

A critical analysis of the National Environmental Management Act section 24G fine calculator

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PREFACE AND ACKNOWLEDGMENTS

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ABSTRACT

The Section 24G administrative fine which provides for the ex post facto authorisation of illegal development is unique to South Africa since it is enacted into legislation. This retrospective authorisation is seldomly practised internationally except in South Africa, India, Papua New Guinea and Lesotho. In India, the instruction only comes as a directive by which is given time frames and is only applicable to certain activities. In Lesotho, it is only done for projects that have already undertaken the Environmental Impact Assessment (EIA) and such a directive will be from the government, whereas in South Africa it is applicable to all the listed or specified activities for which authorisation should have been obtained prior to the commencement of the activity. In all the countries, this has been controversial and being challenged as it is viewed that it undermines the purpose of the EIA. South Africa has a plethora of environmental management legislation, which is used to manage and conserve the environment. Over and above the legislation, environmental impact assessment (EIA) is one of the environmental assessment tools used and adopted internationally to manage the environmental impacts. It has its own challenges but still comes out to be one of the widely accepted and used tools worldwide.

In South Africa things started to change when amendments for Environmental Impact Assessment (EIA) regulations of Environment Conservation Act, no. 73 of 1989 were effected to introduce the National Environmental Management Act, No. 107 of 1998, which requires the calculator. The administrative fine is determined by using a prescribed administrative calculator. The calculator was never published, and it was criticised as the developers alleged that the competent authorities are not consistent when determining the quantum fines. In addressing such criticism, the Minister of Environmental Affairs publicised the calculator in July 2017 to enable the stakeholders to make meaningful inputs in determining the administrative fines. Drawing from this, the study aims at critically analysing the NEMA S24G administrative fine calculator. To achieve the study's aim, the study evaluated the use of S24G calculator, assessed challenges experienced using the fine calculator, and finally investigated ways that can be used to improve the fine calculator.

The study adopted the qualitative research approach embedded within the interpretivism research tradition. Competent Authorities (CAs) and Environmental Assessment Practitioners (EAPs) formed the basis of the population of the study and its sample thereof. Data was gathered using questionnaire from both CAs and EAPs, and the gathered data was analysed using thematic data analysis. This enabled the researcher to develop codes and to classify the findings. The findings of this study revealed that the competent authorities (CA) and the EAPs have adequate knowledge of EIA regulations and the application of fine calculator in Section 24G. The results

further revealed that the application of a calculator is perceived to be an appropriate instrument in environmental management tools.

It was recommended that there be a room to improve the calculator and expand some of the indexes, such as the pollution index, to take into consideration the cumulative impacts. Another noble suggestion was that the fine must take into consideration the profit made with the illegal activities and that be factored into the calculator. It was also recommended that a National Environmental Trust Fund (NETF) be considered as it would help realizing 'the polluter pays' principles and rehabilitation of impacted areas as contemplated in section 28 on NEMA. Finally, the weighting of the calculator should be investigated further to comprehend the weighting and the description of the variables.

Key words: *Section 24G, ex post facto, administrative fines, authorisation, the calculator, EIA, NEMA and illegal developments.*

ABBREVIATIONS AND ACRONYMS

CEA	Cumulative Effect Assessment
CEA	Central Environmental Authority
CER	Centre of Environmental Rights
DEADP	Department of Environmental Affairs and Development and Planning
DEA	Department of Environmental Affairs (now DEFF)
DEDTEA	Department of Economic Development, Tourism and Environmental Affairs
EA	Environmental Authorisation
EAP	Environmental Assessment Practitioner
EC	Environmental Clearance
ECA	Environment Conservation Act
EEF	Ecological and Environmental Footprinting
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
IAIA	International Association for Impact Assessment
IEM	Integrated Environmental Management
LCA	Life Cycle Assessment
NECER	National Environmental Compliance and Enforcement Report
NEMA	National Environmental Management Act
NEMA	National Environmental Management Act
NEMAQA	National Environmental Management Air Quality Act
NEMWA	National Environmental Management Waste Act
NEPA	National Environmental Policy Act
PAJA	Promotion of Administrative Justice Act
RA	Risk Assessment
S&EIR	Scoping and Environmental Impact Report
S24G	Section S24G of the National Environmental Management Act
SA	South Africa
SEA	Strategic Environmental Assessment
SEMA	Specific Environmental Management Act
UNEP	United Nations Environment Programme
USA	United States of America
ZAC	Zululand Anthracite Colliery

KEY DEFINITIONS

Key definition and terms are explained in a manner that they are applied in the study.

ASPECT	DEFINITIONS
EIA	“The process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made” (IAIA, 1999) “A tool used to identify the environmental, social and economic impacts of a project prior to decision-making” (UNEP, 2015:5). “Investigations carried out to determine the impacts on the environment of major projects are referred to as Environmental Impact Assessment. EIA is a planning and management tool for sustainable development, aimed at providing decision makers with information on the likely consequences of their actions” (Sandham <i>et al.</i> 2005:49). “EIA assists the government to keep track of development activities that have the potential to cause significant adverse impacts on the environment, and to ensure that adequate mitigating measures are integrated into planning of the project” (Murumbo, 2008:108). “For those of us who consider that impact assessment is an essential tool (and often the only tool) for the purpose of ensuring that environmental and broader sustainability concerns are given consideration in decision-making” (Pope <i>et al.</i>, 2013:1). “EIA means a systematic process of identifying, assessing and reporting environmental impacts associated with an activity and include basic assessment and S&EIR” (DEA,2014:6).
IEM	“IEM provides an holistic framework that can be used by all sectors of the society for the assessment and management of environmental management impacts and aspects associated with each stage of the activity life cycle, taking into consideration a broad definition of environment and with the overall aim of promoting the sustainable development” (DEA 2004:02).

Fine calculator	“It means the fine calculator approved by the Minister which incorporates the factors listed in regulation 4 and it includes the formula for the determination of an appropriate fine” (DEA, 2017).
<i>Ex post facto</i>	“It is generally understood as a law that retrospectively converts an act of ignorance when at performance to act of crime thereby resulting in punishment for the crimes committed. “ (DEA, 2017).
Unlawful activities	“Unlawful activities refer to those listed or identified activities performed without the consent of legal authority. In other words, it is the commencement of listed activities without approaching law and order.” (DEA, 2017).
Administrative fine	“Administrative fine is the fine imposed by the NEMA for not adhering to the provisions listed in S24G with regard to the commencement of the activities listed under S24G NEMA. It is an action taken by court against those who are proven criminals before law. It is not a punitive measure in the conventional sense, but merely serves to trigger the authority’s consideration of the application for rectification.” (Fourie, 2009: 15).
Non-compliance	“Non-compliance is the condition of lacking relevant authorization required under a law to perform an operation or take up an ownership.” (Fourie 2009: 15).

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CHAPTER 1: INTRODUCTION

This chapter focuses on the orientation of the study. It outlines the general orientation of the study, the background of the research, as well as problem of the study. The chapter also unveils the aim and objectives of the study, the research questions, the significance of the study, including the demarcation, and scope of the study. This study stems from the National Environmental Management Act section 24G fine calculator. South African citizens have right to a protected environment and live in an environment, that promotes health and safety to human wellbeing as stated in the Chapter 2, Bill of Rights of the Constitution of the Republic of South Africa (DEA, 2005). The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) places people at the focal point of environmental management (DEA, 2014b:65).

According to the National Framework for Sustainable Development (2008:15), South Africa (SA) is considered to be one of the countries with progressive environmental legal agendas embedded within the environmental right to “*ecologically sustainable development*”. There are a number of tools listed in the environmental framework legislation, namely National Environmental Management Act, No. 107 of 1998 (NEMA) where EIA is one of such listed tools. Currently, EIA is playing a vital role in realising sustainability as outlined in section 2 of the NEMA. The emergence of EIA in SA began early in the 1970’s as a public policy tool and as a result of environmental concerns. Legal legislation of EIA was adopted under the Environment Conservation Act, No. 73 of 1989 (ECA) as the act only provided for selected aspects of environmental conservation and did not give effect to Section 24 of the Constitution, hence there was need for the new regulations to cover those aspects.

Environmental Impact Assessment (EIA) is one of the planning tools of integrated environmental management (IEM) that identifies the potential effects on the environment resulting from a development or project and suggests possible ways in which the impacts can be minimised and remedied. Apart from the EIA some other IEM tools often used to aid in environmental management, are Environmental Management Plan (EMP), Strategic Environmental Assessment (SEA), Risk Assessment (RA), Ecological and Environmental Footprinting (EEF), Cumulative Effect Assessment (CEA), Life Cycle Assessment (LCA) and so forth (Department of Environmental Affairs and Tourism, 2004: 11-14). The underlying philosophy and principles of EIA is formed on a rationalist approach to decision making. This necessitates a technical evaluation to be made for the objective decision making and hence it has been commonly recognised and practiced for this. This is also partly due to its staunch legislative basis. This tool started in the United States of America (USA) in 1969 guided by the National Environmental Policy Act (NEPA) (Sandham *et al*, 2005:40). Since then, EIA has been adopted in many other parts of the world and it has spread to more than 100 countries (Wood, 2003:303).

Before deliberating the topic of EIA in context of SA, it is also important to cover the debate regarding the *ex post facto* authorisation of EIA in different parts of the world. “*Ex post facto* law” as in the Constitution, is legal terminology which is meant to refer to retroactive criminal laws (Mikhail, 2019:80). The EIA process requires that before a listed or specified activity can commence, an authorisation issued by the competent authority must be obtained. Listed activity/activities are identified by the Minister in terms of section 24 and 24D of NEMA as having a detrimental effect on the environment, which may not be commenced without prior written authorisation received from the competent authority. Despite legislative requirement outlined above, proponents are still developing some of the listed or specified activities without prior approval. Therefore, the provision of section 24G made illegal activities to become legal by applying for an *ex post facto* authorisation and paying an administrative fine (September 2012:16).

1.1 Evolution of the EIA regulations in SA

The main purpose of the EIA regulations is to ensure that decision makers take environmental factors into consideration before commencing with a project. In other words, EIA regulations assure to identify, predict, and evaluate the impact of a development on the environment, which in turn assist the applicant to manage potential significant impacts. To be able to understand the S24G, one needs to have a clear background of the evolution of the EIA regulations in South Africa. For the purpose of this study, only the major amendments that have taken place will be highlighted. The first EIA regulations were published in 1997, as EIA Regulations promulgated in terms of the ECA, Act No. 73 of 1989. In September 1997, EIA regulations were published in terms of Sections 21 and 26 of the ECA. This was introduced to formalise or make EIA a legal requirement in SA. It lacked clear time frames as enunciated in the Promotion of Administrative Justice Act (PAJA), Act 3 of 2000 and roles were not clearly defined. There was very limited enforcement and NEMA S24G had not existed then. The ECA Listings and Regulations were repealed in 2006 thereby prompting for new set of NEMA EIA activities.

Then NEMA EIA regulations (GNR 385, 386 and 387 Government Gazette No 28753) were promulgated in 2006 and came into effect from 03 July 2006. Some activities were poorly written, which were subjected to a wide interpretation of activities resulting in inconsistent implementation (Scheepers, 2019). A threshold per activity was introduced resulting in introduction of the two types of processes to be followed i.e. Basic Assessment (BA) for projects with minimal impacts and Scoping and Environmental Impact Report (EIR) for projects with potential to have significant impacts on the environments (Kidd and Retief, 2009: 984). The roles were clearly assigned and time frames were allocated to some processes. Coverage extended by including mining activities and provision for compliance monitoring and enforcement was introduced. The regulation was implemented up until 01 August 2010 when amendment was approved (DEA, 2010).

Then amended NEMA EIA regulations (GNR 543, 544, 545 and 546. Government Gazette No 33306) came into effect on 02 August 2010 after 2006 regulations have been repealed. This regulation also introduced the third listing notice which is based on the geographical/sensitive areas. This regulation was implemented up to 07 December 2014 when the 2010 regulations were repealed (DEA, 2014). Then regulations (GNR 982, 983, 984 and 985. Government Gazette No. 38282) came into effect on 8 December 2014. This regulation introduced the one environmental system approach which required significant amendments to NEMA and EIA Regulations. In terms of the system, all the mining related listed or specified activities are subjected to the NEMA EIA process for which the DME is the competent authority.

The rectification provision (section 24G) was introduced to enable the non-compliant developers to comply with the ECA EIA regulations. The provision was meant to be a transitional arrangement of six months only. However, the provision has since been expanded and enacted into NEMA to aid/ deal with illegal developments. The application process for this particular provision (which is not outlined) is different from the normal EIA process as an administrative fine must be paid before the competent authority decides whether or not to authorise the activity.

The administrative fine is determined by using a prescribed administrative calculator. The calculator was never published and it was criticised as the developers alleged that the competent authorities are not consistent when determining the quantum fines. In addressing such criticism, the Minister of Environmental Affairs publicised the calculator in July 2017 to enable the stakeholders to make meaningful inputs in determining the administrative fines.

1.2 Problem statement and substantiation

The introduction of *ex post facto* authorisation in NEMA in SA came into effect in January 2005 as a transitional provision to last for six months (from 7 January 2005 to 7 July 2005) and has since been expanded to deal with illegal commencement of activities listed or specified in terms the EIA regulations, National Environmental Management Waste Act, 59 of 2008 (NEMWA) as well as National Environmental Management Air Quality Act, 39 of 2004 (NEMAQA), the listed activities.

Currently, applications submitted in terms of NEMA S24G are subjected to an administrative fine not exceeding R5 million as contemplated in NEMA S24G (4). The competent authorities use a fine calculator to determine the quantum fine. September (2012:50) identified the administrative fine amounts and the lack of transparency of the fine calculator as the main challenge in implementing the S24G provision. Those were not the only challenges, as the Centre for

Environmental Rights (2011) raised concerns over the relationship between the numbers of fines issued as well as the environmental impacts that have already occurred as a result of the unlawful activities.

As mentioned in the introduction above, there are cases where an activity that requires an EIA to be conducted before the commencement, unlawfully operates without environmental authorisation from the competent authority in terms of NEMA and the SEMAs. In this case, an *ex post facto* authorisation provided in S24G of NEMA is issued. The fines are determined using fine calculators, which in some instances are challenged and appealed as form part of administrative action.

The administrative fine calculator has its advantages and disadvantages. Thus, it is important to conduct research that looks into analysing the calculator used to determine the administrative fines in S24G.

1.3 Research aim and objectives

1.3.1 Aim

The aim of the study is to critically analyse the NEMA S24G administrative fine calculator.

The objectives which will expedite the realisation of the aim of the study, are reflected below:

1.3.2 Research objectives

1. To evaluate the use of S24G calculator,
2. To assess challenges experienced using the fine calculator, and
3. To identify ways that can be used to improve fine calculator.

1.3.3 Scope and focus of the study

The evaluation of the three research questions is based on the perceptions of a sample of competent authority (CA) officials and environmental assessment practitioners (EAPs). The researcher has evaluated the use, challenges and ways to improve the calculator based on perceptions by participants. No further evaluations of effectiveness and efficiency were done based on any other evaluation criteria. The study was conducted between January 2017 and December 2019 however, it focused on S24G fines calculated over the period March 2005 to December 2019. The study focused on how the S24G calculator was used, whereby all four aspects of the calculator were studied. This considered the S24G from inception and its amendments to date. The results and findings of the study were determined using the perceptions of the CA and the EAPs on the S24G fine calculator.

1.4 Outline of the study

The study of the calculator needs to be understood in the context of environmental management with specific aspects, being impact assessments. **Chapter 1** presents the background of the EIA, the problem statement, the objective of the study, as well as the research questions. The chapter is concluded by outlining the structure of the study.

Chapter 2 outlines the philosophical foundations of the study, this includes the approach, design and methodology. Concept pertaining to population, sampling, data collection and analysis are detailed.

Chapter 3 presents the review of books, journals, articles, theses, and dissertations, with the intention of evaluating the research problem, at hand. The chapter details the conceptualisation of *ex post facto*, S24G and EIAs. An overview of the international examples regarding *ex post facto* authorisations, the legal mandate for S24G applications and the administrative fines in SA, and the S24G regulations. Further, the chapter details an overview of the S24G application process, the fine calculator, challenges of S24G and case laws of administrative fines. The chapter concludes by reviewing other administrative laws in SA.

Chapter 4 presents the gathered data, analysis and interpretation. It is in this chapter wherein results are discussed. Results are analysed to understand the application of the fine calculator, the challenges experienced in using the fine calculator and identifying the ways in which the calculator can be improved.

Chapter 5 outlines the recommendations for further studies and draw the conclusions of this study.

1.5 Conclusion

This chapter has set the scene by introducing the topic and outlining the chapters of this study. It gives a brief introspection into the EIA process in different parts of the world and also delineates *ex post facto* authorisation of EIA and the international scope regarding it. The chapter also outlines the study's aims, objectives and research questions to be explored. Overall, the chapter has clearly identified the gaps, which this study seeks to fill. The next chapter will proceed to discuss the philosophical foundations, namely, the research approach, the design and the methodology, employed to carry out the study.

CHAPTER 2: METHODOLOGY

2.1 Introduction

Research methodology is a collective term for the structured process of conducting research. The term is usually considered to include research design, data gathering and data analysis. Research methodology seeks to inform on why a study has been undertaken, how the research problem has been defined, in what way and why the hypothesis has been formulated (Onwuegbuzie and Leech, 2005). Research methodology also involves data that have been collected and particular method that has been adopted, and a host of similar other questions usually answered. Traditionally, research methodologies are broadly classified into qualitative and quantitative, thereby creating a huge division amongst researchers, especially in social sciences (Onwuegbuzie and Leech, 2005). Research methodologies can be quantitative (for example, measuring the number of times someone does something under certain conditions) or qualitative (for example, asking people how they feel about a certain situation).

2.2 Study approach and design

Denzin & Lincoln (2011) define the research design as the type of inquiry within the qualitative, quantitative and mixed methods approaches that provide specific direction for procedures in a research. The study will be based on a qualitative approach, which is embedded within the interpretivism paradigm or approach. *“Interpretivism is defined as an approach which is implemented by the researcher in order to synthesize facts which are derived mainly from secondary sources, and which are qualitative in nature”* (Willis, 2007:189). In line with the interpretivism paradigm, the methodology of the study ought to be qualitative. This is because the researcher sought for deep comprehension of the data as opposed to quantity.

2.3 Research Methods

An extensive literature review on the international debates on *ex post facto*, current use and challenges of NEMA section 24G was conducted to understand the problem. This implies that literature review was used as one of the data collection technique. To get an expert view, two questionnaires were developed and distributed. Twenty (20) EAPs were selected randomly from Limpopo Department of Economic Development, Environment and Tourism database. The selected EAPs all had a junior degree and only one had a post graduate degree. All the participants had more than five (5) years of relevant working experience.

Using more than one method to collect data, positioned the study in a triangulation spectrum in terms of data collection (Altrichter *et. al* 2008:147). Since this study was aimed at finding an understanding of the administrative fine calculator between the users (CAs) and the EAPs (the

applicants) triangulation was suitable. Questionnaires are a reliable and quick method of data collection to effectively and timeously collect data from a number of participants. Bell (2005: 114) indicates that a general disadvantage of the questionnaires is their fixed and strict format, which might eliminate the possibility for more in-depth or abstract observation. All the questionnaires were self-administered by the researcher, which implies that the questionnaires were developed by the researcher to enable the respondents to complete it without interference of the researcher. One questionnaire was distributed to the twenty (20) CAs administering section 24G applications, and the other one to the twenty (20) randomly selected EAPs who manage the EIA applications on behalf of the developers or applicants. In total forty (40) participants were selected for this study. The CAs dealing with the section 24G applications are one national Department of Environmental Affairs and the nine provincial departments responsible for the Environmental Affairs of their provinces. Due to ethical considerations their names will not be disclosed in this study.

2.3.1 Data collection methods

Research data is considered as a critical part of the research study. As per the relevancy of data collected by the researcher, the overall research methods will be selected. The main purpose of research methodology is the data collected from the different sources. The techniques of data collection are broadly classified into two main sections, which are primary and secondary (Maxwell 2012: 100). Both collection of primary and secondary data is important for meeting the research aim and these are explained below.

2.3.1.1 Primary data collection technique

This is touted as a major form of data collection technique wherein the large amount of data for analysis is obtained under this data collection technique. The primary data is usually collected when the researcher follows an experimental or descriptive research design. The source of gathering primary data is by engaging into direct communications or surveys with relevant correspondence or respondents. Here, the primary data is used for experimentation purposes wherein observations are made. The researcher may conduct online surveys or face-to-face interview processes to collect quantitative and qualitative data respectively (Neuman, 2012:166). The primary data collection techniques are divided into qualitative and quantitative research methods. The researcher collects raw data under this technique which is later analysed to confirm the research's aim of the study (Miller *et al.*, 2012: 157).

Qualitative data is also termed as a subjective research method. This method results in some new theories (Jackson, 2015:86). Primary qualitative data is defined as social phenomena to explain the viewpoint of the respondents. This method involves explanation, description, and

interpretation of data that helps in discovery of new theories. The qualitative primary data can be gathered through case studies, grounded theories or content analysis. Richardson (2000:283) stated that qualitative primary data result in successful exploration of investigation the most reliable and relevant data as per the selected subject matter.

2.3.1.2 Selected technique

In this study, the researcher selected a mixed data collection approach. The primary data was gathered through unstructured questionnaires, it was received from the EAPs and the CA, who make use of administrative fine calculators. The questionnaires were distributed to understand the viewpoint in response to the fine calculator. The outcome from the questionnaires surveys were considered the primary data set of this study.

2.4. Questionnaires

A questionnaire is a data accumulation instrument consisting of a progression of questions and other prompts for the aim of collecting information from respondents (Burns & Grove, 2009). A structured self-administrated questionnaire was used to collect data and it consisted of open and closed ended questions. The researcher developed the two questionnaires guided by the study objectives and literature reviewed. The first part was the demographic questions, relating to the highest level of education, job title as well as experience. The second part was about the knowledge of the environmental management tools. Whilst, the third part was questions addressing the main objectives of this study (see Annexure A1 and A2). The first objective was addressed by question 3 of both questionnaires, whilst the second objective was addressed by question 4 of both questionnaires and the third objective was addressed by question 5 of both questionnaires.

According to Kumar (2014:138), a questionnaire is a written list of questions, the answer to which is recorded by respondents. In this study, the researcher designed two different questionnaires for the two groups of participants. The two sets of questionnaires were designed separately for the EAPs and CAs because they are different organisations, whereby the EAPs do not really work with the administrative fine calculator whereas the CAs do. This was done in order to gather valuable information from the different groups. The questionnaires were distributed to the two groups via e-mails as it is the quicker, more effective and less costly mode of communication.

Most of the participants were contacted directly and the forms were also distributed to them directly. The distribution and completion of the questionnaire was done in the course of months as other participants took longer to respond even after numerous follow up calls and e-mails. To

encourage the respondents to participate truthfully and without hesitation, questionnaires were completed anonymously, and the information was treated confidentially (de Vos *et al.*, 2005:166).

2.5. Data processing and analysis

The collected data were processed and analysed. The method used to process and analyse are outlined below.

2.5.1 Thematic Data Analysis

Creswell and Plano Clark (2011:39) argue that data analysis in qualitative research is the process of interpreting collected data using a textual or thematic analysis method. Thematic analysis is one of the methods used to interpret the data from the questionnaires. The designs of the questions were mostly open-ended questions. Leeson *et al* (2019:2) indicates that there are applications like NLP (Natural Language Processing), word embedding and text analytics that can be used to decipher various themes from the answers received from the respondents. There is an upper hand of using software based thematic analysis because it saves time and increases the accuracy, quantifies customer feedback, it makes the data driven decisions better and can help track results faster (Leeson *et al* 2019:2). In a similar way, thematic analysis can be done manually as well. Sometimes, the researcher uses tables and charts to present the results from the questionnaire, especially if the thematic analysis is done manually which was the case in this study.

2.6. Problems and limitations

The researcher came across problems and challenges during the course of study. Getting people to respond to the questionnaires was the biggest challenge. Not enough questionnaires were answered by the EAPs although a questionnaire distributed to the twenty (20) EAPs. With this type of methodology selected, it must be highlighted that there were a number of limitations that can be outlined. As the sample size chosen for the dissertation is smaller, the outcome from this, although precise, the findings may not be applicable to a bigger scale. The use of smaller data size for this dissertation was because it does not follow statistical tests which normally require a larger dataset to give a representative distribution of the population.

The outcome from the thematic analysis helps in the understanding of new concepts and theories and not so much in giving a generalised view of the topic. The second one is the use of the interpretivist approach, which was guided by the nature and objectives of the research. As such the results of this study may be biased in the sense that only the analytical and judgmental skills of the researcher were used and no empirical evidence was used. Bias usually has a negative connotation in research, although one has to have a positive bias as well, especially if the bias

reflects the reliance on research. The third limitation was time constraints, as the questionnaires handed over to the respondents were either not available on time nor the respondents did not revert back. This increased the overall time of the study. However, the following limitations gave a future scope of the research wherein the researchers can base this study on statistical analyses rather than qualitative analysis methods. They can incorporate large dataset and give a generalised view through their analysis. The questionnaire prepared in that case, will be structured and close-ended.

The participants were approached directly through their e-mails and the questionnaires were distributed via the e-mail and returned likewise. This took longer than anticipated and some of the participants' responses were followed up via e-mails and telephone calls. Hence, a time constraint can be attributed as the major limitation of this method.

2.7 Ethical Consideration

Ethical issues were taken into consideration in this study. All the participants were informed about the purpose of the study. Their identity and the names of their institutions were not included on the questionnaire to maintain confidentiality. The information collected was used only for this study and it was kept confidential. The current dissertation is also approved by the North West University committee and the researcher received ethical clearance from the ethics committee.

2.8 Conclusion

This chapter provided the overall research plan in detail. Thus, the nature of the study and the study population have been established. The data collection and analysis instruments employed in this study were also identified, and their justifications were appraised. Subjects involved in this study were clearly specified. Finally, the data presentation and processing procedures, as well as the ethical considerations were dealt with. The next chapter provides a detailed scholarship pertaining to the research problem that the study seeks to address.

CHAPTER 3: LITERATURE REVIEW

3.1 Introduction

In this chapter, an overview of scholarly debates and literature on what environmental impact assessment entails is detailed. Environmental Impact Assessment (EIA) is a global environmental management tool adopted by many countries including SA to aid in decision making for developments with the potential to cause significant environmental harm (Morgan, 2012:6). NEMA and its SEMAs as well as other related environmental legislation, are the enabling legislation for section 24 of the Constitution to protect our environment. S24G provision has been widely criticized for being rigid, long, and expensive with respect to the quality of reports (Retief and Chabalala, 2009, Sandham *et al.* 2010). September (2012:12) also indicates that the EIA has been criticised and blamed for hindering the projects and economic growth in the country.

As explained previously, NEMA introduced S24G when the act was amended in 2004 and it states that “*on application by a person who—*

(a) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F (1);

(b) has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008),

the Minister, Minister responsible for mineral resources or MEC concerned, as the case may be, may direct the applicant to—

(i) immediately cease the activity pending a decision on the application submitted in terms of this subsection;

(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;

(vi) eliminate any source of pollution or degradation;

(vii) compile a report containing—

(aa) a description of the need and desirability of the activity;

(bb) 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;

(cc) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(dd) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed;

(ee) an environmental management programme; or

(viii) provide such other information, or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary”.

The amendments were effective from 7 January 2005. These provisions were introduced in legislation as an amnesty to deal with illegal activities in terms of ECA, which was given only six months. It provided for the rectification of unlawful EIA listed or specified activities, which commenced without an environmental authorization. At the time, the administration fine for commencing with a listed or specified activity without an authorization was up to R1 million. Upon paying the fine, the competent authority (CA) considers application, and then takes a decision to grant or refuse application (DEA, 2005:3). If found engaging in a listed or specified activity/activities, the CA will then take either administrative enforcement or criminal enforcement or both against the perpetrator as it is a criminal offence to commence with a listed or specified activity without an environmental authorization in terms of section 24F read with section 49A (1) (a) of the NEMA which states that “a *person is guilty of an offence if that person—*
(a) *commences with an activity in contravention of section 24F (1)*”.

Alongside this provision, a calculator was developed to assist the CA to determine the fines to be paid by the applicants for consideration of their applications. The regulations were gazette in 2017 to deal with the developers who previously abused these provisions as it provided for a clear process to be followed and criteria to be considered when determining the fines (DEA, 2017). This came due to some developers who would commence with the listed or specified activity/activities and apply for *ex post facto* after the development has been finalized. Some developers weighed the financial gain against the alleged lengthy EIA process and included maximum amounts in their budget (Paschke and Glazewski, 2006:26). Such developers will be dealt with in terms of the S24G regulation 9(1), as it provides that the committee must recommend a maximum fine to the CA where trends to prove abuse of S24G will be proven.

It is generally stated that S24G deals with the decision-making process that will exert tremendous impact on the environment. Du Toit (2016:33) indicates this section was amended to form part of legislation in order to ensure that the effect of all the development activities does not harm the environment and at the same time ensure to provide equal opportunity to the common public

through public participation, making decisions that might affect the sustainable environment. Developers who commence their activities without environmental authorization are considered to have committed a criminal offence, therefore all the developers should report to the CA to deal with the unauthorized development that affects the environment and its sustainability.

Since the introduction of S24G in NEMA, numerous challenges had emerged, particularly in an abusive manner. September (2012:2) states that *“it appears S24G provisions have been abused in an attempt to circumvent the prescribed EIA process and may have thereby effectively provided an escape route for criminals, thus suggesting that blatant disregard of the law and the environment may be tolerated, and environmentally reckless behaviour reminiscent of the ‘bad old days’ condoned”*. In other words, it is considered that S24G provisions evade the EIA process and provide an opportunity for the criminals to escape from their responsibilities. Some of the reasons advanced by the developers in commencing with the listed or specified activities illegally was to respond to emergency situations where formal EIA process cannot be undertaken to respond to such incidents (Selamolela, 2019). At the meantime, section 30A of NEMA provides that *“the competent authority may on its own initiative or on written or oral request from a person, direct a person verbally or in writing to carry out a listed or specified activity, without obtaining an environmental authorisation contemplated in section 24(2)(a) or (b), in order to prevent or contain an emergency situation or to prevent, contain or mitigate the effects of the emergency situation”*. This is done through issuing a directive by the CA for such an activity or specified activities. It is only when such an activity is triggered by emergency situations where it can be authorized without undertaking an EIA process. This was brought by an indication that some applications of the S24G are resulting from responding to emergency situations, which can only be controlled by undertaking a listed or specified activity (du Toit, 2016:95). Government responded by amending the legislation to make provision for such sudden occurrences. The provision came into effect on 18 December 2014. For these reasons, the provision was extended through NEMA amendments and the S24G regulations which were also published in 2017.

3.2 The international examples of *ex post facto* authorisations

Ex post facto is implemented in some countries such as India, Papua New Guinea and Lesotho which will be briefly outlined below.

3.2.1 *Ex post facto* in India

Kalita (2016:52) presents that the EIA development plan in India commenced in 1977-78 and it was when the Department of Science and Technology accepted the environmental appraisal of river valley projects. The projects where EIA is mandatory require approval from the Central government and is currently applicable to thirty (30) industries. India is one of the first countries

in South-East Asia to formulate the EIA (Turaga, 2016: 1). In India, the Director of the Union Ministry of Environment and Forests issued an official memorandum allowing developments which have made significant construction progress to be granted environmental clearance by an expert committee despite not having obtained necessary approvals prior to development (Press Trust of India, 2013). Furthermore, the Press Trust of India highlighted that those developments were required to obtain an environmental clearance as required by the EIA Notification of 2006. *Ex post facto* authorisation is not common internationally, but it is practised in some countries like India and South Africa. In 2013, the Environment Ministry issued another official memorandum which outlined the process of obtaining the *ex post facto* environmental clearance. In March 2017, the Environmental Ministry passed a notification which proclaimed that any project without a proper environmental clearance (EC) can turn into legal units by submitting a remedial plan and also by paying a heavy penalty.

The *ex post facto* provision has been controversial in India to such an extent that the National Green Tribunal (NGT) in July 2015 repealed the retrospective provisions. Scroll (2015) reports that the basis for repealing those provisions were that “*the ex post facto environmental clearance mechanism would come in handy to unduly favour the violators and dilute the deterrence effect of environmental rules*”. The affected developers who developed without EC approached the Supreme Court for relief without success. Again, the two memoranda were viewed as contravening the Environmental Protection Act, 1986 by the National Green Tribunal (NGT). National Green Tribunal (2015) argued that the office memoranda are nothing but administrative instruments, which must be used to clarify issues and simplifying administration. Therefore the main concern was that the official memoranda are used to amend the law, which is not procedural. Scroll (2015:11) reports that “they had amended the law in view of weakening its original intent to protect the environment and had put in place a mechanism to violations and regularisation”.

As recently as in March 2020, India proposed amendments to the EIA legislation where the *ex post facto* would have been included in the legislation. The *ex post facto* comes under clause 22 of the Draft Environmental Impact Assessment Notification 2020. Clause 22(2) state that: “*The cases of violation will be appraised by Appraisal Committee with a view to assess that the project has been constructed or carried (out) at a site, which under prevailing laws is permissible or expansion has been done which can be run sustainably under compliance of environmental norms with adequate environmental safeguards; In case finding of the Appraisal Committee is negative, closure of the project shall be recommended along with other actions under the law including directions for remediation. Also refer Appendix-XV of this notification*” The amendments are said to be diluting the EIA legislation thereby contravening the international negotiations and agreements (Chakravarty, 2020). Chakravarty (2020) further indicates that such dilutions in the

EIA regime might lead to international implications at a later stage. As per the Union Environment Minister of India, the draft notification is still pending to be finalised and it may take more time as public consultation is still underway (Times of India, 2020).

3.2.2 *Ex post facto* in Papua New Guinea

Another country where *ex post facto* is implemented, is Papua New Guinea. The amendments made provision for the retrospective authorisation providing the government with the power to authorise certain activities associated with developments, including *ex post facto* authorisation. The basis was that those developments are given an opportunity to become compliant with the environmental laws. Cole (2010:43) argues that in Papua New Guinea, amending environmental laws are highly controversial and sometimes influenced by the political pressures. Du Toit (2016:41) indicates that third parties are precluded from legally challenging pollution permits granted by the government after Papua New Guinea amended its Environment Act in 2010 to encourage resource projects.

3.2.3 *Ex post facto* in Lesotho

EIA is provided for in the part V of the Environment Act 2008. Lesotho is one of the few countries that provided for *ex post facto* authorisation in the legislation. Section 26(1) of the Act provides that *“the Director may, after the issue of an environmental impact assessment licence, direct the holder of the licence to submit fresh environmental impact statement where-*

- (a) there is a substantial change or modification in the project or in the manner in which a project is being conducted; or*
- (b) the project poses environmental threat, which could not be reasonably foreseen at the time of the first study”.*

This provision suggests that it is only applicable to projects that are already authorised and not projects that commenced illegally without being issued with the environmental impact assessment licence. An important thing to also note from this provision is that a developer will only be able to conduct the new EIA upon receiving a directive from the Director. Ndlovu (2005:58) indicates that the act does not provide for a separate procedure for the *ex post facto* application. The *ex facto* EIA is treated like a new one without considering the first EIA conducted for the project. This is different from SA and India, where *ex post facto* is provided for developments that commenced without acquiring the authorisation.

Another interesting aspect to note from Lesotho is that, developers who commenced illegally may apply for pollution licence in terms of section 44(1) of the Environment Act 2008. It states that *“no person shall carry out a project or activity, which is likely to pollute the environment in excess of any standards or guidelines issued under this act, unless he is in possession of pollution licence”.*

This section goes further to indicate that one is only able to apply for pollution licence within 12 months of coming into effect of the act and the issued licence will be valid for one year from the date of issue. Section 44(8)(f) of the Act provides that *“the director may, before issuing a pollution licence where it appears necessary to conduct environmental impact assessment study, require the applicant to conduct an environmental impact assessment study in respect to that project or activity”*. This gave an opportunity to developers who commenced with their project without conducting the required EIA, to apply. Although the pollution licence will be valid for only one year, the developer who is directed to conduct an EIA might obtain an *ex post facto* authorisation through this process. The act does not indicate whether the EIA authorisation issued through this process will also be valid for one year or it will be treated like the EIA authorisation in terms of section 26(1). Such applications are subjected to a fee to be charged which is determined in accordance with the polluter pays principle as per section 44(9) of the Act. In all the three countries mentioned above, it is not clear whether a fine calculator is used to determine the fines or not.

3.3 The legal mandate for S24G applications and the administrative fines in SA

In terms of Section 24 of the Constitution (1996) states that *“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 the present and future generations, through reasonable legislative and other measures that-*

- *prevent pollution and ecological degradation,*
- *promote conservation, and*
- *Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”*.

NEMA and its SEMAs as well as other related environmental legislation are the enabling legislation for section 24 of the Constitution. SA has progressed in relations to environmental management with specific focus to the EIA. NEMA acts as a crucial law to provide cooperative governance with the environment and it regulates the EIA in SA through regulations. Section 24 of NEMA identifies activities that require the EA prior commencement.

The same Act makes provision for illegally commenced activities to be continued through S24G. According to September (2012:4) S24G *“aims at restoring the compliance and as such is an integral part of the SA environmental compliance and enforcement.”* These unlawful activities affect the environment and hence the government came up with provisions to address them. Moreover, SA recognises that to achieve desired environmental outcomes, all the business entities, stakeholders, communities and others should support the environmental laws (Maake 2018). Therefore, this provision is perceived to be assisting the applicants to comply with the

required legislation. This is a unique provision globally in the environmental sector as explained previously.

S24G does not provide all solutions for the illegal developments, this provision comes with its own advantages and disadvantages. If the matter is taken to court, upon finalizing the matter, the court might fine the developer with a certain amount and the environment will continue to suffer the impacts of this activity or activities. In respect of the non-compliance relating to activities conducted on site, Section 49A (1) of NEMA as amended applies, therefore, should one fail to comply with the compliance notice that the CA issued, you will have committed the following offences:

Section 49A (1) states that: *“A person is guilty of an offence if that person –*

(a) commences with an activity in contravention of section 24F(1);

(k) fails to comply with or contravenes a compliance notice issued in terms of section 31L”.

Section 49B(1) of NEMA as amended states that: *“A person convicted of an offence referred to in section 49A(1)(c), is liable to a fine not exceeding R10 000 000 or to imprisonment for a period not exceeding 10 years, or both such fine and such imprisonment”.* The act in section 49B(1) of NEMA as amended further states that: *“A person convicted of an offence referred to in section 49A(1)(k), is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding 5 years, or both such fine and such imprisonment, and in the case of a second or subsequent conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, and in both instances to both such fine and such imprisonment”.*

3.3.1 S24G and application

It must be noted that the S24G is applicable to the activities listed in terms of the EIA regulations, National Environmental Management Waste Management Act and section 22A of National Environmental Management Air Quality Act, No 39 of 2004 for activities operating without a provisional registration certificate. National Environmental Management Laws Second Amendment Act, No. 30 of 2013 aligned the NEMWA to NEMA by including it to be a SEMA. The amendments made it very clear that S24G will also be applicable to unlawfully commenced listed waste management activities. Prior this alignment, an application of S24G to waste activities was contentious as the Act did not include it in the definition of the SEMAs.

It is a known fact that law does not act retrospectively unless that is specified within that particular legislation. The same applies with S24G. Those who were adversely affected are developers who commenced with listed or specified activities which were listed in one of the previous regulations

but are no longer listed in the new EIA regulations. In terms of regulation 53(2), if you commenced with an activity/activities listed in 2010 regulations and you want to apply for S24G after the 2014 amendments, the activity/activities you are applying for, must be listed in the 2014 regulations (DEA, 2014). This brought a challenge to developers who were not aware of such changes.

3.3.2 S24G Authorisation

It must be noted that there was a confusion previously with the *ex post facto* EA issued. Some would think that it is applicable from the date when the activity started. The amendments have made it clear that the authorization is applicable from the date of issue. This means that from the date that the activity started until it was authorized, the activity remains illegal. Hence the section was no longer referred to as rectification but continuation of the listed or specified activity. The ambiguity of this section became clearer in that the administrative enforcement can run parallel with the criminal case or even after the authorisation has been issued. An example is the BP vs Uzani (2017) case in Gauteng. Private prosecution was instituted against BP as NEMA provides for such in terms of section 33. Section 33 of NEMA states that “*Any person may-*

(a) in the public interest; or

(b) in the interest of the protection of the environment,

institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of (the) state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence”. Uzani prosecuted BP after the *ex post* authorisation was issued by Gauteng Department of Agriculture and Rural Development.

Should you realize later that an activity you are engaged with has required an authorisation but it is repealed in terms of current regulations, the activity will remain illegal as the regulations do not allow that an activity which was repealed be processed through the S24G process. Even if the CA may consider processing your application, it is as good as null and void as the activity is no longer applicable and the activity/activities remain unlawful.

3.4. The S24G regulations

The CA developed the regulations to deal with some of the issues which led to the appealing of the quantum fines issued to the developers (September, 2012). The S24G regulations set out procedure and criteria that have to be considered by the CA when determining the quantum fines in terms of S24G. The regulations were promulgated on 20 July 2017. Some of the major changes brought by the regulations are as follows:

- Establishment of the committee to determine and recommend the quantum fine. The regulation has no provision for any deviation by the committee when determining the fines as this might be the cause of the inconsistencies the regulation is dealing with.
- Social index removed from the calculator which was seen as a providing the discount to the fines issued (CER, 2017);
- The register for the interested and affected parties to be included with the S24G application;
- Compliance history of the company or the applicant to be disclosed upon application;
- Recommendation of the maximum fine for the repeated contraveners. In terms of regulation 9, the fine committee must recommend maximum fine to the CA for the repeated offences. Annexure A of the S24G fine regulations makes provision for the developers to disclose the previous administrative actions such as issued warning letters, pre-directives, directives, pre-compliance notices, compliance notices and criminal convictions against them or their company. The developer will also have to disclose previous S24G applications;
- Representation where an applicant will be afforded an opportunity to comment on a quantum fine issued against them. Important to note is that in terms of regulation 6(4), the applicant must notify all the interested and affected parties about the fine and the reasons for issuing the fine within 14 days of receiving the fine from the CA;
- Record keeping is now mandatory for all the CA. Those records must include a list of all applications in terms of S24G, all the fines issued and their reasons, minutes of those meetings, amounts paid per applications (whether wholly, partially or not paid), as well as all the appeals lodged and their decisions. All CA are required to send that information to the National Office twice a year (30 April and 31 October);
- Consolidation of the applications. Finally, the regulations clarify that an applicant may be issued with a single fine in respect of multiple activities, provided that these activities are inter-related. This settles the long-standing debate as to whether a CA is able to issue a single fine in respect of more than one activity applied for.

The changes in the regulations are significant because S24G aims to restore compliance with environment by eliminating unlawful activities by means of issuing legal authorization or asking applicants to cease their activities identified as illegal. Interestingly, the regulations require the CA to consider whether the director of the company applying was a director of any company that committed any non-compliances to the environmental laws. Added to that is the “culpable applicant”, which is defined to mean an applicant whose prior conduct displays a knowledge of legal requirements relating to the activity which has been applied for and who has historically

committed environmental legal non-compliances. Where an applicant is found to be a culpable applicant, the regulations prescribe that the fine recommendation committee must recommend that the maximum fine (5 million rand) be imposed (DEA, 2017).

Another imperative aspect that became clear was that, previously only the person who contravened the law was allowed to apply for *ex post facto*, but with this amendment anyone can apply. Vast changes have taken place with regards to the contents of the application. Previously the CA would direct an applicant to do the following:

- a. Assess the impacts
- b. Mitigate the measures
- c. Conduct the Public Participation
- d. Submit an Environmental Management Programme
- e. Submit other information or studies

The amendments gave precision to some aspects and set some criteria to ensure consistency on how a fine should be recommended to the CA. They also re-emphasised that the CA can direct an applicant to do the following:

- a. Immediately cease pending the decision
- b. Investigate and evaluate the impact
- c. Remedy any adverse effects
- d. Cease, modify or control
- e. Contain or prevent the movement of pollution/degradation
- f. Eliminate the sources of pollution
- g. Compile a report.

The aforementioned aligns with the requirements of section 28 of the NEMA, which give effect to the duty of care. It also aligns with 'the polluter pays' principle, which is provided for in the section 2 of the NEMA. The NEMA provides a framework of principles that must be applied to all decision-making that may affect the environment and its biodiversity (Blackmore, 2015:2). NEMA can draw lessons from other legislation in the country in dealing with administrative fines which will be discussed below. The application process has been standardised through gazetting of the S24G regulations which are outlined below.

3.5. An overview of the S24G application process

September (2012: 58) contends that S24G undermines NEMA and its intention as well as other requirements of the EIA regulations, in that the development takes place prior following the due process. Its process is not as lengthy as the normal EIA process except that there are no clear

time frames attached to it. S24G has no mandatory time frames for most of the steps, which gives the offenders more reasons why they should go for it. Again the fact that developments are not stopped whilst processing the applications, the offenders will prefer this much more than the normal EIA applications process (September, 2012:10).

In spite of all the shortcomings, EIA process for S24G is considered as efficient for its strict disciplinary actions, application, and administrative fee imposed on the applicants. Moreover, EIA process takes into consideration the factors which affect the environment due to the unlawful activities. The CA uses reasonable time frames to process applications which is drawn from Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA). The procedure by Department of Environmental Affairs and Development and Planning is outlined in figure 3.1 where some of the steps (e.g. public participation process) are allocated clear time frames and some steps are not allocated time frames as in the normal EIA process.

Section 24G Application Process

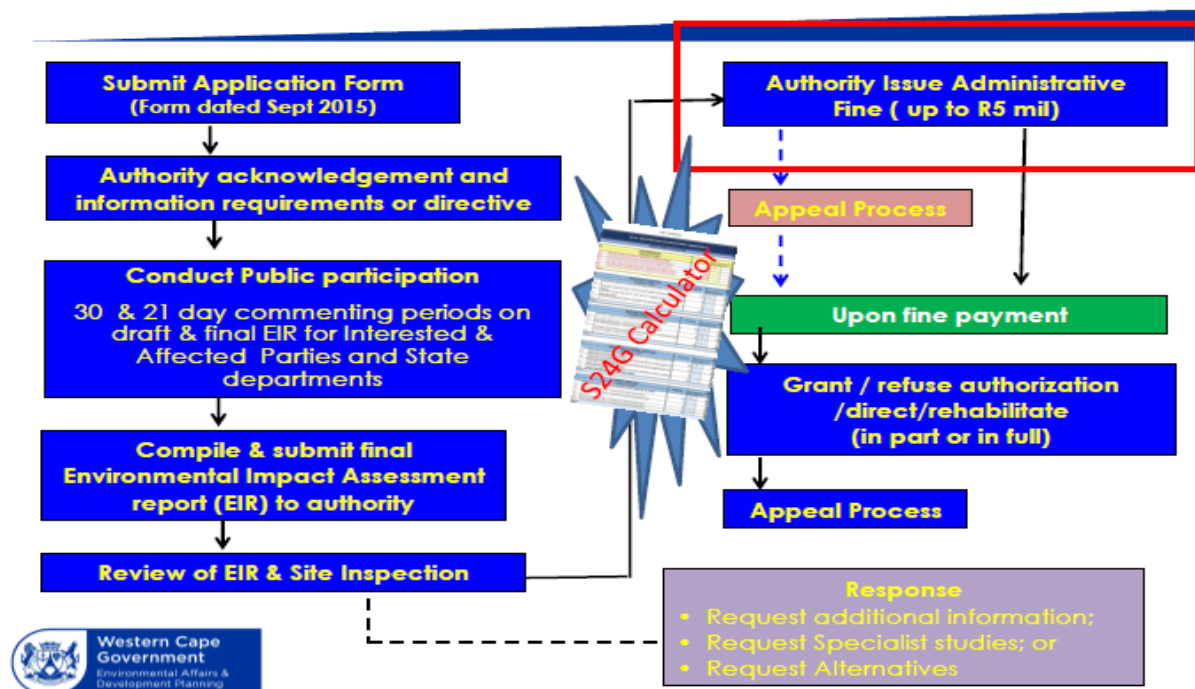


FIGURE 3.1: Schematic representation of the S24G application process (DEADP, 2010)

Lack of clear time frames for the S24G process does not bother the developers as the activity or activities will be continuing while the application is processed. From the inception of S24G, the provision did not enable the CA to stop the development while processing the application, but it has provided that the Minister or the MEC concerned will have to consider the report and the information submitted and decide to do one of the following:

- i. Refuse to issue an environmental authorization
- ii. Issue an EA with conditions to continue with the activity or activities. The issued EA will only be applicable from the date of issue meaning that the activity or activities are only lawful from the date of issue of the EA
- iii. The applicant may be requested to supply further information
- iv. The applicant may be directed to rehabilitate the activity or activities commenced.

The provision was later amended as follows “*On application by a person who*

(a) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F (1);

(b) has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister or Minister responsible for mineral resources or MEC concerned, as the case may be, may direct the applicant to—

(i) immediately cease the activity pending a decision on the application submitted in terms of this subsection”.

3.6 The calculator

The current researcher is of the opinion that the calculator or the method of calculation has always been questioned, criticised, and was mostly biased and manipulative before the Minister published the calculator in July 2017. According to the CER (2017) the quantum of the fine is driven by two things which are the significance of the impacts of that development and the compliance history of the developer. The CER (2017) continued to argue that prior to gazetting regulations for S24G, administrative fines were issued without consideration of the Interested and Affected Parties (IAP). This was evident in Aquilla Steel’s S24G applications, where the interested and affected parties only knew about the fine issued to the applicant after decision to grant the authorisation has been approved as alluded by the CER (2017). They further maintained that the fine was issued before the final report was submitted as the date of payments was recorded to be before the final report was submitted. The fine amount was considered to be insufficient considering the significance of the area where developments took place.

Hugo (2014:53) argues that SA’s environmental law does not contain the administration penalty. The researcher agrees with Hugo as administrative penalties in environmental legislation have only been introduced recently. The administrative fine as explained under section S24G is for the application to be considered and not necessarily to serve as a punishment to the developer. How the fine was determined was never explained until July 2017 when the fine calculator and the explanatory notes were published during development of the S24G regulations.

3.6.1 The *indexes* of the fine calculator

The fine calculator is a standard tool used by the CA. It consists of the four indexes namely socio-economic impact, biodiversity impact, sense of places or heritage impact and pollution impact. The tables below indicate the indexes and self-explanatory notes of how the calculator works as adapted from Department Environment Affairs, Development and Planning (DEADP) and Department of Environmental Affairs, Forestry and Fisheries (DEFF). Figure 3.2 below is a brief summary and explanation of the index and variables of the calculator as adapted from the self-explanatory notes which were published with the calculator.

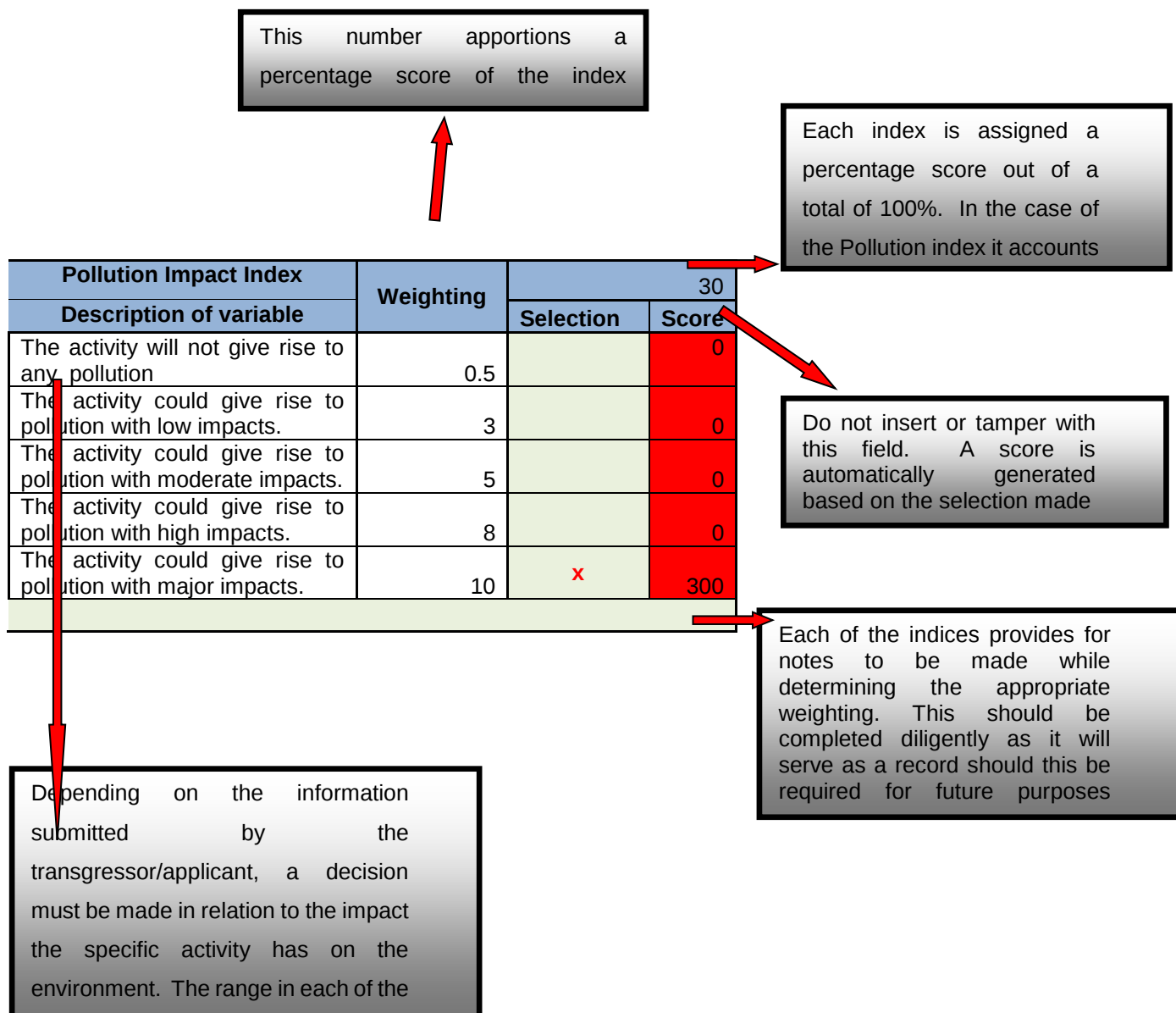


FIGURE 3.2: The explanation of the index (DEA, 2015)

Table 3.1 below outlines factors that can be considered to inform the appropriate weighting. The weighting ranges from 0.5 to 10 and increases with the severity of the impacts. In the calculator, the weighting is fixed and cannot be changed, and the users can only select a score. It must be highlighted that the EIA reports and the specialists' studies will be used to help the committee to determine the relevant factors from the studies done and therefore the studies need to be accurate and the reports to be meticulous. Other tools such as EMFs, conservation plans, strategic environmental assessment (SEA), bioregional plans, and state of environment report may be used to make an informed decision.

Description of the variable	SELECTION CRITERIA – Biodiversity context	
	What may be considered as a relevant consideration	Weighting relative to the consideration
The activity will give rise to no impacts on biodiversity;	• Largely remains in a natural state • Vibrant fauna and flora, with species diversity and abundance matching the nature of the area • Well planned development/activity • Area forms part of an overall ecological regime of conservation value • Biotic resources emulate their original state	0.5
The activity could give rise to localised biodiversity impacts	• The development/activity could have an impact on the environment but only in the vicinity of the development/activity • The impact will not migrate beyond the perimeter of the specific development/activity	3
The activity could give rise to significant biodiversity impacts/ The activity is likely to permanently/irreversibly transform/ destroy a recognised biodiversity 'hot-spot' or threaten the	• The development/activity has resulted in or could result in the natural state being largely disturbed • Limited natural fauna and flora remains as a result of the development/activity • Exotic plant species evident • Unplanned development.	8 – 10 Decision on score here will depend on whether the area can

existence of a species or sub-species.	Biotic diversity disturbed and/ or significantly impaired	be rehabilitated
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Table 3.1: Explanation of what to be considered to mark the appropriate rating (DEA, 2015)

As explained, the calculator consists of the four main impact indexes namely socio-economic impact; biodiversity impact; sense of place/heritage impact; and pollution impact. Each impact will be illustrated and briefly discussed below to indicate the variables, weighting and the scores that each index contributes to the overall score used to determine the administrative fine.

Table 3.2: The Socio Economic Impact index (DEA, 2015)

1 Socio Economic Impact Index		Weighting	20	
Description of variable			Selection	Score
a	The activity will not give rise to any negative socio-economic impacts	0,5		0
b	The activity could give rise to negative socio-economic impacts, but highly localised	3		0
c	The activity could give rise to significant negative socio-economic and regionalized impacts	7		0
d	The activity could result in wide-scale socio-economic impacts.	10		0
Notes:				

This index as illustrated above in table 3.2 outlines the variables and the weighting allocated to each variable. This index contributes 20% to the total indexes of the calculator. The weightings allocated are increasing as the impacts are increasing.

Table 3.3: The Biodiversity Impact index (DEA, 2015)

2 Biodiversity Impact Index		Weighting	30	
Description of variable			Selection	Score
a	The activity will not give rise to any impacts on biodiversity	0,5		0
b	The activity could give rise to localised biodiversity impacts	3		0
c	The activity could give rise to significant biodiversity impacts	8		0
d	The activity is likely to permanently / irreversibly transform/ destroy a recognised biodiversity 'hot-spot' or threaten the existence of a species or sub-species.	10		0
Notes:				

This index as illustrated above in table 3.3 outlines the variables and the weighting allocated to each variable. Interestingly the weightings in this index are the same as in the one in socio-economic index except the one variable (“the activity could rise to significant biodiversity impacts”) which is 8. This index contributes 30% to the total indexes of the calculator. The weightings allocated are also increasing as the impacts are increasing. Only four variables are used to categorise the impacts of this index.

As in biodiversity and socio economic indexes, table 3.4 below illustrate that the weightings increase with the severity of the impacts for the heritage or sense of place index. The number of variables and the weightings are exactly the same as the biodiversity index. This index accounts for 20% of the overall score, just like the socio economic index.

Table 3.4: The Sense of place/Heritage Impact Index (DEA, 2015)

3 Sense of Place & / or Heritage Impact Index		Weighting	20	
Description of variable			Selection	Score
a	The activity is in keeping with the surrounding environment and / or does not negatively impact on the affected area's sense of place and /or heritage	0,5		10
b	The activity is not in keeping with the surrounding environment and will have a localised impact on the affected area's sense of place and/or heritage	3		0
c	The activity is not in keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage	8		0
d	The activity is completely out of keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage	10		0
Notes:				

Table 3.5 below shows the variables in the pollution index and one notices the five variables contained in this index as opposed to the three indexes explained. Again this index contributes 30% of the overall score just like the biodiversity index. Each index is assigned a percentage score out of 100%. The above tables combined, makes a full calculator where the first index is allocated a weighting of 20% out of 100%; biodiversity index is allocated 30% out of 100%; sense of place is allocated 20% out of 100%; and pollution is allocated 30% out of 100%. The summary of allocation of weightings is clearly seen in figure 3.3 below.

Table 3.5: The Pollution Impact Index (DEA, 2015)

4 Pollution Impact Index		Weighting	30	
Description of variable			Selection	Score
a	The activity will not give rise to any pollution	0,5		15
b	The activity could give rise to pollution with low impacts.	3		0

c	The activity could give rise to pollution with moderate impacts.	5		0
d	The activity could give rise to pollution with high impacts.	8		0
e	The activity could give rise to pollution with major impacts.	10		0
Notes:				

From figure 3.3 below it is clear that biodiversity and pollution indexes were given equal weighting of 30% and socio economic and sense of heritage were also allocated equal weightings of 20%. Given that the fine is called an administrative fine intended to be used as a deterrence, one would have expected the pollution impact to have more weighting or higher percentage score than the other three indexes as it somehow summaries if the development will give rise to pollution or not. The rationale behind fixing the weightings on the calculator was not provided when the fine calculator was published with the explanatory notes.

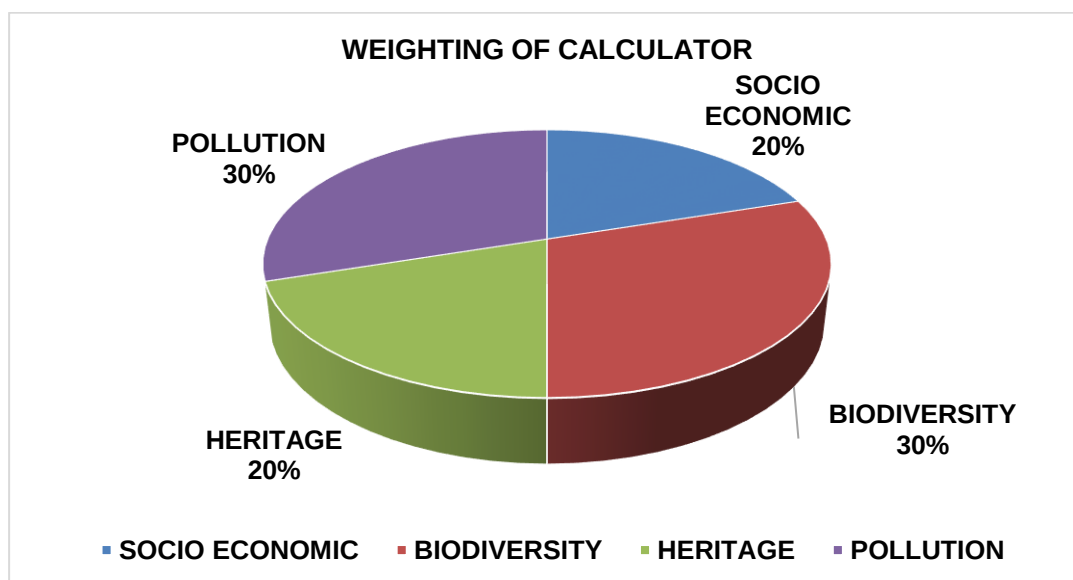


Figure 3.3: The fine calculator weighting

The same indexes and descriptions were used to develop section C of annexure A of the application form. The only difference is that it only consists of description variables as well as a column to select the applicable description. Table 3.6 below is expected to be completed by an EAP who compiled the application to indicate to the CA the impacts or the potential impacts of the development. After each index there is a space for motivation to be written by the EAP for the variable selected. This section helps the applicant to juxtapose the findings of the fine committee as the indexes are the same as the ones in the calculator. Ideally the findings are supposed to be the same, since the same EIA report is used.

Table 3.6: The impacts or potential impacts of the activity/activities: Section C of annexure A, (DEA, 2015)

Index	Socio Economic Impact	Place an “x” in an appropriate box
Description of variable		
The activity will not give rise to any negative socio-economic impacts		
The activity could give rise to negative socio-economic impacts, but highly localised		
The activity could give rise to significant negative socio-economic and regionalized impacts		
The activity could result in wide-scale socio-economic impacts.		
Motivation:		
Index	Biodiversity Impact	Place an “x” in an appropriate box
Description of variable		
The activity will not give rise to any impacts on biodiversity		
The activity could give rise to localised biodiversity impacts		
The activity could give rise to significant biodiversity impacts		
The activity is likely to permanently / irreversibly transform/ destroy a recognised biodiversity ‘hot-spot’ or threaten the existence of a species or sub-species.		
Motivation:		
Index	Sense of Place & / or Heritage Impact	Place an “x” in an appropriate box
Description of variable		
The activity is in keeping with the surrounding environment and / or does not negatively impact on the affected area's sense of place and /or heritage		
The activity is not in keeping with the surrounding environment and will have a localised impact on the affected area's sense of place and/or heritage		
The activity is not in keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage		
The activity is completely out of keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage		
Motivation:		
Index	Pollution Impact	Place an “x” in an appropriate box
Description of variable		
The activity will not give rise to any pollution		
The activity could give rise to pollution with low impacts.		
The activity could give rise to pollution with moderate impacts.		
The activity could give rise to pollution with high impacts.		
The activity could give rise to pollution with major impacts.		
Motivation:		

Previously the calculator consisted of the five indexes which had the same weighting but inclusive of the following social benefit index as illustrated in table 3.7 below. This index did not have a percentage score and its weightings were in a percentage form as compared to the other four. This index was working like a discount based on whether the development will provide any social services or infrastructures. The more services there are to be provided, the greater the percentage, thereby reducing the fine tremendously.

Table 3.7: Social Benefit index, adapted from the Fine calculator (DEA, 2015)

B Social Benefit Index			
Description of variable		Weighting	
		Selection	Score
B1. The activity provides no social service/infrastructure to the affected community	0%		0
B2. The activity provides indirect social service/infrastructure to the affected community	10%		0
B3. The activity provides some social service/infrastructure to the affected community	30%		0
B4. The activity provides an important social service/infrastructure to the affected community	60%		0
B5. The activity provides an essential social service/infrastructure to the affected community	80%		0
Notes:			

The stakeholders such as the CER submitted comments to DEFF indicating that the index depicted in table 3.7 above, be removed from the calculator, as it gives more of a discount on a quantum fine to be issued (CER, 2015). This index was indeed removed completely from the calculator leaving the other four indexes as presented and circulated.

3.6.2 Determination of the fines

According to September (2012:8), the CAs are inconsistent in determining the fines as some institutions are lenient while others are strict. This suggests that the method and systems used to determine the fines are not applied uniformly and consistently. The calculator explained in paragraph 3.6 is the one used to calculate the fines for EIA and waste activities. The procedure and considerations have been outlined in Table 3.4. Table 3.8 below is an example of how the calculator is used to determine the fine.

Table 3.8: An example of how to use the calculator (DEA, 2015)

2 Biodiversity Impact Index		Weighting	30	
Description of variable			Selection	Score
a	The activity will not give rise to any impacts on biodiversity	0,5		0
b	The activity could give rise to localised biodiversity impacts	3		0
c	The activity could give rise to significant biodiversity impacts	8		0
d	The activity is likely to permanently / irreversibly transform/ destroy a recognised biodiversity 'hot-spot' or threaten the existence of a species or sub-species.	10	X	300
Notes:				

Looking at the description of the variables of all the indexes, one can say that the administrative fine is easy to use but can be easily manipulated. This is drawn from the fact that the amount of the fine is depending on the severity of the impacts which must be interpreted from the reports submitted as in the example illustrated in table 3.8 above. The lower the impacts, the lesser the fine. The same must be done to the other three indexes to determine the quantum fine.

One interesting aspect observed in the calculator is the fact that the fines consist of two categories. The two categories differentiate between the applicants where individual applicants and companies are not issued with the same amount of the fine for a similar activity. On closer look at the four indexes, they all start with a variable that says the activity will not have any impact to a particular index and these all carry a weighting of 0.5. This suggests that on satisfying all the low impact variables, a developer will receive a minimum fine. This was tested and the minimum fine that the calculator can issue from ticking the x for the four lowest variables, it came out as R10 000.00 for an individual. This was based upon the basis that "the range in all variables are ranked from minor activities to that which impacts significantly on the environment" (DEA: 2017). A minimum fine for the category of companies, government, and parastatals for the same entry of variable, was R250 000.00. When the four variables with major impacts are selected, the maximum fine for an individual applicant works out to be R200 000.00 and for companies, government, and parastatals is R5 000 000.00. This simply shows that an individual cannot get a fine of more than R200 000, 00 unless they are the repeated offender which prompt the committee to recommend the maximum fine. This somehow suggests that the fine is linked to the 'polluter pays' principle as outlined in chapter of the NEMA. At the same time categorizing the applicants also suggests that this might be linked punitive measures. This is evident in the fact that despite an activity being commenced illegally, the quantum of the fine to be paid will depend on who is the applicant and not necessarily about the impacts on the environment.

The determination of the fine for NEMAQA activities differs with the one used for EIA and waste activities as demonstrated in table 3.9 below. It has been kept very simple for everyone to understand by having fixed fines. What is also different is that repeating and convicted offenders will be fined a maximum fine as provided for in the S24G regulation 4 as stipulated in the regulations for determining the fines for section 22A of the NEMAQA; unlike S24G where the committee must recommend the maximum fine. The maximum to be issued is up to R1 million; unlike with S24G which is R5 million.

Table 3.9 NEMAQA fine structure extracted the Regulations for the Procedure and Criteria to be followed in the Determination of an Administrative Fine in terms of section 22A of the Act, 2016.

Minimum Fine	Yes/No	Amount
For operating illegally		R200 000
Aggravating Factors/Criteria		Additional amounts to the minimum fine(if yes)
Each year in which the facility has operated without a license		R200 000, 00 per year i.e. 12 months
The facility for which the application for which the application is submitted is a declared Priority Area in terms of section 18 of the Act		R1 000 000

The method above as illustrated in table 3.9, seems to be easy to understand and everyone will be able to come to the same amount for the fine to be issued. It must be highlighted that the fines referred to in table 3.9 are also called the administrative fines. The amounts for each factor are clearly set and easy to calculate. The aggravating factors are clearly described as well and will not cause any uncertainties. Just like the EIAs and waste activities' administrative fines, these fines are not taking into considerations the profit made by the development while operating illegally and the cumulative impacts.

3.7. Challenges of S24G

Some of the challenges identified using the administrative fine, includes the following:

- a. High fines could lead to high prices as these firms may try to recoup their fines through higher prices of their products (September 2012);

- b. The issued fines are unfair to the poor rural communities who cannot afford to pay such fines;
- a. Hugo (2014:73) highlighted that when quantum fines are administered by the CA, it leads to almost, if not all, S24Gs being authorized.
- b. In the application of the calculator such as having an element of being subjective in the sense that anyone who has an in depth knowledge of a particular impact index, influences the scoring of such an index. It also doesn't look at the mitigation measures provided in the report. Mitigation measures and positive impacts are sometimes not considered when the fine is being determined.
- c. The process does not have the clear time frames aligned to each step as opposed to the normal EIA process. For instance, the time frame for paying the fine is regulated but not defined. In terms of regulation 6(2), the time frame to pay the fine is left to the discretion of each CA. The regulation only emphasizes that the time frame must be reasonable.
- d. The regulations still failed to outline a clear procedure to be followed when one lodge such an application as in normal EIA regulations (Kohn 2012). An example to this change is the Aquilla Steel matter where according to the CER (2017), the interested and affected parties only learned about the fine amount when the authorisation was issued. In the authorisation, it was indicated that the fine amount was paid prior the final report was submitted to the CA. This suggests that the information contained in the final report submitted was never considered when the fine was issued. This is the inconsistencies that the section S24G regulations was to address in outlining the process and procedure.

3.8. Case law / Appeals of administrative fines

NEMA provides for the administrative actions to be appealed as per section 43 of NEMA. This provision of the law allows everyone to appeal to the CA any decision taken in terms of NEMA. Issuance of the administrative fine is part of the administrative actions that can be appealed as per section 43 of the Act. Below are the examples of why the fines of different appeals lodged against the quantum fines issued by CAs in different provinces, are so contentious:

3.8.1. In the case study of Pretoria Timbers Treathers CC and Khabisi Mosunkuto (53710/2008) [2008] ZASCA 175 (22 September 2009)

In the case of Khabisi Musonkuti and Pretoria Timbers, the administrative fine of R522 500.00 was appealed in September 2009. The application was made in terms of PAJA. At the time the maximum fine was R1 000 000, 00. The applicant requested the following from the CA

- Reasons for imposing the fine
- Consideration of voluminous information submitted by the applicant
- Copy of the protocol and the guideline used to determine the amount of the fine

- Method of operation of the calculator
- Calculator applied mechanically without due consideration of applicability of the applicant's application

Reasons advanced for this appeal:

- failed to satisfy the requirements of rationality and reasonableness;
- are inadequate as contemplated in section 5(2) of PAJA presuming that the fine was issued without a good reason.

The fine was viewed as excessive, and that the CA did not consider its representation and was unreasonable and acted arbitrarily

- Applicant requested a fine of R15000,00
- The application was dismissed with costs as the applicant failed to make out a case to support its contentions and accordingly, the application could not succeed.

3.8.2 In the case study of Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Another v Plotz NO and Another (495/2017) [2017] ZASCA 175 (1 December 2017)

The DEADP had a S24G committee before it was actually regulated. The Department would subject the fines to be adjudicated by the committee for the quantum fine to be issued. In this case, in 2012, the Department had issued a quantum fine to the Trust whereby it was appealed. The quantum fine issued was R475 000.00. The department could not consider the appeal due to late submission as it was supposed to be lodged within 20 days as per appeal regulation of 2014. This matter was taken to the High Court by the appellant as the Department considered the appeal to be outside the timeframe to lodge an appeal (Schoeman, 2018). The court in this matter agreed with the Trust's arguments that the way section S24G fines were utilized in this instance was unreasonable and irrational for the following reasons:

- a. The social benefit index is used exclusively for organs of state and is not equally applicable to private concerns and
- b. It was unclear which portion of the amount of the fine was made up of the pollution impact portion when the Trust's activities had no negative impacts.

The quantum fine was then reduced by the High Court of appeal to R75 000. DEADP then appealed the fine to the Supreme Court of appeal. The High Court order was set aside and R475 000 reinstated as the court held that Mr. Plotz failed to utilize the internal remedies without justification (Schoeman, 2018).

3.8.3 Lucky Star appeal to DEADP

Lucky Star (LS) was issued with an administrative fine of R1 300 000, 00 in September 2017 for the section S24G application that was lodged with the DEADP. This appeal was lodged by the LS through its legal representative to the Department (Smith, 2017). The Department availed the reasons, as well as the copy of the calculator used to determine the fine. Smith (2017) on behalf of LS was appealing the fine on two grounds. The two grounds of appeal were;

- *“Absence of discretion by the decision-maker pertaining to consideration of the quantum of the administrative fine as determined by the Calculator (which amount was not deviated from by the Department’s decision-maker in the exercise of her discretion and in the context of the reasons given for the decision to impose a fine exactly as determined by the Calculator).*
- *Failure by the decision-maker to properly consider all substantively relevant considerations”.*

Smith (2017), amongst other reasons submitted by to substantiate the two grounds above are:

- LS installed the scrubbers to effect positive environmental impacts which the calculator did not consider. It was maintained that the positive impacts cannot be ignored and DEADP must consider that when determining the fine as the scrubbers will improve the air quality;
- That the calculator has no provision for the positive ecological, economic and social benefits;
- The weighting allocated for socio-economic index was that “no negative socio-economic impacts will arise as a result of the activity” was considered to not have reflected the true depiction and LS argued that the Department allocated a wrong weighting;
- LS submitted that inputs provided for the purposes of the calculator were incorrectly quantified leading to the wrong determination of the fine;
- Requested the methodology used in the calculator to determine the fine;
- That the reasons or factors advanced for deviation were not all considered;
- The interpretation of the reports submitted by LS to determine the level of impacts in order to determine the quantum fine.

In summary, LS was appealing to DEADP that the quantum fine issued be reduced and the positive impacts which brought some of the technology to be installed be considered. The fine was reduced from R1 300 000.00 to R130 000.00 which was eventually paid and the authorization was issued in September 2018 (DEADP, 2018).

3.8.4 Zululand Anthracite Colliery's administrative fine lodged by the CER to DEDTEA

Another example of the appeal is the one lodged by the CER which is a non-profit organization whose mission is "to defend the rights of communities and civil society organizations to an environment that is not harmful to health or wellbeing of present and future generation", against Zululand Anthracite Colliery (ZAC) mine (CER, 2009) to the MEC of DEDTEA. The CER argued that the mine developed three separate shafts resulting in illegal commencement of activities which occurred in 2006, 2008 and 2010. *Ex post facto* application was only submitted in November 2013.

The mine was then fined R497 000 by Department of Economic Development, Tourism and Environmental Affairs (DEDTEA) in 2014 while the maximum fine still was R1 000 000.00. This did not auger well with the environmental groups and eventually the fine was appealed to the MEC of DEDTEA by the CER. The basis of the appeal was mainly as follows:

- Failure to impose an administrative fine in respect of each offence and in this instance is the twelve (12) EIA listed activities
- Failure to take into account relevant considerations, alternatively to properly assess such considerations as the quantum fine was issued before the Basic Assessment Report (BAR) was submitted. DEDTEA failed to also consider the following:
 - I. Severity of the offence,
 - II. Failure to take into account the BAR and impacts,
 - III. Assessment of impacts,
 - IV. Non-compliance by ZAC with other relevant and applicable laws ,
 - V. Failure to impose fine with deterrent effect, and
 - VI. The monetary or other benefits accrued to the person through commission of an offence.

It has been observed that companies have been budgeting for this S24G as the profit to be made outweighs the time and the cost to undertake the EIA process to unfold as it may take from six to 12 months (Paschke and Glazewski, 2006:24). Some companies have been budgeting for the S24G administrative fine thereby abusing it by continuing to develop without conducting the EIA (CER, 2011). The Centre for Environmental Rights (2011) view the administrative fines as a punitive fine and indicates that it will serve as deterrence to the company. The CER (2011) has noted that the CA hardly refuses the S24G applications and argues that companies were budgeting for this provision and do not pursue criminal cases where such applications lodged.

The CER (2011) was seeking relief from the MEC that ZAC be issued with maximum fine in respect of each and every offence committed for failure to obtain EA before commencing with listed activities. The CER (2011) wanted government to also lay criminal charges on top of the administrative enforcement undertaken. The dissatisfaction was not only raised by the CER (2011) but Global Environmental Trust also lodged an objection to the application advancing reasons that the fine was just a mockery of justice. Fine was viewed as not reasonable and rational. The CER (2011) would have preferred the Department to issue each of the 12 contraventions with a fine but not an integrated fine. The MEC dismissed this appeal, ZAC paid the fine issued and EA was issued in July 2017.

3.8.5 In the case study of Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (CC82/2017) [2019] ZAGPPHC 86; [2019] 2 All SA 881 (GP); 2019 (5) SA 275 (GP) (1 April 2019)

The matter of Uzani Environmental Advocacy CC v BP Southern Africa (PTY) LTD (2017) became the game changer in the sector where private prosecution was ensued. As previously indicated, private prosecution was instituted against BP by Uzani as NEMA provides for such in terms of section 33. The summary of this case in relation to this study is that a precedence has been set and now it is clear that applying for section S24G and issuance of the authorization can still lead to prosecution. The court in this matter held that submission of a section S24G application and payment of the issued administrative fine does not stop the court to prosecute them. The court held that BP commenced with construction and upgrades of filling stations before applying for the environmental authorisations as required by EIA regulations. BP was found guilty on 17 counts of contravening s 22(1) read with s 21(1) and s29(4) of the Environment Conservation Act 73 of 1989 (*“ECA”*) together with item 1 (c) of Schedule 1 and Schedule 2 of Government Notice R.1182 of 5 September 1997 and was convicted on 16 criminal charges.

There are many more appeals made to the quantum fine issued and in most cases the applicant is applying for reduction of the quantum fine issued by the CA. Similarly, the interested and affected parties also do appeal the quantum fines issued to the developers and mostly they apply for increase of such a fine.

3.9. Other administrative fine(s) laws in SA

Erasmus (2011:11) argues that the intention of the legislator in NEMA for the administrative fine in terms of S24G (2) *“was not to impose penalty as such but rather to give effect of ‘polluter pays’ principle”*. He indicated that the administrative fines are not new in SA legislation and are applied differently with the one in NEMA. Three legislation selected for this study to demonstrate the

examples of how such administrative fines are administered within those legislation are outlined below as follows:

3.9.1 The Companies Act, Act 71 of 2008

The administrative fine in terms of this act is issued by the court upon application by the commission or panel unlike in NEMA where the administrative fine is issued by the CA. The provision outlines the triggers for the court to impose the fine and they are provided in section 175 of the act which states that:

1. *“A court on application by the Commission or panel may impose the administrative fine -*
 - a. *only for failure to comply with compliance notice, as contemplated in section 171(7) and*
 - b. *not exceeding the greater of -*
 - (i) *10% of the respondent’s turnover for the period during which the company failed to comply with in the compliance notice; and*
 - (ii) *the maximum prescribed by subsection (5)”.*

Subsection 2 of the act outlines the following factors to be considered when determining the administrative fine:

- (a) *“the nature, duration, gravity and extent of the contravention;*
- (b) *any loss or damage suffered as a result of the contravention;*
- (c) *the behaviour of the respondent;*
- (d) *the market circumstances in which the contravention took place;*
- (e) *the level of profit derived from the contravention;*
- (f) *the degree to which the respondent has co-operated with the Commission or the Panel;*
- (g) *whether the respondent has previously been found in contravention of this Act.*

Subsection (4) of the act specifies where the fines must be paid and it says, *“A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution”*. Finally, subsection (5) makes a provision for the Minister to *“make a regulation prescribing the maximum amount of an administrative fine, which amount must not be less than R1 000 000”* and the maximum is not prescribed in terms of this act. The process is different from the one used for NEMA S24G in that the administrative fines are issued by the committee of the CAs and the administrative fine is paid to the CAs. NEMA can draw a lesson to some of the factors considered when determining the fine. For example, the amount of the fine to be issued is linked to the turnover made during the non-compliance duration.

3.9.2 The Competition Act, Act 89 of 1998

In terms of section 61(1) of this act, the administrative fines are imposed by the Competition Tribunal and not the court as in Companies Act, Act 71 of 2008. Section 61(2) of the act provides

that “An administrative fine imposed in terms of subsection (1) may not exceed 10% of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year”. This is the same with the Companies Act, Act 71 of 2008 and over and above that, it includes the exports from the Republic. There are factors outlined that must be considered when determining the administrative fines and these factors are exactly the same as the ones contained in the Companies Act, Act 71 of 2008 and provided as follows under subsection 3 of the Act: “When determining an appropriate fine, the Competition Tribunal must consider the following factors:

- (a) the nature, duration, gravity and extent of the contravention;
- (b) any loss or damage suffered as a result of the contravention;
- (c) the behaviour of the respondent;
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;
- (f) the degree to which the respondent has co-operated with the Competition Commission and the Tribunal; and
- (g) whether the respondent has previously been found in contravention of this Act.

As with the Companies Act, Act 71 of 2008, the administrative fine is linked or influenced by other factors such as profit made and whether the accused is a repeated offender. S24G regulations have introduced some of the factors where the committee upon proving that the applicant is a repeated offender, can recommend the maximum fine to the CA. Similar to the Companies Act, Act 71 of 2008, this act does specify that the fines paid in terms of this act must be paid into the National Revenue Fund.

3.9.3 The Financial Institutions (Protection of Funds) Act 35 of 2001

Section 10 provides as follows:

- (1) “A person who contravenes or fails to comply with any provision of this Act is guilty of an offence and on conviction (is) liable to a fine or imprisonment for a period not exceeding 15 years.
- (2) A court may, in addition to any penalty it may impose in terms of subsection (1), order that such person-
 - (a) pay the institution or principal concerned any profit he or she made; and
 - (b) compensate the institution or principal concerned for any damage suffered, as a result of the contravention or failure.
- (3) A court may, in addition to any penalty imposed in terms of subsection (1) and an order made in terms of subsection (2), order that such person may not serve as a director, member, partner or manager of any financial institution for such period as the court may deem fit”. Similar to the

Companies Act, Act 71 of 2008, the fine is issued by the court and it is also linked to the profit made. What is different from other legislation is that, with this one, over and above the fine issued, the institution may still recover costs suffered by the institution due to the non-compliances in question.

The administrative fines were introduced as a deterrent but looking at the trends of NEMA S24G applications, the amount of the fines issued fluctuate annually as indicated in figure 3.4 below. The administrative fines “*are intended to provide an alternative enforcement mechanism that is cost effective, timely and practical than prosecutions through court system*” (Hugo, 2014:107). It must be emphasized that these provisions do not replace criminal prosecution hence S24G provides that both be applied where necessary. Prior to S24G amendment (2013), it was not clear whether an applicant can be criminally charged once the application has been lodged or not. The S24G then indicated that a directive will be issued once the fine has been paid to continue or rehabilitate the affected environment. The NEMA (2013) amendments which came to effect on the 8th December 2014, also made it clear that lodging an application in terms of S24G does not derogate from EMI’s or South African Police Services authority to investigate the transgressors/applicant in terms of NEMA and its SEMAs and National Prosecuting Authority to institute the criminal prosecution.

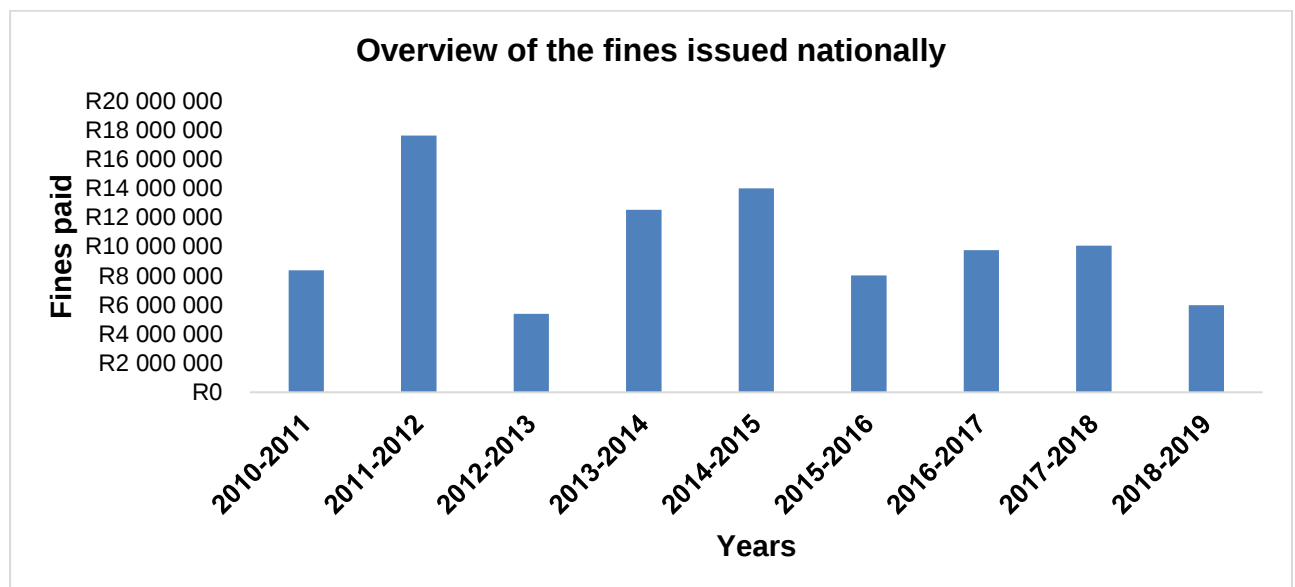


FIGURE 3.4: NECER between 2010 and 2019

Since the provision came in place in 2014, the Department has reported the escalations of fine amounts paid in respect of section S24G applications. This suggested that the number of

applications may be increasing annually which suggests that the increased penalty is not deterrence enough.

3.10 Conclusion

This chapter reviewed scholarly debates and relevant literature. The provision of S24G remains unique to South Africa and a few countries which apply a similar model but for special projects just like in India, Lesotho and Papua New Guinea, but in their prescribed procedures. It has been noted that the EIA regulations in SA has undergone immensely, and numerous amendments thereby changing the listed activities and delisting some of the activities, making it difficult for the developers of such activities to authorize them. The provision was extended into legislation to promote voluntary compliance by those developers who commenced with their activities illegally.

It has been noted that NEMA is functioning differently from other legislation in SA that also have administrative fines. Other legislation that issue administrative fines are the Companies Act, Act 71 of 2008, Competition Act, Act 89 of 1998 and The Financial Institutions (Protection of Funds) Act 35 of 2001. NEMA can draw some lessons to each of those acts to strengthen their administrative fine system. For instance, the Financial Institution Act, Act 35 of 2001 recover costs suffered due to the non-compliances and are also linking the fine to a certain percentage of the profit made by the developer while engaging in illegal activities.

The method of application of the quantum fines still remains a challenge as contested by other developers, despite the S24G regulations gazetted to eliminate inconsistencies. The regulations are beneficial to both the CAs and the developers. The developers can now be afforded an opportunity to comment on the fine against them. The developer will also have access to the reason advanced in issuing the fines as it is now mandatory for the committees to keep such records and minutes. This will grant the developer an opportunity to either understand or challenge the CA where they feel they were inappropriately fined. The S24G process is not different from the normal EIA process except that it does not have clear time frames for each step to be undertaken. The CAs use 'reasonable' as enunciated in the PAJA to process the applications. An administrative fine must be paid before the CA decides.

The fine calculator consists of the biodiversity, pollution impact, socio economic, and the heritage impact indexes. The indexes have descriptions of variables which are used to rank the severity of the impacts. Each index has a weighting used as a measure to assess the severity of the impacts. The weightings are fixed and cannot be changed. The indexes are also assigned a percentage score out of the total of 100%. Under each index, a provision has been made to write notes as motivation for the score allocated.

It has been highlighted that the calculator does not take into consideration other factors such as positive impacts brought in by the development but that remains the discretion of the CA. The removed social benefit index was taking into consideration the positive impacts, but only in relation to social activities. The method used for determining the air quality fines seems to be easy and transparent as opposed to the one used for EIAs and waste activities, however, it can still be abused as it will be easy for the developers to measure the financial benefit of operating without the required license against the fines to be paid.

The NEMA and the S24G regulations allow that the fine issued can be appealed by the applicant or the interested and the affected parties. Should the CA not consider the application for the appeal, the appellant may approach the court to seek an appropriate relief. It was also highlighted in the case law though, that an environmental authorization may be issued to the applicant, which does not exempt the applicant from being criminally charged.

CHAPTER 4: DATA ANALYSIS AND DISCUSSION

4.1 Introduction

Chapter two dealt with the presentation of the rationale for decisions, and procedures pertaining to data collection and analysis. In this chapter, the captured data from the qualitative research is sequentially presented, analysed, and interpreted in a systematic manner as the next step of the research process. The distribution of the questionnaires was used as a method to collect information from the officials from the National and the Provincial Departments of Environmental Affairs. Presentation of the results will be in two-fold as per questionnaires (attached as annexure A1 and A2) distributed and the order will follow the structure of the questionnaire. Analysis and interpretation were done in line with the following research objectives as outlined in chapter 2.

4.2 Responses from EAP participants

This section aims at presenting the results from the questionnaires completed by the EAPs.

4.2.1 Results related to research objective 1: Evaluating the use of the Section 24G calculator

4.2.1.1 Awareness of the NEMA EIA regulations

All the respondents indicated that they know about NEMA and they all understand the 2014 EIA Regulations promulgated in terms of the section 24 (5) of NEMA, Act 107 of 1998 as they work with it daily. It was alluded that the regulations help to identify the listed activities which prior to commencement require an EIA process to be conducted. It was further explained that the EIA regulations aim to ensure sustainable development through:

- Equal consideration of all relevant ecological, social and economic factors in development;
- avoiding or minimising pollution or degradation to the environment;
- avoiding or minimising the disturbance of ecosystems;
- avoiding or minimising disturbance to cultural heritage sites;
- the application of a risk-averse and cautious approach;
- the anticipation and prevention of negative impact on the environment and on people's environmental rights;
- public participation by interested and affected parties; and
- compliance to all applicable environmental and other legislation.

They elaborated that they understood the EIA regulations as it is mentioned in the above act which consists of the three different listing notices. They also outlined the three listing notices which contains the procedure and standards of conducting the environmental impact assessment

processes, the basic assessment process and the scoping / full EIA process. The listing 1 notice defines and list activities that must be authorised prior to commencement through the Basic Assessment process. Listing 2 notice contains the activities that should undertake the scoping and Environmental Impact Assessment Report process and should be authorised by the Competent Authority (CA) prior to commencement. Listing notices 3 comprise of the activities that should go through the Basic Assessment process and be authorised by the Competent Authority in sensitive geographical areas of each province. Their explanations portray that they do know and understand the EIA process as well as the listed activities.

4.2.1.2 Awareness of the use of the calculator

All respondents indicated that they are aware of the use of the calculator used to determine the administrative fine for section 24G applications.

4.2.1.3. Duration of use of calculator to determine the fines

It has been found that 60% of the respondents said the calculator have been applied between 5 to ten (10) years and 10% have indicated that it has been applied for less than five (5) years, 10% indicated that they have eleven to fifteen (11-15) years and lastly 20% has indicated that it was applied between sixteen to twenty (16 - 20) years. This is a clear indication that although they have been in the field for a considerable number of years, not all of them know when the calculator was initiated by the competent authorities in order to determine the fines. The calculator was introduced in 2005 when the S24G were effected. It must be mentioned that the calculator was only made available to the public during the development of the S24G regulations.

4.2.1.4. Appeal of fines issued by committee

Out of ten (10) respondents, eight (8) (80%) of them have answered yes and only 2 (20%) said no. For the respondents who answered yes, it was motivated that:

- Written or oral representations are provided for to negotiate the fine thereby appealing it;
- The fines are usually high and many applicants who commenced without knowledge and negative intentions tend to appeal the fines as they some cannot afford it;
- The calculated fine may be appealed as the regulations provide for this;
Most of the time the applicants are satisfied with the fine but in some cases they feel that the fine is too high in relation to the transgression;
- It is possible that the accused may feel that his/her (constitutional) rights have been violated by the penalty;
- That precedent has already been set for a similar violation in a previous adjudication;
- That there was prejudice/bias on behalf of the 'committee';

- That the quantum has been miscalculated;
- That the 'committee'/experts had not considered all the facts surrounding the case. An appeal to the Minister/MEC would be the first approach, but could be followed with a legal process leading up to the Constitutional Court in some instances.

For those who said no, it was indicated that most of the time the applicants take it as admission of guilt for commencing with an activity without proper environmental authorization and are trying to comply with the regulations and acts i.e. accepting the responsibility.

4.2.1.5 Adequacy of the calculator

The results reveal that 80% of the respondents do agree that all four aspects of the calculator are adequate to determine the quantum fine. It was indicated that some projects are so small that the legislated fine should consider that especially when a maximum fine is to be issued. The size of the project must be used as the controlled variable to influence the quantum of the fine. The remaining 20% indicated that not all aspects are covered but the alternative or additional aspects which they feel are omitted or are suggested for improving the calculator not provided.

One of the respondents also indicated that the Socio-economic; Biodiversity; SOP/Heritage; and Pollution Index, by definition should be adequate inputs into the calculator where there is sufficient information relating to the potential impacts (short, medium and long term) coupled to sufficient understanding by the 'committee' and experts of the respective components of these four aspects. The respondent continued to argue that it is possible, however, that in the absence of full information relating to any particular aspect, that the rating (a – d) could be under or over stated resulting in an inappropriate score either be too low or too high.

This example was given to substantiate the arguments above that in the absence of 'quality'/ 'in-depth' specialist studies in an EIA/Basic Assessment or studies made on the areas impacted by other individuals, it is probable that the 'committee' will not be fully informed on the potential impacts (short term to long term) associated with the project. Simply put Garbage-in, Garbage-out or "GIGO". Where the accused feels the fine is 'light' there is little chance of a challenge. Conversely, where the accused feels it is too high, there is all likelihood of a challenge. The respondent closed the argument by indicating that the adequacy of the four aspects is dependent on the following:

- The quality of the related information and
- The skill of the committee members and their expertise.

One of the respondents indicated that the calculator covers the main environmental and social issues. It was also highlighted that the calculator also becomes less complex to handle and to understand for an ordinary person. The respondents acknowledge that the four aspects are adequate but challenges may still arise where other aspects like the quality of the reports may affect the proper score. The competency of the committee members was highlighted as they have to be able to comprehend the reports submitted to be able to determine the appropriate fine. That is, for the fine to be accurate, the good quality reports must be adjudicated by the highly skilled and competent committee.

4.2.2 Results related to research objective 2: Challenges experienced with the calculator

4.2.2.1 Commensuration of fines against environmental impacts

The study results show that 60% of the respondents do not agree that the fines issued are commensurate of environmental impacts emanating from illegal activities. It was indicated that the fines are human-imposed and have some faults depending on the manner in which the assessment reports were compiled. According to the respondents the fines issued are not too expensive to commensurate the environmental impacts. It may not even cover the total costs of rehabilitating the degraded environmental areas arising from illegal activities since some of the damage could arise after a long period of time. This response suggests that the understanding of the fines by the EAPs is that they should equal the amount of money required to rehabilitate the impacted area. This explains why there are sometimes appeals from interested and affected groups or individuals about the fine an applicant has been issued with. The fine is not defined as punitive in the legislation and the regulation, but still linked to polluter pays, where in this case the cost of rehabilitation should be considered.

One of the respondents indicated that in some instances the administrative fine might be appropriate. It was contended that in a number of cases the true environmental cost, socio-economic cost, heritage cost and / or pollution cost may not be fully understood at the time of the penalty calculation. In such instances the true cost of the project will be borne by society to the direct advantage of the project proponents. In South Africa we can see such examples that were created prior to NEMA, for example, acid mine leachate/drainage contaminating rivers and groundwater today, dust and pollution from gold and asbestos mine dumps, mining and industrial land that is not rehabilitated, and illegal waste disposal sites. The respondent concluded by indicating that sometimes the polluter's runaway from such long-term pollution. The rehabilitation will eventually be the responsibility of government to protect and conserve the environment. Therefore, it was submitted that a thorough understanding of all impacts, short to long term, is required to make an informed decision. At the time of calculating the fine, such information is not usually available. One of the respondents answered that "*based on my experience, yes. As*

indicated above all environmental angles are being covered. Moreover, fines are not meant to destroy someone or a business but should be used as a deterrent factor only.” This shows that the respondents are not agreeing as the fine does not take into consideration the cumulative effects and the long-term impacts that may arise. If this was considered by the calculator, the fine would not be issued, but be calculated at different intervals to assess the cumulative impacts of the project.

4.2.2.2. Appropriateness of calculator to determine the administrative fines

Eighty percent (80%) of the respondents who agreed that the calculator is an appropriate tool to determine the administrative fines, however, said it would be better if the calculator has set a metric to determine the fines to make the determination more objective and fair irrespective of the provincial competent authority or which official is assessing the application. This suggests that an independent body/ committee is considered to be better than the officials to promote fairness. This is seen in the Competition Act, Act 89 of 1998 where the administrative fines are issued by the Competition Tribunal.

Only 20% of the respondents disagreed that the calculator is not an appropriate tool to determine the quantum fine since its input is determined internally by the competent authority. It was argued that it is possible for a fine to be ‘light’, i.e. a cheaper route to follow than perhaps the financial cost that may be incurred through a delay in the project (could be time related / availability of capital / loss of market / competitor advantage etc.) when following the EIA process. It was maintained that EIAs can cost in excess of R5 million; delays can translate to lost contracts worth tens of millions. In this regard a R5 million fine can be insignificant over the life of the project. If the fine can be capitalised through creative bookkeeping, then the fine may be amortized over, say, 20 years. At 10% interest, this may be an input cost of less than R50 000 per month – insignificant on a large project. The respondent continued to reason that, whilst the fine on the company is not seen as a deterrent, individual liability is a significant deterrent only if the current R200 000 is amended to the maximum penalty in terms of NEMA, i.e. R10 000 000 and a prison sentence (even if suspended) coupled to associated fines where a transgression impacts on the National Water Act, Act 36 of 1998, NEM: AQA, NEM: WA and National Environmental Management Biodiversity Act, Act 10 of 2004. The argument was closed by indicating that if the individual liability was increased to include possible penalty in terms of the maximum fines / imprisonment possible in terms of the above legislation, then the system would be a sufficient deterrent. The CEO/ MD and responsible executives need to be held accountable as R200 000 is not a deterrent here. This respondent advocates that the maximum fine be increased from R5 million to R10 million and again the profit made be considered when effecting the fine. This is not

new as it is applied in the Companies Act, Act 71 of 2008, Competition Act, Act 89 of 1998 and Financial Institutions Act, Act 35 of 2001. By considering the profit made it is seen as deterrence.

4.2.2.3. Challenges of the fine calculator

The respondents mentioned several challenges of the fine calculator. The following challenges were indicated by the respondents:

- There still is some subjectivity involved in using the calculator. This can be affected by the quality / thoroughness / accuracy of the S24G application and report submitted by the EAP, as well as the experience of the official assessing the application. Also, the relative importance of socio-economic factors versus bio-physical factors will vary according to the type of project and the specific area. It is difficult to do this type of calculation with absolute objectivity, as the factors being assessed are not very easily quantifiable;
- The calculator not considering the positive impacts of the development;
- The fines resulting from the calculator is biased, may result in conflict of interests, and corruption;
- The absence of 'quality'/ 'in-depth' specialist studies in an EIA/Basic Assessment, or studies made on the areas impacted by other developers, it is probable that the 'committee' will not be fully informed on the potential impacts (short term to long term) associated with the project resulting in the fine being miscalculated;
- Insufficient information relating to both the scale of the impacts in the short and long term;
- Insufficient information on the (sensitivities) of the receiving environment and hence, true impacts;
- It requires skills, understanding, interpretation of the official committee and their selected experts;
- Penalties may be appropriate for small projects but are inappropriate for larger projects;
- The calculator should be calibrated to match various categories of projects based on locations and nature of the projects.

Although the respondents are not the ones applying the calculator, they are able to identify challenges that may arise from determining the fine using it. The regulation may be able to deal with some of the above issues in that the developer will be afforded an opportunity to comment on the issued fine and the reasons for the determination will be communicated as well. This is where the developer through the EAP will be able to juxtapose their findings with the ones submitted using Part 1 of the Annexure C (completed by the EAP) which provides for the impacts or potential impacts of the activities applied for. The only difference between the calculator index

and Part 1 form index is that competent authorities have more columns to it to score whereas the EAP only mark the appropriate variable based on the findings of the study.

4.2.3 Results related to research objective 3: Improvements to the fine calculator

4.2.3.1. Recommendations to improve the fine calculator

Out of 10 respondents, (60%) did not answer this section; only less than a half (40%) did. Two respondents indicated that they have no recommendations while the other one has indicated that the calculator should consider the applicant - whether it is a private or public beneficial project. Another respondent mentioned that each province should be specific to cater for enviro-social variables.

4.2.3.2. Suggestions of an alternative tool(s) to calculate the fines

Only 20% (2) of the respondents indicated that one might need to consider the project value factor, the level of commitment to improve or manage the environment sustainably going forward if authorised, while 70% (7) did not respond to the question. About 10% (1) of the respondents revealed that the recommendation might be about the possibility of establishing a 'National Environmental Trust Fund' to act as a fidelity fund to cover unseen events associated with S24G "projects" should be considered. It was argued that funding could be based on the project proponent being required to contribute an amount to the fund equal to the calculated amount of the penalty. This would effectively double the calculated penalty whilst at the same time making provision for mitigating impacts that may occur at a later stage. It would have the purpose of addressing unidentified aspects at the time of the imposition of the penalty. Again, if the applicant receives an EA, the cost of mitigation will need to be borne by him/her. It was concluded that the possible inclusion of the need to establish a rehabilitation/impact mitigation fund/insurance policy or a contribution to a National Environment Trust Fund on commencement of the project designed to cover possible unforeseen impacts / future costs to society. The suggestion of rehabilitation fund would see the department realizing and implementing the 'polluter pays' principle through section 28 of NEMA which states that *"every person who causes, has caused or may cause significant pollution or degradation of the environment must take 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 and rectify such pollution or degradation of the environment"*. The competent authorities will use the funds to address the pollution that arise from such similar illegal activities.

4.3 Responses from competent authorities

As indicated that each institution was given two (2) questionnaire to complete, not all of the institutions completed them. The total number of a questionnaire responded to, is thirteen (13).

4.3.1. Results related to research objective 1: Evaluating the use of the Section 24G calculator.

4.3.1.1. Awareness of the NEMA EIA regulations

All respondents indicated that they do work with EIAs and that they know about Integrated Environmental management tools. They indicated that the tools set out the standards for development in the three spheres of sustainable development. One respondent indicated that the tools are categorized into three groups i.e. planning tools such as EIA and EMF; managing or doing tools such as EMP; and checking tools such environmental auditors and environmental monitors. These tools serve as a basic foundation for implementing environmental conservation and protection.

They further indicated that the EIA regulations are made to regulate the procedure and criteria as contemplated 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, subjected to environmental impact assessment, in order to avoid detrimental impacts on the environment, or where it cannot be avoided, ensure mitigation and management of impacts to acceptable levels, and to optimise positive environmental impacts, and for matters pertaining thereto. This indicates that the participants are relevant for this study.

4.3.1.2 Awareness of the use of the calculator to determine the fines

It was found that three quarters (75%) of the respondents have been involved in application of the calculator for between 5 to 10 years of experience and 25% indicated between 0 to 5 years. This outcome indicates that the respondents are involved in using the calculator and most have adequate experience using it.

4.3.1.3. Duration of use of calculator to determine the fines

It was found that 87.5% of the respondents say it has been applied for 5 to 10 years whereas 12.5% say less than 5 years. One would have expected that 100% of the respondents get the same answer since they are all from the competent authorities.

4.3.1.4. Application of the fine calculator

All the respondents indicated that it has been calibrated to look at the index calculations of impacts associated with the activity illegally commenced with. They mentioned that it includes the following:

1. Socio economic impact index that looks at among others as to whether the activity provides wide scale socio economic impacts;
 2. Biodiversity impact index that looks at, among others, whether the activity could give rise to significant biodiversity loss and or biodiversity destruction;
 3. Heritage impact Index, whether the activity will affect the sense of place and or heritage thereof;
 4. Pollution impact index, whether the activity will give rise to pollution with high or major impacts.
- The four aspects mentioned, indeed make up the administrative calculator as provided for in S24G regulations.

4.3.1.5. Adequacy of the calculator

Eleven (11) of the respondents answered yes and also indicated that the four aspects are adequate as they contain all aspects of the environmental assessment. Whereas the two (2) respondents answered no, and indicated that the social-benefit index must be brought back as it was assisting the previously disadvantaged individuals who mainly deals with poverty alleviating projects and genuinely did not know about the legislative requirements. They further indicated that the pollution aspect/index must be expanded to be specific to type of pollution (e.g. surface or ground water pollution, air pollution, and land pollution) as this will increase the accuracy of the calculator. Although most of the respondents find the 4 aspects adequate, the concerns raised by the others have been advanced in chapter 3 and some were even highlighted with some of the appeals lodged with competent authorities and courts.

4.3.1.6. The number of applicants fined using the calculator

Of the thirteen (13) respondents, twelve (12) did not give any figure but indicated that the numbers vary annually but one respondent indicated that five (5) offenders were fined for the financial year of 2018/2019. This was probed to evaluate if the competent authorities do get voluminous applications and eventually assess the trends. A trend could not be established since there were none available to determine the trend.

4.3.1.7. Appeal of fines issued by the committee

Out of the thirteen (13) respondents, twelve (12) indicated that the fines issued by the committee are sometimes appealed by the developers or the interested and affected parties. It was indicated that the committees were developed after the promulgation of the S24G Fine Regulations on 21 July 2017. However, prior to this, some of the fines issued by the CAs were appealed and presented to the appeal panel for decision. Only one respondent indicated that the committee is not yet functional.

4.3.1.8. Duration of appeals by the applicants

One (1) respondent indicated that the fines are always appealed and twelve (12) of the respondents indicated that the appeals are occasionally appealed. Appealing the fines is provided for in NEMA and the S24G regulations where the developer is afforded an opportunity to make a representation against the fine issued. Chapter 3 has highlighted some of the appeals made and the basis which some have been highlighted by the respondents above.

4.3.2 Results related to research objective 2: Challenges experienced with the fine calculator

4.3.2.1. Challenges of the application of the calculator

Ten (10) respondents indicated that the calculator is calibrated in such a way that it adds and provide the sum/answer without having to go through any problems and therefore they are not experiencing any challenges applying the calculator. They further added that the calculator is easy to use and it allows for deviations when dealing with appeals or request for reduction of fines. It was also highlighted that one can say that the accuracy level of the calculator is questionable, especially when dealing with pollution issues, as all aspects of pollution are not expanded but dealt with under one index.

Meanwhile, three (3) of the respondents indicated a number of the challenges encountered listed as follows:

- It does not differentiate between the company that is only commencing business and the one that has been operating for many years and has been generating income. The same applies to the municipalities; the index fails to look at the difference between the activities that are triggered by the township establishments that emanate from illegal land occupation by private individuals constructing shacks and later demanding services from the municipalities and those activities that the municipalities had an opportunity to plan in advance, covered in their Integrated Development Plans. There is no reason for the municipality to fail to conduct an EIA when it is known in advance, when the development planned and is acted within what is legally required.
- It has an element of being subjective in the sense that anyone who has an in-depth knowledge of a particular impact index, influencing the scoring of such index. It also doesn't look at the mitigation measures provided in the report. Mitigation measures undertaken are not considered when the fine is being determined.
- The temptation of using the negative significant impact to justify the descriptive variable of the impact indexes to calculate the fine amongst the committee members, changes the purpose of the calculator to become punitive.

- Another respondent submits that the inconclusive EIRs, which result in difficulty determining the relevant fine. Poor quality of the submitted EIRs are also a limiting factor as well as challenges that are making determination of an administrative fine a mountainous task to undertake.

Although most of the respondents do agree that the calculator is easy to use, some are raising the challenges which are compromising the effectiveness of the calculator. Some of the challenges highlighted were raised by the EAPs above and this is now confirmed by the CAs, for instance the issue of poor quality reports.

4.3.2.2. Training of the committee members

Three respondents indicated that the Fine Determination Committee members were trained as they participated in the workshops where the calculator was developed. It was alluded that the “system” has not changed. Another respondent indicated that only the officials working in S24G directorate did an on-job training. The other nine respondents said there was no training undertaken. Thus, this could indicate that there may be no formal training that has ever been provided for the officials or the committee. This explains why there has been inconsistencies which prompted the CA to develop the regulations to outline the procedure to be followed.

4.3.2.3. Commensuration of the fines against environmental impacts

Eleven (11) respondents answered no and indicated the following as the reasons for their answer:

- There is no amount of money that could replace the lost environment.
- Some impacts are irreversible and others are invisible and difficult to identify the source, for instance, projects that involve air quality issues especially in a congested industrial area.
- As the law states, this is an administrative fine which means the transgressor is charged for his/her failure to identify and apply for listed activity so that he/she can be able to identify, assess and evaluate the negative and positive environmental impact of his/her activity. So the fine will never be equated to the environmental impacts.
- Sometimes the amount issued cannot match the cumulative impacts of the illegal activity in the long run. The amount is eventually based on the socio-economic benefits the activity or the applicant provides. For instance, the calculation of the fine can be high, if only the calculation is based on the negative environmental impacts of the activity.

Two (2) of the respondents answered yes and indicated the following and substantiated as follows:

- The site inspection provides a good perspective of what has already occurred on site and the impact on the environment is visible at that stage and brings a balance, taking into consideration the non-compliance, the impact on the environment, the retrospective impact assessment and gives an indication whether the authorization has to be approved or denied. The payment of the administrative fine does not automatically equate to the approval, in some instances the developer is instructed to demolish and rehabilitate the environment to its original status.
- Small activities, like building and slightly extending a footprint are issued with harsh penalties. For second offenders the penalty is harsh when considering the environmental minimum impact of the activity. Significance is difficult to determine. This is evident for poorer provinces such as Eastern Cape, Northern Cape, Limpopo, Mpumalanga and KwaZulu Natal. With limited larger development that Gauteng has it may well deserve larger fines.
- The social benefit issues of a project can be considered at the appeal or representation stage where it can be considered that the development will provide an essential service or infrastructure to the community thereby reducing the amount of the fine.

4.3.2.4. Appropriateness of the calculator to determine the administrative fine

All the respondents said yes the calculator is the appropriate tool to determine the administrative fines and provided the following as their reasons:

- This calculator at least caters for all elements of sustainable development, which is socio economic factors and physical environment. It also caters for all stages of the development or activities, that is, the project that is completed, put on halt while still processing the NEMA S24G application and the project that is at an initial stage (commencement). So this calculator allows the fine committee to consider the stage of the project during the NEMA application. If the activity was discovered and stopped at commencement stage, and application was lodged during that period, the fine should be lesser than the same project which is already completed illegally.
- There is no other means at this stage to expect the calculator that is being used to recover the loss associated with illegal commencement on the environment.
- It is project specific and not generic and considers various types of impacts the activity might have on the receiving environment (e.g. impacts of biodiversity, pollution levels caused by the activity, etc.). It further allows room for deviations, especially when dealing with appeals. However, it must be noted that the calculator is open to high levels of inconsistency, as individuals may calculate the fines differently for similar activities undertaken on the same area (type of receiving environment). To this effect, one might

argue that a more generic/standard guideline, with the already calculated amounts, will be more appropriate as it will close the inconsistency gap and probably the room for discretion and corruption activities.

4.3.3. Results related to research objective 3: Improvements to the fine calculator

4.3.3.1. Recommendations to improve the fine calculator

The following recommendations were suggested by the respondents to be considered in improving the fine calculator:

- It was indicated that the calculator is working well for Gauteng as there has not been any challenges met thus far. The province also appreciated the developed regulations which would ensure consistency to assist with the implementation and application of the calculator.
- To avoid the subjectivity of the calculators, clear explanation of the impact indexes and variable descriptions would be useful.
- Somehow there is a need to establish a net income of the applicant and profit/loss to inform the quantum of the fine. The quantum needs to be adjusted accordingly to consider profits made due to engaging in illegal activities.

There is still a call for clarification of variables used in the calculator to avoid subjectivity. As alluded by the EAPs, the officials are hereby somehow confirming that the element of subjectivity may be there. It is again recommended that the profit made by the developer be considered and factored into the administrative fines.

4.3.3.2. Suggestion of alternative tool(s) to calculate fines

The following recommendations were suggested by the respondents in an attempt to improve the current tool (the calculator) used:

- A process similar to the one adopted for S22A of the NEMAQA for determining the fines can be appropriate. The process already provides for standard amounts that must be paid by the contraveners prior to impact calculation. The similar approach for EIA listed activities needs to be adopted to have S24G fine be fixed.
- Immense awareness drive and capacity development to the regulated community about the legislative requirements of the environmental sector
- A tool that will be punitive, which will look at associated impacts of a project and fine the transgressor for each and every negative significant impact caused or is causing or will be caused by conducting the illegal development

- A tribunal needs to be appointed with judiciary and environmental experience to determine the administrative fines. The system needs to link to a court decision where non-compliance would be contempt of court.
- The equation must cater for either addition or multiplication of a variable(s) for scoring repeat contravention, economic value, or gain due to the illegal development as well as the social variable.

4.4 Conclusion

The findings of the data collected were presented using thematic analysis. The results were presented sequentially according to how they were structured in the questionnaire. This was influenced by the small size of the sample used for this study. The findings of this study show that the competent authorities (CA) and the EAPs have adequate knowledge of EIA regulations as well as the application of a fine calculator in Section 24G. The results further revealed that the application of a calculator is perceived to be an appropriate instrument in environmental management tools. The implication is that there is room to improve the calculator and expand some of the indexes, such as the pollution index to be specific on the type of the indicator. Another noble suggestion was to suggest that the fine takes into consideration the profit made with the illegal activities and that be factored into the calculator.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

In the previous chapter, data was analysed and interpreted. The study's findings are discussed in relation to the research questions and objectives, as set out in chapter one. This is done by referring to the literature study in Chapter three, and the research data analysed in Chapter four. The study contributions, conclusions, and recommendations are drawn.

5.2 Summary of the Study

These provisions remain controversial and are still not commonly used in other countries. Currently India does have something similar to this *ex post* authorization and it is also a controversial aspect. The processes and applications are also different. In SA they have administrative fines, where in India there are no fines to such applications. In India, the normal EIA application is processed and administered by the EM and the EC issued by the EM but the *ex post facto* is issued by the Expert Appraisal Committee whereas in SA all are administered and issued by the competent authorities.

The provision of S24G remains unique to SA and a few countries which apply a similar model but for special projects just like in India, Lesotho and Papua New Guinea only in their prescribed procedures. It has been noted that the EIA regulations in SA have undergone numerous amendments thereby changing the listed or specified activities and delisting some of the activities, making it difficult for the developers of such activities to authorize them. S24G was extended into legislation to promote voluntary compliance by those developers who commenced with their activities illegally.

It has been noted that NEMA is functioning differently from other legislation in SA that also have administrative fines. Other legislation that issue administrative fines are the Companies Act, Act 71 of 2008, Competition Act, Act 89 of 1998 and The Financial Institutions (Protection of Funds) Act 35 of 2001. NEMA can learn some lessons from each of those acts to strengthen their administrative fine system. For instance, the Financial Institution Act, Act 35 of 2001 recover costs suffered due to the non-compliances and also linking the fine to a certain percentage of the profit made by the developer while engaging in illegal activities.

The NEMA S24G calculator was found to be complex and subjective hence the fines issued are sometimes appealed by the developers and interested parties. The section 22A of NEMAQA's administrative fines were made very simple to administer and to calculate by everyone involved, including interested and affected parties. It is interesting to note that all the fines of both NEMA

and NEMAQA are referred to as the administrative fines but follow two complete different processes of determining the quantum fine. The aims of these two sections are the same with the aim to assist the developers to come to compliance.

The method of application of the quantum fines still remains a challenge as contested by other developers despite the S24G regulations gazetted to eliminate inconsistencies. What was noted with the four indexes of the calculator, was that the weighting of the variables was the same but total contribution of the indexes was not equal. Pollution and biodiversity indexes were given higher scores of thirty (30) each whereas socio-economic and heritage indexes were given twenty (20) each. This makes the use of the calculator and determination of the fine subjective and easily manipulative. On the other hand, determination of the NEMAQA section 22A fines has been simplified to avoid subjectivity and manipulation. The method of calculating the NEMAQA fines is simplified and it was recommended that it be adopted and replace the calculator.

The regulations are beneficial to both the CAs and the developers. The developers are now afforded an opportunity to comment on the fine against them. The developer will also have access to the reason advanced in issuing the fines as it is now mandatory for the committees to keep such records and minutes. This will grant the developer an opportunity to either understand or challenge the CA where they feel they were inappropriately fined.

It has been indicated that although these provisions aim at assisting the developer to come to compliance, the compliance of the development will be from the date of issue of the environmental authorization. Part of the development remains illegal forever. Again with the regulations of the EIA listed or specified activities being amended very often, this tends out that these provisions do not offer solutions for all. It has been clearly outlined that one can only apply for an *ex post facto* of an activity or activities that are still listed in the current EIA regulations.

The participants highlighted that the calculator does not take into consideration other factors such as positive impacts brought in by the development, but that remains the discretion of the CA. The removed social benefit index was taking into considerations the positive impacts but only in relations to social activities. The method used for determining the air quality fines seems to be easy and transparent as opposed to the one used for EIAs and waste activities, however it can still be abused as it will be easy for the developers to measure the financial benefit of operating without the required license against the fines to be paid. These findings have addressed the second objective of the study which was to assess the challenges experienced using the fine calculator.

The findings of this study revealed that the competent authorities (CA) and the EAPs have adequate knowledge of EIA regulations and the application of fine calculator in Section 24G. The results further revealed that the application of a calculator is perceived to be an appropriate instrument in environmental management tools. It was suggested that there is room to improve the calculator and expand some of the indexes such as the pollution index to be specific on the type of indicator. Another noble suggestion was that the fine must take into consideration the profit made with the illegal activities and that be factored into the calculator. These findings have addressed the first and the third objectives of the study which are to evaluate the use of the S24G calculator and to identify the ways that can be used to improve the fine calculator.

5.3 Recommendations

Suggestion was made to increase the fine from R5 Million to R10 million. Reasons are still based on abuse of this provision, as it is already indicated by some respondents that no amount of money will replace the damaged or polluted environment. Stimulating recommendations were made where National Environmental Trust Fund (NETF) was suggested to be used. If agreed to, the fund will cover for unseen activities associated with S24G. It was suggested that the proponents be subjected to contribute an equal amount of the fine to the NETF. The basis of such contribution is to assist in addressing the unidentified aspects at the time of determining the fine.

It is further suggested that in depth research be undertaken to probe the use of the administrative fines' calculator and the following areas of future research are recommended:

- The aspects of the calculator to be expanded to accommodate the cumulative impacts
- The consideration of the profit made by the developers while engaging in an illegal activity or specified activities
- Establishment of a National Environmental Trust Fund where administrative fund would be used to deposit the administrative fines and be used for environmental rehabilitation projects.
- The weighting of the calculator to be investigated further to comprehend the weighting and the description of the variables.

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Annexure A

A1: QUESTIONNAIRE DISTRIBUTED TO THE EAPs

DRAFT QUESTIONNAIRE

As part of my Master's degree in environmental management at the North West University, I am conducting a survey that investigates the use of the calculator under section 24G of National Environmental Management Act, 1998 (Act No. 107 of 1998) as amended. I will appreciate it if you could answer below questions. Note that any information obtained in connection with this study that can be identified or obtained from you will remain confidential and will only be used for this research.

1. Respondent's Demographics

1.1. What is the highest level of education that you have completed?

Grade 1-7	
Grade 8-11	
Matric	
Other qualification	
Diploma	
University/ Technikon Degree	
Post-graduate Degree (e.g. Masters, PhD)	

1.2 What is your job title?

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1.3 Number of years working with Environmental Impact Assessment (EIA's)

Less than 5	5-10	11-15	16-20	20+

2. Knowledge on Environmental Management Tools

2.1 Do you know of/work with NEMA: Environmental Impact Assessment regulations?

Yes/No (If yes briefly explain your understanding of the regulations)

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3. Objective 1: The application of the NEMA section 24G calculator

3.1. Are you aware of the use of the calculator to determine administrative fines under section 24G of NEMA?

Yes	No

3.2 How long has the calculator been applied to determine the fines?

Less than 5	5-10	11-15	16-20	20+

3.3 Are the fines issued by the committee appealed? Motivate your answer

Yes	No

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3.4 Do you think the four aspects of the calculator are adequate to determine the appropriate fine? Please explain.

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4. Objective 2: What are the challenges experienced using the fine calculator?

4.1 Do you think the fines issued are commensurate of environmental impacts emanating from the illegal activities? If yes/no, please motivate

Yes	No

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4.2 Do you think this calculator is an appropriate tool to determine the administrative fine as contemplated in NEMA section 24G? If yes/no, please motivate

Yes	No

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4.3 Identify challenges of the fine calculator

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5. OBJECTIVE 3: Recommendations to improve calculator

5.1 Any recommendations about how the calculator may be improved?

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5.2 Do you have any suggestions of an alternative tool to determine the fines?

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THANK YOU FOR YOUR PARTICIPATION IN THIS STUDY, IT IS HIGHLY APPRECIATTED!

DRAFT QUESTIONNAIRE

As part of my Master's degree in environmental management at the North West University, I am conducting a survey that investigates the use of the calculator under section 24G of National Environmental Management Act, 1998 (Act No. 107 of 1998) as amended. I will appreciate it if you could answer below questions. Note that any information obtained in connection with this study that can be identified or obtained from you will remain confidential and will only be used for this research.

1. Respondent's Demographics

1.1. What is the highest level of education that you have completed?

Grade 1-7	
Grade 8-11	
Matric	
Other qualification	
Diploma	
University/ Technikon Degree	
Post-graduate Degree (e.g. Masters, PhD)	

1.2 What is your job title?

.....

.....

.....

.....

1.3 Number of years working with Environmental Impact Assessment (EIA's)

Less than 5	5-10	11-15	16-20	20+

2. Knowledge on Environmental Management Tools

2.1 Do you know of/work with NEMA: Environmental Impact Assessment regulations?

Yes/No (If yes briefly explain your understanding of the regulations)

3. Objective 1: The application of the NEMA section 24G calculator

3.1. How long have you been involved in the application of the calculator?

Less than 5	5-10	11-15	16-20	20+

3.2 How long has the calculator been applied to determine the fines?

Less than 5	5-10	11-15	16-20	20+

3.3 How is the calculator applied?

3.4 Do you think the four aspects of the calculator are adequate to determine the appropriate fine? Please explain.

3.5 In your province how many people were fined using the calculator?

3.6 Are the fines issued by the committee appealed?

Yes	No

3.7 How often do applicants appeal the fine amount issued?

Never	
Seldom	
Sometimes	
Often	
Always	

4. Objective 2: What are the challenges experienced using the fine calculator?

4.1 Are there any challenges experienced when the calculator is applied? If yes, please identify them and motivate

Yes	No

4.2 Is the committee trained for using the calculator? If yes, please elaborate about the training provided.

Yes	No

4.3 Do you think the fines issued are commensurate of environmental impacts emanating from the illegal activities? If yes/no, please motivate

Yes	No

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4.4 Do you think this calculator is an appropriate tool to determine the administrative fine as contemplated in NEMA section 24G? If yes/no, please motivate

Yes	No

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.....

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5. OBJECTIVE 3: Recommendations to improve calculator

5.1 Any recommendations about how the calculator may be improved?

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5.2 Do you have any suggestions of an alternative tool to determine the fines?

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THANK YOU FOR YOUR PARTICIPATION IN THIS STUDY, IT IS HIGHLY APPRECIATED!

