Q&A on Environmental Law in The Netherlands

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Contents

Introduction

Using a Q&A format, this article provides a guide to environmental law in The Netherlands and gives a practical description of a wide range of topics including:

- Emissions to air and water
- Environmental impact assessments
- Waste
- Contaminated land, and
- Environmental issues in transactions.

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Environmental regulatory framework

1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?

Dutch environmental law is largely influenced by EU law. Therefore, the Dutch regulatory framework is often based on, or amended by, new EU directives and regulations. These either apply directly, or are incorporated into national law by amending existing acts or creating new decrees.

The main sources of national environmental law are:

- Acts of Parliament.
- Government regulations, policy rules and decrees.
- Jurisprudence and case law.

The environmental regulatory framework covers the following fields:

- Environmental management (pollution prevention and control).
- Air.
- Conservation of nature, wildlife and habitats.
- Contaminated land.
- Environmental impact assessments (EIAs).
- Nuisance.
- Waste.
- Water.

Health and safety matters and planning matters are regulated separately from environmental matters, but are interlinked.

For more details on the regulatory authorities see Page 23.

Public/administrative law

Administrative sanctions can be imposed to achieve compliance with applicable rules. For example:

- Administrative action. The competent authority can take action to remedy any breach of law that threatens the environment before initiating court proceedings. This can be done in cases where a party in breach refuses to take action and the costs involved can be recovered from that party.
- Closure. The competent authority can order partial or complete closure of a facility. Immediate closure is only justified to terminate an unlawful and environmentally unacceptable situation, which cannot be remedied by less drastic action.
- Financial penalty. The competent authority can impose an incremental penalty payment on a daily basis, or per event, in cases where administrative action or closure is permitted if:
  - a fine is the most appropriate penalty; and
  - no environmental interests suffer by imposing that fine.
- Partial revocation of a permit or consent. This action can be taken in cases of non-compliance with the permit conditions or the general regulations applicable to the permit holder. The permit holder must terminate its activities immediately or it may be subject to administrative action (*see above*).
- Provinces and water boards can impose a sanction that can be seen as a mix between administrative and criminal law: administrative punishment (*bestuurlijke strafbeschikking*).

Criminal law

Criminal environmental activities are penalised by the Economic Offences Act (*Wet op de economische delicten*) (EOA). This Act provides for sanctions, such as:

- Penalties, which take into account the economic advantage enjoyed by the offender.
- A duty to remedy the consequences of the offence at the offender's expense.
- Detention, if the criminal environmental activity justifies this punishment, of up to:
  - six years, for intentional criminal environmental activity;
  - one year, for unintentional criminal environmental activity.

In addition to the penalty, the offender must still comply with the requirements under the applicable permits.

Regulatory enforcement

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

The competent authorities must generally take enforcement action against breaches of environmental regulations. However, in practice priority is given to the more serious and/or recurring breaches. The competent authorities have discretionary powers to impose sanctions. The level of sanctions imposed depends on whether special circumstances exist, such as impending changes in legislation.

Furthermore, due to a recent reform of the law and the regulatory framework, municipalities and provinces must co-operate in the formation of regional agencies (*Regionale Uitvoeringsdiensten*) (RUD) to whom enforcement powers will be transferred. This reform is intended to improve the supervision and co-ordination of environmental enforcement.

Environmental NGOs

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

NGOs and other pressure groups are very active in influencing environmental legislation and policy. These groups often get involved in the legislative process itself. However, they are probably more active in objecting to proposed decisions (such as environmental, spatial planning or construction decisions) that may have a negative impact on the environment.

Environmental permits

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all

activities on a site or do they have to apply for separate permits?

There are two types of permits:

- The all-in-one permit for physical aspects (*omgevingsvergunning*) (APPA).
- The water permit (WP).

APPA

On 1 October 2010, the Environmental Management Act (*Wet Algemene Bepalingen Omgevingsrecht*) (EMA) came into force. This enables an applicant to apply for an all-in-one permit for physical aspects (*omgevingsvergunning*) (APPA), which covers a range of 25 former environmental permits, and regulates air, land waste and energy efficiency (but not water, *see below, WP*). The permit applies to companies and institutions, as well as individuals.

Whether a full APPA or simple notification is required depends on the environmental activities of the company concerned. A company is classified into one of the following categories (*Activities Decree (Activiteitenbesluit)*):

- **Type A.** This is for companies with no impact or a negligible impact on the environment. The general rules of the Activities Decree apply, but the company is not required to make a report to the competent authorities and does not have to apply for an APPA.
- **Type B.** This is for companies with a substantial impact on the environment. These companies must inform the authorities of their commercial activities by notification, and may need to apply for an APPA. Existing environmental permits issued prior to new regulations automatically qualify as APPAs.
- **Type C.** This is for companies that have extensive impact on the environment, for example, companies subject to Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive). These companies must apply for an APPA. Larger, more polluting installations must be regulated by an APPA based on the use of best available techniques (BAT).

WP

WPs are regulated by the Water Act (*Waterwet*) (WA) (*see Question 6*).

5. What is the framework for the integrated permitting regime?

Permits and regulator

The APPA can be applied for electronically at a service desk on the following website, *www.omgevingsloket.nl*. Notifications under the Activities Decree must be made separately at *http://aim.vrom.nl*. Subsequently, individual applications are referred to the competent authorities for each individual permit comprising the APPA. The competent authorities are the local authorities, such as the municipality or water board involved (or the province in case of large projects or large companies). The competence of the central government, province, water board or municipality to review a permit application and eventually issue the permit depends on the type of permit requested and the applicable regulations. The Minister of Infrastructure and Environment issues permits for cases of specific importance (for example, mining or defence projects).

At the end of the process one central order constituting the permit is given.

Length of permit

Generally, permits are issued for an unlimited period of time. However, certain permits must be issued for a limited period as prescribed by governmental decree (for example, temporary facilities). In any case, permits remain subject to review. If a facility undergoes changes, an alteration or expansion permit must be obtained. If the changes are extensive, it may be necessary to obtain a revision permit.

Restrictions on transfer

In principle, a permit is attached to the facility, not to the owner of the facility. This means that in the case of transfer of ownership of a facility, the permit automatically transfers to the new owner. However, certain categories of non-transferable permits can be created by decree. The only example so far is the permit under the Environment Decree (*Besluit omgevingsrecht*) for the permanent inhabitation of a recreational home. Each owner of the facility must comply with the obligations set out in the permit. If the owner of the facility changes (for example, in an asset transaction), the competent authorities must be notified one month in advance, but this notification does not affect the validity of the permit itself.

Penalties

If the facility must have a permit, and it is not obtained, the operator commits a criminal offence and can be penalised under the EOA (*see Question 1, Criminal law*). Penalties include fines and up to six years' imprisonment. However, imprisonment is generally reserved for extreme cases of continuing criminal behaviour.

In addition to the penalty, the facility must still comply with the requirements of the permit. Compliance is enforced through:

- Administrative action.
- Financial penalties.
- Partial withdrawal of permit or consent.
- Closure (*see Question 1, Public/administrative law*).

Water pollution

6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

Permits and regulator

In 2009 the WA was enacted. The WA regulates the management of surface water and groundwater, and is aimed at aligning water policy and environmental planning. The WA combines eight former Acts. The various permits that originated from those Acts are now combined in one single WP, which is required for any activity that could impact on either the quality or quantity of surface water and/or subsurface water.

The competent authorities to issue WPs for water pollution activities are as follows:

- The water board (*waterschap*) for the regional water system.
- The Directorate-General for Public Works and Water Management (*Rijkswaterstaat*) for the main water system.
- The province for major water extractions or infiltrations and the Transport, Public Works and Water Management Inspectorate for the Directorate-General for Public Works and Water Management's own works.

Applications for a permit can be submitted electronically at one service desk, after which the service desk directs the application to the competent authority (*see Question 5*). The competent authority decides whether or not to grant a permit for the proposed activity. If the application is submitted for multiple polluting activities, the highest competent authority is the only competent authority.

Prohibited activities

The following are prohibited without a WP:

- Discharging materials into surface waters.
- Discharging materials or water at a water treatment plant.
- Dumping materials in sea waters.
- Discharging water in or extracting water out of surface waters.

For some other polluting activities notification given at the environmental office instead of a WP is sufficient.

Clean-up/compensation

Polluters can be required to clean up or pay compensation for water pollution.

Penalties

The competent authority may partially revoke the WP in case of breach of the terms of the permit, or of any applicable legal provision or if the applicant has misrepresented any information to the competent authority granting the permit. The competent authority may also impose administrative sanctions (*see Question 1*), where polluting activities are undertaken without a WP or where a polluter does not comply with applicable legal provisions. Carrying out polluting activities without a WP can be a criminal offence in which case offenders can be penalised under the EOA (*see Question 1, Criminal law*).

Air pollution

7. What is the regulatory regime for air pollution (whether part of an integrated regime or separate)?

Permits and regulator

The EMA applies to air pollution and an APPA can be required for air polluting activities (*see Questions 4* and *5*).

In addition to the APPA, an Emission Permit (EmP) may be required for companies emitting greenhouse gases (*EMA*). The Emissions Authority (*Nederlandse Emissieautoriteit*) (EA) issues the EmP. This is an agency that is affiliated with the Ministry of Infrastructure and Environment.

Prohibited activities

Undertaking activities that require an APPA or an EmP without having obtained the relevant permit is prohibited.

Clean-up/compensation

Polluters can be required to clean up or pay compensation for air pollution.

Penalties

For the APPA, *see* *Questions 4* and *5*.

In relation to the EmP, the EA can issue an official warning or impose administrative sanctions. Polluting activities can be a criminal offence and the EA can report the offence to the Public Prosecutor. The competent authority may revoke the APPA or EmP.

See also *Question 10*.

Climate change, renewable energy and energy efficiency

8. Are there any national targets or legal requirements for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in buildings and appliances)? Is there a national strategy on climate change, renewable energy and/or energy efficiency?

Emission targets

The Dutch government is subject to targets set by EU member states to reduce greenhouse gas emissions by 2020 by 20% (in comparison with 1990).

Sectors participating in the EU Emission Trading System (EU ETS), such as electricity, heavy industry and civil aviation, must reduce their emissions by 21% by 2020. For sectors that do not participate in the ETS, the Dutch government set a national target of 16% reduction by 2020.

In the long term, the Dutch government plans to reduce emissions of greenhouse gas by 40% by 2030, in line with EU targets of 80% to 95% reductions by 2050 (both in comparison with 1990).

Increasing renewable energy

The Dutch government wants to stimulate the use of wind, biomass, water and other forms of renewable energy. The goal is to increase the percentage of renewable energy from 4% in 2010 to 14% by 2020.

Directive 2009/28/EC on the promotion of the use of energy from renewable sources (Renewable Energy Directive) requires renewable energy to form 20% of total EU energy consumption by 2020, although this may be raised to 30% in future. The Netherlands' contribution to the EU-wide target is 14% by 2020.

In addition, the Renewable Energy Directive imposes an obligation on member states (including The Netherlands) to ensure that at least 10% of overall transport fuel consumption comes from renewable sources (largely to be met by increasing the use of sustainable biofuels).

Increasing energy efficiency

In 2010, Directive 2002/91/EC on the energy performance of buildings (Energy Performance Directive, Directive 2010/31 EU) was revised and has had a significant impact on the built environment policy area. The Energy Performance Directive contains requirements concerning:

- Installation systems.
- Extension of the energy labelling of buildings requirements.
- Energy performance standards for new buildings.
- Penalties for infringements of the provisions adopted under this Directive.

The Energy Performance Directive required member states to implement these provisions and penalties by 9 July 2012. Most Dutch legislative proposals for implementation of the Energy Performance Directive have been rejected by the Lower House (*Tweede Kamer*). The relevant Minister is currently considering the options, and it is currently envisaged that new legislative implementation proposals will be put before the Lower House in early 2014.

On 25 October 2012, the EU adopted the Directive 2012/27/EU on energy efficiency. This Directive establishes a common framework of measures for the promotion of energy efficiency within the Union. This is in order to achieve the Union's 20% headline target on energy efficiency by 2020 and to pave the way for further energy efficiency improvements beyond that date. It sets out rules designed to remove barriers in the energy market and overcome market failures that hinder efficiency in the supply and use of energy. In particular, the Directive

provides for the establishment of indicative national energy efficiency targets for 2020 and a compulsory requirement for larger companies to have energy audits every 4 years. Member States are required to bring laws into force that will comply with the Directive by 25 June 2014 (*Article 28(1)*). This has not yet occurred in The Netherlands.

9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

Parties to UNFCCC/Kyoto Protocol

The EU and the UK are parties to the UNFCCC and the Kyoto Protocal. The EU's emissions reduction target under the Kyoto Protocol is to reduce its greenhouse gas emissions by 8% from 1990 levels in the period 2008 to 2012 (the end of the first commitment period). The EU's target was redistributed among member states, and The Netherlands agreed to a 6% reduction for the first commitment period.

A second commitment period has now been agreed until 2020 with parties setting their own reduction objectives. The parties have also agreed to an amendment to the Kyoto Protocol to provide for an overall objective of reducing emissions by 18% below 1990 levels by 2020 (the original objective was a 5% reduction below 1990 levels in the first commitment period). The EU and Member States have committed to this target on a joint basis (and the EU has pledged to strengthen the commitment to a 30% reduction if a strong international agreement is reached). Parties that have signed up to the second commitment period will review their emissions reduction objectives in 2014.

Implementation

To implement Directive 2004/101/EC amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (Amended Emissions Trading Directive) (that contributes to the Kyoto Protocol obligations), the EMA was amended and subsequently adopted by the Senate on 6 April 2006.

10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?

EU ETS overview

As an EU member state, The Netherlands is covered by the EU ETS, which works in three compliance stages:

- Phase I of the EU ETS ran from 2005 to 31 December 2007.
- Phase II ran from 1 January 2008 to 31 December 2012.
- Phase III started on 1 January 2013 and will run to 31 December 2020(*see below, Phase III*).

Participants must surrender allowances (or other credits) at the end of each compliance period to match their emissions. Failure to comply will result in a penalty. Each allowance represents the emission of one tonne of carbon dioxide.

Following allocation and auctioning, allowances are subsequently traded in an online registry enabling companies to purchase additional allowances to meet their obligations. To obtain and surrender allowances, a participant must have an account on an online registry.

Operators can also obtain credits (that can be traded in the EU ETS) by investing in:

- Qualifying projects to reduce emissions in industrialised countries and certain countries in economic transition (known as joint implementation (JI) under the Kyoto Protocol).
- Projects to reduce emissions in developing countries (known as the clean development mechanism (CDM) under the Kyoto Protocol).

Operators can also surrender any credits as well as EU allowances to comply with their obligations under the EU ETS.

In The Netherlands, in addition to surrendering allowances (or other credits) to match their emissions, participating companies must obtain a greenhouse gas permit from the EA as set out in the EMA.

Aviation

From 1 January 2012, the EU ETS covers any aircraft operator, whether EU or foreign-based, operating international flights on routes to, from or between EU airports. There are certain exemptions, including for light aircraft, military flights, flights for government business and testing flights. Various complaints were made by non-EU

countries at the inclusion of flights to or from destinations outside the EU into the EU ETS. As a result the EU excluded such flights during 2012 from the EU ETS, pending discussions at international level over the future position of international aviation in the scheme.

Phase III

Phase II ended on 31 December 2012. Phase III commenced on 1 January 2013. The main changes in Phase III are as follows:

- There is a single EU registry for all users, which was activated on 20 June 2012, rather than national member state registries.
- There is a single EU-wide cap on emissions, which will decrease annually meaning that former National Allocation Plans will no longer be required.
- Other greenhouse gases and industrial sectors will be included.
- Allocation of allowances will be replaced to a large degree by auctioning, with at least 40% of allowances auctioned from 2013.
- The use of credits from JI and CDM projects is limited.

Environmental impact assessments

11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?

Scope

The requirement for EIA is covered in the EMA, which describes the basic principles of environmental policy. The details are then set out in the Environmental Impact Assessment Decree (*Besluit milieueffectrapportage*) (EIA Decree), including when an EIA must be carried out.

The requirement to carry out an EIA is divided into two types of activities (referred to as plans and projects) (*Appendices, EIA Decree*):

- C-list activities: plans and projects for which an EIA is mandatory because of the nature of the activity itself. For example, the construction of oil refineries, chemical installations and motorways.
- D-list activities: plans and projects that are assessed individually (on the basis of an Article 7.16 to 7.20 procedure) to determine whether an EIA is required.

  An EIA is only necessary where these plans or projects are likely to have significant effects on the environment, for example, the:
  - construction, alteration or enlargement of a waterway;
  - construction of a highway (other than a motorway).

Depending on the activity and the thresholds in the C list and D list, a limited or extensive procedure must be applied.

Where an EIA is required, it must be undertaken before any decision is taken in relation to a plan or project. The EIA must be taken into account in making that decision.

A further EIA regime is contained in Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment Directive). This Directive lays down the rules for a mandatory EIA for strategic decisions. This means, for example, that plans for spatial planning or waste management must be reviewed for any impact they may have on the environment. This Directive was implemented into Dutch law in September 2006 through an amendment of the EMA and the EIA Decree.

The Crisis and Recovery Act (*Crisis- en Herstelwet*) (CRA) was enacted to facilitate the realisation of infrastructure projects and other major building projects to mitigate the economic crisis. The CRA exempts those projects from the EIA. Developers do not have to investigate alternative solutions, as is required under an EIA.

Permits and regulator

A permit may be subject to an EIA, in which case the permit will not be issued without an EIA being performed. The competent authority for the EIA is the authority responsible for granting the permit.

Penalties

If a required EIA is not carried out, the company can be subject to administrative sanctions (*see Question 1*). If a relevant authority grants planning permission for a development without properly considering the statement, the permission or development consent risks being legally challenged.

Waste

12. What is the regulatory regime for waste?

Permits and regulator

The Activities Decree, the EPA and the EMA form the regulatory framework for waste management. Depending on the type of waste and the waste activities carried out, an APPA (*see Question 4*) or a Collection Permit may be required. Under the EPA, anyone who wishes to collect small scale hazardous waste, oil waste and ship waste, requires a Collection Permit. This permit can be requested at the Ministry of Economic Affairs, Agriculture and Innovation and is granted for an indefinite period.

Prohibited activities

Anyone who carries out waste activities and who knows or reasonably should know that the environment may be harmed by these activities, must take all action necessary to prevent or limit the consequences.

Where an APPA is required, it is prohibited to generate, transfer or dispose waste without obtaining the APPA. It is also prohibited to collect waste without the required Collection Permit. For the transfer and disposal of waste see below, *Operator criteria*.

Operator criteria

Waste businesses such as landfill sites, storage, waste transfer, and incineration plants and sorters must notify the National Waste Notification Bureau (*Landelijk Meldpunt Afvalstoffen*) about the waste using a waste processor ID. The National Waste Notification Bureau makes this information available to the authorities for enforcement, policy and licensing. Companies disposing, transporting, treating or processing, or buying or selling waste must register the waste by keeping a waste record.

When establishing a landfill site, an operator must apply for an APPA (*Environmental Permitting Regulation (Regeling Omgevingsrecht)*). When operating a landfill site, the operator must comply with the rules of the Dumping Locations and Waste Substances Decree (*Besluit stortplaatsen en stortverboden van afvalstoffen*), including a prohibition on disposal of certain substances without specific approval.

Landfill operators must also supply data regarding the:

- Soil quality.
- Impact on the soil.
- Method of aftercare after closing the landfill.

The Provincial Executive may require a company to provide financial security for the fulfilment of the aftercare payments.

Companies that collect, transport or sell hazardous and industrial waste must be registered on the transporters, collectors, traders and contractors list (*Vervoerders, Inzamelaars, Handelaars en Bemiddelaars lijst*) (VIHB) list.

Special rules for certain waste

Waste is classified as hazardous if mentioned on the list of hazardous substances provided in Directive 2008/98/EC on waste (Revised Waste Framework Directive). Handling of large-scale hazardous waste is likely to require an APPA, depending on the type of waste and the impact on the environment (*see Question 5*). A company that collects or processes large scale hazardous waste must be registered on the VIHB list.

A Collection Permit is required for collecting small volumes of hazardous waste.

Directive 2002/96/EC on waste electrical and electronic equipment (WEEE Directive) was implemented in the Electric and Electronic Equipment Management Decree (*Besluit en de Regeling beheer elektrische en elektronische apparatuur*), and contains rules for the collection, treatment, recycling, recovery and disposal of electrical and electronic equipment.

Directive 94/62/EC on packaging and packaging waste (Packaging and Packaging Waste Directive) contains provisions aimed at reducing the production of packaging and the promotion of recycling. The Directive is implemented in the Packaging Regulations (*Regeling verpakking en verpakkingsafval).*

Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators (Batteries Directive), provides rules for batteries, accumulators and waste batteries and accumulators. Its purpose is to require the collection and recycling of all batteries placed on the EU market. The Directive is implemented in the Batteries and Accumulators Regulations (*Besluit beheer batterijen en accu's 2008*).

Penalties

Non-compliance with the waste regulations is an environmental offence under the EOA. In addition, administrative sanctions can be imposed (*see Question 1, Public/administrative law*).

Asbestos

13. What is the regulatory regime for asbestos in buildings?

Prohibited activities

The manufacture, import, possession, use and processing of asbestos and products containing asbestos is prohibited (Products Decree Asbestos) (*Productenregeling asbest*). All activities involving asbestos are prohibited since 1993, except for the removal and treatment of asbestos that already exists in products, buildings and structures. In addition to the general rules in the Products Decree Asbestos, there are several decrees covering specific situations, for example the:

- Asbestos Removal Decree 2005 (*Asbestverwijderingsbesluit 2005*).
- Working Conditions Decree (*Arbobesluit*).
- Building Decree 2012 (*Bouwbesluit 2012*).

Main obligations

The Asbestos Removal Decree 2005 provides several rules to prevent the release of asbestos when a building or object is demolished or materials containing asbestos are removed. The rules also apply to the clean-up of materials containing asbestos after incidents. The owner of the building must assess and arrange the removal and disposal of asbestos in certain situations (*Asbestos Removal Decree*) (*see below, Permits and regulator*). Some removal activities can only be performed by specialist contractors.

The Building Decree 2012 controls the construction, use and demolition of buildings and structures. In addition, the Building Decree 2012 establishes a general rule for the maximum permitted concentration of asbestos fibres in the air inside any building. In the original Building Decree (2003) this concentration level was limited to fibres from building materials, but since the introduction of the Building Decree 2012 the source of the fibres is no longer relevant. Furthermore, rather than requiring a building demolition permit, the 2012 Decree simply requires that, if asbestos has to be removed, the demolition and removal must be reported at least four weeks before the works begin.

The Working Conditions Decree contains several rules to protect employees from exposure to asbestos. If a company wants to remove asbestos, it must have an inventory report drawn up by a certified company. The outcome of this risk assessment determines whether the company may remove the asbestos themselves, or whether the removal should be executed by a certified company.

Permits and regulator

The Building Decree provides that from 1 April 2012 a demolition permit is no longer required. The following activities, however, require an inventory report to be drawn up by a certified company:

- The removal or demolition of a structure or object, where it is known or reasonably should be known that it contains asbestos.
- The clean-up of materials or products that have been released due to incidents, where it is known or reasonably should be known that they contain asbestos.

The Ministry of Infrastructure and Environment, Ministry of Social Affairs and Employment, the municipalities and the Labour Inspectorate (*Arbeidsinspectie*) verifies that there is compliance with these rules. To be authorised for the inventory or removal of asbestos, a certificate must be requested at the Asbestos Certification Foundation (*Stichting Asbest Certificatie*).

Penalties

Non-compliance with the asbestos regulations is an environmental offence under the EOA. In addition, administrative sanctions can be imposed (*see Question 1, Public/administrative law*).

Contaminated land

14. What is the regulatory regime for contaminated land?

Regulator and legislation

The Act for Soil Protection(*Wet Bodembescherming*) (ASP) aims to prevent new soil contamination as well as regulate the remediation of historic soil contamination.

The regulators are the relevant provinces and municipalities.

Investigation and clean-up

The ASP provides a duty of care for anyone performing activities that can potentially have an impact on the quality of the soil and requires that all measures are taken that could reasonably be expected in connection with the contamination of land or soil water (for example, remedial works).

The ASP distinguishes between new and historical contamination (*see Question 15, Liable party*).

The condition determining whether remediation is required is whether there is serious contamination accompanied by a "remediation necessity". The principle of remediation necessity considers whether the current or intended use of the soil, or the possible migration of the contamination, may lead to risks for mankind, flora and fauna, to the extent that prompt remediation is required.

The aims of the required remediation are to:

- Make the soil suitable for purposes after remediation.
- Reduce the risks for mankind, flora and fauna as a result of the contamination.
- Limit migration of contaminating substances as much as possible.
- Provide an action plan for any remaining contamination after remediation. This plan must contain measures such as monitoring and maintaining the affected soil and restrictions on future use of the soil.

As a result of an agreement concluded in 2009 between the state, provinces, municipalities and water boards, all contaminated land that is deemed a threat to public health or environment must be remediated urgently. Other contaminated land must be remediated before 2030.

Penalties

Non-compliance with these rules, such as deliberately contaminating the soil or omitting to take soil remediation measures where required, constitutes a criminal offence under the EOA. In addition, administrative sanctions can be imposed (*see Question 1, Public/administrative law*).

If the competent authorities take remedial action to clean up the contaminated soil, the costs can be reclaimed either from the polluter or the owner.

15. Who is liable for the clean-up of contaminated land? Can this be excluded?

Liable party

The ASP contains the principle that the polluter is liable for the carrying out of the remediation. To determine whether a person can be held liable, the timing of the ownership, use of the relevant land and date of contamination is important.

In relation to new contamination, after 1 January 1987, any person who performs activities on or in the soil (including the operator of a facility) must take all necessary precautions to prevent contamination occurring. If contamination occurs, immediate action is required to mitigate the damage and then carry out remediation, if necessary.

In relation to historic contamination, the law distinguishes depending on the date of contamination:

- **Contamination caused before 1 January 1975.** These are considered to be old historic contamination cases. Owner or polluter liability generally does not apply as the law deems these parties not to have been aware of pre-January 1975 contamination. The remediation costs in these cases are settled by the competent authorities (that is, municipalities, provinces and water boards).
- **Contamination caused between 1 January 1975 and 1 January 1987.** A regime of owner/polluter liability applies. The owner and/or the polluter must investigate and remediate possible contamination on the property. If action is not taken, the competent authorities can enforce this by issuing investigation and remediation orders on either the owner or polluter. If the relevant companies or persons fail to remediate, the competent authorities must remediate the land themselves. However, the costs can be recovered from the liable parties.
- **Contamination caused after 1 January 1987.** Liability for remediation rests with the owners of the property or the polluter. The owner is liable to carry out the remediation if:
  - it cannot be determined who caused the contamination;
  - the polluter cannot be found or no longer exists.

Any user or tenant of contaminated premises can only be held responsible if and to the extent that user or tenant is responsible for the contamination.

Previous owners or occupiers can only be held liable as polluters.

Limitation of liability

The liability for soil investigation and remediation can be limited (for example, in a purchase agreement) contractually between a seller and buyer, for investigation and remediation of contamination, but this will not have a bearing on a party's direct liability to the competent authorities under the ASP(*see Question 18*).

16. Can a lender incur liability for contaminated land and is it common for a

lender to incur liability? What steps do lenders commonly take to minimise liability?

Lender liability

A lender cannot in principle incur liability for contaminated land if it is solely the financier and not the polluter, owner or occupier of the respective financed or secured assets. However, a lender can incur liability if:

- It is actively involved in the day-to-day management of the borrower and able to exercise power or control over the assets.
- It can be proved that the lender has committed a tort (for example, a breach of public or environmental law).
- The lender takes possession of contaminated property subject to a mortgage.

Minimising liability

Lenders can minimise liability by not taking control of borrowers' environmental issues. Lenders can also require the borrower to provide warranties and/or indemnities for environmental liabilities and/or provide copies of environmental reports. Usually lenders also obtain a reliance letter or collateral warranty from the seller's environmental consultants. Occasionally, lenders engage their own environmental consultants to help identify the environmental risks.

17. Can an individual bring legal action against a polluter, owner or occupier?

An individual can bring legal action against a polluter, owner or occupier.

The individual must prove that the polluter, owner or occupier has committed a tort by violating public law rules or by breaching the law (for example, the ASP and/or a breach of civil law duties between neighbours). Allowing contamination to move onto the neighbouring land can also constitute a tort against the neighbour and can lead to a civil claim.

The individual can also ask the Public Prosecutor to enforce public criminal law where there is serious environmental damage (*see Question 1, Public/administrative law*).

Environmental liability and asset/share transfers

18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?

Asset sale

In an asset sale, pre-acquisition environmental liabilities normally remain with the seller. The seller and the buyer can agree to apportion environmental liability differently. However, the mere act of acquiring contaminated land and becoming the owner can expose the buyer to liability for remediation:

- Under the ASP for failing to have the contamination remediated.
- In its capacity as the owner of the contaminated land with a duty of care towards the competent authorities (*see Question 15, Liable party*).

Another potential risk can occur where contamination migrates to an adjacent property. In that case, the buyer as owner of that property may incur liability for clean-up measures towards the claimant and/or the competent authorities (*see Question 17*).

The buyer will only be able to seek recourse against the seller if the sale contract provides for this.

In addition to the contamination aspects, a buyer also must consider whether the:

- Seller has obtained all environmental permits.
- Permits are transferable.
- Seller has complied with all applicable environmental laws.

Although the buyer is not liable for pre-acquisition breaches of law or permits, he still needs to know whether there are any issues that may prevent him from lawfully continuing the business at the property after the sale (for example, any necessary upgrades to plant or equipment).

However, liabilities in an asset sale are often structured in the same way as in a share sale. Therefore, a buyer may agree contractually to assume the seller's pre-acquisition liabilities or not and parties may agree on indemnities from one party towards the other against these liabilities.

Share sale

Any liability incurred by the target company remains, in principle, with the target company and therefore in the buyer's hands after the acquisition, including both:

- Liabilities existing before the acquisition.
- Liabilities arising after the acquisition that relate to acts, omissions or circumstances before the acquisition.

A buyer is primarily concerned about the risk of liabilities of the target company relating to:

- Compliance with environmental laws and permits.
- Contamination on the target company's current properties and on any properties it previously owned, used or occupied.

19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?

Asset sale

In an asset transaction the seller, in principle, remains liable for environmental liabilities accruing before the acquisition. The seller and the buyer can agree to apportion the civil liability and any associated indemnities differently, but the competent authorities may still hold the seller responsible for any pre-acquisition contamination that it causes.

In addition, the seller is potentially liable for environmental damage that manifests itself after the sale, if it caused or knowingly permitted contamination on the sold property. Parties can contractually agree in their asset purchase contract that the buyer bears the risk of environmental liabilities and it is then advisable for the seller to obtain an indemnity from the buyer in relation to this liability.

Share sale

Liabilities that the target company incurs before the sale (or after the sale but relating to acts or omissions before the sale) remain with the target company after the sale (*see Question 18*). Therefore, the seller should not retain any environmental liabilities after the sale. However, if the seller, during its ownership of the target's shares, was directly involved in the target's activities and committed a wrongful act that led to contamination, the seller could retain liabilities after disposal of the target. In principle, however, it is not easy to hold a selling shareholder liable for environmental damage caused by the actions of the target company after disposal. The seller may be liable to the buyer for a breach of contract, in particular a breach of warranties or indemnities given in the share purchase agreement.

20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?

Asset sale

There is no general rule on disclosure of environmental information.

However, the seller must disclose essential facts (for example, facts that to the knowledge of the seller are relevant for the buyer) and the buyer must make its own investigations. Whether the seller's duty to disclose takes precedence over the buyer's duty to investigate the facts depends on the circumstances, such as whether the:

- Information is in the public domain.
- Buyer had site-specific reports dealing with contamination issues.

A seller is deemed to know about the presence of contamination if it has been registered by the competent authorities in the Land Register (*Article 55, ASP*). The seller is likely to be liable for environmental issues that were not self-evident but were known or should have been known by the seller at the time of the sale and which were not communicated to the buyer.

A buyer usually requires the seller to give warranties on the environmental condition of the business and its assets to encourage a seller to disclose environmental information (*see Question 22*).

Share sale

The same general rules apply as for asset sales (*see above, Asset sale*). More information is generally disclosed in a share sale than in an asset sale, as the environmental liabilities move with the target company (*see Question 18, Share sale*).

21. Is environmental due diligence common in an asset sale/a share sale?

Scope

It is common for environmental due diligence to be undertaken in commercial transactions. However, its extent or scope depends on the:

- Nature of the target's activities or the business or asset to be acquired.

- The parties' attitudes to and understanding of environmental risk and any time constraints on the transaction meaning that extensive investigations are not possible.
- Nature of the sale (for example, whether the seller has produced a seller's due diligence pack and/or if the sale is being run as a competitive auction).

For example, financial and private equity buyers tend to be more risk averse and therefore may require more thorough environmental due diligence, as well as contractual protections (such as warranties and indemnities) (*see Question 22*). The same is true for lenders, who typically take a cautious approach to environmental risks.

Areas covered

The areas usually covered by environmental due diligence include:

- Soil and water contamination.
- Asbestos.
- Dangerous substances.
- Waste.
- Environmental and issued permits.
- Health and safety compliance.
- Compliance with environmental regulation and any threat of enforcement measures by competent authorities.
- Fines, notifications or complaints made or threatened (either on behalf of, or against, the target).

Types of assessment

On its most basic level environmental due diligence will include:

- A desk-top environmental assessment.
- Pre-contract enquiries of the seller.
- Reviewing information contained in a data room.

At a more advanced level, it can involve appointing environmental consultants to carry out detailed environmental assessments, including:

- Compliance reviews.
- Potential soil and groundwater investigations.

See below, *Environmental consultants*.

Environmental consultants

As lawyers generally limit their due diligence to the legal aspects of the documents made available in a data room and are not in a position to assess technical or environmental assessments and their financial implications, it is advisable to use environmental consultants for environmental due diligence. An engagement letter should cover at a minimum the:

- Scope of the analysis.
- Time frame for the analysis.
- Consultant's liability.

Sometimes sellers commission their own environmental reports before the sale, which are provided to the potential buyers. This is often done to discourage buyers from insisting on warranties or indemnities from the seller. In these circumstances, it is usual for buyers to obtain a reliance letter or a collateral warranty from the seller's environmental consultants, to rely on the reports. However, most buyers will engage their own environmental consultants to assist in identifying material environmental risks. When engaging environmental consultants, negotiation of their terms usually focuses on the:

- Scope of the review.
- Financial and time limits of the consultant's liability.
- Extent of their professional indemnity insurance cover.

22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?

The environmental warranties and/or indemnities that are provided by a seller to the buyer depend on several factors, including:

- The nature of the target's business and the likelihood of significant environmental impact.
- Significant environmental issues and risks identified during the due diligence phase.
- The attitude of the parties towards the allocation of environmental risks.
- Buyer's intended use of the assets.
- Whether it is an auction sale, a bid situation or a private treaty.
- The bargaining strength of each party.

Asset sale

The following are the principal environmental warranties typically granted by a seller regarding its business:

- The company has all environmental permits necessary to operate the business.

- The company has complied with all applicable environmental laws and permits.
- The company is not subject to any environmental proceedings, claims, investigations or complaints.
- As far as the seller is aware, there is no contamination present on any of the properties.
- The seller has disclosed all environmental reports relating to the company's business and properties.
- Absence of soil or groundwater contamination.
- Absence of pending claims or investigations.

Usually, indemnities relate to specific risks that are relevant or have been identified in relation to the assets involved.

The seller usually tries to limit the warranties by reference to its awareness and materiality in time.

An indemnity is usually limited to liabilities in relation to contamination present on the property at the time of the sale and generally covers:

- Costs incurred as a result of regulatory actions.
- Third party civil claims.
- Voluntary remediation costs (occasionally).

An indemnity is usually limited in time.

Share sale

Similar warranties and indemnities are usually agreed in a share sale. As the target being transferred retains all liabilities and potential liabilities relating to historic operations of the business, additional warranties and indemnities may be obtained.

23. Are there usually limits on environmental warranties and indemnities?

It is common to limit environmental warranties and indemnities with time limits and financial caps. In general, time limits for environmental warranties and indemnities are longer than those for other warranties and indemnities (except perhaps for tax claims). Time limits range from two to five years for warranties and up to ten years for indemnities. Financial caps are usually linked to the purchase price. Financial caps for indemnities are generally higher than those applicable to warranties (or may not even apply).

Time limits and caps for an environmental indemnity vary according to the scope of the indemnity and the environmental losses it is intended to cover. For example:

- An asbestos indemnity, is likely to be longer in duration with a higher cap (or no cap).
- A soil and groundwater indemnity is often shorter in duration (up to ten years) and limited to what the parties agree is the reasonable cost of any required remediation.

An environmental indemnity is usually also subject to trigger events that must occur before a buyer can make a claim. Limitations on liability due to events after completion are usually included.

Reporting and auditing

24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Public registers

Companies must submit annual environmental reports to the authority that granted the environmental permit and the Ministry of Infrastructure and Environment, if the threshold value of a substance from the substances list of the Pollutant Release and Transfer Register (PRTR) Regulation is exceeded (*PRTR-regulation and Title 12.3 Wet milieubeheer*) (the implementation in The Netherlands of Regulation (EC) No. 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register).

The report must contain information on:

- The amounts of pollutant released to the air, water and land.
- Off-site transfers of waste and of pollutants in waste water including heavy metals, pesticides, greenhouse gases and dioxins.
- Energy efficiency.
- Fine dust.

In the case of oil, gas and intensive livestock companies more details are required.

Under the PRTR-reports, the national government checks compliance with international agreements and where a company exceeds the rules an environmental permit may be changed or withheld.

Companies and local authorities must report and review their emission details in electronic form (*www.e-mjv.nl*).

Specific rules are set out in the Environmental Reporting Guidelines (*Leidraad Milieurapportages*).

After registration, all relevant public information on the reports is available online (*www.emissieregistratie.nl*).

Compulsory information required by the European PRTR-regulation is publicised in the European PRTR-registration. A company must report data under European PRTR if it fulfils the following criteria:

- The company falls under at least one of the 65 European PRTR economic activities. These activities are also reported using a statistical classification (NACE rev2).
- The company has a capacity exceeding at least one of the European PRTR capacity thresholds.
- The company releases pollutants or transfers waste off-site which exceeds specific thresholds set out in Article 5 of the European PRTR-regulation. These release thresholds are specified for each media (air, water and land) in Annex II of the European PRTR-regulation.

Soil contamination

It is mandatory to register soil contamination in the Land Registry under the Immovable Property (Disclosure of Restrictions under Public Law) Act (*Wet kenbaarheid publiekrechtelijke beperkingen*) (*Article 55, ASP*). These details are accessible to the public.

Environmental permits

Environmental permits may require operators to report environmental details to the authorities. The environmental permits and required reports are publicly available from the competent authority that issues the permits. An overview (including a map, diagram and table) of all contaminated properties is publicly available in all provinces.

25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

Environmental auditing

Under Dutch law, environmental auditing is not compulsory. However, many companies consider it good practice to carry out environmental auditing, such as internal audits or audits carried out by external consultants. Many companies have opted to obtain certification under the international Environmental Management Systems standard (ISO 14001).

Reporting requirements

Environmental permits frequently contain a reporting condition. An environmental permit usually requires emissions to be monitored and the results to be provided to the competent authorities. Aside from this, there are generally no specific requirements for companies to report on environmental performance to the public, although many companies carry out environmental auditing voluntarily (*see above, Environmental auditing*).

26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

Generally, the conditions of an environmental permit require the holder to notify the competent authority if an environmental incident occurs. Notification of incidents that cause soil or surface or groundwater contamination is also required under the ASPand WA.

27. What access powers do environmental regulators have to access a company?

The competent authorities have wide powers of investigation, including the power to:

- Require that information be provided.
- Gain access to premises.
- Obtain samples.
- Interview site employees.
- Carry out works in case of an emergency.

Certain restrictions apply to these powers.

Environmental insurance

28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain

environmental insurance and is it common in practice?

Types of insurance and risk

Special environmental insurance is available in The Netherlands. It can be obtained as a standard environmental damage insurance policy (*milieuschadeverzekering*) (MSV).

Many companies apply for special environmental insurance because most general fire and business liability insurance (*aansprakelijkheidsverzekering voor bedrijven en beroepen*) (AVB) policies provide little environmental coverage. The AVB only covers the sudden and unexpected release of environmentally hazardous substances directly from the insured site. The damage to the site itself is not insured by the AVB.

The MSV insures soil and water damage directly arising from environmentally harmful substances. It usually covers:

- Remediation costs (and costs as a result of remediation).
- Clean-up and disposal of asbestos.
- Investigation costs.
- Mitigation costs aimed at reducing or preventing further damage.

In general, the insurance does not cover:

- Air contamination.
- Soil contamination present before the policy is put in place.
- Personal injury.
- Tank storage of dangerous substances.

These aspects are often covered by other insurance policies.

Obtaining insurance

There are legal obligations to obtain insurance, for example where transporting harmful substances.

Environmental tax

29. What are the main environmental taxes in your jurisdiction?

The main environmental taxes are covered by the Environmental Tax Act (*wet belastingen op milieugrondslag*), which contains the following environmental taxes:

- **Tap water tax.** Tap water tax is levied on the delivery of drinking water to a maximum of 300 cubic metres per connection per year. The tax is levied on the consumers of drinking water. The suppliers include the tax in their consumer price and transfer the tax to the tax authorities. The supply of water for emergency situations (for example, sprinkler installations) is exempted from the tax. The aim of this tax is to encourage consumers to save water. The government is proposing to repeal the tap water tax.
- **Energy tax.** This tax is levied on the consumers of:
  - semi-heavy weight fuel (kerosene and petroleum);
  - gas oil (diesel and domestic fuel);
  - liquid petroleum gas;
  - natural gas;
  - other gases; and
  - electricity.

The tax rates vary per energy source and quantity. Petroleum and certain gases are subject to a reduction in the tax. Also, electricity used within the energy production industry is exempt from the energy tax. An overview of all tax rates is available at *www.belastingdienst.nl*. The tax is included in the consumer price and the suppliers transfer the tax to the tax authorities. The revenue is recycled back to taxpayers through reductions in direct taxes and positive incentives to promote energy saving. This tax aims to reduce carbon dioxide emissions and encourages conservation of energy by consumers.

- **Coal tax.** This tax is levied on producers and importers of coals.
- **SDE+.** As of 1 January 2013, the grant scheme for renewable energy (*Stimuleringsregeling duurzame energieproductie*+) (SDE+) will be funded by a surcharge on energy bills of individuals and companies and no longer through the national budget.

Reform

30. What proposals are there for significant reform (changes) of environmental law in your jurisdiction?

Integrated Environment Act

Under current Dutch law, there are two main pieces of legislation in respect of environmental permits for business activities, the WA and the EMA. However, there are a number of other laws and regulations, related to the

environment in a broader sense, for example in the field of infrastructure and nature protection. To carry out a further integration of environmental law, the government intends to submit a new legislative proposal (the Integrated Environment Act (*Omgevingswet*)), which will integrate the EMA and the Water Act, with the Housing Act, the Spatial Planning Act and the Crisis and Recovery Act. The purpose of this is to reduce the amount of applicable legislation and simplify the rules, so that environmental issues can be handled in a more transparent and efficient way. This is expected to lead to a reduction of administrative burdens and shortened procedures (for example for permitting). The Integrated Environment Act is scheduled for submission to parliament in 2013 and is intended to enter into force in 2018.

The regulatory authorities

Ministry of Infrastructure and Environment

Main activities. This Ministry is responsible for the development of policy and legislation and can provide information on all principal environmental topics.

W *www.government.nl/ministries/ienm*

Ministry of Economic Affairs, Agriculture and Innovation

Main activities. This Ministry co-operates with the Ministry of Infrastructure and Environment in relation to energy and emission regulations.

W *www.government.nl/ministries/eleni*

Ministry of Social Affairs and Employment

Main activities. In relation to the environment, the Ministry is responsible for the issuance for asbestos removal permits and monitors compliance in relation to the removal of asbestos. It is also responsible for other labour issues and working conditions policy and inspection.

W *www.government.nl/ministries/szw*

Inspection Environment and Transport (ILT)

Main activities. ILT is responsible for day-to-day inspection of transport of goods, transport by road, air and water as well as passenger transport, and environmental and building regulations. For information on these topics, it is possible to contact the hotline and information centre.

W *www.ilent.nl*

Directorate-General for Public Works and Water Management

Main activities. The Directorate-General for Public Works and Water Management manages and develops the national network of roads and waterways on behalf of the Minister and State Secretary of Infrastructure and Environment.

W *www.rijkswaterstaat.nl*

Emissions Authority

Main activities. The Emissions Authority is responsible for the issuance of emission permits, the allocation and issuing of emission rights, monitoring compliance and imposition of sanctions.

W *www.emissieautoriteit.nl/*

Netherlands Commission for Environmental Assessment

Main activities. The Netherlands Commission for Environmental Assessment (NCEA) prepares mandatory and voluntary advisory reports for government (national, provincial and local) on the scope and quality of environmental assessments (EAs).

W *www.commissiemer.nl*

National Waste Notification Bureau

Main activities. The National Waste Notification Bureau processes the reports of industrial and hazardous waste, including ship-generated waste, distributes the data of these reports to government authorities and other bodies, and maintains a database of waste permits.

W *www.lma.nl*

Online resources

W *www.omgevingsloket.nl/Zakelijk*

Description. This is the application desk for Environmental Permits (APPA). The website is maintained by the Ministry of Infrastructure and Environment and official and up-to-date information is available.

W *http://aim.vrom.nl/*

Description. This is the notification desk for notifications under the Activities Decree, maintained by the Ministry of Infrastructure and Environment. Official and up-to-date information is available on the website.

W *www.answersforbusiness.nl/regulation/all-in-one-permit-physical-aspects*

Description. This website contains information and answers to frequently asked questions concerning the APPA, maintained by the Ministry of Economic Affairs, Agriculture and Innovation. Official and up-to-date information is available.

W *www.belastingdienst.nl*

Description. This is the website of the Tax and Customs Administration. It contains official and up-to-date information.

W *www.e-mjv.nl*

Description. This website deals with applications for the reporting and reviewing of emission details, and is maintained by the Ministry of Infrastructure and Environment. Official and up-to-date information is available.

W *www.emissieregistratie.nl*

Description. This website contains public information on emissions in The Netherlands on the basis of emission reports, including charts and tables, and is maintained by The National Institute for Public Health and the Environment. Official and up-to-date information is available.

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