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DEPARTMENT OF
ENVIRONMENTAL
AFFAIRS

ENVIRONMENTAL IMPACT ASSESSMENT AND MANAGEMENT STRATEGY

ENVIRONMENTAL IMPACT ASSESSMENT AND MANAGEMENT STRATEGY
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EXECUTIVE SUMMARY

The Environmental Impact Assessment and Management Strategy for South Africa (EIAMS) is a participatory process being undertaken to compile a national strategy that will give effect to the objectives of integrated environmental management as contained in Section 23 of NEMA within the context of the principles of sustainable development in Section 2 of the Act. This report addresses one of eleven sub-themes identified in this process, procedures and institutional structures, and forms part of the Governance and Administration theme.

Problem statement

The current procedures and organisational structures for environmental impact management are not necessarily achieving integrated decision-making and/or co-operative governance. As a result, there is a failure to achieve the objectives of integrated environmental management (IEM) as set out in section 23 of NEMA.[1] Chapter 5 of NEMA deals with integrated environmental management and its purpose is to promote the application of appropriate environmental tools in order to ensure the integrated environmental management of activities and the integration of the principles of environmental management (set out in section 2 of the Act) into all decisions which may have a significant effect on the environment.

In addressing the problem statement, this sub-theme report reviews the current regulatory and policy framework relating to IEM and proposes new or amended procedures and /or decision–making structures. The focus is on providing input that will lead to the consideration of the type of alternatives or amendments that will properly facilitate the integrated decision making and co-operative governance objectives of IEM. The investigation revolves around an assessment of the status quo which is followed by an analysis of the problems which have become evident; a synthesis of our proposals and suggestions as to improvements that could be undertaken; and an overview of what we perceive to be the major risks involved in each of our proposals.

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[1] The National Environmental Management Act 107 of 1998

Sub-theme objective and goals

The objective for this sub-theme is to ensure integrated decision-making and co-operative governance so that NEMA's principles and the general objectives for IEM can be achieved. The sub-theme goals are:

a. to ensure that the Environmental Impact Assessment ("EIA") procedures facilitate integrated decision-making and co-operative governance;
b. to ensure that the organisational structures within government are set up in such a way that integrated decision-making and co-operative governance within the EIA procedures can be achieved;
c. to facilitate integrated decision-making in all decisions affecting the environment; and
d. to ensure that there is intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.[2]

Status quo assessment

The Report starts with an assessment of the status quo which considers who the decision makers are, what structures they operate within and what procedures are currently in place to encourage integration, co-operation or at least, alignment of functions and decisions. There are many pieces of legislation and a number of different authorities involved in authorising a development project and regulating land use. The Report considers the empowering legislation to determine firstly, who the competent authorities are, and secondly, the rules that are in place to encourage interaction and integrated decision-making.

The report also analyses the key problems and problem areas regarding some procedural and institutional shortcomings in the current regulatory and institutional framework. Officials involved in implementing the EIA system and stakeholders have, through the EIAMS process, identified a number of short-comings and inefficiencies in the current system. These include:

- *Misalignment with the objective of promoting ecologically sustainable development*: the EIA system is designed to reduce the harm caused by specific projects rather than to promote the overall objective of attaining ecologically sustainable development while promoting justifiable social and economic development. This means that in making decisions in relation to a specific project there is often insufficient attention given to the context in which the decision is being made

[2] (NEMA, Section 2(4)(l)).

and to whether or not the implementation of the project would have a positive impact on the attainment of ecologically sustainable development and can be considered to be “justifiable” socio-economic development.

- *Decision-making criteria and consistency of goals:* another area of concern is that of inconsistencies and lack of clarity regarding the criteria and approach the decision-makers apply in deciding on applications for environmental authorisations. Some commentators drew attention to the fact that it would be helpful to have greater clarity as to what environmental governance was seeking to achieve and what approaches were regarded as appropriate.

- *Multiple rather than integrated decision-making processes reduce effectiveness and efficiency:* the need for enhancing inter-governmental co-operation and improved decision-making that is inclusive, take into account a wide range of factors and is linked to land use planning approvals was raised repeatedly by stakeholders.

- *The role of municipalities*: the role of municipalities in conserving the environment and promoting ecological sustainable development is often not fully recognised and many commentators identified the lack of integration between national and provincial environmental management systems and municipal land use planning and control systems as a significant shortcoming.

- *Enforcement*: several commentators drew attention to the need to strengthen post-approval monitoring of compliance with conditions in environmental authorisations and enforcement where there has been non-compliance

Synthesis of proposals

To determine whether or not the current IEM procedures and institutional structures are successful in meeting the objectives spelt out in NEMA, and promoting integrated decision-making and cooperative governance, it is necessary to return to first principles. This is so because the current procedures and institutional structures which attempt to enhance integrated decision-making and co-operative governance do not necessarily result in sustainable development.

IEM procedures and institutional structures should firstly **adhere** to the environmental right enshrined in the Constitution by ensuring ecological sustainability; secondly **ensure** the environmental right through monitoring which will show whether the procedures and policies that are being followed actually do lead to ecological sustainability: and thirdly be **aligned** with the national vision of sustainable development spelt out in the National Strategy on Sustainable Development (NSSD). Ecological sustainability does not preclude or devalue the interests of society or the economy – ensuring ecologically sustainable use of the environment must occur at the same time as the promotion of justifiable economic and social development, but inappropriate trade-offs must be avoided. Ecological sustainability is the imperative for achieving social and economic intergenerational equity.

In our view, the way in which the NEMA Chapter 5 objectives (which promote the integrated environmental management of activities) are being implemented, and in particular, the "basket" of environmental management tools that have been made available to date, do not adequately answer the question referred to above. Some things have to change. Our proposals will be presented on three levels:

1. What existing measures or mechanisms can be tweaked or improved with minimal intervention?
2. What can be done through making some minor legal amendments or new interventions?
3. What needs to be completely overhauled?

Tweaking the existing system to reap "low hanging fruits"

We propose that some minor tweaking of the existing system may go a long way to achieve efficiency gains. We propose, for example, a change of reporting format for environmental assessment practioners; better and more use of Memoranda of Understanding (MOUs); promoting the use of "sustainability enhanced" planning tools and maps; and linking the achievement of ecological sustainability objectives directly to performance and delivery outcomes.

Minor interventions to achieve greater efficiency and effectiveness gains

We propose certain minor interventions that could be introduced to achieve greater efficiency. These include prioritisation and coordination of guidelines; where appropriate, introducing greater use of using norms and standards to regulate activities; developing and implementing an objectives driven monitoring system; legislative changes (amending existing environmental laws); increased structured alignment between planning and the environment (specifically laws and policy frameworks); strengthening

cooperative governance mechanisms that are aimed at ensuring ecological sustainability is addressed in policy frameworks; and conflict resolution.

Complete overhaul

Some of our proposals would require major changes or interventions being introduced. These include changing the regulatory regime from one which authorises activities to one which authorises projects that are triggered by certain activities; identifying and redefining environmentally damaging government policies and programmes; fully integrating environmental policy considerations via budgetary, planning and auditing processes; and or changing the hierarchy of decision making.

Our report includes high level indicators for success for each of the proposals and an overview of the risks associated with each proposal. The ultimate indicator of success remains the achievement of section 24, specifically ecological sustainability.

Conclusion

Many of the proposals included in our report reflect specific interventions and actions that are captured under Output 3: *Sustainable Environmental Management* in National Delivery Outcome 10: *Protected and enhanced environmental assets and natural resources.* The Delivery Agreement on Outcome 10 provides detailed targets and indicators for all outputs and key activities; identifies the necessary inputs; and clarifies the roles and responsibilities of the various delivery partners: It spells out who will do what, by when and with what resources. Outcome 10 applies across all spheres of government. As such it is a key document in informing and directing government action and priorities for achieving ecological sustainability and should be taken into account in the further development of this sub-theme to ensure alignment between what is being proposed in the EIAMS and Outcome 10 outputs and targets.

SUBTHEME 1: PROCEDURES AND ORGANISATIONAL STRUCTURES:

1. INTRODUCTION

The principles of the National Environmental Management Act 107 of 1998 ("NEMA") apply to the actions of all organs of state that may significantly affect the environment.[3] These principles also serve as the general framework within which environmental management and implementation plans must be formulated.[4] All development must be socially, economically and environmentally sustainable[5] but this cannot be achieved without integrated decision-making, aided by structures and procedures which foster the principle of intergovernmental co-ordination and the harmonisation of policies, legislation and actions relating to the environment.[6]

One of the tasks of the Environmental Impact Assessment and Management Strategy ("EIAMS") is to investigate the effectiveness of the current environmental impact assessment structures and procedures; to highlight problem areas and to develop proposals for amended procedures and/or organisational decision-making structures that improve integrated decision-making and co-operative governance and ultimately ensure that integrated environmental management ("IEM"), is achieved

The report on this sub-theme provides specialist input for eventual inclusion into the report for Theme 1: Governance and Administration. It addresses the problem that current procedures and /or organisational structures are not achieving integrated decision making and/or co-operative governance, resulting in a failure to achieve the objectives of integrated environmental management. It also takes into account the desired future for EIAMS and identifies the actions necessary for achieving it.

The desired future includes an EIAMS consisting of voluntary and regulatory instruments in the next 5 years where:

- the system is efficient and effective;
- Environmental impact assessment ("EIA") is used only when it is most appropriate;

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[3] NEMA, Section 2(1).
[4] NEMA, Section 2(1)(b).
[5] NEMA, Section 2(4)(b).
[6] NEMA, Section 2(4)(l).

- IEM is given effect to through a range of other tools to complement or replace EIA;
- Authorities and other stakeholders are sufficiently capacitated and committed to make IEM work; and
- government regulatory processes are integrated or at least aligned.

1.1. PROBLEM STATEMENT

Current procedures and/or organisational structures are not necessarily achieving integrated decision-making and/or co-operative governance and as a result, there is a failure to properly achieve the objectives of IEM as set out in section 23 of NEMA. Section 23(1) of NEMA provides that the purpose of Chapter 5 of NEMA (which deals with integrated environmental management) is to promote the application of appropriate environmental tools in order to ensure the integrated environmental management of activities. In addition, section 23(2) provides that the general objective of integrated environmental management is,(among other things), to promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment.

Furthermore, section 23(3) requires that the Director General must co-ordinate the activities of organs of state in their role as the relevant competent authority (including where the Minister of Minerals and Energy is the decision maker) and assist them in giving effect to the objectives of IEM. The assistance may include training, manuals and guidelines as well as the co-ordination of procedures.

NEMA section 2 principles apply to the actions of all organs of state that may significantly affect the environment and in the context of IEM, these include that –

- the principles must 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 other statutory provision concerning the protection of the environment[7]; and must
- guide the interpretation, administration and implementation of the Act and any other law concerned with the protection and management of the environment.[8]

In order to improve integrated decision-making and co-operative governance and achieve IEM, this sub-theme report takes into account the current regulatory and policy framework relating to IEM and

[7] Section 2(1)(c).

proposes new or amended procedures and /or decision–making structures. The focus is on providing input that will lead to the consideration of the type of alternatives or amendments that will properly facilitate the integrated decision making and co-operative governance objectives of IEM. The investigation revolves around a status quo report which considers who the decision makers are, what structures they operate within and what procedures are currently in place to encourage integration, co-operation or at least, alignment of functions and decisions. Furthermore, an analysis of the problems which have become evident and some suggestions as to improvements makes up the balance of the report.

1.2. OBJECTIVE

The stated objective for this sub-theme is to ensure integrated decision-making and co-operative governance so that NEMA's principles and the general objectives for integrated environmental management of activities (as prescribed in section 23 of NEMA), can be achieved.

1.3. GOALS

The sub-theme goals are –

- To ensure that the Environmental Impact Assessment ("EIA") procedures facilitate integrated decision-making and co-operative governance;
- To ensure that the organizational structures within government are also set up in such a way that integrated decision-making and co-operative governance within the EIA procedures can be achieved;
- To facilitate integrated decision-making in all decisions affecting the environment; and
- To ensure that there is intergovernmental co-ordination and harmonization of policies, legislation and actions relating to the environment (NEMA section 2(4)(l)).

2. BACKGROUND

The current regulatory and policy framework relating to IEM involves an investigation of a number of tools, one of which is Environmental Impact Assessment ("EIA"). EIA has been used as a tool for

[8] Section 2(1)(e).

environmental management for over 30 years, is applied internationally and is a legal requirement in many countries. Project-specific environmental assessment is referred to as the "first generation EIA".

As a result of limitations in the project-specific approach, impact assessment methodologies evolved, with Strategic Environmental Assessment ("SEA") becoming prominent in the 1990s. SEA has been prominent in addressing environmental concerns in relation to policies, programmes or plans and is referred to as the "second generation" of environmental assessment.

In recent years, there has been increasing recognition of the need for environmental assessment tools to be adapted so as to become effective in contributing to sustainable development objectives. Thus, Sustainability Assessment ("SA") has emerged as the "third generation" of environmental assessment.

In South Africa, EIA has been a legal requirement since 1997, initially in terms of the regulations under the Environment Conservation Act 73 of 1989 ("ECA") and subsequently in terms of EIA Regulations under NEMA. The most recent EIA Regulations, (accompanied by three Listing Notices), came into effect on 2 August 2010. Any activity which is listed in Listing Notice 1, Listing Notice 2, or Listing Notice 3 (and which is to take place in a geographic area that is identified in that list), is subject to environmental authorisation. The process that needs to be followed differs, depending on which Listing Notice is involved. Activities in Listing Notices 1 and 3 require a Basic Assessment ("BA"), while those in Listing Notice 2 require the more comprehensive Scoping and Environmental Impact Report Assessment ("S&EIR") procedure. (Note however that for ease of reference, the term EIA process is used throughout this sub-theme, whenever the information provided is relevant to both processes (i.e. BA and S&EIR)).

Since the overarching purpose of the EIA process is to determine, assess and evaluate the consequences (positive and negative) of a proposed development, activity or project, virtually any significant impact on the surroundings within which we live, including impacts on the built environment and socio-economic impacts that affect human health or well-being, must be assessed during the EIA process. As a result, the national or provincial department of Environmental Affairs (whichever is

specified in the Listing Notices as the competent authority[9] to decide on a particular application for authorisation to commence a listed activity), will not necessarily be the *only* decision-making authority involved. The environmental permission will often be only one of a number of permissions that must be obtained before the project can commence. This is because there are a number of pieces of legislation other than NEMA, which regulate activities that may significantly impact on the environment.

These additional pieces of legislation operate under their own structures and procedures. The other governmental structures that may be involved in the EIA process are dealt with in more detail in Section 3 below, firstly by identifying where the permitting powers lie and secondly by identifying what procedures are already in place that appear to encourage co-operative governance and integrated decision-making. In some instances the government departments concerned may be directly involved as decision makers, while in others their role may be solely to comment.

3. STATUS QUO ASSESSMENT OF CURRENT PROCEDURES AND ORGANISATIONAL STRUCTURES FOR IEM

Chapter 3 of the Constitution of the Republic of South Africa[10] ("the Constitution") sets out principles for co-operative governance and intergovernmental relations that govern the relations between all spheres of government and all organs of state within these spheres. NEMA contains various provisions that give effect to the Constitutional requirement of cooperative governance and seek to address the overlapping of roles between authorities in respect of activities that impact on the environment. Chapter 2 of NEMA deals with institutions; Chapter 3 with procedures for cooperative governance; Chapter 4 with fair decision-making and conflict management; and Chapter 5 with integrated environmental management. In our assessment of the status quo of current procedures and organisational structures for IEM, we first discuss the issue from the view point of Chapters 2, 5 and then 4 of NEMA.

3.1. STRUCTURES FOR COOPERATIVE GOVERNANCE AND INTEGRATED DECISION-MAKING

Anticipating the need for government departments to work together and coordinate decisions and actions, Chapter 2 of NEMA made provision for institutions for cooperative governance. These

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[9] Whether the competent authority is the national or provincial department depends on the nature of the activity and also in which Listing Notice it is listed.

institutions included the National Environmental Advisory Forum ("NEAF") and the Committee for Environmental Coordination ("CEC"). However, the National Environmental Laws Amendment Act, 14 of 2009 ("2009 Amendment Act") repealed the provisions under Chapter 2 of NEMA establishing both the NEAF and CEC.[11]

The NEAF's mandate was set out in Chapter 2, where the Forum would assist the Minister in considering the views of numerous stakeholders and advise the Minister on the achievement of environmental governance objectives. The Forum consisted of 12 to 15 members elected by the Minister and nominations would be received from numerous stakeholders, including NGO's and community based organisations.[12]

The object of the CEC was to promote integrated and co-ordinated environmental management by all organs of state. An objective of the CEC was to investigate the possibility of a single point through which all environmental authorisation applications would be received,[13] as well as to "co-ordinate the application of integrated environmental management… including co-operation in environmental assessment procedures and requirements."[14] The CEC comprised of the Director-Generals of numerous departments, including Minerals and Energy, Water Affairs and Labour. Further, the CEC would aim to co-ordinate the consideration of numerous environmental authorisation applications by the designated organs of state in order to avoid the duplication of efforts. Sub-committees were established to support the CEC in achieving its objectives and performing its objectives.

Currently, only two CEC sub-committees remain: the Subcommittee on Environmental Implementation Plans, and the Subcommittee on Law Reform. The intention behind the Subcommittee on Environmental Implementation Plans is to minimize the duplication of environmental functions and expenditures by the affected departments; to build and strengthen relationships between departments; to promote joint planning on environmental issues and to improve cooperative governance and share information. The Subcommittee on Law Reform is intended to coordinate all environmental legislation and evaluate draft legislation from other relevant departments that may impact on the environment.

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[10] Act 8 of 1996.
[11] Section 3. This section was repealed by section 5 of Act 14 of 2009.
[12] Section 4. This section was repealed by section 5 of Act 14 of 2009.
[13] Section 7(3)(c). This section was repealed by section 5 of Act 14 of 2009.
[14] Section 7(3)(d). This section was repealed by section 5 of Act 14 of 2009.

Section 3A of NEMA currently provides for the establishment of any forum or advisory committee at the discretion of the Minister. The Minister may, by notice in the government gazette establish these committees or forums as well as indicate their composition and functionary powers.

Government has an established system of cooperative governance structures across and within all three spheres. Within spheres these structures are based on the cluster management model which groups line departments into clusters along sectoral lines. Cooperation is achieved across spheres at both political and executive levels through various intergovernmental forums within the clusters such as MINMECs, MINTECH and its Working Groups, FOSAD and those structures established in terms of the Intergovernmental Framework Relations Act. These structures focus largely on strategic and policy setting matters. Established mechanisms that facilitate and promote engagement and interaction between government and its social partners also exist. Examples of such mechanisms include NEDLAC; the various multi-stakeholder forums established at provincial level to structure engagement on Provincial Growth and Development Strategies and at municipal level on local economic development.

3.2. INTEGRATED ENVIRONMENTAL MANAGEMENT PROCEDURES

Section 24 of the Constitution requires, amongst other things, that the environment is protected through reasonable legislative and other means to secure ecologically sustainable development and use of natural resources. Chapter 5 of NEMA seeks to give effect to this imperative by promoting the application of appropriate environmental management tools to ensure the integrated management of activities that may impact on the environment. Section 24 of NEMA provides for consideration, investigation, assessment and reporting of the potential consequences for or impacts on the environment of listed activities (or specified activities) to the competent authority.

Depending on the nature of the project, permissions other than environmental authorisations may also be required. These include water use licences, waste management licences, air emissions licences, permits to cut down protected trees, permits to operate a major hazard installation ("MHI"), heritage resource agency approval, permits to mine, permits to cultivate virgin land, permits to subdivide agricultural land and planning approval. In most cases the decisions are made at a national or provincial level but in a few cases the decision-making is handled at the municipal level, such as in instances where land needs to be rezoned before a particular activity can commence.

Since there may be many pieces of legislation and a number of different authorities involved in authorising a development project, our starting point is the empowering legislation. This sets out

(a) who the competent authorities are, and

(b) what rules are in place to encourage interaction and integrate decision-making?

We explain the procedural requirements in the following section.

3.2.1. Who are the Competent Authorities?

Constitution of the Republic of South Africa, 1996

The reason so many different levels of government bodies may be involved in the EIA process, is due to the division of powers contained in the Constitution. The "environment" is included in Schedule 4 of the Constitution as a functional area of concurrent national and provincial legislative competence. This means that both national and provincial government have the power to make legislation that affects the environment. Other functional areas listed in Schedule 4 include agriculture, soil conservation, nature conservation, housing, public transport, regional planning and development, urban and rural development and pollution control. Schedule 5 of the Constitution contains matters of exclusive provincial legislative competence. They include provincial planning and provincial roads. Local government (subject to capacity) deals with issues such as noise pollution, municipal roads, water supply and sanitation, storm water management, refuse and solid waste disposal. The national government has exclusive legislative competence in respect of matters not listed in Schedules 4 and 5. These matters include energy and water (other than sanitation and potable water systems).

National Environmental Management Act 107 of 1998 ("NEMA")

NEMA provides in section 24C that the national Minister of Environmental Affairs is the competent authority in situations where -

- The activity has implications for national environmental policy or international commitments or relations;
- The activity will take place in an area identified in terms of sections 24C(2)(b) of NEMA in certain circumstances;[15]
- The applicant is a national department;

[15] This covers situations where the activity will take place within an area protected by means of an international convention, other than (i) any area falling within the sea shore or within 150 metres seawards of the high water mark (ii) a conservancy,(iii) a protected natural environment, (Iv) a proclaimed private nature reserve, (v) an natural heritage site, (vi) the buffer zone or transitional area of a biosphere reserve; or (vii) the buffer zone or transitional area of a world heritage site.

- The applicant is a provincial department responsible for environmental affairs;
- The applicant is a statutory body (excluding a municipality) performing an exclusive competence of national government; or
- Where the activity will take place in a national proclaimed protected area or another conservation area under the control of a national authority; and
- Where the activity has a development footprint that falls within the boundaries of more than one province or traverses international boundaries.

The Minister of Minerals and Energy is the competent authority where the activity constitutes prospecting, mining, exploration, production or a related activity, occurring within a prospecting, mining, exploration or production area.

The provincial MEC for the environment is the competent authority when specified in the list of activities. For example the MEC is empowered to make decisions on the storage of general waste while the national minister must deal with hazardous waste permitting. In Listing Notice 3, the competent authority is always the environmental authority in the province in which the activity is to be undertaken (again, unless mining is involved).

NEM: Waste Act 59 of 2008 ("Waste Act")

Section 43(1) provides that the national Minister is the licensing authority in situations where -

(a) unless otherwise indicated by the Minister by notice in the *Gazette,* the waste management activity involves the establishment, operation, cessation or decommissioning of a facility at which hazardous waste has been or is to be stored, treated or disposed of;

(*b*) the waste management activity involves obligations in terms of an international obligation, including the importation or exportation of hazardous waste;

(*c*) the waste management activity is to be undertaken by a national department; a provincial department responsible for environmental affairs; or a statutory body, excluding any municipality, performing an exclusive competence of the national sphere of government;

(d) the waste management activity will affect more than one province or traverse international boundaries; or

(*e*) two or more waste management activities are to be undertaken at the same facility and the Minister is the licensing authority for any one of those activities.

In all other instances (except where the power has been delegated), the MEC in the province within which the activity takes place will be the permitting authority.[16] It is also possible for the Minister and MEC to enter into an agreement which allows for either the Minister or MEC to be the licensing authority for any specific activity.[17]

NEM: Air Quality Act 39 of 2004 ("AQA")

In terms of Section 21 of the AQA, the Minister "must" and an MEC "may" publish a list of activities[18] that may cause atmospheric emissions which are deemed to have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage. In order to carry out such an activity, a provisional atmospheric emission licence or an atmospheric emissions licence must be obtained.

Section 36 provides that the licensing authority will be the Metropolitan and District municipalities unless this power has been delegated (as provided for in terms of Section 238(a) of the Constitution) to the provincial authority. In addition, if the MEC has intervened in a metropolitan or district municipality (as provided for in terms of section 238(b) of the Constitution), on the ground that the municipality cannot or does not fulfil its obligations as licensing authority in terms of the Act, a provincial organ of state designated by the MEC must for the duration of the intervention be regarded as the licensing authority in the area of that municipality.[19]

Furthermore, if the Municipality is the applicant for such a license, a provincial organ of state designated by the MEC must be regarded as the licensing authority for the purpose of-

a) that application; and

b) the implementation of this Act in relation to any licence that may be issued to the municipality.[20]

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[16] NEM: Waste Act , section 43(2).
[17] NEM: Waste Act , section 43(3).
[18] These activities are listed in GN 248 of 31 March 2010.
[19] NEM: AQA Section 36(3).

NEM: Integrated Coastal Management Act 24 of 2008 ("ICMA")

Earlier drafts of the ICMA provided that certain activities could not be undertaken within the coastal zone or parts of the coastal zone, without a coastal permit. In the version of the ICMA that was enacted references to coastal permits were replaced with reference to environmental authorisations under NEMA, but some of the specific provisions which had applied in relation to coastal permits were retained, in recognition of the unique character of the coast.

The ICMA defines "coastal activities" as activities that are listed or specified in terms of chapter 5 of NEMA and which take place in the coastal zone. The ICMA then imposes additional requirements in relation to EIA processes that are undertaken in relation to coastal activities.

First the ICMA requires that the competent authority must take into account a number of specific factors when deciding whether or not to grant an environmental authorisation for a coastal activity (these are specified in section 63(1)).

Secondly the ICMA guides the exercise of the discretion of the competent authority by providing that a competent authority may not issue an environmental authorisation for a development or activity in certain circumstances. For example, a competent authority should not authorise a development or activity within coastal public property, the coastal protection zone or coastal access land if that activity or development would be inconsistent with the purpose for which the area in question has been designated or is being managed, or if it would substantially prejudice the achievement of any coastal management objective (section 63(2)).

However, in recognition that the restrictions on the ability of a competent authority to issue environmental authorisations could give rise to undesirable results in certain circumstances, the ICMA provides for exceptions in specific circumstances. For example, the ICMA allows a competent authority to issue an environmental authorisation in respect of a development or activity if the very nature of the proposed activity or development requires to be located in that part of the coastal zone (section 63(3)(a)) or if it will provide important services to the public (section 63(3)(b)).

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[20] NEM: AQA section 36(4).

The ICMA also provides that if the restrictions imposed by section 63(2) prevent a competent authority from issuing an environmental authorisation in circumstances in which it believes that doing so would be in the public interest, the competent authority may refer the application for consideration by the Minister. The Minister may then grant an environmental authorisation if he or she believes that the environmental authorisation is overwhelmingly in the interests of the whole community (section 63(4) as read with section 64).

NEM: Biodiversity Act 10 of 2004 ("Biodiversity Act")

The Act provides that the "issuing authority" for licences is the Minister or an organ of state in the national, provincial or local sphere of government that has been designated (by regulation) as such for permits specified in section 87. The section 87 permits relate to:

(a) restricted activities involving specimens of—
  (i) listed threatened or protected species in terms of section 57(1);
  (ii) alien species in terms of section 65(1); or
  (iii) listed invasive species in terms of section 71(1);
(b) activities regulated in terms of a notice published in terms of section 57(2);
(c) bio-prospecting involving indigenous biological resources in terms of section 81(1); or
(d) the export of indigenous biological resources for bio-prospecting or any other type of research in terms of section 81(1).

Furthermore, in terms of subsection 53 (1) the Minister may, by notice in the *Gazette*, identify any process or activity in a listed ecosystem as a threatening process; and subsection (2) provides that an identified threatening process must be regarded as a specified activity contemplated in Section 24 (2) (*b*) of NEMA and a listed ecosystem must be regarded as an area identified for the purpose of that Section.

National Water Act 36 of 1998 ("NWA")

In terms of section 41(2)(1)(ii) of the NWA, an application for a water use license may also require an EIA, (for instance, to assess the effect of the proposed licence on water resource quality). The competent authority for water licences is the Minister for Water Affairs or a Catchment Management Agency ("CMA") (if the duty has been assigned by the Minister to the CMA).

Marine Living Resources Act 18 of 1998 ("MLRA")

In terms of section 18(3) of the MLRA, when an application is made for fishing rights, the applicant may be required to undertake an EIA prior to the right being granted. The competent authority in this instance is the Minister of the Department of Agriculture, Forestry and Fisheries ("DAFF").

Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA")

In order to obtain a mining right, an EIA process must be undertaken and an EMP is required. Application for permission to prospect or mine is made to the Minister of Minerals and Energy. While the Minister of Minerals and Energy is the competent authority for decision making where the activity constitutes prospecting, mining, exploration, production or a related activity occurring within a prospecting, mining, exploration or production area, an appeal against a decision taken by the Minister of Minerals and Energy in respect of an environmental management programme or environmental authorisation is to the Minister of the Department of Environmental Affairs (section 43 (1A) of NEMA).

Development Facilitation Act 67 of 1995 ("DFA")

The DFA Tribunal may approve a development application made in terms of the Act, but no construction can commence until an environmental authorisation has been obtained. The DFA Regulations[21] contain their own provisions for environmental evaluation, but they merely incorporate the EIA regulations[22] in that they require that a scoping report and an environmental impact assessment report is prepared in accordance with DEA's own EIA requirements, so the process is the same. Although it is not essential, it is advisable to obtain an environmental approval before approaching the DFA Tribunal.

There have been major concerns with the use of the DFA process for development applications that are not strictly speaking Reconstruction and Development Programmes ("RDP") and the fact that the DFA Development Tribunal makes decisions about land use that over-ride those of the municipalities. This has been resolved by the ruling of the Constitutional Court in City of Johannesburg case[23]. It was held that provincially appointed bodies (such as Development Tribunals) may not interfere in any way with the administration of "municipal planning". This has effectively ousted any jurisdiction these bodies may have

[21] GN R1 in GG 6709 of 7January 2000.

22 Regulation 31(1) provides that the land development applicant must include in his or her application, as set out in Annexure B, an environmental scoping report, prepared in accordance with the environmental impact assessment guidelines or other requirements which are from time to time issued or amended by the national Department of Environmental Affairs and Regulation 31(3)(a) provides that on the basis of the scoping report, the tribunal may require the land development applicant to prepare an environmental impact assessment in accordance with the environmental impact assessment guidelines or other requirements which are from time to time issued or amended by the national Department of Environmental Affairs.

had before the 1996 Constitution came into effect. However as there is a significant lack of capacity at the municipal level, the declaration of constitutional invalidity (with respect to Chapters V and VI of the Act) has been suspended for two years (except in the City of Johannesburg and eThekwini, which the court adjudged to have sufficient capacity) so that Parliament can correct the defects or enact legislation. It is likely that the DFA may have outlasted its usefulness and will be repealed, if not in its entirety, at least in part.

The Constitutional Court in the City of JHB Municipality v Gauteng Development Tribunal & Others 2010 (6) SA 182 (CC) confirmed the powers of municipalities with regard to "planning" and held that 'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of use of land. Therefore the Court held that the provisions of the Development Facilitation Act that grant the provincial authority, in this case the Gauteng Development Tribunal, powers to determine applications for the rezoning of land and the establishment of townships are unconstitutional in that they usurp the municipality's constitutional municipal planning powers as planning is a local government competence in terms of section 156(1) of the Constitution,

National Heritage Resources Act 25 of 1999 ("NHRA")

Heritage resources are any place or object of cultural significance. They are controlled at the national level by the South African Heritage Resources Agency ("SAHRA"). In some provinces there are also provincial Heritage Resources Acts in place and in these instances, provincial bodies are set up to control provincial heritage resources.

The Act refers to the cultural heritage resources of South Africa as the "national estate". Anyone who intends to undertake a development must notify the heritage resources authority and if there is reason to believe that heritage resources will be affected, a heritage impact assessment ("HIA") report must be compiled at the developer's cost. Thus developers will be able to proceed with certainty about whether work will have to be stopped if a heritage resource is discovered.

[23] City of Johannesburg v Gauteng Development Tribunal & Others 2010 (6) SA 182 (CC)

The need for a HIA is not only determined by the type of development being proposed (and whether this type of development is listed in section 38(8) of the NHRA). Heritage resources could arise as an issue in respect of any type of development, which means that a specialist study on heritage issues (i.e. a HIA) will generally be needed. It may also be necessary to obtain a permit from the relevant heritage resources authority under certain circumstances, for example, if any change to a national or provincial heritage resource[24] or to any heritage objects[25] or a structure older than 60 years,[26] is envisaged.

National Forests Act 84 of 1998 ("NFA")

This Act seeks to promote sustainable use of forests for environmental, economic, educational, health, recreational, cultural and spiritual purposes, and provides special measures for the protection of certain forests and trees. A licence must be obtained from the Department of Agriculture, Forestry and Fisheries ("DAFF") for certain activities. For instance, the moving of water, electricity, gas, fuel, hunting and fishing in state forests, require licenses.

National Building Regulations and Building Standards Act 103 of 1977

No development can commence without building plan approval from the building control officer of the local authority. Section 7(1) of the Act provides that permission to build may only be given if the municipality is satisfied that the application complies with both the Act itself as well as "any other applicable law", obviously including any environmental law.

Approval of building plans overlaps with environmental issues in a number of ways. For instance, the Regulations under the Act provide that in some cases where an application has been made for building permission and the local authority has reason to believe that the land upon which the building is to be erected is contaminated,[27] it must inform the applicant of this and the applicant must then appoint an approved competent person to undertake a geotechnical site investigation. This duty is not only triggered when and if a notification is sent, but the applicant is also obliged to commission an investigation in two other circumstances - where he or she is aware of the contamination, or if it is evident. The geotechnical investigation must determine whether or not the erection of the building

[24] NHRA section 27(18).
[25] NHRA section 32(13).
[26] NHRA section 34(1).
[27] For the purposes of the regulations, contaminated land refers to "any land that due to substances contained within or under it, is in a condition that presents an unacceptable risk to the health and safety of occupants of buildings constructed on such land".

(including the site works) on the contaminated land should be permitted, and if so, under what conditions.

Provincial Town Planning Ordinances and Municipal Town Planning Schemes

The position with respect to authorisations and land use planning is rather complicated. The complexity of determining the zoning and land use rights of specific sites, particularly where these are located outside of urban areas, is exacerbated by the fact that much of the land use control and planning legislation predates the 1996 Constitution and reflects the former system where provinces delegated land use management powers to municipalities and municipalities had restricted areas of jurisdiction (i.e. much of the land within a province fell outside of the area of jurisdiction of any municipality).

The pre-1996 provincial legislation, which is still in force, continues (except in KZN and Northern Cape) to apply to the same geographical areas to which it applied before the 4 former provinces were replaced by the current 11 provinces. This means that the Western Cape operates under the Land Use Planning Ordinance 15 of 1986 (LUPO) and this also still applies in most of the Eastern Cape, (except in the area previously known as the Transkei, which has its own Transkei Ordinance from the time when it was self-governing). The Free State operates under the Free State Town Planning Ordinance. North West Province operates partly under the old Transvaal Ordinance and partly under the Cape Province's LUPO. All of the former Transvaal (i.e. Gauteng, Limpopo, Mpumalanga and parts of the North West) operate under the Transvaal Ordinance 15 of 1986. As mentioned, Northern Cape has a new era Planning and Development Act (Act 7 of 1998) as has KZN, the KZN Planning and Development Act (Act 6 of 2008).

Provincial ordinances generally establish regional planning bodies for final decision-making purposes, such as adjudicating appeals, but applications for rezoning of land (which is often a necessary part of a development project which triggers a listed activity) are made to local municipalities. This is because since the 1996 Constitution municipalities have been given original powers to deal with issues of municipal planning. Most town planning is a function of a metropolitan (Category A) or local (Category B) municipality although district (Category C) municipalities may also have some planning functions (for instance they plan the regional road network).

3.2.2. What co-operative governance procedures are in place to ensure integrated decision-making?

Given that there are so many different pieces of legislation in terms of which additional approvals or permits may need to be obtained, there is (of course) a pressing need for co-operation and integrated decision-making. Again, the investigation of what rules are in place to ensure that the various authorities work together and integrate decision-making, is dealt with below through a study of the different pieces of empowering legislation.

Constitution of the Republic of South Africa, 1996

The principle that different organs of state and spheres of government must cooperate with one another is a fundamental feature of the Constitution. Chapter 3 of the Constitution sets out principles of cooperative government and intergovernmental relations which must be applied by all spheres of government. Among these principles is the requirement that organs of state must cooperate with one another in mutual trust and good faith by, among other things, informing one another of, and consulting one another on matters of common interest[28] and co-ordinating their actions with one another.[29]

The Constitutional principle that organs of state have a duty to cooperate also means that, to the extent possible, an application for environmental authorisation must be aligned with the application processes for other authorisations that an Applicant is required to obtain (such as approval for re-zoning and subdivision applications), and *vice versa*.

The Constitution also provides that the decision-maker must ensure that where the development proposal involves functional areas administered by other state departments, whether national or provincial, it consults with those other departments during the course of deciding the application.

A decision-maker should also take into account laws administered by other departments in formulating the conditions subject to which the authorisation will be granted.

[28] Constitution,Section 41(1)(h)(iii).
[29] Constitution,Section 41(1)(h)(iv).

Intergovernmental Framework Relations Act, 13 of 2005

The Intergovernmental Framework Relations Act, 13 of 2005 establishes a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations. It also provides for mechanisms and procedures to facilitate the settlement of intergovernmental disputes.

In terms of the Act, all organs of state must make every reasonable effort to avoid intergovernmental disputes and to settle intergovernmental disputes without resorting to judicial proceedings.

National Environmental Management Act 107 of 1998

One of the principles of NEMA is that there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.[30] Furthermore, Chapter 3 of NEMA provides for procedures for co-operative governance. In terms of section 11, every department listed in Schedule 1 or 2 must prepare an environmental implementation plan and environmental management plan, respectively, every four years. Before submitting such a plan, consideration must be taken of every other environmental implementation or management plan already adopted, so that consistency can be achieved and the duplication of procedures and functions can be avoided. Thereafter, departments are required to exercise their functions in accordance with the environmental implementation plan or the environmental management plan that they have adopted.

It is also a principle of NEMA that actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures[31] and therefore without recourse to litigation where possible. In resolving a dispute, the parties can either attempt to resolve the problem amongst themselves or a third party who has no personal interest in the matter can facilitate and mediate the resolution process. The dispute resolution process allows opportunities for both sides to put forward their concerns. As a result of having their views considered, the parties are more likely to support the final outcome. Dispute resolution allows the parties to be creative and foster better relationships and provides an opportunity for new ideas to be generated to address problems. It is a useful tool and should be encouraged to resolve disputes during the EIA process, so as to avoid unnecessary litigation.

[30] NEMA, Section 2(4)(l).)
[31] NEMA, Section 2(4)(m)

The EIA Regulations "unpack" the NEMA principles relating to co-operation and integrated decision making further by specifically prescribing that certain steps are taken or factors are taken into account by the competent authority ("CA") when making a decision. The CA for a listed or specified activity is bound to consider certain factors during the decision-making process. Some of these involve the idea of co-operative governance and integrated decision-making. For instance, the CA must:

- Ensure NEMA section 24(4) minimum requirements have been satisfied (these include that there is co-ordination and co-operation between organs of state in the consideration of applications and that they have been given a reasonable opportunity to participate in procedures);
- Take into account and apply NEMA section 2 principles (these include that there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment and those actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures);
- Consider all the criteria prescribed in NEMA section 24(O) (these include that the Minister, the Minister of Minerals of Energy, the MEC or any other competent authority for an EIA authorisation, must consult with and take into account the comments of any organs of state charged with the administration of any law that relates to the activity in question. Where mining is concerned an objection from another state department may be referred back to the Regional Mining Development and Environmental Committee ("RMDEC") for consideration and recommendation);
- Consider the requirements of NEMA section 24K (these include that a Minister or MEC may consult with any other organ of state responsible for administering legislation relating to any aspect of an activity that also requires environmental authorisation so that the respective requirements of such legislation is co-ordinated and duplication is avoided. Furthermore the Minister or MEC may after such consultation enter into a written agreement with the organ of State in order to avoid duplication in the submission of information or the carrying out of a process. After having concluded such an agreement the Minister or MEC may, when considering an application for environmental authorisation that also requires authorisation in terms of other legislation, take into account whether any process authorised under the other legislation is, with certain provisos), adequate for meeting the NEMA EIM requirements);
- Take into account relevant national and provincial guidelines and assess the submission in terms of relevant legislation, policies, plans, strategies, and guidelines.

NEMA also contains provisions that ensure that the different authorisations can be aligned. Section 24L(1) provides that If the carrying out of a listed activity or specified activity contemplated in section 24 is also regulated in terms of another law or a specific environmental management Act, the authority empowered under that other law or specific environmental management Act to authorise that activity and the competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of that activity may exercise their respective powers jointly by issuing—

(*a*) separate authorisations; or
(*b*) an integrated environmental authorisation.

In terms of section 24L(2), the integrated environmental authorisation can only be issued if -

(a) The relevant provisions of NEMA and the other law or specific environmental management Act have been complied with ; and
(b) The environmental authorisation specifies the provisions in terms of which it has been issued and the relevant authority or authorities that have issued it.

If the specific environmental management Act is also administered by that CA, section 24L(3) provides that the CA empowered under Chapter 5 to issue an environmental authorisation in respect of a listed activity or specified activity may regard such authorisation as a sufficient basis for the granting or refusing of an authorisation, permit or licence under a specific environmental management Act.

Furthermore section 24L(4) provides that a competent authority empowered under Chapter 5 to issue an environmental authorisation may regard an authorisation in terms of any other legislation that meets all the requirements stipulated in section 24 (4) (*a*) and, where applicable, section 24 (4) (*b*) to be an environmental authorisation in terms of that Chapter.

The order in which particular applications should be submitted is not set or specified. In order for an organ of state to fulfil the obligation to take the NEMA principles (section 2) into account when making decisions that may significantly affect the environment, it makes sense to wait until the EIA process has been concluded or at least until the environmental information is to hand (BAR or S&EIR), before making the decision. It would be difficult for those decision-makers to consider the environment meaningfully without the benefit of the information gathered during the EIA process. The competent authority's view

on whether the environmental impacts can be successfully mitigated should also be considered, which means that decision-makers need to consult each other.

It should be noted that whilst the legislation requires co-ordination between organs of state, this does not mean that they must all reach the same decision. Each organ of state operates within its own mandate and thus applies decision-making criteria that are relevant in the context of exercising this mandate. For example, land use decisions such as rezoning and sub-divisions should take account of spatial plans (such as the municipal SDP), infrastructure capacity, access, existing use of the site, surrounding land uses and the like.

It is incorrect to suggest that because one decision-maker has issued an approval, that other decision-makers should do the same. This applies even if the decision-makers are located within one government department. For example, the DEA may decide to authorise a major energy development, but the DWA may refuse to issue a water use licence because it has been determined that there is inadequate water available in the system. In this example, it must be noted that the DWA has a narrower or more focussed mandate (i.e. water resources) than the DEA (environment). Water availability will be one of several factors that the DEA would consider when determining whether to authorise or refuse the development. The DWA would, however, make the decision based on matters directly related to water resources. Another possibility is that both DEA and DWA could decide to refuse the application because it is determined that limited water availability is such a significant issue that it constitutes a "fatal flaw". This decision would be based on considering the sustainability of water resources, the impacts on other water users and ecological issues.

NEMA EIA Regulations (GN R543, GG33306, of 18 June 2010)

Regulation 6 deals with issue of consultation between the CA and State departments administering a law relating to a matter affecting the environment. Where there is already an agreement in place between the separate departments then the application must be dealt with in accordance with that agreement (Regulation 6(1)).

Furthermore, if the Minister, MEC, Minister of Mineral Resources or identified competent authority considers an application for an environmental authorisation, the Minister, MEC, Minister of Mineral Resources or the CA must take into account all relevant factors including any comments received from a

relevant State department that administers a law relating to a matter affecting the environment, relevant to that application for environmental authorisation (Regulation 6(2).

The Minister, MEC, Minister of Mineral Resources or identified CA, must consult with every State department that administers a law relating to a matter affecting the environment relevant to that application for an environmental authorisation when he or she considers the application (Regulation 6(3).

Of the authorisations, arguably the most crucial is an environmental authorisation under NEMA since it requires a developer to undertake a detailed and often lengthy environmental impact assessment ("EIA") process involving extensive public participation as part of the application process. Depending on the nature of the projects, developers may be obliged to undertake either a shorter Basic Assessment process or the more comprehensive scoping and environmental impact assessment ("S&EIR"). Although it is conceivable that some small projects may only be subject to Basic Assessment, our view is that the majority will require S&EIR and this memorandum has assumed that to be the case for the purposes of making recommendations on streamlining. Authorities responsible for making decisions in other consent processes must usually consider the outcome of the EIA process as a relevant factor in their own decision.

We have summarised the key features of the EIA procedure as prescribed in the NEMA EIA Regulations in the table below and the steps to be followed in the both the Basic Assessment and more comprehensive S&EIR processes is illustrated in a flow diagram[32] following the table:

[32] Taken from the "Sector Guidelines for the EIA Regulations" prepared for the national Department of Environmental Affairs by MEGA and EnAct International (2010)

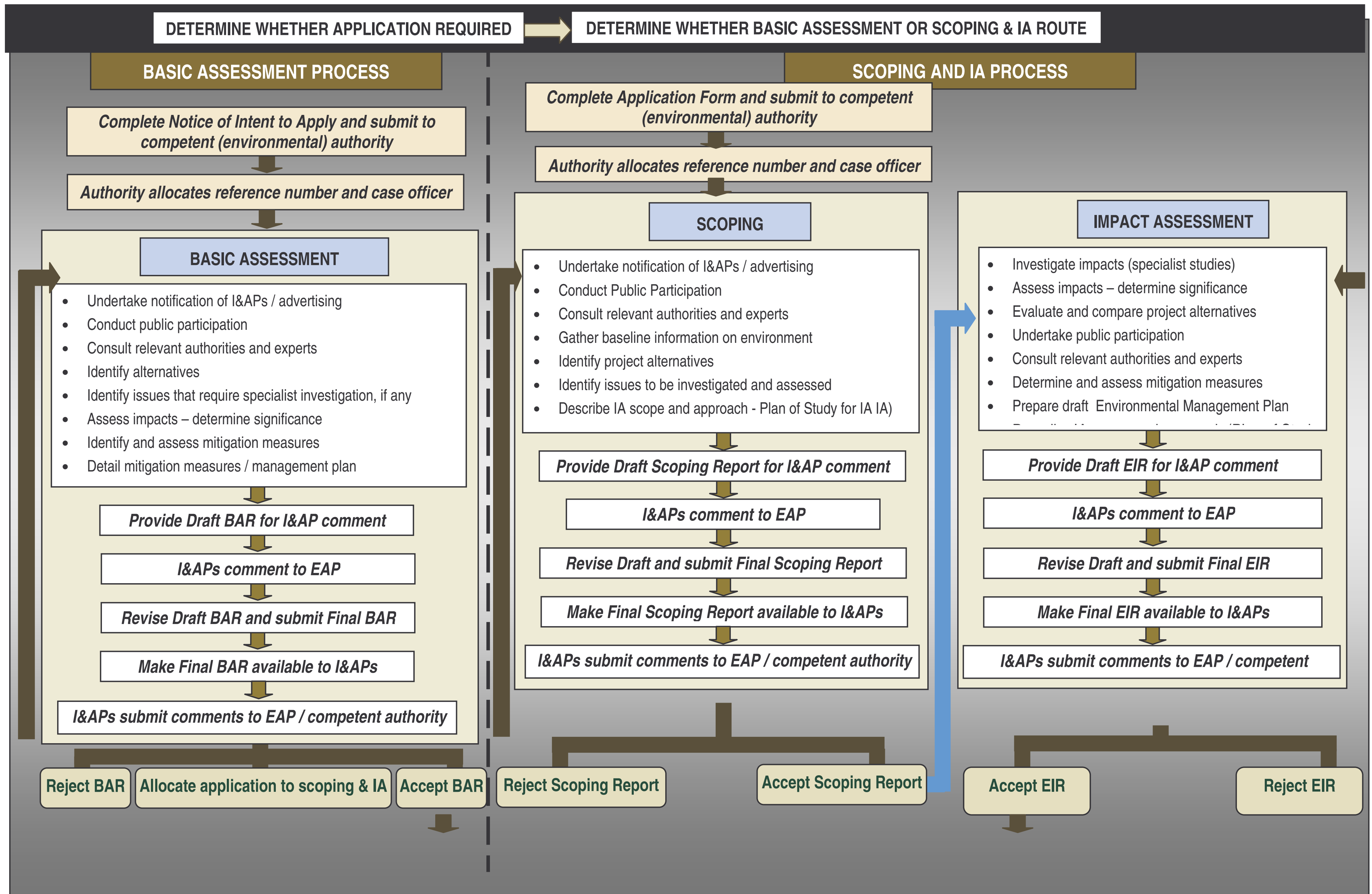
FIGURE 1: KEY PROCEDURES IN TERMS OF NEMA EIA REGULATIONS

Trigger	Application	Gathering of Information	Public Participation Process (PPP)	Review procedure	Decision and Granting of Authorisation	Appeal
Listed Activity requiring a basic assessment. Listing Notice 1, June 2010 and Listing Notice 3, June 2010.	Application	**Regulation** 22: a Basic assessment must contain all the information necessary for a component authority ("CA") to reach a decision **Regulation** 22 lists the necessary information	**Regulation** 54	**Regulation** 23 - Submission of report to the CA. Submission includes: Basic Assessment Report ("BAR") Any representations and comments in connection with the application or BAR **Regulation** 24 - CA will accept or reject the report within 30 days of receipt	**Regulation** 25 – within 30 days of accepting the report or receiving additional information – grant authorisation or refuse the authorisation Grant authorisation or refuse the authorisation. **Section 24O – Criteria to be taken into account by a competent authorities when considering applications**	**Section** 43 appeal process. Any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under this Act or a specific environmental management Act.
Listed Activity requiring both a Scoping procedure as well as an EIA Listing Notice 2, June 2010. Scoping Procedure	**Regulation** 26 - Complete application form for environmental authorisation and submit application with necessary documents referred to in **Regulation** 12(2)(b)	**Regulation** 27 - After Application – then allow for a Public Participation process. Gather comments and maintain a register of interested an affected parties. Complete a scoping report by looking at potential environmental impacts of the activity and feasible and reasonable alternative **Regulation** 28 – Content of the Scoping report	**Regulation** 27- Allow all registered interested and affected parties comment on the scoping report in accordance with **Regulation** 56.	**Regulation** 29 – report is submitted to the CA including Representation made by interested and affected parties Minutes of meetings **Regulation** 30 – report must be accepted or rejected (more information needs to be submitted)	**Regulation** 31 – Scoping report accepted – then allow EAP to proceed with the EIA **Section** 24O – Criteria to be taken into account by a competent authorities when considering applications	
EIA Procedure	Scoping report has been accepted – EAP proceed with	**Regulation** 31(2) – indication of what the EIA report must contain	**Regulation** 31(1) read with **Regulation** 28 – must conduct a PPP.	**Regulation** 34 - Submission of the EIA report	Within 45 days of acceptance of the EIA report – grant or refuse the application	**Section** 43 appeal process. Any person may appeal to the Minister against a decision taken by any person acting under a power

FIGURE 1: KEY PROCEDURES IN TERMS OF NEMA EIA REGULATIONS

Trigger	Application	Gathering of Information	Public Participation Process (PPP)	Review procedure	Decision and Granting of Authorisation	Appeal
	EIA			**Regulation** 34 - The CA must accept or reject the submission	Authorisation granted **Regulation** 36 – may be a single authorisation for more than one activity in compliance with **Regulation** 14 and in terms of **Section** 24L of NEMA **Section 24O – Criteria to be taken into account by a competent authorities when considering applications**	delegated by the Minister under this Act or a specific environmental management Act.

FIGURE 2: OVERVIEW OF NEMA EIA PROCESS



NEMA Environmental Management Frameworks (EMF) Regulations (GN R547, GG33306 of 18 June 2010)

The Environmental Management Framework Regulations came into effect in August 2010 and make provision for environmental management frameworks. An environmental management framework ("EMF") may be formulated for an area by the Minister or by an MEC with the concurrence of the Minister.[33] An EMF aims to promote co-operative governance and will assist in ensuring environmental protection within the designated area.[34] The initiation of an EMF requires a public participation process and a draft EMF must be made available for public scrutiny.[35] Representations and comments arising from this process must be considered and the draft EMF must be reviewed in light of the numerous comments received. The draft EMF must specify the numerous attributes of the environment in the area, including sensitivity and significance,[36] the conservation status of the area or specific parts of the area,[37] the environmental management priorities within the area[38] as well as the kind of developments or land uses that may have a significant impact on the area[39] or may be undesirable.[40]

NEM: Integrated Coastal Management Act 24 of 2008 ("ICMA")

The National Environmental Management: Integrated Coastal Management Act, 24 of 2008 ("ICMA"), most of which came into force on 1 December 2009, is particularly important from the perspective of strengthening the institutional and procedural aspects of the EIA system.

First the ICMA provides a good example of legislation designed to achieve integrated decision making. In fact the clauses on integrated authorisations which now appear in NEMA were first drafted for the ICMA and were subsequently removed from that Act and adapted for inclusion in NEMA so that they could have wider application.

Secondly the ICMA provides an example of how to integrate environmental decision-making and land use decision-making, and how to strengthen the link between project-specific decision-making and strategic policies and plans.

[33] Regulation 3(1).
[34] Regulation 2(3).
[35] Regulation 3(2)(c)(i).
[36] Regulation 4(b).
[37] Regulation 4(d).
[38] Regulation 4(e).
[39] Regulation 4(f).

Thirdly, the ICMA contains mandatory provisions relating to how EIAs must be conducted in relation to proposed activities within the coastal zone, which must be fully integrated into EIA decision-making processes under NEMA.

There are various other provisions of the ICMA which are relevant to other sub-themes, such as the provisions in section 58 which are designed to ensure that the enforcement of the duty of care under section 28 of NEMA can be implemented effectively in coastal areas.

Land use decisions within the coastal protection zone

The ICMA provides in Section 62(g) that "an organ of state may not authorise land within the coastal protection zone to be used for any activity that may have an adverse effect on the coastal environment without first considering an environmental impact assessment report"

It is important to appreciate that this provision does not apply throughout the coastal zone but only to land in the coastal protection zone (an area inland of the high water mark as defined in the ICMA). This provision has significant implications for land use decision-making in relation to the coastal protection zone, most of which is undertaken within the provisional and municipal spheres of government, although some are undertaken within the national sphere of government (e.g. the consent of the national Minister of Agriculture is required for the subdivision of agricultural land, in accordance with the provisions of the Subdivision of Agricultural Lands Act, 70 of 1970). In order to implement this provision, organs of state that have the power to authorise the use of land within the coastal protection zone must establish procedures for determining which activities may have an adverse effect on the coastal environment, and then require the applicant to provide an EIA report. Although the ICMA does not specify that the EIA report should be prepared in accordance with the requirements of NEMA and the EIA regulations, it would be sensible and practical for the organ of state in question to impose that requirement.

The ICMA also provides that the implementation of legislation relating to the planning of development of land in the coastal protection zone must be applied in a manner that gives effect to the purposes for which the coastal protection zone is established as set out in section 17. This effectively means that all national, provincial and municipal legislation that regulates the use of land within the coastal protection zone must be implemented in a manner that ensure that coastal protection zone fulfils the functions for

[40] Regulation 4(g).

which it was designated. These include: protecting the ecological integrity, natural character and the economic, social and aesthetic value of coastal public property, protecting the ecological integrity of the coastal environment, and protecting people, property and economic activities from risks arising from dynamic coastal processes, including the risk of sea level rise.

Procedural and institutional implications

It is clear from the above that competent authorities responsible for issuing environmental authorisations under NEMA that have jurisdiction over areas of the coastal zone, must review their procedures to ensure that they comply with the provisions of the ICMA.

It is also important that the DEA liaise with provincial and municipal governments in the coastal provinces to ensure that land use management planning and decision-making is being undertaken in a manner that is consistent with the ICMA. In this regard it should be noted that part 7 (Coastal Planning Schemes) of chapter 6 (Coastal Management) of the ICMA contains specific provisions to facilitate the integration of coastal management concerns into land use management schemes (see sections 56 and 57).

NEM: Biodiversity Act 10 of 2004 ("Biodiversity Act")

The Biodiversity Act deals in section 92 with the co-ordination of permitting activities by prescribing that if the carrying out of an activity mentioned in section 90 is also regulated in terms of other law, the authority empowered under that other law to authorise that activity and the issuing authority empowered under this Act to issue permits in respect of that activity may—

(a) exercise their respective powers jointly; and

(b) issue a single integrated permit instead of a separate permit and authorisation.

Furthermore, an authority empowered under that other law may issue an integrated permit for the activity in question if that authority is designated in terms of this Act also as an issuing authority for permits in respect of that activity. An integrated permit may be issued only if *(a)* the relevant provisions of this Act and that other law have been complied with; and *(b)* the permit specifies the provisions in terms of which it has been issued; and authority or authorities that have issued it. The issuing authority in terms of the other law must also be the designated issuing authority in terms of the Biodiversity Act.

FIGURE 3: INTEGRATED PERMITTING PROCESS (BIODIVERSITY ACT)

Trigger	Application	Gathering of Information	Public Participation Process (PPP)	Review procedure	Decision and Granting of Authorisation	Appeal
Section 87 - Permits	**Section** 88 - A person may apply for a permit by lodging an application on the prescribed form to the authority.	**Section** 89 -Before issuing a permit, the issuing authority may in writing require the applicant to furnish it, at the applicant's expense, with such independent risk assessment or expert evidence as the issuing authority may determine. **Section** 90 – contents of the permit	**Section** 99 - Consultation.— (1) Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this **Section** and **Section** 100, the Minister must follow an appropriate consultative process in the circumstances. **Section** 100 – Public Participation The Minister must give notice of the proposed exercise of the power referred to in **Section** 99	**Section** 89 (2) An issuing authority may— request the applicant to furnish any additional information before it considers the application; require the applicant to comply with such reasonable conditions as it may impose before it grants the application; issue a permit unconditionally or issue it subject to conditions; or Refuse a permit.	**Section 92. Integrated permits.—** (1) If the carrying out of an activity mentioned in **Section** 87 is also regulated in terms of other law, the authority empowered under that other law to authorize that activity and the issuing authority empowered under this Act to issue permits in respect of that activity may— (*a*) exercise their respective powers jointly; and (*b*) Issue a single integrated permit instead of a separate permit and authorisation.	**Section 94. Appeals to be lodged with Minister.**—(1) An applicant who feels aggrieved by the decision of an issuing authority in terms of **Section** 88 (2) (*c*) or (*d*), or a permit holder whose permit has been cancelled in terms of **Section** 93, may lodge with the Minister an appeal against the decision within 30 days after having been informed of the decision. **95. Appeal panels.**—(1) If the Minister decides that the appeal must be considered and decided by an appeal panel

Chapter 3 of the Biodiversity Act sets out the requirements and procedures for the preparation and publication of bioregional plans. A bioregional plan is a plan for the management of biodiversity in a bioregion, where such a region has been identified by the Minister or the MEC as region containing whole or nested ecosystems characterised by its landforms, vegetation, human culture and history.[41] When an organ of state prepares an environmental implementation plan ("EIP") or environmental management plan ("EMP"), or when a municipality adopts an integrated development plan, provision must be made for a bioregional plan that applies to it and it must be indicated how an applicable bioregional plan may be implemented.[42]

National Water Act 36 of 1998 ("NWA")

The NWA allows the Department of Water Affairs to dispense with the need for a water use licence if it is satisfied that the purpose of the NWA will be met by the grant of an authorisation under any other law (section 22(3)). The DWA may also arrange with other organs of state to combine their respective licence requirements into a single licence requirement. (section 22(4))

The question of timing (which comes first) is always problematic. For instance, neither NEMA nor the NWA specify that a water use licence must be obtained before an environmental authorisation or *vice versa.* The decision-maker under the NWA will focus his or her decision on what effect the abstraction will have on the water resource or on other users. However, he or she must also apply the principles set out in section 2 of NEMA when making the decision. While it is not necessary for the decision-maker under the NWA to wait for environmental authorisation to be issued, all the environmental information generated by the EIA process must be available and considered prior to making the NWA decision. In practice, usually the environmental authorisation is granted subject to the Applicant obtaining a water use licence from DWA. From the competent authority's point of view, however, it would be beneficial for all of the information relevant to the water use application to be available, as this will be of assistance when consulting the DWA. Furthermore, such information will be beneficial to the competent authority in determining whether water availability represents a significant issue from an environmental impact point of view or not. As noted in the discussion under NEMA, the two authorities do not need to make the same decision. Each authority must apply its own mind consider the potential impacts on the environment from their own perspective.

NEM: Waste Act 59 of 2008

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[41] Section 40(1)(a) of NEMBA.

[42] Section 41 of NEMBA provides that all bioregional plans must be consistent with the principles set out in section 2 of NEMA.

A waste management licence is required for undertaking waste management activities (including landfill gas extraction) and for constructing facilities for waste management activities. The Waste Act requires a licensing authority under the Act to co-ordinate or consolidate the application and decision-making processes in the Waste Act with the decision-making process in NEMA and other legislation administered by other organs of state, without whose authorisation the waste management activity may not commence.[43] A licensing authority may either:

- issue an integrated licence, which must be regarded as an integrated authorisation under NEMA;[44] or
- issue the licence as part of a consolidated authorisation consisting of different authorisations issued under different legislation by the persons competent to do so, consolidated into a single document "in order to ensure that the conditions that are imposed by each competent authority are comprehensive and mutually consistent."[45]

An integrated licence may be enforced in terms of any of the laws under which it was granted but conditions may only be enforced in terms of the specific laws that authorised them.[46] The table below summarises the key procedural elements of the Listed Activities requiring authorisation under the Waste Act:

Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA")

Section 37(1) of the MPRDA provides that the principles set out in section 2 of the National Environmental Management Act, (*a*) apply to all prospecting and mining operations, as the case may be, and any matter relating to such operation; and (*b*) serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the Act.

When considering an environmental management plan or environmental management programme the Minister must consult with any State department which administers any law relating to matters affecting the environment. Written comments are required. If any State department objects to the contents of a mining related application, the Minister of Minerals and Energy must refer the objection back to the Regional Mining Development and Environmental committee for its consideration.

[43] Section 44(1).
[44] Section 44(4).
[45] Section 44(2)(b).

National Heritage Resources Act 25 of 1999 ("NHRA")

The approval process under the NHRA is already integrated with NEMA and the 2010 EIA Regulations, since it provides that where a heritage impact assessment will be carried out as part of the NEMA process then a separate assessment is not necessary under the NHRA.

NEM: Air Quality Act 39 of 2004 ("AQA")

In terms of the EIA Regulations, an activity which requires an atmospheric emission licence ("AEL") may not commence without an environmental authorisation. In other words, commencing an activity requiring an AEL is itself a listed activity under NEMA. An application form for an AEL could be submitted to the licensing authority under the AQA at the same time as the application for environmental authorisation and the licensing authority under AQA could make its decision jointly with DEA once the final environmental impact has been submitted and considered.

Major Hazard Installation Regulations (GN R692, GG22506 30 July 2001)

As is the case with regard to heritage assessments, the issue of whether a MHI assessment (conducted by a Department of Labour Approved Inspection Authority (AIA)), would be required is treated as a specialist studies within the EIA.

Development Facilitation Act 67 of 1995, Provincial Town Planning Ordinances and Town Planning Schemes or Land Use Management Schemes

The DFA was originally passed to fast-track RDP[47] developments and the extra-ordinary measures put in place to allow this (such as the suspension of certain other legislation) were intended to be temporary. The DFA was supposed to have been superseded by a Land Use Management Act. However this has not happened and at present it appears that national land use legislation (with one set procedures for the whole country, thereby eliminating the current situation where different procedures apply in different provinces), is unlikely to be commence in the near future.

As a result, the provinces will each have their own say regarding the powers of local government in their own provinces – the provincial authorities will continue to determine how much decision-making each municipality will be capable of undertaking. For instance the Transvaal Ordinance talks of "authorised" and "unauthorised" local municipalities, while the KZN Town Planning Ordinance refers to

[46] Section 44(5).

[47] Reconstruction and Development Programme.

"exempt" and "non-exempt" local authorities. If a municipality is authorised or exempt, it can (for instance) allow re-zoning without needing to refer an application to the province.

Although a Land Use Management Act is not in place, the terminology of land use management schemes ("LUMS") is now used by many municipalities. The LUMS outlines all the actions a municipality needs to take, to manage the use and development of land. It forms part of the Spatial Development Framework ("SDF"), which itself is an integral part of the Integrated Development Programme ("IDP"). All decisions on development applications must be consistent with these planning tools, as must the guidelines and requirements found in each particular provincial ordinance.

Co-ordination between planning requirements (such as the need for an activity to be consistent with zoning or land use) and the requirements for environmental authorisation is problematic. Most planning legislation does not specifically refer to the environment but this has now become part of the KZN Planning and Development Act ("PDA"), which requires that the authorities need to consider the impact on the environment of the proposed development and has procedures in place for integrated permitting. Since there is so little co-ordination, practical steps need to be taken to ensure that projects run as smoothly as possible. For instance, if an Applicant waits for the land to be rezoned before he or she appoints an EAP to undertake the EIA process there will be unnecessary delays. This is due to the fact that most authorities involved in land use decisions require the EIA process to be complete to enable them to take these factors into account in their decision-making process. From an EIA perspective, information from the rezoning application can be useful in gaining insight into whether the proposed project is aligned with spatial plans for the area and whether it is appropriate in the context of surrounding land uses. Furthermore, if the rezoning application is lodged when the EIA process commences, this will allow a streamlined approach in respect of the public consultation process required for the rezoning and environmental applications.

In some provinces, new generation planning legislation has already commenced, such as in KZN which has the KZN Planning and Development Act ("PDA"). This Act is more specific about the manner in which applications are handled and makes use of integrated permitting and procedures.

National Forests Act 84 of 1998 ("NFA")

Section 3 of the NFA stipulates that any person required in terms of any legislation to carry out an environmental impact assessment in respect of any activity which may have a detrimental effect on natural forests, must take into account the principles that guide decisions affecting forests in terms of NFA. This therefore requires

alignment between requirements of DAFF with those of the department authorizing the EIA if a listed activity has been triggered and it also involves forestry.

Local Government Municipal Systems Act 32 of 2000 ("MSA")

In terms of the Local Government: Municipal Systems ("the Municipal Systems Act") a municipal council is required to adopt an Integrated Development Plan ("IDP") which is a strategic planning instrument guiding and informing planning and development. An IDP must include a spatial development framework ("SDF") which provides guidelines for land-use management within in the municipality.[48] Section 25 requires that an IDP be compatible with national and provincial development plans and planning requirements that bind the municipality. The Local Government: Municipal Planning and Performance Management Regulations were published in August 2001 in terms of section 120 of the Municipal Systems Act providing the details of an IDP as well as a SDF. An SDF is an ideal instrument through which environmental concerns could be integrated into development plans, particularly because a strategic environment assessment ("SEA") is required for every SDF.[49]

National Building Regulations and Building Standards Act 103 of 1977

Although the erection of a building cannot commence until all other applicable legislation has been complied with, there are again no specific provisions as to the order in which authorisations should be obtained or as to how and when other authorities must comment. However where contamination is suspected and a geotechnical assessment has to be carried out to check the quality and safety of the soil, this will need to be done prior to any other building related permit being obtained.

However, case law (Fuel Retailers' case)[50] states that planners have to take the environment into account and the environmental authorities are obliged to view any planning decision from an environmental angle. Therefore, any geotechnical assessment will need to form part of the information assessed by the environmental authorities when making their own decision about a proposed development.

Trigger	Application
Approval for the erection of buildings – **Section** 7. Required to comply with all laws including environmental laws. If land believed to be contaminated	Application to CA. Require a geotechnical site investigation in terms of National Building Regulations

[48] Section 25 of the Local Government: Municipal Systems Act 32 of 2000.
[49] Regulation 5(4)(f) of the Local Government: Municipal Planning and Performance Management Regulations, 2010.
[50] Fuel Retailers' Association of Southern Africa v director- General : environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others 2007 (6) SA 4 (CC)

4. ANALYSIS OF KEY PROBLEMS AND PROBLEMS AREAS

In this section we present our key findings regarding procedural and institutional shortcomings based on information provided to us. Officials involved in implementing the EIA system and stakeholders have, through the EIAMS process, identified a number of short-comings and inefficiencies in the current EIA system which could be addressed by reforming and strengthening procedural aspects of the system. These may be grouped into various categories, as set out below.

4.1. MISALIGNMENT WITH OBJECTIVE OF PROMOTING ECOLOGICALLY SUSTAINABLE DEVELOPMENT

The EIA system is reasonably effective in identifying and mitigating the worst environmental impacts of a particular development, by requiring the developer to implement the least harmful option from among those identified by the developer as "reasonably possible" and viable and by imposing conditions in the environmental authorisation which require the developer to take measures to reduce the environmental impacts of a project. A small minority of projects do not go ahead because they are refused an environmental authorisation. It is also possible that some would-be developers of projects that are undesirable from an environmental or socio-economic perspective may be deterred from even applying for an environmental authorisation.

The main difficulty is that the EIA system is designed to reduce the harm caused by specific projects rather than to promote the overall societal objective of attaining ecologically sustainable development while promoting justifiable social and economic development (see for example, section 24 of the Constitution). This means that in making decisions in relation to a specific project there is often insufficient attention given to the context in which the decision is being made and to whether or not the implementation of the project would have a positive impact on the attainment of ecologically sustainable development and can be considered to be "justifiable" socio-economic development.

For example:

- environmental impact assessment reports ("EIARs") do not always provided sufficient information regarding the extent to which the project is compatible or incompatible with strategic plans and policies such as: EMFs, Bioregional Programmes and biodiversity conservation planning, the National Strategy for Sustainable Development ("NSSD"), climate change mitigation and adaption strategies, economic growth and development plans and strategies, and IDPs (which must be informed by a strategic environmental assessment);

- the implications of the project for the attainment of strategic goals set out in plans and programmes such as those referred to in the previous paragraph, are usually not considered; and
- decision-makers do not decide whether or not to grant an environmental authorisation on the basis of whether or not the project will contribute to ecologically sustainable development (i.e. do not give adequate attention to the wider context).

These concerns are reflected in comments such as:

"*Given the context of sustainable development (including national, provincial and local strategies and development imperatives) and the Court ruling that social, economic and environmental issues should be equally considered, decision makers need to determine whether a development is appropriate in the receiving environment, that its benefits exceed negative impacts and that there is no net loss of endangered ecosystem services.*"

"I would really encourage that as a department you begin to look at a way of rationalising those application processes and instruments, but also that we really begin to look at those strategic plans, be they at the local or at provincial level, as a basis for making those initial or detailed decisions."

"If we have an effective decision making context within which we conduct EIAs, then the EIAs can focus on those decision making issues that they often lose. I think EIAs often lose sight of what the key issues are in terms of decision making and that's really the point that I'm trying to make."

4.2. DECISION-MAKING CRITERIA AND CONSISTENCY OF GOALS

A related concern relates to inconsistencies and a lack of clarity regarding the criteria and approach the decision-makers apply in deciding on applications for environmental authorisations. Some commentators drew attention to the fact that it would be helpful to have greater clarity as to what environmental governance was seeking to achieve and what approaches were regarded as appropriate. For example, are decision-makers guided by the National Framework on Sustainable Development ("NFSD"), the NSSD, the Millenium Development Goals, or the ecosystem approach developed by the Conference of the Parties to the Convention on Biological Diversity? These concerns are reflected in comments such as the following:

> *"It's absolutely essential that we start to develop an effective decision-making framework that can be consistently applied so that practitioners know what the issues are in terms of decision-making and on that basis we will improve the effectiveness of EIA …."*

Other commentators drew attention to the fact that the goals and approaches of different organs of state are sometimes incompatible, particularly those of the DEA and the DME. One commentator stated that:

> *"What I really want is that we see a far closer, deliberate, intentional alignment of SANBI's initiatives with those of the Department of Environmental Affairs and Tourism."*

4.3. MULTIPLE RATHER THAN INTEGRATED DECISION-MAKING PROCESSES REDUCE EFFECTIVENESS AND EFFICIENCY

Stakeholders commented repeatedly on the need for enhancing inter-governmental co-operation, "better', "faster" decision-making that is inclusive, takes into account a wide range of factors (e.g. human health) and is linked to land-use management and planning approvals.

Despite the fact that NEMA was designed to promote an integrated environmental management ("IEM") approach and integrated decision-making (and has been amended to allow for the issuing of integrated authorisations), most projects require a number of authorisations which are granted or refused by different organs of state (often in different spheres of government) pursuant to separate processes, and on the basis of different criteria. This is an area in which there is great potential for improving both the effectiveness and efficiency of the EIA system by enhancing inter-governmental co-operation and developing procedures in order to promote a more integrated approach.

A lack of integration leads to inefficiencies, duplications of effort and increased costs. For example, in relation to a single project:

- several public participation processes may be required (e.g. to comply with NEMA and with provincial and municipal land use planning legislation);
- project proponents must produce a number of different documents each dealing with specific aspects of the project (i.e. that do not convey an holistic understanding of the project and its implications), often at significant cost;
- decision-making is slower because each relevant organ of state and interested and affected parties must comment on multiple applications in relation to the same project and some decisions cannot be made before others; and
- there may be numerous appeal processes in relation to the same project.

A lack of integration also leads to less effective decision-making because better decisions (i.e. decisions that will be more effective in protecting the environment and promoting ecologically sustainable development) would be made if the decision-makers were presented with all relevant information in a single report (e.g. an expanded EIAR) and could make mutually consistent decisions that take account of all the implications of the project simultaneously.

A number of commentators suggested that integrated authorisation processes could significantly improve the situation and made suggestions such as stream-lining and integrating application processes and having a single point of entry for applications and a single "exit point" (presumably meaning that one organ of state would liaise with the applicant with regard to all decisions in relation to the same project or issue and integrated authorisation.) This implies that appropriate cooperative institutional structures are in place and able to function (in other words there must be the capacity,

competencies and resources present within the relevant organs of state to sustain such structures and ensure their optimal and effective functioning.

It is apparent from the above that there are opportunities to improve both the effectiveness and the efficiency of the EIA system and to better promote the objectives of the Constitution and of NEMA (e.g. as reflected in section 23 and in principle 2(4)(l)) by changing structures and procedures in order to facilitate integrated decision-making and the co-ordinated implementation of policies, legislation and actions (e.g. enforcement) relating to the environment.

4.4. ROLE OF MUNICIPALITIES

The vital role of municipalities in conserving the environment and promoting ecologically sustainable development is often not fully recognised, partially due to the fact the Constitution identified the environment as a matter of concurrent national and provincial competency and not as a matter of municipal competency. However municipalities have a very significant impact on the environment and development through the exercise of their strategic planning functions (e.g. the formulation of IDPs), and through their powers to control land uses (e.g. by zoning schemes and controls over subdivision) and to approve building plans.

Many commentators identified the lack of integration between national and provincial environmental protections systems (e.g. the EIA regime under NEMA) and municipal land use planning and control systems as a significant shortcoming. These concerns are reflected in comments such as:

"I think we have to use the EMFs as much ***as*** *possible in combination with the SDFs and we, in fact, in the city, in our planning processes are combining the two…."*

"The local authority should be able to assume authority for environmental matters, subject to having competence in this field and subject to appeal to a provincial body."

4.5. ENFORCEMENT

Several commentators drew attention to the need to strengthen post-approval monitoring of compliance with conditions in environmental authorisations and enforcement where there has been non-compliance. (This issue is discussed more fully in another sub-theme).

A particular concern was that the co-operative governance provisions in the Constitution and in the Intergovernmental Framework Relations Act which discourage inter-governmental litigation (unless all other mechanisms have been exhausted) were preventing compliance enforcement action being taken against municipalities.

5. SYNTHESIS

5.1. PRINCIPLES THAT UNDERLINE OUR PROPOSALS

To determine whether or not the current IEM procedures and institutional structures are successful in giving effect to the environmental right in section 24 of the Constitution, meeting the objectives spelt out in NEMA, and promoting integrated decision-making and cooperative governance, it is necessary to return to first principles. This is so because legal and administrative systems can only be rationally evaluated in relation to the purposes which they were established to achieve. This means that the current procedures and institutional structures which attempt to promote IEM and to enhance integrated decision-making and co-operative governance must be evaluated on the basis of how successful they are in promoting ecologically sustainable development.

IEM procedures and institutional structures should firstly **give effect** to the environmental right enshrined in the Constitution by ensuring ecological sustainability; secondly **assess the effectiveness** of IEM through monitoring which will show whether the procedures and policies that are being followed actually do lead to ecological sustainability: and thirdly be **aligned** with the national vision of sustainable development spelt out in the National Strategy on Sustainable Development (NSSD).[51]

[51] In setting out these principles which form the premise for our proposals, we have chosen to return to the environmental principles in the Constitution and in NEMA. In practice we recognise that, in addition to first principles, there are a host of other principles that govern and guide IEM and governance in NEMA, King 2 and 3, *Batho Pele* etc.

5.2. Adherence to the Environmental Right – Ensuring Ecological Sustainability

The basic principle behind our proposals is that IEM must be a means of giving effect to the constitutional imperative in section 24[52] of the Constitution that –

(a) ecologically sustainable development must be ensured and

(b) the use of natural resources must be *ecologically* sustainable, while at the same time justifiable economic and social development must be promoted.

Without this, it is not possible to ensure that the environment *as a whole*, does not deteriorate.

It should be noted that this emphasis on ecological sustainability does not preclude or devalue the interests of society or the economy. In the long term the well-being of people, social development and the health of the economy depend on maintaining the integrity and functioning of the ecological systems. This means that the promotion of justifiable economic and social development must be achieved in a manner that does not undermine ecological sustainability by making inappropriate "trade-offs". Ecological sustainability is the imperative for achieving social and economic intergenerational equity.

Background:

In order to give effect to subsection (a) of section 24 we need a regulatory system, that can –

(i) identify if an environment is harmful to health and well-being, and

(ii) prevent activities being authorised that are likely to be harmful to health or well being; and

(iii) seek to eliminate or reduce environmental threats to health and well-being.

At present the EIA system is the main tool used to prevent harmful activities. Tools such as Strategic Environmental Assessments (SEA's) and Environmental Management Frameworks (EMF's) support

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[52] Section 24 of the Constitution states that:

"Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

this regulatory role - in relation to policies and plans as these tools can identify a harmful environment and inform authorities of activities that are likely to be harmful to health or well being.

Decision-making, particularly in relation to environmental authorisations and other permits or licences, play an important role in giving effect to this constitutional imperative. The extent to which development approval contributes to ecological sustainability will depend on how the decision is made, what the decision is, and what the conditions of the authorisation are. Key in this regard is the extent to which the competent authority (at all three tiers of government) applies his or her mind to the NEMA principles. It is important for all decision makers to maintain the link between the substantive goal of ecological sustainability and how they each make their decisions.

Subsection (b)(iii) of section 24 indicates that we need to ensure ecologically sustainable development and the ecologically sustainable use of natural resources, *while promoting justifiable economic and social development*. The State has to take reasonable legislative and other measures to achieve this and such measures must be in the interests of future as well as of present generations. It is clear from the approach advocated in the National Framework for Sustainable Development (NFSD) and that the Government recognises that to achieve ***ecological sustainability,*** it implies:

- firstly, that the maintenance of healthy ecosystems and natural resources are preconditions for human wellbeing; and
- secondly, that there are limits to the goods and services which healthy ecosystems and natural resources can provide.

In other words, ecological sustainability acknowledges that human beings are part of nature and not separate from it. Sustainable development, then, implies the selection and implementation of a development option which allows for the achievement of appropriate and justifiable social and economic goals (based on meeting basic needs and equity) without compromising the natural system on which it is based.

5.2.1. Ensuring the Environmental Right – Monitoring Ecological Sustainability

To confirm whether or not a harmful environment is being created, or if health or well being is being affected, monitoring is required. Unless this is being done there is no sound basis for determining whether or not progress towards ecological sustainability is being made.

Under the present EIA system, monitoring is inadequate because, other than the monitoring requirements contained in environmental management programmes or in the conditions of a permit, there is no other provision for monitoring. Also there is no provision for an accepted and agreed to mechanism to verify that principles are being applied – this applies to the process of assessing impact, decision-making, as well as to the implementation, monitoring and enforcement phases; and it is relevant to both project and policy/plan interventions. Although the NEMA Section 2 principles apply to the actions of all organs of state, political decisions

Another problem with the inadequate attention given to monitoring is the lack of clarity and agreement on (a) what the desired objective or end state is in relation to ecological sustainability; and (b) indicators to measure performance and progress. (It is impossible to monitor performance and progress if you do not know where you are headed and what the milestones along the way are).

In our view, in order to ensure the ecological sustainability, provision for some form of monitoring (or other measurement) of the level of ecological sustainability that is actually being achieved, must occur outside the constraints of the EIA structure. In addition, government will have to set a clear vision for ecological sustainability and define performance indicators.

Monitoring in order to confirm the level of ecological sustainability (so that the environment as a whole does not deteriorate), is an essential but under-utilised part of the current scenario.

5.2.2. Alignment with Sustainable Development Policy – Planning for Ecological Sustainability

The White Paper on National Environmental Management Policy (1998), the National Framework for Sustainable Development ("NFSD") and the National Strategy for Sustainable Development ("NSSD") articulate a high level national vision of sustainable development. This vision needs to be refined and developed further in more practical terms and must be institutionalised to ensure that government and private sector priorities and goals and objectives support the achievement of the national vision of an ecologically sustainable and socially just society.

Strategic goals proposed in the NSSD include ensuring that the reference to sustainability is interpreted as "ecological sustainability" and that this becomes the underlying principle of the government's vision as a whole. This shift "would imply for example that human well being and ecological sustainability

indicators replace GDP growth as the primary development indicator"[53]. This in turn requires an institutional framework that will ensure this is implemented. Options to achieve this include making use of, and creating linkages with, existing frameworks and mechanisms in order to avoid a proliferation of structures. In this regard, one of the principles to be followed is the need to enhance synergy between the environmental and the planning regimes and to integrate sustainability targets into planning frameworks.

5.3. STRATEGY OUTCOMES (WHAT WE WANT TO ACHIEVE)

The NFSD and NSSD provide a vision for a sustainable society:

> *"South Africa aspires to be a sustainable, economically prosperous and self-reliant nation state that safeguards its democracy by meeting the fundamental human needs of its people, by managing its limited ecological resources responsibly for current and future generations, and by advancing efficient and effective integrated planning and governance through national, regional and global collaboration."*[54]

The main goal is human well being and ecological sustainability and the secondary goal is the effective monitoring of appropriate measures, to ensure that the main goal is achieved and maintained over time (in other words monitoring the outcome of whatever measures are being used to determine whether ecological sustainability has been achieved). For these interlinked goals to be achieved, the correct procedures and institutional structures must be in place. These form the regulatory and institutional framework that make ecological sustainability possible and must be properly designed and operated.

Whether or not the desired outcome is achieved depends largely on whether the current environmental impact management system has a negative or positive effect on the overall prospects for ecological sustainability. In other words, the enquiry that precedes the desired outcome (of ecological sustainability) is whether the manner in which Chapter 5 of NEMA currently interprets the obligation to give effect to the environmental right (through IEM), is likely to lead to a depletion of natural capital as a whole (bearing in mind that it is possible to deplete natural capital in one area while simultaneously fostering it in another).

[53]NSSD and Action Plan 2010- 2014, clause 2.2.2

If the current IEM system cannot answer the question whether the environment is deteriorating, then it does not comply with the NEMA section 2 principles, read with the environmental right. To secure ecologically sustainable development and the *ecologically* sustainable use of natural resources demands a higher standard than that of sustainable development (in the usual sense of a balancing of competing interests), and to measure the achievement of this outcome, the test is whether an activity can be sustained over a long period without degrading the environment.

In our view, in order to achieve the desired outcome, the (currently tenuous) linkage between the macro goal (a strategic policy or plan which ensures ecological sustainability) and the micro goal (an authorisation) will need to be revisited (in order to ensure outcome of ecological sustainability is achieved). An authorisation through the EIA process needs to result in ecological sustainability, not just in the issuing of a permit saddled with mitigation measures. Decision making must be informed by the requisite level of strategic environmental assessment (which we believe IEM currently does not provide), before the decision maker can properly say "yes" to things which are consistent with the big plan and "no" to the things that are not.

5.4. PROPOSALS

In our view, the way in which the NEMA Chapter 5 objectives (which promote the integrated environmental management of activities) are being implemented, and in particular, the "basket" of environmental management tools that have been made available to date, do not adequately answer the question referred to above. Some things have to change.

Our proposals will be presented on three levels:

1. What existing measures or mechanisms can be tweaked or improved with minimal intervention?
2. What can be done through making some minor legal amendments or new interventions?
3. What needs to be completely overhauled?

5.4.1. Tweaking the existing system to reap "low-hanging fruits"

- **Change of Reporting Format for EAPs**

The current reporting system during the EIA process does not gather the right sort of information and also does not present it in such a way that a decision-maker[55] can easily see if a project will be ecologically sustainable. Providing more complete information in a proper framework makes it easier to achieve integrated decision making.

EIA reports need to be written in a manner that helps decision-makers. Firstly, EAPs must respond properly to any issues raised by I&APs and should not gloss over issues by using terminology such as "noted". EAPs must enhance understanding by creating a framework for proper responses. Secondly, as is the case in planning applications (where compliance with certain planning tools must be "ticked off" or else the gap must be explained), EAPs should have to indicate how the proposed development will contribute to achieving ecological sustainability, what legislative principles are meet and if the development does not meet specific principles, then they must indicate why not. Similarly, like planners, they should also be able to show what public sector plans apply to their project and indicate whether they comply with these plans or not.

Although by ensuring that they follow more rigorous reporting procedures (as above), EAPs may be able to assist decision makers, they cannot assist directly with the integration and co-ordination of government decision-making because government procedures and structures do not fall within their influence. Nor can the reporting work of EAPs counteract political decision-making, in circumstances where that tends to over-ride other issues.

- **MOUs**

Memoranda of Understanding (MOUs), whether legally binding or not, can be utilised to promote co-ordination and alignment. Given the current levels of legislative fragmentation MOUs can facilitate integrated decision-making; streamline administrative and decision-making processes; and reduce duplication of effort between the parties in regulating activities and monitoring and enforcing compliance.

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[55] Our brief does not extend to include I&APs; however, we suggest that this point is also relevant to the respective sub-themes and trust that this will be dealt with under those topics. If IA&Ps are also presented with the correct information which is packaged in a way that assists them in understanding the extent to which the proposed project will contribute to, or undermine, the attainment of ecologically sustainable and socially just development, it would help to focus the comments of I&APs on the main issues and in turn result in efficiency gains.

It is important to realise that agreements between affected organs of state will only be successful in scenarios where there is a strong and shared incentive[56] to make it work; tangible, mutual benefit or gain to all parties ("competitive advantage"); the purpose, scope, areas of engagement, responsibilities and expected outcome/s of the agreement are clearly defined and accepted by all parties; the resources needed for implementation; and the necessary political and management will (champions) to implement the agreement. For example, there is a Working for Wetlands MOU in place although not yet signed by all parties it has been implemented successfully in the last two years. The outcome is that wetlands are being protected and subjected to sustainable use.

- **Promoting the use of "sustainability enhanced" planning tools and maps**

The Planning Profession Act 36 of 2002 defines a "planner" as someone who "exercises skills and competencies in initiating and managing change in the built and natural environment in order ***to further human development and environmental sustainability***". In most instances the changes envisaged by planners are predicated on the existence of maps and these are created after much prior technical research and discussion around what is needed and desired for a particular land use area. By using planning tools more comprehensively, decision makers can not only decide (for instance) where it would be best to situate a factory but also find out where ecologically sensitive areas exist or what the extent of the water resource in a particular area is - in this manner planning tools can capture both zoning designation and environmental overlays, so that more sustainable decision making results.

The participative processes that inform the development of planning tools should frame all decision making that also affects the environment but the EIA decision making process currently only allows for limited engagement around strategy. Strategic decisions need to be fully canvassed at the outset so that planning frameworks include ecological sustainability and can be relied upon by the parties to the EIA process at a time when the application is being considered, not adjudicated. The Constitutional Court held in the Fuel Retailers' case[57] that the environmental authorities have a duty to consider both the environment and socio-economic aspects of a proposed project and must not simply accept the views of the planning authorities regarding the "need" and "desirability" of a proposed project. However the integration of environmental and land use management criteria in decision-making by planning

[56] Experience has shown that a common threat or having to face a crisis if often the "glue" that holds cooperative agreements together and that once this is out of the way the agreement collapses as there is no longer an incentive to cooperate.
[57] Fuel Retailers' Association of Southern Africa v director- General : environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others 2007 (6) SA 4 (CC)

authorities would be achieved more effectively if they can refer to planning tools that have already taken ecological sustainability into account.

In our view, ecological sustainability should be a major consideration when developing Spatial Development Frameworks ("SDF"). Planning regulations require the authorities to consult and decide upon the desired "use of space" and so ecological sustainability is a logical consideration at this point. Greater use of SEAs, EMFs and also Bioregional Plans (provided for under NEMBA) in the process of compiling planning tools and maps should be promoted to ensure that these tools are premised on ecological sustainability considerations and informed by sustainability indictors.

The following example of work done for Gauteng in 2006 by S Berrisford, on the identification of geographical areas based on the environmental attributes of the areas (under NEMA s24), illustrates how this can be achieved in practice:

> *"The approach adopted consists of a matrix of identified geographical areas within which the areas are defined according to their environmental attributes that are linked to specified activities. The end result is a spatial data layer that consists of facets that are each made up of one or more identified areas. Each facet type (each possible combination of identified geographical areas) is linked to a unique list of specified activities.)"*[58]

Once planning tools and maps make allowance for answers to the questions of need[59] and desirability[60] (such as these concepts are described and understood in their wider sense by Hardcastle[61]) in a manner that incorporates the demands of ecological sustainability, decision-making at the micro/ authorisation level will link more closely to the macro plan. This will serve to "close the gap" and ensure greater integration between planning and IEM.

The incorporation of some planning references and tools into the EIA process has already occurred.[62] The NEMA Regulations require that Environmental Management Frameworks ("EMFs") may be completed and that these must indicate what activities would be undesirable in the area (or part of the area). The EIA Regulations also make reference to tools such as bioregional plans and biosphere

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[59] "Need" would have to be addressed in terms of asking "is it wise land use?" or "is it the right time and place for the particular land use proposed? " or "is it a "societal priority?"

[60] "Desirability" would need to be assessed in terms of the idea of "placing" and the question would be "is it going to compromise the IDP and the SDF or the EMF for the area?"

[61] Hardcastle and others in "Sustainability Criteria for Planning and EIA in South Africa" and "Planning and EIA in South Africa: Our Sustainability Mandate"

reserves (provided for under NEMBA) and require a basic assessment for certain activities in these areas. Therefore, taken together, the "environmental bolstering" of the IDP and SDF tools, and their use in conjunction with the information gathered from EMFs, SEAs or from bioregional plans, would enable a development proposal to be viewed strategically, so that the achieving ecological sustainability (unless there is a justified departure in the interests of society) would be more realistic.

If re-vamped planning tools are brought in at the application stage, they can serve as indicators of how easy (or difficult) it would be for applicants to get environmental authorisation for a project and decision makers can avoid becoming involved in projects that should never be considered. As described above, when submitting applications EAPs should have to say whether they comply with certain things, (such as specified planning frameworks) and if they do not, they should have to motivate why the project should even be considered. This presupposes that (along the lines of the requirement in Listing Notice 3) an activity is only triggered if it falls into an area where a specified type of plan (which has needs to have been specifically adopted by the competent authority), exists. This ensures that only ecologically sustainable plans are relied upon.

- **Linking the achievement of ecological sustainability objectives directly to performance and delivery outcomes**

Government has a well developed performance management system that can be utilised to support greater effectiveness in achieving ecological sustainability and bring about efficiency gains in the sector. To ensure that ecological sustainability objectives are met; integrated decision-making is achieved; and cooperative governance is promoted, clear targets in relation to these objectives should be incorporated in performance agreements and delivery outcomes. In addition it would be helpful to set up a system of incentives to encourage the right sort of decision making. These measures can be incorporated into all spheres of government, and at both political and executive levels, and thereby ensure that government as a whole works towards achieving the same objectives.

5.4.2. Minor Interventions needed to achieve greater efficiency and effectiveness gains

- **Development of Guidelines**

In order to assist both decision-makers and applicants, there should be more emphasis on the development and use of guidelines. There are numerous guidelines in place[63] and in our opinion there is a need to coordinate the development of guidelines and to prioritise which are the most appropriate

[62] See for instance, Regulations 22(2)(g) and 31(2)(f) of GN R543 in GG 33306 of 18 June 2010 .

guidelines given the overarching objective of achieving ecological sustainability and giving effect to the objectives spelt out in chapter 5 of NEMA. Officials (particular in the local government sphere) are often not familiar with the existence and content of these guidelines and do not always know how to use and interpret the guidelines. There is a need to also address the issue of ensuring the consistent interpretation and application of guidelines across all spheres and in all sectors of government. It may therefore be advantageous to develop guidelines for officials that build capacity[64] on, and facilitate, for example:

- the consistent interpretation and application of the NEMA principles;
- the determination and application of sustainability criteria;[65]
- decision-making which impacts on the environment; and
- the implementation of legislation which relates to the environment (including clarifying the relationship between planning and environmental legislation).

We suggest that the priority should be on ensuring that 'first order' guidelines (such as one on the interpretation and application of the NEMA principles and sustainability criteria and a general procedural guideline) are developed, communicated and implemented. 'Second order' guidelines that focus on the more technical and operational aspects related to specific sectors, activities, projects etc can follow suit.

Operating under guidelines (such as those that provide specific sustainability criteria and indicate the sort of projects that are likely to be authorised), is something that could be put into effect relatively quickly.

- **Development and use of Norms and Standards**

Standards are appropriate where it is possible to make a precise objective distinction between what is acceptable and what is not and are generally technical in nature whereas norms are more of a qualitative test and linked to the use of reasonable measures.

[63] We identified 50 guidelines in 2009 when we were drafting the Five Sectors Guidelines for DEA and this was not an exhaustive list.
[64] The brief to our sub-theme did not include capacity building and training and we have consequently not addressed this at all. This however does not mean that we do not recognise the need for building capacity and in fact view it as one of the critical building blocks that are needed to ensure ecological sustainability objectives are met.
[65] Such as suggested by Paul Hardcastle in his paper on "Sustainability Criteria for Planning and EIA in South Africa" Hardcastle proposes such a guideline to ensure that the planning and EIA processes are objectives-led and don't become merely a compliance exercise to ensure that legislated procedural steps have been followed.

In our view norms and standards would be very useful as alternative tools to EIA in defined environments where the receiving environment is not sensitive and the impacts of the activity and project in question are known and can be avoided through adherence to standards. There is already precedent for this idea in that the NEMA: Waste Management Act 59 of 2008 prescribes in section 20 that no person may undertake a waste management activity except under licence or in accordance with the requirements or **standards determined** in terms of section 19(3) **for that activity.** Section 19(3) refers to the notice of listed waste management activities and prescribes that if a waste management licence is not required for a particular listed activity, then the notice listing the activities must contain the requirements or standards that must be adhered to when conducting the activity. In this manner, some listed activities- even though they may have some detrimental effect on the environment – can be managed without going through a cumbersome assessment process. Consideration could also be given to combining the use of norms and standards with EMF's and other planning tools which identify geographical areas based on the environmental attributes and link these to specific activities. Thus certain activities can either be automatically regulated by a compulsory adherence to norms and standards or they may need to be fully assessed through the scoping and EIR procedure and be regulated by licence conditions.

Although reliance on norms and standards may seem to exclude I&AP involvement and oversight, it can have the effect of improving the chances of ecological sustainability because these tools are research and outcome based and there is less discretion for independent (and sometimes arbitrary) decision-making. Furthermore, using norms and standards as an alternative to the EIA process does not mean that there are no checks and balances. As indicated above they can be used in association with maps or be linked to an EMF. In other words, planning tools can be used to strengthen the option.

- **Monitoring**

Monitoring at present relates mostly to compliance monitoring by the authorities (who tend to lack capacity) and does not include enough overview by civil society.[66] To address the lack of attention given to monitoring in the wider sense within the current IEM system, an appropriate and objective-driven monitoring system (including sustainability indicators) must be developed and implemented.

This should include measures that verify the extent to which the overarching objective of ecological sustainability and NEMA principles are being applied in planning, assessing impacts, decision-making,

[66] For instance where mining is concerned, the public can appeal to REMDEC but they have no other influence on the decision

implementation and enforcement. The system should be relevant to both project and policy/plan interventions and should apply across all spheres of government. In order words it should be integrated in the government-wide monitoring and review system to ensure alignment with government's monitoring system for reviewing IDP's, government performance against delivery outcomes etc. This will ensure that ecological sustainability is measured and addressed in IDP's, SDF's and other planning tools and that there is alignment between these tools and EIP's and EMP's under NEMA. It will also facilitate in greater emphasis being placed in practice on ensuring effective and consistent implementation of requirements that are already essentially covered in law.

- **Legislative changes – amending existing environmental laws**

Although there is already some alignment between various pieces of legislation such as between the NEMA EIA Regulations and the NEMWA, the NEMA EIA Regulations and NEMAQA, the NEMA EIA Regulations and ICMA, the NEMA EIA Regulations and Heritage Impact Assessments and the NEMA EIA REGS and Health Impact Assessments, studies (such as the Cliffe Decker legal audit report[67]) illustrate that there is much duplication, fragmentation and lack of co-ordination with regard to the area of environmental management regulatory functions in terms of national legislation. These hinder the imposition of fully functioning integrated permitting.

Therefore legislative reform should take place to amend where duplication exists and to clarify procedures where they are not co-ordinated.[68]

However, in our view in order to achieve ecological sustainability there is also a need for certain more substantive amendments to be made. NEMA should actually say that if a decision-maker is not satisfied that ecological sustainability and the sustainable use of natural resources will be achieved, the application must be refused. Development should not be allowed to go ahead with just the mitigation of negative effects (developers should not be able "to do the wrong thing right"). The law needs to be changed to impose an obligation on the competent authority to refuse applications for projects that cannot demonstrate that they will contribute to the national strategic objectives of achieving ecologically sustainable and socially just development.

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[68] We understand that a section 24(8) K and L guideline is apparently in the pipeline and its development is supported.

The Constitutional Court has held that if the legislation provides for authorities to have a discretion (such as to grant or refuse an authorisation), it must also provide guidance on how the discretion should be exercised. To some extent this is achieved by providing that NEMA's principles must be taken into account by all organs of state when making decisions that affect the environment, but the law should be amended to go further.

A suggestion is that the similar provisions to those in section 63 of the Integrated Coastal Management Act should be incorporated into NEMA. These (a) provide guidance for regarding what the competent authority must take into account but (b) also go further by providing for instances where the competent authority may not issue an environmental authorisation. There is also provision for a qualification, in that even if the competent authority is compelled to refuse an application, the Minister can grant an environmental authorisation provided that the proposed project is in the interests of the whole community and provided that there is also mitigation of the adverse effects. This is in line with the Constitution, which provides for a qualification when it talks about the need to secure ecologically sustainable development and use of natural resources while promoting *justifiable* economic and social development. (This also brings legislative compliance with government policies into play – the development can only be authorised if it is justifiable in respect of the needs of society as a whole, as determined by consultation and policy making).

Another suggestion is to require decision makers to adopt spatial plans that take account of ecological antenna and then take them into account when making decisions. This idea is very much along the lines of the procedure that is already prescribed in Listing Notice 3 where if the CA has adopted certain plans (such as bioregional plans), these must be taken into account. There is scope for this procedure to be expanded and further reliance on adopted plans would ensure that cumulative impacts (which are vital to sustainability) would be taken care of.

- **Increased structured alignment between planning and the environment (laws and policies)**

In order to connect the planning imperatives more closely with those of the environmental authorisation system, there must be a more structured alignment than that which exists at present. At the moment alignment issues are covered by the Local Government Municipal Systems Act 32 of 2000 (MSA), which provides that municipalities must ensure the co-ordination and alignment of SDFs (including those of district and local municipalities) with the plans, strategies and programmes of national and provincial organs of state. Section 32 of the MSA calls for the evaluation of such alignment by the

MEC. In addition, NEMA states in section 16(4) that SDFs must comply with environmental management principles.

The need for alignment and integration should be specifically considered during town planning applications. In this regard, unlike the old order legislation which basically ignores environmental issues, the new generation provincial planning laws such as the KZN Planning and Development Act 6 of 2008 ("KZN PDA") are doing just this by bringing environmental considerations into decision making. For instance the KZN PDA refers to the potential impact of a proposal or application (such as rezoning or subdivision) on "the environment, socio-economic conditions, and cultural heritage" as an issue that needs to be considered.

Attempts have been made to integrate the environment even further at the local level by using town planning schemes to formalise environmental considerations. For instance, Durban has developed a biodiversity mapping "overlay" called D'MOSS (Durban Municipal Open Space) and moves are afoot to have this changed from purely a mapping tool with guideline status to a legal requirement. If the proposal succeeds, D'MOSS will be adopted as a control attached to particular zones. However, there are constitutional problems with this proposal as legislating the environment (amending a scheme has the status of amending a by-law and is therefore legislative in nature) is not a municipal function. As useful as the idea may be, we are not convinced that the law allows for this type of intervention at this time. In any event, though in a more discretionary manner, (as described above), the KZN PDA does require the environment to be considered in decision-making.

For some time attempts have been made to get a framework environmental and planning law off the ground. Significant changes have had to be made to allow for the Constitutional Court's ruling about the role of municipal planning in the City of Johannesburg case and its insistence on the separation of powers in that regard. We understand that it will not involve a complete overhaul of planning laws (so that the environment is fully integrated with planning) but that it will meet NEMA half -way by mirroring its provisions that enable various forms of joint decision making.[69]

However, in our view implementation of these alignment provisions alone is not adequate to ensure the achievement of ecologically sustainable development. Alignment requirements and targets for all organs of state that impact on the environment should be included in the relevant sector plans and in the outcomes delivery agreements for political heads.

- **Strengthening cooperative governance mechanisms aimed at ensuring ecological sustainability is addressed in policy frameworks**

The current legislative framework makes provision for the development and implementation of various policy and planning frameworks that specifically address cooperative governance and ensuring ecological sustainability across all spheres of government. NEMA, for example, provides for the development of, and adherence to, environmental implementation and management plans (EIP's and EMP's) by national departments and provincial governments. It further places an obligation on provincial governments to ensure that the relevant provincial EIP is complied with by each municipality within its province; and requires municipalities to adhere to these plans, and the principles[70] in the preparation of any policy, programme or plan, including the establishment of IDPS and land development objectives. Under the MSA municipalities are obliged to undertake developmentally orientated planning in the form of IDP's, which are required to ensure that municipalities, together with other organs of state, contribute to the progressive realisation of fundamental human rights, including specifically section 24 f the Constitution. Furthermore, municipalities are required to ensure that IDPs are aligned with, and complement, the development plans and strategies of other organs of state so as to give effect to the principles of co-operative government.

In our view, these are appropriate and adequate mechanisms to ensure ecological sustainability across all spheres and to facilitate cooperative governance in this regard. However, interventions are needed to address current institutional weaknesses and failures (such as capacity and resource constraints, management crisis in municipalities[71] and delivery backlogs) which result in the lack of alignment in developing such plans and these plans not being adhered to in practice (when for example decisions are made at micro level to approve developments). The nature and extent of the capacity and delivery challenges at the institutional level in provinces and municipalities will determine the level of and appropriate intervention required to correct the current lack of alignment and weak adherence to these policy and planning frameworks. There are various ways in which policy integration can be internalized within institutions. These include the appropriate allocation of responsibility; structural arrangements; allocation of human and financial resources to support policy integration; and the implementation of integrated management systems. Policy integration must be a continuing and complex process and cannot simply be approached as a "once off activity" that is simply achieved. Success depends on a

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[69] Pers. communication from Stephen Berrisford (legal drafter of new planning law).
[70] Contained in section 2 of the Act.
[71] Approximately 48 municipalities have been placed under provincial administration

mixture of political commitment, structured processes and even personalities. As indicated above targets set in sector plans and Delivery Outcome Agreements can assist in ensuring ongoing policy integration.

- **Conflict Resolution**

This mechanism can be used in at least two instances. Firstly, within the public participation process (where it would also be necessary to decide upon the triggers for instances where conflict resolution might be applicable) and secondly where departments with different mandates come together. In the former case, a constraint would be the additional cost, which would need to be borne by the applicant.

Conflict resolution should be dealt with at the macro level (possibly by a commissioner or ombudsman) where there is no vested interest - this would assist in circumstances where one department (such as Mining) needs a project to go ahead, while another (such as Forestry) finds it to be detrimental.

5.4.3. Complete Overhaul

- **Authorisation of projects, not activities**

One of the criticisms of the EIA process is that it is the specific listed activities that are assessed and authorised, whereas they should be focussed on the impact of the proposed project as a whole. We propose that there should be a paradigm shift from a system that is activity based and driven to a more integrated and holistic one in which activities are merely “first stage triggers” and a greater emphasis is placed on assessing and authorising the development as an integrated whole. This “project” emphasis would of necessity involve a better consideration of the cumulative impacts of a development and that in turn, would influence the prospects for ecological sustainability.

The EIA practice should shift away from the consideration of constraints, problems and impact mitigation, to a developmental process focussed on opportunities that enhance ecological sustainability and finding sustainable alternatives and solutions. A move in this direction is the introduction of environmental management frameworks (EMFS) which are informed and defined by the environmental attributes of geographical areas. These should be used to provide an effective framework for the search for solutions in projects.

In order to change the focus from activities to projects, there would need to be a significant level of re-drafting of the legislation, not just in terms of the framework legislation but also of all the environmental management Acts which link in with activity based permitting systems. In addition, if this approach is taken, there would also of necessity be more synergy between planning and the environment and planning laws would need to be amended to cater for this.

- **Identify and redefine environmentally damaging government policies and programmes**

To ensure alignment with the overarching objective of ecological sustainability, an investigation into the nature and level of government expenditure, programmes and policies should be initiated to identify those that contribute to environmentally damaging practices and natural resource production and use that is not ecologically sustainable. It should also recommend what policy shifts are needed to address expenditure patterns, programmes and policies that hinder sustainability and which sectors can contribute to ecological sustainability. The goal of ecological sustainability needs more emphasis so that it becomes embedded in political will.

- **Full Integration of environmental policy via budgetary, planning and auditing processes**

In order to ensure that environmental policy translates into ecological sustainability outcomes, it is important to integrate it into as many avenues as possible. The aim is to strengthen the contribution of whole administrations towards environmental protection and sustainable development and to do so in a way that ensures cost effective action without suppressing innovation in the different departments. In this regard, the European Environment Agency has prepared a Technical Report on Administrative Culture and Practices[72] which highlights the potential to use budgetary, planning and auditing processes, to support what is termed Environmental Policy Integration (EPI). The report notes that in particular the potential to use auditing systems to evaluate progress in relation to EPI is largely untapped. This is because even where auditing has been valuable, auditors have tended to focus narrowly on examining the implementation of specific budgets or other financial measures, rather than assessing them in terms of, broader, sustainable development commitments and objectives.[73] As far as budgeting is concerned, the report found that even where financial resources are earmarked for activities that help to push environmental integration down through all the sectors of the administration, the risk is that it does not keep pace with developing demands such as the increasing demands of the

[72] EEA Technical Report 5/2005

[73] Some exploratory work has been done by the Office of the Auditor General by including compliance with environmental obligations as part of the regulatory audits conducted in departments. Pilot projects were rolled out in the North West Province and Department of Water Affairs and Forestry.

impact assessment process and public consultation procedures. Nevertheless budgeting for the inclusion of environmental policy is important and should be factored into every department, whether or not their mandates differ. Furthermore, if government departments open up their budget debates to civil society, then in the end there will be mutual accountability towards the environment and ecological sustainability will be a more likely outcome..

Organisational planning mechanisms such as the establishment of ad hoc or issue specific communication and coordination mechanisms like advisory councils, helps to ensure policy integration, but the risk is that unless the advisory councils are sufficiently cross-cutting, issue specific communication can lead to some issues being neglected.

Nevertheless, sustainable development cannot be achieved without EPI. The way to integrate environmental policy is to ensure that regular budgetary and audit exercises reflect EPI priorities. Environmental responsibilities must be reflected in the internal management regime of each department. There should be a strategic department/unit/committee in charge of coordinating and guiding EPI across sectors and there must be mechanisms to ensure environment/sector coordination and communication between departments and between different levels of governance. EPI requires environmental issues to be taken on board in the work of all government departments. This requires a move away from a culture of fragmentation and "policy silos' so that departments are less single minded and more receptive to environmental issues.

- **Change in hierarchy of decision making**

In our view, provision needs to be made for a change in the hierarchy of decision-makers. It is not new to suggest an environmental ombudsman or commissioner, but it is an idea that we support. The Western Cape Constitution provides for the establishment of a "Commissioner for the Environment" but this has not occurred.[74] The underlying principles of the envisaged Commissioner are that:

- *In the exercise of his or her powers and functions the Commissioner must ensure the conservation of the environment, and must give attention to the need to balance the goals of environmental conservation and sustainable development.*

[74] To date the provisions relating to the Commissioner for the Environment have not been implemented.

- *The Commissioner is independent and subject only to the national Constitution, this (the provincial) Constitution and the law, and must be impartial and must exercise the powers and perform the functions of the office of Commissioner without fear, favour or prejudice.*
- *Other provincial organs of state must assist and protect the Commissioner to ensure the independence, impartiality, dignity and effectiveness of the office of Commissioner.*
- *No person or provincial organ of state may interfere with the functioning of the Commissioner.*

The Western Cape Constitution further provides that the Commissioner will have the following powers and functions:

- monitor urban and rural development which may impact on the environment;
- investigate complaints in respect of environmental administration;
- recommend a course of conduct to any provincial organ of state or municipality whose activities have been investigated; and
- act in accordance with the principles of co-operative government and intergovernmental relations referred to in Chapter 2.

Similar principles, powers and functions could be developed to cater for a national commissioner. A national commissioner should be outside of the national government departments and should be the final arbiter on all things environmental, subject only to review by the courts and certain necessary exclusions that cater for issues that are of national strategic importance.

The NSSD contains various options for institutionalising sustainable development which include the concept of establishing a national commissioner. Another option is to make the National Planning Commission responsible for ensuring the development of sustainability indicators; ecological sustainability is incorporated in the national strategic plan, departmental strategic plans and in municipal IDPs; and inter-sectoral cooperation on sustainable development. Changes in the hierarchy of decision-making will need to be aligned with the institutional arrangement that is put in place to oversee the implementation of the NSSD.

Whatever the nature of the ombudsman or commissioner that may be established, it will be important to ensure that decisions are transparent.

5.5. INDICATORS FOR SUCCESS

The ultimate indicator of success remains the achievement of section 24, specifically ecological sustainability. The table below provides guidance as to specific indicators for each of the above-mentioned proposals. The performance indicators that we have suggested are high level and do not focus on specific interventions to be undertaken in respect of the proposals that we have made.

PROPOSAL	HOW	PERFORMANCE INDICATOR	RESPONSIBILITY	WHEN (timeframe / priority)	ASSUMPTIONS
TWEAKING THE EXISTING SYSTEM TO REAP "LOW HANGING FRUITS"					
Change of reporting format for EAP's	Submit proposal to MINMEC for adoption and distribute circular to all EAPs informing them of the new reporting requirement	✓ % of EIA reports comply within 3 months of circular ✓ % of EIA reports that do not comply returned for amendment	DEA and provincial environment departments	Short term High priority	All competent authorities support proposal and there is the political will to enforce
MOU's	Relevant organs of state to prioritise and formulate MOUs on overlapping functions	✓ MOU's adopted in respect of priority interventions ✓ Administrative procedures and response times streamlined	DEA and other government departments involved in decision-making affecting the environment	Short term Medium priority	All spheres of government and departments desire to avoid the duplication of processes and want to align and cooperate
Promoting the use of "sustainability enhanced" planning tools and maps	Greater use of SEAs, EMFs and Bioregional Plans in the preparation of planning tools and maps	✓ Number of EMFs prepared ✓ % of planning tools and maps revised/amended to address ecological sustainability considerations ✓ Reliance of EIA reports and decisions on "sustainability enhanced" planning tools and maps	Planning and environmental authorities and municipalities	Short-term High priority	Data and specialist studies from qualified planners and environmental scientists are sufficient to amend planning tools and maps
Linking the achievement of ecological sustainability objectives directly to performance and delivery outcomes	Set targets for ensuring ecological sustainability objectives are met in performance agreements and delivery outcomes	✓ % of performance agreements and delivery outcomes that incorporate ecological sustainability targets ✓ Actual performance in relation to performance and delivery targets	Department of Performance Monitoring and Evaluation in the Presidency	Short-term High priority	Such targets are not already incorporated
MINOR INTERVENTIONS NEEDED TO ACHIEVE GREATER EFFICIENCY AND EFFECTIVENESS GAINS					
Development of Guidelines	Relevant organs of state to coordinate and prioritise guideline development	✓ Measurable improvement in the consistency of decision-making across departments in all spheres ✓ % of officials that are familiar with guidelines	Relevant planning and environmental authorities	Medium term High priority	Agreement amongst the relevant authorities about priorities

PROPOSAL	HOW	PERFORMANCE INDICATOR	RESPONSIBILITY	WHEN (timeframe / priority)	ASSUMPTIONS
Development and use of Norms and Standards	Allow certain activities to be undertaken in defined environments in accordance with determined standards	✓ Technical requirements and standards determined for certain activities ✓ All environmental authorities agree to use standards	DEA and provincial environmental authorities	Medium term High priority	All environmental authorities support this and I&APs fears can be allayed
Monitoring	Develop capacity and procedure for monitoring	✓ Mandatory reporting by authorities on compliance	DEA and provincial environmental authorities	Medium term High priority	Political will and institutional capacity to implement
Legislative changes – amending existing laws	Remove duplication; clarify unco-ordinated procedures; and introduce obligation to refuse authorisation if a decision-maker is not satisfied that ecological sustainability and the sustainable use of natural resources will be achieved.	✓ Amendments adopted and in force	DEA	Medium term High priority	All environmental authorities support the amendments
Increased structured alignment between Planning and the Environment (laws and/or guidelines)	Strengthen alignment of SDFs with the plans, strategies and programmes of national and provincial organs of state; and ensure SDFs comply with environmental management principles. Include alignment targets in performance and delivery agreements	✓ % of SDFs that are aligned with EIPs and EMPs and comply with NEMA principles ✓ % of performance and delivery agreements that alignment targets ✓ Actual performance in relation to performance and delivery targets	Relevant planning and environmental authorities Department of Performance Monitoring and Evaluation in the Presidency	Medium term High priority	Planning imperatives not in alignment with general EM processes Such targets are not already incorporated
Strengthen cooperative governance mechanisms aimed at ensuring ecological sustainability is addressed in policy frameworks	Address current institutional weaknesses and failures (such as capacity and resource constraints, management crisis in municipalities and delivery backlogs)	✓ Cooperative governance mechanisms operational ✓ % of policy frameworks that address ecological sustainability	Relevant planning and environmental authorities Department of Performance Monitoring and Evaluation in the Presidency	Medium term High priority	Institutional capacity and will to strengthen cooperative governance mechanisms and address ecological sustainability in policy frameworks
COMPLETE OVERHAUL					
Authorisation of projects, not	Legislative reform	✓ Development as an integrated	DEA	Long term	All organs of state and I&APs

PROPOSAL	HOW	PERFORMANCE INDICATOR	RESPONSIBILITY	WHEN (timeframe / priority)	ASSUMPTIONS
activities		whole assessed and authorised		High priority	understand and support paradigm shift
Identify and redefine environmentally damaging government policies and programs	Policy review	✓ Identification of government expenditure, programmes and policies that contribute to environmentally damaging practices and unsustainable patterns of natural resource production and use ✓ Recommendations for policy shifts adopted and implemented	Department of Performance Monitoring and Evaluation in the Presidency Relevant organs of state in all spheres	Long term Medium priority	Organs of state will support the necessary shifts to their policies and programs that contribute to environmentally damaging practices Political will to change
Full integration of environmental policy via budgetary, planning and auditing processes	Directive from Treasury and Auditor-General	✓ Ecological sustainability considerations addressed in MTEF ✓ Audit reports reflect compliance with NEMA principles and section 24 of the Constitution	Treasury Auditor-General Department of Performance Monitoring and Evaluation in the Presidency Relevant organs of state in all spheres	Long term High priority	Political will to change Organs of state will support the necessary shifts to be made
Change in hierarchy of decision-making	Introduce an independent institution that oversees and coordinates all environmental decisions	✓ Independent oversight institution established and operational	Presidency	Long term High priority	Political will to introduce such a body and Treasury support

6. RISKS

The table below summarises what we perceive to be the major risks involved in each of the above-mentioned proposals:

PROPOSAL	RISKS
Change of reporting format for EAP's	✓ Resistance and objections from EAPs may delay and hamper roll out of this proposal ✓ EAPS do not have skills or capacity to meet this requirement ✓ Majority of reports returned for amendment due to non compliance which will result in the EIA process on applications taking longer and may lead to objections and legal challenges being made by applicants
MOUs	✓ Depend on political will ✓ Lack of available resources and capacity may result in MOUs not always working in practice ✓ May cause undue shift of responsibility (passing the buck) ✓ MOUs may stretch existing capacity
Promoting the use of "sustainability enhanced" planning tools and maps	✓ The extent to which planning tools and maps are able to contribute to ensuring ecological sustainability depends on a number of factors such as the underlying purpose for which these planning tools and maps have been produced; the quality and reliability of the data; the scale and comprehensiveness of maps; and the level of competency available to interpret and apply the information.[75] ✓ The requirement to ensure ecological sustainability may add to the administrative burden on local authorities lacking the necessary capacity
Linking the achievement of ecological sustainability objectives directly to performance and delivery outcomes	✓ Current management crisis in municipalities, capacity and resource constraints and delivery backlogs can impact negatively on the ability to perform
Development of Guidelines	✓ Without proper capacity building guidelines may not be consistently interpreted and applied ✓ One of the knock-on effects of the plethora of existing guidelines is that officials (particular in the local government sphere) are often not familiar with the existence and content of these guidelines and do not always know how to use and interpret the guidelines ✓ The provincial departments and DEA may not agree on priorities which will hamper coordination of guideline development and implementation
Development and use of norms and standards	✓ I&AP's may perceive the shift to reliance on norms and standards as means to allow certain activities in certain areas to take place as problematic and fear that this would enable several developments to be excluded from the EIA process and exclude their involvement from this process
Monitoring	✓ Inadequate capacity and resources to develop and implement the monitoring system
Legislative changes – amending existing laws	✓ Legislative changes take time- may lead to uncertainty ✓ May need to develop and implement transitional arrangements which could place an additional administrative burden on authorities
Increased structured alignment between Planning and the Environment (laws and/or guidelines)	✓ Resistance from local authorities ✓ Different priorities between planning and environmental authorities
Strengthen cooperative governance mechanisms aimed at ensuring ecological sustainability is addressed in policy frameworks	✓ Insufficient political will to address current institutional weaknesses and failures (such as capacity and resource constraints, management crisis in municipalities and delivery backlogs) ✓ Inadequate/no resources allocated to address these problems
Authorisation of projects, not activities	✓ Scope of this may not be fully understood by developers and authorities alike

[75] Our brief does not include quality of tools and we trust that it will be addressed in the relevant sub-theme.

PROPOSAL	RISKS
	and it may take time before the paradigm shift is translated successfully in practice
Identify and redefine environmentally damaging government policies and programs	✓ Resistance from government departments and sector interest groups ✓ Differences in between departments on how to give effect to the desired policy in practice ✓ No/inadequate resources allocated to making the policy shift
Full integration of environmental policy via budgetary, planning and auditing processes	✓ Political will to change current system ✓ Even where financial resources are earmarked for activities, the risk is that it does not keep pace with developing demands such as the increasing demands of the impact assessment process and public consultation procedures
Change in hierarchy of decision-making	✓ Will require legislative reform that may not be supported by Treasury if it requires the establishment of a new organ of state ✓ Resistance by departments to cooperate with the new institution

7. CONCLUSIONS

We note that many of the proposals included in our report reflect specific interventions and actions that are captured under Output 3: *Sustainable Environmental Management* in Delivery Outcome 10: *Protected and enhanced environmental assets and natural resources.*[76] The Delivery Agreement[77] on Outcome 10 provides detailed targets and indicators for all outputs and key activities; identifies the necessary inputs; and clarifies the roles and responsibilities of the various delivery partners: It spells out who will do what, by when and with what resources. Outcome 10 applies across all spheres of government. As such it is a key document in informing and directing government action and priorities for achieving ecological sustainability and should be taken into account in the further development of this sub-theme to ensure alignment between what is being proposed in the EIAMS and Outcome 10 outputs and targets.

In the diagram below we have attempted to illustrate where the proposals that we have identified fit in the conceptual representation of integrated environmental management cycle that has been developed in the EIAMS project. Several of our proposals relate to institutional aspects as opposed to dealing with specific tools. As these proposals are not management tools we have not included them in the management cycle diagram.

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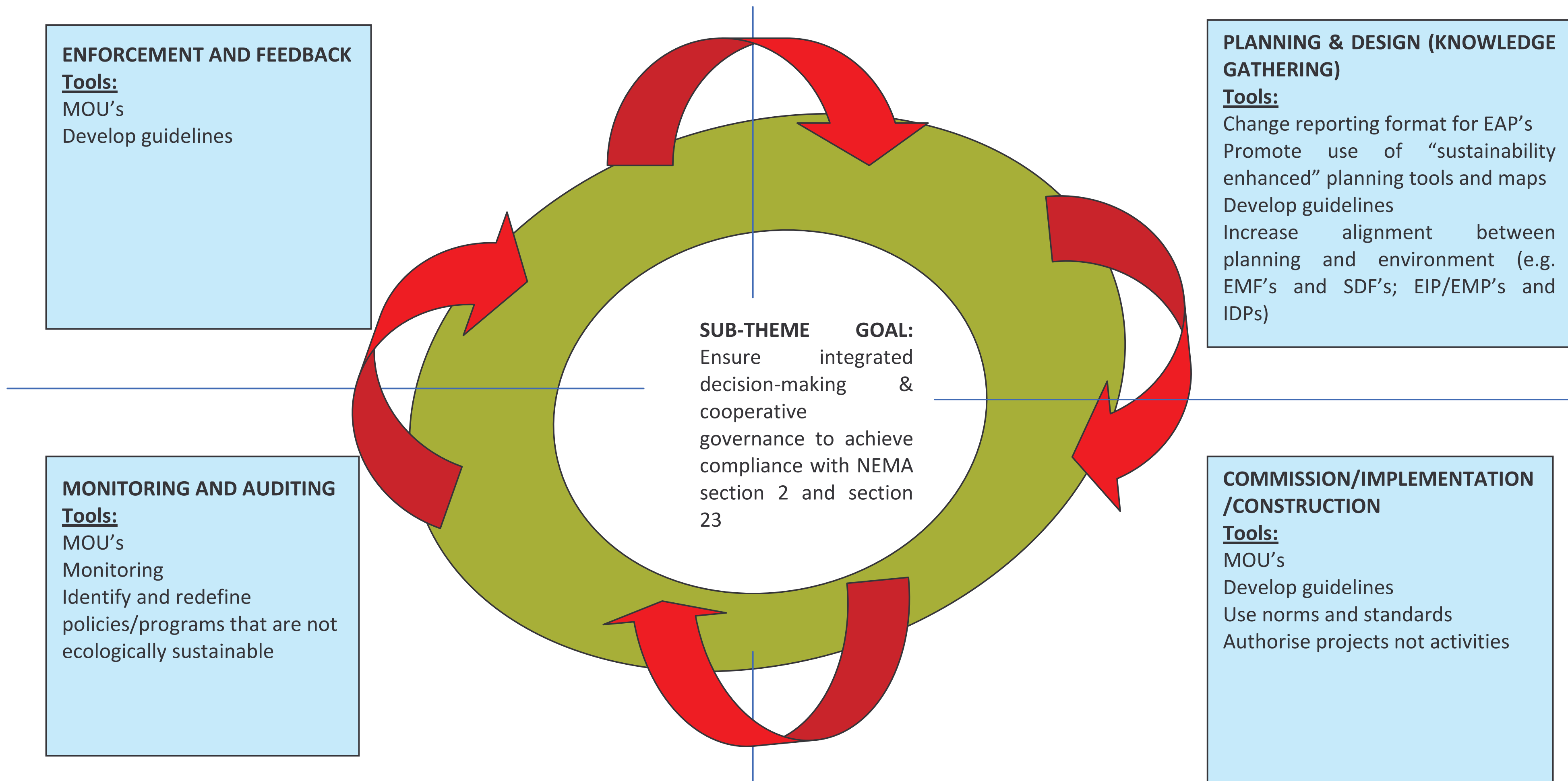
[76] The correlation between our proposals and the content of Delivery Agreement on Outcome 10 is purely coincidental as we were not provided with a copy of this Agreement or instructed to study it. The correlation between what we have proposed and the outputs and targets contained in this Agreement does, however, serve to corroborate our findings and evaluation of what needs to be done.

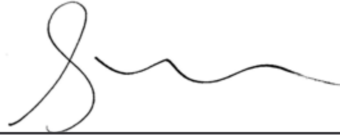
[77] The Delivery Agreement on Outcome 10 was signed by the national minister and provincial environmental MEC's in September 2010 and is a negotiated charter which reflects the commitment of the key partners involved in the direct delivery of services and activities needed to produce the mutually agreed-upon outputs for achieving Outcome 10 over the medium to long term.

The concept

INTEGRATED ENVIRONMENTAL MANAGEMENT PHASES



Dated at CAPE TOWN on this 8th day of April 2011.



INGRID COETZEE & GLENDYR NEL