Co-operative environmental governance: alignment of environmental authorisations in the province of KwaZulu/Natal

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ABSTRACT

The main legislation governing environmental authorisation in South Africa is the National Environmental Management Act, 107 of 1998 (NEMA). This legislation is administered by the environmental affairs departments at national, provincial and local spheres of government. Besides NEMA, there are other pieces of legislation which govern environmental authorisation and, in some instances, are administered by other organs of state. They, like NEMA, require submission of reports to authorities for decision-making. This may result in cumbersome and duplication of processes; which in turn, may delay the initiation of development activities.

NEMA provides for co-operative governance, coordination of activities and alignment of processes to counter the above problems. Section 24L states that activities regulated in another law may be regarded as sufficient for authorisation in terms of NEMA, and vice versa. Furthermore, section 24K provides for consultation and coordination of legislative requirements to avoid duplication. Flowing from these provisions is that competent authorities may exercise their powers by issuing separate or integrated authorisations. All these provisions aim to promote smooth and seamless interactions between all key role-players involved in authorisation processes.

However, there are widespread concerns amongst key role-players and the public at large about the lack of application and/or implementation of the foregoing legislative provisions. This study investigates these concerns through a literature review, case study analysis and administration of a questionnaire. The results show that the fruits of these provisions (i.e. coordinated activities, aligned processes and/or integrated authorisations) in the province of KwaZulu-Natal have yet to be realised. This study recommends, therefore, that clear guidance be provided to provinces on how to implement the legislative provisions described above.

Key words:
Environmental authorisation, alignment of processes, co-operative governance, seamless interactions, cumbersome processes

DECLARATION

I declare that this dissertation, apart from the contributions mentioned in the acknowledgements, is my own unaided work. It is submitted for the Degree of Master of Environmental Management at the North West University, Potchefstroom Campus.

I also declare that it has not been submitted before to this institution for another Degree or any other institution in this country or abroad.

Signature of the Candidate

06 May 2013

Date

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CONTENTS

LIST OF ACRONYMS

AEL	Air Emission Licence
BA	Basic Assessment
BIA	Biodiversity Impact Assessment
CA	Competent Authority
CC	Constitutional Court
CEC	Committee for Environmental Coordination
CEM	Centre for Environmental Management of the University of the North West
DAEA&RD	Department of Agriculture, Environmental Affairs and Rural Development
DAFF	Department of Agriculture, Forestry and Fisheries
DEA	Department of Environmental Affairs
DFA	Development Facilitation Act, 1995 (Act 67 of 1995)
DLA	Department of Land Affairs
DMR	Department of Mineral Resources
DWA	Department of Water Affairs
EA	Environmental Assessment
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act 73 of 1989)
EIA	Environmental Impact Assessment
EIP	Environmental Implementation Plan
EIR	Environmental Impact Report
EMF	Environmental Management Framework
EMP	Environmental Management Plan
EMPr	Environmental Management Programme
FOSAD	Forum of South African Directors-General
GMO	Genetically Modified Organism
GMO Act	Genetically Modified Organisms Act, 1997 (Act 15 of 1997)
GN	Government Notice
HDPE	High-density polyethylene
HIA	Health Impact Assessment
I&AP	Interested and Affected Party
IGR	Intergovernmental Relations

IRFA	Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005)
KZN	Province of KwaZulu-Natal
LEG	Local Environmental Governance
LPG	Liquefied Petroleum Gas
MEC	Member of the Executive Council
MINMEC	Minister and Members of the Executive Council
MINTEC	Minister and Members of the Executive Council's Technical Committee
MRG	Methane Rich Gas
MPRDA	Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)
NEAF	National Environmental Advisory Forum
NEMA	National Environmental Management Act, 1998 (Act 107 of 1998)
NEMAQA	National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004)
NEMBA	National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004)
NEMICMA	National Environmental Management: Integrated Costal Management Act, 2008 (Act 24 of 2008)
NEMPA	National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003)
NEMWA	National Environmental Management: Waste Act, 2008 (Act 59 of 2008)
NHRA	National Heritage Resources Authority
NWA	National Water Act, 1998 (Act 36 of 1998)
OTP	Office of the Premier
PCEC	Provincial Committee for Environmental Coordination
PP	Public Participation
R	Regulation
RA	Risk Assessment
RoD	Record of Decision
RSA	Republic of South Africa
S&EIR	Scoping and Environmental Impact Report
SA	Sustainability Assessment
SANBI	South African National Biodiversity Institute
SANParks	South African National Parks
Sc	Science
SCA	Supreme Court of Appeals
SEA	Strategic Environmental Assessment
SIA	Social Impact Assessment

SR	Scoping Report
v	versus
WESSA	Wildlife and Environmental Society of South Africa
WML	Waste Management Licence
WUL	Water Use Licence

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CHAPTER 1: INTRODUCTION AND RESEARCH DESIGN

This chapter introduces the study, starting with the background and the problem statement, followed by the study objectives and the research questions. The chapter ends with the methodology applied to achieve the objectives.

1.1 BACKGROUND AND PROBLEM STATEMENT

The National Environmental Management Act, 107 of 1998 (NEMA) is an overarching legislation that governs environmental management in South Africa. Section 2 of this Act outlines environmental management principles, which must be integrated into all environmental management decision-making processes (RSA, 1998a; Glazewski, 2005:147; Van der Linde, 2009:198). NEMA is also the main legislation which provides for environmental authorisations. In this regard, certain activities cannot be undertaken unless an environmental authorisation is granted. Such authorisations are preceded by an assessment of the potential impacts of the proposed activity through an environmental impact assessment (EIA) process.

Over and above the NEMA requirements, authorisations are required, administered and governed by various other pieces of legislation and government entities. These include, *inter alia*:

i) the prospecting and mining rights licence under the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA), administered by the Department of Mineral Resources (DMR) (RSA, 2002),
ii) a water use licence (WUL) under the National Water Act, 36 of 1998 (NWA), administered by the Department of Water Affairs (DWA) (RSA, 1998b),
iii) an atmospheric emission licence (AEL) under the National Environmental Management: Air Quality Act, 39 of 2004 (NEMAQA), administered by the Department of Environmental Affairs (DEA) (RSA, 2004),
iv) a waste management licence (WML) under the National Environmental Management: Waste Act, 59 of 2008 (NEMWA), also administered by the DEA (RSA, 2008),
v) a land use permit under the Development Facilitation Act, 67 of 1995 (DFA), administered by the Department of Land Affairs (DLA) (RSA, 1995), etc.

These pieces of legislation also require assessment of potential impacts and submission of reports to the authorities for decision-making. This often results in cumbersome authorisations, turf wars between (and within) government entities and duplication of processes (Kotzé, 2005:23; Du Plessis, 2008; Steenkamp, 2009:33). The Constitution of the Republic of South Africa, 108 of 1996, the Intergovernmental Relations Framework Act, 13 of 2005 (IRFA) and NEMA provide for co-operative government, coordination of activities, alignment of processes and integration of authorisations to avoid all the foregoing problems (RSA, 1996; RSA, 1998a; RSA, 2005).

Despite all the foregoing provisions, there appears to be widespread concerns amongst government entities, environmentalists, academics, development proponents and the public at large, about the lack of practical application and/or implementation of these legislative provisions, particularly cooperation, alignment of processes and integration of authorisations. Clearly, therefore, these concerns need to be investigated in a rigorous and scientific manner. This also requires the investigation of the availability and functioning of institutional structures which promote co-operative environmental governance (CEG) and alignment of processes.

1.2 STUDY OBJECTIVE AND RESEARCH QUESTIONS

The aim of this study is therefore to investigate the functioning of CEG in the province of KwaZulu-Natal (KZN) in relation to environmental authorisations, particularly the alignment of processes. The problem question is: to what extent does KZN coordinate, align and/or integrate its authorisation processes? In order to respond to this question, the following sub-questions are asked:

- what information has been published on CEG and the alignment of environmental authorisation processes in South Africa,
- what are the legal prescripts that govern and/or guide CEG and the alignment of authorisation processes in South Africa,
- what conclusions can be drawn from a sample of EIA case files with regards to cooperation between authorities and the alignment of environmental authorisation processes in KZN,

- what are the views of the key role-players regarding the current state of CEG and alignment of authorisation processes in KZN, and
- what can be done to improve cooperation between government entities involved in environmental authorisation in KZN?

In line with the foregoing research questions, the objectives are, therefore, to:

i. investigate published information on CEG and the alignment of authorisation processes,
ii. identify legal prescripts which provide for CEG and environmental authorisations,
iii. analyse a sample of EIA cases in order to determine the effectiveness of CEG and the alignment of environmental authorisation processes,
iv. analyse the views of key role-players regarding CEG and alignment of authorisation processes, and
v. formulate recommendations on how to improve the current environmental authorisation processes.

1.3 METHODOLOGY FOR THE STUDY

A literature study, covering (*inter alia*) peer reviewed journals, legislation and court cases was undertaken in order to achieve the first and second objectives, which are presented in Chapters 2 and 3 of the dissertation, respectively.

The third objective was achieved by analysing a sample of EIA cases and conducting interviews with role-players involved in the EIA cases to ascertain missing information from EIA case files and source anecdotal evidence. Cases which covered a variety of activities, e.g. water use, installation of hazardous chemical facilities, mining activities, etc., were selected, and these are presented in Chapter 4 of the dissertation. EIA cases were evaluated and analysed as follows:

- providing a brief description of the activity,
- identifying the authorisation processes followed and whether some of the processes were aligned,
- scrutinising the interaction and correspondence between authorities, environmental assessment practitioners (EAPs) and interested and affected parties (I&APs),

- reviewing the duration of the authorisation process and identifying the causes of delays,
- identifying co-operative government structures involved in the decision-making process, and the role thereof, and
- conducting interviews with key role-players to ascertain information that could not be sourced from EIA case files.

The fourth objective was achieved by administering a questionnaire to: i) the competent authority, particularly the KZN's Department of Agriculture, Environmental Affairs and Rural Development (DAEA&RD); ii) EAPs; and iii) development proponents. Once a questionnaire was administered, data was analysed and conclusions were drawn. These are presented in Chapter 5 of the dissertation.

The fifth objective was achieved by analysing data generated from the study to provide recommendations which may promote effective CEG and alignment of environmental authorisation processes in KZN, and this is presented in Chapter 6 of the dissertation.

1.4 CONCLUSION

Therefore, besides the literature study, the main methodology for this study includes the case study analysis of selected EIA cases and conducting interviews with the competent authorities, EAPs and development proponents who were involved in the selected EIA case files. Analysis of filed correspondence between key role-players was one of the key methods of obtaining data for the study. Some EAPs and development proponents make their EIA correspondence available on the internet, and this source of information was used.

In order to facilitate ease of reference and smooth alignment of results with research objectives, the table below summarises and links the methodology, study objectives and the chapter layout of the dissertation.

TABLE 1: Research objectives, methodology and dissertation chapter layout

Research objectives	Research method	Dissertation chapter
1. Investigate literature on CEG & the alignment of environmental authorisation processes	Literature study	Chapter 2
2. Identify legal provisions for CEG & alignment of environmental authorisation processes	Literature study, overview of statutes & case law study	Chapter 3
3. Analyse a sample of EIA cases to assess CEG & alignment of environmental authorisation processes	Case study analysis	Chapter 4
4. Analyse the views of key role-players about CEG & alignment of environmental authorisation processes	Administration of questionnaire	Chapters 5
5. Formulate recommendations to improve the current state of CEG & environmental authorisation in KZN	Deductions from data generated by this study	Chapter 6

CHAPTER 2: LITERATURE REVIEW

In accordance with the first research objective, this chapter reviews literature on CEG, environmental authorisation – including alignment, and the role of the local government in environmental governance. As an introductory background, the chapter defines the concepts: environment, environmental governance and environmental management. This is followed by an overview of the role of the local sphere of government in environmental governance. Thereafter, this chapter discusses CEG, followed by an overview of environmental authorisation and the alignment of different authorisation processes. This is followed by a review of the performance of environmental assessment (EA). Lastly, the chapter concludes with a summary and/or commentary on published literature which relates to co-operative governance, environmental authorisation, alignment of processes, local environmental governance, and performance of EA.

2.1 INTRODUCTION

In South Africa, the administration of environmental issues is fragmented, disjointed and disintegrated (Bosman *et al*., 2004; Kotzé, 2006; Kotzé, 2009:110). A comprehensive discussion of the fragmentation of the South African environmental legislative regime is outlined by Kotzé (2005:23-4). Different environmental media (biota, land, water and air) are administered by different institutions, which may be located in the same or different spheres of government, e.g. land issues are administered by DLA, water resources by DWA, air quality by DEA and municipalities, mining activities by DMR, biodiversity and protected areas by the South African National Biodiversity Institute (SANBI) and South African National Parks (SANParks), etc. (Müller, 2009:81). However, environmental issues are not as clearly demarcated and unambiguous as the foregoing differentiations. There are various cross-cutting issues and areas of overlap, which make the administration of most environmental issues complex because they rest with more than one entity (Nel and Kotzé, 2009:13). There are widespread concerns regarding this because it leads to gaps in authorisations, duplication of processes, unnecessary delays, turf wars and inefficient use of resources.

Co-operative government provisions as outlined in the Constitution and other supporting legislation, particularly CEG, were meant to address all the foregoing problems. It is therefore important to consider the concept of CEG and its theoretical basis. This is discussed in the next section, but the following subsections focus first on key terminology and concepts. These include: environment, environmental management and environmental governance, which are discussed below.

2.1.1 Environment

Nel and Kotzé (2009:1-2) state that any discussion on environmental governance or advocacy for the environmental cause presupposes clarity on the important concept of "environment". These authors observe that there is no general consensus on what exactly the concept "environment" encompasses, and that its meaning is generally taken for granted. Kidd (2011:2) supports this observation and acknowledges that there is no consensus regarding the exact meaning of environment, though there may be some agreement on its core tenets.

Historically, environment was perceived to only relate to the natural physical environment and the man-made changes to such environs (Kotzé, 2009:107). This observation is supported by Nel and Kotzé (2009:2) who point out that the historical definitions of environment only addressed the living and non-living elements of the earth's systems, and their interactions. This is no longer the case. Social, cultural and economic dimensions are now central in the definition of environment. There is also consensus that environment is a complex, integrated system, where all the different components are inter-dependant and inter-related (Kotzé, 2009:107).

Nel and Kotzé (2009:2) emphasise the point that the concept "environment" may either be defined from an exclusively "green" perspective (biotic and abiotic elements) or a perspective which integrates "green" with "brown" (social, cultural and economic) issues. However, for any definition of environment to be comprehensive, it must be considered from both legal and scientific points of view (Nel and Kotzé, 2009:2). In this regard, the legal definition of "environment" in South Africa is found in section 1 of NEMA, which is:

> "the surroundings within which humans exist and that are made up of –
> (i) the land, water and atmosphere of the earth;
> (ii) micro-organisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing" (RSA, 1998a).

This is an all encompassing definition and does not only cover the bio-physical aspects of the environment, but also includes socio-cultural issues (Van der Linde, 2009:193; Du Plessis, 2009). Kotzé (2009:107) points out that the NEMA definition reflects an integrated approach, covering legal, natural, sociological and political aspects, i.e. the disciplines which are necessary to formulate strategies which may address global environmental problems. Furthermore, the definition shows that the environment is broad and made up of various media, hence a fragmented government system may require different state entities to administer it.

Considering that this definition is broad, it is subject to different interpretations (as it usually happens with most legal matters). Nel and Kotzé (2009:5-7) encourage a broad interpretation which includes "natural environment, anthropogenic environment, cultural processes and socio-economic influences and considerations", particularly if such an interpretation promotes the constitutional values and principles. The forgoing definition and interpretation is used throughout this dissertation; and therefore, any reference to "environment" refers to its broad interpretation.

Now that the meaning of "environment" and the context of its use here has been clarified, this dissertation turns to the concepts of "environmental governance" and "environmental management". The starting point for such a discussion is contrasting management and governance, on the one hand; and governance and government, on the other. The latter is the focus of the next subsection.

2.1.2 Governance versus government

In examining the concept of environmental governance, it is important to differentiate between "governance" and "government". Kotzé (2009:103) decries the fact that these two concepts are used loosely and interchangeably, but "to imply different things". While this dissertation does not try to resolve this anomaly, hereunder is the context under which these concepts are used in this dissertation. Kotzé (2009:106) defines governance as essentially implying activities that promote the fulfilment of public tasks of

common interest. This is supported by Müller (2009:71-2) who views governance, particularly public governance, as "a way in which stakeholders interact with each other in order to influence the outcome of policies".

Bosman *et al*. (2004:412), however, describes governance as "both the process and structure by which officials are held accountable for executing the fiduciary duty with which they are entrusted to the public". This definition seems to contrast the above authors by implying that governance is not limited to process, but also includes the structure. One of the sources of confusion when contrasting "governance" and "government" is the inter-relation between these two concepts. Hence defining one inevitably leads to the use of the other. This is shown by the following contrast by Bray (2008:9): "'government' refers to the structures or branches of government established for co-operative governance (...); 'governance' refers to the process of government or to be governed". Clearly, this does not make it easy to clarify the difference between these two concepts.

Glansbergen (1998:1) has a slightly different approach and points out that governance is mainly about manageability of society and its institutions. It is a management process, which is about relationships embedded in law, involving numerous actors, and concerned with the promotion of common interests. Plummer and Fitzgibbon (2004) support this by pointing out that governance is mainly about functionality of management structures. Bray (2005a), supported by Muller (2009:71), adds by pointing out that governance encompasses the activities of governments, and that such activities are continuously changing, no matter how institutionalised the systems may be: "it is a continuous and dynamic evolutionary process that fluctuates between order and disorder". It is not about making public organisations and public services more efficient, but rather about solving "wicked problems", such as environmental problems (Müller, 2009:71).

The discussion above shows the broad and varied understanding of governance, but what may be distilled from it is that: governance is the process with which institutions continuously work towards achieving the mandate bestowed on them. Governance must however not be confused and/or used interchangeably with government. Kotzé (2009:106) points out that a clear distinction can be drawn between governance and

government. The difference is that while governance is a process, government relates to institutional structures and hence a necessary element to realise governance. Müller (2009:71) emphasises this point by saying the use of governance instead of government in the public management discipline, signifies that the emphasis is on the public problem solving realm. It therefore follows that there are institutional structures (government structure) which must be put in place to ensure effective and efficient environmental governance.

The next subsection contrasts environmental management with environmental governance; which, in accordance with the above discussion, refers to the governance landscape for environmental management.

2.1.3 Environmental governance and environmental management

Environmental governance, in line with the discussion above, can be defined in broad terms as "a management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and effects of human activities on the total environment (...) by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the common present and future interests human beings hold in the environment" (Kotzé, 2009:107-8; Humby, 2009:161). Glansbergen (1998:1) argues that environmental governance involves the introduction of environmental policy which, in turn, helps to shape society and induces it to change "behaviour and to imbue society with new and more ecologically sound social arrangement".

On the other hand, one may be tempted to define environmental management as the management of the different environmental media listed in the above definition of environment. However, it is not. Environmental management is a management or governance strategy "aimed at shaping or changing the behaviour of people in their environment (...). Its primary objective is the regulation of the effects of peoples' activities, products and services on the environment" (Nel and Kotzé, 2009:1). Environmental management is therefore **not** the management of the environment, but the management of activities, products and services in order to prevent their undesirable

impacts on the environment. It can be summarised as the management of people and their activities with respect to the environment (Nel and Kotzé, 2009:10).

It is clear, from the foregoing discussion, that environmental management and the statutory institutional dispensation for environmental management are very complex and require a coordinated governance approach. Because the country's environmental management system is fragmented between and/or within environmental media and the spheres of government, CEG (which is discussed in the next section) is viewed as the most appropriate governance model to achieve the objectives of environmental sustainability (Müller, 2009:83-4).

2.2 CO-OPERATIVE ENVIRONMENTAL GOVERNANCE IN SOUTH AFRICA

It is common knowledge that the environment is unitary and all environmental media are integrally linked. It follows, therefore, that an integrated approach to environmental management is required; hence the need for cooperation and coordination of governance effort between and within the country's fragmented system (Kotzé, 2005:24). While Schedules 4 and 5 of the constitution clearly delineate the roles and responsibilities of the different spheres of government, Chapter 3 provides for co-operative government[1]. Constitutionally, the three spheres of government must cooperate and coordinate functions and activities of common responsibility (RSA, 1996). This constitutional imperative is critical for environmental governance. Furthermore, CEG, which is provided for in NEMA, is the main vehicle through which coordination of activities and processes may be realised.

Some aspects of the environment are concurrently administered by the national and provincial spheres of government; some by the provincial and local spheres; while others are the sole responsibility of the national sphere (Bosman *et al*., 2004). An example is water resources, which is administered by national government; while water supply and sanitation is a local government responsibility. This complicated delineation of roles and responsibilities results in areas of overlap and gaps in the administration of some

[1] This is discussed in Chapter 3 of this dissertation

environmental management functions, with potential to cause friction and conflicts between and within government entities (Boer *et al*., 2003; Du Plessis, 2009).

According to Klug (2010:252), supported by Bosman *et al*. (2004), in creating the three spheres of government, the constitution, unlike in federalised governance systems, allocates powers simultaneously in a shared manner to the different spheres (concurrent authority). These authors further point out that this "places less emphasis on geographical autonomy and more on the integration of (...) jurisdictions into separate functionally determined roles in the continuum of governance". This concurrent competence requires conformance with the principles of co-operative government which are presented later in this chapter (Boer *et al*., 2003; Klug, 2010:252; Mathebula, 2011). The next subsection discusses intergovernmental relations.

2.2.1 Intergovernmental relations with respect to the environment

There is a conceptual difference between co-operative government and intergovernmental relations. Edwards (2008:66) points out that "intergovernmental relations are intended to promote and facilitate cooperative governance and decision making by ensuring that policies and activities across all spheres encourage service delivery to meet the needs of citizens in an effective way. Ineffective intergovernmental relations and coordination are often problems of capacity and management rather than of structures and procedures". This author (Edwards, 2008:68) goes further to explain that "intergovernmental relations are concerned with the political, financial and institutional arrangements regarding interactions between the different spheres of government and organs of state within each sphere". Supported by Mathebula (2011), Edwards (2008:68) further specifies that "intergovernmental relation is one of the means through which the values of cooperative government may be given institutional expression". In this regard the "system of cooperative governance is a philosophy that governs all aspects and activities of government" (Edwards, 2008:68). The foregoing discussion shows the link between intergovernmental relations and co-operative governance, while at the same time its showing that these are two different concepts.

In South Africa, a system of intergovernmental relations to facilitate cooperation, effective and efficient service delivery in areas where different spheres of government

are assigned joint responsibility, has been developed. Thornhill (2002:36) defines intergovernmental relations as the "official actions and interactions amongst politicians and officials of national, provincial and local spheres of government, requiring them to perform their duties" with regards to certain powers and functions so as to foster cooperation and cordial working relations for the benefit of the communities served. Intergovernmental relations are mandated by law, starting with the constitution, as observed by Thornhill (2002:37) who highlights its importance and acknowledges the legislative and government systems. This author emphasises that the legislative and government systems "determine the administrative arrangements needed to give effect to the policies of the various spheres of government". Bray (2008) points out that poor intergovernmental relations hinders efficient and effective co-operation and the settlement of interdepartmental uncertainties and disputes. This point is taken further by Meijers and Stead (2004), supported by Kotzé (2005:28), who point out that poor intergovernmental relations may be exacerbated by attitudes, values and perceptions of officials who work in environmental organisations, which play a significant role in inhibiting organisational coordination, co-operation and integration.

Intergovernmental relations are provided for in IRFA[2], which provides for the establishment of institutional structures which must facilitate harmonious working relations and dispute resolution mechanisms in all the spheres of government. The Minister and Members of the Executive Council (MINMEC) is a co-operative government structure established in terms of the IRFA to facilitate good working relations between the provincial and national spheres at a political level. The Minister and Members of the Executive Council's Technical Committee (MINTEC) is the corresponding structure for the technocrats. Intergovernmental working groups may be established to implement the resolutions of MINMEC and MINTEC. There are also working groups which facilitate good working relations between the provincial and local spheres of government.

The next subsection discusses CEG and how intergovernmental relations facilitate this concept.

[2] Intergovernmental Relation Framework Act, 13 of 2005

2.2.2 Co-operative environmental governance

Co-operative government is a constitutional imperative in the country and NEMA has adapted it to the field of environment. According to Bray (2005a), co-operative government is one of the most important structures used to ensure integrated and sustainable environmental management and is a central part of NEMA as clearly outlined in its Preamble. Edwards (2008:68) points out that "cooperative government is a partnership between the three spheres of government, where each sphere is distinctive and has a specific role to fulfil". Boer *et al*. (2003) notes that there is no universally accepted definition for CEG, but usually involves two key components, i.e. "local representation in the negotiation and implementation of environmental regulation, and adoption of public-private partnerships as forms of negotiation". Kotzé (2009:121) points out that CEG is one of the most important strategies used to address fragmentation and an indispensable part of the country's environmental management regime. Bray (2008:11) points out that co-operative governance "underlines the view that spheres of government working harmoniously together are more likely to address challenges than if they were acting on their own or, alternatively, in competition with one another".

According to Edwards (2008:66) "Cooperative governance implies that sub-national and national jurisdictions have certain political and legal obligations to support and consult one another on matters of common concern, to cooperate and maintain friendly relations." NEMA explicitly provides for CEG by means of stipulating principles for decision-making on matters affecting the environment (RSA, 1998a; Bray, 1999). According to Kotzé (2009:122), the essence of CEG can be illustrated by the figure below, which illustrates the link and interaction between and within different sectors, spheres of government, officials operating in such spheres, and various environmental management statutes. A detailed model of this figure is outlined by Kotzé (2005:46) as representing a comprehensive integrated environmental management concept.

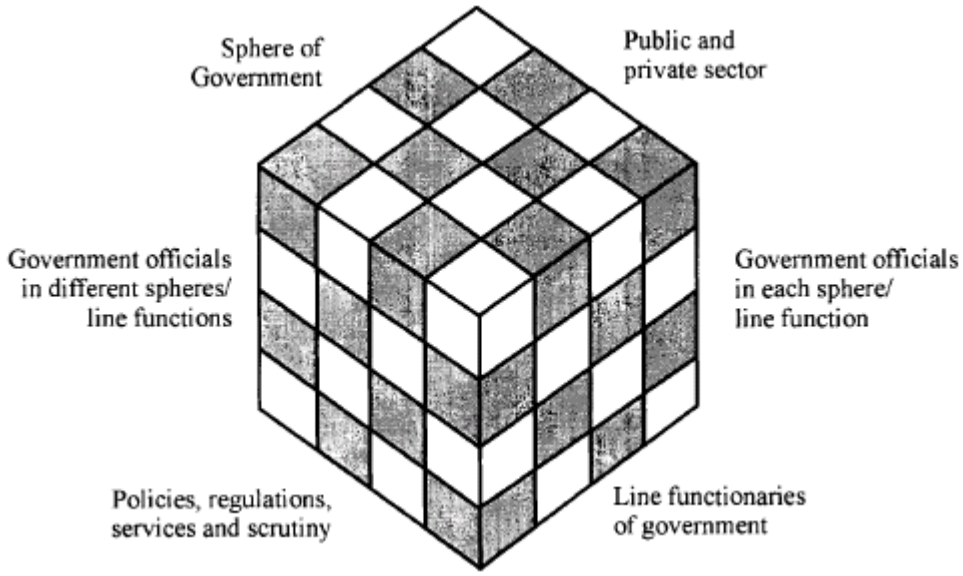

FIGURE 1: Model illustrating co-operative environmental governance (Kotzé, 2009:122)

This figure shows the complexity of the CEG concept and how different spheres, sectors, policy directives, etc., are pooled together to form one whole.

2.2.2.1 Constitutional and other requirements

The constitution entrenches three distinct spheres of government (national, provincial and local) – which are autonomous, distinct, interdependent and interrelated – and three branches of government (the executive, legislature and the judiciary) (RSA, 1996; Klug, 2010:251, 257). While the branches of government are independent, the three spheres are required to exercise their powers and functions in a mutually supportive and co-operative manner. Disputes within and between different spheres of government and organs of state are to be resolved through mediation, and every reasonable effort must be taken and all other remedies exhausted before a court of law can be approached (RSA, 1996; Klug, 2010:251).

Chapter 3 of the constitution deals with co-operative government, and provides constitutional prescripts for cooperation within and amoungst all government spheres and government entities. The constitution stresses the point that though the three spheres are distinct, they are also interdependent and interrelated, and must observe

and adhere to co-operative government principles, and conduct their activities within the parameters of co-operative government (RSA, 1996; Thornhill, 2002:34; Vermaak, 2006).

The principles of co-operative government are outlined in section 40 of the constitution and "define specific duties that each (sphere) of government owes to the other" (RSA, 1996; Klug, 2010:257). Klug (2010:258) argues that viewed in totality, the co-operative government principles seek to promote a climate of governance which is based on cooperation, mutual trust and good faith. The principles require government entities to, *inter alia*:

- preserve peace, national unity and indivisibility[3],
- respect the constitutional status, institutions, powers and functions of entities in other spheres,
- assume neither any power nor function except those conferred on them,
- exercise their powers and perform their functions in a manner that does not encroach on functional and institutional integrity of others,
- refrain from exercising their powers in a way that encroaches on the geographical, functional and institutional integrity of other entities, and
- cooperate with each other in mutual trust and good faith by, *inter alia*, fostering friendly relations, co-ordinating actions and legislation, adhering to agreed procedures, and avoiding legal proceedings against each other (RSA, 1996; Thornhill, 2002:36; Bosman *et al*., 2004; Vermaak, 2006; Klug, 2010:257-258).

According to Malan (2009:1140) the concept of co-operative government is "based on relationships among institutions in terms of certain policy areas (...) which may enhance the capacity of the collective, while imposing constraints on individuals in the design and implementation of policy and legislation". This author further points out that "concepts such as intergovernmental relations, partnerships, collaboration and co-management are brought into consideration" to emphasise the importance of working together to sustainably manage the environment. Furthermore, this author supported by Boer *et al*. (2003) points to four principles of co-operative government which need to be satisfied for "the true spirit of co-operative environmental management to emerge". These four

[3] Willingness to work in unison

principles are fairness, accountability, responsibility and transparency. These principles can be viewed as key tenets of an open democratic system of government and conform with the section 40 principles outlined above.

2.2.2.2 Problems with environmental governance

The source of all problems associated with environmental governance is fragmentation. Bray (2008:18), supported by Kotzé (2005:25), argues that "fragmentation is contrary to the very nature of environment as an integrated, interrelated and holistic" concept. According to this author, fragmentation "results in costly delays in decision-making" which are caused by "inefficient arrangements between organs of state that control similar activities; significant gaps in control arrangements while other pertinent issues are not controlled at all; inconsistent behaviour by government officials; conflicting conditions in authorisation and externalisation of government inefficiencies to development costs which may result in negative impacts on development" (Bray, 2008:8). Therefore, fragmentation inhibits the achievement of sustainable governmental service delivery efforts (Kotzé, 2005:25; Kotzé, 2006; Bray, 2008).

Problems associated with environmental governance, which the CEG concept aims to address are widely documented, e.g. RSA, 1998a; Bosman *et al*. (2004); Bray (2005b); Kotzé (2005:24-5); Du Plessis (2008); Nel and Kotzé (2009:17-25); Du Plessis (2009) and Muller, (2009:70). Some of the major problems are:

- fragmentation of institutional structures and statutes,
- ineffective enforcement of legislation,
- potential conflict of interest, in that government entities tasked with enforcing compliance are also responsible for promoting activities which may have significant negative impacts on the environment,
- inadequate accountability to the public and over-centralisation of authority,
- inadequate public participation in decision-making processes, and
- the DEA, government entity which must champion the environmental cause, is weak in terms of jurisdictional, statutory and executive authority, and lacks adequate professional and technical personnel to carry-through its entire mandate.

The functioning of the CEG concept has a significant effect on environmental authorisation. In this regard, CEG can harness the network of government institutions at national and provincial levels to achieve the goals and objectives of environmental authorisation (Kotzé *et al*., 2007; Nel and Kotzé, 2009:22). The above discussion may give the impression that environmental management and environmental authorisation are only restricted to the national and provincial spheres of government. However, the local sphere of government is an integral and significant part of the operational state and hence, responsible for the realisation of the constitutional environmental right (Du Plessis, 2009). Furthermore, one of the constitutional objects of local government is to promote a safe and healthy environment (RSA, 1996). The next subsection examines the role of local government in environmental governance.

2.3 LOCAL ENVIRONMENTAL GOVERNANCE

The role of local government in environmental governance is essentially captured in the following observation by Bosman *et al*. (2004): "Environmental governance is a good example of an instance where all three spheres of government are required to establish and enforce legislative measures pertaining to a single and shared subject matter (...). The competency to oversee matters that relate to the environment is thus shared between the different spheres on the basis that each sphere is responsible for the particular governance that best suits its structure, resources, reach, dimension and nature." Atkinson (1998) and Du Plessis (2009) also confirm the important role that the local sphere of government plays in environmental management, which is continuously re-enforced and expanded through successive Acts of Parliament which clearly outline the responsibilities of local government in environmental management.

Bosman *et al*. (2004) observes that "some of the services rendered by local government are directly dependent upon, and affected by, the integrity or quality of natural resources, such as the provision of potable water supply services. However, local government has a specific dual role to play in this regard, both as frontline regulator of certain environmental aspects, as well as a provider of basic services with potential impacts (for example the disposal of sewage effluent, which is regulated by other spheres of government)". This clearly shows the importance of local government as the regulator and as regulated.

Local government plays a significant role in environmental management and has environmental management responsibilities assigned to it by the constitution. Du Plessis (2009) points out that "Environmental and local government law are two of the most varied and intricate areas in South African public law." Hence, there is material and substantive intersection between local government and environmental law. The environmental management responsibilities of local government are implemented through the concept of Local Environmental Governance (LEG) which is defined as a management process executed by local government and communities to regulate human activities and effects thereof on the environment. This management process necessitates a collection of legislative, executive and administrative functions, instruments and ancillary processes that could be used by local government, the private sector and citizens to pursue sustainable behaviour within the community (Du Plessis, 2009).

Local government environmental management responsibilities are also assigned by some of the sector and media specific legislation, e.g. NEMBA allocates some biodiversity responsibilities to local government despite the fact that nature conservation is not listed in the constitution as one of the areas of local government competence. Local government has a responsibility to protect and enhance air quality in terms of NEMAQA. Bosman *et al*. (2004) points out that in view of the definition of "environment", the competencies listed in Schedules 4 and 5 of the constitution could potentially lead to inconsistency in decision-making and even conflict among and between spheres of government that cannot be resolved with reference to the provisions on co-operative governance alone.

As stated elsewhere in this dissertation, the administration of environmental management responsibilities falls within the shared legislative and executive competence of national and provincial governments. Be that as it may, local government is also tasked with environmental management responsibilities. Furthermore, local government is the only sphere of government to which the constitution explicitly assigns not only the general duty to realise the environmental right, but also a specific additional duty to promote a safe and healthy environment (RSA, 1996; Du Plessis, 2009). Despite this, there are no discernible institutional structures at

local government level to oversee its environmental management responsibilities. Be that as it may, well resourced and bigger municipalities have a well established environmental management component, which oversees a number of responsibilities ranging from solid waste management to climate change initiatives. Furthermore, municipalities have a big role to play in EA processes; i.e. i) as a proponent for municipal development projects, ii) as an I&AP for third party developments within municipal property, iii) as a government entity with jurisdiction over an activity that is within its boundary, and iv) as a competent authority for AEL[4]. The next section discusses the environmental authorisation dispensation in the country, with emphasis on the processes in KZN.

2.4 ENVIRONMENTAL AUTHORISATION IN SOUTH AFRICA

South Africa has a number of environmental management tools which are part of its environmental legislative and enforcement armoury. One of the tools is the authorisation of certain listed activities through impact assessments. The commonly used tool is the EIA process (Kidd and Retief, 2009:971). This section discusses EA and the alignment of various EA processes and their performance.

2.4.1 Environmental assessment and environmental authorisation

Glazewski (2005:229) defines EA as a tool used to "facilitate sound, integrated decision-making in which environmental considerations (...) are explicitly and systematically taken into account in the planning and development process", and "do not, in spite of common perceptions, provide definitive answers as to whether controversial developments should be authorised or not". EA cover both EIAs – which are project specific, and Strategic Environmental Assessments (SEAs) – which are the assessment of policies, programmes and plans (Glazewski, 2005:229). SEA and EIA may be viewed as complementary tiers within a broader EA approach. SEA considers strategic and priority issues, providing sound focus and criteria for subsequent EIA (Glazewski, 2005:230). Kidd and Retief (2009:981) support this assertion by pointing out that EA encapsulates "both project level EIA and strategic level SEA". EA plays a central role, in ensuring that

[4] Atmospheric emission licence

environmentally sound decisions are made for both project and strategic level activities. It is widely accepted that for projects (i.e. EIA processes), the assessment tends to be reactive while for policies, programmes and plans (i.e. SEA), it is proactive.

Environmental authorisation, in contrast, is defined in section 1 of NEMA as "the authorisation by a competent authority of a listed activity or specified activity (...) and includes a similar authorisation contemplated in a specific environmental management Act" (RSA, 1998a). Kotzé (2005:26) defines authorisation within the context of environmental administration as "tools that enable designated organs of state to administer, implement and enforce environmental laws". It is clear from this definition that environmental authorisation is not only limited to EIA authorisations, but includes decision-making processes of other sector and media specific environmental legislation. Environmental authorisation therefore includes WUL, WML[5], AEL, mining exploration and/or development permits, etc. Authorisation in terms of NEMA replaced authorisation processes under the Environment Conservation Act, 73 of 1989 (ECA), which were referred to as the Record of Decision (RoD).

There are a number of EA processes, which include EIA, SEA, Sustainability Assessment (SA), Biodiversity Impact Assessment (BIA), Social Impact Assessment (SIA), Health Impact Assessment (HIA), Environmental Management Framework (EMF) and Risk Assessment (RA). Some are undertaken simultaneously as part of a much broader process. Most are done as specialist studies within an EA process and hence form an integral part of another EA process. At the time of writing (November 2012), only the EIA and EMF are legislated processes in the country. The next subsection discusses the EIA, which is the EA process that is most widely used in the country.

2.4.2 Environmental impact assessment processes

EIA is a legislated requirement and NEMA bestows powers to the Minister of Environmental Affairs to publish regulations which list activities which may not commence without an authorisation (RSA, 1998a). In 2010 a list of activities, as three separate notices, were published. The first notice was for activities which may not commence without a Basic Assessment (BA) EIA process. The second was for activities

[5] Water use licence; Waste management licence

which may not commence without the Scoping and Environmental Impact Report (S&EIR) EIA process. The third was for activities in identified geographical areas which also need BA before commencement. Depending on the sensitivity of the environment and/or the discretion of the competent authority, activities which are listed for the BA process may be upgraded to the S&EIR process, and vice versa.

Bray (2008:4) defines the EIA process as "the environmental assessment required in terms of NEMA for certain activities that may have a significant detrimental effect on the environment. It includes requirements and standards of environmental authorisation, the identification of and procedures related to listed activities and competent authorities, offences relating to the commencement or continuation of listed activities, the rectification of unlawful commencement or continuation of listed activities and the appointment of specialist(s) to review the assessment". An EIA is defined in the EIA regulations as a "systematic process of identifying, assessing and reporting environmental impact(s) associated with an activity and includes basic assessment and S&EIR". This definition shows that EIA is required to be undertaken in one of two procedural formats, i.e. the BA process and the S&EIR process. The EIA regulations locate the administrative function of EIAs at the provincial sphere of government (RSA, 1998a). This means the EIA regulations designate provinces to be the competent authority with the power to issue authorisations – but only on applications that lie within their boundaries. In turn, provinces may designate certain municipalities as competent authority. However, authorisations in terms of water, mining, energy, hazardous waste and nuclear materials still remain the competence of national government. The 2010 EIA regulations clearly spell out the process for both of the two procedural formats. A brief overview of each of these formats is given below, starting with the BA.

2.4.2.1 The basic assessment process

BA is applicable to development activities which are listed in GN R.544 and GN R.546 of 18 June 2010. Generally the impacts are usually known and easily measured (Steenkamp, 2010:12-13; Broughton, 2011:6). The flow diagram on the next page (Figure 2) shows each step of the BA process. Highlighted in yellow in the figure are timeframes which authorities, EAPs, development proponents, I&APs and other commenting entities must adhere to, in order to ensure that EIA processes do not lead to unwarranted delays to the country's economic activities. Adhering to the stipulated

timeframes might go a long way in addressing unnecessary time delays associated with EIAs.

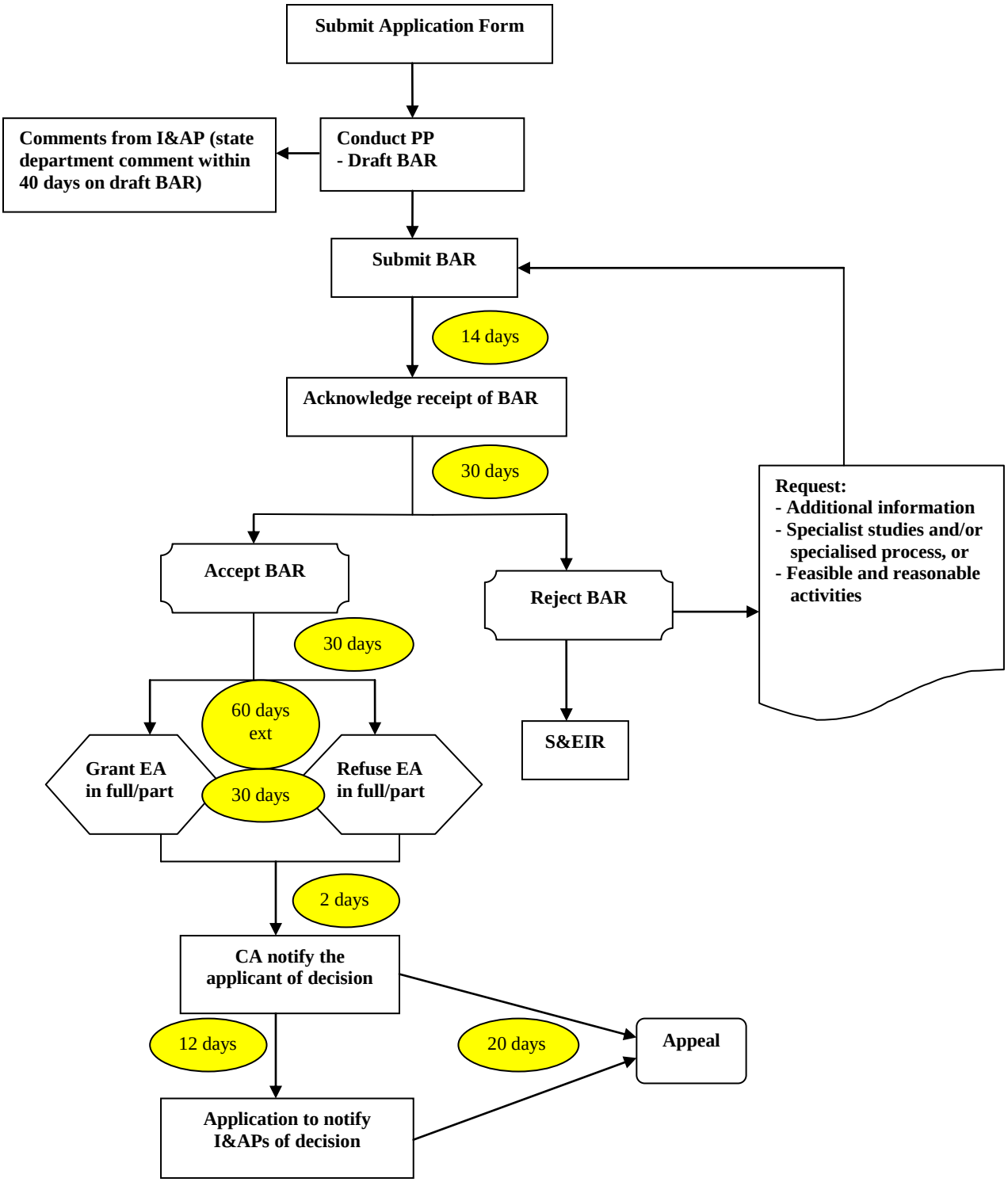

FIGURE 2: Flow diagram for the basic assessment process (DEA, 2010)

2.4.2.2 The scoping and environmental impact report process

The S&EIR process is applied to processes listed in GN R.545 of 18 June 2010 and these activities are of a higher risk or are undertaken at a larger scale, and generally have a significant impact on the environment. In this process, the EIA is viewed as being undertaken in three main phases, i.e., i) submission of an application to authorities, ii) scoping phase, and iii) the full EIA process (Broughton, 2011:6; Steenkamp, 2010:15-6). The 2010 EIA regulations introduced an integrated S&EIR concept (Kidd, 2011:250).

The flow diagram on the next page (Figure 3) shows the steps of the S&EIR process. It is clear that this process is much more elaborate and more complicated than the BA process. Hence it normally takes longer than the BA process as evidenced by the amount of time allocated for some of the steps shown in the figure (yellow highlights). Likewise, sticking to stipulated timeframes would ensure that unnecessary delays associated with this process are minimised or eliminated.

2.4.2.3 Summary

Generally, the objectives of an EIA process are (*inter alia*) to: provide a description of the proposed activity, its location and the environment that may be affected; provide a description of the need and desirability of the proposed activity, propose measures to avoid significant impacts, and reasonable and feasible mitigation measures for impacts that cannot be avoided; identify and consider feasible and reasonable alternatives to the proposed activity; and afford the public an opportunity to take part in environmental decision-making processes (Glazewski, 2005:229). It therefore follows that the two EIA procedural formats described above must be able to ensure that the foregoing objectives are met.

The flow diagrams (Figures 2 and 3) present an opportunity to all key role-players to ensure that there is careful prior planning and consultation to draw up an EIA project plan that is aligned to the required timeframes. Furthermore, by using the EIA flow diagrams, EAPs in consultation with authorities may facilitate an appropriately aligned process that avoids duplication and unnecessary delays. In the context of the alignment of environmental authorisation processes, these flow diagrams must be indispensable.

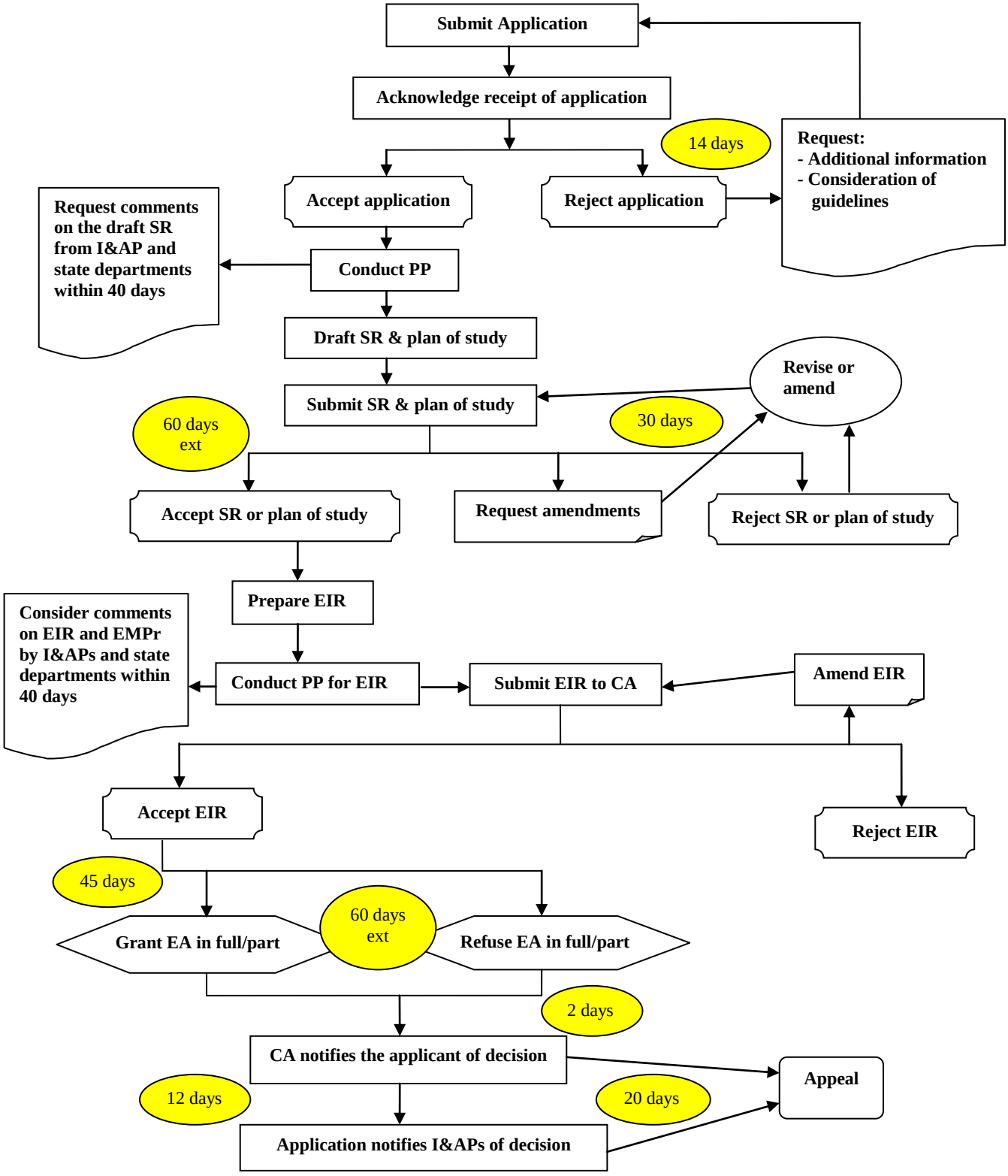

FIGURE 3: Flow diagram for the scoping and environmental impact report process (DEA, 2010)

2.4.3 Alignment of environmental authorisation and co-operative governance

As shown in the previous discussion, fragmentation of the environmental governance effort has led to widespread concerns about the unsustainable delays in authorisation processes. Using the environmental authorisation process as an example, Kotzé *et al*. (2007:59) prove that despite efforts to coordinate the widely known fragmented South African environmental governance regime at a policy level, "governance processes at an operational level are still disjointed". This shows that policy directives at higher levels do not necessarily translate to practical application at operational levels. Kotzé *et al*. (2007:59) suggest that alignment of environmental authorisation processes would not necessarily facilitate co-operative governance at operational level.

While the foregoing may be true, there should be a way of getting around the fragmented institutional structures and developing a fool-proof system that will facilitate aligned and/or integrated processes. There is limited literature which deals with the issue of alignment and integration of environmental authorisation. In this regard, the input by Kotzé *et al*. (2007:77-80) is very important and presents a model that a large part of this subsection reviews. Kotzé *et al*. (2007:77) propose an integrated model with four different scenarios. These authors (Kotzé *et al*., 2007:77) point out that: "The scenarios imply a cumulative and progressive advancement of cooperation and integration arrangements that range from an initial voluntary informal, administrative arrangement, to a penultimate scenario that requires fundamental legal and structural reform."

In presenting the four scenarios that would facilitate cooperative governance and aligned or integrated authorisation, Kotzé *et al*. (2007:78) start by outlining the need to optimise procedural inefficiencies – this is the "house in order and debottlenecking" scenario. This scenario is quite appealing because it involves voluntary and informal measures by environmental authorities which would ultimately lead to the sorting out of environmental authorisation problems through informal associations and alliances.

The second scenario (Kotzé *et al*., 2007:79) seeks to formalise the voluntary and informal associations established in the first scenario; thereby "increasing optimisation and improving alignment". Another aspect of this scenario is to establish informal and

voluntary relationships along the lines of the first scenario with authorities that were not part of the previous arrangements. This leads to "streamlining and mainstreaming" which is the third scenario. In this regard, structural and legal reforms are addressed and decision-making mandates are mainstreamed and reformed. This scenario seems to expect too much from a legislative reform and/or transformation process. For many years, the words reform, restructure, transform, reengineer, redress, etc., have been bandied about, but anecdotal evidence suggests that any legislative process that seeks to address the fragmentation problems and EIA inefficiencies has not borne fruits yet.

The fourth and last scenario is a fully integrated "one-stop shop" for environmental authorisation based on integrated legislation and resultant administrative re-arrangements. Whilst this scenario is appealing, it is worthwhile reflecting on the fact that the "environment" is a very broad concept and assembling a team of officials with wide-ranging expertise, covering almost every field, such as economics, agriculture, mining, etc., may be a difficult task. What is of utmost importance is that all entities that have an environmental management responsibility or which engage in activities that may negatively affect the environment must be willing to pool together in the spirit of "sustainable environmental governance" and align activities.

While it is well and good to design perfect models and scenarios which may facilitate co-operative environmental governance, speedy and aligned authorisations, it is worthwhile to reflect on whether EAs are worth our while. The next subsection examines the performance of EA processes and the role that alignment of processes may play in addressing some EA inefficiencies.

2.4.4 Performance of environmental assessment

One of the main problems facing EAs is the perception (possibly justifiable) that they are an impediment to development, because of the obstructionist manner in which they are used (Kidd and Retief, 2009:971). This concern relates to performance and whether they provide the required results. Furthermore, EAs do not explicitly control specific environmental problems or identified adverse environmental impacts, but only aid decision-making (Retief, 2008); hence, their performance may be questionable. Performance is usually measured in terms of effectiveness and efficiency. This is the

main reason why multiple authorisations must be aligned to avoid duplication and unnecessary delays, which would lead to inefficiency.

Retief (2008) points out that the test for EA effectiveness (i.e. whether better decisions are made and environmental objectives are realised), is sometimes equated to whether the assessment process guarantees environmental quality. However, there are problems in evaluating environmental quality because it is sometimes impractical to compare environmental quality of projects which underwent EA with those which did not. This complicates the effectiveness evaluation agenda, and therefore blurs appraisal of performance (Retief, 2008).

So, how is the performance of EA determined? Kidd and Retief (2009:1032-3) identify four main aspects that are raised when considering EA performance, which are:

i) efficiency, i.e. the number of assessments conducted, capacity to process them, decision-making capability and timeframe for such decisions,
ii) quality of the EA process and the quality of EA reports,
iii) effectiveness of EAs, which relates to the added value to the environment; and
iv) cost, which may be viewed as forming part of efficiency, it is defined and/or measured by considering the time and cost implications of an EA process.

Over and above the four main aspects of performance, there is an on-going debate on EAs which is presented in the schematic diagram below, which focuses on:

i) EA identity, which deals with the fundamental question of what EA entails, its objectives and whether there is a need for it,
ii) application of EAs, which relates to how EAs are conducted in practice, which includes macro level issues such as the EA system requirements, and micro level issues such as process requirements and methodologies, and
iii) the performance evaluation aspect, which deals with the quality and effectiveness of EA process (Retief, 2008; Kidd and Retief, 2009:971-2).

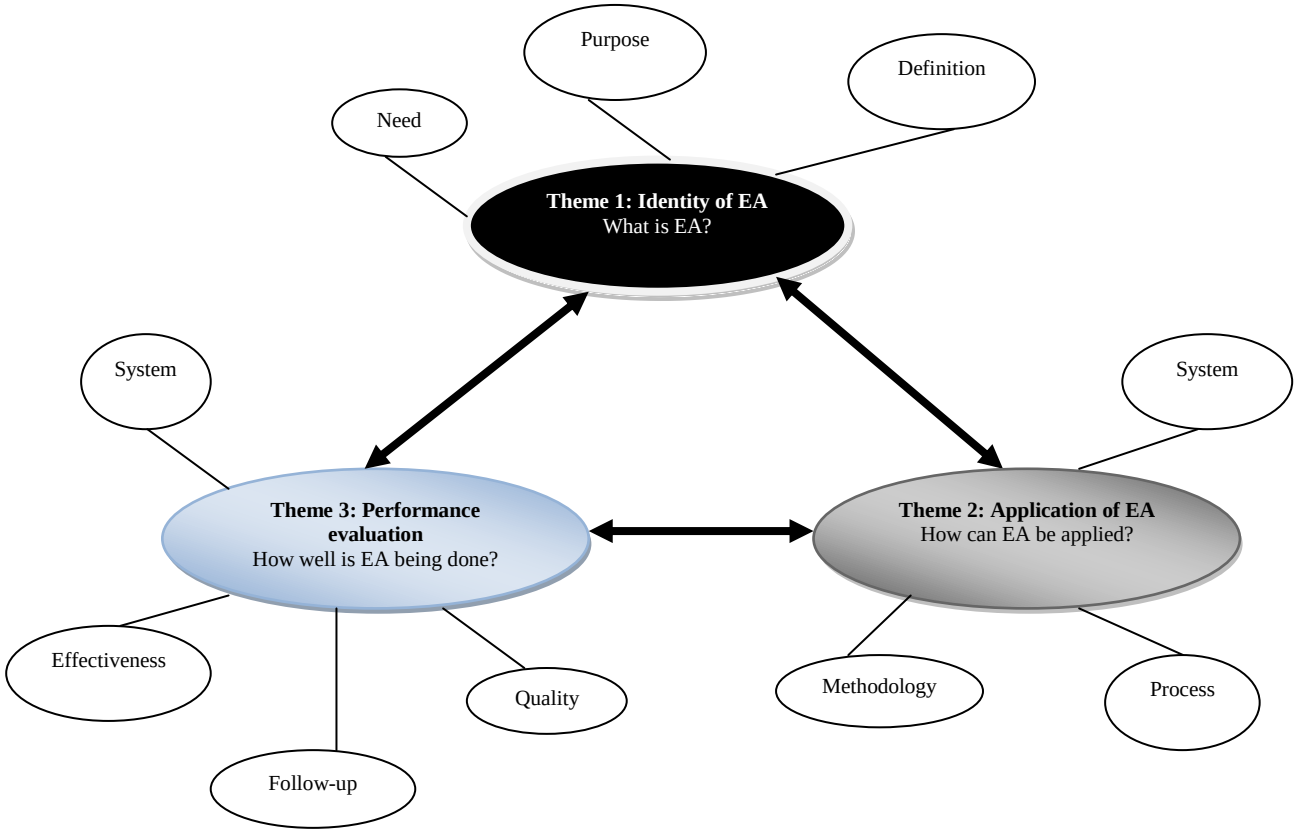

FIGURE 4: Environmental assessment themes (Kidd and Retief, 2009:972)

Clarity about the main objectives of an EA process is always important for the evaluation of its effectiveness. A distinction between quality and effectiveness must always be made, which requires consideration of activity attributes, results of the activity, how results are used, and eventual impact on decision-making. Furthermore, calls have been made for more action and research, generally to provide explanation for the intrinsic and complex interactions between content, process and outcome (Retief, 2008). This is all important in order for authorisations and their role in the decision-making process to be understood. Once fully understood, it would be easy to align and integrate various processes to ensure efficiency.

The above discussion shows the importance of the performance of EA and the need to understand the reasons behind poor performance in order to improve efficiency. Inefficiency problems can be caused by inability or incapacity to properly align or integrate processes. The root cause can be institutional or due to officials manning

those institutions. There are statutory structures which provide the required environment for decision-making and smooth governance of environmental issues, and will be discussed in the next chapter. The next section concludes the literature review.

2.5 CONCLUSION

This chapter examined a wide range of literature in order to achieve the first objective of this study; i.e., to "investigate published information on CEG and the alignment of authorisation processes". From the studied literature, the conclusions below are drawn on CEG, EA and the alignment of processes, including the performance of EA.

A number of authors have studied co-operative government and its legislative background in South Africa. They have generated an extensive body of knowledge on the theoretical underpinnings of the concept, its application, and problems with governance in general. The examples of the literature include: Levy and Tapscott (2001); Bray (2005a); Edwards (2008); Kotzé (2009:106-8) and Mathebula (2011). It can be deduced from the literature that co-operative government is mainly about intergovernmental relations, which provides the necessary institutional structures for effective governance.

Secondly, literature confirms that the concept of CEG has taken root in South Africa. There is considerable published literature on the theoretical aspects of it, the principles behind it and comparative analysis with other countries. All the literature reviewed for this dissertation acknowledges the well developed legal provisions for CEG. However, there are reservations about the application of such legislative requirements. Furthermore, court judgements have made strides in supporting the need for government entities to cooperate and coordinate their activities when dealing with environmental issues of common interest (Kidd, 2006; Kotzé, 2007; Kidd and Retief, 2009:988-991).

There is a huge body of knowledge on EA, its legislative requirements, case law, and assessment processes, including data on its performance and effectiveness. There is a general perception that good quality inputs in the assessment process would lead to effective outputs. However, literature on EA quality proves this assertion wrong.

Effectiveness is generally influenced by factors which extend beyond quality, but the quality of the EA report has a direct effect on the entire process, particularly the subsequent decision-making process. Poor quality reports can render the entire EIA process useless, and the subsequent decision taken, academic. These are all important aspects that need serious consideration, and that alignment and integration must never compromise effectiveness and quality of EIAs.

The next chapter examines the legislation which provides for CEG and the alignment of authorisations. Institutional structures tasked with environmental governance are also reviewed.

CHAPTER 3: LEGAL PROVISIONS AND INSTITUTIONS TASKED WITH ENVIRONMENTAL GOVERNANCE

The previous chapter introduced and discussed the concepts of environmental management, co-operative governance and environmental authorisation. This chapter provides the relevant legislative basis for these concepts through an overview of the pieces of legislation which provide for environmental management, CEG, environmental authorisation and alignment thereof. This chapter also introduces and discusses institutional environmental decision-making structures. Particular attention is drawn to institutional structures in KwaZulu-Natal province. Finally, the chapter presents key examples of case law that set precedent and/or clarified co-operative governance and environmental authorisation law in South Africa.

The chapter begins with an introductory background of the South African environmental management dispensation, followed by CEG legislative provisions. This is followed, in turn, by an overview of the different pieces of legislation which provide for environmental authorisation. Then the provisions for the alignment of environmental authorisations are given and finally, important EIA court judgements are outlined.

3.1 INTRODUCTION

All entities, in the country, which are responsible for environmental governance, draw their mandate from the constitution. Section 24 of the South African constitution guarantees everyone a right to an environment that is not harmful to health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures (RSA, 1996; Glazewski, 2005:76).

Furthermore, Schedules 4 and 5 of the constitution allocate roles and responsibilities to different spheres of government, i.e. functional areas of concurrent national and provincial legislative competence, and exclusive provincial legislative competencies, respectively (RSA, 1996; Thornhill, 2002:35-36; Glazewski, 2005:113-114). The environment is listed as one of the concurrent functions of government. Part B, of both

schedules lists activities assigned to local government, many of which relate to environmental management. All these lists feature environmental responsibilities and/or functions that relate to the management of the environment, making environment a shared responsibility by all the three spheres of government.

The main national legislation that gives effect to the environmental constitutional right is NEMA, which is an overarching framework legislation governing environmental issues in all spheres of government in South Africa. As indicated in Section 3.3 of this dissertation, various other sector and medium specific pieces of legislation provide for environmental management. The most important of these are tabulated below:

TABLE 2: Legislation which provides for environmental management

Statutes	Environmental responsibility	Lead government entity
National Environmental Management: Waste Act, 2008 (Act 59 of 2008)	Waste management activities	Department of Environmental Affairs
National Environmental Management: Integrated Costal Management Act, 2008 (Act 24 of 2008)	Management of marine resources	Department of Environmental Affairs
National Environment Management: Air Quality Act, 2004 (Act 39 of 2004)	Protection of air quality & prevention of air pollution	Department of Environmental Affairs
National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004)	Conservation, sustainable use & equitable access to biodiversity resources	South African National Biodiversity Institute
National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003)	Protection & conservation of important environments and/or rare & threatened species	South African National Parks
Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)	Management of mineral resources & mining activities	Department of Mineral Resources
National Water Act, 1998 (Act 36 of 1998)	Management of water resources	Department of Water Affairs
The Marine Living Resources Act, 1998 (Act 18 of 1998)	Conservation of marine ecosystems & sustainable use of marine living resources	Department of Agriculture, Forestry and Fisheries
Development Facilitation Act, 1995 (Act 67 of 1995)	Administration of planning, reconstruction & development activities	Department of Land Affairs

The common thread in all the foregoing pieces of legislation is the establishment of institutional structures tasked with the administration, advisory duties, enforcement and/or implementation of the provisions outlined in each. These pieces of legislation also provide for application of various environmental management tools to ensure

sustainable development and protection, preservation and responsible use the country's environmental resources.

The foregoing pieces of legislation confirm that the administration of the environment is vested with various government entities in different spheres of government, operating and mandated by different pieces of legislation. This is an indication that environmental issues are governed concurrently in all spheres of government; hence there is a need for the establishment of legal and/or institutional structures which may facilitate cordial working relations between all the government entities involved. This would prevent duplication of services and eliminate gaps in environmental management functions (Thornhill, 2002:36). The next section discusses institutional structures for environmental management.

3.2 INSTITUTIONS TASKED WITH ENVIRONMENTAL MANAGEMENT

It is necessary to begin by reviewing the statutory structures, before considering informal arrangements within each structure. Indeed several pieces of environmental management legislation provide for the establishment of institutional bodies which are tasked with environmental management, including advisory functions.

3.2.1 Legislation which provides for environmental governance institutional structures

NEMA provides for the establishment of the Committee for Environmental Coordination (CEC) which is tasked with facilitating cooperation between all entities which have an environmental management function. NEMA also provides for the establishment of the National Environmental Advisory Forum (NEAF) to advise the Minister of Environmental Affairs on all pertinent environmental issues. Another important institution established in terms of NEMA is the Environmental Management Inspectorate (EMI), which is tasked with enforcing environmental legislation. Furthermore, Chapter 3 of NEMA allows the establishment of institutions which can promote CEG and procedures for coordinating cross-cutting environmental management functions (RSA, 1998a; Bray, 2005a).

Besides NEMA, the sector and media specific pieces of legislation also provide for the establishment of various institutional structures tasked with environmental management responsibilities. These include:

- NWA provides for the establishment of Water Management Area, Catchment Management Agency, Water Users Association and the international water governance body. All these institutions are important in the administration of NWA and the management of the country's water resources,
- NEMICMA provides for the establishment of a Coastal Management Committee, which is tasked with promoting integrated coastal management and effective co-operative governance,
- NEMBA provides for the establishment of SANBI, which is responsible for conserving biological diversity, sustainable use of its components and equitable access to its benefits,
- NEMAQA provides for the establishment of a national air quality advisory committee as a substructure of the NEAF. The functions and functioning of this body are determined by the Minister of Environmental Affairs,
- NEMPA provides for the establishment of the South African National Parks (SANParks) which is tasked with the management of the country's protected environments,
- MPRDA provides for the establishment of a Mineral and Mining Development Board, which is tasked with advising the Minister of Mineral Resources, *inter alia*, on the sustainable development of the country's mineral resources. The Board, in turn, can establish Regional Mining Development and Environmental Committees to oversee regional mining activities (Müller, 2009:81-82).

While the foregoing structures are mainly established at a national level, some pieces of legislation provide for establishment of similar and/or corresponding institutional structures or similar arrangements to be cascaded to provincial and local spheres of government for them to meet their constitutional obligations and responsibilities with regards to the environment.

3.2.2 Institutions facilitating co-operative environmental governance

CEC and NEAF are the main co-operative government structures at the national sphere of government, which may be supplemented and/or complemented by working groups. These structures can facilitate co-operative governance on all environmental issues at the national and provincial levels (Muller, 2009:81-82). In KZN, a structure established along the lines of the CEC is the Provincial Committee for Environmental Coordination (PCEC). This structure is the custodian of the provincial EIP and other cross-cutting issues. Its composition is made up of officials from all the provincial entities which are "exercising functions that may affect the environment" and/or "functions involving the management of the environment". This structure is chaired by the DAEA&RD's Environmental Planning, Governance and Information Management component and was established as a statutory body under the Office of the Premier's (OTP) technical committees, in line with the IRFA[6] provisions. The flow diagram of how this structure links with, and relates to other government structures and technical committees within the OTP as developed in terms of the IRFA is shown in Figure 5 on the next page.

The responsibilities of PCEC are mainly to coordinate collaboration and alignment of environmental management functions. It was established in 2008 and is expected to play a central role in facilitating cooperation on environmental issues. Institutional structures, though critical, do not translate to effective and efficient CEG – there are other important determining factors. Kotzé (2009:114), quoting a 2004 report on environmental management systems for the North-West Province prepared by the Centre for Environmental Management (CEM), observes that our fragmented environmental governance regime is further fraught with unfavourable organisational behaviour, leading to more governance inefficiencies. This includes "turf protection, bureaucracy, irrational decision-making and factors inherent in the administrative systems", which may result in "excessive governance cost and other externalities and inefficiencies" (Kotzé, 2009:115). Kotzé (2005:26) supports this and points out that "During the administration of environmental law through the various tools, unfavourable organisational behaviour of government officials may aggravate the already fragmented environmental governance regime."

[6] Intergovernmental Relations Framework Act, 13 of 2005

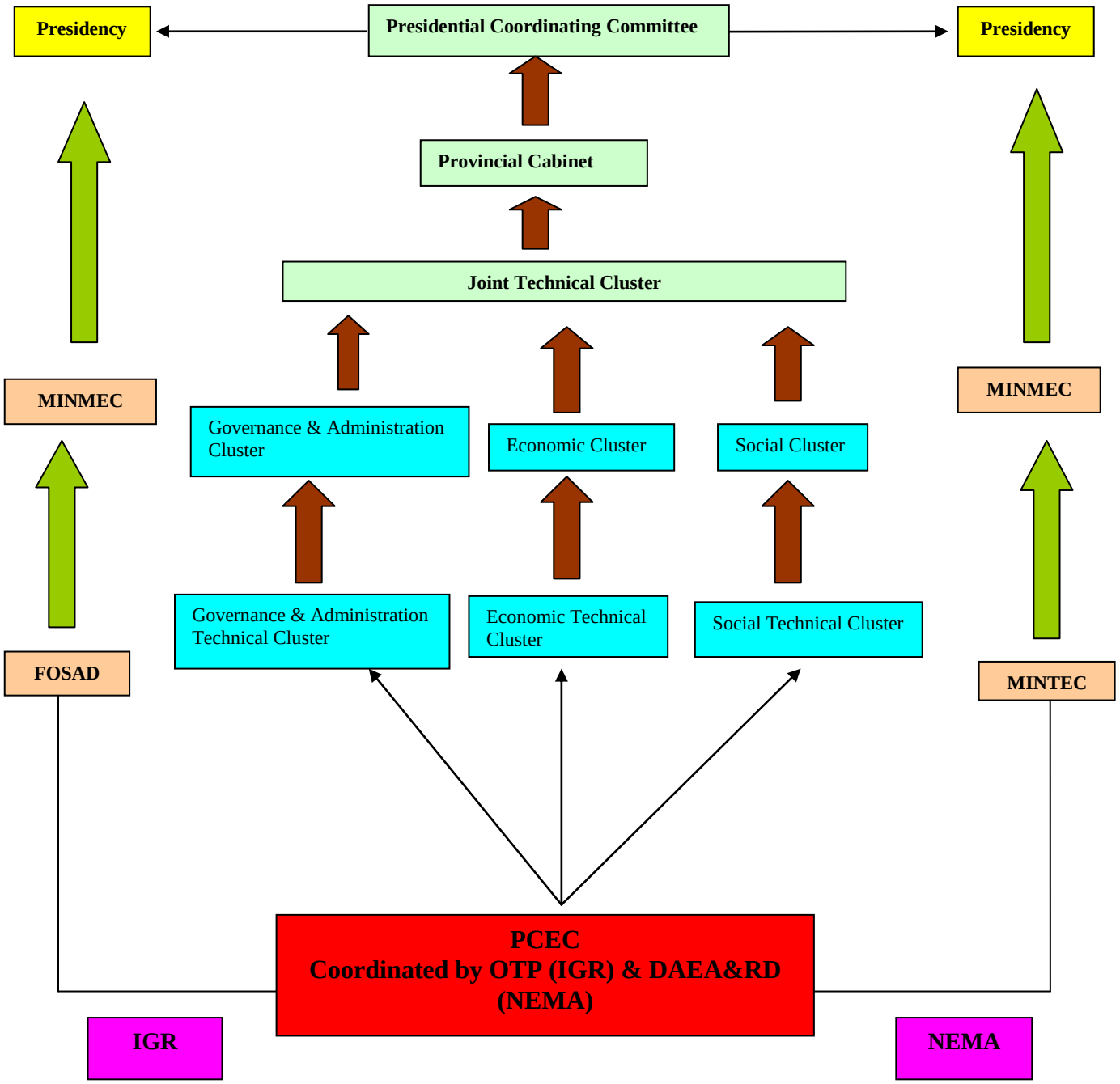

FIGURE 5: Structural positioning of the Provincial Committee for Environmental Coordination within the intergovernmental systems

Kotzé (2009:121) further points out that measures which aim at addressing inefficiencies in the environmental governance effort do not exclusively fall within the purview of government. This is supported by Müller (2009:71-72) who acknowledges that it has become clear that environmental problems may not be solved by public entities alone, but require collaboration "with a wide range of other organisations in the public, private and voluntary sectors". This author further notes that "Instead of relying exclusively on government to solve public problems, a host of other actors is being mobilised as well, sometimes on their own initiative, but often in complex partnerships with the state." This observation is supported by this study, particularly when it comes to the environmental authorisation processes, hence alignment of authorisations requires full cooperation of the private and not-for-profit sectors.

It is important to note that people are the principal actors in government structures – hence the human element always comes to bear in the functioning and success of any governance effort. It follows then, that it is not always the enabling laws and institutional structures which create "costly, inhibitive, over-prescriptive and ineffective" government structures, but the way in which individuals within such structures operate and coordinate their actions (Kotzé, 2009:115). The drawback of the human element can be two-fold, i.e. limited "capacity and competence to evaluate the information provided to them" for decision-making, and high turn-over of staff coupled with loss of institutional memory and inadequate handover. Officials tend to ask for additional information, thereby avoiding and/or evading responsibility and accountability associated with decision-making. This lead to costly time delays and further inefficiencies – which, in turn lead to the perception that the state of environmental governance in the country is not favourable (Kotzé, 2009:117).

This has received the attention of the courts: in the case of the Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd (Pelt Products) (case no 1050/2001(E)) the court pointed out the costly effects and damage caused to the environment (and people) as a result of bureaucratic bungling among state departments who in terms of the principles of co-operative government should work together and coordinate their environmental responsibilities (Bray, 2005b). Further details of court judgements on CEG and EIAs are discussed in Section 3.6 of this dissertation. The next section outlines statutory provisions for CEG in the country.

3.3 LEGISLATIVE PROVISIONS FOR CO-OPERATIVE ENVIRONMENTAL GOVERNANCE

NEMA is the main legislation which provides for CEG. Chapter 3 of NEMA requires the development of two main documents which aim to foster cooperation with respect to the environment, i.e. the development of Environmental Management Plan (EMP) and Environmental Implementation Plan (EIP). A list of government entities which are expected to cooperate and coordinate their environmental responsibilities in order to avoid duplication of activities is provided in NEMA. Schedules I and II list government entities "exercising functions involving the management of the environment" and those "exercising functions that may affect the environment", which are therefore required to develop an EMP and EIP, respectively (RSA, 1998a). Furthermore, the provinces and municipalities are required to develop an EIP.

EMP and EIP are required to be developed and/or updated every four years (this is currently being revised to five years), and these developments are meant to foster co-operative governance as required by the constitution. In this regard, section 12 of NEMA (RSA, 1998a) describes the purpose of an EMP as follows:

> "(a) coordinate and harmonise the environmental policies, plans, programmes and decisions of the various national departments that exercise functions that may affect the environment or are entrusted with powers and duties aimed at the achievement, promotion, and protection of a sustainable environment, and of provincial and local spheres of government, in order to -
>
> (i) minimise the duplication of procedures and functions; and
>
> (ii) promote consistency in the exercise of functions that may affect the environment;
>
> (b) give effect to the principle of cooperative government in Chapter 3 of the Constitution;
>
> (c) secure the protection of the environment across the country as a whole;
>
> (d) prevent unreasonable actions by provinces in respect of the environment that are prejudicial to the economic or health interests of other provinces or the country as a whole; and
>
> (e) enable the Minister to monitor the achievement, promotion, and protection of a sustainable environment".

The foregoing NEMA provisions present a good framework for different government entities and provinces to effectively facilitate the alignment and coordination of activities that relate to environmental authorisations. Legislative provisions for coordination of environmental management activities between and within government departments and spheres of government are not only limited to the development of an EMP and EIP, nor

are they limited to the provisions of NEMA. The various sector and media specific pieces of legislation in Table 2 also provide for CEG.

Be that as it may, Humby (2009) questions the manner in which reporting on EMPs has been designed. This author argues that while the objectives of EMPs and EIPs are laudable, "the format of reporting (...) enables the identification of overlaps but not gaps. Even at a theoretical level, the EIPs and EMPs fall short of establishing a coherent frame for co-ordinating, harmonizing and integrating functions of different departments relating to the environment. The actual EIPs and EMPs are lengthy and unwieldy with much unnecessary information" (Humby, 2009:175).

Co-operative governance is critical to environmental authorisation considering that different pieces of legislation administered by different organs of state may require environmental authorisation. The next section provides an overview of some of the pieces of legislation which provide for environmental authorisations.

3.4 OVERVIEW OF LEGISLATION WHICH PROVIDES FOR ENVIRONMENTAL AUTHORISATION

Activities which require environmental authorisation in terms of NEMA may also require a permit or licence in terms of other pieces of legislation (Kidd and Retief, 2009:1018). This may lead to a cumbersome authorisation process and duplication of activities if not handled properly. A failure in the co-operative governance system may compromise seamless coordination of activities and alignment of authorisation processes. Some of the pieces of legislation and provisions which relate to environmental authorisation are discussed below, starting with NEMA provisions.

3.4.1 National Environmental Management Act, 1998 (Act 107 of 1998)

Section 24 of NEMA deals with environmental authorisation and subsection 24(4)(a) states that procedures for investigation, assessment and communication of impacts of activities on the environment must ensure that there is cooperation and coordination between organs of state where an activity falls within the jurisdiction of more than one organ of state. Subsection 24(5)(b) points out that the Minister may make regulations

laying down the procedure to be followed in respect of efficient administration and processing of an environmental authorisation (RSA, 1998a). The Minister has made successive EIA regulations, the latest being the 2010 regulations, in line with this subsection.

Subsections 24(7) and (8) point out that the provisions in the other subsections of 24 do not absolve compliance with authorisation requirements in terms of other legislation, and vice versa. These provisions may be perceived as counter to alignment and/or integration of processes; however, subsection 24(8)(b) allows authorities discretion to regard other pieces of legislation as sufficient for the purposes of NEMA, if NEMA requirements are met (RSA, 1998a; Vermaak, 2006). These stipulations provide the legislative framework for different authorities to facilitate alignment of authorisation without undermining each other's legislative requirements.

The main NEMA provisions dealing with the alignment of environmental authorisations are presented in Section 3.5 of this dissertation. The next subsection presents provisions under the NWA which provide for environmental authorisations and CEG in line with the above mentioned NEMA provisions.

3.4.2 National Water Act, 1998 (Act 36 of 1998)

Water use requires authorisation by DWA[7] as the relevant competent authority for issuing a WUL. This Act requires an EA to be undertaken before anyone (besides those with general authorisation) may be granted a WUL. Section 41 points out that the responsible authority may require the applicant to ensure that an assessment of the possible effects of the proposed use on resource quality is undertaken. The competent authority may further require that such assessment complies with the ECA requirements, which have since been replaced by NEMA (RSA, 1998b; Kidd and Retief, 2009:1022).

The NWA also supports alignment of processes by pointing out in subsection 22(4) that in the interest of co-operative governance, a responsible authority may promote arrangements with other organs of state to combine their respective licence requirements into a single requirement (RSA, 1998b).

[7] Department of Water Affairs

3.4.3 Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)

In terms of section 38(1) of the MPRDA, environmental assessments must be undertaken in line with NEMA provisions before anyone can be given a mining permit and/or mining authorisation. The authorisation process requires an approved environmental management programme (EMPr), which must be developed through an EIA process (Glazewski, 2005:470; Kotzé, 2006; Kidd and Retief, 2009:1019). The impacts identified through the EIA process must be managed in terms of the approved EMPr, which in turn, must be an integral part of the permit holder's operations. The EMPr is authorised by the Minister of Mineral Resources which is a different authority from the EIA process, hence a source of potential problems. Furthermore, the timeframes for the mining permit process are different from those of the EIA process, which may also be a source of problems with regards to alignment.

The Minister of Mineral Resources is empowered to implement environmental matters in terms of NEMA with regards to prospecting, mining, exploration and production of mineral resources (RSA, 2002; Glazewski, 2005:468). Furthermore, section 40 of the MPRDA requires consultation between the Minister of Mineral Resources and any organ of state which is responsible for the administration of any law relating to matters affecting the environment (RSA, 2002). This provision supports cooperation between different government entities, and hence alignment of environmental authorisation processes.

3.4.4 National Environment Management: Air Quality Act, 2004 (Act 39 of 2004)

Though NEMAQA does not directly refer to the alignment of environmental authorisations (Kidd and Retief, 2009:1025), the long title of this Act indicates that it must be applied in line with NEMA provisions. Hence, the NEMA principles which provide for cooperation and alignment of processes apply here too. Subsection 38(2) requires that EIA requirements be met for all applications for AEL[8]. In terms of subsection 38(1), the licencing authority may require the applicant to submit information on the likely effect of the proposed application on air quality, and invite comments from any organ of state which has an interest in the application (RSA, 2004). Furthermore,

[8] Atmospheric emission licence

the Minister may declare certain activities as controlled activities, if they emit substances which may pose adverse impacts to human health and the environment; and request that an assessment may be undertaken before such activities are authorised (Kidd and Retief, 2009:1025; Kotzé, 2006). The foregoing provision is in fact an EIA process that has to be undertaken in line with NEMA provisions.

3.4.5 National Environmental Management: Waste Act, 2008 (Act 59 of 2008)

NEMWA requires authorisation for a list of waste activities, including hazardous waste treatment and disposal facilities. Previously, these activities were listed in terms of NEMA 2006 EIA regulations – and have since been removed from the 2010 EIA regulations to align with section 19 of the NEMWA listing of waste management activities. In terms of this Act, listed waste management activities may only be undertaken if a WML is issued and licence applications must be accompanied by documentation and information which will be prescribed by the licencing authority. The licencing authority (as is also the case with NEMAQA) must invite comments from other organs of state which have an interest on the application (RSA, 2008).

NEMWA promotes co-operative governance, particularly section 44 provides for co-operative governance in WML application activities, and explicitly provides for integrated licences. The intention is to streamline licencing of waste management activities which may require authorisation in terms of other statutes, and for which different organs of state may be the authorising entity (RSA, 2008).

3.4.6 Genetically Modified Organisms Act, 1997 (Act 15 of 1997) and the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004)

The GMO Act and NEMBA's EA provisions seem to be intertwined. They are discussed simultaneously here. The GMO Act requires the establishment of the GMO Executive Council which has far-reaching responsibility in the administration of the Act, particularly in dealing with EA. Section 5 of the GMO Act provides for the applicant of a GMO product to undertake an EA, where there is a need. The Act has no clearly defined EA processes or clearly defined provisions for alignment with NEMA processes. However, section 20 provides for the Minister to make regulations, *inter alia*, outlining the

procedure to be followed in undertaking and submitting EAs (RSA, 1997; Kotzé, 2006; Kidd and Retief, 2009:1020). It must be noted that the GMO Act is administered by the Department of Agriculture and reference to the Minister is the Minister of Agriculture, not the Minister of Environmental Affairs.

NEMBA, on the other hand, has provisions which relate to EAs with regards to threatened and/or protected ecosystems. The Minister (in this case Minister of Environmental Affairs) may publish a list of threatened ecosystems or ecosystems which need to be protected. Section 53 of NEMBA requires the identification of threatened species in listed ecosystems which must be regarded as specified and/or listed activities in terms of NEMA, and hence subject to EAs (RSA, 2004). In this regard, these activities are listed in the 2010 EIA regulations (R.546), hence there is no duplication of processes.

The link between the two Acts is that Chapter 5 of NEMBA provides for EAs with regards to permits issued under the GMO Act, and that such EAs must comply with NEMA requirements. Section 78 stresses this requirement, especially if the Minister (Environmental Affairs) has a reason to believe that the release of GMOs into the environment may pose a threat to indigenous species or the environment. Consultation with permit authorities, i.e. the GMO Executive Council is also provided for (RSA, 1997; RSA, 2004; Kidd and Retief, 2009:1021).

3.4.7 Other legislation

The other pieces of legislation in the country's fragmented environmental management framework which provide for environmental authorisation are presented below:

- In terms of the DFA[9], a land development application is decided on by the land development tribunal. The tribunal, when approving an application, may impose any condition relating to environmental evaluation – where environmental evaluation is defined as an evaluation of environmental impacts in line with NEMA guidelines. In this regard, development tribunals rely on NEMA environmental authorisations and hence there is no duplication of process (RSA, 1995; Rigby and Diab, 2003; Kidd and Retief, 2009:1023-1024).

[9] Development Facilitation Act, 67 of 1995

- The National Heritage Resources Act, 25 of 1999 requires EA for certain activities (section 38), which the South African Heritage Resources Authority (SAHRA) feels there is a reason to believe that heritage resources will be affected (RSA, 1999; Kotzé, 2006; Kidd and Retief, 2009:1024). This EA process is usually carried out as a specialist study in the NEMA EIA process (HIA), hence no duplication of processes.
- The Petroleum Pipelines Act, 60 of 2003 and Gas Act, 48 of 2001 indirectly have implications on EAs through their respective licencing processes. Sections 16 of both pieces of legislation require an applicant to provide authorities with plans and ability to comply, *inter alia*, with environmental legislation. Therefore, these licencing processes are normally preceded by NEMA EIA processes.
- The Marine Living Resources Act, 18 of 1998 requires authorisation for anyone who intends to extract marine resources, and section 18(3) stipulates that the Minister may require an EIA to be undertaken before any authorisation is granted (this legislation is administered by the DAFF, hence the Minister was the Minister of Agriculture, Forestry and Fisheries). Provisions in section 2 of this Act impose some obligations on the decision-maker whenever an authorisation is granted and such obligations were confirmed by the courts (RSA, 1998c; Kotzé, 2006; Glazewski, 2005:139-140). The provisions in section 2 are mainly in line with NEMA requirements; hence NEMA requirements may be easily aligned and/or integrated into authorisations under this Act.

The above discussion shows that there are legislative provisions for coordination and/or alignment of authorisation activities mandated, first by NEMA and then by various sector and media specific environmental legislation. The next section discusses the possible practical application and/or use of the foregoing legislative provisions by scrutinising the alignment of environmental authorisation and their implications for an EA process.

3.5 LEGISLATIVE PROVISIONS FOR THE ALIGNMENT OF PROCESSES

The process leading up to a decision on whether an activity is authorised or not is complex and involves a number of stakeholders. These include: i) the proponent (developer, funder, contractor, etc.); ii) the EAP (environmental consultants who must be independent); iii) the I&APs (neighbours, land owners, government entities,

environmental advocacy groups, general public, etc.); iv) government entities with jurisdiction over the activity (e.g. municipalities); and v) the competent authority (mostly provincial environmental affairs departments). A critical question in the environmental authorisation process is whether authorities, EAPs and proponents follow the legislated provisions which aim to address duplication and ensure seamless interaction between all the parties throughout the process. Some of the stipulations which are critical in addressing burdensome processes and duplication are in sections 24K, 24L and 24O of NEMA.

Section 24K provides for the Minister to consult with any organ of state responsible for EAs and to enter into agreements in order to coordinate respective legislative requirements and avoid duplication in the submission of information and authorisation process. This section further provides for competent authorities to exercise their respective powers by issuing separate or integrated authorisations – but this does not preclude compliance with any of the legislation (RSA, 1998a). These provisions are very important and were given effect by the 2006 EIA regulations and still prevail in the current (2010) EIA regulations. The only difficulty is that this section does not yet appear to be fully utilised by authorities[10].

Section 24L deals specifically with the alignment of authorisations, and states that environmental authorisation for an activity:

- regulated under another law can be regarded as sufficient basis for authorisation in terms of NEMA if such legislation is administered by the same competent authority, and/or
- in terms of any other legislation that meets the requirements of NEMA can be regarded as authorisation in terms of NEMA (RSA, 1998a).

The foregoing provision is, again, another important stipulation for coordinating authorisation processes, but also anecdotal evidence shows that it not yet fully utilised by the authorities and EAPs.

[10] In KZN, no agreement has been entered into to avoid duplication in the submission of information; in fact anecdotal evidence shows that the province has yet to implementation of this section four years after its first promulgated

Sections 24O(2) and (3) require that a competent authority must consult with every organ of state that administers a law which relates to any matter affecting the environment – when the application for authorisation is considered. The mode, level and extent of this consultation process are not defined. This may lead to further delays if there are no proper co-operative government structures which open up communication channels and facilitate speedy consultation. However, to avoid excessive delays, this consultation process is limited to a 40-day period in terms of NEMA (RSA, 1998a).

Clearly, despite the various authorisation requirements, NEMA provides a platform for cooperation and/or integration/alignment of authorisation processes. In order to ensure an efficient EIA system, the foregoing NEMA provisions must therefore be supported by all key role-players through practical application thereof. In this regards, the success of an integrated licence rests, in large part, on an integrated licence application procedure. If the application process and the EIA procedures are not integrated, it may be difficult to obtain an integrated authorisation. It is up to authorities, affected organs of state and EAPs to facilitate full and proper implementation of the law to eliminate cumbersome processes and duplication of processes. Failure by any of the key role-players to play its part can lead to duplication of processes and costly delays.

The main problem, however, is that instead of working together and facilitating speedy processes and speedy resolution of problems, there are disputes between the key role players, which are usually resolved through the courts. The next section discusses important court judgements which relate to co-operative government and environmental authorisations.

3.6 IMPORTANT COURT JUDGEMENTS

While legislation provides possible solutions to fragmentation, overlaps, duplication and gaps in the administration of environmental management responsibilities; there are still problems with application and/or interpretation of such provisions, which sometimes result in disagreements and disputes that end up in court. This, according to Kidd (2006:72) puts the judiciary under an “environmental spotlight”. Hence, it becomes important for judges to decide environmental cases in a way that favours the environment, but also correctly consider, interpret and apply the relevant environmental

legal instruments and give environmental considerations appropriate deliberation (Kidd, 2006:72).

Most cases relate to the interpretation and/or application of co-operative government principles, environmental authorisation, procedural conflicts, administrative decision-making, appeals process, etc. Cases of significance which provide, in one way or another, clear interpretation and clarification of authorisation processes are tabulated below.

TABLE 3: Court judgements on EIAs and co-operative governance (Kidd, 2011:257-9)

Important legal aspect and/or principle	Court cases	Comments
Cooperative government	Uthukela District Municipality v The President of the Republic of South Africa, CCT 7/02 (2002)	This judgement confirms the need for government entities to exhaust all processes before instituting legal proceedings against each other
Justifiable administrative action	Director: Mineral Development, Gauteng Regions and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others, 1999 (2) SA 709 (SCA)	Heralded as a beacon of light, this case stresses the need for environmental considerations to be accorded appropriate recognition & respect in the administrative processes
Cost of litigation	Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and others 2002 (1) SA 478 (CPD)	Legal cost must not be a deterrent for those acting in the interest of the environment
Correction of illegal activities	Eagles Landing Body Corporate v Molewa NO and Others 2003 (1) SA 412 (T)	This case contradicted an earlier judgement which rejected the authorisation of an illegal activity. This led to the amendment of NEMA & the introduction of section 24G process
The role of DEA guideline documents	MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another 2006 (5) SA 483 (SCA)	This case confirms the importance of guidelines to protect & conserve critical environments and/or rare & threatened species
Environmental interests versus socio-economic issues	BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (WLD)	This case gives impetus to the fact that sustainable development requires the balancing of environmental and socio-economic factors

The last issue in the table above was also addressed in the case of the 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), which is regarded as groundbreaking by both detractors and

supporters. The judgement in this case also highlights the need to assess economic and social soundness, plus the cumulative impacts of a development before authorisation can be granted. It has now become a legal precedent that, environmental factors do not determine, in an unbridled manner, whether a development is authorised or not. Developments which may be regarded as economically and socially unsound may not be authorised and cumulative impacts are central to whether a development is sustainable. All these aspects, including the need to take into account the principles spelt out in section 2 of NEMA, are stressed in this case.

A critical review of the Fuel Retailers case by Bray (2008) argues that the essence of the case is "not about the question of sustainability or whether the authorisation (...) considered correctly and in a balanced way the social, economic and environmental impacts of the proposed project", but the fatal flaw was "a breakdown in proper co-operative governance and intergovernmental relations during the EIA process", which was fragmented and incomplete. Therefore, "elements that required collective consideration were 'sliced up' amoung the authorities involved". The fact that "the responsible spheres of government and specific departments did not co-operate fully", resulted in an authorisation which "did not reflect the proportionality of the social, economic and environmental impacts". In this regard, cooperation was "fragmented and insulate, and the various contributions to decision-making were never coordinated, integrated and evaluated in a holistic context" (Bray, 2008:11); hence, the flawed outcome.

All the foregoing cases focussed on EA and disputes that arose in relation to the implementation and/or application of EIA legislation. They also focussed on some of the gaps and/or discrepancies in legislation which led to the amendment of NEMA to correct such gaps. In reviewing literature for this dissertation, no cases dealing with disputes on the application and/or interpretation of the alignment of authorisation processes could be found, nor cases which dealt with integrated authorisations. However, case law is critical and the foregoing cases may give important precedent and clarity for the alignment of processes once they are fully implemented in future.

3.7 CONCLUSION

Because of the country's fragmented environmental management dispensation, there may be instances where multiple authorisations are required from authorities located in different spheres of government. This chapter illustrates that there are legislative provisions aimed at unlocking such complex matters. In such instances, legislation provides that the sphere responsible for the dominant activity will take responsibility for the required authorisations, and must therefore also take responsibility for integration and alignment. All this illustrates that the legal framework required to ensure that duplication, disruptions, hinderances and unnecessary delays in the authorisation process are minimised or eliminated is already in place.

This chapter presents all the necessary information required to meet the second objective of this study, i.e. to "identify the legal prescripts which provide for CEG and environmental authorisations". All the necessary legislation, which include NEMA and the media and sector specific environmental legislation, were identified. An important finding from this review is that the authorisation process must be sufficiently flexible to accommodate not only authorisation requirements in terms of NEMA, but also licence and/or permit requirements administered by other environmental legislation. The flexibility of the process will facilitate successful implementation of provisions under sections 24K and 24L of NEMA.

This chapter also highlights and provides an analysis of established institutional structures which are necessary to facilitate CEG and alignment of processes. In KZN, required structure has been established in line with legislative requirements and all that is needed is for it to function optimally. This chapter also observes that the human element attached to any government structure may be the source of a problem. In this regard, one must always be mindful that inefficient, incompetent and unaccountable staff complement may scupper the good intentions of properly established institutions.

The next chapter examines various EIA case studies and an analysis of the authorisation process and interaction between key role-players will be undertaken.

CHAPTER 4: EIA CASE STUDY ANALYSIS

The previous chapter gave an overview of the legislative provisions for CEG and environmental authorisation. In order to investigate the extent to which such legislative provisions are applied, this chapter examines EIA case files of a selection of different authorised activities within KZN. Data from each case is presented, analysed and discussed. Disparities and serious omissions in EIA processes are identified and discussed. At the end, all cases are collated to assess the extent of alignment and/or integration of processes.

This chapter begins by introducing different development activities which were identified as cases for this study. This is followed by a detailed discussion of each case and an overall conclusion at the end of the chapter.

4.1 INTRODUCTION

Different EIA case files were identified, covering a wide range of activities. The case selection process was stratified by giving consideration to activities in different sectors of the KZN economy. The selection process was further predisposed towards those activities which may fall under the jurisdiction and/or administration of different organs of state in order to obtain cases which may require multiple authorisations by different competent authorities. Consideration was also given to selecting cases which may cover varying proponents, both from the private and public sectors. Seven cases, regarded as enough to yield a comprehensive analysis, were selected and these are:

1) a low cost housing development,
2) a petrochemical station development,
3) a mining development,
4) a water reticulation system development,
5) a water reservoir inlet development,
6) a gas pipeline development, and
7) a hazardous waste treatment plant development.

The selected EIA cases are further outlined in the table below:

TABLE 4: Details of the selected EIA cases

Activity	EIA case	Location	EIA process
1. Housing development	Farm Isonti low cost housing development	Umzinto, Umdoni Local Municipality	S&EIR
2. Hazardous installation development	Notefull petrochemical station development	Umbongitwini, Ethekwini Metro	S&EIR
3. Mining development	Exxaro Fairbreeze mine development	Mthunzini, Umlalazi Local Municipality	BA
4. Reticulation system development	Sewage conservancy tanks decommissioning	Dambuza, Msunduzi Local Municipality	BA
5. Linear inlet development	Almond road water reservoir inlet development	Kingsburgh, Ethekwini Metro	BA
6. Hazardous or linear development	Sasol gas pipeline development	Wentworth, Ethekwini Metro	S&EIR
7. Hazardous waste development	Ecocycle hazardous waste treatment site development	Mkondeni, Msunduzi Local Municipality	S&EIR

The next section examines the first case study which is a human settlement development in the Umdoni Local Municipality, Ugu District Municipality, in the South-eastern coast of KZN.

NB: it must be noted that most of the information in all the case studies is reproduced from the EIA case files and EIA study reports, which are acknowledged here as the respective sources and will not be referenced again.

4.2 CASE STUDY I: FARM ISONTI LOW COST HOUSING DEVELOPMENT

This is a residential housing development, comprising residential units, schools, crèches, commercial, mixed use or light industrial sites, community facilities and agricultural land (shown in the table below). The entire land mass of the development is approximately 372 hectares.

TABLE 5: Case study I: Composition of the development area

Land use	№ of Erven	Area (ha)
Residential	2225	88.71
Community facility	12	3.36
Shops / commercial	3	19.64
Primary schools	2	3.72
Secondary school	1	2.29
Shared sports field / play lots	3	5.23
Public open space	20	218.17
Reservoir	1	0.26
Proposed roads	-	22.67
Existing road	-	8.26
TOTAL	**2267**	**372.31**

The following levels of services were viewed as critical for the authorisation process and were given due consideration during planning: internal water reticulation; waterborne sanitation services; gravel roads and storm water drainage system; bulk services of water and sanitation (to be upgraded by the Ugu District Municipality, the water services authority in the area); solid waste removal services (to be done by Umdoni Local Municipality, the proponent); and electricity supply (not part of the development, to be provided separately by Eskom, the national electricity utility).

4.2.1 Description of the affected environment and possible impacts

The development site is predominantly agricultural land (sugar cane), with few homesteads, and a small business unit. Generally, the topography is moderate undulating hills, with wide valleys, dominated by wetlands. The non-agricultural area consists primarily of grassland with deep forested ravines and gorges. Some of the grassland is intermingled with coastal woodland thickets and subtropical forest.

The wetlands had all been substantially altered by the land use and drains had been created throughout most. The upper reaches of the wetlands had been canalised or were continually graded to direct water away from the fields into the bottom of the valleys. The valleys drain into the Mpambanyoni River, which runs very close to the development site. There are small fragments of relatively diverse riparian vegetation within the valley matrix, with limited alien invasions.

The development may have negative impacts on agriculture and land productivity, natural vegetation, water resources (particularly the wetlands) and air quality (particularly during the construction phase). Other impacts may be on bulk services, traffic and biodiversity. The potential positive impacts may be on the socio-economic aspects of the affected communities, such as job prospects, proper sanitation, improved housing and other social amenities, such as education, health and well-being.

4.2.2 Description of the authorisation process

This development is a listed activity in terms of sections 24(2) and 24D of NEMA (Activity 15 of the 2010 EIA regulations). However, the authorisation process was done in terms of the previous EIA regime, i.e. the April 2006 EIA regulations which were applicable at the time. The EIA process had to follow the S&EIR, because “any development activity, including associated structures and infrastructure, where the total area of the development area is, or is intended to be, 20 hectares or more” (Activity 2), is listed as an activity that requires the full EIA process.

The EIA process was managed by SiVEST Environmental Consultancy which was contracted by the Umdoni Local Municipality as part of the Umzinto Slums Clearance Project to undertake the EIA process through the DFA planning process. The DFA, as outlined in Chapter 3, aims to provide a coherent and integrated legislative framework to facilitate and expedite land development projects, through the provincial planning and development tribunals (Rigby and Diab, 2003).

SiVEST (the EAP) divided the EIA process into two phases: the scoping phase and the full EIA phase. The scoping phase covered the following:

- EIA application which was submitted to DAEA&RD on the 6th of October 2008 and receipt acknowledged on the 23rd of October 2008,
- development and distribution of the background information document (BID) to identified stakeholders and I&APs, including relevant government entities in October 2008,
- visiting of the development site and placing advertisements in local and regional newspapers in November 2008,
- up-keep of a register of I&APs and public participation (PP) in November 2008,
- scoping of potential environmental issues and/or concerns which required further assessment, and
- the compilation of a scoping report (SR), including the plan of study which was submitted to I&APs for comments and subsequently to authorities for consideration and approval on the 16th of February 2009.

The SR was accepted on the 13th of March 2009 (the delay was due to the absence of the land owner's consent) without the land owner's consent – however a condition was attached to ensure that this requirement is met before the EIA report could be submitted for review. Subsequently, the application was exempted from including the land owner's consent on the 28th of April 2009.

After the scoping phase, the full EIA process was undertaken and included the following:

- the required specialist studies were commissioned. These included geotechnical studies, HIA, traffic impact assessment, wetland delineation studies and agricultural potential assessment,
- compilation of EIA report for submission to I&APs for comments and subsequently to authorities on the 28th of June 2010 for review,
- notification of all registered I&APs regarding the environmental authorisation and the conditions attached thereto, and the appeals process.

One of the most important processes within the broader EIA process is PP, which assists in the identification of potential impacts of development initiatives to human health and the environment. Records show that a public meeting was held on the 19th of November 2008; a discussion with a focus group of key stakeholders was held on the 26th of November 2008; all the required draft reports were sent to all registered I&APs

who were given sufficient time to make inputs and comments. A database of I&APs shows that a wide range of stakeholders were consulted and a rigorous process was undertaken.

As indicated above, the SR was accepted on the 13th of March 2009 and it took 16 months from the beginning of the process to a point where the EIR could be submitted. Records show that in these 16 months, SiVEST submitted and was granted two requests for extensions – the first (warranted by problems with land availability after Illovo Sugar reneged on an initial consent) was granted on the 8th of October 2009 and the second (caused by problems of sewage treatment capacity) was granted on the 15th of April 2010. The EIR was submitted on the 28th of June 2010, reviewed and not authorised, with a request for a layout amendment and further public consultation. A revised EIR was re-submitted on the 4th of August 2010 with motivations for neither undertaking further PP nor revising the development layout.

The motivation was found to be inadequate and rejected on the 17th of August 2010. From that point onwards, a site visit by authorities and the EAP was undertaken, clarification of the reasons for not implementing the recommendations were given, the planning application was reviewed and internal consultation within the DAEA&RD was undertaken. This ultimately led to the acceptance of the EIR on the 12th of October 2010.

4.2.3 Analysis of the level of cooperation and alignment

The proponent was the Umdoni Local Municipality, within Ugu District Municipality, and the project was aimed at realising the objective of creating integrated sustainable human settlements, where persons of different income levels reside together and share socio-economic amenities (communal facilities). This was in line with the municipality's housing sector plan developed in 2007, which identified the project site and set aside resources for the preparatory phases of the project. The housing sector plan also ensured that the necessary application to the Department of Housing (currently Human Settlement) for the subsidy to proceed with the project was done. Furthermore, during the preparatory stages, Ugu District Municipality was approached and gave an "in-

principle" agreement to provide bulk services required for the project, the details of which were to be ascertained during the EIA process.

This shows commendable relations between different spheres of government prior to the initiation of the project, and a good understanding of the mandate of each sphere. In this regard the spheres of government with the authority on each aspect of the development were formally approached and the necessary authority or "go-ahead" was given. In this case, the proponent did not encroach on the jurisdiction of the national government, but approached it with regards to funding, and Ugu District Municipality was approached for bulk services. Other key government entities were consulted during PP: i.e., DWA (on wetland issues), Transport (on traffic related issues), Land Affairs (on land claims and ownership), Local Government & Traditional Affairs (on traditional aspects), Ezemvelo KZN Wildlife (on biodiversity issues), KZN Amafa (on heritage resources), and the Wildlife and Environmental Society of South Africa (WESSA) (on broad biophysical environmental issues), were all consulted and contributed during the process.

This shows some level of prior planning and engagement with the necessary stakeholders to facilitate a smooth and seamless EIA process. This was necessary to ensure that the EAPs had all the necessary information to respond to public queries during PP and to compile the EIR. Despite this, the fact that the EIR was rejected twice is confirmation that cooperation between the relevant government entities, consultation with key role-player and the general public may not have been thorough enough.

4.2.4 Case study I: General observations

The environmental authorisation was granted on the 26th of October 2010 and the entire process (from application to authorisation) took just over 24 months. The EIA case file does not provide any record of the DFA process and therefore its link to the EIA process could not be ascertained. While the EAP was required to manage the process through the DFA, there was no record in the EIA file of any of the activities that had to be undertaken through the planning ordinances and the development tribunals. Therefore it was not possible to ascertain the exact duration of the entire process from the EIA case files alone, and whether there are some activities which are required in the DFA process which could have been aligned and/or done concurrently with the EIA process.

The EIA process does acknowledge that the sewage treatment capacity in Umzinto was unable to handle the proposed development. However, the application for a new sewage treatment facility for the proposed development was not integrated into the this EIA process. This is a serious omission and an unwarranted fragmentation of activities, particularly considering that the construction of sewage pipelines (associated infrastructure for sewage treatment facilities) were authorised in this process. This may lead to delays in the initiation of the construction phase and/or delays in the handing over of completed facilities, particularly if there are delays in the authorisation application for bulk services and associated infrastructure.

Another serious omission is that the EIA process did not seriously consider site and layout alternatives, the motive for this omission was that town planning studies (which also include environmental criteria) conducted prior to the EIA process assessed ten different sites and recommended that Farm Isonti was the most favourable site. Despite this motivation, the DAEA&RD was not convinced. However, it acknowledged the pressing need for the municipality to provide housing and the limited resources which may not have allowed the municipality to explore every feasible and possible alternative; hence this important provision was forgone.

Inefficiencies observed in this case study include submission of incomplete information, repeated requests for time extensions and by-passing some critical processes, such as consideration of site alternatives. These caused delays and denied the competent authority the necessary information needed to make an informed decision. Be that as it may, incomplete file records and inconsistencies on dates are limitations in this case study which mitigate against proper and accurate analysis of inefficiencies. Finally, there is no record to indicate that formal co-operative government structures, which are necessary to coordinate the authorisation process, exist in this District.

The next section examines the second case study, which is the installation of a hazardous activity in Umbongitwini, Ethekwini Metropolitan Municipality on the KZN south coast.

4.3 CASE STUDY II: NOTEFULL PETROCHEMICAL STATION DEVELOPMENT

Notefull 1297 cc was the proponent for the construction of a Sasol petrol filling station on Ashgate Drive in Umbongitwini, Ethekwini Metropolitan Municipality. The site is part of the Southgate Business Park and was zoned as controlled industry by the Umbongitwini Town Planning Scheme.

4.3.1 Description of the affected environment

The site had already been excavated, platformed and graded, but left undeveloped, therefore its natural vegetation had already been removed. Hence, there were no indigenous fauna and flora. The development site was covered by loose alien vegetation and there were signs of dumping of building rubble and soil on the site. The site is approximately 9408 square metres, but only 2998 square metres would be used for the development with the remainder being allocated for warehousing.

The Umbongitwini area presents a mixed land use area with significant industrial and business park complexes. The site is bordered by industrial developments on three sides; the fourth side is a conservation area (the Umbogovango open space system, which is part of a network of linked open spaces within Ethekwini Municipality which incorporate areas of high biodiversity value). Within 300 metres to the east of the site is a stream which drains into the adjoining Mbokodweni River. Construction may be a potential source of negative impacts on the stream though the seepage zone is considered to be 50 metres away from the lower boundaries of the site.

Besides the foregoing, the development may yield positive impacts on the environment because the illegal dumping of rubble will stop. Alien vegetation, as well, will be removed which, if left unattended, may also pose a security threat.

4.3.2 Description of the authorisation process

This activity required authorisation in the form of a S&EIR process in terms of regulations 13(1) and 24(b) of the EIA regulations. The authorisation, however, was

undertaken in terms of the previous EIA regime. The activity was listed as Activity 3 of the April 2006 EIA regulations, i.e. “the construction of filling stations, including associated structures, or any other facility for the underground storage of a dangerous good, including petrol, diesel, liquid petroleum gas or paraffin”.

The application was managed by Kerry Seppings Environmental Management Specialist cc (KSEMS) as the EAP. The application was lodged on the 24th of January 2008, recorded in the Ethekwini District office of the DAEA&RD on the 29th of January 2008 and the letter of acknowledgement was sent on the 4th of February 2008. The SR and the plan of study was submitted on the 21st of May 2008 and accepted on the 4th of August 2008.

Records show that thorough PP was undertaken. As per legislative requirement, letters and leaflets were hand delivered to neighbours on the 30th of January 2008; advertisements were placed in *The Mercury* and in the *South Coast Sun* on the 25th of January 2008 and 1st February 2008, respectively. A register of all I&APs was kept and they were given sufficient time to comment on the required documents. Furthermore, records show that comments from I&APs were satisfactorily responded to.

The EIR was submitted on the 28th of October 2008 and outstanding comments from the municipality were received on the 2nd of December 2008. The final site visit by authorities was undertaken on the 17th of March 2009 and the EIR was accepted on the 11th of May 2009. The seven month delay for this acceptance seems to be due to the outstanding traffic impact information and/or comments from the Department of Transport. There is no record, however, to show that this information was ultimately received, except correspondence dated the 13th of March 2009 indicating that the process had to proceed because enough attempts had been made to source the required input.

4.3.3 Analysis of the level of cooperation and alignment

This case shows that there may have been inadequate cooperation between DAEA&RD and the Ethekwini Municipality, and lack of coordination within the municipality itself which resulted in various units (Planning, Waste management and Electricity divisions)

commenting separately. The EIR had been submitted to the competent authority for consideration. Furthermore, the municipality's planning unit stressed the need for the environmental division to comment. This shows, in the first place, poor cooperation between DAEA&RD as the competent authority and Ethekwini as the government entity with the jurisdiction over the activity. Secondly, poor internal coordination of inputs and poor synchronisation of environmental management responsibilities by the municipality.

Filed record highlights the difficulty in getting inputs from key government entities. For instance, no comments were forthcoming from the Department of Transport for more than two months and the officials from that office indicated that only one official could provide the required input. Another aspect that shows poor levels of cooperation relates to the fact that traffic impact studies were done as part of the Southgate Business Park development 13 years before the initiation of this EIA study. In view of this time span, the authorisation requires that the development plans for this activity be submitted to Ethekwini Municipality's traffic department for approval. There is no indication of any level of cooperation between the Ethekwini traffic authorities and the competent authority to try and align and/or integrate the foregoing traffic plan authorisation. Furthermore, there is no indication of whether the prior traffic plan approval for the Southgate Business Park had any conditions, time limits or took into consideration any possible future developments.

4.3.4 Case study II: General observations

The environmental authorisation was granted on the 18th of November 2009 and the entire process took 22 months. This case study shows that authorisation may have been granted a lot sooner, had the required inputs been provided on time. There is also no clear indication that prior authorisation of the Southgate Business Park were taken into consideration. In this regard, there is no record relating to the validity and/or applicability of traffic assessment studies done for the approved Southgate Business Park, though it took into account the development of a petrochemical station as a possible future development. This may be due to the period of time since those studies were undertaken, hence the EIA process required a new traffic plan for approval.

Another observation is that, while the site was approximately 9408 square metres, only 2998 square metres would be used for the development, with the remainder earmarked for warehousing. Considering that the development of a warehouse does not trigger an EIA, the developer started to erect it. This may give an impression that authorisation, even prior to its finalisation, is a *fait accompli*. A further problem may arise if a layout alternative which may overlap with the warehouse layout is authorised.

The next section examines the third case study which is a mining development in Fairbreeze, Mthunzini Local Municipality on the KZN north coast.

4.4 CASE STUDY III: EXXARO FAIRBREEZE MINE DEVELOPMENT

Exxaro KZN Sands was the proponent for this development which covered an area of approximately 4143 hectares, stretching between the Fairbreeze and Mtunzini ramps off the N2 highway, Mthunzini Local Municipality, Uthungulu District. The project involves the mining of Fairbreeze A, B, C and C Extension, and D ore bodies for which Exxaro KZN Sands already has authority for mining rights from the Department of Mineral Resources. Furthermore, Exxaro KZN Sands has environmental authorisation (from DAEA&RD) and a WUL (from DWA) for Fairbreeze C and C Extension. However, the inclusion of the other ore bodies requires additional service infrastructure, extension as well as modification of the positioning and capacity of certain components of the previously authorised mining activity. These include, *inter alia*, relocation of the Primary Wet Plant, residue storage facilities, dams, pipelines, electrical infrastructure and access roads. The entire project, therefore, requires authorisations under various pieces of legislation (activities and the applicable legislation are presented in Table 6 below), namely:

- an environmental authorisation in terms of NEMA,
- a water use licence in terms of the NWA, and
- an environmental management programme in terms of the MPRDA.

4.4.1 Description of the affected environment

The topography of the Fairbreeze area is undulating and comprises of low hills and dunes lying parallel to the coastline. The dunes have been significantly eroded and

incised by water courses which form the low points in the topography. The project area falls within the Siyaya catchment, which comprises the Amanzimnyama and Siyaya Rivers. The confluence of the Amanzimnyama and Siyaya Rivers downstream forms an estuary, the Siyaya Estuary, which is a marine protected area within the Umlalazi Nature Reserve.

TABLE 6: Case study III: Activities requiring authorisation

NEMA	MPRDA	NWA
Mining, backfilling & rehabilitation of all ore bodies	Revision of mining plan, backfill and rehabilitation of all ore bodies	Water use licence for mining operation & related activities
Construction of the Primary Wet Plant and dams within its boundary	Relocation of the Primary Wet Plant	Amendment of the water use licence for the changed location of the Primary Wet Plant
Construction of the residue storage facilities	Extension of the residue storage facilities	Water use licence for the extension of residue storage facilities
Construction of on and off-ramp to the N2	-	-
Re-routing power line & the new Eskom substation	-	-
Construction of the return water dam	Revision of the location of the return water dam	Amendment of water use licence for the relocation of the return water dam & waste
Construction of the drainage trench	-	-

The development area consists mainly of transformed land used for forestry interspersed with small patches of agricultural land for sugar cane production (Fairbreeze C Extension is located in agricultural land and the rest of the ore bodies are under tree plantation). Also, there are small fragments of natural vegetation remaining within the development area, which are mainly restricted to the riparian zones.

Forestry practices in the region have greatly impacted the ecological functioning of the area, through the destruction of the natural dune vegetation. Furthermore, tree plantations have changed the hydrological regime of the catchments, which has in turn affected the wetland areas, within the project site, as well as downstream.

4.4.2 Description of the authorisation process

Exxaro KZN Sands appointed Exigent Engineering Consultants as the EAP to manage the application for environmental authorisation. Exigent consultancy was assisted by

ACER (Africa) Environmental Management Consultants who were tasked with conducting PP[11]. The application was lodged with the DAEA&RD in October 2010. The site was visited and inspected by DAEA&RD officials on the 23rd of August 2011. A comprehensive PP process was undertaken and the basic assessment report (BAR) was submitted to the DAEA&RD in February 2012.

What is important to note in this process is that authorisation of mining and related activities of a portion (Fairbreeze C and C Extension) of the development had previously been granted in 2006 by all competent authorities. The specialist studies conducted for that authorisation resulted in the generation of a significant body of scientific and environmental information.

The listed activities for this development requiring authorisation and the EIA process required to facilitate decision-making are set out in the June 2010 EIA regulations. The development of the Fairbreeze mine and related activities triggered a number of activities which are listed in all three lists of activities in terms of the NEMA 2010 EIA regulations. In this regard, some activities require a BA process while others the S&EIR EIA process.

Due to the magnitude of the project and the fact that most activities require full EIA, the authorisation process required is the S&EIR. However, because of the amount of information generated in the previous EIA process for Fairbreeze C & C Extension, the EAP sought, and was granted permission, in terms of regulation 20(4) of the EIA regulations, for the completion of a BA process instead of the S&EIR process.

In terms of the MPRDA an application for a mining right and/or an amendment thereof requires an EIA to be conducted and an EMPr to be submitted, as per section 39 of the MPRDA and regulation 50 of the MPRDA regulations. The EAP submitted a consolidated report which fulfils both the requirements of regulation 22 of the NEMA EIA regulations and the requirements of section 39 of the MPRDA and regulations 50 and 51 thereof.

[11] Public participation

4.4.3 Analysis of the level of cooperation and alignment

Shared and similar processes in terms of NEMA, MPRDA and NWA were undertaken concurrently and aligned accordingly to avoid duplication and to save time and resources. The preparation of a consolidated BAR shows a very important aspect of aligning and integrating authorisation processes because aligned processes and integrated reports may easily yield integrated authorisations. The fact that similar processes were undertaken concurrently ensured that there was no duplication of effort.

Though the WUL application was undertaken at the same time, it was not consolidated into the same report and it is not clearly stated why it was not done.

4.4.4 Case study III: General observations

The environmental authorisation was granted on the 12th of July 2012 and the entire process took almost two years. It is clear from the records that this development elicited a lot of public interest and a number of environmental advocacy groups were opposed to the development. Delays and inefficiencies were due to their opposition and despite a spirited, intensive and transparent PP process; the environmental groups were not swayed. In November 2012, the environmental interest groups were planning to appeal the authorisation and the indication is that they were prepared to do that through the court processes if such an eventuality arises.

The next section examines the fourth case study which is a water services activity in the Greater Edendale area, Msunduzi Local Municipality, Umgungundlovu District Municipality on the KZN midlands.

4.5 CASE STUDY IV: SEWAGE CONSERVANCY TANKS DEVELOPMENT

The Msunduzi Local Municipality was the proponent of this development which entailed the decommissioning of existing sewage conservancy tanks and installation of a water-borne sewer pipeline and upgrading of the water supply pipeline of the Dambuza reticulation system. This project was the second phase in the Greater Edendale area of improving the water and sanitation system (the first phase was in the Georgetown area).

The project entailed the replacement of an existing system which was old, inadequate and in some instances not functioning properly, with a new, environmentally-friendly and socially acceptable system.

4.5.1 Description of the affected environment

The sewage pipeline was installed within a dense residential area, and the norm, the accepted approach and/or the only practical solution for installation of such pipelines is for the mains to run within the road reserve along the road servicing the affected properties. The affected environment therefore was, in the main, the road reserve of a densely populated residential area.

Considering that this development is the upgrading of a system which was inadequate, a health hazard and a source of pollution to the adjacent Msunduzi River; the potential environmental impacts were considered to be favourable during the commissioning and implementation phases. Potential negative impacts were only limited to the construction phase, and included local infrastructural disturbance, soil pollution and erosion, but these were all taken into consideration in the development of an EMPr.

4.5.2 Description of the authorisation process

The activity is listed as Activity 1(k) of the April 2006 EIA regulations, i.e. “the construction of facilities or infrastructure, including associated structures for bulk transportation of sewage and water, including storm water, in pipelines with (a) an internal diameter of 0.36 metres; or (b) a peak throughput of 120 litres per second or more”, and the authorisation process was through a BA. Guy Nicolson Consulting cc was appointed as the EAP to manage the EIA process.

The notice of the intention to apply for an environmental authorisation was made on the 19th of June 2008 and receipt was acknowledged on the 26th of June 2008. A site visit by DAEA&RD officials was undertaken on the 18th of July 2008. The application was subsequently submitted with the BAR on the 16th of January 2009 and there is no record of correspondence to confirm the acceptance of the BAR.

Because of the nature of the project, it was considered not relevant to consider site alternatives because the upgrade had to occur in exactly the same location as the old system. Furthermore, the upgrade process was viewed as the most appropriate starting point to respond to the socio-economic conditions of the area by all parties concerned, including community representatives during the planning phases.

Lastly, PP which included consultation with various authorities, interested parties and Ward Councillors was considered to have been thorough. All environmental issues and concerns raised during PP, including the mitigation measures proposed in the BAR were viewed as adequate to warrant authorisation.

4.5.3 Analysis of the level of cooperation and alignment

It is evident from the case files that there was adequate cooperation between the DAEA&RD and other government entities which had an interest or a stake in this development. The DAEA&RD consulted with Ezemvelo KZN Wildlife on biodiversity issues and the latter indicated that there were no biodiversity concerns. There was also consultation with DWA and again this department raised no concerns regarding water issues, but supported the upgrade with an assurance that it would be done in accordance with their standards and technical requirements. In this regard, this development was included in the Water Services Development Plan.

The municipality was also consulted but, as expected in view of the fact that it was also the proponent, did not raise any concerns. Consultation with the Department of Health on health issues (positive and negative) associated with this development seems to have been missed. However, cooperation between other government entities was considered to be acceptable. There is no record of any other authorisation which was required which had to be aligned and/or integrated with the EIA process.

4.5.4 Case study IV: General observations

The authorisation was granted on the 23rd of September 2009 and it had taken over eight months from the date of the submission of the BAR in January 2009 until

authorisation was granted. Anecdotal evidence suggests that the reason for such an excessive delay was successive re-assignment of the file due to staff turn-over, procrastination and the re-evaluation of already evaluated reports.

The next section examines the fifth case study which is a linear activity in Umbongitwini, Ethekwini Metropolitan Municipality on the KZN south coast.

4.6 CASE STUDY V: ALMOND ROAD RESERVOIR INLET DEVELOPMENT

The Ethekwini Municipality was the proponent of this development which entailed the installation of a reservoir inlet pipeline with a length of approximately 690 metres, a diameter of 300 millimetres, and which was to be laid in a trench of 1500 millimetre dept and 900 millimetre width. The installation mainly followed a route through a residential area within a road reserve.

4.6.1 Description of the affected environment

The development was undertaken within a residential area, and the land use along the proposed route constituted both undeveloped and developed (mainly formal urban residential) land. The development further traversed an undeveloped valley, where the vegetation was predominately alien species.

The section of the development which passed through the undeveloped land descended on a slope that crossed a valley through which a tributary (Little Manzimtoti River) flowed. Impacts would mainly be during the construction phase and would include local disturbance, obstruction of the river flow, soil pollution and erosion. The disturbance would also occur during the construction of access roads, water course diversions, and side drains. EIR pointed out that construction would be in a manner that would not lead to irreparable damage to the environment; and impacts would be rehabilitated soon thereafter.

4.6.2 Description of the authorisation process

The authorisation took the form of the BA process in terms of regulations 13(1) and 24(b) of the EIA regulations. The activity is listed as Activity 1(m) in the April 2006 EIA regulations, i.e. "the construction of facilities or infrastructure, including associated structures or infrastructure, for any other purpose in the one in ten year flood line of a river or stream, or within 32 metres from the bank of a river or stream where the flood line is unknown, excluding purposes associated with existing residential use, but including i) canals; ii) channels; iii) bridges; iv) dams, and v) weirs".

The application was managed by WSP Environmental (Pty) Ltd as the EAP and the notice of intent to lodge an EIA application was submitted on the 5th of April 2008, and receipt by the Ethekwini District office was acknowledged on the 17th of April 2008. The application was lodged, and subsequently the BAR, in February 2009 and accepted on the 2nd of March 2009.

Site alternatives were considered during the EIA process and evaluated in terms of: i) efficiency and cost-effectiveness; ii) potential impacts on the bio-physical environment; and iii) the level and degree of disturbance to surrounding communities. Though the authorised route is neither the shortest nor the one causing the least disturbance to land owners, it outweighs other alternatives by virtue of its practicality and ease with which maintenance would be done, hence it was the most feasible and favourable route. With regards to PP, records show that an adequate process, in line with legislative requirements, was undertaken, with newspaper advertisements placed in the *Sun Sport* on the 6th of June 2008 and notices erected on the development site. A register of all I&APs was kept and they were given sufficient time to comment on the required documents – no objections to the development were received.

4.6.3 Analysis of the level of cooperation and alignment

The main government entities which actively participated in the EIA process through PP were: the DWA, Ezemvelo KZN Wildlife, Amafa akwaZulu-Natali, eThekwini Municipality's Development Planning section, and WESSA. Besides cooperation through PP, there are neither records indicating other forms of cooperation nor were

there other authorisation processes which needed to be aligned and/or integrated into the EIA process.

4.6.4 Case study V: General observations

Authorisation was granted on the 4th of May 2009 and it took just over a 12 month period to complete the process. Identified inefficiencies can be associated with the reshuffling of officials attending to the file which caused some delays. Generally, the process went smoothly and no serious delays were noted.

The next section examines the sixth case study, Sasol gas pipeline development in Jacobs, Ethekwini Metropolitan Municipality on the KZN south coast.

4.7 CASE STUDY VI: SASOL GAS PIPELINE DEVELOPMENT

This case is a combination of a linear activity and an installation of a hazardous activity. Associated Additives Pty (Ltd), the proponent of this development, contracted Sasol Gas Limited to supply them with Methane Rich Gas (MRG) to replace the Liquefied Petroleum Gas (LPG) and paraffin which was used to power their boilers and furnaces. This required the construction of an underground low pressure pipeline to transport MRG and an on-site customer metering station. The pipeline, which would be made of steel, was 300.8 metres, the external High-density polyethylene (HDPE) pipeline was 61.8 metres and the internal HDPE was 239 metre long and at least one metre deep and would link the existing MRG pipeline to the proponent's site.

4.7.1 Description of the affected environment

The entire route of the pipeline was in the industrial area. Replacing LPG and paraffin as sources of energy with MRG was an attempt to reduce emissions associated with fossil fuels with "green" sources of energy. Impacts would mainly be during the construction phase and included local disturbance, interruption of services and disruption of vegetated verges.

During the operational phase, potential environmental risks would result from pipe rupture and might include gas leaks, explosion, flammable gas cloud, fire or explosion in the pipeline itself, and environmental impacts of methane gas as a greenhouse gas, impacts on air quality and public health during incidents of gas leaks.

4.7.2 Description of the authorisation process

The activity is listed as Activity 1(j) of the April 2006 EIA regulations, i.e. "the construction of facilities or infrastructure, including associated structures or infrastructure, for the bulk transportation of dangerous goods using pipelines, funiculars or conveyors with a throughput capacity of 50 tonnes or 50 cubic metres or more per day". The authorisation process was the S&EIR process in terms of regulations 13(1) and 24(b) of the EIA regulations.

The application was managed by KSEMS as the EAP and was lodged on the 2nd of April 2008, recorded in the Ethekwini District on the 3rd of April 2008 and receipt was acknowledged on the 9th of April 2008.

The SR and the plan of study was submitted on the 13th of May and resubmitted on 22nd of September 2008 after the DAEA&RD pointed out some flaws that needed to be corrected. It was accepted on the 29th of October 2008. The EIR was submitted on the 27th of February 2009 and accepted on the 28th of May 2009.

Records show that PP was done in line with legal requirements. Notices were placed around the perimeters of the site and advertisements were placed in *The Mercury* and *Rising Sun* newspapers on the 3rd and 7th of April 2008, respectively. Notification letters were also submitted to all owners/tenants within the 100 metre radius of the pipeline route.

4.7.3 Analysis of the level of cooperation and alignment

There are no records showing any level of cooperation between government entities that had an interest and/or jurisdiction over this activity. Records only point to a detailed correspondence from DWA commenting on the draft EIR and EMPr. There is neither

indication that the municipality nor the Department of Energy participated in the EIA process. This may lead to authorities making a decision from an ill-informed position.

4.7.4 Case study VI: General observations

Authorisation was granted on the 5th of November 2009 and it took 20 months to complete the authorisation process. Identified inefficiencies include the allocation of the file to different officials. The delays may be attributed to the re-allocation of files – scrutiny of the EIR was re-assigned to a new official on the 9th of March 2009, who had to familiarise him/herself with the development.

The next section examines the seventh case study, the development of a hazardous waste treatment facility in Mkondeni, Msunduzi Local Municipality on the KZN midlands.

4.8 CASE STUDY VII: ECOCYCLE WASTE SOLUTIONS DEVELOPMENT

Ecocycle Waste Solutions (Pty) Ltd was the proponent of this development which entailed the construction of a hazardous waste treatment facility in an industrial area in Mkondeni, Msunduzi Local Municipality, Umgungundlovu District Municipality.

4.8.1 Description of the affected environment

The Mkondeni industrial area is mainly composed of different industries and transportation networks, which have significant impacts on the surrounding environment. Air quality in the area is potentially affected by the presence of such industrial and transportation facilities. The vegetation type in the area is categorised as vulnerable; however, Ezemvelo KZN Wildlife classified the development site as occurring within an area of little or no conservation potential. With regards to water resources, there are no visible hydrological features on the site, but there is a non-perennial tributary (Blackborough Spruit), which is approximately 300 metres from the site.

Environmental issues associated with the development are: the transportation of hazardous waste, its segregation and storage; air (odour and noxious gases) and effluent emissions; and the disposal of waste treatment residues. According to the EIR,

the proposed waste treatment technology does not generate any emissions or effluent. Thus, the impact on the receiving environment would be lower than other waste treatment practices. Furthermore, the proposed treatment technology reduces the volume of waste by approximately 80%, thereby reducing impact on the landfill airspace. All these can be viewed as positive spin-offs for the environment.

4.8.2 Description of the authorisation process

WSP Environmental (Pty) Ltd was appointed as the EAP to conduct an EIA through the S&EIR process. At the initiation of the process, the April 2006 EIA regulations were applicable, i.e., Activity 1(q), which is "the construction of facilities or infrastructure, including associated structures or infrastructure, for the incineration, burning, evaporation, thermal treatment, roasting or heat sterilisation of waste or effluent, including the cremation of human or animal tissue". Halfway through the process, NEMWA regulations came into effect. After consultation between the EAP and authorities, there was an agreement that transitional arrangements would come into play – meaning the DAEA&RD would not adjudicate the EIA process and the EAP would apply directly to the DEA for a WML in terms of the then new NEMWA regulations.

The EIA process was preceded by pre-application consultation with authorities (DAEA&RD and DWA) undertaken in August 2007. The authorisation process was undertaken in two phases: the scoping phase and the full EIA phase. An EIA application in terms of NEMA, together with a detailed plan of study for the scoping phase was lodged on the 21st of November 2007. Receipt of application was acknowledged on the 27th of November 2007. The scoping phase commenced in November 2007 and was completed in May 2008. The scoping phase examined and assessed technological alternatives and the associated potential environmental issues. The preferred technology and the need and desirability of the proposed activity were also considered. The SR and a plan of study for the full EIA phase were submitted to the DAEA&RD on the 19th of May 2008, and were both accepted.

Concurrently, an extensive PP process was undertaken in line with legislative requirements. Advertisements were placed in *The Witness*; *The Mercury*; *The South Coast Herald*; and *The Zululand Observer* newspapers on the 14th and 15th of November

2007. Notices were placed on the boundary of the site, which was preferred at the time, in November 2007. Subsequently, notices were placed on the boundaries of all the site alternatives (8th of December 2009). A register of I&APs was developed and kept, and all I&APs were given sufficient time to make comments and inputs into all draft documents.

The second phase, i.e. the full EIA, focused on the preferred technology and the assessment of environmental impacts. Two industrial areas within the Msunduzi Local Municipality (Mkondeni and Willowton) were identified as potential locations. Four sites were identified within these industrial areas for the assessment process. The most suitable option was identified and recommended for authorisation. The EIR was completed in March 2010 and submitted to the authorities for consideration.

4.8.3 Analysis of the level of cooperation and alignment

There is no indication that cooperation was sought from the Department of Health, which is the major generator of health care waste in this region. Besides this anomaly, there seems to have been good cooperation between DAEA&RD and DWA, on the one hand; and the DAEA&RD and the municipality, on the other. Records show that there was a smooth liaison between DAEA&RD and its national counterpart, the DEA, during the transitional process into the NEMWA WML process, during the July 2009 to October 2009 period. The transitional period coincided with the full EIA phase of the process, and the full EIA phase went through another elaborate PP process, despite the extensive consultation during the scoping phase.

4.8.4 Case study VII: General observations

The WML was granted on the 3rd of September 2010 and it had taken more than three years to complete the entire process. It is not quite clear why the process took this long, but anecdotal evidence suggests that the delays were due to officials taking too much time to reach a decision. The transition from the NEMA EIA process to the NEMWA WML process may have contributed immensely to the delays as well because this application was amongst the first to experience this situation.

The next section concludes the case studies and summaries the findings.

4.9 CONCLUSION

Of the seven EIA case studies, three were BA and the rest were S&EIR (see Table 7 on the next page). No inference could be drawn from these case studies that BA processes were completed quicker than S&EIR. In fact, what seems to be more plausible from the case studies is that the EIAs for big and complex developments, which are likely to cause huge impacts on the environment, took longer to complete. This is true for the EIA processes of the mining activity, residential development and the installation of hazardous activities which all took longer, while the duration of the rest was reasonable, irrespective of the type of the EIA process undertaken.

It may be deduced from the case studies that activities which attract more public interest and more scrutiny, tend to lead to elaborate consultation and PP processes. This may be time-consuming and may lead to extensive delays in completing the EIA process. It seems that some contestations during PP were mainly based on emotions rather than substantiated environmental matters. Furthermore, some of the activities elicited non-explicable delays in decision-making which may be caused by procrastination. However, incomplete information, by-passing some steps in the EIA process and failure to attach the required supporting documentation definitely contribute to delays and must be avoided.

With regards to CEG, no evidence was found of well functioning co-operative government structures which facilitated collaboration and cooperation on areas of common interest during the authorisation in all the case studies. No evidence of efforts which were aimed at avoiding gaps and duplication of activities and reduction of costly delays were found in any of the case studies.

TABLE 7: Summary of the EIA case study findings

EIA case study	EIA process	Duration	Findings
Case study I: Farm Isonti low cost housing development	S&EIR	24 months	By-passing some processes, such as consideration of site & layout alternative, caused massive delays
Case study II: Notefull petrol station development	S&EIR	12 months	The EIA process proceeded smoothly with no significant delays
Case study III: Exxaro Fairbreeze mine development	BA	20 months	Opposition mainly based on emotional issues by vocal interest groups contributed to delays
Case study IV: Sewage conservancy tanks	BA	9 months	Community interest & local government commitment facilitated speedy finalisation of the process
Case study V: Almond road reservoir inlet development	BA	13 months	Proceeded reasonably well
Case study VI: Sasol gas pipeline development	S&EIR	24 months	Some required specialist studies may have delayed authorisation
Case study VII: Ecocycle waste treatment development	S&EIR	37 months	The reasons for huge delays were not clearly visible, but procrastination and changes in legislation contributed

With regards to the alignment of processes, the third case study, i.e. Exxaro Fairebreeze mine application integrated the EIA with the MPRDA process. In the seventh case study, i.e. Ecocycle Waste Solution, the WML process was regarded as sufficient to satisfy the EIA requirements; hence no separate process was undertaken. This is in line with section 24L(4) of NEMA and duplication of processes was avoided. However, the process still took a long time to complete.

Considering that various EIA cases have been discussed, the next chapter turns into the views of key role-players regarding the authorisation processes and co-operative governance.

CHAPTER 5: CO-OPERATIVE ENVIRONMENTAL GOVERNANCE AND ALIGNMENT OF PROCESSES: STAKEHOLDER VIEWS AND ANALYSIS

The EIA case studies in the previous chapter show that there are a number of areas which need improvement in the environmental authorisation processes in KZN. This chapter examines this assertion further by presenting, analysing and discussing the findings and information drawn from a questionnaire administered to key role-players. The chapter focuses on the views and experiences of competent authorities, EAPs and development proponents on CEG and environmental authorisations, particularly the alignment of processes.

The chapter begins by introducing the questions in the questionnaire. Then responses to the questionnaire and data drawn from them are presented as findings, and findings are interpreted, analysed and discussed. The interpretation of the findings is presented as a comparative analysis of the different groups of respondent's views.

5.1 INTRODUCTION

A questionnaire was administered to competent authorities (provincial and national levels), EAPs and development proponents. These key role-players were asked a number of questions which focussed on co-operative governance issues, environmental authorisation, alignment of processes, and their experiences regarding processes in KZN. The structure of the questionnaire is outlined in the next subsection (the full questionnaire is attached as Annexure 2).

5.1.1 The structure of the questionnaire

A questionnaire (which was a combination of closed and open-ended questions) was designed by providing four possible answers for each of the closed questions. Respondents were required to mark or select the appropriate answer/s; for instance, the possible answers for the way respondents rate CEG in KZN were: i) very poor, ii) poor with some good aspects; iii) satisfactory; and iv) very good. An extra space was

provided below each question for further or additional information. The questions can be grouped as follows:

- Background information, i.e. qualifications, field of qualification, work experience, and role in authorisation processes (Questions 1 to 4),
- Environmental authorisation issues, i.e. number of authorisations required per application which the respondents normally encounter, number of authorities required to give authorisation to such application, actions normally undertaken to avoid duplication, and authorisation processes which are easy to align (Questions 5 to 8),
- Main questions (CEG and alignment of authorisations), i.e. how do the respondents experience CEG in KZN, and respondent's views on the implementation of sections 24K and 24L of NEMA (Questions 9 and 10), and
- Open-ended questions (i.e. no suggested answers, only open spaces), provided an opportunity for comments on CEG and suggestions on how to align processes (Questions 11 and 12).

The questionnaire was sent to a selected group of 23 individuals (as outlined in the methodology in Chapter 1), and fifteen responded (nine competent authority, four EAPs and two development proponents) (See Table 8 below).

TABLE 8: Summary of the number of respondents to the questionnaire

Competent authority	EAP	Development proponent
4 DAEA&RD Head Office	1 Exigent Engineering Consultants	2 EThekwini Municipality
4 DAEA&RD District Office	1 SiVEST SA (Pty) Ltd	-
1 DEA	1 WSP Environmental (Pty) Ltd	-
-	1 Kerry Seppings Environmental Management Specialists cc	-
Total = 9	**Total = 4**	**Total = 2**

5.1.2 Methodology used to analyse the responses

The following methodology was used to interpret, analyse and present the findings (the methodology is summarised in Table 9 below):

- the background information questions (Questions 1 to 4) were mainly used to understand the context under which the responses were given (i.e. whether comments were from a competent authority, EAP or development proponent). The level of experience and the field of expertise were used to determine whether there was any potential that a respondent may not have the full understanding of the information enquired,
- the respondents' views on environmental authorisation issues were gleaned from Questions 5 to 8. In this regard, responses to questions regarding the average number of authorisations per application and the competent authorities required to authorise them, together with the processes which are easily aligned were used to deduce the level and the complexity of the environmental authorisation process,
- Questions 9 and 10 were used to gauge the state of CEG and alignment of authorisation processes in KZN, using a scale ranging from "very poor", "poor with some good aspects", "satisfactory", or "very good". The frequency with which the respondents selected each of the four options was determined and presented as a chart. A fifth element, i.e. not applicable, was introduced for those respondents who felt that none of the four options were applicable, and
- finally, general comments and suggestions about CEG and alignment of authorisations were gleaned from Questions 11 and 12.

TABLE 9: Methodology used to analyse questionnaire responses

Set of questions	Information gleaned	Comments
Questions 1 to 4	Respondent's background information	Assisted in ascertaining the respondent's level of experience & expertise, and whether they were CA, EAP or proponents
Questions 5 to 8	Respondents views on general issues relating to environmental authorisation	Ascertained processes which are easily aligned and the number of authorities & authorisations usually required per application
Questions 9 & 10	Respondents views on CEG & alignment of authorisations	Ascertained whether CEG & alignment of authorisations in KZN are "very poor", "poor with some good aspects", "satisfactory", or "very good"
Questions 11 & 12	General comments and suggestions	Sourced respondents' advise on how to improve CEG & the alignment of authorisation processes

5.1.3 Responses to the questionnaire

Responses were received from nine officials who represented a competent authority; of which four were from DAEA&RD head office, four from district offices, and one from DEA. With regards to the EAPs, four responses were received from four different environmental management consultancies. Lastly, two responses were received from a development proponent. It must be noted that the development proponent is a municipality which is represented by environmental officials in its employ. No business developer/entity responded to the questionnaire. The summary of the respondents is shown in Table 8 on Page 78. Findings are presented in the next section.

5.2 FINDINGS

In line with the methodology described in the previous section, this section presents data on: i) background information (Questions 1 to 4), ii) general environmental authorisation issues (Questions 5 to 8), and iii) CEG and alignment of authorisations (Questions 9 and 10). Each data set is interpreted and the discussion is presented in the next section. Interpretation of data from the open-ended questions (Questions 11 and 12) is also presented in this section and raw data thereof is attached as Annexure 4.

Guidance on the interpretation of data presented in Tables 10, 11 and 12: the first column has questions, which each respondent (second column) was expected to answer. The third column is for answers with four sub-columns for each of the four options provided in the questionnaire. Numerical figures across each row represent the number of respondents that chose the corresponding option, and must add-up to the number of respondents, total in the last column, i.e. nine for competent authority, four for EAPs and two for development proponents.

5.2.1 Background information (Questions 2 to 4)

Table 10 on the next page presents data for the questions on respondents' background. The first question allowed for the identification of the respondent groupings, i.e. whether competent authority, EAP or development proponent; hence the table begins with Question 2.

TABLE 10: Data on background information (Questions 2 to 4)

Questions	Respondents	Answers				Total
		0-2 years	2-5 years	5-10 years	More	
Question 2 (years of experience)	CA	2	3	4	-	9
	EAP	-	2	-	2	4
	Proponent	-	-	1	1	2
Total for Question 2		2	5	5	3	
-		Degree	Honours	Masters	Doctorate	-
Question 3 (level of expertise)	CA	-	7	2	-	9
	EAP	-		4	-	4
	Proponent	-	1	1	-	2
Total for Question 3		-	8	7	-	
-		Natural Sc.	Social Sc.	Legal studies	Other	-
Question 4 (field of expertise)	CA	5	4	-	-	9
	EAP	3	1	-	-	4
	Proponent	2	-	-	-	2
Total for Question 4		10	5	-	-	

The table illustrates that the respondents are relatively well experienced, mostly over two years, except for two competent authorities. This is not surprising considering the high staff turnover in government's environmental management components as reported in other studies (Kotzé, 2005:92-94). Alternatively, this may be caused by internship programmes in the public service or entry level employees who had been brought in to strengthen capacity so as to handle EIA backlogs.

All respondents are educated with an honours level degree or higher, which would result in high levels of expertise. The field of expertise is overwhelmingly in natural sciences, which reflects the observation by Sandham *et al*. (2005) that the EIA community in South Africa is dominated by people from a natural science background.

5.2.2 Environmental authorisation issues (Questions 5 to 8)

Table 11 on the next page presents data for Questions 5 to 8 which deal with various issues relating to environmental authorisation.

One can observe from the table that not all the numbers tally to the required/expected total in all the questions. For instance, the total for competent authority is eight for Questions 7 and 8, which is one less than expected. This is also true with regards to EAPs for the latter, while the tally is more by one for the former. The reason for this is that some respondents did not complete Questions 7 and 8, while others just made comments on the open spaces provided beneath each question without selecting any of the options provided. With regards to the number which exceeds the expected total, one EAP selected two options, i.e. “integrated application” and “alignment of processes” as the two measures they employ to avoid duplication.

Data from this group of questions shows that most applications handled by competent authorities require two authorisations, mostly from one competent authority. This is not exactly the case for EAPs, where the number of authorisations required, ranges from two to more than three. Also contrary to most competent authority respondents, data shows that EAPs mostly require authorisations from more than three competent authorities.

There was an overwhelming support from all respondent groups that the “alignment of processes” is the most suitable measure to avoid duplication. Furthermore, all respondents, with the exception of EAPs, believe that EIAs and WML are the processes which are easy to align. This may be caused by the fact that EIA and WML applications usually fall under one competent authority, as opposed to the MPRDA and WUL processes. Hence, it may be easy for DEA and DAEA&RD to align processes that are within their purview or “sole” administration.

TABLE 11: Data on environmental authorisation issues (Questions 5 to 8)

Questions	Respondents	Answers				Total
		One	Two	Three	More	
Question 5 (№ of authorisations required per application)	CA	2	6		1	9
	EAP	-	2	1	1	4
	Proponent	-	1	1	-	2
Total for Question 5		2	9	2	2	
-		One	Two	Three	More	-
Question 6 (№ of CAs required to issue authorisations per application)	CA	5	3	-	1	9
	EAP	1	1	-	2	4
	Proponent	-	1	1	-	2
Total for Question 6		6	5	1	3	
-		Integrate	Align	By-pass	Other	-
Question 7 (What do you do to avoid duplication)	CA	2	6	-	-	8
	EAP	1	3	1	-	5
	Proponent	-	2	-	-	2
Total for Question 7		3	11	1	-	
-		WUL	MPRDA	WML	Other	-
Question 8 (Which processes are easy to align)	CA	-	-	8	-	8
	EAP	1	1	1	-	3
	Proponent	-	-	2	-	2
Total for Question 8		1	1	11	-	

5.2.3 Main focus area (Questions 9 and 10)

Table 12 below presents data for the main study objectives, i.e. respondents' views on CEG and alignment of authorisations, covered by Questions 9 and 10.

TABLE 12: Data on CEG and alignment of authorisations (Questions 9 and 10)

Questions	Respondents	Answers				Total
		Very poor	With good aspects	Satisfactory	Very good	
Question 9 (state of CEG in KZN)	CA	-	1	5	2	8
	EAP	-	4	-	-	4
	Proponent	1	1	-	-	2
Total for Question 9		1	6	5	2	
-		Very poor	With good aspects	Satisfactory	Very good	-
Question 10 (extent of implementation of Sections 24K & 24L of NEMA)	CA	2	1	4	-	7
	EAP	1	2	1	-	4
	Proponent	2	-	-	-	2
Total for Question 10		5	3	5	-	

As explained in the previous subsection, the numbers in this table also do not tally to the required/expected totals because two competent authority respondents did not complete both questions. Only the respondents from the competent authority view the state of CEG in the province as "satisfactory", with some even rating it as "very good". In contrast, overwhelmingly, all the other respondent groups rated it as "poor with some good aspects" – with some even viewing it as "very poor".

Again the majority of the competent authority respondent group regards the implementation of sections 24K and 24L of NEMA, i.e. provisions for the alignment of authorisations, as "satisfactory", in stark contrast to the other respondent groups who equally rate it as either "very poor" or "poor with some good aspects". It is worth noting that two competent authority officials also rated it as "very poor". Figures 6 and 7 below present a chart representation of CEG and alignment of authorisations. Data for these figures is sourced from the above table and tabulated percentage version of the data is attached as Annexure 3.

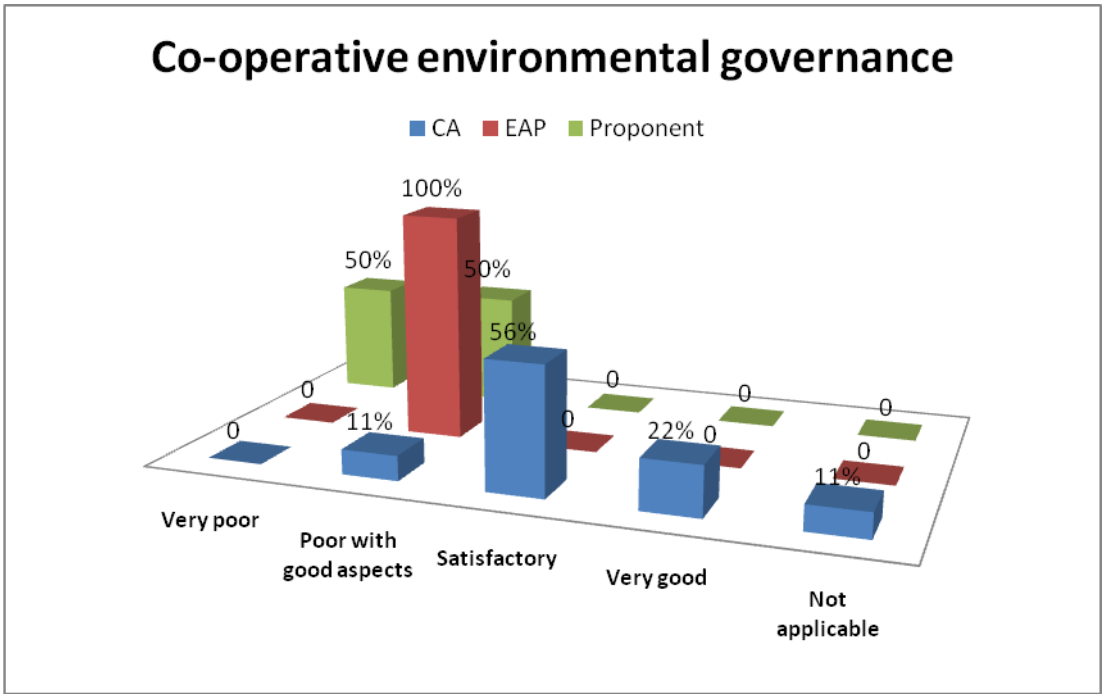

FIGURE 6: Views on the state of co-operative environmental governance

It is clear from Figure 6 above that overwhelmingly all the key role-players in the authorisation process do not feel that CEG in the province of KZN is operating optimally. In fact, only the competent authority grouping seems to rate it favourably. As indicated above, it is understandable that as administrators of NEMA, the legislation which provides for CEG, the competent authority is likely to be more positive with regards to their efforts to implement it. It is worth noting, however, that some respondents within the competent authority group indicated that CEG provisions are not applicable and the reason for this is because the national DEA has not yet translated the legislation into practical and implementable guidelines.

Of great interest as well is the fact that none of the other respondent groups (EAPs and development proponents) view CEG as very good or satisfactory. In contrast with the competent authority grouping, they rated it (overwhelmingly) as “poor with some good aspects” or “very poor”. This may be a direct reflection of the practical experiences they encounter with regards to poor or lack of cooperation and coordination of shared responsibilities by government entities.

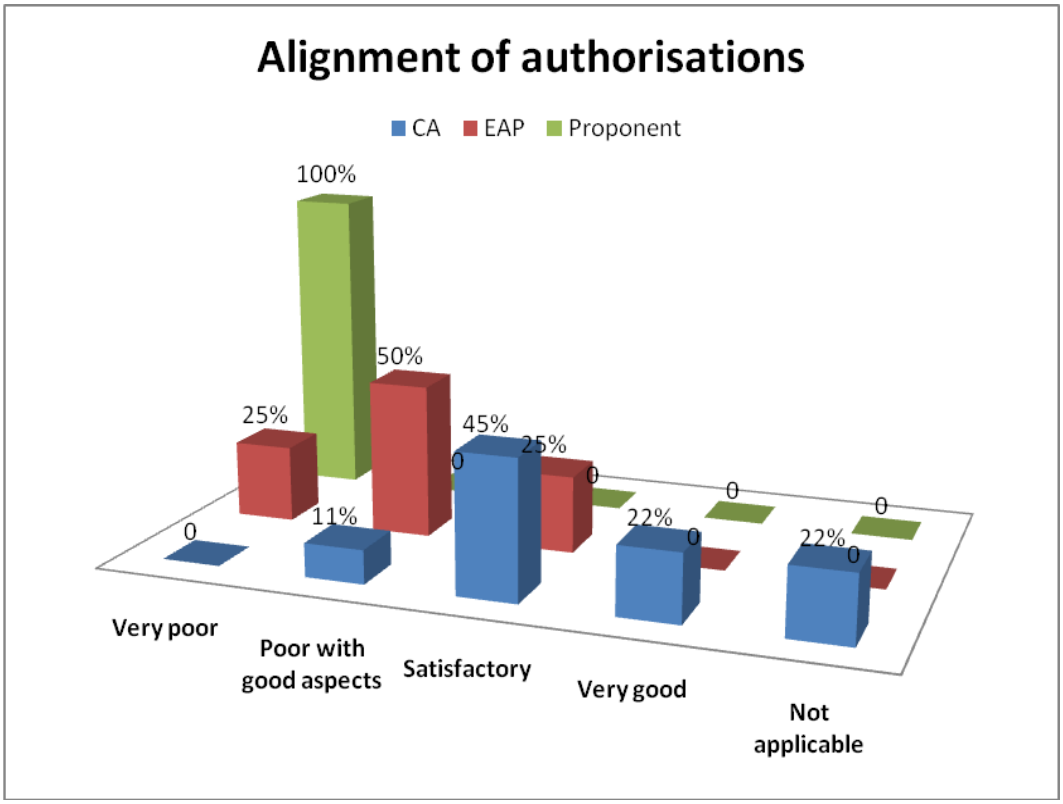

FIGURE 7: Respondent's views on the alignment of processes

Figure 7 illustrates that the competent authority grouping is positive with regards to implementation and application of the provisions of sections 24K and 24L of NEMA (alignment of authorisation processes). However, there were those (as with CEG) who felt that these provisions are not applicable due to the fact that the national DEA has yet to translate them into implementable provisions.

Again as with the previous discussion on CEG and in contrast with the competent authority group, the other group of respondents overwhelmingly rated alignment of authorisations as "very poor" or "poor with some good aspects". These disparities may be explained in the similar manner as the previous discussion on Figure 6 in the previous page.

5.2.4 General comments and suggestions (Questions 11 and 12)

Raw data for the open-ended segment (Questions 11 and 12) is included in Annexure 4. This section only interprets and discusses the information gleaned from these questions for each of the respondent groups, starting with the competent authority.

5.2.4.1 Competent authority

It is evident from the open-ended questions and comments that co-operative governance in KZN has been massively up-scaled in recent years. This was supported by a provincial cabinet resolution which ratified the establishment of a statutory body, the PCEC[12], to coordinate all CEG efforts. While viewed as a huge step forward, it is still experiencing teething problems and there is confidence that things will only improve going forward. What remains to be seen is whether there will be sufficient political will to carry this initiative through.

A major problem with co-operative governance is the fact that the pieces of legislation which provide for co-operative government do not specify details regarding practical procedures and processes, but only focus on principles. The implication is that co-operative governance ends up taking different forms with varying levels of success. For instance, Humby (2009) argues that the CEG focus in NEMA is mainly on EMP and EIP development by certain identified entities, without defining the nature of relations between such entities. This approach neglects any possibility of facilitating good working relations on areas of common interest, outside of the "EMP/EIP documents". It therefore, becomes important for legislation such as the IRFA to be used, not only to customise co-operative government, but to also formalise relations between affected entities.

KZN is embarking on a process of fast-tracking environmental authorisations. However, formal implementation of NEMA provisions on alignment and integration of authorisations has not yet taken place. A key point was made that alignment and/or integration of authorisations mainly depend on integrated applications and processes, for success. Some respondents stress that environmental legislation must clearly provide regulations for integration and coordination of processes as envisaged in sections 24K

[12] Provincial Committee for Environmental Coordination

and 24L of NEMA before any step could be taken to implement these sections. There seems to be a concern that integrated and/or coordinated processes and authorisations will benefit other role-players to the inconvenience of authorities; hence there may be reluctance to effect them without clear guidelines. This assertion was unsubstantiated and hence it may be difficult to verify its validity.

5.2.4.2 Environmental assessment practitioner

Comments by EAPs express a general feeling that different government entities are not properly collaborating in line with CEG provisions. EAPs have concerns that affected government entities, particularly those with jurisdiction over development activities, do not actively participate in EIA processes leading to delays in processes, particularly where co-operative government structures are non-existent or not functioning.

With regards to alignment of authorisations, some EAPs indicated that they sometimes by-pass certain processes to fast-track the application and facilitate alignment. However, this is not advisable because it results in massive delays – Case study I in Chapter 4 of this dissertation is an evidence of this. There is a general agreement amoungst EAPs that the public participation process is the easiest process to align; for instance, a single notice or advert which meets all the requirements or a single public meeting for all processes. What also comes out strongly is that even aligning processes does not guarantee speedy authorisations. In fact, aligning processes tends to complicate matters further, particularly if the EAP is not familiar with all the processes. Data from the questionnaire suggests that in certain instances, the speediest way is not to try to avoid duplication, but to ensure that all processes are followed completely. Sometimes, no matter how hard EAPs try to align and/or integrate process, it proves difficult, mainly because of different timeframes or no timeframes at all.

Finally, there is acknowledgement by EAPs that sections 24K and 24L of NEMA, *inter alia*, call for more formalised institutional dispensation where aligned and/or integrated authorisations may be issued. They also acknowledge that implementation of such provisions have been minimal throughout the country or non-existent in KZN. However, outside these provisions there are several good experiences and initiatives on alignment of NEMA EIA authorisations and; i) Conservation of Agricultural Resources Act, 43 of 1983 permits, ii) NWA WUL, iii) NEMWA WML, and iv) NEMAQA AEL. While the

foregoing initiatives are not formalised through institutional structures, they present a good working arrangement between authorities which are responsible for different processes and the EAPs who conduct such EIAs. However, no evidence or examples were highlighted where these progressive steps are undertaken. It would be good for KZN to identify areas where these positive initiatives are in place in order for them to be formalised in line with the provisions of sections 24K and 24L of NEMA and cascade them throughout the province.

5.2.4.3 Development proponents

The main problem with the development proponents is that there were only two respondents, making it hard to draw significant or conclusive findings. Furthermore, both respondents were municipal officials, based in the planning and environmental components. However, anecdotal evidence shows development proponents are not well conversant with the provisions that seek to facilitate alignment and integration of processes, and structures within the province which aim to facilitate the implementation of such provisions.

Development proponent's participation in EIA processes is mainly driven by EAPs, who have an overbearing influence on the timeframes and the resources required to complete the process. The decision on whether to lodge separate and/or integrated applications is heavily dependent on EAPs – giving the impression that if integration favours them, then such a process will be followed or vice versa. Development proponents heavily depend on the professionalism of EAPs and may be easily deceived by unscrupulous practitioners. Furthermore, development proponents do not seem to have enough power and legislative recourse against such actions and/or alternatives to unlock any unnecessary delays which may be caused by the EAP's or competent authority's other commitments, negligence and/or incompetence.

The general feelings of development proponents are that EIAs are still mired in a lot of unnecessary delays despite the number of legislative provisions which aim to speed-up processes and facilitate cooperation between all important role-players. They decry, *inter alia*, the:

- excessive economic and opportunity costs caused by delays in attaining authorisations,

- poor or lack of cooperation and coordination of shared responsibilities by authorities, including contradictory requirements by different authorities,
- inadequate and/or selective implementation, application and enforcement of legislation,
- mistakes in the drafting of authorisations, which require elaborate processes to correct, coupled with unreasonable and unenforceable conditions, and
- over-stretched and unprofessional conduct by some EAPs who field more applications than they can handle.

5.2.4.4 Summary

The findings presented above point to high levels of disparities between authorities, EAPs and development proponents on the functioning of the CEG effort and alignment of authorisations in KZN. Clearly, the legislative prescripts are not implemented optimally and no strong relations exist between key role-players. From the findings presented above, it is clear that the inefficiencies in authorisation processes and CEG cannot be addressed by one entity. Therefore, all key role-players must work together. The optimism expressed by the competent authority is encouraging, but the negative views from the EAPs and development proponents are not unwarranted.

The next section provides a discussion and concludes this chapter.

5.4 DISCUSSION AND CONCLUSION

It is clear from the findings that co-operative governance in KZN is not at an optimal level. Most respondents feel that co-operative governance is “poor with some good aspects” or “very poor”. Only the competent authority group gave more positive ratings, even viewing it as “very good”. This may be due to the fact that the competent authority is the administrative authority of NEMA and therefore more likely to be satisfied with the broader thrust of its activities. Also, despite the absence of detailed regulatory processes and guidelines, authorities will be satisfied with the knowledge that the broad principles are in place, while EAPs and development proponents need practical implementable rules and procedures, which may save them time and costs.

The findings also illustrate that alignment of authorisations is not at an optimal level as well. Most respondents feel that it is “very poor” or “poor with some good aspects”. Again, the competent authority group was more positive with its ratings. The findings illustrate that (in spite of defensiveness and subjectivity) generally, all the key role-players in authorisation processes regard the process in the province as inadequate and needing improvement. There is agreement that legislation is in place and detailed regulations and guidelines are needed to ensure that all provisions are applied consistently throughout KZN and the country. This, of course, must be supported by political will and willingness to work collaboratively on all areas of jurisdictional overlap.

Lastly, while the PCEC is viewed as an important institutional structure to facilitate CEG in KZN, its durability and authority over other government entities has yet to be tested. It is evident from the findings that what Bray (2008:19) observed still holds true, i.e., “there is a general misunderstanding of the meaning, aims and effects of co-operative governance; and of how to use administrative structures, procedures and mechanisms to achieve effective and sustainable co-operative environmental governance”. Authorities must take this into cognisance and work together towards the attainment of “sustainable co-operative environmental governance”.

Having attained the research objective of analysing the views of key role-players regarding CEG and alignment of environmental authorisation in KZN, the next chapter concludes and gives recommendations to improve the process in KZN.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

The previous chapter presented, analysed and discussed data generated in the questionnaire administered for this study. This chapter concludes this study and sums up all findings with regards to each objective, before presenting recommendations on how processes may be improved to address the problems identified, and ends with a look at what possible future studies may be considered.

6.1 CONCLUSION

Glazewski (2005:229) correctly points out that "whatever the motivation behind EA, its ultimate success depends on three fundamental mechanisms being satisfactorily carried out: public participation, inter-sectoral coordination and the consideration of alternatives to specific development proposals". It is therefore of critical importance that the public is properly consulted, alternatives thoroughly investigated and cooperation between all important role-players optimised. By-passing, foregoing or half-heartedly undertaking any of these "three fundamental mechanisms" of an EA process is counter-productive and makes the final report not comprehensive enough to facilitate an informed decision. This is important to note in view of the fact that some EAPs sometimes by-pass certain processes which they regard as less important. Case study I shows that this is a misinformed position which leads to massive delays.

While the statutory provisions are in place, one may still come to a conclusion that "the structures, procedures and mechanisms (used) to enhance or achieve overall co-operative governance are inadequate and are often used improperly" (Bray, 2008:19). This study shows that the country has comprehensive environmental authorisation legislation which is regularly updated and improved to respond to any gaps that may be identified during implementation. Evidence from case studies shows that there are still massive delays in authorisation processes, some of which cannot be satisfactorily explained. While this is the case, current processes indicate that authorities, EAPs and development proponents have not taken steps to fully utilise the space provided by legislation to ensure speedy authorisation processes. This study also shows that the judiciary has been playing its role of interpreting and adjudicating environmental authorisation disputes. Perhaps in future, court decisions may force key role-players to

actively implement co-operative governance provisions and alignment of processes. The findings of this study are summarised in Table 13 below.

TABLE 13: Summary of the findings of this study

Research objectives	Findings and comments
1. Investigate literature on CEG & the alignment of environmental authorisation processes	There is a substantial body of literature on co-operative environmental governance, but less on the alignment of authorisation processes
2. Identify legal provisions for CEG & alignment of environmental authorisation processes	NEMA and other pieces of environmental management legislation were identified and the main provisions relating to CEG and authorisation were highlighted
3. Analyse a sample of EIA cases to assess CEG & alignment of environmental authorisation processes	Seven case studies were analysed and there is little evidence of optimal use of the legislated provisions, though two cases showed some elements of alignment and integration (Case studies III and VII, respectively)
4. Analyse the views of key role-players regarding CEG & alignment of environmental authorisation processes	Development proponents and EAPs were not positive regarding CEG and alignment of authorisations compared to authorities, though the latter acknowledged that legislation relating to this has not been fully implemented
5. Formulate recommendations to improve the current state of CEG & environmental authorisation in KZN	This study recommends that the DEA must provide practical guidance for the implementation of CEG provisions and alignment of authorisation processes (see Section 6.2 below)

This study shows that sections 24K, 24L and 24O of NEMA are major legislative strides which seek to improve CEG between all key role-players with regards to environmental authorisations. Whilst other prior initiatives (successive amendments of NEMA and EIA legislation) have achieved some level of success, those attempts are always inadequate in achieving real integration of authorisations. This is always been a big problem for development proponents who have to go from authority to authority, through EAPs, to get various authorisations for a single development. However, while statutes are in place to correct these inadequacies, conversion of such statutes to practical and implementable guidelines is not forthcoming, leading to delays in authorisations. Improving capacity of authorities and political will is necessary to correct this problem as observed by Kotzé *et al*. (2007).

Finally, this study highlights important stipulations in key pieces of environmental legislation which may be utilised to run multiple environmental authorisation processes both efficiently and cost-effectively. It also highlights, most critically, that such processes

must end up with a legally defensible outcome. Also, this study highlights the critical importance of inter-departmental agreements as envisaged in NEMA and EIA regulations in order to facilitate seamless and speedy processing of environmental authorisations. This would reduce cost, duplication of processes, bridge gaps and facilitate cordial working relations between key role-players.

6.2 RECOMMENDATIONS

Based on the findings, it is critical for the DEA to provide guidance with regards to implementation of CEG provisions and alignment and/or integration of processes so as to achieve uniformity across all provinces in the country. Once such guidance is in place, relevant environmental departments in each province should convene a meeting of all key role-players to map out processes and institutional arrangements to operationalise the guidelines in their areas of jurisdiction. These may take the form of formalised or less-formal co-operative agreements as suggested by Kotzé *et al*. (2007). Thereafter, this would have to be extensively and widely communicated to ensure that all key role-players and the public at large are made aware of procedures and how to report deviation from such procedures.

While the foregoing recommendation is important, cognisance has to be given to a study by Fish *et al*. (2010) which found that institutional arrangements and integration cannot be achieved through a simplistic "additive" policy process. These authors point out that "Effective integration requires the development of a new collaborative approach to governance that is designed to cope with scale dependencies and interactions, uncertainty and contested knowledge, and interdependency among diverse and unequal interests." This point is very important because there may be contesting priorities and contradictory information, which may not be solved through continuous addition of policies and guidelines. So, this study recommends that policy guidelines must take into account and integrate practical considerations from a variety of role-players in line with the principle of co-operative government.

Another aspect which needs urgent consideration is the meaning of authorisation. In the environmental arena authorisations are numerous and can include planning approvals, prospecting and mining rights, WUL and general authorisations, AEL, WML, heritage site

permits, removal of protected species permits, etc. Most developments easily trigger a number of the foregoing activities. However, data from the questionnaire suggests that not all of these are always evident in EIA processes, and not all are necessary for consideration in an EIA process. This makes it important to understand what really encompasses authorisations in the context of the need to align processes. This study recommends that environmental authorities must clearly identify the authorisation processes which may be aligned and/or integrated.

What is evident in environmental authorisation legislation is that EAPs must be independent and conduct EIAs without any undue influence from development proponents. While this is critical for the credibility of the EIA study, there seems to be a gap in legislation on the role of development proponents. Seemingly, development proponents are always at the mercy of EAPs and competent authorities. They have no clearly defined course of action in cases where there are costly delays in processes due to negligence, incompetence or unscrupulous and unprofessional conduct of EAPs and competent authorities. Anecdotal evidence suggests that integrated or aligned processes may be unfavourable (financially) to EAPs, but beneficial for the development proponent. This study recommends that the guidelines referred to above should include punitive measures that may be taken against EAPs and competent authorities should there be failure in implementing provisions on co-operative governance and alignment of processes stipulated in sections 24K, 24L and 24O of NEMA.

6.3 FUTURE CONSIDERATIONS

There are some definitive answers that this study could not generate due to limitations and difficulties which are inherent in studies with a similar methodology. These relate to the fact that the information received may not be adequate for a comprehensive analysis of co-operative environmental governance in KZN. Furthermore, the use of questionnaires and the analysis of records may pose problems for researchers with regards to:

- poor filing of records and/or correspondences leading to incomplete records on EIA case files,
- miss-captured data and/or illegible information, particularly dates, may present a problem in determining the timeframes of processes, and

- besides subjectivity, poor response and accessibility; questionnaires inherently have a tendency to elicit defensive answers rather than honest and objective responses.

The foregoing problems must be taken into consideration when future study designs and research methodologies are drawn. Another issue that needs consideration is that, since this study revolves around legislated provisions and implementation thereof, critical analysis of legal provisions are better suited for a critical legal review by legal practitioners, hence a legal expect must be involved in future studies.

Lastly, it must be noted that the optimal use, implementation and application of all the legislative provisions that deal with CEG and alignment of environmental authorisations is still lacking. Therefore, further research, commitment, political will and pooling of resources by all role-players are necessary pre-requisites to reach an ideal position where costly delays would be eliminated and most of the misconceptions and problems associated with environmental assessments would be corrected.

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ANNEXURES

ANNEXURE 1: Institutions approached to answer questionnaire

Entity / Institution	№ of officials approached	Comments
SiVEST SA (Pty) Ltd	2	One (1) response was received – detailed comments were made
AcerAfrica Environmental Management Consultants	2	Response was declined
WSP Environmental (Pty) Ltd	2	One (1) response was received – on behalf of one of the officials approached
Exigent Engineering Consultants	1	Prompt response was received
Kerry Seeping Environ Management	1	Response was received on behalf of the approached official
Guy Nicholson Environ Consulting	1	No response was received after successive reminders
DAEA&RD (Head Office)	4	Four (4) responses were received – 3 from those approached & the 4th from another official who was asked by a colleague to also respond
DAEA&RD (Ethekwini Office)	1	No response was received after successive reminders
DAEA&RD (Uthungulu Office)	1	Prompt response was received
DAEA&RD (Ugu Office)	1	A comprehensive response with detailed comments was received
DAEA&RD (Umgungundlovu Office)	1	Two (2) responses were received on behalf of the official who was approached
Ethekwini Metropolitan Municipality	2	Two (2) responses were received
DEA	2	One (1) response was received
DWA	2	No response was received

ANNEXURE 2: Research questionnaire

<u>Section 1</u>: Background information

1. What role do you or your institution play in the authorisation process

EAP	CA	Proponent	I&AP

---

2. How much experience do you have in the authorisation process

0-2 years	2-5 years	5-10 years	More than 10 years

---

3. What is your level of expertise

Junior Degree	Honours Degree	Masters Degree	Doctoral & post-Doctoral

---

4. What is your field of expertise

Natural sciences	Social sciences	Legal studies	Other (specify)

<u>Section 2</u>: Alignment and/or integration of authorisation processes

5. Mostly, how many authorisations are required in the applications that you deal with

One (1) authorisation	Two (2) authorisations	Three (3) authorisations	More than three (3)

_____

6. Mostly, how many CAs must issue authorisations in the applications that you deal with

One (1) CA	Two (2) CAs	Three (3) CAs	More than three (3)

_____

7. What steps do you take to avoid duplication, ensure seamless and speedy authorisation

Integrate applications	Align processes	By-pass some processes	Other (specify)

_____

8. Which authorisation processes do you find easy to align and/or integrate

EIA & Water use licence processes	EIA & MPRDA permit processes	EIA & Waste licence processes	Other (specify)

_____

9. How would you rate your experience about co-operative environmental governance in KZN

Very poor	Poor with some good aspects	Satisfactory	Very good

_____

10. How would you rate your experience about the implementation and/or application of Sections 24K and 24L of NEMA in KZN

Very poor	Poor with some good aspects	Satisfactory	Very good

_____

Section 3: Concluding remarks

11. Do you have any further comments about co-operative environmental governance and environmental authorisations in KZN

_____

12. What would you recommend must be done to improve the implementation and/or application of Sections 24K and 24 L in KZN

_____

Section 4: Sheet of paper for additional information

ANNEXURE 3: Respondent's views on co-operative governance and alignment of processes

Co-operative governance table – expressed as a percentage

	CA	EAP	Proponent
Very poor	-	-	50%
Poor with good aspects	11%	100%	50%
Satisfactory	56%	-	-
Very good	22%	-	-
Not applicable	11%	-	-

Alignment of processes table – expressed as a percentage

	CA	EAP	Proponent
Very poor	-	25%	100%
Poor with good aspects	11%	50%	-
Satisfactory	45%	25%	-
Very good	22%	-	-
Not applicable	22%	-	-

ANNEXURE 4: Raw data on general comments and suggestions (Questions 11 and 12)

Questions		Answers
Question 11 (further comments on CEG)	CA	1. With S24O being implemented, co-operative governance has increased immensely. A lot of robust approaches taken now where, for instance, local government appoints people to deal with environmental issues
		-
		3. No
		4. Most pieces of legislation does not specify cooperative governance procedures but mentions it as a principle meaning the Intergovernmental Relations Framework Act should be used to not only customise cooperative government but also to formalise cooperative government relationships. This is an involving process most authorities are not eager to undertake
		5. No comment
		-
		-
		8. There has been several good initiatives in this area (as highlighted in 10 above. Also with the implementation of Chapter 3 of NEMA which has similarities with Section 24K &L when one considers the objectives if EIP & EMP the province has significantly improved. The province has a valid EIP which was compiled thorough a consultative process. Annual EIP Compliance Reports are compiled and submitted accordingly. The Committee for Environmental Coordination has also been set up and is fully functional, dealing with the issue of EIP implementation and other cooperative governance issues as they arise
		9. Co-operative environmental governance must be strengthened because environmental management is a concurrent function both Provincial and National Government have a huge role to play
	EAP	1. No matter how hard you try to get everyone involved in an integrated process, it is very difficult, mainly due to the timeframes of the various processes, and certain legislation which does not have timeframes
		-
		3. SA government departments known to be very separate from each other. Thus, it is up to the EAP to streamline approval processes between different government departments. However, integrated applications for NEMA and NEMWA are an improvement. But those handled by DEA still only S only one CA
		-
	Proponent	1. I think KZN is very disadvantaged (could be generalising here but to be specific Ethekwini District). There is insufficient capacity in the CA's office to advise proponents on various aspects of the NEMA. This is very crippling for local authorities as you now find that the CA imposes certain tasks with no guidance whatsoever on how to tackle them. The CA is not concerned with protection of the environment but with ticking the boxes
		2. The practicality of the process is questionable considering that different competent authorities have different interest on a given proposal. For example, a mining application might be favourable to DMR whilst is not supported by the Environmental Department. DMR might authorise the project whilst the environmental department is not in support of it
-		

Question 12 (comments and suggestions on how to improve the process)	**CA**	1. Still in process, no experience with it
		-
		3. As it has not yet been implemented, no recommendation can be made to improve it
		4. Environmental legislation ought to clearly provide for the making of regulations for integration and coordination procedures the procedures as envisaged sin sections 24K and 24L and a time-frame for such publishing of regulations must also be specified. The reason being integration and coordination shall surely benefit the public and will inconvenience the authorities hence the reluctance to effect the provisions
		5. Workshoping EAPs on the process and stricter compliance measures
		-
		-
		8. Firstly, it is critical that DEA provide guidance wrt implementation of this provision as there is a need for uniformity across all provinces. Once this is in place, relevant department should come together to map out processes and institutional arrangements around this. There could be a need for cooperation agreements (formal or less formal). A communication strategy also has to be in place to inform all relevant authorities about these processes Section 24K and L are a major stride in terms of improving environmental cooperative governance especially between "managing departments". Whilst other prior initiatives have achieved some level of success, these were always in adequate in achieving real integration of processes. This was a big challenge for developed who had to run around getting various authorisations for a single activity. These adequacies and loopholes in the environmental permitting processes much has been lost through illegal developments
		9. No comment
	EAP	-
		-
		3. Without guidelines or policies to streamline the processes, little progress will be made. Especially when KZN DAEA&RD and DEA (and DWA) are under resourced and at times inexperienced
		4. Improved provision of resources and staff to provincial offices, and improved communication with EAPs may assist the integration of applications. This is only currently available at national levels
	Proponent	1. We need better professionals to ensure better implementation of these NEMA provisions, people that can apply their minds. There is a lot I could say but I think that would take all day
		2. One authorising department and the other Departments become the commenting authorities