municipal environmental strategy (optional, for the entire territory)	<ol style="list-style-type: none"> Municipal sewerage programmes Other optional programmes

Consequences for the current water plan system

In the Netherlands, the responsibility for policy and the maintenance of water is assigned to various administrative bodies. The water domain differs from other domains because some of the tasks are assigned to a functional layer of administration: the water board. This has consequences for the design of the planning system for the water domain. In the field of water, there are also a

number of obligations arising from EU Directives, which, taking account of the administrative organisation in the Netherlands, call for specific planning requirements or planning obligations for each of these administrative bodies. The special situation in the domain of water can be seen most clearly when it comes to regional water management. In this context, the formulation and implementation of policies are divided over two administrative layers, namely the province and the water board, whereby the province supervises the implementation of tasks carried out by the water boards. At various points, the system of the Environment and Planning Act has been adapted to this special situation, in order to take full advantage of it.

The current management plan for national waters is also incorporated into the national water programme. River basin district management plans and flood risk management plans, which are mandatory in Europe, also take the shape of programmes in the legislative bill. The water boards, the provinces and the State follow the European six-yearly cycle for their water programmes. Together, they formulate aims, ambitions and measures pursuant to the Water Policy Framework Directive and the Floods Directive. In order to adequately implement the European requirements, the water programmes are mandatory for water boards, provinces and the State.

In this way, the emphasis of the environmental strategy is placed on the entire policy (including water) and the emphasis of water programmes is placed on coherent (mainly operational) water policy and water management. As a result of this, it is possible to carry out efficient and consistent water management, which is linked to measures where possible. In the Administrative Agreement on Water²⁵, it was decided that the State and the provinces will no longer make any special national and regional water plans and that provincial approval of the water management plans made by water boards will no longer apply. It was also noted that the correct implementation of EU directives must be assured. In view of this, the decision was made to prescribe water programmes in the legislative bill on national and regional levels.

The national and regional water programmes mainly contain the national and European frameworks for the management of water systems. This also means that the emphasis for the implementation of EU directives is placed predominantly on water programmes on the level of the State, the provinces and the water boards, for example for defining objectives for national and regional water systems. Of course, consideration was given to the idea to drop the national and regional water programmes and use the European elements from these plans in the environmental strategy or general rules (for example the environmental regulation). This option was ultimately dismissed. If the implementation were to be linked to the environmental strategy, this would be disproportionately burdened with planning requirements from the water domain and it would also have to be adapted every six years. This would put pressure on the free-form and policy-related character of the strategy.

Consequences for the municipal sewerage programmes

The municipal sewerage programme is being transferred to the Environment and Planning Act as an optional programme. The municipal sewerage programme is no longer a mandatory programme in the legislative bill, but it remains important to municipalities, local authorities, citizens and companies for a number of different reasons. This instrument enables municipalities to describe the policy and the measures that are drawn up in order to fulfil the tasks in the field of urban waste water (originating from the Urban Waste Water Treatment Directive), rain water and to meet groundwater measures. It encourages municipalities to keep the sewerage network in order and makes it clear to citizens and companies what they can expect from the municipality in this field. The municipal sewerage programme also promotes effective policy alignment between municipalities and water boards and makes the way in which the sewerage levy is spent transparent.

Consequences for the current environmental plans

In addition to the environmental policy plan that is to be transferred to the environmental strategy, the legislative bill also incorporates various existing planning figures. These are designated as (obligatory) programmes.

- In the first instance, this involves the action plan for noise for various noise sources, such as the results of the Environmental Noise Directive. These will be transferred to the Environment and Planning Act. The action plans address the policy to be pursued in order to limit noise pollution, the measures to be taken in the first five years to prevent noise levels from being exceeded or to rectify them if they are exceeded and the expected consequences of those

²⁵ Parliamentary Papers II 2010/11, 27 625, no. 190, Annex.

measures. The Directive stated above also stipulates that noise pollution charts be drawn up, which are implemented in Section 20.3.

- Secondly, this involves plans ('programmes' using the terminology from the Environment and Planning Act) that arise from the Air Quality Directive. In particular, this concerns the air quality plan (Article 23 of the Directive).²⁶ These 'programmes' should be drawn up in the event that air quality values are exceeded or if there is a danger of them being exceeded. The obligation to draw up this plan is based on Article 3.9, where it is laid down that programmes should be drawn up if environmental values are not complied with or there is a danger that environmental values will not be complied with. This is developed by order in council.
- The National Air Quality Cooperation Programme [*Nationaal Samenwerkingsprogramma Luchtkwaliteit, NSL*] is indicated as a programme-based approach and will be developed by order in council.

Consequences for the proposed planning system for nature

The proposed Nature Protection Act presents three relevant instruments for Chapter 3 of the legislative bill: the nature vision to be established by the State, the management plans for Natura 2000 areas to be established by the Provincial Executive or governmental parties, and the programme-based approach.

The nature vision (or at least parts of it) will be included in the environmental strategy. In the national environmental strategy, nature will therefore be included in the integral policy considerations for the physical environment on a strategic level (drawn up jointly by involved ministers), which will ensure that the importance of nature is guaranteed to be one of the defining elements of the policy for the physical environment. On a provincial level, the (strategic) nature policy forms part of the provincial environmental strategy.

The management plan for Natura 2000 areas is an important instrument for the implementation of Natura 2000 in the Netherlands. The Minister of Economic Affairs is responsible for complying with the international obligations within the framework of the Wild Birds Directive and the Habitat Directive. For this purpose, the minister establishes designation orders for each Natura 2000 area. These orders indicate how each area should contribute towards achieving national objectives. In the management plans, a plan is drawn up for each area outlining how these objectives from the designation order will be achieved. The premises for these management plans are included in Articles 3.7, third paragraph, and 3.8, third paragraph, of the legislative bill.

The programme-based approach, as included in the anticipated Nature Protection Act, forms part of the general regulation for this instrument in the legislative bill.

Effects

- The purpose of the system for policy planning is to enable administrative bodies to apply powers in the physical environment in a more efficient and effective manner. This will lead to greater cohesion in the environmental policy and a greater transparency of the policy for citizens, companies and other administrative bodies. In addition, it will decrease the administrative burden and allow flexibility in terms of the application of policy instruments.
- The obligation for the State and the provinces to draw up a single integral environmental strategy for the whole territory for which the respective administrative body is responsible, provides a significant contribution to this. By introducing the environmental strategy, the (strategic parts of the) current sectoral plans (the spatial development strategy, the environmental management plan, the traffic and transport plan and the water plan) are dropped. The obligation for the State and the provinces to lay down a single environmental strategy reduces the administrative burden. In the current system, it is always mandatory to draw up four strategies. A reduction to the administrative burden is achieved for municipalities, as the environmental strategy at that level is not obligatory and the mandatory spatial development strategy is dropped.
- Furthermore, the cohesive environmental strategy increases the transparency and predictability of government interventions for the initiator. The initiatives that the administration wishes to take in the physical domain will be made clearer to the initiator, and they will be able to see more clearly whether their intended activity fits in with this. The ways in which the administration wishes to apply its powers and legal instruments will become more predictable.

²⁶ The short-term action plans as referred to in Article 24 of the Directive are included in Chapter 19 of the Environment and Planning Act.

- As a result of the integral character of the environmental strategy, a clear picture can be formed of all aspects of the physical environment, which can be taken into account for individual projects. What is possible and what is not is clear, and which aspects of the project need to be involved. This improves the decision-making process; it improves the speed of the assessment of initiatives, primarily when these are included in the environmental strategy.
- The obligation to draw up programmes is limited to those that are mandatory in Europe. This results in the reduction of a single obligatory planning figure (the municipal sewerage programme will lapse as an obligatory planning figure after 2020) and provides the option to restrict requirements for programmes as much as possible to the requirements that arise from EU directives, or to harmonise these requirements. By applying planning requirements sparingly, administrative bodies are given space to create and design programmes at their own discretion and as required.
- Flexibility increases as a result of expanding the programme-based approach, because measures and projects in the same area can be scheduled in conjunction with one another. Within a usable area demarcated by an environmental value or other objective (laid down as a material decision-making standard) for the physical environment, this space can be handled more efficiently. If a programme is drawn up with a programme-based approach, the research burden for individual projects is also reduced if they form part of the programme-based approach. The National Air Quality Cooperation Programme has achieved good results with this. The required research is carried out at site level. The environmental impact assessment evaluation can be dropped if monitoring at site level is provided for (in relation to the aspects in question).

General rules on activities in the physical environment (Chapter 4 of the Environment Act)

Introduction

An important category of rules set by government authorities in implementation of their tasks in the area of the physical environment concerns the rules on activities performed by individuals, businesses or government authorities in the physical environment. Chapter 4 deals with general rules set by municipal authorities, water authorities, provincial authorities and the State in respect of those activities. The environmental permit and the project decision, which regulate individual activities, are addressed in Chapter 5.

Decentralised, unless

The rules on activities that affect or may affect the physical environment may be laid down in the physical environment plan, the water board regulation, the environmental regulation or orders in council issued by the State. These rules may concern activities such as infrastructure-building activities, construction activities or demolition activities, or the performance of operating or management activities. The initiative for such activities is usually taken by individuals and businesses, but sometimes also by authorities themselves (such as the construction of a road, the building of a sewage treatment plant or the creation of a local marina). In setting rules on activities, the basic premise is again decentralised discretionary power. In principle, it is up to local and regional authorities whether or not to set rules. Thus, many municipalities opt, for example, to set rules concerning the protection of trees and standing timber, the construction of an entrance or exit or the installation of commercial advertising on or against immovable property. Water authorities set rules on matters such as water discharge and extraction.

For a number of subjects, however, the Government did consider it necessary that general rules should be set at decentralised level. To this end, the legislative bill contains a number of mandates. In particular, this involves a mandate to the municipal authorities to assign functions to locations in the physical environment plan and to set rules with a view to those functions. For other subjects, the mandate to set rules is more implicit. This applies, for example, to the mandate to the provincial authorities to protect groundwater in groundwater protection areas and to prevent or limit noise pollution in quiet areas. The provincial authorities cannot comply with this mandate without setting rules for activities, either directly in the environmental regulation or via instructional rules to the municipal authorities, who subsequently lay down rules implementing these regulations in the physical environment plan. In cases in which the State explicitly orders that rules be set at decentralised level or assigns a task entailing the setting of rules, the State may control the content of such rules where necessary through instructional rules and sometimes

also through an instruction. Finally, there are activities for which the State itself lays down rules, either by setting general government regulations or by creating a permit requirement. In order to restrict the administrative and management burden and to seek regulatory uniformity for those performing activities, it was decided in recent decades to use general government regulations for many types of activities. This resulted in several orders in council which contained general rules and which exhaustively regulated a number of subjects. These general government regulations only allow room for supplementary (or non-standard) decentralised rules where this is stated explicitly.

The legislative bill continues the option to set general government regulations. The main reasons for making use of this option are:

- a social issue of national importance (such as health, the safety of individuals, water safety, traffic safety, constructive safety, fire safety or water quality) requires that nationally uniform measures be taken;
- from the perspective of efficiency, regulatory uniformity and transparency it is desirable to regulate an issue at national level;
- an EU Directive necessitates that general rules be set at national level;
- international treaties require general rules;
- this involves potentially adverse consequences of activities which demonstrably exceed or may exceed the boundaries of the territory of the municipality, water board or province, and there is a real risk that these consequences will be passed on to an adjacent municipality, water board or province if no national regulations exist and the activities are regulated only at local level.

In the decision to make use of the option to set national regulations for particular subjects, the above reasons are weighed up against the advantages of the decentralised margin of appreciation which will continue to exist if no national regulations are created. This weighing-up may also cause the State to decide not to create general government regulations and instead to order local and regional authorities to set rules for activities without the State itself exhaustively regulating the content of these rules. Part 4.1 of the legislative bill contains an exhaustive list of the activities for which that weighing-up will or may lead to the creation of national government regulations.

Assignment of functions to locations

Paragraph **Fout! Verwijzingsbron niet gevonden.** already addressed the role of the municipal authorities, water authorities, provincial authorities and the State in the care for the physical environment. An important part of that care is to combine the use and the development of the physical environment with the importance of a good-quality physical environment. In finding an equilibrium between 'protection and utilisation', a balanced assignment of functions to locations is crucial. For the purposes of the legislative bill, the term 'function' has a general meaning. The function is the intended purpose or the status (in the sense of special characteristic) of a part of the physical environment at a particular location.

Every function assignment has at least two essential features: functional features and location features. The functional features express a particular role, task or service of the relevant part of the physical environment. For example, the assignment of the functions 'main road', 'military site', 'water catchment area' or 'industrial estate' relates to the task of that part of the physical environment. That function has an impact or imposes special requirements on the immediate surroundings of that part or on activities that are or may be performed within that part. The assignment of the function 'listed building' relates to the special and protected status of that object (structure or site), whereby the rules laid down in that respect may entail limitations on its use or alteration.

The location features may be explained as follows. The term 'location' is a spatial concept which indicates a part of the physical environment. This concept comprises a spot, a plot, a place, an area, a structure or other object. Locations may be very different in size, ranging from a single spot or a long strip (infrastructure) to a large area. The location is delineated through geographical positioning. This offers the option of delineating a location in three dimensions. Therefore locations may be situated next to each other, but also on top of each other. Thus, the subsoil of a location may be assigned the function of groundwater extraction, above which a location may be designated to accommodate a structure with a particular function (such as a particular designated use or a function as locally listed building), on top of which a zone may be delineated which may not accommodate high-rise objects because these would hinder aviation. Alternatively, a particular level of the subsoil may be assigned the function 'pipeline-gas', the top soil may have the function

'agricultural' and the dimension above that may have the function 'low-flying zone'. The functions of the different dimensions may result in restrictions on the use of the other dimensions. This means, for example, that because of the pipeline in the subsoil the farmer is not allowed to deep plough, or that, because of the 'low-flying zone' function, height restrictions are set in respect of the buildings and the use of mobile tower cranes.

A location may also be assigned several functions. Thus, functions such as 'residential' and 'water catchment area' may apply to one and the same location.

Not every conceivable function of the physical environment is relevant for the regulation of activities. A plot of land may have an investment function for one person and a production function for another. That a function of air is to be breathed is a given fact. That a function of air is to be flown through by birds is also a given fact. The same applies to aircraft. The first two functions need not be assigned by the government and cannot be restricted by the government. This is different for the use of the air by aircraft flying in a low-flying zone. This function is relevant, for example, for the positioning of tower cranes or the erection of high structures. If no distinction is made or can be made in location features, there will be no reason to assign a function or to differentiate between functions.

Whether a function is relevant depends on the extent to which that function affects its environment or imposes specific requirements on that environment for the performance of particular activities. Functional and location features may be both active and passive. Where the municipal authorities assign the function 'residential' to a part of their territory, this means that this location must also possess or acquire a suitable quality (urban planning, environmental) for that function (active) and that this location must be protected against negative influences on the residential function, such as industrial and traffic noise (passive). From the assignment of a function it follows that activities conducive to that function may be performed and that activities inconsistent with that function must be omitted. Often, however, it will be necessary to lay down general rules clarifying what activities may or may not be performed, or to what extent or in what manner. Thus, the assignment of the function 'groundwater protection area' will not make it clear to everyone what activities are permitted and what activities are banned because they may harm that function. The same applies to a particular area that is reserved for a future function. With a view to that function, therefore, rules will have to be set which show what activities are (not) permitted and under what conditions activities may be performed.

As appears from the foregoing, the term 'function' has a wide meaning, wider perhaps than the meaning of this term in common parlance. It is also wider than the term 'designated use', which is currently used in referring to the functions of sites in zoning plans. Thus, a protected (valuable) object is also called a function. A 'restricted area' may also be regarded as a function, while the restricted area of, for example, an airport extends far beyond the area that fulfils a traffic function. Under current legislation, too, the assignment of functions to locations takes place at all levels of government, for instance by:

- the municipal authorities, who specify the designated use of sites (such as residential or various forms of industry) in zoning plans;
- the municipal authorities, who grant a building the status of locally listed building, designate a berth for houseboats or identify a protected tree in a regulation;
- the provincial authorities, who designate groundwater protection areas in which the quality of the groundwater requires special protection with a view to water extraction;
- the State, which designates restrictions areas around Schiphol Airport.

The assignment of functions to locations is the foundation for setting rules on a multitude of activities.

1: The function assigned to a location, in combination with the rules attached to that function, determines whether construction activities may be carried out at that location and, where that is the case, what specific building rules apply at that location, such as rules on the height, size or appearance of structures. Supplementary to this, the general government regulations on construction activities contain rules which guarantee a minimum construction quality and the health and safety of persons in and around the structure.

2: The function assigned to a location, in combination with any environmental rules pertaining to that function (such as zoning or an emissions cap), primarily determines what environmentally harmful business activities may be performed at that location within what values. In assigning a function and setting rules, the authorities take account of the accumulation of environmental consequences of different functions and potentially environmentally harmful activities. Supplementary to this, general government regulations on environmentally harmful activities

contain rules on subjects such as the best available technologies and the limitation of specific forms of nuisance.

3: In implementation of the task to protect groundwater, a location is assigned the function of groundwater protection area. Activities in the groundwater protection area will subsequently be subject to supplementary rules.

Because of the great importance of assigning functions to locations and setting associated rules in protecting and utilising the physical environment, the legislative bill contains a mandate to municipal councils to make a balanced assignment of functions to locations in the physical environment plan for the entire territory of the municipality.

Special character of the physical environment plan in relation to other general rules

Because the primacy of assigning functions to locations and setting rules in this connection lies in the municipal physical environment plan, this plan differs substantially in parts from the general rules set by water authorities, provincial authorities and the State. The function assignment and the associated rules of the physical environment plan are much more location-specific in character than general rules of other authorities. Moreover, they have a major impact on the opportunities for land owners to perform activities on their plots. The fact that functions assigned and rules set may differ from one plot to another, furthermore, often imposes stringent requirements on the substantiation as to why a particular function is assigned and a particular rule is set (why my neighbour and not me?). The stacking of functions and rules needs to be considered as well. There is a risk that uncoordinated stacking will drastically and sometimes unreasonably limit the opportunities of plot owners at a specific location.

In view of the special characteristics of the physical environment plan described above, the legislative bill provides that, as is the case for the zoning plan, the adoption or amendment of the physical environment plan is prepared in accordance with Part 3.4 of the General Administrative Law Act, and that a direct appeal can be lodged against the decision with the Administrative Jurisdiction Division of the Council of State. The current option to permit specific initiatives that deviate from the rules laid down in the physical environment plan is continued in the legislative bill. To this end, Section 5.1(1)(b) of the legislative bill provides for an environmental permit in respect of deviating activities. Initiators can apply for an environmental permit insofar as initiatives are inconsistent with the physical environment plan.

In principle the physical environment plan may, within the same values as other regulations, contain both prohibitory and mandatory provisions, as well as rules on the application of a power to grant permits, or rules on construction activities that need not always be applicable in an objectified, predictable and mechanical manner in the context of an application for an environmental permit. Unless provided otherwise, there is no need to demonstrate that assigned functions will be created within a period of, for example, ten years. Likewise, it is not self-evident that existing situations will continue under a regime of standard transitional law. As is the case for other regulations and government regulations, the transitional law may be differentiated and geared to the severity of the changed rules. This will have the effect that a part of the restrictions on zoning plans that have evolved in practice and case law will not apply to a physical environment plan. Further details will be laid down in the implementing regulations.

Towards greater uniformity within general rules

It often happens that an initiator is confronted with general rules at multiple levels. An activity may currently therefore be subject not only to the zoning plan but also to several regulations (such as a municipal tree-preservation by-law, a water board regulation or a provincial regulation) and a variety of government regulations (such as the Order in Council on Building 2012, the Order in Council on Activities [Activiteitenbesluit milieubeheer], the Order in Council on Soil Quality [Besluit bodemkwaliteit] or provisions of the Railways Act).

Example: An initiator decides to create a multi-tenant business premises on an undeveloped site, offering space for various types of retail trade. In this context, a ditch will have to be rerouted, a number of trees will have to be felled and the plot will have to be raised. The zoning plan provides whether such a function is possible at that location, and imposes a number of location-specific requirements on the structure. The rules on felling trees are contained in a municipal tree preservation by-law. Rules on re-routing the ditch and discharging run-off rainwater into the ditch are contained in the water board regulation. The Order in Council on Building 2012 sets requirements for the construction quality, the Order in Council on Activities contains rules for the

various environmentally harmful (retail) activities and the Order in Council on Soil Quality applies to the use of some building materials and soil during construction.

Apart from the fact that the initiator must sometimes consult many different documents, the rules are currently also difficult to access and difficult to understand: the current general rules for activities contain many terms which are very similar but have slightly different meanings for legal purposes. Sometimes terms are used which have different meanings in different regulations. Those differences often have their roots in the historical context in which the rules evolved.

Example: the Spatial Planning Act provides that the municipal executive can set further requirements in respect of subjects or elements described in the zoning plan. General government regulations may offer a similar option, but in that context the term 'further requirements' has been largely replaced over the years by the term 'situation-specific regulations'. Those situation-specific regulations in turn contain the term 'additional requirements'. The situation-specific regulations in government regulations may also involve a dispensation, whereas decentralised rules normally use the term 'dispensation' independently, side by side with the term 'permit'. The term 'dispensation' also occurs in government regulations, but in a number of cases these regulations equate dispensations with permits and use the term 'environmental permit'.

The new environmental law system intends to increase the accessibility of various general rules in two ways:

- The integration of rules into a limited number of regulations. In principle, this results in one physical environment plan, one environmental regulation and one water board regulation, and, according to current understanding, two orders in council containing general government regulations on activities;
- The greatest possible harmonisation of instruments, terms and concepts occurring in many general rules. This will be addressed in more detail below.

The core of all current general rules for activities consists of prohibitory and mandatory provisions. This will be no different in the future for the physical environment plan, the regulations and the general government regulations.

Prohibitory provisions may be absolute prohibitions. In addition, environmental law provides for many relative prohibitions, whereby deviation from the prohibition is possible by means of an individual decision. The legislative bill refers to such deviations by the term 'environmental permit'. The environmental permit, which will comprise more activities in comparison with the Act providing for uniform provisions for managing the physical environment [Wet algemene bepalingen omgevingsrecht], also replaces terms such as 'permit' and 'dispensation' that are sometimes used at present. Section 4.4(2) of the legislative bill provides that the environmental permit and the water board regulation may also contain a prohibition on the performance of an activity without an environmental permit. Section 5.1 of the legislative bill regulates the permit requirements for activities initiated by the State. That chapter also regulates the environmental permit for a deviating activity, which allows deviation from the rules of the physical environment plan (including assigned functions). This means that all the prohibitions in the physical environment plan are relative prohibitions.

Most of the existing general rules for activities take the form of mandatory provisions. These involve 'relative orders': the general rules do not make it mandatory to perform activities, but contain rules which must be satisfied when an initiator performs an activity. In addition, many general rules include the option to protect the physical environment in a manner other than indicated in the mandatory rules, provided that this results in equivalent protection.

Under the current legal system, mandatory provisions are used only sparingly in zoning plans. Although the zoning plan may permit a particular designated use, it cannot, in principle, make it mandatory to bring about that use. Zoning plans do contain so-called conditional obligations, however. These entail that the creation of a designated use is not compulsory, but anyone creating that use must comply with certain rules. Other municipal by-laws which are incorporated into the physical environment plan do not distinguish between 'conditional obligations' and other orders and obligations either. For this reason, the legislative bill does not use the term 'conditional obligation'. The basic premise is that the physical environment plan makes functions possible but does not make it mandatory to create these functions, whereby the premise that particular functions may only be created if the rules laid down in the physical environment plan are satisfied will continue to exist.

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), and especially Article 1 of the First Protocol, which protects property rights, play an important part in setting prohibitory and mandatory provisions for plot owners. When the physical environment plan is amended, it must be assessed whether or not the amendment will mean regulation or confiscation of property. Whether setting mandatory and prohibitory provisions involves regulation or confiscation will depend on the circumstances of the case. Situations are conceivable which only involve regulation of property: restricting the possible applications of the property, without the right of disposition of that property being (largely or wholly) lost.

What matters in this context is that any interference in the property must be justified. The interference must serve a justified public interest, whereby there must be a proper balance between the public interest served by the measure and the interests of the plot owners involved.

- 1: In a particular street, the physical environment plan permits the construction of a dormer window of particular dimensions and a particular design, facing the street. As a result, all the homeowners but one have installed such dormer windows. It would benefit the appearance of the street if the last homeowner installed a dormer window as well. However, an obligation to do so is evidently disproportional.
- 2: The plots in the street concerned are connected to a public waste-water sewer. Due to increased surfacing and expansion, that sewer can no longer handle the volume of rainwater run-off. The municipal authorities decide to install a storm-water system and obliges the homeowners to cease discharging rainwater into the waste-water sewer within a particular period. As a result, the homeowners must either channel the rainwater into the newly-constructed storm-water system or filter it into the soil themselves. The proportionality of this measure depends in part on the costs associated with the modification in the specific situation and the transitional period offered.
- 3: In the context of facilitative planning, the municipal authorities assign a plot the function 'office' in addition to its existing function, but stipulates that if this function is created, a specific number of parking bays must be constructed on the plot, in view of the existing parking pressure in the area. Since it is not mandatory to terminate the existing function and to create the 'office' function, such an obligation will soon be proportional.

Apart from prohibitions and orders, the general government regulations offer a number of other instruments. Although the legislative bill continues to provide the opportunities to use these instruments, it harmonises the terminology and application. This involves the following instruments:

- offering the option to comply with the general rules in a different manner by taking equivalent measures;
- including a prohibition on performing an activity without first having notified the competent authorities;
- the opportunities for the competent authorities to further specify, supplement or derogate from the general rules in specific cases.

The option to comply with the general rules in a different manner by taking equivalent measures
Depending on the wording of a provision, measures are conceivable by which the same result is achieved. With regard to both decentralised general rules and government regulations, the legislative bill provides that the use of equivalent measures will be possible, unless this is excluded in the general rules. The initiator must demonstrate the equivalence of a measure. The point of departure is that the competent authorities assess the equivalence prior to the application of an alternative, which results in an individual decision. The general rules may provide, in derogation from the foregoing, that prior permission will not be required. In that case it may be stipulated, where necessary, that a prior notification must be made in the event that an equivalent measure is applied.

The obligation to notify the competent authorities of a proposed activity

With regard to activities which have a significant impact on the physical environment, prior notification of the competent authorities may be desirable. This may be combined with a disclosure requirement, so that third parties are also aware of the activity. This will sometimes be necessary pursuant to EU law. Therefore the legislative bill makes it possible for a prohibition on performing an activity to be imposed by general rules, if the activity has not been reported in advance to the competent authorities designated in those general rules.

Customisation within general rules

General rules may have the disadvantage that in certain cases they are insufficiently clear and therefore require further illustration. It may also happen that in specific local conditions, these rules do not result in the desired level of protection of the physical environment. Conversely, it

happens that general rules are unnecessarily restrictive for the initiator. In such cases, providing the competent authorities with the opportunity to further specify or supplement the general rules, or offering the competent authorities an administrative margin of appreciation for derogating from the provisions of those rules, may offer a solution.

The Government did not opt for offering the competent authorities a blanket opportunity to set further or non-standard rules in general or in individual cases. This would be detrimental to the clarity which the general rules are meant to provide and would entail risks for the level of protection. Therefore the legislative bill offers space for customisation only in respect of subjects indicated in the general rules. This applies to rules in the physical environment plan, to rules in a by-law and to the general rules set by the State. The legislative bill refers to the option of individual customisation by the term 'situation-specific regulations'. Application of this option by the competent authorities takes the form of an individual decision, which means that the procedural safeguards for decisions under the General Administrative Law Act apply. If the activity also requires an environmental permit, the general rules may stipulate that that permit will be subject to the situation-specific regulations.

If the general rules were set by the State or the provincial authorities, the option of setting further or non-standard regulations may also be linked to the physical environment plan, the water board regulation or the environmental regulation. This will offer municipal authorities, water authorities and provincial authorities the opportunity to set the situation-specific regulations not only for individual cases, but to extend their application to, for example, a particular area. For this option, the legislative bill uses the term 'situation-specific rules'. To prevent stacking of general rules, the legislative bill – as in the case of situation-specific regulations – restricts the option of setting situation-specific rules by means of a physical environment plan or by-law. This option exists only in respect of those subjects indicated in the general rules set by the State and the provincial authorities. The application of this option takes the form of a decision to adopt or amend the physical environment plan and the by-law respectively. On this occasion, therefore, the procedural safeguards for the formation of those decisions apply.

Competent authorities within general rules

When general rules are set, it must also be clear which administrative body must be notified and which administrative body is competent to take decisions on situation-specific regulations and equivalence.

For the physical environment plan this is the municipal executive, for the water board regulation this is the executive board of the water board and for the environmental regulation this is the provincial executive.

Preliminary protection

A preliminary planning decision may be taken for the preparation of a physical environment plan or an environmental regulation. A preliminary planning decision may also be taken with a view to the preparation of instructional rules, an instruction or a project decision.

By means of the preliminary planning decision, rules may be set which prevent a location designated in the decision from becoming less suitable for the creation of the purpose for which the physical environment plan will be amended. The physical environment plan may be amended on the initiative of the municipal council or (if delegated for that purpose) the municipal executive, in implementation of instructional rules or an instruction or through a project decision. The rules in a preliminary planning decision may prohibit the execution of particular works, not being structures, or activities. The demolition of structures or the alteration of the use of structures or locations may be prohibited as well.

With regard to construction activities requiring an environmental permit, the legislative bill adheres to the regime of deferring the decision on the application for an environmental permit. The deferment facility prevents that a permit is granted, in anticipation of the new physical environment plan, for construction activities which are subsequently no longer permissible under the new physical environment plan. Here, too, the need for such a deferment facility only exists in situations in which it is envisaged that particular construction activities, which are still permissible under the current physical environment plan, will be subject to further rules or entirely prohibited under the future physical environment plan. However, often a decision to adopt the physical

environment plan does not result in more and further rules but, on the contrary, the aim of the adoption is to set fewer rules and permit a wider range of construction activities. Under the new regime, a deferment facility will not take effect in cases where there is no need for such a facility.

Special provisions on decentralised rules

Creation period and duty to update

In the current practice, sites can only be assigned a (new) designated use if it can be demonstrated that this use will be effectively created within a period of ten years. The legislative bill does not continue this line. This is in response to many reactions which described that creation period and the application of the feasibility requirement as an undesirable "straitjacket". For some large developments, this period is indeed unrealistic. The Government considers it to be inconsistent with facilitative planning that functions included in a physical environment plan must be effectively created within a particular period. However, implementing regulations will stipulate that the municipal authorities, when assigning a new function to a location in the physical environment plan which differs from the existing, created function, must demonstrate that, by reasonable expectations, the new function will be created within ten years. This will provide the owners involved with legal certainty.

Unlike the current zoning plan, the physical environment plan will contain rules which do not regulate the planning situation, such as rules on felling trees. The physical environment plan can be regarded as a legal basis for the policy advocated by the municipal authorities. It will have to be updated whenever there is a change in policy views, as is the case for water board regulations, environmental regulations and rules at national level.

However, there are two situations in which a specific duty to update will remain necessary, i.e. in respect of instructional rules and instructions, and in the event of deviation from the physical environment plan via an environmental permit. The relevant instructional rule or instruction will set a time limit for the incorporation into the physical environment plan of rules set by the State and the provincial authorities. If there is a permanent deviation from the physical environment plan via an environmental permit, the physical environment plan for the plots concerned will not be a true reflection of the planning situation. This will affect the legal certainty of both the user of the environmental permit and any third parties. An amendment of the physical environment plan will then be in order. It is left primarily to the municipal authorities to integrate the environmental permits granted for deviating activities into the physical environment plan at a suitable and effective moment. To prevent a total lack of commitment in this context, this must be done within a period of five years after an environmental permit became irrevocable. This will ensure that the physical environment plan remains up to date also in areas where transformations take place.

Policy choices regarding general government regulations

Point of departure in setting government regulations on activities: space for development and quality guarantees

Based on the objectives and premises described in Chapters 1 and 2 of this Explanatory Memorandum, the Government prefers to apply general rules for as many activities as possible. This will contribute to the desired simplification of environmental law. The wider application of general rules is meant to achieve that in many cases an initiator needs to take account of these rules only.

Because general rules are not always sufficient, the legislative bill also provides the basis for procedures by which an assessment and balancing of interests can be made that is geared to a specific situation. In that case, the individual assessment will be made in the context of individual or area-specific customisation within the general rules (situation-specific regulations or situation-specific rules) or when an environmental permit is granted. In the usually more complex situations in which an individual assessment through an environmental permit is considered necessary, this assessment often needs to be aimed only at a part or a particular aspect of the proposed activity. In those situations, the initiator will be dealing with a combination of general rules and regulations under a permit. In substance, this may involve either of the following situations:

- The provisions with which the initiator must comply have been laid down in general rules. However, the individual prior permission from the authorities is still required. In this context, the focus is either on whether the provisions are observed, or on whether the activity is acceptable at that location. The initiator is aware of the rules in advance, but may only start the activity if the permitting procedure has a positive outcome.

- Especially if the potential impact on the physical environment is significant and the specific environment plays a part in the assessment of this impact, it will not always be possible to formulate general rules beforehand which guarantee sufficient protection of the physical environment. In that case, an activity will require an environmental permit, whereby both the permissibility of the activity and the associated regulations only become apparent when the permit is granted. This offers the initiator the greatest amount of advance uncertainty.

The provisions on activities in Chapters 4 and 5 of the legislative bill make it possible to utilise all the aforementioned options of general rules (including, where necessary, notification and customisation). The combination of general rules with an environmental permit is possible as well.

The aforementioned exhaustive list of general government regulations is related to permit requirements. In line with the premise that general rules have precedence, section 4.1 contains an obligation for the State to draw up general government regulations for most of the activities for which the State imposes a permit requirement. This obligation will only be lacking if working with general rules is not self-evident due to specific issues, for example in the case of dumping activities at sea. For these activities, Part 4.1 only provides a basis for setting general rules if such is desired.

Abandoning the term 'establishment' as the central reference point for environmentally harmful activities

The new environmental law system pools, harmonises and simplifies the rules laid down in various laws and orders in council. In this context, the term 'activity' has been chosen as the umbrella term for many bases within these regulations. The legislative bill distinguishes a variety of activities, including the environmentally harmful activity. The basis for the environmentally harmful activity is broader than the definition given in the Environmental Management Act: 'adverse consequences which establishments may cause'. The basis now also comprises a multitude of environmentally harmful activities outside establishments that are already subject to general government regulations at present, such as:

- discharging waste water into sewage systems and into the soil;
- handling waste materials (dumping, incinerating, recycling);
- applying heat and cold storage systems.

At present, these activities are largely regulated on the basis of the Environmental Management Act and the Soil Protection Act. The decision to introduce the broad term 'environmentally harmful activity' and abandon the term 'establishment' enables the integration of the current general rules. The new term comprises activities both within and outside the establishment, either location-specific or not and irrespective of their duration.

An additional argument for abandoning the term 'establishment' is that the term has lost much of its relevance now that most establishments have to comply with general rules, rather than a permit.

Because of the basis 'environmentally harmful activity', activities regulated in the Order in Council on Activities and other activities under the other orders in council to be integrated can be designated directly in line with the acts that have an environmentally harmful impact. By explicitly identifying the activities and setting bottom limits for these activities, the scope becomes clear and the system becomes more transparent and accessible.

Such targeted designation has the added advantage that if a notification is required, the requested information can be geared to the designated environmentally harmful activity instead of the whole establishment, as is the case under the current system. This will prevent any unnecessary administrative burden.

In general government regulations, the term 'establishment' currently still plays a part in a limited number of provisions of the Order in Council on Activities. These are provisions which apply to the entire establishment rather than to individual activities, such as provisions about noise, air emissions and external safety. These provisions involve accumulation effects. In many cases a solution can be found by adjusting the provision.

Envisaged effects

- The integration of general rules for activities into the physical environment plan, the environmental regulation, the water board regulation and a limited number of orders in council makes the rules much more accessible to individuals and businesses and improves their harmonisation.
- The preference expressed in the legislative bill to use instructional rules in the assignment of functions and the setting of rules in that connection by the provincial authorities will have a positive effect on the harmonisation of rules of different administrative bodies. This will reduce the chance of an individual or business being confronted with contradictory or inconsistent rules.
- In combination, the physical environment plan, the regulations and general government regulations offer better opportunities for addressing tasks in the physical environment at the correct scale level, with a well-considered choice of the instruments to be deployed, such as individual and local customisation. This improves the margin of appreciation which administrators need.
- In combination, the renewed instruments offer greater flexibility and create more space for the facilitative planning entailed by organic growth. Organic growth extends over many years. The physical environment plan which, unlike the zoning plan, does not have a plan horizon in the form of a duty to update, plays a decisive role in this context.
- The government specifies in the physical environment plan what functions are possible. Together with other rules in the physical environment plan, regulations and general government regulations, the values of area development are determined. The ball will then be in the initiators' court. It is up to them to comply with the rules set within the functions offered: a shift of role between government and 'market'.
- Better harmonisation of government regulations and decentralised rules, taking advantage of the new opportunities for situation-specific rules and environmental values, offers greater possibilities for a more general assignment of functions under the physical environment plan and rules set in that connection. The greater freedom of choice at decentralised level will increase the administrative margin of appreciation. A physical environment plan with a more general purpose offers more scope for initiatives. This may stimulate aspects such as organic area development, private commissioning (with an eye on the end user), the production of homes and the transformation of offices.
- The purpose of the physical environment plan in combination with other rules results in a restriction of the investigation burden: the deferral of investigation work to a later decision-making phase and the cancellation of the duty to update will considerably reduce the management burden.
- Projects with a realistic, long execution period (such as national projects, restructuring and transformation areas, expansion areas) no longer need to be chopped up into several plan sections on account of the case law regarding the ten-year period.
- The harmonisation of the rules on equivalence, on the notifications and on the creation by the competent authorities of situation-specific regulations within general rules, makes the general rules more accessible at all levels and offers the option of limiting the burden for individuals and businesses through further streamlining and amendment of implementation regulations.
- The equivalence regulation gives the initiator the right to apply equivalent measures.
- For specified subjects, the general rules may offer room for situation-specific regulations and situation-specific rules. The lack of room for customisation was sometimes a reason not to make the changeover from permits to general rules, because this step could have had undesirable consequences at particular locations or in particular areas. The opportunities for customisation will facilitate such a changeover to general rules. This may restrict the administrative burden.

Physical environment plan, water board regulations and environmental regulations (Chapter 4)

Introduction of the instruments

In implementation of their tasks, government authorities draw up rules on the physical environment. The target is to pool these rules into one regulation per government authority, thus increasing the accessibility and transparency of the rules on the physical environment. To this end, Part 2.2 of the legislative bill introduces the physical environment plan combining the municipal rules, the water board regulation containing the rules of the water board and the environmental authority containing the provincial rules. These instruments first of all contain the rules which will

be set pursuant to the various chapters of the legislative bill. In addition, they contain rules on the physical environment which are imposed pursuant to the Municipalities Act [*Gemeentewet*], the Water Authorities Act [*Waterschapswet*] and the Provinces Act [*Provinciewet*], and pursuant to other special acts. Particular subjects or other situations which are left outside the scope of the physical environment plan, the water board regulation and the environmental regulation may be designated by order in council on a temporary (as part of the transitional law) or permanent basis. This may, for example, involve regulations on administrative charges and levies or subjects at the interface of the physical environment and other policy areas, such as public order. This may also involve provisions to the effect that no integration needs to take place of regulations which are required pursuant to special acts that also cover the physical environment, such as the Airport Decision of an airport of regional importance. Where necessary, a provision may be included in the special act, via the Act implementing the Environment and Planning Act, to the effect that integration is not required.

Target situation: one comprehensive regulation per municipality, water board and province

The consideration to pool the rules relating to the physical environment at municipal, water board or provincial level was prompted primarily by the wide distribution and diversity of the existing rules. The rules are distributed among various regulations, each of which often concern one subject or sub-area. Many municipalities have more than 100 different zoning plans and more than 20 other regulations regarding the physical environment. Provincial and water authorities often apply various regulations as well, although these are fewer in number compared with municipalities. It also regularly happens in practice that these regulations differ in content. In addition, there is a risk that individuals and businesses are left insufficient room for manoeuvre. Finally, the large number of regulations is disadvantageous where the accessibility of rules is concerned. Even though the rules are usually available in digital form, it remains difficult for the initiator to determine whether he has a complete overview of all the regulations relevant in his situation, whether these are the most recent versions and how they must be interpreted in relation to each other.

In order to overcome the above disadvantages, the Government's aim in introducing this legislative bill is to achieve one area-wide regulation per government body: the physical environment plan for municipal authorities, the environmental regulation for provincial authorities and the water regulation for water authorities. These have a wider and more comprehensive character than the existing regulations. Rules on good spatial planning (such as existing zoning plans and management regulations) will be integrated with rules on the environment, nature, cultural heritage, trees and building aesthetics.

Integration will also lead to fewer rules, and will facilitate an effectively comprehensive approach towards the physical environment. Because of the broadening of the objective to the targets referred to in Section 1.3, the municipal authorities will be able to integrate a much wider range of matters in the physical environment plan than in the zoning plan. This will make the physical environment plan much more suitable for the creation of comprehensive area-specific environmental policies. For example, it will be possible to include environmental values and set associated rules in the physical environment plan which sufficiently protect a particular environmental aspect in an area, which means that the subsequent assignment of functions to locations in that area can be more general ('more general designation').

Comparable advantages apply in respect of provincial rules, in which for example the mandatory provincial environmental regulation is integrated with other regulations.

Procedural advantages

Integration into one physical environment plan or regulation also offers advantages in procedural terms. The integration will have the effect, for example, that municipal authorities can regulate both the assignment of the function 'local village or urban conservation area' and the tightening of building and demolition rules required for that purpose through one amendment. Locally listed buildings, too, are designated through assignment of this function to buildings or sites at locations via an amendment of the physical environment plan, rather than via separate designation orders. This means a reduction of the burden for administrators, individuals, businesses and the judiciary during the preparatory procedure and the appeal phase.

Integration does not cause a loss of flexibility. To prevent the physical environment plan or the regulations from becoming a rigid and unwieldy instrument, the municipal authorities may, for example, set different rules for different locations, as is the case for the existing zoning plan. Furthermore, the 'plan area' relating to a particular rule can be determined for each rule

individually. In the terminology of the legislative bill this will then involve restricting the scope of a rule to a location specified through geographical positioning. The full digital structure of the physical environment plan, which can always be consulted in the current consolidated version, makes it very simple to customise rules in this manner to a particular location and have them apply to that location only. Thus, it remains possible for the municipal council to change the rules applicable in a particular area in one go. A physical environment plan may therefore be amended in part for a sub-area. However, it is also conceivable that a partial revision relates to the rules imposed about a particular subject for the municipality's entire territory.

Flexibility is further guaranteed by the option of delegating the power to adopt parts of the physical environment plan and the regulations.

Decentralised discretionary power

The pursuit of one regulation per government body does not mean that the State determines the content of those broad, comprehensive rules. Decentralised discretionary power is the point of departure. The rules based on the Environment and Planning Act restrict this decentralised discretionary power on the following points:

- The State sometimes sets exhaustive rules on a particular subject, thus removing or restricting the room for the setting of rules by local and regional authorities, for example in the case of structural rules. However, the government regulations sometimes do provide room for local or regional customisation.
- In other cases, the law assigns a task entailing discretionary power to local and regional authorities. This relates to the execution of the specific tasks, but also to the obligation to comply with environmental values, or the obligation to set rules on a specific subject, such as the assignment of functions to locations. The discretionary power in the fulfilment of those obligations is often considerable, but may be curtailed and illustrated through instructional rules or instructions.
- Finally, the legislative bill provides a basis for rules on the structure and design of the rules which municipal authorities, water authorities and provincial authorities set and include in the physical environment plan, the water board regulation or the environmental regulation at their own initiative. In that case the local and regional authorities will remain entirely free in the decision whether or not to set rules, and if so, what the content of those rules should be. The rules on structure and design will only ensure that the rules are comparable to each other for users who perform activities in various areas and are therefore dealing with various physical environment plans and regulations.

Special position of the physical environment plan

For several reasons, the physical environment plan is a special concept within the instruments of the Environment and Planning Act for setting rules at decentralised level for activities in the physical environment. Just like the environmental regulation of the provincial authorities and the water board regulation of the water board, the municipal physical environment plan is an order of general application containing universally binding regulations. Accordingly, the physical environment plan has many things in common with an ordinary regulation. At the same time, a large part of the rules laid down in the physical environment plan differs from the rules in a standard regulation in terms of character. This is because the majority of the rules in the physical environment plan relate to the assignment of functions to locations and the manner in which those functions can be performed at those locations. As is the case for a zoning plan, the rules often only apply to a particular location and are therefore specific and substantiated in nature. For this reason it will remain possible to appeal against the decision to adopt a physical environment plan (or a part of it), as is also the case for the zoning plan. By contrast, no appeal can be lodged against the decision to adopt an environmental regulation or water board regulation. Furthermore, deviation from the physical environment plan through the environmental permit is always possible for a specific activity. This environmental permit for the so-called 'deviating activity' is regulated by Section 5.1(1)(b) of the legislative bill. This 'extra-plan' environmental permit system gives much flexibility to the physical environment plan and does not exist for the environmental regulation or the water board regulation.

The appealability of all the rules in the physical environment plan and the option of deviating from all the rules through an environmental permit were included after a number of variants had been considered. All the rules in the physical environment plan are appealable, and deviation from all those rules is possible by means of an environmental permit for a deviating activity. Thus, the generic line of the General Administrative Law Act on the appealability of universally binding regulations is abandoned for a part of the rules of the physical environment plan.

As stipulated in Part 16.1 of the legislative bill, the physical environment plan is drawn up, adopted and made available in digital form. This means that any user can find the municipal rules on the Internet at plot, geo-coordinate or address level.

The environmental permit and the project decision (Chapter 5 of the Environment Act)

Introduction

Chapter 5 contains provisions on two instruments for the creation of activities with an impact on the physical environment which require prior permission. The first of these is the environmental permit. This is a continuation and further expansion of the environmental permit under the Environmental Permitting (General Provisions) Act. The second instrument is the project decision, a special development procedure in which an administrative body, in promoting a specific government interest, can apply a streamlined decision-making procedure in order to take a decision by which the physical environment plan is directly amended and which may furthermore contain the permissions required to execute a project. The legislative bill positions the environmental permit and the project decision as two separate instruments for project decision-making. An important difference between these instruments is that an environmental permit is issued on the application of an initiator, whereas the project decision is a decision to be taken by the government on its own initiative for the promotion of a public interest. With a view to this public interest, the project decision comprises a preparatory procedure which differs from the procedure for the environmental permit. Where possible, the provisions of the environmental permit have been declared applicable by analogy to the project decision. The chapter also provides for a procedure, equivalent to the project decision, for the preparation by the municipal authorities of a physical environment plan for the creation of a project of public interest. In this way, the applicability of the 'faster and better' approach of the project decision is extended to the preparation of such a physical environment plan.

Environmental permit

Introduction

The point of departure for the legislative bill is only to set general rules for activities where possible, so that the initiator of an activity will not require prior permission. This will reduce the administrative burden. Where an activity has or may have a major impact on the physical environment and the specific situation plays a part in the assessment of that impact, however, it is sometimes necessary for the permissibility of that activity to be assessed by an administrative body.

If regulation of activities is inevitable, a permit requirement will only be imposed if this is necessary with a view to the fulfilment of an obligation under international law, or if the interest cannot be efficiently promoted through general rules. Insofar as it is efficient to designate a permit requirement for the regulation of an activity, the next question is whether this permit requirement must be designated at national level or whether this designation can be left to local and regional administrative bodies. Important arguments for designating a permit requirement at national level may concern international obligations, the scale level of possible adverse consequences of an activity, or a social issue of national importance. The limitation of the administrative and management burden and the pursuit of a level playing field may also be reasons for continuing the designation of permit requirements at national level. The legislator has opted for an exhaustive list of bases for permit requirements at national level, in view of the point of departure only to set general rules for activities where possible in situations where regulation is necessary. Because Section 5.1 does not contain a basis for the addition of new permit requirements by order in council, the designation of a new permit requirement for activities will require a change in the law.

The environmental permit under the legislative bill integrates and harmonises the granting of permits for existing activities requiring a permit in the domains of construction, environment, cultural heritage and spatial planning with the water permit under the Water Act, the permits under the Earth Removal Act, the permits or dispensations under the Public Works (Management of Water management Structures) Act, the Railways Act (Section 19), the Local Railways Act (Section 12), the Aviation Act (Section 8.12) and the permit for archaeological sites of national importance under the Monuments and Historic Buildings Act 1988 (Section 11). Some of the activities requiring a permit in relation to protected areas and species, as already included in integrated form in the

Environmental Permitting (General Provisions) Act, are integrated and the Nature Conservation legislative bill²⁷, which is currently before the Lower House of Parliament. As part of the physical environment plan, a number of permit systems under local regulations will also be incorporated into the environmental permit. Although the legislative bill introduces no other or new activities requiring a permit relative to current legislation, it sometimes uses new terms and appellations.

Designation of permit requirements

The designation of activities requiring an environmental permit comprises three categories.

The first category concerns activities which require an environmental permit pursuant to the Environment and Planning Act itself, such as the permit requirement for construction activities, environmentally harmful activities, and a part of the activities relating to water and listed buildings. The deviating activity is part of this category as well. This is an activity which requires deviation from the physical environment plan. The rules set by the municipal authorities in the physical environment plan have a knock-on effect on the deviating activity via the environmental permit. Among other things, the deviating activity is a continuation of the activity involving the use of sites or structures in contravention of a zoning plan or other planning regulations, laid down in Section 2.1(1)(c) of the Environmental Permitting (General Provisions) Act. In view of the special character of deviating activities, these activities will be discussed in detail below.

The second category concerns the environmental permit requirement arising from a water board regulation. The water board regulation may designate activities which require an environmental permit. The permit can only be granted on the grounds set out in the water board regulation.

The third category concerns the environmental regulation of the provincial authorities. Just like the water board regulation, the environmental regulation may designate activities which require an environmental permit. A permit will be granted on the grounds listed for that purpose in the environmental regulation.

Under current law, the acts to be integrated into the Environment and Planning Act provide for a local margin of appreciation in respect of some activities when it comes to adjusting the limits of the activities requiring a permit designated by that act. One of the acts offering this option is the Earth Removal Act. The legislative bill gives local and regional administrative bodies the option to adjust this limit in an upward or downward direction within a bandwidth specified by order in council. The idea behind this options is that in some cases it is desirable to consider a number of location-specific conditions when determining the bottom limit of a permit requirement for an activity. With regard to the permit requirement for earth removals, for example, a different bottom limit may be designated for the activity requiring a permit, depending on the type of subsoil or the groundwater pressure. One uniform limit without customisation would make the permit requirement unnecessary in some cases. Conversely, the option of local customisation may result in a less stringent wording of the regulation at national level. Because this local margin of appreciation is also desirable in respect of a number of other activities, the Environment and Planning Act will extend the application of this power to these other activities. Local and regional authorities will not be offered the option to deviate if this is opposed by an obligation under international law or arguments of effectiveness (such as a nationwide level playing field). The opportunities for administrative bodies to provide local customisation for permit requirements in this manner will be laid down in the physical environment plan, the water regulation or the environmental regulation. Thus, these opportunities will be furnished with procedural safeguards for public consultation, democratic decision-making and – where the physical environment plan is concerned – legal protection. For a more detailed explanation, please refer to the explanatory notes on Section 5.2.

Deviating activities

A deviating activity under Section 5.1(1)(b) is a new name for what the Act providing for uniform provisions for managing the physical environment calls a deviation from the zoning plan or other planning regulations (the use of sites or structures in contravention of the planning regulations as referred to in Section 2.1(1)(c) of the Environmental Permitting (General Provisions) Act). The legislative bill has increased the extent of the deviating activity. This is because of the fact that the physical environment plan has a wider scope than the zoning plan, and therefore regulates a larger number of subjects in the area of the physical environment. This may involve, for example, the regulation of activities that already require an environmental permit pursuant to Section 2.2(1) of the Environmental Permitting (General Provisions) Act. These subjects will be regulated in the

²⁷ Nature Conservation (Regulations) legislative bill (Nature Conservation Act) (Parliamentary Papers 33 348).

physical environment plan. Furthermore, the scope of the deviating activity is wider because of the legislative decision to cease using so-called 'intra-plan' permit systems and dispensation possibilities. For all the rules in the physical environment plan it is proposed only to apply the extra-plan basis in order to deviate from the rules via an environmental permit.

The legislative decision to cease using intra-plan permit systems and dispensation possibilities results in a legislative and procedural simplification. Because of this simplification, intra-plan and extra-plan permit systems can no longer be 'stacked on top of each other'. Under the current system of the Environmental Permitting (General Provisions) Act, such 'stacking' may have the effect that an intra-plan permit or dispensation for a particular activity would have to be refused on the grounds of an assessment rule laid down in the zoning plan itself, while the activity can still be permitted via the extra-plan environmental permit to deviate from the zoning plan. The legislative bill replaces this procedural stacking of intra-plan permit systems and dispensation possibilities on the one hand and extra-plan permit systems on the other by the permit for the deviating activity. In the methodology of this legislative bill, the activities requiring a permit under Section 2.1(1)(b) (infrastructure-building activities) and (g) (demolition activities) of the Act providing for uniform provisions for managing the physical environment will be incorporated into the deviating activity. The same applies to the activities currently referred to in Section 2.2(1) of the Environmental Permitting (General Provisions) Act. This involves, for example, the permit requirement for felling standing timber, installing advertising material or storing movable items. Insofar as municipal authorities consider regulation of these activities necessary, this will be done in the physical environment plan. To the extent that it is considered necessary to regulate these activities through prior assessment, the permit requirement for these activities will be incorporated into the deviating activity. The environmental permit requirement laid down in Section 2.1(1)(g) of the Act providing for uniform provisions for managing the physical environment for the demolition of structures in village and urban conservation areas designated by the State will be regulated entirely via the physical environment plan. The demolition ban to be imposed by municipal authorities in those areas, from which deviation is possible via an environmental permit in respect of a deviating activity, may be prompted not only by a desire to prevent undeveloped plots, but also by a desire to protect buildings of high cultural historic value, without having to designate the building as a locally listed building.²⁸

The physical environment plan may contain rules to the effect that the environmental permit for a deviating activity will be granted in any event if those rules are satisfied. These rules may achieve a result comparable to that of intra-plan permit systems and dispensation possibilities and the associated review frameworks. Such rules constitute the primary assessment framework used in determining whether the environmental permit can be granted for the deviating activity. If the rules are satisfied, the environmental permit must be granted. If a permit for a deviating activity cannot be granted on the basis of these rules, however, that does not mean that the environmental permit must be refused. In that case, the competent authorities will weigh up the applicant's interest against the purpose for which the rule from which deviation is requested was created.

With regard to rules set pursuant to Section 4.2(1), an assessment will be made against the purpose 'balanced assignment of functions to locations'. For a deviating activity relating to such rules, the balancing of interests by the competent must be fairly wide-ranging and will be comparable to the current 'extra-plan' environmental permit for deviating from the zoning plan. In addition, instructional rules regarding the physical environment plan will in principle apply by analogy in the assessment of the application, which means that the competent authorities must assess the application against those rules.

With regard to rules which the municipal authorities included in the physical environment plan on their own initiative, such as rules on felling trees, the municipal authorities themselves determine the purpose of the rule. That purpose may have been laid down in the physical environment plan itself, in a manner comparable to the 'with a view to' wording in the legislative bill, but may also appear from the explanatory notes. This method will prevent a situation in which the integration into the physical environment plan of permit systems under municipal by-laws significantly broadens the balancing of interests. Such broadening is undesirable, because it would lead to an increase in the management burden, an increase in the need for information on the part of administrators and thereby indirectly an increase in the burden for applicants. The details of the method will be laid down in assessment rules to be set pursuant to Section 5.17.

²⁸ Administrative Jurisdiction Division of the Council of State, 15 January 2014, ECLI:NL:RVS:2014:67 and Administrative Jurisdiction Division of the Council of State, 12 March 2014, ECLI:NL:RVS:2014:898.

If acts are performed in contravention of the physical environment plan, the prohibition on performing a deviating activity without an environmental permit will constitute the prohibited conduct on which enforcement measures may be based. This also applies to the rules on construction activities and on the use of sites and structures, as well as to other rules. If the physical environment plan includes a prohibition on felling particular trees or standing timber, surfacing particular areas, installing pipelines, demolishing buildings or demolishing, disturbing, moving or altering locally listed buildings, deviation from these prohibitions is possible through the environmental permit for the deviating activity. If this permit cannot be granted, there will be no chance of legalisation and the competent authorities will have a general duty to take enforcement measures.

One application, multiple activities

The basic premise of the legislative bill, which is also that of the Environmental Permitting (General Provisions) Act, is that initiators themselves decide for which activities a permit will be requested, and when. On this occasion, the applicant can either submit one application for several activities requiring a permit simultaneously or file the applications separately and spread out in time. The requirement of inextricable cohesion laid down in Section 2.7(1) of the current Act providing for uniform provisions for managing the physical environment still partly restricts this flexibility for the applicant. Where so-called inextricable activities are concerned, the current Act providing for uniform provisions for managing the physical environment stipulates that one application must be submitted for these activities simultaneously. Inextricable activities involve one physical operation which falls under two or more activity descriptions at the same time. In other words, the operation falls under different categories of activities requiring a permit, which cannot be performed separately in time. An example of this is the refurbishment and alteration of a nationally listed building, which classifies both as a construction activity and as a nationally-listed-building activity in the terminology of the legislative bill. An important advantage of submitting one application for two or more activities is that it enables a joined-up assessment of the activities concerned against the applicable assessment rules, and that regulations attached to a permit can be better coordinated in terms of content. In this way, the applicant will receive one decision from one administrative body which is also the authority fully competent to supervise and enforce the environmental permit.

1: Such cohesion applies in particular to construction activities relating to a listed building, because the applicability of particular rules of the Order in Council on Building 2012 may partly depend on the regulations attached to the environmental permit for the listed-building activity in question. This may have the effect that if the environmental permit for the construction activity is granted earlier, it will have to be amended again if the regulations attached to the environmental permit for the listed-building activity require this. It will therefore also be in the applicant's interest that the environmental permit for a listed-building activity is requested at the same time as or at least prior to the permit for the construction activity.

2: An initiator applies for an environmental permit in respect of the construction of a building in which an environmentally harmful activity will be performed. General rules applicable to environmentally harmful activities may give rise to requirements relating to the technical condition of the structure in which that activity will take place. It is important that an initiator, before submitting an application for a construction activity requiring a permit, obtains information about possible rules relating to the proposed use of the structure, so that the content of the building plan can be geared to these rules. If the activity is an environmentally harmful activity requiring a permit, requesting a permit for that environmentally harmful activity at the same time as or prior to the permit for the construction activity will usually be advantageous as well.

Sometimes there are good reasons for requesting permits for activities separately and spread out in time. This may be desirable, for example, with a view to limiting costs by first checking whether an irrevocable permit can be obtained for the deviation from the physical environment plan before further investments are made in the development and preparation of an application for a construction activity. Alternatively, applicants may want to phase the granting of permits for different activities because they wish to secure funding or ensure that the permitting process fits in seamlessly with the progress of the project development and the realisation. It may also happen that an application for an activity can only be prepared after a permit has been granted for another activity. As indicated earlier, the environmental permit for an environmentally harmful activity may contain substantive conditions as regards the structure in which that activity will take place. Therefore a situation may exist in which the application for the building plan can only be worked out in detail and submitted after the permit for the environmentally harmful activity has been granted. In this way, the building plan may be drawn up partly in accordance with the conditions

resulting from the permit for the environmentally harmful activity. The order in which applications are submitted for activities may therefore differ from one case to another. There is no statutory scenario providing a mandatory order for this submission.

In order to meet the aforementioned need for phasing, the Act providing for uniform provisions for managing the physical environment already provides for the possibility of obtaining a permit via two sub-decisions open to appeal. For each sub-decision, clarity can be obtained (in due course) about the acceptability of individual activities. The decisions of the first and second phases together constitute the environmental permit under the Environmental Permitting (General Provisions) Act. Here, too, the applicant already decides in which order the applications for the activities will be submitted.

Under the Environmental Permitting (General Provisions) Act, application of the inextricable cohesion requirement and the phased permitting regulation is not always found easy. Accordingly, the judiciary regularly has to address the question to what extent activities are inextricable. An initial evaluation of user experiences with the Act providing for uniform provisions for managing the physical environment and the Environmental Permitting Portal [*Omgevingsloket*] also revealed that the term 'inextricable cohesion' raises questions and that large-scale projects often involve the use of partial permits and the phased grant of environmental permits.²⁹ Furthermore, the phasing regulation of the Act providing for uniform provisions for managing the physical environment is complex in procedural terms and still restricts the applicant's freedom to obtain a permit for inextricable activities in more than two phases. For this reason the Act providing for uniform provisions for managing the physical environment is regarded as lacking in flexibility, despite the phasing regulation. This objection was met in part through an amendment of the Environmental Permitting (General Provisions) Act, offering the option to apply for the environmental permit for a deviation from the zoning plan separately and in anticipation of a construction activity.³⁰

Since the present legislative bill adds more activities requiring a permit to the environmental permit system, the number of potential combinations of inextricable activities has increased. As a result, the inextricable cohesion regulation would become more laborious, flexibility would be reduced and practical application would become more complicated. This is why the inextricable cohesion requirement in the Act providing for uniform provisions for managing the physical environment has not been taken over in the Environment and Planning Act. The effect in procedural terms is a considerable simplification, whereby one procedural phasing variant has become entirely superfluous. The cancellation of the requirement has no undesirable consequences. This is because an operation will be prohibited for as long as a permit has not been granted for all the activities forming an inextricable part of it. Therefore the inextricable cohesion requirement will not be needed in order to take enforcement measures in the event of violation. Applicants themselves are responsible for possessing the required permits for all the activities they perform. The Environment and Planning Act helps applicants in this context by enabling them to view online, via the 'permit check' on the Environmental Permitting Portal, what activities require a permit. Moreover, Section 3:20 of the General Administrative Law Act imposes a best-efforts obligation on the competent authorities to notify applicants if any other decisions taken on application are required for the activity which they intend to perform. Subsequently the initiator himself decides whether to request a permit for all the activities simultaneously or to do so separately and spread out in time. Thus, it is up to the initiator whether or not to phase the process of requesting and obtaining the permits. An initiator is responsible for making inquiries about the applicable laws and regulations and to hold the required permit for all the activities he will perform. It is also the initiator's responsibility to request a permit for activities simultaneously in cases in which a simultaneous assessment of activities offers advantages. However, the competent authorities also play a part in informing an applicant about applicable laws and regulations. The preliminary consultation, which is self-evident in more complex projects, plays an important part in this context. Ultimately it is up to the initiator to prevent a situation in which he requests a permit for, say, a building plan which, as may afterwards appear, needs to be amended because of requirements arising from general rules or a permit subsequently requested for a different activity which entails requirements in respect of that structure.

²⁹ AT Osborne, *Evaluatie van gebruikerservaringen met de Wabo en het Omgevingsloket Online* ['Evaluation of user experiences with the Environmental Permitting (General Provisions) Act and the Environmental Permitting Portal'], Baarn, 18 September 2012.

³⁰ Act of 28 March 2013 amending the Crisis and Recovery Act and various other acts for the purpose of finalising the Crisis and Recovery Act and making a number of improvements in the area of environmental law (Bulletin of Acts and Decrees 2013, 144/145).

Only in one case does the legislative bill require simultaneous submission, in view of an obligation resulting from the Industrial Emissions Directive. This requirement applies in the event that a permit is requested for an environmentally harmful activity and a water-related activity, if those activities relate to the same IPPC installation. For a more detailed explanation, please refer to the explanatory notes on Section 5.7(3).

In addition, a joined-up approach towards (complex) activities will be guaranteed by opting for a relatively wide-ranging description of the activity requiring a permit in a number of situations in which a comprehensive consideration is mandatory under EU law or highly desirable because of the harmful environmental consequences. IPPC installations and Seveso establishments* are in any case regarded as one activity. This will be regulated in the implementing regulations. Thus, it is guaranteed for this activity that the granting of permits, any general rules applicable to the activity, supervision and enforcement are all the responsibility of one competent authority. Furthermore, the legislative bill contains a basis which ensures in specified cases that the environmental permit for a construction activity will only take effect after an environmental permit for another activity has taken effect. This will prevent the occurrence of situations that are inefficient for enforcement or implementation purposes.

Finally, it is pointed out that the current regulations under the Environmental Permitting (General Provisions) Act will be continued in respect of applications for an environmental permit for construction activities, which regulations also classify such an application as an application to deviate from the physical environment plan in the event of inconsistency with the building plan. This will be addressed in more detail below.

Phased permitting for construction activities in contravention of the physical environment plan

Phased submission of applications for permits occurs frequently in relation to the construction of a structure that is in contravention of the zoning plan. Because the physical environment plan has a wider scope than the zoning plan, the need for phased permitting under the Environment and Planning Act will probably increase even further on this point. As indicated in the previous paragraph, phasing is always possible in principle, except in the situation specified in that paragraph.

Applications for an environmental permit for construction activities are assessed against the rules laid down in the physical environment plan on construction activities or the use of structures. Despite the fact that the physical environment plan has a wider scope than the zoning plan, the assessment rules in the physical environment plan will not, in principle, differ in substance from those under the present regulations where construction activities are concerned. Therefore a construction activity will not be assessed against all the other rules laid down in a physical environment plan, not even if those other rules might pose an obstruction to the building plan. An application regarding a construction activity will therefore not be assessed against rules in the physical environment plan on felling trees or demolishing existing structures. Instead, the assessment is made against the rules on the location, the design and the appearance of structures and the use of structures. Examples include rules on gutter and ridge height, cubic content, surface area and reasonable requirements of building aesthetics. If the construction activity involves the refurbishment of a building designated as a locally listed building, the activity will also be assessed against the (building) rules applicable to such buildings. After all, refurbishment also means an alteration of the listed building. In this case, therefore, the inclusion of the regulation for locally listed buildings in the physical environment plan does broaden the review framework for the construction activity.

In addition to the rules on construction activities laid down in the physical environment plan, the assessment is also made against the rules on the use of structures. This is meant to be a continuation of the practice of assessing whether the proposed use of the structure complies with the rules laid down in the physical environment plan on the use of structures. In this context, the legislative bill continues the line developed in case law that the assessment of a building plan against a zoning plan (soon: physical environment plan) should not only consider whether the structure can be used in accordance with the designated use (soon: function or functions) but also whether the structure is erected with a view to that use. This means that a building plan must be regarded as being in contravention of the designated use (soon: function or functions) if it can reasonably be assumed that the structure will be used either wholly or in part for purposes other than those for which the designated use (soon: function or functions) provides.³¹

³¹ See, for example, Administrative Jurisdiction Division of the Council of State, 19 November 2003, ECLI:NL:RVS:2003:AN8359.

Assessment of the application for an environmental permit

When taking a decision about a permit, the administrative body takes both statutory rules and policy rules into consideration. Collectively, these rules are also known as the 'review framework'. In this context, the substantive statutory provisions on the assessment of an application for a permit are referred to as 'assessment rules'.³² In the formation of this legislative bill, it was necessary to select the level of regulation of statutory assessment rules. At present, these are sometimes distributed between Acts of Parliament and orders in council, and are occasionally worked out in more detail by ministerial decree. Thus, the Environmental Permitting (General Provisions) Act, the Order in Council on Environmental Permitting [*Besluit omgevingsrecht*] and the Ministerial Environmental Decree [*Regeling omgevingsrecht*] all contain assessment rules for environmentally harmful activities. This means that those involved must look for the formal regulations in different cross-referencing documents. In order to increase the transparency, predictability, ease of use and possibilities of a joined-up assessment of the application, it was decided that this legislative bill should combine the assessment rules for environmental permits into one order in council.

A perceived disadvantage of this decision is that the envisaged effect of the permit system is not visible at statutory level. This was overcome through the identification of the interest central to the assessment of the application for each of the activities designated by the State as requiring a permit. For many activities, the legislative bill also contains statements providing a framework for the assessment rules to be laid down by order in council. Thus, it provides in respect of construction activities that the exhaustive-mandatory system currently applicable to such activities will continue to exist: the permit will be refused in the event of contravention of the general government regulations for construction imposed pursuant to Section 4.3 or the rules on construction activities laid down in the physical environment plan. With regard to deviating activities, the point of departure is that the instructional rules issued for physical environment plans pursuant to Sections 2.22 and 2.24 will be declared applicable by analogy to permanent deviating activities. Furthermore, the legislative bill indicates for a number of activities – in conformity with the basic premises described in paragraph 0 – what policy principles under international law will form part of the assessment rules.

Permits made compulsory pursuant to local and regional regulations are subject to the assessment rules which the administrative body laid down in the regulation for the activity in question.

The assessment rules of the various permitting regimes combined into the Environment and Planning Act work in very different ways. With regard to some activities, the statutory assessment rules provide a wide discretionary margin, which in turn gives the competent authorities a wide margin of appreciation. However, other activities, such as the construction activity, are subject to an exhaustive, and on some points, mandatory review framework providing a more limited discretionary margin. Widening the discretionary margin in review frameworks would have the effect that activities must be assessed on more aspects than is currently the case; this would be detrimental to the predictability as to whether activities are permissible. For permits made compulsory by the State, the implementing regulations contain rules for each activity which are geared to that activity with a view to legal certainty and efficiency. These rules are used to assess the permissibility of the activity and to materially limit the possibility of conditions being attached to the permit. The further integration of activities into one environmental permit also has a favourable effect on the decision space of administrative bodies. Opportunities for a more comprehensive consideration will improve as well. Although the rules for the assessment of the applications differ per activity, a joined-up assessment will facilitate harmonisation of the decision space relating to the various activities and enable a comprehensive consideration. The increase in the decision space for making considerations will improve the opportunities for the competent authorities to make a comprehensive assessment.

Furthermore, the assessment rules for permits made compulsory by the State will be combined into one order in council, streamlined through uniformity in terminology and through the elimination of duplication, but also through greater uniformity in the manner in which environmental values will or will not have a knock-on effect. This adjustment is part of the process for establishing national implementing regulations laid. In combination with digitisation, this is

³² Draft versions of the legislative bill and the Explanatory Memorandum also used the broader term 'review framework' to specifically indicate the assessment rules. As this appeared to cause confusion, it was subsequently decided to use two distinct terms.

meant to bring about a situation in which it is more transparent than before for the initiators which assessment rules apply to the proposed activities.

Assessment of the application in the programmatic approach

The system of the Environment and Planning Act focuses as much as possible on achieving a good-quality physical environment at area level, for example by adopting a programme relating to an environment value at area level. If a programme is in place that puts a programmatic approach into effect, the legislative bill provides that the assessment rules for the environmental permit work differently in respect of that element. In that case, the administrative body will assess the application for a permit on that element against rules specifically adopted in relation to the programmatic approach, rather than against the assessment rules designated for that activity. This is possible because the government uses a programmatic approach to ensure that the desired quality of the physical environment is achieved at area level.

Ex-officio revision permit

The legislative bill transforms the revision permit on application into an ex-officio power of the competent authorities to provide for an administrative combination of related permits with a view to effective implementation and enforcement. The legislative bill eliminates the revision permit on application. The power to issue an ex-officio revision permit may be applied if a stacking of permits occurs due to a change and alteration of activities over time and an amendment of regulations because of advancing protection of the physical environment. Businesses expand, increase their production capacity, start new activities or replace installations. Each time, the competent authorities will take a decision in this respect and an additional permit will be granted. This stacking may result in an obscure permit situation and obstruct efficient implementation and enforcement for both the competent authorities and the business. For this reason, both environmental and water-related regulations traditionally offer the revision permit in order to make a fresh start after a number of changes. In current practice, however, the revision permit is also used as an instrument for permitting changes or amending regulations. The legislative bill provides different instruments for permitting changes, amending regulations or withdrawing permits. In order to eliminate ambiguity regarding the supplementary effect of the revision permit relative to the application for a new permit and the amendment or withdrawal of an existing permit, the proposed Section 5.41(1) provides for only one instrument, which is the ex-officio revision permit that may be granted in the interest of efficient implementation and enforcement.

Project decision

The project decision is an instrument for the State, provincial authorities and water authorities in permitting - often complex - projects in the physical environment that have a public interest. This instrument offers a flexible procedure for projects in which a government body has a responsibility, such as infrastructure and water safety, but also for private initiatives whereby the private initiative concurs with the achievement of public objectives in the physical environment. The purpose of the former is to facilitate government activities and offer space for projects of public interest. Examples include the construction or expansion of a main road, or the reinforcement of a primary water-control structure. Alternatively, the government may streamline decision-making for an initiative of provincial or national interest which originates from the area or a private initiator and combines the achievement of both private objectives and public objectives in the physical environment. Examples include the development of new nature areas in cooperation with a private initiator and the development of energy infrastructure.

Decision-making on projects in environmental law

The project decision is in line with a trend in legislation occurring in recent decades, based on the practical experiences gained with the realisation of projects of public interest.

Although there are larger and smaller differences between the current procedures in various acts, they have a number of common characteristics:

- access to the procedure is delineated to a certain extent;
- the power to take the decision lies with the administrative body that is responsible for the policy to realise the projects, therefore with the provincial executive, the executive board of the water board or the minister responsible;
- where necessary, the State or provincial government may issue an implementing decision itself if this decision is not granted in good time in conformity with the application;
- all appeals are heard by one body.

These characteristics return in the proposed project decision. The procedure for the project decision combines the strengths of the current procedures. Thus, the preparation based on the

'faster and better' approach was derived from the Transport Infrastructure (Planning Procedures) Decision [*Tracébesluit*] and the directly binding character of the decision upon private individuals was derived from the integration plan [*inpassingsplan*].

Characteristics of the proposed project decision

One decision

The project decision contains the measures necessary for the execution of the project. These may include a description of the project that is being accomplished, as well as any facilities associated with this project. In addition, rules may be set which are aimed at the protection and maintenance of the realised project. This may be necessary, for example, where the project decision concerns the creation of a nature area. In that case, the project decision may also contain measures in the associated area and compensatory measures to protect and maintain the area created through the project decision. Pursuant to Sections 2.24 and 16.86, rules on the content of the project decision will be laid down by order in council.

The project decision makes it possible that all permissions for the project are granted through one decision. Because the project will generally not be consistent with the rules of the applicable zoning plan, the project decision will change those rules. Thus, the project decision is also a decision to (partially) amend the physical environment plan or plans, owing to the realisation and maintenance of the project. Furthermore, the project decision also counts as an environmental permit for the activities explicitly referred to in the project decision and as permission for other activities specified in the project decision, such as a traffic order.

The 'faster and better' approach

In complex and high-impact projects, a wide-ranging exploration and early participation of the public and stakeholders, resulting in a broadly supported preferred direction and coordinated execution, are of major importance. The procedure for the project decision contains a number of safeguards through which the recommendations on the 'faster and better' approach were incorporated into the legislative bill. The project decision concerns the realisation of projects of public interest whereby an initiative evolves into concrete decision-making by means of a funnel model.

The exploratory phase is an important component of the project decision. Individuals, businesses, organisations and the administrative bodies involved all participate in this exploratory phase. This exploration leads to political-administrative decision-making at strategic level on whether or not a project is necessary. Depending on the size and nature of the project, the process may give rise to a preference decision, or its results may be included in the (draft) project decision. If the project is found to be necessary, the details of the project decision can be worked out on the basis of that exploration. Carrying out a wide-ranging exploration and not focusing too early on solutions will prevent a situation in which a 'solution' is presented prematurely.

Delineation of application possibilities

The project decision relates only to projects involving a provincial or national interest or a water management interest. The development procedure is the appropriate instrument in the event of provincial or national policies regarding the physical environment or water management interests which make it desirable that the State, provincial government or water board is responsible for taking decisions on the realisation of a project. This involves public interests. The legislative bill provides for a - non-exhaustive - delineation of projects for which the development procedure is followed. For a number of (categories of) projects, the legislative bill (or a different act) prescribes that decision-making should take place only in accordance with the development procedure. This applies both to decisions taken by the authorities of their own accord and to private initiatives. The legislative bill prescribes the application of the development procedure for projects which are subject to the Transport Infrastructure (Planning Procedures) Act under current legislation, or which require a project plan pursuant to the project plan procedure of the Water Act. It also applies to specific energy projects. An exhaustive delineation would be insufficiently future-proof, however. The development procedure may also be applied in cases other than those referred to above, in which it is desirable to create an element of policy regarding the physical environment or water management interests. The non-exhaustive delineation is also in line with the principle of subsidiarity, whereby the State and the provincial authorities may interfere in government care with a view to safeguarding national and provincial interests respectively. The public interest may be substantiated in an environmental strategy or a programme, but may also appear in other ways. In cases for which the development procedure has not been designated as mandatory and

the procedure for the project decision is considered too heavy, the regular instrument of the environmental permit may be applied. In this context, the legislative bill is in line with the current system of integration plans, which also involves non-exhaustive provisions as to when there exists a national interest or a provincial interest and when an integration plan is mandatory. This freedom of choice appears to work well in practice.

Amendment of the physical environment plan

The project decision provides directly for the (partial) amendment of the physical environment plan or plans. This regulation of direct amendment of the physical environment plan was included to prevent an additional burden for municipal authorities in that otherwise, following the adoption of the project decision, the physical environment plan would have to be amended in line with the project decision. The Spatial Planning Act contains a comparable construction for the State and the provincial authorities to create projects of national or provincial interest by means of an integration plan which is deemed to be part of the zoning plan. Subsequently the new planning regulation for the area in question may be inferred from the integration plan and the zoning plan. Because the project decision amends the physical environment plan, it is also clear what rules apply to the amended physical environment plan. In the case of projects that cross municipal borders, the project decision may affect several physical environment plans and the amendment may apply to several physical environment plans.

The amendment only relates to the creation and maintenance of the project. It may involve rules providing for the permission of construction options and application possibilities for the project, such as the creation of high-voltage pylons, a main road or a nature area. It may also involve the limitation of construction options or the exclusion of previously permitted functions, such as an agricultural function in the event of the construction of a power plant. In addition, it may involve other functions ('double zoning' in current terminology), such as high-voltage lines or archaeological values. Alternatively, the amendment may concern (digital) representation, such as the indication of the blade radius of a wind turbine. Furthermore, the project-related amendment may concern rules applicable to a restricted area, such as a restricted area along a gas pipeline.

Instructions in combination with project decision

In most cases, the power to amend the physical environment plan directly through the project decision will be sufficient. However, it is conceivable that in certain situations it is still necessary or desirable that an instruction as referred to in Sections 2.33 or 2.34 be issued as well for the execution of the project. This situation may occur if the creation, operation or maintenance of the project requires that (parts of) the physical environment plan be amended whilst the municipal authorities have discretionary power in detailing that amendment. An example is the case in which the creation of a project, such as the construction of a road, makes a number of homes unfit for habitation because of external safety risks. The buildings in question need not be demolished, but a different, non-vulnerable, function will have to be found for these buildings. The latter may involve a municipal policy decision. In that case, the minister or provincial executive involved can not only take a project decision for the execution of the project, but can also issue an instruction ordering the municipal authorities concerned to amend the physical environment plan in such a way that the vulnerable function is no longer permitted. It will then be up to the municipal authorities to decide what *is* permitted. Because the project decision is a comprehensive decision, the substantiation of the project decision will address the instruction as well. It is estimated that such an instruction will be required only rarely. After all, in most cases the project decision will suffice. In addition, it may be expected that such situations will be identified during the preparatory phase of the project decision and that the municipal authorities and the authority competent for the project decision will ensure by consultation that an appropriate arrangement is included in the project decision.

Coordinated decision-making

Integrating all the decisions required for the project into the project decision is not always efficient. The detailed technical data necessary for a permit is often only available at a later stage of the design process of a project. Sometimes it is also more efficient if an implementing decision is taken and subsequently enforced by the administrative body normally responsible for this, rather than by the authority competent for the project decision. The authority competent for a project decision may decide in favour of coordinated preparation of the decisions implementing that project decision, in compliance with Part 3.5 of the General Administrative Law Act. Obviously the applicability of such coordinated decision-making may also be stipulated in a different act. This procedure provides for the coordinated preparation of the permissions required for implementing the project decision that are not directly included in the project decision. This means that these so-called implementing decisions follow the same preparatory procedure and that appeals against these decisions can only be lodged with the Administrative Jurisdiction Division of the Council of

State. With regard to the coordinated decisions implementing the project decision, it is possible that the minister or provincial executive, insofar as they are not the competent authority, issue these implementing decisions themselves. For this reason, the legislative bill stipulates that the coordination regulation for decisions implementing the project decision will only apply insofar as this has been provided by law or pursuant to a prior decision of the provincial executive or the minister responsible.

Situation-specific procedure

During the development procedure, account is taken of the possibility of an accelerated procedure in which the adoption of a preference decision is not compulsory. In less complex projects, the 'faster and better' approach, with its adoption of a preference decision, will have a complicating rather than an accelerating effect. These may be projects in which no major interests are at stake, or for which no real alternatives need to be considered. For those projects, a limited exploration will be sufficient and funnelling many problem-solving approaches into one preferred solution will have no added value. The legislative bill identifies only a limited number of situations for which a preference decision is mandatory. In all other cases, the competent authority may decide as it sees fit.

In addition, the legislative bill offers the competent authority the option to link preliminary protection to the phase of the decision-making process in which such protection is necessary. Preliminary protection may prevent a situation in which the preparation of decision-making is hampered by other developments in the physical environment. The instrument provides possibilities for customisation: the preliminary protection will only take effect at the moment when it is considered necessary and will last until the physical environment plan amended by the project decision enters into force.

Furthermore, the legislative bill offers administrative bodies wishing to initiate related projects the option to adopt one project decision in this respect by consultation, with one competent authority.

One body for all appeals

The project decision is prepared in compliance with Part 3.4 of the General Administrative Law Act. Subsequently an appeal can be lodged with the Administrative Jurisdiction Division of the Council of State. The legislative bill provides for one appeal body in respect of the project decision in order to prevent delays, given the size and public interest of the project and the legal certainty in taking follow-up decisions implementing the project decision.

Enforcement of the project decision

Where enforcement is concerned, the authority competent for the project decision sees to the correct implementation of the provisions laid down in the project decision. Insofar as the project decision counts as an environmental permit for the activities specified in the project decision, the administrative body which took the project decision will also be the authority competent for the supervision and enforcement of the associated regulations. In the event of deviation from the physical environment plan amended by the project decision, this will count as an act without a permit or an act in contravention of the physical environment plan, and the normal competent authority will be responsible for supervision and enforcement. The municipal authorities are the authority competent for the supervision and enforcement of the physical environment plan, and thereby also the authority competent for the supervision of compliance with the rules of the physical environment plan amended by the project decision. This situation is comparable to the current integration plan under the Spatial Planning Act, which is part of the zoning plan. If an environmental permit has been granted for the implementation of the project decision, the normal regulation for the assignment of competent authority will apply.

Example: The Minister of Infrastructure and the Environment takes a project decision for the construction of an aquaduct at a canal administered by the water board. He integrates the environmental permit for the water-related activity into the project decision and is therefore responsible for supervising compliance with the water-related regulations. The environmental permit for the construction of the aquaduct will be requested at a later stage, and the municipal authorities are responsible for the supervision and enforcement of this permit.

Difference between project decision and environmental permit

Both the project decision and the environmental permit can be used to grant permission for a combination of activities. Table 6 illustrates the principal differences between the project decision and the environmental permit.

Table 6: Differences between the project decision and the environmental permit

Project decision	Environmental permit
Projects with a public interest <i>and</i> a provincial or national interest	All activities, except for a number of project types that are always regulated via a project decision
Ex-officio decision after public preparation	Always on application
Direct amendment of physical environment plan	Deviation from physical environment plan, which is updated within five years of the permit being granted
Competent authority is the State, provincial authorities or water board	Competent authority is 'municipal authorities, unless'
State and provincial authorities may overrule other administrative bodies by taking implementing decisions themselves or disregarding local and regional regulations	Administrative bodies are equivalent
One body for all appeals	Two bodies to hear appeals

The procedure for the project decision

Step 1: Public announcement of the intention to take a project decision (intention)

The intention marks the start of the procedure eventually resulting in a project decision. The intention is not an intention to take a legally binding decision to carry out the project. Instead, it seeks to publicly announce the exploration of a task in the physical environment and to indicate whether and in what manner the public will be involved. Therefore the intention is not open to objection or appeal.

In the case of a private initiative, the competent authority, at an initiator's request, will announce an intention if it intends to cooperate in the initiative and the project involves an element of provincial or national policy. In the situation in which a private initiator requests the authorities to take a project decision and the authorities refuse this request, there will be an actual decision. In that case the refusal will relate to the non-commencement of the decision-making procedure for the project decision.

Step 2: Determination of the scope of the investigation into possible impact of the project

Subsequently it is decided, based on the published intention, what information will be gathered so as to ensure a balanced decision regarding the project. If the enhanced procedure is followed, the exploration will be carried out in the context of the preference decision. If the accelerated procedure is followed, the exploration will be carried out in the context of the project decision and its results will be included in the explanatory notes on the project decision.

In both cases, there will be an obligation to carry out an environmental impact assessment (EIA) in the event of a project subject to an EIA or a preference decision subject to a plan EIA pursuant to Part 16.4 of the legislative bill. The plan EIA also plays a part in the enhanced procedure, because the preference decision is classified as a plan which, for example, sets the values for the project decision to be adopted. If there exists an obligation to carry out a plan EIA, this assessment should in any case comprise an investigation into the potentially considerable environmental impact and the reasonable alternatives. In addition, the bodies to be consulted will be asked to advise on the scope and level of detail. This gives substance to the obligation laid down in the SEA Directive that 'competent authorities' must be given the opportunity to advise on the information to be provided by the contract awardee. Where possible, the EIA procedures have been geared to the procedure for the project decision. The assessment rules and obligations to investigate are harmonised where possible. Further details will be laid down in the implementing regulations.

Phasing and scope of project decision

By determining the size of the project decision and thereby the scope of the obligation to provide information in advance (and in consultation with the initiator), it is possible to phase the project at this moment in the procedure. To the extent that the competent authorities consider this desirable, permits for the execution of the project may be granted at a later stage, in compliance with the coordination regulation. For example, a provision may be included to the effect that the constructive safety of a tunnel to be built as part of a new motorway to be constructed will not be considered in the project decision, but will be addressed in a separate environmental permit for a construction activity which will be granted at a later stage. Another example is the installation of a

high-voltage line whereby the project decision indicates the location of the projected route, the location of the masts and the restrictions on use for the areas and structures involved in the decision. If desired, the structural requirements of the masts may be addressed at a later stage, when an application is made for an environmental permit for the execution of the project. The idea behind this is that practice requires flexibility on this point, as is also reflected in current legislation. Although the implementing decisions may be adopted at the same time as the project decision, this may also happen at a later stage, either in one go or in phases.

The project decision provides at least for permission for those activities which are necessary in order to assess the acceptability of the project. Elements of the implementation of the project decision which are not considered in detail in the project decision may be regulated after the project decision has been taken by means of an environmental permit or other decision implementing the project decision. In this context, the minister or provincial executive will apply the coordination regulation for implementation permits pursuant to the General Administrative Law Act.

Assessment rules and the programmatic approach

The basic premise of the project decision is a comprehensive consideration. The adoption of a project decision involves a weighing-up of interests, in which political and administrative insights play an important part. The comprehensive nature of the project decision entails that the assessment of those activities that are relevant to the overall view as to the acceptability of the project should be included in the project decision and be ineligible for phasing. The assessment of the activities included in the project decision will nearly always be made on the basis of the assessment rules applicable to these activities. If a project decision replaces the environmental permit for an activity, the assessment rules for that activity will apply by analogy to the project decision.

When taking a project decision, the central authorities always work within the rules laid down by the local and regional authorities, with the exception of the rules of the physical environment plan. In some cases, however, it is also possible for the State or provincial authorities to exclude application of regulations set by other administrative bodies. This must then involve situations in which the realisation of a project decision is disproportionately obstructed. An example is an absolute prohibitory provision contained in the environmental regulation, a provincial programme, the water board regulation or in a municipal regulation not integrated into the physical environment plan, which prevents the realisation of the project within reasonable limits. This power can be used only as a last resort. For the provincial authorities, this power concerns regulations of municipal authorities or a water board. For the minister, it is also possible to exclude application of regulations laid down by the provincial executive. Given the constitutional relationships, the water board does not have this option. This option is currently contained in Section 3.35(8) of the Spatial Planning Act and has been taken over in Section 5.51 of the legislative bill. The codification of this option was prompted by the public interest of the projects to which the development procedure relates. In the event of a programmatic approach, the provision is the same as in the case of an environmental permit for an activity: the assessment rules for that activity do not apply; the activity is assessed on the basis of the programme. Sometimes, however, such rules may result in disproportionate obstructions to a project. In such cases, application of the rules laid down by the local or regional authorities may be excluded. The decision to exclude application of disproportionately obstructive rules may be part of the project decision, insofar as this has been stipulated explicitly. Alternatively, it may be taken as a decision implementing the project decision. In all cases, a careful substantiation will be required as to why compliance with the local or regional provision has a disproportionately obstructive effect on the project. The programmatic approach is explained in more detail in paragraph 0.

Involvement of other administrative bodies

A project decision, too, may concern activities for which other administrative bodies bear responsibility. These bodies are involved in the decision. In principle, the regulation on concurrence in project decisions is the same as that for environmental permits. This means that other administrative bodies will have the right to advise or the right to advise and consent in relation to a project decision at the moment when the authority competent for the project decision opts to integrate particular permissions into the project decision. In that case, the administrative body which would otherwise be authorised to grant the permit will obtain a right to advise or a right to advise and consent. However, the coordination of interests in the project decision also involves a vertical effect. This means that the State will have overriding authority in granting an environmental permit for an activity for which another administrative body is the competent authority. Likewise, municipal authorities or water authorities will be unable to stop the execution

of the project of the provincial authorities by withholding consent. However, municipal authorities and water authorities do have the option to advise on the proposed project decision of the provincial authorities. Project decisions of the State are subject to the same rules as those of municipal authorities, water authorities and provincial authorities.

In the procedure for the permit that may be required, appellants will be unable to contest the choices made in the project decision. After all, the project decision itself is open to appeal. The latter is in line with the current regulations.

Relationship with the environmental strategy and programmes

The project decision is meant to safeguard public interests. For this reason, a procedure is followed which takes account of the public interest and provides for participation. In order to enable application of the project decision, the intention to execute a project will usually have its roots in the environmental strategy of the government authority concerned or be based on an adopted programme. After all, the purpose of the project decision is to realise an element of provincial or national policy. This inclusion is not compulsory, however. The existence of a public interest may also be substantiated in other ways. Whether a project decision is eventually adopted will depend on the outcome of the weighing-up of interests carried out to that end. In this context, political and administrative insights play an important part.

Step 3: Preference Decision

This step applies only if the competent authority has indicated in the intention that it will take a preference decision, or if an order in council stipulates that a preference decision should be taken. In this way, the legislative bill offers the competent authority as much room as possible for customising the procedure for creating the specific project decision. Taking a preference decision has significant added value in funnelling an abstract task into a concrete project decision. A preference decision may be in order if a wide-ranging exploration is desirable, for instance in respect of a complex project which requires broad participation. In general, a preference decision will be more desirable to the extent that a project causes greater public controversy, has a greater impact on the physical environment and/or is administratively sensitive. The preference decision involves an expression of preference by the authorities. In order not to disrupt this process, it is important that the preference decision remains in the political-administrative domain and does not enter the legal domain. Accordingly, the preference decision is not open to appeal and has no direct binding force. The project decision, on the other hand, as the culmination of the development procedure, is a decision which may be contested at law.

A general criterion at statutory level which provides in what situation a preference decision must be taken will not sufficiently specify those projects that satisfy this criterion and would result in delineation problems, thus causing legal uncertainty and juridification. A link with, say, the EIA obligation would not be sufficiently distinctive either, because the EIA obligation also applies to those projects for which a preference decision is not always desirable. For example, an EIA obligation is also in place for projects that require appropriate assessment. For this reason, it was decided to designate the projects for which a preference decision is mandatory by order in council. On this occasion, those projects can be designated for which a preference decision is already mandatory at present in the context of the Transport Infrastructure (Planning Procedures) Act. For these projects, after all, the added value of a preference decision has already become apparent from the experiences with that Act. If the preference decision is not mandatory, the authority competent for the project decision will decide whether a preference decision prior to a project decision is desirable in view of the characteristics of the project. Once a preference decision has been taken, this choice is further detailed in a project decision. If the project decision deviates from the preference decision, the administrative body will explain in the project decision why this deviation is necessary, given the position taken and any arrangements made in respect of the preference decision. It is possible for the preference decision to be detailed in several project decisions insofar as several distinct projects are involved.

In the event of a preference decision subject to a plan EIA, the legislative bill provides for harmonisation of the plan EIA and the development procedure.

Step 4: Draft project decision

The project decision is prepared in compliance with the uniform public preparatory procedure (Part 3.4 of the General Administrative Law Act). This method was chosen because the project decision involves high-impact or complex projects. In large projects which are expected to elicit many different views, the procedure of Part 3.4 of the General Administrative Law Act is much more efficient than the normal procedure, in which all parties must file objections individually before an

appeal can be lodged. If Part 3.4 of the General Administrative Law Act is applied, the current objection phase will cease to exist.

Step 5: Project decision

The competent authority adopts the project decision. This is followed by the publication of the decision and the opportunity to lodge an appeal. Based on a comprehensive consideration of the facts and interests involved, the project decision contains all the relevant provisions and measures for the physical environment which are necessary for the realisation of the project. Depending on whether the option of phasing was used, this involves a detailed description of the work or works to be carried out through the project and the measures necessary for realising the project. The project decision also contains the measures aimed at limiting or undoing the impact of (the execution of) the project on the physical environment. Thus, the project decision, in addition to provisions on the position, size and other aspects of the high-voltage line to be installed or road to be altered, may also contain provisions on temporary work sites that are necessary for the construction. It also contains the physical measures to compensate for damage to natural features or to limit noise pollution, as well as provisions on the limitation of application possibilities of works and plots insofar as this is necessary for the execution and maintenance of the project. Apart from the possibility of phasing the project by including aspects to be detailed in a (coordinated) environmental permit to be granted at a later stage, rather than in the project decision itself, the legislative bill also offers flexibility by declaring applicable the regulation whereby a measure prescribed in the project decision may be replaced by another measure insofar as the latter measure achieves the same result, as laid down in Section 4.7. This means that a different measure may be selected during the execution of the project, provided that this measure achieves the same result as the measure included in the project decision. The regulation on the project decision also offers the option to indicate for particular elements of the project that the technical details of the decision will be worked out within the limits specified in the project decision. This option may be used in respect of elements of the project where the overall picture of the solution is clear, but the exact details will only become clear at a later stage. Examples include the design of a connection to the main road which is widened in the context of a project decision. When the project decision is taken, there will be an overall picture as to how this connection will be designed and the land take will be clear as well, but the exact position of the tarmac, the height and construction of any engineering structures may not. In that case, the project decision may contain the values for the details, which will be specified at a later time.

Step 6: Permits that may be granted at a later stage

As stated earlier, the basic premise is that the project decision has considered all the relevant aspects of the project and that the project can be executed. This means that the individual permissions to carry out the project are included in the project decision and that no further permits are required to execute the project. However, the inclusion of these permissions is optional under the regulation in the legislative bill. After all, it is possible that a number of activities which are part of the project were not taken into consideration in the project decision. This will often be the case for complex, long-term projects in which the government outsources execution to a market party via, for example, a DBFM contract form (design, build, finance, maintenance). An example in this connection is the construction of buildings and the associated assessment of these buildings against the Order in Council on Building 2012. When the scope of the investigation is determined, the initiator may opt, in consultation with the competent authority, to request separate permits for particular elements after the project decision has been adopted. In that case, the exact shape and building style of the structure need not be laid down in the project decision. This will facilitate flexibility and phasing of the project. The bottom limit in this context is that the competent authority must be able to make a careful assessment in the project decision as to whether or not to permit the project. With regard to certain aspects, such as natural features, it must be made clear at the very least at the time of the project decision that nature conservation regulations will probably not obstruct the execution of the project. Only aspects that do not affect the opinion on the acceptability of the project as a whole may be eligible for 'deferment' to the permit phase. The minimum project decision will provide for the facilitation of the project in terms of planning, insofar as it is a project decision adopted by the provincial executive or the minister.

The point of departure is that an implementation permit is granted by the administrative body that is the authority competent for the environmental permit pursuant to Paragraph 5.1.2 of the legislative bill. Where necessary, however, the State and the provincial authorities may also use the option of an overriding regulation with regard to any remaining permit applications. If the State or a provincial government is the authority competent for the project decision, it may eventually grant the environmental permit itself insofar as it is not already the competent authority in this respect. Obviously the applicable assessment rules will have to be observed on this occasion.

Where enforcement is concerned, the authority competent for the project decision sees to the correct implementation of the provisions laid down in the project decision. In the event of deviation from the project decision, this will count as an act without a permit or an act in contravention of the physical environment plan, and the authority normally competent for the activity concerned will be competent to take enforcement measures. Because this is the municipal authorities for the majority of activities, a mingling of responsibility for the execution of the project and responsibility for supervision will be avoided.

Development procedure for water management structures

The executive board of a water board is also competent to adopt a project decision insofar as this concerns the management of water systems which has been assigned to the water board by provincial regulation. The development procedure is mandatory in respect of the construction, rerouting or reinforcement of primary water defences for which a project plan is compulsory under the Water Act. The development procedure offers a flexible arrangement for making decisions on the construction, rerouting and reinforcement of water defences and the modification of water management structures by or on behalf of the manager of the water management structure. Based on the water board regulation, modifications by third parties will often require an environmental permit. Alternatively, the manager may opt for an environmental permit rather than a project decision in respect of works which he wishes to execute or have executed and for which the development procedure is not mandatory.

Physical environment plan for projects of public interest

The instruments available to the municipal authorities with regard to the creation of projects are the physical environment plan and the environmental permit enabling deviation from the physical environment plan. The legislative bill does not provide for a project decision at municipal level. However, the legislative bill does offer the municipal authorities a procedure equivalent to the project decision by which a project of public interest may be prepared through the physical environment plan. The municipal authorities may opt to declare the 'faster and better' approach applicable to the preparation of the rules to be included in the physical environment plan on a project of public interest. In that case, the provisions about the intention, the exploration and the preference decision of the development procedure will apply by analogy. In addition, the municipal authorities must indicate in the decision to amend the physical environment plan how individuals, businesses, social organisations and administrative bodies are involved in the preparation. If this procedure is applied in respect of a project of public interest, the six-month judicial decision period laid down in Section 16.85 will also apply by analogy. This offers the procedural advantage, also for municipal projects, of an accelerated hearing of the appeal by the court. Examples of a project of public interest include the construction or reconstruction of a ring road and the refurbishment of a shopping area. Such a project must encompass more than, say, the establishment or extension of an individual business or the construction of a few homes. It must involve the construction or refurbishment of public facilities in the public domain. The large-scale character and the public interest may appear, for example, from the substantiation of the local policy of which the project concerned is part, as laid down in the municipal environmental strategy. Obviously this approach towards the preparation of the physical environment plan may also be applied to the preparation of rules in the physical environment plan relating to projects other than large-scale projects of public interest. In addition, the municipal authorities may opt for other forms of preparation which are comparable to the 'faster and better' approach. Thus, many municipalities have a public participation regulation which offers public participation based on a preliminary draft zoning plan. These forms of preparation in themselves do not yet justify an accelerated hearing of the appeal by the court. As is the case for the project decision, an accelerated hearing is only considered justified for projects of public interest if the 'faster and better' approach was applied, as indicated in Section 5.53.

What matters is that the project is incorporated directly into the physical environment plan and therefore in principle no longer requires the grant of an environmental permit for an (ongoing) deviating activity. In compliance with Part 3.5 of the General Administrative Law Act, a choice can be made in favour of coordinated preparation of the relevant decision to amend the physical environment plan and other decisions required for the execution of the project. For example, the environmental permit for construction activities may be taken into account in the preparation. If a choice is made in favour of such coordinated preparation, all coordinated decisions will, pursuant to the General Administrative Law Act, be subject to the same legal procedure as that applicable to the physical environment plan (direct appeal to Administrative Jurisdiction Division of the Council of

State), with an accelerated hearing of appeals pursuant to Section 16.85. In this way, the procedure accelerators pertaining to the project decision can also become applicable to municipal projects.

Effects

Environmental permit

- The environmental permit is integrated with seven permits: the effect is ease of use for the initiator, who now applies for one permit at one counter. This also facilitates harmonisation of the regulations and a joined-up consideration by the administrative body of the impact of the activities for which the permit is requested. Inextricable cohesion of activities is largely abandoned. As a result, the initiator is in control of his application and can phase this application as desired. This will reduce the investigation burden, because not all the investigation data needs to be submitted at an early stage, while it is still unclear whether the activity will be permitted.
- The flexibility to transfer the competent authority will reduce the governmental burden, because this authority can be transferred where this is efficient and effective.
- The term 'activity' replaces the term 'establishment' as the key term in setting general rules and in designating environmentally harmful activities that require a permit. The effect of this is a reduction of the burden for the business community, because the obligation to obtain a permit will be limited to one activity or sub-activity of a business. Only that element needs to be assessed, without the entire business (establishment) requiring a permit. The same applies to amendments to the permit. This will enable a more uniform implementation of EU Directives in that it will be easier to link up with these Directives.

Project decision

- One clear instrument for the State, the provincial authorities and the water authorities for complex projects of public interest: this will facilitate a pooling of expertise (which is currently fragmented because different instruments must be applied) among the implementing agencies.
- Guaranteed flexibility of the project: the project decision may directly contain all the permits and permissions that have been identified. They may also be phased. The expected effect is that a greater number of permits will be included directly in the project decision, which will limit the procedures and the governmental burden of granting permits for municipal authorities.
- The project decision directly amends the physical environment plan. This will reduce the governmental burden for municipal authorities. Moreover, it creates immediate clarity as what rules apply in the physical environment plan.
- The extension of the 'faster and better' approach in project decisions to the wider physical domain also increases the participation of stakeholders at statutory level. Active and targeted involvement of the stakeholders enhances the level of support and improves the decision-making process.
- The number of views is limited because of the provision of more and better information. This again reduces the governmental burden. The Priority Roadworks Programme [*Spoedaanpak Wegen*] generated positive experiences in this respect.³³ Upfront investment is expected to shorten the total processing time and will limit the number of objections and appeals. Where objections and appeals are made, there will be one opportunity for legal protection and no scope any more for multiple court cases about the same project.
- The generic completion assessment under the Transport Infrastructure (Planning Procedures) Act is not taken over. This will reduce the investigation burden. This assessment relates to monitoring the impact of the project, which is already done in the context of the EIA evaluation and pursuant to Part 20.1. The duplication has therefore been eliminated.
- The State and the provincial authorities have overriding authority with regard to the project decision, which will accelerate the decision-making processes.

Land Development (Chapter 12 of the Environment Act)

Introduction

In land development, the process of preparation for development, construction of public facilities and the layout of public areas all play an important role in the evolution of development locations.

³³ Parliamentary Papers II 2010/11, 29385, no. 63.

This chapter regulates the government role in land development and the recovery of the costs incurred from developers and private individuals who are going to build. Municipalities can choose different roles for land development. On the one hand, municipalities can opt for an active land policy. With that, they try to acquire all land or take a risk-bearing part in a partnership. On the other hand, they can opt for a facilitating (passive) land policy, in which the municipality waits for the private initiatives and does not take part in profit-sharing or risk-bearing. With both forms of land development, first of all agreements are made on the development and land development and the planning decision-making process forms the final element. This is different with facilitative planning because with this, the municipality offers planning certainty beforehand. In terms of planning, it does provide room for own specifics. It also provides insight into the main features of the land development. Thanks to this certainty, it is easier for owners and players to develop an initiative. This option can meet a need with:

- small infill, demolition and new development and outlying locations;
- locations whereby change of function is stimulated within the existing building structure;
- other outlying locations, provided the financial consequences for the municipality are easily manageable.

In principle, the community recovers the costs of land development from the owners who benefit from it. This cost recovery is primarily based on the direct benefit principle. Usually this happens in the form of contracts concluded on a voluntary basis. Research by the Netherlands Environmental Assessment Agency [*Planbureau voor de Leefomgeving*] shows that in circa 96% of the cases, this works out in private law.³⁴ In case parties do not manage, the Spatial Planning Act (*Wro*) provides a last resort under public law in the form of a development plan, that contains the requirements for land development and the basis for recovery of costs. The actual cost recovery takes place with the integrated environmental permit for the construction work.

This chapter intends to provide a toolkit with suitable tools for active and facilitating land policy. The tools must be useable for growth and contraction situation, for explanation/interpretation or restructuring, for large-scale and small-scale projects, as well as for active land policy, facilitative planning, organic development and facilitating land policy. For the recovery of costs, it must be noted that contraction and restructuring projects are often loss-making, as a result of which cost recovery will have more limited significance. The government is seeking that municipalities achieve a better balance between active and facilitating land policy, given the risks of active land policy and the mixing of the role as authority with a role as entrepreneur in active land policy. Active land policy can have a negative effect on the size of the EMU deficit. An expected shift in the nature of the future building programme (fewer non-commercial functions like public housing), will also increase the interest of facilitating land policy.

This chapter contains improved regulation of the provisions on land development included in the *Wro*. This follows a study by Radboud University that found that the current tools for land policy did indeed function adequately, however parts can be improved.³⁵ The bill integrates the tools for land development much more forcefully into other municipal tools.

Agreements, enforceable development rules and development regulations

Agreements

First of all, the bill provides a firm basis for shaping agreements on land development. In it, agreements are made on cost recovery as well as on construction and on preparations for house building, roads and laying out the landscaping, on utilities and the layout of public areas and often for housing categories as well. Without the explicit legal basis, agreements on cost recovery would not be permitted in many cases.

Regulations under public law: development rules and development regulations

It is not desirable for owners to be able to avoid the recovery of costs incurred by the municipality for the site development. The municipality must be able to set site requirements and requirements for some housing categories. That is why the bill provides a last resort under public law in the event no agreement is concluded. Application of enforceable rules for land developments is only on the agenda if with a construction site, there are specific types of land development costs

³⁴ Netherlands Environmental Assessment Agency [*Planbureau voor de Leefomgeving*], Ex-durante evaluation Spatial Planning Act [*Wet ruimtelijke ordening*], first and second reports, 2010 and 2012

³⁵ Radboud University, Nijmegen, Considered on the substance: a study on alternatives and improvements for legal tools in the realm of land policy in the context of the drafting of the Environmental Planning Act [*Omgevingswet*] and the evaluation of the Expropriation Act [*onteigeningswet*], 2012. Parliamentary Papers II 2012/13, 33 118, no. 7, appendix.

designated by order in council. In any case, that concerns the costs for the installation of public utility physical facilities. This is a tightening compared to the *Wro*. In addition, a decision specified in the law must allow for a construction activity at the construction site designated by order in council. It concerns building activities such as new buildings, a comprehensive change of function or extension of existing buildings. By 'allow for' is meant that an amendment to the environment plan provides immediate planning permission.

In the *Wro*, the development plan forms the last resort under public law. That plan is linked to a limited number of decisions, which are primarily provided for in the new building plan. In the bill, it was opted to delete the development plan as separate planning concept and integrate it in the decision that it belongs to. With integration into the environment plan, the development plan is transposed into development rules. In an environment plan or development decision, the development plan is transposed into development regulations. The municipal council or the Municipal Executive can set development rules with an amendment to an environment plan. The Municipal Executive can lay down development regulations for:

- an integrated environmental permit for a derogating activity that enables the designated construction activity;
- an integrated environmental permit for building, if with an amendment to the environment plan or integrated environmental permit for the derogating activity it is decided to transfer the development rules.

The Provincial Executive or the responsible Minister can lay down development regulations for a project decision or an integrated environmental permit for a derogating activity that enables a designated construction activity.

Whereas under the *Wro*, the development plan is linked to the zoning plan, that is made more flexible in the bill. The existing flexibility is retained. If the municipal council opts for global functions in the environment plan, for which additional rules must be set and thereby it is determined that still no integrated environmental permit for a designated construction activity can be issued, no development rules have to be set nor can they have a global character.

The municipal council may pass on the obligation to set development rules for an amendment to the environment plan to the integrated environmental permit for the construction activity. The Municipal Executive may do so for an integrated environmental permit for a derogating activity that enables the designated construction activity. With that, advantage can be taken of the desire to provide more options for facilitative planning. The building plan is after all facilitated in a spatial decision so that a promoter knows what he/she can build. Passing it on saves costs and limits the risks for the municipality. Because after setting a land development rule, the municipality is jointly responsible for the land development. If the costs end up higher or if the development contributions lower, then that can produce a financial setback.

A few material safeguards for the private owner and municipality are tied to the passing on. For private owners, three safeguards are built in:

- In changing the environment plan, it must be indicated what the development area is. As a result the owner cannot be surprised by an unexpected development contribution to other locations.
- The municipal council must indicate whether requirements are made on housing categories and what they are. That is of great importance for the practicability as well as for the development contributions.
- It is also important for the owner to obtain insight into the cross-area facilities to which he/she must contribute. However flexibility is necessary with this point. That is why it shall be provided by order in council that the information relating to the change to the environment plan shall provide insight herein.

For the municipality, being able to specify the development area provides a significant advantage. If that were not possible, there would be no question of a shift from an area-oriented approach to a parcel-oriented approach to cost recovery by passing on the recovery of costs. The permit application would then be normative for the scope of the development area. That would mean that a lot of costs and revenue outside the parcel were no longer taken into account. Therefore there would longer be any plan-based settlement at area level. A second important safeguard for the municipality is contained in the provision that the municipality can reject the integrated environmental permit for building when the development budget shows a deficit.

The passing on of the cost recovery is not entirely without financial risks for the municipality. The municipal council will therefore want to know which financial consequences are to be expected for the municipality before it takes a decision on an amendment to the environment plan. First of all, an amendment to the environment plan can produce costs, such as loss resulting from government

planning decisions. Secondly, it is uncertain whether construction will be done and it therefore also uncertain if the costs will be recovered in full. Thirdly, it can be necessary to build municipal facilities. That risk can be partially offset by linking municipal investments in (cross-district) facilities to the progress of the site development.

The development regulations and appurtenant development budget [*exploitatieopzet*] only pertain to the relevant integrated environmental permit. To grant a subsequent integrated environmental permit for a building plan in the development area, the competent authority shall, if required, update the development budget and site requirements and on the basis thereof, attach regulations to the permit. Finally, passing on the recovery of costs also has consequences for the research costs to be recovered. Within the context of preparing the environment plan, the municipality shall, inter alia, have to take cultural heritage into account, including (anticipated) archaeological assets. It is important that the municipality makes the known and anticipated assets as clear as possible beforehand. This will avoid having it only becomes clear at the execution of projects that there are (archaeological) assets at stake, certainly given the fact that the (research) costs are borne by the individual initiator.

Recovery of costs under public law

The enforceable recovery of costs has some important restrictions. The recovery of costs may not be higher than the revenue. Consequently, with a loss-making plan, the municipality cannot pass on the costs to the owners. All costs must meet three criteria: the construction site must benefit from it, the costs must be attributable to the land development and the costs must be equitably apportioned among all benefiting areas. These restrictions are copied from the *Wro*. The development rules and development regulations can concern site requirements for preparation for development, the utilities, layout for public areas and requirements for some housing categories. These include social housing and vacant plots. That is worked out by order in council. In addition to an overview of all land development costs and revenues, the development budget accompanying the rules and regulations contains a time period and phases along with the basis for the development contribution to be paid by the permit holder.

The actual recovery of costs takes place with the integrated environmental permit for a derogating activity or construction activity. An instruction to pay the development contribution is attached thereto. The contribution is calculated on the basis of the development budget.

As expected, in the future as well, development rules or development regulations will only be necessary for a limited percentage of construction sites. In the event of a shift to facilitative planning, that can increase slightly, but with most projects, municipality and initiator will reach agreement on the land development. However in most cases, public regulation will act as reference point in the negotiations on a development agreement.

Procedure

The development rules are part of the environment plan and follow the procedure for amending the environment plan. The development regulations are part of an integrated environmental permit or project decision and follow that procedure. This also applies for legal protection. Given the major, mainly financial, consequences, in the new system a few additional safeguards are copied in the procedure from the regulation for the development plan in the *Wro*, namely:

- a notice to land owners of development rules and development regulations, in the bill as well as after adoption;
- a record of development rules and development regulations in the register on the basis of the Act on awareness of immovable property restrictions under public law [*Wet kenbaarheid publiekrechtelijke beperkingen onroerende zaken*], through which it is apparent to third parties that attached to the parcel, there is an obligation to pay a development contribution;
- an obligation to defer for the integrated environmental permit for a construction activity, until development rules in the environment plan are irrevocable, which avoids the permit being granted without recovery of costs being ensured. The Municipal Executive can break this obligation to defer.

In the Municipalities Act is indicated that there is no room for a betterment levy when cost recovery is possible via Part 6.4 *Wro*. This exclusion shall be maintained in the proposal for the Act implementing the Environment and Planning Act.

The relationship to expropriation isn't changing either. If an owner is not willing or able to realise the envisaged building plan in accordance with the development rules, the municipal council can institute expropriation proceedings. In an expropriation, the form of the execution of the assigned job plays an important role. Development rules can be seen as a form of execution of the construction possibilities in the environment plan. They thus reinforce the basis for expropriation.

Amendments with respect to the current situation

The bill contains a few substantive improvements of the regulation of land development as included in the *Wro*.

1. The bill provides more flexibility:
 - The obligation to lay down development rules can be deferred to the time when the Municipal Executive adopts an amendment to a part of the environment plan or to the time of application for an integrated environmental permit for a construction activity. Under the *Wro*, the development plan is adopted with the revision of a zoning plan that provides for a designated building plan. This provision implements the recommendation of the Adviescommissie Wonen en Cultuur [Housing and Culture Advisory Board] on the bill and fits well in facilitative planning.
 - The municipality can waive a spatial decision in the event of an operating deficit, so that a municipality cannot be forced to adopt a deficit plan. That is not regulated in the *Wro*. The rejection of an application for a spatial decision is liable to appeal.
2. The Environment and Planning Act reinforces the integration of the environmental law:
 - The development plan disappears as plan form. Regulation of land development is integrated into the environment plan, the integrated environmental permit and the project decision. That means fewer procedures and no liaising and coordination problems.
3. The chapter provides more predictability and with that, an opportunity for acceleration:
 - The cost category cross-plan costs in the development plan has been scrapped. Research has shown that very little use was made of the option to charge cross-plan costs.³⁶ In the cases in which that occurred, the financial settlement between locations envisaged by the legislator was only the goal in a few cases. In the majority of cases, the cross-plan costs actually concerned the costs of the cross-district facilities.
 - The cost category “financial contribution to spatial developments” in a development agreement has been scrapped. This lowers the land costs of construction sites. In practice, use is regularly made of the option to include in a contract a contribution for spatial developments. This refers to a contribution to societal functions that cannot be enforced via the development plan. For these contributions too, the study showed that the majority related to cross-district facilities. For cross-district facilities applies that they must meet the aforementioned criteria profit, proportionality and accountability. Scrapping these contributions makes law-making easier and can result in time savings in negotiations. At the same time, the majority of these shaved costs under this cost category remain recoverable as before as costs of cross-district facilities.
4. The charges decrease because there will be fewer development rules or development regulations necessary and a few procedural improvements will be introduced:
 - Instead of for all cost categories, the land development chapter will only be applicable if there are a few specific designated cost categories, including in any case the land development costs for the installation of physical facilities and for archaeological research.
 - The number of cases in which development rules or development regulations can be waived will be expanded. That can be done by expanding the *Kruimellijst* (literally Crumb List: a list on the basis of which application of cases designated by Order in Council can be waived by summary procedure).
 - The bill provides the option to withdraw development rules. That is not regulated in the *Wro*.

Effects

- By adding development rules to the environment plan and development regulations to the integrated environmental permit, there is better integration between spatial planning and land development.
- Speeding up procedures becomes possible by providing more certainty about the costs. Scrapping cost categories that produce a lot of discussion and further regulation of the cost category plan costs also contribute to this.
- More flexibility and room for the initiator by being able to pass on development rules or development regulations to a delegated amendment to the environment plan or to an integrated environmental permit.
- The administrative burden for companies and administrative charges are decreasing because development rules or development regulations are required in fewer cases and because due to the greater certainty about costs, there are fewer negotiating points and less cause to appeal.

³⁶ National Law Enforcement Database [BVH] Space, Follow-up study cross-plan costs and contributions to spatial developments, 2014

- A reduction in the number of statutory provisions compared to those in the *Wro*. In setting out the regulation for land development, the aim was to resolve the main issues at the level of the law and the other elements at the level of decision. Likewise, far fewer procedural provisions are necessary. They are compiled in Chapter 16 of the bill.

Procedures (Chapter 16 of the Environment Act)

Introduction

This chapter contains the procedural provisions for the instruments contained in the legislative bill. It includes provisions relating to decision-making processes, digitalisation, the involvement of governing bodies and other procedural aspects. In comparison with current legislation, the procedures are more uniform and more flexible, and have been integrated where possible. By doing so, the government intends to reduce the procedural burden and to increase the transparency of decision-making processes.

As a basic principle, the legislative bill shall provide for as little as possible in addition to or by way of derogation from generic regulations such as the General Administrative Law Act. This shall contribute to greater clarity in the decision-making process. Furthermore, the procedural organisation of the decision-making process shall be left to the competent authorities as much as possible, so that the most appropriate decision-making process can be viewed in a region-oriented manner and on a case-by-case basis. The setting up of the decision-making process will therefore fall primarily to administrators, for example where this involves setting up informal participation by third parties at an early stage.

A single digital administration point will be provided for citizens and companies. The use of online data traffic, the availability of an online service and the wide availability of research data and other relevant data will contribute to improved ease of use.

In order to reduce the burden, research commitments shall only be included in so far as they contribute to effective decision-making processes, or in so far as they enable the (re)use of current data. This basic principle has been developed in the provisions relating to research commitments and the provisions relating to the environmental impact assessment.

Environmental Impact Assessment

Introduction

Section 16.4 of the legislative bill contains the regulations relating to the environmental impact assessment (EIA). The EU Directive on Environmental Impact Assessment (EIA Directive) and the EU Directive on Strategic Environmental Assessment (SEA Directive) prescribe that an 'environmental assessment' be carried out for certain plans and projects prior to decisions being made regarding adopting the plan or authorising the project. In the Environmental Management Act, the 'environmental *assessment*' is referred to as the environmental impact assessment. This is abbreviated to EIA. The environmental impact assessment *report* is abbreviated to EIA report. The EIA report sets out the environmental effects of a plan or project in a prescribed manner before the decision is made or the plan is adopted. In this way, the competent authority is able to include any possible environmental consequences in its considerations, meaning that environmental interests are assigned a proper place in the decision-making process for projects and plans likely to have a major effect on the environment. It should be noted that the term 'environment' is defined in the EU Directives stated. This term not only comprises natural elements such as water, air and soil, but also cultural heritage and nature. For this reason, the Ministry of Economic Affairs and the Ministry of Education, Culture and Science are also involved in this instrument, as reflected in their role as advisers for the EIA procedure.

For plans or programmes that require an EIA, a 'plan EIA' is required. For projects that require an EIA, a 'project EIA' is required. The rules for the environmental impact assessment are included in the legislative bill and lay down requirements for the decision-making process for a number of instruments introduced in the Environment and Planning Act.

Points of departure

The purpose of the legislative bill is for the government to simplify the application of existing EIA instruments so that they can be better used as a tool for the decision-making process, whilst

simultaneously reducing the investigation burden. Important points of departure for this process include:

- Linking the obligations contained in the EIA Directive and the SEA Directive. An example of a consequence of this is that in the legislative bill, the mandatory advice from the EIA Committee with regard to an EIA project becomes optional. The option to designate activities that require an EIA in provincial regulations has also been removed.
- Reducing the investigation burden, *inter alia*, by preventing the piling up of environmental impact reports by better use of research information that already exists and previous environmental impact reports. The introduction of a plan EIA for certain plans or programmes (primarily for small areas on a local level and for small amendments) will also ensure that the investigation burden is reduced.
- Allowing the administrative body a margin of appreciation in order to determine for itself what is necessary for successful decision making. This will not only strengthen the character of the environmental impact assessment as a tool for decision making, but it also means that information that does not contribute to effective decision making no longer needs to be collected. In consultation with the initiator, the competent authority shall properly weigh up the required scope, level of detail and the alternatives that are required in order to be able to make a good decision.
- Aligning the procedural steps of the environmental impact assessment as much as possible with the procedure of the decision that is to be taken. This will remove any duplications from the procedure and ensure that the information that is required for the EIA is consistent with other information that is needed in order to make a decision about the plan or project.
- Simplification of the procedure for the EIA of a project by better aligning this with the procedure of the decision for the project. If the project EIA reveals that a project EIA report is not required, it is no longer necessary to make a separate decision about the assessment, but this must be justified in the draft decision for the project. The legislative bill brings together the two procedures currently in place for EIA to form a single procedure. In addition, if desired, the opportunity is presented to integrate the EIA with the mandatory application for a permit.

These points of departure have resulted in a number of substantial changes to the regulations.

The EIA procedure

Determining an EIA requirement for plans

Plans or programmes that provide a framework³⁷ can require a plan EIA on the basis of the EU Directive. This can relate to various plans and programmes that are introduced at various points in the legislative bill. For the question as to whether or not there is a requirement for a plan EIA, this will no longer depend upon whether or not the plan is included in a list with other plans that may require an EIA. The determining factor will be whether the plan fulfils the criteria for the EIA requirement. These criteria are listed in the legislative bill. This concerns the integration of the criteria that are listed in Article 3 of the SEA Directive:

- Is there a legally or administratively prescribed plan or programme?
- Does the plan form the framework for the future awarding of permits³⁸ for projects that require EIA?
- Or must a suitable assessment in the context of nature be carried out for the plan or programme?

As the number of statutory figures for plans or programmes that provide a framework will decrease due to the integration of multiple laws in the Environment and Planning Act, it will no longer be necessary to explicitly indicate which plans or programmes require an EIA. The inclusion of criteria in the legislation is sufficient. An important advantage of this over having a list with designated plans is that plans are not incorrectly excluded or assigned. The plans or programmes that are included in the legislative bill and that may require a plan EIA are the environmental strategy, the programmes, the physical environment plan and the preference decision in the development procedure. However, plans may also require a plan EIA as a result of other, sectoral legislation, in so far as they fulfil the criteria that are listed in the legislative bill. For example, this applies to the land-use plan as referred to in Article 17 of the Dutch Rural Area Development Act [*Wet Inrichting Landelijk Gebied*].

³⁷ 'Plans and programmes' are mentioned here, in line with European terminology. This involves more plans and programmes than the environmental visions and programmes from Chapter 3 of the legislative bill.

³⁸ This can also include the project decision.

For plans or programmes that designate the use of small areas on a local level or for small amendments to these plans or programmes, the legislative bill states that a plan EIA and the drawing up of a plan EIA report only need to be carried out if considerable environmental consequences could be involved. In addition, for plans or programmes that form the framework for projects other than those that require EIA, a plan EIA need only be carried out if that plan or programme could cause considerable consequences for the environmental effects. For this purpose, a new procedure has been included in the legislative bill, namely the 'plan EIA assessment'. This can also help to reduce the piling up of plan EIAs.

Determining an EIA (assessment) requirement for projects

A list of projects and decisions shall continue to be the determining factor as to whether the project requires an EIA (assessment), as included in Sections C and D of the current Annex to the Environmental Impact Assessment Decision. By means of an order in council, the legislative bill assigns decisions for the preparation of which an EIA must be compiled. This may relate to the project decision and the environmental permit, as well as the physical environment plan in so far as this plan permits new developments without further specification. In addition, the EIA requirement can apply to certain special decisions from other legislation such as the permit on the basis of the Nuclear Energy Act. The option to designate projects that require an EIA in provincial regulations is no longer present in the legislative bill. This means that the designation of projects that require an EIA corresponds better with the EIA Directive.

In the EIA Directive, the European Union indicates which projects may have considerable environmental consequences. These projects always require an EIA.

In addition to this, a number of projects are also stated, as a result of which it is not clear whether or not considerable environmental consequences will occur. In order to determine whether or not this is relevant, an EIA assessment must be carried out on a case-by-case basis.

As a result of the statement from the European Court of Justice³⁹ about the thresholds in the Environmental Impact Assessment Decision (then: Environmental Impact Decision 1994), Dutch EIA legislation has, since 1 April 2011, involved the co-existence of two different procedures for EIA assessment. In the legislative bill, this is replaced with a single, simplified system of EIA assessment that corresponds better with the EU Directive. The essence of these regulations, which shall be developed by means of an order in council, is that prior to, or no later than at the same time as applying for the permit, the initiator shall inform the competent authority that he/she wishes to carry out a project that requires EIA. If the competent authority decides that an EIA is not required, this decision is included in the draft decision. An advantage of this, first of all, is that the initiator does not have to wait for the decision about the EIA requirement from the competent authority and that this decision about the EIA requirement can be integrated with the 'mother procedure'. As it seems that, in practice, in most cases it is already determined during prior consultation between the initiator and the competent authority whether or not the competent authority believes that an EIA is required, it is possible to prevent delays arising during the procedure due to a missing EIA report required for the permit application. In addition, it seems that for the majority of projects that require EIA assessment - for which the competent authority judges that EIA is not required - time savings and simplification of the procedure can be achieved. By integrating the EIA assessment decision in the procedure, the requirement from the EIA Directive that the results of the EIA assessment must be made available to the public are fulfilled.

If the competent authority decides that an EIA report is in fact required, the permit application will be rejected by virtue of Article 16.47. In most cases, the initiator will have the opportunity to prevent this result. He/she can always decide to enter into prior consultation with the competent authority or to provide notification of the intention to implement a project that requires EIA assessment before submitting the application.

Researching alternatives

Researching the impact of alternatives forms an essential part of the EIA. The order in council will therefore also prescribe that research into reasonable alternatives be carried out. The legislative bill enables the competent authority to research alternatives in a situation-specific fashion, as only reasonable alternatives will be investigated. The emphasis is therefore placed on only investigating those alternatives that are important for effective decision making, as opposed to researching all conceivable alternatives. If the competent authority is of the opinion that an alternative has no added value, it can be left out of consideration or a limited number of alternatives can suffice. The initiator and the competent authority should enter into a discussion about this at an early stage in

³⁹ European Court of Justice 15 October 2009, C-255/08.

order to ensure that the necessary environmental information is available at the correct point of the process. By determining the scope of the research into alternatives at an early stage, research into cases that have no added value for the decision can be avoided. As a result of this, the EIA provides an important contribution towards making information available that is required to make a sound decision.

The Dutch Crisis and Recovery Act contains the option to refrain from research into alternatives if a project has been included in Annex II of that Act or if it has been identified by order in council as a local or (supra)regional project with national significance. As determined in the 2012-2013 progress reports⁴⁰, municipalities appear to exercise this option sensibly. If a specific project situation requires research into alternatives, this research will take place in accordance with the normal procedure, even if there is no obligation to do by virtue of the Dutch Crisis and Recovery Act. To make the Dutch Crisis and Recovery Act permanent, consideration was given to the idea of incorporating an 'if/then clause', which would allow research into alternatives to be waived if a project area or route had already been designated in a prior plan, meaning that all of the relevant alternatives in terms of planning had already been researched as much as reasonable. In response to the advice about this from the Advisory Division of the Council of State,⁴¹ the government decided not to include the amendment to the EIA Directive in that legislative bill, but to include it in the present legislative bill instead, in order to avoid unnecessarily burdening the practice with amendments. This has been developed in the legislative bill. This means that in the project EIA report, research into alternatives can be waived if these alternatives have been sufficiently researched in terms of planning and have been dropped because a different alternative was chosen. As a result, in the project EIA report, research into alternative project areas or routes can be waived if a project area or route has been chosen for the plan and this has been sufficiently developed in the project. The research into alternative project areas or routes can therefore not be waived if a plan EIA does not refer to a project area or route, but the plan only considers options. In addition, it is still a requirement to describe possible alternatives for the establishment or implementation of the project. The formulation corresponds with Article 7.2, second paragraph of the Environmental Management Act. This stipulation also helps to reduce the investigation burden as it prevents the duplication of research. Furthermore, in terms of planning, research need not be carried out in such detail.

EIA and participation

The procedures for the EIA and the decision-making process have been streamlined in order to reduce the administrative burden as much as possible and to enable the information that is required for the EIA to be aligned with the other information that is necessary for the decision-making process. The preparation procedure for the project EIA is not especially detailed, so that it doesn't conflict with the preparation procedure for the plan or programme that is being established or the decision that is being made. The legislative bill does not include separate notification of the intention to draw up an EIA report and the option to submit points of view relating to the intention through to the formulation of an EIA report, as included in the Environmental Management Act. This ensures that the EIA is a more evident part of the decision-making process and less of a stand-alone procedure. During parliamentary scrutiny of the legislative bill for the Modernisation of the Regulations Regarding the Environmental Impact Assessment, extensive discussions took place in the Lower and Upper Houses of Parliament regarding the use and necessity of additional legal requirements about participation in the preliminary phase in addition to the procedures regarding the stating of views.⁴² At that time, the decision was made to make this a legal obligation. However, evaluation studies⁴³ have revealed that the decisive factor for an effective participation process is not legal assurance, but a professional approach. Legal assurance does play an important additional role. The stating of views relating to the intention through to the formulation of an EIA report as well as the formal outlook procedures from Section 3.4 of the General Administrative Law Act stimulate the competent authority and the initiators to implement additional participation activities. This is intended to keep the number of views stated - as a possible prelude to complaint and appeal procedures - as low as possible. The legislative bill corresponds with the General Administrative Law Act and does not provide for further legal obligations in addition to the procedure regarding the stating of views from Section 3.4 of the General Administrative Law Act.

⁴⁰ Parliamentary Papers II 2012/13, 32 127, no. 170, Annex.

⁴¹ Parliamentary Papers II 2011/12, 33 135, no. 4.

⁴² Parliamentary Papers II 2008/09, 31 755, no. 15 and Parliamentary Papers I 2009/10, 31 755, F, H, I and J.

⁴³ *Participatie in de uitgebreide mer-procedure* [Participation in the extended EIA procedure], Partners + Pröpper, December 2012.

Evaluation

Evaluation, an assessment of the actual impact on the environment, forms the final element of the EIA procedure and contributes towards modification of the activities or policy. The SEA Directive calls upon member states to investigate the notable environmental consequences of the implementation of plans or programmes. The legislative bill also contains a basis for the regulation of EIA evaluation by order in council. This regulation will correspond with the policy cycle that provides the structure for the Environment and Planning Act. An important component in this cycle is the monitoring of the state or quality of the physical environment and carrying out adjustments in the event of possible upcoming violations. This has a lot in common with the EIA evaluation. In order to prevent excessive administrative burdens, the evaluation obligation will not apply to environmental values, as the monitoring of these values already takes place by virtue of Article 20.1 of the legislative bill. In addition, just like in the EU Directive, the EIA evaluation will be linked to the implementation of plans or programmes. Project-level EIA evaluation will no longer take place. The guidelines for the evaluation will be developed by the order in council.

In addition to the EU Directive, the Espoo Convention⁴⁴ and the Protocol on Strategic Environmental Assessment⁴⁵ (SEA Protocol) also contain regulations for EIA in the event of cross-border consequences. These regulations for the plan EIA and the project EIA will be developed by order in council.

Coordination

The Environmental Management Act contains a number of stipulations regarding coordination during the formulation of an EIA report. This legislative bill does not contain any obligations about this topic. This was decided as coordination is a responsibility of the competent authority itself. Of course, the legislative bill does not constitute an obstacle to coordination. Whenever two EIA procedures are coordinated, the requirements for the content and procedure shall apply that would apply to both reports separately.

The Environmental Impact Assessment Commission

The position of the Environmental Impact Assessment Commission (EIA Commission) requires specific attention. In practice, the importance and added value of the Commission can be illustrated by the expertise and independent assurance of the quality of testing by the Commission, and as a 'seal of quality' on the EIA at appeal proceedings at the administrative court. The SEA Directive lays down a system of independent quality assurance. Considering the apparent added value, the Commission has been included in the legislative bill. The system of independent quality assurance that is required by the SEA Directive has taken shape by means of mandatory testing advice for plan EIAs. Alongside this, the most important reason to comply with the duty to provide advice for plan EIAs is that decisions that are made on the planning level often have bigger consequences than decisions that are made on the project level. Obligatory quality assurance seems logical.

However, other situations will arise where the added value of advice from the EIA Commission is not as significant, for example for project EIAs for projects with which the competent authority has had a great deal of experience. For this reason, the legislative bill states that testing advice for project EIAs is optional. It can be expected that, as a rule, the competent authority will seek advice from the EIA Commission about project EIAs. It can also decide not to do this, for example if the EIA Commission has already provided advice in the phase of the plan EIA. The competent authority is deemed to be in a position to make reasoned decisions and to take an active role in the process. This also applies to the option of involving the EIA Commission at the start of an EIA process. The simple step of identifying which information is necessary for the EIA report can prevent unnecessary research. In such cases, the EIA Commission can provide specific advice at the request of the competent authority about the points of departure for the EIA report, for example.

It was previously stated that this legislative bill includes an 'if/then clause' for research into alternatives, taken from the original proposal to make the Dutch Crisis and Recovery Act permanent. This original proposal to make the Dutch Crisis and Recovery Act permanent also provides for the option for projects that are included in Annex II of that Act or projects with national significance that have been identified by order in council to be excluded from testing by

⁴⁴ The Convention on Environmental Impact Assessment in a Transboundary Context that entered into force on 25 February 1991 in Espoo (Treaty Series 1991, 104).

⁴⁵ The Protocol on Strategic Environmental Impact Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context that entered into force on 21 May 2003 in Kiev (Treaty Series 2005, 13).

the EIA Commission. In this legislative bill, obligatory advice from the EIA Commission becomes optional advice. It is the responsibility of the competent authority to decide for itself in which cases it deems testing advice from the EIA Commission necessary for a project MER. The progress reports on the Dutch Crisis and Recovery Act⁴⁶ reveal that this option is being exercised sensibly.

Alongside the involvement of the Ministry of Economic Affairs and the Ministry of Education, Culture and Science stated in the 'Introduction', these ministries are also involved in the process of appointing the chairperson and the deputy chairpersons of the EIA Commission. The Minister of Infrastructure and the Environment makes these appointments in consultation with the other ministries.

Enforcement and implementation (Chapter 18 of the Environment Act)

Introduction

Chapter 18 of the legislative bill contains regulations about the enforcement of the stipulations set out in or pursuant to the legislative bill. The form and content of these regulations are derived from Chapter 5 of the Environmental Law (General Provisions) Act [*Wet algemene bepalingen omgevingsrecht, Wabo*]. This chapter assigns enforcement tasks to governing bodies and lays down a number of enforcement and supervisory tasks in addition to the General Administrative Law Act. It also contains stipulations about the assignment of regulatory officials. Furthermore, the government intends to include regulations in Chapter 18 of the Implementation Act of the Environment and Planning Act that are aimed at improving the quality of the implementation of the awarding of permits, supervision and enforcement, and improving cooperation during enforcement. These regulations serve to replace and supplement the current paragraph 5.2 of the Environmental Law (General Provisions) Act and are included in the legislative bill for the amendment to the Environmental Law (General Provisions) Act pending before the Lower House of Parliament (improvement to the procedure relating to the awarding of permits, supervision and enforcement).⁴⁷

Allocation of the task to administrative enforcement

Administrative enforcement also includes supervising compliance with regulations. This task also involves dealing with complaints about compliance with regulations and enforcing administrative sanctions in the event that regulations are violated. The legislative bill allocates the task of administrative enforcement to the competent authority designated on the basis of paragraph 4.1.3 (for notification, situation-specific regulations and the equivalent measures), 5.1.2 (for the environmental permit) or 5.2.1 (for the project decision). According to the legislative bill, the Municipal Executive is, as a rule, authorised to enforce general government regulations that are not associated with a reporting obligation or for which situation-specific regulations or similar measures are permitted. The regulations that are shaped in this way correspond with the current situation in which, in the majority of cases, the Municipal Executive is authorised to enforce environmental permits and general regulations laid down by the State.

As stakeholders within the meaning of the General Administrative Law Act, governing bodies that, pursuant to Article 16.14, are authorised to provide advice within the framework of awarding an environmental permit, are able to request the administrative body that awards the permit to take enforcement action. In cases to be designated by government decree, independent authorisation can be given to the administrative body that, pursuant to Article 16.15, needs to give its assent to an intended decision to grant an environmental permit, to apply administrative coercion or to impose of a fine. This additional power to impose sanctions only relates to the activities that gave rise to the imposed requirement of consent. The administrative body that grants permits and the administrative body with additional, independent powers to impose sanctions coordinate their interventions.

The Municipal Executive, the Board of Directors of the water board and the Provincial Executive are charged with the implementation of the physical environment plan, the water board regulation and the environmental regulation respectively, unless the task is assigned to a different administrative body in the corresponding regulations.

⁴⁶ Parliamentary Papers II 2012/13, 32 127, no. 170, Annex.

⁴⁷ Amendment to the Environmental Law (General Provisions) Act (improvement to the procedure relating to the awarding of permits, supervision and enforcement) (Parliamentary Papers 33 872).

EU Directives

EU Directives in the field of environmental law require member states to provide for the designation of 'competent authorities' that are responsible for fulfilling obligations arising from those directives. This is usually associated with the obligation for the 'competent authority' to supervise compliance with national regulations that have been established for the implementation of the guidelines in question. More and more directives are containing detailed obligations regarding the performance of inspections. This is the case for the Industrial Emissions Directive and the (revised) Seveso Directive. The EU recommendation for minimum criteria for environmental inspections⁴⁸ also lays down a number of general organisational requirements for the planning and implementation of and responsibility for the supervision of compliance with the provisions from a large number of EU environmental directives.

If it is determined that these regulations have been infringed, the 'competent authority' should take necessary measures to ensure that the regulations are complied with. For this reason, each member state must provide the 'competent authorities' with an effective, proportionate and dissuasive arsenal of sanctions. In doing so, the choice of a certain method of enforcing sanctions - by administrative law, private law, criminal law or disciplinary penalties - is left to the member states. The Criminal Law Directive⁴⁹ requires the environment to be protected by criminal law where appropriate.

Chapter 18 deals with the implementation of the intended obligations, with the exception of the last mentioned point regarding legal sanctions. Legal sanctions for activities that are hazardous to the environment are laid down in the Dutch Penal Code and the Economic Offences Act. The prohibitions and codes of conduct in or pursuant to the Environment and Planning Act (primarily in Chapters 4 and 5) constitute criminal offences pursuant to (Article 1a of) the Economic Offences Act. This is implemented in the Implementation Act of the Environment and Planning Act.

The promotion of quality and cooperation

The government intends to use the Environment and Planning Act and the far-reaching integration and combining force of the Environmental Law to improve the provision of services by the authorities and to further streamline, speed up and simplify implementation by the various authorities, and to integrate these processes where possible. In order to achieve this, it is crucial that all involved governing bodies guarantee a uniform, high quality of implementation. This places high demands on harmonisation and cooperation between the authorities.

In this connection, considerable efforts have been made for some time now to improve the professionalism of supervision and implementation, and more recently also the awarding of permits. The Environmental Law (General Provisions) Act contains a regulation for harmonisation and coordination in the interest of effective enforcement (paragraph 5.2 of the Act). In and pursuant to the order in council, regulations have been established in the interest of effective enforcement for a strategic, programmatic and concerted implementation of supervision and enforcement. These regulations can be found in chapter 7 of the Order in Council on Environmental Permitting and chapter 10 of the Ministerial Environmental Decree. This assurance of the quality of supervision and enforcement can, in part, be traced back to the EU recommendation cited earlier regarding minimum criteria for environmental inspections, and also applies in part to the implementation of Article 23 of the Industrial Emissions Directive.

Within the framework of the administrative Programme for Implementation with Ambition [*Programma Uitvoering met Ambitie (PUMA)*] that was concluded towards the end of 2012, the State, provinces, municipalities and the water authorities worked together. The aim of this collaboration was to further expand quality assurance so that it also covers the awarding of permits, based on the notion that the whole chain of implementation does not yet function adequately. The aim of this was to achieve high-quality implementation of all VTH tasks (the awarding of permits, supervision and enforcement) [*Vergunningverlening, Toezicht en Handhaving*] in the field of the Environmental Law by the consistent performance of these tasks. Furthermore, a number of other projects have placed an emphasis on improving cooperation between administrative and legal enforcement authorities, the exchange of information between

⁴⁸ Recommendation from the European Parliament and the Council of 4 April 2001 on minimum criteria for environmental inspections in the member states (2001/331/EC) (OJEU L118).

⁴⁹ Directive 2008/99/EC from the European Parliament and the Council of 19 November 2008 on the protection of the environment by means of criminal law (OJEU L 328).

enforcement agencies and the use of this information, and a national research base for the implementation process.

In order to provide a statutory basis for the results of these various projects within the Programme for Implementation with Ambition, the legislative bill for Improvement to the Procedure Relating to the Awarding of Permits, Supervision and Enforcement was submitted to the Lower House on 13 February 2014.⁵⁰ The legislative bill contains a new, additional paragraph 5.2 to the Environmental Law (General Provisions) Act with the heading 'The promotion of quality and cooperation'. This new paragraph provides a basis for the establishment of quality criteria for the implementation of VTH tasks in or pursuant to the order in council. The legislative bill also determines that regulations be established in the order in council regarding the harmonisation of enforcement activities and determining the priorities of these, the exchange of information between the enforcement authorities and the use of information.

The legislative bill for the Improvement to the Procedure relating to the Awarding of Permits, Supervision and Enforcement also provides the basis for the order in council to establish rules regarding setting up the environmental services and their tasks. The authorities involved have already agreed that the environmental services will implement a number of VTH tasks from provinces and municipalities in the environmental field (the 'basic task package'). These environmental services work or will work in accordance with the VTH quality criteria.

The stipulations from the legislative bill for the Improvement to the Procedure relating to the Awarding of Permits, Supervision and Enforcement will be included in the Environment and Planning Act (via the Implementation Act of the Environment and Planning Act) in due course. Section 18.3 of the legislative bill has been set aside for this purpose. The impact of these provisions in and pursuant to the order in council must therefore be sufficient in light of the new tasks that the Environment and Planning Act raises for the implementation of VTH tasks. The State and the other authorities must enter into discussion with one another about this. Together they should investigate how they can guarantee that the implementation of VTH tasks that fall under the Environment and Planning Act can be carried out with the desired quality, legitimacy, effectiveness, efficiency and customer focus. Furthermore, they must investigate how they can contribute as much as possible to achieving the social aims of the Environment and Planning Act and the targets for improvement in the reform. The framework for this is provided for by the intergovernmental Exploration of the Implementation of the Environment and Planning Act, which is dealt with in more detail in paragraphs **Fout! Verwijzingsbron niet gevonden.** and **Fout! Verwijzingsbron niet gevonden.** of this Memorandum.

Supervision of compliance

Aside from the competent authority, governing bodies that are involved in the compilation of requirements for a certain activity can also supervise compliance with these regulations. In these cases, they should always qualify as governing bodies entrusted with implementation of the law. These organs are able to assign officials as their regulatory body. The rules relating to the assignment of regulatory bodies largely corresponds with those in the current Environmental Law (General Provisions) Act. The powers enjoyed by the regulatory body are described in section 5.2 of the General Administrative Law Act. In addition to this, the power to enter a dwelling without the permission of the resident is granted for the purpose of supervision of the rules, set out by or in accordance with the Environmental Code, for which this power is necessary.

Supervisory bodies in the service of the competent authority (one role) that also have investigative powers in accordance with the Order in Council on Special Investigating Officers (other role) are called BOAs. The scope of this investigative power is not determined by the Environment and Planning Act, but instead by the domain that is assigned in the investigative deed.⁵¹

Assurance of compliance by private parties

Up until now, the Environmental Law has regarded supervision of compliance with legislation primarily as a governmental task. However, it is now acknowledged that other instruments could be used alongside governmental supervision in order to guarantee effective compliance in structural terms. Private assurance of compliance with regulations involves the party under

⁵⁰ Amendment to the Environmental Law (General Provisions) Act (improvement to the procedure relating to the awarding of permits, supervision and enforcement) (Parliamentary Papers 33 872).

⁵¹ See the Special Investigating Officers Circular of 10 January 2011, no. 5679441/10.

supervision systematically controlling compliance with regulations (whether or not with the involvement of other private parties), rectifying infringements and taking measures to ensure that infringements are not repeated. The supervision of compliance carried out by the government can be adjusted accordingly by focusing it on the system of assuring compliance. Random *spot checks* on compliance can be used to verify whether the assurance is leading to effective compliance in reality. The government formulates the regulations with which (private) parties must comply in the system. This means that the system still involves a significant public component. Private assurance of the compliance with regulations in combination with governmental supervision adapted to this can contribute towards three important goals: establishing responsibilities where they belong, achieving improved compliance and reducing the administrative and governmental burden.

In the government memorandum Systematic Change to Environmental Law⁵² of 9 March 2012, the Minister of Infrastructure and the Environment announced that research should be carried out "into the extent in which the assurance of compliance with governmental regulations can be carried out by private parties as opposed to the government, as is currently being developed for building regulations following recommendations from the Dekker commission". The Ministry of Infrastructure and the Environment commissioned the Erasmus University Rotterdam to carry out this research. The report from this research⁵³ describes the conditions and safeguards required to ensure that private assurance is applied successfully. The government believes that there is a good basis to explore together with involved parties where private assurance can be (further) implemented in the various domains of the Environmental Law, which expertise and know-how is required for this and what role certification can play in this. The Exploration of the Implementation of the Environment and Planning Act also deals with this subject. For further information, see paragraphs **Fout! Verwijzingsbron niet gevonden.** and **Fout! Verwijzingsbron niet gevonden.**

With regard to building regulations, the Minister for Housing and State Authority set out his intentions regarding the planned improvement of quality assurance in the field of construction in his letter to the House of Representatives dated 27 November 2013⁵⁴. These proposals involve the contracting authority or permit holder themselves organising the assurance of quality in such a way so that there are sufficient assurances that the construction work provided complies with the legislation. The contracting authority shall carry this out by means of an instrument that is permitted for private quality assurance. When reporting completion of the construction work, the contracting authority or permit holder shall submit a declaration of quality assurance to the competent authority, stating that the construction work complies with the legislation. With the emphasis in the assurance of quality being placed on the quality and performance of the completed construction work, the intention is that construction companies themselves will incorporate safeguards into the start, middle and end of the process. When they report that the work has been completed, this will enable them to demonstrate that they have complied with the regulations.

An important notion from the report mentioned above is that the involvement of the target group is necessary when compiling the regulations. This ensures future compliance and structural assurance of said compliance. When the implementation regulations are developed, the options for private assurance will be considered.

In the letter from the State Secretary of Infrastructure and the Environment of 12 June 2013 to the Lower House of Parliament regarding the co-financing of supervision by major high-risk companies⁵⁵, the tendency not to charge these companies for supervision is, for the time being, maintained. Equally, it is noted that developments are taking place which could produce new insights and constitute grounds for reconsideration of the point of departure that in principle, the costs of supervisions are not charged to companies. Subsequently, this letter announces a (new) cabinet opinion regarding the issue of paying for supervision.⁵⁶ In any case, the government will include the aspect of promoting private assurance in further policy making on this subject.

Administrative and legal enforcement; sanctions

⁵² Parliamentary Papers II 2011/12, 33 118, no. 3.

⁵³ *Private borging van regelnaleving in het omgevingsrecht* [Private assurance of compliance with environmental legislation], Erasmus University Rotterdam, June 2013, ISBN 978-1-291-45644-8.

⁵⁴ Parliamentary Papers II 2013/14, 32 757, no. 91.

⁵⁵ Parliamentary Papers II 2012/13, 26 956, no. 164.

⁵⁶ Parliamentary Papers II 2014/15, 24 036, no. 407.

Following the example set by the Environmental Law (General Provisions) Act, amongst others, the Environment and Planning Act allows for administrative coercion to be applied or for a⁵⁷ fine to be imposed as administrative remedial sanctions. These sanctions, intended to put an end to any infringement on the regulations, are stipulated in Chapter 5, Section 5.3 of the General Administrative Law Act. The power to apply these sanctions is laid down in Article 125 of the Municipalities Act, Article 122 of the Provinces Act, Article 61 of the water authorities Act and Article 18.4 of the legislative bill that will replace, amongst others, Article 5.15 of the Environmental Law (General Provisions) Act. In addition to the arsenal of sanctions offered by the General Administrative Law Act, the administrative sanction to revoke the environmental permit is now laid down in the legislative bill, following the example set in Chapter 5 of the Environmental Law (General Provisions) Act.

Under current environmental legislation, in the event of non-compliance with regulations, punitive sanctions can generally be imposed in addition to remedial sanctions. The focus of punitive sanctions is usually placed on punishing the contravening party. Traditionally, punitive sanctions have been imposed within the framework of criminal law, primarily via the Economic Offences Act. In parts of the environmental law, an administrative penalty has also been introduced as an administrative punitive sanction ('tit for tat' instrument). The government's intention is to include a regulation in the Environment and Planning Act that enables the use of an administrative penalty in wider-ranging environmental legislation. Paragraph 18.1.4 of the legislative bill has been set aside for this purpose. A concrete proposal for this regulation will be made within the framework of the Implementation Act of the Environment and Planning Act. In part, this proposal will be based on the findings from research that is currently being carried out into the desired form and structure of the punitive enforcement of the Environment and Planning Act, commissioned by the Ministry of Infrastructure and the Environment (in accordance with the Ministry of Security and Justice). As indicated, the Environment and Planning Act will create a basis for the enforcement of administrative penalties in the event of infringements. The decision could be made to apply administrative penalties across the entire Environment and Planning Act. In this connection, it is important to ask how the application of administrative penalties compares to enforcement under criminal law. This question operates on two levels. On the level of legislation: which infringements will be criminalised (via the Economic Offences Act or other means) and which won't (and will therefore only be subject to administrative enforcement, for example by imposing an administrative penalty)? And on the level of applying the law in those cases in which one infringement may result in legal sanctions as well as an administrative penalty. An important, complicating factor in this context is that a great number of infringements, including those of minor importance, are made punishable in the environmental legislation (regarded as economic offences). The Exploration of the Implementation of the Environment and Planning Act reveals that punitive enforcement and the various ways in which this is dealt with in the different domains pose a problem for practical implementation.

Against this background, it is considered desirable to arrive at a clear, unambiguous and efficient form and structure for punitive enforcement within the framework of the reform of environmental legislation. The first step is to consider whether it is possible to come to a clear and workable demarcation of the implementation of enforcement under criminal law and administrative punitive enforcement in statutory terms. In so far overlap is unavoidable for enforcement and/or legislative technique, processes should be properly coordinated between administration and prosecutors, for example by employing a common enforcement strategy. The research mentioned above shall result in a number of recommendations with regard to the legal demarcation. These recommendations could produce building blocks for the proposal that will ultimately be compiled by the government, which will be included in the Implementation Act of the Environment and Planning Act, as stated.

Effects

- The provisions in this chapter lay down the instruments that should be used to supervise and enforce measures, thereby forming an essential component of the system of environmental legislation. The future incorporation of the legislative bill for the Improvement to the Procedure relating to the Awarding of Permits, Supervision and Enforcement could be an important stimulus for further improving the implementation of awarding permits, supervision and enforcement.
- Where possible and appropriate, private assurance of compliance with regulations can be implemented in combination with governmental supervision tailored to this. As a result, individuals and businesses will gain more responsibility to ensure that the regulations are

⁵⁷ See Article 5:32 of the General Administrative Law Act.

complied with in structural terms. Depending on the structure of private assurance and governmental supervision, the burden associated with governmental supervision can be reduced.

Monitoring (Chapter 20 of the Environment Act)

Chapter 20 primarily focuses on data. Section 20.1 deals with the production of data. This involves monitoring the actual condition of the physical environment by carrying out measurements and calculations and collecting data such as information about activities that have consequences for the physical environment. Section 20.2 deals with data access and management. The main points here are the data storage method and users being able to access data. Section 20.3 covers data products created administratively, which in practice are reports and maps. These reports and maps subsequently play a role as a starting point for the policy cycle, primarily for establishing programmes. The data that are necessary for reports and maps are produced pursuant to Section 20.1 and are made available pursuant to Section 20.2.

Section 20.4, Evaluation, also relates to compiling reports. Whereas the reports mentioned in 20.3 are generally intended for implementation of the stated policy, these reports are more geared towards determining whether the implemented policy leads to socially desired results. These types of reports also form a starting point for the policy cycle.

Chapter 20 provides the basis to lay down the existing obligations in the field of monitoring, data collection, data management, reports and maps, in an effective and uniform manner by order in council, whilst taking the existing distribution of tasks into account. Considering the targets for improvement in the reform, it seems that there is no need for new information obligations, unless the decision is made to establish more environmental values than legally required. However, there is a need to make existing data more freely available.

Monitoring is a key component in the policy cycle for the physical environment. An effective policy is formed by gaining an insight into the actual condition of the physical environment and the various components thereof. Monitoring is a form of information provision that takes place over a period of time and in a systematic manner, and by which information about the physical environment or parts of it is collected, processed and presented with the aim being to judge whether or not the policy objectives or obligations (under international law) have been or are being achieved. Apart from the government bodies involved, the data collected by monitoring are also important for citizens, companies and organisations. It allows them and government bodies to compare the policy results and to formulate new policy aims where necessary.

Governing bodies entrusted with taking care of an aspect or part of the physical environment are obliged to assume responsibility for measurements or calculations relating to its qualitative condition. Various EU Directives, such as the Water Policy Framework Directive, the Groundwater Directive, the Air Quality Directive and the National Emission Ceilings Directive (which sets regulations regarding an emissions trading system), contain concrete monitoring obligations. In addition, various obligations for the submission of reports to the European Commission require a type of monitoring. The Netherlands is also bound by compliance with international treaties that contain varying obligations for the submission of reports. In order to be able to comply with the obligations, national,⁵⁸ regional and, in some cases, municipal monitoring networks have been set up.

For environmental values, the legislative bill contains a general obligation for monitoring. The aim is not so much to determine the absolute level of quality of the physical environment, but rather to see whether the requirements for a certain environmental value are being fulfilled. This relates to the current condition (measurements and, in some cases, calculations) and the future condition (calculations in all cases). The required depth of monitoring is determined by the impact associated

⁵⁸ Examples include the *Landelijk Meetnet Effecten Mestbeleid* [National Monitoring Network on the Effects of the Manure Policy], *Landelijk Trendmeetnet Verzuring* [National Monitoring Network on Acidification], *Landelijk Meetnet Grondwaterkwaliteit* [National Monitoring Network on Groundwater Quality], *Landelijk Meetnet Bodemkwaliteit* [National Monitoring Network on Soil Quality], *Landelijk Meetnet Luchtkwaliteit* [National Monitoring Network on Air Quality], *Trendmeetnet Geluid* [Monitoring Network on Noise], *Nationaal Meetnet Radioactiviteit* [National Monitoring Network on Radioactivity], *Meetnet Functievervulling* [Monitoring Network on the Fulfilment of Functions].

with the environmental value and the actual condition in the physical environment. The monitoring of an environmental value with an obligatory outcome that is not being complied with in parts of the country at that time should, of course, take place with greater intensity than the monitoring of an environmental value with an obligation to act that is largely already being complied with. The establishment of a monitoring system will also be implemented in the implementation regulations, just like the establishment of the environmental values.

The main points of the system of monitoring will be determined during the establishment of an environmental value in an order in council, provincial regulation or physical environment plan. A decision will also be made as to which governing bodies will carry out the monitoring. This is important, for example, in water management, where the water authorities carry out monitoring of regional waters and primary water-retaining structures in accordance with European or national regulations for implementation. The monitoring requirement applies to all environmental values, even those that are determined by the provinces and municipalities. For environmental values determined by the State or that need to be determined by decentralised authorities, more detailed regulations concerning implementation can be laid down by ministerial order. These could concern measurement methods and the assurance of quality, for example. It is up to provinces and municipalities to determine whether or not they lay down regulations concerning implementation for environmental values that they determine on their own initiative. These types of regulations concerning implementation are primarily significant in cases that involve multiple layers of administration for the monitoring of an environmental value for which specific tasks need to be laid down. If an administrative body is wholly in control of the implementation of the monitoring, for example a municipality for a municipal environmental value, regulations concerning implementation do not necessarily have added value. The main point here is to ensure that the correct measurements or calculations are made.

The legislative bill provides the option to test and correct measuring and calculation methods and the data that are acquired as a result, in so far as they concern state environmental values and obligatory provincial environmental values. This is derived from the system for air quality (Article 5.21 of the Environmental Management Act) but has gained a more general meaning here. This regulation is intended for exceptional cases in which there are major doubts about the reliability of a method or the results acquired through this method.

Through the use of measurements or calculations, monitoring results in new data concerning the condition or the quality of the physical environment. Sometimes other data are also required for the government to be able to take care of the physical environment. This can relate to data regarding activities and the consequences of activities. These data are provided by those performing the activity or by the competent authority. Examples of this are the data that are requested in conjunction with the Pollutant Release and Transfer Register Regulation (PRTR), the register for external safety and the traffic data that are used alongside measurement data for the monitoring of air quality. Various international obligations also exist concerning the performance of calculations, for example calculations that form the basis for noise pollution charts from the Environmental Noise Directive and flood hazard maps and flood risk maps from the Assessment and Management of Flood Risks Directive.

Data access and management

Data is continually gathered for specific purposes, for example to monitor policies or to fulfil international obligations, but it can also be used in other ways, for example to prepare a request for a permit or a project decision. For this reason, a central article in the legislative bill provides that it is possible to stipulate that all data obtained through monitoring, including monitoring carried out by decentralised authorities, and other data regarding the physical environment, must be made available. Formal requirements can also be stipulated, for example the use of certain open standards for documents. In addition to this, the legislative bill provides the option to lay down an obligation by order in council to inform the public as soon as it appears that an environmental value is not being fulfilled.

For certain data, inclusion in a register is desirable. The data in a register are administered, filed and usually made accessible via a user interface, so that citizens can access them without the need

for specific software. The legislative bill allows for a number of compulsory registers in connection with obligations under international law, and also pursues the register for external safety⁵⁹. It is not only data about the physical environment that are important for data users. As described in paragraph **Fout! Verwijzingsbron niet gevonden.**, the legal situation is also of considerable importance. Over the past years, the Spatial Planning Act has made considerable progress by digitalising location-specific regulations and policy plans and making these available online (Ruimtelijkeplannen.nl). By providing geographic coordinates for policies and regulations, digital maps can be created. This functionality is reserved for documents that can be regarded as direct successors to the documents from the Spatial Planning Act: the environmental strategy, the programme, the physical environment plan, the environmental regulation and the project decision. For reasons of harmonisation, the obligation also applies to water board regulations. Due to the large substantive scope of the legislative bill, this means that the digital availability of data about the legal situation at a specific site will increase. By laying down more documents in future by order in council as environmental documents in accordance with Article 16.2, the availability of data can be further improved after the legislative bill enters into force (see paragraph **Fout! Verwijzingsbron niet gevonden.**). In the long-term, this should mean that it will be possible to find all location-specific regulations and policy plans about the physical environment online via a single source of information.

Most data are published online in the form of 'open data' or accessible registers. Despite the increased availability of mobile internet, there is still a demand for information in situ in the form of information panels or boards. The legislative bill provides the option to establish rules for this as well, where necessary. Such rules will, in any case, be established for bathing waters, as Article 12 of the Bathing Water Quality Directive requires members of the public to be able to find certain information in the immediate proximity of all bathing waters.

Reports and maps

As a starting point for the policy cycle, there is often a demand for data to be presented in a more accessible form: a report or map that presents a clear overview of the data and that can be used to assess it. For this reason, Article 20.14 of the legislative bill lays down an obligation to submit reports and assess the results of the monitoring of environmental values and the progress, implementation and degree of success of programmes with a programme-based approach. The submission of reports and provision of assessments can also be required for other data. In addition, the chapter provides the basis for the implementation of obligations to provide reports about the physical environment under international law.

It also provides the basis for the compilation of maps containing actual information about the physical environment. This relates to maps without immediate legal effect that are required for the preparation and formulation of policies or for the implementation of management tasks. In this vein, the Environmental Noise Directive stipulates the creation of noise pollution charts for important sources of noise (roads, railways and airports) and for agglomerations. The function of these charts is to assist with the preparation of policies in conjunction with the action plan for noise that is included as a programme in paragraph 3.2.2 of the legislative bill. Pursuant to the Flood Risks Directive, the same relationship exists between flood hazard maps and flood risk maps and flood risk management plans. For maps with immediate legal effect, the basis is always included in the chapter that stipulates this legal effect.

Experimentation clause (Chapter 23 of the Environment Act)

The legislative bill contains an experimentation clause. This clause is intended to provide leeway for deviation from stipulations resulting from or pursuant to the Environmental Act and the other acts stated in the article. It provides a solution for projects aimed at improving the quality of the physical environment or the formulation of policies for this, but that can't be achieved under the applicable regulations. In the same way as for the Dutch Crisis and Recovery Act, the premise for this is that the legal process often lags behind initiatives from society and technological developments such as new sustainable technologies or new materials. An experimentation clause means that during experiments it is possible to first investigate whether updates constitute an improvement, before regulations are adapted generically. The 2012-2013 progress reports on the

⁵⁹ The Act of 15 September 2005 for an amendment to the Environmental Management Act (registration of data regarding external safety of installations, transportation routes and pipelines) (Dutch Bulletin of Acts, Orders and Decrees, 2005, 483).

implementation of the Dutch Crisis and Recovery Act⁶⁰ reveal that experimentation can provide a valuable contribution towards the updating of regulations. Key words here are flexibility, customisation and personal responsibility.

An example of an experiment that has been carried out pursuant to the Dutch Crisis and Recovery Act is the construction of self-sustaining housing. In order to construct this housing, it was necessary to deviate from the standard requirements that are set with regard to sewer connections, the provision of electricity and water connections, for example. The construction of an energy-neutral district in Meppel is another example of an experiment in which the requirements for building-related energy consumption of new-build homes (the energy performance coefficient) pursuant to the Order in Council on Building 2012 were deviated from. The experimentation clause is intended for situations in which other options in or pursuant to the Environmental Act that provide for flexibility, are not sufficient. In this way, the legislative bill provides a basis for it to be determined by order in council that initiators can use different, but equivalent means to comply with the general regulations for the activity (equivalence clause). However, depending on the means used, it is not always possible to know in advance if they are equivalent to the prescribed means, meaning that the equivalence clause cannot be applied. The character of the experimentation clause is therefore different to the application of the other flexibility instruments. After all, the experimentation clause focuses on 'testing'. If it is expected that a certain method or procedure will be effective but this needs to be determined by experimental trial, it may make sense to adapt the experimentation clause in order to provide a clear insight into the effectiveness.

The necessary safeguards have been established because one or more legal requirements are being deviated from. The first stipulation is that an experiment shall only be designated if its purpose is to contribute to the achievement of the objectives referred to in Article 1.3, introduction and item a, including the improvement of the quality of the physical environment, the procedures to be followed or the decision-making processes in that regard. An even further legal demarcation of the field of application is not desirable as the experimentation clause has been included in order to allow experiments to be carried out that relate to topics that have not yet been identified. This therefore relates to special situations that are not provided for pursuant to the Environmental Act, for example as a result of new developments. These experiments can relate to procedural and substantive aspects.

The experiments are designated by order in council. In this process, the permitted deviation is determined as well as how long the deviation may last. Deviations are only permitted in so far as they do not conflict with international requirements. This means that deviations cannot be made from EU Directives, for example. This means, for example, that further deviations cannot be made from the environmental values for air quality other than those permitted by the Air Quality Directive and that deviations from the Nature Protection Act can only be made in so far as the Conservation of Wild Birds Directive and the Habitat Directive do not stand in the way of this. Governing bodies, as well as private initiators (whether or not via governing bodies) are able to put forward experiments.

The nature of an experiment means that it is temporary and limited to a specific field or other concrete situation. However, the permitted level of deviation means that in certain cases for a specific activity or project, the regulations could be permanently deviated from. An example of this is a construction project for homes, for which, by means of an experiment, additional insulation requirements are prescribed by way of derogation from the applicable regulations. The homes that are constructed in this district will always have to comply with the obligations laid down in the order in council in which this experiment is stipulated. In the experiment referred to in the order in council, reference will be made to which deviations are permitted after the experiment, for example in conjunction with the activities that have been carried out. Depending on the nature of the experiment, the decision is also made as to how progress on and the results of the experiment will be reported or how the experiment will be evaluated. If the experiment has the desired effect, it can be transposed into regulations.

⁶⁰ Parliamentary Papers II 2012/13, 32 127, no. 170, Annex.

Transposing EU Directives and treaties

Introduction

Paragraph 0 states that a basic regulation derived from the EU Directive was used as the basis for the Environment and Planning Act. The policy cycle from the EU Directive relevant to the Environment and Planning Act emerged, creating the basis for the legislative bill. The application of this policy cycle, amongst other things, makes it easier to implement the EU Directive in the future.

"Whenever European legislation has substantial impact on the content of the national legislative complex, it can make sense to deviate from national terms, boundaries and instruments. National legislation will then be modelled on European legal methodology. (...) The acquisition of European methodology sometimes goes so far that national rules and procedures that do not fall under the scope of the European legislation are also brought in line with European methodology for reasons of harmonisation and consistency. (...) The advantage of the acquisition on European methodology is that it can contribute to a system in which new European legislation can be easily implemented," reported the Council of State.⁶¹

A number of policy areas and stipulations incorporated into the Environment and Planning Act are driven by EU legislation or international law. The area of environmental policy is an important example of this, but EU legislation and international law also play an important role in the fields of water, nature and construction, as well as the fields of infrastructure, cultural heritage and aviation.

The methodology from EU legislation has been incorporated in the legislative bill through the acquisition of instruments from the EU legislation. This simplifies the implementation and working methods. In this way, a number of definitions have been streamlined and various standards have been brought together under the term 'environmental values' (which allow diversity to be incorporated as required by means of instructional rules). The proactive approach of usable area (see paragraph **Fout! Verwijzingsbron niet gevonden.**) and the programmed approach of Section 3.2 of the legislative bill enable goals to be achieved more easily, as laid down in certain EU Directives (such as the Air Quality Directive and the Water Policy Framework Directive).

A large number of EU Directives are of importance to the Environment and Planning Act, as well as certain EU regulations and treaties. A large part of the guidelines and treaties are implemented or re-implemented in the Environment and Planning Act and the implementation regulations. The commentary on the individual articles indicates in more concrete terms where specific implementation (obligations) are involved. The overview below presents the most important EU directives, regulations and treaties for this legislative bill in a global sense. Further additions to the Environment and Planning Act and the elaboration on the implementation regulations of the Environment and Planning Act shall justify the description of other directives or treaties. In this way, a number of environmental aspects will be incorporated from directives that have not yet been described.

European Landscape Convention

The purpose of the European Landscape Convention⁶², adopted by the Council of Europe, is to recognise the importance of landscapes as an essential component of our environment, as an expression of our shared cultural and natural heritage and as a cornerstone of our identity. It contains agreements regarding the formulation and implementation of landscape policy aimed at identifying, protecting and managing values related to the landscape, about informing and involving the public, about training and education and about international cooperation. In the process, with reference to the subsidiary principle and the European Charter of Local Self-Government, parties are given the space to implement the treaty pursuant to the policy of the country in question, in accordance with its own distribution of powers, constitutional powers and administrative procedures.

⁶¹ 2010 Annual Report from the Council of State, Chapter on Unity and Diversity, page 71.

⁶² The European Landscape Convention, which entered into force in Florence on 20 October 2000 (Treaty Series 2005, 23).

Implementation in current legislation

The government care for landscape, as a component of the living environment, are laid down in Article 21 of the Constitution. The stipulations of the Spatial Planning Act, the Environmental Management Act, the Nature Conservation Act 1998 and the Monuments and Historic Buildings Act 1988 help to protect landscapes. In the negotiated settlement on the decentralisation of nature⁶³, the state and the provinces agreed that generic landscape policy should no longer be assigned to the state and should instead count among the autonomous tasks assigned to the provinces.

Implementation in the legislative bill

By virtue of Article 1.2 of the legislative bill, landscapes form part of the physical environment. By virtue of Article 1.3, the application of the legislative bill is thereby partially aimed at achieving and maintaining high-quality landscapes and at an effective management, use and development of landscapes. Administrative bodies from an authority perform their tasks and exercise their powers on the basis of this legislative bill with the aim of achieving the aforementioned goals. This could, for example, include the creation of an environmental strategy pursuant to Section 3.1 of the legislative bill. The legislative bill for the Nature Protection Act stipulates that the nature vision of the State focuses its attention on the state policy for landscapes; by virtue of the legislative bill in the present case, this policy shall form part of the State's environmental strategy (see also paragraph **Fout! Verwijzingsbron niet gevonden.** of this Explanatory Memorandum). By virtue of Article 1.6, the duty of care for every person also applies to landscapes. Section 16.3 of the legislative bill lays down public input, which is one of the requirements of the European Landscape Convention. In this way, the European Landscape Convention is implemented.

Groundwater Directive

The Groundwater Directive (2006/118/EC) further elaborates on a number of parts of the Water Policy Framework Directive and lays down specific measures for groundwater. These directives all have the same aim.

Implementation in current legislation

The quality requirements are currently implemented via Chapter 5 of the Environmental Management Act in the Order in Council on Quality Requirements and the Monitoring of Water 2009 and are linked to the adoption of the hydrological plans by virtue of the Water Act. This also applies to the reversal of trends. Monitoring is governed within the framework of Chapter 5 of the Environmental Management Act by ministerial order.

The Groundwater Directive also contains specific obligations regarding putting an end to the release of pollutants in groundwater and preventing the spreading of historically contaminated plumes via the groundwater. The first obligation has been implemented in various regulations, such as the Order in Council on Activities [*Activiteitenbesluit milieubeheer*] and the Order in Council on Discharging Outside Establishments. As groundwater is part of the ground, the prevention of groundwater contamination is also provided for in the Order in Council on Soil Quality. The obligations to combat the spread of contaminants have been implemented via the clean-up scheme from the Soil Protection Act (which will be incorporated into the Environment and Planning Act at a later date, see paragraph **Fout! Verwijzingsbron niet gevonden.**).

Implementation in the legislative bill

Implementation of the Directive in the Environment and Planning Act is carried out in accordance with the aforementioned points under the Water Policy Framework Directive in chapters 2, 3 and 4 of the legislative bill (and the associated implementation regulations). Rules regarding monitoring the environmental values are laid down in and by virtue of Section 20.1.

Habitat Directive and Conservation of Wild Birds Directive

The aim of the Conservation of Wild Birds Directive and the Habitat Directive is to protect plant and animal species and nature conservation areas. The purpose of the Conservation of Wild Birds Directive (originally 74/409/EEC, codified in 2009/147/EU) is to protect the population level of certain birds by conserving, maintaining or rebuilding their habitats in order to maintain the natural balance of the species (within reasonable limits). The purpose of the Habitat Directive (92/43/EEC) is to maintain, protect and improve the quality of the environment, including the conservation of natural habitats and wild flora and fauna (therefore: plant species, animal species with the

⁶³ Parliamentary Papers II 2010/12, 30 825, no. 107.

exception of birds, and habitats). The establishment of protection zones required to do so is governed by the European Natura 2000 Network.

Implementation in current legislation

The Directives have been implemented in the Netherlands in the Flora and Fauna Act and the Nature Conservation Act 1998. The legislative bill for the Nature Protection Act incorporates both acts from the Forestry Act under consideration of the stipulations of the Conservation of Wild Birds Directive and the Habitat Directive.

Implementation in the legislative bill

Although it is expected that the Nature Conservation Act will enter into force in 2015, the ultimate intention is to incorporate this act in the Environment and Planning Act. See paragraph **Fout! Verwijzingsbron niet gevonden.** for further details. The Environment and Planning Act already incorporates the management plan for Natura 2000 areas, (parts of) the nature plan and the permit procedure.

Articles 3.7, third paragraph and 3.8, third paragraph, stipulate that management plans must be established for Natura 2000 areas. The management plans implement the aims for the conservation of habitats and species in Natura 2000 areas (see paragraph 0 for further information). The obligation to obtain a permit for activities that impact on Natura 2000 areas has been included in Article 5.1, third paragraph.

Marine Strategy Framework Directive

The purpose of the Marine Strategy Framework Directive (2008/56/EC) is to conserve and revive European seas and to achieve a healthy environmental status by 2021 without impeding on economic activities. In order to achieve this, member states must develop plans at the level of marine regions for the seawater that belongs to their territory. For the Netherlands, this is the North-East Atlantic.

These plans must include elements such as a description of the good environmental status of the waters in question; the establishment of environmental goals and indicators; the establishment and implementation of a monitoring programme; the development and application of programmes of measures to achieve / maintain a good environmental status.

The deadline for the creation of an operational programme is 2015. These programmes must commence in 2016. In 2019, the Commission will publish an initial evaluation report and by 2021, the seawaters must have a good environmental status.

Implementation in current legislation

The Marine Strategy Framework Directive is closely linked to the Water Policy Framework Directive. The Marine Strategy Framework Directive has been implemented throughout the Netherlands via the Order in Council on Water, based on the Water Act. The Order in Council on Water specifies that the key elements from the marine strategy for the North Sea are included in the National Water Plan.

Implementation in the legislative bill

Article 3.8, second paragraph, item c of the legislative bill includes the obligation to establish an action plan, pursuant to Article 5 of the Marine Strategy Framework Directive. Elaboration of the stipulations regarding the programme of measures of Article 13 remains on the level of an order in council.

As explained in paragraph 0, the new planning system will include components of the national water plan that arise from EU directives, together with the management plan for national waters, to form a national water programme. The action plan and the programme of measures for marine strategy also form a part of this.

The Water Policy Framework Directive

The Water Policy Framework Directive (Directive 2000/60/E) requires surface waters and groundwater in the European Union to be in a good condition from 2015 and the prevention of any form of further deterioration to the condition of these. For surface waters, this requirement involves every body of water (on the basis of the 'one out, all out' principle), not only achieving a good chemical condition for each substance, but also a good ecological condition (which comprises a number of values).

For groundwater, this requirement involves every body of groundwater achieving a good quantitative and chemical condition. Furthermore, measures must be taken in good time to eliminate negative trends that pose a threat to the quality and to counter the spread of (historical) ground contaminants.

In addition, the Water Policy Framework Directive contains requirements for the quality of surface water and groundwater intended for drinking water and requirements for the quality of water in protected areas, such as Natura 2000 areas.

Implementation in current legislation

In order to implement the general requirements listed above, the Netherlands decided to establish environmental quality requirements within the framework of Chapter 5 of the Environmental Management Act by order in council (the Order in Council on Quality Requirements and the Monitoring of Water 2009). The requirements have been further implemented with regard to the ecological situation in the Regulation for the Monitoring of the Water Framework Directive. The environmental quality requirements are linked to the water plans that need to be established by the State, the provinces and the water authorities by virtue of the Water Act. The Order in Council referred to also includes the exceptions that are permitted by the Water Framework Directive in the field of phasing and lowering targets.

Another important obligation by virtue of the Water Framework Directive involves monitoring being carried out to investigate the extent to which the quality of water meets the environmental quality requirements. The results of the monitoring process will also serve as the basis for the creation of water plans and for the adjustment of measures in the event that problems arise in terms of the quality of water.

In addition to the Water Framework Directive, two other EU directives have been drawn up, namely the Groundwater Directive and the Priority Substances Directive. These directives contain requirements that are even more specific, which are mainly a further development of the above.

Implementation in the legislative bill

Chapter 2.4 of the legislative bill lays down and assigns the responsibility for the government care for (amongst others) water and groundwater, establishes environmental values and stipulates how these values should be implemented. Chapter 20 contains the premises for monitoring and registration.

By virtue of Article 13 of the Water Framework Directive, the member states ensure that a river basin district management plan is created for every river basin district that is fully located on its territory. This takes place in collaboration with the other member states in the same international river basin district. In addition to this, by virtue of Article 11 of the Water Framework Directive, a programme of measures must also be compiled for each river basin district. The purpose of this is to implement the river basin district management plan. This is implemented in the legislative bill in Article 3.8, second paragraph, point a: here it is determined that river basin district management plans be established for the river basin districts of the Rhine, Maas, Schelde and Eems, in so far as they relate to Dutch territory. Article 3.7, second paragraph and Article 3.8, second paragraph, point d, also include the requirement to establish regional and national water programmes. Certain aspects of the current national water plan and the management plan for national waters are included in a State water programme (see paragraph 0 of this Explanatory Memorandum).

Section 4.1 of the legislative bill provides a basis for general rules, amongst other things. These general rules lay down a number of requirements for directives. If general rules do not sufficiently guarantee fulfilment of the requirements of directives, customisation is possible, or an obligation to obtain a permit can be established for a particular test by virtue of Section 5.1. General rules and permits are both relevant for the discharge of waste water.

Rules regarding monitoring the environmental values are laid down in and by virtue of Section 20.1.

The London Protocol

The London Convention (Treaty Series 1973, 172) and the London Protocol 1996 (Treaty Series 1998, 134 and Treaty Series 2000, 27) lay down rules relating to the dumping of waste and other

materials at sea. The London Protocol replaces this convention in full for states that are parties to the convention and the protocol. The protocol prohibits the dumping of all materials except for those listed in Annex I to the protocol. For the exceptions listed, whether or not they may be dumped at sea is based on careful considerations. Annex II to the protocol lists these considerations and the requirements for the awarding of a permit for dumping at sea.

Implementation in current legislation

Chapter 6 of the Water Act and Chapter 6 of the Order in Council on Water lay down the obligation to obtain a permit for dumping waste at sea.

Implementation in the legislative bill

Article 4.3, second paragraph, introduction and item b of the legislative bill lay down the basis for government regulations regarding dumping activities (this relates to a reporting requirement in the event of governmental dumping). Article 5.1, first paragraph, item e stipulates the obligation to obtain a permit for dumping activities at sea.

EIA Directive and SEA Directive

The aim of the EIA Directive for 'project EIA' (2011/92/EU) and the SEA Directive for 'plan EIA' (2001/42/EC) is to subject projects that may have a considerable environmental impact (prior to the awarding of a permit) to an assessment of that considerable environmental impact, and to contribute to the integration of environmental considerations for the preparation and establishment of plans and programmes, intended to promote sustainable development.

Implementation in current legislation

So far, both directives have been implemented via Chapter 2 (paragraph 2.2), Chapter 7 (Articles 7.1 up to and including 7.42) and Chapter 14 (paragraph 14.2) of the Environmental Management Act and in the Environmental Impact Assessment Decision.

Implementation in the legislative bill

The stipulations for the EIA are implemented in Section 16.4 and Articles 13.6 and 17.5 (Articles 17.2 up to and including 17.4 also apply) of the legislative bill; they will be further developed in the implementation regulations. In comparison with the current situation in the Environmental Management Act and the Environmental Impact Assessment Decision, more emphasis is placed on the implementation regulations in the legislative bill, such as the content of the EIA and cross-border situations.

As the Environment and Planning Act contains new instruments, it is being considered whether or not the EIA is applicable. Broadly speaking, it can be said that plan EIAs are required for environmental strategies, programmes or physical environment plans with the nature of a framework policy or which may have a considerable environment impact. Visions, plans or programmes that require suitable assessment pursuant to the Habitat Directive also fall under this category. See also paragraph 0.

The SEA Directive introduces an obligation for independent quality assurance for the plan EIA. In view of this, the legislative bill contains obligatory testing advice from the EIA Commission for plan EIAs. However, this quality assurance is not obligatory for project EIAs and sometimes not necessary either, as the competent authority itself is in a position from which it can make a good decision. For this reason, the decision was made to make the testing advice from the EIA Commission for project EIAs optional (to be determined by the competent body).

As of 15 May 2014, the EIA Directive has been revised for project EIAs. The latest date for implementation is 15 May 2017 and therefore elapses before the expected date of entry into force of the Environment and Planning Act. As indicated in paragraph 0, this also means that the current legislation must be adapted to the revised directive.

The National Emission Ceilings Directive (NEC Directive)

The purpose of the National Emission Ceilings Directive, or NEC Directive (2001/81/EC), is to reduce large-scale air pollution and acidification in Europe, with the aim to protect human health and natural features.

The NEC Directive sets upper limits in Europe for a number of substances that cause acidification and air pollution. In 2010, the Directive set upper limits for each EU member state for the total emissions from sulphur dioxide (SO₂), nitrogen oxides (NO_x), volatile organic compounds (VOC) and ammoniac (NH₃). The Directive also contains obligations for the member states to submit reports about the ways in which they are complying with the requirements with reference to the national emission ceilings for 2010.

Implementation in current legislation

The NEC Directive was originally implemented in the Air Pollution Act, but the stipulations regarding the national emission ceilings were later transposed to the Environmental Management Act.

Implementation in the legislative bill

Article 2.15 of the legislative bill provides a summary of the environmental values for the environmental compartment that must be established at national level by means of order in council. This obligation provides the basis for implementation of the NEC Directive, amongst other things.

The order in council in which the environmental values are established must include a legal classification: what type of obligation is involved, and for whom; is there a term; does the obligation apply to the entire territory? Customisation is possible, for example with reference to the obligations arising from the NEC Directive.

Chapter 3.2 of the legislative bill determines that, in view of EU requirements, programmes shall be created in order to meet such requirements. The requirement has been removed from the NEC Directive, so that the programme in question could be 'developed'. When the (announced) new NEC Directive is formulated, and this contains a plan requirement, this can be added to Section 3.2. Furthermore, a more general plan requirement applies by virtue of Article 3.9: if the monitoring carried out pursuant to Section 20.1 reveals that an environmental value is not being complied with or will not be complied with in time, a programme must be created that is aimed at fulfilling (or continuing to fulfil) this environmental value. Paragraph 0 covers the obligatory programmes in more detail.

Article 20.1 states the core provision for monitoring: it is used to determine whether the environmental values are being fulfilled. The system of monitoring is developed in the implementing regulations and the responsible governing body for measuring or calculating the qualitative condition of the respective aspect of the physical environment is indicated. The NEC Directive contains concrete requirements for monitoring, which should be implemented in accordance with Section 20.1.

PRTR Regulation

PRTR stands for Pollutant Release and Transfer Register. PRTR includes the obligation to provide a statement of contaminants in the air, water and soil for certain activities. The reporting obligation lies with companies that carry out the activity and exceed the threshold value. The activities are listed in Annex I to the EC Regulation 166/2005.

Implementation in current legislation

Chapter 12 of the Environmental Management Act contains an obligation for the establishment of a measurement and registration system in order to fulfil the requirements of the PRTR Regulation. A foundation for the establishment of requirements for the system and the nature of the report by order in council are also established. For particulate matter, this has been realised by means of the implementation regulation for EC Regulation PRTR and PRTR protocol.

Implementation in the legislative bill

Article 20.6 lays the basis for the establishment of rules regarding the collection of data by means other than monitoring. By virtue of Article 20.7, this must in any case take place for the implementation of the PRTR Regulation. In addition to this, Article 20.11 stipulates that in any case a national register be set up for data relating to the release and transfer of pollutants.

The Industrial Emissions Directive

The Industrial Emissions Directive (2010/75/EU) ensures that permits are awarded in an integrated fashion and combines previous directives, of which the IPPC Directive⁶⁴ is the best known. The Directive ensures that companies have one office and one procedure that they follow for the awarding of permits. For implementation, the competent authority decides in one go and in relation to a number of components of the physical environment, in which areas the activities may have consequences, including air, water and soil. The Directive ensures that the best available technologies are applied in a strict manner for the awarding of permits in order to prevent or limit negative consequences for the physical environment. It also provides for effective and programmatic supervision.

Implementation in current legislation

The directive is currently implemented in the Environmental Law (General Provisions) Act, the Water Act, the Environmental Management Act, the Order in Council on Environmental Permitting [*Besluit omgevingsrecht*] and the Order in Council on Activities [*Activiteitenbesluit milieubeheer*].

Implementation in the legislative bill

The requirements from the Industrial Emissions Directive are implemented in the legislative bill in Article 4.3, 4.22 and 4.23 (delegation principle governing government regulations on the best available technologies) and Article 5.1, second paragraph, introduction and item b, which relates to demarcation of activities requiring a permit that have negative consequences for the environment and in the section outlining the requirements for the awarding of a permit. These requirements will be further developed by order in council.

Air Quality Directive

The purpose of the Air Quality Directive (2008/50/EC) is to prevent or reduce hazardous consequences to human health and the environment as a whole. The directive sets requirements for the member states with regard to the designation of zones and agglomerations for the whole territory to assess the level of air pollution for a number of pollutants, including sulphur, nitrogen, lead and particulate matter. In addition, upper limits apply for sulphur dioxide, nitrogen dioxide, PM₁₀, PM_{2.5}, lead, benzene and carbon monoxide.

Implementation in current legislation

In the Netherlands, the Air Quality Directive is implemented in Chapter 5 of the Environmental Management Act, and further developed in the implementation regulations. Chapter 5 of the Environmental Management Act also provides for the National Air Quality Cooperation Programme.

Implementation in the legislative bill

Section 2.3 of the legislative bill provides a delegation principle governing the environmental quality requirements (in the Environment Act: environmental values), after which the standards are developed by order in council.

Section 3.2 of the legislative bill provides for a national programme for air quality (National Air Quality Cooperation Programme). This section provides for the option to establish a programme with a programme-based approach, for example in the event that there is a chance that an environmental value will be exceeded. Section 19.1 provides for a regulation in the event of an unusual incident. The submission of reports shall be carried out by virtue of Article 20.14.

The Offshore Safety Directive

The purpose of this directive (2013/30/EU) is to better guarantee the safety of offshore oil and gas activities through the implementation of strict safety requirements. The directive applies to existing and future oil and gas installations and activities.

According to the directive:

- The authority granting the permit in the member states must ensure that offshore activities are only carried out by 'operators' who have sufficient technical and financial capabilities in order to guarantee safety and environmental protection. The involvement of citizens is required if new areas for mining are involved.
- The 'operators' of offshore activities will be fully responsible for environmental damage caused to protected marine animals and natural habitats.

⁶⁴ Directive 96/61/EC of the Council of 24 September 1996 on Integrated Pollution Prevention and Control (OJEU 1996, L 257).

- An emergency plan should be drawn up prior to the operation. If there is a potential environmental threat to other member states, the member state should send the relevant information to the member state that could be affected before the operation takes place.
- A safety zone should be installed around installations where offshore activities are carried out. Within this safety zone, a ban on entry or stay shall apply to third parties, with certain exceptions. One such exception is if the member state grants permission.

Implementation in current legislation

At the moment, this is implemented via adaptation of the Mining Act, the Order in Council on Mining and the Ministerial Decree on Mining, the Environmental Management Act, the Workplace protection Act and the Order in Council on Workplace Protection.

Implementation in the legislative bill

The requirement to obtain consent to enter a safety zone is stipulated by the environmental permit requirement for carrying out a restricted area activity with reference to an installation in a water management structure laid down in Article 5.1, second paragraph, introduction and item f, under 5° of the Environment and Planning Act.

Environmental Noise Directive

The purpose of the Environmental Noise Directive (2002/49/EC) is to protect against noise pollution. It requires the member states to establish an approach to prevent, avoid or reduce hazardous consequences of exposure to environmental noise. This should take place by the production of noise pollution charts, by informing the public and by coming up with action plans in order to achieve the aim of the directive.

Implementation in current legislation

The Environmental Noise Directive is currently being implemented via Chapter 11 of the Environmental Management Act and Chapter 8A of the Aviation Act.

Implementation in the legislative bill

Articles 3.5, 3.7, first paragraph and 3.8, first paragraph, contain the basis for programmes carried out by municipalities, provinces and the State, including the action plan from the Environmental Noise Directive. Article 20.17 stipulates that noise pollution charts be established for roads, railways and airports by the administrative bodies that compile the action plans.

Floods Directive

The Floods Directive (2007/60/EC) ensures that the negative consequences of floods on humans, the environment, cultural heritage and economic activity are limited. By virtue of this directive, member states are obliged to consult with one another and to create maps and plans regarding the management of floods. These plans should be coordinated with other states in the river basin district. The premises for this are assuming responsibility, an approach targeted to the river basin district, dealing with risks, sustainability and public participation.

Implementation in current legislation

The directive is implemented in the Netherlands via the Water Act, the Safety Regions Act and the General Administrative Law Act. It is implemented by the production of flood hazard maps, flood risk maps and flood risk management plans. The flood risk management plans are based on the water plans that are established on various administrative levels (State, province, water board).

Implementation in the legislative bill

The environmental values are included in Articles 2.13 and 2.15 of the legislative bill. Section 20.3 provides specific premises for reports, flood hazard maps and flood risk maps. In view of the EU regulations, programmes must be established for the management of river basin districts and flood risks (Articles 7 and 8 of the Floods Directive). For this purpose, Article 3.8, second paragraph, item b, includes an obligation for the establishment of flood risk management plans for the four river basin districts of the Rhine, Maas, Schelde and Eems. Article 3.7, second paragraph contains an obligation on the provincial level.

In addition, the current Flood Protection Programme from the Water Act will be implemented in the Environment and Planning Act at a later date.

The Priority Substances Directive

The Priority Substances Directive (2008/105/EC) is, just like the Groundwater Directive, an addition to the Water Policy Framework Directive, in which certain parts of the guideline that relate to water quality requirements for specific priority chemical substances and the discharge of such substances in surface water are further developed.

Implementation in current legislation

The quality requirements are, just like the other two directives, currently implemented via Chapter 5 of the Environmental Management Act in the Order in Council on Quality Requirements and the Monitoring of Water 2009 and are linked to the adoption of the hydrological plans by virtue of the Water Act.

The stipulations for discharge relate to working with mixing zones, in which lower requirements can be applied than those that apply for the water quality outside of them. These stipulations are implemented in the 'Emission Tests Manual; Testing Discharges for their Effect on Surface Water', published by the Minister of Infrastructure and the Environment. The Ministerial Environmental Regulations refer to this document as a 'best available technique' document, which means that it must be applied as the best available technique when awarding water permits for discharging substances.

Furthermore, the Priority Substances Directive stipulates that the discharge of (hazardous) priority substances must be terminated or limited. This has been implemented in the Netherlands by the establishment of upper limits for emissions in various ministerial decrees by virtue of the Water Act. Dutch regulations do not expressly include a general obligation to end or limit the discharge of (hazardous) priority substances.

Implementation in the legislative bill

Article 2.15, first paragraph, item b is the foundation for the establishment of environmental values for the chemical and ecological quality of bodies of surface water and the chemical quality and quantitative condition of bodies of groundwater, for the implementation of the Groundwater Directive and its subsidiary directives, including the Priority Substances Directive. Rules regarding monitoring the environmental values are laid down in and by virtue of Section 20.1.

The Urban Waste Water Treatment Directive

The purpose of the Urban Waste Water Treatment Directive (91/271/EC) is to protect the environment from the detrimental effects of the discharge of urban waste water and waste water from certain industry sectors. The directive contains requirements for the collection, treatment and discharge of urban waste water. Furthermore, some of the requirements in the guideline are provided with a schedule as to when they must be fulfilled. Requirements are also included regarding the disposal of sewage sludge, including the requirement to end the disposal thereof in surface waters.

Implementation in current legislation

Currently, implementation is mainly carried out via the Water Act, the Environmental Management Act, and Orders in Council based on these Acts.

Implementation in the legislative bill

The regulation is implemented in Chapter 2 of the legislative bill, in the section in which the government care is assigned. More specifically, it relates to Article 2.16, first paragraph, item c, point 3^o: this is where the collection and transportation of urban waste water are assigned to the municipality. In addition, Article 2.17, first paragraph, item a, point 2^o, assigns the purification of urban waste water in public foul water sewers to the water board.

The regulations regarding the disposal of sewage sludge are developed in an order in council by virtue of Article 4.3, first paragraph, introduction and item b. The obligation to obtain a permit for discharge in sewers has been implemented in general rules featuring the obligation to obtain a permit (see also Article 4.3 and Article 5.1, second paragraph, item c). As the term 'establishment' is not included in the Environment and Planning Act in favour of the term 'activity', a separate basis for the discharge of substances outside establishments is also removed; for this reason, the Orders in Council can also be integrated (in a larger cluster for general rules) and a single foundation for the discharge of substances is sufficient.

The Public Access to Environmental Information Directive, Directive on Public Participation in Respect of the Drawing up of Certain Plans and Programmes relating to the Environment and with regard to Public Participation and Access to Justice

The Public Access to Environmental Information Directive and the Directive on Public Participation in Respect of the Drawing up of Certain Plans and Programmes relating to the Environment and with regard to Public Participation and Access to Justice⁶⁵ provide for participation, access to information and access to the justice, in relation to the environment. The idea behind the directives is also developed, in part, in other EU Directives.

Implementation in current legislation

In the Netherlands, the directives are partially implemented in the Government Information Act (WOB), partially in the General Administrative Law Act, and also, until now, partially in the Environmental Management Act: Article 4.1a declares that Section 3.4 of the General Administrative Law Act shall apply accordingly to plans and programmes (from the directive) unless other specific rules are applicable; Article 4.1b declares that this procedure does not apply to the plan EIA and the Groundwater Directive, as the EIA procedure already applies here.

Implementation in the legislative bill

Chapter 21 of the legislative bill is reserved for stipulations relating to the provision of environmental information to the public. These provisions will be transferred from the Environmental Management Act at a later stage. In addition to this, by virtue of Section 16.3, the implementation regulations should indicate the cases in which the Aarhus Convention and the directive listed above for the implementation of that convention are applicable. The standard public preparation procedure from Section 3.4 of the General Administrative Law Act should be explained, so that Article 4.1 of the Environmental Management Act is implemented.

It is also a stipulation for programmes, the physical environment plan and the project decision that the standard public preparation procedure from Section 3.4 of the General Administrative Law Act applies.

The Seveso Directive

The purpose of the Seveso Directive (2012/18/EU) is to prevent major accidents involving hazardous substances and to limit the consequences of such accidents to human health and the environment.

The Directive stipulates that the member states must ensure that the operator takes all necessary measures to prevent major accidents and to limit the consequences of such accidents to human health and the environment. The Directive stipulates that the member states should take into account the necessity of ensuring that there is sufficient distance between vulnerable areas (such as densely populated areas and nature conservation areas) and companies that pose a threat to the physical environment through the presence of hazardous substances.

Implementation in current legislation

The Seveso Directive is implemented in the Netherlands in the Order in Council on the Risk of Major Accidents 1999 (Brzo), the Order in Council on the External Safety of Installations (Bevi) and the Safety Regions Act.

The Order in Council on the Risk of Major Accidents contains general rules aimed at the operator of activities dealing with certain hazardous materials in certain quantities. These rules relate to meeting management measures in order to prevent major accidents and to periodically providing the competent authority with a safety report, which it will subsequently assess and publish. The Order in Council on the Risk of Major Accidents incorporates regulations in the field of occupational safety, external safety and disaster relief in one legal framework. The intention is to prevent and manage major accidents involving hazardous substances.

The Order in Council on the External Safety of Installations is aimed at authorities that practise powers that could influence external safety, such as providing an environmental permit for

⁶⁵ Directive 2003/35/EC from the European Parliament and Council of 26 May 2003 on public participation in respect of the drawing up of certain plans and programmes relating to the environment and with regard to public participation and access to justice, amending Council Directives 85/337/EEC and 96/61/EC (OJEU 2003, L L156).

companies that work with hazardous substances and decisions that provide for spatial developments in the surroundings of such companies. The Order in Council on the External Safety of Installations contains environmental quality requirements in the field of external safety. These requirements form a benchmark that can be used to assess the permissibility of companies that cause risks outside the company premises and the permissibility of spatial developments in the area of the company premises. These requirements relate to location-specific risk. In addition to this, the Order in Council contains rules for the consideration and responsibility of group risks.

Implementation in the legislative bill

Article 2.28, item b of the legislative bill stipulates that the State must establish instructional rules for the external safety risks involved in the storage, production, use and transportation of hazardous materials. In the order in council in which these instructional rules are laid down, the way in which they influence decisions by virtue of the legislative bill can be determined, as well as the way in which they are involved in the amendment of a physical environment plan or the establishment of a project decision. A similar foundation can be found in paragraph 5.1.3 regarding the establishment of assessment rules relating to awarding an environmental permit.

The Aarhus Convention

The Aarhus Convention came into being on 25 June 1998 in Aarhus. The convention is implemented in the EIA Directive, the Public Access to Environmental Information Directive and the Directive on Public Participation, amongst others (see paragraphs 0 and 0).

Implementation in current legislation

In the Netherlands, the directives are partially implemented in the Government Information Act (WOB), partially in the General Administrative Law Act, and, until now, also partially in the Environmental Management Act: Article 4.1a declares that Section 3.4 of the General Administrative Law Act shall apply accordingly to plans and programmes (from the directive) unless other specific rules are applicable; Article 4.1b declares that this procedure does not apply if the EIA procedure applies here.

Implementation in the legislative bill

Chapter 21 of the legislative bill is reserved for stipulations relating to the provision of environmental information to the public. These provisions will be transferred from the Environmental Management Act at a later stage. In addition to this, by virtue of Section 16.3, the cases shall be designated in which the Aarhus Convention and the directive listed above for the implementation of that convention are applicable. The standard public preparation procedure from Section 3.4 of the General Administrative Law Act should be explained, so that Article 4.1 of the Environmental Management Act is implemented. It is also a stipulation for programmes, the physical environment plan and the project decision that the standard public preparation procedure from Section 3.4 of the General Administrative Law Act applies.

The Granada Convention

The European Council's Granada Convention entered into force in the Netherlands on 1 June 1994. Its purpose is to protect and preserve architectural heritage so that it can be passed on to future generations as a frame of reference. Translated into the Dutch situation, heritage sites include monuments that have been built or construction, townscapes and village conservation areas and partially constructed cultural landscapes. The convention stipulates that architectural heritage sites that are to be protected should be identified and that legislation to protect these sites should be created, including suitable procedures relating to controls and approval. It also stipulates that measures designed to improve the physical environment in and around these heritage sites should be promoted, adequately enforced and an integrated policy aimed at preserving these sites should be promoted. The use and, if necessary, conversion of (protected) architectural heritage sites should be promoted and suitable structures for the provision of information, consultation and cooperation between the State, regional and local authorities, cultural institutions and societies and the public should be established.

Implementation in current legislation

In the current system, the Granada Convention is implemented via the Monuments and Historic Buildings Act 1988 (designation of nationally listed buildings, townscapes and village conservation areas), the Environmental Law (General Provisions) Act (permit systems and administrative enforcement), the Economic Offences Act (penal provision), the Spatial Planning Act (preservation of cultural heritage values via zoning plans and protection of world heritage sites via the Order in

Council on General Rules for Spatial planning , the Environmental Management Act (environmental impact assessment), the Housing Act (ability to give priority to requirements in the interests of the preservation of monuments above the stipulations of the Order in Council on Building 2012) and on a decentralised level, also via the provincial and municipal (heritage) regulations (assignment of municipal and provincial monuments and protected areas).

Implementation in the legislative bill

Most of the acts and the decentralised regulations listed above are included in the current legislative bill. As a result, the majority of the Granada Convention is implemented in or pursuant to the Environment and Planning Act. The assignment of national monuments will be governed by the proposed Heritage Act, which will incorporate the Monuments and Historic Buildings Act 1988 in so far as this doesn't lapse or revert to the present legislative bill. The criminal procedure will continue to be provided for by the Economic Offences Act.

The Valletta Convention

The purpose of the European Council's Valletta Convention (also known as the Malta Convention) is to protect archaeological heritage sites as a source of common European memory and as a tool for historical and scientific studies. The Convention provides for the establishment of a legal system regarding the identification of archaeological heritage sites, the designation of listed archaeological monuments and areas, the conservation and maintenance - preferably *in situ* - of archaeological heritage sites, the establishment of a reporting obligation for archaeological finds, the establishment of procedures for archaeological activities (the awarding of permits and supervision), the embedding of archaeology in spatial planning activities, the implementation of the principle that destruction must be paid for, the guarantee that work is carried out in a scientifically responsible manner by qualified and competent persons, the guarantee that environmental impact assessments and decisions that result from them take full account of archaeological sites and their context, and the introduction or modification of archaeological research, inventories and maps of archaeological sites.

Implementation in current legislation

The Valletta Convention is implemented via the Archaeological Conservation Act and the Order in Council on Archaeological Conservation. In doing so, amendments have been made to the Monuments and Historic Buildings Act 1988, the Earth Removal Act, the Environmental Management Act, the Housing Act, the Order in Council on Submission Requirements for the Request for Planning Permission and the Order in Council on Mining. These amendments are also reflected in the Environmental Law (General Provisions) Act and the Spatial Planning Act, primarily in the submission requirements for requesting planning permission for activities that may disrupt archaeological values, the requirements that in the interest of archaeological conservation could be associated with environmental permits, the safeguarding of the interests of archaeological conservation via zoning plans and land development. Requirements could also have been included in decentralised regulations in the interests of archaeological conservation.

Implementation in the legislative bill

Most of the acts and the decentralised regulations listed above are included in the current legislative bill, in so far as these are relevant. A number of specific provisions relating to archaeological conservation that are not directly or not exclusively related to the physical environment will end up in the proposed Heritage Act. This shall include the part of the Monuments and Historic Buildings Act 1988 that does not lapse or revert to the present legislative bill. It concerns the regulation regarding the designation of (archaeological) national monuments, the provision of subsidies, excavations, a reporting obligation for archaeological finds, the ownership of archaeological finds and archaeological depots.

In this way, the Heritage Act and the Environment and Planning Act are complementary and together guarantee the implementation of the Valletta Convention. The criminal procedure will continue to be provided for by the Economic Offences Act.

The World Heritage Convention

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention for the Protection of the World's Natural and Cultural Heritage (Treaty Series 1993, 6), also known as the World Heritage Convention, which was prepared on 16 November 1972 in Paris, entered into force in the Netherlands on 26 November 1992. The purpose of the convention is the identification, protection and conservation of cultural and natural world heritage sites, and to make these

accessible to future generations. The convention requires that member states fulfil these purposes in so far as the world heritage sites are located on their territory. They should also strive to give the world heritage sites a societal function and to integrate the protection of world heritage sites in spatial planning. The member states are obliged to report to the World Heritage Committee about legal and administrative provisions with which they have complied and other measures that they have taken in order to comply with the convention, and their experiences of these. The Operational Guidelines at the end of the convention contain the obligation to announce large-scale restorations and new spatial developments that may have an impact on the value of the world heritage site.

Implementation in current legislation

The World Heritage Convention is implemented in the current legal system via the Monuments and Historic Buildings Act 1988, the Environmental Law (General Provisions) Act, the Spatial Planning Act and the decentralised regulations. The protection of world heritage sites in the Netherlands is governed by the designation as a listed monument (on national, provincial or municipal level), as a protected townscape or village conservation area or other via the zoning plan, whether or not prescribed by the General Rules for Order in Councils on spatial planning.

Implementation in the legislative bill

Implementation shall take place mainly via the legislative bill. The designation of municipal or provincial monuments, protected townscapes or village conservation areas and the zoning plans will, in any case, be transferred to the Environment and Planning Act. Soon, only the assignment of national monuments will be governed by the proposed Heritage Act, which will incorporate the Monuments and Historic Buildings Act 1988 in so far as this doesn't lapse or revert to the present legislative bill.

The Bathing Water Quality Directive

The purpose of the Bathing Water Quality Directive (2006/7/EC) is to preserve, protect and improve the quality of bathing water (inland and coastal waters) and to protect human health.

Implementation in current legislation

The directive is, for the most part, implemented in the Swimming Facilities Hygiene and Safety Act (Whvbz) and implementation regulations. In addition, the Water Act and associated implementation regulations also contain provisions for the implementation.

Implementation in the legislative bill

The premises from the Swimming Facilities Hygiene and Safety Act, the Water Act and implementation regulations have been incorporated into the Environment and Planning Act and implementation regulations. The Swimming Facilities Hygiene and Safety Act is mainly developed in Chapters 2 and 4 of the legislative bill. The proposed Article 4.27 is not based on the Bathing Water Quality Directive, but on national law. In chapter 2 (especially Articles 2.18, first paragraph, item d, point 3°, 2.30 and 2.38), the distribution of powers is laid down and a foundation for the management of swimming facilities is laid down. This includes: the distribution of assigned bathing sites into quality classes, the management of bathing water quality, the power to designate bathing water and bathing sites (to the Provincial Executive), the power to issue a no-swimming recommendation for bathing waters or bathing sites if there is reason to do so on the grounds of hygiene or safety, the establishment of a schedule for the use of bathing sites (bathing season). Article 4.3, first paragraph, introduction, point g provides the foundation for general rules relating to hygiene and safety for swimming and bathing. Article 10.10 relates to the duty to tolerate if signs are installed (to inform the public about the quality of bathing waters). Article 16.24 of the legislative bill lays down that the designation of bathing water and bathing sites is carried out pursuant to Section 3.4 of the General Administrative Law Act. Chapter 20 contains the basis for recording and collecting data about bathing water and bathing sites and informing the public (especially Article 20.11, item d, and Article 20.13).

The Swimming Facilities Hygiene and Safety Act is being updated parallel to the Environment and Planning Act on the basis of the premises from the Environment and Planning Act, and incorporated in the implementation regulations.

Glossary

This glossary ties in with the glossary in the Annex to the legislative bill and the list included there containing abbreviated names for EU regulations, directives, decrees and international treaties. The following words and terms are used in this Explanatory Memorandum but not in the Annex to the legislative bill. Terms that are described in the articles of the legislative bill are included.

Term	Description
General rule	A rule that is applicable to everyone (a generally binding regulation that does not exclusively apply to administrative bodies).
General government regulation	A regulation that is applicable by means of an order in council or ministerial order.
General duty of care	An obligation for everyone to take sufficient care for the physical environment and, in so far as it can be reasonably expected, to prevent negative effects arising from their activities, or in so far as those effects cannot be prevented, to limit or remedy those effects as much as possible, or if that is also not possible, to refrain from those activities (Section 1.3).
Principle of conferral (EU)	The European Union can only form a policy or regulations if there is a legal basis to do so in one of the treaties.
Management	A special task or group of tasks, arising from a statutory regulation in connection with an order of precedence, in order to bring one or more specified concrete objects or areas to a pre-determined quality level or to ensure that this level is maintained (including recovery) and to supervise any possible use by individuals and businesses through the application of appropriate powers and measures.
Assessment rule	A rule relating to granting or refusing to grant an environmental permit, including rules regarding the justification of the decision to grant or refuse a permit (Article 5.17).
Outcome-oriented regulation	A stipulation that indicates the outcome that needs to be achieved, whereby it is up to the initiator to decide which measures it will use to achieve that outcome.
Physical environment	Comprises components such as structures, infrastructure, water systems, water, soil, air, landscapes, nature and cultural heritage (Article 1.2).
Area-specific, location-specific	Relating to activities that take place within an area or in a fixed location (and thereby not relating to activities that move freely across the territory such as vehicles and products).
Use	The use of the physical environment by people.
Usable area	The judicial area available within a region for activities in the physical environment.
Decentralised unitary state	The Dutch form of government, in which territorial entities within a unitary state have independent powers. The State is responsible for legislation and supervision of the entity. In addition to this, there are decentralised layers of administration. Each layer of administration has its own tasks, responsibilities and powers. Decentralised authorities are obliged to implement State regulations at a higher level (the obligation to cooperate).
Territory	The area over which an administrative body has jurisdiction. Where relevant, this can also refer to the exclusive economic zone, where the Netherlands has limited jurisdiction.
Substitution	Making a decision or carrying out a task in cases in which the administrative body is not able to do so or not able to do so properly by virtue of a statutory regulation.
Instruction	An instruction to another administrative body regarding performing a duty or exercising a power if that is necessary in terms of an even distribution of functions at sites or in order to achieve coherent and effective water management (Articles 2.33 and 2.34).
Instructional rule	A rule relating to the performance of a duty or exercising of a power by an administrative body (Articles 2.22 and 2.24).

Term	Description
Intrinsic value	The value that something has in itself, separate from the possibilities for use.
IPPC installation	An installation as referred to in Annex I of the Industrial Emissions Directive.
Ledger	A document that describes the requirements for water management structures in terms of location, shape, dimensions and construction (Article 2.39).
Level playing field	A principle of fairness, involving the same rules applying to everyone under the same circumstances.
Site	Part of the territory of a municipality, water board, province or the Netherlands, which is delineated through geographical positioning.
Location-specific	Not the same for the whole territory of an administrative body, so differing from site to site.
Measure	A decision as to whether to perform another action in order to achieve goals.
Situation-specific rules	General rules laid down by a municipality, water board or province, in addition to or by way of derogation from the general rules laid down by a province or the State (Article 4.6).
Situation-specific regulation	The decision through which the competent authority lays down the obligation to comply with regulations in addition to or by way of derogation from applicable general rules (Article 4.5).
Means-oriented regulation	A stipulation that indicates the means that must be applied by the initiator.
Environment	The physical environment, with regard to the interest of protecting people, animals, plants and goods, the protection and improvement of the quality of water, soil and air, climate control, the efficient management of waste substances and waste water and the economical use of energy and raw materials.
Environmental space	The usable area for environmental matters.
Physical environment plan	A plan containing the rules regarding the physical environment laid down by the municipal authorities. This always consists of a balanced assignment of functions to sites in the entire municipal territory, as well as the rules that are necessary for the purpose of ensuring this (Articles 2.4 and 4.2).
Environmental permit	The permission, on request, to perform one or more activities in the physical environment (Section 5.1).
Environmental regulation	A provincial regulation containing the rules relating to the physical environment (Article 2.6).
Environmental strategy	A policy document containing the broad outline of the proposed development, use, management, protection and preservation of the territory of an administrative body and the principal aspects of the entire policy to be pursued in relation to the physical environment (Article 3.2).
Environmental value	A benchmark for the state or quality of the physical environment or a part thereof, or the permissible burden caused by activities or by the concentration or deposition of substances in the physical environment of a part thereof, expressed in measurable or calculable units or in other objective terms (Article 2.9).
Participative approach	The involvement of stakeholders in the early stages of the decision-making process with regard to a project or activity.
Programme	An elaboration of the policy to be pursued or the development, use, management, protection or preservation, or measures to comply with one or more environmental values or to achieve one or more goals for the physical environment, for one or more parts of the physical environment (Article 3.4).
Project decision	A decision made by the State, a province or a water board in relation to carrying out a project and the operation or maintenance thereof (Article 5.42).
Register	A public source of factual information about the physical environment.

Term	Description
Seveso institution	The entire area managed by an operator, as referred to in Annex I of the Seveso Directive where hazardous materials are present in one or more installations, including collective or associated infrastructure or activities.
'Faster and better' approach	A working method for the preparation and construction of complex projects, based on the advice from the Committee for Faster DecisionMaking in Relation to Infrastructural Projects under the leadership of P. Elverding. Key features of the working method are an integrated, area-specific approach, broad participation from citizens, companies and organisations at an early stage, funnelled decision-making processes, a transparent budgetary framework and sensible determining of effects.
Subsidiary principle	The foundation for the way in which tasks are allocated to 'higher' and 'lower' public authorities. In a general sense, this involves 'higher' authorities not having to carry out tasks that could be taken care of by 'lower' authorities.
Review framework	The entirety of the legislation and policy rules that apply to an administrative body for the decision-making process.
Implementation regulations	Orders in council and ministerial orders laid down by or pursuant to the Environment and Planning Act.
Preference Decision	A decision due to exploration of the development procedure. The preference decision can involve: a) the execution of a project, b) a solution without a project, c) a combination of elements a or b and the execution of other projects, or d) choosing not to develop a solution (Article 5.47).
VTH tasks	Tasks relating to the awarding of permits, supervision and enforcement.
water board regulation	A regulation laid down by the water board containing the rules relating to water management(Article 2.5).