



Centre *for*
Environmental Rights

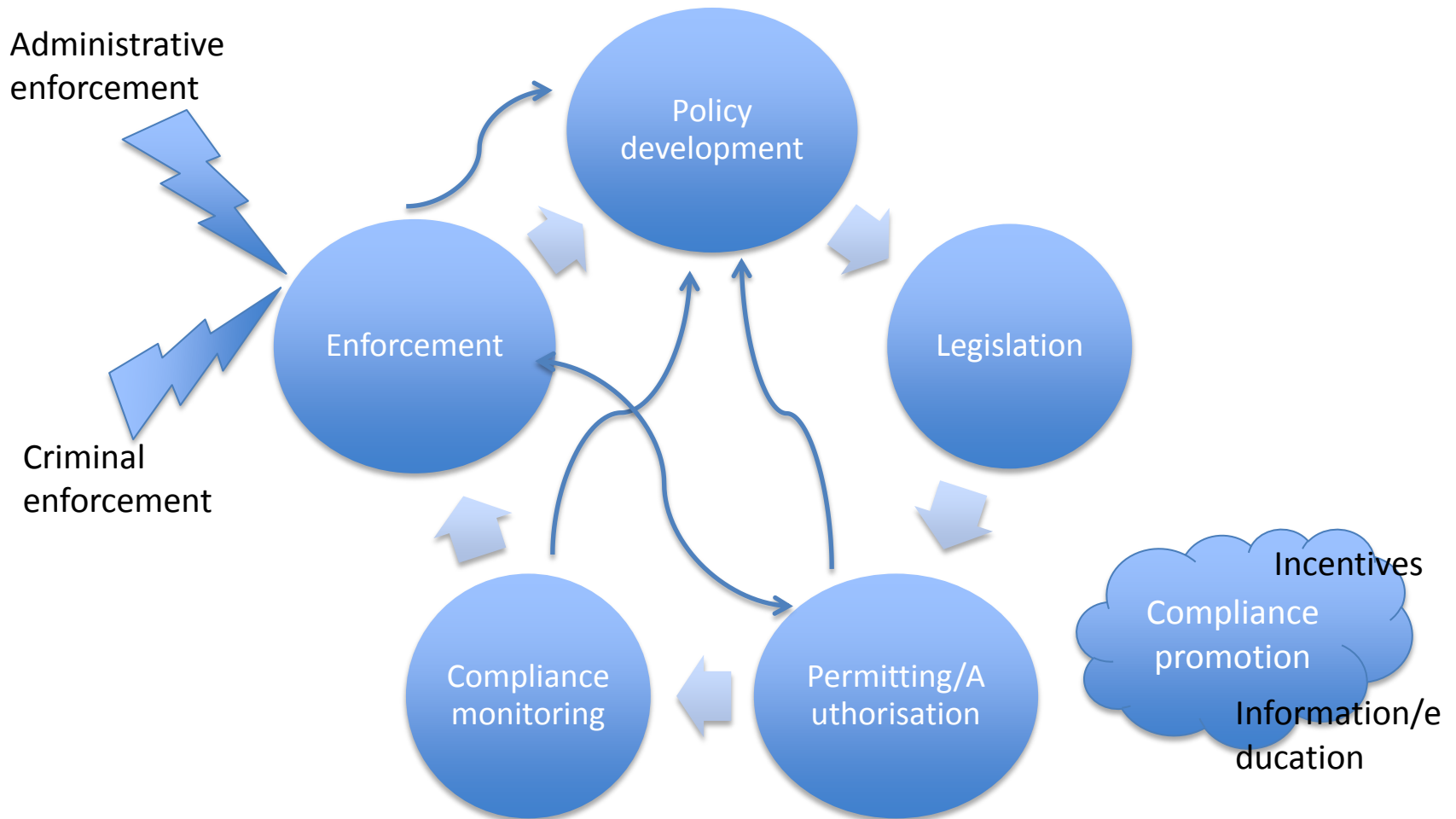
Advancing Environmental Rights in South Africa

Introduction to regulatory cycle
What are the current rules, and who
applies them?
How can we improve compliance?

Overview

- The regulatory cycle
- What are the rules?
 - CARA Control Measures
 - NEMA Environmental Authorisations
 - Other
- Consequences of non-compliance: different types of enforcement, additional consequences
- What promotes and discourages compliance?
- Qualities and principles of effective regulation

The regulatory cycle



What are the rules applicable to the conversion of virgin land?

CARA s.6 Control Measures

- **Reg. 2 Cultivation of virgin soil:** Must apply at least 3 months months in advance for authorisation to cultivate virgin soil (except if approval under Forest Act)
 - “virgin soil”: “land which in the opinion of the executive officer has at no time during the preceding ten years been cultivated”
- **Reg 3 Cultivation of land with a slope:** Must apply at least 3 months months in advance for authorisation to cultivate land with *slope* of more than 20% or more than 12% in certain magisterial districts in KZN and Eastern Cape

Rules applicable: CARA Control Measures (cont.)

- **Reg 7(3) Utilisation and protection of vleis, marshes, water sponges and water courses:** Must apply for authorisation at least 3 months in advance to:
 - drain or cultivate any vlei, marsh or water sponge (concepts not defined); or
 - cultivate any land within the flood area (1/10 years) of a water course or within 10m horizontally outside the *flood area* of a water course(certain pre-1984 exceptions)
- **Reg 8 Regulating flow pattern of run-off water:** Must apply for authorisation to “divert any *run-off water* from a water course to any other water course” (unless in terms of approved water run-off control plan)

Rules applicable: CARA Control Measures (cont.)

- **Reg 9 Utilisation and protection of veld:**
Obligation to take measures to protect *veld* effectively against deterioration and destruction (including alternate grazing, types and numbers of animals, windbreaks, etc):
 - *“veld”: “land which is not being or has not been cultivated and on which indigenous vegetation, or other vegetation which in the opinion of the executive officer is or can be utilised as grazing for animals, occurs”*

Rules applicable: CARA Control Measures (cont.)

- **Reg 12 Prevention and control of veld fires:**
Must apply 30 days in advance for authorisation to burn any veld or utilise as grazing any veld that has burned
- **Reg 13 Restoration and reclamation of eroded land:** Obligation to take measures “effectively to restore or reclaim land on which *excessive soil loss* due to erosion occurs or has occurred”

Rules applicable: CARA Control Measures (cont.)

- **Reg 14 Restoration and reclamation of disturbed or denuded land:** Series of rules applicable where *land user* disturbs or denudes land other than for prospecting or mining (what to do with topsoil, impacts on flow pattern of *run-off water*, vegetation, withdrawal from grazing, etc.). No area bigger than 1 ha may be left unprotected before commencement of restoration/reclamation
- Reg 6(2), 13, 14: Executive officer can direct additional measures

Rules applicable: CARA Control Measures (cont.)

Consequence of non-compliance:

- Administrative enforcement: “direction” ito s.7
- Criminal offences:
 - non-compliance with s.6 control measures (s.6(5))
 - refusing to receive direction (s.7(6)(a))
 - refusing or failing to comply with direction (s.7(6)(b))
- Criminal penalties (s.23):
 - 1st conviction: R5,000 or 2 years
 - 2nd conviction: R10,000 or 4 years
 - However...

Rules applicable: CARA Control Measures (cont.)

Consequence of CARA listed in schedule 3 of NEMA:

- S.34(1) and (2): on conviction, court can enquire into and make order for **loss or damage to any organ of state or other person**, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment
- S.34(3): on conviction, court can enquire into monetary value of **any advantage gained** or likely to be gained by such person in consequence of that offence, and order
 - the award of damages or compensation or a fine equal to the amount so assessed; or
 - that such remedial measures as the court may determine must be undertaken by the convicted person

Rules applicable: CARA Control Measures, consequences of NEMA schedule 3 listing (cont.)

- S.34(4): Court can order payment **of cost of investigation and prosecution**
- S.34(5)-(7): Liability of **employer** where act committed by manager, agent or employee, liability of **manager, agent or employee**, liability of **directors**

Rules applicable conversion of virgin land (cont.)

NEMA s.24 Environmental Authorisations for Listed Activities

- 2010 EIA Regulations
- Distinction in listing notices between **virgin soil** (listing notice 2) and 75% **indigenous vegetation cover** (listing notice 3)
- Different thresholds in listing notice 3: 300m², 1 ha, 5 ha
- **Listing Notice 2 Activity 16**: Must do full EIA for physical alteration of *virgin soil* to agriculture, or afforestation for the purposes of commercial tree, timber or wood production of **100 ha or more**
 - “*virgin soil*”: “*land not cultivated for the preceding 10 years*”

Rules applicable: NEMA EAs (cont.)

- **Listing Notice 3 Activity 12:** Must do Basic Assessment for clearance of an area of **300m² or more** of vegetation where 75% cover constitutes *indigenous vegetation*
 - Within any critically endangered or endangered ecosystem listed in terms of s.52 of NEMBA or identified as critically endangered in the NSBA
 - Within critical biodiversity areas listed in *bioregional plans*
 - Within the littoral active zone or 100m inland from high water mark of the sea or an *estuary*, whichever distance is the greater, excluding where such removal will occur behind the *development setback* line on erven in *urban areas*
- “*indigenous vegetation*”: “*vegetation consisting of indigenous plant species occurring naturally in an area, regardless of the level of alien infestation and where the topsoil has not been lawfully disturbed during the preceding ten years*”

Rules applicable: NEMA EAs (cont.)

- **Listing Notice 3 Activity 13:** Must do Basic Assessment for clearance of **1 ha or more** of vegetation where 75% or more of the vegetative cover constitutes indigenous vegetation, except where removal is required for:
 - Waste management activity
 - Undertaking of a *linear activity* falling below Listing Notice 1 thresholdsand where this clearance takes place in:
 - critical biodiversity areas and ecological support areas as identified in *systematic biodiversity plans* adopted by the CA
 - *NPAES Focus Areas*

Rules applicable: NEMA EAs (cont.)

- EC, FS, KZN, Limp, Mpum, NC and WC:
 - In *estuary*
 - Outside *urban areas*: PA under NEMPAA, excluding conservancies; NPAES Focus Areas; sensitive areas identified in EMF adopted by the CA; *sites or areas identified to an International Convention* (excluding WHS, including Ramsar); core areas in biosphere reserves; areas within 10km from national parks or WHS or 5km from any other PA under NEMPAA or from core area of a biosphere reserve; areas seawards of the *development setback* line or within 1km from high-water mark if no *development setback* line is determined
 - Inside *urban areas*: public open space, conservation areas in SDFs, areas seawards of development setback line, areas on *water course* side of *development setback* line or 100m from edge of *water course* where no setback line has been determined

Rules applicable: NEMA EAs (cont.)

- **Listing Notice 3 Activity 14:** Must do Basic Assessment for clearance of **5 ha or more** of vegetation where 75% or more of the vegetative cover constitutes *indigenous vegetation*, except where removal is required for:
 - Agriculture or afforestation inside areas identified in spatial instruments adopted by CA for agriculture or afforestation purposes
 - Waste management activities
 - Undertaking of a *linear activity* falling below Listing Notice 1 thresholdsand where this clearance takes place outside *urban areas*

Rules applicable: NEMA EAs (cont.)

Consequence of non-compliance:

- Administrative enforcement: s.31L compliance notice and/or s.28 directive
- Criminal offences and penalties:
 - S.24F(1)(a) as read with s.24F(2): **commencing listed activity without an EA: (s.24F(4))**: R5 million or 10 years
 - Emergency defence s.24F(3): “activity was commenced or continued in response to an emergency so as to protect human life, property or the environment”
 - S.31N **non-compliance with s.31L CN**: R5 million or 10 years
 - S.28(14): **general offences**: R1 million or 1 year: unlawfully and intentionally or negligently commit any act or omission which causes significant or is likely to cause significant pollution or degradation of the environment, or which detrimentally affects or is likely to affect the environment in a significant manner
 - S.28(14) **non-compliance with s.28 directive**: R1 million or 1 year

Rules applicable: NEMA EAs (cont.)

Additional considerations for criminal proceedings:

- S.34(1)-(4) Damage and cost recovery on conviction
- S.34(5) Extended criminal liability
- S.34B: ¼ fine can be awarded to person whose evidence led to conviction
- S.34C: Magistrate can withdraw permit and disqualify convicted person for 5 years
- S.34D: Magistrate may declare any item used for the purpose of, or in connection with, the commission of the offence and which was seized under NEMA to be forfeited to the State

General note: Plea and sentence agreements s.105A of CPA: a just sentence (suspended/not) + “compensation where offence causes damage to or loss of property” (s.300)

Rules applicable: NEMA EAs (cont.)

Consequence of non-compliance: Problem of s.24G rectification

- Person who has committed an offence under s.24F(2) may apply to the CA, who may then direct the violator to:
 - conduct an EIA, including public participation
 - pay an administrative fine of up to R1 million
- Then CA may refuse or grant an EA
- Note:
 - discretion
 - no exclusion of criminal liability

Other rules?

- NWA
- NEMBA
- National Forest Act

Who implements these rules?

- CARA administered by DAFF; powers given to Executive Officer:
 - or by an officer under a delegation or direction or under the control of the executive officer
 - Can authorize an employee of a local authority and certain other officers
- NEMA primarily administered by DEA, but:
 - “Environment” shared national and provincial function
 - EMIs mandated to monitor compliance and enforce NEMA and SEMAs
 - Because EAs in these cases are generally issued by provincial departments, most likely provincial EMIs

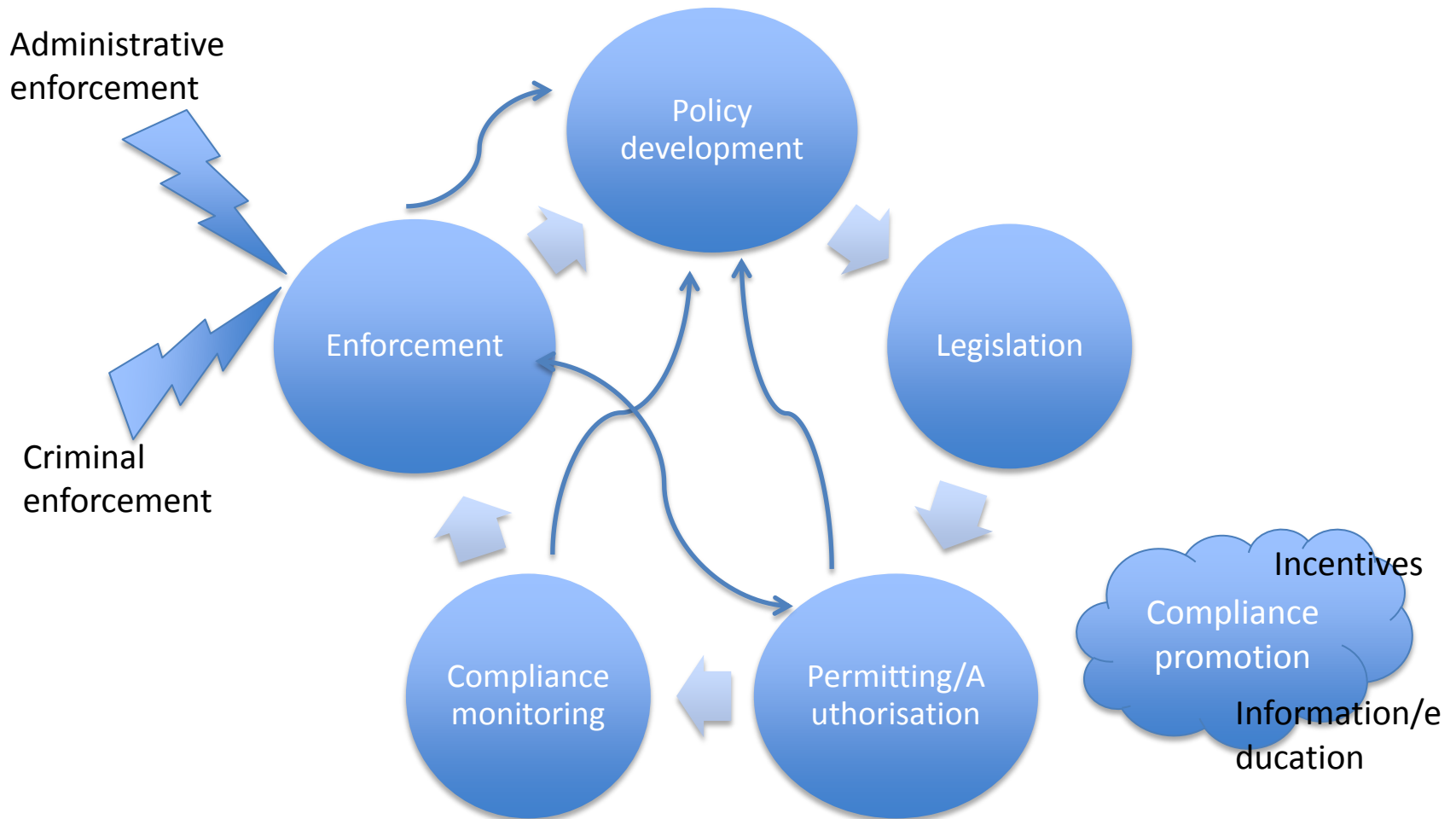
Requirements of cooperative governance

s.41 of Constitution

Organs of state must:

- exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- co-operate with one another in mutual trust and good faith by -
 - fostering friendly relations;
 - assisting and supporting one another;
 - informing one another of, and consulting one another on, matters of common interest;
 - co-ordinating their actions and legislation with one another;
 - adhering to agreed procedures; and
 - avoiding legal proceedings against one another.

The regulatory cycle



Factors promoting compliance

- **Economic**
 - Desire to avoid penalty, and future liability
 - Desire to save money through more cost-efficient and environmentally sound practices
- **Social & moral**
 - Moral & social values for environmental quality
 - Respect for the law
 - Strong government will to enforce
- **Technological**
 - Availability of affordable technologies
- **Management**
 - Jobs and training dedicated to environmental compliance
 - Performance incentives linked to environmental compliance
- **Personal**
 - Desire to avoid personal consequences of enforcement, like jail
 - Desire to avoid stigma and negative publicity

Factors encouraging non-compliance

- **Economic**
 - Lack of funds
 - Greed, competitive advantage
 - Competing demands for resources
- **Social & moral**
 - Lack of respect for the law
 - Lack of public support for environmental concerns
 - Lack of government will to enforce
- **Personal**
 - Fear of change
 - Inertia
 - Ignorance of requirements, or how to meet them
- **Management**
 - Lack of internal accountability for compliance, lack of compliance training
- **Technological**
 - Inability to meet requirements due to lack of appropriate technology
 - Technologies that are unreliable or difficult to operate

Qualities of an effective regulatory programme

- Creating enforceable regulations which will deliver the desired outcome
- Understanding the regulatory culture of the activities to determine which approaches/instruments would be most appropriate
- Ensuring that the regulated community clearly understand their obligations (including through permits)
- Promoting compliance
- Monitoring compliance with legal obligations
- Taking action against violations in a way that deter future violations
- Ensuring an effective administration to undertake activities
- Monitoring the programme and modifying where necessary

Principles of effective regulation

- Transparency and accountability
- Enforceable and consistent regulations
- Regulation must be risk-based and proportionate
- Regulation should be outcome-focused
- Regulation should be simple and not incur unnecessary costs

So how are we doing on:

- Creating enforceable regulations which will deliver the desired outcome?
- Understanding the regulatory culture of the activities to determine which approaches/instruments would be most appropriate?
- Ensuring that the regulated community clearly understand their obligations (including through permits)?
- Promoting compliance?
- Monitoring compliance with legal obligations?
- Taking action against violations in a way that deter future violations?
- Ensuring an effective administration to undertake activities?
- Monitoring the programme and modifying where necessary?