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Environmental Assessments in Namibia

Article 95(l) of Namibian Constitution is the focal point for the protection of Namibia's environment. It declares that the Government will take steps to maintain Namibia's ecosystems, essential ecological processes and biological diversity. It also says that the Government will try to make sure that all of the nation's living natural resources are used on a sustainable basis for the benefit of all Namibians, both present and future generations.

Article 95(l) falls under a section in the Namibian Constitution that deals with principles of state policy. While these principles cannot be enforced by the courts in the same way as other sections of the Constitution, they are intended to guide the Government in making laws which can be enforced. In this regard, the Environmental Management Act 7 of 2007 (EMA) provides the required legislative foundation for environmental protection in Namibia.

Against this background, let us consider what an environmental assessment is, when it is required and how it fulfils the Namibian Government's Constitutional obligations towards the protection of the environment.

The EMA provides the legal requirements for environmental assessments. The Act defines environmental assessment as the process of identifying, predicting and evaluating the effects of proposed activities on the environment. An environmental assessment should include information about the risks and consequences of activities, possible alternatives, and steps which can be taken to lower any negative impacts on the environment.

The assessment should also consider steps to increase positive impacts on the environment that promote compliance with the principles of environmental management. These principles include, amongst others, using renewable resources on a sustainable basis, promoting community involvement in the management of natural resources, promoting public participation in decisions affecting the environment and taking precautionary measures to prevent environmental damage.

Anybody planning an activity can be required to carry out environmental assessments, including the Government and private companies. The EMA provides for the appointment of an Environmental Commissioner (EC) who decides when environmental assessments are required and reviews environmental assessment reports.

The EMA stipulates that no one can carry out a listed activity without an environmental clearance certificate. The certificate indicates that the Ministry of Environment, Forestry and Tourism (MEFT) is satisfied that the activity in question will not have an overly negative impact on the environment. The

certificate may set certain conditions for the activity, to prevent or to minimise harmful impacts on the environment.

In terms of Government Notice 29 of 6 February 2012, activities that may not be undertaken without an environmental clearance certificate include constructing facilities for energy generation, waste management activities, mining and quarrying activities, forestry activities, land use and development activities, tourism development activities, agricultural and aquaculture activities, water resource developments and the manufacturing, storage, handling or processing of any hazardous substance.

A person who wants to carry out a listed activity (referred to in the EMA as the “proponent”) has to apply to a competent authority for an environmental clearance certificate. This is the person or the body with responsibility over the listed activity. A competent authority could be, for example, a Ministry, a regional authority, a local authority, a traditional authority, a Communal Land Board or any Government body created by law.

The proponent must go to the competent authority, pay an application fee and complete an application form for an environmental clearance certificate for the proposed activity. The competent authority forwards the application to the Environmental Commissioner so that he or she can decide whether an environmental assessment is needed.

In reaching a decision on whether an assessment will be required, the EC must consult the relevant organ of state. The EC has a discretion on whether or not to consult other interested or affected persons. For the purposes of administrative justice, good environmental management practices and transparency, it is assumed that the EC must document all consultation processes so that members of the public can see how decisions were reached.

If an assessment is required, the EC will determine the scope, procedures and methods for the assessment including the time frame for completion. The proponent must see to it that the assessment is carried out, pay all the costs involved and submit an assessment report to the EC. The assessment must be based on the principles of environmental management as stipulated in the EMA.

This law on environmental assessments provides for the principle of public participation. There must be notification to all potentially interested and affected persons that the assessment report is available for inspection. The EC can take care of the notification and require the proponent to pay the costs, or the proponent can take care of the notification and provide the EC with proof that it has been properly done. Any interested or affected party is entitled to comment on the report in writing, and to bring any relevant issues to the attention of the EC.

Unfortunately, past experiences have shown that notification efforts are not always adequate, resulting in the exclusion of parties who might have to live with the negative consequences of a decision without having had an opportunity to raise their objections.

After considering the report and any submissions, the EC has the power to conduct further consultations, which may include holding public hearings, before deciding on whether or not to issue an environmental clearance certificate.

Any person who feels harmed or unfairly treated by a decision of the EC may appeal to the Minister of Environment, Forestry and Tourism to change the decision. The Minister may confirm, cancel or alter the EC’s decision. Any affected person may appeal the decision of the Minister and ask the High Court to decide the matter. The High Court will consider only legal questions, and not facts. For example, the High Court might consider whether an environmental assessment followed the procedures set out in the law, but it would not decide if the factual conclusions in the report were correct.

In addition to supervising the process of environmental assessments, the EC is tasked with advising Government bodies on the preparation of environmental plans and conducting inspections to monitor compliance with the EMA. Thus, the EC clearly plays a central role in ensuring that the EMA is implemented effectively. Furthermore, as an administrative official, the EC has a constitutional obligation in terms of Article 18 of the Namibian Constitution to act reasonably and fairly in all decision-making processes.

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