

The role of environmental auditing in compliance monitoring and enforcement in South Africa: are current practices promoting a just transformation?



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Introduction

- To address global environmental challenges, the world needs multiple just transformations in societies across the world.
- The impact assessment sector is well positioned to support such transformation
 - Impact assessment (EIA/EsIA) practice helps to deliver evidence based, informed and inclusive decisions.
 - Impact assessment community has the knowledge and skills required to facilitate the transformation.
- However, a just transformation cannot be based on good decisions, such decisions need to become reality through the implementation of transformation projects.
 - Just transformation is only achieved when the commitments to protect the environment, while embracing justice and social inclusion, are implemented and the associated regulatory conditions met.
- This requires
 - effective EIA follow-up to ensure that project commitments and regulatory conditions are implemented
 - effective monitoring and enforcement efforts to promote compliance.

EIA implementation framework

EIA FOLLOW-UP

- ❖ **Monitoring**
 - Data collection & comparison with standards, predictions or expectations
- ❖ **Evaluation**
 - Compliance with regulatory requirements
 - Conformance with standards, prediction, expectations
 - Environmental management performance
- ❖ **Management**
 - Response to monitoring and evaluation issues
- ❖ **Communication**
 - Informing stakeholders about the results

Environmental auditing

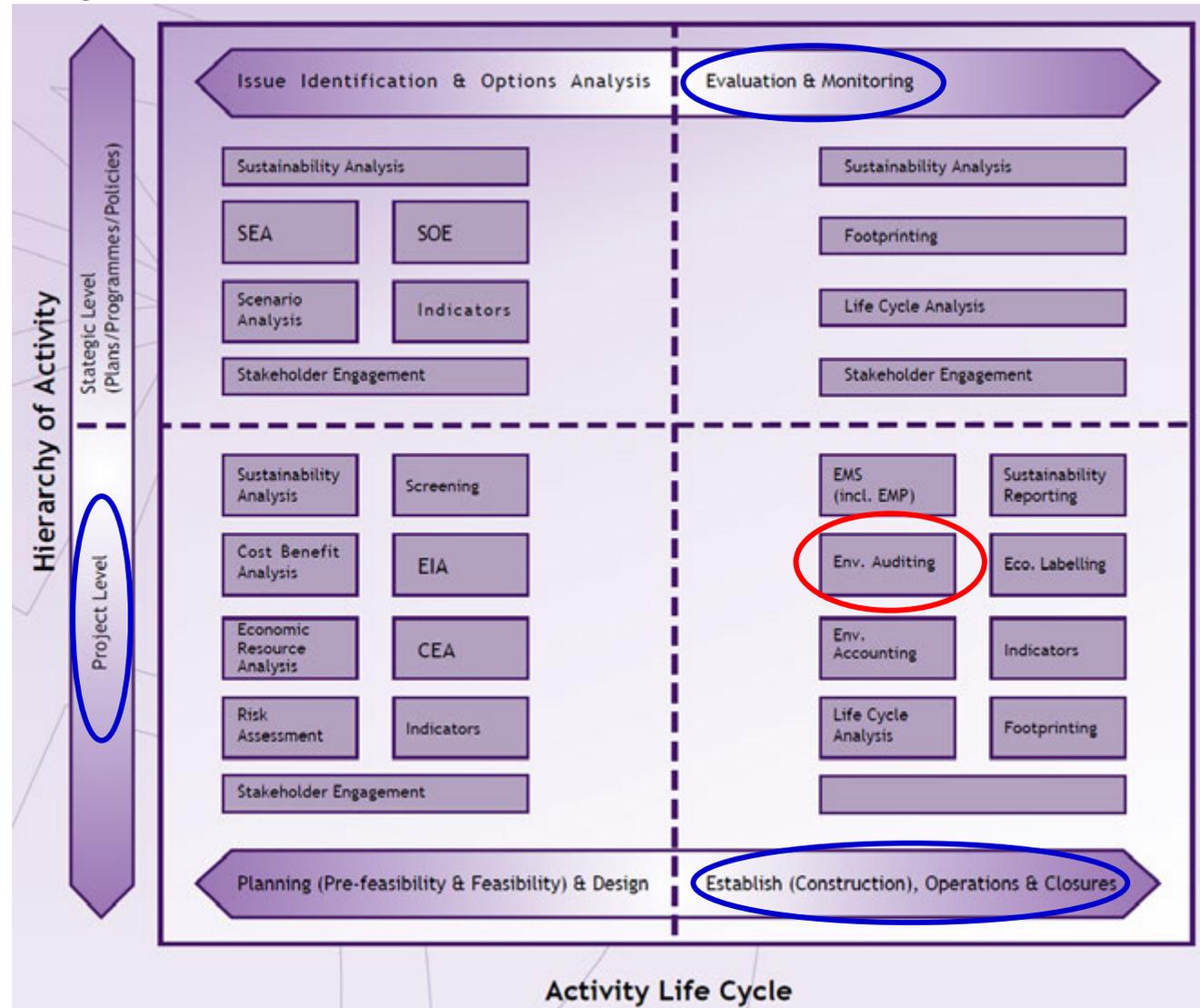
COMPLIANCE MONITORING & ENFORCEMENT

- ❖ **Deterrence-based enforcement approach**
 - confrontational, accusatory and adversarial enforcement regime
 - coerces compliance through a criminal enforcement
- ❖ **Cooperative compliance approach**
 - conciliatory and compromising enforcement regime
 - coerces compliance through advice, persuasion & administrative enforcement
- ❖ **Differentiated, hybrid 'responsive regulation' approach**
 - enforcement responses tailored to context of regulated organisations
 - escalate the enforcement response up an enforcement pyramid
 - harness other parties as 'surrogate' regulators

Environmental auditing in South Africa

- Adopted as environmental management tool in non-compliances IEM guideline series 2 (2004)
- Included in the environmental framework act (NEMA 107 of 1998)
 - initial inclusion in terms of model bylaws, which has never been implemented (1998)
 - compliance auditing added & performance assessment (auditing) of mining EMPs (2009)
 - regulations related to auditing and reporting of environmental liability provided for (2014)
 - defined in relation to the acceptability of mitigation measures & the adequacy of rehabilitation costs for mines (2022)
- Included in EIA regulations (2006), generic environmental management plans & EPR regulations
- Included in mining laws (MA 50 of 1991 & MPRDA 102 of 2002) – performance assessment
 - regulations for EMP performance assessment and monitoring (1999)
- Included in conditions of permits & licenses issued in terms of water laws (WA of 1956, NWA 36 of 1998) and waste laws (ECA of 1989, NEMWA of 2010)

Commonly used tools in the IEM toolbox in SA



Compliance monitoring and enforcement context in South Africa (1)

Aspect	EIA sector	Waste sector	Water sector
Broad CME approach	Risk-based, hybrid (responsive regulation) approach, tailoring response to organisational context		
CME Roles	<ul style="list-style-type: none"> • Compliance monitoring & promotion • Detection of legal violations & environmental harm • Improving compliance, deterring non-compliance & reducing non-compliant behaviour • Ensuring appropriate action where non-compliance occurs • Prevention or reduction of environmental harm • Identifying need for improving conditions or future law reforms 		
Policy & legal frameworks	<ul style="list-style-type: none"> • Constitution (Bill of rights) • Environmental framework law & sector specific (water, waste, air quality) environmental laws • Administrative justice and access to information laws • Criminal procedure laws 		
Official guidelines	• Departmental EMI SOP Manual	• Departmental EMI SOP Manual	<ul style="list-style-type: none"> • Departmental CME Strategy • Departmental EMI SOP Manual

Compliance monitoring and enforcement context in South Africa (2)

Aspect	EIA sector	Waste sector	Water sector
Success	Fairly successful <ul style="list-style-type: none"> • Many organisations do not want to comply • Administrative enforcement actions often do wonders, while criminal sanctions result in behaviour changes 		Fairly successful
Success enablers	<ul style="list-style-type: none"> • Committed, well-trained and skilled officials • Regulated community awareness of successful enforcement • Regulated community mostly respond appropriately 		
Success barriers	<ul style="list-style-type: none"> • Too few CME officials (boots on the ground) • Limited geographical distribution of officials • Fragmented, ever changing, overly complex legal regime • Unenforceable legal conditions • Budget constraints • Lengthy compliance report format • Poor legal knowledge of the regulated community • Lack of support & understanding of other enforcement agencies 		<ul style="list-style-type: none"> • Lack of adequate, competent officials • Limited geographical distribution of officials • High staff turnover • Death threats to CME officials • Budget constraints • Lengthy enforcement processes • Top management corruption & lack of support

External environmental auditing context in South Africa (1)

Aspect	EIA sector	Waste sector	Water sector
Role in CME	<ul style="list-style-type: none"> • Evaluation of compliance to EMPr commitments & authorisation conditions • Evaluation of implementation effectiveness, identification of new environmental risks/impacts • Extend the reach of regulators beyond their constrained own capacity • Inform regulators of non-compliances, issues of concern and trends • Assist regulators to adopt a risk-based CME approach • Assist regulated community to rectify non-compliances and limit environmental harm & pollution • Identify the need to amend EMPrs, authorisations or water, waste and atmospheric emission licenses 		
Policy & legal frameworks	<ul style="list-style-type: none"> • Environmental framework law & EIA regulations • Sector specific (water, waste, air quality) environmental laws • Administrative justice and access to information laws • Environmental authorisation & water use/waste management/atmospheric emission license conditions 		
Official guidelines	<ul style="list-style-type: none"> • No official guidelines • Limited guidance in EIA regulations 	<ul style="list-style-type: none"> • Existing, but old guideline • WC prescribes the use of an official audit protocol 	<ul style="list-style-type: none"> • Limited guidance to use the water use license as template for the audit

External environmental auditing context in South Africa (2)

Aspect	EIA sector	Waste sector	Water sector
Success	Partial success, where audits are conducted	Partial success, but many licensed entities do not conduct audits	Limited success, most licensed entities do not conduct audits
Success Enablers	<ul style="list-style-type: none"> • Auditor independence, competence and integrity • Data collection and analysis 	<ul style="list-style-type: none"> • Awareness of audit responsibilities • Quality of audit reports 	
Success barriers	<ul style="list-style-type: none"> • Auditors are not objective as they are paid by auditee • Auditors do not understand differences between different report types 	<ul style="list-style-type: none"> • Lack of sector specific external auditing guidelines 	<ul style="list-style-type: none"> • Lack of sector specific external auditing guidelines • Auditors lack water related knowledge and experience • Generic audit reports, lacking specifics • Submission of reports of other audits conducted

Environmental auditing in South Africa vs relevant IAIA Best Practice Principles

EsIA Compliance and Enforcement	Evaluation		EIA follow-up
1. Implement EsIA programs within a broad system of governance & regulatory framework	√	X	7. The proponent of change must accept accountability for implementing EIA follow-up
2. Integrate commitments into legally binding instruments that follow the project life cycle	√	X	8. Regulators should ensure that EIA is followed up.
3. Ensure effective legal enforcement authorities & compliance strategies for preventive & remedial EsIA aspects	?	√	11. EIA follow-up should promote continuous learning from experience to improve future practice.
4. Empower the public and other stakeholders to advance EsIA compliance	?	√	13. EIA follow-up should be objective-led & goal oriented
5. Modernize & invest in administrative & IT support	X	X	14. EIA follow-up should be "fit-for-purpose."
		X	16. EIA follow-up should include the setting of performance criteria, enacted through well-defined methodologies.
		X	17. Adequate resources should be provided for EIA follow-up

Conclusion

- The world needs just transitions to address global environmental challenges, based on sound development decisions & effective implementation of transformation projects
- EIA can facilitate this through sound, evidence-based decision-making, effective follow-up and effective compliance and enforcement practices that support responsible project implementation.
- Environmental auditing is a tool that support both effective EIA follow-up and compliance & enforcement.
- The South African risk-based, hybrid (responsive regulation) CME approach has clear objectives, is well supported by a diverse legal framework and fairly successful. However, it is constrained by a fragmented, ever changing, complex legal regime, as well as inadequate staff resources and budgets.
- External environmental auditing fulfil a variety of roles in CME in South Africa, is supported by a legal framework, but provide no to limited guidance to auditors. It is partially successful, although many regulated entities fail to conduct such audits, without any legal sanctions.
- Environmental auditing subscribe to some of the IAIA BPP for follow-up & C&E, with room for improvement

Let's continue the conversation!

Post questions and comments in the IAIA24 app.



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