

## Environmental Compliance

Research towards achieving improved environmental compliance  
in water-related sectors in South Africa.

### Negotiated Environmental Agreements

#### Issues of compliance

Historically, the natural and social environment was not at the forefront of South African legislation.

When awareness of the need for environmental regulations began to grow after the 1960s, the regulations being introduced were initially reactionary rather than being preventative in nature; the approach was also primarily “command-and-control”. This approach essentially prevented organisations from undertaking certain activities that were deemed harmful to the environment; it was not necessarily conducive to achieving long-term economic or environmental sustainability.

Since the rebirth of South Africa as a democratic country, the natural environment has received greater prominence, being afforded explicit protection in the Constitution. Protection for the social and natural environment through the application of various integrated environmental management tools is further entrenched in a suite of legislation, of which the National Environmental Management Act (NEMA; Act 107 of 1998) and the National Water Act (NWA; Act 36 of 1998) are prime examples.

Mechanisms that offer alternatives to the traditional command-and-control approach to achieve environmental compliance are now also available to the water sector in South Africa. These, termed **Negotiated Environmental Agreements** (NEAs), are aimed at improving dialogue among diverse stakeholders and government; they combine elements of regulation, self-regulation and co-operative relationships.

Internationally, NEAs usually focus on setting objectives above the legal requirements for compliance and this would ideally happen in South Africa as well.

In South Africa, NEAs take the form of **Environmental Management Co-operation Agreements** (EMCAs) provided for in Section 35 of NEMA. The ECMA would seem to have potential to be an important tool among those already available in following an integrated approach to Water Resource Management (WRM).

This is especially so in the light of questions regarding the effectiveness of current measures to implement provisions of the NWA. Although the NWA is a robust and well respected piece of legislation that contains numerous tools to achieve integrated water resource management (IWRM), there are concerns about the effective use of these tools. It would certainly appear that because of the multi-faceted nature of water in society, IWRM could benefit greatly from negotiated agreements among its various stakeholders.

Although the EMCA, as a form of NEA, would seem to offer a positive alternative for achieving environmental compliance, major stakeholders appear loathe to have pursued this avenue to date. The reasons for this reluctance need to be better understood.

#### Enhancing environmental compliance

Research was consequently initiated to gain a better understanding of whether NEA-type mechanisms (EMCAs or less formal alternatives) are suitable for achieving environmental compliance in water-related sectors in South Africa, and if so, the conditions under which the approach would be acceptable. The motivation for this research was based on the assumption that it would add value in terms of informing government of the likelihood that a negotiated approach would be supported and upheld by role-players associated with the different facets of water resource management South Africa.

In order to understand the successes and failures of NEAs internationally, and particularly in South Africa where compliance with provisions of the NWA is a key issue, the following questions needed to be asked and answered:

- Why have no Section 35 EMCAs been formally signed into law since their introduction as part of NEMA in 1998?
- Are there other forms of NEAs which have been successfully entered into between multi-parties?
- What factors would make an NEA effective?

Issues of scale and range were crucial in developing a framework for investigating the relevance of NEAs in achieving environmental compliance in the water sector. Scale is important as the interest in water matters ranges widely, from the

individual to a village, from provincial to international scale – with numerous levels in between.

The issue of range refers to matters such as water service delivery, water demand management, social and political values and the sustainability of water resources. The third important category needed to complete the framework for the study was the issue of the NEA as a co-regulatory environmental instrument.

Within this framework, the basic elements underpinning the development of a NEA were adopted as the selection criteria for a case study that would provide answers to the above-mentioned questions. These criteria were:

- The agreement had to take place within a legal framework.
- Multi-parties had to be party to the agreement.
- At least one government agency had to be involved in negotiations.
- An existing problem posing a threat to the environment had to be present.
- The negotiation process had to have been documented.

The selection criteria for a case study were met by the process followed to establish a NEA for the South Africa Metal Finishing Industry (MFI) in KwaZulu-Natal. The MFI case study then formed the basis for this research. The two relevant laws to which the MFI needed to comply are the NWA and the Local Government: Municipal Systems Act (Act No. 32 of 2000) (MSA).

## Outcomes and recommendations

The research process revealed that the broad issue of acceptability of a NEA to a water-related sector industry (eg the MFI) has three interrelated components. These are:

- Institutional capacity;
- Economic drivers, and
- Attitudinal drivers.

Key findings and recommendations that relate to the current *status quo* of NEAs in such a water-sector industry are best summed up within the context of these three component areas.

### Institutional capacity

**Findings:** A Section 35 (NEMA) EMCA is not necessarily appropriate for the water sector. The relevant laws (NWA and MSA) already provide mechanisms for negotiated dialogue. Regardless of robust legislation, the current lack of government capacity is regarded as contributing to poor implementation and discriminatory enforcement. Non-compliant acts in water-related sectors do not receive priority and officials are reluctant to issue fines or prosecute. These factors tend to render the legislation ineffectual.

**Recommendation:** Establishment of a Municipal Court should be a priority. Environmental justice could be promoted through providing magistrates with instruction regarding the financial and environmental implications of non-compliance. This would

relieve pressure on the Department of Justice by expediting municipality-related cases; numerous of these are water-sector related.

### Economic drivers

**Findings:** Financial penalties are inadequate and do not discourage non-compliance. Juxtaposed against this, current regulations are considered excessively punitive and do not provide sufficient incentive for achieving compliance.

**Recommendation:** A “feebate” should be introduced: companies that comply would benefit from being offered a financial rebate; a substantial penalty (a “fee” or a tax) would be issued for non-compliance.

### Attitudinal drivers

**Findings:** The MFI perceives NEAs as providing the opportunity for government to avoid being held responsible for effective enforcement of legislation. The MFI is also concerned that self-regulation may become a mechanism by which unfair competition practices within the industry are implemented.

**Recommendation:** A NEA is a strong tool for co-operative relationships if properly structured. The MFI is encouraged to strengthen the industry’s Code of Conduct to improve business and operational standards. Improving government capacity may contribute towards improving attitudes.

## Conclusions

Existing water-related regulations are robust and should achieve environmental compliance. As such, the legal form of an NEA (EMCA), in particular, could be considered superfluous in the water sector.

However, NEAs could potentially complement existing regulations and provide a mechanism for constructive dialogue within the water sector. This, in time, could mature into a platform to encourage the concept of co-regulation.

However, lack of government capacity is undermining the existing regulatory framework and the potential for future NEAs. This has resulted in negative attitudes permeating government and the MFI.

#### Further reading:

*An Evaluation of the Suitability of Negotiated Environmental Agreements for Achieving Environmental Compliance in Water-related Sectors in South Africa (Report No: 1511/1/07).*

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