COUNTRY PROFILE

The Netherlands

Country Profile

Editor's Note: *This is the 17th in a series of articles summarizing various countries' government and SH&E legislative processes. It is intended to serve as a useful planning tool for SH&E professionals preparing to conduct business in profiled country. Previous profiles have included Argentina, Australia, Brazil, Chile, China, Germany, India, Indonesia, Ireland, Italy, Japan, Kuwait, Mexico, Singapore, Spain and the U.K. All country profiles are provided courtesy of AECOM and are available on ASSE's International Practice Specialty website. Direct requests for additional country information to Halley Moriyama at halley.moriyama@aecom.com; +1-978-589-3233 or to Jack Fearing, CPEA, at +1-703-462-7294; jack.fearing@dyn-intl.com.*

The Netherlands is comprised of 12 provinces as well as major cities. The total area of the country is 41,864 sq km. The population is approximately 17 million (July 2010 estimate). The official nationality is Dutch. Its government is a constitutional monarchy with a parliamentary system. The executive branch of the government consists of the queen (or king) and ministers. The current chief of state is Queen Beatrix (since Apr. 30, 1980). The ministers are accountable to the parliament, the national legislative body. The ministers, who are appointed by the monarch after parliamentary approval, head various governmental departments.

Regional authorities (provinces) and local municipalities each have their own legislative bodies and legislative powers.

Laws are enacted at the national level by parliament and are implemented through a royal decree. A royal decree must be approved by the Council of Ministers and reviewed by the Council of State before being sent to the parliament. The royal decree is signed by the monarch after parliamentary approval. The Council of State is a consulting body to the crown and consists of 29 members. In many cases, the law provides a legislative framework and the appropriate minister, who has legislative authority and may issue ministerial decrees, provides detailed requirements.

Regional authorities (provinces) and local municipalities each have their own legislative bodies and legislative powers. These lower public bodies may issue regulations provided that they are consistent with those promulgated by a higher public authority. In accordance with this approach, the national government may enact a law with general standards required for compliance, and the provincial authorities may have an obligation to develop more specific regulations that implement this national legislation.

Lastly, local water boards are responsible for water quality, water usage and wastewater discharges. These water boards also have the authority to issue legislation.

Environmental Authorities

A variety of governmental and quasigovernmental bodies at all levels of government are involved in the environmental regulatory process. Some of the more important ones are noted here. Listings of addresses and telephone numbers for some of these agencies are included at the end of this article.

•The Minister for Housing, Spatial Planning and Environment (VROM): The minister issues implementing decrees and regulations concerning environmental matters, issues permits in particular cases and has certain enforcement responsibilities. The minister is assisted by the directorate general for the environment.

•The Provincial Executive (Gedeputeerde Staten): The provincial executive is one of the main licensing and enforcement bodies with regard to particular activities involving waste, soil pollution and certain large industrial facilities. Each province has its own provincial executive, who can play an advisory role with regard to some permits issued by the municipalities. For larger cities, licensing and enforcement regarding soil pollution activities are handled at the city executive level (mayor and aldermen).

•The Mayor and Aldermen (Burgemeester en Wethouders): The mayor and aldermen represent the competent authorities at the local level of government (municipalities). In environmental matters, they have certain permit issuing responsibilities relative to smaller industrial installations. In larger cities, they are also the competent authority regarding licensing and enforcement of soil pollution activities.

•Water Boards (Waterschappen): The water boards enforce all water quality matters with the exception of those quality issues regulated by the central government that involve large rivers, IJssel Lake (IJsselmeer) and certain major channels. The water boards enforce the requirements of the Water Act pursuant to powers delegated to them by the provincial executive. In this position, they issue water discharge permits, collect pollution levies and enforce compliance with the act. As of Jan. 1, 2005, 26 separate water boards have jurisdiction, but

more and more water boards have merged (see http://www.waterschappen.nl, last accessed in January 2010).

•Environmental Inspectorate (Milieu-Inspectie): The environmental inspectorate is a body working under the supervision of the directorate general for the environment and operates in each province and supervises compliance with environmental laws and regulations. It also controls enforcement activities associated with the lower public bodies and serves in an advisory role with respect to environmental issues. These inspectorates report to the minister for housing, spatial planning and environment, the provincial executive, the mayor and aldermen, the water boards and the public prosecutor (Openbaar Ministerie).

Health & Safety Authorities

In the occupational health and worker safety area, the Ministry of Social Affairs and Employment is the principal national policymaking authority. This ministry issues various guidelines governing labor conditions. Supervision and enforcement of the Occupational Conditions Act (Arbeidsomstan-dighedenwet) and its implementing regulations are through the Labor Inspectorate (Arbeidsinspectie; see http://www.arbeidsinspectie.nl, last accessed in January 2010). The inspectorate generally only reports to the ministry in the form of a written annual report process; however, it is obligated to report directly to the ministry upon request and/or in such instances as an occupational catastrophe. The inspectorate has the authority to perform (reactive) inspections and investigations of a workplace due to a worker complaint or a serious industrial accident or based on their own initiative. It also has the authority to impose a fine.

The Labor Inspectorate was reorganized in 2003. Since then its organizational structure has provided for national sector-specific directorates that enforce occupational safety and health regulations. In addition, there are three thematic directorates: Labor Market Fraud, which combats illegal employment, Occupational Conditions, which supervises the compliance with the Occupational Conditions Act and its implementing regulations, and Major Hazard Control, which manages major risks.

Employers, employees and other responsible persons are required to supply the Labor Inspectorate with all information that is requested and/or identified in the Occupational Conditions Act and enabling legislation.

Enforcement of SH&E Regulations

Administrative Actions

If a party violates environmental laws or regulations, the environmental authorities or other relevant administrative bodies responsible for enforcement under the law may impose administrative sanctions against the responsible party, though such sanctions cannot be imposed immediately. These administrative sanctions include financial penalties (dwangsom) and/or the revocation of the permit. The financial penalties, which can be imposed on a daily or per-event basis, can range from approximately $400,000-$800,000 depending on the impact to the environment. The violator normally will be given a specified schedule within which to correct the compliance problem. During that period, the financial penalty will not be in effect. If the noncompliance issue continues beyond the specified schedule, the financial penalty is imposed. Alternatively, an administrative penalty may be imposed. This is a criminal sanction that can be imposed immediately without intervention of the public prosecutor. Amounts vary according to the severity of the violation.

For example, an administrative penalty for violating emissions trading laws may reach approximately $625,000. There is also a fourth option called bestuursdwang, which involves the issuance of a letter by the appropriate authority identifying the noncompliance status of the facility and the timeframe required for corrective action. If this correction is not made by the facility, the authority has the right to make the correction or to temporarily shut down the facility. The revocation of the operating permit would also result in the shutting down of the facility.

Civil Liability

Private parties who have an interest that is protected under the Dutch Civil Code can also take civil actions, including recovery for damages. For a cause of action to be successful, there must be a tortuous act (contravention of a law/regulation, breach of duty of care), damages must be sustained, a causal relationship between the tortuous act and the damages must be established and the impact of the tortuous act must have been foreseeable. Even if a facility is operating in a manner that is consistent with permit requirements, it can be held liable for environmental damages. Under Dutch case law, it has been established that there is a general duty of care obligation that may go beyond permit requirements. On the basis of case law, any facility whose operations may be harmful to the environment has an obligation to have inquired as to the damaging effects of such operations.

The statute of limitations for environmental damage actions is a maximum of 30 years, commencing at the moment the damage was incurred or, in cases where damage takes place over a prolonged period of time, the time when the activity was terminated. On the other hand, action generally must be taken within five years of knowledge that impacts to the environment have occurred and a responsible party has been identified. If no action is taken within five years of first knowledge, the responsible party cannot be held liable. If no knowledge and/or no responsible person(s) have been identified, the 30-year statute of limitations period applies.

Under Dutch law, the managing and supervisory directors of a corporation can be held liable to a third party for environmental damages. Such liability appears to arise if it was within the power of the managing direc-

tor to prevent the environmental damage and s/he was negligent in not taking action to prevent it.

Since a Supreme Court ruling in 1986, legally organized groups, such as the Society for the Defense of the Environment, may pursue a civil action against an environmental offender provided that the organization's articles of association include as its objectives the protection of the environment or similar language.

Criminal Sanctions

Most Dutch environmental laws contain provisions allowing for criminal sanctions for certain breaches. In such cases, the Economic Offenses Act defines the allowable remedies, which may range from imprisonment up to a maximum of six years, a fine up to a maximum of $874,959 or both. Other environmental violations are subject to the Dutch Code of Criminal Procedure, where maximum penalties are up to fifteen years imprisonment and/or include a fine of up to $874,959 Euros for offenses that cause danger to the life of other persons or result in death. The public prosecutor may also seek to have the facility closed down, the appointment of a supervisory manager and even forfeiture of economic gains achieved as a result of the offense.

Directors and other company officers can be held criminally liable if they ordered the violating action or omission or had de facto control over the violations concerned.

The Dutch have a long history of providing public access to environmental information. The Freedom of Information to the Public Act first entered into force in 1978 and was later amended in May 1992.

Strict Liability

Strict liability (without fault) exists in certain areas of Dutch environmental law; this most often involves activities where hazardous substances are concerned. In such cases, the courts tend to hold the defendant liable unless s/he can prove that the incident was unavoidable and that s/he was not at fault or careless.

In addition, the Civil Code (Articles 6:175 and 6:176) contains provisions imposing strict liability on persons (i) who are in possession of or had power over by way of producing, handling, transporting, storing or disposing hazardous substances in question when the damage occurred or (ii) operating a landfill.

Comments on Enforcement Practices

The importance of enforcement in the implementation of SH&E regulations was identified as early as 1985/1986. Since that time, enforcement has become more stringent, especially in the form of increased administrative actions. Dutch environmental authorities routinely visit industrial facilities once or twice a year to establish compliance with the provisions of issued permits. If compliance is found to be lacking, the permit holder and/or the person in control of the facility is issued a warning. If at the time of the second visit it is found that the problem still has not been corrected and/or that another issue of noncompliance is identified, the administrative actions detailed here can be implemented. Since 1993, the issuance of financial penalties has been used increasingly with respect to administrative enforcement actions.

A recent development in enforcement and inspection of SH&E regulations is increased international cooperation. The harmonization of laws and regulations, as well as the transfer of know-how with the current and future members of the European Union, is especially important. Interpol will play an increased role in fighting international environmental criminality (Green Interpol).

Criminal sanctions against an industrial facility can also be imposed by the public prosecutor under the Economic Offenses Act. Although uncommon, this action can be taken, even if an administrative action has not been taken. The public prosecutor may also impose criminal sanctions in cases where the offender has received a letter from the authorities indicating that no further action will be taken despite the infringement.

Audit Privilege

If an audit is conducted to meet a specific license or permit condition, these findings are public information and must be made available for discovery. However, if an audit is self-initiated, there is no obligation to report the findings to the regulatory authorities.

Attorney-client privilege is available in the Netherlands, although the scope of this privilege is substantially more limited than in the U.S. If an audit report is actually prepared by an attorney for his client, the report would be considered privileged and would not be subject to discovery. On the other hand, the audit report itself would not be considered privileged if it were prepared by a consultant on behalf of an attorney (outside or in-house) or an in-house attorney.

Access to Information

Environmental information about a specific facility may be available through the governmental authorities upon request. This assumes that the requested information does not involve national security issues or has not been designated as confidential business information.

The Dutch have a long history of providing public access to environmental information. The Freedom of Information to the Public Act first entered into force in 1978 and was later amended in May 1992. The rules on confidentiality of commercial information are discussed in Chapters 12 and 19 of the Environmental Management Act. These acts were both amended on Feb. 14, 2005 to fully comply with the Aarhus treaty. Requests for information must be in writing and submitted to the authority that has possession of the requested document. If a request involves environmental information concern-

ing a particular facility and if a third party is making the request, only that information, which is required by law to be supplied to an agency in the first place, will be made available to the requesting party. Decisions on requests for information can be appealed.

Contaminated Land

Applicable Regulations

The main regulatory vehicle for the prevention and/or remediation of soil pollution is the Soil Protection Act (Wet Bodembescherming). The act currently includes four components:

1) A general and procedural portion;

2) A section on preventive measures (Articles 6 through 20);

3) A section addressing investigations and cleanups (Articles 21 through 72); and

4) A portion dealing with financial issues and liabilities (Articles 73 through 87).

Under the Soil Protection Act, general decrees are issued, the implementation of which is generally enforced in licensing requirements. The application of a specific decree largely depends on the nature of the activity concerned and on the persons involved.

Liability for Preexisting Contamination

The statutory framework for soil policy is the Soil Protection Act (passed in 1987 and revised in 1994 and 2006) and the Environmental Management Act. The legislation's objective is that soil quality may not deteriorate and where necessary, the soil must be cleaned up. Many specific regulations and decrees are based on these two pieces of legislation. In addition, there is the Netherlands Soil Protection Guideline for industrial activities. This guideline describes preventive measures to be taken by businesses to protect the soil. The competent authority uses the guideline to draft permits and to enforce the Environmental Management Act. The Soil Protection Guidelines apply to the majority of businesses in the Netherlands in the form of the general rules for establishments.

The Provincial Executive (Gedeptueerde Staten)—and in larger cities, mayor and aldermen—may issue specific orders relative to a cleanup action, if it has been determined that the pollution is of such a nature that it either reduces or threatens the functional properties of the soil for man, plant or animal. Such a result is identified as serious pollution. The application of this cleanup principle (remediation of the soil in relation to the current use of the soil) can lead to the issuance of a cleanup order if certain established levels of contamination have been exceeded. The timeframe within which an order may be issued is based on the identified urgency of the cleanup.

The term "urgency" refers to the danger to humans or to the environment. The more urgent the situation, the more quickly an order will be issued. Cleanup should start as soon as possible after issuance of the order and no later than the date mentioned in the order. For company premises, the owner or long-term lessee of the premises must remediate if a cleanup order has been issued, irrespective of his/her status as the responsible party/polluter. Furthermore, when transferring the ownership of premises that are contaminated, the former owner remains responsible for cleanup until the new owner has provided sufficient financial security.

It should be noted that the policy framework on soil protection and environmental law in general (as described) will lead to amendments of laws and regulations. These amendments will lead to the incorporation of the Soil Protection Act in the Environmental Management Act and to the consolidation or integration of as many implementing regulations as possible into other existing regulations. The consolidation with other laws and regulations (in particular for spatial planning, agriculture and water) will provide for more integrated solutions.

Soil users are entitled to use the soil but also have a duty to treat the soil with care, bearing in mind the interests of third parties. In planning and developing their territories, the local and provincial authorities will evaluate the present quality of the soil and the required quality of the soil for its new use. The desired soil quality is set down in a soil management plan or a local authority ordinance (e.g., for dealing with (polluted) soil, earth and dredging sludge).

The Provincial Executive can issue an investigative order and/or an order mandating the implementation of isolation, control and monitoring (ICM) measures. ICM refers to allowing pollution to stay in place (sometimes after fixation or encapsulation); this compares to a removal action. The orders can be issued to either the person whose actions resulted in the pollution or the owner/lessee. Additional orders for investigation and cleanup can be issued subsequent to the issuance of the initial orders.

It should be noted that investigative and ICM measure orders can also be issued to those parties that may have either a personal or business right (most often contractual in nature) associated with the contaminated property.

Based on jurisprudence, the government can bring civil cases to court to recover soil cleanup costs from soil polluters by holding them liable under tort law. Cost recovery is generally possible only in those cases where the pollution occurred after 1975. In cases where the pollution occurred before 1975, recovery of costs may be possible if the following conditions are met:

•The polluter was cognizant of the serious dangers posed by the action at the time the pollution was caused or should have been cognizant of the dangers, and

•The polluter was seriously culpable in not refraining from the polluting or impairing actions in view of the seriousness of the action. With respect to actions that took place within a company, the following special considerations must be taken into account:

- the standard business practices followed by comparable companies; and
- the reasonable alternatives, which were available for use and could have been applied by the polluter at the time the contamination occurred.

It is generally thought that redress of costs for pollution that occurred before 1975 will not be successful due to the stringent conditions that must be met and proven.

Cleanup Standards

The values used to establish when and if cleanup is necessary are detailed under the Decree and Regulation on Soil Quality (Besluit en Regeling Bodemkwaliteit) and the Ministerial Circular for Soil Remediation (Circulaire Bodemsanering 2009), which came into force in April 2009. This Ministerial Circular establishes cleanup goals and the criteria for evaluating the seriousness of the contamination and the urgency of the implementation of cleanup and remediation activities.

In that respect, two values for groundwater and one value for soil have been established: the target value (S-value) and the intervention value (I-value). The target value is generally used as the reference value for clean groundwater. The intervention value is the concentration above which a further site investigation is required as a result of potential or actual threats to humans, flora or fauna based on the results of the site investigation. Remediation may be necessary. The substances or contaminants of interest are categorized as metals, inorganic compounds, aromatic compounds, polycyclic aromatic hydrocarbons, chlorinated hydrocarbons, pesticides/herbicides and other pollutants. The target and intervention values for soil and groundwater are presented in Tables 1 and 2 of the Circular on Soil Remediation 2009 (Circulaire bodemsanering 2009) at , http://wetten.overheid.nl/BWBR0025649/geldigheidsdatum_29-09-2010, last accessed in January 2010.

List of Provinces

Drenthe
Flevoland
Friesland
Gelderland
Groningen
Limburg
Noord-Brabant
Noord-Holland
Overijssel
Utrecht
Zeeland
Zuid-Holland

Property Transfer Legislation

For persons or companies engaged in the purchase or sale of a business of property, there is no statutory legal requirement to undertake pretransaction environmental investigations. Nor is there any legislation in effect that requires sellers of businesses or property to provide the potential buyer with any document or statement concerning the environmental condition of the property. Nevertheless, the buyer has an active duty to adequately investigate the objects of the sale and to make enquiries that will ensure an informed opinion. Dutch case law appears to place great emphasis on this duty (termed "onderzoeksplicht"). On the other hand, the Dutch good faith principle (goede trouw) entails that a vendor is obliged to disclose any information regarding the business or property that s/he believes or should believe to be of material interest and relevance to the potential buyer.

Amsterdam skyline.

It is not unusual for parties involved in property or business transactions to seek, by way of contract negotiations, warranties and indemnities and to receive environmental disclosures regarding the purchase or transaction.

Reporting Obligations

Accidental Spills & Releases

Notification of accidents, which either pollute the environment or may pollute it, is required under the Environmental Management Act (EMA, Section 17) to the competent authorities (usually the authorities that issued the EMA license). In the EMA license, as well as in any environmental emission licenses with respect to emissions to the air, waters or sewers, there normally is a requirement to notify the authorities in the event of an accident. Furthermore, the facility is required to immediately take all measures, which can reasonably be required from the facility to prevent or, if prevention is not possible, limit the environmental risks of the accident.

While there are notification requirements as described, the regulations do not establish quantitative thresholds below which there are no requirements to notify the authorities. Instead, it is left to the facility to determine whether the accident or incident caused or may cause pollution of the air, land or water (including sewers), and if so, the notification must be made immediately. If the facility is not able to determine the consequences of the spill or release, it is recommended that the authorities be notified

as a matter of prudence. Failure to notify will result in the potential for prosecution.

Contamination Identified During Sampling

Generally, there is no reporting obligation in the event that soil or groundwater contamination is identified during the course of conducting a sampling program that is independent of an accident or spill incident (e.g., Phase II sampling as part of due diligence). On the other hand, if the sampling was in response to a reportable accident or incident, the competent authorities may require transmittal of the results.

List of Key Agencies

Ministry for Housing, Spatial Planning
and Environment
Postbus 20951
2500 EZ The Hague
The Netherlands
Telephone: (31-70) 3393939
E-mail: vrominfo@postbus51.nl
http://www.vrom.nl
(English version: http://international.vrom.nl/, both sites last accessed in January 2010)

Ministry of Social Affairs and Employment
Postbus 90801
2509 LV The Hague
The Netherlands
Telephone: (31-70) 3334444 or (31) 0800 9051
E-mail: info@minszw.nl
http://www.minszw.nl
(English version: http://english.szw.nl/, both sites last accessed in January 2010)

Sources of Regulatory Information

All regulations can be downloaded for free from http://www.overheid.nl. Large parts of this website are in English (both sites last accessed in January 2010).

Publications

Copies of other publications (brochures, reports) can be ordered (often online) from the following ministries.

Environmental publications can be obtained through contacting the following:

Ministry of Housing, Spatial Planning
and Environment
Telephone for orders: 0031-800-8051
Telephone Library: 0031-(0)70-339 30 00
E-mail library: bibliotheek@minvrom.nl

Health and safety publications can be obtained by contacting:

Ministry of Social Affairs and Employment
Telephone for orders: 0031-800-9051
Fax for orders: 013-5953565 (Pondres handles the orders)

Are you LinkedIn to ASSE?
Get connected!
Join ASSE's practice specialty and branch group pages on LinkedIn.com. Nearly 5,000 members have already joined! Get involved and participate in the discussions, search jobs, contribute articles, find resources and network with other SH&E professionals.
Join the ASSE groups

Visit www.linkedin.com and search ASSE in the Groups tab.