

Auditing is a New Feature of the 2014 EIA Regulations

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The on-going implementation of stricter environmental regulation in South Africa has resulted in environmental compliance becoming a fundamental economic consideration in the business sector. The most widely used tool for the identification of non-compliances in an operation is the legal compliance audit. Environmental audits typically operate to highlight aspects within an operation which may or may not comply with the applicable regulatory framework. This, in turn, allows the operation to address certain areas of non-compliance in an effort to operate within the boundaries of the law.

The 2014 Environmental Impact Assessment Regulations and Listing Notices were published on 4 December 2014 and introduced a significant transformation in the regulation of environmental audit reports. Of particular importance is regulation 34(1), which provides that:

*"The **holder of an environmental authorisation must**, for the period during which the environmental authorisation and EMPr, and where applicable the closure plan, remain valid-*

*(a) Ensure that the compliance with the conditions of the environmental authorisation and the EMPr, and where applicable the closure plan, is **audited**;*
and

(b) Submit an environmental audit report to the relevant competent authority."

Previously, only certain environmental authorisations or EMPr approvals required the undertaking of audits or performance monitoring. The requirement to undertake an audit has never been mandatory in terms of the EIA Regulations. Since the introduction of regulation 34, the requirement to undertake an environmental audit has become mandatory for *all* holders of an environmental authorisation, an EMPr and a closure plan.

Although the auditing requirement set out in regulation 34(1) itself seems unambiguous, read in the context of the transitional arrangements, it presents certain complexities. The transitional provisions of the 2014 EIA Regulations essentially deem any environmental authorisation issued in terms of the previous EIA Regulations, to be environmental authorisations issued in terms of the 2014 EIA Regulations. Therefore, based on the wording of regulation 34(1), the requirement to undertake an environmental audit, applies to *all* holders of environmental authorisations, which includes those environmental authorisations that were issued in terms of previous EIA

Regulations or even under the Environment Conservation Act. Consequently, a strict interpretation of the provision means that even holders of environmental authorisations that were not required to undertake environmental audits in terms of the conditions of their authorisation, are suddenly required to comply with regulation 34.

It is unclear whether the Legislature anticipated the above interpretation since in practice the auditing requirement set out in regulation 34 is not being imposed on holders of environmental authorisations issued prior to the commencement of the 2014 EIA Regulations. Therefore, it would seem that the government departments are only implementing the provisions of regulation 34 in respect of environmental authorisations issued in terms of the 2014 EIA Regulations.

In an environmental authorisation issued in terms of the 2014 EIA Regulations, the conditions applicable to the environmental audit will stipulate very specific conditions, such as the frequency of audits, as well as general conditions applicable to all operations. In general, all holders of the environmental authorisation must audit the following:

- (i) *“The level of performance against and compliance of an organisation or project with the provisions of the requisite environmental authorisation or EMPr and, where applicable, the closure plan; and*
- (ii) *The ability of the measures contained in the EMPr, and where applicable the closure plan, to sufficiently provide for avoidance, management and mitigation of environmental impacts associated with the undertaking of the activity.”*

In addition to the above, regulation 34(6) further proposes particularly onerous obligations in relation to the finalised audit report.

*“within 7 days of the date of submission of an environmental audit report to the competent authority, the holder of the environmental authorisation must **notify all potential interested and affected parties** of the submission of that report, and **make such report immediately available-***

*(a) **To anyone on request;** and*

*(b) On a **publicly accessible website**, where the holder has such a website.”*

Essentially, regulation 34 now obliges *all* holders to not only undertake mandatory environmental audits but to also make such audit report publically available within 7 days. This provision is reinforced by regulation 26(h) of the 2014 EIA Regulations which also requires, *inter alia*, that environmental audit reports are made publically available to anyone on request and

on a publically accessible website. Although, the nature of an audit report and the implications of making such a report publically available has its own 'Pandora's Box' of unanticipated implications, certain concerns arise regarding the competent authority's capacity to give effect to regulation 34.

Although the previous system involved the submission of audit reports by only the select operations that were expressly required to do so in terms of the conditions of their environmental authorisation, even then the departments frequently failed to use this process as a tool for the enforcement of environmental compliance. With the requirement to submit audit reports now imposed on *all* holders of environmental authorisations, and consequently the drastic increase in the number of audit reports being submitted to the departments, the question arises as to whether the departments are capable of giving meaning and effect to regulation 34? Will operations continue to submit audit reports to department without the risk of follow ups or investigations? What would the purpose of imposing such onerous provisions be if the departments are not in a position to constitute sufficiently resourced auditing departments that are able to review the contents of the audit reports and use them effectively in the compliance and enforcement function?

While holders of environmental authorisations have no choice but to comply with the onerous auditing requirements, time will tell whether or not, the Legislature has enacted legislation that the departments are in a position to give proper effect to.