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Environmental enforcement trends in South Africa: insights from our experience

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A previous [article on environmental enforcement](#) summarised certain trends drawn from the Department of Environmental Affairs' (DEA) National Environmental Enforcement and Compliance Reports (NECERs). This article outlines certain focus areas where we anticipate environmental enforcement action, in the coming year, particularly regarding:

- Atmospheric emissions licensing
- Environmental authorisations
- Waste management and disposal
- Mining, water and rehabilitation

Atmospheric emissions licensing

As a basis, the Air Quality Act requires a person who undertakes a listed activity to obtain an atmospheric emissions licence (AEL) in order to lawfully conduct such an activity.¹ The published list of activities sets minimum emissions standards (ME Standards) for constituents emitted by "existing plant" or "new plant", such as particulate matter, sulphur dioxide and oxides of nitrogen.

The timeframes within which facilities had to / must meet the ME Standards, included targeted dates, namely 1 April 2010 and 1 April 2015, unless the compliance timeframes had been postponed.² The next deadline is **1 April 2020** at which existing plant must comply with new plant ME Standards.³ Postponements of the compliance timeframes may be granted for an existing plant for a period not exceeding **five years per postponement**. There does not appear to be a limit on the number of postponements that may be granted.

Prior to the 1 April 2015 deadline, the DEA had reportedly received 37 applications for postponement.⁴ Facilities applied for and received postponements for different five-year periods, namely the period between 2015 and 2020 and between 2020 and 2025.⁵ At the time, challenges were brought against the stricter requirements; some were withdrawn as postponement applications were subsequently granted.⁶ According to the DEA, "*the applicants were strictly required to submit compliance road-maps that indicate when they envisage to have completed their tasks regarding investments in pollution control technologies...*".⁷

Where the compliance timeframes were postponed in 2015,⁸ existing plant will be required to comply with the existing plant ME Standards from 1 April 2020. Where the compliance timeframes were not postponed in 2015, existing plant will be required to comply with the new plant ME Standards from 1 April 2020.

Facilities that were established and operated long before the ME Standards were published, and are often referred to as "legacy" operations, are likely to require large capital expenditure to bring them into compliance with the ME Standards. This may in some instances be unviable or uneconomical considering that some facilities may require costly refurbishment. This is amidst the next phase of looming ME Standards, which take effect in 2020. The National Framework for Air Quality Management is also due to be reviewed in the next year.⁹

¹ The National Environmental Management Air Quality Act 39 of 2004, sections 21 and 22. The listed activities identified in terms of section 21 of the Act in GN 893 of 22 November 2014/33 (which was preceded by GN 248 of 31 March 2010).

² New plant had to comply with the new plant ME Standards from 1 April 2010. Existing plant had to comply with existing plant ME Standards by 1 April 2015, unless, for example, the compliance timeframes had been postponed as contemplated in Regulation (11) to (14) in GN 893.

³ See the compliance timeframes in Regulation 8, 9 and 10 of the listed activities and associated minimum emission standards identified in terms of section 21 of the Air Quality Act, 2004, in GN 893 of 22 November 2013.

⁴ In terms of GN 893 regulation (13). https://www.environment.gov.za/mediarelease/molewa_airqualityemissionstandards (accessed 7 June 2017).

⁵ Some of the facilities that had applied for postponements of the different constituents (PM, SO₂ or NO_x and others) were refused postponements in respect of some but not other constituents. It is therefore not possible to say how many of the 37 applications were successful. See the Summary Postponement spreadsheet referred to in the DEA's media statement at https://www.environment.gov.za/mediarelease/molewa_airqualityemissionstandards (accessed 7 June 2017).

⁶ https://www.environment.gov.za/mediarelease/molewa_sasolwithdraw_litigation and <https://mg.co.za/article/2014-12-23-00-sasol-set-to-fight-clean-air-standards>.

⁷ https://www.environment.gov.za/mediarelease/molewa_airqualityemissionstandards (accessed 7 June 2017).

⁸ Regulation 11 to 14 in GN 893 of 22 November 2013.

⁹ Section 7(5) of the Air Quality Act read with the National Framework published in Notice 919 on 20 November 2013.

If the ME Standards are not met or adhered to, postponed or challenged, operations may have to cease their activities and face criminal sanctions. These include fines not exceeding ZAR 5 million, or imprisonment not exceeding five years. In the case of a second or subsequent conviction, a fine not exceeding ZAR 10 million or imprisonment for up to 10 years may be imposed.¹⁰

It is anticipated that further postponement applications will be submitted when this next deadline approaches.¹¹ Such applications or postponements may be challenged.¹² A challenge to the list of activities itself, such as the challenge brought in 2014, is less likely to succeed owing to the time lapse since the publication of the list in 2013, among other factors.

Environmental authorisations

Listed activities, which require an environmental authorisation before they may commence, have been published under the National Environmental Management Act 107 of 1998 (NEMA).¹³ The publications of listed activities requiring authorisation have been replaced and amended a few times over the last 20 years, in summary:

- Listing notices, requiring authorisation for listed activities, were first published under the Environment Conservation Act 73 of 1989 (the ECA) on 5 September 1997.¹⁴
- In 1998 the ECA was repealed, in some respects, by NEMA¹⁵ such as the provisions regarding listed activities requiring environmental authorisations.
- In 2006 listing notices were published under NEMA; these were replaced by subsequent lists published in 2010. The 2006 and 2010 lists have also been amended a few times.¹⁶
- The latest 2014 listing notices repealed those published on 18 June 2010 and were again amended with effect from 7 April 2017.

As one of its focus areas, the DEA has identified a need to ensure that activities are undertaken lawfully and with the necessary authorisations.¹⁷

These listed activities, as a principle of statutory interpretation, do not operate retrospectively.¹⁸ A significant challenge to the implementation of the listed activities is that the activities and thresholds requiring authorisation are continually being amended. The requirement for an authorisation is based on the commencement of the activity at a particular point in time. We have seen compliance and/or enforcement action based on the incorrect interpretation or application of these listed activities. An example is where a particular listed activity did not apply at the time when a client commenced a certain activity or operation.

It is an offence to undertake such activities without the requisite authorisation, and activities may be ordered to cease pending the decision on an application for authorisation.¹⁹ One could be liable to fines of up to ZAR 10 million or imprisonment of up to 10 years per offence.²⁰

Therefore, one should carefully consider whether or not a listed activity that requires an environmental authorisation is in fact triggered. Such a thorough consideration is especially necessary when a section 24G

¹⁰ Section 51(3) read with section 52(1) of the Air Quality Act.

¹¹ <http://citizen.co.za/news/1535479/sasol-admits-struggling-remove-poisonous-gasses-air/>

¹² <http://cer.org.za/virtual-library/letters/eskom/eskoms-applications-to-delay-compliance-with-aaa-minimum-emissions-standards> (accessed 9 June 2017).

<http://irc.org.za/ircarchive/law-policy-reform/3149-submissions-minimum-emissions-standards-sasol-and-natref-exemptions-and-postponement> (accessed 9 June 2017).

¹³ In terms of section 24 of NEMA and published in GN R983, 984, 985 of 4 December 2014.

¹⁴ In GN R1183 which was also amended by: GN R1645 of 11 December 1998 and GN R672 of 10 May 2002.

¹⁵ Section 50 of NEMA with effect from 29 January 1999 in terms of Proclamation 8 of 29 January 1999.

¹⁶ Including by GN 719 of July 2009, GN R660 of 30 July 2010 and GN R 1159 of 10 December 2010 with effect from 2 August 2010.

¹⁷ In terms of the National Environmental Management Act 107 of 1998, read with the EIA Regulations and Listed Activities published under that Act, also the National Environmental Management Waste Act 59 of 2008 and the listed activities under that Act.

¹⁸ LM Du Plessis, *Statute Law and Interpretation*, LexisNexis, Law of South Africa, Volume 25, para 358. De Ville, *Constitutional & Statutory Interpretation*, Interdoc Consultants (Pty) Ltd, 2000, page 135, 204, 206 – 207. *Transnet Ltd v Chairman National Transport Commission 1999* (4) SA 1 (SCA).

¹⁹ Sections 24F and 24G of NEMA.

²⁰ Sections 49A(1)(a) and 49B(1) of NEMA.

rectification application may be required. It is essential to establish what law/listed activities were in force at the time, as well as whether the technical descriptions of the listed activities are in fact triggered.

Waste management and disposal

Waste management licences are required before commencing, undertaking or conducting waste management activities listed under the Waste Act.²¹ The regulation of waste has also changed significantly over the past 20 years.²² The list of waste management activities,²³ and the definition of "waste"²⁴ (which is integral to a determination of licensing requirements) has undergone various changes. It is essential to determine the relevant legal provisions and application of transitional provisions to the commencement or undertaking of waste management activities.

Investigations and enforcement action that we have seen have focused on the incorrect disposal or burial of waste and associated pollution. We have seen unsuccessful attempts to extend liability for waste management practices by waste management contractors to the generator (or holder) of the waste.²⁵ In other words, authorities have attempted to prosecute generators of waste when in fact a contractor had failed to comply with its duties under its appointment.

There has also been media attention on waste facilities that have received directives from the authorities and/or the courts to cease activities.²⁶ Waste facilities are generally strictly regulated and require a suite of environmental authorisations, permits and licences, and various conditions for operation are imposed on these facilities. Inspections and enforcement actions in respect of these facilities often flow from community complaints. In some instances, criminal charges are brought simultaneously with administrative enforcement measures, as these are not mutually exclusive enforcement measures or measures implemented on escalation based on the severity of the transgression.

Authorities are faced with upholding a delicate balance between ensuring compliance versus complete shutdown of facilities that provide key services. Alternatives to the continued operation of these facilities may result in seemingly unsustainable solutions when they are ordered to cease operations.²⁷

We expect that waste management and disposal activities, particularly those that result in observable pollution or impacts on neighbouring communities, are likely to remain a priority area for enforcement authorities.²⁸

Another area where we expect further development is ongoing challenges to the Waste Levy and Industry Waste Management Plan (IWMPs) systems, which are being implemented under the Waste Act. The costs and financing of the implementation of such plans require the imposition of further fees and levies, likely to be collected by SARS. Industry fears are that the existing industry bodies which have made great efforts at recycling will no longer be able to function. The demise of REDISA,²⁹ which the Minister of Environmental Affairs intends

²¹ In terms of section 19 and 20 of the National Environmental Management: Waste Act 59 of 2008 and as listed in the list of waste management activities that have, or are likely to have, a detrimental effect on the environment, published in GN 921 of 29 November 2013.

²² By way of example, prior to the commencement of the Waste Act, waste disposal sites required a permit under Section 20 of ECA which was repealed by the Waste Act in terms of section 80 and schedule 2 with effect from 1 July 2009 in Proclamation 34 of 2009.

²³ Including that the first list of waste management activities was published in GN 718 of 3 July 2009, was replaced by a new list in 2013 published in GN 921 of 29 November 2013 and amended by: GN 332 of 2 May 2014 and GN R633 of 24 July 2015.

²⁴ First published with the Waste Act with effect from 1 July 2009, the definition was then substituted by section 38 of Act 14/2013 and section 1 of Act 26/2014.

²⁵ The Waste Act also contains general requirements regarding: waste management and the obligations of a holder of waste; storage of waste; collection of waste; duties of persons transporting waste, and prohibitions on unauthorised disposal, among other requirements. A holder of waste has a duty to, within the holder's power, take all reasonable measures to do the following: where waste must be disposed of, ensure that the waste is treated and disposed of in an environmentally sound manner or prevent the waste from being used for an unauthorised purpose. Sections 16, 21 to 26 of the Waste Act.

²⁶ <http://citizen.co.za/news/news-national/1498683/shongweni-landfill-case-court-rules-against-enviroserv/>
[http://www.noseweek.co.za/article/3873/UPDATE-EnviroServ-owns-up-\(finally\)](http://www.noseweek.co.za/article/3873/UPDATE-EnviroServ-owns-up-(finally))
<http://www.gov.za/speeches/landfill-site-16-feb-2017-0000>; <http://www.timeslive.co.za/sundaytimes/stnews/article2073514.ece>
<http://citizen.co.za/business/1462659/midstream-points-fingers-lonmin/>

²⁷ <http://www.iol.co.za/news/south-africa/kwazulu-natal/contaminated-liquid-makes-it-way-to-joburg-site-8991435>.

²⁸ NECER 2015/16, page 108.

²⁹ The Recycling and Economic Development Initiative of South Africa.

to liquidate and which faces the withdrawal of approval for its IWMP, signals an important step in the process of implementing the new system.³⁰

Mining, water and rehabilitation

Among other regulatory requirements,³¹ mining activities often impact on water resources, which may require water use licences (WUL) issued in terms of the National Water Act,³² or a NEMA environmental authorisation. It is an offence to undertake a water use without a WUL or impact on a water resource (including in the manner contemplated in the NEMA listing notices) without an environmental authorisation.³³

Over the years the authorities have had successes in environmental criminal enforcement, particularly where activities were undertaken without a water use licence,³⁴ resulted in impacts on or the destruction of wetlands or dunes, or resulted in pollution of water resources.³⁵ Some of these have also been a focus area for litigation by public benefit or non-government organisations.³⁶

Since the introduction of the One Environmental System,³⁷ there has been an ongoing debate about the use and functioning of this system, including the powers of the different functionaries within the DEA and Department of Mineral Resources and which functionaries are responsible for its enforcement.³⁸

Mining rehabilitation liability, including for environmental impacts and pollution, has also received a lot of attention. This is particularly so when dealing with marginal mining assets and where companies are put into liquidation without attending to or making adequate provision for closure obligations or continued compliance with environmental management programmes and plans. In these instances directors have been criminally charged in their personal capacities and face possible criminal consequences.³⁹ It may be a matter of time for the extension of such liability to be tested in respect of the obligations of liquidators, where they do not act reasonably in ensuring environmental rehabilitation or clean-up while an asset is in liquidation.

In May 2017, Mark Olalde published his findings of a research project, undertaken over nearly two years, into the financial provisions for rehabilitation, and closure certificates applied for and issued post mining. This was based on information obtained through requests for records.⁴⁰ This research reveals significant data⁴¹ of financial provisions made for mining rehabilitation, it lists the entities that made the provisions, and includes information regarding closure certificates applied for and granted by the provincial authorities.

Conclusion

In conclusion, trends we have seen and anticipate in respect of environmental enforcement include:

1. **Air Quality:** With the next deadline approaching in 2020, further applications for the postponement of the minimum emission standards which apply to activities requiring AELs, may be submitted. Such postponement applications may be subject to challenge, including by non-government organisations.

³⁰ Such as indicated in Notice 530 of 5 June 2017, and Notice 524 of 1 June 2017. <http://www.engineeringnews.co.za/article/redisa-placed-under-liquidation-2017-06-05>.

³¹ Including the issuing of rights, permits or licences under the Mineral and Petroleum Resources Development Act 28 of 2002 (**MPRDA**).

³² Section 21 of Act 36 of 1998.

³³ Section 151 of the National Water Act and section 24F of NEMA.

³⁴ Issued in terms of the National Water Act 36 of 1998.

³⁵ A few examples include: *The State v Nkomati Anthracite (Pty) Ltd* Nelspruit, Case No SH412/13. *The State v Anker Coal & Mineral Holdings S.A. (Pty) Ltd* in Ermelo, Case: ESH 8 / 11, Sheepmoor CAS 26/06/2009. *The State v Golfview Mining (Pty) Ltd* Ermelo, Case: ESH 82 / 11, Sheepmoor CAS 462/07/2009. *The State versus Blue Platinum Ventures (Pty) Ltd and Matome Samuel Maponya*, Lenyenyene, Case Number: RN126/13. *The State vs Vunene Mining (Pty) Ltd* Ermelo, Ermelo CAS 94/11/2010.

³⁶ <https://business-humanrights.org/en/so-africa-ngos-take-concerns-of-mining-affected-communities-to-un-human-rights-council>
<http://cer.org.za/wp-content/uploads/2016/10/2017-SA-UPR-submission-mining-and-HR-2016-10-5-final.pdf>
<http://www.groundwork.org.za/> and <http://www.fse.org.za/> as well as <https://mg.co.za/article/2017-05-09-environmentalists-are-winning-the-battle-for-enforcement-of-the-law>.

³⁷ Introduced, by the commencement of the NEMA Amendment Act 62 of 2008 and the NEM Laws Amendment Act 25 of 2014.

³⁸ *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others* (18701/16) [2017] ZAWCHC 25; [2017] 2 All SA 599 (WCC) (20 March 2017).

³⁹ *The State versus Blue Platinum Ventures (Pty) Ltd and Matome Samuel Maponya*, in The Magistrates Court for the Regional Division of Limpopo Province Held at Lenyenyene, Case Number : RN126/13. <http://www.iol.co.za/business-report/companies/mining-directors-face-r10m-fine-jail-time-for-pollution-8142857>

⁴⁰ In terms of the Promotion of Access to Information Act 2 of 2000, see <http://oxpeckers.org/2017/05/r60-billion-held-mines-never-closed/>

⁴¹ In the form of spreadsheets available on the Oxpeckers webpage.

2. **Environmental Authorisations:** It is a focus area of the DEA to ensure activities are undertaken lawfully and with the necessary authorisations. Due to the various changes in the listing notices, one must take care in assessing whether a particular activity does, in fact, require an environmental authorisation and the legal requirements applicable at the time, particularly when faced with an alleged non-compliance or request to submit a rectification application.
3. **Waste management:** The authorities have focussed on waste management and disposal practices and we expect that these activities, particularly those that result in observable pollution or impacts on neighbouring communities, are likely to remain a priority enforcement area together with ensuring such activities are undertaken lawfully (i.e. with the required authorisations and licenses, and in compliance with the conditions of such licences and authorisations).
4. **Mining and water:** The authorities have had many successes in environmental criminal enforcement, particularly where mining activities impacted on water resources. Rehabilitation funding and mine closure will remain an area of focus and is an area in which affected companies should focus attention.