The Environment & Planning Act

OUR INSIGHTS

DLA PIPER

Contents

Part 1: General Framework

1. Introduction

The Environment & Planning Act (*De Omgevingswet*), will enter into force on 1 January 2024. The DLA Piper Environmental Planning and Administrative law team has prepared a paper providing relevant insights to this new legislation.

At a time when the climate crisis and biodiversity crisis demand more attention to the living environment than ever, a complete overhaul of all regulations affecting it is very radical. The Environment & Planning Act provides a new set of instruments to respond to these crises, but also sets the framework for all existing and new projects such as area and property development, industrial activities and renewable energy projects.

It provides a high-level overview of the Environment & Planning Act, serving as a practical booklet. It follows a logical structure similar to the structure provided by the Environment & Planning Act itself, starting off with the General Framework, followed by the various Instruments. After which it will discuss Enforcement and Judicial Protection. This forms the general section of the paper. The chapters will discuss more specific aspects such as provisions regarding Sustainability and the Environment included within the Environment & Planning Act, applicable Transitionary Law, Land Policy and Compensation, ending with the Experimental provisions, Innovation and Digitalization. Finally, the legislator has provided four extensions to the Environment & Planning Act in the shape of Environmental Decrees (*Algemene Maatregelen van Bestuur*). The final section of the paper will discuss the Environment Buildings Decree (*Besluit Bouwwerken Leefomgeving*), Environmental Activities Decree (*Besluit Activiteiten leefomgeving*), Environmental Quality Decree (*Besluit Kwaliteit leefomgeving*) and the Environment (and Planning) Decree (*Omgevingsbesluit*).

This paper includes a list of definitions with Dutch to English translations of the new/specific terminology of the Environment & Planning Act. The DLA Piper team has spent years preparing for this new legislation and is well equipped to offer legal services to answer questions and address issues related to the Environment & Planning Act.

2. Purpose and system

HISTORY AND BACKGROUND

The Environment & Planning Act is the largest legislative project since the introduction of the Dutch constitution (*Grondwet*) in 1814. The new Environment & Planning Act is a total overhaul of the current planning and environmental legal framework. This new concept was first introduced in 2010 – as a response to mitigate the effects of the financial and real estate crisis – to boost urban developments in the Netherlands.
The Environment & Planning Act was adopted in 2015 by the House of Parliament (*Tweede Kamer*) and was adopted in 2016 by the Senate (*Eerste Kamer*).
The Environment & Planning Act was officially published in the official state gazette (*Staatsblad*) on 26 April 2016.
The Environment & Planning Act will enter into force as of 1 January 2024. The introduction of the Environment & Planning Act has often been postponed because of several implementation issues regarding IT, high costs and issues of the competent authorities with implementing the new law.

GENERAL GOAL OF THE ENVIRONMENT & PLANNING ACT

The intention of the Environment & Planning Act is to simplify the current legal framework by integrating different (zoning and environmental) laws and decrees into one cohesive (environment) act. The different elements that might influence any spatial development (for example, the environment, water and waste management, soil pollution, air quality and spatial planning) were divided over separate laws. This made a coherent reading and understanding of all these (interlinked yet) separate laws for new developments complex and scattered.

In light of this envisaged "one stop shop" approach, the framework of the Environment & Planning Act is founded on rules regarding the "physical living environment" (*fysieke leefomgeving*). The Environment & Planning Act aims to include all aspects that are relevant for the physical living environment (e.g. buildings, infrastructure, water systems, water, soil, air, landscapes, nature and cultural (world) heritage). The policy goals on which the Act rests underline the importance of aspects such as public health and the wellbeing of the environment. The Environment & Planning Act also aims – by virtue of the concept of the "physical living environment" – to promote/facilitate sustainable development using a broader rationale. The Environment & Planning Act should improve sustainability and provide more possibilities for the initiators, instead of (only) imposed plans/rules of the government (*uitnodigingsplanologie*).

The actual goals/aims of the lawmaker are:

(a) improving the understandability, predictability and use of the environmental laws;

(b) implementing a coherent and integral approach of the physical living environment in policy, legislation and decision-making;

(c) improving the discretional powers of the governmental review and decision-making (scrutiny) via an active and flexible approach to achieve the goals for the physical living environment; and

(d) speeding up and improving the decision-making process regarding projects in the physical living environment.

This new attitude towards an integrated planning and environmental approach is seen as a change of "paradigm" (*paradigmawisseling*) in thinking about planning and environment law.

The Environment & Planning Act is still subject of societal debate. Especially, given the issues regarding the implementation. Scholars have indicated that this legislative project is too complicated and that it is even questionable whether this law is required to achieve the envisaged goals, if these can even be met by this new law. It is therefore doubtful whether this new law will actually achieve its goals and whether this new legislation will not result in an even more difficult legal framework. This besides from all the implementation issues that are expected due to IT and the size of this legislative project, but time will tell whether these critical comments will or have become reality.

3. Legal framework of the Environment & Planning Act

INTRODUCTION

The new legal framework consist of the Environment & Planning Act itself and four governmental (environmental) decrees: the Environment (and Planning) Decree, the Environmental Activities Decree, the Environment Buildings Decree, and the Environmental Quality Decree. These (national) decrees contain rules on procedural aspects, rules on the activities within the physical living environment aimed at stakeholders and citizens, and rules for the authorities, respectively. Additional rules may be set by the province(s) and the Water Board(s) in their regulations. We refer to the flowchart below:

LEGISLATIVE GOALS AND SCOPE

The Environment & Planning Act sets – in deviation of its predecessors – legislative goals (Article 1.3 Environment & Planning Act):

"The goal of the Environment & Planning Act is – with the aim of sustainable development, liveability of the land/country and the protection, improvement of the environment and the achievement of a balance and coherence between: (i) a safe and healthy physical living environment and a good environmental quality also in light of the intrinsic values of nature; and (ii) efficient management, use, and development of the physical living environment in order to achieve the societal needs."

The Environment & Planning Act is only aimed towards the "physical living environment" and explicitly excludes related specialized laws that separately deal with topics like public order and market regulations (Article 1.4 Environment & Planning Act).

FLEXIBILITY, ENVIRONMENTAL VALUES, PROGRAMS AND DECENTRALIZATION

The Environment & Planning Act aims to transfer more power(s) to the local authorities to achieve more customization/flexibility (decentralization). The basic idea being; "the municipality is allowed to set rules, unless" ("*decentraal, tenzij*"). In line with the higher level of flexibility offered to the municipality, this encompasses more flexibility in setting the rules of the Environmental Plan as well as in the decision-making process originating from it. However, there is no total decentralization of powers to the municipality.
In some cases, the regulations are still set out at a national or provincial level. The delineation depends mainly on the central government and the provinces, which themselves can draw subjects to themselves.
We also note that certain stipulations/standards (solely related to European Law obligations) have to be implemented by virtue of law (*krachtens de wet*), as laid down in the Environmental Quality Decree and the Environment Buildings Decree.

However, on the whole, municipalities are allowed to set rules on a local level. Based on the policies set out by the authorities, as laid down in their Program (*Programma*), and translated into Environmental Values (*Omgevingswaarden*) and goals (*doelstellingen*), rules/policy goals are set out by the municipality. This is how municipalities create their own assessment framework. To achieve a good physical living environment, the Environment & Planning Act offers authorities a variety of instruments.

4. Responsibilities and powers of administrative bodies

INTRODUCTION AND STAKEHOLDERS

The Environment & Planning Act rethinks the various stakeholder roles and responsibilities. Three groups of stakeholders can be distinguished: citizens, businesses and the government. Citizens are primarily seen as the users of the physical living environment. They're also participants in its development. Many citizens also own parts of the physical living environment. Businesses, similarly to citizens, are users of the living environment. They're also initiators of new activities and responsible parties for conducted activities. Businesses have an important role as recipients and implementers of government policy. The Environment & Planning Act assigns two important roles to the government: ensuring quality and providing room for developments.

ALLOCATION OF RESPONSIBILITIES WITHIN THE GOVERNMENT

The subsidiarity (*subsidiariteit*) principle applies within the government, meaning that tasks are the municipality's responsibility (local), unless (*decentral, tenzij*) they are a province's or the state's responsibility (centralized) due to their respective individual interests (Article 2.3 Environment & Planning Act). The principle of least burdensome intervention (*beginsel van de minst belastende interventie*) (Article 2.3 (3) Environment & Planning Act) prescribes how responsibilities can be used, e.g. leaving as much room for administrative discretion as possible to municipalities when laying down instruction rules. The various governmental levels should respect this allocation of duties and consult each other when conducting tasks. To this extent, the Environment & Planning Act continues the current system. The provinces and state can only carry out tasks if the relevant interest cannot be served efficiently and effectively by a 'lower' (more local) authority.

Regarding the clarity of rules for citizens and businesses, the basic principle is that a subject may only be regulated in no more than two places. This is to prevent having to search for applicable rules in too many different (types and levels of) regulations.

INSTRUCTIONS AND INSTRUCTION RULES

Under the Environment & Planning Act, Instruction rules may be set (*Instructieregels*). These are mutual rules between authorities that occur at various levels. For generally binding regulations, authorities can issue instructions to their own and 'lower' administrative bodies. These rules are directed towards administrative bodies and not towards citizens and businesses. Instruction rules are, firstly, rules that determine the application of a certain power. Additionally, instruction rules can stipulate Environmental Values, which must be applied by the administrative bodies. In addition to instruction rules, a province and the state may issue instructions. These are not general rules that can be applied repeatedly, but decisions for one-off application in a specific case. Such decisions aim to ensure that other administrative bodies pay sufficient attention to a specific interest.

SUPERVISION

If instructions are neglected, a province can adopt a 'substitution decree' (*plaatsvervangend besluit*). This means that the province itself adopts the decision that the municipality has failed to adopt. This power already exists in the current system but is rarely applied. Equally exceptional is the option for a province to ask the Crown (*De Kroon*) to annul a municipality decision.

The concept known under the previous legal system as the 'reactive designation' (*reactieve aanwijzing*) returns under the Environment & Planning Act. Provinces and the central government have an option to resist the entry into force of parts of an Environmental Plan (*Omgevingsplan*) if it conflicts with their own respective policies.

5. Values, strategies and programs

INTRODUCTION

Under the Environment & Planning Act, policies are set out by the authorities through their Environmental Strategies (*Omgevingsvisies*). These convey Programs and are drafted into Environmental Values (*Omgevingswaarden*). These Programs and Environmental Values are new (policy) instruments introduced under the Environment & Planning Act to achieve a good physical living environment.

Environmental values can, for instance, set a specific allowed level of sound or emissions. To prevent surpassing maximum levels, a duty can arise for the municipality to set a "Program" (*Programmaplicht*) preventing the Environmental Value from being exceeded. Despite the fact that neither the Environmental Value or the Programs are directly legally binding for stakeholders and citizens, it will influence the decisions made by the municipalities in allowing certain activities within certain areas, and even allowing permits. They're binding to the authority who has set them.

ENVIRONMENTAL VALUES

Environmental values are a (reasonably concrete) measure of the desired condition, or quality, of the physical living environment, or permitted burden/contribution/concentration of substances. Found in Chapter 2 of the Environment and Planning Act. It is characterized by a measurable or computable unit or otherwise in objective terms (Article 2.9).

They are directed and binding to the governmental body who set the values, being the municipality, province or State. They are adopted through Environmental Plan in case of the municipality, Environmental Regulation in case of the province or by Governmental (Environmental) Decree in case of the State (Articles 2.11, 2.12, 2.14). In some instances, the State and the province are obliged to determine the Environmental Value, instead of the municipality (Articles 2.13 and 2.15).

The environment value is monitored to see whether it is being met (Article 20.1). Furthermore, it requires a location determination/designation (Article 2.10 (1)) and may potentially set a term/time period (Article 2.10 (2)) and finally it substantiate which competences are used to achieve the values (Article 2.10 (3)).

Environmental Values can be obligations of result, best efforts obligations or some other type of obligation. They can be divided in three groups:

(a) object-oriented Environmental Values such as the "chance/risk," such as "the risk of flood";

(b) environmental values for an entire (wider) country, such as, measurable units like nitrogen emission; and

(c) objective qualitative Environmental Values, setting clear standards about the qualities of a particular object/area, such as a habitat.

ENVIRONMENTAL STRATEGIES

Environmental strategies are a core policy instrument of the Environment & Planning Act, containing the challenges found within the physical living environment and a strategy as for how to resolve them. The environmental strategies are due 1 January 2024. They are established under chapter 3 of the Environment & Planning Act.

The Environmental Strategy is self-binding for the government drawing it up, meaning they are (legally) bound to it. Made by either the Central government, provinces or municipalities (Article 3.1), each of these governmental layers construes one single all including strategy. They describe what occurs in one area of the physical living environment in conjunction with other parts. (Examples of such areas are: soil, water, air, infrastructure, housing. However, the strategy is broader: social themes, cultural heritage, health and safety). Despite the fact that these strategies are form-free, they are subjected to conditions.

The strategies (must) entail the following:

(a) The EU-environmental precautionary, preventive and the polluter pays principle are embedded in the Environmental Strategy (Article 3.3).

(b) The quality of the physical living environment is included, and in particular the way in which it will be managed and used (Article 3.2)

(c) The objectives set by the municipality and how to achieve them.

The strategies give substance to the social objectives of the Environment & Planning Act (Article 2.1 (1) and Article 3.2). Consequently, they are all worked out in the more binding instrument used by the government that established the Environmental Strategy, e.g. for a municipality this would be an Environmental Plan.

The Environmental Strategy, having its own place in the policy cycle, is continuously amended to fit the status quo of the physical living environment through a process of evaluation and monitoring. Furthermore, the strategies are subject to an Environmental Impact Assessment (*MER-plicht*).

When making an Environmental Strategy, the elaborate preparatory procedure (*uitgebreide voorbereidingsprocedure*) is followed. This means that after research is conducted, and after mandatory participation of the general public and other stakeholders, through application of section 3.4 of the General Administrative Law Act (*Algemene wet bestuursrecht* (Awb)), a draft strategy (*ontwerp visie*) is submitted for inspection. After consideration of all the views on the draft, it can be implemented.

PROGRAMS

Contrary to the Environmental Strategy, the Program is an implementation-oriented program, aiming to achieve an objective (or certain aspect of it) in a manageable/set timeframe. Programs can be established for an entire physical living environment, but also for the development of a specific area. It can also be used as an instrument for complying with Environmental Values. And can be divided into compulsory and non-compulsory Programs. It is found in Paragraph 3.2 of the Environment & Planning Act. It is self-binding to the government establishing it.

A Program is set for one or more aspects of the physical living environment, it will contain (Article 3.5) an elaboration of the policy to be pursued for the development, use, management, protection or preservation. Examples are measures to meet one or more Environmental Values or to achieve one or more other objectives for the physical living environment (Article 3.5). The elaborate preparatory procedure of section 3.4 of the General Administrative Law Act, as described above, is followed for the establishment of a Program too. Again, participation of the general public in the pre-phase is mandatory. There is no appeal possible against the final program, because the Program is self-binding. The Programs are subject to an Environmental Impact Assessment.

The Program is adopted by either the Municipal Executive (*College van B&W*), the general management of the Water Board (*Bestuur Waterschap*), the Provincial Executive (*Gedeputeerde Staten*), or the Minister of Infrastructure and Water Management (*Minister van IenW*), depending on which area/level it entails. The municipality (Article 3.6), the Water Board (Article 3.7), the province (Article 3.8) and the central government (Article 3.9) all have a mandatory obligation to set a Program. This is based on one of two things: either for it is an implementation of an EU-guideline (*EU Richtlijnprogramma*), such as a Program including a Natura-2000 area management plan. Or it is meant to prevent the (potential) exceedance of an Environmental Value (*Omgevingswaardeprogramma*). Despite the fact that several (levels) of governments (local, provincial, central) may set Programs, in principle, it is always the municipality who is obliged to draft a Program when any – no matter at what level it was established – Environmental Value is (potentially) exceeded (Articles 3.10 and 3.12). This follows from monitoring the Environmental Value (Article 3.11). The Program itself is also monitored and might be subject to amendment too (Article 3.11).

Other than the above, there is also a "Voluntary" Program. Despite its name, a Voluntary Program is also self-binding to the government that sets it (Article 3.18). It is a Program that contains measures to meet an Environmental Value or other objective for the physical living environment, which is established in a material decision standard, on the basis of which, in a specific area, control is also taken of activities that are still permitted (paragraph 3.2.4). Examples of Voluntary programs are the municipal sewage program (*gemeentelijk rioleringsprogramma*) (Article 3.14) and the layout plan (*inrichtingsprogramma*) (Article 3.14a). The Voluntary Program can be part of an Environmental Plan/environmental regulation/decree, and a framework against which the admissibility of – for instance – a permit might be tested. The Voluntary Program regards the use of space and the permissibility of a certain activity performed within a certain area and within a certain timeframe (Article 3.17).

Part 2: Instruments

6. General rules on activities within the physical living environment

INTRODUCTIONS: THE PHYSICAL LIVING ENVIRONMENT

The basic principle of the Environment & Planning Act is that decentralized authorities must bring together their rules on the physical living environment in an area-wide regulation.

Article 1.2 of the Environment & Planning Act introduces that rules may be set on behalf of the Physical Living Environment (*fysieke leefomgeving*) and activities that affect or may affect the physical living environment. The physical living environment includes buildings, infrastructure, water systems, water, soil, air, landscapes, nature, cultural heritage and world heritage. Article 1.2 is consistent with the approach used in the Aarhus Convention. This convention systematically distinguishes between, as far as relevant here: the state of the elements of the environment, such as air, water, soil, landscapes and natural areas, activities that affect or may affect the elements of the environment, and the state of human health and safety and human living conditions, insofar as they are or may be affected by the state of the elements of the environment or, through those elements. This threefold division from the convention is also reflected in the structure of Article 1.2.

Impacts on the physical living environment include consequences that can result from: changing parts of the physical living environment or its use; the use of natural resources; activities that cause emissions, nuisance or risks; and failure to carry out activities. Impacts on the physical living environment also include impacts on humans, insofar as they are or may be affected by or through components of the physical living environment.

In comparison to old legislation, the Environment & Planning Act Act aims to remove the previously fragmented legislation on the subject of the Physical Living Environment (formerly often linked to the more limited concept of good spatial planning).

GENERAL GOVERNMENT REGULATIONS (GOVERNMENTAL DECREES)

To regulate the physical living environment, the Environment & Planning Act sets governmental regulations through four Governmental Decrees. These rules are both substantive and procedural and are introduced through Article 4.3 of the Environment & Planning Act.

Section 4.3.2 of the Environment & Planning Act indicates why these governmental regulations are necessary. They are often an elaboration of international obligations. This is also the reason why an activity requires a permit. In addition – in the area of construction – government regulations have been set with an eye to safety, health, sustainability and usability. Environmental regulations are set for the purpose of ensuring safety, protecting health and protecting and improving the quality of environmental media.

The general and procedural regulations are included in the Environmental Decree. This decree is aimed at both the government (as reviewing body) and citizens and businesses (applicant and performer of activities).

The other three decrees are more substantial, and contain the following:

(a) The Environmental Quality Decree contains a description of how the Environment & Planning Act should be dealt with and which environmental values should be involved in the assessment of activities. The decree focuses entirely on the government.

(b) The Environmental Activities Decree focuses entirely on citizens and businesses. The decree contains rules for permit-free activities in the physical living environment, in particular rules about Environmental Harmful Activity and water activity.

It is a merger and revision of 24 existing national regulations.

(c) The Environment Buildings Decree is aimed at citizens and businesses that are going to build, renovate, demolish or use buildings. The decree is broadly comparable to the Building Decree 2012 which it replaced.

Two instruments allow for deviation from the governmental regulations contained in these decrees. The first is customization. Secondly, an equivalence provision has also been included. Depending on the government regulation, it must be demonstrated beforehand or afterwards that the deviation from the government regulation produces an equivalent result. We refer to the section of this paper relating to customization.

Article 4.9 stipulates that the Municipal Executive is the competent authority for enforcing government regulations in the first instance when these apply to businesses and individuals. Articles 4.10, 4.11, 4.12 and 4.13 contain exceptions to this main rule. For example, the Water Board is the competent authority if it concerns water activity. The province is the competent authority if it concerns the activity of providing opportunities for swimming and bathing or bringing substances into the groundwater. The central government is the competent authority for the following activities (examples): environmentally harmful activities with national security interests, mining activities, excavation activities, activities in an economic exclusive zone, flora and fauna activities (including activities in a Natura 2000 area).

Finally, Article 4.13 regulates that if a governmental regulation is present and an environmental permit is also necessary, it must be avoided that several administrative bodies have to decide on an application. Article 4.13 stipulates that the administrative body that must decide on the application is also the competent authority for the national regulations. This applies to activities covered by the Industrial Emissions Directive (IED) and the Seveso Directive. In these cases, the province is the competent body.

FLEXIBILITY

One of the aims of the Environment & Planning Act is to increase the scope for administrative deliberation by enabling a flexible approach to achieving goals for the physical living environment. Reasons for this are: (1) the regional differences in the Netherlands and (2) the need for more space for initiatives. Flexibility is a wide term that consists of administrative discretion (*bestuurlijke afwegingsruimte*) on the one hand and room to manoeuvre (*handelingsruimte*) on the other. Room for administrative deliberation is the space that rules offer to administrative bodies in the exercise of their tasks and powers.

Both the room for administrative deliberation and the room for manoeuvre have been incorporated at three levels: (1) space in (general) rules, (2) area-specific customization and (3) individual customization. In addition, as a kind of safety net provision, there is the experimentation provision of Article 23.3, the successor to Article 2.4 of the Crisis and Recovery Act (CRA) (*Crisis- en herstelwet*). The precise elaboration of flexibility possibilities follows from the decrees.

USABLE SPACE

Usable space (*gebruiksruimte*) concerns another principle in the development of the new Environment & Planning Act and its accompanying decrees. A definition of "usable space" is not included in the text of the Act itself because it is not a legal instrument, but a policy concept.

According to the legislator, 'usable space' means the legal space available within an area for activities in the physical living environment. Within this space, activities are possible without jeopardizing any objectives or failing to comply with environmental values. Within the area of use, businesses, citizens and government must jointly ensure that the agreed environmental values remain within the set boundaries. The goal of the Environment & Planning Act is to prevent allocated but unused space from unnecessarily restricting new activities in the physical living environment. The Environment & Planning Act aims to achieve a better distribution of usable space so it is easier for new activities to take place without exceeding the usable space. Making (more) usable space can be achieved through e.g. Environmental Values, revoking permits, drafting Programs, Environmental plans and actualizing governmental regulations.

The concept of user space is not a new phenomenon. The legislator has drawn inspiration from the Crisis and Recovery Act. In Article 2.1 of CRA the concept of environmental space (*milieu gebruiksruimte*) is included. The concept of the environmental space in the Environment & Planning Act does not differ significantly from the environmental space in the CRA. The Environment & Planning Act has an integral character, the scope of the concept is larger and does not only relate to the environment. The Environment & Planning Act speaks of 'usable space' instead of 'environmental space.'

DUTY OF CARE AND BALANCING

The starting point of the Environment & Planning Act is the core concept of the physical living environment, which underlines the importance of nature. Everyone ought to take care of this physical living environment, pursuant to Article 1.6 of.

Due to this broad formulation, the (general) duty of care also extends to the Nature Network Netherlands. Another new element is the inclusion of a prohibition on performing an activity that may have significant adverse effects on the physical living environment. The cases are listed in Article 1.7a in conjunction with Article 1.3 of the Environmental Decree. For example, protected nature may not be neglected if it has or threatens to have significant adverse effects on the protected values. Violation of this prohibition can be enforced by criminal law.

For a number of subjects, the legislator has included a more specific duty of care. These specific duties of care take precedence over the general duty of care. The general duty of care also deviates if specific rules have been set for an activity (Article 1.8).

The Environment & Planning Act contains a number of specific duties of care (Article 4.3). In relation to nature, these relate to: Activities with possible effects on Natura 2000 areas or special national nature reserves (Article 11.6), Flora and Fauna activities (Article 11.27) and activities involving wood stands, wood and wood products.

An actor wishing to carry out an activity (e.g. a business wishing to expand) that may have a deteriorating or significantly adverse effect on such an area is required to investigate the conservation objectives for the areas concerned prior to that activity. This involves the following steps:

(a) Checking whether adverse effects on animal and plant species can be ruled out;

(b) Identifying adverse effects if exclusion is not possible;

(c) Appropriate preventive measures to avoid adverse effects;

(d) Stop/cease the activity or take remedial measures.

This duty of care applies to the permit requirement that applies to an activity.

Through balancing/netting (*salderen*), impacts within the activity or area itself are netted out. This involves mitigating the negative effects of an activity by taking a measure that has such a positive effect on the value(s) in question that on balance no negative effect occurs. By enabling balancing and compensation, room is offered for permitting activities that otherwise would not be carried out due to their negative impact on usable space. According to the legislator, rules must offer room for balancing and compensation.

Within the framework of the Environment & Planning Act, balancing and compensating are possible unless the rules (including international obligations) implicitly or explicitly exclude it. If an environmental value or policy objective applies to a certain subject, and no other instructional rules or assessment rules apply, the competent authority has every opportunity to allow balancing and compensation. In principle, the local government itself can make this possible. The basic rule is that no more value may be extracted than is being created.

ESTABLISHMENT TO ENVIRONMENTALLY HARMFUL ACTIVITY

The legislator has opted not to use the term 'establishment' (*inrichting*) as the point of reference for regulation in the Environment & Planning Act, but rather 'environmental harmful activity' (*milieubelastende activiteit (MBA)*). This change may result in activities that under former legislation were performed by different legal entities in close proximity to each other and which, under former law qualify as a single entity (a single establishment) no longer qualifying as a single entity under the Environment & Planning Act. For example, two chemical companies that currently form a single establishment/ facility may, under the Environment & Planning Act, consist of two or more environmentally harmful activities. Or, conversely, activities carried out in the vicinity of each other that do not currently qualify as a single entity (two or more establishments) may, under the Act, be regarded as a single entity – a single environmentally harmful activity.

INTERNATIONAL AND EUROPEAN LAW

In so far as the Environment & Planning Act does not provide for another basis for laying down rules, rules may be laid down by or pursuant to the four decrees for the implementation of obligations under international law which relate to or are connected with subjects to which the Environment & Planning Act applies (see Article 23.1 Environment & Planning Act). An amendment to a regulation, guideline or decree as referred to in Appendix B of the Environment & Planning Act, which is referred to in or by virtue of the Environment & Planning Act, takes precedence over the application of the Environment & Planning Act (Article 23.2 Environment & Planning Act).

7. Environmental plan

INTRODUCTION

The Environmental Plan is probably one of the most characteristic instruments introduced by the Environment & Planning Act. In it, government policymaking meets regulation for implementation by, mainly, the general public. The Environmental Plan constitutes an important part of the framework for activities to be undertaken. The Environmental Plan may be regarded as the successor to the Zoning Plan (*bestemmingsplan*), but with a wider scope.

The topics that are regulated in an Environmental Plan are determined by the responsibilities assigned to the municipality. In addition to their general task of allocating functions to locations – which will be discussed in more detail below – the municipality also has various specific tasks. These include responsibility for ground-, rain- and wastewater, public roads and noise control.

WHAT IS THE ENVIRONMENTAL PLAN

The Environmental Plan is a regulation, just like the Provincial Environmental Regulation (*Provinciale verordening*) and the Water Authority Regulation (*waterschapsverordening*). The Environmental Plan contains rules for specific locations, and the adoption of the plan is open to appeal.

A preparatory decision (*voorbereidingsbesluit*) may be issued prior to adoption of an Environmental Plan. In that case, provisions will be included in the current Environmental Plan to prevent obstruction of the plan (still) under preparation. The new plan has to be prepared via the uniform public preparatory procedure (*uniforme openbare voorbereidingsprocedure (UOV)*). After adoption, there's a two-week waiting period for the plan publication to provide the province the opportunity to intervene. It then enters into force four weeks after publication, unless a suspension was requested in that period.

The decision for adoption is taken by the Municipal Council (*gemeenteraad*). The Environmental Plan may provide that the Municipal Executive (*College van Burgemeester en Wethouders*) has the discretion to subsequently amend parts of the plan. Deviations from the Environmental Plan are possible by means of permits. If the deviations made by permits are (intended to be) permanent, they must be incorporated into the Environmental Plan within five years.

WHAT DOES THE ENVIRONMENTAL PLAN REGULATE

Every municipality must adopt a single Environmental Plan for its entire territory, containing all regulations governing the physical living environment. Unlike its predecessor, the Zoning Plan, of which multiple (often overlapping) plans could apply to the same area(s) within the municipal territory. The Environmental Plan concerns planning, but also subjects such as preservation of monuments, environment, health and more.

The Environmental Plan's content consists firstly of allocating functions to locations: a function is the role, task/responsibility or service of the location in question. A location is a three-dimensional point, place or object. An Environmental Plan may also contain Environmental Values, specific rules for (specific) activities, customization (*maatwerk*) and assessment rules (*beoordelingsregels*) for the granting of permits. Within the boundaries set by European and national law, the municipality has the liberty to decide on local customization wherever needed.

TRANSITIONAL LAW

As drawing up one single comprehensive plan for the entire municipal territory is a big effort, municipalities are not required to create one before the Environment & Planning Act enters into force. The existing regulations will become a "temporary Environmental Plan" consisting of three temporary parts:

(a) The first part consists of all existing Zoning Plans applicable to the full territory of the municipality that will, by operation of law (*van rechtswege*), be combined into one single (temporary) Environmental Plan.

(b) The second part constitutes all parts of local by-laws/ordinances (*verordeningen*) that pertain to the physical living environment.

(c) Finally, part of the regulations currently prescribed on a national level (applying to the territory) will be included in the Environmental Plan. The municipality will be the competent authority for these issues regulated in the plan and may amend them as it sees fit. This third part is called the 'dowry' (*bruidsschat*).

These three temporary parts must be replaced by a new (permanent) Environmental Plan no later than 1 January 2032. It is important to underline that when the Environmental Act enters into force on 1 January 2024 all pending procedures will still be completed under the old rules. All new procedures will have to be governed by the new rules.

8. Provincial environmental regulation

INTRODUCTION

Building on the policies set out by the provinces through their Environmental Strategies (in turn conveying Programs), and are translated into Environmental Values, to achieve a good physical living environment, the provinces are burdened with specific obligations and are required to construct one Provincial Environmental Regulation per province effectuating their strategy.

PROVINCIAL OBLIGATIONS

As laid down in Article 2.18 (1), the provinces are burdened with the following responsibility: the area-oriented coordination of tasks carried out by municipalities and Water Boards (Article 2.18 (1) sub a), preventing or limiting noise at sanctuaries/quiet areas (*stiltegebieden*) (Article 2.18 (1) sub b), protecting the quality of groundwater (Article 2.18 (1) sub c), the management and supervision of water systems (insofar these are bestowed on the province) (Article. 2.18 (1) sub d), bathing water management (*zwemwaterbeheer*) (Article 2.18 (1) sub d), prevent adverse consequences of activities related to infrastructure (Article 2.18 (1) sub e) and ensure its condition and functionality, controlling noise coming from roads and local railways and industrial estates (Articles 2.12a and 2.13a (1) sub a) They're also tasked with the conservation, restoration and care for animals, plants, habitats, and the Natura 2000 areas in general. They could be assigned with the management of regional waters (Article 2.18 (2)).

Each province constructs one single Environmental Regulation for the entire area, as is laid down in Article 2.6. The Environmental Regulation, includes:

(a) Direct and binding rules aimed at citizens, businesses and other stakeholders. Such as a licensing system;

(b) Rules for the executive management (*dagelijks bestuur*) binding to the province itself. An example of this is the Environmental Values; and

(c) Instruction rules about tasks of municipalities and Water Boards.

The rules embedded in the Provincial Environmental Regulations are aimed at the physical living environment) (Article 2.6). They are established by the Provincial Council (*Provinciale Staten*), but there is a partial delegation of responsibilities possible to the Provincial Executive (Article 2.8). As opposed to the Environmental Plan, the regulation only allocates functions to locations in exceptional circumstances, only where this cannot be done efficiently and effectively already with instructions (and instruction rules) (Article 2.22 (1) and Article 2.33 (1) read together with Article 4.2).

TRANSITIONARY LAW

There is no transitional law for existing Provincial ordinances that merge with the Provincial Environmental Regulations based on the Environmental Planning Act.

All provinces prepared the regulation prior to the entry into force of the Environment & Planning Act, immediately replacing the prior regulations.

RULES ON ACTIVITIES

When drafting rules on activities that have potential consequences for the physical living environment, Provincial Councils take into account the principle of subsidiary. In light of this, there are several types of rules that they can set to accomplish the given objective:

(a) practical regulations on measurements and calculations, for instance rules for activities of the Environmental Plan (Article 4.1 (2));

(b) rules on making a notification (*meldingsplicht*), prohibiting activities without notification (Article 4.4.(1));

(c) rules prohibiting activities without an Environmental Permit (Articles 4.4 (2) and 4.5 (1) and (2));

(d) custom-made regulations (*maatwerkvoorschriften*) and custom rules (*maatwerkregels*). Custom-made regulations and custom rules are only allowed if this has been determined by Environmental Regulation (Articles 4.1, 4.3, 4.5. and 4.6); and

(e) rules on equivalence (*regels over gelijkwaardigheid),* foresee in rules regarding the application of equivalent measure (*gelijkewaardige (maat)regel)* instead of the prescribed measures (Article 4.7).

PROCEDURAL ASPECTS

The procedure for drawing up an Environmental Regulation (Article 16.32) is subject to the section 3.4. of the General Administrative Law Act, the Uniform public preparatory procedure. As is standard practice for such procedures, it is possible to challenge the draft version of the Environmental Regulation when it is open for consultation (*zienswijze*) (Article 16.23 in combination with Article 16.22). However, no appeal can be made against the Environmental Regulation (Article 8:3 (1), General Administrative Law Act).

9. Environmental permit

INTRODUCTION

The Environment & Planning Act aims to introduce more general rules instead of prior and specific approvals (permits). This is to create more flexibility and deregulate environmental regulations as much as possible.
These general rules are laid down in the Environment & Planning Act itself and the four governmental decrees belonging to it: the Environment Buildings Decree, the Environmental Activities Decree, the Environmental Quality Decree and the Environment (and Planning) Decree. These (national) decrees contain rules on mere procedural aspects, rules on the activities within the physical living environment aimed at stakeholders and citizens, and rules for the authorities. In principle, most rules are found here.

LISTED ACTIVITIES THAT REQUIRE A PERMIT

The Environment & Planning Act will still include the obligation to obtain an Environmental Permit (*omgevingsvergunning)* for stipulated activities. It is prohibited to conduct these listed activities unless a permit is obtained. The activities are listed due to their environmental impact or due to European legislation. We note the difference between Article 5.1 (1) and (2) in this regard. In Article 5.1 (1) it is stipulated that a permit is obliged for these activities "unless" (*tenzij*) the relevant decrees stipulate otherwise. In Article 5.1, section 2 Environment & Planning Act is stipulated that a permit for these activities is only required to the extent (*voor zover*) these are specifically listed in the (relevant) decrees. The decrees should be reviewed to determine whether a permit obligation applies.

There should also be special attention in relation to the listed activity "Environmental Plan Activity" (*omgevingsplanactiviteit).* This refers to activities that are included in the (local/decentralized) Environmental Plan that – following the municipality – require a permit. These activities will be included in the Environmental Plan and the listing of such activities is to the discretion of the municipality.

We also note that specifically for the building activity a new distincion is introduced between the 'building activity' and the 'Environmental Plan Activity' ('de knip') meaning that these activities can be applied for seperately but also meaning that the competent authority will no longer intergrally assess these aspects as part of an environmental permit (i.e. to review whether the building plan is also in line with Environmental Plan). This responsibility is now with the applicant.

PERMIT APPLICATION

The current principle of a "one-stop-shop" remains. This means that one Environmental Permit can include several (required) activities for a project. The applicant has flexibility to choose which activities will be included in the permit application. Please note that for a water activity/water permit (*watervergunning*) an exemption applies. This activity should be requested separately. The application and the included activities therein will – in principle – determine the scope and process of the review by the competent authority. The principle of "insuperable coherence" (*onlosmakelijke samenhang)* will no longer be included in the Environment & Planning Act. This due to the fact in that the applicant determines for which activities and when it applies.

COMPETENT AUTHORITY

The competent authority for a single activity or multiple activities will in principle be the Municipal Executive of the relevant municipality, unless the Environment & Planning Act stipulates differently. In the event that different/multiple competent authorities are competent to review one of the requested activities, the entire (all activities) will be reviewed to determine which competent authority is best placed to review the application on the basis of the most significant activities (*magneetactiviteit*).

The competent authority that grants the permit will also be responsible for the supervision of the Environmental Permit after it is granted and all other related issues/steps (meaning: revoking, adjusting or enforcement of the permit).

APPLICATION PROCEDURE

The requirements for the application for the relevant activity are stipulated in the Environment & Planning Act and the relevant decree(s) and regulations. In principle the regular preparatory procedure (*reguliere procedure*) (eight weeks and possible (once time) extension of six weeks) will apply in relation to an application for an Environmental Permit. In certain exceptional and listed cases the elaborate preparatory procedure will apply.

APPLICATION REVIEW

The application will be reviewed on the basis of stipulated regulations in the relevant decree(s) and/or the Environmental Plan. This review can also consist of an integrity/KYC-check (*Bibob-toets*) and the newly aspect of "health" (*gezondheid*) will also be reviewed as part of the permit review.

THE ENTRY INTO FORCE OF AN ENVIRONMENTAL PERMIT

In general the Environmental Permit will enter into force one day after it is granted. In certain cases the Environmental Permit will – due to the adverse effects of the requested activities – enter into force after four weeks. The applicant can also jointly with the competent authority request to let the permit enter into force earlier (within the six-week appeal period). Please be aware of the possibility to file an injunction (*voorlopige voorziening*) which could further postpone the entry into force of the permit (soonest after a verdict on the injunction is received).

PERMIT HOLDER

Due to changes under the Environment & Planning Act an Environmental Permit could be related to a person/permit holder (*persoonsgebonden*) or to an object (*zaaksgebonden*). The Environment & Planning Act now provides the explicit possibility – in deviation of the general rule – to attach a permit to person/entity instead of an object. The Environment & Planning Act will also explicitly provide the possibility to attach the permit to multiple permit holders.

TRANSFERABILITY OF AN ENVIRONMENTAL PERMIT

The transfer of an Environmental Permit will not change. The (Administrative) Ascription (*wijziging tenaamstelling*) of a permit holder still needs to take place in the event of a transfer of the object to which the permit is attached. This can be done via a notification of the competent authority four weeks in advance of the transfer of the object to which the permit is attached.

10. Project decision

INTRODUCTION

The project decision (*projectbesluit*) is a governmental instrument which combines the required decisions making in one procedure to execute a complex project with a public interest (*publiek belang*) in respect of the physical living environment. The adoption of this instrument is – in principle – at the discretion of the competent authority (or upon request of private parties which execute a project with a public interest) but on some occasions – as laid down in the law – this procedure is mandatory (Article 5.46 and 9c (1) and Article 20a of the Electricity Act 1998; Article 39b (1) Gas Act and Article 141a of the Mining Act). This instrument replaces the Trace-decision (*tracébesluit*) the national planning decision (*inpassingingsplan*) and project plan under the Water Act, which were basically similar instruments. Municipalities can only use certain steps and aspects of this special procedure to amend the Environment Plan to serve public interests.
In certain cases the project decision cannot be used (Article 9.2 and 9.3 Building and Environment Decree) when such decisions relate to the core quality of the protected persevered national parks (*natuurnetwerk Nederland*) or to international protected cultural heritage.

The project decision can also include environmental permits (Article 13.3 Environment Decree) but can also be coordinate (*coördinatie uitvoeringsbesluiten*) and taken directly in conjunction with other permissions required for the project (Article 5.45).

AIM

The project decision is a specific instrument to facilitate the decision-making process for a large (infrastructural) project with a regional or national interest. In that sense this instrument will probably only be used for certain specific and limited projects.

The municipality cannot use this specifc instrument of the project decision.

PROCEDURE

In this context the project procedure (paragraph 5.2 of the Environment & Planning Act) prescribes the procedure that should be followed. This is a special procedure for this specific type of decision making. Depending on the (geographical) location of the project and the content (Articles 5.44 and 5.44a and 5.44b). The competent authority can delegate some of its powers in this context and the municipality can also use steps/aspects of the project decision for amending the Environment plan for a project of public interest.

The project decision consists of the following steps: (i) notification of intention (*kennisgeving voornemen*) regarding the project; (ii) notification of participation (*kennisgeving participatie*); (iii) analysis (*verkenning*); (iv) publication preferred decision *(voorkeursbeslissing*) (Article 16.36 Environment & Planning Act) and (vi) final project decision.

An Environmental Impact Assessment can be mandatory in relation to the preferred project decision and the final project decision (paragraph 16.4.2).

TRANSITIONARY LAW

An irrevocable Trace-decision will become a project decision by virtue of law (Article 4.47 Adoption Law Environment & Planning Act). The current/previous laws will remain applicable, if before the entering into force of the Environment & Planning Act a "start decision" has been taken, the analysis progressed significantly the project is listed by the government and within one year the draft decision will be published (Article 4.45 Adoption Law Environment & Planning Act).

Part 3: Enforcement and judicial protection

11. Judicial protection

APPLICABILITY PROCEDURES: REGULAR AND EXTENSIVE

Although the General Administrative Law Act will remain the starting point of procedural law, its applicability will differ from the current system in certain respects. The regular (section 4.1 General Administrative Law Act) and elaborate (section 3.4 General Administrative Law Act) procedure will continue to apply in the administrative decision-making, but the regular procedure is the starting point, and the extensive procedure will be the exception (Article 10.24 and Planning Decree).

The extensive procedure may in principle not be declared applicable to an application for an Environmental Permit (Article 16.62(3)). This is subject to the exception that certain cases concern an application for an Environmental Permit for an Environmental Plan activity outside the scope of the Environmental Plan (Article 16.65 Environment & Planning Act) or the applicant has explicitly requested or agreed to apply the extensive procedure (Article 16.65 (1)). There are also a number of specific cases in which the extensive procedure must be followed, even if it concerns the amendment or withdrawal of a decision.

SUSPENSION OF DECISION

If a decision on an application for a decision pursuant to the Environment & Planning Act or a decision to amend a decision cannot be made after an international obligation has been fulfilled, the term for making that decision is suspended (Article 16.77). For example, a notification must be made on the basis of an obligation under international law. Also, if compensatory measures need to be taken (following the Habitat Directive), the period for making a decision can be suspended during the period in which the applicant prepares their proposal for these measures. The period ends on the day the applicant submits its proposal, or when the period set by the competent authority has expired unused.

ENTRY INTO FORCE OF DECISIONS

An Environmental Plan will enter into force on the day that four weeks have elapsed since the day on which the decision has been made available for inspection in accordance with Section 3:44(1)(a) of the General Administrative Law Act, unless the Environmental Plan specifies a later date. A decision of Reactive intervention (*reactieve interventie*) as referred to in Article 16.21 will enter into force simultaneously with the Environmental Plan to which it relates.

A Project Decision will enter into force on the day that four weeks have elapsed since the day on which the decision has been made available for inspection in accordance with Article 3:44(1)(a) of the General Administrative Law Act. If the competent authority deems earlier entry into force necessary due to urgent circumstances, the competent authority may determine that the Project Decision will enter into force earlier.
In deviation from subsection 3, a project decision of the executive board of the Water Board will enter into force on the day on which four weeks have elapsed since the day on which the decision on approval was announced.

ENTRY INTO FORCE OF ENVIRONMENTAL PERMIT

An Environmental Permit will take effect from the day after the day on which:

(a) the permit has been published; or

(b) if the permit has been prepared with application of Section 3.4 of the General Administrative Law Act (the decision has been made available for public inspection in accordance with Section 3:44(1)(a) of the General Administrative Law Act).

The competent authority will provide in the Environmental Permit if it will enter into force on the day four weeks after the day of publication or public inspection if, in its opinion carrying out the activity enabled by the Environmental Permit within those four weeks may lead to a change in an existing situation that cannot be rectified/undone and the purpose of the rules regarding the granting of the Environmental Permit are to protect/conserve this existing situation.

If a request for an injunction is submitted to the competent court within the four-week period, the Environmental Permit will not take effect until a decision

has been given on the request. Interested parties whose interests are directly affected by the suspension may request the preliminary relief judge to lift or modify the suspension.

If the competent authority deems the earlier entry into force of an Environmental Permit necessary due to urgent circumstances, it may, in deviation from the above, determine that the decision will enter into force earlier and the suspension will (no longer) apply.

This regime applies *mutatis mutandis* to a decision to amend the requirements of an Environmental Permit or to withdraw an Environmental Permit.

APPEAL PROCEDURE PROJECT DECISION

The main rule is that decisions can be appealed. The administrative body that had made the decision must then decide again as a result of the objection. That decision can then be appealed to the court and the court's decision can be appealed to the Council of State. The time limits for lodging objections, appeals and appeals are always six weeks.

If a decision has been prepared using the extended procedure, objection is skipped and the decision can be appealed directly. For the larger and more far-reaching decisions, such as the amendment of the environmental plan, the court is also skipped and thus there is direct appeal to the Council of State.

In appeals against Project Decisions and decisions implementing Project Decisions, no grounds for appeal can be submitted after the expiry of the appeal period. Nor can grounds for appeal against decisions to implement project decisions be put forward that relate to the Project Decision on which they are based (Article 16.86). This would lead to more efficient dispute resolution and streamline and funnel the procedures.

On appeals against Project Decisions or against approval decisions (Article 16.72), the Council of State (*Afdeling bestuursrechtspraak Raad van State*) (the highest administrative court that is concerned with environmental cases) will decide within six months after receipt of the defence (Article 16.87). In special circumstances, the Council of State may deviate from this term by up to three months. On appeals against a decision to implement a Project Decision, where section 3.5 (related/coherent decisions) of the General Administrative Law Act is applicable, the Council of State will decide within six months.

12. Enforcement and control

GENERAL ENFORCEMENT

In a general sense, enforcement is centrally regulated in Chapter 18 of the Environment & Planning Act. The chapter contains rules on the enforcement of the provisions made by or under the Environment & Planning Act. The chapter assigns enforcement duties to administrative bodies and, in addition to the General Administrative Law Act, regulates a number of enforcement and supervisory powers. It also contains provisions on appointing supervisory officials (*toezichthoudende ambtenaren*). The vast majority of supervision and enforcement is and will continue to be regulated in the old way as under the General Administrative Law Act.

The Environment & Planning Act can be enforced not only administratively, but also criminally. Article 1a of the Economic Offenses Act (*Wet economische delicten*) provides that acting without a required environmental permit or in violation of the regulations is considered an economic offence.

Chapter 18 of the Environment & Planning Act contains Articles on the situations in which the competent authority can impose an administrative fine. These are:

(a) Environmental rules Seveso Directive (Article 18.11), this is a new power under the Environment & Planning Act;

(b) Rules on building, demolishing use and maintaining structures (Article 18.12);

(c) Heritage rules (*erfgoedregels*) (Article 18.13), this is also a new power under the Environment & Planning Act;

(d) Airport restriction area(s) (Article 18.14);

(e) Railroad restricted area(s) (Article 18.15); and

(f) Rules on trade in animals, plants, wood or products thereof (Article 18.15a).

The specific (enforcement) rules can be found in the Environmental Activities Decree and the Environment Buildings Decree. Evident/obvious rules are no longer written out in the regulations. Instead, each activity has a specific duty of care, which includes everything that is evidently harmful. Almost all activities covered by the Environment & Planning Act are subject to a specific duty of care. The exception is if it concerns a new construction (nieuwbouw) or a renovation (chapters 4 and 5). If the Environment Buildings Decree and/or the Environmental Activities Decree do not apply, a specific duty of care still applies on the basis of the Environmental Plan. The question of whether other regulations already exhaust the subject of discussion (and no duty or care applies) is no longer relevant.

ENVIRONMENTAL ACTIVITIES DECREE

Under the Environmental Activities Decree, the enforcement and supervision regulations apply to "the person performing the activity." This is anyone who can start, stop or change an activity. This person is also liable for the behaviour of employees and executing companies. In practice, this is usually the person who has submitted a notification or an application – or holds the permit/permissions.

ENVIRONMENT BUILDINGS DECREE

With regard to the Environment Buildings Decree, because this concerns only an existing building and the safety, health, durability and usability associated with it, here it is often the owner of the structure or the person who for other reasons is authorized to make provisions on that structure to whom the enforcement and supervision relates. In other cases, the rules may apply to "the person who builds the building, the person who rebuilds or moves the building or changes its use function, the person who uses the building and the person who performs construction or demolition work."

TRANSITIONAL LAW

All ongoing enforcement cases are handled in accordance with the old law.

The schedule below illustrates the relation between the various enforcement and supervision rules (e.g. the Environment Buildings Decree being a centralized General rule, and the Environmental Plan forming a basis for the duty of care).

13. Participation

INTRODUCTION

One of the concepts central to the Environment & Planning Act is "participation" (*participatie*). This means the idea that the government and the citizen should be closer to each other, and citizens are to become more involved in decision-making, are involved earlier, and as a consequence there is more public support for developments. All this aims to benefit the decisions. According to the legislator, proper participation of third parties in the policy or decision-making process will ensure that input from society is taken into account throughout the process, that any initiatives from society are treated with the same care as government initiatives, and that participation takes place in a transparent manner. Furthermore, it guarantees a continuous dialogue and early insight into the interests of third parties.

PROCEDURE

No participation procedure is prescribed. However, the Environment & Planning Act does provide an obligation to justify how participation has taken place. Pursuant to Articles 10.7, 10.8 and 10.2 of the Environmental Decree, an Environmental Strategy, a Program or an Environmental Plan must stipulate how citizens, businesses, social organizations and administrative bodies were involved in the preparation and what the results were. The manner in which the applicable (decentralized) participation policy has been implemented must also be indicated. Participation takes place taking into account the following steps:

(a) Notification requirement: in a notification, the competent authority describes who/which parties will be involved, what the (expected) issue is and when it will take place, what the role of the competent authority and the initiator is and where more information will be available for those interested.

(b) Requirement to state reasons: the competent authority indicates with the decision how citizens, companies, civil society organizations and administrative bodies have been involved in the preparation and what the results are.

(c) Application requirement: the initiator must indicate whether, and if so how, he has organized participation and what he has done with the results.

PARTICIPATION ENVIRONMENTAL PLAN

Article 16.29 of the Environmental Act specifically provides that the intention to adopt an Environmental Plan must be announced in one or more (daily) newspapers or door-to-door newspapers, or in another suitable (electronic) manner. Article 10.2 of the Environmental Decree stipulates that the manner in which citizens, businesses, social organizations and administrative bodies will be involved in the preparation of the plan must also be clearly indicated.

PARTICIPATION ENVIRONMENTAL PERMIT

In accordance with Article 16.55 (6) of the Environmental Act and Article 7.4 of the Environmental Decree, the initiator of an Environmental Permit must indicate whether and, if so, how consultation with interested parties took place. In addition, it must be described what has been done with the results of the consultation. In principle, participation in the application for an Environmental Permit is not compulsory. It is also up to the initiator whether and how they implement the participation process. However, pursuant to Article 16.55 (7) of the Environmental Act, the Municipal Council may designate cases of activities in which participation of, and consultation with, third parties is mandatory before an application for an Environmental Permit for an activity for which the Municipal Executive is the competent authority can be submitted.

PARTICIPATION PROJECT DECISION

The exploration phase is an important part of the Project Decision. The exploratory phase is carried out with the participation of citizens, businesses, organizations and involved administrative bodies. The procedure is regulated in Article 5.47 and Article 5.3 of the Environment Decree. At the start of the study on behalf of the Project Decision, the relevant authority will notify the participation and state whether or not a Preferential Decision (*voorkeursbeslissing*) will be taken. The notification of participation must in any case include the following information:

(a) who will be involved in the project procedure;

(b) what they will be involved about;

(c) when they will be involved;

(d) the role of the competent authority and the initiator in involving these parties;

(e) where additional information is available or will become available during the procedure;

(f) the nature of the task/development;

(g) the developments relevant to the physical living environment; and

(h) the possible solutions for the task/development.

The person proposing a possible solution (as referred to in Article 5.47 (3) Environment & Planning Act) may request that the competent authority seek the advice of an independent expert.

FINANCIAL PARTICIPATION: RENEWABLE ENERGY PROJECTS

A common form of participation in recent years is in relation to the realization of (large-scale) renewable energy projects such as windmills and solar parks, by a professional developer in cooperation with the local community. The way in which this participation takes place is usually through co-ownership (via association, cooperative, foundation or other form) or financial participation (by means of bonds or shares).

In all cases it concerns an effort and not an obligation, meaning municipalities and provinces can stimulate the desire for financial participation of the local environment in renewable energy projects but they cannot (en) force it. We underline however that within their policy, a municipality can include an effort obligation for the initiator to inform local residents and create public support (*maatschappelijk draagvlak*). If the initiator does not comply with this obligation, this can be a reason for the municipality not to grant the permit. It is important to note that this is not an obligation to achieve a certain result, for instance achieving 50% public support. The initiator is only obliged to make an effort to achieve 50% public support (in this example).

The question is whether such a (financial) incentive has a spatial motive/relevance (*ruimtelijk motief/relevantie*). If, for example, an initiator refuses to allow the neighbourhood to participate financially in the production of renewable energy or to benefit from the proceeds, this does not constitute a spatially relevant motive for refusing an Environmental Permit. So if the refusal of the permit has no spatial motive, it is ambiguous whether the municipality could in fact enforce the participation obligation.

The broadened scope of the Environmental Planning Act does not yet seem to offer a solution for making participation mandatory.

Part 4: Sustainability and health

14. Sustainability

SUSTAINABILITY

Sustainable development requires a balance between the quality of the natural environment (planet), the economy (profit) and the social capability of people (people). At its core, it is about not damaging the recovery capacity and natural resilience of ecosystems, safeguarding the vitality of the natural capital. Natural capital consists of biotic (living) and non-biotic (chemical and physical) elements. A vital natural capital can provide us with the desired ecosystem services, so less human intervention is necessary. This requires careful use, development and management of the natural capital.

In the Netherlands, various spatial functions compete for the scarce space on land, water and the subsurface. Sustainability permeates various domains such as sustainable use of space, sustainable mobility, sustainable construction and sustainable use of cultural (world) heritage. There is a constant need to weigh up interests and find the right balance. Due to the many facets, the legislator determined an integral approach is needed.

The Environment & Planning Act covers a significant part of the issues involved in the deliberations on sustainable development, as it focuses on the care for the physical living environment. This care is given substance in Article 2.3, which outlines the establishment of Environmental Values, as well as the obligations attached to them and the manner in which they are to be achieved. The Environment & Planning Act's scheme allows local government room to make their own decisions but sets out the parameters for the choices they make.

Sustainable development is a process of continuous assessment. According to the Environmental Act's Explanatory Memorandum, the assessment must be integral, transparent and explicit. According to the legislator, there must be a broad participative approach. Directly interested parties, but also others, must be given the opportunity to express their views, especially on aspects that concern important issues and/or a longer time frame. Also, in this assessment two principles have a crucial role: the precautionary principle and the 'polluter pays' principle. For sustainable action, one must gain and retain insight into the consequences of various actions and their combinations. Finding such insight starts with an integral assessment of the consequences when deciding on policy and projects. This is why the core instruments of the Environment & Planning Act, which are intended to support sustainable action, have been explicitly designed to work integrally.

Sustainable action and development also require that there is substantive coherence between the various subsectors of the physical living environment. There must be sufficient coherence between the policies of the various authorities, which requires cooperation between administrative bodies and between administrative bodies and other parties. The legislator expects from authorities to possess or develop the ability to look beyond the boundaries of one's own responsibility when making coherent policy.

HUMAN HEALTH

During the parliamentary debates, much attention was paid to the subject of health. The Environment & Planning Act also offers a number of instruments to achieve a healthy physical living environment. With regard to human health, the Act focuses on the impact of the living environment on that health. An essential reform compared to the current situation is the choice to apply an integral approach here as well. For most environmental influences on health, the healthy basic level will be safeguarded by setting standards in the form of environmental values, instructional rules and general rules. In some cases, despite setting standards, health consequences may still occur, for example when several environmental and other influences occur simultaneously or when health effects cannot (yet) be standardized. Various non-statutory instruments are already available to enable a proper assessment of this e.g. the Health Effect Screening, the Disability Adjusted Life Years (DALY) a measurement of years of life lost plus years lived with health problems. The National Institute for Public Health and Environment is currently developing a new instrument for assessing environmental health risks.

15. Environmental impact assessment

INTRODUCTION

The legislation surrounding Environmental Impact Assessment (EIA) is included in Section 16.4 of the Environment & Planning Act and in Chapter 11 and Annex V of the Environment Decree. Not much is changing in terms of content, but there are big changes procedurally. The purpose of the Environment & Planning Act is to simplify the application of the existing EIA instruments so that they are even more useful as a tool for decision-making.

The basic principles of the Environment & Planning Act are explained in section 4.16.5 of the Explanatory Memorandum to the Environment & Planning Act. The main ones are:

(a) Alignment with the obligations in the Environmental Impact Assessment (EIA) Directive (*m.e.r,-richtlijn*) and the Strategic Environmental Assessment (SEA) Directive (*SMB-richtlijn*).

(b) Reducing the research burden. For example, by making better use of already existing research information and previous environmental impact reports. The introduction of a Plan-EIA (*plan-mer*) for certain plans or programs also reduces the research burden.

(c) Aligning the procedural steps of the environmental impact assessment as closely as possible with the procedure of the (underlying) decision to be made.

(d) Simplifying the procedure for the Project-EIA (*project-mer*) and the EIA of a project (*mer-beoordeling van een project*). The Environment & Planning Act reduces the current 3 procedures for the Project-EIA and the current 2 procedures for the EIA of a project both to 1 procedure.

PLAN PROCEDURE

The procedure for Plan-EIA remains largely the same. Only the notification of the intention to prepare a plan or Program subject to EIA is left out. In addition, there are two changes that are relevant to the question of which plans and programs must comply with the Plan-EIA obligation: the generic designation and the Environmental Impact Assessment (*plan mer-beoordeling*).

(a) Generic designation: First, there is the generic designation in the Environment & Planning Act of the plans and programs subject to Plan-EIA. Connection has been sought for this with the 2001/42/EC Directive. Under the Environment & Planning Act, at least the instruments Environmental Strategy, Program, Environmental plan, and preferential decisions (*voorkeursbeslissing*) are designated as plans or programs.

(b) EIA to a plan: Second, the Environment & Planning Act has introduced the EIA to a plan for three types of plans and programs, namely i) for small areas at the local level; ii) for minor amendments; and iii) for plans and programs that provide a framework for projects other than in EIA directive.

Also new is the EIA to a plan for a program/plan that sets the framework for projects and decisions that (might be) subject to EIA, and that are not listed in the Environment Decree. For example, a plan that sets the framework for a new technological development that is not mentioned in the Environment Decree, such as a solar panel park or a tidal power plant but may still have significant environmental effects.

PROJECT PROCEDURE

The Project-EIA is subject to several procedural changes. The extensive procedure for complex projects will disappear. This means that advice from the EIA Commission (*Commissie m.e.r.*) in relation to the Project-EIA will become voluntary. The Explanatory Memorandum to Environment & Planning Act does state that advice from the Commission may nonetheless/still be desirable for complex projects because of the specific knowledge required.

CONTENT OF THE EIA

The Environment Decree fully spells out the content of the Project-EIA. The content requirements of the prior EIA have not changed. The environmental impact report must (still) assume the maximum possibilities of the plan or project and describe and compare alternatives. Also, an environmental impact report still only has to describe the relevant environmental effects.

16. Water

INTRODUCTION

The current Water Act will be merged into the Environment & Planning Act. Under the Environment & Planning Act a number of things will change in the field of "water law." For example, the bylaw (*keur*) will be replaced by the Water Board Ordinance (*Waterschapsverordening*), while the ledger (*legger*) and the water-level decision (*peilbesluit*) will remain (Article 2.6). Unlike now, the designation of restricted areas will be in the Water Board Ordinance and no longer in the ledger.

Furthermore, one single Water Board Ordinance will be adopted by the General Board (*Algemeen Bestuur*), and this includes all the rules relating to the physical living environment (Article 2.5) – which oversee the water systems within the management area, and where necessary also roads. By means of a Governmental Decree it is possible to designate rules about the physical living environment which may not, or may only, be included in the water ordinance (Article 2.7 Environment & Planning Act).

The authority/power to adopt parts of the Water Board Ordinance can be delegated to the Executive Board (Article 2.8 Environment & Planning Act). It is not possible to transfer this authority/power in its entirety.

INTEGRATED WATER MANAGEMENT

The method of water management as it will be regulated under the Environment & Planning Act is in line with the idea and objectives of the Environment & Planning Act, meaning the interrelated consideration of various aspects of the physical living environment are central. All interests will be considered (such as nature, environment, infrastructure and water).

There is also shared responsibility, to illustrate: in groundwater management, both the municipality (e.g. measures to limit adverse effects of groundwater levels on a function), the Water Board (with its water level decisions, influence on groundwater levels, such as surface water levels) and the province (large-scale industrial groundwater abstraction and achieving groundwater quality targets) are responsible.

DECENTRALIZED RULES

On a decentralized level, measurement and calculation rules (Article 4.1 (2) and (3)) can be set (e.g. in an Environmental Plan) about the rules relating to the activities in the Water Board Ordinance. The subsidiarity principle, however, must be observed in this regard.

A prohibition on carrying out certain activities without notification (Article 4.4 (1)) should be included in the Water Board Ordinance. A prohibition on carrying out certain activities without a permit (Article 4.4 (2)) must be laid down in the bylaws, and the imposition of customary rules (Article 4.3) is also only possible if this is laid down in the Water Board bylaws. On the basis of Government Regulations (*rijksregels*) (Article 4.3) it can be determined that customization rules are set in the Water Board Ordinance. The principle of equivalence of measures also applies here: equivalent measures can be taken with the same result (Article 4.7).

COMPETENT AUTHORITY

The General Board adopts the Water Board Ordinance. The Executive Board is the competent authority to which a notification should be made. The Executive Board may therefore set customizing regulations and it may, on request, give permission for an equivalent measure to be taken. It also decides on measurement and calculation regulations, insofar as these relate to the Water Board Ordinance.

TRANSITIONAL LAW

The Water Board Ordinance contains the former bylaw. The rules on road management included in separate bylaws, based on the Water Act, are also incorporated into the bylaws.

Although the ledger will (for the most part) be incorporated as part of the bylaws, the maintenance ledger has been left out, as the instrument does – according to the legislator – not fit in with the nature of the Environment & Planning Act (it is seen as an extra burden).

RESPONSIBILITIES OF WATER BOARD

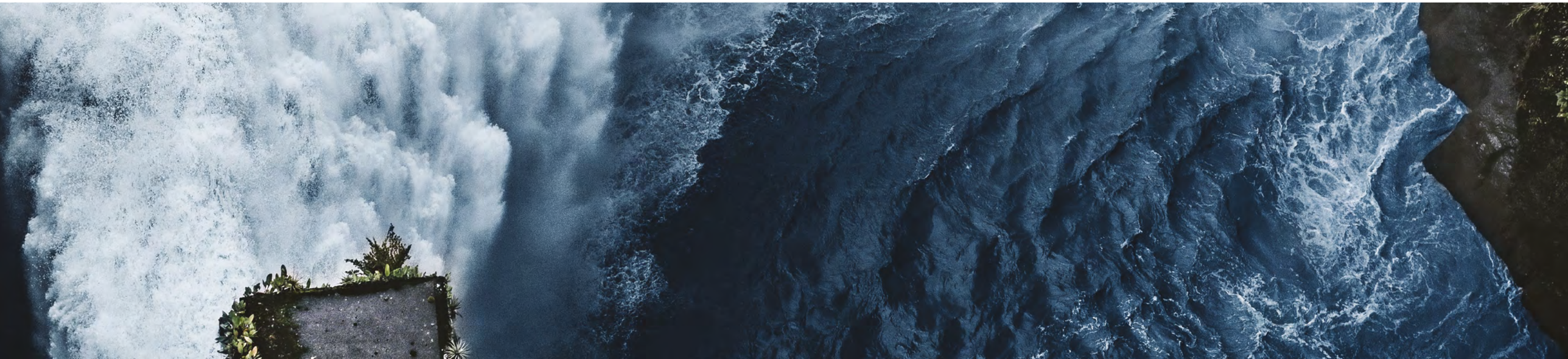
The Water Board has a number of responsibilities/tasks relating to the management of water systems and water management (Article 2.17(1)), which also follow from other legislation. For example, the general responsibility description of the Water Boards Act (*Waterschapswet*) (Art. 1 and 2 of the Water Boards Act), or the prevention of damage to water works. It also manages the water systems, insofar as they're assigned to the Water Board (Article 2.18 (2), and 2.20 (3)). Actions aimed at the usability of the water system such as construction or maintenance. This management also includes regulating the activities of third parties in the water system by setting general rules, granting permits, and supervision and enforcement (passive management).

ANNULMENT OF WATER BOARD DECISION

A decision or non-prescriptive decision aimed at any legal effect taken by the Water Board may be annulled by royal decree (*koninklijk besluit*) if the decision is taken in violation of the instruction rule (pursuant to section 2.24 of the Environment & Planning Act) or an instruction (pursuant to Article 2.34), or in violation of the provisions under Chapter 18 of the Environment & Planning Act (enforcement and implementation). In this respect, Article 2.37 and Article 2.36 regulates the substitution for such a decision or non-written decision. For non-written decisions aimed at any legal effect, sections 10.2.2 and 10.2.3 of the General Administrative Law Act apply (Article 2.37).

DISCHARGES

The Environment & Planning Act will make discharges subject to a permit requirement only if required by European law or if the subject cannot be effectively regulated by general rules. The licensing system is reversed: Under Article 5.1(2), a water activity is only prohibited if this is explicitly determined. Under the former regime of the Water Act, a discharge was prohibited unless it was authorized.



Part 5: Transitional law

17. Transitional law and the Environment & Planning Act

INTRODUCTION

The Environment & Planning Act will enter into force on 1 January 2024. The transition from the previous to the new environmental law system will not pass unnoticed. The Dutch Ministry of the Interior and Kingdom Relations (*Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (BZK)*) has indicated that a soft landing and a gradual transition is intended. To do so, transitional law been included in the Implementation Act (*Invoeringswet Omgevingswet*) for the Environment & Planning Act.

STRUCTURE OF THE ENVIRONMENT & PLANNING ACT IN RELATION TO TRANSITIONAL LAW

The transitional law for the Environment & Planning Act consists of three legal sources.

(a) The majority can be found in Chapter 22 of the Environment & Planning Act. It contains additions and amendments to the Environment & Planning Act.

(b) Besides that, the Implementation Act also contains its own transitional law on current procedures and regulates the equivalence of decisions under the current regulations with new variants in the Environment & Planning Act. This transitional law consists, on the one hand, of the transitional law that, in view of Articles 22.1 and 22.5 of the Environment & Planning Act, is relevant to the gradual transition of existing (spatial) decisions (*besluiten*) in the 'temporary part' of the Environmental Plan to the new permanent part from 2024 to 2032, and on the other hand, of transitional law that relates to the moment the Environment & Planning Act enters into force on 1 January 2024.

(c) Finally, chapter 8 of the draft Implementation Decree will also contain transitional law. This will concern notifications, customized regulations, and enforcement decisions in the context of (various) environmental regulations.

These different sources of transitional law make the Implementation Act somewhat complex, which seems inevitable given the scope of the Environment & Planning Act.

EFFECTS ONGOING PLANNING PROCEDURES AFTER IMPLEMENTATION OF THE ENVIRONMENT & PLANNING ACT

At the time that the Environment & Planning Act enters into force, all irrevocable Zoning Plans, management regulations, and other spatial plans will, pursuant to Article 4.6 (1) of the Implementation Act, become part of the temporary part of the Environmental Plan as referred to in Article 22.1. Zoning Plans and other spatial decisions of which the procedure has not yet been completed at the time of entry into force of the Environment & Planning Act will also be added to this. For those procedures that are still ongoing, transitional law had to regulate which law applies and until when.

Article 4.3 of the Implementation Act contains the transitional law for decisions upon application (*besluit op aanvraag*). It provides that the moment of application is decisive for the applicable regime. The old law will continue to apply to a decision open to appeal until it becomes irrevocable. Regarding decisions to be taken by virtue of office (*ambtshalve te nemen besluiten*) (to which Division 3.4 of the General Administrative Law Act applies), the main rule, pursuant to Article 4.4 of the Implementation Act, is that if the draft decision has been made available for public inspection before 1 January 2024, the procedure will be handled under the old law until the decision becomes irrevocable. Articles 4.3 and 4.4 contain two 'tipping points' for the transition from old to new law; namely the application or the fact that the draft decision has been made available for inspection, and the moment when the decision becomes irrevocable.

FORMER ZONING PLANS

For Zoning Plans, Article 4.6 of the Implementation Act contains a rule that differs from Articles 4.3 and Article 4.4. Here, the moment the draft plan is made available for inspection has been chosen to determine the applicable regime. The second tipping point here is the entry into force of the adopted plan, rather than it becoming irrevocable. According to the legislator, this deviation is necessary to prevent a legal vacuum.

Article 4.6 (2) of the Implementation Act intends that if a plan is not or only partially suspended, the new law will apply to the parts of the plan that are not suspended. These parts of the Environmental Plan will immediately apply as the Environmental Plan in the temporary section and form the basis for Environmental Permits under the Environment & Planning Act. If the main rule of Article 4.4 were to apply in this situation, the old law would continue to apply to the entire plan until the Council of State has ruled, and the plan would not be included in the temporary part until after the ruling. From 1 January 2024 onwards, it will no longer be possible to apply for an Environmental Permit based on the old law, and to that extent, a legal gap could occur in some cases. This explains the deviating arrangement in Article 4.6.

In the context of current procedures, it is important to note that the recently adopted 18th tranche of the Crisis and Recovery Act Implementation Decree (*Besluit uitvoering Crisis- en herstelwet*) includes an amendment that applies specific transitional law to 'Chw-plans' and gives municipalities the time to adopt such plans before 1 January 2024 if the drafts have been made available for public inspection before the entry into force of the Environment & Planning Act. Because the old law continues to apply to current procedures of 'normal' spatial plans and the old law continues to apply to 'Chw-plans' until well after 2024, changes to the temporary part of the Environmental Plan may take place long after 2024 because of rulings of the Council of State in current appeal procedures. However, the Explanatory Notes to the draft Implementation Decree states that no amendments can be made to the current national provision, www.ruimtelijkeplannen.nl, as of 1 January 2026. The intention to freeze www.ruimtelijkeplannen.nl as of 2026 – and to no longer allow amendments to the temporary part of the Zoning Plan as of that date – seems hasty. After all, as mentioned above, 'Chw-plans' can be adopted until 31 December 2023, so that any procedures that may follow will most likely not be completed before that deadline. It is also not certain that all current proceedings against other spatial plans will be completed before 2026, especially if preliminary questions have been referred to the Court of Justice of the European Union in a current procedure. The Explanatory Notes to the draft Implementation Decree (*nota van toelichting bij het ontwerp Invoeringsbesluit*) states in this regard that the legislator will consider whether longer amendments can be made to www.ruimtelijkeplannen.nl.

18. The temporary part of the Environmental Act

THE 'DOWRY'

From Article 22.1 of the Environment & Planning Act, read in conjunction with Article 4.6 of the Implementation Act, a whole package of existing spatial decisions such as Zoning Plans, Provincial and national Zoning Plans, development and amendment plans, exploitation plans, and management regulations will form part of the new temporary Environmental Plan as of 1 January 2024, by operation of law. Because these spatial decisions must be converted into a 'real' full-fledged Environmental Plan during the eight-year transitional period, the Environmental Plan will be referred to by operation of law as the temporary part of the Environmental Plan. This temporary part of the Environmental Plan will be supplemented with several state regulations, referred to as the 'dowry.'

This dowry finds its legal basis in Article 22.2 of the Environment & Planning Act. The dowry is a striking form of transitional law. It aims to prevent a legal gap from arising on 1 January 2024. Such a gap could occur because, when the Environment & Planning Act enters into force, several existing and important statutory regulations will be repealed, and the regulation of the relevant matters will be transferred to the municipal Environmental Plan. These could be rules in formal Acts, such as the Environmental Law (General Provisions) Act, and rules in orders in council, such as the Activities Decree (*Activiteitenbesluit milieubeheer*).

From that moment on, the relevant issues may be regulated on a decentralized level in the Environmental Plan, but obviously municipalities have not adjusted their plans accordingly by the time the Environment & Planning Act enters into force. Existing Zoning Plans, which in view of Article 4.6, first paragraph of the Implementation Act for the Environment & Planning Act, will apply by operation of law as part of an Environmental Plan as referred to in Article 2.4, do not contain any rules about these subjects. This was not allowed, as these subjects had already been regulated at a higher (legislative) level. If the existing plans were to apply as the Environmental Plan on 1 January 2024 and the government regulations were to lapse at the same time, this would mean that, without the 'dowry' various important subjects would suddenly be unregulated.

The state-level/national regulations that are being "converted" into the 'dowry' include rules from the Activities Decree on Environmental Management regarding noise from, among others, wind farms, catering establishments and supermarkets, and odour because of keeping agricultural animals and horses, various rules from the Buildings Decree 2012 (*Bouwbesluit 2012*), insofar as they have not been incorporated into the Buildings Decree. The legal prohibition of Article 2.1(1)(a) of the General Provisions of Environmental Law Act to build a structure without an Environmental Permit, as far as the assessment of the building plan against the plan is concerned, is also included in the dowry. The new prohibition of spatial building activities, which has come into being because of the 'cut' in the Environmental Permit for building, is also in the dowry. The dowry is extensive and can be found in chapter 7 of the draft Implementation Decree.

Incidentally, not all the rules in the dowry have been copied identically from the current regulations, as this would not fit in with the new regime of the Environment & Planning Act in terms of terminology or legal form. This results in an extensive transitional regime and means that municipalities will have to make one or more regulations in the new Environmental Plan regarding a multitude of issues that were previously regulated by the state.

In short, the temporary part of the Environmental Plan will consist of old spatial plans and the dowry. The dowry can be transferred from the temporary part to the new part by adopting one new comprehensive Environmental Plan, but it is much more likely that municipalities will opt for a considerably less complex and more transparent procedure with multiple partial Environmental Plan revisions. These decisions will be open to appeal by interested parties in their entirety. The Municipal Council will have to make choices as to which parts of the dowry it wishes to adopt and which parts it does not and develop a strategy and planning for how it intends to realize the conversion into a fully-fledged single comprehensive plan for its entire territory in the transitional phase up to 2029. When adopting the various revisions of the Zoning Plan during this transitional phase, the municipal council must explicitly reconsider the rules from the dowry and choose between letting them lapse or adopting the rule from the temporary part in an amended form. Lapsing a rule must be explicitly determined in a decision to adopt. This is a change from the current line of jurisprudence. Currently, when a new plan is adopted, the previously applicable plan and its rules automatically lapse.

CONVERTING THE "TEMPORARY PART" BY SITE OR BY TOPIC

When converting old spatial plans to the new Environmental Plan, the Municipal Council must bear in mind that Article 22.6 (1) does not allow for the replacement of only part of the rules of old spatial plans per location. By location, it means a single plot or larger parts of the municipal territory. However, it is possible under this Article to opt for a subject-oriented working method for the entire territory of the municipality; this is the approach chosen by the legislature for rules that are currently included in local bylaws or orders in council.

NO TRANSITIONAL LAW IN RESPECT TO REGULATIONS ON PROVINCIAL LEVEL

In view of Section 4.6 of the Implementation Act, the Provincial regulations pursuant to Section 4.1 of the Spatial Planning Act will continue to apply, as part of the old law, to plans of which the draft has been made available for inspection prior to the entry into force of the Environment & Planning Act. In the case of new Environmental Plans that are initiated after the entry into force of the Environment & Planning Act, the new Provincial environment regulation pursuant to Article 2.22 must of course be observed. The Implementation Act to the Environmental Decree does not provide for transitional law for Provincial bylaws. Local authorities and the Ministry aim to have Provincial environmental regulations enter into force at the same time as the Environment & Planning Act.

THE PHASE FROM 1 JANUARY AND BEYOND

Article 22.6 (3), stipulates that no later than a time to be determined by Governmental Decree, all rules of the Environmental Plan will be included in the new permanent part of that plan. That date is 1 January 2032. However, there will be limited legal consequences if the deadline for adopting one cohesive Environmental Plan is not met. After all, Zoning Plans and other spatial decisions in the temporary part of the Environmental Plan, as well as the former government regulations that are in the dowry, will continue to apply after 1 January 2032. Local bylaws that must also be partially converted to the new part of the Environmental Plan, will not remain in force after 2032. In view of Article 22.4, rules laid down in autonomous bylaws that belong in the Environmental Plan will lapse by operation of law on 1 January 2032. This Article stipulates that Article 122 of the Municipalities Act (*Gemeentewet*) does not apply until 2032. In other words, existing autonomous bylaws and new Environmental Plans can co-exist and be amended until 2029.

In the literature, it is pointed out that the temporary part of the Environmental Management Act will remain in place until well after 2032, as there are no sanctions for failure to convert Zoning Plans and other spatial decisions into a new Environmental Plan on time.

CONSEQUENCE ANNULMENT OF ZONING PLAN (SECTION) IN CURRENT APPEAL PROCEDURE AFTER 1 JANUARY 2024

The question is whether, in the event that an element of the Environmental Plan is annulled.

The existing practice under the Spatial Planning Act and the Spatial Planning Act is that the previously applicable plan is revived if the succeeding plan (part) is annulled. In this way, the annulment of a plan or part of a plan in ongoing appeal proceedings cannot create any gaps in the temporary part of the Environmental Plan.

For the permanent new part of the Environmental Plan it is still unclear what the consequences are of the annulment of part of an Environmental Plan. When adopting an amendment to the new part of the Environmental Plan, it is less obvious to assume that, in the event of the annulment of a function assigned to a location, all the rules of the Environmental Plan will no longer apply to that location, and to fall back on a previously applicable regime, whether that is the temporary part or the previous version of the permanent part of the Environmental Plan.

ANNULMENT AND (FINAL) DISPUTE RESOLUTION

As for the possibility of applying an 'administrative loop' (*bestuurlijke lus*) in ongoing planning procedures after 2024, the explanatory notes to the Implementation Act state that the old law will continue to apply. The same applies to court decision or upholding of legal consequences as referred to in Article 8:72 (3) of the General Administrative Law Act in pending appeal proceedings, as the former law will also apply to these.

Part 6: Land policy and compensation

19. Landownership

INTRODUCTION

A separate subject within the Environment & Planning Act is the set of instruments for land policy. Although the main thrust of the Environment & Planning Act is that of a facilitating government, which does not need to pursue an active land policy in order to bring about developments, these instruments are nevertheless included in the Environment & Planning Act. This concerns both the acquisition of the ownership of locations and the imposition of obligations to tolerate. Following on from this, the recovery of costs incurred by the government from the private development is also a relevant subject.

LEGISLATIVE PROCESS

The subjects were added to the Environment & Planning Act by means of a separate 'supplementary bill'. The idea was that, if necessary, these subjects could also be added later. This way, the legislative risk could be spread. Ultimately, there was no need for this, and all sections will enter into force simultaneously.

PRE-EMPTIVE RIGHTS

The pre-emptive right (*voorkeursrecht*) can be established by the government and obliges the owner, if they wish to sell the property, to first offer the property to the government concerned. There are several exceptions to this obligation. However, this should not be taken lightly. Acts prejudicial to the pre-emptive right may be declared null and void.

The law provides for detailed procedures for establishing and extending a pre-emptive right. In addition, there is a procedure whereby the owner can have the court decide on the purchase price, to which the government is then also bound.

EXPROPRIATION

Expropriation (*onteigening*) of real estate is the most far-reaching instrument offered by Dutch environmental law. So the procedure must be strictly followed and contains special elements to protect the position of the owner. Expropriation derives its competence from Article 14 of the Constitution and should only take place as a last resort, when there are no alternatives left. For this reason, an attempt must always be made to find an amicable solution first. The relevant administrative body adopts a decision to expropriate.

This decision is prepared with the elaborate preparation procedure. The owner and other interested parties can then express their views.

A special feature is that the decision does not enter into force in the ordinary way but must first be confirmed by the court (Article 11.2). The administrative body itself must initiate this procedure. Even if the owner or other interested parties do not put forward arguments – but they usually will – the court will rule on the content of the expropriation decision. An appeal against that judgement can be lodged with the Council of State.

Expropriation takes place for the implementation of a project, for which the environmental plan must be adopted or amended. This decision-making process has its own procedure.

In the event of expropriation, compensation must of course be paid. This is subject to a separate procedure in the civil courts (Articles 11.3 and 15.3). This procedure, too, must be initiated by the government. In this procedure, the court will appoint experts who will advise on the amount of compensation. With these experts, the court will visit the property to be expropriated, so it can be seen before the expropriation has taken place and it has been demolished or modified for the implementation of the project. After that, the procedure for determining the amount of the compensation can be carried out. To avoid the parties losing their property but having to wait a long time for the compensation, a provisional compensation is paid first. At the end of the compensation procedure, any discrepancies are settled with this.

Only once the decision on the area plan and the judgment in the ratification procedure have become irrevocable, the property has been inspected by the court and the experts, and the provisional compensation has been paid, can actual expropriation take place. This is done by the notary who executes the expropriation deed (Article 11.4). Of course, the cooperation of the owner is not required. However, it is the notary's job to establish whether all the formal conditions have been met.

OBLIGATION TO TOLERATE

In the Environment & Planning Act, the obligations to tolerate for various purposes have been brought together. A distinction is made between two types of obligations to tolerate: obligations to tolerate which apply by operation of law and therefore apply without further decision, and obligations to tolerate which are imposed by the decision.

If an obligation to tolerate arises by operation of law, compensation for loss may be claimed. Obligations of tolerance that are imposed by decree are entitled to full compensation.

COST RECOVERY

The basic principle is that the government recovers the costs incurred in connection with a development – for example, the costs of the deployment of civil servants and of infrastructure that must be built – from the development concerned. This can be done by entering into an agreement with the initiator prior to decision-making on the project. This is called the anterior agreement. The alternative is that the decision-making process also includes rules for cost recovery. This possibility of public cost recovery casts its shadow, so to speak, over the negotiations on an agreement.

To meet the idea of the Environment & Planning Act that more developments should be left to the market and not be carried out according to a government blueprint, many different variants for the public law recovery of costs were tried out. Ultimately, a system with two variants was chosen: developments with and without a timeframe. With a timeframe means that the decision lays down which work will be carried out and when, so that a detailed budget can be drawn up and the costs can be recovered on that basis. Without a timeframe means that the decision only sets the framework, but not whether and when a development will be carried out. In this variant, making a budget is more difficult and cost recovery therefore takes place on the basis of an estimate.

The Environment & Planning Act introduces a new obligation to pay. Developments can be obliged to pay a financial contribution for other developments with which there is a functional connection. This does require careful recording in the government's decision-making process, including justification of expenditure. Of course, the payment of this contribution can also be agreed upon in contracts, but the introduction of the possibility of enforcing these contributions under public law puts more pressure on the negotiations.

20. Compensation for disadvantages

INTRODUCTION

Under the Environment & Planning Act, loss of profits for stakeholders and the government due to environmental decisions being made will also be regulated differently. The (new) section 4:5 of the General Administrative Law Act will enter into force (to a limited extend) at the same time as the Environment & Planning Act. The entry into force of this section has been halted since 2014 because the (new) general compensation regulation would be too general and would generate too many claims for damages, with too many types of damage. Therefore a limitation of 4:5 and 4:126 General Administrative Law Act will enter into force together with the Environment & Planning Act with the aim of limiting this too general concept, which could include damage caused by, for example, remarks made by officials.

There is an exhaustive list in the Environment & Planning Act including which decisions (may) lead to damage, and which activities (may) lead to damage. If it is not listed there, the damage cannot lead to damage compensation under the Act. The limitation only sees to environmental issues. The general regulation is still unlimited for non-environmental issues such as traffic decisions.

This list is included in the Environment & Planning Act via the Implementation Act, Article 15.1 and in particular Article 15.1. It is a limitative exclusive list of the instances in which a stakeholder can claim damage compensation. To claim damages, the stakeholder should turn to the implementing body.

PROCEDURAL

The General Administrative Law Act Article 4:5 contains the basic principles, substantive requirements and procedural provisions for the award of loss compensation. The rules from Article 15.1 supplement the General Administrative Law Act. The rules on detriment compensation in the Environment & Planning Act takes precedence over the rules in the General Administrative Law Act. If Article 15.1 does not regulate a subject, the General Administrative Law Act applies: this applies to the basis for granting compensation for loss (4:126 of General Administrative Law Act), requirements for an application for compensation (Article 4:127 of the General Administrative Law Act), contribution for handling an application (Articles 4:128 of the General Administrative Law Act), reimbursement of reasonable costs for limiting loss and procedural costs (Articles 4:129 of the General Administrative Law Act) and general provisions on the decision period and limitation period (Articles 4:130 and 4:131 General Administrative Law Act).

The application for damage claims is made separate from the decision. Also, the application for disadvantage compensation does not have to be submitted during the procedure on the decision that caused the damage. For the award of damages, it is not required that an objection or appeal has been lodged against the decision causing the damage. The applicant for compensation does not need to object to the decision causing the damage.

A fee may be required to make a damage claim, this must be determined by regulation (however a max EUR 500 per application). There is a decision period of eight weeks, however, in case of an advisory committee in principle 6 months (4:130 General Administrative Law Act).

CONCEPT OF DAMAGE

Articles 15.1 and 15.4 form a limitative enumeration of causes of damage. If a cause of damage is not covered by environmental law, compensation cannot still be claimed under the General Administrative Law Act. Causes of damages are measurement regulations, Programs such as the Natura-2000 area management plan, Environmental Plan, Water Board Ordinance, governmental decree (as long as it contains direct obligations for citizens and businesses), Project Decisions and an Environmental Permit decision and its refusal.

We note that in Environmental Strategies and Instruction Rules there are no cause of damages that can be claimed under the Environment & Planning Act as they don't contain/set direct rights and obligations for citizens and businesses/stakeholders.

Further to damages caused by decisions, including policy rules and generally binding regulations, it may also concern damages caused by actual acts (*feitelijk handelen*). This means that all disputes about lawful government action are concentrated in one court, the administrative court.

The type of damage determines the reference date for the determination of the damage:

(a) If the damage can be determined at the time of the decision, such as a decrease in value, then that is the reference date.

(b) For another type of damage, such as income damage, the competent authority determines the cut-off date in the first instance.

(c) For decrease in value of a property in case of indirect damage, special rules apply on the cut-off dates. Article 15.3 and 15.4 regulate this.

DIRECT OR INDIRECT DAMAGE

Direct damage is damage that results from the modification of existing rights. For example, limiting the possibilities for expansion of one's own business. Indirect damage is damage caused by activities in the 'vicinity.' For example, decrease in value of a house by the construction of a high-rise on the neighbouring plot.

A value comparison of the real estate determines the amount of indirect damage. Whether the activity that causes damage requires a permit or is permit-free determines the time of the value comparison. For this purpose, the value is compared immediately before and immediately after the time that: the competent authority can have communicated the decision to grant or change the damage-causing decision, or the competent authority has provided information about the activity, or the activity has already started.

SHADOW DAMAGE

The prospect of a decision being made may also result in damage. Under the Environment & Planning Act, however, this is considered a normal social risk (*normal maatschappelijk risico*), which every stakeholder must bear. The regulation on compensation for loss of amenity from section 15.1 does not provide for compensation for this shadow damage. Intangible damage, such as loss of enjoyment, is also not eligible for compensation (Article 15.2).

NORMAL SOCIAL RISK AND STATUTORY FIXED AMOUNT

The normal social risk is borne by the injured party (Article 4.126 General Administrative Law Act). The rules about the statutory lump sum will change (*wettelijk forfaitair bedrag*). In case of plan damage (*planschade*) the value of real estate decreases as a result of the planning development. Fixed social risk was, prior to the Environment & Planning Act, 2% minimum of the value of the property. This will become 4% fixed. (This is regulated in Article 15.7). For direct damage and income loss there is no legal lump sum. For the municipality this also means a change in the damage risk analysis.

TRANSITIONAL LAW

In case the damage causing decision is taken before the entry into force of the Environment & Planning Act, the old law with regard to its compensation remains applicable. If the damage-causing decision has not yet become irrevocable before the entry into force of the Environment & Planning Act, there is still five years from irrevocability of decision causing damage to claim compensation.

Old planning regulations must be converted to loss compensation regulations. There is already a draft that can be used for this.

Part 7: Experiments, innovations and digitalization

21. Experimenting

Article 23.3 includes an experimentation provision. this provision is intended to provide additional room to deviate from provisions set forth in the Environment & Planning Act and other laws mentioned in the Article. It offers a solution for projects that aim to improve the quality of the physical living environment or the decision-making process in relation to it. But which cannot be realized under the already applicable (codified) regulations.

An experimentation provision makes it possible to first use an experiment to determine whether the (intended) innovation is an improvement, before the regulations are generically amended. The experiment is designed to achieve this. The experimental provision is intended for situations in which other possibilities included in the Environment & Planning Act, and therefore already provided for, are or appear to be inadequate.

In cases where there is an expectation that a certain measure or procedure will be effective, but the determination must be determined experimentally, the application of the experimentation provision may be useful to provide insight into the effectiveness.

Administrative bodies, but also initiators, can propose experiments. An experiment must be intended to contribute to sustainable development. An experiment must be designated by decree, which determines what deviation is allowed and how long the deviation may last. Derogations must not be in conflict with international obligations. The experiment must by its nature be temporary and limited to a certain area, or other concrete situation. The Decree must be in relation to the experiment provision in any case stipulate (see Article 23.3 (3)):

(a) what the purpose of the experiment is;

(b) what the intended consequences are for the physical living environment;

(c) which administrative body is responsible for the implementation of the experiment; and

(d) the duration of the experiment. The experiment must not last longer than is necessary for the purpose of the experiment.

Article 23.3 (3) under item 'i' ensures that rules are set on the manner and frequency of monitoring and evaluation of experiments. In any case, these must take place after the end of the experiment so that conclusion can be drawn from the experiments. This also makes it possible to determine the extent to which the experiment has contributed to improving the quality of the living environment and to achieving the goals envisaged by the experiment.

22. Digitalization and monitoring information

DIGITALISATION

Digitalization can aid the smooth and simple implementation of the Environment & Planning Act. Research costs are reduced by enabling initiators to access information more quickly, information is exchanged more easily, and there are opportunities to speed up and improve decision-making. Digitalization of the Environment & Planning Act focuses on two improvements: a) better information provision, and b) better support of the actors who implement the Act in their process.

INNOVATION

The ambition is that the Environment & Planning Act will invite innovation and that the concept of the initiative will be key in this. The design of the Act aims to allow for solutions that cannot be foreseen at present. Means to this end are a sensible combination of goal-oriented and means-oriented regulations or the use of experimental provisions. There are a number of arrangements in the Act that are important for innovation, such as the generic scheme for equivalence in general regulations that gives the initiator room to apply new means instead of prescribed means, the margin a competent authority has to take specific circumstances and innovative developments into account by either deviating from general national rules and regulations through customization or deviating from the rules for activities in the environment plan by means of a permit for an environmental plan activity, and others.

INFORMATION AND MONITORING

Information plays a crucial role in caring for the physical living environment. Chapter 20 of the PEnvironment & Planning Act contains provisions on information and the provision of monitoring. An important step in the information supply process is monitoring, which involves systematically collecting data on the physical living environment over an extended period of time. The purpose of monitoring is to assess whether policy objectives or other obligations were achieved.

23.4 The Act contains a general monitoring obligation for Environmental Values. The aim is to see whether the requirements of an environmental value are met, covering both current and future conditions. The main aspects of the monitoring system and the designation of the administrative bodies tasked with the monitoring are established when the environmental value is adopted. The Environment & Planning Act also includes a direct obligation to monitor for alarm values and for each noise production cap set and makes it possible to include an obligation to monitor for other parameters in the implementing regulations. If the monitoring shows that an Environmental Value is not being met, the responsible administrative body must draw up a Program or modify it if there already is one (Article 3.10). This must result in compliance with the Environmental Value. The monitoring of alarm values specifically is required to be able to perform the tasks described in Article 19.3, for instance informing or warning the public.

Various sections of Chapter 20 of the Environment & Planning Act contain Articles on the implementation of obligations under international law (see also Articles 20.7 and 20.9). A number of rules will in any case be laid down for the implementation of EU Directives (following Articles 20.1 to 20.3). These Articles guarantee that requirements under international law will be implemented in the rules to be adopted on the basis of these Articles.

There is also a need for data in a more accessible form, such as a report or map that presents data in a clear manner. The administrative body or other body charged with carrying out the monitoring is obliged to report the results and present a report in which they assess/ review whether the environmental values have been met (Article 20.14). There are also provisions detailing the manner of depicting the results of monitoring on maps. In the end, various authorities are tasked with evaluating the information provided through monitoring and other means and prepare recurring reports.

Part 8: Environmental governmental decrees

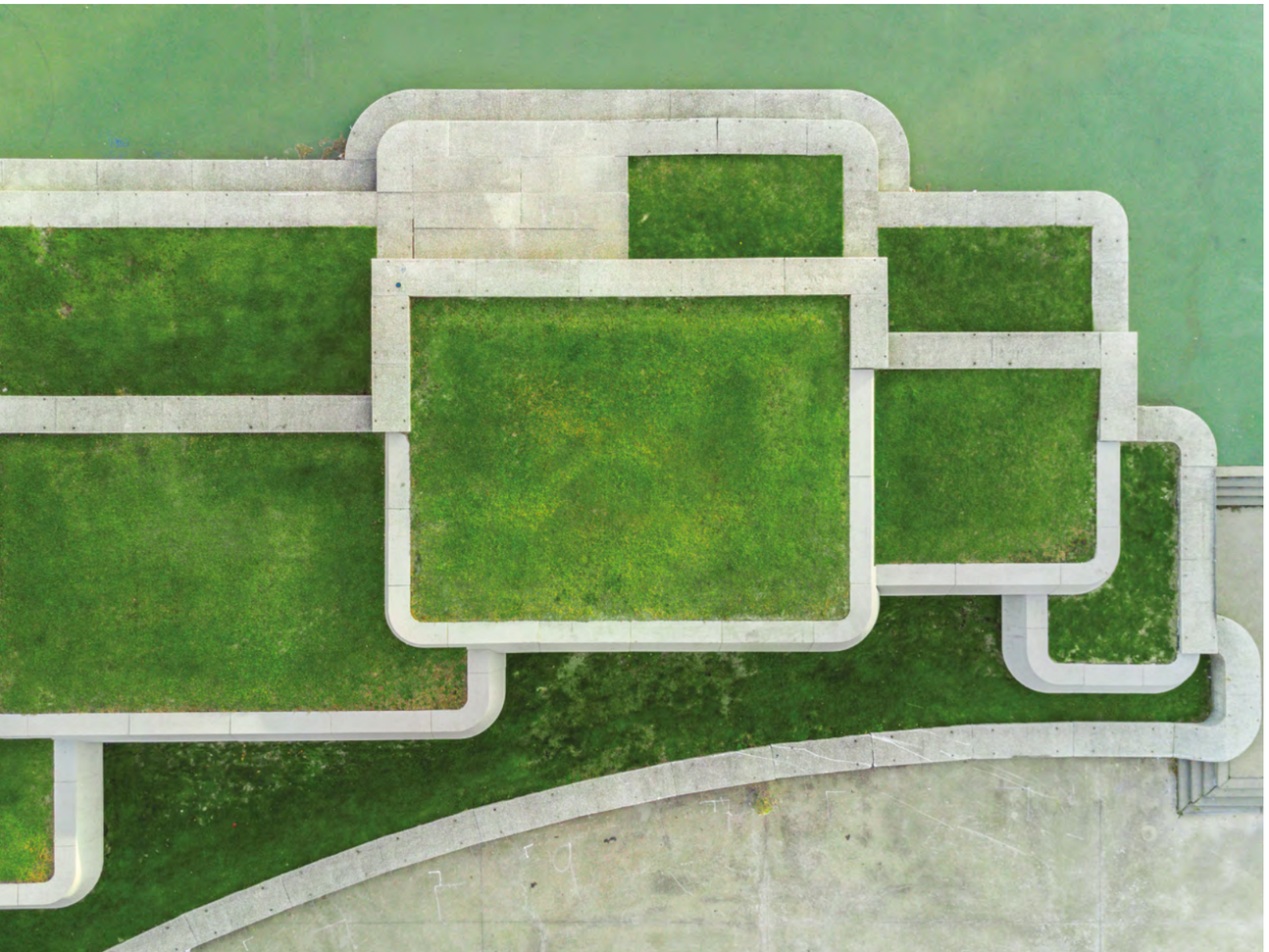
23. Environment buildings decree

INTRODUCTION

The Environment Buildings Decree includes regulations with regard to safety, health, usability and use of constructions (*bouwwerken*) and for construction and demolishment works. The Environment Buildings Decree includes general regulations for activities that could have an impact on the physical living environment. These regulations can consist of goal requirements (*doelvoorschriften*) or of requirements regarding the means (*middelvoorschriften*). These regulations also provide for Custom Rules and requirements or Equivalent measures. This provides a possibility for municipalities to set certain (stricter) rules in relation to certain subject that are governed by this legislation but also to have some flexibility in specific cases.

BUILDING REGULATIONS

The Environment Buildings Decree is in principle a continuation of the Building Decree 2012 and the introduction of this legislation is merely a legal transition of the existing legislation without some relatively minor material adjustments.



24. Environmental activities decree

INTRODUCTION

Within the Environmental Activities Decree, it is stipulated which general rules an 'activity' must comply with. Who is the competent authority (important for customization and enforcement) and what information must be provided accompanying a notification.
An estimated 95% of operators (*drijvers*) should be able to find all relevant rules here. In addition to the Environmental Activities Decree they should in any case consult the environment plan and – in the case of a permit requirement – the Environment Decree.

The Environmental Activities Decree provides rules for environmentally harmful activities, discharges/drains and for (other) activities in places where additional regulation is considered necessary, e.g. for water works, (rail) roads and airports, cultural heritage and world heritage, swimming and bathing, groundwater extraction and excavations on land and in regional waters.

The rules are derived from:

(a) a large number of royal decrees. In their entirety, they include: the Activities (Environmental management) Decree and therefore the Environmental Management (Activities) Regulations), Domestic Waste Water Discharges Decree and the Discharge of Waste Water outside Establishments Decree);

(b) a number of legislative provisions (from the Environmental Management Act (Wm) and the 1988 Monuments Act); and

(c) they are the implementation of a long series of European regulations and directives.
The most important European regulations for the Environmental Activities Decree are the Seveso Directive and the Industrial Emissions Directive (IED).

INTENTION

The intention of the Environmental Activities Decree is to set national rules for activities with general binding regulations. Rules of Environmental Activities Decree relate in particular to safety, health, air quality, soil, the quality of water systems, efficient use of energy and efficient management of waste and wastewater.

The Environmental Activities Decree offers room to deviate from these rules and when a permit is required in addition to or instead of general rules. It is the successor to the Activities Decree (in particular).

Environmental Activities Decree has been designed from the perspective of the initiator. This means that the initiator can find everything relating to their activities (rules, permit requirements) in one place.

LEGAL INSTRUMENTS

The Environmental Activities Decree contains a specific duty of care (*zorgplicht*) (article 2.10), goal and means requirements (Chapter 4), Equivalent measures (article 4.7), Customization regulations (article 2.5), Custom Rules (Article 2.5) and sets the notification requirement or permit requirements (article 2.6).

Goal requirements prescribe a specific goal in concrete terms (units/values) whereas means regulations prescribe a measure in concrete terms. Means requirements are precise and concrete, but under certain circumstances (when locally a smarter solution is possible) can be (too) rigid. Correct implementation of those measures also implies compliance with the given target regulation. In addition to goal and means requirements, information obligations are also distinguished as a third category, requirements to provide data to the competent authority.

The Environmental Activities Decree offers room to deviate from these rules and when a permit is required in addition to or instead of general rules. It is the successor to the Activities Decree (in particular). The Environmental Activities Decree has been designed from the perspective of the initiator. This means that the initiator can find everything relating to their activities (rules, permit requirements) in one place.

LEGAL BASIS

The legal basis for establishing government regulations (the core of the Environmental Activities Decree) lies in Article 4.3 (Article 4.3 (1) under b for environmentally harmful activities and Article 4.3 (1) under c for discharging activities) and Article 5.1 (designation of (Article 5.1 (1)) activities that are prohibited without an Environmental Permit. Unless designated as such in a Decree or (Article. 5.1 (2)) activities that are prohibited insofar as they are designated as such by a Decree. Article 4.3 (1) lists activities for which government regulations must be given and Article 4.3 (2) in which government regulations can be given.

DUTY OF CARE

A specific duty of care applies to almost all activities in the Environmental Activities Decree. Some rules are not exactly spelled out in the Environmental Activities Decree but fall under this duty of care. The specific duty of care appeals to an initiator's own responsibility. A specific duty of care prohibits actions which are generally and reasonably known to be unacceptable. In general, someone will not violate a specific duty of care if they perform an activity in the usual way. The criterion 'reasonably': it is not about the personal knowledge of the person performing the activity. It is about what can be expected of the average person performing an activity.

The Article in the Environmental Activities Decree about a specific duty of care states a three-step obligation. The person performing an activity is obliged to:

(a) take all measures that can reasonably be required of that person to prevent those consequences;

(b) to the extent that these consequences cannot be prevented: to limit or reverse these consequences as much as possible; or

(c) if the consequences cannot be sufficiently limited: to not to carry out the activity, insofar as this can reasonably be demanded of that person.

This is a 'preferred order.' Option 1 is better than options 2 and 3. Option 3 is the last resort. Option 1 and 3 state 'reasonably' and option 2 'as far as possible'. So a specific duty of care does require an impossibility of a person/stakeholder. Also, the competent authority may not demand any measures, whereby the costs or efforts are disproportionate to the benefit to the physical living environment.

CUSTOMIZATION

Customization rules are generally binding provisions set to ensure that activities carried out or to be carried out at a location fit within the objectives and purport of the general rules in those chapters. They are not addressed to a particular stakeholder but apply to a certain location regardless of who carries out or will carry out an activity there. Customization rules are suitable for steering future developments. If necessary, the local competent authority can add nuance or deviate. Customization rules can only deviate from general rules if this is stipulated in a Decree. The Environmental Activities Decree includes that customization rules may deviate from the rules in chapters 3 through 5, unless otherwise provided in those chapters.

Unlike the general customization rules, the Environmental Activities Decree allows the competent authority to use customization regulations to provide stricter protection for the environment and more leeway for the operator. However, a waiver of the duty of care through customization is not permitted. Customization regulations are also not permitted with respect to the designation of activities as environmentally harmful activities or discharge activities (Chapter 3 Environmental Activities Decree) or with respect to measurement and calculation requirements. Customization regulations are not permitted with respect to notification requirements.

In all cases, customization must serve the purposes of the Environmental Act (Articles 4.22 and 4.23) and may not be motivated by reasons not relevant to the rules in question (principle of specialty). In the case of customization regulations, reasons must always be given as to why they are necessary for the optimum utilization or protection of the environment.

PERMIT AND NOTIFICATION

For certain activities, it is required to have a permit or make a notification. This is in most cases the one who performs the activity. A distinction can be made between the following stages of regulation of activities:

(a) The initiator is entirely free to carry out an activity and no permit or notification is required. In this case the general rules of the Environmental Activities Decree must be observed when carrying out the activity.

(b) A notification ought to be made, general rules must be observed, and the commencement of the activities must be reported in advance (the report enables the competent authority to assess, among other things, whether there is reason for customization).

(c) A permit is required to carry out the activity, general rules must be observed, and specific permit requirements may be set.

It may happen that a group of companies wants to operate as one towards the government, for instance because they share a building in which several (potentially environmentally harmful) activities take place. In this case the group will devise a private-law form of collaboration. This form of cooperation then makes a single notification or applies for a single permit. Then the group as a whole is responsible for compliance with the rules.

The basis for the regulation of environmentally harmful activities by general rules lies in Chapter 4 of the Environmental Act, and that of permits in Chapter 5. In this order (according to the legislator), it is given that general rules are the main rule and permits the exception.

With the introduction of the concept of 'activity' as the point of reference for regulation, instead of the previous 'establishment' the fact that an activity lasts for a (very) short time and/or is only done on a hobby basis is no longer a reason to keep it outside the rules and/or the permit requirement. The bondage to a certain location remains.

CUMULATIVE EFFECTS

General rules for activities focus solely on the activity and not on the combined effect of the activity and other activities in the vicinity. However, certain environmental impacts, when cumulated, result in unacceptable burdens to the surrounding area. The Explanatory Memorandum uses a classification into four situations to indicate how this is dealt with under the Environment & Planning Act and the Environmental Activities Decree:

(a) Situation 1: when the preventive rule is so effective that there is nothing to fear from cumulation. The Explanatory Memorandum gives the example of the BAT-based emission limit value for discharging oily wastewater into the sewer.

(b) Situation 2: the effects are not completely eliminated by the preventive rule, but there is a residual effect. However, this can be adequately regulated on an individual basis. The example here is the (additional) prescription of a distance between a gas storage tank and a vulnerable building.

(c) Situation 3: the supplementary rules of situation 2 are not sufficient in some cases either, but customization is necessary. An example is the Instruction Rules concerning noise levels of sensitive buildings and locations in the Environmental Quality Decree for the preparation of the environment plan.

(d) Situation 4: where cumulation plays a very important role and a regulation based on individual ratios hardly makes sense. The example given here is the power of municipalities and (district) Water Boards to require glasshouse horticulture companies to connect to the sewage system (without regulation in the Environmental Activities Decree).

25. Environmental quality decree

INTRODUCTION

The Environmental Quality Decree includes regulations for the competent authorities for exercising their powers and authorities under the Environment & Planning Act. The Environmental Quality Decree only applies to the competent authorities themselves and sets rules for how certain instruments and (legislative) powers should be applied also taking into account the governmental hierarchy between the competent authorities / different governmental bodies. In this context it should be noted that the regulations as set forth in the Environmental Quality Decree do not directly apply to other parties other than the relevant governmental bodies.

PROCEDURAL REGULATIONS FOR COMPETENT AUTHORITIES

The Environment Quality Decree also specifically regulates the adoption of instruments Environmental Value(s) (chapter 2) for setting – following mainly EU and international law related – values for water and air quality, Instruction Rules (chapters 3, 4, 5, 6, 7, 9 and 10) for local governmental to apply certain national standards and regulations in their decentralized plans (external safety, noise, odour and the protection of cultural heritage, Assessment Rules (chapter 8) in relation to the legal framework for the issuance of an Environmental Permit for the relevant activities and rules for monitoring and the collection of certain environmental data (also with respect to Environmental Values (chapter 11).

26. Environment (and planning) decree

INTRODUCTION

The Environmental and Planning Decree (or Environmental Decree) elaborates on the task and competence distribution among administrative bodies and on the procedural aspects of the various legal instruments of the Environment & Planning Act. It not only clarifies who is responsible when and under what situation, but also provides guidance for the application of the other three decrees. The Decree is aimed at all parties active in the physical living environment: citizens, companies and the government.

This decree partially or wholly implements the following sections of the Environment & Planning Act, which require rules to be laid down by general administrative measure:

(a) Tasks of the central government (designation of national waters, (Article 2.4.2);

(b) Designation of competent authority for the environmental permit (Article 5.1.2);

(c) the project decision (Article 5.2);

(d) the recovery of costs (Article 12);

(e) financial provisions (Article 13.5);

(f) the involvement of other administrative bodies (advice and consent, Articles 16.15, 16.16 and 16.17);

(g) electronic traffic (electronic application, environmental documents and method of application, Articles 16.1.1 and 16.55);

(h) procedures (Articles 16.88, 20.6, 20.8 and 20.13);

(i) the environmental impact assessment (Article 16.4);

(j) advisory bodies and advisers (Article 17.1);

(k) enforcement and implementation (Article 18.1.1).

In the Decree, certain provisions are of importance to citizens and businesses and others to government bodies and administrative authorities. Citizens and businesses can find the general and procedural provisions regarding the environmental permit, including the preparation procedures, in the Environmental Decree. Government bodies and administrative authorities can consult the Decree on the allocation of management tasks and powers not assigned to government authorities in the Act, and the allocation of powers of advice and consent; on procedural provisions on decisions to be taken by administrative bodies (which include provisions about Programs, Environmental Plans, Environmental Strategies and Environmental Permits, as well as procedural provisions regarding Environmental Impact Assessments and procedural matters regarding cost recovery); and, on the provisions on administrative law enforcement of the other instruments under the Act. In outline, the rules relate to:

(a) the competent authority for permits;

(b) the procedures for instruments of the Environment & Planning Act;

(c) implementation and enforcement; and

(d) the Digital System for the Environment & Planning Act (*Digitale Stelsel Omgevingswet (DSO)*).

THE COMPETENT AUTHORITY FOR THE APPLICATION OF AN ENVIRONMENTAL PERMIT

The competent authority decides on an application for an Environmental Permit and is sometimes obliged to seek advice or consent. Chapter 4 of the Environmental Decree regulates who that competent authority is for a specific permit application. The Environment & Planning Act allocates competence for water-related activities and activities other than water-related activities. Under the Decree it is not permitted to apply for a water-related and non-water-related activity in one application, the request must be done through separate applications. However, sometimes a coordination scheme can be applied, when an activity takes place on the territory of more than one municipality, province or Water Board. The competent authority is then the municipality, Water Board or province where the activity will mainly take place (Article 5.14). Furthermore, an application can be single or multiple. An initiator is free to submit one multiple application or several single applications.

The competent authority is the administrative body that decides on an application for an Environmental Permit. There is always only one competent authority for an Environmental Permit. The Environment & Planning Act stipulates that in certain cases the competent authority must request advice before granting a permit or customization. Sometimes, the consent of that advisory body is also required before a decision is taken. The law also describes the procedures and deadlines. Situations in which advice and consent are required have been identified for activities from the environmental regulation, environmental plan activities, national monument activities, excavation activities, Natura 2000 or Flora and Fauna activities, construction activities, environmental activities, water activities and restricted area activities. There are also situations in which advice and consent are required, irrespective of the activity applied for. If there are several related applications, the coordination scheme determines which administrative body will coordinate the application.

MAIN ROUTES OF PROCEDURES UNDER THE ENVIRONMENT AND PLANNING ACT

The term 'procedures' has a broad meaning under the Environment & Planning Act. It not only concerns objections and appeals or judicial protection, it also concerns the process of issuing permits, participation and public participation. The new regime of the Act will follow the General Administrative Law Act as closely as possible. The legislator has scrapped divergent provisions from the old legislation as much as possible. In addition, the Act leaves administrative bodies free as much as possible to organize the process of issuing permits, participation and public consultation themselves. Within these procedures, administrative bodies can further structure the decision-making process. Regional authorities can use additional methods and moments to involve citizens, companies, organizations and other authorities. This way, these regional authorities can use the most appropriate decision-making procedure for each area and each case. Here it is important to note that an administrative body has to take into account the tasks and competences of other administrative bodies (Article 2.2) and where necessary, coordinate with them.

IMPLEMENTATION AND ENFORCEMENT

The process criteria are the requirements that are set for the policy cycle for the tasks of licensing, supervision and enforcement (VTH). These criteria can be found in Articles 13.5 to 13.11 of this decree. The process criteria constitute two cycles, a policy-making (strategic) cycle and an executive (operational) cycle. The implementation program lies at the intersection of both cycles. The policy-making cycle is mainly the domain of the competent authorities. This is where the frameworks for the implementation program are formulated. The implementation cycle is partly the responsibility of the environmental services and partly of the competent authorities themselves. The coherent whole of both cycles is also called BIG-8. From a strategic framework, this model translates into operational policy for the purpose of quality assurance together with a sound planning and control cycle. By following these cycles, the cycle, which starts with the formulation of the policy and ultimately leads to the adjustment of the policy via its implementation, is closed.

Chapter 13 of the Environment Decree lays down the preconditions for municipalities and provinces to improve the quality of enforcement. Articles 13.5 through 13.11 in particular elaborate on the process criteria, the separate components of strategic and programmatic implementation and enforcement.

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DLA Piper

Your trusted ESG guide

Environment, Social and Governance (ESG) is no longer a corporate box ticking or report writing exercise. It's the umbrella under which all facets of the transition towards a more sustainable future are gathered. In the past few years, we've seen the ESG legal framework evolve rapidly. Making the transition towards a more sustainable future an undeniable and critical necessity for every business. Your organisation's social license depends on meeting stakeholder's ESG expectations, complying with the ESG legal framework and driving performance through a well-articulated strategy.

We believe that by making businesses better, we make the world a better place. On your journey towards a more sustainable future, we are your trusted ESG guide. Wherever you are in your transition, we will guide you with forward-looking and pragmatic legal advice. With our global mind-set and vast practical experience, we help you overcome environmental, social and governance challenges and seize ESG-related opportunities.

Definitions/terminology

(Administrative) Ascription (*wijziging tenaamstelling*)

(Water) Bylaw (*Keur*)

Activities Decree (*Activiteitenbesluit milieubeheer*)

Administrative Discretion (*bestuurlijke afwegingsruimte*)

Administrative Loop (*bestuurlijke lus*)

Assessment Rules (*beoordelingsregels*)

Balancing/Netting (*salderen*)

Buildings Decree 2012 (*Bouwbesluit 2012*)

Bylaw (*keur*)

Council of State (*Afdeling bestuursrechtspraak Raad van State*)

Crisis and Recovery Act (*Crisis en Herstelwet Chw*)

Crisis and Recovery Act Implementation Decree (*Besluit uitvoering Crisis- en herstelwet*)

Custom Rules (*Maatwerkregels*)

Customization (*Maatwerk*)

Custom-made Regulations (*maatwerkvoorschriften*)

Decisions taken by virtue of office (*ambtshalve genomen besluiten*)

Decisions upon application (*besluit op aanvraag*)

Digital System for the Environment & Planning Act (*Digitale Stelsel Omgevingswet (DSO)*)

Discharge of Wastewater outside Establishments Decree (*Besluit lozen buiten inrichtingen*)

Domestic Wastewater Discharges Decree (*Besluit lozing afvalwater huishoudens*)

EIA of a project (*mer-beoordeling van een project*)

EIA to a plan (*plan-mer-beoordeling*)

EIA Commission (*Commissie m.e.r.*)

Environment and Planning Act (*de Omgevingswet*)

Environment & Planning Decree, or Environment Decree (*Omgevingsbesluit*)

Environment Buildings Decree (*Besluit Bouwwerken Leefomgeving*)

Environmental Activities Decree (*Besluit Activiteiten leefomgeving*)

Environmental Governmental Decree(s), or Governmental Decree (*Algemene Maatregel(en) van Bestuur*)

Environmental Harmful Activity (*milieubelastende activiteit (MBA)*)

Environmental Impact Assessment (EIA), or obligation to conduct an EIA (*MER, or MER-plicht*)

Environmental Impact Assessment (EIA) Directive (*m.e.r.-richtlijn*)

Environmental Management (Activities) Regulations (*Activiteitenregeling milieubeheer*)

Environmental Management Act (*Wet milieubeheer*)

Environmental Permit (*Omgevingsvergunning*)

Environmental Plan (*Omgevingsplan*)

Environmental Plan Activity (*Omgevingsplan activiteit*)

Environmental Quality Decree (*Besluit Kwaliteit leefomgeving*)

Environmental Space (*milieugebruiksruimte*)

Environmental Strategy(ies) (*Omgevingsvisie(s)*)

Environmental Value(s) (*Omgevingswaarde(n)*)

Equivalence Rules (*regels over gelijkwaardigheid*)

Equivalent measure(s) (*gelijkwaardige maatregel(s)*)

Establishment (*inrichting*)

Executive management (*dagelijks bestuur*)

Explanatory Memorandum to the draft Implementation Decree (*nota van toelichting bij het ontwerp Invoeringsbesluit*)

Expropriation (*onteigening*)

General Administrative Law Act (*Algemene wet bestuursrecht (Awb)*)

General Board (*Algemeen Bestuur*)

Goal Requirements (*doelvoorschriften*)

Government(al) Regulations (*rijksregels*)

Heritage rules (*erfgoedregels*)

Implementation Act (*Invoeringswet Omgevingswet*)

Implementation decree (*Invoeringsbesluit*)

Injunction (*voorlopige voorziening*)

Instructions for Regulations (*Aanwijzingen voor de regelgeving*)

Instruction Rules (*Instructieregels*)

Insuperable Coherence (*onlosmakelijke samenhang*)

KYC-check/integrity check (*Bibob-toets*)

Ledger (*legger*)

Lump Sum (*wettelijk forfaitair bedrag*)

Minister of Infrastructure and Water Management (*Minister van IenW*)

Ministry of the Interior and Kingdom Relations (*Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (BZK)*)

Municipal Council (*Gemeenteraad*)

Municipal Executive (*College van Burgermeester en Wethouders*)

Municipalities Act (*Gemeentewet*)

National Planning Decision (*inpassingsplan*)

Normal/Acceptable Social Risk (*Normaal maatschappelijk risico*)

Notification obligation (*meldingsplicht*)

Notification of Intention (*kennisgeving voornemen*)

Notification of Participation (*kennisgeving participatie*)

Object related (*zaaksgebonden*)

Odor Nuisance and Livestock Farming Act (*Wet geurhinder en veehouderij*)

Operator (*drijver*)

Participation (*participatie*)

Person related (*persoonsgebonden*)

Physical Living Environment (*Fysieke leefomgeving*)

Plan Damage/Planning Blight (*planschade*)

Plan-EIA (*plan-mer*)

Pre-emptive Right (*voorkeursrecht*)

Preferential Decision (*voorkeursbeslissing*)

Preparatory Decision (*voorbereidingsbesluit*)

Program, or obligation to set a Program (*Programma or Programmaplicht*)

Project Decision (*projectbesluit*)

Project-EIA (*project-mer*)

Provincial Council (*Provinciale Staten*)

Provincial Environmental Regulation (*Provinciale verordening*)

Provincial Executive (*Gedeputeerde Staten*)

Publication Preferred Decision (*voorkeursbeslissing*)

Public support (*maatschappelijk draagvlak*)

Reactive intervention (*reactieve aanwijzing*)

Regular Preparatory Procedure (*reguliere voorbereidingsprocedure*)

Requirements regarding the means or Means Requirements (*middelvoorschriften*)

Road Traffic Act (*Wegensverkeerswet*)

Room to Manoeuvre (*handelingsruimte*)

Royal Decree (*koninklijk besluit*)

Spatial Planning Act (*Wet ruimtelijke ordening*)

Spatial Relevance (*ruimtelijk relevant*)

Strategic Environmental Assessment (SEA) Directive (*SMB-richtlijn*)

Statutory lump sum (*wettelijk forfaitair bedrag*)

Supervisory officials (*toezichthoudende ambtenaren*)

The “Dowry” (*Bruidsschat*)

Trace-decision (*tracébesluit*)

Umbrella reviews of old plans (*parapluplan herziening*)

Uniform public preparatory procedure (*uniforme openbare voorbereidingsprocedure (UOV)*)

Water Authority Regulation (*waterschapsverordening*)

Water Board (*Waterschap*)

Water Board Ordinance (*Waterschapsverordening*)

Water Boards Act (*Waterschapswet*)

Water Permit (*watervergunning*)

Water-level Decision (*peilbesluit*)