



edtea

Department :

Economic Development, Tourism and
Environmental Affairs

PROVINCE OF KWAZULU-NATAL

ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS

**NEMA COMPLIANCE
MONITORING AND
ENFORCEMENT – SYSTEMS,
PROCESSES AND PROCEDURES**

**PRESENTATION TO COGTA
17 NOVEMBER 2017**



Purpose

The purpose of Environmental Compliance and Enforcement is to:

- Ensure Compliance with environmental legislation
- Ensure development takes place in a responsible and sustainable manner
- Ensure the environment is protected for the benefit of current and future generations



Mandate

➤ S24 – Constitution of RSA 1996:

***Everyone** has a right to an environment that is not harmful to their health and well-being...and to have that environment **protected** for the benefit of present and future generations through **reasonable legislative** and **other measures**...*

The Environmental Right's imperatives

- I. Prevent pollution and ecological degradation;
- II. Promote conservation; and
- III. Secure ecologically sustainable economic and social development.



Legislative Mandate

- Environmental Conservation Act, Act No. 73 of 1989
- National Environmental Management Act, No.107 of 1998, as amended
- NEMA Environmental Impact Assessment Regulations
- Criminal Procedure Act, No. 55 of 1977
- All other SEMAs



Guiding principles include,

➤ NEMA 1998:

- I. Principle 3 – Development must be socially, environmentally & economically sustainable;
- II. Principle 4(a) – Sustainable development requires consideration of all relevant factors ... biodiversity, ecosystems, waste, pollution, impacts, peoples rights ...
- III. Principle 4(g) – Decisions must take into account all forms of knowledge, including traditional and ordinary knowledge



Functions

CME aims at ensuring that developments / projects proceed in an environmental sustainable manner:

- Compliance monitoring
- Sector-based compliance
- Reactive compliance
- Compliance enforcement
- Compliance promotion



Commencement Prohibition

- NEMA S24F states that “...no person may commence an activity listed in terms of S24(2) a or b, unless the competent authority has issued an environmental authorization for the activity”.



Definition of “Commencement”

- “Commence”, when used in Chapter 5, means the start of any physical implementation in **furtherance** of a listed activity, including site preparation and any other action on site or the physical implementation of a plan, policy, programme or process, but does not include any action required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed or specified activity



Environmental Management Programme

- An EMPr is submitted as part of an Environmental Impact Assessment report
- It details the possible environmental impacts, measures developed in order to prevent, minimise or mitigate impacts associated with the various aspects of the activity or development



Compliance Monitoring

- Compliance monitoring is conducted by way of routine site inspections, and is based on a License/permit or authorization issued in terms of a provision of law; which is then a legally binding document which must be complied with
- This process is conducted in order to establish the license holders' compliance to said License



Compliance Monitoring activities: Pre-inspection

- Information gathering prior to inspection
- Date EA / WML issued?
- Other state organs authorization?
- Contact details of responsible person/developer
- Verify location /co-ordinates
- Description of the development area
- Site and layout maps
- Magnitude of the development
- Compile audit checklist of all conditions of the EA / WML, EMPr and ECO Audit Report findings



Inspection

- Monitor against pre-inspection information
- EA/WML, EMPr, ECO audit report findings
- Record status of development
 - Stages:
 - Did not commence within validity period
 - Construction in progress
 - Construction Complete
 - Operational Phase
 - Decommissioning
- Record non-compliances, S28 issues (housekeeping, spillages etc. that are not covered by the EA / WML)



Post Inspection

- Administrative aspect
- Evaluate inspection
- Identify legislative contraventions
- Determine action to be taken based on contraventions identified
- Time-frames for next inspection or enforcement action to be issued



Sector Compliance Objectives

The objectives are to:

- Ensure environmental compliance;
- Promote the cradle to grave principle (environmental auditing);
- Promote and ensure environmental sustainability;
- Promote cooperative governance;
- Identify environmental impacts;
- Develop and implement mitigation measures;



Sector Compliance Phases

- Planning Phase
- Pre-Audit Phase
- Audit Phase
- Post-Audit Phase



Planning Phase

Collect relevant information about the facility/ies:

- All relevant permits, licenses or authorizations
- Emergency incidents reported
- Complaints received
- Compliance audits conducted and;
- All internal and external audits of the facility.

Obtain all additional and relevant information from the facility/ies including

- Process flow (life cycle analysis)
- Layouts and site plans
- Compliance history of the facility and specialist's reports
- Storm water and waste water management plans, etc.
- Identify raw materials, products, by-products, emissions and waste streams



Pre-audit phase

- Identify the expertise needed to conduct the inspection.
- Formulate the inspection team based on expertise and experience.
- Conduct the planning meeting with the team.
- Formulate the teams to conduct inspection based on complexity and size of the facility and documents team as compulsory.
- Select team leaders based on knowledge and experience.
- Discuss the procedures and conduct of team members during audits.
- Finalize logistics and equipment that will be needed to conduct the audits.
- Formulate the checklist based on all permits for teams to conduct inspection.



Audit Phase

- Conduct opening meeting with facility representatives to:
 - Explain the purpose of the audit
 - Introduce the teams and aligning the facility staff to teams based on their knowledge of the operations at the facility
 - Discuss do's and don'ts during audit

- Proceed with audit with emphasis on:
 - Non-compliances with environmental legislation, authorizations and permits
 - Section 28 issues including housekeeping
 - Complaints



Audit Phase cont...

- Each team will have a dedicated person to take photos where necessary. Each photo must be dated and labeled or referenced.
- In cases of uncertainty the teams must consult with each other and the decision be reached by the team leader.
- All the documents obtained from the facility must be recorded and signed for. Inspectors must issue a facility with receipt for all the documents obtained.
- Conduct closing meeting with the facility: The purpose of the closing meeting is to indicate to the facility the progress made by the inspection team as well as to relay any challenges experienced, clarifying uncertainties during the audit, no feedback to be provided to the facility.



Post-Audit Phase

- Team discussion on uncertainties, problems and other issues encountered during inspection
- Commence with report writing based on the standardized report writing format
- Closure of the audit
- Once finalized the District office responsible will send the final report to legal services for legal review
- Final report will be issued to the facility
- The District responsible will receive facility's representation and conduct further compliance inspection



Reactive Compliance

In responding to complaints:

- Identify the nature of the complaint
- Identify if the complaint falls within legislative mandate
- Establish the legal status of the complaint
- Determine action to be taken in light of the above-mentioned



Section 28 Duty of Care

- Imposes every person who causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring...to minimise and rectify such pollution or degradation to the environment



Section 30 of NEMA

Section 30 defines an **Emergency Incident** as “*an unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion, that causes, has caused or may cause significant harm to the environment, human life or property*”

Section 30 imposes a person responsible for an emergency incident to report to the **Director-General, provincial head of department and municipality within 14 days of the incident, (Section 30(5))**

- a) the nature of the incident;
- b) the substances involved and an estimation of the quantity released and their possible acute effect on persons and the environment and data needed to assess these effects;
- c) initial measures taken to minimise impacts;
- d) causes of the incident, whether direct or indirect, including equipment, technology, system, or management failure; and
- e) measures taken and to be taken to avoid a recurrence of such incident.



Enforcement

- Enforcement of the law is a vital component of any regulatory system
- While compliance refers to a state of adherence to a set of legal standards or requirements, enforcement refers to the actions taken in response to detected non-compliance or contravention of a provision of law
- All non-compliances must be met with some form of enforcement action or consequence



Compliance Enforcement

- Response to non – compliance with a provision of environmental legislation
- Types of non – compliances:
 - Commencement of the listed activity without an authorization/waste management license
 - Failure to comply with conditions of an EA/WML
 - Section 28 Duty of Care issues
 - Failure to report Section 30 emergency incidents



Enforcement Tools

Enforcement Actions:

➤ **Administrative Actions**

- Written / Verbal Warning Letters
- Pre-Compliance Notice
- Compliance Notice
- Directives – Pollution related cases (Section 28)

➤ **Criminal Proceedings**

- Open the case with SAPS
- Administer the docket
- Hand – over the docket to DPP
- Civil action (Interdicts)



Guiding Principles of Enforcement

- **Proportionality**: The enforcement action must be proportionate to the risks posed on the environment and to the seriousness of any breach of law
- **Consistency**: Taking a similar approach in similar circumstances to achieve similar ends but also recognising that decisions are based on a number of variables
- **Transparency**: the regulated community must clearly understand what is expected from them, and what they can expect from the regulatory authority
- **Targeting**: Regulatory effort must be directed at transgressors in order to prevent environmental damage and degradation
- **Lawfulness**: The enforcement action must be based on contravention of a provision of legislation to which it relates



Offences and Penalties

In order for legislation to be enforceable, contraventions to legislation, in the form of offences, must be linked to a penalty

Example

In terms of S49A (1) a person is guilty of an offence if that person:

(a) Commences with an activity in contravention of section 24F(1)

In terms of S49B(1):

A person convicted of an offence in terms of section 49A(1) (a) is liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or imprisonment



Enforcement Tools

- **Informal measures**; refers to measures not specifically prescribed by legislation
- This includes oral warnings, written warning letters or the issuing of an inspection report with an opportunity to rectify non-compliances



Administrative measures

- Typical administrative measures include pre-compliance notices, compliance notices and directives
- The aim of these mechanisms is to prevent or mitigate damage to the environment or to ensure rehabilitation of the affected environment



Compliance Notice

- CN issued based on S31L of NEMA if there are reasonable grounds for believing that a person has not complied with a provision of the law to which the inspector has been designated in terms of S31D or; has failed to comply with a condition of a permit, authorisation or any other instrument in terms of such law



Contents of a compliance notice

A compliance notice must set out:

- (a) Details of the conduct constituting non-compliance
- (b) Any steps the person must take and the period within which those steps must be taken
- (c) Anything which the person may not do, and the period which the person may not do it; and
- (d) The procedure to be followed in lodging an objection to the compliance notice with the MEC

A CN further provides the transgressor with two options

- Demolish and rehabilitate or opt for S24g application process



Section 24g of NEMA

- Voluntary process applied for by a person who has commenced with a listed or specified activity without an EA in contravention of S24F(1)
- This process is subject to the payment of an administrative fine and submission of a Basic Assessment Report
- Previously titled “Rectification of unlawful commencement or continuation of a listed activity”
- This procedure for ‘*ex post facto*’ authorisation was perceived to be quicker, and often cheaper, despite the fines imposed
- Implied issue of a positive decision
- NEMA 2014: “Amended to consequences of unlawful commencement of activity”



S24g continued...

S24g calculator upon which the fine is calculated and determined is based on six (6) indices

- ✓ Biodiversity Impact
- ✓ Socio-Economic Impact
- ✓ Social Benefit
- ✓ Heritage Impact
- ✓ Pollution Impact

NB: Payment of an administrative fine does not guarantee issue of a positive decision



Section 24g Regulations

Development of Section 24g regulations in order to regulate the process



Section 24g Fine Committee

- The committee members are appointed by the HOD, comprised mainly of designated environmental management inspectors
- The members of the fine committee may call upon any other person with relevant technical, specialist or local knowledge to advise the fine committee as and when deemed reasonably necessary



Fine committee cont...

- The fine committee, when determining the proposed quantum of the fine in terms of section 24G(4) (**determination of an administrative fine for unlawful commencement**) , must take the following considerations into account—
 - a). the information submitted by an applicant
 - b). the application form
 - c). the impacts or potential impacts, including the cumulative impacts, of the activity
 - d). any pollution and/or environmental degradation which has been, is being or may be caused by the activity or activities



Fine committee cont...

- e). any technical or specialist advice or information on local knowledge received
- f). compliance history of the applicant
- g). whether the applicant is a firm or a natural person
- h). Any other representations made by the applicant

- These factors may motivate for aggravation or mitigation of the quantum of the fine.
- The fine committee provides a recommendation of the quantum of the fine; and reasons for the recommendation.



Fine Determination

- The determination referred to must:
 - (a) within a reasonable time, be communicated by the competent authority to the applicant together with reasons thereto; and
 - (b) specify the time period within which the fine must be paid in full, which period may reasonably be extended by the competent authority upon written application by the applicant.
- In the event that the applicant fails to pay the fine within the time period specified in the determination, including any extension thereof, the application shall lapse and **partial amounts** paid to the competent authority, if any, **will not be refunded** to the applicant.



Mandatory Record Keeping

The competent authority must keep—

- all applications received in terms of section 24G, including a register thereof; (track repeat contraveners)
- the minutes of all meetings of the fine committee and recommendations made;
- all determinations, including the reasons therefore and the amount of any fines imposed; and a register thereof;
- a register of whether fines imposed have been paid in full, partially or not at all and
- all appeal decisions and reasons therefore.



Civil Measures

- Prohibitive or Mandatory interdicts, to either stop a person from doing something or compel a person to do something, which are usually applied for in the High Court with associated legal costs
- Only available in limited urgent circumstances



Criminal Enforcement

- The criminalization of certain acts of non-compliance allows for prosecution as an enforcement tool
- The purpose of this measure is to ensure that the transgressor carries the cost of prevention and rehabilitation and to eliminate any advantage gained from the commission of such an offence.
- Evidence
- Burden of proof



Determining appropriate enforcement action

- Bearing in mind that legislation provides for various methods of enforcement, the most appropriate enforcement action or a combination of enforcement actions must be taken in proportion of the offence committed



Informal measures

An informal measure may be undertaken if the particular action:

- Caused or had minor harm to the environment; and
- The perpetrator did not act intentionally or recklessly; and
- The perpetrator has clearly demonstrated the desire, intention and capacity to comply
- The failure to comply or adequately comply with an informal measure may be followed by formal administrative measures



Criminal Action

- Criminal action should be taken under the following instances:
 - Where the action was intentional or grossly negligent
 - Where the offence caused, or has the potential to cause serious environmental harm
 - Where the offence is of an organised nature
 - Where the offence relates to other offences such as fraud, falsification or corruption
 - Where the execution of an activity was purposefully done without a permit, License or authorization
 - Where there is substantive failure to comply with administrative notices or directives
 - Where there is persistence or wrong-doing or non-compliance
 - Where there is substantive failure to comply with a prescribed duty (Section 28 duty of care and remediation of environmental damage and Section 30 duty to report an emergency incident)



Environmental Management Inspectorate

- The rationale behind the creation of the inspectorate:
- Develop a single set of powers and duties under NEMA
- To create a more consistent compliance and enforcement unit for environmental legislation
- Develop single standardised training, qualification criteria and to create a corporate identity



EMI Designation & Training

- S31E of NEMA empowers the Minister to prescribe qualification criteria and training requirements for all EMIs
- S31B & C of NEMA empowers the Minister or MEC to designate any member of staff as an EMI on completion of the prescribed standards referred to above



EMI General Powers

➤ EMI have the powers to:

Investigate: question witnesses, inspect and remove articles, take photographs and audiovisual recordings, take samples

Inspect: enter premises to ascertain whether legislation is adhered to, seize evidence of criminal activity

Enforce: search premises, containers, vessels, vehicles, aircraft and pack-animals, seize evidence and contraband, issue compliance notices

	Grade 5 Environmental Management Inspector	Grade 4 Environmental Management Inspector	Grade 3 Environmental Management Inspector	Grade 2 Environmental Management Inspector	Grade 1 Environmental Management Inspector
Powers that may be conferred in terms of section 31D (3)	Powers in terms of section 31H, section 31I (3) and section 31J of the Act.	All the powers given to environmental management inspectors under the Act, except for the power under sections 31H (1) (b), 31H (5), 31I (3), 31J, 31L and 34G (2) of the Act.	All the powers given to environmental management inspectors under the Act, except for the power under sections 31H (5) and 31L of the Act.	All the powers given to environmental management inspectors under the Act, except for the power under section 31L of the Act.	All the powers given to environmental management inspectors under the Act.



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Offences relating to EMIs

Legislative Provision	Offence
S49A (m)	Hindering or interfering with an EMI in the execution of the inspector's official duties
S49A (n)	Pretending to be and EMI, or the interpreter, or assistant of such inspector
S49A (o)	Furnishing false or misleading information when complying with a request of an EMI
S49A (p)	Failure to comply with a request of an EMI



Compliance Promotion

- Forums
- Workshops
- Meetings
- Enquiries
- Awareness Campaigns



S30A

- Emergency incidents in response to natural disasters
- NEMA recently amended to include S30A incidents

NB: Definition of an Emergency Incident in terms of the Disaster Management Act.



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THANK YOU FOR YOUR ATTENTION.