

# Tools for enforcement

Legal tools for the enforcement of legislation associated with natural resource use in communal lands in South Africa



## The Association for Water and Rural Development

Private Bag X483  
Acornhoek 1360  
South Africa



Tel: 015 - 793 - 7500  
Fax: 015 - 793 - 7509  
e mail: [info@award.org.za](mailto:info@award.org.za)  
[www.award.org.za](http://www.award.org.za)

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Written by

Madeleine Sinclair and Derick du Toit

for

The Association for Water and Rural Development (AWARD)

&

LEAP



March 2010

The Association for Water and Rural Development (AWARD)  
AWARD: Private Bag X483, Acornhoek 1360  
Tel: (015) 793 7504  
Email: [derick@award.org.za](mailto:derick@award.org.za)  
[www.award.org.za](http://www.award.org.za)

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## Acknowledgements

AWARD and LEAP thank the organizations and people who were part of the various aspects of this work. These include individuals from governmental departments: Mpumalanga Department of Agriculture and Land Affairs (DALA); the Department of Agriculture (DoA) and NGOs: (Legal Resources Centre). We are specifically indebted to the following individuals who were part of this study: Love Shabane (DoA), Musa Luhlanga (DALA -compliance), Elize Mnisi (DALA- enforcement), Toneka Tanda (DALA - enforcement), Bheki Mndawa (DALA -authorization), and Naseema Fakir (LRC).

The study and report were made possible with the aid of a grant from the International Development Research Centre (IDRC), Ottawa, Canada

## Disclaimer

This document serves as a reference only and affords a general explanation on matters of interest. In the preparation of this information, every effort has been made to offer the most current, correct and clearly expressed information possible. However, law is subject to interpretation and argument, and laws and regulations often change. In addition, the application and impact of law varies case to case based on the set of facts involved.

None of the information contained herein should be construed as legal advice nor relied upon as such. The authors were not engaged to offer legal advice but to offer legal information and an explanation of a legal framework. The scope of the work is limited in the ways described herein and special attention should be paid to those limits. If legal advice is required it should be sought from independent legal counsel.

Note: more details and specific issues are reported in a case study entitled:

Sinclair, M (2007). Monitoring and Enforcement Compliance with Environmental Legislation in South Africa. A case study of a clay brick factory in Bushbuckridge. AWARD

Available on the AWARD website: [www.award.org.za](http://www.award.org.za)

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# Communal areas in South Africa

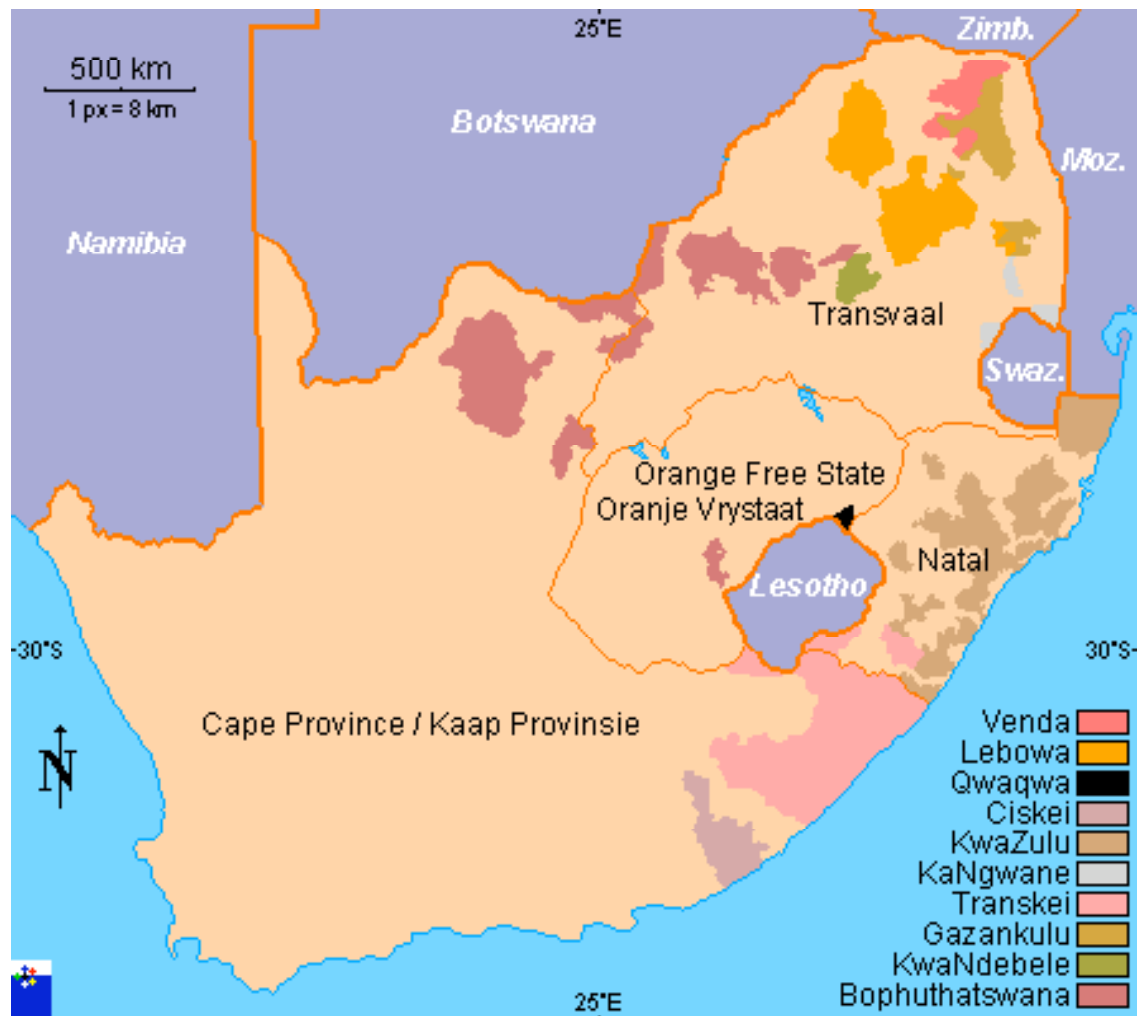


Figure 1. Communal areas in South Africa

## Natural resource management in communal lands

Land ownership or tenure falls into two categories, commercial/private land or communal land. Communal land was maintained as the 'homelands' under the apartheid regime and fell under the control of a Traditional Authority, the administrative arm of the apartheid order. Since the democratic elections of 1994 major legal reform has resulted in the overturning of old laws and legal frameworks. Democratisation set the stage for major changes to natural resources management.

## Livelihoods and resource management

Because effective NRM is linked to land tenure and management, both of which are in transition and highly contested, the uncertainties are reverberated and experienced in local efforts to manage natural resources. This has bearing for many since communal lands in South Africa (pictured above) are home to some 2.4 million rural households. Indeed, work over the last decade suggests that an increasingly precarious situation is developing with regard to natural resources and the livelihoods of some of the most vulnerable in communal areas in South Africa.

This resource aims to find applicability to the regulation of natural resources use in communal lands

## Background to this document

This document forms part of a greater body of research currently being conducted by AWARD (The Association for Water and Rural Development) and LEAP (A learning approach to promoting tenure security) into governance of natural resources in communal lands of South Africa. The bulk of the work is being carried out in the village of Craigieburn, Bushbuckridge, South Africa. Very briefly put, the governance project seeks to use the opportunity to explore issues relevant to the strengthening of governance of natural resources in this specific community.

The situation in Craigieburn village is representative of the widely reported trends regarding natural resources in communal areas, where most of the poorest people in South Africa reside. These communities are particularly vulnerable to exploitation by developers who have a relative monopoly on knowledge, skills and resources. In addition, developers may be skilled at authoring and/or sponsoring division and conflict within these communities. The lack of functional, reliable and predictable institutional arrangements and governance structures serves to exacerbate an already vulnerable state of affairs. Ideally, South Africa's environmental regulatory framework should offer a level of safeguarding.

This document is not intended for the legal specialist or the environmental inspectors but rather for civil society so that they have a better understanding of how environmental legislation is and should be implemented. We introduce only the very basic concepts and tools. A deeper study is recommended for those interested in more legal detail. Please note that we do NOT cover the Environmental Impact Assessment (EIA) as a tool for enforcement. This is a tool for regulation and authorisation of activities that impact on the environment.

## A legal framework for regulation

In terms of the Constitution of the Republic of South Africa Section 24 guarantees everyone:

- the right to an environment that is not harmful to their health and well being; and
- to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
- Prevent pollution and ecological degradation;
- Promote conservation and
- Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

And in addition Section 27 guarantees everyone:

- the right of access to sufficient food and water
- the state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right

## Relevant legislation

- National Environmental Management Act of 1998 (NEMA)
- National Water Act, 1998 (NWA)
- Water Services Act, 1997 (WSA)
- National Forest Act, 1998
- National Veld and Forest Fire Act, 1998
- Promotion of Administrative Justice Act, 2000
- Promotion of Access to Information Act, 2000
- Inter Governmental Relations Framework Act, 2005
- Agricultural legislation (Cape, 1983)



## Regulatory bodies involved in impacts on natural resources

A number of organisations and government bodies play an important role in regulation. Those with regulatory scope include (but are not limited to):

- Department of Agriculture
- Department of Environmental Affairs
- Department of Mineral Resources (DMR)
- Provincial Departments of Agriculture
- Organised Crime Division of South African Police Services (SAPS)
- National Prosecuting Authority (NPA)
- Department of Public Prosecution (DPP)
- National Intelligence Agency (NIA)
- Provincial Governments Departments
- Research Institutions
- Non Governmental Organisations (NGOs), Community Based Organisations (CBOs), Civil Society, etc.
- Other government bodies such as the Office of the Premier etc all have an important influence over regulatory mechanisms by calling for accountability and remedial action

**A note of departmental names:** it is noted here that at the time of writing the various departments were being restructured and reconstituted. Names have therefore changed. The use of departmental names and designations therefore is of the most generic nature and will be updated when departmental names are stabilized.

## What is a Regulator?

Consult 'State Institutions' in Chapter 9 of the Constitution. The interpretation from S181 of that chapter would likely be as follows:

- The sector regulator is an independent and impartial entity whose mandate it is to protect the consumer of services without fear, favour or prejudice.
- The functions of the regulator are to:
- ensure full compliance with legislation, regulations, standards and policies; and
- No person or organ of state may interfere with the functioning of these institutions
- A regulator is only accountable to the General Assembly and must report on its activities and the performance of its functions to the Assembly at least once a year.

## Regulation processes

This document will focus on what mechanisms were available specifically to the Department of Water Affairs, Department of Agriculture and Department of Environmental Affairs to monitor and enforce compliance with the laws and regulations under their corresponding jurisdictions.

### Enforcement

Enforcement is the set of actions that government take to achieve compliance within the regulated community, to regulate and to correct or halt situations that endanger the environment and public health. Enforcement by government includes:

- Inspections to determine the compliance status of the regulated community and detect violations
- Negotiations with individuals or representatives of an organisation who are out of compliance to develop mutually agreeable schedules and approaches for achieving compliance
- Legal action where necessary to compel compliance and to impose some consequences for violating the law or posing a threat to public health and the environment
- Under a PAJA a civilain may seek to bring a mandamus order against a government official or department. A mandamus application seeks an order directing a government body to do something it is required to do by statute.

# The National Water Act (NWA)

&

## The Conservation of Agricultural Resources Act (CARA)

*N*ew words

Regulatory tools for the regulation of water and land use practices fall under the two relevant statutes respectively: The National Water Act (NWA) and The Conservation of Agricultural Resources Act (CARA)

Sustainable  
Equitable  
Existing lawful use  
Unlawful use  
Schedule 1

### Water: the National Water Act

Under the National Water Policy (1997) and the National Water Act (1998), every person has the opportunity to lead a dignified and healthy life and to participate in productive economic activity. DWA as custodian of our national water resources must ensure that our resources are protected, used, developed, conserved, managed and controlled in accordance with the requirements of the policy and law. The central objective of managing water resources is to ensure that water is used to support equitable and sustainable social and economic transformation and development.

The conditions for use of water are specified by the National Water Act in Chapter 4. Water use is defined broadly, and includes taking and storing water, activities which reduce stream flow, waste discharges and disposals, controlled activities (activities which impact detrimentally on a water resource), altering a watercourse, removing water found underground for certain purposes, and recreation. In general a water use must be licensed unless it is listed in Schedule I, is an existing lawful use, is permissible under a general authorisation, or if a responsible authority waives the need for a licence. The Minister may limit the amount of water which a responsible authority may allocate. In making regulations the Minister may differentiate between different water resources, classes of water resources and geographical areas.

In regulating water use the following sections of the legislation are important:

- Constitution: Sections 24 and 27
- NWA: Sections 19, 20, 21, 29, 53, 118, 125 and 151
- and also the Water Services Act (WSA): Sections 9, 10 and 19

### Agriculture: Conservation of Agricultural Resources Act

The Department of Agriculture is tasked with monitoring and enforcing compliance with the Conservation of Agricultural Resources Act, 1983 (CARA). CARA provides for the conservation of natural agricultural resources by maintaining the production potential of land, by combating and preventing erosion and weakening or destruction of the water sources, and by the protection of vegetation and combating of weeds and invader plants.



# Tools for Enforcement

Both the Department of Water Affairs and Agriculture have compliance and enforcement officers (in the case of the DWA they are called “Blue Scorpions”). These officers have the competency to issue directives in the event of a provision of the relevant law being violated.

## New words

Predirective  
Directives  
PAJA  
Judicial Review  
Prosecution

### Directives issued under the NWA, CARA and PAJA

An executive officer may issue a Directive to a land or water user to perform or not to perform any specified act if this is essential in order to achieve the objects of the NWA and CARA. A directive issued under these two laws must follow the procedures set out by administrative law as defined by the Promotion of Administrative Justice Act (PAJA).

In accordance with the Promotion of Administrative Justice Act (PAJA), a written **warning**, that a Directive will be issued, should be provided in the form of a Pre-Directive. An opportunity should also be provided to make representations. This requirement can be dispensed with if urgency requires it to be.

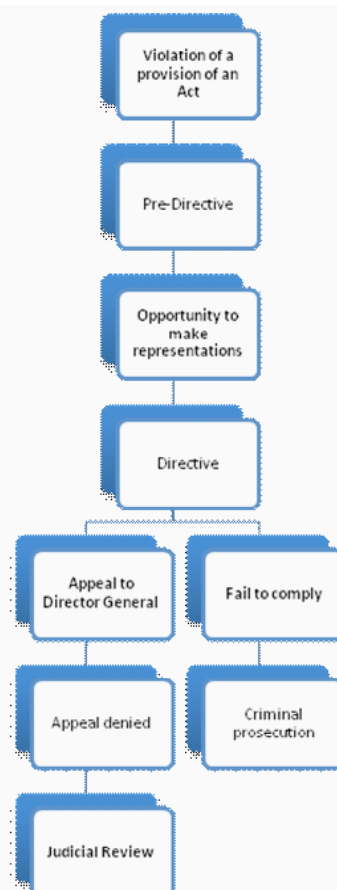
A Directive may provide requirements to be complied with in the manner and within the time period specified.

An appeal may be lodged with the Director General against a Directive.

Judicial review of the decision to issue a Directive may also be sought.

Any Directive is binding and to refuse or fail to comply with a Directive is an offence. If a Directive is not complied with, the matter may be forwarded to the South African Police Service (SAPS) for prosecution. Such an offence carries a penalty of a fine or imprisonment. A second such offence carries a greater penalty or imprisonment.

Figure 2. Directives issues in accordance with PAJA relevant to the NWA and CARA



# Tools for enforcing environmental legislation - ECA & NEMA

The competent authorities for the regulation and compliance monitoring of environmental issues are the national and provincial Departments of Environmental Affairs under the National Environmental Management Act (NEMA). The exception is the environmental management of mining activities, which fall under the jurisdiction of the Department of Mineral Resources (DMR) as per the Minerals and Petroleum Resources and Development Act (MPRDA).

## The Environmental Management Inspectors (EMIs)

The National Environmental Management Amendment Act (NEMA) empowers the Minister or MECs to designate officials in national, provincial and local government as Environmental Management Inspectors (EMIs).

The function of an EMI is to monitor and enforce compliance with the law for which he or she has been designated. In order to carry out this function, EMIs have been accorded a range of statutory powers, including inspection, investigation, enforcement and administrative powers.

With the powers given to them under NEMA, EMIs are designated to monitor and enforce compliance with the provisions of NEMA and the **specific environmental management acts** (SEMAs) which include NEMA: Biodiversity Act ; and NEMA: Protected Areas Act. Eventually the EMIs will also enforce NEMA: Air Quality Act and NEMA: Waste Bill.

## Authorisation of listed activities

Under both the Environment Conservation Act (ECA) and NEMA, a system exists whereby certain "listed" activities require authorization. Once obtained, these authorizations list conditions that must be complied with. Under ECA, the authorization is the Record of Decision (RoD). Under NEMA, this authorization is referred to as an Environmental Authorization.

As mentioned above, the EMIs use the powers given to them under NEMA to enforce compliance with NEMA. This includes enforcing compliance with the conditions of Environmental Authorizations. EMIs also enforce compliance with ECA and the RoDs. However, when monitoring and enforcing compliance with ECA and RoDs, the EMIs cannot use the enforcement mechanisms under NEMA to do so. Only the procedures provided for under ECA may be used. This is because ECA has not yet been designated a SEMA under NEMA.

- If passed, the National Environmental Laws Amendment Bill would allow EMIs to use their powers under NEMA to enforce:
- the ECA;
- the Atmospheric Pollution Prevention Act (APPA) until the NEMA: Air Quality Act is fully in effect; and
- the provisions of the NEMA: Air Quality Act currently in effect.
- Note that the EMIs can also report contraventions of other legislation to the appropriate authorities for further investigation, e.g. the National Water Act (NWA) to the Department of Water Affairs (DWA) or CARA to the Department of Agriculture (DoA).

## *New words*

Competent  
authority  
NEMA  
SEMA  
EMI  
Listed activity  
Authorisation  
RoD  
ECA

# Responsibilities of EMIs

The responsibilities of EMIs relevant to a project such as the BBR CB include the following:

## 1. Ensuring that the proper authorizations are in place:

This entails enforcing the provisions in NEMA and ECA that state that all listed activities require an authorization . If an authorization should have been issued under ECA then ECA is used to enforce that requirement. If an authorization should have been issued under NEMA then NEMA is used to enforce the requirement. Note that the EMIs have no jurisdiction to enforce authorizations with respect to mining activities. The DMR has its own environmental inspectors for ensuring compliance.

## 2. Ensuring that the conditions of authorizations are not violated:

This entails enforcing the provisions in NEMA and ECA that state that the conditions of an authorization must not be violated . Again, if an authorization was issued under ECA then ECA must be used to enforce it and if an authorization was issued under NEMA then NEMA must be used to enforce it. Note that the EMIs have no jurisdiction to enforce the conditions of authorizations with respect to mining activities.

## 3. Ensuring compliance with the “environmental duty of care”:

This entails enforcing the duty of care in s.28 NEMA applicable to “every person who causes, has caused or may cause significant pollution or degradation of the environment”. In this case, it is irrelevant whether there is a listed activity involved or whether it began under ECA or NEMA.

## 4. Ensuring compliance with the specific provisions of the SEMAs:

this entails monitoring and enforcing compliance with all of the provisions in the SEMAs.

# Tools for Enforcement

In addition to several powers of investigation and inspection for monitoring compliance, several tools are available to enforce environmental laws. Many of the mechanisms can be combined or used sequentially.

## Section 28 NEMA Directives

Section 28 of NEMA contemplates a duty of care to take “reasonable measures” to prevent, minimize and rectify any significant pollution or degradation of the environment. This duty of care applies to “every person”, not just those with Environmental Authorizations.

The list of “reasonable measures” includes the investigation, assessment and evaluation of impact on the environment; the containment or prevention of

### *New words*

“Duty of care”  
Significant pollution  
NEMA directives  
Reasonable  
measures

movement of pollutants; the elimination of the sources of pollution; and the remediation of the effects of pollution.

The section operates as follows: if a person causing significant pollution or degradation fails to take "reasonable measures" then the Director-General (DG) or the Head of the provincial Department (HoD) may direct the polluter to take a number of steps including: investigating, evaluating, assessing and reporting the impact of specific activities and taking "reasonable measures" before a certain date.

**N***ew words*

In keeping with PAJA, this process would include an initial warning, in the form of a Pre-Directive and an opportunity for the person to make representations before a Directive is issued. This requirement may be dispensed with if urgency requires it to be.

Director general  
Administrative  
actions

The consequence of a failure to comply with such a Directive is that the DG or the HoD may then step in to take the "reasonable measures" to remedy the situation and recover the costs involved .

As with all administrative actions by the state, a s. 28 Directive would be reviewable by a court in accordance with the Promotion of Administrative Justice Act (PAJA) .

If a DG or HoD has not issued a Directive to take certain steps discussed above, any person can give 30 days' notice to the DG or HoD and then apply to a court for an order directing the DG or HoD to take those steps.

S. 31L Compliance Notices are preferred over s. 28 Directives because of this shift of burden by which the responsibility to rehabilitate shifts to the state. Frequently, the perpetrator is "judgment proof" by the time the DG or HoD has taken rehabilitative steps and is trying to recover costs. This means that the money can no longer be recovered, for example because of bankruptcy, etc.

## Section 31A Environment and Conservation Act, (ECA) Directives

Section 31A of the ECA states that a Directive may be issued against any person who performs an activity or fails to perform an activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected.

Section 31A Directives are used to enforce compliance with authorizations issued under ECA. In the past, they were also used to enforce the general duty of care before s. 28 NEMA came in.

The relevant actor is the Minister, competent authority, local authority or government institution, as the case may be. S/he or it may, in writing, direct a person to cease an activity or take steps within a specified time period to eliminate, reduce or prevent the damage, danger or detrimental effect.

A Pre-Directive must be issued whereby the intent to issue a Directive is expressed. An opportunity is given to the person to furnish reasons stipulating why the Department should not issue a Directive . Note that a Pre-Directive can be dispensed with if the situation is urgent .

A Directive is issued to cease activity or take necessary steps to eliminate, reduce or prevent the damage, danger or detrimental effect.

If the damage is not rehabilitated, the Minister, competent authority, local authority or government institution can take steps to rehabilitate and recover the costs from the perpetrator.

An internal appeal may be sought to the Minister or Competent Authority . Judicial review of s. 31A Directives is codified in the ECA. The person has 30 days in which to request written reasons of the decision and reasons must be furnished within 30 days. The person then has 30 days to seek judicial review of the decision in Supreme Court.

A failure to comply with a Directive issued under s. 31A of the ECA is an offence punishable by a fine or a maximum of three months imprisonment. Thus, a failure to comply can result in the matter being referred to a Director of Prosecution for a criminal prosecution.

If the accused is convicted, an order may be made to repair the damage. If the damage is not repaired, the state can take necessary steps to repair the damage and recover the cost from the convicted person.

## Section 31L NEMA Compliance Notices

An EMI can issue a Compliance Notice if s/he has reasonable grounds for believing that a person has not complied with a provision of the law over which the EMIs have jurisdiction or with a term or condition of a permit/authorization/other instrument.

Thus a Compliance Notice is useful for enforcing the requirements for: authorisations when the activity is a listed one; compliance with the conditions of those authorisations; and compliance with provisions of NEMA and SEMAs.

If, after an inspection, a Compliance Notice is to be issued, the matter is referred to a Grade 1 EMI to issue it, as EMIs with Grades 2-5 do not have the power to.

A Pre-Compliance Notice will first be issued, as advanced warning must be given of the intention to issue a Compliance Notice and an opportunity must be provided for the affected person to make representations .

A Pre-Compliance Notice can be dispensed with if the EMI has reason to believe that the issuing of a Pre-Compliance Notice will cause a delay resulting in significant and irreversible harm to the environment . In that case, a Compliance Notice is issued right away. Reasons for dispensing with the Pre-Compliance Notice must be given in the Compliance Notice .

A Compliance Notice is then issued setting out: details of the conduct constituting non-compliance; any steps the person must take and the period within which those steps must be taken; any thing which the person may not do; the period during which the person may not do it; and the procedure to be followed in lodging an objection to the Compliance Notice with the Minister or MEC, as the case may be. An EMI may, on good cause shown, vary a Compliance Notice and extend the period within which the person must comply with the notice.

An objection to a Compliance Notice may be lodged within 30 days with the Minister or MEC and a suspension of the Compliance Notice in the meantime can also be applied for. The Compliance Notice is then confirmed, modified or cancelled .

In keeping with PAJA, an affected person may seek judicial review in a court of the decision to issue a Compliance Notice.

In contrast to a Directive issued under s. 28 of NEMA, but similar to a s. 31A ECA Directive, failure to comply with a Compliance Notice is an offence. The EMI must report the failure to the Minister or MEC and s/he may: revoke the authorization/permit/other instrument which is the subject of the Compliance Notice; take any necessary steps and recover the costs from the person who failed to comply; and report the matter to a Director of Prosecution Services for criminal prosecution.

## Interdicts

Interdicts are a remedy for present and future conduct. Theoretically, they can be used to put a stop to harmful activity and often at an early stage, allowing proactive intervention and prevention. However, the test to be met is a stringent one, making them more difficult to obtain in practice. In addition, feedback from the EMIs interviewed was that applications for interdicts are seldom made, as they are fraught with delays. This is because the matter must be referred to a state attorney before an application can be brought, as the EMIs with legal backgrounds at DEA are not admitted to the bar. This referral process can take a very long time.

Generally, to obtain an interdict, the applicant must show: a reasonable apprehension of the infringement of a right; that there is no suitable alternative remedy; and that the balance of convenience favours granting an interdict over not granting one.

## Criminal prosecutions

Criminal prosecutions can be used immediately in the case of a number of violations. However, it is DEA's policy that administrative remedies should be used first where they are an option and criminal prosecutions should be a last resort.

It is felt that criminal prosecutions are a very lengthy process as there are long delays. There is the investigation, which takes a long time and then there are the delays while the Director of Public Prosecution (DPP), whom the matter must be referred to, decides whether the case should be prosecuted.

The author's own analysis is that there are many disadvantages to criminal prosecutions:

- From the point of view of the damage to be corrected, criminal prosecutions are more reactive rather than preventative;
- The criminal burden of proof is much higher than the civil standard applicable to the other courses of action. In a criminal prosecution an accused is normally considered innocent until proven guilty and that guilt must be proven beyond a reasonable doubt (as opposed to on a balance of probabilities in the civil context). That burden can be very difficult to meet in situations where many facts are involved and expert opinions are required to decipher them; and
- Generally in a criminal prosecution, criminal intent must be shown in addition to the actions that are the subject of the offence. This can be difficult to prove and would have its own particular challenges in the environmental context.
- That said, the deterrent effect is not without value, especially in a legal climate such as South Africa's where the rule of law does not seem particularly strong.

## Rectification applications under s. 24G of NEMA

A Rectification application under s. 24G of NEMA is a process by which a person who does not have a valid Environmental Authorization for a listed activity under NEMA can apply for one after the fact. In a sense this course

## *N*ew words

Interdict  
Infringement of  
rights  
Referral  
Remedy  
Criminal procedure  
DPP  
Rectification  
application



## *New words*

Administrative fine  
Environmental  
management plan  
Procedural fairness  
Tribunal

of action is mis-categorized, as it is not an enforcement tool per se. Rather it is an application by which the violator can rectify his or her non-compliance. The normal procedure is that a Pre-Compliance Notice would be issued under s. 31L of NEMA, alerting the violator to the non-compliance and stating that a rectification application will be accepted.

Upon receiving the application and an administrative fine (not exceeding R1 million), the Minister or MEC may issue a Directive to: compile a report similar to an environmental impact assessment; submit an environmental management plan; and provide any other requested information. After considering the submissions, the Minister or MEC may issue a Directive to cease the activity and rehabilitate or issue an Environmental Authorization.

If the Directive to cease and rehabilitate is not complied with or the conditions of the authorization are violated, the matter may be referred for criminal prosecution.

### **A note on procedural fairness and judicial review under PAJA**

The above procedures, excluding criminal prosecutions and interdicts, are administrative actions. PAJA stipulates that certain requirements be met where any **administrative action** is concerned. Some of these requirements are concretized in NEMA and ECA. Those that are not must nonetheless be met.

Administrative action must be procedurally fair. This means that a clear statement and adequate notice must be given of the nature and purpose of the proposed action (hence the Pre-Compliance Notices and Pre-Directives). This also means that a reasonable opportunity must be given to make representations and notice must be given of any internal rights of review or appeal. Also, notice must be given of the right to request reasons within 90 days of the action.

However, PAJA also provides that, if it is reasonable and justifiable in the circumstances, the notice requirements listed above may be dispensed with. A decision to dispense with the requirements must take into account: the nature and purpose and the need to take the action, the likely effect of the action; the urgency of taking the action and the urgency of the matter; and the need to promote an efficient administration and good governance.

A person affected by an administrative action may request written reasons if none have been provided within 90 days. The administrator must then supply the reasons within another 90 days. This requirement can be dispensed with if it is reasonable and justifiable in the circumstances. Similar considerations apply as do in the case of dispensing with the notice requirement.

Any person affected by an administrative decision may institute proceedings in a court or a tribunal for judicial review of that decision. This must occur "without delay" and no later than 180 days from the day that the person became aware of the action and the reasons for it or after any internal remedies have been concluded. Internal remedies must be exhausted first. This requirement may be dispensed with in exceptional circumstances.

While the requirements of PAJA may seem onerous, there is no doubt that ensuring fairness in government action is a laudable goal. The perceived tension between the procedural fairness requirements and the goal of protecting the environment may not be well founded as at each step of the process, PAJA provides for exemptions from these requirements if it is reasonable and justifiable in the circumstances.

Figure 3. Enforcement under NEMA illustrated. No authorization exists for a listed activity

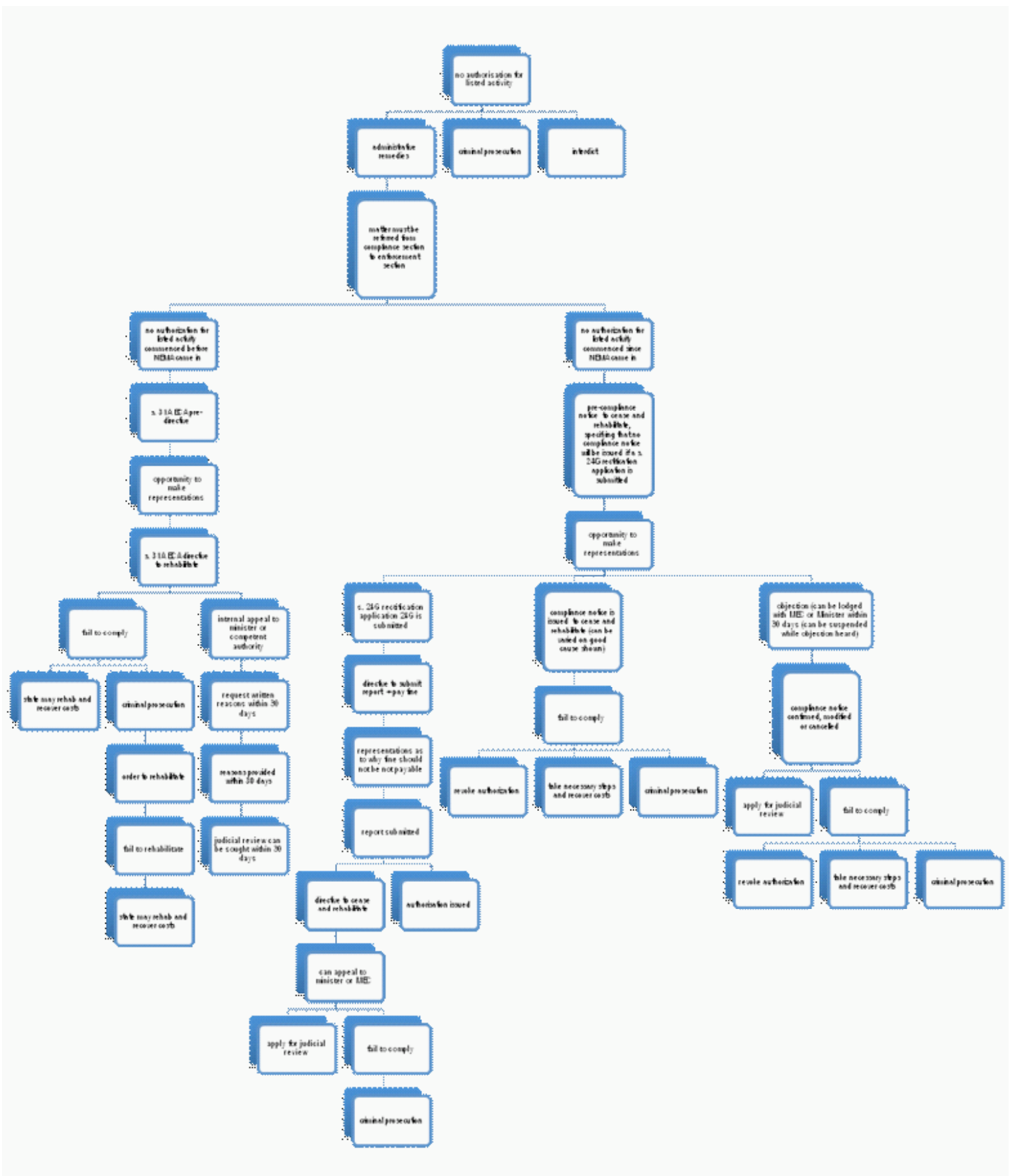


Figure 4. Enforcement under NEMA illustrated. A condition of an authorisation is being violated

