MANAGING ENVIROMENTAL LAW

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ENVIRONMENTAL MANAGEMENT

INTRODUCTION

As a result of South Africa obtaining full world status and being afforded the opportunity of being a roll player within the world community our national activities will in future be put to finer scrutiny. There is little doubt that pressure will be put on our legislature to limit environmental practices which are unacceptable to our International trade partners. It is anticipated that sanctions similar to those imposed during the apartheid era could be enforced by the industrialized world to demand that the environmental costs of South Africa's industrial output be reflected in the price of its products as has been the case in first world countries. The argument which has been advanced by South Africa in the past, that first world standards should not be applied to a developing third world country, is fast losing its credibility.

It is thus foreseeable that the development of South African Environmental Law, as is the case with Labour Law, will be promulgated in line with International legislation and tendencies. Under the term international legislation I refer to the umbrella legislation of the European Community.

It is therefore paramount that industry adapts the management of its technology timeously as the re-active implementation can result in a considerable financial implication for the business community. This becomes even more relevant in view of the fact that the new democratic government, who have shown that they are less sympathetic towards industry, is starting to legislate according to the changing technological environment. An example of the Governments change in approach to major business was its reluctance to assist Iscor with their Saldanha project. After the study of local literature it became apparent to

the author hereof, that to be in a position to properly understand the process of development South African will have to go through to achieve a worthwhile Environmental Management System, it would be necessary to undertake a study of Environmental Management in Europe. For purposes of this study a week was spend at Oxford University under the guidance of the ECU (Environment Control Unit) of the University during August of 1995. The study at Oxford greatly concentrated on the European communities umbrella environmental legislation. Thereafter the better part of a week was spent with the Environmental management department of one of Germany's biggest steelworks, Mannesmann Demag. Three days was also spend with the environmental management department of Thyssen Steel, also being one of the top industries in Germany. It is true that Germany is currently considered to be leaders in the field of Environmental management. Simultaneously extensive consultations were had with European jurists and academics.

Environmental Management in Germany is a top priority as the legal implications with which industry is confronted are enormous. It is comparable, in large degrees, with Labour Law as the legal implications thereof are largely dependant on the way the Act is managed by the particular company.

The following three definitions, were some of the definitions that were born during a group discussion at Oxford's Environment Control Unit (ECU). I list them herein as a self explanatory measure for the exact meaning of the phrase "Management of the Environment" as it appears that this field is still open for a formal world wide recognized definition.

"Development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

"Ecology and economy are becoming ever more interwoven – locally, regionally, nationally and globally into a seamless net of causes and effects".

"The management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations".

Phrases and catch words such as:

Pressure groups
Public awareness
Competitors
Green Consumers
Government Policy
Insurers
Employees

are some of the key factors resulting in pressure for change from sustainable development to Environmental Management. The balance between the Environment (E) and sustainable development (SD) is one of the most difficult issues to deal with in a growing third world country. Sustainable development in short means the costs of a development in terms of natural resources and the Environment. The three important questions to ask in this regard are discussed hereunder. If put on a scale measure, the environment will

always weigh heavier in first world countries than would be the case in third world countries where sustainable development will be given the advantage over the protection and conservation of the environment. At present South Africa has more or less reached a stage where E v SD are more or less in a state of equilibrium and only the future will learn whether we will fall back into sustainable development overpowering the environment or whether we will move forward where the environment will win the battle over sustainable development.

1. Efficiency Standard

To know whether there is compliance with the efficiency standard, the following question needs to be answered in the positive: "Will the benefits of development exceed the costs of damage to the environment?"

2. Equity Standard

To know whether there is compliance with the equity standard, the following question needs to be answered in the positive: "Will the benefits and costs of development be distributed fairly among present-day society?"

3. Sustainability Standard

To know whether there is compliance with the sustainability standard, the following question needs to be answered in the positive: "Will the benefits of development continue to exceed the costs to the environment over time?"

Before 1994 a development never had to answer to the Environment or to the sustainability standards. This changed mainly due to the following factors:

1. The Government changed from pro industry to pro individual;

2. The privatization approach saw to the Government loosing its stake in most of the major industries in the country;

3. The Human rights chapter in the new constitution brought a new major force to the fore being the rights of the man in the street. In practise it is referred to as IAP's (Interested and affected parties/persons as it is also referred to in the Environment Conservation Act of 1989 (ECA) and the Integrated Environmental Management Model (IEM) that is compelled by the ECA, both of which will be discussed in chapters 3 and 4 herein.

In this paper we will look at the present approach to the management of the Environment as opposed to the historical approach and I will also fire a shot from the hip to the most probable future approach. Due to the fact that this field of management has been in labor for the last couple of years and was only born during April of this year, it is still a fairly new field of management and accordingly the literature relevant thereto is few and far between.

CHAPTER 1

THE PREVIOUS POSITION

1.1 HISTORICAL BACKGROUND

1.1.1 ENVIRONMENTAL CONCERNS

The impact of human activity on the natural environment probably began when humans first learnt to control fire. In the centuries which followed they altered the face of the planet beyond recognition through agricultural and industrial practices which have been recognised relatively recently for the threat which they pose to the continued existence of the planet in a form which is able to sustain human life of an acceptable quality (Fuggle & Rabie, 1992 : 11-25). The need to measure and control the impact of human activity on the environment gave rise to the concepts of environmental impact assessments which should be seen as a necessary part of any development planning process. In the United States of America (USA), concern for the environment was translated into law by the promulgation of the National Environmental Policy Act of 1969 (NEPA) on 1 January 1970. It was this instrument which provided the foundation for modern American environmental law (John E Bonine & Thomas O McGarity, 1984 : 4). NEPA was also the first statute to provide for mandatory impact assessments and evaluations as part of the development process of policy. Much of the industrialized Western world soon followed the American example and the process has been refined and adopted into environmental policy with great

success in many western countries. Why then has South African been so slow to react, and why is there so much reticence on the part of the authorities to follow suit? This paper will attempt to provide some of the answers to this dilemma.

1.1.2 THE COUNCIL FOR THE ENVIRONMENT

In 1984 the Council for the Environment (the "Council") established a committee to formulate a national strategy to ensure the integration of environmental concerns into development actions. The committee undertook considerable research into experience both in South Africa and abroad and after some five years recommended to the Council that the country adopt a concept which it termed "integrated environmental management" and commonly known as IEM. The document in which it was set out was published shortly before the promulgation of the Environment Conservation Act 73 of 1989 and it clearly anticipates the statement of policy which was included in the Bill which preceded the Act, but which was omitted from the Act (P D Glavovic, 1990 : 107). Without the legislative articulation of an environmental policy, the procedure loses much of its effect. The Act contemplates mandatory impact assessments but only in respect of activities which the minister (of Environment Affairs) has identified in terms of s 21 to be those which "in his opinion have a substantial detrimental effect on the environment, whether in general or in respect of certain areas". Where environmental impact assessments (EIA) have previously been undertaken, they have been voluntary.

The Council's version of IEM has not been without its critics. More significantly, developers have encountered practical difficulties in applying the process strictly or without such modification that the result is not recognisable as the product of IEM. The procedure provides for a cumbersome sequence in which there is an iterative process of a series of draft and final reports which are subjected to public review. Foreseeing lengthy delays in this process, developers have attempted to undertake different parts of the sequence in parallel and that has severely undermined the integrity of the procedure in some cases.

1.1.3 THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS

Recognising that there were inadequacies in the Council's version of IEM, the Department of Environment Affairs contracted with the Environmental Evaluation Unit of the University of Cape Town (EEU) to undertake a revision of the procedure, the result of which was published by the department in 1992. The procedure has been considerably streamlined and was likely to find more favour with environmental lobbyists. The procedure retains the system of "screening" now termed the initial assessment as the process whereby a determination is made as to whether or not an EIA is required. The danger of this step is that a decision not to proceed with a full scale EIA may be made on superficial information before the full impacts of the development are understood. This is of particular concern at this early stage of the application of IEM.

Existing zonings, structure plans and development rights may be in place, but they are unlikely to have been granted on sound environmental considerations. If they are environmentally expedient that is probably more a matter of luck than of design. To try to impose the principles of IEM, which necessarily involves the evaluation of alternatives, on a predetermined land use, quite simply does not work. Until there had been an application of IEM in land use planning sufficient to ensure that structure and policy plans are based on sound environmental thinking, a modified form of the procedure will have to be used.

Few would disagree with the proposition that sound policies would lead to sound planning, and that in order to achieve sound policies, the principles of IEM should be followed in its determination, yet it appears that there are opponents of this logic (Guy Preston, 1993 : 31-32). Lobbyists are seeking to have policy proposals excluded from the List of Activities. It is argued that there will be an unnecessary duplication of legislation and an overlapping of authority in the process of physical planning. This problem could easily be addressed as Preston suggests, by the rationalisation of the national policy planning authority and the formation of a national planning and environment council. Since sound policy is fundamental to wise land use planning, it is essential that the policy making body be guided by a process which can be relied upon to ensure sound decision making. That was the underlying principle of NEPA: the control of all federal activities which had the potential to affect the environment. The emphasis is on

the planning phase in which all federal agencies are required to give full consideration to environmental effects in planning their programs (NEPA in the Courts, 1973). The instrument used in the process of that consideration is the environmental impact statement (EIS). The requirement for impact statements has dominated NEPA's interpretation by the courts in the USA. A full understanding of the nature and purpose of the EIA and its resultant EIS is fundamental to the understanding of the IEM process.

1.2 THE NINETIES

Before the Government compelled the management of the environment during 1998, there was no real urgency by the industry to manage the environment due to the fact that they were not obliged to do so. The Environment Conservation Act (ECA) was promulgated in 1989 and looked to be an act that could kick off an inspired Environmental Management System. Although the Act made for superb reading it was never really implemented or enforced to an extent to really give it any form of practical visibility. As already mentioned on page 5, there were the three obvious reasons why it was difficult for the Government of the day to enforce the ECA of 1989. The policing of this act was delegated by the Government to local authorities. From this one can only deduct that the Government was trying to shift the responsibility in order to avoid it having to deal with some of the major polluters in which it also had a large stake. As an example this would mean that the Vanderbijlpark local authority would have to enforce the act against Iscor Limited, being one of the major industries within its jurisdiction. With Iscor being one of the major providers of revenue for the local authority it would be ludicrous for the local

authority to get involved in a David versus Goliath battle. The end result of the 1989 ECA was basically no result.

Although certain major companies implemented Environmental Management before it was compelled by the act, this was more often than not done as a marketing tool. During the middle to the later years of the century we saw a lot of advertising campaigns by major industries in South Africa to the effect that either their product was environment friendly or that the company itself was "Green", meaning that the company was concerned about the environment.

The only major instance where we saw the enforcement of not only the ECA but also the enforcement of its future regulations, was during the Iscor Saldanha development. It became clear quite quickly what unbelievable muscle could be flexed by the people working and living in the vicinity of the proposed development. (In the act described as interested and affected parties, IAP) When people in Saldanha came together they formed a force to be recond with and caused a lengthy delay in the development of the project resulting in a loss of 80 million rand to the developer. Interaction with IAP's was not compulsory at that stage but the developer was forced into lengthy discussions and negotiations with the IAP's. The IAP's threatened with court interdicts and insisted on an objective environment impact assessment (EIA). It is rumoured that the IAP movement in Saldanha was funded by Greenpeace who in turn was funded by some of the International opposition companies of Iscor. Apparently competitors were unhappy that the price of products from South Africa could not be beaten on the International market, as the price of these products did not reflect the cost to the environment. This was a very strategic move by the International competitors to force Iscor to get on par with

them regarding Environmental Management and the huge costs related thereto. In Saldanha peace was eventually made with the IAP's after millions was spent on environment impact assessments and also on the education of the IAP's regarding the impact on the environment by the proposed Saldanha steelworks. Apart from the Iscor Saldanha development the only other instances where some form of environmental responsibility was forced onto certain industries, were cases like the Thor chemicals saga, the AECI Somerset West fire and the Merriespruit disaster. The penalties imposed however originated on the criminal liability in terms of the Occupational Health and Safety Act and the Compensation for Occupational Injuries and Diseases Act. By August of 1995 there were already more than 300 environmental actions brought against industries in Europe for that year alone. In the worst year almost 700 million rand was paid by industries in Europe to individuals for compensation, legal costs and medical expenses. (Dr Ekkehard Schulz - Environment in the Steel Industry).

CHAPTER 2

THE PRESENT POSITION

The Environment Conservation Act of 1989 is still in force and effect but with the difference that in terms of sections 21 and 26 of the act the minister has now promulgated certain regulations which will have a very definite effect on especially the big companies with more than average levels of pollution. In terms of section 21 a list of activities is identified which may have a substantial detrimental effect on the environment. The list of activities reads as follows:

1. The construction or upgrading of

    (a) facilities for commercial electricity generation and supply;

    (b) nuclear reactors and installations for the production, enrichment, reprocessing and disposal of nuclear fuels and wastes;

    (c) transportation routes and structures, and manufacturing, storage, handling or processing facilities for any substance which is dangerous or hazardous and is controlled by national legislation;

    (d) roads, railways, airfields and associated structures outside the borders of town planning schemes;

(e) marinas, harbours and all structures below the high-water mark of the sea;

(f) cableways and associated structures;

(g) structures associated with communication networks, other than telecommunication lines and cables, as well as access roads leading to these structures;

(h) racing tracks for motor-powered vehicles and horse racing, excluding indoor tracks;

(i) canals and channels, including diversions of the normal flow of water in a river bed and water transfer schemes between water catchments and impoundments;

(j) dams, levees or weirs affecting the flow of a river;

(k) reservoirs for public supply;

(l) schemes for the abstraction or utilization of ground or surface water for bulk supply purposes;

(m) public and private resorts and associated infrastructure;

(n) sewage treatment plants and associated infrastructure; and

(o) buildings and structures for industrial and military manufacturing and storage of explosives or ammunition or for testing disposal of such explosives or ammunition.

(p) Buildings and structures for industrial and military manufacturing and storage of explosives or ammunition or for testing disposal of such explosives or ammunition.

2. The change of land use from -

(a) residential use to industrial or commercial use;

(b) light industrial use to heavy industrial use;

(c) agricultural or undetermined use to any other land use;

(d) use for grazing to any other form of agricultural use; and

(e) use for nature conservation or zoned open space to any other land use.

3. The concentration of livestock in a confined structure for the purpose of mass commercial production.

4. The intensive husbandry of, or importation of, any plant or animal that has been declared a weed or an invasive alien species.

5. The release of any organism outside its natural area of distribution that is to be used for biological pest control.

6. The genetic modification of any organism with the purpose of fundamentally changing the inherent characteristics of that organism.

7. The reclamation of land below the high-water mark of the sea and in inland water including wetlands.

8. The disposal of waste in terms of section 20 of the Environment Conservation Act, 1989.

9. Scheduled processes listed in the Second Schedule to the Atmospheric Pollution Prevention Act, 1965 (Act No. of 1965).

In terms of the new regulations promulgated under section 21 of the ECA, the management model known as the integrated environmental management model (IEM) has become compulsory for industries who conduct activities as listed above. The IEM became compulsory for those industries as of the following dates;

List of activities	Dates of commencement
1 (a) (b) (d) (e) (f) (h) (m) ; 7	8 September 1997
1 (g) (o); 3; 4; 5; 6	5 January 1998
1 (c) (i) (j) (k) (l) (n); 8; 9	2 March 1998

The promulgation of these activities in terms of section 21 has been long awaited and I would dare to venture as far as to say that it has in fact being long overdue.

Apart from the fact that a management model has now become compulsory for the first time in our history regarding the management of the environment by industry, it is significant that the watchdog that has now been appointed to enforce the act, is the respective provincial Governments. All conservationists welcome this step, as it should lead to a proper enforcement and policing of the act. If a certain industry's impact on the environment affects more than just one province then the National Government becomes the authority in charge. As we have seen in the past it is fairly useless to appoint an authority to enforce the act if it is given a lot of bark but no sharp teeth to back it up. A further significant change is the fact that the individual's rights are acknowledged and as such the role of IAP's has become the most acknowledged role.

Balancing the scale between the environment and sustainable development is an extremely difficult task especially in modern day South Africa. Although we know that the conservation and protection of the environment is important, not only for future generations, but also for the very profitable tourism industry, there is the immediate problem of unemployment and the resulting need for major business.

CHAPTER 3

INTEGRATED ENVIRONMENTAL MANAGEMENT

3.1 THE IEM – WILL IT WORK

To ascertain the probability of success for the IEM a brief overview of the IEM will first be discussed.

The IEM is the Environmental Management model prescribed by the NCA which companies are obliged to implement. It provides for gradual implementation over a period of years. Although the IEM is forced onto South African Industry, it will be considered against the background of a third world environment. Companies must sign and will be bound by an environmental contract with society in terms of which its newly founded environmental manager and/or environmental management division will be ethically bound to society. Violation or damage to the environment could seriously impact on a company's financial resources and even existence. This is dealt with under the "Polluter pays" principle in the Act which provides that the perpetrator must foot the bill for its costs to the environment. The greater the impact on the environment of a specific industry, the faster the IEM must be implemented. Each industry is accordingly evaluated on its impact on the environment. It would make a lot of sense to implement the IEM as a proactive measure, because it will obtain community involvement with positive perceptions. It can be used as a powerful marketing tool resulting in a competitive advantage. Take for example the message of being Environmentally friendly by major companies, such as Mercedes Benz, BMW, Sasol, Total, etc. The IEM can be phased in over a period of time and can thus be budgetted for, resulting in a spread

of costs. It allows for proper consultation with the Research and Development Department as a good working relationship with the R & D department is crucial for the successful management of the environment within a company. Proactive steps will also cause an environmental awareness amongst the employees and by IAP's (interested and affected parties). A good relationship with IAP's is crucial from a company's marketing point of view and can also result in huge financial implications as will be dealt with later herein. Obviously the counter arguments are applicable for the re-active implementation of the IEM. It is accordingly important that a company send out a clear message that it is doing everything in its power to prevent or limit the damage to the environment, and that it is always considering the input and interests of all IAP's. A company with a well known product will on this basis rather base its advertising campaign on what lies close to the heart of people for example the conservation of nature. Think in this regard about Mazda's contribution to the protection and conservation of Wild Life.

3.2 IEM IN PRACTISE

A diagram of the IEM management model is depicted herein as figure 1 on page 43.

The first step will be to appoint an environmental management team. Notify interested and affected parties (IAP'S). They can be the most powerful adversaries in any new development and it is therefore important to win their trust and involve them early in a totally transparent process. The impact of the business on the environment is best reflected by the magnitude of the IAP's resistance. Their resistance in a third world might not prevent the development from taking place, but might hamper the process greatly, even end up in court resulting in money and time

losses and bad public opinion. IAP's normally consists of individuals, industries, groups, associations, section 21 companies, authorities, municipal councils, etc.

Obtain the best possible information in order to compile an internal assessment report which will typically address aesthetics e.g. plants, trees, lawns, gardens, parks, ponds, bird parks, etc. If the internal assessment report has been done properly, then the information contained therein can be helpful regarding the following:

3.2.1 To assess the possible impact of a new development on the environment.

3.2.2 The possible impact of a present development on the environment.

3.2.3 To consider long term consequences of a development.

3.2.4 To gather independent, expert opinion so that full knowledge of the impact on natural resources, especially delays between expenditure and regeneration, is available when making decisions.

3.2.5 Consult users and IAP's to make informed business decisions.

3.2.6 Assess the present value and cost of resources involved in the implementation of the business plan.

3.2.7 Form alliances or partnerships with companies engaged in corrective or renewal technologies.

3.2.8 To enter into contracts with waste removal companies and large established companies with existing water purification plants, etc.

3.3 CREATING THE DEPARTMENT

Many companies make the mistake of appointing an environmental manager just for the sake of having one. This person will play a vital role in the strategic management of the company over the years to come. Normally the environmental manager will find himself in the unfortunate position where he will always be seen asking for a bigger budget, although he can never show a clear return on the company's investment in the environment. If senior management and shareholders alike don't really believe in the need for a skilled environmental manager then the appointment of such a person can be regarded as a short term window dressing for the company. Indirectly the environmental manager will save the company huge amounts of money by giving correct advice to senior management and by making sure that the company adheres to the relevant sections of the act. We have seen with the Iscor Saldanha Development how costly a delay can be, especially a delay caused by IAP's. A proper environment impact assessment will furthermore cost a company anywhere in a region of between a couple of hundred thousand rand to a couple of million rand. The spending of this money needs to be managed properly and therefore it is important to make sure that the correct professionals/consultants are appointed to attend to certain investigations in terms of the impact assessment. The environmental manager must see to the appointment of the right people to take responsibility and with the ability to address crucial environmental issues. The department must monitor the environment, determine environmental impacts of

activities, become informed and seek for alternatives. It is suggested that the department communicate on a regular basis with the public (IAP's). It is important to make sure that public opinion is positive and remains so. The department must make sure that the importance of the IEM and its requirements, advantages and disadvantages are well understood by senior management, share holders and IAP's.

After assessing the proposal, classify the impact of the development as significant, uncertain or no significant impact and consequently follow the appropriate route according to the model.

In the event of a new plant being developed, chances are good for it to have a significant impact and the detailed route might as well be followed in order to avoid unnecessary costly delays in the development of the project.

3.4 ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

3.4.1 SCOPING

It includes both goal setting and focussing and sets the guidelines for the investigations.

Decide goals and only focus on that. The investigation will only concentrate on what you want to achieve. The company will probably consider appointing professionals as consultants to perform the investigation. A

typical team doing scoping for the environmental impact assessment report will normally consist of the following:

- External members

Appoint independent consultants who are not permanently in your service to work with employees to manage and control the process objectively.

- Internal members

Appoint skilled employees to the team.

Section 21 of the Act prescribes what type of people to appoint. The team members must:

- be knowledgeable;

- be competent to perform the tasks required in an EIA;

- be competent to ensure public participation by the IAP;

- be competent to submit in time complete and comprehensible documentation;

- provide sufficient record to ensure that all accumulated data are maintained;

- must have practical knowledge of all legislation and regulations of both national and provincial legislature;

- ensure transparency in all aspects of the EIA. Effected parties must appoint their forum of adequate representatives from interested parties / people who must be invited to all meetings. The company is however under no obligation to satisfy their demands. The problem is just that the blessing or doom of the IAP's regarding a development, is an important factor when the final decision has to be made by the government regarding their consent for the development or not;

- ensure that IAP's are always present during decision making. Record their opinions and inputs;

- exempt the government or any of its employees from any responsibility towards any consequent impact on the environment or unnecessary costs incurred for e.g. investigative procedure;

- consultants may not have any present affiliation with, or gain financially (other than professionally) from the company for whom an impact assessment is conducted.

3.4.2 IAP

As already mentioned the interested and affected parties (IAP's) are the most powerful force the company will have to face during a proposed new

development. IAP's can be all classifications of people and parties who stand to be affected by the company's pollution, for example individuals, groups of individuals, people who work or live in a vicinity of the company, conservationists, parastatels, local authorities and even the government itself. They must appoint their forum of adequate representatives who must be invited to all meetings. IAP's must be notified of the proposed development through all possible means for example notices, letters, banners, posters, print media, electronic media, etc. You must have proof that all possible IAP's were given notice through all possible means.

3.4.3 REPORT

All reports from consultants collectively form the final report, presented to IAP's and the relevant authority for revision and approval.

3.4.4 IMPLEMENTATION

The contents of the report are audited so that the correctness and truthfulness thereof are ensured.

CHAPTER 4

RELEVANT LEGISLATION

4.1 THE CONSTITUTION ACT 108 OF 1996 - HUMAN RIGHTS CHAPTER

"Everyone has the right –

- to an environment that is not harmful to their health or wellbeing; and

- to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

  (i) prevent pollution and ecological degradation;

  (ii) promote conservation; and

  (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

This section of the Act is enforceable against the state, companies, institutions and individuals. It must however be noted that it only includes physical conditions and not psychological or cultural environments. In conjunction with this, section 24 allows for the setting aside of any law, whether legislation or common law, upon

which private corporations might rely to protect their rights to emit harmful substances or to disclaim legal responsibility therefore.

All environmental management issues originate from this act. It is important because it protects the right of the individual, which is one of the strongest rights. Because we have a pro-individual government, the act (NAC) will more than likely be policed for the first time. Public opinion therefore stays the most important factor in any business environment. The Human Rights Chapter compels the management of the environment. If a company does not properly manage this act it could lead to the contravention of this section of the act resulting in huge civil claims especially in terms of a class action where a number of individuals can issue one civil summons against a company. It assigns a right to each individual, a right to have fresh water, clean air, noise restrictions and right to safety and health.

4.2 THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1993

The OHS Act links up to the Human Rights Act in various of its sections and it is accordingly important that the environmental manager takes note of the following sections:

Section 8 The responsibility of the employer towards the employee is fully dealt with in this section, for example the responsibility of the employer regarding the protection and safety of it's employees.

Section 9 The responsibility of the employer towards third parties e.g. people working and living in the vicinity of the company;

Section 10 The responsibility of the company as the manufacturer of certain goods can not be nullified through a contract with a purchaser, but the safety of the product remains the responsibility of the manufacturer;

Section 13 The responsibility of the employer to exactly inform and educate employee regarding:

- all the risks and possible health threats involved by accepting the job. The right not to accept the job;

- employee's right by law to take employer to court if health or quality of life is affected;

- equip employee to prevent safety/health risks;

- employee must report and document injuries, health and safety risks, etc.

Section 14 Responsibility of employee to inform supervisors regarding health or life threats and the latter's responsibility thereupon;

Section 41 This section clearly states that no right conferred upon an employee can be nullified via contract between the employer and employee. This is to protect the employee against an employer who wants to protect itself by renegotiating the health and safety aspects of the working environment of the employee.

4.3 COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT (COIDA) 1993

The act stipulates that top management stays ultimately responsible. Senior management cannot delegate their responsibility and will remain ultimately responsible for the act or omission of any employee. According to the Polluter Pays principle in the act, the company stays responsible for its actions and can even be held responsible for injuries or sickness of its former employees on the basis that the sickness or disease is a result of the employee's working conditions. There is no prescription period in this regard and former employees can file a claim against the employer at any time as long as the claim is filed within three years after the employee became aware of the sickness or disease. This act also puts a lot of emphasis on the management of the environment.

CHAPTER 5

AIR POLLUTION

5.1 THE BIGGEST CULPRIT

Due to the fact that Air Pollution is regarded as the biggest culprit in South Africa and it being one of the main problems in the Vaal Triangle, I will only deal with this aspect of pollution briefly.

Effective emission control technologies do exist. In South Africa the main reason which militates against the introduction of these technologies is cost. Economic justification for the failure to introduce effective emission control is a short-sighted and dangerous approach to take to the problem. What it enables the producer to do is to generate its products at a cost which ignores the cost to society of the free use of natural resources such as air and water. It deprives the consumer of the ability to show its disapproval of "dirty" technologies by refusing to buy environmentally "expensive" products. With matters as they are at present, the consumer has no ability to measure the environmental cost of consumer items. The problem is aggravated by the fact that the state controls and subsidises a number of enterprises which are major contributors to the country's waste stream (Ian McRae, 1989 : 18). The inescapable truth is that the solution to the problem lies not in clean up, but in control at source (Fuggle & Rabie, 1992 : 430-435). That too should be the focus of legislation.

5.2 COMMON LAW CONTROLS

The common law of nuisance could be used in the control of air pollution but for one significant practical obstacle: the identification of the polluter. Often an air pollution problem is caused by a combination of emissions which, when blended in the atmosphere, produce the offending pollutant cocktail. A plaintiff experiences insurmountable difficulties in both causation and proof of the damages sustained. Often whole communities are affected by pollution emissions and it is therefore that our constitution now allows citizens suits and class actions. In the United States of America and in Germany citizen suit clauses have been included in many statutes (for example The Toxic Substances Act of 1982 and The Endangered Species Act of 1973) and this has made a substantial contribution to the achievement of a cleaner environment (Environmental Protection Act, 1970). Similar provisions in the Human Rights Chapter of the Constitution have now enhanced South Africa's legislation. Fears that this will lead to a flood of frivolous legislation is not supported by the American experience which does not have the restraining effect of a "cost following the result principle" in litigation (Ecology Law Quarterly, 1985 : 271).

5.3 THE REDUCTION OF EMISSIONS

Despite the fact that the level of air pollution in South Africa in some areas exceeds those recommended by the World Health Organisation, there has been a marked decrease in pollution levels since 1958 (Press release of The Department of National Health and Population Development, 1990). This is attributable to the imposition of the following controls which have reduced emissions:

- The identification of and listing of "scheduled processes" (69 to date) over a wide range of industrial activities;

- Compulsory registration of such processes;

- Compulsory installation of emissions control devices;

- The imposition of a specification standard which requires pollution control equipment to meet certain design criteria;

- Control of zoning, building regulations and fuel use within specific areas;

- The setting of emission standards for the control of smoke emanating from fuel burning appliances;

- The setting of emission standards in respect of motor vehicle exhausts;

- The declaration of certain activities where air is polluted by smoke or any other product of combustion as nuisances.

This approach is technically sound as it assists in the treatment of the problem at source.

CHAPTER 6

CRIMINAL LIABILITY

There is great potential for criminal liability in the field of waste management, for the producers, transporters and the operators of disposal sites. Corporations, their directors and servants can all be held liable for contraventions of the various statutes we have discussed. Section 332(5) of the Criminal Procedure Act 51 of 1977 deems directors of corporations to be liable for offences committed by the corporation "unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporation or apart therefrom, and on conviction be personally liable to punishment therefor". The courts have interpreted the section widely to mean that a director may not accept information and advise blindly, is not excused for being ignorant of the company's affairs, that the director has an affirmative duty to safeguard and protect the company, and must not have a "supine attitude" amounting to concurrence in the unlawful conduct. It is important to note that it is the director or servant who bears the onus of showing that it should not be held liable for the offence.

As we have observed the Environment Conservation Act provides severe penalties for its transgression – a maximum of R100 000 for certain offences. For example, under the Water Act, the failure to comply with abstraction permits conditions or the pollution of a public stream can result in severe penalty or even closure. I remind you that the ECA deems the employer to be liable for the acts of its servants unless it shows that it could not have prevented the act or omission by the employee. Under the Environment Conservation Act, the unlawful disposal of waste, or the undertaking of activities declared

prohibited by the minister carry potential fines of R100 000.

Under the Occupational Safety and Health Act, it is the Chief Executive Officer of the company which is charged with the duty of ensuring that the company complies with the Act. The maximum fine for a number of lesser offences is R50 000, while those which result in the death or injury of any person, R100 000.

CHAPTER 7

ENVIRONMENTAL IMPACT ASSESSMENTS

7.1 DEFINITION

The EIA may be defined as the documentation of an environmental analysis which includes identification, interpretation, prediction, and mitigation of impacts caused by a proposed project. This document (EIA) is utilised to provide a basis for intra-agency review of project impacts and is designed to provide adequate information for judging whether an environmental impact statement should be prepared (Environmental Impact Analysis, 1977 : 18). The "Impact Statement" (EIS) is the document which flows from the analytical and evaluative process, if that process indicates that there is a potential for "significant" or "controversial" impacts. If the EIA is to serve its purpose, it must obviously be undertaken at the earliest possible stage of the development. The function of an EIA is to provide decision makers with an account of the implications of proposed courses of action before a decision is made (Environmental Impact Assessment, 1983). Decision makers are not usually involved in the assessment process as this is generally regarded as a technical exercise. In South Africa, where the process has been undertaken, the information gathering and assessment stages have been undertaken by the proponent of the development with in-house expertise or by consultants employed by and paid for by the developer. This has two fundamental weaknesses: the danger exists that the consultants will gather information and produce a report which is supportive of the development proposal; and the public perceive the consultants to have a bias in favour of the developer by whom they are paid, and

will regard with suspicion, any report generated by them no matter how independent they may be. Where the public interest is as stake, as indeed it is where there is any exploitation of natural resources, the credibility of the EIA is of paramount importance or else emotion will dominate the process of evaluation, and not the true scientific facts.

7.2 THE FUNCTION OF AN EIA

The fundamental purpose of an EIA is to ensure that the public interest is best served in any development proposal. It is not merely a planning tool to ensure that the maximum economic benefit is achieved at the least environmental cost. The imposition of such a limitation gives it too narrow a focus and ignores the non-economic values of society, which may not be quantifiable in pure economic terms, but nevertheless are significant determinants in the evaluation process. In South Africa the tendency has been to juxtapose economic benefit against environmental cost in the EIA's which have been undertaken. The conservation lobby has been branded "anti-development" and has been warned that conservation in the Third World cannot survive without the benefits and funding of economic development (Rotating the Cube, 1990 : 87). That is not the true issue. The issue is doing what is in the best public interest, all relevant factors taken into account. The EIA must establish what the public requires, and for that reason communication with the public is an essential part of the process.

CHAPTER 8

PUBLIC PARTICIPATION

8.1 IAP

Making decisions without public consultation has been likened to taxation without representation. Consultation should take place at all stages of the process, but most importantly, it should take place at the earliest opportunity. If the public is invited to participate only after the development proposal is at an advanced stage or its design has been finalised, the invitation is likely to be regarded as an afterthought, the purpose of which is to lend credibility to the claim that the proposal is in the public interest and that there has been adequate public consultation in the process. In all but a few of the major EIA's which have been undertaken in South Africa, the public has only become a part of the process after there has been public criticism of the development proposal. The developer has immediately had to deal with a hostile, un-informed public. As a result the process becomes adversarial rather than consultative. IEM by its very nature is ill equipped to deal with conflict, and more significantly, the process has been managed by natural scientists who are simply not trained to deal with adversarial situations. Much of the energy and resources which could be spent on ensuring that the EIS is complete and accurate, is spent on the one hand by the developer on public relations campaigns in order to gain favour with the public or in an attempt to justify the proposal outside of the process, and by the concerned public groups on vilifying the developer and the proposal even before the full facts have emerged.

8.2 JUDICIAL REVIEW

Although the IEM procedure provides the opportunity for appeal, it is not clear how this is to be achieved. The right to appeal will be limited decisions made in terms of the Act and not to decisions made in terms of any other Act but which have an effect upon the environment. Furthermore the appeal must be made to the minister stipulated or the Administrator. It is submitted that the role to be played by the courts in the refinement and the practical application of the process is important to the evolution of the process (The Environmental Decade in Court, 1982).

Now that the IEM has legal status judicial review will be very important. Judicial review will have to play an important interpretative role as it did in the USA and Europe especially in the regard to the terminology employed. Terms such as "significance", "irreparable harm" and "likely effects" will have to be given meanings in law which might not be identical to the context in which they are presently used.

8.3 DEFINING THE IAP's

These fall into three groups:

- parties directly affected by the proposed development;
- parties who are not directly affected but may have the public interest at heart;
- the authorities under whose jurisdiction the proposed development or activity falls.

The "interest" which a person may have in any proposed development may be wider than that given its narrow definition in law (Bamford v Minister of Community Development and Auxiliary Services, 1981 : 1054). If the full benefit of public participation is to be derived, interest should be given the widest possible meaning. Input from a diverse range of people will ensure that the public interest is best served. In South Africa there is a practical problem in obtaining the participation of "disadvantaged" communities because of lack of communication. They are not easily reached through the media except perhaps by radio, and therefore formal techniques for making contact and soliciting their opinion must be developed. Local knowledge of environmental conditions could significantly influence a decision as to which of the proposed alternatives is to be preferred, or the design of a particular project. For the developer, the most advantageous aspect of inviting early public participation is that the development is likely to be better understood, the developer's motives viewed with less suspicion and the delays of an emotional objection avoided. If the public is made part of the process they are less likely to be destructive of it (Wisconsin Law Review, 1963 : 3-46).

During the process, the public must have adequate access to information and a clear line of communication with the developer and the specialist consultants undertaking the EIA. There are practical problems in that the volume of enquiries and communications received may be considerable. This can be alleviated by ensuring that the public is kept informed through public interest groups and the media. The greatest obstacle to achieving public participation is public apathy. Initial reports and invitations to participate may be ignored until the project is under way and public concern suddenly awakened. It is no answer to argue that the public was given adequate opportunity to participate and by not responding

timeously, has lost the right to do so. The public will demand to be heard, and the development will inevitably be delayed.

Public participation assists in ensuring that the report upon which the decision is based is both accurate and complete. There will be confidence in a project when there is acceptance that informed decisions have been made. In order to achieve this there must be accountability for the information on which the decision is made and for the decision itself. An efficiently executed EIA and a complete and accurate report will serve that purpose.

CHAPTER 9

FUTURE SURVIVAL OF THE ECA

Although somewhat belated, South Africa now at least have some form of policy against which to determine the position of the scale regarding the Environment against sustainable development. We will have no choice but to make sure that it is properly enforced with bigger to ensure that it is adhered to by all. South Africa will never become a fully fledghed member of the International Trade Society unless we can refer with pride to our environmental management systems and also the enforcement thereof. The system has been put in place and the only way that we can see to its proper survival and functioning is to see to the enforcement thereof. Due to the fact that our country will still have to grow enormously in the future, the enforcement of the management model will take a great deal of discretion as it can not be nearly enforced on the same basis as it is presently enforced in first world countries. Although there is pressure from the International Trade that we comply with International standards as soon as possible, it needs to be kept in mind that they also followed a process of 15-20 years to reach a level of minimum or zero pollution. The steel manufacturing companies in Germany claim to manufacture their product with zero damage to the environment and it took them a 20 year long road to get there. We are merely in our starting blocks and the pace of enforcement will probably pick up as time passes. We should see a lot of civil litigation in terms of the ECA and relevant sections of other Acts as described herein. Due to the shift of onus it will become easier for people to file civil claims under a class action against the perpetrator companies. But I caution, we must not gloss over the very real fact that because of overpopulation and hence necessary use of technology, the virginity of untouched nature is no longer restorable - and we all ultimately have to live with an unavoidable minimum of an environmental risk.

CONCLUSION

In the relatively short span of its existence in South Africa, the IEM has developed a good reputation. It may be for this reason that the minister has promulgated numerous regulations under both sections 21 and 26 of the Act (ECA : 1989). We cannot simply use the exact models of the first world countries, because this country is significantly different in its social components and its history. The gap between having no comprehensive environmental management plan, and a sophisticated environmental policy in which EIA is mandatory, is massive. There is an urgent need to bridge this gap before more irreversible decisions, which have an adverse impact on the environment, are made. Making the IEM mandatory is the first step towards the proper policing of Environmental Management in South Africa and although somewhat belated it should still serve its purpose adequately. If the IEM is not enforced then it will simply remain as ineffective as most sections of the ECA. Although the department is understaffed, I can only express the hope that the enforcement of the IEM will be given first priority by the government in order to ensure our international acknowledgement as an environmental friendly nation.

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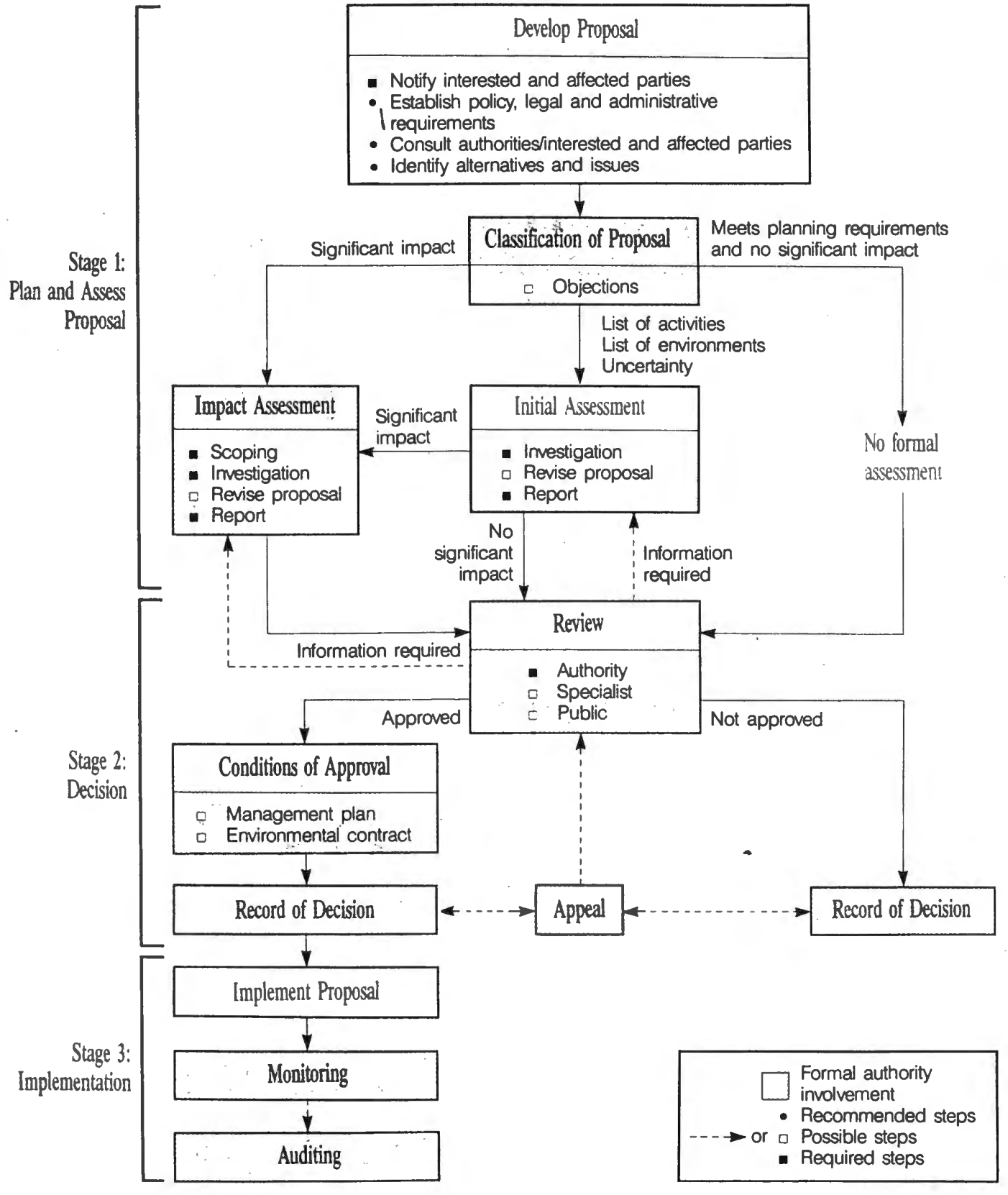
FIGURE 1: THE IEM PROCEDURE



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