Bending the rules
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A Dutch approach to improving the flexible application of environmental standards

1. Introduction

Environmental law is sometimes seen as an obstacle for spatial development. There is a tension between the wish to expedite valuable development on the one hand, and the collective desire to protect vulnerable environmental qualities on the other. An often heard complaint about the current legal system is that it’s not flexible enough. Environmental rules (spatial planning, building law, nature conservation law etc.) should not be an obstacle for economically relevant projects of spatial development, especially in the fields of sustainability and green energy. The Dutch legislator has implemented instruments that try to improve the flexibility of the regulatory system by allowing competent authorities to deviate from environmental standards. Initially temporary legislation allowed deviation from certain environmental standards for experimental “development areas” and “innovative projects”. In practice these provisions are applied for projects such as sustainable soil management, small scale wind turbines in industrial zones and the transition of a business area into a residential area.

The Dutch government is working on a fundamental system change by restructuring Dutch environmental, spatial and planning law into one Environmental Planning Act (hereafter EPA). One of the ideas is to make the initially temporary provisions permanent. A first legislative proposal was delivered in June 2014. These ideas have generated a lot of criticism, especially from legal scholars. They see problems with regard to legal certainty and judicial review and argue that the legal instruments that allow competent authorities to deviate from environmental rules infringe the road to sustainability. However, on the other hand some scholars argue that these provisions do not go far enough. The new system of environmental law should provide competent authorities with more flexibility to put aside a norm of environmental law. Therefore a more general provision to deviate from environmental standards should be included in the new EPA.
In this paper we analyse the Dutch approach, which could be characterised as “bending the rules”, that allows competent authorities to deviate from environmental standards.\footnote{1} We start with the introduction of the current instruments provided by the Dutch Crisis and Recovery Act (hereafter CRA). Are these instruments legally sound? How are these provisions applied in practice? (Section 2) Subsequently we address the discussion of a general provision to deviate. We take a closer look at the idea of a more general provision to deviate from environmental standards as put forward in literature. After that, attention will be given to the recent proposed EPA. We explore to what extend the new proposed regulatory framework would allow authorities to deviate from environmental standards and reflect on the choices that have been made by the government (Section 3). We finish with some final considerations (Section 4).

2. Instruments to deviate temporary from environmental standards

2.1 Legal framework

The instruments to deviate from environmental standards are regulated in the CRA that came into force in 2010.\footnote{2} This special act is one of the measures the Netherlands has chosen to combat the economic crisis. Its goal is to alleviate the economic crisis and to promote the recovery of the economic structure of the Netherlands. Initially the CRA was a temporary act that was to expire on 1 January 2014. In 2013 the government extended the functioning of the CRA for an unlimited period of time. The intention is to implement the CRA in the proposed EPA (see Section 3.2).\footnote{3} One important element of the CRA is the introduction of an experimental set of rules on so called ‘development areas’ and ‘innovative projects’.

Development areas

Articles 2.2 - 2.3a CRA offer municipalities tools for getting urban area development back on track if progress has run up against environmental law issues. The local authority is provided the power to allow temporary deviation from the applicable environmental standards when developing a specific area (with a maximum of ten years) and to oblige businesses to imple-
ment certain environmental measures. The idea behind these provisions is that environmental standards should not be an obstacle for economically relevant projects of spatial development, especially in the fields of sustainability and green energy. How does it work? Areas are designated in an Order in Council which is called the ‘Decree implementing CRA’. The areas are designated by the central government based on a recommendation by the Minister of Infrastructure and Environment. An area can be added to the list ‘if it’s appropriate in particular with a view to strengthening the sustainable spatial and economic development of that area’.

Art. 2.3(7) CRA contains a limited list of legislation from which deviation can be allowed, such as the Noise Abatement Act, the Soil Protection Act, and the Nature Protection Act. The Decree implementing the CRA describes in art. 2a more specific from which provisions on the list of legislation deviation can be allowed. The local authority has to regulate the temporary deviation in the municipal land-use plan. Such a land-use plan in the sense of the Spatial Planning Act has to meet some extra conditions. For example it has to be focused on the optimization of the use of the physical environment with a view to the reinforcement of a sustainable spatial development of that area in conjunction with the establishment of a good environmental quality.

**Innovative projects**

Art. 2.4 CRA allows competent authorities to deviate from certain environmental standards that form an obstacle to innovative projects. The idea behind this provision is that environmental rules should not be an obstacle for activities that stimulate the efficient use of energy, or the exploitation of renewable energy sources. How does it work? Projects are designated in the ‘Decree implementing CRA’. The projects are designated by the central government based on a recommendation by the Minister of Infrastructure and Environment. Public authorities or companies can also identify projects that they want to add to the Order in Council by sending an application for designating a project to the Minister. A project can be added to the list if its meets a few conditions. The experimental activities have to contribute to innovative developments, to the combat of the economic crisis as well as sustainability. Art. 2.4 CRA contains a limited list of selected legislation from which deviation is allowed such as the Water Act, the General Environmental Law Act and the Spatial Planning Act. The Decree implementing the CRA regulates a) which deviation is allowed, b) the maximum allowed duration of the devia-

4 Art. 2.3(1) CRA.
tion and c) the manner in which it is determined whether a deviation corresponds to its purpose, and whether the duration needs to be adjusted.

2.2 Legal problems pointed out in literature

The Crisis and Recovery Act was written and enacted in great haste. It was therefore no surprise that this act has met great criticism from the academic world. The provisions on development areas and on innovative projects raise many practical and legal questions.\(^5\)

It is for example not clear how the vague criteria in order to designate a development area or innovative project is used by the central government. At this point the provisions do not seem to be in line with the demands on experimental regulations.\(^6\) The legal basis which provides for experimental regulation should be restricted and described as accurate and concrete as possible. A clear and accurate description provides a safeguard for arbitrary application. Also the goal and function of possible experiments must be mentioned in the legal basis. This is important with regard to the evaluation of the projects. Also the specific rules or parts of regulation which can be deviated from must be clearly stated. In the CRA all these requirements are regulated by governmental decree.

Another weak point of the provision on development areas is the lack of legal guarantee for the measures required to meet environmental standards. In development areas only a temporary deviation of environmental standards is allowed, with a maximum of ten years. After that period of deviation the local government is held responsible for the implementation of the measures required to meet the environmental standards (art. 2.3(10) CRA). However, this duty of care is no guarantee that the standards will be met for the interested parties that are hindered by the deviation of the environmental standards.\(^7\)

With regard to innovative projects it’s even less clear what happens with the experiment after the deviation term ends. Should the experiment also end? Art. 7 of the Decree implementing CRA seems to suggest that the deviation term can be adjusted. This leaves in the-

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ory room for an indefinite period. It is not entirely clear if interested parties can use legal remedies such as judicial review or instruments that will force the authority to enforce the environmental standards.8

2.3 Practice

How are the provisions about development areas and innovative projects applied in practice? Every year the government reports the progress of the application of these instruments in practice to the Lower House. The information in this Section is based on these reports.9

Development areas

In total 22 development areas have been designated since 2010. Notable is the wide variety of sort and nature of the designated areas. In most cases (15) it concerns former industrial areas transformed in (or combined with) a living and working environment. For example we point out the development area of Nuland-Oost in the municipal Maasdonk. This relatively small project is aimed at the development of 300 houses and at restructuring an industrial area. Environmental standards hinder the development of the project that involves the removal of a recycling company. The provisions of the CRA are used to allow for deviation from the standards. The CRA offers the possibility to temporary deviate from these environmental standards and start with the development of the residential area, instead of waiting for the actual removal of the recycling company from the area. An example of a relatively large project is the City port of Rotterdam. Noise pollution and external safety make the development of residential areas in this project complex. In other designated areas (5) the relation between living and working environment hinders development of infrastructural projects such as a railway zone or the implementation of a highway. Furthermore industrial areas (2) are designated to establish a more optimal economic utilization. For the most part the rules from the Noise Abatement Act form an obstacle for the urban development in the designated areas. In some cases smell-nuisance or external safety rules cause difficulties.

It is important to note that the designation of a development area does not automatically mean that the flexibility of the CRA is used in practice. Practice shows municipalities take a lot of time (sometimes even a view years) to adopt a land-use plan (about 13 of these land-

8 A.G.A. Nijmeijer, ’Tijdelijk afwijken van milieukwaliteitsnormen. (Geen) zorgen voor morgen?’ TBR 2010, p. 43.
use plans are still being prepared). In some cases (5) it appeared possible to develop the designated area without using the instruments of the CRA. An explanation for this is that the local authority (and other parties involved) find creative solutions for area development that have been stalled because of issues with the applicable environmental standards. These municipalities don’t need to apply the extra competences awarded to them to deviate from the environmental standards. The possibility to apply the extra instruments of the CRA has created a positive impulse to find solutions that fit within the regular legal framework.

Innovative projects

In total 54 innovative projects have been designated since 2010. They concern a wide range of activities such as: building sustainable houses, small scale wind turbines in industrial zones, an energy-neutral floating ‘eco’-home, a floating autarkic recreation bungalow and a reciprocating compressor turbine combination.\(^\text{10}\) As an example we point out the project of small scale wind turbines. In order to stimulate the building of small-scale wind turbines, industrial zones of seven municipals have been appointed as so called ‘Rule free zones’, for a period of ten years. In this rule free zone it is allowed to build small-scale wind turbines without an environmental building permit (a deviation from the General Environmental Law Act). Furthermore deviation is allowed from certain rules of the Environmental Activities Decree. A specific division of the Environmental Activities Decree is applicable to wind turbines and contains for example the rule “A wind turbine is assessed on the safeguards, maintenance and repairs necessary by an expert in the field of wind turbines at least once per calendar year”. Also a higher noise standard on the façade of sensitive buildings on the boundaries of the sight is allowed (during the day 47 decibel instead of 41 decibel).

In the first place it is noteworthy that an “innovative project” doesn’t always refer to a new technique. The designated innovative projects can be divided in four categories: new techniques, sustainable building, less rules and proceedings, and experiments with future legislation like the proposed Environmental Planning Act. Furthermore it is worth mentioning that deviation of environmental standards doesn’t always result in more flexible rules. Practice shows that art. 2.4 CRA is also being used to set stricter norms. For example the project of the development of a residential area in the municipal of Meppel: deviation of the Building code to set stricter insulation values for walls en roofs. Finally, some experiences in practice show that more flexible regulation alone is no guarantee for the realization of sustainable en-

\(^{10}\) At the moment two new tranches of the Decree implementing CRA are being prepared. In total 26 new innovative projects are being proposed in these tranches.
ergy projects. For example the rule free zones mentioned above. There seems very little inter-
est in the development of small-scale wind turbines in these rule free zones. Only a few small-
scale wind turbines have been realized. It can be said that the contribution to sustainable ene-
rgy of this innovative project is relatively limited.

3. Towards a general permanent provision to deviate?

3.1 Debate on bending the rules

A common complaint about current environmental law is that its application in projects for
area development, results in missed opportunities for improving the environmental and spatial
quality.11 Although the vast majority of decisions fits perfectly within the legislation that ap-
plies, sometimes legislation can be an obstacle for projects that contribute to sustainable de-
velopment and optimal environmental quality. One idea raised in the discussion during the
development of the EPA is to apply a so-called principle of ‘positive proportionality’. This
principles was introduced by scholars and defined as follows:

“The principle of positive proportionality demands a fair alignment between the desired pro-
ject and all involved interests.”12

These scholars believe that this principle of positive proportionality should be a voluntary
assessment by the initiator of the project for the benefit of other citizens and businesses.

“When someone applies for a permit including arguments based on positive proportionality,
we suggest the administration is obliged to include this in the assessment of the permit request
it would make anyway. In our opinion this will give a major incentive to the initiator of a pro-
ject to work on an advantageous combination of interests that is good for both the project and
a sustainable environment. (…) Together with the other principles the principle of positive
proportionality gives all involved actors the opportunity to assess why this singular legal
standard in this case must be pushed aside, in order to get to a full and balanced result.”13

11 De F. de Zeeuw, F. Hobma & R. de Boer, Knelpunten omgevingsrecht voor gemeenten, Delft: TU Delft, 29
oktober 2012.
7. This paper is available via ssrn.com/abstract=2121526. See also: H.C. Borgers & G.M.A. van der Heijden,
Evenredig de ruimte. Bestuurlijke ruimte in het afwegingskader van het omgevingsrecht op basis van een even-
10. This paper is available via ssrn.com/abstract=2121526.
In March 2012 the government outlined the future EPA in its notice to Parliament. This first outline of the EPA also included the principle of positive proportionality. The government uses the following description:

“Indien het belang van de leefomgeving zich er niet tegen verzet, kan van individuele normen worden afgeweken, mits bepaalde belangen hierdoor niet onevenredig benadeeld worden.”

This could be translated as follows: if the interests of the environment do not object, deviation from individual standards may be allowed provided that this does not disadvantage certain interests disproportionately.

From the academic world there was some criticism on this approach of bending the rules. For example it is not clear how this principle of positive proportionality exactly relates to classic proportionality principle, which demands that no unjustified imbalance develops between the desired development and the interests that might be harmed. More important seems the fundamental remark that the concept of positive proportionality is not in line with the conditions applicable in the Dutch democratic constitutional state and more specific the Dutch rule of purpose-specific powers. Applying this principle carries a risk that important environmental standards will be ignored by the competent local authority when making a particular local decision.

The Council of State emphasised in response to the governments notice that a ‘carte blanche provision’ which gives local authorities the power to deviate from environmental standards whenever they want is not desirable. Arbitrariness in the balancing of interests by competent authorities will diminish legal certainty for individuals and businesses.

14 Kamerstukken II 2011/12, 33 118, nr. 3, p. 18.
17 Advies Raad van State inzake Stelselwijziging Omgevingsrecht, Kamerstukken II 2011/12, 33 118, nr. 3, blg. 158168, p. 19.
3.2 New Dutch Environmental Planning Act

The government is working on restructuring Dutch environmental, spatial planning law and on integrating the existing legislative acts into one EPA. The proposal of the EPA was submitted to Parliament in June 2014. Reason for a fundamental system change is that current and future challenges concerning the human environment cannot be tackled effectively using the current instruments, which are based on a whole range of statutory regulations. The EPA will – possibly in 2018 – replace fifteen existing acts (including the General Environmental Law Act, the Water Act and the Spatial Planning Act) and incorporate the area-based components of eight other acts. In the future other acts may be incorporated, including a new Nature Conservation Act. The EPA can be qualified as a framework act. The content mainly deals with procedural aspects and the current substantive environmental norms will largely be delegated to implementing legislation.

It is obvious that one could say a lot about this ambitious fundamental system change. However, in this paper we focus on the following question: To what extend will the new proposed regulatory allow competent authorities to deviate from environmental standards? Relevant is art. 2.23 EPA. This provision on experimental project builds on art. 2.4 CRA on innovative projects. However, there are some differences. First of all the scope of the criterion used in order to designate an experimental project in the EPA is much wider than that of the CRA. Art. 2.23 EPA gives the central government the power to designate projects which considering sustainable development aim to achieve and maintain a safe and healthy physical environment and a good environmental quality, including the proceeding and decision-making. Secondly, the government seized the opportunity to improve the procedural and substantive safeguards of the experimental provision. As we mentioned before, there is a lack of guarantees in art. 2.4 CRA (Section 2.2). Art. 2.23(3) EPA sums up the requirements that have to be incorporated in the governmental degree. This governmental decree has to determine the goal of the experiment, the competent authority responsible for the implementation, the duration of the experiment and which deviation of environmental standards is allowed after the expiration of the experiment. Furthermore it needs to include which deviation is allowed, for which area or decision to deviate is allowed and state the maximum permissible duration of the deviation (with a maximum of ten years in the case of environmental values.

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19 Kamerstukken II 2013/14, 33 962, nr. 2.
20 Art. 2.23 lid 2 Wetsvoorstel.
(omgevingswaarden). The governmental decree also has to explain how the project is going to be monitored and evaluated. Additionally it’s worth mentioning that if a project results in an adjustment of regulation, the minister has the power to lengthen the duration of the deviation considering these adjustments of regulation. Finally with regard to the governmental decree a special procedure (voorhangprocedure) is demanded to ensure the involvement of Parliament.\(^{21}\)

Initially the government intended to include application of the principle of positive proportionality (Section 3.1)\(^{22}\) and the provisions of the CRA concerning “development areas” (discussed in Section 2).\(^{23}\) However, both concepts didn’t make it to the final proposal that was sent to Parliament June 2014. The reason is that the government believes that a general provision that gives local authorities the power to put aside environmental standards granting permission for activities is unnecessary. Research has led to the conclusion that only regulation in the field of noise abatement and soil protection would be suited to deviate from. However, these fields of regulation are under construction.\(^{24}\) Furthermore, one point of departure in drafting the EPA was to introduce more discretion and flexibility so that solutions can be tailored to specific situations. The government takes the view that the flexibility particularly should be built in the legal framework. If the rules provide flexibility to deviate in specific situations, there is no need for a general provision in the EPA to deviate from environmental standards. Once the rules are set, the possibilities to deviate from environmental standards should be limited. A potential disadvantage of general environmental standards is that it is not possible in every situation to make an assessment with an optimal outcome. Therefore, the government introduces instruments that make customization for specific circumstances possible. The EPA includes for example a generic provision on equivalence when applying general rules (art. 4.7 EPA). The EPA together with the implementing legislations provides enough instruments to create flexibility in the application of environmental standards and therefore there is no need for specific provisions on development areas.\(^{25}\)

\(^{21}\) Kamerstukken II 2013/14, 33 962, nr. 3, p. 609.
\(^{22}\) Kamerstukken II 2011/12, 33 118, nr. 3.
\(^{23}\) On 28 February 2013 a first draft of the concept of the text of the proposal was presented to several institutions for formal consultation (Toetsversie Omgevingswet). The text of this first draft, that was not officially published by the government is available online for the general public. Art. 4.17-4.18 of this first draft corresponds to the provisions on development areas in the CRA.
\(^{24}\) Kamerstukken II 2013/14, 33 962, nr. 3, p. 267.
\(^{25}\) Kamerstukken II 2013/14, 33 962, nr. 3, p. 268.
3.3 Reflection

We agree with the choice made by government to exclude the principle of positive proportionality as proposed in literature from the proposed EPA. We believe that the necessity of such a radically instrument can be seriously questioned. The experiences with the CRA show that the provisions on development areas that give competent authorities the power to deviate from environmental standards are hardly used in practice. However, we find it remarkable that the government doesn’t mention the fundamental criticism by academics and the Council of State.

Furthermore we don’t think that the specific provisions on development areas of the CRA, which will expire when the EPA comes into force, are going to be missed in practice. The proposed EPA seems to provide more than enough flexibility. In this paper we will not discuss all the proposed instruments that will improve the flexibility of the regulatory system. However, it is worth mentioning here that even the Council of State points out that there is a risk that flexibility will be valued over legal certainty in the proposed new system of environmental law.26

Finally, art. 2.23 EPA. On the one hand this experimental provision does not seem to be in line with the demands for experimental regulations. The scope of experiments that can be designated is hardly limited by the vague criterion that is used (compare Section 2.2). However, based on the experiences with the current experimental provision in practice we don’t expect irresponsible application of art. 2.23 EPA in the future. On the other hand the government has made major improvements by including extra procedural and substantive conditions and requirements.

4. Final Considerations

It is often heard that environmental standards should not be a hindrance for economically relevant projects especially in the field of sustainability and green energy. The Dutch government also believes that the current system of environmental law is not flexible enough and results in missed opportunities for improving the quality of the environment. In 2010 the Dutch legislator implemented instruments to improve the flexible application of environmental standards by allowing competent authorities to deviate from environmental standards. What lessons can be learned of this Dutch approach of bending the rules?

26 Kamerstukken II 2013/14, 33 962, nr. 4, p. 46.
First of all, the experiences in Dutch practice show that in most cases of urban development areas there is no need to bend the rules. The desired development projects fit perfectly well within the current regulatory system of environmental law. This data confirms that it is often just a perception that environmental standards are an obstacle. One could also claim that with regard to complex urban area development the current environmental law is apparently flexible enough. An obvious recommendation is to underpin the necessity with empirical data, before implementing such a radical provision. Secondly, the experience in practice shows that more flexible regulation alone is no guarantee for the realization of projects. The role of the law should not be overestimated. Other important factors are for example: finance, administrative decisiveness and civil service culture.

From a legal point of view the power to deviate from environmental standards can be qualified as a radical instrument to provide flexibility now that local authorities are given the power to set aside standards that were established by Parliament. More flexibility results in less legal certainty for individuals and businesses. Valuable developments at the expense of vulnerable environmental qualities must be prevented. Therefore a very demanding legal procedure is required. General conditions should at least be that a project is monitored and evaluated, that there is a legal guarantee that the measures required to meet environmental standards are met and that the legal rights of those persons whose interests are directly affected by the project are safeguarded. In the past the Dutch legislator had paid far too little attention to such (legal) safeguards when allowing public authorities to bend the rules. With the proposed art. 2.23 EPA on experimental projects and the possibility to deviate from environmental standards, the Dutch system of environmental law will achieve a better balance between flexibility and legal safeguards for judicial control and legal certainty then it had under the CRA.