

TURN ON THE FLOODLIGHTS:

TRENDS IN DISCLOSURE OF ENVIRONMENTAL LICENCES AND COMPLIANCE DATA



Centre *for*
Environmental Rights
Advancing Environmental Rights in South Africa

CONTENTS

Executive summary	iii
Foreword	iv
Introduction	1
Legislative provisions requiring disclosure of environmental licences and compliance data	2
Environmental legislation	2
Non-environmental legislation	8
Comparative analysis of domestic legal requirements in other jurisdictions	13
General practice: companies operating in South Africa and abroad	23
Annual reports	24
Websites	25
Ancillary organisations and reports	26
Responses to requests for voluntary disclosure of permits	27
Conclusions	27
Conclusions and recommendations	28
Voluntary disclosure	28
Central online register or database	28
Incentivisation	29
Bibliography and references	30
Acknowledgements	33



EXECUTIVE SUMMARY

In April 2012, the Centre for Environmental Rights (CER) published its report *Unlock the Doors: How greater transparency by public and private bodies can improve the realisation of environmental rights*. Based on 18 months of work attempting to access environmental information on behalf of civil society organisations and communities, the report found poor implementation of and compliance with the Promotion of Access to Information Act, 2000 amongst government departments and private bodies that hold environmental information. *Unlock the Doors* made recommendations that included a far greater consideration of voluntary disclosure about environmental governance and regulation by public bodies, as well as increased obligations and incentives for private bodies to disclose information about environmental management.

Our *Turn on the Floodlights* report provides a comparative context for the recommendations in *Unlock the Doors*, looking both at other domestic legal requirements and international legal requirements and practices. By comparing the levels of disclosure by the same corporate group in different jurisdictions with different legal requirements for disclosure, it powerfully demonstrates how companies tailor their disclosure according to the prevailing legal requirements. This means that, in the absence of corporate leadership, regulation is required to ensure a level playing field between companies and for companies that operate in multiple jurisdictions.

Key findings of *Turn on the Floodlights*:

- Although South African environmental laws acknowledge the importance of transparency in environmental governance, few statutes compel disclosure of licences and compliance data. Where such disclosure is envisaged, it often has not yet been implemented by the authority in question.
- Disclosure provisions in non-environmental South African legislation could justifiably be imported into environmental laws. There is no obvious reason why workers exposed to safety risks, or investors exposed to the risks of unscrupulous operators, deserve greater protection than individuals, communities, or the South African public at large, faced with the risks posed to a compromised environment.
- Mandatory disclosure of, or at least easy public access to, environmental licences is common in many jurisdictions in both developed and developing countries.
- Large multinational companies operating in South Africa disclose environmental licences and compliance data only in those jurisdictions that require it.
- Public registries of environmental licences and public recognition programmes would incentivise greater voluntary disclosure by licence-holders. A number of databases of environmental licences already exist, but are, in all but one instance, designed to give access to authorities themselves, and often also to licence applicants and holders, while excluding members of the public, communities and civil society organisations.

FOREWORD

TURNING THE BURDEN OF INFORMATION INTO CITIZENS' POWER

The instinctive resistance of South African institutions to disclosure of information is an unfortunate legacy of our past. This is most absurdly demonstrated in the battles of civil society organisations and communities to access basic information about environmental management and governance, most notably environmental licences – battles that make the public consultation that precedes the issuing of these licences a mockery. Environmental licences are not confidential "behind-closed-doors" agreements between government and private companies, as some companies argue. Instead, they constitute the licence provided to these companies to operate, and to manage and mitigate their environmental impacts, by a state that holds the environment in public trust for all of the people of South Africa.

In times of high pressure for service delivery and limited capacity for compliance monitoring, the most obvious intervention is to empower citizens to assist authorities to identify non-compliance with obligations. Moreover, as has been demonstrated in other countries, companies conduct their operations more responsibly when they are in the spotlight.

Requirements in operational permits for disclosure of those permits are an easy, cost-effective and immediate way of achieving these results. At the same time, only limited investment is required to have online public registries in place for all environmental licences by 2014. In most instances, these databases already exist.

With this report, we call on the departments of Environmental Affairs, Water Affairs, Mineral Resources and Agriculture, Forestry and Fisheries and their agencies to make more accountable governance of our natural resources a priority through:

1. listing environmental licences as automatically available records in their manuals under the Promotion of Access to Information Act, thereby drastically reducing the administrative burdens on these departments;
2. making public disclosure of environmental licences and reports against the conditions of those licences mandatory for all licence-holders; and
3. making all environmental licences available to the public through accessible online databases.



Melissa Fourie
Executive Director
Centre for Environmental Affairs

Visit our website at www.cer.org.za for more information on the CER's work on promoting transparency in environmental governance, and to download copies of the *Unlock the Doors* report.



INTRODUCTION

This report seeks to gain a greater understanding of both industry practice and legislative requirements relating to the disclosure of environmental information. In this context, environmental information refers to:

- ✓ environmental licences or permits, including licences and permits that incorporate environmental conditions;
- ✓ environmental management plans and programmes incorporated in those permits; and
- ✓ compliance data that evidences compliance with environmental permits, such as emissions and discharge information, internal and external audits, as well as inspection and compliance reports.

How much of this information is available to the public, third parties or adjoining facilities? Do companies voluntarily make this information available, or is it only available through requests made in terms of the Promotion of Access to Information Act 2000¹ (PAIA)? Access to environmental information is not only integral in the exercising of environmental rights, it is also important for the purposes of monitoring the actions of large companies and assessing their impacts, both positive and negative, on society and the environment.

This report takes a three-pronged approach in assessing levels of disclosure of environmental permits and compliance data:

1. It considers a range of South African legislative provisions relating to disclosure of information to third parties and members of the public. Both environmental and non-environmental legislation (relating to occupational health and safety, labour legislation, agricultural legislation, banking legislation, gun laws and selected municipal legislation) was assessed and compared to ascertain whether more provisions about access to information are provided for in environmental legislation as compared to other legislation.
2. The report then examines legislation relating to disclosure of environmental information in other jurisdictions. A range of legislative provisions from developed and developing countries was canvassed to illustrate levels of disclosure abroad.
3. The last section of the report considers the general practice of a selection of large companies currently operating in South Africa: Anglo American & De Beers, ArcelorMittal South Africa Limited, BHP Billiton, Sasol Limited, and Sappi Limited. In looking at their practices relating to voluntary disclosure of environmental information, consideration was given to what information is already available either through the company or adjoining facilities, their responses to requests for voluntary disclosure, and what information each company makes available in other jurisdictions in which they operate.

The report also assesses the status and public accessibility of seven key databases of environmental licences in South Africa.

¹ Act 2 of 2000.



LEGISLATIVE PROVISIONS REQUIRING DISCLOSURE OF ENVIRONMENTAL LICENCES AND COMPLIANCE DATA

Environmental legislation

South Africa has a range of legislation aimed at protecting and preserving the environment, and many of those statutes recognise the importance of transparency and public participation in environmental governance. However, when it comes to legislating access to environmental information, and with the exception of access to information during public participation, much of South Africa's environmental legislation simply relies on the Promotion of Access to Information Act (PAIA).

National Environmental Management Act² (NEMA)

NEMA expressly recognises the importance of transparency in environmental decision-making, and promoting public participation in environmental governance.³ The Act initially expressly provided for access to environmental information held by the state in s.31, but this provision was repealed after the promulgation of PAIA.⁴

Unusually, NEMA prohibits disclosure of certain information, and attaches a criminal sanction to that prohibition.⁵ However, s.31Q(1A) contains broad categories of exclusion from that prohibition that include: environmental quality or the state of the environment; any risks posed to the environment, public safety and the health and well-being of people; or compliance with or contraventions of any environmental legislation by any person.

Through the integrated environmental management provisions in chapter 5, as read with the EIA Regulations, 2010,⁶ NEMA makes comprehensive provision for public participation during the course of an application for an environmental authorisation, which includes access to reports and assessments at various stages of the application process.

The EIA regulations provide that once a decision has been reached regarding an application for a permit, the competent authority making that decision must notify the applicant, who in turn must notify the registered interested and affected parties (IAPs) in writing. The regulation does not stipulate how much information about the decision must be passed on to the IAPs. It simply states that they must be notified of the outcome of the application, reasons for the decision and the fact that they can lodge an appeal if necessary. The EIA regulations also require a competent authority to keep a register of all applications for environmental authorisations received, and records of all decisions in respect of environmental authorisations.⁷

2 National Environmental Management Act 107 of 1998.

3 See ss.2(4)(f) and (k).

4 National Environment Laws Amendment Act 14 of 2009, at s.13.

5 S.31Q of NEMA.

6 Environmental Impact Assessment Regulations, 2010 (GN R543 in GG 33306 of 18 June 2010).

7 Regulation 11 of the EIA Regulations, note 6 above.

“Every financial services provider must display its licence in a prominent and durable manner within every business premises, and ensure that the licence is at all times available to any person requesting proof.”

– Section 8 of the Financial Advisory and Intermediary Services Act 2000.



NEMA makes provision for reporting certain information regarding environmental emergency incidents that may potentially be hazardous to others.⁸

Other regulations under NEMA also address access to information, but these regulate very specific and discreet areas. For example, the Multilateral Environmental Agreements for Chemicals Management Regulations⁹ seeks to ratify a number of international instruments and, in so doing, provides for varying degrees of access to information relating to specific substances. Many of the provisions in these regulations relate to information exchanged between parties to the international instruments.¹⁰

NEMA contains a definition that has potential interpretative relevance for access to environmental information: the definition of commercially confidential information states that "details of emission levels and waste products must not be considered to be commercially confidential notwithstanding any provisions of this Act or any other law".¹¹

In the past five years, the Department of Environmental Affairs (DEA), together with all the entities and provincial environment departments that participate in the Environmental Management Inspectorate established under NEMA, have radically increased compliance information available about specific operations through publication of an annual National Environmental Compliance and Enforcement Report.¹² This report typically details the findings of compliance inspections of a limited number of key facilities, from which at least some information about the permitting and compliance status of selected companies and facilities is made available to the public. Unfortunately, these same departments have not always been willing to provide the supporting documents relied on for these Reports. Note that publication of this report is not a statutory requirement.

National Environmental Management: Air Quality Act¹³ (NEMAQA)

NEMAQA stipulates that, when applying for an atmospheric emission licence, the applicant must take appropriate steps to bring the application to the notice of interested persons and the public.¹⁴ As in NEMA, NEMAQA also allows for a greater amount of access to information before a licence is granted, rather than once the application has been successful.¹⁵ Once granted, there is no provision for making the permit or its provisions available to IAPs.

8 NEMA at ss.30(3), 30(10) and 31.

9 GenN 201 in GG 33005 of 8 March 2010.

10 Article 9 and 10 of the Stockholm Convention and article 14 of the Rotterdam Convention.

11 NEMA at s.1(1).

12 National environmental compliance and enforcement reports for 2007-8, 2008-9, 2009-10, 2010-11 and 2011-2 are available at www.environment.gov.za.

13 National Environmental Management Air Quality Act 39 of 2004.

14 NEMAQA at ss.7(2)(a), (b) and (g).

15 NEMAQA at ss.38(3)(a) and (b); s.44(4) and s.46(3).



"With the cost to government and industry to implement a South African Waste Information System, it is critical that this data be used within government and made available to citizens of South Africa."

– National Waste Management Strategy Framework Document, 2005. The SAWIS contains copies of all waste licences in a public, online database.

NEMAQA also stipulates that the national framework must establish national standards for the monitoring of ambient air quality and the collection of data necessary to ascertain compliance with the Act and emissions standards, as well as access to information by the public.¹⁶ Section 30 of NEMAQA stipulates that an air quality officer may require a person to submit an atmospheric impact report if it is suspected that the person has contravened NEMAQA, or as part of a review of a provisional atmospheric licence or an atmospheric emission licence.¹⁷ However, this report is only available to the air quality officer and no mention is made of it being more widely available.

By way of incentivisation, s.31 of NEMAQA states that air quality officers may establish programmes of "public recognition of significant achievements in the area of pollution prevention"¹⁸ Unfortunately, the section does not expand on what a public recognition programme might entail.¹⁹

Regulations in terms of NEMAQA reiterate the need for the provision of access to information, as well as attaining the highest levels of disclosure possible, even when confidentiality is needed.²⁰ Where regulations consist of environmental management plans, some general emissions level data is made available. For example, the Highveld Air Quality Management Plan²¹ contains collective data on ambient air quality relative to national air quality standards. The ambient air quality data was compiled by using air quality monitoring data from companies operating in the area concerned. These companies included Eskom and Sasol, but the data does not reveal whether or not those companies are compliant with their authorisations. Regulations that include data gathered from companies effectively serve as an indirect, and more generalised, way of obtaining access to information.

National Environmental Management: Waste Act²² (NEMWA)

As with NEMA and NEMAQA, NEMWA specifies that public participation must be adhered to in the application for a waste management licence.²³ Once again, however, once the licence is granted, there is no equivalent provision allowing for public access to that licence.

NEMWA provides for the establishment of a National and Provincial Waste Information System, which would offer information to the public regarding education, awareness, research and development, as well as public safety management

16 NEMAQA at s.8, see particularly s.8(c)(vi).

17 NEMAQA at s.30.

18 NEMAQA at s.31.

19 This seems to be a section in NEMAQA that may hold some utility in terms of advocating greater amounts of voluntary disclosure, particularly if the programme adopted in the Philippines (see the comparative analysis of domestic legal requirements in other jurisdictions) is taken as an example.

20 Highveld Priority Area Air Quality Management Plan (GN 144 in GG 35072 of 2 March 2012).

21 GN 144 in GG 35072 of 2 March 2012.

22 National Environmental Management: Waste Act 59 of 2008.

23 NEMWA at ss.48, 51(2)(c), 52(5), 55(4).

and the impact of waste on the environment.²⁴ The provisions relating to the Waste Information System specifically mention that an objective of the system would be to "provide information to organs of state and the public".²⁵ In terms of explicit access to information contained in a waste information system, NEMWA simply relies on the provisions of PAIA.²⁶

NEMWA further stipulates that certain information regarding the transfer of contaminated land must be provided, by the Minister, to the Registrar of Deeds whose records are available to the general public.²⁷ Provision is also made for a so-called contaminated land register, which should include information about owners and users of investigation areas, the location of those areas and details about the contamination.²⁸ As at date hereof, this section is not yet in force.

NEMWA provides for access, which includes access to interested persons and the public, to industry waste management plans, but only after a person has been asked (by the MEC or Minister) to compile a waste management plan.²⁹ There is also a general duty on manufacturers of products which may result in the generation of hazardous waste to inform the public of the impact of that waste on health and the environment.³⁰

Like NEMQA, NEMWA stipulates that programmes for the "public recognition of significant achievements in the area of waste avoidance, minimisation or other forms of waste management" may be established by waste management officers.³¹

National Environmental Management: Integrated Coastal Management Act³² (NEMICMA)

Like the previous statutes, NEMICMA makes provision for public participation processes,³³ but no express requirement for making authorisations or licences available to the public.

However, there is a general information provision in NEMICMA that requires that the Minister progressively, and within available resources of the Department, make sufficient information available and accessible to the public concerning the protection and management of the coastal zone, to enable the public to make an informed decision of the extent to which the State is fulfilling its duty to fulfil environmental rights in the coastal environment.³⁴

National Environmental Management: Biodiversity Act³⁵ (NEMBA)

NEMBA contains the usual provisions relating to public participation and access to information before a permit, authorisation or exemption is granted.³⁶ It also stipulates that national and regional biodiversity frameworks and management plans must be developed and implemented. During the adoption of these measures, a consultative process must be followed.³⁷ The Minister must make monitoring information publicly available.³⁸ Other than stating that the Minister must report to parliament and make monitoring information publicly available, NEMBA fails to stipulate how this information should be made available.

National Environmental Management: Protected Areas Act³⁹ (NEMPA)

NEMPA has a whole section (part 5) on the consultation process.⁴⁰ This provides that the Minister or MEC must follow a consultative process, which includes various public participation measures, before issuing specific notices in terms

24 NEMWA, see the definition of extended producer responsibility measures in s.1. Also see s.60 and s.62.

25 NEMWA at s.61(c).

26 NEMWA at s.64.

27 NEMWA at s.40. Also see s.7 of the Deeds Registries Act 47 of 1937.

28 NEMWA at s.41.

29 NEMWA at s.28 to 31.

30 NEMWA at s.16(2).

31 NEMWA at s.42.

32 National Environmental Management Integrated Coastal Management Act 24 of 2008.

33 NEMICMA at ss.34(1)(a), 53 and 63(1)(a).

34 NEMICMA at s.93(1).

35 National Environmental Management: Biodiversity Act 10 of 2004.

36 NEMBA at ss.57, 59, 60 to 63, 79, 82, 86, 99 and 100.

37 NEMBA at s.47.

38 NEMBA at s.49(3)(b).

39 National Environmental Management: Protected Areas Act 57 of 2003.

40 NEMPA at s.41.

of NEMPA.⁴¹ The registrar of deeds (whose records are public⁴²) must also be notified when a special area is declared in terms of NEMPA.⁴³

Mineral and Petroleum Resources Development Act⁴⁴ (MPRDA)

The MPRDA has provisions stipulating that holders of certain rights in terms of the MPRDA (such as prospecting rights or reconnaissance permission) must keep proper records and submit progress reports and data.⁴⁵ The MPRDA specifically forbids the destruction of any record, except in accordance with written directions from the Regional Manager;⁴⁶ such records include information about prospecting operations and results, expenditure connected to those operations, borehole core data and core-log data. The MPRDA places some responsibility on the Regional Manager to notify IAPs of applications for mining and prospecting licences in terms of the MPRDA and to invite objections.⁴⁷ However, the public consultation process is still the responsibility of the applicant.⁴⁸

Section 25 of the MPRDA stipulates that holders of mining rights must lodge the right for registration at the Mining Titles Office,⁴⁹ also known as the Mineral and Petroleum Titles Office. Furthermore, the MPRDA requires mining right holders to submit prescribed annual reports detailing the extent of the holder's compliance with their social and labour plan, as well as other relevant provisions of the MPRDA.⁵⁰

Sections 28 to 30 deal with information disclosure in terms of the MPRDA, and provide that certain, specific information must be given to the Minister if and when requested. Information and data that is submitted may be disclosed to others to give effect to s.32 of the Constitution.⁵¹ The MPRDA also refers expressly to PAIA at s.88, where provision is made for the person (or entity) submitting the information to the regional manager to indicate which information must be treated as confidential (this provision does not, however, override the obligations in PAIA).

National Water Act⁵² (NWA)

The key provisions relating to disclosure of information in the NWA establish that applications for licences must be brought to the attention of IAPs,⁵³ that dams constituting a safety risk must be registered, and that a national information system must be established.⁵⁴ Access to information in this system should also be provided to those requiring information.⁵⁵

Section 139 of the NWA places an obligation on the Minister to establish national information systems regarding water resources; included in this system is "a register of water use authorisations".⁵⁶ One of the objectives of the national information system is "to provide information to water management institutions, water users and the public".⁵⁷ Section 142 provides that information contained in the national information system must be made available by the Minister, subject to any limitations imposed by law, and the payment of a reasonable charge determined by the Minister.

Finally, information relating to floods, droughts and other potential risks (for example water quality) must be made publicly available – the NWA phrases it in the form of a positive duty upon the water management institution concerned.⁵⁸

41 NEMPA at ss.31 to 33.

42 Note 25 above.

43 NEMPA at s.36.

44 Mineral and Petroleum Resources Development Act 28 of 2002.

45 MPRDA at ss.21, 25 and 28.

46 MPRDA at s.21.

47 MPRDA at s.10.

48 MPRDA at ss.16, 22 and 27.

49 MPRDA at s.25.

50 MPRDA at s.25(2)(h).

51 MPRDA at s.30.

52 National Water Act 36 of 1998.

53 NWA at ss.25 to 43.

54 NWA at s.139.

55 NWA at ss.140(c) and 142.

56 NWA at s.139(2)(d).

57 NWA s.140(c).

58 NWA at ss.142 to 145.



Holders of nuclear authorisations must, at all times, display copies of the authorisation at such places and in such languages and form to ensure public access to the conditions specified in the authorisation.

Water Services Act⁵⁹ (WSA)

Although the WSA predominantly relates to state entities, there is provision for water service providers to enter into a joint venture or contracts with the private sector.⁶⁰ Providers must make information available to consumers or potential consumers; this includes the conditions for provision of water services.⁶¹ The WSA does not prescribe what type of information must be made available. Also, the WSA allows for the establishment of a national information system, with reasonable access allowed to members of the public.⁶² Other information accessible to the public in terms of this Act includes policy statements of water boards and a annual report issued by a water board.⁶³ Water services committees are required to provide information to the Minister, but there is no provision relating to access to the same information granted to members of the public.⁶⁴

National Nuclear Regulator Act⁶⁵ (NNRA)

The NNRA takes an inconsistent approach to disclosure of information. A licence is required for the decommissioning, operation, construction, or decontamination of a nuclear installation.⁶⁶ To obtain a licence, a copy of the application must be served on every municipality affected, and published in the Gazette and two newspapers circulating in the area.⁶⁷ This also applies when an application is made for registration or exemption for certain actions.⁶⁸

Holders of nuclear authorisations must, at all times, "display copies of the authorisation at such places and in such languages and form [...] to ensure public access to the conditions specified in the authorisation".⁶⁹ Furthermore, licence-holders are required to establish a public safety information forum for those living in the municipal area affected.⁷⁰ As has been illustrated above, these requirements are unique to this legislation. Nuclear regulators are also required to inform all persons who could have been affected during a nuclear accident, and emergency-planning structures must be put in place.⁷¹ The NNRA provides for a record of nuclear installations to be kept by the Regulator, but it is silent on whether this list is publicly accessible.⁷²

59 WSA 108 of 1997.

60 WSA at ss.18 to 19.

61 WSA at ss.4, 14 and 23.

62 WSA at ss.67 to 70.

63 WSA at ss.39 and 44.

64 WSA at ss.59.

65 NNRA 47 of 1999.

66 NNRA at s.20.

67 NNRA at s.21 and 22.

68 NNRA at s.22.

69 Nuclear Regulator Act at ss.26 and 27.

70 Nuclear Regulator Act at s.26.

71 Nuclear Regulator Act at ss.37 and 38.

72 Nuclear Regulator Act at s.39.



The Marine and Living Resources Act provides for the creation of a register of “all rights of access, other rights, permits and licences granted or issued in terms of the MLRA”, which “shall be available for inspection by the public”.

A record of nuclear accidents and incidents, also held by the Regulator, is specifically available upon request by any person.⁷³ However, the NNRA then goes on to state that no public disclosure is permitted if the information is not already public knowledge or if the disclosure is likely to jeopardise security.⁷⁴ Also, no person may receive information knowing that it has been disclosed in contravention of the NNRA.⁷⁵

Other environmental legislation

The National Forest Act⁷⁶ provides that there is a duty to monitor forests and disseminate information, particularly where that dissemination promotes forestry management.⁷⁷ The Marine and Living Resources Act⁷⁸ (MLRA) provides for the creation of a register of “all rights of access, other rights, permits and licences granted or issued in terms of the MLRA,” which “shall be available for inspection by the public”.⁷⁹ The Nuclear Energy Act⁸⁰ only allows for access to information via a court order.⁸¹ This provision does not override PAIA. It does also provide that records must be kept and submitted to the Minister at prescribed times or on the occurrence of certain events, and that this information may not be published or disclosed by the Minister.⁸²

Non-environmental legislation

Other legislation not specifically aimed at protection of the environment illustrates that, in some industries, the legislature is prepared to lift the bar significantly when it comes to disclosure requirements and access to information. In general, legislation dealing with health and safety tends to require greater disclosure than legislation from other sectors. What follows are a few illustrative examples, from a variety of pieces of legislation, of provisions allowing for greater access to and disclosure of information.

The Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act⁸³ requires disclosure of “particulars in respect of such fertilizer” to purchasers or before administration of such fertilizers, farm feeds and agricultural remedies.⁸⁴ The Hazardous Substances Act⁸⁵ only allows for disclosure for the purpose of legal proceedings or for carrying out

73 Nuclear Regulator Act at s.40(d).

74 Nuclear Regulator Act at s.51.

75 Ibid.

76 National Forest Act 84 of 1998.

77 National Forest Act at s.6.

78 Marine and Living Resources Act 18 of 1998.

79 Marine and Living Resources Act at s.12.

80 Nuclear Energy Act 46 of 1999.

81 Nuclear Energy Act at s.31.

82 Nuclear Energy Act at s.33, also see ss.22, 26 and 51.

83 Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947.

84 Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act at ss.9 to 10.

85 Hazardous Substances Act 15 of 1973.

functions in performance of duties under the Act, but it does not list such duties, nor does it allow for disclosure of actual permits or authorisations themselves.⁸⁶

The Mine Health and Safety Act⁸⁷ has a number of provisions relating to the rights of employees to information on safety, health and "incidents". Employees have a right to information relating to hygiene measurements and their own medical records, which the employer keeps.⁸⁸ Employers must post instructions at mines and may post reports on investigations, but must give trade unions (and similar representatives) a copy.⁸⁹ Furthermore, inquiries must be public, unless a person presiding or a witness requests exclusion of members of the public/specific persons.⁹⁰

The National Health Act⁹¹ allows for disclosure of a person's health records to "any other person, health care provider or health establishment as is necessary for any legitimate purpose [...] where access or disclosure is in the interests of the person to whom the records relate".⁹² As with much of the environmental legislation discussed above, some health-related legislation only provides for access to information in terms of PAIA.

The Firearms Control Act⁹³ only allows for access to information by government officials. However, there is a provision allowing for access to information in order to comply with laws relating thereto. The Firearms Control Amendment Act⁹⁴ further stipulates that firearms dealers and manufacturers must keep their dealer's/manufacturing licence on the premises and must also keep a register of information about sales and customers, both of which must be produced if requested by any police official. The register must be linked to a central dealer's database. This also applies to gunsmiths.

The Tobacco Products Control Act⁹⁵ contains a variety of provisions relating to warning signs on, sale of and promotion of tobacco products. For example, packaging must show health hazard information as well as quantities of the constituents of the tobacco product.⁹⁶

A number of pieces of legislation relevant to the health and safety of workers deal with access to information. These include the Labour Relations Act (LRA)⁹⁷ and the Occupational Health and Safety Act (OHSA).⁹⁸ In terms of the LRA, an employer must disclose to a trade union all the relevant information (subject to certain limitations – legally privileged, confidential, private/personal information) that will allow the union representative to perform its functions effectively. This includes during consultation/bargaining processes.⁹⁹ Information available for any person to inspect at the registrar's office includes information relating to registration of union and employee organisations.¹⁰⁰

The OHSA includes a number of employer obligations that include provision of access to information, instructions, training to employees, as well as supervision to ensure the health and safety of employees.¹⁰¹ Employers are also duty-bound to inform employees (in a way they understand) about the hazards of their work and the precautionary measures in place to address those hazards.¹⁰² Health and safety representatives and committees must be established, and committees are required to keep written records of recommendations made to the employer and any reports submitted to the Department of Labour.¹⁰³

86 Hazardous Substances Act at s.17.

87 Mine Health and Safety Act 26 of 1996.

88 Mine Health and Safety Act at ss.11, 12, 19 and 30.

89 Mine Health and Safety Act at s.64.

90 Mine Health and Safety Act at s.68.

91 National Health Act 61 of 2003.

92 National Health Act at s.15.

93 Firearms Control Act 60 of 2000.

94 Firearms Control Amendment Act 43 of 2003.

95 Tobacco Products Control Act 83 of 1993.

96 Tobacco Products Control Act at s.4.

97 Labour Relations Act 66 of 1995.

98 Occupational Health and Safety Act 85 of 1993.

99 OHSA at s.16.

100 OHSA at s.110.

101 OHSA at s.8.

102 OHSA at s.13.

103 OHSA at s.17 to 20.



There is no obvious reason why workers exposed to safety risks, or investors exposed to the risks of unscrupulous operators, deserve greater protection than individuals, communities, or the South African public at large, faced with the risks posed to a compromised environment.



Where a manufacturer or supplier deals with hazardous substances, they must make information available regarding that substance, the risks associated with it, how to use it safely and what to do in case of a spill or accident.¹⁰⁴ These provisions pertain to information that is important for the safety and health of individuals and their work environment.

South African banking legislation includes a number of provisions relating to disclosure and access to information. The Banks Act¹⁰⁵ provides for furnishing of information to the Registrar and some of that information, including company memoranda of incorporation, articles of association and annual reports, is available to the public if they apply for it. The Collective Investment Schemes Control Act¹⁰⁶ has detailed information disclosure provisions, which provide that, before entering into a transaction with an investor, the scheme must provide him/her with "information about investment objectives, calculation of asset value and dealing prices, charges, risk factors and distribution of income accruals". The investor must also be provided with information "necessary to enable the investor to make an informed decision [...] timeously and in a comprehensible manner".¹⁰⁷

The Financial Advisory and Intermediary Services Act¹⁰⁸ states "a licensee must display a certified copy of the licence in a prominent and durable manner within every business premises of the licensee"; "ensure that a reference to the fact that such a licence is held is contained in all business documentation, advertisements and other promotional material"; and "ensure that the licence is at all times immediately available or within a reasonable time available for the production to any person requesting proof of licensed status under authority of a law or for the purpose of entering into a business relationship with the licensee".¹⁰⁹ The requirement to display a licence to promote transparency in the industry and to protect affected persons is one that could be more broadly adopted in environmental legislation and much can be learnt from this practice in the financial sector.

There are a number of examples of provisions in the legislation canvassed that could justifiably be imported into environmental legislation. There is no obvious reason why workers exposed to safety risks, or investors exposed to the risks of unscrupulous operators, deserve greater protection than individuals, communities, or the South African public at large, faced with the risks posed by environmental violations and risks.

¹⁰⁴ OHSA at s.10(3).

¹⁰⁵ Banks Act 94 of 1990.

¹⁰⁶ Collective Investment Schemes Control Act 45 of 2002.

¹⁰⁷ Collective Investment Schemes Control Act at s.3.

¹⁰⁸ Financial Advisory and Intermediary Services Act 37 of 2002.

¹⁰⁹ Financial Advisory and Intermediary Services Act at s.8(8).

Table 1: Assessment of status and accessibility of seven well-known databases of environmental licences as at November 2012

Environmental licence ¹¹⁰	Database	Public access	Plans to give public access
1 » Environmental authorisations (NEMA)	National Environmental Authorisations System (NEAS) hosted by the Department of Environmental Affairs (DEA)	No. The NEAS is currently only available to officials of DEA and provincial environment departments. It is primarily designed to capture, track and report the progress of applications for environmental authorisations.	No. The DEA plans to develop the NEAS into a public, online database of applications for environmental authorisations. The public portal has already been developed, and the DEA hopes to test this portal with two provinces in March 2013. However, it is not envisaged that this database will provide access to copies of approved and issued environmental authorisations, due to storage capacity issues associated with uploading the documents.
2 » Atmospheric emission licences (NEMAQA)	2.1 » Atmospheric Emission Licence (AEL) database ¹¹¹ 2.2 » Database of Certificates under the 1965 Atmospheric Pollution Prevention Act (APPA) 2.3 » South African Air Quality Information System (SAAQIS) (www.saaqis.org.za), managed by the Air Quality Information Unit (AQIU) at the South African Weather Service (SAWS) for DEA	No. An AEL database is currently not in place. However, the database of APPA certificates in the process of being included in SAAQIS. Plans are underway to update and upgrade the current APPA database to an AEL system for managing AEL authorisations.	Public access to AELs will be considered, but this will be subject to addressing issues relating to concerns around confidentiality of industrial processes. It is the intention for the AEL database to be integrated into the SAAQIS to allow AEL applicants to file and track applications, and for relevant authorities to manage the licenses online. The AEL system will be linked to the NEAS as part of DEA's planned Integrated Permitting System.
3 » Waste management licences (NEMWA)	South African Waste Information System available at the South African Waste Information Centre (www.sawic.org.za) hosted by DEA	Yes. However, many pre-NEMWA licences issued by the Department of Water Affairs have not yet been incorporated into SAWIS.	Not applicable. The South African Waste Information System will also to be linked to the NEAS as part of the DEA's planned integrated permitting system.
4 » Water use licences (WULs) under the National Water Act (NWA)	Water Use Authorisation Registration Management System (WARMS) (www.dwa.gov.za/Projects/WARMS/) hosted by the Department of Water Affairs The WARMS system depends on registration by water users, and also suffers from an updating backlog – to be addressed through project Letsema WARMS is also linked to a billing system for water use charges.	No. The WARMS unit in each region will consider requests for providing copies of licences and information in licences without a PAIA request, as long as the request is reasonable, and subject thereto that they may redact what they regard as personal information. ¹¹²	No. Although the draft 2nd Edition National Water Resource Strategy places emphasis on improved water information management and monitoring systems, it does not expressly provide for public access to WARMS or WULs. The DWA is considering making the WARMS a GIS-based system, and also to give access to water users, but not to the public. >>

110 Not a complete list of all environmental licences/permits/authorisations.

111 Referred to as the System for National Atmospheric Emission Licensing (SNAEL) in the Draft Air Quality Framework, par 5.2.1.4 and 5.2.1.5.

112 Note the provisions of s.139–142 of the NWA, which deals with the establishment of and public access to national information systems.

5 » Licences under Marine Living Resources Act ¹¹³	Fisheries Rights Registers (www.nda.agric.za/doaDev/fisheries/03_areasofwork/resourcemanagement.html) hosted by the Department of Agriculture, Forestry and Fisheries (DAFF)	No. Records of decision (Fishing Rights Allocation Processes) and permit conditions are both listed in the DAFF PAIA Manual as subjects of records that may be accessed automatically, i.e. without a PAIA request. Details of fishing rights (including quantum of allocation) can be downloaded, but not the actual rights documentation.	No.
6 » Licences under the National Nuclear Regulator Act	Internal database of nuclear installation and vessel licences hosted by the National Nuclear Regulator	No. Requests for copies of licences will be considered through PAIA only.	No.
7 » Rights issued under the Mineral Petroleum Resource Development Act (MPRDA), and environmental management plans and programmes approved under the MPRDA	South African Mineral Resources Administration System (SAMRAD) (www.samradonline.co.za) hosted by the Department of Mineral Resources (DMR)	No. Although SAMRAD advertises itself as the portal "where the general public can view the locality of applications, rights and permits made or held in terms of the MPRDA and where applications in terms thereof can be submitted electronically", members of the public cannot download copies of licences from SAMRAD, or any other online database. There also appears to be no data on applications, rights and permits accessible to the public on SAMRAD, or on the DMR's website. ¹¹⁴	No.
	Mineral and Petroleum Titles Office ¹¹⁵ at the DMR	The Mineral and Petroleum Titles Office based at the DMR's Pretoria office has an internal database for licences, but it is not online. Copies of licences (rights incorporating Environmental Management Plans and Programmes, as well as Social and Labour Plans) are filed at this Office, but it appears that only copies of rights can be obtained in writing from the Office against payment of copying costs.	No.

¹¹³ In terms of s.12 of the MLRA, the Director-General shall keep a register of all rights of access, other rights, permits and licences granted or issued in terms of the MLRA. This register is to be made available to the public at the prescribed places and time.

¹¹⁴ At <http://www.dmr.gov.za/state-owned-entities/contact-a-mine.html>, the DMR provides a spreadsheet of mines with details of properties and other operational information, but no reference to mining rights, permits or EMPRs.

¹¹⁵ S.8 of the Mining Titles Registration Act 16 of 1967 makes inspection of records and supply of information by this office subject to PAIA.



COMPARATIVE ANALYSIS OF DOMESTIC LEGAL REQUIREMENTS IN OTHER JURISDICTIONS

The following section looks at how other countries have dealt with enabling access to information. The countries reviewed here are Australia, the United States, Canada, India, the Philippines and Jamaica. These countries were chosen in order to gain a picture of the situation across both developed and developing nations. These countries also have a number of similarities with South Africa, namely their economies, Brazil-Russia-India-China (BRIC) membership or significant economic reliance on natural resource extraction. Many of the large mining companies operating in South Africa also operate in many of the countries discussed here.

Australia

There are a number of legislative provisions in Australia enabling greater access to environmental information. In New South Wales (NSW), the Protection of the Environment Operations Act (POEO)¹¹⁶ is key among legislation containing these provisions. The POEO states that regulatory authorities must maintain registers relating to environmental information such as licence applications and provisions, violations, convictions and penalties regarding the licensee-holder, as well as pollution reduction programme details. The registers are publicly available and some of the information is available online through a government website.¹¹⁷

Chapter 6 of POEO also contains provisions specifically providing public access to audit and inspection information relating to facilities, which hold environmental protection licences. The POEO divides audits into two categories – either mandatory or voluntary. Mandatory audits are those audits which are prescribed as a condition in the licence. This is usually done if the holder of the licence has previous contraventions of POEO or a licence granted under the POEO, or if an activity is being carried out in an environmentally unsatisfactory manner.¹¹⁸ Section 175 states that a mandatory audit can be ordered if an inspection agency reasonably suspects a facility to have breached the POEO, regulations or conditions of its licence and that that breach has caused or is likely to cause harm to the environment.¹¹⁹ Information gathered through voluntary audits is protected, whereas information gathered from mandatory audits can be used for regulatory and enforcement purposes, and the public is entitled to inspect the mandatory audit reports. This public access provision was added in 2011 and came into effect in early 2012. The amendments also provided for public access to details of pollution studies and pollution reduction programmes.¹²⁰

¹¹⁶ The Protection of the Environment Operations Act 1997 (NSW) ss.308, 309 available at <http://www.legislation.nsw.gov.au/inforcepdf/1997-156.pdf?id=35a71851-d0d2-4b8c-fb85-a6382a46e66f> (Note: This version of the Act includes amendments adopted in 2011).

¹¹⁷ The website for the NPI is: <http://www.npi.gov.au>.

¹¹⁸ For more on this see <http://www.environment.nsw.gov.au/legislation/aboutpoeo.htm>, last accessed on 8 October 2012.

¹¹⁹ POEO at s.175.

¹²⁰ POEO at ss.308(2)(d2); 308(2)(d3).



The POEO also authorises authorities to include monitoring data in environmental protection licences.¹²¹ This includes monitoring data, pollution discharges and ambient environmental conditions. The POEO provides for the public disclosure of monitoring data.¹²² It defines monitoring data as:

"information supplied to the appropriate regulatory authority by the holder of a licence in relation to the monitoring of the following aspects of the activity or work authorised or controlled by the licence:

- (a) discharges from premises,
- (b) relevant ambient conditions prevailing on or outside premises,
- (c) any other thing prescribed by the regulations."

The abovementioned section makes provision for the Environmental Protection Agency or regulatory authorities to publish monitoring data, or provide access through written requests submitted under the POEO.¹²³ There are three grounds upon which access to monitoring data can be refused. These are: if the data is already available in a public register; if it would be cumbersome and time-consuming to fulfil the information request; or if the data is available in a document available for purchase. Importantly, the POEO does not provide for information to be withheld for confidentiality reasons, unless those are provided for in the NSW access to information law.

There is also an online pollutant inventory, which is maintained by the federal government.¹²⁴ This inventory discloses information about emissions and transfer of substances potentially harmful to human health. Various facilities submit reports about emissions to the state governments, which, in turn, submit them to the federal government for inclusion on the national inventory.

Other Australian legislative provisions providing for access to environmental information include the Mining Act of 1992 (NSW)¹²⁵ and the Mining Regulation promulgated in 2010.¹²⁶

Section 159 of the Mining Act states that the Director-General must ensure records are kept of all applications for an authorisation; and, all authorisations that are granted, renewed, transferred or cancelled in terms of the Mining Act.¹²⁷ These records must be kept at the offices of the Department and regulations may prescribe that they are made available for public inspection, free of charge. Clause 34 of the Mining Regulation 2010 states that for the purposes of s.159,

¹²¹ POEO at s.66.

¹²² POEO at s.320.

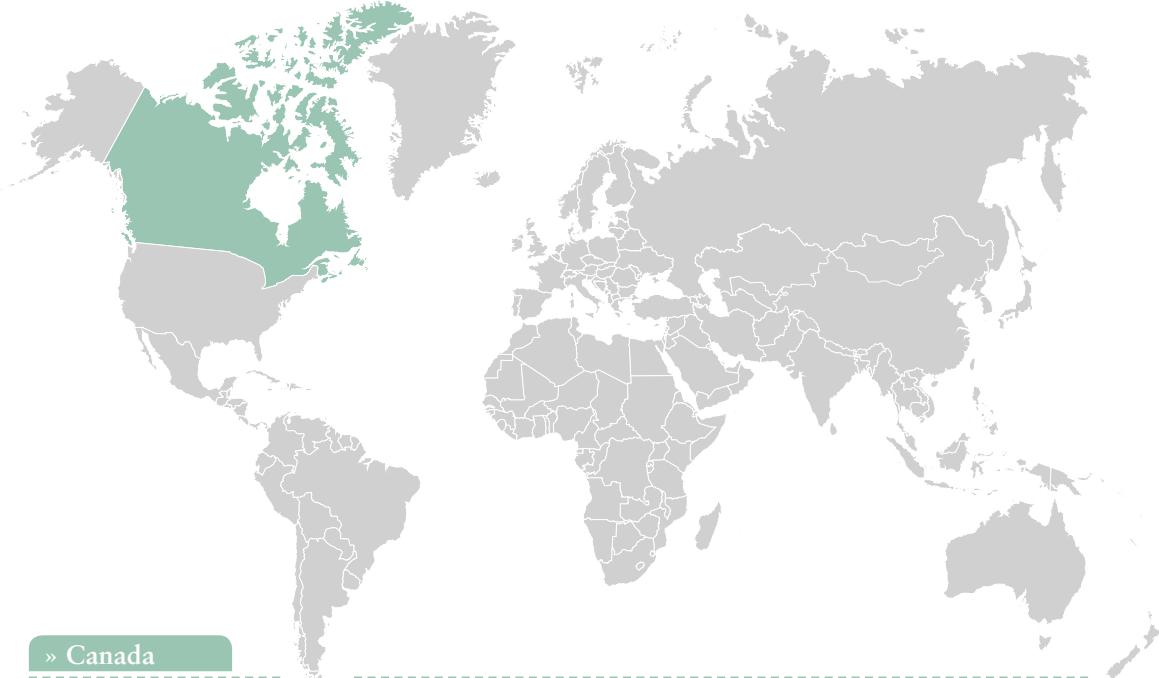
¹²³ Ibid.

¹²⁴ The substance list is available at <http://www.npi.gov.au/substances/list-of-subst.html>.

¹²⁵ Available at http://www.austlii.edu.au/au/legis/nsw/consol_act/ma199281.

¹²⁶ Available at <http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2010-619.pdf>.

¹²⁷ Mining Act 1992 (NSW) at s.159.



» Canada

the records which must be made available (in written or electronic form) must contain certain details; including the date the authorisation was granted and when it expires, the name and address of the applicant or permit-holder or the registered office of such person, a description of the authorised area, the minerals to which the authorisation relates, the mining purposes to which the permit relates, the permit period and other details relating to royalties, security, and the current status of the authorisation.¹²⁸

In short, Australia – and particularly NSW – has a range of legislative provisions ensuring access to information by third parties. These provisions promote transparency in the industry, by ensuring that there are fewer roadblocks for those seeking environmental information.

Canada

Canada's federal laws have a number of provisions enabling access to environmental information such as permits, licences, certificates and governmental approvals. Much like South Africa's PAIA, the Canadian Access to Information Act (AIA) provides for access to records held by government institutions.¹²⁹ To use AIA, you have to file a formal request. Like PAIA, the AIA also has exceptions which block disclosure.¹³⁰ These exceptions include trade secrets;¹³¹ financial, commercial, scientific and technical confidential information;¹³² information which, if disclosed, could reasonably be expected to result in financial loss or be prejudicial to the competitive position of the concerned party;¹³³ information that could reasonably interfere with contractual negotiations;¹³⁴ and personal information.¹³⁵

Regardless of the exceptions mentioned above, the AIA allows the government to release information relating to public health and safety, as well as protection of the environment.¹³⁶ In this regard, public interest trumps the potential prejudice suffered by the third party (the permit-holder). If part of a record contains results or products of environmental testing done by or on behalf of a government institution, then disclosure of that information cannot be refused.¹³⁷

One of the findings of the *Unlock the Doors* report was the under-utilisation of s.28 of PAIA, which provides for the release of all parts of a document that can be reasonably severed from any confidential information contained

128 Clause 34 of the Mining Regulation 2010.

129 Available at <http://laws-lois.justice.gc.ca/eng/acts/A-1/index.html>.

130 Access to Information Act, R.S.C. 1985, c. A-1.

131 Access to Information Act, R.S.C. 1985, c. A-1, s.20(1)(a).

132 *Id.*, s.20(1)(b).

133 *Id.*, s.20(1)(c).

134 *Id.*, s.20(1)(d).

135 *Id.*, s.19 referring to Privacy Act, R.S.C. 1985, c. P-21, s.3 available at <http://laws-lois.justice.gc.ca/eng/acts/P-21>.

136 Access to Information Act, R.S.C. 1985, c. A-1, s.20(6).

137 *Id.*, s.20(2).

therein.¹³⁸ The Canadian Access to Information Act has a similar provision allowing for the redaction of confidential information. It provides for disclosure of any part of a record which does not contain confidential information and which can reasonably be severed from any part, which does.¹³⁹

The Canadian Environmental Protection Act (CEPA)¹⁴⁰ provides for a publicly accessible Environmental Registry,¹⁴¹ which contains certain environmental information like "proposed and existing policies, guidelines, codes of practice, government notices and orders, agreements, permits, and regulations."¹⁴² The registry also tracks instruments from proposal to eventual publication in the *Canada Gazette*. Simply put, it acts like a central site where all IAPs would be able to access and track application processes for new permits. By law, certain information must be made available on the registry. However, Environment Canada has gone one step further and included voluntary expansions – increasing publicly available CEPA-related documents.

Environment Canada also has a database called the National Pollutant Release Inventory (NPRI).¹⁴³ It contains pollution reports from more than 8 000 industrial facilities nationwide. There are certain reporting requirements that have to be met in order for information to make it onto this registry. These either relate to specific activities (water treatment facilities, waste incineration etc) or to the size of the operation – such as companies whose employees work more than 20 000 hours per year. Unfortunately, these reporting requirements do not apply to oil and gas exploration or drilling, but do apply to the disposal of tailings and waste rock by mining companies.¹⁴⁴

There are a number of region- or industry-specific public registries that are established by other federal environmental laws in Canada. Examples of these include: the region-specific Mackenzie Valley Resource Management Act¹⁴⁵ which establishes a public register of permits issued and other information prescribed by the regulations, and a registry for mining permits in the Northwest Territories established by regulations of the Territorial Lands Act.¹⁴⁶

Like the federal legislation and attached regulations, there are also specific provincial laws, which establish their own disclosure systems to provide information on environmental permits. Alberta has a number of governmental databases which state departments voluntarily established. There is an online database of permits, licences and documents associated with its Water Act and Environmental Protection and Enhancement Act.¹⁴⁷ There is also a localised database for agricultural registrations and water licences.¹⁴⁸ Alberta has a regulation¹⁴⁹ permitting the Ministry of Environment and Sustainable Resource Development to publish information, regardless of whether there has been an official request for such information.

British Columbia has used the power granted in terms of the Environment Assessment Act¹⁵⁰ to establish an online registry of all completed Environmental Assessment Certificates.¹⁵¹ The British Columbia Environmental Management Act grants officials the authority to inspect potentially contaminated property.¹⁵² Reports on the findings of such investigations are published in a publicly accessible registry.¹⁵³

Ontario has enacted regulations in terms of the Environmental Protection Act, which require specific industry sectors to make pollution reports publicly available. For example, mining companies must make monitoring and pollution

138 See p20 of the *Unlock the Doors* report.

139 Access to Information Act, R.S.C. 1985, c. A-1, s.25.

140 Canadian Environmental Protection Act, S.C. 1999, c. 33, ss.12, 13 available at <http://laws-lois.justice.gc.ca/eng/acts/C-15.31/index.html>.

141 The registry is available at <http://www.ec.gc.ca/lcpe-cepa/eng/search>.

142 Environment Canada (the agency responsible for maintaining the Registry, see <http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&tn=D44ED61E-1>.

143 See <http://www.ec.gc.ca/inrp-npri/default.asp?lang=En&tn=4A577BB9-1>.

144 See Department of the Environment Notice (December 24, 2011), at Schedule 3 ("Criteria for Reporting") available at <http://gazette.gc.ca/rp-pr/p1/2011/2011-12-24/html/notice-avis-eng.html#d101>.

145 S.C. 1998, c.25, s.72, available at <http://laws-lois.justice.gc.ca/eng/acts/M-0.2/FullText.html>.

146 Northwest Territories and Nunavut Mining Regulations C.R.C., c. 1516, s. 5 available at http://laws-lois.justice.gc.ca/eng/regulations/C.R.C._c_1516/FullText.html.

147 Available at <http://environment.alberta.ca/01519.html>.

148 Available at http://ssrb.environment.alberta.ca/licence_viewer.html.

149 The Disclosure of Information Regulation drafted in terms of the Environmental Protection and Enhancement Act, (Alta. Reg. 273/2004), s. 2(1) available at http://www.qp.alberta.ca/574.cfm?page=2004_273.cfm&leg_type=Regs&isbncln=0779735420.

150 See Environmental Assessment Act, SBC 2002, c.43, s.25 available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/LOC/freeside/--%20e%20--/environmental%20assessment%20act%20sbc%202002%20c.%2043/00_02043_01.xml.

151 Available at <http://a100.gov.bc.ca/pub/epic/projectStatusCategoryReport.do#cert>.

152 Environmental Management Act SBC 2003, c.53, s.41(1), available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/03053_00.

153 Environmental Management Act SBC 2003, c.53 at s.43(2)(a) and s.43(5).



discharge results available to anyone at the plant, or upon request during normal office hours.¹⁵⁴ There are a number of such provisions that mandate disclosure according to industry (eg. the inorganic chemical sector, the pulp and paper sector, and the iron and steel sector).¹⁵⁵ The Ontario Clean Water Act (CWA) allows the public to obtain general information related to inspections of activities that threaten public drinking water sources.¹⁵⁶ The information is made available to the public in the form of the annual reports which summarise the actions of risk management inspectors who inspect premises to ensure they are compliant with their risk management plans.¹⁵⁷ A further piece of legislation in Ontario which allows for greater access to information, is the Ontario Toxic Reduction Act,¹⁵⁸ which makes certain reports available to the public. The reports contain audit results, which illustrate the facilities' level of compliance with their toxic substance reduction plans, as well as whether the plan itself has been effective.¹⁵⁹

In short, Canadian legislation, on both a federal and state level, illustrates a broad range of provisions allowing for greater access to information. The state-specific legislation which goes further than mandatory disclosure levels prescribed by national legislation is commendable, and seems to show an awareness of the need for greater transparency in environmental governance and public access to environmental information.

India

India's federal Right to Information Act (RIA) allows for formal requests for access to information held by a public authority. This information can include "particulars of recipients of concessions, permits or authorisations granted by it [and] details in respect of information, available or held by it".¹⁶⁰

Like South Africa's PAIA, the RIA has exceptions to the general disclosure requirements. These tend to relate to intellectual property, disclosure that would harm competitive positions of a third party and trade secrets. The only way to get around these exemptions is to illustrate a larger public interest in respect of the disclosure requested.¹⁶¹ According to s.10(1) of the RIA, provision is made for the severability of parts of a record that may have been refused because of the abovementioned exemption from disclosure. The RIA allows private parties submitting information to request that it remain confidential. However, there is a degree of discretion on the part of the governmental authority when it comes to requests for such information. The authority must balance the public interest against the possible harms to the private party which has requested that the information remain confidential.¹⁶²

154 O Reg 560/94, s.35(2) available at http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_940560_e.htm#BK42.

155 See, e.g. O Reg 64/95, s.38 (inorganic chemical sector); O Reg 760/93, s.31 (pulp and paper sector); O Reg 214/95, s.37 (iron and steel sector) available at http://www.ene.gov.on.ca/environment/en/legislation/environmental_protection_act/STDPROD_081764.html.

156 Clean Water Act, S.O. 2006, c.22, available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_06c22_e.htm#BK65.

157 Clean Water Act, S.O. 2006, c.22, ss.62(1), 54(3) and 81.

158 Toxics Reduction Act, S.O. 2009, c.19, available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_09t19_e.htm#BK11.

159 Toxics Reduction Act, S.O. 2009, c.19, ss.10(1), 10(2) and 10(4).

160 The Right to Information Act of 2005, ss.4(1)(b)(xiii), (xiv), available at <http://www.righttoinformation.gov.in/rti-act.pdf>.

161 *Id.*, s.8(1)(d).

162 *Id.*, s.11.

The RIA is the primary mechanism enabling access to information in India. There are also a number of federal environmental acts and regulations, which specifically allow for access to environmental information. These include the Air Prevention and Control of Pollution Act (the Air Act), the Water Prevention and Control of Pollution Act (the Water Act), as well as regulations under the Environment Protection Act, which require disclosure of information by the state, even if that information relates to private bodies. The Air Act stipulates that all Indian states must create and maintain public registers of government consents (which contain information relating to emissions levels) issued in terms of the Air Act.¹⁶³ There are also further regulations stipulating which information must be included in the public register.¹⁶⁴ The Water Act has a similar provision. It provides for a public register relating to consents issued in terms of the Water Act. These consents would include information on effluents, conditions imposed, and outlets.¹⁶⁵ Regulations under the Environment Protection Act mandate the disclosure by the state of environmental authorisations granted to private bodies. The Environmental Impact Assessment Notification provides that developers must obtain environmental clearance for certain projects.¹⁶⁶ A further regulation directs the government to put environmental clearances in the public domain on the Government portal.¹⁶⁷ To comply with this, the Ministry of Environment and Forests has a public database of documents relating to all stages of environmental clearance.¹⁶⁸

All three of the abovementioned Acts have provisions relating to inspection of facilities by government officials. So, in terms of the Air Act, an official could take samples of air from a chimney, duct etc. for analysis;¹⁶⁹ and in terms of the Water Act, the same could be done with liquid emissions.¹⁷⁰ The Environment Protection Act also allows government officials to take sampling data (soil, air, water, etc.) from facilities.¹⁷¹ Where samples are taken, they are analysed and a report is produced either by the State or a Central Pollution Board (depending upon which has the applicable jurisdiction). If the analysis is done in terms of the Air or Water Acts, then a copy of the report will remain with the State or Central Pollution Board.¹⁷² Under the Environment Protection Act, the information also remains with government officials.¹⁷³ Although there is no specific provision expressly requiring these reports to be made available to the public, in theory, this information would be accessible under the RIA.

Individual state governments in India also make some information publicly available. Some state departments place environmental clearance orders on their websites.¹⁷⁴ Others provide consent information, including final consents, which illustrate emissions and discharge allowance levels online.¹⁷⁵ Both the state and the central authorities also receive reports from entities that have had to undergo environmental impact assessments for a project. These projects are often subject to "post-clearance monitoring" of terms and conditions included in the environmental clearance certificate. Reports regarding this post-clearance monitoring are submitted twice a year and are termed "public documents". This means they are available to the general public upon request to the authority concerned. The most recent report must also be made available on the website of the regulatory authority.¹⁷⁶

Although the legislative provisions outlined above seem to paint a positive image of the amount of information available to members of the public, in reality much of this information is not readily available. In a review of some environmental clearance orders, it was found that, in addition to compliance reports, they also contain monitoring

163 The Air (Prevention and Control of Pollution) Act of 1981, s.51 (available at <http://www.moef.nic.in/legis/air/air1.html>).

164 See Air (Prevention and Control of Pollution) (Union Territories) Rules, 1983, Form VI (available at <http://www.moef.nic.in/legis/air/air3.html>).

165 The Water (Prevention and Control of Pollution) Act of 1974, s.25(6) (available at <http://www.moef.nic.in/legis/water/wat1c5.html>).

166 See Environmental Impact Assessment Notification S.O. 1533(E), (14 September 2006), s.2 (available at <http://envfor.nic.in/legis/eia/s01533.pdf>).

167 Environmental Impact Assessment Notification S.O. 3067(E), (1 December 2009), s.IV (available at <http://moef.nic.in/downloads/rules-and-regulations/3067.pdf>).

168 Available at <http://environmentclearance.nic.in>.

169 The Air (Prevention and Control of Pollution) Act of 1981, s.26(1) (available at <http://www.moef.nic.in/legis/air/air1.html>).

170 The Water (Prevention and Control of Pollution) Act of 1974, s.21(1) (available at <http://www.moef.nic.in/legis/water/wat1c5.html>).

171 The Environment (Protection) Act of 1986, s.11(1) (available at <http://envfor.nic.in/legis/env/env1.html>).

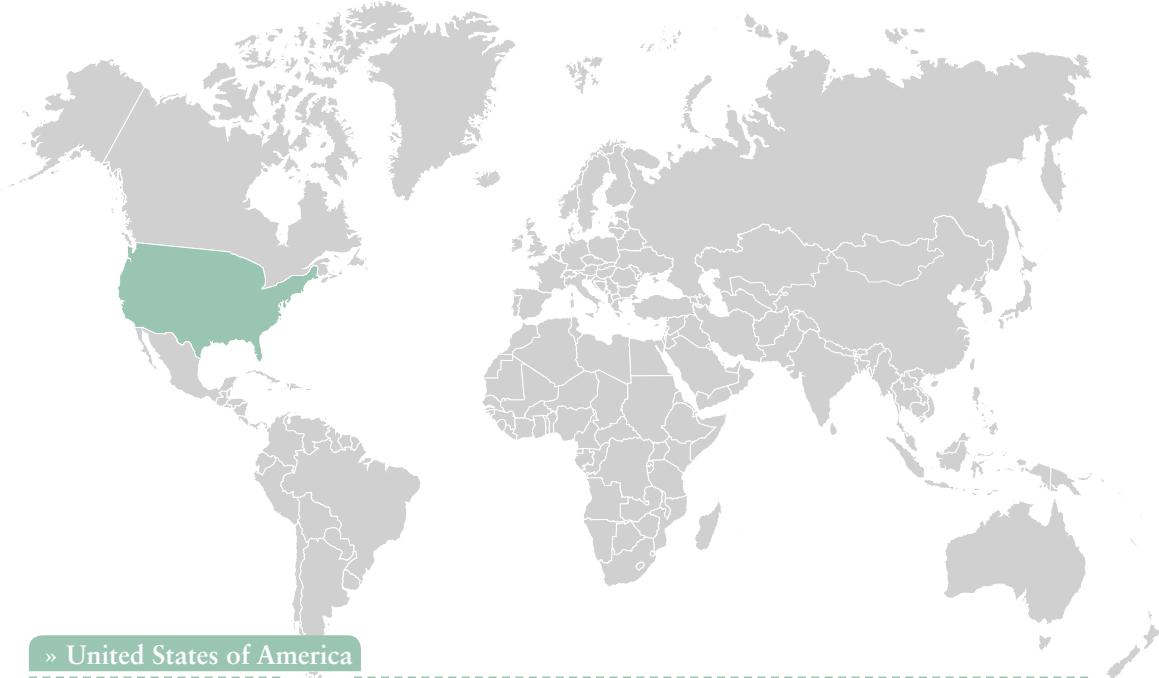
172 The Air (Prevention and Control of Pollution) Act of 1981, s.27 and The Water (Prevention and Control of Pollution) Act of 1974, s.22.

173 See Environment (Protection) Rules, Notification S.O. 844(E), (19 November 1986), s.8 (available at <http://www.moef.nic.in/legis/env/env4.html>).

174 See West Bengal Environment Department (available at http://www.enviswb.gov.in/main/environment_clearance.php); Bihar Environment and Forestry Department (available at <http://forest.bih.nic.in/>); and copies of final decisions granting or refusing environmental clearance under the Environment (Protection) Act are available for the state of Maharashtra here: http://ec.maharashtra.gov.in/final_direction.php.

175 For example, the website for Maharashtra's Pollution Control Board allows users to search for information according to where the application for consent is in the decision process. (Available at <http://mpcb.gov.in/> under the heading "Consent Status"). Also see "Accessing Consent Grant/Refuse Copy" database (available at http://mpcb.ommunication.net/consent/cnst_show_uploads.php).

176 Environmental Impact Assessment Notification S.O. 1533(E), (14 September 2006), s.10.



data. As such, members of the public would have access to this information either through regulations or the RIA, but this requires going through an official request process.¹⁷⁷ The individual state websites that should have contained compliance reports did not. Federal databases did include some compliance and monitoring reports.¹⁷⁸ Other information relating to air and water quality was available on India's Central Pollution Control Board website. However it was not organised, and thus lacked accessibility.¹⁷⁹ The equivalent state-specific pollution control board websites contained a range of data, but there was no uniformity in the type of information made available on each site.¹⁸⁰ Some state sites contained industry-specific data, while others contained more general data on the current state of water or air quality for particular geographic areas. Specific data relating to particular facilities was unavailable.

The United States of America

The United States of America's information law is the Freedom of Information Act (FOIA).¹⁸¹ In general, permits issued under other laws should be available under the FOIA, which makes all federal agency records publicly available. There are, however, some specific exemptions that apply.¹⁸² Exemptions that enable a record to be legitimately withheld include exemptions for information containing trade secrets and confidential commercial or financial information.¹⁸³ The FOIA also states that places within reports where information has been redacted must be identified and such documents should be severed in such a way as to obtain the highest levels of disclosure possible.¹⁸⁴

Although on paper the FOIA strives to achieve as much disclosure of information as possible, information is often withheld. In relation to mining companies, information typically withheld includes: ore grade information, mining cut-off grades, commodity prices, assay results, pit maps, geological maps, cross-sections and sample location maps.¹⁸⁵

¹⁷⁷ For example through Notification S.O. 1533(E) or the Right to Information Act, also see http://www.enviswb.gov.in/main/environment_clearance.php.

¹⁷⁸ For example see <http://environmentclearance.nic.in>.

¹⁷⁹ See <http://cpcb.nic.in>.

¹⁸⁰ See E.G. Andhra Pradesh Pollution Control Board (available at http://www.appcb.ap.nic.in/main/index_flat1.php), Gujarat Pollution Control Board (available at <http://gpcb.gov.in>), and Tamil Nadu Pollution Control Board (available at <http://www.tnpcb.gov.in>).

¹⁸¹ Freedom of Information Act (FOIA), 5 U.S.C. § 552.

¹⁸² See 5 U.S.C. § 552(a)(3).

¹⁸³ "[A] commercial or financial matter is "confidential" for purposes of [Exemption 4] if disclosure of the information is likely to have either of the following effects:

(1) to impair the Government's ability to obtain necessary information in the future; or
(2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁸⁴ Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made." 5 U.S.C. § 552(b) available at [http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=\\$\\$a\\$\\$busc5.wais&start=187300&SIZE=125455&TYPE=TEXT](http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$a$$busc5.wais&start=187300&SIZE=125455&TYPE=TEXT).

¹⁸⁵ According to a letter from the Bureau of Land Management addressing mine-related information, available at <http://www.pima.gov/Mining/FOIA%20response%20from%20BLM%20Feb%202019.pdf>.

The United States does have laws specifically aimed at access to permits for some activities. For example, provision is made for access to permits needed to discharge dredged or fill material into a protected wetland or navigable waters in the Federal Water Pollution Control Act.¹⁸⁶ This Act is applicable to more than just mining companies that discharge pollutants. The Air Pollution Prevention and Control Act (the "CAA") has a similar provision relating to emissions permits, compliance plans, emissions or compliance monitoring reports, and certification.¹⁸⁷

There are three types of permits relating to mining operations. These permits are issued under different pieces of legislation or by different state or federal departments. The Clean Water Act¹⁸⁸ and the Clean Air Act¹⁸⁹ deal with water pollution permits and air pollution permits, respectively. Although these Acts are federal legislation, the Environmental Protection Agency (EPA) delegates water and air pollution permitting in terms of these Acts, to state authorities. Any permits issued under these Acts must be disclosed to the public. Thus, these permits are publicly available.

Operations permits, on the other hand, are issued by the Bureau of Land Management, which is part of the Department of the Interior, responsible for the environmental impact statement processes relating to mining operations (such as large-scale open-pit mining) on public lands. The Record of Decision (ROD) relating to the impact statement process ostensibly functions as a mining permit; that is, if the decision was exercised in favour of the mining operation. The ROD must include an approved plan of operations, which the company prepares. Thus, the permit issued by the Bureau of Land Management consists of an Environmental Impact Statement (EIS), the ROD and the plan of operations. This system seems to suggest that there is not an official permit issued, but rather a selection of three documents (ROD, EIS and the plan of operations) gathered along the way.¹⁹⁰

These documents contain information relevant to mitigation measures and requirements. Because there is not one official permit, it is slightly more difficult to access all the information at once. The EIS, specifically, is considered a key document for the environmental impact assessment process in terms of the National Environmental Policy Act (NEPA), and thus it is more readily accessible.¹⁹¹ The record of decision is a public document and although not automatically published, should also be relatively easily accessed, upon request.¹⁹² The plan of operations would have to be requested in terms of the FOIA.

In short, the US has varying degrees of accessibility of information relating to environmental authorisations, and there seems to be a disjuncture between what is made available by one department or piece of legislation, and that made available by another department.

¹⁸⁶ Federal Water Pollution Control Act (33 USC ss.1251-1387) (known as the Clean Water Act or "CWA") 33 U.S.C. ss.1344(o), 1342(j).

¹⁸⁷ The Air Pollution Prevention and Control Act (CAA), 42 U.S.C. s.7661b(e).

¹⁸⁸ Federal Water Pollution Control Act (33 USC ss.1251-1387) (known as the Clean Water Act or "CWA") 33 U.S.C. ss.1344(o), 1342(j).

¹⁸⁹ The Air Pollution Prevention and Control Act (known as the Clean Air Act or "CAA"), 42 U.S.C. s.7661b(e).

¹⁹⁰ As an example, here is a record of decision issued for a mine expansion proposal in 2010: http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/battle_mountain_field/blm_information/nepa/round_mountain_expansion0.Par.37232.File.dat/ROD%20complete.pdf.

¹⁹¹ Regulation 40 C.F.R. § 1502.19, available at http://edocket.access.gpo.gov/cfr_2010/julqtr/40cfr1505.2.htm.

¹⁹² See 40 C.F.R. § 1505.2, available at: http://edocket.access.gpo.gov/cfr_2010/julqtr/40cfr1505.2.htm; also see NEPA's Forty Most Asked Questions, question #34a, <http://ceq.hss.doe.gov/nepa/regs/40/30-40.HTM#34>.



» Philippines and Jamaica

The Philippines and Jamaica

Both the Philippines and Jamaica have interesting perspectives and approaches to allowing and encouraging access to environmental information. The Philippines started a programme in the mid-1990s which actively encourages greater voluntary disclosure. Thus companies that exceed the stipulated levels of disclosure prescribed in legislation are rewarded. Jamaica is an example of a country that allows for disclosure of information through a variety of pieces of legislation, yet there is no congruence in this legislation. Thus the same piece of information may be easier to obtain if you choose to access it in terms of the provisions of one Act rather than another.

The Philippines implemented a pollution disclosure programme in order to encourage industry compliance with the requirements of pollution laws. The programme is called Industrial Eco Watch and was adopted in the mid-90s and amended in 2003 by the Department of Environment and Natural Resources (DENR).¹⁹³ The programme aimed to encourage mandatory self-monitoring and compliance with environmental standards and voluntary self-regulation among establishments for improved environmental performance.¹⁹⁴ The programme used incentives, such as public recognition and praise, in order to promote pollution reduction levels that exceeded mere compliance with legislated standards.

The implementation of the programme was done by creating a colour-coded environmental ratings system, which reflects a firm's compliance levels regarding effluent, emissions and implementation of environmental management systems.¹⁹⁵ A black rating (very bad) for a firm would reflect that that facility's pollution and discharges exceed permitted levels and that it impedes attempts to inspect the premises or has failed to respond to a public complaint of pollution against the firm.¹⁹⁶ A gold-rated firm consistently emits less pollution or fewer discharges than the permitted legal threshold, and the firm implements environmental management programmes and waste reductions plans, whilst also maintaining a community outreach programme.¹⁹⁷ Companies with ratings on the better side of the spectrum are incentivised; for example, by not having to submit pollution reports to the DENR as frequently as other companies. There are also other regulatory incentives.

¹⁹³ See DAO 2003-26 available at <http://lamp.denr.gov.ph/pol03/DAO/dao26.PDF>.

¹⁹⁴ DAO 2003-26, s.2.

¹⁹⁵ Id., s.5 (describing qualification criteria for six different environmental ratings).

¹⁹⁶ Id., s.5.1.

¹⁹⁷ Id., s.5.6.

All ratings information is published in local and national newspapers. The DENR is also authorised publicly (through press conferences or media activities) to recognise good behaviour or condemn dismal performance by companies.¹⁹⁸

In Jamaica, most of the documents that one would want to access exist in hardcopy format. This means that if a member of the public wishes to access a document, they would have to go to the relevant office where that document is housed. Jamaica has a number of pieces of legislation enabling access to information. Each of these prescribes a different fee (either per page or for the whole document) that must be paid in order for a person to get a copy of a piece of information, and thus gain access to it.

The 2002 Access to Information Act (ATI) prescribes a fee of US\$0.12 per page. In contrast, the Mining Act stipulates that information registered with the Commissioner of Mines (such as prospecting rights, licences, mining leases and water rights)¹⁹⁹ must be available to the public. Copies of information in this register cost US\$5.83 per page.²⁰⁰ In addition to the permits granted under the Mining Act, companies need to apply for an environmental permit from the Natural Resources Conservation Authority (NRCA), which also keeps a public registry of permits and licences.²⁰¹ The register is available for public inspection,²⁰² and copies of information in this register cost only US\$0.12 per copy.²⁰³ Companies can, however, apply to have certain information excluded from the public register, but the final decision is taken by the NRCA.²⁰⁴

The examples from Jamaica illustrate that it is possible to make non-digitised versions available to the public in the form of public registers or archives held at a government office. It shows that disparity between pieces of legislation is a common thread that runs through the environmental legislation surveyed. This leaves room for confusion both on the part of the government officials having to comply with the legislation, and on the part of those utilising the legislation in order to gain access to information.

¹⁹⁸ Procedural Manual for DAO 2003-26 (Revised Industrial EcoWatch System), sec. 2.6 (available at emb.gov.ph/manuals/FINAL%20manual%20ecowatch%20.pdf) [NOTE: This link works sporadically – but if you Google the title of the manual, you should be able to access it]. It is not clear whether the Industrial Eco Watch Programme is still running, as there were no recent references to it on government websites or media reports. The Asian Development Bank Institute mentioned the programme as recently as 2011 as one that achieved good success rates when it was initiated.

¹⁹⁹ Mining Act of Jamaica at s.66 is available at <http://www.moj.gov.jm/laws/statutes/Mining%20Act.pdf>.

²⁰⁰ Mining Act of Jamaica at s.69 is available at <http://www.moj.gov.jm/laws/statutes/Mining%20Act.pdf>, the fee is prescribed in the second schedule of the Mining Regulations.

²⁰¹ r. 21(1) of the Natural Resources Conservation (Permit and Licences) Regulations, 1996.

²⁰² r. 21(2) of the Natural Resources Conservation (Permit and Licences) Regulations, 1996.

²⁰³ r. 24 of the Natural Resources Conservation (Permit and Licences) Regulations, 1996.

²⁰⁴ r. 21(3) of the Natural Resources Conservation (Permit and Licences) Regulations, 1996.



GENERAL PRACTICE: COMPANIES OPERATING IN SOUTH AFRICA AND ABROAD

This section of the report examines the extent to which multinational companies operating in South Africa voluntarily disclose information here and abroad, and how such disclosure varies from one jurisdiction to another.

The methodology used for this section was as follows: first, the companies' annual reports were reviewed – this included all other published annual reports that the company made available on their websites; second, the main international website (where applicable) for each company was examined to see if any documents, reports or disclosures were available; next, the company region-specific company websites were reviewed and the types of information and disclosures available there were examined and compared; thirdly, a general search was done via various search engines and ancillary organisations' websites to try and find environmental disclosure documents that were publicly accessible. Where appropriate, we have included publicly available information regarding our own or our clients' experience with disclosure by the company in question.

The companies considered were Anglo American PLC, De Beers, BHP Billiton Limited, ArcelorMittal South Africa Limited, Sasol Limited, and Sappi Limited.

Table 2: Domestic and international listings of multinational companies considered

Companies	Listed on Johannesburg Securities Exchange	Other listings	Listed on JSE's Socially Responsible Investment Index
Anglo American²⁰⁵	Yes.	London Stock Exchange SWX Swiss Exchange Botswana Stock Exchange Namibian Stock Exchange	Yes. Also listed on the FTSE4Good Index Series.
De Beers²⁰⁶	No – privately held by Anglo American PLC and Government of Botswana through De Beers SA	None.	No.
BHP Billiton²⁰⁷	Yes.	BHP Billiton Limited listed on the Australian Securities Exchange BHP Billiton Plc listed on London Stock Exchange	Yes. Also listed on the FTSE4Good Index Series.

²⁰⁵ www.angloamerican.com

²⁰⁶ www.debeersgroup.com

²⁰⁷ www.bhpbilliton.com

Companies	Listed on Johannesburg Securities Exchange	Other listings	Listed on JSE's Socially Responsible Investment Index
ArcelorMittal ²⁰⁸	Yes – as ArcelorMittal South Africa Limited	New York Stock Exchange Amsterdam Stock Exchange Paris Stock Exchange Luxembourg Stock Exchange Various Spanish Stock Exchanges	Yes. Also listed on the FTSE4Good Index Series and the Dow Jones Sustainability Index.
Sasol Limited ²⁰⁹	Yes.	New York Stock Exchange	Yes. Also listed on the Dow Jones Sustainability Index.
Sappi Limited ²¹⁰	Yes.	New York Stock Exchange	Yes.

Annual reports

Annual reports are not the appropriate place to look for permits or compliance data, but they do offer general insights into the way a specific company may view certain issues. Most of the annual reports were scant on any concrete or measurable information relating to the environment, permits, authorisations, or even the impact that a company's operations are having on the environment surrounding each mine or facility. The content of these reports suggest that environmental issues are issues which are potentially of interest to the shareholders and need to be reported on, and that sustainable development is at the forefront of the minds of those making decisions on behalf of the company. Safety data and incident-reporting are however reported on in significant detail.

Many of the companies included a section on the environment in their annual reports. Some involved graphs relating to water consumption, or climate change strategies, environmental risks (predominantly dust, noise and leakages), and costs relating to environmental restoration.²¹¹ Most of the annual reports were positive about the aims of companies to achieve high levels of disclosure and stakeholder engagement,²¹² and many listed specific concerns. For example, ArcelorMittal's annual report²¹³ mentions some of the company's most pressing environmental issues, including their goal to regain their zero effluent discharge (ZED) status at their Vanderbijlpark Works and achieve ZED status at their Newcastle facility.²¹⁴

ArcelorMittal's report also listed how they have engaged with communities affected by their work, and includes tables illustrating environmental issues.²¹⁵ Reasons for engagement are given as the need to participate in developing and regulating environmental legislation, applications for amendments to necessary permissions such as water use licences and zoning activities, and compliance with relevant legislation.²¹⁶ Some examples of engagement were: environmental impact assessments co-ordinated with authorities and stakeholders, and official inspections conducted by the Environmental Management Inspectorate.²¹⁷

Some reports made mention of King Code of Governance Principles (King III) and its importance,²¹⁸ while also acknowledging stakeholder concerns and the ways in which the company is trying to address these concerns.²¹⁹ However, the absence of illustrative examples in reports limited the scope of statements promising that a company was operating within clearly defined environmental management programmes.

208 www.arcelormittal.com and www.arcelormittalsa.com

209 www.sasol.com

210 <http://sappi.investoreports.com>

211 For example Anglo American, De Beers, BHP Billiton and SAPPi.

212 For example ArcelorMittal.

213 Available at <http://www.arcelormittal.com/corp/investors/financial-reports/annual-reports>, last accessed on 9 August 2012.

214 Available at <http://www.arcelormittal.com/corp/investors/financial-reports/annual-reports>, at p50, last accessed on 9 August 2012.

215 Op cit note 140 at p13-14.

216 Op cit note 140 at p14.

217 Op cit note 140 at p14.

218 Sasol Annual Report p34 – 35 available at http://www.sasol.com/sasol_internet/frontend/navigation.jsp?navid=15800008&rootid=4 last accessed on 5 August 2012. Also see ArcelorMittal Annual Report available at <http://www.arcelormittal.com/corp/investors/financial-reports/annual-reports>, at p3, last accessed on 9 August 2012.

219 Op cit note 139 at p55.

In short, the annual reports showed a willingness to include some details on environmental issues; however, where information was included, the information was not specific or detailed enough to provide meaningful information to the public regarding environmental compliance.

Websites

The websites for each company illustrated varying levels of disclosure depending upon the laws applicable in the jurisdiction to which the website related. In general, the Australian and Canadian websites for a company would include more disclosures and access to permits and other environmental authorisations than the South African websites.

Anglo American's South Africa website included details such as links to policy statements and case studies.²²⁰ In contrast, the Australian website for Anglo American had links to annual environmental management reports going back to 2008.²²¹ These reports included details on mining titles and leases held, consents and licences, the name of the lease-holder, and the names of the reporting officers. The report also had a comprehensive list of licences, complete with detail on the issuing authority, conditions of the licence and sampling and audit reports, as well as other relevant information.²²² The website also had links to various environmental reporting issues, land management plans, environmental management plans (EMPs), monitoring information and other licences.

Similarly, the De Beers Canada website included links to a variety of policy statements,²²³ as well as an online interaction section for mines currently being developed.²²⁴ Like the Australian Anglo American website illustrated above, the De Beers Canada website also disclosed licence details such as a water use licence included in a water licence community newsletter.²²⁵

BHP Billiton's international website had a wealth of information ranging from environmental management plans, licences, maps, environmental impact statements and case studies to other regulatory information.²²⁶ These documents predominantly related to BHP's Australian operations and facilities. No similar documentation was made available about BHP's South African operations.

This lack of disclosure on websites relating to South African operations was echoed by ArcelorMittal South Africa, which only disclosed policy documents and a certificate indicating the company's BEE rating.²²⁷ In contrast, the ArcelorMittal USA website had a number of documents available for download, including safety data sheets, quality documents and a radiation letter.²²⁸ The Canadian site allowed access to emissions summaries, dispersion models, information relating to the Toxic Reductions Act, community liaison meeting minutes, effluent discharges, environmental performance reports, and policy documents.²²⁹ Furthermore, the website provided links to Canadian government websites that contain information on ArcelorMittal.²³⁰

220 Anglo American South Africa, <http://www.angloamerican.co.za>, last accessed on 10 August 2012.

221 Available at <http://www.angloamerican.com.au/our-operations/thermal-coal/%7E/media/94C015C12F794CF69D7B74E42653A6E0.pdf>, last accessed on 10 August 2012.

222 Op cit note 148 at p76-77.

223 Available at http://www.debeerscanada.com/files_3/policy-statements.php, last accessed on 13 August 2012.

224 Available at http://www.debeerscanada.com/files_3/gahcho-kue.php, last accessed on 13 August 2012.

225 Available at http://www.debeerscanada.com/files_3/pdf_documents/2011-04-27_SLM-Water-License-Community-Newsletter.pdf, last accessed on 13 August 2012.

226 Available at <http://www.bhpbilliton.com/home/aboutus/regulatory/Pages/default.aspx> last accessed on 15 August 2012.

227 Available at <http://www.arcelormittalsa.com/InvestorRelations/LegalNotices.aspx> last accessed on 8 August 2012.

228 Available at <http://pc.arcelormittal.com/NA/Environmental>, last accessed on 9 August 2012.

229 See for example http://www.dofasco.ca/bins/content_page.asp?cid=502-18649-346692&lang=1.

230 Available at http://www.dofasco.ca/bins/content_page.asp?cid=315910-1852-315510&lang=1.



“...a more effective approach would be to contact the relevant government departments.... That...would ensure that you obtain the full range of authorisations we have filed... rather than merely those of the companies that agree to your request.”

– AngloGold Ashanti, 25 July 2011, in response to the CER’s request for all environmental licences to be published on the company’s website.

Unfortunately, the levels of disclosure illustrated by some companies was not obtained by all the company websites reviewed. For example, the Sasol websites – South African, Canadian and American – all reflected very little access to environmental information.²³¹ The main type of information available on its United States site was access to various types of management system certificates.²³²

Sappi’s websites, for both South Africa and its European operations, included links to a number of certificates of compliance such as those of the International Organization for Standardisation (ISO) and Occupational Health and Safety Assessment Specification (OHSAS), registration certificates for forest stewardship associations, and European Eco-Management and Audit Scheme Regulation certification (EMAS EU).²³³ No environmental permits were accessible via the company’s websites.

Ancillary organisations and reports

Most documents available relating to South African operations of the various companies were via either governmental online databases or consultants’ websites. Many of these documents related to the public participation process, rather than to the outcome of that process. However, there were some authorisations that had been granted that were available.

Much of the information that was available was information relating to authorisations, rather than the licence or authorisation itself. Furthermore, the South African Waste Information Centre (SAWIC) was a source of a number of licences. This database is available online and is very user-friendly.²³⁴ This system could serve as a blueprint for future public registers developed by other government departments.

The National Environmental Compliance and Enforcement Reports (NECER) published by DEA and related government departments contain information about a number of the companies assessed for this report.

²³¹ See www.sasol.com; <http://www.sasolcanada.com>; and <http://www.sasolnorthamerica.com>.

²³² Available at <http://www.sasolnorthamerica.com/iso.asp>, last accessed on 20 August 2012.

²³³ See for example <http://www.sappi.com/regions/za/SappiSouthernAfrica/Sappi%20Chemical%20Cellulose/Pages/Saiccor-Mill.aspx>.

²³⁴ Available at <http://www.sawic.org.za> last accessed on 8 October 2012.

Table 3: Key findings of government compliance inspections at facilities owned by some of the companies assessed

Company and facility	NECER 2011-2
Sasol Limited's Secunda Refinery	"Non-compliances to authorisations still ongoing"
BHP Billiton's Metalloys	"Non-compliances to conditions of authorisations still ongoing" "Criminal investigation... initiated"
ArcelorMittal South Africa's Vanderbijlpark Works	"Criminal investigation has been recently initiated in respect of the non-compliances and ongoing incidents at the site"
ArcelorMittal South Africa's Newcastle Works	"Non-compliances to environmental authorisations conditions still continues..."
ArcelorMittal South Africa's Vereeniging Works	"The [National Prosecuting Authority] has requested the Department [of Environmental Affairs] to conduct further investigation in relation to the criminal case"
Sappi Limited's Ngodwana Facility	"Non-compliance with conditions of... permits" "Operation of... sites without authorisation"

Responses to requests for voluntary disclosure of permits

In *Unlock the Doors*, the CER reported on a joint initiative with the Open Democracy Advice Centre in which we requested a significant number of South African mining companies voluntarily to upload their environmental permits on their websites. Amongst those who refused was DeBeers Consolidated Mines Limited:

"The documentation you have requested us to publish on our website contains resource information, technical information and financial information which, if shared generally by way of publication on a website, would be likely to cause harm to our commercial interests and prejudice us in commercial competition. Moreover, the documentation requested... runs to very many thousands of pages, and it would undoubtedly take our staff a very considerable period of time to collate, consider, redact and upload all the information requested in your letters. We do not at present, having recently weathered the global financial crisis, have the resources to dedicate to a project of this magnitude." ²³⁵

Conclusions

The discrepancies between the information that is publicly available for each company is significant. All of the companies researched had some information available. Some of this information simply related to the types of promises and assurances that companies are expected to include in their annual reports. However, many of the companies had a lot more information available, particularly through adjoining facilities such as public comment forums and consultancy firm websites. There were also those companies that made information available if they were legally compelled to do so. If one jurisdiction requires certain information to be publicly disclosed, then that information was available, but only in relation to the company's operations in that jurisdiction, and not across all of the jurisdictions and operations in which the company is involved. Furthermore, some companies would disclose this information on their websites, while others simply left it to the regulatory authorities to make the information accessible.

Many companies make information available in order to comply with the public participation process before an authorisation is granted. However, once the authorisation is granted the flow of information from the company's side either slows down or stops entirely, and access to later authorisations is arbitrary and sometimes entirely based on chance (and whether a consulting firm makes a document available).

The inconsistencies in the availability of licences cast doubt on the claims that companies made in response to requests to publish licences: for instance that they lack the resources, that the information is confidential, and that too much disclosure is problematic.²³⁶

²³⁵ Correspondence dated 28 June 2011.

²³⁶ See p13 of the *Unlock the Doors* report.



CONCLUSIONS AND RECOMMENDATIONS

Readily available environmental information enables citizens and communities to take preventative measures to avoid exposure to environmental risks, participate meaningfully in environmental decision-making, track the progress of a project, and notify stakeholders and authorities if something seems amiss.

Recommendations aimed at achieving better levels of access to environmental information include:

- higher levels of voluntary disclosure and consistent disclosure, mirroring best practice in other jurisdictions,
- making disclosure an obligation on all licence holders,
- creation of a publicly available registry of environmental authorisations, and
- making use of incentivisation schemes (some of which are specifically provided for in current South African legislative provisions regarding the environment).

Voluntary disclosure

A comparison between information made available (either mandatory or voluntarily) in one jurisdiction as compared to another illustrates that there is not one set international standard. It is submitted that good corporate governance requires companies to operate to a single and high standard, regardless of the fact that its operations occur in different countries and legal jurisdictions. If a company discloses documents in one jurisdiction, it should also make similar documents and authorisations available in all the jurisdictions in which they operate. Most companies talk about accountability and transparency on their websites and in their annual reports. Voluntary disclosure of environmental licences would reinforce this talk with action.

Central online register or database

There are many pieces of environmental legislation in South Africa that envisage the creation of registers of environmental licences. In many instances, these databases already exist for official use, and converting it to a public register is not particularly onerous, but has simply not yet been undertaken. Where not all records are held in digital format, the Jamaican example could be followed, in that the hard copies of a record could be made available to interested persons. Not only do such public registries incentivise more voluntary disclosure (there being little point in refusing access to information already publicly available), but it would significantly reduce for both authorities and licence holders the day-to-day administrative burden of responding to requests for copies of such permits.

Even in instances where affected people and communities do not have access to the internet, a central, online database improves the prospects of those people gaining access to information, including through the assistance of civil society organisations that do have internet access.



Incentivisation

As mentioned in this report, there are some provisions in existing legislation that allow for public recognition regarding good behaviour by companies. These provisions could be better utilised through the creation of an incentivisation programme similar to the one used in the Philippines. If companies were made aware of the benefits of voluntary disclosure through incentives, then this would, hopefully, foster a culture of greater voluntary disclosure.

BIBLIOGRAPHY AND REFERENCES

South African Legislation (listed chronologically)

- Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947
- Hazardous Substances Act 15 of 1973
- Banks Act 94 of 1990
- Tobacco Products Control Act 83 of 1993
- Occupational Health and Safety Act 85 of 1993
- Labour Relations Act 66 of 1995
- Mine Health and Safety Act 26 of 1996
- Water Services Act 108 of 1997
- Marine and Living Resources Act 18 of 1998
- National Water Act 36 of 1998
- National Forest Act 84 of 1998
- National Environmental Management Act 107 of 1998
- National Environment Laws Amendment Act 14 of 2009
- Nuclear Energy Act 46 of 1999
- Nuclear Regulator Act 47 of 1999
- Promotion of Access to Information Act 2 of 2000
- Firearms Control Act 60 of 2000
- The Gas Act 48 of 2001
- Private Security Industry Regulation Act 56 of 2001
- Mineral and Petroleum Resources Development Act 28 of 2002
- Financial Advisory Information Services Act 37 of 2002
- Collective Investment Schemes Control Act 45 of 2002
- Firearms Control Amendment Act 43 of 2003
- National Environmental Management: Protected Areas Act 57 of 2003
- National Health Act 61 of 2003
- National Environmental Management: Biodiversity Act 10 of 2004
- National Environmental Management Air Quality Act 39 of 2004
- Judicial Services Commission Amendment Act 20 of 2008
- National Environmental Management Integrated Coastal Management Act 24 of 2008
- National Environmental Management: Waste Act 59 of 2008

Websites (listed alphabetically according to title)

A

Alberta Environment and Sustainable Resource Development: environment.alberta.ca
Alberta Queens Printer: www.qp.alberta.ca
Andhra Pradesh Pollution Control Board: www.appcb.ap.nic.in
Anglo American international website: www.angloamerican.com
Anglo American South Africa website: www.angloamerican.co.za
Anglo American Australia website: www.angloamerican.com.au
Anglo Platinum South Africa website: www.angloplatinum.co.za
Anglo Platinum international website: www.angloplatinum.com
ArcelorMittal international website: www.arcelormittal.com
ArcelorMittal Dofasco Hamilton: www.dofasco.ca
ArcelorMittal USA: www.pc.arcelormittal.com
Asia Development Bank: www.adbi.org
Australian Legal Information Institute: www.austlii.edu.au
Australia Mines Atlas: www.australianminesatlas.gov.au

B

Bench Marks Foundation: www.bench-marks.org.za
BHP Billiton international website: www.bhpbilliton.com
Bohlweki-SSI Environmental: www.bohlweki.co.za
British Columbia Laws: www.bclaws.ca

C

Canada Gazette: www.gazette.gc.ca
CCA Environmental: www.ccaenvironmental.co.za
Central Pollution Control Board, India: <http://cpcb.nic.in>
Centre for Environmental Rights: www.cer.org
Clean Development Mechanism, UNFCCC: <http://cdm.unfccc.int>

D

D List Benguela: www.dlist-benguela.org
De Beers Group international website: www.debeersgroup.com
De Beers Canada: www.debeerscanada.com
Debswana: www.debswana.com
Department of Justice, Canada: <http://laws-lois.justice.gc.ca>
Department of Water Affairs, South Africa: www.dwaf.gov.za

E

EIA Portal of South Africa: www.eia.za.net
Environment Canada: www.ec.gc.ca
Environmental Law Alliance Worldwide: www.elaw.org

G

Golder and Associates: www.golder.com
Government of Alberta, Environment: <http://ssrb.environment.alberta.ca>
Government of Bihar, Environment and Forests Department: <http://forest.bih.nic.in>
Government of India Ministry of Environment and Forests: www.moef.nic.in
Government of Jamaica Ministry of Justice: www.moj.gov.jm
Government of West Bengal, Environment Department: www.enviswb.gov.in
Gujarat Pollution Control Board <http://gpcb.gov.in>

J

Jones and Wagner: www.jaws.co.za

L

The Land Administration and Management Project: <http://lamp.denr.gov.ph>



M

Maharashtra Pollution Control Board: <http://mpcb.oncommunication.net>

Ministry of Environment and Forests Environmental Clearance Form: <http://environmentclearance.nic.in>

N

Department of Agriculture, Forestry and Fisheries: www.nda.agric.za

National Nuclear Regulator: www.nnr.co.za

National Pollutant Inventory: www.npi.gov.au

New South Wales Government: www.legislation.nsw.gov.au

Nuclear Energy Regulator of South Africa: www.nersa.org.za

O

Ontario Ministry of the Environment: www.ene.gov.on.ca

P

Philippines Department of Environmental and Natural Resources Environmental Management Bureau: <http://emb.gov.ph>

Pima County Government, Arizona: www.pima.gov

Public Environmental Arbiters: www.pea.org.za

Public Process Consultants: <http://publicprocess.co.za>

R

Right to Information Portal, India: www.righttoinformation.gov.in

S

South African Mineral Resources Administration System (SAMRAD): <http://portal.samradonline.co.za/>

SALBU Index: www.salbu.co.za

SAPPI international website: www.sappi.com

Sasol Canada: www.sasolcanada.com

Sasol international website: www.sasol.com

Sasol North America: www.sasolnorthamerica.com

Shangoni Consultants: www.shangoni.co.za

South African Air Quality Information System (SAAQIS): www.saaqis.org.za

South African Journal of Wildlife Research: www.sawma.co.za

South African Waste Information Centre: www.sawic.org.za

SRK Consultants: www.srk.co.za

Strategic Environment Focus: www.sefsa.co.za

Strategic Environmental Management Consulting: www.sesolutions.co.za

Surica Environmental Consulting: www.suricata.co.za



T

Tamil Nadu Pollution Control Board: www.tnpcb.gov.in

Terratest Geotechnical, Environmental & Earth Science Consultants: www.terratest.co.za

U

Urban Environment Management Programme: www.uemp.org.za

US Department of the Interior Bureau of Land Management: www.blm.gov/wo/st/en.html

V

Vaal Environmental Community News: <http://vaalenvironmentalnews.blogspot.com>

W

Water Use Authorisation Registration Management System (WARMS): www.dwa.gov.za/Projects/WARMS/

Web Enabled Environmental Clearance Procedure, Maharashtra: <http://ec.maharashtra.gov.in>

Worley Parsons Resources and Energy: www.kv3.co.za

WSP Environmental: www.wspenvironmental.com



ACKNOWLEDGEMENTS

This report was written by Sally Hurt, with inputs by Melissa Fourie, Dina Townsend, Robyn Hugo, Mmoloki Mmolawa, Michael Lowman and other CER staff members.

CER would like to acknowledge and thank Environmental Law Alliance Worldwide (ELAW) (www.elaw.org) for their comparative research inputs into this report.

CER would also like to thank the following officials for their participation in our research:

- **Department of Environmental Affairs:** Lucas Mahlangu, Jeremia Sibande, Dr Greg Scott, Tsietsi Mahema, Patience Gwaze, Simon Moganetsi
- **South African Weather Services:** Dr Gregor Feig, Vumile Senene, Xolile Ncipha
- **Department of Mineral Resources:** Morné Koen, Noluvo Matangayi, Kgotsi Mokwatile, Siyanda Lurengwa, Masera Ndawakulu, Tshoene Moabelo
- **Department of Water Affairs:** A Abrahams, Khutso Mabela, Justice Makhuma, M Morovhi
- **Department of Agriculture, Forestry and Fisheries:** Naeem Abdurahman, Craig Smith, Raymond Scott, Odwa Dubula
- **National Nuclear Regulator:** Gino Moonsamy

CENTRE FOR ENVIRONMENTAL RIGHTS NPC

223 Lower Main Road, Observatory 7925

Cape Town, South Africa

Tel: 021 447 1647

Fax: 086 730 9098

Email: info@cer.org.za

www.cer.org.za

A non-profit company with registration
number 2009/020736/08, PBO No. 930032226
NPO No. 075-863
and a Law Clinic registered with the Law Society
of the Cape of Good Hope

Production: Aletta Jordaan

Photographs: iStockphoto.com, Shutterstock

This report was prepared and published with funding provided
by the Open Society Foundation for South Africa.





Centre *for* Environmental Rights

Advancing Environmental Rights in South Africa

Tel 021 447 1647 | Fax 086 730 9098 | info@cer.org.za | www.cer.org.za

