

ENVIRONMENTAL MANAGEMENT CO-OPERATION AGREEMENTS: CARROT OR STICK?

KATE FARINA

Environmental Legal Advisor, Sasol, P O Box 5486, Johannesburg, 2000

1. INTRODUCTION

The setting up of environmental management co-operation agreements (EMCA's) (or voluntary agreements as they are also known), is provided for in terms of section 35 of the National Environmental Management Act (No 107 of 1998). EMCA's may be entered into between the government, represented by the Department of Environmental Affairs and Tourism, and any person (including a company or sector) or community in order to further the principles espoused by NEMA.

Due in some part to the pressure being exerted by various non-governmental and community-based organisations for improvement of South Africa's air quality, the setting up of EMCA's for the various industrial sectors within South Africa is high on the agenda of the Deputy Minister of Environmental Affairs and Tourism. As a result the Chemical and Allied Industries Association and the Refinery Manager's Environmental Forum are currently involved in a process to develop a framework for EMCA's for both the chemical and refinery industries respectively.

The core of an EMCA entered into by any industrial sector will be an undertaking to improve on standards laid down by law with respect to resource use and pollution, and further to define measurable targets for implementing this commitment in order to demonstrate continual improvement.

This paper describes the proposed application of EMCA's to the chemical and refinery sectors in South Africa with emphasis on the need to address historical inadequacies in terms of the legislative

framework applicable to air pollution control in South Africa. In addition, some of the issues raised already in the negotiation process will be discussed including:

- participation of NGO's and CBO's,
- sectoral framework agreements vs site environmental plans,
- standardisation of air pollution targets within sectors vs localised levels,
- incentives for commitments,
- penalties for non-compliance.

Finally, the question is raised as to whether EMCA's as they are being applied in the South African context are truly a voluntary approach, and if so, whether there are sufficient incentives, both positive and negative, to ensure that they are implemented and maintained.

2. DEFINING AN EMCA

The intended purpose of an EMCA has been stated as one of improving the environmental performance of the regulated beyond or in compliance with legal requirements. [1]

Much is made of the distinction between self-regulation (where industry chooses the environmental target and the means of getting there such as ISO 14000 and responsible care) and co-regulation (where the environmental objectives and methods of achieving the objectives are defined through interaction between government and industry). The EMCA as one example of the co-regulatory approach envisages an ongoing and vital partnership between the regulator and the regulated.

Table 1 shows this partnership to involve a large degree of collaboration between the parties, whilst maintaining a high level of government control.

Table 1 - Environmental Policies

Co-operative <i>Business / Government relationship</i>	"Induced" (Market based)	"Negotiated" (Co-regulation)
	<ul style="list-style-type: none"> • Tradable permits • Subsidies • Energy tax 	<ul style="list-style-type: none"> • Covenants • Voluntary / co-operative agreements
	"Unconstrained" (Self -)	"Regulated" (Command & control)
	<ul style="list-style-type: none"> • Minimal regulation/enforcement • Market pressures 	<ul style="list-style-type: none"> • Permits • Emission limits • Fines
Confrontatio	Indirect	Direct
	<i>Government Control</i>	

The voluntary approach is seen as complimentary to, and to some extent ultimately a substitute for, the traditional regulatory or "command and control" type approach.

An EMCA as defined in terms of section 35 of NEMA is envisaged to be a legally binding agreement between government and industry (or a community):

“35. Conclusion of agreements

- (1) The Minister and every MEC and municipality, may enter into environmental management co-operation agreements with any person or community for the purpose of promoting compliance with the principles laid down in this Act.
- (2) Environmental management co-operation agreements must-
 - (a) only be entered into with the agreement of-
 - (i) very organ of state which has jurisdiction over any activity to which such environmental management co-operation agreement relates;
 - (ii) the Minister and the MEC concerned;

(b) only be entered into after compliance with such procedures for public participation as may be prescribed by the Minister; and

(c) comply with such regulations as may be prescribed under section 45.

(3) Environmental management co-operation agreements may contain-

(a) an undertaking by the person or community concerned to improve on the standards laid down by law for the protection of the environment which are applicable to the subject matter of the agreement;

(b) a set of measurable targets for fulfilling the undertaking in (a), including dates for the achievement of such targets; and

(c) provision for-

(i) periodic monitoring and reporting of performance against targets;

(ii) independent verification of reports;

(iii) regular independent monitoring and inspections;

(iv) verifiable indicators of compliance with any targets, norms and standards laid down in the agreement as well as any obligations laid down by law;

(c) the measures to be taken in the event of non-compliance with commitments in the agreement, including where appropriate penalties for non-compliance and the provision of incentives to the person or community.”

An EMCA will be voluntary to the extent that both the Minister and the industry concerned have a discretion as to whether to enter the agreement, however imple-

mentation of the agreed terms and compliance therewith will clearly be mandatory.

3. CURRENT SOUTH AFRICAN INITIATIVES

Authorities, industry and NGO's are currently engaged in developing EMCA's within the South African context. Drawing both on the definition of the EMCA in terms of NEMA, as discussed above, as well as from international experience, these parties have been investigating how best environmental targets and objectives relevant to the chemical and refinery sectors can be incorporated into the framework of an agreement.

The Dutch model, which is being heavily drawn upon, has seen industry sectors rather than individual companies entering into EMCA's. Clearly however well organised proactive sectors and business associations are an important pre-condition. The mandate and support base of members is also critical when an association negotiates on behalf of the members.

What is envisaged at this stage is a two-tiered approach as described in table 2 below, in terms of which an EMCA for a particular sector sets generic targets and objectives for the members of that sector, which then need to be rolled out in terms of site environmental plans (SEP's).

An SEP is essentially an agreement between a private company and those who are adversely impacted or affected by the

company's activities. Precedents for such agreements already exist with respect to emission reduction plans negotiated recently between various NGO's and the refineries of Engen and Natref.

Two levels of an EMCA in the South African context are therefore envisaged, namely:

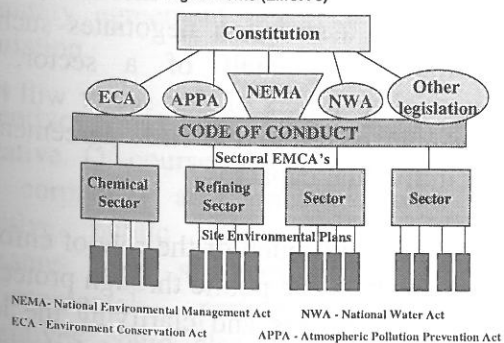
- An agreement negotiated between an industrial sector and government, and
- Agreements entered into as a result of interaction between individual polluters and affected parties such as local communities, NGO's etc.

A key concern regarding the sustainability of EMCA's in South Africa is clearly their credibility. Although provision is made for regulations regarding public participation with respect to the development of EMCA's, to date no such regulations have been published nor does it seem that DEAT intends to do so. The extent of involvement particularly of NGO's and CBO's in terms of the negotiation of an EMCA to be entered into by government and industry or sector is therefore unclear. It appears that the technical task groups which are being set up to negotiate the details regarding environmental targets are the most appropriate mechanisms to cater for a participatory approach which will "promote the participation of all interested and affected parties in environmental governance"—a NEMA principle

4. SETTING TARGETS AND OBJECTIVES

Whilst the chemical and refinery sectors will no doubt be the fore runners in terms of setting the precedent for future EMCA's, it is already clear that the defining of targets for various pollutants, particularly when it comes to atmospheric emissions, are difficult to do in isolation from other sectors such as steel processing and power generation for example.

Table 2 - Proposed Approach to Environmental Co-operation Agreements (EMCA's)



Clearly the objectives and targets set in an EMCA must be measurable in order to be capable of being monitored and evaluated. Issues that still need to be decided on include quantification by means of absolute figures (such as maximum amount of emissions) or by means of reductions (with respect to the total percentage of emissions). Measurability also implies that time tables must be agreed upon with milestones and interim targets.

The economic feasibility of reaching targets is a critical issue and EMCA's should not be a tool to put industry out of business. Targets should be seen as the basis for the desired environmental situation, which will still ensure economic growth.

One of the international precedents which have been studied is the agreement signed in the Netherlands between the chemical industry and Ministries of Environment, Economic Affairs and Water Management. Quantitative targets for emissions relating to air, water, soil, waste and energy were defined and milestones set. It was important to note however that this agreement was founded on a National Environmental Policy Plan based on a quantitative assessment of the environmental situation in the Netherlands. The incorporation of percentage emission reductions into the agreement was therefore possible with this baseline as a reference. Individual companies then had to enter into company environmental plans in order to implement the objectives of the agreement. This is used as a basis for authorisations and permit reviews as well as monitoring of progress.

The Dutch agreements have addressed a variety of issues including:

- Phasing out of materials (CFC's, asbestos, PVC)
- Meeting waste reduction targets in key industrial sectors
- Achievement of air and water quality emission targets
- Reduction of greenhouse gas emissions (primarily carbon dioxide)

- Energy efficiency measures within various sectors
- Targets relating to collection, recycling and material composition of packaging
- Promoting research and development into alternative fuels for motor vehicles
- Increasing the adoption of environmental management systems in companies
- Promotion of environmental reporting

5. LEGAL STATUS

It has been stated that the kind of agreement provided for by NEMA is an administrative agreement rather than a purely private law contract in which the parties act as equals.[2] DEAT anticipates therefore that an EMCA will be governed by a mix of both public law (constitutional and administrative law) and private law (contract). One of the essentials of the law of contract is that performance of the terms and conditions of the agreement must not be impossible. This means that it is vital that environmental targets and time frames for reaching them be practical and capable of being implemented by the industries concerned.

The difference between an EMCA and a private law contract will essentially be seen in terms of the remedies for non-performance by either party whereby administrative procedures can be implemented to remedy the breach. For government this will mean that abatement procedures and interdicts may be used to stop any infringement of the agreement, whilst any irregularities committed by an organ of state in terms of the agreement can be taken by the affected party to a competent court for review. In order for an EMCA to be capable of enforcement therefore, where an industry association negotiates such an agreement on behalf of a sector, the individual members of that sector will have to be signatories to the final agreement in their individual capacity.

NEMA has put much of the role of enforcer in the hands of the public through protection of whistle blowers and clarifying the legal standing of interested and affected parties to

enforce environmental laws. Favourable cost provisions have been included to encourage the role of the public as watch dog and to assist in actions being brought in protection of the environment. Section 33 allows any person, either in the public interest or in the interest of the protection of the environment, to conduct prosecutions in respect of any breach or threatened breach of any duty laid down in any legislation, regulation, licence, permission or authorisation concerned with the protection of the environment. The extent to which commitments made in terms of an EMCA may become such a duty and therefore imply the potential for private prosecution is still debatable.

6. INCENTIVES AND PENALTIES

DEAT sees the adoption of negotiated environmental agreements as part of the policy mix of instruments needed to achieve sustainable development and further as a supplement to the regulatory framework that will foster ongoing innovation and industry.[3] An EMCA can serve as an easy way out for government by side stepping the need for intensive resource requirements which necessary for reviewing environmental legislation and regulatory instruments. Flexibility can also be built in allowing modification to meet changing circumstances more easily than regulations. However, whilst the EMCA might be recognised as a tool in achieving sustainable development, it is argued that in the guise of the voluntary approach it can in fact become yet another command and control mechanism if the issue of incentives is not adequately addressed. It is submitted that if penalties are included in the absence of incentives to counter balance them, the voluntary agreement becomes yet another regulation.

Incentives may be both positive and negative. Of course an incentive that many big corporates are concerned with is a positive public image and increasing pressure from shareholders to improve environmental performance. Positive incentives could also include tax breaks,

subsidising of new technology, improving relationships with the public and communities, streamlining the permitting process, and the introduction an element of de-regulation within a clear legal framework.

Penalties could include refusal of permits (and therefore licence to operate), fines, and the strengthening the hand of the public as watch dog.

Whilst continually striving for sustainable development may be the moral obligation of all people on the planet, where improved environmental performance and the adoption of best practice standards that exceed the minimum existing requirements is sought, investments will be required. The argument that more innovative environmental management leads to direct cost savings is not always applicable and often only seen in the long term. The short-term consequences are often that better technology must be implemented with associated capital inputs. As industry is in business for the benefit of shareholders, to go beyond the minimum required by any duty to stakeholders, incentives will be required to make such initiatives an integral part of daily business decisions.

For EMCA's to be truly successful it is submitted that the public authority commitment must consist of more than the intimation that no new legislation or tax will be introduced unless industry fails to comply with the agreement. In terms of the South African context and the current capacity problems experienced by the public authorities charged with enforcement of environmental laws, this type of a veiled threat will certainly not be sufficient to induce an abiding commitment to better environmental performance.

The underlying question is still unanswered – how “voluntary” will voluntary agreements in South Africa prove to be?

REFERENCES

- [1] Department of Environmental Affairs and Tourism. 2000. Document for Discussion on Environmental Management Co-operation Agreements: A Guide for their Design and Use. p 10
- [2] Department of Environmental Affairs and Tourism. 2000. Document for Discussion on Environmental Management Co-operation Agreements: A Guide for their Design and Use. p 11
- [3] Department of Environmental Affairs and Tourism. 2000. Document for Discussion on Environmental Management Co-operation Agreements: A Guide for their Design and Use. pp. 6 - 7