

NATIONAL ENVIRONMENTAL ENFORCEMENT POLICY¹

1. INTRODUCTION

Section 24 of the Constitution of the Republic of South Africa² states that:

“Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and*
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
 - (i) prevent pollution and ecological degradation;*
 - (ii) promote conservation; and*
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

The State has a positive duty to take reasonable legislative and other measures to give effect to the environmental right as set out in the Bill of Rights. The Department of Environmental Affairs and Tourism has embarked on national law reform programme, entailing the development of a suite of environmental legislation under the National Environmental Management Act³ (NEMA). The aim of this process is to develop an integrated regulatory framework for environmental management in all spheres of government.⁴

The formulation of environmental legislation is not itself sufficient to ensure the realisation of this constitutional right. In order to strive for an environment that is not harmful to peoples’ health and well being; and to protect the environment for the benefit of present and future generations, the law must be supported by appropriate policies and programmes that are designed to promote the effective implementation and enforcement of legislative measures.⁵ The primary goal of enforcement is therefore to ensure compliance with environmental legislation; the secondary goal is to deter potential offenders from non-compliance.⁶

2. THE PURPOSE OF THE POLICY

¹ As adopted by Working Group IV (Compliance and Enforcement) on 10 April 2007

² 1996 (Act No. 108 of 1996)

³ 1998 (Act No.107 of 1998)

⁴ In terms of the schedule 4 of the Constitution, “environment” is a functional area of concurrent national and provincial competence. In addition, part B of schedules 4 and 5 empower local government to make bylaws in respect of certain environmentally related functions, such as air pollution, public nuisances, noise pollution, refuse removal, refuse dumps and solid waste disposal.

⁵ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169) at 69B

⁶ The enforcement programme should be of such a nature and scope that it instils a public sense that violators will not be tolerated. This will deter would-be offenders from committing or continuing with their activities and assist in the prevention of environmental damage

This Environmental Enforcement Policy is intended to promote the effective, fair, proportional and consistent enforcement of environmental legislation in South Africa. More specifically, the policy is intended to:

- 2.1 promote fair and equitable enforcement practices that are within the confines of the law and in accordance with the spirit of the Constitution;
- 2.2 provide a framework within which environmental enforcement officials can exercise their discretion; and
- 2.3 inform the public of the principles that will guide officials in the event of a breach/suspected breach of environmental legislation.

The policy will be reviewed on a regular basis to ensure that it continues to serve the changing needs of the South African people and the environment in which they live.

3. GUIDING PRINCIPLES

NEMA requires that all organs of state refer to the Chapter 2 principles in exercising any function when taking a decision in terms of the Act or any statutory provision concerning the protection of the environment⁷. In addition to the NEMA requirements, the following basic principles⁸ should underpin all enforcement actions:

3.1 Proportionality
“The punishment must fit the crime”, in other words, the severity of the enforcement action must be commensurate with the risks posed to the environment or human health and to the seriousness of any breach of the law.
3.2 Consistency
All people are equal before the law and this means that all violators of environmental legislation should be treated with a similar approach in similar circumstances. This pattern will create an atmosphere in which the public is stimulated to comply because the government has acted in a reliable manner when non-compliance is detected. ⁹
3.3 Transparency
The enforcement action must be transparent to enable the regulated community to understand what is expected of them and what they should expect from those responsible for environmental enforcement. It also means making it clear why an official intends to, or has taken enforcement action.

⁷ Section 2(1)(c) of NEMA

⁸ See “Guiding Principles for Reform of Environmental Enforcement Authorities in Transition Economies of Eastern Europe, Caucasus and Central Asia” Organisation for Economic Co-operation and Development, 2003. and “Enforcement and Prosecution Policy” Environment Agency, 1998.

⁹ Taking a consistent approach does not mean that variations are not appropriate in certain circumstances, taking into account the particular offender’s intention, attitude, history etc. into account.

4. CONSEQUENCES OF NON-COMPLIANCE

All detected non-compliance with environmental legislation (including authorisations issued under such legislation) should be met with an enforcement consequence. Such consequences may include any of the following:

- a formal or informal warning to comply;
- a compliance notice or directive (usually preceded by a pre-compliance notice or pre-directive);
- the suspension or withdrawal of an authorisation where the rights in that authorisation have been abused, or there is little or no intention of complying, or ability to comply, with that authorisation; and/or
- criminal charges.

Criminal charges are the most likely consequence of the following types of non-compliance:

1. no authorisation for an activity that requires authorisation (noting, however, that no person will be prosecuted for not being in possession a valid authorisation if that person has taken all reasonable measures to obtain such an authorisation);
2. intentional or negligent harm or potential harm to the environment;
3. intentional or negligent disregard for the health and wellbeing of employees;
4. intentional or negligent non-compliance with legislation or a permit;
5. repeated non-compliance with legislation or a permit;
6. non-compliance despite advice, warnings or a compliance notice or directive;
7. intentional false reporting or misinformation; and/or
8. interfering with an official's inspection, or refusing an official access to a site.

5. ZERO TOLERANCE IN RESPECT OF CERTAIN CONTRAVENTIONS

Contraventions of environmental legislation may require greater intervention and stronger enforcement action in different geographical areas, or at certain times. This Policy provides for the declaration of National or Provincial Priority Contraventions on an annual basis in respect of which the national or provincial governments will adopt a "zero tolerance" approach, i.e. the strongest enforcement action allowed by law will be used irrespective of the existence or absence of the factors listed in 4. above.

6. SPECIFIC ENFORCEMENT MATTERS

Specific, detailed policies on or procedures for specific enforcement matters may be added to this Policy in additional Appendices.

Appendix A: National Priority Environmental Contravention List (2007-8)

Area	Legislation	Offence

Appendix B: Provincial Priority Environmental Contravention List (2007-8)

Province	Legislation	Offence
Eastern Cape		
Free State		
Gauteng		
KZN		
Limpopo		
Mpumalanga		
Northern Cape		
Northwest		
Western Cape		