

Polluter Pays:
An Overview of South Africa's
Pollution, Waste and Environmental
Impact Assessment Legislation

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Overview

- A. **Enforcement Mechanisms**
- B. **Solid waste:** Environment Conservation Act
- C. **Air pollution:** Atmospheric Pollution Prevention Act and the new Air Quality Act
- D. **Freshwater pollution:** National Water Act
- E. **Environmental Impact Assessments:** Environment Conservation Act / NEMA

A. Enforcement mechanisms

- **Overlap- strategy**
- **Criminal mechanisms:** different legislative instruments / common law
- **Civil mechanisms:** interdicts
- **Administrative mechanisms:**
 - "directives" – general application for harm to the environment (section 31A ECA, section 28 NEMA, section 19 NWA)
 - compliance notices - EMI

A. Enforcement mechanisms, continued

Section 31A of the Environment Conservation Act

A directive may be issued where a person:

- performs an activity, or fails to perform an activity; and
- the department is of the opinion that this has resulted, or will result, in the environment being seriously damaged, endangered or detrimentally affected.

Directive can include:

1. instructions to cease an activity;
2. instructions to take specified steps; or
3. directions for rehabilitation.

Failure to comply with directive: CRIMINAL OFFENCE (unspecified fine, or imprisonment for 6 months max)

A. Enforcement mechanisms, continued

Section 28 of National Environmental Management Act

- Duty of care to take reasonable measures to prevent significant damage to the environment
- Applies retrospectively
- Even where an activity is authorised, there is still a duty to minimise the pollution or degradation
- Applies to a broad range of people beyond those actually engaged in the activity (including owner of land, person with right of use)
- Where the duty is not discharged properly, the DG/HOD may issue a directive to take specific reasonable measures

Failure to comply with directive: NOT CRIMINAL OFFENCE

Government may take steps and recover costs from responsible persons

A. Enforcement mechanisms, continued

Section 31L of National Environmental Management Act

- Compliance Notice
- Issued by a Grade 1 EMI (cf DG/HOD or Minister/MEC)
- EMI must have reasonable grounds for believing that a person has not complied with:
 - a provision of the law for which EMI designated, or
 - term or condition of permit, authorisation or other instrument issued in terms of law which EMI has been designated to enforce
- No requirement of serious environmental damage or significant degradation of the environment

**Failure to comply with Compliance Notice:
CRIMINAL OFFENCE**

No prescribed penalty

B. Solid Waste

- Legislation not co-ordinated, and different competencies in terms of the Constitution – result in various government departments exercising control over aspects of waste management
- Refuse removal, refuse dumps and solid waste disposal – exclusive provincial competency to be administered by local government
- Environment and pollution control – concurrent provincial and national competency
- Municipal by-laws dealing primarily with general waste/domestic and builders refuse/littering/certain aspects of waste disposal sites. Fines are very low (R100, R300, R1 000) / imprisonment for a period not exceeding six/twelve months, or to both such fine and imprisonment (community correctional service).

B. Solid Waste, continued

Environment Conservation Act, 1989

- Section 20 – can only operate a disposal facility with a permit from DWAF (imminent transfer of function to DEAT)
- Section 20(6) - no person shall discard waste or dispose of it in any manner except at a disposal site for which a permit has been issued or in a manner prescribed by the Minister
- Section 22 - requirement for disposal of waste in terms of section 20 to also have an EIA authorisation
- Contravention of these sections = **CRIMINAL OFFENCES**

B. Solid Waste, continued

Penalties

- Section 29(4) – criminal sanction carries a penalty of up to **R100 000** or imprisonment for **10 years** or both (also fine not exceeding three times the commercial value of anything in respect of which the offence was committed)
- Section 29(7) - court can also order that damage to the environment be **repaired** (if order not complied within 30 days – take steps and recover costs)
- Section 30 - order of **forfeiture**
- NEMA extension of liability provisions in section 34

B. Solid Waste, continued

Difficulties with enforcement

- Majority of landfill sites – government operated – problems with co-operative governance
- If sites are closed down for being illegal, where else can waste be disposed of?
- Significant number of waste disposal sites are on private industrial premises – may not be aware of them – historical – only certain permits
- Various permits are required – disagreements between different government departments
- Hazardous vs general waste – impacts vary – necessary to balance resources and capacity
- Burying of waste – rely on whistleblowers
- Mandates of different government departments – duplication of effort

C. Air Pollution

- APPA, 1965
- AQA, 2004
- Municipal by-laws



C. Air Pollution

Atmospheric Pollution Prevention Act, 1965

- Roleplayers: Chief Air Pollution Control Officer and inspectors (DEAT)
- Atmospheric pollution by smoke, dust control, vehicle emissions
- Control of noxious or offensive gases: list of "scheduled processes" (Second Schedule)
- Prohibition: cannot carry on scheduled process, or erect building/plant for scheduled process, or alter existing permitted building, without registration certificate.
- Doing so: CRIMINAL OFFENCE
- Provisional v final registration certificates

C. Air Pollution

- Section 12(1): all registration certificates subject to condition that:
 - all plant and apparatus used for the purpose of carrying on the scheduled process in question and all appliances for preventing or reducing to a minimum the escape into the atmosphere of noxious or offensive gases, shall at all times be **properly maintained and operated** and that the holder of the certificate shall ensure that **all other necessary measures are taken to prevent the escape into the atmosphere of noxious or offensive gases**;
 - Provided that in applying the provisions of this subsection due allowance shall be made for the **unavoidable escape into the atmosphere of noxious or offensive gases during the starting up of any plant or apparatus** in respect of which the registration certificate was issued or **during the period of any breakdown or shutting down or disturbance of such apparatus or plant**.

C. Air Pollution

APPA, continued

Powers of CAPCO and inspectors (Section 7)

- May enter any premises where a scheduled process is or is suspected to be carried on without previous notice at any time, and examine any process
- Can require person to produce APPA registration certificate
- Apply tests and samples
- Criminal offence to:
 - falsely hold yourself out to be the your ability any question lawfully put by the CAPCO or an inspector in the exercise of his powers or the performance of his duties or functions under this section; or
 - refuse or fail to comply to the best of your ability with any lawful requirement of the chief officer or an inspector in the exercise of such powers or the performance of such duties or functions; or
 - obstruct or interfere with the CAPCO or an inspector in the exercise of such powers or the performance of such duties or functions.

C. Air Pollution

National Environmental Management: Air Quality Act, 2004

1. Air quality standards

- Framework legislation: national norms and standards to be declared by Minister – October 2005
 - MUST identify substances or mixtures of substances in ambient air which present a threat to health, well-being or the environment
 - MUST identify, in respect of each substance or mixture, national ambient air quality standards
 - MAY establish, in respect of each substance or mixture, national standards of emissions from point, non-point or mobile sources.
- MECs may do the same for provinces, but only the same or stricter than national standards.
- Municipality may do the same for municipal areas, but only the same or stricter than national or provincial standards.

C. Air Pollution Air Quality Act, continued

2. Roleplayers

- **National Air Quality Officer** in DEAT
- **Provincial Air Quality Officer** in each province
- **Air Quality Officer** in each municipality
- **Emission Control Officer** – air quality expert that Air Quality Office may require certain facilities to employ. Emission Control Officer must:
 - work towards cleaner production;
 - take reasonable steps to ensure compliance; and
 - promptly report non-compliance to licensing authority.

C. Air Pollution Air Quality Act, continued

3. Listed activities

- Minister must or MEC may (after consultation) publish **list of activities** which result in atmospheric emissions and which Minister or MEC reasonably believes have or may have significant detrimental effect on environment, including health; social, economic or ecological conditions; or cultural heritage
- Notice must also specify:
 - **minimum emission standards** for a substance or mixture resulting from listed activity (permissible amount, volume, emission rate or concentration); and
 - manner in which emissions must be **measured**.

C. Air Pollution
Air Quality Act, continued

3. Listed activities, continued

- No person may conduct a listed activity without an **atmospheric emission licence** (or provisional AEL) (if on national list, nowhere; if on provincial list, in that province)
- Doing so is an **offence**

C. Air Pollution
Air Quality Act, continued

4. Atmospheric Emission Licences

- Issued by Metropolitan and District Municipalities, unless delegated to province (by municipality) or province designated (by MEC), or Municipality itself applies for AEL (province)
- S24 of NEMA and S22 of ECA apply to all AELs
- Specified contents
- Contravening or failing to comply with a condition or requirement of an AEL is an **offence**
- If air pollutants at concentrations above emission limits specified in an AEL are emitted as result of listed activity, person performing listed activity is guilty of **offence**

C. Air Pollution
Air Quality Act, continued

5. Controlled emitters

- Minister or MEC may, after consultation, declare any **appliance** or **activity** as controlled emitter if appliance or activity result in atmospheric emissions that present a threat to health or environment.
- Notice must establish:
 - **emission standards** (permissible amount, volume, emission rate or concentration or substance or mixture that may be emitted from controlled emitter); and
 - manner in which emissions from controlled emitters must be **measured**.

C. Air Pollution
Air Quality Act, continued

5. Controlled emitters, continued

- No person may **manufacture, sell or use any appliance** or **conduct activity** declared as controlled emitter, unless complies with set standards (if on national list, nowhere; if on provincial list, in that province)
- Doing so is an **offence**
- If emissions from controlled emitter do not comply with standards established, person operating a controlled emitter is guilty of **offence**

C. Air Pollution
Air Quality Act, continued

6. Offensive odours

"any smell which is considered to be malodorous or a nuisance to a reasonable person"

- Minister or MEC may prescribe measures for control of offensive odours emanating from specified activities
- Occupier of premises must take all reasonable steps to prevent the emission of any offensive odour caused by an activity on premises
- Failing to do so is an **offence**

C. Air Pollution
Air Quality Act, continued

7. Rehabilitation when mining operations cease

- If determined that mine is likely to cease operations within 5 years, owner of mine must notify Minister, and advise of plans:
 - For rehabilitation or area; and
 - For the prevention of dust pollution.
- Failure to notify the Minister is an **offence**.

C. Air Pollution
Air Quality Act, continued

8. Pollution Prevention Plans (S29)

- Minister or MEC may by published notice declare a substance as a **priority air pollutant**, and require categories of persons to submit and implement **pollution prevention plans** in respect of such a pollutant
- Minister or MEC may also by written notice require a **person conducting a listed activity** which involves emission of a priority air pollutant to submit and implement a pollution prevention plan.
- Minister or MEC must prescribe requirements for pollution prevention plan.
- Offence not to submit or implement pollution prevention plan when required to do so.

C. Air Pollution
Air Quality Act, continued

9. Atmospheric Impact Reports

- Air Quality Officer may require any person to submit an atmospheric impact report if:
 - Reasonably suspects that person has once or more contravened or failed to comply with AQA or any conditions of a licence, and that such contravention has or may have detrimental effect on the environment;
 - or
 - A review of an AEL is undertaken.
- Failure to submit atmospheric impact report is an **offence**.

C. Air Pollution
Air Quality Act, continued

10. Other criminal offences (S51)

- Supplying false or misleading information in an application for an AEL (including for transfer, variation or renewal)
- Supplying false or misleading information to an air quality officer
- Contravening or failing to comply with a condition subject to which exemption to an AQA provision was granted under S59

C. Air Pollution
Air Quality Act, continued

11. Penalties S52

- A fine or 10 years or both
- Fine may not exceed maximum fines
- Fine must be determined considering:
 - Severity of offence – potential or actual impact on health, well-being, safety and environment;
 - Monetary or other benefits which accrued through commission of offence;
 - Extent of person's contribution to overall pollution load of area under normal working conditions.

C. Air Pollution

APPA to AQA: Transitional provisions

When it commences, AQA repeals APPA in full, BUT

- Provisional APPA registration certificates remain valid for 2 years from commencement date, and AQA now applies as if provisional APPA certificate is provisional AEL.
- APPA registration certificates remain valid for 4 years from commencement date, and AQA now applies as if APPA certificate is AEL. Must within 3 years apply for renewal application – if not, certificate expires at end of 3 years.
- Unprocessed APPA applications become AEL applications.
- Until Minister publishes AQA listed activities, APPA Scheduled Processes are regarded as listed activities under AQA.
- Until Minister publishes ambient air quality standards, the AAQ in Schedule 2 to AQA apply.

D. Water Pollution

National Water Act, 1998 (NWA)

- Administered by Department of Water Affairs and Forestry (DWAF)
- More stringent enforcement of legislative contraventions
- More stringent control over the way in which industry uses water
- Increased liability
- Pressure to improve water management practises through, *inter alia*, reduction of use, recycling and waste minimisation

D. Water Pollution National Water Act, continued

Pollution:

the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it -

- (a) less fit for any beneficial purpose for which it may reasonably be expected to be used; or
- (b) harmful or potentially harmful -
 - (aa) to the welfare, health or safety of human beings;
 - (bb) to any aquatic or non-aquatic organisms;
 - (cc) to the resource quality; or
 - (dd) to property.

D. Water pollution National Water Act, continued

- **Water use:** water may only be used if authorised by the NWA. Authorised users are divided into those requiring a licence (conditional) and those not requiring a licence
- **Duty of Care:** the provisions of the Act that are aimed at remedying the effects of pollution apply retrospectively and impose a duty on the owner of land, a person in control of land or a person who occupies or uses land on which any activity or process or was performed or undertaken, which causes, or is likely to cause pollution of a water resource, to take all reasonable measures to prevent any such pollution from occurring, continuing or recurring and to clean up the effects of pollution
- Where a person fails to take such reasonable measures, a **directive** can be issued by the catchment management agency and should the person fail to comply with the directive, the agency can take the measures and recover the costs from the relevant persons (section 19)

D. Water pollution National Water Act, continued

Offences – section 151

- Using water otherwise than permitted by the NWA
- Failing to comply with condition of permit
- **Unlawfully and intentionally or negligently committing any act or omission which pollutes or is likely to pollute a water resource**
- **Unlawfully and intentionally or negligently committing any act or omission which detrimentally affects or is likely to detrimentally affect a water resource**
- Failing to comply with a Section 19 directive
- Other offences

D. Water pollution National Water Act, continued

Penalties

- First conviction – fine (unspecified) or imprisonment for a period not exceeding 5 years or both
- Second or subsequent conviction – fine (unspecified) or imprisonment not exceeding 10 years or both
- Upon conviction court can in the same proceedings enquire without pleadings into any harm, loss or damage suffered by another person or caused to the water resource and the determine the extent of this damage
- Award of damages including cost of remedial measures and order that remedial measures be implemented

E. Environmental Impact Assessment (EIA)

- Legislative requirement that an EIA is conducted prior to the commencement of certain listed activities (harm to environment)
- EIA = process whereby environmental impacts of the activity are assessed and mitigation measures are investigated
- Competent authority (national and provincial government) then decides on whether or not to grant an authorisation
- Additional requirement to another permit eg. waste disposal, emission licence, zoning permission, mining licence, water licence = BASIS FOR ENVIRONMENTAL PERMITTING
- Environment Conservation Act and relevant regulations (GNR 1182 and 1183) since 1997
- National Environmental Management Act and new regulations from 2005 (not yet in force)

E. Environmental Impact Assessment

Enforcement scenarios for EIAs

- Although required (ECA/NEMA), no EIA is done and an authorisation is not obtained (often resulting in damage to the environment)
- A conditional authorisation has been issued, but the conditions are not being adhered to
- The procedural or process requirements are not being complied with
- Fraudulent authorisations used to justify the commencement of the activity

E. Environmental Impact Assessment

Typical case study

- A complaint is received by the Department that a residential development is impacting on a wetland which is the habitat of the Giant Bullfrog (Red Data Species). Furthermore, the wetland is a functional reedbed wetland which serves the important functions associated with wetlands. Current activities taking place on the site are undermining the ecological integrity of the wetland.
- Upon investigation, it appears that the developer has not applied for authorisation to the Department. A pre-directive is served on the developer followed by a directive. The developer claims that the development was approved prior to the EIA regulations through the municipal planning process. The developer continues with the development. The Department approaches the High Court for an urgent interdict to compel the developer to cease with construction activities. Criminal proceedings are also instituted.
- By the time the developer complies with the interim interdict, a number of the houses along the wetland have already been completed.

E. Environmental Impact Assessment

Key enforcement tools in respect of EIAs

1. **Environment Conservation Act**
 - Section 31A directive
 - Criminal prosecution
2. **National Environmental Management Act**
 - Section 28 directive
 - Compliance notice
 - Criminal prosecution
 - Section 24G rectification
 - Regulations – offences
3. **Civil litigation:** interdict

E. Environmental Impact Assessment

Environment Conservation Act

Criminal Offences

- Section 29(4): failure to obtain authorisation and failure to comply with a condition of an authorisation = criminal sanction carries a penalty of up to **R100 000,00** or imprisonment for **10 years** or both as well as a fine not exceeding three times the commercial value of anything in respect of which the offence was committed
- Section 29(3): failure to comply with s31A directive
- Section 29(7): court can also order that damage to the environment be repaired (if order not complied within 30 days – take steps and recover costs)
- Section 30 - order of forfeiture
- NEMA extension of liability provisions in section 34 to address historic limitations

E. Environmental Impact Assessment

National Environmental Management Act

1. Criminal offences

- **Section 24F:** failure to obtain authorisation and failure to comply with condition of authorisation = criminal sanction carries a penalty not exceeding **R5 million** or imprisonment for a period not exceeding **10 years** or both
- **Section 31N** – failure to comply with Compliance Notice

2. Rectification of illegal listed activity

- **Section 24G**
 - committed offence under section 24F, the Minister or MEC may direct a person to apply for rectification
 - upon payment by the person of an **administration fine** not exceeding **R1 million** the application will be considered and either authorisation given or a directive given to cease and rehabilitate
 - failure to comply with directive or condition of authorisation = offence and liable on conviction to penalty provided in section 24F

E. Environmental Impact Assessment

NEMA, continued

New EIA regulations

- New listed activities
- Tightened up in relation to obligations of parties involved in the EIA process and includes mechanisms to assist with compliance and enforcement eg. variation, transfer, lapsing of application, audit report
- Additional offences:
 - Transferring ownership of property / activity without complying with the provisions of regulation 20
 - Failing to submit an environmental audit report when required
 - Supplying false or misleading information in respect of an audit report, application for environmental authorisation or transfer of an authorisation
- Penalties – still to be determined

E. Environmental Impact Assessment

Difficulties with enforcement

- Need to stop activity immediately – limitation of criminal sanction – therefore use an administrative mechanism such as a directive – High Court challenge resulting in further delay of criminal matter
- Pressure for development and other government priorities (poverty alleviation, employment, housing) vs environmental protection
- Many of the violators are other government departments
- Legal interpretations around when an activity commenced (particularly change of land use) – whether or not an EIA authorisation is required
- Mechanisms for addressing non-compliance with conditions of authorisation – when to institute criminal proceedings / when to withdraw authorisation (probability = continue anyway or activity completed)

Questions?

- Guilty of offence: failing to obtain EIA authorisation prior to commencing with listed activity – can court condone the continuation of the illegal activity?
- Once matter has been reported to NPA (docket may not be opened yet) – decision to prosecute?

Polluters beware

Thank you