



# ENVIRONMENTAL LAW

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### Introduction

Environmental issues in South Africa are largely regulated by statute. However, the administration of environmental laws has often been described as fragmented because responsibility has been shared among many different Government departments. Although this picture has not entirely changed, the Department of Environmental Affairs is currently the lead agent for environmental management. Other national departments which administer and enforce environmental laws in South Africa include:

- Agriculture, Forestry and Fisheries;
- Energy;
- Mineral Resources;
- Rural Development and Land Reform; and
- Water Affairs.

### Constitution

Section 24 of the Constitution of South Africa, 1996 (Constitution) provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

- prevent pollution and ecological degradation;
- promote conservation; and
- secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 38 of the Constitution provides for certain persons to approach a competent court if these rights have been infringed or threatened. Certain persons include, among others, anyone acting in the public interest.

### National Environmental Management Act

The National Environmental Management Act, No. 107 of 1998 (NEMA), came into operation in January 1999. It is the flagship environmental statute of South Africa. NEMA's primary purpose is to provide for cooperative environmental governance by establishing principles for decision-making on all matters affecting the environment. NEMA also establishes procedures and institutions that will promote public participation in environmental management.

The principles enshrined in NEMA guide its interpretation, administration and implementation as well as all other laws concerned with the protection or management of the environment in South Africa. These principles serve as a framework within which environmental management must take place. They include, among others, sustainable development and the "polluter pays" principle.

#### Sustainable development

Sustainable development will ensure the integration of social, economic and environmental factors in decision-making so that development serves present and future generations. Sustainable development also requires that a risk-averse and cautious approach be applied to decision-making.

#### "Polluter pays" principle

The "polluter pays" principle provides that "the costs of remedying pollution, environmental degradation and consequent adverse health effects; [and the costs] of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment".

NEMA imposes a duty of care on every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent the pollution or degradation of the environment from occurring, continuing or reoccurring. In so far as such harm to the environment is authorised by law or cannot reasonably be avoided, NEMA requires that measures be taken to ensure that the pollution or degradation is minimised and rectified.

The State may direct any person who fails to take these reasonable measures to commence, continue and complete the reasonable measures. If a person fails to comply with a directive, the State may itself take the reasonable measures to remedy the situation and recover all the costs of remediation from specified persons, which include the person who failed to take the reasonable measures. Liability may be apportioned according to the degree to which each person was responsible for the harm to the environment.

NEMA makes provision for damages to be awarded by the courts where loss or damage has occurred as a result of contravention of certain environmental statutes. In addition, some offences under certain other environmental statutes may result in penalties being imposed in terms of NEMA, for example the National Water Act, No. 36 of 1998 (National Water Act), and the Environment Conservation Act, No. 73 of 1989 (Environment Conservation Act).

### **Administration and enforcement**

NEMA further provides for the enforcement of provisions of certain environmental Acts and enables the director-general or the provincial head of department to designate environmental management inspectors to implement this function.

There were 1 399 environmental management inspectors on the national register in the period 2011-12, a 30% increase from 2010-11 when there were only 1 076 environmental management inspectors. There has also been a 0.25% decrease in the number of reported environmental incidents, from 3 944 in 2010-11 to 3 934 in 2011-12. It is unclear whether this is related to the increase in the number of environmental management inspectors or the increase in general awareness of environmental legislation. Nevertheless, the total number of administrative notices issued has decreased slightly from 547 in 2010-11 to 521 in 2011-12.

### **Integrated environmental management**

NEMA regulates the system of environmental impact assessments and related management tools, which was previously regulated by the Environment Conservation Act. Comprehensive regulations on environmental impact assessment were promulgated under NEMA and came into force in 2006. These regulations were repealed and replaced with effect from 2 August 2010.

The current environmental impact assessment regime requires that the potential impact on the environment of listed activities be considered, assessed and reported to the competent authority. There are three lists of activities. One contains activities which require a full scoping and environmental impact-reporting process. The other lists set out activities which need to undergo only a basic assessment process.

### **Environmental liability**

Following international practice, NEMA makes provision for the liability or conviction of employees, managers, agents and directors for certain offences resulting from the failure to take all reasonable steps necessary under the circumstances to prevent the commission of an offence. Interestingly, with the increase in environmental management inspectors, there has been a decline in the number of arrests reported from 2 384 in 2009-10, to 1 988 in 2010-11, and 1 339 in 2011-12. This has in turn resulted in a slight decrease in the number of cases handed to the National Prosecuting Authority from 234 in 2010-11 to 201 in 2011-12.

Section 34(7) of NEMA makes a director personally liable for offences committed by the company during the period of his or her appointment if he or she failed "to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence". NEMA stipulates that such liability exists in regard to an offence under any provision listed in Schedule 3.

In addition, NEMA allows a court to enquire into any costs the State may incur in rehabilitating the environment and any monetary advantage gained by the offender. The court may order the award of compensation, damages or a fine equal to such amounts.

Significant amendments are proposed by the National Environmental Laws Second Amendment Bill, 2012 (Second Amendment Bill) which seeks to streamline environmental regulation under NEMA. If implemented in its current form, the Second Amendment Bill will result in a substantial increase in penalties in respect of a number of environmental offences under NEMA.

### **National Water Act**

The National Water Act recognises that water is a natural resource that belongs to all people. It regulates the way people obtain the right to use water and provides for just and equitable use of water resources.

Sustainability and equity are identified as central guiding principles in the protection, use and management of water resources. These guiding principles recognise the:

- basic human needs of present and future generations;
- need to protect water resources;
- need to share some water resources with other countries; and
- need to promote social and economic development through the use of water.

Government, acting through the Minister of Water and Environmental Affairs (Minister), is responsible for the achievement of these fundamental principles. Being empowered to act on behalf of the nation, the Minister has the ultimate responsibility to fulfil certain obligations relating to the use, allocation and protection of water resources.

### **Water use licensing**

Water use requires a licence or other form of regulatory authorisation under the National Water Act. For the purposes of the National Water Act, “water use” includes, among other things:

- taking water from a water resource;
- storing water;
- impeding or diverting the flow of water in a watercourse;
- disposing waste in a manner that may detrimentally impact on a water resource; and
- altering the bed, banks, course or characteristics of a watercourse.

The exceptions to this rule are:

- water use identified under Schedule 1 to the National Water Act;
- water use that is a continuation of a lawful water use which took place during a period of two years before the commencement of the National Water Act; and
- water use that is permissible in terms of a general authorisation or waiver from the responsible authority.

### **Pollution of water resources**

The National Water Act provides for situations where the pollution of a water resource occurs as a result of activities on land. The person who owns, controls, occupies or uses the land in question is responsible for taking all reasonable measures to prevent any pollution of a water resource from occurring, continuing or recurring.

If these measures are not taken, the catchment management agency (if not established, the Minister) concerned, may do whatever is necessary to prevent the pollution or to remedy its effects. The catchment management agency may then recover all the costs incurred as a result of it so acting from such a person. In recovering these costs, the catchment management agency may also claim from any person who would have benefited from the measures taken by it.

The National Water Act lists the acts and omissions that constitute offences, including the associated penalties. These offences include unlawfully, intentionally or negligently committing any act or omission that pollutes or detrimentally affects a water resource.

The National Water Act contains provisions aimed at improving the safety of dams. Only dams that are a specific size; fall within a prescribed category; or have been declared to be dams with a safety risk, are subject to regulation.

Dam Safety Regulations published in 2012 provide for a classification system for dams with a safety risk. On the basis of these classifications, a licence is required before a dam with a safety risk may be constructed, repaired, altered, decommissioned or before water may be impounded. Dams with a safety risk are also required to be registered in accordance with the provisions of the National Water Act.

In addition to criminal proceedings, the National Water Act also provides for an enquiry into the harm, loss or damage suffered as a result of an act or omission constituting an offence. In this regard, the court may award damages for the loss or harm suffered by the person. Furthermore, the court may order that the remedial measures to be implemented, be undertaken either by the accused or the relevant water management institution. Some of the offences set out in the National Water Act have also been designated in terms of Schedule 3 to NEMA.

### **Atmospheric Pollution Prevention Act and National Environmental Management: Air Quality Act**

The law relating to air pollution in South Africa has been reformed. The Atmospheric Pollution Prevention Act, No. 45 of 1965 (APPA), was for many years denounced as having inadequate compliance and enforcement mechanisms for its provisions to be implemented effectively.

In addition, the APPA largely governed point-source emission control, which did not take into consideration the cumulative impacts of air pollution in areas where the concentration of emissions of harmful substances into the atmosphere is substantial.

Accordingly, the APPA has been entirely replaced by the National Environmental Management: Air Quality Act, No. 39 of 2004 (Air Quality Act). The objective of the Air Quality Act is to protect the environment by providing reasonable measures for:

- the protection and enhancement of the quality of air in South Africa;
- the prevention of air pollution and ecological degradation; and
- securing ecologically sustainable development while promoting justifiable economic and social development.

The Air Quality Act requires the establishment of a national framework for achieving these objectives and the adoption of national, provincial and local standards for ambient air quality. It further requires the formulation of air quality management plans and pollution prevention plans; the declaration of priority areas, controlled emitters and controlled fuels; and the preparation of atmospheric impact reports.

Activities that result in environmentally detrimental atmospheric emissions have been listed and anyone who intends to undertake any of the listed activities is required to have an atmospheric emission licence or a provisional atmospheric emission licence. An amended list of activities which result in environmentally detrimental atmospheric emissions was published for comment in Government Notice 964 in 2012 (Proposed List). The period during which submissions would be accepted was extended until the end of January 2013. If implemented in its current form, the Proposed List will introduce many changes, including a relaxation of a number of emissions thresholds.

The Air Quality Act also addresses issues of trans-boundary air pollution and control of dust, noise and offensive odours. Draft national dust control regulations were published for comment in Government Notice 309 in 2011. A revised draft was published in Government Notice 1007 in December 2012 but has not yet come into force (Draft Dust Control Regulations). The purpose of the Draft Dust Control Regulations is to prescribe general measures for the control of dust in all areas.

Current penalties that may be imposed in terms of the Air Quality Act will be increased in line with other specific environmental management Acts when the National Environmental Laws First Amendment Bill, 2012 (First Amendment Bill), comes into force.

### **Environment Conservation Act**

The Environment Conservation Act provides for the protection and control of the environment. Following the enactment of NEMA and the National Environmental Management: Waste Act, No. 59 of 2008 (Waste Act), a number of the provisions of the Environment Conservation Act have either been repealed or assigned to the provinces. The remaining provisions of the Act deal with, among other things, criminal and other sanctions and the making of regulations on various matters, for example noise, vibration and shock.

In the 2011-12 financial year, there were 136 contraventions of the Environment Conservation Act as a result of which there were a number of convictions for criminal offences. For instance, in the case of *State v Arbac Services CC* (Gauteng) and 2 Others, two accused were charged for operating a waste disposal site without a waste permit and for undertaking a listed activity without an environmental authorisation. The accused were convicted on both counts.

## Waste Act

The Waste Act was enacted to reform the law regulating waste management and to govern waste management activities. It has repealed and replaced those sections of the Environment Conservation Act that dealt with the prevention of littering and regulation of waste disposal sites.

The Waste Act creates a general duty in respect of waste management, obliging holders of waste to minimise waste, recycle and dispose of waste in an environmentally sound manner. Section 18 introduces “extended producer responsibility”. The Minister may:

- identify a product in terms of which extended responsibility applies;
- identify extended producer responsibility measures that must be taken, and by whom; and
- specify how to implement such extended responsibility and any financial arrangements that must be made.

To date no such measures, products or persons have been identified.

Section 19 provides for the listing of waste management activities that have or are likely to have a detrimental effect on the environment. On 3 July 2009 the list of waste management activities was published in Government Notice 718. The notice established two different categories of listed waste management activities. Any person wishing to commence, undertake or conduct a waste management activity listed under either of these categories must apply for and be issued with a waste management licence to do so.

An amended and more consolidated list of waste management activities was published in Government Notice 779 for public comment in 2012. Once implemented, the amended list will introduce a third category of waste management activities which will require compliance with requirements or standards determined by the Minister and will repeal the existing list of waste management activities.

Part 8 of the Waste Act provides for far-reaching provisions regarding contaminated land. Although these provisions are not yet in force, they will have retrospective effect and will apply to the contamination of land which occurred prior to the date when the provisions take effect. The contaminated land provisions will also be applicable to an act that results in a change to pre-existing contamination. In terms of these provisions, the Minister may direct the owner of identified contaminated land to submit a site assessment report, and may prevent the owner from transferring the land without complying with any conditions specified. The Minister may also make a remediation order to neutralise any risk, at the cost of the person against whom the order is made.

In May 2010, the Department of Environmental Affairs released a document titled “Framework for the Management of Contaminated Land” (framework document) which was compiled in support of Part 8 of the Waste Act. The framework document is based on a review of international best practice and remediation policies and has been developed to “provide a risk-based decision support protocol for assessing sites”. The framework document also offers a set of guidelines for the submission of site assessment reports.

In March 2012, the Department of Environmental Affairs released draft national norms and standards for the remediation of contaminated land and soil quality and draft regulations for site assessments and reports.

The National Waste Information Regulations (Waste Information Regulations) were published in August 2012 and came into force on 1 January 2013. Any person who undertakes an activity listed in Annexure 1 to the Waste Information Regulations is required to apply to be registered on the South African Waste Information System (or on a Provincial Waste Information System, if one exists) within 30 days after the commencement of the activity or within 90 days of 1 January 2013 (for activities which were pre-existing). The Waste Information Regulations have also introduced a number of obligatory reporting and record-keeping requirements.

Offences in terms of the Waste Act carry a penalty of a fine not exceeding ZAR 10 million or imprisonment for a period not exceeding 10 years, or both. There were 59 incidents reported at the National Department of Environmental Affairs for the unlawful disposal of waste and 156 Waste Act contraventions nationally in the 2011-12 financial year 1.

## Other Important Environmental Statutes

### Heritage resources

The National Heritage Resources Act, No. 25 of 1999 (Heritage Resources Act), provides for the protection and management of certain categories of heritage resources in South Africa. A “heritage resource” is defined to include any place or object of cultural significance.

The Heritage Resources Act provides that certain activities relating to heritage resources require consent from relevant heritage resources authorities. For example, no person may alter or demolish any structure that is older than 60 years without a permit issued by the relevant provincial heritage resources authority.

### Hazardous substances

In South Africa, substances that may cause injury or ill-health by reason of their toxic, corrosive, irritant, strongly sensitising or flammable nature are largely controlled by the Hazardous Substances Act, No. 15 of 1973 (Hazardous Substances Act).

The Hazardous Substances Act also controls certain electronic products and provides for the prohibition and control of the importation, manufacture, sale, use, operation, application, modification, disposal or dumping of such substances and products.

### Public nuisance

The Health Act, No. 63 of 1977 (Health Act), contains certain provisions that relate specifically to a “nuisance”. The Health Act defines “nuisance” widely and has among other meanings, the following:

- any factory, industrial or business premises not kept in a clean state and free from offensive smells arising from any drain or any other source, or not ventilated so as to be injurious or dangerous to the health of the employees;
- any factory or industrial or business premises giving rise to smells which are offensive or which are injurious or dangerous to health; and
- any area of land kept or permitted to remain in such a state as to be offensive.

Where a nuisance occurs, a local authority is empowered to take all lawful and reasonably practicable measures to abate or remedy such nuisance or to cause it to be abated or remedied.

### Nuclear energy

The Nuclear Energy Act, No. 46 of 1999 (Nuclear Energy Act), and the National Nuclear Regulator Act, No. 47 of 1999 (National Nuclear Regulator Act), came into operation on 24 February 2000.

A primary objective of the Nuclear Energy Act is to prescribe the measures regarding the discarding of radioactive waste and the storage of irradiated nuclear fuel. The authority over the management and discarding of radioactive waste and the storage of irradiated nuclear fuel vests with the Minister of Energy (Energy Minister).

The Nuclear Energy Act also provides that, except when authorised by a ministerial authority issued under the Hazardous Substances Act, no person may, without the written permission of the Energy Minister, discard radioactive waste in any manner. The permission may be granted subject to any conditions that the Energy Minister, in concurrence with the Minister, deems fit to impose. The conditions so imposed are additional to any conditions contained in a nuclear authorisation as defined in the National Nuclear Regulator Act.

The National Nuclear Regulator Act establishes a juristic person known as the National Nuclear Regulator. A nuclear installation licence is required to construct, operate, decontaminate or decommission a nuclear installation. No person may engage in any activity that is capable of causing nuclear damage, except under the authority of a certificate of registration or a certificate of exemption.

### Protected areas

The National Environmental Management: Protected Areas Act, No. 57 of 2003 (Protected Areas Act), provides for the continued existence of South African National Parks and for the declaration and management of protected areas in South Africa.

The Department of Environmental Affairs launched strategies on the expansion of protected areas and also on Buffer Zones for National Parks in 2012, which indicate the importance of protecting these areas. There were 386 contraventions of the Protected Areas Act in the 2011-12 financial year 1.

### Biodiversity

The National Environmental Management: Biodiversity Act, No. 10 of 2004 (Biodiversity Act), provides for the management and conservation of South Africa's biodiversity; the protection of threatened and protected species and ecosystems; the sustainable use of indigenous biological resources; and the fair and equitable sharing of benefits arising out of the bio-prospecting of those resources.

On 16 April 2013, the Minister published the draft Regulations related to listed Threatened or Protected Species and the proposed List of Species that are Threatened or Protected for public comment. These proposed amendments aim to address a number of challenges relating to biodiversity permitting and provide for a more integrated system of regulation through the inclusion of all threatened or protected marine species under one piece of legislation.

In light of the on-going rhino poaching scourge in the country, there have been a number of convictions relating to illegal hunting of rhinos and dealing in and possession of rhino horn in terms of the Biodiversity Act. In *S v K Khoza* and *S v Luthuli CAS 194/02/2009*, two accused were found in possession of firearms and rhino horn. The State proved by means of DNA that the rhino horns were linked to a carcass. Both accused were subsequently convicted in terms of the Biodiversity Act. In 2012, 455 rhinos were killed, surpassing the total of 448 rhino that were killed in 2011.

### Pesticides and fertilisers

The use of pesticides and fertilisers is controlled in South Africa under the Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, No. 36 of 1947 (Agricultural and Stock Remedies Act). The Department of Agriculture administers this Act.

In terms of the Agricultural and Stock Remedies Act, fertilisers, farm feeds, agricultural remedies, stock remedies, sterilising plants and pest control operators are to be registered. The importation, sale, acquisition, disposal and use of such remedies are regulated.

### Marine living resources

The Marine Living Resources Act, No. 18 of 1998 (MLRA), makes provision for the conservation of the marine ecosystem and the long-term sustainable use of marine living resources including access to exploitation, use and protection of certain marine living resources. There are wide powers under the MLRA to arrest and detain vessels, as well as to revoke, suspend or cancel fishing rights for serious contraventions of the MLRA.

A bill to amend the MLRA was published for comment on 25 April 2013. The Marine Living Resources Amendment Bill, 2013 (MLRA Amendment Bill) seeks to introduce public trusteeship of South Africa's marine living resources as well as to provide for the allocation of fishing rights to small-scale fishing communities.

The National Environmental Management: Integrated Coastal Management Act, No. 24 of 2008 (Integrated Coastal Management Act), came into force on 1 December 2009, save for certain sections. This Act focuses on regulating activities within the coastal zone and implements new planning procedures to ensure that any development is sustainable, integrated and in the interest of all who use the coastal zone. The Integrated Coastal Management Act also regulates activities that require an environmental impact assessment to be carried out. The Minister can issue an environmental authorisation if the activity is "overwhelmingly in the interests of the whole community despite the adverse effect it is likely to cause to the coastal zone".



## Conclusion

While environmental management in South Africa is highly regulated, the implementation of environmental laws and enforcement of environmental prohibitions has been largely inconsistent.

The legislation currently being passed indicates an intention by the Department of Water and Environmental Affairs to ensure that a more streamlined approach to the administration and enforcement of environmental regulation is developed while encouraging and rewarding investment in sustainable and beneficial industries at the same time.