



ENVIRONMENTAL COMPLIANCE MONITORING AND ENFORCEMENT AT MINES: THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY'S PERFORMANCE DURING THE FINANCIAL YEARS 2017 TO 31 MARCH 2019

INTRODUCTION

In 2016, the Centre for Environmental Rights (CER) published a Report titled, ["Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga"](#). The Report documents government's failure to ensure that mining companies comply with environmental laws and highlights how such non-compliance has led to unprecedented environmental degradation and chronic health problems in Mpumalanga – with dire consequences for communities and South Africa's future prosperity. *Zero Hour* finds that this failure to enforce environmental laws at mines arose as a result of neglect, limited resources and willful inaction by the Departments of Mineral Resources and Water and Sanitation. Since the publication of *Zero Hour*, the CER has continued to track the environmental compliance monitoring and enforcement (CME) activities of these Departments at mines.

Using the Promotion of Access to Information Act, 2000 (PAIA), the CER asked the Department of Mineral Resources and Energy (DMRE) about its capacity to undertake inspections and any necessary enforcement action in the 2017 to 2019 financial years. The CER hoped to see an improvement as the DMRE settled into its role as the competent authority for compliance with NEMA by mining companies. The information supplied by the DMRE shows that there has not been any significant improvement in the DMRE's capacity to conduct environmental CME since the publication of *Zero Hour* in 2016 and therefore that it remains woefully inadequate.

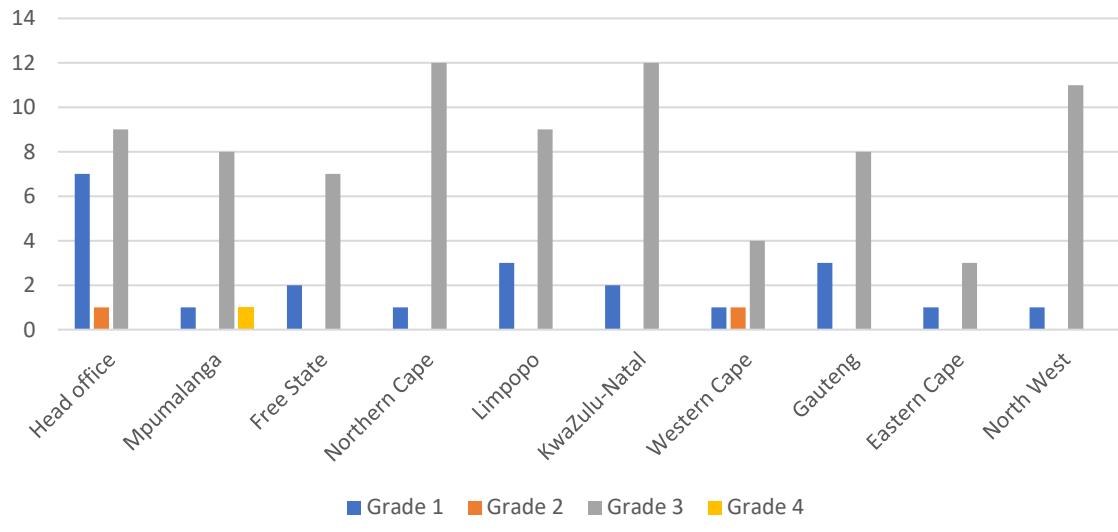
CAPACITY

Environmental CME is vital to ensure that statutory requirements are met and mining companies fulfil their obligations in their licences and in terms of environmental laws. The DMRE must appoint suitably qualified officials to monitor compliance and take the appropriate administrative and criminal enforcement action against transgressors where environmental laws are violated. Environmental Mineral Resource Inspectors (EMRIs) are responsible for undertaking environmental CME in the mining sector and their specific roles and functions are dependent on their qualifications and the grades they fall under.

As at 31 March 2019, the number of staff employed by DMRE who had been designated as EMRIs in terms of S31BB of NEMA was 108, positioned around the country as follows:



Number of EMRIs designated by the DMRE in terms of section 31BB of NEMA as at 31 March 2019



According to the DMRE, the 7 EMRIs who sit at head office perform managerial and supervisory functions while the other 15 grade 1 EMRIs at provincial managerial levels perform both supervisory and operational functions. DMRE gave no further breakdown of these numbers or what operational functions they undertake. Most of the EMRIs are grade 3 which means they are compliance officials and do not have enforcement powers and there are only 2 EMRIs who operate as enforcement officials with no managerial functions.

According to the DMRE's website, there is a total of 1 856 operating mines in South Africa broken down as follows:

Province	Number of operating mines
Eastern Cape	179
Free State	78
Gauteng	188
KwaZulu-Natal	140
Limpopo	148
Mpumalanga	235
Northern Cape	316
Western Cape	198
North West	374

With 1856 operating mines, 108 EMRIs is woefully too few to ensure that mining companies are complying with their environmental licences. This reality is cast into sharp relief in Mpumalanga with 235 known operational mines yet only 10 EMRIs designated in the Province, with 8 of them being compliance officials and the one grade 1 EMRI undertaking both supervisory and operational functions. Grade 1 EMRIs as managers have many other obligations and duties beyond monitoring environmental compliance and taking enforcement action under NEMA – an impossible task to fall on



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a single person. With only 10 designated EMRIs in the province and 235 operational mines, that is, where rights and permits have been issued, the EMRIs would monitor around 23 mines each. This is a high target if each is properly trained, resourced and dedicated full-time to compliance monitoring and enforcement. However, add all of the unauthorised mines in the province and the hundreds of derelict and ownerless mines and the task of monitoring and enforcing compliance with environmental licences and laws proves impossible.

DMRE had plans to train 7 more EMRIs in the 2019/2020 financial year. However, information regarding their designation and which offices they will be based in was not provided making it difficult to assess the impact of the training and the intended designations on actual capacity to implement NEMA.

COMPLIANCE MONITORING

The DMRE records relating to **inspections** conducted in the Financial Years 2017/18 and 2018/19 respectively indicated the following:

	General inspections conducted in FY2017/18	General inspections conducted in FY2018/19	Inspections prompted by public complaints in FY2017/18	Inspections prompted by public complaints in FY2018/19
Head office			253	292
Mpumalanga (235 licenced mines)	167	115		
Free state (78 licenced mines)	182	148		
Northern Cape (316 licenced mines)	193	207		
Limpopo (148 licenced mines)	197	187		
KZN (140 licenced mines)	153	143		
W Cape (198 licenced mines)	152	158		
Gauteng (188 licenced mines)	214	270		
E Cape (179 licenced mines)	214	117		
North West (374 licenced mines)	181	179		

Whereas some provinces such as the Western Cape show a slight increase in the number of inspections conducted in the 2017/18 and 2018/19 financial years respectively, the records show a decrease in the number of inspections undertaken by the DMRE in 6 of our 9 provinces. For example, in the 2017/18 financial year, 167 inspections were undertaken in the Mpumalanga Province and this



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number reduced to 115 inspections in the 2018/19 financial year – less than half the licenced mines were inspected. Given the enormous environmental impact of mining, particularly coal mining in Mpumalanga, the DMRE’s failure to inspect most of the mines in Mpumalanga is a serious and dangerous breach of its obligations under NEMA.

It is not clear from the information supplied what type of inspections were conducted and by which officials. The DMRE’s information does not indicate the duration of the inspections, how many officials conducted the inspections including their designations. No information about the number of inspection reports finalised or about violations detected was supplied.

The Department of Environment, Forest and Fisheries (DEFF) publishes the National Environmental Compliance and Enforcement Report (NECER) annually, detailing that department’s compliance enforcement activities and results, thereby making such information available to the public. There are a range of benefits that flow from such publication, not least of which is deterrence of environmental violations. Despite requests to the DMRE and its Minister to publish its own version of the NECER providing comprehensive information about environmental compliance monitoring and enforcement activities and results at mines, to date no such report is published by the DMRE.

The DMRE publishes annual reports, however, these do not provide a summary of enforcement action being undertaken by the Department, only the number of inspections carried out.

In the 2017/18 report, the number of inspections were as follows:

- 1 583 environmental compliance inspections
- 487 mine work/ prospecting work programme inspections
- 212 legal compliance (mineral laws and SLP) verification inspections
- 306 SLP verification inspections

In the 2018/19 report, stated the following:

- 1 502 environmental compliance inspections
- 384 mine work programme/prospecting work programme inspections
- 155 legal compliance (mineral laws and SLP) verification inspections
- 251 SLP verification inspections

The DMRE does not provide any details or results of these inspections, including by province. In response to the PAIA request CER made to the DMRE, it indicated that there was a total of 1 653 environmental compliance inspections undertaken in the 2017/18 financial year and 1 524 inspections carried out in the 2018/19 financial year. There is therefore a discrepancy between the information recorded by the DMRE in its respective annual reports and the information provided through PAIA. This raises a question about adequacy and accuracy of information held by the DMRE about its own mandate and performance. However, given that the DMRE had planned 1 275 inspections per year since FY2017/18 and 212 SLP verification inspections, we take note that a higher number of inspections were conducted in the reporting period than were planned.

The DMRE provides no information on the methodology used by officials to conduct inspections, for example, whether mining companies are given advance warning of an inspection or whether the officials conduct inspections against a list of licence conditions or what inspections entail.



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Further, in response to CER's PAIA request, the DMRE indicated that its Head Office had conducted a total of 253 inspections prompted by complaints against illegal mining activities in the 2017/18 financial year and 292 similar inspections in the 2018/19 financial year. According to the respective annual reports, the DMRE responded to a mere 50% of complaints received in FY2017/18 and of those inspected, the DMRE only closed 25%. It indicated that the underachievement was due to the backlog of complaints received.

In FY2018/19, the DMRE inspected 81% of the complaints received and closed 37% of those complaints. In its report, the DMRE states that the Directorate received more complaints in FY2018/19 and some of the complaints were carried over from previous financial years therefore creating a backlog. Most of the complaints that could not be attended to were then scheduled for Quarter 1 of 2019/2020. With the DMRE Head Quarters only housing 17 EMRIs it is clear that this is insufficient to attend to all complaints timeously.

ADMINISTRATIVE ENFORCEMENT

Appropriate enforcement action is achieved by issuing notices and directives to compel compliance and in the absence of compliance with these, by undertaking civil and criminal proceedings.

With regards to the number of notices of intention to issue a compliance notice and compliance notices in terms of section 31L of NEMA issued during the 2017/18 and 2018/19 financial years respectively, we obtained the following information from the DMRE:

Pre-Compliance Notices and Compliance Notices issued by the DMRE in terms of section 31L of NEMA in the Financial years 2017/2018



Pre-Compliance Notices and Compliance Notices issued by the DMRE in terms of section 31L of NEMA in the financial years 2018/2019



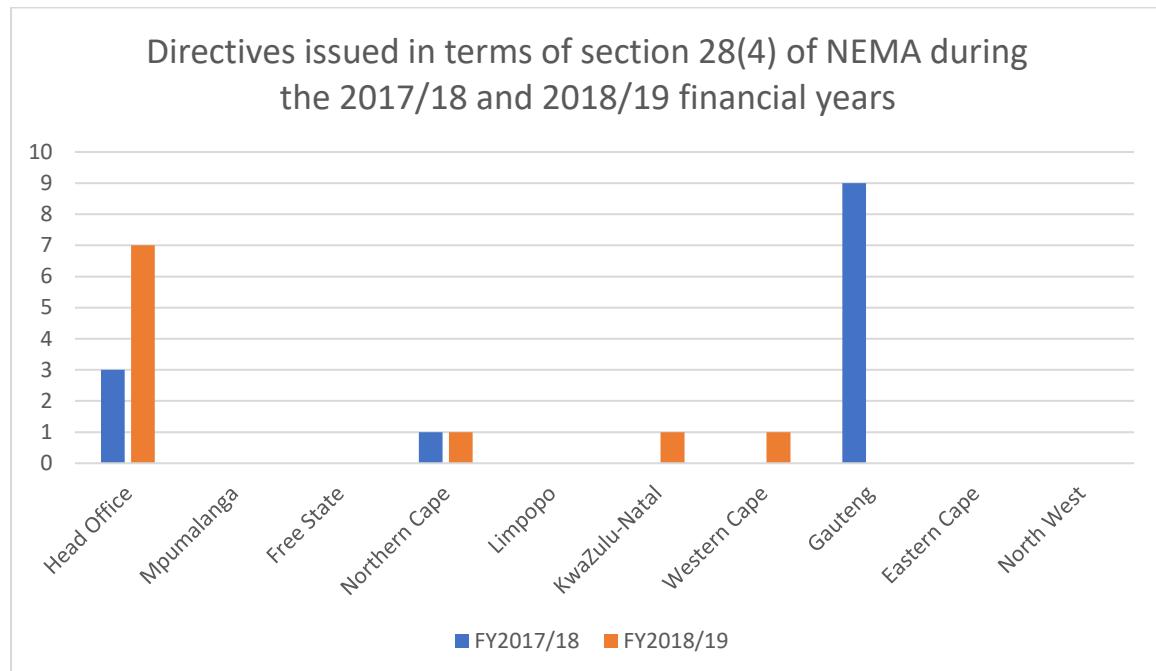
No information was supplied about how many of the pre-compliance notices were complied with and how many of them resulted in the issue of a compliance notice, or no further action. Therefore, while the overall number of pre-compliance notices issued is lower than the number of compliance notices issued, there is no way to tell if this is as a result of compliance with the pre-compliance notices or a result of an overlap with the previous financial year, or a failure by the DMRE to take further action.



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Section 28(4) of NEMA provides that the DMRE may issue a directive directing a person who has caused, or is causing significant pollution or environmental degradation to either cease the activity, investigate, evaluate and assess the impact of the activity or to take the appropriate measures to remedy the pollution or damage. The DMRE issued the following directives in terms of section 28(4) of NEMA during the 2017/18 and 2018/19 financial years respectively:



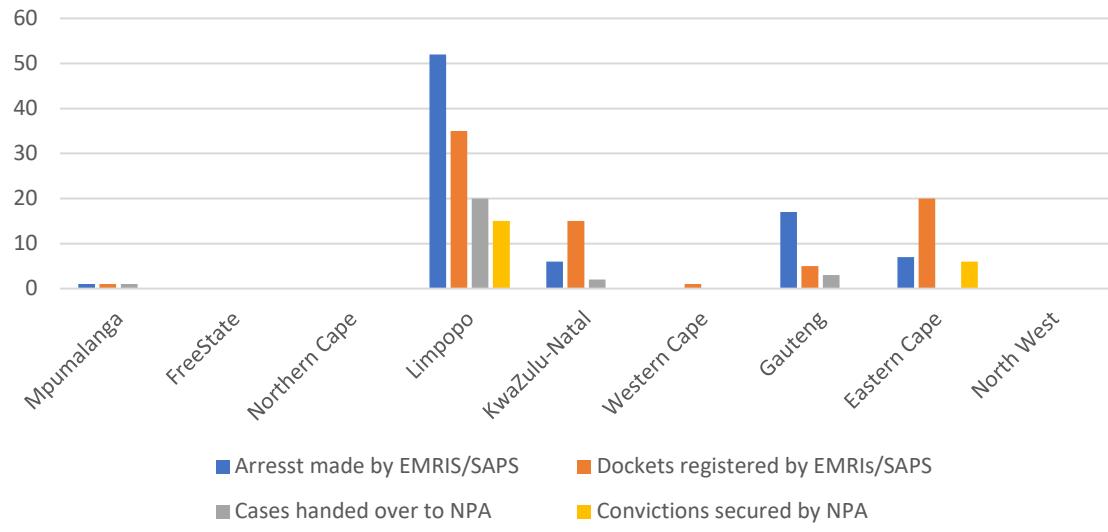
The DMRE annual reports state an achievement rate of 100% in terms of the statutory directives/notices issued in FY2017/18 and 90% achievement in FY 2018/19. It is not clear what constitutes “achievement” in this framing.

CRIMINAL ENFORCEMENT

Some offences under the MPRDA, NEMA and relevant regulations that relate to mines are criminal offences and therefore have to be dealt with under the criminal justice system. EMRIs and SAPS have the power to make arrests for environmental offences and the NPA can prosecute such offences. In respect of the financial years 2017/18 and 2018/29, the information supplied did not distinguish in which year the criminal enforcement occurred but the data for both financial years was as follows:



Criminal Enforcement by the DMRE during the 2017/18 and 2018/19 Financial Years



In certain provinces such as the Free State and Northern Cape, there was no criminal enforcement at all. There is no way to ascertain whether this is because inspections revealed that there were no criminal offences committed, or inspections revealed criminal offences yet no criminal enforcement action was taken, or insufficient inspections were conducted, or if information is not being recorded. It is also clear from the information that where arrests have been made, it is not certain that a docket will be opened, the case will be prosecuted or if the NPA will be able to secure a conviction. For instance, in Limpopo 52 arrests were recorded but 35 dockets were opened, 20 cases handed over to the NPA but only 15 cases were successfully prosecuted. Information was not provided regarding the number of s105 plea and sentence agreements that were received in both financial years nor the number of acquittals granted in relation to cases handed to the NPA.

Section 24G of NEMA

In terms of section 24 of NEMA, a person is required to obtain an environmental authorisation in order to commence a listed activity. Due to its significant impact on the environment, mining is a listed activity and therefore an environmental authorisation is required before one can commence mining or a related activity. In terms of section 24F of NEMA, a person who commences a listed activity without an environmental authorisation may be guilty of an offence in terms of section 49A. Section 24G of NEMA allows a person who commenced with a listed activity prior to obtaining environmental authorisation to apply to the Minister or MEC of the relevant Provincial Department to rectify that unlawful commencement.

In both the 2017/18 and 2018/19 financial years, the DMRE received a total of 9 section 24G applications broken down as follows:



	Applications received in terms of Sec 24G	Fines issued in terms of Sec 24G
Mpumalanga	0	0
Free state	1	0
Northern Cape	1	1
Limpopo	2	1
KZN	3	0
W Cape	1	1
Gauteng	0	0
E Cape	1	1
North West	0	0

The DMRE does not distinguish between applications received and fines issued in a particular financial year, however, at the time of the PAIA request, only 4 fines had been issued in relation to section 24G applications that had been made. The DMRE indicated that where fines have not been issued, the applications were waiting to be adjudicated upon by the Department's Section 24G Committee. The DMRE received a total sum of R2 993 000 from section 24G applications. In its 2018/19 annual report, the DMRE reported that a fine of R 1. 25 million was issued under section 24G for failure to obtain an environmental authorisation before commencement of a listed activity. From the above, it's not clear whether the R1.25 million reported in the 2018/19 annual report forms part of the R2 993 000 reported for both financial years or if it is a separate amount.

Conclusion

The information gathered in this report highlights how little information about the DMRE's environmental compliance monitoring and enforcement activities and results is in the public domain; and from what information can be gathered and interpreted, how little environmental compliance monitoring and enforcement is undertaken by the DMRE responsible for a sector that wreaks some of the most extreme environmental damage.

"Lack of enforcement undermines and perverts the regulatory regime. This means the few companies who do comply are prejudiced, while those considering compliance are discouraged from doing so. Failure to enforce legislation distorts the will and intention of parliament. This erodes not only the regulatory regime, but also our constitutional democracy."¹ Moreover, such lack of enforcement facilitates the violation of environmental rights.

¹ Zero Hour, 2016, pp 72