

**COMPARISON BETWEEN SOUTH AFRICAN,
NAMIBIAN AND SWAZILAND'S EIA
LEGISLATION**

by

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**COMPARISON BETWEEN SOUTH AFRICAN,
NAMIBIAN AND SWAZILAND'S EIA LEGISLATION**

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SUMMARY/OPSOMMING

An EIA is one of the available environmental management tools, which seems to have become entrenched as the cornerstone of effective environmental management. It can be regarded as a tool to facilitate sound, integrated decision-making in which environmental considerations are explicitly and systematically taken into account in the planning and development process. EIAs have been practised extensively in South Africa for the last three decades. The impetus for this practice did not originally come about from legislation. Environmental assessment legislative provisions were later contained in both the *Environment Conservation Act 73* of 1989 and the *National Environmental Management Act 107* of 1998, as well as in some sectoral legislation (such as *National Water Act 36* of 1998 and the *Minerals Act 50* of 1991). South Africa is in the process of finalising its EIA legislation under NEMA and is currently in the process of redrafting its EIA regulations.

In this dissertation, fourteen distinct EIA evaluation criteria are discussed as set forth by Wood, supplemented by other writers, regarding the essential elements for an effective EIA. These criteria form the main framework against which the comparative study of South African, Namibian and Swaziland's EIA legislation are discussed.

Swaziland recently adopted the new *Environmental Management Act 5* of 2002 and Namibia also adopted the *Environmental Management Act 101* of 1998. The comparative analysis of the three countries' legislation offers numerous potential opportunities for improving the current South African EIA legislation. As fellow SADC countries, these countries can learn from one another. It is also important during the redrafting process to attempt the alignment of principles between these neighbouring countries as they share natural resources and many private companies undertake projects that exceed the countries' national boundaries. Consideration is also briefly given to transborder regulations concerning EIAs.

Furthermore the different EIA amendment proposals from some of the participating parties as well as the *National Environmental Management Second Amendment Bill* of 2003 are discussed. Although many of the problems are addressed in the *National*

Environmental Management Second Amendment Bill of 2003 there is still potential gaps and shortcomings which must be considered in the redrafting of the EIA regulations.

'n Omgewingsinvloedstudie (EIA) is 'n belangrike bestuursinstrument wat die hoeksteen vorm van effektiewe omgewingsbestuur. 'n EIA kan beskou word as 'n instrument wat grondige, geïntegreerde besluitneming fasiliteer en waarin omgewings oorwegings eksplisiet en sistematies inaggeneem word in die beplannings- en ontwikkelingsproses. Die afgelope drie dekades is die EIA proses op grootskaal beoefen in Suid-Afrika. Die beweging vir die praktyk het nie oorspronklik voortgespruit uit wetgewing nie. Later is bepalings vir omgewingsimpakstudies vervat in beide die *Wet op Omgewingsbewaring* 73 van 1989 en die *Nasionale Wet op Omgewingsbestuur* 107 van 1998, asook in sommige sektorale wetgewing (soos die *Nasionale Waterwet* 36 van 1998 en die *Mineralewet* 50 van 1991). Suid-Afrika is in die proses om sy EIA wetgewing te finaliseer en is huidiglik in die proses om die EIA regulasies te hersien.

In die verhandeling word veertien afsonderlike evaluasie kriteria wat handel oor die essensiële elemente waaraan 'n effektiewe EIA gekenmerk kan word van die skrywer Wood, aangevul deur ander skrywers, bespreek. Die kriteria vorm die hoof raamwerk waarteen die vergelykende studie van Suid-Afrika, Namibia en Swaziland bespreek word.

Swaziland en Namibië het onlangs, onderskeidelik die *Environmental Management Act* 5 van 2002 (EMB) en die *Environmental Management Act* 101 van 1998 (EMA) aangeneem. Die vergelykende studie van die drie lande se wetgewing bied verskeie potensiële geleenthede vir die verbetering van die huidige Suid-Afrikaanse EIA wetgewing. As mede lede van SADC kan die lande van mekaar leer. Omdat die buurlande natuurlike hulpbronne met mekaar deel en verskeie privaat maatskappy projekte onderneem wat die nasionale grense oorskrei is dit ook belangrik dat gedurende die hersieningsproses 'n poging aangewend moet word om die beginsels tussen die buurlande met mekaar in ooreenstemming te bring. Oorweging word dan ook kortliks gegee aan oorgrensende regulasies aangaande EIAs.

Verder word die verskillende EIA hersieningsvoorstelle van sommige van die deelnemende partye, asook die *Tweede Nasionale Wetsontwerp op Omgewingsbestuur* van 2003 bespreek. Alhoewel baie van die probleme van die vorige EIA wetgewing aangespreek is in die Wetsontwerp is daar steeds potensiële gapings en tekortkominge wat aandag moet geniet in die hersiening van die nuwe EIA regulasies.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BCLR	Butterworths Constitutional Law Report
BPEO	Best Practicable Environmental Option
CA	Competent Authority
CEC	Commission for Environmental Co-operation
CEQ	Council for Environmental Quality
CH	Chapter
CMP	Comprehensive Mitigation Plan
CMR	Comprehensive Mitigation Report
DEAT	Department of Environmental Affairs and Tourism
DME	Department of Minerals and Energy
DWAF	Department of Water Affairs and Forestry
EA	Environmental Assessment
EAARR	<i>Environmental Audit, Assessment and Review Regulations 58 of 1996</i>
EAP	<i>Swaziland's Environmental Action Plan</i>
EAR	Environmental Assessment Report
ECA	<i>Environmental Conservation Act 73 of 1989</i>
ECC	Environmental Compliance Certificate
ECom	Environmental Commissioner
ECS	Environmental Consulting Service
EIA	Environmental Impact Assessment
EIA report	Environmental Impact Report
EIR	Environmental Impact Report
EIS	Environmental Impact Statement

EMA	Namibian <i>Draft Environmental Management Bill</i> of 1998
EMB	Swaziland's <i>Environmental Management Act</i> 15 of 2002
EMP	Environmental Management Programme
EMS	Environmental Management Statement
GG	<i>Government Gazette</i>
GN	General Notice
IAIASa	International Association for Impact Assessment of South Africa
IEE	Initial Environmental Evaluation
IEM	Integrated Environmental Management
KZN	Kwa Zulu-Natal
LDO	Land Development Objectives
MEC	Member of Executive Committee
MEPD	Ministry of Economic Planning and Development
MEPD	Ministry of Economic Planning and Development
NAAEC	North American Agreement on Environmental Co-operation
NEMA	<i>National Environmental management Act</i> 107 of 1998
NEP	Draft National Environmental Policy of 2000
NEPA	USA National <i>Environmental Policy Act</i>
NGO	Non-Governmental Organisation
Procl	Proclamation
PPA	Post project analysis
Reg	Regulation
S	Section
SADC	South African Development Community
SAJELP	South African Journal of Environmental Law and Policy

SDC	Sustainable Development Commission
SEA	Strategic Environmental Assessment
SIE	Social Impact Assessment
Ss	Sections
TEIA	Transboundary Environmental Impact Assessment
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg
UK	United Kingdom
UNCED	United Nations Conference on Environments and Developments
USA	United States of America

CHAPTER 1 INTRODUCTION

1.1 PROBLEM STATEMENT

South Africa has numerous acts dealing with the conservation of the environment. Section 24 of the *Constitution* of South Africa forms the main framework within which other legislation has to be interpreted. It makes provision for the protection of the environment and the right of everyone to have an environment that is not harmful to their health or well-being. South Africa has also adopted the *National Environmental Management Act* 107 of 1998 (hereafter referred to as NEMA) that serves as environmental framework legislation. The NEMA provides *inter alia* for tools to protect the environment. One of these tools is an environmental impact assessment (hereafter referred to as EIA).

An EIA is used as an administrative or regulatory process by which the environmental impact of a project is determined.¹ The *Environmental Conservation Act* 73 of 1989 (hereafter referred to as ECA) regulates the investigation of environmental impacts in South Africa until the provisions in NEMA are in operation.² South Africa is in the process of redrafting its EIA legislation and can learn much from the other South African Development Community (hereafter referred to as SADC) countries' EIA legislation.

Namibia is in the process of adopting their *Environmental Management Act* (hereafter referred to as EMA). The purpose of this legislation is to give effect to article 95(1) and 91(C) of the Namibian Constitution. This legislation encompasses what could be one of the region's most innovative approaches to development planning and provides for a comprehensive system of environmental assessment at both project and strategic

1 See 2.3 The purpose of EIA.

2 The South African Government is currently revising ch. 5 of NEMA as well as the Regulations. See Chapter 4.

level.³

Swaziland's *Environmental Action Plan* (hereafter referred to as EAP) addresses the environmental issues of the country. The past *Environmental Audit, Assessment and Review Regulations, 2000* (hereafter referred to as EAARR) made explicit provision for environmental impact assessments and recently Swaziland excepted the new *Environmental Management Act 5 of 2002*. The EIA legislation of these three countries differs in many ways.⁴

The SADC Protocol mentions that environmental issues between member countries must be addressed on transborder level. Until now nothing constructive has been done to address these issues. Currently before development can take place each country's legislation has to be studied separately. This process hampers development projects and conservation of the environment. Developments may have severe consequences that transgress the boundaries of states. This is one reason why transborder regulations concerning EIAs are important to be consulted by these countries.

In North America, the governments of Canada, the United Mexican States and the United States of America (hereafter referred to as USA) have an agreement that addresses crossborder environmental issues between these countries.⁵ This agreement includes provisions on assessing environmental impacts, notice to the country potentially affected by these impacts, mitigation measures and public participation in decision making.⁶ The problem in the SADC countries is that most of them are surrounded by numerous countries with different legislation on environmental issues such as EIAs and different ways of addressing these problems. There are no transborder regulations between the SADC countries to provide for standard regulations that can be followed in crossborder environmental issues. This may lead

3 Tarr and Figueira "Namibia's Environmental Assessment framework"- the evolution of policy and practice" 18.

4 See Chapter 3.

5 *Resolution 73-03 on Transboundary Environmental Impact Assessment of 1997*.

6 See 2.5.2 Transboundary Environmental Impact Assessment.

to negative impacts on the environment and a delay in the sustainable development of these countries.

There are numerous definitions of an EIA and they are applied differently between countries and even within a particular country. Wood⁷ formulates fourteen best *practica* EIA criteria. Several other authors added to these criteria. These criteria may be used as a framework against which existing EIA legislation may be measured

1.2 POINTS OF DEPARTURE, ASSUMPTIONS AND HYPOTHESES

South Africa's EIA legislation is currently insufficient. South Africa is in the process of redrafting its EIA legislation. Both Namibia and Swaziland's EIA legislation is new and modern and offers potential opportunities for improving the current South African EIA legislation.

In North America, the agreement on Environmental Co-operation between Canada, Mexico and the United States of America adopted *Resolution 97-03 on Transboundary Environmental Impact Assessment* in September of 1997 and it can be assumed that a study of this agreement will be of great value for the investigation into the possibility for transborder EIA legislation in the SADC countries.

1.3 THE FRAMEWORK AND OBJECTIVES

The objectives of this dissertation are to:

- define an EIA as well as other relevant definitions
- discuss Wood's fourteen criteria as well as other writers' criteria
- study the contents of the North American Agreement on Environmental co-operation between the governments of Canada, Mexico and the United States of America in broad terms
- measure existing EIA legislation against the criteria set by Wood and other writers

- compare South African EIA legislation with the EIA legislation of Namibia and Swaziland
- establish the shortcomings of the South African EIA legislation and determine the possible learning points for South Africa from Namibia and Swaziland regulations
- study the new and the proposed amendments to the EIA regulations
- suggest recommendations for consideration to be included in the new South African EIA regulations.

1.4 DESCRIPTION OF THE RESEARCH METHODS TO BE USED

The research is based on comparative legal research between South Africa, Namibia and Swaziland. Reference is also made to the North American Transboundary Agreements.

1.5 CUT-OFF DATE

The cut-off date for information gathered for this dissertation was September 2003.

CHAPTER 2 DEFINITIONS AND THEORETICAL FRAMEWORK

2.1 INTRODUCTION

In this chapter, certain important definitions and concepts that are used throughout the dissertation will be discussed and explained. Wood's⁸ fourteen evaluation criteria, supplemented by other writers' contributions' will form the main framework around which the different concepts of the EIA will be discussed.

2.2 DEFINITION OF ENVIRONMENT

In this study, it is important to define the term "environment", because not every country regards the environment as being made up of the same elements. Because of this reason, one country's definition may differ from another. The South African NEMA defines the term "environment" as:⁹:

the surroundings within which humans exist and that are made up of

- the land, water and atmosphere of the earth
- micro-organisms, plant and animal life
- any part or combination of (i) and (ii) and the relationship among and between them
- the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

NEMA has, however, not repealed ECA's definition of "environment." ECA defines "environment" as: " ... the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of

8 Wood *Environmental Impact Assessment: A Comparative Review*.

9 S 1(xi) of NEMA.

organisms."¹⁰ It is evident from the above two definitions that NEMA places humans in the middle of the environment where they are regarded as being part of the environment and ECA places the humans outside the environment where the environment can influence the life and habits of man.

For the purpose of this dissertation no definition will be taken as a universal definition. Rabie¹¹ points out there is no general agreement on what the term "environment" encompasses and after a thorough analysis, concludes that an all embracing concept of the environment is unacceptable as a workable basis for determining the scope and content of environmental law, because the all encompassing nature of environment would tend to make all law environmental law.

2.3 THE NATURE OF ENVIRONMENTAL IMPACT ASSESSMENT

Numerous definitions are used to define an EIA ranging from very broad to narrow.¹² Wood defines an EIA as "the evaluation of the effects likely to arise from a major project (or other action) significantly affecting the natural and man-made environment."¹³ According to Wood, an EIA is a systematic and integrative process with consultation and participation as an important part of the process. The systematic process of examining the environmental consequences of development actions that take place in advance of the implementation of a project.¹⁴ The emphasis inherent to an EIA is on the prevention of significant environmental impacts.¹⁵

According to the United Kingdom (hereafter referred to as UK) Department of the Environment, an EIA is "essentially a technique for drawing together, in a systematic manner, expert qualitative assessment of a project's environmental effects, and

10 S 1 of ECA.

11 Rabie "Nature and Scope of Environmental Law" ch 6 in Fuggle and Rabie (ed) *Environmental Management in South Africa* 1992 83-92.

12 Glasson *et al Introduction to Environmental Impact Assessment* 4.

13 Wood *Environmental Impact Assessment: A Comparative Review* 1.

14 Swaziland Government *EXPLORER* http://www.ecs.co.sz/env_articles_envassa.htm/ 5 September 2001.

15 Wood *Environmental Impact Assessment: A Comparative Review* 1.

presenting the results in a way which enables the importance of the predicted effects, and the scope for modifying or mitigating them, to be properly evaluated by the relevant decision-making body before a decision is given. Environmental assessment techniques can help both developers and public authorities with environmental responsibilities to identify likely effects at an early stage and thus to improve the quality of both project planning and decision-making."¹⁶ This comprehensive definition explains the EIA purpose in broad terms.

An EIA may also be defined as a management tool for planners and decision-makers that serves to complement other project studies on engineering and economics. Environmental assessment is accepted as an essential part of development planning and management. It is important that an EIA is not considered as just part of the approval process, but rather as an action plan to be followed during the planning, implementation and post-implementation phases of a project cycle.¹⁷

It is also important to distinguish between an EIA and a strategic environmental assessment (hereafter referred to as SEA).¹⁸ SEA expands EIA from projects to policies, plans and programmes.¹⁹ The main difference between an EIA and a SEA lies in the fact that an EIA focuses only on projects, while a SEA focuses earlier in the planning process on policies, plans and programmes.²⁰

While there are multiple definitions regarding SEA, there is not a commonly held universal definition. The *White Paper on Environmental Policy for South Africa* (1998) defines SEA as "a process to assess the environmental implications of a proposed strategic decision, policy, plan, programme, piece of legislation or major plan." Foremost, the purpose of SEA is to integrate natural environmental concerns into the planning process at the same level at which social and economic considerations are addressed. The fundamental benefit of SEA is that it aims to

16 Wood *Environmental Impact Assessment: A Comparative Review* 1.

17 Swaziland Government EXPLORER <http://www.eds.co.sz/welcome.htm>/ 31 August 2001.

18 See 3.3.2 Definition of Environmental Impact Assessment.

19 Glasson *et al Introduction to Environmental Impact Assessment* 8.

20 For further discussion in this regard see 2.4.14 Strategic environmental assessment.

integrate the concept of sustainability into the formulation of plans and programmes.²¹ However, this dissertation focuses on the assessment of projects (EIA) and the issue regarding SEA will not be discussed in detail.²²

Development action impacts are not only limited to the physical environment, they can also have impact on social and economic environments. This includes impact on employment opportunities, services (e.g. health education), community structures, life styles and values.²³ Impact studies such as these are referred to as social impact assessments (hereafter referred to as SIA). The SIA is regarded in some countries as an integrated part of an EIA, where in other countries it is regarded as a separate process, sometimes parallel to EIA.²⁴

The issues surrounding SIA will merely be defined in this dissertation, thus forgoing extensive detail.²⁵ Gilpin defines SIA as:

an assessment of the impact on people and society of major policies, plans, programmes, activities and developments. Social impacts or effects are those changes in social relations between members of a community, society or institution, resulting from an external change. The changes can either be physical or psychological and involving a combination of social cohesion, general lifestyle, cultural life, attitudes and values, social tranquillity, relocation

21 Govender *et al* "Integrating Strategic Environmental Assessment and Integrated Development Planning with reference to the uMhlathuze Municipality" 141 -148.

22 See 2.4.14 Strategic environmental assessment. Due to the extent of this dissertation it cannot be discussed in great detail. For further information see: Webb and Segal *Strategic environmental assessment in the United States* (1992) 137 -141; Lee and Walsh *Strategic Environmental Assessment: an overview* (1992) 126 -136; Wood *Environmental Impact Assessment: A Comparative Review* 266 -288.

23 Glasson *et al Introduction to Environmental Impact Assessment* 7.

24 Glasson *et al Introduction to Environmental Impact Assessment* 7.

25 Due to the extent of this dissertation it can not be discussed in great detail. For further information see: Gilpin *Environmental impact assessment* 50-51; Branch *et al Guide to Social Assessment: A Framework for Assessing Social Change*; Burge and Vanday *Social Impact Assessment* 31-66; Burge 1990 "A community guide to Social Impact Assessment" 22-31; Craig *Environmental Impact Assessment Review* 37-54; Finsterbusch *Environment and Behaviour* 193-221; McDonald *Impact Assessment Review* 25-36; Thompson and Williams *Impact Assessment Bulletin* 43-56.

of residents, and severance or separation. The consequences have been social discontent, unhappiness, increased illness and a loss of productivity and income.²⁶

The new NEMA originally included socio-economic conditions and cultural heritage as potential impacts that must be considered, investigated, assessed and reported by the competent authority,²⁷ but the *NEMA Amendment Bill* excluded these provisions again. Section 24(3) of the *NEMA Amendment Bill*, however, set out minimum procedures for the investigation, assessment and communication of the potential impact of activities. One of these minimum procedures is the investigation of the potential impact, including cumulative effects, of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage and assessment of the significance of that potential impact.²⁸

2.4 THE PURPOSE OF EIA

Economic, social and environmental change is inherent to development. Whilst development can bring about positive change it can also lead to conflict. The need to avoid adverse impacts and to ensure the long-term benefits of development has become an essential feature of development. In order to predict environmental impacts and to provide an opportunity to mitigate against negative impacts and enhance positive impacts, the environmental impact assessment procedure was developed in the 1970s.²⁹

The EIA process provides several benefits in its process to promote a sustainable development. Foremost, it is an aid to decision-making.³⁰ Through the processes of assessment, mitigation and public participation, the EIA process should contribute to sound environmental management and through this process, sustainable development

26 Gilpin *Environmental impact assessment* 172.

27 S 24 (1)(b)-(c) of *NEMA Amendment Bill*.

28 S 24(3)(b) of *NEMA Amendment Bill*.

29 Anon 2001 EXPLORER <http://www.ecs.co.sz/welcome.htm> 31 Augustus 2001.

30 Glasson *et al Introduction to Environmental Impact Assessment* 8; also see 3.3.11

is promoted.³¹ In the end, sustainable development is the central and ultimate goal of an EIA.³²

An EIA can also be an aid to the formulation of development actions and can thus provide a framework for considering location and design issues and environmental issues in parallel.³³ The early consideration of environmental impacts in the planning life³⁴ of a development can improve relations between the developer, planning authorities and local communities.³⁵ The public also has an opportunity to participate in the decision-making process.

The motivation behind EIAs originates from various sources: From an economic resource viewpoint, an EIA acknowledges that natural resources such as air and water have an economic value and the costs and benefits of their utilisation should be built into the development process.³⁶ In part, the EIA process can also be described as "early warning planning" to anticipate and prevent potentially significant negative impacts and unearthed hidden costs to both the proponent and the environment.³⁷

Essentially, the EIA process can be seen as a positive process that seeks a harmonious relationship between development and the environment that is not harmful to the people's health or well-being.³⁸

2.5 EFFECTIVE EIA

Each country's EIA system is unique due to legal, administrative and political

Consideration and Record of Decision.

31 Cubitt and Diab 1992 *SAJELP* 342.

32 See 2.4.13 Costs and benefits of EIA systems.

33 Glasson *et al Introduction to Environmental Impact Assessment* 9.

34 See 2.2 Nature of an EIA.

35 Glasson *et al Introduction to Environmental Impact Assessment* 9.

36 Glazewski *Environmental Law in South Africa* 270.

37 Glazewski *Environmental Law in South Africa* 270.

38 S 24 of the *Constitution of the Republic of South Africa*, 1996; also see 3.2 Environmental Rights.

circumstances specific to each of these countries.³⁹ In order to compare different countries' EIA systems it is important to compare the particular system in question to a current EIA system that is internationally recognised as good practice. Such a system is put forward by Wood⁴⁰ and is derived from an analysis of the stages in the EIA process⁴¹ including consideration of alternatives in project design, screening, scoping, report preparation, review, decision-making, monitoring of project impacts, mitigation of project impacts, mitigation of impacts, consultation and participation.

The EIA system evaluation criteria set out by Wood⁴² will be discussed hereafter.⁴³

2.5.1 Legal Basis of EIA Systems

Wood⁴⁴ makes provisions for certain criteria by which an effective legal basis can be distinguished. The EIA requirements must first be codified in legislation or regulations and must provide for a formal EIA system.⁴⁵ The question arises whether the legislation and regulations have to be legally specified or largely discretionary. Although the discretionary EIA system contains certain advantages such as the desirability of voluntary compliance and avoidance of judicial involvement, there is a gradual shift towards EIA systems in which both administrative and judicial supervision is seen.⁴⁶ In the absence of mandatory EIA procedures, it is usually difficult to persuade developers that it is in their own interest to conduct an EIA.⁴⁷ However, some degree of discretion in the operation of the various steps of the EIA process needs to exist since every eventuality cannot be foreseen in laws and

39 Wood *Environmental Impact Assessment: A Comparative Review* 11.

40 Wood *Environmental Impact Assessment: A Comparative Review* 12.

41 Wood 1999 *South African Geographical Journal* 53.

42 Wood *Environmental Impact Assessment: A Comparative Review* 12.

43 Paragraphs 2.5.1-2.5.14.

44 Wood *Environmental Impact Assessment: A Comparative Review* 72-75.

45 Wood *Environmental Impact Assessment: A Comparative Review* 72.

46 The Canadian Federal Government and the New Zealand Government codified their discretionary EIA system into legislation. Wood *Environmental Impact Assessment: A comparative Review* 74.

47 Glasson *et al Introduction to Environmental Impact Assessment* 194.

regulations.⁴⁸ The flexibility is necessary to ensure that the EIA is focused on the desired outcome, namely environmentally sensitive decisions and not just ensuring that all the procedural formalities have been completed. This discretion must be reasonable and must promote legal certainty.⁴⁹

A further question is whether an EIA system should be independent from the existing decision-making procedure or whether it should be integrated into the decision-making procedure.⁵⁰ It is evident from Wood's discussion⁵¹ that the distinction between separated and integrated EIA systems may not hold ground in practice, since the essential aim of an EIA is to guide decisions that will take full account of the outcomes of the EIA process. Both these systems may, or may not, achieve this aim.

According to Wood, steps in the EIA process must be mandatory in order to avoid failure caused by any of the multiple stakeholders in this process who discharge their full responsibility. Due to this reason the EIA process should be sufficiently specified in a law or binding regulation in order to provide a measure of certainty to the stakeholders throughout the EIA process. Provisions must also be made so this procedure cannot be changed arbitrarily.

In order for the EIA system to function effectively, ambiguities need to be minimised. As a further criteria for an effective legal basis, the legal requirements relating to an EIA ought to be clearly distinguished from those requirements relating to other types of actions in order to eliminate confusion, especially in the integrated EIA system.

Enforcement actions against any one of the participants in the EIA process are important. Enforcement actions can include, amongst others, criminal sanctions, compensation and economic penalties.⁵² The participants, including the public, must have adequate opportunities to appeal administratively or to the court in the case of

48 Wood *Environmental Impact Assessment: A Comparative Review* 74.

49 Wood *Environmental Impact Assessment: A Comparative Review* 74.

50 See 3.3.1 Applicable Legislation for EIAs.

51 Wood *Environmental Impact Assessment: A Comparative Review* 73.

52 Soltau 1999 *SAJELP* 33-51.

non-compliance with the EIA legislation or regulations.⁵³ An outline of the EIA procedures and time limits for the various steps in the EIA process must also be made available so that proponents, developers, consultees, the public and relevant authorities can gain an overview of the whole process.⁵⁴

2.5.2 Coverage of EIA systems

The coverage of EIA systems refers to both the range of actions subjected to EIA and to the range of impacts regarded as relevant.⁵⁵ The objective of an EIA is, among others, to ensure that all the environmental impacts of significant actions should be assessed prior to implementation.⁵⁶ The EIA systems must, therefore, apply to both public and private actions.⁵⁷ These actions should not only refer to projects, but must include policies, programmes and plans.⁵⁸ The reason for the need of EIA at strategic levels (policies, programmes and plans) is that an EIA at project level takes place too late in the decision-making process to influence crucial choices in the development process when their environmental impacts are well established.⁵⁹ One of the golden rules for an EIA is that it must be carried out at the earliest possible stage in the project development and in relation and proportion to other project planning activities.⁶⁰ Since it is difficult to anticipate every impact, it is evident that impacts arising at different stages of the project must be assessed accordingly and as necessary.

53 Wood *Environmental Impact Assessment: A Comparative Review* 74; also see 3.3.15 Reasons and Appeal.

54 Wood *Environmental Impact Assessment: A Comparative Review* 75.

55 Wood *Environmental Impact Assessment: A Comparative Review* 87.

56 See 3.3.4 Activities requiring an EIA.

57 Wood *Environmental Impact Assessment: A Comparative Review* 87.

58 Wood 1999 *South African geographical Journal* 53; also see 2.2 nature of Environmental Assessment.

59 Wood *Environmental Impact Assessment: A Comparative Review* 88; also see 2.4.14 Strategic environmental assessment.

60 Anon EXPLORER http://www.ecs.co.sz/em_info.htm 27 September 2001.

According to Wood, exemption must not be given to public or private projects, especially where these projects can lead to significant impacts, unless in exceptional circumstances (for example national security) which must be well defined in the legislation or regulations.⁶¹

The definition of "environment"⁶² in terms of "EIA" must not make provision solely for the physical environment, but it must also take the economic and social factors of the development into account in the decision-making procedure.⁶³ An active example currently in place where these factors are also taken into consideration is the definition of Canter (an American authority), where he defines EIA as " ... the systematic identification and evaluation of the potential impacts of proposed projects, plans, programmes or legislative actions relative to the physical, chemical, biological, cultural and socio-economic components of the total environment."⁶⁴ It is important when these factors are all taken into account that balance must be reached.⁶⁵

Lastly, it is important that all impacts affecting the physical environment be assessed. This includes impacts on the various environmental media such as air, water, soil, etc., on living organisms such as people, plants, etc., and on the man-made environment. Also, direct impacts that arise from other types of induced activity and cumulative impacts⁶⁶ need to be assessed.⁶⁷

61 Wood *Environmental Impact Assessment: A Comparative Review* 88.

62 See 2.2 Definition of Environment and 2.3 The Nature of environmental impact assessment.

63 Wood *Environmental Impact Assessment: A Comparative Review* 89; also see 2.2 The Nature of environmental impact assessment.

64 Glazewski *Environmental Law in South Africa* 272.

65 Wood *Environmental Impact Assessment: A Comparative Review* 89.

66 Gilpin *Environmental Impact Assessment* 169, defines cumulative impacts as: "Progressive environmental degradation over time arising from a range of activities throughout an area or region, each activity considered in isolation being possibly not a significant contributor. Such effects might arise from a growing volume of vehicles, multiple sources of power generation or incineration, or increasing application of chemicals to the land"; also see Glasson *et al Introduction to Environmental Impact Assessment* 386 - 387.

67 Wood *Environmental Impact Assessment: A Comparative Review* 89.

2.5.3 Consideration of alternatives in EIA systems

The consideration of alternatives to an action is the first step in the EIA process and is described by the Council on Environmental Quality as the heart of the environmental impact statement.⁶⁸ The proponent's aim of reaching certain goals according to the planned project can actually be reached in a number of alternative ways. The proponent must consider other feasible approaches, including alternative project locations, scales, processes, layouts, operating conditions and also the "no action" option.⁶⁹

The easiest and cheapest stage where the different alternatives can be considered is the design stage, before any commitment to any particular action has been made.⁷⁰ In order for the designers to choose between these alternatives, they must have access to environmental expertise and/or simple evaluation tools such as regular meetings between designers and environmental professionals, easy-to-use methods to prove certain facts and informal consultations with all the stakeholders at an early stage.⁷¹

As the process progresses, it is equally important that the avoidance and/or mitigation of environmental impacts continue to be considered. The same evaluative tools utilised in the design stage can be used in evaluating the later stages as well.

In order to assure that the proponent considers the alternatives sufficiently and because of the public nature of the EIA process, this consideration must be demonstrated in documentary form.⁷² The consideration of alternatives can be included in preliminary documents produced prior to the EIA report.⁷³ As a final check the consideration of alternatives must be induced adequately in the EIA report.⁷⁴

68 Wood *Environmental Impact Assessment: A Comparative Review* 102.

69 Anon EXPLORER http://www.ecs.co.sz/env_articles_envassd.htm 5 September 2001.

70 Wood *Environmental Impact Assessment: A Comparative Review* 102.

71 Wood *Environmental Impact Assessment: A Comparative Review* 102.

72 Wood *Environmental Impact Assessment: A Comparative Review* 104.

73 See 3.3.8. Scoping.

74 See 3.3.10 EIA report.

The choice of alternatives will vary from case to case and the standard test is, according to Wood's theory, reasonableness. Published guidelines or advice on the consideration of alternatives in the EIA process is recommended by him that could benefit all stakeholders.

2.5.4 Screening

The process of screening narrows the application of EIA down to those projects that may have significant environmental impacts.⁷⁵ In the process it is determined whether or not an EIA report must be prepared for a particular action. The purpose of the screening process is, on the one hand to prevent unnecessary assessment of a large number of actions that will not have significant environmental impacts, and on the other hand, to ensure that actions with significant adverse environmental impact will be assessed.⁷⁶ Those actions with few or no impacts are screened out and allowed to proceed according to normal planning permission and administrative processes without any additional assessments or additional losses in time and expenses.⁷⁷

According to Wood,⁷⁸ two broad approaches can be used to establish the significance of the actions. The first approach is to use a list of actions, thresholds and criteria in order to determine which actions should be assessed.⁷⁹ The second approach is to establish a procedure for the discretionary determination of which actions should be assessed.⁸⁰

In practice, these two approaches are not always strictly applied, but a mixture of these approaches is used in some instances.⁸¹ No matter what approach is adopted, it is

75 Anon EXPLORER http://www.ecs.co.sz/env_articles_envassa.htm 5 September 2001.

76 Wood *Environmental Impact Assessment: A Comparative Review* 115.

77 Glasson *et al Introduction to Impact Assessment* 88.

78 Wood *Environmental Impact Assessment: A Comparative Review* 115.

79 See 3.3.4 Activities requiring an EIA.

80 Wood *Environmental Impact Assessment: A Comparative Review* 115.

81 Wood *Environmental Impact Assessment: A Comparative Review* 117.

evident that for a screening process to be effective, the proponent should be required to submit information that will assist the decision maker and/or the relevant environment authorities in the process of determining whether an EIA is necessary in any particular case. The required information must be clear and detailed, describing the actions, criteria, thresholds and the screening procedures.⁸² Other requirements that Wood⁸³ stipulates include that the decision in the screening process should be made by a publicly accountable body in order to bring about confidence in the process. The reason for the decision must also be on public record. The screening process⁸⁴ must also make provision for a formal period of public participation, which also includes a third party right of appeal against screening decisions.

The final criteria requires that the screening procedure and level of participation must work effectively and efficiently, which implies that decisions must be reached within a specified period of time without undue expenditure by any of the participants in the EIA process.⁸⁵

2.5.5 Scoping

Scoping is the process of determining the range of issues to be addressed in an EIA report, as well as identifying the significant issues relating to a proposed action. One of the purposes of an EIA is to focus on the most important issues, while ensuring that indirect and secondary effects are not overlooked and while irrelevant impacts are eliminated.⁸⁶

The scoping process could vary considerably from case to case⁸⁷ depending on numerous factors such as complexity of the proposal, public sensitivity of the environment and the potential for significant impacts.⁸⁸ However, Wood sets out

82 Wood *Environmental Impact Assessment: A Comparative Review* 117.

83 Wood *Environmental Impact Assessment: A Comparative Review* 117.

84 See 3.3.7 Screening.

85 Wood *Environmental Impact Assessment: A Comparative Review* 117.

86 Wood *Environmental Impact Assessment: A Comparative Review* 130.

87 See 3.3.8 Scoping.

88 Glazewski *Environmental Law in South Africa* 286.

certain criteria which are characteristic of a proper scoping procedure.

The scoping of impacts must be mandatory in the EIA process. Consultation with the decision-making and environmental authorities and interest groups (such as local communities and any other interested and affected groups or parties) could assist in the identification of all the potentially significant impacts.⁸⁹ The consultation with the decision-makers and/or environmental authorities provides an opportunity for the relevant authorities to give opinions about the scope of the EIA to be expressed.⁹⁰ The requirement of public participation is important to make the proponents and the decision-makers aware of public concerns early in the EIA process. Public meetings may also be conducted because it is the most sufficient way to ensure open dialogue on the significance of impacts. Questionnaires and surveys may also be helpful to determine the public's concerns.⁹¹

When a significant issue is raised in the screening process by an accountable public body, the proponent in the scoping process will typically address the issue.⁹² The proponent, or another appointed individual must be required to have appropriate levels of knowledge and expertise in order to determine what significant effects are likely to arise, how they are likely to impact the environment and what steps might be taken to deal with them.⁹³

Formal published scoping guidelines are highly recommended in order to assist both the proponent and other participants throughout the scoping procedure. It is also recommended that there be a public record of the outcome of scoping and a third party right of appeal against such decisions.⁹⁴

89 *Wood Environmental Impact Assessment: A Comparative Review* 131.

90 *Wood Environmental Impact Assessment: A Comparative Review* 132.

91 *Wood Environmental Impact Assessment: A Comparative Review* 131.

92 See 2.4.4 Screening.

93 *Wood Environmental Impact Assessment: A Comparative Review* 132.

94 *Wood Environmental Impact Assessment: A Comparative Review* 132.

2.5.6 EIA report preparation

The preparation of an EIA report can be regarded as the step that makes the EIA process meaningful, because it contains the findings relating to the predicted impacts of the proposal on the environment.⁹⁵ Most countries' EIA regulations specify the minimum regulations required in an EIA report. A problem, however, is that they do not specify a standard for the presentation of this information.⁹⁶ Among the requirements are a description of the proposed actions and the environment likely to be affected, a perceivable forecast of possible significant impacts and the presentation of a non-technical summary.⁹⁷

The preparation of this information requires the use of a wide variety of methods and techniques. It is also important to prepare the EIA report on the basis of designs that are sufficiently detailed in order to predict more accurately.⁹⁸ According to Wood,⁹⁹ the important features of the proposal should be presented in the EIA report in a comprehensive and concise manner, while focusing on the information allowing the prediction of significant impacts. It is also important to focus on the different stages in the life cycle of an action, considering that different impacts may arise at different stages. Check lists can also be helpful to assist the applicant to describe the project.

In order to draw an accurate and convincing picture of the likely effects the development will have on the environment, it is important to describe the initial or baseline environmental conditions systematically.¹⁰⁰ Any additional information included in an EIA report must be directly relevant to the predicting of impacts.¹⁰¹

95 Wood *Environmental Impact Assessment*, 143.

96 Glasson *et al Introduction to Environmental Impact Assessment* 172.

97 See 3.4.10 EIA Procedure and 3.4.11 EIR/EAS/EIA – Report /EIS.

98 Wood *Environmental Impact Assessment: A Comparative Review*, 144.

99 Wood *Environmental Impact Assessment: A Comparative Review*, 144.

100 According to Glasson *et al Introduction to Environmental Impact Assessment* 104 the establishment of an environment baseline includes both the present and likely future state of the environment, assuming that the proposed project is not undertaken, taking into account changes resulting from natural events and from other human activities.

101 Wood *Environmental Impact Assessment* 145.

Information on the potential magnitude of the impacts of the proposed action on the environment should be precise, objective and value-free. The prediction of magnitude must also take into consideration the option of no action and the effect of mitigation measures.¹⁰² It is also essential to state the time scale and the probability of the predicted occurrences.¹⁰³ In order to keep the assessment simple and focused, Wood suggests the simplest and least data-demanding forecasting techniques.¹⁰⁴

In the process of dealing with the significance of impacts in the EIA report, consistent vocabulary should be used in order to describe the significance.¹⁰⁵ According to Wood,¹⁰⁶ the organisation of a panel of professionals can be very helpful in establishing an agreement about the significance of impacts. The use of public opinion can also be of great assistance in this regard.

The non-technical summary for the non-specialists typically sets out the findings of the EIA report in order to provide information to the general public.¹⁰⁷ This summary must be clear, concise, objective and well written, because it is often the only document that is read by the public.¹⁰⁸ The public should be able to understand the possible environmental impacts of the project.

Specified methods and techniques that must be used in EIA report preparation must be described in the EIA report.¹⁰⁹ It is recommended by Wood that the contents of the EIA report be reviewed by either the responsible authority, a swift review of form and content, or reviewed by a consultative group before the report is published.

Whether consultants prepare individual sections or the whole of the EIA report, it is essential that the consultants be accredited or perhaps that a code of practice is

102 Wood *Environmental Impact Assessment: A Comparative Review* 146.

103 Wood *Environmental Impact Assessment: A Comparative Review* 146.

104 Wood *Environmental Impact Assessment: A Comparative Review* 146.

105 Wood *Environmental Impact Assessment: A Comparative Review* 147.

106 Wood *Environmental Impact Assessment: A Comparative Review* 148.

107 Wood *Environmental Impact Assessment: A Comparative Review* 148.

108 Wood *Environmental Impact Assessment: A Comparative Review* 148.

109 Wood *Environmental Impact Assessment: A Comparative Review* 148.

introduced¹¹⁰ in order to ascertain that the consultants have the necessary knowledge to prepare an EIA report. Wood also suggests a more radical approach to quality assurance in EIA report preparation in that the EIA report must be prepared by the decision-maker or lead agency and not by the proponent.

Clear and readily accessible guidelines on EIA report preparation is helpful to all the stakeholders in order to produce better results. During this stage, open communication between the consultants and the public will increase the project credibility and will build the trust and acceptance of the wider community.¹¹¹

2.5.7 EIA report review

Review of the EIA report is aimed at determining the quality, adequacy, sufficiency and relevance of the information provided in the report as a basis for decision-making. Different countries make use of different procedures during the review process. The fundamental requirement of this stage, according to Wood,¹¹² is that those bodies with responsibilities and expertise (and the public) should have the opportunity to address their concerns regarding the EIA report and the action it describes. These comments should be taken into account by the decision-making or environmental authorities before any decision regarding the action is made.

Wood¹¹³ emphasises the importance of objectivity during the review of EIA reports and also the difficulty to ensure it. He highlights various methods in which objectivity can be ensured, for example, the use of review criteria which can provide a useful focus for the review of EIA reports, action-specific scoping guidelines and a set of statutory requirements for the EIA reports contained in legislation or regulations.¹¹⁴ The accreditation of EIA report review consultants are also regarded by Wood as a

110 See 3.4.4.3 Consultants.

111 Anon EXPLORER http://www.ecs.co-sz/em_info.htm.

112 Wood *Environmental Impact Assessment: A Comparative Review* 162.

113 Wood *Environmental Impact Assessment: A Comparative Review* 162.

114 See 3.4.12. EIA report review and record of decision.

valuable method of ensuring objectivity.¹¹⁵ The competence of such reviewers is a notable issue, as they tend to be engaged in reviewing more complex and significant proposals.¹¹⁶ The setting-up of an independent review body that has been selected from acknowledged experts in the field contains two main advantages, it should provide a means of reducing any bias in the relevant authority's decision on the action and it should ensure the quality of the EIA.¹¹⁷ The other proposed methods include the publication of the results of the review and the involvement of the consultants and the public.

After the decision-maker or environmental authority has reviewed the EIA report and after there has been a response from the consultants and the public, the competent authority must have the right to demand the proponent to provide further information if the EIA report is inadequate. This additional information should be provided without further demands upon resources or time.¹¹⁸

This request for further information must also be co-ordinated, reasonable and not deliberately used as a delaying tactic.¹¹⁹ Published guidelines on the procedures in either formal or informal EIA review and on the methods which may be used in reviewing EIA reports, is valuable to all the stakeholders involved.¹²⁰ Suitable provisions for public participation¹²¹ is essential in this stage of the EIA process and it is preferable that this participation takes place prior to requesting further information from the proponent.¹²² It is also essential that after the formal review is made public, all stakeholders must have the right to appeal against the findings.¹²³

115 See 3.4.4.3 Consultants.

116 Wood *Environmental Impact Assessment: A Comparative Review* 162.

117 Wood *Environmental Impact Assessment: A Comparative Review* 163.

118 Wood *Environmental Impact Assessment: A Comparative Review* 165.

119 Wood *Environmental Impact Assessment: A Comparative Review* 165.

120 Wood *Environmental Impact Assessment: A Comparative Review* 143.

121 See 2.4.11 Consultation and participation.

122 Wood *Environmental Impact Assessment: A Comparative Review* 165.

123 Wood *Environmental Impact Assessment: A Comparative Review* 166.

2.5.8 Decision-making

Decision-making takes place at several stages during the EIA process and the main decision centralises around the question whether or not to allow the proposed action to proceed.¹²⁴ This main decision must be made by a body other than the proponent and it is also important that public participation must be included during this stage.¹²⁵ Finally, the results contained in an EIA report must be placed before the decision-making body.¹²⁶ In order for the competent authorities to reach a decision, they must have access to all the environmental information, including the information contained in the environmental statement. Furthermore, any comments made by the statutory consultants and representatives from members of the public, as well as from other material considerations should be taken into account.¹²⁷ Some writers¹²⁸ agree unanimously about the fact that this information can be extremely complex and that the competent authority seldom has the time to read the EIA report and other EIA documentation. The competent authority will, therefore, be (in many instances) dependent upon their officials for some form of summary evaluation from earlier stages of the EIA process.¹²⁹ According to Gilpin, this summary must be a simple statement of no more than two or three pages containing simple language that summarises the objectives of the proposal, any alternatives to it, its positive and negative impacts and their significance, the mitigation measures proposed, the principal conclusions concerning the proposal and how the objectives have been met.¹³⁰

The original intention of an EIA regarding the proposed action was to give greater

124 Wood *Environmental Impact Assessment: A Comparative Review* 181.

125 See 2.4.11 Consultation and participation and 3.3.13 Consultation and public participation.

126 Gilpin *Environmental Impact Assessment* 23.

127 Glasson *et al Introduction to Environmental Impact Assessment* 181.

128 Wood *Environmental Impact Assessment* 181 and Glasson *et al Introduction to Environmental Impact Assessment* 191.

129 Wood *Environmental Impact Assessment: A Comparative Review* 182.

130 Gilpin *Environmental Impact Assessment* 24.

weight to environmental considerations during the decision-making process.¹³¹ It is also important that the decision-maker should know something of the climate surrounding the EIA process, the politicians or parties participating and which conservation bodies participated.¹³²

In the process of reaching the EIA objectives, the decision-maker should be in a position to require modification, to impose conditions or to refuse permission for the proposal to proceed, which is the ultimate sanction against the proponent.¹³³ Wood recommends that three checks be used in order for the decision on the proposal to be seen as fair, which includes: (a) the decision must be made by a body other than the proponent (as already discussed); (b) the summary evaluation prepared for the decision-makers by their advisers should be made public and (c) the reasons and conditions given for the decision should be published.¹³⁴

It is desirable, according to Wood, that public consultation and participation take place after the summary evaluation has been prepared for the decision-makers, but before any decision has been reached. A public right of appeal against the decision can also increase public confidence in the EIA process.¹³⁵

2.5.9 Monitoring and auditing of actions

Monitoring and auditing, also referred to as EIA follow-up,¹³⁶ are important, though in many countries a neglected part of the EIA process.¹³⁷ An EIA as it is currently practised in many countries (including South Africa, United Kingdom etc.) focuses primarily on the period before decision-making.¹³⁸ It is widely acknowledged that the

131 Wood *Environmental Impact Assessment: A Comparative Review* 183.

132 Gilpin *Environmental Impact Assessment* 24.

133 Wood *Environmental Impact Assessment: A Comparative Review* 183.

134 Woo Wood *Environmental Impact Assessment: A Comparative Review* 183.

135 Wood *Environmental Impact Assessment: A Comparative Review* 184.

136 See 3.4.13 EIA follow-up.

137 Glasson *et al Introduction to Environmental Impact Assessment* 191.

138 Glasson *et al Introduction to Environmental Impact Assessment* 191; also see 2.4.8 Decision-making.

inclusion of EIA follow-ups in the EIA system is essential.¹³⁹

In Wood's discussion,¹⁴⁰ he made a distinction between the monitoring of individual actions (which will be discussed now) and the monitoring of the EIA system as a whole.¹⁴¹ Wood also distinguishes between three main types of action monitoring and auditing: implementation monitoring, impact monitoring and impact auditing.¹⁴² Writers like Carley and Sanvicens¹⁴³ also identify a number of different types of monitoring: baseline monitoring, periodic inspection, regulatory compliance monitoring, experimental environmental monitoring, monitoring of ambient environmental quality/environmental auditing, programme evaluation monitoring, project evaluation monitoring, monitoring of socio-economic agreements or contracts made by government and industry, monitoring for project impact management, cumulative impact monitoring and impact monitoring. Tamlinson and Atkinson¹⁴⁴ also identify seven different types of auditing which include decision point audit, in draft EIS decision point audit in final EIS, implementation audit, performance audit of the full operation, predictive techniques audit, project impact audits and procedural audits.

For the purpose of these studies, the focus will be on the three main types of action monitoring and auditing identified by Wood.¹⁴⁵ Implementation monitoring is defined as the verification that the action has been implemented in accordance with the approval that mitigation measures correspond with those required during approval and that conditions imposed upon the action have been met.¹⁴⁶ This implementation monitoring can include physical inspection, measurement by using various types of

139 Cubitt and Diab "EIA follow-up: current status and recommendation" (unpublished paper delivered at the South African IAIA Congress 8-10 October 2001 Mapumalanga) 73.1

140 Wood *Environmental Impact Assessment: A Comparative Review* 197.

141 See 2.4.12 Monitoring of EIA systems.

142 Wood *Environmental Impact Assessment: A Comparative Review*, 197.

143 Du Plessis and Sutton "EIA ISSUES II" (Unpublished assignments 3 at the Department Geographics and Environmental studies 17 May 1996) 14.

144 Glasson *et al Introduction to Environmental Impact Assessment* 170-171.

145 Wood *Environmental Impact Assessment: A Comparative Review* 197.

146 Wood *Environmental Impact Assessment: A Comparative Review*, 198.

instruments and the use of professional judgement.¹⁴⁷ This kind of monitoring can be carried out under the provision of various sets of legislative requirements like building requirements and pollution control procedures.¹⁴⁸

Impact monitoring is described as the measurement of the environmental impacts that were a result of the implementation of the action.¹⁴⁹ Impact monitoring should include reference and treatment areas. Monitoring can be implemented in the pre-operational period by establishing these locations and by taking samples.¹⁵⁰

One of the advantages of impact monitoring is that the results can indicate that the proponent has not complied with the conditions installed at decision-making.¹⁵¹ Another advantage is that harmful impacts can be identified at an early stage and be avoided. It can also provide rapid feedback into the system where mitigation or control measures are to be formulated.¹⁵² According to Glasson, monitoring can also provide an acceptable database for the assessment of other similar actions by helping to identify relevant areas of concern.¹⁵³ Monitoring is also essential for successful environmental impact auditing and can be one of the most effective guarantees of commitment to undertakings and to mitigation measures.¹⁵⁴

Auditing is also sometimes referred to as Post Project Analysis (hereafter referred to as PPA) and defined by Gilpin as an environmental study undertaken during the operational stage of a project or programme to assess compliance with the terms imposed by the EIA process while considering the quality and possible improvement of environmental management. According to Gilpin, however, PPA has broader aims than environmental auditing.¹⁵⁵ Impact auditing (similar to PPA) involves comparing

147 Wood *Environmental Impact Assessment: A Comparative Review* 198.

148 Wood *Environmental Impact Assessment: A Comparative Review* 198.

149 Wood *Environmental Impact Assessment: A Comparative Review* 198.

150 Du Plessis and Sutton 1996 "EIA ISSUES II" 14.

151 Wood *Environmental Impact Assessment: A Comparative Review* 198.

152 Du Plessis and Sutton 1996 "EIA ISSUES II" 14.

153 Wood *Environmental Impact Assessment: A Comparative Review* 198.

154 Glasson *et al Introduction to Environmental Impact Assessment* 192.

155 Gilpin *Environmental Impact Assessment* 171.

the results of implementation and impact monitoring with the commitments made earlier in the EIA process and in the EIA report.

Impact auditing serves the purpose of reviewing predicted environmental impacts in order to achieve proper management of risks and uncertainties.¹⁵⁶ It is not always possible to impose conditions during the initial decision-making process that cover every eventuality. Consequently, it can happen that uncontrolled environmental impacts may arise. In this case, auditing serves as an effective tool in order to modify the activity or to develop mitigation measures.¹⁵⁷ Impact auditing can also be used to determine the accuracy of past impact predictions and the effectiveness of mitigation measures to transfer this experience to future activities of the same type.¹⁵⁸

Impact auditing provides a means for both industry and government to demonstrate their competence in environmental management to the public. The achievement of satisfactory auditing could provide the basis of agreement between environmental authorities and the proponent in the process of determining impact monitoring programmes, however, it is important that monitoring continues.¹⁵⁹

Although it is evident that auditing is an important part of the EIA system containing numerous benefits for environment conservation as well as for the stakeholders involved, it is clear from the large amount of literature on this subject that certain problems exist.¹⁶⁰ Some of the identified problems are:

- predictions are not always testable and sometimes only relate to minor impacts¹⁶¹
- the monitored environmental parameters may differ from the ones for which the

156 Wood *Environmental Impact Assessment: A Comparative Review* 199; Glasson *Introduction to Environmental Impact Assessment* 193 also refers to this as environmental management auditing, which focuses on private and public structures and programmes for environmental management, associated risks and liabilities.

157 Gilpin *Environmental Impact Assessment* 26.

158 Gilpin *Environmental Impact Assessment* 26.

159 Wood *Environmental Impact Assessment: A Comparative Review* 199.

160 Glasson *et al Introduction to Environmental Impact Assessment* 198.

161 Glasson *et al Introduction to Environmental Impact Assessment* 198.

predictions were made¹⁶²

- the monitoring techniques may be inadequate for predictions to be tested ¹⁶³
- the designs of projects are usually modified between the completion of the EIA and the implementation thereof¹⁶⁴
- the data used for monitoring may be biased towards the developers or project operators¹⁶⁵
- there appear to be no standardised audit methodologies¹⁶⁶
- many EIA report forecasts are vague and qualitative¹⁶⁷
- monitoring has often been inadequate for auditing purposes¹⁶⁸
- only a minority of EIA forecasts have proved to be accurate or almost accurate.¹⁶⁹

In order to overcome or address these problems, Gilpin¹⁷⁰ recommended the following:

- an advisory board consisting of industry, government, contractors, independent experts and public representatives should be used as a tool for managing audits
- public participation should be encouraged
- impact auditing reports should be made public
- the conditions of approval for a project should be such that the management of the

162 Glasson *et al Introduction to Environmental Impact Assessment* 198.

163 Glasson *et al Introduction to Environmental Impact Assessment* 198.

164 Glasson *et al Introduction to Environmental Impact Assessment* 198.

165 Glasson *et al Introduction to Environmental Impact Assessment* 198.

166 Wood *Environmental Impact Assessment: A Comparative review* 200.

167 Wood *Environmental Impact Assessment: A Comparative review* 200.

168 Wood *Environmental Impact Assessment: A Comparative review* 200.

169 Wood *Environmental Impact Assessment: A Comparative review* 200.

170 Gilpin *Environmental Impact Assessment* 27.

project should take account of the findings of the auditing.

Problems included both monitoring and auditing, which may lead to better planning and compilation of EIAs for future projects. If the information is readily available, it can give effect to more speedy and effective EIAs, because some of the problems from the past could be avoided.¹⁷¹ Maintaining and auditing outcomes can contribute to an improvement in all aspects of the EIA process, from understanding the baseline conditions to the framing of effective mitigating measures.

2.5.10 Mitigation of impacts

Mitigation involves the introduction of measurements to avoid, reduce, remedy or compensate for any significant adverse impacts.¹⁷² According to Wood,¹⁷³ one of the main purposes of an EIA is to allow the proposed development to proceed, while reducing its impacts to an acceptable level. On the other hand, the secondary purpose is to prevent unsuitable development when indicated that certain impacts cannot be mitigated in order to be acceptable.¹⁷⁴

In order for an EIA to be successful it is important to identify potential impacts early in the planning process and to make provisions for avoiding or mitigating these effects wherever possible.¹⁷⁵ Mitigation of impacts can take on a variety of forms such as: avoidance (using an alternative approach to eliminate an impact), reduction (lessening the severity of an impact) and remedy (may include some enhancement or compensation).¹⁷⁶ Different measures of mitigation may be proposed at various stages of the EIA process including: during the review stage, in preparation for the EIA

171 Glasson *et al* *Introduction to Environmental Impact Assessment* 192.

172 Swaziland Government EXPLORER http://www.ecs.co.sz/env_article_public_part.htm 5 September 2001.

173 Wood *Environmental Impact Assessment: A Comparative Review* 212.

174 Wood *Environmental Impact Assessment: A Comparative Review* 212.

175 Glazewski *Environmental Law in South Africa* 287.

176 Wood *Environmental Impact Assessment: A Comparative Review* 212.

report, the decision-making stage, monitoring stage and during the public participation process.¹⁷⁷

Financial compensation or remuneration as a remedy can play an important role in gaining public acceptance for environmental impacts. These measures should be considered when steps to reduce impacts are not possible or sufficient. The compensation can be material (reconstruction of homes), financial (compensation for loss of property) or a combination of both.¹⁷⁸

In the process of deciding which mitigation measure to use, it is important to compare the benefits of the different mitigation measures to one another. There may also be a need to trade-off between the mitigation of different impacts, for instance, the use of the best practicable environmental option where it relates to pollution.¹⁷⁹ In some cases these trade-offs can be complex. In these instances public participation plays an important role in providing invaluable assistance in determining which impacts are tolerable and which are not.¹⁸⁰ Additional costs associated with mitigation measures can also play a role in the developer's decision to continue with or withdraw a proposed development.¹⁸¹

It is important according to Wood, that the EIA legislation makes provisions for the effective means of ensuring that the mitigated measures proposed in the EIA report are implemented.¹⁸² It will also be ideal if the mitigation of environmental impacts is already included in the preliminary documentation.¹⁸³ The EIA report should also provide clear details of all the mitigated measures and modifications suggested or accepted by the proponent.¹⁸⁴ Flexibility of mitigation measures is an important virtue

177 Glazewski *Environmental Law in South Africa* 287.

178 Swaziland Government EXPLORER http://www.ecs.co.sz/env_articles_road_env.htm 5 September 2001.

179 Wood *Environmental Impact Assessment: A Comparative Review* 213.

180 Wood *Environmental Impact Assessment: A Comparative Review* 213.

181 Wood *Environmental Impact Assessment: A Comparative Review* 213.

182 Wood *Environmental Impact Assessment: A Comparative Review* 214.

183 See 2.4.4 Screening and 2.4.5 Scoping.

184 Wood *Environmental Impact Assessment: A Comparative Review* 214.

in order to mitigate unexpected impacts and to amend unnecessary and expensive mitigated measures.¹⁸⁵ In this case, the incorporation of mitigation measures into an environmental management plan with appropriate monitoring, as well as the opportunities for modifying the monitoring arrangements, are desirable.¹⁸⁶

Published guidelines on mitigation and modification of actions would be helpful to all the stakeholders involved in order to be more environmentally acceptable. It is evident from the above discussion that the earlier in the EIA process mitigation proposals are made, the more effective and efficient they are likely to be.¹⁸⁷

2.5.11 Consultation and participation

Consultation and participation are integral to the EIA process. Consultation and participation can produce significant benefits for the proponent and for those affected.¹⁸⁸ Democracy is increasingly seen as a continuous and dynamic process in which governments carry ultimate responsibility but only with the most careful public scrutiny,¹⁸⁹ which indicates the public's desire to be part of the decision-making process.¹⁹⁰

Early consultation and participation can be to the advantage of all the stakeholders, because when concerns are identified and addressed at an early stage in the EIA process, it may result into few or no objections. It may also result in substantial project modifications or abandonment if no other accommodation can be reached.¹⁹¹

Some important principles for public involvement in the EIA process include:¹⁹²

185 Wood *Environmental Impact Assessment: A Comparative Review* 215.

186 Wood *Environmental Impact Assessment: A Comparative Review* 215.

187 Wood *Environmental Impact Assessment: A Comparative Review* 215.

188 Wood *Environmental Impact Assessment: A Comparative Review* 225.

189 Gilpin *Environmental impact Assessment* 63.

190 See principles 10 and 17 of the Rio Declaration.

191 Wood *Environmental Impact Assessment: A Comparative Review* 226.

192 Wood *Environmental Impact Assessment: A Comparative Review* 226.

- the participation in the evaluation of the proposals through offering advice, expressing opinions, providing local knowledge, proposing alternatives and forwarding suggestions on how a proposal might be changed in order to protect the environment to its best
- starting the consultation and participation process as early as possible
- being informed and becoming involved in the administration and outcome of the EIA process
- taking a responsible approach to the opportunities set forth for public participation in the EIA process and to seek objective information about issues of concern
- involving the entire spectrum of interested and affected parties before irreversible decisions are made¹⁹³
- to only communicate the truth and allow enough feedback time.¹⁹⁴

There are several different types of public participation which can be distinguished by the nature of the relationship between the public and the decision-making body or proponent.¹⁹⁵ The different types of public participation include the provision of information, a range of different types of consultation and direct public control. All three types of relationships may be used at different stages and circumstances in the EIA process.¹⁹⁶ Different public participation techniques include letters, memoranda, advertisements, large meetings, small group meetings, workshops, telephone hotlines, exhibits or displays, surveys, interviews and questionnaires, open hours, advisory groups, panels and forums.¹⁹⁷ Mediation or environmental dispute resolution can also be used in certain circumstances to encourage public participation. Mediation

193 A practical guide for South African environmental managers and administrators *Managing the Environmental Impact Assessment* 173.

194 A practical guide for South African environmental managers and administrators *Managing the Environmental Impact Assessment* 173.

195 Wood *Environmental Impact Assessment: A Comparative Review* 226.

196 Wood *Environmental Impact Assessment: A Comparative Review* 226.

197 A practical guide for South African environmental managers and administrators *Managing the*

involves the assistance of a mediator in negotiations between the parties in dispute over a new development and requires a willingness to compromise and utilise environmental mitigation.¹⁹⁸ In order for mediation to contribute to successful public participation it must comply to four preconditions, namely: (a) a deadlock must exist or it must be inevitable; (b) the mediation must be voluntary; (c) there must be room for flexibility and (d) there must be means to implement agreements. These preconditions, however, only appear to apply in a small minority of decisions involving EIAs.¹⁹⁹

Consultation and participation can and should be employed at various stages in the EIA process including the screening stage (Western Australia), scoping stage,²⁰⁰ EIA report preparation, EIA report review, the decision-making process and monitoring and implementation stage, among others.²⁰¹

The effectiveness of consultation and participation depends upon the ready availability of copies of the EIA documents to the public at a number of convenient locations at a reasonable price at each stage of the EIA process.²⁰² Although some countries have a constitutional right of access to information, there might be explicit restrictions on the availability of the information contained in the EIA legislation.²⁰³ Some of the valid restrictions may be, among others, to protect national security or because of commercial sensitivity as long as the restriction is reasonable.

Broad based participation can often be achieved through financial aid. Financial assistance through intervenor funding, can be of assistance in making participation more effective.²⁰⁴ A specifying list of consultees,²⁰⁵ whom the proponent or decision-

Environmental Impact Assessment 173.

198 Wood *Environmental Impact Assessment: A Comparative Review* 227.

199 Wood *Environmental Impact Assessment: A Comparative Review* 227.

200 See 3.3.13 Consultation and Participation.

201 Gilpin *Environmental Impact Assessment* 63.

202 See 3.3.14 Access to Information.

203 See 3.3.14 Access to Information.

204 Wood *Environmental Impact Assessment: A Comparative Review* 228.

205 See 3.3.5.3 Consultants.

maker must consult at the various stages of the EIA process can make a valuable contribution to the success of the EIA process.²⁰⁶

It is important to take into consideration the environmental impact on neighbouring countries. When there is a possibility that a proposal will have an effect on a neighbouring country's environment,²⁰⁷ it is important that the proponent or authority conducting the proposed activity consult this country and provide information on the circumstances surrounding the impact or possible impact.²⁰⁸ The *Espoo Convention*²⁰⁹ sets out an excellent model for consideration in domestic legislation.²¹⁰

It is also important during this process that the results of consultation and participation must be published. This publication must also include submissions done by the public and consultees.²¹¹ The parties involved must have the right to appeal against any decision made by the decision-making body. However, there must be a balance between this right, the positive benefits of consultation and participation, reaching consensus on environmental outcomes and the financial and time implications involved.²¹²

2.5.12 *Monitoring of EIA systems*

Monitoring of the EIA system is increasingly necessary in order to contribute to the successful EIA process. The main purpose of monitoring is the diffusion of EIA practice and the alteration of the EIA system to incorporate feedback from experience and to remedy any weakness identified.²¹³

Numerous elements of an EIA system can be monitored in order to promote the

206 *Wood Environmental Impact Assessment: A Comparative Review* 228.

207 See 2.5.3 Transboundary impacts.

208 *Wood Environmental Impact Assessment: A Comparative Review* 229.

209 Convention on Environmental Impact Assessment in a Transboundary context, 1991.

210 *Glazewski Environmental Law in South Africa* 274.

211 *Wood Environmental Impact Assessment: A Comparative Review* 229.

212 *Wood Environmental Impact Assessment: A Comparative Review* 229.

213 *Wood Environmental Impact Assessment: A Comparative Review* 241.

diffusion of the best EIA practices and to amend the system through feedback from experience.²¹⁴ Public records of the number of EIA reports undertaken and record of the different types of actions undertaken need to be maintained and available to the public. Details regarding the precise title of each document, its length, date, the place of inspection and any other relevant matters should be made available to the public.²¹⁵

All formal reports and documents, such as scoping reports, EIA reports, public participation results and review results should be publicly available at one or more central locations during reasonable hours.²¹⁶ These documents and reports can provide a valuable source of information to the people involved in preparing such documents and reports, to reviewers and to the public and researchers.²¹⁷ As far as documents concerning financial costs are concerned, there are considerable difficulties in obtaining accurate information.²¹⁸ Apart from these difficulties, information about expenditures incurred during the preparation and processing of EIA documents in every EIA system, including details about the number of staff involved, consultancy costs, and any fee payments should be obtained and centrally recorded.²¹⁹

It is important to maintain an accurate record of the time required to complete all facets of an EIA report. This includes: the time required to undertake an EIA and the amount of time needed to process each EIA report and document once they have been received. Reasonable and reliable records, possibly on a sample basis, can provide such information despite the numerous measurement difficulties.²²⁰

Effective feedback procedures should, therefore, be put in place to help determine if changes in practice or procedure need to take place. Feedback from specific EIAs may point out changes in practice or procedure to proponents and consultants that need to be made. This may include practice advice notes, circulars, regulations,

214 Wood *Environmental Impact Assessment: A Comparative Review* 241.

215 Wood *Environmental Impact Assessment: A Comparative Review* 241.

216 See 33.14 Access to Information.

217 Wood *Environmental Impact Assessment: A Comparative Review* 242.

218 See 2.4.14 costs and benefits of EIA systems.

219 Wood *Environmental Impact Assessment: A Comparative Review* 242.

training, amendment of projects and specific or generic guidelines. Feedback tends to be most effective where only a limited number of responsible authorities are involved in the EIA process.²²¹

It is evident that the better the EIA system for monitoring information, the easier it is to review and implement changes in the EIA system. Consultation and participation, as stipulated throughout the EIA system, are very important in the monitoring process and adequate provisions must be provided for in environmental legislation.

2.5.13 *Costs and benefits of EIA systems*

No reliable quantification for the effectiveness of an EIA exist. The reason for this is because quantification can only be measured subjectively and qualitatively by examining the attitudes and the opinions of those involved.²²² Apart from this shortcoming, the continued diffusion of EIA requirements around the world demonstrates the prevailing belief that EIA is an effective and efficient environmental management tool.²²³

The financial costs of the EIA process are difficult to separate from all other costs but must be set within the framework of environmental costs as a whole. For a variety of reasons, the integration of the EIA process into the planning and decision-making process and the cost of EIA systems are difficult to distinguish from other costs involved in obtaining approval.²²⁴ According to Gilpin,²²⁵ the cost of the EIA

procedures (direct and indirect) and the costs of appropriate mitigation measures must be set within the framework of environmental costs as a whole and not distinguished from them.

220 *Wood Environmental Impact Assessment: A Comparative Review* 242.

221 *Wood Environmental Impact Assessment: A Comparative Review* 242.

222 *Wood Environmental Impact Assessment: A Comparative Review* 253.

223 *Wood Environmental Impact Assessment: A Comparative Review* 253.

224 *Wood Environmental Impact Assessment: A Comparative Review* 253.

225 *Gilpin Environmental Impact Assessment* 26.

Hart²²⁶ stipulates that there are four main elements regarding the cost that can be distinguished in the EIA process namely:

- The preparation of documents, review, circulation and administration of the law costs
- Delay costs
- Uncertainty costs
- Mitigation costs.

These main elements of cost are difficult to calculate, especially those costs associated with delay, uncertainty and mitigation. In large projects the availability of related data and studies can help lower the cost of EIA as a proportion of the total cost.²²⁷ Although the costs involved in preparing the EIA documentation may also include additional fees for EIA reports to be reviewed by the decision-making authority, or review consultants, it is generally believed that the cost of an EIA rarely exceeds one percent of total project cost.²²⁸ The cost can range from about 0,1 percent to 1 percent, with 0,5 percent being a commonly quoted figure.

However, it is important to note that this view is not applicable to small community development projects, considering that their budgets are more modest. Many believe that over time, the cost of assessing small projects will eventually become proportionate to those of larger ones.²²⁹

There are a number of variables that contribute to higher costs. Delay of some stages (as recognised earlier) in the EIA process can contribute to higher costs. However, most EIA systems specify time frames within which the various stages of the EIA process should be completed. Also, inadequate information provided by the

226 Wood *Environmental Impact Assessment: A Comparative Review* 254.

227 Anon EXPLORER http://www.ecs.co.sz/em_info.htm 27 September 2001.

228 World Bank EXPLORER <http://inweb18.worldbank.org/ESSD/essdext.nsf/47ByDocName/policy> 23 October 2001.

229 Anon EXPLORER http://www.ecs.co.sz/em_info.htm 27 September 2001.

proponent can be one of the reasons why delays occur during the decision-making process. Sometimes solutions can be used in practice to try and avoid delays, such as submitting a "draft" EIA report for informal scrutiny and amendment before submission, or many developers have built considerable lead-times into their project planning procedure to accommodate the EIA process.²³⁰ Sometimes authorities' unreasonable requests for further information, or for changes to the design of the action, can also contribute to costly delays.²³¹ One possible solution to overcome these problems is an agreement to an action-specific timetable between the proponent and the decision-making authority, which provides for submission of further information under specific circumstances only.²³²

Finally, one major purpose of an EIA is to improve the quality of decisions that have environmental implications by combining the behaviour of proponents, consultants, the public and decision-making authorities.²³³ In order to determine the efficiency of an EIA, it is important to determine whether the quality of decisions has increased and whether these decisions have become more acceptable as a consequence of its use, for instance, the increased use of modification or mitigation.²³⁴

In conclusion, the aim of any EIA system should not only be to minimise costs, but above all to maximise environmental benefits.²³⁵ Although projects rarely become entirely innocuous as a result of EIA process, the public and the environmental groups tend to see EIA as a worthwhile process.²³⁶

2.5.14 Strategic environmental assessment

SEA can be defined as: "the formalised, systematic comprehensive process of

230 Wood *Environmental Impact Assessment: A Comparative Review* 254.

231 Wood *Environmental Impact Assessment: A Comparative Review* 255.

232 Wood *Environmental Impact Assessment: A Comparative Review* 255.

233 Wood *Environmental Impact Assessment: A Comparative Review* 255.

234 Wood *Environmental Impact Assessment: A Comparative Review* 255.

235 See 2.3 purpose of EIA.

236 Gilpin *Environmental Impact Assessment* 26.

evaluating the environmental impacts of a policy, plan or programme and its alternatives, including the preparation of a written report on the findings of that evaluation and using the findings in publicly accountable decision-making.²³⁷ It is clear from the definition that SEA is the environmental assessment of policies, plans and programmes, while EIA²³⁸ is the assessment of projects.²³⁹

Although policies, plans and programmes are all in a sense "strategic", they are implemented at different hierarchical levels and may require different methods of environmental assessment. These methods for policies, plans and programmes are not only different to the methods for projects, but are also different from one another.²⁴⁰

There is generally a multi-level forward planning process, which starts with the formulation of a policy at the upper level, followed by a plan at the second stage and then by a programme at the third level.²⁴¹ This multi-tiered system can be applied at the national level, as well as in certain instances at the regional level.²⁴² For example, a policy may be considered the inspiration and guidance for action. A plan can be considered as a set of co-ordinated and timed objectives for implementing the policy and a programme and can be defined as a set of projects in a particular area.²⁴³ Tiers of SEA and EIA can be illustrated by the following flow chart:²⁴⁴

Figure 2.1

237 Glasson *Introduction to Environmental Impact Assessment* 300.

238 See 2.2 The Nature of Environmental Impact Assessment.

239 See 3.3.2 Definition of Environmental Impact Assessment.

240 Du Plessis and Sutton "EIA Issues II."

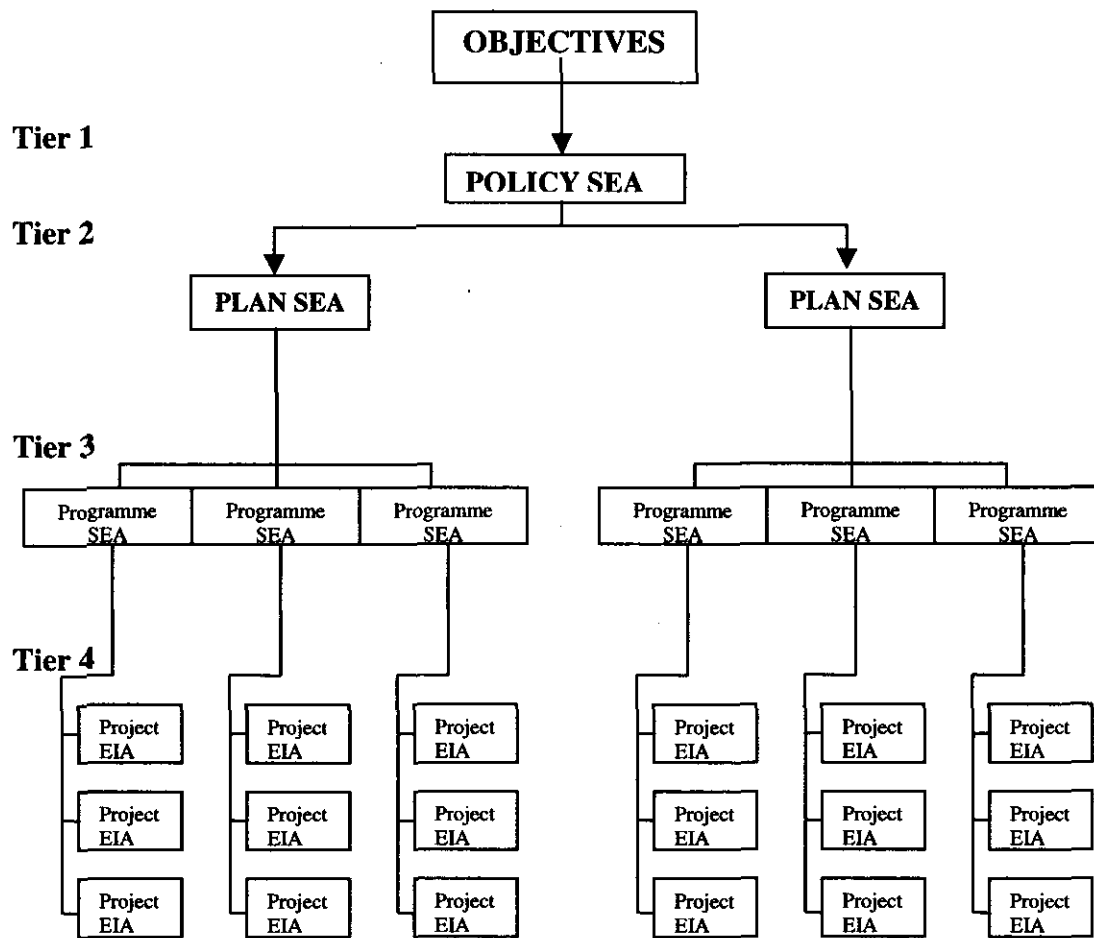
241 Wood *Environmental Impact Assessment: A Comparative Review* 266.

242 Wood *Environmental Impact Assessment: A Comparative Review* 267.

243 Glasson *et al Introduction to Environmental Impact Assessment* 300.

244 Glasson *et al Introduction to Environmental Impact Assessment* 300.

Figure 2.1: Tiers of SEA and EIA can be illustrated by the following flow chart:



The need for SEA can partly be explained by taking note of the advantages of a project EIA that is so widely recognised and the growing desire to take the environment into account earlier in the planning process has arisen throughout the world.²⁴⁵ Several more reasons for the perceived need for SEA can be summarised as follows:²⁴⁶

- SEA can increase the weight given to the environment in decision-making
- SEA facilitates and increases consultation and participation on environmental matters
- SEA establish principles for the development of certain classes of projects
- alternative approaches, cumulative impacts and synergistic impacts (which may be cross-sectoral in nature), ancillary impacts, regional or global impacts and non-project impacts (such as impacts resulting from management practices) may all be better assessed initially at policy, planning and programme level, rather than at project level.²⁴⁷

The main element of an EIA process, according to Wood, is the EIA report.²⁴⁸ This is in practice applicable to all levels of decision-making including SEA. In practice, there are mainly five reasons why a SEA report will be different from an EIA report:

- the precision with which spatial implications can be defined is less
- the amount of detail relating to the nature of physical development is less
- the lead-time is greater
- the decision-making procedure and the organisations involved may differ as it may

245 Wood *Environmental Impact Assessment: A Comparative Review* 267.

246 Wood *Environmental Impact Assessment: A Comparative Review* 268.

247 For more arguments in favour of SEA also see Wood *Environmental Impact Assessment: A Comparative Review* Box 19.1 268 and Glasson *et al Introduction to Environmental Impact Assessment* 301.

require a greater degree of co-ordination

- the degree of confidentiality may well be enhanced.

As far as certain alternatives and significant environmental impacts are concerned, they sometimes cannot be adequately assessed at the project level. But, it is possible to assess them at the policy, plan, and programme levels. Similar to EIA, SEA would involve screening, scoping, prediction, consultation, public participation, mitigation of impacts and monitoring.²⁴⁹ The reason why in some instances alternatives and significant environmental impacts can be more adequately assessed during policy, planning and programme levels is because a SEA can deal with them in more detail than other types of impacts. The assessment does not need to be confined only to one level of action since it can be assessed at different tiers²⁵⁰ in the planning process.²⁵¹

Although there are many benefits associated with SEA, various problems can also be identified. A large number of proposed or planned projects that spread out over a vast area may result in analytical complexity.²⁵² Further problems can occur because information (such as nature, scale and location) regarding existing and envisaged policies, plans, and programmes is scarce or limited, which leads to outcomes that are difficult to predict.²⁵³ The large numbers of alternatives that need to be assessed and the public participation process may further complicate the SEA. There is also a very limited number of models available that may be used because of the limited information about SEA and because there are also very few completed SEAs available.²⁵⁴ The nature of the investigation of existing and projected environmental conditions is less clear-cut than it is for project EIAs.²⁵⁵ There are also severe methodological problems associated with SEA. These problems are related to

248 See 2.4.6 EIA report preparation.

249 Wood *Environmental Impact Assessment: A Comparative Review* 270.

250 See figure 2.1.

251 Wood *Environmental Impact Assessment: A Comparative Review* 270.

252 Glasson *et al Introduction to Environmental Impact Assessment* 301.

253 Glasson *et al Introduction to Environmental Impact Assessment* 301.

254 Glasson *et al Introduction to Environmental Impact Assessment* 302.

difficulties in predicting impacts, lack of definitive SEA models, monitoring of ongoing changes and the absence of specific SEA methods of consultation and participation.²⁵⁶

As far as problems with policy-making are concerned, the policy, planning and programmes are usually unclear documents. It is uncertain when their environmental impacts should be assessed because a policy is created and adopted over a period of time. Policies, plans and programmes also do not have clear boundaries which might have the result that policies might affect one another. Further problems with policies are that they need to be interpreted and then implemented, which can lead to different interpretations that may differ from person to person. Sometimes these policies may also be fragmented, which may have unpredicted or unintended implications.²⁵⁷ Policymaking is also above all, a political process where one's own interests may be regarded as beneficial to the government administration.²⁵⁸

To overcome these barriers it is evident that some form of formal framework is needed to ensure that the SEA process works. In order for SEA to be successful there needs to be both a specific and unambiguous requirement to undertake it and either environmental legislation or an environmental authority with sufficient strength of purpose and professional competence to ensure that the requirements are complied with.²⁵⁹

A number of other steps are also recommended by Wood²⁶⁰ in order to overcome these barriers:

- increasing the general understanding of SEA
- clarifying procedural issues

255 Wood *Environmental Impact Assessment: A Comparative Review* 271.

256 Wood *Environmental Impact Assessment: A Comparative Review* 271.

257 Du Plessis and Sutton "EIA Issues II."

258 Wood *Environmental Impact Assessment: A Comparative Review* 272.

259 Wood *Environmental Impact Assessment: A Comparative Review* 272.

260 Wood *Environmental Impact Assessment: A Comparative Review* 273.

- clarifying methodological issues by adopting existing methods for SEA
- strengthening the capacity for the practical application of appropriate SEA methods
- reviewing existing environmental data sources to assess their potential use in SEA and prioritising measures for correcting any deficiencies.

When comparing the current situation regarding SEA with the early years of EIA implementation, it is clear that similar problems were experienced. Experience, however, has shown that an EIA is feasible and may be regarded as a cost-effective tool of environmental management. It is very likely that a SEA can accomplish the same success as an environmental tool.²⁶¹

2.6 OTHER RELEVANT DEFINITIONS

In the following passage a few concepts that are important in the dissertation will be discussed briefly.

2.6.1 Sustainable development

The concept of sustainable development is a prominent concept in various aspects of development. This is an issue that has already been discussed profoundly in the literature.²⁶²

In this study, the definition in the Brundtland report²⁶³ will be used. Sustainable development is defined as "development that meets the needs of the present generation without compromising the ability of the future generation to meet their own needs."²⁶⁴

261 Wood *Environmental Impact Assessment: A Comparative Review* 273.

262 For the purpose of this study and because of the comprehensiveness of this issue, sustainable development will not be discussed in detail, but there will be a focus on defining the concept and explaining it in broad terms.

263 Report of the *World Commission on Environment and Development* in 1987.

264 Treurnicht S " Sustainable Development" in De Beer F and Swanepoel H (ed) *Development*

This definition is regarded as being extremely broad as it is impossible to estimate what the needs of future generations will be.²⁶⁵ According to Gilpin, the needs of future generations cannot be predicted to any degree even of approximation. The maximum possible range of options and opportunities can, however, be ensured.²⁶⁶ Sustainable development will, therefore, include the handing down to future generations of not only "man-made capital" such as knowledge and skills, but also of "natural environmental capital" such as clean air, fresh water, rain forests, the ozone layer and biological diversity.²⁶⁷

Bray,²⁶⁸ with reference to Pronk and Haq, argues that sustainable development is not only a concept of environmental protection, but it also implies a new concept of economic growth which provides fairness and opportunity for all people without destroying the world's natural resources and carrying capacity.

The immediate purpose and the central and ultimate role of an EIA is to achieve sustainable development.²⁶⁹ Better management of the use, renewal and conservation of all natural resources through the EIA process must be emphasised because future development depends on the conservation of natural resources.²⁷⁰ Therefore, an EIA is one of the many tools in an attempt to ensure development that is sustainable.²⁷¹

studies 2nd ed (Oxford University Press 2000) 61-70.

265 Treurnicht *Sustainable Development* 63.

266 Gilpin *Environmental Impact Assessment* 10.

267 Glasson *et al Introduction to Environmental Assessment* 11.

268 Bray 1998 *SAJELP* 6.

269 Glasson *et al Introduction to Environmental Assessment* 11.

270 Gilpin *Environmental Impact Assessment* 10.

271 Due to the extent of this dissertation it can not be discussed in great detail. For further information see: Anon EXPLORER <http://iisa.ca/rio+s/timeline/satimeline.htm> 20 May 2001; Miller G *Living in the Environment. Principles, connections and solutions* 10th ED (Woodsworth Publishing Company U.S.A 1998) 45-83; Nel J "Environmental Sustainability: chronos pre-feasibility Report" (unpublished paper for the Environmental Management Unit, Potchefstroom University, Potchefstroom 1996); Schmidheiny S *Changing course: A global Business Perspective on Development and the Environment* Ch 1-13.

2.6.2 *Transboundary Environmental Impact Assessment*²⁷²

Many projects transcend national boundaries. These projects can, therefore, not only negatively affect the environment of the country where the project takes place, but they can also affect neighbouring countries' environments. The important concept of transboundary co-operation between states or governments often arises, which is highly necessary in order to promote sustainable development in all the affected countries.

The term "transboundary impact" was defined in the *Espoo Convention*²⁷³ as " ... any impacts, not exclusively of a global nature, within the area of jurisdiction of a party caused by a proposed activity the physical origin of which is situated wholly, or in part, within the area of jurisdiction of another party."²⁷⁴ The problem of transboundary environmental impacts is addressed on the transboundary level in some countries²⁷⁵ through international declarations, judicial pronouncements and, in particular, the *Espoo Convention*. In other countries this issue is left unanswered.²⁷⁶

First of all, it is important to consider what is meant by "boundaries." The most obvious and commonly recognised physical boundary that comes to mind in this regard is the political border between countries. However, it is important to realise that boundaries within countries, such as states, provinces, municipalities or other denominations are also relevant. While boundaries in terrestrial ecosystems might be easier to define and deal with, an understanding of highly dynamic ecosystems such as the marine environment is needed to promote and achieve effective co-operation in all areas.²⁷⁷

272 Hereafter referred to as TEIA.

273 Convention on Environmental Impact Assessment in a Transboundary context, 1991.

274 Glazewski *Environmental Law in South Africa* 274.

275 North American Agreement between Canada, United States of America and the United Mexican States and agreement in the European Union.

276 South African Development Community (hereafter referred to as SADC); also see S 24(6) of the *NEMA Amendment Bill*.

277 The World Conservation Union (IUCN) and the World Commission on Protected Areas (WCPA) International Symposium on Parks for Peace 12.

Apart from the *Espoo Convention*, other conventions such as the *Convention on Biodiversity*²⁷⁸ and the *Law of the Sea Convention*²⁷⁹ include environmental assessment obligations.²⁸⁰ The Espoo model provides an excellent example of a convention that could be adopted in a regional context.²⁸¹ The *Espoo Convention* contains a general obligation for states to agree to take all the appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impacts from proposed activities.²⁸² The *Espoo Convention* also sets out the required minimum contents of EIA documentation²⁸³ as well as provisions for notification,²⁸⁴ final decisions²⁸⁵ and post project analysis²⁸⁶ among others.²⁸⁷

Another example of countries that are in the process of adopting TEIA are the North American countries of Canada, the United States of America (hereafter referred to as the USA) and the United Mexican States (hereafter referred to as Mexico). In 1993 Canada, the USA and Mexico signed the *North American Agreement on Environmental Co-operation* (hereafter referred to as NAAEC), which promotes strengthened co-operation between the three countries regarding the conservation, protection and enhancement of the environment.²⁸⁸

Article 10(7) of the NAAEC makes provisions for the development of recommendations for an agreement on the assessment of environmental impacts of

278 A 29 of the *Convention on Biodiversity*.

279 A 206 of the *Law of the Sea Convention*.

280 Glazewski *Environmental Law in South Africa* 274.

281 Glazewski *Environmental Law in South Africa* 274.

282 A 2(1) of the *Espoo Convention*, 1991.

283 Appendix 2 of the *Espoo Convention* 1991.

284 A 5 of the *Espoo Convention*, 1991.

285 A 6 of the *Espoo Convention*, 1991.

286 A 7 of *Espoo Convention*, 1991.

287 Glazewski *Environmental Law in South Africa* 275.

288 CEC 1998 EXPLORER http://www.cec.org/pubs_info_resources/law_treat_agree/pbl.cfm?varla=english 2 July 2001.

proposed projects likely to cause significant adverse transboundary effects.²⁸⁹ The contents of the *Draft North American Agreement on Transboundary Environmental Impact Assessment* (hereafter referred to as *Draft North American Agreement*) will be discussed briefly.

The term "transboundary environmental impact" is defined in the *Draft North American Agreement* as "any environmental impact, either permanent or temporary in the territory of a party caused by a proposed project, the physical origin of which is situated wholly or in part in the territory of another party, and may include, *inter alia*, environmental impacts on migratory species and marine resources and environmental impacts transmitted through shared water sheds and air sheds." This definition is much broader than the definition provided in the *Espoo Convention*. TEIA is defined as "a domestic assessment procedure that is used to evaluate the transboundary environmental impacts of a proposed project."²⁹⁰

The *Draft North American Agreement* initially stipulates that the party of origin must notify any potentially affected parties of the proposed projects.²⁹¹ The agreement also stipulates the specific circumstances under which notification must take place. Provision are also made under the agreement for time frames within which this notification must take place,²⁹² including specifications on whom is required to notify and whom they must notify.²⁹³ According to this agreement, notification must take place by means of a record of notification in at least one of the official languages of the party of origin and also a translation in the language of the potentially affected parties whenever possible.²⁹⁴

The notification of a proposed project should contain sufficient information to

289 CEC 1998 EXPLORER http://www.cec.org/pubs_info_resources/law_treat_agree/pbl.cfm?varla=english 2 July 2001.

290 A 1 of the *Draft North American Agreement* on TEIA.

291 A 2 of the *Draft North American Agreement* on TEIA.

292 A 3 of the *Draft North American Agreement* on TEIA.

293 A 4 of the *Draft North American Agreement* on TEIA.

294 A 5 and 6 of the *Draft North American Agreement* on TEIA.

appraise a potentially affected party on the nature of the proposed project.²⁹⁵ Part 1 and Part 2 of Appendix 1 stipulates the information that must be included in the notification when the party of origin has decided to conduct a TEIA.

The *Draft North American Agreement* also makes provision for when a notification has not been received. When the potentially affected party has reasonable concerns that its environment would be significantly adversely affected by a proposed project, the provision provides the affected party the right to request information from the party of origin.²⁹⁶ This also includes when notification has occurred and additional information is requested.²⁹⁷

The *Draft North American Agreement* also prescribes what the potentially affected party's response should include.²⁹⁸ In this regard the potentially affected party should indicate whether it intends to provide comments, or to participate in a TEIA if one is undertaken. If the potentially affected parties indicate that it does not intend to provide comments, or to participate in a TEIA, or if it does not respond within the designated time frames, the party of origin does not have any further obligations for that particular project pursuant to this agreement unless the potentially affected parties became aware of new information at a later date.²⁹⁹

When it is evident that the proposed project is likely to cause significant adverse transboundary environmental impacts on the environment of another party then the party of origin should ensure that a TEIA is undertaken.³⁰⁰ This TEIA must comply with all the elements provided for in Appendix 4.³⁰¹ The contents of the TEIA are

295 A 7(1) of the *Draft North American Agreement* on TEIA.

296 A 8(1) of the *Draft North American Agreement* on TEIA.

297 A 8(2) of the *Draft North American Agreement* on TEIA.

298 A 9(1) of the *Draft North American Agreement* on TEIA.

299 A 9(2) of the *Draft North American Agreement* on TEIA.

300 A 10(1) of the *Draft North American Agreement* on TEIA.

301 Appendix 4 provides for the basic contents of a TEIA which includes: information on the nature of the proposed project; information on the spatial and temporal boundaries of the proposed project; information on the environment likely to be affected; the expected adverse transboundary environmental impacts and the proposed mitigation measures.

similar to the EIA documentation provided for in the *Espoo Convention*.

The potentially affected parties must be notified of the TEIA and also of the elements outlined in Part 2 of Appendix 2, which includes additional information on the proposed project as well as information on the public participation process undertaken by the party of origin.³⁰² Provisions are also made for elements which the party of origin may use in the process of determining whether a proposed project is likely to cause significant adverse transboundary environmental impacts on the environment of another party.³⁰³

The party of origin must ensure that any potentially affected parties have a meaningful opportunity to participate and that all relevant information furnished by these parties is taken into consideration.³⁰⁴ The party of origin must invite close co-operation of any potentially affected parties during the TEIA.³⁰⁵

The party of origin must conduct a public participation process among the public of the potentially affected parties to the same extent as the public participation process among the public of the party of origin.³⁰⁶ The party of origin must also submit all the written documentation of any completed TEIA to the potentially affected parties and communicate to these parties the decisions made with regard to the proposed project after the review of the TEIA. Mitigation measures must also be considered as soon as possible during the TEIA and provision must be made for post-project monitoring.³⁰⁷

Any party may request consultation regarding any aspects of the operation of these

302 A 10(b) of the *Draft North American Agreement* on TEIA.

303 Appendix 3 factors for determining significant adverse transboundary impacts includes: context factors such as the potentially affected human population and vulnerable segments of population; geographic extent such as ecological context; unique characteristics of the geographical area; standards regarding the protection of health or the environment as specified in international, national or subnational legal instruments; probability of occurrence and scientific uncertainty; an other factor is the intensity factor such as degree and duration.

304 As 11(1)(a and (b) of the *Draft North American Agreement* on TEIA.

305 A 11(2) of the *Draft North American Agreement* on TEIA.

306 A 12 of the *Draft North American Agreement* on TEIA.

307 As 14 and 15 of the *Draft North American Agreement* on TEIA.

recommendations including any determination, action or inaction taken thereunder.³⁰⁸ Provision is also made for dispute resolution but this provision is still to be elaborated upon.

TEIA is important for the proper conservation of the environment and for prosperity in and between countries. In countries where provisions are not made for TEIA (such as SADC), each country's legislation must first be studied before an EIA may be conducted.³⁰⁹ This process slows development projects and ensures sufficient conservation of the environment and can lead to impacts that are not assessed in time.

2.7 CONCLUSION

It is evident from the above discussion that it is important to define environmental terminology, because of the varied international terminology as well as terminology that is used on home ground. The important definitions discussed in this chapter include "environment", "EIA", "SIA" and "sustainable development."

It became clear from the discussion that an EIA provides several benefits in its process to promote sustainable development. An EIA can be regarded as (among others):

- an aid to decision-making
- a contribution to sound environmental management
- an aid to the formulation of development action
- an early warning plan
- a positive process that seeks a harmonious relationship between development and the environment.

The fourteen evaluation criteria, as set out by Wood and supplemented by other writers' contributions, form the main framework around which the different concepts

308 A 18 of the *Draft North American Agreement* on TEIA.

309 Du Plessis "The potential for EIA partnerships in SADC" xx-xx.

of the EIA will be discussed. In summary these criteria are the following:

- a legal basis for EIA
- coverage of EIA systems
- consideration of alternatives in EIA systems
- screening
- scoping
- EIA report preparation
- EIA report review
- decision making
- monitoring and auditing of actions
- mitigation of impacts
- consultation and participation
- monitoring of EIA system
- costs and benefits of EIA systems
- strategic environmental assessment.

The concept regarding TEIA is an issue that becomes increasingly more important as development may have severe consequences on the environment that transgressed the boundaries of states and countries. The Espoo Convention is one of many conventions that addresses this issue and has been adopted by many countries. The *Draft North American Agreement* is an agreement that sets out a comprehensive process that must be followed when projects of one country threatens to have a impact on the environment of another country.

CHAPTER 3 SOUTH AFRICAN, NAMIBIAN AND SWAZILAND'S EIA LEGISLATION

3.1 INTRODUCTION

The EIA process is a relatively new process in South Africa as well as in Namibia and Swaziland. In the past, the conducting of an EIA was not a legal requirement for most of the African countries. Most EIAs were conducted on the basis that the project was funded by foreign institutions, for example, the World Bank, which insisted on EIAs as a requirement for the funding. Where property was owned by foreign companies, an EIA is sometimes also required, because it is part of the parent company's code of conduct. These EIAs have been at the insistence of the lending agencies rather than driven by a desire to do so in order to protect the environment.³¹⁰

South Africa is currently in the process of redrafting its EIA regulations and legislation.³¹¹ South Africa is, however, also a member of SADC and, therefore, it is important to study the legislation of neighbouring SADC countries throughout the redrafting process. As already discussed in Chapter 1 of the dissertation,³¹² South Africa shares natural resources (i.e. rivers and mountains etc.) with its neighbouring countries and many private companies also undertake projects that exceed the national boundaries; in either case the action can have a positive or negative effect on one or more countries. This necessitates an alignment of principles between the affected countries to devise a mutual environmental legislation or treaty. However, before development can take place it is imperative that each country's legislation and respective priorities are studied. The extended process can slow the pace of development projects causing unnecessary degradation to the environment. In order to strive towards sustainability it is important to ensure that the EIAs that are undertaken

310 Tarr P and Figueira M "Namibia's Environmental Assessment framework - the evolution of policy and practice" September 1999.

311 See Ch 4 Proposed Amendments.

312 See 1.1 Problem Statement.

within the region adhere to a similar standard.

In South Africa, Namibia and Swaziland environmental legislation provisions are made for the investigation of environmental impacts. The countries' EIA legislation is similar in some aspects but differ in other. Countries may learn from one another when EIA systems are due for review and eventual improvements as is the case in South Africa.

The purpose of this chapter is firstly to compare the three countries' EIA legislation in order to identify possible learning points for South Africa. Secondly, to determine whether the South African EIA regulations can be brought in line with the EIA legislation of its neighbouring countries Namibia and Swaziland.

3.2 ENVIRONMENTAL RIGHTS

Section 24 of the *Constitution of South Africa, 1996*³¹³ forms the main framework within which South African legislation has to be interpreted. This section makes provision for the protection of the environment for the benefit of present and future generations and for the right that everyone has to an environment that is not harmful to their health or well-being. In order to comply with these rights, section 24(b) necessitates the development of 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. The EIA process is a measure that is being used in development projects in order to establish possible pollution and ecological degradation and to introduce preventional mitigation measures, which may contribute to the protection of the environment as set out in section 24 of the Constitution.³¹⁴

313 *Constitution of the Republic of South Africa* 108 of 1996.

314 S 24(b)(i)-(iii) of the *Constitution of the Republic of South Africa, 1996*.

Namibia has similar fundamental rights outlined in their Constitution. In terms of section 95(1)³¹⁵ of the *Namibian Constitution* the state plays the active role in the conservation of the environment in order to promote and maintain the welfare of the people. Section 91(c) also places an explicit duty on the state to investigate complaints concerning any abuse inflicted on the environment and natural resources. Namibia is regarded as one of the countries which, in addition to the traditional Bill of Rights, also contains a Policy Guideline for authority action with regard to the implementation of socio-economic rights.³¹⁶ According to Ferreira,³¹⁷ these rights contained in the Policy Guideline do not create judicial enforceable rights for individuals in Namibia, but place a constitutional duty on the state to initiate certain development programmes.

Both sections 95(1) and 91(c) of the *Namibian Constitution* suggest only vertical working (between state and natural people) of the Constitution. Part 1 of EMA also sets out various environmental rights and duties including the right of current and future generations of Namibians to: "an environment conducive to health, well-being and security" and equitable access to resources. A duty is placed on all people as well as on the government in section 2 to protect and conserve Namibia's environment.³¹⁸ The environmental rights in Part 1 of EMA place a general duty on all people and on the government to protect and conserve Namibia's environment. In this section, horizontal (between private people) and vertical working are provided for. In section 24(a) of the South African Constitution there is no express reference to the state as being the only accountable body that is responsible for the creation of an environment

315 S 95(1) of the *Namibian Constitution* declares that: "The State shall actively promote and maintain the welfare of the people by adopting policies aimed at ... the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians both present and future."

316 S 91(c) reads as follow: "The function of the Ombudsman shall be defined and prescribed by an Act of Parliament and shall include ... the duty to investigate complaints concerning the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia."

317 Ferreira GM "Grondwetlike waardes en sosio-ekonomiese regte met verwysing na die reg op 'n skoon en gesonde omgewing" 1999 *TSAR* 291.

that is not harmful to the people's health and well-being. There are arguments interjected by various commentators³¹⁹ that this section can be invoked in disputes against the state as well as between private parties where the state is not involved at all. This suggests the horizontal working of this section, while section 24(b) is limited by creating obligations solely between the state and the people.

Both the South African and Namibian Constitutions reserve the right to a protected environment for both present and future generations. The measures that will be used to achieve these rights in section 24³²⁰ and section 95(l)³²¹ are mainly corresponding except for the fact that section 24 mentions that these measures must be used while promoting justifiable economic and social development. The South African Constitution does not provide a section that is comparable to section 91(c) of the *Namibian Constitution* but the NEMA³²² contains various sections where a duty is placed on the relevant authorities to take necessary steps where an incident occurs.³²³

Different from Namibia and South Africa, the people of Swaziland do not have any formal constitutional entrenched environmental rights. The environmental protection of the country stems from the *Swaziland Environmental Action Plan* (hereafter referred to as *EAP*) which provides a holistic perspective and meaningful basis for all kinds of national policy development to ensure sustainable development.³²⁴ Swaziland is, however, in the process of adopting the *Draft National Environmental Policy* of 2000 (hereafter referred to as *NEP*). *NEP* builds on the analysis and recommendations contained in the *EAP* and represents the next step in promoting sound environmental management across all areas of decision-making. One of the principles in *NEP* provides the people of Swaziland with environmental rights and

318 Tarr and Figueira "Namibia's Environmental Assessment framework- the evolution of policy and practice" September 1999.

319 Davis *et al* *Fundamental Rights in the new Constitution: comments and cases* (Juta Cape Town 1997) 43.

320 *Constitution of the Republic of South Africa*, 1996.

321 *Namibian Constitution*, 1990.

³²² *National Environmental Management Act* 107 of 1998

323 Ss 28 and 30 of the *National Environmental Management Act* 107 of 1998.

324 Anon 1997 EXPLORER <http://www.swazi.com/government/sz-howgov.html> 25 Julie 2001.

reads as follows: "every inhabitant of Swaziland is entitled to live in an environment that is conducive to health and well-being and to have access to the natural environment on an equitable and sustainable basis and to the means enforcing these rights."³²⁵

3.3 A COMPARISON BETWEEN SOUTH AFRICA, SWAZILAND AND NAMIBIA

3.3.1 *Legal basis of EIA systems*

The *Constitution of the Republic of South Africa*, 1996 together with the ECA³²⁶ and the NEMA³²⁷ form the main legal framework of environmental legislation in South Africa. At present the ECA³²⁸ regulates the EIA process in South Africa until the repealed³²⁹ provisions of NEMA³³⁰ comes into effect on a date still to be published by the minister in the *Government Gazette*.³³¹ The ECA empowers the minister to declare either activities or areas to be affected activities or limited development areas, respectively for which EIAs may be required.³³²

In Swaziland, the EAARR³³³ regulated the process of EIAs. These regulations were promulgated to give effect to section 18(1)(b) of the *Swaziland Environmental*

325 Anon 2000 EXPLORER <http://www.ecs.co.sz/NEP/index.htm> 11 November 2001.

326 *Environment Conservation Act* 73 of 1989.

327 *National Environmental Management Act* 107 of 1998.

328 Ss 21-23 of ECA and GN R1182, 1183, 1184 in GG of 1997-09-05 promulgated under ss 21 and 22 of ECA.

329 See Ch 4 Proposed Amendments where the repealed Chapter 5 of NEMA is discussed.

330 S 50(2) of NEMA will repeal ss 21, 22 and 26 of ECA as well as regulations GN R1182, 1183, 1184 issued pursuant to ss 21 and 22 in GG 18261.

331 In a recent case *Silvermine Coalition v Sybrand van der Spuy Boerdery and Others* an as - yet unreported judgement by Davis J in the Cape of Good Hope Provincial Division in the High Court of South Africa (judgement is dated 20 June 2001) it was determined that because ss 21 and 22 of ECA remains in force, where a person seeks authorisation to carry out an activity identified under s 21 of ECA, the ECA regulations continue to apply, subject to compliance with s 24(7) of NEMA.

332 GN R1182-1184 in GG 18261 of 5 September 1997.

333 *Environmental Audit, Assessment and Review Regulations* 58 of 1996.

Authority Act 15 of 1992 which stated that "the Minister may after consultation with the Authority make regulations for ... the procedure for the introduction of EIA on development projects." Swaziland's government recently accepted the *Environmental Management Act 5 of 2002* (hereafter referred to as EMB), which will be framework environmental legislation.³³⁴ Part 4 of the EMB makes provision for an EIA process.³³⁵ Throughout the discussion reference will be made to the EAARR as authoritative source but reference will also be made to the EMB if it includes or explain matters which the EAARR does not include or explain sufficiently.

Namibia also recently accepted the *Environmental Management Act 101 of 1998*, a act similar to that of Swaziland. This act will give statutory effect to Namibia's *Environmental Assessment Policy* that is set out in Part 4 of the Act and which was in the past the authoritative source for EIAs.

In comparing the discussed countries' legislation to Wood's criteria³³⁶ for legal basis of EIA systems,³³⁷ it is clear that the countries' EIA legislation is legally specified and mandatory. The South African *EIA regulations* specify the procedures which must be followed to generate the scoping report, the EIR and record of decision. The Namibian EMA and Swaziland EAARR and EMB also includes specifications regarding the contents of EIA reports and other required records.

All the provisions in the Swaziland EAARR and EMB will be enforceable through the courts.³³⁸ The enforcement actions can include criminal proceedings and civil remedy proceedings that can be brought before court simultaneously, consecutively, separately or consolidated. The Namibian EMA makes provision that the minister may direct any person to cease such activity or to take such steps as he or she may deem fit. The minister can practise this power when any person fails to perform an activity or performed an activity as a result of which the environment or any component thereof

334 The EMB was accepted November 2002.

335 S 32 of EMB.

336 Wood *Environmental Impact Assessment: A Comparative Review* 72-75.

337 See 2.4.1 Legal basis of EIA systems.

338 Reg 15(3) of EAARR and part 9 of EMB.

is, or may be seriously damaged, endangered or detrimentally affected.³³⁹ EMA also contains comprehensive provisions for penalties when a person fails to comply with notices or directives.³⁴⁰ It is also probable that all the steps of the South African EIA process specified in the EIA regulations will be enforceable through the courts.³⁴¹

All three countries' EIA legislation contains a proper outline of the relevant EIA procedures. The South African *EIA Guideline Document* provides valuable guidance for the relevant authority, proponent, consultant and all interested and affected parties.

3.3.2 Definition of Environmental Impact Assessment

The term "EIA" is not directly defined in the South African environmental legislation. NEMA does not use the term EIA but refers generally to investigation into the environmental impact activities.³⁴² Section 23 of NEMA sets out the general objectives of integrated environmental management³⁴³ (hereafter referred to as IEM) and one of the objectives is " ... the identification, prediction and evaluation of the actual and potential impact on the environment, socio-economic conditions and cultural heritage of activities with a view to minimising negative impact, maximising benefits, and promoting compliance with the principles of IEM referred to in section 2. The risks, consequences and alternatives also have to be considered as well as their alternatives and options for mitigation of impacts."³⁴⁴ When the term "activities" is used in Chapter 5 it includes policies, programmes and projects³⁴⁵ (which are referred to as Strategic Environmental Assessment).³⁴⁶ This definition makes it clear that not only actual activities (for which EIA are used) are included but also any planning,

339 S 32 of EMA.

340 S 29 of EMA.

341 Wood 1999 *South African Geographical Journal* 53; also see Soltau 1999 *SAJELP* 33-51.

342 S 23(1) of NEMA.

343 See 2.2 The Nature of Environmental Impact Assessment.

344 S 23(2)(b) of NEMA.

345 See 2.4.14 Strategic Environmental Assessment.

346 Sadler B *International study of the effectiveness of Environmental Assessment in a Changing World: Evaluating practice to improve performance* Canadian EIA Agency and International Association of International Assessors 1996.

policy development and programmes. Similar to NEMA, the ECA does not define EIAs but only refers to environmental impact reports. In GN R1183³⁴⁷ reference is made to environmental impact assessments but the term is not defined. In the *Environmental Impact Management Guideline* document of the Department of Environmental Affairs and Tourism³⁴⁸ (hereafter referred to as *EIA Guideline Document*), an EIA is defined as "a process of examining the environmental effects of development." Fuggle³⁴⁹ defines an EIA as: "... the administrative or regulatory process by which the environmental impact of a project is determined."

In Swaziland, an EIA is defined in the EAARR as "the process of predicting and evaluating the likely environmental impacts of a proposed project where the scale, extent and significance of the environmental impact can not be easily determined." At this stage, South Africa (with GN R1182) and Swaziland limit EIAs to projects only.

In the Namibian legislation the term EIA is not used. Throughout the legislation the term Environmental Assessment (hereafter referred to as EA) is used and is defined as "a process of identifying, predicting and evaluating the actual and potential biophysical, social and other relevant effects on the environment of projects prior to their authorisation, or in the case of proposals prior to their implementation as well as the risks and consequences of projects and proposals and their alternatives and options for mitigation with a view to minimising negative impacts on the environment, maximising benefits and promoting compliance with the principles of environmental management set out in section 6."

The Namibian definition of EA is comparable to the section 23(2)(b) objective of NEMA. This section can be regarded as a description of the EIA process as well as a description of the SEA. Although the definition regarding EA of Namibian EMA makes provision for both projects and policies, plans and programmes the EMA distinguish between these two categories. The *EIA regulations* in South Africa

347 Regulations in GG 18261 of 1997-09-05 regarding activities identified under s 21(1).

348 EIA Regulations- Implementation of ss 21, 22 and 26 of the *Environment Conservation Act* (April 1998).

349 Fuggle *Environmental Evaluation* in Fuggle and Rabie (red) *Environmental Management* 764.

currently apply only to projects, but it is, however, clear that the objectives³⁵⁰ in NEMA include policies, plans and programmes. In Swaziland EAARR, the term EIA concentrates on projects only while no provision is made for policies, plans and programmes, but the Swaziland EMB, although not defining EIA, however, makes provision for SEA.

Wood³⁵¹ defines an EIA as "the evaluation of the effects likely to arise from a major project (or other action) significantly affecting the natural and man-made environment."³⁵² Wood's definition is similar to Swaziland's definition in the EAARR but makes provision for effect arising from projects as well as other actions, which includes policies, plans and programmes.³⁵³

3.3.3 Definition of significant impact

The term significant impact is a term that is used in all three countries' legislation. In NEMA and ECA there is no definition for this term. In the *EIA Guideline Documents*³⁵⁴ the term significant impact is described as "an impact that, by its magnitude, duration or intensity alters an important aspect of the environment."

In the Namibian EMA, the term significant effect means "having, or likely to have, an appreciable qualitative or quantitative impact on the environment, including changes in ecological, aesthetic, cultural, historic, economic and social factors, whether directly, indirectly, immediately or cumulatively."

In Swaziland's EAARR, category 3 projects are described as projects that are likely to have significant adverse impacts on the environment. These significant impacts are further qualified as impacts whose scale, extent and significance cannot be determined

350 S 23(2)(b) of NEMA

351 Wood *Environmental Impact Assessment: A Comparative Review* 1.

352 See 2.2 The Nature of Environmental Impact Assessment.

353 Wood *Environmental Impact Assessment: A Comparative Review* 1, also see 2.5.14 Strategic environmental assessment.

354 DEAT *EIA Regulations Implementation of ss 21, 22 and 26 of ECA*, April 1998.

without in depth study.³⁵⁵ Wood also uses this term in his discussion but does not define it³⁵⁶.

3.3.4 Activities requiring an EIA

As already discussed above, both ECA and NEMA contain provisions that deal with EIA issues in South Africa. In order to determine what activities require an EIA, the ECA adopts a two-way approach by empowering the minister to declare either activities³⁵⁷ or limited development areas.³⁵⁸ The minister, therefore, has discretion to exercise his or her right in order to declare such activities or limited development areas. In the case where activities have been declared these activities cannot be undertaken unless a written authorisation has been obtained from the minister or premier (as the case may be).³⁵⁹ In the process to obtain authorisation an EIA may be required. GN R1182 promulgated under section 21, identifies activities which may have a substantial detrimental effect on the environment and for which EIAs are required. GN R1183³⁶⁰ and 1184³⁶¹ were issued to deal with matters regarding the EIAs, which is required for these activities.

These activities³⁶² include:

- the construction and upgrading of certain facilities like electricity generation, nuclear reactors, roads, railways, airfields, harbours, cableways, communication network structures, racing tracks, channels and canals, dams,

355 First Schedule under Regulation 7 of EAARR.

356 Wood *Environmental Impact Assessment: A Comparative Review* 1.

357 S 21 of ECA.

358 S 23 of ECA.

359 In terms of s 235(8) of the *Constitution of the Republic of South Africa* 200 of 1993 various sections of the ECA were assigned to the provinces – Proc R29 in GG 16346 of 7 April 1995; Proc 43 in GG 17354 of 8 August 1996.

360 GN R1183 contains the substantive body of rules regarding the actual conduct and contents of EIAs.

361 GN R1184 provides that the MoE designates the competent authority in each province as the authorised authority to issue written authorisations to undertake the listed activities provided for in R1183.

- reservoirs for public water supply, schemes for abstraction or utilisation of ground or surface water, public and private resorts, sewage treatment plants, industrial and military manufacturing and storage of explosives or ammunition
- the change of land use from a specific use like residential use to a total different use like industrial use³⁶³
 - specific situations that include the concentration of livestock for mass commercial production
 - the intensive husbandry or importation of any plant or animal that has been declared a weed or an invasive alien species
 - the release of any organism outside its natural area of distribution for biological pest control
 - the genetic modification of any organism
 - the disposal of waste
 - scheduled processes in terms of the *Atmospheric Pollution Prevention Act 45* of 1965.

NEMA addresses the issue of EIAs in Chapter 5, which is entitled "Integrated Environmental Management" (IEM). Section 23 sets out the general objectives of IEM where one of the objectives are "... the identification, prediction and evaluation of the actual and potential impact on the environment, socio-economic conditions and cultural heritage of activities with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of IEM referred to in section 2. The risks, consequences and alternatives also have to be considered as well as their alternatives and options for mitigation of impact."³⁶⁴ This objective emphasises the necessity of the EIA process in order to minimise negative impacts on the environment.

362 Schedule 1 of Regulation 1182.

363 In the *Myburgh Park Langebaan (Pty) Ltd v The Langebaan Municipality and Others* (unreported judgement by Selikowitz J, in the Cape of Good Hope Provincial division of the High Court of SA 4459/98; judgement is dated 8 May 2001) the court set out the meaning of item two of GN R1182 "The change of land use" as the actual change of land use, and not merely an application for permission to change the land use. It means a factual change of land use rather than one triggered by law, like an application for rezoning.

364 S 23(2)(b) of NEMA.

Section 24 of NEMA makes provision for procedures to accomplish these objectives and principles in the IEM procedure. Section 24(1) declares that potential impacts of activities on the environment that require authorisation or permission by law and which may affect the environment significantly must be considered, investigated and assessed prior to their implementation.³⁶⁵ This section includes the activities that are declared under GN R1182 and any other activities the minister may choose to declare.³⁶⁶

Section 24(2) of NEMA points out the power that the South African MoE and in some instances, the MEC of a province charged with environmental management (or in some instances in consultation with each other) have to declare activities which may have a detrimental effect on the environment. The authorities concerned may either identify activities that may not be undertaken without prior authorisation from them or they may identify specific geographic areas where such activities may not be undertaken without their prior consent.³⁶⁷ Every organ of state³⁶⁸ authorised to permit activities must take into account any information such as maps which specifies the sensitivity of a specific geographical environment which the minister and MEC concerned have compiled.³⁶⁹ These provisions do not only apply to new or proposed activities but are more far reaching in that they also apply to existing authorised and permitted activities.³⁷⁰

Section 19 of Namibia's EMA provides for the circumstances under which EAs are required. This section stipulates that no person shall start a project that involves activities listed in Schedule 1 of the Act unless all of the provisions of the prescribed

365 According to the *Silvermine Coalition v Sybrand van der Spuy Boerdery and Others* case there are two preconditions for section 24(1) to take effect, namely, the activity must require the authorisation and permission by law and the activity must have a potential significantly to affect the environment.

366 Glazewski *Environmental Law in South Africa* 290-291.

367 Compare to ss 21 and 23 of ECA.

368 Organ of state means "any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation."

369 S 24(2)(e) of NEMA.

sections³⁷¹ have been complied with.³⁷² Schedule 1 of EMA specifies a positive list of over 30 activities that require an EA. They are grouped under 4 headings, namely:

- Construction and related activities, which include roads, dams, factories, pipelines and other infrastructures
- Land use planning and development activities, which include rezoning and land use changes
- Resource extraction, manipulation, conservation and related activities such as mining and water abstraction
- Other activities, which include pest control programmes and the export of waste.

The listed activities of South Africa and Namibia mainly correspond with each other. Except for the activity where a concentration of livestock is in a confined structure for the purpose of mass commercial production,³⁷³ all the listed activities mentioned in GN R 1182 are included in schedule 1 of Namibia's EMA. South Africa's listed activities, however, exclude mining activities,³⁷⁴ while the Namibian legislation lists prospecting, quarrying, mineral extraction and mineral beneficiation activities. EIAs and EMPs for mining related activities in South Africa are separately controlled by the *Minerals Act 50* of 1991.³⁷⁵ Namibia also includes activities such as the construction of any structure associated with aquaculture activities, drilling of bore holes, veterinary,³⁷⁶ oil refineries, oil, water,³⁷⁷ gas and petrochemical pipelines, the

370 S 24(2)(d) of NEMA.

371 Ss 21, 22, 23, 24 and 25 of EMA.

372 S 19(1) of EMA.

373 Schedule 1 no 3 of R 1182.

³⁷⁴ See Ch 4 Proposed Amendments.

375 S 39(5)(a) of the *Minerals Act 50* of 1991 states that the Director General may, pending on the approval of an EMP "... require that an EIA be carried out in respect of the intended prospecting or mining operations by a professional body designated by the Director-General."

376 Place for treatment of sick animals.

377 Chapter 11 of the National Water Act 36 of 1998, however, requires an EIA to be carried out before the construction of any waterworks, which includes water pipelines.

establishment of resettlement schemes and forestry which are not part of the listed activities in South Africa.

The Namibian environmental commissioner, in agreement with the competent authority, (not the proponent) has powers similar to the competent authority in South Africa,³⁷⁸ namely to determine, in addition to any activity referred to in Schedule 1, that projects which may have a significant effect on the Namibian environment are required to carry out an EA.³⁷⁹ These projects must also comply with the provisions of section 20, 21, 22, 23, 24 and 25 of EMA. In South Africa, the minister also has the competence to identify specific geographic areas or limited development areas where such activities may not be undertaken without prior authorisation.

Swaziland has a totally different system from South Africa and Namibia that they use in the process of determining activities for which EIAs are required. If a project, regardless whether the project is new or part of a previously approved project, requires a permit, licence, or any kind of approval or consent from the authorising agency or if the project is forwarded to the Ministry of Economic Planning and Development (hereafter referred to as MEPD) for inclusion in the development plan,³⁸⁰ it is subject to revision by the authorising agency³⁸¹ or proposing ministry.³⁸² This revision takes place in order to determine whether any significant environmental impacts are likely to occur. This authority will then determine under which category (1, 2 or 3) of the first schedule this project will fall. The first schedule sets out guidelines and illustrative lists for project types in order to allocate in what category a specific project will fall. In the process of determining the category under which a project will be classified it is essential to consider the scale and allocation of the project.

378 S 24(2) of NEMA and ss 21 and 23 of ECA.

379 S 19(3) of EMA.

380 The *National Development Strategy* defines Development Plan as "social and economical transformation process."

381 S 4 of EAARR defines authorising agency as "a person, body, government department or agency, local authority or any person empowered by law in Swaziland to issue a permit, licence, consent or approval."

382 S 7(1) of EAARR.

Category 1 projects are described to be unlikely to cause any significant environmental impacts. The category 1 list includes *inter alia* small-scale development and renovations. Projects under category 2 are those projects likely to cause environmental impacts some of which may be significant, unless mitigation actions are taken. Such projects include those that cause impacts, which are relatively well known and easy to predict and the mitigation actions in preventing or reducing the impacts are also well known. Projects listed under this category are medium-scaled which include projects located near environmentally sensitive areas. Large-scale projects are allocated under category 3. These projects are likely to have significant adverse impacts which scale, extent and significance cannot be determined without an in-depth study, which include projects located in environmentally sensitive areas.

After the project is categorised the authority can review this decision and accept or change it. If the authority accepts a project under category 1, no EIA will be required and an environmental compliance certificate (hereafter referred to as ECC) will be issued which means the project can proceed to the authorisation procedure. Where a project is classified under category 2, the proponent is obliged to submit an initial environmental evaluation (hereafter referred to as IEE) and a comprehensive mitigation plan (hereafter referred to as CMP) to the authorising agency or the MEPD. If these reports comply with the prescribed reporting requirements (in the second schedule) the authorisation process continues which means that no EIA is required. If not, the project proponent would have to prepare and submit amended reports. After the amendment the authority may order the project proponent to prepare and submit an EIA and a CMP or to amend the report. Projects under category 3 require the proponent to submit an EIA as well as a CMP report to the authorising agency. The authority will then decide whether the EIA and CMP are within the reporting requirements.

The Swaziland EMB works on the same principle as the EAARR as it makes provision for different categories of projects that may have an effect on the environment. The minister, on advice of the authority, may make regulations in order

to prescribe these categories.³⁸³ These categories of projects are similar to the categories provided for in EAARR and is also divided in 3 groups namely:

- Categories of projects that are deemed not to have an effect on the environment. This is comparable to category 1 projects in EAARR.³⁸⁴ Projects under this category may be approved³⁸⁵ and no EIA will be required
- Categories of projects that are deemed to have an effect on the environment.³⁸⁶ This category can also be compared to category 2 projects in EAARR. The potential effects of these projects on the environment are likely to be more than minimal or insignificant, which may have certain consequences for the applicant³⁸⁷
- Categories of projects that are deemed to have a significant effect on the public interest³⁸⁸ are similar to category 3 projects in EAARR and will require an EIA.

The EMB also makes provision that the minister, on advice of the authority, may by regulation prescribe categories of facilities and activities in respect of which the authority may require environmental audits to be conducted.³⁸⁹ This is something that does not appear in either the South African or Namibian legislation.

The advantage of the Swaziland system of categorising projects according to scale and allocation in both the EAARR and EMB prevents from an early stage that EIAs are required for small insignificant projects. A problem with the system in Swaziland is that there is no definite standard against which unlisted activities can be measured in order to determine what the scale of the activity will be. As stated earlier, both South African and Namibian authorities have the power to declare activities, apart from the

383 S 33 of EMB.

384 S 33(b) of EMB.

385 S 32(5)(a) of EMB.

386 S 33(a) of EMB.

387 S 32(5)(b)(i)-(iii) of EMB.

388 S 33(c) of EMB.

389 S 33(g) of EMB.

listed ones, that may not be undertaken without their prior consent.³⁹⁰ Neither the EAARR nor EMB gives the Swaziland authority a similar power.

Similar to Namibia, Swaziland also includes mining activities as part of their listed activities.³⁹¹ Currently the South African EIA process is controlled by numerous Acts, for example the EIA procedure followed during mining activities is separately controlled by the *Minerals Act 50 of 1991*³⁹² and the Department of Minerals and Energy. There is, therefore, not one Act or piece of legislation that makes provision for all relevant activities and this can obstruct the proper practice and control of the EIA process.

Wood's criteria³⁹³ stipulates that EIA procedures must apply to both public and private actions and must refer to project as well as policies, plans and programmes (also referred to as strategic environmental assessment and hereafter referred to as SEA.) From the above discussion it is clear that the South African EIA system applies to most public and private environmentally significant projects, but, however, not currently to policies, plans and programmes. NEMA, however, makes provision for policies, plans and programmes as well as for projects. Both the Namibian EMA and Swaziland's EMB make provision for the assessment of policies, plans and programmes.

As already discussed as different from South Africa, both Namibia and Swaziland's legislation includes mining activities, development within rivers and intensification of various land uses as part of the range of activities subjected to the EIA legislation. Separate legislation like the *Minerals Act 50 of 1991*, the *National Water Act 36 of 1998* and *Development facilitation Act 67 of 1995*, among others, make provision for EIA requirements for activities that fall under these acts and which are not included in the EIA regulations.

390 S 24(2) of NEMA; s 19(3) of EMA.

391 Category 3 of Schedule 1 of EAARR.

392 The *Minerals Act 50 of 1991* is in the process to be amended by the *Minerals Development Draft Bill of 2000*.

393 Wood *Environmental Impact Assessment: A Comparative Review* 87-89.

The South African ECA indicates that environmental impact reports (hereafter referred to as EIR) should not only focus on physical impacts,³⁹⁴ but should identify affected economic and social interests and estimate the nature and extent of effects on them.³⁹⁵ The *EIA Guideline Document* also stipulates that the effects on human health, socio-economic conditions, physical and cultural resources should be included.³⁹⁶ The term "environmental assessment" is defined in the Namibian EMA not only to include the evaluation of physical impacts but also social and other relevant effects on the environment.³⁹⁷ The general objectives of environmental assessment in EMA also make provision for social and other relevant effects to be identified, predicted and evaluated.³⁹⁸ Similarly, the Swaziland EAARR includes provisions that during the description of the environment in the initial environmental evaluation (hereafter referred to as IEE) and EIA report, the physical as well as ecological and human aspects must be taken into account. No provisions are, however, made for this aspect in the EMB.

3.3.5 Role players

3.3.5.1 Relevant environmental authorities

The Department of Environmental Affairs and Tourism (hereafter referred to as DEAT) is the implementing authority in terms of both ECA and NEMA. In terms of ECA and NEMA, however, the approval of EIAs can be done either by DEAT, a MEC of a province or a local authority depending on the circumstances.³⁹⁹ The local authorities of Midrand and George,⁴⁰⁰ amongst others, were given authorisation to act

394 See 2.2 The nature of environmental impact assessment.

395 S 26(a) of ECA; also see s 24(7)(b) of NEMA.

396 *EIA Guideline Document* 3.2.3.1 p23.

397 S 1 of EMA.

398 S 17(b) of EMA.

399 Ss 22 and 24 of NEMA; Reg 4(2) of GN R 1183.

400 GN R 467 in GG 21149 12 May 2000.

as relevant authorities for specified activities in their areas of jurisdiction.⁴⁰¹ The circumstances under which the provincial authority must refer the application to the minister for consideration include:⁴⁰²

- where the activity concerned has direct implications for national environmental policy or international environmental commitments or relations
- where the environment under threat is demarcated as an area of national or international importance
- where the minister and the provincial authority jointly decide that an application in respect of a specific activity should be considered by the minister
- where a national government department, the relevant provincial authority or a statutory body is the applicant
- where the activity has the potential to affect the environment across the borders of two or more provinces.

The minister and the provincial authority concerned may jointly decide that the provincial authority may consider such an application.⁴⁰³ EIAs may also be required in terms of the *Minerals Act* 50 of 1991,⁴⁰⁴ the *National Water Act* 36 of 1998⁴⁰⁵ or the *Development Facilitation Act* 67 of 1995.⁴⁰⁶ In terms of these acts, DEAT is not the relevant authority⁴⁰⁷ but according to the *Minerals Act*, the Department of Minerals and Energy Affairs has been authorised to act as relevant authority for mining

401 Nel "Unsustainable EIA partnerships: poorly-defined rights, roles, responsibilities and duties of EIA stakeholders."

402 Reg 4(3) of GN R 1183.

403 Reg 4(3A) of GN R1183 inserted by R 1645 in GG 19599 of 11 December 1998.

404 S 39(5)(a) of *Minerals Act* 50 of 1991.

405 Ss 41(2)(a)(ii) and 10(1) of the *National Water Act* 36 of 1998.

406 *Development Facilitation Regulations* GN R31 in GG 20775 of 7 January 2000.

407 Relevant authority according to reg 1 of the GN R 1183 means the minister, provincial authority or local authority, as the case may be.

activities.⁴⁰⁸ The Minister of Water Affairs is the relevant authority in cases where EIAs are required in terms of the *National Water Act*. Provision is also made in the *Development Facilitation Act* that the authorising body that may require an EIA for a development project is the development tribunal⁴⁰⁹ in each of the nine provinces.

The South African *EIA Guideline document* sets out the various responsibilities of the relevant authority. It includes⁴¹⁰ the responsibility to ensure that the applicant/consultant complies with the regulations. The relevant authority must ensure inter-departmental consultation and harmonisation of the administrative and decision-making process, which are essential for the effective implementation of the regulations. The relevant authority must stay in consultation with the applicant/consultant throughout the application procedure in order to provide general guidance on procedures, information and reports required. The relevant authority is also concerned with the evaluation, review and decision-making in terms of the regulations concerned, in order to ensure that it is done efficiently and within a reasonable time.

According to Swaziland's EAARR, the Swaziland environmental authority is the authority which exercise the functions and powers conferred upon it by the *Swaziland Environmental Authority Act* 15 of 1992.⁴¹¹ An authorising agency, is defined as "a person, body, government department or agency, local authority or any person empowered by law in Swaziland to issue a permit, licence, consent or approval." This authorising agency or in some cases a proposing ministry or the Ministry of Economic Planning and Development determines whether any significant environmental impacts are likely to occur and determine under which category the project will fall.⁴¹² The Swaziland EMB also indicates that the Swaziland Environmental Authority⁴¹³ is the relevant environmental authority who will approve projects and in the case of a

408 See 3.4.3 Activities requiring an EIA.

409 S 15(1) of *Development Facilitation Act* 67 of 1995.

410 *EIA Guideline Document* 3.1.4.1 p15.

411 S 4 of the *Environmental Authority Act*.

412 Reg 7(2) of the EAARR, 1996.

413 S 2 of EMB definition of authority.

review, the EMB explicitly provides that the minister responsible for environmental affairs⁴¹⁴ is the relevant authority.⁴¹⁵

The Namibian EMA appoints a competent authority (CA) as the relevant authority to which the project application must be submitted. The CA is defined in EMA as: "... the Ministry, regional or local authority, traditional authority or communal Land Board or any other statutory body administratively responsible for a proposal or project, or under whose jurisdiction a proposal or project falls." The Minister of Environment and Tourism appoints an environmental commissioner, where one of his functions is to supervise the environmental assessment process⁴¹⁶ and to determine the form, scope and content of an environmental assessment. This environmental commissioner must then make recommendations to the sustainable development commission (hereafter referred to as SDC) whose function is, among others, reviewing EA reports and issuing or refusing to issue environmental clearance in respect of projects.⁴¹⁷ In some instances the application shall be submitted to the environmental commissioner⁴¹⁸ and in other the environmental commissioner will consider such application in consideration with the competent authority.⁴¹⁹

In all three countries the relevant authority is the decision-making authority unless another sphere of governance is requested to make the decision. In Swaziland and Namibia one "higher" authority reviews or supervises the decisions of the competent authorities. The fragmentation of environmental legislation in South Africa leads to the fact that the environmental authority is not centralised in just one department and there is not a "higher" authority to supervise all decisions regarding EIAs. This can bring forward inconsistency in decision-making between various competencies.

414 S 2 of EMB definition of minister.

415 S 32(1) of EMB.

416 S 16(d) of EMA.

417 S 14(g) of EMA.

418 S 20(1) of EMA.

419 S 20(1) of EMA. In the case where the CA is the proponent or where there is no CA, such application shall be submitted to the environmental commissioner.

As stipulated above, the South African *EIA Guideline Document* places a duty on the relevant authority to work in close co-operation and consultation with other relevant government departments at various levels.⁴²⁰ According to Bray,⁴²¹ one of the most important structures prescribed by the state to achieve integrated and sustainable environmental management, is co-operative governance by all stakeholders involved. NEMA provides explicitly for the provision of co-operative environmental governance throughout the act by means of principles for decision-making on matters affecting the environment. In Swaziland and Namibia there is also some form of co-operation and consultation with other relevant government departments in the case where respectively the Swaziland environmental authority and the minister⁴²² (in the case of review) and the Namibian environmental commissioner or the SDC can review and supervise the decision and acts of the relevant authority. The Namibian EMA also makes explicit provision in some cases that the environmental commissioner must consider applications in consideration with the competent authority. In the case of EIAs, co-operative governance is, therefore, important in order to make an informed decision regarding the approval of projects.

Wood and the other contributing authors do not require the environmental authority to be the decision-making authority. Wood's only requirement regarding this issue is that the decision must be made by a body other than the proponent.⁴²³ Gilpin stresses also that the decision-making body must have knowledge of the climate surrounding the EIA process, politicians or parties participating and which conservation bodies participated.⁴²⁴ In all three countries the final decision in the EIA process is made by a body other than the proponent.

420 *EIA Guideline Document*, 3.1.4.1 Regulatory procedural guidelines.

421 Bray 1999 *SAJELP* 2.

422 S 32(1) of EMB.

423 Wood *Environmental Impact Assessment: A Comparative Review* 183; also see 2.5.8 Decision-making.

424 Gilpin *Environmental Impact Assessment* 24.

3.3.5.2 Applicant

In Regulation 1 of the South African GN R1183, an applicant is defined as "any person who applies for an authorisation to undertake an activity or to cause such activity to be undertaken as contemplated in section 22(1) of the Act." In regulation 3, the responsibilities of the applicant are set out and include the appointment of a

competent, independent consultant who has no financial or other interest in the undertaking of the proposed activity.⁴²⁵ The applicant is also solely responsible for all costs in connection with the employment of the consultant⁴²⁶ as well as the public participation process.⁴²⁷

The Swaziland regulations do not use the term applicant but refer to proponent which is defined as "... a legal person or entity responsible for initiating a project and obtaining the appropriate authorisation." The term operator is also used and is defined as "... a legal person or entity responsible for the existence or management of an existing project."⁴²⁸ The legislation makes provision that the proponent is responsible for all expenses for the duration of an initial environmental evaluation (hereafter referred to as IEE) and EIA report.⁴²⁹ The guide to EIA in Swaziland sets out some responsibilities of the proponent of the project, be it government or private, to obtain the necessary permits or licences and environmental compliance certificate (hereafter referred to as ECC) before the project can commence.⁴³⁰

In the Namibian EMA the term proponent is also used and means according to the Act "the developer, implementor or proposer of a project or proposal and, where applicable includes a Competent authority." Section 18(1) makes provision that the proponent shall be responsible for carrying out environmental assessments under the regulations of EMA and shall bear the costs thereof. In EMA, the other

425 Reg 3(1)(a), (c) and (d) of GN R1183.

426 Reg 3(1)(b) of GN R1183.

427 Reg 3(1)(f) of GN R1183.

428 Reg 4 of the EAARR.

429 Reg 7(12) and (14) of the EAARR.

responsibilities of the proponent are also not set out distinctly but it is implied in the regulations dealing with environmental assessments.

Wood does not discuss the roles of the applicant/proponent during the EIA process, but only emphasises that the decision-making body must not be the proponent.⁴³¹

3.3.5.3 Consultant

The Swaziland and Namibian legislation do not make mention of a consultant as a role player in the EIA process. Section 7(2) of Swaziland's EAARR makes provision that the authorising agency or proposing ministry review all projects to determine whether any significant environmental impacts are likely to occur and then determine the category under which it falls. Under this legislation the proponent is the only one who is required to submit the appropriate reports and acts in order to satisfy the conditions of the EIA process. In 1997, however, environmental consulting services (ECS) was established as the first consultancy in Swaziland offering a range of environmental consultancy services with the emphasis on EIA, environmental audits and monitoring. ECS's main objective is to assist developers from both private and public sectors, in complying with the EAARR.⁴³² Making use of this ECS is not compulsory by law, as is the case in South Africa, where the regulations require the appointment of an independent consultant.⁴³³

In Namibia the duty is placed on the proponent to carry out the EA process under EMA⁴³⁴ and the competent authority will monitor the compliance of the process. In both Namibia and Swaziland, if use were, therefore, made of a consultant, it would be the responsibility of the proponent of the project to ensure that the EIA/EA is properly done in accordance with the legislation and regulations. In the final instance the proponent will be the liable person.

430 Anon EXPLORER [http:// www.ecs.co.sz/env_articles-envassd.htm/](http://www.ecs.co.sz/env_articles-envassd.htm/) 5 September 2001.

431 Wood *Environmental Impact Assessment: A Comparative Review* 183.

432 Anon EXPLORER [http://www.ecs.co.sz/ welcome.htm/](http://www.ecs.co.sz/welcome.htm/) 31 Augustus 2001.

433 Reg 3(1) of GN R1183.

434 S 18(1) of EMA.

In South Africa, regulation 3(1) of GN R 1182 sets out measures for the applicant to appoint an independent consultant who will conduct EIA on behalf of the applicant. The regulations specify certain requirements with which the consultant must comply. The consultant may not have a financial or other interest in the project,⁴³⁵ he or she must have the necessary expertise and knowledge in the area of environmental issues and the ability to perform all relevant tasks. The consultant must also be able to manage the public participation process and to produce thorough, readable documents.⁴³⁶ It is the author's opinion that it is important that the EIA legislation must make provision for a consultant and the necessary qualifications that are required for a consultant in order to perform an EIA successfully.⁴³⁷ It is also important to have some sort of administration or council where consultants whom comply with certain requirements can register as qualified environmental consultants. This is important in order to control the standard of work the consultants do and to prevent consultants with lack of necessary knowledge or expertise to give themselves out as environmental consultants. This matter still requires attention in all three countries.

In Wood's discussed criteria, he focuses on the issue regarding the accreditation of EIA consultants.⁴³⁸ He discusses methods of ensuring objectivity during the review of EIA reports and one method is to use EIA consultants during the EIA review stage. He further emphasises that these consultants must have the necessary competence in order to review the EIA reports accurately. He suggests the setting-up of an independent review body consisting of experts in the field.⁴³⁹

435 Reg 3(1)(c) of GN R1183.

436 Reg 3(1)(i)-(vi) of GN R1183.

437 See 4.2.5 Independence of EIA consultant, where the new provisions in the *NEMA Amendment Bill* are discussed.

438 Wood *Environmental Impact Assessment: A Comparative Review* 162; also see 2.5.8 EIA report review.

439 Wood *Environmental Impact Assessment: A Comparative Review* 163.

3.3.6 Application

In South Africa, the applicant must apply to undertake an activity on a prescribed form.⁴⁴⁰ This application must be submitted to the relevant provincial or local authority for consideration⁴⁴¹ and in some cases to the minister.⁴⁴² The relevant authority can also require the applicant to advertise the application in a specific manner.⁴⁴³ Advertising shall generally take the form of both on-site and press advertising.⁴⁴⁴ The relevant authority must also keep a register of all applications received. After the relevant authority considers the application, he or she may request the applicant to submit a scoping report.⁴⁴⁵

The Namibian EMA also request an application for all projects which must be submitted to a competent authority which after consideration may require an EA under section 19 of EMA. Different from South Africa, this application must be accompanied by a completed form⁴⁴⁶ which sets out information about potential impacts on the environment and such further information and detail as may be necessary to determine whether an EA is required.⁴⁴⁷ The environmental commissioner also has the duty to register the application in an environmental assessment register.⁴⁴⁸

If a project in Swaziland requires a permit, licence, approval or other form of consent from an authorising agency,⁴⁴⁹ these projects are then reviewed and categorised by an authorising agency or proposing ministry in order to determine if an environmental compliance certificate can be issued. The Swaziland EAARR does not explicitly

440 Reg 4(1) of GN R 1183.

441 Reg 4(2) of GN R 1183.

442 Reg 4(3)(a)-(e) of GN R 1183; also see 4.4.1 Relevant authorities.

443 Reg 4(6) of GN R1183.

444 South African *EIA Guideline Document* 3.2.1.4.

445 See 3.3.8 Scoping.

446 The contents shall be prescribed by regulations; s 20(1) of EMA.

447 S 20(1) of EMA.

448 S 2(a) of EMA.

449 Reg 7(1)(a) of EAARR.

require an application form and there is also no provision for registration of the new projects. This can lead to poor control over new projects requiring approval from the relevant authority.

The Swaziland EMB, however, makes provision that a person proposing to undertake a project must submit a project brief to the authority containing sufficient information to determine the potential impacts of the project on the environment.⁴⁵⁰ This process is similar to the scoping process in South Africa.⁴⁵¹ The proponent is also obliged to pay an appropriate administration fee with the project brief, which shall be determined by regulations.⁴⁵² Similar to the Swaziland's EAARR, the EMB also does not make provision for registration of the new projects.

Wood does not discuss the process of application and registration of a project. It is, however evident from his discussion that all projects must go through a screening process in order to determine if an EIA report is necessary for the particular action.⁴⁵³

3.3.7 *Screening*

The South African EIA regulations do not specifically refer to the screening procedure. The purpose of a screening mechanism is to focus on those projects with potentially significant adverse environmental impacts or whose impacts are not fully known.⁴⁵⁴ The South African regulations specify a set of activities, which must be subjected to EIA.⁴⁵⁵ This is, according to Wood, one of the two broad approaches in establishing the significance of the action.⁴⁵⁶ Although the Namibian EMA has listed

450 S 32(4) of EMB.

451 See 3.3.8 Scoping.

452 S 32(11)(a) of EMB.

453 Wood *Environmental Impact Assessment: A Comparative Review* 115; also see 2.5.5 Screening.

454 Glasson *et al An Introduction to Environmental Impact Assessment* 88; also see 2.4.4 Screening.

455 Schedule 1 of GN R1182.

456 Wood *Environmental Impact Assessment: A Comparative Review* 115; also see 4.4 Screening.

activities⁴⁵⁷ which require an EA, and in this case a more extended list than in the case of listed activities in South Africa, EMA also contains specific requirements for screening.⁴⁵⁸ EMA, therefore, follows both approaches which include the listing of actions as well as an established procedure for the discretionary determination of which actions should be assessed.⁴⁵⁹ The environmental commissioner and the competent authority must determine on the basis of information, which is furnished in the project application,⁴⁶⁰ the completed form and comments received from interested and affected parties,⁴⁶¹ whether an EA is required.⁴⁶² This decision is based on their collective judgement of the nature and significance of the impacts the activity is likely to cause.⁴⁶³ If the parties cannot reach consensus about this they will refer this matter to the Sustainable Development Commission (hereafter referred to as SDC) for its decision.⁴⁶⁴ This "fast-track" process of screening ensures that time and resources will be used efficiently and the SDC spares unnecessary work.⁴⁶⁵ After this screening process the relevant authority can either determine that an EA is required or not and then issue an environmental clearance for the project.⁴⁶⁶

The Swaziland EIA system in the EAARR does not have similar procedures to those of South Africa and Namibia. The terms "screening" and "scoping" do not appear in the EAARR but in the *Guide to EIA in Swaziland*.⁴⁶⁷ Project screening is defined as the narrowing down of the application of EIA to those projects that may have

457 Schedule 1 of EMA.

458 S 21 of EMA.

459 Wood *Environmental Impact Assessment: A Comparative Review*; also see 4.4 Screening.

460 S 20(i) of EMA.

461 S 20(2)(b) of EMA.

462 S 21(1) of EMA.

463 S 21(2) of EMA.

464 S 21(3) of EMA.

465 Tarr and Figueira "Namibia's Environmental Assessment framework- the evolution of policy and practice" September 1999.

466 S 22(1) of EMA.

467 Swaziland Government EXPLORER http://www.ecs.co.sz/env_articles-envassd.htm/ 5 September 2001.

significant environmental impacts. According to the guide, screening may be partly determined by the EAARR⁴⁶⁸ and the categories⁴⁶⁹ therein.

The Swaziland EMB similarly does not use the term "screening" but in the legislation, provisions are made to determine the significance that the project may have on the environment⁴⁷⁰ according to the project brief that the proponent has to submit.⁴⁷¹ The legislation also empowers the minister on advice of the authority, to promulgate regulations to prescribe categories of projects deemed not to have an effect,⁴⁷² projects which will have an effect⁴⁷³ and projects, deemed to have a significant effect on the environment.⁴⁷⁴ Similar to the EAARR, these categories can be regarded as screening as these categories will narrow down the activities that may have a significant effect on the environment.

From the above discussion it is evident that the three countries follow the approach of listing of actions.⁴⁷⁵ The list of activities in the South African regulations⁴⁷⁶ has very few indications of the lowest level at which the action will have to be assessed in order to eliminate minor activities. The South African regulations also, as of yet, have no classification in their listed activities of affected environments that can be excluded as non-sensitive areas.⁴⁷⁷ The Swaziland EMB and EAARR indicate in most cases thresholds in order to eliminate minor activities and also provide criteria to determine which actions should be assessed.⁴⁷⁸

468 S 7(2) of EAARR.

469 First Schedule of the EAARR.

470 S 32(5)(a)-(b) of EMB.

471 S 2(4) of EMB.

472 S 33(b) of EMB.

473 S 33(a) of EMB.

474 S 33(c) of EMB.

475 *Wood Environmental Impact Assessment: A Comparative Review 115.*

476 Schedule 1 of GN R 1183.

477 *Wood 1999 South African Geographical Journal 54.*

478 First schedule of EAARR and ss 32(5)(a) and (b) of EMB.

The specific requirements that the Namibian EMA provides for the screening of actions measure up to the evaluation criteria that Wood sets out.⁴⁷⁹ As indicated above, the proponent is required to submit clear and detailed information for the screening process.⁴⁸⁰ The decision in this regard is made by public accountable bodies, namely the collective judgement of the environmental commissioner and the competent authority.⁴⁸¹ The screening process also makes provision for public participation where the comments received from interested and affected parties must be taken into consideration.⁴⁸² This is, however, not the case in South Africa and Swaziland where public participation does not take place during the screening process. The Namibian screening process also provides for specified periods of time when decisions must be reached and it can, therefore, be regarded as effective and efficient.⁴⁸³ It is the opinion of the author that South Africa should consider the use of a screening process, which is similar to the screening process Namibia uses. Namibia's screening process ensures that time and resources be efficiently used and it makes the EIA process more "streamlined." It seems as if the new EIA regulations will include screening.⁴⁸⁴

3.3.8 *Scoping*

Scoping is defined in the South African *EIA Guideline for Scoping*⁴⁸⁵ as a procedure for determining the extent of, and approach to an impact assessment. The main purpose of scoping is to focus the impact assessment in order to ensure that only the significant issues and reasonable alternatives are examined.

479 Wood *Environmental Impact Assessment: A Comparative Review* 115-117; also see 2.4.4 screening.

480 S 21(1) of EMA.

481 S 20(1) of EMA.

482 S 20(2)(b) of EMA.

483 S 21(3) of EMA.

484 See 4.3 Proposed EIA process.

485 DEAT *Guideline for Scoping* (1992) p14.

After an application is considered in South Africa by the relevant authority,⁴⁸⁶ they may request the applicant to either submit a plan of study for the purpose of a scoping report⁴⁸⁷ or, in specific cases, to submit the scoping report without a prior plan of study.⁴⁸⁸ This plan of study for scoping should include the following information:

- a brief description of the activity to be undertaken⁴⁸⁹
- a description of all tasks to be performed during scoping⁴⁹⁰
- a time-table setting out when the above-mentioned tasks should be completed
- an indication of the stages at which the relevant authority should be further consulted⁴⁹¹
- a description of the proposed method of identifying the issues and alternatives.⁴⁹²

The plan of study for scoping must be submitted to the relevant authority for review.⁴⁹³ The relevant authority after consideration can request the applicant to

486 Reg 4 of GN R1183; also see 3.3.6 Applications.

487 Reg 5(1)(a) of GN R1183.

488 Reg 5(1)(b) of GN R1183.

489 The South African *EIA Guideline Document* 3.2.2.1 makes provision that this description may include the following information: The name and address of the applicant, the nature of the activity or the development, a description of the site, design, size, scale and all relevant phases of the proposed development and the proposed location on a map.

490 The *EIA Guideline Document* 3.2.2.1 makes provision that this description may include: the preparation of a plan of study for scoping, a discussion with the relevant authorities and key interested parties, by collecting available information and identifying information gaps, the identification of the issues and alternatives, the evaluation of concerns in order to assign priority to the more important issues, developing a strategy for addressing and resolving each key issue, providing feedback on the way comments have been incorporated and preparing a scoping report for review and decision making.

491 The *EIA Guideline Document* 3.2.2.1 recommends that the relevant authority be further consulted during the following stages of the process: accepting the plan of study for scoping; accepting the scoping report; considering the application on the information contained in the scoping report; accepting the plan of study for EIA; review compliance of EIA and consideration of application.

492 The *EIA Guideline Document* 3.2.2.1 prescribed that this description may include the following aspects: consultation with the relevant authorities and key interested parties at an early stage in identifying the broad range of issues and alternatives and methods used such as rating and ranking techniques as well as existing criteria to determine whether the issues and alternatives are significant.

provide additional information that the relevant authority needs before accepting the plan of study for scoping.⁴⁹⁴

Once the plan of study is approved the regulations stipulate again in detail what the scoping report itself is to include.⁴⁹⁵ A scoping report must contain the following:

- a brief project description⁴⁹⁶
- a brief description of how the environment may be affected⁴⁹⁷
- description of environmental issues identified⁴⁹⁸
- a description of all alternatives identified⁴⁹⁹
- a description of the public participation process, including a list of interested parties and their comments included in an appendix.⁵⁰⁰

Similar to the plan of study for scoping, the scoping report must be submitted to the relevant authority for review⁵⁰¹ by all relevant authorities, interested and affected parties when it is a highly technical assessment or when the relevant authority lacks

493 See 3.3.5.1 Relevant environmental authority.

494 Reg 5(3) of GN R1183.

495 Reg 6(1) of GN R1183.

496 The *EIA Guideline Document* 3.2.3.1 provides that the contents of this project description depends on the nature of the project and its site.

497 The *EIA Guideline Document* 3.2.3.1 prescribes that this can be determined by using the basic information on the project and the existing environment, and then potential links should be identified between them.

498 Environmental issues are defined in the *EIA Guideline Document* 3.2.3.1 as definable impacts (e.g. air pollution); the cause of an impact (e.g. burning mine dumps) or a generally expressed concern which need to be translated into specific impacts to be investigated (e.g. social disruption of communities).

499 This provides a basis for choice among options available to the decision-maker. During consideration the *EIA Guideline Document* 3.2.3.1 suggests that the following questions should be addressed: How should alternatives be identified? What is the reasonable range of alternatives that should be considered? What level of investigation should be applied to each alternative? The *EIA Guideline Document* also provides certain guidelines to address these questions.

500 See 3.3.13 consultation and participation; *EIA Guideline Document* 3.2.3.1 also makes provision for what may be included in this part.

501 Reg 6(2) of GN R1183.

expertise review by specialists.⁵⁰² Amendments may be requested in order to accept the scoping report.⁵⁰³ After consideration of the scoping report the relevant authority can decide to issue an authorisation to undertake the activity with or without conditions, they can decide that the information contained in the scoping report should be supplemented by an EIR or they can decide to decline the application.⁵⁰⁴ In the case where the application has been authorised or refused the relevant authority must issue a record of decision to the applicant.⁵⁰⁵

The Namibian EMA does not provide for such a comprehensive scoping process as in South Africa. After the CA and environmental commissioner (hereafter referred to as Ecom) (and in certain cases SDC)⁵⁰⁶ have considered the nature, size and location of the project that is likely to have a significant effect⁵⁰⁷ and determined that an EA shall be required,⁵⁰⁸ one of the steps in order to submit an EAR is scoping. The Ecom, in agreement with the proponent and CA (where there is a CA and where the CA is not the proponent), shall determine the form, scope and content of such assessment.⁵⁰⁹ In order to determine the above mentioned, the provisions of section 18(2) which prescribes what the contents of an EAR should be, as well as the principles of environmental management set out in section 6 should be taken into account.⁵¹⁰ Where the proponent, Ecom and CA (where appropriate) cannot reach consensus on the form, scope and contents of the EA, the matter⁵¹¹ shall be referred by the Ecom to the SDC for its decision.⁵¹² The Namibian EMA does not make provision for a plan

502 *EIA Guideline Document 3.2.3.2.*

503 Reg 6(2) of GN R1183.

504 Reg 6(3) of GN R1183; also see *EIA Guideline Document 3.2.3.3.*

505 Reg 10(1) of GN R1183; also see 3.3.11 Consideration and record of decision.

506 See 3.3.7 Screening.

507 S 21(2) of EMA.

508 S 23(1) of EMA.

509 S 23(1)(a) of EMA.

510 S 23(1)(b) of EMA.

511 Must be referred to SDC within three days of such deadlock reached.

512 S 23(2) of EMA provides that this decision must be reached within 14 days of the matter being referred to the SDC.

of study for scoping or a scoping report like the South African regulations.⁵¹³ The scoping process in Namibia does not precede the EA process but is part of it. This implies that after screening by the Ecom and CA,⁵¹⁴ the proponent automatically has to go forward with an EA after the decision of the Ecom and CA in order to submit an EAR to the Ecom. Some of the information contained in the EAR⁵¹⁵ is comparable to the information that has to be included in the plan of study for scoping and in the scoping report.⁵¹⁶

The term "scoping" is not a term used in either the Swaziland EAARR or EMB. The guide to EA, however, defines the term scoping as "the process, which seeks to identify at an early, stage, from all the project's possible impacts and from all the alternatives, those impacts that are the key significant issues."⁵¹⁷

Projects classified under category 1 in EAARR⁵¹⁸ or projects with a potential effect that is likely to be minimal or insignificant⁵¹⁹ may be approved and an ECC will be issued whereafter no EIA will be conducted. Projects, however, classified under category 2 or 3⁵²⁰ or where the potential effect on the environment is likely to be more than minimal or insignificant⁵²¹ will require the proponent to submit further reports in order to identify and focus on the key significant issues. The EAARR requires a proponent to submit in the case of category 2 projects an IEE report and a CMP to the

513 Reg 5 and 6 of GN R1183..

514 See 3.3.7 Screening.

515 See 3.3.10 EIA Reports.

516 S 18(2)(a) of EMA, a description of the proposed project and its purpose – comparable to reg 6(1)(a) of GN R1183; s 18(2)(b) of EMA a description of the environment likely to be significantly affected by the proposed project and its alternatives – comparable to reg 6(b) and (d) of GN R1183; s 18(2)(c) of EMA, a description of the potential environmental impacts of the proposed project and its alternatives and its estimation of its significance – comparable to reg (1)(c) of GN R1183.

517 Anon http://www.ecs.co.sz/env_articles-envassd.htm/ 5 September 2001.

518 Reg 7(9) of EAARR.

519 S 32(5)(a) of EMB.

520 Reg 7(10) of EAARR.

521 S 32(5)(b) of EMB.

authorising agency or MEPD.⁵²² The IEE report⁵²³ will contain an introduction,⁵²⁴ a description of the project,⁵²⁵ description of the environment,⁵²⁶ impact description and evaluation⁵²⁷ and impact management.⁵²⁸

The CMP is prepared by using the results obtained from IEE, EIA and EIA reports. The CMP identifies:⁵²⁹

- impacts that must be prevented or reduced in severity
- benefits to be enhanced
- mitigation measures in order to achieve the above
- costs as well as institutional and training requirements
- monitoring programmes to track project related impacts and implementation of mitigation measures
- community liaison procedures needed.

This plan must contain:⁵³⁰

- schedules for implementation or targets
- reporting procedures
- work programmes
- budget
- staffing and training requirements.

522 Reg 7(11)(a) of EAARR.

523 Second Schedule of EAARR, Reporting Format A.

524 Purpose of the IEE.

525 Describes the location, size, construction or operational activities, schedule for implementation, workforce and any alternatives.

526 Brief description of the physical, ecological and human aspects of the site and its surroundings.

527 Brief account of the significant impacts likely to occur if no mitigation occurs.

528 Description of mitigation measures, monitoring programmes and schedule of implementation (CMP). Technical and institutional requirements for successful implementation.

529 Second Schedule of the EAARR, Reporting Format D.

530 Second Schedule of the EAARR, Reporting Format D.

The contents of the IEE report are comparable to the contents of the scoping report of South Africa.

The authority must, within 15 days after receiving the IEE report and the CMP, decide whether the documents comply with the prescribed reporting requirements specified in the second schedule.⁵³¹ The authority may require the proponent to submit an amended IEE report and CMP⁵³² or where the authority is satisfied with the IEE report, the authorisation process continues to the next stage.⁵³³ The authority must review the IEE report and the CMP and may order the project proponent to prepare and submit an EIA and CMP⁵³⁴ or order any other appropriate amendments.⁵³⁵

The Swaziland EMB does not order the proponent (like the EAARR) to submit an IEE report before ordering an EIA. According to the EMB, the proponent is required to submit a project brief to the authority which must contain sufficient information to enable the authority to determine the potential impacts of the project on the environment.⁵³⁶ After the authority has reviewed the project brief and is satisfied with the categorisation of the project as an impact likely to be more than minimum or insignificant, it may require the applicant to conduct an EIA with or without a public hearing⁵³⁷ and to submit an EIS and CMP.⁵³⁸ The EMB does not prescribe what the contents of the project brief must be, but the minister may promulgate regulations to give contents to this project brief.⁵³⁹

When analysing the scoping procedures of the three countries according to Wood's criteria,⁵⁴⁰ it is evident that the scoping process is mandatory in all three countries.

531 Reg 7(11)(b) of EAARR.

532 Reg 7(11)(b)(ii) of EAARR.

533 Reg 7(11)(b)(i) of EAARR.

534 Reg 7(11)(c)(i) of EAARR.

535 Reg 7(11)(c)(ii) of EAARR.

536 S 32(4) of EMB.

537 S 32(5)(b)(i) of EMB.

538 S 32(5)(b)(ii) and (iii) of EMB.

539 S 33 of EMB.

540 Wood *Environmental Impact Assessment: A Comparative Review* 133.

The South African regulations require that the plan of study for scoping must contain an indication of the stages when the relevant authority should be further consulted and the *EIA Guideline Document* recommends when these consultations must take place.⁵⁴¹ The South African regulations also require that the scoping report must include a description of the public participation process, including a list of interested and affected parties and their comments. The Namibian EMA also makes provision for adequate consultation with the relevant authorities during the scoping process, in fact the proponent and the CA must determine together the form, scope and content of the EA.⁵⁴² Although EMA makes provision for adequate consultation with the relevant authority, no provision is made for public participation while the scope of the EA is determined.⁵⁴³

The Swaziland EAARR and EMB also provide for consultation with the relevant authorities after the IEE or project brief (respectively) is accepted. After the respective reports have been submitted, interested and affected parties have the opportunity to raise their objections, comments or submissions.⁵⁴⁴

According to the South African regulations, the consultant that conducts (among other obligations) the scoping process⁵⁴⁵ must have the appropriate levels of knowledge and expertise.⁵⁴⁶ Neither Namibia nor Swaziland make provision for the requirement of appropriate levels of knowledge or expertise for the proponent or consultant in the process of conducting scoping. Swaziland and Namibia can take this into account while in the process of accepting their new EIA regulations.

South Africa and Swaziland provide public records of the scoping process and all three countries supply the stakeholders with the right of appeal against the decision.⁵⁴⁷ It seems as if the new South African EIA regulations will cut out the comprehensive

541 *EIA Guideline Document* 3.2.2.1 p21.

542 S 23(1)(a) of EMA.

543 See 3.3.13 Consultation and participation.

544 See 3.3.13 consultation and participation.

545 See 3.3.5.3 Consultant.

546 Reg 3(d)(i)-(vi) of GN R1183.

scoping process and only conduct screening, whereafter the relevant authority will decide if an EIA is necessary or not.⁵⁴⁸

3.3.9 EIA report preparation

In Namibia, once the Ecom and the CA have agreed that an EA is required,⁵⁴⁹ a comprehensive EIA process follows. The Ecom, with concurrence of the proponent and CA (where there is a CA and where the CA is not the proponent), shall determine the form, scope and content of such assessment.⁵⁵⁰

During the above procedure, the Ecom, proponent and in some cases CA must take section 18(2) which prescribes the contents of EAR and section 6 which sets out the principles of environmental management, into consideration. The following principles of environmental management are applicable to the EA process in Namibia:

- community involvement in natural resource management and sharing in the benefits arising therefrom⁵⁵¹
- public participation in decision-making affecting the environment⁵⁵²
- precautionary principle and the principle of preventive action⁵⁵³
- there shall be prior environmental assessment of projects and proposals which may significantly affect the environment or the use of natural resources⁵⁵⁴
- generators of waste and polluting substances shall adopt the best practicable environmental option to reduce such generation at source⁵⁵⁵

547 See 2.3.15 Reasons and Appeal.

548 See 4.3 Proposed EIA Process.

549 S 23(1) of EMA.

550 S 23(1)(a) of EMA, also see 3.3.8 Scoping.

551 S 6(2) of EMA.

552 S 6(3) of EMA.

553 S 6(6) of EMA.

554 S 6(7) of EMA.

555 S 6(10) of EMA.

- the EA must be carried out in accordance with the procedures laid down in this Act and as may be elaborated on by regulations.⁵⁵⁶

After a scoping report has been accepted in South Africa, the relevant authority may decide that the information contained in the scoping report is sufficient for the consideration of the application without further investigation⁵⁵⁷ or it should be supplemented by an EIA which focuses on the identified alternatives and environmental issues in the scoping report.⁵⁵⁸ The South African *EIA Guideline Document* describes EIA as "a process of examining the environmental effects of development."⁵⁵⁹ In terms of the legislation, the applicant must first submit a plan of study containing prescribed details for an EIA.⁵⁶⁰ The actual impact assessment may only go ahead once the plan is approved.⁵⁶¹ This plan of study for EIA should include:

- a description of the environmental issues identified during scoping that may require further investigation⁵⁶²
- a description of the feasible alternatives⁵⁶³
- additional information required⁵⁶⁴
- a description of the proposed method of identifying these impacts⁵⁶⁵

556 S 18(4) of EMA.

557 Reg 6(3)(a) GN R1183.

558 Reg 6(3)(b) GN R1183.

559 *EIA Guideline Document* Glossary of terms p 6.

560 Reg 7(1) of GN R 1183.

561 Reg 8 of GN R1183.

562 According to the *EIA Guideline Document* 3.2.4.1 various methods could be used to assist the consultant to determine whether issues are significant and require examination; consultation with specialist consultant; rating or ranking techniques; or existing criteria (e.g. water quality).

563 According to the *EIA Guideline Document* 3.2.4.1 this entails a description of the feasible alternatives that have been identified during scoping that may be further investigated.

564 According to the *EIA Guideline Document* 3.2.4.1 an indication of additional information required to determine the potential impacts of the proposed activity on the environment should be provided.

565 According to the *EIA Guideline Document* 3.2.4.1 impact identification methods include: checklists; matrices; networks; overlays and geographical information systems (GIS); computer expert systems; and professional experience.

- a description of the proposed method of assessing the significance of these impacts.⁵⁶⁶

The *EIA Guideline Document* also provides a system where the project is divided into four phases from which impacting activities may be for the purpose of assessing the impacts identified. The four phases are:

- *Pre-construction phase* that includes all activities on and off-site up to the start of construction. This does not include the transport of material, but it includes the initial site preparation
- *Construction phase* that includes all activities on and off-site, including the transport of materials
- *Operational phase* that includes all activities, including operation and maintenance of structures
- *Decommissioning phase* that includes any activity related to the physical dismantling of the structures.

The activities arising from each phase should be included in an assessment table. This is to facilitate the identification of those activities which require certain management actions to mitigate the impacts arising from them. This process of dividing the projects into phases is not a compulsory regulation which must be included in the plan of study for scoping, but it is recommended because it makes the EIA process more manageable.⁵⁶⁷

The plan of study for an EIA must be reviewed and considered by the relevant authority. The relevant authority may request the applicant to make the necessary amendments to the plan in order to accept the plan⁵⁶⁸ and after acceptance, the

566 According to the *EIA Guideline Document* 3.2.4.1 the rating and ranking of impacts are often controversial, because of the inherent difficulties involved in attaching values to impacts.

567 DEAT *EIA Guideline Document* 3.2.4.1.

568 Reg 7(2) of GNR 1183.

applicant must submit an environmental impact report (hereafter referred to as EIR).⁵⁶⁹

NEMA also sets out certain minimum procedures, which must be complied with in investigating, assessing and communicating the potential impacts of activities.⁵⁷⁰

These procedures must include the following:

- an investigation of the environment likely to be significantly affected by the proposed activity, and alternatives to it⁵⁷¹
- an investigation into the potential impacts of the activity, including potential cumulative impacts and alternatives⁵⁷²
- an investigation into the mitigation measures necessary to keep adverse impacts to a minimum as well as the option of not implementing the activity⁵⁷³
- public participation and information in all the phases of the investigation and assessment of impacts⁵⁷⁴
- independent review and conflict resolution⁵⁷⁵
- reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions and uncertainties encountered in compiling the required information⁵⁷⁶
- arrangement for monitoring and management of impacts and the effectiveness thereof⁵⁷⁷
- the co-ordination and co-operation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state⁵⁷⁸

569 Reg 8 of GNR 1183.

570 S 24(7) of NEMA.

571 S 24(7)(a) of NEMA.

572 S 24(7)(b) of NEMA.

573 S 24(7)(c) of NEMA.

574 S 24(7)(a) of NEMA; also see 3.3.13 Consultation and participation.

575 S 24(7)(d) of NEMA.

576 S 24(7)(e) of NEMA.

577 S 24 (7)(f) of NEMA.

- this investigation must take into account the general principles of environmental management⁵⁷⁹ as well as the general principles of IEM.⁵⁸⁰

NEMA also empowers the minister and/or the MEC to make additional regulations.⁵⁸¹

Prior to prescribing such regulations, a draft must be submitted by the minister or MEC concerned to the Committee for Environmental Co-ordination (hereafter referred to as CEC)⁵⁸² which has to approve the regulations. After approval, the regulations must be published in the *Government Gazette* for comment.⁵⁸³

The *NEMA Amendment Bill* sets out similar procedures as discussed above, but also provides for additional procedures which must be complied with. Some of these additional procedures include the investigation of socio-economic conditions and cultural heritage and assessment of significance of that potential impact⁵⁸⁴ and the environmental attributes identified in the compilation of information and maps.⁵⁸⁵

The Swaziland EAARR makes provision for an extensive EIA procedure.⁵⁸⁶ After the authority has reviewed the IEE report and the CMP they can order the project proponent to prepare and submit an EIA and CMP.⁵⁸⁷ In the case of category 3 projects an EIA report and a CMP must be submitted from the start without any preliminary documents as in the case of category 2 projects.⁵⁸⁸ The EAARR prescribe that the following must be included in the EIA process:

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- 578 S 24(7)(g) of NEMA.
 - 579 S 2(1)(a)–(e) of NEMA.
 - 580 S 24(7)(h) of NEMA.
 - 581 S 24(3)(b) of NEMA.
 - 582 S 24(4)(a) of NEMA; see also ss 7–10 Committee for Environmental Co-ordination.
 - 583 S 47 of NEMA.
 - 584 S 24(3)(b) of *NEMA Amendment Bill*.
 - 585 S 24(3)(i) of *NEMA Amendment Bill*.
 - 586 Second Schedule, Reporting Format B of EAARR.
 - 587 Reg 7(11)(c)(i) of EAARR category 2 projects.
 - 588 Reg 7(13)(a) of EAARR.

- an executive summary, which includes a brief account of the findings of the EIA with emphasis on the key issues. These issues are for consideration by the decision-maker in the Swaziland Environmental Authority (SEA), the authorising agencies and members of the public
- an introduction setting out the purposes of the EIA, the boundary of study area and the speculated future date or time for which impacts will be predicted
- a description of the project and reasonable alternatives which describe the location, size, construction or operational activities, workforce and schedule for implementation. A description is also needed of any associated projects (for example roads, aggregate extraction)
- description of the environment. This description includes an overall evaluation of the type and quality of the environment. A description must also be included any expected changes to the "baseline" environmental situation before implementation of the project subject to an EIA
- prediction and evaluation of impacts for all alternatives. In this case a distinction must be made between significant adverse and beneficial impacts and irreversible impacts must be identified. Significance must be allocated against international and/or national regulations, standards and quality objectives, governing health and safety, protection of environmentally sensitive areas, land use and ambient pollution levels. Significant data deficiencies, assumptions made, as well as mitigating measures must be identified. The spatial and temporal distribution of impacts must also be determined
- analysis of alternatives and selection of preferred options. In order to select the preferred alternatives, the residual environmental impacts of each option must be compared on the basis of the expected results of all mitigating actions to be implemented
- an impact management plan for preferred alternatives. This includes monitoring programmes, schedules for implementation and technical and institutional requirements for successful implementation
- results of any consultation held with government agencies and the public during EIA process.

An article on conducting an EIA in Swaziland⁵⁸⁹ stipulates some key points to remember during the EIA process before the EIA report is submitted. This EIA procedure contains similar steps that are required in the plan of study for an EIA in South Africa.⁵⁹⁰ The results from the EIA procedure should be contained in an EIA report and a CMP submitted to the relevant authority.

The Swaziland EMB does not provide for any preliminary procedures which must be complied with before an environmental impact statement (hereafter referred to as EIS) must be submitted.⁵⁹¹ The environmental principles in Part 2 of the EMB, however, must be taken into consideration.⁵⁹² This includes, amongst others, that adverse effects should be prevented and minimised through long term integrated planning and the co-ordination and integration of efforts which should consider the entire environment as a whole entity.⁵⁹³ The minister, on advice of the authority, may make regulations for the better administration of EIAs.⁵⁹⁴ This power vested in the minister is similar to the power that the minister or MEC has in South Africa to prescribe additional procedures.⁵⁹⁵ The Namibia EMA and Swaziland's EAARR does not provide for similar procedures.

In measuring the Namibian, South African and Swaziland legislation against Wood's⁵⁹⁶ evaluation criteria for the preparation of the EIA report,⁵⁹⁷ it is clear that no accreditation of EIA consultants exist in any of the three countries.⁵⁹⁸ South Africa's

589 Swaziland Government EXPLORER http://www.ecs.co.sz/em_info.htm 27 September 2001.

590 Reg 7 of GNR 1183.

591 S 32(5)(b)(ii) of EMB.

592 S 5 of EMB.

593 S 5(b) of EMB.

594 S 33 of EMB.

595 S 24(3) of NEMA.

596 Wood *Environmental Impact Assessment: A Comparative Review* 143-148.

597 See 2.4.6 EIA Report preparation.

598 See 3.3.5.3 Consultants.

NEMA Amendment Bill includes stipulations for the registration of competent environmental assessment practitioners.⁵⁹⁹

Formal published guidance on the preparation of EIA reports exist in South Africa as part of the *EIA Guideline Document*.⁶⁰⁰ An article on conducting an EIA in Swaziland⁶⁰¹ stipulates some key points to remember during the preparation of an EIA report, but they are, however, not formally published guidelines. The South African

EIA Guideline Document also sets out certain specified EIA methods and techniques that can be employed during this phase.⁶⁰² These guidelines are, however, not compulsory by law. The *NEMA Amendment Bill* empowers the minister and MEC to make regulations concerning the procedures to be followed during the preparation and evaluation of an EAI.⁶⁰³ Neither Swaziland nor Namibia specify any EIA methods or techniques to be employed during the preparation of an EIA report. Wood also suggests that the preparation of the EIA report requires the use of a wide variety of methods and techniques.⁶⁰⁴ He further specifies that these methods and techniques must be described in the EIA report. He also suggests that clear and readily accessible guidelines on EIA report preparation must be made available.⁶⁰⁵

The relevant authorities in South Africa are, according to Wood, using their approval of the plan of study for EIA to demand the preparation and circulation of a draft EIR.⁶⁰⁶ This can be regarded as checks being made on the contents of the EIR before it is released despite the absence of any formal requirement.⁶⁰⁷ The Namibian legislation makes provision that after receipt of the EAR, the Ecom can direct that the

⁵⁹⁹ S 24G of *NEMA Amendment Bill*; also see 4.4.2.5 Independence of EIA consultants.

⁶⁰⁰ *EIA Guideline Document* 3.2.4.1 p26.

⁶⁰¹ Anon EXPLORER http://www.ecs.co.sz/em_info.htm 27 September 2001.

⁶⁰² *EIA Guideline Document* 3.2.4.1 p26.

⁶⁰³ S 24(4)(b)(iii) of *NEMA Amendment Bill*.

⁶⁰⁴ Wood *Environmental Impact Assessment: A Comparative Review* 144.

⁶⁰⁵ Wood *Environmental Impact Assessment: A Comparative Review* 148.

⁶⁰⁶ Wood 1999 *South African Geographical Journal* 55; also see 2.5.6 Report preparation.

⁶⁰⁷ Wood 1999 *South African Geographical Journal* 55; also see 2.5.6 Report preparation.

EAR must be subjected to an independent review at the proponent's expense⁶⁰⁸ and in certain cases, convene an *ad hoc* committee of experts to assist with the review.⁶⁰⁹ This can be regarded as a formal requirement, in certain cases, for checks to be made on the contents of the EAR before it is released. Swaziland's legislation does not make any provision for checks to be made on the contents, form, objectivity and accuracy of the information presented before publication of the EIA report.

Critics are of the opinion that the EIA procedure in South Africa is too elaborate, which delays projects and inflates project costs.⁶¹⁰ According to Glazewski,⁶¹¹ the Namibian EIA procedure is more streamlined in regard that it makes provision that the Ecom, (CA in some cases) with the concurrence of the proponent shall determine the form, scope and contents of such assessment. This ensures that all the stakeholders have input from the start in what is required in the EAR in order to save time and money. According to Wood, it is important to have open communication between the consultants and the public during this stage as it will increase the project credibility and will build the trust and acceptance of the wider community.⁶¹²

3.3.10 Contents of EIR/EAR/EIA report

In terms of the Namibian EMA, the proponent must undertake an EA in order to submit an environmental assessment report (hereafter referred to as EAR) to the competent authority (where there is a CA and where the CA is not the proponent) and to the ECom.⁶¹³ The general obligations in EMA stipulate the minimum information that should be included in the EAR⁶¹⁴ (as set out in the comparative table). Together

608 S 24(1)(c) of EMA.

609 S 24(1)(d) of EMA.

610 Glazewski *Environmental Law in South Africa* 287.

611 S 23(1)(a) of EMA.

612 Wood *Environmental Impact Assessment: A Comparative Review* 148; also see 3.3.13 Consultation and participation.

613 S 23(1)(b) of EMA.

614 S 18(2)(a) of EMA.

with these general obligations,⁶¹⁵ the principles of environmental management should also be taken into account.⁶¹⁶

On receipt of the EAR, the ECom may, in consultation with the CA (in certain cases), invite such further public comments and input as he or she may consider necessary.⁶¹⁷ The ECom may also require that the project be subjected to public hearings.⁶¹⁸ The ECom can further direct that the EAR must be subjected to an independent review at the proponent's expense⁶¹⁹ and in certain cases, convene an *ad hoc* committee of experts to assist with the review.⁶²⁰ The ECom can also refer the EAR back to the proponent for further elaboration, clarification or information as it may require.⁶²¹

After a submission of the EAR⁶²² and after completion of any further requirements which may have been required by the Ecom,⁶²³ the ECom must review the EAR within 30 days and must furnish the sustainable development commission (SDC) with the EAR together with his or her written recommendation. This written recommendation must be in respect of the granting or refusal of an environmental clearance as well as in respect of any conditions to be imposed by the CA including written summaries of the views expressed by interested and affected persons, experts and government institutions, if any.⁶²⁴ The SDC must, therefore, consider the recommendation of the ECom in the light of their own understanding of the report.⁶²⁵ Ultimately, the SDC must issue a conditional or unconditional environmental clearance for the project or refuse to grant such clearance.⁶²⁶

615 S 18 of EMA.

616 S 6 of EMA.

617 S 24(1)(a) of EMA.

618 S 24(1)(b) of EMA.

619 S 24(1)(c) of EMA.

620 S 24(1)(d) of EMA.

621 S 24(1)(e) of EMA.

622 S 23(1)(b) of EMA

623 S 24(1) of EMA.

624 S 24(2) of EMA.

625 S 25(1) of EMA.

626 S 25(1)(a)–(d) of EMA; also see 3.3.11 Consideration and record of decision.

After the plan of study for the EIA has been accepted in South Africa, the applicant must submit an environmental impact report (EIR)⁶²⁷ (the contents are set out in Table 3.1). NEMA makes provision that certain minimum procedures must be complied with in regard to investigating, assessing and communication.⁶²⁸ NEMA, however, does not prescribe requirements for the EIR except that one will most probably be expected to address all the procedural issues set out in section 24(7).⁶²⁹

The *EIA Guideline Document* provides for criteria according to which the assessment of impacts should be done.⁶³⁰ The criteria includes the following:

- the nature of the impact⁶³¹
- the extent of the impact⁶³²
- the duration of the impact⁶³³
- the probability of the impact actually occurring⁶³⁴
- the intensity of the impact.⁶³⁵

According to this criteria the significance⁶³⁶ of the impact can be determined on a scale of low, medium or high.

The possible mitigation of each identified impact⁶³⁷ is also described in more detail in the *EIA Guideline Document*. According to the *EIA Guideline Document*, mitigation seeks to find better ways of doing things, minimise or eliminate negative impacts,

627 Reg 8 of GN R 1183.

628 Reg 24(7) of NEMA; also see 3.4.10 EIA procedure.

629 See 3.3.9 EIA report preparation.

630 *EIA Guideline Document* 3.2.5.1.

631 This is an appraisal of the type of effect the activity would have on the affected environment. This description should include what is being affected and how.

632 Here it should be indicated whether the impact will be local extending only as far as the activity, will be limited to the site and its immediate surrounding, will have an impact on the region or will have an impact on a national scale or across international borders.

633 Whether lifetime of impact will be short term, medium term, long term or permanent.

634 For example: improbable, probable, highly probable or definite.

635 For example: low, medium or high.

636 Reg 8(a)(i) of GN R 1183.

enhance project benefits and protect public and individual rights to compensation.⁶³⁸ In order to do the above certain criteria must be used.⁶³⁹ Mitigation options include among others, alternative ways of meeting the need, changes in planning and design, improving monitoring and management, monetary compensation and replacing of (for example) wetlands by constructing other wetlands, relocating villages or people and rehabilitating sites.⁶⁴⁰

After the relevant authority has received an EIR that complies with regulation 8, the authority must consider the application and may decide to either issue an authorisation with or without conditions, or refuse the application⁶⁴¹ which is similar to the decision made by Namibian authorities.⁶⁴²

In Swaziland, the EAARR prescribes that an EIA report will be required from the proponent where the project is classified under category 2⁶⁴³ and the authority ordered the proponent after the review of the IEE report to submit an EIA and the CMP.⁶⁴⁴ Where a project is classified under category 3, the proponent has to submit an EIA and CMP from the start.⁶⁴⁵

The results from the EIA⁶⁴⁶ must be contained in an EIA report and a CMP.⁶⁴⁷ The contents of this report⁶⁴⁸ are discussed in Table 3.1 (see below). The CMP must contain:

637 Reg 8(a)(ii) of GN R 1183.

638 See 2.4.10 Mitigation of impacts.

639 Nature, extent, duration, intensity, probability and significance.

640 DEAT *EIA Guideline Document*, 1998.

641 Reg 9(1)(a)–(b) of GN R 1183.

642 S 25(1)(a)–(d) of EMA; also see 3.3.11 Consideration and record of decision.

643 Reg 7(11) of EAARR.

644 Reg 7(11)(c)(i) of EAARR.

645 Reg 7(13)(a) of EAARR.

646 See 3.3.9 EIA report preparation.

647 Second Schedule, Reporting Format B of EAARR.

648 See 3.3.9 EIA report preparation.

- schedules for implementation/targets
- the reporting procedures
- the work programmes
- the budget staffing and training requirements.⁶⁴⁹

In the CMP the following must be identified:

- impacts to be prevented or reduced in severity
- benefits to be enhanced
- mitigation measure, to achieve the above
- costs, institutional and training requirements
- monitoring programmes to track project related impacts and implementation of mitigation measures
- community liaison procedures needed.

The authority must within 20 days of receiving the EIA report and CMP, decide whether this document conforms to the prescribed reporting requirements or guidelines specified in the second schedule and that it does contain the necessary breadth, depth and types of analysis.⁶⁵⁰ After the review, the authority may either decide that the authorisation process may continue to the next stage⁶⁵¹ or the authority may order the project proponent to prepare and submit an amended EIA report and CMP to the authority.⁶⁵²

The Swaziland EMB makes provision for an environmental impact statement⁶⁵³ (hereafter referred to as EIS) which contains the same information as the EIA report⁶⁵⁴ provided for in the EAARR. The only information the EAARR further includes are

649 Second Schedule, Reporting Format D of EAARR.

650 Reg 7(13)(b) of EAARR.

651 Reg 7(13)(b)(i) of EAARR.

652 Reg 7(13)(b)(ii) of EAARR.

653 S 32(5)(ii) of EMB.

654 S 32(7)(a)–(c).

the results of any consultation held with government agencies, NGOs and the public during the EIA process.⁶⁵⁵ According to the EMB, any further information needed in both EIS or CMP may be prescribed by the minister.⁶⁵⁶ The contents of the CMP provided for in the EMB⁶⁵⁷ are similar to the CMP provided for in the EAARR.⁶⁵⁸

Table 3.1:

The Namibian EAR⁶⁵⁹, South African EIR⁶⁶⁰, Swaziland's EIA report⁶⁶¹ and Swaziland EIS⁶⁶² should include as a minimum:

Namibian EAR	South African EIR	Swaziland EIA report	Swaziland EIS
A description of the proposed project and its purpose	An appendix containing a description of the activity to be undertaken	A description of the project and reasonable alternative An introduction setting out the purpose, boundary of study area and time frame for which impacts will be predicted	A full description of the project and the aim(s) it is intended to achieve
A description of the environment likely to be significantly affected by the proposed project	An appendix containing a descriptions of the environment concerned	A description of the environment	

655 Second Schedule of EAARR, Reporting Format B.

656 Ss 32(7)(c) and 32(8)(c) of EMB.

657 S 32(8) of EMB.

658 Second Schedule of EAARR, Reporting Format D.

659 Ss 18(2)(a)-(j) of EMA

660 Reg 8(a)-(c) of GN R 1183.

661 Second Schedule, reporting Format B of EAARR.

662 S 32(7)(a)-(c) of EMB.

and its alternatives			
A description of the potential environmental impact of the proposed project and its alternatives and an estimation of its significance	A description of each alternative, including particulars on the extent and significance of each identified environmental impact A comparative assessment of all the alternatives	The prediction and evaluation of the impacts The analysis of alternatives and the selection of preferred options	An identification, description and assessment of the likely environmental effects of: the project; alternative means of carrying out the project, including the preferred means; alternatives to the project that would achieve the same aim as the project was intended to achieve
		An impact managing plan for the preferred alternatives	An identification description and assessment of all the relevant measures that could be undertaken to avoid, remedy or mitigate any adverse effects that could be caused by the project
A description of effects on cultural heritage and also of major impacts or socio-economic conditions resulting from alterations to those factors			

<p>A description of mitigation measures to keep adverse environmental impact to a minimum</p>	<p>A description of the possible mitigation measures for each identified impact</p>	<p>See contents of comprehensive mitigation plan (hereafter referred to as CMP) in above discussion</p>	<p>See contents of CMP in above discussion;</p>
<p>An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data</p>			
<p>An identification of gaps in knowledge and uncertainties encountered in compiling the required information</p>			
<p>A description of the steps taken to consult with and solicit comment from interested and affected parties</p>	<p>An appendix containing a description of the public participation process followed, including a list of interested parties and their comments</p>	<p>The results of any consultation and government agencies; NGO's and the public during the EIA process</p>	
	<p>An appendix containing a description of any media coverage given to the proposed activity</p>		
<p>Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis</p>			

A non-technical summary including a visual presentation as appropriate.	An appendix of any other information which was included in the accepted plan of study.	An executive summary of the findings of the EIA.	Any other information prescribed by the minister.
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The contents of the Namibian EAR⁶⁶³ are comparable to the contents of the scoping report,⁶⁶⁴ the plan of study for EIA⁶⁶⁵ and the EIR.⁶⁶⁶ Some of the requirements that must be included in the Namibian EAR are, however, not requirements included in the documents above. Most of these requirements are included in the procedures set out in NEMA for the investigation, assessment and communication of the potential impacts.⁶⁶⁷

The only requirement EMA contains which is not included in any of the documents or reports in South Africa or prescribed in NEMA is the inclusion of a non-technical summary including a visual presentation as appropriate.⁶⁶⁸ Some of the requirements included in the South Africa documents are issues that are already dealt with in the screening process in Namibia.⁶⁶⁹

The information required in the Swaziland EIA report⁶⁷⁰ and EIS⁶⁷¹ is relatively the same as the required information in the scoping report and EIR of South Africa and EAR of Namibia. Different from the South African and Namibian legislation, the Swaziland EAARR and EMB make provision for alternative means of carrying out the project⁶⁷² as well as alternatives to the project that would achieve the same aim as the

663 S 18(2)(a)–(j) of EMA.

664 Reg 6 of GN R 1183; also see 3.3.8 Scoping.

665 Reg 7 of GN R 1183; also see 3.3.9 EIA report preparation.

666 Reg 8 of GN R 1183.

667 Ss 24(7)(c)–(f) of NEMA and ss 18(e), (f), (g) and (i) of EMA.

668 S 18(2)(j) of EMA.

669 S 21 of EMA.

670 Second Schedule of EAARR, Reporting Format B.

671 S 32(4) of EMB.

672 The way in which you carry out the project.

project was intended to achieve.⁶⁷³ Although the South African regulations just refer to alternatives in general, the *EIA Guideline Document* stipulates the different alternatives applicable, among others, activity alternatives, process alternatives as well as location alternatives.⁶⁷⁴ The Namibian EMA also just refers to alternatives in general⁶⁷⁵ and does not describe this alternative in more detail, but regulations will address these issues.

In all three countries there is a degree of public participation⁶⁷⁶ as requirement in the distinguished EIA documents. The South African scoping report must include a description of the public participation process.⁶⁷⁷ The appendices included in the South Africa EIR must also contain descriptions of the public participation process followed,⁶⁷⁸ including a list of interested parties and their comments.⁶⁷⁹ The Namibian EMA also requires in their EAR that the steps taken to consult with and solicit comments from interested and affected parties must be included.⁶⁸⁰ The Swaziland EAARR makes provision that results from any consultation held with government agencies, NGO's and the public during an EIA must be included in the EIA report (Swaziland EMB does not contain any explicit requirements in this regard).

In South Africa, the public participation process is already advanced to this stage while the public participation process will mainly take place in Swaziland after the EIA report is submitted to the relevant authority and before ECC is issued.⁶⁸¹ Swaziland legislation (both EAARR and EMB) makes provision that their mitigation

673 S 7(b)(j) of EMB; Second Schedule of EAARR, Reporting Format B.

674 *EIA Guideline Document* 3.2.3.1.

675 S 18(2)(c) of EMA.

676 See 3.3.13 Consultation and participation.

677 Reg 6(1)(e) of GN R 1183.

678 See 3.3.13 Consultation and participation.

679 Reg 8(c)(iii) of GN R 1183.

680 S 18(2)(h) of EMA.

681 Reg 8 of EAARR.

plan be discussed in separate documents (CMP) apart from the EIA report and EAP. Both South Africa and Namibia just provide for one EIA document.

South Africa has a long comprehensive EIA procedure where various acts and regulations must be taken into consideration, which makes it expensive and time consuming. The Namibian EMA includes in one document (EAR) all the required information which South Africa includes in four separate documents, which must be reviewed after the submission of each one.

The contents of the South African, Namibian and Swaziland's EIA reports fulfil the evaluation criteria of the contents of the EIA report set out by Wood.⁶⁸² The required contents of the three countries include a description of the action and of the environments effected, a forecast of impacts and any indication of significance. It is also evident from the discussion above that consultation and participation are part of all three countries' EIA report preparation.

In comparing the three discussed countries' legislation to Wood's⁶⁸³ criteria with regard to mitigation of impacts,⁶⁸⁴ it is found that mitigation measures are in all three countries mainly focused on the EIA preparation stage.

The South African NEMA provides for mitigation as part of minimum procedures during assessment⁶⁸⁵ with emphasis on avoiding, reducing or remedying the negative environmental impacts of development and enhancing the positive impacts at each stage in the EIA process. This provision is, however, not mandatory and the only mention of it in the EIA regulations is the requirement that the EIR must include particulars about the possibility for mitigation measures for each identified impact.⁶⁸⁶ The *EIA Guideline Document* also provides for a range of mitigation options as already discussed in this section.

682 Wood *Environmental Impact Assessment: A Comparative Review* 143-148 See 2.5.10 Mitigation of impacts.

683 Wood *Environmental Impact Assessment: A Comparative Review* 212-215 See 2.5.10 Mitigation of impacts

684 See 2.4.10 Mitigation of impacts.

685 S 24(7)(c) of NEMA.

Namibian EMA also prescribes that the EAR must include a description of the mitigation measures in order to keep adverse impacts to a minimum.⁶⁸⁷ EMA does, however, not provide any more information or regulations concerning this matter. The Swaziland EAARR and EMB require a separate document specifically concerned with mitigation, namely the CMP, with contents as described above.

Swaziland EAARR and EMB requires in the CMP that schedules for implementation and targets of the mitigation measures must be included as well as reporting procedures. The South African regulations as well as the Namibian EMA do not provide means of ensuring that the mitigation measures proposed in the EIA report must be implemented. It is evident from the above discussion as well as from Wood's discussion that proper provision for mitigation measures throughout the EIA process is important in order to promote a successful EIA process.⁶⁸⁸

3.3.11 *EIA report review and record of decision*

In South Africa, the application for a proposed project will be considered in two instances, either after a scoping report has been accepted and the relevant authority has decided that the information contained in the scoping report is sufficient,⁶⁸⁹ or after the authority has received an EIR that complies with regulation 8.⁶⁹⁰ In these two instances the relevant authority may decide to issue a record of decision with or without conditions⁶⁹¹ or refuse the application.⁶⁹² The relevant authority must determine the period of validation.⁶⁹³

686 Reg 8(A)(ii) of GN R 1183.

687 S 18(2)(e) of EMA.

688 See 2.4.10 Mitigation of impacts.

689 Reg 6(3)(a) of GN R 1183.

690 Reg 9(1) of GN R 1183.

691 Reg 9(1)(a) of GN R 1183.

692 Reg 9(1)(b) of GN R 1183.

693 Reg 9(2) of GN R 1183.

The relevant authority must issue the record of decision to the applicant. This record of decision must also be made available to the interested parties on request.⁶⁹⁴ The

regulations describe what the contents of such record of decision must be.⁶⁹⁵ After both instances the applicant may appeal to the minister or provincial authority. An appeal must be completed in writing within 30 days from the date on which the record of decision was issued to the applicant.⁶⁹⁶ An appeal must set out all the facts as well as the grounds of appeal and must be accompanied by all relevant documents or copies of them.⁶⁹⁷

In Swaziland the EAARR stipulates that an environmental compliance certificate (ECC) must be issued in order for the project to proceed to the authorisation procedure.⁶⁹⁸ If a project is classified under category 1, the authority must issue an ECC⁶⁹⁹ within 10 days. In the case of projects classified under category 2 the authority must, within 15 days after receiving the IEE report and CMP decide whether the authorisation process may continue to the next stage,⁷⁰⁰ or after review, order the project proponent to prepare and submit an EIA report and CMP.⁷⁰¹ Projects classified under category 3 must submit an EIA report and CMP to the authorising agency or the Ministry of Economic Planning and Development (hereafter referred to as MEPD) which must forward it to the Swaziland environmental authority (hereafter

694 Reg 10(1) of GN R 1183.

695 Reg 10(2)(a)–(l) of GN R 1183 describes that the record of decision must include (a) a brief description of the proposed activity, (b) specific place where the activity is to be undertaken, (c) name, address and telephone number of the applicant and (d) consultant involved, (e) the date of, and persons present at, site visits, if any, (f) the decisions of the relevant authority, (g) the conditions of the authorisation (if any), (h) the key factors that led to the decision, (i) the date of expiry or the duration of the authorisation, (j) the name of the person to whom an appeal may be directed as contemplated in regulation 11, (k) the signature of a person who represents the relevant authority and (l) the date of decision.

696 Reg 11(1) of GN R 1183.

697 Reg 11(2) of GN R 1183.

698 Reg 7(8) of EAARR.

699 Reg 7(9) of EAARR.

700 Reg 7(11)(b)(i) of EAARR.

referred to as SEA).⁷⁰² In the case of category 2 (where the EIA report is required and 3 projects), the SEA must review the EIA report and CMP and can either order amendments⁷⁰³ or order the authorisation process to continue to the next stage.⁷⁰⁴

In order to obtain an ECC the regulations make provision for a procedure to be followed.⁷⁰⁵ Firstly the IEE report, the CMP,⁷⁰⁶ the EIA report and the CMP must be internally reviewed by the SEA whereafter the SEA will conduct an evaluation for the project and its impacts.⁷⁰⁷ If these reports and CMPs are accepted, the SEA then has to conduct a public review process.⁷⁰⁸ The EIA and CMP reports are then distributed to interested and affected parties and arrangements are made for public viewing.⁷⁰⁹ The authority shall, at the expiration of the public review period, review the comments or submissions of the interested and affected parties and determine whether or not a public hearing or inquiry is necessary.⁷¹⁰ If the project is of a sensitive nature⁷¹¹ or if the public concern over the project is considerable and the number of written and substantiated objections exceeds ten,⁷¹² the authority may hold a public hearing or inquiry.⁷¹³ After the authority receives the report of public hearing it must make a decision whether to allow the proponent to proceed with the project and issue the proponent with an ECC⁷¹⁴ or disallow the proponent from proceeding with the project

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- 701 Reg 7(11)(c)(i) of EAARR.
702 Reg 7(13)(a) of EAARR.
703 Reg 7(13)(b)(ii) of EAARR.
704 Reg 7(13)(b)(i) of EAARR.
705 Reg 8 of EAARR.
706 Reg 7(11)(b)(i) of EAARR.
707 Reg 8(1) of EAARR.
708 Reg 8(2) of EAARR; also see 3.3.13 Consultation and participation.
709 Reg 8(3)(i)–(ii) of EAARR.
710 Reg 8(4) of EAARR.
711 Reg 11(12)(a) of EAARR.
712 Reg 11(12)(b) of EAARR.
713 Reg 8(5) of EAARR.
714 Reg 8(7)(a) of EAARR.

as planned if it would bring about unacceptable environmental impacts or it contains inadequate mitigation measures.⁷¹⁵

The regulations require the authority to communicate its decision in writing to the authorising agency or to the MEPD giving reasons, conditions or comments for its decision.⁷¹⁶ This decision must also be published in a medium to be decided by the authority⁷¹⁷ and must include a detailed statement of the decision for public inspection.⁷¹⁸ Copies of the decision must also be sent to any person who has, in writing, submitted comments or lodged an objection to the authority in terms of these regulations.⁷¹⁹

The decision and consideration process in Swaziland is a comprehensive process where the interested and affected parties' views play a very important role. The record of decision provided for in South Africa legislation is similar to the authority's written communication of the decision in Swaziland.⁷²⁰

The Swaziland EMB also requires, similar to the EAARR, that no person, organ of government or public body may grant a permit or licence for execution of a project unless an approval for the project has first been granted by the authority, with or without conditions.⁷²¹

The application will be considered after the person proposing to undertake a project has submitted a project brief to the authority.⁷²² After reviewing the project brief, the authority can either determine that the potential effect of the project on the environment is likely to be minimal or insignificant and approve the project⁷²³ or

715 Reg 8(7)(b) of EAARR.

716 Reg 8(9)(a) of EAARR.

717 Reg 8(9)(b) of EAARR.

718 Reg 8(9)(c) of EAARR.

719 Reg 8(9)(d) of EAARR.

720 Reg 8(a) of EAARR.

721 S 32(3) of EMB.

722 S 32(4) of EMB.

723 S 32(5)(a) of EMB.

determine that the potential effect on the environment is likely to be more than minimal or insignificant and order the applicant to conduct an EIA in order to submit an EIS and CMP.⁷²⁴

Upon receipt of the documents (EIA and CMP), the authority may refuse to consider the application and return the application to the applicant (with written reasons for refusal). This refusal will take place where the application fails to contain the appropriate administration fee or fails to provide any information required under this section.⁷²⁵ The authority may also order the applicant to amend the application if the application does not provide adequate information that is required under this section. The authority must advise the applicant in writing of the reason why the application is inadequate. The date of the amended application will be considered to be the date of application.⁷²⁶ Lastly the authority must consider the application and if it is determined that the project will affect the public interest significantly, require the matter to be subjected to public review and/or request the minister to convene a public hearing (for the same reasons set out in EAARR).⁷²⁷ If the project will not affect the public interest significantly the authority can grant approval with or without any conditions.⁷²⁸

The minister, acting on advice of the authority, may grant approval for a project to whatever terms and conditions it may consider appropriate after he or she determines that all the concerns or effects are adequately addressed by the EIS and CMP and that the adverse effects of the project are effectively avoided, mitigated and/or remedied.⁷²⁹ The minister shall refuse to grant an approval in respect of a project if the authority considers that the implementation of the project would bring about unacceptable adverse effects or that the mitigation measures may be inadequate to satisfactorily

724 S 32(5)(b)(i)-(iii) of EMB.

725 S 32(11)(a) of EMB.

726 S 32(11)(b) of EMB.

727 In accordance with ss 53 and 32(11)(c)(i) of EMB.

728 S 32(11)(c)(ii) of EMB.

729 S 32(12) of EMB.

mitigate the adverse effects of the proposed project.⁷³⁰ This process is identical to the process followed in the EAARR. The EMB does, however, not require an ECC for the project to proceed to the authorisation procedure but the EMB only refers to an approval needed from the authority.⁷³¹

The Namibian EMA also provides two instances (similar to South Africa)⁷³² where the project application will be considered by the relevant authority in an attempt to obtain an environmental clearance for the project. The first instance occurs where the ECom and CA have determined after screening⁷³³ that an EA is not required.⁷³⁴ The ECom may issue an environmental clearance for the project without conditions⁷³⁵ or the ECom may recommend that certain conditions be imposed by the CA which must be met by the proponent prior to, or after its commencement.⁷³⁶ In issuing an environmental clearance, the ECom must base his or her decision on the findings of the screening process and where such findings are disregarded, reasons must be given.⁷³⁷

The second instance where the project application will be considered in an attempt to get an environmental clearance for the project is after submission of the EAR⁷³⁸ and after completion of any further requirements which may have been required.⁷³⁹ The ECom shall, within 30 days, review the EAR and furnish the SDC with the EAR together with his or her written recommendation in respect of the granting or refusal of an environmental clearance as well as in respect of any conditions to be imposed by

730 S 32(13) of EMB.

731 S 32(4) of EMB.

732 See above discussion.

733 S 21 of EMA.

734 S 22(1) of EMA.

735 S 22(1)(a) of EMA.

736 S 22(1)(b) of EMA.

737 S 22(s) of EMA.

738 S 23(1)(b) of EMA.

739 S 24(1) of EMA.

the CA, including written summaries of the views expressed by interested and affected persons, experts and government institutions, if any.⁷⁴⁰

The SDC, must (within 30 days) after receiving the recommendations of the ECom review the EAR⁷⁴¹ and issue and environmental clearance for the project with or without conditions,⁷⁴² or the SDC may refuse the granting of the environmental clearance.⁷⁴³ In issuing an environmental clearance in this instance the SDC must base its decision on the findings of the EA and where such findings are disregarded; reasons must be furnished.⁷⁴⁴

All the above decisions must be recorded in writing and furnished to the proponent and, on request, be furnished to any interested and affected party. These records of decision must be published in the *Government Gazette*.⁷⁴⁵ The contents of this record of decision⁷⁴⁶ are the same as the record of decision provided for in South African legislation.⁷⁴⁷ The consideration-process in South Africa and Namibia is similar except for the stages when it takes place. The consideration process in the Swaziland EAARR and EMB is a more comprehensive process where public involvement plays an extremely important role.

When comparing the above information to Wood's⁷⁴⁸ criteria for the review of EIA reports, it is clear that the discussed countries all make provision for the review of the EIA report.⁷⁴⁹ The South African EIA regulations do, however, not stipulate the contents of the EIA report review apart from demanding that the relevant authority must consider the application after it has received an EIR that complies with the

740 S 24(2) of EMA.

741 S 25(1)(a) of EMA.

742 S 25(1)(b) of EMA.

743 S 25(1)(d) of EMA.

744 S 25(2) of EMA.

745 S 26 of EMA.

746 S 26(a)–(f) of EMA.

747 Reg 10(2)(a)–(l) of GN R 1183.

748 Wood *Environmental Impact Assessment: A Comparative Review* 162-166.

749 See 2.4.7 EIA report review.

regulations.⁷⁵⁰ NEMA requires that procedures for independent review must be implemented⁷⁵¹ and the *EIA Guideline Document* describes this procedure in more detail.⁷⁵² The Swaziland EAARR and EMB makes provision for a comprehensive review process and public involvement plays an extremely important role in this. The Namibian EMA also makes provision for the review process, but similar to the South African regulations, it does not describe the process in detail.

The South African *EIA Regulations* do not contain any formal requirement for checks involving the objectivity of the EIA report review, but the *EIA Guideline Document* recommends certain general procedural review criteria and review methods, which may be helpful in reaching objectivity.⁷⁵³ Both Swaziland's EAARR and EMB similarly do not include any formal requirements for checks concerning objectivity, but make provision for comprehensive public participation⁷⁵⁴ during this stage. This may be a helpful method in order to ensure objectivity during the review stage. The Namibian EMA also does not contain any formal requirements to ensure objectivity.

The South African *EIA Regulations* do not contain any formal requirements for public participation during review or that the findings of the EIA review be published. The only requirement is that the findings must be available to interested parties on request.⁷⁵⁵ In the case of the Swaziland EAARR and EMB, it formally requires that the decision of the review process be published in a medium that will be decided upon by the authority.⁷⁵⁶ As already indicated,⁷⁵⁷ public involvement plays an extremely important role in the Swaziland legislation. The Namibian EMA similarly requires that the results of the EIA review must be published in the *Government Gazette*⁷⁵⁸ and

750 Reg 9 of GN R 1183.

751 Wood 1999 *South African Geographical Journal* 55.

752 *EIA Guideline Document* 3.2.5.2.

753 *EIA Guideline Document* 3.2.5.2.

754 See 3.3.13 Consultation and participation.

755 Reg 10(1) of GN R 1183.

756 Reg 8(9) of EAARR.

757 See above discussion.

758 S 26 of EMA.

similar to South Africa, Namibian legislation does not make provision for formal public participation during this process.

In regard to Wood's⁷⁵⁹ criteria concerning decision-making, it is evident that all three countries' legislation make provision for decision-making after the EIA has been prepared and reviewed.⁷⁶⁰ In the respective countries decision-making, however, also takes place earlier in the EIA process, for instance, after a scoping report has been accepted in South Africa,⁷⁶¹ when a project is classified under category 1 and in some cases category 2 in Swaziland⁷⁶² and after the screening process in Namibia.⁷⁶³

In all three countries the EIA legislation gives the decision-making body various powers with regard to the decision they may come to, such as the power to accept the application with or without conditions, to order the proponent to amend the application when necessary and to refuse the application. It is also clear from the discussion above that the decision-making body in the discussed countries is a body other than the proponent⁷⁶⁴ and that these respective decision-making bodies are required to issue a record of decision to the proponent. In South Africa, this record of decision will also be available to other interested parties on request and in Swaziland and Namibia these records of decision must be published.

The Namibian EMA is the only legislation that makes provision that the Ecom will review the EAR prior to decision-making and furnish the SDC with the EAR together with his or her written recommendation in respect of the granting or refusal of an environmental clearance.⁷⁶⁵

It is apparent that the number of refusals in South Africa is very small because of the fact that the decision to grant authorisation is sometimes being made by provincial

759 Wood *Environmental Impact Assessment: A Comparative Review* 181-184.

760 See 2.4.8 Decision-making.

761 Reg 6(3)(a) of GN R 1183.

762 Reg 7(a) and 7(11)(b)(i) of EAARR.

763 S 21 of EMA.

764 See 3.3.5.1 Relevant authority.

765 S 24(2) of EMA.

authorities on narrow, nature conservation or other grounds, rather than on the full range of factors.⁷⁶⁶ This factor, according to Wood, can jeopardise the original intention of an EIA. Kotze emphasises this point as he stipulates that co-operative governance is not readily achieved in South Africa due to horizontal fragmentation between the different national, provincial and local spheres of government.⁷⁶⁷

3.3.12 *EIA Follow-ups*

At present, EIA follow-ups in South Africa by means of audits, inspections or reports that need to be submitted after EIA implementation, is not a mandatory step in the EIA procedure. Neither the EIA regulations nor the *EIA Guideline Document* make explicit provisions for EIA follow-up. According to the NEMA, the IEM procedure provides certain minimum procedures which must be complied with in investigating, assessing and communicating the potential impact of activities.⁷⁶⁸ One of these minimum procedures includes an investigation and formulation of arrangements for the monitoring and management of impacts and the assessment of the effectiveness of such arrangements after their implementation.⁷⁶⁹ According to Cubitt and Diab,⁷⁷⁰ the above section of NEMA is only a partial consideration of EIA follow-up, because this section fails to describe how, when and by whom this follow-up must be conducted. Cubitt and Diab⁷⁷¹ highlight that the EIA process places its greatest emphasis on the stages leading up to the record of decision, with little concern on the monitoring and auditing of impacts. Monitoring and auditing are normally left to be undertaken on a voluntary basis.

766 Wood 1999 *South African Geographical Journal* 55.

767 Kotze "Co-operative environmental governance" 166.

768 S 24(7) of NEMA.

769 S 24(7)(f) of NEMA.

770 Cubitt and Diab "EIA follow-up: Current Status and recommendations" (unpublished paper delivered at the South African IAIA Congress 8-10 October 2001 Mpumalanga) 75.

771 Cubitt and Diab "EIA follow-up: Current Status and recommendations" (unpublished paper delivered at the South African IAIA Congress 8-10 October 2001 Mpumalanga) 75.

Where EIA follow-ups have indeed been done in South Africa, Nel⁷⁷² mentions that they were either done in terms of specific conditions stipulated in the record of decision,⁷⁷³ or in terms of ECA section 41(1) authority to enter land, but there is no legal requirements in this respect. The *NEMA Amendment Bill* places an obligation on the minister or MEC to, as a minimum, ensure that adequate provision is made for ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity.⁷⁷⁴

The Namibian EMA also does not provide comprehensive EIA follow-up procedures. The proponent must, however, include in the EAR an outline for monitoring and management programmes and any plans for post-project analysis.⁷⁷⁵ After the project is reviewed and authorised,⁷⁷⁶ the CA may revoke or suspend the project in the event of the conditions of authorisation not being complied with, provided that the proponent has been afforded a reasonable opportunity to remedy such non-compliance and has failed to do so.⁷⁷⁷ This suspension shall remain in place until the proponent has complied with the conditions of the authorisation and any environmental damage caused by non-compliance is rectified by the proponent at the proponent's expense, to the satisfaction of the CA in consultation with the ECom.⁷⁷⁸ This section describes the consequences of non-compliance but it does not describe the process of monitoring and post-project analysis.

Projects, however, conducted by government institutions must be monitored by SDC to ensure that all the principles of environmental management⁷⁷⁹ are complied with.⁷⁸⁰

772 Nel "EIA partnerships in the SADC region – Learning points for SA from Mozambique's EIA regulations (unpublished paper delivered at the South African IAIA Congress 2-4 October 2000 Goudini) 9.

773 Reg 10 of GN R 1183; also see 3.3.11 Consideration and record of decision.

774 S 24E of *NEMA Amendment Bill*.

775 S 18(2)(i) of EMA.

776 S 25(1)(a)–(c) of EMA.

777 S 24(1) of EMA.

778 S 24(2) of EMA.

779 S 6 of EMA.

780 S 7(1) of EMA.

The SDC may take appropriate steps and make such inquiries, as it deems fit in order to determine whether the principles of environmental management are being complied with.⁷⁸¹ If the SDC is of the opinion that the above provisions are not being complied with by any government institution it may recommend to the minister that he or she request the minister under whose jurisdiction the government institution in question falls, to remedy the situation.⁷⁸² In the event of the minister failing to take the necessary action to remedy the situation, the matter must be referred to the ombudsman.⁷⁸³

It appears that EMA enforces stricter measures in respect of follow-up procedure upon projects conducted by government institutions than on any private people or companies conducting a project.

The Swaziland EAARR makes explicit provision for EIA follow-up procedures. After implementation of the authorised project,⁷⁸⁴ an authorising agency or implementing ministry shall at periodical times carry out inspections to ensure that the CMP is being implemented and to identify and evaluate the actual environmental impacts occurring.⁷⁸⁵ Immediately after carrying out an inspection and valuation the authorising agency or implementing ministry shall prepare and submit a project compliance report to the authority.⁷⁸⁶ The times and frequency of the inspections and submissions of reports must be determined in writing by the authority and authorising agency or implementing ministry before any ground preparation work is started.⁷⁸⁷

The project compliance report must include:⁷⁸⁸

- an introduction which sets out the purpose of the report

781 S 7(1)(a) of EMA.

782 S 7(b)(i) of EMA.

783 S 7(b)(ii) of EMA.

784 Reg 10(1) and (2) of EAARR..

785 Reg 10(3) of EAARR.

786 Reg 10(4) of EAARR.

787 Reg 10(5) of EAARR.

788 Second Schedule of EAARR, Reporting Format E.

- a description of the project which include the location, size, phase of implementation (construction of operation) and workforce
- a performance review which includes checking of implementation of CMP and results of actual impacts of projects
- recommendations in order to improve environmental performance. A date for the preparation and submission of the next project compliance report.

Notwithstanding all the above provisions the authority may, on its own initiative or on the results of the project compliance report, carry out inspections, valuations and take appropriate action in terms of the act.⁷⁸⁹

The Swaziland EAARR also makes provision for regulations concerning environmental audits on already existing projects.⁷⁹⁰ The authority shall annually identify and maintain a list of projects, which cause concern to the authority, public or environment and must publish the list in its annual report.⁷⁹¹ An operator of an identified or listed project may be required to submit an environmental audit report (EA report)⁷⁹² and a CMP to the authority within six months after notification. The EA report must include:⁷⁹³

- an introduction describing the purpose of the EA report
- a description of the project
- a description of the environment
- an impact description and evaluation.

The authority must after receiving the reports determine if they comply with the prescribed reporting requirements and if not, the operator shall be required to amend the reports and re-submit them.⁷⁹⁴ The authority must distribute copies of the EA report and CMP to every ministry concerned or responsible for the control of the

789 Reg 10(6) of EAARR.

790 Reg 5 of EAARR.

791 Reg 5(1)(a) of EAARR.

792 Hereafter referred to as EA report.

793 Second Schedule of EAARR, Reporting Format C.

projects where upon they must comment and submit their comments to the authority within 4 weeks.⁷⁹⁵ These EA reports are public documents⁷⁹⁶ and copies will be made available for inspection by members of the public at a selected location in the vicinity of a project.⁷⁹⁷ These copies of the EA report will not be made public if the publicity will be detrimental to either the normal commercial operations of that project or the national interest of the country.⁷⁹⁸ The operator will only be required in this instance to produce and submit a summary of the EA report to the authority.⁷⁹⁹ After the period of procedure for public review, inspection, submission of comments and objections⁸⁰⁰ expires, the authority has to decide whether or not the CMP requires to be amended. In the case where the CMP requires to be amended, the operator with the assistance of the authority, shall prepare a final CMP.⁸⁰¹ The authority shall order in writing, after acceptance of the final CMP, that the operator must implement the CMP.⁸⁰²

The Swaziland EMB makes provision that the minister, on advice of the authority, may by regulation prescribe categories of facilities and activities in respect of which the authority may require environmental audits to be conducted.⁸⁰³ The authority may also require the operator to submit reports on the audits to the authority. The environmental audit reports must include among other things the following:

- a detailed description of any facility or activity⁸⁰⁴
- a detailed description of the environmental effects of a facility or activity⁸⁰⁵

794 Reg 5(1)(c) of EAARR.

795 Reg 5(3) and (4) of EAARR.

796 Reg 5(5) of EAARR.

797 Reg 5(6) of EAARR.

798 Reg 5(7)(a)–(b) of EAARR.

799 Reg 5(8) of EAARR.

800 In accordance with reg 5(8) and (11) of EAARR.

801 Reg 5(11) of EAARR.

802 Reg 12 of EAARR.

803 S 33(g) of EMB.

804 S 33(h)(i) of EMB.

805 S 33(h)(ii) of EMB.

- plans to prevent and reduce the risk of adverse effects, and to remedy adverse effects, caused by facility or activity⁸⁰⁶
- penalties if any person fails to comply with a plan provided for under subparagraph (iii) of paragraph (h).⁸⁰⁷

Part 9 of the EMB sets out a comprehensive process of inspection, investigation and monitoring. The board may designate in writing any employee of the authority, public officer or official of a local authority, either by name or *ex officio*, as an inspector for the purpose of this inspection, investigation and monitoring.⁸⁰⁸ The inspectors and senior inspectors have various powers, for example, to enter or have access to any premises or object in order to do their inspections, investigation and monitoring without a warrant of the court.⁸⁰⁹ The EMB sets out an extensive process of inspection.⁸¹⁰

In comparing the discussed regulations and legislation to the evaluation criteria of Wood⁸¹¹ for the monitoring and auditing of action impacts,⁸¹² it is clear that although the Namibian legislation make provision for the discussed monitoring, it does not give contents to this provision. The Namibian legislation mainly concentrates on the monitoring of projects undertaken by the government. The South African legislation, however, does not make provision for the discussed monitoring. Similar to the Namibian EMA, the *NEMA Amendment Bill* discusses monitoring but does not give contents to the provisions.⁸¹³

The Swaziland EAARR and EMB make explicit provision for both implementation monitoring as well as impact monitoring for all undertaken projects, including projects undertaken by government and private projects. This legislation also

806 S 33(h)(iii) of EMB.

807 S 33(h)(iv) of EMB.

808 S 60(1) of EMB.

809 S 61 of EMB.

810 See in this regard ss 61-67 of EMB.

811 Wood *Environmental Impact Assessment: A Comparative Review* 191-200.

812 See 2.4.9 Monitoring and auditing of actions.

provides for environmental auditing on projects being implemented as well as already existing projects. The monitoring and auditing procedures are set out in detail in the legislation.

Both the Namibian and Swaziland legislation require that the monitoring arrangements be specified in the EIA report. The South African EIA report, however, does not include such specifications. Swaziland's legislation also stipulates that these auditing results be made available to all interested and affected parties. As discussed South Africa and Namibia do not even provide for auditing reports.

According to Wood's article,⁸¹⁴ the conditions attached to authorisations that are issued under the *EIA Regulations* are used in practice to partly enforce the use of EIA follow-ups in South Africa. The problem with this is that under-funding and under-staffing of provincial and local authorities means that they must rely on the complaints of neighbours and the integrity of developers and their consultants for information about non-compliance.

It is, therefore, evident that the Swaziland EAARR and EMB make sufficient provision for EIA follow-up procedures in Swaziland. This is, however, not the case in Namibia where monitoring and auditing are mentioned in the acts but no sufficient procedures are provided to give effect to these follow-up procedures. South Africa and Namibia must take positive action in this regard and can learn from the Swaziland legislation. According to Hill,⁸¹⁵ the "lack of regulations on EIA follow-up constitute a retrograde step for environmental management in South Africa."

In this section the author will also discuss the monitoring of EIA systems⁸¹⁶ as provided for by Wood.⁸¹⁷ Neither one of the discussed countries' legislation make explicit provision for this kind of monitoring. In South Africa, the relevant authorities must, however, keep a register of all the applications received and must make these

813 S 24E of *NEMA Amendment Bill*.

814 Wood 1999 *South African Geographical Journal* 56.

815 Hill 2000 *SAJS* 96 53.

816 See 2.4.12 Monitoring of EIA systems.

information available to the public.⁸¹⁸ In Namibia, one of the EC's functions is to act as register for all project notifications in regard to EAs⁸¹⁹ and to maintain a register of all environmental assessments conducted and environmental clearances issued under EMA.⁸²⁰ EMA also stipulates that the minister (after consultation with SDC) may make regulations pertaining to the holding of environmental registers by the EC.⁸²¹ Swaziland's EAARR does not provide for any review of the EIA system or for the keeping of documents relating to EIA. The Swaziland EMB, however, makes provision for the registration of environmental information.⁸²² This information must be available at one location for public viewing during ordinary business hours and it must also be available in the form of electronic documents accessible through a world wide web site on the internet.⁸²³

Although some of the reports are registered according to the three countries' legislation, no provisions are made that records of financial costs of the EIA or the time required to conduct an EIA be registered and made public. It is also not clear if the lessons from specific EIAs are fed back into the system of these three countries.

In South Africa, DEAT sees the responsibility of keeping records of EIA documents or copies of these documents as the responsibility of the provincial governments or of the appropriate local governments (where EIA responsibilities are delegated). This view is however, not shared by these bodies.⁸²⁴ According to Wood, the fragmentation of EIA responsibilities, the understaffing of relevant authorities and the unaccountable bureaucratic culture in South Africa contribute to the inadequate EIA system monitoring.⁸²⁵ The *NEMA Amendment Bill* requires procedures for the investigation,

817 Wood *Environmental Impact Assessment: A Comparative Review* 241-243.

818 Reg 12 of GN R 1183.

819 S 16(a) of EMA.

820 S 16(b) of EMA.

821 S 3(c) of EMA.

822 S 50 of EMB.

823 S 50(3) of EMB.

824 Wood 1999 *South African Geographical Journal* 56.

825 Wood 1999 *South African Geographical Journal* 57.

assessment and communication of the potential impacts of activities to ensure as a minimum the reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions and uncertainties encountered in compiling the required information.⁸²⁶ The *NEMA Amendment Bill* also makes provision that the minister and MEC may make regulations requiring that the CA maintain a registry of applications for, and records of decisions in respect of environmental authorisation.⁸²⁷

3.3.13 Consultation and participation

In South Africa, the public participation process is part of the duties of the applicant as presented in the *EIA Guideline Document*. There is also a requirement of the consultant, who is appointed by the applicant, to have the necessary skills to manage the public participation process.⁸²⁸ Provisions are made under the general objectives of the NEMA for adequate and appropriate opportunities for public participation in the making of decisions concerning matters effecting the environment.⁸²⁹ Although attention is given to the principle of public participation, the term is not defined in any of the South African legislation. The interested parties who take part in the public participation process are defined in the *EIA Guideline Documents* as "individuals or groups concerned with or affected by an activity and its consequences. These include the authorities, local communities, work force, customers and consumers, environmental interest groups and the general public." This definition suggests a very broad spectrum of parties that may qualify as interested and affected parties.

The *EIA Guideline Document* presents the interested and affected parties with the right to provide inputs and comments during specific stages of the project development. These stages include the scoping stage,⁸³⁰ the assessing⁸³¹ and

826 S 24(3)(e) of *NEMA Amendment Bill*.

827 S 24(4)(f) of *NEMA Amendment*.

828 Reg 3(1)(d)(iii) of GN R1183; also see 3.3.5.3 Consultants.

829 S 23(2)(d) of NEMA.

830 See 3.3.8 Scoping.

831 See 3.3.9 EIA report preparation.

mitigating of impacts, the revision of the environmental assessment report⁸³² and also during the implementation and monitoring stage.⁸³³ The interested parties are further responsible to provide these inputs and comments within the specific time frames as is specified by the applicant or consultant and the relevant authority.

The Namibian EMA does not give contents to the term public participation, although it makes provision for such a process in the principles of environmental management. This principle of public participation applies during the decision-making process whenever the environment is affected. The principles in Part 2 of EMA make provision for the process of public participation in the decision-making in cases when the environment is affected.⁸³⁴ These general objectives of conducting an EA states that provision must be made for adequate opportunity for public participation throughout the EA process. Opportunity for public comments is provided for after the project notification is handed in,⁸³⁵ during the screening process⁸³⁶ and during the review of the EAR.⁸³⁷ EMA, however, does not mention how this procedure must take place.⁸³⁸ Similar to South Africa, interested and affected parties are defined broadly in EMA.⁸³⁹ The process of public participation is not at all described in EMA and the meaning of "adequate opportunity" is left unanswered.

As already discussed above⁸⁴⁰ the Swaziland's EAARR sets out a detailed public participation process depending on the category of projects. The public participation process goes through certain stages as is set out in the EAARR. Interested and

832 See 3.3.11 Consideration and Record of Decision.

833 See 3.3.12 EIA follow-ups.

834 S 6(3) of EMA.

835 S 20(2)(b) of EMA.

836 S 21(1) of EMA.

837 Ss 24(1)(a) and (b) of EMA.

838 S 17(1)(d) of EMA.

839 S 1 definitions of EMA define interested and affected parties as: "any person or persons or government institutions that may be directly affected by the project or proposal in question."

840 See 3.3.11 EIA report review and record of decision.

affected parties have the opportunity to first raise their objections, comments or submissions after the reports and the CMP have been accepted by the authority.⁸⁴¹

If the project falls under category 2 or 3,⁸⁴² a further public review period commences.⁸⁴³ The public review of category 2 projects commences immediately after the authority release copies of the IEE and the CMP.⁸⁴⁴ In respect of category 3 projects there is a duty on the proponent to pursue a consultation process before preparing an EIA report and CMP in order to include concerned or affected government agencies, local authorities, non-governmental organisations and any other interested and affected persons to help determine the scope and effect of the project to be carried out.⁸⁴⁵ The proponent is required to take this consultation process into account in drafting the terms of reference which must be submitted to the authority.

After the documents and reports are examined by the relevant parties and it is the opinion of the authority that the project is of such a sensitive nature or if the public concern over the project is great and the number of written and substantiated objections against the project exceeds ten then the applicant shall hold a formal public hearing.⁸⁴⁶ The authority's duty in this respect is explained in regulation 11(13), which also includes the time limit in which the relevant role players must respond. The authority also has the right to appoint not less than three and not more than five people (one of whom shall be the chairperson) with professional qualifications in environmental management, sociology, economics, engineering or law as hearing officers to conduct a public hearing.⁸⁴⁷ The chairperson (appointed by the above mentioned people) with the approval of all the hearing officers must compile and deliver a report of the findings of the committee to the authority. The authority, after making this report available for public inspection, may make a decision regarding the

841 Reg 8(2) of EAARR.

842 See 3.3.4 Activities requiring an EIA.

843 Reg 11(1) of EAARR.

844 Reg 11(2) of EAARR.

845 Reg 11(3) of EAARR.

846 Reg 11(12) of EAARR.

847 Reg 12(1) of EAARR.

approval of the proposed project.⁸⁴⁸ If a person is aggrieved with this decision he or she has the right to appeal within a certain time frame.⁸⁴⁹ In South Africa, the management of the public participation process is only part of the duties of the consultant and there is no additional obligation to appoint specifically skilled people to conduct the public participation process like in Swaziland. The consultant, however, must have the necessary qualifications to conduct a public participation process.⁸⁵⁰

Part 8 of the Swaziland EMB deals explicitly with public participation. The process stipulates a very similar process as in the case of the EAARR.⁸⁵¹ It is evident from the detailed process above that the interested and affected parties have adequate input in the decision-making process concerning the approval of development projects.

The discussion above will now be analysed on the basis of Wood's⁸⁵² criteria for consultation and participation.⁸⁵³

As stipulated above, the South African *EIA regulations* make provision for public participation during various stages of the EIA process, including the scoping stage, during the preparation of the EIR, during review of the EIR and finally during the implementation and monitoring stage. Although the Namibian legislation requires adequate opportunities for public participation throughout the EA process, it only makes provision for it after the project notification is handed in, during screening and during the preparation and review of the EAR. Swaziland's EAARR and EMB provide that public participation will only take place after the required reports are handed in and released for public insight in the case of category 1 and 2 processes. Category 3 projects, however, require consultation before preparing an EIA report and CMP. It is, therefore, evident that only the Namibian legislation provides for public

848 Reg 13(1)(a) of EAARR.

849 Reg 13(2) of EAARR.

850 See 3.3.3 Consultant.

851 Part viii of EMB.

852 Wood *Environmental Impact Assessment: A Comparative Review* 225-230.

853 See 2.4.11 Consultation and participation.

participation to take place prior to scoping. In all three countries the comments of the interested and affected parties must be taken into consideration during the decision-making process.

Regarding the availability of copies of EIA documents at each stage of the EIA process,⁸⁵⁴ all three countries' legislation makes provision for the availability of copies to interested and affected parties throughout the EIA process. Similarly, in all three countries the various legislation⁸⁵⁵ contains circumstances where a request for information can be refused. None of the three countries' legislation mentions the provision of funding (from government or environmental conservation groups) for public participation. The proponents of the discussed countries are responsible for all the costs incurred in complying with the regulations, which includes public participation process.⁸⁵⁶ According to Wood, the absence of funding can bring severe limitations upon the participation of the disadvantaged sections of society.⁸⁵⁷

As already discussed, the South African *EIA regulations* require that an independent consultant⁸⁵⁸ must be appointed by the proponent. This consultant must manage the whole EIA process and although he or she must have the necessary skills to manage the public participation process, there is no additional obligation on the proponent to appoint specifically skilled people to conduct the public participation process as is the case in Swaziland.

The South African NEMA makes provision that the South African minister may make regulations in accordance with section 28(3) and (4) of NEMA, which must be followed during the investigating, assessing and communicating of potential impacts where the activity will affect one or more international states.⁸⁵⁹ The Swaziland authority can also forward the relevant EIA reports and documents to neighbouring

854 See 3.3.14 Access to information.

855 See 3.3.14 Access to information.

856 See 3.3.5.2 Applicant.

857 Wood 1999 *South African Geographical Journal* 56.

858 See 3.3.5.3 Consultant.

859 S 24(6) of NEMA; also see 3.3.17 International Implications.

countries when it is believed that the project is likely to have significant impacts on the environment of this neighbouring country.⁸⁶⁰ The Namibian EMA does not include similar provisions.

In both Namibia and South Africa, the roles, responsibilities and duties of the interested and affected parties are poorly defined. The well laid out public participation process of Swaziland which includes well defined roles, responsibilities and duties of the role players in this respect can serve as a valuable learning point for Namibia and South Africa in order to avoid conflict in the development process.

3.3.14 Access to information

A successful public participation process is dependent upon adequate access to information.⁸⁶¹ The right of access to information is a constitutional right in South Africa⁸⁶² which gives everybody the right to information held by the state as well as information held by private people if this information is needed to protect another right. The *Promotion of Access to Information Act* 2 of 2000 gives effect to this constitutional right to information. The Act also makes explicit provision for mandatory disclosure of access to information held by the state in cases where the environment is affected as well as where there are actual or future threats in this regard.⁸⁶³ Similar to the Constitution, this Act also gives the organs of state the right to demand insight into information held by private people.⁸⁶⁴ NEMA also contains detailed provisions regarding access to environmental information.⁸⁶⁵ The constitutional right is, however, not an unlimited right and is restricted by *inter alia* section 36 of the Constitution, section 36 of the *Promotion of Access to Information*

860 Reg 11(9) of EAARR and s 32(a) of EMB.

861 Du Plessis W "Reg op omgewingsinligting in die Europese Gemeenskap" 1998 *TSAR* 222. Du Plessis states that: "Die reg op inligting word uitgebrei om ook die reg op omgewingsinligting te omsluit. Die besef dat die omgewing volhoubaar beskerm moet word, het meegebring dat individue dit al hoe meer op hulself begin neem om as bewakers van die omgewing op te tree. Hulle kan dit slegs doen as hulle inligting tot hulle beskikking het."

862 S 32 of the *Constitution the Republic of South Africa* 108 of 1996.

863 S 31(1)(a) of the *Promotion of Access to Information Act*.

864 S 9(a)(ii) of the *Promotion of Access to Information Act*.

Act as well as section 31(1)(c) of NEMA. NEMA sets out the following circumstances where a request for information can be refused:

- If a request is manifestly unreasonable or formulated in too general a manner⁸⁶⁶
- If the public order or national security would be negatively affected by the supply of the information⁸⁶⁷
- For the reasonable protection of commercially confidential information⁸⁶⁸
- If the granting of the information endangers or further endangers the protection of the environment⁸⁶⁹
- For reasonable protection of personal privacy.⁸⁷⁰

The *Promotion of Access to Information Act* provides for the same circumstances under which access to information can be refused⁸⁷¹ but, different from NEMA, the *Promotion of Access to Information Act* does not make provision for refusal of information in order to protect the environment.⁸⁷²

Throughout the EIA regulations provision is made for public participation. For a proper public participation process a right to access to information is needed. The relevant authority must issue a record of decision⁸⁷³ that was taken after receiving an EIR from the applicant.⁸⁷⁴ Interested and affected parties may ask insight into the records concerning the decisions that are made during the EIA process.⁸⁷⁵ These

865 S 31 of NEMA.

866 S 31(1)(c)(i) of NEMA.

867 S 31(1)(c)(ii) of NEMA.

868 S 31(1)(c)(iii) of NEMA.

869 S 31(1)(c)(iv) of NEMA.

870 S 31(1)(c)(v) of NEMA.

871 S 36 of the *Promotion of Access to Information Act*.

872 S 31(1)(c)(iv) of NEMA.

873 Reg 10(1) of GN R1183.

874 Reg 9(1) of GN R1183.

875 Reg 10(1) of GN R 1183.

records of decision and also any reports required in the regulations become public documents.⁸⁷⁶

The Namibian EMA's provisions for access to information⁸⁷⁷ are similar to those of the *Promotion of Access to Information Act 2* of 2000 and NEMA. The *Namibian Constitution* does not provide people with a constitutional right to access to information. The circumstances in which a request for information can be refused differ in some aspects from circumstances in the South African legislation.

The EMA only provides for access to information that is publicly held⁸⁷⁸ and no provision is made in this section regarding access to information held by private persons. Similar to NEMA, access to environmental information will be refused in Namibia when the request is manifestly unreasonable or formulated in too general a manner.⁸⁷⁹ It will also be refused when the public order or national security would be affected by the supply of the information⁸⁸⁰ and for the reasonable protection of trade or industrial secrets.⁸⁸¹ Access to environmental information will, however, not be refused in Namibia when there is a possibility that this access will endanger or further endanger the protection of the environment as the case is in South Africa⁸⁸² and access will also not be refused for reasonable protection of personal privacy.⁸⁸³ Similar to the South African regulations, EMA stipulates that all decisions taken⁸⁸⁴ shall be recorded in writing and will be available, on request, to any interested and affected parties.⁸⁸⁵

876 Reg 12 of GN R 1183.

877 Ss 4 and 20(2)(b) of EMA.

878 S 4(1) of EMA.

879 S 31(c)(i) of NEMA; s 4(3)(a) of EMA.

880 S 31(c)(ii) of NEMA; s 4(3)(b) of EMA.

881 S 31(c)(iii) of NEMA; s 4(3)(c) of EMA.

882 S 31(c)(iv) of NEMA.

883 S 31(c)(v) of NEMA.

884 In terms of ss 21, 22(1) and 25(1) of GN R1183.

885 S 26 of EMA, also see 4.12 Considerations and records of decision.

According to Swaziland's EAARR, the environmental assessment report (EAR) and the comprehensive mitigation report (CMR) are public documents,⁸⁸⁶ which means that copies are available to any interested party.⁸⁸⁷ The regulations take it a step further where the authority must also make copies available for inspection by members of the public at selected locations in the vicinity of a project for a period not less than 20 days.⁸⁸⁸ Notifications of these projects must also be displayed in the *Government Gazette*, on the Swaziland broadcasting service and in a newspaper circulating in Swaziland twice a week for two consecutive weeks.⁸⁸⁹ This process also takes place in South Africa where documents are made available, for instance, at local libraries across the country so that the public can have reasonable opportunity to inspect them.⁸⁹⁰ This makes the information available to people without them requesting it and makes access to information more easily attainable to the broader public. Swaziland also narrows the circumstances under which a request for information can be refused down to only two cases⁸⁹¹ and, therefore, makes the process of access to information easier.

The provisions made in the Swaziland EMB for the right to access to information is more or less similar to the provisions made in the EAARR. The EMB places a duty on the authority to create and maintain an environmental information registry.⁸⁹² This registry contains information relating to the environment and the legislation prescribes what the contents of this registry must be.⁸⁹³ This registry shall be in the form of paper documents that are kept in one location and are accessible for public viewing. This section also makes additional provision for this registry to be made available in the form of electronic documents accessible through a world wide web site on the

886 Similar to reg 12 of GN R1183.

887 Reg 5(5) of EAARR.

888 S 5(6) of EAARR.

⁸⁸⁹ Reg 11(7) of EAARR.

890 Reg 12 of GN R1183.

891 Reg 5(7)(a)-(b) of EAARR stipulates that the authority may not make the information available when it would be detrimental to the normal commercial operations of that project or to the national interest of the country.

892 S 50(1) of EMB.

internet.⁸⁹⁴ These additional provisions are not provided for in either South African or Namibian legislation.

Any person may request from the minister, authority or any other organ of government any information relating to the environment that is not available in the registry.⁸⁹⁵ This information will only be distributed if the information could reasonably assist that person in contributing to the enhancement, protection and conservation of the environment and the sustainable management of natural resources.⁸⁹⁶ In this last case, the organ of government responding to the request may charge an administration fee.⁸⁹⁷ The other provisions stipulated in the EMB are similar to those provided for in EAARR.⁸⁹⁸

The right to access to information is protected in the South African Constitution, which is not the case in Namibia and Swaziland. This constitutional right in South Africa also makes provision for a right of access to information held by private persons if this information is needed to protect another right.⁸⁹⁹ Neither Namibian nor Swaziland's legislation makes provision for access to information held by private persons. The Swaziland EMB makes provision for a very comprehensive and modern system for access to information where it make provision for internet access to this information.⁹⁰⁰ This is something both South Africa and Namibia can take note of and consider for inclusion in future legislation.

893 S 50(2)(a)-(j) of EMB.

894 S 50(3) of EMB.

895 S 51(1) of EMB.

896 S 51(1) of EMB.

897 S 51(4) of EMB.

898 Ss 52, 53 and 54 of EMB.

899 S 32 of the *Constitution of the Republic of South Africa, 1996*.

900 S 50(3) of EMB.

3.3.15 *Reasons and appeal*

Appeal in South Africa should be directed to the Minister of DEAT or to the MEC for the provincial department who is responsible for authorising or rejecting the proposed activity.⁹⁰¹ An appeal must be lodged in writing within 30 days from the date on which the record of decision⁹⁰² was issued to the applicant.⁹⁰³ An appeal must set out all the facts as well the grounds of appeal and must be accompanied by all the relevant documents or certified copies of it.⁹⁰⁴ The minister or relevant provincial MEC may, after considering all the relevant facts and supportive documents, decide to uphold the original decision with or without modifications, or to reverse the original decision. In the last instance the minister should also issue a revised record of decision.⁹⁰⁵ In terms of the South African common law as well as the Constitution,⁹⁰⁶ reasons have to be given by the authority for the decisions made by the authority according to the authorisation of the project (administrative action).⁹⁰⁷

Any person who feels aggrieved by a decision made by the relevant authority in terms of these regulations may appeal.⁹⁰⁸ The South African Constitution makes provision that a broad spectrum of people may seek appropriate relief in respect of any breach or threatened breach of any right provided for in the Bill of Rights.⁹⁰⁹ In this case it would be in respect of any breach or threatened breach of any provision concerning the protection of the environment in the public interest.⁹¹⁰ In addition to the *locus*

901 Reg 11(1) of GN R1183.

902 See 3.3.11 Consideration and Record of Decision.

903 Reg 11(1) of GN R1183.

904 Reg 11(2) of GN R1183.

905 *EIA Guideline Document*.

906 S 33 of the *Constitution of the Republic of South Africa*, 1996.

907 See also *Promotion of Just Administrative Act*.

908 S 35 of ECA.

909 S 38 of the *Constitution of The Republic of South Africa*, 1996 provides that the following people can approach the court: (a) Someone acting in his own interest; (b) someone who acts on behalf of someone else who is unable to institute such proceedings in their own name; (c) someone acting in the interest of or on behalf of a group or class of people; (d) someone acting in the public interest; and (e) an association acting on behalf of its members.

910 S 24 of the *Constitution of the Republic of South Africa*, 1996.

standi clause in the Constitution,⁹¹¹ NEMA also provides that a person may approach the court in the interest of protecting the environment.⁹¹²

In regard to awarding costs, the court may decide not to award costs against a person or group of persons who failed to secure the relief sought in respect of any breach or threatened breach in regard to the protection of the environment. In this case the court must be of the opinion that the person or group of persons acted reasonably out of concern for the public interest or in the interest of protecting the environment and had made due efforts to use means reasonable for obtaining the relief sought.⁹¹³ The court may also on application in the case where a person or a group of persons have secured the relief, award costs on appropriate scale to persons (advocate or attorney) who provided free legal assistance or representation in the applicable case or the court may order the party against whom relief is granted to pay any reasonable costs for the investigation of the matter and its preparation for the proceedings.⁹¹⁴ NEMA also provides aggrieved people with an option to use alternative dispute resolution mechanisms⁹¹⁵ such as conciliation and arbitration⁹¹⁶ but this, however, does not exclude recourse to the courts. The *NEMA Amendment Bill* also makes provisions for Appeals that may be directed towards the Minister or MEC.⁹¹⁷ The *NEMA Amendment Bill* makes further provision that the minister or MEC may, either consider or decide an appeal or appoint an appeal panel to consider and advise the minister or MEC on the appeal.⁹¹⁸

In terms of the Namibian EMA any person who feels aggrieved by a decision of the EC under this act, or under powers conferred by regulation, may appeal against such decision to the SDC in the prescribed manner within the prescribed period and upon

911 S 38 of the *Constitution of the Republic of South Africa, 1996*.

912 S 32(f) of NEMA.

913 S 32(2) of NEMA.

914 S 32(3)(a)-(b) of NEMA.

915 Ss 18 and 19 of NEMA.

916 In terms of the *Arbitration Act 42 of 1965*.

917 S 43(1) of *NEMA Amendment Act*; also see 4.2.10 Appeals.

918 S 43(5) of *NEMA Amendment Act*.

payment of the prescribed fee.⁹¹⁹ The record of decision⁹²⁰ can also stipulate the body to which an appeal may be lodged.⁹²¹

The EMA makes provision for the same spectrum of people as in South Africa (Constitution and NEMA) that will have legal standing in respect of any breach or threatened breach of any provision of EMA or of any law concerned with the protection of the environment.⁹²² The EMA, similar to NEMA, gives a person legal standing to act in the interest of the environment.⁹²³

If any person feels aggrieved after the decision made by the SDC in regard to the appeal, he or she may appeal against it to the minister⁹²⁴ in the same way as the first appeal.⁹²⁵ The SDC or minister (as the case may be) may after considering such an appeal decide to confirm, set aside or vary the decision of the EC or the SDC (as the case may be) or they may decide to make such order as it shall deem fit. The relevant authority may also order that the prescribed fee that must be paid by the applicant, or a part of it, be refunded to the applicant.⁹²⁶ Different from South Africa the Namibia, EMA does not stipulate when the fee, or part of it, will be repaid. The South African legislation, however, does not make provision for a second authority to whom the appellant can appeal if they are not satisfied with the outcome of the first appeal.

In spite of the provisions of appeal,⁹²⁷ any person whose interest is affected by a decision of an administrative body under EMA, may within 30 days after the record of decision has been published in the *Government Gazette*, request such body in writing to furnish reasons for the decision within 30 days after receiving the request.⁹²⁸ The

919 S 33(1) of EMA.

920 See 3.3.11 Consideration and Record of Decision.

921 S 26(f) of EMA.

922 S 3 of EMA.

923 S 3(e) of EMA.

924 Minister of Environment and Tourism.

925 S 33(2) of EMA.

926 S 33(3) of EMA.

927 S 33 of EMA.

928 S 34(1) of EMA.

aggrieved person may within 30 days after having been furnished with reasons or after the expiration of the period within which reasons had to be furnished, apply to the High Court to review the decision.⁹²⁹ Different from NEMA, EMA does not make provision for alternative dispute resolution mechanisms as an alternative to appeal.

In terms of the Swaziland EAARR, an appeal may be lodged by any person who has either a substantial interest in the decision of the authority⁹³⁰ or who is aggrieved by its decision⁹³¹ and has paid the prescribed appeal fee.⁹³² The appeal must be directed in writing to the minister⁹³³ in accordance with the prescribed form and within the specified time.⁹³⁴

An appellant must pay an appeal fee of five hundred Emalangeni to the Account-General before the appeal is heard.⁹³⁵ The minister may seek an expert opinion, if the nature of the issue necessitates it, in order to determine an appeal.⁹³⁶ The minister shall decide each appeal in terms of the *Swaziland Environmental Authority Act* and must take the environment policy, practice and objectives of the act into account.⁹³⁷ After considering all the relevant facts the minister may decide to confirm, vary or rescind the decision, or make any order which the authority is competent to make.⁹³⁸

The appellant shall be responsible for charges, costs and any other expenses incidental to the appeal including charges for an expert opinion.⁹³⁹ The Swaziland EAARR does not include, like Namibian and South African legislation, provisions that the minister

929 S 34(2) of EMA.

930 Reg 9(1)(a) of EAARR.

931 Reg 9(1)(b) of EAARR.

932 Reg 9(1)(c) of EAARR.

933 Minister responsible for environmental protection.

934 S 17(1) of the *Swaziland Environmental Authority Act* 15 of 1992.

935 Reg 9(2) of EAARR.

936 Reg 9(3) of EAARR.

937 Reg 9(4) of EAARR.

938 S 17(2) of the *Swaziland Environmental Authority Act* 15 of 1992.

939 Reg 9(5) of EAARR.

may order that the prescribed fee, or a part of it, be refunded to the appellant.⁹⁴⁰ The appellant will be responsible for the prescribed appeal costs no matter what the outcome of the case may be. The Swaziland EAARR also just makes provision for people who have a substantial interest in the decision or who are aggrieved by the authority's decision⁹⁴¹ in respect of legal standing. The EAARR does not make provision for such a broad spectrum of people to have the right to approach the court as in the case of South Africa⁹⁴² and Namibia.⁹⁴³ The EAARR provides that reasons must be given for the decisions that the authority made in writing.⁹⁴⁴

The Swaziland EMB expands the legal standing of people in respect of approaching the court to lodge an appeal. Any person may, within 60 days of the granting or refusal of an approach, lodge an appeal if that person has applied for an approval of a project and the application has been refused⁹⁴⁵ or if a person objects to the approval conditions imposed by the minister.⁹⁴⁶ The EMB also provides that a person can appeal against the granting of an approval⁹⁴⁷ or if a person objects to a regulation deeming a project or class of projects to be likely, or not to be likely to have an effect on the environment, or to significantly affect the public interest.⁹⁴⁸ Similar to South Africa and Namibia, the Swaziland EMB also provides that any person may lodge an appeal on behalf of the environment. This takes place when the conditions in the licence, permit or authorisation do not provide adequate protection to the environment or to human beings against the risk of adverse effects.⁹⁴⁹

Similar to the EAARR, the EMB stipulates that the appellant must pay a prescribed appeal fee which must be delivered to the director of the SEA within a specified

940 S 33(3) of EMA and s 32(2)-(3) of NEMA.

941 Reg 9(1)(a)-(c) of EAARR.

942 S 38 of the *Constitution of the Republic of South Africa*, 1996 and s 32 of NEMA.

943 S 3 of EMA.

944 Reg 8(a) of EAARR.

945 S 14(a) of EMB.

946 S 14(b) of EMB.

947 S 14(c) of EMB.

948 S 14(d) of EMB.

period after the date on which the appellant was given notice of the decision.⁹⁵⁰ The EMB⁹⁵¹ provides that the director may take the same decisions as provided for in the *Swaziland Environmental Authority Act*.⁹⁵² The EMB also provides that the authority must notify the appellant in writing of the reasons for dismissing an appeal application.⁹⁵³ Neither the Swaziland EAARR nor the EMB make provision for alternative dispute resolution mechanisms as an alternative procedure to appeal.

3.3.16 Costs and Benefits

As far as costs and benefits of EIA systems are concerned, no information was available concerning Namibia and Swaziland in this regard.⁹⁵⁴ In South Africa, the results of a business survey included some information concerning the cost if an EIA was undertaken under the voluntary IEM procedure. This information was presented in the *White Paper on Environmental Management Policy*⁹⁵⁵ and the findings were that 25% of proposed activities spent less than 1% on EIAs, 13% spent between 2 and 4% and 60% were unsure what percentage of costs went to EIAs. The South African practitioners, however, felt that this result was an over estimate of the financial costs of EIA, which they believe to be between 0,2 and 0,4% of project costs.⁹⁵⁶ This estimate value is supported by the World Bank's view that the cost of an EIA rarely exceeds 1% of total project cost.⁹⁵⁷ Concerning the costs of an EIA procedure the *NEMA Amendment Bill* makes provision that the minister and MEC may make regulations prescribing fees to be paid for the consideration and processing of

949 S 81(2) of EMB.

950 S 82(1) of EMB.

951 S 82(4)-(7) of EMB.

952 S 17(2) of the *Swaziland Environmental Authority Act* 15 of 1992.

953 S 82(8) of EMB.

954 See 2.13 Costs and Benefits of EIA systems.

955 *White Paper on Environmental Management Policy* for South Africa N749/1998 GG 18894 15 November 1998 (Final).

956 Wood 1999 *South African Geographical Journal* 57.

957 Anon EXPLORER http://www.ecs.co.sz/em_info.htm 27 September 2001.

applications for environmental authorisation.⁹⁵⁸

According to Wood's information almost all stakeholders, including proponents, consultants, the public and decision-making authorities believed EIA undertaken under the voluntary IEM procedure has changed their behaviour and those of others. The stakeholders almost unanimously agreed that environmental quality and acceptability of decisions are improved by EIA.⁹⁵⁹

Many developers in South Africa are of the opinion that the mandatory EIA requirements are a burden. They believe that the *EIA Regulations* are entangling many small developers who have no previous experience of conducting an EIA. According to the World Bank, the budgets of small project development are much more modest than large projects' budgets, which can make costs of small projects in proportion much more than large projects.⁹⁶⁰ The public, environmental groups and relevant authorities, however, perceive EIA to be a valuable environmental management tool that can be regarded as a worthwhile process.⁹⁶¹

3.3.17 *International implications*

In South Africa, provisions are made in NEMA for cases where an activity will affect the interest of more than one province or traverse international boundaries or cases where an activity will affect compliance with obligations resting on the Republic in terms of customary or conventional international law.⁹⁶² The South African minister may make regulations in accordance with subsection (3) and (4) which stipulates the procedure to be followed and the report to be prepared in investigating, assessing and communicating potential impacts. The *NEMA Amendment Bill* also includes these provisions.⁹⁶³

958 S 24(4)(c) of *NEMA Amendment Bill*.

959 Wood 1999 *South African Geographical Journal* 57; also see 2.3 Purpose of EIA.

960 Anon EXPLORER http://www.ecs.co.sz/em_info.htm 27 September 2001.

961 Wood 1999 *South African Geographical Journal* 57.

962 S 24(6) of NEMA.

963 S 24(6)(a)-(b) of *NEMA Amendment Bill*.

The Namibian EMA does not have a similar provision.

The Swaziland EAARR stipulates that after the authority has received either the IEE and CMP or EIA report and CMP⁹⁶⁴ and these documents are made available for public review,⁹⁶⁵ the authority may also forward the relevant reports and documents to neighbouring countries.⁹⁶⁶ This process will only take place where the authority believes a project is likely to have a significant impact on the environment of the neighbouring country or when that country requests the particular documents and reports.⁹⁶⁷

The Swaziland EMB also makes provision that relevant reports and documents be forwarded to the neighbouring country in the case where the project in Swaziland is likely to have a significant adverse effect on that country.⁹⁶⁸ The minister shall also invite comments from the neighbouring country within a specified period.⁹⁶⁹ The authority must, before granting an approval, consider the comments of neighbouring countries.⁹⁷⁰

The effect that a project will have on the environment must be taken into consideration by the authority before a decision regarding the project is made. Consideration of other countries' environmental well being is important to create sustainable development. The sharing of communal resources has the effect that pollution, for instance, in one country can also have negative consequences on the environment of the neighbouring countries. It is, therefore, very important that countries must make provision for comments from other countries in cases where projects can have transboundary significant effects.

964 Reg 11(6) of EAARR.

965 Reg 11(7) of EAARR.

966 Reg 11(9) of EAARR.

967 Reg 11(9) of EAARR.

968 S 32(9) of EMB.

969 S 32(9) of EMB.

970 S 32(10) of EMB.

3.3.18 *Strategic Environmental Assessment*

Due to the extent of this dissertation and due to the comprehensiveness of this subject,⁹⁷¹ the three countries' legislation and provisions for SEA will not be discussed in detail.

The South African EIA regulations currently only apply to projects and do not make any provision for policies, plans and programmes. NEMA, however, requires that IEM be applied to "activities" and this term is defined to include projects as well as policies, plans and programmes.⁹⁷² The need for SEA is widely acknowledged in South Africa since previous EIA practice and the existing EIA regulations, have failed to take account of cumulative effects and sustainability issues, more generally.⁹⁷³ The *NEMA Amendment Bill* talks about SEA specifically.⁹⁷⁴

The Swaziland EAARR does not make any provision for the assessment of policies, plans and programmes. The Swaziland EMB, however, includes SEA as part of the chapter on IEM. EMB defines SEA as the assessment of the positive and adverse effects that implementation of legislation or of a public policy, plan and programme are likely to have on the enhancement, protection and conservation of the environment and on the sustainable management of natural resources.⁹⁷⁵ The EMB stipulates that when there is a possibility that a bill, regulation, public policy, programme or plan might have an adverse effect on the environment, the proponent is required to conduct a SEA⁹⁷⁶ and submit a SEA report to the minister and the authority for review. Similar to the provisions for EIA, the minister may order the documents to be subjected to public review and/or to a public hearing before making a final decision.⁹⁷⁷

971 See 2.4.14 Strategic environmental assessment.

972 S 23(b) of NEMA; also see 3.3.2 Definition of Environmental Impact Assessment.

973 Wood 1999 *South African Geographical Journal* 57.

974 S 24 (4)(b)(iii) of *NEMA Amendment Bill*.

975 S 31(2)(a) of EMB.

976 S 31(1)(a) of EMB.

977 S 31(10) of EMB.

The Namibian EMA makes provision for the assessment of projects as well as proposals.⁹⁷⁸ EMA defines proposal as a policy, plan or programme including bills, draft regulations and proposed amendments to existing legislation, which may have a significant effect on the Namibian legislation.⁹⁷⁹

The proponent according to EMA must submit the proposal to the EC after formulation, together with a written summary indicating how and to what extent the principles of environmental management have been taken into account in the proposal concerned.⁹⁸⁰ The EC may in consultation with the relevant authority invite further public comments or inputs or direct that the proposal must be subjected to a public hearing. Hereafter the EC must forward the documentation together with his or her comments and recommendations and written summaries of public comments or inputs received, to the SDC.⁹⁸¹ The SDC must then in consultation with the proponent assess the significant effects of the proposal on the environment⁹⁸² and then forward its comments and recommendations to the proponent, competent authority or to the cabinet (where the proposal pertains to bills, draft regulations and amendments to existing legislation).⁹⁸³

In both the Namibian EMA and Swaziland's EMB, it is clear that similar procedures are followed during SEA as during the EIA process. The Namibian EMA does, however, not make provision for a SEA report, because of the fact that the authority conducts the assessment, whereafter he or she comments to the relevant parties involved. According to Wood, the explicit provision for the assessment of policies, plans and programmes is important because policies, plans and programmes are implemented at different hierarchical levels, which may require different methods and procedures of environmental assessments. As discussed above, Namibian EMA and Swaziland's EMB make provision for separate SEA procedures. Wood also

978 See 3.3.2 Definition of Environmental Impact Assessment.

979 S 1 Definitions of EMA.

980 S 28(1) of EMA.

981 S 28(3) of EMA.

982 S 28(4)(a) of EMA.

983 S 28(4)(b) of EMA.

emphasises that a separate SEA report is important because it is also different from an EIA report which Swaziland comply with.⁹⁸⁴

3.4 CONCLUSION AND RECOMMENDATIONS

The above in depth discussion about the South African, Swaziland and Namibian EIA legislation revealed similarities in some instances, but also various differences. In comparing these three countries' EIA legislation it is important to take into account that the countries governmental and administrative systems differ. South Africa and Namibia are democratic countries with constitutions as their highest law, while Swaziland is a Kingdom with a fully autonomous government. South Africa is also a larger country with a larger population than Namibia and Swaziland.

South Africa is in the process of adopting environmental framework legislation and Namibia and Swaziland recently adopted new framework legislation, which are or will be the backbone of all their environmental legislation. South Africa is also in the process of revising its EIA legislation and must take note of the EIA legislation in Namibia and Swaziland (amongst others) in a process to try and align their legislation as far as possible. The purpose of this alignment is to try and avoid conflict in the case of transboundary projects or pollution.

Swaziland makes provision for a comprehensive EIA process, while Namibia's EIA process is much more streamlined. In some instances, the Swaziland EIA process is to be recommended because of its comprehensive description of the project and their public participation process, while Namibia's legislation just gives an outline of what the public participation process must conclude. On the other hand, the Namibian legislation is more realistic in the sense that it is a more concise process and through screening the authority can determine sooner if a project will require an EIA.

The Swaziland legislation can be regarded as an ambitious piece of legislation, but the question arises whether this legislation will have the kind of success it hopes for in practice. It is important to remember that all three countries are regarded as

⁹⁸⁴ Wood *Environmental Impact Assessment: A Comparative Review* 270.

developing countries and that they do not have the same strength of resources that developed countries possess. It is, therefore, important to have an EIA process which addresses all the issues sufficiently, but which keeps the limitations of the country and its people in mind.

A comparative analysis of the South African, Swaziland and Namibian legislation offers numerous potential opportunities for improving the current South African EIA legislation. Possible learning points for South Africa include:

- an explicit definition of EIA
- a more comprehensive explanation of the term "significant impact"
- only one set of regulations which control all EIA procedures in South Africa with one complete list of all possible activities, which may have a detrimental effect on the environment (including mining activities among others)
- the establishment of a single environmental authority
- some sort of administration or council where consultants who comply with a certain requirements can register as qualified environmental consultants
- a definition of the public participation process
- clearly defined roles, responsibilities and duties of the interested and affected parties, the applicant and the authority in respect of the public participation process
- legal requirement on the authorities to make provision for internet access to information
- a more concise but thorough preliminary process that must be conducted before an EIA is required; either screening or scoping
- a more streamlined regulatory EIA process
- explicit provisions for monitoring and auditing of projects
- clear regulatory provisions must be provided for in the case of transboundary environmental impacts.

All three countries may learn from one another because Swaziland and Namibia only recently accepted their Environmental Management Acts and South Africa is revising

its EIA legislation. There is, therefore, still time to align the EIA regulations in order to promote sustainable development in these countries.

CHAPTER 4 PROPOSED AMENDMENTS

4.1 INTRODUCTION

As discussed in Chapter 3, South Africa is currently in the process of reviewing its EIA legislation with the intent of redrafting the EIA legislation. In this chapter a brief overview of the different amendment proposals available to the author is given.⁹⁸⁵

Since the beginning of October 2000, the consultants who have been contracted to undertake the review and redrafting of Chapter 5 of NEMA and the new EIA regulations, together with the representatives of DEAT, have consulted with most (but not all) provincial environment departments concerning the redrafting process.⁹⁸⁶

The purpose of these consultations have been to provide both information on the law reform process on the one hand and to obtain input for the drafting process from those who have previously been responsible for or involved in the implementation of the 1997 regulations on the other hand.⁹⁸⁷

The focus of this chapter gives the provisional suggestions⁹⁸⁸ for the new EIA regulations and sets out the comments of some of the participating parties.⁹⁸⁹ A further focus of this chapter is to have a brief look at the newest developments⁹⁹⁰ in this regard.

985 The information used in the chapter is based on the information available to the writer on 30 October 2003, and the proposed amendments to the NEMA (National Environmental Management Second Amendment Bill, 2003). The new regulations will only be available in 2004.

986 Several stakeholders, including the IAIA and certain academics have also been consulted; see Progress report of Peter Lazarus (24 November 2000).

987 Progress report of Peter Lazarus (24 November 2000).

988 Progress report of Peter Lazarus (24 November 2000).

989 Preliminary provincial comments by Gauteng Department of Agriculture, Conservation, Environment and Land Affairs; Western Cape Department of Environmental, Cultural Affairs and Sport; Comments by Minister of Environmental Affairs and Tourism (hereafter referred to as MoE) and DEAT.

990 Until September 2003.

4.2 PROVISIONAL SUGGESTIONS AND COMMENTS

4.2.1 *EIA framework legislation*

It is the intention of DEAT to develop framework regulations to be adapted by other levels of government (national, provincial and local).⁹⁹¹ The then Western Cape Department of Environmental Affairs agreed with this proposal and stipulated that the framework legislation must prescribe the minimum national standards, which may be adopted or extended by provinces or other departments.⁹⁹²

The intention of DEAT was to provide for delegation of authority to the lowest level of government, as provided for in the Constitution.⁹⁹³ With regard to provisions for delegation to the lowest level of government, it was generally supported by the provinces. The Gauteng Department of Environmental Affairs⁹⁹⁴ proposed that options be explored for the delegation of functional responsibility to local levels, whilst, in certain circumstances, retaining the final responsibility at the provincial level.⁹⁹⁵ According to Lazarus, the new regulations must also contain clear circumstances where local governments may grant provincial governments power to act on their behalf. Provisions must also be made for the management of impacts that transcend local government boundaries.⁹⁹⁶

4.2.2 *Terminology*

In order to have a sound and successful EIA process it is understandable that the general terms used throughout the regulations must be clearly defined and standardised. The commonly used term "environment" is a problematic definition

991 Progress report of Peter Lazarus (24 November 2000) 8.

992 Comments by Western Cape Department of Environmental Affairs (December 2000) 8..

993 Chapter 4 of the Constitution.

994 Hereafter referred to as Gauteng Department.

995 Progress report of Peter Lazarus (24 November 2000) 8.

996 See 2.5.3 Transboundary Environmental Impact Assessment.

because the NEMA definition differs from the one in ECA⁹⁹⁷ and is often misunderstood. The MoE suggested that the definition of "environment" must be clarified to include socio-economic effects on the environment.⁹⁹⁸ Western Cape Department of Environmental and Cultural Affairs and Sport⁹⁹⁹ agreed with this suggestion and stipulated that the new regulations should enable authorities to require detailed economic information relating to an activity.¹⁰⁰⁰ The *NEMA Amendment Bill*, however, excluded socio-economic conditions and cultural issues as areas where the potential impact must be determined. DEAT allege that that the definition of "environment" is wide enough to include socio-economic conditions and cultural issues, but it is not the case as the definition¹⁰⁰¹ of "environment" does not include socio-economic conditions. The effect will be that people will not be required to conduct socio-economic assessments when a new project is in process. The cultural heritage issues are covered under the *National Heritage Resources Act 25* of 1999 where a heritage impact assessment is required in certain circumstances.

Additional terms that need attention in the same regard include "sustainable detrimental effects" in the ECA "significant pollution or degradation" in NEMA "reasonable measures" in NEMA and "adequate public participation" in the EIA regulations. However, with regard to these terms, Lazarus advised that it would be unwise to define terms such as "significant", "reasonable" and "adequate" exhaustively in the legislation. A degree of flexibility must be retained which, under certain guidelines, may be clarified over time in practice or even in the courts.¹⁰⁰² Also, some of the specific terms need to be clarified.¹⁰⁰³ In the described comments no contents were mentioned in relation to this terminology problem. The *NEMA Amendment Bill* did not define these terms.

997 Comments by MoE December 2000 15; also see 2.2 The Nature of Environmental Impact Assessment.

998 Comments by the MoE (December 2000) 15.

999 Hereafter referred to as Western Cape Department of Environmental Affairs.

1000 Western Cape Department of Environmental Affairs (December 2000) 30.

1001 S 1 of NEMA.

1002 Progress report of Peter Lazarus (24 November 2000) 8.

1003 See 3.3.4 Activities requiring an EIA.

4.2.3 Activities requiring an EIA

The different authors and departments of involved parties raised a variety of concerns regarding the current list of activities promulgated under ECA.¹⁰⁰⁴ The different parties also expressed a wide variety of proposals as possible solutions to their concerns. Briefly, the concerns expressed in this regard are:¹⁰⁰⁵

- the regulations identified are limited by their application to activities as opposed to the impacts of those activities¹⁰⁰⁶
- the aspect of desirability or need of the activity is not currently considered in the EIA regulations
- the EIA regulations in the current form are strictly activity based and do not provide for the protection of sensitive environments
- mining should not be excluded from the listed activities
- an EIA should be made a requirement for a mining permit.

The suggested solutions and proposals for the identified problems will be briefly discussed. Lazarus¹⁰⁰⁷ stipulated in his progress report that there was widespread recognition that the new regulations should regulate the impacts of the activities rather than the activities itself. In the process of shifting the scope of the regulations to the impact of the activity, it is further suggested that these regulations should include specific criteria such as the location and magnitude of activities or the extent of the impact. Finally, he stated that in order to manage the impacts of the activities, it is vital to address the cumulative impacts of new and existing impacts.

In comments from the Western Cape Department the following suggestion was

1004 Schedule 1 of GN R 1182.

1005 Progress report of Peter Lazarus 24 November 2000.

1006 See 3.3.4 Activities requiring an EIA.

1007 The Law Reform Sub-Committee Meeting on 24 November 2000.

supported.¹⁰⁰⁸ They suggested that only a few activities with a clearly significant impact should be nationally listed, therefore, leaving the provinces to list activities, localities and sensitive areas of lesser significance. In the case of cumulative impact assessment they stipulated that this process would only be of value if the authorities set maximal levels against which cumulative totals can be assessed. Spinks¹⁰⁰⁹ emphasises the importance of addressing the issue of cumulative impacts. According to him, the current EIA regulations have failed to come in terms with such impacts. The consequence of this failure is that the "last" development suffers because of the cumulative effects of the activities preceding it. The *NEMA Amendment Bill* does not cover this issue either.

In the comments report by the MoE,¹⁰¹⁰ the issue concerning listed activities was approached from a different angle. According to the MoE, the point of departure for EIAs must still be the activity. However, regulations should include a 'catch all clause', which would allow relevant authorities to make the regulations applicable when they deem it necessary, such as an activity that is not specifically listed but may have a significant environmental impact. The MoE follows the suggestions of Winstanley¹⁰¹¹ who recommends that the new regulations should provide for two lists of activities that require EIAs. The first list should be mandatory for all provinces and contain all major developments that have major environmental impacts. The second list should only be applicable to provinces that have the listed types of activities. Provinces should have some discretion, however, it should be balanced against the requirement for certainty so as not to discourage development. In addition to this, he also suggests that each province should be granted the ability to identify sensitive areas in which additional criteria should apply, similar to Lazarus' provisional suggestions as well as the Western Cape's commentary.

1008 Comments by Western Cape Department of Environmental Affairs December 2000.

1009 Spinks *et al* "EIAs as an obstacle to sound environmental management in South Africa: A practitioner's perspective" (unpublished paper delivered at the South African IAIAsa Congress 1-3 September 2003 Wilderness) 309.

1010 Comments by MoE (December 2000).

1011 Winstanley T "EIAs: One year later" *SAJELP*.

The direction of both of these suggestions have their mutual advantages and disadvantages. A negative aspect of Lazarus' and the Western Cape's suggestion to shift the focus onto the activity's assessed impacts is that it would place severe demands on the capacity of the provincial departments to implement the regulation. The MoE's suggestion, on the other hand, would lead to uncertainty, which could hamper much needed development in the country. It is clear from the discussion that the current listed activities, which focus on the activity itself without combining it with other criteria, are insufficient. As discussed, the Swaziland EMB and EAARR categorises its activities according to the significance of the project's impact considering how well known and how easy it is to predict the impacts.¹⁰¹² It focuses on the impacts of the activity as mentioned in the parties' comments and suggestions.

The *NEMA Amendment Bill* makes provision for the minister and member of executive council (hereafter referred to as MEC) to identify activities as well as geographical areas as suggested in the above discussion. The *NEMA Amendment Bill* stipulates that the minister may, with concurrence of the MEC, and every MEC may in the prescribed manner:¹⁰¹³

- identify activities which may not be commenced without prior authorisation from the minister or MEC
- identify geographical areas based on environmental attributes in which specified activities may not be commenced without prior environmental authorisation from the competent authority and specify such activities
- identify existing activities in respect of which an application for an environmental authorisation must be made to the competent authority.

The *NEMA Amendment Bill* also makes provision that the minister, and every MEC with the concurrence of the minister, may prepare compilations of information and maps that specify the attributes of the environment, in particular geographical areas,

1012 See 4.3 Activities requiring an EIA.

1013 S 24(2) of the *NEMA Amendment Bill*.

including the sensitivity, extent, interrelationship and significance of such attributes which must be taken into account by every competent authority.¹⁰¹⁴

Lazarus¹⁰¹⁵ and the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs¹⁰¹⁶ raised an issue regarding the desirability or need of an activity. Lazarus stipulated that it is a factor that should be catered for and outlined by the new regulations, but neither of the researched commentators described how this issue should be approached.

With regard to the identification of sensitive environments for which EIAs will become automatically required, Lazarus stipulates that the scope of the regulations concerning the impact of the activities will extend to the impact of activities but not to the activities themselves. The Gauteng Department made suggestions that the following categories can be included in order to deal with this matter: ecologically sensitive areas, socially or culturally sensitive areas, sensitive existing land use and certain polluted or degraded areas.¹⁰¹⁷ Lazarus suggests that a provision should be made for certain sensitive areas at a national level such as certain wetlands, estuaries, and catchment areas, among others. Provinces, however, should be given the flexibility to declare and manage regionally sensitive areas.¹⁰¹⁸

The Western Cape Department stated that both activities and the affected environment should be listed in the new legislation. This department also agrees that provinces should be given the flexibility to declare and manage regionally sensitive areas. The emphasis should be on the identification and management of development within sensitive areas rather than the control and management of development in non-sensitive areas.¹⁰¹⁹

1014 S 24 (2A) of the *NEMA Amendment Bill*.

1015 Progress report of Peter Lazarus (24 November 2000); Comments by Gauteng Department (November 2000).

1016 Hereafter referred to as Gauteng Department.

1017 Comments by Gauteng Department (November 2000).

1018 Progress report of Peter Lazarus (24 November 2000).

1019 Comments by Western Cape Department of Environmental Affairs (December 2000).

The MoE also agrees that it is important to focus on the sensitivity of the environment with regard to requiring an EIA. ECA¹⁰²⁰ provided for "limited development areas", but NEMA is silent on whether the power to declare limited development areas is preserved or not. It is suggested that a provision be made for separate regulations made applicable in identified sensitive environments in accordance with the principle of "limited development areas" provided for under the ECA. Not one of the discussed countries makes provision for the listing of sensitive environments.¹⁰²¹ As stipulated above, the *NEMA Amendment Bill* makes provision for the preparation of information and maps that specify the attributes of the environment, in particular geographical areas, which include the sensitivity, extent, interrelationship and significance of such attributes.¹⁰²²

According to Lazarus, there was broad support to include mining as an identified activity, however, there is concern over the capacity of the provinces¹⁰²³ to cope with the increased workload that will result.¹⁰²⁴ The Gauteng Department suggested that the Department of Minerals and Energy¹⁰²⁵ should still continue to issue permits but the environmental authorisation should fall within the EIA regulations.¹⁰²⁶ According to Lazarus, this will create a dual process that is both costly and administratively cumbersome. According to the other provinces, adequate co-operation between the two departments might be the solution regarding the management of the mining impacts as is the case of the Northern Province.¹⁰²⁷ It seems as if the new regulations

1020 S21(1) of ECA.

1021 See 3.3.4 Activities requiring an EIA.

1022 S 24(2A) of the *NEMA Amendment Bill*.

1023 In Kwazulu Natal mining activities are already included in their list of activities in EIA regulations.

1024 Progress report of Peter Lazarus (24 November 2000).

1025 Hereafter referred to as DME.

1026 Preliminary Provincial comments by Gauteng Department (November 2000).

1027 New *Minerals Development and Petroleum Development Bill* also makes provision for EIAs which leads to confusion.

issued under the *NEMA Amendment Bill* will include mining in its list of activities.¹⁰²⁸ Both Namibia and Swaziland's EIA legislation include mining activities as part of their listed activities.¹⁰²⁹

The following activities were suggested for inclusion in the list of activities that should be made subject to EIAs:¹⁰³⁰

- activities that result in densification without a change in land use, for example subdivision of rural agricultural land
- the disturbance of natural vegetation or landscapes including coastal dunes
- marine dredging and dumping
- coastal zone development
- development within 50 meters of urban streams and rivers
- marinas and harbours in inland waters
- structures associated with mariculture
- the disturbance of any wetland, river or estuarine system. (At present only filling of wetlands is listed. Many disturbances other than filling may be significantly detrimental, for example, draining wetlands)
- the construction or upgrading of towers for any purpose over 20 meters high or where a tower of any height is out of character or visually or otherwise detrimental in the surrounding environment
- the construction of bridges, causeways and the like should be included

1028 Gordon "Co-operative governance and strategic environmental assessment: Rustenburg as a case study" (Unpublished paper delivered at IAIA congress 1-3 September 2003 Wilderness) 2.

1029 See 3.3.4 activities requiring an EIA.

1030 Progress report of Peter Lazarus (24 November 2000) 14; Comments by MoE (December 2000) 8.

- notwithstanding the provisions in the Forest Act, it has been suggested that afforestation should also be subject to the EIA process.

According to the MoE, the mentioned "disturbance of natural vegetation of landscapes" and the "disturbance of any wetland, river" should *inter alia* be mentioned above as types of sensitive environments and therefore not as activities.¹⁰³¹

The Western Cape Department also suggests that the following activities should included:

- Change of land use from industrial or commercial to any other land use
- Outdoor advertising structures and signs

In regard to the uncertainty over the ambit of the regulations where land use is concerned, there is a general consensus that in reference to "change of land use,"¹⁰³² it should be defined to include any actual change of land use and not be limited to changes in legal zoning of land use.¹⁰³³ This point of view was substantiated in the recent decision in *Myburg Park Langebaan (Pty) Ltd v Langebaan Municipality and others*.¹⁰³⁴ The court mentioned that an actual change of land use is envisaged in regulation 2 of GN R 1182 and not merely an application for permission to change the land use. The term "change in land use," therefore, means a factual change of land use rather than one triggered by law, an example being application for rezoning. It is unsure if the new regulations will include the suggested activities.

4.2.4 Ill-defined allocation of responsibility for environmental management

The MoE stipulates the ill-defined allocation of responsibility for environmental management as one of the most significant weaknesses in EIA and IEM. It is

1031 Comments by MoE (December 2000) 10.

1032 Reg 2 of GN R 1182.

1033 Progress report of Peter Lazarus (24 November 2000) 14.

1034 Unreported judgement delivered by Selikowitz J in the Cape of Good Hope Provincial Division Case number 4459198 8 May 2001.

in South Africa: accommodating diverse sectoral interest, especially in the field of pollution control and waste management.¹⁰⁴¹ Namibia faced two choices, either to consolidate all the expertise, infrastructure, administration and enforcement into one body or to create a mechanism to facilitate and ensure integration and co-operation between the respective agencies. Because of the problems with sectoralism, Namibia decided on the second choice. As a result, the Act attempts to consolidate the previous fragmented sectoral legislation and to promote a standardised environmental approach towards development planning.¹⁰⁴²

4.2.5 Independence of EIA consultant

The current requirement for the consultant to be "independent" is regarded by a number of institutions and provinces as problematic.¹⁰⁴³ According to Lazarus it is accepted that in truth, the consultants are never truly independent. This artificial separation of the consultant from the developer, merely excludes potentially competent consultants from the environmental practice.¹⁰⁴⁴

One of the presented solutions is the establishment of an accreditation system.¹⁰⁴⁵ This recommendation is supported by Wood¹⁰⁴⁶ as he suggested the use of obligatory consultants, with the necessary knowledge and expertise, throughout the EIA process. The concern, however, with this criteria is that it may be a too exclusionary certification and it may also make it necessary for government officials to become certified.¹⁰⁴⁷

1040 Comments by MoE (December 2000) 10.

1041 See 3.3.5.1 Relevant environmental authority.

1042 Tarr and Figueira 1998 "Namibia's Environmental Assessment framework:-the evolution of policy and practice"11.

1043 See 3.3.5.3 Consultant.

1044 Progress report of Peter Lazarus (24 November 2000) 8.

1045 Comments by MoE (December 2000) 14.

1046 Wood *Environmental Impact Assessment: A Comparative Review* 230.

1047 Progress report of Peter Lazarus (24 November 2000) 8.

Other suggestions include the appointment of consultants by the government, requiring consultants to register with the government or requiring an independent review of the reports submitted.¹⁰⁴⁸

On the contrary, some view the payment of consultants by the developer as problematic and, therefore, it is suggested that this requirement be precluded in the new regulations.¹⁰⁴⁹ The Western Cape Department strongly supports this suggestion.

The *NEMA Amendment Bill* makes provision for any association to apply to the minister to register its members as EIA practitioners. These associations must apply to the minister to be appointed as a registration authority.¹⁰⁵⁰ The *NEMA Amendment Bill* prescribes the contents of the application.¹⁰⁵¹ After the minister considers an application, the minister may by notice in the *Government Gazette* either appoint the association as a registration authority¹⁰⁵² or refuse to appoint the association as a registration authority.¹⁰⁵³ The minister may further for good cause and on notice to the association terminate the appointment of an association as a registration authority.¹⁰⁵⁴ The minister must maintain a register of all associations appointed as registration authorities.¹⁰⁵⁵

4.2.6 EIA procedure

Most provinces agreed that the existing regulations do not adequately provide for a

1048 See 4.2.7 Provisions for the independent review panels.

1049 Comments by MoE (December 2000) 14.

1050 S 24G(1) of *NEMA Amendment Bill*.

1051 S 24G(2) of *NEMA Amendment Bill* requires that the application must contain: (a) the constitution of the association; (b) a list of the members of the association; (c) a description of the criteria and process to be used to register EIA practitioners; (d) a list of the qualifications of the members of the association responsible for the assessment of applicants for registration; (e) a code of conduct regulating the ethical and professional conduct of members of the association; and (f) any other prescribed requirements.

1052 S 24 (g)(3)(a) of *NEMA Amendment Bill*.

1053 S 24G(3)(b) of *NEMA Amendment Bill*.

1054 S 24G(4) of *NEMA Amendment Bill*.

1055 S 24G(5) of *NEMA Amendment Bill*.

screening mechanism¹⁰⁵⁶ to decide which activities should be subjected to an EIA.¹⁰⁵⁷ According to Lazarus, in practice the screening process collapsed into the scoping process. The Western Cape Department of Environmental Affairs regarded the inadequate provisions for a formidable screening process as one of the fundamental weaknesses of the existing regulations. The department recommended that the new regulations should include a statutory classification or screening procedure.¹⁰⁵⁸ All the proposed scheduled activities, or activities occurring in sensitive areas,¹⁰⁵⁹ should be submitted to the relevant authorities for review. The authority might, after reviewing the screening documentation provided by the applicant, decide to authorise the activity conditionally or alternatively require that the application be subjected to initial assessment or to a full impact assessment.¹⁰⁶⁰ It seems as if the new EIA regulations will make provision for a screening process and will exclude the comprehensive scoping process. According to Spinks¹⁰⁶¹ an effective screening process is important because far too often, small projects which pose little risk of severe environmental impact are forced to proceed through unnecessarily lengthy and complicated EIA process. As discussed in the previous chapter, the Namibian EMA makes explicit provisions for a screening process,¹⁰⁶² which stipulates that the relevant authorities may determine whether an EIA is required and if so, it allows them the power to issue an environmental clearance for the project.¹⁰⁶³

With regard to the scoping procedure it has been argued that the requirement for both a plan of study for scoping and a scoping report¹⁰⁶⁴ is an over-regulation of a responsible profession.¹⁰⁶⁵ The MoE has expressed that an accreditation system would

1056 Progress report of Peter Lazarus (24 November 2000) 7.

1057 See 3.3.7 Screening.

1058 Comments by the Western Cape Department of Environmental Affairs (December 2000) 13.

1059 See 4.2.1 Activities requiring an EIA; also see 3.3.4 Activities requiring an EIA.

1060 Comments by Western Cape Department of Environmental Affairs (December 2000) 13.

1061 Spinks *et al* "EIAs as an obstacle to sound environmental management in South Africa" 312.

1062 See 3.3.7 Screening.

1063 S 22(1) of EMA.

1064 See 3.3.8 Scoping.

1065 Comment by the MoE (December 2000) 11.

allow the scoping procedure to be left to professional judgement.¹⁰⁶⁶ However, certain provinces were of the view that the plan of study for the scoping process should not be omitted from the new regulations since it outlines the framework for the entire process.¹⁰⁶⁷ On the other hand, the MoE commented that it is important that all stakeholders agree on the scope of the report at an early stage to avoid backlashes in the future process, resulting in requests for additional information, time and resources.¹⁰⁶⁸

The Western Cape Department of Environmental Affairs also agreed that a comprehensive scoping process would avoid unnecessary delays during the EIA process.¹⁰⁶⁹ Another recommendation in this regard is to retain a plan for scoping that is more streamlined as a result of the current *EIA Guideline Document* that is too comprehensive and involves both screening and a mini-EIA.¹⁰⁷⁰

The same criticism was levelled against the EIR¹⁰⁷¹ procedure, which also requires a plan of study for the EIR and the EIR itself and details of the contents of both.¹⁰⁷² The MoE was of the opinion that a more streamlined process is needed, particularly in light of the fact that the provinces lack capacity to regulate the process efficiently. Some of the provinces, however, similarly to the screening process, argued that the plan of study for the EIR should be retained as this sets out the issues which are to receive additional specialist studies in the EIR.¹⁰⁷³

According to Lazarus, stages in the EIA process that require departmental input or departmental decisions and public participation should be clarified.¹⁰⁷⁴ The new

1066 See 4.2.5 Independence of EIA consultant.

1067 Progress report of Peter Lazarus (24 November 2000) 7.

1068 Comment by MoE (December 2000) 12.

1069 Comment by Western Cape Department of Environmental Affairs (December 2000) 13.

1070 Progress report of Peter Lazarus (24 November 2000) 7.

1071 See 3.3.10 EIA report.

1072 Comments by MoE (December 2000) 12.

1073 Progress report of Peter Lazarus (24 November 2000) 7.

1074 Progress report of Peter Lazarus (24 November 2000) 7.

regulations should also clarify at what stage in a development project an EIA becomes necessary. Lazarus recommends that the EIA process should commence at the planning/design stage of the project.¹⁰⁷⁵ EIA should ideally be an interactive process integrated into the entire project cycle.¹⁰⁷⁶ Most provinces also recommended that the new regulations make provisions concerning a specified time frame for the processing of an EIA applications.¹⁰⁷⁷ The Western Cape Department of Environmental Affairs, however, does not believe that strict time frames are appropriate for this type of application, due to a variety of reasons.¹⁰⁷⁸

4.2.7 Provision for independent review panel

Lazarus¹⁰⁷⁹ stipulated in the progress report that there is wide support for the establishment of independent review panels to assist provinces in reviewing applications that require specialist input, due to the highly technical issues covered in the application. The only review provided in current EIA regulations is the review by the regulatory authority. NEMA, however, provides for such independent review as suggested above. According to NEMA this should be done by all authorities, specialists, interested and affected parties and the public.¹⁰⁸⁰ Concerning the cost of this type of review, it was suggested that it should be borne by the project proponent.

In contrast to Lazarus and NEMA, the Western Cape Department did not support the notion of an independent application review panel for all the applications; nor did they support the linkage of such a panel to an appeal review tribunal.¹⁰⁸¹ On the other hand they agreed that in some cases independent review is useful where the department lacks certain technical and scientific expertise. However, expertise and knowledge are

1075 See 2.4.14 Strategic Environmental Assessment.

1076 Progress report of Peter Lazarus (24 November 2000) 7.

1077 Progress report of Peter Lazarus (24 November 2000) 7.

1078 Comments by the Western Cape Department of Environmental Affairs (December 2000) 15.

1079 Progress report of Peter Lazarus (24 November 2000) 11.

1080 Comments by MoE (December 2000) 14.

1081 Comments by Western Cape Department of Environmental Affairs (December 2000) 22.

not needed for all the applications.¹⁰⁸² This department, therefore, suggested that the new regulations ought to make it possible for the authorities to have a specialist document reviewed independently at the applicant's expense by a reviewer appointed by the authority. The *NEMA Amendment Bill* makes provision for specialist reviewers.¹⁰⁸³ The minister may appoint specialist reviewers in two cases:

- where technical knowledge is required and expertise is lacking within authority or
- where a high level of objectivity is necessary in order to decide whether the information contained in the documents is adequate for decision-making or if it requires amendment.

It is evident from this section that specialist reviewers will not be used for all the applications, but only in exceptional circumstances.

4.2.8 Post-decision implementation and monitoring

The 1997 regulations, as already discussed in Chapter Three of the dissertation, were widely criticised for failing to provide post-decision monitoring and implementation.¹⁰⁸⁴ It has been suggested that the new regulations should list activities or impacts that require EMPs/EMSs in addition to the EIA. Compliance with the EMP/EMS should then be made part of the authorisation.¹⁰⁸⁵ It was suggested by the Western Cape Department of Environmental Affairs that the decision to impose an EMP/EMS on specific activities should be left to the discretion of the relevant authority. However, the department proposed that in cases where lists of activities for which an EMP/EMS are obligatory are provided for, the discretion should be extremely limited.¹⁰⁸⁶ The Swaziland EAARR and EMB make provision for a list of

1082 Comments by Western Cape Department of (Environmental Affairs December 2000) 22.

1083 S 24J of *NEMA Amendment Bill*.

1084 See 3.3.12 EIA follow-ups.

1085 Progress report of Peter Lazarus (24 November 2000) 12.

1086 Comments by the Western Cape Department of Environmental Affairs (December 2000) 23.

projects (determined annually), for which environmental audit reports are required.¹⁰⁸⁷

With regard to post-decision monitoring, Lazarus suggested that regular compliance reports should be submitted to the regulatory authorities.¹⁰⁸⁸ The Western Cape Department of Environmental Affairs, however, stipulated that post-decision monitoring would place significant obligations on the environmental authorities concerned. As the department stressed, most authorities do not currently have the capacity to undertake monitoring of compliance with conditions that are attached to such authorisation.¹⁰⁸⁹ It is, therefore, evident that because of a lack of human resources, even if ongoing monitoring and auditing by independent environmental consultants were required, the authorities would not always be able to review and act upon such audits.¹⁰⁹⁰

The Western Cape Department suggested, on its part, that conditional authorisation (as is current practice) of all significant activities should require the compilation and implementation of construction and operational phase EMPs, monitoring and auditing. This could be established by an environmental monitoring committee, representative of all the interested and affected parties. This suggestion is similar to Gilpin's recommendation of using an advisory board consisting of industry, government, contractors, independent experts and public representatives as a tool for managing audits.¹⁰⁹¹ As for the lack of human resources to implement and monitor the regulations, the MoE presented the possibility of obtaining financing for this from the proponent.¹⁰⁹²

Apart from the difficulty in undertaking monitoring and auditing, it is essential that these processes must be included in the new EIA regulations in order to achieve

1087 Reg 5(1)(a) of EAARR and s 33(g) of EMB.

1088 Progress report of Peter Lazarus (24 November 2000) 12.

1089 Comments by Western Cape Department of Environmental Affairs (December 2000) 23.

1090 Comments by MoE (December 2000) 11.

1091 Gilpin *Environmental Impact Assessment* 27.

1092 Comments by MoE (December 2000) 11.

proper management.¹⁰⁹³ It can also give effect to more speedy and effective EIA, as problems from the past could be avoided. The *NEMA Amendment Bill* makes provision for this issue as it stipulates that every environmental authorisation must as a minimum ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity.¹⁰⁹⁴ It further stipulates that the minister or MEC may direct any person who has commenced or continued any listed activity in contravention of chapter 5 to compile a report containing, among other things, an environmental management plan.¹⁰⁹⁵

4.2.9 Public participation process

Concern has been raised regarding the lack of sufficient regulations for the public participation process. Some of the probable solutions regarding this issue were set forward by certain provinces, all of which include the suggestion that minimum requirements must be set for the participation process.¹⁰⁹⁶ The problem with these suggestions, however, are that a vast array of projects with different magnitudes and varying impacts exists, therefore, it is not always possible to require standard procedures to be followed in every case.¹⁰⁹⁷

Another suggestion made in this regard has been that the plan of study for scoping should contain a description of the proposed public participation process. By following this suggestion, flexibility could be retained in the process allowing the regulatory authority to make decisions or provide input both in approval of the plan of study for scoping and the authorisation process.¹⁰⁹⁸

One of the problems experienced with the current public participation process is the

1093 Wood *Environmental Impact Assessment: A comparative Review* 19.

1094 S 24E of *NEMA Amendment Bill*.

1095 S 24H(iv) of *NEMA Amendment Bill*.

1096 Progress report of Peter Lazarus (24 November 2000) 9.

1097 See 3.3.13 Consultation and participation.

1098 Progress report of Peter Lazarus (24 November 2000) 9.

fact that alternatives to the proposed development are not discussed with interested and affected parties.¹⁰⁹⁹ According to the Western Cape Department of Environmental Affairs, the consideration of alternative courses of action is essential during all phases of the process: screening, scoping, initial assessment and full assessment. Therefore, the new legislation should require the consideration and discussion of reasonable alternative courses of action in all phases of assessment.¹¹⁰⁰ The *NEMA Amendment Bill* does not address this issue.

Provinces with large rural populations were particularly concerned about the method of advertising mentioned in current regulations. These methods are stipulated as being inadequate in the rural areas.¹¹⁰¹ The Western Cape Department of Environmental Affairs made the suggestion that the advertising guidelines could be expanded to incorporate appropriate methods for use in rural areas. The department did not, however, stipulate what these appropriate methods should include.¹¹⁰²

One of the MoE's criticisms against the present regulations was that the duty to conduct public participation and to ensure that the government is given the opportunity to participate in the process rests on the initiative of the proponent.¹¹⁰³ According to the MoE, the government should initiate its participation as well as the participation of all the other interested and affected parties.¹¹⁰⁴ This is the case in Swaziland and Namibia where it is the responsibility of the relevant authority to conduct a public participation process.¹¹⁰⁵

All the parties involved agreed that public participation is critical throughout the process. Therefore, it is important to describe and clarify the different roles of the authority and the public. Recommendations have been made that would require public participation "on completion of a draft scoping report/initial assessment" and

1099 Progress report of Peter Lazarus (24 November 2000) 10.

1100 Comments by Western Cape Department of Environmental Affairs (December 2000) 19.

1101 Progress report of Peter Lazarus (24 November 2000) 10.

1102 Comments by Western Cape Department of Environmental Affairs (December 2000) 19.

1103 See 3.3.2 Proponent.

1104 Comments by MoE (December 2000) 14.

"on completion of a draft EIR", rather than after each action as stated by Lazarus in the progress report.¹¹⁰⁶ The motivation behind this is that by the time a final scoping report (or EIR) is completed, they are required to submit it to the proper authorities for consideration and at that late stage it is uncertain what the purpose of public participation would really achieve.¹¹⁰⁷ The *NEMA Amendment Bill* does not set out specified requirements for the public participation process, but it can be assumed that the new EIA regulations will contain sufficient procedures regarding the public participation process. The *NEMA Amendment Bill* however empowers the minister or MEC to direct any person who has commenced or continued with any listed activity in contravention to chapter 5 to compile a report containing a description of the public participation process followed during the course of compiling the reports. This include all comments received from interested and affected parties and an indication of how the issues raised have been addressed.¹¹⁰⁸

4.2.10 Appeals

The procedure for appeals provided for in the 1997 regulations was unanimously regarded as being inadequate by the participating parties.¹¹⁰⁹ There was concern over the fact that in practice, appeals are often heard by the same official or same department that originally made the decision that is the subject matter of the appeal. On appeal however, the decision simply bears the signature of another official of the same department.¹¹¹⁰ As provided for in the EIA regulations, an aggrieved party must appeal to the minister or provincial authority under section 35(3) of ECA, depending on who the authority was who made the decision.¹¹¹¹ The MoE recommended that specific provisions must be made for appeals set against the decision of the minister in

1105 See 3.3.13 Consultation and participation.

1106 Comments by Western Cape Department of Environmental Affairs (December 2000) 19.

1107 Comments by Western Cape Department of Environmental Affairs (December 2000) 19.

1108 S 24H(iii) of *NEMA Amendment Bill*.

1109 Progress report of Peter Lazarus (24 November 2000) 11.

1110 Progress report of Peter Lazarus (24 November 2000) 11.

1111 Reg 11 of GN R 1183.

the circumstances where the act deems the minister the responsible decision-making authority.¹¹¹²

It has been suggested that legislation should provide for an independent appeal process, which would provide a consistent and coherent structure for the appeal process.¹¹¹³ The MoE further suggested that national legislation should prescribe a minimum streamlined process for appeals allowing provinces to add on their own unique procedures.¹¹¹⁴ These new provisions for appeal must cater to any decision made in terms of NEMA and the new regulations.¹¹¹⁵

The participating provinces and other interested groups supported the notion that appeals should be heard by an independent tribunal.¹¹¹⁶ Lazarus also suggested that the appeal tribunal could dovetail the tribunal that is being considered for the administration of the conflict management provisions in NEMA. The Western Cape Department and the MoE strongly favoured the view of Lazarus.¹¹¹⁷

The *NEMA Amendment Bill* makes provision for circumstances where any affected person may appeal to the minister against a decision taken by any person acting under a power delegated by the minister.¹¹¹⁸ The section also makes provision for circumstances where the appeal may be directed towards the relevant MEC against a decision taken by any person acting under a power delegated by the MEC.¹¹¹⁹ Section 43(5) makes provision that the minister or MEC may, either consider or decide an appeal or appoint an appeal panel to consider and advice the minister or MEC on the appeal. This section does not, however, stipulate the process that must be followed when the minister is the responsible decision-making authority.

1112 Comments by MoE (December 2000) 16.

1113 Comments by MoE (December 2000) 16.

1114 Comments by MoE (December 2000) 16.

1115 Progress report of Peter Lazarus (24 November 2000) 11.

1116 Progress report of Peter Lazarus (24 November 2000) 11.

1117 Comments by the Western Cape Department (December 2000) 22.

1118 S 43(1) of *NEMA Amendment Bill*.

1119 S 43(2) of *NEMA Amendment Bill*.

4.2.11 Provision for other environmental management tools

According to Lazarus,¹¹²⁰ there is general consensus that the scope of Chapter 5 of NEMA must be widened and provisions must be made for a range of environmental management tools and not only for EIA as is presently provided. As discussed in the previous chapter,¹¹²¹ the term "activities" is used in chapter 5, which includes not only projects but also policies, programmes and projects.¹¹²² This forms the basis for this expansion. Lazarus stipulates, however, that the chapter should not prescribe which tool ought be used in particular circumstances, but should provide a framework for what the use of each tool entails. The Western Cape Department of Environmental Affairs agreed with these suggestions by Lazarus.¹¹²³

NEMA provided for EMP to assess organs of state. It was suggested that provisions be made for the assessment of policies, programmes and plans of the private sector. With regard to the provision for the assessment of policies, programmes and plans of the private sector, the Western Cape Department of Environmental Affairs is of the opinion that the government does not have the capacity to implement such provisions. They were, however, of the opinion that it would be valuable to incorporate provisions which would enable an authority to require private organisations to compile and comply with EMPs if the authority deemed it to be necessary. The *NEMA Amendment Bill* enables the minister or MEC to direct any person who has commenced or continued any listed activity in contravention to chapter 5 to compile a report containing, among other things, an EMP.¹¹²⁴

In Lazarus' Progress Report, it is stipulated that although there are benefits to using SEAs in particular, there is widespread concern that these management tools should not be made mandatory until firm standards and policies are in place.¹¹²⁵ The *NEMA*

1120 Progress report of Peter Lazarus (24 November 2000) 14.

1121 See 3.3.2 Definition of Environmental Impact Assessment.

1122 See 2.4.14 Strategic Environmental Assessment.

1123 Comments of Western Cape Department (December 2000) 23.

1124 S 24H of *NEMA Amendment Bill*.

1125 See 2.4.14 Strategic Environmental Assessment.

Amendment Bill stipulates that the minister and MEC may make regulations laying down the procedure to be followed, and the institutional arrangements, in respect of the preparation and evaluation of EIAs, SEAs, EMPs, risk assessment, lifecycle assessment and similar environmental management instruments.¹¹²⁶

According to the Gauteng Department, there should be guidance with respect to the implementation of regulations for SEA. According to them, SEAs would be useful for sensitive areas, (World Heritage sites for example), as well as advantageous for housing developments within an approved Land Development Objective (hereafter referred to as LDO) process. They also agree that any other use of SEA, which is legally binding, should be used with the necessary caution until firm standards and policies are in place.

The Gauteng Department also stipulated the negative points with regard to SEAs. According to the department, in the implementation of cleaner technology or improved technologies it would not be possible to use a SEA approach, as there would be no legal obligations to stop a gradual development if the impacts are becoming unacceptable. The use of SEA also limits public participation. Utilising a SEA could disguise the activities of polluting industries and could reduce the potential to apply mitigatory measures.

From the above it is clear that standards and norms must be in place. There could be an enormous amount of work generated if a framework is not clearly defined, stipulating who should be conducting a SEA and for what purpose.

Both Namibia's EMA and Swaziland's EMB provide for SEA. In particular, Namibia makes an explicit provision of proposals.¹¹²⁷ Some of the aspects contained in this section of EMA can be taken into consideration. For instance, the explicit provision for public participation¹¹²⁸ and the focusing on mitigation with the objective of minimising negative impacts on the environment while maximising benefits and

1126 S 24(4)(b)(iii) of *NEMA Amendment Bill*.

1127 S 28 of EMA.

1128 S 28(2)(a)–(b) of EMA.

promoting compliance with the principles of environmental management.¹¹²⁹ The Swaziland EMB also provides for a comprehensive SEA process,¹¹³⁰ which may also be taken into account during the amendments. The *NEMA Amendment Bill* makes provision for multiple environmental management tools and will give affect to it through regulations.¹¹³¹

4.3 PROPOSED EIA PROCESS

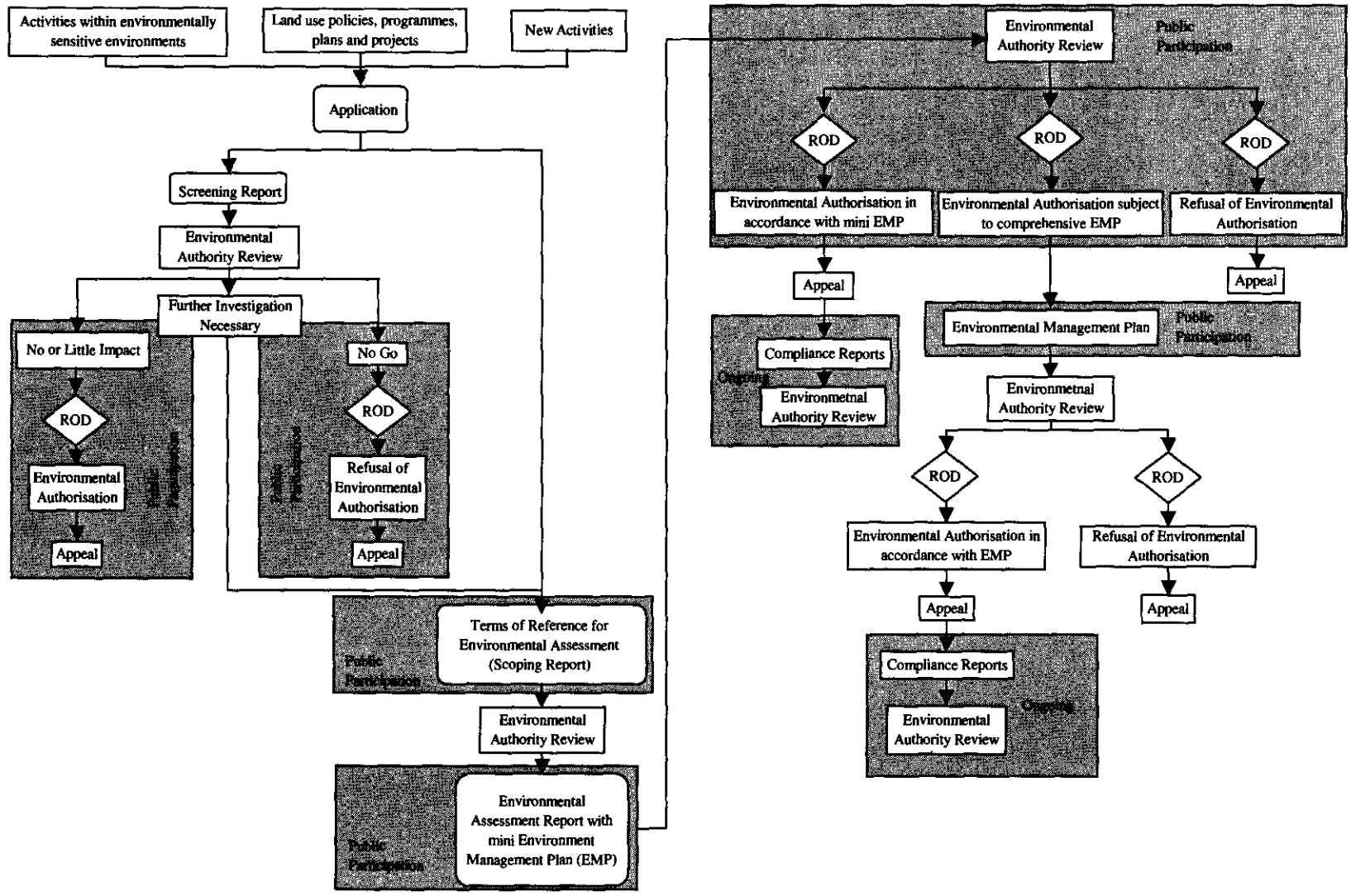
As a result of the comments and recommendations of the provinces and other participating parties, Lazarus set out the following flow chart for the proposed EIA process:

Figure 4.1

1129 S 28(4)(a) of EMA.

1130 S 31 of EMB.

1131 S 24(4) of *NEMA Amendment Bill*.



The following activities were proposed to be subjected to these new regulations:¹¹³² activities within an environmental sensitive environment, land use policies, programmes, plans and projects, as well as all new activities.¹¹³³ When the proposed activity falls within these categories of activities as stipulated above, the relevant authority must provide the applicant/consultant with the necessary application form (contents will be described in the new regulation). After the submission of the application to the relevant authority, the applicant and/or consultant (as stipulated in the new regulations) may be requested to submit a screening report (contents will be provided for), or in circumstances that will be specified in the new regulations, a scoping report may be requested.¹¹³⁴

When the relevant authority requests a screening report, this report must be submitted to the relevant authority for review. When the activity has little or no impact on the environment and after public participation has taken place, the relevant authority may issue an environmental authorisation to undertake the activity and publish a environmental authorisation.¹¹³⁵ The relevant authority may in certain circumstances (that will be specified in the new regulations) decide to refuse environmental authorisation. The relevant authority must also publish the environmental authorisation and make provisions for public participation in order to make an informed decision. All the interested and affected parties also have the right to appeal against any decision of the relevant authority. The authority may also decide that the information contained in the screening report is inadequate and request that further investigation is necessary.

After the screening report is reviewed and the relevant authority has requested further

1132 The new regulations were not available yet and it was impossible to ascertain whether the proposed process is going to be accepted.

1133 See 4.2.1 Activities requiring an EIA.

1134 It seems as if the new regulations will make provision for ex post facto approval for projects that was stated without an EIA under ECA. Distinction will be made between EIAs under ECA and EIAs under the *NEMA Amendment Bill*.

1135 In the *NEMA Amendment Bill* do not talk about a record of decision any more, but makes provision for an environmental authorisation which is broader than a record of decision as it can include also other conditions to protect the environment.

investigation, the applicant must submit a scoping report after conducting a public participation process, containing the terms of reference for the environmental assessment. After the proponent hands in the scoping report, the relevant authority must review the report. When the scoping report is accepted, the proponent is required to hand in an EAR, which must include a mini EMP. During the preparation of EAR, a public participation process must be conducted.

The relevant authority must review the information contained in the EAR taking into consideration the comments of the public. The authority may decide to refuse an environmental authorisation, or may decide to grant an environmental authorisation in accordance with the mini-EMP. In this case the proponent is also obliged to hand in an ongoing compliance report (the frequency of these reports will be specified in the new regulations). The relevant authority may also issue environmental authorisation subjected to a comprehensive EMP. The proponent must then hand in an EMP after which it will be reviewed by the relevant authority. Following the revision, the authority may decide to issue environmental authorisation in accordance with the EMP, whereafter an ongoing requirement will rest on the proponent to hand in compliance reports that will also be subjected to review by the authority. The relevant authority may also decide, after the handing in of the EMP, to refuse environmental authorisation. After any of these decisions the relevant authority must publish a environmental authorisation and all the interested and affected parties will have the right and opportunity to appeal against the decision.

4.3.1 DISCUSSION OF NEW DEVELOPMENTS

The proposed flow chart broadened the current EIA regulation's scope not only by subjecting new activities to these regulations, but also by analysing activities within an environmental sensitive environment.¹¹³⁶ The EIA regulations will also be applicable to land use policies, programmes, plans and projects, which would make it possible to take the environment into account earlier in the planning process.¹¹³⁷

1136 See 4.2.3 Activities requiring an EIA.

1137 See 2.4.14 Strategic environmental assessment.

The proposed flow chart also makes provisions for a comprehensive screening mechanism which includes public participation in order for the relevant authority to make an informed decision. As indicated in the flow chart, the screening report must be submitted to the relevant authority for review whereafter the authority can come to a decision. The decision may be to grant environmental authorisation, to refuse environmental authorisation or to demand that further investigation must be done.

The scoping stage is not as comprehensive as in the current EIA regulations since it only makes provisions for a scoping report where terms and references for the environmental assessment will be determined. The plan of study for scoping is omitted in this proposal.¹¹³⁸ This scoping report must also be reviewed by the relevant authority to assure that all the required information is included in the scoping report.

The plan of study for the EAR is also omitted from the proposed regulations as a more streamlined process is introduced.¹¹³⁹ The proponent is required, however, to submit an EAR together with a mini-EMP, which is not a requirement in the current EIA regulations. After revision, the authority may also decide that a more comprehensive EMP is necessary. While the relevant authorities review the reports during the EIA process, a provision is made that the public's view and comments be taken into account, as this was not provided for in the current EIA regulations.

The proposed flow chart also makes provisions for the submission of an ongoing compliance report, which a relevant authority must review. Throughout the proposed process the authority is required to publish records of decisions regarding all the decisions made during the process. The involved parties also have a right to appeal after all the decisions have been made by the authority, which is in line with

1138 See 4.2.6 EIA procedure; also see 3.3.8 scoping.

1139 See EIA report preparation; also see 4.2.6 EIA procedure.

Wood's¹¹⁴⁰ recommendations that the right of appeal must exist at various stages in the EIA process.

1140 Wood *Environmental Impact Assessment: A comparative review* 230.

4.4 CONCLUSION

After an overview of the different amendment proposals certain concerns regarding the previous legislation was discussed whereupon suggestions were given by the numerous parties involved in the reviewing process. The provisions of the *NEMA Amendment Bill* were, where applicable, included in order to determine where gaps in the legislation still exist. The following table set out the concerns, suggestions and the new amendments.

Table 4.1

Concerns regarding previous legislation and regulations	Suggestions	<i>NEMA Amendment Bill</i>
Aspect of desirability or need of the activity are not discussed.	Should be catered for and outlined by the new regulations.	Not included in the <i>NEMA Amendment Bill</i> .
Regulations are only applied to activities as opposed to the impacts of those activities.	The point of departure must still be the activity. Regulations should include two lists of activities: first list should be mandatory for all provinces and second list should only be applicable to provinces that have the listed types of activities.	S 24(1) stipulates that in order to give effect to the general objectives of IEM laid down in Chapter 5 of NEMA the potential impact on the environment of listed activities must be considered, investigated, assessed and reported. The <i>NEMA Amendment Bill</i> focuses on activities and geographical areas as opposed to the impacts of those activities.
EIA regulations are strictly activity based and do not provide for the protection of sensitive environments.	Each province should have the ability to identify sensitive areas in which additional criteria should apply.	S 24(2) makes provision for the minister and MEC to identify activities (existing and new) as well as geographical areas which may not commenced without prior authorisation by the competent authority.
Mining should be included as a listed activity.	The DME should still continue to issue permits but environmental authorisation should fall within the EIA regulations.	It seems as if new regulations will include mining in its list of activities.

<p>Cumulative impacts of new and existing impacts are not considered.</p>	<p>Authorities must set maximal levels against which cumulative totals can be assessed.</p>	<p>S 24 (3) sets out the minimum guidelines for procedures dealing with EIAs and include the investigation of the potential impacts, including cumulative effects, of the activity and its alternatives. No further requirements concerning cumulative effects are discussed.</p>
<p>Ill-defined allocation of responsibility for environmental management in NEMA.</p>	<p>Uniform departmental policy regarding the administration of the regulations was suggested.</p>	<p>S 24C lay the procedure down for identifying the competent authority. It is evident from the act that the minister and MEC must identify the competent authority responsible for granting environmental authorisation when listing activities in terms of S 24(2). The <i>NEMA Amendment Bill</i> makes provision for several competent authorities which leads to the effect that the regulations are not uniformly applied.</p>
<p>Requirement for consultant to be "independent" is regarded as problematic.</p>	<p>The establishment of an accreditation system that would determine the knowledge and expertise of the EIA consultants was suggested.</p>	<p>S 24G makes provision for any association to apply to the minister to register its members as EIA practitioners. In the prescribed contents of the application the association must list, among other things, the qualifications of the members of the association.</p>
<p>Existing regulations do not adequately provide for a screening mechanism.</p>	<p>The new regulations should include a statutory classification or screening procedure. All the proposed scheduled activities, or activities</p>	<p>It seems as if the new regulations will provide for a screening process where after the competent authority will either decide if it will</p>

	occurring in sensitive areas, should be submitted to the relevant authorities for review. After reviewing the screening documentation the authority may decide to conditionally authorise the activity or alternatively require that the application be subjected to a full EIA.	give conditional authorisation, or if a full EIA will be required.
It is regarded that a requirement for both a plan of study for scoping and a scoping report is over-regulation.	An accreditation system would allow the scoping procedure to be left to professional judgement. It is also suggested that the scoping procedure must be made more streamlined.	It seems as if the scoping procedure will be excluded from the EIA process.
The requirement for a plan of study for EIR and the EIR itself is regarded as too comprehensive.	A more streamlined process is needed, particularly in the light of the fact that the provinces lack capacity to efficiently regulate the process.	It is not clear how the new regulations will handle this issue.
Failure to provide post-decision monitoring.	The new regulations must include a list of activities or impacts that require EMPs/EMSs in addition to the EIA. Compliance with the EMP/EMS should then be made part of the authorisation. It was also suggested that regular compliance reports must be submitted to the competent authority.	S 24E stipulates that every environmental authorisation must as a minimum ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity. S 24H further stipulates that the minister or MEC may direct any person who has commenced or continued any listed activity in contravention of chapter 5 to compile a report containing, among other

		things, an environmental management plan.
There is a lack of sufficient regulations for the public participation process. The alternatives to the proposed development are not discussed with interested and affected parties.	Minimum requirements must be set out for the public participation process. It is suggested that the consideration of alternative courses of action is essential during all phases of the EIA process.	The <i>NEMA Amendment Bill</i> does not discuss this issue, but it seems as if more contents will be given to the public participation process in the new regulations. S 24H, however, empowers the minister or MEC to direct any person who has commenced or continued with any listed activity in contravention to chapter 5 to compile a report containing a description of the public participation process followed during the course of compiling the reports. This include all comments received from interested and affected parties and an indication of how the issues raised have been addressed.
The duty to conduct public participation and to ensure that the government is given the opportunity to participate in the process rests on the initiative of the proponent	The government should initiate its participation as well as the participation of all interested and affected parties.	The <i>NEMA Amendment Bill</i> does not discuss this issue.
Competent authorities do not always have the necessary knowledge to review the EIA applications sufficiently.	The establishment of independent review panels was recommended to assist provinces in reviewing applications that require specialist input, due to the highly technical issues covered in the applications. It was further suggested that review panels must only be used where the reviewer lacks the certain	24J makes provision for this suggestion. The minister may appoint specialist reviewers where technical knowledge is required and expertise is lacking within authority or where a high level of objectivity is necessary in order to decide whether the information contained in the documents is adequate for decision-

	technical and scientific expertise and not for all the applications.	making or if it requires amendment.
Current EIA legislation and regulations only focus on EIAs and does not give attention to a wider range of environmental tools	The EIA legislation should include the assessment of policies, plans and programmes as well as the conducting of EMPs and other management tools.	S 24(4) makes explicit provision that the minister or MEC may make regulations concerning the preparation and evaluation of EIAs, SEAs, EMPs, risk assessments, lifecycle assessments and similar environmental management instruments.
Appeals provided for in the 1997 regulations are inadequate. Concerns that in practice appeals are often heard by the same official or same department that originally made the decision that is the subject to appeal.	Specified provisions must be made for appeals set against the decisions of the minister in circumstances where the act deems the minister the responsible decision-making authority. Further suggestions in this respect include the provision of an independent appeal process or an independent appeal tribunal.	S 43(1) and (2) of the <i>NEMA Amendment Bill</i> makes provision for circumstances where any affected person may appeal to the minister and also circumstances where a person may appeal to the MEC. S 43(5) makes provision that the minister or MEC may, either consider and decide an appeal or appoint an appeal panel to consider and advise the minister or MEC on the appeal. This section does not, however, stipulate the process that must be followed when the minister is the responsible decision-making authority.

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

This dissertation presents an evaluation of the strengths and weaknesses of the South African EIA system. The various stages and aspects of the South African EIA system are compared to Namibian and Swaziland's EIA legislation and are analysed against a set of fourteen evaluation criteria set out by Wood and supplemented by other writers. Wood's evaluation criteria, the South African EIA requirements under ECA and NEMA, the provisions under *NEMA Amendment Bill* and the EIA requirements under Namibian EMA and Swaziland's EMB and EAARR are briefly summarised below.

Table 5.1

Wood's evaluation criteria	South African EIA requirements under ECA and NEMA	Provisions under NEMA Amendment Bill	EIA requirements under Namibian EMA and Swaziland EAARR and EMB
<p>1. The EIA system must be based on clear and specific legal provisions that must be mandatory. Enforcement actions against any one of the participants in the EIA process must be provided for.</p>	<p>The EIA legislation is clear, legally specified and mandatory. Probable that all the steps of the EIA process specified in the EIA legislation will be enforceable through the courts.</p>	<p>The new NEMA Act repealed the former ECA and will be framework legislation that will determine the minimum national standards that all EIA procedures must comply with. Ss 24F(2) and S 24H(2) makes provision for enforcement actions against any participant in the EIA process.</p>	<p>Namibia and Swaziland recently accepted the EMA and the EMB respectively, which will serve as framework legislation. Both sets of legislation provide for legally specified and mandatory legislation, which include enforcement actions.</p>
<p>2. The relevant environmental impacts of all significant actions must be assessed prior to implementation. The EIA system must apply to both public and private actions and must include policies, plans and programmes.</p>	<p>The EIA regulations provide for comprehensive coverage of impacts of almost all environmentally significant projects but exclude (among others) mining-related activities. The EIA regulations apply to most public and private environmentally significant projects but not to policies, plans and programmes. NEMA,</p>	<p>S 24(2) makes provision for the minister and MEC to identify activities as well as geographical areas, which may not commence without prior environmental authorisation from the competent authority. It seems as if the new regulations will include mining-related activities in its list of activities. S 24(4) makes explicit provision that the minister and</p>	<p>The Namibian EMA and Swaziland's EAARR and EMB provide for comprehensive coverage of impacts of almost all environmentally significant projects and include mining-related activities. Both countries' legislation makes provision for the assessment of policies, plans and programmes as well.</p>

	however, requires that IEM be applied to policies, plans and programmes as well as to projects.	MEC may make regulations concerning the preparation and evaluation of SEA.	
3. Evidence of the consideration, by the proponent, of the environmental impacts of reasonable alternative actions must be demonstrated in the EIA process.	The EIA regulations makes considerable provision for the consideration of alternatives in the scoping report, the plan of study for EIR and in the EIR itself. The <i>EIA Guideline Document</i> provides advice on the identification of alternatives and describes the use of the no-action alternative.	S 24(3)(b) stipulates that the procedure for the investigation, assessment and communication of the potential impacts of activities must as a minimum included the investigation of the potential impact of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage and assessment of the significance of that potential impact.	Namibian EMA and Swaziland EAARR and EMB stipulate that the EIA report must include a description of the project and reasonable alternatives.
4. Screening of actions for environmental significance must take place in order to determine whether or not an EIA report must be prepared for a particular action. Two broad approaches can be used to establish the significance of the action. The first is to use a list of activities, thresholds and criteria and the second is to establish a procedure for the discretionary determination of	The EIA regulations make use of the first approach by using a list of activities in order to determine which actions should be assessed. There are, however, very few thresholds to eliminate minor activities and no classification of affected environments are included.	It seems as if the new EIA regulations will provide for a screening process, whereafter the competent authority will either decide to give conditional authorisation, or require a full EIA.	Namibian and Swaziland's legislation make use of listed activities. Namibian EMA also makes use of a screening process where the proponent is required to submit clear and detailed information for the discretionary determination of which action should be assessed. This screening process also includes public participation.

<p>which action should be assessed.</p>			
<p>5. Scoping of the environmental impacts of actions must take place and specific guidelines must be produced. The scoping process must be mandatory and consultation with the decision-making and environmental authorities and interest groups could assist in the identification of all potentially significant impacts.</p>	<p>In the EIA process heavy emphasis is placed on the scoping process. The EIA regulations permit the relevant authority to request a preliminary scoping document, namely a plan of study for scoping as well as a scoping report. The Scoping report contains specified information and is mandatory. This report must also include a description of the public participation process.</p>	<p>It seems as if the new EIA regulations will cut out the comprehensive scoping process and only include screening. During the screening process the relevant authority will determine the scope of the EIA, whereafter the relevant authority will decide if an EIA is necessary or not.</p>	<p>In Namibia the Ecom, in agreement with the proponent and CA, shall determine the form, scope and content of the assessment. The scoping process does not precede the EA process but is part of it. The scoping procedure is mandatory in both Namibia and Swaziland. Namibia makes provision for adequate consultation with the relevant authority but no provision is made for public participation while the scope of the EA is determined. Swaziland EAARR and EMB make provision for adequate public participation during the scoping procedure.</p>
<p>6. EIA reports must meet prescribed content requirements and must make provision for checks to prevent the release of inadequate EIA reports.</p>	<p>The acceptance of the plan of study for EIR ensures that the content requirements are met, but no formal checks on adequacy exist. The EIA regulations does</p>	<p>S 24(4) empowers the minister and MEC to lay down procedures to be followed in respect of the preparation and evaluation of EIAs. S 24G makes provision for</p>	<p>The Namibian EMA and the Swaziland EAARR and EMB prescribe content requirements that are comprehensive and concise. The Namibian EMA</p>

<p>Consultants that prepare the EIA report must be accredited in order to ascertain that consultants have the necessary knowledge to prepare an EIA report.</p>	<p>not make provision for the accreditation of EIA consultants.</p>	<p>any association to apply to the minister to register its members as EIA practitioners. In the prescribed contents of the application the association must list, among other things, the qualifications of the members of the association.</p>	<p>makes provision for checks to be made on the contents of the EAR before it is released. Swaziland's legislation does not make provision for this. The accreditation of EIA consultants does not exist in Swaziland or Namibia.</p>
<p>7. EIA report must be publicly reviewed by accredited review consultants as a method to ensure objectivity. The setting-up of an independent review body that has been selected from acknowledged experts is recommended. The public must also have the opportunity to address their concerns regarding the EIA report and the actions it describes. After the environmental authority and public have reviewed the EIA report the competent authority must have the right to demand the proponent to provide further information if the EIA report is inadequate.</p>	<p>The EIA regulations are silent about EIR review beyond demanding that the relevant authority must consider the application after it received the EIR that complies with the regulations. The EIA regulations, in particular, does not contain any formal requirements for objectivity or for consultation and participation in the review process. NEMA, however, specifies that that procedures for independent review must be implemented, but the EIA regulations does not give any contents to this requirement.</p>	<p>S 24J makes provision for this suggestion. The minister may appoint specialist reviewers where technical knowledge is required and expertise is lacking within authority or where a high level of objectivity is necessary in order to decide whether the information contained in the documents is adequate for decision-making or if it requires amendment.</p>	<p>Swaziland EAARR and EMB make provision for a comprehensive review process where public involvement plays an extremely important role. Namibia makes provision for the review process, but it does not describe the process in detail or make provision for public participation.</p>
<p>8. The main decision must be</p>	<p>Decision-making takes place</p>	<p>S 24J makes provision for</p>	<p>In Namibia and Swaziland the</p>

<p>made by a body other than the proponent and it is also important that public participation must be included during this stage. All the relevant parties must have the right to appeal against the decision by the competent authority.</p>	<p>either after a scoping report or an EIR has been accepted. The <i>EIA Guideline Document</i> provide no detail about the factors which ought to be considered in reaching the decision or about the weight to be given to different factors. The decision-making authority is a body other than the proponent. Once it has made its decision, the relevant authority must issue a ROD to the applicant and any other interested and affected party who requests it. Any relevant party can appeal to the minister or provincial authority within 30 days of the issue of the ROD.</p>	<p>specialist reviewers to help the competent authority to make informed decisions. According to s 24(4) the minister and MEC may make regulations laying down the procedure to be followed in respect of fair decision-making and conflict management in the consideration and processing of applications for environmental authorisation.</p>	<p>decision-making body is a body other than the proponent. Decision-making takes place in Namibia after the screening process and after the EIR was accepted. The Ecom will review the EAR prior to decision-making and furnish the SDC with his or her written recommendation in respect of the granting or refusal of an environmental clearance. In Namibia and Swaziland the ROD is published in the GG.</p>
<p>9. Monitoring of action impacts must be undertaken and it must be linked to the earlier stages of the EIA process.</p>	<p>EIA follow-ups by means of audits, inspections and reports that need to be submitted after the EIA implementation, is not a mandatory step in the EIA process. Neither the EIA regulations nor the <i>EIA Guideline Document</i> make provision for EIA follow-ups. NEMA makes provision for EIA follow-up in its minimum procedures for the</p>	<p>S 24E stipulates that every environmental authorisation must as a minimum ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity.</p>	<p>Both the Namibian and Swaziland legislation require that monitoring arrangements be specified in the EIA report. Swaziland's legislation also stipulates that these auditing results be made available to all interested and affected parties. Namibia does not provide for auditing reports.</p>

	assessing and communicating of potential impacts of activities, but fails to describe how, when and by whom this follow-ups must be conducted.		
10. Mitigation of action impacts must be considered at various stages of the EIA process.	NEMA provides for mitigation measures as part of minimum procedures during the assessment with emphasis on avoiding, reducing or remedying the negative environmental impacts of development and enhancing the positive impacts at each stage of the EIA process. No provisions is, however, made for this in the EIA regulations. The only requirement in the EIA regulations is that the EIR must include particulars about the possibility for mitigation measures for each identifies impact.	S 24(3) provides that procedures for the investigation, assessment and communication of potential impacts of activities must ensure the investigation of mitigation measures to keep adverse impacts to a minimum, as well as the option of not implementing the activity.	Namibian EMA include provisions for the description of mitigation measures in the EAR, but does not provide any more information or regulations concerning this matter. Swaziland's EAARR and EMB require a separate document specifically concerned with mitigation, namely the CMP. Swaziland's legislation also makes provision for the implementation of the mitigation measures as well as the reporting procedures.
11. Consultation and participation must take place prior to, and following EIA report preparation. Effectiveness of consultation and participation depends upon the	The EIA regulations, while providing opportunities for public participation in the preparation of both the scoping report and the EIR, does not provide stipulation	The <i>NEMA Amendment Bill</i> does not discuss this issue, but it seems as if more contents will be given to the public participation process in the new regulations. S 24H,	The Namibian EMA and Swaziland EAARR and EMB both require adequate opportunities for public participation throughout the EA

<p>availability of copies of the EIA document to the public. It is also important to take into consideration the environmental impact on neighbouring countries. Financial assistance through intervenor funding can be of assistance in making participation more effective. The results of consultation and participation should be published.</p>	<p>to comment on the completed scoping reports or EIRs. The <i>EIA Guideline Document</i> go further than the regulations and recommend that interested and affected parties must be involved in reviewing both the scoping report and EIR and give brief guidance on the conduct of these reviews. This provisions is, however, not mandatory. The proponent is responsible to conduct public participation and not the competent authority. The proponent is also responsible for all the costs incurred in complying with the regulations, which includes public participation. No provisions are made for financial assistance from the government or other environmental organisations. The EIA legislation makes provision for the availability of copies of EIA documents at various stages of the EIA process. Provisions are made in NEMA for cases where an activity will affect the interest of more than one province or</p>	<p>however, empowers the minister or MEC to direct any person who has commenced or continued with any listed activity in contravention to chapter 5 to compile a report containing a description of the public participation process followed during the course of compiling the reports. This include all comments received from interested and affected parties and an indication of how the issues raised have been addressed. S 24(6) empowers the minister to make regulations stipulating the procedure to be followed and the report to be prepared in investigating, assessing and communicating potential impacts where the activity will affect more than one province or traverse international boundaries or where the activity will affect compliance with obligations resting on the Republic under customary or conventional international law.</p>	<p>process, which include public participation prior to, and following EIA report preparation. Both Swaziland and Namibian legislation makes provision for the availability of copies to interested and affected parties. Swaziland EAARR and EMB makes provision for a well laid out public participation process, while the roles, responsibilities and duties of the interested and affected parties in the Namibian EMA are poorly defined. The EIA legislation in Namibia and Swaziland does not mention the provision of funding from the government or environmental conservation groups for public participation. Swaziland's EAARR and EMB make provision for the forwarding of EIA reports and documents to neighbouring countries when it is believed that the project is likely to have significant impacts on the environment of the neighbouring country. Namibian EMA does not include similar provisions.</p>
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	traverse international boundaries.		
<p>12. The EIA system must be monitored. The main purpose is the diffusion of EIA practice and the alteration of the EIA system to incorporate feedback from experience and to remedy any weaknesses identified. Public records of the number of EIA reports, scoping reports, public participation results and review results should be publicly available at one or more central locations. Important to maintain an accurate record of the time required to complete all facets of the EIA report. Effective feedback procedures should be put into place.</p>	<p>There is no provision in either ECA or the EIA regulations for any review of the EIA system. Apart from the relevant authorities that keep a register of all applications received, no provision is made for the keeping of documents relating to the EIA process.</p>	<p>S 24(3) requires procedures for the investigation, assessment and communication of the potential impacts of activities to ensure as a minimum the reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions and uncertainties encountered in compiling the required information. S 24(4) also make provision that the minister and MEC may make regulations requiring that the CA maintain a registry of applications for, and records of decisions in respect of environmental authorisation.</p>	<p>Namibian and Swaziland's legislation does not make provision for this kind of monitoring. Namibian EMA stipulates that one of the EC's functions is to act as register for all project notifications in regard to EAs and to maintain a register of EAs conducted and environmental clearance issued under EMA. Swaziland EMB makes provision for the registration of environmental information. This information must be available at one location for public reviewing and it must also be available in the form of electronic documents accessible through a world wide web site on internet.</p>
<p>13. The financial costs and time requirements of the EIA system must be acceptable to those involved. The costs and time requirements must also be outweighed by discernible</p>	<p>The EIA regulations does not make provision for the prescribing of fees by the minister or MEC during the EIA process. Through a business survey presented in the <i>White Paper on Environmental</i></p>	<p>S 24(4) empower the minister and MEC to make regulations prescribing fees to be paid for the consideration and processing of applications for environmental authorisations.</p>	<p>As far as costs and benefits are concerned, no information was available concerning Namibia and Swaziland in this regard.</p>

<p>environmental benefits.</p>	<p><i>Management Policy</i>, 1998 it was determined that overall, almost all stakeholders believe that EIA is cost effective and that the environmental quality and acceptability of decisions are improved by EIA. Some developers, however, resent the financial costs and time requirements of an EIA.</p>		
<p>14. EIA system must apply to policies, plans and programmes, as well as to projects. The assessment of policies, plans and programmes must include the preparation of a written report on the findings of that evaluation. These finding must be used in public accountable decision-making.</p>	<p>The EIA regulations only apply to projects. NEMA, however, require that IEM be applied to policies, plans and programmes as well as to projects. NEMA does not give contents to the assessment of SEA.</p>	<p>S 24(4) makes explicit provision that the minister or MEC may make regulations concerning the preparations and evaluation of SEA.</p>	<p>The Namibian EMA and Swaziland EMB make explicit provision for separate SEA procedures, which are in both instances similar to the countries' EIA procedures. The Swaziland EMB also makes provision for a SEA report that must be submitted to the minister and authority for review. The minister may order the documents to be subjected to public review and/or to a public hearing before making a final decision.</p>

After researching Wood's and other writers' criteria for an effective EIA and after using these criteria as main framework against which the comparative study of South African, Namibian and Swaziland's EIA legislation are discussed, various shortcomings in the current EIA process were identified. Some of these shortcomings were discussed by consultants and representatives of DEAT who was in consultation with most provincial environment departments during the EIA redrafting process. The contents of the *NEMA Amendment Bill* were also compared to these suggestions, whereafter further shortcomings were determined. On the strength of these findings the following recommendations are made:

- Key definitions such as "environment", "EIA", significant impact" and "SEA" should be defined and explained
- Provision must be made for one set of framework legislation which sufficiently prescribes the minimum national standards that all EIA procedures must comply with
- NEMA must make provision for uniform departmental policy regarding the administration of the regulations. A mechanism must be created to facilitate and ensure integration and co-operation between the respective environmental authorities. They must attempt to consolidate the previous fragmented legislation and promote a standardised environmental approach toward development planning
- The regulations must include one complete list of all possible activities, which may have a detrimental effect on the environment (including mining-related activities among others) and also geographical areas based on environmental attributes in which activities may not commence without prior environmental authorisation from the competent authorities. In this respect provinces should be given the ability to identify sensitive areas in which additional criteria should apply. Aspects of desirability or need of the activity also needs to be concentrated on
- The EIA process should include policies, plans and programmes as well as projects. The regulations must describe the process to be followed during the

preparation of the SEA and must make provision for a SEA report. The findings in the SEA report must also be used in public accountable decision-making

- Although section 24(3) of the *NEMA Amendment Bill* provides for the investigation of cumulative effects of the activity this aspect needs more consideration. Because of the fact that cumulative effects may be local, regional or global in scale, co-ordinated institutional arrangements are required in dealing with it. In most cases cumulative effects must be addressed before the project level, because cumulative impacts may result from broader biophysical, social and economic considerations
- Screening process must make provision for thresholds to eliminate minor activities. The proponent should submit clear and detailed information for the discretionary determination of which action should be assessed. Public participation should play an important part during this stage, as this might be the final stage before the proponent will be given authorisation to go ahead with the project
- The previous comprehensive scoping procedure must be made more streamlined. Authorities with the necessary expertise, accredited consultants and interest groups could assist in the identification of potential significant impacts
- The regulations must make provision for formal checks to be made on the adequacy of the contents of the EIR before it is released for decision-making
- The regulations must make provision for formal requirements for objectivity and consultation and participation during the review process. The *NEMA Amendment Bill* makes provision for specialist reviewers in specified cases, which may help to establish objectivity
- Public participation must be part of the decision-making process. The regulations must include factors which ought to be considered in reaching the final decision and it must describe the weight that must be given to the different factors in order to establish a fair decision-making process

- The regulations must make provision for effective EIA follow-up by means of audits, inspections and reports before and after EIA implementation. The regulations must describe how, when and by whom the EIA follow-up must be conducted
- The regulations must pay special attention to mitigation measures and must make provision for the option of not implementing the activity. A separate document that is specifically concerned with mitigation measures, which includes implementation of mitigation measures as well as reporting procedures, similar to the CMP of Swaziland, could be helpful to address this issue
- Public participation must take place prior and following the EIA report preparation. Copies of the EIA documents must be available to the public and the results should be published. The regulations must make provision for consideration of impacts on neighbouring countries and must set out procedures to be followed in these circumstances. The roles, responsibilities and duties of interested and affected parties must be defined
- The EIA system must be monitored in order to get feedback from experience and to remedy any weaknesses. An accurate record of the time required, to complete all facets of the EIA report must be maintained. The regulation should set out effective feedback procedures and must put a system in place for the keeping of records relating to the EIA procedures. These records must be available for the public at a stipulated place and also on a world wide web site on internet
- The NEMA Amendment Bill does not stipulate the process for appeal that must be followed when the minister is the responsible decision-making authority. It is important that this issue be addressed, as an appeal cannot be heard by the same official or same department that originally made the decision that is subject to appeal.

It became evident throughout the discussion that an EIA is a necessary and helpful environmental decision-making tool, which will help to ensure sustainable development in our country. Although various shortcomings in the current EIA process have been identified, the redrafting process of the regulations created an

opportunity to address these problems and to establish a workable EIA process.

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