



Information Document

Compliance Inspections by Environmental Management Inspectors of facilities with Environmental Authorisations

March 2007

INTRODUCTION

As at March 2007, officials in the Department of Environmental Affairs and Tourism (DEAT)¹ and most provincial environment departments are now trained and designated as Environmental Management Inspectors (EMIs). The functions of these EMIs are (a) to monitor compliance with, and (b) enforce, certain national environmental legislation, including regulations and permits issued under that legislation. To fulfil their functions, EMIs are given a range of inspection, investigation and enforcement powers.

COMPLIANCE INSPECTIONS

DEAT has already commenced preparation for a series of prioritised compliance inspections in two key industrial sectors in 2007/8, namely the refineries industry and the iron and steel and ferroalloy industries. These inspections will be joint projects with provincial and local government. Joint inspections will also take place at other facilities to which the authorities' attention is drawn when possible non-compliance is detected through, inter alia, complaints, failure to submit audit or monitoring reports, emergency incidents, media reports and environmental quality data from a range of sources.

In addition, provincial environment departments have their own strategic compliance programmes, particularly in relation to compliance with environmental impact assessment authorisations, and both proactive and reactive inspections will take place in line with these strategies.

Inspections are firstly intended to assess and ensure compliance with environmental legislation, but also to support other projects such as:

- the national programme of prioritised review of registration certificates issued in terms of the Atmospheric Pollution Prevention Act, 1965 in preparation for the commencement of the National Environmental Management: Air Quality Act, 2004;
- the transfer of the permitting of disposal sites in terms of Section 20 of the Environment Conservation Act, 1989 from the Department of Water Affairs and Forestry to DEAT;
- the implementation of the 2006 Environmental Impact Assessment Regulations under the National Environmental Management Act, 1998;
- monitoring the status or level of environmental compliance at a strategic level.

¹ This includes the remaining Air Pollution Control Officers previously designated under the Atmospheric Pollution Prevention Act, 1965. Note that, on 5 May 2006, the Minister designated the Director-General of DEAT as the only Chief Air Pollution Control Officer.

Managers of facilities which have environmental authorisations and/or environmental impacts should therefore expect and plan for compliance inspections, announced or unannounced, by EMIs to ascertain the facility's compliance with environmental legislation.

The following factors place no legal constraint on EMIs' powers to inspect a particular facility:²

- whether or not EMIs have or will inspect all the facilities in the area, or all the facilities in a particular sector;
- whether or not other similar facilities may be in non-compliance (all suspected non-compliance by other facilities may be reported to the EMI on site, to DEAT's anonymous toll-free Environmental Crimes and Incidents Hotline on 0800 205 005) or to the relevant provincial environment department;
- whether or not a complaint has been received;
- whether or not the inspection forms part of the annual planned programme of inspections;
- whether or not other departments have recently inspected the facility; or
- whether or not the facility is ISO14001 accredited and has recently been audited.

WHAT TO EXPECT

EMIs have formally adopted the following core values:

- Treating all institutions, enterprises and individuals in a manner that is firm, but fair
- Carrying out our work and conducting ourselves:
 - in an effective and efficient manner
 - in accordance with the highest ethical standards
 - with the utmost respect for the human rights of every person
 - with regard for the principles of environmental justice
 - in cooperation with other EMIs and other enforcement agencies.

EMIs will therefore be polite, efficient and professional during inspections, and expect the same from managers, staff and professional representatives at a facility.

Appointments

EMIs are entitled to enter any business premises without a warrant at any reasonable time to ascertain compliance. They do not need to make an appointment, and are entitled to arrive unannounced. However, in many cases they will advise facilities in advance of their planned inspection.

Who will inspect?

Inspections are likely to be carried out by a team of EMIs with different skills and specialisations. EMIs will often be employed by different institutions. EMIs are also entitled to bring with them any person whose assistance is reasonably required, including other government experts or external consultants, such as sampling experts or process engineers.³

EMIs must introduce and identify themselves to you when they arrive.

² Not a complete list.

³ Section 31G(2)(b)

Procedure

The inspection team is likely to have a pre-inspection meeting for introductions and to advise facility staff of exactly what they require (particularly access to staff and documents), and how long they think the process will take. EMIs are likely to split into teams in the interest of efficiency.

Take note that “any business premises” means the entire business premises, including offices and all operational and storage areas. EMIs may therefore inspect any area of the premises.

On-site safety

Although many of our EMIs have their own safety equipment, please ensure that you have personal protective equipment (PPE) available, and that you provide them with the necessary safety information relevant to your site.⁴

Confidentiality

EMIs are not conducting inspections in order to access commercial information (e.g. pricing, costing and expansion plans). However, it is possible that an EMI may come across such information during an inspection, or that such information may be relevant to the inspection (e.g. where an expansion requires authorisation).

It is a criminal offence for an EMI (and any other person) to disclose information about a company that was acquired while exercising or performing a power or duty in terms of NEMA or a SEMA, unless:

- the information is disclosed in compliance with legislative provisions (such as the Promotion of Access of Information Act, 2000, which has its own protection for companies⁵);
- the person is ordered by a court to disclose the information;
- if the information is disclosed to enable a person to perform a function in terms of NEMA or a SEMA; or
- for the purposes of the administration of justice.⁶

An EMI convicted of this offence is liable to a fine of R20 000 or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment. It is also likely to constitute a disciplinary offence for an EMI.

If you have evidence to support an allegation that an EMI has disclosed information obtained during an inspection in contravention of the exceptions above, you are encouraged to report this to DEAT, the relevant provincial environment department (where the EMI is designated by the provincial MEC) and to the South African Police Services for further investigation.

Note, however, that you cannot refuse an EMI access to your site, a particular part of the site, persons or documents relevant to their inspection to ascertain compliance with environmental legislation, because you are concerned that they may come across information you regard as sensitive.

⁴ See S9 of the Occupational Health and Safety Act as read with Section 2 of the General Safety Regulations (GN R1031 in GG 10252 of 30 May 1986)

⁵ See, for example, Section 36 of the Promotion of Access to Information Act, 2000

⁶ Section 31Q

Legal representation

Companies are not ordinarily entitled to insist on having legal representation during an inspection⁷ and the inspection can therefore not be delayed or postponed by the unavailability of your attorney. However, EMIs will not object to an attorney attending the inspection.

Consequences of not cooperating with an EMI

Note that it is an offence to do any of the following:

- hinder or interfere with an EMI in the execution of that inspector's official duties;
- furnish false or misleading information when complying with a request of an EMI; or
- fail to comply with a request of an EMI.

A person convicted of one of these offences is liable to a fine of R20 000 or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.⁸

Demonstrating compliance

Note that the authorised facility may be requested to demonstrate compliance with its environmental authorisations.

After the inspection

After the inspection, you are likely to receive feedback from the EMI's institution. Although it is possible that you may get some immediate feedback, please do not ask EMIs do provide you with a report while still on site. They will go back to their office, prepare a report and make recommendations to their institution.

It is also possible that, before making recommendations, an EMI may come back to your site to verify information, or to conduct a more thorough investigation in respect of certain aspects.

Consequences of non-compliance

A finding of non-compliance may have, but is not limited to, any of the following consequences:

- a formal or informal warning to comply;
- a compliance notice or directive (usually preceded by a pre-compliance notice or pre-directive);
- the withdrawal of an authorisation where the rights in that authorisation have been abused, or there is little or no intention of complying, or ability to comply, with that authorisation;
- criminal charges, particularly in, but not limited to, the following cases:
 - no authorisation for an activity that requires authorisation (noting, however, that no person will be prosecuted for not being in possession a valid authorisation if that person has taken all reasonable measures to obtain such an authorisation);
 - intentional or negligent harm or potential harm to the environment;
 - intentional or negligent disregard for the health and wellbeing of employees;
 - intentional or negligent non-compliance with legislation or a permit;
 - repeated non-compliance with legislation or a permit;
 - non-compliance despite advice, warnings or a compliance notice or directive;

⁷ Unless the particular situation falls within the provision of Section 35 of the Constitution or other applicable legislation.

⁸ Section 34A(1) of NEMA

- intentional false reporting or misinformation; and/or
- interfering with an EMIs' inspection, or refusing an EMI access to a site.
- if the non-complying facility is ISO 14001 accredited, notice of non-compliance to the ISO accreditation body.

HOW TO PREPARE FOR A COMPLIANCE INSPECTION

1. Ensure that you are in full compliance with all applicable environmental legislation and permits.
2. Ensure that staff on site, as well as relevant management, are aware of the fact that there may be an inspection of the facility at any time. Ensure that those staff members you would like on site during an inspection are contactable. It is a good idea to identify and communicate which staff members should be the primary points of contact for the EMIs (a number of alternative people should be identified). It is important that you identify staff who are fully conversant with all processes and procedures on site.
3. Have the necessary PPE on site.
4. Ensure that all relevant documents and electronic information are on-site and easily available. Since EMIs will, inter alia, inspect compliance with authorisations, it saves an enormous amount of time for EMIs and facility staff if you have a file for each permit that contains evidence of compliance with each condition in the permit. Also be prepared to make photocopies of documents or copy electronic information if requested.
5. If you believe that you need legal representation during the inspection, ensure that your attorneys are on stand-by.

EMIs' LEGISLATIVE MANDATES

Legislation enforceable by EMIs includes:

- the National Environmental Management Act, 1998 ("NEMA"), including all regulations and all environmental authorisations (including EIA Records of Decision previously issued under the Environment Conservation Act, 1989). Note in particular that this includes Section 28(1) of NEMA, which places an obligation on a person who "causes, has caused or may cause significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring";
- the National Environmental Management: Protected Areas Act, 2004 ("NEM:PAA"), including regulations under this act. Note that NEM:PAA also applies to all World Heritage Areas, such as the Great St Lucia Wetlands Park, the Vredefort Dome and the Cradle of Humankind; and
- the National Environmental Management: Biodiversity Act, 2004.

Other legislation will be included in this list in the near future.

If the EMI suspects that the facility is in contravention of other legislation such as the National Water Act, 1998, or municipal by-laws, it is highly likely that this will be reported to the appropriate authorities for further investigation. Also note that offences outside of the EMI's mandate may nevertheless be added to a charge sheet in a case investigated by an EMI, including common law crimes such as fraud and other statutory crimes such as offences under the Occupational Health and Safety Act, 1993, the National Water Act, 1998 and the Hazardous Substances Act 1973.

EMIs' POWERS

Note that, in this section, all references to "law" or "permit" are references to a law within the EMI's mandate or permits issued in terms of a law within the EMI's mandate described above.

Entering a site

As mentioned above, an EMI can enter and inspect any building, land or premises at any reasonable time without a warrant to ascertain compliance with relevant environmental legislation. Note that a warrant is required to inspect residential premises, unless there is consent, or there are reasonable grounds to believe that a warrant would be issued on application, but the delay caused by application would “defeat the object of the entry or inspection”.⁹

Inspection of documents and computer records

An EMI is entitled to:

- request permits, licences, permissions, certificates, authorisations “or any other document” issued in terms of NEMA or a SPECIFIC environmental management Act as defined in Section 1 of NEMA (“SEMA”);¹⁰
- inspect, or question a person about, any document, book or record or any written or electronic information which may be relevant for the purpose of and offence or breach of the law or permit, or to which NEMA or a SEMA relates;¹¹
- copy or make extracts from, or remove in order to make copies of, any document, book or record or any written or electronic information;¹² and
- require a person to produce or deliver to a place specified by the EMI any document, book or record or any written or electronic information.¹³

Questioning people

In addition to normal interviewing during an inspection, an EMI may also formally question a person about any act or omission (or any specimen, article, substance or other item¹⁴) in respect of which there is a reasonable suspicion that an act or omission constitutes either:

- an offence in terms of mandated legislation;
- a breach of mandated legislation; or
- a breach of a term/condition of a permit issued under mandated legislation.¹⁵

A person questioned under Section 31H(1)(a) is not compelled to answer questions.

Should a person refuse to answer the EMI's questions, the EMI may issue him or her with a notice (in a prescribed form) with questions. A recipient of such a notice must answer all the questions, even if it incriminates him or herself, but may then not be prosecuted using the evidence given in his or answers.¹⁶

Other site activities

⁹ Section 31K

¹⁰ Section 31P

¹¹ Section 31H(1)(c) as read with (a)

¹² Section 31H(1)(d) as read with 31H(4)

¹³ Section 31H(1)(e)

¹⁴ Section 31H(1)(f)

¹⁵ Section 31H(1)(a)

¹⁶ Section 31H(1)(b) as read with 31H(2) and 31H(3). Note that only an EMI can issue this notice in its prescribed form, and a person being interviewed cannot decide to use this provision on his or her own.

While on site, an EMI is also entitled to do the following:¹⁷

- inspect and remove any specimen, article, substance or other item in respect of the EMI has reasonable suspicion may have been used in an offence or breach of the law or permit.¹⁸ The EMI may also request the person who was in control of the item to take it to a designated place; if the person so requested refuses, the EMI may do so him/herself;¹⁹
- seize anything in or on any business or residential premises or land that may be used as evidence in the prosecution of any person for an offence under NEMA or any SEMA;²⁰
- take photographs or make audiovisual recordings of anything or any person relevant for the purpose of an investigation;²¹
- dig or bore into the soil;²²
- take samples;²³ and
- remove waste or other matter deposited or discharged deposited or discharged in contravention of legislation and/or a permit.²⁴

Searching vehicles, vessels and aircraft

An EMI may stop, immobilise and search vehicles, vessels and even aircraft in certain circumstances.²⁵

Searching premises, containers and persons and seizing items

An EMI has the same powers that an ordinary police officer has in terms of the Criminal Procedure Act, 1977, to search any person or container or premises and seize certain items. Normally such searches are carried out with a warrant, but there are circumstances which justify searches without a warrant. Only a court may release vehicles, vessels and aircraft seized by an EMI.²⁶

Arrest

An EMI has the same powers as an ordinary police officer has in terms of the Criminal Procedure Act, 1977, to arrest suspects. Arrest can take place with or without a warrant in certain circumstances. It is often not necessary to arrest a suspect to secure their presence in court, and an ordinary summons for their appearance in court will be issued in due course.

Compliance notices

If an EMI has reasonable grounds to believe that a person has not complied with a provision of the law or a permit, he or she can issue (or if not specifically empowered, recommend) a compliance notice. A compliance notice must be issued in terms of a prescribed procedure and in a prescribed form. Companies will be given

¹⁷ Section 31K(7)

¹⁸ Section 31H(1)(f)

¹⁹ Section 31I(2)

²⁰ Section 31K(5) as read with 31K(6)

²¹ Section 31H(1)(g)

²² Section 31H(1)(h)

²³ Section 31H(1)(i)

²⁴ Section 31H(1)(j)

²⁵ Section 31J

²⁶ Section 34F

advance notice of an EMI's intention to issue a compliance notice, with reasonable opportunity to make representations, unless the delay in doing so will result in significant and irreversible harm to the environment.

Failure to comply with a compliance notice is a criminal offence.²⁷

OTHER IMPORTANT PROVISIONS TO NOTE

Other administrative enforcement mechanisms

Following an inspection, and depending on the particular circumstances, a decision may be made to use an administrative mechanism other than a compliance notice. The facility may therefore be issued with either a directive in terms of NEMA's Section 28, or a directive in terms of ECA's²⁸ Section 31A in circumstances where there is a breach of the duty of care (as set out in section 28 of NEMA and/or the applicable sections of ECA and/or other relevant environmental legislation) where activities are resulting in, have resulted in or may result in serious damage to the environment. Facilities will usually be given advance notice of the intention to issue a directive, with a reasonable opportunity, based on the circumstances, to make representations.

Costs that can be recovered from a company

When a company or person is convicted of an offence under a provision listed in Schedule 3 to NEMA, the magistrate or judge may make any of the following civil orders:

- payment of the cost of the loss or damage caused (including the cost of rehabilitation);²⁹
- payment of damages or compensation in the amount of, or a fine equal to, the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence;³⁰
- payment of the costs of investigation and prosecution of that offence.³¹

Other parties that may be criminally liable

A company or person can be guilty of an offence if a manager, agent (which could include a subcontractor) or employee of that company or person commits or omits an act which constitutes an offence because the employer failed to take all reasonable steps to prevent the act or omission.³²

A manager, agent or employee may also be convicted and sentenced as if he or she were the employer if that person does or omits to do an act on behalf of the employer which act would be an offence under a provision in NEMA or its amendments, schedules or regulations.³³

A person who is or was a director of a company (or member of a close corporation or partner in a partnership) at the time of the commission by that company (or close corporation or partnership) of an offence under the relevant Acts, is guilty of the offence and liable to the applicable penalty if the offence results from failure of that director to take all reasonable steps necessary under the circumstances to prevent commission of offence.³⁴

²⁷ Section 31L, M and N.

²⁸ Environment Conservation Act 73 of 1989

²⁹ Section 34(1) and (2)

³⁰ Section 34(3)

³¹ Section 34(4)

³² Section 34(5)

³³ Section 34(6)

³⁴ Section 34(7) and (8)

Cancellation of and disqualification for permits

If a person fails to comply with a compliance notice issued by an EMI (which has to be done in writing in accordance with a prescribed procedure), the Minister or relevant MEC may revoke or vary that person's permit, take the necessary steps and recover the costs from the offender, and refer the matter to the National Prosecuting Authority for prosecution.

In addition, the court convicting a person of an offence in terms of NEMA or a SEMA may:

- withdraw any permit or authorisation under NEMA or a SEMA if the rights under that permit had been abused;
- disqualify that person from obtaining a permit or other authorisation for up to five years, and order that all other permitting authorities be notified of such disqualification.³⁵

Forfeiture of items used to commit environmental crime

A court convicting a person of an offence in terms of NEMA may declare any item - including but not limited to any specimen, container, vehicle, vessel, aircraft or document - that was used for the purpose of or in connection with the commission of the offence and was seized under NEMA, to be forfeited to the State.³⁶

Payment of part of fine to informers

A court which imposes a fine for an offence in terms of NEMA or a SEMA may order that up to ¼ of the fine be paid to the person whose evidence led to the conviction or who assisted in bringing the offender to justice.

IN CONCLUSION

The primary objective of the establishment of the Environmental Management Inspectorate was to ensure greater compliance with environmental legislation. If a person is in compliance, or acknowledges problems and shows a real commitment to coming into compliance (not only because they have been caught out), there is no need to fear a compliance inspection. If, however, there is no co-operation with, threatening or abuse of EMI's or intentional concealment of information from EMIs, it can be expected that serious consequences will follow.

A compliance inspection should be viewed as a positive experience even if some form of enforcement action follows, as the aim of such inspections is to ensure improved compliance and better environmental management at the facility.

Please note that this document is not intended to be a complete statement of the law, but merely a guide to assist industry and other stakeholders, inter alia, during a compliance inspection. If you are in doubt about your rights and obligations in relation to environmental legislation or regulations, please consult an appropriately qualified professional, such as an attorney.

³⁵ Section 34C

³⁶ Section 34D