

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

Introduction

Good morning I'm Louis Snyman, an attorney in the environment programme at the Centre for Applied Legal Studies operating out of the University of Witwatersrand. Thank you to the Portfolio Committee for the invitation to submit oral comments today. These are important discussions and we value the time made to consider all avenues and ultimately assist in hopefully improving the EIA system. First of all it must be said that the initial construction of the EIA system was an achievement in its self and it must be recognised as such. The creation of an efficient system is an intersectional, dynamic and nuanced exercise, taking time to learn what works and what doesn't. It is important that we constantly look at improving the system which affects the manner in which business is conducted and the way in which we mitigate environmental damage.

The following comments are by no means comprehensive nor detailed as the level of interrogation required to do justice to the importance, scope and complexity of this cornerstone of the environmental governance system would be a full time exercise. We seek to broadly identify issues and aspects of the EIA framework that require attention and in so doing contribute to the conversation on how to achieve a more effective environmental management system in South Africa.

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

Quality of EIA reports

Content

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

Methodological soundness

There seems to be a lack of structured methodology for assigning relative significance to potential impacts regarding the prediction and evaluation in EIA's. It is vital that a just balance between socio-economic and biophysical factors is struck when preparing the reports and that the links between the physical environment and human needs be brought to the fore. In addition, cumulative impacts are too seldom adequately addressed; this is especially problematic in relation to large scale or particularly invasive projects with far-reaching impacts. It therefore follows that the EIA process should, at all times, be considered an integral part of the regional planning process.

Role of Environmental Assessment Practitioners (EAPs)

The quality of a decision can only be as good as the quality of the report on the decision maker's desk which, in turn, hinges on calibre of the EAP's work. At present, the competence and integrity of EAPs vary greatly. Consequently the profession of environmental assessment practitioners (EAPs) needs to be more effectively regulated. The current Environmental Assessment Practitioners Association of South Africa is a voluntary body which must become more robust in order to improve the regulation of the sector. A regulatory body must be designated with implementable power in order to have sufficient monitoring and enforcement capabilities to incentivise adherence to rules and regulations.

Impact of EIA regime

Influence on decision-making

EIA's are designed to constitute the primary source of information that the relevant authority relies on when deciding whether to permit a particular land use in a particular area. These decisions must be based on verifiable scientific environmental findings and able to withstand critical analysis and scrutiny. The decision process should involve a dialogue between different disciplines including law, environmental sciences, spatial planning and sociology. Decisions must be guided by the imperative of sustainable development and thus integrate environmental, economic and social concerns. Decisions should not assess impact in isolation but pay attention to the cumulative effect of the development.

Monitoring

The EIA process places the highest emphasis on the stages leading up to the record of decision, with less concern for the mechanisms to periodically monitor the implementation. What is required is a transparent review process for all aspects of environmental management with comprehensive feedback mechanisms. A more rigorously enforced implementation management system is needed for monitoring, controlling and evaluating the effects of development. There is also a need for periodic environmental assessment reviews that do not only concentrate on the regulating project but also on implementation management and monitoring.

Enforcement

There has been an increase in enforcement activities including the imposition of sanctions, and the establishment of the Green Scorpions, in recent years but it is possible that more creative enforcement mechanisms are required. Enforcement must be strong enough to deter crimes and to result in the reduction of environmental harm. The increase in fines is the step in the right direction. However there remains a need for further attention as the majority of environmental protection measures for projects lack enforceability.

Efficiency and capacity

Collaboration and communication between departments

Collaboration between government departments, as NEMA seeks to achieve, is required to align organs of state operating in different spheres of government, which would promote the concept of integrated environmental governance. This would encourage the adoption of a holistic and integrated process. This element of integration cannot be overstated, as all elements of the environment are intrinsically linked. All the role players in environmental governance should therefore take account of these connections.

Sufficient capacity

Despite having a well-developed regulatory framework, South Africa does not seem to have the capacity to fully implement these regulations. At the same time, recent initiatives by the department to increase the efficiency of the system, and hence reduce the demand on capacity, must be recognised and these efforts have proved somewhat successful. Although additional initiatives must be developed in order to increase department capacity.

Role of multiple stages and decision points in straining capacity

Alleviating the strain on the department's capacity might involve reducing the number of formal decisions required by officials, streamlining the EIA Process by reducing the number of steps between the application and the decision. An attempt must be made to identify any unnecessary steps or processes and to eliminate them if they exist. The NEMLAB addresses these concerns effectively but still more effort can be made in the streamlining process.

What resources are required for regime to work as intended?

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

Public Participation

Public participation is a pre-requisite for ensuring that development meets the socio-economic needs, and consistent with the environmental well-being, of all sectors of society. Public participation is a key weakness of the South African EIA regime, issues include the domination of the process by consultants, facilitators' lack of sensitivity to issues of culture, power, gender and inadequate dissemination of information to the communities. Other concerns include the adequacy of notification methods and the logistical constraints experienced by interested and affected parties. There seems to be a lack of understanding of the purpose and value of public participation amongst some conducting the process. The value of local knowledge cannot be overstated. A holistic understanding of impacts is not achievable without public participation. Technical assessment and public participation are equally important and consultants should be mutually accountable for their efforts. Both technical *and* sociological realities need to be clearly and accurately reflected in the EIA report; otherwise officials will not have before them sufficient information to make a sound decision on whether to give the proposed development the go-ahead. Ultimately the views and concerns interested and affected people, including local communities, must have an impact on the design of the development and on the decision to grant environmental authorisations.

Sufficient dissemination of information

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

Effective participation

Effective participation requires the public to understand the basic environmental principles in order to effectively participate in EIA's and in the broader process of realising sustainable development and resource use. It has been observed that in this country the participation process often mirrors and reinforces social and economic differentiation as the disadvantaged are often not served well by the process. For example traditional leaders at times play a preponderant role in the discussions despite the fact that their interests may diverge from less advantaged members of the community. Consultants and I&AP's need to forge a greater level of cooperation, to ensure that results of the process addresses the needs of the disadvantaged rather than serving the interests of the empowered few. Participation processes must be tailor made to suit the particular dynamics of the community. Getting around the disparities in power might require creative solutions such as special forums for women and youth.

Creating a culture of compliance

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

Suggestions

Sufficient checks on quality

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

Mitigation and no-go options.

The EIA procedure is not always diligently applied and due consideration is not always given to alternatives at an early stage in the development of a proposal. Extension and clarification of the no-go option must be formulated. This will help protect the most ecologically sensitive areas from being irreversibly undermined. This will also ease demands on the department's capacity as certain areas, for example the surroundings of UNESCO World Heritage Sites will not be the subject of applications. Developments too seldom err on the side of caution and less harmful alternatives (including the scenario of no development) are not always thoroughly considered.

Incorporate insights of resilience

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

Formal mechanisms for periodic review of the system

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

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

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

Training, support for officials

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

Regulating environmental practitioners

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

SRI Index

The Johannesburg Stock Exchange (JSE) has developed a system called the Socially Responsible Investment (SRI) Index, which was developed in response to global and domestic debate around sustainability and corporate social responsibility more broadly. The system involves constant measurement of the company's performance on sustainability and good practices by the JSE. Reviews take place annually during the second half of each year, with results usually announced at the end of

November each year. A similar system might be established for environmental compliance. This might be mandatory for all companies and could involve constant monitoring and report submission.

Post-authorisation monitoring

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

EIA Dictionary

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

EIA's should formally include climate change

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

Public participation

A brief fieldwork exercise should be undertaken at the project initiation stage, in order to get a basic understanding of who the public is, the main groupings in the public (with a focus, in particular, on identifying vulnerable groups and the holders of power), their priorities and their education levels. The process of consultation must be accompanied by proper training of the community on the public participation process and on the content and process of EIAs. Information disseminated to the community must be accurate, comprehensive but also presented in a manner accessible to them. Effective audio-visual communication will be essential for illiterate members of the community. Issues need to be viewed through the lens of gender and consultants must also be mindful of culture.

Introduction of awareness programmes

It is vital that all consultants involved in facilitating public participation and in running the broader EIA process are sensitive to social dynamics. Programmes to raise awareness amongst this group should be considered. Possible methods could include lectures to the Environmental Assessment Practitioners Association of South Africa (EAPASA), workshops, short courses and handbooks. Partnerships between *inter alia* the DEA, EAPASA and civil society organisations could co-ordinate such efforts.

Conclusion

We thank you for this opportunity to comment on the EIA system and look forward to participating further in the national dialogue.