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WESTERN CAPE PROVINCIAL EVALUATION PROJECT

EVALUATION OF THE IMPLEMENTATION AND IMPACT OF ENVIRONMENTAL IMPACT ASSESSMENT ('*EIA*') DECISION MAKING

ABRIDGED FINAL REPORT

Prepared for:

Directorate Planning and Policy Coordination
Western Cape Department of Environmental Affairs and Development Planning

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10 October 2014

Our ref: DEADP: EIA evaluation project/D007-017

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Acronyms and Abbreviations

BAR	Basic Assessment Report
CCT	City of Cape Town
Constitution	Constitution of the Republic of South Africa, 1996
D-MOSS	Durban Municipality Open Space Systems
DPME	National Department of Performance Monitoring and Evaluation
EAP	Environmental Assessment Practitioner
EA&DP	Department of Environmental Affairs and Development Planning
ECA	Environmental Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
EIA Regulations, 2010	Environmental Impact Assessment Regulations, 2010 (GNR 543 of 18 June 2010)
EIAR	Environmental Impact Assessment Report
EMP	Environmental Management Plan
I&APs	Interested and Affected parties
LUPO	Land Use Planning Ordinance 15 of 1985
M&E	Monitoring and Evaluation
MEC	Member of the Executive Council
NEMA	National Environmental Management Act, 107 of 1998
NEP	National Evaluation Plan
PAJA	Promotion of Administrative Justice Act, 3 of 2000
PEP	Provincial Evaluation Plan 2013/14–2015/16
PSOs	Provincial Strategic Objectives
RBM&E	Results-Based Monitoring and Evaluation
S&EIR	Scoping and Environmental Impact Reporting
SCA	Supreme Court of Appeal
SOPs	Standard Operating Procedures
TOR	Terms of Reference

Acknowledgements
We would like to acknowledge the inputs of Anique Rossouw and Paul Hardcastle of the Directorate Planning and Policy Coordination, the members of the Project Steering Committee and all the officials who attended the 11 July workshop for their insights and contributions.

POLICY SUMMARY

One of the challenges facing the Western Cape Department of Environmental Affairs and Development Planning is the high number of judicial reviews of its administrative decisions. These legal challenges cause additional administrative burdens, which in turn have cost and economic implications that are felt not only by the applicant and Department, but can also impact on the economy of the Province. Accordingly, the Western Cape Provincial Government prioritised the evaluation of the implementation and impact of EIA decision making in the Province as a priority in the Provincial Evaluation Plan (PEP) 2013/14–2015/16. This evaluation is aligned with the Provincial Strategic Objective 7: *Mainstreaming sustainability and optimising resource-use efficiency*, and at the national level with Delivery Outcome 10: *Protect and enhance our environment assets and natural resources*. The purpose of the evaluation is to strengthen the current system of EIA review and decision making and identify ways in which to mitigate the high number of litigation against EIA decisions.

The key implications of the findings of the evaluation are summarised as follows:

- From the analysis of the class A case law it is evident that the ground of review most often relied on is that the decision maker took irrelevant considerations into account (8 cases rely on this ground). This is closely followed by the decision maker not being authorised to make the decision (6 cases), the decision maker being biased (5 cases), mandatory and material procedures or conditions prescribed by an empowering provision not being complied with (6 cases) and the decision reached by the decision maker was procedurally unfair (5 cases). Most class A cases reviewed were set aside in wholly and referred back to the decision maker for reconsideration.
- A single ground of review is sufficient for a matter to be set aside even though a number of grounds may have been raised. Accordingly, it would be incorrect to conclude that if ten grounds had been raised in a particular matter and one of these grounds was successfully defended, then this meant that the Department's decision making had been proved right.
- With some exceptions the Department's SOPs are very detailed and generally comprehensive in respect of the procedural steps that must be taken. This is important given that procedural non-compliance was identified as a common review ground. However, the SOPs do not refer to the broader constitutional and legislative context set out in PAJA and NEMA. Neither do the SOPs or Guidelines provide any guidance as to how the various reports in the process must be assessed to determine whether they must be accepted or rejected in terms of the EIA Regulations. Most significantly, there is no guidance on how to make a decision to grant or refuse an environmental authorisation. These gaps must be addressed to ensure more robust decision making.
- Practically speaking, the easiest grounds to prove are procedural grounds. Procedural defects in the decision making process tend to be more cut-and-dried than merit based arguments. Focusing on the grounds which are the easiest to prove is the most rational place to start in making EIA decisions more defensible. It is also the easiest defect to fix as it is usually a simple yes or no answer. Accordingly the Department should start by developing checks to strengthen its procedural compliance first and follow by improving the decision making process qualitatively (i.e the reasoning process). Consideration should also be given to strengthening the existing internal knowledge management systems to improve communication on judgements and avoid the same mistakes being repeated.

EXECUTIVE SUMMARY

Purpose and scope of the project

The Western Cape Department of Environmental Affairs and Development Planning (DEA&DP) appointed EnAct International (EnAct) to evaluate court challenges against environmental impact assessment (EIA) and other administrative decisions made by the Department. This Project is part of the Western Cape Provincial Government's Provincial Evaluation Project (PEP) and aims to evaluate the implementation of the EIA review and decision making process in the Province. The purpose of the evaluation is to strengthen the current system of EIA review and decision making and identify ways in which to mitigate the high number of litigation against EIA decisions.

Report structure

The report is organised into the following sections:

- **Background** which briefly outlines the purpose of the Project, the scope of work and expected outcomes;
- **Project approach and methodology** which includes a description of the approach and methodologies used in compiling the case law database and analysis, as well as the criteria for selecting cases and questions guiding the analysis of cases and the EIA decision making framework**;**
- **Principles of administrative law** which introduces the principles of administrative law which govern decision making by authorities and serve as overarching framework for all administrative decisions;
- **EIA decision making framework** which sets out the legislative context for EIA decision making and provides a roadmap of the fundamental elements in the EIA decision making process. The analysis of the Department's operating procedures and guidelines is captured in this section which focuses on the correctness of procedures, completeness of information, what is relevant to the decision and how conclusions are reached in decision making;
- **Case analysis findings and trends emerging from court challenges** which discusses the following major trends in respect of the selected case law based on analysis of the grounds of review: changed circumstances, requirement of authority, procedural fairness, disjointed decision making, reasonableness and effects of government inaction; and
- **Lessons learned and recommendations** which builds on the case analysis and highlights the major lessons from the case law and recommends measures that could be introduced to improve decision making and strengthen operating procedures and systems within the Department.

Key findings in respect of the EIA decision making framework and case law

In order to evaluate the impact of EIA decisions and make recommendations for improving decision making, the Department's internal policies, SOPs and guideline documents on the EIA decision making process were reviewed to establish whether the internal procedures and practices comply with the legal requirements; what guides and informs decision making; and what measures exist to ensure consistency and legal compliance.

The review of the case law was done in accordance with the set of parameters designed to inform the analysis of trends and lessons learned. These parameters included a summary of facts and grounds of review; whether the challenge was substantive or procedural and the Department's position; and the overall outcome (settled, decision overturned, upheld or

returned to decision maker with directives). At the Department's request consideration was also given to:

- where a court held that the Department had executed its obligations and duties under the application legislation correctly in making the decision that had been taken under review; and
- where a judgement that had been made was wrongly decided or gave rise to bad precedent having been created.

The overarching objective of classifying and selecting cases was to isolate those cases able to improve the EIA decision making process and make the Department's decisions more defensible. In other words, cases which illustrated what the Department was doing wrong; what it was doing well; and what other decision makers were doing right or wrong. Cases were classified into the following three classes, namely cases involving the review of EIA decisions made by the Department (class A); cases involving the review of other administrative decisions made by the Department such as land use planning decisions (class B); and cases involving the review of administrative decisions made by other authorities.

From the analysis of the class A case law it is evident that the ground of review most often relied on is that the decision maker took irrelevant considerations into account (8 cases rely on this ground). This is closely followed by the decision maker not being authorised to make the decision (6 cases), the decision maker being biased (5 cases), mandatory and material procedures or conditions prescribed by an empowering provision not being complied with (6 cases) and the decision reached by the decision maker was procedurally unfair (5 cases). Most class A cases reviewed were set aside in wholly and referred back to the decision maker for reconsideration.

A single ground of review is sufficient for a matter to be set aside even though a number of grounds may have been raised. Accordingly, it would be incorrect to conclude that if ten grounds had been raised in a particular matter and one of these grounds was successfully defended, then this meant that the Department's decision making had been proved right.

With some exceptions the Department's SOPs are very detailed and generally comprehensive in respect of the procedural steps that must be taken. This is important given that procedural non-compliance was identified as a common review ground. However, the SOPs do not refer to the broader constitutional and legislative context set out in PAJA and NEMA. Neither do the SOPs or Guidelines provide any guidance as to how the various reports in the process must be assessed to determine whether they must be accepted or rejected in terms of the EIA Regulations. Most significantly, there is no guidance on how to make a decision to grant or refuse an environmental authorisation. These gaps must be addressed to ensure more robust decision making.

Practically speaking, the easiest grounds to prove are procedural grounds. Procedural defects in the decision making process tend to be more cut-and-dried than merit based arguments. Focusing on the grounds which are the easiest to prove is the most rational place to start in making EIA decisions more defensible. It is also the easiest defect to fix as it is usually a simple yes or no answer. Accordingly the Department should start by developing checks to strengthen its procedural compliance first and follow by improving the decision making process qualitatively (i.e the reasoning process). Consideration should also be given to strengthening the existing internal knowledge management

systems to improve communication on judgements and avoid the same mistakes being repeated.

Lessons learned from findings and recommendations

The identification of lessons learned from the existing internal operating procedures and systems and formulation of recommendations to strengthen these procedures and systems was guided by the following considerations:

a) How should the decision maker ensure that operating procedures and systems comply with the legal requirements?
b) What measures are needed to address weaknesses and gaps in the current operating procedures and systems and ensure that lessons learned through decisions taken on review are captured and applied in future decision making?

Specific recommendations are made in respect of strengthening the Department's existing knowledge management systems, improving the formulation of conditions of authorisation and addressing gaps and weaknesses in certain of the Department's standard operating procedures.

The following questions guided the identification of lessons learned from the case law and formulation of recommendations to improve decision making:

a) How can the trends be utilised to further strengthen the current environmental impact assessment review and decision making process?
b) What are the lessons learnt from other relevant judgments, challenging the Department and other decision makers, which can be further applied to approve the Department's current environmental impact assessment review and decision making framework?

Making administrative decisions more defensible require the systematic elimination of reviewable defects in the decision making process. Accordingly the recommendations made in the report focus on measures that will strengthen procedural compliance with regard to the requirement of authority, procedural fairness, reasonableness, providing reasons, dereliction of constitutional and statutory obligations and disjointed decision making.

1. INTRODUCTION

The Western Cape Department of Environmental Affairs and Development Planning (DEA&DP) appointed EnAct International (EnAct) to evaluate court challenges against environmental impact assessment (EIA) and other administrative decisions made by the Department. This Project is part of the Western Cape Provincial Government's Provincial Evaluation Project (PEP) and aims to evaluate the implementation of the EIA decision making process in the Province with the view to strengthening the current system of review and decision making and ensuring that the Department's decisions are more defensible and sustainable.

The report structure is broken down into the following three key sections: Firstly the wider context which is described in the Introduction, Background and Project approach and methodology; followed by a short overview of the 'building blocks' underpinning the project namely the Principles of administrative law and EIA decision making framework; and finally the analysis and findings which form the bulk of the report and describe the Case analysis findings and trends emerging from court challenges and Lessons learned and recommendations.

2. BACKGROUND

2.1 Purpose of the Project and scope of work

The Department is faced with an increasing number of court applications challenging its decisions in terms of planning and EIA legislation. Judicial review in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) is the primary method used to challenge the Department's EIA decisions and have substantial negative implications for the Department in terms of costs, time delays and additional resources and capacity required. In response to the above the Department intends to identify and utilise the lessons learnt from court challenges in order to inform ways of strengthening the current system of environmental impact assessment review and decision making within the Department (the Project). The Project's aim is to ensure more defensible decisions and more sustainable decision making by the Department.

The Project scope envisages three phases. The first phase concerns the identification and compilation of databases containing relevant case law reviewing EIA decisions by the Department, other relevant decisions by the Department and relevant decisions made by other competent authorities. The second phase concerns the review and analysis of the listed cases to identify trends, lessons, gaps and challenges relating the existing EIA decision making process. During the third phase, the findings of phase two are used to formulate recommendations and guidelines on how to improve the existing system to make EIA decisions more defensible.

2.2 Expected outcomes

The Project is included as one of the 10 evaluations agreed upon as provincial priorities in the Provincial Evaluation Plan (PEP), 2013/14–2015/16. The expectations contained in the PEP and those ultimately agreed to for the Project differ to a degree. The key focus of the PEP evaluation is to seek ways of improving policies, procedures and processes relating

to EIA "in order to reduce court cases". From the outset of the Project, the parties acknowledged and agreed that the public will litigate regardless of the quality of decisions and that the recommendations should therefore be aimed at putting the Department in a better position to successfully defend its decisions.

The PEP evaluation methodology is statistical in nature, but this methodology was found to be inappropriate and unhelpful for this Project. Firstly, only one of the three classes of cases analysed are related to EIA decisions by the Department and secondly, only a small selection of EIA related court challenges were analysed, many of which pending at this time. Accordingly, the sample is not a statistically correct reflection of the challenges to date and is incapable of providing credible statistics relating to the number of challenges, the number of successful challenges, litigation costs or correlations between implementation/ challenges.

Through ongoing engagement with the Department and Project Steering Committee (PSC), the evaluation focus of the Project shifted to more pragmatic outcomes aimed at ensuring that the decisions by the MEC are upheld on review.

3. PROJECT APPROACH AND METHODOLOGY

3.1 Project approach

The following factors played a role in determining how to approach the evaluation of the implementation and impact of EIA decision making in the Province. The main consideration was to ensure that the approach would achieve the primary purpose of undertaking the evaluation as specified in the TOR[1]. From the stated project it was clear that the work needed to focus on court challenges and identify ways in which to strengthen and improve the Department's current system of determining whether or not an EIA had been carried out correctly, and whether or not the resulting information was adequate, to make a decision to grant or refuse authorisation.[2] Another consideration was the importance of producing deliverables that would not only meet the Department's expectations and requirements of the TOR, but would also be practical and add value.

In light of the above considerations, the underlying approach entailed close and regular engagement with the Department, through its project manager and PSC. This ensured that the expectations of both the Department and Provincial Evaluation Plan Project were taken into account throughout the Project's duration and in respect of each of the key Project phases and activities. Furthermore, this served to ensure that the deliverables were aligned with the Department specific need to improve its EIA decision making and ability to formulate defensible and robust decisions.

The engagement comprised regular progress meetings with the PSC, regular written progress reports, a workshop with key Departmental officials and ongoing communication with the Departmental project manager. Based on these engagements certain refinements were made to the compilation of the case law database, the review and analysis of case law, review of the Department's decision making framework, and the identification of

[1] Paragraph 1.2 of the Terms of Reference, p2.
[2] Section 1 of NEMA defines "review", when used in Chapter 5, to mean "the process of determining whether an assessment has been carried out correctly or whether the resulting information is adequate in order to make a decision.

trends, lessons learned, gaps and challenges. The refinements were captured in the action minutes of the inception and progress meetings and the bi-monthly progress reports.

3.2 Project methodology

For purposes of project work flow planning, the high level phases and major activities identified in the TOR were refined and broken down in more detail to identify the specific activities and tasks that needed to be undertaken. These were then grouped according to the logical work flow[3] into six project activity phases in a detailed Project Work Plan. The phases are illustrated in the figure below and described in more detail in the Project Work Plan.

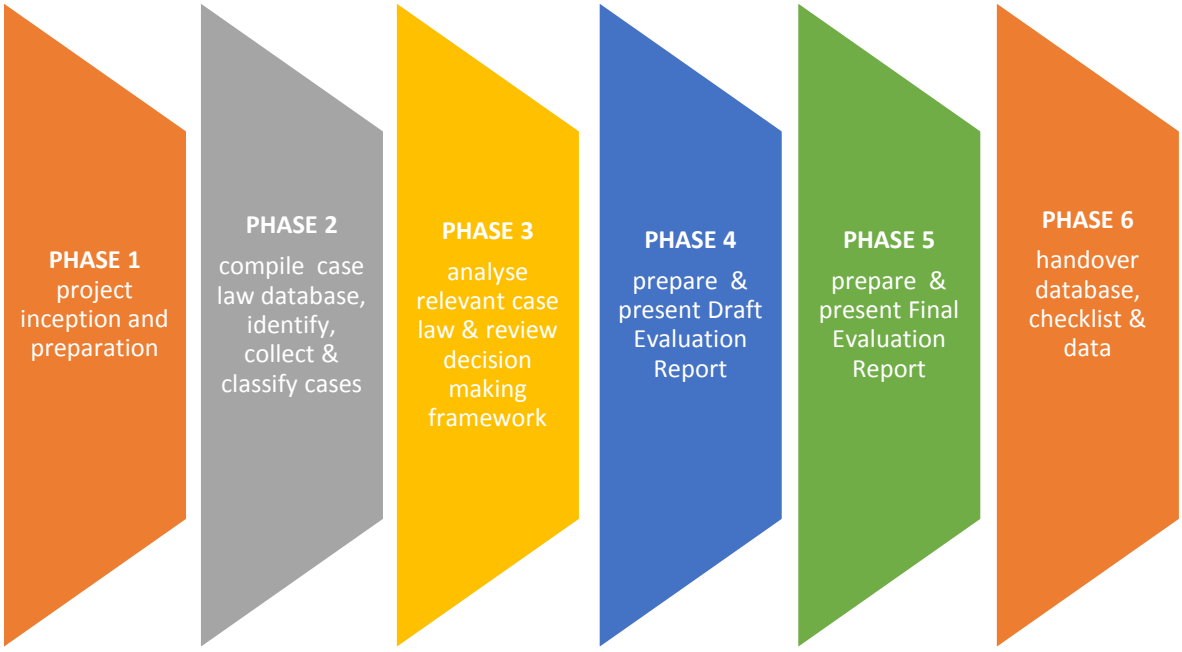

Figure 1 Project Phases

The Project Work Plan describes the specific activities and tasks included in each of the six project activity phases; indicates the key milestone for each activity; and sets time frames. This was presented to the PSC at the Inception Meeting and amended to incorporate the changes suggested by the PSC.

Compilation of case law database
The case law database was compiled during phase 2 of the Project and focused on identifying the best sources of information; finalising the selection of cases to be included in the case analysis; and identifying, collecting and cataloguing the selected cases. The initial arrangement was to rely primarily on the court record. However, it soon became apparent that this arrangement was inefficient and causing delays because the High Court's records were incomplete and disorganised. This meant that the data gathering methodology and selection of cases had to be amended to take consideration of available information and records. Accordingly the database was populated from information

[3] Workflow in the context of this report refers to the activities and tasks that need to be undertaken to achieve the scope of work specified in the TORs, and the sequence and timing of these activities and tasks.

contained in founding documents and judgements available from the court record and Departmental court files.[4]

Classification and selection of cases
The overarching objective of classifying and selecting cases was to isolate those cases able to improve the EIA decision making process and make the Department's decisions more defensible. In other words, cases which illustrated what the Department was doing wrong; what it was doing well; and what other decision makers were doing right or wrong. Cases were classified into the following three classes, namely cases involving the review of EIA decisions made by the Department (class A); cases involving the review of other administrative decisions made by the Department such as land use planning decisions (class B); and cases involving the review of administrative decisions made by other authorities. The Department selected class A and B cases which it deemed valuable for this evaluation. These cases were sourced largely from the Department's internal record keeping system which limited the availability of case files predating 2009/2010. The PSC approved the selection of class C cases recommended by the service provider on the basis of the following criteria:

- cases confirming fundamental principles of administrative law;
- cases confirming principles of EIA decision making; and
- cases providing lessons and examples of sound decision making processes.

The selected cases under each class are listed below:

Table 1 List of selected cases

CLASS A	CLASS B	CLASS C
✓ Sea Front for All	✓ Houtbay & Llundudno Environmental Action Group	✓ Minister of Environmental Affairs & Tourism & Another v Scenematic Fourteen
✓ Hangklip/Kleinmond Federation of Ratepayers Association	✓ Clairisons	✓ Bel Porto School Governing Body & Others v Premier of the Western Cape Province & Another
✓ SLC Property Group Pty (Ltd) and Longlands Holdings Pty (Ltd)	✓ Lagoon Bay Lifestyle Estates	✓ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others
✓ Dealtime Trade 63	✓ Colmant	✓ Minister of Health & Another v New Clicks SA Pty (Ltd) & Another
✓ Shadewind Pty (Ltd)	✓ Habitat Council	✓ Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others
✓ Gonnemanskraal Home Owners Association	✓ Green Collection Four (2010)	✓ Director: Mineral Development, Gauteng Region & Another v Save the Vaal Environment & Others
✓ Lions Watch Action Group	✓ Green Collection Four (2011)	✓ Fuel Retailers Association of South Africa v Director-General: Department of

[4] The Department's internal recordkeeping system for litigation matters was set up in 2009 and has been a work in progress since. Accordingly, the case files provided by the Department were primarily post 2009 and were received in varying degrees of completeness.

CLASS A	CLASS B	CLASS C
		Environmental Management
✓ Durbanville Community Forum	✓ Folkes Holdings	✓ Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Limited trading as Pelts Products & Others
✓ Astral Operations	✓ Llundudno Civic Association	✓ Vaal Environmental Justice Alliance v Acerlormittal
	✓ Wesson	✓ Interwaste (Pty) Ltd v Ian Coetzee
	✓ Lezmin	✓ Retail Motor Industry Organisation & Circuit Fitment CC v Minister of Water and Environmental Affairs
	✓ Ithemba Farmers Association	✓ Viking Pony Africa Pumps (Pty) Limited t/a Tricom Africa v Hidro-Tech Systems (Pty) Limited & Another
		✓ AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the Southern African Social Security Agency and Others

Analysis of the EIA decision making framework and case law trends, gaps and lessons learned

The analysis undertaken of both the decision making framework and case law followed a diagnostic approach which is informed by systems thinking and is particularly suited to assessing performance and problem solving as the emphasis is on understanding how things or processes influence one another and work together as a whole. In the context of EIA decision making, the system includes, for example, the regulatory regime within which decision making takes place; administrative procedures; operational practices; information and record keeping systems; and the institutional structures involved in the decision making process. To evaluate the impact of EIA decisions and make recommendations for improving decision making, the Department's internal policies, SOPs and guideline documents on the EIA decision making process were reviewed to establish whether the internal procedures and practices comply with the legal requirements; what guides and informs decision making; and what measures exist to ensure consistency and legal compliance.

The review of the case law was done in accordance with the set of parameters designed to inform the analysis of trends and lessons and approved by the PSC. These parameters included a summary of facts and grounds of review; whether the challenge was substantive or procedural and the Department's position; and the overall outcome (settled, decision overturned, upheld or returned to decision maker with directives). At the Department's request consideration was also given to:

- where a court held that the Department had executed its obligations and duties under the application legislation correctly in making the decision that had been taken under review; and
- where a judgement that had been made was wrongly decided or gave rise to bad precedent having been created.

It was agreed at project inception that the analysis of the selected cases would be guided primarily by the questions formulated by the Department and only address the PEP questions to the degree that these questions fell within the scope of this Project. Both sets of questions are captured in the table below:

Table 2 Evaluation questions

DEADP EVALUATION QUESTIONS	PEP EVALUATION QUESTIONS
i. What are the trends emerging from court challenges relevant to the Department's decision making in terms of environmental impacts assessments?	i. What is the emerging picture from the court cases on EIAs? • What are the main issues on which the public and developers are challenging the Department? • Are the areas in terms of which the Department is challenged related to the manner in which EIA processes are implemented? • How many court cases have been dealt with from 2009/10 to date? • How many cases have been successful and how many not successful? • How much has been spent since 2009/10 on court cases?
ii. How can the trends be utilised to further strengthen the current environmental impact assessment review and decision making process?	ii. Does the Department's implementation of the EIA regulations contribute to the lodging of court cases, and is the outcome of the EIA process resulting in the right area being excluded?
iii. What are the lessons learnt from other relevant judgments, challenging the Department and other decision makers, which can be further applied to approve the Department's current environmental impact assessment review and decision making framework?	iii. What is the relationship [correlation] between the implementation of the EIA processes or guidelines and the areas on which the public challenges the Department in court?
	iv. What do we need to do to ensure the optimum results of EIA in terms of development and the environment?
	v. Which approach would work best with regard to minimising the number of court cases the Department has to deal with?
	vi. How do we need to strengthen the EIA programme?

The initial findings of the review of the decision making framework and case law analysis was presented to the PSC in May 2014 discussed in more detail with a wider group of official makers, including the delegated decision makers at a workshop held on 11 July 2014. The workshop provided valuable insight and input with regard to developing

practical recommendations that could be made to strengthen and improve EIA review and decision making. The comments and issues raised in the workshop were taken into account in finalising the analysis of the decision making framework and case law and, where appropriate, captured in the draft evaluation report.

4. PRINCIPLES OF ADMINISTRATIVE LAW WHICH GOVERN DECISION MAKING

The full report includes a discussion on the principles of administrative law which govern decision making by authorities. These principles serve as overarching framework for all administrative decisions, including the decisions made by the Department in reviewing EIA applications and in granting or refusing environmental authorisation for such applications. The pertinent points made in this discussion are summarised below as follows:

- Administrative justice is entrenched as a fundamental right in section 33 of the Bill of Rights in terms of which all administrative actions must be' lawful, reasonable and procedurally fair'. Section 33 determines that national legislation must be enacted within three years of the date on which the Constitution became effective, to give effect to these rights.
- The Promotion of Administrative Justice Act (PAJA) was promulgated to give effect to section 33 of the Constitution and specifically defines what would constitute an 'administrative action' and 'decision' for purposes of PAJA.
- The environmental right is contained in section 24 of the Constitution. The inclusion of an environmental right in the Bill of Rights confirms it as a fundamental justiciable human right and is a clear indication of the change in social values in respect of the environment, recognising the fundamental importance which environmental issues have now assumed.
- Section 24 requires the development of environmental legislation to promote sustainable development. NEMA was enacted to give effect to section 24 of the Constitution and contemplates that environmental decisions should achieve a balance between environmental and socio-economic developmental considerations through sustainable development. The EIA process is one of the tools provided for in NEMA to give effect to sustainable development.
- Section 24 of NEMA empowers the Minister or a competent authority (hereinafter referred to as the Department) to make a decision regarding whether environmental authorisation should be granted in accordance with the provisions of relevant sections of NEMA. The decision of whether or not environmental authorisation should be granted falls within the definition of administrative action as defined in PAJA.
- The primary focus in scrutinising administrative action is to ensure the fairness of the process, not the substantive correctness of the outcome. PAJA addresses the four requirements of just administrative action as required by section 33 of the Constitution, being: lawfulness, reasonableness, procedural fairness and the provision of reasons. In order to ensure just administrative action, the following requirements must be adhered to:
    a. acting in accordance with empowering legislation;
    b. adequate consultation with public and private stakeholders and all interested and affected parties;
    c. the decision maker must obtain all relevant information and make it available for consultative purposes;

d. the decision maker must consider all relevant factors; and
e. the decision maker must identify reasons for his decisions and maintain a record of all decisions made.

- In terms of section 24(1) of NEMA the potential consequences of impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported to the Department. In reaching a decision as to whether environmental authorisation should be granted, the Department must have due and proper regard to the EIA. The EIA is therefore one of the relevant documents which must inform the decision of the Department.
- Section 6 of PAJA sets out various grounds for review of an administrative decision. In challenging the validity of an administrative action the aggrieved party may rely on a number of alleged irregularities in the administrative process. These irregularities should be presented as evidence to establish that one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the conclusion that one or more of the review grounds do in fact exist.
- If a person succeeds in establishing one or more of these grounds during judicial review, the decision of the administrator must be declared unlawful in terms of section 172(1)(a) of the Constitution. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's requirement of a just and equitable remedy.

5. EIA DECISION MAKING FRAMEWORK

5.1 Legislative context for EIA decision making

Section 24 of the Constitution requires, amongst other things, that the environment is protected through reasonable legislative and other means to secure ecologically sustainable development and use of natural resources. Section 33 of the Constitution also gives every person the right to administrative action that is lawful, reasonable and procedurally fair. Organs of state have a duty not only to respect and protect these rights but also to promote and fulfil them (section 7(2)).

NEMA seeks to give effect to the Constitutional imperatives and provides the overarching framework within which environmental decision making must take place. Key in this respect is the set of principles contained in section 2 of the Act. These principles embody the environmental right enshrined in section 24 of the Constitution and recognize that the consideration of environmental factors requires the integration of social, economic and ecological considerations into decision making. The NEMA principles apply to the actions and decisions of all organs of state that may significantly affect the environment. Decision making, particularly in relation to environmental authorisations and other administrative decisions that grant/refuse permission to proceed with an activity that may impact the environment, is central to giving effect to section 24 of the Constitution and the NEMA section 2 principles. The extent to which development approval contributes to ecological sustainability will depend on how the decision is made, what the decision is, and what the conditions of the authorisation are. Accordingly it is important that all decision makers maintain the link between the substantive goal of ecological sustainability and how the administrative decision is made.

NEMA chapter 5 gives further effect to section 24 of the Constitution by setting out the procedural and governance framework for environmental decision making. Sections 23 and 24 of NEMA are of particular importance: Section 23 provides for the integration of the section 2 principles into all decisions which may have a significant effect on the environment, whereas section 24 provides specifically for the consideration, investigation, assessment and reporting of the potential consequences for or impacts on the environment of listed activities (or specified activities) to the competent authority. The National Minister has published three lists of activities under section 24 of NEMA and the application procedure, information and reporting requirements, public participation process, timelines within which the competent authority must process the applications, issuing of environmental authorisations and appeals against such authorisations are described in the Regulations.

The full report includes a flow diagramme (Figure 2) which provides a roadmap of the key decision making milestones, which will influence the success or failure of a review application in the Courts in the EIA decision making process. The review of the EIA decision making framework in the Province focussed on assessing Departmental guidelines and SOPs' compliance with the legal requirements; identifying gaps, errors and omissions in the Departmental guidelines and SOPs; and highlighting, where appropriate, the implications of these gaps, errors and omissions for decision making in the Department.

The law formed the basis against which the Department's SOPs and guidelines were compared and assessed to establish compliance with the empowering provisions in the legislation; to determine the correctness of the operational guidance provided in the SOPs and guidelines; and to identify any gaps, errors or omissions which should be addressed to ensure more robust and defensible decision making. The analysis of the Department's SOPs and guidelines was done in relation to each of the major decision making milestones. The proposed amendments to the EIA Regulations (published on 29 August 2014) are substantial. If implemented, it will require the review and update of all the Department's current guidelines and SOPs. Of particular relevance is the proposal that an environmental authorisation may be refused on the basis of the scoping report if the scoping report "does not comply to the policy directives of government" or does not comply with the regulations with respect to the information that must be included in the scoping report (regulation 22(1)(b).

The full report provides a brief explanation of what is required in relation to each of the decision making milestones and sets out the findings of the review undertaken of the Department's SOPs and guidelines. Only the findings are summarised below. More specific comments about the SOPs are provided in APPENDIX 11 to the full report.

5.2 What is the correct procedure?

The correct procedure is outlined in the full report. With some exceptions (which are detailed in APPENDIX 11 attached to the full report), the SOPs (Basic Assessment, EIA and Appeals booklets) are very detailed and generally comprehensive in respect of the procedural steps that must be taken. This is important in light of the fact that non-compliance with a material provision or condition was identified as a common review ground. However, the SOPs do not refer to the broader constitutional and legislative context and while the Guideline refers briefly to PAJA, this is only in the context of "relevant considerations". Accordingly it is recommend that the SOPs are updated to

include reference to the broader legislative context for decision making as it relates to the right to fair administrative action and the requirements of cooperative governance.

5.3 Is information complete?

None of the Department's SOPs deal specifically with how to assess whether a report has been validly submitted and in particular, whether the report contains all the relevant information to allow the decision maker to make a decision based on all relevant considerations. This is discussed in more detail in the next section.

5.4 What is relevant to the decision?

Although the guidelines that we reviewed do deal with the requirement to consider relevant factors (and the Guideline on Need and Desirability explains the requirement to consider relevant factors in more detail), none of the SOPs or guidelines provide guidance on how to identify all the relevant factors in a decision, or where specific requirements of the EIA Regulations are not complied with.

5.5 Conclusions in relation to each decision making criterion

The clearest gap in the SOPs and Guidelines is that there is no guidance for decision makers on how to make the decisions required of them in terms of the EIA Regulations, 2010. In the first instance, the SOPs and Guideline do not provide any guidance as to how the various reports in the process - Basic Assessment Report (BAR), scoping report, Environmental Impact Assessment Report (EIAR) or Environmental Management Plan (EMP) - must be assessed to determine whether they must be accepted or rejected in terms of the EIA Regulations, 2010 (in particular regulation 13). It may be useful to update the 2002 checklist against which the decision maker can determine whether the report in question complies with the EIA Regulations. For example, a BAR must be rejected if it does not contain the "material information required in terms of these Regulations" or does not take into account "relevant guidelines". The SOPs would be more useful if the "material information" were spelled out. We have been provided with an Information Document on the use of Guidelines in EIA decision making and although we were not required to consider whether the document is comprehensive, our view is that in principle an Information Document that lists relevant guidelines for EIA decision making is useful and necessary to ensure compliance with section 24O of NEMA, the EIA Regulations, 2010 and with the requirements of PAJA.

A related issue is that although the appeal SOP mentions the legal requirements for validity of the decision maker notice of appeal, appeal submission, answering and responding statements, in the "control column", it would be useful to have a checklist at each of the stages in the process diagramme entitled "determine whether the notice of appeal/appeal submission/responding statement/answering statement is valid" since this is the logical stage at which a decision maker should consider all the requirements for validity (date submitted, parties served, contents, etc) before accepting it.

Most significantly, there is no guidance on how to make a decision to grant or refuse an environmental authorisation. Environmental decision making is particularly complicated as it involves very many variables, including: the type of listed activity applied for, different locations and impacts and a law and policy context that is constantly changing.

In our view, a checklist approach to decision making is not feasible as nothing can replace the exercise of good judgement by an experienced and skilled decision maker. However, as set out in this section, it is possible to provide some information for decision makers on the steps that must be followed for sound decision making such as:

- checking compliance with the empowering legislation;
- ensuring adequate consultation with all public and private stakeholders and I&APs;
- obtaining all relevant information and making it available for consultative purposes;
- considering of all relevant factors - the so-called decisional referents; and
- identifying reasons for the decision and maintaining a record of the reasons.

Perhaps the most challenging part of the this process is identifying the relevant factors and ensuring that the decision maker takes into account those factors in a way that is reasonable, giving effect to the requirements of rationality and proportionality in administrative action. In some cases the relevant factors are identified in legislation, for example, in section 2 of NEMA or, in the case of decisions on waste management licences, in section 48 of the National Environmental Management: Waste Act.

6. CASE ANALYSIS FINDINGS ON TRENDS EMERGING FROM COURT CHALLENGES

A number of the cases are still pending and accordingly could not be taken into account in determining trends. The pending decisions and the grounds of review raised are appended at the end of the full report. Cases which were settled before judgment also offered limited insight because the settlement agreements were not made available to the service providers. The emphasis on isolating trends focussed on qualitative rather than quantitative aspects, such as understanding why decisions had been challenged and how such decisions had been made, as opposed to merely quantifying the number of review grounds applicable to each case, class of cases and the body of cases. Because judges need only one ground on which to decide a matter and will chose which of the grounds raised to decide the matter, statistics are not an accurate or reliable reflection of trends emerging from court challenges or weaknesses in decision making. In other words, it would be incorrect to conclude that if ten grounds had been raised in a particular matter and one of these grounds was successfully defended, then this meant that the Department's decision making had been proved right. Similarly, if the statistics reflect that 90% of the decisions taken on review are successfully defended, it does not equate to the Department's decision making being proved 90% right. All it does show is that in respect of a single ground of review, the Department's decision making was right. Statistics will also not solve the problem of addressing flaws and errors in the decision making process.

Having considered the various cases under class A, we have found the majority of review grounds were raised in respect of decisions by the Department relating to EIA. Most of the grounds in class A cases relate to procedural defects and the ground most often relied on is that the decision maker took irrelevant considerations into account (8 cases rely on this ground). This is closely followed by the decision maker not being authorised to make the decision (6 cases); mandatory and material procedures or conditions prescribed by an empowering provision were not complied with (6 cases); the decision maker being biased (5 cases); and, the decision reached by the decision maker was procedurally unfair (5 cases). The majority of cases were set aside in entirety and referred back to the decision maker for reconsideration.

The graph below indicates the frequency with which each ground was raised (the number refers to the number of cases in which the review ground was raised):

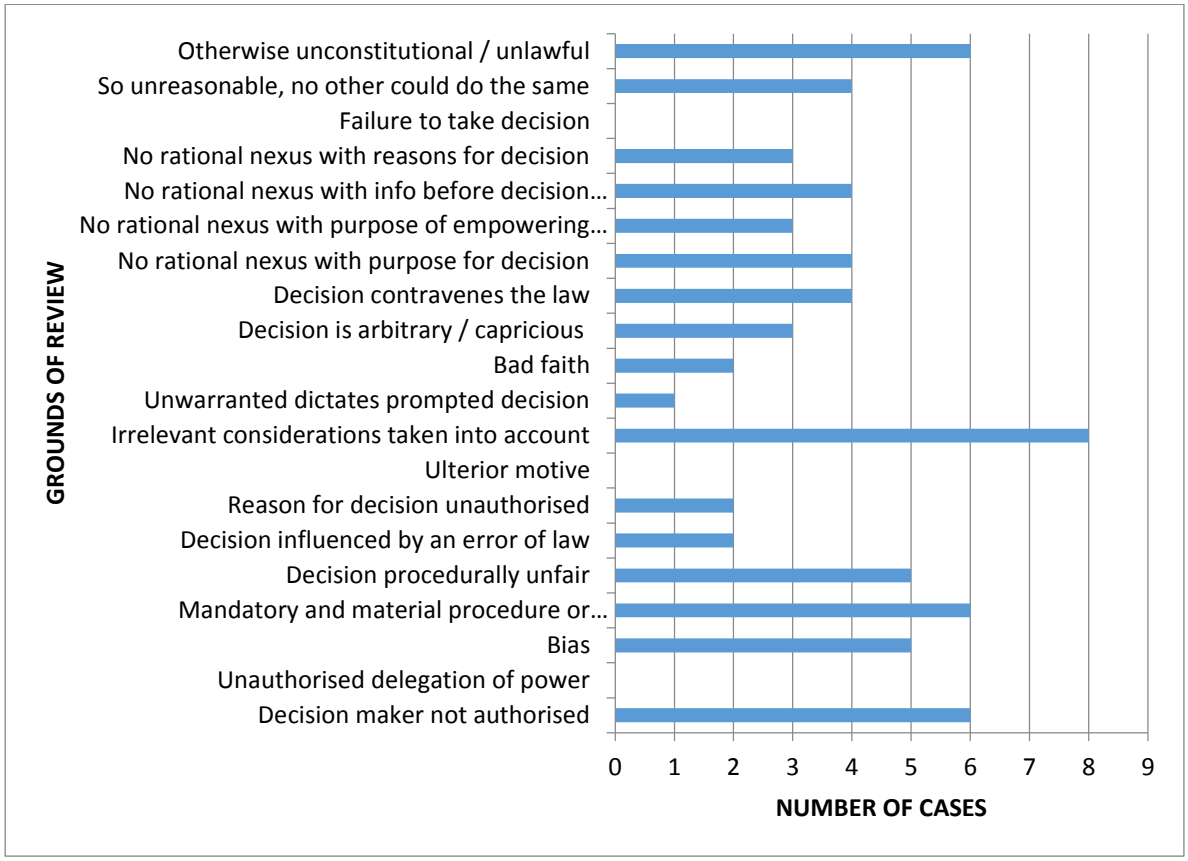

Figure 2 Frequency of review grounds raised

The extent to which the review of decisions were influenced by legislative changes to the EIA regulatory regime, changing political priorities and external factors such as economic pressures does not appear to have been a factor review applications. The analyses indicate a consistency in types of grounds of review invoked irrespective of a change in the regulatory regime and other external factors. It should also be mentioned that the small sample size made it difficult to identify a trend in the extent to which changes in the regulatory regime or other external factors influenced review applications.

The graph below indicates which grounds of review were successfully upheld by a court with regard to class A and B cases.

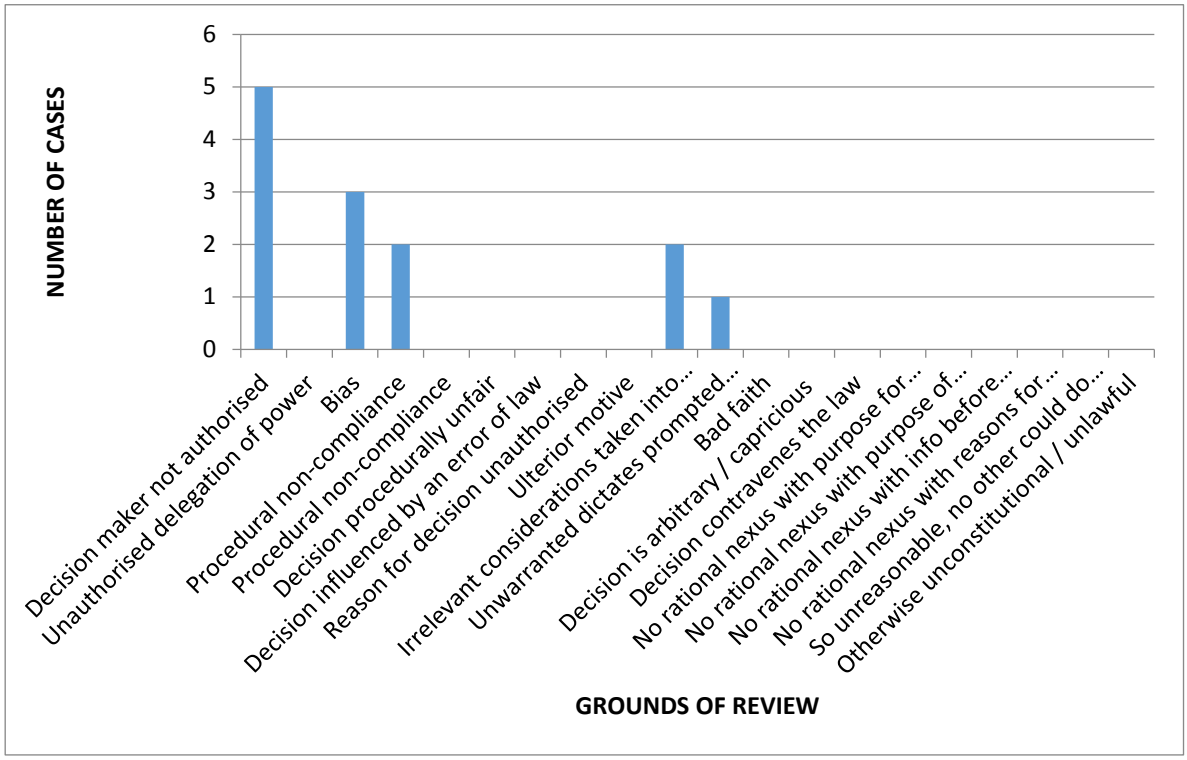

Figure 3 Successful review grounds

The next graph illustrates the ratio of decisions upheld, overturned, partially overturned, returned to the decision maker with directives and matters settled in all in respect of both class A and B cases.

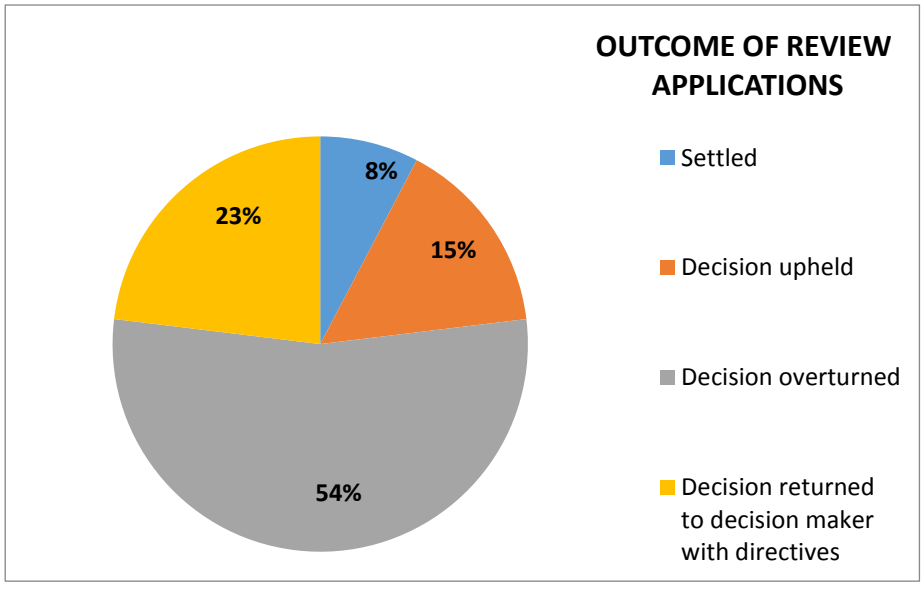

Figure 4 Ratio of judicial review decisions

In the last graph we indicated the number of grounds of review invoked in the pending cases and further show both the total numbers per ground of review, as well as compare how many of the grounds raised for class A versus class B cases.

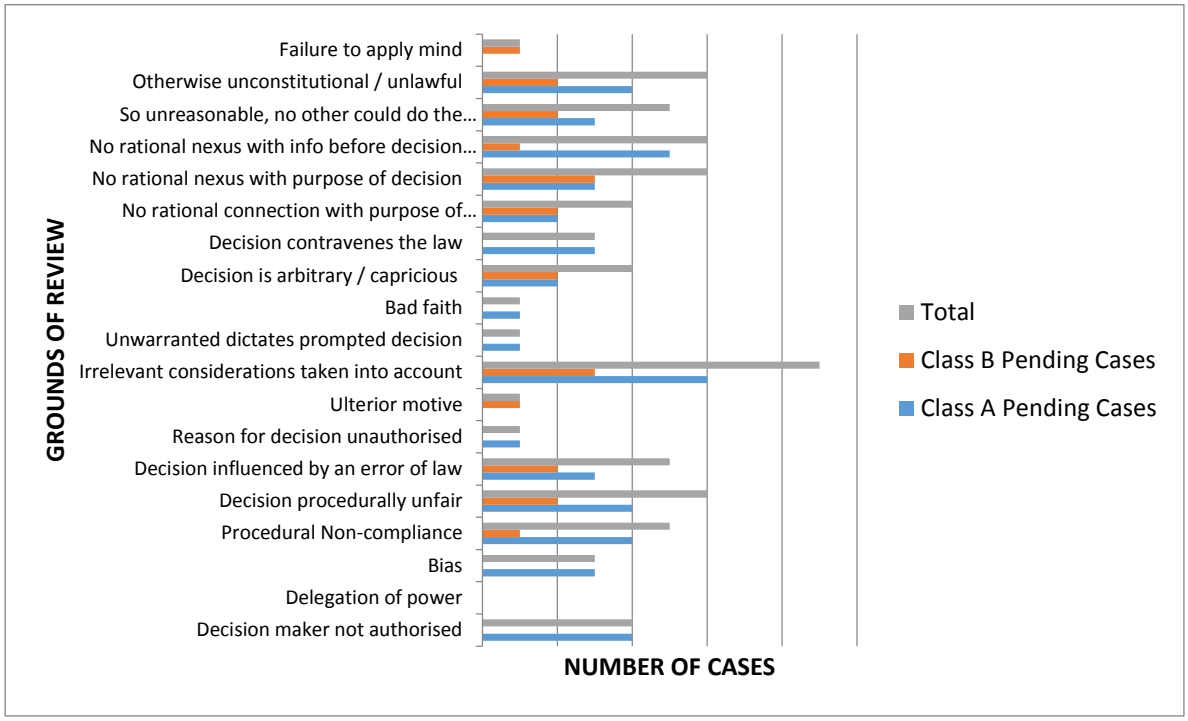

Figure 5 Pending cases

Under this section we deal with the relevant facts of the three categories of cases, consider the grounds of review held by the Court and, where possible, identify emerging trends from these cases. We do not refer to all the cases where a specific ground of review was raised as courts generally do not decide a case on all of the grounds raised. Rather, we focussed on the grounds that were upheld and, more importantly, the reasons for doing so. The reasoning adopted in the cases have been summarised below. For the purposes of capturing trends in the report, the grounds of review were grouped into the following themes:

- **Requirement of authority,** which includes the decision maker not being authorised and acting beyond the powers of the empowering provision;
- **Procedural fairness,** which includes changed circumstances, failing to take relevant considerations into account, taking irrelevant considerations into account, hearing the other side and bias**;**
- **Reasonableness,** which includes reasons**;**
- **Effects of government inaction,** which includes the failure to take decisions and the dereliction of constitutional and statutory obligations; and
- **Disjointed decision making,** which is linked to administrative justice in general but relates to an efficient administration that results in certainty in decision making.

The findings with regard to each of the above themes is summarised below. The full report deals with each in more detail and includes information on the relevant facts of the three

categories of cases under each theme, discusses the grounds of review held by the court in those cases and briefly explains the implications of the judgement for decision making.

Requirement of authority
An official including the MEC may only exercise a power or perform a function as conferred upon them in terms of an empowering provision and in line with the considerations to be taken into account in exercising that power. Decisions must be rationally related to the purpose for which the power was given.

Appointment of authority
The Minister acts beyond his powers where the Minister grants approval for matters which fall outside of his Department's constitutional competence. Those decisions are reviewable and fall to be set aside.

In *Brashville Properties 51 (Ptd) Limited v Colmant and Others* the Supreme Court of Appeal (SCA) held that in terms of LUPO, the power to impose and deal with rectification lies squarely within the discretion of the Municipality. Such power should neither be exercised with any influence from a superior body such as the Department, nor should the superior body dictate how the discretion is to be exercised. By simply following the instruction of the Department, the officials of the municipality did not apply their minds in deciding whether or not payment of the contravention levy was appropriate in the circumstances. The decisions to invite Brashville to pay a contravention levy, and, to re-approve, re-issue and approve building plans were reviewed and set aside.

Acting beyond powers granted
In *SLC Property Group (Pty) Ltd and Another v Minister of Environmental Affairs and Economic Development (Western Cape) and Another ("SLC Property")* the Minister granted an environmental authorisation to SLC Property. Two weeks after this authorisation was received, a second environmental authorisation was sent to SLC Property. The second environmental authorisation contained a condition requiring the construction of low-cost housing. The court was critical of the Department's ineptitude and of its answer to SLC Property that, insofar as it wanted the condition clarified, it should have asked the Department for reasons. The Court stated that the Department's ineptitude should not oblige an applicant to incur further costs and delay by asking for clarification of conditions.

SLC Property successfully challenged the validity of the second authorisation and the housing condition. The Court held that only conditions which are rationally related to the purpose for which powers under the ECA were given may be attached to the environmental authorisation. The implementation of a housing policy was beyond the powers of the decision maker in a decision for environmental authorisation made under the ECA. Furthermore, the condition was also not based on or derived from information placed before the Minister. The Court made it clear that the condition must pertain to the impact of the then identified activities (now listed activities in terms of NEMA) on the environment.

Procedural fairness
Procedural fairness is not restricted merely to a fair hearing (the right of both sides to be heard) and an unbiased decision maker but is wider.

Changed circumstances
When the decision maker or the Minister considers a matter it is important to note the dates when the EIA application was made and when the reports were compiled and whether the circumstances relating to the proposed development have changed significantly since then. This is so as economic development, social development and environmental protection are the three pillars of sustainable development. In deciding whether or not to grant environmental authorisation the competent authority takes these pillars into account (from the information in the EIA reports) and decides whether the proposed development is acceptable (i.e. sustainable). In order to do so, the information provided to the competent authority must be relevant.

In *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government and Others,* the Court found that the MEC, among other things, considered outdated information when making the decision. The MEC's reliance on outdated and erroneous information meant that the MEC was unable to balance properly the socio-economic consequences of the development against the environmental consequences.

Failure to take relevant information into account
In *Lezmin 2588 CC v The Provincial Ministers for Local Government, Environmental Affairs and Development Planning, Western Cape and Another,* the Minister's decision to dismiss an appeal to have a property rezoned and subdivided, was set aside. The review succeeded on the grounds that relevant considerations as provided in the EIA reports (even though this was a land use planning matter) had not been taken into account and therefore the decision was procedurally unfair.

Hearing the other side
In *Astral Operations v The Minister of Local Government Environmental Affairs Development Planning* the Minister in terms of the Environment Conservation Act, 73 of 1989 (ECA) upheld an appeal against the decision by the Director: Integrated Environmental Management (Region B) in the Department to authorise listed activities associated with a new landfill site at Atlantis and rather permit these activities at the Kalbaskraal site. The Minister took into account new information which had been placed before him during the appeal process but did not provide the applicants, who were registered, interest and affected parties, with an opportunity to make representations in respect of this new information. The Minister's decision was set aside on the basis that the Minister had failed to provide the Applicants with a proper opportunity to make representations and was therefore procedurally unfair.

However, in *Hout Bay v The Minister of Local Government* the Court considered the authorisations granted in terms of the Less Formal Township Establishment Act 113 of 1991 and Land Use Planning Ordinance, 15 of 1985 (LUPO) in respect of the development of a township in Hout Bay known as Imizamo Yethu and whether it should be set aside as the City and not the Minister, had the constitutional mandate to determine development parameters for the township and the process was technically defective.

The Court held that it is not just and equitable to stop an entire development on the basis of what may be technical defects in the process, as interested and affected parties had commented on an objected on the land use planning application, and that public interest, pragmatism and practicality dictate otherwise. The application was accordingly dismissed.

In *Lezmin* the Court also considered when it is appropriate to rely on summaries. The general rule is that the decision maker is required to hear the case of the interested party in that parties' own words not, as it were, the words of a broad summation of facts. The exception to this general principle that the decision maker is required to read all original documentation is narrowly circumscribed in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C)*. The decision maker should be fully informed of the submissions made on behalf of interested parties and he or she should properly consider them. However, in some circumstances, it may suffice for the decision maker to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the decision maker. What is required, as a minimum, is that the summary will contain a *'fair synopsis of all the points raised by the parties so that the repository of the power can consider them in order to come to decision'*.

Bias
The test for bias is whether there is a reasonable apprehension of bias on the part of the decision maker. It is whether a reasonable person in the position of the litigant or an observer, would reasonably apprehend that the decision maker has not brought or will not bring an impartial mind to bear.

Reasonableness
Reasonable administrative action is made up of rationality and proportionality. Rationality means that a decision must be supported by the evidence and information before the competent authority and the reasons given for it. The decision must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. Proportionality is to avoid an imbalance between the adverse and beneficial effects of an action. Its essential elements are balance, necessity and suitability.

In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism & the Chief Director: Marine and Coastal Management and Scenematic Fourteen* the Constitutional Court gave content to what 'reasonableness' means in terms of s33 of the Constitution and s6(2)(h) of PAJA. The judgment provides various factors which decision makers should consider in order to make reasonable decisions.

Reasons
In *Lezmin* the Court explained what "reasons" mean. It does not refer to the facts and circumstances which form the factual foundation for the decision. The decision maker is required to explain his decision in such a way which will enable the aggrieved party to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging." This requires that the decision maker set out:

- his understanding of the relevant law;
- any findings of fact on which his conditions depend (especially if those facts have been in dispute); and
- the reasoning process which led him to those conclusions.

Effects of government inaction
Inaction on the part of government may take the form of a failure to make a decision or the dereliction of constitutional and statutory obligations that have been granted to an organ of state in terms of the Constitution, an empowering Act or delegated to an organ of state.

Disjointed decision making process
There is a risk of improper dissemination or handover of information on pending applications for authorization, from one decision maker to the next that may result in deviations from previous decisions taken on such applications by incumbent officials. For example, in *Lagoon Bay Lifestyles (Pty) Ltd v The Minister of Local Government* there was a lack of consistency in the successive Ministers' decisions and this may impact negatively on the Department's decision making process.

7. LESSONS LEARNED FROM THE FINDINGS AND RECOMMENDATIONS

This section considers the lessons learned in considering the different cases and makes recommendations as to how the Department can ensure that its decisions are defensible and less likely to be set aside on judicial review. As mentioned at the outset, this may not result in the number of review applications brought against the Department being reduced but should result in the number of successful reviews against the Department being reduced.

7.1 Lessons and recommendations to strengthen operating procedures and systems

The identification of lessons learned from the existing internal operating procedures and systems and formulation of recommendations to strengthen these procedures and systems was guided by the following considerations:

a) How should the decision maker ensure that operating procedures and systems comply with the legal requirements?
b) What measures are needed to address weaknesses and gaps in the current operating procedures and systems and ensure that lessons learned through decisions taken on review are captured and applied in future decision making?

Strengthening knowledge management systems
The discussions at progress meeting presentations and in the 11 July workshop exposed a weakness in the Department's knowledge management systems. One of the observations was that the Department's record keeping system did not facilitate quick and accurate preparation of Rule 53 Records (this is the record that indicates all of the information that the MEC took into account when making the decision and is called for in terms of High Court review proceedings). The failure to attach all of the information considered by the MEC may result in the decision being set aside on review if there is no indication in the Record or decision that the MEC took that information into account. A robust record-keeping process could very easily remedy this potential area for reviews.

Another observation was that even though all information was available from a central source, directorates within the department who were responsible for the initial decision remained unaware of the outcome and reasons for an appeal decision which may be contrary to their decision. Furthermore, not all directorates are made aware of judgements

which may affect their decision making processes which may result in the decision maker repeating mistakes that a court may have confirmed as a valid review ground.

The **recommendation** that is made in light of the above is that the Department must develop and implement feedback loops in its knowledge management system to ensure that information is captured properly, that the information required by decision makers are made available to those decision makers and that this is properly reflected in its records, that whenever a decision is upheld or set aside on appeal by the MEC that the initial decision maker is informed of that decision and of the reasons for finding differently, and, that where a decision has been set aside on judicial review that the reasons for that decision be communicated to the appeals directorate, the initial decision maker and the Department to avoid the same mistakes being repeated. The Department should at the very least develop a protocol to ensure that new developments are up-to-date and accessible on the central drive and another related mechanism should be implemented to ensure that all relevant directorates are identified and made aware of new information affecting them. This may require an SOP for data capturing and circulation.

Improving the formulation of conditions of authorisation
During engagement with officials and decision makers it became apparent that there was uncertainty among decision makers and case officers with regard to the nature and extent of conditions that the Department may include in an approved environmental authorisation. Conditions are an essential control mechanism to minimise the environmental harm and deal with the concerns raised by interested and affected parties at the commencement and for the lifetime of the authorised project. However, the Department may not impose conditions that do not relate specifically to the matter at hand irrespective of its good intentions.

The *SLC Longlands* matter confirmed that the MEC's powers to impose conditions are limited by authority and context. The Department may not impose conditions that go beyond its powers. This includes, as in the *SLC Longlands* matter, where the purpose for the condition is beyond the scope of the empowering legislation as well as being contrary to the principles of administrative justice. The *SLC Longlands* matter was decided under the ECA but the position under NEMA is unlikely to differ substantially. The principle therefore remains relevant under NEMA.

The Department must further ensure that conditions are rational within the context of the application. In *SLC Longlands* the MEC approved onerous conditions relating to low cost housing whilst simultaneously rejecting the part of the development which funds the construction of the low cost housing. Self-defeating conditions provide contrarians with an opportunity to argue that the conditions are irrational or that the decision maker did not apply its mind when imposing them.

We **recommend** that the template committee ensures that conditions imposed in an environmental authorisation are clear and enforceable and written in such a way that they link to an identified activity and impact. Conditions must identify who must act, what action must be taken and the period within which the action must be taken. The test is who, what and by when. The condition is unenforceable if any one part is absent without further clarification.

Addressing gaps and weaknesses in SOPs
The SOPs we reviewed were fairly comprehensive as to the basic procedure to be followed in EIA applications (with some minor inaccuracies). It is very important that good procedural SOPs are in place because non-compliance with procedural aspects of empowering legislation is relatively simple to establish as a review ground.

However, we **recommend** that the SOPs should make more practical reference to the wider legislative context in which the EIA Regulations must be implemented including the right to fair administrative action, the duty to promote sustainable development and the requirements of cooperative governance. In situations like those which arose in the *Astral Operations* and *Save the Vaal* cases, officials may benefit from guidance on how to make a decision on whether to consult with interested and affected parties at a particular stage, particularly where the empowering legislation is silent or unclear. They might also provide practical guidance on how to avoid creating grounds for review of an application on the basis of the failure to take a decision within the prescribed period or within a reasonable period, where applicable. Although the latter ground of review was not a feature of the cases reviewed for the Project, it is relatively easy to establish as a review ground and is relatively easy for the Department to avoid.

The existing SOPs should also include information that assists officials in making the assessments and decisions that form part of the EIA process, for example: how to assess whether an EAP is independent or not, how to decide whether to accept or reject a BAR, scoping report or EIAR and how to assess whether an appeal has been validly submitted and must therefore be considered by the appeal authority.

We also strongly recommend the development of a guideline or SOP on environmental decision making that will assist in the making of decisions that are sound and defensible and therefore less vulnerable to review.

As set out above, one of the key elements of fair decision making is that all relevant information is considered by the decision maker. It is not possible to provide an exhaustive list of this information as it will obviously depend on the circumstance of each application. However, it is possible and, we submit, useful to specify some of the kinds of information that should be considered such as guidelines relevant to applications in general (which must be considered in terms of section 24O) or even in more specific kinds of applications.

The NEMA principles and the duty to promote sustainable development are also relevant considerations in applications for environmental authorisation. A decision making guideline could also improve decision making by providing advice on the consistent interpretation and application of the NEMA principles and the determination and application of sustainability criteria;[5]

7.2 Lessons & recommendations on improving decision making

The following questions guided the identification of lessons learned from the case law and formulation of recommendations to improve decision making:

a) How can the trends be utilised to further strengthen the current environmental impact assessment review and decision making process?

[5] Such as suggested by Paul Hardcastle *et al*, 2010 and Gerber *et al*, 2010 in paper on "Sustainability Criteria for Planning and EIA in South Africa". They propose such a guideline to ensure that the planning and EIA processes are objectives-led and don't become merely a compliance exercise to ensure that legislated procedural steps have been followed.

b) What are the lessons learnt from other relevant judgments, challenging the Department and other decision makers, which can be further applied to approve the Department's current environmental impact assessment review and decision making framework?

Grounds of review

Making administrative decisions more defensible require the systematic elimination of reviewable defects in the decision making process. As mentioned, the statistical data relating to grounds of review are somewhat skewed on account of the small selection of cases, the fact that many cases are pending and that the courts do not always decide on all the grounds raised on review. It is accordingly more appropriate to start with those grounds which are the easiest to prove as the courts would usually decide a matter on one of these easier grounds.

However, it is incorrect to assume that elimination of the grounds on which EIA decisions are statistically overturned the most, will make decisions more defensible. The reason for this is that courts often decide cases on one or two of a number of review grounds raised, which means that there are still a number of potentially fatal review grounds which the courts have not considered. Similarly, to assess the grounds which applicants tend to rely on in their affidavits are also not a credible indication of the review grounds to start with as applicants often list as many review grounds as possible, regardless of the prospect of success.

Practically speaking, the easiest grounds to prove are procedural grounds. Procedural defects in the decision making process tend to be more cut-and-dried than merit based arguments. These grounds include:

- non-compliance with a mandatory and material procedure or condition prescribed by an empowering provision;
- the decision maker was not authorised to make the decision by the empowering provision;
- the decision maker acted under a delegation of power which was not authorised by the empowering provision;
- the action concerned consists of a failure to take a decision;
- the action is unconstitutional or unlawful; and
- unreasonable delay in taking the decision.

Focusing on the grounds which are the easiest to prove is the most rational place to start in making EIA decisions more defensible. It is also the easiest defect to fix as it is usually a simple yes or no answer.

Our **recommendation** is that the Department should start by developing checks to strengthen its procedural compliance first and follow by improving the decision making process qualitatively.

The following principles will assist the department when making decisions so that those decisions are less likely to be set aside on review:

- act within the empowering provisions of NEMA (or relevant law) and in terms of a proper delegation of authority;
- treat everyone fairly;
- ensure compliance with all mandatory and material procedures or conditions for exercising the power;

- apply your mind to all relevant considerations for the decision (these considerations would have been determined from the relevant facts and law applicable to the proposed project); and
- ensure that the decision is rationally related to the:
  - purpose to be achieved by the decision;
  - the empowering provision;
  - the information provided; and
  - the reasons provided for the decision.

We now turn to consider each of the requirements discussed under section 6 and focus on the lessons learnt and recommendations to avoid similar review grounds being successfully decided in the future.

Requirement of authority

Appointment of authority
The Department, if it has not done so already, must critically consider its role in relation to municipalities and ensure that it is tested against the constitutional competencies of the different spheres of government. It is likely that these concerns may have been addressed in the recently assented to but yet to come in force provincial Land Use Planning Act. However, as seen in the *Brashville* matter there may still be instances where the Department is fettering the discretion of municipalities or intruding on areas of their competence. A proper assessment of the respective constitutional powers between provincial and municipal organs of state may result in costly litigation being avoided.

Acting beyond powers granted
Careful consideration is required when attaching conditions to an environmental authorisation. A competent authority does not have the power to impose conditions in an environmental authorisation that are not related to a specific listed activity. Differently put, where conditions are included as part of an environmental authorisation those conditions must be linked directly to the environmental impacts of the listed activity. Furthermore, where conditions that are not directly linked to the listed activities are included, it could be argued that irrelevant considerations were taken into account and that the authorisation must be set aside on that basis.

The competent authority must determine if the conditions relate to the listed activity and, if it does not, but the conditions are still included then the competent authority must determine whether there are other factors that make those conditions relevant. The court may conclude that irrelevant considerations were taken into account where the conditions imposed relate to the second enquiry, are too far removed from the listed activity and materially influenced the decision. This is also dealt with under the heading procedural fairness discussed further below.

Procedural fairness
This relates to the process that was followed and ultimately turns on whether one party was treated differently in relation to the other and that that difference of treatment resulted in a favourable outcome for one of them. This would include where circumstances have changed significantly and the decision maker failed to take those considerations into account, only hearing one party's version and failing to hear the other party, and the decision maker was bias.

Relevant considerations
Under section 6 above changed circumstances were discussed separately from the failure to take relevant considerations into account. This was done to make the point that changed circumstances in an area or property subject to an application for environmental authorisation (as in the *Seafront for All* matter) may also be a ground of review. The failure to take changed circumstances into account expressed in terms of a review ground is a failure to consider relevant considerations. An indication of changed circumstances may be the lengthy time period between the application and the decision.

The flipside of the failure to consider relevant considerations is that irrelevant considerations were taken into account. This may be where the Department fails to react to changing circumstances, like new and repealed guidelines or where the passing of time may result in information before the decision maker being irrelevant. The courts have understandably not laid down a test to determine when circumstances have changed sufficiently to warrant a reconsideration of the information before the decision maker.

The Department must adopt a precautionary approach and assess whether the information is still valid, relevant and complete before handing it over to the decision maker in every instance. The competent authority must take information, particularly if it may affect the outcome of the decision, into account. It does not have discretion on whether or not to do so. Furthermore, that information may even be from an entirely different process (for example EIA process) when considering land use planning matters.

The Department must ensure that its record-keeping process is up to date so all relevant information can be made available to the competent authority.

Opportunity to make representations
Whenever new information is included in the EIA process or any other process for that matter, interested and affected parties must be provided with an opportunity to comment on that information more so when they are likely to be affected by the decision. The competent authority must ensure that interested and affected parties are provided with an adequate opportunity to make representations on the information that it is taking into account when making its decision.

Interested and affected parties may also make representations on preliminary decisions where those decisions may have serious consequences for the interests that those parties are trying to protect. A competent authority must consider whether its preliminary decision would have serious consequences on the interests of those parties and, if so, it is likely that those interested and affected parties would have to be consulted.

Bias
The competent authority when making a decision should be aware that an apprehension of bias could be created, not only by its own conduct, but also as a result of the conduct of its "superior". The test as mentioned is whether there is a reasonable apprehension of bias on the part of the decision maker.

Furthermore, even though comment from interested and affected parties may have been obtained on the new material and that an appeal hearing was held at which all parties were present that this would not dispel the reasonable apprehension of bias.

Where a competent authority is required to perform an adjudicative administrative act it must do so free from political influence exercised by a party to the appeal through the decision maker's political superior.

Reasonableness

Reasonableness is one of the more difficult grounds to prove as the courts are reluctant to set aside a decision on this basis especially where it is a matter that requires a particular expertise and balancing of competing interests. As mentioned under section 6 above, reasonable administrative action is made up of rationality and proportionality. Rationality means that a decision must be supported by the evidence and information before the competent authority, the reasons given for it and must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. Proportionality relates to balance, necessity and suitability.

Decision makers must consider the factors set out below when making a decision in order to ensure that their decision is reasonable. These factors include:

- the nature of the decision
- the identity and expertise of the decision maker,
- the range of factors relevant to the decision,
- the reasons given for the decision,
- the nature of the competing interests involved and the
- impact of the decision on the lives and well-being of those affected.

Decisions should be reasonable in terms of:

- the purpose for which the power is given to the decision maker;
- the facts; and
- the reasons given for the decision.

If a decision made by the Department is reviewed based on section 6(2)(h) of PAJA for a lack of reasonableness, the decision maker will be able to provide evidence that a defensible, reasonable decision was in fact made due to the consideration and balancing of the abovementioned factors.

Reasons

In *Lezmin* the Court explained what "reasons" mean. It does not refer to the facts and circumstances which form the factual foundation for the decision. The decision maker is required to explain his decision in such a way which will enable the aggrieved party to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."

The decision maker must set out:

- his / her understanding of the relevant law;
- any findings of fact on which his / her conditions depend (especially if those facts have been in dispute); and
- the reasoning process which led him / her to those conclusions.

The decision maker should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.

Effects of government inaction
In this section we consider the failure by government to take decisions and the dereliction of constitutional and statutory obligations.

Failure to take decisions
Our **recommendation** if that the Department must ensure that the process in relation to deciding environmental authorisations is streamlined so that decisions are made timeously, that communicating environmental authorisations to applicants is streamlined to avoid different authorisations being issued to the same applicant and that the conditions imposed are practical and capable of fulfilment.

Dereliction of constitutional and statutory obligations
In the *Interwaste* matter the Gauteng environmental authorities failed to enforce permit conditions in respect of an unlawfully operated landfill despite knowing about the dumping of medical waste on site, created confusion though permit conditions and took 5 years to consider an application. The authorities must respond promptly to infringements of the law.

The Department must ensure that it fulfils its constitutional and statutory obligations and that, in appropriate circumstances, to avoid adverse costs orders being ordered against it even though it is not a party to the proceedings, to at least provide an explanatory affidavit setting out its version of the facts particularly if doing so would result in the avoidance of protracted and expensive litigation.

Disjointed decision making process
The Department is advised to ensure that there are adequate hand over procedures whenever there is a change in administration, so as to rebut any allegations of disjointed information dissemination, which may affect the decision making process and could result in a claim for damages against the Department.

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