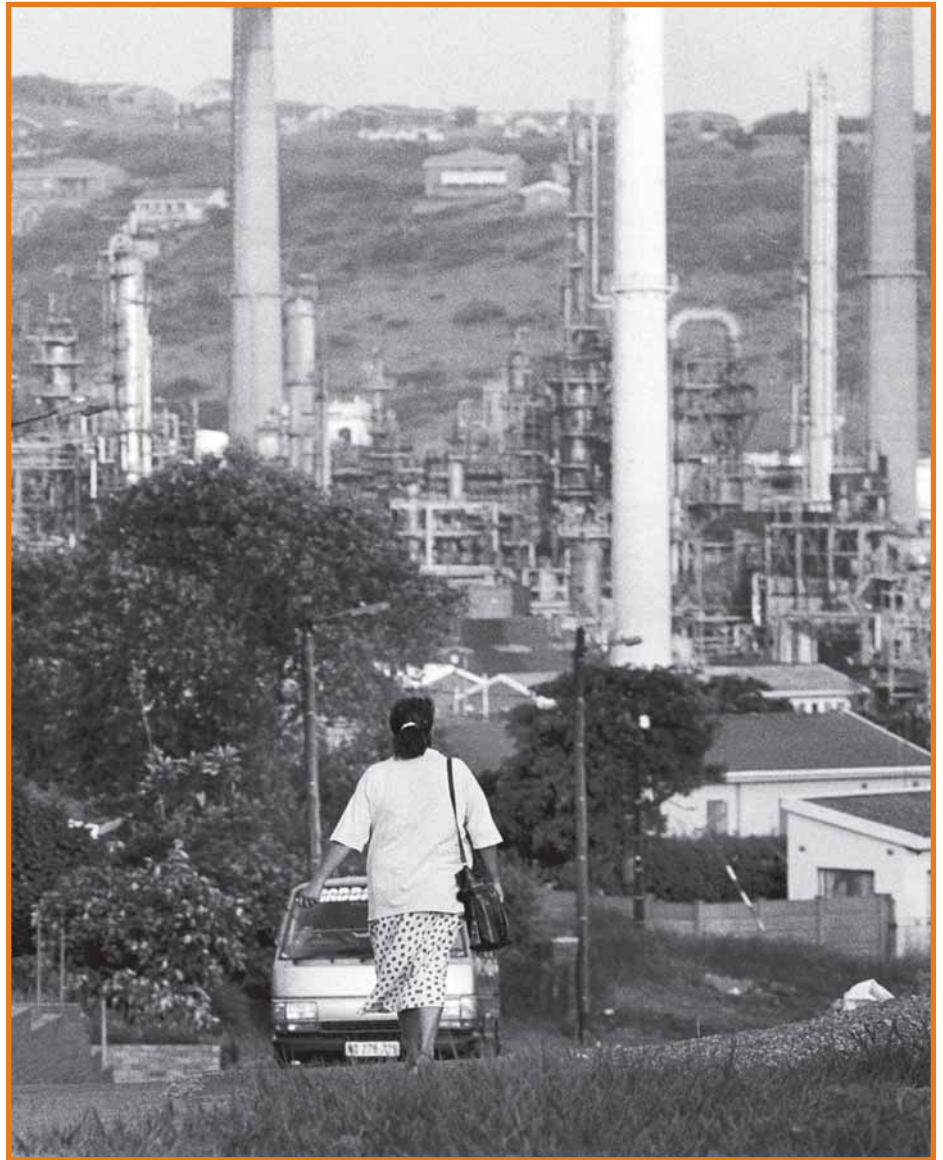

Environmental rights

CHAPTER 5



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KEY WORDS

Access	Able to get, have or use something, eg access to health care.
Administrative action	Decisions taken or not taken that negatively affect your legal rights, eg administrative action by government departments, local authorities and other organs of State.
Arbitration	When both sides in a dispute agree that a neutral person can make a final decision on how to solve the dispute, after listening to both sides, and without the need for litigation.
Biodiversity	Our many different plants, animals, the variability among living organisms and the ecological environments of which they are part.
Conciliation	When a neutral person tries to assist two sides in a dispute to reach an agreement to solve the dispute. The neutral person helps the people involved by clarifying the issues and assessing the strengths and weaknesses of each side of the case, and if the case is not settled, exploring the steps that remain to prepare the case for trial.
Discretionary action	Actions where government officials have to think about all relevant factors and then decide on what to do.
Discrimination	Being treated differently, eg because you are a woman, black, gay, living with a disability, or living with HIV.
Ecological	To do with the relationship between living things (animals, plants and humans) and their environment.
Ecosystem	The relationship and interaction between plants, animals and the non-living environment.
Emission/Emitting	Sending out or discharging, eg emitting substances or fluids.
Environmental degradation	Lowering the quality of the environment through human activities.
Environmental impact	The effect of proposed activities or developments on the environment, society and economy.

Environmental Impact Assessment (EIA)	An EIA is an important planning tool that focuses on the likely impacts of a specific proposed development or activity on the environment – in other words, all the things that can happen when you disturb the environment through a development or other activity that may significantly change the environment.
Exploitation	Using or taking advantage of something or someone.
Hazardous waste	Waste that is a threat to people, plants and animals, eg hazardous waste from factories, hospitals, use of detergents, pesticides and vehicles.
International instruments	International documents like conventions, declarations, treaties and charters – can also include structures and procedures.
Just administrative action	The duty of authorities to listen to the concerns of the public before giving permission for an activity that may significantly affect the environment.
Legislation	Laws made by national and provincial parliaments, and by a Municipal Council of a municipality.
Litigation	Bringing or defending a court case against another person.
Mediation	When you agree to bring in a neutral person to help two people in a dispute to find a solution. The neutral person assists people involved in the dispute by managing the negotiation process, helping them to listen to each other and keeping them on track.
NEMA	The National Environmental Management Act 107 of 1998.
Regulate	Make laws, rules, procedures and standards to control an activity or otherwise regulate society.
Sanitation	Toilets and sewerage systems, including the disposal of their contents.
Significant	Key word used in NEMA – something important or something that has a serious effect, eg significant pollution.
Strategic Environmental Assessment (SEA)	A process of examining environmental policies, plans and programmes before implementation. Unlike an EIA that reacts to a proposed activity or development, the aim of an SEA is to proactively provide information on and an analysis of the consequences of different actions and their environmental impacts in the short-, medium- and long-terms.
Sustainable development	Development that is planned to meet the needs of present and future generations. Sustainable development includes using and conserving resources responsibly.

Unfair discrimination A policy, law, conduct or situation that unfairly disadvantages you, eg because you are a woman, black, lesbian, living with a disability, or living with HIV.

.....

Violate/Violation Abuse or not respect, eg violate your environmental rights.

.....

5.1

Why is it important to understand your environmental rights?

CASE STUDY



TAKING UP ENVIRONMENTAL STRUGGLES

Disadvantaged communities in the South Durban area live near two oil refineries and many industries that cause a lot of pollution. The refineries in the past used to produce up to 60 times more pollution than a clean oil refinery in Europe or North America. A 2002 medical study, carried out by the University of KwaZulu-Natal's Nelson Mandela School of Medicine and a United States University, found that an abnormally high number of students and teachers (52%) at a primary school bordering one of the refineries suffered from asthma.

But these communities have taken action against industry in the area, and are slowly getting the pollution levels decreased. They have done this through protest action and by challenging industry and local and national government in many ways, including protest action and court action. From 1997 to 1999 these communities participated in the Durban South Basin Strategic Environmental Assessment. Their participation was instrumental in stopping further development of the area that may have introduced more pollution problems.

Today things are improving, as the polluters and government are taking steps to minimise pollution. The plight of the South Durban communities for a healthy environment is, however, a continuous struggle for justice, as there does not seem to be a permanent solution in sight.

Durban South Basin Strategic Environmental Assessment (undated), eThekweni Municipality website

If you know what your environmental rights are and how you can protect and advance them, you and your community can also take up similar struggles.

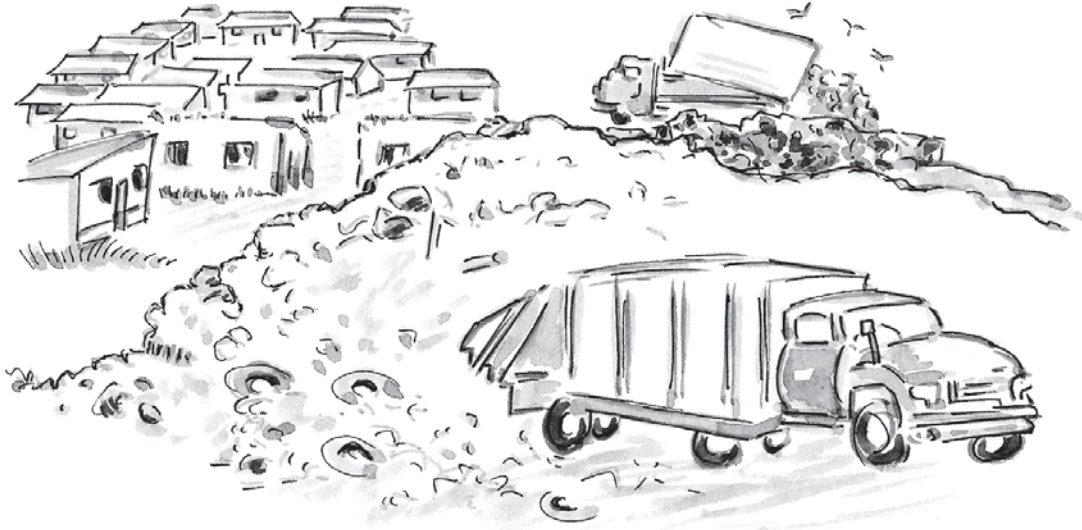
5.2

History and current context

South Africa's economic development since colonial times has been based on the extraction of its mineral wealth and many other natural resources, and the exploitation of its indigenous population. The interests of industry have come first and the effect of these economic policies and activities on the environment and people has been a low priority.

Our environment today experiences problems such as industrial pollution, unsustainable agricultural practices, soil erosion and the contamination of ground water. Exploitative mining and industrial practices have often left a legacy of disease and poverty. Apartheid city planning has ensured that most of the negative impacts on the environment today are felt by historically disadvantaged communities.

Conditions contributing to stress and poor health in these communities include:



- Poor living conditions.
- Poor provision of services (eg refuse removal and sanitation).
- Dangerous and unhealthy workplaces.
- Air pollution.
- Proximity of residential areas to disposal facilities and polluting industries.
- Lack of access to quick and safe transport.

Demands for an improved environment are essentially a call for an improved quality of life that will cost a lot in the short-term. The costs involved would include those required for improved industrial safety, new (alternative) energy sources, better town planning and public transport infrastructure, and improved municipal services and amenities. These costs are possible obstacles to getting access to these rights.

However, by responding to the calls of communities for a better quality of life for all, and investing time, energy, effort and costs in the short-term, the real possibility exists of improving the future quality of life and looking after our resources in a sustainable manner.

5.3

What are your environmental rights in the Constitution?

5.3.1 What are environmental rights?

Section 24 of the *Constitution (Act 108 of 1996)* says:

- Everyone has the right to an environment that is not harmful to health or well being.
- The Government must act reasonably to protect the environment by preventing pollution, promoting conservation, and securing sustainable development, while building the economy and society.

5.3.2

What other constitutional rights support environmental rights?

One way of making sure that the Government takes responsible decisions to protect the environment is to make sure that it follows transparent and reasonable administrative procedures, and to ensure that its decisions are made in a manner that is substantively fair.

There are two fundamental rights in the Constitution to make sure that these things happen:

- The right of access to information (*section 32*).
- The right to just administrative action (*section 33*).

Section 36 of the Constitution says that these rights are not absolute – they may be limited if the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom.

The Constitution also promises us the right to:

- *Civil and political rights*, including the right to human dignity, life and privacy.
- *Socio-economic rights*, including the right to:
 - Access to health care services.
 - Access to sufficient food and water.
 - For children: basic nutrition, shelter, basic health care services and social services, and to be protected from neglect or abuse.

a) Poverty and socio-economic rights

Imagine circumstances where some or all of these rights could be under threat because of poor economic circumstances. For example, circumstances where people are living without adequate sanitation, refuse removal or water, as are often found in informal settlements, poorly serviced townships and rural areas.

Residents who demand that a local authority must provide them with toilets, water, sanitation and refuse removal can argue that if the Government does not provide these, it could be violating a number of constitutional rights. Improved socio-economic conditions could result from an effective campaign around these rights.

b) Equality and non-discrimination

The Constitution also recognises equality as a fundamental right. The right to equality says that everyone must have equal protection and benefit of the law. This means that a safe and healthy environment should not only be for those who can afford it, but for everyone. The State and private bodies may not unfairly discriminate directly or indirectly against anyone.

Indirect discrimination happens when there is no obvious discrimination, but in fact the law or an activity has a greater negative impact on a particular group.

One of the indirect forms of discrimination that has been recognised, for example in the United States, is the placing of the majority of hazardous or polluting industries in poor or black neighbourhoods. These neighbourhoods then carry an unequal share of the environmental burdens of these industries, including their effects on the health and safety of the residents. This practice is called 'environmental discrimination' or 'environmental racism'. Planning and environmental decisions taken in South Africa also need to be examined for this kind of discrimination.

EXAMPLES



DIFFERENT RIGHTS BEING VIOLATED

An informal settlement without water or sanitation could be a threat to public health. If the local authority does not provide toilets, sewerage, water and refuse removal, this could be:

- *A violation of the environmental right (a threat to the health or well being of residents).*
- *A violation of the right to life (if the unhealthy conditions threaten life itself, eg through the outbreak of diseases like tuberculosis and cholera).*
- *A violation of the right of access to water (if no water is supplied to residents).*
- *A violation of the right of children to basic nutrition.*
- *A violation of the right to privacy and dignity (if there are no toilets and the local authority refuses to supply them).*

5.4

Guides to interpreting your environmental rights

5.4.1 Case law

There have not been many cases in South Africa's courts that directly interpret the right to a healthy environment, as described in the Bill of Rights in the Constitution or in international instruments. Most of the cases so far have looked at whether there has been just administrative action when a decision was taken that affects the environment.

COURT CASE



THE DUTY TO LISTEN TO THE CONCERNS OF PEOPLE

In the 1999 case of *The Director, Mineral Development Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*, the Supreme Court of Appeal considered the right to participate in an environmental decision-making process. The people concerned were mainly property owners whose environment was the subject of an environmental decision-making process.

The Court decided:

- Before a permit is given authorising mining activities, government must be prepared to listen to the views of people who might be affected by potential environmental impacts.
- Interested and affected parties must be told about the application for a new mining activity and given a chance to raise their objections in writing. If it is necessary, after the submission of written objections, a more formal hearing can take place.
- The kinds of environmental concerns that can be raised include destruction of plants and animals, pollution, loss of jobs and small businesses, and the depreciation of property values as a result of mining.
- Government must make sure that development meets present needs, but does not compromise the needs of future generations.

COURT CASE



COURT CHALLENGES TO ENVIRONMENTAL DECISION-MAKING MUST BE REASONABLE

In the 2005 case of *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others*, the Eastern Cape High Court considered whether a non-governmental organisation (NGO) had acted in an unreasonable manner in challenging an environmental decision.

The NGO had been involved in an Environmental Impact Assessment (EIA), but misunderstood one of the processes that were the subject of the EIA, as it did not realise that its concerns had been addressed. When a decision was taken by government to authorise the construction of an incinerator (a waste-burning facility), the NGO appealed to the MEC against that decision.

On appeal, the MEC dismissed the NGO's challenge on the basis that its concerns had been addressed. The NGO then approached the court to challenge the MEC's decision on appeal. The Court decided:

- The NGO misunderstood the waste disposal process. Because of this misunderstanding, the appeal against the decision that authorised construction of an incinerator had no prospects of success.
- The appeal had been correctly decided by the MEC.
- The NGO, in launching a court application against an unfavourable decision, had acted in an unreasonable manner.
- If the NGO had exercised due care, it should have been aware that its concerns had already been addressed, and that the application was therefore unnecessary.
- The NGO should pay the costs of the parties who opposed this application, because the NGO's application was not well prepared when brought before the court.

5.4.2 What are South Africa's international environmental duties?

In addition to its constitutional duties, the Government also has a number of international duties to protect the environment. These are set out in international instruments, including:

- The *African Peer Review Mechanism*.
- The *United Nations Millennium Development Goals*.
- The *World Summit on Sustainable Development Plan of Implementation*.
- The *Rio Declaration*.
- The *African Charter on Human and Peoples' Rights*.

a) The African Peer Review Mechanism

The African Peer Review Mechanism (APRM) is a self-monitoring mechanism voluntarily adopted by African states, including South Africa. As part of the APRM, South Africa must prepare periodic reports on its performance in adopting and implementing policies, standards and practices that will lead to political stability, high economic growth, sustainable development, and regional and economic integration.

Civil society plays an important role in the development of these reports as it is involved in responding to the questionnaire that initiates the process. Environmental sustainability is one of the key issues and is systematically built into all sections of the questionnaire.

For more on the APRM, see Chapter 3 on page 99.

b) The United Nations Millennium Development Goals

The United Nations Millennium Development Goals (MDGs) must be met by 2015. Among these is Goal 7, directing countries to ensure environmental sustainability by:

- Integrating the principles of sustainable development into country policies and programmes.
- Reversing loss of environmental resources.
- Reducing by half the percentage of people without sustainable access to safe drinking water.
- Achieving significant improvement in the lives of at least 100 million slum dwellers by 2020.

For more on the MDGs, see Chapter 3 on page 97.

c) The World Summit on Sustainable Development Plan of Implementation

The World Summit on Sustainable Development Plan of Implementation (2002) directs States to prevent and minimise waste and maximise re-use, recycling and use of environmentally friendly alternative materials, with the participation

of all stakeholders. This must be done to minimise adverse effects on the environment and improve resource efficiency.

The Plan of Implementation also says that, in order to reverse the current trend in natural resource degradation as soon as possible, States must implement strategies, including targets to protect ecosystems and to achieve integrated management of natural resources. To achieve this:

- States must launch a programme of action to achieve the MDG on safe drinking water with a view to halve, by 2015, the proportion of people who are unable to reach or to afford safe drinking water and the proportion of people without access to basic sanitation.
- States must facilitate access to public information and participation, including women, at all levels, in support of policy and decision-making related to water resource management and project implementation.

d) The Rio Declaration

The Rio Declaration says that, in order to protect the environment, States must first fulfil the basic needs of their people and improve living standards.

e) The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights says that all people have a right to a generally satisfactory environment favourable to their development.



5.5

Policies, legislation and programmes to implement your environmental rights

The Government has produced a number of policy documents and laws to give meaning to the environmental rights in our Constitution. These include laws about water, waste management, air quality and protecting our biodiversity.

South Africa has also signed the *Basel Convention* that, from January 1998, banned imports of toxic waste by developing countries from industrial countries. At home, the Government regulates the establishment, operation and closure of waste disposal sites to make them safer.

5.5.1 The National Environmental Management Act

COURT CASE



INTERPRETING ENVIRONMENTAL LAWS

In the 2005 case of *The MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Limited and Another*, the Supreme Court of Appeal settled a dispute on the meaning of provisions of the *Environment Conservation Act 73 of 1989*. What was in dispute was whether the Act prohibited the construction of a filling station without written authorisation. The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs (the Department) had developed policy guidelines based on the understanding that the construction of a filling station is a prohibited activity that may only be undertaken after a written authorisation has been issued.

The Department applied these guidelines and refused Sasol Oil (Pty) Ltd authorisation to build a filling station in Randpark Ridge on the grounds that the construction would be potentially harmful to the environment. Sasol argued that the construction of a filling station is not a prohibited activity and the guidelines are unlawful, as they were based on wrongly thinking that the Department had powers to decide whether the construction of a filling station should be authorised or refused.

The Court decided:

- The Department had these powers and the guidelines were lawful.
- The proposed development was planned opposite a church (a culturally and socially sensitive location) and next to properties zoned for residential development. The development would also be a source for pollution and have a negative visual impact on the surrounding areas.
- The interpretation of an environmental law must be consistent with the purpose of the law, the environmental right set out in the Constitution, and other relevant statutory provisions that are part of environmental laws.
- The *National Environmental Management Act 107 of 1998* (NEMA) says that the interpretation of any law concerned with protecting and managing the environment must be guided by its principles.
- At the heart of the NEMA principles is the principle of sustainable development – this means organs of State must evaluate the social, economic and environmental impacts of activities that may significantly affect the environment.

International experiences show that environmental rights cannot be effectively protected unless other rights are also protected, including the right of access to information, public participation in decision-making and access to justice. The Government passed NEMA to help you to claim these other rights in the context of protecting the environment.

NEMA helps protect the environment by:

- Creating a set of environmental principles that show the Government how it should act. For example, it tells the Government what “sustainable development” means and says that the public must be actively involved when decisions that affect the environment are made.
- Making the Government consider all the effects that a development can have (“environmental impacts”) before it is allowed to go ahead.

5.5.2 Access to information

Getting the right information is very important because it helps you make the right decision about what you are going to do before you take action. This can save you delays, costs and damage. The Constitution gives us the right to information held by government, and information held by private individuals and bodies that is needed by you to protect any of your rights.

The Government passed the *Promotion of Access to Information Act 2 of 2000* (PAIA). This Act tells you what information you can get and how to go about asking for it from government and private individuals or bodies. A request for commercial information about a company can only be refused if the information is genuinely confidential. This means that, if made available to the public, it would unfairly affect the commercial interests of the company.

NEMA and PAIA work together in opening up access to information. NEMA also says what information you are allowed to get about the environment and public health.

NEMA, for example, says that information about pollution and waste products from industry can never be private information. Under PAIA, a person cannot refuse to give this information unless it would harm the polluter’s commercial interests.

For more on PAIA, see Chapter 2 on page 58.

COURT CASE



MAKING REPRESENTATIONS WHEN NEW INFORMATION IS INTRODUCED IN AN EIA

In the 2005 case of *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Another*, the Cape High Court considered the question of what is a reasonable opportunity to make representations in an EIA before a decision is taken on whether or not to authorise the generation of energy by using nuclear power.

A decision to authorise was taken based on an Environmental Impact Report that was fundamentally different from a draft Environmental Impact Report on which the public had commented. Earthlife Africa launched court proceedings challenging this decision.

The Court decided:

- The fact that a decision is but the first step in a multi-stage process does not mean that interested and affected parties must not be given an opportunity to make representations before it is made.
- It also does not mean that an aggrieved person must await the final step before taking legal action to review the decision.
- Where a draft Environmental Impact Report is substantially different to a final Environmental Impact Report, interested and affected parties have a right to a reasonable opportunity to make representations to the decision-maker on the new aspects not previously addressed in the draft Environmental Impact Report.

COURT CASE



ACCESS TO INFORMATION MAY BE COSTLY

In the 2005 case of *The Trustees for the Time Being of the Biowatch Trust v The Registrar: Genetic Resources and Others*, the Transvaal Provincial Division of the High Court considered an application that related to a constitutional right of access to information.

In this case, the Court granted an NGO access to information, but ordered it to pay the legal costs of an international company that had opposed the court proceedings.

The High Court decided:

- Where a person has established a clear right of access to information, a failure to grant access is a continued infringement of the constitutional right.
- Even where a person has been successful in court proceedings instituted to advance, protect or enforce a right to access to information, the court may still grant a costs order against that person. The court may grant this order if it finds that the way that the requests for information were formulated was vague.

5.5.3 Public participation in environmental decision-making

Governments all over the world have recognised that when the public is involved in environmental decision-making, it is possible to make better decisions that protect the environment and your health. Remember, the Constitution says that you have the right to just administrative action.

In making decisions about the environment, just administrative action means that the concerns of the public must be listened to before giving permission for an activity that may significantly affect the environment. This principle is set out in NEMA.

For more on PAJA, see Chapter 2 on page 61.

The *Promotion of Administrative Justice Act 3 of 2000* (PAJA) helped to explain what the constitutional right to just administrative action means. It says:

- Administrative action that may negatively affect your rights must follow fair procedures.
- Government has the discretion to decide if a public enquiry should be held in cases where administrative action negatively affects your rights. It can also give you a chance to make written comments if it decides that this is appropriate.

One of the ways that the public can participate in environmental decision-making is when an Environmental Impact Assessment is done before a new development. The EIA must look at all the different ways in which the development can be done and choose the one that does the least harm to the environment. It must also evaluate the impact of new developments on the socio-economic conditions of people and their cultural interests.

5.5.4 Access to justice in protecting environmental rights

One of the important ways of protecting the environment and your health and well being is to approach a court for an order. In the past, people were not keen to do this because if they lost, they had to pay their opponent's legal costs. Even if they won the case, it could still cost a lot.

NEMA helps to use the law to protect the environment by:

- Making it easy to complain to government about damage to the environment.
- Allowing for conciliation, facilitation and arbitration where there is a dispute about an environmental issue.
- Making it less financially risky for you to go to court to defend the environment.
- Saying that you can charge someone through a private prosecution if government is not willing to prosecute environmental crimes.

Access to information, public participation and access to justice are important tools for exercising your environmental rights. But how do you know when to use them? There are so many different laws governing the environment that can make a difference to your quality of life. As a result, you may need a lawyer to explain which of the many environmental laws may have been broken on the way to your environment or health being harmed. This can create difficulties.

NEMA helps you fight for your constitutional right to the environment without having to know all the environmental laws. It has a set of environmental principles that must be followed whenever government takes any action significantly affecting the environment. It also says that, whenever anybody "significantly pollutes or degrades the environment", you can go to government to ask it to investigate and force the polluter to clean up the pollution.

GUIDELINES



SOME OF NEMA'S KEY ENVIRONMENTAL PRINCIPLES

- You have a right to be consulted before your environment can be harmed.
- All important aspects of the environment that may be affected by a development must be studied before it happens.
- Women and other vulnerable and disadvantaged groups should be helped to participate in decisions about their environment.
- The polluter must pay for harm done to the environment.
- There must be fair access to environmental resources.

5.5.5 Evaluation of new environmental laws and their implementation

The environmental rights in the Constitution and other laws have many positive aspects, but these laws also have shortcomings (see the table on the next page).

Tighter regulation of the environment will take many years and a lot of political controversy because pollution control is expensive in the short-term. Continuously, environmental groups and other NGOs have to lobby government, Parliament and polluters to improve standards and to protect health. They need the help of environmental scientists and lawyers to make submissions and to take part in enquiries about technical issues (eg chemical processes, toxic chemicals and causes of disease).

If you think that someone is causing damage to the environment and government does not agree with you, you can ask government to pay for a mediator or arbitrator to help solve the problem. Government does not have to do this – if they refuse, you will have to go to court for a decision about this issue.

Our new environmental management system has improved the position for women and other vulnerable and disadvantaged groups. This is because the environmental principles say that environmental management must put people and their needs first. They also say that there must be environmental justice. This means that there must not be unfair discrimination in the way that negative environmental impacts are distributed.

Evaluation of our environmental laws

Positive aspects

- The laws help to coordinate government activity by setting standards for different government departments to protect the environment in a consistent way.
- Before new developments can happen that may significantly affect the environment, there must be public participation and information-sharing.
- Polluters who damage the environment must clean up their pollution.
- There is improved access to justice for members of civil society with complaints about damage to the environment.

Shortcomings

- The laws set out general principles for environmental management and public participation, but do not spell out exactly how people, businesses and government should behave. They leave issues poorly regulated or unregulated. For example, they do not say how much pollution is allowed by any particular factory, or how different kinds of waste should be managed and disposed of.
- Government officials still have a lot of discretion about how much pollution and degradation of the environment they are prepared to allow.
- NEMA has been amended to exclude a duty to undertake an EIA where an activity is not identified as requiring one, even though the activity may significantly affect the environment.
- The meaning of “reasonable measures” is still vague and has not been decided by courts, or spelt out in regulations in enough detail.
- Some new laws have not been implemented even though they have been drafted, eg the *Coastal Zone Management Bill of 2003*.

5.6

Protecting and advancing your environmental rights

In this part, we deal with two environmental problems:

- When a new development is about to start or an activity is about to be continued that may harm your health or your environment, and where you want to protect your environmental rights.
- Where the harm to your environment or your health is already happening, and you want to do something to stop it.



5.6.1 Problem 1: New developments or continuing activities

GUIDELINES



WHAT HAPPENS WHEN NEMA REGULATIONS DO NOT COVER A DEVELOPMENT?

- If you think it will have a significant impact on the environment, you can try to persuade government that an impact assessment should be done beforehand. This impact assessment would be part of the developer's duty of care under NEMA.
- If you are ignored, you can go to court and see whether the court agrees with you.
- If the court agrees with you, it can order the development to be stopped until the impact assessment is completed.

Section 24 of the Constitution says that the State must protect the environment through reasonable steps that “prevent pollution and ecological degradation”, “promote conservation” and “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. This means that, when the State allows new developments or continuation of existing activities, it must act reasonably to protect your health or well being, and to protect the environment.

NEMA also says how impacts must be assessed before the Government can give permission for a development which may “significantly” affect the environment.

a) **Using an Environmental Impact Assessment**

An EIA is a process of finding out what harm a development might do to the environment:

- Each different form of harm is called an *impact*.
- Ways of making the harm less (*mitigation*) are explored.
- If there are different ways of doing the development (*alternatives*), these are also researched.
- An expert not involved in any other way in the project (called an *environmental assessment practitioner*) usually does the research.

The public is told about the project and allowed to make comments. They can suggest different ways of doing the project. After all the impacts have been identified, government looks at what everyone has said and decides whether to let the development go ahead or not. Conditions that aim to protect the environment can be placed on the development.

NEMA says that there must be an EIA before any activity or development that is identified or specified by the Minister of Environmental Affairs and Tourism, or the MEC for a provincial environmental affairs portfolio, as needing an environmental authorisation before it can start or continue. This means that the developer must ask government for permission and must do an impact assessment before starting with or continuing the development. The impact assessment helps government to decide whether to let the development go ahead.

Under NEMA, there are regulations saying that certain activities must definitely have EIAs before they may begin or continue.

NEMA says that when we do these assessments, we must not only look at the way the environment may be affected. We must also look at the way our society and our cultural heritage may be affected. For example, we should assess the impact that a proposed development is likely to have on unemployment in the surrounding community, and on areas of cultural significance such as graves and battlefields.

Government is not allowed to ignore what is recommended in an EIA. It is also not allowed to ignore the NEMA environmental principles when it decides what to do. If it does, you can take legal action, and ask a court to stop the development until government has issued a new decision taking into account the NEMA environmental principles and the recommendations of an EIA.

b) **Preparing to take action**

On the next page, we suggest some steps you can take to get organised to advance, protect and defend your environmental rights when new developments are being planned.

If you are not satisfied at the end of an EIA that it has been done following these guidelines, you can go to court and try to stop the development from going ahead until an EIA is done that is in line with legal requirements. You can also ask for government to appoint a conciliator or arbitrator to try to solve the dispute.

GUIDELINES



STEPS TO TAKE WITH NEW DEVELOPMENTS

1. Find out from the developer which government department it has approached for permission.
2. Ask for a list of interested and affected parties in your area.
3. Organise other interested and affected parties in your area to be included on the list.
4. Ask who the environmental assessment practitioners are and what their qualifications are.
5. Find out from your local university or technikon, or the Internet, if there have been any similar developments elsewhere in the country or in the world, and what kind of harm they caused to the environment and to human health. For example, there are many support groups in the United States of America dealing with industrial and other developments. The United States Environmental Protection Agency also has a website and provides information.
6. Find out what important issues need to be raised in the impact assessment.
7. Ask to see all scientific studies done on the impacts.
8. Ask for 'mitigation measures' to be studied in each impact – in other words, what can be done to make the impact less harmful.
9. Find out all the impacts that the activity may have on the socio-economic environment or cultural heritage.
10. Ask the independent consultants to say when they do not have scientific answers to questions, or where they are not qualified enough to answer scientific questions.
11. Ask for an independent review of the reports by another consultant to be paid for by the developer.
12. Make sure all your comments are included and recorded in the review.
13. If you are unhappy at any stage, ask for conciliation, mediation or arbitration.
14. Make sure that at all stages of the process you get all the information you need from the developer about possible harm to the environment, or your health and well being.
15. Ask if arrangements have been made for the monitoring and managing of the harm that the development may cause to the environment or to your health.
16. Make sure that government considers all recommendations from reports that were done during the impact assessment, and other provisions of NEMA and its environmental principles.



5.6.2

Problem 2:

Stopping actions that harm the environment and your health

Under South Africa's environmental management laws, you can get organised to protect your environmental rights in these situations:

- When a law that protects the environment has been broken, for example, a person is dumping used motor oil in a river.
- When government has not followed a principle of NEMA, for example, government has made no attempt to get a mining company to cover a dusty mine-dump next to a community. It says it is too expensive for the mine. This goes against the principle that environmental management must put people and their needs first, and must be fair.
- When there is serious pollution of the environment, for example, a local authority is pumping sewage into a river used by a community for drinking water.
- If you are punished for refusing to do work that could harm the environment or for giving information about risks to the environment.

Your different options for action will depend on what kind of harm is being caused to the environment or to your health and well being. Your options include:

- Complaining to local or provincial authorities.
- Complaining to the Director General of the relevant government department.
- Asking for conciliation or arbitration.
- Going to court.

a) Preparing to take action

GUIDELINES

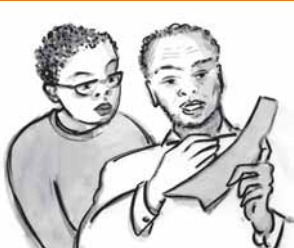


WHAT TO DO BEFORE TAKING ACTION

1. Prepare as much evidence as you can, for example, take photographs, soil or water samples, and record complaints by people affected.
2. If you write letters, include as much detail as possible and keep copies of what you have sent.
3. Try to approach local universities and technikons (many have environmental units) and ask them to help you with scientific information and support.
4. Get legal advice about whether a law has been broken, for example, from university law faculties, law clinics, advice offices, Legal Resources Centres, or human rights lawyers in private practice.
5. Contact other environmental groups locally for support and advice.

b) Complaining to local or provincial authorities

GUIDELINES



COMPLAINING TO AUTHORITIES

For example, if someone is illegally dumping builders' rubble or medical waste in your community:

- Phone your local government health or environmental department and make a complaint.
- Complain to the provincial department responsible for Environmental Affairs or, if the waste is being dumped in a water resource, the Department of Water Affairs.
- Ask whether the action you are complaining about is a crime, and if it is, lay a charge at the police station.

c) Complaining to the Director General

If your complaint is about serious pollution, you can make a complaint to the Director General of the government department that is responsible, for example:

- Water Affairs and Forestry, if water or soil is being polluted.
- Environmental Affairs and Tourism, if any part of the environment is being polluted.

If they do not answer, you can go to court to order them to respond. You should put your complaint in writing, especially if later you want to go to court for help and you need to prove that all other efforts have failed.

d) Asking for conciliation or arbitration

Conflict management happens when a neutral person helps to solve a dispute between two or more persons by conciliation or arbitration. You can ask government to pay a conciliator or arbitrator to solve the problem. This is a much cheaper way to solve problems than going to court.

e) Going to court

You can go to court to:

- Stop government or a person from breaking the law, or
- Force someone to do their duty if there is a duty on them to do something, such as clean up pollution.

The next three case studies show how you can protect your environmental rights.

CASE STUDY



RIVER POLLUTION IN PIETERMARITZBURG

Bayne's Spruit River is situated next to Sobantu Township in Pietermaritzburg. This river is a valuable resource to the Sobantu community, as its water is used for irrigation purposes, swimming and washing of clothes. For years, oil companies upstream of the township were illegally polluting this river by discharging oily, smelly fluids ('industrial effluent') into it. These fluids clogged up the irrigation pipes, and made the water unsuitable for swimming and washing.

Action taken:

- Community members formed an organisation to deal with the pollution problem, among other issues.
- This organisation was instrumental in establishing a multi-stakeholder forum, including representatives of oil companies, the Department of Water Affairs and Forestry, the Department of Agriculture and Environmental Affairs, and the Msunduzi Municipality.
- The aim of the forum was to stop the pollution through investigating pollution incidents, identifying the polluters and collecting samples to assist in the prosecution of individual companies.
- The forum's activities helped to decrease the companies' pollution of the river because the threat of prosecution became real.

Environmental Justice Project Report, 2002, Legal Resources Centre, 8

CASE STUDY



AIR POLLUTION IN TABLE VIEW

An oil refinery is situated and operating in the residential area of Table View in Cape Town, less than three kilometres from poor community areas of De Noon and Joe Slovo. In these areas, residents complain that they have a high prevalence of respiratory problems, chest-related illness, coughs, sore throats, weak immune systems, sinus complication, headaches, eye infections, ear infection and allergies. It is suspected that all these problems are linked to toxic air pollution, allegedly caused by the refinery.

Action taken:

- The residents in Table View started to take air samples that showed the presence of 31 chemicals, 12 of which are categorised as dangerous ('toxic') air pollutants by the United States Environmental Protection Agency.
- Using these air samples, the Table View Residents Association approached the South African Human Rights Commission alleging that the residents are experiencing human rights abuses as a result of the operations of the oil refinery.

National Report on Community-based Air Pollution Monitoring in South Africa – Air Pollution in Selected Industrial Areas in South Africa, 2003, groundWork, 34

CASE STUDY



RECYCLING CHEMICALS

A company that recycled hazardous chemicals in Europe was having trouble proving to government officials that its industrial process was not making workers ill. The company decided to go to South Africa, as it thought our environmental laws were less strict than in Europe. It set up a factory to recycle the chemicals. After a while, two workers died and many others became sick. They discovered that one of the hazardous chemicals they were recycling was making them ill.

Action taken:

- The workers took the case to court in Britain. An out-of-court settlement was reached and the workers were paid damages for their injuries.
- The company later improved its safety processes and workers are no longer getting sick.

groundWork press release, 'Thor chemicals to be held accountable for poisoning workers, community and environment', 12 March 2003; Greg Dropkin, UK Judges Block Thor Manoeuvre, LabourNet UK website.

Discussion ideas



TALKING POINT 1

Organise the community that lives near an industry that causes harm to the environment. Choose a local example that you are aware of.

Workshop these steps to take up the issue:

1. Find out and highlight the issues:

- Discuss the nature of the operations involved.
- Discuss the environmental impacts that are likely to result from those operations – in other words, are they likely to pollute the air, soil or water?
- Discuss the likely impact on the community – with air pollution, for example, are chest problems common among the members of the community?
- Highlight these issues to other members of the community with the aim of forming a community organisation or using an existing community organisation to take up these issues.

2. Get more information and help:

- Find out where other operations of the industry are located in other parts of South Africa or in other countries.
- Link up with communities in those places to find out how they have challenged the industry.
- Find out about NGOs that assist communities with environmental pollution.

3. *Take up the issue:*

- *Discuss ways of taking up the issue, such as petitioning the industry concerned or taking legal steps against the industry for specific incidents of environmental pollution.*
- *Discuss the possibility of establishing a multi-stakeholder forum, involving community, industry and government representatives with the aim of tackling environmental pollution.*
- *Find out about forums in other parts of the country and learn from their experiences.*

TALKING POINT 2

Challenge a new development that may significantly affect the environment.

An aluminium smelter (a known large-scale polluter) is planned for construction near a low-income community. Workshop these steps to take up the issue:

1. *Find out what the issues are:*

- *Discuss the environmental rights in the Constitution.*
- *Discuss the NEMA environmental principles.*
- *Discuss whether an EIA must be undertaken.*
- *Brainstorm possible impacts, eg water pollution, air pollution, noise, traffic changes.*

2. *Find out more about the process:*

- *Identify possible interested and affected parties.*
- *Work out what kind of information should be asked from the developer.*
- *List what kinds of advice (eg scientific, legal) are needed to take part in the assessment, and where you can get this advice.*

3. *Take part in the process:*

- *Discuss how to get the most out of meetings and discussions that the developer will hold.*
- *Discuss how to ask for an independent review of the process.*
- *Discuss how to ask for mediation or arbitration if there is a dispute in the process.*
- *Write a submission setting out the community's concerns.*

4. *Think about what to do after government takes a decision:*

- *Discuss what you need advice on, and how to get advice about what to do.*
- *Discuss how to prepare to appeal against the decision.*
- *Discuss how to prepare to take the case to court.*

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