

# REFORM OF ENVIRONMENTAL LAW: REALISE YOUR AMBITIONS

DECEMBER 2015





### **About the Council for the Environment and Infrastructure**

The Council for the Environment and Infrastructure (Raad voor de Leefomgeving en Infrastructuur, Rli) advises the Dutch government and Parliament on strategic issues concerning the sustainable development of the living and working environment. The Council is independent, and offers solicited and unsolicited advice on long-term issues of strategic importance to the Netherlands. Through its integrated approach and strategic advice, the Council strives to provide greater depth and breadth to the political and social debate, and to improve the quality of decision-making processes.

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The Dutch version of this advisory report contains an additional analytical section, Part 2.



**ADVICE**



## 1. Context and request for advice

Over the course of time, Dutch environmental and planning legislation has become fragmented across dozens of laws, approximately 120 orders in council<sup>1</sup> and a comparable number of ministerial orders. The national government feels that this fragmentation has created coordination problems and eroded the comprehensibility and usefulness of the legislation. It also acknowledges that there are substantive shortcomings: the legislation is insufficiently geared to sustainable development and pays insufficient heed to regional differences, the need for flexibility and early stakeholder involvement. The multiplicity of laws, each with their own procedures and methods, makes it hard to pursue integrated policies and perform balanced assessments of social initiatives (Tweede Kamer, 2014). The Ministry of Infrastructure and the Environment has therefore reformed the legislation and consolidated the various laws in the new Environmental and Planning Act and its associated orders in council.

### Goals of the reform

The reform of environmental and planning legislation serves both procedural and societal aims. The Environment and Planning Act (Eerste Kamer, 2015), adopted on 1 July 2015 by the House of Representatives, articulates the four procedural objectives guiding the reform:

<sup>1</sup> Translator's note: the Dutch legal term *Algemene Maatregel van Bestuur* (AMvB) is commonly translated as 'general administrative order' but recently 'order in council' has been adopted by the Dutch government in official translations. It concerns decrees with the force of law issued by the government (executive branch) rather than parliament (legislative branch).

- “improving the transparency, predictability and ease of use of environmental law;
- achieving a coherent approach towards the physical environment in policy, decision-making and regulations;
- making it possible to improve the administrative scope for consideration by means of an active and flexible approach, in order to achieve goals relating to the physical environment;
- improving and speeding up the decision-making with regard to projects in the physical environment.”

The societal objectives enshrined in the Environment and Planning Act are articulated in Article 1.3 of the Act: “In the interests of sustainable development, liveability and protection and improvement of the environment, this Act seeks a balanced approach to:

- a. achieving and maintaining a safe and healthy environment and good environmental quality, and
- b. effectively managing, utilising and developing the physical environment for public use.”

### Legislative reform and the Environment and Planning Act

The purpose of the legislative reform is to simplify and reduce legislative requirements, research requirements and red tape, harmonise regulations in various policy areas and put users first (governments, businesses and citizens). Doing this means bundling policy from various areas as much as possible into a single legislative package which can also serve as the

basis for an all-in-one environmental permit. The new legislative package consisting of the Environment and Planning Act and a limited number of implementing decrees aims to do just that. The House of Representatives adopted the Environment and Planning Act on 1 July 2015.

### The Environment and Planning Act

The Environment and Planning Act is expected to come into force in 2018. The bill was given the title: 'Rules on the protection and use of the physical environment (environmental policy)'. The Act consolidates 26 laws in the area of the physical environment, covering topics such as construction, environmental quality, water management, spatial planning and the conservation of cultural heritage and nature. The old laws often had a narrow sectoral focus and, when viewed or applied in conjunction, failed to meet current requirements. The government has introduced the Environment and Planning Act to make the legislation 'simpler and better' ([www.omgevingswet.nl](http://www.omgevingswet.nl)).

### Orders in council

The Environment and Planning Act will be implemented through a limited number of orders in council.<sup>2</sup> This will take place in stages. In the first stage, about 60 orders in council and 20 portions of laws now in force will be reduced to four orders in council.

<sup>2</sup> Translator's note: no official translations of these orders in council are currently available. For this reason, the titles given here (which were coined) may deviate slightly from future translations.

This should make it easier to take an integrated approach and improve transparency, comprehensibility and user-friendliness. The other stages will follow after 2018. Four orders in council are now being drawn up in anticipation of the Act's entry into force in 2018 (Tweede Kamer, 2014):

*Environment and Planning Decree.* This sets general and procedural rules regarding instruments such as those governing permit requirements, competent authorities, submission requirements and decision-making.

*Environmental Quality Decree.* This contains the substantive standards for administrative action and is therefore directed exclusively at the authorities that apply the instruments contained in the Act.

*Decrees on activities in the physical environment.* This group of rules is directed at the actions of individuals, businesses and authorities and concern general and directly applicable national rules governing activities within the physical environment. Due to the volume and diversity of topics and target groups, two decrees will be adopted to incorporate the current sectoral regulations on construction, water management and environmental protection. The current Activities Decree comprises the core of the Environmental Regulations Decree, whereas the current 2012 Building Decree forms the core of the Building Regulations Decree.



### **A focus on new instruments and supplementary rules**

The Rli's 2015–2016 work programme includes the preparation of advice on the reform of environmental law. In addition to this, the Minister of Infrastructure and the Environment asked for consideration to be given to the Environmental Strategy<sup>3</sup> as well. Now that the Environment and Planning Act has passed the House of Representatives, this advisory report takes its contents as given. This also explains the focus on supplementary rules, the orders in council now being drawn up by the Ministry of Infrastructure and the Environment. This advisory report deals with two of the four orders in council being prepared – the Environmental Quality Decree and the Environment and Planning Decree – because the Council expects that these orders in council will have the greatest impact on speeding up and improving decision-making. The Environmental Regulations Decree and the Building Regulations Decree will not be treated in this report. At the request of the Minister, the Council will address the new instrument of the Environmental Strategy. At the moment, the Ministry is working on an Environmental Agenda to support this strategy.

Achieving the desired streamlining and improvement of regulations governing the physical environment will stand or fall with the implementation of the Act in the new rules and instruments. In order to do justice to the intentions of the reform (called 'simply better'), it is important that the choices being made now are sound and consistent with

<sup>3</sup> Translator's note: in previous Rli publications, the term *visie* (a self-binding strategic document) was translated as 'vision'. In conformance with the unofficial translation of the Environment and Planning Act's explanatory memorandum, we now use the term 'strategy' to denote the same.

the reform's underlying objectives. Will the reform prevent detailed sectoral objectives from undermining integrated assessments so that decision-making will indeed be 'simpler and better'? Can a satisfactory balance be struck between a development-oriented approach and the protection of essential environmental qualities?

These kinds of questions prompted the Rli to consider the following research questions:

*Will the implementation of the Environment and Planning Act achieve the objectives of the reform in a balanced way? What is the best way to bring these objectives to fruition in the orders in council and Environmental Strategy now in preparation?*

## **2. Societal context**

The reform of environmental law is one of the largest legislative operations in decades. Despite this, the adoption of the Environment and Planning Act by the House of Representatives (on 1 July 2015) met little public or political resistance. This may give the impression that the reform does not reflect a sense of urgency within society and that it is primarily a technocratic matter of legal harmonisation, but this is absolutely not the case. The Act, and particularly the supplementary regulations and instruments now being drawn up, will have a great impact on the Netherlands when it takes effect in 2018.

The Environment and Planning Act creates a new arena which drastically changes relationships between individuals, businesses and public



authorities. The emphasis within the decision-making procedure will shift to earlier stages of the development process and the developer or project proponent will be given more responsibility. Rules and procedures will be more clear-cut, but with greater latitude for local or political considerations within the decision-making process. The intent is to reduce the need to produce supporting information or studies. Sectoral rules (e.g. regarding safety and noise) will become part of an integrated assessment with a single aim: the quality of the physical environment. In addition, the philosophy of static planning – the local land use plan exemplified this – will be replaced by a dynamic system of continuous adjustment and renewal.

The reform affects all processes and decisions concerning the physical environment, whether big or small. It affects how large-scale urban development processes are set up just as much as how a request for permission for a new driveway is handled. It concerns decisions about and interventions in the everyday environment. It is of utmost importance that a good balance is struck between the two main aims of the law: protection and development.

The Council has written two advisory letters on the Environment and Planning Act (Rli, 2011a and 2015a). Now that new regulations and instruments are being drawn up, it is a good time to provide additional advice. As intimated above, the proof of the pudding is in the eating. We are now faced with the question of whether the completely redesigned legislative toolbox will actually work in practice. Will the strategies and

plans prove to be useful instruments? Have the regulations and standards been harmonised and integrated in the right way? Will decision-making really be simpler and better? Can additional improvements and innovations be made?

### Current practices

Three examples from current practice illustrate how the current system creates problems, imposes high research costs and sets complicated decision-making procedures. This advisory report should contribute to faster and better decision-making in such cases.

- A municipality wishes to build new houses along a busy arterial road to the town centre. The rules on noise pollution prohibit this, even though houses once stood on this exact spot. The new development will improve safety and the urban structure, the local school will not have to close and the local supermarket will remain profitable. Development elsewhere in the municipality encountered opposition because it would be detrimental to the quality of the area.
- A municipality wishes to prohibit the use of electric patio heaters at cafes and restaurants in the interests of sustainability, but the heaters comply with national standards. Can the municipality impose its own more stringent environmental policy?
- A developer wants to build 50 luxury owner-occupied apartments in a former school, while the municipal council wants to do something about the shortage of mid-range rental units. Can the municipality make an agreement with the developer to build 40 luxury apartments for sale and ten for rent?





### 3. Main messages of the advisory report

This advisory report consists of two parts. This part presents the main messages of the advice. The second part, available only in Dutch, provides more detailed information and argumentation.

The reform of environmental law has two main aims: protection and development. The Council's recommendations presented in this advisory report are made with the aim of cementing a cohesive system which safeguards both aims and ensures, as far as possible, that they are brought into balance. The Council agrees with the basic philosophy of the Environment and Planning Act and will concentrate in this advisory report on the instruments currently being drawn up: the Environmental Strategy and the Environmental Quality Decree and Environment and Planning Decree.

#### 3.1 Make a strategy that is both inspirational and selective

The Minister of Infrastructure and the Environment requested advice about the Environmental Strategy planned to come into force in 2018. In the interim, the Ministry is producing an Environmental Agenda to be published in 2016. The Council is in favour of an inspiring and selective national strategy, in keeping with a decentralised system in which not only regional and local authorities, but also the private sector and civil society are given more responsibility for environmental policy. National policy must inspire all stakeholders and challenge them to help tackle the major challenges facing the Netherlands. Selectivity is also required in view of the limited capacity of the national government. The Council recommends that the national government apply a number of related criteria when

selecting topics for its Agenda: it should concern long-term challenges with an international dimension, address concerns about subsidiarity and the benefits of a cross-sectoral approach, and consider the welfare aspects of development and correcting market failures. A national interest exists if regional and local authorities are unable to solve problems themselves or if coordination at a higher level has clear added value. According to the PBL Netherlands Environmental Assessment Agency, a national interest may also involve safeguarding the viability of previous national investments or the economic importance of Schiphol Airport, the Port of Rotterdam and the Brainport Region Eindhoven (Kuiper & Evers, 2012). Using these criteria, the Council has identified four cross-cutting topics to be addressed in the national strategy: the energy transition, climate change adaptation, improving the spatial-economic structure and the transformation of rural areas. Of course, the final selection of topics should take place within the public and political arenas. The Council advises the national government to focus mainly on these kinds of cross-cutting long-term topics in its strategy, and deal with more sectoral or thematic matters in separate short-term programmes.

#### 3.2 Flexibility and latitude in the orders in council

The Council recommends that the national government limit itself to a select number of rules and standards in its implementation of the Act. The idea should be to maximise flexibility to improve the prospects for a comprehensive assessment geared towards environmental quality and to ensure that adequate procedural checks exist for individuals.



### **Use uniform terminology and harmonise how quality standards are dealt with in the Environmental Quality Decree**

The Environmental Quality Decree will contain national government quality standards (instructions) for decisions at the municipal level regarding matters such as the adoption of a local plan. The Council advises continual consideration of these standards and the way they are set to prevent unwanted juridification, and that the government show restraint when considering non-negotiable standards, because these can become sectoral barriers that prevent an integrated assessment of environmental qualities. The Council furthermore recommends standardising both the concepts and the way standards are dealt with. A four-step assessment (see Part 2, Section 3.3) is proposed to minimise research burdens and other demands placed on the decision-making process. The more a standard is deviated from, the more demanding the requirements will become. The Council acknowledges the need for greater decision-making powers for regional and local authorities. Lip service alone will not help bring this about: the orders in council should explicitly increase their decision-making latitude. Finally, including a balancing requirement can help to break through sectoral impasses and enable a comprehensive approach.

### **Ensure that the physical environment plan facilitates cooperation and regulate for this in the Environment and Planning Decree**

The Environment and Planning Decree can be seen as the follow-up to the Spatial Planning Decree, which contains rules for making local land use plans. Because the environmental plan integrates the broadened and renewed local land use plan and the ordinances relating to the physical

environment, the scope of the Environment and Planning Decree is much wider than its predecessor. The Council believes that the national government should design the Environment and Planning Decree in such a way that the physical environment plan will indeed become a new instrument to support local negotiations between authorities, developers and citizens, and one which allows for more integrated and flexible decision-making. An important recommendation is to allow planning agreements to be concluded on the basis of the physical environment plan. This will allow the government to ensure that public interests are sustained and improvements in environmental quality are achieved. In addition, the Council recommends stimulating the use of general rules, re-evaluating transitional law, introducing an unfeasibility check and enabling the inclusion of obligations in the physical environment plan. To safeguard these innovations, they need to be explicitly included in the orders in council themselves, not just in the accompanying explanatory notes.

## **4. Striking a balance**

The central theme of this advisory report is the balance between the two main aims of the legislative reform: protection and development. Can these two aims actually be brought into balance, and where do choices need to be made to achieve this? To answer this question, the Council makes a distinction between four contexts in which this balance is sought: state/society, sectoral/integrated, central/local and legal certainty/flexibility.



### **The state/society context**

As far as the state/society context is concerned, the Council feels that the relationship between the initiator/developer, society and government is due for a change. The national government has correctly observed an increased self-reliance in society and the necessity to take a step back, which is why the Environment and Planning Act allows for facilitative planning. The Council supports this aim, but wishes to make a few qualifying remarks as well. The first concerns the Environmental Strategy. The abstract and strategic character of the challenges being faced (such as climate change adaptation and the energy transition) will not resonate with all citizens. This fact puts into perspective what can be expected from the public and limits the ways public consultation can be organised. At the same time, consultation should also help to garner support for tackling the challenges, since the government can obviously no longer do this alone. The way this issue is dealt with will have major consequences for how the national strategy is drawn up.

Second, this context is also relevant for the orders in council, particularly the Environment and Planning Decree. Facilitative planning within the context of physical environment plans will generate different roles for initiators/developers and authorities. Citizens will have to adjust to this situation by becoming more active in their neighbourhoods and adopting an attitude of negotiation and exchange. The Council recommends strengthening the position of citizens in the planning process.

### **The sectoral/integrated context**

As far as the sectoral/integrated context is concerned, the Council endorses the need for an integrating framework to allow balanced assessments to be made in the new system. The Environment and Planning Act consolidates a large number of laws and regulations, which make rules not only easier to understand, but also more complementary in their application. The Council supports this, but also warns against an obsession with integration when implementing policy. Many issues are sectoral in nature and should be treated as such. For the national strategy this means not insisting that the scores of strategies now in effect in the area of the physical environment are all integrated into a single policy document. This will do nothing to enhance the utility or influence of the strategy. If required, specific sectoral or thematic strategies should be given the status of a programme, making them a more concrete and sectoral part of the strategy. While the overall aim is for the orders in council to facilitate and expedite comprehensive environmental decisions, here too a sectoral approach can improve the simplicity and speed of decision-making.

### **The central/local context**

Some decisions have already been made as far as the central/local context is concerned. The National Policy Strategy for Infrastructure and Spatial Planning opts for decentralisation. The Environment and Planning Act is also predicated on a decentralised system, but can just as easily be used for centralised policy without violating the law. For this reason, whatever standpoint is taken on the central/local issue will remain a political decision by the national government. On the one hand, there is a need for a general





strategy that inspires, puts issues on the agenda and provides guidance by means of shared images of the future; there is also a need for the national government to set general rules on environmental quality. On the other hand, it should still be possible to take policy decisions at the regional and local level and have sufficient latitude to devise place-based solutions. The Council advocates this, but points out that this goes beyond a technocratic adjustment, and will demand a major change in culture among stakeholders. It will be important to stave off any recentralisation until authorities at different governmental tiers have learned to deal with the new allocation of powers. In addition, the Council wishes to draw attention to regional cooperation between authorities. As environmental issues rarely respect administrative borders, joint creation of intermunicipal or regional environmental strategies could prove beneficial.

### **The legal certainty/flexibility context**

As far as the legal certainty/flexibility context is concerned, the Council advocates creating flexibility to enable customised solutions at the level where the various problems and solutions converge. The political reality is that complex situations require solutions tailored to specific local circumstances. However, the Council does not view flexibility as a *carte blanche* and argues for a thorough and transparent argumentation and account of how decisions are made. Substantive flexibility should therefore be accompanied by procedural certainty. In addition, the Council is convinced that flexibility can contribute to improving environmental quality. It can also lead to more stringent standards at the local level. Regarding procedural legal certainty, the Council advocates adapting the

process to the situation at hand: the more a standard is deviated from, the more strenuous the procedure should become, and the more demanding the requirement for documented evidence should be.

## **5. In conclusion**

The Council realises that it will be impossible to simultaneously protect and develop every place in the Netherlands. Choices are unavoidable when seeking the right balance in different parts of the country, as each location has its own environmental qualities – tranquillity is a quality of rural areas, but irrelevant anywhere near Schiphol Airport, for example. The legislative reform should make it easier to deal with these kinds of regional differences more effectively. The Council hopes that the recommendations contained in this advisory report will contribute to this.

Trust is one of the cornerstones of the legislative reform, and the Council concurs with this. Still, one must remain vigilant to prevent so much emphasis being placed on development that the protection or improvement of quality of the physical environment suffers. Government authorities must not violate the trust invested in them; this will require both professionalism and vision. In this sense, the Council is pleased about the mandatory local environmental strategies as it gives municipal councils a means to determine whether the quality of a particular area is being put under too much pressure, or whether opportunities are being missed to improve environmental quality. The municipal council will also need to see to it that public interests are sufficiently taken into account in the decision-making. The Council notes that the interaction between citizen and



state will change with the Environment and Planning Act. The Council has previously argued for strengthening the position of citizens by including provision for public participation early on in the decision-making process in the Environment and Planning Act.<sup>4</sup> Perhaps this recommendation can still be included in the implementing act.

The reform of environmental law is a major operation. The year 2018 is an important milestone as it sees the implementation of the Act, the accompanying implementation act and the orders in council, and also the publication of the Environmental Strategy. This will not complete the reform however. Supplementary legislation will follow, as well as the second and third stages of the operation to reduce the number of orders in council. The Environment and Planning Act is a law under construction: new topics can be added in the decades to come, such as health and safety, aviation, hazardous materials and energy. This is more than a technocratic exercise. It cannot be emphasised enough that success will depend on a change in culture among all stakeholders.

<sup>4</sup> Facilitate and support participation in the early stage. Investigate the possibility of offering project initiators the option to follow the Elverding committee's approach prior to submitting a request for an environmental permit and allowing them to appeal decisions on permits directly to the Council of State, as is now the case for project decisions (Rli, 2015a, p. 3).



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# APPENDICES

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# OVERVIEW OF PUBLICATIONS

## 2015

A prosperous nation without CO<sub>2</sub>, towards a sustainable energy supply by 2050 [Rijk zonder CO<sub>2</sub>, naar een duurzame energievoorziening in 2050]. September 2015 (Rli 2015/06)

Room for the regions in European policy [‘Ruimte voor de regio in Europees beleid’]. September 2015 (Rli 2015/05)

Changing trends in housing: flexibility and regionalisation within housing policy [‘Wonen in verandering, over flexibilisering en regionalisering in het woonbeleid’]. June 2015 (Rli 2015/04)

Circular economy: from wish to practice [‘Cirulaire economie: van wens naar uitvoering’]. June 2015 (Rli 2015/03)

Fundamental Reform of Environmental and Planning Legislation [‘Stelselherziening omgevingsrecht’]. May 2015 (Rli 2015/02)

Survey of technological innovations in the living environment [‘Verkenning Technologische Innovaties in de leefomgeving’]. Januari 2015 (Rli 2015/01)

## 2014

Released national real estate, on social goals and money [‘Vrijkomend rijksvastgoed, over maatschappelijke doelen en geld’]. December 2014 (Rli 2014/07)

Risks assessed. Towards a transparent and adaptive risk policy [‘Risico’s gewaardeerd, naar een transparant en adaptief risicobeleid’]. June 2014 (Rli 2014/06)

Recovering the costs of environmental damage: Financial indemnity to be provided by high-risk companies [‘Milieuschade verhalen, advies financiële zekerheidsstelling milieuschade Brzo- en IPPC4-bedrijven’]. June 2014 (Rli 2014/05)

The future of the city. The power of new connections [‘De toekomst van de stad, de kracht van nieuwe verbindingen’]. April 2014 (Rli 2014/04)

Quality without Growth. On the Future of the Built Environment [‘Kwaliteit zonder groei, over de toekomst van de leefomgeving’]. April 2014 (Rli 2014/03)

Influencing behaviour, more effective environmental policy through insight into human behaviour [‘Doen en laten, effectiever milieubeleid door mensenkennis’]. March 2014 (Rli 2014/02)



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