

Environment & Climate Regulation 2022

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James M Auslander and Brook J Detterman
Beveridge & Diamond PC

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Environment & Climate Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the European Union.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, James M Auslander and Brook J Detterman of Beveridge & Diamond PC, for their continued assistance with this volume.



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LEGISLATION

Main environmental regulations

1 | What are the main statutes and regulations relating to the environment?

The main statutes and regulations relating to the environment are:

- the Environmental Management Act;
- the Environmental Permitting General Provisions Act;
- the Living Environment Law Decree;
- the Activities (Environmental Management) Decree;
- the Spatial Planning Act;
- the Nature Conservation Act;
- the Major Accidents (Risks) Decree;
- the Soil Protection Act;
- the Water Act;
- the Noise Abatement Act; and
- the Nature Conservation Act.

Integrated pollution prevention and control

2 | Is there a system of integrated control of pollution?

Under the Industrial Emissions Directive 2010/75/EU (implemented in the Environmental Management Act and the Activities Decree), companies containing integrated pollution prevention and control (IPPC) installations must have an environmental permit that complies with the Best Available Techniques (BAT) (as included in BAT conclusions and European and national BAT reference documents).

Soil pollution

3 | What are the main characteristics of the rules applicable to soil pollution?

Under the Soil Protection Act, soil pollution that was caused before 1987 only has to be remediated if the competent authorities have stated that the pollution is serious and urgent remediation is necessary. Functional remediation is the standard.

Soil pollution caused after 1987 falls under a duty of care, meaning that, in principle, all pollution must be remediated by the one that caused it.

The responsibility for remediation lies primarily with the person that caused the pollution or with the owner, although the owner of a plot of land that is part of a business park is responsible for remediation as well.

Regulation of waste

4 | What types of waste are regulated and how?

Waste is regulated both at the European level and at the national level. The objective is to limit waste and to stimulate reusage as much as possible. Detailed regulations are in place concerning the definition of

by-products and end of waste. Companies that accept or process waste generally require an environmental permit to do so.

The Environmental Management Act contains a broad range of administrative requirements for companies that create, import and remove (hazardous) waste. The European Waste Shipment Regulation (Regulation (EC) No 1013/2006) is directly applicable to shipments of waste within the European Union and is also relevant for shipments to and from the European Union.

Regulation of air emissions

5 | What are the main features of the rules governing air emissions?

Companies must comply with the BAT as much as possible when limiting air emissions. The Activities Decree contains directly applicable emission limit values for all companies. The Environmental Management Act contains emission limit values for some specific contaminants.

Under the Industrial Emissions Directive 2010/75/EU, which contains regulations for large polluting companies, companies containing IPPC installations must have an environmental permit that complies with the BAT. BAT conclusions regularly contain emission limit values that must be incorporated in the environmental permit.

The Activities Decree (based on the Energy Efficiency Directive) contains regulations regarding energy efficiency and requires companies to take all measures that can be paid back within five years. The duty to perform energy audits only applies to large companies, which must perform an audit every four years. In the energy audit report, a list concerning energy saving measures must be incorporated.

Protection of fresh water and seawater

6 | How are fresh water and seawater, and their associated land, protected?

Under the European Framework Directive on water (Directive 2000/60/EC), all European waters had to meet certain quality standards by 2015. Water quality is also one of the main purposes of the Water Act. Standards for chemical and ecological quality are included in the Environmental Management Act and the Water Quality Requirements and Monitoring Decree 2009.

Protection of natural spaces and landscapes

7 | What are the main features of the rules protecting natural spaces and landscapes?

Under the European Habitat Directive 92/43/EEG, Natura 2000 areas have been appointed. These are protected by the Nature Conservation Act. A system of permits and exemptions is in place to guarantee that Natura 2000 areas are protected. An important area of focus is protecting Natura 2000 areas from nitrogen deposition.

Protection of flora and fauna species

8 | What are the main features of the rules protecting flora and fauna species?

The European Birds Directive 2009/147/EC and the Habitat Directive 92/43/EEG have been implemented in the Nature Conservation Act. Under the Act, both specific types of birds and other animals and plants are protected via a system of permits and exemptions. The level of protection and types of protected species varies per province.

Noise, odours and vibrations

9 | What are the main features of the rules governing noise, odours and vibrations?

Regulations regarding noise are laid down in the Environmental Management Act (eg, noise production ceilings and noise exposure from national roads), the Noise Abatement Act (assessment framework for the realisation of roads and railways and industrial noise zoning) and the Activities Decree (general noise regulations and limits for companies).

Regulations regarding protection against odour are incorporated in the Activities Decree. Odour regulations can also be included in an environmental permit. Specific regulations have been set for odour caused by livestock farms in the Odour Nuisance and Livestock Farming Act.

The Activities Decree also contains regulations concerning vibrations.

Liability for damage to the environment

10 | Is there a general regime on liability for environmental damage?

Title 17.2 of the Environmental Management Act (which implements Directive 2004/35/CE on environmental liability) contains regulations concerning liability for damage to the environment that occurred after 30 April 2007. The regulations concern larger cases of environmental damage to soil, water and nature (the latter meaning damage to protected species and natural habitats). The person or company causing the damage must prevent imminent damage and limit and restore damage that has occurred. This regulation exists alongside other regulations containing environmental liabilities, such as the Soil Protection Act.

Environmental taxes

11 | Is there any type of environmental tax?

The Dutch Environmental Taxes Act provides for taxes on mains water, waste, coal and energy tax.

Mains water tax is levied on suppliers, who may charge the tax on their customers.

Waste tax is levied from waste processors who may pass the tax on to customers who use their landfill sites.

Coal tax is levied from companies that use coal as fuel and coal importers. It is also levied on the possession of coal by companies, public bodies and natural persons for purposes other than personal use. Exemptions are applicable under certain circumstances, for example, if the company does not use the coal solely for heating or as fuel.

Energy tax is levied on the use of electricity and natural gas. Energy suppliers pay the tax and may pass it on to their customers. In some cases, the supplier can receive an energy tax refund or an exemption, for example, if natural gas is used for the generation of electricity. A tax reduction is granted per electricity connection.

In addition to the aforementioned taxes, the Netherlands has water pollution levies, purification levies and sewage levies.

Certain companies can benefit from a tax scheme for investing in environmentally friendly technology. They may be eligible for the environmental investment deduction (MIA) and arbitrary depreciation

of environmental investments (Vamil) schemes. Through the MIA, companies can deduct up to 36 per cent of the investment costs for an environmentally friendly investment on top of its regular investment tax deductions, and through Vamil, the company can decide when to write off 75 per cent of the investment costs.

There are no general issues regarding double taxation.

Environmental reporting

12 | Are there any notable environmental reporting requirements (eg, regarding emissions, energy consumption or related environmental, social and governance (ESG) reporting obligations)?

In the environmental annual report, industrial companies report their waste, energy and water consumption and emissions to air, water and soil. This information appears on the European Pollutant Release Transfer Register (PRTR).

Government policy

13 | How would you describe the general government policy for environmental issues? How are environmental policy objectives influencing the legislative agenda?

In recent years environmental issues have received more attention than previously, especially with regard to nitrogen deposition and substances of very high concern.

HAZARDOUS ACTIVITIES AND SUBSTANCES

Regulation of hazardous activities

14 | Are there specific rules governing hazardous activities?

Safety regulations are in place to limit risks owing to the storage, production and transport of dangerous substances, and risks caused by wind turbines and airports. In spatial planning, vulnerable objects (eg, houses and schools) must be protected against external safety risks (primary in the applicable zoning plans). The applicable regulations are included in, for example, the External Safety (Establishments) Decree, the Activities Decree and the Physical Planning (General Rules) Decree.

Regulation of hazardous products and substances

15 | What are the main features of the rules governing hazardous products and substances?

The European REACH Regulation 1907/2006 is directly applicable and contains regulations concerning registration, evaluation and authorisation of chemical substances that companies must comply with.

The Activities Decree contains a regulatory framework regarding emissions of 'substances of very high concern' (substances that are dangerous for people and the environment). The main purpose of these regulations is to minimise emissions of these substances through a source-oriented approach and reduction measures.

Industrial accidents

16 | What are the regulatory requirements regarding the prevention of industrial accidents?

The Major Accidents (Risks) Decree (BRZO) (which is an implementation of the Seveso III Directive) contains regulations concerning external safety, the prevention of industrial accidents and labour safety. Companies that exceed the BRZO threshold values (which concern the permitted amount of hazardous substances within the facility) are responsible for safety in relation to dealings with hazardous substances

within their facility. Low threshold-companies must take all measures necessary to prevent accidents and draw up a prevention policy and safety management system. High threshold-companies must also submit a safety report. BRZO companies that are situated close to each other can be designated as 'domino' companies.

ENVIRONMENTAL ASPECTS IN TRANSACTIONS AND PUBLIC PROCUREMENT

Environmental aspects in M&A transactions

17 | What are the main environmental aspects to consider in M&A transactions?

Aspects to consider include:

- compliance with environmental permits and general regulations (eg, the Activities Decree);
- the European REACH Regulation (REACH);
- legionella;
- nitrogen;
- developments in the applicable environmental legislation that may be relevant to the business;
- zoning;
- soil contamination;
- possible complaints (regarding noise, odour, etc);
- expansion possibilities (on the basis of an applicable zoning plan, environmental permits, etc); and
- developments on neighbouring plots.

Environmental aspects in other transactions

18 | What are the main environmental aspects to consider in other transactions?

Aspects to consider include:

- compliance with environmental permits and general regulations (eg, the Activities Decree);
- REACH;
- legionella;
- nitrogen;
- developments in the applicable environmental legislation that may be relevant to the business;
- zoning;
- soil contamination;
- possible complaints (regarding noise, odour, etc);
- expansion possibilities (on the basis of an applicable zoning plan, environmental permits, etc); and
- developments on neighbouring plots.

Environmental aspects in public procurement

19 | Is environmental protection taken into consideration by public procurement regulations?

Environmental protection is taken into consideration in multiple ways in the Public Procurement Act. Article 2.81, paragraph 2 obliges public authorities to request the tenderer or candidate to indicate that it has taken into account the environmental, social and labour law obligations following from EU law, national law or collective labour contract law or the provisions summed up in Annex X of Directive 2014/24/EU on international environmental, social and labour law. When a contracting authority notices that any of these obligations is not met, it rejects the tender because the tender is abnormally low (article 2.116, paragraph 5 of the Act).

Under article 2.84 and 2.85 of the Public Procurement Act, a tenderer or candidate provides the public authority with a self-declaration, in

which it declares that it will comply with the technical specifications and performance conditions relating to (among other things) the environment. An entrepreneur can demonstrate his or her technical or professional competence (the suitability requirements) by indicating the environmental management measures he or she can apply while executing the public contract (article 2.93, paragraph 1, item (h) of the Public Procurement Act).

According to article 2.115, paragraph 2, item (e), environmental characteristics may also be one criterion the public authority uses to establish the most economically advantageous tender on the basis of the best price-quality ratio (the award criteria).

ENVIRONMENTAL ASSESSMENT

Activities subject to environmental assessment

20 | Which types of activities are subject to environmental assessment?

An environmental impact assessment (EIA) is obligatory for plans and decisions by the competent authorities that can lead to negative impacts on the environment. Three routes can lead to the obligation to perform an EIA:

- the plan or decision is listed in the Environmental Impact Reporting Decree;
- the plan contains an activity that requires assessment under the Nature Conservation Act; and
- the provincial authorities have appointed specific activities.

An EIA is not a licence for an activity but must be performed as part of the preparation procedure for the decision that makes the activity possible (eg, a zoning plan or permit).

The Environmental Impact Reporting Decree makes a distinction between activities that require an EIA and activities that might require one but need to be assessed first. For the latter, an EIA is only necessary if negative effects on the environment cannot be ruled out.

Environmental assessment process

21 | What are the main steps of the environmental assessment process?

Two procedures are possible: an extended and a limited procedure. In both procedures, the main steps are:

- announcement of the proposed activity to the authorities;
- notice regarding scope and detail;
- an EIA;
- public announcement and the possibility to submit views regarding the EIA;
- a decision regarding the activity;
- the possibility for appeal against the decision; and
- an evaluation.

In the extended procedure, it is compulsory to request advice from the EIA Commission. In the limited procedure, this is voluntary.

REGULATORY AUTHORITIES

Regulatory authorities

22 | Which authorities are responsible for the environment and what is the scope of each regulator's authority?

Various regulatory authorities are responsible for the environment. The Human Environment and Transport Inspectorate is responsible for the supervision and enforcement of rules and regulations relating to,

among other things, regulation on shipment of waste. The Inspectorate SZW is responsible for supervision and enforcement of rules and regulations relating to working conditions.

The competent provincial authorities are responsible for the large industrial companies. The competent municipal authorities are responsible for small industrial companies and spatial decisions. The competent provincial or municipal authorities may grant environmental permits. The mayors of the municipalities are authorised to give certain emergency orders in the event of environmental catastrophes or disasters. The Minister of Economic Affairs and Climate is responsible for some (large) energy projects.

The public prosecutor or criminal court may impose criminal sanctions.

Investigation

23 | What are the typical steps in an investigation?

The regulatory authorities periodically inspect the compliance of companies with the applicable rules and regulations. Both announced and unannounced inspections are common.

To conduct the necessary inspections, the regulatory authorities have various powers, including the authority to demand access to the premises and inspection of documents and records. A report is made of their findings. The report may be made publicly available pursuant to the Public Information Act but, in principle, only after the party concerned has been given the opportunity to submit its complaints.

Administrative decisions

24 | What is the procedure for making administrative decisions?

After a violation of a rule or regulation has been established, the competent authorities announce an intention to impose an administrative enforcement decision to the party involved before enforcement decisions are actually imposed. A complaint may be submitted by the party involved against the intention to impose an administrative enforcement decision.

Sanctions and remedies

25 | What are the sanctions and remedies that may be imposed by the regulator for violations?

For violations of environmental rules and regulations, the competent authorities may, under certain conditions, impose punitive administrative sanctions, such as a fine, or remedial administrative sanctions, such as an order subject to a penalty for non-compliance and an administrative enforcement order. Revocation of an environmental permit is the most severe administrative sanction that may be imposed. An exploitation ban may be imposed as well.

Criminal penalties (eg, fines or the restoration of illegal profits) may, under certain conditions, be imposed as well if rules and regulations have been violated.

Administrative (punitive and remedial) sanctions are imposed by the competent authorities and can, in the case of an appeal, be assessed by the administrative courts. Criminal penalties are generally imposed by the criminal courts following prosecutions.

The Public Information Act provides a basis for publication of enforcement decisions.

Appeal of regulators' decisions

26 | To what extent may decisions of the regulators be appealed, and to whom?

Administrative enforcement decisions may be appealed on formal and material grounds to the competent administrative court, and the

decisions thereof may be appealed to the Judicial Department of the Council of State. Criminal enforcement decisions may be appealed in multiple instances as well (courts, high courts and the Supreme Court).

JUDICIAL PROCEEDINGS

Judicial proceedings

27 | Are environmental law proceedings in court civil, criminal or both?

Environmental law proceedings in court may be civil (eg, wrongful acts owing to contamination), criminal (eg, as a result of criminal enforcement of environmental rules and regulations) or administrative (eg, with regard to environmental permitting procedures and administrative enforcement).

Powers of courts

28 | What are the powers of courts in relation to infringements of environmental law?

The civil courts, regardless of whether in provisional proceedings, may order both the taking of certain actions (eg, to remediate certain pollution) and the ceasing of certain actions (eg, activities that cause contamination).

The administrative courts may nullify and, in provisional proceedings, suspend administrative decisions based on environmental law.

Both in civil law proceedings and in administrative law proceedings, provisional measures can and will only be allowed in the event of an urgent interest.

Civil claims

29 | Are civil claims allowed regarding infringements of environmental law?

Civil (contractual and non-contractual) claims regarding infringement of environmental law are allowed in principle (eg, in the event of breach of contract or wrongful act). However, a claim before a civil court is inadmissible if administrative proceedings with sufficient resources (eg, an appeal) are available.

The possibility for government bodies to claim infringements of environmental law may be limited if they can achieve the same goal using administrative measures.

Defences and indemnities

30 | What defences or indemnities are available?

In the event of contractual civil claims, the available defences or indemnities depend heavily on the specific contractual arrangements that have been made. Dutch contract law, in principle, allows the parties to arrange their agreements as they believe suitable.

In respect of non-contractual civil claims, the most common defences are lack of unlawfulness, lack of guilt, lack of accountability and lack of damages. Besides these claims, it can be argued that the alleged violation of a legally binding norm does not allow protection against the damage that has occurred.

Third parties may be prosecuted in proceedings as a co-defendant if they can be held responsible for environmental damages.

Directors' or officers' defences

31 | Are there specific defences in the case of directors' or officers' liability?

Criminal law offers the possibility of prosecuting directors and officers, provided that they are the actual supervisors (ie, all persons who have

actually led the company or site). In principle, the same legal defences that apply to a company apply to directors and officers, although depending on the specific circumstances, directors and officers could argue that they had not been awarded sufficient funds by the company to comply with environmental rules and regulations.

Appeal process

32 | What is the appeal process from trials?

Appeal of the decisions of the court in civil or criminal matters lies with the high courts and, ultimately, the Supreme Court. Appeal of the decisions of the administrative courts lies with the Judicial Department of the Council of State.

INTERNATIONAL TREATIES AND INSTITUTIONS

International treaties

33 | Is your country a contracting state to any international environmental treaties, or similar agreements?

The Netherlands is a contracting state to various international environmental treaties, including the Aarhus Convention, the Basel Convention, the Convention for the Protection of the Marine Environment of the North-East Atlantic and the International Convention for the Prevention of Pollution from Ships. The Netherlands is also a member state of the European Union.

International treaties and regulatory policy

34 | To what extent is regulatory policy affected by these treaties?

Treaties that are ratified by the Netherlands are binding and must be complied with. In some cases, legislation and regulations must be implemented to comply with a treaty. In other cases, legislation and regulations must be amended to comply with a treaty.

UPDATE AND TRENDS

Key developments of the past year

35 | Are there any emerging trends or hot topics in environment law in your jurisdiction?

The planned entry into force of the Environment and Planning Act, which regulates and modernises legislation and regulations on, among other things, the environment, construction, spatial planning, nature and water, has been further postponed to 1 July 2022. The Environmental and Planning Act will have a large impact on the legal framework in the Netherlands.

In order to solve the 'nitrogen crisis' the legislator has amended the Nature Conservation Act several times since the Council of State ruled in 2019 that the Dutch law on nitrogen deposition was not in compliance with the Habitats Directive.

In addition, last year, the Minister of Environment and Housing signed the Clean Air Agreement together with various municipalities and provinces. The aim of the Agreement is to jointly and continuously improve air quality in the Netherlands. Participating parties take measures to limit air pollution from domestic sources. The ambition is to achieve a 50 per cent decrease in the negative health effects of domestic sources by 2030 compared with 2016.

The policy and rules and regulations relating to potential substances of very high concern, which concern substances that are currently not officially considered 'substances of high concern' but could possibly be qualified accordingly at a later date, are in development.

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