

National Environmental Management Act 107 of 1998 (NEMA)

Topic: Environmental

IN A CALABASH

Introduction

In terms of our Constitution, everyone has the right to an environment that is not harmful to their health or well-being.
The National Environmental Management Act 107 of 1998 (NEMA) is the overarching law which establishes sound environmental principles upon which all other environmental laws are based.

Objectives of the Act

The NEMA sets out an environmental governance framework, which seeks to promote certain common environmental management principles and procedures which apply throughout South Africa. These principles must be used by all when making decisions on matters which may affect the environment.

Application of the Act and its implication to Tourism

The NEMA applies to all persons in South Africa, especially those who carry out activities which have an impact on the environment.

The NEMA is particularly important in relation to tourism in South Africa as a number of attractions and facilities offered to tourists are located in our game reserves, protected areas, coastal areas and national heritage sites.

Summary of the provisions of the Act

The NEMA sets out guiding environmental principles which seek to provide an environmental framework within which an entity can operate and manage its business in a sound environmental manner.

Whilst the NEMA does not stipulate limits, levels or controls of impacts on specific environmental media (such as air, water or soil), it does seek to regulate and protect the

biodiversity, the air, the ground and the water from all forms of unjustifiable environmental degradation in a broad and all-encompassing manner.

The obligation on entities and organisations is therefore to implement reasonable measures to prevent pollution or degradation of the environment from occurring, continuing or recurring.

An entity has a legal duty to consider and evaluate all its operations and activities to establish how it interacts with the environment and whether these activities have a detrimental or negative effect on the environment. This evaluation includes the following principles:

- Development, in whatever form, must be socially, environmentally and economically sustainable.
- Any decision must take into account all aspects of the environment and all people in the environment by pursuing the best practical environmental option, one which provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term.
- Pollution and degradation of the environment are to be avoided, or, where they cannot be altogether avoided, are to be minimised and remedied.
- When there is suspicion that an impact will be harmful to the environment, it is assumed that it will be harmful to the environment until such time that it can be proven otherwise.
- A person or organisation is required to take responsibility for the environmental and health and safety consequences of a policy, program, project, product, process, service or activity throughout its life cycle, i.e. from cradle-to-grave.
- The costs of remedying pollution, environmental degradation, consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.

The NEMA has listed a number of specific activities which may have a negative effect on the environment and, if not correctly controlled, may result in environmental pollution and degradation. These listed activities are found under the regulations to the Act.

Before any person embarks on any listed activity, that person has to formally carry out an environmental impact assessment, to assess the potential impact which that project or activity may have on the environment.

A professional environmental assessor or practitioner will prepare an environmental impact assessment and report which will be submitted to the Department of Environmental Affairs for consideration and approval.

Once the EIA report has been submitted, the Department of Environmental Affairs will consider the report and either allow the activity to proceed or advise the applicant that it may not proceed with the activity as it will have an adverse and negative effect on the environment.

Where the person is given permission to proceed with the activity, this permission is known as a record of decision or ROD, which may or may not be subject to conditions.

No person may commence with a listed activity unless the competent authority has granted an environmental authorisation for the activity, and no person may continue an existing listed activity if an application for an environmental authorisation is refused.

It is an offence for any person to proceed with a listed activity without an ROD or contravene any conditions applicable to any environmental authorisation granted for a listed activity.

It is, however, a defense to any criminal charges to show that the activity was commenced or continued in response to an emergency situation in order to protect human life, property or the environment.

A person convicted of an offence is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and imprisonment.

Duty of care and remediation of environmental damage

In terms of the NEMA, where a person has caused significant pollution or degradation of the environment, such person must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring.

The obligation to take reasonable measures rests on either the owner of land or premises, a person in control of the land or premises or a person who has a right to use the land.

The NEMA also houses a provision that states that any person, including an employee, has the right to refuse to perform any work if they are of the belief that the performance of the work would result in an imminent and serious threat to the environment. The person may inform the employer of their refusal to perform and provide reasons to the employer (either personally or via a representative). As long as this procedure was followed, with substantial reasons to support any refusal to carry out work, the employee cannot be liable on any grounds nor may that person be dismissed, disciplined, prejudiced or harassed.

When any unexpected or sudden occurrence on a person's land is likely to lead to serious danger or pollution to the public or to the environment, that person must report the incident to—

- the Director-General;
- the South African Police Service and the relevant fire prevention service;
- the relevant provincial head of department or municipality; and
- all persons whose health may be affected by the incident.

The report should include—

- the nature of the incident;
- any risks posed by the incident to public health, safety and property;
- the toxicity of substances or by-products released by the incident; and
- any steps that should be taken in order to avoid or minimise the effects of the incident on public health and the environment.

The responsible person or, where the incident occurred in the course of that person's employment, his or her employer, must, as soon as possible after the incident—

- take all reasonable measures to contain and minimise the effects of the incident, including its effects on the environment and any risks posed by the incident to the health, safety and property of persons;
- undertake clean-up procedures;
- remedy the effects of the incident; and

- assess the immediate and long-term effects of the incident on the environment and public health.

The owner or controller of any hazardous substance which may have been involved in an incident must report the incident to the Director-General, provincial head of department and municipality within 14 days in order for the responsible officials to evaluate the incident. The same applies to an employee where an incident may have occurred in the course of that person's employment.

These reports should contain the following details—

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

When a person fails to take steps to remedy and clean up the polluted areas, a relevant authority may direct the responsible person to undertake specific measures timeously to fulfill his or her obligations. The relevant authority must have regard to—

- the NEMA principles;
- the severity of any impact on the environment as a result of the incident and the costs of the measures being considered;
- any measures already taken or proposed by the person on whom measures are to be imposed, if applicable;
- the desirability of the state fulfilling its role as custodian holding the environment in public trust for the people; and
- any other relevant factors.

A verbal directive must be confirmed in writing within seven days.

In the event of a failure to comply with a directive by a person responsible for the hazardous substance or even in the absence of knowing who such responsible person is, a relevant authority may take necessary measures to contain and remedy the effects of an incident. This will be done where there is a likelihood of serious risk, detriment or danger to the public or environment.

A relevant authority may claim reimbursement of all reasonable costs incurred by it from every responsible person jointly and severally.

A relevant authority which has taken steps must, as soon as possible, prepare comprehensive reports on the incident. This must be made available to the public, the Director-General, the South African Police Service and the relevant fire prevention service, the relevant provincial head of department or municipality and all persons who may be affected by the incident.

This is extremely important. All incidents have to be reported immediately, cleaned up and the results of an investigation thereafter reported.

Where the person responsible for the pollution fails to do this even after they have been issued with a directive, the government may do so and recover the cost from the responsible person.



WHAT HAPPENS IF YOU DO NOT COMPLY?

Non-compliance with the provisions of the NEMA will amount to a criminal offence.

Furthermore, the NEMA makes non-compliance with a number of related environmental Acts a criminal offence. These Acts are listed under Schedule 3 to the NEMA.

Where a person fails to comply with a provision of the NEMA they will be guilty of an offence and liable on conviction to a penalty of up to R5 million or to imprisonment for a period of up to ten years, or to both such fine and such imprisonment.

Where any person incurs monetary loss or damages as a result of an incident, a court may award compensation for the damages and/or loss incurred as long as there is proof in this regard.

In addition, the court may enquire into and assess the monetary value of any advantage gained by a wrongdoer as a result of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed. A court may also order wrongdoers to pay the legal costs of the state.

Whenever any manager, agent or employee fails to comply with the Act, a fine may be imposed depending on the severity of the non-compliance. In some cases, an order to pay for the remedial costs may also be in order.

Following from the above, any such manager, agent, employee or director may also be convicted and sentenced to imprisonment in addition to the employer or firm.

A director of a firm who does not comply will be guilty of an offence and liable on conviction to the penalty specified in the relevant law. This may also include an order to pay for remedial costs if the offence in question resulted from the failure of the director to take all reasonable steps to prevent the commission of the offence.

In terms of directors' liability, non-compliance or a failure to take steps to avoid the offence is an offence and liable on conviction to the penalty specified in the relevant law. This includes any costs and damages.

Finally, both the company and its employees and directors can be convicted and fined. Any such manager, agent, employee or director may be so convicted and sentenced in addition to the employer or firm.

Cancellation of permits

A person found guilty of an offence in terms of the NEMA or a specific environmental management Act will be subject to the withdrawal of any permit or other authorisation issued in terms of the Act. The person will not be allowed to obtain a permit or other authorisation for a period of up to five years.



RECOMMENDED ACTIONS OR CONTROLS WHICH SHOULD BE IMPLEMENTED BY THE TARGET AUDIENCE TO ENSURE COMPLIANCE WITH THE ACT

The following controls and measures must be in place in order to demonstrate compliance:

- Knowledge and awareness of all environmental laws;
- Controls in place to prevent pollution and ecological degradation;
- Sound environmental management plans and practices in place;
- Awareness of all environmental principles;
- Cradle-to-grave approach;
- Clean production processes;
- EIAs and RODs in place where required;
- Sound and up-to-date policies and procedures;
- Waste disposal policies and processes;
- Minimisation of environmental unfriendly processes and practices;
- Directors' awareness of responsibilities;
- Emergency procedures and reporting and clean up processes in place in the case of a spill or contamination;
- Whistle blowing procedures in place; and
- Procedures in place in the case of a dawn raid or inspection.

FURTHER INFORMATION

Regulator

Department of Environmental Affairs

Websites

www.deat.gov.za

www.environment.gov.za