

Author: J Verschuuren

**THE DUTCH *CRISIS AND RECOVERY ACT*: ECONOMIC RECOVERY AND LEGAL
CRISIS?**

ISSN 1727-3781



2010 VOLUME 13 No 5

THE DUTCH *CRISIS AND RECOVERY ACT*: ECONOMIC RECOVERY AND LEGAL CRISIS?

J Verschuuren*

1 Introduction

Throughout the world, governments are responding to the financial and economic crisis. Such responses vary from supporting the banking system to adopting economic stimulus packages. The latter vary greatly. Some countries focus on specific sectors, often the green energy sector or, in a broader sense, the sustainable technology sector. Others have an even broader scope. Some countries use only financial instruments, such as subsidies or tax incentives, to stimulate (certain sectors of) the economy. Others apply a whole range of legal instruments. Combinations of measures such as these are seen as well. The article focuses on the Netherlands. This country opted for the enactment of a special act containing literally hundreds of articles, all of which are meant to speed up decision-making on a wide variety of activities, in the hope that after the crisis is over, all these projects can immediately be carried out, without any delay caused by legal procedures in court or elsewhere. The *Crisis and Recovery Act*¹ is seen as an example of *ad hoc* legislation. Drafted in a great hurry, it is meant to be in effect for only five years and contains several experimental instruments. The CRA has met with great criticism because it allegedly curtails citizens' procedural rights, since it focuses almost exclusively on environmental standards as obstructions that need to be removed and because it infringes international and EU law. The article describes the main characteristics of the new law and analyses the legal critique of the CRA, with the aim of assessing this new law's ability to help the economy to recover without bringing about a crisis in the legal system.

* Jonathan Verschuuren. MA LLM PhD (Tilburg University). Professor of International and European Environmental Law, Tilburg University, Netherlands, and Extraordinary Professor of Law, Faculty of Law, North-West University, South Africa (j.m.verschuuren@uvt.nl). The article is based on a paper presented at an HL Swanepoel Lecture at the Faculty of Law, North-West University, in March 2010.

1 *Crisis- en Herstelwet* of 18 March 2010 – hereafter CRA, as published in the Government Gazette (*Staatsblad*) 2010, 135.

2 Aim and content of the *Crisis and Recovery Act*

The CRA has four main elements:² (a) special provisions for specific projects; (b) experimental rules on "development areas"; (c) special provisions for residential construction projects; and (d) provisions simplifying and streamlining twenty existing acts. These are discussed hereafter.

2.1 *Special provisions for specific projects*

Politically, in the media and in legal scholarship, most attention has been directed to the first chapter of the CRA. This chapter applies to seventy projects of national importance listed in Annex II and to categories of projects described more generally in Annex I. The provisions that apply to these projects aim to simplify the decision-making process significantly so that the projects can be carried out as soon as possible, thus stimulating the recovery process of the economy. All the listed projects are large developmental projects, such as the extension of large industrial sites, large-scale wind parks, large urban development plans and projects concerning central infrastructure (highways, railways, airport extensions and the renovation of bridges). General categories of projects also include infrastructural projects, including water management and sustainable energy projects. These provisions expire on 1 January 2014.

Changes made to existing administrative law in order to speed up decision-making on these projects include (this list is not exhaustive):

- (a) Decentralised government bodies cannot appeal against decisions by the central government that are not directed to them. This is contrary to existing administrative law. Unlike some other countries, it is common practice for government bodies to appeal the decisions of other government bodies;³

2 Other elements are not discussed here because they are considered to have much less impact on the legal system, and are thus of less relevance for the main research objective of the article. An example of these is a provision permitting homeowners to let their homes temporarily whilst they are for sale (A 2.8).

3 A 1.4 CRA.

- (b) Substantive illegalities can be passed, should these not affect interested persons. The current *General Administrative Law Act*⁴ already has a comparable provision for procedural illegalities. This has now been extended to include substantive illegalities.⁵
- (c) The length of processes has been curtailed. Courts have to apply the fast-tracking procedure already in existence, originally designed for the preliminary suspension of cases.⁶
- (d) Courts must decide within six months of the date on which the decision was made (that is, the start of the appeal term).⁷ This replaces the existing provision that courts have to reach a decision within a "reasonable" term.
- (e) Appellants can lodge only motivated appeals⁸ and are no longer permitted to add additional grounds for appeal later.⁹ This ends the common practice of lodging a "*pro forma*" appeal and adding motivations later during the trial.
- (f) The "relativity" principle has been introduced, meaning that claimants can invoke only rules that are specifically intended to protect their interests.¹⁰
- (g) In instances in which an environmental impact assessment¹¹ is required, it is necessary neither to assess alternatives nor to require a recommendation by the EIA committee.¹²
- (h) The "*lex silencio positivo*" principle has been introduced on a wider scale. According to this principle, a permit is legally deemed to be issued in cases in which the competent authority does not make a timely decision on an application for a permit.¹³ Although already present in the GALA, this provision is now applied to more decisions (certain spatial planning decisions).

4 *Algemene Wet Bestuursrecht* of 4 June 1992 – hereafter GALA.

5 A 1.5 CRA.

6 A 1.6(1) CRA.

7 A 1.6(4) CRA.

8 A 1.6(2) CRA.

9 A 1.6a CRA.

10 A 1.9 CRA. Under common Dutch administrative law, once one is accepted as an interested person, one may have the entire decision reviewed by court.

11 Hereafter EIA.

12 A 1.11 CRA. Under Dutch environmental law, an EIA has to include an assessment of alternatives, such as other routes for a road or other locations for a harbour extension. The EIA committee is an independent scientific committee that advises on the scientific quality of the draft EIA.

13 A 1.12 CRA.

2.2 *Experimental rules on "development areas"*

The second important element of the CRA is the introduction of an experimental set of rules on "development areas".¹⁴ Under Article 2.2, the central government can designate either urban or industrial development areas. The "bubble" concept is applied in these areas, that is, environmental standards apply only to the entire area and no longer to individual polluters. The local authority has to achieve a "good environmental quality" without having to apply the same environmental standard to each source of pollution. This offers the possibility of balancing polluting activities with clean activities in the area, thus creating additional "pollution rights" within the overarching environmental quality standard. Local authorities can also redistribute environmental rights within the development area to enable development without impairment to the overall environmental quality. The basis for such a redistribution of pollution rights is the newly created instrument of the "development area plan". Should, for example, the authorities wish to enable the construction of a new road or the establishment of a new industrial plant in an already polluted area, existing activities within the area can be forced to reduce emissions so that the new activity can proceed without infringement of existing environmental quality standards at the overarching development area level. Under current environmental law, each activity has to comply individually with the relevant environmental quality standard. To enable the experiment to be executed, the CRA has made it possible to deviate from a whole series of environmental and spatial planning laws.¹⁵ The administrative rules for specific projects dealt with under Section 2.1 above apply to decisions concerning activities in development areas.¹⁶

This is experimental legislation, in that the central government will designate the experimental areas and monitor the results. An experiment can last up to ten years, with a possible extension of up to five years. The provisions of the CRA on development areas expire on 1 January 2014. This means that an experiment can last until 1 January 2029.

14 See extensively Klijn and Stam 2010 *TBR* 56–64.

15 A 2.4 CRA. See Nijmeijer 2010 *TBR* 42–49.

16 A 1.1(1)(b) CRA.

2.3 *Special provisions for residential construction projects*

The third main element of the CRA is the introduction of the "one-stop-shop" principle for the development of new residential areas comprising anything between twelve and 2000 new houses. Although only applicable to the construction of new residential areas, the provisions of this element are quite far-reaching. Practically, none of the legal provisions that require decisions to be made by any government authority is applicable to these projects.¹⁷ These can include provisions in a wide variety of laws and regulations in fields such as the environment, nature conservation, spatial planning, water management and infrastructure. The only exceptions are provisions in nature conservation law and law protecting archaeological sites, both of which are sets of rules with an international and EU background. Rather than applying all these regular pieces of legislation, there is only one "project decision" to be made by the local city council. In making the project decision, the local council has to take into account the norms in the laws and regulations that were declared inapplicable. The "one-stop-shop" principle has thus been introduced into Dutch legislation. The initiator of a building project has now only to go to one authority, which reaches a decision on its own and provides the applicant with one integrated permit. There are ample possibilities for public participation, albeit just once (since there is only one decision). Appeal is possible in one instance only and the administrative rules on the decision-making process described above under Section 2.1 apply to the project decision as well.¹⁸ Again, these provisions expire on 1 January 2014.

2.4 *Provisions simplifying and streamlining twenty existing acts*

The last element of the CRA that the article highlights comprises by far the largest part of the Act. The remaining forty pages of the CRA contain a seemingly endless list of modifications, both large and small, of existing rules in a wide variety of laws, mainly in the field of the environment and energy. Although they are presented as being aimed at simplifying and streamlining existing legislation, many of the amendments are actually difficult to link to the economic crisis. Although some are

17 A 2.10(2) CRA.

18 A 1.1(1)(c) CRA.

merely textual corrections, others have been discussed for many years and have suddenly ended up in the CRA, which seems to have acted as a drag-rope for old political desires. The most significant difference between this and the other three central elements is that the amendments in existing environmental and energy law do not expire on 1 January 2014. These amendments, therefore, need extra careful scrutiny. Two examples of the changes that can be linked to the financial crisis are:

- (a) the introduction of rules to simplify and speed up decision-making on the construction or extension of sustainable energy installations, particularly in the *Electricity Act*¹⁹ and the *Spatial Planning Act*²⁰ – these amendments are clearly in favour of energy companies that wish to invest in the production of sustainable energy;
- (b) the relaxation of nature conservation rules in various ways, for instance, by regulating that existing activities in or around protected areas do not need a permit under the *Nature Conservation Act*²¹ (this is now only the case for existing activities that are regulated under a management plan for the protected area concerned).²² Another far-reaching example is that nitrogen emissions by farms no longer have to be individually regulated through permits because the central government wishes to rely on the general policy to reduce nitrogen levels in those parts of the country in which the levels are so high that severe damage to protected areas is evident. Obviously, this favours farmers who were previously unable to increase the size of their herds.²³

19 *Elektriciteitswet* 1998 of 2 July 1998.

20 *Wet Ruimtelijke Ordening* of 20 October 2006.

21 *Natuurbeschermingswet* 1998 of 25 May 1998.

22 See Bastmeijer 2009 *M en R* 628–633.

23 Veltman and Smits 2009 *M en R* 638–641.

3 Analysis of the legal debate

The CRA has generated a great deal of criticism. This section deals with the main points of critique as expressed in academic literature, as well as by the Council of State²⁴ and in Parliament.²⁵

3.1 *It is not always the law that causes delays*

This point was already evident from a 2008 advisory report on the acceleration of decision-making on infrastructural projects, the Elverding Committee report.²⁶ Delays are often caused by a lack of administrative or political competence to reach a decision that receives wide support, often simply because the project is extremely complicated. The Council of State emphasises this: "[T]herefore, the way in which all stakeholders are involved in the decision-making process is of great importance. The role of legislation is limited when it comes to these types of problems".²⁷ The Council of State, in its advice on the CRA, argues that some delays can be solved by legislative measures, especially those aimed at resolving fragmented decision-making by various authorities. The Council points at initiatives already underway, such as the introduction of a new environmental permit (*omgevingsvergunning*) integrating a whole series of decisions in the field of environmental, planning and building law. It was this part of the advice of the Council of State that made the cabinet introduce the special provisions for residential construction projects into the CRA (an element that was not originally in the Bill).

24 In the Netherlands, the Council of State advises on all bills before they are sent to Parliament. For their advice on this Bill, see Tweede Kamer der Staten-Generaal 2009 <http://bit.ly/azDLug>.

25 In the Netherlands, bills have to be accepted by both Houses of Parliament, first by the more politically dominated Second Chamber and then by the First Chamber (the Senate), which focuses more on constitutional and other legal issues. Their reports are available at www.overheid.nl.

26 Advisory Committee Acceleration Decision-making Infrastructural Projects (*Advies Commissie Versnelling Besluitvorming Infrastructurele Projecten*, chaired by Mr Elverding), see Ministerie van Verkeer en Waterstaat 2008 <http://bit.ly/iiASnH>.

27 Tweede Kamer der Staten-Generaal 2009 <http://bit.ly/azDLug> 8.

Many authors argue that the CRA will ultimately not lead to a speedier process, but most likely to even further delays.²⁸ The reasons for this are threefold. Firstly, it is clear that the Bill was drafted in a hurry and many issues have not been properly thought through. As a consequence, new legal issues will arise from these rapid but fundamental changes that are brought about by the CRA. Secondly, the CRA itself often creates new legal complexities. Consider, for example, the many alterations of existing nature conservation law. Whereas the original *Nature Conservation Act* in 1998 began with a simple Article 19, there is now not just an Article 19a, 19b, 19c, etc, but even an Article 19ka, 19kb, 19kc, etc. Article 19kh, for example, has five sections of which Section 1 has six subsections, of which a subsection has two sub-sub-sections. Rules frequently have exemptions, which in turn are exempted (which is an exemption to an exemption to a rule). Thirdly, given the knowledge we now have of decision-making in complex situations, it is very likely that some of the amendments will be counterproductive. Decision-making on large projects requires time. The feasibility of the project has to be studied, alternatives have to be looked into (see further below), environmental and other impacts have to be studied, including possible side-effects, and, as already indicated, the involvement of stakeholders requires careful attention so as to achieve political and social acceptance.

3.2 *The Crisis and Recovery Act curtails citizens' rights in legal procedures*

The right to appeal is limited in various ways, as described above, especially through applying the relativity principle and thus limiting the arguments that appellants may bring forward. Firstly, interested persons who have standing are no longer allowed to have the entire decision reviewed. Even in instances in which they invoke only rules that are particularly meant to protect their interests, small illegalities can be glossed over, thus rendering their appeal virtually ineffective. Obviously, much depends on the manner in which the courts are to apply these new provisions. Both the question of whether a certain legal rule is meant to protect the interests of the

28 Interestingly, this point was made by most authors in the various thematic issues of Dutch law journals on the topic. These law journals approached a range of authors, each on a topic of their specific expertise (eg EIA, natural resources law, administrative procedure, building law, water law, etc). See particularly the thematic issues of *M en R* 2009/10 and *TBR* 2010/1.

individual or non-governmental organisation (NGO) involved and the question of whether the illegality is insignificant and can be ignored, leaves sufficient manoeuvrability for the courts.²⁹

The period within which individual citizens and NGOs have to study documentation and write an appeal also appears to be problematic. There are only six weeks provided for this. Given that large and complex projects are involved, six weeks appears to be a short time, especially in combination with the measure to no longer allow *pro forma* appeals. Interested and affected parties have to study documentation, consult with specialists if necessary, confer with others (for instance, with other inhabitants of the area who are affected by the decision, or with their lawyers), and document the legal complaints as correctly as possible because these cannot be changed or extended at a later stage.

3.3 Frequent potential infringements of international and European Union law

There are at least five elements in the CRA that conflict or may conflict, depending on the manner in which the provisions will be applied in practice, with international and EU law. Such a conflict is legally prohibited under the *Constitution of the Kingdom of the Netherlands*, 1815,³⁰ and under the EU Treaty.³¹ As a consequence, courts will have to apply international or EU law directly rather than the CRA. The five conflicting elements are:

- (a) making decisions against EU law is legally impossible;
- (b) limiting public participation and access to justice may be contrary to the United Nations/Economic Commission for Europe Convention on Access to Information,

29 See extensively Schueler 2010 *TBR* 36–41.

30 *Grondwet voor het Koninkrijk der Nederlanden* of 24 August 1815 – hereafter *Dutch Constitution*.

31 A 94 of the *Dutch Constitution* states that national laws and regulations are not allowed to be contrary to binding international law. The new Treaty of Lisbon regulates in A 4(3) that member states have to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union. Since 1964, it is consistent case law of the EU Court of Justice that EU law has precedence over conflicting national law (*Flaminio Costa v ENEL* [1964] ECR 585 case 6/64).

Public Participation in Decision-making and Access to Justice in Environmental Matters³² and EU directives implementing this convention;

- (c) infringements of the EU EIA directive;
- (d) infringements of the EU biodiversity directives; and
- (e) infringements of the EU directives concerning environmental quality standards.

3.3.1 *Making decisions against European Union law is legally impossible*

Since it is legally impossible for any member state of the EU to make decisions that are contrary to EU law, two of the mechanisms to speed up decision-making in the CRA are illegal in cases to which they are applied in those instances in which EU law is applicable to the cases. Obviously, this is the case when illegalities are passed. Passing illegalities, even insignificant ones, is not possible when EU law is involved. Courts will therefore not be able to apply this provision when testing government decisions that relate to EU law. This will be so in most environmental cases because EU environmental regulation exists on practically all environmental topics. In addition, applying the *lex silencio positivo* principle will not be possible either, at least not in so far as it would lead to a decision that is contrary to EU law. The European Court of Justice has already judged, in a case against Belgium, that a system of tacit authorisation is contrary to a whole series of environmental laws.³³

3.3.2 *Aarhus Convention and European Union directives implementing this convention*

In testing the CRA against the literal wording of both the Aarhus Convention and the EU directives implementing this convention within the EU,³⁴ one could argue that the CRA does not impinge on the limits set by these documents. However, one could also argue the opposite. It all depends on whether one takes the convention literally or uses the spirit of the convention as a starting point. The Aarhus Convention, for instance, states that public participation procedures have to include reasonable time-frames allowing the public to prepare and participate effectively during the

32 38 ILM 517 1999 – hereafter Aarhus Convention.

33 ECJ 14 June 2001 *Commission v Belgium* ECJ 2001 I-4591 case C-230/00.

34 Especially Directive 2003/35/EC OJ 2003 L 156.

environmental decision-making.³⁵ As stated above, six weeks may, in complex cases, not be time enough to prepare thoroughly.

As far as access to justice is concerned, the Aarhus Convention allows national regulators to set criteria that have to be met in order for individual citizens and environmental NGOs to have standing. However, these criteria have to be consistent with the objective of giving the section of the "public concerned" wide access to justice.³⁶ The "public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making. Environmental NGOs are deemed to have an interest.³⁷ In taking these provisions literally, applying the "relativity" principle probably does not lead to an infringement. This, however, depends on the manner in which the courts are to test the principle. A very strict and narrow interpretation of the principle may lead to the situation in which people can invoke only those rules that are meant to protect personal interests, such as health and property. Since, according to its preamble, the Aarhus Convention is meant to preserve and improve the state of the environment and to ensure sustainable and environmentally sound development, such an application of the relativity principle would, in my view, be contrary to the Aarhus Convention. One can even wonder whether it is legitimate to reduce access to justice in environmental matters, since the entire convention concerns improving procedural rights in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.³⁸

3.3.3 *European Union directive on environmental impact assessment*

The EU EIA directive³⁹ does not explicitly require a scientific committee to be instituted. Again, however, the question arises whether abolishing such a committee once it exists is permissible, since the directive aims at having a reliable EIA system.

35 A 6(3) Aarhus Convention. A 2(3) and 3(4) of Directive 2003/35/EC OJ 2003 L 156 state the same.

36 A 9(2) Aarhus Convention.

37 A 2(5) Aarhus Convention.

38 A 1 Aarhus Convention.

39 Directive 85/337/EEC OJ 1985 L 175, as amended in 1997 and 2003.

Another point of discussion is whether the directive makes refraining from researching alternatives for the planned project a possibility. Assessing the consequences of the projects, looking into the consequences of potential alternatives, and comparing the environmental impact of all of these appear to be a basic feature of an EIA.⁴⁰ Still, the directive states only that an EIA has to include "[w]here appropriate, an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects".⁴¹ In following this text literally, one could argue that once the developer refrains from searching for an alternative, the EIA can do without the assessment of alternatives as well. Although there is no relevant case law by the European Court of Justice on this issue yet, I assume that simply abolishing the need to assess the effects of alternatives is in conflict with the directive.⁴² In the case of projects such as the ones listed in the CRA, it seems highly unlikely that one would not investigate possible alternatives, even should this only be for economic reasons (for example, the most economically viable route for a new road). If that is the case, then in my view, the EIA also has to include an assessment of the environmental impact of these alternatives. In addition, failing to investigate alternatives would probably rebound unpleasantly on those implementing the project because people would be able to argue in court that there was a far better alternative that should have been studied and that by not studying it the developers had not fulfilled their responsibilities. Since there is a general principle in administrative law that decisions have to be carefully prepared, this is a line of reasoning that may very well be successful in court.⁴³

40 Jesse *Een Hernieuwd Perspectief* analyses the literature on this issue. Examples are Yost "Administrative implementation of and judicial review under the National Environmental Policy Act" 14 (this is the "heart of the environmental statement") and Wood *Environmental Impact Assessment*.

41 Annex III para 2.

42 Similarly, Jesse *Een Hernieuwd Perspectief* 268–271. The opposite opinion is defended by Gundelach and Soppe 2010 *TBR* 23–34.

43 This principle is considered to be one of the most important administrative law principles and is codified in A 3:2 of the GALA.

3.3.4 *European Union biodiversity directives*

Just as in the above situations, the drafters of the CRA sought to eliminate legal provisions that are not strictly necessary from the point of view of EU law. Again, it must be concluded that they are walking on thin ice. Without going into too much detail, the CRA reduces everything to the minimum requirements of the EU Birds Directive⁴⁴ and the EU Habitats Directive⁴⁵ by following the literal wording of both directives as much as possible. However, this is a tricky thing to do, because the wording of the directives is necessarily of a rather general nature to leave room for the member states to find the most appropriate ways to implement the DIRECTIVES whilst achieving their goal of biodiversity conservation. Only regulating the bare minimum bears the risk that both the competent authorities and the project developers might interpret the wording of the law in a way that suits them, which was what was done by the drafters of the CRA. One example can be found in the explanatory memorandum that accompanies the Bill, in which it is suggested that "projects of national interest" might as well be regulated in the Natura 2000 site management plan. As a consequence, such a project no longer requires a permit under the *Nature Conservation Act*. The EU Habitats Directive indeed regulates in Article 6(3) that projects that are necessary for the management of a site are exempted from the approval procedure laid down in that provision, which procedure has been implemented in the Netherlands in the *Nature Conservation Act*. Whilst this may accord with the literal wording of the directive, it conflicts absolutely with the goal of the directive. The goal of the approval procedure of Article 6(3) is to have the consequences of projects assessed. Circumventing this procedure simply by putting projects into the site's management plan undermines the intentions of the directive.⁴⁶ Only if and to the extent that the decision-making process on the management plan meets the requirements of Article 6(3) can an infringement of the Habitats Directive be avoided. Given that a management plan is adopted for a period of six years and that it covers a wide range of activities, it is quite unlikely that the authorities, when adopting the site's management plan, would have all the necessary information to

44 Directive 2009/147/EC OJ 2010 L 20.

45 Directive 92/43/EEC OJ 1992 L 206.

46 Bastmeijer 2009 *M en R* 631.

assess the impact of every future project individually. It is therefore likely that infringements will occur.

The CRA also contains direct infringements against the Habitats Directive, which are independent of the manner in which the authorities apply the Act. An example thereof is the exemption of the deposition of nitrogen (from farms and traffic) from the *Nature Conservation Act* permit as described above. The Habitats Directive, in Article 6(3) does not allow any exemption, except when Section 4 is applied. Article 6(4), however, applies only in cases in which overriding public interests are at stake. There is no doubt that the economic interests of individual farmers do not qualify as such. Thus, the effect of nitrogen emissions from cattle farms on a nearby Natura 2000 site has to be assessed. Should the assessment demonstrate that there is a serious impact, the request for a permit has to be denied. In those regions of the country in which there are already extremely high nitrogen emissions, with a severe impact on Natura 2000 sites, this is not an unlikely scenario. Counting on the future effect on the nationwide reduction of nitrogen emissions of general policies still to be formulated is a far too optimistic approach that would definitely be rejected by courts testing against the EU Habitats Directive.⁴⁷

3.3.5 *European Union directives concerning environmental quality standards*

There are many EU environmental directives concerning environmental quality standards, particularly with regard to air and water. The CRA does make provision for a deviation from environmental quality standards that flow from EU law, so the CRA does not infringe on EU law in this respect.⁴⁸ However, depending on the way in which some of the rules of the CRA are implemented in practice, problems may arise. An example of such potential infringements can be found in the case of the experimental development areas. Generally, environmental quality standards have to be followed in individual cases, for instance, in granting a permit to an individual industrial installation under Article 9 of the EU Directive on Integrated Pollution Prevention and Control.⁴⁹ Not applying the standards at the individual level, but at

47 Veltman and Smits 2009 *M en R* 638–641.

48 See Klijn and Stam 2010 *TBR* 58.

49 Directive 2008/1/EC *OJ* 2008 L 24.

the regional level, such as would be the case in the experimental development areas, would therefore infringe EU law.

3.4 Reducing the level of environmental protection

The above sections make it clear that the CRA reduces the level of environmental protection in the Netherlands, both in instances of procedural safeguards and with respect to the substance. The first chapter of the *Dutch Constitution*, which contains fundamental rights, includes the proclamation of a right to environmental protection. Article 21 states that a duty to care for the environment rests with all authorities. This provision, therefore, is regarded as a socio-economic right, not as a classical individual right. As a consequence, courts are reluctant to test government decisions against Article 21. Until now, the constitutional right to environmental protection has had a rather "soft" legal status. In the explanatory memorandum that accompanies the *Dutch Constitution* and in the literature, it is argued that one of the functions of Article 21 is to prevent the government from reducing the standard of environmental protection.⁵⁰ On the contrary, the provision rather aims at a constant improvement of the environment through the enactment of progressive laws and policies. In my view, the current CRA does not safeguard such an approach and is therefore unconstitutional. Unfortunately, there is no constitutional court in the Netherlands with the power to test legislation against the *Dutch Constitution*.

4 Conclusion

The Dutch legislature has enacted the CRA in an attempt to combat the financial and economic crisis. The CRA is an example of "occasional" (*ad hoc* or impulsive) legislation. There is a pervading sense of urgency, which has enabled the legislature to implement innovations and amendments to existing legislation that have been pending for a long time. However, most of the issues dealt with in this legislation have not been fully thought through. Legal scholars predict that the many legal questions that will arise in implementing the CRA will slow down the implementation of projects rather than speed them up. The CRA conflicts frequently

⁵⁰ Verschuuren 1994 *Current Legal Theory* 23–36 and Verschuuren 1994 *RJE* 339–347. This has not changed since.

with EU law. These conflicts will be discussed in court and not all such cases are likely to be decided in favour of the CRA.

The stakeholders in environmental matters are creative. They will find ways to defend their interests and pursue alternative legal pathways, thus obstructing decision-making that they regard as illegal. The CRA therefore arguably reduces citizens' rights solely to speed up decision-making.

The possibility of being careful is lost where it is needed most: in complex cases in which the stakes and environmental risks are high. A 2008 advisory report demonstrated that the success of projects largely depends on the preparatory phase. Careful research into the pros and cons of the project and into potential alternatives, advice given by various advisory bodies, consultations with all the relevant stakeholders (including local authorities, NGOs and individual residents) all contribute to the success of a project.⁵¹ These are exactly the considerations and aspects that are limited in the CRA.

Nevertheless, the CRA does contain some interesting experiments, such as the designation of "development areas" and the introduction of "project decisions". These new instruments may lead to more integrated decision-making, hopefully without blinkered vision on the part of the competent authority. A positive⁵² proposal is also to prevent government bodies from suing each other. In accordance with the principle of cooperative government, authorities should work together to serve the common good rather than fight each other.⁵³ In addition, the set of rules enabling a swift conversion from fossil fuel energy production to green energy production is a positive element of the CRA.

Do the positive effects of the CRA outweigh the negative ones? It is difficult to say at this point, since much depends on the manner in which the authorities will actually apply the CRA. Should they enthusiastically apply the CRA's full potential, the effect

51 Tweede Kamer der Staten-Generaal 2009 <http://bit.ly/azDLug>.

52 Some authors argue the opposite because they feel that decentralised authorities should be able to defend the interests of the people they represent in all possible ways, see De Vries 2010 *TBR* 65–70.

53 Note that this principle, as laid down in S 41(1) of the *Constitution of the Republic of South Africa*, 1996, is not known in any legal text in the Netherlands.

in sum will be negative from an environmental point of view. The CRA will help the economy to recover, but then again, the economy, if left to its own devices, would probably do so anyway, and the CRA will only induce a crisis in the legal system. In my view, the CRA will not contribute to sustainable development.

Bibliography

Bastmeijer 2009 *M en R*

Bastmeijer CJ "Natuurbeschermingsrecht in crisistijd" 2009 *M en R* 35(10) 628–633.

De Vries 2010 *TBR*

De Vries HJ "Beperking van het beroepsrecht van de decentrale overheden in de Crisis- en herstelwet: Niet doen!" 2010 *TBR* 1 65–70

Gundelach and Soppe 2010 *TBR*

Gundelach J and Soppe MAA "De betekenis van de Crisis- en herstelwet voor de m.e.r." 2010 *TBR* 1 23–34

Jesse *Een Hernieuwd Perspectief*

Jesse KD *Een Hernieuwd Perspectief op Milieueffectrapportage* (PhD thesis Tilburg University 2008)

Klijn and Stam 2010 *TBR*

Klijn AR and Stam HAH "Gebieds- en innovatie-experimenten in de Crisis- en Herstelwet" 2010 *TBR* 1 56–64

Nijmeijer *TBR*

Nijmeijer AGA "Tijdelijk afwijken van milieukwaliteitsnormen. (Geen) zorgen voor morgen?" 2010 *TBR* 1 42–49

Schueler 2010 *TBR*

Schueler BJ "De relativiteitseis: Sneller of beter?" 2010 *TBR* 1 35–41

Veltman and Smits *M en R*

Veltman J and Smits G "De voorgestelde regeling van stikstofdepositie in de Crisis- en Herstelwet" 2009 *M en R* 35(10) 638–641

Verschuuren 1994 *Current Legal Theory*

Verschuuren J "The constitutional right to environmental protection" 1994
Current Legal Theory XII(2) 23–36

Verschuuren 1994 *RJE*

Verschuuren J "The constitutional right to protection of the environment in the
Netherlands" 1994 *RJE* 4 339–347

Wood *Environmental Impact Assessment*

Wood C *Environmental Impact Assessment: A Comparative Review* 2nd ed
(Pearson Harlow 2003)

Yost "Administrative implementation of and judicial review under the National
Environmental Policy Act"

Yost NC "Administrative implementation of and judicial review under the National
Environmental Policy Act" in Novick SM (ed) *Law of Environmental Protection*
Volume 2 (Clark Boardman Callaghan New York 1987) 1–48

Register of legislation

Dutch legislation

Algemene Wet Bestuursrecht of 4 June 1992

Crisis- en Herstelwet of 18 March 2010

Elektriciteitswet 1998 of 2 July 1998

Grondwet voor het Koninkrijk der Nederlanden of 24 August 1815

Natuurbeschermingswet 1998 of 25 May 1998

Wet Ruimtelijke Ordening of 20 October 2006

European legislation

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998 38 ILM 517 1999

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment *OJ* 1985 L 175 40–48

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora *OJ* 1992 L 206 7–50

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC *OJ* 2003 L 156 17–24

Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control *OJ* 2008 L 24 8–29

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds *OJ* 2010 L 20 7–25

South African legislation

Constitution of the Republic of South Africa, 1996

Register of international agreements

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community Lisbon 13 Dec 2007

Register of cases

Commission v Belgium ECJ 2001 I–4591 case C-230/00

Flaminio Costa v ENEL [1964] ECR 585 case 6/64

Register of Internet sources

Staatsblad 2010 Regels met betrekking tot versnelde ontwikkeling en verwezenlijking van ruimtelijke en infrastructurele projecten (Crisis- en Herstelwet) Government Gazette 2010, 135

Ministerie van Verkeer en Waterstaat 2008 <http://bit.ly/iiASnH>
Ministerie van Verkeer en Waterstaat Advies Commissie Versnelling
Besluitvorming Infrastructurele Projecten 2008 Sneller en beter
<http://bit.ly/iiASnH> [date of use 25 Jan 2011]

Tweede Kamer der Staten-Generaal 2009 <http://bit.ly/azDLug>
Tweede Kamer der Staten-Generaal 2009 Regels met betrekking tot versnelde ontwikkeling en verwezenlijking van ruimtelijke en infrastructurele projecten (Crisis- en Herstelwet) Parliamentary documents 2 32 127 <http://bit.ly/azDLug>
[date of use 25 Jan 2011]

List of abbreviations

CRA	Crisis and Recovery Act
EIA	Environmental impact assessment
GALA	General Administrative Law Act
M en R	Milieu en Recht
OJ	Official Journal
RJE	Revue Juridique de l'Environnement
TBR	Tijdschrift voor Bouwrecht