The National Environmental Management Act 107 of 1998 (‘NEMA’) states its object immediately as being, inter alia, to ‘provide for cooperative environmental governance by establishing principles for decision-making on matters affecting the environment’.¹ This is an ambitious aim. Fuggle and Rabie state that ‘[t]here never has been, nor is there likely to be, a single statutory instrument which comprehensively codifies environmental law. It is doubtful whether such an instrument is even feasible’.²

The Preamble gives an immediate nod to the history of inadequate access to environmental resources in South Africa (by reference to ‘previously disadvantaged communities’)³ and seemingly acknowledges that such people are currently suffering the infringement of their constitutional environmental right: ‘[M]any inhabitants of South Africa live in an environmental that is harmful to their health and well-being ... everyone has the right to an environment that is not harmful to his or her health or well-being’.⁴

Cheryl Loots has pointed out that s 24(a) of the Constitution has probably been framed in the negative so as to prevent the state from being burdened with a positive obligation to create conditions that are ‘not harmful’.⁵ She argues that the intention seems to be to do something toward this only if something new happens which creates a situation that is ‘harmful’.⁶ This interpretation seems borne out in the Preamble to NEMA by the use of words like ‘respect, protect, promote and fulfill’ and ‘strive’.⁷ Loots has for this reason commented that s 24(a) should be a

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¹ NEMA Long Title.
³ See below, n7.
⁴ Ibid.
⁵ Cheryl Loots ‘The impact of the Constitution on environmental law’ (1997) 4 SAJELP 57 at 58.
⁶ Ibid.
⁷ ‘The State must respect, protect, promote and fulfill the social, economic and
potent weapon against pollution, but not of much assistance to conservation.8

The concept of sustainable development is brought in directly, its applicability and relevance taken for granted. ‘Sustainable development requires’ reads the Preamble, listing factors that need to be integrated in environmental management.9 This is important as it links South Africa’s environmental policy firmly to the United Nations Conference on Environment and Development (Rio 1992) plan for sustainable development on a global scale, Agenda 21. The Act is thus bolstered by the weight of international environmental norms.

‘[A]ll spheres of government and all organs of state,’ runs the Preamble, ‘must cooperate with, consult and support each other’.10 The intention is therefore present to remedy the criticism often levelled at environmental legislation to date, that of fragmentation of legislation with responsibility for administering environmental law being distributed amongst various government organs.11

The Draft White Paper on Integrated Pollution and Waste Management currently defines waste to exclude certain (significant) types of waste,12 possibly a reflection of the ‘possessive nature’ of the various government bodies controlling various types of waste.13 This can be seen as undermining the principle of unity in current government thinking.

It is also not clear from the preamble what is meant by ‘consult’. Under the Act’s predecessor, the Environment Conservation Act 73 of 1989, the Minister of Environmental Affairs was required to obtain the concurrence of other Ministers before coordinating environmental activities of

environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities’ (emphasis added).

8 Loots op cit n5 at 58.

9 These factors being ‘the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations’.

10 This section of the Preamble also provides that ‘the environment is a functional area of concurrent national and provincial competence’.


Focus on NEMA

governmental bodies. This was due to the old constitutional dispensation, which held that one governmental department could not overrule another. This led former Minister of Environmental Affairs Gert Kotze to comment that, “I am the Minister of Damn all!” NEMA, on the other hand, as will be seen, contains measures for consultation and arbitration which bode well for effective co-operation of departments.

In Chapter 1, the Act can be viewed as being anthropocentric: ‘Environmental management must place people and their needs at the forefront of its concern’. The criticism can therefore be made that the Act has not gone as far as it might have, in that recognition might have been given to the environment itself’s need to have some degree of inherent legal right to be protected. Later in the Act there is, however, a hint that such recognition might be accorded the environment by a court of law.

In any case, that is something that perhaps still needs further thought and for the moment we should rely on a firm commitment to sustainable development to protect the environment. The commitment to sustainable development in the Act certainly appears to be a serious one. In s2(4)(a)-(r), elements required for sustainable development are cited for consideration. These include principles such as the ‘hierarchy of waste’; the ‘precautionary principle’; the ‘cradle-to-grave principle’ and the ‘polluter pays principle’.

In s 2(4)(a)(vi) it is stated that the use and exploitation of renewable resources should ‘not exceed the level beyond which their integrity is jeopardised’. No definition of ‘jeopardised’ is given, which could be a problem. However, in the context of sustainable development this presumably cannot mean anything even approaching non-recovery.

Chapter 2 provides for extensive public participation in environmental decision-making and the implementation of sustainable development. Provision is made for the involvement of non-governmental and

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14 Fuggle and Rabie op cit n2 at 102.
15 Ibid.
17 Chapter 4.
18 Section 2(2).
19 Section 32(1)(e) and s 33(1)(b).
20 Section 2(4)(a)(iv).
21 Section 2(4)(a)(vii).
22 Section 2(4)(e).
23 Section 2(4)(p).
community based organisations, a significant advance on the Environment Conservation Act 73 of 1989 which provided only for public comment on programmes without explicitly obliging the Minister to consider such comments in reaching a decision.

The word ‘stakeholders’ is used several times and is not defined. This seems vague, but that is not necessarily a bad thing. It may be that even a minor interest affected by the application of the principles of sustainable development may entitle the consideration of interests.

Also of interest in Chapter 2 is the fact that the Committee for Environmental Co-ordination is to be chaired by the Director-General of the Department of Environmental Affairs and Tourism. This reflects the increasing importance in government thinking of this department, which only a few years ago was an ineffective department working with an Act (73 of 1989) that Jan Glazewski described as a ‘gun without bullets’.

In Chapter 3 it is made compulsory that each (listed) national department prepare an environmental implementation plan within a year of the Act’s promulgation — and again at four yearly intervals thereafter. There is some potential for conflict in that, before submitting such a plan, the department must take into consideration every other plan already adopted. This gives the first department to submit its plan a virtual free hand. It is hoped, though, that the Act’s conciliation procedures will prevent conflict arising.

These submitted management plans are of great importance in that, according to s 16, every organ of state must exercise its functions, which may significantly affect the environment, substantially in accordance with the plan. Such compliance is monitored by the Director-General of the

24 Section 4(3)(a).
26 Ibid.
27 Section 3(2)(a) and s 4(2).
28 Section 8(1)(a).
29 Clarke op cit n16 at 137.
30 Section 11(1)-(3).
31 Section 11(4).
32 Chapter 4.
33 Section 11(3).
34 Section 16(2).
Department of Environmental Affairs and Tourism.  
Fuggle and Rabie write that '[o]ur law, by and large, has failed to oblige administrative bodies to consider the environmental implications of their action; worse, it has in most cases failed even to authorise them to do so'. The new Act is thus an important step forward.

Chapter 4 provides for investigation, conciliation and arbitration procedures. These are not limited to the use of state officials only and can be seen as another major step beyond the Environment Conservation Act 73 of 1989, which provided for 'in-house' appeals only.

Chapter 5 introduces formally into law the concept of integrated environmental management. Before the Act was promulgated, Michael Kidd wrote: '[The fragmented approach [to administration of environmental law] discourages consideration of the environment as a whole ... a holistic viewpoint would recognise the interrelated nature of the environment and its problems. A national environmental policy which guides the way organs of state carry out their duties may address these problems'. Kidd then lamented the fact that the Environment Conservation Act 73 of 1989 provided for this, but that 'at present no effort is being made to implement such'.

The new Act, however, has now not only provided the 'holistic national environmental policy', but has also made its implementation compulsory. Fuggle and Rabie describe the autonomy of government departments, under the old Act, as having brought about 'a situation in which administrative bodies responsible for the making of policy decisions have become institutionally separated from those having to attend to the effects of such decisions'. This, it is hoped, will be a situation of the past.

Chapter 6 empowers the Minister to make recommendations to Cabinet and Parliament concerning international environmental instruments. Section 26 contains the only explicit reference in the Act to Agenda 21 (apart from the Preamble), but the spirit of sustainable development permeates the entire Act. The government’s commitment to Agenda 21 is

35 Section 1(ix).
36 Fuggle and Rabie op cit n2 at 105.
37 Glavovic op cit n25 at 112.
38 Section 23(1).
40 Kidd op cit n1 at 169.
41 Fuggle and Rabie op cit n2 at 101.
42 Section 25(1).
43 Section 26(2).
Importantly, the Minister is required to initiate the compiling of an annual report on the state of sustainable development to ensure that the government remains committed thereto.

Chapter 7 sees a duty of care laid squarely to rest on those who cause environmental damage, with the allied duty to make reparations. Extensive measures are then set out concerning liability for damage and the costs to be recovered.

An interesting section is s 29, which gives workers authority to defy employers without fear of punishment, should such workers be asked to perform a task that is potentially environmentally hazardous. This can be allied to s 31, which is entitled 'protection of whistle-blowers'. A certain lack of trust toward industry and company owners by the drafters of the Act seems indicated.

This could be of concern as Chapter 8 concerns environmental management co-operation agreements. Recently, Pallo Jordan, current Minister of Environmental Affairs and Tourism, went on record as saying that his department would not support voluntary initiatives, based on the lack of trust between industry and other stakeholders.

All in all, though, s 29 must be seen as an interesting adjustment of workers' rights — and an attempt by the drafters of the Act to effect a sea-change in the environmental awareness of South African citizens. No sanction is provided for contravention of the section, though, and it should perhaps be seen more as a guiding principle for the courts to follow in regard to labour disputes.

Sections 32 and 33 go a long way toward making explicit the rights conferred on citizens by s 38 of the Constitution, introducing the 'class action' into our law and abolishing the common law requirement of locus standi to litigate. The Act even contains marked encouragement of litigation in environmental matters, in that it is suggested that courts not award costs against an unsuccessful, but reasonable, litigant.

These sections are interesting in a further respect. As mentioned earlier

44 Section 26(2)(a).
45 Ibid.
46 Section 28(1).
47 Section 29(1).
48 Section 31.
49 Section 35(1).
51 Section 32(2).
in this essay, the Act has an ‘anthropocentric’ bias. Yet in s 32(1)(e), the words ‘in the interest of protecting the environment’ appear. The same phrase is used in s 33(1)(b). Here we come closer than ever before to what Christopher Stone has called ‘thinking the unthinkable’, and conferring on the inanimate environment legal standing in its own right.

In terms of the Environment Conservation Act 73 of 1989, landowners and holders of other real rights in land had a right to recover compensation (for limitations on their rights) but only in respect of actual loss suffered. Chapter 9 of the new Act provides that such people must be given ‘a hearing’ before expropriation occurs, and iterates that s 25(3) of the Constitution is applicable. As the Constitutional Court has not yet interpreted s 25(3) fully, we are necessarily in the dark as to the complete implications of Chapter 9.

Fuggle and Rabie write that the Environment Conservation Act 73 of 1989 ‘should be welcomed as an important legislative milestone in the development of South African environmental law’. But they caution that it ‘cannot be regarded as a codification of South African environmental legislation’. They go on to quote Cowen as saying that ‘unless distinctive legal criteria can be established which characterise environmental law, the subject will continue to lack coherence and logical structure’.

It may now be, however, that, with the promulgation of the National Environmental Management Act 107 of 1998, South African environmental legislation can be said to have moved closer to codification. Distinctive legal criteria can be seen to have been established and the field of environmental law may now evince both coherence and logical structure. And the Act may prove to be close to the ‘infeasible document’ of which Fuggle and Rabie were sceptical.

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52 Section 2(2) - see n18.
54 Stone op cit n53 at 12.
55 Fuggle and Rabie op cit n2 at 17.
56 Section 36(3).
57 Ibid.
58 Fuggle and Rabie op cit n2 at 118.
59 Ibid.
60 Ibid.
61 Fuggle and Rabie op cit n2 at 99. See n2.