Balancing the economic and environmental impacts

Mining activities are placing increasing strain on the natural environment, creating a situation calling for better regulation of environmental impacts, writes the Legal Assistance Centre's WILLEM ODENDAAL

Namibia's legislative framework provides for a number of environmental safeguards for prospecting and mining. For example, there are Constitutional provisions ensuring the sanctity of the natural environment (95(l)), mechanisms by which the government can investigate misuse of resources (91(c)) and mechanisms for the enforcement of sound management policy.

The Constitution entitles an aggrieved stakeholder to seek administrative justice in the event the Government makes a decision that has an adverse impact on his or her substantive rights.

Thus, the Constitution establishes that when the Government acts, it does so on behalf of the people, and that it should act with an effort to ensure both the rule of law and justice for each person. Moreover, Article 18 of the Constitution requires a fair, direct process for persons to challenge administrative action.

In addition, Article 91 of the Constitution empowers individuals to monitor the treatment of the environment and to help ensure its continued vitality. While the Constitution emphasises the need for sustainable development and human rights, Government is still required to make laws that are specific and enforceable. Since independence the Namibian Government has enacted a number of laws and policies intended to protect fragile ecosystems, manage mining operations, and ensure that all commercial development projects eliminate or, at the very least, mitigate adverse impacts on the environment, people and wildlife. These laws establish clear mandates in some cases, but not in others. Consequently, many gaps remain in the enforceable regulatory structure.

For example, parks are established under the pre-independence Nature Conservation Ordinance of 1975 for the purposes of conservation and tourism by the Ministry of Environment and Tourism (MET), yet the post-independence Policy on Mining in Protected Areas allows prospecting and mining in protected areas under certain circumstances, which undermines conservation and tourism objectives and policies. Also, article 95(l) of the Constitution requires management for sustainability, yet the Directorate of Water Affairs (DWA) gives permits for groundwater abstraction without knowing, for example, the sustainable yield of the aquifer, because the Water Act of 1956 does not make provision for this.

Major inconsistency

A major contributing factor to the inconsistency and conflict between different sectoral laws is arguably the fact that some laws are outdated and ignore the realities of the physical resources and socio-economic circumstances of modern-day Namibia. For example, the Water Act of 1956, ignores the hydrological reality of Namibia and fails to account for the natural environment's new status under the Namibian Constitution since it does not recognise the natural environment as a user of water nor as a provider of essential processes and services. Thus it cannot deal effectively with the challenges that a growing mining sector places on scarce water resources. On the other hand, the Water Resources Management Act which was passed in 2004, from a sustainable water management perspective, could deal with these challenges

more effectively, but the Act is not yet enforced, due to lack of personnel capacity to do so.

As a result, Namibia continues to rely on outdated and ineffective legislation that is inconsistent with the provisions of article 95(l) of the Namibian Constitution.

Further problems with Namibia's regulation of mining include overlapping jurisdiction between ministries, a lack of legal authority for the MET's role in the licensing process and a lack of transparency in the award of Exclusive Prospecting Licences (EPLs) and Mining Licences (MLs).

While mining has historically been under the authority of the Ministry of Mines and Energy (MME), acting as both a licensing authority and environmental regulator, the task of ensuring proper environmental management also falls within the mandate of the MET. The MET and the directorates under its auspices are also charged with monitoring the environmental assessment process in mining license applications.

Not surprisingly, institutional conflicts between the two agencies have arisen frequently, especially in the context of mining in protected areas. The various policies enacted by the ministries were supposed to remedy some of these conflicts, but since these policies are not legally binding, they have had little effect on overlapping jurisdictions and competing regulatory activities. As noted in the 2004 Minerals Policy:

"There is little effective environmental management within the Namibian mining industry. This is the result of inadequate co-ordination between the MME and the MET in relation to environmental legislation; a lack of public awareness, capacity weaknesses and education programs focused on environmental issues; the absence of an environmental budget, and the public antagonism towards mining activities because of its negative effects on the environment. The problem is compounded by the fragmentation of environmental capacity throughout the various Government Ministries."

In addition, the Minerals Act of 1992 does not provide for transparency in the mineral licensing process. To the contrary, the Act contains specific language that discourages it. Section 6 calls for the preservation of secrecy by the MME of all matters pertaining to compliance with the provisions of the Minerals Act. This provision protects the mining companies and inhibits public awareness and participation in decision-making relating to prospecting and mining operations. Through the MET, however, the public can gain access to some records, including those of a company's EIA/EMP compliance, environmental clearance status and biannual reports.

Finally, the Minerals Act currently only requires information on the previous convictions of individuals applying for NEPLs and Mining Claims; corporations are entirely exempt from any background checks. This could possibly create an incentive for companies with histories of poor environmental performance to seek licenses in Namibia where their records will not be subject to public scrutiny. In this way, the Minerals Act seems to create a perverse incentive for the country: it attracts precisely the type of unprincipled companies that the country should be avoiding due to the unnecessary risks to the environment that such companies might present.

To address this lack of transparency and the existing institutional tensions, efforts have been made to rationalise the licensing and regulatory system, clarify roles, and fill policy and enforcement gaps.

Slow response

In 2007, the Government passed the Environmental Management Act (EMA), which creates the position of the Environmental Commissioner responsible for monitoring and coordinating environmental assessments processes, maintaining a register of environmental assessment plans, providing public notification, ensuring the availability of any EIAs submitted in relation to prospecting and mining licenses, and conducting inspections to monitor compliance.

Although the EMA is a step in the right direction to address some of the gaps in protecting the environment, it is crippled by the fact that the Namibian Government, more than four years after having passed the EMA, is still grappling with establishing the regulatory agency and only recently appointed an Environmental Commissioner.

In such uncertain circumstances, the results are a prospecting and mining process that is slow, inefficient, and occasionally tainted by corruption. These flaws leave the door open to environmental abuse, and at the same time discourage responsible investment. Well-intentioned companies shy away from the unclear, slow regulatory process, and instead invest in projects in other countries in the region. Consequently, the poor regulatory structure and enforcement problems deprive Namibia of both environmental protection and investment.

In summary, while at least on paper Namibia has reasonably good environmental legislation, the existing framework does not adequately protect the environment from abuse by some mining companies. It is therefore essential that corporate responsibility programmes and environmental management plans are implemented by all companies to ensure a high degree of environmental awareness and best practice management. In addition, it is recommended that the EMA is amended to include:

- A provision that defines EIA circumvention as a form of corruption punishable by criminal law;
- A clause that requires the development of an Environmental Management Plan (EMP), which should be developed from the findings of the EIA;
- Regulations that ensure that all life cycle costs are identified in the EIA report, including the cost of reclamation, closure, re-contouring, land stabilisation, post-closure monitoring and maintenance. In other words, mine sites should be rehabilitated to their natural or pre-determined states or to a generally accepted level for future use of the area;
- A minimum set of standards for an EIA, so that both process and content are of an acceptable quality, and the information presented is accurate, reliable and useful;
- The review of the structure of Records of Decision (ROD) should to include much more precise and detailed information, specifically with respect to: the criteria used in making the decision; reasons for arriving at a decision; transfer of rights and obligations if there is a change of ownership of the project or property; and specific conditions to protect the environment;
- A mechanism for the establishment and governance of a rehabilitation and restoration fund that will enable proper management of project closure; and
- Mechanisms for public or civil society involvement in monitoring of projects, whether in parks or elsewhere, so that vigilance is enhanced and broad based.

Equally important is that the Minerals Act 1992 is amended to require of mining licence applicants to make adequate and sufficiently liquid financial provisions for the costs of mine closure, including reclamation, long-term monitoring, and maintenance. Also, the Act must require MME to conduct background checks on corporations as well as individuals to look for history of prior environmental violations or other illegal practices. The Act must clearly establish the legal criteria applicable to proposals for mining within parks. At present, mining projects proposed for parks are treated the same as any other proposal.

Finally, in order to increase enforcement and proper implementation of current law, the fees due for all permits and applications should be reviewed. At present both are insubstantial and not effectively collected by the reviewing body, which leads to a general non-payment of fees.There is also a need to improve the way that the DEA sets conditions that proponents must adhere to when they are authorised to proceed with their project. Currently, many RODs are vague and very short on detail.

With an Environmental Commissioner having been appointed to enforce the EMA, he/she will have to make certain that regular inspections are undertaken of projects in the field. But perhaps more importantly, the Commissioner will have to ensure quality control in the EIA guide and review process by screening unethical or unqualified EIA consultants out of the system. This could be achieved by using independent experts (e.g. consultants or NGOs) to help with assessments, inspections, and audits to remedy any lack of technical expertise among ministry staff.