

ENVIRONMENTAL AND WATER MANAGEMENT LAW IN POST-APARTHEID SOUTH AFRICA

PATRICK BOND and ROBYN STEIN

INTRODUCTION

When the competing environmental discourses find their way into law, they are most dangerous. Of foremost interest in post-apartheid environmental legislation is the introduction of environmental rights into formal jurisprudence. Both the Interim (1993) and Final (1996) versions of the Constitution guaranteed every person the right to an environment that is not "detrimental" (1993) or "harmful" (1996) to their health or well being, with the Final Constitution adding further socio-economic rights with environmental implications. Coupled with the constitutional enjoiner to Parliament to ensure public participation in law making, the Final Constitution required legislation that would give effect to the rights enshrined in the Bill of Rights and to the founding values of the Constitution, including the achievement of the equality and the advancement of human rights and freedom. (RSA, 1996, s.1).

In this chapter we unpack the two most significant pieces of environmental legislation in the ANC's first term of government: the National Environmental Management Act 107 of 1998 and the National Water Act 36 of 1998. Both give a degree of legislative effect to the concept of "sustainable development," in keeping with the discourse of ecological modernisation. Both rely heavily on a highly-regulatory "command-and-control" approach, and incorporate environmental and social justice values.

But both are also ultimately designed for federalist enforcement at the "lowest most appropriate level." And as with the Constitution, the enforcement of these laws' environmental rights are, in the end, dependent upon the South African legal system's ability to deliver on the constitutionally guaranteed right of access to courts or any other independent or impartial tribunal or forum (RSA, 1996, s.32). Some of the more important contradictions contained in the two statutes must also be identified in the process, for it is evident that they arise from the socio-political context and the need for compromise in what was still, in 1998, a tentative first term of democratic government. What is ultimately most obvious is that notwithstanding rhetoric to the contrary, apartheid-era state support for industrial development and capital accumulation at all costs

was not significantly altered through the new laws.

THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT

The National Environmental Management Act (NEMA) came into effect in January 1998. It called for "co-operative environmental governance" -- a phrase derived from the Constitutional mandate (RSA, 1996, Chapter 3) that all spheres and organs of government are obliged to co-ordinate their actions -- by establishing principles to be taken into account in all decision making-processes affecting the environment. Apartheid-era South African environmental law, in contrast, was fragmented and disbursed amongst a wide variety of statutes and subordinate legislation and was administered by a multitude of regulatory authorities (Fuggle and Rabie, 1992). NEMA represents law-making in the ecological modernisation mode, for while insisting that "environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interest equitably," it immediately switches to Brundtland-style sustainable development discourse, with a call for "socially, environmentally and economically sustainable" development (RSA, 1998a, s.3.2, 2.3). The idea of sustainability entails "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations" (RSA, 1998a, s.1.29), which in turn follows from the Constitution's approach to "justifiable economic and social development" (RSA, 1996, s.24.b).

Thus NEMA (RSA, 1998a, s.2.4.a) stipulates avoidance (or where that is impossible minimisation and remedy) of "the disturbance of ecosystems and loss of biological diversity...; pollution and degradation of the environment...; disturbance of landscapes and sites that constitute the nation's cultural heritage...; [and] waste..." It continues by insisting

that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource; that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised; that a risk-adverse and cautious approach is applied,

which takes into account the limits of current knowledge about the consequences of decisions and actions; and that the negative impacts on the environment and people's environmental rights be anticipated and prevented, and where they cannot altogether be prevented, are minimised and remedied.

Hence prevention is better than cure, but qualifications are made consistently so that sources of environmental harm and damage located in the existing mode of production are ultimately not challenged.

But here too an environmental justice thread is woven into the legal rhetoric. NEMA's founding principles recognised that "environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons" (RSA, 1998a, s.2.4.c). But "adverse environmental impact" is not defined, and although it capable of wide interpretation, there is a threat that a narrow reading of NEMA's definition of "environment" will nullify the broader social intent of the principle. For that foundational definition (RSA, 1998a, s.1.11) -- "the surroundings within which humans exist and that are made up of -- the land, water and atmosphere of the earth; micro-organisms, plant and animal life; ... the interrelationships among and between them; and the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing" -- is, after all, an eco-centric approach which explicitly avoids clarifying in plain language *social, living and working environments* (Lukey, 1995, 40). In a context where a relatively untransformed judicial bench retains strong class, race, gender and other relations to the privileged of society, clear legislative language is vital, and NEMA's implicit distinction between human health and well-being, and environmental health and well-being, leaves the law more amenable to an ecotourist's conception of environmental sustainability than to someone from poor or working-class roots.

To illustrate, while NEMA safeguards the refusal to do environmentally hazardous work (RSA, 1998a, s.29), this section is curiously silent on potential, threatened or actual health threats associated with particular work practices. The balance of convenience is clearly in the hands of employers, for workers are required to comply with technical and complex administrative requirements. There is, thus, access to environmental

information in NEMA -- including, under certain circumstances, privately-held information -- and added protection for whistle blowers (RSA, 1998a, s.30), yet the extent of employer disclosure will ultimately depend both upon Open Democracy legislation not yet passed by Parliament (where considerable pressure will be exerted by corporate interests), and regulations promulgated by the Minister of Environmental Affairs and Tourism. Such ministerial regulations must be "reasonable" (RSA, 1998a, s.30.2) -- i.e., objectively justifiable in the circumstances -- which leaves significant room for manoeuvre, particularly in an age of commercially-protected information. (As noted below, the regulations are subject to Parliamentary approval but nonetheless constitute "subordinate legislation.")

In sum, NEMA's principles are internally qualified or simply do not go far enough to address distributional issues, the root causes of environmental damage and harm, and practical power relationships on the legal battlefield.

NEMA's compliance and enforcement provisions contain relatively far-reaching provisions which, at first blush, resonate with social and environmental justice values. But these provisions contain substantial terminological loopholes following compromises with key corporate-industrial interests. The "polluter-pays" principle is fundamental, requiring "every person, who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, insofar as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation" (RSA, 1998a, s.28.1). But again the qualifier "reasonable" can be invoked when there is any alleged economic hardship or job loss associated with pollution-control measures.

Moreover, those who are obliged to take "reasonable measures" include the "owner of land and or premises, a person in control of land or premises or a person who has the right to use the land or premises on which or in which any activity is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment" (RSA, 1998a, s.28.2). South Africa's legacy of brutal land dispossession and land tenancy should have suggested the need for sensitivity as to the relative priority given to *which* polluter must pay, and there is

very little prospect for prosecution of predecessors-in-title. For while NEMA boldly declares an intention to consider any person who "is or was responsible for, or directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation," there is no specification of whether, for example, lenders, technical specialists or predecessors-in-title can be brought into the liability net. As for costs that may be recovered, again these must be "reasonable," and no mention is made of indirect social costs.

The provisions of the Constitution dealing with the enforcement of rights (RSA, 1996, s.38) are replicated and given effect in NEMA (RSA, 1998a, s.32), including the reintroduction of class action into the South African court process and cost protections for group-plaintiffs, but nonetheless these are premised on access to justice being available to all; given fiscal constraints and residual class privilege, this simply does not exist in South Africa. Court procedures continue to be alienating and extremely costly. Alternative means of private party dispute resolution are vaguely provided for in NEMA, but are not likely to make a substantial difference to the problem of access. In short, possibilities for integrating compliance and enforcement provisions given the existing system of civil and criminal justice do not appear to be in the least bit realistic.

The Constitution (RSA, 1996, s.44.2) sanctions national government to set minimum uniform norms and standards regarding provincial and municipal legislation, with space given for specific and technical issues pertinent to regional and local settings. But again, in the interstices of practical legislative implementation in a context of a severely compromised transition process, semi-federalism has been repeatedly entrenched, and is evident in the supreme law of the land. Activists' concerns around uneven legislation and regulatory control in respect of the environment seemed to have been ignored in the Constitution. Environment and pollution control are "concurrent" national and provincial government legislative responsibilities, and even more worrying, exclusive legislative competence has been granted to the provinces and indeed to municipalities in regard to monitoring and regulating waste disposal (whether this includes hazardous waste disposal is left unclear). As a result, NEMA's chapter on integrated environmental management facilitates asymmetry in an already terribly uneven regulatory and administrative environment (RSA, 1996, Chapter 5). NEMA's weak conception of integrated environmental management also surrenders socio-ecological regulatory power to other (non-

environmental) national and provincial departments, with the result that the most significant polluters -- the mines -- will continue to enjoy protection from, for instance, the rigours of far-reaching impact assessments prior to commencement of prospecting or mining operations.

Finally, in the spirit of ecological modernism, and despite the philosophical devolution of regulation to the lowest most appropriate level, environmental "co-regulation" and "self-regulation" find their way into NEMA (RSA, 1996, Chapter 8). Although paying lip service to control and also to community-based participation, NEMA leaves all meaningful powers to the prerogatives of the Environment Minister's executive lawmaking through regulation (RSA, 1998a, s.35.2).

THE NATIONAL WATER ACT

The National Water Act (NWA) came into operation in October 1998, replacing a 1956 Water Act. Its core objectives are: (a) meeting the basic human needs of present and future generations; (b) promoting equitable access to water; (c) redressing the results of past racial and gender discrimination; (d) promoting the efficient, sustainable and beneficial use of water in the public interest; (e) facilitating social and economic development; (f) providing for growing demand for water use; (g) protecting aquatic and associated ecosystems and their biological diversity; (h) reducing and preventing pollution and degradation of water resources; (i) meeting international obligations; (j) promoting dam safety; and (k) managing floods and droughts (RSA, 1998b, s.2). As with NEMA, ecological modernism discourse underpins the NWA, particularly the calls for sufficiency and sustainability (undefined) in the public interest and the facilitation of social and economic development. In the Brundtland mode, intergenerational equity and the meeting of basic human needs are fundamental provisions. Yet the extent to which the NWA legislates the protection, use, development, conservation, management and control of water resources, in relation to the country's vast unmet human needs, is nevertheless questionable.

Here the NWA's concept of an abstract "Reserve" of water resources to meet both basic needs and the integrity of aquatic ecosystems is a key international legal innovation. But the basic needs provision is itself reliant

upon interpretations of a 1997 Water Services Act, the constitutionally-enshrined rights of access to sufficient water (RSA, 1996, s.27) and environmental rights as discussed above. Those interpretations are, unfortunately, subject to the vagaries of administrative decision-making and regulatory prescription by the Minister of Water Affairs and Forestry.

The lack of clarity on meeting basic needs is carried through to the pricing strategy provided for in the NWA (RSA, 1998b, s.56), which obliges the Water Minister to "consider measures necessary to support the establishment of tariffs by water service authorities," and in particular to "make allowance" for lifeline and progressive block tariffs. Yet neither the NWA nor the Water Services Act provide clues as to what is meant by a lifeline tariff, which gives rise to somewhat arbitrary determinations of the "minimum" amount of water per day to required to sustain human life and hygiene. For the ANC's first term in office, and indeed for the foreseeable future, the RDP *short-term* objective of 25 litres per person per day is used, and has become not a minimum in actual water projects, but the effective *maximum* for which small pipes are installed. Nor is this amount guaranteed as a free entitlement; as noted above, official policy is that marginal cost should be met by consumers. Thus though laudable for including the recognition of sufficient water for basic human needs, the NWA suddenly stops short, in the modernist mode, of granting the full ambit of this notion. The threat and reality of water cut-offs have actually intensified over the ANC's first term, as a result of a burgeoning municipal fiscal crisis (following from a dramatic reduction in central-local intergovernmental grants), and an extremely tough "credit control" mandate given municipalities by DCD.

Interpretation of these issues will again be left to the courts, which remain a highly inadequate forum for the environmental and social justice values mandated by the Constitution. Moreover, the NWA's administration will ultimately take place by delegation (although the NWA makes it clear that this does not mean devolution), at the level of an anticipated 13 "water management areas" such as catchments or regions. But administrative discretion is again fundamental to the management of these areas. To replace apartheid-era irrigation boards in rural areas, which represented pockets of white agrarian power, the NWA provides for "water user associations," i.e., representative "co-operative associations of individual water users who wish to undertake water related activities for their mutual benefit" (RSA, 1998b, Chapter 8). Yet given the existing power and distributional imbalances as well as South Africa's failed

land redistribution programme, the NWA is remarkably silent on ensuring the desired transformation.

Despite its "localised," "most appropriate level" approach to water resource management, the NWA contradicts itself by providing for ultimate *national* government responsibility as "public trustee" of South Africa's water resources (RSA, 1998b, s.3). The Minister has responsibility for ensuring that water is allocated "equitably" and used "beneficially" in the public interest, while promoting environmental values (RSA, 1998b, s.3.2). The practical effect is the juxtaposition of central power, regulation and control with delegated or localised power and control, which throws into question effective participatory democracy at the water management area level.

The NWA proceeds to introduce a wide definition of "water use" (RSA, 1998b, s.21), including abstraction of water from a water resource, storing water, impeding or diverting the flow of water as well as the discharging or disposing of water found underground if this is necessary for the efficient continuation of an activity or for the safety of people (i.e., in underground mining operations). The NWA constitutes a legislative shift from a system which facilitated acquisition of private use rights in water to a public system where allocation of water use rights is administratively determined on a licensing basis, which in turn will be influenced by an abstract water market as set out in the pricing policy. Riparianism, the doctrine developed in the South African Common Law, English law and apartheid law, is also abolished in the NWA.

Yet here, too, where the opportunity arises for a great leap forward for social and environmental justice, the NWA gives protections to "existing lawful water uses" (RSA, 1998b, s.32), i.e., "during a period of two years immediately before the date of commencement of this Act; or which has been declared an existing lawful water use..." It is only through the compulsory licensing process (RSA, 1998b, s.43-48) that existing lawful water uses are ultimately challenged, but this is constrained by the spirit of the orthodox economic approach, namely residual (and sacrosanct) property relations under the Riparian system. The point was to avoid challenge to the NWA on grounds of the Constitution's protection of private property. But as a result, payment of compensation can be claimed where "severe prejudice to the economic viability of an undertaking" has resulted in "financial loss suffered in consequence" of a lesser water use

being authorised or a substantial reduction in water use imposed through the compulsory licensing process (RSA, 1998b, s.22.6). The budget for the Department of Water Affairs and Forestry does not, however, contain provision for major compensations, and indeed the water services budget came under fierce attack -- at one point suffering mid-year cuts of 67% -- from the Department of State Expenditure during the mid-1998 period of foreign financial turmoil, which in turn catalysed intensified fiscal discipline.

With respect, too, to pollution, economic principles associated with ecological modernisation -- particularly the "internalisation of externalities" -- impinge upon social and environmental justice, for while the NWA contains a relatively more stringent polluter-pays provision than its predecessor, once again the "measures" provided for are qualified by the test of "reasonableness." Clean-up or mitigation costs may be recovered from persons "jointly and severally," and the NWA creates an offence of criminal negligence in regard to water pollution; but this is ultimately dependent upon prosecution through the courts.

Though written in apparently more plain and accessible language than the NEMA, ultimately the fulfillment of the rights guaranteed in the NWA are dependent upon the say-so of a water tribunal (established under the NWA) and the courts. Again, given South Africa's untransformed civil and criminal and justice system, serious concern arises as to the extent to which the NWA will deliver meaningful social and environmental justice. And given South Africa's extraordinary maldistribution of water resources, the NWA's light treatment of redistribution and its somewhat fickle provisions for implementation together raise serious concerns as to whether any progress to "equity," repeated so often in the NWA, will occur in reality.

CONCLUSION

In short, both laws and their implementation will very likely amplify the core political dynamics damaging the South African environment. On the one hand, we witness the tendency for government to talk eloquently about environmental justice (without any intention, though, of carrying forward the necessary radical transformation of economy, society and environment). On the other, the tools of ecological modernisation are often invoked -- yet they are applied in a manner that never truly challenges the power of capital, thanks to

diverse but effective loopholes. Finally, the overriding logic of accumulation offers big capital the assurance that if an economic growth discourse is invoked, its privilege to destroy the environment will ultimately be defended.