



Postponement of Compliance Timeframes: A Critical Analysis, Lessons Learnt and Possible Solutions



environmental affairs

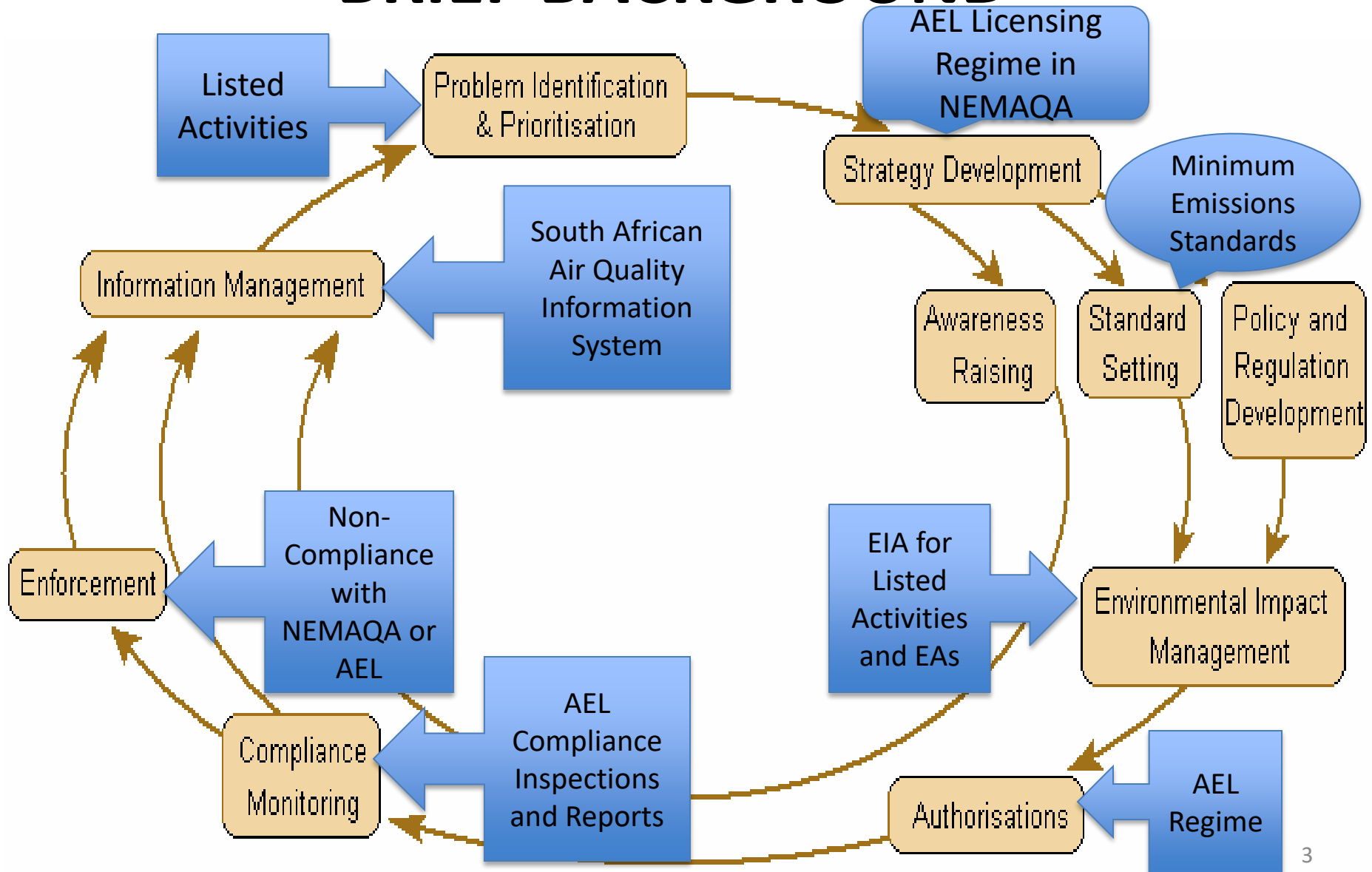
Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA



PRESENTATION OUTLINE

- Brief background
- Current legal framework
- Legal shortcomings of current legal framework
- Where to from here?

BRIEF BACKGROUND



CURRENT LEGAL FRAMEWORK

- The entire National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) came into operation on April 01, 2010.
- National Listed Activities and its Associated Minimum Emissions Standards (known as Section 21 Notice) came into operation March 31, 2010 and was repealed on November 22, 2013 and amended on June 12, 2015.
- Paragraph (8) of Section 21 Notice require a new plant to comply with new plant emission standards from April 01, 2010.
- Paragraph (9) of Section 21 Notice require an existing plant to comply with existing plant emission standards from April 01, 2015.
- Paragraph (10) of Section 21 Notice require an existing plant to comply with new plant emission standards from April 01, 2020.

CURRENT LEGAL FRAMEWORK

- Section 21 Notice affords ONLY existing plants to apply for postponement of compliance timeframes.
- The postponement application may either relate to postponement to comply with-
 - (a) existing plant emission standard, and
 - (b) new plant emission standards.
- In terms of paragraph (11), the application must be made to the National Air Quality Officer.
- Application must be accompanied by the following information:
 - (a) air pollution impact assessment report;
 - (b) detailed justification and reasons; and
 - (c) a concluded public participation process undertaken as specified in EIA Regulations.

CURRENT LEGAL FRAMEWORK

- Paragraph (13) of Section 21 Notice empowers the NAQO, with the concurrence of the relevant licensing authority, to grant a postponement for a period not exceeding five years per postponement.
- Paragraph (14) of Section 21 Notice empowers the NAQO to review and withdraw any postponement-
 - (a) should ambient air quality conditions in the affected area of the plant not conform to ambient air quality standards; and
 - (b) following representations from the affected plant or community.

LEGAL SHORTCOMINGS OF CURRENT LEGAL FRAMEWORK

- On Paragraph (11), the following is observed:
 1. *Application is made to the NAQO instead of the Minister. This approach disadvantaged the Minister of Executive Oversight in the performance of this function. This means, as the NAQO is exercising an administrative action in terms of PAJA, an aggrieved person may approach a court of law for judicial review, if not satisfied with NAQO decision;*
 2. *No clarity whether existing plant is allowed to apply for postponement of only existing plant emission standards, or new plant emission standards, or for both emission standards in one application;*

LEGAL SHORTCOMINGS OF CURRENT LEGAL FRAMEWORK

- On Paragraph (12), the following is observed:

1. No clarity whether postponement applications must be subjected to an environmental impact assessment process or not;

2. No clarity when a public participation process should be undertaken, i.e. before submission of the postponement application or after submission of application on instruction by the Minister or NAQO;

LEGAL SHORTCOMINGS OF CURRENT LEGAL FRAMEWORK

- On Paragraph (13), the following is observed:
 1. *No criteria or factors that NAQO must take into consideration when considering the postponement application, i.e. ambient air quality where the plant is situated, proximity to residential areas or whether the plant is situated in a national or provincial priority area;*
 2. *No discretion for NAQO after consideration of the application to either grant an application, or refuse an application, send back the application to the applicant for submission of further information within stipulated timeframe;*
 3. *It appears from the provisions that the NAQO is not empowered to refuse an application, but only empowered to grant an application;*
 4. *If postponement is granted, it is not clear what emission standards must be included in the AEL, or the emission standards that the plant must comply with during the period of the postponement (for five years);*

LEGAL SHORTCOMINGS OF CURRENT LEGAL FRAMEWORK

- On Paragraph (14), the following is observed:
 1. *Not clear what emission standards (existing plant or new plant) will be applicable in instances where a postponement is withdrawn;*
 2. *On withdrawal, not clear whether the existing plant must immediately comply with the applicable emission standards;*

LEGAL SHORTCOMINGS OF CURRENT LEGAL FRAMEWORK

- General Observations on Paragraphs (11)-(14) is as follows:
 1. *Initially, there was no prescribed date for submission of postponement applications well before April 01, 2015 or April 01, 2020;*
 2. *Provisions not clear whether existing plants can apply for postponement only once;*
 3. *Transferability of a postponement;*
 4. *Legal consequences for non-compliance with applicable emission standards during the period of the postponement (for five years).*

WHERE TO FROM HERE?...

- In our view, the shortcomings highlighted above have resulted in the abuse of the provisions, and by extension undermines section 24 of the Constitution of the Republic of South Africa, 1996 as well as the objectives of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004).
- It is difficult to say with legal certainty whether further amendments to Section 21 Notice (specifically on the provision on postponement of compliance timeframes) will rescue the situation, and by extension solve the problem statement, since this legal framework is been part of the air quality legislation since 2010.
- In our view, it appears that the following options may be explored:
 - (a) Minor amendments: to clarify that all postponements were granted as a once off;
 - (b) Minor amendments: to provide for legal consequences for non-compliance with applicable emission standards during the period of the postponement.



Thank You