

Are biodiversity offsets a licence to plunder natural resources?

Thanks to Peter Coombes' recent talk to the Vaal branch, my attention has been turned to biodiversity offsets. Offsets are a hot topic among EA practitioners at present. I think this has been stimulated by increasing awareness of the need to conserve our biodiversity and the timely publication of a collaborative report between Insight, a UK investment firm and the IUCN (International Union for Conservation of Nature and Natural Resources).

This report, written by Kerry Ten Kate and colleagues (2004), assesses the business case for implementing biodiversity offsets. They found that there are substantial benefits to businesses that voluntarily implement biodiversity conservation, including maintaining their social licence to operate, avoiding risks to their reputation and keeping the goodwill of regulators.

Of course, there are benefits to society as a whole as well. We would get more in situ conservation activity than occurs now. Conservation efforts would improve through being focussed on areas with a high biodiversity value, instead of highly compromised sites of relatively low biodiversity value. Offsets are a mechanism to integrate conservation of biodiversity into the investment plans of companies. They allow us to place a greater economic value on biodiversity and provide a new source of finance for biodiversity conservation.

It is these last two points, economic value and sources of finance, that led me to ask the question posed in the title of this article: Are biodiversity offsets a licence to plunder natural resources? I have answered the question to my own satisfaction and would like to share with you the information that has led me to my answer.

Biodiversity offsets or conservation offsets are a tool to implement an organisation's "no net loss" or "net benefit" policy with respect to biodiversity. Some definitions include:

"An offset is typically a measure taken to reduce the negative impacts of a project, both primary and secondary, and to help fully mitigate impacts at a project site. The objective of an offset is that, by the end of a project, the status of biodiversity at a particular site is comparatively the same as before the project began." (The Energy and Biodiversity Initiative, 2001)

"Conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to ensure no net loss of biodiversity." (Ten Kate, 2004)

Even though the word "biodiversity" has only been in use since the late 1980s, protecting and conserving biodiversity remains a key focus of the environmental community. The recent promulgation of the South African Biodiversity Act emphasises that this priority has also been recognised by government.

Biodiversity provides a range of ecological functions such as control of disease and flood prevention. There are functions of biodiversity that have not yet been discovered. To those of us (including myself) who are not ecological specialists, biodiversity is the basic characteristic of our natural environment. It is what gives us the opportunity for recreation, relaxation and renewal of spirit.

When the business community, as transformers of natural resources, becomes interested in offsets, it is a cause for concern. A conservation offset is a form of compensation – the business development is seeking to "pay" for its impacts by substituting something of equal or greater value. This places conservation at the level of a transaction. The community and environment must "pay" for the development "investment" and bear the risk of the investment not providing a beneficial return.

If this is the case, then offsets are indeed a licence to plunder natural resources. Once given

the opportunity, developers are sure to leap at the chance to trade the impacts of their developments for a slice of a conservancy.

Of course, this situation has been anticipated by proponents of offsets. Ten Kate (2004) states that offsets are not a substitute for the "no-go" option. This position is echoed by innumerable stakeholders in places such as the US, Europe and Australia, where the use of offsets is recognised by regulators and in legislation. Offsets should only be applied to address the residual biodiversity loss after the mitigation hierarchy of avoid, minimise, mitigate impacts has been applied.

This still leaves the issue of assigning a value to the biodiversity loss or gain. Development is a communal investment. The cost of the investment in terms of consumption of natural resources, including biodiversity, must be less, or at worst equal, to the benefits of the development in terms of sustainable development gains. This requires that biodiversity be given some value so that its relative value against other resources can be determined.

Corporate policies are tending to include concepts such as "no net loss" to biodiversity. Again, this raises the question of how biodiversity is valued so that the proposed loss due to the development can be compensated for. How do we value biodiversity?

As yet, there is no agreement on a single method of placing a value on biodiversity even though attempts have been made to trade biodiversity in a similar fashion to trading carbon credits. The wetland banking system under the US Clean Water Act is a case in point. An entire industry has grown around providing developers with wetland "credits". And yet reviews of wetland mitigation banks in the US suggest that the scheme has resulted in a net gain in wetland area but no gain in wetland functions (Nature Conservation Council of New South Wales Inc, 2001).

Initiatives like wetland banking have created a situation in which biodiversity is traded as a commodity. A biodiversity market. As biodiversity is lost, the remaining centres of biodiversity will increase in value, meaning that more developments can offset their impacts against this greater value, which will increase the value of the remaining centres still further. Clearly, this paradigm leads to a situation in which the globe is covered by development, whose impact is “offset” by a small number of “high value” biodiversity “preserves”. The flaw in this paradigm is in trading only one aspect of biodiversity value, such as acreage, while ignoring other “intangible” benefits of the resource, such as its ecological functions and aesthetic value.

Any consideration of offsets needs to place a value on unknowns and intangibles. This is the key flaw – as a human species we have struggled for our entire existence with placing

objective value on subjective things: art, love, religious beliefs... and now biodiversity.

Our solution to placing value on the subjective has been to involve the community. Through consultation, some consensus is reached regarding the perceived value of subjective concepts. Clearly, the use of offsets by a developer should require buy-in from all stakeholders and the wider community. Perhaps the successful implementation of offsets should be regulated, not by including technical definitions in legislation – which tends to satisfy lawyers rather than conservationists – but by mandating the extent of consultation on the use of offsets, thus allowing us to get closer to a “real” value of biodiversity.

Are offsets a licence to plunder? My answer is an unqualified Yes. We do not live in an ideal world. Control mechanisms are needed to ensure the offset concept is applied responsibly. Inevitably, we will be faced with a compromise

situation. The key question is not whether offsets are a licence to plunder but “can we apply the use of offsets so that plundering is reduced, while biodiversity conservation is increased?”

Terry Harck, senior environmental scientist, Golder Associates Africa

Ed: Because there are a number of uncertainties about biodiversity offsets, papers have been put forward by the International Council on Mining and Metals to stimulate debate in order to reach agreement on if, how and where biodiversity offsets could be used to address development impacts on biodiversity. ‘Good Practice Guidance for Mining and Biodiversity’ (May 2005) is available on the website: www.icmm.com. Anglo’s Peter Coombes was a member of the eight person steering committee who oversaw the preparation of these guidelines and he is the author of the AAplc Biodiversity Action Plan guideline.

Continuing the sustainability debate....

Reflections on sustainability

FROM A MOUSE

The concept of Sustainability is like God. It comes in many forms, some are waiting for the second coming, disbelievers are considered heathen and amongst the faithful mere mention of the word draws reverential, sighed hallelujahs!

In this paradigm, I admit to being a humanist. My eyes tend to glaze over at the mere mention of “sustainability indicators” and philosophical discussions on sustainability; as new jargon proliferates to give fashionable flair to recycled concepts such as “carrying capacity” in the age-old discourse on the tension between humans and natural resources. A mere mouse, I walk through the dark vale of imminent ecological collapse armed with EIA and EMS (my rod and staff). I do, frankly, long for the days when I can lay me down on non-radioactive pastures to feed the sheep of my ideals and drink the sweet waters of deed following word.

But, human nature is essentially self-centred. Calls to the New Environmental Testament ways

of altruism required by the current discourse on sustainability, are being made without a firm foundation. We are, at least in South Africa, still troubled by a lack of mastery of the basics of the Old Testament – adherence to the law/EIA commitments. Only when we reform the current paper shuffling exercise that, in the main, constitutes environmental administration and replace it with one geared to implementation and adaptive management, will the waters part to the promised land of sustainability. Too much environmental administration is still a dog chasing its tail.

I live in hope and am heartened by the few beacons of light I see around me such as, the stand taken by Ingrid Coetzee, the work of the Green Scorpions, budgetary increases for follow up at GDACE and the growing number of smart people I meet in environmental agencies. However, environmental agencies (including sections of DME and DWAF and Agriculture)

in a number of provinces, some with the highest levels of impact in the country, still cannot get it together to send a letter of acknowledgement of receipt of a scoping report or take three months to process it. What hope do they have of following up EIA commitments or permit conditions and promoting sustainability? Environmental administration is still seen as report review and associated paperwork. Actionable outcomes and ensuring their implementation are not even in the frame of reference.

The term Record of Decision is a misnomer – an institutionalised form of wishful thinking. It only becomes a “decision” when implemented. In this respect, the quality of resources available to a society can be measured by the quality of its environmental institutions, their decisions and, most importantly, their ability to get them implemented. If we get this right we may indeed find that “heaven is a place on earth!”

Andrew Duthie

Ed: In his article ‘Of Cats and Mice’ in the April 2005 newsletter, Brett Lawson gave us an alternative model of sustainable development, which he said graphically clearly reflected the primacy of the planet’s ecological functionality, with economic and socio-political sphere’s embedded within it. He commented that he was not sure who had initially come up with this bright idea. Environmental Management Consultant Stephen Davey emailed Brett with a copy of page 43 of the Provincial Government Western Cape Bioregional Planning Manual of October 2003, where this same so called interdependence model of sustainability, represented graphically, is ascribed to Cowling et al, 1999, and the statement is made that “This model illustrates biodiversity and ecosystem conservation (environmental sustainability) as being a prerequisite and enabling factor for achieving sustainable development.”

What is the mixed bag of issues for improving environmental decision-making?

IEM tools and sustainable development

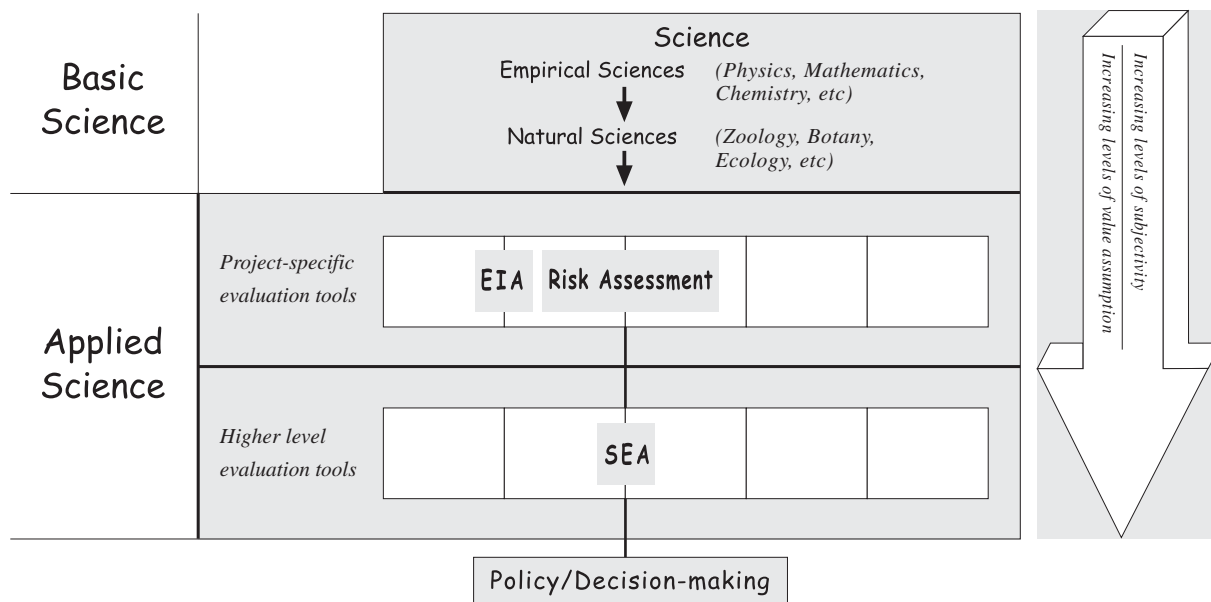
The concept of sustainable development poses new challenges for processes such as Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Environmental Management Systems (EMS) and Life Cycle Analysis (LCA). Today these tools are expected to provide multi-disciplinary information to aid sustainable decisions, and not just to inform decisions about environmental effects (van der Vorst et al, 1999). The assertion that more scientific information means better decisions has been discredited. Tools and processes may now be more sophisticated, but they also unearth basic dilemmas at the heart of environmental decision-making. The dilemma is that EIA practice, which is currently heavily based on science and technical information needs to be expanded to embrace ethical, social and political issues. Promoting EIA processes, which rely heavily on technical scientific information to inform decision-making, is short-sighted (ESRC and GECP, 2000). Practitioners and authorities alike need to recognise that subjective values and political processes influence EIA outcomes to a greater extent than scientific information.

IEM tools and decision-making

The application of environmental tools is aimed at the generation of information feeding into the decision-making process. The question that needs to be posed is whether the tools we have are sufficient or whether there is a need for concepts such as sustainability to infuse the IEM tools and ultimately influence decision-making.

The concept of sustainability is articulated in a broad range of South Africa's public policies, particularly NEMA. The key implementation weakness of NEMA is that its sustainability principles have not been translated into quantitative objectives and targets. Project-specific decisions (such as those for EIA) are therefore not being made with the explicit policy goal of sustainability in mind (Rossouw and Wiseman, 2004). Cascading the objective of sustainability from policy intent to project decision-making should be promoted in the following applications such as:

- State of Environment (SOE) reporting and sustainability indicators, which should be actively used to guide EIA decision-making
- EIA, which should encourage addressing the full life cycle of processes and products through the application of LCA



Scientific values

Engel and Engel (1990) believe that science needs a revised environmental ethic. Natural science has a reputation of being value free and objective. This view is inherited from the basic natural science disciplines like mathematics, physics and chemistry and transferred into applied assessment tools such as EIA. However, these tools are never free of value (see Figure 1).

The exclusive authority of scientific expert knowledge should be questioned, particularly in value-laden processes such as EIA. The perception that expert knowledge is neutral is a fallacy. Scientific approaches and results reflect value judgements and underlying assumptions about society. These assumptions, in turn, are related to the particular positions, locations and interests of scientists. Scientific expertise and judgement in EIA specialist studies cannot therefore claim to be truly objective (ESRC and GECP, 2000).

Figure 1: Increasing levels of subjectivity and value assumption in information provision are evident as one moves from the basic sciences to the applied evaluation tools such as EIA and SEA.

- EMS, which needs to be guided by the use of Clean Technology rather than the focus on impact mitigation and end-of-pipe solutions

Cascading policy objectives (through SOE and SEA) and promoting a tiered framework for decision-making has been criticised as being unrealistic and a reflection of a technocratic conceptualisation. However, there are merits in promoting the need to quantify policy objectives and use these as measurables to guide and assess the performance and efficacy of decision-making at lower levels (Figure 2).

Conclusions

Environmental decision-making needs to take account of the diverse perceptions, values and ethics that have to be recorded and evaluated along with formal scientific information. Combining quantitative data

and qualitative information by using novel integrative methods is an important area, which needs further work. The development of such an integrative approach would greatly enhance environmental decision-making. Scientists involved in EIAs should be required to extend their

interpretation of impacts beyond the limits of their professional subject and to emphasise those values that are perceived by society to be important.

*Nigel Rossouw
President of IAIAAsa*

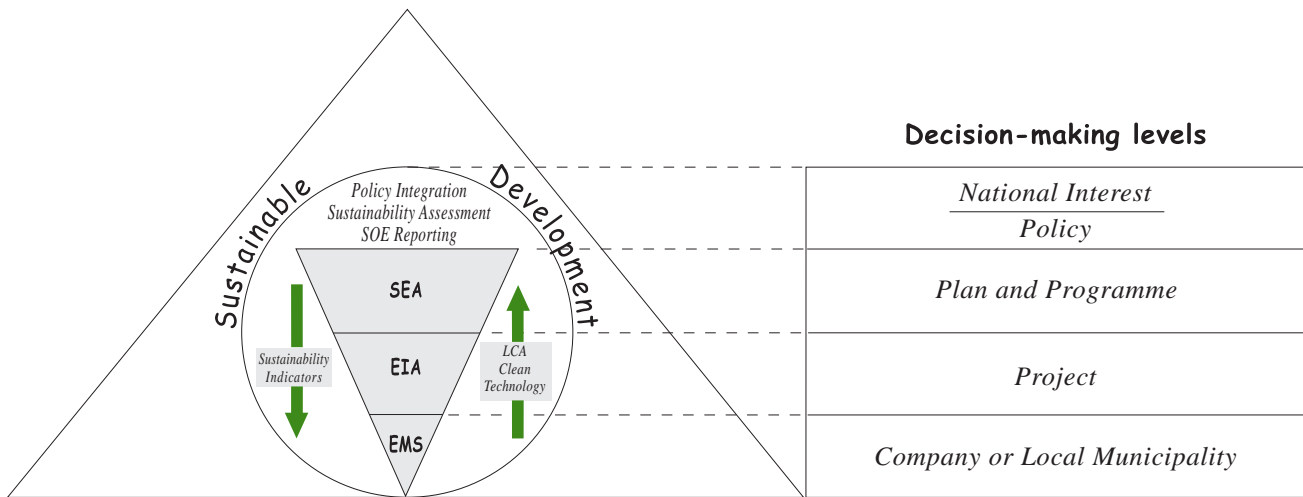


Figure 2: The idealised tiered framework for IEM and decision-making.

Cultural Heritage Resources

How do they fit into an Environmental Impact Assessment?

Two papers presented at the recent International Congress of the Pan African Archaeological Association for Prehistory and Related Studies raised the issue of heritage practitioners only being included at the final stage of an EIA to fulfil a legal requirement, and made the point that their inputs were often misunderstood. In some recent cases, this section of the EIA has been omitted and Records of Decision have been issued by Provincial Departments. At the commencement of development, a costly suspension of a particular project was necessary due to the discovery of graves. In cases at Polokwane and Lydenburg, large archaeological sites were overlooked.

We should ask ourselves whether cultural heritage resources and the requirements for the assessment of these within the EIA process are taken seriously?

The National Heritage Resources Act (NHRA (Act 25 of 1999)) states that the relevant Heritage Authority needs to be informed at an early stage of any development that includes,

- the construction of a road, wall, powerline, pipeline, canal or other similar form of linear development or barrier exceeding 300m in length;
- the construction of a bridge or similar structure exceeding 50m in length;
- any development or other activity which will change the character of a site:
 - exceeding 5 000m² in extent; or
 - involving three or more existing erven or subdivisions thereof; or

- involving three or more erven or divisions thereof which have been consolidated within the past five years; or
- the costs of which will exceed a sum set in terms of regulations by SAHRA or a provincial heritage resources authority;
- the re-zoning of a site exceeding 10 000m² in extent; or
- any other category of development provided for in regulations by SAHRA or a provincial heritage resources authority.

The above also includes all developments stipulated in NEMA and the Petroleum and Minerals Development Act, which require the inclusion of an assessment of cultural heritage resources. Thus, the relevant heritage authority must be informed of all developments whether they qualify for exemption from EIA regulations or not.

Unfortunately, many Environmental Practitioners still regard the assessment of cultural heritage as an unnecessary expense that influences their competitiveness in submitting a quote - a sentiment that has been expressed on numerous occasions. This exclusion of a competent evaluation of cultural heritage resources often leads to a general statement of this nature '...No site of cultural significance found during a scan of the development area...'. This kind of statement is fortunately becoming less frequent in EIA Reports.

Reading the National Heritage Resources Act (NHRA (Act 25 of 1999)) and grasping the extent of cultural heritage resources is quite sobering. With some generalisation, cultural

heritage includes archaeological sites and remains, architectural structures (ruins or existing structures), oral history and graves - most of these being protected under NHRA if they are older than 60 years. Exceptions do occur with the interpretation of this general 60 year protection clause that is built into NHRA.

It is as important to utilise a qualified heritage practitioner to conduct the Heritage Impact Assessment section, within the larger Environmental Impact Assessment process, as it is to use a qualified person to assess and model air quality indices. To identify, assess and provide mitigation measures for a cultural heritage resource on the site of a proposed development is as important as the identification of red data species and sensitive landscapes. The discovery of graves or an archaeological site during construction can delay a project for months, pushing retaining costs into millions of rands.

The destruction of a cultural heritage site without the proper authorisation can lead to the confiscation of all construction equipment and large fines imposed by the relevant heritage authority. The community outcry usually has a bigger negative effect on the project than the fines imposed.

I would like to think that we all practice our fields of expertise to conserve our environment for perpetuity. This includes preserving our cultural heritage.

*Wouter Fourie, director:
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LEGAL UPDATE

Introduction

Significant developments in the period under review for this update are the commencement of the *National Environmental Management Amendment Act*, 46 of 2003, and expiry of the period within which amnesty applications had to be made under the *National Environmental Management Act*, 107 of 1998 (NEMA).

Health and safety

The President has proclaimed the commencement date of specified sections of the *National Health Act*, 61 of 2003, as 2 May 2005 (Proclamation R19 of 18 April 2005). The proclamation does not repeal all remaining sections of the old *Health Act*, 63 of 1977, which remain in place, as do the regulations made under the Act. Under the *Medicine and Related Substances Act*, 101 of 1965, certain medicines have been excluded from the operation of the regulations (GN R325 of 8 April 2005). Under the *Foodstuffs, Cosmetics and Disinfectants Act*, 54 of 1972, the Health Minister has amended regulations relating to permitted maximums of pesticide residues in foodstuffs (GN R247 of 24 March 2005), included Neotame in the Regulations Relating to the Use of Sweeteners in Foodstuffs (GN R248 of 24 March 2005) and published regulations concerning marine biotoxins (GN R491 of 27 May 2005). The Minister has also authorised the Cape and Johannesburg Metropolitan Municipalities, as well as the Ehlanzeni District Municipality, to be inspectors under the Act (GN R342 of 15 April 2005) and amended existing authorisations for certain local authorities to enforce relevant provisions in the Act (GN R429 of 13 May 2005). Under the *Health Professions Act*, 56 of 1974, regulations have been published stipulating the qualifications to register as environmental health assistants (GN R454 of 20 May 2005). The North West Health Bill has been published for public comment (PN159 of 23 March 2005).

Under the *Compensation for Occupational Injuries and Diseases Act*, 130 of 1993, the maximum earnings with reference to which the

assessment of an employer should be calculated have been increased (GN R199 of 11 March 2005). Under the *Occupational Health and Safety Act*, 85 of 1993, a notice has been published exempting entities performing load testing on all lifting machinery, subject to conditions of registration and only until 29 April 2005 (in GN R158 of 18 February 2005). The Labour Minister has also published draft regulations to replace the existing Electrical Machinery Regulations (in GN R183 of 4 March 2005). Comments were required within 90 days of publication.

Under the *Agricultural Products Standards Act*, 119 of 1990, standards have been published regarding food hygiene and safety of certain plant-based agricultural food products for export (GN R707 of 13 May 2005). Draft amendments to regulations made under the *Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act*, 36 of 1947, were published for comment within four weeks after publication (GN R348 of 15 April 2005). The amendments concern fees payable for registration of remedies, sterilising plants and pest control operators. Further draft regulations regarding agricultural and stock remedies were also published under the Act for comment by 1 July 2005 (GN R502 and GN R503, both of 3 June 2005). Also under the same Act, the Minister has prohibited the use of agricultural remedy Monocrotophos by regulation (GN R154 of 25 February 2005). Under the *Agricultural Pests Act*, 36 of 1983, the Minister has made regulations amending the control measures (GN R243 of 24 March 2005) and the fees payable for specified services (GN R244 of 24 March 2005). Further amendments were also made to those regulations (GN R457 of 20 May 2005).

Environment

General

The President has proclaimed 1 May 2005 as the commencement date of the *National Environmental Management Amendment Act*, 46 of 2003 (Proclamation R20 of 28 April 2005). The Act deals with, amongst other matters, the appointment of environmental management inspectors, the power of those inspectors to check compliance with permit conditions and the issuing of compliance notices. Proposed regulations have also been published under NEMA, which address the issue of identity cards for the environmental management inspectors (GN 345 of 8 April 2005).

The regulations published under the *Plant Improvement Act*, 53 of 1976, dealing with Table 1 which refers to fees payable for services (GN R185 of 11 March 2005) and the establishment of varieties, plants and propagating material, have been amended (GN R477 of 27 May 2005).

Under the *Genetically Modified Organisms Act*, 15 of 1997, a notice has been published that amends the existing regulations regarding the fees payable for applications relating to the importation, exportation and the contained use of GMOs (GN R478 of 27 May 2005).

The Minister has also published levies under the *Sea Fisheries Act*, 12 of 1988, which are to be imposed on fish and fish products with effect from 1 April 2005 (GN 252 of 24 March 2005). The September 1998 regulations published under the *Marine Living Resources Act*, 18 of 1998, have been amended in relation to the catching seasons and times for the landing of West Coast rock lobster (GN 426 of 3 May 2005) and in providing for permits to be issued for three types of line fishing, namely: traditional line fishing, tuna pole fishing and hake handline fishing (GN 329 of 6 April 2005). A number of draft policies concerning the allocation and management of long-term commercial fishing rights in the various fisheries sectors have been published for comment (GN 396 – GN 400 of 4 March 2005). The draft policy concerning the allocation and management of long-term fishing rights in the traditional line-fishing sector was also published for public comment (GN 592 of 11 April 2005). Proposed application fees payable in respect of applications for commercial fishing rights have also been published (GN 327 of 4 April 2005). The *Marine Living Resources Amendment Bill*, 16 of 2005, will amend the *Marine Living Resources Act* by repealing the provisions dealing with, amongst other matters, the Fisheries Transformation Council and by regulating the granting of rights and appeals.

A policy framework for disaster risk management has been released under the *Disaster Management Act*, 57 of 2002 (GN 654 of 29 April 2005). The policy covers, amongst other matters, disaster risk management, risk assessment and risk reduction.

The *National Energy Regulator Act*, 40 of 2004, which is aimed at establishing a single regulatory authority for electricity, piped gas and petroleum pipeline industries has been assented to by the President but will commence on a date to be proclaimed (GN 340 of 6 April 2005). Nominations for members of the National Energy Regulator have also been called for (GN 653 of 29 April 2005).

Water

The Minister of Water Affairs and Forestry has levied rates and charges under the *National Water Act*, 36 of 1998, and the *Water Research Act*, 34 of 1971, for the Water Research Fund – which charges replace the previous charges published in 2003 (GN 249 of 24 March 2005).

The Mvoti to Mzimkulu Catchment Management Agency situated in KwaZulu-Natal has been established (GN 484 of 20 May 2005), with further catchment management agencies being proposed for Thukela and Usutu to Mhlathuze, respectively (GN 482 and GN 483 of 20 May 2005).

A number of Water User Associations have also been established. These include the following: the Spruit River Water User Association in Wellington (Province of the Western Cape) (GN 323 of 8 April 2005); the uPhongolo Dam Water User Association, (KwaZulu-Natal Province) (GN 324 of 8 April 2005); and the Houdenbeks River Water User Association, Ceres (Province of the Western Cape) (GN 458 of 20 May 2005).

Protected areas

Draft regulations for the proper administration of special nature reserve, National Parks and World Heritage Sites have been released under the *National Environmental Management: Protected Areas Act*, 57 of 2003 (GN 417 of 11 March 2005). These regulations address, amongst other things, biodiversity management and conservation issues, permissible activities and community-based natural resource use in protected areas.

The St Croix Island Reserve, the Stag Island Provincial Nature Reserve and the Algoa Bay Island Provincial Nature Reserve, including Seal Island Provincial Nature Reserve and Black Rocks Nature Reserve, have been declared under the *National Parks Act*, 57 of 1976, as part of the Greater Addo Elephant National Park (GN 281 of 1 April 2005).

Under the *National Heritage Resources Act*, 25 of 1999, the South African Heritage Resources Agency (SAHRA) has provisionally protected the following areas as heritage resources: Robben Island (GN 514 of 3 June 2005); Historical Green Point Burial Ground (GN 515 of 3 June 2005); Cape Winelands Cultural Landscape (GN 516 of 3 June 2005); and Freedom Park (GN 517 of 3 June 2005). SAHRA has also published a draft policy on the protection, management and conservation of heritage objects (GN 500 of 30 March 2005). Heritage Western Cape has published notification continuing the legal protection of certain properties, conservation areas and gardens of remembrance as heritage resources in the Western Cape (PN 106 of 31 March 2005).

International law

The Commission on Sustainable Development (CSD) held its thirteenth session at the United Nations Headquarters in New York from 11 to 22 April 2005. The CSD is tasked with reviewing the implementation of outcomes from the World Summit on Sustainable Development. On 19 April 2005, the South African people and President Mbeki were recognised for outstanding

achievements in the field of the environment at a United Nations Environment Programme (UNEP) event in New York.

The second meeting of the parties to the Biosafety Protocol took place from May 30 to June 3, 2005 in Montreal.

Miscellaneous

The *National Environmental Management Amendment Act*, 8 of 2004, came into effect on 7 January 2005. Section 7 of the Act allows anyone who has commenced or continued a listed activity in contravention of the *Environment Conservation Act*, 73 of 1989, (the ECA) to apply under section 24G of NEMA for authorisation for that activity. The period for submission of such an application ended on 6 July 2005. Anyone who did not lodge an application may face prosecution under the ECA for the offence in question. However, the failure to make application does not constitute an offence under NEMA. This legal position may change once activities are listed under NEMA.

In April 2005, the Minister of Environmental Affairs and Tourism signed a memorandum of understanding with the Minister of Water Affairs and Forestry, providing for the transfer of approximately 97 000ha of land to South African National Parks. This will enable the future establishment of the Garden Route Mega Reserve, encompassing the Tsitsikamma National Park, the Wilderness National Park and the Knysna National Lake Area.

On 3 July 2005, the Deputy Director General of Environmental Affairs and Tourism issued an ROD for the construction of permanent toll plazas on Chapman's Peak Drive.

Case law

In the Eastern Cape, the Environmental Management Inspectorate (aka the Green Scorpions) concluded a plea bargain with Mr Darryl Tucker, who was prosecuted for the dumping, storing and illegal disposal of large quantities of hazardous waste in contravention of the ECA. He was sentenced to the maximum fine under the Act of R100 000 and five years imprisonment, suspended subject to compliance with conditions that include cleaning up the site at his own cost.

There have been various judgments handed down since the last IAIA update. The first is *Hugh Stanley v Avontura Ltd and Others* heard in the Cape Provincial Division. Judgment was delivered on 25 February 2005. The central legal issue was whether the plaintiff should be granted a right of way over Avontura's property for the purpose of constructing a road, when it was not yet known whether authorisation would be granted, under the ECA, for construction. The court granted the right of way and held that it was not required to refer to environmental considerations in doing so. The Supreme Court of Appeal gave judgment on 22 March 2005 in

The Minister of Environmental Affairs and Tourism v Scenematic 14 (Pty) Ltd. The Minister successfully appealed against a High Court Order setting aside the decision of the Deputy Director-General of Marine and Coastal Management to refuse Scenematic commercial fishing rights in the hake longline sector. The judgment discussed several important administrative law principles in relation to the DDGs decision.

The third judgment was handed down in the Transvaal Provincial Division during March 2005 in the matter of *Capital Park Motors CC and Others v Shell South Africa Marketing (Pty) Ltd*. Capital Park sought and obtained an interim interdict preventing Shell from operating a fully constructed filling station without authorisation under section 22 of the ECA, pending the exercise of certain statutory remedies. The court found that Capital Park had legal standing, due to potential socio-economic harm it faced if the filling station traded, and held that an authorisation under section 22 of the ECA could be issued for identified activities after their completion.

Lastly, in *Wildlife and Environmental Society of South Africa (WESSA) v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others*, the MEC and the second respondent sought costs against WESSA after it withdrew an application for the review and setting aside of an authorisation, granted under section 22 of the ECA, for the construction of an incinerator. The Eastern Cape High Court found that WESSA had not taken due care to clarify the facts upon which its application was based and that an error of fact had led to the subsequent withdrawal of the application. Accordingly, WESSA had not acted reasonably and the protection available under section 32(2) of NEMA, for unsuccessful litigants acting in the public interest and in the interest of protecting the environment, was not available to it.

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