



***Ex post facto* environmental authorisation in South Africa**

TJ Rantlo

 **[Orcid.org/0000-0002-9206-6861](https://orcid.org/0000-0002-9206-6861)**

Thesis accepted in fulfilment of the requirements for the degree
Doctor of Laws in Perspectives on Law at the North-West
University

Promoter: Prof W Du Plessis

Graduation: August 2021

Student number: 26780623

DEDICATION

This thesis is dedicated to my late father and best friend of all times,
T'seliso "Mike" Rantlo. Finally, we made it Motaung.

ACKNOWLEDGEMENTS

I wish to express my greatest gratitude to my study leader and mentor, Prof Willemien du Plessis for your unwavering support and patience. You have been more than just a study leader but a mother, mentor and motivation for me to press on. When the journey became too overwhelming, when I did not have it in me to continue with the journey anymore, you became a reason for me to press on. Your guidance, never-ending humorous comments and financial assistance kept me going. Thank you for believing in me even when I stopped believing in myself and continuously opening doors for me.

Thank you to Prof Johan Nel. You indirectly become part of this journey. Whenever Prof W and I called on you for assistance, you always came through.

Thank you to Prof Anel Du Plessis for your encouragement, motivational talks and sharing materials. Your phrase "it will be worth it at the end" kept me pushing.

Thank you to Mrs Saritha Marais for all the support you rendered. You became and continue to be a deputy mother (deputy to my supervisor). You assisted me in all possible means whenever I came to you. For that, I am eternally grateful.

The former Dean of the Faculty of Law, Prof De la Harpe and Prof Schutte, thank you for the financial assistance and endless opportunities during my journey.

The financial contribution of the National Research Foundation (Grant # 111762) is acknowledged for assisting in attending the conferences, trip to the Western Cape for data collection and data during the lockdown period to carry out research, conduct interviews for my thesis and language editing. However, the ideas expressed herein are the researcher's.

The participants in the study, thank you for your assistance in this study. Had it not been for your willingness to participate even in the trying times (lockdown), this study would not have been completed. I thank the DEFF, the Gauteng DARD, the Western Cape DEA&DP and the North West DREAD for granting me permission to

carry out my study in your Departments. I also wish to thank the consultancy firms and EAPs that participated in this study

Thank you to the Faculty of Law administrators, Ms Audrie Francis and Ms Lysandre le Roux. You checked up on me, helped me whenever I needed your help, listened to me when I needed to vent, forced me to take necessary breaks and encouraged me. For that, I am grateful. I thank Mrs Rieëtte Venter for always assisting me whenever I knocked on your door.

The moot court squad and colleagues: Ninette, Riana, Melandrie, Dr Ify, Andrew, Jeanette, Minette, Celia, Jos, Stal, Dr Julliete, Dr Nicolene, Dr Angwe thank you guys for your support, encouragement and checking up on me, cheering for me and sharing your wisdom. I am eternally grateful.

To my friends Moseline, Gao, Lionel, Samuel, the Kgabakges, Khaka, Khofu, Noosi, Ramanyaka-Hlalele, Wendy and Tumza thank you for the support and the friendship. This journey would have been unbearably lonely without you.

To the Kganakgas, words cannot encapsulate my gratitude towards you. You became a family to me in a foreign land for years. You supported me in an unimaginable way. You stood with me and held my hand in the most trying times in this journey. Thank you, and I am indebted to you.

To the Matras family, thank you for taking me in as a son. Apostle, your Sunday sermons carried me through my journey. Auntie Mione, thank you for being the mother that you have been. May the Lord bless you abundantly.

To my family, Ntate Mike (late), 'Me' 'Marethabile (late), Mpho, Khothlang, Tumisang, Bokang, Mmakamo, Kojang, Nanabbery (Lebo) and Thabi, Karabelo and Liteboho thank you to every one of you for the unwavering support through my journey. Your encouragements, checking up on me and being in my corner and cheering for me always did not go unnoticed.

To God who is able to do exceeding, abundantly above all that I can think, ask or imagine be glory and honour. The Almighty, All-knowing and infinite God, had it not

been for your hand, I would not have made it this far. Thank you for the grace to start the journey and get to the finish line.

Isaiah 60:22- When the time is right, I the Lord will make it happen.

PUBLICATIONS AND CONFERENCE CONTRIBUTIONS

Publications

Rantlo J & Viljoen G 2020 *A Critical Appraisal of Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd 2019 5 SA 275 (GP)* Impact Assessment and Project 1-5

Conference contributions

National conferences

"Retrospective Authorisations in South Africa (section 24G of NEMA) " at South Africa Rights of Way Association, Pretoria, Gauteng in 2020.

"Retrospective Authorisations in South Africa: A closer look at Uzani case" at International Association of Impact Assessment South Africa at Bela-Bela, Limpopo, October 2019.

"Mining & Environmental Justice Community Network of SA & Others v Minister of Environmental Affairs & Others (The Mabola Case)" at International Association of Impact Assessment South Africa at Bela-Bela, Limpopo, October 2019.

"Environmental Impact Assessment in Lesotho and South Africa" at Environmental Law Association Conference at Johannesburg, Gauteng, October 2016.

"*Ex post facto* environmental authorisation in South Africa" at Environmental Law Association Conference at University of Cape Town, Western Cape, October 2017.

International conferences

"*Ex post facto* environmental authorisation in South Africa, The Court's approach", Durban ICC, KwaZulu-Natal in April 2018.

ABSTRACT

Competent authorities issue environmental authorisations before a proposed activity that is likely to have a significant impact on the environment can take place (section 24 *National Environmental Management Act* 107 of 1998 (NEMA)). Non-compliance is an offence (section 24F NEMA). However, South Africa allows an *ex post facto* environmental authorisation after a listed activity has commenced without the necessary authorisation (section 24G NEMA).

Before an environmental authorisation or *ex post facto* environmental authorisation may be granted, an environmental assessment has to be carried out. However, it remains questionable whether an environmental assessment is an ideal tool to inform decision-making before issuing an *ex post facto* environmental authorisation.

Sustainable development and environmental management principles underpin environmental decision-making and include, amongst others, the precautionary and the preventive principles. The emerging international law principle of non-regression requires that states must not backtrack on their commitment to environmental protection.

This study interrogates the practical and theoretical challenges of an *ex post facto* environmental authorisation in South Africa and whether introducing section 24G of NEMA is tantamount to a regressive measure.

The study also includes a limited empirical study to probe the practical experiences of the national Department responsible for environmental matters and three provinces in implementing section 24G of NEMA to identify the challenges. The findings of the study suggest that section 24G is not punitive but a corrective measure to bring unlawful activities into the regulatory loop. The challenges identified are the abuse of the section 24G process, interpretation issues, public participation, the administrative fine issue, and the fact that an environmental assessment is not the ideal tool to inform the decision-making in the case of an *ex post facto* environmental authorisation. Further, the findings suggest that an *ex post*

facto environmental authorisation *prima facie* was not intended to undermine the non-regression principle.

The thesis further followed a legal comparative method to discuss the experiences of Ireland, England, India and the Kingdom of Eswatini with *ex post facto* environmental authorisations to distil lessons for South Africa. Given the lessons, the study recommends, among other things, that section 24G be retained but be amended so that it applies to exceptional circumstances to curb abuse. Further, the public participation process should be strengthened. It is further recommended that alternative tools such as environmental risk assessments, environmental audits or a combination of tools should be introduced to strengthen the process.

Keywords

Environmental authorisations, *ex post facto* environmental authorisations, South Africa, environmental impact assessment, section 24G of NEMA, sustainable development, preventive principle, precautionary principle, non-regression principle, Ireland, India, England, Eswatini

TABLE OF CONTENTS

DEDICATION	ii
ACKNOWLEDGEMENTS.....	iii
PUBLICATIONS AND CONFERENCE CONTRIBUTIONS.....	vi
ABSTRACT	vii
LIST OF ABBREVIATIONS.....	xvii
Chapter 1: Introduction	1
1.1 <i>Background</i>	1
1.2 <i>Environmental authorisation</i>	3
1.3 <i>Ex post facto environmental authorisation</i>	4
1.4 <i>Environmental impact assessment</i>	4
1.5 <i>Overview of EIA legislation in South Africa.....</i>	6
1.5.1 <i>Unauthorised listed activities</i>	9
1.6 <i>Section 24G of NEMA</i>	9
1.6.1 <i>Background.....</i>	9
1.6.2 <i>Current provision of section 24G of NEMA</i>	11
1.6.3 <i>Practical challenges pertaining to the application of section 24G of NEMA.....</i>	13
1.7 <i>Theoretical challenges</i>	15
1.8 <i>Possible lessons from other jurisdictions</i>	16
1.9 <i>Objectives of the study</i>	20
1.10 <i>Research methodology</i>	21
1.11 <i>Limitations to the study.....</i>	26
1.12 <i>Structure of the study.....</i>	27
Chapter 2: Theoretical framework.....	29
2.1 <i>Introduction</i>	29
2.2 <i>Background: Incidents of non-compliance.....</i>	29
2.3 <i>Definition of environmental authorisation</i>	33

2.4	<i>Ex post facto environmental authorisation</i>	36
2.4.1	<i>Definition</i>	36
2.4.2	<i>Drivers for ex post facto environmental authorisation</i>	38
2.4.3	<i>Challenges with ex post facto environmental authorisations</i>	39
2.4.4	<i>Preliminary observations</i>	43
2.5	<i>Environmental authorisation and EIAs</i>	44
2.5.1	<i>Differentiation between EIA and environmental authorisations</i>	44
2.6	<i>Historical background</i>	49
2.7	<i>Evolution of EIAs</i>	52
2.7.1	<i>Developed countries</i>	52
2.7.2	<i>Developing countries</i>	53
2.7.3	<i>International instruments</i>	53
2.7.4	<i>International agencies</i>	55
2.8	<i>Generic EIA procedure</i>	56
2.8.1	<i>Screening</i>	56
2.8.2	<i>Scoping</i>	58
2.8.3	<i>Impact prediction, assessment and mitigation</i>	59
2.8.4	<i>Mitigation and impact management plan</i>	60
2.8.5	<i>EIA report</i>	61
2.8.6	<i>Review of EIA</i>	62
2.8.7	<i>Decision-making</i>	63
2.8.8	<i>Follow-up impact management monitoring</i>	65
2.8.9	<i>Discussion</i>	68
2.9	<i>Environmental authorisation and environmental management principles</i>	69
2.9.1	<i>Origin and need for principles</i>	69
2.9.2	<i>Sustainable development</i>	70
2.9.3	<i>Nexus between sustainable development and EIA</i>	75
2.9.4	<i>Preventive principle</i>	76
2.9.5	<i>Precautionary principle</i>	77
2.10	<i>Principle of non-regression</i>	82
2.10.1	<i>Recognition of the principle of non-regression</i>	82

2.10.2	<i>Principle of non-regression and sustainable development</i>	86
2.10.3	<i>Principle of non-regression, EIA and environmental authorisation</i> ...	89
2.10.4	<i>Principle of non-regression and ex post facto environmental authorisation</i>	90
2.11	<i>Alternative environmental management tools</i>	92
2.11.1	<i>Environmental risk assessment and incident management</i>	93
2.11.2	<i>Environmental audit</i>	96
2.11.3	<i>Duty of care</i>	99
2.11.4	<i>Combination of tools</i>	101
2.12	<i>Conclusion</i>	102
Chapter 3:	Historical overview of environmental authorisations in South Africa	105
3.1	<i>Introduction</i>	105
3.2	<i>Historical background</i>	105
3.2.1	<i>Evolution of EIAs before 1989</i>	106
3.2.2	<i>Legislative and policy formation from 1989 to 1997</i>	107
3.3	<i>Environment Conservation Act 73 of 1989</i>	111
3.3.1	<i>Period between 1997-2004</i>	113
3.3.2	<i>ECA case law</i>	116
3.3.3	<i>Challenges</i>	120
3.3.4	<i>White Paper on Environmental Policy for South Africa, 1998</i>	122
3.4	<i>National Environmental Management Act 107 of 1998</i>	125
3.5	<i>Period 2004-2008</i>	128
3.5.1	<i>NEMA Amendment Act 8 of 2004</i>	128
3.5.2	<i>Ex post facto environmental authorisation</i>	130
3.5.3	<i>2006 NEMA EIA Regulations</i>	137
3.6	<i>2008-2014</i>	143
3.6.1	<i>NEMA Amendment Act 62 of 2008</i>	143
3.6.2	<i>2010 NEMA EIA Regulations</i>	145
3.6.3	<i>NEMA Amendment Act 30 of 2013 and section 24F</i>	147
3.7	<i>Current section 24G of NEMA</i>	148

3.7.1	<i>2013 Amendment Act</i>	148
3.7.2	<i>Case law</i>	152
3.8	<i>2014 to the current position: EIA regulations</i>	156
3.8.1	<i>NEMA 2014 EIA Regulations</i>	156
3.8.2	<i>Section 24G Fine Regulations</i>	160
3.8.3	<i>National Environmental Management Laws Amendment Bill [B14D-2017] (NEMLA IV)</i>	162
3.9	<i>Preliminary observation</i>	163
3.10	<i>Conclusion</i>	164
Chapter 4:	<i>Practical application of section 24G</i>	170
4.1	<i>Introduction</i>	170
4.2	<i>Overview of completed section 24G studies</i>	170
4.3	<i>Rationale and research method</i>	172
4.4	<i>Internal instruments for section 24G implementation</i>	179
4.5	<i>Findings</i>	182
4.5.1	<i>Original intent of section 24G of NEMA</i>	183
4.5.2	<i>Drivers for section 24G of NEMA</i>	184
4.5.3	<i>Interpretation issues</i>	187
4.5.4	<i>Lack of uniformity on the contents of the assessment report</i>	188
4.5.5	<i>Public participation</i>	190
4.5.6	<i>Abuse</i>	191
4.5.7	<i>Continuation of the unlawful activity</i>	194
4.5.8	<i>Misconceptions about section 24G of NEMA</i>	195
4.5.8.1	<i>Environmental management principles</i>	195
4.5.8.2	<i>Shorter, less rigorous and cheaper procedure</i>	196
4.5.9	<i>Alternative tools</i>	199
4.6	<i>Conclusion</i>	201
4.6.1	<i>Original intent of section 24G of NEMA</i>	203
4.6.2	<i>Drivers of section 24G of NEMA</i>	203
4.6.3	<i>Interpretation issues</i>	204
4.6.4	<i>Lack of uniformity on the contents of the assessment report</i>	204

4.6.5	<i>Public participation</i>	205
4.6.6	<i>Abuse</i>	205
4.6.7	<i>Misconceptions</i>	205
4.6.8	<i>Alternative tools</i>	206
Chapter 5: Lessons from other jurisdictions		208
5.1	<i>Introduction</i>	208
5.2	<i>EU, Ireland and England</i>	208
5.2.1	<i>European Union</i>	208
5.3	<i>Ireland</i>	211
5.3.1	<i>Overview of planning permission requirement in Ireland</i>	211
5.3.2	<i>Retention permits</i>	212
5.3.3	<i>Irish case law</i>	213
5.4	<i>England</i>	216
5.4.1	<i>Overview of planning permission requirements in England</i>	217
5.4.2	<i>Planning permission</i>	218
5.4.3	<i>Retrospective planning permissions</i>	219
5.4.4	<i>English case law</i>	223
5.5	<i>India</i>	228
5.5.1	<i>Overview of Indian legislation for environmental clearance</i>	228
5.5.2	<i>Environmental clearance</i>	229
5.5.3	<i>Ex post facto environmental clearance</i>	230
5.6	<i>Eswatini</i>	235
5.6.1	<i>Overview of ECC procedure</i>	236
5.6.2	<i>Retrospective environmental clearance certificates</i>	236
5.7	<i>Lessons distilled</i>	237
5.7.1	<i>Exceptional circumstances</i>	238
5.7.2	<i>Unfair or improper gain</i>	238
5.7.3	<i>Principle of proportionality</i>	238
5.7.4	<i>Fines for rehabilitation</i>	239
5.7.5	<i>Alternative tool</i>	239
5.8	<i>Conclusion</i>	240

Chapter 6: Conclusion and Recommendations	242
6.1 Introduction	242
6.2 Overview	242
6.3 Findings.....	245
6.3.1 Original intent of section 24G of NEMA.....	245
6.3.2 Applications in terms of section 24G	246
6.3.3 Interpretation issues.....	248
6.3.4 Abuse	249
6.3.5 Continuation of the unlawful activity.....	249
6.3.6 Prosecution	249
6.3.7 Proportionality.....	250
6.3.8 Principle of non-regression.....	251
6.4 Recommendations.....	251
6.4.1 Retention of section 24G of NEMA	251
6.4.2 Abuse	252
6.4.3 Proportionality.....	253
6.4.4 Application process.....	253
6.4.5 Alternative tools	254
6.5 Future research	255
ANNEXURES.....	256
Annexure 1 - Ethical clearance certificate	256
Annexure 2 - Informed consent and questionnaire.....	257
BIBLIOGRAPHY	263
Literature	263
Case law	288
Legislation	290
International instruments.....	292
Government publications.....	292
Internet sources.....	293

LIST OF FIGURES

Figure 2-1:	The overall national enforcement statistics.....	32
Figure 3-1:	The basic assessment process	158
Figure 6-1:	The EIA regulations	244

LIST OF TABLES

Table 1-1:	Unlawful commencement of activities 2017-18 until 2019-2020	31
Table 4-1:	The list of participants	178

LIST OF ABBREVIATIONS

APEEL	Australian Panel of Experts on Environmental Law
CESCR	Committee for Economic Social and Cultural Rights
CMP	Comprehensive Mitigation Plan
COGTA	Minister of Cooperate Governance and Traditional Affairs
DARD	Department of Agriculture and Rural Development
DBSA	Development Bank of Southern Africa
DEA	Department of Environmental Affairs
DEA&DP	Department of Environmental Affairs and Development Planning
DECLG	Department of the Environment, Community and Local Government
DEDECT	Department of Economic Development, Environment, Conservation and Tourism
DEFF	Department of Environment, Forestry and Fisheries
DESTEA	Department of Economic, Small Business Development, Tourism and Environmental Affairs
DREAD	Department of Rural, Environment, Agriculture and Development
EAARR	Environmental Audit, Assessment and Review Regulations, 2000
EAP	Environmental Assessment Practitioner
ECA	Environmental Conservation Act 73 of 1989
ECC	Environmental Compliance Certificate
ECJ	European Court of Justice
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statements
EISDA	Electoral Institute for Sustainable Democracy in Africa
EMA	Environment Management Act 5 of 2002
EMI	Environmental Management Inspectors
EMP	Environmental Management Plan
EMPr	Environmental Management Programme
EPA	Environmental Protection Agency
ERA	Environmental Risk Assessment
EU	European Union

HOD	Head of Department
HRD	Human Resource Development
ICC	International Chamber of Commerce
IEE	Initial Environmental Evaluation
IEM	Integrated Environmental Management
IJSID	International Journal of Science Innovations and Discoveries
IOS	International Organisation of Standardization
IUCN	International Union for Conservation of Nature
LAWERec	Faculty of Law Research Ethics Committee
MEC	Member of Executive Committee
MMP	Maintenance Management Plan
MoEF	Ministry of Environment and Forestry
NAAEC	North American Agreement on Environmental Cooperation, 1993
NAFTA	North America Free Trade Agreement
NECER	National Environmental Compliance and Enforcement Report
NEMA	National Environmental Management Act
NEPA	National Environmental Policy Act of 1969
NPA	National Prosecution Authority
NWU	North-West University
OECD	Organisation for Economic Co-operation and Development
PELJ	Potchefstroom Electronic Law Journal
RoD	Record of Decision
S&EIAR	Scoping and Environmental Impact Assessment Report
SAGJ	South African Geographical Journal
SAIEA	Southern African Institute for Environmental Assessment
SAJEL	South African Journal of Environmental Law and Policy
SANDRP	South Asia Network on Dams, Rivers and People
SAPL	Southern African Public Law
SEA	Swaziland Environment Authority
SEMA	Specific Environmental Management Acts
ToR	Terms of Reference
UDHR	Universal Declaration of Human Rights 1948

UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
USA	United States of America
WWSD	World Summit on Sustainable Development

Chapter 1: Introduction

1.1 Background

South Africa is a developing country.¹ Section 24 of the *Constitution of the Republic of South Africa*, 1996 (Constitution), however, states that development must be ecologically sustainable and meet the needs of present and future generations.² Development should not only be sustainable in the eyes of the proponent of the developmental activity but also in the eyes of the public that stands to be affected by the activity.³ The *National Environmental Management Act* 107 of 1998 (NEMA), which is the environmental framework legislation of South Africa, provides that development must be socially, environmentally and economically sustainable.⁴ In the case of *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*,⁵ the court stated that development could not be undertaken on a deteriorating environmental base. The court further said that "unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development".⁶

¹ This thesis adopts the definition of development provided for in the *Development Facilitation Act* 67 of 1995. The Act defines development as "land development that refers to any procedure aimed at changing the use of land and for the purpose of using land mainly for residential, industrial, business, small scale farming, community or similar purposes". See also Kotzé 2003 *PELJ* 85. Development may include such activities, undertaking and projects that are undertaken on the environment or they may have an impact on environment. Various terms are used in different legislation to refer to development. For instance, in South Africa, the environmental legislation refers to development as "activities", while in Lesotho development is referred to as "projects". Swaziland's environmental legislation refers to development as "undertakings". For further details on interpretation of "development" in the South African context, see Kotzé 2003 *PELJ* 85.

² Section 24 of the *Constitution of the Republic of South Africa*, 1996. For further discussions on section 24 of the Constitution, see Kotzé and Du Plessis 2010 *Journal of Court Innovation* 165. See also Kotzé 2003 *PELJ* 85 for the definition of development in the context of section 24 of the Constitution.

³ Murombo 2008 *PELJ* 108.

⁴ Sections 2(3) and 2(4)(a) of NEMA. See also the Preamble of NEMA.

⁵ *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 44 (hereinafter *Fuel Retailers*).

⁶ *Fuel Retailers* para 44.

In the case of *MEC: Department of Agriculture, Conservation and Environment v HTF Developers*,⁷ the court quoted with approval the *Fuel Retailers* case⁸ and stated that the Constitution recognises the interrelationship between the environment and development and the need to protect the environment as well as the need for social and economic development.⁹

The above notwithstanding, the state of environmental degradation emanating from development is a serious concern.¹⁰ The concerns on environmental degradation can be traced to time immemorial.¹¹ Part of the environmental degradation emanates from human activity in their endeavours to bring about development.¹² The manner in which development is undertaken is often detrimental to the environment.¹³ It is said that a greater part of the "negative aspects of development have impressed themselves so much on the minds" of people who are concerned with the environment that they question the need for development.¹⁴ It has, however, been proven to be almost impossible to divorce development, or any human activity, from environmental degradation.¹⁵

In the 1970s, the state of environmental degradation emanating from development led to the formation of pressure groups in the United States of America (USA) that sought the introduction of tools that could be used to protect the environment and development.¹⁶ In response to the pressure, the USA required that the impact of the major actions that were proposed to be carried out by the Federal Agencies be

⁷ *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Limited* 2008 2 SA 319 (CC) (hereinafter HTF Developers).

⁸ *Fuel Retailers* para 44.

⁹ *HTF Developers* para 27.

¹⁰ Tladi *Sustainable Development in International Law* 2; Glazewski "The nature and scope of environmental law" 1-6.

¹¹ Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Tladi *Sustainable Development in International Law* 2.

¹² Tladi *Sustainable Development in International Law* 2; Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Morrison-Saunders *Environmental Impact Assessment* 5.

¹³ Tolba *Development Without Destruction* 11.

¹⁴ Tolba *Development Without Destruction* 10.

¹⁵ *Fuel Retailers* para 44.

¹⁶ Boden 1980 *SAJS* 252; Morrison-Saunders *Environmental Impact Assessment* 5; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 3.

assessed.¹⁷ This marked the advent of environmental assessment,¹⁸ which is one of the measures employed to address the negative impacts that development may have on the environment and contribute to sustainable development.¹⁹ In a nutshell, environmental assessment necessitates assessing the impacts of the proposed development on the environment, reporting to the competent authority and based on the information supplied, the competent authority could authorise the commencement of such a development. This led to the introduction of the phenomenon of environmental authorisation (permitting).²⁰

1.2 Environmental authorisation

According to Nel and Alberts,²¹ legislation may prohibit persons who intend to carry out developments that are likely to have a significant impact on the environment, to do so without authorisation from the competent authority. Environmental authorisation (permitting) requires the competent authority designated to deal with environmental matters to request the applicant of the environmental authorisation to carry out an environmental assessment and furnish the competent authority with information on the impact of the proposed development that is likely to have a significant impact on the environment to determine whether to authorise the development.²² Different countries have identified developments that may not commence without environmental authorisation.²³

However, the above notwithstanding, there are incidents of non-compliance to the law where developers carry out developments that are likely to have a significant impact on the environment without authorisation from the competent authority.²⁴ This renders these developments unlawful. In the context of South Africa, the unlawful commencement of unlawful activities is considered a prevalent

¹⁷ See para 2.6 in Chapter 2 below for detailed discussion.

¹⁸ See para 2.5 in Chapter 2 below for detailed discussion of environmental assessment.

¹⁹ Wathern *Environmental Impact Assessment* 1.

²⁰ See para 2.6 in Chapter 2 below for detailed discussion.

²¹ Nel and Alberts "Environmental Management and Environmental Law" 35.

²² Craigie, Snijman and Fourie "Dissecting Environmental Compliance" 209; Nel and Alberts "Environmental Management and Environmental Law" 35.

²³ See Chapter 5 for detailed discussion in this regard.

²⁴ See para 2.2 in Chapter 2 below.

environmental offence.²⁵ However, some developers seek environmental authorisation for their unlawful developments. This type of authorisation is known as an *ex post facto* environmental authorisation.

1.3 *Ex post facto* environmental authorisation

The *ex post facto* environmental authorisation denotes an environmental authorisation that is granted after the commencement of a development that would have ordinarily required an environmental authorisation before commencement. Similar to environmental authorisation, the developer must furnish the competent authority with the information detailing the impact of the activity on the environment for the competent authority to decide whether to grant an *ex post facto* environmental authorisation.²⁶ The *ex post facto* environmental authorisation authorises the developer to continue with the development subject to the conditions that the competent authority may impose.²⁷ *Ex post facto* environmental authorisation is seen as another form of environmental authorisation, albeit granted post commencement of the development. According to Nel and Alberts,²⁸ the South African environmental authorisation is linked to an environmental impact assessment (EIA) because carrying out an EIA is a prerequisite for a developer to be granted environmental authorisation.²⁹

1.4 *Environmental impact assessment*

The terms environmental assessment and EIA are used interchangeably in this thesis.³⁰ There is no universal definition of an EIA; hence different definitions and descriptions have been attributed to the understanding of an EIA in various

²⁵ See the DEFF *National Environmental Compliance and Enforcement Report 2019-20* 18.

²⁶ See para 2.4.1 in Chapter 2 for detailed discussion.

²⁷ See para 2.4.1 in Chapter 2 below.

²⁸ Nel and Alberts "Environmental Management and Environmental Law" 35.

²⁹ In South Africa a distinction is made between an EIA and a basic assessment. Last-mentioned has less procedural prescripts. For purposes of this thesis, EIA will be used predominately to refer to environmental assessment. See also Paschke and Glazewski 2006 *PELJ* 2.

³⁰ Sadler *Environmental Assessment* 12; Paschke and Glazewski 2006 *PELJ* 2. For a detailed discussion on usage of the terminology of EA, EIA and integrated environmental management (IEM), see Glazewski and Brownlie "Environmental Assessment" 10-3; Nel and Du Plessis 2004 *SAPL* 182; Robinson 2006 *SAJELP* 97.

jurisdictions.³¹ According to Wood,³² an EIA is an "evaluation of the impact which is likely to arise from a major project (or other action) significantly affecting the natural or man-made environment." Some authors consider an EIA as the systematic identification and assessment of the impacts of the proposed activity, plans, programmes or legislative actions relating to the environment in its entirety.³³ An EIA is also described as a procedure to assess the environmental implications of initiating development, and it has been accepted as a tool or instrument in the suite of environmental management tools.³⁴ It is one of the primary tools used by planners, environmental managers and decision-makers to consider environmental considerations in developmental decisions.³⁵ An EIA has also been described as a tool for sustainability³⁶ itself.³⁷ Although EIA definitions and descriptions differ, there is a generic EIA framework that has been developed by some theorists which offer a conceptual description of EIAs and includes the minimum steps that every EIA may be expected to have.³⁸ According to Wood,³⁹ the ideal generic EIA process has the following steps, to wit; consideration of alternative means of achieving objectives, the design of the proposal, screening, scoping, preparation of EIA report,

³¹ Glazewski and Brownlie "Environmental Assessment" 10-6; Sadler *Environmental Assessment* 12.

³² Wood *Environmental Impact Assessment* 1. An EIA is also perceived as the process for identifying the likely consequences of implementing certain activities and communicating such information to the authorities responsible for making environmental decisions. See also Wathern *Environmental Impact Assessment* 1.

³³ Canter *Environmental Impact Assessment* 2. See also Glazewski and Brownlie "Environmental Assessment" 10-6; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 4; Li 2008 <https://data.opendevelopmentmekong.net/> 1.

³⁴ Wathern *Environmental Impact Assessment* 1. See also section 24(b)(bA) of NEMA.

³⁵ Paschke and Glazewski 2006 *PELJ* 1. See also Li 2008 <https://data.opendevelopmentmekong.net/> 1.

³⁶ The term sustainability is used synonymously with sustainable development. However, some authors have suggested that the two terms do not necessarily mean the same thing. Sustainability is a desired state, while sustainable development is one of the pathways to sustainability. See Nel and Alberts "Environmental Management and Environmental Law" 11; Du Plessis and Feris 2008 *SAJELP* 158; Du Plessis and Nel "An introduction" 3-10.

³⁷ Kidd and Retief "Environmental Assessment" 971. This is also reflected in the definition of EIA by Sadler *Environmental Assessment* 13. See also Robinson 2006 *SAJELP* 103; Murombo 2008 *PELJ* 107. EIA also aims at encouraging sustainable development. See IAIA 2015 <http://www.aiai.org>; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 8; Barrow *Environmental and Social Impact Assessment* 6.

³⁸ Wood *Environmental Impact Assessment* 1; Aucamp *Environmental Impact Assessment* 87; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 4.

³⁹ Wood *Environmental Impact Assessment* 1; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 4; Barrow *Environmental and Social Impact Assessment* 99; Li 2008 <https://data.opendevelopmentmekong.net/> 1.

review of EIA reports, decision-making and monitoring. The EIA legislation of various countries has some or all of these or variants of these steps in their EIA requirements.⁴⁰

Seemingly, an EIA is a tool used before certain developments that may have a significant environmental impact are undertaken to determine whether to grant environmental authorisation.⁴¹

1.5 Overview of EIA legislation in South Africa

The history of the introduction of EIA legislation explains the rationale for the introduction of section 24G of NEMA, which provides for *ex post facto* environmental authorisation. Initially, the *Environment Conservation Act (ECA)*,⁴² the erstwhile environmental framework legislation, made provision for EIAs, although most of its provisions are now repealed by NEMA.⁴³ The ECA empowered the then Minister of Environmental Affairs and Tourism to make regulations listing activities that required authorisation and set out procedures that had to be followed in applying for such environmental authorisation.⁴⁴ The competent authority could authorise the activity with or without conditions attached to the said authorisation contained in a record of decision (RoD) or reject the application.⁴⁵ The first EIA regulations were published in 1997.⁴⁶ However, the Regulations raised interpretation challenges, resulting in

⁴⁰ These steps as developed by Wood, have been included in the EIA legislation of various jurisdictions, such as South Africa. For instance, section 24 of NEMA read with GN R982-985 in GG 38282 of 4 December 2014, as amended. The most recent amendments include GN 324-326 in GG 40772 of 7 April 2017; GN 706 in GG 41766 of 13 July 2018 and GN 599 in GG 43358 of 29 May 2020. The regulations and the procedures contained therein will be discussed in detail in para 3.8.1 in Chapter 3 below. The amended version of the regulations is discussed, except if reference is made to the historical context wherein the regulations of the specific time will be referred to.

⁴¹ Paschke and Glazewski 2006 *PELJ* 2.

⁴² 73 of 1989; sections 21, 22 and 26 of ECA.

⁴³ Sections 21, 22 and 23 of ECA.

⁴⁴ Section 26 of ECA. The Minister published a list of identified activities and EIA regulations in 1997 that outlined the procedures to be followed by developers who sought environmental authorisation for their activities. See also Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 159; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1217; Basson 2003 *SAJELP* 134; Kidd *Environmental Law* 236. The regulations were published in GN R1181 to 1183 in GG 18261 of 5 September 1997 as amended.

⁴⁵ Kidd *Environmental Law* 236.

⁴⁶ See para 3.3.1 in Chapter 3 below for detailed discussion.

court disputes.⁴⁷ Not everyone had applied for a RoD under the ECA, and by the time that NEMA was promulgated, there were many "unlawful" developments in South Africa.⁴⁸ NEMA came into effect in January 1999. However, the ECA provisions and regulations on EIAs remained in force until the NEMA regulations were published.⁴⁹ In terms of section 24(1) of NEMA, the "potential" impacts of the listed activities on the environment for the activities that may not commence without an environmental authorisation had to be considered, investigated, assessed and reported to the competent authority.⁵⁰ Section 24(4) state the requirements that each applicant of an environmental authorisation must comply with.⁵¹

Section 24 of NEMA has to be read with section 2 of NEMA that provides environmental management principles. These principles are applicable throughout the country to the actions of all organs of state that may significantly affect the environment.⁵² The principles serve as guidelines that any organ of state must refer to when taking decisions relating to environmental protection, including a decision of whether a development should be allowed to proceed or not.⁵³ The NEMA principles that specifically relate to EIAs are sustainable development,⁵⁴ the preventive principle,⁵⁵ the precautionary principle,⁵⁶ and the public participation principle, amongst others.⁵⁷ These principles can be traced to some international

⁴⁷ *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye* 2002 1 SA 4789 (C) (hereinafter Silvermine Valley Coalition); *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412 (T) (hereinafter Eagles Landing); *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) (hereinafter BP Southern Africa). See also Murombo 2008 *PELJ* 108; Field 2006 *SALJ* 763.

⁴⁸ *Silvermine Valley Coalition*; *Eagles Landing* and *BP Southern Africa*.

⁴⁹ Kidd *Environmental Law* 238. The sections that remained in force included sections 21, 22 and 26 of ECA. See section 50(2) of NEMA, which provides for the repeal of the ECA provisions and regulations. The EIA regulations in terms of NEMA were published in 2006 in GN R385-387 in GG 28753 of 21 April 2006 and GN R615 in GG 28938 of 23 June 2006. In 2010, there were other regulations that were published in GN R543 in GG 33306 of 18 June 2010.

⁵⁰ Competent authority is defined in NEMA as "the organ of state charged by NEMA with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity".

⁵¹ Now section 24(4) of NEMA. see also section 24(1A) of NEMA.

⁵² Section 2(1) of NEMA.

⁵³ Section 2(1) of NEMA.

⁵⁴ Section 2(3) of NEMA.

⁵⁵ Section 2(4)(a)(i) of NEMA.

⁵⁶ Section 2(4)(a)(vii) of NEMA.

⁵⁷ Section 2(4)(f) of NEMA. However, all the principles of section 2 need to be considered by the competent authority when making decisions that may affect the environment. Department of

instruments such as *Stockholm Declaration on Human Environment* 1972 (*Stockholm Declaration*); World Commission on Environment and Development (WECD), *Our Common Future* 1987 (Brundlandt Report) and *Rio Declaration on Environment and Development* 1992 (*Rio Declaration*).⁵⁸ Sustainable development is generally defined as development that meets the needs of the present generation without compromising future generations ability to meet their own needs.⁵⁹ Sustainable development requires the integration of environmental and socio-economic considerations into decision-making.⁶⁰ The preventive principle generally demands environmental degradation be prevented.⁶¹ If environmental degradation cannot be avoided, it must be minimised and mitigated.⁶² Conversely, the precautionary principle is a principle of foresight that demands that a gap in scientific information must not be an excuse for environmental degradation or not taking precautionary measures.⁶³ The precautionary principle requires developers to take anticipatory action to avoid future risks.⁶⁴ Although the principles underpin an environmental authorisation and an EIA, it is questionable whether they imply or provide for an *ex post facto* environmental authorisation.

To date, the parliament has amended section 24 of NEMA on various occasions to broaden its scope.⁶⁵ The most recent regulations regulating EIAs and granting of environmental authorisations were published in 2014 and substantially amended in 2017.⁶⁶ The 2014 EIA regulations are accompanied by three Listing Notices

Environmental Affairs and Tourism (DEAT) published another 19 set of principles that underpin IEM. See DEAT *Overview of Integrated Environmental Management, Integrated Environmental Management, and Information Series 0*.

⁵⁸ Verschuuren 2006 *PELJ* 209; Glazewski "The Nature and Scope of Environmental Law" 1-25; Kidd *Environmental Law* 7-14; Krämer and Orlando (eds) *Principles of Environmental Law*; Sands *et al Principles of International Environmental Law*. For detailed discussion, see para 2.9 in Chapter 2 below.

⁵⁹ *Our Common Future* 1987. See para 2.9.2 in Chapter 2 below for detailed discussion.

⁶⁰ See para 2.9.2 in Chapter 2 below.

⁶¹ Kidd *Environmental Law* 10; Glazewski "The Nature and Scope of Environmental Law" 1-10; Glazewski and Pilt *SAJELP* 194. See para 2.9.4. in Chapter 2 below.

⁶² See para 2.9.4. in Chapter 2 below.

⁶³ See para 2.9.5 in Chapter 2 below.

⁶⁴ Strydom "Essentialia of International Environmental Law" 78.

⁶⁵ For instance, the amendments were contained in *National Environmental Management Amendment Act* 8 of 2004; *National Environmental Management Amendment Act* 62 of 2008 and *National Environmental Management Amendment Act* 9 of 2013.

⁶⁶ GN R982 in GG 38282 of 4 December 2014, as amended by GN R706 in GG 41766.

indicating the activities that require authorisation and the competent authority for an application of each activity.⁶⁷

1.5.1 Unauthorised listed activities

Despite the foregoing history of EIA legislation in South Africa and the attempts to regulate the activities that may have a significant impact on the environment, thereby requiring environmental authorisation, the commencement of illegal or unauthorised activities continued.⁶⁸ From the era of ECA, it was uncertain whether the developer who has commenced the activity without environmental authorisation could later apply for such authorisation.⁶⁹ The uncertainty became evident in several cases brought before the courts where the courts reached different decisions on whether an *ex post facto* environmental authorisation under ECA was permissible or not.⁷⁰

Following the divergent interpretations by the courts regarding the *ex post facto* environmental authorisation and potentially a large number of EIA applications before the administrators, the legislature made efforts to rectify the situation in the dispensation of NEMA.⁷¹

1.6 Section 24G of NEMA

1.6.1 Background

In 2005, the *NEMA Amendment Act*⁷² came into effect and introduced amendments intended to restructure the EIA process.⁷³ The *NEMA Amendment Act* introduced

⁶⁷ GN R983-985 in GG 38282 of 4 December 2014, as amended.

⁶⁸ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 205; Basson 2003 *SAJELP* 133.

⁶⁹ Paschke and Glazewski 2006 *PELJ* 7; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1233.

⁷⁰ *Silvermine Valley Coalition; Eagles Landing and BP Southern Africa; Hichange Investment (Pty) Ltd v Cape Produce (Pty) Ltd t/a Pelt Products* 2004 2 SA 393 (E). See Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 161.

⁷¹ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 162.

⁷² *National Environmental Management Amendment Act* 8 of 2004.

⁷³ Paschke and Glazewski 2006 *PELJ* 2.

section 24G, which was headed "Rectification of unlawful commencement or continuation of listed activities" and had to be read with section 24F.⁷⁴ Section 24F prohibits the commencement of listed activities without an environmental authorisation. It is believed that section 24G was anticipated to bring developers that commenced the listed activities without environmental authorisation back into the regulatory loop by providing the authorities with mechanisms to evaluate the illegal activities.⁷⁵ This would also have solved the problem relating to whether retrospective authorisation was allowed or not.

The initial section 24G(1) provided that a person who had committed an offence in terms of section 24F, thereby commencing a listed activity before obtaining an environmental authorisation, could apply for a retrospective environmental authorisation from the Minister or a Member of the Executive Council (MEC) of a province.⁷⁶ Upon receipt of the application, the Minister or MEC could direct the applicant to submit a report.⁷⁷ The report was expected to indicate the assessment of the nature, extent, duration and significance of the consequences for or impacts of the activity on the environment.⁷⁸ The report also had to indicate the mitigation measures undertaken or proposed to be undertaken in respect of the impacts of the activity.⁷⁹ Further, the report had to describe the public participation process undertaken in compiling the report,⁸⁰ and the applicant had to submit an environmental management programme (EMPr).⁸¹

The applicant for an *ex post facto* environmental authorisation had to pay an administrative fine of up to R1 million before the Minister or MEC would consider such application.⁸² Following consideration of the application and the report, the competent authority could either direct the developer to cease the activity and

⁷⁴ Section 24F prohibits commencement of any activity without prior authorisation.

⁷⁵ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1260; Kohn 2012 *SAJELP* 9.

⁷⁶ Section 24G(1) of the *NEMA Amendment Act* 8 of 2004.

⁷⁷ Section 24G(1)(a) of the *NEMA Amendment Act* 8 of 2004.

⁷⁸ Section 24G(1)(a)(i) of the *NEMA Amendment Act* 8 of 2004.

⁷⁹ Section 24G(1)(a)(ii) of the *NEMA Amendment Act* 8 of 2004.

⁸⁰ Section 24G(1)(a)(iii) of the *NEMA Amendment Act* 8 of 2004.

⁸¹ Section 24G(1)(a)(iv) of the *NEMA Amendment Act* 8 of 2004. For detailed provisions on EMPr, see section 24N of NEMA.

⁸² Section 24G(2) of the *NEMA Amendment Act* 8 of 2004.

rehabilitate the environment or issue an environmental authorisation.⁸³ It was considered an offence to fail to comply with the directive issued by the competent authority.⁸⁴ The then section 24G of NEMA was criticised for its shortfalls, and as a result, it was amended on several occasions.⁸⁵

1.6.2 Current provision of section 24G of NEMA

Section 24G, as it currently stands, provides that any person who has contravened section 24F,⁸⁶ thereby commencing with the listed activity without an environmental authorisation or waste management license⁸⁷ must apply to the competent authority.⁸⁸ The most recent amendments also give the Minister of Mineral Resources and Energy power in terms of the Act.⁸⁹ Upon the receipt of the application, the competent authority may issue various directives.⁹⁰ The applicant may have to compile a report wherein he or she describe the need and the desirability of the activity, the assessment of the nature, extent, duration and the significance of the consequence for impacts on the environment of the proposed activity.⁹¹ The report must also contain the mitigation measures to be undertaken or those that have been undertaken and the public participation that was followed during the compilation of the report, and all the comments of the interested and affected parties (I&APs).⁹² An EMPr must also be submitted.⁹³

⁸³ Section 24G(2) of the *NEMA Amendment Act 8* of 2004.

⁸⁴ Section 24G(3) of the *NEMA Amendment Act 8* of 2004.

⁸⁵ For detailed discussions on amendments of section 24G of NEMA, see Chapter 3 below.

⁸⁶ Section 49A(1)(a) that makes it an offence to contravene section 24F(1) and section 49B, which stipulates the fines that may be imposed upon conviction.

⁸⁷ Section 20(b) of the *National Environment Management: Waste Act 59* of 2008. The waste management activities were included at a later stage as they were not included in the initial section 24G.

⁸⁸ Section 24G(1) of the NEMA.

⁸⁹ For instance, *NEMA Amendment Act 9* of 2013.

⁹⁰ Section 24G(1) of the NEMA: "(a) the activity ceases immediately pending the (b) decision on the application submitted; (c) investigate, evaluate and assess the impacts of the activity; (d) remedy any adverse effects of the activity; (e) cease, modify or control any effect of the activity that is causing pollution or environmental degradation; (f) contain or prevent the movement of pollution or degradation of the environment; (g) eliminate any source of pollution or degradation; or (h) compile a report."

⁹¹ Section 24G(1)(bb) of the NEMA.

⁹² Section 24G(1)(dd) of the NEMA.

⁹³ Section 24G(1)(ee) of the NEMA.

Following the filing of an application by the applicant for an *ex post facto* environmental authorisation, the competent authority must determine the administrative fine that must be paid by the applicant and which may not exceed R5 million before considering the application.⁹⁴ The Department of Environment, Forestry and Fisheries (DEFF) published section 24G Fine Regulations relating to the procedure to be followed and criteria to be considered when determining the *quantum* of the fine.⁹⁵ When the administrative fine has been determined, the competent authority will consider the application and any other information and decide whether to refuse or grant environmental authorisation to continue with the activity.⁹⁶

As part of the decision, the competent authority may direct the applicant to rehabilitate the environment or take any other measures as it deems fit.⁹⁷ Notwithstanding the submission of the application in terms of section 24G(1), or the granting of an *ex post facto* environmental authorisation, the Environmental Management Inspectorate (EMI) or the South African Police Service (SAPS) may investigate any contravention of NEMA or any other specific environmental management Acts (SEMAs).⁹⁸ Further, the National Prosecution Authority (NPA) may institute criminal proceedings against the developer of illegal activity.⁹⁹ The competent authority may also defer the decision-making on an *ex post facto* environmental authorisation if it is brought to its attention that there is a criminal investigation against the applicant.¹⁰⁰

The *ex post facto* environmental authorisation has not been limited to the NEMA listed activities and the *National Environmental Management: Waste Act*¹⁰¹ (NEMWA), but similar provisions have been included and extended to other Acts.

⁹⁴ Section 24G(4) of the NEMA.

⁹⁵ Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of section 24G published in GN R698 in GG 40994 of 17 July 2017. See detailed discussions in para 3.6.5 in Chapter 3 below.

⁹⁶ Section 24G(2) of the NEMA.

⁹⁷ Section 24G(3) of the NEMA.

⁹⁸ Section 24G(7) of the NEMA.

⁹⁹ Section 24G(7) of the NEMA.

¹⁰⁰ Section 24G(7) of the NEMA.

¹⁰¹ *National Environmental Management: Waste Act* 59 of 2008.

For instance, section 22A of the *National Environmental Management: Air Quality Act*¹⁰² (NEMAQA) provides that section 24G applies to the commencement of listed activities relating to air quality that commenced without an environmental authorisation. The *Mineral and Petroleum Resources Development Act*¹⁰³ (MPRDA) provides that the environmental authorisation (in terms of NEMA) is a *sine qua non* to the issuing of the permit or any right in terms of the MPRDA.¹⁰⁴ Therefore, section 24 of NEMA, which includes section 24G, applies to the MPRDA.

Despite the several amendments to section 24G of NEMA, SEMAs and other environmental-related legislation to address the challenges that prevailed, there are practical and theoretical challenges that have been posed by section 24G of NEMA.¹⁰⁵ The provision has proven to be contentious and frustrating for both applicants and decision-makers in its application.¹⁰⁶

1.6.3 Practical challenges pertaining to the application of section 24G of NEMA

Section 24G has been criticised for having several practical challenges for both the applicants and the competent authorities. The practical challenges include but are not limited to, the following:

- a) the *ex post facto* environmental authorisation undermines environmental management principles;¹⁰⁷
- b) the section 24G process is abused;¹⁰⁸
- c) there are interpretation challenges of section 24G;¹⁰⁹

¹⁰² *National Environmental Management: Air Quality Act* 39 of 2004.

¹⁰³ *Mineral and Petroleum Resources Development Act* 28 of 2002.

¹⁰⁴ Section 38A(2) of the MPRDA.

¹⁰⁵ Hugo *Administrative penalties* 56.

¹⁰⁶ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 207.

¹⁰⁷ Paschke and Glazewski 2006 *PELJ* 24; Hugo *Administrative penalties* 56.

¹⁰⁸ Kohn 2012 *SAJELP* 1; Hugo *Administrative penalties* 55; September *A critical analysis* 51. In Paschke and Glazewski 2006 *PELJ* 24, it is argued that *ex post facto* environmental authorisation may be a norm.

¹⁰⁹ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 162; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1258; Hugo *Administrative penalties* 55.

- d) the nature of administrative fines may be problematic;¹¹⁰ and
- e) it constitutes a *fait accompli* in that the environment is already degraded, leaving the authorities with no choice but to approve the application for an authorisation.¹¹¹

As said above, the NEMA and its regulations have been amended over time to address these shortfalls.¹¹² Although some of the challenges might have been addressed, practical and theoretical challenges still remain.¹¹³ Therefore, this necessitates a study into the current practical application of section 24G of NEMA. Furthermore, it is imperative to interrogate whether the introduction of section 24G of NEMA is a regressive measure in terms of section 24 of the Constitution, the NEMA principles and the objectives of IEM.¹¹⁴

There have been studies on section 24G of NEMA.¹¹⁵ However, little or no comparison has been made across different provinces. The studies already conducted focused on one province, and the results might have been province-specific. There have been legislative amendments after these studies, which may make their findings outdated. This study is premised on the hypothesis that an *ex post facto* environmental authorisation continues to pose both practical and theoretical challenges. Therefore, this study critically interrogates the current practical challenges of *ex post facto* environmental authorisation in the DEFF, Gauteng Department of Agriculture, Rural Development (DARD), the Western Cape Department of Environmental Affairs and Development Planning (DEA&DP) and the

¹¹⁰ See for instance Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 165-166; Paschke and Glazewski 2006 *PELJ* 26; Hugo *Administrative penalties* 57.

¹¹¹ *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West* [2013] 3 All SA 416 (SCA) para 56 (hereinafter *Magaliesberg Protection Association*); Hugo *Administrative penalties* 56; Paschke and Glazewski 2006 *PELJ* 25. The competent authorities are left with little or no grounds to refuse the application because environmental damage has occurred and there is no option for consideration of alternatives.

¹¹² For instance, see *NEMA Amendment Act* 62 of 2008; *NEMA Amendment Act* 30 of 2013.

¹¹³ See chapter 3 below.

¹¹⁴ See para 1.7 below.

¹¹⁵ September *A critical analysis*; Hugo *Administrative penalties*; Du Toit *A critical evaluation of the National Environmental Management Act*; Burford *The impact of retroactive authorisation*.

North West Department of Rural, Environment, Agriculture and Development
DREAD.¹¹⁶

1.7 Theoretical challenges

A newly emerging environmental principle that is not listed in section 2 of NEMA, but that is internationally gaining momentum is the principle of non-regression.¹¹⁷ This principle of non-regression requires that "norms which have already been adopted by states may not be revised in ways which would imply going backwards on the previous standard of protection".¹¹⁸ It does not exclude repealing or amending existing rules.¹¹⁹ However, a new rule should, for example, continue to promote the protection of the environment and health and should not enhance environmental degradation.¹²⁰ According to Prieur,¹²¹ the "purpose of environmental law implies the prohibition of regressive measures".¹²² Although regression may take many forms, it is rarely explicit, and in some instances, states do not have the courage to proclaim backtracking on environmental protection officially.¹²³ Therefore, it is important to consider whether section 24G of NEMA is not a regressive step in South African environmental law and whether it does not undermine the environmental management principles.

Therefore, this necessitates the study to investigate how challenges of section 24G may be addressed. Failure to address these challenges is likely to lead to adverse environmental and other challenges. Some of the aforementioned challenges include continued abuse of the section 24G process where developers will cause environmental harm and 'apologise' later. Further, the I&APs may not effectively engage in the public participation process in the section 24G application process

¹¹⁶ See Chapter 4 below for detailed discussion.

¹¹⁷ Leary and Pisupati 2010 <https://archive.unu.edu/unupress/sample-chapters/FutureOfIntlEnvironmentalLaw.pdf> 2.

¹¹⁸ Leary and Pisupati 2010 <https://archive.unu.edu/unupress/sample-chapters/FutureOfIntlEnvironmentalLaw.pdf> 2.

¹¹⁹ Prieur 2012 *SAPIENS* 55.

¹²⁰ Prieur 2012 *SAPIENS* 55.

¹²¹ Prieur 2011 IUCN Academy of Environmental Law e-Journal 1.

¹²² Leary and Pisupati 2010 <https://archive.unu.edu/unupress/sample-chapters/FutureOfIntlEnvironmentalLaw.pdf> 2.

¹²³ Prieur 2012 *SAPIENS* 53.

because of inadequate provision of public participation. Lastly, the inconsistent and contradictory interpretations of section 24G will render this process inconsistent and very confusing to all stakeholders in this process.

1.8 Possible lessons from other jurisdictions

Although the *ex post facto* environmental authorisation may have only been introduced in South Africa in 2004 and has been riddled with challenges, there are other jurisdictions, such as Ireland, England, India and Eswatini,¹²⁴ that provide for an *ex post facto* environmental authorisation, albeit under different names. Therefore, this study will discuss the jurisdictions with similar provisions for *ex post facto* environmental authorisation to distil lessons for South Africa. Ireland and England (at the time of writing of the thesis) are both Member States of the European Union (EU) and their planning law must give effect to EU Directive 2014/52/EU. The Directive mandates the Member States to adopt measures that ensure that developments that are likely to have a significant impact on the environment are assessed due to their nature, size or location before permission is granted.¹²⁵ The Directive is accompanied by Annexes I to IV, which provides for the list of projects that triggers EIA as per Article 4.¹²⁶

¹²⁴ Officially known as the Kingdom of Eswatini (previously known as Swaziland; hereinafter Eswatini). The King decided in 2018 to change the official name of the country – see in this regard Anon 2018 <https://www.bbc.com/news/world-africa-43821512>. The legislation of Eswatini as well as the Constitution still refers to Swaziland and the names are used interchangeably.

¹²⁵ Article 2 of the Directive 2014/52/EU; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 45. Article 2 of the Directive further requires that EIA must be integrated into existing procedures for consent (permission) to developments in the Member States, or, failing this, into other procedures to be established to comply with the aims of the Directive.

¹²⁶ Article 2(2) of the Directive 2014/52/EU; Wood *Environmental Impact Assessment* 3; Barker and Wood 1999 *EIAR* 388. Annex I lists the projects that must be carried out subject to an assessment. Annex II lists the projects for which the Member States must determine whether they shall be carried out subject to an assessment. In addition, the *European Communities Act* 1972 provides that regulations may be published to give effect to the Directive, thereby requiring assessment of impacts of the proposed activities on the environment. Therefore, the individual Member States publish their regulations to implement the Directive and have considerable discretion in doing so. See in this regard section 2.2 of the *European Communities Act* 1972; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 61.

Directive 2014/52/EU refers to "development consent" for developments that are listed in the Annexes.¹²⁷ The EIA is recognised as one of the tools used to apply for development consent in the Members States.¹²⁸ Article 5 of Directive 2014/52/EU mandates the Members States to adopt measures to ensure that the developers provide the appropriate form of information.¹²⁹ Directive 2014/52/EU *prima facie* provides only for granting a development consent before the commencement of the project. Therefore, it does not seem to make provision for an *ex post facto* development consent. However, the courts have held that the EU law permits retrospective development consents (or however they may be termed). In *R (Baker) v Bath and North East Somerset Council*,¹³⁰ the court opined that EU law allows a retrospective planning permission for EIA developments, although in exceptional circumstances only.¹³¹

In Ireland, a developer must carry out an EIA and obtain planning permission before the execution of works that require permission.¹³² In terms of section 151 of the *Planning and Development Act*,¹³³ it is an offence to carry out an unauthorised development. However, a developer may apply for permission for a development that is unauthorised to acquire a retention permit.¹³⁴ In *Commissioner v Ireland*,¹³⁵ retention permission is equated to "ordinary planning permission that precedes the carrying out of works and development". Ireland accordingly allows developers to apply for a retrospective authorisation known as "retention permission" for unauthorised developments.¹³⁶

¹²⁷ Article 2 of the Directive 2014/52/EU. The development consent is defined in Article 1 as the decision of the competent authority that permits the developer to commence with the project.

¹²⁸ Article 2(2) of the Directive 2014/52/EU.

¹²⁹ The Directive further mandates the Members States to ensure that there are measures in place that ensure that the developer may be given an opinion if the said developer so requests such an opinion from the competent authority before filing the application of development consent.

¹³⁰ *R (Barker) v Bath and North East Somerset Council* [2013] EWHC 946 (Admin) para 15 (hereinafter *R (Baker)*). See also *Commission v Ireland* para 11.

¹³¹ See also *R (On the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin) [2014] EWHC 51 (Admin) para 8 (hereinafter *Maidstone Borough Council*).

¹³² Case C-215/06 *Commission v Ireland* para 54.

¹³³ Section 151 of the *Planning and Development Act* 30 of 2000. See also Case C-215/06 *Commission v Ireland* para 54.

¹³⁴ Section 32(1)(b) of the *Planning and Development Act* 30 of 2000.

¹³⁵ Case C-215/06 *Commission v Ireland* para 54.

¹³⁶ Section 32(1) of the *Planning and Development Act* 30 of 2000.

In England, an environmental authorisation (planning permission) requirement is derived from European Union law.¹³⁷ Directive 2014/52/EU¹³⁸ is applicable in England subject to the *Town and Country Planning (Environmental Impact Assessment) Regulations*.¹³⁹ A developer is required to obtain planning permission before undertaking a development.¹⁴⁰ However, section 73A of the *Town and Country Planning Act*¹⁴¹ provides that planning permission may be granted for a development carried out before the date of such an application.¹⁴² In *R (on the application of David Padden) v Maidstone Borough Council*,¹⁴³ the court stated the factors that must be considered before granting retrospective permission.

In India, the granting of environmental clearance is regulated by the *Environmental (Protection) Act* 1986.¹⁴⁴ India promulgated an *EIA Notification* 1994 to give effect to the *Environmental (Protection) Act* 1986, which made it a requirement that a developer must obtain environmental clearance for the expansion, modification or setting up new projects listed in Schedule 1 of the *EIA Notification* 1994.¹⁴⁵ The *EIA Notification* 1994 was amended by the *EIA Notification* 2006. In order to obtain the environmental clearance, the developer of a project listed in Schedule 1 must apply to the Secretary of the Ministry of Environment and Forest.¹⁴⁶ The application must be accompanied by the project report, which must include the EIA report, an EMP and the details of the public participation process.¹⁴⁷ The competent authority will consider the application and decide on the application in terms of article 2 of the *EIA Notification* 2006. Article 2 of the *EIA Notification* 2006 prohibits the construction work or preliminary work to be carried before the environmental

¹³⁷ *Maidstone Borough Council* para 50.

¹³⁸ Directive 2014/52/EU.

¹³⁹ *Town and Country Planning (Environmental Impact Assessment) Regulations* 2017.

¹⁴⁰ Section 57(1) of the *Town and Country Planning Act* 1990.

¹⁴¹ *Town and Country Planning Act* 1990.

¹⁴² Section 73A of the *Town and Country Planning Act* 1990.

¹⁴³ *Maidstone Borough Council*.

¹⁴⁴ Section 3 of the *Environmental (Protection) Act* 1986; *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) para 20 (hereinafter referred to as *Alembic Pharmaceuticals*). Section 3 of the *Environmental (Protection) Act* 1986 mandates the Central Government to undertake all such measures as it deems necessary or expedient for protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.

¹⁴⁵ CSE 2020 <https://www.cseindia.org/understanding-eia-383>; *Alembic Pharmaceuticals* para 6.

¹⁴⁶ Article 2 of the *EIA Notification* 2006.

¹⁴⁷ Article 2 of the *EIA Notification* 2006.

clearance is granted. The *EIA Notification 2006* is silent on the rectification or regularisation of the unlawful projects. However, the Indian Supreme Court in the matter of *Alembic Pharmaceuticals Ltd v Rohit Prajapat*¹⁴⁸ held that an *ex post facto* environmental authorisations are at odds with *EIA Notification 2006*, sustainable development and the precautionary principle. However, the court held that based on the proportionality principle, the *ex post facto* environmental authorisation could be granted.

In Eswatini, the law allows for an *ex post facto* environmental authorisation retrospective environmental compliance certificate (ECC) for existing projects. However, in applying for an *ex post facto* environmental authorisation, the applicant must carry out an environmental audit and submit a comprehensive mitigation plan (CMP). Eswatini provides for "existing undertakings"¹⁴⁹ in its *Environmental Audit, Assessment and Review Regulations* (EAARR).¹⁵⁰ The Swaziland Environment Authority (Authority) is empowered to identify those existing activities that cause concern to the Authority or the public because of their impact on the environment.¹⁵¹ The Authority may require a developer responsible for an unauthorised existing activity to submit an environmental audit report and a CMP so that the authority may decide whether to issue the environmental authorisation or not.¹⁵² When the Authority has considered the report and the CMP, and it is satisfied with the contents thereof, it may issue an ECC.¹⁵³ The Authority may also refuse to issue an ECC for the existing undertaking if it believes that the continuation of the undertaking is causing or is likely to cause danger to the environment or the public and the mitigation measures in the CMP are inadequate to address the foreseen danger.¹⁵⁴ It seems that although some countries make provision for the rectification of

¹⁴⁸ *Alembic Pharmaceuticals* para 6.

¹⁴⁹ These are enterprises or activities that were being conducted on a site in Eswatini on 12 April 1996 and which are still being conducted on the same site without interruption at present.

¹⁵⁰ EAARR 2000.

¹⁵¹ Regulation 4(1)(a) of the EAARR.

¹⁵² Regulation 4 of the EAARR.

¹⁵³ Regulation 15 of the EAARR.

¹⁵⁴ Regulation 15 of the EAARR.

unlawful activities, the procedures to be followed differ. South Africa may be able to draw lessons from these foreign jurisdictions in this regard.

The underlying research question of this thesis is, therefore, what are the practical and theoretical challenges of *ex post facto* environmental authorisation in South Africa? Secondary to this research question is whether *ex post facto* environmental authorisation undermines the non-regression principle?

1.9 Objectives of the study

This study aims to determine the current theoretical and practical challenges of *ex post facto* environmental authorisation in South Africa and how they can be addressed by drawing lessons from foreign jurisdictions. Further, the study aims to determine whether section 24G does not undermine the principle of non-regression. In order to fulfil the aforementioned main objective, the following subsidiary objectives are set:

- (a) To provide a theoretical framework on *ex post facto* environmental authorisation;
- (b) To critically analyse the legal historical development of EIA legislation and *ex post facto* environmental authorisation in South Africa;
- (c) To provide a practical analysis of the challenges pertaining to *ex post facto* authorisations by the national government and selected provinces and determine whether *ex post facto* environmental authorisation undermines the principle of non-regression;
- (d) To derive learning points from legislation and practice pertaining to *ex post facto* authorisation in foreign jurisdictions; and
- (e) To make recommendations for South Africa relating to the theoretical and practical challenges of *ex post facto* authorisation based on (a), (b), (c) and (d).

1.10 Research methodology

Firstly, this study is based on a literature review of primary sources such as legislation, guidelines, policies and case law, supported by secondary materials such as chapters in textbooks, articles in journals and internet materials.¹⁵⁵ The researcher uses the literature review method to develop the theoretical framework on which the study will be based. The researcher employs the literature review method to develop a definition for environmental authorisation¹⁵⁶ and *ex post facto* environmental authorisation.¹⁵⁷ Further, this method is used to establish a theory around the drivers for *ex post facto* environmental authorisation¹⁵⁸ and the general challenges of *ex post facto* environmental authorisations.¹⁵⁹ Since environmental authorisations hinge on EIAs, the literature review method is also used to critically discuss the definitions of EIAs to formulate the definition of EIA for this study,¹⁶⁰ discuss its historical background¹⁶¹ and describe the evolution of EIAs.¹⁶² The study determines a generic EIA procedure¹⁶³ and establishes the link between EIAs, sustainable development and the environmental management principles that underpin the EIAs and environmental authorisations (*ex ante* and *ex post facto*).¹⁶⁴ The emerging principle of non-regression is further analysed.¹⁶⁵ The theory relating to alternative tools that may be used instead of EIAs to apply for *ex post facto* environmental authorisation is further discussed.¹⁶⁶

Secondly, the researcher uses a mixed research method of the literature review and empirical research to determine the implementation of South African *ex post facto*

¹⁵⁵ Kroeze 2013 *PELJ* 36; Du Plessis 2007 *PELJ* 23; Venter *Constitutional Comparison*; Venter *Legal Research*; Barkan, Bintliff and Whisner *Fundamentals of Legal Research*; Van Hoecke *Methodologies of legal research*; Fisher *Legal Reasoning in Environmental Law*; Salter and Mason *Writing Law Dissertations*.

¹⁵⁶ See para 2.3 in Chapter 2 below.

¹⁵⁷ See para 2.4 in Chapter 2 below.

¹⁵⁸ See para 2.4.2 in Chapter 2 below.

¹⁵⁹ See para 2.4.3 in Chapter 2 below.

¹⁶⁰ See para 2.5.1 in Chapter 2 below.

¹⁶¹ See para 2.6 in Chapter 2 below.

¹⁶² See para 2.7 in Chapter 2 below.

¹⁶³ See para 2.8 in Chapter 2 below.

¹⁶⁴ See para 2.9 in Chapter 2 below.

¹⁶⁵ See para 2.10 in Chapter 2 below.

¹⁶⁶ See para 2.11 in Chapter 2 below.

environmental assessment legislation.¹⁶⁷ The legal instruments that regulate the procedures for granting both environmental authorisation and *ex post facto* environmental authorisation are critically analysed to establish how section 24G of NEMA is supposed to be implemented.

To determine the practical challenges surrounding the application of section 24G of NEMA, the researcher employs a limited qualitative research study. Qualitative research is described as "the naturalistic interpretative approach concerned with understanding the meanings that people attach to phenomena within their social worlds".¹⁶⁸ Empirical research means making planned observations.¹⁶⁹ Empirical research allows the researcher to engage in a systematic, thoughtful process.¹⁷⁰ This methodology was selected to determine the understanding and perceptions of some stakeholders involved in the implementation of section 24G of NEMA.¹⁷¹ The researcher used semi-structured questionnaires (open-ended) to conduct interviews and collect data from participants.¹⁷² The data were collected through semi-structured physical and virtual interviews held via Zoom and Microsoft Teams, to obtain information from the selected population to answer the research question.

The participants comprised government officials from the DEFF, Gauteng, the Western Cape, the North West, and the environmental assessment practitioners (EAPs). The DEFF is the national department, and it recorded a lower number of section 24G fines issued and paid. The Western Cape was chosen since it is one of the provinces where section 24G offences are prevalent. Gauteng was chosen as it has a Section 24G Unit that deals specifically with section 24G applications. Both provinces indicate an increase in the number of administrative fines in recent

¹⁶⁷ See Chapter 3 below.

¹⁶⁸ Ritchie "The Application of Qualitative Research Methods to Social Research" 3. Qualitative research endeavours to understand the local population's perspectives on the given research problem or topic. Qualitative research can "provide complex textual descriptions of how people experience a given research issue". Qualitative research further shows the human side of a problem, such as, "the often contradictory behaviours, beliefs, opinions, emotions, and relationships of individuals".

¹⁶⁹ Patten *Proposing Empirical Research* 6. See Chapter 4.1 for more details.

¹⁷⁰ Patten *Proposing Empirical Research* 6.

¹⁷¹ For detailed discussion on the procedure followed by the researcher, see Chapter 4 below.

¹⁷² For detailed discussions on the data collection, see Chapter 4 below.

years.¹⁷³ Gauteng processed many *ex post facto* environmental authorisations applications and continues to record the highest number of administrative fines collected. In contrast with the Gauteng DARD and the Western Cape DEADP, the North West DREAD recorded a lower number of unlawful commencement of activities and administrative fines issued.¹⁷⁴

In order to carry out this empirical research, the researcher had to obtain ethical clearance from the Faculty of Law Research Ethics Committee (LAWRec), which was issued on 17 June 2019 under ethics number 0150219A3.¹⁷⁵ The study was considered to be a low-risk study, and no further approval from additional committees was necessary. Furthermore, the researcher had to obtain permission from gatekeepers before engaging the participants.¹⁷⁶

To verify the validity of the findings, the researcher used the triangulation method. Triangulation involves interrogation of the convergence of both the data and conclusion obtained from them.¹⁷⁷ Triangulation "assumes that the use of different sources of information will help both to confirm and improve the clarity, or precision, of a research finding".¹⁷⁸

Following the study of the practical challenges of section 24G of NEMA, the researcher employs the legal comparative method to a limited extent to determine new legal rules and lessons that South Africa can borrow from other jurisdictions to address these challenges. The legal comparative method entails a comparison of the law of one country to that of another.¹⁷⁹ It does not only entail comparison, but it includes borrowing legal rules from other jurisdictions. According to Meintjes-Van

¹⁷³ See para 2.1 in Chapter 2 below.

¹⁷⁴ See para 2.1 in Chapter 2 below.

¹⁷⁵ See detailed discussions in para 4.2 in Chapter 4 below.

¹⁷⁶ See detailed discussion in para 4.3 in Chapter 4 below.

¹⁷⁷ Ritchie "The Application of Qualitative Research Methods to Social Research" 43.

¹⁷⁸ See para 4.3 in Chapter 4 below for a detailed discussion of the empirical research method.

¹⁷⁹ For a detailed discussion on comparative research, see Meintjes-Van der Walt 2006 *Speculum Juris* 52-64; Eberle 2009 *Washington UGSLR* 451-486; Adams and Griffiths "Against 'Comparative Method'" 279-301; Glenn "The aims of comparative law" 57-65; Viñuales "Comparative Environmental Law" 3-34; Tarlock and Tarak 1983 *Denver IJLP* 85-108; Yang *et al Comparative and Global Environmental Law*; Clark "A comparative method for the study of law and religion"; Morgera 2015 *RECIEL* 254-263.

der Walt,¹⁸⁰ comparative research is not a matter of just borrowing from other legal systems or knowing whether the legal systems are similar, but also of paying careful attention to the legal culture of a borrowing jurisdiction. Foreign law can be borrowed at different levels, including but not limited to reception through scholarly work.¹⁸¹ As environmental law is a 'growing' discipline, countries tend to borrow from each other, and this field of law also attracts 'comparative analysis'.¹⁸² Sometimes countries borrow from other legal systems due to the new and unique nature of environmental law.¹⁸³ However, whenever one country borrows from another country, it will be subject to considering whether the rule or practice will fit into the borrowing jurisdiction and or local circumstances. In *Sanderson v Attorney-General, Eastern Cape*,¹⁸⁴ the Constitutional Court of South Africa acknowledged the significance of comparative research, especially when dealing with the problems that are novel to the local jurisprudence, while well developed in mature constitutional democracies. However, the court warned that the use of foreign precedents requires "circumspection" and acknowledgement that the transplants require careful management.¹⁸⁵

To this end, the researcher selected Ireland, England, India and Eswatini to determine if lessons can be distilled for South Africa with regard to *ex post facto* environmental authorisation. These countries have similarities with South Africa in that they allow *ex post facto* environmental authorisation of activities that commenced without an environmental authorisation. Ireland and England are the

¹⁸⁰ Meintjes-Van der Walt 2006 *Speculum Juris* 64.

¹⁸¹ Mostert 2001 *Stell LR* 498.

¹⁸² Wiener 2001 *Ecology Law Quarterly* 1296; Murchison 1995 *BCEALR* 504. The latter compares the environmental law of Australia and United States of America.

¹⁸³ Meintjes-Van der Walt 2006 *Speculum Juris* 52-64. Legal culture has been defined as public knowledge of an attitude and behaviour patterns towards the legal system. Meintjes-Van der Walt 2006 *Speculum Juris* 58.

¹⁸⁴ *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) paras 20-24.

¹⁸⁵ *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) paras 20-24. See also *S v Makwanyane* 1998 3 SA 391 (CC) where the court opined that the comparative human rights jurisprudence is of great importance while an indigenous jurisprudence is developed. According to Meintjes-Van der Walt 2006 *Speculum Juris* 64, comparative research is not a matter of just borrowing from other legal systems or knowing whether the legal systems are similar but careful attention must be paid to legal culture of the borrowing jurisdiction.

Member States of the European Union.¹⁸⁶ The two states must give effect to the Directive 2014/52/EU, which provides for environmental authorisations and EIAs.¹⁸⁷ Furthermore, these countries' public administrative systems are built on English law. South Africa's public and administrative law has also been heavily influenced by English law.¹⁸⁸

India has a hybrid legal system of civil, common law and religious law, similar to South African law.¹⁸⁹ Both countries were colonies of England. Unlike Ireland and England, Indian law does not seem to make provision for *ex post facto* environmental authorisation, but the courts have allowed it.¹⁹⁰ Eswatini is a small developing country in the southern part of Africa and is a neighbouring country to South Africa.¹⁹¹ Eswatini follows a mixed or hybrid legal system, that is, common law, customary law and civil law, as is South Africa.¹⁹² Eswatini, similar to Ireland and England, provides for *ex post facto* environmental authorisation. India and Eswatini are developing countries, while Ireland and England are developed countries. South Africa is also a developing country but has features of a developed country. Therefore, this study considers learning points that South Africa can borrow from these foreign jurisdictions.

Based on the theoretical framework established and the data collected from the semi-structured interviews, the researcher offers findings on the practical and theoretical challenges of the *ex post facto* environmental authorisations and whether it is a regressive measure given the literature. Using the challenges

¹⁸⁶ Ludlow "The European Commission" 85-132; Dinan, Nugent and Paterson *The European Union in Crisis*; Archick *The European Union*; Pinder *European Community*.

¹⁸⁷ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 43; *Maidstone Borough Council* para 50; Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 3. For detailed discussion, para 5.2 in Chapter 5 below.

¹⁸⁸ Thomas, Van der Merwe and Stoop *Historical Foundations* 9; Rautenbach and Bekker *Introduction to legal pluralism*; Currie and De Waal *The Bill of Rights Handbook* 1; Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 3.

¹⁸⁹ Srikrishna 2008 *IJLI* 242.

¹⁹⁰ See detailed discussion in para 5.5 in Chapter 5.

¹⁹¹ Bray "Development and the Balancing of Interest in Environmental Law: Swaziland" 459.

¹⁹² Bray "Development and the Balancing of Interest in Environmental Law: Swaziland" 461.

identified, the researcher draws lessons from the above-mentioned foreign jurisdiction and makes recommendations for South Africa.

1.11 Limitations to the study

Although the researcher was able to collect data successfully, the exercise was riddled with several limitations. The process of obtaining approval from the gatekeepers of the government departments was tedious and lengthy. This was because it was never clear from the onset to whom the application for permission to conduct the study was ought to be sent. Although the researcher identified the gatekeepers before obtaining the ethics clearance approval, the researcher only ascertained the correct application process flow after several months, and this caused delays in data collection as some gatekeepers kept passing the buck. Further, the determination of the application for approval also took several months. For this reason, the researcher abandoned the Free State DETEA as a case study area because he could not establish the official who had to consider his application for approval.¹⁹³ The decision was further influenced by the time constraints that faced the researcher in the completion of his study.

Furthermore, the outbreak and spread of the Covid-19 pandemic in South Africa led to the publication of the Declaration of National State of Disaster by the Minister of Cooperative Governance and Traditional Affairs (COGTA)¹⁹⁴ pursuant to section 27(1) of the *Disaster Management Act 57 of 2002*. The Minister of COGTA further prohibited the movement of people.¹⁹⁵ Consequent thereto, the researcher could not go to the selected case study areas save for Western Cape DEADP; thus, the researcher did not have access to the records of the section 24G applications in the other provinces, save for what was available on the internet.¹⁹⁶

¹⁹³ Despite numerous attempts that proved futile, the researcher could not ascertain the gatekeeper and the relevant government official who was responsible for making a determination on the application for approval.

¹⁹⁴ GN R313 in GG 43096 of the 15 March 2020.

¹⁹⁵ GN R398 in GG 43148 of 25 March 2020.

¹⁹⁶ The researcher visited the Western Cape DEADP before the lockdown.

1.12 Structure of the study

In this study, Chapter 2 establishes the theoretical framework on *ex post facto* environmental authorisation. To achieve this aim, Chapter 2 discusses the notion of environmental authorisation. The chapter further discusses the incidents of non-compliance, which ultimately lead to the need for *ex post facto* environmental authorisation. This chapter further links environmental authorisation to EIAs to establish the purpose of EIA and the theories that underpin environmental authorisations. The chapter also links environmental authorisation to sustainable development and the environmental management principles; namely the preventive and precautionary principles. Lastly, Chapter 2 discusses the emerging principle of non-regression and links it to *ex post facto* environmental authorisation.

Chapter 3 provides a critical analysis of the legal historical development of environmental authorisation legislation and *ex post facto* environmental authorisation in South Africa. Chapter 3 discusses the historical background of environmental authorisation in South Africa and the evolution thereof. Chapter 3 further highlights the challenges that emanated from the environmental authorisation legislation, which ultimately led to the introduction of *ex post facto* environmental authorisation in section 24G of NEMA. The chapter also refers to *ex post facto* environmental authorisation challenges in South Africa and determines whether, in theory, section 24G undermines the non-regression principle.

Chapter 4 provides a practical analysis of the data obtained from the empirical study carried out at DEFF and three selected provinces, and discusses the findings. The researcher sets out the methodology followed in carrying out the empirical research, data analysis and validation.¹⁹⁷

In Chapter 5, the researcher follows a legal comparative method and discusses the legislation from foreign jurisdictions that provides for *ex post facto* environmental authorisation to draw lessons to address the South African challenges. The

¹⁹⁷ See para 4.3 in Chapter 4 below.

researcher discusses legislation in the European Union (EU), Ireland and England, as members of the EU, India and Eswatini. Chapter 6 concludes the study.

Chapter 2: Theoretical framework

2.1 Introduction

This chapter aims to provide a theoretical framework on *ex post facto* environmental authorisation against which South African legislation will be measured. To achieve the foregoing, the first section of the chapter firstly indicates the incidents of non-compliance to the requirement that an environmental authorisation needs to be obtained. Thereafter, it defines the term environmental authorisation and describes the purpose thereof to determine the original intent of an environmental authorisation. The chapter also defines the notion of *ex post facto* environmental authorisation and drivers thereof while underscoring the difference between the two phenomena. The subsequent section of this chapter then discusses EIAs and links them to environmental authorisations to establish a theory on how an environmental authorisation is issued. The environmental authorisation is then linked to sustainable development and some of the environmental management principles, namely, the preventive principle and the precautionary principle as well as the emerging principle of non-regression. Lastly, the chapter discusses alternative environmental management tools that may be used to assess the impacts to obtain *ex post facto* environmental authorisation. The discussion first provides a background indicating the number of section 24G applications that were recently lodged in South Africa.

2.2 Background: Incidents of non-compliance

Every financial year, the DEFF collaborates with its provincial and local counterparts to publish a *National Environmental Compliance & Enforcement Report* (NECER).¹ The most recent NECER 2019-20 indicates that unlawful commencement of listed activities that require an environmental authorisation² is the most prevalent

¹ DEA *National Environmental Compliance & Enforcement Report 2019-20* 1 (NECER 2019-2020). NECER is aimed at providing a synopsis of environmental compliance and enforcement activities carried out by the different environmental authorities in a financial year.

² Thus, the NEMA and its EIA Regulations were indicated as the most contravened legislation. See Chapter 3 below for a discussion of NEMA and the regulations.

environmental crime in the brown sub-sector.³ NECER 2019-20 indicates that the Gauteng DARD recorded the highest number of section 24G administrative fines issued and received payment to the value of R2 884 079.⁴ The Western Cape DEA&DP recorded 27 incidents and the total of the administrative fines was R2 278 325.⁵ The North West DREAD did not record any numbers for section 24F transgressions for 2019-20.⁶

The following table indicates the number of unlawful activities from 2017 until 2020, reflecting on the national department and the three provinces where the empirical research was undertaken.⁷ The table indicates the number of fines as well as the total amount of the fines paid.

³ The 'brown' sub sector is defined in NECER 2019-2020 as 'pollution, waste and EIA matters.' However, although the unlawful commencement of a listed activity is a prevalent environmental crime in South Africa, each province indicates its own prevalent crime. For instance, in the Free State, the prevalent crime is illegal hunting and possession of wild animals without permit, while in Limpopo, the prevalent crime is picking indigenous plants without permits. See NECER 2019-2020 19.

⁴ NECER 2019-2020 6.

⁵ NECER 2019-2020 26.

⁶ NECER 2019-2020 34.

⁷ September *A critical analysis* carried her study out in Gauteng between the period of 2005 to 2010. Du Toit *A critical evaluation of the National Environmental Management Act* studied the Western Cape and it dealt with the applications between the period of 2006 and 2014. A summary of these studies is provided in para 4.2 in Chapter 4 below.

Table 2-1: Unlawful commencement of activities 2017-18 until 2019-2020⁸

	2017/18	2018/19	2019/20
DEFF	-	-	R1 000 000 (One fine)
GDARD	R4 358 449 (59 fines)	R2 710 449 (28 fines)	R2 884 079 (19 fines)
DEA&DP	R2 869 750 (23 fines)	R1 977 750 (17 fines)	R2 278 325 (27 fines)
DREAD	-	R60 000 (Two fines)	-

Regarding enforcement (sometimes referred to as command and control measures),⁹ the NECER 2019-20 shows that there has been an increase in the number of the opening of criminal dockets at the national level,¹⁰ namely 1364 dockets.¹¹ The report further indicates that the number of admission of guilt fines

⁸ The information is extracted from the NECER 2019-2020.

⁹ The command and control mechanism stipulates the legal obligations and compels compliance by using various enforcement mechanisms "through various enforcement tools where non-compliance is detected. These mechanisms aim to compel legislative compliance, punish and deter non-compliance." See Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement Institutions" 51-52. According to Kidd, command-and-control is "a system where there is strict monitoring by the authorities as to whether the law is being followed and where offenders are prosecuted, using criminal law." See in this regard Kidd *Environmental Law* 269; Kidd 2002 *SAJELP* 26-27. These measures can be exemplified by criminal, administrative and civil measures. For detailed discussions on these measures, see Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement Institutions" 53-55; section 31I of the *National Environment Management Act* 107 of 1998; Winstanley "Administrative Measures" 234; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 187; section 28 of *National Environment Management Act* 107 of 1998; section 19 of *National Water Act* 36 of 1998; Winstanley "Administrative Measures" 226; Bray "Administrative Justice" 187; Winstanley "Administrative Measures" 225.

¹⁰ Criminal measures were traditionally used as primary enforcement tools. See Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement Institutions" 53. This has, however, been criticised in that it fails to adequately address the environmental harm caused by the commission of the offence. See Craigie, Snijman and Fourie "Dissecting Environmental Compliance and Enforcement Institutions" 54. This can be seen in the cases where the developer has not obtained an environmental authorisation and is subsequently prosecuted. The prosecution on its own may not be necessarily enough to redress the environmental harm that might have been caused.

¹¹ NECER 2019-2020 4. This was in comparison with the previous periods where in 2018-2019, there were 1257. This highlights the increase in number of criminal enforcements. The number

issued has also increased.¹² Convictions increased from 38 in 2018-19 to 47 in 2019-20.¹³ Similarly, the number of administrative notices issued and the total value of the section 24G administrative fines paid increased. The foregoing information is illustrated in the figure below that is to be found in the DEFF NECER 2019-20 report.

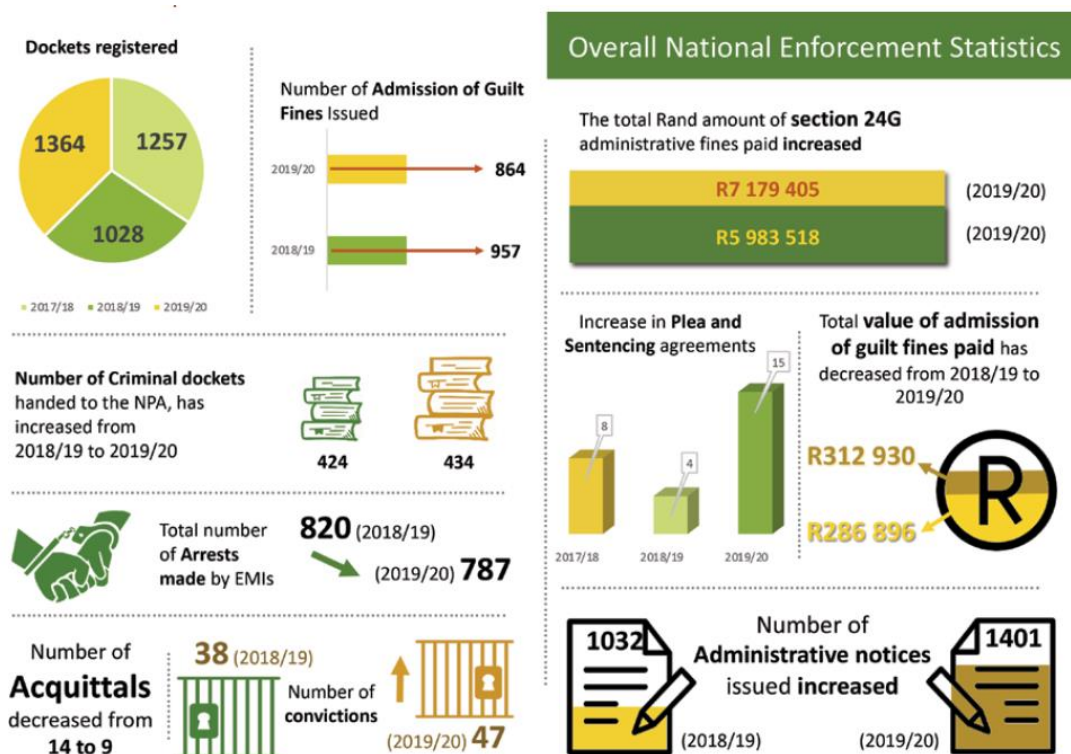


Figure 2-1: The overall national enforcement statistics¹⁴

From the above discussion, it seems, therefore, that the DEFF, Western Cape and Gauteng have a higher number of enforcement notices and section 24G administrative fines issued and paid while North West has a higher number of enforcement notices and a low number section 24G administrative fines issued and paid. Therefore, this study will investigate the reasons behind the disparity in the

of dockets that has been handed over to the NPA has also increased from 424 in 2018-2019 to 434 in 2019-2020. However, these registered dockets are not exclusively for section 24F contraventions but inclusive of other crimes as well. See NECER 2019-2020 4.

¹² See figure 2-1 above.

¹³ NECER 2019-2020 4.

¹⁴ NECER 2019-2020 4.

numbers and amounts discussed above and determine the implication of the same on the application of section 24G of NEMA.¹⁵

The subsequent paragraphs of the chapter discuss non-compliance to the EIA requirement and how this non-compliance is remedied through *ex post facto* environmental authorisation. Firstly, it will be determined what the definition of an environmental authorisation is.

2.3 Definition of environmental authorisation

In order to comprehend what is meant by *ex post facto* environmental authorisation, the term environmental authorisation must be defined. There is currently no universal definition for an environmental authorisation. However, an environmental authorisation is a general term that is used to describe an authorisation issued by a designated body in a particular country authorising the commencement of a particular development, activity or project (whatever the case may be) that would otherwise not be permitted without such an authorisation.

Environmental authorisation is referred to by different names in different countries. For instance, in some jurisdictions, it is referred to as a RoD,¹⁶ an environmental permit,¹⁷ a planning permission,¹⁸ a development consent¹⁹ or an environmental compliance certificate (ECC).²⁰

The United States of America (USA) uses RoD, referring to the document that explains the reasons for the project decision and that contains mitigation

¹⁵ See Chapter 4 below.

¹⁶ Initially in South Africa, ECA referred to an environmental authorisation as a RoD. In the United States of America, reference to a RoD is to be found in 40 CFR 1502.2.

¹⁷ DFRA 2020 <http://www.fwr.org/WQreg/Appendices/ep2010booklet.pdf>.

¹⁸ Section 32(1) of the *Planning and Development* 30 of 2000 of Ireland.

¹⁹ Directive 2011/92/EU.

²⁰ See Regulation 15 of the EAAR.

measures.²¹ A RoD is issued after the submission and consideration of environmental impact statements (EIS).²²

The EU uses the term "development consent" in Directive 2014/52/EU. Directive 2014/52/EU defines "development consent" as the decision of the competent authority to authorise the developer to proceed with the project.²³ Article 8(1) of Directive 2014/52/EU states that the "development consent" must contain reasons for the decision; any environmental conditions attached to the decision; measures that must be taken to avoid or reduce significant adverse effects on the environment and any monitoring measures.²⁴

England uses the term "planning permission" as an official permit issued by the local authority before something new may be built or when permission is sought to add to an existing building.²⁵ The English planning law does not define "planning permission".²⁶ Regulation 70 of *The Town and Country Planning (Environmental Impact Assessment) Regulations 2017* indicates that the planning permission may be granted subject to conditions.

In Eswatini, the environmental authorisation is referred to as an ECC whereby the competent authority authorises "an existing undertaking continuing to operate" or that a proposed project may proceed, subject to the developer complying with the conditions set out in the ECC and an approved CMP.²⁷

²¹ Department of Interior USA 2020 [https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20\(ROD\)%20Format.pdf](https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20(ROD)%20Format.pdf).

²² Federal Transit Administration 2019 <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/record-decision-0>.

²³ Article 1 of the Directive 2014/52/EU.

²⁴ Article 8 of the Directive 2014/52/EU.

²⁵ Collins English Dictionary 2021 <https://www.collinsdictionary.com/dictionary/english/planning-permission>.

²⁶ For instance, sections 57 and 58 of the *Town and Country Planning Act 1990* provides for the requirement for planning permission for development and granting of planning permission respectively. Regulation 3 of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017* prohibits the competent authority to grant the "planning permission" for a development that requires EIA without such being carried out. The regulations do not however define the planning permission.

²⁷ Regulation 3 of EAARR.

In South Africa, an environmental authorisation is issued for listed activities, that are likely to have a significant impact on the environment. According to Nel and Alberts,²⁸ the legislation may contain provisions to prohibit prospective developers from commencing such activities. According to Craigie, Snijman and Fourie,²⁹ permitting allows the relevant authority first to require the applicant to provide specific information on the environmental impact of the proposed activity in order to make an informed decision as to whether to allow the activity or not and secondly to formulate the conditions such as mitigation measures under which the activity must be conducted.³⁰

In light of the foregoing, an environmental authorisation is defined as follows in this study:

The authorisation issued by the competent authority for an activity or project that is likely to have a significant impact on the environment, including the reasons for the decision, conditions subject to which it is issued, mitigation and monitoring measures and is issued before the commencement of the activity based on the information obtained from an EIA.

From the definitions of environmental authorisations above, it is clear that the authorisation has to precede the commencement of an activity or project. The advantage of issuing environmental authorisations before a project commences is that it indicates why the authorisation has been issued.³¹ Secondly, it set out the conditions subject to which it was issued and that have to be complied with once the activity or project commences.³² Therefore, if the developer fails to adhere to the conditions, the competent authority or any other person affected by that authorisation may seek redress against the developer's non-compliance. The conditions are clearly set out from the beginning of such an activity or project. Put differently, the conditions in the environmental authorisation lays down a framework

²⁸ Nel and Alberts "Environmental Management and Environmental Law" 35. Detailed discussions of how different jurisdictions identify activities that require environmental authorisations is provided in detailed in Chapter 5 below.

²⁹ Craigie, Snijman and Fourie "Dissecting Environmental Compliance" 49.

³⁰ Nel and Alberts "Environmental Management and Environmental Law" 35.

³¹ Department of Interior USA 2020 [https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20\(ROD\)%20Format.pdf](https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20(ROD)%20Format.pdf).

³² Article 8 of the Directive 2014/52/EU.

against which the developer must carry out the activity. Thirdly, the environmental authorisation may set out mitigation measures that the developer must put in place to either avoid, minimise or mitigate the adverse impact of the activity on the environment.³³ Lastly, the environmental authorisation may set out monitoring measures that the developer must follow. This ensures that environmental authorisation is not only for the commencement of the activity, but it helps to regulate the activity until it lapses or for the duration of the activity.

As indicated before, environmental authorisations are sometimes issued after the commencement of the listed activities. It is now imperative to define *ex post facto* environmental authorisation and the drivers thereof.

2.4 *Ex post facto* environmental authorisation

As indicated above, some developers commence with activities that require environmental authorisation without the requisite environmental authorisation. Thus, this renders such activities unlawful.

2.4.1 Definition

Similar to environmental authorisations, there is no universal definition for an *ex post facto* environmental authorisation. This type of environmental authorisation goes by many names in different states, to wit; retrospective authorisation, after fact permission and retention permission.³⁴

The *ex post facto* environmental authorisation is a combination of two terms, to wit: *ex post facto* and environmental authorisation. The term "*ex post facto*" is the Latin phrase that means "after the fact" or something that is done afterwards.³⁵ Seemingly, an *ex post facto* environmental authorisation can be preliminarily defined as an environmental authorisation granted after the activity that is likely to cause or has had a significant impact on the environment has commenced without the

³³ Article 8 of the Directive 2014/52/EU.

³⁴ See Chapter 5 for detailed discussions.

³⁵ Cornell Law School date unknown https://www.law.cornell.edu/wex/ex_post_facto. See also Reingold and Thomas 2018 *Cal LR* 595.

requisite environmental authorisation. In some countries, an *ex post facto* environmental authorisation authorises the unlawfully commenced activity and its retention from its commencement date,³⁶ while in other countries, it authorises the activity from the day it is issued.³⁷

The *ex post facto* environmental authorisation has also been described as a reactive regulatory tool³⁸ as well as an exception to the general rule that some form of assessment must precede the commencement of a listed activity or specified project.³⁹

It is argued herein that although granted after commencement, an *ex post facto* environmental authorisation remains an environmental authorisation and serves to some extent a similar purpose to the authorisation that is issued before commencement. Firstly, an *ex post facto* environmental authorisation must contain the reasons for the decision and set out the conditions. Secondly, the *ex post facto* environmental authorisation may contain the mitigation measures that the applicant must implement. Furthermore, the *ex post facto* environmental authorisation may provide for ongoing monitoring measures on the impact of the activity from the date it is granted. The *ex post facto* environmental authorisation may further require the developer to cease some parts of the activities that cause environmental degradation and carry out rehabilitation.

Therefore, in light of the foregoing and for this thesis, an *ex post facto* environmental authorisation is defined as:

[A]n environmental authorisation issued after the commencement of an activity that is likely to or is having a significant impact on the environment and that includes the reasons for the decision, sets out conditions for the continuation of the project, mitigation measures and provides for ongoing monitoring measures.

³⁶ See Chapter 5.

³⁷ See Chapter 3.

³⁸ McCutcheon 1998 *Cornell ILJ* 450.

³⁹ Paschke and Glazewski 2006 *PELJ* 24; *Magaliesberg Protection Association* para 49.

In order to understand the need for something such as *ex post facto* authorisation, it is necessary to refer to the drivers (over and above the statistics already mentioned)⁴⁰ and the challenges related to *ex post facto* authorisations.

2.4.2 *Drivers for ex post facto environmental authorisation*

Given the above discussion on its definition, *ex post facto* environmental authorisation has few advantages that can be inferred. Firstly, the application for such an authorisation necessitates an assessment of the impact of the activity, although this happens after the commencement of the activity. Therefore, the assessment will focus on the actual and possible future impact. The report generated from this assessment informs the competent authority to determine whether to allow the continuation of this activity, direct it to cease or require alteration on the manner of operations. Secondly, *ex post facto* environmental authorisation creates a platform where the developer may cease, avoid, prevent, minimise or mitigate the environmental degradation.⁴¹ Thirdly, the *ex post facto* environmental authorisation creates a platform for public participation to be carried out during the application process. Fourthly, the *ex post facto* environmental authorisation ensures that the activity is regulated throughout the life cycle of the activity.

The drivers for the introduction of *ex post facto* authorisations include the desire to halt unlawful environmentally degrading activities; to regularise the unlawful activity and bring it back into the regulatory loop.⁴² This can happen either at the developer's own accord or the developer being directed to undertake certain steps (for example, an EIA) after commencement through an enforcement notice issued by relevant authorities.

⁴⁰ See para 2.2 above.

⁴¹ September *A critical analysis* 8.

⁴² Paschke and Glazewski 2006 *PELJ* 24; September *A critical analysis* 8.

Further, an *ex post facto* environmental authorisation may be necessitated by the fact that the developer may not have been aware (ignorance) that the activity he or she undertook triggered a listed activity or is a listed project.⁴³

The interpretation of legislation may create ambiguity or uncertainty. For example, where it is not clear whether certain activities are incidental to the listed activities or form part of the listed activities or where it is difficult to determine the scope of the listed activity.

There is anecdotal evidence that some developers deliberately disregard the listed activities or projects and even budget to pay fines or to fast-track the authorisation of the development.⁴⁴ In other instances, state organs or sometimes enterprises (such as mines or industries) have to undertake a listed activity or introduce a project to protect people or the environment in an emergency situation.⁴⁵ Furthermore, the organs of state are sometimes faced with the pressure of providing services to citizens; hence they commence listed activities without an environmental authorisation.⁴⁶ Therefore, these organs of state may, at a later stage, need to obtain *ex post facto* environmental authorisation when the need arises to expand the listed activities or project and the unlawful activity comes to light.⁴⁷ However, *ex post facto* authorisations also have challenges, and they discussed hereunder.

2.4.3 Challenges with *ex post facto* environmental authorisations

Some critics of the *ex post facto* environmental authorisation concept have labelled it an "anomaly".⁴⁸ The criticism refers, among other things, to an undermining of the environmental management principles. It is also subject to abuse, the public participation is watered down and less rigorous and stringent procedures are used. Further, it constitutes a *fait accompli*.

⁴³ September *A critical analysis* 42.

⁴⁴ September *A critical analysis* 42; Kohn 2012 *SAJELP* 9; Paschke and Glazewski 2006 *PELJ* 24.

⁴⁵ September *A critical analysis* 42.

⁴⁶ See para 4.5 in Chapter 4 below.

⁴⁷ September *A critical analysis* 42.

⁴⁸ Kohn 2012 *SAJELP* 2; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 163.

a) Undermines environmental management principles

As stated before, the notion of *ex post facto* environmental authorisation has been labelled as undermining environmental management principles such as sustainable development, the precautionary and preventive principles and making a mockery of such principles.⁴⁹ Sustainable development requires prediction and assessment of the significant impact before the commencement of the activities that are likely to have a significant impact on the environment.⁵⁰ Sustainable development demands the integration of socio-economic, cultural and environmental factors in decision-making.⁵¹ However, in the instances of *ex post facto* environmental authorisation, the prediction and assessment of the significant impact occur after the commencement of the activity and where environmental degradation may have already occurred. Furthermore, it has been contended that *ex post facto* environmental authorisation does not create a platform for integrating socio-economic, cultural and environmental factors into the decision-making of whether to authorise the activities to commence.⁵² Therefore, it is said that *ex post facto* environmental authorisation undermines sustainable development.⁵³

The preventive principle demands foresight.⁵⁴ The possible significant impacts are not averted or minimised before the commencement of the activity, but rather the *ex post facto* environmental authorisation addresses the actual impact of environmental degradation.⁵⁵

The precautionary principle demands that a lack of scientific knowledge or certainty must not be used as an excuse to proceed with an activity that is likely to have a significant impact on the environment.⁵⁶ The *ex post facto* environmental authorisation is applied for and issued while the developers have already proceeded

⁴⁹ See Paschke and Glazewski 2006 *PELJ* 24; Kohn 2012 *SAJELP* 9. These principles are discussed in more detail in para 2.9 below.

⁵⁰ See para 2.9 below for detailed discussion on sustainable development.

⁵¹ See para 2.9 below.

⁵² Paschke and Glazewski 2006 *PELJ* 24. See para 2.9.2 below for detailed discussion on this argument.

⁵³ September *A critical analysis* 2.

⁵⁴ See para 2.9 below.

⁵⁵ See para 2.9.4 for detailed discussing on this argument.

⁵⁶ See para 2.9 below.

in the absence of scientific knowledge. *Ex post facto* environmental authorisation is seemingly undermining sustainable development and the subsidiary environmental management principles. However, the researcher argues that this argument is flawed, and in fact, an *ex post facto* environmental authorisation gives effect to sustainable development and the environmental management principles.⁵⁷

b) Abuse

Ex post facto environmental authorisation is meant to be an exception to the general practice of carrying out an EIA before the commencement of listed activities.⁵⁸ However, it is argued that the *ex post facto* environmental authorisation application process is susceptible to abuse and could become the norm.⁵⁹ It has been labelled "a quick fix" to obtaining an environmental authorisation.⁶⁰ The *ex post facto* environmental authorisation presents prospective developers with an opportunity to weigh their choices and elect whether to carry out an EIA or an *ex post facto* environmental authorisation, whatever choice may be cost-effective for them.⁶¹

c) Public participation

One of the pillars of an EIA process is meaningful public participation that must inform decision-making.⁶² Robinson⁶³ argues that the views of the interested and affected parties (I&APs) should inform the decision-making process as part of the EIA process. The developer or environmental assessment practitioner (EAP) does not always take the views of the I&APs seriously. If the comments are raised after the commencement of the identified activity, the developer may consider changing the nature of the activity or project to avoid public outrage.⁶⁴

⁵⁷ This argument is explored further in para 2.9 below.

⁵⁸ See para 2.4.1 above.

⁵⁹ Paschke and Glazewski 2006 *PELJ* 24; Kohn 2012 *SAJELP* 9; September *A critical analysis* 2; Hugo *Administrative penalties* 55.

⁶⁰ Kohn 2012 *SAJELP* 3.

⁶¹ September *A critical analysis* 42; Paschke and Glazewski 2006 *PELJ* 25; Kohn 2012 *SAJELP* 7; Zhao 2009 *Natural Resources Journal* 515.

⁶² Murombo 2008 *PELJ* 106-136; Kohn 2012 *SAJELP* 8; Basson 2003 *SAJELP* 144.

⁶³ Basson 2003 *SAJELP* 144.

⁶⁴ Basson 2003 *SAJELP* 144; Kohn 2012 *SAJELP* 9. See for instance *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) at para 718J-719A where

Public participation in the *ex post facto* environmental authorisation application process is described as less stringent.⁶⁵ In effect, the public is often confronted with a *fait accompli*, while they may have local knowledge about the possible impacts of the activity or project on, for example, water resources, animal, insect or plant life that could have been shared before the commencement of the activity. The public may also know how an activity or project may impact their socio-economic life or culture that could have prevented an activity or project.⁶⁶ In the event where the commencement of the listed activity or project has started, it is questionable whether public participation has any value, except perhaps in mitigating further or future impacts.

Public participation and informed decision-making are regarded as environmental principles.⁶⁷ The public participation principle demands the promotion of all I&APs in environmental governance.⁶⁸ With regards to decision-making, the decisions must take into account the interests, needs and values of the I&APs.⁶⁹

d) Shorter, less rigorous and less stringent procedures

Some authors hold a view that the *ex post facto* environmental authorisation process adopts a less rigorous procedure and that the rules are less stringent.⁷⁰ The *ex post facto* environmental authorisation has also been characterised as a make-up EIA process that is less rigorous than the normal EIA process.⁷¹ For this reason,

the court held that the I&APs must be informed as early as possible and be given an opportunity to submit their submissions earlier rather than later.

⁶⁵ Hugo *Administrative penalties* 64.

⁶⁶ See for instance *Baleni v Minister Mineral Resources* 2019 2 (SA) 453 (GP).

⁶⁷ See for instance, sections 2(4)(f) and 2(4)(g) of NEMA; Kidd *Environmental Law* 37-38; Kidd 1999 *SAJELP* 21-31; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1988" 142-143; Verschuuren 2006 *PELJ* 209; Du Plessis 2008 *PELJ* 1-33. For detailed discussion on the origins of the environmental principles, see para 2.9 below.

⁶⁸ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1988" 142.

⁶⁹ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1988" 143.

⁷⁰ Kohn 2012 *SAJELP* 6; Hugo *Administrative penalties* 64.

⁷¹ Kohn 2012 *SAJELP* 6.

the make-up process becomes a mockery of this environmental authorisation requirement and renders it a "mere paper tiger".⁷²

e) Competent authority presented with *fait accompli*

It has been argued that the competent authority is presented with a *fait accompli*, thus, leaving the competent authority with little or no ground at all to refuse an application for an *ex post facto* environmental authorisation, especially if it already brought economic development or created jobs or if there is political pressure to approve the activity or project.⁷³ It might also be that quick action is needed because environmental damage has already occurred. *Ex post facto* authorisation affords hasty developers "a quick fix approval" once the development is *fait accompli*.⁷⁴

Therefore, based on the foregoing, it can be concluded that although *ex post facto* environmental authorisation may have been introduced with good intentions of addressing the consequences of unlawful activities. Notwithstanding the above, the notion of an *ex post facto* environmental authorisation is riddled with unintended challenges. Seemingly, *ex post facto* environmental authorisation undermines the requirements of an environmental authorisation and to some extent defeats the purpose thereof. The study will examine in Chapter 4 if these identified challenges are legitimate, especially in the South African context.

2.4.4 Preliminary observations

In light of the foregoing, it can be tentatively concluded that *ex post facto* environmental authorisation is an authorisation for the continuation of a development that initially required an environmental authorisation before commencement, but such environmental authorisation was not obtained. In order to address the non-compliance, the developer then applies for *ex post facto*

⁷² Kohn 2012 *SAJELP* 6.

⁷³ Paschke and Glazewski 2006 *PELJ* 25; Kohn 2012 *SAJELP* 7; Hugo *Administrative penalties* 56; *Magaliesberg Protection Association* case para 56; *Uzani Environmental Advocacy CC v BP Southern Africa(Pty) Ltd* 2019 5 SA 275 (GP) para 34.

⁷⁴ Kohn 2012 *SAJELP* 3.

environmental authorisation. Therefore, primarily, the *ex post facto* environmental authorisation aims to restore compliance and bring the unlawful activities back into the regulatory loop. *Ex post facto* environmental authorisation was never intended to be an alternative to or a first option as opposed to the environmental authorisation. The foregoing discussion highlights that an *ex post facto* environmental authorisation relates to the continuance of the activity while environmental degradation may have already occurred. There seems to be a need for such an authorisation in light of its drivers,⁷⁵ but it also has some challenges and criticism that should be addressed.

As indicated above, the notion of an environmental authorisation is usually linked to the identification of some activities that are likely to have a significant impact on the environment and undertaking some scientific studies before the activity is authorised. One of the tools used is an EIA or environmental assessment. The following paragraph discusses whether an EIA or environmental assessment is suitable for applying for an *ex post facto* environmental authorisation.

2.5 Environmental authorisation and EIAs

The EIA has been used interchangeably with the term environmental assessment, but the two terms do not necessarily mean the same thing.⁷⁶ Therefore, it is imperative to distinguish the two terms.

2.5.1 Differentiation between EIA and environmental authorisations

There is no universal definition of EIA and there is a plethora of literature around the subject.⁷⁷ Environmental assessment is generally defined as a "planning tool to

⁷⁵ See para 2.4.2 above.

⁷⁶ Nel and Du Plessis 2004 *SAPL* 181-191; Sadler *Environmental Assessment* 12; Wood *Environmental Impact Assessment* 5; Morrison-Saunders *Environmental Impact Assessment* 15-16. Morrison-Saunders notes that some jurisdictions like Canada use the terms environmental assessment. However, he interprets the terms to mean the same thing.

⁷⁷ Glazewski and Brownlie "Environmental Assessment" 10-4; Sadler *Environmental Assessment* 12; Wood *Environmental Impact Assessment* 5; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 5; Paschke and Glazewski 2006 *PELJ* 1; Morrison-Saunders *Environmental Impact Assessment* 8. For instance, Canada uses the term environmental assessment under *Canadian Environmental Assessment Act* 2012.

help decision-makers take account of environmental factors in a planning or development decision".⁷⁸ According to Bond *et al*,⁷⁹ it is an *ex ante* decision-making tool because it must be carried out before the decision is made to understand and communicate the environmental impacts of approving any development application that might have a significant environmental impact. The final decision is the environmental authorisation.

Environmental assessment is further defined as a process of collecting information about the impacts of activity to enable the competent authority to make an informed decision on whether to authorise activity or not.⁸⁰ Sadler⁸¹ contends that an environmental assessment is a generic process that includes an EIA of specific activities, a strategic environmental assessment (SEA) of policies, plans and programmes and their relationship to a larger set of impact and planning-related tools. Morrison-Saunders⁸² agrees with Sadler and states that a project-level EIA is

⁷⁸ Glazewski and Brownlie "Environmental Assessment" 10-3.

⁷⁹ Bond *et al* 2010 *JCP* 12; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1223.

⁸⁰ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 3; Sadler *Environmental Assessment* 13; Morrison-Saunders 2014 *Impact Assessment and Project Appraisal* 8; Canter *Environmental Impact Assessment* 2; Kidd *Environmental Law* 235; Glazewski and Brownlie "Environmental Assessment" 10-5; Morgan 2012 *Impact Assessment and Project Appraisal* 5. See also Morrison-Saunders *Environmental Impact Assessment* 25 who contends that EIA in NEPA includes the notion of SEA. Lee and George "Introduction" 1 define environmental assessment as a "tool for reducing the negative environmental consequences of development activities and for promoting sustainable development".

⁸¹ Sadler *Environmental Assessment* 12. SEAs have been defined as "a process to ensure that significant environmental effects arising from policies, plans, and programmes are identified, assessed, mitigated to decision-makers, monitored and that opportunities for public involvement are provided." It has also been defined as the "systematic process of evaluating environmental consequences of proposed policy, plan or programme initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision making on par with economic and social" consideration. The last-mentioned definition introduces the consideration of economic and social factors. Therefore, an SEA is not only limited to environmental considerations. For more on SEAs, see Kidd *Environmental Law* 235; Retief, Jones and Jay 2007 *SAGJ* 44; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1223; Glazewski and Brownlie "Environmental Assessment" 10-7 for detailed discussions on SEAs. Due to the scope of the thesis, a discussion of SEAs will not form part of this thesis. See also Rossouw and Retief "South Africa" 188-200; Bond *et al* 2015 *JEM* 97-104.

⁸² Morrison-Saunders 2014 *Impact Assessment and Project Appraisal* 6; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1213.

a known form of environmental assessment.⁸³ An EIA is considered the most prominent form of an environmental assessment.⁸⁴

Conversely, an EIA has been generally defined as "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals before major decisions being taken and commitments made".⁸⁵ It is also defined as the "evaluation of the effects likely to arise from major projects significantly affecting the natural and the man-made environment".⁸⁶ EIA informs decision-makers about the likely environmental consequences of an activity or project or the proposed alternative development option.⁸⁷ What is to be assessed may differ from one jurisdiction to another. Some countries list projects,⁸⁸ while others refer to activities⁸⁹ or EIA development.⁹⁰

Some authors suggest that an EIA includes a SEA. For instance, Morgan⁹¹ defines EIA as:

...the essential idea of assessing proposed actions (from policies to projects) for their likely implications for all aspects of the environment, from social through to biophysical, before decisions are made to commit to those actions, and developing appropriate responses to the issues identified in that assessment.

⁸³ Morrison-Saunders 2014 *Impact Assessment and Project Appraisal* 6.

⁸⁴ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1223.

⁸⁵ Sadler *Environmental Assessment* 13; Yang 2018 *Hastings LJ* 529; IAIA 20091 <https://www.iaia.org/news-details.php?ID=30>; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 5-9; Wood *Environmental Impact Assessment* 1; Aucamp *Environmental Impact Assessment* 5.

⁸⁶ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1223.

⁸⁷ Glazewski and Brownlie "Environmental Assessment" 10-6.

⁸⁸ NEPA of the United States of America and several authors use the term "projects".

⁸⁹ The South African environmental legislation refers to "activities." This study will use the term activities since the study is primarily focused in South Africa.

⁹⁰ The English and Irish planning law refer to EIA development. See Chapter 5 for detailed discussion.

⁹¹ Morgan 2012 *Impact Assessment and Project Appraisal* 5; Kidd *Environmental Law* 235; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1223. Sands *Principles of International Environmental Law* 800. See also Morrison-Saunders *Environmental Impact Assessment* 5-6 who states that EIA provides a basis for designing policies, plans and projects to take account proactively of important environmental considerations and to ensure that the impacts associated with the activities are managed. He further argues that EIA in NEPA includes SEA. Morrison-Saunders *Environmental Impact Assessment* 25.

Sadler⁹² contends that an environmental assessment is "applied to a wide range of policy, developmental and geographical settings". An environmental assessment is institutionalised as a separate "formal process under various legal and institutional arrangements established by countries, provincial jurisdictions and international organisations".

Although these authors argue that an EIA includes a SEA, the contention is that the two concepts are distinguishable in that EIA is project or activity-specific while a SEA relates to the assessment of policy, plans and programmes and is not activity or project-specific.

In addition to the foregoing definitions, the following common elements or characteristics can be discerned from other definitions of EIAs in the literature to wit: that an EIA

- a) is a systematic process;⁹³
- b) involves identification, evaluation, assessment;⁹⁴
- c) of the "potential" impact of "proposed" projects (actions);⁹⁵
- d) includes the identification of mitigation measures and alternatives;⁹⁶ and

⁹² Sadler *Environmental Assessment* 12.

⁹³ Wood *Environmental Impact Assessment* 1. Wood further describes EIA as an interactive process. Sadler *Environmental Assessment* 13; Canter *Environmental Impact Assessment* 2; Glazewski and Brownlie "Environmental Assessment" 10-6; Lawrence *Environmental Impact Assessment* 7; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 4; Bond *et al* 2010 *JCP* 12.

⁹⁴ Wood *Environmental Impact Assessment* 1; Sadler *Environmental Assessment* 13; Canter *Environmental Impact Assessment* 2; Lee and George "Introduction" 1; Glazewski and Brownlie "Environmental Assessment" 10-6; Lawrence *Environmental Impact Assessment* 7; Morgan 2012 *Impact Assessment and Project Appraisal* 5; Morrison-Saunders *Environmental Impact Assessment* 7.

⁹⁵ The operative words in this element or characteristic are "potential" and "proposed" because they bring the element of anticipatory nature of EIA into the picture. Wood uses the phrase "effects likely to arise" which denotes what is still yet to happen. See Wood *Environmental Impact Assessment* 1; Lawrence *Environmental Impact Assessment* 7; Lee and George "Introduction" 1; Morrison-Saunders *Environmental Impact Assessment* 4. Glasson, Therivel and Chadwick *Environmental Impact Assessment* 5 make reference to "consequences of development actions in advance".

⁹⁶ Some authors consider an EIA as a tool that can be used to identify mitigation measures and alternatives. For instance, see the following: Lawrence *Environmental Impact Assessment* 7; Morrison-Saunders *Environmental Impact Assessment* 4; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 5; Morgan 2012 *Impact Assessment and Project Appraisal* 5 makes reference to EIA as a tool for developing appropriate responses to the issues identified in the EIA process. See also Morrison-Saunders *Environmental Impact Assessment* 7 who

e) assists in the "planning" and decision-making processes.⁹⁷

From the above analysis, it is clear that an EIA is not necessarily the same as an environmental assessment but rather one of the tools for environmental assessment. An environmental assessment may, for example, also refer to a SEA. Secondly, an EIA is carried out before the commencement of the activity to predict the potential impact, as opposed to the actual impact of the proposed activity. Therefore, it is manifestly evident that an EIA is a "foresight" or anticipatory tool that must be used as early as possible.⁹⁸ Aucamp⁹⁹ argues that an EIA cannot be carried out for existing projects. However, an EIA can be carried out for the expansion of an existing activity (which constitutes a new activity that has not happened yet).¹⁰⁰ Thirdly, it is meant to inform decision-makers whether to allow the proposed significant impacts or whether the mitigation measures taken are sufficient. Therefore, it cannot be undertaken after the activity has been commenced or completed. However, this will depend on the extent to which the activity has commenced. It is also important to note that the definitions and descriptions do not refer to an EIA as a retrospective tool.

In light of the foregoing, for this thesis, an EIA is preliminarily defined as a systematic process of predicting, assessing and evaluating the significant impacts of a proposed activity on the environment before the commencement of the activity, the identification of the alternatives and formulation of mitigation measures, and reporting to the competent authority on the foregoing to aid in decision-making.

contends that the aim of identifying the impacts is to find ways to avoid and minimise the likely adverse impacts and to enhance positive impacts.

⁹⁷ See Wood *Environmental Impact Assessment* 1; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 5; Morrison-Saunders *Environmental Impact Assessment* 6; Sadler *Environmental Assessment* 13; Glazewski and Brownlie "Environmental Assessment" 10-6. Sadler asserts that EIAs facilitate sustainable development planning and decision making. Sadler further states that this process happens prior to major decisions and commitments being made. See Sadler *Environmental Assessment* 11. See also Morgan 2012 *Impact Assessment and Project Appraisal* 5 where it is stated that EIA takes place before decisions are made to commit to the proposed actions.

⁹⁸ Morrison-Saunders *Environmental Impact Assessment* 6.

⁹⁹ Aucamp *Environmental Impact Assessment* 5.

¹⁰⁰ Aucamp *Environmental Impact Assessment* 5; Morrison-Saunders *Environmental Impact Assessment* 6.

In order to understand the anticipatory nature of an EIA, the history and initial purpose of an EIA will be discussed in the next paragraph.

2.6 Historical background

The current state of the world is characterised by massive environmental degradation as is evident from the depletion of the ozone layer, high destruction of biodiversity and high emissions of anthropogenic greenhouse gases, amongst others.¹⁰¹ Environmental degradation increased exponentially over the years.¹⁰² Before the First World War, western countries experienced a rapid loss of natural resources and a deteriorating environmental base at an alarming rate due to rapid industrialisation and urbanisation.¹⁰³ The foregoing situation prevailed to a period after the Second World War and increased the concerns for pollution, quality of life and environmental stress.¹⁰⁴ Consequently, some pressure groups were formed, which required the introduction of tools that could be used to protect the environment and development and try to bring harmony between the two.¹⁰⁵

In response to the above-mentioned pressure, the EIA process, which was initially referred to as the environmental assessment,¹⁰⁶ was introduced in the USA through the *National Environment Policy Act 1969 (NEPA)*.¹⁰⁷ The purpose of the NEPA was

¹⁰¹ Tladi *Sustainable Development in International Law* 1.

¹⁰² Tladi *Sustainable Development in International Law* 1. For the detailed discussion on the inceptions of movements relating to the state of environment, see Elliott *Sustainable development* 42-45.

¹⁰³ Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Tladi *Sustainable Development in International Law* 2.

¹⁰⁴ Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>. This state of environmental degradation continues to be a challenge to date. Some scholars argue that the humans have been altering the environmental in an unprecedented manner. The environmental degradation resulting from human activity has grown rapidly. See Morrison-Saunders *Environmental Impact Assessment* 5; Sadler *Environmental Assessment* in this regard. This has led to the modern geological age being referred to as Anthropocene due to the human activity having dominant influence on the environment.

¹⁰⁵ Boden 1980 *SAJS* 252; Morrison-Saunders *Environmental Impact Assessment* 5; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 3.

¹⁰⁶ Glazewski and Brownlie "Environmental Assessment" 10-2; Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>. The terms EA and EIA have been used interchangeably. However, for the purposes of this paragraph, the term EIA will be used. See also para 2.5 above.

¹⁰⁷ See Jay *et al* 2007 *EIAR* 289 where the foregoing position is affirmed and it is stated that NEPA was enacted during the period when serious environmental degradation emanating from "a wide range of human activities" was increasingly becoming evident. Some of these activities included, but were not limited to, the influence of "population growth, high-density urbanisation,

to promote efforts that addressed environmental degradation.¹⁰⁸ The NEPA mandates all agencies of the Federal Government to incorporate a detailed statement on the environmental impact of the proposed action "in every recommendation or report on proposals for legislation and other major Federal actions that may significantly affect the quality of the human environment".¹⁰⁹ The report has to indicate, amongst others, the following:

- a) the impact of the proposed action on the environment;
- b) any negative impact on the environment that could be avoided should the proposed action be carried out;
- c) alternatives;
- d) the nexus between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- e) any "irreversible and irretrievable commitments of resources" that would occur should the proposed action be carried out.¹¹⁰

The developer of the proposed action (agencies of the Federal government), which may likely have a significant impact on the environment, has to carry out

industrial expansion, resource exploitation, and new and expanding technological advances". This gave rise to growing public concern and political activism to address the environmental crisis. This impact of human activities on the environment influenced the USA Congress to reaffirm its efforts of promoting general welfare and creation and maintenance of "conditions under which human and nature can exist in harmony and fulfil the social, economic, and other requirements of present and future generations". Section 101(a) of *National Environment Policy Act* 1969. See Tladi *Sustainable Development in International Law* 1; Sadler *Environmental Assessment* 1; Canter *Environmental Impact Assessment* 221; Lee and George "Introduction" 3; Glazewski and Brownlie "Environmental Assessment" 10-2; Wood *Environmental Impact Assessment* 1; Morrison-Saunders 2014 *Impact Assessment and Project Appraisal* 5; Li 2008 <https://data.opendevelopmentmekong.net/> 1; Bond *et al* 2010 *JCP* 12; Benson 2003 *Impact Assessment and Project Appraisal* 262; Yang 2018 *Hastings LJ* 530; Rantlo *Environmental Impact Assessment* 6.

¹⁰⁸ Section 2 of *National Environment Policy Act* 1969; Jay *et al* 2007 *EIAR* 289; Morrison-Saunders *Environmental Impact Assessment* 22.

¹⁰⁹ Section 102(2)(c) of *National Environment Policy Act* 1969; Canter *Environmental Impact Assessment* 2; Wood *Environmental Impact Assessment* 1; Morgan 2012 *Impact Assessment and Project Appraisal* 5; Morrison-Saunders *Environmental Impact Assessment* 22; Benson 2003 *Impact Assessment and Project Appraisal* 261; Rantlo *Environmental Impact Assessment* 6-7; *Andrus v Sierra* 442 US 348. Due to the spread of EIA legislation, various terms were used to refer to developmental activities – see 2.5 above. For the purpose of this thesis, the South African terminology will be used. Thus, proposed actions and proposals will be referred to as "activities".

¹¹⁰ Section 102(2)(c) of *National Environment Policy Act* 1969; Morrison-Saunders *Environmental Impact Assessment* 22.

environmental assessment studies and submit an EIS. Seemingly, NEPA, at its inception, was mainly concerned with the "major actions" of the "Federal Government" to the exclusion of other actions of private entities. NEPA does not define the term "major actions" and does not refer to major actions of the states' governments and private entities that could significantly affect the environment.¹¹¹ Therefore, the duty was initially mainly on the federal government's officials to report on the impact of their actions on the environment. Moreover, the NEPA did not make provision for mitigation measures to address the adverse impact emanating from a project.¹¹²

According to Amy,¹¹³ NEPA requires government officials to look before they leap with the belief that being equipped with information and more alternatives leads to better decisions that would minimise environmental damage. Therefore, the process initiated by NEPA had the characteristic of "foresight". Jay *et al*¹¹⁴ state that this marked the advent of EIA and the notion of an EIA evolved to describe the process that led to the formulation of an environmental impact statement (EIS).¹¹⁵

The environmental concerns that led to the enactment of the NEPA had a wider global impact.¹¹⁶ As a result, the notion of EIAs first spread to developed countries and later to developing countries. The EIA can now be found on every continent and in many countries of the world.¹¹⁷ An EIA that included rigorous project-by-

¹¹¹ Canter *Environmental Impact Assessment* 5; Morrison-Saunders *Environmental Impact Assessment* 22.

¹¹² Morrison-Saunders *Environmental Impact Assessment* 24.

¹¹³ Amy "Decision Techniques for Environmental Policy" 60. See also Morrison-Saunders *Environmental Impact Assessment* 4; Robinson 2006 *SAJELP* 97; Kohn 2012 *SAJELP* 3.

¹¹⁴ Jay *et al* 2007 *EIAR* 289.

¹¹⁵ This marked the first time an EIA became a tool used to protect the environment. See Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>. It is considered as the most recognised and practiced tool of environmental assessment or appraisal. See also Jay *et al* 2007 *EIAR* 289.

¹¹⁶ Jay *et al* 2007 *EIAR* 289-290.

¹¹⁷ Sadler *Environmental Assessment* 16; Craik *The International Law of Environmental Impact Assessment* 261; Robinson 2006 *SAJELP* 103; Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Wood *Environmental Impact Assessment* 5; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 40; Morgan 2012 *Impact Assessment and Project Appraisal* 6; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1213; Retief and Kotzé 2008 *SAJELP* 145; Jay *et al* 2007 *EIAR* 288; Bond *et al* 2010 *JCP* 12; Benson 2003 *Impact Assessment and Project Appraisal* 261; Gillespie 2008 *Review of European Community & International Environmental Law* 221-222; Alberts *An application of theory of change* 66.

project assessment of the significant impact on the environment as a way to address the environmental problems was attractive and accordingly, countries initially adopted some elements of the USA EIA process. The spread of EIA into different jurisdictions and its domestication in different national laws and policies eventually led to different terminology and procedures in each of the jurisdictions.¹¹⁸ Therefore, the evolution of the EIA legislation will be discussed in the next paragraph.

2.7 Evolution of EIAs

2.7.1 Developed countries

As stated above, the adoption of the use of the EIA process began in developed countries.¹¹⁹ The Australian state of New South Wales is considered to be one of the first states to adopt the USA EIA procedures in 1972.¹²⁰ Canada followed Australia and issued a directive on EIAs in 1973.¹²¹ New Zealand followed suit in 1974.¹²² In 1976, Ireland enacted legislation that permitted an EIA although it was not mandatory.¹²³ The EIA was initially not compulsory in some states.¹²⁴ In 1985, the Council of the European Communities adopted the *European Community Directive on EIA*,¹²⁵ which motivated the enactment of EIA legislation in several

¹¹⁸ Wood *Environmental Impact Assessment* 5.

¹¹⁹ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 40; Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 10; Lee and George "Introduction" 3. See also para 1.1 in Chapter 1 above.

¹²⁰ Wood *Environmental Impact Assessment* 4; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 40; Lee and George "Introduction" 3; Sadler *Environmental Assessment* 25. The Northern Territory of Australia has introduced the new environmental regulatory regime by enactment the *Environment Protection Act* 31 of 2019. The Act is aimed amongst other things to recognise the role of the EIA and environmental approval in promoting the environmental protection and environmental management in the Northern Territory. See section 3(c) of the *Environment Protection Act* 31 of 2019. The Northern Territory of Australia has also published *Environment Protection Regulations* 2020.

¹²¹ Wood *Environmental Impact Assessment* 4; Sadler *Environmental Assessment* 25. For detailed discussions on Canada, see Chapter 5 below.

¹²² Wood *Environmental Impact Assessment* 4; Durning, Palframan and Perdicoúlis "Introduction" 5; Sadler *Environmental Assessment* 25.

¹²³ Wood *Environmental Impact Assessment* 4.

¹²⁴ See Chapter 5 for further detailed discussion on Ireland.

¹²⁵ [85/337/EEC and 97/11/EC]. For detailed discussion on the current EU EIA law see para 5.2 below (Chapter 5).

European countries in the late 1980s.¹²⁶ In the 1990s, EIA use was introduced and adopted in developing countries.¹²⁷

2.7.2 *Developing countries*

The adoption of EIAs in developing countries was initially slow,¹²⁸ but can now be found in several countries.¹²⁹ The growth occurred mainly since the 1990s in the African and South American countries.¹³⁰ According to Ogola,¹³¹ an EIA was not readily understood and accepted as a tool, and the developers resisted its use and considered it to be anti-development. An EIA was, for example, viewed as a means by which developed countries intended to keep developing countries in poverty and prevent rapid development.¹³²

2.7.3 *International instruments*

The introduction of EIAs was further fuelled by its incorporation into some international instruments such as the *Declaration of the United Nations Conference on the Human Environment* (Stockholm Declaration) in 1972.¹³³ According to Kidd,¹³⁴ the Stockholm Declaration marked the recognition of the use of EIAs in the international arena and this was followed by the widespread introduction of EIAs.¹³⁵ Sands *et al*¹³⁶ contend that although an EIA was not expressly provided for in the Stockholm Declaration, the rationale underlying an EIA can be identified in the

¹²⁶ Benson 2003 *Impact Assessment and Project Appraisal* 261; Wood *Environmental Impact Assessment* 4; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 40; Sadler *Environmental Assessment* 25.

¹²⁷ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 40.

¹²⁸ Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 10.

¹²⁹ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 40; Retief and Kotzé 2008 *SAJELP* 145; Sadler *Environmental Assessment* 25; Jay *et al* 2007 *EIAR* 288.

¹³⁰ Wood *Environmental Impact Assessment* 4. Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 10; Abaza, Bisset and Sadler *Environmental Impact Assessment* 15; Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Wood "Environmental Impact Assessment in Developing Countries" 4.

¹³¹ Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>.

¹³² Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>.

¹³³ Li 2008 <https://data.opendevelopmentmekong.net/> 6.

¹³⁴ Kidd *Environmental Law* 235.

¹³⁵ Sands *et al Principles of International Environmental Law* 601.

¹³⁶ Sands *et al Principles of International Environmental Law* 602.

principle that "rational planning must constitute an essential tool for reconciling development and environments needs".

Principle 8 of the Stockholm Declaration acknowledges that "development is needed to improve the environment" while principle 11 requires that environmental policy must not hamper development. Therefore, the principle indicates that both development and environment are equally needed and that they must co-exist. Thus, one cannot exist at the expense of the other.¹³⁷ The emphasis was still on development rather than the protection of the environment.

The *Convention on Environmental Impact Assessment in a Transboundary Context*, 1999 (Espoo Convention), which is considered as the first multi-lateral EIA treaty that looks at the EIAs in a transboundary context, entered into force in 1997.¹³⁸ The state parties to the Espoo Convention have an obligation to assess the environmental impacts of certain activities that are likely to have a significant adverse transboundary impact at the early planning stage.¹³⁹ Therefore, this Convention recognised that the impacts of a project (activity) may not only be local but may cross boundaries. What becomes evident from the Espoo Convention is that an EIA is a tool that must be used in the planning stage of a project as opposed to during the construction phase of a project and that activities may have impacts across the borders of states.

The *Rio Declaration* reaffirmed the *Stockholm Declaration*.¹⁴⁰ Principle 17 thereof requires the use of EIA as an instrument that should be undertaken for the proposed

¹³⁷ *Fuel Retailers* paras 44-62; Strydom "Essentialia of International Environmental Law" 60; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 139; Field 2006 *SALJ* 411-436; Tladi *Sustainable Development in International Law* 11-33.

¹³⁸ *Convention on Environmental Impact Assessment in a Trans-boundary Context* (1991); Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1226; Glazewski and Brownlie "Environmental Assessment" 10-12; Sadler *Environmental Assessment* 27; Yang 2018 *Hastings LJ* 533. See also the case of *Hungary v Slovakia* 1997 ICJ para 111. The Espoo Convention applies to the EU members.

¹³⁹ Article 2.2 of the Espoo Convention. The parties thereto agreed to take all necessary measures to implement the provisions of the Convention with respect to establishing EIA procedures that allow public participation. See also Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Sands *et al Principles of International Environmental Law* 611.

¹⁴⁰ Wood *Environmental Impact Assessment* 5; Sadler *Environmental Assessment* 25.

activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a national competent authority.¹⁴¹

The *Rio Declaration* led to the adoption of Agenda 21, which proposes that governments should develop, improve and apply the EIA tool to foster sustainable industrial development. Agenda 21 further proposes that governments should introduce appropriate EIA procedures for proposed projects likely to have significant impacts upon biological diversity, providing for suitable information to be made widely available and for public participation, where appropriate, as well as encourage the assessment of impacts of relevant policies and programmes on biological diversity.¹⁴² Seemingly, these international instruments portray the view that an EIA at the international arena is viewed as a tool that must be used to assess the impact of the "proposed" activity that is likely to have a significant impact on the environment at the planning stage. However, no mention is made of it being a retro-active tool.

2.7.4 *International agencies*

Some international institutions and agencies also played a significant role in the spread of the use of EIAs.¹⁴³ Some of the funding international institutions such as the World Bank required an EIA as part of its funding approval process, and as a result, the spread of the use of EIAs was faster in most of the developing countries.¹⁴⁴

¹⁴¹ Principle 17 of *Rio Declaration on Environment Development* (1991); Kidd *Environmental Law* 235; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1227; Bond *et al* 2010 *JCP* 12; Yang 2018 *Hastings LJ* 532.

¹⁴² Article 15.5(k) of *United Nations Conference on Environmental & Development* (1992). For more details on Agenda 21, see Sands *et al Principles of International Environmental Law* 604.

¹⁴³ Wood *Environmental Impact Assessment* 5; Sands *et al Principles of International Environmental Law* 605; Sadler *Environmental Assessment* 25.

¹⁴⁴ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 40; Munyazikwiye *An Assessment of EIA* 9; Abaza, Bisset and Sadler *Environmental Impact Assessment* 15; Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal* 10; Wood *Environmental Impact Assessment* 5; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1226; Hey *International Environmental Law* 82; Lee and George "Introduction" 3; Yang 2018 *Hastings LJ* 532.

In 1974, the Organisation for Economic Cooperation and Development (OECD) recommended that member states adopt EIAs in the process of granting funds.¹⁴⁵ The United Nations Environment Programme (UNEP) also made recommendations to members regarding the establishment of EIA procedures and issued guidance on the implementation of EIAs in developing countries.¹⁴⁶ Some other international and bilateral aid agencies also created their own EIA guidelines, including the European Bank for Reconstruction and Development in 1992 and Overseas Development Administration in 1996. These guidelines assisted countries that did not have EIA legislation.¹⁴⁷

2.8 Generic EIA procedure

As indicated above, each country has its own EIA procedures, and the details thereof are included either in policies, legislation or guidelines, to mention a few. They tailored their EIA towards the needs of their specific jurisdiction.¹⁴⁸ The role players and the sequence of the steps may also differ.¹⁴⁹ However, some generic steps can be discerned, including, for example, screening, scoping, impact prediction evaluation, mitigation and follow up on the decisions. These generic steps are briefly discussed in the following paragraphs.¹⁵⁰

2.8.1 Screening

Screening is the initial step of the EIA process, which is aimed at identifying the proposed activity that triggers an EIA and excluding those that do not.¹⁵¹ The focus

¹⁴⁵ Wood *Environmental Impact Assessment* 4. This followed a concern by the commission that "too much economic activity was taking place in the wrong place, using environmentally unsuitable technologies and that effects on environment should be taken into account at the earliest possible stage in all the technical planning and decision-making process".

¹⁴⁶ Wood *Environmental Impact Assessment* 5; UNEP *Environmental Impact Assessment: Basic Procedures for Developing Countries* 5.

¹⁴⁷ Lee and George "Introduction" 3; Mnyazikwiye *An Assessment of EIA* 9.

¹⁴⁸ Aucamp *Environmental Impact Assessment* 87; Morrison-Saunders *Environmental Impact Assessment* 40; Rantlo *Environmental Impact Assessment Legislation* 18.

¹⁴⁹ Morrison-Saunders *Environmental Impact Assessment* 40.

¹⁵⁰ Lee and George "Introduction" 6.

¹⁵¹ Abaza, Bisset and Sadler *Environmental Impact Assessment* 44; Lawrence *Environmental Impact Assessment* 55; Morrison-Saunders *Environmental Impact Assessment* 47. Screening seeks to answer whether the activity requires EIA or not. See Morrison-Saunders *Environmental Impact Assessment* 41.

of screening is on projects that are likely to have a significant adverse impact or where the impacts thereof are not fully known. This is the step that should identify the "level or the extent to which an EIA is warranted".¹⁵² Screening is seen as a way to establish the significance of the project.¹⁵³

Wood¹⁵⁴ states that there are two ways in which the significance of the impact can be identified, and they are:

- (a) the drawing of lists of activities, thresholds and criteria to determine which activities should be assessed;¹⁵⁵ and
- (b) the formulation of a procedure for the discretionary determination of which activities or projects should be assessed.¹⁵⁶

Ogola¹⁵⁷ suggests that the criteria for the screening are usually specified in the legislation of each state, although this may not always be the case.¹⁵⁸ The screening is a process that must be done as quick and early as possible and this is made easy when mandatory lists (either of activities or projects) are used.¹⁵⁹

¹⁵² Abaza, Bisset and Sadler *Environmental Impact Assessment* 44.

¹⁵³ Wood *Environmental Impact Assessment* 140; Morrison-Saunders *Environmental Impact Assessment* 47.

¹⁵⁴ Wood *Environmental Impact Assessment* 140. See also Glasson, Therivel and Chadwick *Environmental Impact Assessment* 86.

¹⁵⁵ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 86. The screening procedure and methods include the use lists of projects with size thresholds to which EIA must be applied automatically. See for instance Abaza, Bisset and Sadler *Environmental Impact Assessment* 46. This can be exemplified by the case, Eswatini where the *Environmental Audit, Assessment and Review Regulations* 31 of 2000 (EAARR) also contains a list of projects that must be subjected to EIA. The EAARR also categorises the activities into categories discussed above. Wood *Environmental Impact Assessment* 143. In the United Kingdom, the *Town and Country Planning Regulations* of 2017 contains lists of projects that require an EIA and they are contained in Schedule 1 and Schedule 2. See also Wood *Environmental Impact Assessment* 144.

¹⁵⁶ This may be dependent on case-by-case presented to the competent authorities.

¹⁵⁷ Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>.

¹⁵⁸ For instance, in the case of the United States of America, there is no criteria or thresholds in place to determine whether a proposed activity is likely to have significant impact on the environment. However, pursuant to the provisions of NEPA, there is a determination of whether the NEPA applies to the proposed activity and whether the proposed activity or project may significantly affect the quality of human environment. In the event that the answers to the foregoing are in the affirmative, the developer must prepare an environmental impact statement (EIS).

¹⁵⁹ Abaza, Bisset and Sadler *Environmental Impact Assessment* 46. This usually helps the developer to know instantly if an EIA will be required for the proposed activity and the extent of assessment by scrutinising the list of activities.

For the screening to be effective, the developer is required to submit the information that will assist the decision-makers in determining whether the activity triggers an EIA or not.¹⁶⁰ The output of the screening process is sometimes contained in a document called initial environmental evaluation.¹⁶¹ Therefore, the screening process must be undertaken before the activity commences, and there are no indications that this can be used after the fact.

2.8.2 Scoping

Scoping is considered the foundation of an effective and efficient EIA.¹⁶² Scoping is aimed at identifying "the key issues and impacts that have to be addressed" and excludes those that should not.¹⁶³ In some other jurisdictions, the scoping process helps in the formulation of focused terms of reference (ToRs) to avoid waste of time and money on unnecessary studies and investigations. With regard to the ToRs, they are usually prepared by the developer or the professional (consultant) responsible for carrying out an EIA.¹⁶⁴

Scoping is also meant to identify the information necessary for the decision-making, the significant impacts and alternatives to be considered and the content and scope of the EIA.¹⁶⁵ This part of the EIA process is also expected to cover the issues of mitigation by specifying measures to prevent, minimise and compensate for

¹⁶⁰ Wood *Environmental Impact Assessment* 142. However, in other jurisdictions such as South Africa and Lesotho, this information is provided for in the scoping report. For instance, see Rantlo *Environmental Impact Assessment* 19-21.

¹⁶¹ Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>.

¹⁶² Abaza, Bisset and Sadler *Environmental Impact Assessment* 47. Scoping process differs from one jurisdiction to another. See Abaza, Bisset and Sadler *Environmental Impact Assessment* 47.

¹⁶³ Sadler *Environmental Assessment* 19; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 88; Wood *Environmental Impact Assessment* 159; Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>; Aucamp *Environmental Impact Assessment* 2; Morrison-Saunders *Environmental Impact Assessment* 50-51.

¹⁶⁴ Abaza, Bisset and Sadler *Environmental Impact Assessment* 49. ToRs is considered as a consensus document that indicates the agreement among the interested affected parties on the scope of the issue of the assessment and issues to be assessed.

¹⁶⁵ Abaza, Bisset and Sadler *Environmental Impact Assessment* 45; Lawrence *Environmental Impact Assessment* 55. "During this phase in the EIA process, there is identification and prediction of the potential significance of the risks, effects and consequence of the proposed project". See in this regard Sadler *Environmental Assessment* 19; Wood *Environmental Impact Assessment* 160. The process of scoping is undertaken through an open interactive process, which enables the establishment of this information that will help the decision-makers. See also Aucamp *Environmental Impact Assessment* 60.

environmental degradation. Scoping also creates a platform for early and constructive public involvement, which helps to ensure that critical issues and alternatives are considered when preparing the ToRs.¹⁶⁶ Therefore, it is essential that the scoping step should commence by identifying all the interested and affected parties (I&APs) and the authorities that are likely to be affected by the proposed activity and then bringing them together in a working group with the developer.¹⁶⁷ Therefore, it can safely be deduced that the scoping process is carried out before the commencement of the activity to achieve its intended purpose – again, none of the literature refers to the possibility to undertake this step after a project or activity commenced. This step is then followed by reporting the findings and the review of the same report.

2.8.3 Impact prediction, assessment and mitigation

This step of impact prediction and evaluation is considered the technical heart of the EIA process.¹⁶⁸ It is defined as "any statement that predicts a change, or no change, to any part of the biophysical or social environment as a result of project implementation".¹⁶⁹ Generally, an impact prediction must indicate who or what will be affected.¹⁷⁰ According to George,¹⁷¹ this stage requires specialist technical skills and a thorough understanding of the receiving environment. This information is

¹⁶⁶ Abaza, Bisset and Sadler *Environmental Impact Assessment* 47. This is applicable in the jurisdictions where the developers must prepare the ToRs. See also Glasson, Therivel and Chadwick *Environmental Impact Assessment* 88.

¹⁶⁷ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 88; Wood *Environmental Impact Assessment* 161; Abaza, Bisset and Sadler *Environmental Impact Assessment* 48. The importance of public participation is that it makes the environmental authorities aware of public concerns. All the I&APs must therefore be provided with the preliminary information and the alternatives with sufficient details to highlight issues of concern and that there is an opportunity for I&APs to respond and make a meaningful participation. The information provided to the I&APs must not be too technical for them to understand it.

¹⁶⁸ Abaza, Bisset and Sadler *Environmental Impact Assessment* 49; George "Environmental Impact Prediction and Evaluation" 85; Morrison-Saunders *Environmental Impact Assessment* 54. There are several tools and methods that are used to carry out this step of an EIA. However, for the purpose of this thesis, they shall not be discussed in detail. For more detailed discussion on the above-mentioned, see Glasson, Therivel and Chadwick *Environmental Impact Assessment* 101; Aucamp *Environmental Impact Assessment* 61.

¹⁶⁹ Morrison-Saunders *Environmental Impact Assessment* 54.

¹⁷⁰ Morrison-Saunders *Environmental Impact Assessment* 55; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 114.

¹⁷¹ George "Environmental Impact Prediction and Evaluation" 85; Morrison-Saunders *Environmental Impact Assessment* 56. This may involve multi-disciplinary team.

used to come up with appropriate mitigation measures.¹⁷² The information derived from this stage assists the decision-makers in determining whether to allow the proposed activity to proceed or not.¹⁷³

George¹⁷⁴ states that the overall prediction and evaluation process is expected to include *inter alia* defining the baseline environment, determining future changes to the baseline and defining the action in sufficient detail to understand its consequences. Assessment is aimed at determining whether predicted impacts are significant or not.¹⁷⁵ Put differently, this stage of the process deals with determining the significance of the predicted impact.¹⁷⁶ The assessment stage is expected to feed into other stages of the EIA process.¹⁷⁷ This step, similar to the preceding stages, reaffirms the anticipatory nature of an EIA because the main aim is "predicting and evaluating" the significant impact of the *proposed* activity.

2.8.4 Mitigation and impact management plan

Mitigation aims to address the significant adverse impact of the proposed activity firstly.¹⁷⁸ Mitigation is considered "the practical phase of the EIA process concerned with the proposed interventions to prevent or remedy the negative impacts" while maximising the environmental and social benefits of a proposed activity.¹⁷⁹ When the significant impact and mitigation measures have been identified and evaluated, the developer must compile an EIA report, and environmental management plan (EMP) as the case may be, that must be presented to the competent authority.¹⁸⁰

¹⁷² Abaza, Bisset and Sadler *Environmental Impact Assessment* 49.

¹⁷³ Abaza, Bisset and Sadler *Environmental Impact Assessment* 50.

¹⁷⁴ George "Environmental Impact Prediction and Evaluation" 86; Morrison-Saunders *Environmental Impact Assessment* 56.

¹⁷⁵ Morrison-Saunders *Environmental Impact Assessment* 57; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 126.

¹⁷⁶ Morrison-Saunders *Environmental Impact Assessment* 58-59. It must be born in mind that an EIA process focuses on the assessment of the significant impact.

¹⁷⁷ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 126.

¹⁷⁸ Abaza, Bisset and Sadler *Environmental Impact Assessment* 55.

¹⁷⁹ Abaza, Bisset and Sadler *Environmental Impact Assessment* 55; Morrison-Saunders *Environmental Impact Assessment* 61.

¹⁸⁰ Abaza, Bisset and Sadler *Environmental Impact Assessment* 55. EIA report may be referred to by many names depending on the jurisdiction. For instances, in some the USA, it is referred to as environmental impact statement (EIS) while in South Africa is known as the scoping and environmental impact assessment reports (S&EIAR).

The comments from the public participation process, which usually occurs during the scoping process and indicate how those comments will be addressed, may be included in the EIA report. In some jurisdictions, public participation may be required during the full EIA process.¹⁸¹

2.8.5 EIA report

Wood¹⁸² asserts that an EIA is rendered meaningless in the absence of the preparation of a report or reports containing the findings relating to the predicted impacts of the proposed activity. The EIA report or statement is a document that collates the information derived from the scientific studies and is to be submitted to the decision-makers responsible for the approval of the proposed activity.¹⁸³ The report is prepared by the developer or consultant as required by each country's legislation.¹⁸⁴ The information contained in the report must correlate with the ToRs or as specified in legislation regulating the EIA process in a particular state.¹⁸⁵ The EIA report is meant to provide the decision-makers with sufficient information to either approve or refuse the carrying out of the proposed activity and determine the conditions attached to the approval.¹⁸⁶ The EIA report is a public document in that it is subject to public review and comment.¹⁸⁷ Therefore, it must be well organised and written clearly so that it communicates even to non-experts while meeting the appropriate technical standard.¹⁸⁸ The information contained in the report that relates to the significance of the impacts of the activity on the environment should

¹⁸¹ See Chapter 3 below for the South Africa position.

¹⁸² Wood *Environmental Impact Assessment* 176.

¹⁸³ Abaza, Bisset and Sadler *Environmental Impact Assessment* 56.

¹⁸⁴ Abaza, Bisset and Sadler *Environmental Impact Assessment* 56; Wood *Environmental Impact Assessment* 183.

¹⁸⁵ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 153.

¹⁸⁶ Abaza, Bisset and Sadler *Environmental Impact Assessment* 56. For this reason, Wood considers this step of EIA as the most important since the findings are used by the decision-makers, government agencies and the public. See also Wood *Environmental Impact Assessment* 177; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 153 state that the EIA report must be comprehensive.

¹⁸⁷ Abaza, Bisset and Sadler *Environmental Impact Assessment* 56; Wood *Environmental Impact Assessment* 181.

¹⁸⁸ Abaza, Bisset and Sadler *Environmental Impact Assessment* 56; Wood *Environmental Impact Assessment* 182. The report must also be concise, objective, factual and internally consistent. The EIA report must be coined in plain language with minimal technical language, summarising data in good quality maps, charts and other visual aids.

be "precise, objective and value-free".¹⁸⁹ The report still focuses on the predicted impact of the proposed activity as its actual impacts may be more severe or less severe.

2.8.6 Review of EIA

Following the compilation of the report, the draft EIA report or the final EIA report should be subjected to review before it is submitted to the decision-makers.¹⁹⁰ It has been indicated that one of the objectives of the EIA process is to provide information about the "proposed activity" to the stakeholders so that a better decision may be made.¹⁹¹ The decision, in this case, relates to whether to allow or refuse the proposed activity. It can be inferred, therefore, that public participation or review is intended to influence the decision-making. It becomes questionable whether this can be effectively achieved in the case of an *ex post facto* environmental authorisation application as the activity has started.

The public participation stage allows the groups in some jurisdictions with relevant expertise and the public to have an opportunity to scrutinise and table their concerns regarding the report.¹⁹² In some jurisdictions, the I&APs may comment on the final report while in other jurisdictions input is made during the process. In other jurisdictions such as South Africa, it is a continued process. The public review at the EIA report stage serves as an important check on the quality, especially in the event where such checks have not been applied earlier in the EIA process.¹⁹³ More active

¹⁸⁹ Wood *Environmental Impact Assessment* 146.

¹⁹⁰ This step is not included in all jurisdictions. Abaza, Bisset and Sadler *Environmental Impact Assessment* 57. This is considered as one of the checks and balances built into an EIA process since it permits a separate review to be made of the developers own assessment of the proposal. See also Morrison-Saunders *Environmental Impact Assessment* 63. See also Glasson, Therivel and Chadwick *Environmental Impact Assessment* 144.

¹⁹¹ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 144.

¹⁹² Wood *Environmental Impact Assessment* 162. However, it has also been argued that in some jurisdictions where open public participation in EIA and public review of EIS is not the norm. See in this regard Morrison-Saunders *Environmental Impact Assessment* 63.

¹⁹³ Wood *Environmental Impact Assessment* 198. The reviews that sometimes involve the setting of boundaries, selection of reviewers, the use of the comments of the interested and affected people were considered as forms of quality control. Consultation with the stakeholders in the EIA process can help to improve the quality, comprehensiveness and the effectiveness of the EIA process and to ensure that submissions of various stakeholders are taken into consideration

engagement and review processes may be undertaken, including consultation, meetings or panel hearings with I&APs that enable oral submissions.¹⁹⁴ The comments of the I&APs must be included in the final report and how the concerns raised therein are going to be addressed.¹⁹⁵

The public participation procedure necessitates that the I&APs must be notified as to the time to comment on the reports. Wood¹⁹⁶ states that the provision for public participation is crucial at this stage of an EIA but that it is preferable if such participation could take place before requesting further information from the proponent.¹⁹⁷ Following the review of the report, the environmental authority may request further information from the developer. The environmental authority will thereafter, decide whether to grant an environmental authorisation or not.

2.8.7 Decision-making

Subsequent to the submission of the EIA report and other relevant documents, the competent authority must make a decision based on the report before it on whether to authorise the proposed activity or not. The approval decision is often the responsibility of the elected politician or the government agency (competent authority) responsible for administering the EIA process.¹⁹⁸ Where an EIA is enshrined in legislation, it is typically the case that the decision-maker must take

in the decision making. See also Glasson, Therivel and Chadwick *Environmental Impact Assessment* 144.

¹⁹⁴ Morrison-Saunders *Environmental Impact Assessment* 64. This approach has been criticised in that it has a likelihood that many public stakeholders in EIA may actively oppose a proposed development. They may be seeking to stop the development from going ahead rather than suggesting mitigation enhancement. In the case of review process, it may be more of a political struggle than cooperation for mutually desired outcome. There is sometimes also opposition based on competition or economic issues. For instance, see the *Fuel Retailers* case para 78. Nonetheless the requirement that the proponent involve and respond to EIS review submissions remain an important element of proposal design and management as well as upholding principles of accountability and transparency.

¹⁹⁵ Abaza, Bisset and Sadler *Environmental Impact Assessment* 58. Proponents may be asked to respond formally to public review submissions thereby providing them with an opportunity to modify their development proposal prior to the regulators "final evaluation and the approval decision-making step". See also Morrison-Saunders *Environmental Impact Assessment* 64.

¹⁹⁶ Wood *Environmental Impact Assessment* 165.

¹⁹⁷ *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C).

¹⁹⁸ Morrison-Saunders *Environmental Impact Assessment* 65.

into account the results of the EIA process up to this point when making the decision, including inputs from the public participation and submissions.¹⁹⁹ The approval decision is vital for proponents because it determines whether they may commence with the proposed activity or not.²⁰⁰

As it has been alluded to, one of the aims of an EIA is to assist the decision-makers in reaching a sound and integrated decision in which environmental and socio-economic concerns are taken into consideration before carrying out an activity.²⁰¹

Wood²⁰² states that most jurisdictions prohibit making a decision on the proposed activity until the final EIA report has been prepared and subjected to review. This is because the EIA's original intent is to ensure that environmental concerns were taken into consideration and given greater weight in the decision-making before the activity commences.²⁰³ The decision-maker must be autonomous so that the results of the review are considered fair enough. However, in the *ex post facto* environmental authorisation application process, this cannot be the case because the activity has already commenced. Contrary to the normal EIA process, in the case of an *ex post facto* environmental authorisation, the approval decision is mainly whether the illegal activity will be permitted to continue or not and what must happen if the approval is not granted.

¹⁹⁹ Morrison-Saunders *Environmental Impact Assessment* 65; Lee "Integrating appraisals and decision-making" 162; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 160.

²⁰⁰ Wood *Environmental Impact Assessment* 221. The decision at this stage does not involve the consideration of alternatives but it is a choice between authorisation and refusal. See also Glasson, Therivel and Chadwick *Environmental Impact Assessment* 160. The decision may also include suggestions for further mitigation. Morrison-Saunders *Environmental Impact Assessment* 64. Although decision-making takes place throughout the whole EIA process, the main decision in the EIA process relates to whether the proposed activity must be authorised or not.

²⁰¹ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 160.

²⁰² Wood *Environmental Impact Assessment* 223.

²⁰³ Wood *Environmental Impact Assessment* 223. In some other jurisdictions like South Africa, the developer must ensure that the I&APs have a sufficient opportunity to meaningfully review the EIA report before it is submitted to the relevant authority for decision-making. In some other jurisdictions, the relevant authority also ensures that the EIA report is subjected to public reviews before the final decision is taken. See Chapter 3 below.

According to Ogola,²⁰⁴ if the decision-makers accept the EIA report, they must issue an authorisation. The decision, the reasons thereof, and the conditions must be published.²⁰⁵ The developer might appeal against the decision if the decision was not in his or her favour.²⁰⁶ The I&APs should also be able to appeal against the decision if the decision aggrieves them.²⁰⁷

2.8.8 Follow-up impact management monitoring

Morrison-Sanders²⁰⁸ refers to EIA follow-up as the monitoring and evaluation of the impacts of the activity "for the management of, and communication about the environmental performance of that activity". He further states that there are four components of the EIA follow-up, namely: monitoring, evaluation, management and communication.²⁰⁹ These key components are briefly explained hereunder.

a) Monitoring

Monitoring helps to ensure that the activity is carried out per the conditions set out in the environmental authorisation and the environmental management programme (EMPr) or plan.²¹⁰ There are three main types of monitoring that a developer may consider or undertake for an activity or project, namely compliance monitoring, mitigation monitoring and impact monitoring.²¹¹

b) Evaluation

²⁰⁴ Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>. See also Paschke and Glazewski 2006 *PELJ* 1; Wood *Environmental Impact Assessment* 223. This decision must be reached within a specified period of time. For the EIA process to be considered meaningful, it must be possible that modifications can be demanded or the refusal to grant environmental authorisation.

²⁰⁵ Wood *Environmental Impact Assessment* 224.

²⁰⁶ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 160.

²⁰⁷ For instance, see section 43 of NEMA in the South African context.

²⁰⁸ Morrison-Saunders *Environmental Impact Assessment* 67. See also Wood *Environmental Impact Assessment* 240.

²⁰⁹ Morrison-Saunders and Arts "Introduction to EIA follow-up" 4-5.

²¹⁰ Sadler *Environmental Assessment* 19; Lee and George "Introduction" 6; Wood *Environmental Impact Assessment* 240.

²¹¹ Abaza, Bisset and Sadler *Environmental Impact Assessment* 60. Compliance monitoring enables the assessment of whether the predicted values are in compliance with actual values. Mitigation monitoring monitors the effectiveness of the mitigation measures. Impact monitoring relates to assessing the relationship between the impact and the effects it causes.

Evaluation refers to the interpretation of monitoring data.²¹² This provides the basis for any management response that might be needed or confirm that existing mitigation measures are satisfactory.²¹³

c) Management

Impact management deals with the implementation of mitigation measures under the EMP.²¹⁴ The impact management "can occur throughout project construction and continue into the operational and decommissioning phases".²¹⁵ This process forms a larger part of the EIA follow-up during the initial approval stage.²¹⁶ The approved EMP (or environmental management plan) is the basis for impact management together with other terms and conditions, imposed during the decision-making stage.²¹⁷ It is argued that the process of impact management also has three phases, which are the implementation of the mitigation measures, monitoring and evaluation, and revision of the EMP when the need arises.²¹⁸

d) Communication

This stage maintains the best practice principles of credibility and transparency for the implementation phase of development.²¹⁹ Morrison-Saunders²²⁰ argues that stakeholders other than the developers and the competent authority have the right

²¹² Morrison-Saunders *Environmental Impact Assessment* 68; Morrison-Saunders and Arts "Introduction to EIA follow-up" 4-5.

²¹³ Morrison-Saunders *Environmental Impact Assessment* 68.

²¹⁴ Abaza, Bisset and Sadler *Environmental Impact Assessment* 59.

²¹⁵ Abaza, Bisset and Sadler *Environmental Impact Assessment* 59; Morrison-Saunders *Environmental Impact Assessment* 68.

²¹⁶ Abaza, Bisset and Sadler *Environmental Impact Assessment* 59. Impact management is supported by other follow-up components and tools such as monitoring, which provides information relevant for this process.

²¹⁷ Abaza, Bisset and Sadler *Environmental Impact Assessment* 59.

²¹⁸ Abaza, Bisset and Sadler *Environmental Impact Assessment* 59. Impact management is backed up by a monitoring process that encompasses practical steps and actions to control negative environmental impact during the implementation process. Monitoring involves measuring and recording of the impacts and it "provides information on the characteristics and functioning of variables in time and space, and in particular, the occurrence and magnitude of impacts". See also Glasson, Therivel and Chadwick *Environmental Impact Assessment* 168.

²¹⁹ Morrison-Saunders *Environmental Impact Assessment* 69.

²²⁰ Morrison-Saunders *Environmental Impact Assessment* 69.

to know the environmental performance outcomes of the activity. This provides an opportunity for the public to potentially influence the management of the activity.²²¹

e) Auditing

Auditing has different applications. Authors refer to environmental impact auditing to relate to the comparison of the predicted impact in the EIA statement with the impacts that occur after implementation.²²² The auditing can be of both the impact predictions and the mitigation and enhancement measures and the conditions contained in the authorisation.²²³ Therefore, impact auditing is "aimed at reviewing predicted environmental impacts to achieve proper management of risks".²²⁴ Impact auditing applies where uncontrolled impacts arise that were not foreseen during decision-making. Auditing is thus used as a "tool to modify or develop mitigation measures".²²⁵ Auditing also ensures that the developer complies with the conditions set out in the authorisation or the undertakings in the EMPr. The developer or the government can engage an independent auditor to assess compliance.²²⁶

²²¹ Morrison-Saunders *Environmental Impact Assessment* 69.

²²² Glasson, Therivel and Chadwick *Environmental Impact Assessment* 168. In some literature this process is referred to as evaluation.

²²³ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 168.

²²⁴ Wood *Environmental Impact Assessment* 199.

²²⁵ Roux *Comparision Between South African, Namibian and Swaziland's EIA Legislation* 33. The auditing may also be used to determine the accuracy of the impact prediction that were previously made and test the effectiveness of the mitigation measures.

²²⁶ Environmental auditing is defined as a process with which the industries' environmental performance is tested against environmental policies and objectives. See in this regard DEAT 2004 https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf 4. Auditing has other meanings and applications too. For example, in the case of self-regulation, auditing entails that industries carry out auditing on their own accord, while in other instances the competent authority may order an audit to be done where there is suspicion that the conditions of an environmental authorisation are breached or the industry or person do not act in accordance with their EMPr. For instance, in South Africa, a holder of environmental authorisation must monitor and audit compliance with the requirement of the EMPr. See in this regard section 24N (7)(d) of NEMA read with regulation 34 of the GN R982 in GG 38282 of 4 December 2014. See also Craigie, Snijman and Fourie "Dissecting Environmental Compliance" 50-51. Some industries adopt and implement environmental management systems (EMS) that are based on ISO 14001, thus obtaining ISO 14001 certification. ISO 14001 are internationally agreed standards that set out requirements for an EMS. The EMS assists the industries to identify, manage, monitor and control environmental issues. The EMS requires the industries to adopt environmental management instruments such as monitoring and measurements. See Nel and Alberts "Environmental Management and Environmental Law" 25; ISO 2015 <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100371.pdf>.

2.8.9 Discussion

The foregoing generic steps of an EIA demonstrate that, theoretically, an EIA was initially intended to be an anticipatory tool as opposed to being used post commencement of the activity.²²⁷ The description of the scoping stage and what it entails affirms its anticipatory nature because it helps to identify the scope of the studies that are yet to be carried out. The stage of impact prediction and assessment deals with predicting and assessing the potential impact of the proposed activity measures before such impact occurs and identification of the mitigation measures that must be implemented. Therefore, it is submitted that this stage cannot be carried out post commencement of the activity to deal with the actual impact of the activity. However, it is submitted herein that if the listed activity has commenced unlawfully, an EIA may be used to predict the future impact of the activity. Further, this stage of the EIA process may be applicable where the developer seeks to extend the activity and the said extension triggers an EIA.

Public participation that is encapsulated under the stage of EIA reports review is intended to inform the decision-makers whether to authorise the activity or not. Conversely, where the activity has commenced, public participation is likely not to serve its main intended purpose of informing decision-makers whether to authorise the activity or not. However, in the event where the activity has commenced, public participation is likely to merely inform the decision-makers whether to authorise the continuation of the activity or not while environmental degradation may have already occurred. However, public participation in an *ex post facto* environmental authorisation may help influence the decision regarding how the operations will be carried out from the time when an *ex post facto* environmental authorisation is granted.

In relation to decision-making, as it has been alluded to above, the step relates to the determination of whether to authorise the commencement of the activity or not. Put differently, an activity may not commence before the decision is made. Only

²²⁷ The question of whether in practice an EIA can be carried out after commencement of the activity will be determined in the subsequent chapters.

monitoring and auditing can be regarded as steps that are undertaken after the activity or project has commenced. It seems, therefore, that the EIA was meant to produce information that would ultimately assist the decision-makers in determining whether to allow a proposed activity or not. Thus, it was not designed to cater for *ex post facto* environmental authorisation applications.

As it has been alluded to, development or any human activity must be sustainable.²²⁸ Further, an EIA has been described as a tool for sustainable development.²²⁹ In addition to EIAs, there are environmental management principles that underpin sustainable development. These principles include but are not limited to the preventive and precautionary principles.²³⁰ Given the foregoing, it is imperative to discuss environmental authorisation and sustainable development with its subsidiary principles, namely preventive and precautionary principles to determine whether *ex post facto* environmental authorisation gives effect to them.

2.9 Environmental authorisation and environmental management principles

This section first discusses the origins of sustainable development and its subsidiary environmental management principles. This discussion aims to build a framework against which it will be determined whether *ex post facto* environmental authorisation gives effect to sustainable development and its subsidiary principles.

2.9.1 Origin and need for principles

The origins of sustainable development and environmental management principles can be traced to some international instruments adopted due to the concern on the deteriorating environmental base.²³¹ These principles can be found in international instruments such as the *Stockholm Declaration* and the *Rio Declaration*.²³² The

²²⁸ See para 1.1 in Chapter 1 above.

²²⁹ See para 1.4 in Chapter 1 above.

²³⁰ Kohn 2012 SAJELP 5-6; Verschuuren 2006 *PELJ* 225.

²³¹ See Sands *et al Principles of International Environmental Law* 187-188; Hey *International Environmental Law* 52; Stockholm Declaration.

²³² For instance see Hey *International Environmental Law* 52; Verschuuren 2006 *PELJ* 209.

principles are generally "applicable to all members of the international community across the range of activities" that they conduct to authorise and for environmental protection.²³³ Sustainable development and the principles are aimed at, amongst others, guiding the interpretation and application of treaties, customary international law and the regimes developed by private actors.²³⁴ Sustainable development and the principles have to be adopted into the domestic legislation of signatories to these international instruments. Sustainable development is discussed, followed by the environmental management principles

2.9.2 Sustainable development

There is a plethora of literature on sustainable development, and it is regarded as a very contested subject.²³⁵ The inception of the concept of sustainable development can be traced to the Stockholm Declaration.²³⁶ It has been suggested that from the time of the Stockholm Declaration, the notion of sustainable development received considerable recognition from the international

²³³ Sands *et al Principles of International Environmental Law* 187. In the South African context, see Kidd *Environmental Law* 36-37.

²³⁴ Hey *International Environmental Law* 52. For instance, in the context of South Africa, the principles are applicable throughout the Republic to all actions of the state that affect the environment and they guide the decision-making on matters relating to the environment. See also section 2(1) of NEMA; *Fuel Retailers* para 67. The officials are expected to consider these principles in decision-making in the event that they are applicable. See Sands *et al Principles of International Environmental Law* 189.

²³⁵ The concept of sustainable development has been redefined on several occasions and it is used to cover several aspects of society, environment relationships that there are doubts there are "doubts whether anything good can ever be agreed". For detailed discussion on sustainable development, see Mawhinney *Sustainable development* 1; Glazewski "The nature and scope of environmental law" 1-15; Strydom "Essentialia of International law" 61-69; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1988" 139-141; Feris 2010 *PELJ* 78; Couzens 2008 *SAJELP* 31; Du Plessis 2008 *SAJELP* 67-68; Kidd *Environmental Law* 17; Kidd 2008 *SAJELP* 86; Tladi *Sustainable Development in International Law* 9; Field 2006 *SALJ* 411-417; Verschuuren 2006 *PELJ* 209; Bosselmann *The principle of sustainability*; Krämer and Orlando (eds) *Principles of environmental law*; Faure and Partain "Principles of Environmental Law and Environmental Economics"; Verschuuren *Principles of Environmental Law*; Bridger and Luloff 1999 *Journal of Rural Studies* 377. See also *BP Southern Africa* para 144B-D; *Fuel Retailers* para 44-70.

²³⁶ Hey *International Environmental Law* 65; *Fuel Retailers* para 46. See principle 8 and 9 of the *Stockholm Declaration*. Principle 13 of the Stockholm Declaration provides for the relationship between development and environmental protection, especially the need to ensure that the development is compatible with the need to protect and improve the environment for the benefit of their population.

community.²³⁷ Hey²³⁸ contends that the notion of sustainable development was introduced in the international environmental law through the World Commission on Environment and Development titled the *Our Common Future* (Brundtland report). The Brundtland Report defined sustainable development as "development that meets the needs of the present without compromising the ability of the future generation to meet their own needs".²³⁹ Elliott,²⁴⁰ states that the Commission considered environmental concerns arising through the development process from an economic, social and political perspective. According to Kidd,²⁴¹ the notion of sustainable development as provided for by the Brundtland report contains the two concepts of inter-generational equity and intra-generational equity. The principle of integration of environmental protection and development reflects a:

...commitment to integrate environmental considerations into economic and other development, and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations.²⁴²

The principles of integration of environmental protection and socio-economic developments are considered fundamental to the concept of sustainable development.²⁴³ Therefore, the Brundtland Report considered sustainable development as entailing the notion of integration of development, socio-economic and political concerns.²⁴⁴ Therefore, sustainable development has three pillars: social, economic, and environmental concerns that must be considered

²³⁷ *Fuel Retailers* para 46.

²³⁸ Hey *International Environmental Law* 65; Sands *et al Principles of International Environmental Law* 206; Elliott *Sustainable development* 8; Kidd *Environmental Law* 17; Kidd 2008 *SAJELP* 85; *Fuel Retailers* para 47.

²³⁹ *Our Common Future* at 43; Hey *International Environmental Law* 65; Elliott *Sustainable development* 8; Kidd 2008 *SAJELP* 85; *Fuel Retailers* para 47. Sustainable development has also been defined as maintaining development overtime. See in this regard Elliott *Sustainable development* 16.

²⁴⁰ Elliott *Sustainable development* 9. See also Field 2006 *SALJ* 414-417 and Kidd *Environmental Law* 17 who contends that sustainable development provides for or requires amongst others that the "knowledge of the earth's systems, including appreciation of linkages between human economic and social systems and environment and this relates to the principle of integration".

²⁴¹ Kidd 2008 *SAJELP* 86.

²⁴² Sands *et al Principles of International Environmental Law* 263; *Fuel Retailers* para 52.

²⁴³ *Fuel Retailers* para 53.

²⁴⁴ According to Ngcobo J, the "report argued for a merger of environmental and economic consideration in decision-making and urged that the proposition that the goals of economic and social development must be defined in terms of sustainability". See *Fuel Retailers* para 48.

simultaneously.²⁴⁵ Sustainable development "provides a framework for reconciling socio-economic development and environmental protection" and seeks to regulate how socio-economic development happens.²⁴⁶ It is regarded as the notion that provides for the integration of developmental and environmental concerns.²⁴⁷ However, some authors have argued that cultural factors must also form part of the discussions on sustainable development.²⁴⁸ Du Plessis and Feris²⁴⁹ argue that culture and socio-economic factors are embedded in environmental factors that form part of sustainability in the South African context.

In 1992, the Earth Summit was held in Rio De Janeiro and gave birth to the 1992 *Rio Declaration*.²⁵⁰ The *Rio Declaration* establishes general principles of sustainable development and provides a framework for the development of the law of sustainable development.²⁵¹

Principle 3 provides that "the right to development must be fulfilled to equitably meet developmental and environmental needs of present and future generation"²⁵² and principle 4 that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".²⁵³ Therefore, sustainable development is central to the development and environmental protection.²⁵⁴

²⁴⁵ Hey *International Environmental Law* 65; Kidd *Environmental Law* 17; Kidd 2008 *SAJELP* 86; see also the case of Gabčíkovo where the ICJ stated that the "need to reconcile economic development with protection of the environment aptly expressed in the concept of sustainable development". See also Sands *et al Principles of International Environmental Law* 208.

²⁴⁶ *Fuel Retailers* para 42; Couzens 2008 *SAJELP* 42.

²⁴⁷ Hey *International Environmental Law* 65; Sands *et al Principles of International Environmental Law* 215.

²⁴⁸ Du Plessis and Feris 2009 *SAJEP* 165; Du Plessis 2008 *SAJELP* 57. See also section 23(1)(b) of NEMA. Du Plessis and Britz have argued that the four considerations, namely environmental, economic, social and cultural considerations are inter-related and cannot be dealt with separately. They further argued that sustainable development rests on four pillars that must be considered together. Failure to consider one of them may not lead to sustainability. See Du Plessis and Britz 2007 *JSAL* 275 as well as Du Plessis and Rautenbach 2010 *PELJ* 27-31.

²⁴⁹ Du Plessis and Britz 2007 *JSAL* 166.

²⁵⁰ Elliott *Sustainable development* 9. See also Verschuuren 2006 *PELJ* 217.

²⁵¹ *Fuel Retailers* para 49.

²⁵² Principle 3 of Rio Declaration; Hey *International Environmental Law* 65.

²⁵³ Principle 4 of Rio Declaration; Hey *International Environmental Law* 65.

²⁵⁴ *Fuel Retailers* para 50.

The literature suggests that some scholars refrained from defining the concept of sustainable development. On the contrary, they rather identified some elements of sustainable development.²⁵⁵ These elements include, but are not limited to, the following:

- a) integration of environmental protection and economic development (principle of integration);
- b) sustainable utilisation of natural resources;
- c) right to development;
- d) the pursuit of equity in the use and allocation of natural resources (principle of intra-generational equity);
- e) the need to preserve natural resources for the benefit of the present and future generations (principles of inter-generational and intra-generational equity) or stated differently the equitable use of natural resources, which implies that the use by one state must take account of the need of other states; (the principle of equitable use or intra-generational equity);²⁵⁶
- f) the aim of exploiting natural resources in a manner that is "sustainable" "prudent", "rational", "wise", or "appropriate"; (principle of sustainable use);²⁵⁷ and
- g) the need to interpret and apply rules of international law in an integrated systematic manner.²⁵⁸

In 2002, the World Summit on Sustainable Development (WSSD) reaffirmed the notion of sustainable development.²⁵⁹ The WSSD also reiterates the idea that sustainable development has three integrated pillars.²⁶⁰

The notion of sustainable development can be found in South African jurisprudence. According to Ngcobo J, the notion of sustainable development in the South African framework implies "reconciling socio-economic development and environmental

²⁵⁵ *Fuel Retailers* para 51; Couzens 2008 *SAJELP* 41.

²⁵⁶ For further discussions on the inter-generational equity, see Hey *International Environmental Law* 66-68; Sands *et al Principles of International Environmental Law* 207; Kidd *Environmental Law* 17.

²⁵⁷ Sands *et al Principles of International Environmental Law* 207.

²⁵⁸ *Fuel Retailers* para 51; Couzens 2008 *SAJELP* 41.

²⁵⁹ Elliott *Sustainable development* 9; Couzens 2008 *SAJELP* 40; *Fuel Retailers* para 46.

²⁶⁰ See WSSD para 2 and 5; Kidd 2008 *SAJELP* 86.

protection".²⁶¹ Section 24 of the Constitution provides for sustainable development. Section 24 provides that "everyone has the right to have the environment protected, for the benefit of the present and future generations" through "the measures that secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development".²⁶²

Furthermore, NEMA (which gives effect to section 24 of the Constitution) also provides for sustainable development. NEMA defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of the present and future generations".²⁶³ Section 2(4) of NEMA details the sub-principles of sustainable development.²⁶⁴

Section 2(2) provides that "environmental management must place people and their needs at the forefront of its concerns, and serve their physical, psychological, developmental, cultural and social interest equitably".²⁶⁵ Section 2(3) states that the "development must be socially, environmentally and economically sustainable".²⁶⁶ Section 2(4) of NEMA sets out the element of integration and says that "sustainable development requires consideration of all relevant factors".²⁶⁷ The principle requires the consideration, assessment and evaluation of social, economic and

²⁶¹ *Fuel Retailers* para 57; Couzens 2008 *SAJELP* 42; *BP v MEC Agriculture* para 144-147.

²⁶² Section 24 of the Constitution; Glazewski "The Bill of Rights and environmental law" 5-1; Murombo 2008 *PELJ* 112; Nel and Alberts "Environmental Management and Environmental Law" 7-12; Kidd 2008 *SAJELP* 87; Kidd 2002 *SAJELP* 22-26 discusses section 24 in more detail. Due to the scope of this thesis, section 24 will only be discussed to the extent that it provides for sustainable development. For detailed discussion on section 24 of the Constitution, also see Du Plessis 2008 *SAJELP* 58-59.

²⁶³ Section 1 of NEMA; Murombo 2008 *PELJ* 112; Couzens 2008 *SAJELP* 42; Nel and Alberts "Environmental Management and Environmental Law" 7-12; Kidd 2008 *SAJELP* 87 shield as part of the balancing act inherent to the notion. The balancing act relates to the balancing of environmental, social and economic outcomes and benefits. Also see Du Plessis 2008 *SAJELP* 67.

²⁶⁴ The environmental management principles are applicable throughout the Republic to the actions of all organs of state that may significantly affect the environment – section 2(1) NEMA. See Kidd *Environmental Law* 23; Kidd 2008 *SAJELP* 87; Nel and Alberts "Environmental Management and Environmental Law" 10.

²⁶⁵ Section 2(2) of NEMA. Kidd 2008 *SAJELP* 88.

²⁶⁶ Section 2(3) of NEMA.

²⁶⁷ Section 2(4) of NEMA; Murombo 2008 *PELJ* 124; Nel and Alberts "Environmental Management and Environmental Law" 7, 10; Murombo 2008 *PELJ* 107; *Fuel Retailers* paras 93, 113; Du Plessis and Britz 2007 *JSAL* 160.

environmental impacts of activities and that "decisions must be appropriate in light of such consideration and assessment".²⁶⁸ It provides, amongst others, that sustainable development demands that adverse environmental impacts be anticipated and prevented and where they cannot be altogether prevented are minimised or remedied.²⁶⁹ In addition, Ngcobo J²⁷⁰ stated that the concept of sustainable development requires the state to evaluate the social, economic and environmental impacts of their activities.

2.9.3 Nexus between sustainable development and EIA

The EIA has been described as a tool for promoting sustainable development.²⁷¹ Murombo²⁷² argues that there is a trend of developing and implementing laws and policies that provide for EIAs.²⁷³ The notion that an EIA "enhances the prospects for lasting well-being, by introducing a little more rigour, humility and foresight into our decision-making underlie the sustainability assessment".²⁷⁴ The EIA aims to encourage sustainable developments and enhance the effectiveness of resource use and management opportunities.²⁷⁵ Morrison-Sanders²⁷⁶ suggests that the extent to which an EIA delivers sustainable development will be determined by the kinds of development to which an EIA is applied and how the environment is defined.

Seemingly, the two notions of sustainable development and EIA seek to ensure the integration of socio-economic, cultural and environmental factors in the decision-making of whether to grant environmental authorisation. Environmental protection is at the heart of these two concepts because both sustainable development and the EIA determines how a development, activity or project is to be carried out.

²⁶⁸ Section 2(4)(i) of NEMA.

²⁶⁹ Section 2(4)(a)(viii) of NEMA; *HTF Developers* para 24; Nel and Alberts "Environmental Management and Environmental Law" 10.

²⁷⁰ *HTF Developers* para 63. See also Nel and Alberts "Environmental Management and Environmental Law" 10.

²⁷¹ Morrison-Saunders 2014 *Impact Assessment and Project Appraisal* 7; Morrison-Saunders *Environmental Impact Assessment* 17; Kohn 2012 *SAJELP* 5; Zhao 2009 *Natural Resources Journal* 485; Robinson 2006 *SAJELP* 97; Kohn 2012 *SAJELP* 4.

²⁷² Murombo 2008 *PELJ* 107.

²⁷³ Murombo 2008 *PELJ* 107; Wood *Environmental Impact Assessment* 1.

²⁷⁴ Morrison-Saunders *Environmental Impact Assessment* 17.

²⁷⁵ IAIA 2015 https://www.iaia.org/uploads/pdf/principlesEA_1.pdf.

²⁷⁶ Morrison-Saunders *Environmental Impact Assessment* 8.

Sustainable development will also apply throughout the life cycle of the development, activity or project.

As it has been alluded to, sustainable development is underpinned by environmental management like the preventive and the precautionary principle, and it is discussed hereunder, starting with the preventive principle.

2.9.4 Preventive principle

The preventive principle demands that environmental degradation be prevented.²⁷⁷ Also regarded as a sub-principle to sustainable development,²⁷⁸ the preventive principle can be traced to some international instruments such as principle 21 of the *Stockholm Declaration* and principle 2 of the *Rio Declaration*.²⁷⁹ Due to the need for development, it is impossible to prevent all the activities that are likely to pose a significant impact on the environment.²⁸⁰ Therefore, if environmental degradation cannot be averted, the impact must be reduced or controlled. According to Hey,²⁸¹ the preventive principle entails ensuring that all steps that can reasonably be taken to prevent harm are taken. Furthermore, the preventive principle requires that these steps be taken at an early stage, possibly before any activity occurs.²⁸² Therefore, it is submitted that the preventive principle aims to ensure that environmental degradation is prevented, minimised or controlled. The preventive principle has been linked to sustainable development, and it is described as a subsidiary that helps to attain sustainability.²⁸³ Therefore, to identify activities that are likely to

²⁷⁷ See Kidd *Environmental Law* 10; Glazewski "The Nature and Scope of Environmental Law" 1-26; Sands *et al Principles of International Environmental Law* 195, 200-203; Glazewski and Plit 2015 *Stell LR* 194; Freestone "International Fisheries Law Since Rio" 135.

²⁷⁸ For instance, see section 2(4)(1)-(iv) of NEMA.

²⁷⁹ Strydom "Essentialia of International Environmental Law" 75; Sands *et al Principles of International Environmental Law* 200. Principle 2 of *Rio Declaration* requires the prevention of environmental degradation, or reduction, limiting or controlling of activities that might cause or risk such damage.

²⁸⁰ Kidd *Environmental Law* 10 suggests that the preventive principle is not absolute because "pollution cannot be completely prevented as it is an inevitable side effect of the human-life".

²⁸¹ Hey *International Environmental Law* 71. The preventive principle further requires that an activity that may result in environmental pollution be prohibited.

²⁸² Sands *et al Principles of International Environmental Law* 201. This principle is aimed at minimising environmental degradation "by requiring that action be taken at an early stage of the process and if possible," before such degradation has actually occurred.

²⁸³ Kohn 2012 *SAJELP* 4. See also section 2(4)(a)(vii) of NEMA.

cause environmental degradation and means to avoid or minimise such environmental degradation, scientific studies must be carried out. An EIA is one of such tools, as has extensively been discussed in the preceding paragraphs.²⁸⁴

Sands *et al*²⁸⁵ contend that "the preventive principle is supported by an extensive body of domestic environmental protection legislation" that establishes environmental authorisation procedures and the necessity to conduct an EIA for certain proposed activities. The preventive principle also ensures that activities are carried out in a controlled manner, similar to what is required after an EIA has been concluded.

Although it is suggested that the measures to prevent, reduce or control activities must be employed at the earliest stage, the researcher argues that the preventive principle may also be applicable at a later stage. This submission is based on the premise that even though the activity would have commenced and the damage would have occurred, the application of the preventive principle may stop the activities that are causing environmental degradation, thus preventing future environmental degradation. This is more so because the principle is not absolute and does not only require prevention, but where it is impossible, it requires that environmental degradation be minimised.²⁸⁶ Albeit not the original intent, the preventive principle may further enable rehabilitation of the already caused environmental degradation and ensure that the activity is being carried out in a controlled manner not to cause future degradation or pollution.

2.9.5 Precautionary principle

Another sub-principle of sustainable development is the precautionary principle.²⁸⁷ The precautionary principle has been described as an extension of the preventive principle.²⁸⁸ The precautionary principle originated in the German environmental law notion of the *Vorsorgeprinzip*, which can be translated as the principle of

²⁸⁴ See para 2.5 above.

²⁸⁵ Sands *et al Principles of International Environmental Law* 200.

²⁸⁶ Kidd *Environmental Law* 10.

²⁸⁷ Henderson 2001 *SAJELP* 160.

²⁸⁸ Glazewski and Plit 2015 *Stell LR* 194.

"foresight".²⁸⁹ The precautionary principle demands that environmental degradation must be avoided in situations where there is a gap or uncertainty within scientific knowledge.²⁹⁰ According to Du Plessis,²⁹¹ who quoted with approval the *Wingspread Statement on the Precautionary Principle*, in the event where there is a likely "threat of harm to health or environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically". Further, the principle does not necessarily demand the absence of risk. On the contrary, it requires that decision-makers must be confident about the predicted imminent environmental impact before development is authorised. Moreover, decision-makers must recognise that "conclusive proof of harm is not needed for appropriate mitigation measures to be put in place, including the "no-go" option in rare cases".²⁹²

The precautionary principle imposes "enhanced due diligence in situations of scientific uncertainties".²⁹³ The precautionary principle was enunciated in principle 15 of the *Rio Declaration*, which states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.²⁹⁴

²⁸⁹ Kidd *Environmental Law* 9; Glazewski "The Nature and Scope of Environmental Law" 1-25; Cameron "The Precautionary principle" 29-58; McIntyre and Mosedale 1997 *JEL* 221; Sands *et al Principles of International Environmental Law* 218; Glazewski and Plit 2015 *Stell LR* 194; Freestone "The Precautionary Principle" 197. Jalava *et al Impact Assessment and Project Appraisal* 280 defines the precautionary principle as "environmental protection based on precaution although there may be no clear evidence of harm or risk from an activity". The principle helps the "decision-makers to be more sensitive to uncertainties, ambiguities and ignorance related to the development".

²⁹⁰ Kidd *Environmental Law* 9 exemplifies this by a scenario where there is no scientific proof that a particular substance is safe or hazardous nature, then the substance must be treated as hazardous until such time it is proven to be safe. See also Gullette 1998 *AJEM* 146; Glazewski "The Nature and Scope of Environmental Law" 1-25; Sands *et al Principles of International Environmental Law* 208; Scholtz 2002 *SAJELP* 163; See also Du Plessis 2004 *SAJELP* 140.

²⁹¹ Du Plessis 2004 *SAJELP* 140.

²⁹² Du Plessis 2004 *SAJELP* 140.

²⁹³ Hey *International Environmental Law* 72; Morrison-Saunders *Environmental Impact Assessment* 124; Vershuuren 2008 *PELJ* 225; Scholtz 2002 *SAJELP* 163.

²⁹⁴ Kidd *Environmental Law* 9; Glazewski and Plit 2015 *Stell LR* 194; Strydom "Essentialia of International Environmental Law" 78; Hey *International Environmental Law* 73; Sands *et al Principles of International Environmental Law* 218. The principle can now be found in other

According to Morrison-Saunders,²⁹⁵ the precautionary principle dictates that one may proceed with the activity even though there is scientific uncertainty regarding potential adverse impact provided that suitable mitigation measures are in place. Kidd²⁹⁶ states that the precautionary principle is not absolute because every development has a likelihood of causing environmental degradation that is unknown at the time of development. This principle requires the developer to take anticipatory action to avoid future risk, where the occurrence thereof is uncertain.²⁹⁷ The anticipatory action relates to identifying the potential future hazards and the kind of measures needed to manage the causes before the adverse outcome becomes a reality.²⁹⁸ The point at which the action must be taken is a matter of the "foreseeability or likelihood of the harm and its potential gravity".²⁹⁹

In the context of South Africa, the precautionary principle is provided for in section 2(4)(a)(vii) of NEMA, which states that sustainable development requires "a risk-averse and cautious approach must be applied which takes into account the limits of current knowledge about the consequences of decision and actions". Summarily, it is argued herein that the precautionary principle requires that gaps or uncertainties in scientific knowledge must not be used as an excuse not to put measures in place to avert environmental degradation. Furthermore, the precautionary principle demands that mitigation measures be put in place to anticipate environmental degradation emanating from the proposed activity. The precautionary principle is also premised on the anticipation or foresight of likely environmental degradation.

international instruments, national environmental strategies and domestic legislation. For instance, it is also enshrined in the *United Nation's Framework Convention on Climate Change and Convention of Biological Diversity*. The principle has become part of the international customary law.

²⁹⁵ Morrison-Saunders *Environmental Impact Assessment* 125. Morrison-Saunders further argues that the precautionary principle is conceptually difficult to comprehend or convey to others because of the use of multiple negations within the definition.

²⁹⁶ Kidd *Environmental Law* 9.

²⁹⁷ Strydom "Essentialia of International Environmental Law" 78.

²⁹⁸ Strydom "Essentialia of International Environmental Law" 78.

²⁹⁹ Strydom "Essentialia of International Environmental Law" 78.

According to Du Plessis,³⁰⁰ the precautionary principle in the South African context embodies the principle of duty of care enshrined in section 28 of NEMA.³⁰¹ This assertion is based on the judgement of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products*,³⁰² wherein the court ruled that the provincial department should apply the duty of care (which embodies precautionary principle) *ex post facto*.³⁰³ She further argues that "if the duty of care and the precautionary principles are inter-linked, then the duty of care should also apply to all activities before environmental degradation occurs". The researcher agrees with this line of argument and further submits that it should apply *mutatis mutandis* to the preventive principle.

One way of obtaining the necessary information before undertaking an activity or project is the use of an EIA where prescribed. In the next paragraph, the nexus between an environmental authorisation, an EIA and the precautionary principle is established.

It can be inferred that an EIA, an environmental authorisation and the precautionary principle are aimed at enhancing environmental protection. While an EIA is used to predict and assess the likely significant impact of the proposed activity or project to avoid and minimise environmental degradation, the precautionary principle demands that where there is a gap or uncertainties in scientific knowledge, environmental protection must nonetheless be pursued. Both an EIA and the precautionary principle demands the identification and implementation of mitigation measures that may be set out in the environmental authorisation. Therefore, it is submitted that an EIA is, to some extent, linked to the precautionary principle. This view is affirmed by Du Plessis,³⁰⁴ who states that the duty of care (which is linked to precautionary principle) includes the "optimisation of actions and processes to prevent environmental degradation or where it cannot be prevented altogether, to

³⁰⁰ Du Plessis 2004 *SAJELP* 140.

³⁰¹ See also *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products* 2004 2 SA 393 (E).

³⁰² *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products* 2004 2 SA 393 (E).

³⁰³ Du Plessis 2004 *SAJELP* 140.

³⁰⁴ Du Plessis 2004 *SAJELP* 141.

reduce it to acceptable levels further by doing an EIA". She further asserts that "the information obtained from the EIA should be used to cease, modify or control an action, activity or process that causes the pollution or to eliminate or to reduce the source of the pollution or degradation".³⁰⁵ The researcher argues that while an EIA may not be suitable to identify the actual impact of an existing unlawful activity, it may be used to generate information that assists in ensuring that further operations are carried out observing precautionary principle.

Some scholars also support the idea that there is a connection between EIAs and the precautionary principle. Kidd³⁰⁶ suggests that EIA legislation is premised upon the precautionary principle. Jalava *et al*³⁰⁷ share the same view and state that an EIA "reflects the precautionary principle because it seeks to identify and reduce the uncertainties and negative impact associated with development". Furthermore, it has been argued that an "EIA should encourage or demand a precautionary approach to development" where there is a need.³⁰⁸ According to Gullette,³⁰⁹ the precautionary principle and EIAs "are complementary, and they are both means of informing and influencing decision-making". This decision relates to whether the activity is authorised or not.³¹⁰

The *Fuel Retailers* case³¹¹ also reaffirms the nexus between EIAs and the precautionary principle as the court stated that the precautionary principle is essential in view of section 24(7)(b) of NEMA, which demands "the investigation of the potential impact, including cumulative effects, of the proposed activity on the environment and the assessment of the significance of that potential impact".

³⁰⁵ Du Plessis 2004 *SAJELP* 141.

³⁰⁶ Kidd *Environmental Law* 10.

³⁰⁷ Jalava *et al* 2013 *Impact Assessment and Project Appraisal*. The authors continue to argue that EIA is a tool aimed at reducing and/or highlighting the risks related to a proposed activity. The information obtained after carrying out an EIA increases the knowledge about an activity and its possible impact. The information obtained minimises the uncertainty surrounding the proposed activity and helps in risk evaluation.

³⁰⁸ Jalava *et al* 2013 *Impact Assessment and Project Appraisal* 280.

³⁰⁹ Gullette 1998 *AJEM* 148.

³¹⁰ Gullette 1998 *AJEM* 148. However, it is argued that argues that the two differs conceptually in that EIA is a procedure carried out before decision-making and the precautionary principle is a policy or potentially a rule to inform the decision-making.

³¹¹ *Fuel Retailers* para 81; Glazewski "The Nature and Scope of Environmental Law" 1-26.

Although sustainable development and its subsidiary principles of preventive and precautionary principles have been linked to EIAs and subsequently environmental authorisations, it is argued that sustainable development and environmental management principles will also apply to *ex post facto* environmental authorisations. This is based on the premise that although an EIA may not identify the actual impact, it can help predict the future impact of unlawful activity, thus ensuring prevention and mitigation of future environmental harm. Therefore, it is argued that this line of argument refutes the critique that *ex post facto* environmental authorisations undermine and make a mockery of sustainable development and environmental management principles.

Although not part of South African law, the emerging international environmental law principle of non-regression will be discussed in the next paragraph.

2.10 Principle of non-regression

2.10.1 Recognition of the principle of non-regression

As been stated before, the principle of non-regression is an emerging principle in international environmental law.³¹² The origins of this principle can be traced to international human rights law.³¹³ In international human rights law, the principle of non-regression is reflected in "the idea that once a human right is recognised, it cannot be restrained, destroyed or repealed".³¹⁴ The principle of non-regression manifests in the context of social, economic and cultural rights wherein states are

³¹² Prieur 2012 *SAPIENS* 54; SANDRP 2014 [https://sandrp.in/category/environment-impact-assessment/SANDRP 2014](https://sandrp.in/category/environment-impact-assessment/SANDRP%202014) <https://sandrp.in/category/environment-impact-assessment/>; Prieur 2012 *SAPIENS* 53; APEEL 2017 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf 37; Kotzé and French 2018 *Int Environ Agreem-P* 813.

³¹³ Prieur 2012 *SAPIENS* 53. See SANDRP 2014 [https://sandrp.in/category/environment-impact-assessment/SANDRP 2014](https://sandrp.in/category/environment-impact-assessment/SANDRP%202014) <https://sandrp.in/category/environment-impact-assessment/>. Paterson 2017 *SAJELP* 152. For instance, the UN Committee for Economic Social and Cultural Rights (CESCR) in its General Comment 3 of December 14 1990 condemned "any deliberately retrogressive measures". See in this regard Prieur 2012 *SAPIENS* 54; Article 30 of the *Universal Declaration of Human Rights* 1948 and Articles 17 and 53 of the *European Convention on Human Rights* 1950.

³¹⁴ Prieur 2012 *SAPIENS* 54.

required to ensure "the progressive realisation of these rights".³¹⁵ Conversely, this means that states are not to take regressive measures because this would be tantamount to deviating from their obligation to ensure the progressive realisation of those rights.³¹⁶

The principle of non-regression has also surfaced in other fields of law, such as labour law and investment law. In the context of labour law, the principle of non-regression relates to reducing the general level of protection afforded to workers.³¹⁷ This can be exemplified by several EU Directives that prohibit retrogression on the protection of workers.³¹⁸ For instance, Council Directive 2000/79/EC of 27 November 2000 states that the implementation of the Directive "shall under no circumstances constitute sufficient grounds for justifying a reduction in the general level of protection of workers" in matters covered by the Directive. Therefore, the principle of non-regression in the context of labour law relates to the prohibition of lowering the standard of protection of workers.

In the context of international investment law, the principle of non-regression emerged in the *North America Free Trade Agreement* (NAFTA), which came into effect in 1994.³¹⁹ Although NAFTA deals with the free trade between Canada, Mexico and the USA, it is also the first international instrument to provide for the principle of non-regression on environmental matters. In terms of NAFTA, the Parties thereto undertake to strengthen the enforcement of environmental law.³²⁰ The Parties

³¹⁵ Shenoy 2018 <https://www.barandbench.com/columns/the-principle-non-regression-indian-environmental-jurisprudence>.

³¹⁶ IUCN 2010 <https://www.iucn.org/content/non-regression-principle-knowledge-forum>.

³¹⁷ See the *Community Charter of the Charter of the Fundamental Social Rights of Workers* (1989). The introductory paragraph states that "whereas the solemn proclamation of fundamental social rights at the European Community level may not, when implemented, provide grounds for any retrogression compared with the situation currently existing in each Member States". See also Corazza 2011 *European Law Journal* 385.

³¹⁸ Council Directive 89/391/EEC of 12 June 1989; Article 18, § 3 of the Council Directive 93/104/EC of 23 November 1993; Council Directive 94/33/EC of 22 June 1994, Article 16; Council Directive 96/34/EC of 3 June 1996; Article 2, § 3 of the Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000; Article 6, §2 of the Council Directive 2000/43/EC of 29 June 2000; Article 8, § 2 of the Council Directive 2000/78/EC of 27 November 2000; Article 2, para 2 of the Council Directive 2000/79/EC of 27 November 2000.

³¹⁹ *North American Free Trade Agreement* 1992. NAFTA is a free trade agreement between Canada, Mexico and the USA that entered into force in 1994.

³²⁰ The Preamble of NAFTA.

consider it inappropriate to encourage investment by lowering the domestic "health, safety or environmental measure".³²¹ Furthermore, NAFTA prohibits the Parties to waive or derogate from or offer to waive or derogate from environmental measures to encourage investment.³²² Therefore, NAFTA demands that the Parties must not regress on the standard of environmental protection for the benefit of the investment.

Alongside NAFTA, the Parties therein entered into another agreement that specifically addressed environmental matters. The *North American Agreement on Environmental Cooperation*, 1993 (NAAEC) also provides for the non-regression principle.³²³ Article 3 of NAAEC mandates the Parties to "ensure that their laws and regulations provide high levels of environmental protection, and they must strive to continue to improve those laws and regulations".³²⁴ Therefore, it can safely be inferred that Article 3 of the NAAEC demands continuous improvement and strengthening of environmental protection, thus prohibiting non-regression. Similar to NAFTA, the NAAEC does not use the term non-regression but implies the duty not to take regressive measures on environmental laws.

Albeit not in express terms, the principle of non-regression resurfaced in the Rio+20 outcome document (*The Future We Want*) in 2012. States recognised that it was critically important that they do not "backtrack" from the commitment to the outcome of the United Nations Conference on Environment and Development (UNCED).³²⁵ While the Rio+20 does not expressly mention the non-regression principle, it is argued that the phrase "do not backtrack" in paragraph 20 thereof

³²¹ Article 1114 of the *North American Free Trade Agreement* 1992.

³²² Article 1114 of the *North American Free Trade Agreement* 1992; Mitchell and Munro 2019 *Georgetown JIL* 7.

³²³ *North American Agreement on Environmental Cooperation*, 1993. NAAEC is an agreement between Canada, the United Mexican States and the United States of America. The objectives of NAAEC amongst others, are to "foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generation" and to "strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices". See Article 1 of the NAAEC.

³²⁴ Article 3 of the *North American Agreement on Environmental Cooperation*, 1993.

³²⁵ Anon 2015 <https://intlawspot.wordpress.com/2015/08/24/understanding-the-notion-of-non-regression/>. See also UN date unknown <https://sustainabledevelopment.un.org/futurewewant.html>; see also SANDRP 2014 <https://sandrp.in/category/environment-impact-assessment/>; Prieur 2012 *SAPIENS* 53.

carries the connotation of non-regression.³²⁶ Powers³²⁷ submits that although the principle of non-regression did not become part of *The Future We Want*, it received recognition and is likely to be considered in future forums.³²⁸

Alongside Rio+20, UNEP organised the UNEP World Congress on Justice, Governance and Law for Environmental Sustainability, which produced a document entitled the *Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability*.³²⁹ The Congress recognised the principle of non-regression and described it as prohibiting the frivolous or unwarranted overturning of settled environmental laws and noted that the principle should be developed.³³⁰ Seemingly, the principle of non-regression does not prohibit the amendment or repeal of environmental laws and policies. However, such changes must be warranted and must not lower the standards of protection.

In 2012, the World Conservation Congress pleaded with states to recognise the principle of non-regression in their environmental policy and domestic law because it is necessary to achieve sustainable development objectives.³³¹ Furthermore, Congress requested the International Union for Conservation of Nature (IUCN) World Commission on Environmental Law to continue studying and promoting the principle of non-regression in environmental policy and law in international law, regional law and national law.³³² However, this motion was rejected.

³²⁶ Anon 2015 <https://intlawspot.wordpress.com/2015/08/24/understanding-the-notion-of-non-regression>. See also *North American Agreement on Environmental Cooperation*, 1994.

³²⁷ Powers 2012 *Transnat'l Evtl L* 411.

³²⁸ Powers 2012 *Transnat'l Evtl L* 411.

³²⁹ Powers 2012 *Transnat'l Evtl L* 412; UNEP 2012 <https://wedocs.unep.org/handle/20.500.11822/9969> 46. UNEP organised the World Congress on Justice, Governance and Law for Environmental Sustainability. The Congress was attended by the world's Chief Justices, Attorneys General and Auditors General who contributed to the debates on the environment. The document they issued therefore has no legal status as such but can be used in a persuasive manner.

³³⁰ UNEP 2012 <https://wedocs.unep.org/handle/20.500.11822/9969> 9.

³³¹ APEEL 2017 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf 38; WCC 2012 https://globalpact.informea.org/pdf.js/web/viewer.html?file=/sites/default/files/documents/WCC_2012_RES_128_EN.pdf.

³³² See in this regard WCC 2012 https://globalpact.informea.org/pdf.js/web/viewer.html?file=/sites/default/files/documents/WCC_2012_RES_128_EN.pdf.

2.10.2 Principle of non-regression and sustainable development

The World Conservation Congress noted that there is a nexus between the principle of non-regression and sustainable development in that the former leads to sustainability. Prieur³³³ affirms the nexus between the principle of non-regression and sustainable development and states that sustainable development requires that "the right to life and health of future generations must not be overlooked" and prohibits adopting measures that would be detrimental to such rights. It has been argued that minimising or repealing laws for environmental protection is likely to lead to a "more degraded environment for future generations".³³⁴ Prieur³³⁵ further contends that the principle of sustainable development can now be viewed in the environmental area as supporting the principle of non-regression "since it prohibits subjecting future generations to a law that would reduce environmental protection". Therefore, it can be argued that in addition to the preventive and precautionary principle, the principle of non-regression also underpins sustainable development, although not yet formally recognised as such.

The principle of non-regression was also included in the draft *Global Pact for the Environment* (Pact) in 2017 in France.³³⁶ Kotzé and French³³⁷ argue that the principle of non-regression is potentially "an impactful and useful provision"; it is, however, new in international environmental law. They suggest that the Pact could

³³³ Prieur 2012 *SAPIENS* 54.

³³⁴ Prieur 2012 *SAPIENS* 54.

³³⁵ Prieur 2012 *SAPIENS* 54.

³³⁶ Kotzé and French 2018 *Int Environ Agreem-P* 812. The Pact never came into force. The Pact had three objectives. Firstly, the Pact was aimed to be a globally binding environmental instrument. Secondly, the Pact was meant to enshrine all major principles of international environmental law in one document. These principles include, but are not limited to, long-standing principles such as preventive principle, the precautionary principle and sustainable development and the newly emerging principles like "resilience, non-regression and the role of non-state actors". Thirdly, the Pact was aimed at "developing the law progressively to provide a globally recognised right to live in an ecologically sound environment". The principle of non-regression was enshrined in draft article 17 where the parties should "refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law". See in this regard Kotzé and French 2018 *Int Environ Agreem-P* 812.

³³⁷ Kotzé and French 2018 *Int Environ Agreem-P* 812.

have taken the principle further to provide for "the duty to improve the level of environmental protection offered by current laws".³³⁸

Against this backdrop, it is evident that the principle of non-regression is developing towards a recognised principle in international environmental law. Although different international instruments do not expressly use the term "non-regression", the principle has often been read into or inferred from the usage of expressions such as "backtrack", "progressive" and "waive". Conceptually, the principle of non-regression means that environmental laws and policies must not be repealed or amended to lower the standard of environmental protection. Put differently, the principle of non-regression in environmental law means that there should not be a retreat or backwards movement with regard to the level of protection afforded to the environment.³³⁹

Paterson³⁴⁰ argues that the principle of non-regression also requires the implementation of environmental legislation in a way that does not compromise the level of protection of the environment. The principle of non-regression is aimed at preventing measures that "rollback the existing levels of environmental protection".³⁴¹ Seemingly, the principle of non-regression focuses on preventing rollback and requires continued advancement in environmental laws and commitments.

Prieur³⁴² argues that regression takes many forms, and it is seldom explicit due to the lack of courage of governments to openly announce backtracking on environmental protection.³⁴³ Regression may manifest by way of declining to comply with the universal environmental treaties by states at the international level.³⁴⁴ With regard to national law, regression happens when the procedures are changed to

³³⁸ Kotzé and French 2018 *Int Environ Agreem-P* 831.

³³⁹ APEEL 2017 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf 37.

³⁴⁰ Paterson 2017 *SAJELP* 151.

³⁴¹ Anon 2015 <https://intlawspot.wordpress.com/2015/08/24/understanding-the-notion-of-non-regression> - see if you can also find academic articles to support your viewpoints.

³⁴² Prieur 2012 *SAPIENS* 53.

³⁴³ Paterson 2017 *SAJELP* 151.

³⁴⁴ Prieur 2012 *SAPIENS* 54.

curb the rights of the people under the guise of simplifying them or the impact of activities on the environment.³⁴⁵ Further, it manifests by way of repealing or amending environmental laws resulting in reduced "means of protection or rendering them ineffective".³⁴⁶ Paterson³⁴⁷ suggests that the form of regression can seek to undermine both substantive and procedural aspects of environmental law. Regression may manifest in applying or implementing the environmental law where the decision-making undermines norms, standards, objectives, and commitments outlined in current law.³⁴⁸ As such, the principle of non-regression is not only limited to the amendment or repealing of environmental law but extend to how the environmental law is implemented, particularly in decision-making.

Although the principle of non-regression is not included in the South African environmental framework legislation, some scholars like Paterson³⁴⁹ have suggested reading the principle into how the environmental measures are applied in South Africa. In this view, it becomes imperative to determine whether the insertion of section 24G of NEMA and its application does not amount to regression. This issue will be considered in the subsequent chapters.

In view of the foregoing discussion, the principle of non-regression for this study is regarded as a subsidiary principle to sustainable development that prohibits backtracking or lowering the standard of environmental protection by (a) repealing laws that require environmental protection, (b) adopting measures that are detrimental to health and life of the present and the future generations, and (c) implementing the law in a manner that compromises environmental protection and (d) requires the progressive upholding of the current standard of environmental protection.

³⁴⁵ Prieur 2012 *SAPIENS* 54.

³⁴⁶ Prieur 2012 *SAPIENS* 54. For instance, this may be observed where activities are permitted in protected areas. This can be exemplified by the case of *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* (50779/017) [2018] ZAGPPHC 807 (8 November 2018) where the Ministers of Environmental Affairs and Mineral Resources permitted the developer (Atha-Africa Ventures (Pty) Ltd) to mine within the protected area. For detailed discussion on this matter, see Vinti 2019 *SAJHR* 311-322.

³⁴⁷ Paterson 2017 *SAJELP* 152.

³⁴⁸ Paterson 2017 *SAJELP* 152.

³⁴⁹ Paterson 2017 *SAJELP* 152.

The principle of non-regression has received some criticism. Firstly, it has been argued that the principle of non-regression may be seen as inconsistent with the basic constitutional concept of the mutability of legislation.³⁵⁰ That is, the law should be amended from time to time or even repealed, which is fundamental to the rule of law.³⁵¹ This argument is refutable because the principle of non-regression does not prohibit the amendment or repealing of the law. However, the principle demands that when such an amendment or repeal is effected, it must not lower the standard of environmental protection. Therefore, an amendment or repealing of environmental laws and policies may be done provided that it is aimed at strengthening environmental protection. The second criticism relates to the disagreement about whether a particular change of the law is progressive or regressive.³⁵² However, it is challenging to determine whether the amendment or repeal of the environmental law is progressive or regressive. Given the foregoing, it is imperative to determine whether there is a nexus between the principle of non-regression, EIAs and environmental authorisations.

2.10.3 Principle of non-regression, EIA and environmental authorisation

The literature has highlighted that the EIA and environmental authorisations aim to ensure that environmental degradation is prevented, minimised or mitigated, thereby predicting, assessing, and evaluating the significant impact of the proposed activity on the environment and regulating how activities must be carried out. The literature further argued that an EIA is a tool for sustainable development, while the principle of non-regression also relates to sustainable development. Therefore, an

³⁵⁰ APEEL 2017 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf 38.

³⁵¹ APEEL 2017 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf 38.

³⁵² APEEL 2017 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf 38. For example, recently, there has been strong disagreement about the use of biodiversity and carbon offsets. Some people view offsets as "means to efficiently achieve environmental gains, while others view them as problematic in providing a loophole for environmentally pernicious development". See in this regard Government of South Africa 2015 https://www.environment.gov.za/sites/default/files/docs/discussiondocument_environmentalofsets.pdf. In the South African context, see the Biodiversity offsets in GN R276 in GG 40733 of 31 March 2017 and the Air Quality offsets in GN R597 in GG 38894 of 26 June 2018 as examples the introduction of such offsets. The discussion of offsets does not form part of this study.

EIA, environmental authorisation and the principle of non-regression seem to pursue sustainability. The application of the principle of non-regression in the context of the EIAs implies that the international environmental law instruments that provide for the EIAs must not be amended or repealed to lower the standard of environmental protection sought to be achieved through the objectives of the EIA. Similarly, the environmental laws providing for an EIA must not be amended or repealed to lower the standard of environmental protection at a domestic level. The said amendment or repeal may be in the context of public participation procedures, the procedures of prediction assessment and evaluation of the potential impact and the decision-making and the simplification of other procedures or limiting the scope of scientific studies resulting in lowering the standard of EIAs.

2.10.4 Principle of non-regression and ex post facto environmental authorisation

It is necessary to consider at least from a theoretical perspective whether in general, an *ex post facto* environmental authorisation interferes with or undermines the principle of non-regression. Summarily, the literature overview indicates that an environmental authorisation is required for certain activities that in future are likely to have a significant impact on the environment. An EIA (which is proactive and anticipatory) is used to assess the impact of the proposed activity to inform decision-making. Environmental management principles underpin the decision-making process. However, where an applicant did not apply for an environmental authorisation, scientific studies may be carried out after the commencement, and an *ex post facto* environmental authorisation may be issued.³⁵³ It was established that the *ex post facto* environmental authorisation aims to restore compliance and bring unlawful activities into the regulatory loop.

The *ex post facto* environmental authorisation ensures that environmental degradation is ceased, prevented or mitigated and provides for the ongoing monitoring of the effects of the existing project. At the same time, the principle of non-regression seeks to ensure that the current environmental protection is not

³⁵³ See para 2.4 above.

compromised. The environmental management principles guide the decision-making on whether to grant *ex post facto* environmental authorisation. Therefore, *ex post facto* environmental authorisation does not undermine the environmental management principles.

It may be argued that *ex post facto* environmental authorisation is (a) an alternative to the environmental authorisation, (b) it presents an opportunity for environmental law contraveners to remedy the environmental degradation they might have caused and (c) it is not introduced to reduce the standard of environmental protection.

If in the case of (a) and (b) similar standards and procedures are introduced as in the case of an ordinary environmental authorisation, it may be argued that an *ex post facto* environmental authorisation does not lower the standard of environmental protection. However, if a lower standard or less stringent procedures apply, it could be argued that the *ex post facto* authorisation lowers the existing environmental standards and that it infringes the principle of non-regression. The literature indicates that the *ex post facto* authorisation is riddled with some unintended challenges, such as the likelihood of the process being abused.³⁵⁴ The researcher argues that if the process of applying for and granting *ex post facto* environmental authorisation is not appropriately regulated, it may be a regressive measure. This may occur where an *ex post facto* environmental authorisation may be seen to be an alternative to environmental authorisation or offers developers an opportunity to elect between the normal environmental authorisation and *ex post facto* environmental authorisation. Furthermore, suppose the process and procedure followed in granting *ex post facto* environmental authorisation are watered down from what a normal environmental authorisation would require, for example, public participation and assessment procedures, it could be regarded as a regressive measure. Therefore, in theory, the introduction of an *ex post facto* environmental authorisation in itself may not necessarily be a regressive measure, but the implementation and application of the legislation may result in it being regarded as a retrogressive measure.

³⁵⁴ See para 2.4.3 above.

In terms of (c), it is argued that if the preventive and precautionary principles can apply *ex post facto* as per the *Hichange's* judgement³⁵⁵ to address the environmental degradation, then the same argument may apply *mutatis mutandis* to the *ex post facto* environmental authorisation. As such, an *ex post facto* environmental authorisation ensures that where environmental protection has been compromised, the situation is remedied in part. If that is the case, then it can be argued that an *ex post facto* environmental authorisation does not transgress the principle of non-regression. The application of the *ex post facto* environmental consideration and whether the current practice in South Africa³⁵⁶ can be regarded as a regressive measure will be considered in the subsequent chapters.

While it has been established that an environmental authorisation may be issued following the carrying out of an EIA, it, however, remains questionable whether an EIA, owing to its proactive and anticipatory nature is a suitable tool to apply for an *ex post facto* environmental authorisation. The above discussion highlights that an EIA may not be suitable to deal with the actual impact. However, it may be used to predict and assess the future impact of the unlawful activity, consider alternatives and mitigation measures. Therefore, it is imperative to determine what other alternative tools may be suitable to use in an application for an *ex post facto* environmental authorisation to supplement an EIA.

2.11 Alternative environmental management tools

Some environmental assessment and management tools work independently from EIA but built upon the "think before you act" principle and engages the inputs of the stakeholders or I&APs in the planning, design and implementation of the development activity or project. These instruments could be considered alternatives

³⁵⁵ *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products* 2004 2 SA 393 (E). The court ordered the provincial department to enforce the duty of care, which embodies preventive principle retrospectively. See para 2.9.5 above.

³⁵⁶ The standard of environmental protection in South Africa can be derived from section 24 of the Constitution, section 2 NEMA principles, Chapter 5 of NEMA but to mention a few and these will be discussed in Chapter 3. September *A critical analysis 2* raised concerns in her study, albeit not in explicit terms of whether section 24G in South African context does not amount to non-regression. She posed a question of what is the point of having strong and progressive environmental legislation if it contains the very seed of its own demise.

to EIAs, especially when *ex post facto* environmental authorisation is required. This paragraph discusses some of the possible tools (environmental risk management and incident management, environmental audits and duty of care) that could be proposed as alternatives to an EIA but does not exclude that there might be other more suitable tools.

2.11.1 Environmental risk assessment and incident management

To understand environmental risk assessment (ERA), one must first understand risk assessment. Risk assessment has been defined as:

[A] process where the hazards and exposures are identified, the risk potential of these hazards and exposures are analysed and estimated, and decision as to the acceptability of these risks to people, business or the environment is made.³⁵⁷

An ERA is a generic method of assessing any situation that could involve harm and uncertainty and it applies whenever there is a chance of harm occurring.³⁵⁸ It is considered a tool to assess, evaluate and manage the adverse environmental impact that poses a hazard to human or environmental health or safety.³⁵⁹ An ERA "takes into account the different plausible scenarios following human activities," assesses the probabilities of different results, and the significance of these impacts "while considering the uncertainty involved".³⁶⁰ The above definition adopts a wider approach and does not limit an ERA only to adverse impacts but looks into probabilities of value such as opportunities. The main objective of an ERA is to "provide information on the optimal management decisions under uncertainty,

³⁵⁷ DEAT 2006 https://www.environment.gov.za/sites/default/files/docs/series23_risk_management.pdf 10. The risk assessment has also been defined as "the identification of undesired events, their causes and analysing their likelihood and potential consequences considering existing control measures - in order to make a valued judgement as to the risk's acceptability". See also regulation 5(2) of the GN R692 in GG 22506 of the 30 July 2001, which defined risk assessment as "process of collecting, organising, analysing, interpreting, communicating and implementing information in order to identify the probable frequency, magnitude and nature of any major incident that could occur at a major hazard installation, and the measures required to remove, reduce or control the potential causes of such an incident." See in this regard Glazewski and Brownlie "Environmental assessment" 10-10.

³⁵⁸ DEAT 2006 https://www.environment.gov.za/sites/default/files/docs/series23_risk_management.pdf 10.

³⁵⁹ Glazewski and Brownlie "Environmental Assessment" 10-10.

³⁶⁰ Kaikkonen *et al* 2018 *Marine Pollution Bulletin* 1192.

making it a valuable tool in data-poor situations".³⁶¹ An ERA is usually followed by the drafting of an environmental risk strategy.

Similar to EIAs, an ERA and its report or risk strategy can be used in decision-making to determine environmental harm and opportunities.³⁶² Risk assessment tools and techniques may be used where the activity has taken place, while the environmental impacts have not yet materialised, or when an activity has not yet commenced, or when the primary impacts have occurred (the incident), while secondary or tertiary (knock-on) impacts are not known.³⁶³ Risk assessments may then be used to determine the likelihood and severity of an environmental impact that may occur in future.³⁶⁴

The difference between an EIA and a risk assessment is that the former activity should not have commenced when the EIA is conducted, while a risk assessment may be done after an activity has commenced, but the impacts have not yet materialised or are not known. Therefore, in contrast to an EIA tool that is applied to the potential environmental consequences of a proposed future course of action (a predictive tool), the risk assessment can be successfully applied to existing operations and impacts.³⁶⁵ The then DEAT proposed that such an assessment can be integrated into EIA procedures or EIA procedures, for example, public participation could be made applicable to it.³⁶⁶ However, it must also be noted that

³⁶¹ Kaikkonen *et al* 2018 *Marine Pollution Bulletin* 1192.

³⁶² See Glazewski and Brownlie "Environmental Assessment" 10-10. The ERA may also be used to manage the adverse impact that a risk poses to human or environmental health. See also Sands *et al Principles of International Environmental Law* 616-617; Morrison-Saunders *Environmental Impact Assessment* 57.

³⁶³ See in this regard DEAT 2006 https://www.environment.gov.za/sites/default/files/docs/series23_risk_management.pdf 10.

³⁶⁴ The DEA 2014 <https://cer.org.za/wp-content/uploads/2016/10/ENVIRONMENTAL-IMPACT-ASSESSMENT-AND-MANAGEMENT-STRATEGY-1.pdf> 139 suggested that risk assessments should be used to determine an appropriate tool when scale and sensitivity of the receiving environment alone do not provide a reasonable choice of tool. EIAMS noted that although EIA is the most commonly used tool in South Africa, it is not always an ideal tool for all situations. Therefore, progression of environmental management tools is required. The progression means that the tools must supplement one another to provide information that may not necessarily be provided by an EIA. See DEA 2014 <https://cer.org.za/wp-content/uploads/2016/10/ENVIRONMENTAL-IMPACT-ASSESSMENT-AND-MANAGEMENT-STRATEGY-1.pdf> 130.

³⁶⁵ DEAT 2006 https://www.environment.gov.za/sites/default/files/docs/series23_risk_management.pdf 19.

³⁶⁶ DEAT 2002 https://www.environment.gov.za/sites/default/files/docs/series6_ecological_riskassessment.pdf 5-6. Also see Claassen *et al* 2001 <http://www.wrc.org.za/wp-content/uploads/>

a "risk assessment is a basis for judgments about impacts but not for judgments on the acceptability of impacts. Decision-makers must choose a desired or acceptable level of risk against which the existing risk can be measured".³⁶⁷

Should the impacts or some of the impacts have happened, risk assessments are not the ideal tool to address the immediate consequences of the incident (except if there are still unforeseen consequences). An incident investigation and report may be more appropriate. Like EIAs, risk assessments are forward-looking at what can happen to the receptor, while an incident reports review focuses on events that have happened and where the impacts have occurred. In the case of unlawful activity, therefore, the incident (the construction etc) may have caused ecological degradation or pollution, and these impacts have to be addressed immediately, and measures should be taken to ensure that they do not happen again. Once an incident has happened or environmental degradation or pollution has occurred, then it is an incident. The immediate action to prevent further harm is generally referred to as a correction. This then requires the determination of the root causes of the incident to determine the steps to prevent it from happening again. These actions following a root cause analysis are generally referred to as corrective action, and the focus of corrective action is to prevent such an unwanted occurrence from happening again. In this regard, health and safety incident management may provide answers to determine the methods and techniques to investigate environmental incidents caused by unlawful activities.³⁶⁸

The investigation methods or techniques integrate and supplement pre-existing processes such as risk assessment, management and audit.³⁶⁹ For instance, the Sequential Timed Events Plotting is a technique that can be used to show the basic

mdocs/ TT-151-01.pdf; Nel *et al* 2007 <https://cer.org.za/wp-content/uploads/2016/08/Ecosystem-Approach-to-Fisheries.pdf>.

³⁶⁷ See in this regard Ministry of Environment 2000 https://www.https://coursys.sfu.ca/2017su-ensc-406-d1/pages/Risk_Assessment/view where it is further stated that "ERA differs from EIA by focusing first on environmental conditions, then on the factors causing changes to these conditions. EIA generally focuses on a specific project and the nature of its impacts on the environment". This is referred to as risk appetite. For some risk appetite is defined by means of published exposure limits but for others the appetite must be determined.

³⁶⁸ Sothivanan and Siddiqui 2015 *IJSRD* 680-683.

³⁶⁹ Sothivanan and Siddiqui 2015 *IJSRD* 680.

timeline of an incident.³⁷⁰ This technique focuses primarily on events that occurred as opposed to their causes. Another technique, the Systematic Cause Analysis Technique, is used for occupational health and safety incidents investigations.³⁷¹ This technique requires the investigators to look into the roots of the cause of the incident. Incident investigation could also be assessed using the technique, namely the Management Oversight and Risk Tree.³⁷² This technique helps in determining the causes and contributing factors to major accidents. These investigation methods or techniques may be incorporated into or be used to supplement other tools such as risk assessment in dealing with unlawful activities. It is important to note that these techniques are but examples of the many techniques that exist in the case of incident management. The best technique will have to be selected and adapted in the case of *ex post facto* environmental authorisations.

It seems that an ERA and incident management can introduce some of the procedures based on the EIA procedures that might serve as alternative tools to determine the current and potential impacts of existing projects or could complement the EIA process.³⁷³ However, it must be noted that the environmental risk assessment for *ex post facto* authorisations will have to be developed with stakeholders to ensure their buy-in.³⁷⁴

2.11.2 Environmental audit

Once an environmental risk assessment has been undertaken and a risk management strategy has been drafted, the activities must be monitored and

³⁷⁰ EHS Insight 2019 <https://www.ehsinsight.com/blog/incident-investigation-methodologies-and-models>; Sothivanan and Siddiqui 2015 *IJSRD* 680-683. See also Herrera and Woltjer "Comparing a multi-linear (STEP) and systemic (FRAM) method of accident analysis" 19-26; Katsakiori, Sakellaropoulos and Manatakis 2009 *Safety Science* 1007-1008.

³⁷¹ EHS Insight 2019 <https://www.ehsinsight.com/blog/incident-investigation-methodologies-and-models>; Katsakiori, Sakellaropoulos and Manatakis 2009 *Safety Science* 1009.

³⁷² EHS Insight 2019 <https://www.ehsinsight.com/blog/incident-investigation-methodologies-and-models>; Katsakiori, Sakellaropoulos and Manatakis 2009 *Safety Science* 1008.

³⁷³ Glazewski and Brownlie "Environmental assessment" 10-10; DEAT 2006 https://www.environment.gov.za/sites/default/files/docs/series6_ecological_riskassessment.pdf 23.

³⁷⁴ Environmental risk assessment entails the application of specific techniques and procedures and therefore an informed adapted risk assessment will have to be developed for *ex post facto* authorisations. As this does not entail a legal study, this study does not make specific recommendations in this regard.

audited. The same can be said of the EMPr that is to be compiled for an EIA. Environmental audits are one such environmental management tool.³⁷⁵ An environmental audit bears different meanings depending on the context in which it is used. An organisation can undertake an audit voluntarily or in terms of its procedures and guidelines or the government may force such an organisation to undertake an audit as part of the compliance and enforcement process.³⁷⁶

The International Chamber of Commerce (ICC) defined an environmental audit as:

A management tool comprising systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing with the aim of helping to safeguard the environment by facilitating management control of practices and assessing compliance with company policies, which would include regulatory requirements and standards applicable.³⁷⁷

The International Organisation of Standardization (ISO) defines an environmental audit as "a systematic, documented verification process of objectively obtaining and evaluating audit evidence to determine whether specified environmental activities, events, conditions, management systems, or information about these matters conform with audit criteria, and communicating the results of this process".³⁷⁸

Eswatini's EAARR defines an environmental audit as identifying and evaluating the environmental impacts of existing projects,³⁷⁹ while the USA Environmental Protection Agency (EPA) defines it as the "systematic, documented, periodic, and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements".³⁸⁰ An EIA is a proactive and anticipatory tool,

³⁷⁵ Smith *et al* 2020 *Impact Assessment and Project Appraisal* 1-13; Ingole 2012 *IJSID* 152. For detailed discussion on the history of the environmental audits, see Glasson, Therivel and Chadwick *Environmental Impact Assessment* 335; Irwansyah, Hakim and Yunus 2017 *Bus Manag Rev* 228; Maltby 1995 *Managerial Auditing Journal* 16; Ljubisavljević, Ljubisavljević and Jovanović 2017 *Economic Themes* 523; Shin and Welch "Environmental Auditing and Compliance" 354.

³⁷⁶ See for example, Reg 34 GN R982 in GG 38282 of 4 December 2014 as amended.

³⁷⁷ Dagg 2005 https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm. See also Maltby 1995 *Managerial Auditing Journal* 16; McCourt 1995 *Civil Engineering* 23; Ljubisavljević, Ljubisavljević and Jovanović 2017 *Economic Themes* 524.

³⁷⁸ Also see Glasson, Therivel and Chadwick *Environmental Impact Assessment* 23.

³⁷⁹ Regulation 3 of the EAARR.

³⁸⁰ 51 Fed. Reg. 25,004, 25,006 (1986); Irwansyah, Hakim and Yunus 2017 *Bus Manag Rev* 229; Hunt and Wilkins *Environmental Audits and Enforcement Policy* 365.

that is, it is *ex ante*, and an environmental audit is carried out for existing activities to assess the impacts and mitigation of the impacts of activity or project and provides an indication of what is happening at the time it is carried out.³⁸¹ In contrast with the environmental audit, the EIA focuses on future action relating to activity or project, while the environmental audit involves the review, assessment, and incremental improvement of an existing activity or project.³⁸² An EIA and environmental audit are both environmental management tools that anticipate the impacts and the other one monitors the procedures set out to mitigate the impact.³⁸³

For this study, an environmental audit is defined as the identification, evaluation and reporting of the mitigation of the impacts of an existing activity against environmental framework legislation and standards of a particular country or the industry's prescriptions that they formally adhere to.

The International Organisation of Standardization (ISO) has established a series of standards for environmental management referred to ISO 14001:2015,³⁸⁴ which amongst others prescribes the general principles that industries must consider when carrying out environmental audits.³⁸⁵ ISO 14001:2015 is an internationally agreed standard that established the environmental management system (EMS).³⁸⁶ The EMS assists organisations to identify, manage, monitor and control their activities, projects and services that may impact the environment.³⁸⁷ ISO 14001:2015

³⁸¹ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 335; Shin and Welch "Environmental Auditing and Compliance" 354; Sheate date unknown https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm.

³⁸² Glasson, Therivel and Chadwick *Environmental Impact Assessment* 335.

³⁸³ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 335.

³⁸⁴ ISO 14001 2015 <https://www.iso.org/standard/60857.html> ; also see ISO 14004 2016 <https://www.iso.org/standard/60856.html> and ISO 14006:2019 Environmental Management Systems.

³⁸⁵ Nel and Du Plessis 2004 *SAPL* 51 181-190; Kidd *Environmental Law* 84; Irwansyah, Hakim and Yunus 2017 *Bus Manag Rev* 229; Shin and Welch "Environmental Auditing and Compliance" 355.

³⁸⁶ ISO 2015 <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100372.pdf>; Nel and Alberts "Environmental Management and Environmental Law" 25; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 337; Ljubicavljević, Ljubicavljević and Jovanović 2017 *Economic Themes* 524.

³⁸⁷ ISO 2015 <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100372.pdf>; Ljubicavljević, Ljubicavljević and Jovanović 2017 *Economic Themes* 524.

standard requires a continuous improvement of an organisation's environmental performance.³⁸⁸

The standards and the procedures for environmental management are set out in such instruments as the ISO 14001:2015.³⁸⁹ The ISO 14001:2015 also requires the organisations to identify their environmental impacts and aspects that they can control or over which they can be expected to exercise control to determine their significance.³⁹⁰ The ISO 14001:2015 also requires identification of deviations from legal requirements and procedures must be in place to remedy non-compliance and to prevent re-occurrence.³⁹¹ ISO 14001 also requires that regular environmental audits be conducted.³⁹²

Against this backdrop, it is argued herein that environmental auditing is an environmental management tool considering that it is applicable during the operations of an activity. It can be used to assess the actual impacts of the existing unlawful activity against the environmental standards set out in the legislation and relevant standards (as well as the EMPr or risk management strategy) to formulate a report that should be submitted to the competent authority to determine whether to issue *ex post facto* environmental authorisation. The advantage of environmental audits is that there are already acceptable standards and procedures that have already been set by ISO. However, audits are a snapshot in time and should be supported by continuous monitoring.

2.11.3 Duty of care

Duty of care imposes a duty on the developers to act with due care to prevent, if prevention is impossible, minimise and mitigate environmental harm.³⁹³ In South

³⁸⁸ Ljubisavljević, Ljubisavljević and Jovanović 2017 *Economic Themes* 524. ISO 19011:2018 Guidelines for Auditing Management Systems includes auditing principles. Also see Shin and Welch "Environmental Auditing and Compliance" 355.

³⁸⁹ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 23; Shin and Welch "Environmental Auditing and Compliance" 355.

³⁹⁰ Nel and Du Plessis 2004 *SAPL* 54.

³⁹¹ Nel and Du Plessis 2004 *SAPL* 54.

³⁹² Nel and Du Plessis 2004 *SAPL* 59.

³⁹³ Kidd *Environmental Law* 11.

Africa, the duty of care is enshrined in section 28 of NEMA. Essentially, section 28 of NEMA demands that:

every person who causes, has caused or may cause significant pollution or degradation of the environment must take every reasonable measures to prevent such pollution or degradation from occurring, continuing, or recurring, or in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.³⁹⁴

The duty of care, like an EIA, focuses on a 'significant' impact.³⁹⁵ Although NEMA does not define 'significant', the court in *Hichange*³⁹⁶ quoted with approval the definition by Glazewski,³⁹⁷ who stated that the "threshold level of significance will not particularly be high".³⁹⁸ The duty of care is described as omnipresent and applicable in general to all activities that are likely to cause environmental pollution or degradation.³⁹⁹ According to Du Plessis,⁴⁰⁰ the duty of care "includes the optimisation of actions and processes to prevent pollution or where it cannot be avoided altogether, to reduce it to acceptable levels". Du Plessis⁴⁰¹ further argues that sections 24F and 24G incorporates the idea of *ex post facto* duty of care.⁴⁰² Although the duty of care does not demand assessment of the impact of activities that caused or causing environmental harm, the researcher agrees with Du Plessis⁴⁰³ that section 24G incorporates a duty of care to address actual harm and future harm. Therefore, the duty of care is another alternative that may be considered to where environmental harm has occurred.

³⁹⁴ Section 28 of NEMA.

³⁹⁵ See Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 176.

³⁹⁶ *Hichange* para 414.

³⁹⁷ Glazewski "The National Environmental Management Act" 7-23.

³⁹⁸ Kidd Environmental Law 153; Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 176.

³⁹⁹ Nel and Alberts "Environmental Management and Environmental Law" 32.

⁴⁰⁰ Du Plessis 2004 *SAJELP* 141.

⁴⁰¹ Du Plessis 2004 *SAJELP* 141.

⁴⁰² See also Glazewski "The National Environmental Management Act" 7-23.

⁴⁰³ Du Plessis 2004 *SAJELP* 141.

2.11.4 Combination of tools

Although it has been established that an EIA is the most commonly used tool, it is not always an ideal tool for all situations. In 2014, DEA recommended the progression of environmental management tools, which means that the tools must supplement one another to provide information that an EIA may not necessarily provide.⁴⁰⁴ Furthermore, more tools can be developed to fill the gaps that have been identified or strengthen the existing ones subject to public participation.⁴⁰⁵

Since an EIA is not suitable for all situations, particularly for an *ex post facto* environmental authorisation application, it may be necessary to combine environmental management tools in determining the impacts of the unlawful activity in the event where the circumstance may require.⁴⁰⁶ Therefore, these alternative tools should integrate methods and techniques of environmental risk management, incident management, and environmental audits. The procedures for using these alternative tools should be clearly spelt out and should also provide for a public participation process.

⁴⁰⁴ The *Environmental Impact Assessment and Management Strategy for South Africa* (EIAMS) recommended that "the combination of various instruments and tools can broaden the understanding of the key environmental opportunities and constraints for sustainable development" - see DEA 2014 <https://cer.org.za/wp-content/uploads/2016/10/ENVIRONMENTAL-IMPACT-ASSESSMENT-AND-MANAGEMENT-STRATEGY-1.pdf> 130.

⁴⁰⁵ The EIAMS recommended the improvement of already existing tools. For instance, it recommends that "norms and standards must be available for listed and non-listed activities where impacts are known". Further, cumulative effects assessment must be used to "determine whether changes have been or are likely to be in motion that may have a detrimental effect on the environment and the people". EIAMS further recommend that life cycle assessments must play a "more increased role in various sectors" such as mining. With regard to formulation of new tools, EIAMS recommend formulation of the following new Environmental Outlook, which will include the vision for the desired state of the environment and provide the sustainability objectives and indicators. The sustainability objective and indicators must be used in the assessment phase to contribute to the decision-making and implementation. See in this regard DEA 2014 <https://cer.org.za/wp-content/uploads/2016/10/ENVIRONMENTAL-IMPACT-ASSESSMENT-AND-MANAGEMENT-STRATEGY-1.pdf> 138-140.

⁴⁰⁶ On the combination of tools, see Nel and Alberts "Environmental Management and Environmental Law" 27; Nel, Du Plessis and Du Plessis "Instrumentation for local environmental governance" 93; Emilsson, Tyskeng and Carlsson 2004 *JEAPM* 133.

2.12 Conclusion

The aim of this chapter was to discuss the theoretical framework for environmental authorisations and *ex post facto* environmental authorisations - a background against which South African legislation will be assessed. The chapter defined environmental authorisations and *ex post facto* environmental authorisations for the purpose of this study. The environmental authorisation was defined as the authorisation by the competent authority for an activity that is likely to have a significant impact on the environment to be carried out, and such authorisation may set out reasons for the decision, conditions subject to which it is issued, mitigation measures and monitoring measures.⁴⁰⁷ The chapter further identified the following advantages of an environmental authorisation:

- a) sets out the reasons for the decision;
- b) sets out the conditions subject to which it was issued;
- c) sets out mitigation measures; and
- d) sets out ongoing monitoring measures.

An *ex post facto* environmental authorisation is defined for the purpose of this study as:

an environmental authorisation issued after the fact for an activity that is likely to or is having a significant impact on the environment and that includes the reasons for the decision, sets out conditions for the continuation of the project, mitigation measures and provides for ongoing monitoring measures based on the information obtained from an EIA.

The chapter also identified the drivers for the *ex post facto* environmental authorisation as well as its challenges. The advantages of an *ex post facto* environmental authorisation include that it:

- a) necessitates carrying out of an assessment of the impact of the activity although after the commencement of the activity;
- b) creates a platform where the developer may cease, avoid, prevent, minimise or mitigate the environmental degradation create mitigation measures;

⁴⁰⁷ See para 2.3 above.

- c) creates a platform for public participation; and
- d) brings back the activity into the regulatory loop.

The challenges and criticism levelled against the notion of *ex post facto* environmental authorisation include that it:

- a) undermines sustainability principles;
- b) is abused;
- c) exclude proper public participation;
- d) is a short, less rigorous and stringent procedure; and that
- e) the competent authority is presented with a *fait accompli*.

The chapter argued that environmental authorisation is linked to the assessment of the impacts of the activity by way of an EIA. An EIA is defined as a systematic process of predicting, assessing and evaluating the significant impacts of a proposed activity on the environment before the commencement of the activity, the identification of the alternatives and formulation of mitigation measures, and reporting to the competent authority on the foregoing to aid in decision-making. The historical background of EIA and its evolution the generic EIA procedure indicates that an EIA is a proactive and anticipatory tool used to gather the information that will inform the decision of whether to issue environmental authorisation – there was no evidence that it was ever used as a reactive tool – in other words undertaken once an activity or project has already commenced. However, the chapter argued that an EIA may still be used to predict and assess the future impact of unlawful activity.

Environmental authorisations and EIAs underpin sustainable development and its two subsidiary principles: preventive and precautionary principles.

The chapter further discussed the emerging principle of non-regression. The principle of non-regression prohibits backtracking or lowering the standard of environmental protection by repealing laws that require environmental protection, adopting measures that are detrimental to the health and life of the present and the future generation and implementing the law in a way that compromises

environmental protection. The principle of non-regression requires the progressive upholding of the standard of environmental protection. The chapter argued that if an *ex post facto* environmental authorisation is of a lower standard than what is required to obtain an environmental authorisation, it may be regarded as a retrogressive measure. If the assessment standard is the same or more stringent, then it cannot be regarded as violating the principle of non-regression.

The EIA is an anticipatory tool and may not be the best tool to assess the actual impacts of an existing activity or project. The chapter reviewed an adapted environmental risk assessment and risk assessment strategy, incident management, the use of environmental audits and duty of care as possible alternatives or supplementary tools to the EIA process.

Having discussed the theoretical framework on environmental authorisation, *ex post facto* environmental authorisation and the EIAs, it is now imperative to discuss the historical overview of environmental authorisation in South Africa.

Chapter 3: Historical overview of environmental authorisations in South Africa

3.1 Introduction

Through the years, South Africa adopted measures to address environmental concerns, amongst others, the enactment of environmental laws providing for environmental assessments. This chapter discusses South African environmental legislation relating to environmental assessments and the *ex post facto* environmental authorisation provision. In doing so, the chapter provides a historical overview of the development of environmental assessment legislation in South Africa until the present day. It focuses on current legislation in particular challenges and developments.

To understand what section 24G of NEMA entails and why it came into existence, one must understand the history and the evolution of the legislation on environmental authorisations and EIAs in the South African case.

A brief historical background of environmental authorisations appears in 3.2. The current legal framework providing for environmental authorisations is discussed from 3.4 onwards. In so doing, the chapter interrogates the objectives and aims that were initially sought to be achieved through environmental authorisations.

3.2 Historical background

In order to understand section 24G of NEMA as it is today, it is imperative to understand the historical background of environmental authorisation legislation in South Africa and its evolution as evident in the numerous amendments to environmental legislation and regulations subsequent to the introduction of the ECA. The evolution of environmental authorisations before 1989, legislative and policy formulation from 1989 to 1997, the period between 1997-2004 and the current legislation will be discussed.

3.2.1 Evolution of EIAs before 1989

Following the spread of environmental authorisations and the introduction of EIAs in the world, South Africa, like many other states also adopted the practice of environmental assessment for large-scale developments that were likely to have a significant impact on the environment in the 1970s.¹ However, there was no legislation to regulate environmental authorisations at the time and the environmental assessment was carried out voluntarily or as required by funders.² Kidd, Retief and Alberts³ set out the evolution of the environmental assessment and indicate that around 1976, the South African Council for the Environment released a report that proposed the methods and procedures for environmental evaluation in South Africa.

In 1980, South Africa adopted a *White Paper on National Policy Regarding Environmental Conservation*.⁴ The *White Paper* aimed at formulating a national policy on environmental conservation, which was meant to protect the natural and urban environment.⁵ The *White Paper* stipulated unequivocally that the environment, both the man-made and natural environment, had to be considered in the planning, development and operational phase of projects. The *White Paper* further embodied the idea of environmental assessment in that it indicated that to implement an environmental policy, new development projects had to be evaluated in light of environmental considerations.⁶ The *White Paper* recognised the need to consider environmental concerns throughout the life cycle of the activity. However, the challenge with the *White Paper* was that it was not legally binding.⁷ The initial

¹ DWAF&FE 1980 https://www.environment.gov.za/sites/default/files/legislations/en_vironemtal_management_0.pdf 5; DEAT 2004 https://www.environment.gov.za/sites/default/files/docs/series20_linking_eia_ems.pdf 4; Wood 1999 *SAGJ* 52; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1215; Glazewski and Brownlie "Environmental Assessment" 10-3; Van Wyk *Planning Law* 422; Alberts *An application of theory of change* 76.

² Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1215.

³ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1216.

⁴ DWAF&FE 1980 https://www.environment.gov.za/sites/default/files/legislations/en_vironemtal_management_0.pdf 5.

⁵ DWAF&FE 1980 https://www.environment.gov.za/sites/default/files/legislations/en_vironemtal_management_0.pdf 5; Sowman, Fuggle and Preston 1995 *EIAR* 49.

⁶ DWAF&FE 1980 https://www.environment.gov.za/sites/default/files/legislations/en_vironemtal_management_0.pdf 5.

⁷ Sowman, Fuggle and Preston 1995 *EIAR* 49.

idea of environmental assessment as embodied in the *White Paper* did not envision *ex post facto* environmental authorisation as it refers to the consideration of environmental concerns at the planning stage of an activity or project.

3.2.2 Legislative and policy formation from 1989 to 1997

In 1989, there was extensive research, consultation and review that led to a publication known as *Integrated Environmental Management in South Africa* (Council for the Environment 1989).⁸ This was considered as the introduction of the concept of integrated environmental management (IEM) in South Africa.⁹ IEM was identified at the time as an approach that integrated environmental considerations into all stages of the planning and development process.¹⁰ According to Nel and Du Plessis,¹¹ IEM was initially used synonymously with EIA that was provided for in sections 21, 22, and 26 of the ECA. This view is also affirmed by Kidd, Retief and Alberts¹² who state that IEM was aimed at ensuring that "the environmental consequences of development proposals were understood and adequately considered in the planning process".

IEM was later refined in 1992 by the publication of DEAT's *Integrated Environmental Management Guidelines Series*.¹³ *Guideline Document Series 1* titled "The Integrated Environmental Management Procedure" pointed out that IEM was designed to ensure that environmental impacts of developmental proposals were understood and adequately considered in the planning process of the activity or

⁸ This publication was released by the Cabinet Committee on Environmental Conservation, which later became known as the Council of Environment. See in this regard DEAT 2004 *Overview of IEM Department of Environmental Affairs and Tourism* 5; Council for the Environment 1989 *Integrated Environmental Management in South Africa*; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1219; Wood 1999 *SAGJ* 52; Sowman, Fuggle and Preston 1995 *EIAR* 51; Alberts *An application of theory of change* 76.

⁹ DEAT 2004 *Overview of IEM Department of Environmental Affairs and Tourism* 7; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1220.

¹⁰ Sowman, Fuggle and Preston 1995 *EIAR* 51; DEAT 2004 *Overview of IEM Department of Environmental Affairs and Tourism* 7; Wood 1999 *SAGJ* 52.

¹¹ Nel and Du Plessis 2004 *SAPL* 181-182. See para 3.3 below for discussion on ECA and its provisions. Nel and Du Plessis further allege that this view is supported by the interpretation of section 23(2)(b)-(e) of NEMA. For further discussion on IEM and EIA, see Retief and Kotzé 2008 *SAJELP* 141-144; Alberts *An application of theory of change* 76.

¹² Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1219.

¹³ Glazewski and Brownlie "Environmental Assessment" 10-3.

project. The environmental impacts in a broad sense include biophysical and socio-economic components,¹⁴ extending the scope from the bio-physical also to include the socio-economic components.

The *Guideline Series* contained generally accepted principles that underpinned IEM.¹⁵ These principles included informed decision-making, a broad meaning of the environment,¹⁶ consultation with I&APs and adherence to these principles "during all stages of planning, implementation and decommissioning of proposals".¹⁷ *Guidelines Series 1* suggested that the IEM principles should guide the planning process rather than just inform decision-making.¹⁸ *Guidelines Series 1* further laid down the procedure that had to be followed in the assessment process and provided for the listing of activities, listing of environments, a summary list of environmental characteristics, and a list of competent authorities.¹⁹ It required that the developer had to develop a proposal that had to be considered by the proponent and the consultant in consultation with the competent authority²⁰ if the proposed activity was classified as likely to cause a significant impact that requires an "impact assessment" (composed of scoping,²¹ investigation and reporting). Subsequent to decision-making, a competent authority could impose conditions that may include the preparation of a "management plan" by the applicant.²² Therefore, an impact assessment was meant for activities that were likely to have a significant impact on the environment and subsequent follow-up by monitoring and auditing where required.²³ However, the challenge was that these were merely guidelines; thus,

¹⁴ DEA 1992 *The Integrated Environmental Management Procedure* 1.

¹⁵ Heydenrych and Claassen *National Strategy* 9.

¹⁶ The Guidelines provide that the broad meaning of environment must include physical, biological, social, economic, cultural, historical and political components. See DEAT 2004 *Department of Environmental Affairs and Tourism* 5.

¹⁷ DEAT 1992 *The Integrated Environmental Management Procedure* 5.

¹⁸ Section 2 of the DEA 1992 *The Integrated Environmental Management Procedure* 5.

¹⁹ Sections 4, 5 and 6 of the DEAT 1992 *The Integrated Environmental Management Procedure* 6.

²⁰ DEAT 1992 *The Integrated Environmental Management Procedure* 6.

²¹ DEAT 1992 *The Integrated Environmental Management Procedure* 7. The applicant had to develop a proposal, which had to be classified into whether the applicant had to conduct an "impact assessment", "initial assessment" or if no formal assessment was required.

²² DEAT 1992 *The Integrated Environmental Management Procedure* 8.

²³ DEAT 1992 *The Integrated Environmental Management Procedure* 8.

they were not enforceable.²⁴ It is evident from the foregoing that the IEM procedure, as contained in the *Guidelines*, was anticipatory, focusing on new activities or projects and did not make room for assessment of already existing activities.

In 1992, a major environmental assessment was undertaken at the Eastern Shores of Lake St Lucia.²⁵ The brief facts surrounding the said EIA were as follows: in 1989, Richards Bay Minerals decided to apply for a mining lease and commissioned an environmental appraisal.²⁶ The consultants undertook scoping and consulted with the relevant government departments.²⁷ The appraisal report was completed and circulated to the I&APs, which led to a public uproar and several petitions opposing the mining were submitted.²⁸ In response to the petitions, the government issued a directive that a comprehensive EIA had to be undertaken wherein the principles of IEM should be followed as far as possible.²⁹

The EIA for the Eastern Shores of Lake St Lucia focused on two forms of land use, to wit, development of the ecotourism destination and the other area for mining for minerals followed by rehabilitation.³⁰ According to Kruger, the original purpose of the procedure that commenced in 1989 was to "investigate the impacts of the proposed mining on the physical, social and economic environments" following IEM, principles.³¹ Kruger³² suggests that the approach that was adopted for this EIA was to be in line with the then conceptual policy of IEM for South Africa in that it involved four phases; namely:

²⁴ The practice of environmental assessment was voluntary. See Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1215.

²⁵ Kruger *et al* 1997 *SAJS* 23; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1219. This case provided an example for the application of IEM. Lake St Lucia is a 40 km long lake that flows to the sea at its southern end through a channel of about 20km. See also the judgement on St Lucia *Umfolozi Sugar Planters Limited v Isimangaliso Wetland Park Authority* (873/2017) [2018] ZASCA 144 (1 October 2018).

²⁶ Anon unknown date <http://natalia.org.za/Files/23-24/Natalia%20v23-24%20article%20p45-60%20C.pdf> 50.

²⁷ Anon unknown date <http://natalia.org.za/Files/23-24/Natalia%20v23-24%20article%20p45-60%20C.pdf> 51.

²⁸ Kruger *et al* 1997 *SAJS* 23-33.

²⁹ It could be seen that from the early days of IEM, that EIA and IEM have not always been one and the same thing. However, EIA has been a tool that was used to pursue IEM.

³⁰ Kruger *et al* 1997 *SAJS* 23.

³¹ Kruger *et al* 1997 *SAJS* 23-33.

³² Kruger *et al* 1997 *SAJS* 23.

- a) producing an environmental impact report that integrates evaluations of the environmental, economic and social costs and benefits in such a way as to facilitate policy decision-making that balanced costs and benefits;
- b) involvement of the public through representative institutions and at times, direct participation;
- c) a recommendation for preferred land use by a panel of eminent lay people (review panel), chosen in consultation with the I&APs who then made recommendations to the government after the consideration of the materials produced by the EIA; and
- d) the decision by the government.

This environmental appraisal process continued until 1993 and was claimed to be one of the most comprehensive environmental assessments ever undertaken in the country at the time.³³ According to Kidd, Retief and Alberts,³⁴ this case study provides an example of the application of IEM principles to different levels of decision-making. These views may be considered valid to a greater extent because the assessment studies were aimed at producing a report that reflected the assessment of the environmental impact, public participation and consideration of alternatives before the decision-making. Although a review panel made its recommendations in 1993, the final decision was only made in May 1996 when the government decided not to allow the mining operations.³⁵

This highlights some of the challenges at the time. Firstly, environmental assessment and IEM were not compulsory. Furthermore, there were no specified timeframes considering that the final decision was only taken three years later after the recommendations were made. Against the foregoing, it is evident that although environmental assessment and IEM were introduced in South Africa through policy documents and guidelines, it was still not a legislative requirement. The idea of an

³³ Wood 1999 *SAGJ* 53. This was considered as the first occasion on which a comprehensive implementation of draft policy for IEM was followed in South Africa. See in this regard Kruger *et al* 1997 *SAJS* 24.

³⁴ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1219.

³⁵ Kruger *et al* 1997 *SAJS* 25.

environmental assessment and environmental authorisation (RoD) was first introduced with the enactment of the ECA in 1989, and it is discussed hereunder.

3.3 Environment Conservation Act 73 of 1989

The ECA became the first legislation to incorporate environmental assessment procedures.³⁶ However, ECA made no express mention of IEM or the term environmental authorisation. This was strange considering that IEM and the ECA were introduced more or less contemporaneously.³⁷ The preamble of the ECA stated that the ECA was intended for the "effective protection and controlled utilisation of the environment and matters incidental thereto".³⁸ The ECA defined "environment" as the "aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organisms or collection of organisms".³⁹ It is contended that the definition of the environment was open-ended and could accommodate anything that influences the life of humans and organisms. The initial ECA provided for several issues, including establishing a Council for the Environment,⁴⁰ a Committee for Environment Co-ordination,⁴¹ protection of the natural environment⁴² and waste management,⁴³ but to name a few.⁴⁴ However, the foregoing provisions were later repealed.⁴⁵

³⁶ Glazewski and Brownlie "Environmental Assessment" 10-14.

³⁷ Glazewski and Brownlie "Environmental Assessment" 10-14.

³⁸ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 126.

³⁹ Section 1 of ECA.

⁴⁰ Section 4 of the ECA. It was later repealed by section 50(1) of NEMA. The Council was aimed at advising the Minister on the matters relating to matters that could be referred to it by the Minister. See section 5(1) of the ECA.

⁴¹ Section 12 of the ECA was substituted section 3 of *Amendment Act* 94 of 1993 and later repealed by section 50(1) NEMA. The Committee was, amongst other things, meant to promote co-operation between departments that may have influence on matters that relate to environment.

⁴² Section 16 of the ECA. Competent authority was given authority to declare any area identified by same competent authority and give name to such.

⁴³ Section 20 of the ECA. This section prohibited anyone from operating any disposal without the licence from the then Minister of Water Affairs.

⁴⁴ Section 16 of the ECA.

⁴⁵ The ECA was repealed by section 50(1) of NEMA save for sections 21, 22 and 26, which remain in force and were applicable concurrently with NEMA until the regulations were promulgated in terms of section 24 of NEMA. See section 50(2) of NEMA in this regard. It also remained in place as many applications for RoDs were in process at the time of the introduction of the NEMA and its subsequent EIA regulations. Also, some organisations still had valid RoDs and did not re-apply for an environmental authorisation in terms of the NEMA.

Part 5 of ECA was titled "control of activities which may have a detrimental effect on the environment" and provided for an environmental assessment. In terms of section 21(1), the then Minister of Environmental Affairs and Tourism (Minister) was given powers to identify activities that in his or her opinion were likely to have a substantially detrimental effect on the environment, whether in general or in respect of certain areas that could not commence without authorisation. The reading of this section suggests that the focus was only on activities that were likely to have a substantially adverse impact on the environment⁴⁶ and not policies and other strategic documents that were likely to have an impact on the environment.

Section 22 of ECA prohibited developers from carrying out any identified activity⁴⁷ (currently referred to as listed activities) in terms of section 21(1) without a written authorisation (referred to as a RoD) issued by the Minister or by the competent authority.⁴⁸ The ECA empowered the Minister or the competent authority to issue regulations regarding identified activities and how environmental impact reports had to be compiled, and which procedures had to be followed in carrying out such activities.⁴⁹ The enforcement of sections 21 and 22 depended on the Minister publishing the regulations and the list of identified activities, which was delayed for seven years.⁵⁰

Contravention of section 22(1),⁵¹ section 23(2)⁵² and failure to comply with the conditions of written authorisation or a directive issued in terms of the specified provisions of ECA was rendered an offence punishable by fine not exceeding R100

⁴⁶ Section 21(1) of the ECA. See also Kidd *Environmental Law* 236; Kidd, Retief and Alberts "Integrated environmental assessment and management" 1227-1228.

⁴⁷ The activities were only identified in 1996 in the first EIA regulations that will be briefly discussed hereafter.

⁴⁸ Section 22(1) of the ECA. The competent authority was defined as the "competent authority to whom the administration of ECA has under section 235(8) of the 1993 Constitution assigned in that province". See also *Minister of Water and Environmental Affairs v Really Useful Investments* 2017 1 SA 505 (SCA) para 25; Kidd *Environmental Law* 236, 237.

⁴⁹ Section 26 of the ECA; Kidd *Environmental Law* 236; Glazewski and Brownlie "Environmental Assessment" 10-14; Kidd, Retief and Alberts "Integrated environmental assessment and management" 1228.

⁵⁰ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 126.

⁵¹ The section prohibited the undertaking of listed activities without environmental authorisation.

⁵² The section prohibited the undertaking of listed activities in certain geographical areas.

000 or for imprisonment for a period not exceeding 10 years or both the fine and imprisonment. These sections could not be enforced because the regulations identifying the activities that required a RoD had not been published yet.⁵³

During this period, the Constitution came into force. The significance of the Constitution was that it enshrined the section 24 environmental right.⁵⁴ It imposed the duty on the government to enact legislation and take other reasonable measures that would promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.⁵⁵ The coming into force of the Constitution, especially section 24 led to a new dispensation that is considered to have inspired the publication of the listed activities in terms of the ECA.

3.3.1 *Period between 1997-2004*

During this period, the ECA provisions relating to environmental assessment still prevailed, although NEMA was promulgated in 1998. This section discusses the ECA regulations, the *White Paper*, NEMA and case law that followed on ECA but after the NEMA EIA regulations. The ECA EIA regulations accompanied by lists of identified activities were published in 1997.⁵⁶

GN R1182 listed activities that were likely to have a "substantial detrimental effect on the environment" while procedures for carrying out the EIA were set out in GN

⁵³ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 126.

⁵⁴ See also Kidd *Environmental Law* 21-26; Kidd 2008 *SAJELP* 87; Glazewski and Du Toit *Environmental Law* 5-15; Du Plessis A *SAJELP* 58-63; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 127; *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) at 719; *Fuel Retailers* para 40; *BP Southern Africa*.

⁵⁵ Section 24(b) of the *Constitution of the Republic of South Africa* 1996. Due to the scope of this thesis, section 24 of the Constitution will not be discussed in detail.

⁵⁶ GN R1182-1184 in GG 18261 of 5 September 1997; Glazewski and Brownlie "Environmental Assessment" 10-14; Kidd *Environmental Law* 236; *Sasol Oil v Metcalfe* 2004 5 SA 161 (W); Kidd, Retief and Alberts "Integrated environmental assessment and management" 1228. Some scholars consider this as the formal emergence of the EIA legislation. Paschke and Glazewski 2006 *PELJ* 4 states that this was inspired by the Constitution.

R1183.⁵⁷ GN R1182 merely stipulated activities without providing specific details, such as size and quantity. For instance, Activity 1 included the construction or upgrading of facilities for commercial generation and supply, road and railways, airfields and associated structures outside borders of town, dams, levees or weirs affecting the flow of water. Activity 2 related to a change of land use. This description of activities was broad and vague and led to different interpretations. GN R1183 highlighted the responsibilities of the role players in the application process who were the applicant,⁵⁸ the relevant authority⁵⁹ and the consultant.⁶⁰

Regulation 4 of GN R1183 required that an application be made on a form obtainable from the relevant authority and it had to be submitted to the relevant provincial authority for consideration.⁶¹ The applicant was mandated to appoint an independent consultant who would be responsible for the application on behalf of the developer.⁶² The relevant competent authority was required to evaluate the reports submitted in terms of the regulations within a reasonable time and inform an applicant of the delays, if any.⁶³ The competent authority was also mandated to

⁵⁷ "Activity" was defined in GN R 1183 as any activity identified under section 21 of ECA. See regulation 1 of the GN R1183 in GG 18261 of 5 September 1997. See also Glazewski and Brownlie "Environmental Assessment" 10-14; Basson 2003 *SAJELP* 134; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 159; Kidd *Environmental Law* 236; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1217.

⁵⁸ Regulation 3(1) of the GN R1183 in GG 18261 of 5 September 1997. Applicant was defined as "any person who applies for an authorisation to undertake an activity or to cause such activity to be undertaken as contemplated in section 22 (1) of the Act".

⁵⁹ Regulation 3(3) of the GN R1183 in GG 18261 of 5 September 1997. The relevant authority means "the Minister, provincial authority or local authority contemplated in regulation 4 (2), (3) or (4)" of the regulations. GN R1884 deals with the "designation of the competent authority who may issue an authorisation for the undertaking of identified activities".

⁶⁰ Regulation 3 of the GN R1183 in GG 18261 of 5 September 1997. The procedure was that the applicant had to appoint a consultant to ensure that the applicant meets the requirements of the GN R1183. The relevant competent authority had to ensure that the decision-making is made within the reasonable time and required that the applicant be notified of any delays and the reasons thereof. See also Kidd *Environmental Law* 237 on the discussion on GN R1183.

⁶¹ Regulation 4(1) of the GN R1183 in GG 18261 of 5 September 1997. However, the provincial authority had to "refer the application to the Minister for consideration where the activity had implications for national environmental policy or international commitment," where the area on which the activity had to take place was an area of national or international policy or where the national government department, provincial authority or statutory body is an applicant.

⁶² Regulation 3(1) of the GN R1183 in GG 18261 of 5 September 1997. The applicant was expected to ensure that the said consultant had no financial or any other interest in the application and that he had necessary expertise in the area of environmental concern.

⁶³ Regulation 3(3) of the GN R1183 in GG 18261 of 5 September 1997.

notify the applicant if the applicant could advertise the application and how it had to be done.⁶⁴ Thus, the application was not automatically advertised.

Following the consideration of the application form, the relevant authority could request the applicant to compile a plan of study for scoping or submit scoping report.⁶⁵ Following the acceptance of the scoping report, the competent authority could consider the information to be sufficient or direct that the scoping report is supplemented by a full EIA, if necessary.⁶⁶ If the competent considered the information to be sufficient, it could decide to either issue a RoD or refuse the application.⁶⁷ If the competent authority was of the view that the information in the scoping report had to be supplemented by a full EIA, the applicant had to submit a plan of study for the EIA to be undertaken.⁶⁸

The plan of the study had to include a description of the environmental issues identified during scoping, feasible alternatives, a proposed method of identifying the impacts and the proposed method of assessing the significance of the impacts.⁶⁹ Upon receipt of the said plan, the applicant had to submit an EIA report that contained a description of alternatives, a comparative analysis of the alternatives and the appendices describing the environment concerned, the proposed activity, public participation followed and media coverage given to the proposed activity.⁷⁰ When the competent authority had received all necessary reports, it could either decide to issue a RoD⁷¹ or refuse the application in terms of regulation 9(1). The applicant was not mandated to inform the I&APs of the decision. GN R1183 did not specify timeframes for the different stages of the application process. An appeal against the decision could be lodged with the relevant Minister pursuant to section 35 of ECA within 30 days from the date on which a RoD was issued.

⁶⁴ Regulation 4(6) of the GN R1183 in GG 18261 of 5 September 1997.

⁶⁵ Regulation 6 of the GN R1183 in GG 18261 of 5 September 1997. The applicant was expected to draw up a plan which, if approved, then it would be followed by the scoping report.

⁶⁶ Regulation read with regulation 9 of the GN R1183 in GG 18261 of 5 September 1997.

⁶⁷ Regulation 6(4) read with regulation 9(1) of the Regulation 3(1) of the GN R1183 in GG 18261 of 5 September 1997.

⁶⁸ Regulation 7(1) of the GN R1183 in GG 18261 of 5 September 1997.

⁶⁹ Regulation 7(1) of the GN R1183 in GG 18261 of 5 September 1997.

⁷⁰ Regulation 8 of the GN R1183 in GG 18261 of 5 September 1997.

⁷¹ Regulation 10 of the GN R1183 in GG 18261 of 5 September 1997.

Although the publication of the ECA regulations was a step in the right direction, litigation ensued from the regulations, and these cases are discussed below.

3.3.2 ECA case law

In *Silvermine Valley Coalition*,⁷² the applicants sought that the first respondent be ordered to carry out an EIA in terms of section 21 of the ECA and its regulations for the establishment of a vineyard they had commenced without authorisation. This case highlighted three significant challenges: identifying the listed activities, the time for carrying out an EIA and whether respondents could be legally forced to carry out an EIA. First, the lawyers of the respondents advised them that their activity did not require an environmental authorisation.⁷³ Based on this, the applicants filed an objection with the competent authority and were informed that indeed the activity did not require an authorisation or exemption.⁷⁴ However, the court was of the view that the advice given to the first and fourth respondents was incorrect.⁷⁵ Thus, the activity in question was a listed activity, requiring authorisation.

Regarding the second aspect of the timing of an EIA, the applicants sought the respondents to be compelled to carry out an EIA after the commencement of the activity.⁷⁶ The court held that an EIA carried out after commencement of the activity served no legal significance save to elevate the applicants to the moral high ground if an EIA report supported the views of the applicants.⁷⁷ The court held that a person who carried out an identified activity (as it was then referred to) without a RoD, could not be forced to comply with the same procedures as a person who had

⁷² *Silvermine Valley Coalition*. First respondents had commenced with the construction of vineyards on the property, which been quarried for gravel and the said construction had not been authorised. One of the applicants previously wrote letter to respondent requesting them to carry out an EIA. Failure to do so would lead to institution of legal proceedings. See also Kidd *Environmental Law* 237; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1228; Basson 2003 *SAJELP* 135.

⁷³ *Silvermine Valley Coalition* 481.

⁷⁴ *Silvermine Valley Coalition* 483.

⁷⁵ *Silvermine Valley Coalition* 493.

⁷⁶ *Silvermine Valley Coalition* 489.

⁷⁷ *Silvermine Valley Coalition* 489.

applied for environmental authorisation before the commencement of its activities.⁷⁸ The court further held that the unlawfulness of activity could be remedied by civil law and criminal law measures.⁷⁹ Civil law remedies allow for a prohibitory interdict to be sought for an ongoing activity or a mandatory interdict to remove and restore the *status quo ante*. Regarding criminal measures, the prosecution of the offender could be pursued and could be ordered to repair the environmental damage.

Therefore, this case highlights three issues, namely that there was confusion amongst developers and the competent authorities on the identification of activities that triggered an EIA. Secondly, the courts held the view that an EIA could not be carried out retrospectively but instead highlighted the remedies that could be pursued. Further, the court highlighted the alternative measures that could be used to address unlawful activities. Thirdly, a developer could not be legally forced to carry out an EIA retrospectively.

In the *Eagles Landing case*,⁸⁰ the court reached a somewhat different decision to that of the *Silvermine Valley Coalition's* case in that the court held that an environmental authorisation could be issued for the completion of the partially completed activity if the result complies with the provisions and environmental protection of the environmental legislation.⁸¹

It is submitted that the court's approach to issuing an *ex post facto* environmental authorisation for the continuation of the listed activities if there is compliance with the provisions of environmental law and the environment is protected, was the correct approach. However, the challenge was whether an EIA would have been a

⁷⁸ *Silvermine Valley Coalition* 489.

⁷⁹ *Silvermine Valley Coalition* 490.

⁸⁰ *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412(T). The third respondent, a developer of a golfing estate undertook earthworks on a section of the bank of the dam. The third respondent commenced with the construction. The applicant complained to the competent authority against the construction works. The competent authority invoked section 28 of NEMA and issued the directive to the third respondent to cease the works and submit an EIA in terms of GN R1182. The applicant lodged an internal appeal with the competent authority and the said internal appeal was dismissed. The *ex post facto* environmental authorisation was issued. See also Kidd *Environmental Law* 237; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1229.

⁸¹ *Eagles Landing* paras 102-103.

suitable tool because of its anticipatory nature. This project was still in its initial phases and it is uncertain whether the court would have followed the same argument had the project been completed. The researcher argues that an EIA, albeit an anticipatory tool, would have been an ideal tool since the activity was still at the early stage. Although it would not have addressed the actual impact, an EIA would have assisted the developer to predict, assess and evaluate the future significant impact of the unlawful activity since they intended to proceed with the activity. The EIA would have generated information that would have helped to know which part of the activity ought to be ceased (if any), any alternatives that could be considered for future operations and mitigation measures.

In *Sasol Oil v Metcalfe*,⁸² the issue was whether the departmental EIA policy guidelines were *ultra vires* the ECA.⁸³ The developer had identified a property on which he wanted to develop a filling station and convenience store and sought to apply for authorisation pursuant to the ECA and its regulations.⁸⁴ The competent authority rejected the environmental authorisation application based on the policy guidelines formulated by the competent authority.⁸⁵ The policy guidelines in question were held to be valid. It was held that the competent authority did not have the power to authorise "the development of filling station since the identified activities did not apply to a filling station as such, but only to facilities for the storage and handling of any substance, which is dangerous or hazardous and controlled by national legislation".⁸⁶

It is submitted that although the regulations and the policy guidelines did not explicitly mention the filling station, storage and handling of hazardous products are activities undertaken at a filling station. Thus, it is submitted that the competent

⁸² *Sasol Oil v Metcalfe* 2006 2 ALL SA 329(W). This decision was however overturned by the Supreme Court of Appeal in *MEC for Agriculture, Conservation Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 5 SA 483 (SCA). See also Ramdhin 2008 *SAJEP* 131; Paterson 2006 *SALJ* 55; Glazewski and Witbooi 2004 *Ann Surv SAL* 402.

⁸³ The policy guidelines precluded the development of the filling station within three kilometres of each other or 100 metres of an existing residential and developing residential place. Applicant was of the view that the competent authority only had the power to authorise or refuse to authorise the construction of facilities used for storage and handling of hazardous products.

⁸⁴ *Sasol Oil* para 3.

⁸⁵ *Sasol Oil* para 12.

⁸⁶ *Sasol Oil* para 15.

authority had the authority to determine the application for the filling station. This case highlights the ambiguity in the interpretation of the identified (listed) activities in the ECA regulations and the confusion that was also perpetuated by courts in an attempt to resolve the disputes.

*BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs*⁸⁷ also dealt with a similar issue where it was argued that the competent authority had exceeded its mandate when it applied the Gauteng EIA Guidelines,⁸⁸ which resulted in a refusal of the developer's application for authorisation in terms of the ECA.⁸⁹ The issue relevant to this study was whether the development of the filling station was a listed activity. The court held that the activity was a listed activity. The court distinguished this case from *Sasol's* case, citing several grounds.⁹⁰ However, relevant to this thesis is the court's view that "from the environmental point of view it makes little sense to draw a distinction between, on the one hand, a filling station *per se*, and on the other its facilities which store and handle hazardous products".⁹¹ It is submitted that the view of the court in this regard was correct.⁹² Needless to say, this case also highlights the interpretation issues that surrounded the ECA regulations.

In *HTF Developers v Minister of Environmental Affairs and Tourism*,⁹³ the HTF Developers cleared vegetation in preparation for the commencement of development without an environmental authorisation. The competent authority was of the view that the site in question was virgin ground, and thus, the developer needed an environmental authorisation for cultivation or any other use of the site

⁸⁷ *BP Southern Africa*. See also Du Plessis and Britz 2007 *JSAL* 263-276; Ramdhin 2008 *SAJELP* 131; Field 2006 *SALJ* 429-430; Paterson 2006 *SALJ* 60-61; Glazewski and Brownlie "Environmental Assessment" 10-17.

⁸⁸ Department of Agriculture, Conservation, Environment and Land Affairs of Gauteng 2002 *EIA Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations*.

⁸⁹ *BP Southern Africa* paras 130-131.

⁹⁰ *BP Southern Africa* para 160. See also Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1229.

⁹¹ *BP Southern Africa* para 160.

⁹² See also Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1229.

⁹³ *HTF Developers case*.

as per the GN R1182. HTF Developers disputed that the site was virgin land in terms of the regulations as was alleged by the competent authority.⁹⁴ HTF contended that the concept of virgin land was only intended to apply to agricultural land and not on land that was a site in a proclaimed township area. The court held that the definition of virgin ground was not confined to agricultural land because "cultivate" must be construed widely to include the concept of improvement.⁹⁵

3.3.3 Challenges

The foregoing case law highlights that the ECA and its regulations are riddled with challenges that confused developers, competent authority and I&APs. The main key issue, (although not the only issue) included the lack of clarity on the identification of activities that triggered an EIA. Put differently, the manner in which some of the activities were listed and defined was unclear and accordingly, not all developers applied for an environmental authorisation. The other issue relates to the time at which an EIA must be carried out - that is, whether the EIA may be undertaken after partial commencement of the activity. The latter issue became manifest in the conflicting decisions of the *Silvermine Valley Coalition* case and the *Eagles Landing* case. Another challenge relates to the interpretation of terminology that was not clear enough, as illustrated in the filling station cases. It, therefore, remained unclear to developers of unlawful activities as to what procedures they could follow to rectify their unlawful activities. The lack of clarity extended to the I&APs of such unlawful activities on the recourse they could seek from the courts. In a similar vein, it was not clear if the competent authorities could issue RoDs retrospectively. This challenge of interpretation and identification of identified activities resulted in the inconsistent application by the competent authorities in different provinces in relation to the issuing of the authorisations.

Another challenge was that some developers flaunted the regulations by intentionally commencing the identified activities without authorisation. The cost of

⁹⁴ *HTF Developers* case para 441D-F.

⁹⁵ The matter was taken on appeal in the *HTF Developers* case.

a fine was budgeted as part of the construction costs.⁹⁶ The ECA and its regulations did not provide for the rectification of such illegal activities; thus, the unlawful activities faced perpetual unlawfulness.

The regulations did not set timeframes within which each step must be followed. This was problematic, especially for developers, because the decision-making process could undergo unreasonable delays adding to practical challenges. As a result of the foregoing, it became difficult for the developers who applied for a RoD to have the competent authorities compelled to make a decision in the event of undue delays. This could further have added to the negative perception that the EIA process is cumbersome and riddled with delays.

The regulations did not set out the details as to how the public participation process had to be followed but instead left it in the hands of the applicant and the competent authority to determine how this was to be done. There were no specified factors that had to be taken into consideration during the decision-making process and this had a likelihood of leading to a lack of uniformity in the decision-making process in different provinces.⁹⁷ Further, the documents that had been submitted during the application process only became public documents after a RoD was issued.⁹⁸ The effect of this was that it hampered the process of meaningful public participation as required by the NEMA principles. Put differently, the EIA process as provided for in the regulations was not aligned with the provisions of the *Promotion of Administrative Justice Act (PAJA)*⁹⁹ and *Promotion of Access to Information Act (PAIA)* that were subsequently published in 2000.¹⁰⁰ The Regulations further did not provide for the other specific activities like mining.¹⁰¹

⁹⁶ See para 2.4.3 in Chapter 2 above.

⁹⁷ Regulation 9 of the GN R1183 in GG 18261 of 5 September 1997.

⁹⁸ Regulation 12 of the GN R1183 in GG 18261 of 5 September 1997.

⁹⁹ *Promotion of Administrative Justice Act* 3 of 2000. PAJA gives effect to section 33 of the Constitution, which provides for administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action.

¹⁰⁰ *Promotion of Access to Information Act* 2 of 2000. This Act is meant to give effect to section 32 of the Constitution, which provides for access to information held by the public and private institutions.

¹⁰¹ See Humby 2009 *SAPL* 4.

The delayed publication of the ECA regulations led to "ad hoc and fragmented environmental governance", which enabled activities that had a significant impact on the environment despite the existence of the legislation.¹⁰² Further, as stated before, after the publication that required a RoD for listed activities, some listed activities still commenced without such authorisation.¹⁰³ Accordingly, there were unlawful activities from the ECA regime that continued into the NEMA regime. The issue was whether the unlawful activities could become lawful in any way and be brought into a regulatory loop or they could remain in perpetual unlawfulness. The legislation was silent on this matter, and the courts made conflicting decisions that highlight the *lacunae* in the legislation. It is argued that this necessitated a more normative coherent and integrated environmental regulatory approach to environmental protection. Therefore, the subsequent paragraph will discuss the *White Paper* and NEMA, which were introduced to remedy the deficiencies of the ECA, amongst others.

3.3.4 *White Paper on Environmental Policy for South Africa, 1998*

In May 1998 the then DEAT published the *White Paper on Environmental Policy for South Africa*.¹⁰⁴ This document was intended to provide an interpretation of IEM for both the competent authority and the private sector before the promulgation of the new intended environmental legislation.¹⁰⁵ The *White Paper* paved the way and served as the basis for the current environmental framework legislation (NEMA), which incorporates the idea of IEM¹⁰⁶ as opposed to ECA.¹⁰⁷

The *White Paper* was developed through a comprehensive participatory process known as the Consultative National Environmental Policy Process (CONNEPP).¹⁰⁸

¹⁰² Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 126.

¹⁰³ Paschke and Glazewski 2006 *PELJ* 5.

¹⁰⁴ GN R749 in GG 18894 of 15 May 1998. See also Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1221; Glazewski "The National Environmental Management Act" 7-4.

¹⁰⁵ See para 3.3.3 below.

¹⁰⁶ See section 2(4)(a)(viii) read with section 23 of NEMA.

¹⁰⁷ Hamann 2003 *SAJELP* 24.

¹⁰⁸ GN R749 in GG 18894 of 15 May 1998; Kidd *Environmental Law* 35-36; Glazewski "The National Environmental Management Act" 7-4. CONNEPP was intended to give all stakeholders the

The Policy contained a "vision, principles, strategic goals and objectives and regulatory approaches that the government will use for environmental management".¹⁰⁹

The *White Paper* envisioned the need for a society to live in harmony with the environment.¹¹⁰ To attain the foregoing vision, the *White Paper* recognised the need to pursue sustainability. The *White Paper* further recognised the intrinsic nexus between development¹¹¹ and the environment. The *White Paper* noted that environmental sustainability was necessary to fulfil the environmental right. Additionally, the *White Paper* stated that environmental sustainability recognised the interdependence and integration of social-economic development and environmental protection.¹¹²

The *White Paper* contained strategic goals and supporting objectives aimed at addressing the major issues faced by the government in its endeavour to achieve sustainable development. Goal 3 provided for holistic and integrated planning and management.¹¹³ In this regard, the *White Paper* noted a need to develop mechanisms where there needed and to build on existing mechanisms to ensure integration of environmental considerations into "existing and new government policies, legislation, and programmes, all spatial and economic development planning process all economic activity".¹¹⁴

The first supporting objective of Goal 3 required the inclusion of the IEM principles and methodologies in spatial development. The other supporting objective of Goal 3 was to develop management instruments and mechanisms for integrating environmental concerns in development planning and land allocation. According to

chance to contribute to developing the new environmental policy. See also Janks 1996 *Annual Survey of South African Law* 441.

¹⁰⁹ See Introduction in GN R749 in GG 18894 of 15 May 1998.

¹¹⁰ GN R749 in GG 18894 of 15 May 1998. The *White Paper's* paragraphs are not numbered and it is not possible to refer to sub-divisions in the *White Paper*.

¹¹¹ The *White Paper* defined development in Appendix 2 as "a process for improving human well-being through a reallocation of resources that involves some modification of environment". It focuses on the quality of life as opposed to quantity of economic growth.

¹¹² Glazewski "The National Environmental Management Act" 7-4.

¹¹³ Glazewski "The National Environmental Management Act" 7-4.

¹¹⁴ Goal 3 of the *White Paper* in GN R749 in GG 18894 of 15 May 1998.

Goal 3 standards for EMSs, EIAs, monitoring and auditing procedures were to be established and reporting mechanisms. It further sought to enhance the review processes. It stated that a continued transparent process had to be developed to provide access to information to protect the people's environmental right.

The *White Paper* identified IEM as the prerequisite for government to issue approvals of all activities with a potentially adverse impact on the environment. As stated before, the *White Paper* confused IEM and EIA, thereby failing to recognise EIA as just one of the tools of IEM.¹¹⁵ IEM was considered compulsory to ensure that decision-makers at all levels have adequate information on possible adverse impacts of the activity on the environment. This is also an important step as the then IEM/EIA approach was considered compulsory and was anticipatory.

As regards the punishment for environmental transgressions, the *White Paper* provided that in pursuance of sustainable development and protection of the well-being of people, "punishment of environmental crimes should reflect the gravity and extent of the degradation and abuse of the environment".¹¹⁶ The government was also mandated "to explore the feasibility and desirability of alternative sanctions, which may include seizure of assets used to cause environmental harm or penalties based on the value accruing to the offender."¹¹⁷ The *White Paper* envisioned imposing a commensurate punishment to the harm caused to the environment and ensuring that no developers unduly gain benefits at the expense of the environment and for the activities that commenced without an environmental authorisation.¹¹⁸ From the foregoing, it is clear that the *White Paper* did not anticipate that unlawful activities will be authorised. The *White Paper* has indirectly set a standard that must be pursued in considering the punishment for environmental transgressions.¹¹⁹ Following the publication of the *White Paper*, the NEMA was enacted.

¹¹⁵ For detailed discussion on IEM and EIA, see Nel and Du Plessis 2004 *SAPL* 181-190.

¹¹⁶ GN R749 in GG 18894 of 15 May 1998.

¹¹⁷ GN R749 in GG 18894 of 15 May 1998.

¹¹⁸ GN R749 in GG 18894 of 15 May 1998.

¹¹⁹ The question that remains to be answered is whether NEMA, the specific environmental management acts (SEMA), as identified in section 1 of NEMA) and their regulations have maintained this standard in dealing with environmental transgressions and this question shall be addressed in the subsequent chapter.

3.4 National Environmental Management Act 107 of 1998

Subsequently, the NEMA was enacted, expressly providing for IEM in Chapter 5 thereof.¹²⁰ NEMA, the framework legislation, gives effect to the constitutional right.¹²¹ NEMA gives effect to section 24 of the Constitution and the *White Paper*.¹²² Ngcobo J¹²³ confirmed that:

One of the declared purposes of NEMA is to establish principles that will guide organs of the state in making decisions that may affect the environment. One of these principles requires environmental authorities to consider the social, economic and environmental impact of a proposed activity, including its disadvantages and benefits.

NEMA was in force concurrently with the ECA and its regulations.¹²⁴ NEMA provided for environmental management principles in section 2¹²⁵ and IEM in Chapter 5, which is important for this study.¹²⁶

South African environmental law takes the anthropocentric approach, thereby putting the interests of the people first.¹²⁷ These principles are applicable

¹²⁰ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1215; Glazewski "The National Environmental Management Act" 7-19.

¹²¹ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 128; *HTF Developers* para 24; Morumbo 2008 *PELJ* 111.

¹²² Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 127; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil* 2006 2 All SA 17 (SCA) para 15; *Fuel Retailers* para 59; *Minister of Water and Environmental Affairs v Really Useful Investments* 2017 1 SA 505 (SCA) para 29.

¹²³ *Fuel Retailers* para 4. Ngcobo J referred to section 2(4)(i) of the NEMA. See also *HTF Developers* para 24; *BP Southern Africa* para 144H-145A.

¹²⁴ As has been alluded to, NEMA (and the SEMAs) repealed most of the sections of the ECA although sections 21, 22 and 26 remained in force until the publication of the NEMA EIA regulations. See section 50(2) of NEMA provides that the stated sections of ECA and the notices and regulations issued pursuant thereto would be repealed on a date published by the Minister once the Minister was satisfied that regulations or notices issued under section 24 of NEMA have made the regulations and notices under sections 21 and 22 of the ECA redundant. See *HTF Developers*; *Silvermine Valley Coalition*; *Minister of Water and Environmental Affairs v Really Useful Investments* 2017 1 SA 505 (SCA) para 30; regard *BP Southern Africa*; Kidd *Environmental Law* 238; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1230.

¹²⁵ See para 2.9 above.

¹²⁶ See para 2.9 in Chapter 2 above. See also Glazewski "National Environmental Management Act" 7-8; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 134-145.

¹²⁷ NEMA provided that national environmental management principles must place people and their needs in the forefront of its concerns and "and serve their physical, psychological, developmental, cultural and social interests equitably". Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 138.

throughout the whole of South Africa to all activities of the organs of state that are likely to have a significant impact on the environment.¹²⁸ The principles also serve as a general framework within which environmental management and implementation plan must be formulated¹²⁹ and "as guidelines by reference to which any organ of state must exercise any function when taking any decision" that relate to environmental protection.¹³⁰ The principles further guide the interpretation, administration and implementation of NEMA and any other law that is connected to environmental protection.¹³¹

The principles relevant to this thesis are sustainable development,¹³² the precautionary principle¹³³ and the preventive principle¹³⁴ and have been extensively discussed in Chapter 2.

NEMA does not define the concept of IEM in Chapter 5.¹³⁵ Section 23 initially provided that the chapter of NEMA was aimed at "promoting the application of appropriate environmental management tools" to ensure integrated environmental management of activities.¹³⁶ This chapter further enshrines the objectives of IEM.¹³⁷

¹²⁸ Section 2(1) of NEMA; *Fuel Retailers* para 67. See *HTF Developers* para 7 where one of the issues that surfaced was failure of HTF Developers to apply the environmental management principles in section 2 of NEMA. The Department of Agriculture, Conservation and Environment sent HTF Developers a letter in regard to their property that was considered virgin ground. Cultivation or use of virgin ground was considered as detrimental to the environment in terms of section 21 and thus prohibited in terms of section 22 of ECA unless the written authorisation was granted. HTF Developers were eventually issued a directive to the effect that they should cease with development. The HTF Developers' contention was that the Department has no authority to direct them to cease development. See also Kidd *Environmental Law* 36.

¹²⁹ Section 2(1)(b) of the NEMA.

¹³⁰ Section 2(1)(c) of the NEMA.

¹³¹ Section 2(1)(e) of the NEMA.

¹³² See para 2.9 above.

¹³³ See para 2.9 above.

¹³⁴ See para 2.9 above.

¹³⁵ Chapter 5 gives effect to subsection (b) of the environmental right in the Constitution, which places a duty on the state to take measures that gives effect to the right. See Glazewski and Brownlie "Environmental Assessment" 10-15. Also see Nel and Du Plessis 2004 *SAPL* 181; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 156; Kidd *Environmental Law* 245; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1231; Glazewski and Brownlie "Environmental Assessment" 10-16; Sowman, Fuggle and Preston 55-58.

¹³⁶ Section 23(1) of the NEMA. See also para 3.2.2 for detailed discussion on IEM.

¹³⁷ Section 23(2) of NEMA; *Fuel Retailers* para 64; Glazewski and Brownlie "Environmental assessment" 10-15; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 157.

Among others, IEM aims to integrate environmental management principles into decision-making that may have a significant impact on the environment. Furthermore, IEM demands "identification, prediction and evaluation of the actual and the potential impact on the environment, socio-economic, cultural heritage, the risks and the consequences and alternatives and options for mitigation of activities".¹³⁸ The foregoing is aimed at minimising the adverse impact and maximising the benefits and promoting compliance. Furthermore, IEM ensures that the environmental impacts of the activity are considered before actions are taken in connection with them. Although the objectives of IEM seem to embody EIA,¹³⁹ they, however, do not only focus on the assessment of the potential impact but also focus on the actual impact. Therefore, the objectives of IEM are not exclusively anticipatory but seemingly may cater for retrospective incidents.

To give effect to the objectives mentioned above, section 24 of NEMA provides for the procedures that have to be followed in giving effect to the objectives. The initial section 24 was headed "implementation". The initial section 24(1) provided that:

In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on-

- a) environment
- b) socio-economic conditions; and
- c) the cultural heritage,

of activities that require authorisation or permission by law and which may significantly affect the environment, must be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting, or otherwise allowing implantation of any activity.

This use of the words "the potential impact" denoted the anticipatory nature of the section, that is, it focused on the anticipated impact as opposed to the actual impact. Further, this provision explicitly did not only focus on the environmental impact but included the socio-economic and cultural impact of the said proposed activity.¹⁴⁰

¹³⁸ See section 23(2)(b) of NEMA.

¹³⁹ See section 23(2)(b) of NEMA and para 2.5 above where EIA was defined.

¹⁴⁰ The importance of this consideration was emphasised in the *Fuel Retailers* para 32 and *BP Southern Africa* para 146I-147A.

The initial section 24(2) gave the then Minister the authority to identify activities that could not commence without prior environmental authorisation from the Minister or MEC.¹⁴¹ Further, the Minister was mandated to make regulations relating to the EIA procedures and environmental authorisations. Section 24(2)(d) provided that the Minister had the authority to identify existing authorised and permitted activities that had to be considered, assessed, evaluated and reported on. Although the initial section 24 referred to the existing lawful activities, it did not refer to the existing unauthorised activities. Section 24 further stipulated the minimum requirements for the procedures for the investigation, assessment and communication of the potential impact of activities.¹⁴² The list of activities was not published until 2006.

Against this background, it is evident that the provisions of ECA, its regulations¹⁴³ and the initial section 24 of NEMA posed challenges that led to litigation.

3.5 Period 2004-2008

3.5.1 NEMA Amendment Act 8 of 2004

In 2004, NEMA was significantly amended by the *National Environmental Management Amendment Act 8 of 2004*.¹⁴⁴ The *NEMA Amendment Act* introduced new definitions and significantly amended section 24 of NEMA.¹⁴⁵ Section 1 inserted the definition of "environmental authorisation",¹⁴⁶ "competent authority",¹⁴⁷ and "listed activities".¹⁴⁸ Thus, instead of using "identified activity" as was referred to in ECA, the activities that were listed in the regulations were now to be referred to as "listed activities".¹⁴⁹

¹⁴¹ Section 24(2)(a) of the NEMA.

¹⁴² Section 24(7) of the NEMA.

¹⁴³ See para 3.5.3 above.

¹⁴⁴ Also see Pashcke and Glazewski 2006 *PELJ* 4; Kohn 2012 *SAJELP* 2.

¹⁴⁵ Glazewski and Brownlie "Environmental Assessment" 10-17.

¹⁴⁶ Environmental authorisation meant the authorisation issued by a competent authority.

¹⁴⁷ Competent authority meant the organ of state charged by NEMA with evaluating the environmental impact of a listed activity and decision-making.

¹⁴⁸ Listed activities meant activity identified in terms of section 24(2)(a) and (d).

¹⁴⁹ Following due to the *Amendment Act 8 of 2004*, the identified activities in the regulation shall now henceforth be referred to as listed activities.

The heading of section 24 was amended to be "environmental authorisations".¹⁵⁰ The initial section 24(1) of NEMA was amended by section 2 of *Amendment Act 8* of 2004, which states that:

In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed activities must be considered, investigated, assessed and reported on to the competent authority charged by this Act with granting the relevant environmental authorisation.¹⁵¹

The new section 24 eliminated the wording that referred to socio-economic conditions and cultural heritage, thus referring to impacts on the environment only. This exclusion of socio-economic conditions and cultural heritage does not make sense since the consideration of socio-economic conditions and cultural heritage were factors that had to be taken into consideration in terms of the concept of IEM in terms of section 2(3), section 2(4)(iii), section 2(4)(i) and section 23(2)(b) of NEMA.¹⁵² This position was confirmed in the case of *BP Southern Africa* where the court rejected the arguments that socio-economic factors fell outside the department's mandate when considering applications for authorisation under ECA.¹⁵³ According to Glazewski,¹⁵⁴ the amended section also departed fundamentally from the original version, which required the assessment based on the "orthodox combination of both listing activities and the classical formula of "activities" that could significantly affect the environment". The then-new regime relied on the "lists" of activities.

The 2004 amendments were introduced to streamline the EIA process.¹⁵⁵ Section 3 of the *Amendment Act 8* of 2004 inserted section 24A to 24I, providing for, amongst other things; the procedure of listing an activity or area,¹⁵⁶ a procedure for delisting of such an activity or area,¹⁵⁷ a procedure for identifying the competent authority,¹⁵⁸

¹⁵⁰ Glazewski and Brownlie "Environmental assessment" 10-17; Kidd *Environmental Law* 239.

¹⁵¹ Section 2 of *Amendment Act 8* of 2004; Field 2006 *SALJ* 429.

¹⁵² Glazewski and Brownlie "Environmental Assessment" 10-18.

¹⁵³ *BP Southern Africa* case paras 146I-147A.

¹⁵⁴ Glazewski and Brownlie "Environmental Assessment" 10-18.

¹⁵⁵ Pashcke and Glazewski 2006 *PELJ* 21; Kohn 2012 *SAJELP* 2.

¹⁵⁶ Section 24A of the NEMA.

¹⁵⁷ Section 24B of the NEMA.

¹⁵⁸ Section 24C of the NEMA.

and the publication of lists,¹⁵⁹ but to name a few. Significant to this amendment was the introduction of the notion of *ex post facto* environmental authorisation in South African environmental law through section 24G of NEMA,¹⁶⁰ as discussed hereunder.

3.5.2 *Ex post facto* environmental authorisation

In order to understand section 24G of NEMA, it has to be read with section 24F. Section 24F¹⁶¹ prohibits the commencement of the listed activities without environmental authorisation or continuance with the activity where the environmental authorisation was denied.¹⁶²

The initial section 24G was headed 'rectification of unlawful commencement or continuation of listed activity'. The initial section 24G provided that on application by a person who had contravened section 24F, the competent authority could direct the applicant to compile a report indicating the assessment of the impact of the activity on the environment, description of mitigation measures, description of the public participation¹⁶³ and the environmental management plans.

The applicant was liable to pay an administrative fine not exceeding R1 million for the competent authority to consider the *ex post facto* environmental authorisation.¹⁶⁴ Following the consideration of the report requested by the competent authority, the competent authority could either issue a directive to the

¹⁵⁹ Section 24D of the NEMA.

¹⁶⁰ Section 24G of NEMA must be read with section 24F of NEMA.

¹⁶¹ Section 3 of the *Amendment Act 8* of 2004. See also *Minister of Water Environmental Affairs v Really Useful Investments No 219 (Pty) Ltd* [2017] 1 All SA 14 (SCA) para 32; *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP) para 22; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 160; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1257; Paschke and Glazewski 2006 *PELJ* 21; Alberts *An application of theory of change* 94.

¹⁶² Contravention of section 24F was a criminal offence with a maximum penalty of a R5 million fine or 10 years imprisonment or both. See Kidd *Environmental Law* 244.

¹⁶³ The report had to include all the comments received from the I&APs and an indication of how the concerns would be addressed.

¹⁶⁴ The then section 24G(2) of NEMA. Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1258; Kidd *Environmental Law* 245.

effect that the activity must be ceased and the environment be rehabilitated or issue an environmental authorisation subject to conditions it deemed fit.¹⁶⁵

Section 24G was meant to be a temporary measure aimed at providing an amnesty period for developers who commenced the listed activities without a RoD during the ECA era.¹⁶⁶ Section 7 of *Amendment Act 8* of 2004 provided that the provision of section 24G were to be applicable for five months concerning the unlawful activities commenced or continued in contravention of the ECA.¹⁶⁷ Therefore, it is evident that the notion of *ex post facto* environmental authorisation was never meant to be a permanent feature of South Africa environmental law. It was merely meant to allow developers who had contravened the environmental assessment requirement from the period of ECA into the NEMA era and only for five months.

Kohn¹⁶⁸ argues that section 24G was introduced without a meaningful legislative explanation of what sought to be achieved. However, this argument is refutable because a transitional provision in section 7 to a greater extent indicates that section 24G of NEMA was initially aimed at enabling developers who had contravened ECA provisions an opportunity to bring their unlawful activities into the regulatory loop.

Other scholars believe that section 24G was introduced because of the divergent interpretations by the courts on whether an environmental authorisation can be issued retrospectively.¹⁶⁹ Kohn¹⁷⁰ also argues that the insertion of section 24G was a legislative answer to the dilemma that became evident in the *Eagles Landing* case, referred to above.¹⁷¹

¹⁶⁵ The then section 24G(2) of NEMA. See also Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1258.

¹⁶⁶ Section 7 of the *Amendment Act 8* of 2004.

¹⁶⁷ Section 7 of the *Amendment Act 8* of 2004.

¹⁶⁸ Kohn 2012 *SAJELP* 2. Furthermore, the Memorandum of the *Environmental Management Second Amendment Bill* [B56-2003] (that eventually give effect to the *Amendment Act 8* of 2004) made no mention of the reasons for the introduction of section 24G.

¹⁶⁹ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 162.

¹⁷⁰ Kohn 2012 *SAJELP* 2. The court in the *Eagles Landing* case indicated that where there was an unlawful activity, an environmental authorisation could not be issued for the completion of the activity. See para 3.3.2 above where the case was discussed.

¹⁷¹ See para 3.3.2 above.

Although section 24G of NEMA somewhat offered a solution to the problem of unlawful activities and brought certainty in the legislation, it did not come without criticism.¹⁷² Some authors describe section 24G as an anomaly.¹⁷³ Some of the criticism levelled against section 24G are that it undermines environmental management principles, is abused, has interpretation challenges, and the nature of administrative fines is uncertain. These challenges are briefly discussed hereunder.¹⁷⁴

a) Environmental management principles

Firstly, section 24G was described as "flying at the face of the central place of EIA and it thus sits uncomfortably in its home in Chapter 5 of NEMA".¹⁷⁵ It is was further considered to be undermining the environmental management principles and making a mockery of the principles such as sustainable development, preventive and precautionary principles.¹⁷⁶ It was also seen as going against the objectives of IEM stipulated in section 23 of NEMA, one of them is ensuring that the section 2 environmental management principles are considered in decision-making.¹⁷⁷ Although this argument may seem legitimate, it is, however, refutable. Theoretically, sustainable development, as discussed earlier,¹⁷⁸ demands the integration of socio-economic, cultural and environmental consideration into planning and decision-making. The rationale for section 24G was to ensure that there is the integration of socio-economic, cultural and environmental consideration in the carrying out of listed activities, albeit after commencement.

Section 24G created an opportunity to prevent further environmental degradation that could have ensued from the commencement of the listed activity without

¹⁷² The subsequent amendments of section 24G and the challenges that ensued therefrom will be discussed fully in Chapter 4. However, in this chapter there is a brief discussion on challenges that came with the introduction of initial section 24G, which then necessitated the amendments of section 24G to what it has become presently.

¹⁷³ Kohn 2012 *SAJELP* 2; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 16.

¹⁷⁴ See also para 2.9 above.

¹⁷⁵ Kohn 2012 *SAJELP* 2.

¹⁷⁶ Section 2(4)(a) of NEMA; Paschke and Glazewski 2006 *PELJ* 24; Kohn 2012 *SAJELP* 9.

¹⁷⁷ Kohn 2012 *SAJELP* 9.

¹⁷⁸ See para 2.9 in Chapter 2 above.

environmental authorisation. In the event where environmental degradation could not be prevented, section 24G provided an opportunity to minimise the environmental harm. Therefore, it is submitted that this criticism was flawed. The environmental management principles are applicable to decision-making on the *ex post facto* environmental authorisation.

b) Abuse

The further criticism that was levelled against section 24G was that it is susceptible to abuse.¹⁷⁹ According to the studies carried out in Gauteng, there is anecdotal evidence that section 24G is abused.¹⁸⁰ The case law and NECERs affirmed this assertion.¹⁸¹ Furthermore, section 24G was viewed as offering the developers an option of whether to apply for environmental authorisation before commencement or commence with the activity and apply for *ex post facto* environmental authorisation.¹⁸² This option is seen as having become the norm. While this view may be substantiated with NECERs and case law, the criticism may be unwarranted because the intention of section 24G of NEMA was not to offer an option to developers to contravene the law but rather to bring their unlawful activities into the regulatory loop. While the abuse may not be denied, it is submitted that it was an unintended consequence.¹⁸³

c) Interpretation

One of the challenges that emanated from section 24G relates to the interpretation of the term "commencement".¹⁸⁴ However, this term was defined in the case of *Joint Owners, Erf 5216 Hartenbos v Minister for Local Government, Environmental*

¹⁷⁹ Kohn 2012 SAJELP 3; Hugo *Administrative penalties* 55; September *A critical analysis* 81.

¹⁸⁰ Hugo *Administrative penalties* 55. See also September *A critical analysis* 51.

¹⁸¹ Kohn 2012 SAJELP 3; *The Body Corporate of Dolphins Cove v Kwadukuza Municipality* (8513/10) [2012] ZAKZDHC 13 (20 February 2012) para 57.

¹⁸² Paschke and Glazewski 2006 *PELJ* 25; Kohn 2012 SAJELP 7.

¹⁸³ See para 4.5.6 in Chapter 4 below.

¹⁸⁴ Kidd *Environmental Law* 244; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 161. See also Hugo *Administrative penalties* 55.

Affairs and Development Planning, Western Cape.¹⁸⁵ The court held that commencement was constituted by the existence of the direct nexus between the activity carried out and the activity requiring environmental authorisation. The *Amendment Act 8 of 2004* furthermore inserted a definition for commencement, namely "the start of any physical activity on the site in furtherance of a listed activity".¹⁸⁶ However, this definition still led to different interpretations and the eventual amendment thereof.¹⁸⁷ However, the interpretation of commencement still remains problematic. Commencement can range from minor interference with the environment to completed construction and operation (already having commenced with various stages in between). It is argued that how one addresses the situation depends on whether commencement has taken place. Therefore, this requires proper phrasing and interpretation of commencement.

It was never clear whether the power to direct the applicant to rehabilitate also included the power to issue a directive that the person should demolish the unlawful structure that had been erected.¹⁸⁸ The other challenge was that the courts had difficulty in interpreting section 24G, that is, when could it be invoked and the consequences of pursuing section 24G. It was also not clear whether the granting of *ex post facto* environmental authorisation legitimised the illegal development that had been undertaken or if the legitimacy took effect from the day the environmental authorisation was issued.¹⁸⁹

¹⁸⁵ *Joint Owners, Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape* 2011 1 SA 128 (WCC); Kidd *Environmental Law* 245; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1257.

¹⁸⁶ Section 1 of NEMA.

¹⁸⁷ This definition was again amended by the *National Environmental Management Amendment Act 62 of 2008* to read "when used in Chapter 5, means the start of any physical activity, including site preparation and any other activity on the site in furtherance of a listed activity or specified activity, but does not include any activity required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity"; as well as by the *National Environmental Management Laws Second Amendment Act 30 of 2013* and now reads "the start of any physical *implementation in furtherance of a listed activity or specified activity*, including site preparation and any other *action* on the site *or the physical implementation of a plan, policy, programme or process*, but does not include any *action* required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity" (own emphasis added to indicate the amendments in the definition from 2008 to 2013).

¹⁸⁸ Paschke and Glazewski 2006 *PELJ* 25.

¹⁸⁹ Paschke and Glazewski 2006 *PELJ* 25.

d) Administrative fine

Theoretically, the nature of the administrative fine under section 24G (2) was not clear, that is, whether it was administrative or punitive.¹⁹⁰ The reason for the foregoing confusion emanated from the fact that although it was termed a fine, it seemed to merely trigger the consideration of the application.¹⁹¹ Furthermore, the calculation of the administrative fines was initially problematic as there was no established formula for the calculation of such fines.¹⁹² Section 24G of NEMA did not specify the factors that had to be considered in determining the *quantum* of the fine.¹⁹³ In order to determine the *quantum* of the administrative fine, the competent authority used section 24G Fine Determination Calculator.¹⁹⁴ This administrative fine calculator presented challenges.¹⁹⁵

Although the then DEAT developed the section 24G fine calculator, it was never made public, which resulted in its transparency being questionable.¹⁹⁶ The section 24G fine calculator became a bone of contention in *Plotz v MEC for Local Government, Environmental Affairs and Development Planning, Western Cape*.¹⁹⁷ The facts were briefly that the Trust (which owned Ocean View Guest House), run by Mr Plotz commenced with listed activities without an environmental authorisation.¹⁹⁸ Following the correspondences between the competent authority

¹⁹⁰ Hugo *Administrative penalties* 57; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 166. See also *Plotz v MEC for Local Government, Environmental Affairs and Development Planning, Western Cape* WCD Cases No 12736/2014 of 20 May 2016 para 91. The court in this matter opined that section 24G is not a typical administrative penalty and neither strictly punitive as the payment of the administrative fine was for the consideration of the section 24G application.

¹⁹¹ See *Plotz v MEC for Local Government, Environmental Affairs and Development Planning, Western Cape* WCD Cases No 12736/2014 of 20 May 2016 para 92. To read more administrative fines and what they entail, see Hugo *Administrative penalties* 19-22 who extensively discussed administrative penalties.

¹⁹² September *A critical analysis* 63.

¹⁹³ Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 166.

¹⁹⁴ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1258; *Plotz v MEC for Local Government, Environmental Affairs and Development Planning, Western Cape* WCD Cases No 12736/2014 of 20 May 2016 para 50 (hereinafter *Plotz*).

¹⁹⁵ Hugo *Administrative penalties* 57; Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 164; *Plotz* case para 50.

¹⁹⁶ *Plotz* case para 92.

¹⁹⁷ *Plotz* case.

¹⁹⁸ *Plotz* case para 32.

and the Trust,¹⁹⁹ the Trust applied for an *ex post facto* environmental authorisation from the unlawful activities.²⁰⁰ The competent authority issued a R475 000 fine using the administrative fine calculator.²⁰¹ The Trust challenged the proposed *quantum* of the administrative fine. The High Court set aside and substituted the quantum of the administrative fine with R75 000.²⁰² In making its decision, the court opined that the administrative fine was irrational and unreasonable.²⁰³ Some of the reasons that the court outlined for its decision were that the fine calculator lacked a transparent process and that the calculator was an unacceptable policy instrument that hampered the discretionary powers of the competent authority.²⁰⁴

The matter was taken on appeal, and the Supreme Court of Appeal overturned the High Court's decision and reinstated the original *quantum* of the competent authority.²⁰⁵ The *Plotz* judgement underscores the challenges that arose by applying the section 24G fine calculator.

e) *Fait accompli*

The other criticism that has been levelled against section 24G of NEMA is that the competent authorities are presented with a *fait accompli*.²⁰⁶ When developers carry out the listed activity without environmental authorisation, the competent authority is left with little option but to issue the environmental authorisation.²⁰⁷ This argument is rebuttable because the competent authority was vested with the power to direct the applicant to cease the activity and to rehabilitate the environment.²⁰⁸

¹⁹⁹ See *Plotz* case para 37.

²⁰⁰ See *Plotz* case para 40.

²⁰¹ See *Plotz* case para 50. Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 164-165. The courts set out the background of the fine calculator and the factors that had to be considered in determination of the administrative fine.

²⁰² *Plotz* case para 113.

²⁰³ *Plotz* case para 92. The reasons for this decision are set out by Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 166.

²⁰⁴ *Plotz* case para 92.

²⁰⁵ *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape v Hans Ulrich Plotz* (495/2017) [2017] ZASCA 175 (1 December 2017).

²⁰⁶ Paschke and Glazewski 2006 *PELJ* 26. Also see para 2.4.3 above.

²⁰⁷ Paschke and Glazewski 2006 *PELJ* 26. See also Kohn 2012 *SAJELP* 6; Robinson 2006 *SAJELP* 99.

²⁰⁸ Section 24G(2); Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1258.

Therefore, the burden was on the competent authority to exercise its discretion considering all relevant factors.

The foregoing challenges indicate that while section 24G was introduced to provide a solution to the issue of unlawful activities that commenced during the era of ECA and to address the divergent interpretations of the legislation by the courts, section 24G came with some unintended challenges. As a result, the legislation had to be improved to address these challenges. One of the notable changes of the legislation was the repeal of the 1997 ECA regulations and their replacement with the first NEMA EIA regulations in 2006.

3.5.3 2006 NEMA EIA Regulations

In 2006, the first regulations pursuant to section 24(5) of NEMA were published in GN R385 and the accompanying lists of activities published in GN R386 and GN R387.²⁰⁹ The Regulations repealed the 1996 ECA Regulations. GN R385 provided procedures and criteria for the submission, processing, consideration of and decision-making on applications for environmental authorisations in terms of section 24 of NEMA.²¹⁰ These Regulations, in contrast to the 1996 ECA Regulations provided for the identification of a specified competent authority in terms of the listing notices that accompanied the regulations,²¹¹ two-pronged assessment procedures, that is, a basic assessment and S&EIR,²¹² specific timeframes,²¹³ combined applications²¹⁴ and compliance monitoring.²¹⁵ The regulations further provided for a more detailed public participation process in regulation 56 compared to its predecessor in GN R1183. However, these provisions still had deficiencies.

²⁰⁹ Kidd *Environmental Law* 248 Alberts *An application of theory of change* 81.

²¹⁰ Regulation 2 of the GN R385.

²¹¹ Regulation 3 of the GN R385.

²¹² See regulation 21 of the GN R385. Basic assessment was applicable to the activities listed in GN R386 while S&EIR was applicable for activities listed in GN R387.

²¹³ For instance, regulation 10 that deals with timeframes of notifying applicant after the decision is made and required that the applicant had to be notified within 10 days of the decision. The competent authorities were mandated to comply with the timeframes that were applicable. See regulation 9 thereof.

²¹⁴ Regulation 15 of the GN R385.

²¹⁵ Regulation 69 of the GN R385.

The regulations further provided for mining activities that could be exemplified by activities 8 and 9 in GN R386. These regulations stated that a basic assessment report was required for permission for reconnaissance, prospecting, mining or retention operations.²¹⁶ However, these activities were never put into operation. The regulations further provided for the appointment and general requirements of the environmental assessment practitioners (EAPs).²¹⁷

The regulations no longer referred to an RoD but an environmental authorisation as stated in section 24 of NEMA.²¹⁸ The decision of the competent authority and the conditions had to be contained in the environmental authorisation.²¹⁹ The regulations further made provision for amendments, withdrawals and suspensions of such authorisations.²²⁰ This enabled applicants to also apply for the amendment of their environmental authorisations if they deemed it necessary.²²¹ The competent authority could also apply for the amendment of these authorisations of their own accord.²²²

Generally, the relevant competent authorities had to be determined in terms of the GN R386 and GN R387.²²³ The applicant for environmental authorisation could approach the competent authority to request access to any guidelines and information or practices that had been developed or request advice on the processes that must be followed.²²⁴

The procedure that had to be followed with regard to a basic assessment was that the applicant through the EAP had to, before applying to conduct public participation

²¹⁶ However, environmental authorisations under NEMA did not apply in respect to these activities since the relevant provisions never came into effect. The mining activities were previously not covered in ECA and its regulations. See in this regard Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1261.

²¹⁷ Regulations 17 and 18 of the of the GN R385.

²¹⁸ Regulation 37 of the GN R385 in GG 28753. See also Kidd *Environmental Law* 249. It is for this reason that the authorisation in terms of section 24 of NEMA will be referred to as environmental authorisation instead of RoD.

²¹⁹ Regulations 37 of the of the GN R385. The contents of the environmental authorisation are set out in regulation 38.

²²⁰ Chapter 4 of the GN R385.

²²¹ Regulation 40 of the GN R385.

²²² Regulation 44 of the GN R385.

²²³ Regulation 3(2) of the GN R385.

²²⁴ Regulation 5 of the GN R385.

in terms of regulation 56, give notice of the proposed application to the competent authority and any organ of state that had authority with respect to the activity, open and maintain the register for I&APs, consider all the comments made by the I&APs and then prepare a basic assessment report.²²⁵ The EAP also had to give all the I&APs an opportunity to comment on the basic assessment report.²²⁶ Thereafter, the EAP could submit the application and the reports to the competent authority.²²⁷

With respect to the S&EIR procedure, the EAP had to submit the application form to the competent authority.²²⁸ Contrary to the basic assessment procedure, the EAP had to submit the application form before embarking on other stages of the application process. Following the submission of the application, the EAP had to conduct public participation process, give notice in writing to any organ of state that had jurisdiction in respect of the activity, open and maintains a record of I&APs, consider all comments and then compile a scoping report.²²⁹ If the competent authority approved the scoping report, the EAP could proceed with the EIA and compile an EIA report.²³⁰ The EIA report had to contain, amongst other things, a draft environmental management plan.²³¹ Once the competent authority has accepted all the reports, it could make its decision.

The challenges that emanated from these regulations included but are not limited to inadequate provision for thresholds that indicated the levels of significance.²³² According to Ridl and Couzens,²³³ the lists were capable of different interpretations that could have led to disagreements on which procedures to follow.²³⁴ Further, while there were timeframes for other processes such as decision-making, there were no timelines with regard to public participation to be undertaken in terms of regulation 56.

²²⁵ Regulation 22 of the GN R385.

²²⁶ Regulation 22 of the GN R385.

²²⁷ Regulation 24 of the GN R385.

²²⁸ Regulation 27 of the GN R385.

²²⁹ Section 28 of the GN R385.

²³⁰ Regulation 32 of the GN R385.

²³¹ Regulation 32(1)(o) of the GN R385.

²³² Ridl and Couzens 2010 *PELJ* 90.

²³³ Ridl and Couzens 2010 *PELJ* 90.

²³⁴ Ridl and Couzens 2010 *PELJ* 90.

The regulations did not refer to the section 24G applications that resulted in a lack of clarity with regard to the procedures that had to be followed in the case of section 24G applications. It was uncertain whether the assessment process would follow the basic assessment or S&EIR process depending on which Listing Notice the unlawful activity appeared or whether a totally different process could be negotiated or followed at the discretion of the relevant official. In addition, it was not clear whether the other processes, such as public participation, had to be undertaken in accordance with the EIA regulations or not. The public participation process couched for the EIA process was anticipatory instead of the retrospective public participation that had to be undertaken in terms of section 24G of the NEMA. The unintended challenges that were entangled in section 24G led to new regulations in 2010 that are discussed below.²³⁵

In the case of *Supersize Investments*,²³⁶ the applicant commenced the development of an eco-estate on the basis of, unbeknown to the applicant, a fraudulent environmental authorisation. When it was finally brought to the applicant's attention that the environmental authorisation was fraudulent, it ceased its operations and applied for proper environmental authorisation. The applicant was later told that its application could not be processed further as the construction of activities had commenced before the authorisation was granted.²³⁷ The applicant was further warned that the commencement of a listed activity without an environmental authorisation constituted an offence in terms of section 24F NEMA.²³⁸ The applicant thereafter launched an application to the High Court to compel the Department to make a decision on the actual application that was submitted. The Department refused the authorisation, citing that the EIA process is only for activities that had not commenced in terms of sections 24(1) and 24(4A) of NEMA.²³⁹

²³⁵ See para 3.6.2 below.

²³⁶ *Supersize Investments v MEC of Economic Development Environment and Tourism Limpopo Provincial Government and Another* (70853/2011) [2013] ZAGPPHC 98 (11 April 2013) para 3 (*Supersize Investments*).

²³⁷ *Supersize Investments* para 5.

²³⁸ *Supersize Investments* para 5.

²³⁹ *Supersize Investments* para 7.

The applicant appealed to the MEC who dismissed the appeal.²⁴⁰ It was this decision of the MEC that was in issue. The Gauteng High Court noted that the MEC's decision implied, amongst other things, that the application could only be dealt with in terms of section 24G.²⁴¹ The issue before the court was whether the decision by the MEC not to consider the application because the development had already commenced before a "lawful" environmental authorisation was issued was a decision based on an error of law.²⁴² The court was of the view that the then sections 24F and 24G dealt with criminal proceedings. Therefore, section 24G could not apply to the applicant because it was not subjected to criminal proceedings.²⁴³

It is submitted herein that the court erred in considering that section 24G only applied to situations where criminal proceedings had been instituted. This interpretation contradicts the intention of section 24G of the NEMA, which can be inferred from section 7 of *Amendment Act 8 of 2004*, which was to bring the unlawful activities into the regulatory loop. This view is affirmed by Kidd, Retief and Alberts²⁴⁴ who argue that the court's decision was incorrect in terms of the law and practice relating to section 24G, which was seen as an alternative to prosecution. This case highlights a challenge with section 24G wherein the *bona fide* contravener, who had no intention of contravening section 24F, must bear the brunt of paying an administrative fine and facing the chances of being prosecuted for contravention of section 24F of NEMA.

The other case that demonstrated the interpretation challenges of section 24G was the case of *Interwaste v Coetzee*.²⁴⁵ The High Court erroneously stated that the effect of the rectification application in terms of section 24G of NEMA was to suspend the penal provision contained in section 24F.²⁴⁶ Further, it held that section 24G provided the applicant a moratorium against any further action being taken against

²⁴⁰ *Supersize Investments* para 7. The basis of dismissal of the appeal by the MEC was that the construction of the listed activities commenced before the completion of the EIA.

²⁴¹ *Supersize Investments* para 11.

²⁴² *Supersize Investments* para 11.

²⁴³ *Supersize Investments* para 13.

²⁴⁴ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1258.

²⁴⁵ *Interwaste v Coetzee* (23921) [2013] ZAGPJHC 89 (22 April 2013).

²⁴⁶ *Supersize Investments* para 29.

the said applicant pending the finalisation of the rectification application. Section 24G did not expressly preclude instituting criminal proceedings against the section 24G applicant, nor did it expressly provide that where such criminal proceedings had been instituted, they would be suspended by virtue of filing a section 24G application. The court also rejected an argument that section 24G had nothing to do with waste management activities, thus implying that section 24G was applicable to waste management activities.²⁴⁷

While the debate had moved from the issue of whether *ex post facto* authorisation is permitted or not, the challenge still remained the interpretation of section 24G. The case law seemed to bring more confusion to the EIA process, the courts, the developers and competent authorities. It remained unclear as to when section 24G could be invoked and the scope of its application, that is, which activities could be subjected to section 24G application.

In the *Magaliesberg Protection Association* case, a development commenced in the Magaliesberg Protected Environment without an environmental authorisation. The applicant, a voluntary organisation objected to such development.²⁴⁸ The applicant later learned that the developer, through its consulting firm, requested comments from I&APs concerning the section 24G application in December 2008.²⁴⁹ The application had been submitted in July 2008, while the assessment report had been submitted in October 2008. In March 2009, the applicant was informed that an *ex post facto* environmental authorisation had been issued. The applicant appealed to the MEC against the decision on the ground that the *ex post facto* environmental authorisation was issued pursuant to a flawed public participation process amongst other grounds.²⁵⁰ The MEC dismissed the appeal and stated that the public participation process followed was in line with the procedure stipulated in GN R385, and the High Court upheld this view.²⁵¹

²⁴⁷ *Supersize Investments* para 30.

²⁴⁸ *Magaliesberg Protection Association* para 4.

²⁴⁹ *Magaliesberg Protection Association* para 7.

²⁵⁰ *Magaliesberg Protection Association* para 10.

²⁵¹ *Magaliesberg Protection Association* para 11.

The Supreme Court of Appeal (SCA) also held that a satisfactory public participation process was followed.²⁵² For the purpose of the scope of this thesis, it shall suffice to argue that the MEC, the High Court and SCA seemingly erred in assuming that the public participation procedure had to be in accordance with the EIA regulations. There was no indication that it would apply to the section 24G application process. Assuming without necessarily conceding that the stand was taken by the MEC, High Court, and SCA was the correct position, the sequence in which the public participation happened was not in accordance with section 24G and the 2006 EIA regulations.²⁵³ Following this case law, section 24G was again amended.

3.6 2008-2014

3.6.1 NEMA Amendment Act 62 of 2008

In 2008, NEMA was amended by the *NEMA Amendment Act 62 of 2008*. Section 1 thereof inserted new definitions that included but are not limited to an integrated environmental authorisation, interested and affected parties, mine, Minister of Minerals and Energy, and public participation process. Section 2 of the *Amendment Act* substituted section 24 of the principal Act.²⁵⁴ The substituted section 24 did not only focus on the "impact" of the listed activities as its predecessors but included the consequences of listed activities.

Moreover, the 2008 *Amendment Act* inserted the then Minister of Minerals and Energy within the scope of section 24 as part of the competent authorities. It further included mining activities.²⁵⁵ Prior to this amendment, section 24 of NEMA did not expressly provide for mining activities. Section 24C(2A) provided that the then Minister of Minerals and Energy had to be identified as the competent authority

²⁵² *Magaliesberg Protection Association* para 53.

²⁵³ Section 24G required that the report that had to be submitted by the applicant had to indicate the public participation process that had been followed. In this regard, public participation was purported to be undertaken after the submission of the report. The regulation on the other hand stated that public participation had to be undertaken before and after compiling the report since the report had to include the comments of the I&APs and include an indication of how they were going to be addressed.

²⁵⁴ *NEMA Amendment Act 62 of 2008*.

²⁵⁵ Section 24C(2A) of *Amendment Act 62 of 2008*. See also Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1261.

where the "activity constituted prospecting, mining, exploration, production, or related activity occurring within prospecting, mining, exploration, production area".²⁵⁶ However, the provisions that provided for mining activities only came into force in 2014.²⁵⁷ Section 24G also placed focus on the assessment of consequences for or impacts on the environment. However, section 24G still did not directly refer to a basic assessment or the S&EIR.

The other significant change that the 2008 *Amendment Act* brought was the insertion of sections 24J-24M.²⁵⁸ Section 24N relates to the environmental management programme (EMPr). The competent authority may request an EMPr before considering the application for an environmental authorisation. The EMPr may contain "the proposed management, mitigation, protection or remedial measures that would be taken to address the environmental impact" identified in terms of section 24.²⁵⁹

Section 24O provides for "criteria to be taken into account by competent authorities when considering applications". This included but is not limited to considering all relevant factors, including adverse environmental impacts likely to be caused, measures that could be taken to protect the environment, prevent, control or mitigate environmental degradation.²⁶⁰ Although the foregoing provisions are anticipatory in nature in that they require the applicant to indicate how the eminent environmental degradation will be prevented or mitigated, it is, however, argued herein that these provisions also apply to section 24G of NEMA because it relates to

²⁵⁶ Section 24C(2A) of *Amendment Act* 62 of 2008. See also Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1261.

²⁵⁷ Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1262; Du Plessis 2015 *PELJ* 1441.

²⁵⁸ Section 8 of the *Amendment Act* 62 of 2008. Section 24J provided for publication of guidelines for listed activities or implementation of the regulations. Section 24K provided for consultation between the competent authority with other organs of states responsible for administration of the law that relates to an activity that may require environmental authorisation. Section 24L provided for the alignment of the environmental authorisations. Section 24M provided for the exemptions from application of certain provision. Section 24N provided for environmental management programme while section 24O provided for criteria to be taken into account by competent authorities when considering applications.

²⁵⁹ Section 24N(2) of *Amendment Act* 62 of 2008.

²⁶⁰ In the case of *Earthlife Africa (Johannesburg) v Minister of Environmental Affairs and Tourism* [2017] 2 All SA 519 (GP) the court interpreted section 24O to include climate change considerations.

the decision-making on whether to grant an *ex post facto* environmental authorisation or not. Furthermore, section 24G(1)(vii)(ee) of NEMA provides that the competent authority may require the applicant to submit an EMPr. Although section 24G provides for *ex post facto* environmental authorisation, it is nonetheless an environmental authorisation to which case section 24O must apply. Seemingly, the inserted provisions, albeit anticipatory in nature, theoretically may apply to *ex post facto* environmental authorisation. However, this study will interrogate in Chapter 4 whether this is the case in practice.

3.6.2 2010 NEMA EIA Regulations

In 2010, new regulations published in GN R543-546²⁶¹ were introduced repealing the 2006 EIA Regulations.²⁶² GN R543 provided for the procedures that had to be followed in undertaking EIA. GN R544-546 contain Listing Notices 1, 2 and 3.²⁶³ The 2010 regulations were meant to accommodate the amendments that were made to section 24 of NEMA in 2008.²⁶⁴

Regulation 5 provided for assistance by the competent authority to the applicant or EAP with regard to access to guidelines, policies and decision-making instruments in possession of the competent authority.²⁶⁵ This cured the defect in 2006 EIA Regulations that were not aligned with PAIA and PAJA, amongst others. Similarly, the competent authority was granted a right of access to information that was likely to affect a decision in possession of the applicant, EAP or any other person who was in possession of such information.²⁶⁶

²⁶¹ GN R543-546 in GG 33306 of 18 June 2010.

²⁶² Regulation 78 of the GN R543 in GG 33306 of the 18 June 2010. Kidd *Environmental Law* 251-153.

²⁶³ Listing Notice 1 published in GN R544 provided for the activities that triggered a basic assessment while Listing Notice 2 provides for the activities that triggered a S&EIR.

²⁶⁴ For instance, sections 24K and 24L. See regulation 36(3) of the GN R543.

²⁶⁵ Regulation 5(1) of the GN R543. The regulation further entitled the applicant or EAP to information in the possession of the competent authority upon written request by the applicant or EAP.

²⁶⁶ Regulation 7 of the GN R543.

Concerning the timeframes, the regulations provided specified times within which the application should be considered, and the decision should be made.²⁶⁷ Moreover, the regulations stipulated the timeframes within which the competent authority should notify the applicant of the decision and the time within which the applicant should notify the I&APs.²⁶⁸ If the decision was not made within the prescribed times, the applicant could invoke section 6(2)(g) and (3) of PAJA, a step that was novel to the South African EIA procedure.²⁶⁹ This also cured the deficiency in the previous EIA Regulations pertaining to delays in decision-making by aligning the EIA Regulations with the PAJA. Similar to the 2006 EIA Regulations, the 2010 EIA Regulations did not provide an environmental assessment for existing listed activities that were commenced unlawfully, nor did they refer to whether they are applicable to section 24G applications.

Similar to the 2006 EIA regulations, the 2010 regulations provided for a two-pronged assessment procedure, to wit a basic assessment and a S&EIR. GN R544 set out the competent authorities and list of activities that had to be subjected to basic assessment, while GN R545 provided for the competent authorities and list of activities that had to be subjected to a S&EIR.²⁷⁰ The basic assessment procedure was amended in the 2010 EIA Regulations. Generally, the applicant had to appoint an EAP who would manage the application process.²⁷¹ The EAP had to determine which process was applicable.²⁷² If a basic assessment was applicable, the applicant or the EAP had to submit the application form to the competent authority before conducting a basic assessment.²⁷³

²⁶⁷ See regulation 9(2) which refers to regulations 24(1), 25(1), 30(1), 34(2) or 35 respectively. The regulation further stated that in the event that the timelines were not met, the timeframes would be automatically extended by 60 days.

²⁶⁸ Regulation 10(1) and (2) provided for two days and 12 days.

²⁶⁹ Regulation 9(4) of the GN R543. Section 6(2)(g) of PAJA provides that a court or tribunal may judicially review any administrative action if the action consists of failure to take decision. Thus, if the competent authority failed to make a decision within the prescribed time, the applicant can approach the court for a judicial review for failure on the part of the competent authority to make a decision while it has a duty to same.

²⁷⁰ See part 2 and 3 of the Chapter 3 of the GN R543. See also Kidd *Environmental Law* 250.

²⁷¹ Regulation 16 of the GN R543.

²⁷² Regulation 19 of the GN R543.

²⁷³ Regulation 21 of the GN R543.

This is slightly different from regulation 22(1) of the 2006 EIA Regulations, which required that if the basic assessment was applicable, the EAP had to, prior submitting the application form prepare a basic assessment report. Following the submission of the application form, the EAP had to undertake a public participation process, consider all comments and prepare a basic assessment report, which had to be open for comment by the I&APs.²⁷⁴

In relation to a S&EIR, similarly, the EAP had to submit an application form to the competent authority.²⁷⁵ The EAP then had to undertake the prescribed public participation process as prescribed in regulation 54 and then prepare a scoping report that had to be submitted to the competent authority.²⁷⁶ Following the acceptance of the scoping report, the EAP had to undertake an EIA and prepare the EIA report.²⁷⁷ Upon receipt of the EIA report and other accompanying reports, the competent authority had to decide to either issue or refuse environmental authorisation based on the proposed action's scientific reports and impact predictions. The regulations had somewhat detailed provisions for appeal procedures.²⁷⁸

3.6.3 NEMA Amendment Act 30 of 2013 and section 24F

In 2013, there was another significant amendment to NEMA. Amongst others, the 2013 *Amendment Act* significantly amended section 24F. Section 24F's heading was amended to read "Prohibitions relating to commencement or continuation of listed activities". It also deleted from the principal Act, section 24F(2), which made it a defence to a charge of section 24F to indicate that the activity was commenced or continued in response to an emergency or for the protection of human life, property or the environment.²⁷⁹ Although this is no longer included in section 24F, the wording of the section is included in section 49A(2). However, the emergency will have to constitute an emergency situation or incident as set out in sections 30 and

²⁷⁴ Regulation 21 of the GN R543.

²⁷⁵ Regulation 26 of the GN R543.

²⁷⁶ Regulation 27 of the GN R543.

²⁷⁷ Regulation 31 of the GN R543.

²⁷⁸ See Chapter 7 of the GN R543.

²⁷⁹ Section 8 of the *Amendment Act* 69 of the 2013.

30A of NEMA. It is questionable whether all actions that would necessitate an emergency response for the protection of human life, property or the environment as previously set out will fall under the scope of these two articles. This will mean that such actions that may trigger a listed activity may still be unlawful.²⁸⁰ The 2013 *Amendment Act* also inserted sections 49A and 49B. Section 49A(1)(a) lists contravention of section 24F as an offence. Section 49B(1) institutes a fine of not exceeding R10 million or a period of imprisonment of 10 years, or both for such contravention. Section 49B(2) makes provision for a higher fine for second offenders in relation to other offences. However, there is not a similar measure in relation to section 49A(1)(a) offences.

The current section 24G was inserted by the 2013 *Amendment Act* and will be discussed separately as it forms the main focus point of this thesis.

3.7 Current section 24G of NEMA

3.7.1 2013 Amendment Act

Firstly, the 2013 *Amendment Act* changed the title of section 24G from "Rectification of unlawful commencement or continuation of listed activity" to "Consequences of unlawful commencement of the activity". Secondly, the 2013 *Amendment Act* included waste management activities that have been carried out without environmental authorisations in terms of section 20(b) of the NEMWA,²⁸¹ which were not previously included under the scope of section 24G. It is worth noting that section 24G also applies to other SEMAs. For instance, section 22A of the NEMAQA provides that section 24G applies to the commencement of listed activities relating to air quality that commenced without an environmental authorisation. The MPRDA

²⁸⁰ Section 49A(2) places the following proviso: "(a) in the case of an incident, the response is in compliance with the obligations contemplated in section 30(4) and was necessary and proportionate in relation to the threat to human life, property and the environment; and (b) in the case of an emergency situation contemplated in section 30A, the response was in compliance with a directive issued in terms of section 30A."

²⁸¹ Section 24G(1)(b) of NEMA. See also section 20(b) of NEMWA which prohibits any person to commence a waste management activity without a waste management licence where the licence is required. See also Oosthuizen, Van der Linde and Basson "National Environmental Management Act 107 of 1998 (NEMA)" 163.

provides that the environmental authorisation (in terms of NEMA) is a *sine qua non* to issuing the permit or any right in terms of the MPRDA.²⁸² Therefore, section 24 of NEMA, which includes section 24G, is applicable to the MPRDA.²⁸³

Furthermore, section 24G(1) empowers the competent authority to "direct the applicant to immediately cease the activity pending a decision" on the *ex post facto* environmental authorisation.²⁸⁴ The competent authority may further direct the applicant to:

- (i) immediately cease the activity pending a decision on the application ...;
- (ii) investigate, evaluate and assess the impact of the activity on the environment;
- (iii) remedy any adverse effects of the activity on the environment;
- (iv) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation;
- (v) contain or prevent the movement of pollution or degradation of the environment; and
- (vi) eliminate any source of pollution or degradation.

The competent authority may also direct the applicant to compile a report that must contain, amongst others:²⁸⁵

- a) a description of the need and desirability of the activity;
- b) an assessment of the consequences for or impacts on the environment of the activity and cumulative effect and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;
- c) a description of mitigation measures undertaken or to be undertaken with regard to the activity;
- d) a description of the public participation process followed during the course of compiling the report, including all the comments received from the I&APs and indication of how these issues have been addressed;
- e) an environmental management programme; or

²⁸² Section 38A(2) of the MPRDA.

²⁸³ The 2008 Act already inserted the then Minister of Minerals and Energy as a competent authority for section 24G applications – the section now refers to the Minister responsible for mineral resources.

²⁸⁴ Section 24G(1)(i) of NEMA.

²⁸⁵ Section 24G(1)(vii)-(viii).

f) any additional information that the competent authority may require.

An applicant for a section 24G(4) authorisation must pay an administrative fine that may not exceed R5 million as determined by the competent authority.²⁸⁶ Following the payment of the administrative fine, the competent authority may either refuse an environmental assessment or issue an environmental authorisation to continue, conduct or undertake the activity subject to such conditions as the competent authority may deem necessary. The competent authority may also require additional information.²⁸⁷ Following the decision-making on the section 24G application, any person aggrieved by the competent authority's decision may appeal to the Minister or MEC subject to section 43 of NEMA.²⁸⁸ Section 43(7) provides that such an appeal suspends an environmental authorisation.²⁸⁹ It is argued that this provision applies *mutatis mutandis* on the *ex post facto* environmental authorisation.

Furthermore, section 24G provides that the competent authority may direct the developer to rehabilitate the environment or take any other necessary measure.²⁹⁰ The *ex post facto* environmental authorisation application or granting of the same does not derogate from the EMIs or SAPS to investigate any transgression in terms of the NEMA or SEMAs and the NPA to institute a criminal prosecution.²⁹¹ In the recent judgement of *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*,²⁹² the court stated that section 24G also allows for private prosecution even though the section 24G process has not been finalised. Further, if it comes to the attention of the competent authority after the application has been filed but, before the decision-making that there is the criminal investigation for contravention of section 24F of NEMA or section 20(b) of NEMWA, the competent authority may defer

²⁸⁶ In 2017, the new 24G fine regulations were published and discussed in para 3.8.2 below. At the time of the submission of this thesis, there is proposed amendment to section 24G in *The National Environmental Management Laws Amendment Bill* [B14D-2017] (NEMLA IV).

²⁸⁷ Section 24G(2) of NEMA.

²⁸⁸ Section 43 of NEMA. The appeal process is set out in the *National Appeal Regulations* 2014 published in GN R993 in GG 38303 of 8 December 2014.

²⁸⁹ See section 43(7) of NEMA.

²⁹⁰ Section 24G(3) of NEMA.

²⁹¹ Section 24G(6) of NEMA.

²⁹² *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP) para 112 (hereinafter Uzani case). See also Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 1.

a decision until the investigation is concluded and the NPA has decided not to institute prosecution or the applicant is acquitted or found not guilty after prosecution or the applicant has been convicted of an offence.²⁹³

The phrasing of the current section 24G refutes some criticism levelled against *ex post facto* environmental authorisations in the section 24G context. Firstly, the applicant can now be directly directed to cease immediately with the activity pending the activity's finalisation. Secondly, section 24G requires developers to assess the impact of their development on the environment, albeit after commencement. The downside of section 24G is that it does not prescribe the method of assessment that must be followed, unlike the normal application for environmental authorisations. Thirdly, section 24G requires the developers to remedy the environmental degradation and to "cease, modify or control any act, activity, process or omission causing, contain pollution or environmental degradation". It can be inferred that this requires the application of the preventive principle that demands that environmental degradation is prevented or minimised and mitigated where it cannot completely be prevented. Furthermore, section 24G demands that the applicant reports on the impact of the development on the environment's geographical, physical, biological, social, economic, and cultural aspects. It can safely be inferred that section 24G demands integration and consideration of several sustainable development factors into the decision-making. Rantlo and Viljoen²⁹⁴ argue that an *ex post facto* environmental authorisation works towards sustainability in that it offers the developer an opportunity to get back into the regulatory loop. Furthermore, section 24G provides the applicants for an *ex post facto* environmental authorisation an opportunity to formulate mitigation measures that will ensure that the activity is regulated and monitored. Summarily, contrary to the criticism levelled against section 24G, it is submitted herein that the current section 24G does not, theoretically speaking, undermine sustainable development and the environmental management principles. It ensures that the activity is regulated.

²⁹³ Section 24G(6) of NEMA.

²⁹⁴ Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 4-5.

3.7.2 Case law

Following the insertion of section 24G of NEMA, various disputes were brought before the courts for adjudication (some still under the ECA regime) and they are discussed below.

In the matter of *Pretoria Timber Treathers v Mosunkutu*,²⁹⁵ the applicant sought an order reviewing and setting aside its administrative fine in the amount of R522 500 imposed by the respondent in his capacity as the MEC. The applicant contravened section 24F of NEMA and thus submitted an *ex post facto* environmental authorisation application. Before the application was considered, the applicant was informed of the amount of the administrative fine that had to be paid and the reasons therefore. The reasons for imposing the fine included that it was "imposed using a penalty calculator protocol and guidelines" developed by the then DEA with the provincial departments" to ensure uniformity, coherency and consistency in the imposition of the fines".²⁹⁶ The applicant was of the view that the fine was excessive and that the respondent did not apply its mind to the representation it had made. Thus, the administrative fine was unreasonable and the MEC acted arbitrarily. The court found "that the applicant made bold unsubstantiated allegations that it failed to substantiate".²⁹⁷ The court held that "the applicant failed to make out a case to support its contentions, and accordingly, its application did not succeed".²⁹⁸ This case highlights the issues that surrounded the determination of *quantum* of an administrative fine. However, this position has been addressed by the 2017 regulations relating to the determination of administrative fine.²⁹⁹

In the matter of *Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd*,³⁰⁰ an application for an interdict was made to prevent Kiepersol from continuing

²⁹⁵ *Pretoria Timber Treathers v Mosunkutu* (53710/2008) [2009] ZAGPPHC 326 (22 September 2009) (hereinafter *Pretoria Timber Treathers*).

²⁹⁶ *Pretoria Timber Treathers* para 10.

²⁹⁷ *Pretoria Timber Treathers* para 30.

²⁹⁸ *Pretoria Timber Treathers* para 30.

²⁹⁹ See para 3.8.2 below.

³⁰⁰ *Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd* (40408/08) [2008] ZAGPPHC 320 (7 October 2008) (hereinafter *Kiepersol Poultry Farm*).

with its unlawful activities in contravention of GN R386 and the ECA read with GN R1182.³⁰¹ Kiepersol filed an *ex post facto* environmental authorisation application. The court noted that the filing of an *ex post facto* environmental authorisation by Kiepersol was an admission that it acted unlawfully and that the defences raised by the director of Kiepersol were spurious and false.³⁰² The defence was held to be *mala fide* and that Kiepersol acted with ulterior motives. The court, therefore, granted the interdict.

In *York Timber (Pty) Ltd v National Director of Public Prosecutions*,³⁰³ the court had to determine whether a developer who contravened section 24F can be obliged to apply for an *ex post facto* environmental authorisation. York Timber was criminally charged for commencing with listed activities without environmental authorisation.³⁰⁴ York Timber pleaded guilty to the charges and was duly convicted.³⁰⁵ After conviction but before sentencing, the National Director of Public Prosecutions applied for a confiscation order.³⁰⁶ Following the sentencing for contravention of section 24F, York Timber appealed against the sentence.³⁰⁷ In addition, the confiscation order was granted.³⁰⁸ York Timber appealed against the confiscation order. In dealing with the issue of whether a developer can be legally obliged to apply for an *ex post facto* environmental authorisation, the court held that York Timber could not be legally obliged to apply for an *ex post facto* environmental authorisation for the unlawful activity that has been abandoned.³⁰⁹ However, the court held that the position would be different if York Timber wanted to continue with unlawful activities.³¹⁰ A similar approach was followed in *Global*

³⁰¹ *Kiepersol Poultry Farm* para 4.

³⁰² *Kiepersol Poultry Farm* paras 29-30.

³⁰³ *York Timber (Pty) Ltd v National Director of Public Prosecution* 2015 1 SACR (GNP) para 39 (*York Timbers*).

³⁰⁴ *York Timbers* para 3.

³⁰⁵ *York Timbers* para 6.

³⁰⁶ *York Timbers* para 9.

³⁰⁷ *York Timbers* para 12.

³⁰⁸ *York Timbers* para 13.

³⁰⁹ *York Timbers* para 43.

³¹⁰ *York Timbers* para 43.

Environmental Trust and Others v Tendele Coal Mining and Others,³¹¹ where the court held that Tendele Coal Mining unlawfully commenced with the listed activities and those activities were to remain unlawful until an environmental authorisation was issued. However, the court suspended the abovementioned order for 12 months to allow Tendele Coal Mining to obtain an environmental authorisation.³¹² In essence, the court ordered Tendele Coal Mining to apply for an *ex post facto* environmental authorisation and stipulated the timeframes for such a process.

These judgments are problematic because the wording of sections 24F and 24G implies voluntary application by the contravener of section 24F. Therefore, it is argued that currently, the developers who contravened section 24F may not be legally forced to apply for section 24G unless the wording of section 24G expressly provides for such. On the contrary, they may be criminally prosecuted because of the wording of sections 24F and 24G.³¹³

In the *Uzani* case, Uzani Environmental Advocacy (Uzani) instituted private prosecution proceedings against BP Southern Africa (BP) for carrying out unlawful activities in contravention of section 22(1) of the ECA read with sections 21(1) and 29(4) and item 1(c) of Schedules 1 and 2 of GN 1182.³¹⁴ BP pleaded not guilty to the charges and stated that Uzani had no standing to prosecute.³¹⁵ The court had to deal with three issues: whether BP had standing to prosecute, whether the prosecution was in the interest of the public or interest of protecting the environment and whether private prosecution is permissible terms in section 24G.³¹⁶

The prosecution called an expert witness who indicated that the *ex post facto* environmental authorisation adopts a lower standard of protection.³¹⁷ This line of argument seemed to be a generalisation as it may be true in some instances but

³¹¹ *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* (1105/2019) [2021] ZASCA 13 (09 February 2021) para 93 (hereafter *Global Environmental Trust and Others*).

³¹² *Global Environmental Trust and Others* 93.

³¹³ This argument is advanced further in para 4.5.2 in Chapter 4 below.

³¹⁴ *Uzani* case para 23.

³¹⁵ *Uzani* case para 24.

³¹⁶ *Uzani* case para 75.

³¹⁷ *Uzani* case para 33.

not in all as the competent authority may prescribe the type of assessment that must be carried out and the information that must be submitted.³¹⁸ Furthermore, the witness stated that refusing a section 24G application was not really an option because it could result in job losses.³¹⁹ Although that may be a consideration, section 24G requires that the social-economic, cultural and environmental factors should be considered and a decision should not be made on economic issues alone.³²⁰ Furthermore, NEMA empowers the competent authority to refuse the application for an *ex post facto* environmental authorisation. Therefore, it is submitted herein that the problem may not lie with section 24G of NEMA itself but seemingly with how competent authorities implement it.³²¹

The court held that Uzani was entitled to prosecute because it had informed the Director of Public Prosecution (DPP) and the DPP had no objection to Uzani prosecuting BP. With regard to whether the prosecution was in the interest of the public or environmental protection, the court held that there was no evidence that Uzani was embarking on a commercial venture when it instituted the private prosecution proceedings, despite allegations in this regard. On the last issue of whether private prosecution is permissible under section 24G, the court held that it would be absurd to suggest that if a section 24G application is submitted, a private prosecution is not allowed, while prosecution by the NPA is allowed.³²²

The court is of the view that by submitting a section 24G application, BP admitted that it commenced with listed activities without an environmental authorisation in contravention of section 24F.³²³ It was sufficient for Uzani to rely on the absence of an environmental authorisation to cast the burden on BP to establish on the balance of probabilities that it was the holder of an environmental authorisation.

While this case introduced private prosecution in terms of section 24G applications, it has highlighted another challenge with section 24G of NEMA. Firstly, there is a

³¹⁸ See in this regard Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 5.

³¹⁹ *Uzani* case para 34.

³²⁰ See also the discussion on the *Fuel Retailer* case in para 2.5.1 above.

³²¹ See also Chapter 4 below.

³²² *Uzani* case para 112.

³²³ *Uzani* case para 117.

possibility that there might in future be a high number of private prosecutions on contraventions of section 24G of NEMA. This may deter developers of unlawful activities who would want to regularise their unlawful activities for fear of being prosecuted. This defeats the whole purpose of section 24G, which is not to be punitive but to be a corrective measure. Secondly, it seems that submitting a section 24G application may be tantamount to an admission of guilt. In the *Uzani* case, the court did not look into the matters of fault on the part of BP. This may be problematic given the discussion of different drivers of *ex post facto* environmental authorisations where it is indicated that in some instances, a developer may lack the element of fault. The words "on application by a person who has committed an offence in terms of section 24F(2) ..." are also problematic. It is not clear whether these words connote intention. The question that arises is whether someone without *mens rea* can commit an offence. In *S v Coetzee*,³²⁴ the court held that the element of fault is required in statutory offences unless there is a clear (express or implied) indication to the contrary. The researcher argues that there is no such indication in section 24F. Therefore, if the approach in the *Uzani* case is to be followed, potential offenders may be held criminally liable even if the element of fault was not proven. In those instances, the mere submission of a section 24G application would be sufficient to have them convicted.

3.8 2014 to the current position: EIA regulations

In 2014, new EIA regulations were published, which repealed the 2010 EIA regulations. These regulations were substantially amended in 2017.³²⁵ The 2014 regulations will briefly be discussed.

3.8.1 NEMA 2014 EIA Regulations

In 2014, the 2010 EIA Regulations were repealed by the 2014 EIA Regulations accompanied by three Listing Notices.³²⁶ The general regulations are set out in GN

³²⁴ *S v Coetzee* 1997 (3) SA 527 CC.

³²⁵ GN R324-327 in GG 40772 of 7 April 2017.

³²⁶ Regulation 56 of the GN R982 in GG 38282 of 4 December 2014. GN R983-984 contain Listing Notices 1 to 3.

R982, while Listing Notice 1 in GN R983 provides for activities that trigger a basic assessment.³²⁷ Listing Notice 2 in GN R984 lists activities that trigger a S&EIR.³²⁸ Listing Notice 3 in GN R985 provides for lists of activities in certain geographical areas (in this case the provinces).³²⁹

The purpose of these regulations is to regulate the procedures and criteria set out in Chapter 5 of NEMA relating to the "preparation, evaluation, submission, processing and consideration of, and decision on, applications for environmental authorisations for the commencement of activities" that must be subjected to either basic assessment or a S&EIR.³³⁰ The regulations do not refer to procedures for section 24G applications or make any mention of activities that commenced without authorisation. The only existing activities listed are those that relate to upgrading or extension of the existing activity is undertaken or in the case of closure of some activities. However, it seems this would refer to lawful activities.³³¹

The regulations provide for timeframes and set out how the timeframes have to be determined and state timeframes for different stages of the application process for environmental authorisation.³³² The EAP has to undertake the screening process in which he has to determine what process is triggered by the proposed activity or activities.³³³ The procedures for a basic assessment³³⁴ and the S&EIR³³⁵ are presented in Figures 3-1 and 3-2.

³²⁷ Regulation 3(2) of GN R983 in GG 38282 of 4 December 2014.

³²⁸ Regulation 3(2) of the GN R 984 in GG 38282 of 4 December 2014.

³²⁹ See GN R985 in GG 38282 of 4 December 2014.

³³⁰ Regulation 2 of the GN R982 in GG 38282 of 4 December 2014.

³³¹ The term "commence" in section 1 of NEMA has been defined earlier.

³³² Regulation 2 of the GN R982 in GG 38282 of 4 December 2014. For instance, the regulations provided that the public participation process must be undertaken with 30 days, notice of the decision within 5 days after the decision. Further, basic assessment application takes 90 days while the scoping process take up to 44 days. Regulation 2(2) provides that period of 15 December to 5 January must be excluded in the reckoning of days and excluded the weekends in the counting of days. In terms of regulation 12, the proponent has to appoint the EAP who has to manage the application.

³³³ Regulation 19 of the GN R982 in GG 38282 of 4 December 2014.

³³⁴ Regulations 19 to 21 of the GN R982 in GG 38282 of 4 December 2014.

³³⁵ Regulations 22 to 24 of the GN R982 in GG 38282 of 4 December 2014.

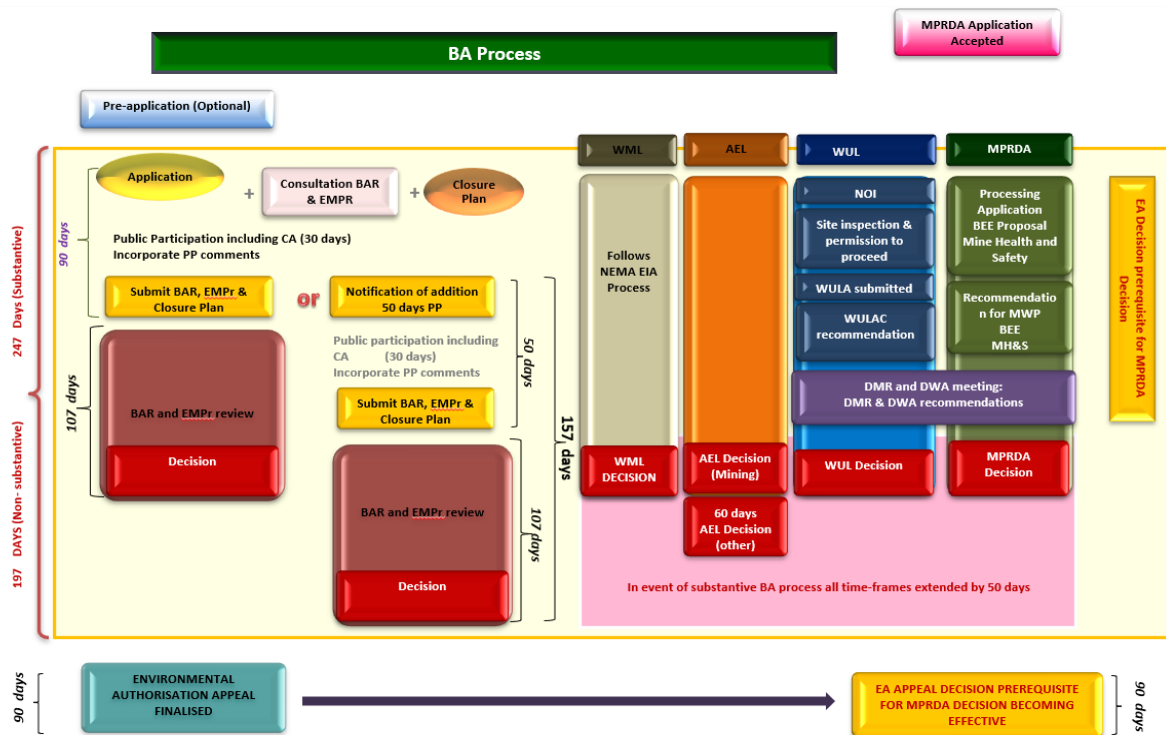


Figure 3-1: The basic assessment process³³⁶

³³⁶ This Figure is an extract from the PowerPoint presentation of Mr Vusi Skhosana, an official from DEFF, which is titled "NEMA EIA 2014 Regulations".

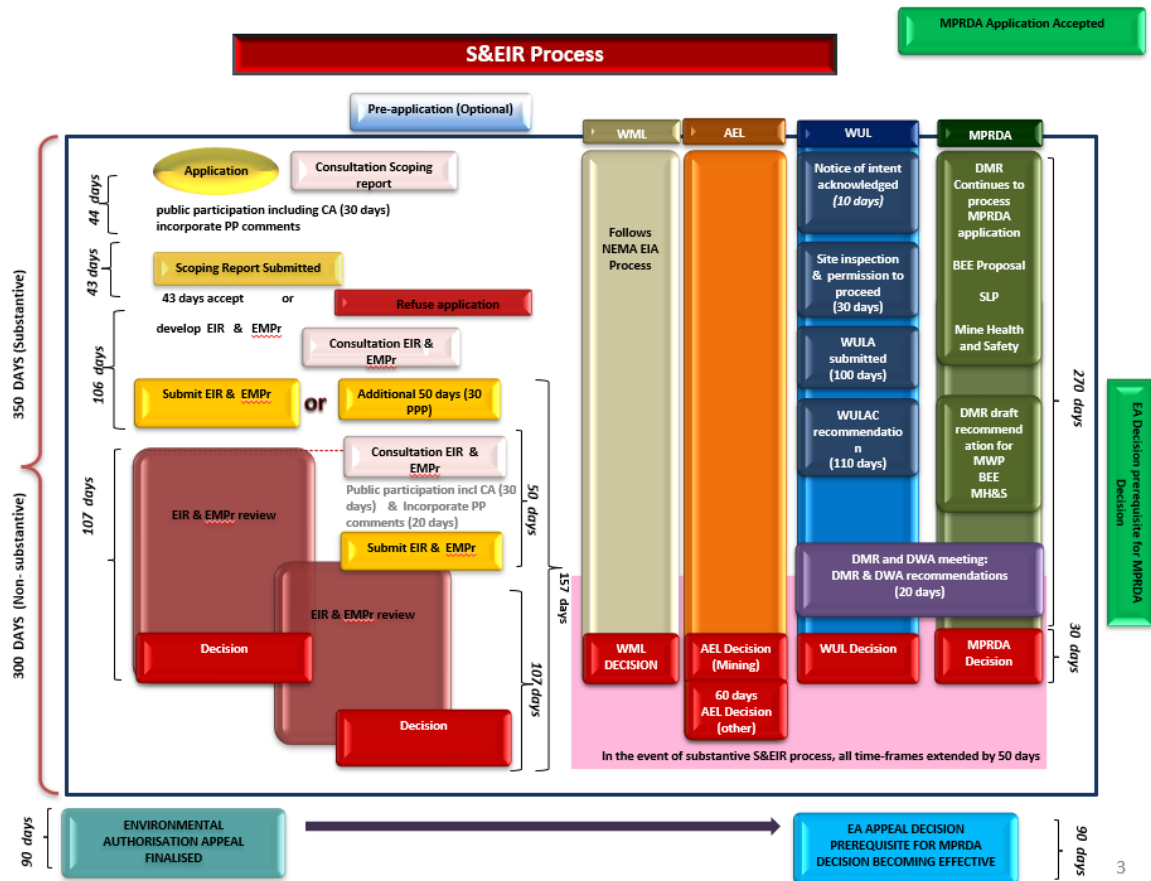


Figure 3-2: The S&EIR process³³⁷

The 2014 EIA regulations have brought some changes to the environmental authorisation application. The Department of Mineral Resources and Energy (DMRE) was identified as a competent authority where a listed activity is directly related to prospecting or exploration of a mineral resource or extraction and primary processing of mineral resource. Furthermore, the term construction was replaced with development.

Furthermore, some activities do not include the operational phase but relate to the construction or commencement phase. This becomes problematic when developers have to apply for an *ex post facto* environmental authorisation. This is more so because it is not clear whether the unlawful activity that is already in its operational phase will fall within the ambit of section 24G of NEMA. Section 24E(a), however,

³³⁷ This Figure is an extract from the PowerPoint presentation of Mr Vusi Skhosana, an official from DEFF, which is titled "NEMA EIA 2014 Regulations".

states that an environmental authorisation should "as a minimum ensure that (a) adequate provision is made for the ongoing management and monitoring of impacts of activity on the environment throughout the life cycle of the activity".³³⁸ A listed activity or authorisation that focuses on the commencement or construction phase of activity only may violate section 24E(a).

Again the 2014 EIA regulations do not refer to the section 24G application process. The regulations provide merely for proactive and anticipatory processes. This can be inferred, for example, from regulation 6 that provides that an application for an environmental authorisation for the "commencement" of an activity must be made to the competent authority. Wherefore, it is hereby submitted that the regulations do not apply to *ex post facto* environmental authorisations. Roughly two years after the publication of the 2014 regulations, the section 24G Fine Regulations were published, and they are discussed hereunder.

3.8.2 Section 24G Fine Regulations

In 2017, section 24G Fine Regulations were published in GN R698 and titled "Regulations relating to the procedure to be followed and the criteria to be considered when determining an appropriate fine in terms of section 24G".³³⁹ These regulations provide for the procedure and criteria to be followed in the determination of an administrative fine for a section 24G application.³⁴⁰ The regulations empower the competent authority to establish fine committees that must consider such applications to recommend the *quantum* of the fine to be imposed on an applicant.³⁴¹ Furthermore, the regulations set out the factors that the fine committee must take into consideration.³⁴² In summary, these factors include the information submitted in the application form for an *ex post facto* environmental authorisation, the impacts or potential impacts of the activity, any technical or specialist reports on the local receiving environment, and the applicant's

³³⁸ Section 24E(a) of NEMA.

³³⁹ GN R698 in GG 40994 of 17 July 2017.

³⁴⁰ Regulation 23 of the GN R698.

³⁴¹ Regulation 3 of the GN R698.

³⁴² Regulation 4(1) of the GN R698.

compliance history.³⁴³ The regulations further afford the applicant for an *ex post facto* environmental authorisation opportunity to make representations in respect of the *quantum* of the fine.³⁴⁴ The fine committee must submit the recommended *quantum* of the administrative fine, their reasons and the representations received to the competent authority for the determination.³⁴⁵ Upon receipt of the fine committee's recommendation, the competent authority must make a determination on the *quantum* of the administrative fine and communicate same to the applicant specifying the time periods within which the administrative fine must be paid.³⁴⁶

The Fine Regulations provide for a public participation process. Regulation 8 provides that before the applicant submits an application for an *ex post facto* environmental authorisation, the applicant must place a preliminary advertisement in the local newspaper and on the applicant's website. The notice must indicate that the applicant has commenced with a listed activity without an environmental authorisation on a particular date, location, the applicable legislation contravened and the activities that have been commenced.³⁴⁷ The advertisement must also indicate where the I&APs can register and submit their comments. Failure to carry out the public participation required by regulation 8 is a criminal offence punishable with a fine not exceeding R5 million or imprisonment for a period not exceeding R5 million or imprisonment for a term not exceeding five years.³⁴⁸ The advertisement, however, also comes down to an admission of guilt, and it would be interesting to see if this can be used as an admission of guilt similar to what happened in the *Uzani* case.

The regulations further provide for the notion of repeat contraveners and state that where a repeat contravener submits an application, the fine committee must recommend that the applicant pay the maximum fine in terms of section 24G(4) of

³⁴³ Regulation 4(1) of the GN R698. The impacts of the activity that must be considered include the socio-economic impact, biodiversity impact, impact on sense of place and any pollution or environmental degradation emanating from the activity.

³⁴⁴ Regulation 5 of the GN R698.

³⁴⁵ Regulation 5 of the GN R698.

³⁴⁶ Regulation 6 of the GN R698. The applicant must ensure that all the I&APs are notified and given access to the determination of the administrative fine and the reasons thereof.

³⁴⁷ Regulation 8 of the GN R698.

³⁴⁸ Regulation 10 of the GN R698.

NEMA.³⁴⁹ This may be regarded as a punitive measure and may address the criticism above, that in the case of an offence, no provision is made for repeat offenders of section 24F.

Summarily, the Fine Regulations cured some of the challenges related to the administrative fine. Firstly, the regulations set out the factors that must be considered in the determination of the administrative fine, which was previously not the case. Secondly, the regulations set out a public participation process for both the application for an *ex post facto* environmental authorisation and the determination of the fine's quantum. However, it does not do away with the fact that the I&APs are presented with a *fait accompli* in that the environmental degradation has already occurred. Furthermore, it is not clear in the regulations whether the I&APs may make representations on the reports requested by the competent authority or merely submit their comments regarding the activity subject to the *ex post facto* environmental authorisation application.

In light of the above, there are proposed amendments to section 24G. They are not finalised yet.

3.8.3 National Environmental Management Laws Amendment Bill [B14D-2017] (NEMLA IV)

In 2018, the National Assembly passed the *National Environmental Management Laws Amendment Bill [B14D-2017]* (NEMLA IV). The Bill lapsed as the National Council of Provinces (NCOP) did not manage to finalise their procedures before the national elections were conducted in May 2019. It was resubmitted to the NCOP in October 2019.³⁵⁰ The proposed amendments to section 24G of NEMA will allow a person in control of, or a successor in title to land on which an unlawful activity had

³⁴⁹ Regulation 9 of the GN R698. The repeat contravener is defined as "an applicant who satisfies one or more of the criteria listed in Regulation 4(1)(e) read with Regulation 4(3)".

³⁵⁰ Parliamentary Monitoring Group "National Environmental Management Laws Amendment (NEMLA) Bill: briefing with Minister" 9 May 2020. According to a parliamentary committee meeting attended by both the national and provincial environmental departments, the NCOP felt challenged by the lockdown measures and were uncertain how they will conduct the public participation process in relation to obtain comments on the Bill.

commenced or where it is already constructed to submit an application for an *ex post facto* environmental authorisation.³⁵¹

Secondly, NEMLA IV provides that the applicant must be directed to cease immediately with the activity pending the decision on the *ex post facto* environmental authorisation application "except if there are reasonable grounds to believe the cessation will result in the serious harm to the environment".³⁵² This may address the challenge that as indicated above, sections 30 and 30A of NEMA would otherwise apply. It will provide a less strict measure and it would be easier to determine what serious harm to the environment would be. NEMLA IV further proposes to increase the quantum of the administrative fine from R5 million to R10 million, which serves as an additional deterrent. The question, however, still remains whether a person in control of the land or a successor-in-title that did not commence the activity but who now applies for an authorisation, could be held criminally liable, especially in light of the *Uzani* case.

3.9 Preliminary observation

In light of the above discussion, section 24G was introduced not to lower the standard of protection of the environment, but to ensure that activities that were not subjected to assessment are assessed and ensure that the competent authority makes an informed decision. Section 24G was further introduced to bring unlawful activities into the regulatory loop. The current section 24G ensures that the I&APs are given an opportunity to make presentations. Therefore, it can be argued that section 24G *prima facie* does not or the at very least was not meant to backtrack on South Africa's environmental commitments.

However, the downside is that section 24G may be regarded as a regressive measure if the level of assessment is lower than that of the original intended environmental authorisation application (i.e. what the applicant would have had to apply for). Further, if the public participation is less stringent than the public

³⁵¹ Clause 5 of NEMLA IV.

³⁵² Clause 5 of NEMLA IV.

participation for a normal environmental authorisation, then section 24G is likely to be regressive. The amendments to section 24G as well as the proposed amendments to section 24G seem to strengthen the application procedures as well as the decision-making. Therefore, the practical application of section 24G by different competent authorities may shed light on whether, in practice, section 24G is indeed a regressive measure, and this will be discussed in the subsequent chapter.

3.10 Conclusion

The chapter was aimed at discussing the South African environmental legislation relating to environmental authorisations. In doing this, the chapter discussed the historical background of the environmental assessment legislation in South Africa and its evolution. Following the spread of EIAs and the concern on environmental degradation, South Africa published the 1989 *White Paper*, which was aimed to ensure environmental protection, thereby requiring that new activities had to be evaluated in light of environmental considerations. Furthermore, the chapter indicates that South Africa introduced the concept of IEM, which evolved over the years, and which generally requires the socio-economic, cultural and environmental considerations to be taken into consideration when new activities were carried out. Initially, the notion of IEM was confused with the EIA, and even today, some authors use the terms interchangeably.

The chapter further discussed the first environmental framework legislation, ECA, which required environmental authorisation (referred to at the time as RoD) for the commencement of certain identified (as were referred to) activities. The then Minister was empowered to identify activities that required a RoD. However, it was only in 1997 when the first EIA regulations were published in GN R1182-1184.

The chapter highlighted that the regulations were riddled with challenges for which the courts' intervention was sought, to wit; whether the legislation provided for *ex post facto* environmental authorisation, when could the *ex post facto* environmental authorisation be applied for as well as the interpretation of the listed activities. The courts reached contradictory decisions on the foregoing issues.

The publication of the regulations was followed by the publication of the 1998 *White Paper*. The chapter stated that the 1998 *White Paper* identified IEM as the prerequisite for the competent authorities to issue an environmental authorisation for activities that were likely to have a significant impact on the environment. Following the publication of the 1998 *White Paper*, NEMA was enacted. NEMA repealed most sections of ECA except sections 21, 22 and 26, which related to environmental assessment. The provisions of ECA initially ran concurrently with the provisions of NEMA. Chapter 5 of NEMA, which provides for environmental authorisation, requires prediction, assessment, evaluation of the impact of the proposed listed activity, and integration into the decision-making before the commencement of the listed activity.

The chapter indicated that despite the existence of legislation that required an environmental authorisation, some listed activities were carried out without an environmental authorisation between the ECA and the NEMA era resulting in unlawful activities. In order to address this challenge, the 2004 *NEMA Amendment Act* introduced section 24G of NEMA. The chapter submitted that section 24G was meant to be a temporary measure to provide an amnesty period for six months for the developers who commenced unlawful activities.

The chapter further discussed the first NEMA EIA regulations that were published in 2006, which were accompanied by three Listing Notices.³⁵³ These regulations set out the procedures to be followed in the application for environmental authorisation and identified the activities that triggered an environmental authorisation. These regulations made no reference to section 24G of NEMA and were anticipatory in nature. NEMA was again amended in 2008. Some of the provisions that were inserted by the 2008 *Amendment Act* such as sections 24N, 24O and 24P are also written in the anticipatory language. However, it is argued that they do not exclude the possibility of being applicable in the *ex post facto* environmental authorisation applications as these sections also apply to the operational phase of activities and projects. In 2010 the NEMA EIA regulations repealed the 2006 regulations. Similarly,

³⁵³ The regulations were published in GN R385 to GN R387.

these NEMA regulations did not refer to *ex post facto* environmental authorisations. Similarly, the 2014 EIA regulations and its subsequent amendments remained anticipatory in nature except where reference is made to the upgrading or expansion of existing facilities as well as closure. However, also in these instances, it is the future environmental impacts that are to be assessed.

The 2013 NEMA *Amendment Act* broadened the scope of the application of section 24G. The heading of section 24G was changed to "Prohibitions relating to commencement or continuation of listed activities". Secondly, it removed the defence that unlawful activity was commenced to save life or environment from section 24G. Further, section 24G covered the waste management activities that were commenced without a waste management license. The chapter indicated that although section 24G requires an assessment of impacts, it does, however, not prescribe the nature of the assessment to be carried out. Seemingly an assessment required by section 24G of NEMA may not be an EIA in the strict sense of the term.

Further, the submission or granting of an *ex post facto* environmental authorisation does not derogate from the EIMs or SAPS to investigate any transgression or the NPA instituting criminal prosecution. However, the chapter demonstrated that the *status quo* has been changed by the *Uzani* case where criminal prosecution is not only limited to the NPA but even private prosecution is permissible for section 24F transgressions. Seemingly submission of a section 24G application is an admission of guilt, but the court did not address the issue proving fault. Allowing private prosecution for a section 24F contravention may lead to an influx of private prosecutions. Failure by the court to address the issue of fault may lead to confusion and erroneous decisions. The chapter further discussed the provisions of NEMLA IV that further proposes to increase the scope of application of section 24G to apply to successors-in-title of the property in which the activity is carried out. The impact of this is that not only people who carried out listed activities can apply for the *ex post facto* environmental authorisation. The challenge with this provision is that the successor in title or the person responsible for the property on which the unlawful activity is carried out may suffer the same consequences as a person who

contravened section 24F of NEMA. That is, they will pay an administrative fine and face the possibility of prosecution or imprisonment or both.

The chapter further discussed some of the challenges of section 24G and summed up hereunder.

a) Environmental management principles

Section 24G was criticised for undermining sustainable development and the environmental management principles; namely, the preventive and the precautionary principle. The *ex post facto* environmental authorisation provides an opportunity for the impacts of the listed activity to be assessed, provide an opportunity for public participation and ensure that further environmental degradation is prevented, minimised and mitigated. In that sense, the preventative and precautionary principles will still be applied. The application also entails the consideration of socio-economic and environmental issues giving effect to the principle of sustainable development.

b) Abuse

Furthermore, section 24G was criticised in that it was possible to be abused by developers and some commentators argue it became the norm. This became evident in the *Kiepersol* case where applicants sought an interdict against Kiepersol from continuing with the unlawful activity. Kiepersol submitted an application for an *ex post facto* environmental authorisation. The court held that the defence of Kiepersol was held to be *mala fide* and that it had ulterior motives. Therefore, albeit unintended, section 24G can be abused by unscrupulous developers.

c) Interpretation

The chapter indicated the section 24G was riddled with interpretation challenges where the definition of such words such as "commencement" was disputed. However, the term was defined in the *Joint Owners'* case. The other challenge related to the timing in which *ex post facto* environmental authorisation could be applied for, and this was traversed in the case of *Supersize Investment* case. In this

case an environmental authorisation was fraudulently issued. The court held that sections 24F and 24G related to the prosecution. In the *Interwaste* case, the court held that the *ex post facto* environmental authorisation suspended the penal provision contained in section 24F of NEMA. The court further held that section 24G provided the applicants a moratorium against any further action being taken against them. The forgoing confusion has been done away by section 24G(6) of NEMA that provides that filing a section 24G application or the granting of an *ex post facto* environmental authorisation does not derogate from further action being taken against the applicant.

d) Administrative fine

The chapter highlighted that nature of administrative fines was in question. It is not clear whether the administrative fine is punitive or administrative in nature. Further, the determination of the *quantum* of the administrative fine was problematic because of the fine calculator that was initially used. For instance, in the *Pretoria Timber Treater's* case, the applicant challenged the administrative fine's *quantum* in that it was excessive. The court held that the applicant made unsubstantiated claims. Similarly, in the *Plotz* case, the *quantum* of the administrative fine was challenged on the basis that it was excessive. The High Court set aside and substituted the *quantum* of the administrative fine and opined that the administrative fine was irrational and unreasonable. The court stated that the fine calculator lacked a transparent process and that the calculator was an unacceptable policy instrument that hampered the discretionary powers of the competent authority.

The chapter further discussed the section 24G Fine Regulations that to some extent cured the deficiencies relating to administrative fines. Firstly, the regulations set out the procedure and the factors to be considered in the determination of the *quantum* of the administrative fine. Secondly, the regulations now set out a public participation process that must be followed although it does not do away with the fact that the I&APs are presented with a *fait accompli* in that the environmental degradation has already occurred. Notwithstanding the above, it is not clear in the

regulations whether the I&APs make representations on the reports requested by the competent authority or if they merely submit their comments with regard to the activity subject to the *ex post facto* environmental authorisation application.

The chapter discussed NEMLA IV, which proposed an increase in the maximum *quantum* of the administrative fine to R10 million to serve as a deterrent measure. Although the determination of *quantum* of the administrative fine has been resolved, the nature of the administrative fine and the public participation remains problematic.

e) *Fait accompli*

The chapter indicated that the competent authorities are presented with a *fait accompli*. This is more so because the competent authorities are presented with section 24G application where the environmental degradation has occurred and are left with little or no option to refuse the application. However, this argument was refuted because section 24G empowers the competent authorities to issue a directive to the applicant to immediately cease with the activity and rehabilitate the area, but to mention a few.

The foregoing discussion highlights that section 24G has challenges that were addressed by means of the legislative amendments that followed its introduction. Further, seemingly, section 24G may be regarded as a regressive measure if the level of assessment is lower than that of the original intended environmental authorisation application (i.e. what the applicant would have had to apply for). Further, if the public participation is less stringent than the public participation for a normal environmental authorisation, then section 24G is likely to be regressive. The amendments to section 24G as well as the proposed amendments to section 24G seem to strengthen the application procedures as well as the decision-making. Therefore, the practical application of section 24G by different competent authorities may shed light on whether in practice, section 24G is indeed a regressive measure.

Chapter 4: Practical application of section 24G

4.1 Introduction

This chapter aims to interrogate the current challenges of the *ex post facto* environmental authorisation that officials may experience in the DEFF, Gauteng DARD, Western Cape DEA&DP and the North West DREAD by carrying out a comparative analysis of the practical implementation of section 24G of NEMA. The first section of this chapter provides an overview of studies completed on section 24G of NEMA followed by the rationale and the research method used and the justification thereof. The second section of the chapter discusses the instruments used in the selected case study areas that guide the implementation of section 24G of NEMA to give insight into how each competent authority implements section 24G of NEMA. Finally, the last section of the chapter analyses the findings in relation to the current practical challenges to establish whether section 24G can be regarded as regressive in nature.

4.2 Overview of completed section 24G studies

September¹ carried out an empirical study on section 24G in 2012 for Gauteng. This study analysed the effectiveness of section 24G by assessing the extent to which it has contributed to improving compliance by addressing unlawful activities. The study further examined how section 24G has undermined progress towards better environmental management and governance. The study argued that section 24G has resulted in a step back in sound environmental management and governance by effectively providing a mechanism that accommodates environmental crimes.² Some of the challenges of section 24G she noted were an abuse of the provision, fine amounts and transparency in calculating the fines, the perception that an

¹ September *A critical analysis*. That is the first empirical study that the researcher could find and that was readily available. The writer acknowledges that there might have been other studies on the subject.

² September *A critical analysis* 69.

authorisation is always granted and the perception that the risk of prosecution is low.³

Hugo⁴ carried out another study in 2014. The study discussed introducing administrative penalty systems into South African law because it had a positive compliance impact in numerous jurisdictions and is used instead of criminal sanctions.⁵ The study looked into the administrative penalties in the Netherlands and the United Kingdom and identified best practices for administrative penalties.⁶ The study argued that section 24G provides for an administrative fine, which is not a true administrative penalty nor complies with the recommended best practices.⁷ The study further suggested that section 24G must be deleted or be amended to meet its obligation of protecting the environment.⁸

Du Toit⁹ carried out a study in the Western Cape DEA&DP in 2016, to determine whether section 24G is an effective deterrent to prevent non-compliance.¹⁰ The study used past research and information obtained from DEA&DP to analyse the trends in section 24G applications and make recommendations for improving the deterrence potential of section 24G.¹¹ The findings of the study were that despite a consistent increase in the average administrative fine, the number of section 24G applications received by the DEA&DP did not reflect an increase in environmental non-compliance but ensured an improved detection of environmental crimes.¹² The study indicated that most applications arose from ignorance. The study suggested that section 24G should be amended to increase its deterrent effectiveness.

Jikijela carried out a more recent study in 2018 concerning KwaZulu Natal.¹³ The study sought to examine whether the concerns raised against section 24G are

³ September *A critical analysis* 50-51.

⁴ Hugo *Administrative penalties*.

⁵ Hugo *Administrative penalties* 8.

⁶ Hugo *Administrative penalties* 28-53.

⁷ Hugo *Administrative penalties* 80.

⁸ Hugo *Administrative penalties* 80.

⁹ Du Toit *A critical evaluation of the NEMA*.

¹⁰ Du Toit *A critical evaluation of the NEMA* 3.

¹¹ Du Toit *A critical evaluation of the NEMA* 30-39.

¹² Du Toit *A critical evaluation of the NEMA* 39-40.

¹³ Jikijela *Protection of the environment through the application of section 24G*.

warranted and determine the role of the environmental considerations in the section 24G process.¹⁴ The study found that environmental considerations were central to the section 24G process, making it possible to address unlawful activities.¹⁵ The study further highlights that concerns regarding section 24G might have initially been warranted but may no longer be substantiated due to the amendments.¹⁶

Lastly, Burford (in 2019) investigated the impact of section 24G on sustainable development in South Africa.¹⁷ The study argued that section 24G allows for developers to evade the due process of EIAs and disregard environmental protection and considerations of the affected community's needs.¹⁸ It further argued that section 24G perpetuates an unsustainable form of development and detracts from the goal of sustainable development.¹⁹ In view of the foregoing, it is now imperative to discuss the rationale for this study.

4.3 Rationale and research method

Although there is literature and empirical studies on *ex post facto* environmental authorisations and section 24G of NEMA, there has not yet (as far as can be ascertained) been a comparison as to the implementation of section 24G made between different provinces. The empirical studies mostly focused on one province, and the results are province-specific.²⁰ Furthermore, there have been legislative amendments subsequent to these studies, which may mean that there is a gap in knowledge. Further, the previous studies did not determine whether the practical application of section 24G across different provinces undermines the non-regression principle.

As indicated in Chapter 1, the researcher used a mixed research method. Firstly, the research analysed secondary sources of law that are used in the case study areas to guide the implementation of section 24G of NEMA. This is done to ascertain

¹⁴ Jikijela *Protection of the environment through the application of section 24G* 2.

¹⁵ Jikijela *Protection of the environment through the application of section 24G* 69.

¹⁶ Jikijela *Protection of the environment through the application of section 24G* 72.

¹⁷ Burford *The impact of retroactive authorisation* 1.

¹⁸ Burford *The impact of retroactive authorisation* 42.

¹⁹ Burford *The impact of retroactive authorisation* 42.

²⁰ See para 4.2 above.

the procedure that is followed in the implementation of section 24G of NEMA. The purpose of this analysis is to establish whether there is uniformity in the implementation of section 24G of NEMA and possibly determine the challenges emanating therefrom. To collect data in this regard, the researcher used naturally occurring data and generated data.²¹ The naturally occurring data method includes participant observation, documentary analysis, discourse analysis and conversation analysis.²² For the purpose of this study, the researcher used a documentary analysis approach wherein the standard operating procedures (SOPs), the section 24G Process Flows and section 24G applications were analysed.²³ Document analysis involves "the study of existing documents, to either understand their substantive content or illuminate deeper meanings that may be revealed by their style and coverage".²⁴ This method is most suitable because it reflects how section 24G is implemented in practice, and this can assist in providing insight into the challenges of section 24G of NEMA. Further, this enabled the researcher to verify and validate the information obtained through interviews. The researcher opted to request recent applications relating to different listed activities to establish the current practical legal challenges.²⁵ These were full files with all the correspondence. As indicated, this was possible in only one province, namely the Western Cape. Although there are application forms from other provinces on the internet, the researcher did not use them because they did not include all the correspondence.

²¹ Some methods of data collection associated with qualitative research include but are not limited to "observational methods, in-depth interviewing, group discussions, analysis of documentary evidence". These methods of qualitative data collection can further be classified into two: naturally occurring data and narrated data. Ritchie "The Application of Qualitative Research Methods to Social Research" 3, 35.

²² For detailed discussion of these methods, see Ritchie "The Application of Qualitative Research Methods to Social Research" 35.

²³ The researcher initially planned to analyse the section 24G application records from all the case study areas. However, due to the national lockdown resulting from the outbreak of Covid-19, the researcher could not travel to the case study areas to peruse the records and the officials also did not want to provide the records in person due to the Covid-19 lockdown.

²⁴ Ritchie "The Application of Qualitative Research Methods to Social Research" 35.

²⁵ The researcher opted for the recent section 24G application records in order to limit the scope the study because there are already studies that related to the records dating from 2006 to 2010 in Gauteng. See September *A critical analysis* in this regard. Another study was carried out concerning application between 2006 to 2014 in the Western Cape. See in this regard Du Toit *A critical evaluation of the National Environmental Management Act*.

Secondly, the researcher used the qualitative empirical research method.²⁶ Empirical research means making planned observations.²⁷ This method was selected to determine the stakeholders' understanding and perceptions involved in the implementation of section 24G of NEMA.²⁸ To collect data, the researcher used the generated data method of data collection, which involves the "reconstruction and re-processing and re-telling of attitudes, beliefs, behaviour or other phenomena".²⁹ Generated data provides an "insight into participants' perspectives and on the interpretation of their beliefs and behaviours and most crucially the understanding and the meaning they attach to it".³⁰ Some approaches followed in generated data include biographical methods, individual interviews, paired interviews and focus groups or group discussions. The researcher used semi-structured questionnaires and in-depth interviews to collect data from individual participants to determine these perceptions and understandings.³¹

The questions were developed based on a literature survey of existing studies. The in-depth interviews were held on Zoom and Microsoft Teams to obtain information from the participants from March to August 2020, and they were recorded subject to the participant's permission.³² The face-to-face interviews with the government officials in the Western Cape DEADP were conducted in December 2019. Therefore, this study adopted a combination of naturally occurring data and the generated data to obtain an insight into the practical and theoretical challenges of the *ex post facto* environmental authorisation process in South Africa.

As alluded to, the DEFF, the Gauteng DARD, the Western Cape DEADP and the North West DREAD were selected for the empirical study. The choice of the study areas was primarily based on the NECERs and the numbers reflected therein.³³ The

²⁶ See para 1.9 in Chapter 1 above for detailed discussion on the qualitative research method.

²⁷ Patten *Proposing Empirical Research* 6. See Chapter 4.1 for more details.

²⁸ For detailed discussion on the procedure followed by the researcher, see Chapter 4 below.

²⁹ Ritchie "The Application of Qualitative Research Methods to Social Research" 36.

³⁰ Ritchie "The Application of Qualitative Research Methods to Social Research" 36.

³¹ For detailed discussions on the data collection, see Chapter 4 below.

³² The permissions and the interviews are stored on the NWU Figshare repository and they are password protected. Only the researcher and the study supervisor can access them.

³³ See para 1.10 in Chapter 1 and para 2.2. in Chapter 2 detailed discussions.

NECER 2017-18,³⁴ the NECER 2018-19³⁵ and the NECER 2019-20³⁶ reveal that unlawful commencement of listed activities continues to be the most prevalent environmental non-compliance being detected by the EMIs.³⁷ However, the NECERs have gaps in the information, and as a result, they are not reliable. The NECERs do not reflect the numbers of applications received per province, the pending applications, the finalised applications and the abandoned applications. The figures do not provide accurate information because they do not take into account that a fine may be issued in one year and then be paid and recorded in the subsequent year. It also does not take into consideration that some applicants may have paid higher fines as others in other provinces. Therefore, the NECERs may be inaccurate and may not reflect the true picture of the current state of affairs.

Albeit not an accurate reflection of the current state of affairs with regard to the *ex post facto* environmental authorisation in terms of section 24G of NEMA, it is safe to infer that the number of fines issued and total amounts of fines received give the impression that DEFF, Gauteng DARD and Western Cape DEA&DP have high numbers of *ex post facto* environmental applications. Conversely, the North West DREAD has a lower number of *ex post facto* environmental authorisations. The implementation of section 24G in these provinces, therefore, had to be investigated.

In addition to the NECERs, Gauteng DARD was selected because Gauteng is described as the financial capital and the most important economic hub in South Africa.³⁸ The Gauteng DARD *Environment Outlook Report of 2017* indicates that although Gauteng is historically built on a mining and industrial base, its economy has subsequently diversified, and it is now primarily driven by finance and business.³⁹ Owing to its economic strength, Gauteng has one of the highest population and growth rates in South Africa. This has a direct and indirect impact

³⁴ NECER 2017-2018 15.

³⁵ NECER 2018-2019 18.

³⁶ NECER 2019-2020 18.

³⁷ For the purposes of this study, the focus will be on the NECER 2017-2018, which was the latest report at the time of submission of this thesis.

³⁸ Gauteng Environment Outlook 14.

³⁹ Gauteng Environment Outlook 14.

on the natural environment, the natural resources and ecosystem functioning.⁴⁰ According to the studies that have been undertaken,⁴¹ Gauteng has processed several *ex post facto* environmental authorisations applications and continues to record the highest number of administrative fines collected.⁴² This is affirmed by the recent NECER 2019/20 in which Gauteng recorded the highest value of administrative fines issued.⁴³

North West Province is described as rich in natural resource value, which includes mineral resources such as platinum and chromium.⁴⁴ According to the North West DREAD *Environment Outlook* 2013, the most economic activity is concentrated between Potchefstroom⁴⁵ and Klerksdorp⁴⁶ and in the Rustenburg region.⁴⁷ Mining is the "predominant economic sector from a financial value perspective" and it happens mainly in the Rustenburg area.⁴⁸ In contrast with the Gauteng DARD and the Western Cape DEADP, the North West DREAD recorded a lower number of unlawful commencement of activities and administrative fines issued compared to the other provinces.

The study focused on government officials from the foregoing departments (competent authorities) as participants in the study as they have insight into the practical implementation of section 24G of NEMA in the different provinces and could determine the current practical and theoretical challenges. Furthermore, the study included, to a limited extent, some EAPs, environmental consultants and developers who deal with the section 24G applications as part of the population of the study to provide their perspectives on the implementation of section 24G of NEMA. The EAPs,

⁴⁰ Gauteng Environment Outlook 14.

⁴¹ September *A critical analysis*.

⁴² See para 1.9 in Chapter 1 above for detailed discussions.

⁴³ NECER 2017-2018 5.

⁴⁴ The North West Environmental Outlook Report 2.

⁴⁵ JB Marks Municipality.

⁴⁶ City of Matlosana Municipality.

⁴⁷ The North West Environmental Outlook Report 9.

⁴⁸ The North West Environmental Outlook Report 9.

environmental consultants and developers were selected randomly from different provinces depending on their availability.⁴⁹

To determine the foregoing population of the participants, the researcher followed purposive sampling. In purposive sampling, the population is chosen with a purpose to represent a location or type concerning criterion.⁵⁰ The population chosen was to represent the category of stakeholders they were part of and they were chosen based on their expertise in the field or their specific work description. The population size depended on the resources and time available, as well as the study's objectives. The researcher was limited to interviewing two officials from each competent authority. This decision was premised on the issue of timeframes and availability of the government officials. In the case of the Western Cape and DEFF, three officials each availed themselves for the interviews.

Regarding the EAPs and environmental consultants, the researcher randomly chose the EAPs and the environmental consultancy firms based in the case study areas. Furthermore, the researcher interviewed some officials (environmental managers) of two parastatals, who spoke to the researcher in their personal capacity to share their experiences with section 24G of NEMA, and their views do not reflect those of their companies. The composition of the population is reflected in Table 4-1.

⁴⁹ The EAPs, environmental consultants and the developers were selected based on the assumption that because of their line of work, they were likely to have worked with section 24G applications.

⁵⁰ The population is the non-probability samples. In non-probability sampling, the units are deliberately selected to reflect particular features of the groups within a sample population. The characteristics of the populations are used as the basis of the selection. See Ritchie "The Application of Qualitative Research Methods to Social Research" 78. See also Gomm *Social Research Methodology* 130 for non-probability sampling.

Table 4-1: The list of participants

Participant	Category	Location
Interviewee 1	Competent authority	Western Cape
Interviewee 2	Competent authority	Western Cape
Interviewee 3	Competent authority	Western Cape
Interviewee 4	EAP	Western Cape
Interviewee 5	EAP	Western Cape
Interviewee 6	Competent authority	Gauteng
Interviewee 7	Competent authority	Gauteng
Interviewee 8	Environmental consultant	Gauteng
Interviewee 9	EAP	Gauteng
Interviewee 10	Competent authority	North West
Interviewee 11	Competent authority	North West
Interviewee 12	EAP	North West
Interviewee 13	Competent authority	DEFF
Interviewee 14	Competent authority	DEFF
Interviewee 15	Competent Authority	DEFF
Interviewee 16	Environmental manager	Parastatal
Interviewee 17	Environmental Manager	Parastatal
Interviewee 18	Environmental Manager	Parastatal
Interviewee 19	Environmental Manager	Parastatal

To verify the validity of the findings, the researcher used the triangulation method. Triangulation involves "investigating the convergence of both the data and conclusion derived from them".⁵¹ Triangulation assumes "that the use of different sources of information will help both to confirm and improve the clarity, or precision, of a research finding". According to Flick,⁵² triangulation is "taking different perspectives on an issue under study or more generally speaking in answering the research question." Further, these perspectives can be supported by the use of various methods and or in several theoretical approaches. Wherefore, *in casu*, the

⁵¹ Ritchie "The Application of Qualitative Research Methods to Social Research" 43.

⁵² Flick *An Introduction to Qualitative Research* 184.

researcher uses the instruments that guide the implementation of section 24G, the section 24G application records, the interviews and the literature review in Chapter 2 and 3 determine the validity of the findings.

It is important that the study is a limited study, and that the findings cannot be extrapolated to all provinces or even to the experience of all officials and EAPs within a province or as to cover all the challenges with the implementation of section 24G. It is merely a reflection of the views of the interviewees at a certain point in time and is used to determine the challenges that arise (or not) from section 24G and to determine whether section 24G is regarded as a regressive measure.

4.4 Internal instruments for section 24G implementation

Subsequent to the insertion of section 24G into NEMA, the then DEAT published a NEMA 24G Guideline in 2005.⁵³ The guidelines were aimed to serve as a supportive text to section 24G of NEMA and set out the procedure that must be followed in the application for an *ex post facto* environmental authorisation.⁵⁴ Since the publication of these guidelines, the law has significantly changed, and the greater part of these guidelines are not relevant anymore.⁵⁵ Therefore, its contents will not be discussed in detail.

The DEFF is currently working on formulating an internal Section 24G Process Flow and Frequently Asked Questions (FAQ) documents that will guide the implementation of section 24G.⁵⁶ Although these documents have not been approved, suffice it to say that the Section 24G Process Flow is aimed at providing a step-by-step process and possibly set out the timeframes for the determination of the section 24G application. The FAQ, as the name suggests, is a composition of questions and answers that relate to the implementation of the section 24G application process. However, since these documents still have to be approved, they

⁵³ DEAT *NEMA section 24G Guideline, Integrated Environmental Management Guideline Series 2.*

⁵⁴ Section 24G of NEMA has been amended, thus some parts of the guidelines have become irrelevant.

⁵⁵ The legislative amendments have been discussed in detail in Chapter 3. Despite the legislative amendments made to NEMA and the regulations, the guidelines were never updated.

⁵⁶ This information was obtained from one of the interviewees. At the time of submission of this thesis, these documents were still subject to consideration for approval by the DEFF.

cannot be discussed. The DEFF is currently relying on the process set out in section 24G(1) of NEMA and the Fine Regulations in the determination of the applications.

The *ex post facto* environmental authorisation process in the Gauteng DARD is administered by the Section 24G Unit. The focus of the Section 24G Unit includes, but is not limited to, providing a system and mechanism for the coordination and implementation of section 24G through processing section 24G applications and issuing the section 24G decisions.

The Gauteng DARD has developed internal guidelines that contain a Section 24G Process Flow. The applicant is expected to submit the application form. The competent authority will thereafter conduct a site inspection and draft section 24G directive for the applicant. Applicant must then conduct public participation. Although the Section 24G Process Flow does not explicitly state, it can be applied that the applicant follows the Fine Regulation public process. In terms of the process flow, following the submission of the section 24G application, the competent authority determines whether the application has been appropriately filed. The competent authority conducts a site inspection and prepares a site inspection report. The competent authority will thereafter issue a directive in terms of section 24G(1) of NEMA which will, amongst other things, stipulate the contents of the report (EIR) that the applicant must submit. The applicant must then submit the assessment report to the competent authority. The competent authority reviews the EIR to determine if it contains sufficient information. If the information is adequate to enable decision-making, the administrative fine will be calculated in terms of the Fine Regulations, and it shall be communicated to the applicant.

Following the payment of the administrative fine, the competent authority reviews the reports submitted with the comments from the other directorates or departments, and drafts a decision that must be submitted for supervisory or managerial review. When the decision is approved, it gets communicated to the applicant. The applicant or the I&APs may file an appeal if they are not satisfied with the decision.

Although the Gauteng DARD Process Flow is very detailed, there are, however, some challenges. Firstly, similar to the DEFF, the Section 24G Process Flow is an internal document; thus, it is not available to the other stakeholders to familiarise themselves with it. Secondly, it does not prescribe the timeframes for the application process. Thus, the applicant does not have certainty of the time it takes for the application to be finalised. Based on the Process Flow, it cannot be determined with certainty whether the section 24G process takes a shorter or longer time to be processed.

In the Western Cape, section 24G applications are administered by the Directorate: Environmental Governance (Legal, Appeal and Enforcement). In 2012, the Western Cape DEADP developed an SOP for guiding the implementation for section 24G of NEMA. The SOP sets out the relevant legislation that must be considered, identifies different officials and the roles they play in the application process. Further, the SOP describes the procedure that must be followed as set out in section 24G(1) of NEMA. Additionally, it contains FAQ. The SOP also includes the timeframes within which the section 24G applications must be processed.

Similar to Gauteng DARD, the Western Cape DEADP has developed a Section 24G Process Flow. The steps followed in the Western Cape are somewhat similar to those that are followed in Gauteng. In the Western Cape, following the submission of the application form by the applicant, the competent authority follows its own internal administrative process of receiving the application. The applicant must then compile a draft report that must be submitted to the competent authority for the competent authority to consult other state Departments in terms of section 240 of NEMA. The applicant must then compile the final EIR. In the event that the applicant does not submit the requested information within six months, the application lapses. This period is based on the good governance principle. For the application to be decided upon, the administrative fine is then determined in terms of the Fine Regulations.

The Western Cape's timeframes for the section 24G applications indicate that the process takes up to nine months. In addition, the Section 24G Process Flow

document mandates the competent authority to consider provisions of NEMA such as sections 24(4)(a),⁵⁷ 24(1A)⁵⁸ and 24E.

With respect to the North West DREAD, there is no specific internal instrument that assists the implementation of section 24G of NEMA. However, the North West DREAD relies on the NEMA and the section 24G Fine Regulations in handling the section 24G applications.

The foregoing discussion demonstrates that each province has developed its own internal instrument, which guides the implementation of section 24G. Furthermore, the section 24G applications process is administered by different units in different provinces. For instance, in Gauteng, there is a specific Section 24G Unit while in the Western Cape, this process is overseen by the Head of Rectification under the Directorate; Environmental Governance. The other material difference that emanates from these internal instruments is that the Western Cape provides for timeframes while the other provinces do not specify timeframes. Notwithstanding the above, the internal instruments make reference to other NEMA provisions and environmental management principles that must be considered in dealing with section 24G application. Therefore, section 24G applications are not considered in isolation but in view of NEMA in its entirety. In light of this background, it is now imperative to discuss the findings of the empirical survey.

4.5 Findings

This section of the chapter discusses the findings of the study emanating from the comparative analysis of the internal instruments guiding the implementation of section 24G, the application records pursued at the Western Cape and interviews conducted with different stakeholders participating in the section 24G application process. The findings are discussed thematically distilling the current practical

⁵⁷ Section 24(4)(a) is the minimum requirements that every application of environmental authorisation must comply with.

⁵⁸ It prescribes the steps that every applicant must comply with in terms of NEMA.

challenges with the implementation of section 24G of NEMA in the different provinces.

4.5.1 *Original intent of section 24G of NEMA*

The data show a unanimous perception that section 24G of NEMA was introduced to enable those who commenced unlawful activities during the ECA era to cross over to the NEMA era, bringing their unlawful activities into the regulatory loop.⁵⁹ Some of the interviewees indicated that there was a problem with the unlawful commencement of listed activities and that there was no mechanism to regularise those unlawful activities or the continuation thereof.⁶⁰ Further, the data indicate that section 24G is not to be regarded as a punitive measure. As was stated by an interviewee the purpose of section 24G of NEMA was to "restore" compliance and to enable the listed activities to proceed in a regulated manner.⁶¹ This perception corroborates the literature in Chapter 2 and 3 that suggested that section 24G was introduced as a corrective measure to allow the developers of the unlawful activities to bring their unlawful activities into the regulatory loop.⁶² Some participants, however, stated that the section 24G process is one of the enforcement tools that are used to address the effects of non-compliance.⁶³

Section 24G's initial intent was to provide an amnesty period for owners of unlawful activities for six months.⁶⁴ However, after the lapse of the six months, it remained

⁵⁹ For the purpose of avoiding repetition, this issue will not be discussed in detail as it has been extensively canvassed in para 3.3 in Chapter 3.

⁶⁰ Although people could be prosecuted, there was, however, no mechanism for authorising the unlawful activities or at the very least, the continuation of the listed activities.

⁶¹ This opportunity was meant to last for six months. See section 7 of 2008 NEMA *Amendment Act*. However, the section 24G was retained after six months. The detailed historical background of section 24G was discussed in Chapter 3.

⁶² The term 'corrective' is used cautiously not to mean that the *ex post facto* environmental authorisation corrects the unlawfulness of the activity but rather to mean that the *ex post facto* environmental authorisation changes the *status quo* and enables the activity to continue subject to authorisation. The operations that were done without environmental authorisation remains unlawful hence the developer can be subjected to criminal prosecution.

⁶³ This is because the competent authorities issue the enforcement notice or section 24G(1) Directive demanding that the contravener of section 24F must apply for *ex post facto* environmental authorisation.

⁶⁴ See the 2008 NEMA *Amendment Act*. This affirms the literature that indicated that insertion of section 24G was a temporary measure.

in the legislation. This view is in line with section 7 of the 2004 *NEMA Amendment Act*. There is no reason that was ever provided for retaining section 24G of NEMA. Furthermore, the participants indicated that section 24G of NEMA was primarily to help to protect the environment and address the adverse environmental impacts of unlawful developments. Section 24G was not introduced to be an alternative to EIA. It is a separate authorisation following on non-compliance to the ordinary environmental authorisation process.

Furthermore, the interviewees indicated that section 24G does not rectify the unlawful activity but rather authorises the listed activity from the day it is issued. Therefore, the unlawful operations remain in perpetual unlawfulness; hence the owner of the development can still be criminally prosecuted after the environmental authorisation is issued.

4.5.2 Drivers for section 24G of NEMA

The data show that most of the applicants plead ignorance of the law with regard to some of the listed activities they undertake that require environmental authorisation. This is raised by different types of developers, including the government departments, companies and individuals. Most of the small developers believe that since they own the properties or a piece of land, they can do as they deem fit. While this submission might hold water for some applicants like individual applicants, that may not necessarily be the case for other developers such as individuals belonging to certain groups (associations) like farmers, big corporations and organs of state. The reasons for the foregoing assertion are that individuals belonging to identifiable groups such as farmers' associations are more likely to be familiar with the laws regulating their operations, thus ruling out a defence of ignorance of law. The data show that in some provinces, for example, the Western Cape and North West, the farmers have been in contact with the competent authorities, and they have been informed about laws regulating their operations. Big corporations and organs of state have compliance departments that are mandated to advise them on legal requirements. Further, the applicants are allowed to engage competent authorities before the commencement of the proposed

activities. Therefore, although ignorance of the law is frequently raised as the reason for the contravention of section 24F, the data show that this excuse does not hold water in all cases.

The data further show that the other driver for contravention of section 24F is the carrying out of maintenance operations for some of the infrastructural projects.⁶⁵ This may happen as a matter of urgency or inadvertently breaching the threshold for exclusions for maintenance operations. Due to the cumbersome nature of the EIA procedure and timeframes, these organisations often find themselves in a quandary of choosing between complying with the cumbersome EIA requirements and timeframes or proceeding with the maintenance and apply for *ex post facto* environmental authorisation later.

The data also show that some contraveners, particularly the organs of state, cite the obligation to fulfil their constitutional mandate of service delivery as the reason for their non-compliance. This may happen in two ways, that is, where they contravene section 24F in performing service delivery and secondly when they seek to expand or upgrade existing unlawful activities. Their line of argument may be flawed because the organs of state are bound by section 8 of the Constitution to respect and protect the Bill of Rights and environmental management principles in section 2 NEMA. They cannot plead ignorance of the law.

There are, however, instances where the organs of state find themselves in an unfortunate situation of having to apply for an *ex post facto* environmental authorisation while they are not responsible for the contraventions. For instance, this happens in areas of informal settlements where people engaged in a land grab of the municipality's land and clearing the vegetation in the process. The challenge usually arises when the municipalities have to provide services in these areas because in some instances, they must apply for an *ex post facto* environmental authorisation before proceeding with service delivery. In such cases, the

⁶⁵ For instance, this may happen in a case where there had been floods that adversely affected the infrastructure and urgent maintenance has to be done.

municipalities have to bear the brunt for the contravention of section 24F of NEMA. The actual people responsible for administrative fine becomes the taxpayers.

The data suggest that some developers apply for *ex post facto* environmental authorisations because they seek to bring their unlawful activities into the regulatory loop of their own volition. This is in line with the language in section 24G(1), which suggests that it is a voluntary process. On the other hand, the data show that some applicants apply for such authorisation because an enforcement notice has been issued to them or they have entered into a plea bargaining with the prosecution in this regard.⁶⁶ This continues to raise the question of whether a developer who contravened section 24F can legally be compelled to apply for *ex post facto* environmental authorisation. Seemingly, the courts believe that a developer can be legally obliged to apply for an *ex post facto* environmental authorisation. This is illustrated in *York Timber*⁶⁷ and *Global Environmental Trust*.⁶⁸ The researcher argues that section 24G currently remains a voluntary process and cannot be imposed on the developers who contravened section 24F. However, owing to the objectives of IEM and the advantages of an *ex post facto* environmental authorisation,⁶⁹ this position might need to be revisited to allow the competent authorities and the courts to compel the developers who contravened section 24F to apply for *ex post facto* environmental authorisation.⁷⁰

Some applicants use section 24G of NEMA because they need to expand their unlawful activities. However, the developers must first obtain an environmental authorisation for their existing unlawful activities. Another reason that has been cited for applying for an *ex post facto* environmental authorisation is that when some developers seek financial assistance or engage in certain transactions, environmental compliance is a *sine qua non*. As a result, they are forced to obtain

⁶⁶ See also Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1250 who suggests that some competent authorities used section 24G to deal with developers who contravened section 24G.

⁶⁷ *York Timber* para 39. See also para 3.7.2 in Chapter 3 above.

⁶⁸ See para 3.7.2 in Chapter 3 above.

⁶⁹ See para 2.4.2 in Chapter 2 above.

⁷⁰ See para 3.5.2 in Chapter 3 above.

the authorisations before obtaining financial assistance or performing the said transactions.

The foregoing discussion highlights that there are several reasons for contravention of section 24F and ultimately for the application for *ex post facto* environmental authorisations. What can be deduced from this discussion is that there are applicants for *ex post facto* environmental authorisations who did not deliberately contravene section 24F but are, however, subjected to the consequences of section 24G. For instance, they are likely to pay for an EAP, the administrative fine, and facing the possibility of prosecution and a fine upon conviction. This will also in future be the case, should NEMLA IV be signed into legislation.

4.5.3 Interpretation issues

The reading of section 24G(1) of the NEMA states that any person who has contravened section 24F of the NEMA or section 20(b) of the NEMWA may apply for an environmental authorisation in terms of section 24G of NEMA.

An interviewee indicated that it is not every contravention of section 24F of NEMA that can give rise to an *ex post facto* environmental authorisation application. For instance, activity 9 of Listing Notice 1 (GN R982) provides for "the development of the infrastructure exceeding 1000 metres" in length for the bulk transportation of water or storm water. In contrast, activity 10 of Listing Notice 1 provides for "the development and related operation of infrastructure exceeding 1000 metres" in length for the bulk transportation of sewage, effluent, process water, wastewater, return water, industrial discharge or slimes. While activity 9 only requires an environmental authorisation for the development of the facility, activity 10 mentions the development and operations component. A government official from the DEFF indicated that only the listed activities that have an operational component fall within the scope of section 24G of NEMA. Regarding unlawful activities that have an operational component that is not completed yet, the developer can apply for environmental authorisation for the ongoing operations of the listed activity. Therefore, it is not in all instances where the developer can apply for an *ex post*

facto environmental authorisation in terms of section 24G of NEMA or where section 24F has been contravened. The researcher supports this view because when a developer has built a bridge and the construction is completed, it will be of no use to apply for an *ex post facto* environmental authorisation. However, if the activity has an operational component, an *ex post facto* environmental authorisation will be necessary to ensure that further environmental degradation is avoided or mitigated. It was only the official from the DEFF that drew this distinction, while the government officials from other competent authorities and EAPs made no mention of this difference between the different listed activities. It is also not the case if section 24G is interpreted as it makes no mention of this interpretation or limitation as to who can apply for a section 24G authorisation. This difference is further mentioned in the draft FAQ compiled by DEFF to highlight that not every unlawful listed activity falls within the ambit of section 24G of NEMA. It can safely be assumed that in the other provinces, every application for an *ex post facto* environmental authorisation is considered irrespective of whether the unlawful listed activity is completed, or whether it has an operational component or not. The problem is that failure of the competent authorities to appreciate this difference is to the detriment and prejudice of some applicants who faced the dire consequences of section 24G of NEMA. This highlights a possible inconsistency in the interpretation and application of section 24G of NEMA. Therefore, the completed unlawful activities that do not fall within the ambits of section 24G of NEMA, will remain illegal. It was argued that such an interpretation may not be necessary if a basic assessment or EIA is used as the assessment tool. As indicated in Chapter 2,⁷¹ it may be necessary to consider the development and use of alternative tools.

4.5.4 Lack of uniformity on the contents of the assessment report

Although section 24G sets out the contents of the assessment report and what must be assessed, the data reveal a lack of uniformity in the contents of the assessment report that must be submitted. That is, the competent authorities in the case study areas follow divergent approaches. Firstly, there is a view that section 24G does not

⁷¹ See para 2.11 in Chapter 2 above.

follow either a basic assessment or an S&EIR since it not an EIA. This view is in line with the provisions of section 24G of NEMA. Notwithstanding the above, the data indicate that some competent authorities consider the section 24G assessment report as equivalent to basic assessment reports, that is, the contents similar to those in Appendix 1 of the 2014 EIA Regulation.⁷² However, in some instances, the assessment report may take the form of Appendix 2 of the 2014 EIA Regulations, which is an EIAR depending on the activity and damage done to the environment.⁷³ There is also a view that each case depends on its own merits. In fact, it was submitted by one of the participants that the type of assessment required, and the assessment report must be tailor-made to fit different circumstances. It would not make sense to request either a basic assessment or an S&EIR because they are anticipatory, while section 24G deals with actual impacts.

Thus, the competent authorities prescribe what must be assessed and the contents of the assessment report. The decision on the contents of the assessment report is influenced by several factors, namely; section 24G(1)(vii), which prescribes the contents of the assessment report and the outcome of the inspection of the compliance and enforcement unit.⁷⁴ Furthermore, the activity in question informs the type of assessment that must be carried and the assessment report.

The data point out that the contents of the application form in the provinces under discussion differ. For instance, the Western Cape application form includes sections that are not included in other province's application forms such as need and desirability,⁷⁵ "assessment methodologies and criteria, gaps in knowledge, underlying assumptions and uncertainties",⁷⁶ recommendations by the EAP⁷⁷ and the representations on the response to an incident or emergency situations.⁷⁸ It can

⁷² See para 3.6.4.1 in Chapter 3 above.

⁷³ See para 3.6.4.1 in Chapter 3 above.

⁷⁴ In the event where an applicant has applied for section 24G, the compliance and enforcement officials attend to the place where the listed activities have been carried out to assess the damage that has been done to the environment. It is this inspection that informs the competent authority on the contents of the assessment report.

⁷⁵ Section D of the Western Cape DEADP Section 24G Application form.

⁷⁶ Section F of the Western Cape DEADP Section 24G Application form.

⁷⁷ Section H of the Western Cape DEADP Section 24G Application form.

⁷⁸ Section I of the Western Cape DEADP Section 24G Application form.

safely be inferred from the foregoing that the Western Cape's application form already anticipates and addresses some of the deficiencies mentioned above.

Further, the data highlight that the quality of the report (depending on the contents of the assessment report) that is acceptable to one competent authority might not necessarily be acceptable to another competent authority. Therefore, the foregoing highlights the lack of uniformity on the type of assessment required and the contents of the assessment reports. In view of the foregoing, the likely risk is that the assessment and contents of the EIR in different provinces may differ in that some provinces may adopt a lower standard of assessment while others may adopt a stricter standard of assessment. It may also confuse developers and EAPs operating in different provinces.

4.5.5 Public participation

The data show that when applying for an *ex post facto* environmental authorisation, the applicants must follow the Fine Regulations with regard to public participation. However, the section 24G Fine Regulations are not as detailed and descriptive as the 2014 EIA Regulations.⁷⁹ In a nutshell, the Fine Regulations require an advertisement to be made in a newspaper and website giving details about the application and informing the I&APs where they can register as I&APs and submit their comments. This is problematic because the regulations do not make provision for commenting on the application itself or the report. Furthermore, the applicant is only expected to indicate the comments in the application form but not how the applicant responded or how he or she will respond to the comments. Therefore, seemingly, the public participation in the Fine Regulations amounts to just informing the I&APs of the section 24G application.

The data show that in one of the section 24G applications, during the meeting with I&APs, the developer provided the background to the section 24G application and discussed the contents of the EMPr. There was no indication of I&APs perusing the

⁷⁹ See para 3.8.2 in Chapter 3 above for detailed discussion on the procedure for public participation process in the section 24G Fine Regulations.

documents themselves. This brings the reliability of the process into question because the I&APs might be told one thing and the application and the EMPr (where applicable) reflects the other. As it was alluded to in the literature,⁸⁰ watering down the public participation process is one of the indications of regressive measure. Therefore, in this regard, it is submitted that section 24G seemingly provides for watered-down public participation process in some process and as a result, which may be regarded as a regressive step.

4.5.6 Abuse

There is a view that *ex post facto* environmental authorisation is open to abuse. The data suggest divergent views on the issue of abuse of section 24G procedure.⁸¹ Firstly, the competent authorities concede that section 24G is abused by some developers.⁸² This can be attributed to the fact that initially, the maximum administrative fine was R1 million and later was increased to R5 million.⁸³ The data reveal that this amount of money might have been minimal in comparison to the loss or gains that some developers were likely to incur if they followed the normal EIA process. This placed the developers in a place of weighing up their options, choosing what they think is the easy way out; namely, the *ex post facto* environmental authorisation.

Although it is difficult to prove abuse, the data propose that the competent authorities had acquired enough experience to detect cases of abuse. For instance, in cases of big corporations, there are instances where the director of the corporation gives permission for an unlawful activity in one province and apply for an *ex post facto* environmental authorisation. The very same director then allows his employees to also commence with another unlawful activity in another province. In order to curb this, the data point out that some competent authorities keep a

⁸⁰ See para 2.10 in Chapter 2 above.

⁸¹ The abuse of section 24G may be deduced from the fact that there are 'repeat offenders' for the *ex post facto* environmental authorisation.

⁸² For the reasons that are advanced as the reasons for filing section 24G applications, see para 4.5.2 above.

⁸³ There is a possibility of the fine being increased to R10 million subject to the proposed amendment in NEMLA IV.

record of repeat contraveners. There is, however, no national database in this regard.

Attached to the problem of abuse, is that there is anecdotal information that some developers seem to budget for the administrative fine. The data have affirmed the literature and indicated that to date, it does seem that there are developers who budget for such administrative fine. Some participants cited a scenario where a company received notification of an exorbitant administrative fine and paid it the same day. Such occurrences give the impression that these companies budget for the administrative fine in advance. The deterrent measures such as the high administrative fines may not be deterrent enough to contraveners with big financial muscle.

While this might still be the situation for some developers, the data confirm that the increment on the maximum administrative fine has reduced the level of abuse of section 24G by developers. This is because the high administrative fine has become a deterrent measure. In addition to this, the possibility of prosecution, refusal of an environmental authorisation, an order for rehabilitation, and the possibility of a court order in terms of section 34(3) of NEMA have been cited as deterrent measures that are likely to have caused potential developers not to consider abusing section 24G of NEMA.⁸⁴

Furthermore, the data show that it is difficult for parastatals to abuse or even consider the section 24G route because of the internal mechanisms in place and the processes that must be followed prior to the commencement of any listed activity.⁸⁵ The employees of the parastatals must justify the administrative fine to be paid, and that has been described as a difficult exercise.

Another deterrent measure is the fear of criminal prosecution. The data, however, reveal that it is not easy to institute criminal prosecutions against the contraveners.

⁸⁴ The recent judgement in *Uzani* case has exacerbated this situation where private prosecution was permitted where the accused was issued *ex post facto* environmental authorisation.

⁸⁵ This includes the determining whether the proposed activity that the parastatal intended to undertake triggers EIA or not.

This is because of the lack of capacity in terms of prosecutors who are well vested with knowledge of environmental law. Secondly, obtaining and securing the evidence are still challenges, such that in some instances, by the time the case proceeds, the environment would have changed. This data is refutable because the Department of Justice and its Justice College undertake the training for public prosecutors on environmental matters, which may change in the future.⁸⁶ The problem lies with the willingness of the competent authorities to charge the contraveners of section 24F criminally.

The data suggest that the competent authorities' understanding is that section 24G's intention is not to punish but to enable the developers to bring their activities into the regulatory loop. Therefore, the primary aim of the competent authorities in dealing with section 24G is to pursue environmental protection. However, this data contradicts high administrative fines issued by the competent authorities.⁸⁷ Furthermore, the intention of the legislature to increase the maximum amount of administrative fine in NEMLA IV also contradicts the above assertion. The data show that the competent authorities consider whether criminal prosecution will assist with the protection of the environment and to address the environmental degradation caused. When the answer is in the negative, the prosecution is unlikely to be pursued. It is submitted that this reluctance to environmental prosecution may in a way reduce the deterrence factor in section 24G of NEMA. The point of departure is also legal compliance, rather than prosecution.

While the legislation was amended on several occasions to curb the abuse of section 24G of NEMA by introducing the deterrent measures, this has brought its own challenges. It seems that they not only deter the *mala fide* offenders from applying for authorisation, but even the *bona fide* offenders who wish to regularise their activities. Data prove that some developers are concerned that when they have to come forth to apply for an *ex post facto* environmental authorisation that they will

⁸⁶ Also see DEFF "Stepping up Enforcement against Environmental Crime" (2010); Murombo and Munyuki *PELJ* 2019 1-41; Kidd *The Protection of the Environment*; White and Pink 2017 *SA Crime Quarterly*.

⁸⁷ See para 3.5.2 d) in Chapter 3 above for discussion on *Plotz* case.

be heavily penalised. Thus, some activities remain in perpetual unlawfulness and not regulated. As a result, the deterrent measure in section 24G defeats its purpose and renders it susceptible to abuse, and may defeat the purpose of curbing the regression.

4.5.7 Continuation of the unlawful activity

Section 24G(1) provides that following submission of the application, the competent authority may direct the applicant to cease the activity immediately pending a decision on the application. The competent authorities indicated that they usually face resistance from the developers when they issue a directive demanding that developers cease their operations immediately. The developers indicate to the competent authorities that they are likely to incur standing costs. However, this argument is a non-starter because the applicants have contravened the law, and they must not be allowed to dictate how the competent must deal with them.

The data further show that in Gauteng, the applicants are permitted to make representations as to why they should not be directed to cease the activity immediately. If the competent authority agrees with the representation of the applicant, the competent authority may allow the applicant to proceed with the unlawful activity. It is submitted that this defeats the whole purpose of section 24G of NEMA, which seeks to regularise the unlawful activity. Permitting the unlawful activity to proceed without authorisation is questionable. It may be argued that in permitting the applicant to proceed with the activity, such authorisation may include other orders such as to cease pollution and to rehabilitate the area or parts of the area. This argument is likely to encourage developers to abuse the section 24G process, knowing that they may not be ordered to cease their activities. Furthermore, considering the duration of the *ex post facto* environmental authorisation process, as alluded to above, it sometimes takes longer to be finalised, and the applicant stands to operate for that time without an environmental authorisation, which defeats the purposes of section 24G. Therefore, this indicates that the implementation of section 24G in some provinces defeats its purpose and as such may be regarded as a regressive measure.

4.5.8 *Misconceptions about section 24G of NEMA*

Criticism has been levelled against the idea of introducing *ex post facto* environmental authorisations. The criticism has been canvassed in detail in Chapters 2 and 3. Due to the fact that section 24G has been subject to legislative amendments, the researcher interrogated this criticism to determine their validity, and the results are discussed below. Some of the criticism was characterised as initial misconceptions of section 24G by different stakeholders.

4.5.8.1 Environmental management principles

Literature indicated that section 24G of NEMA, in particular, is characterised as undermining sustainable development and the environmental management principles enshrined in section 2 of NEMA.⁸⁸ Contrary to this assertion, the data suggest that there is a unanimous view that section 24G of NEMA deals with the application for an environmental authorisation, albeit post commencement of the listed activity. Therefore, section 24G of NEMA cannot be considered in isolation but must be dealt with in light of the objectives of NEMA. Participants in their different capacities argued that section 24G aims to comply and uphold sustainable development and the environmental management principles.

Consequently, the competent authorities are bound by section 2(1) of NEMA when determining whether to issue an *ex post facto* environmental authorisation.⁸⁹ The Western Cape DEADP's SOP indicates that all section 24G applications must be processed in line with all relevant legislation for sustainable development. The Gauteng DARD' Section 24G Process Flow has a similar provision.

If it is the case that all departments consider sustainable development and the environmental management principles in their decision-making to allow a section 24G authorisation, then it could be said that section 24G of NEMA does not undermine the environmental management principles. When section

⁸⁸ See para 2.9 in Chapter 2 above.

⁸⁹ See para 2.9 in Chapter 2 above.

24G(1)(vii)(bb)⁹⁰ is read with section 2(4),⁹¹ it becomes evident that section 24G reiterates sustainable development and the environmental management principles set out in section 2(4).

The data show that an *ex post facto* environmental authorisation is perceived to be in line with the pursuit of sustainable development. The participants argued that an *ex post facto* environmental authorisation creates an opportunity for developers to carry out an assessment, albeit post-commencement, which enables them to identify and consider the economic, social and environmental impacts. Although the listed activity has commenced, the competent authority is presented with an opportunity to authorise the continuation thereof, order that operations be ceased or direct decommissioning or propose changes in order to protect the environment and ensure socio-economic development.

4.5.8.2 Shorter, less rigorous and cheaper procedure

The *ex post facto* environmental authorisation process has been criticised as being shorter, less rigorous and cheaper than the ordinary basic assessment and S&EIR processes.⁹² There seems to be divergent views in this regard. Firstly, the data point out that the duration of the *ex post facto* environmental authorisation process differs from one province to the other. The foregoing is influenced by the fact that some provinces such as the Western Cape have prescribed timeframes for the *ex post facto* environmental authorisation application process as alluded to earlier and other provinces not.⁹³ Further, this is influenced by the capacity of the staff in each province. Some provinces complained that they are short-staffed and have a backlog of applications, which in turn influences the duration of the application process. The Western Cape SOP suggests that the normal period for an *ex post facto*

⁹⁰ Section 24G(1)(vii)(bb) requires that the assessment report must contain "an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity".

⁹¹ Section 2(4) states the requirements of sustainable development that include assessment of negative impacts on the environment, public participation and assessment of "social, economic and environmental impacts of activities, including disadvantages and benefits".

⁹² See para 3.8 in Chapter 3.

⁹³ See para 4.4 above.

environmental authorisation is nine months.⁹⁴ The latter was confirmed by the officials from the Western Cape and some of the EAPs. Furthermore, the four section 24G application records of the Western Cape that were perused by the researcher corroborated this position that the process takes up to nine months.

In Gauteng DARD, the application takes a year to two years to finalise. Data for North West indicate that the application can take two to three months to come to a conclusion if all the information is submitted as requested. Contrary to the Western Cape, the DEFF, Gauteng and North West do not have prescribed timeframes for the *ex post facto* environmental authorisation process. The competent authorities stated that the duration of the process depends on the availability of information requested from the applicant and the cooperation of the EAPs. That is, time the applicant takes to furnish the competent authority with the requested information. Similarly, the appeal against administrative fines also extends the duration of the application process.

There is a lack of clarity with regard to compliance with section 240(2) of NEMA, which provides for consultation with other state departments. This must happen after the submission of the application. The Western Cape SOP indicates when the applications should be sent to other state departments but not so in the case of the DEFF and the other two provinces. However, the challenge is that there are no timeframes within which that process must be completed. Therefore, this negates the assumption that the *ex post facto* environmental authorisation process takes up a shorter time than the ordinary basic assessment and S&EIR procedures.

In answer to the assertion that the assessment is less rigorous, the EAPs concurred with the competent authorities that although the assessment is on the actual impacts, it is not less rigorous. However, this does not rule out the possibility that in certain circumstances, it might be less rigorous. The responsibility lies on the competent authority to ensure that this may not happen. The scope of the assessment depends on the receiving environment where the activity is carried out. What is similar across the different provinces is that the competent authorities

⁹⁴ See para 4.4 above.

inform the EAPs which impacts they must assess and what must be contained in the application form. The data show that in some provinces, the assessment report required from the applicant is somewhat equivalent to a basic assessment, as stated before.

The data reveal that it is a misconception that section 24G of NEMA provides for a cheaper process. The data show that an *ex post facto* environmental authorisation is not necessarily cheaper as is alleged in the literature. On the contrary, the data show that the *ex post facto* is likely to be more expensive and riskier than the normal EIA under certain circumstances. The developer must pay the fees of the EAP as well as the administrative fine which, depending on whether the applicant is a repeat contravener or not, may be the maximum fine.⁹⁵ In the event that the competent authority issues a directive that the applicant must cease its operations,⁹⁶ the applicant is likely to incur standing costs. In addition to these costs, the applicant does not have a guarantee that the environmental authorisation will be issued. Furthermore, the applicant may be subjected to criminal prosecution wherein if he or she is convicted, costs may be awarded against him or her (private prosecution) or he or she may be fined.⁹⁷

Section 34(3) of the NEMA provides that the court may make an inquiry and assess the monetary value of any advantage gained or likely to be gained from the contravention. The court may then order an award of damages or compensation or a fine equal to the amount assessed.⁹⁸ It is for this reason that the population in the study were of the unanimous view that the *ex post facto* environmental authorisation is not cheaper than a normal EIA.

Therefore, in light of the foregoing, it is submitted that it is a misconception that the *ex post facto* environmental authorisation is shorter, less rigorous and cheaper than an ordinary section 24 environmental authorisation application. Each case depends on its merits. However, it is established it is risky to apply for an *ex post*

⁹⁵ Determination of administrative fine is made subject to GN R698 in GG 40994 of 20 July 2017.

⁹⁶ That will be pending the determination of the application.

⁹⁷ Section 32(3)(a) and (b) of NEMA.

⁹⁸ This relates to Schedule 3 offences that include contravention of s 24F(1) of NEMA.

facto environmental authorisation as one may also be held criminally liable or lose reputation in the marketplace.

4.5.9 *Alternative tools*

The data suggest that in order to ease the burden on developers of going through a cumbersome and expensive normal EIA process, some developers have begun to use other alternatives tools. There are developers who from time to time are forced to carry out maintenance. Some of the developers have started using maintenance management plans (MMP) for the activities that fall within the exclusions, for instance, referring to Listing Notice 1 activities 1⁹⁹ and 27,¹⁰⁰ and Listing Notice 2 activity 15.¹⁰¹ The MMPs are site-specific and are formulated for a particular development.¹⁰²

In the case of exclusions, the developers are permitted to formulate an MMP that they must submit for approval to the competent authorities. The developers indicated that the advantage of the MMP is that if they need to undertake maintenance operations and then inadvertently carry out an activity triggering an environmental authorisation (for instance, go beyond the threshold), then they may not have to apply for a section 24G environmental authorisation. This will only be the case if the maintenance operations are in line with the approved MMP.

⁹⁹ The "development of facilities or infrastructure for the generation of electricity from a renewable resource where—
(i) the electricity output is more than 10 megawatts but less than 20 megawatts; or
(ii) the output is 10 megawatts or less but the total extent of the facility covers an area in excess of 1 hectare; excluding where such development of facilities or infrastructure is for photovoltaic installations and occurs—
(a) within an urban area; or
(b) on existing infrastructure."

¹⁰⁰ The "clearance of an area of 1 hectare or more, but less than 20 hectares of indigenous vegetation, except where such clearance of indigenous vegetation is required for—
(i) the undertaking of a linear activity; or
(ii) maintenance purposes undertaken in accordance with a maintenance management plan."

¹⁰¹ The "clearance of an area of 20 hectares or more of indigenous vegetation, excluding where such clearance of indigenous vegetation is required for—
(i) the undertaking of a linear activity; or
(ii) maintenance purposes undertaken in accordance with a maintenance management plan."

¹⁰² For instance, MMP can be formulated for activity 19 of the Listing Notice 1, activity 15 of the Listing Notice 3 and activity 12 of the Listing Notice 3 of the 2014 EIA regulations (as amended).

Some of the participants, however, raised concerns with regard to the MMPs. The MMP is formulated by the developer and then submitted to the competent authority without involving the I&APs. This undermines the environmental management principle¹⁰³ and the dictates of administrative justice as per PAJA¹⁰⁴ that demand public participation.

Another alternative tool that has been introduced in the Western Cape is the Sandveld Environmental Management Framework (Sandveld EMF). The Sandveld EMF is a strategic guide to sustainable agricultural development in the Sandveld and Agter-Cederberg regions in Western Cape.¹⁰⁵ This was developed by the Western Cape DEADP and the Department of Agriculture in collaboration with other government departments and the farming sector.¹⁰⁶ The Sandveld EMF is a proactive approach aimed at reducing the costs (in money and time) of compliance with environmental legislation by reducing the scope of assessment for applicable proposals, whilst protecting the natural resource base and the ecosystems in which it is embedded.¹⁰⁷

¹⁰³ Section 2(4) of NEMA.

¹⁰⁴ Sections 3 and 4 of PAJA.

¹⁰⁵ Sandveld EMF 12.

¹⁰⁶ Sandveld EMF 12. The EMF recognises that farming in this Sandveld area lies at the heart of sustainable social and economic development for the Sandveld and its community.

¹⁰⁷ The Sandveld EMF provides a novel and ground-breaking approach to relieving the regulatory burden on farmers in one of the most rapidly expanding agricultural areas in the Western Cape that coincides with highly-threatened eco-systems and plant species. The EMF serves as a "super Environmental Impact Assessment" that identifies which environmental features and need to be protected against further cultivation, which of these could be used subject to specific conditions and where cultivation can be expedited so long as the proponent abides by the regulatory mechanism adopted for the implementation of the Sandveld. An underlying principle of the Sandveld Environmental Management Framework is that the agricultural expansion catered for herein has been maximised on the premise that such activities will be undertaken in accordance with the recommendations and measures outlined in the EMF. The objectives of the EMF for the Sandveld are to:

- a) "Promote sustainable development by strategic planning that supports efficient application and decision-making procedures in terms of environmental legislation, thereby minimising potential obstacles to legal compliance; and
- b) Proactively steer new development away from areas of high biodiversity significance."

Farmers who successfully accommodate the findings of the Sandveld EMF do not have to undertake the onerous and expensive environmental assessment procedures in order to farm productively and profitably.¹⁰⁸

The EMF provides for farm-level planning to assist farmers in making informed decisions about new expansions and the sustainable use of agricultural resources. The farm-level planning entails that assessments and reports emanating from the consideration of agricultural expansion in terms of Sandveld EMF must comprise of multiple components that transpose the findings of the EMF to a farm-level, and that outline the way in which a farm must be used and managed in order to ensure that such use and management is in line with the objectives of the EMF.¹⁰⁹ The activities that would be expedited if a farmer complies with the regulatory mechanism for implementation of the Sandveld EMF are Listing Notice 1 activities 13 and 15 as well as Listing Notice 3 activities 12 and 26.

The challenge with farm-level planning is that the farmers, who should benefit from the project, have shown reluctance to participate in this project. The reason for the reluctance is that before they can participate, they must obtain *ex post facto* environmental authorisations for their former unlawful activities. In this case, section 24G defeats the purpose of the EMF in that rather than to encourage participation, section 24G might deter the farmers from coming into the regulatory loop.

4.6 Conclusion

This chapter aimed to identify the current practical challenges of the *ex post facto* environmental authorisation enshrined in section 24G of NEMA to determine if South Africa has regressed on its obligation to protect the environment. Although it may be contended that there is a plethora of literature on this topic and somewhat similar studies have been carried out, recent legislative amendments have affected the implementation of section 24G of NEMA. Further, the previous studies have been

¹⁰⁸ Sandveld EMF 12.

¹⁰⁹ Sandveld EMF 115.

carried out in one province and may not necessarily reflect the position in other provinces. Thus, this necessitated a critical comparative study across different competent authorities to determine the current practical challenges of *ex post facto* environmental authorisation. In contrast with the other studies, this chapter critically discusses these challenges in light of the emerging principle of non-regression.¹¹⁰

The chapter adopted the mixed method of research consisting of legal research method and empirical qualitative research. The NECERs and the internal instruments that guide the implementation of section 24G of NEMA in the selected case study areas were investigated. For the purposes of data collection, the researcher used naturally occurring data, which include amongst other things documentary analysis. The researcher used semi-structured interviews and questionnaires to identify the practical challenges. This method was used because it is designed to provide an insight into people's perceptions and understanding of particular issues. The researcher used the generated data collection method, which was mainly individual interviews with selected experts in the field.

The choice of the case study areas was based on the NECERs. These reports indicated that unlawful commencement of listed activities is the most prevalent environmental crime. Summarily the reports indicated that Gauteng DARD and the Western Cape DEA&DP have the highest numbers of the administrative fines issued and paid while the North West DREAD has a lower number of administrative fines issued and paid. However, the chapter has argued that NECERs do not reflect accurate information because they do not indicate the number of applications for the *ex post facto* environmental authorisations that are filed with the competent authorities. Further, the NECERs do not reflect the number of the pending applications, those abandoned or finalised. Therefore, in light of the gaps in the NECERs, it cannot be said with certainty that the numbers of the applications for *ex post facto* environmental authorisation are accurate. However, the data reveal that Gauteng DARD and Western Cape DEA&DP have high numbers of applications per annum as opposed to North West DREAD.

¹¹⁰ See para 2.10 above for detailed discussion on principle of non-regression.

The population of the study was made up of the government officials at the competent authorities in selected study areas, EAPs and environmental consultants in various provinces. The gatekeepers assigned the officials from the competent authorities to represent the competent authorities. The researcher selected the EAPs and environmental consultants randomly depending on their place of business. While the population was made up of few individuals, their views shed light on the perceptions of different stakeholders in the *ex post facto* environmental authorisation process and their implementation of section 24G of NEMA in specific provinces or nationally.

The findings of the study were done thematically and are summarily discussed below.

4.6.1 Original intent of section 24G of NEMA

The chapter also showed that section 24G of NEMA was introduced into the South African legislation purely with the intention of enabling the developers of unlawful activities from the era of ECA and NEMA an opportunity to bring their unlawful activities into the regulatory loop under the era of NEMA. This initiative was intended to be an amnesty period for only six months. The chapter argued considering that section 24G of NEMA was introduced to restore compliance, thereby allowing the offenders to assess the impacts of their unlawful activities, cease pollution, formulate mitigation measures and obtain environmental authorisation. Therefore, the introduction of section 24G NEMA cannot be said to have been a regressive measure mostly because it was meant to restore compliance and to ensure environmental protection in line with sustainable development.

4.6.2 Drivers of section 24G of NEMA

The chapter further discussed the various drivers for non-compliance with a requirement for conducting an EIA prior to commencement and drivers for application for *ex post facto* environmental authorisation. The chapter indicated that developers unlawfully commence with the listed activities because of the ignorance

of the law. Further, the organs of state cited the pressure to carry out their constitutional mandate of service delivery.

This chapter further indicated that some developers apply for *ex post facto* environmental authorisation because they seek to bring their unlawful activities into the regulatory loop either in their own volition or because they must comply with enforcement notices. The chapter argued that the wording of section 24G suggest that it is a voluntary process. However, in view of the objectives of IEM, advantages of *ex post facto* environmental authorisation, and the recent *Global Environmental Trust and Others*¹¹¹ judgement, this wording of section 24G must be revisited. Furthermore, this chapter argued that some developers apply for *ex post facto* environmental authorisation because they need financial assistance, and environmental compliance is *sine qua non*.

4.6.3 Interpretation issues

The chapter has further demonstrated that there are interpretation issues with section 24G of NEMA. There are listed activities that have an operational component and those that do not have an operational component. On a national level only those activities that have operational component and which have not been completed are interpreted to fall within the ambit of section 24G of NEMA. However, the study revealed that this is not necessarily the interpretation of the provinces.

4.6.4 Lack of uniformity on the contents of the assessment report

The chapter further highlighted that the assessments and assessment reports required in provinces may differ. The view is unanimous that the section 24G assessment is neither a basic assessment nor an S&EIR. The competent authorities dictate to the applicants on the type of assessment that the applicant has to carry out and what the contents should be. The study showed that some provinces require more detailed assessments and reports, while others require less stringent assessments and reports. This may be problematic if some provinces allow less strict

¹¹¹ *Global Environmental Trust and Others*.

procedures than the normal environmental authorisation that in turn renders section 24G a regressive measure. Organisations or developers may also capitalise on this fact.

4.6.5 Public participation

The findings in this study have indicated that public participation is undertaken as set out into the Section 24G Fine Regulations. However, the competent authority may direct the applicant to follow the procedures set out in the EIA Regulations. The chapter has argued that public participation in terms of Fine Regulations is less stringent as opposed to the normal EIA. The public participation process enables the I&APs to review the application form and assessments, but does not prescribe that the applicant should address the comments of the I&APs and indicate how they will be addressed. It seems that an *ex post facto* environmental authorisation's public participation is somewhat watered down. Wherefore, it is argued that in this regard, the *ex post facto* environmental authorisation in South Africa amounts to a regressive measure.

4.6.6 Abuse

It seems that although it is difficult to prove that there is abuse of the *ex post facto* environmental authorisation process, the competent authorities have argued that this happens from time to time. While the legislation was amended on several occasions to curb the abuse of section 24G of NEMA by introducing deterrent measures, this has brought its own challenges. The deterrent measures seem not only to deter the *male fide* offenders but even the *bona fide* offenders who wish to regularise their activities. Thus, some activities remain in perpetual unlawfulness and not regulated. As a result, the deterrent measure in section 24G defeats its purpose and render it susceptible to abuse.

4.6.7 Misconceptions

The chapter has demonstrated that there is criticism that have been levelled against the *ex post facto* environmental authorisation in literature. However, the data show

that these criticisms might be misconceptions or apply to earlier versions of section 24G. First, the criticism that *ex post facto* environmental authorisation undermines the environmental management principles seems to be incorrect. The chapter argued that the *ex post facto* environmental authorisation was introduced to give effect to the environmental management principles inclusive of sustainable development. The *ex post facto* environmental authorisation affords the applicant an opportunity to assess the impact of their activity, address the pollution, formulate mitigation measures and obtain an environmental authorisation. Further, the chapter has additionally argued that *ex post facto* environmental authorisation offers an opportunity for public participation, albeit watered down. The officials indicated that they consider the environmental principles in their decision-making.

It seems further to be a misconception that the *ex post facto* environmental authorisation is shorter, less vigorous and cheaper than the normal environmental authorisation application process.

4.6.8 *Alternative tools*

The chapter indicated that other alternative environmental management tools are being used to ease the burden on the developers who have to go through the cumbersome and expensive EIA process. Firstly, some developers are making use of the MMPs for listed activities that have exclusions. The advantage of this is that, when the developer inadvertently exceeds the exclusion threshold and triggers a listed activity, they do not necessarily have to carry out a basic assessment or an S&EIR as long as their maintenance operations are in line with the MMP. However, it has been criticised for its failure to engage the I&APs to comment because this is an initiative between the developer and the competent authority.

The second alternative that was discussed is the Sandveld EMF, which provides for farm-level planning. Farm-level planning outlines the way in which a farm must be used and managed to ensure that such use and management is in line with the objectives of the EMF. The challenge is that farmers are reluctant to be part of this initiative because they must first obtain *ex post facto* environmental authorisation

for their prior unlawful activities. Due to the consequences of filing a section 24G application, farmers are reluctant to apply, and they cannot be part of the farm level planning.

In conclusion, the chapter has indicated that some of the criticism levelled against section 24G of NEMA is not necessarily warranted. Secondly, although legislative amendments were aimed at addressing some challenges, some challenges remain regarding the interpretation issues, abuse, public participation and some misconceptions. There is also an indication that in practice that the basic assessment or the S&EIR process are adapted for the section 24G application process, but there is no prescribed procedure and the procedures of the DEFF and the provinces differ. In other instances, new tools are used to ensure compliance or to avoid a section 24F transgression. The introduction of new tools for section 24G applications are therefore not excluded.

The jury is out, so to speak, on whether section 24G is regressive or not, because theoretically, it was not meant to be regressive; however, the implementation of the section 24G application process in some respect (such as lack of an extensive public participation process) may render it a regressive measure.

Chapter 5: Lessons from other jurisdictions

5.1 Introduction

In the preceding chapters, section 24G of NEMA was discussed from a theoretical and practical perspective and some challenges were indicated. The aim of this chapter is to derive learning points from legislation and practice pertaining to *ex post facto* authorisation in foreign jurisdictions. There are some jurisdictions whose legislation makes provision for a somewhat similar procedure to the *ex post facto* environmental authorisation in South Africa, albeit under different terminology. This chapter is a limited comparative review of the *ex post facto* environmental authorisation in Ireland, England (as members of the EU), India and Eswatini to distil lessons for South Africa. In doing this, the chapter discusses Ireland and England's planning law followed by the position in Eswatini and India. The differences in the legal and administrative systems and cultures of these countries (as well as the EU) are taken into consideration.

5.2 EU, Ireland and England

Ireland and England are both Member States to the EU and are bound by the EU Directives and must give effect to them.¹ Therefore, to understand environmental authorisations in Ireland and England, it is first imperative to discuss the EU law.

5.2.1 European Union

The EU legislation is directly applicable to the Member States and can be enforced in national courts. The Commission of the European Communities (Commission) may also enforce EU legislation and bring matters to the European Court of Justice (ECJ) when it deems necessary.²

¹ The EU is a regional organisation made up of 27 states to which England (at time of writing) and Ireland are part thereto. See the *Treaty on European Union*; Wood *Environmental Impact Assessment* 34; Sands *et al Principles of International Environmental Law* 231.

² Wood *Environmental Impact Assessment* 34. The ECJ is the "judicial; institution of the EU and it is mandated to ensure that in the interpretation of the EU Treaties, the law is observed". See also Sands *et al Principles of International Environmental Law* 179.

The EU member states have sophisticated EIA systems that date as far back as the 1980s, when the EIA system was officially introduced by Directive 85/337/ECC of 1988.³ The adoption of the EU Directive 85/337/ECC led to the enactment of planning laws and EIA legislation in many European countries from 1988 onwards.⁴ Directive 85/337/ECC has been revised over time and the current EIA Directive, Directive 2014/52/EU,⁵ is the controlling document that sets out the rules for EIAs in the Member States. It provides a flexible framework of basic EIA principles that have to be implemented in each Member State through national legislation.⁶ Therefore, the Directive leaves a great deal of detail to be determined by the Member States.⁷

The Directive mandates the Member States to adopt all measures that ensure that developments that are likely to have a significant impact on the environment are assessed due to their nature, size or location before permission is granted.⁸ The Directive is accompanied by Annexes I to IV, which provide for lists of projects that triggers an EIA as per Article 4.⁹ The Directive requires an EIA to be carried out by both public agencies and private developers.¹⁰

The Directive 2014/52/EU further provides for the requirement of "development consent" for developments that are listed in the Annexes.¹¹ Member States are

³ Barker and Wood 1999 *EIAR* 387; Lee 1995 *Project Appraisal* 77-90.

⁴ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 45.

⁵ EC date unknown <https://ec.europa.eu/environment/eia/eia-legalcontext.htm>.

⁶ Wood *Environmental Impact Assessment* 37; Barker and Wood 1999 *EIAR* 388.

⁷ Wood *Environmental Impact Assessment* 40.

⁸ Article 2 of the Directive 2014/52/EU; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 45. Article 2 of the Directive further requires that EIA must be integrated into existing procedures for consent (permission) to developments in the Member States, or, failing this, into other procedures to be established to comply with the aims of the Directive.

⁹ Article 2(2) of the Directive 2014/52/EU. Barker and Wood 1999 *EIAR* 388. Annex I list the projects that must be carried out subject to an assessment. Annex II lists the projects to which developers should carry an assessment. In addition, the *European Communities Act* 1972 provides that regulations may be published to give effect to the Directive, thereby requiring assessment of impacts of the proposed projects on the environment. Therefore, the individual Member States may publish their own regulations to implement the Directive and have considerable discretion in doing so. See in this regard section 2.2 of the *European Communities Act* 1972; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 61.

¹⁰ Article 1 of the Directive 2014/52/EU; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 61.

¹¹ Article 2 of the Directive 2014/52/EU. The development consent is defined in Article 1 as "the decision of the competent authority that permits the developer to commence with the project".

mandated to adopt measures that ensure that, before consent is granted, the projects that are likely to have a significant impact on the environment are carried out subject to a requirement for development consent.¹² The EIA is recognised as one of the tools that may be used to apply for the development consent in the Member States.¹³ Article 5 of the Directive 2014/52/EU mandates the Member States to adopt measures to ensure that the developers provide the appropriate form of information.¹⁴ The Member States must ensure that there are measures that ensure that authorities that are likely to be affected by the proposed project by reason of their specific environmental responsibility are given an opportunity to comment on the application.¹⁵

Furthermore, the Member States are mandated to ensure that the public is informed of the application of the development consent in the early environmental decision-making stages.¹⁶ The comments received from the authorities that have an interest in environmental matters and the comments of the public must be considered in the decision-making.¹⁷ The decision of whether to grant a development consent or not must be communicated to the public. The information should include reference to the content of the decision, the reasons for the decision and the conditions, as well as the mitigation measures.¹⁸

Directive 2014/52/EU *prima facie* provides only for the granting of a development consent before the commencement of the project. Therefore, it does not seem to make provision for *ex post facto* development consent. However, the English and Irish courts have held that the EU law permits respective development consents (or however they may be termed).

¹² Article 2(1) of Directive 2014/52/EU; *R (Barker) v Bath and North East Somerset Council* [2013] EWHC 946(Admin) para 23.

¹³ Article 2(2) of the Directive 2014/52/EU.

¹⁴ The Directive further mandates the Member States to ensure that there are measures in place that ensure that the developer may be given an opinion if the said developer so requests the for the opinion before filing the application of development consent.

¹⁵ Article 6 of the Directive 2014/52/EU.

¹⁶ Article 6(2) of the Directive 2014/52/EU.

¹⁷ Article 8 of the Directive 2014/52/EU.

¹⁸ Article 9 of the Directive 2014/52/EU.

In the case of *R (Baker) v Bath and North East Somerset Council*,¹⁹ the court opined that EU law allows retrospective planning permission for EIA developments but only in exceptional circumstances.²⁰ In addition, the court stated that while Community law cannot prohibit the Member States from allowing, in some instances, the regularisation of unlawful developments, such a possibility should be subject to conditions to prevent the circumvention of the Community rules or to dispense with them and that it should remain the exception.²¹

Against this background of the EU law, it is imperative to now discuss the Irish planning law that provides retention permissions and the English planning law providing for retrospective planning permissions.

5.3 Ireland

As indicated Ireland is a Member State to the EU, which allows for the application for planning permissions and *ex post facto* environmental authorisations referred to as retention permits. In order to understand the retention permits and how they are granted, it is necessary to first briefly discuss the planning permission in Ireland.

5.3.1 Overview of planning permission requirement in Ireland

Irish EIA legislation flows from Directive 2014/52/EU. Local planning authorities are responsible for the planning system in Ireland and are responsible for Ireland's planning enforcement regime.²²

The *Planning and Development Act, 30 of 2000* (PDA) gives effect to the EU Directive.²³ Section 32(1) of the PDA requires that planning permission must be obtained for any development that is not exempted and for the retention of unauthorised development.²⁴ Planning permission is granted before the

¹⁹ *R (Barker)* para 15. See also *Commission v Ireland* para 11.

²⁰ See also *Maidstone Borough Council* para 8.

²¹ *R (Barker)* para 24; *Commission v Ireland* para 57. The court did not refer to the specific EU Directive, nor did it state what the exceptional circumstances would be.

²² DECLG *A Guide to Planning Enforcement in Ireland* 3.

²³ *Commission v Ireland* para 23.

²⁴ Section 32(1) of the *Planning and Development Act 30 of 2000*.

commencement of the listed developments and a retention permit for unlawful developments.²⁵ Planning permission is similar to South African environmental authorisation. Section 32 of the PDA lays down the obligation to obtain a permission for projects listed in Annexes I and II of Directive 2014/52/EU before the commencement of the development.²⁶ It is prohibited for any person to carry out any listed project without a planning permission.²⁷ Similar to South Africa, it is an offence to carry out any unlawful activity.²⁸ When one applies for a planning permission, the application must be accompanied by an EIS.²⁹ Section 176(1) of the PDA empowers the Minister³⁰ to make regulations that identify developments or projects that may have a significant impact on the environment. The application process of a planning permission is regulated by the *Planning and Development Regulations 2006*.³¹ The planning permission is anticipatory in nature.

5.3.2 Retention permits

Section 32(1), read with section 34(12) of the PDA, provides that a developer may apply for a planning permission for the retention of unlawful activity. The success of the application for such a retention permit may depend on the scale, nature and circumstances of each application. The circumstances under which retention permits may be granted are tightly circumscribed.³² The competent authority may refuse an application for a planning permission for a retention permit for any development that would have required an EIA.³³ Therefore, unlike the South African position, it

²⁵ See *Commission v Ireland* para 24.

²⁶ *Commission v Ireland* para 24.

²⁷ Section 32(2) of the *Planning and Development Act 30 of 2000*. Any project that does not have permission, while it requires a permission before commencement, is considered as unauthorised development. Similarly, a development which commences in breach of conditions laid down in the planning permission is also an unauthorised development.

²⁸ Section 151 of *Planning and Development Act 30 of 2000*. DECLG *A Guide to Planning Enforcement in Ireland* 5; *Commission v Ireland* para 27.

²⁹ Section 172(1) of the *Planning and Development Act 30 of 2000*; Article 16 of the *Planning and Development Regulations 2006*.

³⁰ Minister in this regard is the Minister for the Environment, Heritage and Local Government.

³¹ Part 4 of the *Planning and Development Regulations 2006*.

³² See para 5.4.1 above.

³³ DECLG *A Guide to Planning Enforcement in Ireland* 13.

is not every unlawful activity that may be legible to regularisation by way of retention permit under the Irish planning law.

Similar to South Africa, the submission of the application for a planning permit for the retention of unlawful activity does not rectify the unlawfulness of the activity.³⁴ Furthermore, it is not a defence to prosecution if the defendant proves that he or she has applied for or has been granted a retention permit.³⁵ The application for retention permission or granting that permission does not nullify or withdraw enforcement action under section 34(12).³⁶ Therefore, the Irish planning law allows prosecution of the developer of the unlawful development similar to South African position as per section 24G of NEMA despite the lodging of planning permission for retention.

5.3.3 Irish case law

The legality of retention permits was challenged before the European Court of Justice (ECJ). In the case of *Commission v Ireland*,³⁷ the complaint was that Ireland had not taken all measures necessary to comply with the provisions of the Directive 2014/52/EU.³⁸ The Commission complained that the Irish legislation, which allows an application for retention permission to be made after a development has been executed in whole or in part without consent, undermines the preventive objectives of Directive. The Commission argued among other things that the national legislation which recognises a possibility of regularisation of the acceptance of an EIA after the commencement of the development while the Directive requires that the impact of the environment should be taken into account as early as possible in all planning and decision-making, results in undermining the Directive's effectiveness. Further, it was argued that the rules relating to the retention permission are incorporated within the general provisions applicable to a normal

³⁴ DECLG *A Guide to Planning Enforcement in Ireland* page 13.

³⁵ Section 262(2) of the *Planning and Development Act 30 of 2000*.

³⁶ Section 162(3) of the *Planning and Development Act 30 of 2000*.

³⁷ *Commission v Ireland*.

³⁸ *Commission v Ireland* para 41. These Articles of the Directive generally requires that developments that are likely to cause significant impact to the environment be subjected to assessment.

planning permission, and that there is nothing to indicate that applications for retention permissions and the granting of such permissions are limited to exceptional cases.

On the contrary, Ireland contended that the Irish law expressly requires that a permission be obtained for any new activity before its commencement and that for a development that must be subject to an EIA, the assessment must be carried out before the commencement.³⁹ Failure to comply with those obligations is a criminal offence and may result in enforcement action.⁴⁰ Ireland further contended that the retention permission, issued in terms of the PDA and the Planning and Development Regulations, 2001, is an exception to the general rule that requires permission to be obtained before the commencement of a development, and best meets the objectives of the Directive, in particular, the general objective of protection of the environment, since the removal of an unauthorised development may not be the most appropriate measure to achieve that protection. Ireland further argued that it would be disproportionate to order the removal of some structures in circumstances where, after consideration of an application for a retention permission, the retention is held to be compatible with proper planning procedures and sustainable development.

The ECJ held that the Member States had the mandate to implement Directive 2014/52/EU, of which the fundamental objective is that the projects that are likely to have a significant impact on the environment must be subjected to an EIA before the planning permission is granted.⁴¹ The ECJ opined that the Irish planning law establishes a retention permission and equates its effects to those of ordinary planning permission that precedes the carrying out of works and development.⁴² The former can be granted even though the development (requiring an assessment in terms of the Directive) has been carried out.⁴³ The court further held that a

³⁹ *Commission v Ireland*.

⁴⁰ *Commission v Ireland* para 43.

⁴¹ *Commission v Ireland* para 49. Article 2(1) of the Directive. See also C-287/98 *Linster* [2004] ECR I-723, para 52; *Commission v Italy* [2006] ECR I-11025 para 36.

⁴² *Commission v Ireland*.

⁴³ *Commission v Ireland* para 55-60. Moreover, the ECJ held that while the competent authorities are mandated to take remedial measures for failure to comply with the requirement for an EIA,

system of retrospective permission, such as that in force in Ireland, may have the effect of encouraging developers to forgo the necessary environmental assessment of proposed projects.⁴⁴ The ECJ further stated that Ireland failed to comply with the requirements of the Directive by allowing the granting of such retention permission, where no exceptional circumstances were provided.⁴⁵

The Irish Department of the Environment, Community and Local Government (DECLG) issued guide stating that in the past, developers who filed retention permission applications subsequent to an enforcement notice being served upon them were treated less severely by the Irish courts.⁴⁶ The guide further indicated that in some cases, the courts considered that lighter penalties (if any) had to apply where the developer had made some attempt to regularise the unlawful development.⁴⁷ This resulted in developers abusing the process, conducting unlawful activities more regularly, in the knowledge that the full penalties were unlikely to be applied to them.⁴⁸ Therefore, the in-built deterrents in the system were undermined. Therefore, this resulted in the abuse of the retention permission procedure.⁴⁹

The Irish legislation now provides that once an enforcement action is initiated, it will not be affected by the subsequent application for a retention permission.⁵⁰ This is similar to South African position where section 24G of NEMA provides that submission of section 24G application may not bar the criminal investigation or prosecution.⁵¹ The decision on the section 24G application may be deferred where

this does however not mean that a retrospective EIA is equivalent to the EIAs that are required by the Directive.

⁴⁴ *Commission v Ireland* para 57. The ECJ stated that the EU does not prohibit the applicable national rules from allowing, in certain circumstances, the regularisation of unlawful activities or measures in terms of the EU law. However, such a possibility or regularising the unlawful projects should be subject to conditions that it does not offer the person concerned the opportunity to circumvent the community rules or to dispense with applying them, and that it should remain the exception. See also *Maidstone Borough Council* para 56; *Commission v Ireland* para 57.

⁴⁵ *Commission v Ireland*.

⁴⁶ DECLG *A Guide to Planning Enforcement in Ireland* 12.

⁴⁷ DECLG *A Guide to Planning Enforcement in Ireland* 12.

⁴⁸ DECLG *A Guide to Planning Enforcement in Ireland* 12.

⁴⁹ DECLG *A Guide to Planning Enforcement in Ireland* 12.

⁵⁰ DECLG *A Guide to Planning Enforcement in Ireland* 12.

⁵¹ See para 3.6.2.1 in Chapter 3 above.

it is brought to the attention of the competent authority that there is a criminal investigation or pending prosecution proceeding concerning the activity to which section 24G application is filed.

Against this backdrop, it submitted that Irish planning law allows for a planning permission for the retention of unlawful activities just as South Africa. However, unlike in South Africa, the retention permission may only be granted subject to exceptional circumstances to avoid encouraging prospective developers from circumventing the normal EIA process. Moreover, Irish planning law differs from South African law in that the granting of the planning permission for retention depends on the scale, nature and circumstances of each case. Seemingly, each case is treated on its own merits. Furthermore, competent authorities must observe the principle of proportionality in considering the enforcement measure that must be pursued in dealing with the application of the retention permission. The retention permission may not be equated to the planning permission that precedes the commencement of development as it is an exception.

5.4 England

The EIA regime in England also flows from Directive 2014/52/EU.⁵² In England, environmental authorisations are included in planning law and apply to the local government where the local planning authorities are mandated to issue planning permissions.⁵³ The planning permission is granted for activities that are classified as the "EIA developments" while permitted developments may be carried out without a planning permission.⁵⁴ The granting of a planning permission is regulated by the planning framework legislation discussed hereunder.

⁵² Glasson, Therivel and Chadwick *Environmental Impact Assessment* 43; *Maidstone Borough Council* para 50; Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 3.

⁵³ *Maidstone Borough Council* para 49. The local planning authorities are the local borough or district council.

⁵⁴ The unauthorised EIA development means EIA development that is the subject of an enforcement notice. See regulation 34 of the *Town and Country Planning (Environmental Impact Assessment) Regulations* (2017). For detailed discussions on permitted development, see section 60 of *Town and Country and Planning Act 1990*; Denyer-Green and Ubhi *Development and Planning Law* 37.

5.4.1 Overview of planning permission requirements in England

The *Town and Country and Planning Act 1990* (T&CPA) is the planning framework legislation that requires that a planning permission must be obtained for carrying out certain developments.⁵⁵ The T&CPA mandates the Secretary of State to publish regulations setting out the procedures for applying for a planning permission.⁵⁶ Pursuant to the T&CPA, England published the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*, which set out the procedures to be followed in applying for a planning permission.⁵⁷ These Regulations are accompanied by Schedules 1 and 2, which contain a list of developments that are classified as EIA developments.⁵⁸ Regulation 3 read with section 57(1) of the T&CPA prohibits the competent authority to grant a planning permission for an EIA development unless an EIA has been carried out for such development.⁵⁹ Therefore, an EIA is a prerequisite for obtaining a planning permission for EIA developments in Schedule 1 and 2 of the Regulations. The developments listed in Schedules 1 to 4 are somewhat similar to the projects listed in the Annexes of the Directive.⁶⁰ An EIA must be carried out if the development is listed in Schedule 1 while Schedule 2 only applies if the activity is likely to have a significant environmental impact.⁶¹ Against this backdrop, it is imperative to briefly

⁵⁵ Section 57(1) of the *Town and Country and Planning Act 1990*. Development is defined in terms of section 56(1) of the same Act as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". Contrary to South Africa, England uses the term "development" as opposed to activities.

⁵⁶ Section 71A(1) of the *Town and Country and Planning Act 1990*.

⁵⁷ Wood *Environmental Impact Assessment* 56; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 61; *Maidstone Borough Council* para 52; Moules *Environmental Judicial Review* 39. The 2017 Regulations have repealed the previous 2011 T&PC Regulations.

⁵⁸ Regulation 2(1) of the *Town and Country Planning (Environmental Impact Assessment) Regulations (2017)*; Wood *Environmental Impact Assessment* 56.

⁵⁹ Regulation 3 of the *Town and Country Planning (Environmental Impact Assessment) Regulations (2017)*; [2014] EWHC 51 (Admin) para 50-53; *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498 para 3 (hereinafter *R (Ardagh Glass Ltd)*); *R (Barker)* para 15; Glasson, Therivel and Chadwick *Environmental Impact Assessment* 64.

⁶⁰ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 64.

⁶¹ Glasson, Therivel and Chadwick *Environmental Impact Assessment* 66. The developer must submit the environmental information with the application for planning permission. Regulation 3(1) of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*.

discuss the process of obtaining a planning permission and determine whether the English planning law allows for *ex post facto* planning permission.

5.4.2 *Planning permission*

A planning permission may be granted amongst others by the local planning authority or the Secretary of State.⁶² Regulation 3 of the T&CPA Regulations prohibits a competent authority from issuing a planning permission for an EIA development unless an EIA has been carried out in respect of that development.⁶³ The developer who intends to apply for a planning permission may follow the screening procedure, thereby requesting a screening opinion from the relevant planning authority if the EIA development is listed in Schedule 2.⁶⁴ The relevant planning authority must issue its EIA screening opinion on whether an EIA must be carried out or not.⁶⁵

The developer who intends to carry out an EIA development may also "request a scoping opinion from the relevant planning authority" in terms of which they inquire from the competent authority "an opinion on the scope and level of detail of the information to be provided in the environmental statement".⁶⁶ Prior to the preparation of the environmental statement and submission of the application for planning permission, the applicant must notify in writing the local planning authority and the consultation bodies of the intended application.⁶⁷ The developer must then submit an application for a planning permission accompanied by the environmental

⁶² Section 58(1) of the *Town and Country Planning Act* 1990.

⁶³ The significance of the environmental impact of the project is determined on the basis of a set of "applicable thresholds and criteria."

⁶⁴ See regulations 5 to 8 of the *Town and Country Planning (Environmental Impact Assessment) Regulations* 2017. In the event that "the development is listed in Schedule 1, the developer must carry out an EIA". If the "development is listed in Schedule 2 and it exceeds the thresholds," the competent authority must determine "if it is likely to have a significant impact on the environment."

⁶⁵ Regulations 6 and 7 of the *Town and Country Planning (Environmental Impact Assessment) Regulations* 2017.

⁶⁶ Regulation 15 of the *Town and Country Planning (Environmental Impact Assessment) Regulations* 2017. Environment statement is defined in terms of regulation 18 as "a description of the proposed development, the likely significant impact of the proposed development, mitigation measures and alternatives".

⁶⁷ Regulation 17 of the *Town and Country Planning (Environmental Impact Assessment) Regulations* 2017.

statement.⁶⁸ The planning permission may be granted in terms of section 58 of the T&CPA read with regulation 26.⁶⁹ Regulation 26 provides for the consideration of whether a planning permission must be granted and states that the competent authority must consider the environmental information, reach a reasoned conclusion on the significant impact of the proposed development, integrate the conclusion into the decision of whether to grant planning permission and whether monitoring measures must be imposed.⁷⁰

Therefore, it is evident that a developer of a prospective EIA development must carry out an EIA and submit environmental information with the application for a planning permission before commencing with the activity. However, the Regulations make provision for considering applications to regularise unauthorised developments, and they are discussed hereunder.

5.4.3 Retrospective planning permissions

Although it has been established that a planning permission is a *sine qua non* for the commencement of the EIA developments in Schedules 1 and 2, there are instances where some of the EIA developments are carried out without the necessary planning permission. Such EIA developments are unlawful as they are a breach of planning control.⁷¹ Breaching of planning control is defined as "the carrying out of development without required planning permission or failing to comply with the condition or limitation subject to which planning permission has been granted".⁷² The local planning authority is prohibited from granting a planning permission for an unauthorised EIA development unless an EIA has been carried

⁶⁸ Regulations 18 and 19 of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*. The application for planning permission is referred to as EIA application as per regulation 2 of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*.

⁶⁹ Section 58(1) provides that the planning permission may be granted either by development order, by a local planning authority or on the adoption or an approval of a simplified planning zone scheme.

⁷⁰ Regulation 26(1) of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*.

⁷¹ Section 171A(1) of the *Town and Country and Planning Act 1990*. See also Gov UK 2004 "enforcement and post-permission matters" <https://www.gov.uk/guidance/ensuring-effective-enforcement>.

⁷² Section 171A of the *Town and Country and Planning Act 1990*.

out in respect of such development.⁷³ An unauthorised EIA development is an EIA development that is subject of an enforcement notice.⁷⁴ If the local planning authority plans to issue an enforcement notice for an EIA development, the local planning authority must, before issuing such an enforcement notice, issue a screening opinion that shall be attached to the enforcement notice.⁷⁵ Following the issuing of the screening opinion, the local planning authority must then issue an enforcement notice.⁷⁶

There are two ways in which a developer may be granted a retrospective planning permission. Firstly, the local planning authority may ask the developer or the occupier of the land who breached the planning control to apply for a planning permission if it deems it an appropriate way to regularise the development in terms of section 73A of the *Town and Country Planning Act 1990*.⁷⁷ The retrospective planning permission is provided for in terms of sections 73A and 177 of the *Town and Country Planning Act 1990*.⁷⁸ Section 73A provides that subject to the application made to the local planning authority, the planning permission may be granted for developments carried before the date of application.⁷⁹ The retrospective planning permission may be applied for:

- a) developments that were carried out without a planning permission;

⁷³ See regulation 36 of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*.

⁷⁴ See regulation 34 of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*. An enforcement notice is issued in terms section 172 of *Town and Country Planning Act 1990* where a local planning authority is of the opinion that there has been a breach of planning control. When an enforcement notice has been issued, the local planning authority may give the developer issued with the enforcement notice an assurance that he or she may not be prosecuted on the basis of the enforcement notice. See section 172 of the *Town and Country Planning Act 1990*.

⁷⁵ Regulation 37(1) of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*.

⁷⁶ Section 174 of the *Town and Country Planning Act 1990*.

⁷⁷ Section 73A of the *Town and Country Planning Act 1990*; *R (Ardagh Glass Ltd)* para 6; Gov UK 2004 <https://www.gov.uk/guidance/ensuring-effective-enforcement#Retrospective-planning-application>.

⁷⁸ *R (Ardagh Glass Ltd)* para 6; Gov UK 2004 "enforcement and post-permission matters" <https://www.gov.uk/guidance/ensuring-effective-enforcement#Retrospective-planning-application>.

⁷⁹ Section 73A (1) of *Town and Country and Planning Act 1990*. This section was inserted by the *Planning and Compensation Act 1991*.

- b) developments that were carried out subject to the planning permission that was granted for a limited period; or
- c) developments carried out without complying with the conditions of the planning permission.⁸⁰

Regulation 36 prohibits the competent authority from granting a planning permission in respect of unlawful development unless an EIA has been carried out in respect of that development.⁸¹ Therefore, an EIA, which ultimately produces the environmental statement, is a *sine qua non* for granting a retrospective planning permission.

However, an invitation by the local planning authority to submit an application for a retrospective planning permission does not guarantee that the planning permission will be issued.⁸² The local planning authority "must not fetter its discretion before the determination of any application for planning permission, but such an application must be considered in the normal way".⁸³ Seemingly the application for a retrospective planning permission follows the same process as the normal planning permission. Although an EIA is an anticipatory and proactive tool that is carried out before commencement, it is evident that the English planning law demands an EIA to be carried out also for a retrospective planning permission. Whether an EIA is an appropriate tool for retrospective planning permission remains questionable for both England and South Africa.

Secondly, the other means by which a developer of an unlawful activity may be granted a retrospective planning permission is through "an appeal against an enforcement notice on the ground that the planning permission ought to be granted, or the condition or limitation concerned ought to be discharged".⁸⁴ Any person who "has an interest in the land to which an enforcement notice relates or an occupier

⁸⁰ Section 73A(2) of the *Town and Country Planning Act* 1990.

⁸¹ Section 36 of the *Town and Country Planning Act* 1990.

⁸² Gov UK 2004 "enforcement and post-permission matters" <https://www.gov.uk/guidance/ensuring-effective-enforcement>.

⁸³ Gov UK 2004 "enforcement and post-permission matters" <https://www.gov.uk/guidance/ensuring-effective-enforcement>.

⁸⁴ See section 177 of the *Town and Country Planning Act* 1990; Gov UK 2004 "enforcement and post-permission matters" <https://www.gov.uk/guidance/ensuring-effective-enforcement>.

may appeal to the Secretary of the State against the enforcement notice".⁸⁵ One of the grounds for an appeal against the enforcement notice is that "a planning permission ought to be granted in respect of any breach of the planning control that may be constituted by matters stated in the notice".⁸⁶ The person appealing must send a written notice to the Secretary of State indicating that it a notice of appeal and stating the ground on which the appeal is based and any other information that may be relevant.⁸⁷

When the local planning authority that granted an enforcement notice is notified of a filed appeal, the local planning authority must send a statement to the Secretary of State.⁸⁸ The statement may indicate "whether the local planning authority would be prepared to grant a planning permission for the matters alleged in the enforcement notice to constitute the breach of planning control" and if the answer is in the affirmative, the conditions that they may wish to impose on the planning permission.⁸⁹

Regulation 36 of the Regulations⁹⁰ under the heading "Unauthorised development" sets out the procedure to be followed where the appeal relates to an unauthorised EIA development.⁹¹ If the Secretary of State intends to grant planning permission under section 177 of the T&CPA, the Secretary of State must consider the environmental information. Where the appeal was made without submitting an environmental statement, the Secretary of State is obliged to give the appellant the

⁸⁵ Section 174(1) of the *Town and Country Planning Act 1990*.

⁸⁶ Section 174(2) of the *Town and Country Planning Act 1990*.

⁸⁷ Section 174(3) of the *Town and Country Planning Act 1990*.

⁸⁸ Regulation 9 of *Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002*. Section 175 provides that the Secretary of State to make regulations prescribing the procedure to be followed in filing an appeal against an enforcement notice. Subject to s 175, *Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002* have been published.

⁸⁹ Regulation 9(1) of *Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002*.

⁹⁰ *Town and Country Planning (Environmental Impact Assessment) Regulations 2017*.

⁹¹ *R (Baker) v Bath & North East Somerset Council* [2013] EWHC 946 (Admin) (hereinafter *R (Baker)*) para 26.

opportunity to submit an environmental statement within a period specified by him or her.⁹²

Section 70C of the T&CPA, as inserted by section 123 of the *Localism Act* 2011, empowers the local planning authority to decline the retrospective planning permission.⁹³ In terms of section 70C(1), the competent authority may refuse to consider the application if the issuing of the planning permission would be for an EIA development for which a pre-existing enforcement notice has been issued, and the planning permission sought relates to any of the matters stipulated in the enforcement notice.⁹⁴

5.4.4 *English case law*

Similar to South Africa, the English courts have grappled with cases relating to the notion of retrospective planning permission. In *Ardagh Glass, R (On application) v Chester City Council*,⁹⁵ an EIA development was carried out without a planning permission. The Secretary of the State requested the developer to apply for a planning permission, which was refused after a lengthy public inquiry.⁹⁶ Subsequent thereto, the developer filed two applications for a retrospective planning permission in terms of section 73A of the T&CPA for existing works and retrospective planning permissions were duly granted.⁹⁷ These permissions were challenged in the courts.⁹⁸

In the *court a quo*, (High Court) one of the issues before the court was whether the court could make an order prohibiting the grant of any retrospective planning

⁹² *R (Baker)* para 26.

⁹³ See also Gov UK 2004 "enforcement and post-permission matters" <https://www.gov.uk/guidance/ensuring-effective-enforcement>.

⁹⁴ Section 70(C) of the *Town and Country Planning Act* 1990. The pre-existing enforcement notice is an enforcement notice issued before the application was received by the local planning authority.

⁹⁵ *R (Ardagh Glass Ltd)* para 3-4. Application for planning permissions were only submitted during the construction phase in 2004. The Secretary of State refused to issue a planning permission in a decision made in 2007.

⁹⁶ *R (Ardagh Glass Ltd)* para 4. The Secretary of State refused to grant the planning permission because of the concerns of deficiency of the application before her or she was of the view that applicant had to submit fresh application.

⁹⁷ *R (Ardagh Glass Ltd)* para 6. There were other matters raised but the focus of this discussion will be on the retrospective planning permission.

⁹⁸ *R (Ardagh Glass Ltd)* para 7.

permission.⁹⁹ The court *a quo* held that a retrospective planning permission could lawfully be granted as long as the competent authorities pay careful attention to the need to protect the objectives of the Directive,¹⁰⁰ which allow the Member States to formulate their own procedures.

The Appellate Division had to deal with the ground of appeal of whether the *court a quo* erred by holding that the retrospective planning permission could be granted for an EIA development and that the competent authority acted correctly.¹⁰¹ The appellate court concurred with the court *a quo* in holding that the EU law allows a retrospective planning permission for the three reasons that it accorded with common sense, the need to ensure that the measures aimed at ensuring compliance with the Directive are proportionate in accordance with EU law¹⁰² and the ECJ judgment in the *Commission v Ireland* case that allowed for such an authorisation.¹⁰³

The court held that it would be an affront to common sense not to allow a retrospective planning permission in a case where there was inadvertent failure to comply with the law. Further, it would be senseless to compel the local planning authority to require the removal of the activity before considering any further application for a planning permission, at least because the process of removal might itself cause serious environmental harm. An authorisation can also be issued if a development is beneficial and no serious environmental harm was caused.¹⁰⁴

⁹⁹ *R (Ardagh Glass Ltd)* para 8.

¹⁰⁰ *R (Ardagh Glass Ltd)* para 11.

¹⁰¹ *R (Ardagh Glass Ltd)* para 12.

¹⁰² The concept of proportionality in relation to enforcement matters is provided for in the *National Planning Policy Framework* 2012, which provides that the enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breach of planning control. Some local planning authority will consider the degree of harm caused by the alleged breach and determine whether it justifies taking action. The local planning authority may decide not to take any action if it believes that planning permission is likely to be issued. See also Gov UK 2004 "enforcement and post-permission matters" <https://www.gov.uk/guidance/ensuring-effective-enforcement>.

¹⁰³ *R (Ardagh Glass Ltd)* para 14.

¹⁰⁴ *R (Ardagh Glass Ltd)* para 15. The court said given the variety of circumstances in which an EIA development might be carried out in breach of the requirement of Directive and the range of environmental consequences of a breach; it would be astonishing if there was only one response to a breach. At one extreme, developments causing severe environmental harm might have been carried out in flagrant and deliberate contravention of the law, and such cases would

The court held that while the Member States must take the necessary measures to ensure compliance with the Directive and to nullify the effects of the breach, it is considered as a fundamental principle of the EU law that such measures must themselves be proportionate.¹⁰⁵ The refusal of a retrospective planning permission, irrespective of the circumstances, would be disproportionate.¹⁰⁶ This argument may be advanced further to argue that not only the determination of whether to grant the retrospective planning permission should be proportionate, but the consequences thereof, such as the imposition of a fine and the possibility of prosecution. The foregoing proposition is based on the fact that the fundamental reason for retrospective planning permission is to rectify the wrong rather than to punish and to pursue environmental protection. This is further supported by the *National Planning Policy Framework* 2012, which provides that the enforcement action is discretionary, and that local planning authorities should act proportionately in responding to a suspected breach of planning control. On the last point, the court referred to *Commission v Ireland*¹⁰⁷ where the court formed the view that the EU law allows retrospective planning permission, which can only be issued under exceptional circumstances.¹⁰⁸

In *R (Ardagh Glass) v Chester City*,¹⁰⁹ the court held that the decision-maker must consider whether granting the retrospective planning permission would give the developer an advantage he ought to be denied. Moreover, the decision-maker must determine whether the public can be given an equal opportunity to form and advance their view and whether the circumstances can be said to be exceptional.¹¹⁰ The decision-maker must ensure that there will be no encouragement to the pre-emptive developer by ensuring that the developer does not gain an improper advantage. It must be ensured that the developer knows he will be required to

warrant removal of the unauthorised development. On the other hand, if there are inadvertent failure to comply with Directive, which had caused no environmental harm but was positively beneficial in environmental terms, it should be allowed.

¹⁰⁵ *R (Ardagh Glass Ltd)* para 16.

¹⁰⁶ *R (Ardagh Glass Ltd)*.

¹⁰⁷ *Commission v Ireland* para 57.

¹⁰⁸ *R (Ardagh Glass Ltd)* para 18.

¹⁰⁹ *R (Ardagh Glass Ltd)*.

¹¹⁰ *R (Ardagh Glass Ltd)*.

remove his development unless he can demonstrate exceptional circumstances to justify its rendition.¹¹¹ The court did, however, not define the exceptional circumstances. Therefore, it may be safely inferred that the competent authority may exercise its discretion to determine what amounts to exceptional circumstances. It becomes evident that although a retrospective planning permission is permissible, the decision-makers must guard against developers benefitting from flaunting the normal EIA requirements. This form of discretion is not available in South Africa although it may be relevant in the cases where the developer was not at fault or was not responsible for contravention of section 24F of NEMA.

In *R (on the application of David Padden) v Maidstone Borough Council*,¹¹² the court had two issues to determine, to wit, the failure by the *Maidstone Borough Council* (Council) to consider "whether there were exceptional circumstances for the granting of a retrospective planning permission", and secondly, whether the failure by the Council to consider whether such a permission would give the applicants any unfair or improper advantage.¹¹³

Similarly, the court also quoted with approval the decisions of the ECJ of *Commission v Ireland*¹¹⁴ and the *R (Ardagh Glass) v Chester City*¹¹⁵ and reaffirmed that the retrospective planning permission could only be issued lawfully for EIA developments under exceptional circumstances.¹¹⁶ The court held that "the Council failed to consider the question of exceptional circumstances," and therefore, the

¹¹¹ *R (Ardagh Glass Ltd)*; see also *Maidstone Borough Council* para 58.

¹¹² *Maidstone Borough Council*.

¹¹³ *Maidstone Borough Council* para 47. The brief facts of the case were that in 2003, the planning permission was granted by the Council for development referred to as Monk Lakes. The "permission was subject to various conditions, including the submission for approval of various pre-commencement details." These pre-commencement details were not submitted for approval. The then developers commenced with unauthorised works at Monk Lakes contrary to the conditions in the 2003 permission. The "unauthorised works took place between 2003 and 2008". The developers were served with an enforcement notice in September 2008, following a temporary stop order that issued earlier in April 2008. The retrospective permission was granted in 2009 and 2010. The application for a planning permission was filed with the Council on December 2011.

¹¹⁴ *Commission v Ireland*.

¹¹⁵ *R (Ardagh Glass Ltd)*.

¹¹⁶ *Maidstone Borough Council* para 56.

ground of appeal succeeded. On the second ground of appeal, the court ruled that the Council also did not have regard to the "question of unfair or improper advantage".¹¹⁷ Therefore, the court quashed the retrospective planning permission.

From the foregoing discussion on English planning law, it is evident that a retrospective planning permission is allowed. However, the position in English law is different from the South African law, and as a result, the following lessons may be drawn from the English planning law. Firstly, the English planning law stipulates that the applicant for a retrospective planning permission must carry out an EIA and submit environmental information. This is different from the South African position because South African law merely provides that the applicant for *ex post facto* environmental authorisation must submit an assessment report, and the data in Chapter 4 has indicated the confusion on this part. While an EIA may not be an ideal tool for an *ex post facto* environmental authorisation due to EIA's proactive and anticipatory nature, the law provides certainty on the procedure that must be followed. Secondly, the English planning law refers to the principle of proportionality that denotes that the purpose of retrospective planning permission should not be punitive but corrective. Consequently, the measures employed to address the contraventions of environmental laws must be proportionate to the offence. This creates a room for the exercise of discretionary power, which in the case of South Africa, can be useful in the instances where the developer had no intention to contravene the law or where he or she or has to apply for *ex post facto* environmental authorisation for a contravention of section 24F of NEMA not caused by him or her. For instance, the upgrading or expansion of townships and the provision of housing and services in the case of land grabs or informal settlements.

Thirdly, the retrospective planning permission can only be granted in instances where the applicant has shown that exceptional circumstances exist. Although the courts did not describe what could amount to an exceptional circumstance, it can be inferred that the competent authority has the discretion to decide what would constitute such. This is contrary to South Africa where section 24G of NEMA is

¹¹⁷ *Maidstone Borough Council.*

applicable where section 24F has been contravened and do not make provision for exceptions. However, it was also seen that the DEFF held a different interpretation from the provinces in relation to which activities would trigger a section 24G application.

Fourthly, the court stated that the competent authorities must ensure that the applicant for a retrospective planning permission does not gain an advantage he or she ought to be denied. Fifthly, the courts indicated that the competent authorities must ensure that the public gets an equal opportunity to participate in the process. This means that public participation in the retrospective planning permission must not afford the public a lesser opportunity to participate. This is also a different situation with South Africa where it has been argued that section 24G of NEMA provides for a public participation process that is watered down. Lastly, the English planning law demands that the competent authority must ensure that the retrospective planning permission is not granted in a way that it will encourage prospective developers to circumvent the law.

Having discussed an EU law and the position in developed countries, it is imperative to discuss other jurisdictions in the developing world, starting with India.

5.5 India

The Indian environmental law jurisprudence requires that certain listed activities be subjected to assessment before their commencement and that an environmental clearance be granted, and this shall be discussed hereunder. However, there is uncertainty as to whether an *ex post facto* environmental clearance (as referred to in India) is permissible or not.

5.5.1 Overview of Indian legislation for environmental clearance

The granting of environmental clearance is the mandate of the central government.¹¹⁸ The environmental framework legislation that regulates the granting of environmental clearance is the *Environmental (Protection) Act* 1986. Section 3 of

¹¹⁸ CSE 2020 www.cseindia.org/understanding-eia-38.

the *Environmental (Protection) Act* 1986 mandates the Central Government to undertake all such measures as it deems necessary or expedient for protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution.¹¹⁹

It was only in 1994 that India promulgated the *EIA Notification* 1994 to give effect to section 3 of the *Environmental (Protection) Act* 1986, which required a developer to obtain environmental clearance for the expansion, modification or developing new projects that are listed in Schedule 1 of the *EIA Notification* 1994.¹²⁰ The *EIA Notification* 1994 has been published to impose "restrictions and prohibitions on setting up new projects or expansion of existing projects," and these measures "are based on the precautionary principle and the aim to protect the environment".¹²¹ The *EIA Notification* 2006 amended the *EIA Notification* 1994. It includes a Schedule I which provides for projects categorised into two categories, namely Category A and B.¹²² Category A contains a list of projects that must be authorised by the central government, while Category B is a list of projects that must be authorised at the state level.¹²³

The application procedure for the environmental clearance is set out in clauses 6 and 7 of the *EIA Notification*, 2006.¹²⁴ The developers must carry out an EIA to obtain environmental clearance before the commencement of these listed projects.

5.5.2 *Environmental clearance*

In order to obtain environmental clearance, the developer of a project listed in Schedule 1 must submit the application to the Secretary of the Ministry of Environment and Forest.¹²⁵ The application must be accompanied by the project report, which must include an EIA report, an EMP and the details of the public

¹¹⁹ Section 3 of the *Environmental (Protection) Act* 1968; *Alembic Pharmaceuticals* para 20.

¹²⁰ CSE 2020 <https://www.cseindia.org/understanding-eia-383>; *Alembic Pharmaceuticals* para 6.

¹²¹ *Alembic Pharmaceuticals* para 21; CSE 2020 <https://www.cseindia.org/understanding-eia-383>.

¹²² *Alembic Pharmaceuticals* para 6. The activities must be authorised before any construction work, preparation of land.

¹²³ Article 2 of the *EIA Notification* 2006.

¹²⁴ *EIA Notification* 2006.

¹²⁵ Article 2 of the *EIA Notification* 2006.

participation process.¹²⁶ The competent authority will consider the application and make a determination on the application in terms of Article 2 of the *EIA Notification* 2006. Article 2 of the *EIA Notification* 2006 prohibits that construction work or preliminary work be carried before the environmental clearance is granted. The *EIA Notification* 2006 is silent on the rectification or regularisation of possible unlawful projects. However, the Indian courts have made some pronouncements on the matter, and that are discussed below.

5.5.3 *Ex post facto* environmental clearance

Contrary to the Irish and English planning law, the Indian planning law does not expressly provide for an *ex post facto* environmental clearance. However, the competent authorities have often granted these *ex post facto* environmental clearances. The Supreme Court of India grappled with the question of the legality of such environmental clearances in the matter of *Alembic Pharmaceuticals*.¹²⁷

The facts of the case were briefly that the Indian government issued a circular in 2002 that sought to allow developers who commenced listed activities without the requisite environmental clearance certificate an opportunity to apply for an *ex post facto* environmental clearance.¹²⁸ Further, the circular permitted the application for an *ex post facto* environmental clearance subject to a condition that the applicants made payments to "an earmarked fund based on the investment cost of the project".¹²⁹ Some industries that commenced with unlawful projects applied for these *ex post facto* environmental clearances and they were granted.¹³⁰ These *ex post facto* environmental clearances were challenged before the National Green Tribunal (Tribunal).¹³¹ In 2006, the Tribunal held that the circular of the Union

¹²⁶ Article 2 of the *EIA Notification* 2006.

¹²⁷ *Alembic Pharmaceuticals* para 6.

¹²⁸ *Alembic Pharmaceuticals* para 3.

¹²⁹ *Alembic Pharmaceuticals* para 3.

¹³⁰ *Alembic Pharmaceuticals* para 3.

¹³¹ The *National Green Tribunal* is a body established in terms of the *National Green Tribunal Act* 2010. It is established to facilitate "effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto." See in this regard NGT 2019 "National Green Tribunal" <https://greentribunal.gov.in/about-us>.

Ministry of Environment and Forest (MoEF) in 2002 was contrary to law.¹³² The Tribunal further ruled that *ex post facto* environmental clearances granted to some industrial units be revoked and that those industries must close down.¹³³ Furthermore, the Tribunal directed the industrial units to pay compensation for causing environmental degradation, which could be used to rehabilitate their development areas. Some industrial units launched review proceedings against the Tribunal's decision and the said review was dismissed, hence the appeal.¹³⁴

The issue before the Supreme Court was "whether a provision for an *ex post facto* environmental clearance to industrial units could be validly made through the circular in question".¹³⁵ The court opined that for an action to qualify as a measure in terms of section 3 of the *Environmental (Protection) Act* 1968, it must be necessary or expedient to "protect and improve the quality of the environment".¹³⁶ By allowing "an extension of time for industrial units to comply with the requirement of environmental clearance, the circular contravened section 3 of the *Environmental (Protection) Act* 1968".¹³⁷ The court further noted *obiter* that the *EIA Notification* 2006 was published to impose "restrictions and prohibitions on the setting up of new projects or expansion and that these measures are based on the precautionary principle and the aim to protect the environment".¹³⁸ The notion of an *ex post facto* environmental clearance was held to be "fundamentally at odds with the *EIA Notification* 2006," diluting and rendering the requirement of environmental clearance before the construction phase ineffective.¹³⁹ Furthermore, the notion of

¹³² *Alembic Pharmaceuticals* para 1.

¹³³ *Alembic Pharmaceuticals* para 1. The industrial units had missed the deadline for obtaining environmental clearances in terms of the *EIA Notification* of 1994 (as was then applicable). Thus, the industrial units were operating without the requisite environmental certificates. The circular in question sought to extend the deadline for applying for an *ex post facto* environmental certificates.

¹³⁴ *Alembic Pharmaceuticals* para 12.

¹³⁵ *Alembic Pharmaceuticals* para 12.

¹³⁶ *Alembic Pharmaceuticals* para 21.

¹³⁷ *Alembic Pharmaceuticals* para 21.

¹³⁸ *Alembic Pharmaceuticals* para 21.

¹³⁹ *Alembic Pharmaceuticals* para 23. The reason why a retrospective environmental clearance or an *ex post facto* environmental clearance is "alien to environmental jurisprudence is that before the issuance of an environmental clearance, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment". The court further opined that if the environmental clearance "was to be ultimately refused, irreparable harm would have been caused to the environment".

an ex post facto environmental clearance was unorthodox and worked against the fundamental principles of environmental law. It was regarded as an anathema to the *EIA Notification 2006*.¹⁴⁰ Therefore, the Supreme Court held that environment law could not allow the notion of an *ex post facto* clearance as this would be contrary to both the precautionary principle as well as the need for sustainable development.¹⁴¹

While the court somehow vehemently opposed the notion of an *ex post facto* environmental clearance in this *obiter dictum*, it upheld the granting of an *ex post facto* environmental clearances and allowed the holders thereof to continue with their operations. In reaching its decision, the court referred to the constitutional principle of proportionality enunciated in *Lafarge Umiam Mining Private Limited v Union of India*¹⁴² where the court called for the application of "the constitutional doctrine of proportionality to matters concerning the environment".¹⁴³ The court further stated that the use of "the environment and its natural resources have to be in a manner that is consistent with the principles of sustainable development and inter-generational equity".¹⁴⁴ However, the balancing of these equities may entail policy choices.

The court held that the decision of the Tribunal was inconsistent with the principle of proportionality.¹⁴⁵ The revocation of the environmental clearances and the closure of the industries were not warranted. However, the court ordered the industries to pay compensation for the rehabilitation of the environment in observance of the precautionary principle.¹⁴⁶

¹⁴⁰ *Alembic Pharmaceuticals* para 23.

¹⁴¹ *Alembic Pharmaceuticals* para 23.

¹⁴² *Lafarge Umiam Mining Private Limited v Union of India* (2011) 7 SCC 338.

¹⁴³ *Lafarge Umiam Mining Private Limited v Union of India* (2011) 7 SCC 338.

¹⁴⁴ *Alembic Pharmaceuticals* para 119.

¹⁴⁵ Based on the foregoing principles of proportionality and sustainability, the court cautioned itself that "it must take a balanced approach that holds the industries to account for having operated without environmental clearances in the past without ordering closure of operations". *Alembic Pharmaceuticals* para 39.

¹⁴⁶ *Alembic Pharmaceuticals* para 119.

In *Common Cause v Union of India*,¹⁴⁷ the court noted that an environmental clearance could "only be granted after due diligence and reasonable care since damage to the environment can have a long-term impact".¹⁴⁸ Similarly, in the matter of *Mehta v Union of India*,¹⁴⁹ the court held the granting of "an *ex post facto* environmental clearance would be detrimental to the environment and could lead to irreversible degradation of the environment".¹⁵⁰ The notion of an *ex post facto* authorisation was held to be utterly foreign to environmental jurisprudence.¹⁵¹

The foregoing judgements highlight the firm stand taken by the Indian judiciary against *ex post facto* environmental clearances. It is evident that the Indian legislation does not provide for the concept of an *ex post facto* environmental clearance as opposed to South Africa, Ireland and England. However, the challenge that remains is that there is no clarity on how the unlawful activities may be brought into the regulatory loop safe for an *ex post facto* environmental clearance. Therefore, the courts are in a quandary when adjudicating on matters of the *ex post facto* environmental clearance because, on the one hand, it viewed such authorisations as contrary to the Indian environmental law while on the other hand, they cannot just make an order for decommissioning due to the principle of proportionality and sustainability. This position also manifested in the matter of *Electrotherm Ltd v Patel*¹⁵² wherein the court could not order "the closure of the plant since a significant expansion had already taken place and the industry was functioning".¹⁵³

These judgements highlight that an application for an *ex post facto* environmental clearance is not compulsory and a competent authority may not necessarily compel the offenders to apply for it, which may leave the unlawful activities in perpetual unlawfulness. The Indian judiciary echoed the same criticism that has been levelled against an *ex post facto* environmental authorisation in South Africa, by holding that

¹⁴⁷ *Common Cause v Union of India* (2017) 9 SCC 499.

¹⁴⁸ *Common Cause v Union of India* (2017) 9 SCC 499.

¹⁴⁹ *Common Cause v Union of India* (2017) 9 SCC 499.

¹⁵⁰ *Mehta v Union of India* (2004) 12 SCC 118.

¹⁵¹ *Mehta v Union of India* (2004) 12 SCC 118 para 125.

¹⁵² *Electrotherm Ltd v Patel* (2016) 9 SCC 300.

¹⁵³ *Electrotherm Ltd v Patel* (2016) 9 SCC 300.

an *ex post facto* environmental clearance is at odds and an anathema to the EIA process and somewhat a mockery of the principle of sustainable development. The *ex post facto* environmental clearance is regarded to flaunt the precautionary principle. However, as argued above in relation to environmental management principles, the proper implementation of such retrospective authorisations may, in fact, give expression to the precautionary principle.¹⁵⁴

South Africa can take some lessons from the Indian jurisprudence. Firstly, similar to the EU, Irish and English planning law, the Indian law observes the principle of proportionality in matters of contravention of law requiring environmental authorisation and when imposing fines or sentences. While acknowledging the contravention of the law, the courts seemed to recognise the need to take corrective measures that are proportionate to restore the environment. The fines that were demanded were meant for the rehabilitation of the environment. This is contrary to South Africa, where the applicant for an *ex post facto* environmental authorisation must pay an administrative fine, may be ordered to rehabilitate, or face the possibility of prosecution and imprisonment. It is also not clear whether the fines are applied within the relevant national or provincial department or contribute to a rehabilitation fund. Secondly, although the courts held the view that an *ex post facto* environmental clearance was not permitted, the courts used their discretion to allow some of the projects to proceed subject to certain conditions.

Thirdly, the courts held the view that the applicants for *ex post facto* environmental clearance must pay for rehabilitation in pursuance of the precautionary principle. This view is in line with Du Plessis¹⁵⁵ argument that the precautionary and preventive principle can be applicable *ex post facto*. In the following paragraph the position in Eswatini will be discussed.

¹⁵⁴ See paras 2.9 and 3.9 above.

¹⁵⁵ Du Plessis 2004 *SAJELP* 135-165.

5.6 Eswatini

In Eswatini,¹⁵⁶ the issuing of environmental authorisations is the mandate of the Eswatini Environment Authority (Authority), the Ministry of Tourism and Environmental Affairs and municipalities.¹⁵⁷ The applicable legislation is the *Environment Management Act 5 of 2002* (EMA).¹⁵⁸ The EMA aims to provide for and promote the enhancement and protection of the environment and, where appropriate, the sustainable management of natural resources.¹⁵⁹ The EMA is supplemented by the EAAAR published pursuant to section 18 of the *Swaziland Environment Act 1992*.¹⁶⁰ The EAARR require that new listed projects that are likely to have an impact on the environment must be issued an ECC.¹⁶¹ It is an offence punishable by a fine or imprisonment or both upon conviction for one to carry out listed projects without written approval from the competent authority.¹⁶²

The developer of a proposed project that is likely to have a significant impact on the environment must submit a project brief with sufficient details that will help the competent authority categorise the proposed project and decide whether to issue a compliance certificate.¹⁶³ The projects that require permission from the competent authority are divided into three categories.¹⁶⁴ Category 1 projects are the projects that are not likely to have a significant impact on the environment.¹⁶⁵ Category 2 projects are activities that are likely to have a significant adverse impact, which is relatively known and easy to predict.¹⁶⁶ The projects that are likely to have a

¹⁵⁶ Formerly Swaziland.

¹⁵⁷ *Environment Management Act 5 of 2002*; Walmsley and Patel *Handbook on environmental assessment legislation* 374.

¹⁵⁸ ELAW 2019 <https://www.elaw.org/eialaw/swaziland>.

¹⁵⁹ Section 4 of *Environment Management Act 5 of 2002*; Walmsley and Patel *Handbook on environmental assessment legislation* 378.

¹⁶⁰ *Swaziland Environment Act 1992* was repealed by section 86 of EMA. However, the EAARR 2000 that were promulgated under *Swaziland Environment Act 1992* remain in force and are in force concurrently with the new *Environment Management Act 5 of 2002*.

¹⁶¹ Walmsley and Patel *Handbook on environmental assessment legislation* 380. See also Bray "Development and the Balancing of Interest in Environmental Law: Swaziland" 472.

¹⁶² Section 32 of *Environment Management Act 5 of 2002*. See also regulation 15 of the EAARR.

¹⁶³ Regulation 5(1) of the EAARR.

¹⁶⁴ Regulation 6 of the EAARR. However, due to scope of this thesis, the detailed procedures for EIA will not be discussed in detail.

¹⁶⁵ Regulation 6(1)(a) of the EAARR.

¹⁶⁶ Regulation 6(1)(b) of the EAARR.

significant adverse impact on the environment for which in-depth studies are required are classified under Category 3.¹⁶⁷

5.6.1 Overview of ECC procedure

The competent authority must issue an ECC for the projects that fall under Category 1.¹⁶⁸ If the project falls within Category 2 and the impacts thereof are not readily known, the developer must prepare and submit an initial environmental evaluation (IEE) that must be accompanied by a CMP.¹⁶⁹ If the project falls under Category 3, the developer must carry out a full EIA. In this case, the developer must prepare a scoping report in terms of regulation 9(2) of EAARR. The developer must carry out an EIA and prepare an EIA report.¹⁷⁰ A CMP must also accompany the EIA report.¹⁷¹ Following the consideration of the reports submitted, the competent authority may decide whether or not to issue an ECC.¹⁷² Eswatini allows the authorisation of existing projects, and it is discussed hereunder.

5.6.2 Retrospective environmental clearance certificates

The EMA makes a distinction between proposed projects and existing projects that are likely to have an impact on the environment. The Authority is mandated to identify a list of projects of which the impact on the environment raises a concern.¹⁷³ Subsequent to this identification of the projects, the Authority is mandated to ask the developer of the project to prepare and "submit an environmental audit report and a CMP within six months after notification to do so".¹⁷⁴ The environmental audit

¹⁶⁷ Regulation 6(1)(c) of the EAARR.

¹⁶⁸ Regulations 6(1)(a) and regulation 7(1) of the EAARR; Rantlo *Environmental Impact Assessment Legislation* 58.

¹⁶⁹ Regulation 8(1) of the EAARR; Rantlo *Environmental Impact Assessment Legislation* 58.

¹⁷⁰ Regulation 4 of the EAARR; Rantlo *Environmental Impact Assessment Legislation* 60.

¹⁷¹ Regulation 4 of the EAARR.

¹⁷² Regulation 15 of the EAARR.

¹⁷³ Regulation 4(1)(a) of the EAARR; see also Walmsley and Patel *Handbook on environmental assessment legislation* 394.

¹⁷⁴ Regulation 4(1)(b) of the EAARR. For the contents of the environmental audit report, see the Second Schedule of the EAARR. See also Bray "Development and the Balancing of Interest in Environmental Law: Swaziland" 472.

report, amongst others, must describe the environment, an impact description and an evaluation of the activities that were undertaken.

A prescribed fee must accompany the environmental audit report and the CMP.¹⁷⁵ Upon receipt of the environmental audit report and the CMP, the Authority must determine whether the documents contain sufficient information to enable decision-making.¹⁷⁶ If the environmental audit report and the CMP are accepted, the competent authority issues a notice of acceptance, and the documents are open to public review.¹⁷⁷ Following the public review, the competent authority may issue an environmental compliance certificate.¹⁷⁸ However, the competent authority may refuse to issue an ECC for existing projects if it believes that the continuation of the project is "causing, or is reasonably likely to cause, danger to the environment or public and that mitigation measures proposed are inadequate".¹⁷⁹ While South Africa requires the developer or any person responsible for the activity who wishes to obtain an *ex post facto* environmental authorisation to carry out an assessment post commencement, Eswatini requires an audit report. The benefit of this is that an environmental audit is usually undertaken post commencement of the project unlike an EIA and thus may be a more suitable tool.¹⁸⁰

Against this background, Eswatini offers a lesson for South Africa. Instead of requiring the developers of existing projects to carry out an EIA, Eswatini requires the developer to carry out an environmental audit and prepare a CMP.¹⁸¹

5.7 Lessons distilled

The foregoing discussion has demonstrated that there are lessons that can be distilled for South Africa. In view of the fact that Ireland and England are Members States of the EU and their planning law gives effect to the EU Directive (Directive

¹⁷⁵ The fee, as at the time of submitting this thesis was E1500.00 which is equivalent to approximately R1 600.00.

¹⁷⁶ Regulation 4(1)(3) of the EAARR.

¹⁷⁷ Regulation 4(8) of the EAARR.

¹⁷⁸ Regulation 15(1) of the EAARR.

¹⁷⁹ Regulation 15(3)(a) of the EAARR; Bray "Development and the Balancing of Interest in Environmental Law: Swaziland" 474.

¹⁸⁰ See para 2.11.3 in Chapter 2 above.

¹⁸¹ See para 2.11.3 in Chapter 2 above.

2014/52/EU), the lesson distilled from these jurisdictions will be discussed simultaneously.

5.7.1 Exceptional circumstances

The competent authority is expected to determine whether exceptional circumstances are warranting the granting of a retrospective planning permission or retention permit in the case of Ireland and England, respectively. Although the ECJ did not define what may be categorised as exceptional circumstances, it is submitted that each case must be considered on its own merits. In Ireland and England, retention permits and retrospective planning permission are considered exceptions. Seemingly, the competent authorities exercise discretionary powers to determine whether exceptional circumstances existed. However, nothing prevents South Africa from defining what would qualify as exceptional circumstances.

5.7.2 Unfair or improper gain

The competent authorities under EU law, Irish and English planning law are mandated to determine whether the applicant stands to obtain unfair or improper gain if the retrospective planning permission or retention permit is to be issued. If there is unfair or improper gain the developer ought not to receive an *ex post facto* environmental authorisation. It may discourage prospective developers from deliberately contravening section 24F of the NEMA.

5.7.3 Principle of proportionality

The EU law, Irish, English and Indian law provide that the competent authorities must consider the principle of proportionality. The discussion reaffirmed that the aim of the *ex post facto* environmental authorisation is not to be punitive but to be corrective. Therefore, when the competent authorities consider an *ex post facto* environmental authorisation they should ensure that the measures prescribed to address the offence, (such as the administrative fine, possibility of prosecution, the imposition of fine and imprisonment upon conviction and refusal of *ex post facto* environmental authorisation in South African context) are proportionate to the

offence. The discussion showed that Ireland bases its decision on the scale, nature and circumstances of each case. If need be the developer can be ordered to rehabilitate the whole area or parts thereof. A risk assessment or incident management plan as proposed in Chapter 2 may also assist in this regard.

5.7.4 Fines for rehabilitation

In India, the fines that the developer is expected to pay are aimed at rehabilitation of the environment. This is contrary to South Africa, where the developer may be directed to rehabilitate the environment and still be expected to pay an administrative fine. As it has been argued in Chapter 3, this has been one of the reasons the contravener of section 24F do not come forward to bring their unlawful activities into the regulatory loop. However, they might be more likely to pay the administrative fine if they know it would be put to good use, for example, that it is paid into a fund for rehabilitation. If payment is, for example, calculated as a percentage of the annual income of the developer,¹⁸² this may even exclude the need for a section 24F prosecution.

5.7.5 Alternative tool

In the case of Eswatini, the use of an environmental audit as opposed to "assessment" may be an alternative tool to be used to assess the actual impact. Eswatini also offers a lesson for South Africa with regard to the assessment tool to be used. While section 24G of NEMA requires that the developer must carry out an assessment, Eswatini requires that developers of existing activities carry out an environmental audit and submit a CMP. Therefore, the environmental audit report that is aimed at assessing the mitigation of the actual impact, may be a more suitable tool as opposed to using the EIA tool in retrospective authorisations. In Chapter 2 risk assessments and risk strategies, and incident management plans were also discussed as options. An EMPr may also address some of the issues.

¹⁸² See for example section 59 of the South African *Competition Act* 89 of 1998, clause 73 amending section 99 of the *Mineral and Petroleum Resources Development Bill* [B15D-2013] and section 19(4) of the *Electricity Regulation Act* 4 of 2006.

5.8 Conclusion

In this chapter, Ireland and England as Member States to the EU were discussed in relation to their environmental authorisations and *ex post facto* environmental authorisations. The ECJ has interpreted the EU Directive to provide for an *ex post facto* environmental authorisation (albeit in different terms). The Irish and English planning laws also include a form of an *ex post facto* environmental authorisation. An EIA, as an anticipatory tool, has to be carried out before the planning permit and planning permission can be issued respectively. However, provision for an application for an *ex post facto* environmental authorisation is made in Ireland (retention permits) and in England (retrospective planning permission). The ECJ interpreted the EU law, which is applicable to both Ireland and England, that an *ex post facto* environmental authorisation must be granted when there are exceptional circumstances. Further, the applicant must not have obtained an unfair or improper advantage. The competent authorities are expected to apply the principle of proportionality.

India does not have specific legislation allowing for *ex post facto* environmental authorisation, but the case law demonstrated that it could be granted. The Supreme Court of India indicated that *ex post facto* environmental authorisation is at odds with the *EIA Notification 2006*, sustainable development and the precautionary principle. Nonetheless, the Supreme Court held that based on the proportionality principle, an *ex post facto* environmental authorisation could be granted. In Eswatini, the law allows for an *ex post facto* environmental authorisation (retrospective ECC) for existing projects. However, in applying for the *ex post facto* environmental authorisation, the applicant must carry out an environmental audit and submit a CMP.

The various lessons were distilled, refer to:

- a) exceptional circumstances;
- b) improper or unfair advantage;
- c) principle of proportionality;
- d) fines for rehabilitation; and

e) alternative tools.

Chapter 6: Conclusion and Recommendations

6.1 Introduction

The main research question concerned the practical and theoretical challenges of *ex post facto* environmental authorisation in South Africa and whether it undermines the principle of non-regression. Therefore, the main aim of this study was to determine how the theoretical and practical challenges of the *ex post facto* environmental authorisation in South Africa can be addressed by drawing lessons from foreign jurisdictions to not undermine the non-regression principle. This study was based on the hypothesis that *ex post facto* environmental authorisation poses both practical and theoretical challenges in South Africa.

6.2 Overview

Chapter 2 aimed to establish the theoretical framework for environmental authorisations and *ex post facto* environmental authorisations as a background against which South African legislation could be assessed. The chapter defined an environmental authorisation as the authorisation by the competent authority for an activity that is likely to have a significant impact on the environment to be carried out, and such authorisation may set out reasons for the decision, conditions subject to which it is issued, mitigation measures and ongoing monitoring measures.

An *ex post facto* environmental authorisation is defined as the environmental authorisation that is issued after the fact for an activity that is likely to, or is having a significant impact on the environment and that includes the reasons for the decision, sets out conditions for the continuation of the project, mitigation measures and provides for ongoing monitoring measures. The chapter further discussed the incidents of non-compliance in South Africa and the drivers that led to applications for *ex post facto* environmental authorisations. The drivers include that developers unlawfully commence with the listed activities because of the ignorance of the law and now seeks authorisation. This could be from their own volition or as a result of a compliance notice. Organs of state find themselves under pressure to carry out

their constitutional mandate of service delivery and sometimes ignore the environmental requirements. These organs of state also have to apply for *ex post facto* environmental authorisations even where they were not the contraveners of section 24F of NEMA, for instance, where land invasion has occurred, and the organs of state must perform service delivery.

The chapter highlighted various challenges and criticism levelled against the notion of *ex post facto* environmental authorisation. It undermines the environmental management principles; it abuses the environmental authorisation process, public participation is lacking, and provides a shorter, less rigorous and stringent procedure. The competent authorities and the public are further presented with a *fait accompli*.

Environmental authorisations are linked to the assessment of the impacts of the activity, and the EIA is a prominent tool that is commonly used to establish these impacts. An EIA is defined as a systematic process of predicting, assessing and evaluating the significant impacts of a proposed activity on the environment before the commencement of the activity, the identification of the alternatives and formulation of mitigation measures, and reporting to the competent authority on the foregoing to aid in decision-making. An analysis of the literature and history of EIAs indicated that an EIA is a proactive and anticipatory tool used to gather the information on uncertain and unknown future impacts to inform the decision of whether to issue the environmental authorisation. It was found in both the theoretical and practical chapters that alternative environmental management tools or a mix of such tools could be used to assess the impacts of the unlawful project or activity and that could be used by decision-makers to issue an *ex post facto* environmental authorisation. These tools include amongst others, environmental risk assessments combined with incident management plans, environmental audits and environmental management frameworks. If such tools are to be applied in South African law, they will have to be developed with input from the various stakeholders and I&APs.

The environmental authorisation and EIAs are underpinned by the environmental management principles, namely sustainable development and the preventive and precautionary principles. Contrary to criticism that has been levelled against *ex post facto* environmental authorisation that it undermines these principles, neither the theoretical nor the practical analysis seem to support this critique.

The emerging principle of non-regression (although not part of South African law) is used as a benchmark to determine whether the South African *ex post facto* authorisation backtracks or lowers the standard of environmental protection. The backtracking may be done by repealing laws that require environmental protection, adopting measures that are detrimental to the present and future generations' health and life. Further, this may be by implementing the law to compromise environmental protection rather than requiring the progressive upholding of the standard of environmental protection.

Chapter 3 provided an analysis of the historical legal development of environmental authorisation legislation and *ex post facto* environmental authorisation in South Africa. Figure 6-1 summarises the evolution of EIA Regulations in South Africa:

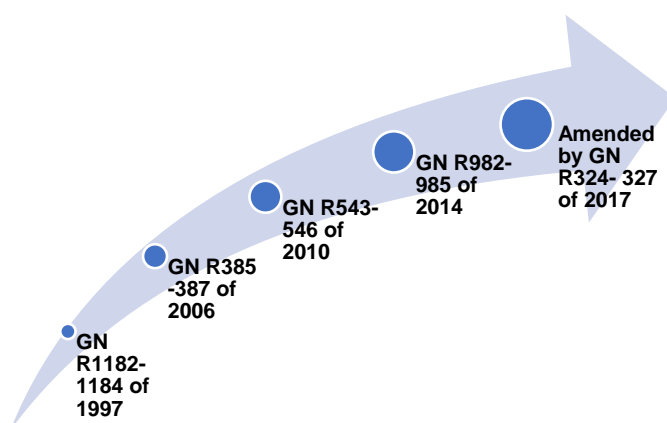


Figure 6-1: The EIA regulations

Chapter 3 highlighted the challenges that emanated from the environmental authorisation legislation, which ultimately led to the introduction of *ex post facto* environmental authorisation in section 24G of NEMA.¹ The researcher argued that

¹ See para 3.3.3 in Chapter 3 above.

although this might have been a solution to some challenges, the inclusion of section 24G into NEMA led to more confusion and challenges.²

Chapter 4 provided a practical analysis of the challenges pertaining to *ex post facto* authorisations experiences in the national DEFF and selected provincial departments (Western Cape, Gauteng and North West). The challenges were identified during an empirical study via semi-structured interviews with the officials from the said competent authorities, as well as with EAPs, environmental consultants and some developers from the same.

In Chapter 5, the researcher derived learning points from legislation and practice pertaining to *ex post facto* authorisation in Ireland and England, as members of the EU, India and Eswatini. The EU law was discussed because it is applicable in both Ireland and England, and it was interpreted by the ECJ.³ Eswatini's EMA allows for *ex post facto* environmental authorisations,⁴ while the Indian courts have permitted such authorisation under certain circumstances. The lessons that South Africa can take from the foreign jurisdictions include provisions for exceptional circumstances, to exclude people who would unfairly gain from the authorisation, the application of the principle of proportionality and to issue fines to be paid in a rehabilitation fund, as well as the use of environmental audits.

6.3 Findings

6.3.1 Original intent of section 24G of NEMA

The literature in Chapter 2 indicated that section 24G in South Africa was introduced without explanation of what it sought to achieve. This study demonstrated that section 24G of NEMA was introduced to enable the developers of unlawful activities from the era of ECA crossing over to NEMA an opportunity to bring their unlawful activities into the regulatory loop. This initiative was intended to be an amnesty period for only six months but continued until today. In view of the theory developed

² See para 3.5.2 in Chapter 3 above.

³ See para 5.2. in Chapter 5 above.

⁴ See para 5.6.2 in Chapter 5 above.

in Chapter 2, the thesis argued that section 24G of NEMA was introduced to restore compliance, thereby allowing the offenders to assess the impacts of their unlawful activities, cease pollution or the causes thereof, formulate mitigation measures and obtain an environmental authorisation. The retention of section 24G of NEMA beyond the amnesty period without any explanation and the implementation of section 24G has led to unintended consequences and challenges. Although there are challenges with section 24G of NEMA's application, it remains necessary to bring back the unlawful activities into the regulatory loop in view of continuing trends of commencement of unlawful activities reflected in the NECERs. Furthermore, it seems that Ireland, England, Eswatini and India all seem to support the idea that unlawful activities should be brought into the regulatory loop.

6.3.2 Applications in terms of section 24G

There is no unanimous agreement on the type of study that needs to be undertaken for an *ex post facto* authorisation. The normal EIA (which can either be basic assessment or a S&EIAR in South Africa) is proactive and anticipatory, while a section 24G application may require an after the fact assessment. Some stakeholders believe that the assessment is neither a basic assessment nor a S&EIR, while some indicated that a basic assessment process is followed in *ex post facto* authorisations.

Although section 24G dictates the contents of the report required in terms of section 24G, there is a lack of uniformity in the contents of the assessment reports in different provinces. However, the competent authorities dictate to the applicants the type of assessment that the applicant must carry out and the contents thereof. The study showed that some provinces require a more detailed report as opposed to the other provinces.

Although public participation may be done subject to the Fine Regulations, the competent authority may direct the applicant to follow the 2014 EIA Regulations. The thesis has argued that public participation in terms of Fine Regulations is less stringent as opposed to the normal EIA. The Fine Regulations do not explicitly

provide for the I&APs to review the application form and assessment reports save for requiring the applicant to inform the I&APs of the application and where to submit their representation. Further, the Fine Regulations do not expressly provide for the applicant to address the comments of the I&APs and indicate how they will be addressed. Wherefore the thesis has argued that *ex post facto* environmental authorisation's public participation is somewhat watered down and that in this regard, the *ex post facto* environmental authorisation in South Africa undermines the non-regression principle.

The *ex post facto* environmental authorisation process has been criticised as being shorter, less rigorous and cheaper than what is expected for ordinary environmental authorisation applications.⁵ The thesis showed divergent views in this regard. Firstly, data highlight that the duration of the *ex post facto* environmental authorisation process differs from one province to the other. The foregoing is influenced by the fact that some provinces such as the Western Cape have prescribed the timeframes for the *ex post facto* environmental authorisation application process as alluded to earlier. In Gauteng, the application takes a year to two years to finalise. Conversely, the data show that in the North West, it can take two to three months if all the information is submitted as requested. Furthermore, the DEFF, Gauteng and North West do not have prescribed timeframes for their *ex post facto* environmental authorisation processes in contrast with the Western Cape.

Secondly, the duration process of the application process may also depend on the appeal against administrative fines that could extend the duration of the application process. Thirdly, staff capacity may be a challenge.

The EAPs concurred with the competent authorities that although the assessment is on the actual impacts, it is nonetheless not less rigorous. However, this does not rule out the possibility that in certain circumstances, it might be less rigorous. Seemingly, the responsibility lies on the competent authority to ensure that this may not happen. The scope of assessment depends on the receiving environment where the activity is carried out. What is similar across the different provinces is that the

⁵ See para 2.4.3 in Chapter 2 above.

competent authorities inform the EAPs. The competent authorities have the mandate to ensure that the assessment and report do not become less rigorous as it sets out what must be in the assessment report. The quality of the assessment and the assessment report depends on the competent authority's willingness to exercise its discretion. The discussion of the foreign jurisdictions also indicates that the officials have discretion as to what to require in the case of their specific *ex post facto* authorisations. However, the principle of proportionality would apply when making these decisions.

The thesis shows that it is a misconception that section 24G of NEMA provides for a cheaper process. The *ex post facto* environmental authorisation is not necessarily cheaper as is alleged in the literature. On the contrary, the *ex post facto* environmental authorisation is likely to be more expensive and riskier than the normal EIA under certain circumstances. This is because the developer must pay the fees of the EAP and an administrative fine which, depending on whether the applicant is a repeat contravener or not may be the maximum fine. In the event that the competent authority issues a directive that the applicant must cease its operations, the applicant is likely to incur standing costs. In addition to these costs, the applicant does not have a guarantee that the environmental authorisation will be issued or that criminal prosecution may follow, or that fines have to be paid and costs may be awarded against him or her.⁶

Therefore, in light of the foregoing, it is submitted that it is a misconception that the procedures applying to an *ex post facto* environmental authorisation is shorter, less rigorous and cheaper. Each case depends on its merits. However, it is established it is risky to apply for *ex post facto* environmental authorisation.

6.3.3 Interpretation issues

Despite several amendments to NEMA and its regulations, interpretation issues in relation to section 24G of NEMA remain. There is still confusion with regard to which activities may be subjected to section 24G applications. Firstly, officials from the

⁶ Section 32(3)(a) and (b) of NEMA.

DEFF indicated that *ex post facto* authorisation applications should only be allowed where listed activities have an operational component. However, it has become apparent that not all competent authorities appreciate this difference. Consequently, some developers who have to apply for an *ex post facto* environmental authorisation on a national level may be prosecuted for contravening section 24F and would not be able to regularise their activities.

6.3.4 Abuse

The thesis has affirmed that anecdotal evidence that section 24G is abused exists and that it has become a norm for some developers to do so. While the legislation was amended on several occasions to curb the abuse of section 24G of NEMA by introducing, amongst others, deterrent measures such as administrative fines and prosecution, they have brought their own challenges. The measures not only deter *male fide* offenders but even the *bona fide* offenders who may wish to regularise their activities. Thus, some activities may remain in perpetual unlawfulness and not being regulated. Such activities may lead to environmental degradation and pollution. As a result, it seems that the deterrent measure in section 24G of NEMA defeats its purpose and may render it susceptible to abuse.

6.3.5 Continuation of the unlawful activity

Section 24G(1) allows the competent authority to give a directive requesting that the unlawful activity be ceased immediately. However, the thesis showed that in some provinces, the applicants make representations to the competent authority as to why they may not be directed to cease immediately with the unlawful activity pending the finalisation of the application. It was argued that this position defeats the whole purpose of section 24G owing to the duration of the application process.

6.3.6 Prosecution

While initially the prosecution was only limited to a decision by the NPA, *Uzani* case allowed a private prosecution for transgressors of section 24F and who submitted a

section 24G application.⁷ It is questionable whether the submission of a section 24G application is tantamount to an admission of guilt. Although the court in the *Uzani* case came to that conclusion, it is unclear whether fault is required for a transgression of section 24F read with section 49A(1)(a). Neither section 24G nor section 24F (or section 49A(1)) expressly refers to fault. The question is whether all instances of contraventions of section 24F should be prosecuted. Further, the proposed amendment to section 24G in NEMLA IV brings more confusion about whether the successor-in-title of the unlawful activity but who wants to apply for authorisation could still be criminally liable and liable to pay an administrative fine. The question is, how will fault be proved in such instances?

Effective prosecution will need trained prosecutors and properly prepared dockets by EMIs to obtain and secure evidence.

6.3.7 Proportionality

The *ex post facto* environmental authorisation is arguably in line with what the ECJ and the Indian case law termed the principle of proportionality. This is because contrary to just ordering decommissioning and rehabilitation where there has been a contravention of section 24F, the *ex post facto* environmental authorisation process creates a platform where all the conflicting interests, that is, the environment, socio-economic and cultural interests are weighed in pursuance of sustainable development. However, the thesis has argued that the administrative fine coupled with the possibility of prosecution, the imposition of fine and or imprisonment upon conviction inadvertently deter offenders from coming forward and applying for *ex post facto* environmental authorisation. As a result, section 24G is self-defeating, and this leads to some unlawful activities remain in perpetual unlawfulness. The correct application of proportionality may change this position.

⁷ See para 3.7.2 in Chapter 3 above.

6.3.8 Principle of non-regression

It was found that theoretically, it seems that an *ex post facto* environmental authorisation should not be regarded as a progressive measure. However, the discussion of the practical implementation of decisions concerning such information is inconclusive. It seems that in some respects, an *ex post facto* authorisation can be seen to backtrack or lower the standards set for applications for environmental authorisations. This manifest in the lack of uniformity on the type of assessment and contents of the EIA report required in section 24G applications by different competent authorities. Further, this manifest in the public participation process followed during the section 24G application process. The researcher argued that the public participation process required by section 24G Fine Regulation is less stringent than the normal EIA process.

6.4 Recommendations

Given the above findings and the challenges identified and lessons distilled, the following recommendations are made:

6.4.1 Retention of section 24G of NEMA

The origins of section 24G of NEMA suggests that it was meant to be a corrective measure that enabled the unlawful activities to be brought back into the regulatory loop. Further, it creates a platform where sustainable development, precautionary and the preventive principle can be applied to prevent further environmental degradation, minimise and mitigate the impact of the activity on the environment. Further, in view of the proportionality principle that is applied in EU and India that requires the measures employed to address the crime to be proportionate and that sustainable development requires the balancing and integration of conflicting interests (environment, socio-economic and cultural factors), it is recommended that the legislature should retain section 24G of NEMA subject to amendments to ensure that the implementation of *ex post facto* authorisations do not undermine the principle of non-regression. The proposed amendments are as follows:

- a) It proposed that the legislature must include the principle of non-regression as one of the principles of NEMA that should be considered when decisions are made regarding the environment.
- b) It is further recommended that the legislature must amend the wording of section 24G to allow the competent authorities and the courts to compel the developers who contravened section 24F to apply for *ex post facto* environmental authorisation.
- c) In view of the confusion of whether the application for *ex post facto* environmental authorisation is tantamount to an admission of guilt and whether the element of fault is required, it is recommended that the legislature must also amend sections 24F to provide for the element of fault expressly.

6.4.2 Abuse

In order to curb abuse of the section 24G authorisation process, it is proposed that the legislature must amend section 24G to indicate that it is *ex post facto* an exception as opposed to an option. In light of the foregoing, it is recommended that the competent authorities must grant *ex post facto* environmental authorisation only in exceptional circumstances, similar to foreign law. Applicants who obtain unfair gain or other advantages if the activity should be authorised, should be excluded. The legislature must circumscribe the exceptional circumstances that could include but not limited to the unlawful activities commenced during emergency situations and for the protection of health, the prevention of environmental degradation and pollution. The onus will be on the applicant to prove that exceptional circumstances warrant granting *ex post facto* environmental authorisation. However, the beneficial impacts of development (for example, job creation, poverty alleviation or economic development) should also be considered, and if there are no or limited environmental impacts that can be mitigated or addressed in, for example, an incident plan or CMP, such activities could be allowed. Alternatively, the competent authority must be given the discretion to determine whether exceptional circumstances existed for the applicant to have commenced with the listed activity without environmental authorisation.

6.4.3 Proportionality

It is recommended that in view of the principle of proportionality, either the administrative fine or the possibility of prosecution be done away with. Alternatively, the competent authorities must be allowed to exercise their discretion in terms of waiving either the administrative fine or possibility of prosecution or to order the applicant to contribute to a rehabilitation fund to a certain percentage of its annual turnover. It is proposed that when the competent authorities consider an *ex post facto* environmental authorisation they must ensure that the measures prescribed to address the offence are proportionate to the offence. Furthermore, the decision should be taken on the scale, nature and circumstances of each case.

6.4.4 Application process

It is recommended that the legislature must amend section 24G to clarify which listed activities it applies to, that is, the activities that have an operational phase and those that do not have an operational phase but are not completed. Further, in view of the argument advanced that the public participation in the application process is watered down, hence flaunting the non-regression principle, it is recommended that the Minister responsible for environmental affairs amend section 24G Fine Regulations to strengthen the public participation process. The section 24G Fine Regulations must not only require the I&APs to be notified of the application for *ex post facto* environmental authorisation, but the Regulations must afford them an opportunity to comment on the application and the relevant reports that the competent authority may require.

It is recommended that the Minister responsible for environmental affairs must formulate guidelines that shall standardise the section 24G application process across all the competent authorities to ensure that the same type of assessment and EIA reports are required. Alternatively, the Section 24G Process Flow and FAQ document that the DEFF is currently developing should be converted to guidelines that all competent authorities shall follow.

6.4.5 *Alternative tools*

Given that the normal EIA is proactive and anticipatory, it has been questioned whether an EIA is an appropriate tool for *ex post facto* environmental authorisation. It is recommended that alternative tools should be applied. The most suitable tool or a mix of tools should be used to assess the impact of the unlawful activity. These tools could include, but is not limited to, an environmental risk assessment and its risk assessment strategy, an incident management plan, a CMP or as stated in the South African case an EMPr, as well as an environmental audit. The environmental risk assessment is suitable in instances where activity has occurred, but the impact has not materialised or not known. The then DEAT had already recommended that this tool be integrated into EIA procedures. However, where the impact has occurred (environmental degradation), it is an incident. When the incident has occurred, the immediate action to prevent further impacts is corrective. The foregoing necessitates the studies on the incident's root cause to determine the steps to prevent further environmental degradation. The developer must ultimately formulate an incident management plan. Similarly, section 24G requires that when a developer submits an *ex post facto* environmental authorisation, they may be directed to cease environmental degradation (incident). In view of the foregoing, the techniques used to investigate the root cause of the incident and helps to formulate the incident management plan may be ideal tools. Regarding an environmental audit, it is a tool that identifies, evaluates and helps with formulating mitigation measures for the impacts of an existing activity. Regional EMFs could also be developed for areas where particular activities occur (e.g. specific farming practices) as done in the Western Cape.

These tools will have to be developed in consultation with all stakeholders. Once such tools are developed, it is further recommended that guidelines be compiled to ensure consistency in applying these tools across the national departments and the provinces.

6.5 Future research

The study did not address all the issues that may arise from a section 24G application. Future studies could include the following:

- a) In view of the confusion that relates to the listed activities for which *ex post facto* environmental authorisation may be applied, further research is needed to determine exactly what activities should give rise to such an authorisation.
- b) The question of whether an *ex post facto* environmental authorisation application or the publication of the advertisement is tantamount to an admission of guilt for the purpose of sections 24F and 49A of NEMA needs to be further investigated.
- c) The principle of non-regression and how it may be integrated into South African environmental legislation, particularly in section 2 of NEMA requires a further application.
- d) If section 24G is regarded as a corrective measure as opposed to a punitive measure, the issue of having both an administrative fine and the possibility of prosecution and fine upon conviction needs to be researched further.
- e) Further studies are required to determine whether the section 24G process is voluntary or the developers can be compelled to file the section 24G application either by enforcement notice or by court order.
- f) The establishment of a rehabilitation fund and the administration of such fund by the DEFF in light of the South African government's financial regulation and restrictions that are placed on spheres of government in this regard.

The above survey has shown that although section 24G is still riddled with both practical and theoretical challenges, it is an essential tool to bring unlawful activities into the regulatory loop. Therefore, it must be retained subject to amendment.

ANNEXURES

Annexure 1 - Ethical clearance certificate



Private Bag X1290, Potchefstroom
South Africa 2520

Faculty of Law
Research Ethics Committee (LAWRec)
Tel: 018 2991932/1996
Fax: 018 2991923
Email: wian.erlank@nwu.ac.za

11 August 2020

To whom it may concern

LETTER OF DECISION

Applicant: Mr John Rantlo (26780623)
Promotor: Prof Willemien du Plessis
Research Title: *Ex post facto environmental authorisation in South Africa*
Risk-level: Low/negligible
Ethics number: 0150219A3

This is to confirm that the abovementioned researcher submitted the abovementioned research topic to the North-West University Faculty of Law Research Ethics Committee (LAWRec) for ethical clearance.

After a full review by the abovementioned ethics committee, it was determined that the research has the risk level mentioned above.

The LAWRec has granted approval for the studies to commence from 17/06/2019.

Permission has been granted for the researcher to continue with his research for another year from 11 August 2020.

If you have any queries, please feel free to contact the ethics committee for more information.

Your sincerely

Prof Wian Erlank

Chair: Faculty of Law Ethics Committee (LAWRec)
Professor of Law at North-West University (Potchefstroom Campus).
BA(Hons) LLB LLM LLD (Stell), Advocate of the High Court of South Africa.

Annexure 2 - Informed consent and questionnaire

INFORMED CONSENT

Title of Research

Ex post facto environmental authorisation in South Africa

Researcher

Tiisetso John Rantlo

Please note that you need to read the following explanation of the research study before you agree to participate in it. This explanation serves to describe the purpose, risks, discomforts, and precautions of the study. It will also explain your right to withdraw from this study. Lastly note that no assurances or guarantees can be made as to the results of the study.

Description of the study

The researcher is undertaking a study towards the completion of a Doctorate degree in Law, and the research for this degree relates to the practical and theoretical challenges relating to the *ex post facto* environmental authorisation in South Africa. The researcher intends to gather information through interviews, which will focus on the practical and theoretical challenges that emanate from *ex post facto* environmental authorisation and how these challenges could possibly be addressed drawing lessons from other jurisdictions. The main objective of the study is to determine how the practical and theoretical challenges emanating from section 24G of NEMA can be addressed.

The interviews are designed to gather information from participants involved in the section 24G application process, through voluntary participation in open-ended structured interviews. The participants will include officials will include all the officials that are involved in the determination of section 24G applications. Should it transpire that any other role-player could also contribute to this study with valuable input, they will be included.

Risks and discomforts

Your participation in this study may involve the risk of exposing the section 24G applicants to possible prosecution. The duration of the interview could last anything from 10 minutes to 1 hour – all depending on the answers from the participant.

Benefits

The possible benefit of the study will be to contribute to the overall objective of the study by highlighting the practical and theoretical challenges of *ex post facto* environmental authorisation and how they can be addressed.

Confidentiality

The information gathered during this research study will at all times remain confidential. The identity of the participants and the relevant other third parties will remain confidential during and after the completion of the interviews and research. Information obtained via the research will be used for research purposes only, and will be stored safely. The research results will be presented in the format of a thesis that will be submitted to the North-West University for the degree LLD.

Withdrawal without prejudice

Participation is voluntarily and refusal to participate in this study will not be prejudicial. Each participant is free to withdraw from the interview and discontinue participation at any given moment during or before the research study.

The research findings will be made available to any participant interested therein.

Results

The research findings will be made available to any participant interested therein.

Financial information

There will be no costs involved for taking part in this research study, and participants will not be remunerated for participating in the interviews.

Questions or concerns

Participants may contact Tiisetso John Rantlo if they have any questions concerning this research study. If any questions or complaints arise from the interview, participants may also contact Professor Willemien du Plessis is the study supervisor; or Professor Wian Erlank at Wian.Erlank@nwu.ac.za or 018 299 1932 who is the Chair of the Ethics Committee of the Faculty of Law.

Consent

I, the undersigned, have read this form and the research study has been explained to me. I have been given the opportunity to ask questions and my questions have been answered. If I have additional questions, I have been told whom to contact. I voluntarily agree to participate in the research study described above and will receive a copy of this consent form.

Full name of Participant: _____

Signature of Participant: _____ Date: _____

Signature of Researcher: _____ Date: _____

Concept questions for semi-structured interviews

1. What is your job title?
2. What are your qualifications?
3. In what department (or section of the department) are you working?
4. At what level of government (National or Provincial) are you working?
5. Briefly describe your functions.

(The following questions will be asked depending on the job title)

6. Did you receive any specific training to do your job?
7. Do you work independently, or do you have clear instructions that you follow?
8. Are you in any way working with section 24G applications?
9. Why was section 24G of NEMA introduced (intention/objective)?
10. Why was its application extended?
11. Why do people apply for a section 24G environmental authorisation, i.e., what are the drivers of section 24G applications?
12. What is the procedure that is followed in applying for section 24G environmental authorisation?
13. What informs the type of assessment that must be followed by the applicant, that is, whether it is basic assessment (BA) or S&EIA process?
14. Are there any regulations or guidelines you follow in making a decision for section 24G applications?

15. If the answer is in the affirmative, who developed these regulations or guidelines?
16. Approximately, how long does it take to finalise each application?
17. How many section 24G applications do you receive annually?
18. Is there an increase or decrease in the number of applications? If the answer is in the affirmative, what do you think is the reason for such a change in number?
19. How many section 24G applications are approved annually?
20. How many section 24G applications are declined annually, if any and why?
21. In your view, is there an abuse of section 24G NEMA application process by developers?
22. Is section 24G of NEMA achieving what it was intended for, in light of section 2 NEMA principles and objectives of IEM?
23. How many administrative fines are contested annually?
24. How many developers get the maximum number of administrative fines?
25. Are there any challenges regarding determination of administrative fines?
26. Approximately, how many section 24G applicants are reported to the Director of National Prosecutions annually and why?
27. How often do you deal with section 24G applications from "habitual offenders"?
28. Are you aware of all the laws pertaining to section 24G environmental authorisations?
29. Could you please explain what laws these are?

30. Has the recent amendments to the environmental framework legislation had any impact on the applications and issuing of section 24G environmental authorisation?
31. Are there any challenges (practical and theoretical) regarding the application of section 24G of NEMA? If so, how did/do you deal with such challenges?
32. Would you recommend any amendments to section 24G applications in particular?
33. What are other environmental management tools that you may recommend in the place of section 24G application?
34. Do you have any other comments or issues that you think need to be addressed in this regard?

BIBLIOGRAPHY

Literature

Abaza, Bisset and Sadler *Environmental Impact Assessment*

Abaza H, Bisset R and Sadler B *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (UNEP Geneva 2004)

Adams and Griffiths "Against 'Comparative Method'"

Adams M and Griffiths J "Against 'Comparative Method': Explaining Similarities and Differences" in Adams M and Bomhoff J (eds) *Practice and Theory in Comparative Law* (Cambridge University Press Cambridge 2012) 279-301

Alberts *An application of theory of change*

Alberts R *An application of theory of change to EIA systems evaluation* (PhD thesis North-West University Potchefstroom 2020)

Amy "Decision Techniques for Environmental Policy"

Amy D "Decision Techniques for Environmental Policy: A critique" in Paehlke R and Torgerson D (eds) *Managing Leviathan: Environmental Politics in the Administrative State* (Belhaven Press London 1990) 59-79

Archick *The European Union*

Archick K *The European Union: Current challenges and future prospects* (Congressional Research Service 2018)

Aucamp *Environmental Impact Assessment*

Aucamp PJ *Environmental Impact Assessment: A Practical Guide for the Discerning Practitioner* (Van Schaik Pretoria 2009)

Barkan, Bintliff and Whisner *Fundamentals of Legal Research*

Barkan SM, Bintliff B and Whisner M *Fundamentals of Legal Research*
(Foundation Press St Paul 2015)

Barker and Wood 1999 *EIAR*

Barker A and Wood C "An Evaluation of EIA System Performance in Eight EU Countries" 1999 *Environmental Impact Assessment Review* 387-404

Barrow *Environmental and Social Impact Assessment*

Barrow CJ *Environmental and Social Impact Assessment: An Introduction*
(Arnold London 2003)

Basson 2003 *SAJELP*

Basson JHE "Retrospective Authorisation of Identified Activities for the Purposes of Environmental Impact Assessment" 2003 *South African Journal of Environmental Law and Policy* 133-150

Benson 2003 *Impact Assessment and Project Appraisal*

Benson JF "What is the Alternative? Impact Assessment Tools and Sustainable Planning" 2003 *Impact Assessment and Project Appraisal* 261-280

Boden 1980 *SAJS*

Boden J "An Introduction to Environmental Impact Assessment" 1980 *SAJS South African Journal of Science* 252-255

Bond *et al* 2010 *Journal of Cleaner Production*

Bond AJ, Claudia VV, Christianne C and Paulo MS "Informal knowledge Process: The Underpinning for Sustainability Outcomes in EIA" 2010 *Journal of Cleaner Production*

Bosselmann *The principle of sustainability*

Bosselmann K *The Principle of Sustainability: Transforming Law and Governance* (Taylor & Francis London 2016)

Bray "Development and the Balancing of Interest"

Bray E "Development and the Balancing of Interest in Environmental Law: Swaziland" in Faure M and Du Plessis W (eds) *The Balancing of Interest in Environmental Law in Africa* (Pulp Pretoria 2011) 459-484

Bray "Administrative Justice"

Bray E "Administrative Justice" in Paterson A and Kotzé LJ (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta Cape Town 2009) 152-196

Bray 2008 *SAJELP*

Bray E "Uncooperative Governance Fuelling Unsustainable Development" 2008 *SAJELP South African Journal of Environmental Law and Policy* 3-22

Bridger and Luloff 1999 *JRS*

Bridger JC and Luloff AE "Toward an Interactional Approach to Sustainable Community Development" 1999 *Journal of Rural Studies* 377-387

Burford *The Impact of Retroactive Authorisation*

Burford SJ *The Impact of Retroactive Authorisation of Listed Activities on Sustainable Development in South Africa* (LLM-dissertation University of Pretoria 2019)

Cameron "The Precautionary Principle"

Cameron J "The Precautionary Principle: Core Meaning, Constitutional Framework and Procedures for Implementation" in Harding R and Fisher EC

(eds) *Perspectives on Precautionary Principle* (Federation Press Sydney 1999)
29-58

Canter *Environmental Impact Assessment*

Canter LW *Environmental Impact Assessment* 2nd ed (McGraw-Hill New York
1996)

Clark "A Comparative Method for the Study of Law and Religion"

Clark B "A Comparative Method for the Study of Law and Religion: Is this a
Defensible Methodology?" in Sandberg R, Doe N, Kane B and Roberts C (eds)
Research Handbook on Interdisciplinary Approaches to Law and Religion
(Edward Elgar Cheltenham 2019)

Corazza 2011 *European Law Journal*

Corazza L "Hard Times for Had Bans: Fixed-Term Work and so-called non-
Regression Clauses in the Era of Flexicurity" 2011 *European Law Journal*
385-402

Couzens 2008 *SAJELP*

Couzens E "Filling Station Jurisprudence: Environmental Law in South Africa
Courts and the Judgement in Fuel Retailers Association of Southern Africa v
Director-General Environmental Management, Department of Agriculture,
Conservation and Environment, Mpumalanga Province and Others" 2008
SAJELP 23-56

Craigie, Snijman and Fourie "Dissecting Environmental Compliance"

Craigie F, Snijman P and Fourie M "Dissecting Environmental Compliance and
Enforcement Institutions" in Paterson A and Kotzé LJ (eds) *Environmental
Compliance and Enforcement in South Africa: Legal Perspective* (Juta Cape
Town 2009) 41-64

Craik *The International Law of Environmental Impact Assessment*

Craik N *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press Cambridge 2008)

Currie and De Waal *The Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* (Juta Cape Town 2013)

Denyer-Green and Ubhi *Development and Planning Law*

Denyer-Green B and Ubhi N *Development and Planning Law* (Routledge New York 2013)

Dinan, Nugent and Paterson *The European Union in Crisis*

Dinan D, Nugent N and Paterson WE *The European Union in Crisis* (MacMillan Palgrave London 2017)

Du Plessis 2004 *SAJELP*

Du Plessis W "Hichange - A New Direction in Environmental Matters?- Hichange Investment (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products & Others" 2004 *South African Journal of Environmental Law and Policy* 135-165

Du Plessis and Britz 2007 *SALJ*

Du Plessis W and Britz L "The Filling Station Saga: Environmental or Economic Concerns?" 2007 *Journal of South African Law* 263-276

Du Plessis 2008 *PELJ* 1-33

Du Plessis A "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights" 2008 *Potchefstroom Electronic Law Journal* 1-34

Du Plessis 2008 *SAJELP*

Du Plessis A "Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight" 2008 *SAJELP South African Journal of Environmental Law and Policy* 56-84

Du Plessis and Feris 2009 *SAJELP*

Du Plessis W and Feris L "A Rebellious Step in the Right Direction? A Note on the Dissenting Judgment of Sachs J in Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province" 2009 *South African Journal of Environmental Law and Policy* 157-182

Du Plessis and Nel "An Introduction"

Du Plessis AA and Nel JG "An Introduction" in Du Plessis A (ed) *Environmental Law and Local Government in South Africa* (Juta Cape Town 2015) 3-39

Durning, Palframan and Perdicoúlis "Introduction"

Durning B, Palframan L and Perdicoúlis A "Introduction" in Perdicoúlis A, Durning B and Palframan L (eds) *Furthering Environmental Impact Assessment: Towards a Seamless Connection between EIA and EMS* (Edward Elgar Cheltenham 2012) 1-18

Du Toit *A Critical Evaluation of the NEMA*

Du Toit J *A Critical Evaluation of the National Environmental Management Act (NEMA) Section 24G: Retrospective Environmental Authorisation* (LLM-thesis Stellenbosch University 2016)

Eberle 2009 *Washington UGSLR*

Eberle EJ "The Method and Role of Comparative Law" 2009 *Washington University Global Studies Law Review* 451-486

Elliott *Sustainable Development*

Elliott J *An Introduction to Sustainable Development* (Routledge London 2013)

Emilsson, Tyskeng and Carlsson 2004 *JEAPM*

Emilsson S, Tyskeng S and Carlsson A "Potential Benefits of Combining Environmental Management Tools in a Local Authority Context" 2004 *Journal of Environmental Assessment Policy and Management* 131-151

Faure and Partain "Principles of Environmental Law and Environmental Economics"

Faure MG and Partain RA "Principles of Environmental Law and Environmental Economics" in Faure MG and Partain RA *Environmental Law and Economics: Theory and Practice* (Cambridge University Press Cambridge 2019) 79-105

Field 2006 *SALJ*

Field T "Sustainable Development Versus Environmentalism: Competing Paradigms for the South African EIA Regime" 2006 *South African Law Journal* 409-436

Fisher *Legal Reasoning in Environmental Law*

Fisher D *Legal Reasoning in Environmental Law: A Study of Structure, Form and Language* (Edward Elgar Cheltenham 2013)

Flick *Qualitative Research*

Flick U *An Introduction to Qualitative Research* 5th ed (Sage London 2014)

Freestone "International Fisheries Law Since Rio"

Freestone "International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle" in Boyle A and Freestone D (eds) *International Law and Sustainable Development* (1999) 139-140

Freestone "The Precautionary Principle"

Freestone D "The Precautionary Principle" in Freestone D (ed) *Sustainable Development and International Environmental Law* (Edward Elgar Cheltenham 2018) 196-215

George "Environmental Impact Prediction and Evaluation"

George C "Environmental Impact Prediction and Evaluation" in Lee N and George C (eds) *Environmental Assessment in Developing and Transitional Countries: Principles, Methods, and Practice* (John Wiley Chichester 2000) 85-110

Gillespie 2008 *Review of European Community & International Environmental Law*

Gillespie A "Environmental Impact Assessments in International Law" 2008 *Review of European Community & International Environmental Law* 221-223

Glasson, Therivel and Chadwick *Environmental Impact Assessment*

Glasson J, Therivel R and Chadwick A *An Introduction to Environmental Impact Assessment* 4th ed (Routledge New York 2013)

Glazewski and Witbooi 2004 *Ann Surv SAL*

Glazewski J and Witbooi E "Environmental Law" 2004 *Annual Survey of South African Law* 397-422

Glazewski "The Bill of Rights and Environmental Law"

Glazewski J "The Bill of Rights and Environmental Law" in Glazewski J and Du Toit L (eds) *Environmental Law in South Africa* (LexisNexis Cape Town 2013) Chapter 5 1-54

Glazewski "The Nature and Scope of Environmental Law"

Glazewski J "The Nature and Scope of Environmental Law" in Glazewski J and Du Toit L (eds) *Environmental Law in South Africa* (LexisNexis Durban 2013) Chapter 1 1-26

Glazewski "The National Environmental Management Act"

Glazewski J "The National Environmental Management Act" in Glazewski J and Du Toit (eds) *Environmental Law in South Africa* (LexisNexis Durban 2013) Chapter 7 1-39

Glazewski and Brownlie "Environmental Assessment"

Glazewski J and Brownlie S "Environmental Assessment" in Glazewski J and Du Toit L (eds) *Environmental Law in South Africa* (LexisNexis Durban 2013) Chapter 8 10-1 – 10-36

Glazewski and Plit 2015 *Stell LR*

Glazewski J and Plit L "Towards the Application of the Precautionary Principle in South African Law" 2015 *Stellenbosch Law Review* 190-219

Glenn "The Aims of Comparative Law"

Glenn HP "The Aims of Comparative Law" in Smits JM (ed) *Elgar Encyclopedia of Comparative Law* (Edward Elgar Cheltenham 2006) 57-65

Gomm *Social Research Methodology*

Gomm R *Social Research Methodology: A Critical Introduction* 2nd ed (Palgrave MacMillan New York 2008)

Gullette 1998 *AJEM*

Gullette W "Environmental Impact Assessment and Precautionary Principle: Legislating Caution in Environmental Protection" 1998 *Australian Journal of Environmental Management* 146-158

Henderson 2001 *SAJELP*

Henderson PGW "Some Thoughts on Distinctive Principles of *South African Environmental Law*" 2001 *South African Journal of Environmental Law and Policy* 139-184

Herrera and Woltjer "Comparing a Multi-linear (STEP) and Systemic (FRAM) Method"

Herrera IA and Woltjer R "Comparing a Multi-linear (STEP) and Systemic (FRAM) Method of Accident Analysis" in Martorell S, Guedes C and Barnett J (eds) *Safety, Reliability and Risk Analysis: Theory, Methods and Applications* (CRC Press Taylor & Francis Group London 2009) 19-26

Hey *International Environmental Law*

Hey E *Advanced Introduction to International Environmental Law* (Edward Elgar Cheltenham 2016)

Heydenrych and Claassen *National Strategy*

Heydenrych R and Claassen P *A National Strategy for Integrated Environmental Management in South Africa* (The Directorate: Environmental Impact Management, Dept of Environmental Affairs and Tourism Pretoria 1998)

Hugo *Administrative penalties*

Hugo RE *Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes* (LLM-dissertation University of Cape Town 2014)

Ingole 2012 *IJSID*

Ingole SP "Environmental Auditing: Its Benefits and Counterance" 2012 *International Journal of Science Innovations and Discoveries* 152-156

Irwansyah, Hakim and Yunus 2017 *The Business Management Review*

Irwansyah I, Hakim W and Yunus A "Environmental Audit as Instrument for Environmental Protection and Management" 2017 *The Business Management Review* 228-232

Jalava *et al* 2013 *Impact Assessment and Project Appraisal*

Jalava K, Pölonen I, Hokkanen P and Kuitunen M "The Precautionary Principle and Management of Uncertainties in EIAs – Analysis of Waste Incineration Cases in Finland" 2013 *Impact Assessment and Project Appraisal* 280-290

Jay *et al* 2007 *Environmental Impact Assessment Review*

Jay S *et al* "Environmental Impact Assessment: Retrospect and Prospect" 2007 *Environmental Impact Assessment Review* 287-300

Kaikkonen *et al* 2018 *Marine Pollution Bulletin*

Kaikkonen L, Venesjärvi R, Nygård H and Kuikka S "Assessing the Impacts of Seabed Mineral Extraction in the Deep Sea and Coastal Marine Environments: Current Methods and Recommendations for Environmental Risk Assessment" 2018 *Marine Pollution Bulletin* 1183-1197

Katsakiori, Sakellariopoulos and Manatakis 2009 *Safety Science*

Katsakiori P, Sakellariopoulos G and Manatakis E "Towards an Evaluation of Accident Investigation Methods in terms of their Alignment with Accident Causation Models" 2009 *Safety Science* 1007-1015

Kidd *The Protection of the Environment*

Kidd MA *The Protection of the Environment Through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa* (PhD thesis University of Natal Pietermaritzburg 2002)

Kidd 2002 *SAJEL*

Kidd M "Alternatives to the Criminal Sanctions in the Enforcement of Environmental Law" 2002 *South African Journal of Environmental Law and Policy* 21-50

Kidd 2008 *SAJELP*

Kidd M "Removing the Green-tinted Spectacles: The Three Pillars of Sustainable Development in South African Environmental law" 2008 *South African Journal of Environmental Law and Policy* 85-102

Kidd *Environmental Law*

Kidd M *Environmental Law* (Juta Cape Town 2011)

Kidd, Retief and Alberts "Integrated Environmental Assessment and Management"

Kidd M, Retief F and Alberts R "Integrated Environmental Assessment and Management" in King ND, Strydom HA and Retief F (eds) *Fuggle & Rabie's Environmental Management in South Africa* 3rd ed (Juta Cape Town 2018) 1213-1277

Kohn 2012 *SAJELP*

Kohn L "The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development" 2012 *South African Journal of Environmental Law and Policy* 1-26

Kotzé 2003 *PELJ*

Kotzé LJ "The Constitutional Courts' Contribution to Sustainable Development in South Africa" 2003 *PELJ* 81-95

Kotzé and Du Plessis 2010 *Journal of Court Innovation*

Kotzé LJ and Du Plessis AA "Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa" 2010 *Journal of Court Innovation* 157-176

Kotzé and French 2018 *Int Environ Agreem-P*

Kotzé LJ and French D "A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for *Lex Anthropocenae*?" 2018

International Environmental Agreements: Politics, Law and Economics 811-838

Krämer and Orlando (eds) *Principles of Environmental Law*

Krämer L and Orlando E (eds) *The Principles of Environmental Law* (Edward Elgar Cheltenham 2018)

Kroeze 2013 *PELJ*

Kroeze IJ "Legal Research Methodology and the Dream of Interdisciplinary" 2013 *Potchefstroom Electronic Law Journal* 36-65

Kruger *et al* 1997 *SAJS*

Kruger FI, Van Wilgen BW, Weaver AVB and Greyling T "Sustainable Development and the Environment: Lessons from the St Lucia Environmental Impact Assessment" 1997 *South African Journal of Science* 23-33

Lawrence *Environmental Impact Assessment*

Lawrence DP *Environmental Impact Assessment: Practical Solutions to Recurrent Problems* (John Wiley New Jersey 2013)

Lee 1995 *Project Appraisal*

Lee N "Environmental Assessment in the European Union: A tenth anniversary" 1995 *Project Appraisal* 77-90

Lee "Integrating Appraisals and Decision-making"

Lee N "Integrating Appraisals and Decision-making" in Lee N and George C (eds) *Environmental Assessment in Developing and Transitional Countries: Principles, Methods, and Practice* (John Wiley Chichester 2000) 161-175

Lee and George "Introduction"

Lee N and George C "Introduction" in Lee N and George C (eds)
*Environmental Assessment in Developing and Transitional Countries:
Principles, Methods, and Practice* (John Wiley Chichester 2000) 1-12

Ljubisavljević, Ljubisavljević and Jovanović 2017 *Economic Themes*

Ljubisavljević S, Ljubisavljević L and Jovanović D "Environmental Audit for
Environmental Improvement and Protection" 2017 *Economic Themes* 521-538

Ludlow "The European Commission"

Ludlow P "The European Commission" in Keohane RO and Hoffmann S *The
New European Community* (Routledge 2018) 85-132

Maltby 1995 *Managerial Auditing Journal*

Maltby J "Environmental Audit: Theory and Practices" 1995 *Managerial
Auditing Journal* 15-26

Mawhinney *Sustainable Development*

Mawhinney M *Sustainable Development: Understanding the Green Debates*
(John Wiley New York 2008)

McConville and Chui *Research Methods*

McConville M and Chui WH *Research Methods for Law* (Edinburgh University
Press 2017)

McCourt 1995 *Civil Engineering*

McCourt B "Environmental Management Systems and Auditing" 1995 *Civil
Engineering* 21-24

McCutcheon 1998 *Cornell ILJ*

McCutcheon ED "Think Globally, (En)Act locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations" 1998 *Cornell International Law Journal* 395-454

McIntyre and Mosedale 1997 *JEL*

McIntyre O and Mosedale T "The Precautionary Principle as a Norm of Customary International Law" 1997 *Journal of Environmental Law* 221-241

Meintjes-Van der Walt 2006 *Speculum Juris*

Meintjes-Van der Walt L "Comparative Method: Comparing Legal Systems and/or Legal Cultures?" 2006 *Speculum Juris* 51-64

Mitchell and Munro 2019 *Georgetown JIL*

Mitchell AD and Munro J "No Retreat: An Emerging Principle of Non-regression from Environmental Protection in International Investment Law" 2019 *Georgetown Journal of International Law* 1-90

Mokhehle and Diab 2001 *Impact Assessment and Project Appraisal*

Mokhehle L and Diab R "Evolution of Environmental Impact Assessment in a Small Developing Country: A Review of Lesotho Case Studies from 1980 to 1999" 2001 *Impact Assessment and Project Appraisal* 9-18

Morgan 2012 *Impact Assessment and Project Appraisal*

Morgan RK "Environmental Impact Assessment: The State of Art" 2012 *Impact Assessment and Project Appraisal* 5-14

Morgera 2015 *RECIEL*

Morgera E "Global Environmental Law and Comparative Legal Methods" 2015 *Review of European, Comparative and International Environmental Law* 254-263

Morrison-Saunders and Arts "Introduction to EIA Follow-up"

Morrison-Saunders A and Arts J "Introduction to EIA Follow-up" in Morrison-Saunders A and Arts J (eds) *Assessing Impact: Handbook of EIA and SEA follow-up* (Earthscan London 2006) 1-21

Morrison-Saunders 2014 *Impact Assessment and Project Appraisal*

Morrison-Saunders A "Strengthening Impact Assessment: A Call for Integration and Focus" 2014 *Impact Assessment and Project Appraisal* 2-8

Morrison-Saunders *Environmental Impact Assessment*

Morrison-Saunders A *An Advanced Introduction to Environmental Impact Assessment* (Edward Elgar Cheltenham 2018)

Mostert 2001 *Stell LR*

Mostert H "Big Oaks from Little Acorns Grow (or: The Significance of Foreign Law for the Development of South African Constitutional Property Law)" 2001 *Stellenbosch Law Review* 498-518

Moules *Environmental Judicial Review*

Moules RJ *Environmental Judicial Review* (Hart Oxford 2011)

Munyazikwiye *An Assessment of EIA*

Munyazikwiye F *An Assessment of Environmental Impact Assessment (EIA) Procedures and Challenges faced by Environmental Officers in EIA implementation in Rwanda* (LLM-dissertation University of KwaZulu-Natal 2011)

Murchison 1995 *BCEALR*

Murchison KM "Environmental Law in Australia and the United States: A Comparative Overview" 1995 *Boston College Environmental Affairs Law Review* 503-561

Murombo 2008 *PELJ*

Murombo T "Beyond Public Participation: The Disjuncture Between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development" 2008 *Potchefstroom Electronic Law Journal* 106-136

Murumbo and Munyuki 2019 *PELJ*

Murombo T and Munyuki I "The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa" 2019 *Potchefstroom Electronic Law Journal* 1-41

Nel and Du Plessis 2004 *SAPL*

Nel J and Du Plessis W "Unpacking Integrated Environmental Management - A Step Closer to Effective Co-operative Governance?" 2004 *South African Public Law* 181-190

Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance"

Nel JG, Du Plessis W and Du Plessis AA "Instrumentation for Local Environmental Governance" in Du Plessis A (ed) *Environmental law and Local Government in South Africa* (Juta Cape Town 2015) 41-166

Nel and Alberts "Environmental Management and Environmental Law"

Nel J and Alberts R "Environmental Management and Environmental Law in South Africa: An Introduction" in King N, Strydom HA and Retief F (eds) *Fuggle & Rabie's Environmental Management in South Africa* (Juta Cape Town 2018) 1-55

Oosthuizen, Van der Linde and Basson "National Environmental Management Act"

Oosthuizen M, Van der Linde M and Basson E "National Environmental Management Act 107 of 1998 (NEMA)" in King ND, Strydom HA and Retief F (eds) *Fuggle & Rabie's Environmental Management in South Africa* 3rd ed (Juta Cape Town 2018) 125-207

Paschke and Glazewski 2006 *PELJ*

Paschke R and Glazewski J "Ex Post Facto Authorisation in South African Environmental Assessment Legislation: A Critical Review" 2006 *Potchefstroom Electronic Law Journal* 1-32

Paterson 2006 *SALJ*

Paterson A "Fuelling the Sustainable Development Debate in South Africa" 2006 *South African Law Journal* 53-62

Paterson 2017 *SAJELP*

Paterson A "Protected Areas Law, Mining and the Principle of Non-regression- A South African Perspective" 2017 *South African Journal of Environmental Law and Policy* 142-194

Patten *Proposing Empirical Research*

Patten ML *Proposing Empirical Research: A Guide to the Fundamentals* (Routledge New York 2020)

Pinder *European Community*

Pinder J *European Community: The Building of a Union* (Oxford University Press Oxford 1995)

Powers 2021 *Transnat'l Env'tl L*

Powers A 2012 "The Rio+20 process: Forward Movement for the Environment" *Transnational Environmental Law* 403-412

Prieur 2011 *IUCN Academy of Environmental Law e-Journal*

Prieur M "Urgently Acknowledging the Principle of 'Non-regression' in Environmental Rights" 2011 *IUCN Academy of Environmental Law eJournal* 26-40 available at <http://www.iucnael.org/en/e-journal/previous-issues/157-issue20111.html> accessed 18 November 2020

Prieur 2012 *SAPIENS*

Prieur M "Non-Regression in Environmental Law" 2012 *Surveys and Perspectives Integrating Environment and Society* 53-56

Ramdhin 2008 *SAJELP*

Ramdhin A "The Use of the EIA Process to Protect Purely Commercial interest: The Case of Fuel Retailers" 2008 *SAJELP* 127-137

Rantlo *Environmental Impact Assessment Legislation*

Rantlo TJ *Environmental Impact Assessment Legislation in Lesotho, Swaziland and South Africa* (LLM-dissertation North-West University Potchefstroom 2015)

Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal*

Rantlo J and Viljoen G "A Critical Appraisal of Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd 2019 (5) SA 275 (GP)" 2020 *Impact Assessment and Project Appraisal* 1-5

Rautenbach and Bekker *Introduction to Legal Pluralism*

Rautenbach C and Bekker JC *Introduction to Legal Pluralism in South Africa* 4th ed (LexisNexis Durban 2016)

Reingold and Thomas 2018 *Cal LR*

Reingold PD and Thomas K "The Wrong Turn on the *Ex Post Facto* Clause" 2018 *California Law Review* 593-630

Retief, Jones and Jay 2007 *SAGJ*

Retief F, Jones C and Jay S "The Status and Extent of Strategic Environmental Assessment (SEA) Practice in South Africa, 1996-2003" 2007 *SAGJ South African Geographical Journal* 44-54

Retief and Kotzé 2008 *SAJELP*

Retief F and Kotzé LJ "The Lion, the Ape and the Donkey: Cursory Observations on the Misinterpretation and Misrepresentation of Environmental Impact Assessment (EIA) in the Chronicles of Fuel Retailers" 2008 *South African Journal of Environmental Law and Policy* 138-155

Ridl and Couzens 2010 *PELJ*

Ridl J and Couzens E "Misplacing NEMA? A Consideration of Some Problematic Aspects of South Africa's New EIA Regulations" 2010 *Potchefstroom Electronic Law Journal* 80-120

Ritchie "The Application of Qualitative Research Methods to Social Research"

Ritchie J "The Application of Qualitative Research Methods to Social Research" in Ritchie J and Lewis J (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE London 1998) 24-46

Robinson 2006 *SAJELP*

Robinson NA "Environmental Impact Assessments: Essential Methodology or Paper Tiger" 2006 *South African Journal of Environmental Law and Policy* 97-104

Rossouw and Retief "South Africa"

Rossouw N and Retief F "South Africa" in Baker M, Carter J, Wood C and Jay S (eds) *Strategic Environmental Assessment and Land Use Planning: An International Evaluation* (Routledge London 2005) 188-200

Roux *Comparison Between South African, Namibian and Swaziland's EIA Legislation*

Roux L *Comparison Between South African, Namibian and Swaziland's EIA Legislation* (LLM-dissertation Potchefstroom University for Christian Higher Education Potchefstroom 2003)

Sadler *Environmental Assessment*

Sadler B *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance* International Study of the Effectiveness of Environmental Assessment - Final Report (UNEP Canada June 1996)

Salter and Mason *Writing Law Dissertations*

Salter M and Mason J *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education 2007)

Sands *et al Principles of International Environmental Law*

Sands P *et al Principles of International Environmental Law* 3rd ed (Cambridge University Press Cambridge 2012)

Scholtz 2002 *SAJELP*

Scholtz W "The Precautionary Principle and International Trade Law: Conflict or Reconciliation?" 2002 *South African Journal of Environmental Law and Policy* 163-175

September *A critical analysis*

September LMF *A critical analysis of the application of section 24G provisions of the National Environmental Management Act (NEMA), the Gauteng Province experience* (LLM-dissertation North-West University Potchefstroom 2012)

Shin and Welch "Environmental Auditing and Compliance"

Shin E and Welch EW "Environmental Auditing and Compliance" in Madu CA and Kuei C (eds) *Handbook of Sustainability Management* (World Scientific New Jersey 2012) 353-378

Smith *et al* 2020 *Impact Assessment and Project Appraisal*

Smith FH, Retief FP, Roos C and Alberts RC "The Evolving Role of Supreme Auditing Institutions (SAIs) Towards Enhancing Environmental Governance" 2020 *Impact Assessment and Project Appraisal* 1-13

Sothivanan and Siddiqui 2015 *IJSRD*

Sothivanan S and Siddiqui NA "Laconic Study on Incident/Accident Investigation Technique – Sequentially Timed Event Plotting (STEP)" 2015 *International Journal for Scientific Research and Development* 680-683

Sowman, Fuggle and Preston 1995 *EIAR*

Sowman M, Fuggle R and Preston G "Environmental Policy Making: A Review of the Evolution of Environmental Evaluation Procedures in South Africa" 1995 *Environmental Impact Assessment Review* 45-67

Srikrishna 2008 *IJLI*

Srikrishna BN "The Indian Legal System" 2008 *International Journal of Legal Information* 242-244

Strydom "Essentialia of International Environmental Law"

Strydom HA "Essentialia of International Environmental Law" in King N, Strydom HA and Retief F (eds) *Fuggle & Rabie's Environmental Management in South Africa* (Juta Cape Town 2018) 57-98

Tarlock and Tarak 2020 *Denver JILP*

Tarlock AD and Tarak P "An Overview of Comparative Environmental Law" 2020 *Denver Journal of International Law and Policy* 85-108

Thomas, Van der Merwe and Stoop *Historical Foundations*

Thomas PJ, Van der Merwe CG and Stoop BC *Historical Foundations of South African Private Law* (LexisNexis Durban 2000)

Tladi D *Sustainable in the Development in International Law*

Tladi D *Sustainable in the Development in International Law: An Analysis of Key Enviro-economic Instruments* (PULP Pretoria 2007)

Tolba *Development Without Destruction*

Tolba MK *Development Without Destruction: Evolving Environmental Perceptions* (Tycool International Dublin 1982)

Van Hoecke *Methodologies of Legal Research*

Van Hoecke M *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Oxford 2011)

Venter *Constitutional Comparison*

Venter F *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Juta Cape Town 2000)

Venter *Legal research*

Venter F *Legal Research: Purpose, Planning and Publication* (Juta Cape Town 2018)

Verschuuren *Principles of Environmental Law*

Verschuuren JM *Principles of Environmental Law: The Ideal of Sustainable Development and the Role of Principles of International, European, and National Environmental Law* (Nomos Verlagsgesellschaft Baden-Baden 2003)

Verschuuren 2006 *PELJ*

Verschuuren J "Sustainable Development and the Nature of Environmental Legal Principles" 2006 *Potchefstroom Electronic Law Journal* 209-261

Vinti 2019 *SAJHR*

Vinti C "The Right to Mine in a 'Protected Area' in South Africa: *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs*" 2019 *South African Journal on Human Rights* 311-322

Viñuales "Comparative Environmental Law"

Viñuales JE "Comparative Environmental Law: Structuring a Field" in Lees E and Viñuales JE *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press Oxford 2019) 3-34

Wägenbaur 1990 *Fordham ILJ*

Wägenbaur R "The European Community's Policy on Implementation of Environmental Directives" 1990 *Fordham International Law Journal* 455-477

Wathern *Environmental Impact Assessment*

Wathern P *Environmental Impact Assessment: Theory and Practice* (Routledge London 2013)

Walmsley and Patel *Handbook on Environmental Assessment Legislation in the SADC Region*

Walmsley B and Patel S *Handbook on Environmental Assessment Legislation in the SADC Region* 3rd ed (Development Bank of Southern Africa Pretoria 2011)

White and Pink 2017 *SA Crime Quarterly*

White R and Pink G "Responding to Organised Environmental Crimes: Collaborative Approaches and Building Capacity" 2017 *SA Crime Quarterly* 37-44

Wiener 2001 *Ecology Law Quarterly*

Wiener JB "Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law" 2001 *Ecology Law Quarterly* 1295-1372

Winstanley "Administrative Measures"

Winstanley T "Administrative Measures" in Paterson A and Kotzé LJ (eds) *Enforcement and Compliance in South Africa: Legal Perspectives* (Juta Cape Town 2009) 225-239

Wood 1999 *South African Geographical Journal*

Wood C "Pastiche or Postiche? Environmental Impact Assessment in South Africa" 1999 *South African Geographical Journal* 52-59

Wood "Environmental Impact Assessment in Developing Countries"

Wood C "Environmental Impact Assessment in Developing Countries: An Overview" in University of Manchester Conference on *New Directions in Impact Assessment for Development: Methods and Practice* (24-25 November 2003 Manchester) 1-28

Wood *Environmental Impact Assessment*

Wood C *Environmental Impact Assessment: A Comparative Review* 2nd ed (Pearson Harlow 2003)

Yang 2018 *Hastings LJ*

Yang T "The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law" 2018 *Hastings LJ* 525-572

Yang *et al Comparative and Global Environmental Law*

Yang T, Telesetsky A, Harmon-Walker L and Percival RC *Comparative and Global Environmental Law and Policy* (Wolters Kluwer New York 2020)

Zhao 2009 *Natural Resources Journal*

Zhao Y "Assessing the Environmental Impact of Projects: A Critique of the EIA Legal Regime in China" 2009 *Natural Resources Journal* 485-524

Case law

South Africa

BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 5 SA 124 (W)

Director: Mineral Development, Gauteng Region v Save the Vaal Environment 1999 2 SA 709 (SCA)

Eagles Landing Body Corporate v Molewa 2003 1 SA 412 (T)

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism 2005 3 SA 156 (C)

Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 6 SA 4 (CC)

Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others (1105/2019) [2021] ZASCA 13 (09 February 2021)

Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape 2011 1 SA 128 (WCC)

Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products 2004 2 SA 393 (E)

Interwaste v Coetzee (23921) [2013] ZAGPJHC 89 (22 April 2013)

Kiepersol Poultry Farm (Pty) Ltd v Touchstone Cattle Ranch (Pty) Ltd (40408/08) [2008] ZAGPHC 320 (7 October 2008)

Magaliesberg Protection Association v MEC of Agriculture (1776/2010) [2011] ZANWHC 67 (15 December 2011)

MEC for Agriculture, Conservation Environment and Land Affairs v Sasol Oil (Pty) Ltd 2006 5 SA 483 (SCA)

MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Limited 2008 2 SA 319 (CC)

Minister of Water and Environmental Affairs v Really Useful Investments 2017 1 SA 505 (SCA)

Pretoria Timber Treaters v Mosunkutu (53710/2008) [2009] ZAGPPHC 326 (22 September 2009)

R (Barker) v Bath and North East Somerset Council [2013] EWHC 946 (Admin)

S v Coetzee 1997 (3) SA 527 CC

S v Makwanyane 1995 3 SA 391 (CC)

Sanderson v Attorney-General, Eastern Cape 1998 2 SA 38 (CC)

Sasol Oil v Metcalfe 2006 2 ALL SA 329 (W)

Silvermine Valley Coalition; Minister of Water and Environmental Affairs v Really Useful Investments 2017 1 SA 505 (SCA)

Supersize Investments v MEC of Economic Development Environment and Tourism Limpopo Provincial Government and Another (70853/2011) [2013] ZAGPPHC 98 (11 April 2013)

The Body Corporate of Dolphin Cove v Kwadukuza Municipality (8513/2010) [2012] ZAKZDHC 13 20 February 2012

Umfolozi Sugar Planters Limited v Isimangaliso Wetland Park Authority (873/2017) [2018] ZASCA 144 (1 October 2018)

Uzani Environmental Advocacy CC v BP Southern Africa(Pty) Ltd 2019 5 SA 275 (GP)

York Timber (Pty) Ltd v National Director of Public Prosecution 2015 1 SACR (GNP)

EU (ECJ)

Commission v Italy [2006] ECR I-11025

ICJ

Hungary v Slovakia 1997 ICJ

Ireland

Commission v Ireland [2008] ECR I-4911

England

R (Ardagh Glass Ltd) v Chester City Council [2011] PTSR 1498

R (Baker) v Bath & North East Somerset 5 Council [2013] WWHC 946 (Admin)

R (on the application of David Padden) v Maidstone Borough Council [2014] EWHC 51 (Admin)

India

Alembic Pharmaceuticals Ltd v Rohit Prajapati 2020 4 CPSCI (SC)

Common Cause v Union of India (2017) 9 SCC 499

Electrotherm Ltd v Patel (2016) 9 SCC 300

Lafarge Umiam Mining Private Limited v Union of India (2011) 7 SCC 338

Mehta v Union of India (2004) 12 SCC 118

USA

Andrus v Sierra 442 US 348

Legislation

South Africa

Competition Act 89 of 1998

Constitution of the Republic of South Africa, 1996

Development Facilitation Act 67 of 1995

Disaster Management Act 57 of 2002

Electricity Regulation Act 4 of 2006

Environment Conservation Act 73 of 1989

Environment Conservation Amendment Act 94 of 1993

Mineral and Petroleum Resources Development Act 28 of 2002

Mineral and Petroleum Resources Development Amendment Bill [B15D-2013] – pg 239

National Environment Management Act 107 of 1998

National Environmental Management Amendment Act 62 of 2008

National Environmental Management Amendment Act 8 of 2004

National Environmental Management Amendment Act 9 of 2013

National Environmental Management Laws Second Amendment Act 30 of 2013

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Waste Act 59 of 2008

National Water Act 36 of 1998

NEMA Amendment Act 30 of 2013

NEMA Amendment Act 62 of 2008

Planning and Development Act 30 of 2000

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Town and Country Planning (Environmental Impact Assessment) Regulations 2017

England

European Communities Act, 1972

Localism Act, 2011

Planning and Compensation Act, 1991

Town and Country Planning Act, 1990

Eswatini

Environment Management Act 5 of 2002

India

Environmental (Protection) Act, 1968 (India)

National Green Tribunal Act, 2010

Ireland

Environmental (Protection) Act, 1968

Planning and Development Act 30 of 2000

Swaziland

Swaziland Environment Act 1992

USA

National Environment Policy Act, 1969

International instruments

Community Charter of the Fundamental Social Rights of Workers (1989)

Convention on Environmental Impact Assessment in a Trans-boundary Context (1991)

Declaration of the United Nations Conference on the Human Environment 1972

European Community Directive on EIA [85/337/EEC and 97/11/EC]

Rio Declaration on Environment Development (1991)

Town and Country Planning (Environmental Impact Assessment) Regulations (2017)

United Nations Conference on Environmental & Development (1992)

Government publications

GN R1182-1184 in GG 18261 of 5 September 1997

GN R749 in GG 18894 of 15 May 1998

GN R692 in GG 22506 of 30 July 2001

GN R385-387 in GG 28753 of 21 April 2006

GN R615 in GG 28938 of 23 June 2006

GN R543-546 in GG 33306 of 18 June 2010
GN R982-985 in GG 38282 of 4 December 2014
GN R993 in GG 38303 of 8 December 2014
GN R276 in GG 40733 of 31 March 2017
GN R324-327 in GG 40772 of 7 April 2017
GN R698 in GG 40994 of 17 July 2017
GN R597 in GG 38894 of 26 June 2018
GN R706 in GG 41766 of 13 July 2018
GN R313 in GG 43096 of 15 March 2020
GN R398 in GG 43148 of 25 March 2020
GN 599 in GG 43358 of 29 May 2020

Internet sources

Anon 2018 <https://www.bbc.com/news/world-africa-43821512>

Anon 2018 *Swaziland king renames country 'the Kingdom of eSwatini'* (BBC News 19 April 2018) <https://www.bbc.com/news/world-africa-43821512> accessed 21 January 2021

APEEL 2017 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf

Australian Panel of Experts on Environmental Law (APEEL) 2017 *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* 1-51 https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf accessed 15 March 2020

CSE 2020 <https://www.cseindia.org/understanding-eia-383>

Centre for Science and Environment (CSE) 2020 *Understanding EIA*
<https://www.cseindia.org/understanding-eia-383> accessed 18 November
2020

Claassen *et al* 2001 <http://www.wrc.org.za/wp-content/uploads/mdocs/TT-151-01.pdf>

Claassen M, Strydom WF, Murray K and Jooste S 2001 *Ecological Risk Assessment Guidelines* (Water Research Commission WRC Report Number TT 151/01 June 2001) <http://www.wrc.org.za/wp-content/uploads/mdocs/TT-151-01.pdf> accessed 12 January 2021

Collins English Dictionary 2021 <https://www.collinsdictionary.com/dictionary/english/planning-permission>

Collins English Dictionary 2021 *Definition of 'planning permission'*
<https://www.collinsdictionary.com/dictionary/english/planning-permission>
accessed 12 December 2020

Cornell Law School date unknown https://www.law.cornell.edu/w ex/ex_post_facto

Cornell Law School date unknown *Definition of 'ex post facto'*
https://www.law.cornell.edu/w ex/ex_post_facto accessed 12 January 2021

Dagg 2005 https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm

Dagg S 2005 *Environmental Auditing and Environmental Management Systems* (Unit 1 Introduction to Environmental Auditing and Management)
https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm accessed 12 January 2021

DEA 2014 <https://cer.org.za/wp-content/uploads/2016/10/ENVIRONMENTAL-IMPACT-ASSESSMENT-AND-MANAGEMENT-STRATEGY-1.pdf>

Department of Environmental Affairs (DEA) 2014 *Environmental Impact Assessment and Management Strategy for South Africa* (EIAMS)

<https://cer.org.za/wp-content/uploads/2016/10/ENVIRONMENTAL-IMPACT-ASSESSMENT-AND-MANAGEMENT-STRATEGY-1.pdf> accessed 12 January 2021

DEA 2018 <https://www.environment.gov.za/mediarelease/deareleases2017-18necereport>

Department of Environmental Affairs (DEA) 2018 *National Environmental Compliance and Enforcement Report 2017-18* <https://www.environment.gov.za/mediarelease/deareleases2017-18necereport> accessed 12 January 2021

DEAT 1997 https://www.environment.gov.za/sites/default/files/legislations/environmental_management_0.pdf

Department of Environmental Affairs and Tourism (DEAT) 1997 *White Paper on Environmental Management Policy* https://www.environment.gov.za/sites/default/files/legislations/environmental_management_0.pdf accessed 12 January 2021

DEAT 2002 https://www.environment.gov.za/sites/default/files/docs/series6_ecological_riskassessment.pdf

Department of Environmental Affairs and Tourism (DEAT) 2002 *Integrated Environmental Management Information Series 6* (Ecological Risk Assessment) https://www.environment.gov.za/sites/default/files/docs/series6_ecological_riskassessment.pdf accessed 12 January 2021

DEAT 2004 https://www.environment.gov.za/sites/default/files/docs/series20_linking_eia_ems.pdf

DEAT 2004 *Linking Environmental Impact Assessment and Environmental Management Systems* (Integrated Environmental Management Information

Series 20) https://www.environment.gov.za/sites/default/files/docs/series20_linking_eia_ems.pdf accessed 12 May 2020

DEAT 2004 https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf

Department of Environmental Affairs and Tourism (DEAT) 2004 *Environmental Auditing, Integrated Environmental Management, Information Series 14* (Environmental Auditing) https://www.environment.gov.za/sites/default/files/docs/series14_environmental_auditing.pdf accessed 12 January 2021

DEAT 2005 <https://www.westerncape.gov.za/text/2005/7/s24gdeatgdline.pdf>

Department of Environmental Affairs and Tourism (DEAT) 2005 *Integrated Environmental Management Guideline Series 2* (NEMA Section 24G) <https://www.westerncape.gov.za/text/2005/7/s24gdeatgdline.pdf> accessed 15 March 2019

DECLG 2012 <https://www.gov.ie/en/publication/10d10-a-guide-to-planning-enforcement-in-ireland/>

Department of the Environment, Community and Local Government (DECLG) 2012 *A Guide to Planning Enforcement in Ireland* <https://www.gov.ie/en/publication/10d10-a-guide-to-planning-enforcement-in-ireland/> accessed 16 June 2020

DWAF&FE 1980 https://www.environment.gov.za/sites/default/files/legislations/environmental_management_0.pdf

Department of Water Affairs, Forestry and Environmental Conservation (DWAF&FE) 1980 *White Paper on National Policy Regarding Environmental Conservation* https://www.environment.gov.za/sites/default/files/legislations/environmental_management_0.pdf accessed 12 January 2021

DEFF 2020 https://www.gov.za/sites/default/files/gcis_document/202011/environmental-compliance-2020-report.pdf

DEFF 2020 *National Environmental Compliance and Enforcement Report 2019-20* https://www.gov.za/sites/default/files/gcis_document/202011/environmental-compliance-2020-report.pdf accessed 12 December 2020

Department for Environment, Food and Rural Affairs (DEFRA) 2010 *Environmental permitting* <http://www.fwr.org/WQreg/Appendices/ep2010booklet.pdf> accessed 16 June 2020

DEFRA 2010 <http://www.fwr.org/WQreg/Appendices/ep2010booklet.pdf>

Department for Environment, Food and Rural Affairs (DEFRA) 2010 *mental permitting* <http://www.fwr.org/WQreg/Appendices/ep2010booklet.pdf> accessed 27 July 2017

Department of Interior USA 2015 [https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20\(ROD\)%20Format.pdf](https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20(ROD)%20Format.pdf)

Department of Interior USA 2015 *Conserving the nature of America* [https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20\(ROD\)%20Format.pdf](https://www.fws.gov/endangered/esa-ibrary/pdf/FWS%20Record%20of%20Decision%20(ROD)%20Format.pdf) accessed 25 September 2018
accessed 25 September 2018

EC date unknown <https://ec.europa.eu/environment/eia/eia-legalcontext.htm>

European Commission (EC) date unknown *Environmental Impact Assessment – EIA* <https://ec.europa.eu/environment/eia/eia-legalcontext.htm> accessed 25 November 2020

ELAW 2019 <https://www.elaw.org/eialaw/swaziland>

Environmental Law Alliance Worldwide (ELAW) 2019 *Swaziland* <https://www.elaw.org/eialaw/swaziland>

EHS Insight Resources 2019 <https://www.ehsinsight.com/blog/incident-investigation-methodologies-and-models>

EHS Insight Resources 2019 *Incident Investigation Blog Series – Part 2: Methodologies and Models* <https://www.ehsinsight.com/blog/incident-investigation-methodologies-and-models> accessed 24 January 2021

Federal Transit Administration 2019 <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/record-decision-0>

Federal Transit Administration 2019 *Record of decision* <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/record-decision-0> accessed 11 April 2020

Government of South Africa 2015 https://www.environment.gov.za/sites/default/files/docs/discussiondocument_environmentaloffsets.pdf

Government of South Africa 2015 *Environmental Offsets Discussion Document*

https://www.environment.gov.za/sites/default/files/docs/discussiondocument_environmentaloffsets.pdf accessed 15 March 2020

IAIA 2009 <https://www.iaia.org/news-details.php?ID=30>

International Association for Impact Assessment (IAIA) 2009 *What is impact assessment?* 1 <https://www.iaia.org/news-details.php?ID=30> accessed 15 March 2019

IAIA 2015 <http://www.aiai.org>

International Association for Impact Assessment (IAIA) 2015 *The leading global network on impact assessment* <http://www.aiai.org> accessed 15 March 2019

ILS 2015 <https://intlspot.wordpress.com/2015/08/24/understanding-the-notion-of-non-regression/>

International Law Spot (ILS) 2015 *Understanding the Notion of Non-Regression* <https://intlspot.wordpress.com/2015/08/24/understanding-the-notion-of-non-regression/> accessed 06 April 2020

ISO 2015 <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100372.pdf>

ISO 14001 2015 *Key benefits* <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100372.pdf> accessed 05 January 2021

ISO 2015 <https://www.iso.org/standard/60857.html>

ISO 14001 2015 Environmental Management Systems: Requirements with guidance for use <https://www.iso.org/standard/60857.html> accessed 05 January 2021

ISO 2016 <https://www.iso.org/standard/60856.html>

ISO 14004 2016 Environmental Management Systems: General guidelines on implementation <https://www.iso.org/standard/60856.html> accessed 05 January 2021

IUCN 2010 <https://www.iucn.org/content/non-regression-principle-knowledge-forum>

International Union for Conservation of Nature (IUCN) 2010 *Non Regression Principle Knowledge Forum* <https://www.iucn.org/content/non-regression-principle-knowledge-forum> accessed 06 April 2020

Leary and Pisupati 2010 <https://archive.unu.edu/unupress/sample-chapters/FutureOfIntlEnvironmentalLaw.pdf>

Leary D and Pisupati B 2010 *The Future of Environmental Law* <https://archive.unu.edu/unupress/sample-chapters/FutureOfIntlEnvironmentalLaw.pdf> accessed 15 April 2019

Li 2008 <https://data.opendevlopmentmekong.net/>

Li JC 2008 *Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security?*

<https://data.opendevelopmentmekong.net/> accessed 28 February 2017

Ministry of Environment 2000 [https://www. https://coursys.sfu.ca/2017su-ensc-406-d1/pages/Risk_Assessment/view](https://www.https://coursys.sfu.ca/2017su-ensc-406-d1/pages/Risk_Assessment/view)

Ministry of Environment, Land and Parks 2000 Environmental Risk Assessment(ERA): *An Approach for Assessing and Reporting Environmental Conditions* [https://www. https://coursys.sfu.ca/2017su-ensc-406-d1/pages/Risk_Assessment/view](https://www.https://coursys.sfu.ca/2017su-ensc-406-d1/pages/Risk_Assessment/view) accessed on 15 March 2020

Nel *et al* /2007 <https://cer.org.za/wp-content/uploads/2016/08/Ecosystem-Approach-to-Fisheries.pdf>

Nel DC, Cochrane K, Petersen SL, Shannon LJ, Van Zyl B and Honig MB 2007 *Ecological Risk Assessments: a tool for implementing an Ecosystem Approach for South African Fisheries* (WWF Report Series 2007/Marine/002) <https://cer.org.za/wp-content/uploads/2016/08/Ecosystem-Approach-to-Fisheries.pdf> accessed 13 January 2021

Ogola 2007 <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf>

Ogola PFA 2007 *Environmental Impact Assessment General Procedures* <http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-10-0801.pdf> accessed 22 May 2017

Sheate Date unknown https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm

Sheate W date unknown *Environmental auditing and environmental management systems* https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm accessed 22 December 2020

Shenoy 2018 <https://www.barandbench.com/columns/the-principle-non-regression-indian-environmental-jurisprudence>

Shenoy A 2018 *The principle of non-regression and Indian Environmental Jurisprudence* <https://www.barandbench.com/columns/the-principle-non-regression-indian-environmental-jurisprudence> accessed 22 December 2020

SANDRP 2014 <https://sandrp.in/category/environment-impact-assessment/>

South Asia Network on Dams, Rivers and People (SANDRP) 2014 *Strengthen and not dilute Environment Laws: Submission to the MEF's HLC to Review Environment Laws* <https://sandrp.in/category/environment-impact-assessment/> accessed 15 August 2018

UN 2015 <https://sustainabledevelopment.un.org/futurewewant.html>

United Nations (UN) 2015 *Future We Want - Outcome document* <https://sustainabledevelopment.un.org/futurewewant.html> accessed 06 April 2020

UNEP 2012 <https://wedocs.unep.org/handle/20.500.11822/9969>

UNEP 2012 *Advancing Justice, Governance and Law For Environmental Sustainability: RIO+20 and the World Congress of Chief Justices, Attorneys General and Auditors General* <https://wedocs.unep.org/handle/20.500.11822/9969> accessed 15 March 2019

WCC 2012 https://globalpact.informea.org/pdf.js/web/viewer.html?file=/sites/default/files/documents/WCC_2012_RES_128_EN.pdf

World Conservation Congress (WCC) 2012 *Need for non-regression in environmental law and policy* (at its session in Jeju, Republic of Korea, 6–15 September 2012) https://globalpact.informea.org/pdf.js/web/viewer.html?file=/sites/default/files/documents/WCC_2012_RES_128_EN.pdf



cumlaude
language practitioners

3 Kerk Street, Haenertsburg, 0730
cumlaudelanguage@gmail.com

Christien Terblanche
SATI-accredited
079 730 8121

Ina-Lize Venter
SATI-accredited
082 527 3021

Etienne Terblanche
PhD (Eng)
079 711 8215

DECLARATION OF LANGUAGE EDITING

I, Christina Maria Etrechia Terblanche, hereby declare that I edited the
dissertation titled:

***Ex post facto* environmental authorisation in South Africa**

for the purpose of submission as a postgraduate research study.

Suggestions were indicated in track changes and application was left to the
author.

Regards,



CME Terblanche

Cum Laude Language Practitioners (CC)

South African Translators Institute accr nr: 1001066

Full member of the Professional Editors Guild