

The importance of environmental impairment insurance

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What is environmental impairment cover?



Environmental impairment insurance refers to cover for the **costs of environmental clean-up and rehabilitation** following an **environmental incident**. Standard cover is for sudden and accidental release of pollutants into the environment. (Cover for gradual release of pollutants is commonly a general exclusion, but some insurers do offer it under certain conditions).

Clean-up and rehabilitation mean emergency response and spillage containment, environmental and ecological restoration following an **Environmental Incident**.

The National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) defines Incident as “an **unexpected, sudden and uncontrolled** release of a hazardous substance, including from a major emission, fire or explosion, that has caused or may cause significant harm to the environment, human life or property.”

Adding to the NEMA definition of the term ‘incident’, the National Water Act, 2008 (Act No. 59 of 2008) (NWA) states that reportable incident “has the potential to have detrimental effects on surface-and/or ground water resources, including potentially harmful effects to humans, any aquatic life or the resource quality.”

It is the NEMA definition of environmental incident that gave birth to Environmental impairment insurance because it is in line with the principles of insurance that requires insurable risks to be fortuitous, accidental and unintentional.

However, it must be noted that most insurers extend their cover beyond the standard sudden and unforeseen incidents to also include gradual pollution when dealing with complex risks such as underground storage tanks.

The need for environmental insurance

Anyone who deals with dangerous goods or potential pollutants is exposed to a great risk and will need protection against the Environmental clean-up and rehabilitation costs, against third-party liability, reputational damages or NEMA penalties. This includes:

1. Transporters of hazardous goods (classified as dangerous goods and potential pollutants) – for example, a fuel or acid tanker overturning leading to the release of pollutants on the road, land or nearby water bodies.

2. Onsite storage of hazardous goods (manufacturing plants/factories, chemical warehouse storages, above and underground storage tanks) – for instance, fuel pipeline leaks, underground tank leaks, above-ground tank implosion, warehouse explosions/fire.

Claims arising from Environmental incidents can cost millions of rands and it can take years before the affected environment can be fully rehabilitated and signed off by the relevant government departments. South African legislation imposes legal obligation on anyone who causes pollution to clean up, rehabilitate, restore and/or minimise such pollution. Non-compliance has serious consequences.

South African legislation on environmental impairment/pollution

South African environmental legislation is one of the toughest in the world and is adapted from international best practices aimed at protecting the environment for the benefits of both present and future generations. Section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution), which is the supreme law, states that “everyone has a right to an Environment that is not harmful to their health or wellbeing.” In ensuring that all South Africans adhere to this section of the Constitution, the following Acts have been signed into law:

- The NEMA – the National Environmental Management Act, 1998 (Act No. 107 of 1998)
- The NEMWA – the National Environmental Management Waste Act, 2008 (Act No. 59 of 2008)
- The NWA – the National Water Act, 1998 (Act No. 36 of 1998)
- The NEMAQA – the National Environmental Air Quality Act, 2004 (Act No. 39 of 2004)

This article will focus on sections 28 and 30 of the NEMA.

Section 28(1) – duty of care

Section 28(1) of the NEMA states that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

This means even companies that hold permits to release waste, manage waste or handle emissions, still have a duty to minimise and rectify such pollution or environmental remains degradation.

Section 30 – guidelines on the administration of incidents

When an incident occurs, the responsible person is required to notify the relevant authorities, including national, provincial or municipal emergency services/authorised response companies.

Types of reports that must be compiled by the responsible person:

1. **Alarm report** – as required by section 30 (3) of the NEMA, this report must be compiled by the responsible person or the employee of the responsible person immediately. It must be submitted to The Director-General, The South African Police Service, the relevant emergency services, the relevant municipality department, and all persons whose safety may be affected by the incident.
2. **The Incident Report** – as required by section 30 (5) of the NEMA, the responsible person must compile and submit this report within 14 days of the incident occurring. It must provide details of spill containment and the remediation process that was followed. It must also provide relevant authorities with results of the preliminary assessment regarding the long-term impacts of the incident.
3. **Government Action Report** – as required by section 30 (10) of the NEMA, this report is compiled by the relevant Authority.

The alarm report and the Incident Report must include the following information:

- The substance involved and an estimation of the quantity released.
- Initial measures taken to minimise impacts.
- Causes of the incident, whether direct or indirect, including equipment, technology, system or management failure.
- Measures taken and to be taken to avoid a recurrence of such an incident.
- The nature of the incident and any risks posed by the incident to public health, safety and property.
- The toxicity of substances or by-products released by the incident.
- Any steps which should be taken to avoid or minimise the effects of the incident on public health and the environment.

NEMA enforcement and penalties for non-compliance:

Administrative enforcement

Section 28 (4) allows director-generals from the Department of Environmental Affairs, Department of Mineral Resources, or provincial heads of department to issue directives for non-compliance which may require the responsible person to cease operation and commence with the measures stipulated by the directives.

Authorities will issue a warning letter prior to the directives. This is being done to provide the responsible person with an opportunity to make representation as to why a final notice should not be issued. This is legally required because section 28 (4) of the NEMA also states that before enforcement actions can be taken, the authorities must also be satisfied that the responsible person is failing to take reasonable measures to address this harm. If authorities are satisfied that the person is taking reasonable measures to address the harm to the environment, then section 28(4) directives will not be issued.

Should a responsible person fail to comply or inadequately comply with any directives issued, a relevant authority may take measures to implement clean-up and remediation operations. The relevant authority may then claim reimbursement of all reasonable costs incurred from every responsible person jointly and severally.

Criminal enforcement

The NEMA has created a network of environmental enforcement known as Environmental Management Inspectors (EMIs). These officials are employed by various government departments, and they work with the National Prosecuting Authority to ensure successful prosecution of offenders.

Failure to comply with section 30 of the NEMA is an offense and an offense will result in a fine not exceeding R5 million or to imprisonment for a period of five years. For second offenders, a subsequent conviction will result in a fine not exceeding R10 million and/or imprisonment for a period not exceeding 10 years.

Contaminated land

Section 36(5) of the NEMWA

Anyone who is in control of the contaminated land (owner, seller, buyer, lessor, lessee) has a legal duty to clean and rehabilitate that land according to NEMA regulations. Government authorities may then issue a contamination status against the land's title deed, which must be disclosed to any potential buyer of that land until remediation has been certified.

This is due to the fact that section 40 of the NEMWA makes it illegal to transfer or sell any contaminated land without informing the buyer or the person whom the contaminated land is transferred to. In case the contamination triggers inspection by the officials or is deemed a remediation site, the Minister or Member of the Executive Council (MEC) must be notified and will then issue remediation orders. The Minister will then notify the relevant Registrar of Deeds to have contamination status registered against the title deed. This will then need to be disclosed to any potential buyer until remediation has been signed-off.

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