

South Africa

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REGULATORY FRAMEWORK

1. Please briefly set out the key environmental legislation and regulatory authorities in your jurisdiction.

Regulatory framework

South Africa has a progressive environmental regulatory framework. The right to an environment that is not harmful to one's health or well-being is entrenched as a fundamental right in the Constitution of South Africa. The Constitution also provides that the government must take reasonable legislative and other measures to:

- Prevent pollution and ecological degradation.
- Promote conservation.
- Secure ecologically sustainable development.
- Use natural resources while promoting justifiable economic and social development.

It is thought that this obligation also applies to private entities, and not just between public and private entities.

The environmental right in the Constitution is supported by other environmental legislation to protect the environment while pursuing sustainable economic growth, in terms applicable to a developing nation. The main legislation is the National Environmental Management Act 107 of 1998 (NEMA). The NEMA:

- Provides for co-operative governance and decision making in matters affecting the environment.
- Is based on best international principles of sustainable development and integrated environmental management.
- Contains the listed activities that trigger when an Environmental Impact Assessment (EIA) is necessary to obtain approval to do a listed activity.
- Grants wide powers to environmental management inspectors to enforce various environmental laws.
- Contains a general "duty of care" to the environment, which means that every person has the duty to avoid pollution and environmental degradation (*section 28, NEMA*). Both civil parties and the government rely on this when enforcing environmental obligations.

The NEMA is also enabling in nature and specific Environmental Management Acts have been enacted to regulate various sectors of the environment. For example, the:

- National Environmental Management Biodiversity Act 2003.
- National Environmental Management Protected Areas Act 2003.
- National Environmental Management Air Quality Act 39 of 2004.
- National Environmental Management Waste Act 59 of 2008.

South Africa became a democracy in 1994. Some of the pre-democracy legislation is still relevant, as some of it is still being overhauled.

Environmental rights and duties can also be enforced through South African common law which is mainly based on Roman Dutch law. However some English law concepts have been imported into South African law such as, in an environmental context, the law of nuisance.

Regulatory authorities

National level. The authority with the main responsibility for enforcing environmental legislation used to be the Department of Environmental Affairs and Tourism (DEAT). The Department of Environmental Affairs (DEA) has been separated from the Department of Tourism. The Department of Water Affairs and Forestry (DWAF) has also been separated (*see box, The regulatory authorities*) and the Department of Water Affairs (DWA) is now independent. However, there is one Minister for Water and Environmental Affairs (WEA) and a separate Director-General for each department. The DEA is responsible at national level for environmental authorisations where EIAs must be undertaken. In issuing EIA authorisations, the DEA takes into consideration other specialist environmental departments' recommendations.

The DWAF used to be responsible for issuing all authorisations relating to the use and discharge of pollutants into or from all water resources. Because all freshwater in South Africa, no matter where in the hydrological system it is located, belongs to the state, permits are needed to use or to pollute a water resource (*see Question 6*). The DWA now issues these permits.

Provincial level. Provincial authorities can issue many of the authorisations for listed activities under the national EIA regulations

(see *Question 10*). Each of South Africa's nine provinces has its own regional Department of Agriculture, Conservation and Environment, which is equivalent to the national DEA. The national DEA generally only considers issuing listed activity authorisations when the matter has cross-boundary impacts, is of a significant size or nature or is a matter of national interest.

Minerals. The Department of Minerals and Energy (DME) is an important regulator and has been split into two separate departments, the Department of Mineral Resources (DMR) (see *box, The regulatory authorities*) and the Department of Energy. Although the DMR's main function is to regulate matters concerning minerals, South African legislation is ambiguous in that it gives the DMR power to approve EIAs and Environmental Management Plans (EMPs) for new developments requiring mining or exploration rights.

Other rules

Administrative action and access to information are also important components of the environmental law system. The right to fair administrative action is a fundamental right contained in the Constitution and is supported by the Promotion of Administrative Justice Act (PAJA). Under the Constitution and the PAJA, everyone has the right to fair administrative action and to have written reasons given when an administrative decision-maker makes any decision. This is important and applies equally to decisions affecting the environment.

Transparency, accountability and access to information are also cornerstones of the South African democracy; the right is in the Constitution and is supported by the Promotion of Access to Information Act (PAIA). This provides mechanisms through which third parties can access records held by both the state and private individuals who impact on the environment (see *Question 23*).

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

Environmental offences have traditionally been associated with a low level of enforcement. However, the DEA has indicated that this is about to change and environmental management inspectors have wide powers of environmental enforcement (*section 32, NEMA*). In fact, environmental management inspectors have the same powers as police officers relating to search and seizure and arrest (see *Question 26*).

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

The most active NGOs in South Africa are those which are formed, based and have concentrated their efforts in southern Africa. Examples of these are:

- The Wildlife and Environmental Society of Southern Africa.
- Earthlife Africa.
- The Endangered Wildlife Trust (to a lesser extent).

One of the internationally recognised and active NGOs is the World Wildlife Fund. Other international NGOs are also active, but to a more limited extent, such as:

- Conservation International.
- Friends of the Earth.
- Greenpeace International.

NGOs are active in the public participation process, which is a vital part of the EIA process. Other, smaller environmental activist organisations are often formed when a development is taking place in a community. They have legal standing in the courts and any person is entitled to participate in the EIA process. If a person feels that a decision has not been taken properly according to legislation, they can appeal the decision to the courts for further review.

EMISSIONS

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

There is no integrated environmental permitting system in South Africa. It is up to the project developer to determine which environmental permits are necessary and to ensure that all such permits are obtained.

A number of separate permits are often required from separate environmental authorities and from different levels of government (see *Question 1*).

Section 24 (*NEMA*) and the listed activities in it can be used as a starting point for developers when determining whether an EIA is necessary (see *Question 10*). However, even if an EIA itself is not necessary, various other permits may still be required depending on the type of activity or development being undertaken.

5. If there is an integrated permitting regime, please provide a brief overview of it, in particular:

- What permits are needed and which regulator issues them?
- How long do permits last?
- Are there restrictions on transferring permits?
- What are the penalties for non-compliance?

There is no integrated permitting regime. However, an authorisation acquired through the EIA process in terms of section 24 (*NEMA*) is the closest example of such a system (see *Question 10*).

6. Please summarise the regulatory regime for water pollution (whether part of an integrated regime or separate). In particular:

- What permits or other authorisations are required and which regulator issues them?
 - Are any activities prohibited (such as causing or failing to prevent water pollution)?
 - Can the regulator require a polluter to clean up or pay compensation for water pollution?
 - What are the penalties for non-compliance?
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Regulatory regime

The National Water Act 36 of 1998 (National Water Act) is the main legislation governing the use and pollution of freshwater. According to the National Water Act, all freshwater in South Africa, regardless of where in the hydrological system it is found, belongs to the state. As such, the use of any water source (unless it is an existing lawful water use or a permitted use under the Act) requires the consent of the authorities. Permission to use water for large developments is granted in the form of a water use licence. Where waste is also being managed and/or discharged into freshwater resources, a person can obtain an integrated waste and water licence.

Because the National Water Act aims to protect the integrity of South Africa's freshwater systems and to allow for its sustainable and fair use, it also contains sections dealing with conservation of water sources and prohibits any unauthorised pollution of water sources.

Prohibited activities

The entire National Water Act aims to make efficient use of water easier and prevent unnecessary pollution. In particular, an owner, controller, occupier or user of land on which anything takes place that has caused or is likely to cause pollution of a water resource must take all reasonable measures to stop such pollution or prevent it from happening (*section 19, National Water Act*).

Section 19(2) also lists certain anti-pollution and remediation measures which parties can be requested to undertake. Section 19 therefore places a positive duty on a person to avoid polluting water resources. It also gives the state the power to enforce this duty of care by issuing remediation directives to persons where pollution has taken place. These directives are common and are a useful administrative tool for the government, which has used them with great effect. The validity of these administrative instruments has been challenged in court but was held to be authorised by the legislation (*Harmony Gold Mining Co Ltd v Regional Director: Free State Department of Water Affairs and Forestry and another [2006] JOL 17506 (SCA)*).

Permits and authorisations

Permits for the use or pollution of water are issued by the DWA. Section 21 of the National Water Act lists the water uses for which a permit is required. These include most activities that have an impact on a water resource such as:

- Discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit.

- Disposing of waste in a way which may detrimentally impact a water resource.
- Disposing of water containing waste from, or which has been heated in, an industrial or power generation process.

In addition, the DWA has developed a waste discharge charge system that is based on the principle that the polluter should pay for any pollution caused to a resource. Therefore pollution is allowed to a certain extent but must be permitted by the DWA.

Because sustainable water resources in South Africa are becoming increasingly scarce, the government often requires large developments to construct or fund their own water resource infrastructure. The National Water Act provides the regulatory support for this through the creation of water user associations.

Clean-up and compensation

The National Water Act gives the Minister of the WEA wide powers to ensure that freshwater resources are used optimally and efficiently and that pollution and degradation of water resources is avoided. Specifically, section 19 (*National Water Act*) places a duty on all persons to avoid pollution and degradation and gives the Minister of the DWEA the power to issue directives to persons to remedy any pollution or degradation. If the conditions of such directives are not complied with, the Minister of the DWEA can order remedial action and recover the costs from any person who caused the pollution.

Penalties for non-compliance

As well as being liable for the costs of remediation, anyone who commits an offence under the National Water Act is liable on first conviction to a fine or imprisonment for a period up to five years, or both. In the case of any subsequent conviction, the person is liable to a fine or imprisonment for a period up to ten years, or both (*section 151, National Water Act*).

In addition, employers can be vicariously liable for employees' acts if the offence has taken place with the express or implied permission of the employer or principal (*section 154, National Water Act*).

7. Please summarise the regulatory regime for air pollution (whether part of an integrated regime or separate). In particular:

- What permits or other authorisations are required and which regulator issues them?
 - Are any activities prohibited (such as discharging certain substances into the air without a permit or causing air pollution)?
 - Can the regulator require the polluter to clean up or pay compensation for air pollution?
 - What are the penalties for non-compliance?
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Regulatory regime

The Air Pollution Prevention Act 45 of 1965 (APPA) regulates air pollution. The APPA is being replaced by the National Environmental Management Air Quality Act (NEMAQA). However, the NEMAQA is being phased in over a period of time and the

relevant sections of the NEMAQA which repeal the APPA have not yet come into force.

The government has given no indication as to when the NEMAQA will be fully effective. The air pollution regime is currently in a transitional phase and it is expected that the NEMAQA will be made fully effective once the relevant technical data has been gathered which allows the regulators to set, among other things, the ambient air quality and allowable point source emissions (see below, *Prohibited activities*).

The APPA sets out that a person wishing to carry out a process that is listed under Schedule 2 to the APPA must obtain a registration certificate. As part of the transitional phase, the APPA registration certificates are being reviewed and optimal ambient air pollution levels are being studied and set in various areas.

Prohibited activities

Schedule 2 to the APPA lists the process for which a registration certificate must be obtained from the authorities. The scheduled processes are industrial processes that typically result in the emission of hazardous substances. These include processes involving:

- Sulphuric acid.
- Phosphate fertiliser.
- Nitric acid.
- Ammonium sulphate.
- Ammonium chloride.

The NEMAQA differs from the APPA as it does not use an end of pipe system (that is, a system based on the concentrations of air pollutants present at the location where they are emitted) for regulating air emissions. Instead, the authorities are setting optimal ambient levels of air pollution.

Permits and authorisations

Under the APPA, the Regional Chief Air Pollution Control Officers were responsible for issuing permits. However, under the new legislation, all the functions of the air pollution authorities have been centralised and presently the national authorities responsible for air pollution at the DEA deal with them. The intention of the NEMAQA is that once the new system is operational, authorisations will again be issued at a regional level.

Clean-up and compensation

The NEMAQA and the NEMA require that the authorities balance the rights and interests of communities to an environment that is not harmful to their health and well-being with the rights of industry to develop and to emit pollutants. As the NEMA places a general duty on all persons to avoid pollution, the regulator can rely on this provision to require polluters to clean up.

In relation to polluters' liabilities to pay compensation for air pollution, the internationally accepted principle that the polluter pays applies and, along with any common law remedies that a party may have, a party may be able to claim compensation from a polluter.

Penalties for non-compliance

A person convicted of an offence is liable to a fine or to imprisonment for a period up to ten years, or both (*section 52, APPA*)

CLIMATE CHANGE

8. Please provide a brief overview of emissions trading schemes in your jurisdiction, including any national targets and carbon allowances systems. Is your jurisdiction party to international agreements on this issue and how have they been implemented into your national law?

South Africa is a party to the UN Framework Convention on Climate Control 1992 and the Kyoto Protocol 1997. South Africa is classified as a developing country under the Kyoto Protocol so there is no obligation on South Africa to reduce its levels of greenhouse gas emissions. As a result no national or regional trading schemes of greenhouse gas emissions have been developed.

However, because of South Africa's status as a developing country, it is an appropriate place to implement a clean development mechanisms project. Once the project has been checked and certified under the Kyoto Protocol, the resulting emission allowances can be traded back into the Kyoto Protocol Trading Scheme.

In August 2009, a Draft Zero Climate Change Policy will be drawn up by the government, to set out South Africa's participation at the international climate change negotiations under the Intergovernmental Panel on Climate Change (IPCC) in Copenhagen, Denmark, in December 2009. In 2010, a Green Paper will be published for public comment on a National Climate Change Response Policy.

The Long-Term Mitigation Scenario, conducted in 2006 to 2008, was a participatory, research-based scenario building process, that focused on identifying South Africa's emissions plan and formulating potential strategies allowing South Africa to reduce its emissions over time, in a way appropriate to its national circumstances and capabilities. Green House Gas Emission Reductions and Limits will be determined from the research conducted.

Further, DEA is developing the National Green House Gas Information Management System as part of the South African Air Quality Information System. The system is likely to include mandatory Green House Gas emission reporting by all significant emitters and emission information holders. A National Treasury report on options to implement a price on carbon will also be conducted in 2009.

9. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.

No legislation has yet been enacted to establish energy efficiency targets for buildings. However, the Green Building Council of South Africa (GBCSA) was established in 2007. In November

2008, GBCSA launched the Green Star South Africa Environmental Rating System for Buildings (Green Star SA), specifically commercial buildings. The purpose of the rating system is to measure building design and construction compliance against the Green Star SA objectives. The objectives aim to reduce environmental and human health impacts and compliance is voluntary.

The Department of Energy introduced an Energy Efficiency Strategy of the Republic of South Africa in March 2005 to address sustainable development and energy efficiency for South Africa. As a result, electricity regulations for compulsory norms and standards were published under the Electricity Regulation Act 4 of 2006 in July 2008. Energy efficient fittings are required, with a few exceptions, and further requirements such as remote control of electricity supply to facilities must be met by certain future dates. SANS 204, which is to be incorporated into the National Building Regulations, also aims to specify design and construction requirements for new buildings to provide energy efficiency. SANS 204 recommends good practice maximum values of energy consumption, set out in kilowatt hours (kWh) per square metre per year.

Therefore, no definite legislation is in place, but there is a voluntary move to the reduction of greenhouse gas emissions involved with building. This is further evidenced by the Draft Green Building Guidelines for Cape Town and the introduction of tax on incandescent light bulbs.

ENVIRONMENTAL IMPACT ASSESSMENTS

10. Please provide a brief overview of the requirements to carry out environmental impact assessments (EIAs) for certain projects (for example, construction of an oil and gas facility). In particular:

- **What type of projects and impacts are covered?**
- **Are permits or other documents required before the project can start and which regulator issues them?**
- **What are the penalties for non-compliance?**

Certain listed activities cannot be started unless an EIA or basic assessment (depending on the size and nature of the activity) is carried out and approval obtained from the relevant authority (*section 24, NEMA*).

Projects and impacts

Projects with a moderate to large environmental impact are listed. This varies greatly, from the construction of a dam to energy generation projects.

Permits and documents

If the activity is a listed activity under EIA regulations, then a permit is required before the activity can begin. Other permits from authorities may also be required as there is no integrated permitting system (*see Question 1*).

Penalties for non-compliance

If a person begins a listed activity without authorisation, that person is liable to a fine not exceeding ZAR5 million (about US\$644,000), or to imprisonment for up to ten years, or both (*section 24F, NEMA*).

WASTE

11. Please provide a brief overview of the regulatory regime for waste. In particular:

- **What permits or other authorisations are required and which regulator issues them?**
- **What activities are prohibited (such as storing or disposing of waste without a permit)?**
- **Do operators need to meet certain criteria (such as having sufficient financial means to operate landfills and other waste disposal sites)?**
- **Are there special rules for certain types of waste (such as hazardous waste or electrical equipment)?**
- **What are the penalties for non-compliance?**

Regulatory regime

The National Environmental Management Waste Act 59 of 2008 (NEMWA) came into effect on 1 July 2009, except for certain sections. Transitional arrangements have been provided for the Environmental Conservation Act 73 of 1989 (ECA) to be phased out in relation to waste.

The NEMWA provides comprehensive and integrated waste management legislation for waste throughout its life cycle. Important provisions include the:

- Extended producer responsibility for products which may have an impact on the environment. This relates to a statutory duty of care, similar to section 28 in NEMA, that extends the person's duties relating to the product to include a financial or physical responsibility to the post-consumer stage of the product (*section 18, NEMWA*).
- Contaminated land provisions, which will have retrospective effect once they are in force (*part 8, NEMWA*) (*see Question 13*).
- Issuing of waste management licences for waste management activities (*chapter 5, NEMWA*) (*see below*).

Prohibited activities

A licence is required for the establishment or operation of a waste disposal site (*section 20, ECA, now chapter 5, NEMWA*). The NEMA EIA regulations set out what types of waste and other materials an EIA is required for and when permission must be obtained. These apply in particular to any of the following with general waste:

- Recycling.
- Re-use.

- Handling.
- Temporary storage.
- Treatment.

The nature and quantity of waste being handled determines which of the regulations apply and what authorisation is required.

Permits and authorisations

If waste is discharged into a water system the relevant authority is the DWA (see *Question 6*).

If waste is dumped at a landfill site the authority is either the national DEA or the provincial (regional) environmental authority.

Operating criteria

Historically, operators of industrial sites or landfill sites were not required to provide financially for the rehabilitation or remediation of sites. However, it is becoming common when issuing an environmental authorisation to require that the applicant agrees to an environmental management programme, which usually includes necessary measures for rehabilitation. If requested by the regulator, financial arrangements for the remediation work during or after operation of the waste management activity must be specified in the waste management licence (*section 51, NEMWA*).

Special rules for certain types of waste

Hazardous waste is also regulated by the Hazardous Substances Act 15 of 1973 (HSA). Substances are grouped according to the nature of their hazardous characteristics. These groups include electrical equipment, radioactive equipment and other waste with hazardous characteristics. Generally, a permit is required under the HSA for any of the following with a hazardous substance:

- Sale.
- Letting.
- Use.
- Operation.
- Application.
- Installation.

Penalties for non-compliance

Depending on the type of non-compliance, the following penalties are stipulated (*section 67 and 68, NEMWA*):

- A maximum fine of ZAR10 million (about US\$1.3 million) or imprisonment up to ten years, or both.
- A fine up to ZAR5 million (about US\$644,000) or imprisonment up to five years, or both.
- A fine and imprisonment up to six months, or both.

ASBESTOS

12. Please provide a brief overview of the regulatory regime for asbestos in buildings. In particular:

- **What activities are prohibited?**
- **What are the main obligations (such as investigating the presence of asbestos and risk assessments for employees) and who is liable to carry them out?**
- **What permits or other authorisations are required and which regulator issues them?**
- **What are the penalties for non-compliance?**

Regulatory regime

Asbestos is specifically regulated by the:

- Occupational Health and Safety Act No. 85 of 1993.
- Asbestos Regulations published under GNR 341 in Government Gazette 30904 of 28 March 2008 (Asbestos Regulations).

Asbestos is also regulated under the general environmental law principles in the Constitution and the NEMA (see *Question 1*).

Prohibited activities

The Asbestos Regulations prohibit the:

- Processing, packaging, repackaging or manufacturing of any asbestos or asbestos-containing product.
- Import or export of any asbestos or asbestos-containing product, unless importation is purely for transit through South Africa. A person transporting asbestos or asbestos-containing materials through South Africa must register with the DEA and provide certain information annually.
- Import of any asbestos-containing waste material, other than from a member of the South African Development Community for the sole purpose of safe disposal locally, subject to submitting certain information annually.

The use of asbestos or asbestos-containing material for research purposes is allowed if the research is not done to produce another asbestos-containing product. The researcher must notify the DEA of their research and provide a report on the amount of asbestos used and the outcome of the research annually. The Minister of Environmental Affairs and Tourism can review the permission annually.

The Asbestos Regulations do not prohibit the continued use of asbestos-containing materials (such as asbestos cement roof sheets or ceilings) that are already in place. However, they should be replaced over time with asbestos-free materials. The regulations relating to exposure of employees to asbestos in the workplace must still be adhered to in terms of the Asbestos Regulations under the Occupational Health and Safety Act 85 1933.

A manufacturer or merchant selling one of a limited number of asbestos-containing products for which there is no immediate alternative can continue making or selling the product, provided they:

- Registered with the Department of Environmental Affairs and Tourism within 120 days of the start of the Asbestos Regulations on 28 March 2008.
- Submitted a phase-out plan for approval by the Minister of Environmental Affairs and Tourism within one year of the start of the Asbestos Regulations on 28 March 2008. This plan must identify the reasons for continuing to use the product and a time frame and activities for the phase-out of identified products.

A registered person must display the registration number on all trading documents.

Penalties for non-compliance

A person who fails to comply with the Asbestos Regulations is liable to a fine up to ZAR100,000 (about US\$13,000), or to imprisonment for a period up to ten years, or both, and to a fine up to three times the commercial value of anything in relation to which the offence was committed.

CONTAMINATED LAND

13. Please provide a brief overview of the regulatory regime for contaminated land. In particular:

- Which regulator is responsible and which legislation applies?
- In what circumstances can a regulator require the investigation and clean-up of contaminated land?
- What are the penalties for non-compliance?

Regulatory regime

Currently there is no single integrated statute dealing with contaminated land. The principles dealing with contaminated land are found in different statutes depending on the nature of the contamination. For example, the relevant legislation for contamination:

- Through a water source, is the National Water Act.
- By hazardous materials, is the Hazardous Substances Act.
- In relation to land, is the NEMWA.

Generally, the starting point for addressing liability for contaminated land is the NEMA because of the general duty of care in section 28 (see *Question 1*). Section 28 states that there is a duty on all persons in control of land, occupying land or carrying on an activity on land to avoid pollution and degradation of the environment. If such pollution or degradation is unavoidable, there is a duty to minimise that pollution. If pollution has occurred, there is a duty to remedy it.

The NEMWA (see *Question 11*) aims to deal with contaminated land by having contaminated land certified as such on the title deeds, and restricting the transfer of such land until it has been cleaned up according to plans issued by the authorities. If a person is found to have contaminated land, that person will be liable to rehabilitate the land. NEMWA's provisions relating to contaminated land will have retrospective effect but have not yet come into force (*part 8, NEMWA*).

A number of regulators can be responsible depending on the nature of the contaminated land. However, the authority with overriding responsibility for environmental matters remains the DEA. In addition, the DEA is responsible for the implementation and enforcement of the NEMWA, once the relevant provisions come into force.

Clean-up

In terms of NEMWA, the Minister of Water and Environmental Affairs can cause an investigation to be undertaken if (*section 36, NEMWA*):

- High-risk activities have or are taking place on the land which may result in land contamination;
- The land is believed to be contaminated on reasonable grounds; or
- The owner of the land or the person who undertakes a high-risk activity notifies the Minister of Water and Environmental Affairs of the land contamination.

NEMWA stipulates the process and requirements for an investigation of contaminated land. NEMA, the National Water Act and NEMWA empower the authorities to investigate if land is contaminated and, if such contamination has occurred, to issue directives to the responsible person to clean up the land. The authority can enforce its directives through the courts if necessary to ensure they are complied with, or it can clean up the land itself and claim the costs back from the person responsible for the contamination. The relevant provisions in NEMWA are retrospective, but not yet in force (see *above, Regulatory regime*).

Penalties for non-compliance

The penalties for non-compliance depend on the nature and severity of the contamination. In general, if an offence under Schedule 3 to the NEMA is committed, it is a criminal offence and, in addition, damages can be recovered through a civil law suit (*section 34, NEMA*).

In terms of NEMWA, a person not complying is liable to a fine up to ZAR10 million (about US\$1.3 million) or to imprisonment up to ten years, or both (*section 67 and 68, NEMWA*).

14. In relation to liability for contaminated land:

- Which party is liable for carrying out or paying for environmental investigation and clean-up?
- Can an owner or occupier who has not caused contamination be liable for investigation and clean-up of contamination on their land?
- Can previous owners or occupiers be liable for contamination they have caused in the past?
- Are there limits on liability or ways for a party to limit its liability?

Liability

Currently, under section 28 of the NEMA, any of the following can be liable for the costs of cleaning up contaminated land:

- Any person who can be causally linked to the pollution.

- The owner of the land or premises.
- A person in control of the land or premises.
- A person who has a right to use the land or premises.

Owner or occupier liability

An owner or occupier of land who has not caused contamination can still be liable for investigation and clean-up of their contaminated land (*section 28, NEMA*).

Previous owners' or occupiers' liability

Previous owners or occupiers are liable for contamination they have caused in the past through application of the polluter pays principle.

Limits to liability

There are no statutory limits on liability for contaminated land. Parties can attempt to limit their liability by contractual means or by obtaining insurance for environmental damage.

15. Can a lender incur liability for contaminated land and is it common for a lender to incur such liability? What steps do lenders commonly take to minimise such liability?

There has not yet been a decided case in the South African courts where a lender has been found liable for contaminated land. In addition, there is no specific statute providing that lenders are specifically liable for environmental damage.

However the courts are bound by the Constitution to consider international precedent when considering any matter brought before them. It is reasonable to suggest that if a matter was brought before the courts, lender liability may be recognised in appropriate circumstances, for example, if the lender:

- Had a degree of control over the operations on the land.
- Could reasonably foresee that such pollution may take place.
- Should reasonably have taken the measures necessary to ensure that the pollution did not occur.

Avoiding such liability may include detailed examination of EIAs by the lenders and ensuring compliance with relevant South African laws and international best practices.

16. Can a private individual bring legal action against a polluter, owner or occupier (for example, for damage caused by the movement of contamination onto his land)?

If there is a breach (or threatened breach) of a duty under national or provincial environmental legislation concerning the protection of the environment, and breaching that duty is an offence, then a person can bring and conduct a prosecution against the party responsible, in the interests of protecting the environment or in the public interest (*section 33, NEMA*).

A party that has suffered harm can also bring an action based on the common law. In a common law action the elements of a delict must be proved. These are that:

- Damage was suffered.

- The damage caused was as a result of the defendant's actions (causation).
- The conduct that caused the harm was unlawful (unlawfulness).
- The defendant was at fault (through negligent or intentional conduct).
- The defendant had the capacity to carry out the action.

In addition, a claimant can bring an action based on the tort of nuisance.

TRANSACTIONS

17. In what circumstances can a buyer inherit pre-acquisition environmental liability in:

- An asset sale?
 - The sale of a company (share sale)?
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Asset sale

A buyer may inherit pre-acquisition environmental liabilities if the asset that is purchased is either contaminated or is causing contamination of the environment. For example, if contaminated land is bought and the authorities are unable to trace the seller, the new owner may be liable for the contamination if the authorities want the contamination cleaned up. In terms of NEMWA (*see Question 13*), the seller must inform the buyer that the land is contaminated.

Share sale

If a buyer acquires the controlling interest in a company which has pre-existing environmental liabilities, the buyer may become responsible for those environmental liabilities. This is especially so if the seller is difficult to trace or is an entity with insufficient financial means.

In both an asset sale and a share sale it is advisable for the buyer to protect itself through contractual means and to obtain appropriate indemnities and warranties from the seller. However, liability can only be limited contractually to a certain extent and it is not a complete defence. Contractual remedies also do not release the buyer from its statutory environmental duties.

18. In what circumstances can a seller retain environmental liability after disposal in:

- An asset sale?
 - A share sale?
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Asset sale

The seller remains jointly and severally liable with the buyer in an asset sale. The seller should therefore attempt to limit and define its liability on a contractual basis with the buyer.

Share sale

The seller may remain liable for environmental liabilities after the shares in an entity are sold and should attempt to define and

limit its liability contractually through appropriate indemnities and warranties.

19. Does a seller have to disclose environmental information to the buyer in:

- **An asset sale?**
- **A share sale?**

In both an asset sale and a share sale, there is no statutory environmental provision that deals with the obligation of a seller to disclose environmental liabilities. The NEMWA does provide for a duty of the seller of land to notify the buyer if the land is contaminated (see *Question 13*). However, this issue is mainly dealt with under the general law of contract. If the seller knows of an environmental liability and does not disclose it to the buyer, this may amount to a material misrepresentation and breach of contract. This matter is therefore best dealt with contractually and the buyer should ensure that the seller represents that all environmental information has been disclosed to the buyer.

20. Is environmental due diligence common in an asset sale or a share sale? If yes:

- **What areas are usually covered?**
- **What types of environmental assessments are available?**
- **Are environmental consultants usually used? If so, what issues should be covered in an engagement letter (for example, limit on consultant's liability)?**

Areas usually covered

In both an asset sale and a share sale, environmental due diligence is common. The scope of the environmental due diligence depends on the size and nature of the transaction, as well as the nature of the activity conducted by the entity or the asset being sold. Environmental due diligence is usually wide in scope to catch any issue which may be problematic.

Types of environmental assessment

Although a client can request any type of environmental assessment that they believe is appropriate in the circumstances, it is most common for assessments to be carried out as either a:

- **Phase 1 assessment.** This is typically a desktop study, where the activities of the business or asset are examined, and potential liability issues are identified.
- **Phase 2 assessment.** This involves on-the-ground, physical testing and sampling of areas identified as problematic, and which require further investigation.

Environmental consultants

Environmental consultants are used when technical expertise is needed. The terms of the consultant's duties are usually defined according to what is necessary in the study.

21. When are environmental warranties and indemnities usually given and what issues do they usually cover in:

- **An asset sale?**
- **A share sale?**

Environmental warranties and indemnities are often given in sale contracts for both assets and share sales. The issues that are dealt with depend on the activities of the business entity or the nature of the asset (see *Questions 17 to 19*).

22. Are there usually limits on environmental warranties and indemnities, for example, time limits or financial caps?

Time limits and financial caps are becoming more common when environmental warranties and indemnities are given. The time limit on the indemnity and warranty and the financial cap depends on the type of business or the nature of the asset being acquired. In addition, if due diligence is carried out, the time limits and financial cap may be based on this.

REPORTING AND AUDITING

23. Do regulators keep public registers of environmental information (for example, of environmental permits or contaminated properties)? What is the procedure for a third party to search those registers?

Public registers

There is currently no integrated contaminated land register available to the public, although the Minister of Water and Environmental Affairs will have to establish a national contaminated land registry once the relevant provision in NEMWA is in effect (see *Question 13*). However, as much pollution has resulted from historical activities, such as mining, many of the contaminated sites are well documented and known to the government.

Environmental permits

Environmental permits are located with the regulator responsible for the particular environmental issue.

Contaminated property

Under the NEMWA, if land is contaminated this will be certified on the property's title deed (*section 40, NEMWA*) (see *Question 13*).

Search procedure

For environmental permits, access to information is promoted under the Constitution and the PAIA (see *Question 1*). The PAIA provides that the public is entitled to access records held by both private institutions and government bodies. If a permit is not on a public record, a request can be made under the PAIA or through one of the specific Environmental Management Acts (see *Question 1*) for access to the permits or environmental records.

24. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

There is no statutory obligation to carry out environmental auditing. However, many companies carry out environmental auditing because of international certification bodies that they subscribe to, such as the International Standards Organisation. In addition, environmental auditing may occur indirectly as companies must ensure that they comply with all environmental laws. To do this, companies often use attorneys to draw up compliance documents that they then use to manage risk and ensure environmental compliance. This can be seen as a form of environmental auditing.

Further, to report accurately on environmental obligations, companies often must include in their annual financial statements provisions for rehabilitation or asset revaluation or depreciation relating to environmental issues. Many South African companies, especially the larger listed companies, also subscribe to the Global Reporting Initiative (www.globalreporting.org).

South African accounting standards (Generally Accepted Accounting Principles (GAAP)) incorporate international accounting standards, which also require disclosure of environmental obligations and other environmental issues.

25. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

Usually, when a company is authorised to emit pollutants into a resource, this is controlled through an authorisation. Most authorisations require that when the conditions of the authorisation are not complied with (for example, if an additional pollutant is released), such incidents must be reported to the regulators.

In addition, in relation to authorisations given to companies, the regular reporting of emissions is often a condition of the authorisation.

The public can request access to companies' environmental information, either through specific environmental management legislation (see *Question 1, Regulatory framework*) or through the PAIA (see *Question 23*). However, there is no specific duty to report matters to the public (unless perhaps there is a direct threat to public health or safety) if no request for information is made.

26. What powers do environmental regulators have to access a company's documents, inspect sites, interview employees and so on?

The NEMA gives wide powers to Environmental Management Inspectors (the so called Green Scorpions) to carry out environmental enforcement and protection of the environment. In this respect, the Green Scorpions have the same powers of search and seizure as normal police officers, as well as the powers of arrest and inspection. The Green Scorpions can enter a facility, inspect all documents, interview people and take any measures that they think appropriate to protect the environment. Interference with a Green Scorpions' investigation is an offence under the NEMA.

THE REGULATORY AUTHORITY

Department of Water Affairs and the Department of Environmental Affairs

Main responsibilities. The previous Department of Environmental Affairs and Tourism has been separated and the Department of Environmental Affairs (DEA) stands alone with its own Director-General. The Department of Water Affairs and Forestry has been separated and the Department of Water Affairs (DWA) stands alone. The DWA is the custodian of South Africa's water and environmental resources. It is mainly responsible for formulating and implementing policy. It also has overall responsibility for water services provided by local government. The DEA aims to lead sustainable development of the environment and to improve the quality of life in South Africa. It aims to do this by:

- Creating conditions for sustainable tourism growth and development.
- Promoting the sustainable development and conservation of South Africa's natural resources.
- Protecting and improving the quality and safety of the environment.
- Promoting a global sustainable development agenda.

W www.environment.gov.za
www.dwaf.gov.za

Department of Mineral Resources

Main responsibilities. The purpose of the Department of Mineral Resources (DMR) is to ensure the best use and safe exploitation of mineral resources and the rehabilitation of the surface.

W www.dme.gov.za

INSURANCE

27. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it usually obtained in practice?

It is possible to obtain environmental risk insurance. However because of the difficulty with predicting the consequences of environmental damage and the potential amount of money needed to repair such damage, this type of insurance is very expensive and so rarely used in practice.

Insurance cover is more likely to be used where an event can be specifically defined, both in terms of time and geographical area.

Insurance companies do, however, provide insurance for ongoing environmental damage, but again this is usually prohibitively expensive.

Most insurance cover is either placed abroad through the European market or underwritten by European companies because the South African insurance industry is relatively small.

TAX

28. What are the main environmental taxes in your jurisdiction (for example, tax on waste disposal, carbon tax and tax breaks for carrying out clean-up of contaminated land)? For each tax, please briefly state how it is calculated, who pays it and the tax rates.

Although South Africa's tax regime and the collection of taxes is fairly sophisticated, the levying of environmental taxes is rather minimal.

Some environmental taxes do exist and are built into the pricing of commodities, such as the fuel levy, which is included in the price of paraffin, diesel and petrol.

The DWA taxes the discharge of waste into water resources and the discharge of wastewater or waste into water under the Waste Discharge Charge System and the National Water Act.

The treasury is aware that the tax regime could be improved in this respect and a process of restructuring the environmental tax law regime is underway. So far, only a framework document has been produced and no draft legislation is available yet. Once the treasury has formalised the changes, some will be introduced through the Income Tax Act and others through various environmental protection legislation.

One example of where the tax regime is currently used to encourage expenditure on environmental protection is that mining companies enjoy a tax break where capital expenditure

is made for rehabilitating mining sites and activities. At the moment manufacturing and industrial business do not enjoy the same tax break but this is being reviewed.

REFORM

29. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

South Africa's environmental laws have changed considerably since it became a democracy in 1994. As a result, many of the laws have only come into effect recently and have only recently begun to be enforced.

One of the aims of the present government is to introduce considerable social and environmental change, so environmental laws are under constant revision. For example, the waste laws are undergoing considerable reform through the NEMWA (see *Question 13*), and the NEMA EIA regulations are currently being redrafted.

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