## The Core of the Matter

*Report of a study on four pilot cases in environmental enforcement*


### Summary

Ever since the introduction of environmental regulation in The Netherlands, enforcement of those rules has basically been a matter of civil authorities applying administrative tools and in the course of the years more and more administrative sanctions, too. Even though transgression of the rules in many cases constitutes a criminal offense as well as an administrative wrongdoing, criminal prosecution was hardly ever brought to bear in rank of the mill cases. Only flagrant criminal behaviour, for instance fraud in the area of waste disposal, has been a regular object of public prosecution. Alarmed by the lack of effective criminal prosecution of environmental crimes, the Dutch attorney general in 1999 published a Guideline for the public prosecutors on how to deal with criminal enforcement of environmental regulation. The intention was to boost the activities of the prosecutors in this area. Evaluation research, done a few years later, showed that the number of cases prosecuted had dropped, rather than risen. This outcome led to parliamentary questioning of the minister responsible, and to more pressure for adequate criminal investigation and enforcement. There are no clear indications, however, that the near future is likely to show a large increase in the prosecuting of environmental offenses.

To counter this, the Public Prosecutor's Office has made great efforts to gain some control over its administrative environment in order to boost the number of cases being filed for criminal prosecution. However, that environment consists of three or four national ministerial departments, eleven provinces and 450 municipalities all having regulatory and enforcement authority. In this fragmented field, it is difficult to establish a clear line for dealing with environmental unlawful activity. Still a lot of energy has been put into creating a more integrated approach for enforcement, including network management, inter-organizational protocols and integral enforcement plans with an assignment of tasks, consultative structures and implementation programs. One of the most important of these documents is the *National Enforcement Strategy*, based on an agreement between municipal, provincial and national enforcement authorities, united in a voluntary organization called LOM (an acronym of a phrase that in translation would be *Nationwide Conference on Environmental Enforcement*). The National Enforcement Strategy consists of an administrative and a penal component and has two related goals: strengthening administrative and penal sanctioning as such, and homogenize environmental enforcement throughout the country in order to create a level playing field. This report deals with a study on the implementation and the attainability of the national strategy.

The foundation for a nationwide uniform sanction policy is what is called a system of *core clauses*. The whole of environmental regulations is divided up in core clauses and other rules. A core clause is a rule that is considered to be the core of the environmental value that a regulation or a permit is considered to protect. A document containing a set of core clauses was originally written by the public prosecutor's office, and later adopted by the LOM. Enforcement of core clauses should be far more strict than enforcement of the remainder of the rules. According to the national strategy, violation of core clauses should result in immediate administrative and penal sanctions. Barring a number of specified exceptions, violation of other rules can be met with a

warning followed by a second inspection.

This study is based on research in four real life pilot cases that took place between March and October 2007 in four regions: Noord-Limburg, Amsterdam-Amstelland, Friesland and Rijnmond. Altogether 29 public authorities participated: municipal governments, inter-municipal environmental authorities, provincial governments, water boards, enforcement units of the environmental public prosecutor, police environmental investigation teams and the national environmental protection inspectorate. The purpose of the pilots was to have all participating authorities overtly demonstrating to each other and to the research team how they go about enforcement once a violation of environmental regulations has been established. Data collection was organized in two different ways. All participating authorities were interviewed twice: at the beginning and at the end of the pilot period. Beyond that, the participating authorities registered all established violations of core clauses in a specially developed on line notification and registration system. The system included a questionnaire, to be filled out for each single violation, with questions on such attributes as properties of the offender and the offense, the enforcement activities undertaken, and the cooperation between enforcement authorities. On the basis of the data thus collected, five central research questions were answered.

*1. To which extend do environmental authorities apply the national enforcement strategy?*

The research shows that actual enforcement practices differ from the national strategy in two major aspects. First, in the different pilot areas, regional strategies have been agreed upon that deviate in a number of ways (priorities, ways of dealing with violations) from the national strategy. Secondly, the actual enforcement activities again deviate markedly from both the regional strategy. More specifically three major deviations were found.

In two of four pilots, the list of core clauses was truncated compared to the national strategy. In the fourth pilot, Rijnmond, the national list was specified in far more detail than the national list. Only in Limburg, the national list was implemented whole.

As far as the administrative enforcement is concerned, in three of the pilots the first reaction to a violation was a mere written warning, be the breached regulation a core clause or not. Only in the pilot Rijnmond, breaches of core clauses always entailed an administrative order.

Penal enforcement in the regional strategies differed from what is agreed upon in the national enforcement strategy because of the abbreviation of het core clauses list. Regional arrangements did follow the national strategy in that violation of a core clause should bring about a penal citation. Enforcement practice diverged strikingly from these regional arrangements. During the research period, in less than half of the cases that warranted a citation one was indeed given. Beyond that, the required cooperation between civil authorities and the public prosecutor was all but absent.

*2. What are the causes of deviation from pre-arranged enforcement strategies ?*

The causes found in this research can be grouped into four categories. First, a number of the deviations can be explained by a lack of knowledge on the part of a number of the enforcement authorities, notably municipal governments. Even when enforcement officers were aware of the national or regional strategy, they might not understand many of its specifics.

Second. many of the participating authorities opted for enforcement policies of their own, rather than complying to the collective arrangements. More specifically, local authorities found the regional and national strategies too harsh, not effective, too inconsiderate for other interests than the environment and too cumbersome.

Third, resources and capacities for compliance to regional arrangements were not seldom lacking.

Fourth, both the national and the regional strategies are voluntary arrangements that are not binding in any way. Thus deviation enforcement practices can easily slip by unchecked.

*3. Which of the core clauses in the national strategy are difficult to enforce?*

The research showed that none of the core clauses were especially difficult to enforce, thus contradiction a commonly held belief. However, the sheer length of the list and its lack of differentiation in terms of severity of violations makes it difficult to sanction the sum total of all violations. This explains why regional strategies truncated the list to a more attainable range of clauses.

*4. Are there other more cost effective ways of enforcement than those of the national and regional strategies?*

Most respondents agreed that regional strategies are more effective and efficient than the national strategy. To an extend, this corresponds with the notion of what constitutes a desired outcome of enforcement. Locally, most authorities believe that the prime goals of enforcement should be repair of environmental damages and promoting compliance in the target group. According to many local officials, in most cases an official warning suffices to attain these goals – while the national strategy requires administrative coercion.

*5. To which extend do enforcement authorities consider exchange of general information and specific data a prerequisite for effective enforcement?*

Even though some of the participating authorities thought they benefitted from the exchange facilities creating within the framework of the pilots, the prevailing mood was scepticism. Most respondents thought that collecting and dispersing information at random was not cost effective and cumbersome.

*General conclusion*

Analyses of the data collected in this research shows, that neither the national enforcement strategy nor its regional proxies have been implemented in the every day enforcement practices of most local and regional authorities. Moreover, it is most doubtful that the goals of the national enforcement strategy (strengthening administrative and penal sanctioning as such, and homogenize environmental enforcement) are attainable at all with the means at hand, that is through voluntary cooperation within the framework of a national agreement (the LOM strategy). More specifically, there are three interrelated complications that throw serious doubt over the feasibility of the LOM approach: reluctance to employ sufficient resources, severe differences of opinion on what constitutes effective environmental enforcement and lack of compulsory collaboration. One homogeneous, systematic and well-considered enforcement, bringing to bear a rich armoury of enforcement and compliance tools, and utilizing sufficient material and human resources is not compatible with an enforcement structure consisting of the voluntary cooperation of some five hundred independent and semi independent enforcement authorities.

This being said, the question arises which alternatives to the LOM strategy might be feasible. A preliminary question however is, what should take pre-eminence: the principle of decentralization and local autonomy or the desirability of effective environmental protection and a matching environmental enforcement structure. The LOM strategy takes local autonomy as its point of departure and creates auxiliary structures to achieve some level of environmental protection. However, as this research shows, the level of protection thus realized is far from what is necessary for environmental sustainability.

This being the case, a number of different future scenarios can be thought of. Four possible policy choices are lined out here – four choices that differ in the way they heed to the interest of local autonomy and the interest of viable environmental protection.

*1. Uphold existing practices*
This policy choice accepts as a fact of life the impossibility of standardizing the enforcement behaviour of five hundred authorities within one national policy framework. In stead actual local and regional practices will form the new standard for environmental protection efforts. Administrative sanctioning will primarily be aiming for repair; penal sanctioning will be the exception. Cooperation will incidentally take place on the basis of voluntary association. Environmental sustainability is

*2. Strengthening nationwide coordination*
This policy option puts the collaboration of five hundred environmental enforcement authorities at the centre of attention. The pilots show that there is some merit in this approach. The methods applied in the pilots could be intensified and extended to all of the country. The successful implementation of a national enforcement strategy, perhaps a updated version of the present one, could then still be feasible. Still the transaction costs of the effort might well be prohibitive.

*3. Limited cooperation on the basis of a simplified list of core clauses*
The third alternative is the opposite of the second one: the collaboration is to be subsided rather then intensified. Because a system of voluntary cooperation will always be vulnerable and costly, collaboratory efforts will be diminished. Division of labour is, in this approach, the key to effectiveness. Enforcement of small violations will be left to local authorities. Inspection and enforcement of more complicated situations and industries will be the province of specialized agencies. A national enforcement strategy will be no more than an exemplary model.

*4. A regional environmental protection agency*
This is the alternative for which adequate environmental management and protection is the starting point. Environmental authorities in a region join forces in shared environmental protection service. This kind of cooperation is not free of obligations and non-committal anymore. The integrated approach to environmental enforcement is ensured by means of a common organization that has sufficient scale to mobilize the required material and human resources. The existing authorities will remain the authorities, but they will mandate most of their powers to the agency they jointly own. Decentralisation and local autonomy are thus not sacrificed, but maintained, be it in a more formal manner. Of all four alternatives, this would by far be the most cost effective.