COMMENTS ON THE EFFICACY OF SOUTH AFRICA'S ENVIRONMENTAL IMPACT ASSESSMENT REGIME: A CALL FOR RESPONSES TO GOVERNMENT'S LEGISLATIVE AND POLICY FRAMEWORK TO STRENGTHEN ENVIRONMENTAL GOVERNANCE AND THE SUSTAINABILITY OF OUR DEVELOPMENTAL GROWTH PATH

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1 Introduction

These comments have been prepared by Susie Brownlie, Ingrid Coetzee and Mary-Jane Morris in response to a call for comment by Parliament on 'The efficacy of South Africa's Environmental Impact Assessment Regime: A call for responses to Government's legislative and policy framework to strengthen environmental governance and the sustainability of our development growth path'.

We welcome the opportunity to submit our comments. Our observations and comments are based on experience in the sector that spans over 25 years of EIA in South Africa. Accordingly, each of us has first-hand knowledge of the introduction of Integrated Environmental Management, how EIA operated prior to legislation being promulgated, as well as how the EIA system has worked under the Environment Conservation Act (Act 73 of 1989)'s 1997 EIA Regulations and the EIA Regulations (2006 and 2010) under the National Environmental Management Act (NEMA, Act 107 of 1998). Collectively our experience spans working in both the public and private sectors: work in the public sector includes reviewing and processing EIA applications and being the delegated competent authority to authorise/refuse EIAs, and developing decision-support systems and tools for the EIA system. Work in the private sector involves undertaking EIAs for a range of development proposals in the industrial / manufacturing, tourism, infrastructure, property development and mining sectors, and reviewing EIAs both in a peer review capacity and for government authorities as part of their decision-making process (i.e. determining if the EIA is adequate). We have also kept abreast of international trends in EIA practice and lecture at a number of South African universities. We therefore have a thorough understanding of the substantive and technical requirements of the EIA process.

2 Evaluation of the current state of the EIA regime

Environmental assessment in South Africa should act to provide assurance of sustainable development and thus guide land use planning and development in such a way that it makes a positive contribution to sustainability without having significant negative impacts on those resources on which human wellbeing and economic development ultimately depends. Although project-level EIA does contribute to some extent to this objective in South Africa, it is currently flawed in many respects.

Our point of departure is that development must be ecologically sustainable and 'economically and socially justifiable' in line with the Constitutional right.[1] The need to comply with this Constitutional imperative is reflected in the Delivery Agreement on Outcome 10, both in the objectives that are set for the sector and the

[1] The Constitution of the Republic of South Africa, Act 1 of 1996, section 24

following statement: *"Given the Constitutional imperative the vision is: a South Africa where environmental assets and natural resources are valued, protected and continually enhanced."*[2]

Environmental assessment, decision making and management should be aligned with these objectives. Our main observations on the current EIA regime are as follows:

1. Despite mandatory Environmental Impact Assessment (EIA) since 1997, our collective view is that many development projects are being authorised although they do not ensure 'ecologically sustainable' development and, in many instances, rely on employment creation during the construction phase of a project as the reason for being 'socially justifiable'. That is, the drive for economic growth appears to predominate decision making, frequently being used to justify loss of ecological infrastructure and deterioration in ecosystem services. If this trend continues, human wellbeing will be compromised due to deterioration in the natural resource base and it is likely that this will be felt most markedly by the poor who are most directly dependent on natural resources for their livelihoods.

2. Globally, attention has been – and continues to be – drawn to the significant costs to society, livelihoods and economic growth of loss of natural capital or ecological infrastructure. In South Africa various initiatives (e.g. Green Fund, the 'green economy', valuing of ecosystems services) recognize this issue. The potentially severe economic implications to the country of continual erosion of our natural capital (and in particular our biodiversity (adaptation insurance), some of our irreplaceable ecological infrastructure and associated services such as reliable water delivery, safeguarding of productive agricultural land for food security, amongst others) appear not to be appreciated by a number of government departments.

   The support for, and funding of, initiatives that threaten the persistence and health of these resources should not be permitted; the environmental evaluation of development should thus be rigorous to enable positive sustainability contributions without significant adverse effects.

3. The current procedures and organisational structures for environmental impact management are failing to achieve integrated decision making and co-operative governance, despite various provisions targeting these matters in current environmental law.

   The status and influence of environmental authorities in decision making is low, compared with that of departments driving economic and infrastructure development (e.g. mining, industry, energy, transport and public works). In addition, there are moves to transfer responsibility for environmental regulation away from the environmental authority into those departments who are seen as key impacting sectors (e.g. DMR) and for whom such responsibility is clearly a conflict of interest (akin to asking the fox to guard the hen house).

   The fact that we are all dependent on ecological infrastructure and services for health, wellbeing, livelihoods and economic growth is not acknowledged or taken into account by these departments when formulating policies, strategies, plans and/ or making decisions. Despite the provisions of the National Environmental Management Act 107 of 1998 (NEMA) being binding on all decision-making authorities where activities have potential to affect negatively the environment, and despite the obligation on certain departments and provincial governments to prepare Environmental Implementation Plans/ Enviromental Management Plans to give effect to the principle of cooperative government in Chapter 3 of the Constitution and secure the protection of the environment across the

[2] Delivery Agreement, Outcome 10, p2

country as a whole, there is an unacceptably low level of co-ordination and collaboration by key authorities with environmental authorities at a strategic level. Again, the implications are that crucial decisions that will affect the environment do not take environmental opportunities and / or constraints into account.

Despite the imperative in section 24 of the Constitution and the principles in NEMA to ensure that development is ecologically sustainable and 'economically and socially justifiable', and numerous initiatives on the part of the national DEA (e.g. National Frameworks and Strategy for Sustainable Development), development is largely being undertaken in a 'business as usual' manner.

4. Current EIA practice is dictated largely by procedural and reporting requirements in the NEMA EIA Regulations, and frequently fails to interrogate and provide focused information on key sustainability issues.

   With the exception of the national environmental management principles contained in the NEMA, there are no robust or explicit decision-making criteria and – perhaps more importantly – no trade-off rules to ensure that the goal of 'sustainable development' is kept firmly in sight.

5. Environmental assessment practice in South Africa is predominantly at project level through EIAs; environmental assessment of policies, plans and programmes (i.e. at strategic level) is not a requirement of current environmental laws. This fact means that the necessary hierarchy or tiers of environmental controls on sectoral or regional development, to ensure that they would be sustainable, are absent. This situation persists even though provision is made in the environmental legislation for Environmental Management Frameworks (EMFs) and EMF Regulations (in2010) have been promulgated. An EMF can be seen as an environmental strategic plan aimed at guiding land use development and planning at a regional level. A major constraint in respect of legislation governing EMFs is that they have limited legal status and only the environmental authorities have an obligation to 'consider' an EMF, if available, in decision-making.

   The consideration of alternatives is a core requirement of 'good practice' environmental assessment. While the consideration of 'reasonable and feasible' alternatives is a legal requirement of project-level EIAs, this requirement currently does not apply to strategic instruments such as policies and development strategies.

   Of the utmost importance to the future sustainability of the country, the cumulative or additive effects of development projects are not being effectively taken into account - and cannot be taken into account, using project-level EIA. Moreover, with regard to landscape-level planning and environmental assessment: while there have been numerous spatial plans prepared defining areas and natural resources/ ecological infrastructure and services of national importance and significance in light of anticipated climate change and the need for adaptation, it appears as if many of these plans have little weight in decision making. This deficiency needs to change.

6. Spatial development planning in most provinces in the country, and the key tools used to determine the location and type of development, are being undertaken through IDPs and SDFs in terms of planning or municipal legislation (seen as 'planning' tools) and, effectively in parallel through Environmental Management Frameworks through environmental legislation (seen as 'environmental' tools). These two tools are of the utmost importance in trying to secure sustainable development at a strategic level, but are frequently seen as adversaries rather than as synergistic and complementary exercises.

7. Despite the NEMA requirement to follow the so-called 'mitigation hierarchy' in EIA (namely first to strive to avoid negative impacts and only then, where impacts cannot 'altogether be avoided', to

'minimize and remedy' them), the majority of EIAs go no further than minimizing potential negative impacts. That is, scant attention is paid to the need to avoid negative impacts in the first instance, and to 'remedy' residual impacts. Consequently, the country's natural capital is at risk of being continuously eroded. This situation is exacerbated by the absence of requirements for ecological compensation or biodiversity offsets to remedy residual negative impacts on the natural environment in cases where other mitigation options have been exhausted. Development that leads to the loss of irreplaceable resources undermines any attempts at sustainable development.

8. Many EIAs - and subsequent environmental authorisations – do not recognise or respect environmental 'thresholds' or 'limits of acceptable change' beyond which development could not be sustainable. Exceeding these limits is invariably an irreversible step, leading to loss of irreplaceable ecosystem goods and services (hence the NEMA EIA Regulations' requirement to highlight these aspects). No amount of compensation would counterbalance these permanent negative effects. Many of these limits are reflected in policy documents, plans and / or spatial assessments of ecological infrastructure (e.g. National Biodiversity Assessment that covers climate change and the need for adaptation, crucial water resources, etc.), but when it comes to the EIA or decision-making process apparently are not seen as 'non-negotiables'.

9. A number of EIAs are carried out for activities and / or in environments where the impacts of those activities are unlikely to be significant. The current 'activity'- and 'affected environment'-based triggers and associated procedural / content requirements are excessively mechanistic and do not provide appropriately for justifiable 'exit points' where EIAs should not be required.

10. A consequence of the mechanistic approach that is encompassed in EIA legislation is that the assessment process has become focused on fulfilling the steps / procedures set out in the legislation – a tick box approach. This leads to a situation where the assessment of a development project / proposal against sustainability objectives is largely being ignored. The decision-making authority is thus provided with documentation that is a weak information base for decision making from a sustainability perspective. EIAs are therefore largely failing to serve as decision-making tools from a sustainable development perspective.

11. Many environmental authorizations include conditions for which no assurance or guarantees (either at a practical implementation level and / or of adequate financial provision) are given as to whether or not they would or could be satisfied prior to the development being allowed to commence. Furthermore, conditions in environmental authorizations are often vaguely framed and do not provide specific performance targets, standards or goals to be achieved. This means that there is no basis on which monitoring of compliance with these conditions can be undertaken or on which enforcement action can be taken.

12. The capacity within the environmental authorities, while improving, remains inadequate in some provinces. Despite an increase in staff for compliance monitoring and enforcement, capacity remains insufficient. The proposal to transfer responsibility for environmental authorisation to other departments (e.g. DMR) brings with it substantial challenges in terms of equipping that department with adequate capacity (staff, skills, experience, information) to this end.

13. There are numerous, apparently intractable, difficulties in accessing information related to permits, licenses and other authorisations with environmental conditions or content from some government departments (e.g. DMR) and private companies. Without access to this information, matters relating

to public accountability and liability, as well as checking and enforcement of environmental management controls, are effectively denied.[3]

3 Recommendations

In our view, the following measures are essential in order to strengthen environmental governance and enable environmental assessment to give assurance of sustainable development in South Africa:

1. Responsibility for environmental authorisations should remain with the environmental authorities, and not be assigned or delegated to other departments, especially where those departments' mandates are clearly in conflict with ensuring ecologically sustainable development;
2. The capacity and status of the national Department of Environmental Affairs must be strengthened if sustainable development is to be achieved;
3. The National Planning Commission, in formulating policy and setting strategic priorities, must strive to ensure compliance with the environmental right in general, and with the need for ecologically sustainable development in particular – without ecological sustainability, neither social nor economic sustainability are possible;
4. Treasury and other government departments need to take cognisance of the 'cost savings' of conserving ecosystems and their goods and services that enable socioeconomic sustainability. In this respect, greater effort should be made to use 'full' economic valuation in cost-benefit and other economic analyses, to ensure that the value of such goods and services is taken into account.

It is important that funding for public infrastructure projects should be made conditional on a positive finding in the Environmental Assessment (at strategic and project levels) of contribution to sustainable development, acceptable trade offs (according to trade off rules) and no significant negative impacts.

5. Co-operative governance mechanisms aimed at ensuring ecological sustainability should be addressed and strengthened in policy frameworks of all government departments. Clear targets in relation to achieving sustainability objectives should be incorporated in performance agreements and delivery outcomes, to track progress in this respect;
6. Fragmentation of environmental management laws should be substantially reduced, planning and environmental policy and laws should be aligned or integrated, as should decision-making processes.
7. Environmental assessment and reporting to decision makers should be a 'sustainability-led' process that is geared to achieving explicit sustainable development outcomes. Decision making needs to elevate sustainability issues as key considerations, to ensure that development satisfies ecological sustainability requirements and makes positive contributions to social and economic sustainability. There is an urgent need to integrate these issues into budgetary, planning and auditing processes across government departments in all spheres;
8. Policy formulation processes and strategic planning of sectors and regions must take into account environmental constraints and opportunities, and seek options that would not result in significant negative effects but would optimise ways to maximise benefits to society. Unless the environmental constraints and opportunities are recognized at the earliest possible stage of these processes, they

[3] E.g. Publications by the Centre for Environmental Rights.

are vulnerable to environmental challenges and risks 'downstream' and, in all likelihood, would not satisfy sustainable development requirements.

That is, decision making at project levels must be informed by environmental assessment at a 'bigger picture' strategic level.

9. Environmental assessment at strategic and project levels should make explicit any tradeoffs between ecological, social and economic resources; decision making likewise should give due consideration to these tradeoffs, taking into account the probable long-term implications for the country of so doing. Every effort should be made in both environmental assessment and decision making to avoid or prevent tradeoffs that involve loss of irreplaceable ecological infrastructure or irreversible deterioration in ecosystem services. In this respect:

   - Explicit sustainability criteria need to be developed and formalised, building on our excellent national environmental management principles (National Environmental Management, 1998), for use in decision making and environmental assessment (Strategic Environmental Assessment and EIA). *In recent years the Department of Environmental Affairs and Development Planning (DEA&DP) in the Western Cape has undertaken a process to formulate such criteria, and engaged stakeholders in the environmental assessment field to this end;*

   - Explicit trade-off rules for use in decision making and environmental assessment need to be developed and formalised.

10. EIA processes should be improved through providing clear 'upstream' policies and plans that define the boundaries within which impacts either would, or would strictly not, be permitted. Such an approach should reduce the pressure on project-level EIAs: if proposals were consistent with these higher tools, the need for – and scope of – EIAs could be significantly reduced. In this regard:

    - Sector specific environmental policies, targets and goals should be developed and adopted;

    - Environmental Management Frameworks should be prepared for regions or particularly important or sensitive geographic areas, and/ or areas under pressure from development;

    - Greater use of norms and standards should be made to regulate activities, and to prevent EIAs being undertaken on projects which could best be managed using existing legal provisions in other laws.

11. The EIA process should shift to a 'sustainability outcomes-based' one, with reduced emphasis on procedural and detailed reporting requirements. It should be undertaken within the framework of having to demonstrate compliance with (to be formulated) sustainability criteria and should explicitly identify tradeoffs that would be made should the proposed development go ahead.

12. In order to ensure ecological sustainability 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 national strategic objectives of achieving ecologically sustainable and socially just development. Serious consideration should therefore be given to introducing a substantive amendment to NEMA to include a provision which states that unless the decision maker is satisfied that ecological sustainability and the sustainable use of natural resources will be achieved, he/she must be refuse the particular application. 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 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 environmental management

principles must be taken into account by all organs of state when making decisions that affect the environment, but NEMA should be amended to include a an obligation on the competent authority to refuse applications that cannot demonstrate ecologically sustainable and socially just development that is similar to section 63 of the Integrated Coastal Management Act (ICMA). The ICMA provision provides guidance regarding (a) 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).

13. Where multiple authorisations, permits or licenses for development (including environmental authorisation) were required for development to proceed, the different processes should be integrated as far as practicable to minimize time requirements. Moreover, where environmental authorisation was required, it should be seen as a prerequisite for other authorisations, permits and/ or licenses.

14. 'Non negotiables' should be explicitly recognised in strategic-level environmental assessment, EIA and decision processes (i.e. those limits to loss or negative change that would lead to irreversible effects and/ or loss of irreplaceable resources); negative impacts on these 'non negotiables' should not be permitted and cannot be compensated – they represent 'fatal flaws' to sustainable development.

15. EIAs must apply the full mitigation hierarchy: striving first to avoid potentially significant negative impacts, then minimizing and finally either offsetting or compensating for residual negative impacts of significance as a 'last resort' once all other mitigation options have been exhausted. The manner in which offsets and/ or compensation would be delivered, and assurance of resources to be successful in their implementation, must be demonstrated 'beyond reasonable doubt' prior to development commencing.

16. Spatial planning instruments and maps (e.g. national freshwater ecosystem priorities, biodiversity and / or bioregional plans, critical water 'towers'/ water resources, etc.) should be improved and transparently used to inform sustainable development and support more effective decision making.

17. A clear vision of the future of information and knowledge management should be identified, to streamline and improve information and knowledge flows, to improve collaboration and the sharing and use of information, and develop explicit 'information indicators' linked to development priorities.

18. Specific, explicit and accurate conditions in authorizations are crucial to ensure that development performance is measurable and enforceable, and more transparent. Currently, conditions of authorization are often vague, do not stipulate clear and measurable outcomes, and in effect, therefore, carry little weight.

19. Where the successful implementation of conditions of authorisation are core to satisfying the requirements of ecologically sustainable development (i.e. in the absence of successful implementation, development would lead to irreplaceable loss of resources), practical and financial

guarantees of successful implementation must be in place and 'beyond reasonable doubt' before a development should be permitted to commence.

20. Government capacity for compliance monitoring and enforcement must be dramatically improved.
21. Access to information relating to permits, licences and authorisations must be enabled to improve environmental governance; and
22. Capacity building and provision of quality assurance in the body of Environmental Assessment Practitioners (both in the public and private sectors) should be promoted through engagement with higher education institutions and accreditation of programmes, learnership and mentorship programmes, establishment of a registration authority (currently underway), and monitoring of performance of these initiatives to evaluate and improve their effectiveness.