

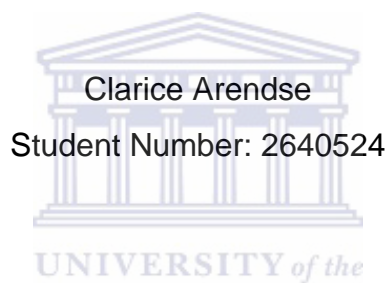
THE UNIVERSITY OF THE WESTERN CAPE  
FACULTY OF LAW

An evaluation of the development of environmental legislation governing environmental  
impact assessments and integrated environmental management in South Africa

A mini-thesis submitted in partial fulfillment of the requirements for the degree

LLM

(Environmental Law) Mode II



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## **Key words**

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Enforcement

Implementation

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Regulations

Environmental authorisation

The Environment Conservation Act (ECA)

The National Environmental Management Act (NEMA)

Environmental impact assessment (EIA)

Integrated environmental management (IEM)



### **List of acronyms**

CONNEPP	Consultative National Environmental Policy Process
EAP	Environmental Assessment Practitioner
ECA	The Environment Conservation Act
EIA	Environmental Impact Assessment
EMF	Environmental Management Framework
EMP	Environmental Management Programme
IEM	Integrated Environmental Management
NEMA	The National Environmental Management Act
SEA	Strategic Environmental Assessment



## Declaration

I, **Clarice Arendse**, declare that **An Evaluation of the Development of Environmental Legislation Governing Environmental Impact Assessments and Integrated Environmental Management in South Africa** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: \_\_\_\_\_

**Clarice Arendse**



19 November 2012

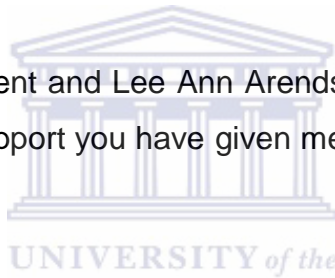
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## Dedication

This work is dedicated to my parents, Elizabeth and Kelvin Arendse who continue to nurture my dream and to my supervisor, the late Prof. Tobias Van Reenen, who gave me the opportunity to pursue post-graduate education.



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## Chapter 1

### 1.1 Introduction

South Africa is a democratic and sovereign state founded on the values of, *inter alia*, '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms; [n]on-racialism and non sexism; [s]upremacy of the Constitution and the rule of law...'.<sup>1</sup>

In order to ensure the sustainable development and protection of our environment as well as the appropriate use of natural resources, environmental rights have been afforded constitutional protection. Section 24 of the Constitution has placed a constitutional mandate upon the legislature to enact reasonable legislative and other measures to give maximum protection to this right.

Prior to the enactment of the Constitution, the Environment Conservation Act (ECA)<sup>2</sup> served to regulate all matters related to the environment. The ECA defined the environment as 'the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms'.<sup>3</sup> This definition provided a holistic view of environmental law as humans were considered part of the environment.<sup>4</sup>

The new constitutional dispensation brought about a turn in the conceptualisation of the environment in the sense that the human right to a specific type of environment is now afforded constitutional protection.<sup>5</sup> From this point of view, the ECA was considered inadequate with regard to providing an effective framework for the furthering of the

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<sup>1</sup> The Constitution of the Republic of South Africa, 1996 (hereafter cited as the Constitution), s1.

<sup>2</sup> The Environment Conservation Act 73 of 1989 (hereafter cited as the ECA). It should be noted that reference to pre-constitutional legislation for purposes of this research is limited to the Environment Conservation Act 73 of 1989.

<sup>3</sup> The Environment Conservation Act, s1.

<sup>4</sup> Kidd, M *Environmental Law: A South African Guide* (1997) 48.

<sup>5</sup> Glazewski, J 'Environmental Justice and the new South African Democratic Legal Order' in Glazewski, J and Bradfield, G *Environmental Justice and the Legal Process* (1999) 51.

constitutional environmental right. This therefore necessitated the review of the ECA and its replacement by a new Act which would be able to fulfil such a purpose.

The ECA was later replaced by the National Environmental Management Act (NEMA)<sup>6</sup> which is designed as a framework environmental Act.<sup>7</sup> This new Act emerged as a result of an environmental development process known as the Consultative National Environmental Policy Process (CONNEPP).<sup>8</sup> The CONNEPP process involved extensive public participation which resulted in the publications of the Green Paper on Environmental Policy for South Africa in October 1996,<sup>9</sup> the draft White Paper on Environmental Management Policy for South Africa in July 1997<sup>10</sup> and finally the White Paper on Environmental Management Policy for South Africa in May 1998.<sup>11</sup> This White Paper accordingly formed the basis for the NEMA which was promulgated shortly thereafter.

The purpose of the NEMA is twofold. First, it aims to ensure that the quality of the environment is in line with the Constitution and secondly, it aims to ensure that the legislature develops a framework for integrating good environmental management into all development activities and matters affecting the environment.<sup>12</sup>

The NEMA provides a new definition of the environment, namely 'the surroundings within which humans exist and that are made up of (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; any part or combination of (i) and (ii) and the interrelationships among and between them; and the physical, chemical,

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<sup>6</sup> The National Environmental Management Act 107 of 1998 (hereafter cited as the NEMA).

<sup>7</sup> See chapter 3, para 3.3.1 for full discussion.

<sup>8</sup> Kidd, M *Environmental Law* (2008) 32. The Consultative National Environmental Policy Process will hereafter be referred to as CONNEPP.

<sup>9</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011). See chapter 2, para 2.3.3 for full discussion.

<sup>10</sup> The Draft White Paper on Environmental Management Policy for South Africa (GN R.1096 in GG 18164 of 28 July 1997). See chapter 2, para 2.3.4 for full discussion.

<sup>11</sup> The White Paper on Environmental Management Policy for South Africa (GN R.749 in GG 18894 of 15 May 1998). See chapter 2, para 2.3.5 for full discussion.

<sup>12</sup> The National Environmental Management Act, preamble.

aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being'.<sup>13</sup> In contrast to the definition in the ECA which is holistic, the NEMA places humans at the centre of the environment and makes the environment and its components subservient to the health and well-being of humans.<sup>14</sup>

The NEMA is based on the fundamental precepts of democracy as it requires public participation and the pursuit of environmental justice.<sup>15</sup> In addition to this, the NEMA is founded on a number of principles contained in section 2 which forms the foundation upon which environmental law jurisprudence has been developed in South Africa.<sup>16</sup>

## 1.2 Problem statement

Prior to the enactment of the Constitution, the ECA regulated activities that affected the environment. Sections 21, 22 and 26 of the ECA made specific provision for the implementation of environmental assessments.<sup>17</sup> It empowered the Minister to identify activities which may have a detrimental impact on the environment and to create regulations regarding environmental impact reporting. It was however only in 1997, some eight years later that the first set of regulations were promulgated.<sup>18</sup>

Accordingly, 1997 saw the formal emergence of environmental impact assessment (EIA)<sup>19</sup> legislation.<sup>20</sup> The main aim of this legislation was 'ensuring that the environmental consequences of development proposals are understood and adequately considered in the planning process'.<sup>21</sup> No mention was however made to the concept of sustainable development which became increasingly important with the advent of the

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<sup>13</sup> The National Environmental Management Act, s1.

<sup>14</sup> Kidd, M *Environmental Law* (2008) 3.

<sup>15</sup> Glazewski, J 'Environmental Justice and the new South African Democratic Legal Order' in Glazewski, J and Bradfield, G *Environmental Justice and the Legal Process* (1999) 37.

<sup>16</sup> See chapter 3, para 3.3.2 for full discussion.

<sup>17</sup> See chapter 2, para 2.3.1 for full discussion.

<sup>18</sup> GN R.1182-4 in GG 18261 of 5 September 1997. See chapter 4, para 4.2.1-3 for full discussion.

<sup>19</sup> Hereafter cited as EIA.

<sup>20</sup> Kidd, M and Retief, F 'Environmental Assessment' in Strydom, H A and King, N D *Environmental Management in South Africa* 2 ed (2009) 978.

<sup>21</sup> Kidd, M and Retief, F 'Environmental Assessment' in Strydom, H A and King, N D *Environmental Management in South Africa* 2 ed (2009) 978.

Constitution. As the ECA and the NEMA were based on different precepts of the environment, it necessarily followed that the ECA and its regulations would be revised to bring it in line with the new constitutional dispensation.

Accordingly, in 1998, the NEMA was promulgated. Section 2 thereof gives effect to the concept of sustainable development by laying down national environmental management principles to guide the application and implementation of the Act.<sup>22</sup> Furthermore, Chapter 5 of the NEMA deals explicitly with integrated environmental management (IEM)<sup>23</sup> and provides for the implementation and adoption of regulations in section 24.

In 2006, the first set of regulations was promulgated under the NEMA. They made specific provision for environmental assessments to be conducted.<sup>24</sup> Central to the effectiveness of these regulations was the use of EIAs as a tool to determine the possible impacts of the proposed activity on the receiving environment.<sup>25</sup> EIAs accordingly form part of the larger activity of IEM which is aimed at a more holistic management of people's activities in the environment in relation to identified activities.<sup>26</sup>

The purpose of the EIA is to try and establish, prior to the taking of any action or decision, any possible environmental impacts which these activities might have on its surroundings and to determine whether it would be beneficial or harmful.<sup>27</sup> In the event that it would be beneficial, the purpose of the assessment would be to maximise the positive effects and in the event that it would be harmful to the environment, the purpose would be to revise the proposal in order to mitigate the harm done to the environment.<sup>28</sup>

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<sup>22</sup> The National Environmental Management Act, s2. See chapter 3, para 3.3.2 for full discussion.

<sup>23</sup> Hereafter cited as IEM.

<sup>24</sup> See chapter 3, para 3.3.3 for full discussion.

<sup>25</sup> Kidd, M and Retief, F 'Environmental Assessment' in Strydom, H A and King, N D *Environmental Management in South Africa* 2 ed (2009) 971.

<sup>26</sup> Van Wyk, J *Planning Law: Principles and Procedures of Land-use Management* (1999) 247.

<sup>27</sup> Van Wyk, J *Planning Law: Principles and Procedures of Land-use Management* (1999) 253.

<sup>28</sup> Van Wyk, J *Planning Law: Principles and Procedures of Land-use Management* (1999) 254.

The regulations are implemented and enforced by the state through its organs in the three spheres of government.<sup>29</sup> The effectiveness of their implementation and enforcement is dependent on good knowledge of the law, human resources, funding, political will, public awareness and the proper training of court officials.<sup>30</sup> This may be compromised when any of the above factors are lacking. In addition to this, it has been argued that the complexity and time consuming procedures provided for in the NEMA may compromise its effectiveness.<sup>31</sup>

This resulted in the review of both the NEMA and its regulations to simplify and streamline the process to make it less complex. This review and reform have on the other hand been criticised as being too simplistic and inadequate, even resulting in a superficialisation of the whole impact assessment process.<sup>32</sup>

### 1.3 Theoretical assumptions

Section 7 of the Constitution provides that the 'Bill of Rights is a cornerstone of democracy in South Africa'<sup>33</sup> and that 'the State must respect, protect, promote and fulfil the rights in the Bill of Rights'.<sup>34</sup> In addition to this, the Constitution places a constitutional mandate on the state to enact reasonable legislative and other measures in order to give effect to the rights listed in the Bill of Rights.<sup>35</sup>

Parliament has been charged with the task of putting into place such legislation.<sup>36</sup> However, legislative measures on their own will not amount to constitutional compliance.<sup>37</sup> What is required is that the executive must take action in order to achieve

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<sup>29</sup> Kidd, M *Environmental Law* (2008) 207. See chapter 3, para 3.2.2 for full discussion.

<sup>30</sup> Van Wyk, J *Planning Law: Principles and Procedures of Land-use Management* (1999) 239.

<sup>31</sup> Kidd, M *Environmental Law* (2008) 201.

<sup>32</sup> Paschke, R and Glazewski, J 'Ex post facto authorisation in South African environmental assessment legislation: a critical review' (2006) 1 *PER* at 28.

<sup>33</sup> The Constitution, s7(1).

<sup>34</sup> The Constitution, s7(2).

<sup>35</sup> The Constitution, s24(b).

<sup>36</sup> The Constitution, s44.

<sup>37</sup> *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC). See Chapter 3, para 3.2.1.2 for full discussion.



the intended results; therefore the legislative measures will have to be supported by well-directed policies and programmes.<sup>38</sup>

The NEMA is an attempt by the legislature to fulfil its constitutional mandate in terms of section 24 of the Constitution. Chapter 5 of the NEMA empowers the Minister to create regulations to enhance the practical implementation and enforcement of the Act. In 2006, the Minister exercised this power and published the first set of EIA regulations under the NEMA.

#### **1.4 Aim of study**

This study provides an overview of the development of environmental assessment legislation in South Africa since the advent of democracy and critically assesses whether an effective regulatory system is in place. Where necessary and appropriate, the study may include aspects of foreign and international law.

#### **1.5 Significance of study**

This study aims to provide an overview of the law as it stands by highlighting both the good and bad elements of the law in relation to EIAs and IEMs. It is furthermore aimed at exposing potential grey areas in the law and proposing possible recommendations for improvement.

This will require assessing the development of the law since the advent of democracy where it is maintained that this is sufficient to determine whether the amendments have contributed to the positive reform and development of the law.

The outcome of this mini thesis will provide a basis to propose possible improvement as it will identify areas in need of improvement as well as contribute to the already existing body of knowledge in respect of environmental law in South Africa.

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<sup>38</sup> *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC).



In the chapter to follow, an historical overview of the development of environmental assessment legislation will be provided.



## Chapter 2

# A HISTORICAL OVERVIEW OF ENVIRONMENTAL IMPACT ASSESSMENTS AND INTEGRATED ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA AND THE DEVELOPMENT THEREOF

### 2.1 Introduction

One of the main aims of environmental law is ensuring that all people work and live in a clean, healthy and safe environment.<sup>1</sup> To achieve this result, the conservation of natural resources in a sustainable manner must be ensured.<sup>2</sup> Efficient sustainability requires that environmental factors be considered before a development is undertaken.

The international community have adopted a procedure known as environmental impact assessments (EIAs)<sup>3</sup> to achieve this result. An EIA requires social and scientific studies to be conducted prior to a proposed activity being undertaken in order to determine the effects of the proposed activity on the particular environment.<sup>4</sup> Within the South African context, the EIA procedure has been refined and is known as integrated environmental management (IEM).<sup>5</sup> IEM accordingly forms the basis for modern environmental law in South Africa.

To appreciate the nature of modern environmental law and enhance our understanding of the rationale behind the law, it is necessary to examine the historical development thereof.

This chapter will commence with a brief overview of the international developments of environmental law starting in the 1960s when EIAs were introduced in the United States of America. The remainder of this chapter will focus specifically on the South African

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<sup>1</sup> Glazewski, J and Wroe-Street, G *Environmental Issues: Developing Justice Series* (1993) 7.

<sup>2</sup> Glazewski, J and Wroe-Street, G *Environmental Issues: Developing Justice Series* (1993) 7.

<sup>3</sup> Hereafter cited as EIA.

<sup>4</sup> Glazewski, J and Wroe-Street, G *Environmental Issues: Developing Justice Series* (1993) 15.

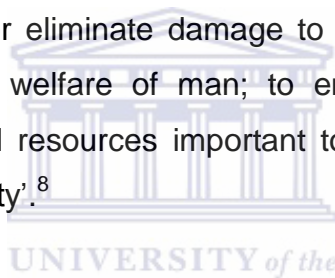
<sup>5</sup> Hereafter cited as IEM.

position. At this juncture, particular attention will be given to the developments of the domestic law so as to determine whether South African environmental law is on par with the international trends in ensuring sustainable development.

## **2.2 Contributions from comparative and international law**

In 1969, the National Environmental Policy Act (NEPA)<sup>6</sup> was promulgated in the United States of America. This Act heralded the beginning of a new era, as this piece of legislation addressed environmental issues on a pragmatic basis, being a departure to the *ad hoc* approach which had been the pattern up until its promulgation.<sup>7</sup>

The stated purpose of NEPA was to 'declare a national policy which [would] encourage productive and enjoyable harmony between man and his environment, to promote efforts which [would] prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation and to establish a Council on Environmental Quality'.<sup>8</sup>



The council on environmental quality was granted the power, in terms of section 204 of NEPA, to 'investigate the quality of the environment, develop national policies to improve environmental quality and to review programs and activities of the federal government to ascertain whether they are contributing to fulfilment of the goals of NEPA'.<sup>9</sup> Subsequent to its inception, the council produced a set of guidelines for the preparation of environmental impact statements.<sup>10</sup> These guidelines were seen as crucial tools in aiding the decision making process and thus served as the formal inception of EIAs worldwide.<sup>11</sup>

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<sup>6</sup> The National Environmental Policy Act of 1969 (Public Law 91-190). Hereafter cited as NEPA.

<sup>7</sup> Kidd, M *Environmental Law: A South African Guide* (1997) 12.

<sup>8</sup> The National Environmental Policy Act of 1969 (Public Law 91-190), s2.

<sup>9</sup> The National Environmental Policy Act of 1969 (Public Law 91-190), s204.

<sup>10</sup> Rodgers, W.H *Environmental Law* (1977) 703.

<sup>11</sup> Sowman, Fuggle and Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1993) 15 *Environmental Impact Assessment Review* 45.

Shortly after the promulgation of NEPA, the 1972 United Nations Conference on the Human Environment (also known as the Stockholm Conference) was convened. The main purpose of this conference was 'to serve as a practical means to encourage and to provide guidelines for action by governments and international organisations designed to protect and improve the human environment, and to remedy and prevent its impairment, by means of international co-operation, bearing in mind the particular importance of enabling developing countries to forestall occurrence of such problems'.<sup>12</sup> Out of this conference, the Stockholm Action Plan to protect the global environment; the United Nations Environment Programme; and the Stockholm Declaration were born.

The main purpose of the Stockholm Action Plan was to identify environmental issues that required international action.<sup>13</sup> The action plan produced 109 recommendations, one of which was to address the integration of development and the environment.<sup>14</sup>

The United Nations Environment Programme is still the primary United Nations programme with general authority over environmental issues.<sup>15</sup> The main purpose of this agency is to 'facilitate international co-operation in the environmental field; to keep the world environmental situation under review so that problems of international significance receive appropriate consideration by Governments; and to promote the acquisition, assessment and exchange of environmental knowledge'.<sup>16</sup>

The Stockholm Declaration<sup>17</sup> was considered an important, albeit non-binding statement of soft law.<sup>18</sup> The declaration emphasised the importance of integrating the environment and development, reducing or eliminating pollution and controlling the use of renewable

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<sup>12</sup> United Nations Conference on the Human Environment [1972] UN document A/RES/2994 (hereafter cited as Stockholm Conference 1972).

<sup>13</sup> Action Plan of the United Nations Conference on the Human Environment [1972] UN document A/CONF.48/5 (hereafter cited as Stockholm Action Plan 1972).

<sup>14</sup> Stockholm Action Plan (1972), recommendation 102.

<sup>15</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 221.

<sup>16</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 221.

<sup>17</sup> Declaration of the United Nations Conference on the Human Environment, [1972] UN document A/CONF.48/14/Rev.1 (hereafter cited as the Stockholm Declaration 1972).

<sup>18</sup> Soft law refers to guidelines, policy declarations or codes of conduct which set standards of conduct. They are, however, not directly enforceable.

and non-renewable resources.<sup>19</sup> It produced a total of 26 principles, the most important principle for the purpose of this discussion being principle 24.<sup>20</sup> According to this principle, States were encouraged to increase their efforts to protect the environment through international co-operation, as this was viewed as 'essential to effectively control, prevent, reduce and eliminate adverse environmental effects'.<sup>21</sup>

Subsequent to the Stockholm Conference, the United Nations General Assembly established the World Commission on Environment and Development in 1983. The main task of this commission was to provide a global agenda for change.<sup>22</sup>

The objectives of the commission were to propose long term strategies for achieving sustainable development; recommend ways that would encourage greater co-operation between developing and developed countries by taking environmental concerns into account; re-examining environmental concerns facing the global community as a whole; and increasing levels of understanding and commitment to action by all people.<sup>23</sup>

Four years after the commission was established it produced a report entitled 'Our Common Future' (more commonly known as the Brundtland Report).<sup>24</sup> The core focus of the report was on sustainable development which was defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>25</sup>

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<sup>19</sup> Stockholm Declaration (1972), articles 1-7.

<sup>20</sup> The principles that were adopted by the international community lacks the status of law but are intended to serve as guidelines to states in their conduct towards each other.

<sup>21</sup> Stockholm Declaration (1972), principle 24.

<sup>22</sup> United Nations General Assembly 'Our Common Future' available at <http://www.un-documents.net/our-common-future.pdf> (accessed on 10 February 2012).

<sup>23</sup> United Nations General Assembly 'Our Common Future' available at <http://www.un-documents.net/our-common-future.pdf> (accessed on 10 February 2012).

<sup>24</sup> Report of the World Commission on Environment and Development: Our Common Future: UN document A/42/427 (hereafter cited as the Brundtland Report 1987).

<sup>25</sup> Brundtland Report (1987), article 27.

One of the recommendations formulated by the commission was the need to integrate environmental considerations and economics in the decision making process.<sup>26</sup> This would entail focusing on the sources of environmental degradation rather than its symptoms, which would in turn require those responsible for decision making to anticipate and prevent environmental damage.<sup>27</sup> In order to do so effectively, the decision makers had to consider not only the ecological dimensions of a particular policy but also the economic, trade, agricultural and other dimensions simultaneously.<sup>28</sup>

The report then concluded with a call for action requiring the United Nations General Assembly to transform the report into a United Nations Programme on Sustainable Development.<sup>29</sup> This report was thus important for two main purposes; first, it provided a generally acceptable definition of the term sustainable development; and secondly, it led directly to the subsequent United Nations Conference on Environment and Development (often referred to as the Rio Earth Summit) which was held in Rio de Janeiro, Brazil, in June 1992.<sup>30</sup>

The Rio Earth Summit was probably the largest international gathering in the history of the planet with a total of 178 nations present, over 1400 non-governmental organisations represented and nearly nine thousand journalists making this Summit the most heavily reported single event in history.<sup>31</sup> Out of this Summit, two main instruments were adopted namely; the Rio Declaration on Environment and Development<sup>32</sup> and Agenda 21.<sup>33</sup>

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<sup>26</sup> Brundtland Report (1987), article 42.

<sup>27</sup> Brundtland Report (1987), article 46.

<sup>28</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 177.

<sup>29</sup> Brundtland Report (1987), article 124.

<sup>30</sup> United Nations Conference on Environment and Development (1992) available at <http://www.un.org/geoinfo/bp/enviro.html> (accessed on 18 February 2012). Hereafter cited as the Rio Earth Summit.

<sup>31</sup> Hunter, D; Salzman and Zaelke *International Environmental Law and Policy* 3 ed (2007) 181.

<sup>32</sup> Rio Declaration of the United Nations Conference on Environment and Development [1992] UN document A/CONF.151/26 (hereafter cited as the Rio Declaration 1992).

<sup>33</sup> Agenda 21 of the United Nations Conference on Environment and Development [1992] UN document A/Conf.151/26 (hereafter cited as Agenda 21 1992).

Initially, the organisers of the Rio Declaration sought to craft a binding document as was requested by the commission for the Brundtland Report, however this was seen to be unrealistic and instead a non-binding instrument consisting of 27 principles was created.<sup>34</sup> The most important principles enumerating from this declaration for the purpose of this discussion are principles 4, 11 and 17.

According to principle 4, sustainable development could only be achieved by integrating environmental protection into the development process as environmental protection constitutes an integral part of the sustainable development process.<sup>35</sup> Principle 11 then placed a mandate on States to enact effective environmental legislation. This required that 'environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply'.<sup>36</sup>

Lastly, principle 17 stipulated that EIAs 'as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority'.<sup>37</sup>

Despite the importance of this document, it has not escaped academic criticism. According to the views expressed by Hunter; Salzman and Zaelke, the text appeared to highlight development issues more than environmental issues.<sup>38</sup> Despite this criticism, the text of this document had visible elements of compromise between developing and developed States.<sup>39</sup> It could thus be viewed as representing a 'global consensus on environment and development decisions at a specific moment in time',<sup>40</sup> thereby setting

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<sup>34</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 189. These principles are not binding upon state actors but are intended to serve as guidelines to states in their respective conduct.

<sup>35</sup> Rio Declaration (1992), principle 4.

<sup>36</sup> Rio Declaration (1992), principle 11.

<sup>37</sup> Rio Declaration (1992), principle 17.

<sup>38</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 190.

<sup>39</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 190.

<sup>40</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 190.



a benchmark for measuring future progress in the environmental and developmental spheres.<sup>41</sup>

Agenda 21 was a comprehensive document that comprised of 40 chapters. It was described by many as a blueprint for sustainable development into the 21<sup>st</sup> century.<sup>42</sup> In its preamble it stated that the 'integration of environment and development concerns and greater attention to them [would] lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future'.<sup>43</sup>

Chapter 8 thereof tackled issues surrounding the integration of environmental considerations and development in decision making. One of its objectives was to 'improve or restructure the decision making process so that considerations of socio-economic and environmental issues [were] fully integrated...'.<sup>44</sup> To meet this objective, States would be required to establish domestically determined procedures that would integrate environment and development issues in the decision making process.<sup>45</sup> In addition to this, States would be required to adopt 'comprehensive analytical procedures for prior and simultaneous assessment of the impacts of decisions, including the impacts within and among the economic, social and environmental spheres'.<sup>46</sup>

Despite the comprehensiveness of Agenda 21, it was not a binding document and thus only served as guidelines for States which would aid them in their decision making processes in respect of matters that pertained to development and the environment.

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<sup>41</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 190.

<sup>42</sup> Pippa Cookson 'What is Agenda 21?' available at <http://www.iol.ie/~isp/agenda21/watsa21.htm> (accessed on 18 February 2012).

<sup>43</sup> Agenda 21 (1992), preamble.

<sup>44</sup> Agenda 21 (1992), Chapter 8, article 3.

<sup>45</sup> Agenda 21 (1992), Chapter 8, article 3(d).

<sup>46</sup> Agenda 21 (1992), Chapter 8, article 5(b).



Ten years after the Rio Earth Summit, the United Nations convened the World Summit on Sustainable Development (often referred to as the Johannesburg Summit)<sup>47</sup> which was held in Johannesburg, South Africa during August and September 2002. This Summit produced two important documents namely the Johannesburg Declaration<sup>48</sup> and the Johannesburg Plan of Implementation.<sup>49</sup>

Unlike the Rio Declaration, the Johannesburg Declaration was not a set of principles but rather a broad and general statement of political commitment to sustainable development.<sup>50</sup> Right from the onset, the delegates reaffirmed the importance of the three pillars of sustainable development namely; economic development, social development and environmental protection.<sup>51</sup> They furthermore reaffirmed their commitment to achieve the development goals set forth in the Rio Declaration as well as those contained in Agenda 21.<sup>52</sup>

With the drafting of the plan of implementation, the delegates placed emphasis on implementation rather than calling upon States to negotiate new international instruments.<sup>53</sup> The plan of implementation thus encouraged the voluntary use of EIAs as a vital tool to assist in identifying trade, environment and development interlinkages.<sup>54</sup>

The Johannesburg Summit has however been heavily criticised as being too vague and setting much weaker goals than those agreed to in previous summits. In addition to this,

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<sup>47</sup> United Nations World Summit on Sustainable Development (2002) available at [http://www.johannesburgsummit.org/html/basic\\_info/basicinfo.html](http://www.johannesburgsummit.org/html/basic_info/basicinfo.html) (accessed on 18 February 2012). Hereafter cited as the Johannesburg Summit 2002.

<sup>48</sup> Johannesburg Declaration of the United Nations World Summit on Sustainable Development [2002] UN document A/CONF.199/20, Chapter 1, Resolution 1 (hereafter cited as the Johannesburg Declaration 2002).

<sup>49</sup> Johannesburg Plan of Implementation of the World Summit on Sustainable Development [2002] UN document A/CONF.199/20, Chapter 1, Resolution 2 (hereafter cited as the Johannesburg Plan of Implementation 2002).

<sup>50</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 209.

<sup>51</sup> Johannesburg Declaration (2002), article 5.

<sup>52</sup> Johannesburg Declaration (2002), article 8.

<sup>53</sup> Hunter, D; Salzman, J and Zaelke, D *International Environmental Law and Policy* 3 ed (2007) 210.

<sup>54</sup> Johannesburg Plan of Implementation (2002), article 97(d).

the resolutions passed at the Johannesburg Summit lacked provisions that would ensure its substantial enforcement.<sup>55</sup>

The Johannesburg Summit was followed by the United Nations Conference on Sustainable Development which took place in Rio de Janeiro, Brazil in June 2012.<sup>56</sup> This conference focused on two main themes; first, how to build a green economy to achieve sustainable development and lift people out of poverty; and secondly, how to improve international co-ordination for sustainable development.<sup>57</sup> One important document was adopted by this conference entitled 'The future We Want'.<sup>58</sup>

Although the document did not expressly refer to EIAs, it acknowledged the principles of IEM in articles 40 and 63. According to article 40, a holistic and integrated approach to sustainable development was advocated which would 'guide humanity to live in harmony with nature and lead to efforts to restore the health and integrity of the Earth's ecosystem'.<sup>59</sup> Article 63 then reiterated the importance of evaluating social, environmental and economic factors and encouraged their integration into the decision-making process.<sup>60</sup>

The extensive attention given to the importance of environmental protection and sustainable development by the international community triggered the development and implementation of formal and informal environmental evaluation procedures in both developing and developed countries.<sup>61</sup>

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<sup>55</sup> Adam Sibley 'World Summit on Sustainable Development (WSSD), Johannesburg, South Africa' available at [http://www.eoearth.org/article/World\\_Summit\\_on\\_Sustainable\\_Development\\_%28WSSD\\_%29,\\_Johannesburg,\\_South\\_Africa](http://www.eoearth.org/article/World_Summit_on_Sustainable_Development_%28WSSD_%29,_Johannesburg,_South_Africa) (accessed on 18 February 2012).

<sup>56</sup> United Nations Conference on Sustainable Development [2012] UN document A/CONF.216-16 (hereafter cited as the UN Conference on Sustainable Development 2012).

<sup>57</sup> United Nations General Assembly 'Rio + 20 the future we want' available at <http://www.un.org/en/sustainablefuture/about.shtml> (accessed on 6 July 2012).

<sup>58</sup> Report of the United Nations Conference on Sustainable Development: The Future we Want [2012] UN document A/CONF.216/L.1 (hereafter cited as The Future We Want 2012).

<sup>59</sup> The Future We Want (2012), article 40.

<sup>60</sup> The Future We Want (2012), article 63.

<sup>61</sup> Sowman, Fuggle and Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1993) 15 *Environmental Impact Assessment Review* 46.

## 2.3 The South African position

Despite the growing interest in environmental issues at an international level, South Africa was slow to develop procedures appropriate to its circumstances. Some of the key constraints faced by South Africa during the past included the 'absence of a general environmental policy; lack of political will and awareness of the need to consider environmental issues; an authoritarian system of government, a lack of accountability on the part of decision-makers; inadequate public participation; ineffective administrative structures; legislative inadequacies; and a lack of environmental expertise and financial resources'.<sup>62</sup> It was only in 1982 that South Africa developed legislation in line with the notion of environmental protection.

### 2.3.1 The Environment Conservation Act

In 1982, the Environment Conservation Act<sup>63</sup> was promulgated. This Act was primarily concerned with the co-ordination of environmental matters and did not contain extensive provisions that regulated activities and decisions that could be harmful to the environment.<sup>64</sup> The Act did however make provision for the establishment of a statutory council for the environment and for the formation of subcommittees.<sup>65</sup> In 1983, the committee for EIAs was established, who was tasked with the responsibility of developing environmental evaluation procedures in South Africa.<sup>66</sup> From the onset, the committee sought to establish procedures and mechanisms that would cater specifically for the South African situation rather than import procedures from foreign jurisdictions.<sup>67</sup>

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<sup>62</sup> Van Wyk, J *Planning Law: Principles and Procedures of Land-use Management* (1999) 239.

<sup>63</sup> The Environment Conservation Act 100 of 1982.

<sup>64</sup> Sowman, Fuggle and Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1993) 15 *Environmental Impact Assessment Review* 50.

<sup>65</sup> Sowman, Fuggle and Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1993) 15 *Environmental Impact Assessment Review* 50.

<sup>66</sup> Sowman, Fuggle and Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1993) 15 *Environmental Impact Assessment Review* 50.

<sup>67</sup> Sowman, Fuggle and Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1993) 15 *Environmental Impact Assessment Review* 50.

Accordingly, during the 1980s, EIAs were undertaken on a voluntary basis. In light of this weakness, a new Environment Conservation Act (ECA)<sup>68</sup> was promulgated in 1989. According to the long title, the new ECA claimed to make provision for the effective protection and controlled utilisation of the environment.<sup>69</sup>

Furthermore, Part V of the ECA made specific provision for the control of activities which may have a detrimental effect upon the environment by incorporating environmental assessments as a tool to be used to identify such activities.<sup>70</sup> The ECA furthermore drew a distinction between identified activities and limited development areas and charged the Minister of Environmental Affairs and Tourism with the responsibility of identifying and controlling such activities.<sup>71</sup>

In respect of the identification of activities, the Minister was empowered to identify activities which in his opinion may have a substantially detrimental effect on the environment by way of promulgating a list in the Government Gazette.<sup>72</sup> This notice could either refer to activities in general areas or in respect of certain areas.<sup>73</sup> In addition to this, the ECA also specified certain categories of listed activities which may be identified by the Minister, such as land use and transformation, water use and disposal; but did not limit the Minister's power to only these categories.<sup>74</sup>

Once an activity was identified in terms of section 21 of the ECA, the undertaking of such an activity was prohibited except if written authorisation to undertake such activity was issued either 'by the Minister, by a competent authority, a local authority or an officer... [which has been] designated by the Minister'.<sup>75</sup>

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<sup>68</sup> The Environment Conservation Act 73 of 1989 (hereafter cited as ECA).

<sup>69</sup> The Environment Conservation Act, long title.

<sup>70</sup> Glazewski, J *Environmental Law in South Africa* 2 ed (2005) 159.

<sup>71</sup> Rabie, M 'Environment Conservation Act' in Fuggle, R and Rabie, M *Environmental Management in South Africa* (1992) 108.

<sup>72</sup> The Environment Conservation Act, s21(1).

<sup>73</sup> The Environment Conservation Act, s21(1).

<sup>74</sup> The Environment Conservation Act, s21(2).

<sup>75</sup> The Environment Conservation Act, s22(1).

Before such authorisation could be issued, the applicant first had to submit an environmental impact report which outlined the impacts of the proposed activity and alternatives to the proposed activity on the environment.<sup>76</sup> The Minister was furthermore empowered in terms of section 26 of the ECA to make regulations relating specifically to the contents of environmental impact reports.<sup>77</sup>

Once the competent authority was in possession of the report, the authorisation could either be granted subject to certain specified conditions or it could be refused.<sup>78</sup> If an application was granted but the applicant failed to comply with any stipulated conditions, the competent authority was empowered to withdraw such authorisation.<sup>79</sup> Furthermore, failure to comply with conditions or carrying out an activity without the required authorisation was an offence in terms of section 29 of the ECA.

With regards to limited development areas, the administrator of the relevant province was empowered to declare any area defined by him or her as a limited development area by way of notice in the Provincial Gazette.<sup>80</sup> Once an area was defined as such, the undertaking of any development or activity within such an area was prohibited unless an application to obtain authorisation was submitted to the administrator.<sup>81</sup>

When considering any application for authorisation, the administrator could request an applicant to submit an environmental impact report which outlined the influence of the proposed activity on the environment in the limited development area.<sup>82</sup> The administrator was furthermore empowered to either issue the authorisation subject to certain conditions or to refuse it.<sup>83</sup> Failure on the part of an applicant to comply with any stipulated conditions of an authorisation or undertaking any development or activity

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<sup>76</sup> The Environment Conservation Act, s22(2).

<sup>77</sup> See chapter 4, para 4.2.2 for full discussion.

<sup>78</sup> The Environment Conservation Act, s22(3).

<sup>79</sup> The Environment Conservation Act, s22(4).

<sup>80</sup> Van Wyk, J *Planning law: Principles and Procedures of Land-use Management* (1999) 164.

<sup>81</sup> The Environment Conservation Act, s23(2).

<sup>82</sup> The Environment Conservation Act, s23(3).

<sup>83</sup> The Environment Conservation Act, s23(2).

within a limited development area was an offence in terms of section 29 of the ECA. The Act, however, did not make provision for the withdrawal of authorisation in the event that a person failed to comply with any conditions

Part V of the ECA thus did not escape academic criticism. According to the views of Kidd, an academic author, a major weakness of the identified listed activities was that its effectiveness remained completely dependent on the actions of administrative officials.<sup>84</sup> This was evident because, despite the clause empowering the Minister to identify activities, it was only in 1997; some eight years later that the first set of regulations were promulgated.<sup>85</sup>

In addition to this, the ECA failed to make provision for the withdrawal of authorisation in limited development areas where conditions were not complied with and, by leaving the submission of the environmental impact reports at the discretion of an official, it undermined the importance of environmental considerations in the decision making process.<sup>86</sup>

Given the inherent weaknesses identified in terms of the ECA, new framework environmental legislation was required. Accordingly, during the period of May 1995 to May 1998, the Consultative National Environmental Policy Process (CONNEPP)<sup>87</sup> was undertaken.<sup>88</sup> This process involved extensive public participation and resulted in the publication of the White Paper on an Environmental Management Policy for South Africa<sup>89</sup> which formed the foundation for the new framework environmental legislation that was to follow.<sup>90</sup>

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<sup>84</sup> Kidd, M *Environmental Law: A South African Guide* (1997) 56.

<sup>85</sup> See chapter 4, para 4.2 for full discussion.

<sup>86</sup> Kidd, M *Environmental Law: A South African Guide* (1997) 57.

<sup>87</sup> Hereafter cited as CONNEPP.

<sup>88</sup> Glazewski, J *Environmental Law in South Africa* 2 ed (2005)134.

<sup>89</sup> The White Paper on Environmental Management Policy for South Africa (GN R.749 in GG 18894 of 15 May 1998). Hereafter cited as White Paper on Environmental Management Policy for South Africa 1998.

<sup>90</sup> See chapter 2, para 2.3.5 for full discussion.



As previously noted, the ECA regulations were only promulgated in 1997, thus prior to its promulgation guidelines for scoping, reporting requirements and review were required for the implementation of IEM. Consequently, the Department of Environmental Affairs appointed the council for the environment to, *inter alia*, refine existing procedures with the aim of formalising the process in South Africa.<sup>91</sup> The task of the council was accordingly to devise a set of guidelines that would assist all parties involved to fulfil the tasks required by the IEM procedure.<sup>92</sup>

### 2.3.2 Guidelines

In 1992, the Department of Environmental Affairs published a set of guideline documents and checklists that revised the IEM procedure in South Africa.<sup>93</sup> The main purpose of these documents was to lay down non-binding guidelines in respect of IEM procedures as required by section 2 of the ECA.<sup>94</sup>

IEM is a procedure that has been designed to ensure that environmental consequences that may flow from development proposals are understood and adequately considered in the planning process.<sup>95</sup> Some of the main principles that were identified as underpinning IEM included informed decision making, accountability for decisions taken, an open participatory approach in the planning of proposals, consultation with interested and affected parties, an attempt to ensure that the social costs of development proposals be outweighed by the social benefits, as well as specialist input in the decision making process.<sup>96</sup>

The drafters recommended that policy, legal and administrative requirements be established during the development of the proposal phase, as this would ensure that the

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<sup>91</sup> Kidd, M *Environmental Law: A South African Guide* (1997) 164.

<sup>92</sup> Kidd, M *Environmental Law: A South African Guide* (1997) 164.

<sup>93</sup> Department of Environmental Affairs *Integrated Environmental Management Guideline Series* (6 Volumes) 1992 (hereafter cited as Department of Environmental Affairs 1992).

<sup>94</sup> Department of Environmental Affairs (1992) vol 1 at 2.

<sup>95</sup> Department of Environmental Affairs (1992) vol 1 at 5.

<sup>96</sup> Department of Environmental Affairs (1992) vol 1 at 5.

underpinning principles for IEM direct the planning of proposals.<sup>97</sup> Furthermore, it was recommended that proposals should indicate possible impacts on the environment and should accordingly be classified so as to determine whether an impact assessment would be required.<sup>98</sup> According to the guidelines, an impact assessment would only be undertaken if there was a possibility of significant impact on the environment.<sup>99</sup>

Three primary components of an impact assessment were identified by the drafters as underpinning the development phase.<sup>100</sup> These were scoping, investigation and the report.

The concept of scoping required the applicant to determine not only the extent of the impact but also the approach that was to be followed when conducting the investigation.<sup>101</sup> This included identifying and exploring alternatives and issues that would require investigation.<sup>102</sup>

The main aims of scoping were to provide an opportunity for all relevant parties and authorities to exchange information that could have an impact on the proposal before the impact assessment was undertaken; 'to focus the study on reasonable alternatives and relevant issues to ensure that the resulting impact assessment [was] useful to the decision maker and [addressed] the concerns of interested and affected parties; to facilitate an efficient assessment process that [saved] time and resources and [reduced] costly delays which could arise were consultation not to take place'.<sup>103</sup>

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<sup>97</sup> Department of Environmental Affairs (1992) vol 1 at 6.

<sup>98</sup> Department of Environmental Affairs (1992) vol 1 at 6.

<sup>99</sup> Department of Environmental Affairs (1992) vol 1 at 6.

<sup>100</sup> Department of Environmental Affairs (1992) vol 1 at 6.

<sup>101</sup> Department of Environmental Affairs (1992) vol 1 at 6.

<sup>102</sup> Department of Environmental Affairs (1992) vol 1 at 6.

<sup>103</sup> Department of Environmental Affairs (1992) vol 2 at 5.



The second component was the investigation. The investigation was primarily guided by the decisions taken during scoping which would enable the relevant authorities to make an informed decision.<sup>104</sup>

The last component was the report. Two main documents which could be required in the IEM procedure were the initial assessment report and the impact assessment report.<sup>105</sup>

The main purpose of an initial assessment report was to place sufficient information before the relevant authority to determine whether or not a proposed activity would result in a significant impact on the environment.<sup>106</sup> If it was found that such harm could result, the applicant was required to complete an impact assessment report.<sup>107</sup>

The impact assessment report was a very detailed report. The applicants were required to, *inter alia*, provide a background to the proposal in order to introduce the proposal; provide a brief description of the environment which would be affected by the development; propose alternatives which may be in the best interest of the community; provide guidelines which would be used for undertaking EIAs as determined during the scoping process; and indicate compliance with administrative, legal and policy requirements.<sup>108</sup>

Once the development phase was completed, a decision had to be taken as to whether the proposed activity could be undertaken. At this stage, all proposals would be reviewed with the aim of evaluating their strengths and weaknesses.<sup>109</sup> It was on the basis of this review that a final decision would be taken. Provision was also made for appeals in the event that a party was dissatisfied with a decision.<sup>110</sup>

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<sup>104</sup> Department of Environmental Affairs (1992) vol 1 at 7.

<sup>105</sup> Department of Environmental Affairs (1992) vol 3 at 5.

<sup>106</sup> Department of Environmental Affairs (1992) vol 3 at 5.

<sup>107</sup> Department of Environmental Affairs (1992) vol 3 at 5.

<sup>108</sup> Department of Environmental Affairs (1992) vol 3 at 8-13.

<sup>109</sup> Department of Environmental Affairs (1992) vol 1 at 8.

<sup>110</sup> Department of Environmental Affairs (1992) vol 1 at 8.

The final phase dealt with the implementation of the proposed activity. During this phase it was recommended that all approved activities be monitored so as to ensure that all conditions of approval were complied with.<sup>111</sup>

Shortly after the publication of the set of guideline documents, South Africa entered a new constitutional era with the advent of the Constitution in 1996.<sup>112</sup> Accordingly a need existed to revise the environmental legislation to bring it in line with the new constitutional dispensation.

### **2.3.3 Green Paper on Environmental Policy for South Africa**

In 1996, the Department of Environmental Affairs and Tourism published a Green Paper entitled Environmental Policy for South Africa. The purpose thereof was 'to provide a basis for developing an environmental policy which [would] lead us on a path of sustainable development and ensure that all South Africans, both now and in the future, [would] have an environment which always caters for their well-being'.<sup>113</sup>

The Green Paper took cognisance of the fact that there was no overarching environmental policy in place in South Africa which reflected the new democratic government.<sup>114</sup> In addition to this, environmental concerns were not given adequate attention in policy or governmental administration. The main aim of the Green Paper was thus to develop a framework for integrating environmental management into all areas of government.<sup>115</sup>

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<sup>111</sup> Department of Environmental Affairs (1992) vol 1 at 9.

<sup>112</sup> The Constitution of the Republic of South Africa, 1996 (hereafter cited as the Constitution).

<sup>113</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>114</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>115</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

Accordingly, the Green Paper proposed a set of principles, structures, processes and mechanisms which would seek to 'integrate environmental governance and thus enable the development of policy, strategy and action to address specific issues and sectors'.<sup>116</sup> Some of these principles included integrated planning and environmental management; the precautionary principle; and the preventative principle.<sup>117</sup>

Regarding integrated planning and environmental management, it was recommended that any actions or decisions which may have a significant impact on biophysical and social elements not be considered in isolation and that those government policy initiatives, programmes and strategies should take environmental policy into account.<sup>118</sup> The Green Paper also acknowledged that environmental policy affects all sectors; therefore it should of necessity be incorporated into the work of all ministries and departments.<sup>119</sup>

The precautionary principle was stated in the negative and provided that in the event that uncertainty exists regarding the environmental consequences of a particular project or action, it should not be undertaken.<sup>120</sup> It was thus advised that risk assessments and strategic environmental assessments (SEAs)<sup>121</sup> be conducted and applied in order to ensure decisions are well reasoned and balanced.<sup>122</sup> In addition to this, effective

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<sup>116</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>117</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>118</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>119</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>120</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>121</sup> Hereafter cited as SEA.

<sup>122</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

monitoring of all projects was pivotal to ensure that the precautionary principle was adhered to.

An SEA is aimed specifically at evaluating policies and programmes. It has been defined as 'a process to ensure that significant environmental effects arising from policies, plans and programmes are identified, assessed, mitigated, communicated to decision makers, monitored and that opportunities for public involvement are provided'.<sup>123</sup>

The preventative principle recognised that the 'cheapest and most effective way of dealing with problems [was] to anticipate them before they arise and prevent negative impacts on the environment'.<sup>124</sup> The Green Paper accordingly provided a hierarchy of control measures that it recommended should be used to govern activities that have a negative impact on the environment.<sup>125</sup> This included elimination, followed by substitution, reduction and finally containment as a last resort.<sup>126</sup>

The principles were accompanied by a set of objectives which would serve to address any major problems that may face environmental management. Three objectives were identified as pivotal to this study to ensure effective governance. These were integration of environmental considerations (objective 5); IEM (objective 30) and planning (objective 46).

Objective 5 required that government officials review all current sectoral policies, governmental responsibilities and decision making functions to ensure the effective

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<sup>123</sup> Kidd, M *Environmental Law* (2008) 195.

<sup>124</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>125</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>126</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

integration of environmental considerations into all decisions on actions and programmes that may affect the environment.<sup>127</sup> These would include permitting procedures, impact assessments and legislation into agreements between departments at all levels of government.<sup>128</sup>

Objective 30 promoted the principle of IEM within all areas of commerce and industry<sup>129</sup> while objective 46 sought to introduce an 'integrated approach to the planning and management of land and natural resources'.<sup>130</sup> The co-operation of all levels of government was therefore vital to the successful fulfilment of these objectives.

If implemented correctly, these objectives would ensure that decision makers were in possession of adequate information regarding the potential adverse environmental effects that an activity might have on the environment as well as possible policies, programmes and alternatives that have been identified.<sup>131</sup> In addition to this, the Green Paper recommended that tools such as IEM, EIAs and risk assessments be used to secure these principles. The Green Paper was accordingly followed by the draft White Paper on Environmental Management Policy for South Africa.<sup>132</sup>

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<sup>127</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>128</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>129</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>130</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>131</sup> Department of Environmental Affairs and Tourism 'Green Paper on an environmental policy for South Africa' available at <http://www.info.gov.za/greenpapers/1996/environmental.htm> (accessed on 19 August 2011).

<sup>132</sup> The Draft White Paper on Environmental Management Policy for South Africa (GN R.1096 in GG 18164 of 28 July 1997). Hereafter cited as Draft White Paper on Environmental Management Policy for South Africa 1997.

### **2.3.4 Draft White Paper on Environmental Management Policy for South Africa**

In this document the government acknowledged the importance of sustainable development which was highlighted by the United Nations Conference on Environment and Development held in 1992.<sup>133</sup> The draft White Paper stipulated that IEM 'will be a prerequisite for government approval of all activities with potentially adverse environmental impacts'.<sup>134</sup>

Similar to the Green Paper, the draft White Paper was premised on a set of fundamental principles which have been specifically formulated to ensure the effective implementation and integration of environmental management into all decisions that may affect the environment.<sup>135</sup> Seven strategic goals were identified for achieving environmental sustainability and IEM.<sup>136</sup> The most important one for the purpose of this study was goal 3 which was headed 'holistic and integrated planning and management'.

The purpose of this goal was to ensure that environmental considerations were effectively integrated into 'the development of government policies and programmes, all spatial and economic development planning processes and all economic activity'.<sup>137</sup> This would entail incorporating the IEM principles into development planning and the development of standards for 'environmental management systems, [EIAs], monitoring and audit procedures and reporting for all activities including government activities that impact on the environment'.<sup>138</sup> The draft White Paper was then followed by the White Paper on Environmental Management Policy for South Africa.

### **2.3.5 White Paper on Environmental Management Policy for South Africa**

In 1998, the White Paper on Environmental Management Policy for South Africa was published. The White Paper again emphasised the importance of sustainable

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<sup>133</sup> The Draft White Paper on Environmental Management Policy for South Africa (1997) 7.

<sup>134</sup> The Draft White Paper on Environmental Management Policy for South Africa (1997) 55.

<sup>135</sup> The Draft White Paper on Environmental Management Policy for South Africa (1997) 20-4.

<sup>136</sup> The Draft White Paper on Environmental Management Policy for South Africa (1997) 26.

<sup>137</sup> The Draft White Paper on Environmental Management Policy for South Africa (1997) 33.

<sup>138</sup> The Draft White Paper on Environmental Management Policy for South Africa (1997) 33.



development as highlighted in both the Brundtland Report and the United Nations Conference on Environment and Development.<sup>139</sup> The main aim of the White Paper was to seek methods of integrating and addressing environmental concerns in such a manner so as to promote the growth of the nation without degrading the environment whilst simultaneously promoting environmentally sustainable development.<sup>140</sup>

Similar to the draft White Paper, the 1998 White Paper was founded upon a set of principles that would guide environmental management and was furthermore accompanied by the same seven strategic goals subject to certain refinements.<sup>141</sup>

In respect of integrated planning and management as identified in goal 3, the concept was given a broader meaning so as to include provision for the development of 'management instruments and mechanisms for the integration of environmental concerns in development planning and land allocation;... to develop agreed, appropriate indicators to measure performance in all areas of national, provincial and local environmental policies... [and] to develop guidelines or other instruments for local government on the integration of environmental consideration into integrated development plans and land development objectives'.<sup>142</sup>

During the same year, a discussion document entitled 'National Strategy for Integrated Environmental Management in South Africa' was published with the view of addressing certain shortcomings identified in the 1992 guidelines as well as extending the scope of IEM so as to deal effectively with any activity that may cause negative environmental impacts.

### **2.3.6 National Strategy for Integrated Environmental Management in South Africa**

Certain weaknesses were identified in respect of the IEM procedure as established in terms of the 1992 guideline series. The main shortcoming identified was that the

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<sup>139</sup> The White Paper on Environmental Management Policy for South Africa (1998) 14.

<sup>140</sup> The White Paper on Environmental Management Policy for South Africa (1998) 13.

<sup>141</sup> The White Paper on Environmental Management Policy for South Africa (1998) 20-8.

<sup>142</sup> The White Paper on Environmental Management Policy for South Africa (1998) 34.

guidelines focused primarily on the development phase and did not make provision for environmental impacts that may result from activities other than those contemplated in the initial proposals.<sup>143</sup> In addition to this, the guidelines lacked legal enforceability.<sup>144</sup> For these reasons the IEM procedure required revision.

The discussion document entitled a National Strategy for IEM in South Africa defined IEM as the 'co-ordinated planning and management of all human activities in a defined environmental system, to achieve and balance the broadest possible range of short-and long-term environmental objectives'.<sup>145</sup>

The main objective of this national strategy was to regulate the entire IEM procedure and provide a national statutory basis for environmental impact management.<sup>146</sup> In order to do so, the drafters recommended three options for regulating the IEM procedure. These were either, the enactment of IEM as a general environmental policy; replacing sections of the ECA; or alternatively creating a special act for IEM.<sup>147</sup>

The first option entailed linking the general environmental policy to the regulations promulgated in terms of the ECA in respect of activities that may have a detrimental impact on the environment.<sup>148</sup>

The second option required the replacement of the provisions contained in the ECA with the IEM procedure as contained in the national strategy document itself; and the last

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<sup>143</sup> Department of Environmental affairs and Tourism *A National Strategy for Integrated Environmental Management in South Africa* (1998) 9.

<sup>144</sup> Department of Environmental affairs and Tourism *A National Strategy for Integrated Environmental Management in South Africa* (1998) 10.

<sup>145</sup> Department of Environmental affairs and Tourism *A National Strategy for Integrated Environmental Management in South Africa* (1998) 14.

<sup>146</sup> Department of Environmental affairs and Tourism *A National Strategy for Integrated Environmental Management in South Africa* (1998) 9.

<sup>147</sup> Department of Environmental affairs and Tourism *A National Strategy for Integrated Environmental Management in South Africa* (1998) 11.

<sup>148</sup> Department of Environmental affairs and Tourism *A National Strategy for Integrated Environmental Management in South Africa* (1998) 11.



option entailed transforming the contents of the national strategy into a special act dedicated to IEM.<sup>149</sup>

This discussion document led to the subsequent promulgation of the National Environmental Management Act (NEMA)<sup>150</sup> which would serve as a framework legislation<sup>151</sup> dealing with all matters pertaining to the environment.

### **2.3.7 The National Environmental Management Act**

The discussion document published by the Department of Environmental Affairs and Tourism resulted in the promulgation of the NEMA on 19 November 1998. Chapter 5 of the NEMA was enacted specifically to repeal sections 21, 22 and 26 of the ECA which deals with the provisions relating to the control of activities that may have a negative impact on the environment. This is accordingly in line with the second option as identified in the National Strategy for IEM in South Africa.

Chapter 5 of the NEMA is accordingly headed 'Integrated Environmental Management' and provides that the objectives are, *inter alia*, to:

promote the integration of the principles of environmental management... into the making of all decisions which may have a significant effect on the environment; identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with the view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management...; ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them; [and] ensure that adequate and appropriate opportunity for public participation in decisions that may affect the environment.<sup>152</sup>

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<sup>149</sup> Department of Environmental affairs and Tourism *A National Strategy for Integrated Environmental Management in South Africa* (1998) 12.

<sup>150</sup> The National Environmental Management Act 107 of 1998 (hereafter cited as NEMA).

<sup>151</sup> See chapter 3, para 3.3.1 for full discussion.

<sup>152</sup> The National Environmental Management Act, s23.

Chapter 5 of the NEMA accordingly creates structures to facilitate meaningful public participation in the environmental decision making process. It furthermore ensures the effective integration of environmental considerations in the decision making process by introducing a new framework for EIA through section 24.<sup>153</sup> Section 24 accordingly makes provision for the practical implementation of IEM and for the adoption of regulations to guide the practical implementation of EIAs.<sup>154</sup> The relevant provisions of the NEMA are outlined in chapter 3 of this mini-thesis.<sup>155</sup>

## 2.4 Conclusion

The international community as a whole has played an important role in shaping our understanding of the vital role that environmental considerations play in ensuring the survival of our planet and of our species.

Nonetheless, South Africa has over time aligned itself with some of the international trends. It is noted that there is still a need for reform of the domestic environmental legal regime and the subsequent chapters provide a modest contribution in this regard.

In the chapter to follow, an in depth examination of the new constitutional dispensation of South Africa will be conducted. In order to do so effectively, the chapter will commence with an overview of the constitutional provisions relating to environmental protection in order to lay a foundation for the discussions that are to follow.

This will be followed by an in-depth examination of the current environmental legislative framework, namely the NEMA.

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<sup>153</sup> van der Linde, M 'National Environmental Management Act 107 of 1998 (NEMA)' in Strydom, HA and King, ND *Environmental Management in South Africa* 2 ed (2009) 204. See chapter 3, para 3.3.2 for full discussion.

<sup>154</sup> The National Environmental Management Act, s24.

<sup>155</sup> See chapter 3, para 3.3.3 for full discussion.

## Chapter 3

### CONSTITUTIONAL CONTEXT

#### 3.1 Introduction

In the preceding chapter, an overview of the historical developments in respect of environmental impact assessments (EIAs)<sup>1</sup> and integrated environmental management (IEM)<sup>2</sup> was given.

It was noted that despite the relatively slow progress to conform to the international standards and obligations imposed by the international community in respect of ensuring that environmental considerations form part of the decision making process and ensuring sustainable development, South Africa has within the last decade made significant progress in this regard.<sup>3</sup>

The present chapter will commence with a brief overview of the constitutional dispensation. At this juncture, specific attention will be given to the environmental clause as contained in the Constitution<sup>4</sup> followed by a brief examination of what this right entails as well as drawing attention to the allocation of responsibilities amongst the different spheres of government in the context of environmental assessments.

The chapter will then conclude with the current post-constitutional legal framework to determine whether the current environmental norms are in line with the constitutional mandate as provided for in the Constitution.

#### 3.2 The Constitution of the Republic of South Africa

Section 2 of the Constitution provides that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it

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<sup>1</sup> Hereafter cited as EIA.

<sup>2</sup> Hereafter cited as IEM.

<sup>3</sup> See chapter 2, para 2.3.1-7 for full discussion.

<sup>4</sup> The Constitution of the Republic of South Africa, 1996 (hereafter cited as the Constitution).

must be fulfilled'.<sup>5</sup> The fulfilment of constitutional obligations is however dependant on the effective implementation and enforcement of the provisions contained in the Constitution.<sup>6</sup>

In respect of the protection and enhancement of the environment, section 24 of the Constitution is of notable importance. It makes provision for an environmental clause which aims to provide a foundation upon which environmental law reform must adhere to.

### 3.2.1 The environmental clause

Section 24 of the Constitution states that 'everyone has the right - (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secures ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.<sup>7</sup>

The importance of the environmental right was highlighted in the case of *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*<sup>8</sup>, where the court held:

Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country.<sup>9</sup>

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<sup>5</sup> The Constitution, s2.

<sup>6</sup> Feris, L 'Environmental Rights and Locus Standi' in Paterson, A and Kotzé, L *Environmental Compliance and Enforcement in South Africa: a Legal Perspective* (2009) 132.

<sup>7</sup> The Constitution, s24.

<sup>8</sup> *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).

<sup>9</sup> *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) at para 20.

Given the importance of this provision, it is necessary to examine what this right entails as it provides the basis upon which future environmental law developments must conform to. In this regard, specific concepts require further investigation. These are health and well-being; reasonable legislative measures and sustainable development.

### 3.2.1.1 Health and well-being

The concept of 'health' has generally been understood to relate to human health and therefore incorporates both mental and physical integrity.<sup>10</sup> For this reason it is important to distinguish the environmental clause as contained in section 24 of the Constitution from the right to health care as contained in section 27 of the Constitution.

Section 27 provides that everyone has the right to access to health care services and that the State is obliged to take measures to ensure the availability of such resources.<sup>11</sup> The concept of health as contained in 24 of the Constitution is however much broader, as factors such as air and water pollution and waste disposal sites pose serious risks for human health.<sup>12</sup> The aspects are unarguably components of environmental law and thus fall within the ambit of section 24.<sup>13</sup>

Inextricably linked to the concept of 'health' is that of 'well-being'. Both concepts were referred to albeit briefly in *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*<sup>14</sup> for the first time in 1996.

In this case, an application was brought for an interdict under the Atmospheric Pollution Prevention Act<sup>15</sup> on the basis that the respondent was operating a saw-milling plant without the necessary registration certificate as required under the Act. The court noted that despite the fact that the Atmospheric Pollution Prevention Act did not contain any

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<sup>10</sup> Feris, L 'Environmental Rights and Locus Standi' in Paterson, A and Kotzé, L *Environmental Compliance and Enforcement in South Africa: a Legal Perspective* (2009) 135.

<sup>11</sup> The Constitution, s27(1) and (2).

<sup>12</sup> Glazewski, J *Environmental Law in South Africa* 2 ed (2005) 76.

<sup>13</sup> Glazewski, J *Environmental Law in South Africa* 2 ed (2005) 76.

<sup>14</sup> *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) SA 155 (N).

<sup>15</sup> The Atmospheric Pollution Prevention Act 45 of 1965.

specific remedies which the applicant could invoke under these circumstances, it had a legal duty to enforce the provisions of the Act. The court accordingly found that 'the generation of smoke in these circumstances, in the teeth of the law as it were, [was] an infringement of the rights of the neighbours to an environment which is not detrimental to their health or well-being as enshrined in the interim Constitution'.<sup>16</sup>

In 2004, the court was once again called upon to examine these concepts in the case of *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others*.<sup>17</sup>

This case concerned the erection of a tannery adjacent to a company that delivered manufactured vehicles to various destinations. It was alleged by the applicants that the noxious gases produced by the tannery had caused foul offensive odours which was prejudicial to the health and well-being of the workers and residents of the city and that it had contributed to the corrosion of the metal structures situated on their property.<sup>18</sup>

The applicants relied on section 28(1) of the National Environmental Management Act (NEMA)<sup>19</sup> which states that persons causing significant pollution or degradation of the environment must be held responsible for taking reasonable measures to prevent such pollution or degradation.

In assessing the term 'significant pollution' as required by section 28(1) of the NEMA, the court noted that a considerable measure of subjective import is required.<sup>20</sup> Having regard to the constitutional right that persons have to an environment that is conducive

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<sup>16</sup> *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 (3) SA 155 (N) at 164F. Despite the fact that the Woodcarb case was decided in terms of the interim Constitution, section 29 of the interim Constitution corresponds with the present section 24(a) of the final Constitution.

<sup>17</sup> *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E).

<sup>18</sup> *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E).

<sup>19</sup> The National Environmental Management Act 107 of 1998 (hereafter cited as NEMA).

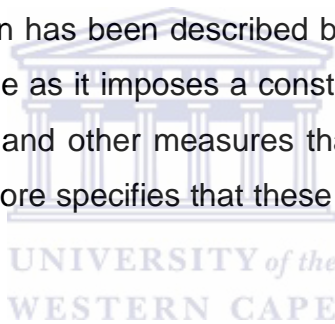
<sup>20</sup> *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) at 414I-J.

to health and well-being, the court concluded that the 'threshold level of significance will not be particularly high'.<sup>21</sup> The court then went on to state that 'one should not be obliged to work in an environment of stench and... to be in an environment contaminated by H<sub>2</sub>S is adverse to one's well-being'.<sup>22</sup> The court was therefore of the opinion that the activities of the respondent had indeed caused pollution as defined in the NEMA.

The court accordingly linked the concept of well-being to the notion of physical discomfort in order to hold that section 24 of the Constitution may be enforced when physical discomfort is caused by pollution.<sup>23</sup>

### **3.2.1.2 Reasonable legislative and other measures**

Section 24(b) of the Constitution has been described by many academics as taking on the nature of a directive principle as it imposes a constitutional mandate upon the state to enact reasonable legislative and other measures that will secure the environmental right.<sup>24</sup> The subsection furthermore specifies that these measures must be aimed at the objectives stated therein.



In the case of *Government of the Republic of South Africa and Others v Grootboom and Others*,<sup>25</sup> the Constitutional Court was afforded the opportunity to consider how the state could meet this constitutional mandate. In this respect, the court noted that:

The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measure will invariably have to be supported by appropriate, well directed

<sup>21</sup> *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) at 415A-B.

<sup>22</sup> *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) at 415D-F.

<sup>23</sup> Feris, L 'Environmental Rights and Locus Standi' in Paterson, A and Kotzé, L *Environmental Compliance and Enforcement in South Africa: a Legal Perspective* (2009) 137.

<sup>24</sup> Kidd, M *Environmental Law* (2008) 21.

<sup>25</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).



policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the states obligations.<sup>26</sup>

Despite the fact that this case centred on the issue of housing rather than the environmental right, the principles that were laid down in this case may be useful in understanding what is required by states when meeting constitutional mandates.

In 2004, the court was afforded another opportunity to consider the meaning of reasonable legislative and other measures in the context of the environmental right in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*.<sup>27</sup>

In this case the court noted that the obligation imposed upon states in terms of section 24(b) of the Constitution is to protect the environment.<sup>28</sup> In order to meet this obligation, any measures adopted must be capable of facilitating the realisation of that right. The legislature and the executive are tasked with the responsibility of laying down the necessary provisions and contents of these measures which must be reasonable. The role of the courts is simply to evaluate the reasonableness of these measures.<sup>29</sup>

It can accordingly be deduced from these two judgements that, for the state to meet its constitutional mandate it must draft reasonable legislation, policies and programmes that will ensure that the environmental right as contained in section 24 of the

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<sup>26</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 42.

<sup>27</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

<sup>28</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

<sup>29</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).



Constitution is adequately protected. In addition to this, the subsection envisages that these measures must be undertaken in accordance with the principle of sustainable development.

### 3.2.1.3 Sustainable development

In the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*,<sup>30</sup> the court was given an opportunity to analyse the concept of sustainable development. In this regard it was noted that:

The goal of attaining sustainable development is likely to play a major role in determining important environmental disputes in the future. This is so because sustainable development constitutes an integral part of modern international law and will balance the competing demands of development and environmental protection. The concept of sustainable development is the fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa... pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principles of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road which will lead to the goal of attaining a protected environment by an integrated approach, which takes into account, *inter alia*, socio-economic concerns and principles.<sup>31</sup>

Similarly, in *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others*,<sup>32</sup> the Constitutional Court gave detailed attention to the notion of sustainable development. According to the views of the

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<sup>30</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

<sup>31</sup> *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 144A-D.

<sup>32</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BCLR 1059 (CC).

majority, it was noted that ‘the integration of economic development, social development and environmental protection implies the need to reconcile and accommodate these three pillars of sustainable development’.<sup>33</sup> In addition to this, sustainability implies continuity, however pure economic factors are no longer decisive. The need for future developments must be determined by its impacts on the environment, sustainable development and social and economic interests. This process accordingly requires the decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions.<sup>34</sup>

In the dissenting judgement handed down by Sachs J, it was however noted that economic sustainability should not be:

treated as an independent factor to be evaluated as a discrete element in its own terms. Its significance for NEMA lies in the extent to which it is inter-related with environmental protection. Sustainable development presupposes accommodation, reconciliation and (in some instances) integration between economic development, social development and environmental protection. It does not envisage social, economic and environmental sustainability as proceeding along three separate tracks, each of which has to be weighed separately and then somehow all brought together in a global analysis. The essence of sustainable development is balanced integration of socio-economic development and environmental priorities and norms.<sup>35</sup>

In light of the above, Feris, an academic author, is of the view that the *BP judgement* and the majority judgement in *Fuel Retailers* were misconceived in their analysis of the concept of sustainable development and that Sachs’ dissenting judgement is the true and accurate reflection on how the notion is to be interpreted.<sup>36</sup>

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<sup>33</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BCLR 1059 (CC) at para 55.

<sup>34</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BCLR 1059 (CC).

<sup>35</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BCLR 1059 (CC) at 1098 A-B and 1099 A-B.

<sup>36</sup> Feris, L ‘Environmental Rights and Locus Standi’ in Paterson, A and Kotzé, L *Environmental Compliance and Enforcement in South Africa: a Legal Perspective* (2009) 141.

Nonetheless, the *Fuel Retailers* case represents an effort by the Constitutional Court to give meaningful content to the duty resting on decision-makers in environmental matters to hear the views of all interested and affected parties by requiring environmental factors to be given greater consideration by decision-makers.<sup>37</sup>

It is thus evident from the discussion above that the achievement of the constitutional environmental right is dependent on the notion of sustainable development which requires the integration of environmental considerations into the decision making process. The development and implementation of laws and policies providing for EIA procedures may therefore serve as a vital tool in ensuring the realisation of this right.

It is furthermore important to note that the Constitution provides a framework for the administration of environmental law in South Africa. This is contained in the provisions relating to co-operative governance.

### 3.2.2 Co-operative governance

According to section 40(1) of the Constitution, the government is divided into national, provincial and local spheres, each of which are distinctive, interdependent and interrelated.<sup>38</sup>

The Constitution furthermore places a positive obligation upon all spheres of government to:

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 to 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

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<sup>37</sup> Couzens E 'Filling Station Jurisprudence: Environmental Law in South African Courts and the Judgement in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*' (2008) 15 SAJELP 54.

<sup>38</sup> The Constitution, s40(1).

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.<sup>39</sup>

National government enjoys concurrent competence with provincial government to pass legislation on any matter that is referred to in Schedule 4 of the Constitution<sup>40</sup> but are precluded from passing legislation concerning Schedule 5 matters.<sup>41</sup> There is however an exception to this rule, namely, if the legislation is necessary 'to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole'.<sup>42</sup> If this exception applies, national government is empowered to pass legislation concerning a schedule 5 matter.

In respect of the provincial sphere of government, the Constitution divides the Republic into nine provinces and empowers the provinces to pass legislation on 'any matter within a functional area listed in Schedule 4; any matter within a functional area listed in Schedule 5 and any matter outside those functional areas that has been expressly assigned to the province by national legislation'.<sup>43</sup> Provinces accordingly enjoy exclusive competence to make legislation in respect of Schedule 5 matters except if it falls within the ambit of the exception contained in section 44(2) of the Constitution.

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<sup>39</sup> The Constitution, s41(1)(g) and (h).

<sup>40</sup> Schedule 4 of the Constitution sets out the functional areas of current national and provincial legislative competence and it divided into two parts. Part A consists of the following item which are relevant to environmental management: administration of indigenous forests; agriculture; animal control and diseases; environment; health services; nature conservation; excluding national parks; national botanical gardens and marine resources; pollution control; population development; regional planning and development; soil conservation; tourism; and urban and rural development. Part B comprises of local government matters.

<sup>41</sup> Schedule 5 of the Constitution sets out the functional areas of exclusive provincial legislative competence and is divided into the same two parts as Schedule 4.

<sup>42</sup> The Constitution, s44(2).

<sup>43</sup> The Constitution, s104(1)(b).

Local government is regulated by section 151 of the Constitution. It provides that a 'municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided in the Constitution...'.<sup>44</sup> Neither the national nor the provincial government may therefore impede a municipality's ability or right to exercise its powers or to perform its functions.<sup>45</sup> Instead, they must support and strengthen the capacity of the municipalities to administer their own affairs, to exercise their powers and to perform their functions.<sup>46</sup>

These provisions have had the effect of entrusting much of the responsibility for enacting environmental legislation to the provinces. However, as national and provincial government enjoy concurrent powers in respect of certain functional areas listed in Schedule 4, the possibility of conflict between these two spheres of government may arise.

The Constitution accordingly provides that national legislation will prevail if certain conditions are met. These include, *inter alia*, if 'the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by respective provinces individually; the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing – norms and standards; frameworks; or national policies [and that] the national legislation is necessary for... the protection of the environment...'.<sup>47</sup>

The issue of co-operative governance was recently addressed in the case of *Maccsand (Pty) Ltd v City of Cape Town and Others*.<sup>48</sup> The case concerned the granting of a mining permit to Maccsand by the Minister for Mineral Resources on land zoned as public open space.

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<sup>44</sup> The Constitution, s151.

<sup>45</sup> The Constitution, s156(5).

<sup>46</sup> Kidd, M *Environmental Law* (2008) 29.

<sup>47</sup> The Constitution, s146.

<sup>48</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

It was common cause in the matter that the use and control of land in the City of Cape Town is regulated by the Land Use Planning Ordinance (LUPO).<sup>49</sup> LUPO authorises municipalities to prepare structure plans which must be submitted to the provincial government for approval.<sup>50</sup> It also authorises the rezoning of land by a municipality. It furthermore obliges municipalities to enforce compliance with its provisions and prohibit the use of land for purposes other than the one permitted in terms of the zoning scheme.<sup>51</sup>

When Maccsand commenced mining operations, the City of Cape Town responded by instituting proceedings for an interdict restraining Maccsand from mining sand on the dunes until the dunes were rezoned to allow mining.<sup>52</sup>

It was argued by the applicants that 'to hold that LUPO applies would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government'.<sup>53</sup> In this regard the court noted that these two pieces of legislation regulated different subject matters but that they operated alongside each other.<sup>54</sup> It was furthermore noted that:

The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate in each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of power by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. It is in this context that the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.<sup>55</sup>

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<sup>49</sup> The Land Use Planning Ordinance 15 of 1985 (hereafter cited as LUPO).

<sup>50</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

<sup>51</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

<sup>52</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

<sup>53</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at para 41.

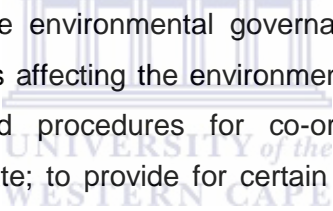
<sup>54</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

<sup>55</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at para 47.

Co-operative governance is accordingly inextricably linked to the environmental clause as contained in the Constitution as this will ensure its effective enforcement in the environmental domain. It is against this background that the author proceeds to examine the legislative framework for environmental laws within South Africa relating specifically to the EIA and IEM procedures.

### **3.3 Post-Constitutional legislation**

The NEMA was passed in November 1998 and entered into force on 29 January 1999. It serves as the first piece of environmental legislation that was passed after the advent of the final Constitution. The primary function of the NEMA is to lay down institutional structures and legal mechanisms that will give effect to the environmental clause contained in the Constitution. This is evident from its long title which provides that its purpose is:



To provide for co-operative environmental governance by establishing principles for decision making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.<sup>56</sup>

It is thus clear that the NEMA was enacted to strengthen existing environmental laws as well as give effect to the environmental clause as mandated by section 24 of the Constitution. The NEMA however goes further as it may also be viewed as framework environmental legislation as discussed below.

#### **3.3.1 Framework environmental legislation**

Framework legislation have been described as legislation that 'aims to define overarching and generic principles in terms of which sectoral-specific legislation is embedded, as well as to enhance the co-operative environmental governance amongst

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<sup>56</sup> The National Environmental Management Act, long title.



fragmented line ministries'.<sup>57</sup> The NEMA conforms to this idea as its preamble expressly refers to the environmental right contained in section 24 of the Constitution and is aimed at giving effect to it at a framework level.<sup>58</sup> It furthermore conforms to the principle of cooperative governance as contained in Chapter 3 of the Constitution by allocating responsibilities to different organs of state. This is significant as the environment is an area of concurrent national and provincial legislative competence which means that both the national and the provincial government are tasked with the responsibility of enacting laws relating to the protection of the environment.<sup>59</sup>

In addition to this, the NEMA is founded on a number of fundamental principles which are contained in section 2 of the Act. These principles are centred on the notion of sustainable development which it defines as 'the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations'.<sup>60</sup>

### **3.3.2 National environmental management principles**

The national environmental management principles contained in section 2 of the NEMA apply throughout the Republic to the actions of all organs of state that may significantly affect the environment.<sup>61</sup> The section stipulates that these principles should serve a general framework within which environmental management and implementation plans must be formulated and that it should furthermore serve as a guideline when interpreting and implementing any provision of the Act or any other laws concerned with the protection or management of the environment.<sup>62</sup> In addition to this, it is stipulated that development must be socially, environmentally and economically sustainable.<sup>63</sup>

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<sup>57</sup> du Plessis, W and Nel, J 'An evaluation of NEMA based on a generic framework for environmental framework legislation' (2001) 8 *SAJELP* 1.

<sup>58</sup> The National Environmental Management Act, preamble.

<sup>59</sup> Kidd, M *Environmental Law* (2008) 32.

<sup>60</sup> The National Environmental Management Act, s1.

<sup>61</sup> The National Environmental Management Act, s2(1).

<sup>62</sup> The National Environmental Management Act, s2(1)(b) and s2(1)(e).

<sup>63</sup> The National Environmental Management Act, s2(3).



In respect of EIAs, three principles can be identified as pivotal to this study. These are the precautionary<sup>64</sup> and the preventative<sup>65</sup> principles; which entails that a risk-adverse and cautious approach should be applied 'which takes into account the limits of our current knowledge about the consequences of decisions and actions; and that negative impacts on the environment and on people's environmental rights be anticipated and prevented and where they cannot be altogether prevented, they must be minimised and remedied'.<sup>66</sup>

The preventative and precautionary principles should accordingly be read together as environmental degradation cannot be avoided all together. The principles accordingly recognise that damage to the environment may often be irreversible therefore measures should be taken to avoid such harm instead of attempting to remedy the situation at a later stage.<sup>67</sup>

The third principle is sustainable development.<sup>68</sup> This principle provides that non-renewable natural resources must be used responsibly and equitably and that the state should take into account 'the consequences of the depletion of the resource'.<sup>69</sup>

The applicability of these principles was discussed in the case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another*<sup>70</sup> in which the court considered the impacts to be covered by the principles as relating only to those activities that may significantly affect the environment.<sup>71</sup> The court however incorrectly proceeded to enquire whether the establishment of the camp 'will' have a

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<sup>64</sup> The National Environmental Management Act, s2(4)(a)(vii).

<sup>65</sup> The National Environmental Management Act, s2(4)(a)(viii).

<sup>66</sup> The National Environmental Management Act, s2(4)(a)(vii) and s2(4)(a)(viii).

<sup>67</sup> Kidd, M *Environmental Law* (2008) 10.

<sup>68</sup> The National Environmental Management Act, s2(4)(a)(v).

<sup>69</sup> The National Environmental Management Act, s2(4)(a)(v). See Chapter 3, para 3.2.1.3 for full discussion.

<sup>70</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC).

<sup>71</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC).

significant effect on the environment.<sup>72</sup> The judgement has been criticised on the basis that environmental science poses much uncertainties when conducting enquiries into the likely environmental impacts on the environment therefore by interpreting the provision as 'will' the court has rendered section 2 of the NEMA ineffective.<sup>73</sup>

Later, in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd*<sup>74</sup> the court recognised that the NEMA requires that:

The interpretation of any law concerned with the protection and management of the environment must be guided by [the principles contained in section 2]. At the heart of these is the principle of sustainable development, which requires organs of state to evaluate the social, economic and environmental impacts of activities.<sup>75</sup>

More recently in *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others*,<sup>76</sup> the court observed that the principles contained in the NEMA are of considerable importance in respect of the protection and management of the environment. The court however contradicted itself when it held that the local authority was not required to consider the social, economic and environmental impacts of the proposed development or identify any actual or potential impacts of the proposed development on socio-economic conditions as the NEMA requires the environmental authorities to do.<sup>77</sup>

It is thus evident that the principles contained in section 2 of the NEMA are of great importance and serves as the foundation upon which the NEMA is built. For the purposes of this research, it is necessary to examine Chapter 5 of the NEMA as it

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<sup>72</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC).

<sup>73</sup> Kidd, M *Environmental Law* (2008) 35.

<sup>74</sup> *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (2) All SA 17 (SCA).

<sup>75</sup> *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (2) All SA 17 (SCA) at 489C-E.

<sup>76</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BCLR 1059 (CC). See Chapter 3, para 3.2.1.3 for full discussion.

<sup>77</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BCLR 1059 (CC) at para 85.

governs proposed activities and developments that may significantly affect the environment.

### 3.3.3 Integrated environmental management

Chapter 5 of the NEMA sets out the principles of IEM. Since its promulgation in 1998, it has been substantially amended by the National Environmental Management Amendment Act 8 of 2004 and the National Environmental Management Amendment Act 62 of 2008. The NEMA in its amended form addresses the authorisation of activities that are likely to have a detrimental effect on the environment.

Section 24 of the NEMA was initially headed 'Implementation' but was amended in 2004 and now reads 'Environmental Authorisations'.<sup>78</sup> One of the reasons for its amendment was to narrow the scope of activities that required authorisation.<sup>79</sup> Initially, the section provided that:

the potential impact - on the environment; socio-economic conditions; and the cultural heritage, of activities that require authorisation or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting, or otherwise allowing the implementation of an activity.<sup>80</sup>

Prior to its amendment, the section could be interpreted to apply to any activity that may significantly affect the environment thus the scope of application was too wide. The amended section has accordingly excluded impacts on socio-economic conditions and cultural heritage and is thus only applicable to listed and specified activities.<sup>81</sup>

The amended version of section 24 now provides for the practical implementation of IEM and for the adoption of regulations related thereto. This is achieved by requiring the

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<sup>78</sup> The National Environmental Management Amendment Act 8 of 2004.

<sup>79</sup> Kidd, M *Environmental Law* 2 ed (2011) 239.

<sup>80</sup> The National Environmental Management Act, s24(1).

<sup>81</sup> Kidd, M *Environmental Law* 2 ed (2011) 239.

potential consequences for, or impacts on, the environment of listed activities or specified activities to be considered, investigated, assessed and reported on to the organ of state charged to issue authorisations.<sup>82</sup> The section furthermore empowers the Minister, or an MEC with the concurrence of the Minister, to identify activities and geographical areas in which listed and specified activities may not be commenced without an environmental authorisation.<sup>83</sup>

Section 24(4) provides for mandatory requirements in respect of the assessment process. It acknowledges the principle of co-operative governance mandated by its preamble and the Constitution by providing for co-ordination and co-operation between various organs of state that may enjoy concurrent jurisdiction over a particular activity. It furthermore enhances the principle of openness as mandated in the Constitution by providing procedures for public participation in the decision making process. It also specifies that the general objectives of IEM as provided for in section 23<sup>84</sup> and the principles of environmental management as contained in section 2 of the NEMA must be taken into account when considering any application for an activity that may potentially affect the environment in a significant manner.<sup>85</sup>

Several activities identified by the Minister in terms of the NEMA as potentially harmful to the environment are also regulated in terms of other legislation. The section therefore expressly states that compliance with the procedures laid down by section 24(4) of the NEMA does not absolve an applicant from complying with any other statutory requirements to obtain authorisation from any organ of state in respect of the activity in question.<sup>86</sup>

Despite the extensive regulation concerning the listing of activities and procedures for obtaining prior authorisation, there have been instances in which applicants have

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<sup>82</sup> The National Environmental Management Act, s24(1).

<sup>83</sup> The National Environmental Management Act, s24(2).

<sup>84</sup> See chapter 2, para 2.3.7 for full discussion.

<sup>85</sup> The National Environmental Management Act, s24(4).

<sup>86</sup> The National Environmental Management Act, s24(7).

commenced listed activities without first obtaining the necessary authorisation. In order to remedy this situation, the legislature inserted section 24F in the NEMA.

This section renders it a criminal offence to commence or continue a listed activity without the necessary authorisation.<sup>87</sup> It is also an offence to fail to comply with or to contravene the conditions applicable to any environmental authorisation granted for a listed activity or specified activity; or an approved environmental management programme.<sup>88</sup> The maximum penalty for contravention of this section is a R5 million fine or 10 years imprisonment or both.<sup>89</sup> The section does contain an exception namely, if an applicant can show that an activity was commenced in response to an emergency incident that was not reasonably foreseeable in order to protect human life, property or the environment, the commencement or continuation of that activity would not be considered a criminal offence.<sup>90</sup>

Section 24F is augmented by section 24G which provides for the rectification of unlawful commencement or continuation of activities.<sup>91</sup> According to this section, a person who has contravened section 24F may apply for authorisation for the activity in question. Prior to considering the application, the applicant must pay an administrative fine not exceeding R1 million.<sup>92</sup> Upon receipt of such payment, the competent authority may either grant the necessary authorisation or it may be refused in which case the person will be required to cease the activity in question and rehabilitate the environment.<sup>93</sup> In the event that the authorisation is refused, the competent authority may decide to prosecute such an applicant in terms of section 24F of the NEMA despite the payment of the administrative fine.

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<sup>87</sup> The National Environmental Management Act, s24F(1).

<sup>88</sup> The National Environmental Management Act, s24F(2).

<sup>89</sup> The National Environmental Management Act, s24F(4).

<sup>90</sup> The National Environmental Management Act, s24F(3).

<sup>91</sup> The National Environmental Management Act, s24G.

<sup>92</sup> The National Environmental Management Act, s24G(2A).

<sup>93</sup> The National Environmental Management Act, s24G(2).

In the event that the authorisation is granted, it may be subject to conditions stipulated by the competent authority charged by law to authorise its undertaking. Failure to comply with any stipulated conditions is an offence and subject to penalty in terms of section 24F.<sup>94</sup> This accordingly means that a person found guilty under this section would be required to pay a fine up to the amount of R5 million in addition to the administrative fine which may not exceed R1 million.<sup>95</sup>

Kidd, an academic author, is of the view that the insertion of sections 24F and 24G should be welcomed as historically there has been widespread non-compliance with the requirements to obtain authorisations as required by the NEMA, thus such heavy penalties could serve as a significant deterrent.<sup>96</sup> The author agrees with the above opinion and believes that it will go a long way in ensuring compliance with the provisions contained in the NEMA.

It is important to note that at the time of writing, the National Environmental Management Laws Amendment Bill<sup>97</sup> was published for public comment. This Bill proposes to increase the administrative fine to R5 million.<sup>98</sup> In the event that the administrative fine is increased to R5 million, persons found guilty of contravening the provisions as contained in section 24F of the NEMA may potentially be liable to pay a fine of up to R5 million in addition to the administrative fine which may not exceed R5 million. The author is accordingly of the opinion that this increase should be welcomed as it will serve as a further deterrent for persons who wish to undertake a listed activity without prior environmental authorisation.

### **3.4 Conclusion**

The advent of the Constitution brought about a shift in the environmental law sphere from the notion of conservation to that of co-operative governance and sustainable

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<sup>94</sup> The National Environmental Management Act, s24G(3).

<sup>95</sup> Kidd, M *Environmental Law* 2 ed (2011) 245.

<sup>96</sup> Kidd, M *Environmental Law* 2 ed (2011) 246.

<sup>97</sup> GN R.586 in GG 34558 of 26 August 2011 (hereafter cited as GN R.586).

<sup>98</sup> GN R.586, section 8.

development. The Constitution furthermore enhanced the principles of openness and accountability and made specific provision for the inclusion of an environmental clause. The effectiveness of this clause was however dependant on effective legislation, thus the NEMA was promulgated.

The NEMA is founded on a number of fundamental principles which corresponds with the principles as laid down in international conventions such as the Stockholm and Rio Conventions as discussed in chapter two.<sup>99</sup> However, by incorporating these principles into national legislation, the principles have been afforded the status of law and are accordingly binding upon state actors.

The NEMA furthermore expressly refers to the environmental right contained in the Constitution and gives effect to this right at a framework level as well as enhancing important principles such as accountability and openness, sustainability and co-operative governance.

The NEMA was amended several times since its promulgation in order to flesh out the provisions relating to the authorisation of activities that may have a significant effect on the environment. Provision is also made for criminal sanctions which serve as a deterrent and provides for the rectification of unlawfully commenced activities in order to enhance compliance with the NEMA.

In the chapter to follow, we will examine the regulatory framework that accompanied the ECA and the NEMA. We will begin by examining the EIA regulations that were promulgated in terms of the ECA as well as the amendments thereto highlighting the inherent weaknesses contained therein. We will then conduct an in depth examination of the regulations that were promulgated in terms of the NEMA and the successive amendments thereof to establish whether an effective regulatory system is in place as mandated by the Constitution.

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<sup>99</sup> See chapter 2, para 2.2 for full discussion.



## Chapter 4

# THE REGULATORY FRAMEWORK FOR ENVIRONMENTAL IMPACT ASSESSMENTS

### 4.1 Introduction

In the preceding chapter, the constitutional provisions relating to the environment were examined.<sup>1</sup> The chapter also focused on the analysis of the current legislative framework, namely, the National Environmental Management Act (NEMA).<sup>2</sup>

In this respect it was noted that the NEMA served as framework legislation and that it was enacted to give effect to the environmental right as contained in section 24 of the Constitution.<sup>3</sup> In addition to this, the NEMA brought South African environmental legislation in line with the internationally recognised principles of IEM by addressing the control of activities that may have a significantly detrimental effect on the environment, allowing for co-operative governance and highlighting the principle of sustainable development.

This chapter will outline the regulatory framework that accompanied both the ECA<sup>4</sup> and the NEMA, to determine whether an effective regulatory system is in place as mandated by the Constitution. Furthermore, this chapter will highlight some of the potential grey areas that remain evident in the regulations despite its recent amendments. Recommendations for reform will be discussed in the concluding chapter that is to follow.

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<sup>1</sup> See chapter 3, para 3.2.1-2 for full discussion.

<sup>2</sup> The National Environmental Management Act 107 of 1998 (hereafter cited as NEMA).

<sup>3</sup> The Constitution of the Republic of South Africa, 1996 (hereafter cited as the Constitution). See chapter 3, para 3.3.1 for full discussion.

<sup>4</sup> The Environment Conservation Act 73 of 1989 (hereafter cited as ECA).



## 4.2 EIA regulations under the ECA

The ECA was promulgated in 1989. Section 26 thereof empowered the Minister to promulgate regulations concerning the procedure to submit environmental impact reports.<sup>5</sup> The submission of these reports were however only required if the Minister exercised his discretionary power and declared an activity or limited development area.

In 1997, some eight years later, the Minister promulgated the first set of regulations pursuant to this power. Three sets of regulations relating to the EIA procedure were published.<sup>6</sup> These however constituted one composite set of rules governing environmental assessments in South Africa.<sup>7</sup> It is accordingly necessary to examine each of these regulations to determine whether they have contributed to the positive reform of the regulatory system.

### 4.2.1 Regulation 1182: the list of identified activities

Regulation 1182 was published on 5 September 1997 by the Minister of Environmental Affairs and Tourism in terms of section 21 of the ECA.<sup>8</sup> The purpose of this regulation was to identify activities which may have a detrimental impact on the environment for which environmental authorisation should be obtained. Shortly after its promulgation, the said regulation was amended whereby a proviso was added to the second paragraph stating that the 'notice is not applicable to an activity that was commenced with before the date of commencement fixed in respect of that activity as indicated in the said schedule'.<sup>9</sup>

Regulation 1182 comprised of two schedules. The first schedule contained the list of activities which was considered to be potentially detrimental to the environment whilst the second schedule contained the timeframes within which all activities identified in the first schedule should be phased in.

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<sup>5</sup> The Environment Conservation Act, s26.

<sup>6</sup> GN R.1182-4 in GG 18261 of 5 September 1997.

<sup>7</sup> Glazewski, J *Environmental Law in South Africa* (2000) 282.

<sup>8</sup> GN R.1182 in GG 18261 of 5 September 1997 (hereafter cited as GN R.1182).

<sup>9</sup> GN R.1355 in GG 18362 of 17 October 1997.

In respect of the first schedule, nine activities were initially identified as activities which may have a substantially detrimental effect on the environment. These included, *inter alia*, 'the construction or upgrading of ...dams, levees and weirs affecting the flow of a river; ... [and] the change of land use from... agricultural or undetermined use to any other land use'.<sup>10</sup>

In 2002, the regulations were once again amended whereby two items were inserted and certain refinements were made to the existing items.<sup>11</sup> Item 10 made reference to the cultivation or any other use of virgin ground.<sup>12</sup> The validity of this insertion was however debatable as no effective date was provided for in terms of schedule 2 as was done in respect of the other items.

Item 11 served to clarify the terminology used in the original set of regulations relating to the term 'road' which had caused some problems in practice. In addition to this, definitions were provided for terms such as 'upgrading' and 'virgin ground' that were inserted into the regulations in 2002.<sup>13</sup>

The concept of virgin ground formed the subject of the case of *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*.<sup>14</sup> This case concerned the establishment of a vineyard on land that was previously quarried for gravel. At the time that judgement was handed down, item 10 had not been inserted into Regulation 1182 yet. The court accordingly relied on the Conservation of Agriculture Resources Act (CARA)<sup>15</sup> to determine the scope of the concept 'virgin soil'. Accordingly, virgin soil was defined as 'land which in the opinion of the executive officer has at no time during the preceding ten years been cultivated'.<sup>16</sup> If it was found that the land in question was

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<sup>10</sup> GN R.1182, items 1(a) and 2(c). See chapter 4, para 4.3 for further discussion on these items.

<sup>11</sup> GN R.670 in GG 23401 of 10 May 2002.

<sup>12</sup> GN R.1182 (as amended), item 10.

<sup>13</sup> GN R.1182 (as amended), item 11.

<sup>14</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C).

<sup>15</sup> The Conservation of Agriculture Resources Act 43 of 1983.

<sup>16</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C) at 487I-J.

indeed virgin soil, then the cultivation thereof was prohibited except if written permission was obtained from the executive officer.<sup>17</sup> The court accordingly found that before such a permit could be issued, it was necessary for the designated official to assess the potential impact of the proposed activity on the environment.<sup>18</sup>

In respect of the second schedule, a timetable was provided indicating specific dates for the coming into force of specified individual listed items.<sup>19</sup> All items were phased in by 1 April 1998.

Following the 2002 amendment, the regulations contained a total of 11 activities that were potentially detrimental to the environment. One of the shortcomings of Regulation 1182 was the fact that no threshold levels were set which would indicate the level of significance and magnitude of the proposed development or activity. Accordingly, any proposed development or activity, even ones that would have minute impacts on the environment would require written authorisation prior to its undertaking. The procedure which an applicant or developer had to follow to obtain this authorisation was outlined in Regulation 1183.



#### **4.2.2 Regulation 1183: EIA procedure under the ECA**

Once it was established that a proposed development or activity was one specified in terms of Regulation 1182, the development or activity in question could not be undertaken until official authorisation was obtained and an EIA had been completed.<sup>20</sup> Regulation 1183 accordingly provided the substantive rules regarding the procedure to be followed when seeking environmental authorisation.

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<sup>17</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C) at 488A-B.

<sup>18</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C) at 488A-B.

<sup>19</sup> GN R.1182 (as amended), schedule 2.

<sup>20</sup> GN R.1183 in GG 18261 of 5 September 1997 (hereafter cited as GN R.1183).

A legal duty was accordingly placed on the applicant to appoint an independent consultant to ensure that the laws and regulations governing EIAs were complied with.<sup>21</sup> To meet the requirement of independence, the consultant could not have any 'financial or other interest in the undertaking of the proposed activity, except with regard to compliance with [the] regulations'.<sup>22</sup> Furthermore, the consultant was required to have, amongst others, the necessary expertise in the area of environmental concern relating to the specific application;<sup>23</sup> 'the ability to perform all the required tasks';<sup>24</sup> 'manage the public participation process'<sup>25</sup> and have 'a good working knowledge of all relevant policies, legislation, guidelines, norms and standards'.<sup>26</sup>

The term independent consultant was however not defined in terms of the said regulations. Accordingly, in April 1998, a guideline document was published by the Department of Environmental Affairs and Tourism which served to complement the EIA regulations.<sup>27</sup>

According to the guideline document, an independent consultant was defined as a consultant who was not in the permanent service of the applicant.<sup>28</sup> In addition to this, certain conditions were stipulated whereby an independent consultant could lose his or

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<sup>21</sup> GN R.1183, reg 3(1)(a).

<sup>22</sup> GN R.1183, reg 3(1)(c). The term independent was extended to include persons compiling specialist reports in the case of *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* 2011 (3) SA 55 (WCC). See chapter 4, para 4.4.1 for full discussion.

<sup>23</sup> GN R.1183, reg 3(1)(d)(i).

<sup>24</sup> GN R.1183, reg 3(1)(d)(ii).

<sup>25</sup> GN R.1183, reg 3(1)(d)(iii).

<sup>26</sup> GN R.1183, reg 3(1)(d)(vi).

<sup>27</sup> Department of Environmental Affairs and Tourism 'Guideline document: EIA Regulations' available at <http://www.google.co.za/url?sa=t&rct=j&q=EIA+regulations+guidelines+april+1998&source=web&cd=7&ved=0CD8QFjAG&url=http%3A%2F%2Fwww.cityoftshwane.co.za%2Fmcdc%2FEIA%2520Regulations%2520-%2520Guidelines%2C%2520April%25201998.doc&ei=2meGULGtPJKAhQfOpoHwCw&usq=AFQjCNHT1bP2aoZhXoQPF3tNEvGCsHf3YA> (accessed on 30 August 2012).

<sup>28</sup> Department of Environmental Affairs and Tourism 'Guideline document: EIA Regulations' available at <http://www.google.co.za/url?sa=t&rct=j&q=EIA+regulations+guidelines+april+1998&source=web&cd=7&ved=0CD8QFjAG&url=http%3A%2F%2Fwww.cityoftshwane.co.za%2Fmcdc%2FEIA%2520Regulations%2520-%2520Guidelines%2C%2520April%25201998.doc&ei=2meGULGtPJKAhQfOpoHwCw&usq=AFQjCNHT1bP2aoZhXoQPF3tNEvGCsHf3YA> (accessed on 30 August 2012).

her independence. These included if the consultant was 'involved in any design or work of the same project';<sup>29</sup> if he or she earned more than half of their earnings from the same company or if payment was dependent on obtaining a positive authorisation for the application.<sup>30</sup>

The requirement of independence, however, posed some difficulty in respect of large enterprises who may have persons with the necessary environmental expertise but whom were disqualified due to this requirement. To address this problem, the guidelines provided for in-house consultants who could undertake the EIA process.<sup>31</sup> Due to the nature of certain proposed activities and the potentially significant consequences that may follow; the author is of the view that professional review be required to ensure that the quality of the environmental assessment was not compromised in the event that an in-house consultant was used.

Once the independent consultant was appointed, the application procedure as laid out in Regulation 1183 could be undertaken. The process may be summarised in 5 simple steps namely, the application for authorisation; submission of a plan of study for scoping; submission of a scoping report; submission of a plan of study for an EIA; and the submission of the environmental impact report.<sup>32</sup>

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<sup>29</sup> Department of Environmental Affairs and Tourism 'Guideline document: EIA Regulations' available at <http://www.google.co.za/url?sa=t&rct=j&q=EIA+regulations+guidelines+april+1998&source=web&cd=7&ved=0CD8QFjAG&url=http%3A%2F%2Fwww.cityoftshwane.co.za%2Fmcdc%2FEIA%2520Regulations%2520-%2520Guidelines%2C%2520April%25201998.doc&ei=2meGULGtPJKAhQfOpoHwCw&usq=AFQjCNHT1bP2aoZhXoQPF3tNEvGCsHf3YA> (accessed on 30 August 2012).

<sup>30</sup> Department of Environmental Affairs and Tourism 'Guideline document: EIA Regulations' available at <http://www.google.co.za/url?sa=t&rct=j&q=EIA+regulations+guidelines+april+1998&source=web&cd=7&ved=0CD8QFjAG&url=http%3A%2F%2Fwww.cityoftshwane.co.za%2Fmcdc%2FEIA%2520Regulations%2520-%2520Guidelines%2C%2520April%25201998.doc&ei=2meGULGtPJKAhQfOpoHwCw&usq=AFQjCNHT1bP2aoZhXoQPF3tNEvGCsHf3YA> (accessed on 30 August 2012).

<sup>31</sup> Department of Environmental Affairs and Tourism 'Guideline document: EIA Regulations' available at <http://www.google.co.za/url?sa=t&rct=j&q=EIA+regulations+guidelines+april+1998&source=web&cd=7&ved=0CD8QFjAG&url=http%3A%2F%2Fwww.cityoftshwane.co.za%2Fmcdc%2FEIA%2520Regulations%2520-%2520Guidelines%2C%2520April%25201998.doc&ei=2meGULGtPJKAhQfOpoHwCw&usq=AFQjCNHT1bP2aoZhXoQPF3tNEvGCsHf3YA> (accessed on 30 August 2012).

<sup>32</sup> Scheepers, T A *Practical Guide to Law and Development* (2000) 133.

In respect of the application for authorisation, an initial consultation between the developer and the relevant authority had to take place.<sup>33</sup> The purpose of this consultation was to ascertain whether the proposed development or activity falls within the prescribed list of activities as identified in Regulation 1182. If the proposed development or activity was indeed listed as such, the developer was required to complete the necessary application form and submit it to the relevant authority.<sup>34</sup> Once the application was submitted, the relevant authority had to provide the developer with the necessary information concerning the content of the prescribed advertisements.<sup>35</sup> These advertisements did not however form part of the prescribed public participation process.

The next step related to the submission of the plan of study for scoping.<sup>36</sup> This plan had to be submitted for purposes of review and had to contain 'a brief description of the activity to be undertaken; a description of all the tasks to be performed during scoping; a schedule setting out when these tasks... [would] be completed; an indication of the stages at which the relevant authority [would] be consulted; and a description of the proposed method of identifying the environmental issues and alternatives'.<sup>37</sup>

Upon receipt of the plan of study, the relevant authority could either accept it or request that the developer provide additional information before accepting the plan of study for scoping.<sup>38</sup> If the relevant authority was satisfied with the information received, and the plan was accepted, the developer had to be notified to proceed with the scoping report.<sup>39</sup>

The term scoping was however not defined in the regulations. The guidelines thus provided some insight by stipulating that the process should entail the identification of

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<sup>33</sup> Scheepers, T *A Practical Guide to Law and Development* (2000) 134.

<sup>34</sup> GN R.1183, reg 4(2).

<sup>35</sup> GN R.1183, reg 4(6).

<sup>36</sup> GN R.1183, reg 5.

<sup>37</sup> GN R.1183, reg 5(2)(a)-(e).

<sup>38</sup> GN R.1183, reg 5(3).

<sup>39</sup> GN R.1183, reg 6(1).



significant issues and alternatives as well as a preliminary assessment of the potential impacts on the proposed environment.<sup>40</sup>

The scoping report had to include 'a brief project description; a brief description of how the environment may be affected; a description of environmental issues identified; a description of all alternatives identified; and an appendix containing a description of the public participation process followed, including a list of interested parties and their comments'.<sup>41</sup>

Once in possession of the scoping report, the relevant authority could elect to accept the report without further investigation, in which case the application was either authorised with or without conditions or the application was refused.<sup>42</sup> Alternatively, the relevant authority could decide that the report be supplemented by an EIA.<sup>43</sup> The developer would accordingly be required to prepare and submit a plan of study for the EIA.<sup>44</sup>

This plan of study had to include 'a description of the environmental issues identified during scoping that may require further investigation and assessment; a description of the feasible alternatives identified during scoping that may require further investigation; an indication of additional information required to determine the potential impacts of the proposed activity on the environment; a description of the proposed methods of identifying these impacts; and a description of the proposed methods of assessing the significance of these impacts'.<sup>45</sup>

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<sup>40</sup> Department of Environmental Affairs and Tourism 'Guideline document: EIA Regulations' available at <http://www.google.co.za/url?sa=t&rct=j&q=EIA+regulations+guidelines+april+1998&source=web&cd=7&ved=0CD8QFiAG&url=http%3A%2F%2Fwww.cityoftshwane.co.za%2Fmcdc%2FEIA%2520Regulations%2520-%2520Guidelines%2C%2520April%25201998.doc&ei=2meGULGtPJKAhQfOpoHwCw&usq=AFQjCNHT1bP2aoZhXoQPF3tNEvGCsHf3YA> (accessed on 30 August 2012).

<sup>41</sup> GN R.1183, reg 6(1)(a)-(e).

<sup>42</sup> GN R.1183, reg 6(3)(a) read together with reg 9.

<sup>43</sup> GN R.1183, reg 6(3)(b).

<sup>44</sup> GN R.1183, reg 7.

<sup>45</sup> GN R.1183, reg 7(1)(a)-(d).

Upon receiving the plan of study, the authority could request the applicant to make amendments thereto.<sup>46</sup> Once the plan was accepted, the developer could proceed into the final stage which entailed submitting an environmental impact report.<sup>47</sup>

This report had to include 'a description of each alternative, including particulars on the extent and significance of each identified environmental impact; and the possibility for mitigation of each identified impact; a comparative assessment of all the alternatives; and appendices containing descriptions of the environment concerned; the activity to be undertaken; the public participation process followed, including a list of interested parties and their comments; any media coverage given to the proposed activity; and any other information included in the accepted plan of study'.<sup>48</sup>

The report was then reviewed by the relevant authority who could elect to either issue an authorisation with or without conditions, or the authority could refuse the application.<sup>49</sup>

The procedure set out in terms of Regulation 1183 was, however, too simplistic as it left many vital decisions to the discretion of the applicant. There were no fixed timeframes within which applications had to be finalised, nor were there any guidelines relating to the procedure to be followed in respect of the public participation process. Agreement could be reached between the applicant and the authorities relating to timeframes which would give the process flexibility taking into account the nature and complexity of the application in question but lack of legal certainty would inevitably lead to time delays.

In addition to this, shortages in capacity and resources within the respective governmental departments could add to the lengthy delays which would then simultaneously lead to inflated project costs.<sup>50</sup> It was therefore submitted that a more

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<sup>46</sup> GN R.1183, reg 7(2).

<sup>47</sup> GN R.1183, reg 8.

<sup>48</sup> GN R.1183, reg 8(1)(a)-(c).

<sup>49</sup> GN R.1183, reg 9.

<sup>50</sup> Glazewski, *J Environmental Law in South Africa* (2000) 287.



streamlined procedure be developed to aid the shortcomings of the 1997 EIA regulations.

#### **4.2.3 Regulation 1184: designation of competent authorities**

Once an activity was listed in terms of Regulation 1182, the applicant was required to apply for environmental authorisation before the activity in question could be undertaken. This authorisation had to be obtained by the relevant competent authority charged with the power to issue such authorisation. Regulation 1184 thus served to identify who the competent authority was to be approached when seeking environmental authorisation.

In contrast to the length of Regulations 1182 and 1183, Regulation 1184 simply provided that the Minister of Environmental Affairs and Tourism designated the environmental authority in each province as the competent authority to issue authorisations to undertake listed activities as provided for in Regulation 1183.<sup>51</sup> All administrative obligations were left at the discretion of the respective provinces and had to be carried out by the respective environmental departments within that province.<sup>52</sup>

#### **4.3 Case analysis of the procedural challenges under the ECA regulations**

There were several cases relating to these regulations that have come before the South African courts. Of these, two cases are directly related to the EIA regime. These are *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*<sup>53</sup> and *Eagles Landing Body Corporate v Molewa NO and Others*.<sup>54</sup>

*Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* concerned the establishment of a vineyard in the Simonstown area. The applicants wished to compel the respondents to undertake an EIA as required in terms of section 21 of the ECA which provided that the Minister may identify activities which, in his opinion, may

<sup>51</sup> GN R.1184 in GG 18261 of 5 September 1997.

<sup>52</sup> Glazewski, J *Environmental Law in South Africa* (2000) 288.

<sup>53</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C).

<sup>54</sup> *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T).

have a substantially detrimental effect on the environment. In 1997 the Minister promulgated this list. The applicants relied on item 1(j) which deals with the construction or upgrading of a dam affecting the flow of a river; item 2(c) namely the change of land use from undetermined use to any other land use and item 2(d) which entails the change of land use from used for nature conservation to any other land use.<sup>55</sup>

The applicants accordingly argued that the establishment of the vineyard was a listed activity in terms of Regulation 1182. The effect thereof was that it triggered the application of Regulation 1183 which stipulated the procedure to be followed for obtaining official authorisation.<sup>56</sup>

The court noted that the purpose of an EIA was to ensure that authorisation was obtained prior to the commencement of an activity to ascertain the likely impacts of the proposed activity on the environment. The relief sought by the applicants was therefore not appropriate in the circumstances as it would hold no legal significance in the legislative structure in which an EIA is located.<sup>57</sup>

Shortly thereafter, the courts came to a slightly different outcome in *Eagles Landing Body Corporate v Molewa NO and Others*.<sup>58</sup> This case concerned the construction of a golfing estate on the bank of the Hartebeespoort Dam (hereafter cited as the peninsula). The applicants argued that the respondents had acted contrary to section 22 of the ECA in that they had commenced with an activity listed in Regulation 1182 without obtaining the necessary authorisation.<sup>59</sup>

It was common cause that the excavations had commenced in during early 1995 and that the said regulations were only promulgated in 1997. Furthermore, Regulation 1182 stipulated that it did not find application in respect of activities which have commenced

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<sup>55</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C).

<sup>56</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C).

<sup>57</sup> *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C).

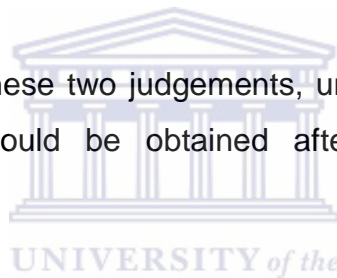
<sup>58</sup> *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T).

<sup>59</sup> *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T) at para 82.

prior to the coming into operation of the said regulation. The court was accordingly of the opinion that the construction of the peninsula was not affected by Regulation 1182 as it had commenced prior to the said regulations coming into operation.<sup>60</sup>

The court nevertheless examined the position envisaged by section 22 of the ECA to ascertain whether authorisation could be granted after an activity has been commenced with. The court held that a relatively small portion of the construction had been undertaken at the stage when authorisation was sought therefore the court decided that it was appropriate for an EIA to be requested after an activity has been commenced but prior to its completion.<sup>61</sup> According to the court, this would enhance proper compliance with provisions and ensure environmental protection and preservation as envisaged in the environmental legislation.<sup>62</sup>

Given the diverging views of these two judgements, uncertainty existed as to whether environmental authorisation could be obtained after a listed activity had been commenced.<sup>63</sup>



The set of regulations that were promulgated in terms of the ECA had been in effect for little over a year when the NEMA was enacted. Given the inherent weaknesses that were identified in terms of the regulations and the enactment of the NEMA, a new set of regulations was required.

#### **4.4 2006 EIA regulations under the NEMA**

As previously noted, the NEMA was specifically enacted to give effect to the constitutional environmental right.<sup>64</sup> It furthermore served to repeal all the provisions relating to EIAs as contained in the ECA. Chapter 5 of the NEMA was accordingly

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<sup>60</sup> *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T).

<sup>61</sup> *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T).

<sup>62</sup> *Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T).

<sup>63</sup> To remedy this situation, section 24G was inserted into NEMA which provided for applicants to apply for authorisation after a listed activity has already been commenced. See chapter 3, para 3.3.3 for full discussion.

<sup>64</sup> See chapter 3, para 3.3 for full discussion.

formulated to repeal the relevant portions of the ECA and to regulate the EIA process under the new constitutional dispensation.

Chapter 5 of the NEMA is headed 'Integrated Environmental Management' and serves to repeal sections 21, 22 and 26 of the ECA as well as all the regulations relating to environmental authorisations and EIAs. This repeal could only take effect after regulations had been promulgated under section 24 of the NEMA and the provisions contained in the ECA had become redundant.<sup>65</sup> It was only in 2006 that the first set of regulations was promulgated under the NEMA and the repeal of the relevant sections of the ECA and its regulations took effect.<sup>66</sup> Accordingly, during the period of 1999 to 2006, the ECA regime and Chapter 5 of the NEMA operated parallel to each other.<sup>67</sup>

Three government notices were promulgated under the NEMA to regulate the EIA process. The first notice related to the process to be followed to obtain environmental authorisation.<sup>68</sup> The second notice identified the activities and competent authorities in respect of which basic assessments would be required.<sup>69</sup> The final notice identified the activities and competent authorities requiring both scoping and EIA.<sup>70</sup>

#### **4.4.1 Regulation 385: 2006 EIA procedure under the NEMA**

Regulation 385 came into operation on 3 July 2006.<sup>71</sup> The main purpose of this regulation was to regulate the procedure and criteria relating to the 'submission, processing, consideration and decision of applications for environmental authorisation of activities...'.<sup>72</sup>

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<sup>65</sup> Kidd, M *Environmental Law* (2008) 198.

<sup>66</sup> GN R.614-5 in GG 28938 of 23 June 2006.

<sup>67</sup> Kidd, M *Environmental Law* (2008) 198.

<sup>68</sup> GN R.385 in GG 28753 of 21 April 2006 (hereafter cited as GN R.385).

<sup>69</sup> GN R.386 in GG 28753 of 21 April 2006 (hereafter cited as GN R.386).

<sup>70</sup> GN R.387 in GG 28753 of 21 April 2006 (hereafter cited as GN R.387).

<sup>71</sup> GN R.612 in GG 28938 of 23 June 2006.

<sup>72</sup> GN R.385, reg 2.

A new insertion into the regulations was the provision relating to combination of applications. Accordingly, an applicant who wished to undertake two or more activities as part of the same development need only complete and submit one single application form.<sup>73</sup> In the event that the activities are not undertaken in the same location, different applications had to be submitted; however the competent authority could on the written request of the applicant grant permission for a single application in respect of the different activities to be submitted.<sup>74</sup>

Another insertion into the regulations was the mandatory timeframes which the competent authority must strive to meet when handling environmental authorisations.<sup>75</sup>

A legal duty still rested on the applicant to appoint an independent consultant, however, the terminology within the regulations changed. An independent consultant is now referred to as an environmental assessment practitioner (EAP).<sup>76</sup> The regulations were however amended in December 2010 whereby the requirement of independence was extended to persons compiling specialised reports or undertaking specialised processes in relation to the application.<sup>77</sup> This amendment followed the judgement in the case of *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others*.<sup>78</sup> In this case, the court noted:

to allow for a lesser degree of independence on the part a specialist, would...seriously compromise the impartiality and integrity of the specialist's report, and thereby undermine the legitimacy and efficiency of the environmental impact assessment process.<sup>79</sup>

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<sup>73</sup> GN R.385, reg 15(1).

<sup>74</sup> GN R.385, reg 15(2).

<sup>75</sup> GN R.385, reg 9.

<sup>76</sup> Hereafter cited as EAP.

<sup>77</sup> GN R.1159 in GG 33842 of 10 December 2010.

<sup>78</sup> *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* 2011 (3) SA 55 (WCC).

<sup>79</sup> *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others* 2011 (3) SA 55 (WCC) at para 63.

Accordingly, the term independent was now defined in the regulations as ‘an EAP or person compiling a specialist report or undertaking a specialised process who has no business, financial, personal or other interest in the activity, application or appeal in respect of which that EAP or person is appointed in terms of these Regulations other than fair remuneration for work performed in connection with that activity, application or appeal; or that there are no circumstances that may compromise the objectivity of that EAP or person in performing such work’.<sup>80</sup>

It was the responsibility of the EAP to determine whether basic assessment or scoping must be applied to the application. The criterion for basic assessment was contained in ‘Government Notice No. R.386 of 2006, or a notice issued by the Minister or an MEC in terms of section 24 of the Act identifying further activities for which environmental authorisation is required and stipulating that the procedure described in Part 2 of this Chapter must be applied to applications for environmental authorisation in respect of those activities’.<sup>81</sup>

The criterion for scoping was set out in ‘Government Notice No. R.387 of 2006; or a notice issued by the Minister or an MEC in terms of section 24 of the Act identifying further activities for which environmental authorisation is required and stipulating that the procedure described in Part 3 of this Chapter must be applied to applications for environmental authorisation in respect of those activities’.<sup>82</sup>

Prior to submitting an application for basic assessment, the EAP was required to conduct a public participation process;<sup>83</sup> give written notice of the proposed activity to ‘the competent authority and organs of state which has jurisdiction in respect of any aspect of the proposed activity’;<sup>84</sup> and keep a register of all interested and affected

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<sup>80</sup> GN R.385, reg 1.

<sup>81</sup> GN R.385, reg 21(1).

<sup>82</sup> GN R.385, reg 21(2).

<sup>83</sup> GN R.385, reg 22(a).

<sup>84</sup> GN R.385, reg 22(b).

parties.<sup>85</sup> The EAP was furthermore required to ‘consider all objections and representations received from interested and affected parties following the public participation process... and subject the proposed application to basic assessment by assessing the potential impacts of the activity on the environment; whether and to what extent those impacts can be mitigated; and whether there are significant issues and impacts that require further investigation’.<sup>86</sup> Finally, the EAP had to ensure that a basic assessment report was prepared,<sup>87</sup> and that all registered interested and affected parties were given an opportunity to comment on the basic assessment report.<sup>88</sup>

The competent authority was then required to, within a period of 30 days of acknowledging receipt of an application; consider the application and the basic assessment report.<sup>89</sup> The competent authority had a choice to either grant the environmental authorisation, or it could refuse the authorisation.<sup>90</sup> If the authorisation was refused, the EAP could amend and resubmit the application.<sup>91</sup> Resubmission could however, not occur unless three years had lapsed since the initial refusal.<sup>92</sup>

In the event that scoping had been applied to an application, it was the EAPs responsibility to complete the application form for environmental authorisation in respect of the relevant activity and submit it to the competent authority.<sup>93</sup>

After submitting the application form, the EAP managing the application had to ‘conduct at least a public participation process’;<sup>94</sup> give written notice of the proposed application to ‘any organ of state which has jurisdiction in respect of any aspect of the activity’;<sup>95</sup>

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<sup>85</sup> GN R.385, reg 22(c).

<sup>86</sup> GN R.385, reg 22(d).

<sup>87</sup> GN R.385, reg 22(e).

<sup>88</sup> GN R.385, reg 22(f).

<sup>89</sup> GN R.385, reg 25(1).

<sup>90</sup> GN R.385, reg 26(1)(a)-(b).

<sup>91</sup> GN R.385, reg 25(4)(a).

<sup>92</sup> GN R.385, reg 78(b).

<sup>93</sup> GN R.385, reg 27 (a)-(b).

<sup>94</sup> GN R.385, reg 28(a).

<sup>95</sup> GN R.385, reg 28(b).



prepare a scoping report;<sup>96</sup> and 'give all registered interested and affected parties an opportunity to comment on the scoping report'.<sup>97</sup>

The scoping report had to contain all the information necessary for a proper understanding of the nature of the issues identified during scoping.<sup>98</sup> Upon completion of the scoping report, it had to be submitted by the EAP to the competent authority for consideration.<sup>99</sup>

The competent authority had a period of 30 days after receipt of the scoping report to consider the report and in writing either accept or reject it.<sup>100</sup> If the report was rejected, it could be amended and resubmitted by the EAP.<sup>101</sup> Resubmission could however, not occur unless three years had lapsed since the initial refusal.<sup>102</sup>

In the event that the report was accepted, the EAP could proceed with the preparation of the EIA report.<sup>103</sup> The EIA report had to contain, *inter alia*, a public participation process and all of the information necessary for the competent authority to consider the application and reach a decision.<sup>104</sup>

The competent authority had 60 days after receipt of the EIA report to, in writing, either accept the report; request the applicant to make amendments to the report; or reject it.<sup>105</sup> In the event that the report was rejected, the EAP could amend and resubmit the report to the competent authority for consideration.<sup>106</sup> Again, resubmission could not occur unless three years had lapsed since the initial refusal.<sup>107</sup>

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<sup>96</sup> GN R.385, reg 28(f).

<sup>97</sup> GN R.385, reg 28(g).

<sup>98</sup> GN R.385, reg 29(1).

<sup>99</sup> GN R.385, reg 30.

<sup>100</sup> GN R.385, reg 31(1)(a) and (c).

<sup>101</sup> GN R.385, reg 31(3).

<sup>102</sup> GN R.385, reg 78(b).

<sup>103</sup> GN R.385, reg 32(1).

<sup>104</sup> GN R.385, reg 32(2).

<sup>105</sup> GN R.385, reg 35(1)(a),(b) and (d).

<sup>106</sup> GN R.385, reg 35(2)(a).

<sup>107</sup> GN R.385, reg 78(b).

The competent authority had 45 days after accepting the EIA report to, in writing, either grant environmental authorisation applied for or it could refuse the authorisation.<sup>108</sup>

The public participation process which remained an inherent part of the EIA process was regulated in far more detail than before. Chapter 6 of the regulations provided that the person conducting the public participation process had to notify all interested and affected parties of the application as well as place an advertisement in a local and provincial newspaper as well as in an official Gazette.<sup>109</sup> The EAP was also required to keep a register of all interested and affected parties to the application and allow such registered persons the opportunity to comment on any submissions made in respect of the application.<sup>110</sup> In addition to this, all comments had to be recorded in the reports that were submitted to the competent authority.<sup>111</sup>

Specific provision was made for the amendment and withdrawal of environmental authorisations in Chapter 4 of the regulations. An authorisation could be amended either at the request of the holder of the authorisation or on the initiative of the competent authority.<sup>112</sup> Furthermore, the competent authority could withdraw the authorisation if any condition attached to the authorisation was not complied with; if the authorisation was obtained in a fraudulent manner; if there was misrepresentation or non-disclosure of material information; or if the activity was permanently or indefinitely discontinued.<sup>113</sup>

Finally, the regulations made provision for transitional arrangements. It provided that all pending applications or appeals that were noted in terms of the previous regulations are still to be carried out in accordance with the provisions of the earlier regulations. However, any new applications should follow the procedure as set out in the 2006 regulations.<sup>114</sup> Furthermore, the coming into effect of the 2006 regulations did not affect

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<sup>108</sup> GN R.385, reg 36(1)(a)-(b).

<sup>109</sup> GN R.385, reg 56(2).

<sup>110</sup> GN R.385, regs 57-8.

<sup>111</sup> GN R.385, reg 59.

<sup>112</sup> GN R.385, reg 39(2).

<sup>113</sup> GN R.385, reg 47(a)-(c).

<sup>114</sup> GN R.385, reg 84(1) and (3).

the continued application of the regulations in terms of the ECA.<sup>115</sup> Accordingly, anything that was done lawfully under the ECA remained lawful but any further applications for environmental authorisations had to be sought in terms of the 2006 regulations.

#### **4.4.2 Regulation 386: listed activities requiring a basic assessment process to be followed in terms of the 2006 EIA regulations**

Regulation 386 was published on 21 April 2006 and came into operation on 3 July 2006 except for items 8 and 9.<sup>116</sup> This regulation served to identify activities in respect of which basic assessments would be required. The types of activities that required basic assessments were identified on the basis of whether they fall within certain specified parameters, or below certain thresholds.<sup>117</sup> Accordingly, a total of 25 activities were identified as activities which may have a substantially detrimental effect on the environment.

The regulation also identified the competent authority in respect of the different listed activities. In respect of items 1 to 7 and items 10 to 25, the competent authority was the environmental authority in the province in which the activity was to be undertaken 'unless it [was] an application for an activity contemplated in section 24C(2) of the Act, in which case the competent authority [was] the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act as amended'.<sup>118</sup>

In respect of items 8 and 9, the competent authority was the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act, as amended.<sup>119</sup> These two items referred to reconnaissance, prospecting, mining or retention operations and the undertaking of any prospecting or mining related activity or operation. At the time of writing, these provisions have not yet come into operation.

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<sup>115</sup> GN R.385, reg 86.

<sup>116</sup> GN R.613 in GG 28938 of 23 June 2006.

<sup>117</sup> Kidd, M *Environmental Law* 2 ed (2011) 249.

<sup>118</sup> GN R.386, items 1-9 and 10-25.

<sup>119</sup> GN R.386, items 8-9.

The undertaking of any activity listed in terms of this regulation was prohibited without first obtaining environmental authorisation from the relevant competent authority. In order to obtain the required authorisation, the procedure for basic assessment as prescribed by the EIA regulations (contained in Regulation 385) had to be followed.

#### **4.4.3 Regulation 387: listed activities requiring a scoping and EIA process to be followed in terms of the 2006 EIA regulations**

Regulation 387 commenced on the same date as above except for items 7 and 8.<sup>120</sup> It served to identify activities in respect of which both scoping and an EIA would be required. A total of 10 activities were identified as activities which may have a substantially detrimental effect on the environment.

The regulation again identified the competent authority in respect of the different listed activities. In respect of items 1 to 6 and items 9 and 10, the competent authority to be approached was the environmental authority in the province in which the activity was to be undertaken 'unless it [was] an application for an activity contemplated in section 24C(2) of the Act, in which case the competent authority [was] the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act as amended'.<sup>121</sup>

In respect of items 7 and 8, the competent authority to be approached was the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act, as amended.<sup>122</sup> These two items referred to reconnaissance, prospecting, mining or retention operations and the undertaking of any prospecting or mining related activity or operation. At the time of writing, these provisions have not yet come into operation.

Similar to Regulation 386, the commencement of an activity identified in terms of this regulation was prohibited unless environmental authorisation was first obtained from the

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<sup>120</sup> GN R.614 of GG 28938 of 23 June 2006.

<sup>121</sup> GN R.387, items 1-6 and 9-10.

<sup>122</sup> GN R.387, items 7-8.

competent authority in accordance with the procedure for scoping as is laid out in terms of Regulation 385.

#### **4.5 Analysis of the procedural challenges relating to the 2006 EIA regulations under the NEMA**

One of the main objectives behind the regulations was the expediting of the authorisation process by including compulsory timeframes and setting threshold levels in respect of the listed activities.<sup>123</sup>

Provision was made for the inclusion of statutory timeframes to aid in the speed at which applications are to be finalised. The timeframes were, however, extraordinarily short and did not take into account the nature or complexity of the application. By limiting the decision making process to defined times, the competent authority would in certain instances be unable to adequately apply their minds to the project before a decision had to be made.

In addition to this, the timeframes were only triggered at a late stage of the application process, as no provision was made for adequate timeframes in respect of the scoping and assessment phases. The speed at which applications were processed and adequateness of these phases were left at the discretion of the participants. Furthermore, the provision relating to timeframes were phrased in a peremptory manner which implied that compliance was mandatory. It was noted that if timeframes were not met, regulation 9(2) required the competent authority to notify the Minister that it could not meet the timeframes but no indication was given of what steps the Minister or MEC would be entitled to take, or should take, in those circumstances.

Moreover, no time limits were set in respect of the public participation process, nor were there adequate guidelines as to what this process would entail. The effectiveness of the process was accordingly left solely at the discretion of the applicant. The inherent

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<sup>123</sup> Ministry of Environmental Affairs and Tourism 'Environmental Protection Quicker, simpler, better new EIA regulations for South Africa' available at <http://bit.ly/fsdco5> (accessed on 30 August 2012).

weaknesses identified in the 2006 the NEMA regulations necessitated the revision of these regulations.

#### **4.6 2010 EIA regulations under the NEMA**

In June 2010, a new set of EIA regulations was promulgated.<sup>124</sup> The purpose of this amendment was to further streamline the existing EIA process as well as to address the weaknesses that were identified in terms of the 2006 regulations and to make provision for the new additions made within the NEMA.<sup>125</sup> The new regulations accordingly introduced an approach whereby impacts associated with the sensitivity of the receiving environment are treated with more care. It achieved this by introducing an additional listing notice dedicated specifically to activities planned for predefined sensitive areas.

In addition to this, the list of activities requiring environmental authorisation prior to commencement of these activities was revised due to the fact that large numbers of applications associated with insignificant activities were received.<sup>126</sup> Additionally, comprehensive scoping and environmental impact report process associated with substantial costs were in some instances unjustifiably required for activities for which the impacts were known.<sup>127</sup> Three listing notices were promulgated in conjunction with the new regulations.

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<sup>124</sup> GN R.543 in GG 33306 of 18 June 2010, Listing notice 1 appeared in GN R.544 in GG 33306 of 18 June 2010, listing notice 2 appeared in GN R.545 in GG 33306 of 18 June 2010 and listing notice 3 appeared in GN R.546 in GG 33306 of 18 June 2010.

<sup>125</sup> Department of Environmental Affairs 'New Environmental Impact Assessment (EIA) regulations come into effect today' available at [http://www.environment.gov.za/?q=content/newenvironmental\\_impact\\_assessment\\_regulations](http://www.environment.gov.za/?q=content/newenvironmental_impact_assessment_regulations) (accessed on 30 August 2012).

<sup>126</sup> Department of Environmental Affairs 'New Environmental Impact Assessment (EIA) regulations come into effect today' available at [http://www.environment.gov.za/?q=content/newenvironmental\\_impact\\_assessment\\_regulations](http://www.environment.gov.za/?q=content/newenvironmental_impact_assessment_regulations) (accessed on 30 August 2012).

<sup>127</sup> Department of Environmental Affairs 'New Environmental Impact Assessment (EIA) regulations come into effect today' available at [http://www.environment.gov.za/?q=content/newenvironmental\\_impact\\_assessment\\_regulations](http://www.environment.gov.za/?q=content/newenvironmental_impact_assessment_regulations) (accessed on 30 August 2012).

#### 4.6.1 Regulation 543: 2010 EIA procedure under the NEMA

Regulation 543 came into effect on 2 August 2010 and accordingly repealed the 2006 set of EIA regulations.<sup>128</sup> The purpose of the regulations expanded on the previous set by incorporating the objectives of environmental assessments namely 'to avoid detrimental impacts on the environment, or where it cannot be avoided, ensure mitigation and management of impacts to acceptable levels, and to optimise positive environmental impacts, and for matters pertaining thereto'.<sup>129</sup>

In October 2011, the Western Cape Department of Environmental Affairs and Development Planning produced a draft information document on the guidelines, Policies and decision-making Instruments relevant to EIAs.<sup>130</sup> This document accordingly served to complement the regulations and aid both the applicants and the decision-makers in understanding what is required of them when interpreting the relevant legislation.<sup>131</sup> In addition to this information document, the department released a draft EIA guideline and information document series which deals specifically with issues such as transitional arrangements, alternatives, the public participation process, exemption applications, need and desirability, appeals, etc.<sup>132</sup>

In respect of the statutory timeframes for the handling of EIAs, the regulations provide that in the event that the competent authority was unable to meet the required timeframes, the period would automatically be extended by 60 days.<sup>133</sup> No justification

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<sup>128</sup> GN R.660-4 in GG 33411 of 30 July 2010.

<sup>129</sup> GN R.543 in GG 33306 of 18 June 2010), reg 2 (hereafter cited as GN R.543).

<sup>130</sup> Western Cape Department of Environmental Affairs and Development Planning 'Draft Guidelines: NEMA Environmental Impact Assessment Regulations Guidelines and Information Document Series' available at <http://www.westrencape.gov.za/eng/pubs/guidelines/D/149826> (accessed on 24 January 2013).

<sup>131</sup> Western Cape Department of Environmental Affairs and Development Planning 'Draft Guidelines: NEMA Environmental Impact Assessment Regulations Guidelines and Information Document Series' available at <http://www.westrencape.gov.za/eng/pubs/guidelines/D/149826> (accessed on 24 January 2013).

<sup>132</sup> Western Cape Department of Environmental Affairs and Development Planning 'Draft Guidelines: NEMA Environmental Impact Assessment Regulations Guidelines and Information Document Series' available at <http://www.westrencape.gov.za/eng/pubs/guidelines/D/149826> (accessed on 24 January 2013).

<sup>133</sup> GN R.543, reg 9(2).



was however submitted in relation to the extension period and could accordingly result in unnecessary delays.

Another new provision was the legal duty that is placed upon the applicant to give written notification to all registered interested and affected parties within 12 days of the date of a decision reached by the competent authority.<sup>134</sup>

The applicant retains the responsibility of appointing an independent EAP to undertake the specialised process. A new insertion in relation to the EAP is that interested and affected parties may now notify the competent authority if they suspect non-compliance with regulations.<sup>135</sup> The competent authority is then required to investigate the allegation. The notification must be made in writing and must contain documentation supporting the allegation.<sup>136</sup>

It furthermore remains the responsibility of the EAP to determine which assessment process is applicable to the application. There has however been a change of terminology within the regulations in the sense that the second process is no longer referred to as 'scoping' but rather the 'scoping and environmental impact reporting process'.

In respect of basic assessment applications, the EAP is now required to conduct the basic assessment after the logging of the prescribed application form. This basic assessment entails compiling a basic assessment report, however the contents thereof was expanded upon. It must still contain all of the information that is necessary for the competent authority to consider the application and to reach a decision but it must now also include, amongst others, a draft environmental management programme (EMP);<sup>137</sup> written proof of an investigation of alternatives as required by the NEMA and motivation

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<sup>134</sup> GN R.543, reg 10(2).

<sup>135</sup> GN R.543, reg 18(2).

<sup>136</sup> GN R.543, reg 18(4).

<sup>137</sup> Hereafter cited as EMP.

if no reasonable or feasible alternatives exist.<sup>138</sup> In addition to this, the basic assessment report must take into account any relevant guidelines, departmental policies and other decision making instruments adopted by the competent authority in respect of the type of activity which forms the subject of the application.<sup>139</sup>

The competent authority must, within 14 days of receipt of the basic assessment report, give written acknowledgement of receipt thereof and has an additional 30 days to consider the application.<sup>140</sup> Thereafter the competent authority has 30 days within which to make a decision on the application.<sup>141</sup>

In respect of scoping and environmental impact reporting, it remains the responsibility of the EAP to complete and submit the requisite application form. Some additions were made to the contents of the scoping report, namely:

a description of the needs and desirability of the proposed activity; a description of identified potential alternatives to the proposed activity...; copies of any representations and comments received in connection with the application or the scoping report from interested and affected parties; copies of minutes of any meetings held by the EAP with interested and affected parties and other role players which record the views of the participants; [as well as] any responses by the EAP to those representations and comments and views.<sup>142</sup>

Furthermore, the scoping report must take into account any guidelines applicable to the type of activity which forms the subject of the application.<sup>143</sup> Moreover, the EAP is required to submit detailed written proof of an investigation of alternatives as required in terms of the NEMA and motivation if no reasonable or feasible alternatives exist.<sup>144</sup>

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<sup>138</sup> GN R.543, reg 22(2)(l) and reg 22(4).

<sup>139</sup> GN R.543, reg 22(3).

<sup>140</sup> GN R.543, reg 23(2) and reg 24(1).

<sup>141</sup> GN R.543, reg 25(1).

<sup>142</sup> GN R.543, reg 28(1)(i)-(m).

<sup>143</sup> GN R.543, reg 28(2).

<sup>144</sup> GN R.543, reg 28(3).

The competent authority must, within 30 days of acknowledging receipt of the scoping report, consider it.<sup>145</sup> If the report is accepted, the EAP must be advised to proceed with the compilation of the EIA report.<sup>146</sup> This report must contain all the information necessary for the competent authority to consider the application and reach a decision which must include, amongst others, 'a description of any assumptions, uncertainties and gaps in knowledge and a draft [EMP]'.<sup>147</sup> The contents of the draft EMP are laid down in subsection 33 of the said regulations.

The competent authority must, within 60 days of acknowledging receipt of the report, in writing, either accept or reject the report.<sup>148</sup> If the report is accepted, the competent authority must, within 45 days of acceptance, either grant or refuse the authorisation.<sup>149</sup>

With regards to the environmental authorisation, it is noted that the contents thereof must include 'where applicable, the manner in which and when the competent authority will approve the EMP and the frequency of updating the [EMP]; and requirements on the manner in which and the frequency when the [EMP] will be approved, amended or updated'.<sup>150</sup>



Reference to the withdrawal of environmental authorisation has been removed from the regulations and provision has now been made for the suspension thereof.<sup>151</sup> The provisions relating to the amendment of authorisations have remained relatively the same except for the inclusion of mandatory timeframes within which the application must be considered and a decision must be reached.<sup>152</sup> Provision was also made for the amendment of EMPs; the procedure and contents thereof were expanded upon in Part 3 of Chapter 4 of the said regulations. The provisions relating to the suspension of

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<sup>145</sup> GN R.543, reg 30(1).

<sup>146</sup> GN R.543, reg 30(1)(a).

<sup>147</sup> GN R.543, reg 31(2)(m) and (p).

<sup>148</sup> GN R.543, reg 34(2)(a) and (b).

<sup>149</sup> GN R.543, reg 35(1)(a) and (b).

<sup>150</sup> GN R.543, reg 37(1)(e) and (f).

<sup>151</sup> GN R.543, chapter 4.

<sup>152</sup> GN R.543, regs 40(2),41(2),42(1) and 45(1)-(4).

authorisations are similar to the ones contained in the 2006 regulations relating to the withdrawal of authorisation.<sup>153</sup>

In respect of the public participation process, amendments were made to ensure a fairer process. To this end, provision is made for the period of 15 December to 2 January to be excluded from the public participation processes.<sup>154</sup> Timeframes were also set to regulate the public participation process, namely that a commenting authority has 40 days from the date of receipt of draft reports within which to make any comments and 60 days in respect of waste management activities.<sup>155</sup> In the event that no comments were submitted after the lapse of the respective timeframes, it should be regarded that there are no comments.<sup>156</sup> Furthermore, provision was made for the use of alternative forms of public participation, as agreed to by the competent authority, for illiterate, disabled and disadvantaged individuals.<sup>157</sup>

Finally, the regulations made provision for transitional arrangements whereby provision is made for decisions reached in respect of both the 1997 and the 2006 EIA regulations, pending applications from either of these two regimes in respect of activities that remain listed in the same format or a similarly newly listed activity as well as activities that are no longer listed.<sup>158</sup> Furthermore, the status of authorisations received prior to the coming into effect of the 2010 regulations remain unaffected and the process for withdrawing applications in respect of activities that are no longer listed are also dealt with.<sup>159</sup> In the event that an activity is no longer listed, no authorisation in respect of the proposed activity would be required, therefore the application would be automatically deemed to be withdrawn.<sup>160</sup>

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<sup>153</sup> See chapter 4, para 4.4.1 for full discussion.

<sup>154</sup> GN R.543, reg 1(3).

<sup>155</sup> GN R.543, reg 56(7) and (8).

<sup>156</sup> GN R.543, reg 56(9)(b).

<sup>157</sup> GN R.543, reg 54(2)(e).

<sup>158</sup> GN R.543, Chapter 9.

<sup>159</sup> GN R.543, regs 73-6.

<sup>160</sup> GN R.543, regs 74(2) and 76(2).

Regulation 543 is accompanied by three sets of listing notices which serves to clarify which types of activities require authorisation and under which circumstances such authorisation should be sought.

#### **4.6.2 Regulations 544, 545 and 546 in terms of the 2010 EIA regulations (listing notices)**

The three listing notices promulgated in 2010 incorporate activities that were identified in terms of the ECA regulations, the NEMA regulations of 2006 as well as newly listed activities. Listing notice one, relates to activities which will require a basic assessment.<sup>161</sup> Listing notice two, relates to activities for which both scoping and an environmental impact report is required,<sup>162</sup> whilst listing notice three, relates to activities requiring basic assessment that are undertaken in specific geographical areas.<sup>163</sup>

##### **4.6.2.1 Regulation 544: listing notice one**

Listing notice one was promulgated on 18 June 2010 and came into operation on 2 August 2010 except for items 19 and 20.<sup>164</sup> The purpose of this listing notice is to identify activities in respect of which basic assessment are required.<sup>165</sup> These activities have the potential to negatively impact the environment but due to its nature and scale, the impacts are generally known. A total of 56 activities are identified in terms of this regulation. In addition to this, the list identifies who the competent authority is in respect of the various activities.

The competent authority remains the environmental authority in the province in which the proposed activity is to be undertaken unless the proposed activity is to take place in a mining area in which case the competent authority would be the Minister of Mineral Resources.<sup>166</sup> In respect of certain activities, the regulations specifically provide that the

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<sup>161</sup> GN R.544 in GG 33306 of 18 June 2010 (hereafter cited as GN R.544).

<sup>162</sup> GN R.545 in GG 33306 of 18 June 2010 (hereafter cited as GN R.545).

<sup>163</sup> GN R.546 in GG 33306 of 18 June 2010 (hereafter cited as GN R.546).

<sup>164</sup> GN R.661 in GG 33411 of 30 July 2010. These items relate to mining and prospecting operations and therefore fall outside the ambit of the scope of study.

<sup>165</sup> GN R.544, reg 1.

<sup>166</sup> GN R.544, appendix 1.

National Environmental Management: Waste Act,<sup>167</sup> the National Environmental Management: Air Quality Act,<sup>168</sup> the National Environmental Management: Biodiversity Act, (or the Genetically Modified Organisms Act)<sup>169</sup> or alternatively the Minerals and Petroleum Resources Act<sup>170</sup> to be consulted.

Item 13 however poses some practical difficulty. It relates to the storage of dangerous goods and provides that authorisation would only be required if the proposed facilities for storage have a combined capacity of 80 but not more than 500 cubic metres.<sup>171</sup> There is no clear indication whether the combined capacity refers to the storage capacity or the potential capacity of the container in question. It is reasonable to conceive that an applicant could install a container which exceeds the specified threshold, but which is below the threshold in terms of storage capacity which would mean that no authorisation would be required.

In the event that the applicant then wishes to expand upon the storage facility, it would only trigger the expansion clause as listed in item 42 if the threshold specified for triggering an EIA of 80 cubic metres or more is reached.<sup>172</sup> If an applicant expands the facility below the expansion threshold, it would not trigger an EIA and the initial threshold level could therefore be exceeded without ever obtaining the required environmental authorisation.

#### **4.6.2.2 Regulation 545: listing notice two**

Listing notice two was promulgated on 18 June 2010 and came into operation on 2 August 2010, except for items 20 to 23.<sup>173</sup> The purpose of this listing notice is to identify activities in respect of which both scoping and an environmental impact report is

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<sup>167</sup> GN R.544, item 28.

<sup>168</sup> GN R.544, item 2.

<sup>169</sup> GN R.544, items 25-6.

<sup>170</sup> GN R.544, items 19 and 20. At the time of writing, these provisions have not yet come into operation.

<sup>171</sup> GN R.544, item 13.

<sup>172</sup> GN R.544, item 42.

<sup>173</sup> GN R.662 in GG 33411 of 30 July 2010. These items relate to mining and prospecting operations and therefore fall outside the ambit of the scope of study.

required.<sup>174</sup> These activities can be recognised by their large scale and highly polluting nature. Accordingly, the full range of potential impacts needs to be established prior to it being assessed. This regulation initially identified 25 activities that would require environmental authorisation. Shortly after its promulgation, the said regulations were amended whereby an additional activity was added to the list.<sup>175</sup> The regulation furthermore identifies who the competent authorities are.

The competent authority remains the environmental authority in the province in which the proposed activity is to be undertaken except if the activity is to be conducted in a mining area in which case the competent authority is the Minister of Mineral Resources.<sup>176</sup> Provision is also made for an applicant to consult the National Environmental Management: Waste Act<sup>177</sup> and the National Environmental Management: Air Quality Act<sup>178</sup> in certain specified circumstances.

#### **4.6.2.3 Regulation 546: listing notice three**

Listing notice three was promulgated on 18 June 2010 and came into operation on 2 August 2010.<sup>179</sup> The purpose of this listing notice is to identify activities in respect of which a basic assessment process is required if the activity that is to be undertaken is within one of the specified geographical areas indicated in the said listing notice.<sup>180</sup> Geographical areas differ from province to province. There are a total of 26 activities identified in specifically designated areas. These areas include both general areas (located outside of urban areas) and specified areas (relating to sensitive, protected and critical biodiversity areas).

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<sup>174</sup> GN R.545, reg 1.

<sup>175</sup> GN R.660 in GG 33411 of 30 July 2010.

<sup>176</sup> GN R.545, items 20-3.

<sup>177</sup> GN R.545, item 5.

<sup>178</sup> GN R.545, item 26.

<sup>179</sup> GN R.663 in GG 33411 of 30 July 2010.

<sup>180</sup> GN R.546, reg 1.



Item 3 may however pose some practical difficulties. It relates to the construction of masts or towers used for telecommunication broadcasting or radio transmissions.<sup>181</sup> It stipulates that an EIA will be triggered in the event that the mast is placed on a site that was not previously used for this purpose and will exceed 15 metres in height.<sup>182</sup>

It is conceivable that an applicant could in theory initially put up a mast that is below the specified threshold and then subsequently break it down and build a new mast on the same premises which exceeds the height requirement without triggering an EIA as the site would have previously been used for such purposes.

Given the importance of these areas, it is vital that such activities be identified to ensure that environmental authorisation is obtained. One of the methods which may be utilised to achieve this is the declaration of environmental management frameworks (EMFs).<sup>183</sup>

#### **4.6.3 Regulation 547: environmental management framework regulations in terms of the 2010 EIA regulations**

The regulations relating to EMFs were promulgated on 18 June 2010<sup>184</sup> and came into operation on 2 August 2010.<sup>185</sup> Provision was made for EMFs in terms of the 2006 EIA regulations; however the amendment to the NEMA which now recognises EMFs as an environmental instrument in its own right necessitated the promulgation of the standalone EMF regulations.<sup>186</sup>

The main purpose of the EMF regulations is to 'provide for the Minister or MEC with the concurrence of the Minister to initiate the compilation of information and maps referred to in section 24(3) of the Act specifying the attributes of the environment in particular geographical areas; for such information to inform environmental management; and for

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<sup>181</sup> GN R.546, item 3.

<sup>182</sup> GN R.546, item 3.

<sup>183</sup> Hereafter cited as EMF.

<sup>184</sup> GN R.547 in GG 33306 of 18 June 2010 (hereafter cited as GN R.547).

<sup>185</sup> GN R.665 in GG 33411 of 30 July 2010.

<sup>186</sup> The National Environmental Management Act, s24(3).

such information and maps to be used as environmental management frameworks in the consideration... of applications for environmental authorisation in or affecting the geographical areas to which those frameworks apply'.<sup>187</sup>

EMFs are accordingly aimed at promoting sustainability and co-operative governance whilst securing environmental protection.<sup>188</sup> It is therefore the responsibility of the Minister or the MEC to initiate an EMF for an area.<sup>189</sup>

In order to do so, the Minister must conduct a public consultation to inform the preparation of a draft EMF.<sup>190</sup> The development of the EMF must furthermore include an assessment of 'the need for an [EMF]; the status quo of the geographical area that forms the subject of the [EMF]; the desired state of the environment; and the way forward to reach the desired state'.<sup>191</sup>

The contents of the draft EMF are set out in regulation 4. The EMF must accordingly:

identify by way of a map or otherwise the geographical area to which it applies; specify the attributes of the environment in the area, including the sensitivity, extent, interrelationship and significance of those attributes; identify any parts in the area to which those attributes relate; state the conservation status of the area and in those parts; indicate the kind of developments or land uses that would have a significant impact on those attributes and those that would not; indicate the kind of developments or land uses that would be undesirable in the area or in specific parts of the area; indicate the parts of the area with specific socio-cultural values and the nature of those values; identify information gaps; indicate a revision schedule for the EMF; and include any other matters that may be specified.<sup>192</sup>

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<sup>187</sup> GN R.547, reg 2(1)(a)-(c).

<sup>188</sup> GN R.547, reg 2(3).

<sup>189</sup> GN R.547, reg 3(1).

<sup>190</sup> GN R.547, reg 3(2)(a).

<sup>191</sup> GN R.547, reg 3(3)(a)-(d).

<sup>192</sup> GN R.547, reg 4(a)-(k).

Once drafted, the Minister or the MEC may adopt the EMF with or without amendments and initiate it.<sup>193</sup> In the event that an EMF has been adopted and initiated, provision is made for such an EMF to be taken into account in the consideration of applications for environmental authorisation in or affecting the geographical area to which the framework applies.<sup>194</sup>

Furthermore, when an EMF has been adopted, official notification thereof must be given in the Government Gazette and it must accordingly be implemented and monitored on a regular basis to ensure that its intended purpose and goals are achieved. It may also be revised by the Minister or an MEC; however such revision must be subjected to a public participation process and once again published in the Government Gazette.<sup>195</sup>

At the time of writing, the Western Cape Department of Environmental Affairs and Development Planning in partnership with the National Department of Environmental Affairs produced a draft EMF for the greater Saldana Bay area.<sup>196</sup> The project was initiated in December 2009 and the purpose thereof was to 'provide a decision-support tool, specifically in relation to EIA applications made under section 24 of the NEMA.'<sup>197</sup>

The draft EMF comprises of three components. The first component relates to the environment *status quo*. The purpose of this component is to consider the environmental and cultural attributes of the study area in terms of the value and importance attached to the resources.<sup>198</sup> The second component relates to the strategic

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<sup>193</sup> GN R.547, reg 5(1).

<sup>194</sup> GN R.547, reg 5(2).

<sup>195</sup> GN R.547, reg 5(4)-(7).

<sup>196</sup> Western Cape Department of Environmental Affairs and Development Planning in partnership the with National Department of Environmental Affairs 'Environmental Management Framework for the Greater Saldana Bay Area' available at [http://www.nrq4sd.org/sites/default/files/default/files/content/public/new\\_s/EGM/department\\_of\\_environmental\\_affairs.pdf](http://www.nrq4sd.org/sites/default/files/default/files/content/public/new_s/EGM/department_of_environmental_affairs.pdf) (accessed on 24 January 2013).

<sup>197</sup> Western Cape Department of Environmental Affairs and Development Planning in partnership the with National Department of Environmental Affairs 'Environmental Management Framework for the Greater Saldana Bay Area' available at [http://www.nrq4sd.org/sites/default/files/default/files/content/public/new\\_s/EGM/department\\_of\\_environmental\\_affairs.pdf](http://www.nrq4sd.org/sites/default/files/default/files/content/public/new_s/EGM/department_of_environmental_affairs.pdf) (accessed on 24 January 2013).

<sup>198</sup> Western Cape Department of Environmental Affairs and Development Planning in partnership the with National Department of Environmental Affairs 'Environmental Management Framework for the Greater

analysis which serves to identify the specific attributes of the environment as well as identify the environmental management priorities of the area.<sup>199</sup> The final component is entitled the strategic environmental management plan and indicates the kind of developments that would have a significant impact on the attributes previously identified, indicates the kinds of developments would be considered undesirable in the area as well as indicating a revision schedule for the EMF.<sup>200</sup>

The use of EMF as tools to aid in decision making processes are welcomed, however, the fact that the power to initiate such frameworks rests with the Minister or an MEC may make its practical achievement very difficult due to state capacity.

#### **4.7 Conclusion**

During the period from 1997 to date, the EIA regulations underwent extensive amendments in order to expedite the environmental authorisation process. Despite the good intentions behind the successive amendments, it is clear that some ambiguity still exist. The final set of regulations have given clarity in respect of issues such as the public participation process; the requirement of independence in relation to the EAP and other persons involved in compiling the respective reports and also the provisions relating to fair process by excluding certain dates from the public participation process.

In addition to this, timeframes have been extended in respect of completion of the application processes however; these extensions are only applicable to actions taken by organs of state and does not take into account the complexity of the respective activities and difficulties that the applicants may face in meeting the timeframes.

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Saldana Bay Area' available at [http://www.nrq4sd.org/sites/default/files/default/files/content/public/new\\_s/EGM/department\\_of\\_environmental\\_affairs.pdf](http://www.nrq4sd.org/sites/default/files/default/files/content/public/new_s/EGM/department_of_environmental_affairs.pdf) (accessed on 24 January 2013).

<sup>199</sup> Western Cape Department of Environmental Affairs and Development Planning in partnership the with National Department of Environmental Affairs 'Environmental Management Framework for the Greater Saldana Bay Area' available at [http://www.nrq4sd.org/sites/default/files/default/files/content/public/new\\_s/EGM/department\\_of\\_environmental\\_affairs.pdf](http://www.nrq4sd.org/sites/default/files/default/files/content/public/new_s/EGM/department_of_environmental_affairs.pdf) (accessed on 24 January 2013).

<sup>200</sup> Western Cape Department of Environmental Affairs and Development Planning in partnership the with National Department of Environmental Affairs 'Environmental Management Framework for the Greater Saldana Bay Area' available at [http://www.nrq4sd.org/sites/default/files/default/files/content/public/new\\_s/EGM/department\\_of\\_environmental\\_affairs.pdf](http://www.nrq4sd.org/sites/default/files/default/files/content/public/new_s/EGM/department_of_environmental_affairs.pdf) (accessed on 24 January 2013).

The result may be that the proposed activity is much more complex than initially anticipated resulting in the applicant failing to meet the timeframes which are still phrased in a mandatory fashion and therefore unrealistic. An applicant may however request an extension by providing motivation which should include tasks that have been completed to date, what must still be done and reasons for delay in submission.

Despite these challenges, the 2010 EIA regulations and its accompanying listing notices have simplified the process for obtaining authorisation by clarifying which activities requires authorisation and stipulating which processes are to be followed in respect of the various listed activities. The new regulations are however considerably bulkier than the previous ones which would in all probability result in a more complex process.



## Chapter 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Summary of findings

The above is set against the backdrop that the world generally and South Africa in particular, are faced with rapidly depleting natural resources the protection of which needs to be balanced with the economic and social needs of the people. To achieve this balance, it is vital that developments are undertaken in a sustainable manner. Tools such as environmental impact assessments (EIAs)<sup>1</sup> and integrated environmental management (IEM)<sup>2</sup> are accordingly central to addressing these concerns. The effectiveness of these tools, however, remains dependant on sufficient policy, appropriate legislation regulating the protection of the environment, state capacity and the availability of resources as well as the proper implementation of the legislation.

In chapter two, it was noted that EIAs were undertaken on a voluntary basis during the 1980s.<sup>3</sup> The importance of the EIA process cannot be understated. It not only has the capability of predicting possible negative effects of proposed developments but also provides avenues to minimise; mitigate or even eliminate these impacts. To ensure effective co-ordination, the EIA process became mandatory with the introduction of the Environment Conservation Act (ECA)<sup>4</sup> in 1989 and the set of regulations that were promulgated to accompany the Act in 1997.<sup>5</sup>

In chapter three, we analysed the constitutional context. It was noted that the Constitution<sup>6</sup> made specific provision for an environmental clause<sup>7</sup> and for co-operative governance<sup>8</sup> to ensure effective co-ordination of environmental legislation.

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<sup>1</sup> Hereafter cited as EIA.

<sup>2</sup> Hereafter cited as IEM.

<sup>3</sup> See chapter 2, para 2.3.1 for full discussion.

<sup>4</sup> The Environment Conservation Act 73 of 1989 (hereafter cited as ECA).

<sup>5</sup> See chapter 2, para 2.3.1 for full discussion.

<sup>6</sup> The Constitution of the Republic of South Africa, 1996 (hereafter cited as the Constitution).

<sup>7</sup> The Constitution, s24.

<sup>8</sup> The Constitution, Chapter 3.

Accordingly, the National Environmental Management Act (NEMA)<sup>9</sup> was promulgated in 1998 to strengthen the constitutional right by providing a framework within which environmental law reform could develop.

In chapter four, we examined the various amendments made to the EIA regulations<sup>10</sup> and highlighted some of the potential grey areas in the law.<sup>11</sup> It was noted that the regulations have undergone extensive amendments since its promulgation in order to expedite the authorisation process.<sup>12</sup>

The initial set of regulations promulgated in 1997 provided clear procedural steps to be followed by the applicant. The first step was the submission of the application form. This was then followed by the submission of the plan of study for scoping and the scoping process which culminated into a scoping report.<sup>13</sup> Next was the submission of the plan of study for the EIA and the EIA phase, the result of which was an EIA report.<sup>14</sup> All plans of study required approval by the competent authorities and all reports were reviewed by the competent authorities and inputs were sought of the public.<sup>15</sup>

These regulations were subsequently amended in 2006 as well as 2010 which has resulted in a more comprehensive document. The regulations now draw a distinction between basic assessments and scoping and environmental impact assessment reports which could potentially prevent many full assessments being triggered.<sup>16</sup> An environmental assessment practitioner is furthermore required to make a value judgement to determine which activities falls into which level of investigation and to undertake the appropriate investigation.<sup>17</sup>

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<sup>9</sup> The National Environmental Management Act 108 of 1998 (hereafter cited as NEMA).

<sup>10</sup> See chapter 4, para 4.2-7 for full discussion.

<sup>11</sup> See chapter 4, para 4.6.2.1 and 4.6.2.3 for full discussion.

<sup>12</sup> See chapter 4, para 4.6 for full discussion.

<sup>13</sup> GN R 1183 in GG 18261 of 5 September 1997, regs 4-6 (hereafter cited as GN R.1183).

<sup>14</sup> GN R.1183, regs 7-8.

<sup>15</sup> GN R.1183, reg 9.

<sup>16</sup> GN R.543 in GG 33306 of 18 June 2010, reg 19 (hereafter cited as GN R.543).

<sup>17</sup> GN R.543, reg 20.



## 5.2 Recommendations based on findings

The initial set of regulations promulgated under the ECA did not contain any timeframes.<sup>18</sup> To give legal certainty and speed up the administrative process, statutory timeframes were included in the 2006 regulations.<sup>19</sup> These timeframes were however unrealistically short and were therefore extended in the 2010 regulations.<sup>20</sup>

The extension of timeframes were however only applicable to organs of state and no justification was tendered for their extension.<sup>21</sup> Accordingly, the new timeframes still fail to take into account the complexity of the particular application and the limited state capacity to ensure that all applications receive the necessary attention. Delays in processing EIA applications accordingly remain somewhat unchanged.

Building on state capacity requires extensive financial backing and given the limited financial resources available in South Africa, it is recommended that a more suitable avenue would be to have an education campaign. This campaign should be aimed specifically at the case officers charged with the responsibility of handling the large volumes of EIA applications that they receive.

The purpose of the education campaign would be to educate and inform case officers of current trends in the area of law concerned. To ensure that persons attend these workshops, a point system should be introduced whereby each case officer must accumulate a prescribed amount of points annually in order to practice within that profession. Attendance will ensure that case officers appointed by state departments have the necessary expertise in the required fields to handle the application processes in a speedier fashion.

Another provision which may pose some difficulty in practice relates to the provision for Ministers within other state departments to be consulted in respect of certain

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<sup>18</sup> GN R.1182 in GG 18261 of 5 September 1997.

<sup>19</sup> GN R.385 in GG 28753 of 21 April 2006.

<sup>20</sup> GN R.543.

<sup>21</sup> GN R.543, reg 9(2).

listed activities.<sup>22</sup> This creates the potential for conflict between different state departments and possible duplication in processes. It is therefore humbly suggested that the provisions relating to co-operative governance as contained in section 24K and the alignment of environmental authorisation as contained in section 24L of the NEMA find application.

Section 24K provides that the Minister or MEC may consult with other organs of state who share jurisdiction over a particular application to co ordinate the respective requirements of such legislation and avoid possible duplication.<sup>23</sup> Following the consultation, the Minister is empowered to enter into written agreements to avoid duplication of submission of information and carrying out of a process related to the proposed activity requiring environmental authorisation.<sup>24</sup> For this provision to work effectively, it is vital that the organ of state in charge of the authorisation process must have the necessary capacity and expertise to ensure proper compliance with the respective legislation.

In addition to this, section 24L of the NEMA provides that in the event that undertaking of a listed activity is also regulated in terms of another law, the competent authority would be empowered to exercise their powers jointly by issuing either separate authorisations or alternatively issuing an integrated environmental authorisation.<sup>25</sup>

Furthermore, in chapter 4 of this document, it was noted that some ambiguity exists in relation to the wording of item 13 of listing notice one (which deals with the storage of dangerous goods) and item 3 of listing notice three in the 2010 regulations (which deals with the constructions of telecommunication masts and towers).<sup>26</sup> In this regard, it is humbly submitted that such activities should be regarded as phased activities as provided for in items 56 and 26 of the respective regulations.

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<sup>22</sup> GN R.544-6 in GG 28753 of 18 June 2010.

<sup>23</sup> The National Environmental Management Act, s24K(1).

<sup>24</sup> The National Environmental Management Act, s24K(2).

<sup>25</sup> The National Environmental Management Act, s24L(1).

<sup>26</sup> See chapter 4, para 4.6.2.1 and 4.6.2.3 for full discussion.

A phased activity refers to activities which had commenced on or after the coming into effect of the 2010 regulations whereby one phase of the activity may be below the threshold but where the combination of phases, including expansions, will exceed the specified threshold.<sup>27</sup> This would ensure that the required environmental authorisation is obtained and that the purpose of the EIA process is not disregarded by scrupulous applicants.

Moreover, the provisions relating to EMFs are welcomed but a potential problem facing these provisions relates to the fact that the initiation thereof must occur from a relatively high level in government. It is therefore recommended that the provisions contained in section 42A of the NEMA find application.

According to this section, the MEC is empowered to delegate, by way of written agreement, any power or duty vested in him or her to any provincial organ of state, municipality, head of that MECs department or the management authority of a provincial or local protected area.<sup>28</sup> This delegation may be subject to conditions; may include the power to sub-delegate and may be withdrawn by the MEC.<sup>29</sup> It does not however prevent the MEC for exercising his or her powers personally.<sup>30</sup>

The MEC is furthermore empowered to 'confirm, vary or revoke any decision taken in consequence of a delegation or sub delegation in terms of this section, subject to any rights that may have accrued to a person as a result of the decision'.<sup>31</sup>

It is accordingly submitted that sub-delegation to lower levels in government would ensure that EMFs are initiated and maintained at grassroot levels thereby ensuring the effectiveness thereof. To ensure effective implementation, it is vital that the departments to whom this power is sub-delegated to have the necessary expertise and capacity to facilitate the initiation of the framework.

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<sup>27</sup> GN R.544 in GG 28753 of 18 June 2010, item 56.

<sup>28</sup> The National Environmental Management Act, s42A(1) and (2)(a).

<sup>29</sup> The National Environmental Management Act, s42A(2)(b), (d) and (e).

<sup>30</sup> The National Environmental Management Act, s42A(2)(c).

<sup>31</sup> The National Environmental Management Act, s42A(3).

### **5.3 Overall conclusion**

Despite the challenges discussed, EIAs and IEM remain the most practical tools for integrating environmental concerns and sustainability issues in development planning. It is therefore essential that steps be taken to ensure the effectiveness of these tools in practice.

It is only through proper implementation of the NEMA and its regulations that these tools will serve their true purpose. The importance of effective enforcement and compliance measures are critical to the efficient operation of EIAs and IEM in South Africa.

It is apparent from the research that despite the successive amendments made to the legislation and its accompanying regulations, some minor ambiguity still exists in respect of certain provisions. The advent of the NEMA brought South African environmental legislation in line with the Constitution and international trends in terms of the various instruments discussed in chapter two, but limited state capacity and resources still hamper the effectiveness of these tools. Nonetheless, the 2010 EIA regulations can be viewed as an effective regulatory system within the South African context as it gives effect to the internationally recognised principles of sustainable development, EIAs and IEM.

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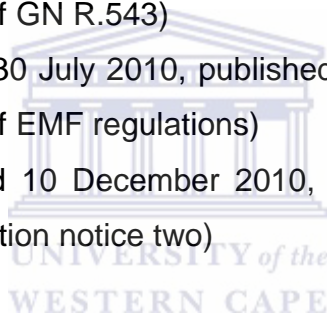
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