European Environmental Principles in Dutch case law.
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This report sketches to what extent Dutch courts have been faced with decisions involving European environmental principles. The report also includes the referral to the integration principle ex art. 6 EC in Dutch environmental case law. Finally the report will identify some similar environmental principles that have emerged in Dutch case law: the Alara principle, the Stand still principle and the Substitution principle.

1. The Polluter Pays principle.

There are only a few cases where the courts refer to the Polluter Pays principle. Sometimes one of the parties raises the principle but the court does consider it.[2] In other cases the principle is mentioned in the conclusion of the Advocate-General to the Supreme Court, but does it not reappear in the final judgment. The scarcity may be related to the fact that the principle has been the starting point in various laws and policies, such as the Soil Protection Act.

The majority of cases in which the principle was referred to related to tax issues, such as waste or discharge levies regarding, handled by the Tax chambers of the courts. The few administrative and civil cases where the principle is mentioned by the court, concern discharge and soil cases, regarding the Discharge Decree (*Lozingbesluit open teelt en veehouderij*)[3], Pollution of Surface Waters Act[4] and wrongful acts[5]. However the Polluter Pays principle rarely affects the result of the cases. Noteworthy is that Dutch courts do not always consider the Polluter Pays principle as a general principle of law with legal consequences.[6]

When the principle occurs, it is mostly referred to in the context of national laws or policies incorporating them.[7] Only in one –published- case the Administrative Law Division of the Council of State (hereafter Adm. Law Div. in text and ABRvS in footnotes) mentioned the Polluter pays principle explicitly in the context of art. 174, par 2, EC. This case of *27 February 2002*[8] concerned cockle fishing in the Wadden Sea and gave rise to a preliminary reference[9]. According to the preliminary opinion of the court art. 174, par 2, EC, including the Polluter Pays principle, can play a role in determining whether "appropriate steps" or an "appropriate approach", as mentioned in art. 6, par 2 and 3, of the Habitat directive, have been taken. The court has asked the ECJ to determine whether this assumption is correct. This case will be discussed in more detail in context of the Precautionary principle, as the court more specifically focused on this principle.

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[2] For example in ARRS 25 February 1992 nr. R01.91.1789/Q01, AB 1992, 491; HR 27 October 1993 nr. 1161 , NJ 1994/703; HR 21 June 2000 nr. 33816, www.rechtspraak.nl; HR 10 November 2001, NJ 2001/87 en HR 25 October 2002 nr. 36.638, www.rechtspraak.nl.
[3] Rb Den Haag 20 March 2002, www.rechtspraak.nl.
[4] HR 26 January 1990 nr 13 724, NJ 1991/393.
[5] RB Amsterdam 31-10-1990, BR 1991/293 (also regarding the Interim Soil Protection Act).
[6] In Hof Den Bosch 22 February 1995, (Belastingblad 1995, 707) and Hof Arnhem 20 February 2001 (nr. 98/03631, www.rechtspraak.nl) the Tax chamber of these courts rejected the appeal to the Polluter pays principle and considered that "furthermore this principle does not constitute a general principle of law".
[7] The principle was one of the foundations for some Dutch laws, for example on liability (article 15.20 and 15.21 of the Environmental Management Act) and soil protection (the former Interim Soil Protection Act and the current Soil Protection Act. The latter is partially based on the Polluter pays principle as interpreted by the Supreme Court in 1994 in HR 30-09-1994, M en R 1994,112.
[8] ABRvS 27-03-2002, no 200000690/1 and 200101670/1, www.rechtspraak.nl.
[9] Case C-127/02, OJ 2002, C 156/4, still pending

2. The Precautionary Principle.

The Precautionary principle increasingly shows up in Dutch case law. Where in *1996*[10] the court did not allow the refusal of a permit on the ground that insufficient insight exists in the environmental consequences thereof, one can derive from recent case law that the Precautionary principle has to be applied. For example in *1999*[11] the Adm. Law Div. concluded that when the authorities have insufficient insight in the possible environmental consequences no permit may be granted.

Contrary to the Polluter Pays principle the Precautionary principle is increasingly used by Dutch courts when reviewing plans or decisions of the authorities. The Precautionary principle affects Dutch case law mostly as part of Dutch policy or through the due care principle or justification principle (art. 3:2 and 4:16 Awb[12]), but rarely as part of European law and not yet as part of International law.[13] The Precautionary principle has indeed lead to annulment of appealed decisions by the courts, mostly implicitly through art. 3:2 Awb.

Although increasingly the Precautionary principle is referred to explicitly, this occurs merely in the context of the Wadden Sea[14]. Overall, most cases where the Precautionary principle is –either implicitly or explicitly- referred to concern the Wadden Sea. The Precautionary principle is included in policies and lower legislation applicable to the Wadden Sea: the Key Physical Planning Decision on the Wadden Sea ("PKB") and the Third Policy Document on Water Management ("Third Policy Document"). The case law on the Wadden Sea is however not unambiguous. Not only differs the definition of the Precautionary principle in the policies, the courts are also not always consistent in applying and citing the Precautionary principle in these policy documents. Therefore no definite conclusion can be drawn as to how the Dutch judiciary would define the principle. [15]

Still some cases are noteworthy, such as the interim decision of *21 December 1999*[16], where the President of the Adm. Law Div. concluded that the Precautionary principle should be applied to the exemption report, even if the principle was already applicable at the time a previous exemption was allowed. Furthermore a recent case of *26 April 2001*[17], suggests that the Adm. Law Div. puts the burden of proof of the Precautionary principle, included in the PKB and the Third Policy Document on the authorities. The court concluded that the authorities have to make sufficiently obvious that the permitted activities will not cause damage.[18]

It can be argued[19] from the Adm. Law Div. case of *27 March 2002*[20], regarding the role of art. 174, par 2 EC in the application of art. 6, par 2 and 3 of the Habitat directive and mentioned above in connection with the Pollution Pays principle, that the court has started to doubt the

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[10] ABRvS 30-09-1996, M en R 1997/6, 76.

[11] ABRvS 28-01-1999, M en R 1999/7-8, 65.

[12] The Awb is the General administrative law act. See hereafter.

[13] Parties sometimes try to raise the Precautionary principle included in international law, for instance in ABRvS 16-11-200, M en R 2001/9, 91 and ABRvS 25-08-200, BR 2000/946 and AB 2000/455. Only in Hof Den Haag 21-10-1999, M en R 2000/1, 2 the court implicitly paid attention to international law, after environmental groups referred to a breach of a Decree with general environmental principles, such as the Precautionary principle, especially the principles 11 and 15 of the Rio convention and art. 130 R EC (old). The court stated that articles 8.8, par 1, and 8:40 EMA comply with these principles.

[14] Such as in VzABRvS 30-08-2000, M en R 2001/4, 39; ABRvS 30-06-2000, M en R 2001/5, 67; ABRvS 16-11-2000, M en R 20001/9, 91; ABRvS 12-05-2000, M en R 2000/9, 94.

[15] 'The Precautionary Principle", by W.Th. Douma, 2003, page 427.

[16] VzABRvS 21-12-1999, KG 2000/49.

[17] ABRvS 26-04-20001, M en R 2001/9, 92, with footnote by J. Verschuuren.

[18] This case deviates from ABRvS 12-05-2000, M en R 2000/9, 94, where the court laid the burden of proof of the applicability of the Precautionary principle on the party invoking it.

[19] This is argued by J. Verschuuren in the footnote to ABRvS 20-03-2002, M en R 2002/7-8, 84.

[20] ABRvS 27 March 2002, no. 200000690/1 en 200101670/1, www.rechtspraak.nl LJN AE0731.

correctness of the interpretation of the Precautionary principle, as included in the PKB and used in earlier case law.[21] In this case appeal was made by environmental groups against decisions to permit cockle fishing in the Wadden Sea, because these decisions were in breach with the Habitat directive. Besides the preliminary question posed to the ECJ mentioned earlier with regard to the Polluter Pays principle, the court also has asked the ECJ to interpret the Precautionary principle ex art. 174, par 2, EC. "Does this principle mean that a particular activity, such as the … cockle fishing in question, can be authorized where there is no obvious doubt as to the absence of possible significant effect *or* is that permissible only where there is no doubt as to the absence of such an effect *respectively* this absence can be established with certainty"? [Emphases added] The preliminary case C-127/02[22] is still pending before the ECJ.

It should be noted that the Adm. Law Div. case of *27 April 2002* is one of the few cases, besides two civil cases mentioned hereafter[23], where the Precautionary principle is explicitly referred to as a European environmental principle. The Precautionary principle has also been referred to in the context of art. 28-30 EC in an appeal case by the Adm. Law Div. of *26 February 2003*[24]. In this case a permit was refused for planting oysters and mussels from Ireland in the Oosterschelde. According to the appellant the Dutch legislation and the policy, used as the basis of the refusal, constitute a violation of article 28 in conjunction with 30 EC. The State Secretary of Agriculture used the Precautionary principle as the foundation of the appealed decision. The District court –in first instance- accepted this[25] and rejected the appeal. However the Adm. Law Div. reversed this judgment, stating that the State Secretary had "with the very general formulated appeal to the Precautionary principle insufficiently taken into consideration … the … conditions under which such a justification could be accepted." In this case no results were presented, no additional research was done and no inquiry was made from the Irish authorities about possible risks. According to the Adm. Law Div. this very general foundation cannot serve as a justification ex art. 30 EC. The Adm. Law Div. concluded that the District court had failed to annul the appealed decision on the basis of violation of the due care and justification principle and finally annuls this decision itself.

Contrary to the case law regarding the policies on the Wadden Sea, the Adm. Law Div. concluded on *12 May 2000*[26] in a case regarding an Environmental Management Act ("EMA") permit that the Precautionary principle did not apply. Because "the Precautionary principle is not a principle codified in the EMA" and is also not included in a policy document applicable for the assessment of the permit. This shows that the Dutch courts seem reluctant to apply the Precautionary principle when it is not included in policies on which an appealed decision is (or should be) based.[27]

There are however cases where the court was prepared to test the Precautionary principle even when it lacked in the applicable laws and policies. There the test was implicit, through the

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[21] In ABRvS 20-03-2002, M en R 2002/7-8, 84, regarding refused permits for drilling for gas at locations near the Wadden Sea, the court concluded that the authorities in reasonableness could have taken the position that there exists reasonable doubt about the non occurrence of possible significant consequences for the eco system of the Wadden Sea. According to the court the authorities had not incorrectly interpreted the Precautionary principle, as included in the PKB. Another example is ABRvS 26-04-2001, M en R 2001/9, 92. The Precautionary principle was decisive in these cases.

[22] Case C-127/02, OJ 2002, C 156/4, still pending

[23] Rb Den Haag 24-11-1999, M en R 2000/3, 24 and Hof Den haag 21-10-1999, M en R 2000/1, 2.

[24] ABRvS 26-02-2003, www.rechtspraak.nl, LJN AF5007.

[25] Rb Middelburg 9-10-2001, www.rechtspraak.nl, LJN AD9224. This court concluded that the legislation was necessary and proportional and that to prevent an irreversible situation "defendant could in reasonableness have taken the position that relatively drastic measures were necessary during a further period in anticipation of the development of knowledge … ."

[26] ABRvS 12-05-2000, M en R 2000/9, nr. 93 and AB 2000/394. The decision was finally annulled on another ground.

[27] See also A.A. Freriks in footnote to ABRvS 30-06-2000, AB 2000/395.

application of art. 3:2 Awb. For example in the case of *28 January 1999*[28], regarding an EMA permit for a motor cycle club with circuit in the Centraal Veluws Natuurgebied, the Adm. Law Div. concluded that the decision to grant a permit lacking insight in the consequences of operating this installation for the natural science and ecological values was in violation of art. 3:2 Awb. The Adm. Law Div. annulled the entire appealed decision. This particular application of art. 3:2 Awb seems to go beyond the standard due care obligation of this article to gather all available information by actually adding the Precautionary element. However this explicit extensive interpretation of art. 3:2 Awb is not standard. In most cases the court will simply, sometimes even without explicitly referring to the Precautionary principle, annul the pending decision because the authorities had not gathered all necessary information concerning the relevant facts and the interests to be weighed. [29]

Although parties sometimes try to raise the Precautionary principle, civil courts, even more so than administrative courts, seem to be reluctant to apply it. This is evident from two civil cases where environmental groups tried to raise the Precautionary principle as included in the EC-treaty. In a wrongful act case of *21 October 1999*[30], the court simply stated that in the light of the nature of this principle, namely a fundamental principle to which environmental law has to comply, the review of the civil court could only be marginal. This review was even more limited in a civil case of *24 November 1999*[31] regarding the Nitrate directive, where the District court dismissed the appeal of violation of the Precautionary principle ex art. 130 R EC (old) because "this article is not a norm directed at the member states". It should be noted however that the Precautionary principle does –implicitly- affect civil wrongful act cases ex art. 6:612 of the Dutch Civil Code. These are cases where the court requires parties who create dangerous situations to take preventive measures.[32]

3. The Prevention Principle.

Contrary to the Precautionary principle there is no –published- case law where the court has explicitly tested the Prevention principle in a dispute, either on its own or as part of Dutch law containing the principle, for example in the EMA. Although it has been argued by Backes *et al.*[33] that parties sometimes refer to the Prevention principle, I have not been able to find such explicit cases in the recent case law.

There is however recent case law of the Adm. Law Div. [34] where the Prevention principle is explicitly mentioned, in the context of the legal framework, within the scope of the IPPC

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[28] ABRvS 28-1-1999, AB 1999/177. Other examples are Pres.Rb Leeuwarden 21-10-1997, KG 1997/397 and ABRvS 23-07-1999, M en R 2000/1, 5. See also A.A. Freriks in footnote under ABRvS 30-06-2000, AB 2000/395. In this case the boundaries of art. 3:2 Awb are stretched beyond the obligation to collect all information ('Codificatie van milieurechtelijke beginselen in de Wet milieubeheer', by Ch.W. Backes, C.J. Bastmeijer, A.A. Freriks, R.A.J. van Gestel and J.M. Verschuuren, Boom Juridische Uitgevers, 2002, page 76.)

[29] This is a regular application of art. 3:2 Awb. Another article used by the courts in these cases is art. 4:16 Awb because the decision was not sufficiently motivated. When these two articles are strictly applied, without referring to the Precautionary principle explicitly, it can be argued that the final effect of the Precautionary principle will be limited on these case, because the authorities are able to mend these flaws in the appealed decisions rather easily.

[30] Hof Den Haag 21-10-1999, M en R 2000/1, 2.

[31] Rb Den Haag 24-11-1999, M en R 2000/3, 24.

[32] Footnote 25, Backes *et al.*, 2002, page 76-77.

[33] Footnote 25, Backes *et a.l*, 2002, page 89. They mention as example air pollution cases.

[34][40] VzABRvS 19-12-2001 nr 200104431/1, AB 2002/121; ABRvS 13-11-2002 nr. 200200405/1, AB 2003/27; ABRvS 13-11-2002 nr. 200104431/2, www.rechtspraak.nl LJN AF0308, ABRvS 19-02-2003, nr. 200204623/1, www.rechtspraak.nl, LJN AF0314. These four cases see to the conformity of revision permits ex EMA for animal farms with the IPPC-directive.

directive.[35] The IPPC directive includes the Prevention principle. The question in these cases was whether the permitted stable systems were based on the Best Available Techniques ("Bat") ex art. 9 of the IPPC directive. According to the court the authorities in these cases had not sufficiently examined whether the permitted systems were based on the BAT. The court concluded therefore that the permits were taken in violation of art. 3:2 Awb and the appealed decisions were annulled. It can be argued that in these cases the administrative courts not only mentioned, but also –implicitly- applied the Prevention principle, as article 3 of the IPPC directive obliges member states to make sure that the installation is exploited in such a manner that all appropriate preventive measures against pollution are taken, in particular by applying the Best Available Techniques.[36]

Besides this case law where the Prevention principle is explicitly mentioned -and implicitly applied- within the scope of the IPPC directive, there is case law that could be considered to contain an implicit application of the Prevention principle. One could argue that the President of the Adm. Law Div. did this in the case of *19 December 2001*[37], where the President especially considered it especially to be of importance that the environmental effect present prior to the revision permit would be engraved by the revision permit, when he granted a suspension of a revision permit ex EMA for a poultry farm. There is also case law where the court refers to 'preventive measures'.[38] Such as cases regarding liability for –faulty- refraining to take preventive measures, resulting in damage[39] and cases regarding compensation for preventive measures.[40]

The only one case in which the Prevention principle ex article 174, par 2, EC was explicitly mentioned, was the cockle fishery case of the Adm. Law Div. of *27 March 2002*[41], where a similar reference to the Prevention principle was made as the Polluter Pays principle.

4. Rectification at Source (bronbeginsel)

The European Source principle is rarely referred to explicitly in case law. Similar to the Polluter Pays principle this may be due to the fact that the Source principle is already extensively used as the starting point of Dutch legislation and policies, such as the EMA and the Pollution of Surface Waters Act.
It did occur in the case of the Adm. Law Div. of *23 April 1996*[42], regarding an appeal against decisions of the Ministry of Environment to object to the intention of appellant to export oil filters and other waste to Germany. According to the appellants this objection was *i.e.* in violation of the free movement of goods. The court considered that the applicable Long-term Plan on Removal of Dangerous Wastes constituted an export prohibition for a lower quality or equal processing of waste in foreign countries and that this appeared in this case to constitute a quantitative export restriction or a measure having equivalent effect. However the court explicitly mentioned that it

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[35] As part of the obligations of member states in art. 3 of the IPPC directive and as part of the assessment in Annex IV of the IPPC.
[36] See also J. Verschuuren in footnote to ABRvS 12-09-2000, AB 2001/133.
[37] VzABRvS 19-12-2001 nr 200104431/1, AB 2002/121
[38] HR 29-01-1999 nr. 16774, NJ 1999/583, on soil pollution by gas stations, where the Supreme Court considered that is was not customary to take preventative measures at the time the act occurred. Another case is Rb Zutphen of 10-11-1994, BR 1995/499.
[39] For example the asbestos case law.
[40] Hof Den Haag 25-06-1996, SES 1997/39. In this case the collision took place outside the Dutch territorial waters and inside waters for which other states had a duty of care. The State had to show that at the time of the preventive measures it was plausible that the oil threatened the Dutch coasts and waters and that the costs of the preventive measures were reasonable. Other examples are Rb Rotterdam 24-10-1996, SES 1997/41 which was appealed to in Hof Den Haag 26-10-1999, SES 2000/132.
[41] ABRvS 27 March 2002, no. 200000690/1 en 200101670/1, www.rechtspraak.nl LJN AE0731.
[42] ABRvS 23-04-1996 nr. E03.95.0106, AB 1996/306.

was uncertain about the importance, in this context, of the considerations of the ECJ in case C-2/90, where the ECJ states that the aim in art. 130 R, par 2, EC (old) to fight pollution with priority at the source is in conformity with the principles of self sufficiency and proximity laid down in the Treaty of Basel of 22 March 1989. Unfortunately this uncertainty was not rephrased as a preliminary question and the ECJ did not consider it in the preliminary ruling C-203/96 (Dusseldorp) of *25 June 1998*[43]. It did also no reappear in the case of *28 January 1999*[44] where the procedure of 23 April 1996 was continued[45].

In another administrative environmental case it is not the Adm. Law Div. but the Minister of Environment who explicitly refers to the Source principle in the EC treaty. In this case of *8 August 2000*[46] the Minister had objected to the shipment of fly ash to Germany. According to him this decision was not a breach of the free movement of goods. He raised *i.e.* the Source principle in art. 174, par 2, EC as justification. The court only mentioned the self-sufficiency principle, without referring –even implicitly- to article 174, par 2, EC. Nor was article 174, par 2, EC referred to in the Order of *27 February 2003* by the ECJ regarding this Dutch case.[47] No other cases were found where one of the parties referred explicitly to the Source principle, in or outside the context of art. 174, par 2, EC.

Furthermore there have also been cases in which the Source principle plays a very implicit role.[48] This occurs when decisions are reviewed for compatibility with legal provisions[49], which are implicitly or indirectly based on the Source principle[50]. There have also been administrative[51] and criminal[52] cases regarding the proximity and self-sufficiency principle within the scope of Regulation 259/93.

5. Producer or Extended responsibility.

It does not appear that such concepts, elaborating of the Polluter pays principle and rectification at source, are being developed in Dutch case law. There is case law, based on the civil concept of unlawful hindrance,[53] where the court sets norms or provisions stricter than or additional to those in permits or in generally binding regulations, if due care compels the court to such a supplementary norm setting. But the civil court is reluctant to do so in permitted situations.[54]

[43] Case C-203/96 of 25 June 1998, AB 1998/340.
[44] ABRvS 28 January 1999 nr. E03.95.0106-A, AB 1999/154
[45] The Court concluded that the policy of the Minister was in violation of article 34 EC and that the appeal decision was in violation of Regulation 259/93/EEC.
[46] ABRvS 8-08-2000 nr. 199901635/2, AB 2000/414.
[47] Order of 27 February 2003, published in C101/11, 26-04-2003, which refers, in short, to the ASA-judgement (C-6/00 of 27-02-2002, I-1961). The Source principle was not intrinsically referred to by the ECJ in the Order.
[48] An example is ABRvS 20-11-2002 nr. 200101216/2, www.rechtspraak.nl LJN AF0802, regarding a permit for offal processing installation, which included emission limits for scent. The emission limits were based on the total expected scent emission of the installation In this case the ABRvS concluded that the authorities had insufficiently researched if and how far per individual emission source these emission limits could be met. The court concluded this was a violation of article 3:2 Awb and annulled the provisions of the permit which included the limits Another example is ABRvS 15-01-2003 nr. 200200707/1, www.rechtspraak.nl LJN AF2891.
[49] Examples of these legal provisions can be found in the Air pollution act, the Aviation act, the Noise hindrance act, the WVO and the EMA.
[50] Footnote 25, Backes *et al.* 2002, page 122.
[51] Besides ABRvS 28-01-1999 nr. E03.95.0106-A, AB 1999/154 and ABRvS 23-04-1996 nr. E03.95.0106, AB 1996/306, examples are ABRvS 24-12-1998 nr. E03.96.1394, AB 1999/153, VzABRvS 31-03-1995 nr. F03.94.1206, AB 1996/25.
[52] HR 13-02-2001 nr. 00800/99E, www.rechtspraak.nl LJN AB0076.
[53] Ex art. 5:37 BW in conjunction with 6: 162 BW.
[54] 'Milieurecht', edited by Ch. Backes, Th.G. Drupsteen, P.C. Gilhuis and N.S.J. Koeman, W.E.J. Tjeen Willink, 2001, pages 531-533.

6. The Integration Principle.

With the exception of the following case, the integration principle is not explicitly[55] referred to in other –reported- environmental cases. The case of the District Court of Den Haag on *2 May 2001*[56] saw to a wrongful act action by environmental agencies against the policy of the Dutch governments on the extraction of gas. According to the plaintiffs this policy violates *i.e.* the sustainability principle in the EC treaty, including art. 6 EC. The court accepted the State's defense that this provision[57] has no direct effect and considered that "art. 6 EC … [is] directed at the European Community and its organs; … [it] does therefore not contain statutory duties (*wettelijke verplichtingen*) for the State."[58]

7. Similar principles that have emerged in the Netherlands

Several environmental principles have emerged in the Netherlands of which the Alara principle, the Standstill principle, the Substitution principle and the Compensation principle have similarities with the Prevention principle.

The Alara ("as low as reasonably achievable") **principle** was derived from art. 6 of the Directive 80/836/Euratom but has been codified more strictly in art. 8.11, par 3, EMA. According to this article, provisions should be attached to the EMA-permit that provide the largest possible protection against environmental harmful consequences, unless this cannot reasonably be required. There is a lot of case law where the Alara principle as mentioned in article 8.11, par 3, EMA is referred to.[59] It has been argued that the Alara principle is subordinate to the precautionary principle, because it is only applied if an adequate protection of the environment does not imply that a permit should be refused.[60] But one could also argue that the Adm. Law Div. has interpreted the principle broadly in the direction of the Prevention principle, for example in ABRvS of *2 November 2000*[61]. It concerned an appeal against the refusal of a permit for the application of creosote wood for sheet piling in Anna Paulowna. The court considered with the policy[62] used for reviewing the permit application the authorities meant to apply the Alara principle ex EMA "in that sense, that to prevent the emission of a certain substance to the surface water initially the Best Existing Techniques should be applied. The court found it acceptable that the permit was not granted because other environmental friendly materials and constructions were available. The court considered the circumstance that these other materials were more expensive to be of no importance. Furthermore the court considers it acceptable, following the ECJ in case C-232/97, that such criteria are used for reviewing the permit requests for the entering of creosote wood into the surface water that the use of creosote wood is not or only very exceptionally

[55] There is case law on art. 21 of the Constitution, which is interpreted in literature as a call for external integration of environmental interests, which appears quite similar to that in art. 6 EC (Footnote 25, Backes *et al* 2002, page 118). The court appears to be very reluctant to derive obligations for the authorities from art. 21 of the Constitution and applies a limitative test. Example are ABRvS 27-03-2002 nr. 20003011/2 and 200103587/1, www.rechtspraak.nl LJN AE0729 and BR 2002/509 and ABRvS 04-12-2002 nr. 200201931/1, www.rechtspraak.nl LJN AF1475.

[56] Rechtbank Den Haag 02-05-2001 nr. 99/1493, www.rechtspraak.nl LJN AB1369 and M en R 2001/9, 83.

[57] As well as other provisions referred to by the plaintiffs: art. 2, 10 and 174, first par. EC.

[58] This was also concluded for the articles 2, 6 and 174, first par. EC. [words between brackes added]

[59] The Adm. Law Div. has in the past also referred to the principle directly in the context of art. 6 of Directive 80/836/Euratom, regarding a nuclear permit. The court concluded that review of the Alara principle lacked and found the appealed decision in breach of the due care principle. At that time the principle was not yet part of the Dutch nuclear law. Footnote 53, Backes *et al.* 2001, pages 81-82, who refers to AGRvS 17-04-1989, M en R 1989/12, 87.

[60] 'Normen in het toekomstig milieubeleid', P. van den Biesen, M en R 1999/3, page 83.

[61] ABRvS 02-11-2000, M en R 2001/3, 37.

[62] This policy was based on the Third Policy Document.

allowed. Such a broad 'preventive' interpretation is not standard[63], especially in EMA permits[64]. It has been argued that the difference in application of the Alara principle is related to whether or not this principle is present in policies on which the appealed decisions are based, such as the Third Policy Document, as in the case regarding the Pollution of Surface Waters Act of 2 November 2000.[65] If applied, the Alara principle can have effect on the outcome of the case, directly or indirectly through article 3:2 or 4:16[66] Awb. Contrary to the administrative courts the civil courts apply a very marginal test of the Alara principle.[67]

The Stand still principle means that the environmental quality in a specific area may not worsen. Some authors do not perceive it as an autonomous principle, but as being related to other principles such as the Prevention principle.[68] The fine line between the Stand still principle and the Prevention principle is shown in early case law where the President concluded that "the weighty interest to prevent further drop of the ground water level must prevail over the interest of the requestor".[69] The Stand still principle has been codified in art. 5.2, par 3, EMA: when in an area, for which an environmental quality norm applies, the environmental quality is better than the norm; this quality replaces the norm for this area and is included in lower legislation, such as . But most of the –scarce- case law on the principle concerns the water withdrawal policy[70], such as the Third Policy Document. In these cases courts in principle reviews the appealed decision in the light of the applied policy [71] or reviews the reasonability of the (application of the) policy itself[72]. In some of these cases the appellant refers to the (non) violation of the Stand still principle in these policies.[73] The review of the court is marginal. In most cases the court does not touch upon the interpretation of the Stand still principle itself, except in the following two cases. In the case of 24 February 2000 the court clarified that the Stand still principle, as part of the Third Policy Document[74], is applicable on the level of a "controlled area" (*beheersgebied*) in stead of the level of an individual permit applicant and that a permit can be granted if this causes and emission increase if this is compensated in the "controlled area". The court concluded in this case that the Stand still principle was not violated. In the case of 30 June 2000 the court rejected the interpretation envisaged by the appealing environmental groups, which was the Stand still principle ex art. 5.2, par 3, EMA and in stead accepted the reversed interpretation for the principle, included in the Indicative Long-term Program for Water Policy 1985-1989, which

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[63] The ABRvS did not do this in its case of 20-06-2000, M en R 2001/2, 17 and ABRvS 18-04-2000, AB 2000/324.
[64] For example in ABRvS 25-08-2000, AB 2000/455.

[65] J. Verschuuren in footnote to ABRvS 2-11-2000, M en R 2001/3, 37. The absence of a reference to these policies in the ABRvS 20-06-2000, mentioned under the previous footnote seems to support this theory.
[66] VzABRvS 26-11-1999, M en R 2000/2, 25K. It is worth noting that in this case, similar to the case of ABRvS 25-08-2000, mentioned in footnote 62 the foundation of the permit application was abandoned, but the case had a different outcome.
[67] Hof Den Haag 21-09-1999, M en R 2000/1, 2 [remark in brackets added].
[68] Footnote 25, Backes *et al* 2002, page 95.
[69] VzAGRvS 03-11-1992, AB 1993/15 and VzAGRvS 26-05-1993, AB 1993/442.
[70] For example ABRvS 11-12-1995, AB 1996/138; ABRvS 29-09-1998, AB 1998/414; ABRvS 30-09-1998, M en R 1999/7-8, 67.
[71] Examples are ABRvS 31-08-1999, AB 1999/468; ABRvS 30-10-2000, www.rechtspraak.nl, LJN AE9515; ABRvS 16-08-1999, M en R 2000/7-8, 117; ABRvS 18-12-2001, M en R 2001/11, 117.
[72] Examples are ABRvS 29-09-1998, AB 1998/414; ABRvS 19-04-2001, AB 2001/212; VzABRvS 15-09-1998, KG 1999/6; ABRvS 25-08-1995, AB 1995/539; Rb. Den Bosch 28-02-2002, www.rechtspraak.nl, LJN AE0410; ABRvS 01-05-2002, www.rechtspraak.nl, LJN AE2040 and M en R 2002/10, 108; ABRvS 13-03-2002, M en R 2002/5, 122K.
[73] Examples are ABRvS 29-09-1998, AB 1998/414; ABRvS 31-08-1999, AB 1999/468; ABRvS 24-02-2000, M en R 2000/10, 108.
[74] The Stand still principle as mentioned in the Third Policy Document stipulates that emissions of black listed substances, calculated over a particular "controlled area" may not increase.

allows for the decrease of the quality of the environment as long as for each new activity the best existing techniques are used.[75]

The Substitution principle, also known as the Alternatives principle, in particular sees to pesticides[76] and means that if less environmentally damaging substances/methods are available these should be used. It was added to the admission requirement of the Pesticides Act in 1993, but was removed before ever being –allowed to be- used because Directive 91/414/EEC supposedly did not leave room for this criterion.[77] In a case before the Trade and Industry Appeals Tribunal (*CBB*) of 1998 environmental groups, appealing against a renewal of an admission of pesticides containing *chloorthanatol,* argued that the fact that Community provisions do not provide for the 'Alternatives" test, as included in the former Dutch legislation, this does not imply that this test should not be applied. The authorities had argued the opposite and stated that for reasons of Community law this test was not applied. According to the appellants Directive 91/414/EEC specifically stipulates that the principles of integrated pest control should be taken into consideration. "The Directive contains provisions which intend to reduce the use of chemical pesticides to a minimum, which means that where possible less damaging substances of methods are used." Unfortunately the court did not consider this argument. The President of the CBB in 1999 concluded that in the current Dutch legal system there is no room for an alternatives test.[78] There has not yet been a full court decision on this matter.[79]

Conclusions

With the exception of the Polluter Pays principle the Adm. Law Div. handles most cases in which the environmental principles arise. There are only a few civil cases in which the principles arises and even less environmental criminal cases. This could be due to the fact that in most cases where the principles are referred to, the principles are incorporated in policies (and rarely in legislation), which at least for civil courts seems to restrict them to very marginal testing of these principles. With the exception of the Precautionary principle, the other three 'European' principles are seldom referred to explicitly. If any of these principles, including the Precautionary principle, are applied this is mostly implicitly, as part of a policy or via art. 3:2 Awb or 4:16 Awb. Only in very few cases the European environmental principles ex art. 174, par 2, EC are directly mentioned in no cases they have been applied in this context. This is also the case with the principles on the basis of international law. In the majority of the cases, especially those regarding the Precautionary and Prevention principle, the parties refer to the principles. In none of these cases the courts have rejected the appeal to a principle because an environmental group brought them forward. When, in scarce instances, an appeal to a principle was dismissed prior the intrinsic evaluation of the case, this was due to the argumentative trap of the EMA.

[75] J. Verschuuren under ABRvS 30-06-2000, M en R 2001/5, 67.
[76] Alternatives also appear to play a small role in the recovery of clean up costs of soil pollution by the State ex art. 75, par 6 b under 1, of the Soil Protection Act (HR 2-04-2001, www.rechtspraak.nl, LJN AB 1201) as well as in the former Key Physical Planning Decision on Schiphol and surroundings that included the aim to substitute part of the aviation traffic into rail traffic (TK, 2000-2001, 27 603, no. 6, page 98).
[77] Information obtained from draft PhD by E.M. Vogelezang-Stoute under 11.2.
[78] Pres.CBB 05-11-1999, M en R 2000/2, nr. 24K. The CBB on 6-12-1994, nr. 93/0076/060/029 had applied the alternative test in a case ruled under the law prior to the amendment of 1993. According to the CBB the availability of alternatives attributed to the 'non acceptability' element in the criteria in the Pesticides Act. It should be noted that the current Pesticides Act includes a comparable element ("unacceptable effect"). However it has not been recognised by the court as having the same meaning.
[79] Environmental groups have argued that the alternative test should be applied –either because Directive 91/414/EEC leaves room for it or on the basis of art. 3:2 Awb- but the CBB has not yet gone into this argument (CBB 29-01-1999, AB 1998/111 respectively Pres.CBB of 11-12-1998, KG 1999/94).

It can be conclude that, independent of the principles being explicitly or implicitly referred to in the cases, they can, in principle, have effect on the actual outcomes of the decisions of the court. The rate to which this occurs differs per principle, for example seldom for the Polluter pays principle compared to the Precautionary principle. Art. 6 EC has not been accepted by the court as having a potential effect at all. Non-observance of these principles can lead to annulment of the appealed decisions. But in most instances this will not be because of violation of the principle itself, but because of violation of the due care principle (art. 3:2 Awb).