

# Understanding and complying with environmental legislation

Environmental legislation should be respected and complied with, write Alan Cluett and Colleen Cluett.

**E**nvironmental legislation in South Africa serves a critical function: to protect the health and well-being of all of us, the current population, future generations and the environment. Therefore, it should be respected and willingly complied with. However, it is often seen as adversarial and is begrudgingly complied with.

Part of this attitude may stem from its complexity and the speed of development of new requirements within this branch of legislation. New draft legislation is issued for comment and / or promulgated frequently, making it very difficult for surface mine managers, by themselves, to keep abreast of new requirements, let alone to be able to confirm their compliance with the numerous requirements.

In addition, environmental management, as a relatively new field, may be seen as supplementary to our actions and responsibilities rather than something that should be fundamental to our thinking and actions, both at work and at home.

In comparison to other legislation, consequences for non-compliance with environmental requirements is significantly more severe, possibly to encourage action where understanding of the reason for implementation is limited.

This is especially true in comparison with the penalties for mining-related health and safety, with which most managers are more familiar. However, both environmental and mining health and safety legislation follow the same principles in the event of non-compliance, namely, the same hierarchy of people who will be tested for individual accountability and for prosecution and conviction. Both will commence directly or indirectly with the CEO and senior



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management and, possibly, end with the actual responsible individual.

## Management tested

If the CEO has fulfilled their respective duties in this regard, then responsibility will fall on the next identified level - the 'person in control of the land', typically the appointed site manager. Again, if they have fulfilled their role then the responsibility will rest with the individual/s directly and indirectly responsible for the non-compliance. Needless to say, that where duties have not been fully executed or the law complied with at any level mentioned above, this may result in joint convictions.

This hierarchy of responsible people is not a new development in our legal system but closely follows the responsibility hierarchy set out in the Mine Health and Safety Act, namely the Section 2, the Section 3.1a and 7 and the Section 22a and 22b - the CEO, the person in control of the land and the individual employee respectively.

An additional difference in environmental legislation is the severity of the penalties that

can be applied by the courts in the event of a conviction. Under the Mine Health and Safety Act, 1996, these penalties range from R200 000 or two years for a Section 22 conviction through to R1-million or five years imprisonment for a Section 2, Section 3.1a and Section 7 conviction. It is possible that, where a manager is charged on more than one count, in terms of the MHS Act, for the maximum penalty, if convicted, to exceed R2.2-million.

In comparison the penalties prescribed in the various branches of environmental law range up to R10-million, imprisonment for 10 years (15 years in terms of GN 528 of the NEM:Waste Act, 2008) or a combination of a fine and imprisonment. In addition, in all cases where pollution or degradation has occurred, those found guilty in a Court of Law will also be held accountable for the restoration costs for areas affected.

The question then becomes, "How do I get to know the applicable law, so I can protect myself?" Well the answer, we believe, is relatively simple despite the complexity of environmental law.

**Ignorance a great risk**

Environmental law is diverse, dynamic and contained in numerous Acts of Parliament, Government Notices and Regulations, Provincial Ordinances and Local Authority By-laws. To master this field may take years of university study. However, the common purpose of this law is relatively simple – to support our Section 24 Constitutional Right to an environment that is not detrimental to our health and wellbeing. Therefore, if one acts to protect our environment (air, water, soil, plants, animals and us) from pollution and degradation or, where that is not possible, to reduce our impacts as far as reasonably practicable then, in most cases, we will remain compliant. This not only protects us from prosecution, but also protects the health and well-being of us, the current generation, and future generations. This then becomes common sense.

If, as a nation we could apply this common sense in our day-to-day activities whether at the mine, at home, at leisure or at a sports stadium, there would be no need for the ever-expanding catalogue of environmental law in South Africa.

However, as there is environmental law in place here are two basic principles of South African environmental law to remember

**1. The identified responsible person is held accountable**

South African law is based on a hybrid system of Roman-Dutch and English Law. In Roman-Dutch law the responsible person is held directly accountable for their actions. This can be seen in all our legislation that specifically names ‘the owner’, ‘the person in control of the land’, and / or ‘the individual directly and / or indirectly responsible’ to account. The hybridisation of Roman-Dutch Law with ‘English Law’, peculiar to many Southern African states, allows for the Judges to test for reasonableness in the actions of the people appearing before them. Essentially, to ask ‘did the accused take reasonable precautions to prevent the non-compliance / polluting event from taking place?’. This is the so called ‘reasonable person test’. If yes, then the Judge may apply leniency to the prescribed penalty – resulting in a reduced or even suspended sentence. If no, then the Judge will apply an appropriate

sentence that may be relative to your income and / or past convictions. Remember the ‘reasonable person test’ and test all your actions against it.

**2. Penalties are severe**

The National Water Act (36 of 1998), National Environmental Management Act (107 of 1998), NEM: Air Quality Act (39 of 2004), NEM: Waste Act (59 of 2008); NEM: Biodiversity Act (10 of 2004) and some associated regulations all make provision for fines up to R10-million and / or imprisonment of up to 10 years plus clean-up (restoration). In instances, a responsible individual may be found guilty on more than one count, from one or more of these Acts. In such cases, it is quite possible for collective penalties to exceed a total of R30-million and / or 30 years imprisonment.

Penalties can be remembered simply as ‘Ten-Ten Plus’ – ten million, ten years PLUS restoration.

**3. Environmental law is there to protect all of us**

All environmental law serves to give effect to our Basic Human Right contained in Section 24: to protect our health and well-being. This includes our ability to have our air cleaned (trees), our water purified (wetlands), our food provided (pollination by bees and birds). This law has not been created to make our lives more difficult or to develop unnecessary hoops to jump through. We encourage you to learn about these benefits and to embrace compliance and continual improvement in your environmental management and performance.

**4. Environmental law is your ally, not your adversary**

How best can you reduce your impact on the environment, comply with environmental legislation and protect yourself and your employees from possible prosecution?

Aside from applying common sense, your best route to protection is through the implementation of effective environmental and health and safety management systems.

ISO based environmental and health and safety management systems are

specifically designed to assist all levels of management and employees in:

- identifying the context of the organisation and identifying and understanding their responsibilities in terms of company policy and the law;
- assessing and prioritising their risks and opportunities;
- developing plans and programmes to achieve compliance with policy and the law and manage their risks and opportunities;
- identifying required activities including employee training needs, communication requirements and setting objectives;
- monitoring and reporting on impacts; and
- reviewing and improving activities and impacts.

**Additional note**

In our role as ASPASA About Face Environmental Auditors for the past six years Cluett Consulting (Pty) Ltd have audited more than 400 member operations. We have identified weaknesses on an annual basis and addressed these through introduction of remedial actions in the next generation or audits and training. Through these interventions ASPASA About Face is at the leading edge of environmental management in surface mining in southern Africa and possibly the world. The 2018 programme includes a formal training session for Management, HODs, SHE Reps and Shop Stewards on environmental legislation.

Additional training presented covers the EMP, PCBs and on-site Soil Remediation and Best and Bad Practice at South African Surface Mines. These audits are not just about identifying shortcomings environmentally – they are about assisting you and your operation in the goal of continual performance improvement.

For more information on membership and ASPASA programmes, contact: office@aspasa.co.za or alan@cluett.co.za or colleen@cluett.co.za. ■

**ABOUT THE AUTHORS**

Cluett Consulting offers services specialist environmental and mining-related services to the industry. Alan and Colleen Cluett have a combined experience in the surface mining industry of more than 40 years. For more information, visit: [www.cluett.co.za](http://www.cluett.co.za).