

South Africa

Country Profile

Editor's Note: This is the seventeenth in a series of articles summarizing various countries' government and SH&E legislative processes. It is intended to serve as a useful planning tool for SH&E professionals preparing to conduct business in the profiled country. Previous profiles include Australia, Brazil, Chile, China, Germany, India, Indonesia, Ireland, Italy, Japan, Kuwait, Mexico, the Netherlands, the United Kingdom, Singapore and Spain. Country profiles are provided courtesy of AECOM and are also available on the *International Practice Specialty website*. AECOM offers complete SH&E protocols for these and many other countries. Requests for additional country-specific information should be directed to Halley Moriyama at halley.moriyama@aecom.com; +1-978-589-3233 or Jack Fearing, CPEA, at +1-703-462-7294; jack.fearing@dyn-intl.com.

South Africa's administrative capital is Tshwane, and the parliament is in Cape Town. The largest city of the country and one of the three biggest urban areas of the African continent is Johannesburg.

After the end of the Apartheid regime, South Africa had 11 official languages, nearly as much as the European Union. However, these are not equally distributed neither. Less than 20% of the population speaks Zulu (concentrated in the province of KwaZulu-Natal), Xhosa (mostly in Eastern Cape), Sotho and northern Sotho (mostly in the provinces of Gauteng, Limpopo and Mpumalanga) and English (mostly in Western Cape). About 10% of the population speaks Afrikaans (mostly in Vrystaat, Northern Cape und North West). Smaller groups speak Ndebele, Tswana, Venda, Tsonga, Pedi and Swasi (Swati).

For many centuries, only the languages of the white minority were official—English and (not always) Afrikaans. Only since the shifting of the government to the African National Congress under Nelson Mandela after 1990 and the end of the Apartheid regime did South

Africa begin to look for a natural behavior concerning its immense richness in languages. This process is ongoing.

Currently, it seems to be best to manage all eleven official languages at the same official level throughout the country. In the near future, there might be trends toward concentrating on certain majority languages in certain regions (for example, Zulu could officially become the predominant language in KwaZulu-Natal).

There seems to be another trend to support English as an official administrative language throughout the country. In most regions, next to black and white people, there are people of Asian origin, mostly from India, who use English as their language. The shortcoming of English as a national language is easy to guess: the English-speaking white minority would have the great advantage of not needing to learn a foreign language, and the black majorities would need to learn a non-African language. Please see the sidebar on this page for the provinces and their capital cities.



List of Provinces & Capitals

- Eastern Cape (Bisho)
- Mpumalanga (Mombela)
- Gauteng (Johannesburg)
- KwaZulu-Natal (Ethekwini)
- Northern Cape (Kimberley)
- Limpopo (Polokwane)
- North-West Province (Mmabatho)
- Free State (Bloemfontein)
- Western Cape (Cape Town)

GOVERNMENT

South Africa is a republic. President Jacob Zuma (chief of state) was elected by the National Assembly to a five-year term of office in 2009 and heads the government's executive branch. The president's responsibilities include appointing a cabinet, signing bills into law and serving as commander-in-chief of the military.

The legislative branch consists of a bicameral parliament, the National Assembly and the National Council of Provinces. The National Assembly currently has 400 members who are elected by a system of "list-proportional representation." Under this procedure, each of the parties appearing on the ballot submits a rank-ordered list of candidates. The voters then cast their ballots for one party. The seats in the National Assembly are allocated on the basis of the percentage of votes each party receives. The National Council of Provinces consists of 90 members, ten from each of the nine provinces. Each provincial delegation consists of six permanent and four rotating delegates.

The judicial branch consists of five courts. The Constitutional Court is the highest court for interpreting constitutional questions, while the Supreme Court of

Appeal is the highest court of appeal except in constitutional matters. The Supreme Court of Appeal may decide only appeals or issues connected with appeals. The High Court may decide any constitutional matter except a matter that only the Constitutional Court may hear (as identified in Section 167 of the constitution) or if assigned by an Act of Parliament to another court. Magistrates' Courts and all other courts established in terms of an Act of Parliament may decide any matter determined by an Act of Parliament. A court of a status lower than a High Court may not inquire into or rule on the constitutionality of any legislation or any conduct of the president.

Regional authorities (provinces) have their own legislative bodies. Each province has an elected legislature and chief executive, the provincial premier.

Bills not affecting the provinces may be introduced only in the National Assembly.

in the case of provincial government; and in municipal councils in the case of local government.

LEGISLATIVE PROCESS

The constitution establishes and empowers the institutions of government. The three levels of government are national, provincial and local. Each level is distinctive, interdependent and interrelated. Legislative authority is vested in parliament in the case of the national government;

in the provincial legislatures in the case of provincial government; and in municipal councils in the case of local government.

NATIONAL LEGISLATIVE PROCESS

The South African constitution creates three different national legislative processes designed to distinguish between the enactment of amendments to the constitution, bills affecting provinces and other bills.

BILLS AMENDING THE CONSTITUTION

Amendments to the constitution may be introduced only in the National Assembly (the National Assembly is the first House of Parliament and the House to which the national executive is accountable). At least 30 days prior to the introduction of a bill to amend the constitution, particulars of the bill must be published in the Government Gazette for public comment and must be submitted to the provincial legislatures for their views. Any written comments on an amendment bill received from the public or from the provincial legislatures must be brought forth in the National Assembly on the introduction of the bill. The National Assembly considers all bills to amend the constitution and may pass them only with a supporting vote of two thirds of its members. Constitutional amendments affecting the founding provisions of Section 1, the Bill of Rights, the National Council of Provinces (NCOP) or other provincial matters may not be passed by Parliament without the support of a vote of six of the nine provinces in NCOP (NCOP is the second House of Parliament. This house aims to give the provinces representation on the national legislative process).

BILLS AFFECTING THE PROVINCES

Section 76 of the constitution identifies a category of bills affecting the provinces, including matters outlined in Schedule 4 to the constitution as well as matters relating to the provincial mandates for NCOP delegations, etc. (The different procedures prescribed by the constitution in cases of bills affecting the provinces and other bills require that to enact a bill, parliament must determine correctly at the outset of the legislative process whether the bills must be processed by the procedure outlined in Section 75 or that of Section 76. This may seem simple, but it creates complicated problems. The difficulties inherent in this exercise are not discussed here. If a Bill is not correctly characterized, the bill is not properly enacted and does not become law.)

Bills affecting the provinces may be brought forth in either house of parliament. A bill, which is passed by one house, must be referred to the other house, which may then pass it, pass an amended version or reject it. If both houses pass the same version of the bill, it is submitted to the president for assent. If the second house passes an amended version of the bill, the amended version is referred to the house in which the bill originated for its consideration and, if passed, is submitted to the president for assent. The matter is referred to the mediation committee where the two houses cannot agree on a single version of the bill. This committee may agree on the bill in the form passed by either house or in another form. If the mediation committee fails to agree within 30 days on any version of the bill, the bill lapses unless it originated in the assembly and is again passed by the assembly with the support of two-thirds of its members. If the mediation committee agrees on a version of the bill, the bill must be referred to the house or houses, which did not pass it in the accepted version and, if passed by such house or houses, it is then submitted to the president for assent. If the relevant house or houses do not pass the bill agreed upon by the mediation committee, it lapses unless it is passed again by the assembly with the support of two thirds of its members.

BILLS NOT AFFECTING THE PROVINCES

Bills not affecting the provinces may be introduced only in the National Assembly. If such a bill is passed, it must be referred to NCOP, which considers the bill and votes on it by individual members (of each provincial delegation) rather than by the delegation itself. If NCOP passes a bill, it is submitted to the president for assent. If rejected or amended by NCOP, the bill is returned to the assembly for consideration and the assembly may pass the bill with or without any amendments proposed by NCOP or may let the bill lapse. A bill passed by the assembly is referred to the president for assent.

ASSIGNMENT OF NATIONAL LEGISLATIVE POWER

Section 44(1)(a)(iii) of the constitution allows the National Assembly to assign any of its legislative powers

to a provincial legislature or to a municipal council. If a dispute concerning a conflict between national legislation and provincial legislation arises and a court cannot resolve it, the national legislation prevails over conflicting provincial laws.

PROVINCIAL LEGISLATIVE PROCESS

The provinces are not sovereign states. They exist only by virtue of the constitution and have no powers beyond those specifically conferred by the constitution. The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the following powers:

- to pass a constitution for its province or to amend any constitution passed by it in terms of Sections 42 and 143;
- to pass legislation for its province with regard to:
 - (i) any matter within a functional area listed in Schedule 4;
 - (ii) any matter within a functional area listed in Schedule 5;
 - (iii) any matter outside those functional areas and that is expressly assigned to the province by national legislation; and
 - (iv) any matter for which a provision of the constitution envisages the enactment of provincial legislation; and
- to assign any of its legislative powers to a municipal council in that province.

A provincial legislature is bound only by the constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with and within the limits of the constitution and that provincial constitution.

A provincial legislature may recommend legislation to the National Assembly concerning any matter outside the authority of that legislature or in respect of which an Act of Parliament prevails over a provincial law.

Section 116(2) of the constitution obliges a provincial legislature to make rules providing inter alia for the establishment of portfolio committees; these committees are responsible for the detailed consideration and debate of bills after their first reading. They are also the institution to which public comment on bills is usually addressed.

Members of the legislature, committees or members of the executive council can introduce ordinary bills into the provincial legislature, but only the member of the executive council responsible for finance can introduce money bills (i.e., legislation that imposes taxes, levies or duties or legislation that involves an appropriation) (The executive council of a province consists of the premier, as head of the council, and no fewer than five and no more than ten members appointed by the premier from among the members of the provincial legislature). There is a special quorum for a vote on a bill—a majority of the members of the legislature must be present. The constitution leaves most other details of the provincial leg-

islative process to be determined by the legislatures themselves in their rules. When the provincial legislature passes a bill, it is referred to the premier for his or her assent.

THE LOCAL GOVERNMENT LEGISLATIVE PROCESS

The republic is divided into metropolitan and non-metropolitan areas. In metropolitan areas, two types of local government operate: metropolitan councils and metropolitan local councils. Nonmetropolitan areas are divided into district council areas. All of these councils (collectively referred to as “municipalities”) have legislative authority.

A municipality may make and administer bylaws (also referred to as “local laws”) for the effective administration of the matters it has the right to administer. In terms of Section 156(1)(a) of the constitution, a municipality has the right to administer the local government matters listed in Part B of Schedules 4 and 5 of the constitution. In addition, a provincial government may assign any of its legislative powers to a municipal council. In terms of Section 160 of the constitution, the passing of local laws may not be delegated.

A majority of the members of a municipal council must be present before a vote may be taken on any matter. Questions concerning the passing of bylaws are determined by a decision taken by a municipal council with a supporting vote of a majority of its members. In addition, a municipal council may pass no bylaw unless:

- all members of the council have been given reasonable notice; and
- the proposed bylaw has been published for public comment.

Once these steps have been followed, the municipal council must properly promulgate the local law after adoption. A local law may not be enforced unless it has been published in the official gazette of the relevant province. It is further necessary to ensure that the local law does not conflict with a national or provincial law and is on a matter, which the municipality has a right to administer.

SH&E GOVERNMENTAL AUTHORITIES

Environmental Authorities

A variety of governmental bodies at all levels of government are involved in the environmental regulatory process.

Department of Environmental Affairs & Tourism

The department is the government’s lead agent for environmental protection. Its more important functions include the authorization (or rejection) of developments that may detrimentally affect the environment and the control of air pollution. The Department of Environmental Affairs and Tourism also represents the South African government on forums established in terms of a variety of environmental conventions/treaties signed and ratified by South Africa. The department has one national and nine provincial offices.

South African SH&E legislation provides for administrative sanctions to be imposed in the event of noncompliance. These administrative sanctions include financial penalties and/or the revocation of the permit.

Department of Water Affairs & Forestry

The department is regarded as the lead agent for the protection, use and development of the nation's water resources. Accordingly, it is entrusted with the granting of licenses for all aspects of water use (including discharge) and is also responsible for the administration and enforcement of the waste management provisions of the Environment Conservation Act No. 73 of 1989 (ECA). Although currently in the initial stages, water management in the country is envisaged to be delegated to "catchment management authorities." Until such time as these authorities have been established, the Department of Water Affairs and Forestry is responsible for water management. The department has one national and nine provincial offices.

Department of Transport

The department is responsible for the enforcement of the regulations aimed at safe transportation of hazardous substances by road.

HEALTH & SAFETY AUTHORITIES Department of Labor

This department issues various guidelines governing labor conditions. Supervision and enforcement of the Occupational Health and Safety Act No. 85 of 1993 (OHSA) and its implementing regulations are through the inspectorate and provincial directors appointed in terms of the act. The inspectorate has the authority to inspect a workplace based on a complaint or on its own initiative. Employers, employees and other responsible persons are

required to supply the provincial directors with all information requested and identified in the act.

Department of Health

The department is entrusted with the control of substances that may cause injury, ill health or death to human beings. Control is exercised over various substances by declaring them to fall into any one of four specified groups of hazardous substances. Once a substance has been declared, licensing requirements and regulations apply.

ENFORCEMENT OF SH&E REGULATIONS Administrative Actions

South African SH&E legislation provides for administrative sanctions to be imposed in the event of noncompliance. These administrative sanctions include financial penalties and/or the revocation of the permit. The financial penalties, which can be imposed on a daily or per-event basis, can range from an insignificant amount or higher, and in some instances, the potential fine is unlim-

ited to provide for the recovery of cleanup costs and/or damages. A third option involves the issuance of a notice or directive by the appropriate authority, identifying the noncompliance status of the facility and the timeframe required for correction. If the facility does not make this correction, the authority has the right to make the correction at the expense of the violator or to temporarily shut-down the facility. The revocation of the operating permit would also result in the facility's shutdown.

Although the enforcement of environmental laws in South Africa has been historically poor, the current Minister of Environmental Affairs recently expressed an intention to pressure industry to become more environmentally responsible, with specific emphasis placed on atmospheric pollution. Examples of increased political will to combat environmental pollution in South Africa include:

- hosting the 8th International Conference on Environmental Compliance and Enforcement to bring together environmental compliance and enforcement practitioners from more than 80 countries and organizations to build partnerships for enforcement cooperation and to share a wide range of skills and experiences that improve compliance with international and domestic environmental laws (2008);
- deployment of 30 environmental enforcement officers per province (2005-07);
- establishment of specialized environmental courts (2005-06);
- introduction of a fine for the commencement of listed activities without following the prescribed environmental impact assessment procedure (2005); and
- intensive training of public prosecutors aimed at equipping them with the specialized skills required for environmental prosecutions (2005).

The Department of Labor describes its approach to the regulation of health and safety as self-regulation. Underlying this approach is the recognition of the limitations of the law as a method of regulating health and safety. Therefore, it requires employers and workers to take responsibility through structures, such as the health and safety representatives and committees. It is the inspectorate's duty, appointed in terms of OHSA to ensure that employers' internal safety management systems are working. The functions and powers of the inspectorate are to:

- ensure and, where necessary, enforce compliance with the provisions of OHSA and regulations;
- inspect workplaces and places where machinery is used;
- prohibit dangerous workplace activities and conditions; and
- conduct investigations or formal inquiries into hazardous or potentially hazardous incidents occurring in workplaces or in connection with plant or machinery.

It is therefore clear that the self-regulatory approach followed by the Department of Labor does not disregard

the role of the law entirely. It recognizes that safety standards must be set and that it is the government's responsibility to penalize those employers who violate statutory requirements. The self-regulatory approach is thus not to be interpreted as a situation where an industry voluntarily regulates itself as an alternative to state regulation.

CIVIL LIABILITY FOR STATUTORY VIOLATIONS

The consequences of a breach of a statutory duty are not always only criminal but also may be used as a basis for civil action for damages (either as provided for in the act itself or in terms of the common law) (while Section 56 of the Compensation for Occupational Injuries and Diseases Act (COIDA) No. 130 of 1993 bars claims by employees' against their employers to recover damages for workplace accidents or occupational diseases, the breach of the statutory duty may assist in establishing a claim for increased compensation in terms of the act).

A party who relies on a breach of a statutory duty as a cause of action (for damage) must satisfy the court that:

- The statute, properly interpreted, gives a right of action.
- The plaintiff is a person for whose benefit the duty was imposed.
- The damage suffered was of the kind contemplated by the statute.
- The defendant's conduct constituted a breach of the statutory duty.
- The breach is causally linked to the damage.

The first two items are legal issues, which depend on the interpretation of the relevant statute. Negligence may or may not be an essential element of the claim, depending on the statute's terms. For example, the National Water Act No. 36 of 1998 (NWA) imposes liability on the owner and/or occupier of land to prevent water pollution, irrespective of whether such owner or occupier causes the pollution concerned.

Where a statute does not specifically stipulate that damage claims may be instituted in the event of a violation, the country's common law (that portion of law not contained in legislation) also provides remedies to citizens who are prejudiced by the environmental wrongs of others. The most important of these remedies are the action based on "delict" and the interdict (injunction).

Many of the more recent environmental laws (National Environmental Management Act No. 107 of 1998 (NEMA) and NWA) empower a magistrate or judge hearing a criminal matter to also inquire into any damages and/or cleanup costs, thus providing for the typical "civil" damages claims as part of the criminal prosecution process. This situation makes it much easier for the "victim" of pollution because the damages claim is pursued by the state at no extra legal cost for the person who suffered damage.

DELICT (UNLAWFUL CONDUCT)

Unlawful conduct, which causes harm to another,

whose interests and rights are protected by law, can be challenged under the common law (actio legis Aquiliae). Fault (intent or negligence) must be proven if a claim under this action is to succeed.

This action would enable a person to recover a financial (economic) loss suffered through a facility's wrongful conduct and would also apply to a claim for damages suffered as a result of bodily injuries to or the death of another. Common law liability for health and safety offences is excluded by the prohibition against the institution of a common law claim contained in COIDA and the Occupational Diseases in Mines and Works Act No. 78 of 1973.

The following elements must be present if an action of this kind is to be instituted successfully:

Wrongful act or omission. Liability depends on the wrongfulness of the act or omission of the defendant. Wrongfulness can manifest itself in different ways, such as the breach of a common law right, the breach of a statutory duty or the breach of a duty to care.

Fault (intention or negligence).

As intention on the part of the wrongdoer is more difficult to prove, the aggrieved party normally alleges negligence when instituting an Aquiline action. To prove negligence, the plaintiff would need to establish that a reasonable person in the position of the defendant (i) would have foreseen the reasonable possibility of his conduct injuring or causing harm to another in his property or person; (ii) would have taken steps to guard against the occurrence of such harm; and (iii) the defendant failed to take such steps.

Causation (a link between the conduct and the damages sustained). The plaintiff will furthermore need to prove a connection between the wrongful act and the damages suffered. Damages will not be recoverable from the wrongdoer if the damages were not foreseeable or were too remote.

Damages. The plaintiff may recover from the defendant the amount by which his or her estate was diminished as a result of the defendant's conduct. The measure of damages is the value of the article to the owner on the day of the wrongful conduct (delict). To prove this value, the plaintiff may, in respect of damage to an article, prove the reasonable cost of repairs to restore it to its original state or the difference between the pre-delict value and the post-delict value. The plaintiff is entitled to the lesser amount and must show that the measure chosen is the correct one under the circumstances. For personal injuries, the plaintiff is entitled to claim:



Since the certification of the 1996 constitution, organized groups may pursue a civil action against an environmental offender.

- 1) actual pecuniary loss, for example, medical expenses and loss of earnings;
- 2) pain and suffering; and
- 3) prospective loss, such as future medical expenses and loss of future earnings.

INTERDICT (INJUNCTION)

A special common law remedy often used in relation to environmental disputes is the possibility of having recourse to the courts under specified circumstances to prevent harm before it occurs or to prevent the continuation of an existing unlawful situation. In response to such an application, a court may order (interdict) the defendant/respondent to refrain from

unlawful conduct or to carry out a certain action or actions. To succeed in an application for an interdict, the plaintiff need not establish fault on the part of the defendant. Whereas the risk associated with the Aquilian action discussed is mainly limited to the extent of the damages proved by the plaintiff, the interdict is potentially more serious as it may result in the suspension of operations.

The applicant needs to establish that the following elements are present in order to succeed with an application for an interdict:

A clear right: It is usually said that the applicant's right need not be

shown on a balance of probabilities; it is sufficient for such right to be established prima facie. The environmental right protected in the constitution should easily satisfy this requirement in respect of both environmental and health and safety disputes.

Injury actually committed or reasonably apprehended: The injury envisaged in this requirement refers to injury either to property or person (or both) and such injury must actually have occurred or be reasonably expected.

The absence of any other ordinary remedy: Such other remedies would include a claim for damages under the Aquilian action discussed, for example.

Even if a facility operates in a manner consistent with permit requirements, it can be held liable for environmental damages. On the basis of the constitution and Section 28 of NEMA, any facility whose operations may be harmful to the environment has an obligation to be knowledgeable of the damaging effects of its operations.

Under South African law, more particularly Section 34 of NEMA, the directors of a company can be held liable to a third party for environmental damages. Such liability appears to arise if it was within the power of the managing director to prevent the environmental damage and s/he was negligent in not taking action to prevent it. The same act also provides for the personal liability of employees, managers and agents for environmental

offenses committed in the workplace that cannot be ascribed to the conduct of their employers.

Since the certification of the 1996 constitution, organized groups may pursue a civil action against an environmental offender. Also, anybody acting in the interest of the public may approach the courts for relief. This broadened legal standing concept facilitates easy access to courts.

CRIMINAL SANCTIONS

Most South African environmental laws contain provisions allowing for criminal sanctions for certain breaches. In such cases, the specific statute identifies the actions constituting offenses and defines the allowable remedies, which may range from imprisonment or a fine or both. The public prosecutor may also seek to have the facility's operating permits withdrawn and, in certain cases, even forfeiture of economic gains achieved as a result of the offense.

Directors and other company officers can be held criminally liable if they ordered the violating action or omission or had de facto control over the violations concerned. Owing to the often inadequate fines prescribed for environmental offenses, a trend is developing to circumvent the penalty clauses of the legislation by seeking relief based on the constitutional principle of a safe and healthy environment. In addition, NEMA's provisions can be used by private and public prosecutors to impose more realistic penalties for violations of other environmental legislation that provide for insignificant fines.

Section 38 of OHSA lists the criminal offenses created by the act. A number of provisions deal with the courts' powers after a conviction. A court may order a person to comply with the act or regulations but may also provide for the following maximum penalties:

- Negligent causing of injury: a fine of \$14,817.70, or 2 years' imprisonment or both.

- Contravention of a provision in the statute: a fine of \$7,408.85, or 12 months' imprisonment or both.

A regulation may prescribe a penalty of a fine or imprisonment for breach of its provisions. The act does not state the maximum fine that may be prescribed by regulations; the maximum period of imprisonment that may be prescribed by regulation is 1 year. For continuing offenses of the regulations, an additional fine of \$29.64 or an additional imprisonment of 1 day for each day on which the offense continues to a maximum imprisonment of 90 days, may be imposed.

NEMA and NWA empower a magistrate or judge hearing a criminal matter to also inquire into any damages and/or cleanup costs, thus providing for the typical "civil" damages claims as part of the criminal prosecution process.

STRICT LIABILITY

Strict liability (without fault) exists in certain areas of South African environmental law; this most often

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involves pollution incidents where the identity of the polluter cannot be established and where the owner or occupier of land from which the incident occurs or occurred is accordingly held liable on the basis of his/her status as the owner or occupier of the land concerned. The imposition of strict liability is furthermore mostly restricted to cases of significant pollution and/or degradation.

ENFORCEMENT

Historically, the enforcement of environmental laws in South Africa has been poor. The political will and commitment to address environmental pollution has been lacking for decades, and enormous capacity constraints plague most government departments entrusted with environmental law enforcement.

However, the country's 1996 constitution confers legal standing (*locus standi*) on a wide range of people, with the result that group and class actions in environmental and health and safety disputes has increased in South Africa. A number of group actions have been successfully instituted to resolve environmental disputes since the adoption of the constitution in 1996. In addition, the Minister of Health and Welfare has already used constitutional principles to circumvent the inadequate penalties prescribed for air pollution in the applicable enabling statute and to suspend violators' operating licences. In addition, the appointment of Martinus van Schalkwyk as the Minister of Environmental Affairs has had a positive effect on the country's air pollution situation.

NEMA furthermore encourages environmental litigation by stipulating that the costs of litigation incurred in the pursuit of environmental matters of a specified nature must be paid by the defendant (polluter), regardless of the outcome of the litigation. (These provisions are contentious and are expected to be challenged in due course. However, they have yet to be declared unconstitutional by the courts and they remain in force and present a real risk of costly litigation to polluters.)

Despite the historically poor enforcement of environmental law, the more stringent regulatory regime introduced after 1996, coupled with the easier access to the courts facilitated by the constitution, has resulted in a general increase in environmental liability in the country; and in addition, facilities' conduct vis-à-vis the environment is also scrutinized more carefully (In this regard, it is also important to note that South African lawyers only recently obtained the right to litigate on a contingency basis, i.e., on the basis of no remuneration without success. Due to the considerable amounts of money involved in environmental claims, lawyers are enticed by the incentive to agree with their clients on a percentage of any damage award that may result from litigation.)

In addition to the stricter laws, current governmental initiatives for more effective enforcement include:

- ensuring the separation of regulatory and operational functions of enforcement agencies;
- increasing the capacity of enforcement agencies; and

- increasing the skills and improving training of inspectors and prosecutors.

Due to the active labor unions in the country and the frequency of strikes, compliance with occupational health and safety legislation is generally higher than that of environmental legislation, albeit not necessarily due to more vigorous enforcement.

AUDIT PRIVILEGE & FREEDOM OF INFORMATION

The right of access to information held by the state and by private facilities is a fundamental right protected by the Bill of Rights in the constitution. In short, this right entitles a person who fears an infringement of another fundamental right (e.g., the environmental right, Section 24) to gain access to information that may be necessary to prove such a violation. Parliament has promulgated the Promotion of Access to Information Act No. 2 of 2000 (PAIA) to give effect to the constitutional right to access to information.

By claiming audit privilege in an attempt to protect internal SH&E audit information, the person claiming privilege is thus limiting others' right of access to information. Limitations on these fundamental rights (including access to information) are, however, provided for in the constitution's "limitations clause." The limitations clause is difficult to interpret and is vague. To establish whether information provided by an audit can be protected from outsiders, the onus will be on the facility to show that a violation of the applicant's right of access to information is justified in accordance with the limitations clause. However, this onus can be difficult to discharge.

South African courts have recognized in several cases that claims for professional privilege differ greatly in nature and that each case will be considered on its own merits. Without analyzing the limitations clause, it is certain that, should a facility's refusal to allow access to environmental information upon request be challenged, the circumstances of the case will need to be debated in court, usually entailing expensive litigation and publicity. (It is also possible that refusal to disclose information based on audit privilege may go unchallenged by the applicant.)

Also important is the fact that PAIA (in Section 68) lists the types of commercial information that may be protected by private facilities. It specifically states (in Section 68(2)) that a record may not be refused "insofar as it consists of information about the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of the private body and its disclosure would reveal a serious public safety and environmental risk." Section 68(3) states that "for the purposes of subsection (2), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation." Accordingly, facilities may refuse access to the internal audit results

on the grounds that these audits have been conducted as preliminary investigations with a view toward guiding the company to future actions and expenditure to address SH&E problems. However, this protection is qualified by the provisions of Section 70, stating the following: “Despite any other provision of this chapter, the head of a private body must grant a request for access to a record of the body if:

a) the disclosure of the record would reveal evidence of:

- i. a substantial contravention of, or failure to comply with, the law; or
- ii. imminent and serious public safety or environmental risk; and

b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”

Under the circumstances defined in Section 70, no record can be successfully protected against disclosure (upon request) to third parties.

The provisions of the Protected Disclosures Act No. 26 of 2000 are also relevant, in terms of which employees receive protection for certain specified wrongs of their employers. This list includes disclosure of information by an employee who has reason to believe that the information concerned shows that a criminal offense has been committed (including violations of environmental and health and safety statutes) and/or that the environment has been, is being or is likely to be damaged. Employees who make such disclosures may not be subjected to any discipline, victimization or other form of harassment for having made such a disclosure.

CONTAMINATED LAND ***Applicable Regulations***

South Africa has no specific legislation dealing with land contamination (The Conservation of Agricultural Resources Act No. 43 of 1983 constitutes the principal legislation dealing with soil conservation. However, this act focuses on issues, such as the cultivation of virgin soil and land with a certain slope and erosion through the action of water and wind. No specific measures relating to land contamination are included in the act.). However, several laws address general environmental degradation, as well as the effects of such degradation. Mindful of the fact that the pathway for the escape of a substance in waste into the environment is often water, legislation aimed at the prevention of water pollution is also pertinent to the question of legal liability for land contamination.

NEMA is aimed at, among other objectives, the protection of the environment. The definition of environment includes “the land of the earth” and “microorganisms, plant and animal life” and is thus sufficiently broad to include soil (environment is defined by the act to mean the surroundings within which humans exist and that are made up of the land, water and atmosphere of the earth; microorganisms, plant and animal life; any part

or combination of (i) and (ii) and the interrelationships among and between them; and the physical, chemical, aesthetic and cultural properties and conditions of the forgoing that influence human health and well-being.). The objective of environmental protection is pursued by, inter alia, the imposition of an obligation on every person (including juristic persons) 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, or in so far as such harm to the environment cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation (Section 28(1)).

Regarding land contamination, one needs to consider the following questions:

•Does the land contamination in question constitute “significant pollution or degradation of the environment”?

•If so, who causes, has caused or may cause the pollution or degradation of the environment? (The act provides no guidance as to when a particular situation will be regarded as “significant pollution or degradation of the environment.” In the absence of statutory guidance, the normal meaning of the words should be followed.)

•Did the law authorize the activities that caused the pollution or degradation?

•Can the harm to the environment be reasonably avoided or stopped?

•What will constitute “reasonable measures”?

The obligation imposed by Section 28(1) to take reasonable measures “to prevent . . . pollution or degradation from occurring, continuing or recurring” entails more than mere prevention. “Reasonable measures” are described in Section 28(3) as including measures to:

•investigate, assess and evaluate the impact on the environment;

•cease, modify or control any act, activity or process causing the pollution or degradation;

•contain or prevent the movement of pollutants or the causes of degradation;

•eliminate any source of the pollution or degradation;

•remedy the effects of the pollution or degradation.

Section 28(2) expands the ambit of Section 28(1) by stating that the persons on whom Section 28(1) imposes an obligation to take reasonable measures include “an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which any situation exists which causes, has caused or is likely to cause significant pollution or degradation of the environment.”

In effect, Section 28(1) targets the polluter, whereas Section 28(2) imposes the same obligations on owners and those in control of land on which a certain situation exists, irrespective of whether or not such owners or people in control caused or contributed to the situation in question.

The persons on whom the obligation to take reasonable measures is imposed are expected to take the re-

quired measures on their own accord. However, if they fail to do so, Section 28(4) empowers the Department of Environmental Affairs and Tourism to issue a directive to any or all of the responsible people and/or companies to take the necessary measures. Failure to comply with such a directive empowers the department to take the reasonable measures to remedy the situation and, in terms of Section 28(8), to recover all costs incurred as a result of such an action from any or all of the following persons:

- the person (including a juristic person) who is or was responsible, or who directly or indirectly contributed to the pollution or degradation, or the potential pollution or degradation;
- the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred;
- the person in control of the land or any person who has had a right to use the land at the time when:
 - the activity or the process is or was performed or undertaken;
 - the situation came about;
 - any person who negligently failed to prevent;
 - the activity or the process performed or undertaken;
 - the situation from coming about.

If the Department of Environmental Affairs and Tourism does the remedial work and needs to recover the costs from one or more of those listed in Subsection (8), the act stipulates that liability must be apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment resulting from their respective failures to take the measures required under Subsections (1) and (4). This proportionality test is difficult to apply and no guidelines in this regard exist.

Land contamination often gives rise to surface and groundwater pollution. Liability for such pollution is governed by NWA in terms of an obligation to take all reasonable measures to prevent pollution from occurring, continuing or recurring; this is the responsibility of the owner of land, the person in control of land or the person who occupies or uses the land on which any situation exists, who causes, has caused or is likely to cause pollution of a water resource.

“Pollution” means the direct or indirect alteration of the physical, chemical or biological properties of a water resource (a water resource includes a river or spring, a natural channel in which water flows regularly or intermittently, a wetland, lake or dam into which or from which water flows, surface water, estuary and aquifers) so as to make it less fit for any beneficial purpose for which it may reasonably be expected to be used; or harmful or potentially harmful to the following:

- to the welfare, health or safety of human beings;
- to any aquatic or nonaquatic organisms;
- to the resource quality; or
- to property.

The “reasonable measures” that must be taken by the landowner and/or the person in control of the land are similar to the measures prescribed by NEMA and include measures to:

- Cease, modify or control any act or process causing the pollution.
- Contain or prevent the movement of pollutants.
- Eliminate the source of pollution.
- Remedy the effects of pollution.
- Remedy the effects of any disturbance to the bed and banks of a watercourse.

Land contamination can therefore clearly also give rise to liability under the NWA.

LIABILITY FOR PREEXISTING CONDITIONS

NEMA came into force during January 1999. Despite the reference in Section 28 to pollution that “has been caused,” the provisions of the act can only be invoked in respect of land contamination caused after January 1999. If the land contamination caused damage to a person or property, the common law liability discussed under Civil Liability for Statutory Violations may apply. However, there are high-level discussions wherein the retrospectivity of this legislation is considered due to the number of polluted facilities that were abandoned prior to 1999 with no recourse taken against the offending companies.

CLEANUP STANDARDS

The values used to establish when and if cleanup is necessary are not yet prescribed by legislation. This creates uncertainty, as facilities often have no benchmark against which to measure land contamination. As regards water contamination, the definition of pollution discussed previously will determine whether or not a situation is actionable under NWA. When the land contamination in question is caused by waste, the Department of Water Affairs and Forestry’s Waste Management Series should be consulted for groundwater monitoring guidelines relating to waste management facilities.

The Department of Water Affairs and Forestry (DWAF) developed an Interim Generic Process for the Determination of Appropriate Remediation Strategies for Contaminated Land Areas and Deteriorated Water Resources. It describes the process to be followed for the management of an initiative aimed at the remediation of contaminated land areas and/or deteriorated water resources. The process entails four phases aimed at obtaining a legal authorization for the remediation activity. Irrespective of the applicable legal control, i.e., a license in terms of Section 21 of NWA, a formal letter

Land contamination often gives rise to surface and groundwater pollution. Liability for such pollution is governed by NWA in terms of an obligation to take all reasonable measures to prevent pollution from occurring.

in terms of Section 19(1) of NWA or a permit in terms of Section 20(1) of ECA, the process is the same and consists of the following phases.

PHASE 1: INVESTIGATION OF SITE STATUS & DETERMINATION OF FUTURE USE & REMEDIATION OBJECTIVES

During this stage, the current status of the contaminated land or deteriorated resource must be investigated in terms of the infrastructure, type of contamination (including all possible constituents) and any existing impacts from the

situation or activity on surface water, groundwater (which includes a hydrogeological investigation), air quality and other environmental aspects, e.g., soils. This investigation must also address other relevant on- and off-site issues such as ecosystems, flora and fauna, stability, phreatic levels, etc. This also implies that a full inorganic and organic analysis of all possible contaminants must be conducted. Once this investigation is completed, the future use of the land or resource must be determined in consultation with interested and affected parties, and for each environmental aspect that the situation or activity adversely impacts, remediation objectives must be formulated that would ensure that these impacts would be managed and mitigated in accordance with the determined future use. These objectives would correspond with specific resource quality objectives determined in accordance with the specific catchment management strategy.

Once compiled, the party responsible for the remediation submits the information generated during this stage to the department for evaluation. In the event that the department is satisfied with the intended future use and that the stated remediation objectives will adequately ensure management and mitigation of the determined impacts on the environment to facilitate such use, these are confirmed in writing.

PHASE 2: ALTERNATIVE OPTIONS TO ENSURE FUTURE USE AND OBJECTIVES ARE ACHIEVED AFTER REMEDIATION

Once the current status and existing impacts have been determined and objectives to address these have been agreed upon between the DWAF, the party who is responsible for remediation and the affected parties during the first stage, the party responsible for the remediation will investigate alternatives to reach these objectives during this second stage. This type of investigation into alternatives should address all available options and may involve a lit-

erature review and/or a comparative risk assessment. Since different options could be available, each with different timeframes and cost implications, a preferred remediation option must be indicated. Adequate motivation must also be provided that the preferred option will indeed achieve the agreed upon remediation objectives and facilitate the future use during implementation and reasons why it should be considered as the best practical environmental option (BPEO). Options for the short, medium and long term must be highlighted and often include engineering intervention and investigations in the short term, maintenance and monitoring in the medium term, with continued monitoring in the long term until a predicted steady state (as agreed upon and corresponding with remediation objectives) has been achieved. Backup options for engineering interventions must also be included for possible implementation in the event that monitoring results indicate the need for further intervention.

The party responsible for the remediation submits a report to the department regarding the outcome of the investigation with alternative options, indicating the preferred option as the BPEO with timeframes for its implementation, and conceptual designs, if applicable. In the event that the department is satisfied that the preferred option will achieve the agreed objectives, this option is accepted in writing by the department as the BPEO, and the party responsible for the remediation is informed regarding whether legal requirements under the NWA or the ECA need to be fulfilled as part of the implementation of this option.

PHASE 3: LEGAL & IMPACT ASSESSMENT

Since the implementation of a specific option has been agreed upon, the legalities and impacts associated with such implementation and the identification of any residual impacts following such implementation, as well as long-term legal liabilities and responsibilities, such as change in land use, responsibilities for maintenance and monitoring, etc., are now investigated by the person responsible for the implementation of remedial measures. This may involve ensuring compliance with the Environmental Impact Assessment (EIA) regulations (imposed by Section 24 of NEMA, read with Government Notice R 386 and Government Notice R 387.), but since the implementation of remedial work should result in a positive effect, compliance with the regulations is often not an extensive exercise.

The outcome of this assessment (and proof of compliance with EIA regulations, if applicable) is submitted to DWAF. DWAF will then confirm whether the remediation will be authorized under the NWA (a letter in terms of s19(1) or a water use license in terms of s21) or the ECA (an ECA s20 permit), as part of the next and final stage.

PHASE 4: SUMMARIZED APPLICATION FOR APPROPRIATE AUTHORIZATION

During this stage, and if applicable, the person responsi-

The party responsible for the remediation submits a report to the department regarding the outcome of the investigation with alternative options, indicating the preferred option as the BPEO with timeframes for its implementation, and conceptual designs, if applicable.

ble for the implementation of remedial measures submits the appropriate application forms for authorization and a Summary Authorization Application Report, which should contain the information required by DWAF or other department(s). Information required could include the following:

- summary of the outcome of the site investigation, including hydrogeology;
- implementation plan of accepted preferred option, including timeframes;
- public participation details relating to the confirmation of rehabilitation objectives;
- detailed design plans of accepted remedial option;
- operational plans;
- EIA of such implementation;
- maintenance plans;
- water management and monitoring plans; etc.

Upon receipt of this information, the appropriate authorization (permit/license/Section 19 letter) is drafted and issued to the person responsible for the implementation of remedial measures. This is followed by the implementation of the rehabilitation measures, which leads to appropriate cost-effective remediation, in accordance with the future use and remediation objectives.

PROPERTY TRANSFER LEGISLATION

For persons or companies engaged in the purchase or sale of a business or property, there is no statutory legal requirement to undertake pretransaction environmental investigations; nor is there any legislation in effect that requires the sellers of businesses or property to provide the potential buyer with any document or statement concerning the environmental condition of the property.

However, mindful of the no fault or strict liability imposed for situations causing water contamination on land owners (and people in control of land or occupying land) by Section 19 of the NWA, it has become essential to include an environmental due diligence investigation as part of any property transaction where historical pollution could be present or where previous activities may give rise to future environmental contamination.

Section 19 states:

19) Prevention and remedying effects of pollution

1) An owner of land, a person in control of land or a person who occupies or uses the land on which:

a) any activity or process is or was performed or undertaken; or

b) any other situation exists, which causes, has caused or is likely to cause pollution of a water resource must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

2) The measures referred to in Subsection (1) may include measures to:

a) cease, modify or control any act or process causing the pollution;

b) comply with any prescribed waste standard or management practice;

c) contain or prevent the movement of pollutants;

d) eliminate any source of the pollution;

e) remedy the effects of the pollution; and

f) remedy the effects of any disturbance to the bed and banks of a watercourse.

Note that the obligation to take “reasonable measures” applies irrespective of whether the landowner, occupant or person in control of the land caused the pollution concerned.

REPORTING OBLIGATIONS

Accidental Spills & Releases

Notification of accidents, which either pollute the environment or may pollute it, is required under the NWA (Section 20), under NEMA (Section 30) and under regulations promulgated in terms of the National Road Traffic Act No. 93 of 1996 (Government Notice 225, read with SABS Codes of Practice 0232-1 and 0232-3, prescribing the action to be taken by a first responder).

Most environmental emission licenses (most notably, water use licenses and records of decisions issued in terms of the ECA and/or NEMA) in respect of emissions to the air or to waters or to sewers, include a requirement to notify accidents.

While there are notification requirements as described, the regulations do not establish any quantitative thresholds below which there are no requirements to notify the authorities. Instead, it is left to the facility to determine whether the accident or incident has caused or may cause pollution (of the air, land, or water [including sewers]), and if so, the notification must be made as soon as practicable. If the facility is not able to determine the consequences of the spill or release, it is recommended that the authorities be notified as a matter of prudence. Failure to notify will result in the potential for prosecution.

CONTAMINATION IDENTIFIED DURING SAMPLING

Generally, there is no reporting obligation in the event that soil or groundwater contamination is identified during the course of conducting a sampling program that is independent of an accident or spill incident (e.g., Phase II sampling as part of due diligence). On the other hand, if the sampling was in response to a reportable accident or incident, the competent authorities may require transmittal of the results.

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Safety in Abu Dhabi

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EHS MANAGEMENT SYSTEMS

Environmental, health and safety (EHS) professionals agree that organizations that implement EHS management programs have a higher success rate in reducing incidents than those that do not. Even OSHA is now considering requiring an injury and illness prevention program that, if implemented, would require employers to have a basic management system. With the benefits of implementing a management system hard to deny, the Emirate of Abu Dhabi has taken the lead by setting the world's first regulatory requirements for the implementation of an EHS management system (EHSMS). Abu Dhabi's innovation has not stopped with implementation of EHSMS. Because organizations find it difficult to steer through various regulatory requirements set by government agencies, Abu Dhabi has committed to integrating its EHS regulatory systems. Integration goes beyond putting regulations in one location and includes setting requirements for integrated plans, studies and impact assessments. People will always know Abu Dhabi for its oil and gas reserves, but in the near future, the world will know Abu Dhabi as a leader in protecting its environment and workforce.

Most EHS professionals agree that management systems are an effective tool for ensuring success. With International Organization for Standardization (ISO) 9001, 14001, 19011 and 31000 and the Occupational

Health and Safety Assessment Series (OHSAS) 18001, professionals can refer to plenty of standards when developing management systems. Although regulatory agencies, such as OSHA in the U.S., have considered, and even discussed, setting requirements for EHS management systems, no government has stepped up and required employers to implement a management system until now.

REGULATORY REQUIREMENTS

The Emirate of Abu Dhabi is often referred to as the capital of (UAE); its modern building designs and unique architecture; Bu Tinah Island, finalist as one of the new seven wonders of nature; and birthplace of Sheikh Zayed bin Sultan Al Nahyan, the first president of UAE. More recently, Abu Dhabi has started taking center stage in the global media for its economic, tourism and cultural projects. With major infrastructure programs, such as Yas Island's Formula One race track and the opening of a Ferrari theme park to the building of the Louvre and Guggenheim museums on Saadiyat Island, Abu Dhabi is growing in its international importance and influence. Because of the Emirate's growth, the Executive Council of Abu Dhabi realized it needed to take steps to ensure that residents have a healthy environment and a safe place to work. With this in mind, the executive council put in motion the world's first regulatory requirement for an integrated EHSMS.

In December 2006, the Abu Dhabi Executive Council issued Decree No. 2-31/2006, which approved the EHS