ENVIRONMENTAL LAW

DISSERTATION

Environmental NGO's and CBO's

Towards an understanding of their role in the development and implementation of Environmental Law

An Examination from an Urban Perspective

PREPARED BY:

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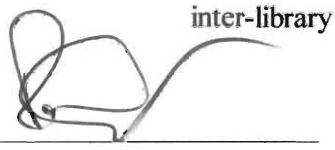
Signed: 

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CONTENTS

'We have met the enemy, and it is us'[1]

The role of CBO's and NGO's in assisting in the implementation and formulation of environmental laws and codes has entered a new dimension. At the local level there is an expectation and a right to be heard in terms of administrative decision making, and new opportunities to provide input to policy processes and law reform. Internationally, the World Summit on Sustainable Development has pointed the way towards a requirement for a globally co-ordinated response amongst NGO's and CBO's, to lobby and otherwise pressure their respective legislatures for the adoption of a regulatory framework that incorporates legal rights for citizens as well as rules and duties for industry. These developments have the potential to empower participants so as to be able to contribute meaningfully to debate and discourse around complex issues surrounding environmental management, sustainability and development. Unfortunately there exists significant obstacles to progress, with access to resources and technical capacity high on the NGO wish list. Bureaucratic inefficiency persists but access to decision makers by NGO's is improving relative to the earlier part of the last decade. Structural problems continue to dampen prospects for environmental compliance, with a dearth of adequately trained personnel and crippling financial constraints the order of the day for most South African environmental regulators. Bureaucratic infighting and corporate capture of local authority continue to pose serious problems to good and fair environmental governance. The myth that economic growth will bring benefits for all neglects to explain how profits are redistributed as it appears that only the negative externalities are freely shared – especially with the poor and needy. Political pressure to fast track developments coupled to a non-prosecutorial climate has led to an escalation of industrial accidents and mishaps, that could have been avoided had a more rigorous approach been adopted. The ideal is that all development should be environmentally sustainable for both present and future generations but in the absence of an agreed strategy for assessing

[1] Walt Kelly's Pogo as quoted by Sutherland & Parker 'Environmentalists at Law' in Borelli (ed) *Crossroads : Environmental Priorities for the Future* 1994 182.

sustainability, it is likely that these words will amount to little more than modernist eco-jargon and consultant rhetoric. Noting then the absence of appropriate environmental standards, non-existent official monitoring, and reluctance to enforce relevant laws, could leave one pessimistic about South Africa's future. On the contrary the participative democracy presents significant opportunities for environmentally concerned persons to respond to these challenges in new and innovative ways. Recent legislation specifically allows for the empowerment of individuals and groups in a manner heretofore unknown, allowing access to the legislative process, to information, to decision makers, and to the courts. The role of the CBO and NGO has grown far larger than that of the traditional environmental watchdog with the uncertain bite. It allows for connectivity at local, regional, national and international levels, and creates the pressure point needed to move and shape our shared environmental future. Then there is the omnipresent dilemma of finding meaningful and sustainable alternatives to our duel addictions to fossil fuels and consumerism. Locating viable alternatives will possibly be one of the greatest challenges facing the environmental movement in the 21st Century. For now the task is to educate, lobby and reform the people of South Africa, to inform them of their rights and to organically grow the concept of environmentally sustainable practices that puts people and not profits at the forefront of its concern.

1. INTRODUCTION

'The price of liberty is eternal vigilance'

Thomas Jefferson.

This paper is set against an urban landscape of first world industry and third world needs and expectations. The location is Durban, South Africa, more particularly the area referred to as South Durban or, as authorities prefer, the Southern Industrial Basin (SIB).

Some years ago the author had occasion to be present at a meeting with authority, industry and others regarding a project development proposal when a comment (an aspersion really) was made by a member of authority that certain of those present were 'environmental activists.' This comment was startling. Activists present in the very same room! Was this Green Peace or a local chapter of the Sea Shepherds; perhaps some new and exotic firebrand organisation? Danger and nervous anticipation were palpable. What were they about to do? But hold...where were the chains, the long hair, the banners and posters...the chants, the cacophony and all the frenetic energy so artfully delivered by our news media? Instead arrayed around the hall were quite respectable and decidedly normal looking men and women, some elderly, some young, most in office attire - no-one looking particularly dangerous. With more experience it has became apparent that the 'activists' are indeed ordinary people with ordinary lives doing extraordinary things with their spare time. They were standing up for their rights; rights to environmental protection, peace of mind, bodily integrity and information, to name a few. Some were present because of pollution but all were

there because of hope. Hope for better things and a better place. Hope for an improved quality of life, and for a legal system that would recognise environmental injustice and promote truly sustainable and effective solutions.

The last decade has been noted for spectacular advances in areas such as bio-engineering, gene mapping, interstellar explorations and cosmic planetary theory. Overshadowing all of these has been the meteoric rise in information technology and associated development of the internet, and personal computing abilities. Extraordinary resources are now available at your fingertips permitting the user the ability to both receive, locate, discuss and disseminate information, without leaving home. In environmental terms this ability represents a monumental advancement in the pursuance of injustices and transgressions. Connectivity and access to information are key determinants to empowering the public, and it is in this department that the internet handsomely delivers. In developing countries, such as South Africa, the internet has led to the location of donor funding, has effectively increased international awareness around environmental issues, and assisted with the location of international experts to assist in unravelling complex environmental problems.[2] Unfortunately not all of modern day *homo sapiens* brilliance is as empowering. Many of the achievements are patented and simply not available to the masses. Instead, many of these technological and scientific milestones only serve to underscore the developed world's economic strength and position, *vis-à-vis* that of the developing world. One

[2] In the context of South Durban the benzene exposures in South Durban have been circulated widely via the internet particularly in the USA and Denmark. Likewise communities have been able to communicate concerns around incineration projects (both locally and in Mozambique) and received overwhelming support from organisations who have previously fought the battle. The South Durban Community Environmental Alliance regularly uses electronic networks and lists, to elicit responses on such issues as epidemiological study design, health risk assessments and pollution impact methodologies.

needs think no further than how retroviral therapies, developed in the West, are withheld from countries plagued with Aids, with the clear incentive being less on the cure and more on the profit. There are, however, other products produced *en masse* and freely shared with poorer neighbours. For example as part of the technological deal we all get to share in Poly Chlorinated Bi-Phenols (PCB's), dioxins, furans, nuclear waste, volatile organic compounds, and possible climate change. Ownership of these less attractive outcomes is hotly contested. So, sadly whilst much greatness has doubtless been achieved by the industrialised nations, the rest of the World, in stark contrast has been left to labour under unimaginable burdens of disease and extortionate debt, an easy prey to both natural and unnatural disasters, and ripe for war, famine and disease.

The global response to the inequities that exist between the rich North and poor South has amounted to nothing more than an unstructured debate between various interest groups. The remedy to the perceived exploitation and suffering visited upon the developing countries by so-called benefactor agencies and nations, is usually to supply further aid in the form of finance, whereas what is really required is clean employment-generating investment and not monetary loans, where default is highly likely. Trade agreements are regularly cited as instruments perpetuating the global power imbalance. Their design ensures the continued domination of the less developed world by industrialised nations and guarantees their access to scarce natural resources. This opinion has been espoused in one form or another by many international labour, human rights and environmental groups, with the events at the 1998 World Trade Organisation meeting in Seattle underlining this position. The scale of the protest and

its trans-continental flavour appears to indicate an emerging awareness by citizens of both Hemispheres of the distortion in global power relationships. It is submitted that there is an emerging global consciousness of a need for swift action, designed to restore a sense of balance to the world order. Something is not quite right with the machine. Many fingers, (black, brown, yellow and white), are being pointed at rising oceans, aberrant climates, biological catastrophes, resource depletion and species extinctions as indicators of world stress. Standing accused are rampant consumerism, trade wars and monolithic world trade institutions and mega-corporations. Apocalyptic events were, and still are, forecast by both the irrational lunatic fringe, and even the mainstream and very respectable scientific community. Panic was spawned amongst the supposed technological elite, when doomsday style prophecies were remodelled as Y2K. Nostradamus was out but Bill Gates was in. That it didn't happen is not important, for it is the behaviour that is illustrative. It shows that the modern world is increasingly susceptible to the notion of impermanence and global alarm. Perhaps this can be taken to mean that as a specie we are coming of age. This is an uncomfortable period where we discover the truth about the frailty of this planet, and the imbedded linkages we have with the natural world and all that befalls it. For humankind to survive let alone sustain itself, will require the commitment and dedication of many many impassioned people, to help find solutions to prevent the inevitable ecological crisis spawned by our extraordinary consumerist momentum. 'Something will turn up' say the technocrats and economists, 'something wonderful will save the day'...but the nagging doubts remain - lurking in the shadow of Y2K.

Scientifically measurable global environmental effects now attest to the trendy 'eighties' ideas of global warming, green house effects and ozone depletion. Some of the blame for these indicated trends is placed upon the wholesale destruction of the carbon dioxide soaks contained within the Americas, Africa and Asia. Less attention is focused upon those who consume them. So while the forests buzz with the sound of chain saws ordinary people in ordinary homes sit around mahogany tables eating their imported Brazilian beef hamburger patties, while outside the children play around dad's brand new fuel guzzling sports utility vehicle.[3] An underlying assumption of this paper is that a high proportion of the global waste and pollution problem, is indexed to First World production practices and associated, reportedly insatiable, consumer demands.[4]

For the environmental lawyer it is significant that these global environmental ills continue to multiply, notwithstanding the proliferation in international covenants and protocols, and the application of increasingly sophisticated environmental legislation, at both regional and local levels. Why is this so? Are there vested interests at stake preventing the environmental message from being effectively communicated? Is it simply that the regulatory authorities are not fulfilling their environmental mandate or are these environmental ills the work of a few 'bad eggs' in the industrial basket? This paper will hope to elaborate upon some of the issues behind these questions. The view

[3] See World Resource Institute webpage at http://www.wri.org/ffi/lff-eng/samer2.htm where they describe the three major activities that destroyed 645000 square km in Brazil alone, as being logging, energy exploration and mining, (gold and diamonds). Quasi First World countries such as Australia are however also not without blame – a recent report identifies Australia as the 5th largest land clearer in the world, with 50 football fields of trees being cleared every hour – see http://enn.com/news/wire-stories/2001/11/11202001/reu_australia_45628.asp.

[4] The reader is directed to the useful works of Barry Commoner *Making Peace with the Planet* 1992 and Alan Durning *How Much is Enough? : The Consumer Society and the Future of the Earth* World Watch Environmental Alert Series 1992, for a more thorough treatment of this topic. See also http://www.csiro.au.

taken is essentially bottom up focusing primarily on the role of a local grassroots environmental movement, and the interplay it has with more macro socio-political questions. A particular focus is placed upon the dynamics and significance of the environmental action as a basis for broader understanding and learning. This paper will seek to establish the reaction of the person and group when confronted with some of humankind's environmental externalities.

The perennial problem in developing a paper, is to attempt to form some kind of logical sequence to the flow of ideas and information. Whilst researching the paper I encountered a statement that suggested that in order to explore sustainable and viable development, one should first attempt to understand all the processes and contradictions in order to see the whole. In particular it was suggested that one should study the actors, the processes and the linkages.[5] I have tried to apply a similar approach to this work. A brief précis of the individual chapters is set out as an approximate guide to the contents of this paper.

The first chapter sets out to develop an understanding about the social and physical dimension and sketches the importance of certain influencing dynamics that continue to shape economic policy and development issues. This is followed by some thoughts on sustainability versus sustainable development, and explores the myth that development and growth are necessary evils for the long term good. Chapter 2 switches focus to the experiences of a local urban community, and the struggle that ensues between those who wish to brand development as 'sustainable,' and those who

get to enjoy the allegedly 'sustainable' effects. The chapter closes by suggesting that a possible way forward is to develop indicators that include community knowledge and perceptions as a key to measuring environmental stress and performance. A discourse on the role of the environmental organisation would not be complete without examining the organisation itself in terms of structure, policies and politics. Chapter 3 concentrates on the non governmental organisation (NGO), develops some definitions, and suggests that these organisations assist in ensuring that political and bureaucratic representatives remain accountable to their constituency especially in the global arena of international conventions, protocols and trade agreements. This is a 'soft' but important mechanism for environmental law reform and development. Chapter 4 deals with local community structures and specific problems that have been encountered when dealing with the regulators. A good deal of the information presented has been obtained from those working at the 'coal face,' and reflects therefore a certain angst and frustration from both authorities and community. Areas covered include the official unwillingness to make decisions, the lack of access to both information and decision makers, and the duplicity sometimes apparent in scientific data when compared to the local urban experience. Chapter 5 ups the ante somewhat, and concentrates on legal mechanisms with particular reference to local community experience. Particular problems and opportunities are highlighted. Chapter 6, in essence closes the analysis by looking towards alternatives and re-emphasising some of the earlier findings.

1.1. THE SETTING

[5] Jimoh Omo-Fadaka in 'Economic growth and sustainable development' as found in D Hallowes (ed) *Hidden*

The South Durban area can be defined as that area extending southwards from the inner aspect of Durban's Central Business District bordering Durban Bay, to the foothills of Umbogotwini and Athlone park. It includes the industrial areas of the Port, Jacobs, Mobeni and Prospecton. Surrounding and in some cases sandwiched by these industrial nodes are the residential areas of the Bluff, Austerville, Wentworth, Merebank, Clairwood, Isipingo, Umlazi and Athlone Park. The western boundary extends inland for approximately 4 kilometres and rather arbitrarily follows the line of the previous wetland southwards for a distance of approximately 22 kilometres. The geographic area exhibits amongst the worst cases of industrial air pollution in South Africa and produces an estimated 500 tons of toxic waste daily. Scientific reports conclude that current practices are unsustainable with the continuation of the current situation likely to result in a crisis.[6]

1.1.1. Economics

The South Durban area constitutes a major component of Durban's gross geographic product, which value is centred upon a vibrant import and export trade linked to Durban's port. In this area the key employers are clothing and textile's (30.4%), food (10%) and chemicals (7%).[7] The effect of the General Agreement on Tariffs and Trades (GATT) was to introduce international competition to the local market and thereby threaten employment opportunities in certain sectors.[8] Conversely GATT has assisted the chemical and paper and pulp industries in marketing their products, and

Faces - Environment, Development, Justice: South Africa and the Global Context 1993 234.

[6] R Hounsome Strategic Environmental Assessment (SEA) Baseline Draft Report No 3 'Waste Management' 31.

[7] R Peart & Van Coller SEA Baseline Draft Report No 1 'A baseline environmental assessment of the economic environment of the South Durban Region' 14.

significant growth has been noted from these sectors. From a manufacturing output point of view, the chemical industry has the lions share, at 13.1% of the total output. It is also amongst the most capital intensive and the most likely to 'shed jobs in the future while...(increasing)...output'.[9] The chemical sector is receiving National Government support particularly through the efforts of the Department of Trade and Industries Spatial Development Initiative (SDI). In particular the Government supports the notion of a petrochemical cluster in the South Durban area due, in part, to the perception that this will provide the necessary impetus for economic growth, but also for strategic reasons.[10] The City's position on these developments has been unclear to the point that provincial government officials have on occasions been frustrated by a lack of formal response.[11]

Historically the City has not always been privy to the expansion or other plans of the strategic fuel industry. This situation was a consequence of apartheid era legislative protection, that effectively cloaked the facilities in secrecy.[12] Another factor indirectly influencing development outcomes in Durban is that certain of these more noxious complexes are sited upon parastatal land. These parastatals have until very recently

[8] Particularly within the clothing and textile industry.

[9] Ibid 16.

[10] It has also been reported in the press that the Government would like to see a quasi State owned refinery positioned on the Airport land – a position possibly in conflict with Sapref's (the Shell/BP refinery) expansion plans. The State bid would involve a black empowerment initiative. In addition, it is no secret that the real market for the new petroleum products lies north of South Africa's borders, and that most countries south of the Sub-Saharan zone represent areas to acquire market share. To what extent the National government is actively involved in promoting the supply of refined fuels to neighbours is unclear, but certainly could be seen to afford South Africa some economic and political leverage.

[11] THE BMA coal terminal expansion on Portnet land was one such example pointed out to the author. This development is directly opposite the proposed Shaka Island tourist development.

[12] The declaration of these chemical storage and fuel production areas as National Key Points, in terms of the National Key Points Act, Act 102 of 1982, led to the development of a culture of non compliance with certain legislative provisions (especially local bylaws). For surrounding communities and even local authorities access to environmental information was essentially denied.

operated autonomously of the City's planning department. Indeed it is only in the last five years that the parastatals have begun to admit the existence of the City interest in these matters. This shielding from public scrutiny allowed the former SAR&H to develop and promote large scale chemical and fuel tank storage facilities, without the encumbrances of the City's planning policy and legal guidelines.[13] It is also clear that the City was reluctant, as a local authority to challenge National authority, in the guise of the parastatal Portnet, on issues associated with their development plans.[14] One consequence of this official protection has been that both off and on-site environmental consequences of these facilities have for decades been beyond scrutiny due to (a) a paucity of information,[15] and (b) no local authority mechanisms for control, despite the fact that the polluter is usually a private company.[16]

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[13] Examples here are the siting of the bulk storage of Natcos on airport (parastatal) land, the Island View Tank storage (another Key point) on Portnet land. Companies operating within the latter facility received their planning permission and consents directly from Portnet. This development and planning control has up until recently operated outside of standard Town planning procedures.

[14] Environmentalists would certainly argue that this position has not changed much in recent years. The ongoing controversy surrounding the Portnet decision making process on development and infill options for Durban Bay, have been subject to much heated debate particularly as some of the options presented appear to present obstacles to the City's tourism potential. In particular the City's bid to develop the Point area is negatively impacted by (a) Portnet's harbour mouth widening plan, (b) the infill and industrialisation of land (and water surface) adjacent to the Point area, (c) the permission to allow the massive expansion of the coaling wharf directly opposite the proposed tourism site.

[15] That is apart from limited atmospheric pollution data pertaining to Sulphur Dioxide. The Protection of Information Act, Act 84 of 1982, and National Keypoints Act (Act 102 of 1980) have been interpreted in such a manner that details of activities were withheld in the 'national interest'. See here National Keypoints Act's S10(2)(c) where it refers to it being an offence to reveal details 'of any incident that occurred there.' Toxic chemical spills presumably fell into the definition of 'any incident' which would account for why industries never informed nor warned neighbouring communities of any potential dangers resulting from industrial mishaps. This situation continued up until the National Secretariat for Key Points was petitioned by Durban City Health officials for authority to compel companies to comply with requests for information. At this point City Health were under pressure to respond to calls for information originating from local environmental and community groups. The Secretariat at that point released a statement that allowed that information as to type and quantity of chemicals could be released. They also indicated that that the Act(s) were not intended to release industry from obligations imposed by any other law. [Source : Minutes of the Island View Workshop held 23/07/1997 and personal interviews with City Health officials].

[16] Ibid - the withholding of information applied as much to communities as it did to City Authorities. In addition the planning and development control vested entirely with Portnet as it related to the Island View Storage Facility. This has led to the highly unsatisfactory location of toxic industry alongside unsuspecting existing residential communities. According to Peart & van Coller op cit 19 Durban's harbour is acknowledgeably the principal liquid bulk port in the Southern Hemisphere. Astonishingly no emergency or evacuation plan nor any

The impact of Parastatal involvement and control at local level, coupled to central government's strategic desires, has been a key factor in directing the planning efforts towards expanding chemical and related industries in their current locations. The role of government is therefore an important dynamic in perpetuating community conflict and environmental impoverishment in the Durban South area. To explain further, it is currently Portnet's (a wholly owned subsidiary of Transnet which in turn is essentially the Government in the form of Department of Transport), firm conviction that the continued development of Durban Bay and its harbour is central to the future success of the region and national economy. This belief is also shared by members of the shipping and business community. Unfortunately the development proponents are not *ad idem* when it comes to determining the type and extent of the intended development. The parastatal, (Portnet), favours further infilling of the water surface of Durban Bay which incidentally has already been reduced to 40% of its original size due to previous infills in the late 1960's. They argue that it is essential for the continued economic health of the Port and apparently the City, region and country to expand the container storage area available with the demise of yet more open water and fecund sand banks being necessary to accomplish that aim.[17] Critics of this proposal have pointed out that the bulk of the future container traffic will be largely transitory with

environmental and risk assessment examining the vulnerability of local communities was ever put in place in all the decades of its existence. In addition no form of quantitative emission inventory has been prepared despite the numerous public complaints received about chemical emissions from the plant. This unhappiness eventually led to a formal protest being made by SDCEA to the National Minister of Environment and Tourism which culminated in the issuing of a multi-point plan. See in this regard article entitled 'South Durban precedent for country :Moosa spells out anti-pollution plan' in The Mercury 29/11/2000 3.

[17] Opponents however note that should certain of the plans presented proceed then there would be an inevitable loss of habitat with resulting loss of bio-diversity. This is unacceptable. They also point out that the loss of the visual and recreational amenities to of Durban Bay would have a major impact upon Durban's ecology, aesthetics and tourism. (source : personal discussion with M Wilson of Durban Bay 20/20).

Durban set to become a leading transhipment port for East and West bound container traffic. A consequence of this form of trade is that it is Portnet and not so much the local economy that is prime beneficiary of the increased traffic. Another issue is that the volumes moved are not as useful an indicator of export/import success as press releases would have us believe.[18] Another ramification is that if Portnet proceeds to infill the current harbour (as it has for some years planned), then it becomes less likely that they will commit themselves to a 'dig-out' of a second port on the airport site to the south of Durban Bay.[19] This second port option is also currently married to the call for a petrochemical complex by industry. Assuming then that the second port option does not go ahead then the entire site, (approximately 460ha in extent) would be available for petrochemical expansion but without a convenient shipment point for product and raw materials. In turn the existing harbour and in particular the Island View chemical storage complex, again comes under enormous pressure to provide further facilities for this (now rapidly expanding) industry which, it is submitted, cannot be achieved without creating further negative consequences for surrounding communities.[20]

[18] The Port of Durban is set to become a mid point for shipping arriving from the Far East. These ships deposit containers on the wharf and then depart. A ship from the west then arrives, is loaded with the container and returns from whence it came. The containers never leave the harbour and indeed herein lies the problem : the containers have to be stored close to the quayside and this takes up space. Portnet earns wharfage fees as well as storage and transfer costs on safe keeping of containers. Portnet also has an exclusive economic zone surrounding the movement of containers around the Port further adding to the coffers. In sum then there is very strong motivation to transform all open space, including mud flats into areas to store containers. Huge additional investment is now being allocated yet productivity issues are also only now being revealed. Ironically Durban Harbour is notorious for its poor container handling rate with a handling rate of 9per hour compared to Cape Town's average of 15. The international levels are around 25 per hour. See http://allafrica.com/stories/200109040393.html and a research note at http://www.aph.gov.au/library/pubs/rn/1997-98/98rn43.htm

[19] This position since confirmed by Portnet in media reports in November 2000.

[20] The geographic constraints of the site mean that expansion must take place directly alongside communities where no buffer zone is present.

The Sapref refinery (located alongside the existing airport site) has in the past stated that it had immediate expansion plans worth R1.25 billion that would be complementary to a proposed R7 billion naptha cracker plant. The National government on the other hand made it known that they would prefer a black empowerment venture involving a possible third oil refinery and were looking for partners in this venture.[21] There is therefore significant conflict between prospective developers over competing land uses as well as some frustration with the fact that the available land mass is largely held by the parastatals and therefore subject to political rather than purely economic considerations. It is possible that National priorities could override local development initiatives and needs. Sandwiched in the middle of this struggle and surrounding all the key development areas are thousands of residents who have had virtually no voice in this 'battle of the titans,' that is, not until recently, as we shall see later in this paper.

1.1.2. Administration and Decision making

The Durban Metropolitan Area (DMA) has recently adopted a centralised administrative structure. Previously there was a two tier system which approach consisted of Metro Council providing bulk services and policy guidance to the area as a whole and various Local Councils being responsible for implementation of policy,

[21] The most likely new entrants to the energy and chemical market are black empowerment company Worldwide Africa Investment Holdings and Africoil. Some interesting crossholdings are evident in the shareholdings with both Engen refinery, Caltex and even Transnet holding a stake in Africoil. See http://www.mbendi.co.za/coao.htm#RelOrgs.

services and administration.[22] Relevant to this discussion is the approach adopted by the local structures to environmental management. Each of the entities were tasked to devise Integrated Development Plans that would focus on such issues as health, safety, security, economic development, pollution control and social transformation.[23] Budget allocations would only be approved by the Province if they adhered to the plan. In order to identify development priorities and to assist in actual resource allocation the Councils proceeded to rank the development priorities according to the importance attached. The then South Central Council (the council responsible for managing the Durban South area), ranked the environment as number 13 out of a possible 13 with the priority being a weak 'ensuring a clean environment'.[24] In a separate exercise the entire Metro Council, (including all the substructures), voted upon development priorities for the DMA. This time the environment received 2,48% of the vote. These percentages and rankings are said to accurately reflect the eventual allocation of capital funds.[25]

Apart from the obvious low priority accorded to the environment by the local authority there are significant additional problems. One such problem is the historically fragmented and piecemeal approach taken regarding the enforcement of environmental laws. This can be attributed to a combination of the following: (a) insufficient financial and human resource capacity at departmental level; (b) confusion as to the applicability of the laws themselves; (c) confusion as to which department is

[22] These sub-structures were established in terms of Provincial Proclamation No 38 of 1996. The uni-city approach has seen to the absorption of these different bureaucracies into one whole.
[23] Integrated Development Plans are to be prepared by local authority structures in accordance with the Local Government Transition Second Amendment Act, Act 97 of 1996.
[24] South Central Local Council 'Integrated Development Plan' 11.

the lead agent; (d) existing vested interests and (e) a general lack of commitment and desire amongst enforcement personnel to carry out their functions.[26]

Furthermore, despite the implementation in 1994 of Local Agenda 21 (LA 21), the specific role of the community and environmental groups in the planning and decision-making process has yet to be clearly defined to the community itself. At present initiatives organised by the City authorities in Durban South are predominantly concerned with extractive consulting efforts and the occasional workshop exercise. These processes are managed and controlled by consultants on behalf of the City with City officials rarely in attendance.[27] Decisions and debate do not take place in the presence of community and it is apparent that certain of the provisions of LA21 in the South Durban context amount to little more than idle rhetoric. Communities are not being empowered so as to be able to participate more fully in the decision making process – a significant departure from accepted LA21 principles. Furthermore this lack of empowerment is seriously eroding community support for local authority initiatives. Community concerns are regularly dismissed as being either uninformed or as being 'too emotional' (an industry favourite!). A senior City planner interviewed

stated that it would be 'impossible to accommodate the needs and concerns of *all* communities affected by development project's so it was perhaps better in some cases

[25] Siyakhana & Ridl-Glavovic Review of Legal, Policy and Institutional Systems in the Durban Metropolitan Authority 57. Incidentally economic growth and job creation enjoyed top spot with approximately 22% of the vote.
[26] These comments are a synthesis of comments received during interviews conducted by the author with Department of Environment and Tourism (G Coetzee), Durban City Health (N Larrett) and various Durban Water & Waste – Pollution Control Division officials.
[27] The City has chosen to restrict its direct involvement with affected communities to appointing Consultants and providing them with terms of reference . Some exceptions have been the more participative Durban Metropolitan

not to hear them, (the communities), at all.'[28] This planner noted problems with the local authority's capacity, particularly in arranging and handling meetings with affected parties, and intimated that this was one reason why consultants were appointed to manage these processes. The requirement of meeting the communities was viewed by the planner as a hindrance to the development process. Consequently he could not fully support truly empowered participation as this would be an unnecessary interference in the performance of his duties leading to further delays in the delivery of planning services to the general public.[29] The overriding sense that the author obtained from this interview was that community dialogue was debilitating to Council resources and that public discussion could only provide impediments rather than incentives to development. It is not known how prevalent this view is within other Council structures.

In terms of decision making, the Council follows the committee system with requests flowing bottom up through the hierarchy of management to the relevant Standing Committee. Where necessary the Metro Executive Committee and full Council may be called upon to approve the matter.

1.1.3. Spatial Orientation

Environmental and citizen groups identify the close proximity to the public of potentially dangerous and noxious industry and processes as the underlying reason for

Environmental Initiative (DMEPI) and the work of City Health in setting up the Island View Forum. Both have since ceased functioning.

[28] Personal interview with a City planner who for professional reasons prefers to remain anonymous.

[29] Ibid.

'conflict'.[30] The juxtaposition of industry and communities are reflected in the following examples:

- The Engen refinery is sited squarely in the midst of a residential area
- Mondi paper mill, (and its now well-publicised illegal ash dump) borders residential properties and market gardeners.
- Sapref refinery is immediately downwind of Merebank West and the Mondi paper mill.
- Island View tank 'farm' – a bulk chemical storage consisting of approximately 1000 plus storage tanks forming an arc encircling the northern Bluff community, geographically in the centre of Durban and directly opposite Durban's Central Business District and Point developments.
- Underground Pipelines link Island View to the refineries via a network of pipelines that traverse residential streets[31].
- Toxic Waste Dumps are sited alongside communities nowhere more noticeable than in the toxic waste dump at the black community of Umlazi (across the road from a secondary school)[32] and the (until recently) unpermitted waste site (H:H), managed by Mondi on their premises.

[30] The term 'conflict' is in fact a bit of a misnomer for it may presents visions of residents being involved in acts bordering on eco-terrorism. In reality the conflict has simply been limited to protestations as to the infliction of environmental hazards and pollution upon communities. Real conflict has been witnessed to occur within the industries themselves (labour related) and between industry, local authority and parastatals - primarily over competing land uses.

[31] These pipelines carry liquid petroleum gas, kerosenes, gasoline and other hydrocarbon derivatives. Industry claims that pressure losses are not easily detectable on the piped product leading community to the conclusion that they are the early warning device. A multitude of pipeline failures during 2001 bear our community concerns.

[32] This H:H site has since been closed as a result of CBO and NGO pressure on DWAF although there has since been substantial pressure from the local authorities to have it reopened!

- Incinerators are also found in South Durban, one of which is in the vicinity of the Umbogotwini golf course . In now appears that some form of incineration device is being mooted for the Mondi site -a move that could forseeably result in a significant additional increase in airborne toxins[33].
- There are two large volume effluent treatment works (Southern Works in Merebank residential area and Central on Northern Bluff). There are also smaller plants in the area. Sewage works are acknowledged as a key emission source for volatile organic compounds.

Typical environmental effects arising from the day-to-day operation of these industries is felt in terms of persistently high levels of air[34]and noise pollution,[35] a huge daily toxic waste stream and increasing heavy vehicle traffic. Substantial loss in visual amenities can be attributed to landscape transformation occasioned by the harbour developments, particularly during the period 1960 to 1980. Corporate expansion of key noxious industries has occasioned further economic harm to residential property values and diminished prospects for soft industry, (such as tourism), in this area. In addition there is the less frequent but spectacular risk of catastrophic failure of plant or

[33] A particular concern is the emission of dioxins and furans that are released when organic material is burnt in the presence of chlorine. As Mondi in the past has used chlorine in its processes it is conceivable that dioxin formation would be possible. Most importantly there are no facilities available in South Africa let alone Durban to monitor these deadly micro-particles. (:SDCEA/Mondi communications regarding EIA : emails 29/10/01 and 11/12/2001).

[34]In addition to sulphur dioxide there are volatile organic compounds, particulates, ozone, nitrogen oxides, carbon dioxide to name a few key substances. A list of some 50 different volatile organic compounds was measured at residential homes on the Bluff as long ago as 1989 (SATS report ref CL26/6/6 dated 14/11/1989.

[35] Sirens, train shunting, industrial manufacturing noise and aircraft are primary contributors. The Strategic Environmental Assessment Noise report has identified several areas as significantly impacted including previously 'white' areas.

vessel such as those witnessed at ENGEN refinery on the night of 18 January 1999 and at SAPREF refinery on the 19 May 1998.[36]

There are currently no emergency response and evacuation procedures in place that involve residents, notwithstanding the perilously close proximity of residential homes to toxic industry. These industries do, however, have their own internal evacuation procedures and appear quite content to leave emergency planning and evacuation to the relevant authorities[37].

It is clear that the offsite environmental consequences of these industries, together with their location with respect to residential communities, provide the necessary preconditions for potential disharmony.

1.1.4. Apartheid Legislation and National Strategic Significance : Some Consequences for South Durban

The first issue relates to the National strategic significance accorded to the chemical and allied industries in the South Durban area. This is no more apparent than in the

[36] The former involved a major gasoline fire with flames reportedly 70m *above* the refinery's stacks. The Sapref incident involved an explosion of the alkylation unit, a significant gas and hydrocarbon fire and eventual loss of at least 5 tons of Hydrogen fluoride. The wind direction at the time of the incident was offshore which carried the deadly gas out to sea and away from the nearby community. The official refinery report on the accident notes that although meteorological conditions were particularly bad for dispersion that calculated concentrations outside the refinery fence were "less than immediately dangerous to life or health. The SDCEA (with the assistance of the University of Michigan) however performed various calculations based on a loss of 5 tons of HF from a vessel in fire conditions and returned toxic endpoint figures with a potential for danger many kilometres beyond the fenceline. Since this time Sapref has suffered a significant hydrogen sulphide (H2S) release, catastrophic failure of a tetra ethyl lead storage tank leading to loss of tank contents, a million litre fuel loss plus numbers of other pipeline ruptures and spills particularly in the harbour area. The Engen refinery during this period suffered an explosion of a compressor unit, failed rooftop seals on crude oil tanks, a significant fire (with casualties) in the waste water treatment unit, an accident resulting in death of a worker from HF exposure, oil spills into the local canal and countless incidents of off gas flaring.

operational secrecy afforded by Apartheid era legislation specifically the National Key Points Act[38] and the Protection of Information Act.[39] There is a strong suspicion amongst the local community that these Acts have led to environmental abuses and practices that would not otherwise have been permitted.[40] It is further believed that these Acts offend the principles of the Constitution, especially those relating to freedom of assembly and expression as well as to the right to information, leading to calls for them to be struck down.[41]

The second issue adding to the unique character of this area and a further factor demanding some attention, is the highly complex racial divides present within what is a relatively small geographical zone. To examine this aspect it is first necessary to explain the City's culpability in forging and developing racial segregation long before the Nationalist Party assumed power.

The Apartheid planning process was initiated by the Durban City Council through a series of plans and ordinances beginning in the 1930's.[42] In 1937 the Durban Harbour Development Committee recommended African and Indian labour housing schemes for

[37] This view was expressed by industry during the course of various Island View Forum Meetings held at Durban City Health offices during 1998 and has since entered the MHI regulations.
[38] National Key Points Act, Act 102 of 1980. This Act has certain provisions (Sections 4 and 10) that have been used up until recently as a reason for not providing environmental information to community and local authority alike.
[39] Protection of Information Act, Act 84 of 1982.
[40] Comments attributed to Wentworth Development Forum (WDF) and Bluff Ridge Conservancy(BRC). The gross contamination of the groundwater in Island View and the chronic air pollution are cited as legacies of this position.
[41] Personal communication with Desmond D'Sa Chairman of WDF and SDCEA. These Acts were used by Industry until July 1997 to refuse community requests for information on environmental conditions at the Island View/Cutler Chemical Storage complex.
[42] D Wiley, C Root, S Peek & S Ramurath *Report on the State of the Environment and Development in the Durban Metropolitan Area* 1996 17.

Lamontville and Merebank.[43] This was followed in 1944 by a Racial Zoning Plan that was submitted by the Durban City Valuator and Estates Manager to the Durban Post War Development Committee. This zoning plan delineated residential areas along racial lines and allowed for the establishment of a white residential area in the northern Bluff, Indian housing in Merebank and a Coloured community interposed between the two race groups. African residential areas were established on the periphery at Lamontville and Umlazi.[44] In the years that followed, the Apartheid machine aided the City of Durban in the furtherance of its racially-based land use planning strategies. It was only many years later that the infamous Group Areas Act came into being – proving itself a very useful adjunct to the City's own 'group areas' planning policy. The Group Areas Act provided the City with additional financial and legal resources to forcibly relocate communities from other areas to the newly created racial zones.[45] A direct consequence of these laws and plans was that the Indian, Black, and Coloured communities were confined to certain demarcated zones and it was to these residential zones that heavy industry was located. The first to arrive was the Standard Vacuum oil refinery (later named Mobil and then Engen), located onto what was then arable land.[46] This was followed later by Mondi Paper and Pulp and various chemical interests. Then in the north the then South African Railways and Harbours began a highly controversial infilling of Durban Bay leading eventually to an almost complete

[43] Ibid.

[44] R Nurick & V Johnson in a paper entitled 'Towards community based indicators for monitoring quality of life and the impact of industry in South Durban' in *Environment and Urbanisation* Vol 10 no 1 April 1998 at 239 note that prior to 1953 South Durban was multi-racial and described as 'close knit with a nice atmosphere and peace with the neighbours.'

[45] Group Areas Act 36 of 1966. This Act severely restricted the common law as it applied to ownership. It established controlled areas (the whole Republic!) and established classes of persons disqualified from attaining ownership without authority of a permit (S13(1)). S23 proclaimed areas as the notorious 'group areas.'

loss of the mangrove forest, to visual amenities, potential tourism and the Durban Bay's flamingo population.[47] This reclaimed land was eventually to become the site for 100's of highly flammable and toxic bulk storage tanks that partially encircle the community.[48] Linking these tanks to the refineries is a system of underground pipelines that traverse residential streets, bypassing schools and busy shopping centres.

Perhaps the most noticeable fact with respect to the heavy industries in the south and the bulk storage to the north is the conspicuous lack of buffer zones between the local communities and the hazardous industry. Indeed in both the north and south of the Bluff, residential homes are as little as 20 metres away from potentially hazardous facilities.[49] Remarkably, it appears that the creation of buffer zones has yet to become a concern of local authority, even with respect to new developments.[50] It is apparent that old habits die hard in the authorities planning departments as the decades-old policy of placing large toxic industries in disadvantaged neighbourhoods continues

[46] The Merebank market gardening communities were expropriated in order to make way initially for the Stanvac oil refinery and later for the Mondi paper mill – related to author by Deva Govindsamy Chairman Merebank West Community Coalition (MWCC).

[47] Lead story appearing in the Mercury Nov 22nd 1961. The similarity between the recent comments on current Portnet initiatives and the editorial bear some thought.

[48] There are said to be in excess of 1100 bulk storage tanks ranging in size from 50 cubic metres to 33000 cubic metres storing a full range of products ranging from fuels, gases, toxic and flammable chemicals to greases and oils. At the time of writing the City has yet to compile a complete emission inventory of the site and only a handful of risk assessments have been completed notwithstanding the cheek by jowl situation of these tanks to residential areas and the heart of the Durban CBD.(per Island View Forum meeting 02/02/1999).

[49] D Wiley et al op cit 18. This may be noted at ENGEN refinery and the area of the Island View Complex referred to as the quarry site. Furthermore the underground pipelines that traverse the community areas run past shopping centres and schools and under busy roads and intersections.

[50] Some more recent developments since 1996 are (a) Durban Fibres expansion onto old Chemico plant alongside children's playing ground (b) Van Ommeren toxic chemical expansion in Island View (c) Various refinery expansions (d) NATCOS ethanol tank conversion – Island View (e) proposed SASOL ethanol/methanol transhipment via residential streets.(f) proposed expansion of Mondi paper to eastern community boundary (g) proposed Industrial Development Zone westwards of Durban Bay through Clairwood and Bluff (h) Proposed removal of Clairwood racecourse (surrounded on 3 cardinal points by community) and replacement with noxious industry (i) Proposed petrochemical complex for Airport land (j) proposed incinerator for waste at Mondi. (j) proposed tetra-ethyl lead (TEL) plant directly opposite community residences by Total – TEL is banned in most modern countries.

apace.[51] The industries wishing to expand are almost exclusively white-owned and the local and regional environmental authority from whom planning permission is received, are also predominantly white. It does not take much imagination for the affected community to draw conclusions as to why they continue to attract the negative externalities of the economic activity, despite the existence of Constitutional provisions apparently safeguarding against such further discrimination.[52] The following example tells the usual story:

In the Mondi Eastlands proposal the City proposed to remove an open space area between Merebank East and Mondi paper mill in order to allow Mondi to expand eastwards towards the residential properties. [53] Communities were aghast at the idea but the city's Physical Environment Service Unit (PESU) was insistent that the community groupings become involved in an Environmental Impact Assessment (EIA) process in order to 'further explore the issue'. Some engagement on the issue.[54] In reaction, the SDCEA prepared and presented a presentation to the Metro's Executive Committee (Exco).[55] Exco was informed that the community regarded the action as

[51] The lessons of industrial tragedies of Bhopal, Mexico City and Seveso appear not to have been taken to heart. As one community representative commented "it appears that they...(City Authorities)...have a hidden agenda – perhaps they are trying to force us out by making it unliveable."[Personal communication Ron Andrews (ex) Chairman BPRA].

[52] Act 108 of 1996 Section 9. It is clear that in terms of apartheid planning ethnicity was the primary determinant as to whether a person would be forced to live in close proximity to hazardous industry. However no measures are being put in place to remedy this situation as called for in terms of S (9)(2) of the Constitution. It is submitted that a continuance of this action could forseeably run contrary to the provisions of S(9)(3) & (4).

[53] The area under consideration is currently owned by the City as part of the Southern Waste Water treatment facility and is predominantly open grassland.

[54] Meeting was held between SDCEA and Dr Debra Roberts of PESU 29 June 1998. Community expressed the opinion that removal of land serving as a buffer (whether zoned as such or not), would certainly lead to a perpetuation of the conflict and represented a perpetuation of past apartheid planning practice. The City response was they were committed to the EIA and that industry (Mondi) could not be kept waiting for expansion permissions. Mondi (Durban's largest bulk water and electricity purchaser) had threatened to relocate the business elsewhere and that the "window of opportunity" to secure the additional business could be lost.

[55] Presentation by SDCEA to Metro Executive Committee 16/11/1998.

potentially unconstitutional. It was also told that notwithstanding the Constitution, the proposed action also would be contrary to the requirement for buffer zones contained within the Environmental Policy issued by the Minister in terms of the Environmental Conservation Act.[56] Furthermore, the existing industry could be classified as a major hazardous installation as a result of its potential for toxic chemical usage and, as such, be precluded from expansion in terms of the Major Hazard Installation regulations especially in terms of regulation 9(1)(a) and (c).[57] Community opposition became more militant after it was confirmed that the vast (and illegal) fly ash dumps on the Mondi site were, as feared, considered toxic.[58] The Minister, after considerable lobbying by SDCEA then ordered that the disposal facility be closed and rehabilitated.[59] In closing the site the Minister made the following comment regarding the illegal landfill "Pollution often seems to occur where black people live. This is the rubbish of history which we have to deal with today."[60] Minister Asmal 'doubted whether the company would have been granted permission to operate the dump in the post 1994 era.'[61] Then SDCEA member Deva Govindsamy noted that placing a 'dump site adjacent to any community is not an acceptable practice-this would never

[56] General Environmental Policy issued in terms of Section 2 of the Environment Conservation Act 73 of 1982, GN 15428 which at that time had not been repealed by National Environmental Management Act, Act 107 of 1998. It is submitted that notwithstanding the repeal section (NEMA S50), that this policy will stand as it is not in conflict with any provision of NEMA (S51).

[57] The Major Hazard Installation Regulations are issued in terms of S43 of the Occupational Health & Safety Act, Act 85 of 1993. The most recent amendment (R692) was issued on 30/7/2001 GN22506.

[58] The waste was alleged to be toxic by community groups. Mondi in response hired consultants to show that the waste was of the 'general' waste category. The community appealed to DWAF and after a visit to the site by Minister Kader Asmal, then initiated its own review of the Company's results. After assessing the information DWAF determined that the landfill be ranked as (big) H:H (DWAF's Carin Bosman communication to Company dated 11/12/1998). The Minister then ordered the dump closed.

[59] See The Mercury dated 3November 1998 article entitled 'Asmal orders closure of Mondi ash dump after neighbours complain.'

[60] Ibid.

[61] Ibid

be allowed in Musgrave Road."[62] The relationship between the SDCEA and Mondi have not improved much since this time and currently some tension exists over Mondi's plans to establish an incinerator on site.[63]

The non-white areas are characterised by a history of oppression and struggle against the social injustices visited upon them by the previous regime. As a reaction to the authoritarian apartheid system, strong 'underground' linkages were developed within these communities in order to disseminate ideas and information. The people were able to mobilise quickly and effectively when the need arose and these mechanisms are still in place today. Consequently community leaders can summon their community to attend 'road meetings' to discuss issues and protest actions with a high degree of support.[64] By comparison the white areas of the Bluff have a much weaker tradition of organised civic structures. Environmental groups in the Bluff and elsewhere do not generally interact with elected politicians largely due to the wide berth given environmental issues by the local councillors.[65]

With respect to political ambitions it would be fair comment to state that in the author's experience the environmental groups generally do not seek the electoral stage to express viewpoints and ambitions. Indeed, political entities such as the Green party, are invariably considered a luxury rather than a necessity by the third world voter. The Merebank Ratepayers Association (MRA) is an exception in this regard as it has based

[62] Ibid.
[63] Personal communications and discussion with SDCEA executive (1/10/2001).
[64] MWCC continue to organise via street committees in the 9000 strong Merebank West.
[65] See Wiley et al op cit 61 for a comprehensive review of community and political party perceptions and interaction.

successful political campaigns upon the environmental conditions found in South Durban. It also has had a past linkage with the African National Congress (ANC) especially whilst the ANC was an underground movement. These links have served the MRA well in its ability to involve National leaders in environmental issues in South Durban as well as providing the mechanism to entry into the national debate on matters concerning environmental policy.[66]

One observation apparent to the author is the ready acceptance by 'white' community groups of the Bluff of the rich experiences and leadership provided by the 'black' communities.[67] The white groups have traditionally been removed from the political aspects of the 'struggle' and it has indeed been an education for many to be exposed to the intricacies of political decision making that accompanies the large scale projects found and earmarked for South Durban.

1.2. THE ACTORS

There are three basic groupings encountered in South Durban. These are the residential community, the industrial grouping and all three spheres of government including parastatals.

1.2.1. The Community and Non Government Organisations

Environmental Organisations in Durban South can be broadly categorised into three classes according to their aim and purpose. The first form to be encountered is the grassroot environmental organisation which is typically a first responder to crises in

[66] Wiley et al op cit 62.

local environmental conditions. Some examples of these are Isipingo Environmental Committee(IEC), Merebank Environmental Action Committee (MEAC), and the Bluff Ridge Conservancy (BRC) to name a few. The second form of organisation are typically civic bodies that field dedicated environmental sub-committees that report to the central structure. In this group we find the ratepayer organisations such as Merebank Ratepayers Alliance(MRA), Bluff Peninsula Ratepayers Association (BPRA) and Wentworth Development Forum (WDF). Assisting these community groups are non-governmental organisations (NGO's) that generally seek to increase participation of civil society in the intergovernmental decision-making process and allow technical resources and knowledge to be shared at community level. Examples found in South Durban are the NGO's of Groundwork, Earthlife and Wildlife and Environment Society. International involvement and support is from the United States of America and Northern Europe can be identified with the US organisations generally organised around two themes (a) environmental racism issues and (b) active resistance to the abuses of the chemical and petroleum industry. The Citizens for a Better Environment and the 'Bucket Brigade' stand out for their contribution. North European agencies such as DN and Danced are more concerned with funding issues and developing and overseeing technical projects relating to North/South empowerment initiatives.

Northern NGO's tend to be over-represented in terms of upper middle-class dominance with research into environmental groups in Europe revealing that members of such groups have higher incomes and much higher levels of education than a

[67] Personal observation – see also Wiley op cit 60.

comparative sample survey of the public. [68] By way of contrast, South Durban community groups can be typified as being more representative of what is likely found in the community and certainly possessing fewer professionally qualified persons than, say, that found in well known NGO groups such as the Wildlife and Environment Society of South Africa.[69] This apparent lack of capacity has, however not prevented these community groups from collectively becoming 'the single most active community group of the approximate 600 CBO and NGO bodies in South Africa,'[70] undertaking issues ranging from neighbourhood reactions to local and National policy inputs.[71] These fairly bland activities nevertheless attracted descriptions by local authority and consultants that would lead uninformed third parties to envisage scenes of fanaticism and irrationality.[72] An informal analysis of the environmental activities undertaken by South Durban CBO's reveals a strong human rightist bias with very few traditionally 'green conservation' issues on the table.[73] In essence, environmentalism in South Durban can perhaps best be described as having a dilute anthropocentric approach that recognises 'the interrelatedness and interdependence of the natural world.'[74] So, whilst advocating and promoting a 'people first approach' the local environmental movement nevertheless continues to recognise the need to protect and

[68] See P Lowe & J Goyder *Environmental Groups in Politics (Resource Management Series 6)* 10 – 11.
[69] Author's personal observation whilst chairman of a WESSA branch - not statistically verified.
[70] Bobby Peek – then National Co-ordinator for the Environmental Justice Networking Forum (EJNF) –personal opinion expressed to the author December 1998.
[71] Contributions to Coastal Management Policy, Hazardous Waste Management, the Environmental Management Policy and the pre – CONNEPP, Environmental Mission were made by MRA. Local policy initiatives comprise inputs to Durban Metropolitan Environment Policy Initiative (DMEPI), EMCA and the Pipeline Bill.
[72] Witness the excessive reference to 'community conflict' contained in recent 'scientific' documents produced by the CSIR for Durban Metro (Strategic Environmental Assessment for South Durban series).
[73] Fundamental human rights are those contained in the Bill of Rights, Constitution of South Africa, Act 200 of 1996. Community are often concerned with the environmental rights (Section 24), right to information (Section 32), and right to bodily integrity (Section 9).
[74] C Redgewell in 'A critique of Anthropocentric Rights' found in A Boyle & M Anderson *Human Rights Approaches to Environmental Protection*1996 73 explains that weak anthropocentrism is 'less hierarchical and does not perceive the human world solely as a means to human ends'.

restore indigenous flora and fauna and have called for the promulgation of legislation to better protect green belts and the restoration of natural areas.[75]

1.2.2. Local Authority and National Government

The key players from local authority interacting at community level are the City's Environmental Health Services (usually referred to as City Health), the Physical Environment Service Unit (PESU) and to a lesser extent the Durban Water and Waste Unit (DW&W). Economic Planning and Urban Strategy departments have not attempted to meet with communities notwithstanding the potential impact that their plans will have on the affected residents. The interventions of City Health led to the formation of the Island View Forum, a joint stakeholder body comprising community, industry, local and National authority. City Health has also been instrumental in obtaining a National Keypoint Secretariat directive on the question as to whether private companyies operating within designated Key Points could continue to withhold information required for environmental purposes[76]. City Health has also been successful in tracking down various incidents of illegal dumping of hazardous wastes in the South Durban area.[77] City Health are tasked with attending to noise related complaints which in this area primarily relate to Spoornet railcar shunting, airport activities and heavy industry. The emphasis has however been solely on negotiation

[75] South Durban Community Environmental Alliance Position Paper June 1998 17-18 where they state that 'land should be reserved for the re-establishment of wetlands and indigenous forest. Some other examples are the frequent calls by community groups for ecologically sensitive Admiralty land to receive greater protection from activities of private developers and squatters.

[76] Minutes Island View Workshop 23/07/1997 and personal discussion Neil Larrett, Environmental Health Services. See also the earlier discussion on National Key Points.

[77] See "Drums of Death" story carried in the 'The Mercury' 02/07/1997. The Department was also successful in tracking down the dumping of wood chip waste in Umlazi although resolving this problem was to become a highly charged political event involving local councillors and senior City officials.

and to the Alliance's knowledge no prosecution for a rail noise offence has yet been taken, despite scientifically documented contraventions of the local by-laws.

Durban Water and Waste, (Wastewater Management Department Pollution control Division), have limited interaction with the Durban South communities. The liaisons that do occur are usually a consequence of committee's and forums surrounding landfill operations and the workings of the Sulphur Dioxide Management Committee. There was for some years a question as to why this division should have been allocated responsibility for air pollution as technically this is a City Health function. The competing claims for jurisdiction have, however, since been settled.[78]

The local by-laws applicable in the Durban Metro area carry insignificant fines for offences and do not constitute a credible deterrent. The (old) Water Act, Act 54 of 1956 was generally never used by Water and Waste in the enforcement of water pollution apparently due to ignorance and uncertainty with respect to its provisions. Water pollution occurring within municipal boundaries was generally left to Department of Water Affairs and Forestry (DWAF), to enforce. The passage of the National Water Act, Act 36 of 1998 provides greater clarity as well as sanction.[79] The relationship between local authority and Provincial and National is however less than clear but with the intergovernmental forum these difficulties will hopefully become a thing of the past.

[78] The political agenda behind air pollution control was a source of much controversy. Several meetings which the author personally witnessed were disrupted by departmental disagreements as to control thereby exasperating community representatives who had made sacrifices to be present at such meetings. City Health has since assumed responsibility for air pollution.

1.2.3. The Corporate's

The major industries perceived by the community as having offsite environmental consequences are the two oil refineries, the paper and pulp mill, various fibre producers, spice and car manufacturers and large chemical storage and processing complexes. Additional impacts are generated from Parastatal controlled air, rail and shipping interests. Several of the industries are members of the Chemical and Allied Industries Association (CAIA) and have signed commitments to the Community Awareness and Emergency Response (CAER) and product stewardship programmes. The CAER programmes have by and large not been implemented with much enthusiasm nor received with same by the community.[80] Ironically many of the companies storing or producing the more flammable and toxic substances have either failed in sustaining the process or simply not implemented the programme at all despite the existence of their signed acceptance thereof.

There are many advantages to doing business in a developing country for the multinational(MNC) or transnational corporation(TNC). Inputs to the industrial enterprise such as labour and raw materials are usually significantly lower than would be found in the international corporate's country of domicile. Added attractions of the developing economy are the (usually) weak environmental laws, minimal enforcement,

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[79] It is worth noting that a pollution prosecution by DW&W was launched against Plascon Paints ostensibly under the old Water Act. It appears however that DW&W did not possess legal (delegated) authority to act in terms of this legislation. In any event the case was eventually settled out of court with the imposition of a significant fine.
[80] The official Engen CAER programme failed some years ago whereas the AECI programme continues to operate with some success. The chemical companies in Island View have not instituted any CAER programme. The existence of a CAER programmes does not however equate to a reduction in risk – see consequences of chlorine gas leak reported in Independent on Saturday, dated 6th May 2000 1.

ineffective sanction and, very importantly, cheap waste disposal costs. Waste disposal is a surprisingly big ticket item for large noxious industries operating in First World countries. Fierce environmental regulations and standards coupled to equally fierce consumer vigilance translates into big money expenditures that can affect the bottom line. Pressure on profits becomes a serious inducement for the company to outsource the disposal 'problem' to areas of the world less concerned with these issues. In turn the emerging economies of the world, burdened as they are by crippling and near extortionate debt, are forced to bid for this somewhat unsavoury investment business as a means to keep their countries afloat. There are many takers : the World Bank and its intricate machinations has seen to that. The intense competitive pressure framed against a backdrop of economic desperation allows the trade negotiators to offer the developing country's environmental goods into the bargain. Air and water resources being public goods are often the big losers in the developing country. National interests will grudgingly permit the degradation of these resources in return for capital investment and job creation.[81] There is usually no effective mechanism within the developing country for the ordinary citizen to take meaningful action as the laws are crafted in such a way so as to make the individual interest subservient to the national interest. As explained elsewhere litigation is costly, infringements difficult to prove and *locus standii* problematic. Couple this to official reluctance to pursue polluters and you have an extremely frustrated environmental lobby.

1.3. THE FORMATION OF AN ENVIRONMENTAL ALLIANCE

[81] This can be seen in the current harbour development proposed for Coega (Eastern Cape) which arguably will have significant negative local impacts – impacts environmentalists argue are being overlooked in the bid to lure the MNC to these waters. Instead the foreign exchange, capital investment and job creation angles are promoted

For several decades opposition to environmental degradation in South Durban was made known to industry and authority. The mechanism used was invariably that of individual complaint to the suspected polluter but without evidence and popular support such complaints were easily dismissed. Civic organisations were marginally more successful than the individual but were still hamstrung by an uncoordinated approach and haphazard response to environmental issues. Over time and increasingly during the early 1990's communities across the colour spectrum began to interact around common problems and complaints. This ultimately led to the formation in early 1997 of the South Durban Community Environmental Alliance (SDCEA). The idea was that SDCEA would act as a network facilitating responses and harnessing the collective community resources and knowledge. The original rallying point was the issue of air pollution which has no regard for skin colour or geographic boundaries. Strategic responses to developmental pressures are debated by SDCEA and then taken to the affiliate organisations. SDCEA has published a position paper illustrating its vision, guiding principles and objectives.[82]

The collective experience of the different groups places SDCEA in a unique position when it comes to confrontation with either polluters or authority. It has fast gained the respect of industry and has the ready ear of the media - a fact not unnoticed by Government. National Government understands the profile and objects of SDCEA and arranges regular meetings with it in order to further environmental sustainability.[83]

heavily by National government. Water pollution, destruction of endangered species, impacts on bird and sea mammal colonies and effects on a nascent abalone fishery are not similarly highlighted.

[82] SDCEA Position paper June 1998.

[83] The most recent such initiative is the meetings initiated in terms of Minister Moosa'a multi-point plan. Besides quarterly report-backs which the Minister personally attends there are monthly intergovernmental and multi-stakeholder forums held to which SDCEA is a member. The Mercury 29/11/2000 3.

Relationships have been established with National ministers, their deputies and certain department director generals. The Parliamentary environmental portfolio committee has also visited South Durban and invited SDCEA to meet with them. At provincial and local level, relations have not been as cordial. This is probably due to the adversarial position that has developed as a result of local authority being seen as more sympathetic to narrow industry interests than issues of social injustice – hence the frequent appeals directly to national level.

SDCEA in sum collectively presents the concerns and aspirations of people from across a broad ethnic, cultural and political spectrum. Its bargaining power lies in the popular local support it enjoys and in the flexibility it has in terms of how it responds to issues. For example, if deemed necessary, SDCEA is quite capable of mobilising mass community protests around a particular issue, running empowering workshops for marginalized communities or presenting formal responses to draft legislation.

2. COMMUNITIES, SUSTAINABILITY AND A PARADIGM SHIFT : SOME THOUGHTS AND DEFINITIONS

'Safeguarding the global commons is one of the pillars of global peace'[84]

This Chapter examines the concept of 'community' as it relates to South Durban. It also explores the question of sustainability and includes a brief debate as to determinations of 'sustainable development.' This will hopefully serve as a useful precursor to the issues flowing from this Chapter. The Chapter closes with some thoughts on the future of environmentalism from a macro perspective with particular reference to the growing problems associated with current production technology and the waste it generates.

2.1. COMMUNITIES

The first term that requires definition for purposes of this paper is the concept of *'community'*. Communities, it is said, are socially differentiated by 'class, race, gender, ethnicity, age and ideology...(possessing)...differing interests and values, and are not homogenous groups of people'[85] The term community is therefore a collection of 'so many different interests that the attempt to describe commonality to them may hide more than it explains.'[86] Consultants and authority would do well to observe this

[84] Kofi Annan UN Secretary General. Comment made during speech at the Goldman Award Ceremony, San Francisco 20/04/98.

[85] D Scott & G Ridsdale 'Social Assessment of Southern Durban' South Durban Strategic Environmental Assessment draft Report No 2, 7.

[86] Ibid. See however the National Environmental Management Act, Act 107 of 1998 (NEMA) Section 1(vi) where community is defined as 'a group of persons or *part of a group* who share common interests and who regard themselves as a community'(my italics). As noted communities rarely share truly common interests therefore it is

statement as it is clear that witnessed attempts at extractive consultancy techniques frequently fail in that they often apply unimaginative labelling to communities and their concerns.[87] In South African terms, labelling by consultants according to perceived socio-economic class and ethnicity often obscures and detracts as much as it informs the reader of research material. That South Durban communities continue to exhibit demonstrable geographically defined commonalties is a constant reminder of our recent Apartheid past. Indeed the distinct geographically defined ethnicity continues to raise serious questions as to the continuance of racism in a new environmental guise.[88] This is particularly evident when one considers the numbers of new proposals for industrial developments that are to be located into previously marginalized communities.[89]

enlightening to see the allowance that a group who believe they represent the community will be recognised as such. This provision is important for a common tactic used particularly by industry and authority is to discredit locally based environmental groups and their initiatives on the basis that they do not wholly represent the views of their entire community. Hopefully this should see an end to such practices designed to undermine good work.

[87] Consultants employed by industry and government tend to 'extract' information and then abruptly depart rather than making the information gathering exercise an empowering process with sharing of information and education of the voluntary participants. The information is removed from the community and consultants are enriched in the process, community on the other hand feel they are worse off in that they gain little or nothing and have sacrificed their time and energy in attending such processes.

[88] This view was popularised by SDCEA and Groundwork at the recent World Racism Conference held in Durban 28/8/2001.

[89] Particularly those industrial developments that carry excessively negative environmental baggage.

2.2. SUSTAINABILITY AND SUSTAINABLE DEVELOPMENT

'That which is common to the greatest number gets the least amount of care. Men pay most attention to what is their own: they care less for what is common'[90]

'Sustainability' and 'Sustainable Development' – two terms used with mind-boggling frequency in any discourse between authorities, developers and communities. Undoubtedly the buzzword of the nineties, sustainable development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[91] This definition has however been subjected to criticism in recent years with much of the attack being placed on the definition's focus on the natural resources to the exclusion of the basic needs of the individual and communities.[92] If these basic individual needs are not satisfied then 'sustainability' (whether viewed from a sociological, economical orecological viewpoint) may prove impossible to achieve. Consequently, addressing the essential requirements of housing, food, health and employment are now increasingly recognised as essential pre-requisites for truly sustainable practices.[93]

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[90] Aristotle. Politics, Book II, Chapter 3 reference found in G Hardin talk entitled 'An Ecolate View of the Human Predicament' http://www.lrainc.com/swtaboo/stalkers/gh_ecol.html.

[91] This definition first proposed in 1987 by the Brundtland Commission (World Commission on Environment and Development) and adopted in 1992 by the UN Conference on Environment and Development (UNCED), otherwise known as the Rio de Janeiro Earth Summit.

[92] T Beatley in *Ethical Land Use* 1994143 believes 'sustainable development' is an oxymoron and prefers to use 'sustainability' in his work..

[93] The principles are described in Section 2 to the NEMA are strongly anthropocentric. For example Section 2(2) states that environmental management must place people and their concerns at the forefront of the activity. Section 2 (4) identifies a range of factors that are to be considered in any development – these largely focusing on environmental considerations but including under S2(2)(4)(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, that they be minimised and remedied. Recognition of the social dimension should be considered an important milestone in our environmental law – unfortunately personal experience has demonstrated that this component all to frequently appears to escape the attention of industrial development planners, their consultants and even

2.3. SUSTAINABILITY AND THE GLOBAL COMMONS

An important consideration with respect to 'sustainability' is that it carries with it the implication that our patterns of production and consumption must be sustainable. Unfortunately, attempting to alter a nation's pattern of consumption is an enormous task that requires some degree of centralised control – the antithesis of the free market system. Any moves to impose restrictions on free enterprise are unlikely to win much favour especially when rights in property and trade are enshrined in law. Environmental protection then becomes a juggling act in trying to balance the general rights to economic development with rights to, say, a clean and healthy environment. Determining and settling this question could come down to judicial intervention when those affected by a particular policy or ruling seek the court's intervention in attempting to balance the conflicting interests presented. In the international experience it is clear that achieving this balance has become less a question of the application of absolute rights and more a question of *ad hoc* equity developed within the context of prevailing norms and community preferences.[94] It is the author's contention that in the longer term, far more radical departures from the present paradigm of development are required for true sustainability to be attained.

decision makers.

[94] Boyle & Anderson op cit 16.

Current global initiatives are preoccupied with reducing demand on fossil fuels and locating alternative non-polluting energy sources. [95] In the author's opinion a preoccupation with such techno-fix initiatives amounts to a partial accommodation as it deals with the effect and neglects the cause. The real challenge is a lot more difficult and requires a two-fold approach. First, in order to avoid a potential environmental nightmare there must be a universal change in global consumption patterns.[96] Second, we have to find ways at determining the carrying capacity of this earth and ensuring it is not exceeded

2.3.1. Re-establishing the boundaries

To explain the dimensions of the problem we need to pause for a moment and reflect on the manner in which our forebears viewed the environment. In times past the world order was underpinned by a belief in a cosmic presence that extended beyond the surface reality of the natural world. These ancient ways provided a sense of an 'all pervasive, numinous, or sacred power' that provided daily life with a sense of security and imbedded spiritual orientation within the natural earth processes and rhythms.[97] The technological revolution spawned by the Western world however, created a new vision and a new reality – a reality that that there was now an objective world available

[95] The Deutsche Bank Research report entitled 'Environmental protection and economic growth - a conflict?' 8 February 2002 found at http://www.investavenue.com. This report contains useful information on global environmental deterioration but falls into the conventional economist trap that clings to the notion that technology will provide a miracle cure without looking to the underlying system that only serves the owners of the technology. The report makes no attempt to examine how redistribution of technology or wealth will occur and in this respect is decidedly unbalanced.

[96] See B Commoner in *Making Peace with the Planet* (1992) 79 –102 where he argues for the redesign of the 'technosphere' in order to ensure the sustainability of the 'ecosphere.' He describes the inevitable conflict between economic productivity and environmental quality as being largely motivated by short term motives at the expense of long term considerations. However he notes that a purely ecocentric formulation of policy would spell certain disaster for developing countries.

for exploitation and containing all the resources required for consumption. Earthly paradise was now possible. The experience has been exhilarating as we have shaped lands, tamed seas, harnessed energy forms and accumulated enormous wealth and knowledge. Unfortunately this has also led to a savage assault upon the earth entirely inconceivable by our forebears.[98] This ferocious attack has seen the loss of basic communion of man and earth and a replacement of the belief in earth spirituality with a new age realism that despises the ancient ways and creates a new devotion to technology as dispensed by scientists - our new high priests. Awakening from this enchantment with technology is painful. Dioxins, PCB's, global warming, radiation, cancer, leukaemia, birth defect and abortion are all hallmarks of our new enslavement.

Thomas Berry in the '*Ecological Age*' postulates that humankind must first rediscover itself and be aware that huge psychic and social transformation are required if we are to again re-establish functional relations with the earth process itself.[99] As a part of the planetary system's life community we, as a species, will either flourish or decline just as the earth and its species flourish and decline. Consequently, it is imperative that our thoughts and actions move away from individual, personal aggrandisement to developing a global view that embraces the inter-connectivity of species and natural processes. This is one of the 'great common tasks of humanity' that requires us to preserve our living environments, feed the hungry, shelter all fellow creatures and treat with care the fundamental resources upon which our very existence depends.[100] Doing

[97] Thomas Berry in 'The Ecological Age' found in Peter Borreli (ed) *Crossroads : Environmental Priorities for the Future* 311.
[98] See Berry op cit 313.
[99] Ibid.
[100] Borelli op cit 23.

so will be no walk in the park for implementation will depend upon the priority to be accorded to achieving the goal of sustainable development. Democracies ironically could find implementation considerably more problematic than one would assume - this a result of the 'lively pluralism of interests, ways of life and conceptions of the good life' present in such society.[101]

2.3.2. Carrying capacity

The second great challenge impacting and informing the concept of sustainability relates to the carrying capacity of the earth or, to be more brutal, the carrying capacity of this earth in relation to one species : *homo sapiens*. Garrett Hardin described this flaw in human behaviour in terms of the 'tragedy of the commons'. This term describes how the herdsman is tempted to add one more head of cattle to the commons. Unfortunately each herder utilising the commons is doing the same thing and inevitably the herders are locked into a system that compels them to increase their respective herds without limit with eventual ruin 'a destination to which all men rush.'[102] The exploitation and eventual tragedy of the commons provides only two alternatives to avoid ultimate hardship for all : either (a) the commons must be broken up and privatised or (b) it must be managed. With privatism the commons is broken up into units of private property whereas under socialism it is retained as one piece and managed by agents of the community – usually the bureaucrats. Unfortunately, entrusting the commons to government can lead back to the re-emergence of commonism especially when previously private lands are nationalised and then opened

[101] Wouter Achterburg in 'Sustainability and Associative democracy' in W Lafferty and J Meadowcroft *Democracy and the Environment : Problems and Prospects* 1997 160.

up to exploitation as has happened with many equatorial state forests in recent times. Consequently, semi-socialistic approaches are required. Hardin has since expanded upon his original premise and now adds a further caveat.[103] Underpinning Hardin's original statement was the element of scarcity - during times of abundance there would be no impact posed by commonism but as soon as the resource grew scarce the tragedy was sure to ensue. Traditional economic interpretation of *scarcity* implies a solution imbedded in terms of supply. Consequently *supply* of the resource has become the focus of most global campaigns relating to, say, poverty and/or hunger. Ironically the solution appears to be to deliver more of the resource rather than to say promote self reliance as demonstrated by, the World Bank supplying more money in the form of loans to the poor or more food aid to the starving.[104] For Hardin, however, no-one is asking the question : 'and then what?' He suggests that a proper evaluation requires one to examine the demand side of the equation. In ecological terms demand can never outstrip supply for once that occurs a cascade of events is set in place that will either severely reduce the species prospects or lead to its extinction. Hardin notes that cherishing individual lives in the short run diminishes the number of lives in the long run and leads to reduction in quality of life and increased pain for the survivors. An approach centred around sanctifying carrying capacity is therefore to be preferred over one sanctifying life. For Hardin the concept of carrying capacity is inseparable from that of sustaining quality of life and means that ultimately very difficult choices must be made. For example if we all want to eat meat then we must

[102] G Hardin found in J Clarke *Back to the Earth : South Africa's Environmental Challenges* (1991) 6.
[103] G Hardin talk entitled 'An Ecolate View of the Human Predicament' later developed into Hardin's book *Filters Against Folly* 1985 found at http://www.lrainc.com/swtaboo/stalkers/gh_ecol.html
[104] *Ibid.* Hardin notes that part of the pathology is due to the fact that short term gains generally weigh more heavily in decision making than do long term losses. We are especially tempted to create a new commons when

understand that some sacrifice must be made in terms of availability of land for plant food. If we all want to have cars and aeroplanes then we must also be content with a far smaller population as there are quite simply insufficient resources to satisfy everyone.

2.3.3. Inventing the future

Clearly a more radical departure from the underlying system is required in order to deliver a vision for global sustainability. First World interventions are usually site specific and amount to little more than 'technological Band-Aids' that do little to address the root cause of the global industrial energy problem.[105] There are also issues relating to equity that must be addressed. For example it is iniquitous that the 1/5th of the world who belong to what the Climate Change Convention refers to as Annex one countries, (OECD and Central and East European Countries), are, through their consumption, six times more responsible for climate change than the rest of the world and five times less vulnerable to the impacts of climate change, as measured by GDP per head per degree of global warming estimated for this century![106]

William Lafferty, in *Democracy and the Environment*, offers some assistance and suggests three transformations required in order to attain the goal of altering consumption patterns.[107]

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the short term effect is a diminution of suffering. The World Bank makes soft loans that have to be covered by the rich countries with the loan itself becoming equivalent to the privilege of drawing on a commons.

[105] H French 'Clearing the Air: A Global Agenda' in *Worldwatch Paper 94* 1990 24.

[106] Domingo Jiménez-Beltrán in a speech entitled 'Towards Global Responsibility :Corporate Accountability through Transparency' found at http://org.eea.eu.int/documents/speeches.

First, a far higher degree of social co-ordination and co-operation is required than is currently the norm in our market society. This means that the consent, creativity and co-operation of all society's participants are required - not simply the application of external incentives as an inducement to improve ecological performance.[108] In addition there must be a more efficient use of energy and resources and a reduction in waste as well as an increase in recycling and product life-spans[109].

Secondly, the market economy has an inherent tendency towards growth and expansion that produces unjust and inefficient outcomes. Achieving sustainability in this context implies the pursuit of the general interest in order to defeat short term domination by certain vested interests. It must amount to a moral commitment to the concept of sustainability. It may prove necessary to regulate the functioning of the macro economy through central government involvement especially in the selection of appropriate instruments to bring about change.

The third aspect to sustainability involves levelling the income playing fields and developing redistributive mechanisms that will allow the less affluent the ability to assist in pursuing the goal of sustainability.[110] This applies as much to individuals and communities as it does to nations. For example, an impoverished third world country suffering from crippling economic debt can hardly be expected to act sustainably in

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[107] W Lafferty & J Meadowcroft *Democracy and the Environment* 1997 160.

[108] Latest statistics indicate that the USA despite a myriad of pollution and waste reduction devices, (ranging from active and passive controls and sophisticated pollution trading and fiscal incentive devices), still shows overall net increases in environmental pollution.

[109] A Durning op cit notes that the consumer class depends on energy supplies equivalent to 2000kg per capita of average grade coal per year. The poor on the other hand consume energy equivalent to less than 400kg per person.

[110] Lafferty op cit 161 –165. The reader is encouraged to consult this work for more detailed examination of this aspect than allowed in the confines of this paper.

relation to its scarce resources if it has as an overriding need to feed and provide for the nation.[111] It is therefore essential that the governments of the Northern Hemisphere recognise that debt relief and real contributions to sustainable development in the South are vital to their own survival.

It is submitted that the New South Africa stands at the crossroad of a marvellous opportunity to reformulate its entire energy policy in order to bring about lasting and meaningful change. South Africa is a country that has a proven ability to produce and pioneer many world firsts notably in the medical, military and engineering fields. It also is a country richly endowed with pollution-free natural resources such as wind, solar, hydro-electric, wave and electrostatic energy). It seems shameful that given these resources South Africa should fall into the fossil fuel energy trap and allow itself to become captive to the oil energy cabal. To effect meaningful change requires National direction especially from the Ministers of Energy and Environment if we are to be truly sustainable. The author remains convinced that with appropriate Governmental guidance and support, meaningful energy alternatives are possible and that South Africa could yet play a leading role in the development of alternative energy and social strategies.

[111] See here S George 'Redefining economics in a Greenhouse World' in J Leggett (ed) *Global Warming : A Greenpeace Brief* (undated) 21 where she comments on the transnational corporations and banks wielding more power than their governments in terms of the massive loans made to Third World Governments. These loans financed huge ecologically destructive projects and purchase of the military hardware. In order to service interest payments natural resources were 'cashed in to earn hard currency'. The IMF and World Bank have since become key players in the Third World with loans exceeding $225 billion in 1989. It was the World Bank that in 1982 financed the paved highways into the Amazon allowing thousands of new settlers to penetrate the region, thus introducing mining, timber and cattle ranching without quantifying the long term cost to the world in terms of climate change. She notes that market forces will continue to concentrate economic power in the hands of the few with catastrophic results for Earth. Economic efficiency cannot and will not produce sustainable development.

2.4. SUSTAINABLE DEVELOPMENT IN SOUTH DURBAN

Sustainable development can be defined as development that 'seeks to integrate environmental, social and economic concerns, now and in the future, and to keep within the carrying capacity of the environment'[112]. The National Environmental Management Act, Act 107 of 1998, confirmed that these concerns must be integrated into planning, implementation and decision making.[113] Unfortunately these 'text book' definitions are not particularly helpful in terms of indicating how sustainability should be measured or actually achieved. Tim O'Riordan, following a visit to South Africa (and South Durban), published an insightful account of sustainability in South Africa. He identified the breakdown of civil order in poorer communities, the lack of capacity in local governance, bureaucratic mismanagement and a 'fickle' judicial system as seriously undermining the possibilities for the success of the definitions listed at the outset of this paragraph.[114] He notes South Africa's attempts to simultaneously promote what he refers to as the 'triple helix' of economic redistribution, social justice and environmental protection but is not persuaded that it will succeed in delivering sustainability.[115]

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[112] GN 1096 of 1997 White Paper on Environmental Management Policy for South Africa 85. The World Commission on Environment and Development (Brundtland Commssion) in 1987 defined sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs. It can also be viewed as living on the earth's income, ('the interest of our ecological endowment'), rather than eroding its capital. See Beatley op cit 144 for more comprehensive treatment of rights and obligations of future generations within the context of sustainability.

[113] Act 107 of 1998 Section 1. The Act is highly anthropocentric stating that people and their needs must be at the forefront of environmental management concern.

[114] T O'Riordan 'Sustainability for survival in South Africa' *Global Environmental Change* Vol 8 no 2 100.

[115] O'Riordan op cit note 110 at 101.

With respect to institutional arrangements O'Riordan submits that the combined presence of a modern Constitution, a democratic government, a solid environmental policy and a redistributive economic policy will not immediately translate into sustainability. He cites three reasons why sustainability will not occur. Firstly he identifies that the governing institutions of economy, society and environment are not connected at any level of governance despite Constitutional arrangements for intergovernmental relations. This failure he believes rests on a lack of 'really motivated people with support staff and bureaucratic opportunities to promote change.'[116] Secondly, he believes that the socio-economic values of natural and social capital are not given the attention they deserve. In addition the link between environmental quality and public health is not being promoted and is overshadowed by 'bureaucratic infighting and a fixation over macro-economic policy.'[117] Thirdly, the drive for economic growth and international investment 'distorts the meaning of sustainability more towards reliable growth than sound management of natural and social capital.'[118]

But it's not all doom and gloom. Of interest to this paper is O'Riordan's finding that community empowerment at local level is likely to be the real driver to eventual success at the national level. The way forward, therefore, is to empower and capacitate communities along, but not necessarily following, Local Agenda 21 (LA21) guidelines.[119] O'Riordan is somewhat enthusiastic in his description of the success of LA21 in Durban; a view not altogether shared by SDCEA. SDCEA believes only lip-

[116] O'Riordan op cit 102.
[117] O'Riordan op cit 103.
[118] Ibid.
[119] O'Riordan op cit 106. Local Agenda 21 and sustainability indicator workshops can all assist.

service is being paid to Durban's acceptance of LA21 and cites as evidence thereof the lack of capacity of the LA21 implementing agency itself; the absence of programmes or workshops on establishing LA21, the lack of mechanisms to empower and capacitate communities, the lack of access to the real decision makers and the lack of progress around core issues impacting residents (especially those concerning chronic pollution and insecurity stemming from unfettered industrial developments).[120] SDCEA goes on to note that the multi-stakeholder forums originated as a result of SDCEA's lobbying and protest action and not as a consequence of LA21.[121] In defence of the LA21 process it did cause a report to be commissioned into sustainable development in Durban.[122] This report recognised that community participation should not be restricted to peripheral involvement and notes that 'deep community involvement and control over environment and development processes can release energy and resources otherwise not available to initiatives.'[123] Several key actions were identified by way of an appendix to the report and it is heartening to see that several of these are being currently tackled.[124]

A second initiative that was launched as a LA21 initiative was a R2million Strategic Environmental Assessment (SEA) for South Durban. Considering this purported to be a LA21 project, it bizarrely ended up generating more conflict and alienation of the community than was previously the case. This was partly due to its pre-occupation with economics and petrochemical option analysis but also due to its highly

[120] Personal communication Desmond D'Sa, chairman SDCEA 01/2002. The Metro Environmental branch has apparently only 1 permanent staff member.
[121] See remarks made under Chapter 6.2 and the example's identified thereunder.
[122] Hindson D, King N& Peart R 'Durban's Tomorrow Today : Sustainable Development in the Durban Metropolitan Area' 1996.
[123] Hindson op cit 79.
[124] Hindson op cit 129-131.

controversial conclusion – that communities may need to be relocated to make way for industry. The final recommendation to Durban Metro was that in order to promote sustainable development in Durban South, the future development should be industrial and that this should be of the petrochemical and port variety.[125] The skewing of the report away from the social and environmental realities to a bald industry specific economic assessment was lamentable. This form of SEA is a poor model on which to base or otherwise associate LA21 processes and indications are that risk-based fully participative SEA's are a preferred option. There is a National Strategy for Sustainable Development (NSSD) that was to have undertaken a general national review of Agenda 21 and to have submitted the findings to the United Nations as a prelude to the World Summit on Sustainable Development.[126]

So what does sustainability actually mean to South Durban communities? Sustainability to a community is about appearances and the preservation of a sense of place. Perceptions play a significant role. A community that believes it is under persistent environmental attack will soon form inescapable conclusions that the situation is unsustainable. The glib utterings of the industry-appointed consultants on how much toxic pollution the body can absorb without ill effect do little to placate the mother of a child dying of leukaemia.[127] Physical evidence of odours, plumes, industrial accidents, destruction of flora and fauna and witnessed disease has led South Durban communities to widely oppose further industrial development including

[125] Durban South Basin Strategic Environmental Assessment Final Integrated Report Aug 1999 133.
[126] Source – Judy Beaumont DEAT comments made during address to DEAT EMCA workshop 20 Sept 2001. See also LA21 report to be made to WSSD at http://www.iclei.org/rioplusten/final_document.pdf
[127] See here Wiley et al op cit 50 –52. The problem of leukaemia's and lung cancers have been the subject of many meetings of the Bluff Ridge Conservancy and Bluff Peninsula Ratepayer meetings with benzene being particularly identified as a problem substance that is not being monitored by authorities despite its toxicity.

refusals to participate in EIA's for development projects.[128] The local authority on the other hand has not been swayed by this recalcitrant attitude and has effectively steamrollered developments through, regardless of intense community opposition.[129]

Supporting the community stance is the following statement arising out of recent research concluded by the CSIR on air pollution :

'*Atmospheric emissions are approaching (or may possibly have reached) the safe assimilative capacity of the atmospheric environment in certain parts of the..(Durban South)...study area.*'[130]

This statement clearly alludes to a situation that there are a set of activities taking place in the South Durban area that could be viewed as unsustainable, the implication being that the situation is now unsafe or perilously close to being unsafe. One member of the community noted that '*at this rate there is no future for future generations*'. Adding to the concern are the preliminary findings of the Island View Health Risk Assessment that indeed a veritable chemical soup exists in South Durban,

[128] SDCEA Position Paper : June 1998 at 3.1 where the Alliance calls on Durban Metro to 'Immediately STOP the initiation of new industries in the area that will contribute to more air pollution.' This demand is reiterated again under 3.6 in SDCEA firmly resisting further expansion of the petrochemical and heavy industry leading to increased pollution levels.

[129] In 1998 community groups from Merebank and Wentworth adopted the position of 'no developments, no EIA' until the Strategic Environmental Analysis (SEA) for the area was complete and that the baseline environmental living conditions had been properly assessed. This created problems for industry wishing to develop leading to pressure on Durban Metro's Environmental Manager, Dr Debra Roberts to seek a ruling from the City's Executive Committee that developments could proceed apace notwithstanding the absence of baseline data. This was subsequently granted by EXCO.

[130] S O'Beirne et al CSIR specialist report for the SEA entitled 'A Synopsis of: Air Quality Indications in the South Durban Area : An Analysis based on Sulphur Dioxide, Nitrogen Oxides and Carbon Monoxide' (July 1998) Section 2.1.1 B. It is also worth indicating that the CSIR, in evaluating the local conditions, have used local South African Sulphur Dioxide Guidelines as their benchmark, which guidelines are approximately double the World health organisation guidelines.

something which residents had long known. Importantly known carcinogens such as benzene and acrylonitrile are observed at disturbing levels. In relation to the predicted benzene levels, the toxicologist to the assessment commented that modelled benzene concentrations originating from Island View storage would be similar to those experienced during rush hour traffic.[131] This is obviously unsatisfactory but is it unsustainable ? In such an instance determining sustainability involves a degree of standard setting that involves rational and substantiated scientific input as well as social acceptance. The agreed standard should also be attainable and coupled to provisions that allow for it to be legally enforceable. A solution therefore is that in testing sustainability one must embrace the social component. Integration of those concerns and perceptions with geographical realities and scientific evidence will assist in developing mechanisms to attain sustainable outcomes. One mechanism to unlock this aspect lies in developing sustainability indicators and ensuring that they are incorporated in a meaningful way into our environmental law.

2.4.1. Sustainability indicators and corporate environmental reports

It is suggested that sustainability indicators offer one mechanism to promote the transition to sustainability.[132] These indicators however must be seen as a process and not a product and be driven by community empowerment. To be successful they must

[131] Comment made by toxicologist Dr van Niekerk in response to question posed by SDCEA, Island View Health Risk Assessment meeting 13/06/2001. The presence of the carcinogen acrylonitrile in air samples enraged community present as its storage had been the source of vigorous opposition (see Chapter 6.8 reference toVan Ommeren EIA). Community concerns were dismissed in terms of the EIA but are now proven in that the toxic airborne chemical is being detected in the air they breathe.

[132] See O'Riordan op cit 106.

not be something 'handed out by scientists, officials and planners'.[133] According to O'Riordan these initiatives should be co-ordinated within planning, investment and educational objectives. Some work has already been undertaken on the development of such indicators with development of informal quality of life indicators a possible way forward .[134] These indicators would need to be prioritised and then set alongside those suggested by industry and government in order to develop a baseline from which a monitoring system could be developed.[135] Some possible examples of community based indicators could include amenities, health, housing, safety issues and industrial impacts. At a national level, bodies such as the National Environmental Advisory Forum could assist this process in that this forum is well placed to communicate directly with the Minister (DEAT).[136]

The European Union has been particularly active in furthering the development of environmental indicators and their experience is useful in assisting our own development of sustainability indicators. Environmental NGO's had for some years engaged in critical attack of the European Union's internal market for putting economics and trade before protection of the environment. This was remedied with the signing of the Treaty Of Amsterdam that provides for stronger environmental guarantees than was previously possible under the Treaty on European Union.[137] In particular the Articles 2 and 6 of the Amsterdam Treaty now makes sustainability a for

[133] Ibid.
[134] see Nurick op cit 239.
[135] Nurick op cit 250.
[136] The Environmental Advisory Forum is established in terms of NEMA S3.
[137] The European Treaty commenced November 1993 and introduced the concept of sustainable growth respecting the environment as well as the precautionary principle upon which European Community environmental policy is founded. See Article 174, (ex Article 130(r)),of the EU Treaty. More information can be found in a document entitled 'The Amsterdam Treaty : A Comprehensive Guide' at http://europa.eu.int/scadplus/leg/en/lvb/a15000.htm

the European Union (EU) and uplifts environment to a policy status.[138] Running parallel with these developments are initiatives aimed at developing indicators for measuring the effectiveness and success of the integration of environmental concern into EU policies.[139] Once developed, it is envisaged that the indicators can be used as a tool to measure and communicate changes in sustainable development to different target groups. Relevant to South Africa is that the EU is considering using a set of environmental indicators to compare or benchmark individual countries, sectors and companies with the European Environment Agency (EEA) being the most likely regulatory office.[140] The EEA believes that community groups will use the indicators to make policy-makers accountable for their actions and notes that 'conventional' indicators such as those measuring energy efficiency and greenhouse gas emissions are already regarded as being insufficient for the task in hand. Instead requests from citizen groups call for indicators of a more radical character such as those designed to measure ecological footprints and the processes behind environmental degradation.

There has also been parallel pressure to develop mechanisms to monitor corporate environmental sustainability. This is particularly so as there is a recognition that certain companies who are using renewable energies face unfair competition from others using fossil fuels whose market prices do not include the full environmental costs. In addition there is an understanding that it is the duty of each generation to pay its way and that

[138] It can be noted that the Single European Act allows the European Council to make decisions, (by a qualified majority),that are roughly the equivalent of laws between member states. The Amsterdam Treaty significantly strengthens this arrangement.

[139] Göran A Persson, Chairman of the Bellagio Forum for Sustainable Development in his report entitled 'Measure And Communicate Sustainable Development' : A Science And Policy Dialogue delivered in Stockholm , 4/5 April, 2001 Stockholm. See website www.bfsd.org/report.htm.

[140] Ibid.

the market prices should capture the full costs of production, consumption and disposal. In the light of this, the European parliament commissioned the EEA to develop a technical report on corporate reporting.[141] The EEA report highlights the growing demand for environmental information from environmentalists (querying the hidden subsidy provided by society to company shareholders in the form of unaccounted offsite environmental costs), to the financial community that provides much of the corporate capital.[142] Initiatives are now underway to broaden and formalise reporting procedures in a manner that will assist the EU in attaining sustainability. It is submitted that the developments in the EU will impact South Africa on account of South Africa being a signatory to a number of international conventions and trade agreements. Indeed it is foreseeable that formal reporting may be required as a possible pre-requisite for trade and investment.[143] This has given rise to a brand new range of NGO's who seek to inform, assist and otherwise advise corporate and investors alike.[144] It is submitted that these neo-NGO's may achieve more in the short term than is achievable by traditional oppositional strategies. It is the author's belief that industry requires a framework that encourages, rather than discourages, sustainable economic activities.

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[141] The full EEA report, technical report 54 entitled 'Business and the Environment : Current trends and developments can be downloaded from http//:www.eea.eu.int.

[142] EEA report op cit 7.

[143] At a recent Sustainability Reporting Award (2001 KPMG SA) the author was able to listen to and then question several large multi-nationals who have recently entered the international investment arena. These recent multi-nationals (Anglo American, Old Mutual plc, and Billiton), all admitted to being 'grilled' by shareholders and investment analysts on their business practices with a focus being placed on their environmental and social justice track record. In order to satisfy investor demands they have all now been compelled to report on environmental performance and stewardship. See also Sunday Times Business Times supplement survey (Sustainability Reporting) 16 article entitled 'Offshore Listings bring global pressure' published 7th October 2001.

[144] Such as CERES (Coalition of Environmentally Responsible Economics) a leader in standardizing corporate environmental reporting.

In summing up it is clear that South Durban has a pressing, if not dire, need for the development of sustainability indicators. The preliminary work already done with environmental groups in South Durban on indicator design must be expanded upon. Ideally the development of indicators should become a component of the governments multi-point environmental plan for South Durban because, quite simply, without indicators, success cannot be measured. Consequently, national level involvement with the formulation of the indicators is an imperative as it is only at this platform that indicators addressing social and economic considerations can be adequately reconciled and integrated into the strategies of various organs of government.

3. ENVIRONMENTAL ORGANISATIONS

'When we breathe the air of freedom, we do not want to choke on fumes'[145]

The United Nations Environmental Programme (UNEP) defines the NGO as a non-profit group or association organised outside of institutionalised political structures to realise particular social objectives (such as environmental protection), or to serve particular constituencies (such as indigenous peoples). NGO activities range from research, information distribution, training, local organisation, and community service to legal advocacy, lobbying for legislative change, and civil disobedience. NGO's range in size from small groups within a particular community to huge membership groups with a national or international scope.[146]

The influence of the international NGO experience is likely to grow in South Durban as relationships are strengthened both informally and contractually.[147] In some cases the relationship with the international NGO has been formed due entirely to the activities of a particular personality.[148] Much of the work done by the NGO is a response to the needs of civil society but is strongly influenced by an overarching world NGO community that is pursuing a common vision of an ecologically sound and

[145] A Sachs *Protecting Human Rights in a new South Africa* 1990 141.

[146] Definition found at http://www.unep-wcmc.org/index.html?http://www.wcmc.org.uk/reception/glossaryM-R.htm~main

[147] SDCEA has formal obligations and outputs to deliver upon *in* terms of contractual undertaking with DN and DANCED. The current project (inception 01/2002) will have a 2 year duration. The Bucket Brigade on the other hand runs empowering workshops on such issues as air sampling and analysis one such workshop being held in South Durban on 19/01/2002).

[148] Internationally recognised environmental activist Bobby Peek of Wentworth South Durban is one such example of an individual who has spotlighted local environmental conditions to a world audience including the United Nations General Secretary, Kofi Anan.

economically just world order.[149] Anne Bischel, in an essay appearing in Lafferty and Meadowcrofts '*Democracy and the Environment*', reflects on how the NGO is guided by a 'common set of values and norms...motivated by a belief in a mission, not by political imperatives, as in the case of government, or economic incentives, as with corporations.[150] Non–profit organisations sponsored by industry and in some cases government, often blur the edges of Bishel's comments, particularly when they masquerade as independent NGO's. For example there are organisations that are considered by environmental NGO's to be acting as *agents provocateur* in that they sow disinformation that is calculated to cast doubt on the statements or actions of main stream activism. Their desire to advance the narrow commercial interests of a certain constituency usually leads to their exposure.[151]

Bischel observes that the presence of the NGO in international forums serves to heighten public scrutiny of decision making and is a reminder to government delegates of their accountability to the constituency. In some instances a government may adopt a strong oppositional stance to a particular environmental resolution which can be traced to powerful economic and bureaucratic interests. In such cases the NGO can report on this position and begin activities that will catalyse public pressure and opinion as a significant counterpoint to the vested interests.[152] NGO's are not fettered by political and institutional constraints, thereby allowing them to introduce new issues

[149] Anne Bischel in 'NGO's as agents of public accountability as democratization in intergovernmental forums' as found in William M Lafferty and James Meadowcroft *Democracy and the Environment – Problems and Prospects* 1997 235.

[150] Ibid.

[151] The Environmental Conservation Organisation (http://eco.freedom.org/), and the Centre for Defense of Free Enterprise (http://www.cdfe.org/) are examples of organisations serving sectoral interests. There are even legal foundations which actively pursue projects that may leave them pitted against environmentalists – see for example the Pacific Legal Foundation (http://www.pacificlegal.org/) in this regard.

to the agenda including more radical and innovative approaches. NGO's are also not driven by profit motives so they are likely to view issues more holistically and with less bias than other international actors.[153] The environmental NGO may through its linkages bring forth the viewpoints of the grassroot CBO thereby introducing local civil society input to the international debate or deliberation.

NGO's have acted as environmental experts at hearings and even been known to have written draft conventions even before discussions have been entered into.[154] NGO's also are integral to assessing and monitoring governmental performance with respect to compliance with signed protocols and conventions.

The relationship between NGO's and government varies and may occasionally be adversarial. With respect to NGO's operating in the Southern hemisphere the NGO often becomes embroiled in seeking greater empowerment for local communities. A sudden proliferation of NGO and CBO's could be taken to be an indication of some form of failure on the part of government to meet the needs of the people. Foreign NGO's who advocate local structure empowerment often encounter hostility from less democratic countries that have a typically top-down forms of governance which can be disabling to environmental reform.[155]

[152] Anne Bichel in Lafferty and Meadowcroft op cit 248.
[153] French H In Worldwatch Paper 107 entitled 'After the Earth Summit: The future of Environmental Governance' 1992 offers the example of how Germany blocked acid rain negotiations until it was informed that its own forests were dying. NGO groups were instrumental in uncovering and publishing this information.
[154] Bichel op cit 249. For example CITES(Convention on International Trade in Endangered Wildlife) was originally an IUCN(International Union for the Conservation of Nature) initiative.
[155] Bischel op cit 243.

Ironically conservation measures taken in the affluent North may have negative consequences for habitat in the South. An example of this reverse conservation effect can be seen in a recent study where the conservation and protection of forests in North America and Europe are said to increase deforestation in previously inaccessible forests in Asia, Africa, South America and even in the previous Soviet Union. Statistics offered quote a predicted loss of 2,5 hectares for every 50 hectares under protection in Europe and North America.[156] A University of Ohio study has determined that conservation measures in North America, currently producing 35% of the world's timber, will have a direct effect of increasing timber prices and, indirectly focussing attention on previously inaccessible and uneconomical forests in the tropics.

Informing the public of these sort of 'macro' trends is not considered a Government function or priority primarily because it calls into question the Government's own economic and environmental policy and supporting law. The NGO, however, can be very effective in addressing this deficiency and to this end will lobby to pressurise politicians to effect change.

The WSSD (Rio +10) piqued international environmental NGO interest in local environmental issues, which interest both polluter and environmentalist seek to enlist for their own devices. A flurry of corporate environmental activity preceded the WSSD with good neighbour type agreements being drafted, CAER committee programmes being resurrected and multi-stakeholder workshops being arranged. Government too has acted with what appears to have been inordinate haste to

[156] As found at http://www.enn.com/news/enn-stories/1999/06/060199/economics_3459.asp

conclude environmental management cooperation agreements (EMCA) with industry - a fact which has not gone unnoticed by local environmentalists. Speculation abounds that these agreements were being readied in order that they could be paraded out as indicators of good corporate and national governance and a measure of sustainable South African business practices. It is uncertain if this occurred or not.

3.1. ADVOCACY ORGANISATIONS

A further distinction can be made between advocacy NGOs and grassroots organisations. Advocacy NGOs are generally established by activists 'who support a certain cause and who create their organisation with the explicit goal of helping people other than their own membership.[157] Grassroots organisations on the other hand originate in the local community and are committed to having an impact on that constituency.[158]

Advocacy organisations are often synonymous with legal activism especially in the United States where several organisations with specialist backgrounds (including many lawyers) have successfully brought actions against individuals, industries and government[159]. Currently the only South African based legal organisation active in supplying advice to the South Durban communities is the Legal Resource Centre. The South Durban community does not seem to have generated much philanthropic interest from the likes of bodies such as the Environmental Law Association and

[157] Ibid Bishel quoting Cernea 1988 9.
[158] Ibid.
[159] The more well known of these advocacy groups in the United States are the Conservation Law Foundation (CLF), the Environmental Defence Fund (EDF), the Sierra Club Legal Defence Fund (SCLDF) and the Natural Resources Defence Council (NRDC).

University Law Schools although ironically they have been sought out specifically by leading environmental jurists and lawyers such as Professors Howard Latin, Durwood Zaelke and Tim O'Riordan who have all had some meaningful contact with the South Durban Communities in recent times.[160] It is clear that much more could, and should, be done on a country-wide basis by the academic and legal fraternity in assisting those who are having environmental abuses heaped upon them in sight of their offices and campuses.

Tom Turner notes that hardship does not appear to be in vogue in the American legal community. As a result, most law graduates remain committed clerks with the result that 'environmental law cases go begging while lawyers enjoy their security, income and caution.'[161] Turner suggests that alternative dispute resolution procedures such as arbitration and mediation will become increasingly popular especially with polluting industry who prefers to compromise and abhors the publicity of a trial.[162]

3.2. NGO DEVELOPMENT, ORGANISATION AND VALUES

An environmental issue impacts the public in different ways. Depending on the level of the threat some members may not react either because it is does not rank high on their political agenda or is not considered to affect them. Others are fatalists and will do nothing, irrespective of the imminence of the threat. Then there are those who do feel aggrieved and begin forms of political protest such as letter writing, gathering petitions

[160] Professors Latin and Zaelke visited in 1997, O'Riordan in 1998.
[161] T Turner in article entitled 'The Legal Eagles' in *Monkeywrenchers* Dick Russell 59.
[162] Turner op cit 61.

or generally instigating collective action. Whether or not a group of persons evolves into an effective pressure group will depend on the level of resources it has available, the dynamism and energy of certain individuals and the overall commitment level of all the members.

The motivation of an individual to join an environmental group often reveals much about the group itself and its likely prospects to succeed as a more permanent structure. O'Riordan has provided a useful insight into the workings of the environmental organisation. He identified three 'categories' of membership based upon individual motivation. The first is the 'private actor' who is motivated by purely personal reasons but usually relating to some personal fears or threat to property or well being. As they believe they are being personally threatened their actions are likely to be highly expressive of this condition and they may be ruthless in the tactics used to alleviate the perceived threat.[163] Unfortunately as far as their ongoing participation is concerned these members can be characterised as episodic and crisis-orientated and are therefore very likely to disappear once the threat has been extinguished.[164] The second type of member are those ideological actors driven by intellectual and moral motives. Being interested in the abstract means that they will be less concerned with the particular issue and more concerned with the process.[165] They will tend to be policy-orientated and very often are responsible for developing specialist roles within the group. The last category is that of the civic actors – those persons motivated by an altruistic concern for their

[163] These members are also referred to as 'nimbys' – 'not in my back yard', being passionate, high energy individuals.
[164] O'Riordan in *Environmentalism* 1981 252.
[165] O'Riordan op cit 253.

community who are usually 'long standing residents with a history of political concern and a knowledge of the local political process.'[166]

It has been said that what distinguishes an environmentalist from the general public is the 'degree of importance they attach to such concern'.[167] A corollary of this definition is that it allows opponents such as polluting industry to identify community environmentalists as extremist, activist or as 'greenies' all of which imply some degree of irrationality. This pigeon-holing allows industry, and occasionally authority, to suggest that these opinions are not representative of the views of the general public. In consequence of these attacks Durban South environmentalists have had to adopt alternative strategies one such being the holding of a series of mass public meetings aimed at identifying public support for specific activities.[168] Having received the public mandate, the environmentalists could proceed more confidently to the negotiating table in the knowledge of that support. This episode also highlighted the issue of public ignorance. Whereas in more affluent areas the print media can be relied upon to deliver the message the same cannot be said for the poor and marginalized. This has led to a requirement for feedback meetings to report back to community structures which unfortunately takes time and resources, something which developers do not appreciate. There is of course always public apathy with public attitudes varying according to the profile of the issue at stake. High profile issues such as cancer or forced removals have attracted more attention than, say, the plight of the remaining mangrove forest in Durban Bay. This doesn't mean that there isn't underlying support for the issue. Goyder points

[166] O'Riordan op cit 254.
[167] Philip Lowe and Jane Goyder (eds) *Environmental Groups in Politics* 1983 13.
[168] In addition to the meetings various 'sign on support' campaigns have been run.

out that local level protest groups usually only emerge to give effect to latent environmental sympathies once the environmental threat has materialised.[169] The fact that it is the poor who generally bear the brunt of polluting activities serves as an efficient 'conscientiser' of that grouping who in turn are very likely to offer their support to environmental pressure groups. In this manner the environmental group is able to garner a support base across the social classes and to summons this interest to mass meetings – SDCEA having attracted upwards of 3000 attendees on occasions - a fact which has not gone unnoticed by Government and local politicians.

3.3. THE ALINSKY MODEL AND LOBBYING

The lobbying activities of the environmental organisation is one of the key areas where they directly influence the form and evolution of our environmental law. SDCEA for example has lobbied various Government ministers, deputy ministers and even a State President in order to effect change.[170] As a result of the lobbying initiative concessions have been made, multi-stakeholder forums been set up and in some cases toxic landfills have been closed. For lobbying to be effective it requires a cohesive and well-motivated organisation that is prepared to willingly invest much social and financial capital. The issue pursued must also be sufficiently profiled to ensure broad-based support and the entity or person lobbied must be receptive to such initiatives. Various models abound with the so called 'Alinsky model' being relevant to the South

[169] Ibid. Goyder does not elaborate on what constitutes the threat condition. In the author's experience it is usually anything that could affect an individual's life or lifestyle. Obtaining public support for the issue becomes a function of accurate assessment and onward communication of that knowledge to the broader population in a manner that can be easily understood.

[170] Although Nelson Mandela's attentions were attracted to South Durban initially as a result of a visible protest action, the actions that followed were all a result of sustained lobbying. See Wiley et al op cit 65-66 for comprehensive account of the WDF protest outside Engen oil refinery and its consequences for the environmental movement.

Durban situation in that it sets out to inspire urban protest by focusing on improving the 'living conditions of the poor, empower(ing) the grassroots and obtaining more democracy and greater social justice.'[171]

Central to the Alinsky model is that people within a community organise around the defence of their immediate interests.[172] To achieve this, a sensible issue should be identified along with a clear opponent.[173] The broader community must then be mobilised around this issue. At the heart of the process lies the Alinsky 'trigger' – the organiser. The organiser is a person who has the community interests close to his or her heart but being a paid professional remains external to the community. A key element of the model is that there is payment for services which distinguishes it from similar socialist models. Payment therefore underscores the community's determination for long term organising and compels fundraising whilst fostering group awareness and identity. One implication of this approach is that organisations that do not attempt to secure funding for services are less likely to remain a collective group.

3.3.1. Lobbying

In South Africa, lobbying action is undertaken primarily by the NGO sector and in the author's opinion ranks high up the scale of effectiveness in terms of obtaining meaningful change. O'Riordan's has produced some guidelines to environmental lobbying that may be of interest to the reader:

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[171] M Castells *The City and the Grassroots* 1983 60. The model originated with Saul Alinsky, a University of Chicago trained sociologist and was extensively funded by different church groups. It was used inspirationally to create significant community organisations especially in the USA during the 1960's and 1970's.

[172] Ibid. Alinsky saw that people do not mobilise around mere models – they require an issue to bring them together.

[173] Ibid. 'Victory' must be attainable as it is only when people win that the effort and sacrifices will be thought to have been worthwhile.

1. Obtain advance intelligence. Access to policy determinations before they becomepolitically binding raises the possibility of success immensely. Once decisions are made authorities are very reluctant to change that decision.
2. Liase with the administration – 'play the game' even if it leads to somedisaffection amongst those wishing to employ 'commando operations' to achieve immediate results.
3. Argue rationally and utilise professional assistance. Provide alternatives.
4. Develop contacts with the legislature and National government.
5. Develop relationships with the media to activate public interest.
6. The group must be prepared to use legal action and sanction in the event thatevidence emerges of untoward behaviour. [174]

3.4. POLICIES AND POLITICS

'...the struggle to ensure sustainable environments goes far beyond green and brown issues : that it is about power and politics. Whether you are an industrialist and want to be a net user of the environment or a community leader attempting to protect your living environment it's about power – and power is about politics. Therefore in order to be successful in using or protecting your

[174] See O'Riordan op cit 254-256 for elaboration.

environment you need to be skilled at playing the political game.[175] *Bobby Peek (Goldman Environmental Award Winner 1998)*

The policies and politics of the local environmental movement are often influenced by the perceived environmental threat, the sector they represent and the aims of the organisation. For example a ratepayer group may be focused more on urban amenities and associated problems whilst a conservation group could be looking towards species and habitat protection. When a common environmental threat is faced the different groups will often develop informal associations with each other. Indeed an analysis by Lowe and Goyder demonstrates that 50% of environmental groups surveyed had contact with at least 14 other groups.[176] This interaction and unification around an issue allows for effective mobilisation around issues, assists in raising awareness and may provide specialist capacity on technical issues. The internet has been spectacularly effective in increasing the turnover rate in information exchanges between different groups allowing for local environmental incidents to become an international talking point within hours. Most of the larger NGO's known to the author belong to at least one environmental electronic network which mechanism provides both opportunities to highlight problems and to obtain resources to deal with them. Perhaps the single most illuminating incident illustrating the global nature of the environmental movement was the 1999 World Trade Organisation (WTO) meeting in Seattle. This protest attracted 45000 demonstrators, was the largest in the US since the Vietnam war and succeeded in sparking similar protests worldwide. It was noted that 'for the first time students, people of faith, environmentalists, labour leaders and working families came together to send the

[175] Personal discussion with the author 05/11/98.

message that the WTO does not protect workers or the environment'. [177] This protest and those that followed in Prague, Washington, Quebec and Genoa have succeeded in demonstrating to the power elite that environmental concern and the actions of the WTO in promoting the perceived evils of multinational corporate capitalism is a global shared concern. [178]

Environmental concern is therefore a significant commonality which allows different multi-sectoral groups to interact and to share. Impeding these relations are the risks of factionalism and rivalry. Conflict may arise when groups pursue divergent objectives. An example of this may occur where there is a disagreement as to a particular land use. This may be illustrated in the context of South Durban as follows: a conservation group supports the dig–out of a second harbour on the current Durban airport site as it believes that this would alleviate development pressure on the existing harbour and its natural resources. This stance is not welcomed by a civic body which opposes the dig-out as this means that the land available for industrial development would be absorbed by the new port which means that future industrial expansions would place pressure upon residential areas leading to relocations of residents for industry. In this example, brokering a compromise between these two positions is essential if the unity of the overall movement is to remain unaffected. It is in this arena that SDCEA has proven itself thus far to be particularly effective as it can provide resources and skills to assist in defusing the situation.

[176] Goyder op cit 80.

[177] Paul Blustein quoting Carl Pope, Director of the Sierra Club in a Washington Post article entitled 'Protest Groups shift tactics at WTO talks' found at http://www.wtowatch.org/news/index.cfm?ID=3065.

Another source of potential disagreement lies in the competition for resources between groups pursuing convergent objectives. In South Durban local donor funding has been virtually non-existent, meaning that an unhealthy competition has resulted for scarce international funding. This has been partly overcome with the formation of SDCEA which can be entrusted with donor funds to be utilised as considered appropriate in the broader community.

The approach taken by the groups to challenges reflects ideology and group politics. CBO's in South Durban tend towards confrontation and direct action whilst the local NGO's by and large seek negotiation and compromise. Leadership of the group is another strong influence on the direction taken with decisions usually deferring to those members with experience in these matters. A blanket mandate to act on behalf of the South Durban community was obtained from those present at a series of public meetings; thereby alleviating the requirement to obtain prior community approval for every action proposed by the executive.[179]

There is also a divide apparent between grassroots campaigners and national organisations. Earth First! point out that this is not unhealthy as they believe it is important that environmental groups remain movements and not organisations and that they remain advocates of a point of view rather than becoming the decision makers.[180] This aspect is dealt with in greater detail in the later Chapters. In sum then the political

[178] Ibid.

[179] Several such meetings have been held in recent years, some meetings attracting up to 3000 attendees. See also here Lowe & Goyer op cit 50 where they note that environmental groups are oligarchic in nature with little rank and file expression possible in the decision making process.

[180] See D Russel in 'The Monkeywrenchers' quoting Dave Foreman of Earth First, as found in Peter Borreli (ed) *Crossroads : Environmental Priorities for the Future* 31.

'power' wielded by an environmental group can be said to be a function of the wise use of available resources, (especially human capital), applied strategically to further the aims and strategies of the environmental group.[181]

3.4.1. Democracy and Public Opinion

The growth in environmental groups in open democracies may be partly attributed to the reduced opportunities for citizen participation in government decisions.[182] Modern industrial societies with large populations tend to concentrate on political and economic power. Administrative power in turn grows and regulatory authorities become concentrated in agencies that are increasingly removed from electoral control. These agencies in turn place increasing reliance on scientific and technical inputs in an attempt to add credibility to their decision-making. The outcome is administrative decisions that are increasingly less understandable and accessible to the public. With the resultant public alienation, comes resistance and the formation of interest groups. The end result is that democratic participation is no longer characterised by 'discussion and debate' and increasingly noted for its oppositional stance. In the case of Durban this trend has been particularly obvious.

South Durban residents have in the past been characterised as being generally ignorant of environmental issues and noted for their complacency. Fiorino volunteers an explanation for community complacency as being evidence of weakness in the controlling political

[181] O'Riordan op cit 252 defines resources as comprising (a) level of organisational strength (b) degree of expertise and (c) ability to communicate effectively with both media and target structures.
[182] See D Fiorino essay 'Environmental policy and the participation gap' in Lafferty & Meadowcroft op cit 198.

institution rather than a limitation in the citizens themselves.[183] In other words, the authorities behaviour engenders within the community, feelings of powerlessness and alienation manifesting as a state of near apathy. For South Durban much blame can be heaped at the door of the apartheid state and its people crushing agenda. In looking critically at the organisational structures found in this area it is more than coincidental to note that the more vociferous community groups are also those with a history of human rights activism and resistance. These experiences have stood the movement in good stead particularly in developing strategies around democratising ecological and 'green' values. It is submitted that the authorities should, in accordance with NEMA and in the interests of furthering democracy, encourage rather than exclude participation in policy and decision-making. Once ordinary citizens are empowered to participate, the gap between what influence citizens think they should have, and what influence they actually do have, in environmental decision making and policy, will hopefully close.[184]

3.4.2. Anti-capitalism and Commonism

It would be useful to conclude this discussion on the environmental organisation by examining the role of anti-capitalism as an unstated, yet implicit theme of many environmental groups. Anti-capitalist sentiments are most commonly embodied in CBO and NGO concern around impending ecological apocalypse. These groups will usually point to the linkages that exist between the anticipated global environmental crisis and the free market economy with a particular focus on the myth of economic growth. Economic growth is said to be the panacea for a struggling economy providing jobs, wealth and prosperity for all. The ugly reality is that this is not so.

[183] Fiorino in Lafferty & Meadowcroft op cit 199.

Improving growth means increased production which means more toxic by-products and yet more consumption. So things actually get a lot worse before getting better. It is only the privileged few who enjoy the real prosperity with the consequences passed on to those who can least afford them. Growth also means change, more market opportunities, more profit, more investment more profit and yet more investment.[185] Governments are very happy with 'growth' as it means more in the way of tax revenues and theoretically more people employed. Underpinning and fuelling these industrial practices is the capitalist free market economy whose 'growth mania' distorts environments and 'robs the world of its non-renewable resources for no better end than to increase the output of ballistic missiles, electric hairdryers...and ...stereophonic tape recorders.'[186] This end result defies the traditional economist expectation that the economic system will automatically select 'only those productive enterprises that use natural, economic, and human resources most efficiently and that best serve society.'[187] The reason why this occurs is straightforward – the actual choice in the production technology used is determined by private interest in profit maximisation and not the social interests of the community at large.[188] Free enterprise grants the owner of capital the right to invest in whatever enterprise will provide the most attractive return and this

[184] See Fiorino op cit 209.

[185] See R Douthwaite *Growth illusion :How economic growth has enriched the few, impoverished the many and endangered the planet* 1992 18.

[186] EF Schumacher in *Small is Beautiful : Economics as if People Mattered* 1975 8. This is not to say socialist and communist formations do not generate their own negative externalities but there is some evidence that suggests that polluting technologies employed in the socialist states originated in the West, particularly after World War II. The underlying design of these production technologies was guided by capitalist short term profit motives that excluded environmental and social concerns – See B Commoner op cit Chapter 10, 211 –222 for more detailed examination.

[187] B Commoner op cit 218. Commoner notes that it is considered a breach of political etiquette to call the system by its name i.e. Capitalism. Most capitalists prefer to be called businessman or industrialists which are 'neutral terms not subject to ideological challenge.'

'right' is usually exercised irrespective of the attached environmental consequences. So, for the policy driven environmentalist, the capitalist market possesses a fundamental ecological irrationality that must be confronted for an extrapolation of this conduct could forseeably result in there being no world left in which to do business. As a consequence some extremists would argue the need for a stronger stand embracing a more philosophical approach. Organisations such as EarthFirst! point to the fact that we are currently in the middle of the greatest species extinction in over 60 million years and we have yet to wake up to this reality! EarthFirst! suggest that people should step outside the system and try and come up with conditions necessary for an environmentally sane world. In doing this EarthFirsters have gained some notoriety with their confrontational approach. Closely aligned to these movements are those organisations that are centred around promotion of non-anthropocentric aspects relative to our existence on this planet. Such groups would seek to assert a basic right to life implicit in all living things and are occasionally more vigorous in their activities than those protesting human rights violations.

In conclusion it is worth noting how important the aspect of commonism is becoming for international NGO's and industry. Commonism implies a system where there is unrestricted and unmanaged access to the global commons which, as it is neither owned nor managed, is vulnerable to exploitation. Whilst the resource is abundant and the population pressure is low, there is no problem, but in times of scarcity the tragedy occurs – participants having locked themselves in cannot get out until the system catastrophically collapses. There are only two responses possible – either the commons

[188] Fikret Berkes (ed) *Common property Resources – Ecology and Community Based Sustainable Development*

must be privatised or it must be managed. This is where wecollectively now find ourselves with respect to both sea and air. If we adopt the idea of privatism then we convey the idea of the commons being broken up into units of private property and so the ultimate risk of corporatism. If we veer towards socialism we intend for it to be retained as one piece and managed by agents of the community, i.e. the bureaucrats. [189] How to create and develop an international system that ensures the rational and sustainable exploitation of the commons will perhaps be mankind's single biggest legal and environmental challenge of this decade. The unspoken alternative is of course war.

1989 34 – noting the competition over the 'free gifts of nature.'

[189] See G Hardin essay entitled 'An Ecolate View of the Human Predicament' found at http://www.lrainc.com/swtaboo/stalkers/gh_ecol.html for an extremely useful account of the subject.

4. SOME CHALLENGES AND PROBLEMS IN DEALINGS WITH AUTHORITY

During the course of researching this paper the author interviewed several officials tasked with regulating industries in South Durban. What follows is a synthesis of several interviews and is revealing as to typical problems facing local authority. It should be noted that some of the interviews were conducted prior to the passing of both NEMA and the National Water Act and so certain of the comments are now redundant. The underlying problems with respect to capacity and intergovernmental cooperation have still to be resolved. For convenience I have set the findings out in the manner in which they were first presented :

1. Certain departments within the local authority were not having sight of EIA's taking place in the greater Durban Metropolitan Area. Consequently, specialised knowledge relating to potential air and pollutant effects was not being fully utilised in the EIA scoping process. It is thought that at least a 100 EIA's in 1998 alone, have been processed outside of the central operational entity leading to concerns that potential health-related impacts may not have been properly identified.[190]
2. There was a perception that the Provincial authority could exclude the local authority's views and inputs from the planning process. It was also feared that Provincial authority would make decisions without sight and knowledge of localised problems. This could lead to sub optimal decisions being made.

Capacity at regional level to handle the entire Provincial workload was also questioned.

3. The interaction between provincial, local and national authorities is inefficient with the three spheres of government rarely undertaking any co-operative functions. Inter-departmental conflict still exists at local authority level and can be traced to duality of roles and to individual 'empire building.' This affects proper policing of the environment and the commitment level of staff.[191]
4. A key concern expressed by all interviewees lay with staffing and resources. Even in adequately staffed units the senior members spoke of the 'appalling work ethic' amongst some junior enforcement staff, the lack of basic ability and the demoralising effect that affirmative action was having upon experienced staff.
5. The trend towards industry self-regulation was not always welcomed by some authorities although it was agreed that it did free up limited manpower resources. It was felt that the larger industries were more likely to successfully apply self-regulation, (i.e. those with shareholders, boards of directors and set codes of business practice), whereas the smaller businesses were considered less likely to observe the law due to limitations on resources and inadequate internal controls.
6. The internal chain of command was also identified as a problem area with respect to enforcement. Both DEAT and DWAF appeared to adopt an

[190] City Health has considerable experience in these matters, having implemented Integrated Environmental Management procedures since 1995 and calling for EIA's in terms of the Scheduled Trade by laws.
[191] This is still seen to be a problem although an intergovernmental meeting is held monthly to further Minister Moosa's multi-point plan. See also Ethekwini Municipality 'Draft Air Pollution Policy Document : A Review of Best Practices Worldwide (CSIR March 2003) where at 2.2.1 it is noted that 'the national and provincial structures for air pollution are somewhat fragmented and unstructured due to the lack of sufficient institutional capacity.'

'informal' top down internal practice of urging negotiation before prosecution with respect to environmental offences committed by industry. It was apparent that senior staff within both Departments set the standard with respect to enforcement. In other words it was a personal interpretation of how a law should be applied that determined how all the subordinates went about their jobs. It was agreed that a new incumbent could adopt an entirely different interpretation that would affect the entire department's operations.[192]

7. The duplication of administrative systems at provincial, local and national level accounted for an excessive wastage of limited resources, both financial and manpower. Job descriptions were too narrow, thereby encouraging a similar narrow focus amongst employees. One official observed that, in his opinion, if the various levels of government were to share information and skills, environmental outputs would be 'increased a hundred fold.'[193]
8. Intimidation of personnel is a problem with occasional threats to life and limb being made to enforcement officers. Corruption and bribery, however, is still not known to exist in the departments interviewed although this remains an omnipresent possibility.[194]

Amongst local authority there was confusion as to which laws to enforce and the methods to be used. The Environment Conservation Act for example was not used for enforcement purposes at all within the DMA until very recently when application

[192] The discretionary application of the law is disconcerting and accounts in part for the lack of uniformity in application throughout the country. This remains a serious deficiency. Source: Personal interview with the author with Gerrit Coetsee then CAPCO for KwaZulu Natal.
[193] Personal communication with Gerrit Coetsee then CAPCO KZN.
[194] Source: personal interview with Neil Larrett Acting Divisional Manager Industrial and Occupational division Metro Health.

was made by City Health for authority to use it.[195] The (old) Water Act[196] was also not available to the local authority as DWAF insisted that it was the sole agency that could apply the law – there was, however, no serious attempt by local authority to request for delegation of authority. The local by- law, although effective in terms of procedure, is ineffective in terms of sanction with only trivial fines being available for offences - a position that has not yet been remedied despite the efforts of the inspectorate to have these fines increased to 'more realistic levels.'[197]. Another worrying development for enforcement officials preparing cases for prosecution is the untoward delay in getting the case heard in court. It is unclear whether this delay lies in the Metro's own legal department or at the court itself – one case being apparently withdrawn by the prosecutor on the basis that the accused, (a company), having relocated to another area no longer posed an environmental risk to that particular jurisdiction. In other words the time and expense spent in collecting evidence for prosecution of the offender for identified pollution transgressions had all been in vain.[198] There are often tedious delays in a case coming to court some of which is occasioned by the necessity of having prosecution material and files transferred to other government departments purportedly for action.[199] In another instance the entire case file disappeared but not before various officials involved with the prosecution had allegedly been subjected to intimidation and violence.[200] Certain government agencies who are empowered in terms of legislation to act do not do so –

[195] Environment Conservation Act, Act 73 of 1989.
[196] The Water Act, Act 54 of 1956
[197] Personal communication with Bill Pfaff Director DW&W December 2003.
[198] Ibid.
[199] This case concerned the large scale dumping of shot blast/grit allegedly contaminated with tri-butyl tin into the Umhlatazana River during late 1990s. The alleged polluter was a waste disposal contractor who was said to be illegally dumping the grit in the river and not in a hazardous landfill. The case was transferred to DWAF in mid 2002 and as yet no prosecution has formally commenced.

for example DWAF, notwithstanding a seeming abundance of potential cases, has yet to institute a successful prosecution in the Durban Metro region for a water pollution offence.[201]

An overriding concern expressed by all participants during these interviews was that many of the environmental transgressions experienced could be resolved by the simple expedient of ensuring that greater co-operation existed between the various organs of State. In the author's opinion the legislative devices contained within NEMA allowing for the establishment of a Committee for Environmental Co-ordination will go a long way in resolving some of the issues.[202] A more difficult problem to resolve is that which originates with non-compliant senior officials. Here, organisational policy frequently becomes a reflection of the orientation of senior staff especially those with strong personalities; typically their views are also more conservative than that of junior colleagues.[203] In this regard, workshops and intergovernmental debate will hopefully introduce new organisational thinking.

4.1. ENFORCEMENT AND COMPLIANCE

Environmental Control in South Africa consists of a complex mixture of legislative and regulatory devices (administrative and criminal) as well as some measure of voluntary

[200] Source : Metro Health official who prefers to remain anonymous.
[201] Source Pat Reddy Assistant director DWAF.
[202] Act 107 of 1998 Section 7 (3)(c) points towards the establishment of a 'single point in the province' for the receipt of authorisations and permissions.
[203] O'Riordan op cit 244. Senior air pollution control officer Gerrit Coetsee (CAPCO) told the author that on many occasions he was instructed not to prosecute cases as it was 'departmental policy not to do', this despite obvious violations of the law. In this instance the official named a senior member of staff as the originator for this approach.

self regulation in the form of industry-based standards. Policing and enforcing of such control mechanisms is the task of both the National and local authority inspectorate.[204] There has been an increasing trend towards delegating authority down to regional and local structures, which initiative, in the larger urban centres, could be viewed as a desirable outcome. The same cannot be said to be necessarily true of smaller municipalities who do not have the capacity to regulate and manage complex environmental problems. A further problem lies in the level of influence that an industry exerts over the local authority. For South Durban residents this is a very real concern for there are certain industries which clearly enjoy the favour and ear of senior bureaucrats and politicians.[205] In such instances there is a very real danger, as pointed out by one writer, of the 'administrative agency becoming subservient to the regulated firm.'[206] However, as described earlier, there are severe constraints in terms of manpower, willingness to act and finances. In addition, there is considerable potential for conflictual responsibilities not only within the Metro but also between national, regional and local authorities tasked with similar job descriptions.

In many instances it is the increasingly vocal and unofficial component, (NGO and CBO), that is becoming the lead 'agency' in ensuring compliance with stated law and standard. It also became clear during the interview process that there was a lack of critical understanding of the scope and applicability of the plethora of environmental legislation in existence. In addition there was a recognition of a requirement for

[204] For example wastewater disposal permits may be the province of the local authority whereas air pollution for scheduled processes are dealt with at national level.

[205] In SDCEA's experience these are industries who are large net consumers of electricity and water – not necessarily large employers. The pressure that such companies can exert on regulators by bypassing the bureaucratic structure and proceeding to CEO level has been witnessed on many occasions.

specially designed legal instruments that would assist in gaining compliance. Frustrations were expressed with respect to the inadequacy, and in some cases un-enforceability, of Metro by-law provisions. These comments all point to a requirement for the intervention and assistance of international NGO's skilled in the development of appropriate mechanisms suited to the socio-political and legal climate. An example of such an organisation is the International Network for Environmental Compliance and Enforcement (INECE) who have aided numbers of emerging and developed economies with environmental enforcement issues.[207]

4.2. ACCESS TO DECISION MAKERS

The institutional arrangements developed over the decades of Apartheid are seen by the environmental movement as being a serious blockage to sustainable development. Local authority structures developed during the previous dispensation still retain the same staff and same methods of conducting their affairs. This is particularly so in the development and service units located within Durban Metro. Most noticeable is the difficulty of the local authority to embrace the concept of a participative democracy. Contact with community groupings is kept to a minimum with consultants being appointed as intermediaries.[208] This has proved frustrating for community groups seeking to deliver their point of view to the bureaucratic decision-maker. Industry leaders on the other hand are not so disempowered. The close relationships established by big business

[206] M Faure 'Enforcement issues for environmental legislation in developing countries' United Nations University Intech paper 19 March 1995 http://www.intech.unu.edu/publications/working-papers/wp19.pdf
[207] The reader is referred to INECE website at http://www.inece.org/ for further detail.
[208] The one exception being the Stakeholder Consultative Forum designed to further Minister Moosa's multi-point plan.

interests with the regulatory authority during the Apartheid years, continue to stand them in good stead when it comes to access to key decision makers.

4.3. 'NON DECISIONMAKING'

O'Riordan identified what he terms authority 'nondecisionmaking' as a significant hindrance to resolution of environmental issues.[209] 'Nondecisionmaking' involves limiting the scope of political processes to only those issues that are comparatively innocuous. Looking at South Durban it can be noted that whilst community has been involved in site specific EIA's and less contentious environmental programs (such as DMEPI and Southern Coastal park), they have been almost totally excluded from strategic and spatial planning decisions that will significantly impact them. 'Nondecisionmaking' therefore will involve a deliberate attempt by powerful groups to keep politically sensitive issues off the public agenda especially when it comes to pollution control. O'Riordan notes that as both industry and authority have little to gain from pollution control measures, they tend not to invest resources. It is only dedicated environmental organisations that are willing to pay the high transaction costs required to achieve greater pollution control.[210] Delaying tactics such as failing to produce information, setting up committees with vague terms of reference, lack of media attention and deliberate efforts by power groups to obstruct investigation are all noted by O'Riordan and finds echoes in South Durban.[211] As O'Riordan remarks these 'cosy relationships ...formed between the regulators and the regulated,' project an 'us and

[209] O'Riordan op cit 246.
[210] These costs include the costs of lobbying and information gathering.
[211] Ibid.

them' approach with the 'them' in this case being the environmental interloper.[212] Even seating arrangements at meetings reflect this polarisation with community and environmental activists seated opposite government and industry.

[212] Ibid.

4.4. CO-OPERATIVE MANAGEMENT

In certain instances Government views the CBO/NGO as a useful device to tackle many problems facing authority.[213] For example they can be used to carry out one-off projects such as greening of urban landscapes or co-opted into managing longer term schemes initiated by the authority.[214] National Government in a reaction to combination of media pressure, community activism and a degree of political correctness has instructed that the problems in South Durban be resolved. To achieve this aim a joint consultative forum has been formed comprising members of community, the three spheres of Government, industry and labour.[215] This is an example of what may be called a 'co-operative management regime' – a formation of social actors who together collaborate in an attempt to resolve an environmental issue.[216] Such initiatives are welcome provided that the forum allows access to the real decision-makers. In community experience, however, there is all too often yet another shadow body that exists beyond the entry level community forum to which access is denied.

There are also those environmentalists who question whether interaction with government could lead to the environmental movement itself being co-opted by government to the detriment of the movement as a whole. Dryzek is one who argues against such formations on the basis that activists may become unnecessarily entangled in the mechanisms of the state and its imperatives which he believes to be 'inhospitable to

[213] See here G Stoker & S Young *Cities in the 1990s* 1993 123.
[214] Stoker op cit 145. Local examples are the various waste recycling initiatives.
[215] The Stakeholder Consultative Forum (SCF) alluded to earlier.
[216] Lafferty & Meadowcroft op cit – essay entitled 'Democracy and the Environment : prospects for Greater Congruence.' An essential precondition to dialogue however is that the parties must recognise each other as legitimate interlocutors.

both democracy and ecology.'[217] In South Durban terms this 'entanglement' has already seen organisations such as SDCEA spending less time on traditional grass root issues and far more on policy and strategy.[218] At this point the jury is out on whether the interests of the overall environment will be proven to have been best served by engaging with government in policy debates or rather waged outside of the factory gates or on the court room floor.

[217] Lafferty & Meadowcroft op cit 118 John Dryzek essay entitled 'Strategies of ecological democratisation.'.
[218] See O'Connor R & Hallowes D 'Ground zero in the carbon economy: people on the petrochemical fence-line' WSSD Groundwork Booklet 5, 16-17 for more detailed discussion on the consequences of partnerships download at www.groundwork.org.za/Booklets/BK5.pdf

4.5. SCIENTIFIC VERSUS NON SCIENTIFIC OPINION

'We acted in good faith on the advice of scientists, but its one of those cases where nature has proved everyone wrong and we have to learn from this' [219]

South Durban environmentalists have, from time to time, expressed a concern that local authority lacks capacity to independently test the scientific conclusions made by industry and technical consultants. Similarly, politicians who rely on the advice of specialists, also run the risk of misinterpreting or (worse) being misled by those presenting the technical findings.[220] Another aspect is that a consultant or specialist may, in simplifying the information, inadvertently present a picture that overly influences the final decision.[221] Communities on the other hand are not as easily misled as they tend towards making value judgements and regularly intuit a situation based on the evidence they see before them. These informal assessments (the common sense approach) often yields unexpectedly accurate results notwithstanding the paucity of skills and information available on which to form conclusions. Unfortunately this ability of community groups to independently assess situations on non-scientific grounds does not engender much enthusiasm from the ranks of officialdom and industry. Indeed community inputs are all too easily dismissed by authority as being unsubstantiated, especially when briefed by the industry appointed scientific establishment.

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[219] Sunday Tribune 10 February 2002 article entitled 'R5million botch up' referring to the Umdloti lagoon wash away and quoting DAEA Director for Environmental Impact Management Sarah Allen.

[220] Non specialist politicians suffer an 'incapacity to understand the mysteries of science...[meaning that]...they may be duped by those who deliberately mystify them for their own game'- quote found in O'Riordan *Environmentalism* 1981 243.

[221] It is clear that decision makers due to work pressures may not always be able to read a voluminous environmental report but will occasionally rely on the consultant's executive summary and verbal presentation for information upon which to base his/her decision.

A series of industrial plant, vessel and infrastructure failures has led to doubt being cast over the abilities of scientists to perform accurate assessments.[222] This has led to a growing awareness that to endow 'scientists' with privileged positions in the decision-making process is an outright folly. A regular feature of interactions with alleged 'experts' in South Durban is their inexperience with local conditions and ignorance of community knowledge of the environment. Community attempts to report on personal experience or to suggest alternatives is often dismissed purely on grounds of it being non-expert opinion and therefore of little consequence.

A 'scientifically informed' study assumes a degree of rationality and precision that non-scientific approaches are believed to lack. Science, therefore, purports to offer an attractive control as it ignores non-scientific alternatives. This is especially useful for decision-makers faced with troubling submissions by community for they can use science as a means of exerting, or perhaps regaining, control over a process. Not acknowledged, nor highlighted is that the practice of science 'necessarily involves uncertainty' – for to do so would cast doubt on the results.[223] An example of how 'science' can be used to manage opinion is provided in the way in which a major industrial accident was investigated in South Durban.[224] In May 1998 a huge explosion and fire rocked the Sapref oil refinery leading to an investigation into the

[222] This is especially so in so called specialist risk assessments where hazard and failure rates are stated at miniscule probabilities (such as 1 in million), only to have the plant or vessel fail shortly afterwards. The events at Sapref's alkylation unit in 1998, the Tetra ethyl lead tank failure in 2001, the Foskor start up incident in Empangeni (2002) and the ongoing Umdloti lagoon debacle are all examples of the failure of science.
[223] Milton Freeman 'Graphs and Gaffs: A Cautionary Tale in Common-Property Resources Debate' in F Berkes op cit 106.
[224] Perhaps 'reported on' is more accurate a description than 'investigated.,' as authority does not appear to have the capacity to conclude technical investigations of its own.

causes of the inferno and subsequent loss of toxic compounds. A written report was duly compiled by the company and presented to authority – the authority itself presumably incapable of conducting its own investigation. SDCEA, however, was not as impressed with the findings and requested an independent refinery specialist to review the report.[225] Whilst the technical details are irrelevant to this paper, the independent expert made the observation that the way in which the report was conducted was analogous to 'someone investigating an car accident and noting smooth tyres and a faulty brake system' concluding that the cause of the accident was due to these faults without paying any attention to the reasons why the vehicle was travelling at 150km/hr in a 60km zone.'[226] Needless to say, the report was accepted by Government. Another example is contained in the Umdloti river recreational facility which has been held directly responsible for widespread destruction of riverine habitat. Although vigorously opposed by environmental groups, the development was permitted to proceed by provincial authorities but, following its collapse, has now been ordered removed by the self same authorities who permitted it.

Modernist thinking is to hold that knowledge of local conditions and history is a form of 'specialist knowledge' uniquely held by that community. Communities should therefore be accepted as experts on their own environment and be provided with resources to further develop this capacity. Unfortunately this is not the case in South Durban with most 'scientific' assessments being limited to studies involving the natural sciences to the virtual exclusion of the social sciences which it is submitted is equally

[225] Castell M *The Power of Identity*:2000 123 notes the linkages between environmentalism and science and the necessity for any major environmental movement to retain the services of scientists.

important and valid.[227] This was especially evident during the Strategic Environmental Assessment of South Durban when a disproportionate bias was exhibited towards so-called scientific findings to the detriment of community determinations.[228]

The NEMA has since recognised this deficiency and allows that the skills and capacities of interested and affected parties must be ensured as a necessary precondition for achieving equitable and effective participation of 'vulnerable and disadvantaged persons.'[229] Equally important, the NEMA states that decisions must take into account 'the interests, needs and values of all interested and affected parties' whilst recognising 'all forms of knowledge.'[230] It remains to be seen how these provisions will be implemented.

[226] Eugene Cairncross Lecturer Air Quality Management Cape Technicon at a meeting held with South Durban Community Environmental Alliance 05/11/98.
[227] Personal interview with Dr Scott, University of Natal Dept. Geographical & Environmental Sciences.
[228] Durban South Basin Strategic Environmental Assessment November 1996 – August 1999. There may well have been political reasons for this rejection.
[229] NEMA, Act 107 of 1998 Section 2 (4)(f). The Act does not elaborate further on the mechanisms for delivery of capacity.
[230] Section 2(4)(g).

5. ENVIRONMENTAL LAW AND THE COMMUNITY ORGANISATION

"Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns"[231]

South African Environmental law takes on a number of different forms. It may range from purposely designed legislation aimed at securing a defined environmental objective to incidental legislation seemingly of no environmental import yet nevertheless capable of determining environmental outcomes.[232] Previous chapters have explored issues around sustainability and the inter-relatedness of earth processes, human action and environment. Promoting these concepts has been the work of environmental NGO and CBO groups the world over with success being partially measurable in the degree to which a nation's environmental law reflects these as precepts. In consequence, environmental law is required to evolve beyond the regulation of the more odious consequences of human consumptive practice and to now embrace a concern with the way society conducts itself with respect to the sustaining environment. This implies a requirement for management and interaction that is not usually contained within traditional rules and standards. It involves the adoption of a more sociological approach in our law, taking into account needs, culture, knowledge and value systems. For decades environmentalism South Africa style has suffered from the stigma of being a green issue located within an almost all

[231] PJJ Oliviera JA in *Director, Mineral Development, Gauteng region and Another v Save the Vaal Environment and others* 1999(2) SA 709 (SCA) at 719D.

[232] An example of direct protection is the Sea Birds and Seal Protection Act (Act 46 of 1973) whose title is self evident whilst the Merchant Shipping Act (Act 57 of 1951) carries certain obligations and principles with respect to the protection of the marine environment.

white preserve leading personalities such as Albie Sachs to comment that this 'theme of conservation must be prised free from the restricted association with a certain section of the white community and be located within the desire of all South Africans for a cleaner and more decent life'.[233]

With these comments and thoughts in mind the reader may find the following definition of environmental law appropriate and rather succinct. Environmental law, it is said, should perform functions. It should :

'...(first)...regulate, providing appropriation and management rules for conflicting interests claiming environmental goods. Second, it should act as an agent of change, providing processes and structuring institutions to enable transition to ecological sustainability. Third, it should protect the public interest.'[234]

This Chapter will set out to examine the extent to which South African environmental law is embracing emerging environmental concern and reflect upon the legal experiences of the environmental movement in South Durban.

5.1. CONTEXTUALISING THE LEGAL EXPERIENCE

As a starting point, it is useful to recall that South Africa's Constitution contains a promise of an environment that is not detrimental to health and well-being. Indeed it has specifically allowed for provisions 'aimed both at broadening the array of

[233] A Sachs op cit 140.

environmental issues that can be brought before the courts and extending the range of people with effective access to environmental justice'.[235] Extending and 'grafting on' this new environmental right to existing legal concepts has necessitated substantive legal change which has not been without some controversy. One dilemma that immediately arises is the difficulty in supporting developmental objectives whilst simultaneously providing for environmental protection. Another is that until recently virtually all South African law suffered from the stigma of not having been formulated under democratic circumstances. Consequently, accusations can be levelled that legislation such as the Atmospheric Pollution Prevention Act serves very narrow interests rather than protecting the public interest.[236] Happily, much work has been done to remedy these defects with the enactment of the National Water Act and National Environmental Management Act (NEMA) being examples of the modernist approach.[237] Concepts such as equity, integration and sustainability have been introduced and the definition of environment broadened so as to encompass the social and economic dimension. The right of communities to participate in environmental governance and the development of skills and capacity are recognised as fundamental to successful environmental partnerships and eventual sustainability.

NEMA sets out in its object that it is to provide for co-operative governance by establishing principles for decision making. These principles contained under section 2 to the Act are extremely wide-ranging and open to interpretation. They are also all framed

[234] D Robinson & J Dunkley J *Public Interest Perspectives in Environmental Law* 1995 294.
[235] Robinson & Dunkley op cit 140.
[236] For example Act 45 of 1965 could be interpreted as allowing exclusive groups (white owned industrial companies) to pollute with impunity provided they have the requisite permit.
[237] Act 36 of 1998 and Act 107 of 1998 respectively. Other examples are the Marine Living Resources Act, Act 18 of 1998 and the National Forest Act, Act 84 of 1998 both of which contain references to equity and sustainability.

with the peremptory 'must' and impose more or less impossible demands upon the present government structures. For example the South Durban community experience has been to receive no assistance in building capacity or skills from government structures despite the instructions contained in subsections 2(4)(d),(f);(h) of NEMA nor are there any delivery mechanisms or financial resources available to give effect to this component of the legislation. Expectations are thus deflated and 'buy in' from the community becomes that much more difficult to obtain. Non-performance and non-compliance invites legal challenge which, it is submitted, if exacted through the Court would represent a financially debilitating threat to the regulatory ability of the State. A criticism therefore exists that in some respects this showpiece of environmental initiative is exactly that – just for show – for there are currently no prospects for effectively discharging the many, and in some cases competing, principles.[238] Unless supported with real measurable commitment, the law may amount to mere words that 'may lull the public into a false sense of security that problems are being addressed.'[239]

As alluded to above, there is an inherent conflict in a system that seeks to provide for environmental protection whilst simultaneously promoting the extractive use of environmental assets.[240] The national focus on redistribution, job creation and economic growth coupled to poor enforcement and monitoring of the environmental laws could lead to significant negative results for the environment. The lack of political will is reflected in the reduced budget allocations and the 'low political status'

[238] See M Faure 'Enforcement issues for environmental legislation in developing countries' United Nations University Intech paper 19 March 1995 where he warns against symbolic legislation that serves no real purpose. Document available at http://www.intech.unu.edu/publications/working-papers/wp19.pdf.
[239] Rabie et al in 'Implementation of Environmental Law' in *Environmental Management* 1992 120.
[240] Act 108 of 1996 Section 24(b).

of the enforcing bodies. [241] What all this adds up to is a high degree of frustration amongst those who witness the despoliation and apathy particularly amongst those who had a hand in drafting the very legislation that is now ignored! At some point it becomes obvious that the lobbying and negotiation isn't working, that the promises are not being honoured and that your backyard belongs to industry. With all this in mind, the obvious and only solution to a beleaguered community is a legal one.

5.2. LITIGATION AND THE COMMUNITY EXPERIENCE

'The worst forms of environmental abuses take place in the poor countries of the world where you also find the weakest environmental legislation. In these countries you will find that they are tied mercilessly to the capitalist system, with massive state debt, over reliance on primary goods and openly exploited by a few large multinational conglomerates. In these countries the capitalist system is not backed up with true democratic freedoms and liberties. South Africa is an example of this and is no different in certain respects to the plight of Mexico or Brazil.' (Bobby Peek 1998 Goldman Award Winner, Director Groundwork.)

The layman often considers that the law should essentially be a reflection of what he or she considers to be morally right or wrong. Unfortunately this is not always so even in cases of true democracy. The law, it is said, is required to 'restrict liberty in order to

[241] See Rabie op cit 120 where he notes that the failures apparent in our environmental law are often attributed more to an 'unsatisfactory application of existing legislation' rather than any fault with the law itself. See also Siyakhana &Ridl/Glovovic op cit finding that environment ranked last out of a list of 13 priorities for Durban Metro.

protect liberty.'[242] It is therefore required of the law in certain situations to constrain individual freedoms when the unfettered use of that freedom conflicts with other freedoms.[243] The law is required, then, to exhibit a degree of paternalism in ensuring that personal choice does not lead to negative societal results, no more so than in the arena of environmental law. Consider the role of environmental law in affording protection to the environment whilst simultaneously attempting to address the social inequalities and economic requirements of the new South Africa. Developers, industrialists, local authorities (and their lawyers), frequently propose strictly teleological arguments favouring their development proposal. Such arguments pointedly demonstrate that the proposed activity provides the greatest amount of value or good to the region/people/nation. Conversely, recipient communities (and their lawyers), typically assess the proposal from a more duty-based (deontological) approach that looks to moral and ethical constructs favouring the individual.[244] Ultimately the decision made becomes a question of restriction of some liberty – either the developer is restricted in terms of his or her use of the resource or the community is affected in terms of its ability to promote personal liberty and life style choices. Conflict and mediation is often inevitable, especially when the proposal involves a potentially hazardous set of activities.

South Durban has witnessed very few instances of community inspired litigation despite a wealth of potential cases. The reasons for inaction thus far are simple. First and foremost it is about money. The typically skewed power relationships between the

[242] Beatley op cit 156.
[243] Ibid – Beatley offers the example of the freedom to drive a motor vehicle at high speed being fettered (necessarily) by law.

victims and the perpetrator mean that there is no way that communities can financially sustain a courtroom battle. The victims of environmental insult are invariably the poor, the ill informed and already marginalized peoples who collectively have little or no access to financial and legal aid. The perpetrator on the other hand is a wealthy industrialist or, in South Durban terms, even powerful government agencies.[245] The mere prospect of an unsuccessful court action with a resultant adverse cost award has been a highly effective dissuader of court action. Additionally, the community has had negative past experiences in the court room which has led to a rather jaded view of the legal process. The experiences of a former Bluff action group and the more recent cases are illustrative of this point. For legal reasons the personalities involved must remain anonymous.

5.2.1. Formative experiences circa 1986

In or around 1986 a Bluff resident group instituted action against a nearby oil refinery alleging health effects directly attributable to pollution originating from the refinery. The group was not recognised as having *locus standii in judicio* and consequently the action was brought in the individual members' names. As is usual in environmental cases, the burden of proving causation and supplying credible scientific proof led to the case being lost. Costs were awarded against the complainants which would have meant having to sell their homes in order to fund the liability. The refinery, noting this dilemma, agreed to forego these costs provided that the following occurred : (a) the

[244] See Beatley op cit 23 –26.

[245] Government bodies such as Spoornet and Portnet are either directly responsible for offsite pollution such as noise and air pollution but are also responsible for the activities carried out on their land by their tenants. In the context of South Durban the wharfside activities of Portnet client's generate large quantities of potentially toxic

community group had to immediately cease further activities and disband, (b) all documentation, notes and transcripts relating to the case had to be destroyed, and (c) the individuals involved were not to discuss the case with anyone. As can be imagined, no further anti-pollution protest action was seen from these residents.[246]

5.2.2. The MEAC vs SASOL court actions

In 2001 an affiliate of SDCEA called the Merebank Environmental Action Committee (MEAC) launched three separate court actions in consequence of a initiative to supply the Engen refinery with a gas pipeline. The first action was to bring an urgent interdict against the Minister of Agriculture and Environment to prevent him from issuing a record of decision authorising the construction of the gas pipeline. Whilst this case was in progress the Minister released the authorisation - an action which was considered by MEAC to have been in bad faith. The second action which followed was to interdict Sasol and others from continuing with the further laying of a gas pipeline through the Merebank community. Simultaneously an appeal against the authorisation was lodged with the Minister in terms of the Environment Conservation Act and the regulations issued in terms of S21 of that Act.[247] This Ministerial appeal was dismissed which led to the third court action which sought to take the Minister's decision on review.[248]

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wastes nowhere more apparent than from the ship repair and servicing operations. Portnet regularly dredges these spoils and dumps them at sea.

[246] As related to author by anonymous Bluff resident who still fears the court order.

[247] Act 73 of 1989 In terms of GN18261 regulation 11(1) issued 5 Sept 1997.

[248] Personal communication with Rajah Naidoo MEAC spokesperson.

Turning now to the second interdict – the action to prevent the further construction of the gas pipeline.[249]

On analysis, the case appears to be not that well constructed and could in retrospect have made greater reference to the various provisions contained in NEMA – but the nature of an interdict suggests haste and thus these shortcomings can be expected. In any event the case was dismissed on procedural grounds as the Court concluded that the requirements for the granting of interim relief had not been satisfied. There were however a few shocks for the community. First, in dismissing the case, Justice Magid ruled that MEAC must pay the costs of both defendants counsel and disputed the applicant's attorney's claim that, as the case concerned an environmental issue, different considerations should be applied to the question of costs. Magid J in his judgement stated that :

> 'Counsel for the Applicant argued that because this was an environmental issue different considerations applied to the question of costs. He was, however, placed in some difficulty when I asked him whether, if he was successful, he would, because environmental factors were involved, agree that costs should not follow the result. He was not prepared, for understandable reasons, to make that concession."

In consequence the learned judge found that :

[249] Uneported case *MEAC vs Executive Member Of KZN Council for Agricultural and Environmental Affairs and others* Case no. 2691/01 D&C LD 25 April 2001.

'there was no basis whatever for depriving the successful party of its costs in this matter.'[250]

The different considerations alluded to by the applicants' attorney are those contained in Section 32(2) and (3) of NEMA.[251] These sections make it clear that where an action is brought by a person or group of persons acting reasonably and out of concern for the environment or public interest, and it is shown that they have made reasonable efforts to investigate other avenues of securing the relief sought, then that Court may decide to not award costs against the applicants who have failed in discharging their case. It is also not necessary that the action be framed under NEMA in order to qualify for relief from costs. NEMA S32(2) states (my italics) :

'A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act *or any other statutory provision* concerned with the protection of the environment...

It is indeed curious why Justice Magid chose to ignore S32 of NEMA for he does not state anywhere in his judgment the basis upon which he was actually rejecting the cost argument. For example he does not rule that it was ill conceived, vexatious, not in the public or environmental interest, nor does he conclude that MEAC had not availed itself of other reasonable alternatives. It is hoped that the Court's position on this matter can be clarified as a matter of urgency as the implications for community environmental action are distinctly unfavourable.

[250] Ibid.

The community were obviously not happy with this outcome as evidenced by MEAC spokesperson Dr Barry Seetharam's statement shortly after the judgement was handed down ::

> 'The judge ...failed to apply his mind properly to the issue of cost. An order of cost against the committee could mean they have to pay up to R50000 to cover legal costs for the Sasol legal counsel. We simply do not have this kind of money. At this stage we cannot even bring an appeal against the decision because it also involves money.' [252]

Dr Seetharam's comments highlight the age-old complaint about access to justice being the exclusive province of the rich. It also raises some questions around the application of NEMA. But it didn't end there. Even more perplexing was the Court's interpretation on *locus standii* which appear to embody some pre-NEMA interpretations.. Note for example the learned Judge's remarks with reference to MEAC that :

> 'I am inclined to believe that anything that calls itself simply a committee, whatever comes before that word, cannot conceivably be an association with *locus standii in judicio.*'[253]

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[251] Personal communication R Naidoo MEAC spokesperson.

[252] As reported in The Mercury Business Report on 26 April 2001. Story can be retrieved by using search facility at http://www.busrep.co.za/.

[253] *MEAC vs Executive Member of KZN Council for Agricultural and* Ibid. Judge Magid also indicated his view of the applicant in his opening remark that the applicant 'is something which calls itself the Merebank Environmental Action Committee' perhaps not the most positive remark one would wish to hear. Concern was

This, it is submitted, runs contrary to NEMA which makes no such distinction. Section 32(1) states :

> 'Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources—
>
> a. in that person's or group of person's own interest;
>
> b. in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
>
> c. in the interest of or on behalf of a group or class of persons whose interests are affected;
>
> d. in the public interest; and
>
> e. in the interest of protecting the environment.'

Also at issue in the *MEAC* case was the fact that MEAC had no constitution. NEMA makes no requirement that the group or class of persons must first constitute themselves, consequently it is the author's submission that this enquiry is entirely irrelevant when considering *locus standii* in environmental cases.[254]

From the facts and from the author's personal experience of MEAC it is clear that MEAC was acting in the public interest and foresaw a real possibility of harm. It is therefore unfortunate that they could not persuade the Court of this fact. Ironically the community fears regarding the safety of methane gas pipelines were realised when the main feeder gas line exploded outside Durban a few months after the court case.

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also noted in the case by the defendants attorneys that MEAC had no constitution – which in the author's opinion is irrelevant to whether they have *locus standii* to bring an environmental matter or not.

It would be useful at this juncture to develop the theme of *locus standii* a little further before moving on to other things. First it should be pointed out that the right of local authority to bring an action on behalf of the city's inhabitants has been settled for some time in our law – see *Brits Town Council v Pienaar NO and Another*,[255] whereas individuals and groups had to show personal right of action.[256] The Constitution with its Bill of Rights and subsequent legislation, (such as NEMA), have considerably relaxed this position as was demonstrated by the 1996 landmark case brought by the Wildlife Society against DEAT.[257]

As can be noted from the MEAC case there were attacks on *locus standii* based on how the group is constituted. A not dissimilar challenge to an environmental group's legal structure was made shortly before the promulgation of the NEMA in the *Director, Mineral Development, Gauteng region and Another v Save the Vaal Environment and others*.[258] An interesting point *in limine* was advanced by Sasol Mining. The argument ran as follows : that as Save had more than 20 members and had not registered as a company, it was therefore an illegal association as in terms of Section 30(1) of the Companies Act, 61 of 1973.[259] The Appeal Court however found

[254] *MEAC v KZN DAEA & others* op cit.

[255] *Brits Town Council v Pienaar NO and Another* 1949(1) SA 1004 (T) at 1016.

[256] *Van Moltke v. Costa Aerosa* 1975 (1) SA 255 CPD where it was held that the applicant had to show personal injury, prejudice or infringement of a right in order to bring an action.

[257] *Wildlife Society and Others v Min. of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996(9) BCLR 1221 (Tk) here an environmental NGO was allowed to bring an action on behalf of the environment against a Government Minister.

[258] 1999(2) SA 709 (SCA).

[259] Act 61 of 1973 Section 30(1) "No company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law...."

that on the facts before it, Save could not be said to be trading nor carrying on a business with the object of the acquisition of gain. The objection was dismissed.

Another noteworthy aspect to the *Save* case was the judiciary's ruling on the *audi alteram partem* principle. The appellants in this case sought to deny the right of the respondents to a legitimate expectation of a hearing and contended that the application of the *audi* rule was effectively excluded in the formulation of the relevant (Mining) Act. The appellants contended that the Director's discretionary power was limited by certain enumerated paragraphs contained in said Act.[260] The respondents however argued that the rule should nevertheless have been applied by the Director and that this denial amounted to prejudice of their primary and substantive rights.[261] Oliver JA found that the appellants approach effectively emasculated the principles of natural justice and that there were no considerations of public policy that militated against its application.

The SA Constitution in terms of S33 allows that :

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

These fundamental rights have since been given life in the promulgation of the Promotion of Administrative Justice Act, Act 3 of 2000. This Act expands on the Constitutional provisions and sets out minimum requirements for procedural fairness

[260] The Appellants relied upon a strict interpretation of Minerals Act, Act 50 of 1991, Section 9(3) para's (a) - (e).
[261] The primary right relied on was Section 24 Constitution of South Africa, Act 108 of 1996.

including especially the right of review, notice, appeal and right to reasons.[262] This last is important for Act 3 of 2000 also contains a presumption that where the administrator fails to provide adequate reasons for the administrative action it will be presumed in any proceedings for judicial review that the administrative action was taken without good reason.[263]

The third (unreported) case involving MEAC was to take the Minister of Agriculture & Environmental Affairs decision to dismiss MEAC's appeal on review.[264] At issue in this case was a denial by the Minister of a right to reply which right had been afforded to the other parties (Sasol and Engen). There were submissions made by those parties which submissions MEAC was denied sight of and MEAC now sought access to those documents. Justice Booysen set aside the Minister's decision and ordered that the Minister must rehear the matter afresh and that the outstanding documents be supplied to MEAC. The learned judge made reference to the provisions of the Administration of Justice Act in his determination.[265]

After the upset of the earlier case this was a significant victory for MEAC and the community. It also establishes a legal precedent in that it has tested the communities right to information, the right to reasons and the right to be provided with reasons. It is hoped that the playing fields will be gradually levelled with this and future actions.

[262] Act 3 of 2000 S3(2)(b).
[263] Act 3 of 2000 S5(3).
[264] As stated earlier MEAC had appealed directly to the Minister against his decision to authorise the activity. Act 3 of 2000 Section 6(1) provides that any person 'may institute proceedings in a court ... for the judicial review of an administrative action.'
[265] Detail on case supplied by applicant Rajah Naidoo of MEAC. Case heard approximately 25 January 2002.

It also highlights that it is more expedient to challenge the regulator than it is to take on the polluter. These actions send a clear signal that community environmental law is now entering a new phase. Community has indicated that it will pursue the regulator in the interests of environmental justice and not accept unequal treatment.

5.3. LITIGATION AND THE INTERNATIONAL EXPERIENCE

In the USA the Environmental movements 'Earth Day' is popularly acknowledged as creating the necessary ground swell to initiate a 'massive legal response aimed at curbing air and water pollution and safeguarding threatened natural resources.'[266] At the time of Earth Day the *Environmental Law Reporter* was able to summarise the entire USA's environmental law into a mere thirty-three pages whereas by 1988 this had already reached 800 pages of statutes with more than 4000 published federal court decisions.[267] Litigation has however not translated into superior environmental quality, for the figures published for pesticide use, pollution to groundwater, total air pollution emissions and oil and hazardous chemical spills all indicate significant increases compared to pre-Earth Day.[258] It is suggested that Government inaction and a heavy reliance on technical fixes instead of prevention appear to be part of the problem although there is recent evidence of a marked change in mindset.[269] Another comment suggests that the regulatory measures embodied in much environmental legislation tend to be proscriptive rather than constructive in that they 'tell the

[266] J Futrell in 'Environmental Law – Twenty years Later in P Borrelli (ed) op cit 191.
[267] Futrell op cit 192.
[268] G Speth in 'Environmental Pollution: High and Rising' in Borrelli op cit 171 – 179.
[269] P Borreli in 'Environmentalism at the Crossroads' Borreli op cit 10-11. See however increase in criminal action discussed in next section.

corporations what not to do rather than what should be done.'[270] The activities of certain well known advocacy groups is also revealing – they have switched their attentions from instituting actions to using other tools of advocacy such as 'education, consciousness-raising, research and law reform'[271] In sum, their activities have become more 'non litigious than litigious.'[272] This is not to say that litigation has no role as it is pointed out that the recognition of the environmental group to be at the bargaining table originated in consequence of intense litigation. Litigation is therefore recognised as 'power for the people who don't have economic power. It is one way to fight the political fight. It gets you leverage...'[273]

Not all US environmental groups are as enthusiastic and point to hidden pitfalls. A key problem is that for a grassroots community using the law can be disempowering because it takes the struggle out of the realm in which the community have control over it. This creates problems in that it 'necessitates the translation of raw anger at societal injustice into legally cognisable claims' and moves a 'collective action into an individual lawsuit.'[274] Grass roots organisations have criticised some of the larger NGO's (such as Environmental Defence Fund and the Sierra Club) as spending much time refining their public image as 'litigation shops' and less on whether litigation is the best way to protect the environment and public health. The grassroots organisations also express concern at the perceived 'colonisation' of the environmental justice field by inexperienced lawyers and legal groups. They note that whereas the

[270] B Commoner in 'The Environment' Borrelli op cit 151.
[271] D Robinson & J Dunkley J (eds) *Public Interest Perspectives in Environmental Law* 1995 63. Robinson cites the EDF as describing 20 non-litigious activities as compared with three court cases
[272]. Robinson & Dunkley op cit 67.
[273] Borelli op cit 58.
[274] Cole L in 'Dangers for the Movement' in *Race, Poverty & the Environment* 1995 4.

national (legal) groups have a national focus and legal orientation the environmental justice movement has a solidly local focus and community orientation.[275] This can lead to inconsistencies in approach – even when dealing with the same problem. Another issue is the unequal access enjoyed by the national (legal) groups to the decision makers and media that permits them to define 'environmental justice' according to their own interpretation and purposes.[276] This activity detracts from, and in some cases inhibits, the work of the actual environmental justice movement. On feared outcome is the potential for reallocation of funds away from the grassroots cause in favour of 'environmental justice projects with a national bias. Local examples of this 'upliftment' of local issues to the national arena are the Minister Moosa's programme for phase out of dirty fuels, (to be executed via the South Durban Multi-Point Plan) and (to a lesser extent) the petroleum lead phase out campaign.

Arising from the WSSD is the observation that developing countries are reluctant to adopt strict measures including penalties and other sanctions due to concerns that it will impede economic growth – severe penalties being seen as likely to encourage disinvestment and an obstacle to new development. Noting this, the environmental movement is pressuring for the establishment of a binding regulatory framework that ensures that the industrial playing fields are levelled and that MNC conduct is uniformly regulated no matter where they do business. Another area of law and potential litigation is to be found in the development of alternative economic models

[275] Cole op cit 5.

[276] It will be interesting to see, (in a South African context) whether it is the legal fraternity (including academics) who will attempt to define what constitutes 'environmental justice' in terms of NEMA S2(4)(c) or whether the movement itself will be sought out for their view!

that ascribe greater value to natural resources and carbon sinks. In other words, developing countries may receive payment or credit for not destroying their resources.

5.4. ENFORCEMENT AND CRIMINAL SANCTION

In May 2000 DEAT launched what it referred to as Environmental Protection Support Unit (EPSU). When SDCEA learned of this there was much speculation as to whether this was the launch of a US EPA styled enforcement body or perhaps an environmental equivalent of the 'Scorpion' task team. Unfortunately EPSU has proven to be none of the above. EPSU is essentially a task team operating according to a specific brief to create an enabling regulatory environment for more effective environmental management. It is currently implementing a project known as NEMA Chapter 7 Implementation Project Phase 1 which project aims to ensure the efficient and effective implementation of Chapter 7 provisions relating to compliance, enforcement and protection. In a formal response to SDCEA the EPSU stated that it would deliver 'over the next few months (i) interim procedures for the effective implementation of NEMA Chapter 7 (ii) an institutional model for the effective implementation of NEMA Chapter 7 and (iii) detailed project document for NEMA Chapter 7 Implementation Project (Phase II).'[277] EPSU also indicated that they would be seeking test cases in which to test the 'products' produced. It is unclear whether the 'test' cases envisaged are 'legal' cases or negotiated arrangements.

From a community perspective, industrial accidents in South Durban appear to be spiralling out of control with the frequency between incidents increasing and very little evidence of regulatory intervention. Authority and industry dealings regarding these incidents are kept secret with no visible evidence of sanction being applied. This led SDCEA to lodge a query directly with the Minister (DEAT) on the lack of response. Highlighted in this complaint was the Minister's previous assurance of a 'rapid reaction environmental enforcement unit' and 'stern action.' [278] This complaint was handed to EPSU who responded on the Minister's behalf. EPSU stated that they were not a rapid reaction unit nor were they ever likely to act as one. This was the responsibility of the local authority.[279] EPSU would only act where the relevant local or provincial authority failed to take action and as far as they were concerned the provincial authorities had addressed many of the incidents to which SDCEA referred. EPSU cited the issuance of S28 NEMA directive to Sapref as one such instance of 'action'[280]

Within SDCEA structures there are concerns that the S28 directives will amount to little more than a slap on the wrist. There are also concerns that the required 'rapid reaction' will not be forthcoming particularly if left to the local authorities. This means it is business as usual for both regulator and industry. So once again the official

[277] Peter Lukey ESPU – document entitled 'Briefing in response to questions raised with the Minister by SDCEA, 11/12/01'

[278] See Minister Moosa's promise of strong action against polluters which action is still eagerly awaited by communities in South Durban – see speech at http://www.environment.gov.za/speeches/2000/30may2000htm.

[279] EPSU is correct in this approach for S30(2)(b) states that the Director General (DEAT) will only be required to take action where no steps are taken by neither municipal nor provincial authorities.

[280] The S28(4) directive was issued as a result of a series of incidents including pipeline and other failures. The government's demands apparently include a comprehensive integrity survey of the refinery and its network of pipelines, a full ecological impact assessment and a programme for the reduction of noxious gases. The Mercury Business Report 3 October 2001.

reluctance to proceed with enforcement of environmental law means that the responsibility now falls squarely back upon community and NGO groups who, for the many reasons identified earlier, are constrained in what they can reasonably achieve. In much the same vain, and for similar reasons, the potential for private prosecution under NEMA (S33) is unlikely to generate much community interest. Non statutory approaches such as those contained in the common law are a possibility. For example compensation for damage may be claimed in terms of delict but proving patrimonial interest in the environment and causation will usually undermine the case's prospects. The recent US experience in this regard is enlightening and could, were it to be adopted locally, go a long way to resolving the underlying weaknesses in proving environmental cases.

The US approach under the public welfare doctrine is to apply strict criminal liability for certain types of environmental offence. In terms of the public-welfare doctrine if an offence involves the violation of a statute designed to protect public health or safety, the *mens rea* requirement will only apply to the defendant's knowledge that the act was committed and not that the act itself was illegal. Several cases have since affirmed this approach leading to imprisonment and fines for polluting company employees and owners. They have also ruled on the question of what is meant by a 'knowing violation' of the statute and whether the negligence standard required for a criminal conviction in an environmental case is 'ordinary' or 'gross'.[281]

281 The majority of US circuit courts hold that the *mens rea* requirement applies only to the defendant's awareness of performing an act and not to each and every element of the alleged crime. See *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) and *United States v. Hopkins*, 53 F.3d 533 (2nd Cir. 1995) Both these cases were affirmed in the more recent in *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *Hanousek* interpreting 'negligently violate' as meaning ordinary negligence not gross. (transcript downloadable from www.usdoj.gov/osg/briefs/1999/0responses/99-0323.resp.html).

It has also been suggested in debates around the EMCA process and by some local academics that criminal sanction is not an effective mechanism for gaining compliance.[282] The US experience is opposite with criminal convictions for violations of federal environmental statutes increasing dramatically in the past decade although the current presidency appears set on reversing this trend. It is on record that 'during fiscal years 1997 and 1998, the United States Environmental Protection Agency (EPA) levied $169.3 million and $92.8 million, respectively, in criminal fines. These figures marked the highest and second-highest annual totals of criminal fines in EPA history. Essentially, this trend is positive and promotes the aggressive criminal enforcement agenda Congress intended under the federal environmental statutes'.[283]

For the South Durban Community, interest in these statistics is two-fold. Firstly it supports SDCEA's contention that sanction in the form of fines and penalties should be applied to environmental transgressions. Secondly, environmental groups in the US often receive, albeit indirectly, a component of the penalty imposed. These awards assist in sustaining the CBO and NGO's activities – in other words the watchdog is rewarded for his vigilance.

A number of important observations were made during the 4th International Conference on Environmental Enforcement which are relevant to this discussion and are persuasive of the necessity to not lose sight of this aspect of environmental law. A general finding

[282] See for example J Milton 'Sharpening the dog's teeth: of NEMA and criminal proceedings' (1999) 6 SAJELP 55.

[283] Research paper found at http://www.nyu.edu/pages/elj/issueArchive/vol9/2/v9n2a2.pdf

of the conference was that penalties in environmental crimes were typically higher than administrative penalties and may be assessed on the past profits of the polluting corporation. Environmental crimes could also be prosecuted under other charges such as fraud, racketeering, or lying. In some countries criminal sanctions would be imposed on the corporation whereas in other countries the individual within the corporation could be held liable. The US trend to impose both penalties and jail terms on high-level corporate officers for 'knowing violations' was highlighted. Of interest to South African legal fraternity was the intention of one country to introduce legislation making the attorneys who incorporated the organization personally responsible! With respect to the fines imposed it was found that the publicity surrounding high penalties and stiff jail terms seemed to provide an effective deterrent against environmental crimes but that problems occurred where the sentence was not stiff enough. To this end it was suggested that sentencing guidelines ought to be developed for judicial officers.[284]

In sum then, the prospects for a stand alone (US EPA styled) enforcement structure are slim. It will remain incumbent upon the CBO and NGO sector to ensure that decision-makers remain accountable and that the regulators regulate in a manner that is environmentally just. Consequently it is submitted that most community-based actions likely to brought in terms of NEMA will rely heavily upon procedural or administrative grounds

5.5. INFLUENCING THE LEGISLATIVE PROCESS

[284] See report at http://www.inece.org/3rdvol2/cerews.pdf

Much has been written about the CONNEPP process and how this process was thought to lead to a fully empowered and participative multi-stakeholder legislative outcome.[285] The reality is that whilst significant consultation was held and various white and green papers issued, the final formulation of NEMA took the NGO sector by surprise leading to queries as to whether this had been 'a process for process sake.' Invariably the NGO sector is only involved after a draft bill is presented, and comments are called for, usually within an almost unreasonably short deadline period. One such example is the draft Petroleum Pipeline Bill. The environmental community in South Durban literally discovered this Bill the day the deadline for comments expired and had to obtain an urgent extension to the comment period. .In this case, as in may others there has been no debate or other consultative procedure with the proponents of the legislation. Those charged with drafting legislation usually receive an instruction along with a terms of reference from a Government agency. They are not required nor mandated to consult outside of that relationship – an omission which is seen by some to constitute a serious flaw in the legal mechanism.[286]

Another area attracting criticism is the manner in which outwardly sound legislation is struck down by parliament on grounds of some process irregularity. It appears that there may be too much scope for 11th hour attack by powerful groupings that use spoiling tactics to undermine validity and acceptance. In the USA the legislative process is initiated by a process of notification that a law is to be formulated accompanied by a request for comments. Several hearings will then be held in order to allow interested and affected parties to make submissions on the matter. Based on

[285] CONNEPP is an acronym for Consultative National Environmental Policy Process.

these hearings a draft form of the law is circulated with a further request for comments. A final hearing is then held following which the draft legislation is sent to the legislature for approval. This process is lengthy and not perfect but it does eliminate much of the process related grounds for attack and is far more inclusive than the South African 'model' which process effectively excludes participation by IAP's in the pre-formulation phase. It is noted that both the development of the Air Quality Bill (which will repeal APPA), and the amendments to Chapter 5 of NEMA have been off limits to the public even though although preliminary drafts were reportedly made available to select industrialists prior to formal release. The concern here is that the Bill, once presented, invariably takes on a specific ingrained character as a result of its pre-formulation. Amendments made in consequence of the public hearing and debate are typically textual amendments and do not alter the overall 'flavour' and direction of the Bill. For the NGO it would be preferable to debate the essence and character of the proposed legislation *ab initio* rather than be left, rather futilely, attempting to effect fundamental change at a later stage.

Access to the Law reform process depends on the personality involved and these personalities in DEAT appear to change from day to day. This is in itself is a concern as a process such as this requires strong leadership and continuity to carry it through from inception to promulgation. Instead it is observed that the Law reform process has been stymied by changing personnel and direction. It also appears to have been

[286] Source: Gerritt Coetsee CAPCO KwaZulu Natal – personal communication.

upstaged by the EMCA process which attracts far more attention possibly due to the power relationships at work.[287]

[287] The operation of the Joint Development Framework (JDF) – a consortium of chemical, oil refinery and Government officials may have something to do with this.

6. SOME POSSIBILITIES FOR URBAN COMMUNITIES IN SOUTH AFRICA

This Chapter reviews some of the mechanisms that are available to the community in their quest for environmental justice. It draws on the conclusions presented in the preceding chapters and sets out to synthesise these within certain specific responses. These responses are by no means exhaustive and may range from negotiation, litigation, to protest and civil disobedience. The choice of tactics will always be a potentially explosive and divisive decision to be made by the environmental organisation. The existence of multiple groupings affected by the same underlying issue can often exacerbate differences rather than highlight commonalties.

6.1. NEGOTION & MEDIATION – SOME LESSONS

A number of potential outcomes are possible as a result of community mobilisation around a particular issue. Occasionally a careful strategy will be thought through by the organisational structures before implementation. Often as not the campaign evolves without premeditation and can be typified as being somewhat reactionary in substance.[288]

[288] This may occur in response to information relating to acute threats to human health or news of ecosystem damage. One such example is the pollution incident at Isipingo lagoon (08/01/1996) that resulted in a massive fish kill with potential endangerment of local squatters abstracting water from the river. The 'campaign' that followed was initiated by IEC and successfully captured significant media attention. At least one culprit ,(Robertsons Spice), was positively identified and DWAF was on record as saying fines of R1million would be levied (see The Saturday Paper 20/01/96). The IEC assumed that the entry of DWAF would result in stern and decisive action particularly following DWAF's strong media statements. No fines were ever issued. Instead a water pollution forum was set up that was akin to a mini 'environmental truth commission.' Responding to charges of deliberate midnight dumping into the river, industries did admit to 'spillages' but considered these to be either negligent acts by employees or acts of God. The IEC in accepting the DWAF's proposal for a forum had effectively negotiated

In such instances the target of the community groups attentions will seek a form of compromise but usually only after the intercession of National authority.[289] Meetings are convened in order to negotiate the problem and chaired by an 'impartial' member of the authority. These meetings are often acrimonious but nonetheless revealing in terms of information uncovered. Quite often the industry and local authority position are perceived to be *ad idem* leading to community demanding National intervention. The agenda is always a source of contention as it is set by perceived authority/industry coalition. Usually only minor concessions are made with regards to the problem. The meetings soon become infrequent and absenteeism of key departmental figures becomes the norm. The community group soon becomes disillusioned with the inaction and feel trapped by the very mechanism they agreed to (i.e. negotiation) for to walk out, the process is not only deemed to be politically incorrect, it is also an act of bad faith.[290]

6.1.1. Lessons learned

The primary lesson for South Durban environmental organisations is that the absence of enforceable and effective legal provisions is disempowering to negotiation. For example South African air pollution guidelines are weak and virtually unenforceable – a fact that successfully allows polluters to sidestep issues relating to pollution levels. A lack of access to independent monitoring equipment also means that industry claims go untested – even by authority. Existing permits have also been traditionally very lenient and/or vague with respect to pollutant measurements. This has allowed the refineries to provide

themselves out of pursuing any other type of action. The media tired of the story and the 'campaign' wound down. Had this issue been carefully strategised and the action group expanded it is possible that a more lasting solution to this river's problems could have been found.

[289] Both the Engen refinery and Isipingo river forums were initiated as a result of National government pressure.

[290] Synthesis of comments provided to author from SDCEA executive members November 2000.

their own estimates as to emissions which in the case of the Sapref refinery turned out to be in error by a factor of 12 tons per day! No action was taken against the refinery for this misreporting despite it having persisted for several years. Complaints about pollution are also defeated by simply referring to the permit levels, for, provided the refineries are within the maximum daily permit level, no action can be taken – even where hourly average guideline values are exceeded – for the very fact that they are guidelines and not standards (which are enforceable).

Emerging form the communities 1996 negotiations with the Engen refinery were the following observations.

1. In any negotiation the community must have access to equivalent technical and scientific resources to enable it to challenge or otherwise interpret assertions made by industry.
2. Secondly, that it is preferable that the regulators be a party to the proceedings and remain committed to the proceedings.[291]
3. Third, that negotiations that proceed amidst a history of mistrust, negative experience and unresponsiveness, are likely to make negotiations difficult. Clear and obtainable objectives must be agreed at the outset.[292]
4. Fourth ,the real decision makers must be present at the meetings. All too often decisions cannot be taken in the negotiation without referring to third parties.

[291] DEAT Deputy Minister Holomisa was the convenor of the initial negotiation which looked set to establish new precedents for the environmental movement as Holomisa had adopted a no nonsense approach to the energy industry. Unfortunately his summary dismissal from office spelt the end of Government's pressure on this industry. One of the 3 Ministers responsible for axing him was apparently the Minister of Energy affairs..

[292] Wiley op cit 99. Conflict over whether they were dealing with 'pollution' (community stance) or a 'release' (Engen stance) is one minor example. Racial problems were also evident in that all white refinery negotiators and managers did not live with the consequences of the pollution and went home to white suburbs. The refinery itself was also seen as an intruder as it had displaced a previously racially mixed market gardening community.

5. Fifth, that there are limits to what can be achieved through local negotiations on issues governed by national policy.[293]
6. Lastly, and associated with the previous point, is the observation that air pollution continues to avoid the attentions of legislative review leading to the assumption that the present Government has retained the old Apartheid era legislation as it is good for business.[294]

The failure of the 1996 Engen negotiation resulted in a change of tactics for South Durban environmental groups. CAER committees were abandoned as being talk shops in preference to issue based campaigning. Another realisation was that most of the South Durban polluters were accorded national strategic significance by Government hence it made sense to engage with the relevant National Minister in locating solutions to problems. This approach saw some success especially with regard to hazardous landfills which were closed as a result of Ministerial direction.[295]

Mediation in contrast to negotiation implies the use of a mediator to effect management of the negotiation process. The mediator does not have decision making power but assists in ensuring that 'the ball is played and not the man.'[296] The mediator assists in identifying common ground and in determining the issues for discussion. In certain instances the facilitators have been sacked by the negotiating parties, or rejected outright

[293] Wiley op cit 100. It is worth noting that negotiations on air emission standards have remained stalled (even to time of writing 6 years hence).
[294] Note the similarity between current attention to economic growth and Reaganism. Reagan is on record as saying that government 'should get off the back of business'. He shared implicitly President Calvin Coolidge's belief that 'the business of government is business.' – quote courtesy S Udall in 'Encounter with the Reagan 'Revolution' Borelli op cit 100.
[295] The Umlazi landfill and the Mondi flyash dump were both ordered closed by Minister Kader Asmal after he was called in to resolve the issue.

on concerns relating to credibility or independence.[297] Mediation aims to produce a result that is best in the circumstances having regard to the common interest of the two parties and is seen as an attractive alternative to litigation. South Durban communities are not so enthused, seeing this as yet another ploy that will demand time and resources from individuals within the environmental movement who, being volunteers, have very little time or resources to spare. The sheer scale and number of projects identified for South Durban is daunting and would tend to render mediation far less likely to be accepted as a mechanism to move forward. NEMA's S17 (mediation) and S18 (conciliation) are identified by community as potentially inhibiting the application of traditional legal remedies to environmental development issues. For example community groups are apprehensive that mediation and conciliation provisions will only unduly delay remedies that could be more speedily resolved in a court application.[298] Another concern relating to court proceedings is that a failure to have previously proceeded down the mediation/conciliation path could lead to an adverse award of costs being made if the court finds that the applicant did not 'use other means reasonably available for obtaining the relief sought.'[299]

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[296] M Arnoldi (ed) 'Environmental Mediation' article found in *Conserva* Vol 12 (4) 11.

[297] An example of this occurred at the Island View Forum meetings initiated during 1997 between industry, community and authority. City Health took over the facilitation role despite being simultaneously a party to the proceedings - an unsatisfactory but unavoidable consequence.

[298] This is especially so in cases of air pollution where an interdict may be a preferred option from the communities point of view. South Durban communities have a lengthy history of protracted negotiation with little tangible end benefit. The polluting activity continues during the negotiation and thereafter leading to frustration with the negotiated option.

6.2. CONFLICT & CIVIL DISOBEDIENCE

The more extreme movements perceive themselves as putting 'a monkeywrench into the gears of the machinery destroying natural diversity.'[300] They attract substantial support primarily from disillusioned members of traditional, pacifist environmental groups who have become jaded with protracted bouts of negotiation ending in environmental compromise. They support a policy of 'aggressive non violence' examples of which would include such actions as pulling out survey sticks and placing spikes into trees to be felled. To these people such acts are simple 'self defence' and not terrorism. The real terrorists they contend are those '...cutting down thousand year –old redwood trees to make picnic tables, and damming up wild free-flowing rivers.'[301] Such tactics however are seen by certain sections of the environmental movement as potentially divisive and capable of tainting all environmentalists as extremists. There are however many who welcome such action but are perhaps too well socialised themselves to resort to similar physical confrontations in the name of the environment. Indeed organisations like Earth First! have succeeded where the Sierra Club had failed.[302] Extremist groups and litigation groups occasionally work hand in hand with the physical activities of the extremist fringe successfully delaying projects in order for a court action to be won. Needless to say the actions of such environmentalists have captured media attention and any disastrous events involving

[299] NEMA S32(2).
[300] Borreli op cit 30.
[301] D Russel in 'The Monkeywrenchers' quoting Dave Foreman of Earth First, as found in Peter Borreli (ed) *Crossroads : Environmental Priorities for the Future* 29.
[302] Russel op cit 33, citing the Sierra Club losing the appeal process over the proposed Bald Mountain Road in the Siskiyou National Forest following which Earth First! blockaded the development leading to 44 arrests and an eventually successful lawsuit.

the petrochemical industry are readily blamed on eco-terrorist activity before complicity has been established.[303]

Strong activist response is likely to be more muted following the September 11 2001 World Trade Centre disaster due to the public mood and opinion. Vested interests will no doubt capitalise on this and it would be no surprise to see the US President Bush's 'war on terror' being redefined and widened so as to include certain types of environmental activism as harmful to State (aka US energy industry) interests. In South Durban the apartheid era National Key Points Act has been resurrected for use by MNC's on the pretext of possible terrorism. The South Durban Community Environmental Alliance have repeatedly voiced their scepticism of this motive particularly as they believe that there is little that is not already in the public domain with respect to either the facilities, the processes or the chemicals involved. They see this development rather as a means to deny access to information relating to the hazards posed by expansions and as a means to suppress information relating to industrial accidents. In sum it is considered an act of bad faith and contrary to the establishment of good neighbour accords.[304]

Environmental activism in South Durban has been rather muted with very few street and banner protests although this has not prevented consultants and industry alike from punctuating reports with references to 'conflict' and 'activism.' One community

[303] See for example the Nigerian pipeline blast that killed 500 civilians that was immediately blamed by Shell as being the work of environmentalists. A similar pipeline blast in Columbia was immediately blamed on community activists even though the Ministry of Police stating that the reasons were not yet known. Stories and links to legislative bills in Texas Pennyslvania and New York that criminalize environmental activism and peaceful demonstrations can be found at http://www.mapcruzin.com/criminalizing-environmentalism

[304] Personal interview with Desmond D'Sa Chairman SDCEA, 20 August 2002.

demonstration that was very effective and bore unexpected fruits was the 1995 protest that took place outside the gates to the Engen refinery. This demonstration succeeded in gaining the personal attentions of then State President Nelson Mandela leading to a personal interaction and eventual assignment of high ranking DEAT officials and Ministers to investigate the problem. Second, the protest organisers(Wentworth Development Forum) chose to invite both the 'white' Bluff Ridge Conservancy and Bluff Ratepayer Association to meet with President Mandela, a move that (a) influenced the prospects for unity amongst environmental and civic groupings and (b) indicated the trans-boundary nature of the pollution problem to government. Third, the meeting generated huge media interest which has resulted in a strong working relationship between the press and the NGO. Use of the media subsequently became the preferred vehicle for environmental expression. Fourth – the spotlight that fell on South Durban sparked a number of experiments with intergovernmental and community consultative forums. South Durban is still seen by DEAT as the test bed for initiatives with local inputs feeding directly into processes that will have a bearing on National legal reform and policy proposals. In sum the protest action, rudimentary though it is, remains a highly effective conscientiser of both the public and the political establishment.

6.3. HUMAN RIGHTS BASED APPROACHES TO CAMPAIGNING

There are significant advantages to presenting an environmental 'issue' as a human rights abuse for campaign purposes. Firstly the human rights approach presents a strong claim to an 'absolute entitlement theoretically immune from lobbying and trade-

offs.'[305] Secondly, a human rights approach is arguably preferable to pursuing the issue from a criminal or administrative law approach in that proof of causation and technicalities often defeat legal actions that may flow from such a campaign.[306] The third advantage lies in the fact that the broader public will mobilise around 'a general statement of right...(rather)...than a highly technical, bureaucratic regulation.'[307] The fourth advantage lies in the 'global' nature of the perceived environmental wrong when expressed as a human right violation.[308] It also de-localises the issue and allows for broader political mobilisation around the issue. Finally, it is possible that an environmental campaign could be better served in reformulating the negative right to an environment not harmful to health and well-being to the more positive 'right to life' embodied in our Constitution.[309]

6.3.1. An International Court and Tribunal

The scale of human carnage occasioned by industrial accidents have led to calls for the creation of a specialised tribunal dedicated to investigating corporate atrocities as crimes against humanity.[310] Of particular relevance to communities faced with industrial hazards is the Permanent Peoples' Tribunal (PPT). The PPT is the immediate successor

[305] Boyle & Anderson op cit 21.
[306] A DWAF pollution inspector in response to a question on why there were so few prosecutions of industrial pollution to water courses responded that the evidentiary burden of determining cause and effect defeated the bulk of seemingly clear cut cases. This has led DWAF staff to largely abandon the command and control approach and to rather pursue negotiated solutions as the preferred method of ensuring compliance.(telephonic interview with author).
[307] Boyle & Anderson op cit 22.
[308] Ibid.
[309] The Constitution of South Africa, Act 108 of 1996, Sections 11 and 24. Note however that judicial officers are likely to be sceptical of cases grounded solely upon constitutional grounds and not in substantive law. Such officers expect a high degree of technical and legal specification for them to arrive at a reasoned conclusion
[310] The tragedy of Bhopal being still subject to the PPT's investigation. See list of cases at http://www.minesandcommunities.org/Company/freeport3.htm.

to the Bertrand Russell Tribunals on Vietnam and Latin America. It operates in much the same manner as the Nuremburg Military Tribunal, being a public opinion tribunal that identifies and publicises systematic violation of fundamental rights particularly in those cases where national and international law fails to protect people's rights.[311] The Tribunal submits its findings to the Secretary General of the United Nations, to other United Nations organisations and to national and international bodies. It is hoped that South African communities need never have to appeal to this structure for assistance.

6.4. DEVELOPMENT OF ENVIRONMENTAL INDICATORS

The earlier Chapter on sustainability expanded upon the need for community-based environmental indicators upon which to benchmark sustainability. There was also a need to establish what the carrying capacity of a specific environment is, relevant to the human population demand, forecast growth rate and available sustaining resources for to neglect this is to overlook the demand side of the economic equation. Besides being a measure of sustainable practice the information provided may soon be required for international trade and investment – perhaps sooner than currently realised. There is therefore a significant opportunity for the environmental and community group to influence the development, design and implementation of such indicators and to ensure that the messages provided by the indicators is acted upon. The environmental indicator itself should not be seen to be exclusively 'scientific' instruments and should include a degree of community-based assessment. In this manner, community

[311] Introduction to : Permanent Peoples' Tribunal *Charter on Industrial hazards and Human Rights* 1996 i.

knowledge will be incorporated into the measure and so inform the applicable standard, thereby giving effect to those provisions of NEMA calling for recognition of knowledge, needs and participation.

With respect to the development of standards, considerable argument is heard on whether there should be overarching national standards or whether local conditions will dictate the appropriateness of the standard. For example, a national emission standard for a particular substance may appear desirable but in practice prove to be inadequate due to a combination of climatic and geographic conditions. South Durban is one such example where a combination of pre-frontal movements and winter temperature inversions serve to trap pollutants leading to elevated pollution concentrations. Couple this to valley micro-climates and down-drafting of flue gases and you have some serious localised problems requiring careful standard setting. Setting higher standards at local level may be desirable but, as one writer caution's, may lead to distortions in market conditions.[312] Such inequalities could have negative repercussions for business and investment. For community there is the fear that setting standards at local level raises the question of the degree of influence big industry has over local authority. It is clear that the environmental quality will depend upon the quality of the standard and that it is enforced.[313]

[312].M Faure op cit 4.

6.5. LITIGATION

As detailed in the preceding chapter the prospects for community litigation have increased markedly with the passing of NEMA into our law. Whilst NEMA does not specifically provide for criminal recourse, it does however allow for private prosecutions and the imposition of vicarious liability. Additionally the imposition of pecuniary awards for environmental damage as provided for in terms of S34(1) is most welcome as are the provisions of S34(3) that allow for the recovery of any monetary advantage gained in consequence of the offence. For communities the absence of specified sanction in the form of steep fines is lamentable. Grass roots organisations are of the opinion that wayward SA industry, having enjoyed the fruits of a lax apartheid era, now require a rigorous regulatory environment to establish compliance and to facilitate the use of other non-criminal instruments.[314] To ignore this developmental phase will be a folly and simply play into industry's manipulative hands.[315] The learnings of the *MEAC* case point to some frustrations with the application of NEMA but these are considered short term hiccups in the judicial process. More exciting are the possibilities revealed with both the Promotion of Administrative Justice Act and the Promotion of Access to Information which, when combined with NEMA and the Environment Conservation Act, represent some powerful opportunities for the environmental litigant.

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[313] Faure op cit 5.

[314] See A Durning paper entitled 'Apartheid's Environmental Toll' *in Worldwatch Paper 95* (1990) for a succinct review of the subject. The lax environmental and health standards applying to SA industry can be interpreted as a legacy of apartheid's bid to attract and/or retain polluting industries especially in the energy and mining sectors.

[315] Synthesis of comments received from various SDCEA Executive members.

Delictual claims for damages arising from pollution are still an important option for the community for a number of reasons. First, regulations can become outdated, technology can change and the possible forms that pollution can take cannot all be regulated. Liability in delict is therefore a useful safety net. Second the enforcement of regulation depends upon administrative and criminal sanction. Unfortunately the low probability of detection, ineffective fines and weak enforcement ethic mean that criminal sanction will often fail as an effective deterrent. Consequently the threat of civil liability remains useful.[316] With respect to foreign domiciled companies the recent £21million settlement relating to Cape plc asbestos victims may persuade CBO and NGO claimants that prospects for litigation are more likely to be successful in foreign courts than local.[317] Certain large ex South African companies who have created environmental harm and are now domiciled outside of South Africa may in time regret losing the protection of an admittedly weak judicial system.

6.6. VOLUNTARY AGREEMENTS AND EMCA's

At time of writing there are no known requirements in our law that pollution reduction and zero waste initiatives should be incorporated into industry plans. South Durban communities acting on their own initiative attempted to remedy this perceived defect in air pollution prevention and developed two approaches to this problem. The first was to draw their own air quality management strategy and the second was to negotiate directly with polluters on pollution reduction strategies. The first initiative was delivered to the Sulphur Dioxide Management Committee but was not accepted. The

[316] Adapted from Faure op cit 9-10.

negotiation with polluters was more successful. In 1998 SDCEA entered into discussions with Engen refinery regarding their emissions with a view to securing a reduction plan. After much debate and negotiation a 5-year air pollutant reduction strategy was agreed and eventually made a condition of the refinery's Scheduled Process Permit.[318] The thinking was that the agreement would be more credible and be provided with 'teeth' if it could be incorporated as a condition of the process permit. This is a significant milestone as here for the first time an agreement had been negotiated totally outside of government structures and was now legally binding upon the polluter. A similar initiative has recently been launched by SDCEA to gain access to the local authority permit-setting process with the intention of ensuring that measurable agreed actions and targets appear in the permit accompanied by penalties for transgressions. This is a reaction to the distinctly voluntary nature of air pollution control on South Durban in the preceding decades notwithstanding legislation that purports to provide for command and control type strategies.

6.6.1. EMCA's

The concept of the Environmental Management Co-operation Agreement (EMCA) were first put forward by business and industry during the 3 year long CONNEPP process. These efforts were successful in that they were eventually included in NEMA but 'with the explicit understanding that these would be supplementary instruments that were to be used in taking industries beyond compliance with national legislation

[317] Full review of Cape plc settlement at http://www.btinternet.com/~ibas/Frames/f_lka_cape_sa_claim_brief.htm.
[318] Scheduled Process permits are required in terms of Act 45 of 1965. Oddly this initiative was initially rejected by the Department of Environment's Chief Air Pollution Officer (Martin Lloyd) for unclear reasons. Happily this situation did not persist and on 28 April 1999 the emission reduction agreement became part of the process permit.

and standards.'[319] The May 1998 draft National Environmental Management Bill included arrangements pertaining to EMCA's and stated *inter alia* that :no environmental management co-operation agreement shall be valid without provision for:

S35(2)(i) reporting

(ii) independent auditing of reports;

(iii) regular independent monitoring and inspections;

(iv) verifiable indicators of compliance with any norms and standards laid down in the agreement as well as any obligations laid down by law;

(v) the automatic suspension of the agreement in the event of non compliance ... and its automatic termination in the event of repeated non-compliance; and;

(vi) penalties for non-compliance.

The final version NEMA contained a surprise for the NGO sector in that the peremptory *shall* was changed to *may* with an obvious implication that there had been a softening in approach by the authority. Following the passage of NEMA into our law there has been a flurry of activity from both DEAT and industry with respect to EMCA's. Initially there was no civil society involvement and exclusive structures such as the Joint Development Forum (JDF) were set up to promote the development of EMCA's.[320] Several documents have been published by both DEAT, JDF and industry on the EMCA process, again without involvement from civil society. Indeed the JDF Progress Report notes with reference to the involvement of civil society that 'Although civil society will not be a Party (signatory) to the sectoral agreement, their involvement is important as they play an essential role in the adoption of site

[319] C Albertyn and J Hall unpublished Groundwork report entitled 'Environmental Management Cooperation Agreements A soft tool at the cutting edge of pollution control in South Africa'. August 2000 7.

[320] The Joint Development Initiative comprises members of DEAT, DWAF, DTI, Refinery Managers Environmental Forum and Chemical and Allied Industries Association.

environmental plans (SEP's) in the sectoral agreement.'[321] It is worth noting that S35 of NEMA contains no such exclusion of civic bodies from being a party to EMCA's.[322] To the environmental organisation it was abundantly clear that they were being effectively shut out of the decision-making process. This led to fears that EMCA's could be negotiated between the two parties in the absence of enforceable pollution control legislation. Worse, the agreement could be seen as a substitute for legislation and standards which were meant to be delivered by the law reform process. Another issue was that EMCA's could retain the *status quo* of an ineffective and under-capacitated inspectorate due to the emphasis on voluntary or self-regulation.

The industry lobbying position is to convince government that self-regulation through voluntary agreements is the most cost-effective means of achieving environmental improvements and likely to make little demands on the administrative capacity of the state - the original CAIA agreement even contemplating the ISO management system as supplanting the need for traditional plant and installation inspections. Ignored however is the reality that thousands of site specific negotiations and agreements on individual targets will be required which will very likely overwhelm the administrative resource.

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[321] JDF document entitled 'Conclusion of Environmental management Co-operative Agreements in terms of Section 35 of the National Environmental Management Act' dated 26/6/2000 2.

[322] Arguments opposing community participation rely on the use of the word 'or' in S35(1) ' ...any person *or* community' to indicate a distinction between agreements made between government and industry and agreements made between government and communities. This view it is submitted is incorrect.

The NGO reaction was to immediately confront Government on this lack of consultation.[323] Key fears highlighted to DEAT were that EMCA's concluded in this manner could lead to a potential erosion of civil society rights; that EMCA's could disempower regulators in that enforcement of laws would be secondary to the non litigious remedies contained within the EMCA and that EMCA's were delaying delivery on the more important law reform process issues. Underscoring all of these concerns was the overriding conviction that the EMCA approach was designed to maintain the 'business as usual' approach for as long as possible. Since these concerns were made known, DEAT has become marginally more accommodating although there has been suspicion that this was tied to the impending World Summit on Sustainable Development (WSSD).[324]

Whilst there is little disagreement that environmental agreements have a potentially valuable role to play as a supplementary instrument, they must be preceded by effective regulation and operate within an atmosphere of general compliance. In sum the environmental NGO identifies EMCA's as a tool to take industries beyond compliance. According to Chris Albertyn, the South African EMCA is being modelled on the Dutch covenant system. This system has chief amongst its failings the exclusivity of the negotiation process. Being private they are not open to NGO participation and amendments or alterations cannot be independently challenged.[325] A further aspect is that Dutch enforcement officials have 'cited examples of violating

[323]Government responded and the deputy Minister DEAT and her Director General met with SDCEA and other NGO representatives shortly thereafter to hear their position. Meeting held Pretoria 13/10/2000.
[324] DEAT Workshop Record of Discussion, Workshop held 19-20 Sept 2001. Judy Beaumont underlined the importance of the New Africa Initiative and referred to a 'new deal' or 'global compact' emanating from the World Summit on Sustainable Development.
[325] Albertyn 29.

facilities using their covenants as a defence for their violations. These environmental officials are pessimistic that any environmental benefit for the future will ever be recognized.'[326] Escape clauses are usually built into the agreement which can be used by industry whenever compliance proves too costly. Various high profile speeches given by DEAT ministers (usually following yet another industrial pollution incident), have followed the theme of stating that co-operative agreements would be put in place in terms of NEMA and that this would address, manage and reduce industrial pollution. Government by entering into negotiations before overhauling the regulatory framework that determines the standard required, has inevitably undermined the logic of the negotiated policy.[327] Indeed all the Government did was provide for a free public image boost to polluting companies and their brands. The government response clearly indicates that it has bought into these strategies.[328]

EMCA's are clearly here to stay and will be forming part of our legal landscape. Their success will depend upon whether realistic environmental targets are negotiated, monitored and enforced and, more importantly, whether the law reform process delivers a package of regulatory tools and standards to underpin such initiatives.

6.7. AN ENVIRONMENTAL TRIBUNAL

Environmental law is recognised as a 'specialism' demanding of the exponent an 'eclectic assemblage of skills'.[329] Likewise, the judiciary require significant skills

[326] Albertyn op cit quoting R Hersh, 'A Review of Integrated Pollution Control Efforts in Selected Countries' December 1996

[327] C Albertyn & G Watkins *Partners in pollution : Voluntary Agreements and Corporate Greenwash* Groundwork Booklet 2 August 2002 9-10.

[328] Albertyn op cit 10.

[329] Robinson & Dunkley op cit 278.

beyond the mere mastery of legal *princeps* and norms. Environmental actions and disputes often concern the intangible and our judiciary will in a short time be called upon to provide rulings and set precedents on matters concerning aesthetic beauty and biotic preservation. For these reasons community groups have proposed that the judiciary requires capacity building and resources in order to more effectively discharge their duties. They point to the fact that the United States Environmental Protection Agency developed a separate programme specifically for the training of judicial officers in understanding environmental matters.[330] It is submitted that a dedicated environmental court and/or tribunal would greatly assist potential litigants and assist in elevating public and industry awareness on planning and environmental issues This court should allow for mixed personnel with extensive use of expert witnesses with judicial appointments matching the diversity of the jurisdiction.[331] Such a court or tribunal, given its multidisciplinary composition, would be best placed to adjudge the so called 'third generation rights'.[332]

The implication for this paper is that environmental experts within the NGO and CBO community could be called to play a role in the development of legal precedent. This would be a refreshing departure from the more traditional approach to the appointment of judicial officers and assessors. Likely benefits to be obtained from this approach would include reduced costs and delays, greater convenience and

[330] Personal communication with Merebank Ratepayers Association's Siva Chetty.
[331] Note that in terms of the Constitution of South Africa, Act 108 of 1996, Section 180(c) allows for National legislation to be promulgated that allows for the participation of people other than judicial officers in court decisions.
[332] See Sachs op cit 144 –145 for description of the evolution of such rights. First generation rights generally compel the State to refrain from certain action, second generation demands the delivery of benefits and services whereas third generation rights are 'peoples' rights.

effectiveness in decision making and a knowledgeable and balanced judiciary.[333] International experience reveals that environmental courts are less successful at promoting public environmental awareness where the laws and jurisdiction are fragmented.[334] Consequently it is submitted that the ongoing review and restatement of our laws through the law reform process is a fundamental prerequisite to the formation of such a court.

6.8. ENVIRONMENTAL IMPACT ASSESSMENT, RISK ASSESSMENT AND THE MAJOR HAZARD INSTALLATION REGULATIONS

The Environmental Impact Assessment process is one of the few arenas where there is representation by community structures in the decision-making process. Representation does not however equate to access to the eventual decision-makers on account of there being a layer of industry-appointed consultants who determine the manner in which the concern is presented. Indeed such is the mistrust by environmental groups of certain environmental consultancies that they have taken to forwarding their comments directly to the environmental officials and not via the appointed consultant.[335] There is also a concern that the consultancies operating in South Durban appear in their professional staffing to be disproportionately skewed towards the engineering fields especially chemical and mechanical. It is a curiosity that the social and human sciences are not represented. Many of the consultancies

[333] Both DWAF and DW&W are calling for the formation of an environmental court to be established that will hear environmental cases : sources Pat Reddy (Assistant Director-DWAF) and Sandra Redlinghuys (Acting Technical Officer -DW&W).

[334] Robinson & Dunkley op cit 263.

[335] It has occurred in the past that the community position has been massaged by the consultant in such a manner that it scarcely resembles the original concern. An environmental official dealing with EIA's then suggested to the author that SDCEA should bypass the consultants in such instances by communicating directly with the provincial authority.

performing EIA's also perform professional services for the polluting industry in South Durban with EIA's being an add-on service and not a central business activity. This raises questions about credibility, impartiality and objectivity in the minds of community-based environmentalists especially where the consultancy is known to have an existing, non-EIA relationship with a corporate client.

Resistance to EIA's by local environmental groups in South Durban is growing. One reason is the sheer volume of EIA's for which input is requested.[336] A second issue is that there is a conviction that the EIA is an inappropriate forum for the community to attempt to influence the decision-making process. This perception originates in a belief that the projects are all tacitly pre-approved by authority in fora to which access is denied. For example there was virtually zero involvement by CBO and NGO structures in the original Integrated Development Planning process, the Spatial Development Plans and the Industrial Development Zone initiatives in South Durban notwithstanding the fact that these forums are the launch-pad for industrial expansions and projects likely to impact the environment and surrounding community. Access to the real decision makers and to the intentions of government planners is therefore an ongoing battle for the environmental organisation. Dealing with the aftermath of planning decisions made by these bodies is considered unsatisfactory, disempowering and contrary to Local Agenda 21 principles. A third negative is the manner in which the EIA process is undertaken. According to SDCEA spokesperson, Michelle Simon, both the EIA consultants and officials exhibit a poor understanding as to effective

[336] According to SDCEA document 'Policy on EIA's' dated 02/05/2002 the organisation has seen comment requests on new EIA's increase to over 7 per month accompanied by 'unreasonable and impossible deadlines

public participation.[337] The following shortcomings were highlighted: a complete failure to check the level of understanding of participants at meetings, a failure to inform and build awareness beyond the meeting, the omission of worst case and negative economic consequences of the proposal and the top down approach to dealing with community structures.[338] The consultancy approach is almost exclusively extractive meaning consultants squeeze the environmental group for expert responses and then depart financially-enriched by their endeavours. The environmental group on the other hand is the poorer for the sacrifice of its time with little value added in terms of capacity and knowledge.

An EIA case study

During the latter part of 1998, community were informed of a project to increase the storage capacity of what was then known as the Van Ommeren tank storage facility.[339] Destined for the site were 13 storage tanks that would warehouse a range of flammable and toxic compounds. Of great concern to the surrounding community was the proposed addition of 2 dedicated tanks for highly toxic acrylonitrile storage, (each tank holding approximately 3450 tonnes), with additional storage in a third tank holding almost 2600tonnes.[340] Acrylonitrile is a considered a probable human carcinogen. A pre-scoping meeting was arranged and attended by various community

resulting in EIA's being approved by government before communities even reach a level of understanding on the project'

[337] Personal communication Michelle Simon – then SDCEA co-ordinator.

[338] Ibid.

[339] In fact some of the tanks subject to this EIA had already been constructed. The then Durban City Health in consequence of an objection received from the Bluff Ridge Conservancy withheld the grant of Scheduled Trade Permit to Van Ommeren (now Vopak). They ordered that a full EIA must be performed before the Scheduled Trade permit would be issued including those tanks constructed prior to the gazetting of GN18261 in terms of S21 the Environment Conservation Act (identification of listed activity).

and environmental groups. These groups individually stated the reasons for their refusal to participate and then left the meeting. The general theme of the objection was that :

- The potential threat to both residents and the City of Durban arising from the bulk storage facility was significant yet, notwithstanding the dangers, no offsite emergency or evacuation plans were yet in place;
- There had been no evaluation of overall tank emissions;
- There had not been any form of cumulative health risk assessment for the area;
- Toxic developments were proceeding in the absence of baseline data necessary for authority to make an informed environmental evaluation;
- The new development would add to the toxic soup already present and in particular add a further probable carcinogen to the air in the form of acrylonitrile;
- That the community had been previously led to believe through its voluntary involvement in the Island View Forum that the above concerns would be addressed and that no further developments would occur until such time as the hazard potential had been adequately quantified and concerns addressed.

In sum, the community believed they could not participate in a project that they believed was fundamentally flawed in that it posed unreasonable and untenable risks to both health and environment. It was felt that the community's continued presence would only serve to legitimise the 'EIA.' They then walked out. Unusually present at the scoping meeting was the City's Environmental Manager, Dr Debra Roberts

[340] Predicted Air Impact Assessment of the Van Ommeren Tank Terminal (EMS-VOTT/98/a 21/08/1998) Table

(allegedly on company/consultant request), who then addressed the remaining attendees. Her address stressed the site specific nature of the EIA and largely dismissed the community concern as it related to pre-existing risks and the potential compounding effects this might have on the proposal. According to Roberts the EIA was not required to examine the surrounding situation and need only concern itself with assessing the new tank development without having to account for any other external environmental problem existing beyond the proposed development.[341] Community groups stayed out of the process and simply monitored the paper generated by the project. One of the aspects monitored was the acute impacts associated with accidental release of stored chemicals. The 1998 EIA reported a 'worst case' toxic end point for acrylonitrile of 0.7km during worst night time conditions and about 1 km during worst day time conditions.[342] Unconvinced the community enlisted the assistance of University of Michigan to model a single tank on basis of the US EPA's 'worst case.' Standard assumptions applicable to US industry were used, including actual bund heights and dimensions. The results were startling. The US EPA's RMPcomp® programme simulation for total tank failure returned a toxic end point with a value greater than 40km![343] Clearly something was rather amiss with the methodologies employed in estimating worst case. The EIA consultant prepared a 'worst case' scenario that allowed for partial releases of product over fairly lengthy periods of time – hence the limited impact. The US EPA approach however is to assume the entire tank fails (reason for failure being irrelevant) and to model the

4.3, EIA reference 0024.

[341] The City Environmental Manager's involvement in this EIA was also due in part to the significant staffing crisis then affecting DAEA.

[342] Utilising the US EPA's ERPG-2 toxic endpoint.

[343] The University of Michigan's Professor Stuart Batterman also utilised the Aloha modelling programme as an alternative and again modelling one tank returned a result of at least 10km to toxic end point.

consequences. Unfortunately our Major Hazard Installation regulations are vague and provide no guidance whatsoever as to methodology to be employed thereby allowing for such grossly different outcomes. Provincial authorities nevertheless approved the project and a favourable record of decision was granted by Sarah Allan of KZN DAEA.

In December 2001 an entirely different project, the Island View Health Risk Assessment, (a Metro Health project) noted the presence of a multitude of chemicals in the air of which 2 where identified as being at levels of concern to health authorities. These were benzene and acrylonitrile. Acrylonitrile was only stored by Vopak.[344] The original 1998 EIA had stated that predicted individual lung cancers associated with acrylonitrile emissions were predicted to exceed 1 in 10^{-6} on then baseline inventories. Post expansion however these cancer rates would decrease the downwind 10^{-6} distances to about 1km or more or less the same distance to the nearest home.[345] The December 2001 Durban Metro report prepared by the very same consultants to the EIA, now concluded an acrylonitrile cancer risk of 1.16 cases per 100,000. In other words an order of magnitude greater than the previous finding. The reason for the discrepancy has not been identified as stored volumes of the carcinogen have decreased rather than increased.

The same affected community were recently faced with yet another expansion to the very same storage site. This EIA (King Site expansion 2002) sought approval for

[344] Van Ommeren had since changed its name to Vopak in consequence of a merger with Pakhoed thereby creating what is reportedly the world's largest bulk chemical storage operator.
[345] A cancer risk of $1:10^6$ is usually considered acceptable by authorities in relation to industrial processes.

construction of an additional 4 tanks to contain various noxious and hazardous chemicals. This time SDCEA elected to participate in the EIA following the failure of the previous walk-out as a strategy. It also saw that this EIA represented an opportunity to uncover the real facts surrounding the hazards posed by this facility to the city of Durban. At some point in the EIA SDCEA requested sight of the full risk assessment for the facility. This was refused. SDCEA in response stated that it was within the community's constitutional rights to understand the risks involved and continued insisting it be allowed unfettered access to the information. The company in turn engaged the services of an environmental lawyer who, in a submission to DAEA, invoked the provisions of the apartheid era National Key Points Act. In sum it was alleged that the release of the risk assessment as envisaged under the provisions of the Major Hazard Installation Regulations could be prevented by the National Key Points Act and as the company facility fell within a National Key Point they were therefore prohibited from supplying the requested information. SDCEA was only provided with meaningless graphics and no hard data that they could themselves test as to its authenticity – a highly unsatisfactory outcome given the highly anomalous results of the previous modelling exercise. The ROD was duly issued by DAEA.

One development that was noticed during the course of this EIA was that some discussion had taken place between the consultant, developer and authority around the provision of a record of decision for the EIA *before* the risk assessment comment period of 60 days (in terms of MHI regulations) had run its course. The gist was that any delay in say distributing the RA for comment was not to be viewed as a material impediment to issuing the ROD. The reason for this strange request lies in the very

material change made to the MHI regulations since the appearance of the draft regulations on 28 July 1995.[346] The amendment altered the MHI regulations approval arrangement from a permission-based system to one of simple notice. The earlier regulation (R1097) stated in terms of Regulation 3(1) that:

'Every employer, *shall apply in writing* to the local authority and the regional director, *for permission* to erect any installation which will be a major hazard installation prior to commencement of erection thereof....'

The revised regulation in terms of R692 now reads :

Reg 3(1) 'every employer, self employed person and user *shall notify* the chief inspector, provincial director and relevant local government *in writing* of –

(a) the erection of any installation that will be a major hazard installation, prior to the commencement of erection thereof;'

What all this means is that the regulatory authority has been significantly and rather effectively disempowered in the sense that they no longer have the right to withhold consent. All that they can do is take cognisance of the new hazard. This change is evidence of the erosion of command and control-type approaches in favour of industry-led initiatives. Interestingly, industry abdicates all responsibility for their offsite consequences in terms of these regulations with the local authority bearing sole responsibility for off site problems.

[346] MHI regulation R1097 GG 166574 revised later in 1998 by regulations R692 GG 22506

This EIA is symptomatic of many performed in South Durban. Community is faced with a proliferation of dangerous processes and storage in their neighbourhood. No offsite disaster management plans or fence line emission monitoring are proposed, notwithstanding the hazard.. It is obvious that the level of concern evinced by community is irrelevant to the decision-making process no EIA having been refused a ROD specifically on grounds of SDCEA opposition.[347] Painfully obvious is the fact that the negative impacts such as cost of reduced mortality, health impacts and loss of amenities are not evaluated in assessing the supposed economic benefit of the project.[348] The EIA process itself is extremely partisan with the consultants defending their client in much the same way as an attorney would his client. The consultants involved invariably have an engineering background and a history of association with the industries for which the EIA is performed. There is also a distinct skewing of professional discipline towards the natural sciences with little or no emphasis being placed on professional analysis of social impacts leading to less than desirable outcomes.

The case study highlights the ease with which data can be manipulated in order to portray a result not likely to attract the interests of the regulator. So for example, if you have a problem with justifying increased hazardous rail or road traffic, simply divide the addition by the total vehicle movements at some busy intersection or rail yard – preferably miles away from the development. Likewise if you have a problem

[347] According to Sarah Allen (Senior KZN DAEA official) of the 3700 applications entertained only 1 was refused. (Q&A workshop held Durban Legal Resource Centre) See also Natal Mercury 4th December 2002.
[348] Ironically the project did not produce any new jobs rather it was posed as saving employees from retrenchment!

with blast over pressures or toxic end points in case of worst case scenarios then reverse engineer the results by limiting the quantities spilled – this isn't worst case, but then again who is going to challenge your methodology? A member of the BPRA once remarked that as far as the DAEA authority was concerned the development 'may just as well be taking place in the middle of the desert' inasmuch as it ignores the toxic reality of the surroundings and the social and environmental plight of the residents.[349] Concern has been raised that only lip service is given to the concept of 'sustainability' as it unfolds in South Durban and indeed it seems that sustainability is 'achieved' by the simple performance of the EIA itself.[350]

These concerns have led SDCEA to engage directly with provincial government on the issue of EIA's and to request that both Provincial and local government develop a EIA management system that addresses the following : (1) Mechanisms for Public participation (2) an acceptable number of EIA's presented to community for comment (3) definition of what EIA's are permissible given the current environmental conditions (4) that sustainable development balances the need for 'air space, land space and water space' (5) that developments are subject to zoning restrictions in accordance with acceptable buffer and spatial planning (6) that there is a strategic understanding of future land use in South Durban.[351] This last introduces the aspect of political intrigue and interference with the EIA process. The National priority for job creation and economic growth is used as a justification in virtually every EIA reviewed by SDCEA even though actual benefits to the receiving community are minimal or nil. It appears

[349] H Badstubner ex Chairman Bluff Peninsula Ratepayers Association - personal communication.
[350] This despite the detailed commentary and analysis available to the Durban Metro in the Hindson *et al* report on sustainable development – see especially Chapter 6 'Paths towards change.'

as if the City is prepared to sacrifice a tourist dominated labour intensive future for the interests of a capital intensive industrial chemical and petrochemical vision presumably as the latter option provides more in terms of revenues to national state than the former. Communities and the Courts must therefore guard against utilitarian decision-makers who continue to provide unqualified support for land use actions that result in the greatest aggregate of good regardless of impacts on the neighbouring environment.[352]

Thomas Beatley in *Ethical Land Use* notes that in terms of land use planning that some option allowing for reversibility of decision-making and backtracking should be incorporated into the decision-making model and the plans made so as to allow a future generation the opportunity to review the resource allocation decision.[353] Insofar as South Durban is concerned the element of review and the obligation to a future generation is not evident in the planning witnessed to date. Rather there is strong evidence of a single-minded focus on short term economic development serving narrow interests that may well lead to long-term impoverishment for future generations who have to live with the degradation arising from the chemical and oil industries. EIA's are increasingly perceived by communities as a rubber stamping exercise especially in the absence of an appropriate regional development plan coupled to clear environmental benchmarks upon which to adjudge the efficacy of each application. In the author's opinion, the City of Durban's economic planning,

[351] SDCEA Policy on EIA's published 02/05/2002 1.

[352] See John Rawls *A Theory of Justice* (1971) as recorded in T Beatley *Ethical land Use* 1994 67 where he argues that any departure from the institution of equal liberties cannot 'be justified by, or compensated for , by greater social and economic advantages.'

particularly in the overt support for a petrochemical cluster, falls clearly into the 'commodity trap' so typical of third world countries. Current planning decisions defer to the interests of the chemical and oil refinery industry with the community currently bearing the brunt of the offsite environmental cost. These costs are quite likely to increase as South Africa attains strategic economic dominance particularly in the refined fuels market where the indirect assistance from the World Bank's clean fuel programme could forseeably lead to new downstream supply contracts being signed with the sub–equatorial African region.

A suggested way forward is for organisations such as SDCEA to be allowed access to the development planning process and to input at that level and not to be limited to the project specific EIA level. A second suggestion is for EIA's to be grouped and to be presented *en masse* at one sitting of the environmental groups. This would cut down on endless meetings. A third device would be to insist that consultancies should employ personnel skilled in human sciences, be prepared to disclose prior dealings with the industrial proponent and on exit to provide facilities or resources that will demonstrably enrich the community structures. The regulatory authority should also be provided with mechanisms and tools to ensure that they give effect to the Section 2 principles of NEMA. In particular the requirements that people should be placed at the forefront of concern, that community knowledge and interests be recognised and that a risk averse approach be adopted, should be fundamental to any decision making process. It should also be incumbent upon the consultants to ensure that these

[353] Beatley op cit 142-143. He does note that the reviewability should be indexed to a reasonable time horizon of say 50 or 100 years. In South Durban the few remaining wetlands in the vicinity of the airport are all earmarked for 'development' and the open space and inherent value of these places will be lost to future generations.

concerns and interests are uncovered and included in the report to the competent authority. Finally, the centralising of the decision-making process at provincial level often means that the decision maker has little real idea of the local situation and concern. It is recommended that the official should ensure that he/she is properly acquainted with the community position, historical relationships, environmental conditions and physical location of the development in order to more properly be able to assess the application. This requires far more interaction with grass roots structures than is currently the case which incidentally is rapidly developing into a checkbox exercise allowing decisions to be made on the basis of an application form and a checklist.[354] While this approach may be acceptable for innocuous, minimal impact developments they are certainly not acceptable for those likely to impact upon communities and the environment. Clearly in this arrangement the information provided by the consultant is the key determinant as to whether the development will either be approved *ab initio* or required to undergo a full blown EIA. This raises the question of the interest being presented in EIA consultations. The developer clearly wants the EIA approved in as fast a time as possible and the consultant wants to be paid and to secure and turn over as much business as possible. All this is couched in gushy eco-speak language but it essentially boils down to this: the consultant desires a result that will endear him/her to those who pay for the service. Community on the other hand does not pay. The end result for the impacted community is to witness the EIA consultant evolve his/her manner so as to be indistinguishable from the client 's interest. This evolution places the environmental consultant in a position not that dissimilar to that of the lawyer representing his client. No-one wants to lose. In such

[354] Western Cape Province EIA Guideline series EIA Application Form and Checklist May 2001 3.

instances sub optimal outcomes are possible for environmental justice, project objectivity and consultant independence.

One solution is to create the post of an independent ombudsman such as is found in the financial services industry and to whom appeals and concerns could be lodged without recourse to the courts. Another is to provide for the payment of consultants from a separate fund to which the developer and/or government contributes.[355]

[355] Fees could be levied by Provincial authority on all applications and then pooled for purposes of paying the environmental consultants.

7. CONCLUSION

'The future cannot be predicted, but futures can be invented.'[356]

The primary aim of this paper has been to introduce the reader to the world of the environmental organisation and to demonstrate by way of a local South African organisation how it is possible for the CBO and NGO to influence the development of legal, political and technical mechanisms and thereby positively contribute towards achieving true sustainability of South Africa's people and natural processes. But in order to accurately assess sustainability there must be some identification of where the problem originates, for to continually treat the effect and not the cause will never result in a cure. To this end it has been necessary to understand the implications of rampant consumerism and of a world that has lost touch with itself and its surroundings. Acknowledging the inter-relatedness and fragility of the ecosphere is the first step to designing alternatives that more adequately distribute the world's wealth and debt in both material and biological terms. Balancing conservation with utilisation of a finite global resource is no easy affair given the dictates of a free market system. Dedicated to effecting change are environmental groups working from both within (such as those dealing with the physical externalities of free enterprise) and those who work without (such as those pursuing deep ecology and anti-consumerist objectives). The goal is nonetheless the same – to preserve what is left of the world's environmental capital and to ensure that we live only on its income.

[356] Dennis Gabor – an engineer philosopher as found in G Hardin's work op cit.

Pursuing the goal in South African terms are a number of CBO and NGO groups who are pursuing the same quest – the quest to change lives and environments for the better. In a lot of respects they are coming off a far weaker base than Northern counterparts. Years of apartheid rule has left a filthy legacy of polluting industries abutting marginalized communities. The previous regime designed a structurally weak environmental legal mechanism that placed the concerns of business at the forefront of its concern. The involvement of the NGO and CBO sector in initiatives such as CONNEPP created for a time a sense of shared responsibility and 'buy in' from those usually seen lobbying on the fringe. The end product, whilst in some respects laudable, does nonetheless occasion concern for it indicates the hijacking of the consensual and participative relationship by powerful elements unseen. This has occasioned calls for the legal machinations to be redefined and to be more transparent when it comes to legislative enactment. Hand in hand with these calls is the overriding requirement for greater involvement of non-industry stakeholders groups in environmental governance thereby providing greater legitimacy and acceptance by society as a whole. Involvement of civil society in monitoring, assessment, auditing and indicator design will provide access to environmental information and increase the overall effectiveness of those tasked with regulatory functions.

The primary catalyst for change continues to be the activities of the environmental CBO and NGO. They do this in a variety of ways, with lobbying, negotiation and legal precedent being some of the mechanisms available. Real change however is not measurable in the mere publication of environmental policy or in the promulgation of new standards. Real change it is submitted, is measured at the coal face and is bottom

up. Progress can be measured in changing attitudes and the degree to which the public embrace the notion of environmental concern. It is, however, less a product of experience and more a consequence of education. Delivering on this aspect is perhaps the environmental CBO and NGO's greatest strength and task. Uncovering information and delivering this information to the masses in an understandable form encourages constructive debate, develops capacity and allows for more informed inputs to participative forums. Assisting the environmental group is the Constitution and a series of Acts it has recently spawned. Of these, the Promotion of Administrative Justice Act and the Access to Information Act are likely to assume significance in the quest for information and official accountability. Some of the provisions of these last named Acts have already been put to the legal test following the provincial environmental minister's refusal to (a) allow a right of reply and (b) access to documents. More lamentable was an earlier case where an award of costs was made against a community structure following the denial of an interdict. This unfortunate disregard for the provisions of the National Environmental Management Act does not set a particularly inspiring precedent for the embattled community.

In international terms the 'hard law' approach used by communities appears to garner political credibility as being a useful by-product of environmental law suits which is extremely important when you don't have economic power. 'Soft law' approaches such as that found in good neighbour agreements, permit setting and other co-operative arrangements are more likely to be effective where there is an existing atmosphere of compliance and where the community is adequately capacitated. These agreements and arrangements inform policy and attitudes and in this way are

incalculably important in informing the direction that our environmental law will take. South Durban NGO's are unanimous in the demand for an empowering legal environment, (for regulator and community alike), with strict liability for specific environmental offences and aggressive fines linked to corporate earnings. It is suggested that the manner in which these laws are formulated should be reviewed so as to allow for greater public access in the pre-formulation phase so as to ensure greater acceptance and to prevent last minute hijacking of Bills. The judiciary could also consider allowing the entry of expert environmental assessors in environmental cases. Alternatively, specialised international NGO's could be brought in to prepare educational environmental law programmes for the judicial officer and prosecutor.

Other learning's uncovered during the course of this paper reflect upon the nature of the organisational structure itself. The formulation of the South Durban Environmental Alliance and the success it has thus far achieved demonstrates what is possible in this new rainbow nation. It is possible to cross the racial and cultural divide and to achieve consensus on issues and it is possible for a CBO to take these concerns to the heart of government itself. SDCEA has shown that armed with little else besides determination and public support, goals unthinkable a few years ago, are indeed achievable. In sum the ecological democratisation of Durban South has resulted in a powerful and astute agency for pursuing injustice and demanding change and is a worthwhile model for other impacted and polluted areas. For success, however, SDCEA must be able to work with, and alongside, an effective and capacitated regulatory authority which has at its disposal regulatory devices ranging from sanction to voluntary instruments. Strategies and tools for compliance must be premised on (a)

promoting pollution prevention and ecological degradation at source and (b) in clean technology. Authority must, however, develop co-operative mechanisms that will provide for the improved participation of civic structures and incorporation of their special skills and knowledge in the decision making process. This is particularly important when making planning and development decisions. Planning authorities who overlook or do not provide adequate weighting to the social impact of a project and who do not look to redistributive objectives in ameliorating adverse impacts will likely fall foul of the principles of the NEMA and render the project incapable of attaining an unsustainable outcome.[357] The environmental group's primary strength lies in its versatility and neutrality with respect to political imperatives. Consequently the NGO and CBO groups are wary of being co-opted into multi-stakeholder systems if that means they are to be muzzled by the participatory process. The watch-dog must be allowed to bark, and so unconventional initiatives such as protest action, lobbying, pickets and legal action will continue to be an important component of the environmental movement. The environmental movement is entering a new phase, a new paradigm, where success will be measured in health, happiness and diversity and not rands and cents. To a new beginning.

[357] This approach has elsewhere been described as 'compensatory equality' and approach that should arguably be adopted in South Durban. See T Beatley op cit 89 –92.

8. TABLE OF CASES

Director, Mineral Development, Gauteng region and Another v Save the Vaal Environment and others 1999(2) SA 709 (SCA).

Wildlife Society and Others v Min. of Environmental Affairs and Tourism of the Republic of South Africa and Others 1996(9) BCLR 1221 (Tk)

Van Moltke v. Costa Aerosa 1975 (1) SA 255 CPD

MEAC vs Executive Member Of KZN Council for Agricultural and Environmental Affairs and others Case no. 2691/01 D&C LD

Brits Town Council v Pienaar NO and Another 1949(1) SA 1004 (T)

United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993)

United States v. Hopkins, 53 F.3d 533 (2nd Cir. 1995)

United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999)

9. TABLE OF STATUTES

Minerals Act, Act 50 of 1991

Constitution of South Africa, Act 108 of 1996

Environment Conservation Act, Act 73 of 1989

The Water Act, Act 54 of 1956

Occupational Health & Safety Act, Act 85 of 1993

National Environmental Management Act, Act 107 of 1998

Local Government Transition Second Amendment Act, Act 97 of 1996

National Key Points Act, Act 102 of 1982

Marine Living Resources Act, Act 18 of 1998

National Forest Act, Act 84 of 1998

National Water Act, Act 36 of 1998

Promotion of Administrative Justice Act, Act 3 of 2000

Protection of Information Act, Act 84 of 1982

Access to Information Act 2 of 2000

10. BIBLIOGRAPHY

BEATLEY T	ETHICAL LAND USE John Hopkins University Press 1994
BERKES F	COMMON PROPERTY RESOURCES : Ecology and Community based Sustainable Development Belhaven Press 1989
BERNSTEIN J D	ALTERNATIVE APPROACHES TO POLLUTION CONTROL AND WASTE MANAGEMENT : REGULATORY AND ECONOMIC INSTRUMENTS Urban Development Division World Bank Discussion Paper (undated)
BEVERIDGE AND DIAMOND P.C.	STEPS TOWARDS ENVIRONMENTAL PROTECTION IN SOUTH AFRICA Paper presented by Paul Hagen, Durban April 8 1997.
BORELLI P	CROSSROADS : ENVIRONMENTAL PRIORITIES FOR THE FUTURE
BOYLE A & ANDERSON M	HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION Clarendon Press Oxford 1996
CASTELLS M	THE CITY AND THE GRASSROOTS Edward Arnold Publishers 1983
CASTELLS M	THE POWER OF IDENTITY Blackwell Massachusetts 2000
CHURCH T & NAKAMURA R	CLEANING UP THE MESS : Implementation Strategies in Superfund Brookings Institution 1993.

CLARKE J	BACK TO THE EARTH : South Africa's Environmental Challenges Southern Book Publishers 1991
DURNING A	HOW MUCH IS ENOUGH? : THE CONSUMER SOCIETY AND THE FUTURE OF THE EARTH World Watch Environmental Alert Series 1992
DURNING A	APARTHEID'S ENVIRONMENTAL TOLL Worldwatch Paper 95 1990
FUGGLE R F & RABIE MA	ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA Juta & Co Ltd 1992
FUGGLE R F & RABIE MA	ENVIRONMENTAL CONCERNS IN SOUTH AFRICA Juta & Co Ltd 1983
HALLOWES D	HIDDEN FACES : Environment, Development, Justice: South Africa and the Global Context Natal Witness Printers 1993
GARBUTT J	ENVIRONMENTAL LAW :A PRACTICAL HANDBOOK Wiley Chancery 1995
LAFFERTY W & MEADOWCROFT J	DEMOCRACY AND THE ENVIRONMENT Edward Elgar Publishing Ltd 1996
LOMAS O	FRONTIERS OF ENVIRONMENTAL LAW Chancery Law Publishing Ltd 1992.
LOWE P & GOYDER J	ENVIRONMENTAL GROUPS IN POLITICS – (Resource Management Series; 6) George Allen & Unwin Ltd 1983

O'CONNOR R & HALLOWES D	GROUND-ZERO IN THE CARBON ECONOMY:- PEOPLE ON THE PETROCHEMICAL FENCE-LINE – Groundwork WSSD Booklet 5 2002
O'RIORDAN T	ENVIRONMENTALISM Pion Limited 1981
PEARSON C	MULTINATIONAL CORPORATIONS, ENVIRONMENT AND THE THIRD WORLD World Resources Institute Duke University Press 1987
ROBINSON D & DUNKLEY J	PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW Wiley Chancery 1995
SACHS A	PROTECTING HUMANRIGHTS IN A NEW SOUTH AFRICA Oxford University Press 1990
SCHUMACHER EF	SMALL IS BEAUTIFUL :Economics if People Mattered Perennial Library Harper & Row New York 1975

REPORTS AND POLICY DOCUMENTS

- South African National Country Profile Report (Commission on Sustainable Development) April 1998.
- Strategic Environmental Reports : South Durban Draft Report 2 - Social Assessment of Southern Durban (Scott & Ridsdale) June 1997.

  Draft Report 1 –Economic Assessment of Southern Durban
- South Durban Community Environmental Alliance Position Paper June 1998
- 'Environmental Management Co-operation Agreements A soft tool at the cutting edge of pollution control in South Africa' Groundwork document (C Albertyn and J Hall) August 2000.
- Integrated Pollution and Waste Management Discussion Document (DEAT/DWAF) May 1997
- Siyakhana & Ridl-Glavovic Review of Legal, Policy and Institutional Systems in the Durban Metropolitan Authority
- Global Warming – A Greenpeace Brief (ed. J Leggett) undated.
- D Wiley, C Root, S Peek & S Ramurath *Report on the State of the Environment and Development in the Durban Metropolitan Area* 1996
- Agenda 21 – An Agenda for Sustainable Development into the 21st Century (DEAT) May 1998.
- Coastal policy Green paper (DEAT) September 1998.
- Jeremy Wates (European Environmental Bureau) paper entitled 'Towards an ECE Convention on Access to Environmental Information and Public Participation in Environmental Decision making.' Undated.
- CONNEPP II Conference Proceedings (DEAT) 24/25th January 1997.

- South Durban : Report on the State of the Environment and Development in the Durban Metropolitan Area (Wiley et al) August 1996.
- A National Strategy for Integrated Environmental Management in South Africa –Discussion Document (DEAT : Heydenrych & Claasen) April 1998.
- Charter on Industrial Hazards and Human Rights : Permanent Peoples' Tribunal 1996.
- Western Cape Province EIA Guideline series EIA Application Form and Checklist May 2001
- Hindson D, King N& Peart R 'Durban's Tomorrow Today : Sustainable Development in the Durban Metropolitan Area' Indicator Press 1996
- The Monitor Group Report entitled 'Durban at the Crossroads' December 2000
- Hardin G talk entitled 'An Ecolate View of the Human Predicament' later developed into Hardin's book *Filters Against Folly* 1985
- South African Journal of Environmental Law and Policy Volume 6 Number 1 May 1999