AN EVALUATION OF THE SUITABILITY OF NEGOTIATED ENVIRONMENTAL AGREEMENTS FOR ACHIEVING ENVIRONMENTAL COMPLIANCE IN WATER-RELATED SECTORS IN SOUTH AFRICA

Report to the Water Research Commission

by

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Foreword

The legal framework within which negotiated environmental agreements will be enacted offers an alternative to the traditional re-active and punitive measures to achieve environmental compliance; the new, negotiated approach is aimed at providing mechanisms which encourage co-operation and rewards for compliance. Effective implementation of any law is at best a challenging task within most countries; within a relatively young democratic country, this task may at times seem insurmountable.

Although democracy is a slow moving, dynamic process, South Africa seems to be at a juncture where the effective implementation of the law is being tested against a multitude of economic, social and political issues. More importantly, however, is an understanding that there may be pockets of society that are reluctant to embrace change. This reluctance is not necessarily founded only in political beliefs, but in how business is conducted, service is provided by government officials and environmental practices are implemented. This reluctance may result in either apathy or passive rebellious behaviour, possibly handicapping potentially robust legislation. It is against this context that this research project has to be interpreted.

While an argument can be made that attitudes can be governed by legislation (particularly through legislation that encourages change and equitable treatment), individual perceptions and attitudes cannot easily be controlled. The real conundrum emanating from this research project is whether South African society is mature enough for regulation which is underpinned by self-regulatory behaviour.

The research journey into the Metal Finishing Industry in Kwa-Zulu Natal is narrowly defined and reflects challenges confronting a certain sector of stakeholders involved in this industry. However, there are important lessons that have been learned which can be extrapolated to other sectors involved in the water sector and possibly elevated to a strategic framework. The findings and recommendations are aimed at supporting the effective implementation of existing legislation through co-operation, which in turn can be a catalyst for changing the negative attitudes that currently permeate business, industry and government in terms of service delivery.

EXECUTIVE SUMMARY

INTRODUCTION

Negotiated Environmental Agreements (NEAs) offer alternatives in an effort to achieve environmental compliance. This legal mechanism which has recently been introduced into South Africa combines elements of regulation, self-regulation and co-operative relationships. The primary aim is to improve dialogue between diverse stakeholders and also with government to encourage change in traditionally reactive paradigms towards environmentally-focused regulation. Internationally, all NEAs focus on setting objectives above the legal requirements; in South Africa, this principle is contained in Section 35 of the National Management Act (Act 107 of 1998) in the form of Environmental Management Co-operation Agreements (EMCAs).

OBJECTIVE OF THE RESEARCH PROJECT

The intention of this research project was to determine whether Section 35 EMCAs or other forms of NEAs would serve as effective mechanisms to achieve environmental compliance in the water sector.

FINDINGS AND RECOMMENDATIONS

The process to establish an NEA for the South Africa Metal Finishing Industry in KwaZulu-Natal (MFI) formed the basis for this research. The National Water Act (Act 36 of 1998) (NWA) and the Local Government: Municipal Systems Act (Act No. 32 of 2000) (MSA) are the two laws relevant to this industry. Three interrelated components crystallised from the research process as the key findings and recommendations underlying the current *status quo* of NEAs.

Institutional capacity: A Section 35 EMCA is not necessarily appropriate for the water sector. The relevant legislation provides mechanisms for negotiated dialogue. Regardless of robust legislation, the current lack of government capacity is regarded in many sectors as contributing to poor implementation and discriminatory enforcement. Non-compliant acts in water-related sectors do not receive priority and officials are reluctant to fine or prosecute. These factors render the legislation ineffectual.

Recommendation: *The establishment of a Municipal Court should be a priority. Environmental justice can be promoted by educating Magistrates on the financial and environmental implications of non-compliance. This system will relieve pressure on the Department of Justice by expediting municipality-related cases; numerous are water-sector related.*

Economic drivers: Financial penalties are inadequate and do not discourage non-compliance. Juxtaposed against this current regulations are considered excessively punitive and do not provide enough incentives to achieve compliance.

Recommendation: *A "feebate" be introduced. Companies can benefit from compliance (a financial rebate is offered.) The substantial penalty is issued for non-compliance (a "fee" or a tax). The Municipal Court system will also present an opportunity to increase fines issued by the municipality.*

Attitudinal drivers: The MFI perceives NEAs as a means for government to avoid being held responsible for effective enforcement. The MFI is concerned that self-regulation may be a mechanism by which unfair competition practices within the industry are implemented.

Recommendation: *An NEA is a strong tool for co-operative relationships if properly structured. The MFI is encouraged to strengthen the industry's Code of Conduct to improve business and operational standards. Comments from the MFI indicate that an improvement in government capacity may contribute towards improving attitudes.*

CONCLUDING REMARKS

Existing water-related regulations are robust and should achieve environmental compliance. As such the legal form of an NEA, i.e. NEMA Section 35 EMCAs specifically could be considered superfluous in the water sector. NEAs can potentially complement existing regulations and provide a mechanism for constructive dialogue within the water sector; this could in time mature into a platform to encourage the concept of co-regulation. However, lack of government capacity is undermining the existing regulatory framework and the potential for future NEAs. This has resulted in negative attitudes permeating government and the MFI. If extrapolated to other sectors the longer term implications do not augur well for economic sustainability for local government and industry.

ACRONYMNS

ACE	All-Cost-Effective scenario
BAU	Business-as-usual scenario
BBM	Building Block Methodology
CCLA	Climate Change Levy Agreements
CCMA	Council for Conciliation, Mediation and Arbitration
CPMFI Project	Cleaner Production in the Metal Finishing Industry Project
DANCED	Danish co-operation for Environment and Development
DANIDA[1]	Danish International Development Assistance
DAR	Division of Aquatic Resources
DEAT	Department of Environmental Affairs and Tourism
DEFRA	Department for the Environment, Food and Rural Affairs
DNR	Department of Natural Resources
DTI	Department of Trade and Industry
DWAF	Department of Water Affairs and Forestry
ECA	Environmental Conservation Act
EDR	Environmental Dispute Resolution
EMCAs	Environmental Management Agreements
EPDC	Electric Power Development Co. Ltd
EPA	Environmental Protection Agency
HDGASA	Hot Dip Galvanizing Association of Southern Africa
IEM	Integrated Environmental Management
ILO	International Labour Organisation
KZN	KwaZulu-Natal
MFA	Metal Finishing Association
MFI	Metal Finishing Industry
MITI	Ministry of International Trade and Industry
NAs	Negotiated Agreements
NEAs	Negotiated Environmental Agreements
NEMA	National Environmental Management Act
NEPP	Netherlands Environmental Policy Plan
NGOs	Non-government Organisations
NWA	National Water Act
NWMS	National Waste Management Strategy
NWRS	National Water Resources Strategy
OECD	Organisation for Economic Co-operation and Development
PAA	Protected Areas Act
PCA	Pollution Control Agreements
PMPs	Park Management Plans
SABS	South African Bureau of Standards
SAMFA	South African Metal Finishing Association
SANParks	South African National Parks
TKTP	Tobata Kyodo Thermal Power Ltd Company
TMNP	Table Mountain National Park
TMNPSC	Table Mountain National Park Steering Committee
ToRs	Terms of Reference
UNGASS	The United Nations General Assembly Special Session
UNWSSD	United Nations World Summit for Sustainable Development
WDCS	Waste Discharge Charge System
WRC	Water Research Commission

[1] Although DANCED has replaced DANIDA, reports published under "DANIDA" are used as reference material.

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CHAPTER 1

1 CONTEXT FOR THE STUDY

Mechanisms that offer alternatives to the traditional “command-and-control” approach to achieving environmental compliance are now available to the water-related sector in South Africa. However, the reluctance to embrace negotiated environmental agreements begs the question as to the suitability of these mechanisms.

Historically, the natural and social environment was never at the forefront of South African legislation, as was the case with many other developing countries. While there was a greater awareness for the need for environmental regulations after the 1960s (Hanks, 1998:298), the regulations were initially reactionary rather than preventative in nature and there was traditionally a “command-and-control” approach. This approach essentially prevented organisations from undertaking certain activities that were deemed harmful to the environment (Shaw, 2001:2 and Hanks, 2001:1) and was not necessarily conducive to achieving long-term economic or environmental sustainability. It had the potential to place business and industry in a position where these parties could become reactionary or defensive, and less likely to pursue alternative solutions to environmental problems.

However, since the birth of South Africa as a democratic country, the natural environment has received greater prominence, with the environment being afforded explicit protection in the Constitution of the country (Section 24 of the Constitution of the Republic of South Africa (the Constitution) (Act 108 of 1996). Further protection for the social and natural environment is entrenched in a suite of legislation through the application of various integrated environmental management tools. Democracy also afforded South Africa the opportunity of re-entering the global economy, giving greater impetus to a burgeoning mining and industrial economy. Many of these activities are reliant on water. In spite of the suite of environmental regulations that have to be adhered to, as well as legislative options available to achieve compliance, pressures on the quantity and quality of South Africa’s water resources continue to mount.

Indeed, the National Water Resources Strategy (NWRS) (2004:4) emphasises the challenge that confronts South Africa in terms of maintaining the quality of water suitable for human consumption and protection of aquatic systems in the face of trying to grow an economy. Furthermore, the NWRS also refers to a survey that was completed in August 2002 to establish the overall health of South African Rivers.[2] Although the National Water Act (NWA) (Act 36 of 1998), the NWA has been in place since 1998, the question can be asked if the implementation of the NWA is as effective as it could be if 31% of South Africa’s rivers are in a poor state as stated in the NWRS (2004:5). Particularly considering that South Africa is considered to be an arid country

It is for this reason that the importance of using various tools available as part of an integrated approach to Water Resource Management, the focus of this study, cannot be overemphasised. Reed & de Wit (2003) highlight the complexities of formulating and giving effect to policies dealing with natural resources in the complex political, societal and political structures of a post-democratic South Africa. This view is supported by Dr Anthony Turton (2002:13-16) who is of the firm belief that the multi-faceted nature of water in society calls for a more integrated approach. In his introduction to the subject of hydropolitics, Turton (2002:17) explains that to date, literature related to water has focused

2 Six river systems, which represent a reasonable sample of typical South African rivers, were surveyed in four provinces under the River Health Programme. The results of these surveys were extrapolated to indicate the overall health of rivers in South Africa. (NWRS, 2004:5)

on four main themes, i.e. water and conflict, water and the environment, water security and water society and culture. These themes seem to form the main elements of hydropolitics.

After exploring various definitions of hydropolitics, Turton (2002: 16) builds on Easton's (1965:21) definition of politics: "politics as the authoritative allocation of values in society" and has settled on the following definition which serves as the basis for his discussions; "Hydropolitics is the authoritative allocation of values in society with respect to water."[3] Of importance to this study, are two concepts which are implied by the definition, namely scale and range. Turton explains that the issue of scale is important, as water issues can range from an individual, to a village, from provincial to international – with numerous levels in between. The issue of range refers to matters such as water service delivery, water demand management, social and political values and the sustainability of water resources.

Drawing on Turton's explanation, this research project will use the issues of scale and range as the framework to investigate the relevance of Negotiated Environmental Agreements (NEAs) in achieving environmental compliance in the water sector. NEAs have been negotiated at different scales and it is important to understand what the international experiences have been, while further unpacking the processes that have been followed in South Africa at a national, provincial and local scale. NEAs comprise a range of issues which include technical categories (type and source of pollution), socio-economic and policy frameworks. However, it is important that a third category is added to complete the framework for the study, that of the legal context, within which NEAs as a co-regulatory environmental instruments are examined. The legal context provides information on the type of NEA, the consultative process between the concerned multi-parties the standards for environmental compliance and the implementation of the NEA.

The closely woven relationship between the legal framework, water, the multi-party sector and the socio-economic and political background in South Africa makes for a complex negotiation process which will require a fine balance to achieve environmental and economic sustainability. This form of social dialogue in a post-democratic country is not new to South Africa; quite the contrary, multi-party negotiations have been taking place in the labour sector for a number of years. Albeit that social dialogue has always taken place within the labour context, there are many principles relating to multi-party discussions and negotiation processes which are similar to environmental Negotiated Agreements.

As with environmental NEAs, the International Labour Organisation (ILO) explains that social dialogue processes can either be informal or legally structured or a combination of the two; this certainly seems to imply self-regulation or co-regulatory relationships. Furthermore, these processes can take place at a "national, regional or at enterprise level" (ILO:2006).

In South Africa, the Labour Relations Act (Act no 66 of 1995) would provide the framework for this dialogue to take place; also providing a suite of different tools, such as Basic Working Conditions, The Employment Equity Act, the Council for Conciliation, Mediation and Arbitration (CCMA) which provides mechanisms for mediation and arbitration, collective bargaining, etc, to enable well

3 The basic principles contained within Easton's definition include inter alia:

- Politics is a dynamic and on-going process;
- Central to this process is the allocation of values via laws and policies;
- This implies decision-making of some kind and this means that some will always be favoured over others;
- This implies an element of contestation as no universal set of values exists and these are applied by an authority whose legitimacy may be contested.

structured negotiations. At the centre of all these tools however, is the principle of discussions, negotiation and consensus between all stakeholders.

In the water sector, the NWA and the NEMA (Act 107 of 1998) (NEMA) provide the framework for social dialogue and although these are robust and well respected pieces of legislation which contain numerous tools to achieve integrated water resource management in South Africa, there are concerns in how this is going to be achieved. Reed and de Wit (2003:103**)** also allude to the importance of achieving the objectives set out at the 2003 United Nations World Summit on Sustainable Development (UNWSSD); "In order to avoid potential conflict and expedite planning and development in shared river basins, equitable trans-boundary agreements should be pursued that encompass shared local development, as well as social and economic objectives " Once again, the importance of well structured social dialogue between multi-parties is integral to achieving the UNWSSD objectives. Taking cognisance of the fact that stakeholders in the water sector are diverse, including *inter alia,* employers (agriculture, business, industry), the labour market, civil society (represented by Non-government Organisations), the parallels to social dialogue in the labour market are quite apparent; the ILO (February 2006) emphasises that the main goal of social dialogue is to "promote consensus building and democratic involvement" between the various stakeholders to resolve issues to promote good governance and stable economies.

Clearly however, the lack of capacity (i.e. adequately trained staff, sufficient funding) as well as a reluctance to shift from an autocratic paradigm to a more co-operative paradigm (which is essential to create a platform for Negotiated Agreements) at various levels of government is a source of concern in terms of reaching these objectives and it seems that a programmatic approach will be necessary over time to implement the various facets of the NWA and the NEMA as capacity issues are resolved (Reed and de Wit, 2003:70). However, in the final conclusions and recommendations, Reed and de Wit (2003:104) are positive that solutions to this problem can be sought, through public-private partnerships and the promotion of self-regulation.

There certainly appears to be a strong shift in emphasis toward finding alternative means to achieve integrated water resource management through tools such as Negotiated Agreements, which offer viable alternatives to the **"**command-and-control**"** approach traditionally followed in this country. The subject of NEAs and particularly EMCAs is not new to South Africa, quite the contrary; the topic has been broadly debated in academic papers authored by individuals such as Johnathan Hanks, and at public fora (the Conference of the International Association for Impact Assessors, South Africa, 2003). Furthermore, there have been various attempts over the past few years to negotiate EMCAs. Despite this, not one EMCA has been signed into law. Hopefully, through this research process, the reasons for this may become clearer.

However, various stakeholders[4] across the country have followed the path of the less formalised NEAs,[5] also provided for in NEMA, some more successfully than others. However, there is no documentation that captures the reasons why EMCAs have not been successfully implemented by the larger industrial stakeholders, whereas smaller stakeholder groups have managed to negotiate

4 The literature reveals that agreements have been entered into between, inter alia, mines, municipalities and DWAF, and also municipalities and sectors of industry.

5 The relationship between voluntary NEAs and regulation is not clear at present. Historically, the older "command-and-control" approach of implementing regulation led to stakeholders entering into informal agreements that had no legal standing within the realms of the regulations. More recently however, the process to establish NEAs, and the process through which regulations must be drafted and promulgated, is very similar in nature – intensive discussions are required by all parties to negotiate an NA. Nevertheless, important distinctions exist that determine whether an NEA remains just an agreement, with commercial legal implications , or whether it is becomes a regulatory tool as allowed for by regulation. The most important distinction is that regulatory agreements between authority and stakeholders are obligatory, whereas NEAs remain voluntary5. (Shaw, 2001:6).

the less formalised NEAs. The NEMA encourages social dialogue between different stakeholders, so it is interesting to note the lack of implementation of environmental policy through mechanisms provided for in legislation in a post-democratic South Africa. If NEMA, and in particular Section 35 EMCAS, as a form of NEAs, provides positive opportunities and alternatives to achieve environmental compliance, why are stakeholders loathe to pursue this avenue? The reasons for this reluctance need to be better understood; could it be attributed to "simple" administrative issues or is it more complex, relating to human behaviour and attitudes? This research process will attempt to seek answers to these questions in an effort to better understand the appropriateness and efficacy of NEAs.

2 BACKGROUND TO NEGOTIATED AGREEMENTS IN SOUTH AFRICA

Negotiated Agreements and voluntary partnerships between government and industry are well provided for in South African legislation. These are implicitly stated in Section 24 of the Constitution of the Republic of South Africa (the Constitution) (Act 108 of 1996) which guarantees every South African the right to a healthy environment that should be protected "through legislative and other measures".

In addition, the National Environmental Management Act (NEMA) (Act 107 OF 1998) Section 35(1) and (2), and the National Water Act (NWA) (Act 36 of 1998), provide mechanisms for industry, government and civil society to enter into Negotiated Agreements with the specific aim of developing and managing environmental standards related to the impact of an industrial sector on the water environment (riparian, in-stream or groundwater). These multi-party agreements are provided for through the following mechanisms by means of which a Negotiated Agreement would be effected:

i. NEMA contains the principles and framework for the process to establish industry-government environmental agreements.
ii. The NWA continues to develop source-directed measures as the mechanism through which a NA related to water could be effected; (MacKay, 2004:1)

Although the Constitution and NEMA came into law in 1996 and 1998 respectively, it was five years before the Department of Environmental Affairs and Tourism (DEAT) sought formally to give impetus to Environmental Management Co-operation Agreements (EMCAs) in South Africa. In 2001 DEAT and several industrial sectors attended a workshop as part of a process to develop and implement EMCAs as a means of achieving long-term economic sustainability in South Africa. The EMCAs were intended to address various components of the social and natural environment on which industrial development impacts (Hanks, 2001:1). DEAT issued policy guidelines for implementation of the provisions of section 35 of NEMA on EMCAs[6], in March 2003. As explained earlier in this document, while the policy appeared to present EMCAs as effective mechanisms for advancing compliance with environmental regulations in South Africa, none have been implemented in this country. It took another two more years before the revised guidelines were published in July 2005.

The South African socio-economic, political and environmental context has changed considerably since NEMA was first introduced. The Inception Report compiled as part of the original Terms of Reference for this research process indicates that the visions which form part of the broader policy

6 The revised EMCA guidelines that were published early in 2006 had one significant change from the Draft Guidelines that were published in March 2003 for comment; signatories to the EMCA will no longer have to comply with standards beyond minimum requirements, rather targets can be set to achieve minimum requirements within an agreed timeframe. According to a DEAT official, this has resulted from the realisation that many South African companies are not currently in a position to meet these minimum requirements.

framework governing NEMA may no longer be appropriate. Consequently, the objective, research and methodology for this research process had to be revised.

3 THE PROBLEM STATEMENT

NEAs are suitable mechanisms for achieving environmental compliance in water-related sectors in South Africa. Although the National Water Act is a robust and well respected piece of legislation which contains numerous tools to achieve integrated water resource management in South Africa, there are concerns in how this is going to be achieved. Reed and de Wit (2003:103) also allude to the importance of achieving the objectives set out in the UNWSSD; "In order to avoid potential conflict and expedite planning and development in shared river basins, equitable trans-boundary agreements should be pursued that encompass shared local development, as well as social and economic objectives "

NEAs are in effect multi-party agreements between different organisations operating within a specific sector or industry in whose interest it would be to achieve environmental compliance. Internationally NEAs have been implemented in a variety of sectors, the sustainability of which is not yet fully understood, as these are relatively new NEAs**.** A separate evaluation would be necessary to establish the effectiveness of these NEAs, but this would be outside the scope of this study.

The purpose of this research was to find arguments and examples that support, or disprove the hypothesis that multi-party agreements are suitable mechanisms to achieve environmental compliance. It was also important to better understand under which conditions they have succeeded or failed, what the process of negotiation was and what the nature of the agreements were.

To achieve this, research questions were designed to provide the framework within which the research will be conducted. The research study explored the nature of NEAs at an international and South African scale and examined a range of technical, political, policy and legal issues that could have an influence over the suitability of NEAs as an effective environmental mechanism. A combined process of literature review, structured interviews and organised workshops with officials within the public sector and interested and affected stakeholders was followed.

4 OBJECTIVES OF THE RESEARCH

The objective of this research process is to understand whether these mechanisms (Negotiated Agreements, EMCAs or otherwise) are suitable for achieving environmental compliance in water-related sectors in South Africa, and if so, under what conditions. The motivation for this research is based on the assumption that it will add value in terms of advising government as to the likelihood that a negotiated approach could be supported and upheld by role-players associated with the different facets of water resource management South Africa.

5 RESEARCH QUESTIONS

In order to understand the successes and failures of NEAs internationally and in South Africa, where stakeholders have to comply with the various regulations, and in particular the NWA, the scale, situation and timeframes against which these were evaluated*.* Consequently, the following questions need to be asked:

i. Why no Section 35 EMCAs, as a form of NEAs, have been formally signed into law since the introduction of Section 35 EMCAs as part of NEMA in 1998;
ii. Are there other forms of NEAs which have been successfully entered into between multi-parties?
iii. What factors would make an NEA effective?

6 IMPORTANCE OF THIS RESEARCH

NEAs are not a new concept, internationally or locally. The merits and demerits of NEAs have been widely debated[7] and questions have been raised regarding the validity of introducing NEAs into developing countries. In an attempt to either prove or disprove the research hypothesis through the above-mentioned questions, this project seeks clarity on the appropriateness of NEAs as an alternative to the traditional "command-and-control"[8] approach and to establish whether there may be other mechanisms which would encourage organisations to achieve environmental compliance.

In his discussions about NEAs being considered an effective means to achieve predetermined environmental goals, Johnathon Hanks (Hanks, 1998: 331-332) suggested that there are specific **institutional** and **procedural** conditions that must be met for NEAs to be implemented. These two conditions relate to the three foundations of sustainability, or what Hanks calls "performance criteria" - environmental effectiveness, social equity and economic efficiency. The intention here is not, at this stage**,** to repeat Hanks' evaluation of South Africa's status in 1998, or to debate the validity of his statements, but rather to focus on the key issues that he raises and to use these as a point of reference for the various arguments presented in this research report.

The intention during the course of the project was to reflect on South Africa's potential to meet the institutional and procedural conditions required for the implementation of NEAs. It was also necessary to evaluate whether any progress has been made since the introduction of Section 35 NEAs and how this relates to the lack of formal NEAs in South Africa. Similarly, it is important to understand that the socio-economic and political climate has changed substantially since 1998, particularly as these pertain to the environment. More important, perhaps, is the fact that South Africans in various sectors are starting to experience the effect of new regulations in action, particularly NEMA and the NWA and are questioning whether these are suitable and can be effectively implemented to achieve environmental compliance. Hanks described an NEA as a tool to achieve environmental goals; at the same addressing social and economic inequities.

Entrenched in the NWA are the same principles to achieve equity between various water user sectors through the use of various tools. It is perhaps appropriate to pause for a moment to reflect on the significance of the NWA as a mechanism to achieve equity through the various tools it offers. Perhaps the most important area where this inequity was experienced acutely, just over a decade ago, was the fact that the ownership of water in South Africa was tied to land ownership, thereby marginalising a vast majority of potentially economical viable South Africans. Of particular relevance is when water was used irresponsibly and to the detriment of downstream users or to those users who were dependent on groundwater supplies (MacKay, 2002:1).

7 See, for instance, Reed (1993), Steward (2000) and Hanks (1998).

8 An approach where standards or targets are set by government and the responsibilities of industry for compliance were prescribed by government with very little input from the industrial sector, or indeed any sector, themselves.

This research process will attempt to provide answers in this regard, perhaps contributing to a process where government can reflect on the appropriateness of environmental legislation. A contribution will also hopefully be made towards a process where government can consider the suitability and efficacy of NEAs as mechanisms to achieve environmental compliance, particularly Section 35 EMCAs.

7 STRUCTURE OF THE RESEARCH REPORT

This section sets out the structure of this research process and summarises the intended content of each of the chapters: (These may be expanded on or amended as the research study progresses)

Chapter 1 Context and background
Chapter 2 The research methodology
Chapter 3 Definitions of concepts used in the study
Chapter 4 An introduction to Negotiated Environmental Agreements
Chapter 5 Overview of the literature review
Chapter 6 South African literature review
Chapter 7 Institutional Framework necessary for NEAs
Chapter 8 Component 1: Wings Galvanising Case Study
Chapter 9 Component 2: Negotiating an NEA for the Metal Finishing Industry
Chapter 10 Legal, administrative and institutional findings
Chapter 11 Attitudinal drivers of NEAs
Chapter 12 Concluding remarks on the findings
Chapter 13 Recommendations
Chapter 14 Concluding Remarks on the Research Project

CHAPTER 2

8 METHODOLOGY

This research was essentially process driven and was to a large extent guided by circumstances arising during the stakeholder consultation process. The broad framework that guided the methodology was, however, not deviated from, but allowances were made within the research process to accommodate the changes that circumstances necessitated. This chapter describes the original methodology and also provides explanations regarding changes that were effected.

8.1 QUALITATIVE RESEARCH METHODS

Qualitative methods were used to conduct the research for this study. In discussing various qualitative methods Patton (1987: 18-19) refers to a “dynamic, development perspective” theme which elucidates a “qualitative-naturalistic-formative” approach for evaluating the implementation of programmes or policies within a changing environment and the effects that these would have on the various participating stakeholders. This is particularly relevant to this research which needs to better understand the consequences of policy which is formulated against a specific background and implemented within an ever-changing socio-economic and political background. This thematic approach is further supported in Patton (1987: 31-32) where he discusses the important function of “legislative monitoring” where the original intention of government may have been sound, but dynamic environments may lead to complexities during implementation. Contained within these complex environments is a multitude of issues that will need to be better understood**.** Grounded Theory which is further discussed in Section 1.3 will assist in identifying these issues and grouping them into themes. As such, both the content analysis of the legislation and investigation of the various processes of implementation will assist in identifying the possible problems experienced in the implementation of legislation.

Patton (1987:40-42) provides a checklist of 20 questions that need to be asked when determining whether qualitative methods are the most appropriate for evaluating programmes. Patton (1987:40) explains that while these questions are not a ”mechanical tool” for decision-making, they should stimulate thought processes and if the researcher answers “yes” to any one of the 20 questions he has posed, the qualitative approach is considered appropriate. There are at least three questions that were answered in the affirmative for this research process includes:

i. “Are decision-makers interested in elucidating and understanding the internal dynamics of programs [the NEMA and NWA legislation] – program strengths, program weaknesses, and overall *program progress?”* [the implementation of NEAs through legislation] (Patton, 1987:40)
ii. “Is detailed, in-depth information needed about *certain client cases or program sites*, for example, particularly successful cases, unusual failures, or critically important cases for programmatic, financial or political reasons?” [successful NEAs, reasons for EMCAs not being implemented] (Patton, 1987: 40).
iii. “Is a *responsive evaluation* approach appropriate – that is, an approach that is especially sensitive to collecting descriptive data and reporting information in terms of differing stakeholder [perspectives based on direct, personal contact with those different stakeholders?”(Patton, 1987:41)

The research programme, methods and criteria reflect the qualitative nature of the research process.

8.2 RESEARCH FRAMEWORK

It was important that the approach to the case studies follow the research framework which guides the overall research. Water is a complex matter and the potential to make this study too broad, does exist, as such it was decided that a framework matrix should provide the basis for the research. This framework also provides the criteria for the evaluation of case studies.

Issues of scale and range will be used as the framework for this study to investigate the relevance of NEAs in achieving environmental compliance in the water sector. The issue of scale is important as water issues can range from an individual, to a village, from provincial to international – with numerous levels in between. The issue of range refers to matters such as water service delivery, water demand management, social and political values and the sustainability of water resources. However, it is important that a third category is added to complete the framework for the study, that of the NEAs as a co-regulatory environmental instrument.

Below is an overview of the issues that will be discussed as part of the framework:

Scale

i. Which NEAs have been successfully implemented internationally and what have been the contributing factors?
ii. What NEAs have been implemented in South Africa?
iii. At what level have these been negotiated, i.e. nationally, provincially or locally?
iv. What role has capacity constraints within the different spheres of government played in stakeholder frustration during the process of negotiating and implementing NEAs?
v. What role has the political buy–in or lack thereof at appropriate government levels played in the concept of NEAs?
vi. What process was followed?
vii. What is the current status of these NEAs?

Range

i. What has been the political, policy and legal framework for the implementation of the NEAs?
ii. What technical categories (point source/end of pipe, diffuse source, instream/ambient standards and objectives) have been applicable to these NEAs?;
iii. What factors have contributed to the successes and failures of the NEAs in South Africa?
iv. What is the role of NGOs and civil society within the negotiation of NEAs?

Regulatory framework

i. In what manner do NEMA and the NWA as separate pieces of legislation support one another to achieve environmental effectiveness?
ii. If the South African government is required to review alternative policy options and research finds that NEAs are not supported, what could these alternatives be?
iii. What principles defined the process of participation and negotiation for the NEAs? (The rules of the game?);
iv. What standards did the NEAs set to achieve environmental compliance?
v. Which regulatory standards were used to achieve compliance?
vi. What process did signatories follow to negotiated NEAs that would allow signatories to move beyond compliance?

8.3 CASE STUDY SELECTION CRITERIA

The basic elements of a Negotiated Environmental Agreement would be used as the selection criteria for the case study:

i. The agreement had to take place within a legal framework.
ii. Multi-parties had to be party to the agreement.
iii. At least one government agency had to be involved in negotiations.
iv. An existing problem posing a threat to the environment had to be present.
v. The negotiation process had to have been documented**.**

These criteria were further unpacked within the scale, range and regulatory research framework. Table 8.1 details each of the framework components.

Scale

i. The international experience;
ii. The South African experience at a national, provincial, catchment and local authority level;

Range

i. Technical categories (point source/end of pipe, diffuse source, instream/ambient standards and objectives;
ii. Political / Policy issues that dictate the context within which regulation is set;
iii. Legal framework that has to be complied with;

The regulatory framework

i. Negotiated Environmental Agreements (NEAs) as co-regulatory instruments
ii. NEAs set the rules of the game, i.e. the principles that define the process of participation in negotiating the NEA;
iii. NEAs will set the standards of the environmental compliance;
iv. NEAs that are negotiated to achieve compliance with regulatory standards;
v. NEAs that are negotiated to allow signatories to go beyond compliance

8.4 RESEARCH METHOD, AND TOOLS

It is important to note from the outset that as an iterative process was followed, the research process was adapted to reflect the changes. The process evolved into two main components. Component 1 focused on the base case study; Wings Galvanising Company. Component 2 focused on the documentation of the process to establish a Negotiated Agreement. A further description of the research method is provided below.

8.4.1 Case Study

An in-depth understanding and evaluation of numerous components relating to NEAs is required. This includes the historical context, stakeholders, legal framework, the negotiation process as well as the factors that contribute to the success and failure of NEAs. As explained by Patton (1987:19) case studies can add great value to research when evaluating the differences and experiences between the different case studies.

8.4.1.1 Component 1: Base Case - Wings Galvanising Case Study

It has already been stated that no formal EMCAs have been signed in terms of Section 35 of NEMA, however, co-operation agreements have been negotiated between parties and are operational. In order to meet the objectives of this research, i.e. is to understand the availability and efficacy of different mechanisms which can be used to achieve environmental compliance in water-related sectors in South Africa, it was necessary to investigate an operational Negotiated Agreement.

Furthermore, mindful of Patton's comments (1987:19), the base case study reflects the scale, range and legal framework that relate to NEAs, dealing with the issue of multi-party sector negotiation. To explore this further, a case study that met the criteria for the research framework was identified. Wings Galvanizing Company (Wings) entered into a Negotiated Agreement with eThekwini Municipality (Durban, KwaZulu-Natal) to operate in an environmentally compliant manner. This agreement contains the criteria of scale, range and legal framework and therefore was considered the ideal process to investigate for this research.

This case study is discussed in Chapter 8 to the extent that the process and findings are briefly documented to reflect the iterative nature of Grounded Theory. The approach and methodology adopted for the Wings case study if fully documented in Appendices 1A to 1E. Chapter 8 reflects how the study evolved through constructive dialogue with diverse stakeholder groupings participating in the research process into more formalised discussions to establish an NEA for the MFI in KZN. The latter process is referred to as "Component 2".

8.4.1.2 Component 2: Documenting the process of a Negotiated Agreement

The Wings Case Study revealed that the process of negotiating an NEA could provide an important insight to the practical issues challenging the implementation of environmental legislation. The Wings Case Study provided a perfect platform for the South African Metal Finishing Association (SAMFA) in KZN to further explore a formalised Negotiated Agreement for the sector involving the relevant stakeholders. The SAMFA (KZN) committee therefore agreed to participate in this process. The SAMFA understood that the process was the key focus and that it may not culminate in a formalised Section 35 EMCA, but that the industry would benefit from the process in terms of better understanding whether this would be a suitable tool for the industry. This process is fully documented in Chapter 9. The supporting documentation is contained in Appendices 2A – 2G.

8.4.2 Comparative analysis: SANParks Table Mountain Nation Park Forum

Juxtaposed against the industrial and economically driven nature of the Wings Case Study is the SANParks Table Mountain National Park Forum (SANParks TMNPF). While completely different in nature and focus, both structures operate within a suite of legislation relevant to its operational focus. The common denominator between Wings and SANParks TMNPF is that both structures wish to achieve environmental objectives, but with different motivating factors. Wings is driven by financial imperatives, i.e. compliant behaviour reduces the risks of fines while SANParks TMNPF wishes to engage actively in their environment through a recognised body

The SANParks TMNPF functions through a steering committee, i.e., the National Park Steering Committee (TMNPSC) and is representative of its social environment. During the literature review period of the research process The Forum's Terms of Reference (ToRs) and more specifically, the

Charter, was identified as a form of an NEA. Although the TMPF cannot be described as being involved in the water sector, one of the research questions focussed on identifying other forms of NEAs that were functional. The nature of NEAs is such that the agreement can be quite pliable, moulding itself to social and legal context. The agreements may have different environmental objectives and follow slightly different negotiation processes but it is important to understand what the drivers behind the NEAs are and how these could contribute to the successful implementation**.**

The process that was followed to better understand the SANParks TMNPF charter as an NEA is fully documented in Appendices 3A – 3F. This thorough and well documented process was carried out in terms of the principles of Grounded Theory. Through the various processes of coding and delimitation of categories, common themes were identified (Glaser and Strauss, 2006:111). Also, to ensure succinctness, prudence was the guiding principle in terms of delimiting the themes to a manageable number. Therefore only those themes relevant to the MFI Case Study, which allow for a comparative analysis have been integrated into this report. It is important to note that this delimitation process was carried out within the research criteria and framework.

8.4.2.1 Research Tools

The tools used during this process are documented below. Differences in approach for the two components are also discussed.

Literature Review

The literature review was by no means exhaustive as the nature of this project proved to reach far wider than the legal and institutional framework. The review includes literature dealing with the research subject as well as literature on research methodology. The literature review was conducted at an international and national level incorporated the issues of Scale, Range and Legal Framework which have been identified for the framework of this project. The literature review has been divided into the following key areas of discussions:

i. Legal frameworks
ii. Case studies focussing on key themes:
iii. Supporting negotiated environmental agreements
iv. Combining Negotiated Agreements with tax and emission trading
v. Environmental Cooperation Agreement to achieve waste minimisation
vi. Understanding the drivers of participating stakeholders

The literature review for the research methodology is incorporated into the discussion in Section 1.3 of this chapter, which focuses on the qualitative research methodology and on Grounded Theory which is used to draw a comparison between the SANParks TMNPF and Wings Case Studies and to document the process and findings of the negotiation process.

In-Depth discussions

At the core of this research project, is the diverse group of stakeholders and the individual perspectives which they have regarding EMCAs. Patton (1987:109) highlights the value that interviewing brings to research, in that it allows the researcher to “enter the other person’s perspective”. It is important to note that two approaches were followed during the research project for “Component one” and “Component two”. These approaches are described below.

COMPONENT ONE: THE WINGS CASE STUDY

The discussions conducted prior to the Wing Case study were conducted with the assistance of an interview questionnaire, to ensure that there was a standard framework within which all the discussions were held, and at the same time allowing the interviewer latitude to accommodate individual contexts and the freedom for both parties to explore other issues that may have been relevant to the subject. The purpose of these personal discussions was to allow individual stakeholders to deal with sensitive issues which may not have been raised as part of the organised workshops with focus groups.

It was also important to hold discussions with various management levels within DEAT and DWAF to better understand how the structures within the government departments had changed since 1984, how the decision-making roles have impacted on the ability to carry out functions and what potential solutions will be. Similarly, organisations that have attempted to enter into EMCAs and NEAs with national and local government were interviewed to identify what the experiences have been in driving the process from the private sector side in trying to turn policy into practice.

COMPONENT TWO: THE NEA NEGOTIATION PROCESS

After the Wings Case Study, it became clear that the standard interview questionnaire would no longer suffice as it was limiting dialogue; the discussions with stakeholders had to be amended to allow for both the researcher and the individual stakeholders to enjoy a greater freedom in exploring issues. Grounded Theory assisted with the revised approach. As explained in Section 1.3, Grounded Theory encourages free flow discussion while the interviewer keeps copious notes. These notes were analysed for recurring themes which informed the research hypothesis. This approach supported the thematic nature which has formed the framework of this project throughout the research project.

Focus group workshop

The intention was to hold a focus group workshop that would allow similar stakeholder sectors to interact with each other on the subject of EMCAs. These workshops structures would have been conducted against a formal agenda. The agenda would be informed by the outcomes of the literature review, policy review and depth interviews. Stakeholders would have been provided with sufficient background information prior to the workshops to enable them to participate constructively. Representative stakeholders from these focus groups would have been asked to participate in an integrated workshop. One of these focus groups would be all the stakeholders that were involved in the Wings Case Study (Component 1).

The focus group approach had to be amended slightly after the first Wings Case Study Focus Group Workshop held in Durban on 28th March 2006. The SAMFA KZN executive committee agreed to participate in the process to establish a Negotiated Agreement for the industry in KZN. Component 2 of the research process therefore used different platforms to enter into dialogue with key sector stakeholders. These included:

i. In-depth discussions: The same principle as the in-depth discussions described in the section 1.4.2.1.2 “Component 2” was followed. Preparatory documents were sent out prior to the meetings.
ii. Organised meetings with the SAMFA KZN executive committee: These meetings were arranged and facilitated by the project researcher. Preparatory documents were sent out and formal agendas were followed.

iii. Independent stakeholder meetings: Various meetings were called by the various stakeholders that are involved in the MFI in some form. The project researcher was invited to attend these meetings as an observer. These meetings added tremendous value to this research process, the notes from these meetings have been incorporated into this report and**,** in the case of stand alone documents, added as appendices.

Integrated workshops

The original project recognized the importance of all stakeholders engaging in debate, which would have enabled a better understanding of diverse perspectives. Based on this, it was the intention to, at the appropriate stage in the research project; facilitate this debate at an integrated workshop. The true value of finding solutions and making recommendations is for stakeholders to better understand each other's problems and try to constructively address these. It is important to note that the intention was not to have these as decision-making workshops, but rather as a vehicle for determining whether the existing policy is relevant; whether EMCAs are indeed effective mechanisms for achieving environmental compliance and if so, proposing recommendations to effectively implement the policy. The stakeholders that would have been invited to attend these integrated workshops would represent the various stakeholder groupings from the focus group workshops.

While this approach worked during Component 1, it became clear during the discussions with the SAMFA KZN Executive Committee that an integrated workshop with all the key stakeholders would be premature. After having gone through two rounds of intensive discussions and debate regarding the advantages and disadvantages of Negotiated Agreements for the industry, the SAMFA KZN Executive Committee indicated that numerous issues within DWAF and eThekwini Municipality would first have to be resolved before any further energy could be spent on further discussions with these stakeholders on the same platform.

This stance had to be respected as the intention of the research process was not to fuel discord amongst stakeholders, but to rather find ways of nurturing the dialogue process which is inherent to NEAs. Therefore individual interviews with the key sector stakeholders were conducted and a focus group discussion was held only with the SAMFA KZN Executive Committee.

8.5 GROUNDED THEORY

Grounded Theory was followed in both study components and thus allowed for two objectives to be met:

i. To better understand the drivers prevalent in the process of negotiating environmental agreements.
ii. A comparative analysis between the Wings Case Study (as a form of a Negotiated Agreement) and a SANParks TMNPF Charter. Grounded Theory assisted with identifying differences and similarities between case studies that were similar enough in nature to be juxtaposed against one another.

Grounded Theory can make use of both quantitative and qualitative data, but due to the nature of Grounded Theory methodology which is primarily focussed on process, the preferred data is qualitative in nature.(Glaser and Holton: 2004:12). As Grounded Theory is a conceptual theory which generates methodology, the researcher can consider everything that he or she engages with during the research process as data. This is confirmed by Glaser and Holton (2004:4) who state that because of the conceptual nature of Grounded Theory, "all is data". Following on this premise then, is the reasoning that data cannot be classified as primary and secondary data; rather all data is sourced throughout the process and the analysis of the data is iterative in nature. The data for this research project has been assimilated through a variety of methods which have been detailed this chapter. This section focuses on how Grounded Theory has been used to compare the two diverse case studies.

Understanding the history of the development of Grounded Theory is almost as important as grasping the theory itself; many of the principles of Grounded Theory are entrenched in what is known as the "Chicago and Columbia traditions" or approaches to research. Anselm Strauss was a student at the University of Chicago and his contribution to Grounded Theory came from inspirations received from interactionist and pragmatist writings which steeped in a strong tradition of qualitative research (Strauss & Corbin, 1998:8). Contributions from this background which led to the development of Grounded Theory included *inter alia* (Strauss & Corbin, 1998:9):

i. The importance and value of field work in terms of conducting research;
ii. The relevance of theory which is grounded in data which led to the development of a discipline;
iii. The complexity and variability of phenomena and of human action;
iv. That research is iterative in nature, and that meanings are constantly redefined through a process of interaction;
v. That there should always be an awareness of the relationships that exist between structure, process and consequences.

The "Columbia" tradition's contribution to Grounded Theory was brought to the table by Barney Glaser who, through his interactions with qualitative research understood the importance of the role of comparative analysis between data in terms of identifying, developing and relating concepts (Strauss & Corbin, 1998:9). Important however, was that the Columbia tradition emphasised the need for empirical research to be conducted in conjunction with the development of theory. Implicit in both the Columbia and Chicago traditions was the recognition that research should be practical and of relevance to both professional and lay persons. This rule is certainly evident if the various constructs of Grounded Theory are examined.

The primary difference between Grounded Theory and other traditional research methodologies is that in the former, the researcher does not set out the research project with a preconceived idea, rather through a systematic process of gathering and analysis of data, a theory or theories may evolve. These theories may also be expanded on or amended, as Grounded Theory is iterative in nature and new data could continuously test existing data. The use of Grounded Theory however, is not excluded if the researcher has already postulated a theory, as explained by Strauss and Corbin (1998:12). Grounded Theory will also be applicable if a researcher's purpose is to "elaborate and extend an existing theory. According to Strauss and Corbin (1998:12), the importance of the "evolvement" or "elaboration" of theory from existing data, is that the theory would resemble the reality and offer better insights which would add value to findings rather than the alternative method of collecting or "putting together a series of concepts based on experience or solely through speculation."

Although the main feature of Grounded Theory is the formulating of concepts which are contained in the data, this research approach calls for a great deal of creativity, flexibility and trust on the part of the researcher. As explained by Strauss and Corbin (1998:13), Patton is of the opinion that qualitative research and evaluation draws on both "critical and creative thinking" which would demand a great deal of the researcher, who will engage in processes which demand creative and non-linear thinking, but who should "have fun" while engaging in the research process. This is borne out by Glaser and

Holton (2004:11) who advocate that the personality of the researcher plays a crucial role in Grounded Theory methodology; firstly, the researcher has to have the type of temperament that can “maintain analytic distance, tolerate confusion and regression while remaining open, trusting to pre-conscious processing and to conceptual emergence.” Also, the researcher must have the ability to “develop theoretical insight into” the research area and be able to organise data, visualise and conceptualise while making abstract connections between the data (Glaser and Holton, 2004:11).”As Strauss and Corbin(1998:13) succinctly put it “Analysis is the interplay between researchers and data,” which is both an art and a science.

There may be some concern however that these philosophies which are entrenched in Grounded Theory may make the research process vulnerable and that there may appear to be a lack of control; how much rigour is involved in Grounded Theory and with the final analysis withstand external testing? This concern is addressed by Strauss and Corbin (1998) who clearly articulate the techniques and procedures that are involved in developing Grounded Theory. Understanding that Grounded Theory can be used in a variety of social disciplines which require flexibility and used by creative researchers, the authors point out that the procedures provided by them are there to “provide some standardisation and rigor to the [research] process”, however, the intention is not for these procedures to be followed dogmatically by researchers (Strauss and Corbin, 1988:13).

The issue of robustness of qualitative research procedures is also addressed by Glaser and Strauss (2006:101), who discuss the nature of Grounded Theory against the background of the general approaches to the analysis of qualitative data. The three approaches which are broadly described below deal with the more “traditional” or “general” qualitative research.

The first approach focuses on converting qualitative data into a “crudely quantifiable form” to be able to provisionally test a hypothesis, through means of first coding the data and then analysing it, rather than generating the hypothesis. The second approach focuses on coding data first and then analysing, or inspecting the data to “find new properties for [the] theoretical categories” and then writing reports or “memos” based on these categories. This process does not allow for a systematic generation of theory. The third option, which Glaser and Strauss (2006:104) call the “analytic induction” approach combines the abovementioned general approaches. This research approach focuses on causal relationships which have also been discussed by Patton in Section 6.2 above. This research approach essentially is followed when a limited number of hypotheses are tested and the data and cases are clearly defined.

Clearly none of these approaches supports the iterative nature of Grounded Theory or the intimate cyclical working relationship which the researcher shares with his/her data and analysing process. Another approach which is suggested by Glaser and Strauss (2006:102), combines the coding procedure of the first approach and the theory development of the second. This approach also allows for a more comparative analytic approach of qualitative data where joint “explicit” coding and analysis takes place simultaneously. According to Glaser and Strauss (2006:102) this will enable a more robust and systematic generation of theory, the procedures which will support this approach are further discussed below.

8.5.1 Coding

Inherent in the constant comparative method is a coding procedure; Strauss and Corbin (1998:13) have summarised the purposes of the coding procedures in the following manner:

i. To build rather than test theories;
ii. To serve as analytic tools for managing large amounts of data;
iii. To provide a manner in which alternative ''meanings of phenomena" can be considered;
iv. To allow for a systematic and creative process which can be carried out simultaneously;
v. Grounded Theory is in essence a "building block" methodology and the coding procedures will assist with the identification, development and relating of the concepts which comprise these building blocks.[9]

As can be seen in the discussions on the constant comparative method, the various coding procedures are aimed at allowing the research participants' voices to be heard in a clear and representative manner, rather than that of the researcher's voice. Furthermore Strauss and Corbin (1998:56) cautiously remind the researcher that while the theories which are generated from the coding process may result in incomplete theories, a "common language or set of concepts" which will allow for a better understanding of these theories, will be provided. And it is in this understanding that Grounded Theory has value. The coding techniques and procedures are described by Strauss and Corbin as being "only tools to assist with analysis" rather than the driving force of the analysis.

8.5.2 The constant comparative method

Glaser and Strauss (2006:105 – 113) describe four stages that are carried out while using the constant comparative method. The stages reflect the iterative nature of Grounded Theory and result in a generation of coded data, a series of memos, a theory and a written report. It is important to note that the stages which are briefly discussed below are not necessarily successive, but occur simultaneously as each stage develops as the researcher moves to the next stage.

8.5.2.1 Comparison of incidents applicable to each category

The researcher will code the various incidents which have been recorded in the data into various categories of analysis by simply making notes either in the margin or on a series of cards. In trying to better understand the possible reasons why Negotiated Agreements (especially Section 35 agreements) are not being used in by business, for example, the analysis could result in a category called "capacity constraints" which emanate from comments such as ""the staff never seem to cope with the work load" or "it takes forever for an official to attend to queries". Glaser and Strauss discuss two rules for constant comparative coding:

[9] The Building Block Methodology (BBM) has become an accepted tool in the development of water resource management in South Africa. BBM focuses particularly on methods to establish the quantity of water that is necessary to satisfy the environmental reserve, or ecological flow. The BBM is applied through a relatively complex process of integrating information from different specialists (ecological), geomorphological and hydrological) and ensuring that the flows in the river can be maintained in a sustainable manner (Hughes, 1999: 279). A factor which adds to the complexity is that the river does not exist in isolation from its social and economic environment and stakeholders (water users) also need to provide an input into the mix. The requirements of the different users and stakeholders also have to be considered (Pike & Schulze, 2000: 3). These may often be conflicting uses. All this information is utilized through a process of building information and understanding the interaction between the different components to achieve a desired outcome. Although the BBM is a scientific process utilized in the discipline of water resource management, the principles of identifying influencing factors; the role of stakeholders and the dynamic between these components through an integration process, can be described as a form of BBM.

The first principle; while coding incidents for a category, comparison of the previous incidents in the same and different groups which are coded in the same category is necessary. Coding may reveal other properties of the category “capacity constraints”, e.g. there may be perceptions amongst business stakeholders that officials are not adequately trained or that there is a lack of willingness to carry out duties. The second principle; at some point the researcher needs to stop coding and start writing memos. Conflicts may arise in the various categories and the researcher needs to find clarity in his/her theoretical notions and formulate logical conclusions grounded in the data.

This constant comparison and categorisation allows for the researcher to de-fragment and reconstruct the “story within the data”, thereby allowing for a better integration of the theory.

8.5.2.2 Integration of categories and properties

When a simultaneous process of data collection through theoretical sampling and analysis occurs, a self-emergence of an integrated theory is likely (Glaser and Strauss, 2006: 108 - 109). The on-going comparison of the different categories and their properties throughout this process allows for better integration. As Glaser and Strauss explain, during the integration process, the units which are used for constant comparison change from comparison of incident with incident, to a comparison of incident with properties of the category that resulted from initial comparisons of incidents.

Using the example of the category of “capacity constraints” – the researcher may establish after comparing the incidents of two separate business organisations who could have attempted to formulated a Section 35 Negotiated Agreement, that the characteristic which was used to measure the impact of capacity constraints was financial implications. This may vary from a company not being able to expand its business due to lack of decision-making to the fact that the company consistently has to pay fines due to officials not being able to approve or license improved operational remediation costs.

Once the various incidents which have a bearing on financial impacts are identified, they could be compared with “accumulated knowledge” which the researcher gained on “financial impacts”. The same process of comparison would be followed with other properties of the category “capacity constraints” and it is through this process of analysis that an integration of categories and properties occurs.

8.5.2.3 Delimiting the theory

The delimiting of the theory is an important aspect in achieving an integrated research product. This will allow the researcher to be more focused when analysing the data in terms of the incidents and categories. According to Glaser and Strauss (2006:110) delimiting occurs at two levels, i.e. the theory and the categories. The process through which delimitation occurs at these two levels is known as “reduction”. This allows the researcher to discard non-relevant properties of categories which would allow for the formulation of the theory with a “smaller set of higher concepts”. One process of reduction takes place through a reduction of the terminology to identify an underlying uniformity which exists with business stakeholders in terms of their experiences. This reduction process may very well reveal that the theory could be generalised to be applicable to all business stakeholders. An example of this may be that the formal theory is that participating business stakeholders would more readily embrace the concept of Section 35 Negotiated Agreements if a commitment would be received from government officials to give the stakeholders the necessary attention.

Glaser and Strauss (2006: 110-111) explain that the first level of delimiting the theory takes place through a process of reduction of terminology and constant comparisons; the major requirements of theory are achieved through: a) ”parsimony of variables and formulation” and b) “scope” in terms of how the research theory can be made applicable to a range of other situations. Both these requirements are essential for a robust research process. The second level of delimiting the theory is a reduction in the original list of categories which have been selected for coding (Glaser and Strauss, 2006:111). Clearly, the two requirements of “parsimony” and “scope” are also applicable at this level of delimitation. The researcher’s commitment to the theory which has evolved from the categories and data coding allow him/her to reduce the list of these categories. This elimination process also allows for the law of succinctness or for the principle of ”Occam's razor” to be implemented (Wikipedia: 2006).

“Theoretical saturation” also plays a role in delimiting the list of categories. Strauss and Corbin (1998:214) explain that saturation has been reached when no more data can be added to the categories. However, Glaser and Strauss, (2006:111) go on to say that if a new aspect of the category is identified well into the analysis and can add value to a category, it should be coded and compared. Once again, the iterative nature of Grounded Theory comes into play; however, this should be tempered with the principles of parsimony and scope. This approach is clearly illustrated in the Appendices 1A and B detailing the Wings Case Study Project and the chapters dealing with the Metal Finishing Industry Negotiated Agreement process. Numerous issues were raised by stakeholders during discussions and workshops; these issues were synthesized and distilled into fewer, more manageable themes.

8.5.2.4 Writing the theory

The researcher has to integrate the coded data, the series of memos and the theory into a cohesive report which reflects a “systematic substantive theory” which is based on his/her analytic framework. The researcher commences by collating the memos which have been written on all the categories, returning to the coded data when validation is required or when gaps in the theory are identified (Glaser and Strauss, 2006:113). For example, the final report for the analysis on the reluctance of the public to adopt Section 35 Negotiated Agreements had a major theme “capacity constraints of government officials” and the “financial impact of government officials’ capacity constraints on business stakeholders”. The content of the report should fulfil the parsimony and scope theory requirements.

8.6 CONCLUDING REMARKS ON THE RESEARCH PROCESS AND METHODOLOGY

Although the research process had to be amended to adapt to the circumstances in the field, the process that has been followed has been robust. In fact, the process has reflected the iterative nature of the discussions that underpin the complex negotiations between a diverse group of stakeholders involved in Negotiated Agreements. Furthermore, it became apparent that negotiated environmental agreements are complex in that they draw from many regulations and disciplines. Considering that the discourse of Negotiated Agreements is social dialogue, translation and a common understanding of the definitions of related concepts are quite important. Grounded Theory approach has added value to the research process from two perspectives; it has assisted with the identification of recurring themes and an opportunity to interrogate often used constructs related to Negotiated Agreements. Cognisance of both perspectives needs to be taken in future negotiation process in the environmental sector.

CHAPTER 3

9 DEFINITION OF TERMS

As stated in the preceding chapter, one of the benefits of following Grounded Theory has been the opportunity to interrogate concepts and definitions that are associated with negotiated environmental agreements. It became apparent during the early stages of the literature review and stakeholder interviews that often-quoted concepts and definitions which are routinely used result in often diverse understandings when the exact meaning is interrogated. It was therefore thought prudent to include a chapter on the definitions of terminology used in this research project.

This is particularly relevant to the various contexts within which Negotiated Agreements can be implemented. While the various pieces of legislation that will be discussed in the following chapters provide a framework for NEAs, the process that has to be followed to establish NEAs is consultative in nature, which will test the practicality of the legal framework. The consultative process and co-regulatory nature of NEAs is in stark contrast to the traditional “command-and- control” approach followed by governments across the world.

Although this study will look towards international trends and examine NEAs established in various sectors, the focus of the study is to explore NEAs as effective mechanisms to achieve environmental effectiveness in the water sector in South Africa. To achieve this objective, it will be important to understand a wide range of issues relating to NEAs and then make them applicable to the South African context. As such, a wide variety of relevant issues are discussed as part of this study; the following definitions and descriptions are provided to ensure uniformity and understanding of these terms throughout the study. These definitions are by no means meant to be exhaustive, but the most important ones that have been incorporated in the research project have been included.

The discussion extends beyond the definition as the context within which these terms are applied, and is integral to the interpretation of the term. Of particular relevance is the definition of NEAs, this definition includes a discussion on what an NEA is **not**. Furthermore, the interdependence between the definitions is important to the context of this study and where there are linkages, these are explained.

To facilitate understanding of these linkages, the definitions have been grouped together in appropriate themes relevant to the study, rather than listing the definitions alphabetically. These themes are:

i. Negotiation, diplomacy and consensus;
ii. Social, socio-economic environmental issues;
iii. Legal and administrative framework.

Where there is a formal definition, this is provided at the outset in italics. Where the original definition has been found lacking or a new definition is provided, the amended section and the new definition are written in bold italics.

9.1 NEGOTIATION, DIPLOMACY, AND CONSENSUS SEEKING

This section discusses the definitions associated with the concept and spirit or intention of Negotiated Agreements.

Negotiated Agreements[10]:

Negotiated Agreements (NAs) are *"commitments undertaken by firms and sectors which are the result of negotiation with public authorities and are explicitly recognised by the public authorities."* (Shaw, 2001:5) The relationship between voluntary NAs and regulation is not clear at present. Historically, the older "command-and-control" approach of implementing regulation led to stakeholders entering into informal agreements that had no legal standing. More recently however, the process to establish NAs, and the process through which regulations must be drafted and promulgated, is very similar in nature – intensive discussions are required by all parties to negotiate an NA. Nevertheless, important distinctions exist that determine whether an NA remains just an agreement, or whether it is becomes a regulatory tool. The most important distinction is that regulatory agreements between authority and stakeholders are obligatory, whereas NAs remain voluntary[11]. (Shaw, 2001:6). Implicit in Shaw's definition of NAs within the context of the United Kingdom, is that an NA is a legally binding contract between stakeholders and the government (i.e. making it subject to public law) (Shaw, 2001:5). Furthermore, Shaw also describes an NEA as being a "flexible policy tool that potentially contains other policy tools such as taxes or levies".

In the South African context, EMCAs are seen to be a form of NEAs and if one interprets Section 35 (1) of NEMA, Shaw's definition would be appropriate for this study. EMCAs must include a process of negotiation and the agreed objectives for improved environmental performance would be subject to "a sanction and/or positive incentive", thus implying legal compliance (Jonathon Hanks 1991:8)[12]. Also contained within NEMA is the understanding that integrated environmental management principles encourage the use of a variety of tools to achieve environmental compliance.

Despite the fact that NAs offer an alternative mechanism to the traditional command-and-control process of ensuring compliance, the intrinsic criteria of an NEA is that it is a voluntary process; the law does not make it obligatory for an organisation to enter into an NEA. As such, the question should be posed: what is not considered as an NEA? The definition provided by Shaw (2001:5) could serve as a framework for discussing Negotiated Agreements (NAs) i.e. that NAs are "commitments undertaken by firms and sectors which are the result of negotiation with public authorities and are explicitly recognised by the public authorities." From this perspective, two criteria that could serve as an indicator of what an ***NEA is not*** are discussed below.

i. A "command-and-control"approach

   There is a legal component to NAs; punitive measures will be implemented by the relevant government department in the event of non-compliance. However, the significant difference between the traditional "command-and-control" approach followed by the authorities and NEAs, is that the organisations who are signatories to the NAs have agreed to the standards contained in

10 British, Canadian and American literature often refer to Negotiated Environmental Agreements (NEAs) as Negotiated Agreements (NAs), whereas South African literature more often than not refers to NEAs. As such, these terms are used interchangeably in the text.

11 The four other distinguishing factors will be discussed in future chapters, suffice to explain here, these factors include inter alia; NAs are incentive based rather than being punitive, NEAs offer a wide selection of remedies; NEAs focus on long-term objectives and NAs are outcomes based. (Shaw, 2003:6).

12 J Hanks authored a discussion document in 1991 for DEAT to discuss the development and implementation of EMCA in South Africa. The description provided here is based on the legal description provided in Section 35(1)a of NEMA.

the NAs as opposed to having these standards forced on them and understand the incentives and punitive measures.

ii. A non-consultative process

Negotiation between various interested and affected parties is intrinsic to NEAs, this infers that an organisation will consult outside its organisational structure with other affected parties to reach a common understanding of how to meet environmental objectives. Shaw points out that purely voluntary approaches followed by an organisation to implement "unilateral codes of practice" or environmental management systems, are not considered to be NAs as no negotiation process has been followed to determine the codes or criteria for environmental management systems (Shaw 2001:5).

Environmental diplomacy:

"A skill that is essential to the process of negotiating successful environmental co-operation agreements." The term "environmental diplomacy" was coined by Lawrence E. Suskind in his book by the same title, "Environmental Diplomacy" (Suskind, 1994:vii). Suskind's book focuses on how domestic environmental policies interact with a constantly changing environmental agenda in the international arena. Suskind examines the complexities of numerous countries at various stages of development, with different environmental and political agendas, and with diverse stakeholder groupings, all having to achieve some level of consensus on how to deal with environmental problems. He strongly suggests that the only way to achieve this goal is through an integrated approach whereby stakeholders [from journalists to environmental groups to diplomats] "weave together knowledge and skills of economics, law, environmental science and negotiation" to find ways of building institutional capacity to deal with global environmental problems. The principles of this environmental diplomacy approach are applicable and fundamental to the process of negotiating NEAs, regardless of the level (international, national or local).

Consensus-based processes:

"These processes typically include independent facilitators or mediators who will, through a collaborative approach, use means of achieving a common understanding between conflicting parties in how to deal with difficult matters". Durant *et al.* (Durant, Fiorino, and O'Leary, R, 2004:331) are confident that consensus can be achieved in the environmental arena, be it at site-specific level or policy level, by using various negotiating techniques. Suskind (1994:61) is more sceptical of consensus-building in the international arena, where the structure of the United Nations precludes the conditions that are prerequisites for achieving consensus for the implementation of effective treaties, viz. sufficient pre-negotiation, face-to-face dialogue and *ad hoc* representation. Suskind's observations should serve as a warning that NEAs can be successfully negotiated *only* if negotiation processes include the criteria described by Durant.

The no-regrets approach:

"Finding a solution to an environmental problem that will benefit all stakeholders, regardless of whether there is agreement on the theory of the problem or whether the proposed solutions will be effective" (Suskind, 1994:78). The no-regrets approach is almost a precursor to the precautionary principle. Although there may be a great deal of scientific uncertainty regarding a negotiation process in which standards must be agreed to, this approach allows organisations considerable latitude to examine various alternatives in order to comply with stringent pollution regulations. Suskind explains that following this unconstrained approach has enabled industries to find solutions which not only reduce pollution levels, but also enjoy cost savings and improved market share - from having a "greener public" image. Perhaps this approach is fundamental in encouraging NEAs between sectoral stakeholders who have traditionally been conservative in their approaches towards compliance.

Precautionary principle:

"*The need to act [timeously] on possible environmental threats even when lacking conclusive scientific evidence [about the consequences of decisions and actions*]." This first part of the definition was coined at the Bergen Conference in Norway in 1990 (Whyte, 1995:29). A comparison to the precautionary principle criteria, put forward in a discussion on the achievement of sustainable development by NEMA, supports and expands on the definition above by describing the precautionary principle in the following manner "that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions" (NEMA (Act 107 of 1998) 4(a)vii). The decision not to use the NEMA definition in its entirety is based on the manner in which it tends to be interpreted by DEAT officials when considering Environmental Impact Reports (EIRs) for the issuing of a Record of Decision (ROD) for proposed developments. Personal experience has shown that the "risk averse and cautious approach" has provided a convenient "reason or excuse" not to issue RODs, regardless of whether the environmental assessment has been sound and the recommendations robust[13]. A similar sentiment is expressed in the Rio Declaration (Principle 15) in terms of stakeholders potentially abusing the precautionary principle: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." (Suskind, 1994:79). The precautionary principle places the onus of responsibility for burden of proof on the organisation or individual engaged in the activity that would produce the pollution.

Negotiation – an expanded theory

"*A theory of negotiation that goes beyond the confines of a negotiation process that only involves two parties (mostly those who can take sole responsibility for immediate decisions) negotiating on a single issue or on an on-going basis*." Suskind (1994:82) suggests that "non-monolithic" parties negotiating within the context of global environmental issues simultaneously deal with a multitude of linked issues, and that the traditional negotiation theory is insufficient and an "expanded theory", which takes into account the complexities of multi-party/multi-linkages, should be considered.

Contingent agreements

"An alternative to achieve consensus in terms of effective policies". Contingent agreements are discussed within the context of the no-regrets approach and the precautionary principle approach. Although these two approaches allow extensive latitude for achieving compliance, both these approaches can be challenged by stakeholders on the basis of lack of scientific evidence. Suskind (1994: 80) is of the opinion that political disagreements would still occur, and suggests that contingent agreements would provide an alternative to the need for achieving consensus in terms of effective policies. Stakeholders would negotiate numerous protocols that would come in to effect if [environmentally threatening] events occurred, or thresholds were exceeded. This does not obviate the necessity for monitoring - quite the contrary, it becomes more of an imperative (Suskind, 2001:81).

13 This statement should be properly contextualised: DEAT's refusal to issue a ROD on an Environmental Impact Assessment conducted for a 765kV Transmission line three years ago, came in the wake of numerous court cases that had been brought against the department. Officials thus were overly cautious in issuing any ROD that may result in legal proceedings. The issue at hand was that insufficient consultation had taken place with landowners during the EIA, this despite an agreed approach contained in the Plan of Study for Scoping. It is important to note that the proposed Transmission line was approximately 600 km long, with numerous landowners potentially being affected. Consultation had included all the representative landowner structures during the EIA to identify environmental impacts and proposed alternative routes. In addition, intense consultation had taken place during the individual landowner servitude negotiation process, where all environmental impacts and recommendations were discussed to finalise the Transmission Line route. It is important to note that servitude agreements cannot be finalised until the affected landowner has signed the agreement. The suggestion to DEAT was that robust conditions be incorporated into the ROD regarding this aspect. The concept of «precautionary principle" "in the NEMA definition is open to different interpretation, in this case into «risk averse".

Visioning

Visioning is a process of articulating a collective statement of future aspiration of society's relationship with the resource often between parties who have diverse and competing requirements of the water resource. Managing water quality forms part of the process of managing towards the attainment of the vision and as a result, the visioning process produces objectives with regard to water quality, amongst others. A vision statement must be converted into, and explicitly linked with, objectives that are useful at the operational level. Visioning also promotes voluntary compliance (DWAF: 2003)**.**

It is clear from the above discussions that to be effective, robust consultation is required. However, NEAs are negotiated within a specific context and cognisance of a plethora of influencing factors is required. Some of these issues are discussed below.

9.2 SOCIAL, SOCIO-ECONOMIC ENVIRONMENTAL ISSUES

The social, socio-economic and natural environment is closely interrelated; all of which can influence the process and outcome of an NEA. Many of the factors within these contexts may be measurable, however, the more intangible factors may be the determinants of the success of an NEA, and the definitions of these are briefly discussed below.

Drives (Drivers)

"*Drives are the motivating force behind the behaviour of man and animals*" (Jordaan and Jordaan, 1984: 618). It is important to understand what it is that drives stakeholders to participate in consultative processes and to adhere to or ignore legislation which could impact on their lives or livelihood.

Economic growth and economic development:

In his discussion on the management of sustainable economic development, Hunter (Fitzgerald, *et al.*, 1995:237) differentiates between these two concepts: economic growth, which is defined as "an expansion of economic activity, specifically for the higher average incomes," and economic development, which is defined as economic growth and "the appropriate changes in the structure of economic activity and an improvement in the distribution of income and wealth."

Economic efficiency:

"The costs associated with achieving a defined environmental target as set out in the NEA: this is one of the three criteria used for assessing the appropriateness of NEAs as a policy instrument (Hanks, 2001:15).

Environment:

"*The surroundings within which humans exist and that are made up of (i) the land, water and atmosphere of the earth, (ii) micro-organisms, plant and animal life, (iii) any part or combination of (1) and (ii) and the interrelationships among and between them; the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being*." NEMA (Definitions). While the economic component is not included in this definition, NEMA does include the integration of economic factors into the social and environmental factors in its definition of sustainable development.

Environmental effectiveness

"*The impact of the NEA on the environmental performance of the signatories to the NEA*". Environmental effectiveness is one of the three key criteria against which an NEA can be evaluated to determine its appropriateness as a policy instrument. According to Hanks (2001:15) environmental effectiveness can be assessed in terms of two main issues which should be contained in the NEA: the "level of ambition of targets as assessed against technical potential for improvements", and the "extent to which the targets have been achieved."

Environmental Justice

The concept of environmental justice relates to environmental abuse to social injustice. It assists in the understanding that unequal power relations in society result in the abuse of people and their environments

Environmental politics

"The basic assumption is that environmental issues are inherently political in nature because they involve people and their respective governments, making decisions about their common interest" (Steel, *et al.*, 2003:2). Diverse cultures, socio-economic and political contexts all affect the manner in which environmental decisions are made, and which will have an affect on the receiving environment. This is illustrated in the discussion on environmental policy. Steel (2003:15) goes on to identify some of the driving forces of environmental politics: population growth and urbanisation, economic changes, technological changes, values and cultures.

Hydropolitics

Turton (2002: 16) "*Hydropolitics is the authoritative allocation of values in society with respect to water."*[14] Of importance to this study, are two concepts which are implied by the definition; scale and range. Turton explains that the issue of scale is important as water issues can range from an individual, to a village, from provincial to international – with numerous levels in between. The issue of range refers to matters such as water service delivery, water demand management, social and political values and the sustainability of water resources.

Moral learning / behaviour

Moral learning occurs when a person learns the ethical codes of behaviour which have been adopted by a particular community and culture, or which are universally accepted an in accordance with which a person's actions are judged, by himself or by other people, to be morally justified or unjustified. At the same time the person also acquires the ability to exercise *self-control*, in other words, he learns to do what is *right* in terms of the ethical codes, and to avoid doing what is *wrong* in terms of these codes. (Jordaan, 1984: 515). This is an important issue to understand as it plays a pivotal role in understanding how and if Negotiated Agreements can be effective. Negotiated Agreements are a compromise between self-regulation and regulated behaviour.

Political economy:

"*Understanding how societies fit together and what the dynamics of the relationships between government and society are"*. Societies, political and socio-economic environments are constantly impacting on one another through an on-going development process.

14 The basic principles contained within Easton's definition include inter alia:

- Politics is a dynamic and on-going process;
- Central to this process is the allocation of values via laws and policies;
- This implies decision-making of some kind and this means that some will always be favoured over others;
- This implies an element of contestation as no universal set of values exists and these are applied by an authority whose legitimacy may be contested.

The on-going changes in South Africa's political economy invariably pose challenges to government and industry in terms of balancing out the use of natural resources against industrial growth, job creation and maintaining a healthy environment to achieve a sustainable economy and natural environment. The importance of understanding the potential dominance or power-based relationship between government and stakeholders in giving effect to NEAs should not be underestimated. This complexity is further underscored by Swartz (2004) who explains that societies do not only consist of economic and political dimensions, but a cultural dimension (traditions, values and beliefs). As such, it is important that these aspects should be considered in terms of the how the economy and these cultural dimensions impact on one another. According to Swartz (2004), Political economy, which is one of the strands of the Critical theory, takes into account how societies fit together and as such, provides a suitable guideline for the theoretical framework for this research.

Social dialogue:

The International Labour Organization (ILO) defines social dialogue as "*all types of negotiation, consultation or simply exchange of information between, or among representatives of governments, employers and workers, on issues of common interest relating to economic and social policy*." (ILO: 2006). As with environmental NEAs, the ILO explains that social dialogue processes can either be informal or legally structured or a combination of the two; this certainly seems to imply self-regulation or co-regulatory relationships. Furthermore, these processes can take place at a "national, regional or at enterprise level" (ILO: 2006).

Social equity:

"*The extent to which provision has been made for the involvement of all relevant stakeholders during the various phases of negotiating, implementing and evaluating the NEA".* Social equity is one of the three key criteria against which an NEA can be evaluated to determine its appropriateness as a policy instrument. Hanks (2001:16) distinguishes between active and passive participation. The former enables stakeholders to constructively engage in the NEA process, while the latter process allows for information-sharing only.

Sustainability and sustainable development:

This definition receives more focus as it is the crux of environmental discussions, and incorporates legislative frameworks, paradigms, attitudes and practices. *"Sustainable development means the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations"* but if one considers the comments made by Hunter (Fitzgerald, *et al.*, 1995:237), the popular perception that sustainability is always positive, should be questioned, this definition provided in NEMA is insufficient, and needs to be expanded to include **["*serves present and future generations "in a positive manner, that will not be detrimental to any person or party*]**". According to Warner (1999:265) who is quoted in Environmental Politics and Policy (Steel, *et al.*, 2003:7) sustainable development is "A situation wherein natural resources are available for day-to-day living, but also can be continued for future generations." This definition is broadly accepted because it resonates also with the term as originally introduced by the Bruntland Commission's report in 1987, Our Common Future (Steel, *et al.*, 2003: 65)[15], but it may be too limiting for the this study in that it focuses on natural resources only. Most definitions of sustainability refer to the present and the future, Hunter (Fitzgerald, *et al.*, 1995:237) is of the opinion that any discussions pertaining to environmental and economic sustainability cannot ignore a common characteristic of timeframes. Further, Hunter argues that financial sustainability can

15 The Bruntland Commission's definition refers to sustainable development the broader environmental context which is not limited to the natural environment; as "meeting the needs of the present without compromising the ability of future generations to meet their own need." (Whyte: 1995:14).

be interpreted as having short-term viability and that environmental sustainability should be viewed from a long-term perspective. These two criteria seem to be implicit in Warner's definition.

Also of significance, is Hunter's view that the assumption that sustainability is inherently positive in nature, may be incorrect (Fitzgerald, *et al.*, 1995:237). He cites as an example the apartheid system that lasted for two generations and that certain socio-economic ramifications may last well into the future, despite changes having taken place. Here he cites the example of cheap labour being the backbone of economic sustainability of the healthy gold reserves in South Africa. This type of sustainability could be considered "destructive". Taking cognisance of Hunter's comments, politics and governing institutional structures are important elements in this study as it is against the political and institutional background that environmental policies and decisions are made (Fitzgerald, *et al.*, 1995:237).

Implicit in the institutional background is the human element, which in the South African context is very important. Crucial to this discussion is acknowledgement that South African government structures have undergone substantial changes in terms of staff and their capacity in terms of implementing policies. As explained by Johnathan Cook (Fitzgerald, *et al.,* 1997:279–294) there is an important link between capacity and performance when discussing sustainable development, whether this is at organisational level or community level, and sustainable development cannot occur without sufficient empowerment. Considering Hunter's views that one cannot separate the issue of timeframes or omit these various elements when discussing sustainability, it would perhaps be more prudent to revise the definition for purposes of this study to include Hunter's conclusion that a definition of sustainability should also include the acknowledgement that "a pre-requisite of long-term sustainability is short-term viability" (Fitzgerald, *et al.,* 1997:239).

Contained within NEMA (Preamble), is a reference to all the elements mentioned above, including the short-term viability and long-term focus. "Sustainable development means the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations." Bearing in mind the assumption that sustainability and sustainable development are not necessarily positive, in other words, that sustainability can be either constructive or destructive, it is suggested that the following words be added to the NEMA definition: "in a positive manner, that will not be detrimental to any person or party".

Water Resource Management:

The process of managing water and its associated ecosystems in rivers, tributaries, dams, estuaries, ground water, etc. This is achieved by understanding the water supply, the quality of the water, how much water is needed for the sustainable supply of water to all water users, and the ecology of rivers.

Many of the issues discussed above are concepts or principles which may have been the driving force behind Policy and contained White Papers of various pieces of legislation in South Africa. The intention is that these principles are effected through the letter of the law. Discussed below is the legal and administrative framework that may contain these concepts and principles.

9.3 LEGAL AND ADMINISTRATIVE FRAMEWORK

Regardless of whether a Section 35 EMCA or a less formalised NEA is adopted by a group of stakeholders, it would have to be managed within the regulatory and administrative framework of national and local government. Below is a discussion of a few concepts associated with the legal and administrative theme; also, evidence of the principles discussed in the previous section is also present.

Environmental policy:

"*Environmental policy evolves through a participative and iterative process involving diverse stakeholders where core environmental problems are defined, placed on a political agenda and remedies sought through supporting legislation*" (Steel, *et al.*, 2003:xi). Considering the definition on the environment provided above, an integrated environmental policy in South Africa is still in its infant stages. It is important to understand the historical context in order to appreciate the progress that has been made in a relatively short space of time. Prior to the democratisation of this country, the focus of the environment was the conservation of nature, and not much thought was given to the integrated approach of the social and economic components. This "authoritarian conservation" (Peart, 1998:238) allowed the natural environment to be used as a perfect pawn or "justification" to displace people from land with potentially high conservation value. According to Whyte (1995:11) there was no surprise in finding a bias to any environmental policies that the apartheid government may have had. In addition, international sanctions placed a substantial strain on the economy of the country, resulting in the natural environment receiving insufficient attention. Similarly, those involved in the struggle against apartheid brought to the table a prejudice against the natural environment, arising from the manner in which it was used as a political pawn.

One of the most significant aspects of the Reconstruction and Development Programme (RDP), was that the relationship between the environment and economic development should be recognised, and that this would have to receive attention in the new dispensation, through policy, if development was going to be sustainable. Within the context of the RDP and a young democracy such as South Africa, it is perhaps prudent to consider Hunter's that the definition of economic development as being "the appropriate changes in the structure of economic activity and an improvement in the distribution of income and wealth." (Fitzgerald, *et al.*, 1995:237) Environmental policies would have to be tempered against this.

Furthermore, the RDP, the Interim Constitution, and the Constitution recognised that the only manner in which environmental and economic sustainability could be achieved was to entrench individual rights and responsibilities within the law. According to Whyte (1995:22) the development of the South African environmental policy has been no different to that of other countries, where changing socio-economic and political environments have resulted in "environmental policies that are less of a system than a compendium of objectives." Certainly this description was (and to some extent still is) relevant to the manner in which environmental issues are dealt with today. There exists, to some extent, a fragmentation of environmental policy which could potentially give rise to conflict between the relevant government agencies and lead to confusion in the public domain.

Environmental policy options:

*"**A set of policy instruments that can be used to achieve environmental effectiveness**."* Policy instruments are distinguished "in terms of the degree to which the state is involved in the development and the implementation of the instrument" (Hanks, 1998:180). These may range from the traditional directive-based regulation to the use of economic instruments, liability reform, co-regulatory or self-regulatory instruments, and NEAs.

Co-operative governance/government:

"*A foundation that supports the principles of integrated environmental management (IEM) and ensures the delivery of environmental justice by government and private sector stakeholders."* In terms of co-operative government, chapter 3 of the Constitution provides the context within which all spheres of government should conduct their business. Similarly, this principle is supported in the preamble of NEMA: "The environment is a functional area of concurrent national and provincial legislative competence, and all spheres of government and all organs of state must co-operate with, consult and support one another." There is, therefore, a strong relationship between the Constitution and NEMA in terms of achieving environmental justice through co-operative government between government and co-operative governance, (Bray, 1999:6) between government and the private sector. However, this objective is possible only if sufficient capacity exists to give effect to NEMA and other related legislation and regulation, and also to ensure compliance.

Co-regulation and self-regulation:

There are various alternatives to the traditional directive-based approach of achieving compliance; these two approaches shift the responsibility from the relevant authority to the regulated organisation: Co-regulation: "[*ensuring] active collaboration and co-operation between government and industry"* (Hanks, 1998:323) and; Self-regulation: "*A strategy in terms of which companies or sectors of industry, responding to various pressures, choose to regulate themselves, by setting standards and code of practice*…"(Hanks, 1998:318).

Self-regulatory policy instruments clearly refer to those instruments which organisations have developed and implemented independently from government to establish and manage environmental standards. The co-regulatory approach involves a mix of the self-regulatory approach and a directive-based approach. This approach is generally considered to be more applicable to achieving environmental, social and economic sustainability, as all relevant stakeholders are encouraged to collaborate (Hanks,1998:323).

Compliance:

First order compliance - "*having respect for existing rules that govern the environment, both on the part of society and government officials. Second order compliance - "the willingness to change inappropriate behaviour to meet with environmental compliance.* Suskind (1994: 109) draws on the distinction of the internal factors that motivate organisations to meet compliance, and external factors that influence organisations to change non-compliant behaviour when they have been found out as explained by Roger Fisher' in Improving Compliance with International Law (1981). According to Suskind, Fisher explains that "first-order compliance" is akin to an intrinsic value system that believes in a fair process that governs environmental laws, and describes this as "respect for standing rules". His "second order compliance" refers to outside influences that could encourage organisations to show "a willingness to change inappropriate behaviour." Suskind feels that this would include government agencies enforcing the law according to predetermined rules about remedies (Suskind, 1994: 109). Although Fisher's discussion pertains to international laws, the principles of first and second-order compliance could be applicable in the South African context. Organisations could be divided into the two groups, i.e. those who would be compliant as a matter of course, while the "second-order" group of organisations would push the boundaries until officially charged with non-compliance. This approach could be translated into an NEA which could also be considered to be a commercial contractual agreement under which the "first order" group would contractually bind themselves to work towards standards which are set higher than those stipulated in the law. The significance of this is that the participating sector will be bound to meet the conditions contained in the commercial agreement as well as those contained in the relevant law.

It would be interesting to test the theory of "compliance without enforcement" alluded to by Suskind (1999:109) in discussions of international obligations, monitoring, enforcement and compliance against a background of sovereignty, in South Africa. This principle claims that there would be far greater support to achieve environmental objectives if compliance and enforcement were not dependent on the "imposition of sanctions or reprisals". This infers that there should be a more positive incentive to meet obligations.

Both NEMA and NWA make reference to non-compliance: NEMA (Chapter 4,(16)) which refers to compliance from government institutions in terms of environmental implementation and environmental management plans; also, Chapter 7 (28) of NEMA deals with non-compliance from organisations and individuals under the section "Duty of care and remediation of environmental damage." NWA (Chapter 4, Part 10 and Chapter 16) refers to "offences and remedies".

Managerialism:

The managerialist model is results-oriented and is part of a democratic process where each individual staff member is responsible for their own actions. This Management by Objectives (MBO) approach allows for a clear delineation of roles and responsibilities, and for the evaluation of an individual's performance (Paine, 1999:50). The managerialist model was applied to the transformation of the public service, from a pre-democracy structure serving apartheid policies, into a more user-friendly structure where accountability, co-operation and autonomy are to be the order of the day. Despite this positive approach, a "dark side" to what may appear, superficially, to be a panacea for the much beleaguered public service is well disguised within the positive elements of the managerialist model (Paine, 1999:50). This dark side relates to the human element (negative attitudes, obstructive behaviour, and lack of personal commitment). New business models may appear at first to be more focused and efficient, but may fail to take into account the psychological and emotional effect on staff members; the driving force behind successful transformation. On a practical level, there is a strong link between capacity, performance and co-operation in achieving environmental compliance and sustainability, and this should be predicated on clear decision-making processes. According to the managerialist model, the decision-making process is de-centralised from national to local government level.

In discussing the managerialist approach in terms of having a more effective public service, Paine (1999: 51) says it would be a mistake to assume that policy formulation can be separated from implementation. From this perspective, it becomes clear that for an NEA, as a policy instrument, to be a suitable instrument to achieve environmental governance, the institutional framework and human resource capacity of both DEAT and DWAF will have to function even more effectively and efficiently to meet their respective mandates.

South Africa is not the only country where the public service has gone through organisational changes that would impact on giving effect to environmental legislation. Denise Scheberle (2004:370-372) explains that the USA's Federal Environmental Protection Agency (EPA) underwent major changes in an attempt to delegate more responsibility from the federal government to individual states. This "Devolution Revolution" occurred in 1995 when the National Environmental Performance Partnership System (NEPPS) was introduced. The NEPPS was intended to find new ways to assess state environmental programmes, and allow the "states to enter into environmental performance agreements that would potentially focus federal oversight on environment outcomes as opposed to agency conduct." It is important to note here that, no matter how well-intentioned the programmatic flexibility of this approach, the NEPPS did not fulfil its potential. Its failure was primarily due to a lack of co-operation from officials reluctant to change traditional, bureaucratic methods of operation. They were unsure of how to achieve the new goals and, more importantly, there was uncertainty as to who was responsible for compliance issues.

Capacity constraints within the government departments which would be involved in the negotiation and enforcement of a Section 35 EMCA have been cited as a concern by various stakeholders who have been interviewed as part of the initial research process. As this issue is extremely complex, it would warrant a much more detailed investigation with a different methodology. Also, understanding government capacity constraints is not the key focus of this research. As such managerialism is only discussed to the extent that it may impact on the successful implementation of Section 35 EMCAs. Managerialism is further discussed in Chapter 7.

An attempt has been made to illustrate the complexities surrounding the concept of Negotiated Agreements; this has been done by unpacking relevant definitions associated with NEAs into three broad themes discussed above. Also, there is a possibility that these discussions have not exhausted all the different constructs that could be associated with a Section 35 EMCA as a form of a NEA.

The following chapters will attempt to better contextualise the interrelationships between these concepts. More importantly, to understand the influence of these concepts on an NEA as a successful mechanism to achieve environmental compliance, particularly when multi-stakeholders are involved.

CHAPTER 4

10 INTRODUCTION TO NEGOTIATED ENVIRONMENTAL AGREEMENTS

Internationally the approach towards how environmental issues are viewed has changed drastically since the 1960s, which were seen as the birth of a more modern environmental paradigm (Doern,1993:1). According to Doern environmental issues were initially viewed from a local and regional perspective, but that it is possible that disasters such as Chernobyl and Bhopal in the 1980s contributed to an international awareness of the need to re-examine environmental approaches. The 1992 Earth Summit in Rio and the endorsement of Agenda 21 further highlighted the global plight of the environment, the latter setting out a variety of economic and environmental actions for the 21st Century (Doern, 1993: 1&97).

The interdependence between various countries in achieving the objectives of Agenda 21 cannot be over-emphasised. Indeed, the objectives appeared to be over-ambitious. Gary Bryner explains this in *Environmental Governance Reconsidered* (Durant *et al.*, 2004:83-85). The United Nations General Assembly Special Session (UNGASS) reviewed the implementation of Agenda 21 at its 1997 sitting. It was apparent that the economic disparities between the northern and southern countries had grown substantially and as poverty continued to increase in developing countries, and capacity constraints continued to hamper governments, environmental priorities continued to spiral downwards. These are all issues that threaten sustainable development. In an attempt to address this problem, UNGASS set out a few key objectives, the most important issue for this study is the fact that international co-operation would be required to address capacity constraints to achieve the Agenda 21 objectives (Durant *et al.*: 2004:84). Included in the UNGASS objectives listed by Bryner (Durant *et al.*, 2004:84), (and relative to this study) are *inter alia:*

i. “integrate economic, social, and environmental objectives in national policies”;
ii. “make trade and the environment mutually supportive”;
iii. “Change unsustainable consumption and production patterns.”

The participants attending the 2002 UN World Summit on Sustainable Development (UNWSSD) held in South Africa reached consensus that mitigation of the depletion of natural resources which arises from the “inextricable link” with poverty and the depletion of natural resources is essential (Durant, *et al.*: 2—4:85). To achieve these objectives set out by UNGASS, economic development and environmental protection would have to have an interdependent relationship. Furthermore, there would have to be a commitment to further support and serve these objectives in order to “shape future global policy making”. (Durant, *et al.*: 2004:85).

Certainly this was not an easy common objective for participating countries to meet, considering that internally countries have differing environmental policies and priorities. This was further complicated by economic development strategies and capacity constraints both within government, non-government organisations, civil society and business. However, as Bryner states (Durant, *et al.*, 2004:86), a strong foundation was formed between parties through a commitment to achieve the aforementioned objectives through partnership agreements, albeit that these were voluntary. Despite the fact that there were some concerns expressed by critics of these partnerships, particularly that compliance and capacity building would to a large extent rest within the hands of those who are potentially responsible for pollution and degradation (Durant *et al.*: 2004:86); strong indications of the global trend of moving away from a purely command-and-control relationship between governments and industry was emerging.

In the British Report entitled *Signed, Sealed and Delivered? The role of negotiated agreements in the UK,* Ben Shaw (2001:2) explains that at European level as well as in the UK, governments have started to acknowledge that alternative policy tools would be required if industry was to find "innovative approaches" to improving environmental performance and that the "command-and-control" approach, while beneficial to the environment in many ways, was restrictive to business and potentially also the environment. According to Shaw these innovative solutions would include environmental policy tools, market-based mechanisms, voluntary approaches and Negotiated Agreements.

Furthermore, the complexities of the global environment in which diverse sectors of business and industry operate, and within which legislation and regulations have to be implemented, demand that a variety of tools be made available to all parties. This will allow the parties to engage constructively in the pursuit of economic and environmental sustainability, including flexible policy, Negotiated Agreements, market- based mechanisms and economic instruments (Shaw, 2001:1).

As with the approach adopted in the United Kingdom to establish Negotiated Agreements, it is important that the South African approach to seeking negotiated solutions should investigate not only potential technical solutions to processes that impact on the environment, but also explore the flexibility of policy and legislation, the capacity of institutional frameworks, and also the relationships between relevant government departments, industry, non-governmental organisations (NGOs), and broader civil society.

Thus, in developing its approach to Negotiated Agreements, South Africa's DEAT has looked to the Netherlands, where a National Environmental Policy Plan (NEPP) was developed in 1989. Essentially, this plan provided a strategy to significantly reduce pollution emissions for more than 200 substances. The NEPP shifted the focus from a purely regulatory approach to control emissions, to a negotiated approach where sustainable target levels of emissions were agreed to by the participating sectors. The responsibility for achieving and maintaining these levels was shifted to the participating industrial sectors and, through a negotiated process, in consultation with government, "Covenants" were drafted and implemented, and are legally binding on the signatories.

It is appropriate to provide a brief overview of EMCAs and the relevant legislation that provides the impetus and framework for this research project.

10.1 THE BENEFITS AND OBSTACLES RELATED TO NEGOTIATED AGREEMENTS

The basic premise on which the establishment of EMCAs is based, is that these can be beneficial to industry, government and the environment. However, trends overseas have shown that there are also disbenefits to all role-players. Initial discussions held during the Inception Phase of this study (i.e. prior to the revising the Terms of Reference) confirmed this. It is thus important that the benefits and disbenefits are better understood, as these may contribute to the findings of this research project. The following provides a summary of the findings contained in the Inception Report which documented the early investigative stages in terms of the original Terms of Reference.[16]

10.1.1 Benefits

16 The Inception Report (January 2005) was presented at the Project Reference Group Meeting on 18 January 2005). This Report evolved in the Project Working Document that was presented to the Project Reference Group at various Milestones in the project. This Project Draft Final Report is the culmination of the research project.

The benefits of NEAs for industry allow industry to provide greater input in how and when environmental targets can be met, are met, which allows industry the freedom to decide how and when to make financial investments into environmentally-related improvements. Since government cannot introduce changed targets without re-negotiating the agreement, the uncertainty related to medium-term targets is reduced, greater operational freedom in meeting targets.

The benefits for government would mean that industry would volunteer its expertise and technical capacity to setting targets and implementing environmental strategies. Increased self-regulation within sectors would greatly reduce the enforcement burden of government and; strong partnerships between industry and government can be utilised in joint problem solving and strategic planning.

The environment would benefit from the voluntary mainstreaming of environmental issues into the core business of industry, rather than the environment being seen as a cost centre and hence a necessary but expensive drawback to doing business. Also, proactive measures taken within industry to protect the environment, rather than relying on government enforcement of compliance with minimum standards.

10.1.2 Obstacles to role-players

Role-players could experience various obstacles when adopting NEAs, four are discussed here. The obligations may not met by the individual regulatory authorities and, due to lack of capacity, communication channels and/or monitoring of compliance is not maintained. Secondly, a lack of trust between business, government and civil society could present a barrier to entering into an EMCA.
A third obstacle is the fact that environmental issues are not at the forefront of many businesses in South Africa, particularly considering that South Africa’s status as a developing country allows industry to perpetuate the perception that there are more critical issues that should be addressed first. The collective paradigm of business and industry needs to change if the value of NEAs is to be appreciated. Finally, civil society, particularly environmental NGOs, may not wish to become signatories to EMCAs; they may feel that this indicates that current levels of operation are acceptable, and that they would rather be consulted as part of the process and continue to play a “watchdog” role, thereby not compromising their mandate.

To better understand the nature and role of various concepts relating to NEAs need to be better understood and the literature review will further investigate these issues relating to these concepts.

CHAPTER 5

11 OVERVIEW OF LITERATURE REVIEW

11.1 INTERNATIONAL CASE STUDIES

The literature review captures the international sentiment expressed towards EMCAs; provided below is an overview of the processes that have been followed as well as a record of the successes and failures.

11.1.1 Sustainability of Negotiated Agreements

The discourse around Negotiated Agreements appears to be relatively young in economic terms; much of the literature refers to case studies from the mid nineties to the present. Also, South Africa has turned to the Dutch Covenant as an example of how Negotiated Agreements can function in this country. However, it is interesting to note that, in addition to the early negotiation process related to in the water sector in the South African case study; the Japanese seem to have embraced this concept several years ago. The Japanese Negotiated Agreement discussed below could also have been considered quite advanced, as it focused on an integrated approach to environmental impacts, i.e. air, water, noise.

An Organisation for Economic Co-operation and Development (OECD) Report (2003:4-5) focuses on two Japanese pollution control agreements (PCAs) in Yokohama City and Kitakyushu City which were negotiated in 1964. The first ever Negotiated Agreement in Yokohama City contains the most important element of the modern day Section 35 EMCA, targets set for an air "pollution control contract" committed the Electric Power Development Co. Ltd (EPDC) to implement measures that would achieve targets ABOVE the levels required by law. This was an important step for the Ministry of International Trade and Industry (MITI) as it was concerned that the new coal-fired power station that was planned by EPDC would exacerbate the air pollution levels in the Yokohama coastal area.

Also a first for the City was an agreement reached in 1967 with the Tobata Kyodo Thermal Power Ltd Company (TKTP) (OECD 2003: 4-5). As this was the first agreement of its kind, a form of "progressive implementation", or as the report refers to it, an "*ad hoc*" approach was adopted. The process was initiated when the City Mayor sent a letter to TKTP requesting that special precautions be implemented in terms of pollution control. TKTP accepted this request. This "gentleman's agreement" was extended to a more formal agreement that was signed between the TKTP president, the City Mayor and the governor of the Fukuoka Prefecture. This PCA focused on the implementation of measures to reduce the sulphur content of fuels and the installation of dust collectors. It is interesting to note that once the city had enforced a municipal ordinance for pollution control in 1970, the PCAs did not become obsolete, rather they played a complementary role in terms of achieving the ordinance standards (OECD 2003:5).

There are some interesting issues relating to the two cases noted in the OECD Report (2003:5)

i. In both cases all the environmental targets (air, waste water and noise levels) were met by a wide margin.
ii. The incentive for Yokohama to meet the PCA conditions perhaps lay in part with the fact that the authorities had the power to "block the building of the power plant" and as the report states; this may "contributed to the environmental effectiveness".
iii. The PCA in Yokohama City was concluded with a single company. This meant that the economic efficiency of a PCA could be low. The PCAs only covered expansions and new plants and did not provide mechanisms that "could [ensure] the achievement of a set environmental target." The abatement costs could therefore be quite high (OECD, 2003:5)
iv. The contrary was found however with the collective PCAs in Kitakyushu. The PCA was collectively concluded between the city and over 100 companies responsible for emissions. A "general reduction policy" was agreed to and this allowed for individual negotiations about allowable emissions to achieve a set environmental target. The economic efficiency in terms of the total abatement costs however could, according to the Report (OECD, 2003:5) not be fully determined.

PCAs are still in existence in Japan and according to the OECD report (2003:5), are instruments that play an important role in achieving environmental effectiveness. Japan takes an approach of cumulatively managing its environment and has "total mass pollutant control schemes for air and water". As such, it appears that the PCAs would focus on emission quotas and control measures for catchments. Most importantly, the PCAs are used as a condition when companies apply for permits or licenses. 3.

11.1.2 Supporting negotiated environmental agreements

Davis, Mausberg, Burkhard and Moffet, (2002) review the options for enhancing the effectiveness, efficiency and credibility of NEAs through examining the role that statutory and regulatory provisions can play in NEAs. The authors make a distinction between self-regulation models (that can be considered as options for Negotiated Agreements) and Negotiated Agreements, the main distinction being that the former does not involve a bargaining process between stakeholders; rather it is a form of delegated authority within clearly prescribed parameters.

Davis *et al.* (2002) do not debate the supporting or opposing arguments around NEAs, as these arguments have been recorded in numerous other documents. Rather, in discussing these two approaches, the authors, without expressing an opinion on whether Negotiated Agreements are viable options. They also examine the opinions of industry and government and how the respective groups may benefit or disbenefit from participating in either of the two approaches. With specific relevance to this research project, Davis, *et al.,* discuss various options for supporting NEAs with statutory and regulatory provisions.

Amongst the benefits of a clearly defined bargaining process that involves stakeholders are, inter alia:

i. Providing a common mechanism for addressing issues that would otherwise have to be addressed separately due to the distribution of authority among various departments and levels of government over different aspects of a given project;
ii. Avoiding the lengthy and costly assessment and review processes that would otherwise be required under formal government permitting regimes;

iii. By involving relevant stakeholders in resolving technically complex questions that inevitably raise value conflicts, an agreement can enhance the legitimacy of outcomes and local acceptance of the risks associated with a given outcome; and
iv. Compared to criminal law, the law of contract offers far more flexibility in identifying appropriate remedies and in responding to surprise situations.

Notwithstanding the benefits and flexibility offered by Negotiated Agreements, the robustness and sustainability of Negotiated Agreements are really only tested when conflicts arise between a diverse group of stakeholders who have different value systems. This is borne out in a case study which examines the conflict between stakeholders involving the protection of coral reefs from aquarium fish collecting along the coast of western Hawai'i. Capitini, Tissot, Carroll, Walsh and Peck (2004:1) examine the scuttling of a previously multi-party Negotiated Agreement during an environmental dispute resolution (EDR) process managed by the Hawai'i Division of Aquatic Resources (DAR). Although Capitini *et al.* (2004:2) are of the opinion that the Negotiated Agreement process as well as subsequent EDR process was sound, the most important issues that were lacking were that scientific evidence primarily drove both processes and that there was an under-representation of some identity-based community perspectives and values. This oversight resulted in key stakeholders from the broader community perceiving themselves to be marginalized as resource managers. While the EDR process may have resulted in some success, Capitini *et al.* (2004:12) issue a cautionary note in terms of the validity of complex Negotiated Agreements in the eyes of the participants who are personally committed to the issue at hand. Furthermore, with this lack of legitimacy, external stakeholders could seek recourse through "unilateral political action" concerning enforcement.

However, the success and effectiveness of the NEAs is measured differently by the various participating parties depending on how best the individual interests have been served. The converse is also applicable in terms of the statutory and regulatory framework; each participating party will want to ensure that their interests are not adversely affected by the legal requirements. In particular, Davis *et al.* (2002) discuss the concept of regulatory capture. This concept refers to bilateral Negotiated Agreements between government and industry which could result in targets being set that favour industry over the public's interests. This could occur for example where there are limited resources and the various parties cannot negotiate broadly, i.e. the negotiation process is limited to government and industry. Another concern is that government officials can collude with industry, thus marginalizing other parties. While the paper acknowledges that the latter practice is not unique to NEAs, the nature of the negotiation process may make the process more vulnerable to regulatory capture.

Davis *et al.* (2002) do provide solutions to the problem of regulatory capture; through recognizing that there should be statutory safeguards in place, NEAs should be carefully worded so as not to fetter either government's legal responsibility or compromise industry financially, legally or administratively. In the same breath however, the flexible nature which is considered the most beneficial quality of NEAs, should not be overwhelmed.

Davis *et al.* (2002) also discuss various options for supporting NEAs with statutory and regulatory provisions, *inter alia*;

i. Authorizing legally binding negotiated environmental agreements[17];
ii. Authorising penalty provisions for non-compliance.[18] ;
iii. Provide fiscal incentives:
iv. A feebate option; where a tax or levy is charged by government for exceeding negotiated targets and a rebate is given where industry meets the negotiated targets.[19];
v. Authorize a permit to account for or integrate the terms of a negotiated permit.[20];
vi. Providing appropriate legal authority and avoiding regulatory capture;
vii. Provide a credible threat in law of regulatory intervention if the agreement is not effective.
viii. Prescribe in law the targets set for the NEA.
ix. Establish a regulatory framework for NEAs.

The overall conclusions and recommendations that are made focus on the positive aspects that the regulatory and statutory framework can add to NEAs, particularly if well defined. However, a balance should be maintained to ensure fairness for all parties without fettering government's legal obligations or prejudicing the other parties in any manner.

11.1.3 Combining Negotiated Agreements with tax and emission trading

De Muizon and Glachant (2003) describe the implementation of the UK Climate Change Levy Agreements (CCLA)[21]. Their focus is on air emissions and their discussions include the environmental effectiveness and cost efficiency of the CCLA. The authors provide an example of how NEAs can be implemented within statutory and regulatory provisions and the discussion adds value to this study in better understanding the principles that provide the foundation for financial incentives and disincentives which the NWA. These Negotiated Agreements are part of a comprehensive policy presented in 2000. The overall Climate Control programme plans to reduce greenhouse gas emissions by 23% beyond 1990 levels, to 2010. The agreements cover the energy-intensive sectors and are combined with a tax and an emission trading programme. The authors examine how the combination with tax leads to a better environmental effectiveness and how the combination with emission trading improves the cost efficiency. However, the authors conclude that the performances of the policy mix would not be affected by the absence of NAs.

At the time of publishing the paper, 43 trade associations, representing 7 000 firms and industrial sites had signed the agreement[22]. The agreements which quantitatively[23] describe industry targets, fall within the feebate[24] category of tax and are closely linked with an energy tax launched in April 2001: The tax targets downstream energy consumption by industry and cover***s*** all types of energy sources

17 With the exception of the Netherlands, most NEAs are not legally binding, the Constitution of the country would stipulate which government entity is authorised to enter into such an agreement, in South African, Chapter 3 of the Constitution gives effect to Section 35 of NEMA.

18 Penalties can only be effected if a NEA has been legalised i.t.o the statutory and regulatory framework

19 Feebates are not limited to NEAs; the Department of Minerals and Energy has been investigating the possibility of a Feebate option as a method of encouraging motor manufacturers and motorists to reduce emissions reduce fuel consumption.

20 The paper discusses various permitting options, of these are not linked to NEAs and can be issued independently of NEAs.

21 The CCLAs are based on a collective liability principle through agreements signed with individual companies, it is through this mechanism that enforcement is enacted through Department for the Environment, Food and Rural Affairs (DEFRA),

22 This represents more than 25% of the UK's policy reduction targets.

23 The quantitative targets of the CCLAs could be expressed in four ways: energy per unit of output, absolute energy consumption, carbon emission per unit of output, absolute carbon emission

24 A "Feebate" approach is a combination of a fee or a tax which is levied, or a rebate that is given to industry in terms of legislation.

(electricity, gas, coal and LPG). The rebate component contained in the CCLA comes in the form of an 80% tax rebate to participating firms.

It is of interest to note that the authors make mention of another type of agreement that was offered to industry, which was not adopted. The agreement was limited to the collective commitment by the sector association to meet a sector specific target without burden sharing between individual companies. One possible explanation for this design being rejected by industry is the fact that the option was based on a mechanism of collective compliance: a firm could lose the exemption, even if it complied with the target, in the case where the whole sector failed to comply.

The CCLAs are based on a collective liability principle through agreements signed with individual companies; it is through this mechanism that enforcement is enacted through Department for the Environment, Food and Rural Affairs (DEFRA). Running in parallel to the CCLA, is the emission trading programme in which firms that have signed a CCLA can voluntarily participate in an emission trading scheme. The programme gives the opportunity to be rewarded with emission credits if they over-comply with their CCLA targets or to buy credits to comply. Put differently, it is a Baseline & Credit scheme[25] of which the CCLA targets constitute the initial permit allocation.

De Muizon and Glachant (2003) also discuss the environmental effectiveness[26] and the efficiency of the mechanism of the CCLA. In order to evaluate the environmental effectiveness of the CCLA, it was necessary to create two hypothetical baseline scenarios to describe what would have happened in the absence of a policy. Two reference scenarios, viz; A "Business-as-usual scenario" (BAU) which describes what would have occurred if firms did not change their behaviour (the full rate levy) and an "All-Cost-Effective scenario" (ACE) in which all cost effective measures of energy efficiency are implemented by the companies.

In comparison with the BAU scenario, ACE measures include major plant replacement, retrofit of particular components and better energy management. The forecasting of the investments is based on standard assumption of plant replacement schedules on the investment criteria that are believed representative in the particular sector. It also assumes that neither capital availability nor managerial time will be restricted.

The authors' analysis of the two scenarios indicates a positive overall assessment of the policy-mix centered on NEAs to deal with energy-intensive industrial sectors. It is important to note that the combination of CCLAs with the energy tax is crucial to secure the environmental effectiveness, while the combination with a tradable permits market allows for cost efficient outcomes. There is a cautionary note however: the overall assessment is only relevant to the combination of the NEAs and the CCLAs. The paper further debates the effectiveness and efficiency of the two scenarios by examining the individual contribution of the CCLAs and the NEAs, or rather the effect of the absence of the NEAs from the policy mix. The theoretically arguments to determine this is elucidated in the paper; suffice to say however, the political, policy and tax framework for the basis of the discussions. The final outcome of the authors' evaluation is that the use of NEAs complicates the CCLA programme, offering no obvious efficiency advantages. More succinctly stated in the report; "If the two challenges are to design a climate change policy in energy intensive sectors which is both efficient

25 This Baseline & Credit scheme for CCLAs participants is one piece of a broader emission trading programme. There are other components apply to other sectors.

26 Environmental effectiveness is defined as the ability to achieve an ambitious environmental target. This requires stringent abatement targets and sufficient mechanisms to ensure compliance.

and acceptable by industry, emission trading would have done the job in a simpler way. In the end, the contribution of NAs to the performance of the British programme is disputable."

11.1.4 Environmental Cooperation Agreement to achieve waste minimisation.

Rather than sector based, this case study examines an Environmental Co-operation Agreement (ECA) that was entered into between the relevant regulatory authorities, an individual company and the directly interested and affected parties (local community)[27]. It is also an interesting study in that the ECA deals with two environmental media, *viz* air and water.[28]

Cook Composites and Polymers Co (CCP) is based in Saukville, Wisconsin, United States of America and manufactures polyester and alkyd resins used in a variety of applications including the coatings, sanitary, automotive and marine industries. The wastes generated from the approximately 52 million tonnes of resin produced annually, are primarily reaction water, spent solvents, filter cleaning residues, and miscellaneous off-spec materials. The facility currently treats two of the waste streams (reaction water and solvents) in an onsite Resource Conservation and Recovery Act (RCRA) licensed hazardous waste incinerator.

The magnitude of the problem faced by CCP is clearer when one understands that in 1998 alone, the CCP Saukville facility generated approximately five (5) million pounds of a characteristic hazardous waste stream (or reaction water). In addition, approximately 1.7 million pounds of spent solvent that was used as a supplemental fuel in the incinerator was generated. Since the solvent has been used as supplemental fuel to incinerate reaction water, the option of recycling of the solvent was historically not considered economically beneficial. The neighbouring communities' concerns can be clearly understood.

CCP recognized the economic, environmental, and community relations benefits associated with moving towards waste minimization and pollution prevention approaches for management of its hazardous wastes and other waste streams associated with the reaction water. The challenge was to synchronize CCP's technical and business evaluation of waste minimization and pollution prevention options with the regulatory requirements and regulatory review of Wisconsin Department of Natural Resources (DNR) and U.S. Environmental Protection Agency (EPA) staff from many different environmental programmes.

CCP submitted a letter of intent to Wisconsin DNR, indicating their interest in an Environmental Cooperative Agreement to help facilitate their waste minimization. Through a negotiated process with the DNR and local interested and affected parties, an Environmental Cooperative Agreement (ECA) was drawn up. The ECA provides the structural framework for CCP and Wisconsin (DNR) to reprioritize and focus their resources to evaluate the feasibility and desirability of waste minimization projects to eliminate the need for a hazardous waste incinerator and reduce and reclaim hazardous wastes and other pollutants at their Saukville Facility. Target dates to achieve these objectives have also been agreed to.

27 Environmental Cooperation Agreement between Cook Composites and Polymers Co. and Wisconsin Department of Natural Resources 10/01/2001. http://dnr.wi.gov/org/caer/cea/ecpp/agreements/cook/final/index.htm#VII

28 It is interesting to not that Jonathan Hanks explains that one of the key motivating factors to move towards EMCAs would be the principle of achieving environmental integration; the traditional "command-and-control" legislation is limiting in achieving integration as it is media specific; i.e. legislation focuses only on one specific environmental medium (land, water or air) without giving consideration to what the different media may have on one another. Hanks, J. Achieving industrial sustainable development in South Africa: what role for 'self-regulatory' and 'co-regulatory' instruments? 1998 5 SALJEP.

It is important to note that the ECA does not replace the normal regulatory review and requirements of DNR's Air, Waste and Wastewater programs for CCP's initial proposed project or any future projects CCP may propose. However, the five year agreement is legally binding on all parties and does synchronize the DNR programme and EPA's review of these projects to help CCP make environmentally sound and cost effective business decisions. CCP, under this agreement, commits to activities and provides information that it would be difficult for any single DNR programme to require. This agreement also requires that CCP continue the long-term cleanup that had been approved as part of its Hazardous Waste license. The CCP has also committed itself to establishing an Environmental Management System, to establish a community advisory committee and to conduct on-going dialogue with the community on environmental issues, to pursue other waste minimization and pollution prevention projects, and to take a leadership role in product environmental stewardship.

A key component of the establishment process of this ECA, was the intense consultative process that was followed with all stakeholders, most notably the immediate community.

One of the key reasons for a Negotiated Agreement is that a group of stakeholders has to share a common vision in terms of addressing an environmental problem or issue. As a country that shares the problem of water scarcity with South Africa, Australia is forced to find pro-active and creative ways of managing its water resources in a sustainable manner. The Ord River is situated in the Kimberley District, in Western Australia. In close co-operation with the Ord Irrigation Co-operative (OIC) the river basin's key stakeholder, embarked on a three year community planning process to find an integrated way of managing the land, river conservation and the town. This process culminated in the Ord Land and Water Management Plan (OLWMP). These stakeholders include; growers and Water Corporation (WC), Department of Environment and Department of Agriculture Western Australia (DAWA),) embarked. Subsequent to the OLWMP, a Water Management Reference Group has been established to develop a collaborative to ensure an integrated approach to achieve improved water management. The group is made up of the diverse stakeholders, including community, industry and government representatives. "It is expected that this approach will result in more efficient investment of regional resources, improved project outcomes and resource condition." The Ord River Basin water users now operate according to a common vision and agreed to operating rules; this in itself can be described as a form of a negotiated environmental agreement. (www.ordirrigation.com.au, downloaded: 19 May 2005).

CHAPTER 6

12 SOUTH AFRICAN LITERATURE

Although South Africa has looked towards the Dutch model in terms of EMCAs, the literature review reveals that internationally, the concept of negotiated environmental agreements between multi-sectoral stakeholders and the relevant authorities is not a new concept. Also evident in the international literature is the fact that no matter how sound policy may be, there are various limitations, complexities and also contradictions between policy and practical implementation. The South African literature review intends to further investigate these issues.

12.1 THE EARLY HISTORY OF NEAS IN THE WATER SECTOR IN SOUTH AFRICA

One of the earliest Negotiated Agreements recorded in South Africa's history, could very well be traced back to the 1800's to a case documented by A.D. Lewis in his paper on the development of Water Law in the Union of South Africa. Lewis (1930-1940)[29] documents two cases in which the principles of negotiation and finding solutions to achieve a sustainable solution that will be beneficial to both parties are apparent:

The first involves two farmers drawing water from the Hex River in the Swellendam area. Pretorius, a downstream farmer, lodged a complaint with the Board of Landrost and Heemraden, Swellendam against van der Berg, owner of the upstream farm, De Oude Wagen Drift. The thrust of the complaint was that van der Berg did not "take out water from his own farm", but had permission from the upper farm, Tweefontein, to draw water for a mill and for irrigation. Pretorius had two furrows taking water from the Hex River "some distance below the intake of van der Berg." Pretorius was disgruntled about the fact that van der Berg was not a riparian farmer and therefore had no right to draw water from the furrow.

The Board's ruling was that van der Berg had a right to use the water, unless a shortage of water or drought periods were experienced, then he would have the right to use water on every other day. The ruling also stated that "milling use did not have to take a second place to irrigation". However, the most important aspect of the ruling was that in terms of the Ordinance for the administration of the Country Districts, Article 130, the Board should "endeavour to bring the parties to amicable terms." (Lewis, 1930-1940: 16).

The second case presented by Lewis (1930-1940: 17) focuses on an agreement entered into between farmers on the Krom River in 1806. This Negotiated Agreement was also ratified by the Board of Landdrost and Heemraden (Board) in Stellenbosch in 1806. It is clear from the information presented by Lewis that this was a multi-party agreement; the words "upper farmers" and "an owner of a lower farm" attest to this fact. The agreement documented the manner in which the upper farms would release water to the lower farms. Interestingly, the agreement also documented penalties for non-compliance. Twelve years later, one of the owners on the lower farm laid a complaint to the Board that two upper farmers had "violated the conditions of the agreement". The lower farm owner claimed penalties from both upper farmers in terms of the agreement. The Board however stipulated that both upper farmers pay a single fine. It is interesting to note that the plaintiff and defendants appealed against the sentence which took three years to get to court (Lewis, 1930-1940: 17). It is not clear from the literature who won the appeal, but Lewis explains that there may have been "something wrong

29 The exact date of this publication could not be established, but Prof R Steyn is of the opinion that this could have been written in the 1930's or 1940's. The intention is to confirm this date as part of further research.

with the rules of 1806" and that these were the subject of further court cases which resulted in revised regulations being drawn up by the Board as instructed by the Governor, with amendments by the Court of Justice.

These two cases highlight a few issues which could very well be relevant to the discussions regarding NAs in the present. The agreements had their origin in various stakeholders' desire to achieve a common objective around the sustainable management of a water resource. Both agreements were recognised in terms of the law and parties sought recourse with the legal structures of that time. In the case of van der Berg vs. Pretorius, an additional dimension was present; the Board was instructed to mediate between the parties to find a way forward in terms of managing the resource. It is evident that a Negotiated Agreement does not guarantee that there will not be a source of conflict or that disputes will not necessarily end up in protracted legal proceedings. The Krom River case also highlights the necessity to find a mechanism to review agreements on an on-going basis to ensure the relevance of the content in terms of changing environments.

Albeit that these agreements go a long way back in history and that multi-parties may not have been involved, they do reflect that Negotiated Agreements have benefit. However, as will be seen from the more recent case studies and concerns expressed by stakeholders regarding the democratic era of NEAs, these agreements are not the panacea to all problems.

12.2 NEAS WITHIN THE CURRENT SOUTH AFRICAN POLITICAL ECONOMY

The on-going changes in South Africa's political economy invariably pose challenges to government and industry in terms of balancing out the use of natural resources against industrial growth, job creation and maintaining a healthy environment to achieve a sustainable economy and natural environment. However, notwithstanding that South Africa is a young democracy, as in many other countries, the relationship between government and industry and government and civil society always has an element of dominance; either government trying to wield its power through legislation and regulations or in the relationships between business and industry and civil society. The importance of understanding the potential dominance or power-based relationship between government and stakeholders in giving effect to NEAs should not be underestimated. This complexity is further underscored by Swartz (2004) who explains that societies do not only consist of economic and political dimensions, but a cultural dimension (traditions, moral behaviour [values] and beliefs). As such, it is important that these aspects should be considered in terms of the how the economy and these cultural dimensions impact on one another. According to Swartz (2004), Political Economy, takes into account how societies fit together and this perspective thus provides an interesting dimension when examining Negotiated Agreements, which essentially have to be negotiated and managed against the complex South African socio-economic and political environment.

The primary focus of the Political Economy theory is twofold; the power relationship that exists between government and society and the importance of acknowledging historical context. Certainly, society is ever evolving and whatever stage it may be in, does not remain the standard for long, as such society can be viewed as "no solid crystal, but an organism capable of change and constantly engaged in a process of change." (Merrifield, 2002:25). Underscoring this position, is the view that the past cannot not be separated from the present and that the present provides an indicator of the future; and how the role-players status in society changes in the different periods, i.e. the leaders and policy makers of today, could very well be ousted by those that they exercise control over, and so too, into the future, this power relationship could change as the political and ideological environment changes (Merrifield, 2002:21).

If one examines the socio-economic and political context of the current policy framework in South Africa, certainly this has been the case. The current democratic government has introduced new policies which have challenged the autocratic style of Apartheid legislation, bringing new ideologies to the fore which represents a new democratic way of governing the country. However, into the future, this all-inclusive approach may prove not to be as effective and could be challenged by a new political or social order.

The process to reach democracy as well as the "post-democratic" period has not been a linear one though. The developmental nature of this process is underscored by Jurgen Habermas who is of the opinion that societies evolve economically and through a dynamic and developmental manner.[30] This statement is supported by Turton's views on principles that within, ethics and value systems attached to water related issues are closely linked to socio-economic changes (2006: 16). This dynamism is reflected in the nature of Negotiated Agreements which have also evolved internationally over time and will no doubt follow the same process in South Africa.

12.3 CO-REGULATION VS. SELF-REGULATION: THE CONTEXT FOR THE NEA DEBATE

A great deal has transpired since 1998 when Jonathan Hanks presented a paper on "achieving industrial sustainable development in South Africa: what role for 'self-regulatory' and 'co-regulatory' instruments?" However, the questions he poses remain relevant, particularly in view of the fact that the role of EMCAs as an environmental management tool is at the forefront of discussions in South Africa. Hanks (1998:30) examines the relevance of new instruments in developing countries, particularly where the responsibility for achieving sustainable development is moving from the public to the private sector.

As explained by Hanks (1998:30), the primary difference between self-regulatory and co-regulatory policy instruments is that there has been a lack of direct government intervention in industry's developing and implementing various instruments. While the rationale and principles of EMCAs are not discussed here, it is important that as the essence of EMCAs is that of a negotiated outcome, co-regulation as an instrument is focused on. Hanks (1998:30) presents two broad arguments in favour of co-regulatory instruments:

i. Co-regulation implies active collaboration and co-operation between stakeholders, this is crucial to achieving an integrated approach and sustainable development through "consensus seeking" (Hanks, 1998:30).
ii. Directive-based regulation on its own is not sufficient to address the longer term issues associated with sustainable development. Hanks (1998:30) however points out that co-regulation does not imply that there will no longer be a need for directive-based regulation

Hanks' arguments raise another possible dimension in terms of achieving consensus between a diverse group of stakeholders. The concepts of "precautionary principle" and "no-regrets approach" have been raised as approaches which stakeholders may follow when setting common objectives for compliance purposes in the absence of scientific evidence. In reality however, consensus is extremely difficult to achieve and Suskind (1994:80) is of the opinion that the aforementioned approaches will be challenged by stakeholders. However, he offers an alternative approach through which agreement can be reached by all stakeholder groupings (including government). "Contingent Agreements" would

30 http://home.case.edu/~ngb2/Authors/Habermas.html retrieved June 26, 2006.

allow stakeholders to negotiate a range of acceptable and appropriate protocols to achieve a common objective, without exceeding prescribed thresholds (Suskind, 1994:81).

Few precedents have been set in this country in terms of establishing and registering EMCAs. However, as Hanks (1998) states, the growing awareness of the importance of the environment as a strategic issue can be seen in the increase in numerous sectors participating in environmental policy related discussions, particularly sectors with a high profile. He refers to particularly the Industrial Environmental Forum of South Africa, the Chemical & Allied Industries Association, Chamber of Mines, Packaging Association of South Africa and the South African Chamber of Business, which has gone through a rigorous process of negotiation between its members and consultation with DEAT and as yet, no EMCA has been formalised. The reasons for this appeared to be numerous, including reluctance from the authority to adopt and legislate the EMCA.[31]

12.4 THE STATUS OF SOUTH AFRICAN POLICY ON EMCAS

DEAT has recently revised its policy guidelines for implementation of the provisions of section 35 of NEMA on EMCAs.[32] The policy is based very much on the model devised by the Netherlands and the experience gained in that country in more than ten years of implementation of the covenant approach. Recently, there have been discussions between DEAT and several industrial sectors concerning the intention of developing EMCAs which encompass all components of the environment. So far, no sectoral Section 35 EMCAs have been concluded. This is partly because the negotiation process is lengthy at the best of times, and partly because there is little experience in South Africa of anything but "command-and-control" approaches to environmental governance. Accordingly, the capacity to develop and establish Section 35 EMCAs is still quite limited.

12.5 THE LEGAL FRAMEWORK

During the Inception Phase of this project, South African policy and legislation, only, were reviewed. International legislation will be reviewed during the course of the study. The intention is not to discuss the legal framework in great detail, but rather to provide an overview as part of the background.

12.5.1 The Constitution

The use of voluntary initiatives is also implicitly provided for in Section 24 of the Constitution, in terms of which everyone has the right to have the environment protected "through legislative *and other measures*." Implicit in Chapter 3, Section 41 (1) (h) (iii) & (iv) of the Constitution is the co-operation between the two government departments, viz. DEAT and the Department of Water Affairs and Forestry (DWAF), both of which would be the regulatory agents signing and giving effect to Section 35 EMCAs.[33] As will be seen in later discussion, co-operative governance and co-operative government is the backbone to successful Section 35 EMCAs.

31 It is important to note that this statement has been based on a initial confidential interview held with one of the key stakeholders and still needs to be further explored.

33 The revised EMCA guidelines that are due to be published at the beginning of July 2005 have one significant change from the Draft Guidelines that were published in March 2003 for comment: signatories to the EMCA will no longer have to comply with standards beyond minimum requirements; instead, targets can be set to achieve minimum requirements within an agreed timeframe. According to a DEAT official, this is a result of the realisation that many South African companies are not currently in a position to meet these minimum requirements.

33 The Minister of Environmental Affairs co-signs an EMCA. The drafting of the EMCA is achieved through a consultative basis between DWAF and DEAT. DWAF becomes the implementing agent.

12.5.2 The NEMA (Act 107 OF 1998) and environmental agreements

The NEMA, established a guiding philosophy for implementation of the NWA in protection and management of the water component of the environment. The philosophy of the NWA towards co-operative government and government-industry partnerships (co-operative governance) is consistent with that of the NEMA, even though the NWA was promulgated earlier in time than the NEMA.

The role for voluntary initiatives has subsequently been formalised in terms of Section 35 of the NEMA which recognises EMCAs as a possible measure for promoting co-operative governance (between government and industry) and compliance with the national environmental management principles. The principle of co-operative government will give effect to EMCAs which are dependent on co-operative governance and is only discussed in this document to the extent that it highlights the importance of co-operation between DEAT and DWAF. The success or failures of EMCAs, an important tool in achieving Integrated Environmental Management (IEM), hinges on giving effect to the principles of IEM, this can only be achieved through making co-operative government/governance applicable to all departments and organs of state. "NEMA has been at the forefront of constitutional reform in environmental affairs. It is therefore not surprising that co-operative governance has received a pivotal place in protecting the environment."[34]

Section 35 of NEMA (Box 1) provides formal recognition for the use ("under prescribed conditions"), of NEAs which are a particular form of voluntary environmental initiatives, a complementary policy instrument for promoting improved environmental performance. In terms of Section 35, these Negotiated Agreements are known within South Africa as EMCAs. Section 35 (1) of NEMA contains provisions on EMCAs which describe the intention and nature of an EMCA, also described is the relationship between the regulator and the stakeholders who are co-signatories to the EMCA. While there is no explicit definition of EMCAs in the guideline document, an EMCA can be described as "a co-regulatory instrument, whereby a mutual relationship between the **regulated** and the **regulator** is established to improve the environmental performance" (A Pillay: Presentation on EMCAs: March 2006). EMCAs also have the potential to become "*credible* and *effective* policy instruments" that can meaningfully contribute towards achieving sustainable development in South Africa (DEAT, 2005: EMCA IEM Guidelines: 2).

Section 35 of the NEMA makes specific provision for the use of EMCAs for the purpose of promoting compliance with the principles laid down in NEMA. The impact of Section 35 of NEMA (Box 1) is to provide formal recognition for the use, under prescribed conditions, of what are generally known internationally as NEAS. Negotiated Agreements[35] are a particular form of voluntary environmental initiatives that are increasingly being introduced as a complementary policy instrument for promoting improved environmental performance. In terms of Section 35, these Negotiated Agreements are known within South Africa as EMCAs

34 Bray, E. Focus on NEMA. Co-operative Governance in the context of the National Environmental Management Act 107 of 1998.

35 British, Canadian and American literature often refers to Negotiated Environmental Agreements (NEAs) whereas South African literature more often than not refers to NAs. As such, these terms are used interchangeably in the text.

BOX 1 – NATIONAL ENVIRONMENTAL MANAGEMENT ACT (No. 107 of 1998)

Environmental Management Co-operation Agreements

Section 35 - Conclusion of Agreements

(1) The Minister and every MEC and municipality, may enter into environmental management co-operation agreements with any person or community for the purpose of promoting compliance with the principles laid down in this Act.

(2) Environmental management co-operation agreements must
- (a) only be entered into with the agreement of
  - (i) every organ of state which has jurisdiction over any activity to which such environmental management co-operation agreement relates;
  - (ii) the Minister and the MEC concerned;
- (b) only be entered into after compliance with such procedures for public participation as may be prescribed by the Minister; and
- (c) comply with such regulations as may be prescribed under section 45.

(3) Environmental management co-operation agreements may contain
- (a) an undertaking by the person or community concerned to improve on the standards laid down by law for the protection of the environment which are applicable to the subject matter of the agreement;
- (b) a set of measurable targets for fulfilling the undertaking in (a), including dates for the achievement of such targets; and
- (c) provision for
  - (i) periodic monitoring and reporting of performance against targets;
  - (ii) independent verification of reports;
  - (iii) regular independent monitoring and inspections;
  - (iv) verifiable indicators of compliance with any targets, norms and standards laid down in the agreement as well as any obligations laid down by law;
- (d) the measures to be taken in the event of non-compliance with commitments in the agreement, including where appropriate penalties for non-compliance and the provision of incentives to the person or community.

Section 45 - Regulations for management co-operation agreements

(1) The Minister may make regulations concerning
- (a) procedures for the conclusion of environmental management co-operation agreements, which must include procedures for public participation;
- (b) the duration of agreements;
- (c) requirements relating to the furnishing of information;
- (d) general conditions and prohibitions;
- (e) reporting procedures;
- (f) monitoring and inspection.

(2) An MEC or municipal council may substitute his or her or its own regulations or *bylaw*, as the case may be, for the regulations issued by the Minister under subsection (1) above: Provided that such provincial regulations or municipal *bylaw* must cover the matters enumerated in subsection (1), and comply with the principles laid down in this Act.

Reference: Department of Environmental Affairs and Tourism (2005) Environmental management co-operation agreements, Integrated Environmental Management Guideline Series 1. Department of Environmental Affairs and Tourism (DEAT), Pretoria.

Section 35 thus provides a framework for co-operation between industry and government on setting of environmental targets, negotiation of deadlines for meeting the targets and measures for meeting them. This is a move away from the “command-and-control” approach where standards or targets were set by government and the responsibilities of industry for compliance were prescribed by government with very little input from the industrial sector, or indeed any sector. The new approach towards co-operative environmental governance acknowledges that there is considerable expertise and capacity within industry to contribute to the development of standards or targets, and that self-regulation should be encouraged in order to ease the administrative and enforcement burden on government.

Section 35 EMCAs may be entered into between the Minister and/or Member of the Executive Committee (MEC) and "any person or community" [36]. If made with a community such as an industrial sector, an EMCA would contain an agreed set of applicable, measurable targets for protection of the environment, which the sector would be bound to meet within certain agreed time frames and according to an agreed implementation strategy.[37]

There are different types of Negotiated Agreements, these can be broadly grouped as follows (Pillay: March 2006):

i. Private Environmental Agreements (Industry / community agreement).
ii. Unilateral Industry Commitments (Developed by firm / sector without government).
iii. Public Voluntary Programmes (Set up by authorities - voluntary business participation).
iv. Negotiated Environmental Agreements (Between public & private sectors).

It is perhaps interesting to note at this point that the National Waste Management Strategies (1998) (NWMS)[38] also encourages different forms of partnerships/agreements to meet its objectives of reducing waste. The NWMS encourages the following forms of partnerships:

i. "Public-public partnerships" which are contracts between the public sector and public service providers to perform management services, assume commercial risks or even provide long-term investments in municipal services. Public-public partnerships that will be promoted as part of the NWMS are combined initiatives by local government structures or local and provincial government to develop regional waste treatment and disposal facilities."
ii. "Public-private partnerships are contracts between public and private sector bodies entered into to access outside sources of long-term financing for infrastructure investment and management, operation and maintenance expertise. In such partnerships, the private sector body may assume commercial risks and responsibility for service fee collection."
iii. "NGO/CBO partnerships are contracts between public sector and non-profit non-government organisations (NGOs) or community-based organisations (CBOs), usually aimed at supporting the delivery of services. Although NGO and CBO groups generally assume minimal risk, their close community links are valuable in development initiatives."
iv. "Private-private partnerships are agreements between private sector bodies, and may also provide business opportunities. In terms of the NWMS, government will encourage and, where necessary, facilitate such initiatives."

36 National Environmental Management Act (NEMA) Act No 107 of 1998, Section 35 (1) & (2).

37 NEMA Section 35 (2) (a) (b) & (c).

38 The NEMA (1998), the draft White Paper on Integrated Pollution and Waste Management (1998) and the draft Waste Management Strategy (1998) have been developed to protect people's environmental rights. The emphasis is on co-operative and integrated environmental management to ensure sustainable equitable use of the air, water, land resources One of the two main considerations behind the Waste Management Strategy is " To move away from end of pipe solutions and to concentrate on avoiding, preventing and minimizing waste" (DEAT, 1998).

According to the guidelines NEAs have to contain the basic conditions as laid out in the DEAT EMCA guidelines, but may take on various forms, depending on the nature of the issue being addressed as well as who the signatories will be. Importantly, the DEAT EMCA guidelines are emphatic that the following legal requirements are complied with. (DEAT, 2005: EMCA IEM Guidelines: 11).

As part of the process of developing the EMCA it is necessary to ensure that, prior to the EMCA being signed, the following legal requirements pertaining to the EMCA process have been complied with:

i. All of the relevant organs of state have been informed of the EMCA, and have agreed to it being established.
ii. The Minister and any relevant MECs have agreed to the EMCA (the Minister is also required to be one of the signatories to the EMCA)
iii. Any procedures on public participation, and any regulations on EMCAs that the Minister (Environmental Affairs and Tourism) has prescribed, have been complied with (at present there are no such regulations).

Section 35 includes a brief set of general preconditions governing EMCAs, and provides guidance on possible provisions that may be contained within any EMCA. Furthermore, while Section 35 does not provide an explicit definition of EMCAs, it does provide working definitions of the different types of agreements as described above. Pending the publication of any future regulations, there is currently very broad scope regarding the possible content, nature and application of EMCAs. No regulations have yet been promulgated on EMCAs, and there are diverging arguments regarding the merit of such regulations.[39]

12.5.3 The Protected Areas Act

The nature of NEAs is such that the agreement can be quite pliable, moulding itself to social and legal context. The agreements may have different environmental objectives and follow slightly different negotiation process; it is important to understand the legal framework within which these NEAs can take place. Although not within the water-related suite of legislation, the National Environmental Management: Protected Areas Act 57 of 2003 (NEMA:PAA) (as amended by Act 31 of 2004 (PAA). is one of the key pieces of legislation in this country within which NEAs can be considered. Importantly, it should be borne in mind that there are always strong linkages between the different suites of environmental legislation and they can never really be managed in isolation from one another. This principle should also be carried through to NEAs.

One of the research questions focuses on understanding whether any other forms of NEAs (other than Section 35 EMCAs) are operational, and whether these are successful. The relevant suites of legislation and the concepts of Park Management Plans and Park Forums are therefore discussed below and in the subsequent sections for two purposes;

i. To illustrate that various mechanisms could be used by stakeholders to negotiated environmental agreements.
ii. To provide the legal framework for a discussion on Park Forums, of which a Charter forms the basis of Negotiated Agreements. As will be seen in the chapters 11 through to 13, the Park Forums and the MFI are juxtaposed against one another when discussing attitudinal drivers.

39 DEAT (2005) Environmental management co-operation agreements, Integrated Environmental Management Guideline Series 1. Department of Environmental Affairs and Tourism (DEAT), Pretoria.

In addition to NEMA, South African National Parks (SANParks) is guided in the implementation of its mandate by a suite of legislation; *inter alia*, the South African Constitution, the Biodiversity Act and the NEMA: PAA. To better contextualise the Negotiated Agreements which can be entered into in terms of this Act, it is important to understand the objectives of the PAA as set out in Section 2 of the Act:

(a) to provide, within the framework of national legislation, including the NEMA for the declaration and management of protected areas;
(b) to provide for co-operative governance in the declaration and management of protected areas;
(c) to effect a national system of protected areas in South Africa as part of a strategy to manage and conserve its biodiversity;
(d) to provide for a representative network of protected areas on state land, private land and communal land;
(e) to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas; and
(f) to promote participation of local communities in the management of protected areas, where appropriate.

There are various categories of agreements which are catered for in the PAA; some of these agreements focus on the declaration of certain areas of private land as "special nature reserves" and "nature reserves" These agreements do not fulfill the requirement of Negotiated Agreements in terms of being multi-party[40] as the declarations for co-management are signed between the private landowner and SANParks.

Also not considered to fully fledged NEA, but listed to illustrate the co-operative government component of the agreement, is Section 15 (2) of the PAA. This section allows for any forest nature reserves or forest wilderness areas which have been declared in terms of section 8 of the National Forests Act, 1998 (Act No. 84 of 1998), which may be situated within areas which have been declared as protected areas in terms of the PAA, "to be managed in accordance with an agreement concluded between the Minister and the Cabinet member responsible for forestry."

12.5.3.1 Park Management Plans as NEAs

One of the key focus areas through which the various National Parks can give effect to NEAs is through the management plans which each Park has to compile. Section 41(1) explains the purpose of management plans "…to ensure the protection, conservation and management of the protected area concerned in a manner which is consistent with the objectives of this Act and for the purpose it was declared."

SANParks therefore acts on behalf of all South Africans, as the custodian of protected areas that fall within its mandate. The implication of this statement is that SANParks can no longer manage its Parks in isolation and separate to the broader public and other relevant government departments, such as local government.[41] Similarly, all Park Management Plans (PMPs) which are required in terms of the PAA (Section 39) have to be developed within the public arena.

40 PAA, Section 18 (3); Section 23 (3)

41 Since the whole of South Africa is now divided into municipal areas, this also encompasses all the Parks and all Integrated Development Plans (IDPs) have to take these parks into account. Similarly, Parks Management Plans have to take cognisance of the IDPs, any proposed developments therefore have to support these IDPs.

The PAA also allows the Park management to co-manage Protected Areas through an agreement with “another organ of state, a local community, an individual or other party” (Section 42. (1) (a)). However, this Section of the Act is quite specific as to which areas of management the stakeholders may become involved in and clearly stipulates that the Minister or Member of the Executive Council (MEC) may cancel these agreements if he or she is of the opinion that the attainment of the management objectives of the protected area are being inhibited (Section 42. (4)). Again, this is an important point to consider and the implications of this section are further discussed in Chapter 9. The discussion focuses on the reasons for the then Minister of Environmental Affairs invoking an earlier agreement between the Table Mountain National Park and the Forum through which the agreement was operating.

12.5.3.2 Park Forum Charters as NEAs

Other forms of an NEA which can serve as a mechanism which can contribute towards environmental compliance are the terms of reference and code of conduct for a Park Forum established by SANParks. Park Forums are established in terms of the (NEMA: PAA). The Park Forums aim to assist SANParks’ individual parks to achieve the national mandate as contained in the NEMA PAA.

Although individually negotiated between the respective Parks and stakeholders, the Park Forum Charters are based on the Park Forums ToRs. The ToRs have to be examined against the background of the SANParks mission which is “To develop and manage a system of national parks that represents the biodiversity, landscapes, and associated heritage assets of South Africa for the sustainable use and benefit of all.” (2005: SANParks Public Participation Guidelines). Park Forums have been proposed as the vehicle through which this engagement with the public is to take place.[42]

SANParks Stakeholder Participation Guidelines which were finalised towards the end of 2005, provide a more structured process for the manner in which SANParks has to engage with the public and establish Park Forums. The Terms of Reference for the individual Parks provide the framework for the Negotiated Agreement between SANParks and the group of stakeholders with whom it will interact[43]. The Forums function through a steering committee which is representative of its social environment. Although the Forums cannot be described as being involved in the water sector, it interesting to note that there are other forms of NEAs that are functional. These Park Forums serve a common objective and diverse stakeholders engage in intensive dialogue to establish and maintain the Forums.

According to the definition and objectives of a Park Forum, it is clear that the most important function that a Park Forum will fulfil, is that of a legitimate platform (but with no legal *locus standi*) from which Parks Managers and stakeholders can mutually [and strategically] address issues that relate to “natural and cultural heritage conservation goals of SANParks” (SANParks, 2004: 2).

42 Many Parks currently do not have established Park Forums but are currently conducting consultative processes in the public domain to establish forums which will be representative of the stakeholders in their area.

43 Section 22 of the PAA makes provision for negotiated agreements through various forms of partnerships between SANParks and a variety of stakeholders. Park Management Plans

12.6 KEY OBJECTIVES FOR INTRODUCING SECTION 35 EMCAS

While acknowledging that Section 35 EMCAs (EMCAs) are not the panacea for sustainable development, the DEAT is of the belief that EMCAs are but one of many tools which can compliment existing policy tools. (DEAT, 2005: 9). As such the rationale and objectives underlying EMCAs should be considered before embarking on the development of an EMCA. The main objective of an EMCA is to promote compliance with the principles contained within Section 2 of NEMA. The guidelines list, the following set of supporting objectives.

a) To result in improved environmental performance beyond minimum standards, and beyond what would be achieved in terms of a "business-as-usual" scenario
b) To adopt a proactive partnership approach, engaging a range of stakeholder groups in identifying innovative solutions to environmental and sustainable development concerns
c) To provide regulatory certainty, thereby facilitating longer-term investment and innovation in the development of cleaner technologies
d) To achieve independently defined environmental objectives with lower administrative and enforcement costs than traditional policy instruments
e) To promote greater efficiency by enabling flexibility in the means of achieving independently defined standards and objectives
f) To promote a more co-ordinated regulatory approach
g) To provide publicly available information for measuring and reporting of performance
h) To provide a possible forum for stakeholder dialogue and public participation

12.7 REGULATORY LIMITATIONS OF EMCAS

The DEAT guidelines are cautious in spelling out the limitations of EMCAs, these limitations however are seen by DEAT purely from a regulatory and administrative perspective. Any limitations that may be experienced by stakeholders wanting to consider negotiating an EMCA, have not been taken into consideration. These potential limitations will, however, be explored as part of this research project. Listed below are the limitations, or rather "issues that EMCAs specifically should *not seek to address*" (as described in the DEAT guidelines. When developing an EMCA, it is important to ensure that the EMCA:

a) Is not used as a mechanism for setting emission standards for individual facilities
b) Does not seek to replace legal minimum standards
c) Does not replace existing government duties and obligations
d) Is not used as the sole source of generating information to inform the setting of standards
e) Is not used as a mechanism to diminish the rights of third parties
f) Does not result in any delays to necessary legislation
g) Is not a permanent *carte blanche* to continue operating without review of practices or to avoid compliance with other regulations

12.8 THE NATIONAL WATER ACT AND SOURCE- DIRECTED MEASURES

If an NEA is to be considered an effective environmental management tool and is to be drafted for multi-party stakeholders in the water related sector, the NEA would have to take into account the legislation which encompasses management tools to achieve integrated water resource management. In brief, the DWAF is entrusted with the management of the country's water resources, to ensure that there is sufficient water and at an acceptable quality for the country; its people, the environment and the economy. To achieve the sustainable objective of "some for all for ever", the DWAF will utilize the NWA which can be viewed a collective of a variety of environmental (water) management tools.

The principles behind integrated water resource management and the possible use of an NEA to give effect to these principles have been discussed in Section 2.2; The NWA and Source Directed Measures[44]. There are various sections contained within the NWA that have direct or indirect bearing on NEAs, most notably the chapters that deal with the protection of water resources and the use of water. For clarification purposes, these sections are listed below. (Please note there are numerous subsections for each of the sections, for brevity, these have been left out).

i. Chapter 3, Protection of water resources:
   a) Classification of water resources Part 2 Section 13(1)-(4); Preliminary determination of class or resource quality objectives Part 2 Section 14(1) and (2); and Giving effect to determination of class of water resource and resource quality objectives, Part 2 Section 15.
   b) Pollution prevention; Part 4 Section 19(1)-(8).
ii. Chapter 4:
   a) General principles of water use; Part 1 Section 21(a-k), Permissible Water Use; Section 22(1)-(10); Consideration for issue of general authorisations and licences Part 2 Section 27(1) and (2), Essential requirements of licences Section 28(1)-(6) and Conditions for issue of general authorisations and licences, Section 29(1) and (2);
   b) Government Notice No. 1191 of 8 October 1999, section 39 provides further support to the NWA in terms of general authorisations.
iii. Chapter 5

   Part 1 (Sections 56 to 60) deals with the financial provisions of the NWA, viz, pricing strategy and water use charges.

   This chapter provides for the introduction of economic instruments to encourage water conservation the reduction of waste as well as the introduction of incentives and disincentive to promote effective and efficient water use. While a Pricing Strategy for Raw Water Use Charges was established in 1999, the impact caused by the associated discharge or the waste conveyed in the discharge was not considered. DWAF therefore compiled a framework document for a Waste Discharge Charge System (WDCS), that will form part of the Pricing Strategy.[45]. The purpose of the document is to define the technical and legal framework for the WDCS. While this document

44 The purpose of source directed measures is to control and manage the impacts of water uses, such that the resource directed measures for protection of water resources (class, Reserve and quality objectives) are met. Essentially all section 21 water uses require authorisation under the NWA: authorisation can be by schedule, by general authorisation or by license.44 The specific conditions of general authorisations can be blanket conditions that apply to all kinds of water uses across the country, such as the section 39 general authorisations for water use contained in Government Notice No. 1191 of 8 October 1999. Authorisations can also be limited, for example to a certain catchment, or to a certain water use, or to a certain sector such as an industrial sector44. Dr Heather MacKay (MacKay, 2004:1-2) explains that with regard to the discharge of wastewater to surface water bodies, the General Effluent Standards represent a generally applicable authorisation, which is granted as long as dischargers meet certain prescribed minimum concentrations in their effluent

45 Department of Water Affairs and Forestry, Water Quality Management Series. Development of a Waste Discharge Charge System; Framework Document. 2nd Edition, May 2000.

will be further discussed in the Draft Scoping Report, a few of the principles of the WDCS should be noted, particularly that these support the principles of Integrated Environmental Management as described in NEMA and Integrated Water Resources Management as described in NWA, these principles include *inter alia*; achieving sustainable development, ensuring that equity is achieved between different sectors and stakeholders; and also that transparency should be maintained during a consultative process with all stakeholders.

As can be seen from above, the NWA provides for a range of source-directed measures for the management of water resources. The purpose of source-directed measures is to control and manage the impacts of water uses, such that the resource-directed measures for the protection of water resources (class, reserve and quality objectives) are met. Essentially, all section 21 water uses require authorisation under the NWA. Authorisation can be by schedule, by general authorisations or by license.[46] The specific conditions of general authorisation can be blanket conditions that apply to all kinds of water uses across the country, such as the section 39 general authorisations for water use contained in Government Notice No. 1191 of 8 October 1999. Authorisations can also be limited, for example to a certain catchment, or a certain water use, or a certain sector such as an industrial sector[47]. With regard to the discharge of wastewater to surface water bodies, the General Effluent Standards represent a generally applicable authorisation, which is granted as long as dischargers meet certain prescribed minimum concentrations in their effluent (MacKay, 2004:1).

During drafting of the NWA, the role of general and limited authorisations in relation to individual water use licenses was explored in some depth. The purpose of general and limited authorisations is primarily to make administration of source-directed measures manageable. If every water user in the country were to require an individual license, the resulting administrative load would rapidly bring the Department's business procedures to a halt. Hence general and limited authorisations are intended to be used as "screening" instruments, whereby water uses which meet the minimum standards prescribed in authorisations are exempt from applying for an individual license and from going through the full license evaluation procedure, on the understanding that the minimum standards which have been prescribed meet the requirements for protection of water resources in most cases (MacKay, 2004:2).

An example of an area where sector-based standards would be appropriate is effluent discharge regulation. Wastewater streams are often from very different origins, and the composition, fate and effect of wastewater in the surface water environment can vary greatly, depending on the process (industrial, agricultural or domestic) which generated the waste, or the treatment process which is used prior to discharge. The NWA provides a place in regulation for sector-specific standards which are more closely tailored to the conditions which prevail in a particular sector, particularly in the water quality constituents which are of importance, the concentrations which are achievable in the final effluent, and the fate and effect of the wastewater in the receiving surface water environment. It is a given, however, that sector-based standards or authorisations must be as protective of the water environment, if not more so than general standards or authorisations, and must remain consistent with resource-directed measures, especially the water resource classification system (MacKay, 2004:2).

46 Relevant to this study are Section 21(f) and (g): (f) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit; (g) disposing of waste in a manner which may detrimentally impact on a water resource.

47 Relevant to this study is Section 4.6 (i) (c) in which the sugar industry is defined as a user: "In this authorisation, unless the context otherwise indicates, any expression to which a meaning has been assigned in terms of the National Water Act shall have that meaning, and-

(i) "biodegradable industrial wastewater" means wastewater that contains predominantly organic waste arising from industrial activities and premises, including-

(c) sugar mills.

If an NEA is to be considered an effective environmental management tool and is to be drafted for multi-party stakeholders in the water related sector, the NEA would have to take into account the legislation and regulations which encompass management tools to achieve integrated water resource management. In brief, the DWAF is entrusted with the management of the country's water resources, to ensure that there is sufficient water and at an acceptable quality for the country; its people, the environment and the economy. To achieve the sustainable objective of "some for all for ever", the DWAF will utilize the NWA which can be viewed a collective of a variety of environmental (water) management tools.

It is clear from the above-mentioned text, that NEAs within the water related sectors, particularly in South Africa, would have to meet the NWA requirements and that the relationship between the different parties will be a strong co-regulatory one. As such, the closely interlinked relationship between the efficacy of NEAs as an environmental management tool, multi-party agreements and co-operative governance is also relevant to South Africa.

Numerous issues discussed in Hank's paper (1998) have been entrenched in the principles, objectives and methods of establishment and implementation as set out in the DEAT EMCA guideline document.

12.9 NEMA (ACT 107 OF 1998) AND CO-OPERATIVE GOVERNMENT AND GOVERNANCE

The importance of co-operative government and governance in achieving the principles of Integrated Environmental Management has been alluded to in the discussion of NEMA and the concept is also implicit in the international case studies mentioned above.

In discussing the importance of co-operation, Bray discusses the important role that NEMA plays in achieving environmental justice in terms of Constitutional rights and that this can only be achieved through effective co-operative governance. The concept of co-operative governance is described as the "golden thread" that is contained in all facets of NEMA and is the "backbone" of IEM. Bray however warns that while NEMA has brought about an important paradigm shift in environmental law, effective and concurrent co-operative governance can only be achieved if there is sufficient capacity at all spheres of government and that the devolution of political decisions are done at the lowest practical level. Perhaps more importantly is that a change is required in the approach to achieving sustainability in this country; Bray explains that while development and the environment are dealt with under different policies and legislation, sustainability would be difficult to achieve. While EMCAs may not be the panacea to achieving sustainability, they certainly could provide a useful vehicle to closing the gap between the objectives of development and environmental sustainability through co-operative government and governance. Perhaps it is prudent at this juncture to fully unpack these two concepts.

Co-operative government refers to the relationship between different government departments and co-operative governance refers to the relationship between government and industry and also between different non-governmental and private stakeholders. Implicit in Chapter 3, Section 41 (1) (h) (iii) & (iv) of the Constitution is the co-operation between the two government departments. In addition to Chapter 3, Section 41 (1) (h) (iii) & (iv) of the Constitution which deals with co-operation between the two government departments, the Inter-governmental Relations Framework Act (2005) aims to, *inter alia,* "facilitate co-ordination in the implementation of policy and legislation ,including:

(a) coherent government;
(b) effective provision of services;
(c) monitoring implementation of policy and legislation; and
(d) realisation of national priorities.

Are these objectives achievable within the context of negotiated environmental agreements?

An example of how co-operative governance/government is essential to giving effect to NEAs is found in a case study presented by Carin Bosman (2003). The agreement that was entered into between the Potchefstroom City Council (PCC) and DWAF was not considered to be a fully fledged EMCA. However, it is interesting to note that through following the principles of co-operative governance/government and EMCA principles water resource quality objectives could be met through establishing a formalised working relationship.

In December 2002 the PCC initiated legal action against a gold mine in the area for allegedly polluting the Coetzee dam in the Wonderfonteinspruit, situated downstream from one of the mine's discharge points. The PCC listed the DWAF, as the responsible agent for the protection of water resources, as the second defendant in the case. Legal action was followed after the PCC failed to receive co-operation from DWAF or the gold mine to address water quality problems caused by the Coetzee dam wall being damaged, and sought urgent relief from the High Court.

After difficult discussions and negotiations between the two spheres of government and agreement was drafted in 2003 within the ambit of Section 35 of NEMA. The agreement stipulates roles and responsibilities and sets the framework for future working relations. At the stage of entering into this agreement, it was considered to be the first of its kind in the country. This is an excellent example of NEMA allowing for environmental justice to take effect and to support the objectives of the NWA.

Contrary to this however, there are issues which could hamper the co-operative government and governance. These barriers relate specifically to the relationships between the different tiers of government and also to the changes within the government department. The latter appear to impact on the ability of government departments to meet the various legal mandates.

It has already been stated that the managerialist model will only be discussed to the extent that it has impacted on the MFI project; suffice to add at this juncture, is that DWAF and eThekwini have gone through structural changes which have impacted on the manner in which they can fulfil the requirements of Chapter 3 of the Constitution. Considering Paine's statement (1999:51) that policy formulation and implementation on closely interlinked, the most significant organisational change that can impact on service delivery has been a reduction in personnel in both the aforementioned departments. The resultant capacity constraints and impacts on the implementation and management of a negotiated environmental agreement with the Metal Finishing Industry in KwaZulu-Natal are discussed in Chapter 7 as well as subsequent chapters.

CHAPTER 7

13 INSTITUTIONAL FRAMEWORK NECESSARY FOR NEAS

To better understand the issues relating to the implementation of NEAs as effective tools to achieve environmental compliance, three key research questions guide this research project:

i. Investigate reasons why no Section 35 EMCAs, as a form of NEAs, have been formally signed into law since the introduction of Section 35 EMCAs as part of NEMA in 1998;
ii. Are there other forms of NEAs which have been successfully entered into between multi-parties?
iii. What factors would make an NEA effective?

As stated in the previous chapter, the law is often well intentioned and well structured, particularly in terms of co-operative government and governance, but implementation is often thwarted by practical issues. One of the objectives of this research project is to better understand the reasons for the lack of Section 35 EMCAs in South Africa. The literature review and the MFI case study have revealed that part of the problems could be traced back to the institutional framework against which NEAs have to be implemented. More specifically, capacity constraints and lack of institutional memory within government departments have been identified by all stakeholders as being key to the lack of successful implementation. This chapter examines the capacity constraints, the lack of institutional memory and also how this could potential be influencing a reluctance to take decisions. This chapter explores the possibility that NEAs, as a co-regulatory and/or self-regulatory mechanism could offer an alternative solution to the capacity constraints.

13.1 CAPACITY CONSTRAINTS

The Netherlands, Canada, the UK and the USA are established democracies and are also countries that have a long track record of environmental legislation operating within established economies[48]. In South Africa however, the socio-economic, political and environmental context has changed considerably since 1998 and visions that were set as part of the broader policy framework that governs NEMA, and more specifically, Section 35, may no longer be appropriate. It is however crucial to better understand the institutional structure which needs to give effect to policy through implementing legislation and regulation; it is this issue which provides direction in terms of the theoretical perspective that will be adopted for this research. As previously stated however, the issue of capacity will only be dealt with to the extent where it can be determined that it impacts on the successful implementation of Section 35 EMCAs, an in-depth investigation into government staffing and structures will not be conducted.

South Africa is still a fairly young country in terms of environmental justice and practices, and therefore international practices inform policy, as is the case with NEAs. The policy has, to a large extent, been based on the Dutch model of negotiated environmental agreements and the experience gained in the Netherlands in more than 10 years of implementation of what is called “the covenant approach”. Hanks (1998:301) explains that the Negotiated Agreements form an integral part of the Netherlands’ National Environmental Policy Plan (NEPP), which has been acknowledged internationally as one of the best attempts at developing a sustainable economy. By 2001, the Netherlands had almost 100 Negotiated Agreements in place (Hanks, 2001:14). The benefits of this

48 The successful implementation of environmental legislation or state of the economies can be challenged but will not be debated here as this is not the focus of the discussion; rather, the focus is the capacity constraints within government departments which pose challenges to one facet of environmental legislation, i.e. negotiated agreements.

co-operative or participatory policy approach are unequivocally stated in the NEPP "….*no government can achieve lasting environmental improvement on its own. Implementing the objectives of the NEPP depends on a major devolution of responsibility to non-government actors, and regulatory control may often be inappropriate at this point….. Consultation and negotiation are central to mobilising this co-operative effort.*" (Hanks, 2001: Appendix A:3)

It is perhaps also important to understand that capacity constraints extend to lack of knowledge in different sectors. The apparent lack of understanding from some quarters of the judicial system of the concept of environmental justice impacts on the effective implementation and enforcement of environmental regulation. This matter is further discussed in Chapter 11, Section 3.4.1. In a move towards redressing the lack of understanding, the eThekweni Municipality will be embarking on a drive to better prepare magistrates who will be heading up the Municipal Court. The focus will be on the importance and context of environmental legislation and compliance when evaluating environmental cases.

Section 35 presupposes that there is efficient and effective government involvement from the relevant government officials to implement and monitor the Negotiated Agreements. The achievement of this objective however demands capacity and well- structured departments. However, as with most government departments, democratisation and transformation has brought about a restructuring and a change in management styles; a restructuring that industry and civil society argue has undermined the potential efficacy of what is essentially robust legislation.

In addition to having to implement and ensure compliance of new regulations, officials within DEAT have had to undergo on-going institutional restructuring. The traditional model of a running government department, which could be described as autocratic, hierarchical systems that were process-based and where officials had to follow standardised procedures (Paine, 1999) have been replaced by a new form of managerialism. Several government departments, however, appear to have adopted a model which mirrors the democratic restructuring of the country, where an autonomous approach allows each official to take responsibility at his or her level for decision-making (Paine, 1999). In addition to this, there has been a strong rationalisation of staff, which has seen many experienced officials leave to become consultants and new (inexperienced) staff moving into positions of decision-making. The impact of this appears to be that there are now additional levels of decision-making to ensure that the correct decisions are made and the additional administrative steps are creating additional bureaucracy instead of reducing it.

This new managerial approach appears to have paralysed efficient implementation of legislation to a large degree and has led to the perception amongst role-players that government is not equipped to act efficiently. Some of these problems have been attributed to capacity problems. However, as explored in a paper presented by Webster and Mosoetsa (2001), there are social tensions that have been brought about by implementing managerial changes. The effects have been felt at personal levels and have also led to conflict and tensions within the working environment. Although the Webster and Mosoetsa article focuses on managerial changes within academic institutions, there are strong parallels in how people respond to change. The article also states that that there could be a strong emotional component that leads to staff not being fully motivated or effective. In turn, this could be termed as "emotional labour", where emotions have to be managed in addition to the administrative burden (Webster and Mosoetsa, 2001:16).

While EMCAs, requiring the full participation of DEAT officials at national level and generally involving large sectoral groups, have not yet been implemented in South Africa, NEAs which have involved participation of local government and smaller stakeholder groups have been more successful. Both levels of government have been through restructuring and have had to adopt new management styles, i.e. management by objectives. At local government level, however, the participation and decision-making of NEAs does not necessarily imply the same legislative responsibilities as it would with EMCAs. It is important to understand the reasons as to why EMCAs have not been negotiated and legislated. The issue of non-implementation is in part addressed by Heather MacKay (2002:12) who expresses a concern that while the current legislative framework provides support through a variety of tools for DWAF staff to make important decisions, the newer and younger staff are being forced into scenarios where they are to "carry far too much responsibility for their levels of experience and expertise". Could these factors thus result in officials constantly deferring decisions to higher levels of management, thereby hampering the implementation of sound legislation and causing frustration to other negotiating parties?

Another issue that requires further investigation is whether the current lack of capacity (staff numbers) within DEAT, DWAF and local government to deal with the implementation of all the other facets of these two laws held benefits for business? Organisations which may not currently be compliant, but are managing to slip through the system, may be happy to benefit from this lack of capacity. (See also the findings in Chapter 9 for further elucidation of this point). Examples of the impact of the stated lack of capacity are discussed in Chapter 10 in terms of the MFI NEA process. Albertyn and Watkins (2002:14) have supported this notion in their statement that lack of capacity within government departments may be a good reason why industries do not want to enter into NEAs; "Companies in industrialised countries also know that if they do not participate in a voluntary agreement, that they [the companies].will be subject to greater scrutiny by the pollution control authorities. Given the incapacity of South Africa's pollution control authorities, there is little chance of dirty industries deciding to implement EMCAs in order to avoid negative attention from government." The reality of this statement is perhaps best illustrated in a current scenario. The eThekwini Pollution Control Department is operating a minimum capacity of ten staff for the entire municipal area. The staff work long hours, operating under stressful conditions, often in life- threatening circumstances[49]. At the time of writing this report, any staff members who resigned could not be replaced due to budgetary constraints.

Furthermore, and perhaps most importantly, another dimension was revealed during the research which is integral to effective compliance and has a negative impact on the effects felt due to capacity constraints. The discussion on the relationship between moral behaviour and the effective implementation of NEAs in Chapter 11 provides an interesting point of view on some reasons why it may not be in business' best interests to improve capacity within government structures.

It was thus important to interview key staff members within the different government departments to better understand how the structures have changed since 1984, how the decision-making roles have impacted on the ability to carry out functions and what potential solutions will be in terms of giving effect to Section 35 EMCAs. Similarly, it was important to obtain the perspective from the private organisations that had attempted to enter into NEAs with national and local government. This would assist in better understanding what the experiences have been in driving the process from the private sector side in trying to turn policy into practice.

49 Notes recorded at a meeting held at eThekwini on 30 October 2006.

13.2 LACK OF INSTITUTIONAL MEMORY

Although this issue was raised in passing during the research process as a possible inhibiting factor to the successful implementation and sustained management of a NEA, it was not dealt with in-depth. Considering however that it is closely linked to the issue of capacity dealt with in the previous section, and also that the issues which at the time of discussions[50], were perceived to be contributing to a lack of institutional memory included, this matter calls for some discussions. The contributing factors include:

i. Older more experienced staff receiving packages as a result of restructuring, affirmative action, early retirement or the lure of private sector;
ii. Younger, inexperienced staff following trends of "job hopping" in an attempt to accelerate their careers.
iii. Younger staff who may have university degrees, be exceptionally bright and understand the law, but show lack the working experience are appointed into lower level management positions;
iv. There is inadequate training i.t.o interpreting the law against a larger social and economic context. This wisdom comes with a long experience in a variety of positions.
v. Lack of experience is exacerbated by the integration between different government institutions and the eventual implementation of regulations.

Although not comprehensively investigated, this matter should be taken seriously, particularly as more of the older, more experienced individuals near retirement.

13.3 RELUCTANCE IN DECISION-MAKING

In terms of the restructuring of the public service, a stronger onus has been placed on the individual public servant in terms of accepting responsibility for decisions which are being made at various decision-making levels. However, the corresponding accountability that accompanies the decision-making appears in some circumstances to be preventing officials from taking decisive action. Two examples of this:

Previously discussed as a footnote in this report is the reluctance of DEAT officials to issue a Record of Decision (ROD) on an Environmental Impact Assessment conducted for an Eskom 765kV Transmission line five years ago. The objective of this 542 km Transmission line was to strengthen the network capacity which provides the Western Cape with electricity. As recent events have shown, this line was urgently required, and the economic impacts on the Western Cape during the rolling blackouts have been extensive. However, appeals and legal challenges to previous decisions had left officials overly cautious in terms of issuing any ROD that may result in legal proceedings. There are numerous complexities in this case: lack of capacity within the department, lack of experience on complex cases and inconsistencies in interpretation of the law. These issues contributed to the reluctance of officials to take decisions in terms of issuing a ROD within a reasonable time -frame of receiving the final environmental reports (three months at the time of the project was considered reasonable).

The Final Environmental Impact Report was submitted in June 2002 and the ROD was awarded in June 2006. The subsequent consequences of this time delay are briefly discussed below.

50 These concerns were raised by a number of stakeholders with whom personal discussions were held.

The social and socio-economic environment had changed; the most significant being that new individuals had moved into the area and felt aggrieved that they had not been consulted with. This resulted in groups being organised and environmental lawyers being appointed to appeal the ROD. Almost 100 appeals were received from aggrieved landowners and other stakeholder groups.[51] The time delay and related changes in the socio-economic environment were the basis of most of the appeals. Objectives stated in the various Integrated Development Plans had been amended by regional and local municipalities and some of these would now impact on the proposed route for the Transmission Power Line. Of greatest significance however was that landowners with whom consultation had been undertaken had sold their property. Land values had changed, placing Eskom in a position where it had to negotiate much higher prices for property. This in itself may at first glance not be seen as a major problem, as it benefits the property owner, however, over a distance of 542 km, this translates to a large number of properties at a cost which is eventually passed onto the consumer. It will take approximately two to three years to construct this line, effectively placing additional strain on an already strained power supply to the Western Cape (Eskom 2002).

Another example is that of a recent toxic spill into the Durban Metro storm water system by a member of the South African Metal Finishing Industry. This is yet another case where officials have been reluctant to make decisions and take decisive action. (Van der Spuy, 2006:16). However, this case presents a slightly different perspective that officials may feel that they are being hamstrung by the regulations which they are supposed to enforce. Although this matter is fully discussed in Chapter 10, the relevant issue here is that the DWAF officials in the Durban office were of the opinion that the R1 000.00 maximum fine which could be imposed on the offending galvaniser was insufficient. However, an interdict or criminal prosecution was not considered an option, as this matter could be too easily thrown out of court for lack of evidence. Furthermore, the individual official is held accountable for the action and for how tax payers' money is spent.[52]

As can be seen from the discussions in this chapter, lack of capacity, institutional memory and the inability to take decisions could have far-reaching implications for government and industry. The full extent of these implications (financial and social) may not be easily quantifiable in the short-term. However, from a qualitative perspective, these issues may have even a greater impact in terms of perceptions that the public and industry in general may have of government. This could translate into a lack of confidence or negative attitudes in terms of seeking joint solutions to common problems. These issues are further explored in subsequent chapters, and in particular in terms of the findings resulting from the case study.

51 Independent Reviewers were appointed by DEAT in March 2007 to make recommendations to the Minister of Environmental Affairs as to whether the ROD should be upheld or whether the Appeals are substantial enough to overturn the ROD. A final recommendation will be made in May 2007, almost five years after the initial application.

52 The Durban Metro is responsible for the storm water system and fined the polluting galvanising company. Furthermore, the monitoring costs and clean-up costs were also paid by the galvanising company.

CHAPTER 8

14 COMPONENT 1: WINGS GALVANISING CASE STUDY

The focus of this research is to understand whether NEAs can be considered effective mechanisms to achieve environmental compliance in the water sector. In order to meet the objectives of the research project, it was necessary to identify whether any other forms of NEAs had been successfully concluded between multi-parties. To explore this further, a case study that met the criteria for the research framework was identified. The Wings Galvanizing Company (Wings) Negotiated Agreement with the eThekwini Municipality provided an ideal opportunity to investigate this. As previously explained, the Wings Case Study progressed from examining the nature and effectiveness of the Wings Negotiated Agreement (Component 1) to investigating the feasibility of a NEA for the metal finishing industry in KwaZulu-Natal (Component 2) i.e. the documentation of a process to establish a Negotiated Agreement; the research process therefore has two components, Wings being Component 1.

Chapter 2, Section 1.4.1.1, explains that Component 1 is only documented here to the extent that the iterative and evolutionary nature of Grounded Theory is reflected. As such, the approach and methodology is briefly discussed in this chapter only the extent that it provides the proper context for Component 2; the NEA negotiation process. Appendices 2A-2G and Chapter 9, which respectively document Components 1 and 2, have added great value to the research process in terms of evaluating experiences on the case studies (Paton, 1987:19) and synthesising the findings.

14.1 KEY OBJECTIVES FOR INTRODUCING AN EMCA INTO THE WINGS GALVANISING PROJECT

The main objective of an EMCA is to promote compliance with the principles contained within Section 2 of NEMA. The objectives stated in the DEAT guidelines list in Chapter 6, 1.6 remain relevant and are repeated here as easy reference:

a) To result in improved environmental performance beyond minimum standards, and beyond what would be achieved in terms of a “business-as-usual” scenario
b) To adopt a proactive partnership approach, engaging a range of stakeholder groups in identifying innovative solutions to environmental and sustainable development concerns
c) To provide regulatory certainty, thereby facilitating longer-term investment and innovation in the development of cleaner technologies
d) To achieve independently defined environmental objectives with lower administrative and enforcement costs than traditional policy instruments
e) To promote greater efficiency by enabling flexibility in the means of achieving independently defined standards and objectives
f) To promote a more co-ordinated regulatory approach
g) To provide publicly available information for measuring and reporting of performance
h) To provide a possible forum for stakeholder dialogue and public participation.

These objectives are consistent with the objectives that eThekwini, DWAF and Wings (as part of the MFI) would want to achieve.

14.2 THE CASE STUDY CRITERIA AND FRAMEWORK

The basic elements of a NEA were used as the selection criteria for the case study (Wings); these were:

i. The agreement had to take place within a legal framework.
ii. Multi-parties had to be party to the agreement.
iii. At least one government agency had to be involved in negotiations.
iv. An existing problem posing a threat to the environment had to be present.
v. The negotiation process had to have been documented.

These criteria were further unpacked within the scale, range and regulatory research framework that guides this research process. Table 8.1 details each of the framework components.

Table 8.1: Case Study Criteria and research framework: DCPP, Wings

<table>
<tr><th>Description</th><th colspan="2">Scale</th><th>Range</th><th>Legal Framework</th></tr>
<tr><td colspan="5">An existing problem posing a threat to the environment had to be present</td></tr>
<tr><td>Wings was not taking preventative measures in its operations which was resulting in water pollution.</td><td colspan="2">Water quality: discharge, groundwater and effluent pipelines into the sea. Management of water – preventing spills into storm water system.</td><td>Environmental compliance to meet metal finishing industry standards.</td><td>eThekwini Sewage Disposal Bylaw against which the permit to operate is issued.</td></tr>
<tr><td colspan="5">Multi-party agreement</td></tr>
<tr><td rowspan="2">SAMFA, DWAF, eThekwini Metro Wastewater Management and Wings entered into an agreement.

The Durban South Marine Pipeline Forum[53] would also have to be informed of the agreement (DANCED Report: 2000, Annex D)</td><td>National [54]</td><td>DWAF is the monitoring agent in terms of water quality, ground water, .and pollution from both point source and non-point source from land-based sources and thus also for the pollution of the marine environment</td><td>Wings' operations would necessitate preventative measures to alleviate further groundwater contamination.</td><td>National Water Act</td></tr>
<tr><td>Local</td><td>eThekwini Municipality is the implementing agent i.t.o. the agreement.
Wings discharges into the eThekwini Sewage disposal system.</td><td>Wings' operations would necessitate effluent treatment to reduce effluent discharges to meet bylaws at point source, avoiding effluent spillage into the storm water system.</td><td>Municipal Systems Act which gives effect to the eThekwini Sewage Disposal Bylaw.</td></tr>
<tr><td colspan="5">At least one government agency had to be involved in negotiations</td></tr>
<tr><td>DWAF; eThekwini Municipality</td><td colspan="2">National ; Local</td><td>As above</td><td>As above</td></tr>
<tr><td colspan="5">The negotiation process had to have been documented</td></tr>
<tr><td colspan="5">Although there is no formal report on the process that was followed, two separate documents capture the terms of the co-operative agreement, but from different perspectives; eThekwini Metro Wastewater Management detailing the conditions attached to the permit withdrawal and co-operative agreement between the multi-parties mentioned above and; the SAMFA report back to Danced in terms of the CPMFI Project.</td></tr>
<tr><td>Additional comment:</td><td colspan="4">The formal process as proposed in NEMA for the establishment of an EMCA was considered too onerous to follow and would have prevented a relatively quick turn-around time for the implementation of measures to meet the permit requirements..</td></tr>
</table>

53This Forum includes not only local authorities but also both scientific and administrative members, as well as participation from the public in the form of NGO representatives.

54 DEAT should by default have been involved in this process as it is responsible for the overall protection of the national environment and deals with issues directly or indirectly concerned with waste disposal and pollution, including air pollution, as well as with the registering and implementation of EMCAs or negotiated agreements. However, as explained by Mrs Redelinghuis, DEAT was not party to these negotiations.

14.3 BACKGROUND TO THE WINGS CASE STUDY

Wings is part of a group of companies which participated in a Danish co-operation for Environment and Development (DANCED)[55] funded project that focused on achieving cleaner production in the MFI. The Cleaner Production for the Metal Finishing Industry (CPMFI) Project in South Africa was implemented following the agreement between the Danish International Development Assistance (DANIDA) organisation[56] and the consulting firm "Danish Technological Institute". This initiative was carried out in terms of National Waste Management Strategies (NWMS)[57] and Action Plans for South Africa. These strategies are aimed at reducing the unacceptably high pollution levels in South Africa and also at finding an integrated way of better managing effluent treatment, as part of normal business practices, as opposed to pollution prevention.

In an attempt to find ways of giving effect to the strategies, DANCED, in co-operation with the DEAT and the Department of Trade and Industry (DTI), launched this initiative. The MFI in particular was selected as the DANCED's objective was to transfer the 10 years of experience and technology from Danish Industry and the Danish Cleaner Production Program (DCPP) to the South African Industry. Although no external support had been given to South Africa's metal finishing industry, support had been received from the WRC to national waste water surveys in the metal finishing industry and also to the setting up of waste minimization clubs in Durban.[58]

Despite this initiative however, Wings, a participant in the DCPP initiative, was still not complying with the discharge standards set by eThekwini Municipality. The objective of the Wings/eThekwini Negotiated Agreement was to force Wings to take preventative measures to avoid further pollution from its operations or to face operational closure by eThekwini. There were only three signatories to this agreement; i.e. DWAF, eThekwini and Wings. SAMFA KZN facilitated this process on behalf of Wings, a member of the organisation.

Unfortunately this process was never formally documented; the only written evidence of the problem and dialogue is provided in correspondence between the parties contained in Appendix 1B. This research project provided an opportunity for the stakeholders to review the agreement process, the efficacy of the agreement and to explore the option of whether the existing agreement could be expanded to a more formalised agreement which could encompass the whole industry in KZN. The main objective of introducing an EMCA to the Wings would therefore be to promote compliance with the principles contained within Section 2 of NEMA.

14.3.1 Project objectives

The background to the DANIDA CPMFI project is fully documented in Appendix1A, a brief overview in terms of providing the proper context for this research project and, in particular, the case study is provided below:

The CPMFI Project was to achieve "a significant reduction in the environmental impact of the South African metal finishing industry, within the electroplating and galvanising sub-sectors, largely due to a

55 This organisation was later replaced by Danish International Development Assistance (DANIDA)

56 Although DANIDA replaced DANCED, the report titles however reflect the name of the organisation at the time of writing the report.

57 The NEMA (1998), the draft White Paper on Integrated Pollution and Waste Management (1998) and the draft Waste Management Strategy (1998) have been developed to protect people's environmental rights. The emphasis is on co-operative and integrated environmental management to ensure sustainable equitable use of the air, water, land resources One of the two main considerations behind the Waste Management Strategy is " To move away from end of pipe solutions and to concentrate on avoiding, preventing and minimizing waste" (DEAT, 1998).

58 Project document – Cleaner Production in the Metal Finishing Industry, south Africa. M.129-0147. Ministry of Environment and Energy, DANCED, December 1999.

preventative approach." The framework[59] for this project provided for the following objectives, project outputs and associated activities:

i. Cleaner production processes and practices implemented in aforementioned sub-sectors with sustainable results.[60]
ii. Sustainable and accessible capacity within the sector to further implement and develop cleaner production processes and practices.
iii. Increased awareness amongst regulators and the aforementioned sub-sectors on the current associated negative environmental impacts of the sector and the possibilities and opportunities to mitigate these impacts through the introduction of cleaner production processes and practices.

14.3.2 Potential barriers

DANIDA however recognised that there would be a reticence or "barriers" that would need to be addressed to achieve the project objectives. Interestingly, there is a synergy between the barriers identified by DANIDA and the findings of this research project. These barriers include; awareness and attitude barriers; operational barriers at factory level; regulatory and financial barriers. (These are fully discussed in Appendix 1A.

14.4 BACKGROUND TO THE SOUTH AFRICAN METAL FINISHING INDUSTRY

Although publicly not a well known industry, the metal finishing industry in South Africa is geographically widespread, with companies based in Durban, Johannesburg and Cape Town and diverse in nature. The industry includes activities such as galvanizing, electro-plating, painting, coating and a wide range of machining processes. The CPMFI Project made a decision to focus only on the galvanising and electroplating activities, as it is in these areas where improvements would be measurable. Similarly, this case study will therefore also exclude the other activities. There are approximately 30 galvanizing and 500 electroplating companies spread across the aforementioned centres, these companies all vary in size.[61] The vast difference in number can perhaps be explained from a technical and financial perspective: while very little capital outlay and small premises are required for the electroplating companies (e.g. jewellery, small electrical components), approximately R2.5 million and much larger premises are required for a galvanizing company (e.g. steel fences, household appliances, motor vehicle parts).[62]

A further distinction is made in the industry itself in terms of the type of work which is carried out by the galvanizing and electroplating companies: "jobbing" production companies essentially provide a specialist services for other companies and "in-line" production companies produce and galvanize or electroplate their own products. As not all the companies are registered with the South African Metal Finishing Association (SAMFA), it is difficult to determine what contribution to the economy the industry would make in terms of its sales and purchases from its suppliers, mainly the steel and chemical industry. However, since the writing of the DANIDA project document in 1999, indications are that the industry is closely tied to the rest of the economy and that companies have been performing fairly well.[63]

59 Project Document (January 2000), Inception Report (October 2000) and the ten Progress Reports (March 2001 – September 2004).

60 Although cleaner production generally deals with preventative approaches to reducing environmental impacts resulting from industrial activities, it goes beyond mere pollution prevention and waste minimization techniques. The changing of paradigms and attitudes in terms of manufacturing methods is almost as important. (WRC Project Report No. T161/02).

61 Project document – Cleaner Production in the Metal Finishing Industry, South Africa. M.129-0147. Ministry of Environment and Energy, DANCED, December 1999.

62 According to 2000 figures quoted in the Project document.

63 Personal interview with Ms Stephanie du Preez, SAMFA secretary: this feedback is received from the various suppliers to the industry (numerous suppliers are members of SAMFA).

As with any industry in South Africa, the MFI does not operate in isolation and there are numerous extraneous factors that need to be taken into account. Understanding the operational context of the MFI is of particular importance to this research project. There are two key components that provide an overview of the operational context for the MFI; the economic climate and sector role-players are briefly discussed below. (The comprehensive background is provided in Appendix 1A).

14.4.1 The economic climate

Financial aspects are an important factor to consider when businesses make decisions regarding operational changes, not only from capital expenditure point of view, but what the economic climate is and if the operational changes will impact on the organisations' competitiveness in the market place. At the time of project inception, the government was still trying to find ways of changing and improving the economic climate after decades of Apartheid, high unemployment, high interest rates and a price-dominated consumer market. According to the DANCED project document (DANCED: 1995:8) [64] consumers demanding improved quality products is an important contributing factor towards getting industry to produce better and cleaner products and this would be a shift from price-driven to quality-driven paradigms in the industry. If one examines the nature of the metal finishing industry, there are two critical components which could act as barriers to improving quality of the galvanizing and electro-plating processes as well as the end product:

i. Imposing restrictions or standards that could lead to financial decisions that could result in reduction of the workforce.
   Fears have apparently been expressed that further restrictions on higher standards could lead to industry players relocating to other areas. The report however does not specify as to what the preferred destination would be (DANCED: 1995: 8).
ii. Increasing the price of water:
   Water is a key component in the metal finishing industry and is currently relatively affordable in South Africa.

In addition to these concerns, the growth of the metal finishing industry seems to be curtailed by what the industry itself describes as a saturated domestic market (DANCED: 1995:8). Furthermore, it appears as though it would only be the companies that have a longer term vision (i.e. potential export) that would survive market and/or legislative changes.

The above provides an important insight into the selection of the financial incentives that were used by the project to attract the various stakeholders (factory owners) to create an interest and to participate in the Cleaner Production project. It is interesting to note that the Project Report (DANCED 1999:20) is transparent in the sense that only once interest was shown by the factory owners would it discuss the benefits of pre-empting pressure by authorities to enforce regulations by timeous compliance. The objective of the project was essentially to illustrate to factory owners that good housekeeping could result in almost immediate financial savings (despite these initially being minimal).

The focus of this approach certainly seems more relevant to the smaller companies however; as explained in the project Report (DANCED: 1999: 18) the larger companies were well established in a market which was enjoying an annual growth rate of 6%. The capital cost involved in implementing cleaner production would certainly add financial pressure to smaller companies. At the time of writing the project report, the interest rate was 19% and there was not a strong guarantee for a return on investments where repayments on loans would extend beyond six months (DANCED: 1999:18).

64 Project document – Cleaner Production in the Metal Finishing Industry, South Africa. M.129-0147. Ministry of Environment and Energy, DANCED, December 1999

To overcome this financial barrier, DANIDA set three project alternatives to meet the three main objectives of the project. These project alternatives were: awareness building, training & technology transfer and subsidies (DANIDA 1999: 20). The financial incentives of the subsidies would hopefully reduce the reticence that the smaller factory owners showed in terms of capital expenditure, since by adopting cleaner production they could reduce financial risk. Clearly however, the three project alternatives are inter-connected and are all necessary to encourage sustainability of the new approach once the subsidy had been paid back.

14.4.2 The sector role-players

The role-players that are involved directly or indirectly in the metal finishing industry are numerous and diverse; straddling institutional, commercial, labour and regulatory sectors. The DANIDA Report (2000: 11) categorised the defined sectors as follows:

i. Industry: The industry falls mainly within the category of small and medium companies; i.e. with between 5 and 100 staff
ii. Industry Associations: Hot Dip Galvanizing Association (HDGA) has nearly 100% membership coverage of the galvanizing industry and SAMFA. Established in 2004, SAMFA represents a third of the metal finishing industry in the country (DANIDA report, July 2000:32).
iii. Service Suppliers: Chemicals, Equipment and Plant and waste Disposal Services (Enviroserv)
iv. Training, Consultancy and Research
v. Regulators: DEAT is responsible for the overall protection of the national environment and deals with issues directly or indirectly concerned with waste disposal and pollution, including air pollution. DWAF is responsible for monitoring and controlling discharges into the natural water systems; i.e. rivers and sea. At local level, the Municipal Authorities are charged with regulating and monitoring waste disposal and the discharge of effluent into the sewerage systems. The municipalities operate within the framework of local bylaws. All regulators have a legal mandate to establish and enforce standards. The officials are also authorised to issue permits/licences and have the right to place conditions on the issue of permits/licenses.
vi. Other stakeholders

   The complexity of the metal finishing industry is reflected in the diverse group of stakeholders who are involved in the sector. It is important to understand this diversity and complexity, particularly if a Section 35 EMCA is to be established in terms of the DEAT guidelines; intensive consultation is required with all interested and affected parties. The other key and potential stakeholders are identified and their roles summarised as follows (DANIDA 2000:9):

   The Water Research Commission focuses on research and developing approaches for protecting the water resource, both in terms of quality and quantity. While DWAF and the local government would set the standards for water discharges, the South African Bureau of Standards: (SABS) sets and regulates minimum standards for a variety of products used in the Metal Finishing Industry, including safety standards. “The Department of Labour is concerned with the full range of issues concerning employment, including occupational health and safety at work” (DANIDA, 2000: 13). The Department of Labour can also contribute to achieving the objectives of cleaner production by encouraging improvements in occupational health and safety and offering training. Although the Metal Finishing Industry is not fully unionised (DANIDA: 2000:13), it is predominantly the metal workers’ unions that should undertake to oversee issues of employees environmental health and safety. The unions would therefore also be an important stakeholder grouping that will have to be considered in future NEA processes. As the main provider of South Africa’s electricity supply, ESKOM Holdings Limited (Electrotech) has a responsibility to pursue the development of energy efficient technology through its Electrotech division. (DANIDA, 2000: 13).

All the above role-players have been identified by DANIDA as key stakeholders in the MFI. Central to Section 35 EMCAs and other forms of NEAs, is that dialogue is entered into with all relevant stakeholders. As Component 1 of this research project focussed only on the Wings Case Study, it was thought prudent to only focus on the relevant key stakeholders, i.e. DEAT, DWAF, eThekwini (the local municipality), the MFI and the WRC. This stakeholder list was expanded during Component 2.

14.5 THE KEY STAKEHOLDERS' ROLE IN THE WINGS NEGOTIATED AGREEMENT

The objective of the Wings Negotiated Agreement with eThekwini Municipality was to force Wings Galvanizing Company to take preventative measures to avoid further pollution from its operations. Clearly this agreement only had three stakeholders, i.e. DWAF, eThekwini and Wings, as part of the MFA. The reasons for only these stakeholders being involved could perhaps be attributed to the fact that this particular agreement had a very specific focus which only demanded the involvement of these stakeholders. Also, the agreement had to be implemented within a very short time span.

However, if one considers the longer term focus and sustainability of achieving the objectives set out in the agreement, would it be prudent to extend the stakeholders involved in the agreement to include some of the above stakeholders? The following questions could be asked;

i. Are Negotiated Agreements a practical tool to achieve environmental compliance?
ii. Will a negotiated approach be supported by role-players in the galvanising industry?[65]
iii. How will Negotiated Agreements be administered against the existing legal framework?

As explained above, only the key stakeholders directly involved with the Wings Case Study were consulted during the first component of the research. These stakeholders were invited to attend the first formal workshop held on 28 March 2006. A background information document providing an overview of the study accompanied the formal invitation (Contained in Appendix 1E). Set against the background of the overall study objectives and the published Guidelines on EMCAs[66], the objectives of the workshop were to:

i. Discuss the process that was followed in the Wings Galvanising Agreement;
ii. Discuss whether Negotiated Agreements are a practical tool to achieve environmental compliance.
iii. Discuss whether a negotiated approach will be supported by role-players in the galvanising industry.[67]
iv. Understand how Negotiated Agreements would be administered against the existing legal framework.

The format of the workshop was structured in a manner that would support the above-mentioned objectives. A comprehensive record of the discussions around these four objectives is contained in Appendix 1A. For the purposes of this Chapter, the discussions were synthesised into three key themes that would provide direction for Component 2, as discussed in Chapter 9. These three key themes are listed below and discussed in the subsequent sections; the Wings Negotiated Agreement process; the practicality of the Wings Negotiated Agreement and SAMFA KZN's support for a negotiated approach

65 The importance of this objective was highlighted during the workshop; the lessons learned from the Wings Galvanising project should be applied to the Metal Finishing Industry as a whole as it would be prudent to enter into an EMCA with the association.

66 Mr Anben Pillay (DEAT) provided a copy of the DEAT (2005) EMCA IEM Guideline Series 1 to each of the workshop participants.

67 The importance of this objective was highlighted during the workshop; the lessons learned from the Wings Galvanising project should be applied to the Metal Finishing Industry as a whole as it would be prudent to enter into an EMCA with the association.

14.5.1 The Wings Negotiate Agreement process

The Wings Negotiated Agreement did not follow any clearly established blueprint and evolved over a period of almost three years as a result of numerous discussions held between officials from eThekwini Metro, the MFA and Wings Galvanizing[68]. A decision was also made to approach the Pollution Research Group at the University of KwaZulu-Natal to seek solutions through a Waste Minimisation Group. As with any negotiated process, there are important drivers that need to be recognised; these are briefly discussed below.

The relationship between the metal finishing industry and the eThekwini Metro was adversarial in nature, as is often the case between the *regulator* and industry. However, there is always a catalyst that will be the driving motivator to “force” stakeholders into dialogue. . eThekwini Metro clearly articulated the cumulative impact and potential financial implications of the lack of management of the discharges to the sewer, the storm-water system and the groundwater[69]. It was evident that the Metro had a serious problem and was looking for a sustainable solution which would permit Wings Galvanising to stay in business, but also address the Metro’s concerns. The ultimatum to Wings was “address the pollution problem, or face closure of the factory”.

Multi-party discussions played a crucial role in the signing of the agreement. A common solution that benefited all parties from an operational and financial perspective was found; it was this search that led to the exploration of the suitability of a Section 35 EMCA. However, the extensive public participation requirements proved prohibitive in terms of the urgent time frames. The agreement between Wings and eThekwini Metro, with the support from the MFA, provided an alternative. A period of grace was given to enable Wings to achieve the discharge standards set, which all parties agreed to.

The legal standing of the Wings Negotiated Agreement is not clear; i.e. it has not been signed off as a commercial contract. However in terms of the NWA and the Water Services Act (Act 108 of 1997) (WSA), the Metro Council holds the ultimate sanction of monitoring the compliance and withdrawing the permit for Wings to discharge effluent to the city systems, should this become necessary. It would be against this legal framework that the contract would be tested. This approach leaves Wings and other MFI companies vulnerable. Should DWAF decide to change the discharge limits, eThekwini Municipality will have to comply. New discharge standards would be applicable to the MFI operators, potentially having financial implications and further non-compliancy.

14.5.2 The practicality of the Wings Negotiated Agreement

The objective of the guidelines is to ensure that there is some degree of *consistency* in the development and implementation of Section 35 EMCAs, with the aim of enhancing their potential to become *credible* and *effective* policy instruments that make a meaningful contribution towards the promotion of sustainable development in South Africa. However, the credibility and efficacy of Section 35 EMCAs have to be measured against the practicality; in this case the Wings agreement provides the framework for this evaluation. The Section 35 EMCA and Negotiated Agreement are compared below. Only one criterion has been used for comparison, viz. the authorisation process.

i. Section 35 EMCA – authorisation process
   Considering the complexity of the metal finishing industry, in terms of the Section 35 EMCA, DEAT, DWAF, eThekwini Municipality, DTi, Department of Labour and Department of Health would be the organs of state that would have to be consulted. The Minister of Environmental

68 Other than the correspondence which is provided in Appendix 1, the process has not been formally documented.

69 According to eThekwini Metro, the sewage works would not be compliant with the standards set by DWAF in terms of sludge disposal. This sludge contains heavy metals resulting from industry. Either DWAF would impose substantial fines or the Metro would have been forced to de-list the sewage works, a costly exercise to the Metro.

Affairs would have to sign the Section 35 EMCA into law. The Minister would have to delegate the authority to monitor and manage the agreement to eThekwini Municipality, with DWAF as an additional monitoring agent. Considering that no Section 35 EMCA has been signed into law, it could be assumed that there would be cautiousness from authorities to go proceed. Furthermore, the time constraints involved with finding a solution would not allow for protracted negotiations or authorisation.

ii. Wings Negotiated Agreement – authorisation process

DWAF and eThekwini Metro were involved with the negotiation process. eThekwini Metro is the implementing authority. In terms of the NWA and the WSA, eThekwini Metro is the implementing agent and as such has entered into the agreement solely with the MFA and Wings. The relevant MECs and Minister of Environmental Affairs have not been party to this agreement in any manner. Once dialogue commenced, the negotiation agreement process was expeditious and Wing started its remediation process.

Importantly, environmental compliance has been achieved in the Wings case through a Negotiated Agreement, in the absence of a formal EMCA. Of relevance is that the principles contained within EMCAs, i.e. the principles of Integrated Environmental Management (IEM), were followed in the Negotiated Agreement between the role-players in the Wings case. Additional benefits which are also indicative that the IEM principles were followed, were derived from the collaborative approach between eThekwini Metro and MFA. These include the fact that the Metro was able to move towards addressing its catchment problem of dealing with waste water and release the pressure on its sewage works. This resulted in a potential savings of hundreds of thousands of Rands. Also, Wings could continue operating under the condition that it would achieve compliance, resulting in no job losses.

The eThekwini Municipality was of the opinion that the Negotiated Agreement had the potential to evolve into something more substantial for the whole industry and wanted to explore this possibility. However, it was only one of the stakeholders that would be involved in this process; it would require the support of the Metal Finishing Industry in KZN.

14.5.3 Will SAMFA KZN's support a negotiated approach?

One of the four key objectives of the key stakeholder workshop was to determine whether this project could proceed with establishing a Negotiated Agreement for the MFI in KZN The research process had therefore reached an important juncture; would SAMFA KZN support the process to establish a Negotiated Agreement for the industry in KZN? If a negative answer was received, the research process would have culminated with an in-depth evaluation of the Wings Negotiated Agreement. Appendix 1A would therefore have become the primary focus of this report.

To the extent that the Wings Galvanising agreement was the result of a negotiated process involving the eThekwini Municipality and the KZN MFI, there was a degree of buy-in from those in the industry who are members of the Association. More importantly, the eThekwini Municipality was optimistic that a Section 35 EMCA could be achieved for the KZN MFI. An eThekwini representative was of the opinion that if the long-term financial benefits for the municipality could be clearly enough articulated, sufficient political support could be garnered to expedite the signing of a Section 35 EMCA. Similarly, the improved communications and working relationship that had been cultivated during the Wings negotiation process encouraged SAMFA to support a more formalised Negotiated Agreement.

The benefits that Wings and other MFI members have had certainly would encourage the Association to support a more formalised EMCA. The decision to pursue this option was, however, not made without reservation: all the affected parties, including DWAF were of the opinion that there were numerous unresolved issues. Certain practical concerns that were raised are detailed below:

i. An EMCA would provide “protection” to the MFI in the sense that businesses would be able to work towards compliance within a given period before legal proceedings are instituted. However this would [70]open up the opportunity for "free-loaders" who do not belong to the Association to abuse the situation. The implication of this is that capital expense is required for cleaner production mechanisms and unfair competitive advantage would be derived by the “free loaders”.
ii. The MFA cannot actively police its members in terms of meeting the EMCA requirements. In a competitive environment, the EMCA could also potentially be abused and the MFA could be put into an invidious position where its members would whistle-blow on competitors to gain competitive advantage. At the same time, the MFA cannot be seen to be “sweeping issues under the table” – this would be in conflict in terms of the spirit of the EMCA. The EMCA could serve as a strong motivating factor to businesses to put their houses in order and potentially also reap the longer term rewards. By the same token however, the EMCA could create a false sense of security to businesses; it was felt that EMCAs would not be able to render protection against ever-changing legislation and should DWAF change its standards, these would immediately be passed down, effectively making the EMCA conditions null and void.
iii. The MFI members therefore thought it prudent that a code of conduct signed by all MFI members could serve as a mechanism to improve production methods to achieve environmental compliance. This code of conduct would support the EMCA.

Notwithstanding the above, the following issues require further attention as these could be seen to be potential barriers to getting an EMCA established:

i. Clarity would be required in terms of who the final authorising and implementing agent would be. At this stage, there is some discomfort with the MFA, as well as the eThekwini Municipality, that the Minister of DEAT would sign the EMCA into law, yet the standards are set by DWAF and the implementing agents would be the eThekwini Municipality. This indicates a clear conflict of interest.
ii. In practical terms, an EMCA for the MFA cannot be entered into until the Waste Discharge Charge has to be finalised by DWAF. Similarly The Reserve Determination for the various river systems has to be finalised before DWAF can set any reasonable standards for quantity and quality.
iii. The EMCA guidelines require that an intensive consultation process would have to be followed with all interested and affected parties. Considering that the previous consultation with only MFA members spanned almost three years, the EMCA consultative process could take considerably longer. There is a school of thought that the consultative process should not be seen as a deterrent when relating to EMCAs. Any licensing applications have to, theoretically, in terms of the NWA, go through an intensive consultative process.

Considering the gravity of the above-mentioned issues, it was not surprising that the agreement to proceed with the study, was done with the understanding that the key stakeholders, and in particular the KZN MFI, would be given the opportunity to further explore the unresolved issues. The decision to proceed was therefore based on the understanding that this would be done under agreed to principles discussed below.

[70] This opinion was expressed during a personal interview conducted with Ms Redelinghuys at eThekwini Municipality.

15 THE PRINCIPLES FOR THE NEGOTIATED PROCESS

As explained above, the agreement to proceed with the negotiation process for a Section 35 EMCA was based on two principles[71]; that all implications of signing a Section 35 EMCA needed to be fully understood. Secondly, that the negotiation process formed part of a research project; as such it was agreed that participation in the negotiation process did not infer that a Section 35 EMCA was a foregone conclusion. The negotiation process could reveal that a Section 35 EMCA was not necessarily the appropriate mechanism for the MFI.

Regardless of the outcome of the process, a complete report would be provided to all the stakeholders involved in process. The process and findings could prove to be valuable to evaluate the industry and its working relationship with other key stakeholders.

It was therefore agreed that the research project would proceed to further explore the process of establishing a Negotiated Agreement with the key stakeholders. This negotiated process is known in this research project as Component 2. Chapter 9 documents the process that was followed to support these principles.

[71] This was agreed to at the key stakeholder meeting held on 28 March 2006.

CHAPTER 9

16 COMPONENT 2: NEGOTIATING AN NEA FOR THE MFI

16.1 THE RESEARCH METHODOLOGY

This is an important chapter from a research perspective; it is a significant milestone in the research process in terms of Grounded Theory. The chapter also provides the basis for subsequent chapters in terms of synthesising the findings. Although iterative in nature, the research process according to Grounded Theory focuses on identifying a range of relevant categories. As elucidated in previous chapters, the subject of NEAs is vast and complex and more specifically, as explained in Chapter 2, it is necessary to delimit the theory through a process of reducing categories or themes identified in the early stages of the study (Glaser and Strauss, 2006:111).

A first order of categorisation has occurred. Appendices 2A – 2F contains copious documentation and notes of meetings, workshops and discussions held with key stakeholders. As stated in Chapter Two, the law of succinctness or the principle of ”Occam's razor” has been acknowledged (Wikipedia: 2006) and implemented in the research process. This chapter therefore contains the data in a better structured manner which supports the overall framework of the research process and findings.

17 BACKGROUND

Negotiated environmental agreements (NEA) are underpinned by process. The process involves an evolution of discussions between a multitude of stakeholders who are involved in or impacted on by the activity that will become the focus of the agreement. The stakeholders need to agree on objectives, operating rules, time frames and be held accountable for managing the agreement. During these discussions, there is a possibility that it may emerge that an NEA is perhaps not the most suitable mechanism. In terms of this research project, the process became the prime focus and a culmination in a NEA was of secondary concern. This chapter explores the process that was followed for the Metal Finishing Industry in detail. Similar issues continued to repeat themselves during this process. While the outcomes of the discussions are contained in separate supporting documentation in Appendices 2A-2F, these issues are synthesised into the key themes that have become the framework of this research project.

The Wings Study discussed in Chapter 8 provided a perfect platform for the Metal Finishing Industry (MFI) in KwaZulu-Natal (KZN) to further explore a formalised NEA involving the relevant stakeholders. This process was agreed to with the MFI and the eThekwini Council. The broad “conditions” regarding the MFI’s participation in the process were based on the three principles discussed in Chapter 8:

i. The researcher would manage the entire process and co-ordinate all discussions.
ii. The MFI would be committed to participating in the process, but this did not imply that the organisation would be forced into signing a Negotiated Agreement.
iii. All the implications of entering into a Negotiated Agreement would need to be fully understood by all parties.

18 DOCUMENTING THE PROCESS

In addition to the first integrated meeting that was held in March 2006 to discuss the Wings Case Study, the original intention was to hold three rounds of stakeholder meetings with the different stakeholder groupings. However, the process had to be adjusted as new information came to light and opportunities presented themselves. The process is discussed below.

18.1 DISCUSSIONS BETWEEN MFI AND KEY STAKEHOLDERS

The meeting between DWAF, eThekwini Metro (Metro) and SAMFA, KZN held on 12 July 2006 was requested by the latter party to address the manner in which the recent illegal dumping of waste into the Umbilo River by Anodising Systems had been managed by the various parties.[72] The illegal dumping resulted in fish dying in the river. The additional damage to the ecosystem had not been determined at the time of the meeting. The incident had received extensive media coverage (Van der Spuy: 2006), with the focus being on the spillage and subsequent environmental damage (A copy of this article is contained in Appendix 2A).It is interesting to note that the follow-up report detailing the R1 000.00 fine which had been imposed by Metro received far less media coverage.

Furthermore, the follow-up actions by Metro for the cleanup and monitoring and evaluation as well as the fact that Anodising Systems was held responsible for these costs which could be in the order of between R20 000 and R30 000, did not receive any media coverage. There was a concern that the lack of balanced media coverage had resulted in negative press for the Metal Finishing Industry. Considering the strong focus on the environmental damage caused, the industry was concerned that it had never been afforded the opportunity to present its case in the media. The industry representatives were of the opinion that a signal had been sent to industry and the public that it was almost “acceptable” and more affordable to dump illegally than follow the legal process. According to the industry representative, implicit in this message is that as neither DWAF nor Metro had the legal “teeth” to prevent illegal dumping or to issue substantial fines, nothing substantial would happen to perpetrators.

With this background, it was agreed that the key objectives of the meeting were for the parties to agree on a way forward in terms of managing future pollution in so far as the media was concerned and to better understand how both DWAF and Metro would manage future pollution problems (illegal dumping) in terms of enforcing the respective laws.

The notes for this meeting are contained in Appendix 2B. The issues and concerns raised by the stakeholders are very similar to those raised during other discussions and are contained in subsequent sections. What these discussions highlighted however, is the fact that the MFI is consistent in its concerns and that the same problems continue to arise in the industry’s regular dealing with the Metro and DWAF; in particular the inequitable manner in which the regulations are implemented and that perpetrators are not penalised.

72Ms Bowler was invited to attend this meeting as it would contribute to a better understanding of the issues and concerns which stakeholders which may relate to the contents of a negotiated environmental agreement should the industry decided to further investigate the possibility of a NEMA Section 35 EMCA.

18.2 FIRST ROUND OF DISCUSSIONS

The first round of meetings was held in August 2006. Each of the key stakeholder groupings were met with separately; i.e. the MFI Executive Committee, DWAF and eThekwini. A preparatory meeting was also held with Ms Aldine Armstrong, an environmental lawyer, who was appointed to provide legal input into the discussions with the stakeholders. The intention of holding separate meetings was to encourage the stakeholders to speak more freely about issues regarding a proposed NEA. However, it became clear after this round of discussions (and in particular with the MFI executive members), that an integrated meeting would be premature. The prime reason for this is that the MFI executive members were of the opinion that progress in discussions was dependent on eThekwini getting its house in order in terms of monitoring, compliance and enforcement. This in itself revealed much about the complexities which would need to be confronted during this process.

The objective of this project was to promote good working relationships between stakeholders, and not being instrumental in potentially causing conflict, either between stakeholders or between the researcher and the stakeholders. In the light of this, the decision was made to focus rather on report-back discussions with the various key stakeholders at a combined meeting.

As was the procedure with previous reports and documents, issues raised by the stakeholders were integrated into the themes which evolved over a period of time. The issues raised during this process were captured in a "Synthesis Report" which. This document would hopefully provide a foundation for a negotiation process which aimed at establishing a Negotiated Agreement for the MFI. This synthesised document as well supporting documentation (Invitation, Agenda, Background Information Document and Attendance Register) is contained in Appendices 2C -2F.

18.3 SECOND ROUND OF MEETINGS

Chapter 8 introduced the wide range of sectoral stakeholders that are associated with the MFI in KZN. As was explained, the intention was not to hold discussions with all of these sectors, but to rather focus on the stakeholders that were identified during the research process as being vital to consultations which could be described as being the "foundation" of a Negotiated Agreement. The objective of each of these discussions is briefly discussed below.

18.3.1 eThekwini Water and Sanitation

It was fortuitous that during this period, eThekwini hosted a meeting with key stakeholders on 30th October 2006 to discuss the issue of increasing the existing pollution fines. These stakeholders included DWAF, the MFI, non-government organisations (environmental) and eThekwini staff. This meeting was significant for the research project as it focussed on many concerns that were raised by the MFI stakeholders during the first round of discussions. The key issues are contained in the legal framework theme below.

18.3.2 Enviroserv Waste Management (Pty) Ltd

Enviroserv Waste Management (Pty Ltd (Enviroserv)[73] focuses primarily on solutions for the industrial market and its products and services deal with general and hazardous waste. Enviroserv operates landfill sites in and around Durban, including the Holfontein and Shongweni sites. They therefore play an important role in the production lifecycle of the metal finishing industry. There is a suite of legislation which Enviroserv has to adhere to, the most significant of these (in relation to this project) are the NWA and the Environmental Conservation Amendment Act of 2003 (ECA)[74]. The latter is important as it deals with the classification of waste, its management and has financial implications on the MFI operators in terms of their waste disposal.[75]. Discussions were held with Enviroserv on 30 October 2006.

18.3.3 Judy Bell (30 October 2006)

Ms Bell is an independent consultant co-ordinating a two year project on behalf on KZN Department of Agriculture and Environmental Affairs (DAEA) – Marine and Coastal Management (MCM), WESSA, DWAF, DEAT, National Ports Authority. R80 000 has been set aside for this project.[76] This project focuses on established an EMCA to manage the cumulative impact from marine outfalls generated from land-based activities in KZN. Ms Bell also recently conducted an independent audit on a few MFI companies to evaluate Occupational, Health and Safety Standards. A meeting was held on 30 October 2006.

18.3.4 Metal Finishing Industry (31 October 2006)

The MFI has, since the start of this project, shown interest and participated actively in the process. Its executive committee members were keen to improve the environmental practices within the industry. There is a willingness to work with the authorities and to support any mechanisms (including financial incentives) that could be put in place to achieve compliance in the sector. It was also clear that the MFI would like to improve its image as an environmentally concerned industry in the public domain. These sentiments were again confirmed at a meeting held with the chairperson, Sergio Guerrera.

18.3.5 Chemical Suppliers (telephonic)

As was stated in the Chapter ?, the chemical suppliers participating in the DANIDA project support cleaner production, but there may be a reticence to become involved in further actions to support a NEA for the MFI. The suggestion was made by Enviroserv that the chemical suppliers are in an ideal situation to provide the municipality with details of all its clients. In this manner, the officials can focus on registering and monitoring the smaller operations that may previously have “slipped under the radar”. The telephonic discussions with Mr John Hauseman were inconclusive and there was a

73. http://www.enviroserv.co.za

74 Commencement of Section 1 of the Environmental Conservation Amendment Act, 2003 (Act No. 50 of 2003)1.

Proclamation by the President of the Republic of South Africa 68, 2005, 20 December 2005, Government Gazette 28346 dated 20 December 2005. The President of the Republic of South Africa has determined 03 January 2006 as the date on which section 1 of the Environment Conservation Amendment Act, 50 of 2003 came into operation. The effect of this Proclamation is to bring a new section 20 of the principal Act into operation. This section deals with waste management. The important difference between the old section and the new one is that permits for waste disposal sites are now to be issued by the Minister of Environmental Affairs and Tourism, and no longer by the Minister of Water Affairs and Forestry. However, the new section provides that the issuing of such a permit is subject to the concurrence of the latter Minister. It also requires the inclusion in the permit of the conditions contained in the relevant Record of Decision by that Minister regarding any measures that the Minister considers necessary to protect a water resource as defined by the National Water Act, 36 of 1998. http://www.caia.co.za/newsletters/ChemNews_200601.doc

75 A copy of a document from Enviroserv is attached and fully explains the implications.

76 Information provided by Mrs Judy Bell.

reluctance to make any firm statements until further discussions had been entered into with his business partner. Unfortunately, further comments were never forthcoming. Perhaps this could be interpreted as being indicative of the uncertainty of the concept of NEAs and the potential impacts (be it benefits or disbenefits) that participation / commitment may have for business.

18.4 DEVELOPING A THEMATIC STRUCTURE

Similar to the earlier stages of the research project which details the discussions between stakeholders (detailed in Appendix 1A), the discussions during the second round were synthesised into themes which evolved during the course of this project and have been captured in this chapter.[77] Also, these themes provide a sound framework indicating the fundamentals of a Negotiated Agreement. Numerous issues cut across themes as they are closely interrelated. The themes are not discrete in nature and these interrelated issues have been repeated to show the potential complexity associated with a Section 35 EMCA. The identified themes focus on the legal framework, benefits offered by section 35 EMCAs vs. Negotiated Agreements, multi-stakeholder involvement and the tools available to implement and support Section 35 EMCAs.

18.4.1 Theme 1: Legal framework

This theme contains all the issues and concerns that pertain to the legal framework within which Negotiated Agreements will be negotiated and managed. The issues raised by stakeholders and listed below reflect the complexity of the potential implications of the various suites of legislation, how these are interpreted, and how effectively they can be implemented.

There is still confusion with stakeholders as to who signs off the Section 35 EMCA and how the responsibilities will be delegated; does the Minister of Environmental Affairs have sole right/authority to sign off on a Section 35 EMCA? eThekwini is concerned that Section 35 of the NEMA is *ultra vires*[78] in that it extends its powers beyond the focus of the mandate of the MEC of DEAT, into the realm of DWAF and municipalities' terrain in terms of the WSA and the Local Government: Municipal Systems Act (Act No. 32 of 2000) (MSA) and the Local Government: Municipal Structures Act (Act No. 117 of 1998) (MSA). It is of particular concern that the final authorisation of a Section 35 EMCA rests with the non-implementing agent. This begs the question as to whether the Minister can delegate this authority to the MEC and/or whether full responsibility will be delegated to the authority that ultimately has to implement the EMCA according to the most applicable legislation. A concern that is linked to the ability of an MEC being able to sign off on an EMCA, is that the stakeholders hold the perception that the successful signing off of an EMCA by the MEC will depend on how much political support there is for the sectors involved.

Theoretically, the above concerns should be addressed through the relatively newly enacted Intergovernmental Relationship Framework Act. The question is whether it is strong enough to ensure co-operative government and to give sufficient power and support to the above-mentioned authority. This is an important issue which relates to other suites of legislation and is discussed further in Chapter 10.

Another cause for concern raised by both the MFA as well as eThekwini Municipality is the extent of the validity of conditions that may be contained in either a Negotiated Agreement or in a Section 35 EMCA. Of specific relevance to this case study, would be conditions relating to the NWA, the WSA

77 Although these issues have been captured in this chapter, the "Synthesis Document" has been provided in Appendix 2A for completeness.

78 ultra vires – acting beyond mandated powers.

and the Waste Discharge Charge System (WDCS) (DWAF, May 2000) which will form a vital component of the Pricing Strategy that DWAF will implement in terms of the NWA. This concern is further discussed in Chapter 10.

There is a strong element of social dialogue in a Section 35 EMCA. The environmental law is still evolving and certainly the EMCA process is still immature. A comparison can be drawn to the early stages of the evolvement of the labour law in South Africa. The Section 35 EMCA is intended to introduce an element of social dialogue into the environmental legal framework by replacing the “big stick” approach with a new mechanism. The aim is to encourage strengthened dialogue between industry and government through NEAs. This approach also offers industry an opportunity to be more in control of the negotiation process.

NEAs or Section 35 EMCAs are not there to replace existing laws – they can strengthen the implementation of the laws by encouraging working partnerships between industry and government. Rather, Section 35 EMCAs can also be used to regulate the gaps that exist between laws, old and new, and levels of government (i.e. the implementation of the law). As such, the Section 35 EMCA should not be seen as another administrative or legal hurdle to overcome – it should be an amalgamation of that which is already in existence. Rather, the most important issue to consider with a Section 35 EMCA is that industry must benefit from it. The Section 35 EMCAs must also seek to achieve the objectives that are not explicitly contained within the existing realms of the law or permits – i.e. working relationships, communication structures, roles and responsibilities.

The process to establish a Section 35 EMCA is normally initiated if some kind of shortcoming has been identified in a sector – is something lacking which could improve the manner in which industry operates and/or functions within the existing legal framework? Can it be solved by a Section 35 EMCA? However, while the setting up of an EMCA could be perceived as onerous, the process should be weighed up against the longer term benefits. The red flag however is that the content of the Section 35 EMCA should receive careful consideration – it should not become an albatross for the industry.

One of the biggest concerns with the MFI, eThekwini Municipality and DWAF, is that the financial limitation which has been placed on fines in terms of the Local Authorities Ordinance No 25 of 1974 (Section 266 (7)(a), as described in the Sewage Disposal *Bylaw* (Section 2.4) is so paltry, that it does not serve as a deterrent to transgressors. The minimum fine is R300 and the maximum fine is R1 000 for illegally discharging into the sewers. Higher fines can only be imposed if the offender is either criminally charged or there is a civil case brought against him/her by eThekwini. The fines are in keeping with the permits that are issued to businesses who are allowed to legally discharge into the municipalities storm water system. In addition to the fines, the offenders can also be held liable for costs related to the clean-up. The following issues were relating to penalties were raised during the various discussions:

i. The National Water Act (Chapter 16, Offences and Remedies, Section 151 (2) allows for a fine and/or prison sentence not exceeding five years for a first offence, and a fine and a prison sentence not exceeding 10 years for contravention of various section of the NWA. No figures are specified.
ii. The NWA (chapter 16, Offences and Remedies (sections 152 and 153) respectively allow for compensation for harm, loss or damages or the award of damages and/or remediation costs. No figures are specified.

iii. The Environment Conservation Act, No. 73 of 1989 (ECA) (Parts VII and VIII), also makes ample provision for penalties for various offences, ranging from R250 to R100 000 (and also prison sentences). Powers have also been delegated to local authorities to give effect to these penalties.

Environmentally related offences do not yet receive high priority in South Africa. Furthermore, the cost and time implications for local authorities to pursue offenders through the legal system to court, is infinitively expensive. In consequence, despite the above-mentioned provisions in the regulations, stakeholders are of the opinion that the authorities (DWAF in particular) are reluctant to prosecute, leaving the Municipalities to deal with issues that fall within their legal ambit. However, having said this, from discussions, it appears that the most urgent/immediate recourse for action without protracted legal battles remains to be through the Municipal bylaws. And it is via this avenue that eThekwini wishes to seek legal recourse.

The intention is that Municipal Courts will be established to deal with all issues that are in contravention of local bylaws, with environmental cases receiving priority.[79] Some difficulties may continue however to be experienced; the Durban magistrate will have to be convinced that there is sound reason to increase the fines to a substantial amount to encourage compliance. However, these fines cannot be too high as this could have negative financial implications for the smaller companies. Context and circumstances of the offence will have to be considered when setting fines i.e. some offences may indeed be accidental or negligent, as opposed to intentional (acts of omission as opposed to acts of co-mission). The former should not be discriminated against. eThekwini is of the opinion that their records will indicate which offenders are repeat offenders and which companies have maintained a good track record.

The suggestions from stakeholders in terms of penalties and/or fines varied greatly and are indicative of the complexities of reviewing and implementing the legal framework and also the sentiments around penalties.

i. R20 000 per fine is substantial and would be seen as a deterrent.
ii. The fine should be greater than the monthly cost of legally disposing of waste. This could average at R10 000 per month for a medium size MFI company.
iii. For companies with a trade income of R50 m per annum, these fines are too low, higher fines should be considered.
iv. In addition to the fines suggested above, the clean-up costs and remediation costs should also be added on as the cost of this is often under estimated.
v. No precedent has been set in terms of the submission of forensic evidence to support cases. i.e. to date, no cases have gone to court as most cases have been settled out of court. Nonetheless, eThekwini states that its officials are trained to collect evidence with the intention of preparing for court.
vi. There is a strong sense that for environmental justice to be fully realised at all levels (particularly within the legal system), but a great deal of education is required:
vii. Prosecutors are not always aware of the full extent of the economic implications of environmental offences that are committed. An example of this is that there are 17 estuaries within eThekwini's municipal boundaries which are the main attraction for tourists. This translates to billions of Rands

79 A telephonic interview with Mr Vivani Made, Deputy Head, Litigation (Ethekwini Legal Services) on 8th May 2007 revealed that the Municipal Court is now a physical project and that the structural completion is expected by the end of June 2007. There are a few legal issues that need to be clarified with the Department of Justice; the appointment of prosecutors and whether the Municipal Court will be able to deal with traffic fines. Mr Made confirmed that the Municipal Court would also provide a suitable platform from which an increase in the existing fines can be addressed.

per year in terms of income to the city. If the estuaries are irreparably damaged, the financial cost / loss to the city would be phenomenal. A R300 fine undermines the municipality's intention to treat offenders seriously.

viii. Similarly, prosecutors are not always aware of the long-term impacts on the social and natural environmental of environmental offences. Environmental justice should therefore include capacity building of individuals within the judicial system. There is a strong need for sufficient capacity if the legal framework is to be effective. Currently, the team dealing with pollution is relatively small for the vast area it has to cover. This team is literally on 24 hour call for emergency call-outs and works in a dangerous environment and their lives are often threatened.

ix. Staff numbers are inadequate to effectively register new companies and ensure on-going monitoring and compliance. In effect, eThekwini staff are placed in an invidious position of being mostly reactive rather than preventative in their actions.

x. No matter how strong the Municipal Court system is, prosecution can only be effective if there is sufficient staff to police activities and an "even hand" in terms of enforcement will still not materialise. Environmental justice should not only be focussed on the legal fraternity, but should also include the capacity building of the broader public. The general public is loathe to report environmental "crimes" – perhaps this is because they are not aware of the full extent of the damage, both to the environment and financially.

The various issues and concerns raised above need to be fully understood and play an integral role in determining the benefits that the various forms of NEAs can present to stakeholders.

18.4.2 Theme 2: Benefits offered by section 35 EMCAs vs. Negotiated Agreements

The MFI industry is still not convinced that there are any advantages to signing a Section 35 EMCA. Apart from the capacity building problems within the Metro which do not allow for an efficient implementation of the existing agreement, the industry does not seem too unhappy about the existing "Memorandum of Understanding" or "Negotiated Agreement" which exists. This takes the form of agreed-to standards in the industry in terms of allowable levels of discharges contained in permits, and the manner in which the permits will be enforced. The "additional protection" which the members are seeking, is i.e.:

i. That there be more certainty that the requirements i.t.o standards / regulations will not change within a five year period and in consequence have a negative financial impact:

ii. Regardless of whether a Section 35 EMCA, permit or other form of agreement is signed, this would have to be reviewed every five years. The permit and a section 35 EMCA would both offer legal protection for this period. A Memorandum of Understanding and/or other form of Negotiated Agreement would almost be considered a "gentleman's agreement" and the legal standing of a "five year protection period would have to be tested".

iii. Standards are negotiated with Metro i.t.o. the permits which are valid for a period of five years. It does not appear that an EMCA offers anything different to this.

iv. The punitive measures offered by the suite of existing legislation (i.e. NWA, permits, Municipal Systems Act), are not considered to be substantial and do not encourage compliance. This will not change with a Section 35 EMCA. The measures are mostly financial and limitations are placed on fines which can be imposed. The only additional mechanism available to Metro to encourage compliance is the costs related to testing, cleaning-up and rehabilitation costs. The opinion of the MFI is that these costs are quite easily met by companies and are not a sufficient deterrent to repetitive behaviour.

v. DWAF is reluctant to prosecute – this will be no different with an EMCA.

vi. The capacity within both DWAF and Metro will remain a problem and policing of non-compliant members will fall to the industry.The industry finds this unacceptable as it is reluctant to impose sanctions on its members. Any actions by the members on the executive committee could be considered as “competitively unfair”.

If the MFI is to move towards a Section 35 EMCA, there would have to be clear benefits involved for the members. One of the benefits that a Section 35 EMCA can offer is that organs of state (in this case Metro), can negotiate on behalf of smaller companies to achieve objectives that could benefit the industry. (This could be an alternative way to deal with the increasing prices as the Waste disposal sites). That the Negotiated Agreement, (or whether it is in the form of a service level of agreement), should unequivocally provide components which clearly provide economic benefits. It is clear that a financial driver would hold more benefits than environmental drivers. The value systems between MFI members differ too much in respect of the environment. The agreement should focus on achieving cleaner production and should be implemented across the board, without bias. It should be highlighted that the MFI executive committee will have to accept responsibility for ensuring that the requirements/conditions contained in the Negotiated Agreement are met. At present there is a reluctance to act as “policeman” over its members lest this be interpreted as unfair competition. This would also mean that the agreement should be backed by a strong enforcement component by eThekwini. This links in closely with the previous statement. Currently, eThekwini only has the manpower to focus on the existing and “legitimised” MFI operators, which are mostly MFI members. Many of the problems also result from new companies operating undetected.

In addition to the Negotiated Agreement resulting in substantial and measurable progress being made at Wings Galvanising (apart from meeting the groundwater standards[80]) the agreement has contributed in part to eThekwini Metro meeting its legal limits at its sewage plants. The following observations were made regarding the benefits of using Negotiated Agreements as an alternative to the formalised EMCA**:**

It is more practical and effective to use the Negotiated Agreement route at local, rather than provincial or national level. Time is an important factor to industry (which may be faced with punitive penalties or sanctions) and the local authority (which may have a very serious problem within their wastewater treatment system as a result of the effluent). Concern was expressed that the full EMCA route would be too cumbersome and time consuming to be effective at local level. Currently EMCAs are not designed to be agreements that contain diverse environmental issues (or referred to as multi-media); i.e., atmospheric pollution, liquid effluent discharges and solid waste disposal, presumably because the regulations and standards for each of these often fall under different pieces of legislation and regulation or enforcement agencies. However, the public participation process for one specific EMCA could raise some multi-media issues (e.g. water and atmospheric pollution). The time required to pilot an EMCA through this bureaucratic maze and the proposed public participation process does not seem practical. Negotiated Agreements allow should allow for greater pliability in terms of setting objectives, standards and time frames for an industry, but could be made relevant to a single organisation. There is almost a sense of having entered into a “gentleman’s agreement”.

80 According to Mr Dale Braum (Acting Engineer, eThekwini Metro, North West District), one of the processes situated in the older parts of the Wings factory, was resulting in groundwater pollution. After consulting with eThekwini Metro on what actions should be taken to alleviate this problem, Mr Reddy conducted a situational analysis with the assistance of specialist consultants as instructed by DWAF. Wings has halted its expansion programme until DWAF can conduct its inspection to determine whether the groundwater pollution problem can be addressed and operations can continue. However, at the time of the interview workshop, DWAF had still not visited the Wings factory to provide advice. According to Mr Braun, groundwater does not fall within the Metro’s jurisdiction and it can not make any recommendations and therefore cannot take the matter further.

There are also however, disadvantages to entering into these “gentlemen’s agreements”, despite them being written into licences; the agreements entrenched in licence conditions are subject to change from a higher authority, i.e. should related regulations change at a national level, these would immediately impact on the signatories of the Negotiated Agreement, effectively rendering them non-compliant. There tends to be quite a high turnover of staff within local government and the strength on which the Negotiated Agreement (or gentlemen’s agreement) was based on, may not hold sound when a new official takes office. The legal relationship between the license and the Negotiated Agreement is unclear. This too, makes for a rather tenuous relationship between the Metro and the signatory, rendering the latter vulnerable.

With specific reference to the positive role which Negotiated Agreements can play in achieving environmental compliance, the following observations were made; it was felt that there were several areas where NEAs might provide a workable route to improving the environment. These were in those areas where the problem was not confined to a local area, but was geographically spread and where there were identified industrial bodies or associations which could represent and negotiate on behalf of the industry concerned. Another area where NEAs were seen to have a potential role to play was where there were no defined standards. In the absence of mandatory standards, a voluntary EMCA could play a useful role in achieving progress towards some negotiated standards that result in a reduced load on the environment.

There are considerable financial benefits associated with environmental compliance, particularly when the cleaner production avenue is selected. Efficiency in production is achieved and wastage on raw materials is reduced. The stakeholders however were of the opinion that the Section 35 EMCA is too formalised and too complex for the KZN MFI. The alternative form of a NEA would therefore be more appropriate to the industry; this not only from a legal perspective, but also from an administrative point of view.

The role of individual and collective attitudes, particularly negative attitudes became more prominent during discussions with the industry, and has the potential to derail not only the Negotiated Agreement but also to affect the longer term sustainability of the industry and the health of the natural environment**.** This matter appears to be the new driver for people NOT wanting to support a Negotiated Agreement, regardless of whether a Section 35 EMCA or another form of NEA is in question. This not only shifts the focus of the study dramatically, but also raises a great deal of warning flags in general for this country and the legislative framework. The issue is discussed fully in Chapter 13.

18.4.3 Theme 3: Multi-stakeholder involvement

The fundamental principle of Negotiated Agreements is that multi-sectors have to have negotiated the agreement to achieve a common focus. This also potentially poses one of the greatest constraints for successfully negotiating an agreement. Again, many of these issues have been articulated in one form or another within the preceding themes. With regard to the legal framework, the potential confusion between the different government departments that will need to become involved with a NEA (regardless of Section 35 EMCA or otherwise), is one of the major concerns in terms of multi-stakeholder involvement. The issues raised by stakeholders who are related to the regulatory framework, together with the issues related to Enviroserv, (as a key stakeholder) included:

Whether full responsibility would be delegated to the authority that ultimately has to implement the EMCA/NEA according to most applicable legislation? Clarification of the roles and responsibilities of each of the stakeholders/regulators would have to receive more attention. These roles and responsibilities are attributed to the two broad categories of the regulators and the MFI stakeholders.

The authorities responsible for implementing the regulatory framework need to be fully committed to their role and cannot be seen to abdicate their responsibilities of equitably, expediently and consistently implementing the regulations by relying on the Sector EMCA to police the sector. Implementing the conditions of the EMCA equitably across the MFI sector is of particular concern to the MFI sector as there is a feeling amongst the “compliant” MFI operators that the smaller operators do not fall within the eThekwini radar and due to lack of capacity, are not being subjected to the same regulations. This calls for the responsible authority ensuring that it has sufficient capacity and committed staff. This becomes even more pertinent as and when the Municipal Courts become fully functional.

The responsibilities for the MFI sector appear to be even more onerous. Sector leaders would have to understand how far they can go to exercise “discipline” over their colleagues. Similarly, all sector stakeholders have to adhere to the same laws and conditions and “free-loaders” should not enjoy the same benefits as signatories. This is a real area for concern, considering that there are between 400 and 600 companies in KZN involved in the metal finishing industry; approximately 60 are members of the MFA. The Association would have to make a concerted effort to increase its membership base if it wants to be able to have better control of its members’ behaviour. Also, the greater the membership tally, the better position the Association will be in to improve it working relationship with Enviroserv and the greater MFI. With the new regulations Enviroserv has had to revise its operational and costing procedures, the thrust of which appears to be a principle of economies of scale.

There has been an increase of almost 300% in tonnage rates for waste disposal over the past two years. However, numerous MFI operators are not large, operate efficiently and have minimised the volumes of waste produced. It has become financially unviable for Enviroserv to continue providing the standard Skips ($7m^3$) which require a minimum removal of twice monthly with a minimal monthly rental of R450. Some companies are producing such low levels of waste that the skips were being removed once a year. The alternative arrangement offered is the provision and transport of 210ℓ (chemi waste drums) at a sliding scale rate (1x 210ℓ – R430, 2 = R460, 3 = R490). This does not include the provision, disposal, treatment, testing or label costs. Again the rule applies: the more drums used, the more economical it becomes to dispose of the waste.

Due to the MFI operators being fairly disparate in terms of size, it would be quite difficult for Enviroserv to offer a standard “deal” that would benefit the industry as a whole. However, Enviroserv provided some alternatives to address this problem by proposing an off-site plant (i.e. off-site to the landfill sites). Waste would be delivered to this site, tested and treated to ensure that the waste was to a standard that it could be delivered to a general waste site. This proposal did not find favour with the MFI as there were not sufficient numbers to support this endeavour. Enviroserv could into the future further assist with achieving improved legal disposal of waste. This could include re-looking at the off-site treatment plant, group “discounts” or a “milk-run” approach to collecting waste[81]. The latter option would involve allocating a skip container vehicle that would cover a pre-arranged route and collect the waste from the MFI operators and deposit it at Shongweni waste disposal site. There are important issues that would need to be addressed if this option is to receive attention:

81 Discussions held with Mesdames Berry and McAllister from Enviroserv on 7th and 8th May 2007. Ms McAllister would be fully supportive of dialogue with the MFI operators to discuss a way forward in this regard..

i. The transport is charged out at an hourly rate; the operators on the collection route will have to be well organised to avoid expensive delays.
ii. The container is very high and a practical area from where the waste can be loaded into the skip would have to be easily accessible.
iii. Individual waste would have to be very carefully monitored; limits set for the different components (e.g. cyanide) would not be allowed to be exceeded. If the cumulative limits are exceeded waste would not be accepted at Shongweni. Transport costs to Holfontein in Johannesburg will have to be carried by the MFI. This implies that the MFI will have to take responsibility for self-regulation in terms of monitoring its members discharge levels.

Enviroserv is aware that there are companies in the MFI in KZN that dump illegally into the stormwater system. This assumption is simply based on the fact that the waste is not being collected. Considering that there is a high number of operators in Durban alone, this not only translates to a vast amount of potential hazardous waste in the stormwater system, but also a large portion of potential business for Enviroserv. The illegal dumping also translates to economic implications for eThekwini in terms of the cost of chemicals to clean the water at the sewage plants. The financial implications of all potential alternatives would have to be fully understood. These alternatives will have to be financially viable for Enviroserv and the MFI operators. Enviroserv would gladly play a role in the Negotiated Agreement and assist the MFI with information regarding the operators not fulfilling the requirements. However, the suggestion is that perhaps the most appropriate sector to approach to identify operators would be the chemical supply industry, as all MFI operators require chemicals to run their operations.[82] Any feebate[83] system would rather have to involve the MFA and Metro in terms of levies and rebates. This would not really be a viable option for Enviroserv as they do not see themselves as becoming involved in this administrative process and would have nothing to gain.

18.4.4 Theme 4: Available tools to implement and support an NEA

In an ideal world, all the mechanisms would be in place and there would be sufficient human and financial capacity available to successfully implement a sectoral Section 35 EMCA. However, as can be seen from the concerns raised in Section 3.2, most stakeholders are of the opinion that existing constraints within the relevant government departments (DEAT, DWAF and eThekwini) do not make it possible to support an EMCA in the manner the law has intended. The following discussion highlights some practical issues and possible solutions.

The NWA requires that Reserve Determinations are carried out for all catchments in the area. The Reserves are to be gazetted and all future decisions in terms of water allocations, license conditions, etc are to be awarded and managed against the Reserves. However, this is just not practical as there is not even a time indication from DWAF as to when the process to determine the Reserves in this catchment will be completed.. Municipalities and businesses have to continue operating in the interim. Solutions to this problem have had to be found to ensure that practices are precautionary. eThekwini has implemented what is called a “hybrid form of pollution control”. The following are the key driving factors of this approach:

82 Mr Houseman from Chemrox was approached in this regard; he was quite reticent to provide a firm answer and would respond formally after consultations with his partner. The basic understanding from Chemrox is that the company follows the assumption that all its customers should be compliant with all regulations. The official response has not been forthcoming and will be followed up.

83 As explained in Chapter 5, A feebate option is where a tax or levy is charged by government for exceeding negotiated targets and a rebate is given where industry meets the negotiated targets. (font on footnotes differs)

i. Reserve determinants – water quantity and quality objectives were set for the Hammersdale catchment (an area in which discharges from factories, particularly textile manufactures have presented many problems). The acceptable discharge levels for the different chemicals were negotiated with the stakeholders in the area and permits were issued accordingly.
ii. Five year permits will be issued according to these guidelines.
iii. Regular audits are carried out and there is support from the Chamber of Commerce.
iv. A similar process has been followed for the MFI in KZN.
v. Sector standards have been agreed to in the permit.
vi. A list of all MFI companies is maintained and compliance recorded. The Top three performing MFA companies receive certificates in acknowledgement of them meeting standards.
vii. Appeal to a form of "industrialist Ubuntu" – industry to collectively support Metro for the greater good of the city.
viii. eThekwini believes in using discretion with the MFA members in terms of non-compliance. However, if consistent non-compliance occurs, the Metro will not hesitate to publically name and shame.
ix. Spread accountability – this should not only rest with Metro. Industry should be encouraged to self-regulate. However, MFI stakeholders have specific views regarding self-regulation in the industry; self-regulation can only work if Metro does carry out its duties by enforcing compliance equitably. Self-regulation should not mean that Metro is exonerated from its responsibilities. The MFI's concerns regarding this approach however was that Metro would always be negotiating from a point of strength and holds all the cards and there would be little room for fairnegotiation. As previously stated, the industry felt that while Metro officials may have good intentions, they would be hamstrung by lack of human capacity. All of these issues, could translate to equitable standards and monitoring not being carried out. The same companies are targeted repeatedly and theguilty parties are not always pursued and prosecuted. The MFI is also jaded based on the fact that it has been hearing about the five year industry permit for the past few years, butnothing has been forthcoming.

In the MFA's opinion Section 35 EMCAs can only work if Metro has to level the playing fields between all the MFI companies. This is not the industry's responsibility. Metro will have to revert back to the system where it inspected all new and existing business and were stricter about issuing and policing permits. Metro must be seen to be doing its job. It is too easy for "fly-by-nights" and non-compliant companies to operate under the radar. The MFI is of the opinion that Metro should become more involved in terms of trying to find a place to legally deposit the sludge or to negotiate a better financial deal for the industry. The current scenario at the existing waste sites in terms of escalating costs is going to create further problems for the industry that will not be able to afford to use these sites – illegal dumping may occur.

It is clear from this theme, that an NEA cannot in itself serve an effective mechanism, rather a successful NEA would have to recognise what other available tools could be incorporated into the NEA, and assist with the implementation of the NEA.

19 CONCLUDING REMARKS FOR THIS CHAPTER

The four broad themes that evolved from Appendices 1A -C comprehensively detail the research process for Components One and Two. Clearly, there are numerous sub-issues, each of importance to the understanding of NEAs as effective mechanisms to achieve environmental compliance. (The themes are listed again below as a reminder to the reader).

The legal framework; the benefits offered by section 35 EMCAs vs. Negotiated Agreements; the tools available to implement and support Section 35 EMCAs and the issue of multi-stakeholder involvement, cannot be treated as discrete events. Rather the issues contained within each theme are interdependent on the other. These themes have become the foundation for understanding the complexities around negotiating and managing NEAs. Chapter 10 will further examine these themes against the context of the research questions.

CHAPTER 10

20 LEGAL, ADMINISTRATIVE AND INSTITUTIONAL FINDINGS

To understand whether Negotiated Environmental Agreements could provide an effective mechanism to achieve environmental compliance in the water sector in the South African Context, this research project had answer three fundamental questions:

i. Why no Section 35 EMCAs, as a form of NEAs have been formally signed into law since the introduction of EMCAs as part of NEMA in 1998;
ii. What other forms of NEAs have been entered into between multi-parties and whether these have been successful?
iii. What factors would make an NEA effective?

It is perhaps fortuitous that the very nature of NEAs and the process that has to be engaged in is multi-dimensional and process driven. This added a definite richness to Grounded Theory, which could be considered a “building block” methodology that was followed to conduct this research process. This theory allowed for an important objective to be met in terms of answering the research questions; i.e. to better understand the drivers prevalent in the process of negotiating environmental agreements.

Inherent in Grounded Theory approach is a coding procedure, which Strauss and Corbin (1998:13) explained as having the purposes of; building rather than test theories; serving as analytic tools; and providing a manner in which alternative ‘’meanings of phenomena” can be considered. Furthermore, Grounded Theory also has to allow for a systematic and creative process which can be carried out simultaneously and to assist with the identification, development and relating of the concepts which comprise the building blocks of Grounded Theory.

As the subject of NEAs is relatively new in South Africa, the focus of this research project was to build a theory rather than to test it. In seeking answers to the research questions, an opportunity was presented to explore particular components of a suite of this country’s legislation from a realistic perspective. A perspective which revealed a gamut of issues that will continue to challenge implementation of well written and well intentioned laws aimed at achieving environmental compliance in South Africa.

The research process revealed interesting phenomena, which had very little to do with the technical or scientific nature of pollution control in the water sector. The complexities of the issues arise from the complex social, economic and political climate in which the regulatory framework has to function. These complexities of these findings have necessitated that the research findings be divided into three chapters; viz the legal, administrative and institutional findings within a South African Context (this chapter); the attitudinal drivers of Negotiated Agreements (Chapter 11) and the synthesised findings (Chapter 12).

This chapter and Chapter 11 refer primarily to the findings within a South African context. This chapter also focuses on the practical and administrative challenges to which solutions could be sought. However, the findings in Chapter 11 pose a substantial challenge and may also hold the answers to the research question: can NEAs be an effective mechanism to achieve environmental compliance? Chapter 12 will contextualise the South African findings against international trends.

20.1 NEGOTIATED AGREEMENTS WITHIN THE SOUTH AFRICAN CONTEXT

This section examines the core issues that have evolved during this research. These discussions may provide some answers to the research questions. The recommendations evolving from these discussions are discussed in Chapter 13.

As NEAs and water are complex issues, it was important that a research framework guide the process and provide a matrix against which the case studies could be examined. The issues of scale and range were used as the framework for this study to investigate the relevance of NEAs in achieving environmental compliance in the water sector. The issue of scale is important as water issues can range from an individual, to an organisation, or from local to provincial contexts – with numerous levels in between. The issue of range refers to matters such as water service delivery, water demand management, social and political values and the sustainability of water resources. However, it was important that a third category was added to complete the framework for the study, that of the NEAs as a co-regulatory environmental instrument.

While the issues of scale and range were relatively easy to define and qualify, the category of the NEA as a co-regulatory environmental instrument presented a challenge; issues were harder to clearly define and substantiate. More important however, from a social dialogue perspective is the interrelationships between these categories. As previously stated, social dialogue processes imply either self-regulation or co-regulatory relationships that can take place at various levels (ILO: 2006). However, the successful multi-party dialogue which is necessary to achieve economic and environmental sustainability has to take cognisance of all these categories. During the MFI negotiation process, stakeholders criticised the lack of cohesion between different suites of legislation, lack of co-operative government and lack of capacity within government departments at national, provincial and local level. Many of these criticisms may prove to be a fair assessment and may also provide reasons for lack of NEAs. However, there are issues that are harder to substantiate; moral behaviours, attitudes, drives and paradigms of stakeholders appear to be some of the underlying factors as to why formalised Section 35 EMCAs have yet to be signed into law. These issues are discussed in Chapter 11.

In keeping with the thematic nature of this report, the key findings to the three questions are discussed against the main themes which evolved during the research project; the legal framework, the benefits offered by section 35 EMCAs vs. Negotiated Agreements, multi-stakeholder involvement and the available tools to implement and support NEAs.

It is also perhaps important to acknowledge that while this project has only focused on the MFI as an industry operating in the water sector, these issues may not be unique to the MFI, but may be endemic in business, industry and society. If so, this is cause for concern not only to the future of the country, but it also has major implications for the legal framework. It is therefore appropriate at this juncture to focus on one of the three research questions and give attention to other forms of NEAs. It would be interesting to juxtapose a “softer” discipline or sector against the “hard core” business and industry nature of the MFI case study. In previous chapters SANParks’ Park Forum Charters have been alluded to as a form of NEAs. In this chapter, Grounded Theory has assisted in identifying differences and similarities between two NEAS that are in nature juxtaposed against one another within the abovementioned themes.

20.1.1 The legal framework of the MFI NEA

The MFI Study is driven by two suites of legislation, of which non-compliance can lead to financial penalties and potential criminal prosecution. The legislation appears to be robust in its intentions and according to officials, should suffice, making an EMCA redundant. In addition to compliance being an imperative, the spirit of consultation and co-operation is also entrenched in the NWA. The main constraints however which appear to impede the successful implementation of the NWA and prevent it from acting as an NEA tool are discussed below.

There will always be a concern with regard to which government department should be the implementing agent. The prevailing perception with some officials is that DEAT considers itself to "own" NEMA, thereby seeing itself as the authorising and implementing agent in terms of a Section 35 EMCA. This raises concerns with both DWAF and eThekwini, both of which are the government agencies that have to enforce compliance of relevant regulation. Despite the fact that a Section 35 EMCA calls for co-operative governance, and is supported by the Intergovernmental Relationship Framework Act, the realities on the ground undermine these ideals. These realities are primarily driven by lack of government capacity; there is simply not enough staff.

As was stated in Chapter 9, eThekwini is concerned that Section 35 of the NEMA is *ultra vires*[84] in that it may compromise the legal mandate of the Municipality. In eThekwini's interpretation of the law, this would mean that the final authorisation of a Section 35 EMCA rests with the non-implementing agent. Considering that all stakeholders (including the municipality) are concerned with capacity constraints and inability to carry out existing regulations, this matter should receive greater attention. The following discussions therefore provide a holistic approach to the matter; the discussions are based on the premise that Section 35 has been included in NEMA to give effect to Section 24 (b) of the Constitution of South Africa which affords everyone the right to have the environment protected "through reasonable legislative and *other measures*." These measures could include formalised Negotiated Agreements, called, EMCAs;

i. NEMA Section 35 (2)(a)(ii) is explicit in that an EMCA can only be formalised if agreement has been received from the Minister of Environmental Affairs and Tourism. While it may at first glance appear that the authority would reside with this Minister, this does not necessarily imply that ministers or officials of other organs of state do not have a mandate.
ii. Section 151(4) of the Constitution deals with the status of municipalities and the relationship between national or provincial government and municipalities; "…the national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."
iii. Section 156 of the Constitution deals with the powers and functions of municipalities and provides the necessary mechanisms to delegate the authority of managing a Section 35 EMCA to local municipal level. Specifically the following sections are of relevance:
iv. Section 156 (1) A Municipality has executive authority in respect of, and has the right to administer –(a) the local government matters listed in Part B of Schedule 4[85] and Part B of Schedule 5;
v. The delegation of duties to local level is further supported by Section 154 (1) which deals with co-operative governance; "The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions."
vi. The Constitution is explicit in that these functions include meeting three objectives which are integral to the principles of an EMCA. Local government has to:

84 ultra vires – acting beyond mandated powers.

85 Part B of Schedule 4 lists the functionalities of local government (only relevant to this study) as being, inter alia, "Water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems."

- Section 152(1) (c) to promote social and economic development;
- Section 152(1) (d) to promote a safe and healthy environment, and
- Section 152(1) (3) to encourage the involvement of communities and community organisations in the matters of local government.

It is clear from the above-mentioned text that Section 35 of NEMA cannot be read in isolation from the Constitution in terms of the relationship between national government and the municipalities in terms of the delegation of powers. What is important however is if a Section 35 EMCA is to be negotiated, it should be explicit in terms of the delegation of duties and powers and nature of co-operative governance that will prevail. It should also be borne in mind that the only difference between a formalised Section 35 EMCA and an NEA of any other form is that the former is legally signed off by the Minister of Environmental Affairs. Thus, the concerns around co-operative government and governance will not be alleviated by a less formal NEA.

While Sections 151 and 156 of the Constitution respectively deal with the relationship between national government and municipalities and the functions and powers of municipalities, section 156 (3) [86]of the Constitution is quite clear that bylaws may not contradict national laws. Clearly, eThekwini will have to amend its bylaws if these are in contradiction with national legislation, with the effects being passed down to its clients.

Perhaps a solution could be sought in the principle of offering some protection (albeit not indefinitely) to signatories of NAs or Section 35 EMCAs in the form of a “grandfather clause”. This principle was contained in the NWA to allow for individuals who were using water legally in terms of the old Water Act. The two relevant “grandfather clauses” are contained in Section 4(2) and Section 34(1) and (2) of the NWA[87]. The Negotiated Agreements could include the provision for these grandfather type clauses, or the new regulations should acknowledge that existing agreements may be in place and that progressive realisation within negotiated timeframes which will not detrimentally impact on the financial sustainability of industry may be permitted.

As explained in Chapter 9, the validity of any conditions imposed on stakeholders within the MFI as part of a NEA by eThekwini would have to be valid in terms of the NWA, the WSA and the Waste Discharge (WDCS) (DWAF, May 2000). The latter forms a vital component of the Pricing Strategy that DWAF will implement in terms of the NWA. The philosophy behind the WDCS is based on the “polluter pays” principle. The intention is to introduce financial and economic instruments that will force water users to internalise costs related to the reduction of effects of pollution on water resources. This may also prove useful in terms of finding alternatives to designing a “feebate” system relevant to the MFI, the beginnings of which can be found in the subsequent discussions on the current economic instruments applied by eThekwini.

eThekwini’s current practices do not conflict with the aforementioned WDCS policy and approach. Essentially, eThekwini’s issues discharge permits are based on what the receiving environment can manage. The economic instrument applied is essentially a financial incentive incorporated in the

86 Section 156(3) of the Constitution reads: “Subject to section 151(4), a *bylaw* that conflicts with national or provincial legislation is invalid. If there is a conflict between a *bylaw* and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the *bylaw* must be regarded as valid for as long as that legislation is inoperative.” Section 151(4) reads “The national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.” Section 149 refers to the further conflicts in terms of “the status of legislation that does not prevail. – A decision by a court that legislation prevails over other legislation does not invalidate that other legislation, but that other legislation become inoperative for as long as the conflict remains. ”

87 Section 4 of the NWA deals with the entitlement of water use in terms of a general authorisation or licence under the new Act. Section 34 deals with the authority to continue to with the existing lawful water use and the conditions attached to this.

monthly charges. Additional costs are attached to the sampling that is required by the Metro to ensure compliance with the permits. Should an organisation consistently exceed the set limits, the more regularly sampling will be required at costs ranging between R195 – R235 per sample. This sampling could be required almost on a daily basis if the limits are drastically exceeded. This could add substantial costs to an organisation if they persist with the practices. The two issues which are problematic to both eThekwini and industry are:

i. The ”receiving environment”; at present no Reserve has been set by the DWAF for the catchment in question, in the absence of the Reserve, eThekwini is following the best practice of a precautionary approach based on its understanding and records. Should a Negotiated Agreement be entered into in the interim based on these standards which are agreed to (and to which an organisation can work towards if not yet in compliance) and the agreement is signed for a period of five years, there is uncertainty as to what surety all parties have that when the Reserve is set, the licence requirements will not change and signatories to the Negotiated Agreement immediately seen as being non-compliant.
ii. The same principle applies to the WDCS;if this system comes into effect and there is a substantial increase in waste discharge tariff, it could potentially have financially crippling effects on small industries.

The Negotiated Agreements, Section 35 EMCAs or otherwise, will often allow a period of grace and time frames allowing non-compliant industries to become compliant, (as was the case with Wings), especially if economic sustainability is the key issue. However, the concern is that if a Reserve is set or if the WDCS have the implication that the goal posts will have shifted for industry and the objective of maintaining some sense of economic sustainability will be negated.

The MFI stakeholders are of the opinion that NWA Act has no “teeth”; this stems from official’s reluctance to enforce the law when transgression has taken place. Reasons include concern lack of substantial evidence, lack of confidence that the case will not receive high priority in court, concern that individual authorities will be held responsible for their actions and law suites may be forthcoming. In addition, the fines that can be imposed are considered a mere slap on the wrist. Lack of capacity within the department is a serious constraint in following up on infringements, particularly if these are not “serious” or “high profile” enough.

The issue of outstanding or delayed Reserve Determination process was previously stated as a major concern. This is again highlighted as problematic; licences are often dependent on Reserve Determinations being carried out for the catchment. This is not happening fast enough and impeding the licence application process. This would be problematic in either a Section 35 EMCA or another form of NEA.

The recurring theme with both the MFI Sector and the DWAF and eThekwini officials is the frustration in terms of legal process, the authorities feel hamstrung in terms of legal prosecution. “Green crimes” currently do not receive high priority in courts. The lengthy and costly legal process, which cannot be guaranteed an outcome in favour of the applicants, serves as a deterrent to prosecute. Often, because the defendants are large corporations with substantial financial coffers. Furthermore, the current fines are deemed insignificant compared to the costs of damage incurred. This does not serve as a deterrent.

The issue of consultation between stakeholders to negotiate an agreement will always remain problematic, and this may lie in interpretation of the regulations. The MFI Case Study shows that the potential stakeholder base is potentially very wide. A Section 35 EMCA will only be considered valid if the consultation is inclusive of ALL stakeholders that may have an interest in or be impacted on by the metal finishing industry's activities. In addition to DWAF and eThekwini, this would range from Department of Labour, labour unions, environmental groups to the chemical suppliers and waste disposal companies. The strong element of both co-regulation and self-regulation would demand that there are internal mechanisms for disciplinary action; this is not an option which the MFA is keen to embrace. A less formal NEA may only involve DWAF, eThekwini and the MFA. This may be an improvement on the agreement that exists between eThekwini and Wings and is extended to the rest of the MFA members. This would be considered a slightly stronger version of a "gentlemen's" agreement.

Regardless of whether a Section 35 EMCA or another form of NEA is followed, it would have to be conducted within the existing regulatory framework and will not be allowed to contradict the regulations in any manner. In summary, it appears as though the current legal mechanism to achieve environmental compliance (i.e. the NWA and the Municipal Bylaws) could in themselves be effective mechanism to achieve environmental compliance. The issues that need addressing however include the financial value of the fines that can be issued and capacity constraints. Notwithstanding these two issues, it would appear that stakeholders in the MFI sector would have greater confidence in a NEA (of any form) if the current legislation was more effectively managed.

20.1.2 The legal framework for Park Forum Charters

Provision is made for different types of Negotiated Agreements in the Protected Areas Act, these are discussed in the Report in Appendix 3A. However, the focus of these discussions is on the agreements entered into between SANParks TMNP and its immediate neighbours. *The SANParks Park Forum* falls within the ambit of the Protected Areas Act, which is also under the NEMA umbrella. As such, the legal common denominator between the NEA agreement discussed above, and the TMNP forum, is that a consultative process between multi-stakeholders is an imperative. The purpose of both NEAs is to achieve a common objective that would benefit the environment in which the agreement will be managed. A few of the issues are highlighted below.

Non-compliance is limited to the Forum's objectives and Charter. There is an element of both self-regulation and co-regulation in place. Non-compliance does not lead to legal sanction or fines. However, if the Forum does not meet its mandate and conflicts between members and/or SANParks cannot be resolved, the Forum may be disbanded by the SANParks Chief Operating Officer and/or the Minster of Environmental Affairs. The Park Forum agreements are not regulated as such. SANParks has established guidelines according to which the Forums should operate. These are to encourage a broad framework to assist SANParks in achieving its mandate.

The Park Forum Charters can be described as "gentlemen's agreements" that have been negotiated between diverse stakeholders to achieve common objectives which will assist SANParks in meeting its legal mandate. Furthermore, The PAA and the SANParks Stakeholder Engagement Guidelines state that each Park Forum operates within a specific social context; allowances should be made for differences in consultative approaches, stakeholder representation and operational methods. A Code of Conduct is to be negotiated with all members. Also, consultation on all future Park Management Plans will be conducted through the Park Forums. The Park Forums will therefore be recognised as the only legitimate forum through which communication with the neighbouring communities will be effected. Implied in this is that the consultation process will have to be robust if the Forum is to be considered legitimate.

20.1.3 Benefits of a Negotiated Agreement vs. a Section 35 EMCA for the MFI Sector

The discussions on the legal framework already alluded to the benefits which could be associated with Section 35 EMCAs and the less formalised NEAs, these are discussed in greater detail below.

An NEA does not require (as is the case with Section 35 EMCAs) approval by the Minister of Environmental Affairs or a Provincial Director General. Therefore it can avoid what could become a drawn-out bureaucratic and political process. The perception within the MFI Case Study is that consultation for an NEA does not have to cast its net was wide in terms of involving a broad range of stakeholders. Rather, the NEA would involve only essential role players, i.e. Metro, DWAF, waste disposal companies and MFI industry members. In contrast, an EMCA would have to extend consultation to, *inter alia,* environmental organisations, labour, and chemical suppliers amongst others, thus substantially increasing the consultative time frames. It was argued that this was unacceptable. The observation was however made that if any of the operators applied for a water use/discharge license, the NWA also requires a consultation process and that this argument is not valid. In reality however, consultation of this kind in industry is limited to the placement of an advertisement and the perception also prevails that DWAF is not consistent in enforcing a standard process.

Section 35 EMCAs can entrench in law, a process of how the MFI can agree to go beyond compliance over a period of five years. This will buy some time for companies to meet the new objectives and standards without placing too heavy a financial burden on companies. The fines for non-compliance after this could however be severe. Also, a Section 35 EMCA places a responsibility on the industry to have an element of self-regulation. The MFA has expressed a reluctance to enforce the agreement on its members, for fear of the perception of unfair competition practices. The less formal NEAs provide a sense of having entered into a “gentleman’s agreement”. This approach sits more comfortably with the MFI as an industry as it alleviates the MFA from having to completely from disciplining its members.

There are also disadvantages to entering into these “gentlemen’s agreements”, despite these being written into licences; the agreements entrenched in licence conditions are subject to change from a higher authority, i.e. should related regulations change at a national level; these would immediately impact on the signatories of the Negotiated Agreement, effectively rendering them non-compliant. There tends to be quite a high turnover of staff within local government and the strength on which the Negotiated Agreement (or gentlemen’s agreement) was based on, may not hold sound when a new official takes office. The legal relationship between the license and the Negotiated Agreement is unclear. This too, makes for a rather tenuous relationship between the Metro and the signatory, rendering the latter vulnerable.

With specific reference to the positive role which Negotiated Agreements can play in achieving environmental compliance, based on discussions with stakeholder, certain observations were made; the MFI Case Study showed that there were several areas where Section 35 EMCAs and/or NEAs might provide a workable route to improving the environment, particularly if there is a pre-existing problem. These were in those areas where the problem was not confined to a local area, but was geographically spread and where there were identified industrial bodies or associations, which could represent and negotiate on behalf of the industry concerned. This is of particular relevance where no defined standards are in place. In the absence of mandatory standards, an NEA could play a useful role in achieving progress towards some negotiated standards that result in a reduced load on the environment. There are considerable financial benefits associated with environmental compliance in the MFI Case Study, particularly when the cleaner production avenue is selected; efficiency in production is achieved and wastage on raw materials is reduced.

Importantly, environmental compliance has been achieved in the Wings Case Study through a Negotiated Agreement, in the absence of a Section 35 EMCA. Of relevance is that the principles contained within EMCAs, i.e. the principles of Integrated Environmental Management (IEM), were followed in the Negotiated Agreement between the role-players in the Wings case.

Additional benefits which are also indicative that the IEM principles were followed, were derived from the collaborative approach between eThekwini Metro and MFA, these include economic benefits to both parties. The Metro was able to relieve pressure on its sewage works by reducing waste water. This resulted in a financial savings in terms of meeting its license conditions at the waste water treatment plant. Wings was also able to continue operating under the condition that it would achieve compliance, resulting in no job losses.

If one considers the comments made in the legal framework, it would appear that at the present time, it is more cost and time effective for the MFI sector and other key stakeholders (primarily DWAF and DEAT) to enter into a less formalised Negotiated Agreement.

20.1.4 Benefits of a Negotiated Agreement vs. a Section 35 EMCA for SANParks

The discussions on the legal framework already alluded to the benefits which could be associated with Section 35 EMCAs and the less formalised NEAs. However, the *SANParks Case Study* however revealed that the departure point for NEAs (in the form of Park Forums) is far more positive. SANParks already has in place a mandate to achieve environmental compliance, stakeholders through the Park Forum will have an opportunity to positively participate and influence further improvements in the Park Plans. There are considerable financial benefits associated with environmental compliance in the *MFI Case Studies,* particularly when the cleaner production avenue is selected; efficiency in production is achieved and wastage on raw materials is reduced. As the key driver of SANParks is to meet a conservation mandate, financial benefits are not of primary concern. Also, there are no direct financial benefits to stakeholders participating in the SANParks Park Forums. However, through constructive input from stakeholders into Park Management Plans, the SANParks' may find more efficient ways of managing its resources, resulting in savings.

20.1.5 Multi-stakeholder involvement with the MFI Sector

Implicit in both the previous themes is a robust consultative process. The MFI Case Study functions within a suite of legislation that encourages social dialogue to achieve objectives. This is a sound principle if one considers that the MFI case study comprises multi-stakeholders. Stakeholder groupings are diverse, consisting of government, civil society and business. The stakeholder structures are complex in their make-up; social, cultural, political backgrounds and economic status (business or personal). Importantly, these differences may extend to differences in ethical codes of behaviour. All these factors have an influencing role in how individuals will perceive, participate and put into practice a Negotiated Agreement.

If a common vision for an NEA is to be achieved, understanding diverse ethical codes and learning common morals for an NEA will be necessary. The social dialogue to achieve this, will have to be intense, more so for a Section 35 EMCA. Although visioning was referred to earlier in this document within a water resource context, the concept of visioning remains the same regardless of the natural resource; "Visioning is a <u>process</u> of articulating a collective statement of future aspiration of society's relationship with the resource often between parties who have diverse and competing requirements..."(DWAF: 2003) More importantly, "a vision statement must be converted into, and explicitly linked with, objectives that are useful at the operational level. Visioning also promotes voluntary compliance"(DWAF: 2003).

One of the reasons for dissatisfaction within the MFI sector appears to have been based on inequities of implementing the law, the economic implications thereof and how this impacts on environmental compliance. While, the NWA and the NEMA provide the framework for social dialogue and numerous tools to achieve integrated water resource management, there is clearly not a negotiated or common vision between all stakeholders to achieve compliance. As previously stated by Reed and de Wit (2003:103) in their commentary on the UNWSSD, structured dialogue between multi-stakeholder groupings is necessary to achieve social and economic objectives.

Considering earlier discussions on the alternative approaches available to stakeholders in terms of achieving consensus in the presence of perceived inequalities, poor capacity, diversity and lack of robust scientific evidence, a common vision may be more achievable if the alternative of a contingent agreement is offered to stakeholders. It may be more effective and acceptable to workshop and agree on various protocols that can be implemented for operational and monitoring purposes (Suskind, 1994:81).

20.1.6 Multi-stakeholder involvement in Park Forum NEAs

Also implicit in the NEMA PAA suite of legislation is consultation and the principle of social equity, as defined by Hanks (2001:16). The process to negotiate a Park Forum would be similar to that of a formal Section 35 EMCA process. The process focuses on encouraging social dialogue to achieve common objectives for the Park and the Stakeholders. *SANParks Park Forums* are also complex in their make-up; social, cultural, political backgrounds and economic status (business or personal). As stated in the MFI case study, these differences could influence ethical codes of behaviour. It is thus imperative the Charter is negotiated to reflect the common characteristics or values that stakeholders share. To achieve this, the negotiation process should incorporate a well facilitated visioning exercise that will enable stakeholders to articulate common visions that can be translated into manageable objectives (DWAF: 2003) or, as Suskind (1994:81) suggested in his discussion on contingent agreements, acceptable protocols that can be effectively monitored.

Interestingly, stakeholders involved in the SANParks TMNPF have been through two rounds of intensive negotiations to establish a representative Forum; these processes unfolded against very different socio-political backgrounds and are discussed in relevant chapter. As with the MFI NEA process, however, the SANParks Park Forum could into the future be tested against the environmental political background. Even though the Park Forum charter is a less formal NEA, i.e. a gentlemen's agreement or a "code of conduct", the sustainability of the Park Forum is also inextricably linked to its political, economic an social environment (Steel 2003:15), and unless it is truly adaptable, the Forum's future may be jeopardised.

20.1.7 Available tools to implement and support NEAs in the MFI sector

A great deal has been written in the report about the available suites of legislation to achieve environmental compliance in South Africa. Apart from the extremely low fines that can be issued for non-compliance, the applicable legislation appears to be quite robust. In addition, there are various tools that could support the implementation of NEAs in the MFI sector, these are briefly discussed below.

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The basis of all water allocations and license conditions are Reserve Determinations and water resource classifications. The reasons for more Reserve Determinations not being carried out have been discussed, but these should still be seen as a crucial issue, particularly as a support tool for Municipalities. In the absence of Reserve Determinations, precautionary measures are being following by eThekwini. The municipality has implemented a "hybrid form of pollution control". Water quantity and quality objectives were set for areas in which discharges from factories presented problems. The current five year permits could be improved on include a hybrid of available measures to encourage pollution control. This could include acceptable discharge levels for sectors, regular audits, remediation activities for spills, fines for non-compliance. The MFI in KZN has a strong structure in place. The MFA consists of companies that are willing to comply provided all MFI operators are identified by eThekwini and treated equitably. The MFA can potentially turn into a strong body with more "teeth" to ensure compliance.

Regardless of how robust or well-intentioned the above-mentioned measures may be, if there is lack of capacity, lack of will to implement the law, a lack of co-operative relationships and consensus building, environmental compliance cannot be achieved. As stated earlier, these issues need to be addressed if good governance and stable economies are to be achieved (ILO: 2006).

20.1.8 Available tools to implement and support Park Forums as NEAs

The tools that give effect and support the Park Forum Charters as NEAs are found in the NEMA PAA regulations, the SANParks Stakeholder Participation Guidelines and ToRs. These documents, in various forms, provide a structured process in which SANParks has to engage with the public to establish Park Forums and how they should be supported and managed. The value of this type of NEA for SANParks is clear; in terms of the Stakeholder Participation Guidelines, the Park Forum's Negotiated Agreement is a tool through which SANParks can meet its mandate.

The real test of the value of this type of NEA will lie in the successful formulating and implementing of the individual Park Management Plans. In terms of Sections 39 and 41 of the PAA, SANParks, as the custodian of National Parks, has the responsibility of protecting these natural assets on behalf of all South Africans. It is therefore expected to provide for the future management of these natural and cultural resources through individual Park Management Plans (PMPs). In terms of in terms of Section 39(3) of the PAA, SANParks is obliged to engage with the public in the formalisation of these plans. Although SANParks, at a national level is engaging with stakeholders at various levels, the individual Parks' are using the Park Forums to conduct this consultation process.

The success of this form of NEA could (for example) be measured in terms of whether the individual Parks will use the Forums/Steering Committees[88](where already established) to effectively communicate the content of the Park Management Plans. Sections of the PMPs will be defined by legal, policy and other determinants. Thus, although stakeholders may be able to give input, they may not be able to change the outcome. However, there will be a range of issues ranging from the manner in which the ecological biodiversity is managed to how communities are engaged with. While stakeholders may be forthcoming with suggestions, the Park is not obliged to incorporate recommendations if not practical or feasible. For stakeholders there is a fine line between making a meaningful contribution which can receive serious consideration and only "rubberstamping" a process. The forum could quickly lose its value if the latter is perceived. Thus management should always explain why certain advice received was not followed. Also management should be clear before the process starts as to what items are non-negotiable. There should also be a mechanism that allows for the Park Forum to communicate with the corporate structures on such issues.

If indeed the Forums are only used as information dissemination vehicles, the "Memorandum of understanding" as a form of a Negotiated Agreement, is negated. It is as much the stakeholders' responsibility to ensure that this does not happen by actively engaging in the Forum as what it is for the Park to be clear on the value that the Forum can add to the implementation of its management plans.'

20.2 CONCLUDING REMARKS FOR THIS CHAPTER

In an attempt to support or disprove the hypothesis that NEAs are effective mechanisms to achieve environmental compliance in the water sector, the research questions have guided the research process. The findings in this chapter highlighted the potential problems contributing to the lack of Section 35 EMCAs in South Africa.

This research project has been conducted against a framework based on four broad themes which evolved during the early stages of the study and have been elaborated on to better understand the MFI case study. The issues raised in these four themes are numerous and closely interwoven and should not be evaluated in isolation from one another. The findings in each of these themes certainly underscore the integrated, but complex nature of Negotiated Agreements. Many of the issues discussed could be clearly articulated and their contribution to the overall understanding in terms of addressing the research questions, were contextualised.

As explained in Chapter 2, the research process can reach a stage of "Theoretical saturation", or when it appears that no more data can be added (Strauss and Corbin 1998:214). It would have been tempting to curtail the process at this juncture and maintain the themes discussed in this chapter. However, the cautionary note sounded by Glaser and Strauss (2006:111) in terms of the coding process revealing an aspect that may add value to the research, should not be ignored. Careful analysis of the data in this chapter reveals an aspect which has to date perhaps been the elusive factor in terms of the lack of successful Section 35 EMCAs in South Africa. The concept of "attitude" in terms of its role in NEAs is explored further in Chapter 11.

88 Not all Parks will have a Park Forum Steering Committee which will serve as the plenary made up of 14 portfolios through which the TMNP communicates. The Marakele Park Forum is made up of representatives from the socio-economic sectors of its stakeholders and will not have a steering committee. Each Park will approach the Park Forums and steering committees in a manner which is most appropriate to their environment.

CHAPTER 11

21 ATTITUDINAL DRIVERS AND NEAS:

As explained in Chapter 2, Grounded Theory was important in terms of meeting two objectives which would contribute to the research hypothesis:

i. To better understand the drivers prevalent in the process of negotiating environmental agreements.
ii. To draw a comparative analysis between the Wings Case Study and SANParks TMNPF Charter (as a form of a Negotiated Agreement).

Emerging from the four themes discussed in Chapter 10, is a common denominator which underlies the administrative issues pertaining to NEAs, i.e. licenses, permits, enforcement and compliance. If one examines the development of Grounded Theory, the "founding fathers" whose principles are known at the "Columbia and Chicago" traditions, it is important to, through a process of iteration and comparison, examine all facets relating to a subject when identifying, developing and relating data (Strauss & Corbin, 1998:9). It is therefore not surprising that through the processes offered by Grounded Theory, the common denominator underlying the above-mentioned issues has a strong social behavioural flavour, namely: attitude. In an attempt to better understand the motivational reasons for stakeholders becoming involved in or avoiding Negotiated Agreements and what the underlying issues are for the prevailing attitude, an understanding of personal drivers is necessary. Jordaan and Jordaan (1984:618) have described drivers as being "…the motivating force behind behaviour of man…".

21.1 INTRODUCTION TO THE DISCUSSION ON ATTITUDE

Successful self-regulation and/or a combination of co-regulation in terms of relevant regulation (in this case NEAs) is largely dependent on the efficacy of the regulatory framework and the available administrative tools. In addition, particularly when diverse stakeholders are involved, other components become critical to ensure the success of NEAs. Co-regulation and the traditional "command-and-control" approaches alike have to rely on strong enforcement and the associated capacity support from the relevant authorities. These are the more tangible components, which could be identified and managed, however the less tangible components of attitude and trust seem to permeate the above-mentioned themes.

The above-mentioned background gives rise to an important facet in terms of Grounded Theory:

The "building block" nature of Grounded Theory: As discussed in Chapter 2, to better understand a complex issue (such as NEAs), it is imperative to identify and integrate all the concepts relating to NEAs; institutional, legal, financial and stakeholders roles. The previous chapter discussed the practical issues associated with most of these components against which NEAs would have to be implemented. The discussion below attempts to articulate the less tangible reasons that could threaten the efficacy of NEAs as suitable tools to achieve environmental compliance in the South African context and to understand the different "building blocks" associated with NEAs.

With particular reference to the focus of this study, i.e. Negotiated Agreements, Suskind (1994:82) presents the "building block" approach from a different and more appropriate perspective; "negotiation – an expanded theory". NEAs invariably involve multi-stakeholders who have to take responsibility for process and decisions within complex social, political and economic backgrounds (Suskind 1994:82).

Through a process of identification, development and integration of these diverse components, it is not surprising that from an expanded theory perspective, attitude has been identified as an additional component to be considered. Albeit more intangible than other components, it is perhaps the most important element that could determine the efficacy of a Negotiated Agreement as a tool to achieve environmental compliance. This certainly is supported through the honest and frankness of the discussion held with MFI chairperson, Sergio Guerrera referred to in Chapter Nine. These discussions allowed a better understanding of the underlying sentiments that could very well be the determining factor of whether a NEA could be an effective mechanism to achieve environmental compliance in the water sector. These sentiments included the importance of personal attitudes about the inequitable manner in which the law is implemented.

Practicality and pragmatism should be important principles integral to any form of Negotiated Agreement, more so a Section 35 EMCA which is required to be signed off by the Minister of Environmental Affairs. A Negotiated Agreement should compliment and serve as a mechanism to encourage good practice. A Negotiated Agreement should not serve to obscure or mask harsh realties which exist within the stakeholders' environment. Issues which were raised during the final round of discussions perhaps provide a better understanding of reluctance by stakeholders in general to expend energy on a long-term commitment to an idea, even when they acknowledge it as sound in principle.

The South African suite of environmental legislation is relatively young and some may say too ambitious for a young democracy in which business and personal attitudes are constantly being challenged. Attitudes, paradigms, principles and practices are not discrete issues and have direct bearing on one another. Attitudes are driven by personal paradigms and principles and are reflected in our personal growth and daily practices. As such, the process of negotiating an agreement, regardless of its nature, can to a certain extent be described as a learning process; particularly where diverse cultures are engaging with one another. This process has been aptly described by Suskind as "Environmental Diplomacy" (Suskind, 1994:vii). He goes on to explain that despite stakeholders having different environmental and political agendas, stakeholder groupings will have to, through some mode of consensus, agree on how to deal with environmental problems.

The MFI NEA and SANParks NEA are perfect examples of a situation where stakeholders are encouraged to find common ethical codes within which the NEAs can be managed. Jordaan (1984:515) describes this as a "moral learning process" through which the Forum members learn "to do what is *right* in terms of the ethical codes (NEA), and to avoid doing what is *wrong* in terms of these codes. As explained in the discussion on the definition of terms, moral learning plays a pivotal role in understanding how and if Negotiated Agreements can be effective within a diverse group of stakeholders setting rules/codes for self-regulated behaviour.

Attitudes are entrenched in or evolve from an individual's moral reasoning or behaviour and this may change over time and according to context. The relationship between individual attitudes and government polices and practices can at best be described as rather tenuous. Sometimes these attitudes are based on perception and sometime on fact. Making moral business decisions against this background can be challenging at best; "…part of the difficulty is that we do not live in a vacuum. Making moral decisions are complex and are connected to different contexts" (Wikibooks: 2007).
Nowhere is this more apparent than in South Africa, and more specifically for this project, in the water sector. In discussing the driving forces and potential impacts of South Africa's 1997 water policy, Heather MacKay (2002:1) explains that despite there being fundamental political changes in the

country that inform policy, changes in society may take longer, "…especially changes in people's attitudes towards water, and the way in which they use and value water in their everyday life."

These personal value systems are perhaps the true drivers of the negotiated process. The more substantive issues of finance and lack of capacity to equitably enforce the law, certainly are issues of concern and should not be discounted. However, they are also issues which influence attitude. As such, the complex personal value systems which permeate business and industry potentially could undermine any attempts at establishing and implementing Negotiated Agreements, particularly in the water sector, which is historically fraught with political sensitivities. This is supported by Turton's earlier definition of hydropolitics (2002:16); "Hydropolitics is the authoritative allocation of values in society with respect to water." Socio-political environments are constantly changing, so too may value systems and values attributed to water.

Similar to the discussions in Chapter 10, to better understand the different types of NEAs and their potential effectiveness as environmental compliance mechanisms, it has been important to draw a comparative analysis between key criteria of at least two different NEAs. This chapter focuses on the attitude which manifests itself, and which can either result in positive or negative behaviour and can serve as a driving force behind stakeholders' decisions regarding Negotiated Agreements in the MFI Sector and the SANParks Park Forums.

21.2 THE ROLE ATTITUDE PLAYS IN THE MFI NEA

eThekwini Metro, and in particular the Water and Sanitation Department have throughout the research process shown a positive attitude towards addressing the pollution problems in the metro. The official involved with this project has illustrated an enthusiasm for any action that will lead to an improvement in environmental compliance. As can be seen in the preceding chapters, there is a strong will to be pro-active and to engage with stakeholders in finding solutions to problems. The benefit of this positive attitude is, however, dependent on an individual's attitude and how this permeates his/her staff contingent. Also, this attitude can only be sustained if it is supported by a strong staff component who can achieve their objectives. A potential threat to the sustainability of this positive attribute is that this same attitude cannot be guaranteed through succession.

The KZN MFI executive committee members actively participated in the research process and indicated support for an NEA. The committee has also said that it would support a working relationship with the Metro. However, there are two statements uttered during the course of interviews which indicate how tenuous this willingness is.

"……The rest of the country is degrading rapidly as more and more people chose to operate outside the confines of the law – and get away with it. An example of this is the fact that nobody adheres to traffic fines – they will push the boundaries until they get caught. The same with the eThekwini permits – if the other businesses can get away with not complying, why should we be disadvantaged financially by complying….? "[89] and;
"….we are willing to enter into a relationship with Metro, but they [Metro] cannot expect us to do their work for them. They are struggling to get to the new operators to register and enforce the regulations. We don't mind co-regulation, but we are not supposed to do the Metro's work."[90]

89 Quoted in confidence in an interview with and MFI member in October 2006.
90 Stated at the meeting held with the MFI Executive Committee in September 2006.

No amount of regulation will be able to address this attitude. It will become more difficult for the standards and principles to be maintained as the numbers of those complying start dwindling. A paradigm shift is an extremely difficult process to entrench with a diverse group of stakeholder, as it speaks to moral behaviour. This issue has not been discussed from judgemental platform, but rather as an observation of the complexity of the implementation and compliance of regulations in South Africa.

The attitudes expressed by members of the MFI Executive Committee regarding environmental compliance reflect the attitudes of individuals who currently operate within the sector-related regulations. Many of these individuals also participated in the DANIDA Cleaner Production Project; the literature review as well as discussions with stakeholders show that this was considered an excellent project and some firms managed to sustain the business and environmental practices they adopted. Perhaps the issue of attitude is tested against the fact that only a few firms that embraced the philosophies of the DANIDA project; other firms However, merely viewed the DANIDA project as just that, a project and not an alternative means of changing practices that would aim at environmental compliance while perhaps also doing business in a more sustained manner from a financial perspective. This may not be unique to the MFI, but it is a paradigm which has to be inculcated and adopted if any NEA is to be successful. The paradigm which seems to permeate the members is best summarised in the statement: “We have this project” as opposed to “We have this process”, which is what achieving sustained environmental compliance should be.[91]

The discussion so far has focussed on issues that are almost intangible and would be difficult to quantify. During the latter part of the study, more disconcerting issues came to light regarding the practices of a few companies operating in the metal finishing industry in KZN. These practices are further discussed in the sections below.

21.3 ATTITUDE AND OPERATIONAL PROCEDURES IN THE MFI

The safe operating procedures and welfare of staff should be non-negotiable in any organisation. It is in this arena where business principles and attitudes can be tested. There appear to be a number of MFI operators that do not comply with the basic principles of the Occupational Health and Safety Act (1993) (OHSA) in terms of the working conditions. This statement is substantiated in an article written in the MFI Trade magazine; “SA Metal Finisher” (Hazvinei Munjoma: 2006).[92] Environmental and OHS issues are inextricably linked. The manner in which either are handled provide a good indicator in terms of attitudes and principles towards the environment and the welfare of the staff. In this regard, there are some factors that indicate that there should be some cause for concern in the industry

If the welfare and safety of the staff do not receive attention, it cannot be expected of the staff to place a high priority or to be aware of the implications that their lack of proper management of waste products would have on the environment. Underlying this statement are components of daily business operations which should raise concerns; the training which is provided is reported to be inadequate in some facets of the operations. This includes poor housekeeping practices in terms of handling and storage of chemicals. Basic hygiene in the restrooms is not adhered to and employees are sometimes confronted with inadequate ablution facilities. More disconcerting is that in some organisations, management fails to take responsibility for OHS issues and tend to blame the cultural background for poor housekeeping practices. Similarly, if training does not receive a high priority, the concept of “first

91 Quoted by Judy Bell during an interview on 30 October 2006.

92 It is important to note that the inspections carried out by a consultant for the Danish Technological Institute, was conducted randomly at seven selected member companies. Some of these companies were members of SAMFA and others of the HDGASA (Hot Dip Galvanizing Association of SA). – SA Metal Finisher, September 2006.

time right[93]" in terms of safe (physically and environmentally) operating procedures, cannot be expected to be understood or complied with by staff. In terms of illegally disposing of waste, this may translate to an act of "omission" by employees, but could still be considered an act of "co-mission" by the employer.

The above may only apply to a small minority of the registered MFI companies; the concern is that it occurs at all. These statements beg the question: how many organisations that "operate beneath the eThekwini radar" operate in a similar manner? If there is scant regard for the OHS Act, an Act where compliance should not be compromised in terms of the value of "human assets", can the assumption be made that this is an indicator of what moral behaviour and attitude could be expected in terms of environmental regulations which could have financial implications? Hanks (2001:16) defined social equity as "The extent to which provision has been made for the [active] involvement of all relevant stakeholders during the various phases of negotiating, implementing and evaluating the NEA". Social equity is one of the three key criteria against which an NEA can be evaluated in terms of determining its appropriateness as a policy instrument. Certain members of the MFI could, through their lack of observance of the basic rights of their employees, be criticised for not involving key stakeholders in an NEA. Considering these issues, the MFI may have a long way to go before it would be able to successfully implement an NEA for its sector.

It is encouraging to note that SAMFA members have acknowledged that the problems recorded above need to be seriously addressed (du Preez: 2006). However, the real conundrum for the MFI in KZN would be how to engender a whole new ethic within the industry with enough members to start a paradigm revolution within organisations that are not yet members of SAMFA. Realistically speaking, new legislation can be a potent mobilising factor for change at the broad societal level, but shifting the underlying attitudes of individuals may take a generation or more. Hopefully, the legislative framework will provide a healthy environment in which a more positive attitude can be cultivated. As explained by Reed and De Wit (2003: 49) " it is also necessary to understand that some changes can take a long time, especially changes in people's attitudes...". These changes could include the executive committee members of SAMFA taking stronger stance in terms of a code of conduct for its members, taking greater responsibility in ensuring compliance within the industry; identifying activities that could engender trust between its members and also between the industry and the regulators. This may take time, but setting small targets could perhaps assist in building confidence between parties.

21.4 FINANCIAL DRIVERS WITHIN THE MFI AGREEMENT.

Financial drivers already permeate the eThekwini Municipality MFI agreement; the objective of the various financial components (i.e. levies and fines) that the local bylaws contain is to encourage compliance within the sector. However, there is a balance to be maintained within the greater context of the municipal system. eThekwini Municipality has as its vision, which is sustainability for the Municipal Region. Sustainability is referred to here in its broadest sense, as a system which ensures a stable economy in which social and environmental structures can prosper. This it has to achieve by balancing income and operational expenses. A significant element in the success of this project is the Water and Sanitation Division which deals with pollution (including sewage plants) and the environment. It is in the interests of the Metro to reduce the effluent discharged into its sewage systems - the Metro is obliged to meet legal limits set by DWAF at its sewage plants and there are financial implications if these limits are not met. These implications include fines as well as remediation costs to treat the water to comply with the legal limits and can total thousands of rand. In addition, if there are effluent spillages into the river systems, these costs are also borne by the Metro.

93 Quoted by Judy Bell.

Although legally speaking the perpetrators responsible for the spillage should be held financially accountable, this is not always achieved and subsequently the onus rests on the Metro alone. These costs are no doubt at some stage passed onto the consumers.

21.4.1 Punitive measures (negative drivers) for MFI members

This report has already made reference to the fines which can be given to companies who transgress regulations or licence conditions. Both government officials and members in the MFI have agreed that the fines need to be far more substantial, as the low amounts are not sufficient to deter illegal behaviour. Higher fines have been suggested by members of the industry and support has also been given to a new Municipal Court system. As previously stated, the intention is that Municipal Courts will be established to deal with all issues that are in contravention of local bylaws, with environmental cases receiving priority. This would also mean that environmentally related cases could be dealt with more expediently than is the case in the current legal system, where environmental crimes are given low priority.

The other economic instrument that could function as a negative driver is contained within the existing permitting system. Costs are linked to the frequency of testing that the Metro has to conduct if an MFI operator does not comply. An operator that consistently complies will be tested far less frequently; this will result in savings, as opposed to an operator that is a known offender. At the time of writing this report, these costs ranged between R195 – R235 per sample – depending on the severity of discharge infringement, and daily tests may be required. The reality however is that if an operator is tested on a daily basis for a month, these costs translate to approximately R7 000.00.

If an operator is found to have discharged effluent illegally and intentionally into the river system and/or sewage system, the Metro also imposes fines and clean-up costs. Currently the maximum fine is R1 000.00, any fines higher than this require court proceedings. Remediation costs are very difficult to ascertain and may also result in court cases if an operator disputes the costs. Clearly these amounts are not sufficient deterrents to serve as a driver to improve or change behavioural patterns.

21.4.2 Cost savings (positive drivers) for MFI members

As was seen with the DANIDA cleaner production project, the Wings Galvanizing company showed savings of almost R400 000.00 within the first year of implementing cleaner production techniques. These are substantial savings and could be in direct proportion to the size of the company. Another saving that is offered through compliance is the savings that an operator could expect if the Metro should require less frequent testing (at a saving of approximately R235 per test).

A double-edged sword in terms financial savings achieved through cleaner production and compliance is that less waste has to be disposed of through a company such as Enviroserv. However, due to Enviroserv's latest arrangements (meeting sufficient quota from the MFI to substantiate collection and ensure profit margins) the MFI operators have to produce substantial waste to have it collected at its premises. If not, alternative transport arrangements have to be made at considerable cost; thereby negating the benefits of cleaner production.

On their own, these positive drivers may not appear to offer enough financial incentive to encourage a change of paradigm and behaviour. Cumulatively and over a period of time, savings here could however manifest as an improvement in a company's financial standing.

Notwithstanding the above discussions, the true costs of compliance need to be fully understood for financial incentives to be considered attractive. Compliance costs can escalate for small business and indeed prove to be an inhibiting factor to fair competition, as Janine Perrett (2004) explains; “People in small business might ‘whine’ about red tape but the vast majority do what is required despite the escalating compliance costs involved. So, for the small number who chooses to ignore the requirements, they have the advantage of not spending time and money on compliance." Certainly this is supported by Hanks (2001:15), who is of the opinion that one of the key criteria for assessing whether NEAs can be an appropriate policy instrument is the economic efficiency of the NEA. This factor cannot be separated from the overall evaluation of an NEA as an appropriate tool to achieve environmental compliance.

21.5 PARK FORUMS AND NEAS

As explained in Chapter 10, to enable a fair comparison to be made on attitude between the Wings Case Study - Park Forum Charters and The Park Forum Charters, it is necessary to use the same criteria as the basis for the analysis process. As explained in Chapter Two, the same framework was used in terms of researching a specific Park Forum, i.e. the SANParks Table Mountain National Park Forum. Interestingly, similar themes emerged from the research and discussions with stakeholders and it was possible to utilise these as a basis for the comparison between the MFI Case study and Park Forum Charter. The discussion on attitude is prefaced against the themes discussed below.

Although SANParks Stakeholder Participation Process Guidelines (provided in Appendix 3B) were only officially drafted and accepted towards the end of 2005, the principle of the Park Forums has been followed by TMNP and there was consensus amongst the stakeholders that a representative forum which would promote and support “the conservation of the cultural and natural heritage” of the Table Mountain National Park should be formed. This co-operative partnership would be based on the fact that the Forum would serve as an advisory sounding board on strategic issues and to also monitor public opinion and activities relating to the TMNP at all levels of society (6 December 2003: Establishment of a Park Forum for the Cape Peninsula National Park. Report on the Public Participation Workshop, SANParks.).

21.6 THE ROLE ATTITUDE PLAYS IN SANPARKS PARK FORUMS

Perhaps the basis for this discussion should be premised on the fact that there is a fundamental difference between the MFI Case Study NEA and the SANParks NEA. This difference has a legal basis; non-compliance for the MFI NEA can result in fines being issued, or in worst case scenarios, legal proceedings being implemented. Compliance in terms of the SANParks NEA is not punitive in nature. The “Charter” that is negotiated with Forum members (includes SANParks’ officials) refers more to achieving common objectives of the relevant SANParks Park. Non-compliance can be interpreted as behaviour that conflicts with the Charter; no fines are imposed or legal proceedings implemented. Compliance thus translates into a moral and ethical choice instead of a legally binding imperative.

Another important distinction is that there are no financial benefits/disbenefits associated in terms of being a signatory to the Charter. This implies that there are different motivating factors, or drivers. These play an important role in attitudes. The stakeholders that participate in the SANParks Park Forum do so voluntarily; they have an interest in and have attached a personal value to Table Mountain National Park.

The previously mentioned point that the process through which an NEA evolves should be seen against a backdrop of moral learning that takes place within a diverse community Jordaan (1984:515), is also very relevant to the issue of attitude. The social diversity of the Park Forum indicates that these interests and value systems may differ. If not managed correctly however, personal attitudes could become a threat to the Park Forum in terms of how diversity is dealt with. If the common denominator (and positive driver) is that of achieving environmental sustainability (a vision of a well managed, diverse National Park), the Park Forum could be managed in a manner that will ensure its (Park Forum and Park) survival; directly or indirectly benefiting those who have an interest in the Park. Once again, the importance of understanding and implementing the principle of “Environmental Diplomacy” (Suskind, 1994:vii) should be noted.

22 CONCLUDING REMARKS FOR THIS CHAPTER

This chapter has focussed on attitude as being one of the key drivers that could contribute towards the success or failure of an NEA. The MFI NEA and the SANParks Park Forum Charter, as two alternative forms of NEAs have been juxtaposed against one another to better understand the effectiveness of an NEA as a mechanism to achieve environmental compliance.

The major difference between the attitudinal drivers inherent in participating NEA stakeholders appears to be financial. It is quite clear that against the diverse social, political and economic backgrounds, a common vision for the NEA between stakeholders is essential for an NEA to succeed and be sustainable. This will also be challenging, however, considering that different social, moral and ethical behaviour may be brought into the NEA. Despite these social challenges, the SANParks Forum Charter as a form of an NEA may have a distinct advantage over the MFI Sector NEA. The latter’s members have distinct financial motivational drivers to either participate or abstain from participating in NEAs. The MFI members that participated in this research process are firm in the belief that, to ensure environmental equity in their sector (i.e. members who incur major expenses to become and stay compliant should not be prejudiced financially), financial benefits should be offered to them and higher taxes, levies or fines imposed on operators who do not comply.

The biggest challenge in terms of the financial benefits / punitive measure however seems to be in the prevailing attitudes NOT linked to money, but rather to personal value systems in terms of the well-being of an operator’s staff and the natural environment. While the regulatory framework (provided capacity from government is forthcoming), could go a certain way in terms of ensuring compliance with basic regulations, positive attitudes that could bring about behavioural and operational changes, are evident in a minority of operators. The prevailing attitude at best can be described as apathetic, as it financially more beneficial NOT to become compliant (Albertyn and Watkins, 2002: 14). This is further explored in chapter 12.

CHAPTER 12

23 CONCLUDING REMARKS ON THE FINDINGS

23.1 INTRODUCTION

The key focus of this research project has been to determine whether Negotiated Agreements would be an effective mechanism to achieve environmental compliance in the water sector. The research has focused slightly beyond the confines of water, as it was important to better understand the process dynamic of a Negotiated Agreement. While the preceding chapters focused on broader discussions regarding the various facets of an NEA, Chapters 11 and 12 explore answers to the three research questions which would assist in determining the efficacy of an NEA by comparing the two Case Studies, viz. *The MFI Case Studies*" or the *SANPark Case Study*". The three research questions also give direction to the recommendations in Chapter 13 (questions are repeated here for convenience purposes):

i. Investigate reasons why no Section 35 EMCAs, as a form of NEAs, have been formally signed into law since the introduction of Section 35 EMCAs as part of NEMA in 1998;
ii. Are there other forms of NEAs which have been successfully entered into between multi-parties?
iii. What factors would make an NEA effective?

Grounded Theory approach was used in an attempt to seek answers to these research questions. During the early stage of the research process, four main themes evolved and the findings for the South African context have been discussed against this framework (again, these themes are repeated for convenience purposes), viz: the legal framework, the benefits offered by section 35 EMCAs vs. Negotiated Agreements; multi-stakeholder involvement and the tools available to implement and support NEAs.

23.2 ADDRESSING THE RESEARCH QUESTIONS

NEAs may provide an alternative mechanism to achieve environmental compliance; however to be successful, the agreements would have to reflect the dynamic nature in which the NEA will function. This includes the economic, social, environmental, technical, legal and institutional environment. Each of these facets is complex in their own right and cognisance needs to be taken of what the issues are and how they may impact on an NEA. Similarly, the answers to the three research questions cannot be provided individually. However, to facilitate a better understanding the overall findings have crystallised into three key themes; economic drivers, institutional capacity and attitudinal change.

It is important not to lose sight of the fact that while three themes have been identified, they not be viewed as discrete topics. The intention is that the themes reflect the complexity of NEAs. Also, it is clear that the success of an NEA is dependent on a healthy functioning relationship between the issues discussed under the banner of these three themes. This relationship at present can at best be described as somewhat tenuous.

23.2.1 Economic drivers

Concerns were also raised by MFI stakeholders with regard to the potential impact of implementing NEAs on their operational costs, and how these would impact on the organisations' competitiveness in the market place. Of particular significance is the reluctance of the MFA to "self-regulate" its members for fear of this being seen as unfair competition. However, these concerns may be unfounded and once again could indicate incorrect perceptions. The OECD Report (1998:27) reports that the stakeholders participating in the Dutch Covenant for the Packaging Industry, made various qualitative statements with regard to the impact on competitiveness; "Some representatives of companies considered that the Covenant neither improved nor worsened their situation. Others, however, recognized that their view of environmental issues had changed as a result of acquiring a better appreciation of environmental impacts on production costs and product development."

Another issue that needs to receive careful consideration is the financial cost of Negotiated Agreements to all parties. The MFI has expressed concerns in terms of what the financial implications would be in terms of time spent, and costs associated with becoming compliant (or in the case of a Section 35 EMCA, moving beyond compliance). There is sound reason for their concern, the assessment of costs and benefits to the long process entailed in co-operative governance through an NEA, requires a new way of looking at costs. David E Booher (2004:43) supports this concern in his discussion on the "transaction costs" of co-operative governances; dialogue being the driving force. "Financial resources are required for professional support to ensure that dialogues are conducted efficiently and effectively. They entail costs in time and money, the risk of failure (not all are successful), and opportunity costs of using collaboration instead of or in addition to adversarial strategies." He explains that adversarial costs could arise when stakeholders "maintain the status quo", increasing the opportunity for adversarial challenges. These adversarial costs could be incurred by lobbyists or costs by stakeholders employing legal services. He cites as an example the dialogue process to establish a Sacramento Water Forum which took six years, at a cost of more than $5 million[94].

The sentiments expressed in the Sacramento case are supported in the evaluation of the Dutch Covenant for the Packaging Industry (OECD Report, 1998: 30 -31). While consumers did not necessarily benefit from reductions in production costs, the benefits to consumers resulted from "win-win solutions". These solutions (and hidden cost benefits) came in two forms; "… a positive impetus on consumer attitude and behaviour towards environmental protection, as well as the further marketing of environmentally sound products." Also, potential costs related to adversarial actions between stakeholders Involvement were avoided through a collaborative approach; "The main stakeholders in the Covenant's deliberation, implementation and monitoring phases favoured a co-operative atmosphere and the avoidance of conflicts in the implementation phases."

Supporting the above statements is the "no-regrets" approach proposed as an alternative solution to business seeking solutions to environmental problems through negotiation processes. Many stakeholders may be aware of and implement the precautionary principle previously discussed. As a precursor to the precautionary principle, the "no-regrets approach" Suskind (1994:78) allows stakeholders a great deal of latitude in terms of negotiating common objectives within stringent

94 The Sacramento Water Forum was a contentious group of environmentalists, business leaders, farmers, and local government officials who spent six years in an intensive consensus-building process. As a result of the success of this effort, leaders in Sacramento decided to organize another consensus process on transportation and air quality. (Booher: 2005: 1)

regulations. According to Suskind (1994:78), the benefits that this approach brings is that, by being more creative, solutions can be found to pollution problems while enjoying financial savings and a “greener public” image. The latter of which will hopefully improve market share.

Integral to both Suskind’s (1994:78) and Booher’s (2004:43) arguments about taking all costs into consideration in terms of understanding the economic nature of NEAs, is Hanks’ (2001:15) argument that the economic efficiency of an NEA needs to be carefully considered by all stakeholders when defining environmental targets. Only then can the appropriateness of an NEA be truly understood. The linkages between the economic efficiency of NEAs and sustained economic growth and welfare cannot be (Hunter in Fitzgerald, *et al.*, 1995:237). Indeed, this is one of the major concerns of the MFI stakeholders.

It is extremely interesting to observe that throughout the discussions on the appropriateness of NEAs as tools to achieve environmental compliance, the environmental effectiveness of an NEA was never questioned. Hanks (2001:15) defines environmental effectiveness as being “The impact of the NEA on the environmental performance of the signatories to the NEA”. This is an interesting omission by the stakeholders, particularly considering that as one of the key criteria for measuring the success of an NEA, environmental effectiveness cannot be separated from the economic implications of implementing an NEA. This is even more interesting when considering that environmental effectiveness was implicit in the DANIDA CPMFI Project as was explained earlier in the project’s objective; “ to achieve a significant reduction in the environmental impact of the South African metal finishing industry…”. Supporting this objective was a wide range of criteria and measurable targets (DANIDA: 1999). On reflection, it is interesting to note that during the discussions with the MFI stakeholders on the economic implications of an NEA, concerns regarding cost of water or savings incurred directly from lower water consumption were never entertained. Perhaps the answer lies in the fact that water in this country, particularly in the industrial sector, is relative cheap, as also stated by MacKay (2002:9) “The prevailing attitude of those people who have access to formal water services, and of many bulk users in industry and agriculture, remains one that sees water as cheap and plentiful, whether water resources are used for abstraction of water or for discharge of waste’’.

The financial linkages and success of an NEA are clearly seen in Hanks’ explanation of how environmental effectiveness should be assessed as part of the NEA; the “level of ambition of targets as assessed against technical potential for improvements”, and the “extent to which the targets have been achieved.” (Hanks, 2001:15). This too was contained in the DANIDA CPMFI project. Perhaps this is indicative of two issues in the MFI sector; either Environmental effectiveness is implicit in their understanding of environmental compliance, or completely opposite would be that there is no understanding and a greater level of awareness that is called for.

23.2.2 Institutional capacity

There will always be technical solutions to problems, albeit that this may come with high capital costs. However, the true challenge for an NEA lies with the administrative and process components. The legal framework to implement NEAs in South Africa is sound, with robust regulations. However, the institutional environment (i.e. Government departments) is confronted with capacity constraints that currently hamper the efficient and effective implementation of regulations.

It is interesting to note that these experiences are not unique to South Africa. Captured by the author of the Australian newsletter 'The Business Network' "…..it has been a common frustration among those who dutifully fulfill their endless paperwork requirements; if the Government is going to introduce all these rules and regulations, and expects us to comply, then why doesn't it do more to enforce them?" (Perrett: 2004).

Co-operative government and governance has been proffered as a solution to lack of capacity; this lies in distributing the responsibility between government departments and sectoral stakeholders more equitably.

There may be a general belief amongst individuals that compliance is a sound, moral form of behaviour and an NEA may be the tool to give effect to this principle. However, the inequitable an inconsistent manner in which the law is applied (through lack of capacity) undermines this perception. Individuals and organisations may be of the opinion that to pursue EMCAs and to accept an even stronger role of self-policing may not be in their best interests. As such, the very same parties who decry capacity problems may very well be enjoying the benefits of government's ever-increasing lack of capacity. A completely different perspective on this matter is that if a sector is of the opinion that a government department's failure to carry out its obligations is impacting detrimentally on business, legal recourse is possible.

Implicit in Chapter 3, Section 41 (1) (h) (iii) & (iv) of the Constitution is the co-operation between the two government departments, viz. Department of Environmental Affairs and Tourism (DEAT) & Department of Water Affairs and Forestry (DWAF), who would be the regulatory agents signing and giving effect to EMCAs.[95] However, there appears also to be a caveat which provides government agents with an "escape clause" if they do not meet their responsibilities. An example of this is found in Sections 24(b) and 26(2) of the constitution which respectively allows for environmental and housing objectives to be met within a reasonable period of time or as resources allow. As the Grootboom Case (Government of the Republic of South Africa and others vs. Grootboom and others 2001 (1) SA 46 (CC)). shows,[96] the definition of "reasonable" can be subjective and this delayed approach by government was tried and challenged successfully by the respondents. Section 26[97] of the Constitution as a whole places a "negative obligation" on the government and other "to desist from preventing or impairing right of access to adequate housing".

Capacity related problems however should not only be associated with Government institutions. Capacity constraints have also been reflected within the MFI sector; particularly with smaller companies who do not have sufficient budget and/or staff to give effect to cleaner production. In this regard however, the precautionary principle should be applied. As previously explained by Suskind (1994:79), lack of scientific evidence should not be used as an excuse not to implement cost effective measures to prevent environmental degradation. Similarly, lack of capacity should not be used as an excuse to delay bringing about operational practices to address pollution problems.

95 The Minister of Environmental Affairs co-signs an EMCA; the drafting of the EMCA is done through a consultative basis between DWAF and DEAT. DWAF becomes the implementing agent.

96The Grootboom case came about after the community in the Wallacedene area in the Western Cape had been evicted from their shack dwellings by the Cape Metro Council as part of its overall programmatic plan to upgrade housing, and when the latter failed to provide housing to the families, leaving them in abject poverty and homelessness. Mrs Grootboom and Others challenged the Constitutionality of the Cape Metro Council's actions and its failure to meet its obligations.

97Section 26(2) makes it clear that obligation imposed on State not absolute or unqualified, this obligation is defined by key elements to be considered separately: (a) obligation to take reasonable legislative and other measures; (b) to achieve progressive realisation of right; and (c) within available resources.

Contained within the principles of EMCAs is a strong inference to shared responsibility between government and industry. However, the responsibility for industry to meet legal requirements, albeit negotiated, within set timeframes, would be quite firm, with prosecution being threatened if the legal requirements are not met. Again, the scales seem unbalanced, in favour of government, with no recourse available to stakeholders.

The above-mentioned statement about an imbalance of power cannot however go unchallenged. Suskind (1994:vii) offers a pragmatic and practical solution to this in his discussions on Environmental diplomacy. He defines environmental diplomacy as “A skill that is essential to the process of negotiating successful environmental co-operation agreements.” To achieve an integrated approach that can support effective co-operative relationships, stakeholders will have to “weave together knowledge and skills of economics, law, environmental science and negotiation” to find ways of building institutional capacity to deal with environmental problems.

A cautionary note however is sounded in this regard; environmental diplomacy and environmental politics are inextricably linked. Institutional support for an NEA, (particularly a Section 35 EMCA that needs signing off by the Minister of Environmental Affairs and delegated down to provincial or local government level) is imperative if an NEA is to be successful. However, as explained by Steel (2003:15), environmental politics are ever-evolving within political, economic and social environments. Political support could change, leaving the NEA’s future vulnerable.

It could be argued that NEAs have to be revisited every few years to make them applicable to the environment and if carefully structured and managed, an NEA can be dynamic enough to ensure sustainability, benefiting its members thus reducing this risk. The reality however, is that external circumstances may prove to be of such a nature, that these changes could compromise the industry or sector. As such, the NEA’s vulnerability is based on an assumption that the political environment may be at the mercy of the government of the day, particularly the more formal Section 35 EMCA. If a cause or objective does not have the full support of the political structures, there may not be a strong enough sanction from members to sustain the NEA (Steel, 2003:15).

23.2.3 Attitudinal change

An issue that is far more difficult to articulate and quantify, is that of attitude and the role that this plays in terms of changing paradigms and practices in achieving a successful NEA for the MFI. The challenge of attitude is not a new one and it is the author’s opinion that the circumstances discussed above are not unique to the Metal Finishing Industry. This is highlighted in Richard Sandbrook’s discussion (1999:20) on the fifth anniversary of Rio (the Earth Summit) and the 25th anniversary of the Stockholm Conference on the Human Environment. Deadlock at the G7 and OECD discussions on sustainable development resulted from parties reluctant to accept responsibility; the prevailing attitudes are clear in his explanation for the reasons for the deadlock: “The NGOs are back to saying ‘governments should’, ‘industry should’, ‘everybody should but me!’, and the governments are saying ‘I will if you will first’.” This attitude impacts on accountable and transparent governance, human rights and the role civil society can play in socio economic development. Sandbrook (1999:21-22) suggests that methods should be sought where forums can be established whereby ”stakeholder groups can come together to sort out ‘best bets’ rather than sitting across from each other saying ‘should’, as presently happens” and that the challenge is to move beyond this paradigm of “the lazy generalizations about what is wrong and who is to blame”. Certainly this approach would be supported by Suskind (2001:80 – 81) who proposes that a contingent agreement may offer alternatives to the “”best bets” “”or precautionary principle. Only when this paradigm shift has been achieved can stakeholders move on to achieve co-operative governance.

Moral behaviour sets an important foundation in business paradigms, principles and practices. While moral behaviour may differ widely between individuals, the social/business context will to a large degree dictate what is acceptable. However, a personal belief system plays an important role in self-policing or self-regulation, but may also lead to internal conflict and finding solutions in complex social and cultural environments. This is supported by C.A. Capitini *et al.* (2004: 767); who are of the opinion that “dispute resolution or conflict management in these more complex circumstances hinges on identification, awareness, and communication of both the interest- and identity-based issues within the controversy.” This is perhaps a challenge that is most pertinent in South Africa, not only a young democracy, but what I would describe as a smorgasbord of cultures and value systems which have to be rationalized within a fledgling economy and changing regulatory environment. These competing systems no doubt have to result in some interesting conundrums.

This challenge is also unpacked by Grazia Sumeli Weinberg (2000:1 - 3) in her inaugural lecture titled “A Rationality and its Discontents: Earth Gods and Sky Gods in Western Myths” which draws parallels between the views of respected African Nobel prize winner, author Wole Soyinka, and Max Weber, a German sociologist of the early 20th Century. Her paper focuses on how these two individuals have interpreted man’s view in terms of his role in society, or rather, as separate to society. According to Weinberg (2000: 1 - 3), Soyinka (1976: 3) believes that man has a restricted, non-complimentary view of the universe; he compartmentalises “…human emotion, phenomenal observations and metaphysical intuitions” and “turns them into separatist myths.” According to Soyinka, the reality of Western man puts natural, complimentary phenomena such as the earth and sky into opposing camps. Weinberg goes on to explain that Weber, who saw modernity as “a process of rationalisation”, would have shared this view with Soyinka. Weber’s thinking is that man with his drive to be more effective and efficient in his desire to exercise control over his life (and reduce uncertainties), has compartmentalised his life to the extent that this rationalisation has come at a cost to “modes of social behaviour”, resulting in “negative effects on culture and society”.

The debate about value systems and ethics is an important one in determining the role that personal drivers and attitudes can play in diverse stakeholders trying to achieve a common vision necessary for an NEA to function effectively. Weinberg provides an excellent example to illustrate the Soyinka – Weber conundrum and which supports the issue about attitude and NEAs. Although Weinberg’s anecdote is taken from the modern media of the internet [http://www.eekim.com/blog/], it does not diminish perhaps the value of an age old issue that will continue to challenge society. The “Venture Capitalist Parable” has been summarised;

“A venture capitalist (VC) was vacationing at the pier of a small coastal village. A couple hours before lunch time, he noticed a small boat with just one fisherman docked nearby. Inside the small boat were several large yellow fin tuna. The VC complimented the fisherman on the quality of his fish and asked how long it took to catch them. "Only a little while," the fisherman replied. The VC then asked why didn't he stay out longer and catch more fish? The fisherman said he had enough to support his family's immediate needs. So the VC asked what he did with the rest of his day. The fisherman said, "I sleep late, fish a little, play with my children, and take a siesta with my wife. Some nights, I stroll into the village and play guitar with my amigos. We entertain the children with stories and songs."

The VC offered, "I have an MBA from Harvard and could help. You should spend more time fishing and with the proceeds, buy a larger boat. With the proceeds from a larger boat you could buy several more boats. Eventually, you would have a fleet of fishing boats. Instead of selling your catch to a middleman, you could sell directly to the processor and open your own cannery. With my advice on marketing, you would ultimately control the supply of product, processing, and distribution."

"How long will all this take?" the stunned fisherman asked. Perhaps 10 to 15 years," the VC said. "What then?", the fisherman asked. "Then you could retire," the VC replied, "move to a small coastal fishing village where you would sleep late, fish a little, play with your kids, take a siesta with your wife, and stroll to the village in the evenings where you could sip wine and play guitar with your amigos."

While Weinberg (2006: 4) suggests that this parable may be a stab at capitalism, its true value for this project lies in the fact that in the real world of business and politics, individuals have different visions and value systems, based on culture and ethics. These will guide the choices we make and the attitudes that we adopt in terms of carrying out our business activities. Of particular interest is Weinberg's opinion that the duality of the parable illustrates the different mindsets of two individuals achieving the same objectives (i.e. acquiring wealth – but with different values attached to wealth, the fisherman; quality of life and sufficient fish to live on – the VC; putting into place actions to acquire wealth by catching fish).

In terms of understanding the nature of NEAs, that they have as their key objective co-regulation and ultimately (in a more mature democracy – self-regulation), the different mindsets of the VC and the fisherman illustrate this perfectly; the fisherman already exercises, through his value systems, a form of self-regulation. The VC however, is inclined to find comfort in a "regulated, controlled, goal-orientated" environment; or in NEA terms, co-regulation? Perhaps the importance of the parable within the context of how Weber and Soyinka view Western society, is that there is a danger in terms of how the pressures to survive in business and industry can deprive stakeholders of personal value systems; with a danger of man (and his environment) becoming but a commodity (Weinberg, 2000: 4).

Although this has to be further researched, the attitudinal issue may be indicative of a much larger problem permeating businesses operating in the Small, Macro, and Medium Enterprise (SMME) sector. Large businesses that enjoy high profiles nationally and internationally are continuously under the microscope to comply and could easily be targeted in the media. The concern is that government is encouraging growth in the SMME sector and that if these negative attitudes are perpetuated as a matter of course, environmental sustainability could be threatened in this country. Considering the integrated nature of the discourse of NEAs, environmental sustainability and sustained economic growth and welfare are integrally woven and cannot be managed separately into the future. As such all environmental tools to achieve environmental compliance and sustainability would have to ensure that there is also equity, or an "improvement in the distribution of income and wealth" in the sector that is being considered (Hunter in Fitzgerald, *et al.*, 1995:237).

The most important component in the discussion on attitude perhaps lies in its relationship to legislation; regardless of how well-intentioned policy and legislation may be in effecting change, its efficacy perhaps rests in how it is perceived by the public. This is supported by MacKay (2002:1) "New legislation can be a potent mobilising factor for change at the broad societal level, but shifting the underlying attitudes of individual people may take a generation or more." Weinberg's (2000:2-4) discussion on modern man's tendency to compartmentalise essential components of life and how this fundamentally influences attitude, is accentuated by MacKay. It can perhaps be inferred from

MacKay's (2002:1) statement "there are some universal principles related to the way in which western society tends to perceive and deal with water" that the '"new" South African society' still sees water as separate to itself; not fundamental to a sustained future. The potential for South Africa to achieve any measure of success in terms implementing legislation that supports environmental sustainability will depend largely on how we integrate ourselves into our social, political and natural environment; "The degree to which the principles are active in the present and the future will determine the long-term success of implementation of South Africa's new water policy" (MacKay, 2002:1).

23.3 AN INTEGRATED RESPONSE TO THE RESEARCH QUESTIONS

From the above-mentioned discussions, the reasons for the lack of formalised Section 35 EMCAs appear to be numerous and complex. However, in carefully analysing the findings and comparing this to literature on South African Negotiated Agreements, these reasons seem less complex and definitely not new. The most important findings can be crystallised into the following statements:

NEAs, regardless of the sector or focus, should ideally reflect the political, social, economic and natural environment within which they would be negotiated. That these mechanisms would have to be negotiated, implemented and monitored against this context, places them firmly within the context of environmental politics as previously defined by Steel (2003:2).As explained under the topic of "institutional capacity," the efficacy of this environmental mechanism, its strength and weaknesses, will be tested against this political environment.

There is a lack of confidence that Section 35 EMCAs are fully supported by Government. The perception by local government and the MFI is that an EMCA will only received the necessary attention if it is seen to benefit a political cause by the officials that will be responsible for its signing off (either the MEC or the Minister of Environmental Affairs.

The MFI, DEAT nor eThekwini seem to have a full understanding of the financial implications of negotiating and implementing a Section 35 EMCA. As it stands, stakeholders conducting business in the water sector already have to comply with a diverse range of regulations, each with its own standards and mechanisms to sanction stakeholders for non-compliance. This already translates to administrative costs, cumulatively, a Section 35 EMCA could make business less viable. In addition to this, stakeholders and regulators (particularly DWAF) alike are of the opinion that these mechanisms are sufficient and that a Section 35 EMCA is superfluous. The additional administration accompanying the intensive consultative process in working towards a Section 35 EMCA would be too lengthy to justify the end result.

An immediate contradiction, however, is that there is a perception that government officials lack the wherewithal to give effect to the existing regulations. The reasons for this is that there is little confidence in the judicial process and also that environmental transgressions do not yet receive high priority and are administratively cumbersome to pursue. The five year permit issued by the eThekwini Municipality provides sufficient security for a company to plan adequately into the future. There is an understanding that if regulations or bylaws change within this period, the permit would have to be amended. However, stakeholders are confident that the less formal "gentleman's agreement" that exists will allow for a gradual implementation to allow for compliance and operators will not become non-compliant overnight.

Legally, a water use license or a permit can also be called a Negotiated Agreement. None of the conditions contained in these documents have not been negotiated between the implementing agent (e.g. either DWAF or eThekwini Municipality). The difference of course is that these mechanisms have a narrow focus, i.e. water use and pollution control. A Section 35 EMCA follows an integrated approach and considered the whole context within which an organisation operates, not only its water use and pollution management activities. eThekwini Municipality and the MFI have successfully negotiated permits and "gentlemen's agreements" in terms of operating conditions. However, there is dissatisfaction that these are not issued and managed equitably to all operators in the MFI industry in KZN. Together with a concern that there is not sufficient staff capacity, this is the basis for the lack of confidence that a Section 35 EMCA or another form of NEA will work.

The attitudinal drivers of stakeholders engaging in any form of NEA are complex. They need assurance that the authorities will treat everyone in the sector equitably. The concept of co-operative governance and self-regulation unfortunately has not progressed beyond the concept of "we are not going to do the authorities job for them". This approach also provides absolution from the MFA executive committee members not playing "bad guy" over their competitors, something which the current executive seems reluctant to do. .

As can be seen from the above discussions, all components relating to an NEA are closely interwoven and currently there are too many issues that are not being sufficiently addressed for a NEA to be considered. However, this does not mean that mechanisms should not be put in place to start a process to achieve one into the future. T

The findings on what factors could contribute to an effective NEA are contained in the final chapter.

CHAPTER 13

24 RECOMMENDATIONS

The key focus of this research project has been to determine whether Negotiated Agreements would be an effective mechanism to achieve environmental compliance in the water sector. The research has focused slightly beyond the confines of water, as it was important to better understand the process dynamic of a Negotiated Agreement. The three research questions give direction to the recommendation, and these questions are repeated here for convenience to the reader:

i. Why no Section 35 EMCAs, as a form of NEAs, have been formally signed into law since the introduction of Section 35 EMCAs as part of NEMA in 1998;
ii. Are there other forms of NEAs which have been successfully entered into between multi-parties?
iii. What factors would make an NEA effective?

This chapter focuses on recommendations and concluding remarks. The recommendations have evolved from previous chapters. The recommendations are by no means exhaustive, or ambitious, but have focused on the three themes identified in the findings. Two of these issues, could be addressed by starting to implement practical mechanisms. The third is the real conundrum; it underlies the first two issues and poses the real challenge to the successful adoption and implementation of an NEA. The three key recommendations focus on economic issues, institutional arrangements and attitudinal change

24.1 ECONOMIC RECOMMENDATIONS

The economic component of Negotiated Agreements needs to receive careful consideration as stakeholders have consistently raised these during the process. This is not so much the case for the TMNPF as it is for the MFI. To sustain the Table Mountain Park Forum, sufficient budget will have to be allocated to ensure sufficient personnel that have the capacity to give energy to the Forum and to regularly engage with the stakeholders. Activities that will support the common objectives of the Forum and SANParks will also require budget. The cost to the stakeholders comes in the form of time and effort, making the financial component a little more difficult to quantify. Also, the impact on competitiveness is not clearly understood. While these issues are difficult to quantify at present even for the two case studies, the following recommendations could be implemented in the MFI in KZN:

An audit needs to be undertaken in terms of the financial losses incurred as a result of non-compliance with the OHS Act. This would include issues such as unsuitable working conditions and lack of training on safety procedures. Non-compliant acts in terms of waste disposal and health and safety issues, will in time translate into financial losses for the company and by implication, serve as a potential motivator to further cut corners to show profits. This issue was identified during the DANIDA project as an “operational barrier at factory level” (DANCED 1999:8). The MFA should ideally revisit the findings and suggestions contained in this report as they remain valid to these findings.

The MFI could strengthen its initiatives to improve awareness and skills necessary to achieve improvements in factory operations. This could lead to overall reduction in water usage, energy consumption and generation of waste. Compounding this issue however, seems to be the lack of sufficient management capacity to undertake cleaner production initiatives and an overall motivation of staff to adopt new practices (DANCED 1999:8). To support this suggestion, the MFA could set up benchmarking standards that are translated into financial terms. This will also assist with a much needed paradigm shift in understanding that compliance will have longer term financial benefits.

Furthermore, it could encourage its members to entrench these principles and practices in a sound code of conduct. This code of conduct could form the basis of the NEA. If and when a Section 35 EMCA is established for the MFI, the possibility and legality of the MFA being able to issue penalties should be further investigated. These monies could be put into a central environmental fund that could be put back into the communities.

The MFI is encouraged to open dialogue with Enviroserv to address alternatives to the existing waste collection and disposal regime which has substantial impacts, particularly for smaller companies. The financial implications of the “milk run” collection approach described earlier in this document should be further investigated. If properly planned and managed, it is believed that this could provide a viable financial alternative to the MFI as well as Enviroserv.

A “feebate” system can be introduced and companies can “feel” the financial benefits and/or penalties for complying or not complying and that this will reflect in the balance sheets. In previous chapters a “feebate” system was alluded to. This is a combination of penalties (fees) and rewards (rebates) which could be implemented by authorities to encourage compliance. The feebate could be negotiated as part of the agreements. As is seen from the discussions on financial drivers, the current financial mechanisms implemented by eThekwini Municipality can be described a form of a feebate system. Although it may not be direct, there is an element of rebates in the testing fee, if a MFI operator remains compliant, his payments are reduced in terms of reduced testing required. The “fees” increase in direct proportion to his lack of compliance. This is supported by Albertyn and Watkins (2002:14) who state that voluntary agreements in pollution control cannot be effective if other regulatory mechanisms are not in place. Enforcement would have to be equitable, strong and consistent and coupled to this would have to be financial incentives and “disincentives”. Only if these mechanisms are in place, would industry be prepared to seriously consider NEAs (Albertyn and Watkins, 2002: 14).

The intention is that the new Municipal Courts will be dealing with non-compliance cases in terms of municipal bylaws into the future. As discussed in Chapter 11, the Municipal Court for eThekwini was scheduled for operation in June 2007. The Municipal Courts will also bring about an opportunity to substantially increase the fines that can be issued for non-compliance or illegal dumping.[98]

24.2 INSTITUTIONAL ARRANGEMENTS

An NEA which is based on co-operative governance and government could provide a solution to the capacity dilemma that confronts government departments. The conundrum however is that industry first wants to see local government “meet its current mandate” effectively before it shares this responsibility. Lack of capacity currently prevents this. Concerns about capacity constraints are not new and have been raised on an on-going basis since the World Summit on Sustainable Development (WSSD) held in Johannesburg in 2002. More specifically, Albertyn and Watkins, (2002: 14) make a strong statement that capacity is a key constraint in NEAs NOT being implemented. Furthermore, they make the claim that capacity constraints play a crucial role in companies perpetuating their pollution activities; “In fact it can be argued that poor enforcement provides economic incentives that encourage continued pollution.” A solution to partly address the problem of capacity constraints perhaps lies in the judicial system:

Although DWAF is an important role-player in an NEA for the MFI sector, the focus of these recommendations is the eThekwini Municipality as it already has sound systems in place. As stated

98A telephonic interview with Mr Vivani Made, Deputy Head, Litigation (Ethekwini Legal Services) on 8th May 2007 however, it is hamstrung by lack of capacity. The following suggestions focus primarily on the implementation of a Municipal Court for eThekwini discussed above in section 1.1. While this may appear to be only one issue, the benefits would be far-reaching in terms of revenue generation and hopefully behavioural change. Through the spirit of co-operation, the eThekwini Municipality could assist in promoting the concept of environmental justice. Legal officers need to better understand the true financial costs of environmental damage caused by illegal dumping and non-compliance. The Metro could provide high level training to legal officers who may be in a better position to issue more appropriate fines to transgressors. Once established, the Municipal Court will hopefully be legally mandated to issue more substantial fines. This could have two possible implications:

i. Revenue would increase substantially. Arrangements would have to be made that this revenue is directed back to the muncipality and not into the provincial coffers. The increased revenue could be used to finance new staff which would improve the likelihood of finding new MFI operators and enforcing compliance. The financial benefits of this approach need to be examined further, but are not the focus of this study.
ii. The fines issued may only act as deterrents for the smaller operators. It may still be viable for larger operators to pay the fines and continue operating illegally. The legal process to prosecute or to issue interdicts may have to be further investigated as this may be the only option into the future to deal with major transgressors.

The above-mentioned suggestions which would appear workable are however contradicted by Albertyn and Watkins (2002:6). The authors are of the opinion that Negotiated Agreements as a co-operative mechanism are not a potential panacea to lack of government capacity; "Industry has lobbied to convince government that self-regulation through voluntary Negotiated Agreements is the most cost-effective and flexible means of achieving environmental improvements in the industrial sector. This implies that voluntary agreements will make little demand on the administrative capacity of the state." Instead of having one national agreement with targets, they [the chemicals and oil refinery sector] propose that each separte factory negotiate with all the relevant local and provincial govenrment officials to set up locally appropriate targets. This could however even further incapacitate an already struggling government sector. "The argument for cost-effective administration can only be valid if it is assumed that government will be a sleeping partner to the agreements."

The above-mentioned concerns were echoed in a warning sounded by MacKay in 2002. In discussing the sustained success of the national water policy, MacKay suggested that it was not management transformation that required attention, but more critically focussing on capacity building; "…there are far too few people of any colour with the necessary capability, and of the people who remain in the public sector, most are carrying far too much responsibility for their levels of experience and expertise. The quality of decision-making will suffer, even though the decision-making tools themselves, as provided in policy and legislation, are more than adequate to the tasks ahead." (MacKay 2002:12).

Part of understanding whether NEAs are indeed suitable mechanisms for achieving environmental governance, has been to understand the institutional framework of the relevant government departments. The intention was to use the managerialism theoretical framework to achieve this objective. However, this project has shown that this theory demands a far more robust research methodology, one that extends beyond the confines of these terms of reference. Considering that Government Departments are under constant scrutiny and restructuring, it may be prudent to conduct such research, into the not too distant future (if this is not already being done).

24.3 ATTITUDINAL CHANGE

The harsh reality of achieving any paradigm change in this regard will have to be a catalyst which brings about a "forced" paradigm shift within a larger group. This would require however, understanding the drivers which would bring about this paradigm shift and also having enough resources to stringently apply the law.

As such, the very same parties who decry capacity problems may very well be enjoying the benefits of government's ever-increasing lack of capacity. Again, C.A. Capitini et al. (2004:767) are of the opinion that this self-policing can be achieved through a strong group culture: "For successful progress, a group culture should be developed that includes the respectful treatment of information from a variety of sources, free and informed choice, and internal commitment to support the group's structure and process and to increase its efficacy." Considering this, a few basic components are necessary for an NEA to be effective.

A real environmental problem will need to exist with a common objective (vision) to address this problem. If there is a diverse range of stakeholders the vision and goals will have to be clearly articulated, consensus may not be achievable though. Importantly, a paradigm change with regard to self-regulation and compliance is required. The paradigm shift need not be a complex one; the current "responsibility abdication" paradigm of "*if everyone is getting away with it, why shouldn't I*" could be encouraged to change to one of accountability; "*if enough of us are adhering to the regulations, let this behaviour exert pressure on others to follow*". This paradigm cannot however succeed on its own and should ideally be supported by other mechanisms; the financial drivers/incentives discussed in the "feebate" system above. Similarly, paradigms regarding the manner in which the labour force is perceived and treated will have to be seriously addressed. This problem may only be relevant to a small portion of the MFI in KZN, but the MFA should make a strong statement that a safe and healthy working environment is a non-negotiable in the industry.

Although this matter should strictly fall within the financial recommendations, the serious nature of the problem relates more to moral behaviour and attitudes towards staff. If the Department of Labour's report on the state of employment conditions holds true, considerable paradigm shifts are necessary to change how working conditions are managed in the industry. This in itself will require financial input. The true financial costs of an MFI negotiated process will need to be carefully compared to what the actual costs to its individual members will be if the current status quo is maintained in terms of the treatment of some staff.

An NEA cannot be singular in its focus, i.e. to implement technical actions to achieve environmental compliance. The conditions, in which the employees who will be driving the technical actions operate, are fundamental to successful and sustained implementation of cleaner production. According to Albertyn and Watkins (2002:8) the "rhetoric of self-regulation" which spews forth responsible environmental and corporate social investment policies and healthy labour relations, disguises a South African market that "values corporate welfare above human rights, labour and environmental concerns." The authors cite two examples where staff was locked inside premises without escape; in once incident ten women died as a result of not being able to escape a fire. In a second incident a woman gave birth prematurely to twins who died as help could not be accessed.

These examples of organisations putting “profits before people’s prosperity” are very serious, but they do illustrate the necessity to change paradigms regarding the value of the labour force. An organisation cannot commit itself to an NEA without embracing basic human rights for its workers. The NEA would therefore clearly have to encompass operational ethics, principles and practices. Furthermore, the Department of Labour would also have to be an important signatory to the NEA.

Finally and most simply put, an NEA will only be successful as long as it serves the purposes of the majority of the participants.

CHAPTER 14

25 CONCLUDING REMARKS ON THE RESEARCH PROJECT

The discourse around environmental policy in South Africa is intended to be positive. Enshrined in the South African Constitution, the National Environmental Management Act, the National Water Act and more recently, the Inter-governmental Relationship Framework Act are constructive mechanisms that are intended to contribute to a strong government, a thriving economy, a stable society and healthy environment. This research project set out to explore the efficacy of one small component of legislation which could contribute to the objectives set out in the aforementioned legislative framework.

The objective was clearly articulated; to determine whether a NEA is a suitable mechanism to achieve environmental compliance in the water sector. Three research questions guided the focus of the research framework and criteria against which case studies could be selected and evaluated. Briefly, the case studies had to reflect the basic elements of a NA; multi-stakeholders, dialogue and a legal framework. In support of this, the research framework comprised three components; scale, range and regulatory framework. Each of these components asked key questions regarding the status of Negotiated Agreements in South Africa, viz, if any agreements had been successfully implemented, what negotiation processes were followed; what the legal framework was; the nature of the technical/operational conditions contained in the agreement and if capacity constraints were experienced?

The research questions focused on the efficacy and practicality of NAs. During the research process, repetitive themes which primarily dealt with the legal, administrative and process facets of NAs emerged. These themes were crystallised even further into three fundamental issues that provided the foundation for the recommendations made in this study; economic, institutional and attitudinal. Considering that the same issues raised during this project emerged back in 2002 in a report that was prepared for the World Summit on Sustainable Development (Albertyn and Watkins: 2002), not much progress has been made in the NAs arena. This in itself should raise flags of concern.

The underlying reasons for this lack of progress lies perhaps in the stakeholder dialogue conducted during this research process. Emerging from the discussions is that the aforementioned facets (lack of capacity, no financial incentives, duplication of existing legislation, etc) are perhaps not the primary reasons for Negotiated Agreements not having been successfully implemented. Rather, disconcertingly embedded within these facets, are ingrained attitudes and ethics that permeate the metal finishing industry in KwaZulu-Natal. It should be said at the outset that it is believed that this is not unique to this industry, but as a well established industrial sector, this industry is perhaps indicative of a growing trend in this country. This research process has perhaps served as a catalyst to better understand the complexities confronting the industry.

Stakeholders have been vociferous about an over-regulated environment which they claim is making it difficult to do business. New mechanisms or regulations are not welcome as they imply additional administration and uncertain financial implications. Government capacity, or rather the lack thereof, is constantly blamed for poor implementation or inadequate enforcement. An ineffective judicial system is constantly put on the table as a reason for non-compliance. The list of reasons given not to engage in a process to address these issues has not been exhausted here. The current regulatory framework is robust, there are sound mechanisms in place to achieve environmental compliance and opportunities for stakeholders too improve profit margins through cleaner production. However, when alternatives of co-operative governance and self-regulation are suggested to address capacity constraints; yet more negative attitudes surface. Stakeholders provide further reasons not to engage in a process that could find common solutions to industry and government problems. It is difficult to escape the conclusion that this behaviour indicates a complete lack of accountability. The perception is created that this behaviour is tantamount to a lack of accountability. Rather, if the *status quo* of an ever-increasing ineffective government is maintained, this would better serve industry's purposes of making short-term profits by cutting corners with compliance.

This rather cynical view is based on the researcher's perception that there is a growing sense of negativity and resignation amongst the stakeholders interviewed, the majority of who feel that it demands too much energy to stay positive and legally "above board" in business. It is far easier to capitulate and join the ranks of those operating not quite within the law; ranks that continue to prosper financially. This short-term focus could potentially undermine a very strong South African environmental regulatory framework, and in the longer term, economic sustainability.

The drivers identified as being fundamental to effective negotiated environmental agreements are in essence attitudinal. Behaviour based on personal ethics and moral behaviour is fundamental to achieving sustained integrated environmental management practices. South Africa is at an important juncture in collectively deciding how it will move forward in terms of personal and business ethics. Perhaps the answer lies in identifying key individuals that have the political, emotional and financial wherewithal to confront these issues head on, make a stand and drive a revolution in attitudes.

It would seem fitting at this stage to support the above principle with the sentiment that is at the core of the SAMFA members. Recorded at the KZN branch's AGM "….the indomitable Tony van der Spuy, who, while initially [scaring us] by describing his visits to hell-on-earth metal finishing shops, happily painted a prettier picture of our potential to address the problems. He re-iterated that it is and will continue to be SAMFA' main objective to assist industry to improve, and that this can only be done by identifying our weaknesses and eliminating them" (Guerrera: 2006).

MacKay (2002:12) suggests that improved working relationships between Government and industry would contribute tremendously to addressing capacity problems and achieving regulatory objectives, but that this would ""require radical re thinking of relationships and ways of doing business between government and the private sector in relation to water. The social climate in South Africa may not yet be mature enough to engage in NEAs, such as Section 35 EMCAs. However, taking cognisance of MacKay's suggestion, it is therefore perhaps more prudent for the authorities working with the existing regulatory framework that provides mechanisms to manage water pollution, to concentrate their resources on implementation and compliance and to encourage improved working relationships with stakeholders.

Negotiated environmental management agreements in South Africa could become effective agreements to achieve environmental compliance into the future. However, presently, they are perceived as an "out" for a government which cannot give effect to current legislation, which in itself is quite robust. Perhaps the stakeholders are correct in their opinions that government should focus on successfully implementing the existing regulations before it tries to progress to more ambitious ideas. Once successful and sustained implementation is achieved, stakeholders may be more amenable to entering into co-operative relationships with government.

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APPENDICES FOR THIS REPORT ARE PROVIDED AS PDF DOCUMENTS ON THE CD AT THE BACK OF THIS REPORT

APPENDICES 1A – 1E: METAL FINISHING INDUSTRY CASE STUDY FILES.

APPENDICES 2A-2G : MFI NEGOTIATED AGREEMENT PROCESS.

APPENDICES 3A-3F : SANPARKS CASE STUDY FILES