Part 7

The proof of the pudding

By Ian Cox

This series of articles is intentionally hard hitting. It is meant to challenge established perceptions and encourage thinking around whether our environmental laws are in truth reasonably necessary to protect an environment that is not harmful to our health and wellbeing and if these laws and environmental authorities are in truth achieving what the Constitution requires of them.

I think environmental authorities are failing to honour this obligation. There are many reasons for this but in essence we have a situation where South Africa's environmental authorities have called for a paradigm shift in thinking an behaviour but have not themselves embraced the changes that paradigm shift requires of them. We are seeing a dichotomous approach of "us and them" in play.

In this context that I answer a very good point that was made regarding my last article – are environmental principles really that necessary? "Interesting, said one person "but a specific example or two might prove illuminating". "750 words!!" I replied. But good point, so in this article I deal with some examples both where DEA has failed to consult properly and where it has failed to consider environment principles as it is legally required to do.

These examples fall into three broad but interrelated groups. The first is where there has been no consultation at all. The second is where insufficient information has been provided in order to enable proper consultation, and the third is where the NEMA principles have not been considered. Failure to comply with any of these is sufficient to make the subsequent law invalid.

The AIS lists and regulations are a case where DEA failed on all three counts. The 2013 AIS lists were promulgated without any consultation process and were consequently declared unlawful in 2014 by the KZN High Court in its judgement in the Kloof Conservancy case. The rule that people selling properties must report on the presence of invasive species on their properties before selling that was introduced in terms of regulation 29(3) was similarly promulgated without any consultation at all and is consequently unlawful. No supplementary information was provided detailing how species were listed as invasive in any of the draft AIS lists right up to the present list which was promulgated late last year. When I asked for this information DEA told me that it lacked the capacity to provide it and that it was consequently unreasonable to expect them to provide it! The process of listing as far as I can tell from my interactions with DEA failed to take the NEMA principles into account at all. This is because DEA does not understand what "environmental harm" means preferring instead to assume that environmental harm and harmful impacts on indigenous biodiversity are one and the same thing. The result is that the AIS lists and regulations are completely unlawful.

Similar problems exist in with the NEMA EIA lists and regulations. The most recent version of these that was promulgated earlier this year (2017) include provisions that require most aquaculture related development to undergo a full scoping EIA. This was introduced without the required consultation process and is invalid. No supplementary information has ever been provided detailing how these lists came to be compiled or how the NEMA principles were applied in this process. I asked DEA a couple of years ago to identify for me the particular risks which resulted in a number of

activities being listed as having a significant environmental impact. Neither DEA nor any of the provincial environmental authorities could supply me with this information.

This begs the question, if you cannot identify the risk how can you say, ostensible applying a science based approach, that the activity has a significant environmental impact? The process of identifying activities that have a significant environmental impact and applying for authorisation to engage in those activities does not overtly follow the principled approach required in section 2 of NEMA. No mention is made of these principles in the 2010 Framework Regulations which are intended develop the critical planning tool that are environmental frameworks. Guidelines intended to assist in the preparation of environmental management plans and applications for environmental authorisations do not speak to the need to adopt the principled approach prescribed in section 2 of NEMA.

This is a tip of a very large iceberg that is the fundamental misalignment between what DEA and provincial environmental authorities are doing as opposed to what they are legally and constitutionally obliged to do. The problem is systemic rather than incidental. We are potentially looking at a complete collapse of effective environmental management in South Africa. That is unless government and the environmental sector wake up to the problem and start taking steps to transform their thinking and approach to one that align with the Constitution and its values.

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