

**Preliminary, draft comments by the Centre for Applied Legal Studies on:
The efficacy of the South African Environmental Impact Assessment
Regime
30 April 2013**

Attention: Ms Tyhileka Madubela

1. Introduction

About the Centre for Applied Legal Studies

The Centre for Applied Legal Studies (CALs) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALs is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALs' vision is a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice.

CALs' mission is:

1. to challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations;
2. to provide professional legal representation to victims and survivors of human rights abuses;
3. to actualise a politically, socially and economically just society;
4. through a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable; and
5. to act with courage against impunity for non-compliance with human rights standards.

CALs operates across a range of areas of human rights including environmental justice. Our Environment Programme focuses on issues such as public participation in environmental decision-making processes, local economic development, governance issues and the role of the private sector. Due to our interest in environmental governance and public participation in particular, we welcome the opportunity to offer our input on the efficacy of the Environmental Impact Assessment (EIA) system in South Africa.

Purpose of this memorandum

This memorandum seeks to broadly identify issues and aspects of the EIA system that require attention and in so doing contribute to the conversation on how to achieve a more effective system. The submissions that follow are intended to be neither comprehensive nor detailed. Our aim is, instead, to make certain broad recommendations and suggestions regarding substantive and procedural areas of the EIA regime. Most

importantly we wish to positively contribute to the EIA system and, by implication, environmental management in South Africa.

The current EIA model is a systematic and integrated process based on the National Environmental Management Act (NEMA) principles¹ and, in particular the principle of sustainable development. Sustainable development aims to achieve economic development that is environmental and socially sustainable and does so by balancing and integrating environmental, economic and social goals in all planning and decision making.²

The South African EIA regime boasts admirable legislation and detailed guidelines. However, implementation is often inadequate which translates into a system whose impact is significantly lower than it is designed to effect. Realising an EIA system that delivers on its promise is a difficult task for a number of reasons. For one, environmental management is a complex area requiring the integration of many disciplines and the balancing of many values. It is thus a difficult one to master. We, however, believe that the problems encountered in the EIA are capable of being overcome or at least minimised. The goal is to have a system which promotes equitable development and environmental protection, thereby giving effect to the principles enshrined in Section 2 of NEMA. For this to happen, the core values of environmental management must be allowed to shine through each and every EIA.

2. Quality of EIA reports

2.1 Content

The EIA report (EIR) is the most crucial aspect of the EIA system, as considering and reporting on the impact lies at the core of the system. The quality of reports is imperative as sound decisions are more likely to result when decision makers have accurate information before them. Suggestions that, too frequently, the reports submitted to the Department fall short of accuracy and comprehensiveness are thus worrying.³ The benefits from producing correct and complete reports are two-fold. Firstly, only decisions based on sound scientific findings can take cognisance of the actual needs of the environment. Secondly, accuracy reduces the administrative burdens and delays associated with the submission of incomplete or inferior reports including appeals against decisions. We recognise that producing reports is a difficult exercise involving the cross-disciplinary application of knowledge, but the effect of inaccurate reports, inadequate prediction and evaluation of impacts, is fatal to the process.

2.2 Methodological soundness

¹ Contained in Section 2 of NEMA.

² NEMA Sections 2 (3), (4)(b) and (i). The definitive judicial statement on sustainable development is to be found in *Fuel Retailers Association of South Africa v DG Environmental Management, Mpumalanga Province and others* [2007] ZACC 13 at para 40-62 (*Fuel Retailers*).

³ M Kidd and F Retief "Environmental assessment in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* at 1037-1041.. Also see discussion on the quality of EIA reports by Ridl and Cousins. J Ridl and E Couzens 'Misplacing NEMA? A consideration of some problematic aspects of South Africa's new EIA regulations' (2010) 13 (5) *Potchefstroom Electronic Law Journal* 80 at 101-104.

A number of methodological shortfalls have been noted in current EIAs. Firstly, there is lack of structured methodology for assigning relative significance to potential impacts regarding the prediction and evaluation of impacts in creating EIA's.⁴ It is vital that a correct balance between socio-economic and biophysical factors must be struck when preparing the reports and that the links between the physical environment and human needs be brought to the fore.⁵ In addition, cumulative impacts are too seldom adequately addressed; this especially problematic in relation to large scale or particularly invasive projects with far-reaching impacts. EIAs should be aligned with local, provincial and national planning frameworks such as Environmental Management Frameworks (EMFs).⁶ The EIA process should, at all times, and by all persons involved, be considered an integral part of the planning process and not simply a hurdle to cross for a development project.

2.3 Procedure

As early as the screening process, the design of a project has often, to a large extent, been pre-determined. The EIA procedure is not always diligently applied and due consideration is not always given to alternatives at an early stage in the development of a proposal.⁷

2.4 Sufficient checks on quality

A formalised, implementable and iterative review process must be established to monitor the quality of EIA reports. This would be able to detect scoping reports that have been supplemented with information and pass as EIAs, an issue which has been detected.⁸ The adequacy and comprehensiveness of the reports must be assessed regularly by an independent party.

2.5 Mitigation and no-go options.

Extension and clarification of the no-go option must be formulated. This will help protect the most ecologically sensitive areas from being irreversibly undermined. This will also ease demands on the department's capacity as certain areas, for example the surroundings of UNESCO World Heritage Sites will not be the subject of applications. Developments too seldom err on the side of caution and less harmful alternatives (including the scenario of no development) are not always thoroughly considered.

2.6 Role of Environmental Assessment Practitioners (EAPs)

The quality of a decision can only be as good as the quality of the report on the decision maker's desk which, in turn, hinges on calibre of the EAP's work. At present, the competence and integrity of EAPs vary greatly. The conviction of an EAP in 2011 for negligently failing to undertake a wetland study for the proposed site for the Pan African Parliament highlighted this problem while also constituting a stride in holding practitioners

⁴ Kidd and Retief (note 1 above) 1040.

⁵ Ibid.

⁶ As regulated by Section 24 (2) of NEMA and Gn. R.547 of 18 June 2010 ("EMF Regulations).

⁷ C Wood 'Pastiche or postiche? Environmental impact assessment in South Africa' (1999) 81 (1) *South African Geographical Journal* 52 at 53-54; Kidd and Retief (op cit).

⁸ Ridl and Couzens (note 1 above) at 102.

accountable.⁹ As EAPs receive much of their income from developers there is a potential threat to their independence.¹⁰ Consequently the profession of environmental assessment practitioners (EAPs) needs to be more effectively regulated. Any regulatory body would need to have teeth to provide a further disincentive¹¹ to collusion with the developer.

3. Impact of EIA regime

3.1 Influence on decision-making

The impact of EIA's is far-reaching. They are designed to provide the primary source of information that the relevant authority relies on when deciding whether to permit a particular land use in a particular area. These decisions must be based on verifiable scientific environmental findings and able to withstand critical analysis and scrutiny.

In reality, EIA findings do not always influence the decision to approve the development and grant the authorisation required in order to commence construction to the extent to which was intended. EIA are often seen by developers as a hurdle in the way of the development.

The decision process must involve a dialogue between different disciplines including law, environmental sciences, spatial planning and sociology. Decisions must be guided by the imperative of sustainable development and thus must integrate environmental, economic and social concerns.¹² Decisions should not assess the impact in isolation but should pay attention to the possible cumulative effect of the development. Further, decisions will need to align with applicable spatial planning frameworks, environmental mapping and strategic environmental assessments (SEAs).¹³

3.2 Monitoring

This is a major issue. There is not sufficient monitoring of compliance after decision-making.¹⁴ Mechanisms to periodically monitor the implementation of EIAs need to be further developed. One possibility might involve increasing the regularity of external audits that must be checked by the DEA. The EIA process places the highest emphasis on the stages leading up to the record of decision, with less concern for the monitoring and auditing impacts.¹⁵ Much focus surrounds the project specific EIA, and focus has been up to and no further than the decision on the project. EIA conditions are seldom properly implemented in practice in construction

⁹ *S v Stefan Frylink and Mpfu Environmental Solutions CC* Regional Division of North Gauteng. Judgment on 6 April 2011 (unreported).

¹⁰ Discussed in Ridl and Couzens at 101.

¹¹ In addition to formal legal sanctions.

¹² NEMA Sections 2 (3), (4)(b) and (i).

¹³ A review by Retief found the main weaknesses of SEAs in South Africa included a lack of influence over both the contents of EMPs and on decision-making. Retief 'Effectiveness of strategic environmental assessment (SEA) in South Africa' (2007) 9 (1) *Journal of Environmental Assessment, Policy and Management*, 83-81 as discussed in Kidd and Retief (note 1 above) at 1041.

¹⁴ *Ibid* at 1030.

¹⁵ *Ibid* at 1038.

projects. What is required is a transparent review process for all aspects of environmental management with comprehensive feedback mechanisms. There should be a standing project level committee to monitor and ensure implementation of the EMP and the conditions of authorisation. The committee must have power to inspect all project related documents and project sites and order stoppage if so required. A review of EIR quality is also an important aspect of measuring the effectiveness of the EIA process.

It seems that a more rigorously enforced implementation management system is needed for monitoring, controlling and evaluating the effects of development. Equal emphasis must be placed on follow up activities, including research to improve analysis and administration. The holistic approach towards EIAs signifies a corresponding increase in the need for environmental assessment reviews that do not only concentrate on regulating project design but also on implementation management and monitoring.

3.3 Are there formal mechanisms for periodic review of the system?

Technology and environmental science are constantly changing. The evolution of environmental science is a constant and the EIA must be as living as the environment which it protects. A regular review of the EIA legislation / Regime is proposed, an internal review every 4 years and an external review every 6 years. These time frames should allow the department to quantify its success and failures accurately.

3.4 Enforcement

There has been an increase in enforcement activities including the imposition of sanctions, and the establishment of the Green Scorpions, in recent years¹⁶ but it is possible that more creative enforcement mechanisms are required. Enforcement must be strong enough to deter crimes and to result in the reduction of environmental harm. The majority of environmental protection measures for projects lack enforceability. The increase in fines is the step in the right direction. However this does not seem to be deterring multinational companies. Creative penalties are therefore required. The Johannesburg Stock Exchange (JSE) has set up a Socially Responsible Investment (SRI) Index, which was developed in response to the debate around sustainability globally and, particularly, in the South African context.¹⁷

The JSE constantly measures company's performance on sustainability and good practices.¹⁸ Reviews take place annually during the second half of each year, with results usually announced at the end of November each year.¹⁹ We suggest setting up a similar system but which applies to all companies and provides for sanctions, regular monitoring and reporting. The sanction might be public shaming of the company as a transgressor of environmental law. The use of public shaming exercises is potentially effective and could involve mandatory publication or broadcasting of violations and penalties that would deter others from

¹⁶ Kidd and Retief (note 1 above) at 1042.

¹⁷ Explained on the JSE Website. <http://www.jse.co.za/Investor-Relations/Sustainability/Socially-Responsible-Investment-Index.aspx>.

¹⁸ Ibid.

¹⁹ Ibid.

following this path and suffering reputational damage. Negative publicity can directly affect share prices and impact the areas of business which businesses value, namely profits.

3.5 Efficiency and capacity

3.5.1 Collaboration and communication between departments

Environmental concerns touch on all aspects of life and must be integrated into the work of all government institutions. Collaboration between government departments as NEMA seeks to achieve²⁰ is required to align the current fragmented and disjointed environmental governance effort by numerous organs of state operating in different spheres of government, which would promote the concept of integrated environmental governance. This would encourage the adoption of a holistic and integrated process. This element of integration cannot be overstated, as all elements of the environment are linked. All the role players in environmental governance should therefore take account of these connections.

3.5.2 Does department have sufficient capacity?

Despite having well developed regulatory framework, South Africa does not have the capacity or the institutions to fully implement these regulations. Three issues that might underpin the lack of capacity are outlined in the following sub-headings. At the same time, recent initiatives by the department to increase the efficiency of the system (and hence reduce the demand on capacity) must be recognised. The 2010 EMF regulations were introduced, alongside new EIA regulations²¹ to empower the Minister or the relevant MEC to initiate the development of an Environmental Management Framework (EMF) for particular areas.²² As Kidd notes²³, this tool, by identifying the nature and the strategy for an area allows the department to concentrate its efforts on authorisations in the most sensitive areas.

3.5.2.1 Role of multiple stages and decision points in straining capacity

Alleviating the strain on the department's capacity might involve reducing the number of formal decisions required by officials, streamlining the EIA Process by reducing the number of steps between the application and the decision. An attempt must be made to identify any unnecessary steps or processes and to eliminate them if they exist.

3.5.2.2 Are EAP's sufficiently well trained or qualified?

Strides must be made to develop databases on relevant expertise to address any gaps in expertise. This task might be performed by the single EIP society/association which we hope will emerge.

²⁰ The principle of co-operative environmental governance is recognized in NEMA at Subsection 2 (4) (l) and given effect to throughout the act in particular in Chapter 3 ('Procedures for co-operative governance).

²¹ Gn. R.660 of 30 July 2010.

²² EMF Regulations (note 6 above).

²³ M Kidd 'Legislation' *Juta's Quarterly Review of Environmental Law* July to September 2010 (3).

3.5.2.3 What resources are required for regime to work as intended?

It is understood that capacity has been greatly improved in the environmental arena but is still not optimal. An increase in the number of officials with the skills to process applications is crucial to get to the root of the problem. Regular training courses and seminars would serve to improve institutional capacity.

3.6 Public Participation

Public participation is a pre-requisite for ensuring that development meets the socio-economic needs, and consistent with the environmental well-being, of all sectors of society. Public participation is a key weakness of the South African EIA regime; this is worrisome as participation is a key element in the preparation of the EIA. Problems include domination of the process by consultants, facilitators' lack of sensitivity to issues of culture and power (including gender), and inadequate dissemination of information to the communities. Other concerns include the adequacy of notification methods and the logistical constraints experienced by interested and affected parties.

There seems to be a lack of understanding of the purpose and value of public participation amongst some conducting the process. The value of local knowledge cannot be overstated. A holistic understanding of impacts is not achievable without public participation. Technical assessment and public participation are equally important and consultants should be mutually accountable for their efforts. Both technical *and* sociological (including the interests of affected communities) realities need to be clearly and accurately reflected in the EIA report; otherwise officials will not have before them sufficient information to make a sound decision on whether to give the proposed development the go-ahead. Ultimately the views and concerns interested and affected people, including local communities, must have an impact on the design of the development and on the decision to grant environmental authorisations.

3.6.1 Sufficient dissemination of information?

Low levels of literacy, other socio-economic disadvantages, limited access to transport and communications infrastructure and the lack of established mechanisms for public involvement are factors that assist in denying rural communities full participation. Language is a massive barrier to the dissemination of information.

3.6.2 Effective participation

Effective participation requires the public to understand the basic environmental principles in order to effectively participate in EIA's and in the broader process of realising sustainable development and resource use. It has been observed that in this country the participation process often mirrors and reinforces social and economic differentiation as the disadvantaged are often not served well by the process. For example traditional leaders at times play a preponderant role in the discussions despite the fact that their interests may diverge from less advantaged members of the community. Consultants and

I&AP's need to forge a greater level of cooperation, to ensure that results of the process addresses the needs of the disadvantaged rather than serving the interests of the empowered few.

Traditional hierarchies pose challenges to meaningful and inclusive participation as certain groups, for example women, are excluded from decision-making. Too frequently developers act on the assumption that leaders speak on behalf of and represent the wishes of all their constituents. The inclusion of all interested and affected parties in environmental governance is crucial, with the aim of achieving equitable and effective participation. The process of facilitation and negotiation must be accompanied by proper training and information sharing. Consultants must be acutely aware of gender and other power dynamics within the community.

Participation processes must be tailor made to suit the particular dynamics of the community. Getting around the disparities in power might require creative solutions such as special forums for women and youth, where members of these groups can discuss their views candidly away from the influence of powerful patriarchs and without fear of any repercussions.

3.6.3 Forming a culture of compliance

One must build a culture of compliance through the dissemination of knowledge about environmental processes, sustainable development and the costs of non-compliance with environmental laws. Environmental considerations need to be mainstreamed; that is, they need to be factored in at every stage of planning and development processes. The targets of dissemination efforts therefore include communities, private sector developers, parastatals and organs of state. Although levels of awareness of the environment and sustainable development have increased since the establishment of the NEMA regime, it remains uneven. Much work still needs to be done until the reach and quality of understanding is sufficient to achieve mainstreaming in practise. Raising awareness must therefore be at the forefront of the department's concerns.

4. Suggestions

4.1 Incorporate insights of resilience

Resilience is a newly emerging environmental governance paradigm based on recent developments in environmental science²⁴ and one that has recently received policy sanction by its employment in the *White Paper on Climate Change* which makes "climate resilient development" a central goal.²⁵ The resilience of a system is defined in terms of its ability to adapt without discarding its essential structure and properties. Adaptability to change and the availability of multiple mechanisms to perform essential functions (hence the failure of one mechanism is not fatal) are cornerstones of a resilient system. One implication for systems of

²⁴ See JB Ruhl 'General design principles for resilience and adaptive capacity in legal systems – with applications to climate change adaptation' (2010-2011) 89 *North Carolina Law Review* 1373.

²⁵ Departments of Environmental Affairs and Water Affairs *White paper on the national climate change response* G.N. No. 757 of 2011.

governance like the EIA system is the importance constant information gathering, assessments of the system in light of new information and adjustments (where necessary). As a consequence record keeping and a formalised, iterative process of EIA system review is paramount importance.

4.2 Additional method of assessment (to take account of levels of impact)

The system should use the preponderance of its capacity on the more significant environmental impacts. This is, in part, accomplished through having differing levels of assessment intensity. This is already provided for by the division between activities requiring a basic environmental assessment and those requiring a full two-stage scoping and EIA assessment. The possibility of an additional level (whether intermediate or an even more simplified process for low impact activities) could be considered.

4.3 Training, support for officials

The core of the capacity problem is of too few officials processing too many applications. This can be remedied by a significant expansion of the number of officials with environmental assessment skills. The department might establish partnerships with universities to establish a large scale training programme which would be coupled with an aggressive, highly publicised recruitment drive.

4.4 Regulating environmental practitioners

Efforts to regulate the sector would benefit from the establishment of a single professional body the membership of which would be compulsory to practice as an EIP. It should be empowered by statute to investigate and discipline members who have conducted themselves dishonestly, negligently and/or in breach of basic standards of professionalism. This should, in addition to civil and criminal sanctions, provide a further disincentive to fraud or malpractice.

4.5 SRI Index

The Johannesburg Stock Exchange (JSE) has developed a system called the Socially Responsible Investment (SRI) Index, which was developed in response to global and domestic debate around sustainability and corporate social responsibility more broadly. The system involves constant measurement of the company's performance on sustainability and good practices by the JSE. Reviews take place annually during the second half of each year, with results usually announced at the end of November each year. A similar system might be established for environmental compliance. This might be mandatory for all companies and could involve constant monitoring and report submission. The sanction for non-compliance could involve public shaming of the offending companies. The use of public shaming exercises are effective and could be used by publishing or broadcasting violations of prosecutions and penalties that would deter transgressions and encourage compliance in fear of reputational damage. Widely disseminated negative publicity can directly affect share prices and impact the areas of business which business value, namely profit.

4.6 Post-authorisation monitoring

One possibility for tightening the monitoring system is through increasing the regularity of external audits that must be checked by the DEA to ensure compliance. For ultra high-impact projects requiring the full scoping and EIA process (perhaps further criteria could be defined to narrow down this group) the law could require a standing project-level committee to monitor and ensure the implementation of the EMP. The committee would need the power to inspect all project related documents and project sites and order stoppage if so required.

4.7 EIA Dictionary

An EIA dictionary of standard usages might be created for everyone involved in the sector including the department, EIPs, civil society and communities.

4.8 EIA's should formally include climate change

Climate change impacts on every aspect of the environment including water resources and eco-systems thereby jeopardising the very services on which we depend. It should therefore be compulsory to account for climate change, both in terms of the development's carbon footprint and the interaction of the development with the effects of climate change.

4.9 Public participation

A brief fieldwork exercise should be undertaken at the project initiation stage, in order to get a basic understanding of who the public is, the main groupings in the public (with a focus, in particular, on identifying vulnerable groups and the holders of power), their priorities and their education levels. Only then should a public participation programme be set up.

The process of consultation must be accompanied by proper training of the community on the public participation process and on the content and process of EIAs. Information disseminated to the community must be accurate, comprehensive but also presented in a manner accessible to them. Effective audio-visual communication will be essential for illiterate members of the community.

Issues need to be viewed through the lens of gender and consultants must also be mindful of culture. Creative solutions to power imbalances might include separate consultation sessions restricted to women (and for any other identified vulnerable groups including the youth), to create a forum for open discussion without fear of repercussion that is insulated from the influence of powerful male figures.

4.10 Introduction of awareness programmes

It is vital that all consultants involved in facilitating public participation and in running the broader EIA process are sensitive to social dynamics. Programmes to raise awareness amongst this group should be considered.

Possible methods could include lectures to the Environmental Assessment Practitioners Association of South Africa (EAPASA), workshops, short courses and handbooks. Partnerships between *inter alia* the DEA, EAPASA and civil society organisations could co-ordinate such efforts.

5. Conclusion

We thank you for this opportunity to comment on the EIA system and look forward to participating further in the national dialogue. For queries or further information please contact Lisa Chamberlain (Deputy Director) at lisa.chamberlain@wits.ac.za or 011 717 8624, Robert Krause (Researcher) at Robert.Krause@wits.ac.za or 011 717 8615 or Louis Snyman (Attorney) at Louis.Snyman@wits.ac.za or 011 717 8629.

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