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Pipelines, Airports, and Waterfront Development in Ethekwini (Durban), South Africa

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Above view of crowded low cost residential housing settlement landscape in Durban, South Africa @Shutterstock

The concept of integrated environmental management, with its environmental management tools of environmental impact assessment and strategic environmental assessment, entered South African law and policy in the early 1990s. The Environment Conservation Act 73 of 1989 made provision for the declaration of an environmental policy for the country and for environmental impact assessments for specified “listed activities”. This statute survived the transition from apartheid to South Africa’s democratic governance in 1994.

1. INTRODUCTION

The regulations that provided the procedure for environmental impact assessments and the notice determining the list of activities requiring environmental authorization, were promulgated some years later, in 1997. In the next year, landmark environmental legislation followed in the form of the National Environmental Management Act 107 of 1998 (“NEMA”), described as “framework” legislation under which key statutes termed “specific environmental management Acts” could

be introduced.¹ In addition to providing the foundation for the legislation that was to follow, NEMA carried into effect the constitutional imperatives imposed on the state by section 24 of the South African Constitution that affords everyone the right to an environment that is not harmful to their health or wellbeing, and compels the state to enact legislation (and use other measures) to give effect to this right. Importantly, NEMA binds all organs of state to principles of sustainable development and all

¹ NEMA lists these as: the Environment Conservation Act 73 of 1989; the National Water Act 36 of 1998; the National Environmental Management: Protected Areas Act 57 of 2003; the National Environmental Management: Biodiversity Act 10 of 2004; the National Environmental Management: Air Quality Act 39 of 2004; the National Environmental Management: Integrated Coastal Management Act 24 of 2008; the National Environmental Management: Waste Act 59 of 2008; the World Heritage Convention Act, 1999 49 of 1999, and any regulation or other subordinate legislation made in terms of any of those Acts.

people to a duty of care to the environment. As a result, South Africa has a suite of excellent environmental legislation, underpinned by a progressive constitution.

Despite the quality of its legislation, environmental standards continue to drop (measured by declining water quality, rising air pollution and loss of biodiversity), particularly in urban areas.

This study examines the reasons for this apparent contradiction and how the better use of available environmental management tools in planning may improve urban environmental health and quality of life.

The study concludes with suggestions as to how urban planners may better use the environmental tools at their disposal.

2. SELECTED CITY: ETHEKWINI METROPOLITAN MUNICIPALITY (DURBAN)

Durban is chosen for the case studies because of its size, demography, varied geographic properties and rich biodiversity.

It is the largest city in the province of KwaZulu-Natal and the third most populous urban area in South Africa after Johannesburg and Cape Town. It is the second most important manufacturing hub in South Africa after Johannesburg. Durban is the busiest port in Africa and serves as a trade gateway into the continent. It is a major centre of tourism because of the city's warm subtropical climate and extensive beaches.

The greater Durban area includes Traditional Council Areas (formerly known as Tribal Authority Areas), increasing its diversity for study purposes.

The city is approximately 2,297 square kilometres in extent and has a population of approximately 3.5 million people making it one of the biggest cities on the Indian Ocean coast of the African continent.

Cultural influences that must be accommodated in planning have their origins in the Zulu people, indentured Indian labourers and colonial Britain. Zulu is the most widely spoken language.

South Africa is the third most biodiverse country in the world² and Durban contains:

- Three of the country's nine terrestrial biomes;
- Eight broad vegetation types, some of which are rare, threatened or irreplaceable;

- Over 2,000 plant species;
- 97 kilometres of coastline with a diversity of beach types and productive rocky shores;
- 17 river catchments and 16 estuaries;
- 4,000 kilometres of rivers; and
- An open space system of approximately 75,000 ha (2010/2011), representing almost one third of Durban's total municipal area.

The biological richness of Durban's environment provides valuable "ecosystem goods and services". The challenge that faces environmental managers is how to control the exploitation of this natural capital so that its benefits can be unlocked, without compromising its sustainability.

3. IDENTIFICATION OF KEY ISSUES AND STAKEHOLDER INPUT

The questionnaire in Appendix 1 was used to solicit stakeholder opinion on the key issues examined in the study from:

- Officials in the three spheres of government (national, provincial and municipal);
- Representatives of state-owned enterprises involved in infrastructure development (Eskom, Telkom, Transnet);
- Traditional Councils (Qadi, Ximba, KwaCele);
- Environmental and environmental justice, non-government organizations (NGOs) (Wildlife and Environment Society of Southern Africa, South Durban Community Environmental Alliance);
- Practitioners in the urban development field (environmental assessment practitioners; environmental specialists, town, and regional planners);
- Private developers.

² Endangered Wildlife Trust (2002). The Biodiversity of South Africa 2002: Indicators, trends and human impacts.

3.2. Key issues are set out in Table 1.

TABLE 1

EXAMPLES OF DEVELOPMENT PROCESSES AND ISSUES	SPECIFIC QUESTIONS
1. DEVELOPMENT WITHOUT EIA ³	<ul style="list-style-type: none"> (i) Are you aware of any major urban developments that proceeded without an EIA? If so, please identify the most significant. (ii) Why was there no EIA? (iii) Was any environmental process followed (e.g. section 31A of the ECA⁴ or section 28 of NEMA⁵)? (iv) What planning process was followed, if any? (v) Were social, economic, and environmental issues nevertheless addressed sufficiently?⁶ (vi) Was D'MOSS⁷ involved?
2. DEVELOPMENT WITH EIA	<ul style="list-style-type: none"> (i) Have you been satisfied that environmental and social issues have been addressed adequately in the EIA processes in which you have participated in your official capacity? (ii) Do public participation processes ensure that interested and affected parties are sufficiently informed about proposed developments? (iii) Are interested and affected parties given any/enough assistance to participate in the EIA process where these skills are lacking? (iv) Are environmental assessment practitioners sufficiently competent to prepare assessment and specialist reports? (v) Do assessment authorities have sufficient competence and capacity? (vi) Do the outcomes of EIAs generally serve the best interests of the community in which the proposed development is planned? (vii) Are all stakeholders in EIA processes treated equitably? (viii) Is the legislation (and regulations) governing EIA processes easy to understand? (ix) Did input from interested and affected parties influence the assessment of impacts in the EIA? (x) Did input from interested and affected parties affect the decision of the authority?

³ EIA in this context refers to any formal environmental assessment process, including Basic Assessment, Scoping and Environmental Impact Reporting, Strategic Environmental Assessment, Reports/assessments in terms of section 28 of NEMA, and compliance with section 31A of the Environment Conservation Act 73 of 1989.

⁴ Environment Conservation Act 73 of 1989.

⁵ National Environmental Management Act 107 of 1998.

⁶ Section 2(3) of NEMA, which is binding on all organs of state, requires that "development must be socially, environmentally and economically sustainable".

⁷ The Durban Metropolitan Open Space System, or D'MOSS, is a system of open spaces, some 74,000 ha of land and water, that incorporates areas of high biodiversity value linked together in a viable network of open spaces (eThekweni Municipality official website).

3. NEGATIVE IMPACT ON COMMUNITIES DESPITE EIA
- (i) Are you aware of projects that have harmed communities (socially, economically, or environmentally), despite the undertaking of an EIA?
 - (ii) If the answer to (i) was affirmative, was the fault with:
 - (a) the process;
 - (b) the quality of the EIA;
 - (c) the decision of the authority?
 - (iii) What was the level of public participation in the process:
 - (a) high;
 - (b) acceptable;
 - (c) poor?
 - (iv) Were interested and affected parties from “poor communities” (informal and low-income housing areas) represented in the public participation process?
 - (v) Were poor communities assisted by any organ of state to gain a better understanding of the process and the development proposal?
 - (vi) Did poor communities comment on any of the documents made available during the process?
 - (vii) Were the EIA documents made available in Zulu where the development affected predominantly Zulu-speaking people?
 - (viii) Where scoping preceded EIA, were all relevant issues accurately and completely captured?
 - (ix) Were the concerns of interested and affected parties dealt with in the EIA? If yes:
 - (d) were recorded but not addressed;
 - (e) were dealt with and dismissed;
 - (f) were reflected in the assessment of impacts and the authorization;
 - (g) made a significant impact on the decision of the authority?
 - (x) Were the negative impacts mostly:
 - (h) social;
 - (i) economic;
 - (j) environmental?
 - (xi) Was community “sense of place”⁸ considered in the process?
4. EXAMPLES OF DEVELOPMENT BEING BLOCKED BY EIA
- (i) Are you aware of any developments being “blocked” by the findings of the EIA? If yes, was it because:
 - (a) the process was flawed;
 - (b) social and/or impacts on the affected community were excessive;
 - (c) environmental impacts were excessive or could not be mitigated adequately or at all;
 - (d) the proposed development was considered undesirable and/or not in the public interest;
 - (e) the project was not financially viable?
5. CHANGE OF PROJECT OR LOCATION BECAUSE OF EIA
- Do you know of instances where either a project or its location was changed because of the findings of the EIA?
6. INFLUENCE OF CLIMATE CHANGE IMPACT ON SELECTION, SITING, PLANNING, AND IMPLEMENTATION OF PROJECT
- (i) Is climate change a significant factor in decisions of:
 - (a) private sector developers?
 - (b) government (all three spheres)?
 - (ii) Is climate change adequately identified and dealt with competently in EIAs?
 - (iii) Are you aware of any projects that were materially affected because of climate change findings in the EIA?
 - (iv) Does the impact of climate change feature in:
 - (a) the guidance provided to developers/EAPS by departmental assessment officials;
 - (b) the decisions of the authority?

⁸ The combination of factors that give a community an identity, shared culture and values, social cohesion, quality of life and wellbeing.

7. CONFLICT BETWEEN EIA AND OTHER POLICIES AND/OR LEGISLATION ⁹	<ul style="list-style-type: none"> (i) Are you aware of instances where an EIA has contradicted any non-environmental legislation or policy? (ii) Has any legislation or policy interfered with any EIA in which you have been involved? (iii) In your experience, has an EIA ever stood in the way of urban development, social development programmes or economic development where poor or vulnerable communities were the beneficiaries?
8. INFLUENCE OF EIA ON CITY WIDE URBAN DEVELOPMENT PLAN	<ul style="list-style-type: none"> (i) Does EIA (including its counterparts – SEA and EMF) influence city wide urban planning? (ii) Are environmental considerations taken into account sufficiently in the compiling of the City's IDP,¹⁰ SDF,¹¹ SDP,¹² LAP¹³ or Precinct Plans?
9. EIAs THAT DID NOT ADEQUATELY ADDRESS ISSUES OF VULNERABLE POPULATION GROUPS (E.G. WOMEN, CHILDREN AND MINORITY GROUPS)	<ul style="list-style-type: none"> (i) In EIA, are vulnerable population groups treated: <ul style="list-style-type: none"> (a) fairly (no differently to others); (b) specially; (c) poorly? (ii) Is there discrimination against vulnerable groups in EIA?
10. FOLLOW UP AND MONITORING AFTER APPROVAL OF DEVELOPMENT	<ul style="list-style-type: none"> (i) Are the conditions of approval of environmental authorizations sufficiently monitored and enforced? (ii) If not, what are the reasons? (iii) Has the non-enforcement of conditions of approval/authorization led to: <ul style="list-style-type: none"> (a) serious environmental degradation; (b) harm to vulnerable communities?
11. DOES EIA FULFIL THE OBJECTIVES GOOD GOVERNANCE CONTEMPLATED IN NEMA?	<ul style="list-style-type: none"> (i) That the law develops a framework for integrating good environmental management into all development activities; (ii) that the law should promote certainty regarding decision-making by organs of state on matters affecting the environment; (iii) that the law should establish principles guiding the exercise of functions affecting the environment; (iv) that the law should ensure that organs of state maintain the principles guiding the exercise of functions affecting the environment; (v) that the law should establish procedures and institutions to facilitate and promote cooperative government and intergovernmental relations; (vi) that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance; (vii) that the law should be enforced by the state and that the law should facilitate the enforcement of environmental laws by civil society.
12. GENERAL ISSUES OR NON-SPECIFIC QUESTIONS OR COMMENTS	Questions: Comments:

3.3. The responses to the questions indicated the following broad trends:

Officials in all spheres of government had confidence in EIA as an effective tool in environmental decision making with the following reservations:

- environmental consultants were not truly independent, despite the requirement of the legislation that they be so, because the developer paid them;
- the environment is low on the political agenda, resulting in environmental compromises;
- they (the officials) are perceived as being an obstruction to development;
- developers cannot be trusted.

⁹ Note D'MOSS is treated as a "planning layer" in the eThekweni Land Use Management Scheme and therefore has the effect of law.

¹⁰ Integrated Development Plan.

¹¹ Spatial Development Framework.

¹² Spatial Development Plan.

¹³ Local Area Plan.

State-owned enterprises and developers consider environmental processes to be onerous, unduly complicated, the cause of serious delays in major projects, and unnecessarily costly.

Traditional Councils consider public participation processes to be inadequate, they are not consulted but merely requested to comment on development proposals, that members of their communities are not made aware of environmental processes, and that they lack sufficient knowledge or expertise to review EIA documents competently.

NGOs have little faith in the integrity of EIA processes, distrust developers and their consultants, consider public participation processes to be inadequate and generally consider the process to favour developers.

4. THE LEGAL FRAMEWORK

4.1. Constitution

South Africa's Constitution¹⁴ provides for government in three spheres: national, provincial and local. The environment is a "concurrent" legislative competence in the hands of national and provincial government. De facto environmental management is generally carried out at the municipal level, often with unfunded mandates resulting in the inadequate allocation of resources to protect the environment.

Section 24 provides as follows: 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) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Subsection (a) has both physical (health) and emotional or spiritual (wellbeing) dimensions. In EIA processes, the physical impacts of a development are generally dealt with comprehensively. "Wellbeing" because it is not easy to define, is often overlooked or dealt with inadequately in social impact assessments. It is common practice to conflate social impacts with economic impacts in a "socio-economic" assessment. In the process, negative social impacts are juxtaposed with economic benefits, often expressed as work opportunities. No account is taken of the potential loss of "sense of place" of a community or its individual members. There is often a misplaced belief that a poor rural community is prepared to give up their way of life to make way for commercial or industrial development on their land.

Subsection (b)(iii) introduces a theme that runs throughout the Constitution and the environmental legislation that it enjoins the state to promulgate – the need to balance ecologically sustainable development and the use of natural resources with the imperative to promote "justifiable economic and social development". The harsh reality is that where a balance cannot be achieved, social and economic development considerations trump environmental protection. Politically, promoting what are perceived to be the more important constitutional rights of access to adequate housing (section 26), and healthcare, food, water and social security (section 27) will always take precedence over environmental rights. Similarly, with an official national unemployment rate of around 27 per cent, "environment" is readily traded for "development" that promises jobs.

Against these negative observations are the following positive features of the Constitution:

- (a) The environmental rights created by section 24 are available to all;
- (b) Section 38 extends locus standi people acting as embers of, or in the interests of, a group or class of persons and anyone acting in the public interest.
- (c) Importantly, constitutional environmental rights have been recognized by South African courts and are justiciable.¹⁵

Property rights (which are not limited to land¹⁶) are protected by section 25 which provides as follows:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application:
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;

¹⁴ Constitution of the Republic of South Africa, 1996.

¹⁵ Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province and Others, 2007 (6) SA 4(CC).

¹⁶ See section 25(4)(b).

- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

Property rights are strongly protected, notwithstanding the obligation on the state in subsections (5) to (9) of section 25 to ensure equitable access to land by all, to provide security of tenure and redress for those who were dispossessed by apartheid, restoration of land or compensation for those who lost ownership of land, and the obligation to enact legislation to give effect to the foregoing.

The doctrine of eminent domain is recognized in South African law and plays no part in environmental and social impact assessments. Land may only be taken for a public purpose, not for private economic gain.

4.2. National legislation

Environmental management

(The state's response to the obligation imposed on it by section 24(b) of the Constitution to ensure that everyone has the right "to have the environment protected, for the benefit of present and future generations, through reasonable and other measures" was the promulgation of the National Environmental Management Act 107 of 1998 (NEMA).

Section 2 of NEMA 17 provides for national environmental management principles that apply to the actions of all organs of state that may significantly affect the environment. These principles:

- (i) apply alongside all other appropriate and relevant considerations, including the state's responsibility to respect, protect, promote, and fulfil the social and economic rights contained in the Constitution, and in particular, the basic needs of categories of persons disadvantaged by unfair discrimination;
- (ii) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of the Act, or any statutory provision concerning the protection of the environment;
- (iii) guide the interpretation, administration and implementation of the Act, and any other law concerned with the protection or management of the environment.

In effect, all administrative actions by officials in all organs of state in terms of any legislation concerned with the protection or management of the environment are governed by the principles contained in section 2 of NEMA. Therefore, these principles apply to all urban planning and development decisions as such

decisions are concerned with the "management" and, at times, the protection of the environment. EIA processes are concerned with both the protection and management of the environment.

The principles are wide ranging and include the following:

- (i) environment management must put people and their needs at the forefront of its concern;
- (ii) environmental degradation (in all its forms) must be avoided, or where it cannot be avoided altogether, must be minimized and remedied;
- (iii) the "precautionary principle" (expressed as "a risk averse and cautious approach, which takes into account the limits of current knowledge") must be applied to decisions concerning the environment;
- (iv) "cradle to grave" responsibility applies to actions that may affect environmental health;
- (v) the "polluter pays" principle applies to those who cause pollution to the environment;
- (vi) public participation in environmental decisions must be ensured;
- (vii) environmental justice must be pursued to avoid the unfair distribution of adverse environmental impacts, especially to ensure that there is no discrimination against vulnerable people or people disadvantaged by unfair discrimination;
- (viii) there must be equitable access to environmental resources, especially by vulnerable or disadvantaged people;
- (ix) the vital role of women and children must be recognized and their full participation in environmental management must be promoted;
- (x) special attention must be given to sensitive, vulnerable, highly dynamic, or stressed ecosystems;
- (xi) In theory therefore, the relevant authorities involved in all aspects of spatial planning and land use management must apply these principles. Properly applied, these principles should ensure that decisions involving the use of land are wise, are taken in or after consultation with interested and affected parties, best serve the public interest, and protect the environment without impeding economic development;
- (xii) Section 24(1) of NEMA makes EIA (either in the form of a "basic assessment" or the more comprehensive "scoping and environmental impact reporting") mandatory if "listed activities" are to be undertaken. The national Minister of Environmental Affairs is empowered in terms of section 24(2)(a) of NEMA to identify activities that may not commence

¹⁷ See Appendix 2.

without environmental authorization from the competent authority.¹⁸

- (xiii) The EIA process that must be followed to obtain an environmental authorization is set out in EIA Regulations¹⁹ promulgated by the Minister of Environmental Affairs in terms of section 24(5)(a) of NEMA. The process will be dealt with below.

Town Planning

The Constitution places town planning in the exclusive executive and legislative competence of municipalities.²⁰ Urban planning and development is accordingly controlled at the lowest level of government. Communities therefore have direct access to planning processes and can shape social, economic and environmental policy. Through input into the various planning layers, from broad municipality-wide “integrated development plans”, which set out the strategic social, economic, and environmental goals of the municipality, and are embodied in “spatial development frameworks” to “local area plans”, detailed “precinct plans” and “land use management schemes” (previously called “town planning schemes”). The various planning tools and “package of plans” used in land-use planning are set out diagrammatically in Appendix 4.

The Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”) is the principal national legislation directly governing urban planning.²¹ Section 7 of SPLUMA sets out five development principles that apply to spatial planning, land development and land-use management. These are aimed broadly at redressing the spatial and other development inequities created by the apartheid regime, and the creation of viable communities, in compact urban settlements with adequate access to infrastructure and environmental resources.²²

SPLUMA empowers municipalities to pass planning bylaws, which must be consistent with its provisions. Bylaws provide the procedure that must be followed in land use and development applications, specify the information that an applicant must provide in its application, and guides municipal planning authorities on the matters to be considered when dealing with an application.

In terms of SPLUMA, municipal planning tribunals and planning authorities may not make decisions that are inconsistent with the municipality’s spatial development framework²³, except where site-specific circumstances justify this²⁴

Durban adopted, but not yet promulgated, its spatial planning and land use management bylaws as most other municipalities in the province. The planning procedure is governed by the KwaZulu-Natal Planning and Development Act 6 of 2008 (PDA), which will become obsolete when all municipalities in the province

have bylaws.²⁵

The relationship between environmental and planning legislation and the processes that are followed to obtain their respective approvals will be discussed below.

4.3. Provincial legislation

Provincial environmental legislation is limited and deals exclusively with nature conservation and the protection of biodiversity. The KwaZulu-Natal Nature Conservation Ordinance 15 of 1974 provides for the protection of fauna and flora in the province. Unless protected species are affected during the course of urban development, it does not feature in the process. However, the nature conservation authority established in terms of the KwaZulu-Natal Nature Conservation Management Act 9 of 1997 (in the form of the KwaZulu-Natal Nature Conservation Management Board and the KwaZulu-Natal Nature Conservation Service, also known as Ezemvelo KZN Wildlife) is one of the organs of state that has a duty to comment on all changes in land use that may affect the biodiversity of the province. Once a very active participant in planning and environmental processes, its lack of financial resources has limited the role of the conservation authority to applications that may have an impact on protected areas.

Post-apartheid provincial planning legislation exists only in the province of KwaZulu-Natal and only in the form of the PDA discussed above. As observed, is limited to providing the procedure in municipalities that do not have spatial planning and land-use management bylaws.

4.4. Municipal bylaws

Municipal bylaws provide for environmental health controls. Municipalities also implement national air quality legislation. The environmental branches of municipal management play a significant role in urban planning applications, in commenting on land use applications to the municipality. In the case of Durban, the environmental branch enforces compliance with the municipality’s open space system and demands that, where listed activities requiring environmental authorization under NEMA will be undertaken, that environmental authorization be obtained prior to the lodging of the planning application.

The approach of the municipality is that a change in land use should not be permitted if there is no guarantee that environmental authorization will be forthcoming. Legally, this is not the correct approach and adds significantly to the time taken to obtain approval for proposed developments. Inevitably, developers blame the EIA process for the ensuing delays as they see it as an intervention in the planning process.

¹⁸ The minister may also identify areas where activities may be undertaken without environmental authorisation (section 22(2)(b)) and areas in which no environmental authorizations may be issued, in order to protect the environment (section 24(2A)).

¹⁹ The current regulations are the EIA regulations, 2014 (as amended by Government Notice 326 of 7 April 2017).

²⁰ Section 156(1)(a) of the Constitution gives municipalities executive authority in respect of, and the right, to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, one of which matters is “municipal planning”.

²¹ Other related legislation includes Local Government: Demarcation Act 27 of 1998; Local Government: Municipal Structures Act 117 of 1998; Local Government Transition Amendment Act 52 of 1997; Local Government: Municipal Systems Act 32 of 2000; Promotion of Administrative Justice Act 3 of 2000; Municipal Property Rates Act 6 of 2004; and Intergovernmental Relations Framework Act 13 of 2005.

²² See the SPLUMA development principles set out in **Appendix 3**.

²³ Section 22(1) of SPLUMA.

²⁴ Section 22(2) of SPLUMA.

²⁵ The appeal provisions of the PDA were found to be unconstitutional in that the appeal tribunal was appointed and administered as a provincial authority, thus falling foul of the determination by the Constitution that municipal planning was the exclusive domain of municipalities. See *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and others* 2016 (4) BCLR 469 (CC).

The Constitution requires all spheres of government (national, provincial and municipal) and all organs of state within each sphere to respect the constitutional status, institutions, powers and functions of government in the other spheres,²⁶ and not to assume any power or function except those conferred on them in terms of the Constitution.²⁷ The Constitution also requires all spheres of government and all organs of state to cooperate with each other in mutual trust and good faith, and to coordinate their actions and legislation with each other.²⁸

Consistent with this constitutional directive, the EIA Regulations require the process it prescribes to be aligned with and run concurrently with applications in terms of any other legislation, where the processes inform each other. This makes sense in the planning context as many issues overlap²⁹ and generally it is the same community or communities that are likely to be interested or affected by the decisions in each process.

In practice, while there is cooperation between organs of state, they still tend to operate within silos, each somewhat jealously protecting their turf. This does not make for efficient land development processes.

Section 2(3) of NEMA demands that “development must be socially, environmentally and economically sustainable”. The EIA process requires that social, environmental and economic issues (social and economic often being conflated) be balanced in any development. This does not mean they must be “equal” but assessed to ensure that the positive and negative impacts are distributed equitably between developers and affected communities.

The legal mechanisms are in place to ensure that environmental review influences planning processes, and should, if the benefits to society are outweighed by the disadvantages to society (usually manifested by negative social and environmental impacts), the development should not be approved.

4.5. Administrative justice and access to information

Central to environmental justice is access to information and just administrative action. The Constitution provides for this in sections 32 and 33 respectively. Flowing from the Constitution are the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Clear mechanisms exist to enable interested and affected parties to obtain information in the possession of the state and private persons if the information is required for the protection of any of their constitutional rights. Everyone is entitled to an administrative process that is fair, the right to reasons for administrative actions, and the right of judicial review of flawed decisions.

Both statutes play an important role in ensuring planning and environmental

processes are conducted in accordance with the law. In the first instance, the relevant organs of state recognize and respect the right of people to access to information and to a procedure that is fair, as determined by PAJA. In the second, South African courts have shown a willingness to enforce the provisions of PAIA and PAJA, which serves as a deterrent to organs of state to deny people their rights under sections 32 and 33 of the Constitution.

5. INSTITUTIONAL STRUCTURES

As observed above, the environment is the concurrent legislative, administrative and executive competence of national and provincial government. The national Minister of Environmental Affairs is the political head of the Department of Environmental Affairs. The minister and his or her department coordinate national legislation and policy.

In KwaZulu-Natal, the Member of Executive Council (MEC): Economic Development, Tourism and Environmental Affairs is the provincial “minister” and directs provincial legislation and policy.

Section 24C(1) of NEMA requires the Minister of Environmental Affairs, when listing the activities for which environmental authorization is required, must identify the competent authority for such authorization. Currently, the competent authority for all EIAs is the provincial MEC responsible for the environment³⁰ except EIAs:

- where the proposed development has international implications or the development footprint crosses provincial or international boundaries;
- in which any organ of state is an applicant;
- will take place in a nationally proclaimed protected area, or other conservation areas under the control of a national authority, for which the Minister of Environmental Affairs is the competent authority.

The provincial and national departments of environment affairs, administer the EIA process, and their respective Heads of Department and Director General make decisions and issue environmental authorizations. These officials act under delegated authority from their respective ministers.³¹

EIAs in respect of activities related to mining are an anomaly. The competent authority is the Minister of Mineral Resources, and the national Department of Mineral Resources administers the EIA process.

Appeals against decisions on EIAs are dealt with by:

- the Minister of Environmental Affairs, where the decision was made by the heads of the national Departments of Environmental Affairs and of Mineral Resources;

²⁶ Section 41(1)(e).

²⁷ Section 41(1)(f).

²⁸ Section 41(1)(h)(iv).

²⁹ For example, both processes must consider traffic impacts, the impacts on sense of place, need and desirability, the likelihood of noise, air and light pollution, social, economic and environmental impacts.

- provincial MECs where the decision was made by the head of the relevant provincial Department of Environmental Affairs.

Appeals against decisions on EIAs seldom succeed, irrespective of whether the appellant is the developer or an interested and affected party. The reasons are twofold:

- First, by the time the EIA is completed, all (or most) issues are identified and dealt with, usually persuasively by the developer's consultant team and specialists, and the relevant assessing officer is inclined to approve the application, sometimes making the environmental authorization subject to conditions to appease opponents of the development;
- Second, the minister or MEC is likely to be influenced by officials of the department he or she oversees, and for whom she or he is politically accountable and will be hard pressed to contradict their findings.

Appeal panels are appointed by the minister and MECs. However, panel members, too, are likely to have a stronger allegiance to the departmental officials than to developers. The panel is also likely to be influenced by the quality of the environmental reports supporting the decision, which are generally superior to the submissions of interested and affected parties, who seldom have the time or resources to provide environmental reports that compete with those of the developer.

The processes prescribed by the EIA Regulations, and the National Appeal Regulations, 2014,³² favour developers.

Public participation in the EIA process is limited to the right to comment on all reports, documents etc. contained in the basic assessment reports, scoping reports, or environmental impact assessment report. The opportunity to comment usually arises only once in respect of each of these reports. The period for comment must be at least 30 days, the latter being the usual time allowed. Where the EIA consists of voluminous and complex specialist reports compiled over many months, and even in relatively simple reports, this is wholly inadequate. Even well-resourced interested and affected parties are hard-pressed to make meaningful input into the process. The developer has the right to respond to all comments received and therefore has the final word on the issues before the competent authority considers them.

Any person aggrieved by a decision of the competent authority has the right to appeal. The appeal regulations require an appellant to lodge an appeal within 20 days of being notified of a decision. Considering that the decision is based on what are usually complex impact assessment reports and the decision, with its record of decision and reasons, may also be complex and require specialist input, 20 days within which to file a complete and comprehensive appeal, is also wholly inadequate. In short, the odds are stacked against interested and affected parties.

State-owned entities and companies³³ are responsible for most public infrastructure

and related services. They provide national roads, multi-purpose pipelines, port facilities, dams and water supply pipelines, railways, national and international airports, electricity supply and telecommunications.

These state-owned entities and companies are deemed organs of state and, while being "developers", must comment on all EIAs if their areas of operation will be affected. Getting timely comment from these entities is difficult and can delay both EIA and planning processes. This is despite regulation 2(2) of the EIA Regulations, 2014 which requires state departments to comment on EIAs within 30 days from the date upon which they were requested to comment, failing which, they will be deemed to have no comment. This is of no assistance when the state department clearly should comment on the application, and no decision should be made without such comment. The only recourse in such circumstances is to the court, which itself, is can be a lengthy and expensive process.

6. ENVIRONMENTAL MANAGEMENT TOOLS

The Minister of Environmental Affairs may identify geographical areas based on environmental attributes and specify spatial tools and environmental assessment applicable to these areas to determine if environmental authorization is required for specified activities, or where environmental authorization is not required.³⁴ These tools and instruments include:

- environmental management frameworks (EMF);
- strategic environmental assessments (SEA);
- environmental impact assessments (EIA);
- environmental management programmes (EMPr);
- environmental risk assessments;
- environment feasibility assessments;
- norms or standards;
- spatial development tools;
- minimum information requirements;
- any other relevant environmental management instrument that may be developed in time.

The most widely used of these instruments is an EIA.

SEA is used informally by developers who wish to establish the environmental constraints to the development of a property or area, and more formally by municipalities as a precursor to the adoption of an EMF.

EMF is a potentially important instrument and has started to gain traction with municipalities. An EMF identifies the biophysical attributes of the municipality on a spatial framework plan and imposes development constraints, ranging from the total prohibition of activities, limitations on development or the requirement that

³⁰ In the case of KwaZulu-Natal, the competent authority is the MEC: Economic Development, Tourism and Environmental Affairs.

³¹ Powers of delegation are derived from section 42 of NEMA in the case of the national minister, and section 42A in the case of the MECs.

³² Published in Government Notice R.993 of 8 December 2014.

environmental authorization be obtained for activities that would otherwise not require this.

While a municipality does not have the power to identify activities for which environmental authorization is required under section 24(1) of NEMA, included in the activities identified by the Minister of Environmental Affairs under this section, are activities that appear in “Listing Notice 3”,³⁵ where these activities are to be undertaken in sensitive areas as identified in an environmental management framework.

Durban’s “Metropolitan Open Space System” (D’MOSS) is an important tool developed by the eThekewini Municipality. It has a similar effect to EMF, although the environmental controls are imposed as a town planning “layer” in the municipality’s Land Use Management Scheme. D’MOSS is an important tool in the municipality’s climate protection strategies. It is described as follows:

- D’MOSS is a system of open spaces, some 74 000 ha of land and water, that incorporates areas of high biodiversity value linked together in a viable network of open spaces. It comprises both private and public land.
- D’MOSS conserves many of South Africa’s threatened ecosystems and species including: the endangered Sandstone Sourveld grasslands; the critically endangered *Brachystelma natalense* (a small herbaceous plant); and the endangered Oribi, Spotted Ground Thrush, and Pickersgill’s Reed Frog. D’MOSS assists the province and the country in meeting biodiversity conservation targets.
- D’MOSS provides a range of ecosystem goods and services to all residents of Durban, including the formation of soil, erosion control, water supply and regulation, climate regulation, cultural and recreational opportunities, raw materials for craft and building, food production, pollination, nutrient cycling, and waste treatment.
- From a climate adaptation perspective, the biodiversity that is protected within D’MOSS plays an important role. The impacts of sea-level rise, for example, can be reduced by ensuring the protection of well vegetated fore-dunes and setting coastal developments back from vulnerable areas. Increased flood events can be moderated by ensuring that wetlands and floodplains are protected and, where necessary, rehabilitated. Predicted increased temperatures can also be alleviated by D’MOSS as vegetated areas help to reduce temperatures.
- D’MOSS also plays a substantial role in climate change mitigation. Research undertaken in 2006 found that D’MOSS stores the equivalent of 24.7±0.6 million tons of carbon dioxide. In addition, it

was conservatively calculated that it sequesters between 31,000 and 36,000 tons of carbon dioxide per annum. Wetlands and forest ecosystems store the most carbon, while disturbed woodlands and alien thickets store the least. These more degraded D’MOSS areas offer restoration opportunities using poverty alleviation projects, providing benefits to biodiversity, people and the climate.

EMPrs are an integral part of EIAs and must be submitted with EIA reports for approval with the issue of an environmental authorization. EMPrs serve the useful purpose of managing impacts during the construction and operational phases, and ensuring compliance with the conditions of environmental authorization.

It is usual for an environmental authorization to stipulate as a condition of approval, that an independent environmental compliance officer (ECO) must be appointed to manage and implement the EMPr for the construction phase, and if appropriate, post construction and operational phases, for the lifespan of the development. The ECO is required to submit audit reports to the environmental authority. Where there are non-compliances, the authorities generally take action, their task being made easier by having the independent audit report on which they can act. This can create tension between the ECO and the developer, as it is the latter who appoints and pays the ECO.

7. NON-COMPLIANCE WITH ENVIRONMENTAL LAWS

The minister and MEC have the power under sections 31B and 31C of NEMA respectively, to designate environmental management inspectors (EMI) with mandates to enforce NEMA and specific environmental Acts, in part or in full.³⁶ Subject to any constraints in their designations, EMIs have wide powers of inspection and seizure of evidence. EMIs enforce environmental legislation (criminal action aside) by way of compliance notices issued under section 31L of NEMA.

Because of requirements of PAJA, that a person who faces administrative action must be given notice of any impending action, and the right to make representations as to why the action should not be taken, an EMI must give notice of the intended action in writing by way of a “pre-compliance notice”. This notice affords the recipient the opportunity to make representations within a stipulated period, usually 14 or 30 days depending on the urgency, why a “compliance notice” should not be issued. If the environmental transgression is serious or is likely to cause irreversible environmental harm, then both the pre-compliance notice and compliance notices may stipulate that the offending activity should cease immediately. The recipient has the right to object to the notices and may apply to the minister or MEC for a directive suspending the operation of the compliance notice, pending the outcome of the objection. Where ongoing harm is perceived, the minister or MEC is unlikely to suspend the compliance notice from taking immediate effect.

³³ Transnet State Owned Company Limited (road transport, rail, ports, multipurpose petroleum pipelines); South African National Roads Agency; Eskom Limited; Telkom Limited; various water utility enterprises.

³⁴ Section 24(2) read with section 24(5)(bA) of NEMA.

³⁵ Published in Government Notice 324 of 7 April 2017 (amending Listing Notice 3 published in Government Notice 985 of 4 December 2017).

Apart from prohibiting the continuation of the offending activity, the compliance notice may issue directives as to rehabilitation of the affected environment and the implementation of measures to prevent ongoing environmental harm.

Where circumstances dictate, compliance notices can be issued verbally, but must be followed up with a written notice as soon as is practicable.

Contraventions of NEMA and specific environmental Acts carry substantial criminal sanctions (fines of up to R10 million, or imprisonment of up to 10 years, or both) and may be accompanied by clean-up or rehabilitation costs, which could run into millions of rand.

8. EIA AND RELATED PROCESSES

Land development invariably involves multiple processes. As observed above, there is a close relationship between EIA and town planning processes. There are also linked processes under specific environmental Acts which also require authorization for specified activities:

- Water uses listed in section 21 of the National Water Act require a water use licence;
- Atmospheric emissions require an Atmospheric Emission Licence under the Environmental Management: Air Quality Act;
- Waste management activities require a Waste Management Licence under the National Environmental Management: Waste Act.

EIA is the environmental assessment procedure that must be followed in applications

for licences under these specific environmental Acts.

Applications for exploration, prospecting and mining rights, and mining permits require the undertaking of EIA, either in the form of a basic assessment if there is no processing of minerals on site, and if no activities in Listing Notice 2 will be undertaken, or scoping and environmental impact reporting if such activities will be undertaken.

While mining and urban development may be separate activities, large-scale urban development that requires construction materials in the form of sand and stone can provoke mining activities near or on land designated for urban development.

9. THE EIA PROCESS

The EIA Regulations determine two forms of process:

- Basic assessment, which must be followed for activities appearing in Listing Notices 1 and 3;
- Scoping and environmental impact reporting, which must be followed for activities appearing in Listing Notice 2.

An applicant for environmental authorization must appoint an independent environmental assessment practitioner (EAP) to manage the EIA process.

The EAP must determine if basic assessment or scoping and environmental impact reporting must be followed.

³⁶ The Ministers of Water Affairs and Sanitation, and Mineral Resources also have the power to appoint EMIs to enforce the legislation under their administration.

Basic assessment

TIME FRAME	PROCEDURAL STEP	COMMENTARY
	<p>PRELIMINARY STEPS</p> <p>Appointment of EAP</p> <p>Pre-application consultation with assessing officer (optional)</p>	<p>This part of the process is voluntary. The applicant and/or EAP can streamline the process, while observing the statutory timeframes.</p> <p>I&APs do not have the same right. Potential prejudice to stakeholders.</p> <p>The competent authority must inform the applicant of any factors that may prejudice the application (regulation 8).</p>
START	SUBMIT APPLICATION FORM AND PAY APPLICATION FEE	Sets out basic information about the applicant, the property involved in the application and the development. Supporting documents (title deeds, proof of company registration etc.)
90 DAYS FROM APPLICATION APPLICANT CAN REQUEST THIS TO BE EXTENDED TO 140 DAYS	<p>PREPARE BASIC ASSESSMENT INCLUSIVE OF SPECIALIST REPORTS (BAR)</p> <hr/> <p>CONDUCT PUBLIC PARTICIPATION</p> <hr/> <p>SUBMIT BAR AND INCLUDE COMMENTS FROM I&APs</p>	<p>The EAP and specialist undertake studies determined by the nature of the development and the biophysical attributes of the land and the receiving environment. Includes social and economic impacts, need and desirability.</p> <hr/> <p>Minimum of 30 days. Methods of giving notice stipulated in regulation 41, includes notice by post, placing notice board on site, advert in local newspaper.</p> <hr/> <p>BAR and specialist reports, together with comments received, and applicant's responses (if any). The report must conform to Appendix 1 of the regulations, which stipulates the content and methodology.</p>
107 DAYS FROM RECEIPT OF BAR	COMPETENT AUTHORITY DECISION	Application reviewed by assessing officer and departmental specialists.
5 DAYS FROM DECISION	COMPETENT AUTHORITY NOTIFIES APPLICANT OF DECISION	Must be in writing.
14 DAYS NOTIFICATION OF APPLICANT	APPLICANT NOTIFIES I&APs OF DECISION AND RIGHT OF APPEAL	Must be in writing and may include advertisement in the same newspaper in which notice of the application was given.
20 DAYS OF NOTIFICATION OF DECISION	LODGE APPEAL SUBMISSION WITH MINISTER/MEC	Severely limits the ability of I&APs to lodge a competent appeal unless.
20 DAYS OF RECEIPT OF APPEAL SUBMISSION	APPLICANT/DECISION-MAKER/I&AP RESPONDING STATEMENT	The appellant has no right to reply to the responding statement. This is a departure from the usual rules of debate and is prejudicial to the Appellant.
	DECISION ON APPEAL	These timeframes are seldom met, especially if an expert or appeal panel is appointed. The appeal authority is expected to make a decision within 20 days of receiving the appeal administrator's recommendation.
50 days	If no appeal panel or expert	
70 days	If appeal panel or expert	
At same time as appeal decision	NOTIFY APPELLANT AND APPLICANT/DECISION-MAKER/I&AP OF APPEAL OF DECISION	There is no further right of appeal. Recourse is to the Supreme Court by way of a judicial review application.

Scoping and Environmental Impact Reporting

Scoping and Environmental Impact Reporting (S&EIR) must be applied to all activities appearing in Listing Notice 2. This is a more comprehensive form of investigation of issues and determined either the magnitude of the development (area to be developed, storage volume, output, or throughput). Normally a wide range of specialist studies are required.

TIME FRAME	PROCEDURAL STEP	COMMENTARY
	PRELIMINARY STEPS	As for BAR. This part of the process is voluntary. The applicant and/or EAP can streamline the process, while observing the statutory timeframes.
	Appointment of EAP	I&APs do not have the same right. Potential prejudice to stakeholders.
	Pre-application consultation with assessing officer (optional)	The competent authority must inform the applicant of any factors that may prejudice the application (regulation 8).
START	SUBMIT APPLICATION FORM AND PAY APPLICATION FEE	Sets out basic information about the applicant, the property involved, and the development. Supporting documents (title deeds, proof of company registration etc.)
44 DAYS FROM APPLICATION	PREPARE SCOPING REPORT	The EAP and specialists investigate issues determined by the nature of the development and the biophysical attributes of the land/receiving environment. Includes social and economic impacts, need and desirability. Receive public input solicited by written invitations, newspaper advertisements and public meetings.
	SUBJECT SCOPING REPORT TO PUBLIC PARTICIPATION PROCESS OF NOT LESS THAN 30 DAYS	Minimum of 30 days. Methods of giving notice stipulated in regulation 41, includes notice by post, placing notice board on site, advert in local newspaper.
	SUBMIT SCOPING REPORT AND INCLUDE COMMENTS FROM I&APs AND COMPETENT AUTHORITY	This part of the process is intended to solicit comments and receive information from I&APs. Invariably, scoping consists of presentations by the applicant and consultants at public meetings. These are often perceived as the applicant's marketing of the project and not the opportunity to engage with the consultants meaningfully.
	SCOPING REPORT MUST COMPLY SUBSTANTIALLY WITH APPENDIX 2 OF THE EIA REGULATIONS	
43 DAYS FROM RECEIPT OF SCOPING REPORT	COMPETENT AUTHORITY DECISION ON SCOPING REPORT	Competent authority must accept scoping report, or refuse environmental authorization if the proposed activity conflicts with legislation, or if the report does not comply with Appendix 2.
106 DAYS INCLUDING PUBLIC PARTICIPATION OF NOT LESS THAN 30 DAYS	COMPLETE STUDIES, COMPILER ENVIRONMENTAL IMPACT REPORT (EIR) AND MUST COMPLY WITH APPENDIX 3	The EIR builds on the scoping report. Scoping may reveal new impacts and/or concerns raised by specialists, I&APs, or competent authority and these must be dealt with by additional or more comprehensive reports.
APPLICANT CAN EXTEND TO 156 DAYS IF CHANGES ARE NEEDED	ENVIRONMENTAL MANAGEMENT PROGRAMME (EMPr)	
	MUST COMPLY WITH APPENDIX 4 INCLUDE COMMENTS FROM I&APs AND COMPETENT AUTHORITY	
107 DAYS FROM RECEIPT OF EIR AND EMPr	COMPETENT AUTHORITY DECISION	Must grant or refuse environmental authorization. Environmental authorization must comply with and contain the information set out in regulations 25 and 26.
14 DAYS NOTIFICATION OF APPLICANT	APPLICANT NOTIFIES I&APs OF DECISION AND RIGHT OF APPEAL	Must be in writing and may include advertisement in the same newspaper in which notice of the application was given.
20 DAYS OF NOTIFICATION OF DECISION	LODGE APPEAL SUBMISSION WITH MINISTER/MEC	Severely limits the ability of I&APs to lodge a competent appeal
20 DAYS OF RECEIPT OF APPEAL SUBMISSION	APPLICANT/DECISION-MAKER/I&AP RESPONDING STATEMENT	The appellant has no right to reply to the responding statement. This is a departure from the usual rules of debate and is prejudicial to the appellant.
	DECISION ON APPEAL	These timeframes are seldom met, especially if an expert or appeal panel is appointed. The appeal authority is expected to make a decision within 20 days of receiving the appeal administrator's recommendation.
50 days	If no appeal panel or expert	
70 days	If appeal panel or expert	
At same time as appeal decision	NOTIFY APPELLANT AND APPLICANT/DECISION-MAKER/I&AP OF APPEAL OF DECISION	There is no further right of appeal. Recourse is to the Supreme Court by way of a judicial review application.

Environmental authorizations may be amended by the competent authority to cure clerical errors or by the applicant on application to the competent authority. Non-substantive amendments are dealt with administratively and without public participation. Notice of the amendment and the right of I&APs to appeal the decision is usually required to be published in a local newspaper. Substantive amendments which increase impacts or change the scope of the proposed developments must be supported by appropriate impact and assessment reports and will be subjected to the same or similar public participation process required for basic assessment and S&EIR.

An applicant cannot submit an application that is substantially similar to an application that has been refused unless an appeal has been finalized or the time for an appeal has lapsed.

Public participation

Since the promulgation of the first EIA Regulations in 1997, amendments in 2006, 2007, 2010, 2014 and 2017 have been introduced to “streamline” the process by refining the lists of activities for which environmental authorization is required, excluding certain activities in urban areas and confining public participation to the right to “comment” on the application. “Consultation” with affected parties or any direct engagement is no longer a requirement of the process. The first EIA Regulations, which took effect in 1997, were short, to the point of being cryptic. No timeframes were prescribed. These were agreed between the developer and the competent authority. On the one hand, the exclusion of interested and affected parties from the agreement between the developer and the competent authority was manifestly unfair. However, provision was seldom used, probably because the process was new. The developer and the competent authority generally did not communicate outside the process. On the other hand, the lack of prescribed timeframes allowed interested and affected parties to prolong the process, many EIAs consequently taking many years to complete. In the early days of EIA, “public participation” was taken to mean “public consultation”, which implies that a level of consensus between the parties must be reached.

In the first revision of the EIA Regulations in 2006, the then Minister of Environmental Affairs (and Tourism), claimed in a newspaper article that they were “quicker, better, greener”, responding to developer complaints that the EIA process was stifling development. Ironically, the six pages of the 1997 EIA Regulations were expanded to 53 in the Government Gazette! Public participation, as observed above, became limited to the right to comment on the process and all relevant documents. Direct engagement between the developer and interested and affected parties, although encouraged, was not mandatory. Public meetings are generally unhelpful as they tend to descend into slanging matches and do little to enhance the public perception of EIA.

In the result, the process is conducted at arms’ length, with the participants having as little direct contact with each other as possible.

The three participant groups must all share some blame for the bad reputation that EIA has gained:

1. the authorities, because they are dilatory, often uncooperative and over-bureaucratic, and sometimes incompetent;
2. developers because they resent the costs to which they are put, and because an EIA means lengthy project delays, and because the need for an EIA is ignored or avoided until late in their development planning, by which stage the development is ready to start, but the EIA process has yet to begin;
3. interested and affected parties because they can be deliberately obstructive, generally have self-interests at heart, and tend to attack the people involved, rather than the issues.

With the expanding of the EIA Regulations, the methods of ensuring public participation have become prescriptive, and public participation limited to the right to “comment”.

The EAP managing an EIA process must ensure that potential or registered interested and affected parties must be provided with an opportunity to comment on all reports once an application has been submitted to the competent authority.³⁷The methods of giving notice of an application and the invitation to comment, are prescribed. They include:

- fixing a notice board at a place conspicuous to and accessible by the public at the boundary, on the fence or along the corridor of the site where the activity to which the application or proposed application relates is or is to be undertaken, and to any alternative site;
- giving written notice to the occupiers of the land in question and the owner, if the proponent is not the owner, as is often the case with applications for minerals exploration or prospecting rights; owners, persons in control of, and occupiers of land adjacent to the site where the activity is or is to be undertaken and to any alternative site where the activity is to be undertaken; the municipal councillor of the ward in which the site and alternative site is situated and any organization of ratepayers that represents the community in the area; the municipality which has jurisdiction in the area; any organ of state having jurisdiction in respect of any aspect of the activity; and any other party as required by the competent authority;
- placing an advertisement in one local newspaper; or any official gazette that is published specifically for the purpose of providing public notice of applications or other submissions made in terms of these regulations; and in at least one provincial newspaper or national newspaper, if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or district municipality in which it is or will be undertaken;
- using reasonable alternative methods, as agreed to by the competent authority, in those instances where a person is desirous of but unable to participate in the process owing to illiteracy, disability or any other disadvantage;

- the notice, notice board or advertisement referred to in above must: give details of the application or proposed application which is subjected to public participation; state whether basic assessment or S&EIR procedures are being applied to the application; state the nature and location of the activity to which the application relates; disclose where further information on the application or proposed application can be obtained; and
- stating the manner in which, and the person to whom, representations in respect of the application or proposed application may be made.

In broad terms, the Constitution, environmental, planning and local government legislation, oblige the authorities to ensure that members of the public are given the opportunity to have a say in decisions that affect them. The law is in place, but is ineffectively implemented. The authorities are not solely at fault - communities are notoriously apathetic when called upon to provide input into planning and environmental processes. It is only contentious developments, usually publicised by activists, that attract attention. Housing development, often large scale, receive very little input from affected, mostly black, communities.

Part of the problem lies in the fact that environmental and planning issues are often complex and highly technical. For communities to participate meaningfully, they need specialist assistance to interpret the various (often voluminous) reports, and because of South Africa's diversity of languages, translation of the documents. It is the duty of the organs of state involved to promote participation of interested and affected parties in environmental governance, to ensure that all people have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and to ensure participation by vulnerable and disadvantaged persons in environmental decision making.

Regulation 46 requires the competent authority processing an application to give reasonable assistance to people who are illiterate, suffer disabilities or any other disadvantage, who cannot, but desire to comply with the regulations. This includes applicants and I&APs. The competent authority occasionally assists applicants. The author has no experience of I&APs being assisted by the competent authority to participate in any EIA process.

Again, the law is in place, but is not implemented effectively.

10. CASE STUDIES

The case studies are chosen for their contribution to urban expansion and regeneration. The developers are grouped under:

- Government projects;
- Private – public partnerships;
- Private developers.

Where development has taken place without an EIA and without environmental authorization where this required, such developments are illegal. Generally, these developments have been stopped by the authorities following legal action, and in most instances (except for illegal sand mining), rehabilitation has been compelled.

Government

New Multi-Product Pipeline (NMPP)

(The developer is a state-owned company, Transnet State Owned Company Limited (Transnet). The project is managed by its Capital Projects and Pipelines divisions.

NMPP is one of the biggest multi-product pipelines in the world providing approximately 715km of underground piping. It is designed to transport liquid petroleum fuel from Durban to Johannesburg (Gauteng province and neighbouring regions).

S&EIR was applied to the project and was conducted in segments by different teams of consultants. On completion, rehabilitation and monitoring was put under the control of one environmental consultant with a specialization in grassland ecology.

The proclaimed benefits of the pipeline are socio-economic and environmental.

The economic benefits are reflected primarily in the supply of necessary fuel to the economic hub of South Africa. The construction phase of the project generated approximately 12,000 new jobs. These are for the duration of construction only. The number of permanent jobs is insignificant. There were no obvious negative economic impacts.

Environmental benefits include reducing road congestion and road maintenance costs, and lower carbon emissions associated with road transport.

Environment impacts are associated with the crossing of 49 main rivers, 95 wetlands and various sensitive environments, including the KwaZulu-Natal Mistbelt Grassland region and the Drakensberg mountain range. Of special concern is the loss of Mistbelt Grassland, a rare and endemic vegetation type that is difficult to replace. The dominant grass species, *Themeda triandra* (Red Grass) does not repopulate itself once removed and must be manually re-planted with seedlings if the grassland type is to be rehabilitated. This is an expensive process. Transnet was not willing to rehabilitate land using this method, despite having agreed to do so with landowners on the route. Otherwise, rehabilitation in the form of revegetation and the reinstatement of wetlands (no longer pristine) is reasonable. The pipeline route followed in 1965 is still clearly visible except where cultivated, indicating that even in the long term, full rehabilitation without intervention, does not occur.

The South Durban Community Environmental Alliance (SDCEA) raised social and political concerns about the selection of the route of new pipeline. It was alleged

³⁷ Regulation 41(3) of the EIA Regulations 2014.

that “affluent white areas” were avoided because the latter could voice their concerns, but poor communities were not able to, or their concerns were ignored. the choice of route, to the detriment of poor communities in the densely populated south Durban and rural Umbumbulu areas.³⁸

There is a legitimate perception that the new pipeline followed a new route that avoided the “affluent white areas” areas of Hillcrest, Assagay and Alverstone, all of which have experienced several large leaks and spills since the construction of the “old” pipeline in 1965. With greater resources and influence, these communities were able influence.

A complaint common to most stakeholders is that Transnet representatives and some of their consultants were arrogant during the EIA process and showed little respect for I&APs. A similar complaint was prevalent during the rehabilitation period. Transnet ran roughshod over agreements with landowners, were dilatory in paying compensation for loss of land use and in paying rent for land used for temporary purposes during construction.

Monitoring by the Department of Environmental Affairs during construction was limited and ineffective. Similarly, the independent environmental control appointed as a condition of the environmental authorization was seldom seen on site during

construction or during the rehabilitation period.

King Shaka International Airport

Stakeholders had similar complaints with the other major infrastructure projects undertaken by Transnet in the region.

(King Shaka International Airport was planned and commenced in the early 1970s when the bulk earthworks were largely completed. The project was abandoned by the apartheid government for economic and political reasons. Interest in the site was revived in the mid-1990s and was again a “stop-start” project for the same reasons. South Africa’s hosting of the 2006 Soccer World Cup and possibly a change in political control of the province to the ruling party were probably the main catalysts for the resumption of the project.

An EIA was conducted after the decision was taken to proceed with the project. Objections to the project and appeals against the EIA failed, and the project proceeded, albeit with delays. At best, the EIA assisted with the identification of off-site impacts that had to be taken into account, noise being the most significant. As part of the rezoning of the airport site, surrounding land that would be subjected

New Transnet pipeline route (green) versus old (dotted line)



Source: Transnet NMPP Environmental Impact Assessment Draft Scoping Report, 2008

³⁸ See Patrick Bond (2015). “South African oil spill pollutes rich whites’ playground. But suburban Durban disaster reveals wider planetary abuse and eco-tourism”. In The Con 19 February . Available at: www.theconmag.co.za/2015/02/19/pipeline-to-hell .

to high noise levels making it unsuitable for residential use was rezoned to non-residential commercial uses.

Going through the motions of compliance with the EIA Regulations added no value to the impact report. I&APs added nothing to the identification of the potential impacts of the project that the consultants would have identified anyway, and their concerns had no effect on the outcome.

In this case, as with the NMPP project, the EIA delayed the project by many months, running into years. By provoking delays, EIA in South Africa has gained a bad reputation among developers, who are often to blame for the delays by not including their environmental due diligence at the same time as they investigate the financial and technical feasibility of their projects.

Public-Private Partnership

Point Waterfront Development

This project is a joint venture between the eThekweni (Durban) Municipality and a consortium of South African and Malaysian investors.

The project involves foreign direct investment (FDI). Generally, in South Africa FDI does not affect the environmental and social impact assessment processes as they are mandatory. However, there is the potential for political interference in the decision or outcome because the head of the environmental authority is a minister or MEC. The minister (or MEC), is also the appeal authority and has the power to overturn the decisions of the competent authority, which is generally a department under their control.

The Point Waterfront area once housed a prison, residences for prison employees and other government employees in various occupations related to the Durban Port. Much of the area was taken up with railway and harbour infrastructure, warehousing and customs clearing houses. As the port developed, harbour facilities were moved elsewhere, the prison was closed, hotels became run down and the social structure of the area crumbled. Much of the area became derelict and many buildings were demolished.

The development opportunities of the area are obvious. Because of location at the mouth off the harbour and a sheltered beach on its eastern side, it lends itself to residential, commercial and tourism development. On its northern boundary is an aquarium, shops and restaurants, making it a popular tourism destination.

The area is also home to four water sports clubs: Durban Underwater Club; Durban Point Yacht Club; Durban Paddle Ski Club; Durban Ski Boat Club, all occupying prime locations on the beachfront. In their midst is Durban Seine Netters, a business operating net-fishing using rowing boats launched from the beach, just as the founders of the business (indentured Indian workers released from service) did about 150 years ago. Their descents still run the business from the same location. The operation has considerable “living heritage” value.

Development has commenced in accordance with plans approved following an EIA process.

The water sports clubs and Durban Seine Netters, all of whom operated under leases from the state, were required to relocate to make way for the proposed development.

The EIA process took more than five years to finalise, with the environmental authorization being issued in February 2007. The decision of the competent authority was taken on appeal by 14 I&APs on both procedural and substantive



Durban Point area prior to development (2001)

grounds. All the appeals were dismissed in August 2009.

During the EIA, Durban Paddle Ski Club and an activist group (Save Vetch's Pier) took legal action to prevent harm to Vetch's Pier, an artificial reef formed by the unsuccessful construction of a pier in early 1860 and abandoned in 1864. The pier is now a naturalized reef with abundant marine life. It is an excellent place for novice divers and the protection it offers the beach makes it a popular family recreation area.

In the litigation, the "privatization" of the beach was also challenged. The litigation was unsuccessful.

At the same time, the water sports clubs were at loggerheads with each other, making any agreement between them and the developer on sites for their relocation difficult. The clubs settled their differences, and an agreement was reached for their relocation to the north-eastern part of the development area.

The environmental authorization was amended in October 2014 to accommodate the proposed relocation and to make various layout changes. Part of Vetch's Pier was excluded from the development and part of the development removed from the beach to allow greater public access to the area.

Abandoned layout

These changes did not deal with all the issues raised in the EIA process, particularly those related to the construction of a small craft harbour in the sea and the limitation of public access to part of the beach.

In early 2015, Malaysian project managers were appointed and major changes to the development were made. These must obtain planning and environmental

approval but, by and large, they address most of the concerns raised during the EIA process. The small craft harbour in the sea has been scrapped, and all development is pulled back and will not extend beyond the "erosion" zone, which defines the public area of the seashore. A promenade (boardwalk), to which the public will have access, will run along the entire beachfront. The water sports clubs and Durban Seine Netters will be accommodated approximately in their current locations, under the boardwalk, and will have direct access to the beach.

Current (2016) development proposal

The EIA did not resolve the thorny issues of public access to the beach, the rights of the water sports clubs and the seine netters and their heritage, the preservation of Vetch's Pier, and the impacts on the marine environment from the small craft harbour. In that sense, the EIA failed the affected community, as EIA processes so often do. However, the public participation process raised significant issues that a more receptive developer might have considered. The compromises made in the 2014 amendment forced I&APs to make the best of a bad thing.

The influence of the Malaysian investors and the new Malaysian project managers was a significant factor in the development. They clearly recognized the merits of the complaints of I&APs even if the developer and the authority did not and that, for the development to succeed, it needed the goodwill and support of the affected communities.

The development has the potential to kick-start development in a part of the city much in need of urban renewal and social transformation. On the one hand, EIA will be blamed for the delays in the development (although there were many other financial and political reasons for the delays), but on the other, this project demonstrates that the EIA process can improve the quality of developments.



Current state of development (21 April 2017)

Foreign direct investment (FDI) can potentially have negative impacts for local communities. Foreigners come in and make a profit, which “leaks” from the local area and/or the country, leaving behind a bad social, economic and environmental legacy.

FDI is an important aspect of the Point Waterfront Development. It has presented problems, but these are not caused by the current Malaysian investors in the developer company. The first investor, also a Malaysian company, ran into financial difficulties, leading to the project stalling. The eThekweni Municipality, as the other shareholder, had neither the financial resources nor the ability to take the project on alone. In any event, part of the motivation for the project was to solicit foreign investment in Durban.

The current developer, UEM Sunrise Berhad, is a public-listed company and one of Malaysia’s top property developers. It is the flagship company for township and property development businesses of UEM Group Berhad and Khazanah Nasional Berhad. UEM Group is wholly-owned by Khazanah, an investment holding arm of the Government of Malaysia. The political commitment of the Malaysian Government compels the developer to persist with the project. Ordinary private developers would have long since cut their losses and walked away from the project, as did the South African company which was previously driving the development.

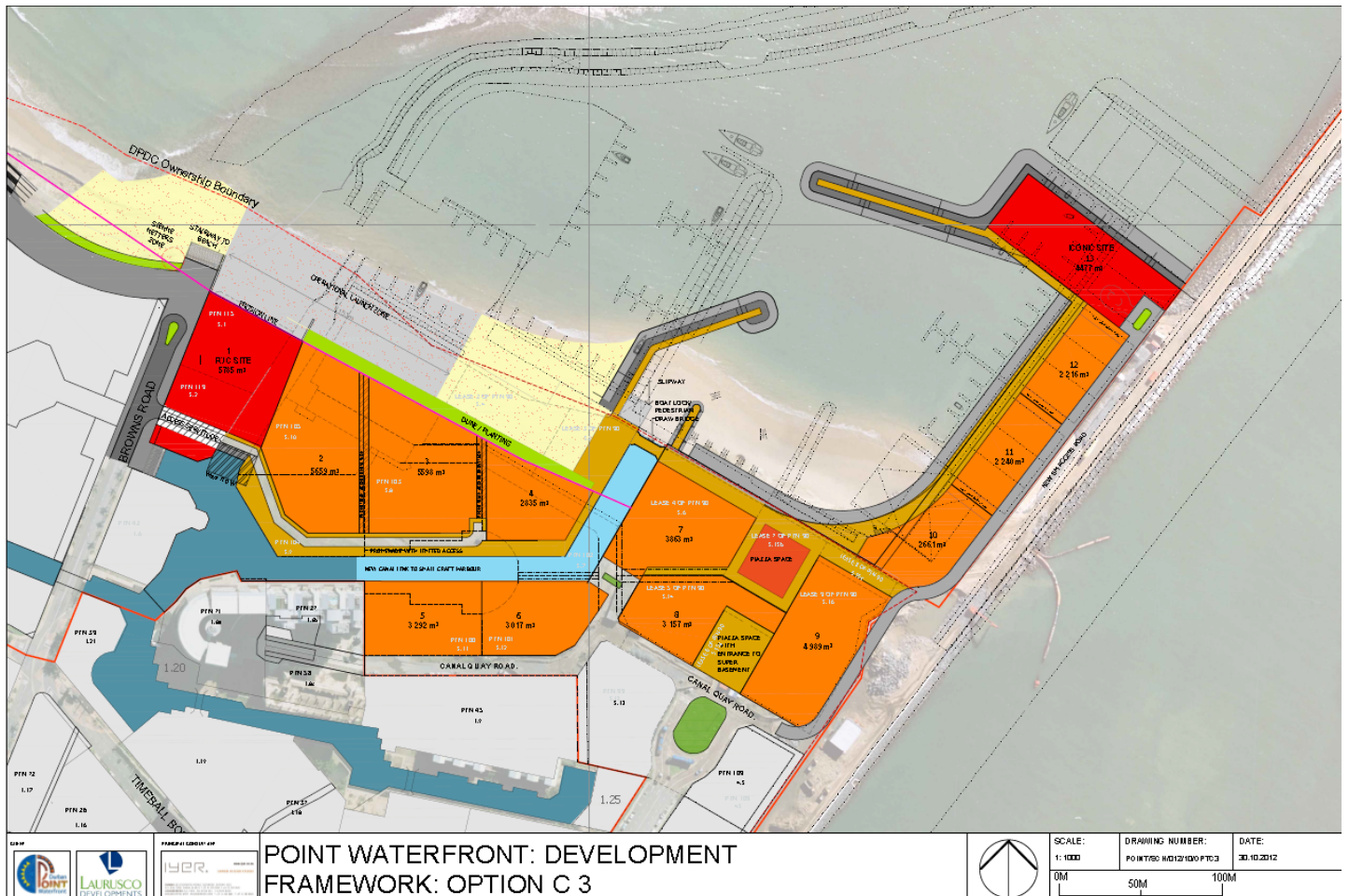
In this project, FDI is not a negative factor. Because it may be difficult to hold the foreign component of the developer accountable for contractual breaches or environmental non-compliances, political accountability is an important safeguard. The criminal provisions of NEMA - the ability of the state to hold directors of the company personally accountable and the power to arrest them to secure their appearance in court - are both a deterrent and a safeguard against reckless disregard for the environment.

Private development

Renishaw Mixed-Use Development

This is a large urban expansion project to be developed over approximately 30 years. The land to be developed is the coastal belt to the south of Durban and falls within the eThekweni and Umdoni Municipalities.

The EIA process assisted in the identification of environmentally sensitive areas and the social impact on the adjacent areas that fall within Traditional Council Areas (formerly known as Tribal Areas).³⁹ The predicted social and economic impacts of



³⁹ The Ingonyama Trust own all Traditional Council land. This land, which formed the KwaZulu “homeland”, was transferred from the South African Government to the Trust to secure the participation of the Inkatha Freedom Party (predominantly Zulu) in the 1994 democratic election. This land cannot be sold or leased except by the Trust, who must have the consent of the Traditional Council (represented by the chief). The chief has the limited right to issue “permissions to occupy” to members of his community.

the development are largely positive.

The layouts in Appendices 5 and 6 show the extent to which the environmental issues identified in the EIA were dealt with in the development proposal. The layouts were approved and form part of the environmental authorization.

An EIA process assisted the developer to form a relationship with the affected communities. This assisted the developer (a public company traded on both the South African and London Stock Exchanges) to revise its business model by including affected communities in its long-term development strategies.

The developer's primary business since the 1870s has been sugar farming, although it has diversified its activities in recent years. As sugar farmers, they own large tracts of land, often adjoining Traditional Council Areas. Some of this land is subject to "land claim" under the Restitution of Land Rights Act.⁴⁰ Although the window for land claims has closed, it is likely to be reopened during the current parliamentary session.

The land comprising the Renishaw Development comprises both land subject to a land claim and land not under claim. Some of the development includes land that may be claimed in the future. Most of the land comprising the development will not be subject to land claim.

Approximate areas of "tribal" land and development land

Partly to pre-empt land claims over a small portion of the land, but more to do what it considers to be socially and economically prudent, the developer has entered into a development protocol with the adjacent "tribal" community. In the protocol, the developer recognizes not only valid land claims but also the need to redress some of the skewed equity in land provoked by apartheid. The community, through its business trust and development company, will acquire a shareholding in the subsidiary of the developer that will own and undertake the development. This is not regarded as a gratuitous gesture. The value of the community's land rights, because they are recognized by law and because recognizing the intangible, emotional connection of the community to the land is "the right thing to do", is given monetary value. These rights are contributed to the development in return for shares.

Having equity in the project will provide the community with long-term income for community upliftment projects.

As with most construction projects of this magnitude, many jobs during the construction period will be created and, because of the duration of the projects, many of these may be regarded as permanent. Post development jobs will also be created. All of this is a positive economic impact. In addition to these benefits to the community, the EIA identified the need to develop skills in the community so that they will be suitably qualified to secure the jobs that become available

during the project. In collaboration with the community and government training entities, formal training programmes, related to construction at this stage, have been implemented. In addition, all major contractors employed on the project are obliged to use local labour where possible and must appoint local subcontractors who are suitably qualified.

While the EIA was not the direct cause of the innovative approach adopted by the developer in its broader business strategy, confronting these issues during the EIA enabled the developer to understand the needs of the ambient community.

11. EFFECTIVENESS OF THE ENVIRONMENTAL TOOLS

The following emerges from the case studies:

- Very few development proposals fail in the environmental assessment phase.
- The EIA process can provoke changes in a development for the better, even if this is not by rulings or decisions of the competent authority.
- Minor modifications may be made because of the undertaking of an SEA. The full potential of this instrument is not exploited.
- Stakeholder comments during the course of an EIA may influence the conditions imposed as part of an environmental authorization or approval, but seldom result in the cancellation of the project.
- Very few appeals succeed, be they by the appellant the developer or an interested and affected party.
- Environmental management frameworks are useful but under-used.

EIA has not reached its full potential because of a combination of factors, these being primarily:

- Over-elaboration over time of the legislation, regulations and lists of activities requiring environmental authorization;
- Lack of capacity and, at times, competence within the regulating authorities;
- Lack of goodwill towards the process by developers;
- Lack of a regulatory body for EAPs and consequently inconsistency in the competence of practitioners.

³⁹ The Ingonyama Trust own all Traditional Council land. This land, which formed the KwaZulu "homeland", was transferred from the South African Government to the Trust to secure the participation of the Inkatha Freedom Party (predominantly Zulu) in the 1994 democratic election. This land cannot be sold or leased except by the Trust, who must have the consent of the Traditional Council (represented by the chief). The chief has the limited right to issue "permissions to occupy" to members of his community.

⁴⁰ Act 22 of 1994. The Act provides for the restitution of land, or compensation for land to people removed by apartheid legislation between 1913 and 1998.

12. ENFORCEMENT

Enforcement of the law is selective enforcement and generally poor. Environmental legislation is seldom applied in Traditional Council Areas.

13. ENVIRONMENTAL CONSIDERATIONS IN PLANNING

The environment plays a small role in planning decisions despite the comprehensive legislation that exists, and compels environmental concerns to be considered in spatial and land use planning. Development ambition generally overrides environmental priorities.

14. CONCLUSIONS

One of the reasons for conducting an EIA, is to determine whether a project should proceed. In the case of all major infrastructure projects, strategic political decisions are made long before the project is planned and an EIA undertaken. The EIA serves to determine how the project is to be undertaken, which of the design, route or location options are preferred, but not whether the project should go ahead at all. I&APs are sucked into the process believing that their input and the collective opposition to the project by the community, might stop the project altogether. This is clearly not the case.

An EIA process with a predetermined outcome fails stakeholders in the following ways:

- the process is dishonest – if the “no development” option that the developer must consider when looking at “alternatives” in the EIA process is not a possibility, this should be disclosed at the outset. Communities would be spared the time, effort, and emotion they put into opposing a development through the EIA process.
- The EIA process could then serve the purpose of a “mitigation report”, to which I&APs could contribute to ensure that impacts are avoided where possible, minimised if they cannot be avoided at all, and rectified by way of rehabilitation or management controls.⁴²

By paying lip service to public participation, I&APs are being denied their constitutional right to have a say in decisions that affect them.

Private developers of major contracts can be persuaded by the findings of the EIA to modify their development plans to accommodate the concerns of I&APs, and in some instances, may influence the developer’s approach to social and economic impacts arising from development.

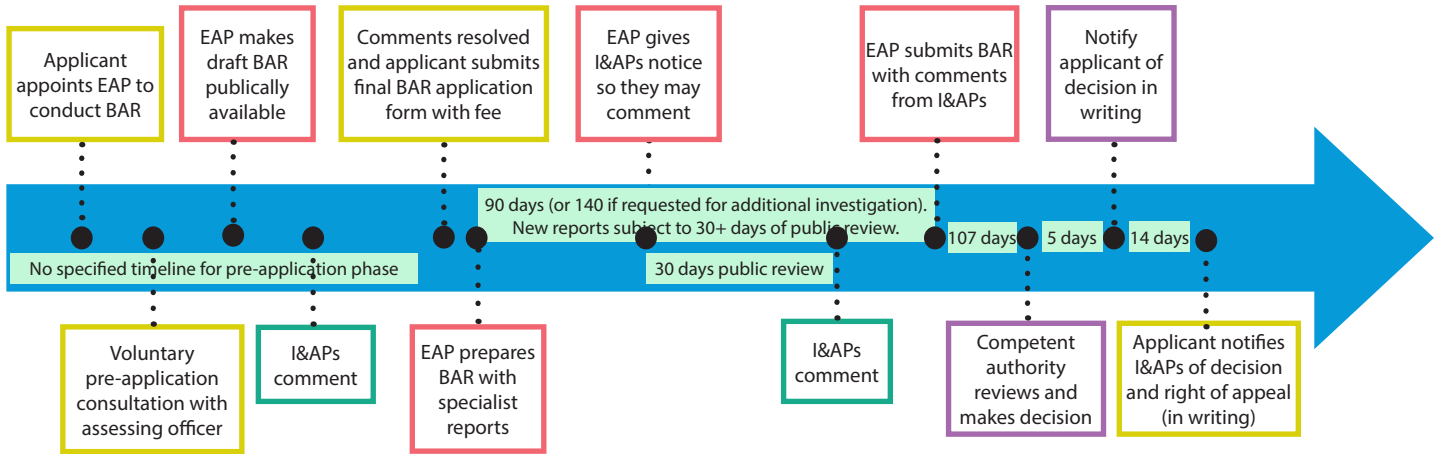
A persuasive approach is to be preferred over a combative strategy, if legal coercion is available, to ensure environmental compliance.

15. RECOMMENDATIONS

- Greater use should be made of EMF and SEAs to provide an information base that indicates areas that are suitable for development, in which case, development should be permissible, subject to planning permission and an EMPr to ensure that impacts are properly managed. Sensitive areas requiring EIA could be identified and, in these areas, the EIA should be rigorous and its main purpose should be to determine if the development should take place, not how. If development is permitted, impacts can be managed through an EMPr. Development in highly sensitive, vulnerable or stressed environments should be prohibited except in exceptional circumstances.
- The lists of activities for which environmental authorization (and therefore EIA) is required, need revision. Thresholds are arbitrary and often serve a bureaucratic rather than an environmental purpose.
- Public participation would be improved if it took place in EMF and SEA processes, conducted by consultants employed by the government and funded from the public purse. The public should have a say in the appointment of consultants and the framing of their terms of reference. Interested and affected parties should have the ability to engage with the consultants, not merely comment on their work. “Open days” could be held at milestone stages of the project and the public should have the opportunity to raise issues in person with the consultants.
- Affected disadvantaged groups must be identified (by the authorities, with the consultants and interested and affected parties) and provided with the necessary assistance and resources to participate meaningfully. Funding for this should be shared between the developer and the state.
- In EIA processes, the EAP should be appointed by the authority on a public tender basis (as is the case with most government projects) but be paid for by the developer. Public notice of the proposed application should be given as a first step of the process, in which notice the invitation to EAPs to tender for the project should be disclosed. This will give the public the opportunity to monitor the appointment of EAPs and to ensure that the tender process and appointment are legitimate.
- Provision should be made for officials who do not comply with prescribed EIA timeframes to be held personally accountable.
- A regulatory body to ensure that only qualified, competent practitioners are allowed to practise as EAPs must be established urgently.

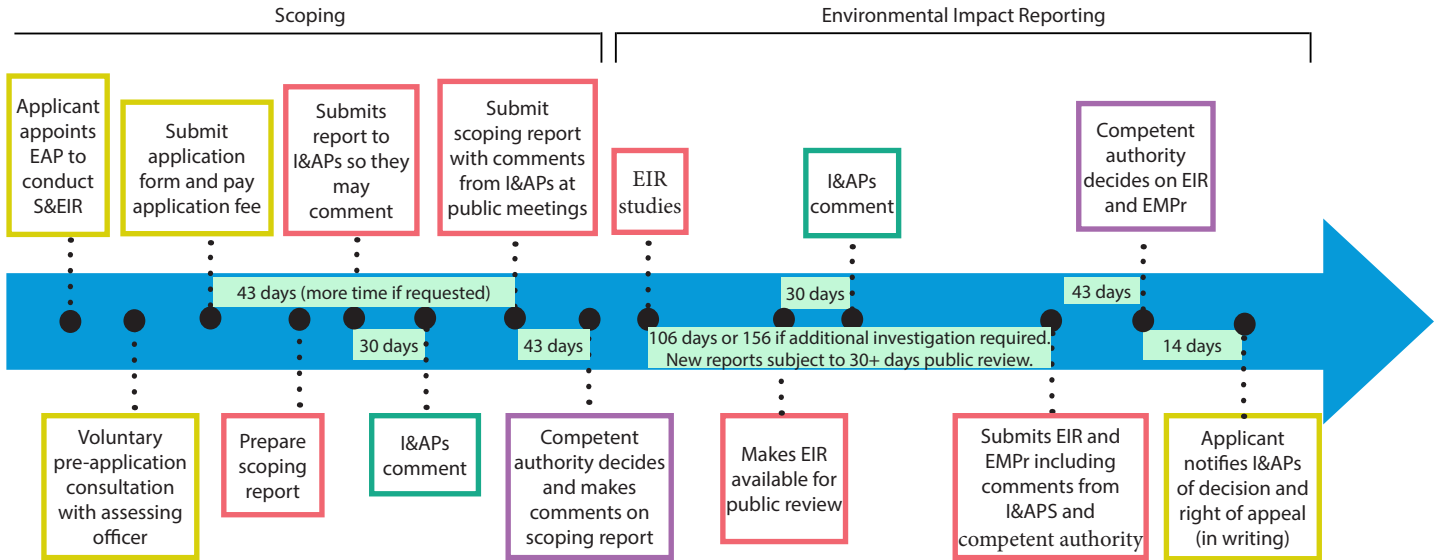
Basic Assessment Report* (BAR) for activities in listing notices 1 & 3

*The appointed EAP determines whether BAR or S&EIR must be conducted

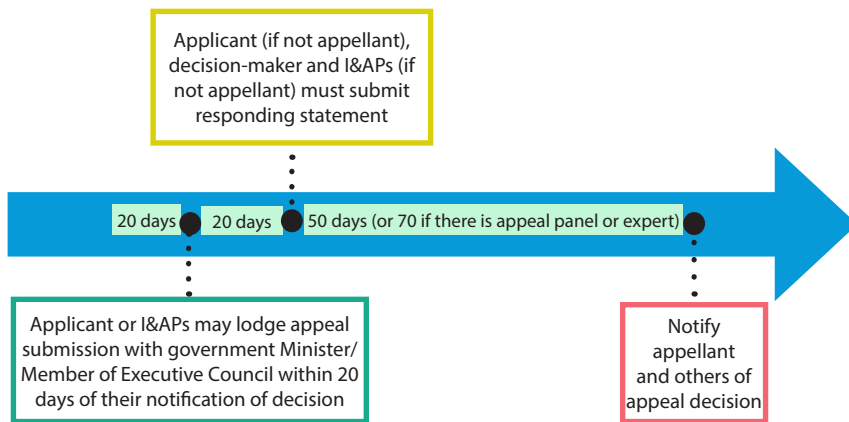


Scoping and Environmental Impact Report* (S&EIR) for activities in listing notice 2

*The appointed EAP determines whether BAR or S&EIR must be conducted
EMPr = environmental management program report



Appeal Process for BAR and EIR



Applicant
 I&APs = Interested and Affected Parties
 Government Authority
 EAP = Independent Environmental Assessment Practitioner