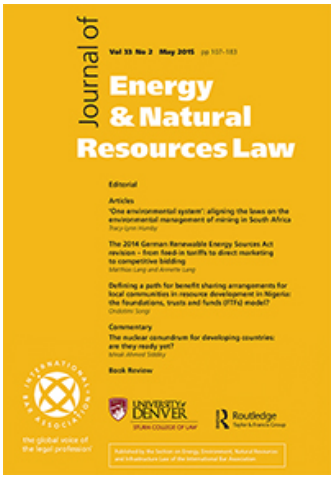

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ARTICLE

'One environmental system': aligning the laws on the environmental management of mining in South Africa

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The South African Parliament recently enacted laws that give effect to 'one environmental system' for the environmental management of mining. The single environmental system will replace the fragmented, contradictory and ineffective model constituted by rules and institutional arrangements that developed in separate mineral development and environmental laws. The single environmental system, framed by the overarching concept of cooperative government in the South African Constitution, shifts the statutory authority for environmental management of mining to the environmental laws, but gives effect to a unique splitting of implementing authority between the authorities responsible for mineral resources and environment respectively. Concerns however remain over whether the new system adequately honors the constitutional environmental right and respects the original legislative and executive authority of the provincial sphere of government.

Keywords: mining and environment; mining environmental management; single environmental system

Introduction

National jurisdictions around the world may be thought of as laboratories of experimentation for the environmental regulation of mining. With the extension of sustainable development principles and sustainability thinking into the regulation of mining, has come a diverse array of regulatory regimes, each attempting to be responsive to these global discourses, but also influenced by the idiosyncrasies of constitutional, political, economic, social and environmental histories and situations within particular nation states.[1] Fundamental institutional questions national regulators face in the design of an effective environmental regulatory regime for mining, include whether the rules should be put into environmental laws or mining laws, and whether the environmental regulator of mining should be the political authority (or authorities) responsible for the environment or the political authority vested with responsibility

1 As a sample of this literature, see for instance Gregory S. Braker, Thomas M. Lingan and Justin W. Curtis, 'Environmental Mitigation in Mining: Unique Challenges and Opportunities' (2012–13) 27 *Natural Resources and Environment* 25; Antonio G.M. la Vina, Alaya M. de Leon and Gregorio Rafael P. Bueta, 'Legal Responses to the Environmental Impacts of Mining' (2011–12) *Philippine Law Journal* 284; Koh Naito, James M. Otto, David N. Smith and Hajime Myoi, 'Legal Aspects of Exploration and Mining: A Comparative Table of Mining Law in Asia' (1999) 17 *Journal of Energy & Natural Resources Law* 1; Jacqueline Peel, 'An Environmental Revolution in the Queensland Mining Industry or Just a Changing of the Guard? An Analysis of the New Regime for the Environmental Regulation of Mining under the Environmental Protection Act (Qld)' (2001) 20 *Australian Mining and Petroleum Law Journal* 137; N.L. Usman, 'Environmental Regulation in the Nigerian Mining Industry: Past, Present and Future' (2001) 19 *Journal of Energy & Natural Resources Law* 230; Michelle van Kampen, 'The Adequacy of Legislation Regulating the Environmental Effects of Mining' (2012) 16 *New Zealand Journal of Environmental Law* 203.

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for promoting and facilitating mineral development. Where the regulatory regime for the environmental management of mining is predominantly situated with the statutory and regulatory authority associated with mineral development, the fear is that there will be a reluctance to subject the mining industry to stringent environmental controls. Conversely, where it is situated predominantly with the statutory and regulatory authorities associated with environmental management, the concern is that rigorous environmental implementation and enforcement will stifle mining investment and make the national industry uncompetitive.

While the South African Parliament and mining industry acted with foresight in incorporating environmental issues into mining laws and regulation in the early 1990s, with the rapid efflorescence of environmental management policy and legislation post-1994, the proper home for the environmental regulation of mining came into question. For many years, failure to resolve this question manifested in a fragmented, duplicating and frequently contradictory environmental management regime and the perception of a turf war between the authorities responsible for mineral development and environment respectively. Since 2008, however, the executive, legislative and judicial branches of the South African state have contributed toward the development of a 'single environmental system' for mining. These efforts have taken place under the umbrella concept of 'co-operative government', a unique feature of the South African constitution, which entrenches a form of cooperative federalism amongst three spheres of government (national, provincial and local).[2] Legislative amendments giving effect to the single environmental system were recently passed, the fruit of more than eight years of protracted engagement. The single environmental system they entrench is a distinctive and important contribution to the range of models available for institutionally positioning the statutory and regulatory authority for the environmental management of mining, as it splits power between the mining and environmental authorities, subject to a variety of checks and balances.

The threefold purpose of this article is to explain the legal and institutional tensions that precipitated the development of a single environmental system, to outline the complex moves on the part of the executive, legislative and judicial branches of state toward developing this system, and to outline the key features of the system as entrenched by the latest round of legislative amendments. The article argues that the novel model South Africa is pursuing may lead to real improvements in the environmental management of mining from the perspective of the business sector. There is ground to argue, however, that the new model does not adequately honor the constitutional environmental right,[3] and the constitutional values of cooperative government and participatory democracy.

Separate paths: historical development of South Africa's fragmented model for the environmental management of mining

South Africa's mineralisation has been an enormously influential factor in the development of the country's political and economic institutions and the laws that underpin

2 See chapter 3 of the South African Constitution 1996.

3 Section 24(a) of the Constitution enshrines a right to an environment not harmful to health or well-being, while s 24(b) entrenches the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

them. Globally, it is not unusual for national mining industries to enjoy an elevated or even preferential status in public and official opinion based on the perceived benefits mining brings relative to its costs. In South Africa, however, the psychological dependence on the mining industry seems to extend beyond cost/benefit, a phenomenon evidenced in the metaphors used to describe the industry's significance. In the 1961 case of *Coupen Holdings v Germiston City Council*,[4] for instance, Judge Hiemstra wrote: 'This industry is the *lifeblood* of the country and particular solicitude for it is only natural'.[5] Fast forward just over 50 years and one hears Johnny de Lange, the co-chair of the historic joint sitting of the Parliamentary Portfolio Committees on Mineral Resources, and the Environment and Water respectively, speaking of mining as the 'DNA' of the South African economy and its 'whole development', as an industry that played an 'absolutely central role' during South Africa's time as a colony and during apartheid, a 'mould' that had not yet been broken in the democratic era.[6]

The prevalence and persistence of this view goes a long way toward explaining why mining has been treated as the special child of the South African environmental management regime as it has evolved over the past 20 years. The desire for special or at least differential treatment manifested in the development of a customised environmental impact assessment (EIA) and management regime for mining in the laws regulating mineral development. The explicitly articulated desire was that this regime would 'cover the field',[7] obviating the need for any other environmentally oriented authorisation. However, this was a view with which national, provincial and local authorities, themselves bearing a constitutional mandate and responsibility to conserve and protect the environment, could not agree. The extensive range of environmental laws developed since 1994 did not specifically exempt mining from their application and, by dissecting the range of activities that go toward constituting mining and the manner in which these impact on a variety of environmental media, they were able to breach the regulatory fortification around environmental issues seemingly constructed by the mineral development laws.

The long-standing dispute between the Department of Mineral Resources (DMR, formerly the Department of Minerals and Energy or 'DME') and the national and provincial authorities responsible for the environment[8] over which environmental authorisations mining companies were required to obtain, when these authorisations were required, and where the power of environmental authorisation should lie resulted in a fragmented regulatory framework comprising multiple authorisation processes, giving rise to duplication, ineffectiveness and contradiction.

In order to contextualise the ensuing discussion on the single environmental system, this section of necessity provides a brief overview of the substance of the separate regimes for the environmental management of mining constituted by mineral development and environmental laws respectively.

4 1961 (2) SA 659 (T).

5 *Ibid* at 661A (emphasis added). The judge did add that this was only insofar as a matter affected the pursuit of minerals.

6 Parliamentary Monitoring Group, 'Audio Recording of the Joint Sitting of the Parliamentary Portfolio Committees on Mineral Resources and Environment & Water held on September 2013' at 5'13"–5'41".

7 See the discussion of the *Maccsand* case below.

8 For many years the national environmental authority was designated as the Department of Environmental Affairs and Tourism (DEAT), for a time from 2009 it was designated as the Department of Water and Environmental Affairs (DWAE), and is now known as the Department of Environmental Affairs with water being regulated by the Department of Water and Sanitation.

Environmental management of mining in terms of mineral development laws

While early legislation on 'mines and works' included a few provisions on the protection of various environmental media, until the enactment of the Minerals Act 50 of 1991 mining proponents were not required to prepare and submit any form of environmental management programme (EMP) for the operational and closure phases of the mine. The Minerals Act required the holder of a prospecting permit or mining authorisation to submit an EMP to the mineral authorities for approval, pending which mining operations could not commence.[9] Even so, upon application the Director: Mineral Development could exempt a proponent from this requirement.[10] There was also scanty guidance in the regulations on how an EMP had to be compiled. Following a consultative process with various government departments, the industry approved an 'Aide-Memoire for the Preparation of Environmental Management Programme Reports for Prospecting and Mining',[11] but this was not a binding legal document.

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and its regulations[12] provided for a considerably more rigorous environmental management regime for the prospecting and mining of minerals (as well as the exploration and production of petroleum[13]). The preparation of an EMP[14] required conducting activities typical of environmental impact assessment methodology[15] and the mineral authorities had no broad power to exempt proponents from this requirement. A prospecting or mining right only became effective upon the mineral authorities' approval of the EMP[16] and the provision of the required financial provision for rehabilitation.[17] Appeals against the granting of prospecting and mining rights, including the approval of the EMP, lay with the minister of mineral resources.[18] The holders of prospecting and mining rights were legally obligated to manage environmental impacts in accordance with the EMP and as an integral part of operations;[19] to rehabilitate the environment affected by operations;[20] to maintain the financial provision for environmental rehabilitation;[21] and to obtain a closure certificate when operations, for various reasons, drew to a close.[22] These environmental requirements were linked to an onerous statement of liability: rights holders were 'responsible for any environmental damage, pollution or

9 Minerals Act 50 of 1991, s 39(1).
10 Minerals Act 50 of 1991, s 39(2)(a).
11 Digby Wells Associates, Growth Lab and Council for Geosciences, *Mining and Environmental Impact Guide: Gauteng Department of Agriculture, Environment and Conservation* (GDARD 2008) at 9-5.
12 The regulations were published as GNR 527 *Government Gazette* 26275 of 23 April 2004.
13 The MPRDA is thus also the applicable regulatory framework for fracking. For purposes of this article, however, reference to the exploration and production of petroleum resources is not further considered.
14 In the case of the MPRDA, the acronym EMP refers to both the environmental management 'plan' that was required for the less environmentally invasive activities associated with prospecting or the smaller scale mining permit, as well as the environmental management programme that was reserved for large-scale mining.
15 Including establishing baseline information concerning the affected environment; investigating, assessing and evaluating the impact of prospecting or mining operations; and identifying the manner in which detrimental impacts could be prevented or mitigated, see MPRDA, s 39(3).
16 In practice the approval was undertaken at the DMR's regional offices – see T Humby, 'The Environmental Management Programme: Legislative Design, Administrative Practice and Environmental Activism' (2013) 130(1) *South African Law Journal* 60.
17 MPRDA, ss 17(5) and 23(5).
18 MPRDA, s 96.
19 MPRDA, s 38(1)(c).
20 MPRDA, s 38(1)(d).
21 MPRDA, s 41.
22 MPRDA, s 43.

ecological degradation occurring as a result of operations, whether arising inside or outside the boundaries of the area to which the right related'.[23] Failing to manage environmental impacts in accordance with the EMP was a criminal offence, attracting a penalty of a R500,000 fine or ten years' imprisonment.[24]

These environmental obligations were framed with explicit reference to principles of environmental management articulated in the National Environmental Management Act 107 of 1998 (NEMA). Thus section 37 of the MPRDA expressly stated that the principles set out in section 2 of the NEMA[25] 'applied' to all prospecting and mining operations and served as 'guidelines' for the interpretation, administration and implementation of the environmental requirements of the MPRDA. Applicants were also required 'to give effect to the general objectives of integrated environmental management' as laid down in chapter 5 of the NEMA.[26] In this fashion, the drafters of the MPRDA sought to position the mining environmental management framework within the ambit of the NEMA, albeit that the MPRDA carved out an environmental management regime specific to the mining sector.

Mining and environmental management in terms of environmental laws

South Africa's first overarching environmental legislation, the Environment Conservation Act No 73 of 1989, provided a basis for a mandatory EIA system. When the EIA requirement was operationalised in 1997, the list of activities having a 'substantial detrimental effect on the environment'[27] did not, however, reference prospecting or mining activities.

When the NEMA commenced in 1999, chapter 5 provided a new statutory basis for EIAs, under the framing concept of 'integrated environmental management'. The first lists identifying activities that required environmental authorisation in terms of the NEMA were published in 2006.[28] Prospecting was listed amongst the activities requiring a 'basic assessment' process, while mining was included amongst activities triggering a 'scoping and EIA' process. In addition to specifically listing prospecting and mining as activities falling within the ambit of the environmental authorisation for the first time, the NEMA lists identified a number of ancillary activities that ordinarily take place within a prospecting or mining area. These included, for example, the construction of facilities or infrastructure for any purpose in the one-in-ten-year flood-line of a river or stream; the off-stream storage of water in dams or reservoirs with a capacity in excess of 50,000 m;[3] the temporary storage of hazardous waste; the removal or damaging of indigenous vegetation of more than 10 m² within a distance of 100 m inland of the high-water mark of the sea; and the transformation or removal of indigenous vegetation of 3 ha or more or of any size where the transformation or removal would occur within a critically endangered or an endangered ecosystem, amongst others.

All relevant activities, *with the exception* of prospecting and mining, commenced on 1 July 2006. While the environmental authorities held back on demanding that

23 MPRDA, s 38(1)(e).
24 MPRDA, s 98(a)(iii) read with s 99(1)(c).
25 NEMA, s 2(4) states the principles upon which environmental management in South Africa should be based. These include almost all the principles enunciated in the Rio Declaration.
26 MPRDA, s 38(1)(a).
27 Environment Conservation Act, s 21(1).
28 Regulations GNR 385, 386 and 387 published in *Government Gazette* 28753 of 21 April 2006 (2006 EIA regulations).

prospecting and mining be incorporated into the general framework for environmental authorisation, the extensive list of ancillary activities nevertheless seemed to hook mining proponents into this regime. The stage was thus set for a power struggle between the political and administrative agencies responsible for mineral development and environment. The DMR stood by the exceptionalism that had characterised government's treatment of the mining industry in the past, maintaining that the provision made for an EMP in terms of the MPRDA justified the exclusion of prospecting and mining from the general EIA regime. The environmental authorities on the other hand, maintained that they had a constitutional duty to maintain oversight over at least the ancillary activities in a prospecting or mining area.

These tensions were not resolved when the second set of NEMA-listed activities were published in 2010.[29] Once again prospecting and mining were listed as activities as such, along with a host of ancillary activities. In practice therefore, many mining companies both sought an approval of their EMP under the MPRDA and applied for an integrated environmental authorisation for a host of ancillary activities in terms of the NEMA.

Apart from the duplication inherent in this model, the MPRDA and NEMA frames for EIA differed on important points. The 'competent authority' to approve the environmental authorisation under the NEMA was ordinarily the provincial government department responsible for the environment. Unlike the EMP under the MPRDA, the environmental reports had to be prepared by an 'independent' environmental assessment practitioner. The NEMA model had also been progressively elaborated to provide for a specialised corps of environmental management inspectors (EMIs),[30] much stiffer penalties for non-compliance,[31] and the possibility for 'rectification' of failure to obtain an environmental authorisation.[32]

Concurrently with the elaboration of the NEMA frame, a host of additional licensing requirements were entrenched. Under the National Water Act 36 of 1998 (NWA), mining companies were required to obtain a water-use licence for a variety of water uses; in terms of the Waste Act 59 of 2008, they were under an obligation to apply for a waste management licence to authorise sundry waste management activities in a prospecting or mining area;[33] and under the Air Quality Act 39 of 2004 a limited set of activities could trigger the obligation to obtain an atmospheric emissions licence from a local authority. Water-use licences in particular proved to be politically controversial when it was revealed that approximately 70 mines were operating without the requisite authority following a parliamentary question put to the minister of environmental affairs in June 2011.[34] The backlog in the granting of water-use licences could in part be ascribed to the institutional and regulatory complexity underlying the NWA's introduction of a rights-based approach to integrated water resources management, in addition to the separate structure it established for water use license appeals, which were heard by an independent water

29 Regulations GNR543–547 published in *Government Gazette* 33306 of 18 June 2010 (2010 EIA regulations).
30 NEMA, ss 31A–31Q.
31 NEMA, s 24F.
32 NEMA, s 24G.
33 This Act initially excluded the major waste generating activity pertaining to mining, i.e. waste rock and tailings deposited on residue stockpiles and deposits.
34 See the reply to the question posed by the Democratic Alliance Member of Parliament, Gareth Morgan, to Minister Edna Molewa <http://www.bench-marks.org.za/publications/mines_operating_without_water_use_licenses.pdf> accessed 26 September 2014.

tribunal. Prior to the collapse and suspension of the latter institution, a number of water use licences associated with mining had been challenged in this forum.[35]

Apart from these licensing requirements, section 28 of the NEMA and section 19 of the NWA established a statutory duty of care toward the environment generally and water resources in particular, which empowered environmental authorities to issue mining companies with directives forcing 'reasonable measures' in relation to activities resulting in environmental pollution or degradation. Section 19 of the NWA had in particular proved to be highly instrumental in the hands of these authorities in dealing with the acid mine drainage problem in the Klerksdorp-Orkney-Stilfontein-Hartbeesfontein gold mining region.[36] There was also a lack of clarity as to whether a closure certificate obtained in terms of the mineral development laws exempted mining proponents from the need to comply with such directives.

The practical outcome of the fragmented model was that mining proponents had to obtain multiple authorisations and interested and affected parties had to spread themselves across multiple participation processes. The many contradictions arising from these misalignments included authorisations with conflicting conditions; misaligned timelines with prospecting and mining rights holders running the risk of losing their licences if they waited for the outcome of environmental authorisation processes; perceptions of different standards of procedural and substantive integrity; and futile appeal processes as the lodging of appeals in terms of environmental laws did not suspend mining operations.

Two paths converge: political, legislative and judicial moves towards a single environmental system

In the late 2000s evidence of a *rapprochement* between the ministers responsible for mineral resources and environmental affairs respectively began to emerge. In 2008 a political agreement on the fragmented model outlined above was reached and parliament passed legislative amendments to the environmental provisions in the MPRDA and the NEMA. Instead of immediately implementing the settlement, however, the minister of mineral resources and the DMR awaited the finalisation of a case in which the question of the extent to which the MPRDA 'covered' the environmental field was at issue. The hope was perhaps that the courts would answer this question in the minister and the DMR's favour. As it turned out, when the case finally reached the Constitutional Court[37] as *Maccsand (Pty) Ltd v City of Cape Town & Others*[38] the court declined to weigh in on the MPRDA's alignment with the NEMA, ostensibly on the basis of a legal technicality, but largely also because the court

35 See the case of *Escarpment Environment Protection Group v Department of Water Affairs* 2013 JDR (GNP). The case dealt with the issue of standing before the Water Tribunal, but is illustrative of the nature of the appeals relating to mining projects being brought before the Water Tribunal.

36 The spatial and temporal scope of s 19 directives was challenged in a series of cases brought by Harmony Gold against the water authorities (see *Harmony Gold Mining Company Ltd v Free State, Dept of Water Affairs and Forestry* 2005 JDR 0465 (SCA), *Harmony Gold Mining Co. (Ltd) v Regional Director: Free State Dept of Water Affairs* 2012 JDR 1110 (GNP), *Harmony Gold Mining Co. (Ltd) v Regional Director: Free State Dept of Water Affairs & Others* 2014 (3) SA 149 (SCA). For commentary see Tracy-Lynn Humby, 'The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in *Harmony II*' (2013) 31(4) *Journal of Energy & Natural Resources Law* 453).

37 Since the 17th Constitutional Amendment Act, the South African Constitutional Court is now the highest court in constitutional and non-constitutional matters.

38 2012 (4) SA 181 (CC).

apparently failed to understand the significance of NEMA authorisations for ancillary activities.[39] With the ball firmly back in the court of the executive, the ministers for mineral resources and environmental affairs reached a second political agreement in 2011, initiating a second round of amendments to the NEMA and an amendment to the NWA. The substance of these political, legislative and judicial moves towards an integrated environmental management system is outlined in the sections that follow.

The 2008 agreement and supporting legislative amendments

The essence of the 2008 political settlement between the two ministers was that (1) the statutory authority for the environmental authorisation of prospecting and mining activities would shift from the MPRDA to the NEMA; *and* (2) over time authority for the *implementation* of the environmental provisions of the NEMA, inclusive of prospecting, mining and all ancillary activities, would shift from the DMR to the environmental authorities. Both aspects of the agreement were subject to specified time delays: the shift in statutory authority would occur 18 months after Acts amending the MPRDA and the NEMA respectively *both* came into force; thereafter the minister for mineral resources would serve as the competent authority for prospecting and mining-related NEMA authorisations, but only for a period of 18 months; upon the expiry of this 18-month period implementing authority would shift wholly to the environmental authorities.

A rather contorted set of legislative amendments was required to give effect to these arrangements. Both the MPRDA and the NEMA needed to be amended. To make the necessary changes to the MPRDA, parliament passed Amendment Act 49 of 2008, repealing the bulk of the Act's provisions relating to the environment.[40] The shifts in the statutory and implementing authority outlined above were in turn effected by adding a new definition of 'environmental authorization',[41] prohibiting any person from prospecting for, or removing or mining any minerals (or conducting technical or reconnaissance operations relating thereto, or commencing any work incidental thereto) without an environmental authorisation;[42] providing that the minister of minerals would be the 'responsible authority' for implementing the environmental provisions of the NEMA as it pertained to prospecting, mining, 'or activities incidental thereto on a prospecting [or] mining … area'.[43] The reference to 'incidental activities' occurring within the relevant 'area' subject to extractive activities was intended to secure an integrated authorisation, ensuring that the minister of minerals was the responsible authority for all activities related to prospecting or mining. This new section also made it clear that the granting of a permit or right in terms of the MPRDA was conditional upon the issue of an environmental authorisation.[44] Section 38B simply laid down deeming provisions to ensure the continued validity of EMPs

39 For a critique of this decision see Tracy-Lynn Humby, '*Maccsand* in the Constitutional Court: Dodging the NEMA Issue' (2013) 24(1) *Stellenbosch Law Review* 55.

40 Sections 39–42 were repealed in their entirety, leaving only s 37 (stating the application of the NEMA principles) and an amended s 43 (dealing with mine closure).

41 The definition of 'environmental authorization' inserted by Act 49 of 2008 cross-referenced the definition in the NEMA, which means 'the authorisation by a competent authority of a listed activity or specified activity in terms of this Act … '.

42 MPRDA, s 5A(a) (as amended by Act 49 of 2008).

43 MPRDA, s 38A(1) (as amended by Act 49 of 2008).

44 MPRDA, s 38A(2) (as amended by Act 49 of 2008).

approved in terms of the MPRDA, subject to a ministerial power to address 'deficiencies'.

The amendments to the NEMA aimed at accommodating the minister of minerals as a 'competent authority' and establishing a framework for environmental management specific to mining, along with the provisions giving effect to the specified time delays in the shift of statutory and implementing authority, were set out in the NEMA Amendment Act 62 of 2008. The most critical change introduced by this Act was to direct that the minister responsible for minerals *had* to be identified as the 'competent authority' for purposes of activities triggering the need for EIA where the activity constituted prospecting, mining or a related activity within a prospecting or mining area.[45] Further to this, a variety of provisions were either substituted or added,[46] in most instances simply replicating the substance of the provisions as they had appeared in the MPRDA.[47] The amendments to section 24 of NEMA, however, stood out for extending the environmental authorities' regulatory authority over a variety of mining-related issues. Specifically, the power of the minister of environmental affairs *and* the relevant head of the provincial executive[48] to make regulations was extended to include the management and control of residue stockpiles and deposits; consultation with landowners, occupiers and other interested and affected parties; mine closure requirements and procedures; financial provision; and monitoring and EMP performance assessments. This constituted a substantial increase in the environmental authorities' power to determine the standards applicable to consultation, planning for mine closure, and closure itself.

The provisions accommodating the delays in the shift of statutory and implementing authority were contained in sections 13 and 14. Section 14(1) provided that the Amendment Act would come into operation on a date determined by the President by proclamation in the *Government Gazette*. Notwithstanding this, section 14(2) continued, any provision relating to prospecting, mining or related activities would only come into operation *on a date 18 months after* the commencement of section 2 of the same Act (incorporating the aforementioned changes to section 24) *or* the Mineral and Petroleum Resources Development Amendment Act, whichever date was the *later*. This rather cryptically drafted section in essence ensured that the amendments to section 24 of the NEMA (extending the environmental authorities' regulatory authority over mining) and the amendments to the MPRDA were coordinated. However, it also made the operationalisation of the entire scheme dependent on the coming into effect of the MPRDA Amendment Act. Section 13 provided that on a date 18 months after the commencement of the provisions relating to prospecting, mining and related activities as contemplated in section 14(2), the principal Act (that is, the NEMA) would be amended to the extent set out in an attached schedule. The substance of the changes in

45 NEMA, s 24C(2A) (as amended by Act 62 of 2008).

46 Amendment Act 62 of 2008 added ss 24J to 24M to the existing legislative provisions appended to s 24, the central provision in the NEMA dealing with environmental assessment. Although some of these provisions were specific to or most obviously applicable to environmental management in the context of mining (for example, s 24P dealt with financial provision for closure, and s 24R dealt with mine closure) the remaining provisions were largely applicable to environmental assessment more broadly.

47 For example, s 24N(7) of the NEMA largely restated the environmental obligations of the prospecting or mining rights holder, as they had formerly been set out in s 38(2) of the MPRDA.

48 In South Africa the relevant members of the provincial executive are termed 'Members of Executive Council' (MECs). The MEC may only make regulations for the relevant province with the concurrence of the minister of environmental affairs.

the schedule was that the implementing authority for the environmental provisions of the NEMA would shift wholly to the environmental authorities. However, as already stated, this all depended on the commencement of Amendment Act 49 of 2008.

As matters turned out, the NEMA Amendment Act 62 of 2008 entered into force on 1 May 2009, but the entry into force of the MPRDA Amendment Act was delayed. When an MP for the Democratic Alliance, the official opposition party, questioned the minister of mineral resources on the reasons for the delay in March 2010, she responded by saying that 'several concerns' were raised by mining stakeholders and government departments relating to the implementation of the Act and that the DMR had thus deemed it prudent to first consult and address these concerns.[49] The DMR and the President's unwillingness to bring Amendment Act 49 of 2008 into operation became evident when further draft legislation amending the MPRDA was introduced,[50] and this draft legislation purported to amend Act 49 of 2008 – as legislation not yet in force! After the DMR was advised that this was not possible, the President shortly thereafter proclaimed the entry into force of Act 49 of 2008 on 7 June 2013.[51] This set the scheme contemplated by the coordinated amendments to the MPRDA and the NEMA in motion, with the pending date for the shift in statutory authority as 8 December 2014, and the pending date for the shift in implementing authority as 8 June 2016.

The Maccsand *moment*

In the meantime, the national executive authorities for mineral resources and environment were closely watching the fate of the *Maccsand* case in the courts. The case involved sand mining on dunes forming part of the sensitive coastal strandveld ecosystem close to poverty-stricken residential areas in the City of Cape Town. The sand miner, Maccsand (Pty) Ltd had been granted various permits and rights to mine the dunes, but the City of Cape Town insisted that the properties also had to be rezoned to accommodate mining as a land use. The dispute therefore initially unfolded as a conflict over whether, within the context of South Africa's unique approach to co-operative government, the MPRDA superseded the particular provincial legislation governing town planning, namely the Land Use Planning Ordinance 15 of 1985 (LUPO). Concerned about the destruction of the endangered strandveld dune ecosystem, the Western Cape provincial environmental authority requested to be joined as a party to test whether the MPRDA also superseded the NEMA and its supporting EIA regulations. In its pleadings, Maccsand and the Chamber of Mines (as an *amicus* of the court) argued for an interpretation of the environmental provisions of the MPRDA as 'covering the field',[52] meaning that the MPRDA dealt comprehensively and sufficiently with environmental authorisations for purposes of mining. Legally,

49 The parliamentary question and the minister's response are available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=170810&sn=Marketingweb±detail> accessed 29 September 2014.

50 A further legislative amendment to the MPRDA was passed by parliament in April 2014. The Bill was tagged as B 15B–2013. The President, however, has not yet assented to the Act.

51 Proc No 14, 2013 *GG* 36512 of 31 May 2013.

52 Maccsand's Affidavit in Answer to Third Respondent's Application for Leave to Conditionally Cross-appeal, to Cross-appeal and for Direct Access Affairs in the matter of Maccsand (Pty) Ltd v City of Cape Town & Other (CCT 103/11), paras 17–25; see also Heads of Argument on Behalf of the Chamber of Mines of South Africa, paras 22; 33–38; and 44–54.

their authority for this position was based on mining as an 'exclusive national competence'.[53]

The Western Cape High Court,[54] the Supreme Court of Appeal,[55] and finally the Constitutional Court[56] handed down decisions in the case. On the MPRDA–LUPO issue all three courts came out in favor of a strong notion of cooperative governance affirming that different government departments, irrespective of the sphere in which they were operating, were not 'hermetically sealed' from one another and that requiring the rezoning of mining property was not an impermissible intrusion upon the national executive's power to regulate mining.[57] The courts found that it was permissible for different regulatory authorities to regulate aspects of the same phenomenon from the vantage point of the particular aspect of the public interest they were mandated to protect. In short, the MRPDA could not supersede LUPO and a rezoning application was thus required.

While the Western Cape environmental authority initially met with success in the High Court, which found that the MPRDA did not supersede the NEMA and could not obviate the requirement to obtain an environmental authorisation, on appeal this aspect of the judgment was set aside on a legal technicality.[58] Despite all the parties explicitly articulating their desire that the matter be decided, the MPRDA–NEMA issue thus remained in limbo.

If the Constitutional Court's decision on the MPRDA–LUPO conflict was to be taken as a principled statement on the cooperative governance model in South Africa (and not so much as a precedent about whether one piece of legislation trumped another), then quite clearly the court's admonition against regarding the exercise of regulatory authority as 'hermetically sealed' applied to the MPRDA–NEMA issue as well. Contrary to the view that mining was an exclusive national competence, subject to exclusive regulation on the part of the national minister and the DMR, on the authority of *Maccsand* the environmental authorities were well within their jurisdictional turf in seeking to regulate the *environmental* impacts of mining. The mining regulator was thus compelled to continue negotiating with its environmental counterparts on the nuts and bolts of an integrated regulatory regime.

53 Cooperative government in South Africa is supported by the allocation of 'functional areas' to different spheres of government in schs 4 and 5 to the Constitution. Schedule 4 lists areas of concurrent national and provincial legislative and executive competence, while sch 5 is the list of exclusive provincial functions. If a functional area is not listed in any of these areas – the case with mining – it is regarded as subject to the exclusive legislative and executive authority of the national sphere of government.

54 *City of Cape Town v Maccsand (Pty) Ltd & Others* 2010 (6) SA 63 (WCC).

55 *Maccsand (Pty) Ltd & Minister of Mineral Resources v City of Cape Town & Others (Chamber of Mines as* amicus curiae*)* [2011] ZASCA 141 (23 September 2011).

56 See n 38 above for the citation.

57 See para 47 of the Constitutional Court judgment for a crisp statement of this dictum.

58 At the time that the pleadings in the case were being formulated, the need to undertake an EIA for the removal of indigenous vegetation exceeding 3 ha was contained in the 2006 EIA regulations. When the judgment in the Western Cape High Court was handed down on 20 August 2010, the 2006 regulations had been repealed some two months earlier and replaced with the 2010 regulations. Notwithstanding that the substantive requirement to undertake an EIA for the removal of indigenous vegetation at a certain scale was incorporated into the 2010 regulations, albeit as a differently numbered regulation, the Supreme Court of Appeal and the Constitutional Court set aside the High Court's decision and dismissed the environmental authorities' leave to cross-appeal essentially on the basis that there was no longer legal authority for their dispute.

The 2011 agreement

In her parliamentary reply of March 2010 outlining the reasons behind the delay in the implementation of Amendment Act 49 of 2008, the minister of mineral resources indicated that a steering committee comprising officials of the DMR and the (newly constituted) Department of Water and Environmental Affairs (DWEA) were developing a 'dynamic implementation plan' for the 'agreement'.[59] Rather than developing an implementation plan, however, the bureaucrats were panel-beating another agreement into shape.

The spanner in the works of the implementation of the 2008 agreement and its supporting legislative amendments apparently took the form of the unresolved issue of water use licenses. According to a presentation made to the Joint Parliamentary Portfolio Committee (PPC, discussed below), a workshop was finally convened on 26 July 2011 at which the departments responsible for mining, water and the environment tackled meeting the challenge of a broader integration.[60] The delegates were presented with three 'options' for a single environmental system: option 1 gave effect to the 2008 agreement (environmental function moving to the environmental authorities); and option 3 to the pre-2008 status quo (environmental function remaining with the DMR). Option 2, on the other hand, identified a new path forward: retaining the environmental management function within the DMR, but requiring that the minister as implementing authority exercise her powers in terms of the NEMA, that is, the 2008 agreement without the final transfer of the environmental function to the environmental authorities. Option 2 was subsequently identified as the 'best and viable' option for moving forward. At the same time there was discussion around the regulatory alignment of the licensing processes for water and waste with the processes for mining and the environmental authorisation (with a strong focus on shortening timeframes); prohibition of mining in sensitive areas and world heritage sites, and the appointment of a specialised corps of inspectors ('environmental mineral resources inspectors' or EMRIs), for mine environmental management.[61] As a compensatory measure, perhaps, for the significant backtrack on the full-scale transfer of the mine environmental function, it was agreed that the minister responsible for environmental affairs would serve as the appeal authority for environmental authorisations and waste use licenses.

An interdepartmental project implementation committee was subsequently appointed in March 2012 to elaborate on the technical detail of this agreement, including the supporting legislative amendments.[62] The results of their efforts were presented at an historic joint meeting of the PPCs for mining and the environment respectively on 10 September 2013.

The Joint Parliamentary Portfolio Committee meeting

At the meeting of the Joint PPC for Mineral Resources and Environment and Water respectively, the departments made a joint presentation on the alignment problem

59 See n 34 above for the parliamentary question and the minister's response thereto.

60 Department of Mineral Resources, Department of Environmental Affairs and Department of Water Affairs, 'NEMA/MPRDA and NWA Amendments: Joint Presentation on Mine Environmental Management' (10 September 2013), slide 16.

61 Parliamentary Monitoring Group, 'Audio Recording of the Joint Sitting of the Parliamentary Portfolio Committees on Mineral Resources and Environment & Water held on September 2013'.

62 Department of Mineral Resources et al. (n 60 above) slide 20.

and the history of the attempts made to address it, the content of the 2011 agreement, and the additional proposed amendments to the NEMA, the MPRDA and the NWA required to bring the agreement into effect.[63] The tone of the discussion was generally pro-investment and pro-business. There was not a single mention during the committee's two-hour discussion of the constitutional environmental right, the rights of communities, the rights of future generations, and the duties that might be owed to the natural environment per se. Emphasis instead fell upon the need for streamlining and shortening timeframes for the three authorisations (mining, environmental and water), which would now run in parallel rather than sequentially, centralising and limiting the appeal process, ensuring that there were 'co-operative governance solutions' when an authority failed to perform, and limiting the potential for the ministers responsible for minerals or water and environmental affairs to depart from the agreement unilaterally.

On the streamlining and shortening of timeframes for the various licensing processes, the Joint PPC was informed that for the simultaneous processing of the environmental authorisation, water-use licence, and waste license, applicants could expect a maximum of 250 days for a straightforward process, and 300 days for a complex process. Departmental officials also confirmed that the number of days would be *inclusive* of processing on the part of both officials and the applicant.

The appeal process (which would last no longer than 90 days at the very most, inclusive of processing time) was described as the 'Achilles' heel' of the integrated model. De Lange, the co-chair who led the discussion, noted that appeals were often used 'to stop these processes' from happening, and that the business community needed 'certainty', not processes 'that were all over the show'. He therefore emphasised the need for strict parameters of appeal, very limited scope for condonation of late appeals, a very limited role for provinces in any appeal process, the need for all appeals to be located with the minister of environmental affairs, and a shortening of the entire appeal process. De Lange's comments were favorably received by the committee, notwithstanding that centralising all appeals relating to water-use licences in the minister would apparently abolish the right of recourse to the Water Use Tribunal only recently affirmed in the *Escarpment Environment Protection* case.[64] There was also a procedural impediment to his proposal: Cabinet had not approved this particular amendment. The Joint PPC was nevertheless empowered to propose this amendment itself.

The need for a 'co-operative governance' solution to failed enforcement was linked to discussions on the appointment of the specialised corps of EMRIs. The concern of the chairs and the committee appeared to be linked to the minister of mineral resources (as the new environmental authority) failing to act. In this circumstance, De Lange noted, the minister of environment should be allowed to take over the function. The system that was going to be entrenched in the legislation had to be 'fail proof'.

Finally, noting the impending general elections in 2014, De Lange expressed concern about the agreement potentially falling apart if and when new ministers were appointed. To prevent this situation from arising, it was agreed that the date of implementation of the integrated model would be put into the legislation (and not

63 Parliamentary Monitoring Group (n 6 above).
64 See n 35 above.

left to the discretion of the minister and ultimately the President). The committee also supported a legislative amendment requiring the consent of all ministers before the agreement could be changed, to ensure that it had integrity over time.

Apart from these issues, brief mention was made of legislative amendments relating to mining in sensitive areas, and the need to do away with the complicated two-phase shift of statutory and implementing authority (about which only one person in the discussion – and not the chairs – appeared to have any knowledge or understanding!).

Key features of the single environmental system

Two Amendment Acts entrenching the 2011 agreement, as elaborated upon by the Joint PPC, were duly passed by parliament and assented to by the President in June 2014. The National Environmental Management Laws Amendment Act 25 of 2014 amended the NEMA, the Waste Act, and the NEMA Amendment Act 62 of 2008; while the National Water Amendment Act 27 of 2014 entrenched changes to the NWA. Both Amendment Acts commenced on 2 September 2014.[65] The key features of the new statutory aligned model discussed in this section are: (1) scope of the environmental authorities' power to determine the 'rules of the game'; (2) the minister of minerals' implementing authority; (3) appeals; (4) establishment of the environmental mineral resource inspectorate; and (5) entrenching the integrity of the agreement over time. For ease of reference the footnotes in this section refer to the amended section of the principal Acts, rather than the provisions of the Amendment Act.

Scope of the environmental authorities' power to determine the rules of the game

The quid pro quo for retaining the minister of minerals as the implementing authority for environmental authorisations under the NEMA in the 2011 agreement must have been acceptance of the environmental authorities' expanded authority to determine the primary rules for the exercise of that authority. As discussed above, Amendment Act 62 of 2008 had already entrenched a substantive increase in the environmental authorities' power to make regulations pertaining to the mining and petroleum industry (with respect to the management and control of residue stockpiles and deposits, consultation with interested and affected parties, mine closure requirements and financial provision, etc). Act 25 of 2014 did not make any substantive change to this list, but did strengthen certain of the provisions of the primary Act dealing with financial provision and liability for pollution, ecological degradation and the pumping and treatment of polluted or extraneous water. For example, when the minister of minerals considers an application for environmental authorisation he must now consider the ability of the applicant to comply with the prescribed financial provision.[66] The financial provision now expressly extends to the ongoing post-decommissioning management of negative environmental impacts in addition to rehabilitation and closure.[67] The holder of an environmental authorisation will henceforward also be obliged to annually

65 See s 32 of Act 25 of 2014, which provided that the Amendment Act would come into effect three months from the date of publication by the President in the *Gazette*. This occurred on 3 June 2014 (see Proc No 448 *Government Gazette* 37713 of 2 June 2014). Section 7 of Act 27 of 2014 provided that it would come into force on the same date as Act 25 of 2014.

66 NEMA, s 24O(1)(b)(iiiA) (as amended by Act 25 of 2014).

67 NEMA, s 24P(1) (as amended by Act 25 of 2014).

assess his or her environmental liability, increase the financial provision to the satisfaction of the minister of mineral resources, and submit an independent audit report on the adequacy thereof.[68] Cutting through the policy uncertainty generated by the failure to bring the latest amendment of the MPRDA into effect,[69] the amended NEMA now states that the requirement to maintain and retain the financial provision remains in force *notwithstanding* the issue of a closure certificate by the minister of minerals under the MPRDA.[70]

One of the major advances of the latest amendments, however, is the power of the minister of environmental affairs to prohibit or restrict the granting of an environmental authorisation and/or the granting of a waste management licence by an authority for a listed activity in a specified geographical area if this is necessary 'to ensure the protection of the environment, the conservation of resources or sustainable development'.[71] The exercise of this power, which thus arches over the minister of minerals' power as the competent/licensing authority for these authorisations, is brought within the ambit of the precautionary approach,[72] one of South Africa's core environmental management principles, as set out in section 2 of the NEMA. The minister of environmental affairs has a broad discretion: the criteria for the exercise of her discretion mirror the text of the broadly phrased constitutional environmental right and the prohibition or restriction of the listed activity may be for such period and on such terms and conditions as she determines. Prior to exercising this discretion, however, the minister must consult all Cabinet members whose area of responsibility will be affected by the exercise of her power as well as the provincial MEC, and she must allow for public notice and comment.[73] The minister's power can only operate prospectively: any activities already authorised by an environmental authorisation or waste management license in the specified geographical area will not be affected by the prohibition or restriction.[74] There are thus at least two ways in which the minister of environmental affairs might seek to exercise this new regulatory power: first, to prohibit or restrict mining in pristine, unmined areas all together; and secondly, to prevent the authorisation of further mining activities in a particular area, as a guard against cumulative impacts that could overwhelm natural systems.

While the latest legislative amendments for the most part expand the environmental authorities' power to set the rules of the game, in at least two instances they also fetter their discretion. The first is the set of restrictions imposed regarding future amendments in respect of environmental matters that affect the content of the 'Agreement' (discussed further below). The second is the new obligation vesting in the minister of water and sanitation to align and integrate the process for consideration of a water

68 NEMA, s 24P(3) (as amended by Act 25 of 2014).
69 See n 50 above.
70 NEMA, s 24P(5) (as amended by Act 25 of 2014).
71 The minister of environmental affairs' power to prohibit or restrict the granting of an environmental authorisation was actually included in the NEMA as s 24(2A) by the National Environmental Management Laws Second Amendment Act 30 of 2013. This Amendment Act largely entered into force on 18 December 2013, but the minister's specific power of prohibition or restriction only entered into force on 18 December 2014. The minister's power to prohibit or restrict the granting of a waste management license was incorporated into the Waste Act as s 20A by Act 25 of 2014.
72 NEMA, s 24(2A)(a) (as amended by Act 30 of 2013); Waste Act, s 20A(1)(a) (as amended by Act 25 of 2014).
73 NEMA, s 24(2A)(f) (as amended by Act 30 of 2013); Waste Act, s 20A(5) (as amended by Act 25 of 2014).
74 NEMA, s 24(2A)(c) (as amended by Act 30 of 2013); Waste Act, s 20A(2) (as amended by Act 25 of 2014).

use license with the timeframes and processes applicable to applications regulated by the MPRDA and NEMA.[75] As discussed further below, the minister of water and sanitation will still issue water-use licences for prospecting and mining activities.

Minister of minerals' implementing authority

The latest legislative amendments affirm that the minister of mineral resources must be identified as the competent authority for NEMA authorisations relating to prospecting, mining, exploration or production.[76] Instead of referring to 'related activities' taking place in a 'prospecting, mining, exploration or production area', however, the law now states that the minister's competence as an authority must be invoked where the 'listed or specified activity is *directly related* to (a) prospecting … of a mineral … resource; or (b) extraction and primary processing of a mineral … resource'.[77] The key significance of this change seems to lie in the removal of the spatial restriction on the minister's implementing authority. The activities 'directly related' to the prospecting or mining may now occur anywhere, and need not specifically occur in the mining area. This may be relevant not only to mining or prospecting as primary activities, but also to remediation and rehabilitation efforts.

The legislative sea-change to the scope of the minister of minerals' authority over NEMA environmental authorisations is however constituted by deletion of the provision, contained in section 13 of Act 62 of 2008, that allowed for the 're-amendment' of NEMA, 18 months after the legislative scheme began to operate, to shift implementation authority finally to the environmental authorities. The deletion of this provision essentially entrenches the permanence of the minister of minerals' implementing authority in respect of environmental authorisations.[78]

The other major change is that the minister of minerals will now also serve as the licensing authority under the Waste Act where the waste management activity is, or is directly related to: (a) prospecting; (b) extraction and primary processing of a mineral; or (c) residue stockpiles and residue deposits from a prospecting or mining operation.[79] In its initial formulation, the Waste Act was premised on the exclusion of residue stockpiles and deposits from the ambit of the Act's jurisdiction.[80] Act 25 of 2014 deletes this exclusion and inserts a new section 24S in the NEMA, stating that residue stockpiles and deposits must be deposited and managed in line with the provisions of the Waste Act. As the Waste Act was not drafted with the intention to include residue stockpiles and deposits, one can expect to see further legislative development – either in terms of amending the primary Act or by introducing new regulations – in this area.

75 NWA, s 41(5) (as amended by Act 27 of 2014).
76 This provision was initially inserted in the NEMA by Act 62 of 2008.
77 NEMA, s 24C(2A) (as amended by Act 25 of 2014).
78 Act 25 of 2014, however, also deleted s 14(2) of Act 62 of 2008. This provision established that the aligned, integrated model would begin to operate after both the Act 62 of 2008 and Act 49 of 2008 had entered into effect. As noted above, taken together with the date of commencement of the latter, this fixed the date of implementation for the new system as 8 December 2014. The effect of deleting s 14(2) was therefore to bring the date of commencement of the new system forward to 2 September 2014, the date of commencement of Amendment Acts 25 and 27 of 2014. On 3 September 2014, however, the Department of Mineral Resources issued a notice to the effect that the aligned model would only become effective on 8 December 2014.
79 Waste Act, s 43(1A) (as amended by Act 25 of 2014).
80 Waste Act, s 4(1)(b).

Appeals

The so-called 'Achilles' heel' of the single environmental system, the appeal process, has been fleshed out by the latest legislative amendments, although the detail of the various forms of appeal will be worked out in the regulations.[81] The NEMA now states that the minister of environmental affairs may hear an appeal by any person against a decision made in terms of NEMA or 'any specific environmental management Act' by the minister of mineral resources or any person acting under his delegated authority.[82] The reference to 'specific environmental management Act' or 'SEMA' is to any of the pieces of legislation regulating specific areas of environmental management and associated with the NEMA.[83] At this stage, the only SEMA of relevance would be the Waste Act.

Appeals to the minister of environmental affairs against the granting of a water use license have to be handled somewhat differently, as the minister of mineral resources has no authority over these. In this regard, the NWA has been amended to provide that any *applicant* for a water-use licence who has also applied for a prospecting or mining right and an environmental authorisation, and who is aggrieved by the decision of the 'responsible authority' may lodge an appeal to the minister responsible for water and sanitation.[84] The responsible authority in this instance could be a catchment management agency, but is more likely to be an official acting under the delegated authority of the minister.

It is significant in this amendment that the authority to appeal to the minister of water and sanitation is restricted to the *applicant* for a water-use licence. This means that the right of any *other* person to appeal to the Water Tribunal against the decision to grant a water-use licence[85] has not in fact been abolished, perhaps contrary to the wishes of the Joint PPC, which had wanted to avoid appeal procedures being 'all over the show'.

One of the major changes in the single environmental system will be that an appeal to the minister of environmental affairs *will* suspend an environmental authorisation or waste-use management licence granted by the minister of mineral resources.[86] This marks a departure from the system that has prevailed for appeals against rights granted under the MPRDA, where an appeal did not suspend the right and where the long delays experienced in finalising appeals essentially meant that mining could proceed – thus undermining the rationale for the appeal in the first place.

The Joint PPC's concern with reining in the appeal process finds expression in amendments to the NEMA that allow the minister of environmental affairs to extend or condone a failure by a person to comply with a time period applicable to an appeal only 'in exceptional circumstances'.[87] Further, the minister may not even accept an application for condonation to submit an appeal if more than 30 days have

81 Draft national appeal regulations were published in late August (see GN 709 *Government Gazette* 37973 of 22 August 2014). A detailed commentary on the draft regulations falls outside the scope of this article.

82 NEMA, s 43(1A) (as amended by Act 25 of 2014).

83 NEMA carries a definition of 'specific environmental management Act' to which various pieces of legislation have been added over the years.

84 NWA, s 41(6) (as amended by Act 27 of 2014).

85 The legal authority for standing before the Water Tribunal for persons other than the applicant is set out in s 148 of the NWA.

86 NEMA, s 43(7) (as amended by Act 25 of 2014).

87 NEMA, s 47CB(1) (as amended by Act 25 of 2014).

elapsed since the minister of mineral resources (or anyone acting under his delegated authority) has granted the environmental authorisation or waste use management license.[88] And the condonation period (in which an appeal would have to be submitted), may not be any longer than the period initially allowed for lodging the appeal in the first place.[89] In deciding whether to grant the appeal, the minister of environmental affairs must consider a number of criteria, including whether the minister of mineral resources will 'suffer prejudice' if the time period to lodge an appeal is extended, or failure to comply with the prescribed period is condoned.[90] These changes accordingly highlight how important it will be for public interest organisations to lodge appeals within the prescribed timeframes, which may be difficult if the notice and transparency arrangements around the granting of the authorisations are not rigorous.

Establishment of the environmental mineral resource inspectorate

The minister of minerals may designate EMRIs for the compliance monitoring and enforcement of NEMA or a SEMA as they pertain to mining or prospecting.[91] An EMRI may exercise any powers given to environmental management inspectors (EMIs) under the NEMA,[92] which include powers of search and seizure and the power to issue compliance notices.[93] As one of the 'co-operative governance' dimensions of the amendments, and provided she acts with the concurrence of the minister of minerals, the minister of environmental affairs is empowered to designate EMIs to fulfill the compliance monitoring and enforcement functions of EMRIs if the latter are unable or not adequately able to fulfill their mandate.[94] Provision is also made for a complaint procedure, whereby a 'complainant' (which is not defined, so presumably this could be anyone), alleging that a specific compliance monitoring and enforcement action relating to prospecting or mining has not been implemented or has been implemented inadequately.[95] The complaint must be submitted to the minister of minerals in the first instance, but if the complainant if not satisfied with his response, the matter may be taken up with the minister of environmental affairs, who may then either 'assist or support' the former minister in the fulfillment of the compliance monitoring and enforcement obligation, or direct EMIs to undertake the functions in question.[96]

Entrenching the integrity of the single environmental system over time

Reflecting the Joint PPC's concern that the agreement to establish a single environmental system should have integrity over time, an identical provision dealing with 'future amendments in respect of environmental matters' insofar as they relate to the 'Agreement' is inserted into both the NEMA and the NWA.[97] This novel provision is not aimed at fettering the legislative authority of parliament. Rather, it affects the

88 NEMA, s 47CB(2) (as amended by Act 25 of 2014).
89 NEMA, s 47CB(4) (as amended by Act 25 of 2014).
90 NEMA, s 47CB(3) (as amended by Act 25 of 2014).
91 NEMA, s 31BB(1) and (2A) (as amended by Act 25 of 2014).
92 NEMA, s 31D(3) (as amended by Act 25 of 2014).
93 The powers of the environmental management inspectorate are set out in ss 31A to 31Q of the NEMA.
94 NEMA, s 31D(4) (as amended by Act 25 of 2014).
95 NEMA, s 31D(5)–(9) (as amended by Act 25 of 2014).
96 NEMA, s 31D(8) (as amended by Act 25 of 2014).
97 NEMA, s 50A (as amended by Act 25 of 2014); NWA, s 163A (as amended by Act 27 of 2014).

capacity of either of the ministers responsible for mineral resources or water or environmental affairs to initiate legislative amendments to the provisions relating to prospecting or mining in the NEMA, a SEMA or indeed 'any other Act of Parliament' that have the effect of amending the Agreement. The restriction is essentially that *all* of the ministers must concur on the amending provisions *and* that an 'intervention' of this nature must be tabled in parliament prior to any steps being taken to effect changes, with a view to parliament expressing its view on the proposed amendment of the Agreement.[98] The Agreement, the legislative amendments continue, means the Agreement reached between the ministers of environmental affairs, water affairs and mineral resources respectively titled 'One Environmental System for the country with respect to mining', the four pillars of which are the following: (1) that all environmental aspects relating to mining would be regulated through the NEMA; (2) that the minister of environmental affairs sets the regulatory framework and norms and standards for the sector, with the minister of minerals as the implementing authority; (3) that the minister of mineral resources, in particular, will issue environmental authorisations in terms of the NEMA and that the minister of environmental affairs would be the appeal authority for those authorisations; and (4) that the respective ministers agree on fixed and synchronised timeframes for the consideration and issuing of authorisations in terms of their respective legislation.[99]

This provision, which is like no other that has entered the South African statute books, raises a variety of structural constitutional issues the most important of which is how it impacts upon the original law-making powers of provinces and municipalities in South Africa's system of cooperative government. The establishment of the 'single environmental system' for mining also has unintended consequences for EIA more generally. Although the essence of the agreement is only that timeframes for mining, environmental and water use licenses should be 'fixed and synchronized', the policy context – as demonstrated by the overview of the Joint PPC's deliberations – is that these timeframes should also be *reduced*. Recently published draft EIA regulations[100] outline processes based on these reduced timeframes, which the environmental civil society movement has charged as being 'woefully insufficient for scientifically sound impact assessment' and 'impractically rigid', impacting negatively on applicants, interested and affected parties and decision-makers alike.[101]

Conclusions

One of the drivers in the development of South Africa's single environmental management system for mining has clearly been concern around the dual role of the DMR as both facilitator and promoter of mineral development and protector of the environment. This has undergirded the environmental authorities' attempts to bring them within the fold of national environmental management for many years. One can also discern, however, how South Africa's unique approach to cooperative government has influenced the development of this system at key points. The mineral authorities' view

98 NEMA, s 50A(1)(a) and (b) (as amended by Act 25 of 2014); NWA, s 163(1)(a) and (b) (as amended by Act 27 of 2014).

99 NEMA, s 50A(2) (as amended by Act 25 of 2014); NWA, s 163A(2) (as amended by Act 27 of 2014).

100 Published as GN733 *Government Gazette* 37591 of 29 August 2014.

101 See, for instance, the Center for Environmental Rights' written comments on the draft EIA regulations <http://cer.org.za/news/time-is-of-the-essence-proposed-new-rules-slash-timeframes-for-eia> accessed 5 October 2014.

that they were entitled to carve out a distinctive environmental management niche for mining was grounded in the constitutional status of mining as an exclusive national competence. The Constitutional Court debunked this view in the *Maccsand* case, affirming a strong version of cooperative government that permits the regulatory participation of multiple governmental departments around the regulation of a single phenomenon. This must have made the minister of minerals and the DMR realise that some form of agreement with the environmental authorities was imperative, despite their apparent unwillingness to move forward with the 2008 agreement. The principle of cooperative government subsequently manifested in the institutional arrangements adopted to develop the single environmental system – the establishment of the interdepartmental project implementation committee and the Joint PPC for instance – as well in the design of the system. A strong version of cooperative government of environmental management of mining has further been entrenched through the new legislative arrangements around ensuring the integrity of the agreement over time.

The principal tension associated with the environmental management of mining – balancing the need to promote and facilitate mineral development and the protection of the environment – has been managed in what may well be a unique experiment: shifting the statutory authority for the rules on environmental management of mining to the environmental legal framework and entrenching the environmental authorities' power to determine the rules of the game, whilst splitting the implementing authority between the mineral resources and environmental authorities. It is difficult to predict, at this stage, how the statutory division of powers between the mineral resources and environmental authorities will play out, whether it will lead to decisions that are more or less conservative in terms of holding back on mining projects for the sake of environmental protection, or not. As the issuing authority for both environmental authorisations and waste-use management licences, the minister of minerals is now powerfully positioned to give mining the environmental go-ahead. The minister of environment's power to hear appeals against positive authorisations is not a proactive power as it depends upon third parties bringing such appeals. Lack of access to information, and lack of capacity and resources militate against third parties lodging appeals or lodging them in time, and the legislative amendments aimed at constraining and limiting the appeal process do not assist in this regard. Nevertheless, the minister of environment is now invested with the power to completely prohibit or restrict the granting of environmental authorisations or waste-use management licences for specific geographical areas, which may counterbalance the rather weak control of the minister of minerals' implementing authority through the appeal process. The cooperative governance arrangements around the EMRIs provide the minister of environment with further tools to ensure that rigorous compliance monitoring and enforcement of environmental management standards pertaining to prospecting and mining take place.

Does the single environmental system for environmental management of mining honor the constitutional environmental right? Answering this question turns on whether the legislative provisions adopted are 'reasonable' in light of the two rights entrenched in section 24 of the Constitution.[102] On one hand, the manner in which power between the mineral resources and environmental authorities has been split is a ground for answering this question in the affirmative. The single environmental system may indeed be a new model that reflects in the institutions of government the

102 See n 3 above.

constitutional imperative to balance 'ecologically sustainable development' with 'justifiable economic and social development'. The counterargument probably centers predominantly on the manner in which the single environmental system is driving a *shortening* of the timeframes for environmental assessment, which affects not only environmental authorisations for prospecting and mining but *all* environmental assessments. Whether these shortened timeframes will enable applicants and regulators to appreciate the impacts of prospecting and mining on the diverse cycles of nature is a moot point worthy of further investigation. From the tenor of the discussions in the PPC it seems fairly clear that the single environmental system has been developed with the interests of the mining business community in mind. The South African mining industry is smaller than it was in 1994, despite global market dominance in some deposits, and there may be a sense of urgency prevailing around promoting mining investment. The recently developed National Development Plan, however, does not state that mining investment and production is 'urgent', but rather that '[i]t is urgent to stimulate mining investment and production *in a way that is environmentally sound* … '.[103] Environmental regulation surely cannot be sound if, at the very base, it is not taking cognisance of the impact of human activities on the complete range of natural cycles, which must respect the time of nature, not the time of human institutions. The shortened timeframes are also provoking concerns that the new framework for environmental assessment driven by the single environmental system does not adequately give effect to the constitutional value of participatory democracy.

Finally, despite the single environmental system's concern with promoting cooperative government amongst the national departments responsible for mineral resources and environmental and water affairs (a form of *horizontal* cooperative government), the impact of the single environmental system on *vertical* cooperative government, that is, on the original legislative and executive powers of the provinces, does not seem to have been properly considered. In vesting implementing authority with the minister of minerals, the provincial sphere of government has lost the power to issue environmental authorisations for ancillary activities, a loss that may well impact upon provincial planning and development. As expressed during the Joint PPC, provinces are also intended to play a limited role in the appeal process. This is a form of 'nationalization' of the environmental management process.

To conclude, to the extent that the single environmental system replaces the fragmented, contradictory and ineffective model that has bedeviled environmental management of mining in South Africa to date, it is a welcome development. The institutional design of the system may well, in time, serve as a model for cooperative government in South Africa, and for the environmental management of mining in other nation states. Much, however, will depend on the integrity of the political masters who sit at its helm and on the professionalism of the officers who implement and enforce its provisions.

103 National Planning Commission, *National Development Plan 2030: Our Future – Make It Work* (undated) 146, http://www.gov.za/documents/national-development-plan-2030-our-future-make-it-work accessed 15 April 2015.