
PUBLIC INFLUENCE ON THE SUPERVISION AND ENFORCEMENT OF ENVIRONMENTAL LAW IN THE NETHERLANDS

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SUMMARY

This paper briefly summarizes the structure of the constitutional law of the Netherlands and the roles of the various layers of government, and focuses on the involvement of the public and interest groups in how regulations and decisions come into being.

A number of practical examples are offered to outline what the effects are in practice, and to demonstrate the importance of public consultation and involvement of interested groups. This avoids situations in which at a later stage, when the policy is being implemented or licences are being granted, obstacles arise which cause significant alterations to decisions which have already been made. A political administrator must always listen to the citizens.

If public influence has been thoroughly taken into account in the preliminary stages, there need be no fear of that influence when supervision and enforcement are carried out. Public influence can then be seen as a good "watchdog" to ensure that the standards laid down in the decisions do actually continue to be enforced, or to implement departures from them in ways that the law permits. This can be done because the various interests have already been assessed. In this situation an administrator is more of a manager, steering and directing the implementation of the rules. In this role an administrator will therefore have a different attitude towards public influence. This attitude arises because in reaching an enforcement decision of this kind, in the context of preparing such a decision and the interests that need to be considered, the Provincial Government will not only again involve the public at large but can confine itself to considering the new special circumstances of the case which had not yet been considered in the decision to be enforced.

In a situation of this kind, where for instance an infringement of a regulation has to be tolerated, it is also necessary to ensure that interests are considered according to the general principles of proper administration. Interested parties who are "third parties" must then always be given an opportunity to subject the decisions and their legal consequences to judicial opinion. Experience shows that interest groups in particular make exhaustive use of these rights, but that in many cases the only material effect is a delay in the administratively desirable state of affairs coming into being.

1 CONSTITUTIONAL STRUCTURE OF THE NETHERLANDS AND THE ROLES OF THE VARIOUS LAYERS OF GOVERNMENT

It is important to note that we are a parliamentary democracy at all three levels of government. This requires a system of cooperation between the government and parliament for central government, the provinces and the municipalities. As we operate a system of proportional representation, the government needs a parliamentary majority each time items of policy are changed or produced.

The government works under the rule of law, which means that the powers of government bodies are based on legal competence.

The State of the Netherlands is a unitary but decentralized state. The framework of the State and State laws includes:

- provinces;
- municipalities.

At a territorial level both of these consist of regions which are parts of the State's land. The governments of the provinces and municipalities have their own councils of elected representatives. They work in the general interest of the people inhabiting these regions.

The main duties and aims of the policy have been assigned to the Ministers of State. Specific planning systems have been set up for most of the fields of policy, at both the national and provincial levels.

Examples are:

- Environmental plans;
- Land use plans;
- Water management plans.

The province is governed by three bodies:

- The Provincial Government or Provincial States. This is the provincial Parliament, consisting of 55 members who are directly elected by the inhabitants of the province.
- The Executive Committee, comprising six members, chosen from the members of the Provincial Government. This is a full-time job, governing the province. On this committee the author is responsible for matters concerning the environment, agriculture, nature conservancy, landscape and public information.
- The Queen's Commissioner, who is appointed by the Queen. He or she chairs the Council and the Executive Committee.

There is a provincial administration helping the Executive Committee to prepare and implement policy in the various fields. The Groningen provincial government consists of five different departments, among which are the department for water management, traffic and transport, the department for welfare and economic affairs, and the department for town and country planning and the environment.

Since 1970 there has been a great increase in the amount of legislation in the fields of the environment and water management. Many of the tasks and responsibilities have been delegated to the province, municipality or water board.

It is important to emphasize that the province has an important strategic role in the fields of:

- town and country planning/land use;
- environmental planning;
- water management planning.

Although there is no formal hierarchy between the national and the provincial environmental policy plans, the provincial government takes account of the main aims of the national environmental policy plan, as well as those of the European Community. Besides planning, the province is responsible for granting and enforcing permits for larger industries and industrial plants, and for large-scale green-field activities, with the Executive Committee as the competent authority.

The municipality is not obliged to draw up an environmental policy plan. However, it is responsible for granting and enforcing permits for industrial plants, businesses and activities on green-field sites with less environmental impact.

The province is the competent authority to grant licences and also carry out inspections to enforce the environmental legislation. We have therefore appointed a number of civil servants as provincial inspectors and these pay regular visits to the permit-holding industries and firms.

The province of Groningen lies in the northeastern Netherlands and borders the Waddenzee, an internationally recognized nature reserve. Our province has a population of approximately 560,000 of whom 170,000 live in the provincial capital, the city of Groningen.

This city is the largest in the northern Netherlands and the sixth largest city in the Netherlands.

1.1 What is environmental law and what is public influence?

First a brief explanation of what environmental law is in the Netherlands, what is meant in this paper by "public influence", and how this influence is expressed in Dutch administrative practice in the context of environmental law.

1.1.1 Environmental law

The concept of environmental law came in in the early 1970s. It was at that time that the first publications appeared on legislation relating to what was then a new problem: damage to the physical environment, classifiable under three headings:

- Pollution (the introduction into the environment of quantities of substances or physical phenomena in such quantities that damage is caused to plants, animals, humans, materials, items of cultural significance or ecosystems).
- Depletion (the removal of elements from the environment on such a scale or at such a speed that this method of using the environment endangers the method itself and other forms of use. This concerns, for example, minerals, water, agricultural land, timber and animal species).
- Damage (This is a residual category. Damage can be the result of pollution or depletion, but also the result of other direct human intervention, e.g., desertification, damage to tropical rain forests).

1.1.2 Public influence

In the latter part of the 1960s environmental problems in western Europe rapidly became a focus of public interest. Air and water pollution aroused particular concern, while noise nuisance from aircraft came in for increasing criticism. These problems were not specific to The Netherlands. Until that time the emphasis in the western world had been on expansion, technological development and economic growth. Reconstruction after the Second World War

continued into the 1960s. Growth in prosperity, the expansion of private car ownership, increases in energy consumption and economies of scale and mechanization in agriculture were hailed as positive trends.

It was in the 1960s that people began to perceive the drawbacks to these developments, in water, soil and air pollution and noise nuisance. It became clear that the environmental problems, which initially were regarded mainly as a problem of pollution, called for action by government. The then existing legislation – in the Netherlands there was only the ‘Nuisance Act’ – was inadequate. New laws on the pollution of surface water and air pollution were introduced in 1969 and 1971. To coordinate efforts to tackle pollution, in 1971 a special department was set up in the Netherlands, the Ministry of Public Health and Environmental Affairs.

2 IMPACT OF PUBLIC INFLUENCE

2.1 Public influence on environmental law

Environmental law came into being via the above path. Public influence on environmental law establishes a standard for social behavior in a manner which benefits the environment. This does not mean that environmental law excludes all behavior whose effect on the environment is negative.

The existence of environmental law does not guarantee a good environment. It only contributes towards putting forward solutions from other disciplines, such as education, technology and financial incentives. That is the limitation of the environmental law approach and immediately also explains government’s interest in involving public opinion. There is still a clear role in the Netherlands for politicians, and hence also for public opinion, in environmental problems.

2.2 Supervision/enforcement

Education/interiorisation of the standards is the most important factor for a good environment. Compliance with legal rules aimed at behavior which is beneficial to the environment can be enforced by means of sanctions. This has by no means always been the case. Consequently legal rules have an additional severity over and above instruments designed to enhance awareness and to educate. These rules give government certain tasks and powers in the area of supervision and enforcement. There can be differences of perception on their application or use between government as the competent authority exercising supervision and enforcement, and (sections of) the public.

In applying environmental law a distinction must be drawn between applying standards laid down by law and creating or establishing standards by exercising discretion in the interpretation of policy. In the former case the provincial government no longer has a role, but if it has at least administrative responsibility and is the “competent authority” then it has an executive role in supervising and enforcing the standards already laid down.

In the latter case, when granting the permit the administrative body must determine whether the activity being applied for can be carried out and on what terms this is possible. How the rules are interpreted will depend on the special circumstances of those activities for which environmental requirements have been laid down and what rules are connected with them. The fragility of the environment is also relevant. The authority competent to exercise supervision will then exercise supervision over compliance with the specific rules laid down and where necessary will enforce such rules by using the powers granted by law to that administrative body to impose

administrative penalties. This means that where necessary the administrative body can create the desired environmental situation by arranging to implement it itself. The costs of doing this can be recovered from the offender.

3 REPRESENTING THE PUBLIC

3.1 Who can represent the environmental interest?

A key question which has been a topic of discussion in environmental law is the extent to which “the environmental interest” is an interest which somebody can put forward as an “interested party”, because being an interested party requires that if you are to be able to oppose a decision it is *your* interests, *your* rights that are being harmed. A tree, or the environment itself, cannot defend its interests, so there must be people who take on that interest.

As elsewhere in the world, so also in the Netherlands an association is entitled to adopt the environmental interest as “its interest” and, as the interested party, to promote it in administrative procedures. A requirement is that an association of this kind should promote that interest on the basis of one of the objects in its statutes and its actual activities, and that it should have a solid membership base which justifies such a policy. An example of such an association is Greenpeace. Experience shows that associations of this kind have expert specialists and sufficient financial resources to put forward their vision or point of view with fervor. Nor must one underestimate the influence which organizations of this kind have on the media, when it is often not just a matter of echoing a view of the organization which has already been formed, but also a matter of influencing public opinion.

It is the task of the general administrative body to make a decision once it has considered all the interests concerned. All the interests involved must be weighed against each other, and greater emphasis must not be placed on one interest or another simply because the interest group only propounds and promotes the environmental interest. On this point the decision-making should clearly be a political matter.

3.2 Public influence on decisions to draw up policy plans

The environmental legislation in the Netherlands ordered provincial governments to prepare environmental policy plans concerning how they will interpret their discretion regarding the environment. In the context of these detailed plans and the decision to be taken on them, a provincial government must, when preparing that decision, give the public, interest groups and also the municipalities in the province opportunities to participate and have their say. Once the policy plan has been confirmed by the provincial government, then when for example the council decides to issue a permit it must also abide by the agreements made in the policy plan. This is also referred to as “the administrators binding themselves”.

3.3 Public influence on decisions, based on policy which has been confirmed

By this is meant decisions to grant permits and also enforcement decisions. These decisions too are subject to general principles of sound administration, the standards that are laid down in Dutch law, and, depending on the type of decision, a circle of third parties – interested parties who must be involved in the preparation of such a decision.

3.3.1 Permit procedures

If the area where the permit is being asked for is a vulnerable nature reserve, then if necessary specific rules will be imposed to protect it. In weighing up all the interests involved the provisional council then has an important role and it can lay down specific requirements. In arriving at such a decision the provincial government is obliged to follow what is called a "detailed preparatory procedure".

In this procedure the draft decision, i.e. the intention to make a decision, is generally publicized by, for example, placing an advertisement in the press. Anyone can then respond to this intention and make his or her view known to the council. The council must then take that response into account in the decision-making. Once the decision has been taken it must also be publicized, for example in newspapers. There is then an opportunity for certain interested parties to object to the council regarding the decision which has been taken, and the council is obliged to reconsider, taking all the interests concerned into account, including therefore also the objections. Thereafter, if an interested party has not got his way and feels that his interests have been damaged, he can ask for a judicial review by bringing an appeal in the courts.

Here we see that interest groups from the public oppose such plans, especially in the case of sites for larger industries or radical planning decisions, pipelines and constructing major infrastructure works such as roads and tunnels. Later, even though often the basic decision has already been made in the general planning and objectors have not gotten their way, these groups also try to prevent permits being issued.

As already stated, an association of this kind has expertise in its field and can afford lengthy procedures and the effort and expense connected with them. The same is true if for example a municipal council does not wish a particular activity to be carried out on its territory, whilst the general interest does in fact require it and that interest thus overrides the interests of the municipality.

Often the result is that the whole gamut of objection, suspension and appeal to the final judicial forum is gone through. Consequently we must always allow for a very long procedure to make a decision and a possible judicial decision in relation to planning locations of this kind. A year is by no means uncommon and the ultimate legal decision may come a year or two after that. In such circumstances construction and production will often already have started, as a provisional favorable legal opinion will already have been given regarding whether a provisional measure (an application not to make a start with the activities being licensed until a definitive judicial opinion has been given) asked for by the parties opposing the project is likely to be rejected.

As a result of these activities by associations, great costs are incurred by government (costs of legal proceedings) and business (costs of delays, and income lost as a result of delays).

In the Netherlands, however, the democratic procedure and the procedure for the protection of people's rights connected with it are such a great good that we accept this downside. The opposite is the case only if there is clear abuse of these rights and procedures in order only to cause delay. In extreme cases the courts can therefore impose appropriate measures, such as compensation for loss, on the parties causing the delay. This kind of thing is easier in other countries but seldom happens in the Netherlands. It is something one needs to be very circumspect about.

3.3.2 Enforcement decisions

As is clear from what has been said above, in the case of enforcement decisions it is often a matter of enforcing a decision already considered and taken, so that the lawfulness of the objective being aimed for in the decision is no longer open to discussion. Matters are only

different if at the time of compliance there are special unforeseen circumstances or there is force majeure as a result of which compliance is impossible.

In normal circumstances there is also seldom any public influence in relation to the enforcement decision to be made.

What does happen, though, is a request from the “public”, as an interested party, to take action against an alleged offender by making a decision to enforce an administrative order or impose a penalty. In law the decision in response to a request of this kind is one which can be objected to and appealed against, and hence judicial proceedings can be started.

In this way the interest association keeps an eye on the supervisors and ensures that supervision and compliance with the rules are affected in the right way – a “watchdog” role. This is all the more effective since the association nearly always ensures that publicity is given to its request; it is therefore politically important that the provincial government should make sure that the rules are properly complied with and that it can fully explain its action or failure to act.

In The Netherlands, and certainly in the province where the author is a member of the Executive Committee, there is good collaboration between the provincial government and the criminal enforcement agencies, the police and the Public Prosecutor. Experience has taught us that working together in this way also promotes the quality of enforcement, as people inform each other and encourage them to reflect on the interpretation and analysis of the situation and compliance behavior as it occurs in relation to a permit-holder or other person.

In practice, government in the role of the competent authority regularly consults with the public through its public relations and consults with pressure groups and other government bodies at a preparatory stage, as well as providing facilities so that they can make their views known on intentions or draft plans. This can be done in writing, but people can also choose to do so orally, an official having the task of writing down the main aspects of what has been expressed orally.

Politically, therefore, we always have an ear turned to the public's influence, and we also have money to enable that influence to be exerted. We even give grants to organizations which have set themselves the aim of safeguarding environmental interests within our borders and have reasonably large memberships. We do the same with associations which aim to preserve sensitive landscape within our borders.

But we accept our own responsibilities too, and that means that not all the public's wishes can be heeded. Sometimes the public's reactions are expressed in a number of different directions because there are a number of currents of opinion among those who respond. Examples of this are whether or not waterways in a particular nature reserve, or part of one, should be opened up for recreational purposes and whether or not fishing should be allowed in a region of that kind.

4 OTHER EXAMPLES .

4.1 Foraging areas

A large part of The Netherlands lies on the route by which birds migrate from north to south and vice versa. This means that in spring and autumn large numbers of migratory birds fly from northern Europe over the Netherlands to the south, to warmer climes, thereby escaping the harsher winters of northern Europe. Over a million geese and swans look for places where they can rest and eat on this migration.

The coastal area of Groningen is especially suited to this. One phenomenon is that these million geese and swans come to eat the grass and the winter grain that has only just been sown, thereby causing damage to these crops. These birds cannot be driven off everywhere; to do so would harm the interests of nature and the environment, as many birds become exhausted if they are not provided with places to rest and facilities to eat. Currently we are faced with choices concerning setting up special foraging and rest areas for geese and swans migrating over our region; hunting them there would be prohibited and farmers would be able to get compensation from government. This element in our policy is being closely followed by all the interest groups, and as a result of this the extent to which politicians are prepared to pay farmers compensation is increasing.

4.2 Pipeline

Another recent example of influence by the public concerns government plans to lay a pipeline from Rotterdam, in the western Netherlands, where there is a great deal of industry, to an industrial region in the north, our province, to transport chemicals. As the regional government we want the pipeline, but the environmental organization considers that industries of this type are not appropriate in our industrial region, even though they are permitted in planning terms. This opposition could affect the level of central government's enthusiasm for the project and its willingness to assign high priority to it and make money available for it.

Given this attitude it can be expected that ways of protecting people's rights will be utilized until the last possible moment, and there will be a tendency for central government to opt for a different proposal which can be implemented more quickly because of an absence of resistance from the public. This alternative may well not be in the interests of Groningen province, as the choice would then fall on another region. In the past there was in fact a case where plans did not come about for reasons of this kind. It concerned a plan for a company to locate in Groningen, where the party taking the initiative had a number of possible locations which in fact were in different countries.

This can mean that certain activities which the public does not want are carried out in those countries where there is no public influence or it is so poorly organized that it cannot be exerted effectively.

It is inconceivable that the competitive position of companies in countries where, under the influence of public opinion, certain measures have been taken to combat nuisances should be adversely affected by companies which do not need to take such measures because public influence in that country is absent or does not compel the taking of such measures.

4.3 Public influence on enforcement decisions

An environmental organization recently wrote to our executive committee and to the minister for the environment and the minister of justice alleging that we deliberately permitted infringements of environmental regulations without making use of our enforcement powers; that is, we were tolerating infringement.

Toleration is deliberately and consciously waiving the application of enforcement remedies by the competent authority when an infringement has been ascertained. This can only be done under special circumstances of force majeure or in unforeseen circumstances and when the environmental interest permits. This must also be clearly made known to third parties who have interest and they must also be able to object to a toleration decision of this kind by means of a procedure to safeguard their legal rights. None of this had been done and the provincial government was asked for an explanation. The writers of the letters also immediately sent them to the newspapers and the matter was covered in a press report.

The provincial government then went into the questions in detail in a response letter and explained that a rule under a permit had in fact been infringed for a long time, but that the offender himself was indicating that the rule was not unreasonable, and therefore compliance with the rule was considered feasible in the near future. There was currently a force majeure situation, however, which made full compliance impossible. This force majeure situation was as follows. The company had always made sufficient efforts to try to meet the conditions. The equipment developed to do this turned out to be vulnerable and could not be operated properly on a continuous basis. The company was actively seeking solutions with the help of external experts at the highest technical and scientific level, and it therefore considered that it would ultimately be able to meet the conditions set out in the licence. In remedying the infringement we subsequently had to grant a reasonable period of grace in order to give the offender, under the threat of applying sanctions, a real opportunity to correct the situation to conform to what was desirable and licensed. Using a period of grace of this kind is not the same as toleration, as toleration means that powers to impose sanctions will not be used.

A campaign of this kind by the environmental movement does achieve something. The publicity generates more public concern, along the lines of: 'it looks as if there's something going on at that company that's not quite right...'. In turn, in order as far as possible to avoid negative publicity, the company will if possible do even more to end the infringement, but may suffer commercial damage as its competitors will not be inclined to suppress newspaper reports of that kind.

Politically too it is not very pleasant to be faced with such matters. But what the provincial government still has going for it if you go about things in the right way is that it will have good arguments against questions of this type and be able to defend newspaper reports, and that is how the provincial government will always try to act.

Of course, this does not rule out the possibility that, looked at retrospectively, the provincial government might take a wrong decision. In that case the ministers of environment and justice will have endorsed our standpoint and the way in which we have acted.

5 CONCLUSION

As the supervisory competent authority the provincial government has a somewhat equivocal attitude towards the public influence to which its actions are subject.

On the one hand the competent authority is interested in public opinion in formulating political policy, and a politician develops special antennae for this. On the other hand the moment that public opinion tries to influence the competent authority as regards the supervisory/enforcement role, the same politician becomes suspicious. This is because a natural feeling of threat is engendered, and this in turn is due to the fact that enforcement action does not make the Executive Committee member popular with the offender. Those who infringe environmental rules are often the same people who provide jobs and economic activity. On the other hand the Executive Committee member is also politically responsible for implementing the decisions which have been taken and must ensure they are implemented by means of supervision and enforcement. If that is neglected the public will criticize the Executive Committee member. Hence for the Executive Committee member there is only one path to tread, and that is the path of clarity and integrity. By working in this way a decision can always be properly justified and hence defended. Critical scrutiny of the provincial government as the competent authority with the job of supervising enforcement may therefore well be perceived as a nuisance, but there is no reason to be afraid of it if you involve the public, pressure groups and the press in preparing policy and arriving at decisions – building up a relationship with them, as it were. This creates opportunities for understanding and respecting the provincial executive's decisions.

