INTEGRATED ENVIRONMENTAL MANGEMENT:

Where is South Africa headed given recent developments relating to NEMA and the Infrastructure Development Act

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I hereby declare that I have read and understood the regulations governing the submission of Masters dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this minor dissertation conforms to those regulations.

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Abstract

Integrated Environmental Management (IEM) was formulated during the 1980s by the Council for the Environment in response to a dual need in South Africa to effectively manage the country's natural resource base whilst stimulating economic growth and development. The IEM principles were translated into the National Environmental Management Act (NEMA) in 1998, and IEM also became the title of Chapter 5, the purpose of which is to promote the application of appropriate environmental management tools to ensure the integrated environmental management of activities.

Over the years a single tool, namely, environmental impact assessment (EIA) has come dominate the environmental management regime in South Africa, and many of the innovative attributes of IEM have been diluted with a more conventional and conservative approach to impact assessment. EIA has consequently been blamed for causing delays and undermining the national government's infrastructural development ambitions for the country. In 2014 the Department of Economic Development introduced the Infrastructure Development Act (IDA) which is aimed at prioritising public infrastructure projects seen to be of significant economic or social importance.

This dissertation focuses on those factors that compel a comparison between NEMA and the IDA, not least of which is the provision for lists of projects and activities subject to legislated requirements. Whereas NEMA aims to ensure that such activities are planned, assessed and monitored in accordance with principles of sustainable development, the IDA seeks to expedite development in the face of lack of employment opportunities, an energy crises and falling GDP growth rates.

The outcome of a comparison between NEMA and the IDA suggests that overly complex and arduous environmental procedures and legislative requirements have precipitated an extreme response. However, the steam-roller type approach advocated by the IDA is likely to create more problems than solutions as it ignores government's concurrent commitments to co-operative governance and sustainability. The original principles and procedures of IEM provide a potential alternative to ensuring a balance between environmental protection and economic growth.

Contents

Abbreviations and acronyms

APP	Annual Performance Plan
ANC	African National Congress
ASGISA	Accelerated and Shared Growth Initiative for South Africa
CEC	Committee for Environmental Coordination
CER	Centre for Environmental Rights
CONNEPP	Consultative National Environmental Policy Process
COSATU	Congress of South African Trade Unions
DEA	Department of Environmental Affairs
DEAT	Department of Environmental Affairs and Tourism
DED	Department of Economic Development
DFA	Development Facilitation Act 67 of 1995
DME	Department of Minerals and Energy
DMR	Department of Mineral Resources
DPME	Department of Performance Monitoring and Evaluation
ECA	Environment Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
EIA	Environmental Impact Statement
EIAMS	Environmental Impact Assessment Management Strategy
EIP	Environmental Implementation Plan
EMF	Environmental Management Framework
EMG	Environmental Monitoring Group
EMP	Environmental Management Plan
EPPIC	Environmental Planning Professionals Interdisciplinary Committee
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution Strategy
IDA	Infrastructure Development Act 23 of 2014
IDC	Industrial Development Corporation
IDP	Integrated Development Programme
IEM	Integrated Environmental Management
IGRFA	Intergovernmental Relations Framework Act 13 of 2005
JIPSA	Joint Initiative of Priority Skills Acquisition
LUPO	Land Use Planning Ordinance 15 of 1985
PAJA	Promotion of Administrative Justice Act 3 of 2000
MDG	Millennium Development Goals

MEC	Member of the Executive Council
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEAF	National Environmental Advisory Forum
NCOP	National Council of Provinces
NEMA	National Environmental Management Act 107 of 1998
NEPA	National Environmental Policy Act 42 U.S.C. §4321
NDP	National Development Plan
NGP	National Growth Plan
NIP	National Infrastructure Plan
NPC	National Planning Commission
NSSD	National Strategy on Sustainable Development
NWA	National Water Act 36 of 1998
PICC	Presidential Infrastructure Coordinating Commission
RDP	Reconstruction and Development Programme
SACP	South African Communist Party
SALGA	South African Local Government Association
SANRAL	South African National Roads Agency Limited
SDF	Spatial Development Framework
SEMA	Specific Environmental Management Act
SIP	Strategic Integrated Projects
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
UK	United Kingdom
UN	United Nations
US	United States

1 Introduction

Integrated Environmental Management (IEM) is the title of Chapter 5 in South Africa's National Environmental Management Act (NEMA).[1] The purpose of Chapter 5 is "to promote the application of appropriate environmental management tools to ensure the integrated environmental management of activities".[2] IEM was formulated during the 1980s by the Council for the Environment which was a statutory body appointed as an advisory forum to the then Minister of Environment Affairs.[3] IEM was adopted by the former Department of Environmental Affairs (DEA) in 1992, in the form of a series of guideline documents and checklists.[4] In terms of these publications a definition of IEM was provided to "to reflect current views".[5] Accordingly, IEM provides an "holistic framework that can be embraced by all sectors of society for the assessment and management of environmental impacts and aspects associated with each stage of the activity life cycle, taking into consideration a broad definition of environment and with the overall aim of promoting sustainable development".[6]

The drafting of effective policy and law does not take place in a contextual vacuum and IEM was no exception. The social, economic and political climate in South Africa at the time strongly influenced the manner in which environmental assessment procedures were developed. According to Fuggle[7] and Huntley *et al*,[8] the promotion of economic growth and development were imperative to redress the inequalities of the apartheid era and an environmental evaluation process would have to take cognisance of these requirements. Direct transfer of United States (US) and European environmental assessment models to the South African context would not be appropriate. Development objectives required emphasis on enhancing positive aspects of a proposal, identifying appropriate mitigation and ensuring that social benefits of the preferred alternative outweighed social costs.[9] IEM was, therefore, developed as a philosophy and a procedure intended to guide, rather than impede, the development process.

On 30 May 2014, some 13 years after the adoption of IEM, the Infrastructure Development Act (IDA) [10] was signed into law by the President. The Act came into effect on 10 July 2014. The need for the IDA is motivated, by the

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[1] 107 of 1998.
[2] NEMA, section 23(1).
[3] This was in terms of the Environment Conservation Act 100 of 1982, subsequently repealed and replaced by the Environment Conservation Act 73 of 1989.
[4] Department of Environment Affairs: *Integrated Environmental Management Guideline Series* (1992) *The Integrated Environmental Management Procedure* (vol 1); *Guidelines for Scoping* (vol 2); *Guidelines for Report Requirements* (vol 3); *Guidelines for Review* (vol 4); *Checklist of Environmental Characteristics* (vol 5); *Glossary of terms used in IEM* (vol. 6).
[5] Department of Environmental Affairs and Tourism (2004) *Overview of Integrated Environmental Management. Integrated Environmental Management Information Series.*
[6] Ibid.
[7] Fuggle, R 'Integrated environmental management: an appropriate approach to environmental concerns in developing countries' (1989) *Impact Assessment Bulletin* 8, 34.
[8] Huntley B, R Siegfried and C Sunter *South African Environments into the 21st Century* (1989) Human & Rosseau and Tafelberg Cape Town, 13.
[9] Sowman M; R Fuggle and G Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) *Environmental Impact Assessment Review* 15, 45.
[10] 23 of 2014.

government's Department of Economic Development (DED), in terms of the *New Growth Path*[11] (NGP) and the *National Development Plan* (NDP).[12] The NDP is a "Country Vision" for 2030 and the NGP is a government strategy in pursuit of the "Country Vision". Incorporated in the NDP is a *National Infrastructure Plan* (NIP) which was developed and adopted by government in 2012 to give effect to the infrastructure goals and objectives defined in the NDP. According to these policy documents, infrastructure development has a critical role to play in the national economy - all South Africans need to work together in a concerted effort to improve service delivery, bolster job creation and expedite economic transformation.[13] The primary purpose of the IDA is to facilitate the development of public infrastructure "which is of significant economic or social importance to the Republic".[14] To achieve this, certain projects must be given "priority in planning, approval and implementation".[15]

The projects referred to are those of the type listed in Schedule 1 and Schedule 3 of the IDA, including the Strategic Integrated Projects (SIPS) that have already been approved, and other projects that may be initiated by private or public development agencies. The latter may include *inter alia* airports, electricity transmission and distribution, mines, oil or gas pipelines, refineries, ports and harbours, power stations or installations for harnessing any source of energy, roads and railways, waste infrastructure (landfills and incinerators) and water works.

One of the general objectives of IEM referred to in NEMA[16] is to "promote the integration of the principles of environmental management ...into the making of all decisions which may have a significant effect on the environment". If one were to consider the types of development projects which may result in a "significant effect on the environment", the list is likely to be similar to that in Schedule 1 of the IDA. It is worth noting that the initial list of activities requiring environmental impact assessment (EIA), published in the IEM Guideline Series by the DEA in 1992, included all the categories in Schedule 1 of the IDA, with the exception of health care facilities.[17]

The goals of the IDA are, in some respects, reminiscent of those defined in the Development Facilitation Act[18] (DFA). The focus of this Act, however, was on the development of land as opposed to specific projects. The long title of the DFA refers to "extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes in relation to land". This Act preceded NEMA, and Section 3(1) contained specific principles relevant to environmental protection including the need to encourage sustainable land development practices and processes[19] and promote the protection of the environment.[20] Chapters of the DFA and associated

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[11] Department of Economic Development *New Growth Path* 2011.
[12] National Planning Commission *National Development Plan: Vision for 2030* 2011.
[13] Message from the President: *A summary of the National Infrastructure Plan: Presidential Infrastructure Co-ordinating Commission Report* 2012.
[14] See further: www.economic.gov.za/communications/bills.
[15] Ibid.
[16] Section 23(2)(a).
[17] Department of Environment Affairs *The Integrated Environmental Management Procedure Guideline Document 1* (1992).
[18] 67 of 1995.
[19] Section 3(1)(c)(viii).
[20] Section 3(1)(h)(iii).

provincial planning legislation have since been invalidated by the courts based on a lack of constitutionality.[21] The DFA will be repealed by the Spatial Planning and Land Use Management Act (SPLUMA)[22] which has been signed by the President but has yet to commence.

Like South Africa's planning laws, environmental legislation has evolved since the adoption of IEM as a strategic policy framework in 1992. NEMA, promulgated in 1998, provided framework legislation for a number of other Specific Environmental Management Acts (SEMAs)[23] and, in the most recent amendment, incorporates mining sector activities.[24] The IEM Chapter 5 has also undergone modifications, including section 24 which governs "Environmental Authorisations". Section 24, *inter alia,* allows the Minister, or an MEC with the concurrence of the Minister, to identify activities which may not commence without environmental authorisation, and to specify procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment.[25] This provision has spawned a series of detailed EIA Regulations[26] and Guideline Documents ,[27] making EIA undoubtedly the main compulsory, and most commonly known, tool provided for in NEMA.[28]

The EIA process of applying for and being granted environmental authorisation for projects that involve listed activities has not been without problems. The numerous amendments that have been made to NEMA[29] and the EIA Regulations[30] have been in response to criticisms about time delays, lack of procedural clarity, inconsistent application of the law, inflexibility of the procedures, lack of guidance regarding the public participation process, reports of poor quality and bias, parallel permitting processes and lack of co-operative governance.[31] Efforts to address these problems have resulted in increasingly stringent requirements creating a regulatory system that is

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[21] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (2010) 6 SA 182 (CC)*; *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others* 2013 6 SA 113 (WCC).

[22] 16 of 2013.

[23] NEM: Biodiversity Act 10 of 2004; NEM: Air Quality Act 39 of 2004; NEM: Protected Areas Act 57 of 2003; NEM: Integrated Coastal Management Act 24 of 2008; Environmental Conservation Act 73 of 1989; National Water Act 36 of 1998.

[24] Formerly regulated in terms of the Minerals and Petroleum Resources Development Act 29 of 2002 but now incorporated into NEMA through amendments in terms of the National Environmental Laws Amendment Act 25 of 2014 published in GN 448 in *GG* 37713 of 2 June 2014. Commenced 2 September 2014.

[25] NEMA section 24(2)(a) read with section 24(4).

[26] The latest in a series of EIA Regulations since 1989 have been gazetted in GN R982-985 in *GG* 38282 of 4 December 2014.

[27] At national level these include the *Companion Guideline on the Environmental Impact Assessment Regulations* (2010); *Environmental Management Framework Guideline* (2010); *Public Participation Guideline* (2012); *Fee Regulations Guidance Document* (2014) and the *Guideline on Need and Desirability* (2014).

[28] Glazewski J *Environmental Law in South Africa* (2013) Lexis Nexis Cape Town 10-5.

[29] These amendments have been effected in terms of the following laws: National Environmental Management Act 56 of 2002; Mineral and Petroleum Resources Development Act 28 of 2002; National Environmental Management Amendment Act 46 of 2003; National Environmental Management Amendment Act 8 of 2004; National Environmental Management Amendment Act 62 of 2008 (with effect from 1 May 2009, except for the provisions relating to prospecting, mining exploration and production and related activities which only comes into operation 18 months after the date of commencement of the Mineral and Petroleum Resources Development Amendment Act, 2008); National Environmental Management Laws Amendment Act 14 of 2008.

[30] These amendments have been effected through the following: GN R385-387 in *GG* 28753 of 21 April 2006; GN R543-546 in *GG* 33306 of 18 June 2010 and GN R982-985 in *GG* 38282 of 4 December 2014.

[31] Ridl J and Couzens E. 'Misplacing NEMA? A consideration of some problematic aspects of South Africa's new EIA regulations' (2010) 13(5) *PER* 80/189.

complex and arduous, requiring input from a range of practitioners, specialist departments in government and the private sector, and environmental lawyers.[32]

In recognition of the need to broaden the applicability of IEM and shift the focus from EIA to other voluntary and regulatory mechanisms, an initiative was launched in 2008 called the Environmental Impact Assessment and Management Strategy (EIAMS)[33]. The latest draft of the 225 page document was released for comment in March 2014 and contains numerous recommendations for adapting IEM, within the framework of NEMA, in order to achieve the stated vision:

> To give effect to the framework for integrated environmental management by providing for a diverse range of regulatory and other mechanisms to ensure proactive assessment and management that are implemented through co-operative governance and accountable, transparent and participatory decision making, to achieve sustainable development.

The publication of the final draft EIAMS preceded the enactment of the IDA by a matter of weeks but its content was clearly not convincing enough of the potential for IEM to overcome the criticisms of NEMA and the EIA Regulations, blamed for causing delays and frustrating development.[34]

The DED's motivation of the IDA to the National Council of Provinces (NCOP) specifically draws attention to the impact of the EIA process on strategic project authorisation timescales, indicating potential delays of up to 6.5 years.[35] In response, the IDA contains provisions for "fast-tracking regulatory decision-making and speeding up the implementation of strategic infrastructure projects"[36] through specific strategies and overarching coordination committees initiated at the highest levels of government. The latter is a reference to the Presidential Infrastructure Coordinating Commission (PICC). This Commission is made up of representatives from all three spheres of government, whose primary function is to "co-ordinate and drive infrastructure development".[37] Specific timeframes for the approval of regulatory licences or authorisations required for the implementation of infrastructure projects are set out in a Schedule 2 to the Act.[38] These are meant to run concurrently towards a common deadline.

During the consultation process for the IDA, concerns were raised about the implications of the Act for environmental decision-making in the context of sustainable development, and more specifically, how the IDA will interface with NEMA in terms of the latter Act's principles and objectives, and the procedural requirements in Chapter 5. According to the Centre for Environmental Rights (CER), the Act "affects environmental decision-making and has radical implications for Integrated Environmental Management (IEM)".[39] The IDA contains a singular reference to the

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[32] Boer, A. 'Sustainable development Bernie Madoff or Indiana Jones?' (2010) *SA Environmental Practice Review* Summer 2010, 3.
[33] Department of Environmental Affairs (2014) *Environmental Impact Assessment and Management Strategy*.
[34] Sampson I 'So near and yet so far with environmental impact assessments (2007) *The Quarterly Law Review for People in Business* 15(2), 77.
[35] The Infrastructure Development Bill Presentation to the Select Committee (NCOP) 4 March 2014.
[36] See further: www.economic.gov.za/communications/bills (accessed 15 February 2015).
[37] Ibid.
[38] Schedule 2 read with section 17(2).
[39] Centre for Environmental Rights *Comments of the Draft Infrastructure Development Bill* March 2013 par13.

environment in section 18. Accordingly, if environmental assessments are required, these will be governed by NEMA. Yet there are aspects of the IDA which appear to be at odds with the principles, procedural and timeframe requirements in NEMA, and the associated EIA Regulations, thereby raising important questions about the compatibility of the IDA and South Africa's environmental laws.

There are a number of factors that compel a comparison between NEMA and the IDA. Significantly, both Acts are to do with regulating development in a socio-economic context in which job provision, housing and service delivery remain key national goals, some 20 years after the demise of apartheid. Both list specific development projects or activities to be regulated and include prescribed procedures and timeframes. Advisory and decision-making institutions are provided for in both Acts as are criteria for decision-making. Despite these similarities, the two Acts advocate divergent paths towards different goals, which can be simplistically stated as long term sustainable development on the one hand, and short term economic growth on the other.

Consideration of where we are headed, in relation to ERM, must be prompted by consideration of where we have come from. The historical context is provided in Chapter 2 which describes the emergence of IEM in relation to the political and socio-economic climes in the late 1970's and 1980s. The various events leading to the DEA's adoption of IEM as a core philosophy for sustainable development are included, as well as a description of how IEM was translated into NEMA in 1998 with particular reference to the legislative mechanisms contained in Chapter 5. This context enables an appreciation of how IEM was intended to effectively act as a 'root system' to support the development of an appropriate approach to environmental governance in the country.

Chapter 3 of the dissertation focuses on the IDA, providing a overview of the historical economic policy context leading to its enactment and the manner in which it has been motivated by the DED. Reference is made to the fact that the Act legitimises the existing PICC and eighteen SIPS already designated. Some of the criticisms of the Act are described which are then addressed in more detail in the following chapter.

Chapter 4 considers the comparable provisions in NEMA and the IDA, highlighting key similarities and differences. Potential areas of conflict are identified, likely to emerge as a developer of a SIP seeks to follow the "fast track" process advocated in the IDA while still having to adhere to the principles and procedures in NEMA, as expressly required in terms of section 18 of the IDA. The common themes that will form the basis of the comparison include the principles and objectives in each Act; the respective decision-making institutions, the scope of applicability, relevant procedures and timeframes; provisions for monitoring and evaluation; and mechanisms for conflict management.

2 Origin and emergence of a regulatory framework for IEM

2.1 Historical overview

The current approach to environmental management in South Africa is the product of an evolutionary process which has been influenced by political, social and economic developments both internationally and locally. From an international perspective, 1970 was regarded as a "watershed year" in relation to environmental matters,[40] primarily due to the publication of the National Environmental Policy Act (NEPA) [41] in the United States in which the concept of EIA was formally introduced.[42] The results of the assessment process is referred to in NEPA as an Environmental Impact Statement (EIS) and the kind of projects that required an EIA are described as "major federal actions significantly affecting the quality of the human environment". [43]

Despite the impetus that NEPA gave to the development of similar legislation in other developed and developing countries,[44] South Africa took a while to follow suit.[45] In the 1970s responsibility for nature conservation and inland fisheries was held by the four provincial jurisdictions[46] while control over natural resources was vested in individual departments of the central apartheid government.[47] Responsibility for land use planning was divided among the three 'levels' of government, as they were referred to at the time, namely, national, provincial and local.[48] The consequence of this fragmentation was a plethora of laws and public ordinances dealing with different aspects of resource use, pollution, land use planning and nature conservation.[49]

In an effort to better co-ordinate environmental governance, a Cabinet Committee on Environmental Conservation was established in 1972, chaired by the Minister of Planning.[50] A second non-statutory South African Committee on Environmental Conservation was also set up to advise the Cabinet Committee. [51] This was renamed the Council for Environment in 1975.[52] At the same time, professional and academic institutions were responding to rising concerns about environmental issues, particularly in the wake of the United Nations (UN) Conference on the Human Environment held in Stockholm in 1972. In the Western Cape, a national conference was held entitled "Man and his

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[40] Fuggle R and M Rabie *Environmental Management in South Africa* (1992) Juta & Co. Ltd Cape Town 18.
[41] Act 42 U.S.C. §4321 et seq. (1969).
[42] Sowman M, R Fuggle and G Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) Environmental Impact Assessment Review 15, 49.
[43] Section 102 C.
[44] Brown A 'Environmental impact assessment in a developing context' (1990) *Environmental Impact Assessment Review* 10, 135.
[45] Sowman M, R Fuggle and G Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) *Environmental Impact Assessment Review* 15, 46.
[46] Transvaal, Orange Free State, Cape, Natal.
[47] Hill R, S Grindley and R Fuggle 'Towards a national policy for EIA in South Africa' (1986) *Conclusions of the Midmar Workshop* (September 1985) Environmental Evaluation Unit University of Cape Town EEU 1/86/5.
[48] Ibid.
[49] Ibid.
[50] Fuggle R and M Rabie *Environmental management in South Africa* (1992) Juta & Co. Ltd Cape Town 19.
[51] Sowman M, R Fuggle and G Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) *Environmental Impact Assessment Review* 15, 46.
[52] Ibid.

Environment" and this led directly to the formation of the Habitat Council[53] and the Environmental Planning Professionals Interdisciplinary Committee (EPPIC).[54]

In 1977 the Habitat Council made a resolution to approach the Minister of Planning regarding the need for legislation which would make the provision of EIS from developers mandatory in relation to major developments.[55] It was the primary task of EPPIC to prepare a set of guidelines to assist planning professionals in taking environmental aspects into account in project planning. These guidelines were discussed and refined at a symposium called "Shaping our Environment" in 1979 attended by government departments, academics, professionals, and various other organisations and members of the public.[56] Here it was recognised that EIA must be accepted, not only as an input to planning, but also as an environmental management technique. The need for an appropriate politico-legal framework, to ensure that recommendations were heeded and implemented, formed an important focus of the discussions. [57]

Following the symposium, the Council for Environment initiated the preparation of a national policy on EIA based on a comprehensive assessment of EIA procedures that had been developed and adopted elsewhere.[58] The resultant report was over 600 pages in length and analysed the successes and failures of EIA implementation in 25 countries and also documented the role of EIA in planning, social impact assessment, environmental mediation, EIA methodologies and the appropriateness of EIA as a tool for environmental management in South Africa.[59] The outcome of the committee's investigations, and a way forward towards a national policy on EIA, were presented at a conference in the then Natal Province, the Midmar Workshop of 1985.

At the time of these policy discussions, the Environment Conservation Act (ECA)[60] was already in place but, despite its all-embracing title, it was mainly concerned with co-ordination of environmental matters and did not deal with activities or decisions potentially harmful to the environment.[61] Public outcry in response to the environmental impact of the Garden Route Freeway[62] and emerging concerns in relation to proposed mining on the dunes around St Lucia highlighted the shortcomings of the Act.[63] The conclusions reached at the Midmar Workshop indicated almost unanimous support for the introduction of EIA, and a working group was established to develop a philosophy on

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[53] This was a non-governmental organisation whose role it was to co-ordinate the activities of various environmental organisations.
[54] Ibid.
[55] Sowman M, R Fuggle and G Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) *Environmental Impact Assessment Review* 15, 62.
[56] Ibid.
[57] Hill R, S Grindley and R Fuggle *Towards a National Policy for EIA in South Africa* (1986) Conclusions for the Midmar Workshop (September 1985) Environmental Evaluation Unit University of Cape Town EEU 1/86/5.
[58] Ibid.
[59] Ibid.
[60] 100 of 1982.
[61] Sowman M, R Fuggle and G Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) *Environmental Impact Assessment Review* 15, 50.
[62] Hill R, S Grindley and R Fuggle. *Towards a National Policy for EIA in South Africa* (1986). Conclusions for the Midmar workshop held September 1985. Environmental Evaluation Unit. University of Cape Town. EEU 1/86/5.
[63] Ridl J 'IEM: Lip-service and licence?' (1994) *SAJELP* 1, 71.

environmental assessment for South Africa and determine systematic procedures for incorporating environmental considerations into planning, decision-making, development, and management actions and processes.[64]

There followed a two-year period of research, consultation and review that culminated in the publication of the document entitled IEM.[65] Accordingly, the purpose of IEM was to ensure that the environmental consequences of development proposals were understood and adequately considered in the planning, implementation and management of all developments. By incorporating principles of proactive planning, informed decision-making, public participation and a broad definition of the term environment, IEM was intended to guide, rather than impede, the development process. The focus was, therefore, on minimising negative environmental impacts and enhancing positive aspects of development proposals. The steps in the IEM procedure were broadly stated, the intention being that these could be adapted by various government sectors to suit their responsibilities in their areas of jurisdiction. Included was a planning stage involving the development and assessment of the proposal, an assessment stage involving an EIA, and an implementation stage involving monitoring and management.

Although the publication and promotion of IEM encouraged many developers to voluntary undertake environmental assessments, the prevailing opinion amongst professionals, NGOs and business leaders was that EIA needed to formally legislated and become compulsory.[66] According to Ridl, the voluntary approach meant that many proponents were guilty of "merely paying lip-service to the recommended procedures in order to gain public confidence in the proposal and licence to proceed in the manner most beneficial to them".[67] He also suggested that IEM had a "humanistic bias" which could lead to "placing short term material wealth ahead of long term environmental prosperity".[68]

A survey was undertaken in July 1989 by Preston *et al*[69] of 100 business leaders[70] and 100 professional ecologists. The results indicated that the overwhelming majority (97%) agreed that an environmental evaluation should be a compulsory component of a development project, and none of those interviewed could provide an example of a type of development project that should be exempt from such an evaluation. When asked whether it would be prudent to forego an evaluation in circumstances where there were social or humanistic needs, most (76%) disagreed and many qualified their answer by saying that the developers should know the potential consequences of their actions even if the findings of the evaluation were overruled in the interest of economic or social progress. A further

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[64] Sowman M, R Fuggle and G Preston 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) *Environmental Impact Assessment Review* 15, 51.
[65] DEAT 'Overview of Integrated Environmental Management' *Integrated Environmental Management Information Series* 0 (2004) DEAT Pretoria, 7.
[66] Hall E, D Cowen, J Watson, J Fulton and J Clarke 'Environmental protection: a practical procedure' (1980) *Die Siviele Ingenieur in Suid-Afrika* May 1980. Preston G, R Fuggle and W Siegfried 'Attitudes of business leaders and professional ecologists to environmental evaluations in South Africa' (1989) *South African Journal of Science* 85, 430.
[67] Ibid at 61.
[68] Ridl J 'IEM: Lip-service and licence?' (1994) *SAJELP* 1, 69.
[69] Preston G, R Fuggle and W Siegfried 'Attitudes of business leaders and professional ecologists to environmental evaluations in South Africa' (1989) *South African Journal of Science* 85, 430-434.
[70] The statistical universe used for the business leaders was the managing directors of the top 100 industrial companies, the top 100 companies by market capitalisation and the equivalent non-listed (private and foreign controlled) companies.

interesting finding related to whether or not environmental evaluations cause delays: 41% of business leaders and 25% of professional ecologists thought that they did cause delays, but 61% of business leaders and 77% of ecologists still thought the evaluation was cost effective in the long run.

The survey was undertaken in the months before the revised version of the ECA was due to be debated in Parliament. There it was proposed that environmental evaluations could be called for at the discretion of the Minister of Environment Affairs in relation to 'major' projects. The revised ECA came into effect on 9 June 1989, [71] replacing the original Act 100 of 1982. The preamble of the new Act declared a far wider intent than its predecessor - "[t]o provide for the effective protection and controlled utilisation of the environment and matters incidental thereto."[72] Despite this ambition, the content of the Act provided relatively few tools to accomplish effective environmental protection and controlled utlilisation. It was criticised[73] for failing to declare a national environmental policy and merely enabling the Minister to determine a general policy at his discretion, subject to a complex consensual processes involving numerous Ministries.[74] According to Glavovic, the national policy needed to be legislatively determined at this stage following all the numerous draft documents and effort already put into the formulation of IEM.[75]

Subsequently the IEM procedure was reconsidered and revised under the auspices of the DEA to reflect the "lessons learnt" through its voluntary application to development projects, and a second version was published, including a series of guideline documents and checklists.[76] The revised version focused more on the EIA phase with less emphasis on management and monitoring. It is likely that this shift was influenced by the publication of national specifications for environmental management in the United Kingdom (UK), the British standard 7750.[77] At the time, the standard with its emphasis on the Deming[78] approach, was being adopted by thousands of companies in the United Kingdom and the US[79] and would later be introduced in South Africa as ISO 14000.[80]

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[71] 73 of 1989.
[72] Preamble to Environment Conservation Act 73 of 1989.
[73] Glavovic P 'Some thoughts of an environmental lawyer on the implications of the Environment Conservation Act. A case of missed opportunities" (1990) *SALJ* 107, 114.
[74] Sections 2 and 3.
[75] Glavovic P 'Some thoughts of an environmental lawyer on the Implications of the Environment Conservation Act. A case of missed opportunities" (1990) *SALJ* 107, 108.
[76] DEAT (1992) Document 1: 'The Integrated Environmental Management procedure'; Document 2: 'Guidelines for Scoping'; Document 3: 'Guidelines for Report Requirements'; Document 4: 'Guidelines for Review'; Document 5: 'Checklist of Environmental Characteristics'; and Document 6: 'Glossary of terms used in Integrated Environmental Management'.
[77] BSI Specifications for Environmental Management Systems BS 7750:1992, replaced by BS 7750:1994 ISBN 0 580 206 440. Referred to in DEAT 'Overview of Integrated Environmental Management, Integrated Environmental Management' *Information Series 0* (2004) DEAT 7.
[78] Also known as PDCA (plan–do–check–act or plan–do–check–adjust), the Deming model is an iterative four-step management method used in business for the control and continuous improvement of processes and products.
[79] Johnson P *ISO 14000: The Business Manager's Complete Guide to Environmental Management* (2007) John Wiley & Sons United Kingdom.
[80] SABS Environmental Management Systems ISO 14001:1996, replaced by ISO 14001:2005 ISBN 978 0 626 25397 4.

Despite the absence of an environmental policy, the concept of EIA was entrenched in Part V of the ECA, which enabled the Minister to identify potentially environmentally detrimental activities by notice in the Gazette.[81] An identified activity was prohibited except under authorisation from the Minister or his delegate following "consideration of reports concerning the impact of the activity in question and of alternative activities on the environment".[82] The Minister could also make Regulations concerning the scope and content of the environmental impact reports.[83] In this regard, Glavovic questioned why the opportunity was not taken, in the Act itself, to provide for mandatory furnishment of environmental assessments in accordance with the IEM Guidelines.[84] This feature of South Africa's environmental legislation, whereby the Minister is given discretion to draft Regulations regarding environmental assessment, has persisted through subsequent legislative developments, and could account to some extent for the EIA Regulations having acquired a "life of their own" quite removed from the IEM principles on which they are supposedly based.

2.2 From ECA to NEMA

The publication of the second version of the IEM procedure in 1992 came at a time when the process of political transition in South Africa was gaining momentum and it was, consequently, inevitable that environmental issues would be swept up in the country's transformation. As Rabie[85] indicated:

> The advent of full democracy and the adoption of an entirely new Constitution, together with South Africa's re-integration into the international world, gave rise to opportunities and provided an impetus for profound and far-reaching re-evaluation and reform of almost every subject which is administered by government departments. Owing to its pervasive nature, the environment features in many of these reforms.

The revisions to the IEM procedure were premised on the need to ensure that assessment procedures would not hinder the much needed economic growth and social upliftment projects that were required to redress the ills of the apartheid era. Hence the environmental evaluation process would have to "encourage early evaluation of socially responsible and realistic alternatives, for focused effort that is directed at solving the problems associated with development instead of attempting to stop development".[86]

The socio-economic policy framework, implemented by the African National Congress (ANC) government in 1994, was the *Reconstruction and Development Programme* (RDP)[87] which is described in more detail in section 3.1 below. The RDP referred to a number of environmental issues in its consideration of strategies to meet basic needs.

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[81] Section 21.
[82] Section 22(2).
[83] Section 26.
[84] Glavovic P 'Some thoughts of an environmental lawyer on the Implications of the Environment Conservation Act. A case of missed opportunities" (1990) SALJ 107, 108.
[85] Rabie A 'Environmental barometer: governmental policy reviews and reforms relating to the environment' (1999) *SAJELP* 6, 121.
[86] Fuggle R. 'Integrated environmental management: an appropriate approach to environmental concerns in developing countries' (1989) *Impact Assessment Bulletin* 8, 44.
[87] African National Congress 'The Reconstruction and Development Programme: A Policy Framework' (1994) Para 1.3 Umanyano Publications Johannesburg.

However, no mention was made of 'environment' in the six basic principles which constituted the political and economic philosophy underlying the RDP.[88] An International Mission on Environmental Policy was, therefore, established to promote sustainable development in realising the objectives of the RDP.[89] This alliance of interest groups viewed its role to "convince those who make key decisions in both the public and private sectors to include environmental goals and environmental accounts in their objectives and targets and in their cost–benefit analyses".[90] The report of the Mission, published in 1995 and received by President Mandela, indicated that "[t]he environment...suffers from a perception that it is a white, middle-class issue focused on nature conservation, that it is not relevant to the urgent needs of the country for development and social justice."[91] Their main message to the government was as follows:

> [R]econstruction and development in South Africa will not be economically sustainable unless the environmental "bottom line" is written clearly into economic and social policy...current structures and processes in government and civil society are inadequate for the task. Some immediate action is needed to strengthen environmental policy and integrate it into mainstream economic thinking and development planning if the tradition of neglect is not to continue, with negative repercussions for the health and economic well-being of the people of South Africa.[92]

As part of the overhaul of administrative functions and legislation that was heralded by the new Constitution,[93] the re-named Department of Environmental Affairs and Tourism (DEAT) was mandated to encourage broad public participation in formalising a national environmental policy.[94] This process was called the Consultative National Environmental Policy Process (CONNEPP) and included a range of public and private bodies and individuals in hearings, deliberations, information-gathering and discussions.[95] The outcome was the compilation of a Green Paper on a *New Environmental Policy for South Africa*[96] followed by a *White Paper on Environmental Management Policy for South Africa*, [97] published in May 1998. CONNEPP reached its conclusion with the promulgation of NEMA, which commenced on 29 January 1999.[98]

Just a year prior to the introduction of NEMA, the Minister exercised his discretion in terms of the ECA and published a list of activities that may have a substantial detrimental effect on the environment,[99] and would require an

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[88] Rabie A 'Environmental barometer: governmental policy reviews and reforms relating to the environment (1999) *SAJELP* 6, 122.
[89] The International Mission on Environmental Policy was established in 1993 and comprised an alliance between members of the African National Congress, the Congress of South African Trade Unions, the South African Communist Party, and the South African National Civic Organisation, with support from Canada's International Development Research Centre.
[90] Whyte Z. Executive Summary 'Building a new South Africa Volume 4 : environment, reconstruction, and development' (1995) International Mission on Environmental Policy International Development Research Centre xviii.
[91] Ibid at xix.
[92] Ibid at i.
[93] Constitution of the Republic of South Africa 1996.
[94] Lawrence R 'How manageable is South Africa's new framework of environmental management?' (1999) *SAJELP* 6, 61.
[95] Ibid.
[96] Department of Environmental Affairs and Tourism: *Green Paper on an Environmental Policy for South Africa* (October 1996). Available at www.environment.gov.za/sites/default/files/legislations/environmental_policy.pdf.
[97] GN 749 in *GG* 18894 of 15 May 1998.
[98] Act 107 of 1998.
[99] GNR 1182 in *GG* 8261 of 5 September 1997.

assessment according to a regulated procedure.[100] The list referred to the "construction, erection and upgrading"[101] of a range of infrastructural developments including, roads, nuclear power facilities, harbours, race tracks, canals, dams, communication networks, surface and groundwater abstraction, resorts, change of land use, animal husbandry, release of genetically modified organisms, waste disposal, cultivation of virgin ground and the scheduled processes in the Atmospheric Pollution Prevention Act.[102]

The assessment process stipulated in the 13 Regulations in GNR 1183[103] was a simplified version of that recommended in the IEM Guidelines (1992), and comprised a number of key steps including: the appointment of an independent consultant (Regulation 3); submission of an application form (Regulation 4); preparation of a plan of study for scoping (Regulation 5); compilation of a scoping study (Regulation 6); preparation of a plan of study for EIA (if the results of scoping indicated the need for further investigation) (Regulation 7); compilation of an EIA Report (Regulation 8); consideration of the application by the competent authority (Regulation 9) and the issue of a record of decision (Regulation 10).

Although much of the ECA was repealed by NEMA, the Regulations in terms of the Part V provisions remained, subject to several amendments,[104] until these were replaced by Regulations in terms of NEMA in 2006.[105]

2.3 NEMA: a landmark statute

At the time of its publication NEMA was regarded as a landmark statute regulating environmental affairs in South Africa.[106] Consequently, the Act drew considerable attention from lawyers, academics and other commentators. It was anticipated that this umbrella legislation would, in time, "transform and co-ordinate most of the currently diverse and fragmented sectors of the environment".[107]

During the CONNEPP process leading to the drafting and enactment of NEMA, attention was given to a range of considerations, of which the need to assess the impact of discrete projects and activities was but one. The International Mission on Environmental Policy had identified the "major problems" as being fragmentation of policy across sectoral government departments, conflict of interest between the mandate to promote certain activities and the mandate to regulate the same (e.g. mining), ineffective enforcement of environmental legislation, lack of accountability, scarcity of skills in the environmental sector, the excessive centralisation of authority in national

[100] Described in GNR 1183 of *GG* 8261 of 5 September 1997.
[101] Section 1.
[102] Act 45 of 1965.
[103] Published in *GG* 8261 of 5 September 1997.
[104] GNR 1182 amended by GNR 1355 of 17 October 1997; GNR 448 of 27 March 1998; GNR 670 of 10 May 2002 and GNR 782 of 7 June 2002; GNR 1183 amended by GNR 1645 of 11 December 1998 and GNR 672 of 10 May 2002.
[105] GNR 385, 386 and 387 in *GG* 28753 of 21 April 2006.
[106] Bray E 'Co-operative governance in the context of the National Environmental Management Act 107 of 1998' (1999) *SAJELP* 6, 1.
[107] Ibid.

government, lack of public participation and a weak "champion" for the environment.[108] It is evident from the contents of NEMA that the intentions of the drafters was to address these problems. There are chapters dedicated to principles, institutions, co-operative governance, fair decision-making and conflict management, IEM, compliance and enforcement, and co-operation agreements. This structure also reflects the characteristics of generic environmental framework legislation which Nel and du Plessis[109] identify as follows: flexibility, broad based policy/principles, arrangements for overarching and sectoral-specific legislation, promotion of co-operative governance and the integration of multiple environmental management tools and instruments.

Prior to the enactment of NEMA, it was relatively easy to understand what IEM meant. It was effectively a South African "take" on EIA specifically formulated to be free of negative connotations and pre-conceptions, and responsive to the country's development needs. It was also intended to be a more flexible approach than conventional environmental assessment procedures, in that it could be applied to development policies, programmes and proposals, as well as be adaptable to the needs of different administrative sectors, namely, water, waste, air quality and so on. IEM's purpose, principles and procedures were clearly defined in the IEM Guideline Series (1992). The Regulations in terms of the ECA did not deviate significantly from the Guideline. That said, the seeds of confusion and misunderstanding were sown through use of the term "EIA" instead of "IEM" in the title of the Regulations, and there was more emphasis on the assessment phase by comparison to the planning, implementation and monitoring phases.

With the introduction of NEMA, IEM became the title of Chapter 5, the purpose of which is described as "to promote the application of appropriate environmental management *tools* in order to ensure integrated environmental management of activities" (emphasis added).[110] This purpose is distinct from the subsequent five objectives listed in section 23 which effectively describe the aims of the environmental assessment process.[111] The inconsistency in section 23 and plural use of the term "tools" has contributed a lack of understanding of the meaning of IEM. By isolating Chapter 5 as the IEM Chapter, it could be presumed that IEM is only concerned with the assessment procedures defined in this Chapter, and yet the principles in section 2 effectively mimic the broader IEM principles.

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[108] Whyte Z. Executive Summary 'Building a new South Africa Volume 4 : Environment, reconstruction, and development' (1995) International Mission on Environmental Policy International Development Research Centre, Chapter 3, 3.
[109] Nel J and W du Plessis 'An evaluation of NEMA based on a generic Framework for environmental framework legislation' (2001) *SAJELP* 8, 3.
[110] Section 23(1).
[111] Section 23(2)(b) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits and promoting compliance with the principles of environmental management set out in section 2; (c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them; (d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment; (e) ensure the consideration of environmental attributes in management and decision-making which may have a significant impact on the environment; (f) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2.

According to Rabie, NEMA "underpins IEM" and provides "a statutory basis for the entire IEM procedure".[112] He regarded Environmental Management Frameworks (EMFs)[113] as tools for supporting environmental decision making, in respect of the scoping and screening components of IEM, their role being to "proactively identify areas of potential conflict between development proposals and sensitive environments".[114] Nel and du Plessis see things differently.[115] They point to the lack of a clear definition for IEM in NEMA resulting in the "inconsistent and incongruent" use of the concept.[116] They proffer four different explanations or interpretations of IEM within the context of NEMA[117] to support their contention that a lack of a common understanding undermines the objectives of co-operative governance because different organs of state, operating in different spheres of government interpret IEM to mean different things.[118]

The fact that EIA did not appear in the original Chapter 5 of NEMA[119] would suggest that the legislature preferred the home-grown concept of IEM to the more internationally accepted concept of EIA and yet, despite an opportunity to rename the Regulations, the legislature persisted with the term "EIA Regulations" when the revised versions were gazetted in terms of section 24 of NEMA. This lent a more conventional flavour to the concept and contributes to a level of *de facto* disassociation between the EIA Regulations and the principles prescribed in section 2 of NEMA.

To further confuse matters, the DEAT issued a revised series of information documents comprising an "Integrated Environmental Management Information Series"[120] in 2004 which describes a considerably greater variety of "tools", including ecological risk assessment, cumulative effects assessment, cost-benefit analysis, life-cycle assessment, strategic assessment, environmental management plans, environment economics and so on. NEMA does make provisions for some of these to be regulated: EMFs, strategic environmental assessments, EIA, EMPs, risk

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112 Rabie A 'Environmental barometer: Governmental policy reviews and reforms relating to the environment (1999) *SAJELP* 6, 124.

113 EMFs are provided for in terms of section 24(2)(b) which allows the identification of geographic areas based on environmental attributes, and as specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities many not commence without and environmental authorisation. Section 24(2)(c) allows for the identification of geographic areas based on environmental attributes, and specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities may be excluded from authorisation by the competent authority. EMFs are regulated by the Environmental Management Framework Regulations under NEMA: GNR 547 in *GG* 33306 of 18 June 2010.

114 Rabie A 'Environmental barometer: governmental policy reviews and reforms relating to the environment (1999) *SAJELP* 6, 124.

115 Nel J and W du Plessis 'Unpacking Integrated Environmental Management - a step closer to effective co-operative governance?' (2004) *SAPR/PL* 19, 181-190.

116 Ibid at 181.

117 Firstly, IEM as synonymous with EIA; secondly as meaning the alignment of the environmental governance effort (institutional, policy, project and decision-making level related to the environment); third as meaning the adoption of NEMA principles by other government line functions; and finally as meaning the adoption and use of EIA arrangements by other organs of State.

118 Ibid at 190.

119 In the amendments to the Act, there is reference to "assessment" in section 24(4) a definition of which was included in 2004 (section 1 of Act 8 of 2004) as the process of collecting, organising, analysing, interpreting and communicating information that is relevant to decision-making.

120 DEAT 'Integrated Environmental Management Information Series' (2004) Department of Environmental Affairs and Tourism Pretoria.

assessments, feasibility assessments, norms & standards and spatial development key tools.[121] However, apart from EIA, regulations have been passed only for EMFs,[122] and not for any of the other tools. The 2004 series of information documents,[123] comprising 16 in total, each focus on a different tool or process for environmental assessment and management. This expansion of IEM clearly represents an attempt by DEAT to broaden the focus of Chapter 5 of NEMA, in keeping with the foremost stated purpose of IEM in section 23, through guidelines rather than legislation.

At the time NEMA was enacted, with its focus on co-operative governance, it was difficult to envisage that EIA would come to play such a dominant role. However, during the 15-year history of NEMA many of the provisions dealing specifically with co-operative governance have failed to achieve their original aims. Meanwhile section 24, dealing with environmental assessment, has gained considerable traction. Amendments have seen a change in the title of section 24 from "Implementation" to "Environmental Authorisations".[124] In the original Act, section 24 comprised seven sub-sections (1) - (7) covering one and a half pages. The latest version of the Act contains 19 separately titled sections (section 24A to section 24S) with each of these including up to 10 sub-sections, extending over 26 pages. The requirements of section 24 are extensively reinforced by the EIA Regulations, introduced under NEMA in 2006, including two notices and 35 listed activities.[125] These Regulations were replaced in 2010 with more detailed procedural regulations and three lists totaling 108 activities.[126] The most recent Regulations were gazetted in December 2014, comprising 277 pages of regulations and lists of activities.[127] In addition to the procedural Regulations and the Listed Activities, there are four sets of Regulations dealing with various associated matters.[128]

Environmental management practitioners who were traditionally schooled in the natural sciences now need to understand and interpret a myriad of laws, guidelines, policies and administrative systems in order to facilitate permit acquisitions for development projects. NEMA has become, predominantly, a framework act for EIA rather than a vehicle to provide for co-operative environmental governance towards sustainable development. The implications of this become clear in the comparison between NEMA and the IDA presented in Chapter 4.

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121 Section 24(5)(b)(A).
122 Environmental Management Framework Regulations (GNR 547 in *GG* 33306 of 18 June 2010).
123 DEAT 'Integrated Environmental Management Information Series' (2004) Department of Environmental Affairs and Tourism Pretoria.
124 National Environmental Laws Amendment Act 14 of 2009: GNR 731 in *GG* 35665 of 6 September 2012.
125 Regulations in terms of Chapter 5 of NEMA (GNR 385 – 387 in *GG* 28753 of 3 July 2006).
126 NEMA EIA Regulations (GNR 543 - 546 in *GG* 333016 of 18 June 2010).
127 NEMA EIA Regulations (GNR 982 - 985 in *GG* 38282 of 4 December 2014).
128 EMF Regulations of 2010, National Appeal Regulations of 2014, National Exemptions Regulations of 2014, Regulations on the fees for consideration and processing of Environmental Authorisations and amendments thereto of 2015.

3 Origin and emergence of the Infrastructure Development Act

3.1 Historical overview

Important context is provided for the IDA by the macroeconomic policy developments in South Africa both before and after the advent of democracy in1994.

Prior to 1994, infrastructure was designed and developed primarily to support a resource-based growth trajectory, but excluded the majority of the population from access to economic opportunities.[129] An analysis undertaken by the Department of Performance Monitoring and Evaluation (DPME) within the Presidency reveals that expenditure on infrastructure development, even during the apartheid years, formed a relatively high percentage of South Africa's Gross Domestic Product (GDP), peaking in 1976 at just under 30%.[130] This is more than government expenditure on infrastructure has ever been since, but the resultant GDP growth at the time was relatively low and there was a significant fall in investment post-1976.[131] This is explained in terms of the fiscal choices made prior to 1994, which ensured "the development of infrastructure for the benefit of a privileged minority, an extractive economy and a security state".[132] These circumstances contributed to the poverty and inequality subsequently faced by the democratic state, which still represents a massive challenge to the government of the day.[133]

Post-1994 there has been a gradual increase in spending on infrastructure which has been facilitated by a series economic development strategies. The first of these was the RDP of 1994, as briefly referred to above in section 2.2. The RDP was intended to be a national blueprint for improving government services and basic living conditions for the poorest citizens, who numbered at least 17 million at the time of South Africa's political transition.[134] Given the imperative of addressing basic needs, the focus of the RDP was on land redistribution and social infrastructure, including provision of housing, schooling, healthcare, and connections to electricity grids and water networks.[135] A degree of legislative support for the RDP came in the form of the DFA.[136] The primary purpose of the Act was to cut through a complex mosaic of old laws which were frustrating development and have one strong Act that would facilitate land and infrastructural reform, while apartheid laws were being repealed.[137] Prior to the enactment of the

[129] Development Bank of Southern Africa Limited (2012) 'The State of South Africa's Economic Infrastructure: Opportunities and challenges' 2012.
[130] Department Planning, Monitoring and Evaluation '20 Year Review South Africa 1994 - 2014' (2014) Chapter 5 Infrastructure 104.
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Byrnes R ed *South Africa: A Country Study* (1996) GPO for the US Library of Congress Washington United States.
[135] Development Bank of Southern Africa Limited *The state of South Africa's economic infrastructure: opportunities and challenges* (2012) Development Planning Division Development Bank of Southern Africa 101.
[136] Act 67 of 1995.
[137] Rhizome Management Services & Gemey Abrahams Consultants 'Final Synthesis Report Land Use Management Bill – Regulatory Impact Review Process: Background Technical Assignment 2: Development Facilitation Act Review (2010)' Executive Summary vi.

DFA, the former 'white' areas were being governed under provincial Ordinances[138] and former 'black' townships were subject to the Black Communities Development Act[139] initially, and later the Less Formal Township Establishment Act[140] which represented an attempt by the former National Party government to deal with an urgent need for low income housing.[141]

Although the DFA was the first Act to be formulated within the parameters of the 1994 Constitution and the RDP, it was intended as interim legislation. Parts of the Act were found to be inconsistent with the defined competencies of the provincial and national government authorities in Schedule 4 and 5 of the final Constitution.[142] The DFA will be repealed by the SPLUMA[143] which, in keeping with the requirements of the Constitution, places responsibility for local infrastructure development in the hands of municipalities (local and district authorities) in terms of their Spatial Development Frameworks (SDFs) and incorporated Integrated Development Programmes (IDPs).[144]

Primarily as a consequence of a collaborative effort, the RDP did produce some significant results, facilitating the construction of over 2.3 million homes, and providing electrification and clean-water access to millions.[145] Yet, with 50% of the population living below the poverty line, implementation of the programme was unable to keep pace with need and the RDP ran into trouble.[146] Lack of capacity to implement the programme resulted in huge backlogs in the provision of basic services and a shortage of financial resources. [147] Instead of gathering new taxes, the RDP was criticised for focusing too narrowly on fiscal prudence and the reallocation of existing revenues.[148] Economic difficulties were reflected in the country's slower than anticipated growth rates of 2.5%, and circumstances were exacerbated by the currency crises which began in 1996 and saw the rand value decrease by more than 25%.[149]

The RDP was consequently replaced by a conservative macroeconomic policy framework called the *Growth, Employment and Redistribution Strategy* (GEAR) in 1996.[150] GEAR was aimed at stimulating economic growth by reducing fiscal deficits, lowering inflation, maintaining exchange stability, decreasing barriers to trade and liberalising

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[138] Cape Land Use Planning Ordinance 15 of 1985; Orange Free State Townships Ordinance 9 of 1969; Transvaal Town Planning and Townships Ordinance 15 of 1986 and Natal Town Planning Ordinance 27 of 1949.
[139] Act 4 of 1984.
[140] Act 113 of 1991.
[141] Rhizome Management Services & Gemey Abrahams Consultants 'Final Synthesis Report Land Use Management Bill – Regulatory Impact Review Process: Background Technical Assignment 2: Development Facilitation Act Review (2010)' 7.
[142] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (2010) 6 SA 182 (CC).
[143] Act 16 of 2013.
[144] Section 5 of the Act defines municipal planning as including the compilation, approval and review of IDPs and land use schemes that are components of the IDPs; and control and regulation of land use in municipal areas where the nature, scale and intensity of use do not affect the provincial planning mandate or the national interest.
[145] Findley L and L Ogbu 'South Africa: From Township to Town' (2011) *Places Journal* November 2011 10.
[146] Visser W 'Shifting RDP into GEAR. The ANC Government's Dilemma in providing an equitable system of social security for the "new " South Africa' (2004) Paper presented at the 40th ITH Linzer Konferenz 17 September 2004, 7.
[147] Ibid.
[148] 'South Africa's key economic policies changes since 1994-2013'. Published on South African History Online available at http://www.sahistory.org.za (accessed 17 February 2015).
[149] Visser W 'Shifting RDP into GEAR. The ANC government's dilemma in providing an equitable system of social security for the "new " South Africa' (2004) Paper presented at the 40th ITH Linzer Konferenz 17 September 2004, 9.
[150] Department of Finance (1996) 'Growth, Employment and Redistribution Strategy'. Available at http://www.treasury.gov.za/publications/other/gear/chapters.pdf (accessed 12 March 2015).

capital flows.[151] Unlike the RDP, GEAR was not the product of a broad consultative process and its emphasis on the role of privatisation meant that it met considerable resistance from Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP).[152] According to GEAR, the poverty problem could be resolved through higher growth rates and the "trickle down" effect - in other words, "redistribution through growth", instead of "growth through redistribution".[153] Although GEAR had the effect of bringing about greater macroeconomic stability, it still did not achieve its goals in terms of private investment, job creation and GDP growth.[154]

In 2005 GEAR was replaced by the *Accelerated and Shared Growth Initiative for South Africa* (ASGISA),[155] led by the then president, Thabo Mbeki. This programme defined objectives for two phases: the first phase, between 2005 and 2009, sought an annual growth rate average of 4,5% or higher; and the second phase, between 2010 and 2014, sought an average growth rate of at least 6% of GDP.[156] In addition, ASGISA focused on skills development and saw the launch of a three year programme called the *Joint Initiative on Priority Skills Acquisition* (JIPSA) in March 2006.[157] This initiative was seen as an important mechanism for achieving the Millennium Development Goals (MDGs) which the South African government had committed to, along with 189 other nations, in 2000.[158] Included in the ASGISA programme were specific infrastructure development targets which saw the implementation of, *inter alia*, Gautrain, King Shaka Airport and Dube Trade Port, the De Hoop Dam and Vaal River Augmentation Project.[159] Through its emphasis on state expenditure on infrastructure, ASGISA was said to reflect the macroeconomic model similar to that of the RDP.[160] It was criticised for being vague regarding implementation strategies, and based on a similar type of 'wish list' approach that led to the downfall of the RDP.[161]

In 2010 ASGISA was replaced by the *National Growth Plan*, supported by the NDP.[162] Building on ASGISA's focus on skills development and job creation, the NGP also identifies infrastructure expansion as a key focus area with a

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[151] 'South Africa's key economic policies changes since 1994-2013'. Published on South African History Online available at http://www.sahistory.org.za (accessed 17 February 2015).
[152] Visser W 'Shifting RDP into GEAR. The ANC government's dilemma in providing an equitable system of social security for the "new " South Africa' (2004) Paper presented at the 40th ITH Linzer Konferenz 17 September 2004, 12.
[153] Ibid at 10.
[154] 'South Africa's key economic policies changes since 1994-2013'. Published on South African History Online available at http://www.sahistory.org.za (accessed 17 February 2015).
[155] The Presidency (2005) 'Accelerated and Shared Growth Initiative'. Available www.thepresidency.gov.za/electronicreport/ (accessed 10 December 2014).
[156] Ibid at 3.
[157] See further at http://www.thepresidency.gov.za/docs/reports/jipsa/annualreport08.pdf (accessed 12 March 2015).
[158] The Presidency 'Millennium Development Goals Country Report 2013'. Available at http://www.za.undp.org/content/dam/south_africa/docs/Reports/The_Report/MDG_October-2013.pdf (accessed 17 February 2015).
[159] Hirsch A 'Accelerated and Shared Growth Initiative - South Africa: A Strategic Perspective' (2006) Available at http://www.shisaka.co.za/downloads/asgisa_perspective_hirsch_0611.pdf (accessed 17 February 2015).
[160] 'South Africa's key economic policies changes since 1994-2013'. Published on South African History Online available at http://www.sahistory.org.za (accessed 17 February 2015).
[161] 'What is Agisa?' (2006) Article published in *Business in Africa* Magazine, June 2006. Available at http://www.fin24.com/Economy/What-is-Asgisa-20060707 (accessed 17 February 2015).
[162] See further http://www.economic.gov.za/communications/publications/new-growth-path-series (accessed 10 December 2014).

target to create five million jobs in the next ten years, thereby reducing unemployment from 25% to 15%.[163] However, the NGP and NDP have far more ambitious infrastructural targets compared to previous macroeconomic policies. This is reflected in the designation of the 18 SIPs[164] coupled with a number of dedicated institutions tasked with managing integrated infrastructure planning. [165] These include the Infrastructure Development Cluster,[166] the National Planning Commission (NPC), the DPME[167] and the PICC.[168] In addition, the National Treasury is responsible for providing the budget for the national infrastructure, and infrastructure related departments are responsible for medium to long term planning of specific infrastructure sectors, programmes and projects.[169]

3.2 The IDA: a fast track

The need for an Act to expedite infrastructure development has been directly linked to the goals and objectives of government's latest economic development strategy, as defined by the NGP and NDP. In their promotion of the IDA, the DED emphasise that infrastructure investment has been identified as playing a critical role in the economy, both as a direct provider of services and as a catalyst for higher employment-creation, inclusive economic growth and trade competitiveness.[170] The IDA is, therefore, seen as a tool for facilitating the achievement of the goals of the NGP and NDP by "fast-tracking regulatory decision-making and speeding up the implementation of strategic infrastructure projects earmarked for South Africa".[171]

The Minister of Economic Development first published the draft Infrastructure Development Bill on 8 February 2013, shortly after government's adoption of the NIP in 2012. The initial comment period closed on the 27 March 2013. Opposition to the Bill was expressed by a number of organisations including the CER, the Environmental Monitoring Group (EMG), the Federation for a Sustainable Environment, Telkom and the South African Local Government

[163] National Planning Commission *National Development Plan: Vision for 2030* (2011) Available at http://www.gov.za/issues/national-development-plan-2030 (accessed 10 December 2014).
[164] SIP 1: Unlocking the northern mineral belt with Waterberg as catalyst; SIP 2: Durban-Free State-Gauteng logistics and industrial corridor; SIP 3: South-Eastern node and corridor development; SIP 4: Unlocking the economic opportunities in the North West Province; SIP 5: Saldanha-Northern Cape development corridor; SIP 6: Integrated municipal infrastructure project; SIP l: Integrated urban space and public transport programme; SIP 8: Green energy in support of the South African economy; SIP 9: Electricity generation to support socio-economic development; SIP 10: Electricity transmission and distribution for all; SIP 11: Agri-logistics and rural infrastructure; SIP 12: Revitalisation of public hospitals and other health facilities; SIP 13: National school build programme; SIP 14: Higher education infrastructure; SIP 15: Expanding access to communication technology; SIP 16: SKA and Meerkat; SIP 17: Regional integration for African cooperation and development and SIP 18: Water and sanitation infrastructure.
[165] Development Bank of Southern Africa Limited *The state of South Africa's economic infrastructure: opportunities and challenges* (2012) Development Planning Division Development Bank of Southern Africa 7.
[166] Comprises all infrastructure sector government departments and is tasked with oversight and integration of infrastructure planning and implementation.
[167] Both of these sit within the Presidency and are responsible for planning and monitoring - reporting directly to the Cabinet.
[168] As mentioned previously the PICC was set up prior to the enactment of the IDA, is headed by the President and has responsibility for oversight of all SIPs.
[169] Development Bank of Southern Africa Limited *The state of South Africa's economic infrastructure: opportunities and challenges* (2012) Development Planning Division Development Bank of Southern Africa 7.
[170] Department of Economic Development 'The purpose of the Infrastructure Development Act and what it means for you' (2014) Available at http://www.economic.gov.za/inside-the-idb (accessed 2 February 2015).
[171] Ibid.

Association (SALGA). [172] A revised Bill was introduced in Parliament on 4 November 2013, and the Portfolio Committee on Economic Development called for comments by 22 November 2013. Public hearings on the Bill were held during December 2013 and January 2014.[173] Parliament subsequently approved the Bill and it was assented to by the President on 2 June 2014.

In its final form the IDA comprises six parts and three schedules. After the initial description of objects and definitions in Part 1, the Act establishes into law the coordination structures of the PICC, and defines the functions of the Council and Management Committee. Part 2 empowers the PICC to expropriate land for infrastructure development projects in accordance with Constitutional requirements. Part 3 provides for the SIPs already identified in the NIP. The implementation structures of the Commission are defined in Part 4, requiring regulatory authorities and relevant departments to work together through Steering Committees for each SIP towards coordinating efforts to speed up project implementation. These Steering Committees are responsible for determining which regulatory or permitting requirements are relevant to a project. Included in Part 4 are mechanisms to prevent corruption and nepotism. Part 5 defines processes for relevant permits and licences and cross-references the time-frames for the acquisition of these approvals in Schedule 2.[174] Instead of sequential approval processes, these must run concurrently, wherever possible. Adherence to Chapter 5 of NEMA is, nevertheless, required in terms of section 18 of Part 5. Part 6 contains general provisions relating to reporting, delegation and assignment, regulations and criteria that must guide the implementation of SIPs.

Media coverage of the hearings on the Infrastructure Development Bill, including that in the *Business Day*, *Eye Witness News*, the *Mail & Guardian* and the *Daily Maverick*, reported a mixed reaction to the proposed legislation. The CER's criticisms related to the absence of references in the Bill to sustainable development, the proposed fast-tracked approval timeframe for "mega projects" and the inclusion of mines on the list of strategic infrastructure.[175] An editorial in the *Business Day* referred to the Bill as "pointless", lacking clarity of purpose. [176] Accordingly, an Act cannot be a substitute for political will and the competence of public service.[177] It was suggested that all that would be achieved was an additional layer of red tape.[178] SALGA were vocal about their concerns over the Constitutional rights of municipalities to plan and build their own infrastructure.[179] Eric le Grange, director of the law firm ENSafrica, maintained that the Bill was unwarranted and questioned the need to give legislative authority to the PICC which was

[172] Du Plessis, A 'ELA blog: Legislation update 2014: Part 1' (2014) Available at http://www.elasa.co.za/blog/legislation-update-2014-part-1 (accessed 14 February 2015).
[173] This decision to hold the hearings over the December period was illustrative of government's urgency to get the bill passed.
[174] These would include, *inter alia*, water use licences, atmospheric emission licences, EIA authorisation, planning approvals, waste licences.
[175] Fourie M 'Sustainability, not a new bill, will fix SA's infrastructure' *Business Day* (23 January 2014).
[176] The Editor 'Patel's bill seems a little pointless' *Business Day* (22 January 2014).
[177] Ibid.
[178] Ibid.
[179] Vecchiatto P 'Municipalities, business decry infrastructure bill' *Business Day* (15 January 2014).

simply an administrative function of the Cabinet. [180] He also pointed to the lack of a priority clause that would override existing approval procedures, implying that the fact-track process could not be implemented.[181]

The Bill did receive some support from COSATU, Transnet, Rand Water, SANRAL[182] and the IDC.[183] Even these organisations, however, expressed concern about the "top-heavy" nature of the PICC and potential abuse of powers to expropriate land for infrastructural development by MPs.[184] Patrick Bond, a senior professor of development studies at the University of KwaZulu-Natal, was quoted in the *Daily Maverick*[185] as saying that the Bill would "make matters worse" by conflating genuine socio-economic upliftment projects and multi-million rand private investment projects. He also warned against the danger of creating more "white elephants" whilst ignoring the impact of fossil fuel dependence and climate change. According to Bond "[a] genuine people's Parliament would have an easy time rewriting this bill". He stresses the need to make the economy less vulnerable to globalisation by developing local connectivities, and to take climate change seriously by promoting renewable energy, public transport and a "decarbonised, de-smokestacked economy".

It is significant that, just prior to the introduction of the NDP in November of 2011, Cabinet approved the *National Strategy for Sustainable Development and Action Plan* (NSSD).[186] This Plan advocates a systems approach where the economic system, the socio-political system and the ecosystem are embedded within each other, and then integrated through the governance system that holds all the other systems together in a legitimate regulatory framework. Sustainable development means making sure that these systems remain mutually compatible as the key development challenges are met through specific actions and interventions to eradicate poverty and severe inequalities.[187] A substantive principle of the NSSD is that basic human needs must be met to ensure that the resources that are necessary for long-term survival are not destroyed for short-term gain.[188]

In his 2012 State of the Nation Address to the Joint Sitting of Parliament, at which the President introduced the NDP, he identified one of its aims as needing to overcome piecemeal planning: "The massive investment in infrastructure must leave more than just power stations, rail-lines, dams and roads. It must industrialise the country, generate skills and boost much needed job creation"[189] In his 2013 Budget Speech, the Minister of Finance confirmed that

[180] Donnelly L 'Infrastructure Bill finds no favour' *Mail & Guardian* (22 November 2013).
[181] Ibid.
[182] South African National Roads Agency Limited.
[183] Industrial Development Corporation.
[184] Vecchiatto P 'Cosatu, utilities give nod to infrastructure bill' *Business Day* (16 January 2014).
[185] Bond P 'Infrastructure 'fast-track' may trip up government and corporations' *Daily Maverick* (21 January 2014).
[186] Department of Environmental Affairs *National Strategy for Sustainable Development and Action Plan* 2011–2014 Available at www.environment.gov.za/sites/default/files/docs/sustainabledevelopment_actionplan_strategy.pdf (accessed 14 December 2014).
[187] Ibid at 1.
[188] Ibid at 9.
[189] See further at www.thepresidency.gov.za (accessed 20 February 2015).

Government intends, over a period of three years, to invest R827 billion in building new and upgrading existing infrastructure.[190]

It is clear that the national government has, on the one hand, committed itself to an accelerated economic growth strategy, to be facilitated by the IDA. On the other hand, it continues to espouse the virtues of sustainable development based on the principles and procedures in NEMA. Critics of the IDA[191] have indicated that the NEMA principles and procedures are fundamentally incompatible with those in the IDA. This contention is explored below through the thematic comparison of the IDA and NEMA, with reference to IEM.

4 Comparison between NEMA and the IDA

As indicated in the preceding discussion, NEMA and the IDA are two different types of legislation. NEMA is a comprehensive Act comprising 53 sections and three detailed schedules. The IDA is a relatively concise Act comprising 23 sections and three short schedules. NEMA is a framework Act and, therefore, provides for overarching mechanisms, principles and procedures which inform other Acts, particularly the SEMAs, and subordinate or subsidiary regulations. In keeping with its role, NEMA has a lengthy preamble and an entire Chapter[192] dedicated to principles for decision-making. NEMA has been on the statute books for 16 years and has undergone numerous amendments, in addition to receiving attention and analysis in the jurisprudence,[193] and scholarly writing and commentary.[194] The IDA, on the other hand, has been less than a year in existence. It has been the subject of relatively little academic commentary and has yet to be 'tested' in the courts.

Despite these differences NEMA and the IDA share a focus on projects or activities, and seek to control such activities, with important implications for IEM as a philosophy that underlies the evolution of environmental policy and legislation in South Africa. The analysis below looks at the common themes in NEMA and the IDA and considers if and how they can be reconciled. The themes include the respective objectives and principles in either Act; decision-making and co-operative governance; the scope of each Act, stipulated authorisation procedures and timeframes; provisions for monitoring and evaluation; and the respective approaches to conflict management.

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190 See further at www.treasury.gov.za/documents/national%20budget/2013/ (accessed 10 December 2014).
191 Drafts of the Infrastructure Development Bill were publicly opposed by, *inter alia*, the Centre for Environmental Rights, the Environmental Monitoring Group, the Federation for a Sustainable Environment, Telkom and the South African Local Government Association (SALGA).
192 Chapter 1 (section 2).
193 See *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C)*; Hichange Investment (Pty) v Cape Produce Company (Pty) Ltd t/a Pelts Product and Others* 2004 (2) SA 393 (ECD)*; Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4(CC*); Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others* 2005 SA 111(T)*; Sea Front For All and Another v The MEC: Environmental and Development Planning, Western Cape provincial Government and Others* 2011 (3) SA 55 (WCC); *Shear v Eye of Africa Development (Pty) Ltd* 2010 (5) SA 129 (GSJ); *The Body Corporate of Dolphin Cove v Kwadukuza Municipality and Another* (8513/10) [2012] ZAKZDHC 13.
194 The *South African Journal of Environmental Law and Policy* published a volume dedicated to analysis of NEMA: *SAJELP* 6 (1999).

4.1 Objectives and Principles

The primary purpose behind the inclusion of either principles or objectives, or both, in an Act is to provide a lens through which the provisions of the Act should be applied. It is through this lens that the regulator must determine appropriate actions and make detailed statutory provisions. Principles and objectives also provide the criteria against which a regulator can be held accountable and are, therefore, critical for those charged with implementing an Act. Authorities should direct their resources where the risks to the established objectives or principles of an Act are the greatest.[195] The discussion below distinguishes the approach to the inclusion of principles in NEMA, and objectives in the IDA, and considers the associated implications.

4.1.1 NEMA

Nel and Du Plessis indicate that environmental principles and policy statements must serve as a framework against which all or defined actions are to be considered, and a fundamental requirement of these should be the desire to enhance sustainability.[196] Accordingly, the preamble to NEMA states that it is desirable for the law to establish principles to guide the exercise of functions affecting the environment. The listed principles in section 2 of NEMA are inclusive of those underpinning IEM[197] and are consistent with the 27 Principles for Sustainable Development contained in the Rio Declaration.[198] NEMA, therefore, provides the main conduit via which the concept of sustainability is introduced into the South African legislature. The NEMA principles must "guide the interpretation, administration and implementation of the Act itself and any other law concerned with the protection and management of the environment".[199] In keeping with this requirement, the SEMAs[200] and the Mineral and Petroleum Resources Development Act (MPRDA)[201] contain cross references to the section 2 principles of NEMA.

The formulation of the NEMA principles is led by section 24 of the Constitution, the environmental right.[202] Direct reference is also made in section 1 of NEMA to the State's responsibility to "respect, protect, promote and fulfill the social and economic rights in Chapter 2 of the Constitution."[203] The principles advocate a "risk averse and cautious

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195 See further www.equalityhumanrights.com/legal-and-policy/commission/principles-and-objectives (accessed 10 February 2015).
196 Nel J and W du Plessis 'An evaluation of NEMA based on a generic framework for environmental framework legislation' (2001) *SAJELP* 8, 6.
197 Department of Environment Affairs *The Integrated Environmental Management Procedure* (1992) Guideline Document 1.
198 United Nations *Rio Declaration on Environment and Development* (1992) Available at www.un.org/documents (accessed 2 December 2014).
199 Section 2(1)(e).
200 Section 5(2) of the NEM: Air Quality Act 39 of 2004; Section 2(b) of the NEM: Integrated Coastal Management Act 24 of 2008; Section 7 of the NEM: Biodiversity Act 10 of 2004; Section 5(2) of the NEM: Waste Act 59 of 2008.
201 Section 37(1).
202 According to section 24 "[e]veryone has the right to (a) an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
203 Section 1(1)(a)

approach"[204] and require that "environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons".[205] In keeping with the anthropocentric character of the environmental right, NEMA also requires that "[e]nvironmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interest equitably", [206] and must be "socially, environmentally and economically sustainable".[207]

Additional requirements in section 2, identified as specifically relevant to sustainable development,[208] include the need to avoid, minimise or remediate ecosystem disturbance and loss of biodiversity, pollution, disturbance of cultural or heritage sites and landscapes, use of non-renewable resources, generation of waste and over-exploitation of renewable resources.[209] The general objectives for IEM in chapter 5 include the need for all decisions which may have a significant effect on the environment to adhere to the principles in section 2.[210]

4.1.2 IDA

The IDA does not contain principles. It has four general objectives which reflect the purpose of the Act. These are, firstly, to provide for the facilitation and co-ordination of public infrastructure development which is of significant economic or social importance; secondly, to ensure that infrastructure development in the Republic is given priority in planning, approval and implementation; third, to ensure that the development goals of the state are promoted through infrastructure development; and fourth, to improve the management of such infrastructure during all life cycle phases, including planning, approval, implementation and operations. [211] More specific objectives are identified in section 2 of the Act. These include, *inter alia*, making provision for the PICC;[212] identification of SIPS;[213] allocation of dedicated capabilities and resources to ensure coherence and expeditious completion of infrastructure build and maintenance programmes; establishment of institutions; definition of processes and time periods; and facilitating the acquisition of licenses, approvals, authorisations and permits.

The type of infrastructure that the IDA is aimed at includes that generally associated with significant implications for the environment , such as ports, power stations, nuclear installations, oil and gas pipelines and mines. Unlike in the SEMAs and the MPRDA, absent from the IDA is any reference to sustainable development or need to take cognisance of the principles of NEMA in relation to the implementation of the Act.

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[204] Section 2(4)(a)(vii).
[205] Section 2(1)(4)(c).
[206] Section 2(2).
[207] Section 2(3).
[208] According to section 2(4).
[209] Section 2(4)(a)(i-vi).
[210] Section 23(2)(a).
[211] Stated in the Preamble to the Act.
[212] The PICC existed prior to the commencement of IDA and the need to provide a 'home' for the PICC in the legislature was one of the reasons put forward by the DED justifying the need for the IDA. See further at http://www.economic.gov.za/inside-the-idb (accessed 20 February 2015).
[213] These would include those that were underway prior to the commencement of the IDA and those still to be designated.

4.1.3 Balancing competing objectives and principles

The "development goals" of the state, that the IDA is intended to promote through prioritising infrastructure development,[214] are spelt out in the NDP and NIP. They include "addressing developmental challenges in a manner that ensures environmental sustainability."[215] Here there is consistency with the NEMA principles which also emphasise the need for development to be sustainable, in keeping with the mandate provided by section 24 of the Constitution.[216] Despite the absence of an explicit reference to section 2 of NEMA in the IDA, there is no escaping the applicability of the NEMA principles since they are relevant to the actions of all organs of state that may affect the environment.[217] The common emphasis on sustainability in the NDP, NEMA and the Constitution would imply that the objectives of the IDA *ought* to be compatible with the NEMA principles. A closer look at these principles would suggest potential for accommodating an expedited procedure for infrastructure development.

To start with NEMA requires that the section 2 principles apply alongside the State's responsibility to respect, protect, promote and fulfill the rights in the Constitution and, in particular, the basic needs of persons disadvantaged by unfair discrimination.[218] The IDA requires that any person exercising a power in terms of the Act must do so in a manner that is consistent with the Constitution,[219] and infrastructure development must be undertaken in a manner which seeks to advance national development goals, including *inter alia* local industrialisation, skills development, job creation, youth development and economic empowerment.[220]

Secondly, the NEMA principles require promotion of equitable access to environmental resources, benefits and services to meet basic human needs , and "special measures" may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.[221] Once again the anthropocentric nature of the environmental right is reflected, and Principle 1 of the Rio Declaration, which places human beings at the centre of concern for sustainable development, entitling them to a healthy and productive life in harmony with nature. IEM is similarly premised on the need to enhance positive aspects of development proposals, and to interpret "environment" broadly to include social, economic and political components.

Both IEM and NEMA principles were, therefore, formulated with regard to the need to redress inequitable access to resources, benefits and services. There is an implicit acknowledgement that, in some instances, negative impacts on the environment may need to be borne in the interest of advancing broader social and economic prerogatives. This approach appears to leave a way open for accelerated infrastructure development and, at the time of enactment of

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[214] Preamble to the IDA.
[215] Chapter 5 of the NDP.
[216] Section 24(b)(iii) requires "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".[216]
[217] Section 2(1).
[218] Section 2(1)(a).
[219] Section 2(2).
[220] Section 2(1)(i).
[221] Section 2(4)(d).

NEMA, would have been consistent with the land allocation and distribution policies endorsed in the DFA.[222] The purpose of the IDA is not, in itself, inconsistent with the principles of NEMA. The "special measures" to ensure equitable access to services and benefits referred to in NEMA[223] could well include measures to prioritise and accelerate projects that are aimed at improving service delivery, promoting health and education, and providing basic infrastructure development. Some of the SIPs and Schedule 1 projects in the IDA could fall into this category, [224] but others would not.[225]

Despite potential for a degree alignment between the key principles of NEMA and the primary objective of the IDA, the overall tone of the IDA is one of needing to overcome other legislative requirements in order to achieve its aims. For example, an object of the IDA is to provide "a statutory instrument by which obstacles to the expeditious implementation of the national infrastructure plan can be unblocked".[226] Similarly the functions of the Council include to identify "any legislation and other regulatory measures that impede or may impede infrastructure development"[227] and to "develop strategies to cause the removal of impediments to investment".[228] The dictionary meaning of "impede" is to "delay or prevent (someone or something) by obstructing them",[229] the implication being that any required environmental authorisations[230] are a hindrance and cause delays. The language of the IDA is clearly indicative of an opinion, in some sectors of government, that decision-making based on the section 2 principles in NEMA and Chapter 5 procedures, is not facilitating the pace of development required to deliver on the goals of the NDP. This is further confirmed by the way in which the IDA was described in a media briefing on 7 March 2013 by the Minister of Economic Development "as building on the approach the state has already begun using to *speed up* regulatory decisions" (emphasis added).

It cannot be denied that project-based EIAs triggered by listed activities in the EIA Regulations are, at times, guilty as charged. The DED cite an example of a six to seven year permitting process for an electricity transmission line.[231] In terms of the current legislative regime there is no provision for discretionary decision-making in the EIA Regulations that would allow projects to be sanctioned on the basis of the principles of IEM and NEMA having been fulfilled. Although exemptions from certain aspects of the prescribed EIA process can be applied for, [232] there is no way round the need for an EIA if the activity, or an aspect thereof, is listed, even if this leads to the absurd situation where obvious benefits are delayed. In such instances IEM would mandate a strategic assessment of the proposal or

[222] 67 of 1995.
[223] Section 2(4)(d).
[224] Examples include schools, health care facilities, water works and sanitation.
[225] Examples include pipelines, mines, powers stations and harbours.
[226] Section 2(h).
[227] Section 4(g)(ii).
[228] Section 4(j).
[229] *Oxford English Dictionary 3rd Edition* (2010) Oxford University Press Oxford United Kingdom.
[230] These would include EIA authorisations, planning permissions, water use licences, waste licences, heritage permits and atmospheric emissions licences.
[231] The Infrastructure Development Bill Presentation to the Select Committee (NCOP) 4 March 2014.
[232] See section 24M of NEMA: Exemptions from application of certain provisions; and NEM: National Exemption Regulations GNR 993 in *GG* 38303 of 8 December 2014

policy, rather than the application of a myriad of site specific EIAs to the consequent activities. When the overall aim of a project, policy or decision facilitates environmental protection, early screening of generic environmental impacts and an appropriate emphasis on the positive versus the negative would allow adequate attention to be given, at the activity stage, to the implementation of appropriate site specific health, safety and environmental management plans.[233]

Despite the limitations of the non-discretionary application of EIA, there are risks associated with a purely objective driven approach. According to the CER "the IDA effectively scopes a proposal on the basis of economic and social development goals prior to the undertaking of any form of environmental assessment".[234] This is problematic since the immediate and obvious social and economic benefits often mask or overshadow harmful consequences that may be less apparent or manifest over a longer term. Unfortunately, the rigidity of the procedures prescribed by the EIA Regulations does not easily allow project proponents to appreciate the enduring value of environmental assessment. More often than not the EIA is regarded, not only by the state, but also by those who commission or manage it, as one in a long list of permits and authorisations that must be 'bagged' before a development can proceed.

The main obstacle to reconciling NEMA and the IDA, with regard to principles and objectives, can be summed up in relation to the cautionary principle. Central to this principle is the element of anticipation, reflecting a requirement that effective environmental measures need to be based upon actions which take a long-term approach and which might anticipate changes on the basis of scientific knowledge.[235] According to Cameron and Aboucher, this principle should be viewed as a guiding principle the purpose of which is "to encourage - perhaps even oblige-decision makers - to consider the likely harmful effects of their activities on the environment before they pursue those activities".[236] Both IEM and NEMA envisage a relaxation of the cautionary principle in circumstances where socio-economic imperatives require that action cannot be delayed, despite a degree of scientific uncertainty. This is not equivalent to abandoning the principle altogether, as the IDA would appear to do. The effect of this has, in the past, resulted in a dear price from both an environmental and economic perspective.[237]

4.2 Scope

Many of the overlaps, and potential conflict, between NEMA and IDA are revealed through their respective scope, meaning the range of activities to which either or both Acts would apply. The overall purpose of each Act is stated in

[233] An apt example would be the government's renewable energy programme - application of IEM to the overall programme and strategic site selection process would save time and expenditure currently directed at separate EIAs for each proposed installation, which need to be approved prior to their being considered for selection.
[234] Centre for Environmental Rights 'Comments of the Draft Infrastructure Development Bill' (2013) par 39.
[235] United Nations Rio Declaration on Environment and Development (1992). Principle 15 UN Doc. A/CONF 151/26 (vol. I) / 31 ILM 874 (1992).
[236] Cameron J and J Abouchar 'The precautionary principle: a fundamental principle of law and policy for the protection of the global environment (1991) *Boston College International and Comparative Law Review* 14(1), 2.
[237] See examples cited in O'Riordan T and J Cameron (Eds) *Interpreting the Precautionary Principle* (1994) Earthscan Publications United Kingdom.

the preamble and the related scope is prescribed by the lists of projects and activities that are regulated by NEMA in terms of the EIA Regulations, and by the IDA in terms of Schedule 1, 2 and 3.

4.2.1 NEMA

In keeping with its purpose to provide for co-operative governance NEMA is broadly applicable to any organ of state that deals with matters affecting the environment and decisions that it may take. As indicated above, such actions and decisions must take account of the principles in section 2 which effectively constitute South Africa's policy on the environment. In addition to the principles, included in the IEM Chapter 5 are specific provisions[238] which apply "where environmental impact assessment has been identified as the environmental instrument to be utilised in informing an application for environmental authorisation".[239] These provisions, contained in section 24, refer to the investigation of the potential consequences or impacts of activities, mitigation measures, reporting, monitoring and management.[240] Section 24, therefore, provides the framework for the EIA Regulations and associated Listed Activities. The latter identifies the projects or developments which may not proceed without an EIA Authorisation, the detailed procedural requirements for which are stipulated in the Regulations.[241]

4.2.2 IDA

The primary purpose of the IDA is to ensure that public infrastructure development which is of significant economic or social importance is given priority in planning, approval and implementation. The type of projects to which the IDA applies are the existing SIPs identified in Schedule 3 of the IDA. Additional SIPs may be designated as such by the PICC, by notice in the Gazette.[242] The PICC may also advertise for developers to assume responsibility for SIPs identified and gazetted by the PICC.[243] A SIP may be state-owned, owned by a public-private partnership or privately owned with the consent of the owner.[244]

Three criteria are listed for a project proposal to be designated as a SIP.[245] Firstly, it must be of significant economic or social importance to the Republic. Secondly, it must contribute substantially to any national strategy or policy relating to infrastructure development. Finally, it must be above a certain monetary value determined by the PICC. Although not explicitly stated in the Act, one would presume that the project must also be of the type listed in Schedule 1.[246] This is confirmed by the definition of a SIP as a "public infrastructure project or group of projects...and may comprise of one or more installation, structure, facility, system, service or process relating to any

[238] See section 24(4)(b).
[239] Section 24(4A).
[240] Section 24(4)(b).
[241] The latest in the series of EIA Regulations since 1989 are published in GN R982-985 in *GG* 38282 of 4 December 2014.
[242] Section 8(1).
[243] In terms of section 8 of the IDA.
[244] Definition of "public infrastructure" in section 1, read with section 7(3).
[245] Section 7(1)(b)(i-iii).
[246] Schedule 1 is entitled: Public installations, structures, facilities, systems, services or processes in respect of which projects may be designated as strategic integrated project.

matter specified in Schedule 1 or which has been added by the Council..."[247] Once the PICC has decided on and designated the SIP, the permitting and licensing can purportedly be dealt with through institutional arrangements set up in terms of the IDA, including the timelines and procedures in Schedule 2.

4.2.3 Reconciling issues of scope

It can be seen from the description above that the scope of the IDA is effectively defined by the meaning of "infrastructure" whereas the scope of NEMA, in relation to development projects, is defined by "activities". The respective definitions of "infrastructure" and "activities" are, therefore, important in a comparison of the two Acts.

Starting with the IDA, the definition of "infrastructure" is consistent with the definition of a SIP: "installations, facilities, systems, services or processes relating to the matters specified in Schedule 1".[248] According to its preamble the IDA is aimed at "public infrastructure", and yet section 7(3) states that a SIP "may include infrastructure that is not public infrastructure, provided it is with the consent of the owner". One would expect that few "owners" would withhold consent if such consent promised faster access to financial returns. By contrast, the dictionary definition of "infrastructure" is the "*basic* physical and organisational structures and facilities (e.g. buildings, roads, power supplies) *needed* for the operation of a society or enterprise" (emphasis added).[249] A number of projects included in Schedule 1 as potential SIPs[250] confirm an interpretation of infrastructure that goes beyond "need", and does not readily distinguish "basic" or "public" facilities from large profit driven projects or developments irrespective of whether they be state or privately owned.

With reference to the interpretation of infrastructure in the IDA, Bond[251] suggests that there are two types of need that must be separated: the type that involves the installation of a "R2,300 township sanitation connector pipe" and the type that involves a "R23 billion Durban-Joburg multiproduct oil pipeline". He argues in favour of locally-oriented spending on small projects that have a higher multiplier effect, and questions whether the IDA's "mention of water/sanitation, clinics, and schools was snuck in to make the mega-project bias more palatable". In their promotion of the Act, the DED attempts to overcome the discrepancy between genuine public-service type projects and large, privately funded projects by conflating several reasons for investment in infrastructure including provision of services, catalyst for higher employment-creation, inclusive economic growth and trade competitiveness.[252]

The corresponding definition of "activities" in NEMA has been amended three times.[253] The term was originally defined simply as "policies, programmes, plans and projects". In the latest version of NEMA, the definition includes

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[247] Section 1.
[248] Ibid.
[249] *Oxford English Dictionary 3rd Edition* (2010) Oxford University Press Oxford United Kingdom.
[250] These would include mines, economic facilities, power stations or installations for harnessing any source of energy, pipelines, human settlement, ports, airports and productive rural or agricultural infrastructure.
[251] Bond P 'Infrastructure 'fast-track' may trip up government and corporations' *Daily Maverick* (21 January 2014):
[252] Department of Economic Development 'The purpose of the Infrastructure Development Act and what it means for you' (2014) Available at http://www.economic.gov.za/inside-the-idb (accessed 2 February 2015).
[253] In terms of section 1 of Act 56 of 2002, by section 1(a) of Act 62 of 2008 and section 1(a) of Act 30 of 2013.

"processes" and restricts the list to those identified in terms of section 24(2)(a) and (b), which are equivalent to those in the EIA Regulations and EMF Regulations.[254]

Despite the overarching applicability of NEMA and its principles to the decisions of any organ of state that deals with matters affecting the environment, there is a single cross-referential clause in the IDA. Accordingly "whenever an environmental assessment is required in respect of a strategic integrated project, such assessment must be done in terms of the National Environmental Management Act, 1998 (Act 107 of 1998) with specific reference to Chapter 5".[255] According to the CER "this clause was apparently reluctantly inserted in the draft Bill after earlier drafts caused alarm amongst other authorities".[256] Irrespective of whether the inclusion of this requirement was a token gesture aimed at appeasing the environmental ministries, the implications amount to the need for a SIP to be assessed in accordance with the EIA Regulations if any of its component activities are listed.[257]

A comparative overview of the lists of activities in the EIA Regulations[258] and Schedule 1 in the IDA (see Table 1 below)[259] is useful for considering the implications of having two concurrent lists in the legislature governing the licensing of development projects. A juxtaposition of the two lists demonstrates, firstly, the extent of overlap between projects that may be designated as a SIP in terms of the IDA, and which would also require an EIA. Secondly, the level of detail included in the EIA Regulations is evident, compared to the simplicity and absence of any thresholds in Schedule 1 of the IDA. The overall scope of the lists is, therefore, similar but the very specific nature of the EIA listings is aimed at creating certainty, and limiting discretionary decision-making and flexibility. The IDA list, on the other hand, appears capable of including any and all development initiatives both inside and outside of urban areas. The lack of detail or thresholds would allow for discretion and flexibility in deciding which projects or activities could qualify as a strategic infrastructure development.

Table 1: Listed activities in terms of GN R983 and GN R984 compared to Schedule 1 of the IDA

Activities listed GN R544 requiring Basic Assessment, and GN R545 requiring Scoping and EIA	**Schedule 1 of the IDA**
Construction and expansion of airports and runways. Construction of landing strips less than 1.4km (province specific).	National and international airports
Construction or expansion of facilities or infrastructure for marine telecommunications where there will be an increase in the development footprint. Construction of masts and towers for communications and broadcasting above a specified height (province specific)	Communication and information technology installations
Transformation of undeveloped, vacant or derelict land to, *inter alia,* institutional use. Clearing of indigenous vegetation (subject to province specific thresholds)	Education institutions
Construction and decommissioning of facilities or infrastructure for the generation of electricity. Construction of facilities or infrastructure for the distribution of electricity exceeding specified thresholds inside and outside urban areas.	Electricity transmission and distribution

[254] In section 1(1).
[255] Section 18.
[256] Fourie M 'Environmental rights blog: The Infrastructure Development Bill is a law for the high rollers' (2014). Available at http://cer.org.za/news/environmental-rights-blog-infrastructure-development-bill-law-high-rollers (accessed 13 March 2013).
[257] Section 18 of the IDA states that whenever an environmental assessment is required in respect of a strategic integrated project, such assessment must be done in terms of the National Environmental Management Act with specific reference to Chapter 5.
[258] Listed activities in GN R983, GN R984 and GN R985 in *GG* 38282 of 4 December 2014.
[259] The activity descriptions have been summarised and specific thresholds excluded.

Activities listed GN R544 requiring Basic Assessment, and GN R545 requiring Scoping and EIA	**Schedule 1 of the IDA**
Transformation of undeveloped, vacant or derelict land to, *inter alia*, institutional use. Clearing of indigenous vegetation (subject to province specific thresholds).	Potentially applicable to all Schedule 1 projects.
Establishment or expansion of cemeteries over a certain size. Transformation of undeveloped, vacant or derelict land to residential, retail, industrial or commercial use inside and outside urban areas. Any process identified in terms of section 53 of NEM:BA (clearing of indigenous vegetation). Construction of billboards (subject to province specific thresholds). Construction, expansion or conversion of resorts, lodges or tourism accommodation (subject to province specific thresholds). Construction of cableways and funiculars (subject to province specific thresholds). Construction or expansion of tracks and routes for vehicle testing (subject to province specific thresholds)	Human settlements and related infrastructure and facilities
An activity that requires a prospecting licence of renewal thereof in terms of the MPRDA. Any activity requiring a mining permit or renewal thereof in terms of the MPRDA. Any activity requiring a mining right or renewal thereof in terms of the MPRDA. Any activity requiring an exploration right or renewal thereof in terms of the MPRDA. Any activity requiring a reconnaissance permit in terms of the MPRDA excluding fly overs. Extraction or removal of peat or peat soils.	Mines
No specific equivalent.	Economic facilities
Construction or expansion of facilities or infrastructure for the storage and handling of a dangerous good in containers of more than a specified capacity (subject to general and province specific thresholds). Expansion or changes to facilities, processes or activities resulting in the need for a permit in terms of legislation governing pollution and emission. Construction or expansion of facilities for the refining, extraction or processing of gas, oil or petroleum products. Construction and expansion of facilities for the bulk transportation of dangerous goods.	Oil or gas pipelines, refineries or other installations
Construction or expansion of structures in coastal public property outside of existing ports and harbours. Earth moving activities in the sea, an estuary or littoral active zone with certain exceptions. Dune stabilisation Infilling and removal of material for a watercourse, the sea or seashore. Construction or expansion of an island, anchored platform or any other permanent structure on or along the sea bed.	Ports and harbours
Construction, expansion and decommissioning of facilities or infrastructure for the generation of electricity. Construction or expansion of facilities or infrastructure for nuclear reaction including, *inter alia*, storage and disposal or radioactive waste. Commencement of an activity requiring an Atmospheric Emissions Licence.	Power stations or installations for harnessing any source of energy
Construction or expansion of facilities or infrastructure for the concentration of animals for the purpose of commercial production over certain densities. Construction of facilities or infrastructure for the concentration of poultry inside and outside urban areas. Construction or expansion of abattoirs or aquaculture facilities (inshore and offshore) (subject to general and province specific thresholds) Construction or expansion of a hatchery or agri-industrial infrastructure exceeding a specified area Construction of expansion of a dam above certain thresholds. Physical alteration of virgin soil to agriculture or afforestation. Construction of reservoirs (subject to province specific thresholds).	Productive rural and agricultural infrastructure
Construction of roads outside urban areas. Route determination of roads. Widening of roads (subject to province specific thresholds).	Public roads and transport
Construction, and expansion of railways, stations or shunting yards where there will be an increased development footprint subject to certain exclusions.	Railways
Construction and expansion of facilities for the treatment of effluent, wastewater or sewage, on undeveloped land, of a specified throughput. Construction or expansion of facilities or infrastructure for the bulk transportation of water, sewage or stormwater except in a road reserve or an urban area more than 32 m from a water course.	Sewage works and sanitation
EIA applicable in terms of NEM:WA.	Waste infrastructure
Construction of expansion of a dam.	Water works infrastructure

Activities listed GN R544 requiring Basic Assessment, and GN R545 requiring Scoping and EIA	Schedule 1 of the IDA
Construction or expansion of bulk stormwater outlets, canals, channels, bridges, dams, weirs, marinas, slipways buildings and other infrastructure within or 32 metres from a water course. Construction or expansion of facilities for the off-stream storage of water over a specified capacity. Construction and expansion of facilities for the transfer of water between catchments, impoundments or water treatment works. Desalinisation facilities Construction of reservoirs (subject to province specific thresholds).	
Construction of facilities or infrastructure for the storage or ore or coal requiring an Atmospheric Emissions Licence.	*No specific equivalent*
The release of genetically modified organisms into the environment.	*No specific equivalent*

The listing approach arguably sits more comfortably within the ambit of the IDA compared to NEMA. This is simply because a proposal or project that will deliver on the socio-economic goals contained in the NDP is more readily identifiable than an activity that *may* have significant environmental impact. According to Petts, the listing of activities that require a mandatory EIA poses numerous challenges, including that the lists are compiled without complete knowledge or information: "[t]hey give the impression, therefore, of being exhaustive while, in actual fact, they are not." [260]

What is notable in relation to the South African EIA requirements, compared for example to NEPA in the United States,[261] is the complex descriptions of the activities and the number of parameters. Take, for example, the description of infrastructure for the generation of electricity. Listing Notice 1 (requiring a basic assessment) has a lower threshold of 10 megawatts, and upper threshold of 20 megawatts and, in the alternative, an area limit of 1 hectare. The equivalent in Listing Notice 2 does not refer to area but stipulates a maximum output of 20 megawatts above which a full assessment is required. In addition, expansion and decommissioning are defined as separate activities, also with upper and lower limits. The descriptions of many of the more than 50 prescribed activities contain a similar level of detail.

These prescribed thresholds, identified as a basis for deciding if an EIA is required, can only but be arbitrary. Neither the receiving environment nor the impact itself can start or cease in accordance with a particular measurement of distance, density, output and so on. The need to create certainty comes at the cost of restricting EIA practitioners and authorities from using a common-sense or practical approach, instead allowing the fear of non-compliance with the letter of the law to distract from the overall purpose of and principles in the legislation. It is, therefore, easy to appreciate how the broader aims of IEM may be overlooked while practitioners, authorities and developers are grappling to decide exactly which regulation applies, when and how.

On the flipside, the lack of detail in the description of projects that may be categorised as SIPs is also of concern. Firstly, there is virtually no restriction on the type of installation or activity that may fall under the definition of

[260] Quoted in Saidi T 'Environmental Impact Assessment as a policy tool for integrating environmental concerns in development' (2010) *AISA Policy Brief* 19 June 2010, 5.

[261] NEPA applies simply whenever an activity or action is proposed on federal lands, or requires passage across federal lands, or will be funded in part or in whole by federal money, or will affect the air or water quality that is regulated by federal law.

infrastructure. Secondly, there is an assumption that the listed projects represent social and economic benefits in the absence of any form of assessment, consideration of alternatives or stakeholder engagement. Third, as discussed previously, there is little scope for the adoption of a risk averse and cautious approach as prescribed by IEM and NEMA principles, particularly where current knowledge may be limited. Most concerning, however, is that the lack of any restrictions conveys a need to meet short term goals and aspirations which are likely to come at a cost to the sustainable use of resources and the needs of future as well as present generations.

4.3 Decision-making institutions and co-operative governance

It has been established that a key difference between NEMA and the IDA is the principle-based character of NEMA, and the objective-driven character of the IDA. This is reflected in the decision-making structures and institutions provided for in each Act. NEMA aims at integrated and co-operative decision-making through the provision of principles, as well as institutions and tools to facilitate the application of the principles to decisions made by spheres of government across sectors relevant to the environment. The IDA, on the other hand, provides for decision-making institutions whose sole purpose is to ensure that projects are managed effectively and that the objectives of the Act are met. This dichotomy has important implications in relation to the Constitution both in terms of the environmental right in section 24, and the arrangements for co-operative governance detailed in Chapter 3 read with Schedules 4 and 5.

4.3.1 NEMA

The original architecture of NEMA was, according to Lawrence, "heavily influenced by an emerging form of public management in South Africa that seeks inspiration from the Constitutional imperative to introduce co-operative governance".[262] This intention is clearly stated in the purpose of NEMA: "[t]o provide for co-operative governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-coordinating environmental functions exercised by organs of state...". The need for integrated decision-making also features in the long title of NEMA, according to which "sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that developments serves present and future generations".

At the time of its enactment NEMA made provision for a number of institutions whose purpose it was to facilitate co-operative governance and integrated decision-making including a National Environmental Advisory Forum (NEAF)[263] and a Committee for Environmental Co-ordination (CEC).[264] These institutions were to play a critical role in promoting co-operative governance.

[262] Lawrence J 'How manageable is South Africa's new framework of environmental management?' (1999) *SAJELP* 6, 61.
[263] Chapter 2 Part 1 (sections 3-6).
[264] Chapter 2 Part 2 (sections 7-10).

The NEAF was established in 2005 and was intended to provide representation for civil society, enabling them to be involved in environmental management matters. At the time, the then Minister of DEAT, Marthinus van Schalkwyk, stated that "[t]he establishment of the NEAF is one of the most important and concrete steps ever taken by Government to recognize the value of stakeholder partnerships in promoting environmental management and governance".[265] However, four years after its establishment, NEAF was disbanded[266] and Chapter 2 of NEMA repealed by the National Environmental Management Laws Amendment Act.[267] The CEC suffered a similar fate to the NEAF, when the relevant sections of NEMA providing for its establishment were repealed.[268] The purpose of the CEC was to bring together relevant government departments involved in environmental functions, the aim being to co-ordinate and integrate their work.[269] It was chaired by the Director General of DEAT and its meetings were supposed to be attended by the Directors General of relevant national departments and the Heads of the provincial environmental departments. In reality the CEC was attended by junior officials which undermined the extent to which its recommendations were taken seriously and there was little buy-in.[270]

In addition to the institutions provided for in Chapter 2 of NEMA, Chapter 3 makes provision for several tools to facilitate co-operative governance and integrated decision-making, including environmental implementation plans (EIPs) and environmental managements plans (EMPs). The purpose of these plans is to assist government departments in ensuring that any internal policies and programmes that may affect the environment will comply with the NEMA principles, and other norms and standards for environmental protection.[271] In the original iteration of NEMA every national department was supposed to prepare these plans within one year and revise them every four years. The requirements for such plans were, however, never regulated and amendments to NEMA in 2013[272] changed the timescale for implementation and revision to every 5 five years. The credibility of EIPs and EMPs was further undermined by the repeal of Chapter 2 in 2009, which effectively meant that the sub-committees or technical working groups responsible for the plans, established under the CEC, had nobody to report to. EIPs and EMPs have subsequently been overshadowed by a wide suite of instruments and tools required in terms of different legislation,

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[265] Quoted in Fakier S, A Stephens, J Tholin and P Kapelus 'Background research paper produced for the South Africa Environment Outlook Report: National State of the Environment Project' (2005). Department of Environmental Affairs and Tourism, 18.

[266] The minutes from the public hearings about the proposed amendments to NEMA that would result in the repeal of Chapter 2 suggest that the NEAF was not functioning optimally, that meetings were poorly attended and they were becoming involved in research tasks that were considered to be beyond their mandate. See further on http://www.pmg.org.za/report/20080813-public-hearings-national-environmental-laws-ab-b66-2008 (accessed 2 February 2015).

[267] Act 14 of 2009 (section 5).

[268] Part 2 of Chapter 2 (sections 7 - 10) repealed by section 5 of Act 14 of 2009.

[269] Bray E 'Co-operative governance in the context of the National Environmental Management Act 107 of 1998' (1999) *SAJELP* 6, 7.

[270] Fakier S, A Stephens, J Tholin and P Kapelus 'Background research paper produced for the South Africa Environment Outlook Report: National State of the Environment Project' (2005). Department of Environmental Affairs and Tourism. 28.

[271] Bray E 'Co-operative governance in the context of the National Environmental Management Act 107 of 1998' (1999) *SAJELP* 6, 7.

[272] National Environmental Laws Second Amendment Act 30 of 2013.

particularly SPLUMA, including spatial development frameworks, integrated environmental programmes, bioregional plans, and permitting and licensing requirements.[273]

An additional procedure for co-operative governance is provided for in Chapter 8 of NEMA, namely, Environmental Co-operation Agreements. These are intended to be "partnership agreements" in terms of which the Minister, provincial and local authorities may enter into an agreement with a person, company, groups of companies or a community for the purpose of promoting compliance with the principles of environmental management.[274] Unfortunately no such agreements have been concluded so potential for co-operation in this regard has not been realised.

Writing at the time of the commencement of NEMA in 1999, Bray opined that co-operative governance "runs through the Act like a golden thread."[275] It is unfortunate that this "thread" has become increasingly difficult to trace through the subsequent eleven amendments to NEMA. Provisions aimed at facilitating co-operative governance have either been repealed, watered down, or have simply not been implemented, partly due to an absence of regulations. According to Nel and Du Plessis,[276] although NEMA provides in principle for the alignment of the fragmented and disjointed environmental governance effort, it fails to provide practical measures through placing positive duties on all organs of state to generate, adopt and use alignment mechanisms. In addition, the overwhelming expectations of government departments at all levels to produce plans, procedures and agreements, where there is often serious overlap and duplication makes for an expensive and time consuming environmental governance effort.[277]

In the absence of a strategic decision making body representing the various horizontal and vertical spheres of government, the responsibility for the implementation of NEMA falls on existing government entities in local municipalities, and the national[278] and provincial departments.

At the provincial level, the environmental departments were originally established *circa* 1994 in response to the inclusion of the environmental right in the Constitution. These departments accorded environmental issues different priorities and emphasis.[279] This is reflected in the manner in which the environmental portfolios in the nine provinces have been combined with various other portfolios including agriculture, rural development, tourism, economic affairs and planning.[280] The Constitution also introduced distinct functions for the local sphere of government.[281]

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[273] Department of Environmental Affairs 'Environmental Impact Assessment and Management Strategy' (2014) 42.
[274] Bray E 'Co-operative governance in the context of the National Environmental Management Act 107 of 1998' (1999) *SAJELP* 6, 9.
[275] Ibid at 2.
[276] Nel J and W du Plessis 'Unpacking integrated environmental management – a step closer to effective co-operative governance?' (2004) *SAPR/PL* 19, 185.
[277] Kotze L and S De La Harpe 'The good, the bad and the ugly: using good and co-operative governance to improve environmental governance of South African World Heritage Sites: A case study of the Vredefort Dome' (2008) *PER* (11) 2, 2/53.
[278] In 2009 President Zuma announced the establishment of the National Department of Environmental Affairs from the former Department of Environmental Affairs and Tourism.
[279] Paert R and J Wilson 'Environmental policy-making in the new SA' (1998) 5 *SAJELP* 262
[280] KwaZulu Natal: Department of Agriculture, Environmental Affairs and Rural Development; Mpumalanga: Department of Economic Development, Environment & Tourism; Limpopo: Department of Economic Development, Environment and Tourism;

Unfortunately a lack of detailed definitions of these functions has resulted in confusion between provincial departments and municipalities about role definition, and caused conflict over resources and authority.[282] This situation has undoubtedly contributed to the often fragmented approach to decision-making under NEMA, providing justification for DED's identification of the need for cross-cutting authorisation procedures - "weak capacity, poor coordination and weak integration".[283] The consequences of NEMA having failed to deliver on its primary purpose to promote co-operative governance cannot, therefore, be disregarded as a reason for national government's enactment of the IDA.

4.3.2 IDA

The PICC report of 2012 refers to the "cost raising and development-dampening" effects of the division of responsibilities for infrastructure across the state, from the national departments to state-owned companies, provinces, municipalities and regulatory bodies.[284] Accordingly this leads to "the risk of contradictory plans and priorities or uncoordinated implementation". Much of the IDA is, therefore, dedicated to formulating institutions and defining procedures for effective decision-making. These institutions and associated procedures are the main mechanisms that will drive the implementation of the Act and also "speed up the delivery and implementation of social and economic infrastructure" and "maximise the developmental impact."[285]

The PICC, as the primary decision-making body set up in terms of the IDA, "must perform the functions provided for in this Act".[286] The Commission was established prior to the enactment of the IDA, the drafting of which was partly in response to a perceived need to legitimise and provide a legal framework for this institution. As implied in the name, the PICC is headed up by the President who is also the Chairperson of the Council which is the executive branch of the PICC. In addition to the President, members of the Council include the Deputy President, Ministers designated by the President, the Premiers of the Provinces and the Executive Mayors of metropolitan council, and the chairperson of SALGA as a representative of all the non-metro municipalities. Other components of the PICC include a Management Committee, a Secretariat, and a Chairperson, Coordinator and Steering Committee for each SIP. The roles and functions of each component of the PICC are clearly defined in the IDA, the most important being the Council.

Northern Cape: Department of Environmental Affairs and Nature Conservation; North West: Department of Economic Development, Environment, Conservation and Tourism; Eastern Cape: Department of Economic Development and Environmental Affairs; Western Cape: Department of Environmental Affairs and Development Planning; Gauteng: Department of Agriculture and Rural Development; Free State: Department of Economic Development, Tourism and Environmental Affairs.

[281] Schedule 4 and 5.

[282] Steytler N and Y Fessha 'Defining provincial and local government powers and functions: the management of concurrency' (2005) Local Government Project Community Law Centre University of the Western Cape. Available at http://mlgi.org.za/publications/publications-by-theme/local-government-in-south-africa (accessed 14 March 2015).

[283] Presidential Infrastructure Coordinating Commission Report 2012 'Summary of the South African National Infrastructure Plan', 7. Available at http://www.gov.za/issues/national-infrastructure-plan (accessed 17 February 2015).

[284] Ibid.

[285] Department of Economic Development 'The purpose of the Infrastructure Development Act and what it means for you' (2014) Available at http://www.economic.gov.za/inside-the-idb (accessed 2 February 2015).

[286] Section 2(1)(a).

The Council's functions include identification of social impacts of the SIP,[287] determination of priorities for infrastructure development,[288] designation of SIPs[289] and ensuring that "infrastructure development in respect of any strategic integrated project is given priority in planning, approval and implementation".[290] The Council must also identify legislative and regulatory measures that "impede or may impede" infrastructure development, and advise the executive authority of the relevant sphere of government.[291] The President heads the Council and has sole discretion in deciding which national Ministers sit on the Council. Individual municipal heads, other than the executive mayors of metropolitan councils, are excluded and represented by SALGA.

The architecture of the IDA is clearly a reflection the DED's ambitions to overcome the fragmented approach to decision-making that has characterised the implementation of NEMA. The structure and functions of the Council ensures that this body has a considerable level of executive power with ultimate control resting in the highest level of government. There is the presumption that the Council is qualified to decide on the social impacts[292] of a project in the absence of any consultation or stakeholder engagement, and then to prioritise projects by, *inter alia*, advising the responsible government departments, including the DEA, about matters under their jurisdiction that are perceived as obstacles to implementation of the SIP. Considerable emphasis is then placed on the co-ordination function of the Council, and Steering Committees who are required to "meet regularly"[293] with the SIP Chairperson. The focus is on pro-active intervention, facilitation and promotion of the objectives of the Act.

4.3.3 Need for co-operative decision making

Ultimately the Constitution[294] provides the yardstick for the measure of good co-operative governance.[295] Accordingly, public administration must be subject to the democratic principles and values enshrined in the Constitution and, therefore, be accountable, transparent, and efficient.[296] This is a sentiment that is echoed in the environmental right which entitles citizens to reasonable legislative measures for environmental protection. Another key feature of good governance encapsulated in the Constitution, is the requirement for non-hierarchical division of functions according to the relevant Schedules.[297] Public power is, thereby, subject to Constitutional control which is intended to promote efficiency and democratic decision-making, and limit the abuse of power within different spheres of government.[298] The President, as the Head of State and Head of the National Executive, must uphold, defend and

[287] Section 2(g)(vi).
[288] Section 4(b).
[289] Section 4(c).
[290] Section 4(d).
[291] Section 4(g)(ii).
[292] Section 4(g)(vi).
[293] Section 11(f).
[294] Constitution of South Africa 1996.
[295] Feris L 'The role of good environmental governance in the sustainable development of South Africa' (2010) *PER* 3 (1), 76.
[296] Section 195.
[297] Glazewski J *Environmental Law in South Africa* (2013) Lexis Nexis Cape Town, 6-9.
[298] Mojapelo J 'The doctrine of separation of powers (a South African perspective)' (2013) *Advocate* April 2013 38.

respect the Constitution.[299] The discussion below considers the extent to which the IDA, compared to NEMA, conforms to the measures for good governance, in relation to the environmental right in the Constitution and the division of functional competencies.

4.3.3.1 Environmental Right

According to section 7 of the Constitution "the state must respect, protect, promote and fulfill the rights in the Bill of Rights." This implies that government officials, responsible for decision-making that has implications for the environment, must be guided by section 24. As South Africa's primary environmental framework Act, NEMA takes its mandate directly from the Constitution, giving substance to section 24 in terms of its principles, procedures and focus on co-operative governance. In this regard Kotze emphasises the nexus between environmental and administrative matters.[300] He points out that government is the primary institution responsible for enforcing laws through its administrative or governance functions - "[w]ith the entrenchment of the environmental right, our administrative or governance processes must change so as to reflect the true nature and spirit of sustainability which is encapsulated in this right."[301]

The notion that sustainable development, as encapsulated by the environmental right, is an inherent factor to be considered in administrative decision-making was endorsed in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture*, *Conservation and Land Affairs.* [302] According to the judgement in this case:

> Pure economic principles will no longer determine in an unbridled fashion whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns.

The subsequent *Fuel Retailers* case[303] effectively sets the bar for the manner in which administrators ought to approach environmental decisions with reference to sustainability. Ngcobo J held that the Constitution recognises the interrelationship between the protection of the environment and socio-economic development. It contemplates the integration of environmental protection and socio-economic development and envisages that the two will be balanced through the ideal of sustainable development. [304] He also held that sustainable development provides a framework for reconciling socio-economic development and environmental protection and thus acts as a mediating principle in reconciling environmental and developmental considerations.[305]

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[299] Sections 83(a) and (b) of the Constitution.
[300] Kotze L 'The judiciary, the environmental right and the quest for sustainability in South Africa: a critical reflection' (2007) *RECIEL* 16 (3) 298-311.
[301] Ibid at 309.
[302] *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 5 SA 124 W (2004).
[303] *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others* CCT 67/06 (2007).
[304] Ibid at par 45.
[305] Ibid at par 55.

Although there is nothing fundamentally wrong with the promotion of efficient and coordinated decision-making in government, the wording of the IDA makes it difficult to envisage that 'fast-tracking', in relation to infrastructure projects, will not to come at the cost of the NEMA and IEM principles for sustainable development which, in turn, has implications for the environmental right in the Constitution. As pointed out by the CER,[306] it is firmly established in relevant legislation and policy frameworks that environmental considerations need to be built into the earliest stages of project planning and "not simply when raised in reaction to detailed plans 'on the table'." Notably absent from the IDA is the demand from the CER for "express recognition of the Constitutional obligation to ensure ecologically sustainable development and ensure that environmental issues, and reasonable and feasible alternatives that would meet the requirements of section 2 of NEMA, are properly considered". [307]

4.3.3.2 Arrangements for co-operative governance

It is stated in the IDA that any person exercising power in terms of the Act must do so in a manner which is consistent with the Constitution, and functional competencies of different spheres of government.[308] In this regard the Constitution dictates arrangements for a "Co-operative Government" in Chapter 3. Accordingly, national and provincial spheres share competencies in relation to the areas in Schedule 4, and province has exclusive competency in relation to the areas listed in Schedule 5.

From a provincial perspective the national executive cannot intervene in governance of the region unless that province cannot or does not fulfill its obligations.[309] Intervention is justified only under specified circumstances including to maintain essential national standards or meet established minimum standards for the rendering of a service; to maintain economic unity; to maintain national security; or to prevent the province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.[310] The Premier exercises executive authority in the Province, together with the other members of the Executive Council, by implementing provincial legislation and implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise.[311]

"Environment" is listed in Schedule 4 (Part A) of the Constitution as a functional area of concurrent national and provincial competence. The original IEM Chapter 5 of NEMA empowered "every MEC... with the concurrence of the Minister"[312] to implement an environmental assessment system within their functional areas of competence, in accordance with a prescribed approach, and to co-operate where appropriate.[313] Amendments to Chapter 5 have subsequently restricted the responsibility for environmental authorisations issued under NEMA to those MECs "to

[306] Centre for Environmental Rights 'Comments of the Draft Infrastructure Development Bill' (2013) par 39.
[307] Ibid at par 47.
[308] Section 2(2).
[309] Section 100 (1).
[310] Section 100(1)(b)(i-iii).
[311] Section 125(2)(a) and (b).
[312] Section 24(2).
[313] Bray E 'Co-operative governance in the context of the National Environmental Management Act 107 of 1998' (1999) *SAJELP* 6, 2.

whom the Premier has assigned responsibility for environmental affairs".[314] This has contributed to the problem of overlapping criteria and differing procedures for permits and licences under various Acts, including the National Water Act (NWA),[315] MPRDA[316] and a range provincial planning ordinances.[317]

Due regard is, nevertheless, given in NEMA to the shared responsibility for the "environment" through the identification, in relation to the listed activities in the EIA Regulations, of the provincial authority as the default decision-maker unless there are prescribed circumstances which would make it logical for the national department to have the final say.[318] Such circumstances include if the footprint of a project falls within the boundaries of more than one province[319] or a Cabinet decision declares a project to be a national priority.[320] There are, therefore, avenues in the Constitution and NEMA via which certain projects can be escalated to the national Minister for decision making. The Minister would still, however, be beholden to the requirements of NEMA and the EIA Regulations. There can be no guarantee that the Minister of Environmental Affairs will be invited by the President to be a member of the PICC nor can it be presumed that a decision of the Council, in terms of the IDA, would be equivalent to or become a decision of the Cabinet.

There is less flexibility in relation to Schedule 4 (Part B) of the Constitution which lists areas of competence that are directly related to infrastructure including "provincial roads" and "provincial planning". These are areas of exclusive provincial competence. So while the environmental authorities, at national or provincial level, would make the decision whether or not to approve a project based on the outcome of the EIA, a separate decision would be taken by the province alone in terms of the relevant planning legislation.

From a local perspective, both national and provincial government, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.[321] A municipality has executive authority in respect of, and has the right to administer, all local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution.[322] These functions include, *inter alia*, air pollution, electricity reticulation, municipal airports, municipal planning, health services, public transport, harbours, water and sanitation services (limited to potable water supply systems) and domestic waste-water and sewage disposal systems. It is unequivocal that local authorities have exclusive competency with regard to infrastructure development in their areas of jurisdiction.

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[314] Section 1 'Definitions' as amended by section 1 of Act 8 of 2004.
[315] Act 36 of 1998.
[316] Act 28 of 2002.
[317] Cape Land Use Planning Ordinance 15 of 1985; Orange Free State Townships Ordinance 9 of 1969; Transvaal Town Planning and Townships Ordinance 15 of 1986 and Natal Town Planning Ordinance 27 of 1949.
[318] Section 24C.
[319] Section 24C(2)(c).
[320] Section 24C(2B)(a).
[321] Section 154: Municipalities in co-operative government.
[322] Section 156: Powers and functions of municipalities.

There are a number of cases where the courts have confirmed the need for national, provincial and local government to respect each other's exclusive competencies, particularly in relation to planning and infrastructure development. In *Gauteng Development Tribunals* case the Constitutional Court held that neither the national nor the provincial spheres of government can, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs.[323] This would infringe on the principles of co-operative governance which provide that each sphere of government must respect the functions of the other spheres and must not assume any functions or powers not conferred upon them by the Constitution.[324] Similarly Yacoob J, in his minority judgement in the case of *Wary Holdings*[325] indicated that to accord the planning function in relation to agricultural land to the national executive would negate the municipal planning function and might well trespass into the sphere of exclusive provincial competence in relation to provincial planning.[326] Confirmation of the distinct planning function allocated to provincial and local government was provided in the *Habitat Council Case*.[327] In this matter Cameron J declared section 44 of the Land Use Planning Ordinance (LUPO)[328] unconstitutional as it justified interference by the provincial authority in matters of municipal competence.

The courts have also pronounced on the autonomy of respective government departments in the exercise of powers conferred by national, provincial and local legislation. In the *Fuel Retailers* case[329] it was indicated that the power conferred upon provincial government by NEMA to assess socio-economic and environmental impacts, is distinct from the need and desirability enquiry required of the local authorities in terms of the Western Cape's LUPO.[330] In the matter of *Minister of Local Government, Environmental Affairs and Development Planning v Lagoon Bay Lifestyle (Pty) Ltd*[331] the Constitutional Court confirmed that different decision-makers may be involved at different phases of a project, applying different tests dictated by different pieces of legislation. Although this is not ideal, the legislation requires it to be so. Finally, in the case of *Maccsand (Pty) Ltd v City of Cape Town and Others*[332] the court concluded that municipal planning is an executive competence vested exclusively in the sphere of local government, and that the provisions of the MPRDA[333] do not allow the Department of Mineral Resources (DMR) to dictate land use in a municipal area.

The distinction between the roles of national and local government under the constitutional dispensation is described by Retief and Sandham as one of national government playing an important role in leading and directing

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[323] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) par 59
[324] Ibid par 58 and 61.
[325] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC).
[326] Par 131.
[327] *Minister of Local Government, Environmental Affairs and Development Planning Western Cape v The Habitat Council and Others* CCT 117/13 (4 April 2014).
[328] 15 of 1985.
[329] *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others* CCT 67/06 (2007).
[330] 15 of 1985.
[331] 2013 ZACC 39.
[332] 2012 (4) SA 181 (CC).
[333] 28 of 2002.

development, but local government as "the agent of change and the vehicle for development".[334] The process to facilitate development at local level is the Integrated Development Planning Process and is a requirement for local authorities in terms of Chapter 5 of the Local Government Municipal Systems Act,[335] read with Chapter 1 of the DFA.[336] The need for municipalities to work in accordance with their IDPs is reiterated in the SPLUMA,[337] which repeals the DFA. The aims of SPLUMA are, *inter alia*, to provide for the inclusive, developmental, equitable and efficient spatial planning of the different spheres of government; and to promote greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions. SPLUMA requires that IDPs form part of SDFs and that these must be reviewed every five years and are legally binding at municipal, provincial and national level.[338]

Efforts have been made to ensure that SPLUMA is aligned with NEMA through several cross references.[339] One of these requires that SDFs be compliant with environmental legislation[340] which is defined in section 1 as NEMA and any other legislation that regulates a specific aspect of the environment. The systematic and co-operative approach to development defined in SPLUMA stands in contrast to the approach advocated in the IDA. The PICC is a centralised decision-making body which is empowered to determine current and future needs and priorities for infrastructure development across the country. It can also decide who will plan development projects, as well as develop guidelines and frameworks in this regard. This clearly has significant implications for local and provincial planning strategies.

Particularly problematic is the requirement of the IDA that "every organ of state must ensure that its future planning or implementation of infrastructure or its future spatial planning and land use is not in conflict with any strategic integrated project."[341] SPLUMA, meanwhile, requires that "[a] Municipal Planning Tribunal *or any other authority* required or mandated to make a land development decision in terms of this Act or *any other law relating to land development*, may not make a decision which is inconsistent with a municipal spatial development framework"[342] (emphasis added). Conflict is inevitable and the odds, considering Constitutional arrangements for co-operative governance, are likely to fall in favour of SPLUMA. Decisions made in terms of the IDA may be regarded as an intrusion into the mandates of local and provincial government. Furthermore, many of the SIPs do, or are likely to,

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334 Retief, F and L Sandham 'Implementation of integrated environmental management (IEM) as part of integrated development planning (IDP)" (2001) *SAJELP* 8, 78.
335 Act 32 of 2000.
336 Act 67 of 1995.
337 Section 5 of Act 16 of 2013.
338 Section 22(1).
339 Section 19(g) requiring compliance of regional spatial development frameworks with environmental legislation; section 24(2)(b) requiring that a land use scheme take cognisance of environmental management instruments and be compliant with environmental legislation; and section 42(2) requiring the municipal planning tribunals comply with environmental legislation when deciding on a development application.
340 Section 19(g)
341 Section 8(4)(a).
342 Section 22(1).

affect non-metropolitan or rural areas which means that the relevant municipality would have no direct representation on the PICC.

The Schedules in the Constitution and the associated jurisprudence consequently mitigate against an institution that seeks to influence and affect autonomous control and decision-making within the different spheres of government. Despite the President's claim that the PICC was "established to forge partnerships among government departments across all spheres of government"[343] the term "co-operative governance", which is so prominent in NEMA, does not appear in the IDA. The Act conveys a need for the PICC to dominate rather than seek alignment in respect of permitting requirements. According to the CER "setting up structures and legislating procedures that pre-empt and compromise the independent exercise of functions... is in conflict with the Constitution".[344] Attempts by the PICC to dictate terms in relation to exclusive competencies of local or provincial government are unlikely to go unchallenged.

4.4 Authorisation procedures and timeframes

As indicated at the start of this dissertation the concept of IEM has suffered from definitional problems, particularly in relation to whether it is a philosophy, a procedure, or both. In this regard, definitions and descriptions of IEM have changed over the years. The IEM Guideline Documents published by the then DEA in 1992 referred to IEM as a "procedure" which was "designed to ensure that the environmental consequences of development proposals are understood and adequately considered in the planning process". [345] The 1992 Guideline Documents were replaced with the revised IEM Series in 1998, the purpose of which was to describe the "concepts, principles and tools" which operate within the "overall framework" of IEM.[346] The revised Series aimed to redefine IEM more broadly in order to shift the focus from the EIA procedural aspects which were emphasised in the 1992 Guidelines. The 1998 revisions acknowledge the need to "use a wider range of environmental assessment and a management tools across the full activity life cycle and by all sectors of society".[347] This need was echoed by one of the original architects of IEM, Professor Fuggle, in his address to the 2008 conference entitled "10 years of Environmental Impact Assessment in SA". Here he called for "recapturing the ethos of wide and responsive proactive consultation and co-operative development."

Despite efforts to broaden and diversify the range of techniques and procedures for environmental management, the latest draft of the EIAMS document [348] indicates that EIA, as prescribed by NEMA,[349] is still the "main compulsory tool to ensure Integrated Environmental Management (IEM) in South Africa, through a regulated environmental

[343] Infrastructure News and Service Delivery 'Zuma tells PICC to ensure infrastructure delivery' (2014). See further at http://www.infrastructurene.ws/2014/08/21/zuma-tells-picc-to-ensure-infrastructure-delivery (accessed 17 February 2015).
[344] Centre for Environmental Rights. 'Comments of the Draft Infrastructure Development Bill' March 2013. Par. 20.
[345] Department of Environment Affairs *Integrated Environmental Management Guideline Series* (1992) Pretoria.
[346] Department of Environmental Affairs and Tourism *Overview of Integrated Environmental Management* Integrated Environmental Management Information Series 0 (2004) 4.
[347] Ibid at 7.
[348] Dated 18 June 2014.
[349] Section 24(1).

authorisation process". It is highly unlikely that practitioners, developers and authorities seeking to act in accordance with this regulated process would distinguish a uniquely South African approach to an assessment that recognises the need to guide rather than obstruct development.[350] The persistent expansion of IEM as an assessment procedure, in terms of Chapter 5 of NEMA, has resulted in the tainting of IEM with the same brush as EIA. This is unfortunate since the current complex and convoluted approach to EIA stands in contrast to the initial, relatively simple 3-stage IEM process, namely, plan and assess, decide, and implement. Recognition by the DEA of the need to overcome the perceptions of EIA being overly onerous is evident in the "by-lines" used to announce and justify the 2010 and the 2014 amendments to the EIA Regulations. The former was referred as "Simpler, Better, Faster" and the latter is being promoted as "One Environmental System".

The IDA is, in part, a manifestation of the fear of delays associated with the EIA procedure and consequent implications for economic development. This phenomenon is reflected in the legislative 'turf war' that has waged for several years between the Department of Minerals and Energy (DME) and the DEA,[351] a situation has prompted the National Environmental Laws Amendment Act[352] which came into operation on 30 September 2014 advocating the latest 'One Environmental System'. In addition to subjecting mining authorisations to the requirements of NEMA and the EIA Regulations, these revisions aim to reduce delays in environmental authorisation procedures through applying the same temporal framework to decision-making, and the subsequent issuing of permits and licenses including those required in terms of the NWA,[353] National Environmental Management: Waste Act (NEM:WA)[354] and the EIA Regulations.[355] Coincidentally, or not, these latest amendments reflect the IDA's requirement that "approvals, authorisations, licences, permissions and exemptions" be submitted "simultaneously to allow for concurrent consideration by the persons authorised by the relevant laws to take the applicable decisions".[356] This gives credence to indications from O'Beirne that the EIA Regulations were at risk of being scrapped altogether:[357]

> We have long recognized that EIA is perceived as an obstacle to development. The new regulations have sought to appease that political pressure, at least for now, but we would do well to not forget that political pressure.

The extent to which IEM has been compromised by the legislated EIA authorisation process is illustrated by a comparison between the relevant procedural and temporal requirements in the EIA Regulations in terms of NEMA, and Schedule 2 to the IDA.

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[350] Hanann R, L Booth and T O'Riordan 'South African environmental policy on the move' (2000) *South African Geographical Journal* 82(2), 11.
[351] Greve, N 'Impending enviro legislation to settle 'turf war' between DMR, DEA' (2014) *Engineering News* September 2014. Mabiletsa M and W du Plessis 'The impact of environmental legislation on mining in South Africa' (2001) *SAJELP* 8 185-193.
[352] 14 of 2013
[353] Act 36 of 1998.
[354] Act 59 of 2008.
[355] Regulation 7(4) of GN R982 in GG 38282 of 4 December 2014 requires that where processes in terms of the EIA Regulations are used to inform applications in terms of other legislation, application processes must be aligned to run concurrently.
[356] Section 15(1)(a).
[357] O'Beirne S 'Who moved the cheese?' (2014) From the IAIAsa NEC Desk. Available at http://iaiasa.co.za/who-moved-the-cheese (accessed 10 December 2014).

4.4.1 NEMA

Section 24 of NEMA is the enabling legislation for the EIA Regulations. It prescribes that "potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority... except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act".[358] The procedural requirements[359] are outlined in NEMA[360] and the detail, including Listed Activities and timeframes, stipulated in the EIA Regulations.[361]

NEMA requires that application for environmental authorisation for a Listed Activity must, at minimum, ensure co-operation and co-ordination when more than one organ of state has jurisdiction.[362] Other requirements relevant to the application include, *inter alia*, taking into account the section 2 principles and objectives of IEM;[363] providing a description of the affected environment;[364] reflecting the results of stakeholder engagement;[365] considering alternatives including the no-go option;[366] inclusion of mitigation measures;[367] reporting on gaps in knowledge, assumptions and uncertainties;[368] making provision for post implementation monitoring and management;[369] referring to relevant maps and databases;[370] and adherence to requirements in relevant SEMAs.[371]

EIA Regulations 1 to 57 (divided into 8 chapters) in GNR 982[372] spell out what steps must be taken in applying for and being granted an Environmental Authorisation. The current EIA Regulations, under the "One Environmental System", are the latest in a long list of revised EIA procedures, beginning with those regulated under the Environmental Conservation Act,[373] followed by the three sets of Regulations under NEMA published in 2006, 2010 and 2014. Table 2 below summarises how the procedures have evolved since 1992 to date.

[358] Section 24(1).
[359] Section 24(5) provides for the Minister or MEC to make regulations laying down the procedure to be followed in applying for, issuing of and monitoring compliance with environmental authorisations.
[360] Section 24(4).
[361] GNR 982 - 985 in *GG* 38282 of 4 December 2014.
[362] Section 24(4)(a)(i).
[363] Section 24(4)(a)(ii).
[364] Section 24(4)(a)(iii).
[365] Section 24(4)(a)(v).
[366] Section 24(4)(b)(i).
[367] Section 24(4)(b)(ii).
[368] Section 24(4)(b)(iv).
[369] Section 24(4)(b)(v).
[370] Section 24(4)(b)(vi).
[371] Section 24(4)(b)(vii).
[372] In *GG* 38282 of 4 December 2014.
[373] Act 73 of 1989

Table 2: Evolution of EIA procedures

Date	Regulatory Framework	Key features
1992	Voluntary: Guideline Document 1: Integrated Environmental Management (IEM) Series published by Department of Environmental Affairs	• Voluntary process with equal emphasis on the Planning stage (incorporating EIA as one aspect), the Decision stage (reviewing and establishing conditions for approval) and the Implementation stage (including monitoring and auditing).
1997	Environmental Conservation Act 73 of 1989: Sections 21 to 23 and EIA Regulations (GN R 1183 in *GG* 8261 of 5 September 1997) comprising 13 sections in a single chapter.	• Regulated process with single Schedule of Listed Activities. • Activities prohibited without authorisation of the Minister on the basis of reports considering the impact of the proposed activity and of alternative activities on the environment. • Approval granted at the discretion of the Minister. • IEM Guidelines indicative of best practice. • Distinction between Scoping Report and EIA.
2006	NEMA 107 of 1998: Chapter 5 and EIA Regulations (GNR 385 in *GG* 28753 of 21 April 2006) comprising 50 sections divided into 9 chapters.	• Regulated process with two Schedules of Listed Activities requiring either a Basic Assessment or Scoping & EIA. • Approval granted at the discretion of the MEC or the Minister. • Detailed procedural requirements. • Introduction of timeframes for decision-making by the competent authority.
2010	NEMA 107 of 1998: Chapter 5 and EIA Regulations (GN R543 in GNR *GG* 33306 of 18 June 2010) comprising 79 sections divided into 9 chapters.	• Regulated process with three Schedules of Listed Activities requiring either a Basic Assessment or Scoping & EIA. • Introduction of provincial lists in order to allow for stricter controls in more sensitive landscapes. • Introduction of retrospective EIA in section 24G of NEMA. • Regulations enacted for Environmental Management Frameworks (strategic planning tool) (GN R547 in *GG* 28753 of 21 April 2006). • Amendment to section 28(4) which removes discretion to require EIA for activities that are not listed. • Amendment to Regulation 28 of GN R383 requiring assessment of "need and desirability" in place of "physical, biological, social, economic and cultural aspects" • Tighter timeframes for decision-making by the competent authority.
2014	NEMA 107 of 1998: Chapter 5 and EIA Regulations (GNR 982 in *GG* 38282 of 4 December 2014) comprising 57 sections divided into 8 chapters and seven appendices.	• Regulated process with three Schedules of Listed Activities requiring either a Basic Assessment or Scoping & EIA.[374] • Inclusion of mining activities in the ambit of section 24 of NEMA and the Regulations. • Delegation of Minister of Mineral Resources as competent authority for EIA authorisations in the mining sector and the Minister of Environment as the appeal authority. • Introduction of timeframes for the completion of assessment in addition to tighter timeframes for the authorities. • Introduction of requirements for Environmental Audit Reports in an effort to balance emphasis on assessment phase with more emphasis on implementation and monitoring phase. • Replacement of repeal provisions in Regulations with the National Appeal Regulations.[375] • No automatic extensions to timeframes but extensions granted on written request. • No provision for competent authority to request additional information or upgrade/downgrade from Basic to Full Assessment or *vice versa*.

[374] The draft Regulations (GN 737 in *GG* 37951 of 29 August 2014) included a fourth list of activities in identified geographical areas that have been subjected to a pre-assessment process using a spatial development tool, but this list was excluded from the final Regulations.

[375] National Appeal Regulations in GNR 993 in *GG* 38303 of 8 December 2014.

Since the publication of the initial EIA Regulations in 1997, it has been required that the prescribed EIA process be managed by an independent Environmental Assessment Practitioner (EAP) that must be appointed and paid by the project proponent.[376] The first task of the EAP is to screen the project proposal with reference to the listed activities for a basic[377] or full assessment (i.e. scoping and EIA).[378] In theory, the basic procedure is relevant where there is a relatively low risk, a greater level of certainty and the project is of a smaller scale. A full assessment is required in relation to larger projects where there is a greater risk of environmentally detrimental impacts. The IEM terms to describe this distinction would be an initial assessment and an EIA.

The 'scoping' process, as part of the EIA, refers to the identification of the key issues, based on public consultation, that need to be investigated through specialist investigation or research. In the EIA Regulations of 2010,[379] an element of discretion was provided for, which allowed the competent authority to approve either the "upgrading" of a proposal from basic to full assessment, or "downgrading" of a proposal from full to basic, upon receipt of a written motivation by the applicant. This provision has been excluded from the latest EIA Regulations (2014). It is a requirement that all assessment reports include an EMP which would be enforced in terms of conditions attached to the environmental authorisation issued by the competent authority.[380]

4.4.2 IDA

Part 5 of the IDA deals with "[p]rocesses relating to implementation of strategic integrated projects".[381] These processes are listed in Schedule 2 against 'periods of time' for a number of consecutive steps: firstly, submitting the application and project plan once it has been approved by the relevant Steering Committee; secondly, undertaking public consultation; third, making subsequent amendments and submitting the proposal to the relevant authority; fourth, submitting a detailed development and mitigation plan to the relevant authority; fifth, for public consultation on the development and mitigation plan; and finally undertaking a last review followed by a decision from the relevant authority.

No more detail is provided on procedural aspects other than these six steps and the associated timing which amounts to 250 days. The relevant authority is referred to in the singular in the Schedule which would imply that only one permit will be issued. It is unclear whether the Council has "competent authority" status in this regard or whether, *de facto,* the Schedule is relevant to the range of permits that are likely to be required, and associated issuing authorities. Of particular concern is that no distinction is made regarding the scale of the project - the prescribed schedule is applicable whether or not the SIP relates to a hospital or a nuclear power plant.

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376 Regulation 12 of GN R982 in *GG* 38282 of 4 December 2014.
377 Listing Notice 1 in GNR 983 in *GG* 38282 of 4 December 2014.
378 Listing Notice 2 in GNR 984 in *GG* 38282 of 4 December 2014.
379 Regulation 20 of GN R543 in GNR *GG* 33306 of 18 June 2010
380 Regulations 19(1)(a) and 23(1)(a) of GN R982 in *GG* 38282 of 4 December 2014.
381 Title to section 17.

It is stipulated in Part 5 of the Act that "processes relating to any application for any approval, authorisation, licence, permission or exemption and processes relating to any consultation and participation required by the relevant laws must, as far as it is possible and in order to expedite the matter, run concurrently".[382] However, "[n]otwithstanding any other law, the processes set out in Schedule 2 provide a framework and guide the implementation of any strategic integrated project, but the time-frames in Schedule 2 may not be exceeded".[383] An executive authority may extend the period specified in Schedule 2 if a written request is received from the relevant authority provided the Council is informed within five days of such a decision, with reasons for the extension.[384] No decision is made invalid "merely because it was made outside the relevant period stipulated in Schedule 2 or the extension to this timeframe".[385]

Several anomalies are apparent in these requirements. The first relates to the need to adhere to relevant permitting schedules and requirements in other laws but without exceeding the time-frames specified in the IDA. The second relates to the timeframes in Schedule 2 being a "guide" and "framework", but also being prescriptive in that they "may not be exceeded". The third relates to extensions being possible to the self same timeframes that "may not be exceeded". The final anomaly is the fact that decisions will be valid irrespective of whether the timeframes or extensions are adhered to. These anomalies will undoubtedly affect the enforcement of the timeframes and associated procedures. The provisions do, nevertheless, ensure oversight by the Council through the requirement that it be informed of any extensions.

4.4.3 Aligning procedures and timeframes

A comparison between the 2010 and 2014 EIA regulatory procedures required for a basic and full assessment, and the process stipulated in Schedule 2 of the IDA, is provided in Table 3 below. This comparison confirms the extent to which the latest iteration of the Regulations has been influenced by pressure from government to minimise potential for delays associated with environmental assessment. According to the CER, significantly reduced timeframes for EIA represent a "political compromise" which threatens to "erode our entire environmental management system."[386] The fact that the IDA, and the Regulations enforcing the 'One Environmental System', were promulgated in the same year would support the CER's suggestion that the amendments were influenced by the government's economic policy. The outcome of this process is an environmental assessment procedure that has been 'boxed' as one of a range permits required to legitimise a project activity, as opposed to an overarching tool to guide South Africa on a path to sustainable development, as envisaged by IEM.[387]

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[382] Section 17(1)
[383] Section 17(2).
[384] Section 17(3).
[385] Section 17(4).
[386] Centre for Environmental Rights 'Time is of the essence: Proposed new rules slash timeframes for EIA' (2014). Available at http://cer.org.za/news/time-is-of-the-essence-proposed-new-rules-slash-timeframes-for-eia (accessed 17 February 2015).
[387] Department of Environmental Affairs and Tourism 'Overview of Integrated Environmental Management' *Integrated Environmental Management Information Series 0* (2004) 4.

Table 3: Comparison of procedures and timeframes in the existing and proposed procedures for basic an full assessments in terms of GN R544 and GN 982

Previous EIA requirement	Timeframe[388]	Revised EIA requirement	Timeframe[389]	DFA requirement	Timeframe
Applicable to projects requiring Basic Assessment				**Applicable to all SIPS irrespective of scale**	
Submit an Application on the stipulated form to the competent authority.	N/A	Submit an Application on the stipulate form to the competent authority.	N/A[390]	See below comparison in relation to Full Assessment given that this is a more likely requirement for the types of projects that will be designated as SIPs.	
Competent authority to acknowledge receipt of and accept Application.	14 days	Competent authority to acknowledge receipt of and accept Application.	10 days.		
EAP to undertake public participation[391] and compile Basic Assessment Report (BAR) in accordance with the prescribed format, and submit to the competent authority.	Not prescribed.	EAP to undertake public participation[392] and compile the BAR, inclusive of comments and EMP, in accordance with the prescribed format, and submit to the competent authority.	90 days.[393]		
Competent authority to acknowledge receipt of BAR.	14 days	The competent authority to acknowledge receipt of BAR.	10 days		
Competent authority to request input from relevant organs of state.[394]	5 days	EAP to consult with relevant organs of state unless an alternative agreement has been reached.	During the time the BAR is being considered.		
Relevant organs of state to respond to competent authority.	40 days[395]	Relevant organs of state to comment on the BAR.	30 days		
Competent authority to review and accept BAR.	30 days (automatic extension of 60 days)	Competent authority to review and accept BAR.	10 days		
Competent authority may request additional information or compel proponent to undertake a full assessment.	Not prescribed	No provision made for authority to request additional information or to alter the level of assessment.	N/A		

[388] According to Regulation 9(2) where certain prescribed timeframes were not met by the competent authority an automatic extension of 60 days was applicable in relation to certain steps - as indicated in the table.
[389] Regulation 3(7) allows the applicant to apply for an extension of the prescribed timeframes where exceptional circumstances can be demonstrated and the application is made and approved prior to the lapsing of the prescribed timeframe.
[390] Given the 90 day timeframe within which the report and public consultation process should be conducted, a considerable amount of preparatory work and notification to interested and affected parties would have to be undertaken prior to submission of the application.
[391] Timeframes for public consultation may be prescribed by the competent authority in terms of Regulation 56(a)(i), and no consultation may take place between 15 December until 2 January unless exception circumstances prescribe the need for consultation during this time (Regulation 54(8)).
[392] Regulation 3(8) stipulates that any public participation process must be conducted "for a period of at least 30 days."
[393] The EAP may notify the competent authority of the need to extend this period to 140 days if new information emerges during the public consultation process and another round of consultation is called for (Regulation 19(1)(b)).
[394] The authority usually requested the EAP to facilitate this process by distributing the report to the other relevant authorities and providing proof of this to the competent authority.
[395] This was to be read as 60 days for waste management activities to allow the Department of Water Affairs to concur (Regulation 56 (8)).

Previous EIA requirement	Timeframe[388]	Revised EIA requirement	Timeframe[389]	DFA requirement	Timeframe
Competent authority to make a decision to grant authorisation, or refuse the application (or part thereof).	30 days (automatic extension of 60 days)	Competent authority to consider BAR and either grant or refuse to grant the authorisation.	107 days from receipt of the BAR.		
Competent authority to notify applicant of decision, conditions and appeal provisions.	2 days	Competent authority to notify applicant of decision, reasons for the decision and appeal provisions.	5 days.		
EAP to notify interested and affected parties of decision and appeal provisions.	12 days from receipt of decision	EAP to notify interested and affected parties of decision, reasons for the decision and appeal provisions.	14 days of date of the decision.		
Interested and affected party or the applicant to submit notice of intent to appeal.	20 days from date of decision.	Appeals dealt with in terms of separate Regulation: National Appeals Regulations.[396]			
Interested and affected party or applicant to submit the appeal.	30 days.				
The Minister of MEC to consider and respond to appeals.	90 days				
Full Assessment					
Submit an Application on the stipulated form to the competent authority.	N/A	Submit an Application on the stipulated form to the competent authority.	N/A	Period for submitting application and project plan[397] measured from approval by steering committee of project plan.	7 days
EAP to undertake public consultation and compile and submit a Scoping Report to the competent authority, including a plan of study for EIA.	Not prescribed	EAP to undertake public consultation[398] and compile and submit a Scoping Report to the competent authority, including a plan of study for EIA.	44 days.	Period for public consultation.	30 days
Competent authority to review and either reject the Scoping Report, or accept Scoping Report, and instruct EAP to proceed with EIA.	30 days (automatic extension of 60 days).	Competent authority to review and either reject the Scoping Report, or accept Scoping Report, and instruct EAP to proceed with EIA.	43 days.	Application and project plan to be amended and submitted to the relevant authority for consideration and approval.	52 days
EAP to undertake EIA, including further public consultation, and submit EIA Report including a draft	Not prescribed.	EAP to undertake EIA, including further public consultation.	106 days from acceptance of Scoping Report.[399]	Submission of detailed development and mitigation plan	60 days

[396] National Appeal Regulations GNR 993 in *GG* 38303 of 8 December 2014.
[397] Presumably the implied recipients are the relevant authorities who need to issue the licenses and permits.
[398] Minimum requirement for a 30 day public consultation period stipulated in Draft Regulation 21(1).
[399] The EAP may notify the competent authority of the need to extend this period to 156 days if new information emerges during the public consultation process and another round of consultation is called for (Draft Regulation 23(1)(b)).

Previous EIA requirement	Timeframe[388]	Revised EIA requirement	Timeframe[389]	DFA requirement	Timeframe
environmental management plan.				and review by relevant authority.	
Competent authority to review and either reject or accept the EIA Report.	60 days (automatic extension of 60 days).	No provision for review and acceptance of EIA Report.	N/A.	Period for public consultation on development and mitigation plan and review by relevant authority.	44 days
Competent authority to grant or refuse authorisation in respect of part or all of the activity.	45 days (automatic extension of 60 days).	Competent authority to grant or refuse authorisation in respect of part or all of the activity.	107 days from receipt of EIA Report and EMPR.	Period for relevant authority to consider and assess development and make a final decision.	57 days
EAP to notify interested and affected parties of decision and appeal provisions.	12 days from receipt of decision	EAP to notify interested and affected parties of decision and appeal provisions.	14 days of date the decision	No reference to or provision for Appeals.	
Interested and affected party or applicant to submit notice of intent to appeal.	20 days from date of decision.	Appeals dealt with in terms of separate Regulation: National Appeals Regulations.[400]			
Interested and affected party or applicant to submit the appeal.	30 days.				
The Minister of MEC to consider and respond to appeal/s.	90 days				

The most important difference between the 2010 and revised 2014 EIA timeframes relates to the prescribed periods for undertaking the basic or full assessment by the EAP. Prior to the revised EIA Regulations (2104) coming into effect, EAPs could take as long as was needed to complete the assessment and only the authorities were subject to decision-making timeframes. The revised requirements are for a Basic Assessment to be completed within 197 days (or 247 days in exceptional circumstances) from submission of application to decision; and a Full Assessment within 300 days (or 350 days in exceptional circumstances) from submission of application to decision.

During the public comment period for the EIA Regulations (2014) concern was raised about the implications for the reduced timeframes in relation to meeting the principles of NEMA and IEM. [401] The cautionary principle requires that scientific studies be undertaken as comprehensively as possible, and these may need to extend over several months, even years, in order to cater for seasonal variations in biodiversity. It is likely that where time constraints prescribed in the EIA Regulations (2014) do not allow for sufficiently comprehensive studies, the specialists or the

[400] National Appeal Regulations GNR 993 in *GG* 38303 of 8 December 2014.
[401] Centre for Environmental Rights 'Written comments on the Draft Environmental Impact Assessment Regulations' (2014). Available at http://cer.org.za/wp-content/uploads/2014/10/CER-comments-on-the-Draft-Environmental-Impact-Assessment-Regulations-Sept-2014.pdf (accessed 17 February 2015).

EAPs will resort to the permissible "reporting on gaps and knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties in compiling the required information".[402] This type of reporting makes the job of the competent authority very difficult. Decision-making on the basis of uncertainty can easily lead to the outcome being challenged, either by a the developer or an interested and affected party.

Stakeholder engagement will also be negatively affected by the regulated time periods for the assessment. Adequate consultation programmes for large infrastructure projects, particularly where impacts affect many people and resettlement of communities may be required, will need to be considerably longer than the allocated 30 days. Most of the work will, therefore, have to be taken prior to the actual authorisation process, outside of the prescribed temporal framework. The EAP would have to be prepared to launch into the regulated process having dealt with much of the assessment requirements in the absence of any formal interaction with the authorities.

As would be expected, the IDA timeframe, amounting to 250 days, is still shorter than the revised standard timeframe for a Full Assessment in the 2014 EIA Regulations . The discrepancy is 50 days. Given the potential complexity of a SIP it is unrealistic to expect that the permitting of such a project can conform to the prescribed time period in the IDA. The anomalous wording in the framing provision of the main Act,[403] implicitly acknowledges this by detracting from the rigour of the timeframes in Schedule 2 . In all likelihood the 'bark' of the IDA is likely to be worse than its 'bite', at least until administrative procedures have been regulated to formalise the procedures and timeframes outlined in Schedule 2.[404] In the absence of such procedures the IDA will, at best, serve to focus decision-makers on prioritising infrastructure development projects under written or verbal pressure from the Council.

Unfortunately, any prescription of timeframes inevitably leads to practitioners and authorities scrambling in search of "loopholes" to justify extensions if and when project schedules become unstuck. This is far from ideal and is likely to be a problem common to both the EIA Regulations (2014) and the IDA.

4.5 Monitoring and Evaluation

Monitoring and evaluation are integral components of any project or programme. This requirements is activated once a development has been authorised, subject to certain conditions. Monitoring and evaluation receives attention in both the IDA and NEMA. The approach differs, however, primarily because the environmental legislation is aimed at ensuring compliance with certain minimum standards whereas the IDA is aimed at achieving the goals of the NIP. Monitoring and evaluation in relation to NEMA must, therefore, ensure that environmental impacts are managed throughout the life cycle of a project. Monitoring and evaluation in relation to the IDA must ensure that the economic impacts are managed and sustained.

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[402] Section 24(4)(a)(iv).
[403] Section 17(3) and (4) allows for extensions, and for an authorisation to be valid even if timeframes are exceeded.
[404] Section 21(1)(e) makes provision for the Minister to make regulations regarding "generally (*sic*), any ancillary or incidental administrative or procedural matter which is necessary or expedient to prescribe for the proper implementation or administration of this Act."

4.5.1 NEMA

When used in the context of environmental management the term "monitoring" means the collection of activity and environmental data both before (baseline monitoring) and after activity project implementation (compliance and impact monitoring).[405] "Evaluation" can be understood as the appraisal of the conformance with standards, predictions or expectations as well as the environmental performance of the activity.[406] The benefits of monitoring and evaluation in relation to the environment are often not immediately apparent. Some may only be realised over years, perhaps decades, and even then the positive outcomes do not always attract endorsement or capture the public's attention.

In addition to the systemic difficulties in monitoring and evaluating the efficacy of environmental management processes, there are also other factors that have undermined performance in this regard. In relation to project development, IEM envisaged three stages of equal importance, namely, the planning stage, the decision stage and the implementation stage. The emergence of EIA as the dominant tool for environmental management in terms of NEMA has resulted in the prioritisation of assessment as part of the planning phase, and far less attention has been given to the subsequent monitoring and evaluation during the implementation stage. These stages are mutually dependent. All development projects come with a degree of adverse environmental impact, hence the requirement in NEMA to investigate mitigation measures to keep adverse consequences or impacts to a minimum.[407]

Best practice in environmental assessment requires rating of impacts pre- and post- mitigation, and decisions are generally made by the competent authority on the basis of the post-mitigation rating of an impact. The effectiveness of the EIA is significantly undermined during the implementation phase if the mitigation and management measures are not adhered to. In order to meet its objectives, monitoring and evaluation need to be targeted both at the developer (or holder of the environmental authorisation) and the receiving environment. Where a monitoring programme is recommended to cater for scientific uncertainty, the implementation of such plays a vital role in ensuring that environmental risks are minimised in relation to similar activities in the future. It is only through a life-cycle approach that the IEM principle of continual improvement can be met.

A common criticism of EIA, and the manner it is regulated through NEMA, is the fact that once the authorisation has been issued, there is no formal mechanism to hold developers, owners, operators and managers to account during the construction and implementation phases of the development. Whatever mitigation methods are generated by the EIA process become redundant if they are not put into effect.[408] This is seldom a voluntary process particularly when the measures have cost implications and when there was a reluctance on the part of the developer to comply with

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[405] Morrison-Saunders A; R Marshall & J Arts 'EIA follow up: international best practice principles' (2007*) IAIA Special Publication Series* 6, 1.
[406] Ibid.
[407] Section 24(4)(b)(ii).
[408] Mammbonani R and S Mbopha 'The Efficacy of South Africa's EIA Regime' (2013) *Presentation to the public hearing on the efficacy of South Africa's EIA Regime* Wildlife and Environment Society of South Africa.

the EIA Regulations (2014) in the first instance. The DEA's Strategic Plan for Sustainable Development (2009 - 2014)[409] identifies a low level of monitoring and enforcement associated with environmental authorisations as a key reason for the reduced effectiveness of EIA as an environmental management tool. This is confirmed in the DEA's Annual Report for 2013/2014[410] which indicates that 1 393 environmental authorisations were issued and only 135 inspections were undertaken to check compliance with the conditions of authorisation and the EMP.

The framework clause in NEMA for the enforcement of the EIA recommendations requires "investigation and formulation of arrangements for monitoring and management of consequences for or impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation". Prior to commencement of the EIA Regulations (2014), the competent authority could issue the environmental authorisation inclusive of conditions and obligations to implement monitoring and evaluation, and discharge any ongoing responsibility for subsequent phases. The EIA Regulations (2014) require that the competent authority ensure that the conditions of the environmental authorisation and the EMP, and where applicable the closure plan, are audited.[411]

Provisions relevant to audit reports are contained in Chapter 5 of the Regulations. Accordingly, it is required that the environmental authorisation, issued in terms of section 24 of NEMA, state the frequency of submission of an independently undertaken environmental audit report to the competent authority, including the timeframe within which a final environmental audit report must be submitted.[412] The aim of the audit is to measure the level of performance against, and compliance of, an organization or project with the provisions of the requisite environmental authorisation or EMP.[413] The information that is required to be included in the audit report is set out in Annexure 7 to the EIA Regulations (2014). The report forms the basis of ongoing evaluation of the suitability of the EMP or closure plan to provide for the avoidance, management and mitigation of environmental impacts. To this end the authority must consider and approve the audit report and, if required, use it as a basis for amendments to the EMP or closure plan.[414]

Government oversight during the implementation phase of a project, with a view to ensuring environmental impacts are minimised, is likely to improve the efficacy of EIAs but will also increase the administrative burden for the authorities. In addition to providing the skills and resources to review audit reports, the DEA and provincial environmental departments will have to significantly increase their capacity to undertake site visits and inspections. During the comment period on the EIA Regulations (2014), concerns were raised regarding the "one size fits all" approach, assuming that projects of different scales will require differing approaches in terms of audit frequency and

[409] See further: www.gov.za/documents/strategic-plan-environmental-sector-2009-2014 (accessed 6 December 2014).
[410] Department of Environmental Affairs *Annual Report* 2013/2014. Available at www.environment.gov.za/sites/default/files/reports/annual_report2013_14.
[411] Regulation 34(1)(a).
[412] Regulation 26(f).
[413] Regulation 34(2)(b)(i).
[414] Regulation 35(1).

level of detail.[415] Additional tasks and responsibilities for the already stretched human resources in the national and provincial environmental government departments inevitably has the effect of distracting much needed attention from the larger, more impactful developments - the type that DED seeks to expedite in terms of the IDA.

4.5.2 IDA

There is undoubtedly more scope for short term gratification in relation to the aims of the IDA compared to the aims of NEMA. One of the objectives identified in the preamble to the IDA is to improve the management of infrastructure during all phases including planning, approval, implementation and operations. The intention appears to be that the institutions set up in terms of the IDA will be involved throughout the life-cycle of the SIPs. A key objectives identified in the DED's *Annual Performance Plan* (APP) (2014/2015) is to "co-ordinate infrastructure for inclusive growth, service delivery, job creation, industrialisation and social inclusion". [416]The Relevant KPIs[417] towards achieving this objective includes the compilations of 60 quarterly progress reports on each SIPs to Cabinet and to unblock, fast-track and facilitate 8 infrastructure projects. [418]

Although the members of the Council, Management Committee, Secretariat and Steering Committees will be drawn from existing government departments, they will have a distinct mandate within the context of a dedicated institutional framework. The DPME,[419] with its role in monitoring and evaluation, will complement the primary function of the Council to co-ordinate the development, maintenance, implementation and monitoring of the NIP.[420] The role of the Steering Committees is to facilitate and monitor the implementation of the SIPs[421] and to report, on a monthly basis, progress on all phases of the project to the Secretariat.[422] Provisions are included with respect to setting out actions, targets and periods of time,[423] aimed at prioritisation of initial and sustained delivery in relation to the envisaged benefits of the SIPs.

4.5.3 Measuring success

Monitoring and evaluation of the implementation of the IDA speaks to the fact that the variables in relation to a SIP lend themselves to quantification in economic terms - for example, the anticipated number of jobs, contribution to the

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[415] IAIA South Africa 'Comment on the Draft Environmental Impact Assessment Regulations 2014 & Listings Notices 1 - 4 in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) 29 September 2014.
[416] Economic Development Department *Annual Performance Plan 2014/2015* (tabled April 2014). Available at www.economic.gov.za/communications/annual-performance-plans/annual-performance-plan-2014-2015 (accessed 29 March 2015).
[417] Key performance indicators.
[418] See further at www.economic.gov.za/communications/annual-performance-plans/annual-performance-plan-2014-2015 (accessed 29 March 2015).
[419] The DPME in the Presidency has been specifically set up to work closely with the National Planning Commission to 'monitor' and 'evaluate' government's strategic priorities Accordingly the DPME aims to set coherent priorities against which to monitor progress; undertake institutional performance monitoring; monitor 'frontline service delivery' and support change and transformation through innovative and appropriate solutions and interventions.
[420] Section 4(a).
[421] Section 11(d).
[422] Section 14(1)(i).
[423] Section 14(1)(c).

GDP, number of houses, services and so on. These measurables enable monitoring and evaluation to be used as a public relations tool, in that they can be translated into news and communicated as success stories or achievements on the part of the DED.

Monitoring and evaluation in relation to NEMA is more complicated. This is because the extent and severity of impacts associated with listed activities in the EIA Regulations depends on intrinsic and extrinsic factors that operate along a temporal continuum and spatial distribution which cannot be easily be measured against specific baselines or goals. The difference is illustrated by the 'headline news' items on the DED's and DEA's respective website pages. At the time of writing, the former read "New shoe factory opened in Cape Town: 300 jobs currently and a further 240 new jobs in the next two years"[424]. By comparison, the DEA's web page tells us that "Deputy Minister Thomson announces the winners of the Greenest Municipality Competition in Tzaneen".[425] The DED's policies would appear to have more to offer to the average South African than the DEA's.

The prescriptive to environmental assessment of projects and activities has resulted in the process becoming much about project management, as opposed to scientific investigation and communication. The "modern" EAP requires typical project management and organisational skills with regard to time allocation, people management, communication and efficiency. These are similar to the skills that are emphasised in the IDA in the descriptions of the implementing structures, including the Council, Secretariat and the Steering Committees. However, the project management type terminology used in the IDA, including "expedite", [426] "facilitate",[427] "unblock",[428] "advance",[429] " given priority", [430] contrasts with comparable terminology in NEMA - "plan",[431] "consult",[432] "investigate",[433] "mitigate"[434], "cautious"[435] and "risk averse".[436] Clearly the IDA does not masquerade as anything but an exercise in project management , with the emphasis on schedules and delivery. Whereas the EIA Regulations still lay claim to the principles and protocols in NEMA, the IDA appears to abscond from any obligations in this regard.

No doubt the expedited procedures provided for in the IDA would garner support if the benefits promised could be demonstrated. Despite the wording of the IDA, the actual project management and engineering capacity and

[424] www.economic.gov.za (accessed 3 February 2015).
[425] www.environment.gov.za (accessed 3 February 2015).
[426] Section 17(1).
[427] Sections 2(1)(b) and 4(k).
[428] Section 2(1)(h).
[429] Section 2(1)(i).
[430] Preamble and section 4(d).
[431] Section 24R(3).
[432] Preamble and sections 24K(1), 24O(2) and 47(B).
[433] Sections 24(i) and 28(3)(a).
[434] Sections 24O(1)(b)(ii)(bb), 30A(i), 30A(2)(b) and 30A(3).
[435] Section 2(4)(a)(vii).
[436] Ibid.

resources to implement, monitor and maintain mega projects appears to be lacking.[437] In the face of such challenges, the successful implementation and monitoring of EMPs for such projects stands a very small chance.

4.6 Conflict Management

Using the environment, and protecting it, involves many societal groups including concerned citizens, impacted stakeholders, businesses and industries, government officials and politicians.[438] According to Field, "[a]chieving sustainable development is primarily about balance and compromise".[439] South Africa's history and cultural diversity means that societal groups come with a broad spectrum of opinions, perspectives and priorities which make the attainment of balance and compromise particularly challenging.

The theme of conflict is relevant to the IDA and NEMA in two ways. Firstly, in relation to what Fields refers to as the "competing paradigms" that tend to tend to emerge where perceived commercial and economic imperatives threaten valuable natural resources.[440] These paradigms are reflected in the respective purpose, principles and objectives of NEMA and the IDA , and go to the heart of the dichotomous relationship between the two. Secondly, there is potential for conflict in relation to the substantive differences in administrative aspects, including the distinct lists of activities or projects, procedures and associated timeframes in either Act.

The former source of conflict is not a new phenomenon. It has long been manifest between decision-makers, that is the government departments with separate mandates for economic development and environmental protection. Illustrative of this is a quote by the Minister of Housing that appeared in the media[441] when the EIA Regulations under NEMA were first drafted:

> We cannot forever be held hostage by butterfly eggs that have been laid, because environmentalists would care about those things that are important for the preservation of the environment, while we sit around and wait for them to conclude the environmental studies.

This statement conveys the perception that the decision-makers in the "economic cluster" feel beholden to decision-makers in the environmental sector. In response, Fields points out that a purely "economic" or "social" point of view reduces and thereby misapprehends the importance of environmental protection for the sustainability of socio-economic projects.[442] However, when environmentalists in turn argue for the protection of individual species or areas

[437] This is most clearly demonstrated by the fact that the Medupi and Kusile power station projects (both implemented as SIPs in terms of the NIP) are currently running four years behind schedule.
[438] Crowfoot J and J Wondolleck *Citizen Organisations and Environmental Conflict* (2012) Island Press Washington DC 1
[439] Field T 'Sustainable Development versus Environmentalism: competing paradigms for the South African EIA regime' *SALJ* 123 (3), 409.
[440] Ibid.
[441] Macleod F 'Ministries aim to trash green laws' (2006) *Mail & Guardian* 18 March 2006.
[442] Field T 'Sustainable development versus environmentalism: Competing paradigms for the South African regime' (2006) *SALJ* 123 (3), 423.

without regard for the economic and social linkages of their demands, or the need to make concessions, they strengthen the position of the "economic cluster" of ministries.[443]

The second source of conflict is likely to affect the recipients of decisions that are made in terms of either NEMA or the IDA. Already the complexity and rigour of the EIA Regulations (2014) prompts disputes resulting from administrative decision-making, where either an applicant or interested of affected party feels aggrieved. The lack of alignment between procedures and timeframes in the EIA Regulations (2104) and the IDA will inevitably precipitate a reaction from stakeholders, including developers, public interest groups, non-government organisations, and affected individuals. Such conflict will be underpinned by broader claims to relevant Constitutional rights including the environmental right in section,[444] right of access to information,[445] and the right to administrative justice.[446]

Potential for both types of conflict described above was anticipated at the time IEM was formulated. It was, consequently, designed to promote a balanced and co-operative approach. The IEM information series (1998) identifies dispute resolution as one the key principles underpinning IEM.[447] Accordingly processes should be undertaken in a consensus-seeking spirit and aim to minimise or resolve conflicts wherever possible. Conflict resolution mechanisms are provided for in NEMA, and less so in the IDA. These tools will be important for resolving disputes related to the dichotomous paradigms, and the substantive differences in the provisions of each Act. The discussion below takes both of these aspects into account.

4.6.1 NEMA

According to Couzens and Dent, NEMA "is soaked in the spirit" of dispute resolution precisely because its drafters recognised that this would be the only practical way to achieve the goals of equity, environmental sustainability and economic efficiency.[448] The focus of NEMA, in keeping with the philosophy of IEM, is on minimising opportunities for conflict or dispute. This is achieved, in relation to competing paradigms, by defining mechanisms for co-operation, [449] and in relation to substantive matters, by defining mechanisms for constructive engagement and dispute resolution.

The measures for "Fair Decision-Making and Conflict Management", relevant to government departments and stakeholders, are defined in Chapter 4 of NEMA. [450] These measures facilitate dispute resolution outside of the High Courts, their purpose being to avoid what can be protracted, confrontational and expensive proceedings.

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[443] Ibid.
[444] Section 24.
[445] Section 32.
[446] Section 33.
[447] This list of principles was updated from the original 1992 Guideline Series with reference to the principles in NEMA, Agenda 21 and other sources.
[448] Couzens E and M Dent 'Finding NEMA: the National Environmental Management Act, the De Hoop Dam, conflict resolution and alternative dispute resolution in environmental disputes' (2006) *PER* 3, 40.
[449] Since the disbanding of the CEC in 2005, MinTechs and MinMecs had an important role to play in this regard.
[450] Chapter 4.

The Chapter 4 provisions apply to any conflict that may arise in relation to NEMA, including those resulting from the application of the EIA procedures outlined in Chapter 5 and detailed in the EIA Regulations. Several options are defined. Firstly, the decision-making authority (at local, provincial or national level) may refer a matter to conciliation if there is disagreement concerning the exercise of government functions, or if they have to deal with an appeal, arising from a disagreement regarding environmental protection, brought under any law.[451] Secondly, anyone may request the Minister, MEC or Municipal Council to appoint a facilitator to conduct meetings of interested and affected parties towards conciliation.[452] Third, a court or tribunal may order the parties in a dispute over environmental protection to submit the dispute to a conciliator appointed by the Director General and suspend proceedings pending the outcome of the conciliation. The function of the conciliator is to attempt to resolve the dispute through consideration of relevant oral and documentary information, mediation, provision of recommendations or any other manner that he or she considers appropriate.

The spirit of conciliation is emphasised in Section 22 which refers to the desirability of , *inter alia*, resolving differences and disagreements speedily and cheaply; of giving indigent persons access to conflict resolution measures in the interest of the protection of the environment; and of improving the quality of decision making by giving interested and affected persons the opportunity to bring relevant information to the decision making process.[453] The Minister also has the option of commissioning an investigation to assist in the evaluation of a matter relating to environmental protection.[454] Appointed investigators may be given the powers of a Commission of Inquiry under the Commissions Act.[455] Provision is made for remuneration of appointed conciliators, arbitrators and investigators[456] and relevant considerations are listed that promote efficiency and equitable access to conflict resolution measures.[457] A conciliator appointed in terms of NEMA "must take into account the principles contained in section 2."[458] In the event that the conciliation route fails, section 19 provides for the dispute to be referred to arbitration in terms of the Arbitration Act.[459]

Public-private disputes are most commonly dealt with using the mechanisms enabling appeal and review. Up until the 2014 amendments, appeals against such decisions were regulated in terms of section 43 of NEMA. In 2013 - 2014 the DEA dealt with 40 such appeals and there were 80 litigation matters.[460] Each appeal would have taken up to 90 days to resolve and not all were settled within the prescribed timeframe.[461] In an effort to streamline appeals in terms of the EIA Regulations and other SEMAs, the EIA Regulations (2014) cross-references a single appeal

[451] Section 17(1).
[452] Section 17(2).
[453] Section 22(a)-(c).
[454] Section 20.
[455] Act 8 of 1947.
[456] Section 21.
[457] Section 22.
[458] Section 18(3).
[459] 42 of 1965.
[460] *Department of Environmental Affairs Annual Report* 2013/2014, 32. Available at www.environment.gov.za/sites/default/files/reports/annual_report2013_14 (accessed 17 February 2015)
[461] Ibid.

process which is regulated by the National Appeals Regulations.[462] The implementation of the new Appeals Regulations is aided by a 'Guideline on the Administration of Appeals' published by DEA, the purpose of which is "to provide information and guidance for applicants, authorities and interested and affected parties ("I&APs") on appeals submitted to the Minister in terms of NEMA and the SEMAs".[463] In addition, a dedicated Appeals Directorate has been established in the DEA to focus on processing appeals against administrative decision-making in terms of NEMA.

4.6.2 IDA

There are a number of features of the IDA that point to disputes emerging in relation to NEMA and other key national legislation, including SPLUMA. Already discussed is the requirement that every organ of state *must* ensure that its future planning and land use is not in conflict with any SIP implemented in terms of the IDA.[464] As indicated this requirement is unlikely to go unchallenged by local authorities who: firstly, may have no direct representation on the PICC; secondly, have already invested in the formulation of long term SDFs and IDPs as required in terms of other national statutes;[465] and third, have a constitutionally mandated right to manage their own affairs in relation to "municipal planning".[466]

This scenario is anticipated in the IDA. Section 8 refers to conflict between a SIP and a strategic planning document devised by another organ of state.[467] Any dispute which arises in this regard must be resolved in terms of the Intergovernmental Relations Framework Act (IGRFA)[468] subject to any national legislation regulating spatial planning and land use management.[469] Chapter 4 of IGFRA deals with inter-governmental disputes. Accordingly, all organs of state must make every reasonable effort to avoid such disputes in exercising their statutory powers or performing their statutory functions, and to settle intergovernmental disputes without resorting to judicial proceedings.[470] The procedures provided for conflict resolution in IGFRA involve the setting up of intergovernmental forums, protocols and reporting mechanisms. All of this effectively amounts to the type of interruptions and setbacks that the IDA is aimed at avoiding.

There is no mechanism in the IDA to deal with public-private disputes that are likely to arise from the disparity between Schedule 2 of the IDA and the EIA regulatory procedures. The absence of correlation between the prescribed steps and time periods make it difficult to envisage how decision making can proceed in terms of the IDA

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462 Regulations 4(1)(c) of GN R982 in *GG* 38282 of 4 December 2014.
463 Department of Environment Affairs *Guideline of the Administration of Appeals* (2015). Available at www.environment.gov.za/sites/default/files/docs/appealsguideline2015.pdf (accessed 23 March 2015).
464 Section 8(4)(a).
465 SPLUMA and the Municipal Systems Act 32 of 2000.
466 Schedule 4 (Part B) of the Constitution.
467 Section 8(4)(c).
468 Act 13 of 2005.
469 Section 8(4)(c). This requirement seems to bring one back to the rules governing the interpretation of statutes.
470 Section 40(1)(a) and (b) and section 45: No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.

without violating the requirement of section 18 to abide by NEMA and the EIA Regulations.[471] Unless the two procedures can be reconciled, there will be a perverse incentive for unscrupulous investors and developers, in the public and private sector, to motivate projects as SIPs in order to avoid compliance with the more onerous EIA procedures.

As yet the permitting procedure outlined in schedule 2 of the IDA, read with section 17, have not been comprehensively regulated or tested. In attempting to do so, legislators will undoubtedly be faced with the challenge of how to ensure that fast-track procedures in terms of the IDA somehow complement rather than compete with the EIA procedures in terms of NEMA. In this regard, the reaction of concerned stakeholders in a public participation process can be quite easily predicted, if or when a brave public official announces that a particular "infrastructure" project (a nuclear power station perhaps) will be expedited in terms of the procedures legislated in the IDA.

4.6.3 Narrowing options for resolution

When NEMA was introduced into the legislature it was viewed as a "paradigm shift" that would bring "environmental management in synchronisation with broader socio-economic development in South Africa"[472] It was, nevertheless recognised that there was a "danger of environmental issues (including environmental management) becoming marginalised as politically urgent developmental issues are resolved for short term gain".[473] Writing in 1999, Lawrence anticipated that there would be a number of practical problems associated with the implementation of NEMA, suggesting that the role of "guardian of sustainable development" was a useful way in which the DEA could expand its empire in a manner which would impinge on other departments, thereby compromising their autonomy.[474]

Fifteen years later the extent of powers allocated to PICC, in terms of the IDA, appears to be a concerted attempt by the DED to take control over infrastructure development. The advocated approach to doing so stands in marked contrast to the emphasis on inter-governmental co-operation and conciliation in NEMA. There are provisions in the Constitution for dealing with conflicting laws,[475] but only with regard to conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4. By virtue of being framework legislation on a national level, provincial and local laws must be consistent with NEMA. If conflict originates as a result of the

[471] Section 18 requires that "[w]henever and environmental assessment is required in respect of a strategic integrated project, such assessment must be done in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) with specific reference to Chapter 5".
[472] Bray E 'Co-operative governance in the context of the National Environmental Management Act 107 of 1998' (1999) *SAJELP* 6, 12.
[473] Ibid at 12.
[474] Lawrence R 'How manageable is South Africa's new framework of environmental management?' (1999) *SAJELP* 6, 62-63.
[475] Section146.

wording of different statutes, such as NEMA and the IDA, the rules governing the interpretation of statutes have to be used to resolve the issue.[476]

There is a myriad of inconsistencies and anomalies in the wording of the DFA, compared to NEMA. These anomalies relate to the intention of either Act and the procedures. This provides a wealth of 'ammunition' for both public and private sector entities seeking to challenge decisions made by the PICC. Section 33 of the Constitution guarantees the right to administrative action that is lawful, reasonable and procedurally fair, and section 34 guarantees right of access to the courts. The Promotion of Administrative Justice Act (PAJA)[477] gives effect to these rights. One of the primary aims of PAJA is to "create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action"[478]. The provisions of PAJA are available to any person whose rights or legitimate expectations are materially and adversely affected by an administrative action.[479] Stakeholders have a right to both adequate notice of the nature and purpose of the proposed administrative action, as well as a reasonable opportunity to make representations before that action is taken.[480]

Section 8 of the Act deals with the "designation" of SIPs. The definition of "designate" in section 1 refers to notification in the gazette of a decision of the PICC, with no mention of opportunities for public comment.[481] In their comments on the IDA the CER points out that the effect of the IDA is to prompt a decision before a project is considered and assessed in accordance with environmental and Constitutional standards.[482] The designation of a project as a SIP would appear to come with the assumption that the project will be approved and implemented. One would expect, therefore, that the administrative decision to declare a SIP, which may be a large mine, power station, human settlement or pipeline, should not be taken without providing opportunity for comment. The extent to which a decision in this regard can be taken on review under PAJA may, however, be affected by section 1(i)(aa) of PAJA which exempts the executive powers or functions of the National Executive.[483]

A more conducive opportunity for stakeholders to utilise PAJA, to challenge the administrative powers of the PICC, may present itself when a project is authorised. Given that the project plan is "approved" by the Steering

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476 Nel J and W Du Plessis. 'An evaluation of NEMA based on a generic framework for environmental framework legislation' (2001) *SAJELP* 8, 28.
477 3 of 2000.
478 Preamble to PAJA.
479 Section 3(1).
480 Section 3(2)(a) and (b).
481 According to section 1 “designate” in relation to a strategic integrated project, means the designation in terms of section 8 by the Commission by notice in the Gazette of a specific project as a strategic integrated project.
482 Centre for Environmental Rights 'Comments of the Draft Infrastructure Development Bill' (2013) par 16.
483 Such powers are referred to in section 85(2)(e) whereby the executive authority of the Republic is vested in the President. Accordingly the President exercises the executive authority, together with the other members of the Cabinet, by (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; (b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the Constitution or in national legislation.

Committee[484] prior to any form of engagement, the 30-day public consultation process that is provided for during the permitting process, in Schedule 2, is unlikely to effectively impact the decision of whether or not to proceed with a SIP. Unlike NEMA, the IDA does not make any reference to appeals and the Act does not fall under the ambit of the National Appeals Regulations.[485] Furthermore, no specific Regulations for administrative processes have been passed in terms of section 21 of the Act.[486] It is trite that no Act can deprive anyone of their Constitutionally-protected right to appeal against administrative action that violates the principles of administrative justice.[487]

In the absence of an appeals process or any other viable internal remedies to resolve disputes, stakeholders have direct recourse to the judicial review process governed by section 7 of PAJA. This process may be instituted in the high court within 180 days from the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.[488] The number of review cases that have sought to challenge administrative decisions taken under NEMA and the EIA Regulations is testimony to the effectiveness of PAJA in ensuring that citizens' rights are not detrimentally affected by procedurally unfair decision-making.[489] Therein lies the irony, that attempts to expedite strategic projects in terms of the DFA may lead to protracted legal battles which cause delay in excess of those posed by EIA and other permitting procedures.

5 Conclusion

A steamroller and a plough are both large, intimidating vehicles designed for a specific purpose. The plough is used by the farmer to turn the soil, mixing the depleted, sun-baked layers with the underlying fresher strata thereby revitalising the ground and improving its fertility. The steamroller is used to prepare the ground for something new by flattening or destroying all that stands in its path - when used as a verb, it has negative connotations , the presumption being that something valuable and worthwhile is being lost to make way for something less desirable. A fundamental question that this dissertation seeks to address is which is the IDA - the steamroller or the plough?

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[484] Step 1 of Schedule 2 allocates 7 days for submitting application and project plan, measured from approval by steering committee of project plan.

[485] Regulations 4(1)(c) of GN R982 in *GG* 38282 of 4 December 2014 (only applicable to decisions taken in terms of NEMA and the SEMAs).

[486] Section 21(1)(e) allows the Minister, in consultation with the Council, to make regulations "generally, regarding any ancillary or incidental administrative or procedural matter which is necessary or expedient to prescribe for the proper implementation or administration of this Act".

[487] Centre for Environmental Rights 'Written Comments on the Draft Environmental Impact Assessment Regulations' (2014) par 37.

[488] Section 7(1)(b).

[489] Examples include *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); *Hangklip/Kleinmond Federation of Ratepayers Associations v Minister for Environmental Planning and Economic Development: Western Cape and Others* (4009/2008) (2009) ZAWCHC 151 (1 October 2009); *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estates (Pty) Ltd and others* (CCT 41/13) [2013] ZACC 39 (20 November 2013); *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others* CCT 67/06 (2007).

The story of environmental management and assessment in South Africa is one of a fairly simple and adaptable procedure, called IEM, being smothered by layer upon layer of legislative amendments, regulations, procedures, protocols and guidelines. To expect a good and helpful environmental impact report to emerge from the current system is a bit like expecting a field to replicate its first season's harvest after years of application of artificial fertilisers.

Hill's presentation to the Parliamentary Portfolio Committee on Water and Environmental Affairs in 2013, regarding the efficacy of South Africa's EIA regime, was entitled "Building on Four Decades of Continuous Improvement"[490]. Writing 20 years ago, during the first decade of "continuous improvement", Hall *et al*[491] cautions as follows:

> [W]e have to consider the often irresistible temptations which confront developers in the pursuit of maximum gain. In the public sector the profit motive is absent but a desire to get on with the job has sometimes led to unwise decisions and steamroller planning. Too often the long term interests of a region or the nation become of secondary importance.

If significant progress has been made towards effective environmental governance, why do Hall's words resonate so strongly when we consider the implications of the IDA? According to the CER the IDA "disregards decades of national policy development in relation to environmental management and sustainable development and existing government commitments". [492]

The original objective of IEM was to develop a framework of harmony between development and environment based on holistic environmental management practices and processes.[493] The contextual parallels, that is the RDP in relation to IEM and the NPD in relation to the IDA, demonstrate that environmental legislation was never intended to promote a conservationist paradigm that would need to compete with development imperatives. When the ANC came to power in 1994, it did so on the back of a policy platform that featured the environment as an integral part.[494] The 1998 IEM Series refers to IEM as the "co-ordinated planning and management of all human activities in a defined environmental system, to achieve and balance the broadest possible range of short- and long-term environmental objectives". It is intended to provide a "way of thinking" that can either be used to underpin a stand-alone process, such as EIA, or be integrated into existing complementary processes - integrated development planning.[495]

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[490] Hill, R 'Building on four decades of continuous improvement' (2013) *Presentation to the public hearing on the efficacy of South Africa's EIA Regime* Department of Environmental and Geographical Science University of Cape Town.
[491] Hall E, D Cowen, J Watson, J Fulton and J Clarke. "Environmental protection: a practical procedure." (1980). *The Civil Engineer in South Africa*. May 1980. 129.
[492] Centre for Environmental Rights *Comments of the Draft Infrastructure Development Bill* March 2013 par 3.
[493] Lindeque R 'Integrated Environmental Management (IEM) in South Africa: a critical assessment' (2003) Dissertation submitted in partial fulfilment of the requirements for the degree of Masters in Geography and Environmental Studies at North West University Potchefstroom.
[494] Peart R and J Wilson 'Environmental policy-making in the new SA' (1998) 5 SAJELP 240.
[495] Department of Environmental Affairs and Tourism (DEAT) *Overview of Integrated Environmental Management* Integrated Environmental Management Information Series 0 (2004).

One of the substantive principles that forms the basis for the Vision of the NSSD is the recognition that socio-economic systems are embedded in, and are dependent on, ecosystems.[496] This reflects the concept of integration that forms the basis of IEM. The purpose of an EIA, within the context of IEM, is to ensure balanced consideration of social, environmental and economic impacts, both positive and negative towards sustainable development.

Legislative developments in terms of section 24 of NEMA have seen the combination of concepts, principles and tools that is IEM become overshadowed by the emphasis on EIA as the primary means to manage environmental impacts. This is despite the purpose of Chapter 5 of NEMA, the apparent statutory home for IEM, "to promote the application of *appropriate* management tools in order to ensure the integrated environmental management of activities"[497] (emphasis added). Acknowledgement of need for alternative approaches is reflected in the EIAMs document, and in the EIA Regulations (2014) which place more emphasis on the implementation and auditing phase. The development of norms and standards for activities where the environmental impacts are well understood has also received recent attention, in relation to biodiversity, contaminated land and waste management.[498] These public and private sector attempts to 're-package' EIA in a more palatable format have, however, come too late to influence or redirect the DED's intentions in relation to infrastructure planning and development.

In response to the amendments to the EIA Regulations (2010), Ridl and Couzens indicated that "there are some extremely worrying signs in South Africa today that government might be leaning too far in the direction of prioritising economic growth".[499] The President's 2015 'State of the Nation Address' left no doubt in this regard as a nine-point economic intervention plan was announced to give the economy a "major push forward" and "ignite much-needed growth". The NIP programme continues to be a key job driver and catalyst for what the DED's APP refers to as "radical economic change".[500] The role of the IDA is to ensure that relatively inflexible environmental permitting processes that are costly and time consuming to administrate, do not inhibit the objectives of the NIP. While much criticism may be leveled at the IDA for potentially undermining a highly developed environmental management regime, the Act may also be seen as the ultimate indictment of a system that has become lost in the detail.

That said, the comparison presented between the IDA and NEMA makes it clear that the introduction of one overarching Act cannot effectively be used to disentangle the complexities of South Africa's environmental legislation without jeopardising the fundamental notions of sustainable development and co-operative governance embedded in the Constitution. Although not made explicit in the IDA, the tone of the legislation imparts an impression that it has been drafted to cater for specific needs, in terms of a specific political mandate, in relation to a specific economic

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[496] Department of Environmental Affairs *National Strategy for Sustainable Development and Action Plan* 2011–2014.
[497] Section 23(1).
[498] NEM: Waste Act 59 of 2008: National Norms and Standards for the Assessment of Waste for Landfill Disposal and National norms and standards for the remediation of contaminated land and soil quality. NEM: Biodiversity Act 10 of 2004: Norms and Standards for Biodiversity Management Plans for Ecosystems.
[499] Ridl J and E Couzens 'Misplacing NEMA? A consideration of some problematic aspects of South Africa's New EIA Regulations' (2010) 13 (5) *PER* 105.
[500] See further at http://www.economic.gov.za/communications/annual-performance-plans/495-app-2014 (accessed 2 March 2015).

plan, at a specific time in South Africa's development. NEMA, on the other hand, has a 16 year legacy and its principles and objectives reflect an approach to environmental governance that is entrenched throughout the world.

Despite the significant differences in their approaches to controlling development activities, the IDA and NEMA are the two primary Acts that do and will govern decision-making in relation to, *inter alia*, fracking, off-shore gas exploitation, harbours, nuclear plants and power stations. Such projects have significant implications for the country's natural resources, for climate change and for socio-economic development. IEM and the principles in NEMA would advocate consideration of a range of issues, alternatives, public opinions, and trade-offs early in the planning phase of such projects. The IDA, however, advocates a caution to the wind approach in the face of service delivery and energy crises, massive unemployment and falling GDP growth rates.

The Department of Environmental Affairs' Strategic Plan for the Environmental Sector (2009 - 2014)[501] warns against the type of approach advocated by the IDA in the following terms:

> Despite a strong and growing commitment from government and other sectors of society to more effectively manage and safeguard South Africa's natural resource base, there remains a need to ensure that this objective is married to planned and appropriate large-scale sustainable infrastructure investments and social development strategies. Care must be taken to ensure that infrastructure genuinely benefits citizens... in order to build from the bottom up and not from the top down. The notion of infrastructure led development must be informed by developing sustainable infrastructure, which asks the right questions, instead of the more common "business as usual" scenario.

At the first meeting of the PICC on 21 August 2014, the President told the gathering of ministers, premiers and mayors, that they must "jointly attend to delivery matters with speed and a problem-solving culture".[502] This can only but come at the cost of the principles of IEM including informed decision making, transparency and accountability. It is early days yet for the PICC but it would come as no surprise if projects qualifying for the legislated "fast track" are hampered by legal battles and advocacy that will ultimately put NEMA ahead of the IDA. It is inevitable that more harm than good will result from the use of the steam roller approach. What is needed is a serious re-assessment of ways in which IEM and its principles can be used to reinvigorate environmental governance in South Africa, enabling us to effectively nurture our valuable natural resource base as a fertile foundation for sustainable economic growth and development.

[501] See further at www.gov.za/documents/strategic-plan-environmental-sector-2009-2014 (accessed 6 December 2014).
[502] See further: http://sanews.gov.za/south-africa/president-zuma-attend-infrastructure-delivery-urgency (accessed 6 December 2014).

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