

# Erasmus

Environmental, Development and Property Law Attorneys  
Omgewings-, Ontwikkelings- en Eiendomsreg Prokureurs

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Kerkstraat 61 Church St, Prince Albert, 6930

☎ (023) 5411 900

☎ 0866 855 979

✉ Box / Bus 50, Prince Albert, 6930

✉ [kallieerasmus@gmail.com](mailto:kallieerasmus@gmail.com)

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Our Reference: GE/EIA Regime/mb

Your Reference: Ms T Madubela

Date: 22 March 2013

## ADV J DE LANGE

Chair: Parliamentary Portfolio Committee on  
Water & Environmental Affairs

By E-Mail:

Dear Sir

**THE EFFICACY OF SOUTH AFRICA'S EIA REGIME – OR RATHER, THE LACK THEREOF.**

## INTRODUCTION

The definition of “efficacy” preferred for this submission is “the capacity for producing a desired result or effect”. To consider the efficacy of SA’s EIA regime it is, consequently, necessary to first establish what the desired result or effect of that regime is?

It would be relatively easy but entirely wrong to assume that an EIA regime is intended to eliminate impacts on the environment.

It needs to be understood that every generation is entitled and, indeed, obligated, to put its own scratches on the surface of this planet – in a different context this is called progress or development. If that were not the case we would have no electricity, no mining or manufacturing sectors and would still be living in caves or shelters and doing our business behind the nearest bush.

What also needs to be borne in mind is that environmental governance, like all forms of governance, is a people-centred enterprise. Good environmental governance leaves people better off. Poor environmental governance doesn't.

What sets environmental governance apart, however, is, on the one hand, the temporal aspect that requires consideration of not only the needs of the present generation, but those of future generations too and, on the other, the spatial aspect or recognition that the global environment is an integrated whole and that even relatively small impacts on one side of the planet may have major consequences elsewhere.

As a result, measuring the efficacy of our EIA regime is a complex exercise. Looking only at what the impacts on the biophysical environment will be may result in lost opportunities of a better life or even extreme wretchedness for many. Looking only at the human consequences of what is being proposed may bring short-term benefits to some but bankrupt an already stressed natural environment.

Sound environmental governance in South Africa should promote an appropriate balance between people and the environment, between conservation and development because only in the finding of that balance can we be sure to attain the kind of sustainability that addresses the needs of the present and future generations and in so doing deliver a better life for all.

Whether South Africa's EIA regime is efficacious or not depends on the extent to which it contributes to the finding of that balance.

This submission suggests that to determine the efficacy of SA's EIA regime one needs to consider at least the following:

1. Whether decisions pursuant to EIA processes are appropriate in terms of:
  - 1.1. Actual biophysical impacts;
  - 1.2. Their social consequences especially insofar as the well-being of affected parties are concerned; and
  - 1.3. Their economic and developmental significance.
2. The sensibility of prescribed processes.
3. The veracity of information placed before interested and affected parties and the competent environmental authorities.
4. How long it takes for final decisions to be taken.

Applying these measures it is submitted that South Africa's EIA regime does not meet muster. It is failing our planet and our people and will continue to do so unless drastic changes are wrought. More's the pity given South Africa's otherwise impressive framework for environmental governance.

In addition it is an objective fact that government and business are ever more sceptical of the efficacy of the present EIA regime which is increasingly considered to be anti-developmental. Unless a way can be found to redesign the EIA regime to render it demonstrably capable of promoting an appropriate balance between conservation and development it is highly likely that the socio-economic challenges facing the country will compel changes that will place the environment at great peril.

While these comments are focused on the specific shortcomings of the South African EIA regime, they are underpinned by three more philosophical considerations:

1. Krishnamurti's "Tyranny of the known" which suggests that the most difficult thing to learn or understand is something you think you already know;
2. The Law of Unintended Consequences which holds that for every intended consequence there is an equal and opposite set of unintended ones; and
3. The dichotomous tension between pose and substance as mutually reinforcing prerequisites for efficacy.

These comments are divided into the following substantive sections;

1. How not to construct an EIA Regime;
2. Measuring the efficacy of South Africa's EIA Regime;
3. A better way.

### **HOW NOT TO CONSTRUCT AN EIA REGIME:**

The temptation to assume that the existing EIA Regime is fundamentally sound and only needs to be fine-tuned has thus far proven to be irresistible. This is hardly surprising because so many people have so much invested in the present model that a radical re-think is akin to an admission of failure. And people don't like admitting they are (or even that they may be) wrong. Krishnamurti called this the tyranny of the known.

It is therefore more in hope than expectation that these comments seek to encourage a return to the proverbial drawing board with our EIA regime.

The present regime is an ass. Always has been, always will be. No amount of window dressing will render it otherwise. We should have learnt that by now.

Imagine if you will that the development of an EIA Regime for South Africa has been put out to tender and that someone proposed the following:

1. Put a bunch of people on the applicant's payroll and pretend they're going to be objective and independent.
2. Give the leader of the applicant's team of recruits (whoever and whatever he/she may be) a statutory title so he/she sounds important.
3. Institutionalise opposition to applications for environmental authorisation and be sure to legislate that no matter how fundamentalist, trivial, misguided or ill-informed such opposition may be, it *must* be taken seriously, especially by the authorities.
4. Separate biophysical environmental decision-making from social, economic and sectoral considerations thereby making them someone else's problem – the Constitutional prohibition against encroaching on the functional areas of competence of other organs of state is a useful excuse to this end.
5. Legislate the views of an applicant to be of no consequence and the information gathered by an applicant to be irredeemably suspect. Whatever you do, do not make an EIA applicant responsible for anything other than paying increasing numbers of consultants.
6. Insist on specialist reports but give them no credence – in other words, if the specialists' findings do not correspond with what the authority would prefer, make sure that they can be ignored at will.
7. Limit EIA process options to one or two "one-size-fits-all" alternatives.
8. Relax, of course the environmental authorities have listed everything that could have a significant impact on the environment.

Sound familiar? It should, because that is precisely what we have at the moment and it isn't good enough. It doesn't work. It can't work. It isn't broken or defective, it is wrong.

## MEASURING THE EFFICACY OF THE SOUTH AFRICAN EIA REGIME

The only measure of the soundness of an EIA regime lies in the extent to which it renders appropriate, balanced decisions.

By simply being resident on earth we humans impact on the environment. Constrained to redressing historical iniquities, alleviating poverty and providing a better life for all, all South African stakeholders (government, business, civil society and individuals) are obliged to enable, undertake and/or allow activities that will have a significant impact on the environment. The alternative is to consign those worst off in society to everlasting (and increasing) wretchedness and to leave the country incapable of developing.

The question is then not how to bubble-wrap the environment or even how to prevent all impacts that may significantly impact on the environment but rather how to ensure that:

1. Necessary impacts are adequately mitigated and managed; and
2. Avoidable impacts are either sufficiently mitigated or are otherwise justifiable.

Applying the standard suggested in the introduction reveals the following:

1. Are decisions pursuant to EIA processes appropriate in terms of actual biophysical impacts?
  - 1.1. If the intention is to avoid unpleasant impacts entirely the answer to this question is most often yes.
  - 1.2. If the intention is, however, to ensure that unpleasant impacts are allowed if they can be properly mitigated, the answer is less clear and too often too heavily influenced by the subjective preference of decision-makers.

2. Are the social consequences of such decisions appropriate?
  - 2.1. Well-being is a subjective measure which makes it problematic to begin with. Problematic in terms of measurement and weighting vis-à-vis environmental and developmental impacts.
  - 2.2. It is, consequently, hardly surprising that EIAs rarely provide for the appropriate assessment of the social impacts of proposed activities with applicants and authorities alike usually limiting themselves to things like the number of jobs created, the sense of place - things that can be dealt with in pseudo-scientific terms unrelated to what their impact on the well-being of affected parties is.
  - 2.3. A further problem is that social impact studies are rarely extended beyond the immediate environs of the proposed activity to the exclusion of the broader receiving environment. How do the neighbours feel? Never mind the rest.
  - 2.4. While the views of those that stand to be immediately affected are important, the question is: how important are they if the proposed activity has potential benefits that reach beyond the local level? What if the neighbours hate what is being proposed but it is enormously beneficial to many, many more people elsewhere?
  - 2.5. In the social sciences it is a well-established fact that people are far more likely to mobilise in opposition to than in support of something – and unlikely to mobilise at all when it doesn't matter to them one way or the other. In the PBMR EIA, if my recollection serves me correctly, there were more than 17 000 objectors and only 5 in favour. Everybody against? Hardly, the potential number of interested and affected parties exceeded 4 million.
  - 2.6. All that can be concluded with any degree of certainty is that the present EIA regime institutionalises, enables and emphasises decontextualized

opposition. More care needs to be taken by the legislator, applicants and authorities alike to ensure that sense is made of the institutionalised opposition that inevitably flows from the present EIA regime..

2.7. Our experience in more than 1 200 EIAs of all kinds would suggest that the present EIA regime is dismal at dealing with social impacts in that:

2.7.1. The impact on well-being is hardly ever assessed at any level;

2.7.2. Proper evaluative frameworks for assessing and weighting social impacts at local, regional or other levels are rarely, if ever, included in EIA Reports;

2.7.3. Local preferences are either accorded undue primacy or disregarded entirely.

3. Are decisions appropriate given their economic and developmental significance?

3.1. In considering this question regard must not only be had to the ultimate decision on whether to authorise or not but also to all the preceding procedural decisions.

3.2. Our experience is that environmental decision-making is usually divorced from the real-world context of the application. The need that a proposed activity seeks to address, the strategic significance of the proposed activity, the money, lives and interests that are at stake, are all dealt with similarly whether a new suburb is being proposed or the country's energy security is at risk.

3.3. The problem seems to be that neither EIA applicants nor the authorities establish proper frameworks for assessing, quantifying and weighting the economic and developmental impacts proposed activities may have.

- 3.4. The result is unnecessarily convoluted processes and decisions that:
  - 3.4.1. Take too long;
  - 3.4.2. Are all too often vulnerable to attack for being incapable of proper justification; and
  - 3.4.3. Rarely find resonance with the associated local, regional or national developmental and growth needs.
4. The sensibility of prescribed processes:
  - 4.1. The section on “How not to construct an EIA Regime” above records our view that the presently prescribed processes are nonsensical.
  - 4.2. Every proposed activity is unique and unless the EIA regime allows for contextual specificity, outcomes are destined to be flawed. The author Tom Robbins was quite correct when he observed that “Equality is not in regarding different things similarly, equality is in regarding different things differently.”
  - 4.3. What is needed is a universal procedural framework that can be adapted to suit the needs of a particular situation. The legislator should set the ground rules for applicants to operate within. No more.
5. Is the information placed before interested and affected parties and the competent environmental authorities adequate and reliable:
  - 5.1. Our EIA regime relies on the professional competence of a non-profession (EAPs) to ensure veracity.
  - 5.2. This is not intended as a slur on EAPs. It is merely an observation that anyone can be an EAP and that the best EAPs are those who best manage EIA processes, not necessarily those with the better environmental qualifications.

- 5.3. However, EAPs managing statutory EIA processes are on an applicant's payroll and by no measure does that ever make them either independent or objective. Where you stand depends on where you sit and when you are forced to sit at the applicant's table that makes it impossible for you to sit anywhere else.
- 5.4. The result is EIA Reports that champion projects rather than assess them. How many EIA reports have any of the competent authorities received recommending a refusal of authorisation?
6. How long it takes for final decisions to be taken?
  - 6.1. Even if an EIA applicant moves expeditiously, it rarely takes less than 12 months for a Record of Decision to be issued in anything other than the most inconsequential application.
  - 6.2. If an ROD is subject to an appeal, that could take another 6 – 12 months.
  - 6.3. This is simply too long on average.

#### **A BETTER WAY:**

1. The listing of activities:
  - 1.1. All activities that may have a significant impact on the environment should require prior assessment and authorisation.
  - 1.2. While sterling work has been done to identify and list such activities it would be naïve to imagine that there aren't things that may have been overlooked.

- 1.3. This vulnerability in the listing of activities that require prior assessment is easily addressed by the introduction of a generic listing of “Any other activity that may have a significant impact on the environment” It would be up to an applicant to make very sure that this requirement is complied with.
  - 1.4. To prevent the competent environmental authorities from being swamped with dozens of inconsequential applications the regulations could provide for exemption from assessment to be granted in the case of generically listed activities.
2. A single, simple, suitably flexible EIA regime:
- 2.1. A single, universal process for which the applicant is entirely responsible and accountable for all EIAs is preferable to the present differentiated system.
  - 2.2. Such a system would comprise:
    - 2.2.1. Application & Scoping:
      - 2.2.1.1. No substantive content other than formal identification of property, parties, activities etc.
      - 2.2.1.2. The Scoping part of this step must be strictly limited to what is effectively a research proposal that can be evaluated by first the authorities and then I&APs and would include:
        - 2.2.1.2.1. What is proposed where;
        - 2.2.1.2.2. Who will manage – anyone;
        - 2.2.1.2.3. How biophysical, social and economic impacts will be identified, assessed, weighted and reported on;

2.2.1.2.4. How veracity of findings will be demonstrated:

2.2.1.2.4.1. The veracity of EIA reports is to be determined by content not authorship. Always.

2.2.1.2.4.2. Every worthwhile piece of empirical research into the subject over the past half a century or more has confirmed that there is no such thing as an objective opinion. Common sense dictates that an applicant wanting to undertake an activity is going to exert serious pressure to ensure that the reports it pays for do not frustrate that intention.

2.2.1.2.4.3. The unintended consequence of insisting on unattainable independence and objectivity is the inevitable loss of reliability.

2.2.1.2.4.4. At the moment the EIA challenge faced by an applicant is to assemble a professional team that looks right and sounds right but does what it is told to do

2.2.1.2.4.5. What is proposed would differ from activity to activity;

2.2.1.2.4.6. Could include appointment of independent EAPs, referral for peer review, use of acknowledged experts.

2.2.1.3. The biggest change proposed herewith is the removal of EAPs as necessary parties to a statutory EIA. It is the applicant's responsibility to ensure that an EIA is properly conducted by appropriately qualified people. While many EIA applicants would need to make an external appointment there is no sensible reason why that cannot also be done in-house where the necessary capacity exists.

2.2.2. Notification for registration and comment on Scoping proposal:

2.2.2.1. Comments limited to what must be included, methodology and matters related to ensuring the proposed EIA process is appropriate.

2.2.2.2. Formal acceptance and opportunity to appeal the sufficiency of the Scoping proposal.

2.2.3. EIA phase:

2.2.3.1. Implementation of scoping;

2.2.3.2. Draft EIA report including call for opposing submissions circulated - normal commenting period;

2.2.3.3. Final EIA report circulated for limited commenting period.

2.2.3.4. Review of report and where necessary referral to ensure scoping proposal is properly implemented and concerns are properly addressed before acceptance.

#### 2.2.4. Decision:

2.2.4.1. Having agreed to a particular assessment process and verification protocol the competent authority and I&APs would, in the absence of compelling evidence to the contrary, be bound to accept the veracity of the reports and recommendations ie. having applied their minds to how the particular EIA must be conducted they must first look at whether that has been done and if so, whether the findings are sound. If so, the EIA report recommendations *must* be followed.

2.2.4.2. Verifiable scientific findings in an EIA report are binding unless more persuasive scientific findings exist. An official cannot disregard an expert scientific finding because he or she subjectively disagrees.

2.2.4.3. All RODs should include an express provision that an appeal would suspend the ROD.

#### 2.2.5. Appeal:

2.2.5.1. Section 43 of NEMA must be repealed. It is unconstitutional and places the environment at immense risk.

2.2.5.2. 30 (Thirty) days is ample for the formulation and submission of an appeal excepting in the most extraordinary of circumstances.

2.2.5.3. In the ordinary course there is no need for giving notice of an intention to appeal.

- 2.2.5.4. Where more time is needed the regulations should provide for a formal and substantive application for the extension of time-limits to be submitted within 15 days.
- 2.2.5.5. If a decision is not taken by the competent authority within 10 days of lodging of opposing and replicatory submissions the extension will be deemed to have been denied and the appeal must be submitted within 30 days.
- 2.2.5.6. Where an application for more time is granted, an appropriate time-line ensues.

## **CONCLUSION:**

The current EIA regime is deeply flawed. Unless it is replaced with a more sensible one ways will be found to accelerate development to the detriment of the environment and people.

The solution is a relatively simple, common-sense based alternative that:

1. Holds an applicant wholly responsible and accountable for an application for authorisation;
2. Ensures processes appropriate to proposed activities in every instance;
3. Take as long as is necessary and no longer;
4. Produces demonstrably reliable and adequate reports and conclusions; and
5. Encourages an appropriate balance between biophysical, social and economic impacts.

In the event of public hearings I would like to address the Committee. Being based in the Karoo and traveling often it will be appreciated if I would be informed as soon as possible of when that is likely to be.

Please acknowledge receipt hereof.

Yours faithfully

Signed electronically

G (Kallie) Erasmus

*Erasmus*