The Practical Application of Section 24G of the NEMA: A Critical and Quantitative Empirical Analysis

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Abstract

The article examines the practical application of section 24G of the *National Environmental Management Act* 107 of 1998 (NEMA), highlighting its historical context, amendments, and challenges. The *Environment Conservation Act* 73 of 1989 (ECA) was the predecessor to NEMA, incorporating environmental assessment procedures and prohibiting the commencement of listed activities without environmental authorisation. Section 24G was introduced in 2004 to address the *lacuna* in ECA and NEMA, allowing developers of unlawful activities to apply for *ex post facto* environmental authorisation. The current version of section 24G of NEMA allows developers who have contravened section 24F(1) of NEMA to apply for retrospective environmental authorisation, provided they comply with the directives and pay an administrative fine of up to R10 million. Section 24G has been criticised for undermining environmental management principles, being prone to abuse, and causing interpretation challenges despite legislative amendments addressing these issues. The empirical study revealed that the challenges of section 24G include interpretation issues, a lack of uniformity in the contents of the EIA report, and inadequate public participation provisions. The study further revealed that developers apply for section 24G due to ignorance of the law, the need to provide services, and the requirement to bring unlawful activities into the regulatory loop. The empirical study further found that some criticisms, such as those related to sustainable development and environmental management principles, are still valid. In contrast, others are no longer valid, as the process is shorter, less rigorous and cheaper. The article recommends retaining section 24G in NEMA and suggests the government publish guidelines to standardise its application nationwide.

Keywords

Section 24G; environmental impact assessment; environmental authorisation; sustainable development.

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1 Introduction

The *National Environmental Management Act* 107 of 1998 (NEMA) requires developers of proposed listed activities (developmental projects) likely to significantly impact the environment to obtain environmental authorisation before commissioning their activities.[1] To obtain an environmental authorisation, a prospective developer of the proposed listed activity must conduct an environmental impact assessment (EIA). An EIA is carried out before the commencement of the proposed listed activity. However, the above notwithstanding, there are incidents of non-compliance with the law where developers commission listed activities without environmental authorisation from a competent authority.[2] This renders these activities unlawful. In South Africa the commencement of unlawful activities is an offence.[3] While the initial NEMA prohibited the commencement of unlawful activities, it did not include a provision of whether a developer of an unlawful activity may obtain environmental authorisation retrospectively. This *lacuna* led to uncertainty in the legislation on how to deal with unlawful activities.[4] The insertion of section 24G into NEMA[5] allowed developers of unlawful activities to apply for *ex post facto* environmental authorisation. The initial section 24G of NEMA attracted debate and criticism. The interpretation and practical application of section 24G also led to litigation with different outcomes.[6] Section 24G has been amended on several occasions in an attempt to resolve some of the challenges.[7] This article argues that despite a plethora of literature on section

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1 Section 24(1) of the *National Environment Management Act* 107 of 1998 (NEMA).

2 For example, see *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP). In this case, the defendant, BP Southern Africa, was criminally charged for the unlawful commencement of listed activities without environmental authorisation.

3 See the DFFE 2022/23 *National Environmental Compliance and Enforcement Report* (NECER) 17.

4 Hall 2022 *PELJ* 6. The author did his doctoral studies before the publication of Hall's article, and the two articles were submitted at the same time to the same journal. Hall's article was published first, impacting the author's first draft findings. This article was revised subsequently and the reviewers are thanked for their inputs and insights.

5 *National Environmental Management Amendment Act* 8 of 2004.

6 *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye* 2002 1 SA 478 (C); *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412 (T).

7 See *National Environmental Management Amendment Act* 62 of 2008, *National Environmental Management Second Amendment Act* 30 of 2013 and *National Environmental Management Laws Amendment Act* 2 of 2022.

24G and several amendments, there are still challenges emanating from the practical application of section 24G of NEMA.[8] Therefore this article aims to investigate the criticism against section 24G (in its initial and amended formats) and the current challenges of the *ex post facto* environmental authorisation emanating from the practical application of section 24G of NEMA. This article addresses the question of how criticisms of section 24G of the NEMA, in both its original and revised versions, alongside challenges from its practical application, signify broader issues regarding the *ex post facto* environmental authorisation process in South Africa.

The author uses a mixed research method.[9] Firstly, a literature review of both primary and secondary sources of law is undertaken to provide an overview of section 24G and highlight the amendments that it has undergone since its inception. The subsequent section of the article briefly sets out the theoretical and practical challenges of section 24G in the literature to set a basis for the discussion of the study's findings.[10] The article then adopts the qualitative empirical research method to determine the theoretical and practical challenges of implementing section 24G. This method was selected to determine the stakeholders' understanding and perceptions involved in implementing section 24G of NEMA. The empirical research is a limited case study of the application of section 24G in three provinces (Western Cape, Gauteng and North West), with inputs from national government officials, the greater part of which was undertaken during the COVID-19 lockdown (2019-2020). The study received ethical clearance from the Faculty of Law Ethics Committee.[11] The study was conducted between November 2019 and August 2020.[12] As the study mostly dealt with governance aspects, provincial and national officials working with section 24G matters were selected. Although specific officials were initially selected, the officials identified other officials and persons who could be questioned (the snowball effect). The challenge with the snowball sampling technique is that the findings cannot be generalised, and it creates homogeneity of the sample; that is, participants tend to refer others who are like themselves. The author prepared a list of questions, but additional questions were asked to provide clarity and test the answers of the officials and environmental assessment practitioners of one province or the national level against those of the other. The study has limitations in that the

8 Also see Hall 2022 *PELJ* 15, who undertook an empirical study from approximately 2016 to 2017.

9 The methodology is discussed in detail in para 4 below.

10 See Hall 2022 *PELJ* 7-11 for a discussion of these issues in more detail.

11 To conduct the empirical research, the author obtained ethical clearance from the Faculty of Law Research Ethics Committee (LAWRec) of the North-West University, which was issued under ethics number 0150219A3, dated 17 June 2019.

12 See part 5 for a discussion of the research methodology and the constraints.

author reached only nineteen officials and environmental assessment practitioners.[13] The findings cannot be generalised or extrapolated as the view of every official or environmental assessment practitioner in the national and provincial governments. The findings are presented as reflecting the views of the interviewed officials and environmental assessment practitioners. The empirical research was undertaken before the article by Hall[14] was published, and the author had no access to this research at the time. The research methodology is discussed in more detail in part 5 of this article. Hall undertook both quantitative and qualitative research, focussing on understanding the empirical experiences of 400 participants within the context of the ten putative indicators she identified. Further, Hall examined the extent to which section 24G is utilised and the level of awareness and understanding of the section. This article differs from Hall's article in that it is a qualitative empirical study focussing on three specific provinces. In contrast to her study, this article examines whether the theoretical and practical challenges outlined in the literature still exist and whether new or additional challenges have emerged. It also highlights the differing views of officials and environmental assessment practitioners from the three provinces, without explicitly examining their understanding of the section, its deterrent effect, or the administrative penalty system.

The second part of the article that follows presents the historical background of section 24G of NEMA and its development over time. Subsequently, the article delves into the current provision of section 24G as per the amendments of the *National Environmental Laws Amendment Act* 2 of 2022. Fourthly, the article briefly sets out past and current criticism of section 24G. The methodology is dealt with in more detail in part five, introducing the scope and limitations of findings from the qualitative empirical study, highlighting different interpretations of the application and criticism of section 24G of NEMA.

2 Background to section 24G of the NEMA

To understand what section 24G of the NEMA entails and why it came into existence, one must understand the history and the evolution of the legislation on environmental authorisations and EIAs in the South African context. The erstwhile environmental framework legislation titled the *Environment*

13 Despite various requests for permission from the gatekeepers, the relevant officials did not always respond. The author and his supervisor visited the Western Cape Department of Environmental Affairs and Development Planning in person. All other interviews had to be conducted via Zoom and MS Teams. Due to the scope and time limit of the study, developers or proponents were not interviewed.

14 Hall 2022 *PELJ* 1-34

Conservation Act 73 of 1989 (ECA)[15] was the first legislation to incorporate environmental assessment procedures.[16] Section 21(1) of ECA empowered the then Minister of Environmental Affairs and Tourism (the Minister)[17] to identify activities that were likely to have a significant adverse impact on the environment, whether in general or in respect of certain areas that could not commence without environmental authorisation.[18] Section 22 of ECA prohibited the commencement of identified activities[19] (currently referred to as "listed activities")[20] without environmental authorisation from the relevant competent authority.[21] Section 26 of ECA empowered the Minister to publish regulations concerning the compilation of environmental impact reports, the scope and content of such reports and the relevant procedures to be followed.[22] The Minister published ECA environmental impact assessment (EIA) regulations accompanied by lists of listed activities only in 1997.[23] GN R1182 listed activities that were likely to have a "substantial detrimental effect on the environment" while GN R1183 set out procedures for carrying out the EIA.[24] The implication of ECA and its EIA Regulations was that a prospective developer of a listed activity must obtain a record of the decision before commencing with such development.

Notwithstanding the provisions of ECA and its regulations, some developers commenced with listed activities without environmental authorisation, thus

15 *Environment Conservation Act* 73 of 1989 (ECA) ss 21, 22 and 26.

16 Glazewski and Brownlie "Environmental Assessment" 10-14.

17 Now Minister of Forestry, Fisheries and the Environment.

18 In the dispensation of ECA, the environmental authorisation was initially referred to as a record of decision (RoD).

19 The activities were identified only in 1997 in the first Environmental Impact Assessment (EIA) Regulations, which will be briefly discussed hereafter.

20 For the purposes of this article, identified activities will be referred to as listed activities, as currently referred to in the legislation.

21 Section 22(1) of ECA. The competent authority was defined as the "competent authority to whom the administration of ECA has under s 235(8) of the 1993 Constitution assigned in that province". Also see *Minister of Water and Environmental Affairs v Really Useful Investments* 2017 1 SA 505 (SCA) para 25; Kidd *Environmental Law* 236, 237.

22 Section 26 of ECA; Kidd *Environmental Law* 236; Glazewski and Brownlie "Environmental Assessment" 10-14; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1228; Hall 2022 *PELJ* 4.

23 GN R1182-1184 in GG 18261 of 5 September 1997; Glazewski and Brownlie "Environmental Assessment" 10-14; Kidd *Environmental Law* 236; *Sasol Oil v Metcalfe* 2004 5 SA 161 (W); Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1228; Hall 2022 *PELJ* 4.

24 "Activity" was defined in GN R1183 as any activity identified under s 21 of ECA. See reg 1 of GN R1183 in GG 18261 of 5 September 1997. Also see Glazewski and Brownlie "Environmental Assessment" 10-14; Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 159; Kidd *Environmental Law* 236; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1217.

rendering such activities unlawful.[25] Hall[26] argues that even though the perpetrators could be prosecuted for commissioning unlawful activities and might pay criminal penalties, the activity remained unlawful. This is because ECA did not specify whether a developer of an unlawful activity could apply for environmental authorisation after the commencement of the listed activity or if the activity remained perpetually unlawful.[27] The foregoing omission in the legislation left developers of unlawful activities and competent authorities in a quandary and led to litigation.[28]

In 1998 NEMA repealed most parts of the ECA except sections 21, 22 and 26 dealing with EIAs.[29] The first NEMA EIA Regulations were published in 2006.[30] Similar to ECA, section 24 of NEMA requires developers of listed activities to obtain an environmental authorisation before commencing such activities. Notwithstanding the requirement for environmental authorisation for listed activities under the dispensations of both ECA and NEMA, some developers

25 Section 22 of ECA; September *Critical Analysis of the Application of Section 24G Provisions* 8.

26 Hall 2022 *PELJ* 5.

27 Hall 2022 PELJ 6; September *Critical Analysis of the Application of Section 24G Provisions* 7.

28 See e.g. *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye* 2002 1 SA 478 (C) (hereinafter *Silvermine Valley Coalition*) where the first respondents commenced with the development of vineyards on the property, which had been quarried for gravel, and the said development had not been authorised. One of the applicants previously wrote a letter to the respondent requesting it to carry out an EIA. Failure to do so would lead to the institution of legal proceedings. The court held that an environmental authorisation could not be issued retrospectively. In contrast, in *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412 (T) (hereinafter *Eagles Landing*), the third respondent, a developer of a golfing estate, undertook earthworks on a section of the bank of the dam. The third respondent commenced with the construction without environmental authorisation. The applicant complained to the competent authority against the construction works. The *ex post facto* environmental authorisation was issued. See Kidd *Environmental Law* 237; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1228-1229; Basson 2003 *SAJELP* 135; Hall 2022 *PELJ* 6.

29 The ECA was repealed by s 50(1) of NEMA except for ss 21, 22 and 26, which remained applicable concurrently with NEMA until the NEMA EIA Regulations were published in terms of s 24 of NEMA. See s 50(2) of NEMA that provides that ss 21, 22 and 26 of ECA and the notices and regulations issued pursuant thereto would be repealed on a date published by the Minister once the Minister was satisfied that regulations or notices issued under s 24 of NEMA have made the regulations and notices under ss 21 and 22 of the ECA redundant. Further, the ECA provisions remained in force because many applications for RoDs were in process at the time of the introduction of the NEMA and its subsequent EIA Regulations. Additionally, some developers still possessed valid RoDs and did not re-apply for environmental authorisation in terms of the NEMA.

30 The regulations were published in GN R615 in GG 23938 of 23 June 2006.

commenced with unlawful activities.[31] Like ECA, NEMA was also silent on whether legislation permitted *ex post facto* environmental authorisation to rectify unlawful activities.[32]

Section 24G was introduced in 2004.[33] The initial section 24G was meant to be a temporary measure to provide an amnesty period for developers who commenced unlawful activities during the ECA era.[34] Section 7 of the *National Environmental Management Amendment Act* 8 of 2004 provided that section 24G was applicable for six months in relation to the unlawful activities commenced or continued in contravention of the law. However, the *National Environmental Management Amendment Act* 62 of 2008 abolished the six-month amnesty period.[35] Some scholars criticised this move because the continued existence of section 24G was seen as undermining the environmental management principles, facilitating abuse by developers, and eroding legal certainty in environmental governance.[36]

3 Current section 24G

As alluded to, section 24G of NEMA has undergone a number of amendments.[37] However, for the purposes of this article, the focus is on the current version of section 24G, that is following the *National Environmental Management Laws Amendment Act* 2 of 2022.[38] Section 24G allows anyone who contravened section 24F(1)[39] or commences a waste management

31 This can be exemplified by the *Silvermine Valley Coalition* and *Eagles Landing*. Also see Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 205; Basson 2003 *SAJELP* 133.

32 Paschke and Glazewski 2006 *PELJ* 7; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1233.

33 *National Environmental Management Amendment Act* 8 of 2004.

34 Section 7 of the *National Environmental Management Amendment Act* 8 of 2004.

35 See s 12(3) of *National Environmental Management Amendment Act* 62 of 2008; Hall 2022 *PELJ* 7.

36 Also see *Minister of Water and Environmental Affairs v Really Useful Investments* 2017 1 SA 505 (SCA) para 32; *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP) para 22; Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 160; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1257; Paschke and Glazewski 2006 *PELJ* 21; Alberts *Application of Theory of Change* 94.

37 *National Environmental Management Amendment Act* 62 of 2008 and *National Environmental Management Laws Second Amendment Act* 30 of 2013. The *National Environmental Management Laws Amendment Act* 2 of 2022 introduced new amendments to s 24G of NEMA.

38 For historical background on s 24G and discussion on the subsequent amendments, see Hall 2022 *PELJ* 6; Rantlo *Ex Post Facto Environmental Authorisation* 129-148. The history will therefore not be repeated here.

39 Section 24F of NEMA prohibits carrying out listed activities without environmental authorisation or without compliance with the norms and standards, as the case may be.

activity without a waste management licence[40] to apply for environmental authorisation retrospectively.[41] Section 24G also applies to the person who is in control, of or successor in title to the land on which the unlawful activity was carried out and enables the person to submit the section 24G application to the minister responsible for environmental affairs, the minister responsible for mineral resources or the member of the executive council (MEC), whatever the case may be.[42] The competent authority must issue a directive outlining the steps the applicant must follow after submitting the application.[43] Some of these steps may include, but not be limited to, the immediate cessation of the activity pending the decision of the application, the assessment of the impact of the activity on the environment, remedying the impact of the activity, and undertaking public participation. Additionally, the applicant may be directed to an assessment report, an environmental management programme and any other documents that the competent authority may deem necessary.[44] The applicant must also pay the administrative fine, which may not exceed R10 million, to the authority competent to decide on the application.[45] The competent authority determines the quantum of the administrative fine. The Department of Forestry, Fisheries and Environment (DFFE) published section 24G Fine Regulations relating to the procedure to follow and criteria to consider when determining the quantum of the administrative fine.[46] Following the payment of the administrative fine, the competent authority must make a decision on the application.[47] The competent authority may either refuse to issue an *ex post facto* environmental authorisation or grant such authorisation, allowing the continuation of the activity, subject to conditions stipulated in the *ex post facto* environmental authorisation.[48] As part of the decision, the competent authority may direct the applicant to rehabilitate or take other

40 See s 20(b) of the *National Environmental Management: Waste Act* 59 of 2008. Waste management activities were included in s 24G of NEMA by s 9 of the *National Environmental Management Amendment Laws Second Amendment* 30 of 2013.

41 Section 24G(1) of NEMA. S 5 of the *National Environmental Management Laws Amendment Act* 2 of 2022 extends the application of s 24G to any person in control of or a successor in title to the land on which an unlawful activity is carried out. S 24G also now includes the minister responsible for mineral resources and energy as a competent authority.

42 Section 24G(1)(c) of NEMA.

43 Section 24G(1)(aa)(A)-(G) of NEMA.

44 Section 24G(1)(aa)(H) of NEMA.

45 Section 24G(4) of NEMA. The maximum amount of the administrative fine was amended by the *National Environmental Management Amendment Act* 2 of 2022.

46 Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of s 24G are published in GN R698 in GG 40994 of 20 July 2017. Due to the scope of the paper, these regulations will not be discussed in detail.

47 Section 24(G)(2) of NEMA. The competent authority may also request more information from the applicant.

48 Section 24G(2) of NEMA.

necessary measures.[49] In coming to a decision, the competent authority may take into account whether the applicant complied with the directive issued by the competent authority.[50]

Notwithstanding the payment of the administrative fine or the granting of an *ex post facto* environmental authorisation the environmental management inspectors, environmental mineral and petroleum inspectors or the South African Police Service, whatever the case may be, may still investigate any breach of the law, and the National Prosecuting Authority may still institute criminal charges against the applicant.[51] The competent authority may defer the decision on the application if it is brought to its attention that criminal investigations are ongoing against the applicant concerning the listed activity on which the application is based until such a time that the investigation is concluded.[52]

Against this backdrop, it is imperative to reflect on the literature concerning the challenges raised against section 24G and determine whether they are still valid.

4 Challenges surrounding section 24G

Although section 24G of NEMA initially offered a solution to the problem of unlawful activities and brought certainty to the legislation, it was riddled with challenges.[53] Hall argues that section 24G continues to cause debates and controversy.[54] Section 24G was labelled an anomaly to the EIA process, as it permits the assessment of environmental impacts after an activity has commenced, whereas the EIA process typically requires such an assessment prior to commencement.[55] Paschke and Glazewski[56] described section 24G as a fundamental departure from the normal EIA that proceeds with the commencement of the listed activity. Kohn[57] affirmed the foregoing argument and described section 24G as an anomaly introduced without legislative

49 Section 24G(3) of NEMA.
50 Section 24G(5) of NEMA.
51 Section 24G(6) of NEMA. The *Uzani* judgment demonstrates that the courts allow private prosecution. See *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP); Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 1-5.
52 Section 24G(7) of NEMA.
53 Paschke and Glazewski 2006 *PELJ* 24. Also see Hall 2022 *PELJ* 7; September *Critical Analysis of the Application of Section 24G Provisions* 2.
54 Hall 2022 *PELJ* 7.
55 Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 163; Hall 2022 *PELJ* 6.
56 Paschke and Glazewski 2006 *PELJ* 261.
57 Kohn 2012 *SAJELP* 9.

explanation.[58] Kohn[59] argued that *ex post facto* environmental authorisation flies in the face of the EIA process and undermines the objectives of the integrated environmental management of the EIA process. These scholars are correct to the extent that section 24G is a departure from the orthodox EIA process that must precede the commencement of the construction phase, while section 24G requires some form of retrospective assessment.

Additionally, section 24G was criticised for undermining environmental management principles and making a mockery of sustainable development, as well as the preventive and precautionary principles[60] enshrined in section 2 of NEMA.[61] The authors argued that these principles are required by sustainable development.[62] In contrast, they argued that section 24G ought to apply only in exceptional circumstances.[63] However, the literature does not specify what could amount to an exceptional circumstance. Failure thereto could culminate in section 24G becoming a norm.[64]

Another criticism was that section 24G is prone to abuse to evade the normal EIA process.[65] Some developers opt to commence with listed activities without environmental authorisation and later apply for *ex post facto* environmental

58 Clause 2 of the Memorandum on the objects of the *National Environmental Management Second Amendment Bill* [B56B-2003].

59 Kohn 2012 *SAJELP* 9.

60 For a detailed discussion of the precautionary principle, see Kidd *Environmental Law* 9; Glazewski "Nature and Scope of Environmental Law" 1-25; Cameron "The Precautionary Principle" 29-58; Du Plessis 2004 *SAJELP* 140. The preventive and precautionary principles in s 2 of NEMA require the negative impacts of the proposed activities to be anticipated and prevented.

61 Section 2(4)(a) of NEMA; Kohn 2012 *SAJELP* 9. The environmental management principles apply to all actions of the state that may affect the environment.

62 The concept of sustainable development is contested and has been redefined on several occasions. It is used to cover several aspects of society and environment relationships. For a detailed discussion on sustainable development, see Mawhinney *Sustainable Development* 1; Glazewski "Nature and Scope of Environmental Law" 1-15; Strydom "Essentialia of International Law" 61-69; Oosthuizen, Van der Linde and Basson "National Environmental Management Act" 139-141; Couzens 2008 *SAJELP* 31; Kidd *Environmental Law* 17; Tladi *Sustainable Development in International Law* 9; Field 2006 *SALJ* 411-417; Verschuuren 2006 *PELJ* 209; Krämer and Orlando *Principles of Environmental Law* in general; Faure and Partain *Environmental Law and Economics* 79-105; Verschuuren *Principles of Environmental Law* in general; Bridger and Luloff 1999 *Journal of Rural Studies* 377. See also *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) paras 144B-D; *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) paras 44-70.

63 Paschke and Glazewski 2006 *PELJ* 24.

64 Paschke and Glazewski 2006 *PELJ* 24.

65 Kohn 2012 *SAJELP* 3; Hugo *Administrative Penalties* 55; September *Critical Analysis of the Application of Section 24G Provisions* 81.

authorisation, which undermines EIA.[66] Previous empirical studies conducted in Gauteng province[67] and case law[68] affirmed the foregoing challenge. However, in her recent empirical study Hall[69] argues that it cannot be definitively concluded that section 24G is abused.[70]

Critics of section 24G argued that it was riddled with interpretation challenges. The term was later defined in the case of *Joint Owners, Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape*[71] and corrected by introducing a definition of "commencement" in section 1 of NEMA.[72]

Another interpretation challenge was determining when one could apply for *ex post facto* environmental authorisation;[73] that is, was section 24G applicable only after the contravener of section 24F had been criminally prosecuted? It was also unclear whether section 24G rectified the unlawful activity or legalised only the activities carried out from the day the authorisation was issued.

Another contention was that the administrative fine was paid before determining the section 24G application. It remains unclear whether the administrative fine is punitive or administrative.[74] Further, it was argued that determining the administrative fine was not transparent because the then fine calculators were not made public.[75] This argument has since fallen away

66 Hugo *Administrative Penalties* 55; Paschke and Glazewski 2006 *PELJ* 25.

67 September *Critical Analysis of the Application of Section 24G* 51. September argued that there was anecdotal evidence that s 24G was abused.

68 *Body Corporate of Dolphins Cove v Kwadukuza Municipality* (8513/10) [2012] ZAKZDHC 13 (20 February 2012) para 57.

69 Hall 2022 *PELJ* 28.

70 This argument will further be explored in para 5.

71 *Joint Owners, Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape* 2011 1 SA 128 (WCC) that stated the court held that commencement was constituted by the existence of the direct nexus between the activity carried out and the activity requiring environmental authorisation.

72 Kidd *Environmental Law* 245; Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 125. The definition of this term was further amended by the *National Environmental Management Amendment Act* 62 of 2008, to read "the start of any physical activity, including site preparation and any other activity on the site in furtherance of a listed activity or specified activity, but does not include any activity required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity."

73 Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1258.

74 Hall 2022 *PELJ* 10.

75 See Plotz v MEC for Local Government, Environmental Affairs and Development Planning, Western Cape (WCD) (unreported) case number 12736/2014 of 20 May 2016.

because of the section 24G Fine Regulations that were published in 2017.[76] However, the challenges relating to administrative fines are explored further in the subsequent sections.[77] Section 24G was subsequently amended to cure some of its deficiencies.

Notably, there are many studies, as well as articles written on section 24G. For example, Paschke and Glazewski published their work in 2006.[78] September carried out her study in 2012,[79] and Hugo carried out a study in 2014.[80] In 2016 Du Toit did a study in the Western Cape,[81] while Jikijela conducted a study in KwaZulu-Natal in 2018[82] and Burford in 2019.[83] However, as of the time this research was conducted, there was not yet (as far as could be ascertained) a comparative study concerning the implementation of section 24G among different provinces. Additionally, there have been amendments to section 24G that were not covered. Hall's article is the most recent in which she conducted empirical studies, having been published in 2022. Her data are based on the study carried out in 2016-2017.[84]

The main findings of the above studies include, amongst others, that:

a) The number of applications in Hall/s study did not reflect a widespread abuse of section 24G. On the contrary, the annual number of applications was somewhat consistent, suggesting that there was no increase in the number of people applying for section 24G authorisations.

b) Section 24G is well-known and understood. However, there were also low levels of knowledge about it. Based on the numbers, whether it was a deterrent or not was not conclusive.

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76 GN R698 in GG 40994 of 20 July 2017.

77 See para 5.3 below.

78 Paschke and Glazewski 2006 *PELJ.* The article critically reviewed and assessed s 24G.

79 September Critical Analysis of the Application of Section 24G Provisions.

80 Hugo *Administrative Penalties*. The study discussed administrative penalty systems in South African law and drew lessons from the Netherlands and the United Kingdom.

81 Du Toit *Critical Evaluation of the NEMA Section 24G*. The study determined whether s 24G is an effective deterrent to prevent non-compliance.

82 Jikijela *Protection of the Environment Through the Application of Section 24G*. The study determined whether challenges raised against s 24G were warranted and the environmental considerations in the s 24G process.

83 Burford *Impact of Retroactive Authorisation*. The study investigated the impact of s 24G on sustainable development in South Africa.

84 Hall 2022 *PELJ.* The article focussed on the extent to which s 24G is used and the degree of awareness and knowledge about s 24G.

c) It cannot also be conclusively stated that section 24G is seen by developers as an option regarding whether to carry out orthodox EIA or apply for *ex post facto* environmental authorisation.

d) Concerning the nature of administrative fines, Hall suggested that this requires careful consideration.[85]

The qualitative empirical survey used in this article was conducted from 2019 to 2021 with government officials and environmental assessment practitioners.

The next part describes the methodology and justification for this study.

5 Methodology

This part first explains and justifies the research methodology followed and then analyses the empirical research findings.

5.1 Research method and limitations of the study

As stated above, this study adopted the mixed research method.[86] The first step involved analysing secondary sources of law in the case study areas to guide the practical application of section 24G.[87] The purpose was to establish uniformity in the implementation of section 24G of NEMA and identify associated challenges. Data collection methods included participant observation, documentary analysis, discourse analysis and conversation analysis.[88] The researcher primarily used a documentary analysis approach to examine the different provincial departments' standard operating procedures (SOPs), section 24G process flows, and section 24G applications.[89] Document analysis involves the study of existing documents either to understand their substantive content or to illuminate deeper meanings that their style and coverage may reveal.[90] This method is most

85 Hall 2022 *PELJ* 10.
86 Hall 2022 *PELJ* 10.
87 Also see Rantlo *Ex Post Facto Environmental Authorisation*.
88 See Kroeze 2017 *PELJ* 36; Venter *Constitutional Comparison*; Venter *Legal Research*; Barkan, Bintliff and Whisner *Fundamentals of Legal Research*; Van Hoecke *Methodologies of Legal Research*; Fisher *Legal Reasoning in Environmental Law*; Salter and Mason W*riting Law Dissertations*.
89 These documents were obtained in Gauteng and Western Cape. The author initially planned to analyse the application records for s 24G from all the case study areas. However, due to the national lockdown resulting from the outbreak of Covid-19, the researcher could not travel to the case study areas to peruse the records. The officials also did not want to provide the records in person due to the Covid-19 lockdown.
90 Ritchie "Application of Qualitative Research Methods to Social Research" 35.

suitable because it reflects how section 24G is implemented in practice, which can assist in providing insight into the challenges of section 24G of NEMA.[91]

Empirical research can be conducted either quantitatively or qualitatively. Quantitative research entails "quantitative measurement of the phenomena studied and systematic control of theoretical variables influencing those phenomena."[92] Conversely, qualitative research is "the naturalistic interpretative approach concerned with understanding the meanings people attach to phenomena within their social worlds."[93] This research followed the qualitative empirical research method. This methodology was adopted to explore how participants comprehend and perceive the practical application of section 24G of NEMA. The Faculty of Law Research Ethics Committee (LAWRec) approved the empirical study, classifying it as a low-risk study.[94]

Interviews were conducted using semi-structured, open-ended questionnaires to collect information from participants to determine their understanding and perceptions of section 24G of NEMA.[95] The interviews took place both face-to-face and virtually through Zoom and Microsoft Teams. In-person interviews occurred in December 2019 in the Western Cape, while those conducted during the COVID-19 lockdown in 2020 were done virtually via Zoom and Microsoft Teams.

Concerning the selection of participants, the author selected national government officials in the Department of Forestry, Fisheries and Environment (DFFE), as well as officials in the Gauteng Department of Agriculture and Rural Development (GDARD), the Western Cape Department of Environmental Affairs and Development Planning (DEA&DP) and the North West Department of Rural, Environment, Agriculture and Development (DREAD). The GDARD was selected because it has a Section 24G Unit that

91 At the time of the research the author chose to request recent applications pertaining to various listed activities to understand the current legal challenges in practice. These applications consisted of complete files, including all correspondence. It is worth noting that this was feasible only in the Western Cape province. Despite the availability of application forms from other provinces on the internet, the researcher opted not to use them as they did not contain all the necessary correspondence.

92 Chui "Quantitative Legal Research" 50.

93 Ritchie "Application of Qualitative Research Methods to Social Research" 35; Patten *Proposing Empirical Research* 6. Qualitative research can "provide complex textual descriptions of how people experience a given research issue". Qualitative research further shows the human side of a problem, such as "the often contradictory behaviours, beliefs, opinions, emotions, and relationships of individuals."

94 Ethics number 0150219A3 of 17 June 2019.

95 The questions were developed based on a literature survey of existing studies.

deals specifically with section 24G applications and has demonstrated an increased number of administrative fines.

Government officials from the competent authorities (those working directly with section 24G, senior officials and legal officers) were targeted because of their knowledge and expertise in the practical implementation of section 24G of NEMA in these provinces. The selection of the interviewees in national government and provincial governments was based on their expertise in assessing section 24G applications or their knowledge of the challenges raised against decisions of officials, the Minister, or a MEC in these departments. Some environmental assessment practitioners (EAPs), environmental consultants and developers who had previously submitted section 24G applications were included in the study to provide their perspectives on their perceptions of and the practical implementation of section 24G of NEMA. The EAPs and environmental consultants were selected randomly from different provinces depending on their availability, which was limited by the lack of people willing to respond during the COVID-19 lockdown.

In the Western Cape three officials of the competent authority were interviewed, and two EAPs responded. The interviews with the Western Cape officials took place in person. It was the only site that could be visited in person at the time. In Gauteng two officials from GDARD, one environmental consultant and one EAP were interviewed. Two officials of the DREAD in the North West province responded, as did one EAP. Three officials of the DFFE were interviewed. In addition, four environmental managers of parastatals were interviewed. The sixteen interviews were held with experts in the field. However, it is acknowledged that only three of the nine provinces were targeted, and the interviews reflect the views of the interviewees and cannot be extrapolated to all provinces or regarded as a reflection of the views of all officials in that department. The empirical information, therefore, reflects the views of these individuals at the time they were interviewed.

The choice of the study areas (Western Cape, Gauteng and North West Provinces) was based on the National Environmental Compliance and Enforcement Reports (NECER). The NECER 2017-18,[96] the NECER 2018-19[97] and the NECER 2019-20[98] indicate that unlawful commencement of listed activities is the most prevalent environmental non-compliance detected by the EMIs (environmental management inspectors) during the specific reporting

96 DEA 2017/18 *National Environmental Compliance and Enforcement Report* 15.
97 DEA 2018/19 *National Environmental Compliance and Enforcement Report* 18.
98 DFFE 2019/20 *National Environmental Compliance and Enforcement Report* 18.

periods. However, it is noted that the NECERs have gaps in their information, so they are not always reliable. For instance, NECERs do not reflect the number of applications received per province, the pending applications when publishing the reports, the finalised applications, and the abandoned applications. Therefore, the figures do not provide sufficiently accurate information in this regard.

The DFFE was selected as a national department with a mandate on listed activities that transgress borders.[99] The Western Cape Province was selected because it is one of the provinces where section 24G offences are prevalent. Conversely, Gauteng was selected because it has a Section 24G Unit that deals specifically with section 24G applications. Both provinces indicate an increase in the number of administrative fines in recent years. The North West was selected because it had fewer section 24G applications and fines paid despite the existence of industrial and mining activities in this province.[100]

Although adding provinces like the Free State and Limpopo was initially considered in order to enhance the geographic and sectoral diversity, they were ultimately excluded because of logistical challenges. Key obstacles included the difficulty in obtaining timely research approvals, limited access to participants, and a lack of funding. Additionally, travel restrictions due to Covid-19 public health measures at the time of data collection further limited the geographic scope of the study. However, the selected provinces together showcase a significant range of perceptions and application of section 24G, adding depth and context to the study's results, despite the ongoing limitations in national generalisability.

However, the exercise of the collection of information was hampered by a number of limitations. The process of obtaining approval from the government departments to conduct the study was tedious and lengthy. This was because it was never clear from the outset to whom the application for permission to conduct the study ought to be sent. Furthermore, as alluded to above, the NECERs do not reflect sufficient information to make deductions. Furthermore, owing to the outbreak and spread of the COVID-19 pandemic in South Africa, the Minister of Cooperative Governance and Traditional Affairs (COGTA) prohibited the movement of people.[101] Consequently, the author could not visit the selected case study areas except for the Western Cape DEA&DP. Therefore, the author did not have access to the records of the section 24G applications in the other provinces, save for what was available

99 Section 24C(2) of NEMA.
100 DFFE 2019/20 *National Environmental Compliance and Enforcement Report* 18.
101 GN R398 in GG 43148 of 25 March 2020.

on the Internet, which was not complete. In this context the findings of the study cannot be reasonably extrapolated to the national context, as regional differences in environmental practices, regulatory documents and local socio-economic dynamics, coupled with the inherent limitations of snowball sampling, specifically its reliance on a non-random selection process and the restricted criteria for participant referral, further constrain the generalisability of the results.

5.2 Findings of the empirical study

This section of the article discusses the findings emanating from the analysis of the internal instruments of the departments guiding the implementation of section 24G, the application records pursued at the Western Cape and interviews conducted with different participants in the study. The findings are discussed thematically, distilling the current practical challenges from section 24G of NEMA implementation in the different provinces.

5.2.1 Internal documents regulating the implementation of section 24G

The study revealed that different competent authorities have internal documents regulating the implementation of section 24G.[102] An official from DFFE stated that the Department was developing an internal Section 24G Process Flow and Frequently Asked Questions (FAQ) document to guide the implementation of section 24G.[103] Although the documents had not been finalised then, the Section 24G Process Flow provides a step-by-step process and sets out the proposed timeframes for determining the section 24G application. The FAQ composes a list of questions and answers related to implementing section 24G.[104]

In Gauteng section 24G is implemented by the Section 24G Unit. The GDARD also developed internal guidelines with a Section 24G Process Flow, which had not been finalised when writing the article.[105] The Directorate: Environmental Governance (Legal, Appeal and Enforcement) deals with section 24G applications in the Western Cape. The Western Cape DEA&DP has developed a SOP which guides the implementation of section 24G of NEMA. The SOP sets out the relevant legislation that must be considered and

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102 The questions posed sought to find out if the officials follow any clear instructions in processing s 24G applications.

103 At the time of submission of this article for publication, these documents were still subject to consideration for approval by the DFFE.

104 However, since these documents still have to be approved, they cannot be discussed in detail.

105 These guidelines cannot be discussed in detail in this paper.

identifies different officials and their roles in the section 24G application process. Further, the SOP describes the procedure and indicates the timeframes that must be followed as set out in section 24G(1) of NEMA. Additionally, it also contains FAQs. In addition, the Western Cape has developed its own Section 24G Process Flow.

5.2.2 Drivers for section 24G applications

As a starting point, the author sought to establish the reasons why developers apply for section 24G authorisation.[106] This investigation aimed to establish whether section 24G is still relevant. Firstly, a number of participants were of the view that some section 24G applicants commence with unlawful activities due to ignorance of the law concerning the listed activities. Different developers, including government officials, companies and individuals, raised ignorance of the law as one of the reasons for the applications. The government officials in the Western Cape and North West stated that most small developers, such as farmers, believe that they are allowed to conduct any activity they deem fit on their property. However, these officials countered the foregoing submission and stated that while this interpretation may be valid for some developers, such as individual developers, this may not necessarily be the case for other developers belonging to certain groups, such as farmers' associations, big corporations and organs of state. It was stated that farmers' associations, organs of state and big corporations are more likely to be familiar with the laws regulating their operations, thus ruling out a defence of ignorance of the law.

These officials stated that in some provinces such as the Western Cape and North West the farmers have regular meetings with competent authorities and are informed about laws regulating their operations. As for big corporations and organs of state, they have compliance departments that are mandated to advise them on legal requirements. Therefore, this article argues that although ignorance of the law is sometimes raised as the reason for the commencement of unlawful activities, the participants show that this excuse is not always valid. Hall's[107] study affirmed that businesses are aware of the requirement to apply for an environmental authorisation before the commencement of the listed activities and section 24G. Approximately 77.9 per cent of her respondents acknowledged knowledge of section 24G.

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106 The question posed in this regard was what were the reasons people apply for an *ex post facto* environmental authorisation and what were the drivers for the commencement of the unlawful activities.

107 Hall 2022 *PELJ* 18.

A participant from a parastatal stated that another reason for section 24F contraventions is the carrying out of maintenance operations for some of their infrastructural projects. This usually occurs as a matter of urgency or an inadvertent breach of the threshold for exclusions for maintenance operations. These organisations often find themselves having to choose between complying with the cumbersome EIA requirements or proceeding with the maintenance and applying for *ex post facto* environmental authorisation later. Some of these entities include state organs that have to provide services during emergency situations. The initial section 24F provided that a developer who contravened section 24F in response to an emergency to protect life, property or the environment could raise such a defence in the event of prosecution. This defence was deleted during the amendment of NEMA in 2013.

Section 30A, inserted into NEMA in 2013, subsequently provides a solution for emergency situations.[108] Developers facing emergency situations may seek authorisation under section 30A of NEMA. This section authorises the competent authority to permit any individual, either of its own accord or upon a written or oral request from a developer, to carry out specified activities without the need for environmental authorisation. This provision applies when the developer is required to prevent or mitigate an emergency situation or its associated impacts.[109] Thus, section 30A may protect the developers against contravening section 24F.

Another driver for section 24G applications was attributed to the duty to provide services. The competent authority officials stated that some contraveners, particularly organs of state, cite the obligation to fulfil their constitutional mandate of service delivery as the reason for their contravention of section 24F. The foregoing may happen in two ways: where the organs of state contravene section 24F in performing service delivery and when they seek to expand or upgrade existing unlawful activities, as explained in the following paragraphs. This places the organs of state in a quandary because they are bound by section 8 of the Constitution to respect and protect the Bill of Rights and at the same time must observe the environmental management principles contained in section 2 of NEMA. Unfortunately, according to them,

108 An "emergency situation" is defined as a "situation that has arisen suddenly that poses an imminent and serious threat to the environment, human life or property, including a 'disaster' as defined in section 1 of the Disaster Management Act, 2002 (Act 57 of 2002), but does not include an incident referred to in section 30 of this Act."

109 Section 30A of NEMA.

section 24G does not specifically refer to activities aimed at service delivery as an exclusion.

As stated above, the participants indicated that sometimes organs of state have to apply for an *ex post facto* environmental authorisation while they are not responsible for the contraventions. For instance, this often happens in informal settlements where people engage in land grabs of the municipality's land and clear the vegetation beyond the permitted threshold. The challenge usually arises when the municipalities have to provide services in these areas because, in some instances, they must apply for an *ex post facto* environmental authorisation before proceeding with service delivery. In such cases, the municipalities have to bear the brunt of the contravention of section 24F of NEMA. The people responsible for paying the administrative fine inadvertently become the taxpayers.

Some participants, composed of officials and EAPs, stated that some developers voluntarily apply for *ex post facto* environmental authorisations to bring their unlawful activities into the regulatory loop. This aligns with the language in section 24G(1), which suggests that it is voluntary. Other government officials stated that some applicants apply for such *ex post facto* authorisation, subject to the enforcement notice issued against them or subject to plea bargaining with the prosecution.[110] This continues to raise the question of whether a developer who contravened section 24F can legally be compelled to apply for *ex post facto* environmental authorisation. There is a developing trend where courts believe that a developer can be legally obliged to apply for an *ex post facto* environmental authorisation.[111] Notably, while it may be inferred from the reading of section 24G that it is a voluntary process, this does not exclude the possibility of developers being compelled to apply for *ex post facto* environmental authorisation through enforcement notices.

A competent authority official noted that some developers seek *ex post facto* environmental authorisations to expand their unlawful activities. Typically, these developers are required to obtain an environmental authorisation for their current unlawful activities before they can apply for additional authorisations. Another reason cited for seeking *ex post facto* environmental authorisations is that many financial institutions require proof of environmental compliance when developers apply for financial assistance or engage in specific transactions. Consequently, developers are compelled to secure

110 Kidd, Retief and Alberts "Integrated Environmental Assessment and Management" 1250.

111 *York Timbers Proprietary Limited v National Director of Public Prosecutions* 2015 1 SACR 384 (GP).

these authorisations before they can obtain funding or complete those transactions.

The above discussion outlines several reasons for violating section 24F and, ultimately, for seeking *ex post facto* environmental authorisations. These reasons, over and above the mention of unscrupulous developers, could not be elucidated from the existing literature. Additionally, the answers emphasise some of the challenges related to these reasons.

5.2.3 Validity of challenges of section 24G of NEMA

As stated above, section 24G, from its insertion into NEMA, was riddled with challenges, some labelled unintended consequences.[112] Given the subsequent legislative amendments made to section 24G of NEMA, the author investigated whether these challenges are still valid.

5.2.3.1 Interpretation issues

The discussion with different participants indicated that one of the challenges that remains with section 24G is its interpretation. While the interpretation issues raised in the literature have been addressed in legislative amendments, there are still remaining interpretation challenges. Participants who were competent authority officials from the Western Cape and the North West submitted that every contravention of section 24F of NEMA falls within the scope of section 24G. However, an official from DFFE argued to the contrary. This official stated that only listed activities requiring environmental authorisation for both the construction and operational phases fall within the scope of section 24G. For instance, activity 9 of Listing Notice 1 (GN R982) provides for "the development of the infrastructure exceeding 1000 metres" in length for the bulk transportation of water or stormwater. In contrast, activity 10 of Listing Notice 1 provides for "the development and related operation of infrastructure exceeding 1000 metres" in length for the bulk transportation of sewage, effluent, process water, wastewater, return water, industrial discharge or slimes. Activity 9 requires an environmental authorisation only for the development of the facility, while in contrast, activity 10 mentions the development and operational components.

Another DFFE official was of the opinion that a developer can apply for *ex post facto* environmental authorisation for unlawful activities only with an operational component that is not completed. Therefore, it is not in all instances that the developer, who has contravened section 24F, can apply for

112 See para 4 above. Also see Hall 2022 *PELJ* 7.

an *ex post facto* environmental authorisation in terms of section 24G of NEMA. The government officials from the other provincial competent authorities and EAPs did not draw this distinction and were of the opinion that section 24G applications can be made for all the listed activities.

If the competent authorities interpret section 24G differently in this regard, it may benefit some section 24G applicants to apply for rectification to the DFFE rather than the province. It seems, therefore, that there may be a possible inconsistency in the interpretation and application of section 24G of NEMA across different competent authorities, in particular, the three competent authorities that participated in the study and the DFFE.

5.2.3.2 Lack of uniformity in the contents of the EIA report

The author asked about the procedures followed during the *ex post facto* environmental authorisation application, whether the applicants have to follow the basic assessment or the full EIA procedures.[113] The competent authority officials in the three provinces noted a lack of uniformity in the assessment procedures followed and the content of the assessment reports. While section 24G sets out the content of the assessment report, it does not set out the assessment procedure to follow compared to the *ex-ante* environmental authorisation application.[114] The participants showed that the competent authorities in the case study areas have different perceptions of section 24G and therefore follow divergent approaches.

First, participants from the Western Cape indicated that section 24G does not prescribe a basic assessment or full EIA procedures. As the competent authority, they usually inform the applicant of the assessment procedure to follow and the contents of the assessment report depending on the merits of each case. The type of assessment required and the assessment report must be tailored to fit the different circumstances of each case. The decision on the procedure and the content of the assessment report are influenced by various factors. The competent authority's decision may also be influenced by the inspection outcome that the compliance and enforcement unit may carry out.[115] Furthermore, the type of activity in question, the extent to which the

113 As set out in GN R983 in GG 38283 of 4 December 2014 as amended.

114 The GN R982 procedure followed in applying for *ex ante* environmental authorisation is two-pronged. The developer of a listed activity must either carry out a basic assessment or a full EIA. The procedures for both a basic assessment and a full EIA are set out in the 2014 EIA Regulation as amended. The regulations are published in GN R982 in GG 38282 of 4 December 2014, as amended.

115 When a developer applies for *ex post facto* environmental authorisation, the compliance and enforcement unit of the relevant competent authority must conduct an inspection.

activity is commenced, and the nature of the receiving environment also inform the type of assessment to be carried out and the assessment report.

Conversely, the competent authorities in Gauteng and the North West equate the section 24G assessment report to basic assessment reports. The effect of this is that the contents are similar to those in Appendix 1 of the 2014 EIA Regulations. However, in some instances the assessment report may take the form of Appendix 2 of the 2014 EIA Regulations. At other times the choice of the procedure is influenced by the list of activities in which the activities appear. Therefore, in the Western Cape the officials have more discretion as to which procedure to use, while it seems that Gauteng and North West determine the relevant procedure in terms of the applicable listed activity.

5.2.3.3 Public participation

The competent authority officials indicated that inadequate public participation provisions were a challenge. Section 24G requires that the applicants for an *ex post facto* environmental authorisation must indicate the public participation process followed during the application process.[116] However, how the public participation process had to be conducted was not prescribed. The recent 2017 section 24G Fine Regulations set out the public participation process that the applicant must follow. However, the section 24G Fine Regulations are not as detailed and descriptive as the process set out in the 2014 EIA Regulations. Summarily, the section 24G Fine Regulations requires an advertisement published in a newspaper circulating in the area and that the applicant's website should provide details about the application and inform the interested and affected parties (I&APs) where they can register as I&APs and submit their comments. Although the regulations prescribe the public participation procedure, they do not expressly provide for the I&APs to comment on the application or the assessment reports. Additionally, the Regulations do not require the applicant to indicate that he or she has addressed the comments of the I&APs. Therefore, the public procedure for the *ex post facto* environmental authorisation seems less stringent and merely amounts to informing the I&APs about the application but is not as detailed as the procedure in the 2014 EIA Regulations.

One of the files perused revealed that during one of the *ex post facto* environmental authorisation application processes, the developer only stated the background of the application and discussed the environmental management programme (EMPr) contents with I&APs. There was no

116 See s 24G(1)(vii)(dd) of NEMA.

indication of I&APs perusing the documents themselves. This brings the credibility of the process into question because the I&APs might be told one thing, and the application and the EMPr (where applicable) might reflect another. It seems, therefore, that section 24G provides for a watered-down public participation process, a problem which should be addressed.

5.2.3.4 Section 24G undermines environmental management principles

The literature suggests that section 24G of NEMA undermines sustainable development and the environmental management principles enshrined in section 2 of NEMA.[117] Contrary to this assertion, the competent authority officials, in their different capacities, held a unanimous view that section 24G of NEMA does not undermine the environmental management principles. According to them, section 24G aims to give effect to the environmental management principles. The participants stated that the section 24G application should be viewed as an application for environmental authorisation, albeit post the commencement of the listed activity. Therefore, the section 24G application cannot be considered in isolation but must be dealt with in the light of the environmental management principles and objectives of NEMA in its entirety. In dealing with the section 24G applications, the competent authorities are bound by section 2(1) of NEMA. Section 2(1) of NEMA states that environmental management principles apply to all actions of all state organs that may significantly affect the environment. Therefore, the competent authorities must consider the environmental management principles when dealing with section 24G applications.

To affirm the foregoing view, the Western Cape DEA&DP's SOP explicitly requires the competent authorities to consider all section 24G applications in line with all relevant legislation for sustainable development. Similarly, the GDARD's Section 24G Process Flow has a similar provision. Conversely the North West did not have the internal documents regulating section 24G applications.

When section 24G(1)(vii)(bb)[118] is read with section 2(4)(viii),[119] it becomes evident that section 24G seeks to give effect to the environmental

117 Paschke and Glazewski 2006 *PELJ* 24; Hugo *Administrative Penalties* 56; Kohn 2012 *SAJELP* 9.

118 Section 24G(1)(vii)(bb) of NEMA provides that the competent authority may request the s 24G applicant to compile a report containing the assessment of the impacts of the activity on the environment.

119 Section 2(4)(viii) of NEMA provides that sustainable development requires that the impacts must be anticipated and prevented, and where they cannot be altogether prevented, be minimised and remedied.

management principles set out in section 2(4). The participants argued that section 24G allows developers to carry out an assessment, albeit post-commencement, and enables them to identify and consider adverse environmental impacts and cease further environmental degradation. Further, section 24G presents the developers with an opportunity to formulate mitigation measures for the impacts that cannot be minimised or avoided. Additionally, the participants argued that section 24G presents the competent authority with an opportunity to authorise the continuation thereof, order the cessation of the operations, direct decommissioning of the unlawful activity or propose changes to protect the environment and ensure socio-economic development. Therefore, the criticism that section 24G undermines environmental management principles seems no longer valid.

5.2.3.5 Abuse

Some of the critics of section 24G also suggest that its process is open to abuse.[120] Given the amendments to section 24G, it was imperative to determine if the criticism still has merit. The participants had divergent views in this regard.[121] Government officials participating in the study recognised that some developers abuse section 24G. Although proving these abuses can be difficult, the officials felt they had gained sufficient experience to identify instances of abuse. They noted that certain competent authorities keep records of repeat offenders to help address this issue. However, there is currently no national database to track these abuses.

Linked to the allegations of abuse of section 24G is the anecdotal evidence that some developers seem to budget for the administrative fine. The competent authority officials believe this is a trend in the applications of some big corporations. However, this may not necessarily be true with small developers such as small-scale farmers, particularly in the Western Cape and the North West.

The participants further indicated that deterrent measures have been put in place to curb the abuse of section 24G. The increment in the maximum administrative fine from R1 million to R5 million could serve as a deterrent measure that reduces the level of abuse of section 24G.[122] In her recent study,

120 Kohn 2012 *SAJELP* 1; Hugo *Administrative Penalties* 55; September *Critical Analysis of the Application of Section 24G Provisions* 51; Paschke and Glazewski 2006 *PELJ* 24.

121 The abuse of s 24G may be deduced from the fact that there are "repeat offenders" for the *ex post facto* environmental authorisation.

122 The administrative fine has since been increased to the maximum of R10 million.

Hall[123] found that the impact of fines differs between affluent and small businesses. Most of the businesses in her study indicated that they could afford administrative fines, but a few indicated that they could not afford the fine. Therefore, there is no definitive evidence that the maximum administrative fine serves as a deterrent measure.

Additionally, the participants highlighted that the possibility of prosecution pursuant to section 24G(6) of NEMA, an order for rehabilitation, and the possibility of a court order in terms of section 34(3) of NEMA are also deterrent measures that are likely to curb the abuse of section 24G of NEMA.[124] Although the possibility of criminal prosecution is a deterrent measure, the competent authority officials showed that it is not easy to institute criminal prosecutions against offenders. They state the lack of capacity of prosecutors who have knowledge of environmental law offences as the first reason. Secondly, competent authorities indicated that obtaining and securing the evidence are still challenges, such that in some instances, by the time the case proceed, the evidence would be destroyed. However, some participants argued that the foregoing assertions are refutable because the Department of Justice and the Justice College conduct the training for public prosecutors on environmental matters.[125] Therefore, it is argued that the willingness of the competent authorities to refer contraveners to prosecution needs further investigation.

Some of the developers further stated that the internal processes in some entities and businesses that must be followed before the commencement of any listed activity or submission of *ex post facto* environmental authorisation application render it difficult for some developers to abuse section 24G.[126] For instance, some developers have internal or in-house environmental law officers who must advise the entities on whether the proposed projects require environmental authorisation.

While section 24G was amended to include some deterrent measures to discourage the abuse of section 24G, this has brought its own challenges. The deterrent measures deter not only the *mala fide* offenders from abusing

123 Hall 2022 *PELJ* 24.

124 The recent judgement in *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP) has exacerbated this situation where private prosecution was permitted where the accused was issued *ex post facto* environmental authorisation.

125 See Murombo and Munyuki 2019 *PELJ* 1-41; Kidd *Protection of the Environment* in general.

126 Some of these measures include the possibility of being held personally liable for the payment of the administrative fine by the employee that authorised the commencement of the unlawful activity.

section 24G but also the *bona fide* offenders who wish to regularise their activities. Participants who are developers argued that some developers are concerned that they will be heavily penalised if they apply for an *ex post facto* environmental authorisation. Therefore, they elect to leave their activities in perpetual unlawfulness. Consequently, one cannot definitively claim that there is an abuse of section 24G of NEMA. Additionally, it cannot be conclusively stated that the built-in deterrent measures in section 24G effectively deter potential developers.

5.2.3.6 Shorter, less rigorous and cheaper procedure

Some critics of section 24G suggest that the *ex post facto* environmental authorisation process is shorter, less rigorous and cheaper than the ordinary basic assessment and full EIA processes. The participants in this study expressed divergent views on this matter. The competent authority officials stated that the duration of the *ex post facto* environmental authorisation process differs from one province to another. This results from the fact that some provinces, such as the Western Cape, have prescribed timeframes for the *ex post facto* environmental authorisation application process, while the other two provinces do not have prescribed timeframes. Secondly, the capacity of the staff in each province affects the duration of the application process. Participants in some provinces highlighted that they are understaffed and have a backlog of applications. This, in turn, influences the duration of the application process.

The officials from the Western Cape stated that the normal period for an *ex post facto* environmental authorisation is nine months. The foregoing position was affirmed by four section 24G application records that the author perused in this province. Conversely, the application process in Gauteng takes up to two years to finalise. North West officials indicate that the application can take two to three months to conclude if all the requested information is submitted. The duration of the application process also depends on whether the applicant submits all the required information in time. Furthermore, if the applicant appeals against the proposed administrative fine, the appeal process may delay processing the *ex post facto* environmental authorisation application.

Another factor affecting the duration of the application process is the lack of clarity concerning compliance with section 24O(2) of NEMA, which requires consultation with other state departments during decision-making. The said consultation must happen after the submission of the application. The Western Cape SOP stipulates when the application should be sent to other state departments. However, this is not the case at the DFFE and the other

two provinces. Although the Western Cape stipulates that consultation between different state departments must happen, the challenge is that there are no timeframes within which the said consultation must be completed. Therefore, this negates the assumption that the *ex post facto* environmental authorisation process takes a shorter time than the normal environmental authorisation application.

Regarding the question of whether the *ex post facto* environmental authorisation process is less rigorous, the participants stated that the process is not less rigorous. However, this does not rule out the possibility that it may be less rigorous in certain circumstances. The responsibility to ensure that the process is not less rigorous lies with the competent authority. The competent authority officials argued that the scope of the assessment process depends on the receiving environment where the activity is carried out and the extent of environmental degradation that has occurred.

Regarding the question of whether the *ex post facto* environmental authorisation is cheaper, the competent authority officials argued that it is a misconception that section 24G of NEMA provides for a cheaper process. They argued that the *ex post facto* environmental authorisation application process is likely to be more expensive than the normal EIA under certain circumstances. This is because the developer must pay the fees of the EAP as well as the administrative fine. If the competent authority issues a directive that the developer must cease the operations wholly or partly, the applicant will likely incur standing costs, or if rehabilitation must take place, those costs also have to be taken into account.

Furthermore, the applicant may be subjected to criminal prosecution[127] wherein if they are convicted, costs may be awarded against him or her (private prosecution) or the applicant may be fined.[128] If the foregoing occurs, section 34(3) of the NEMA allows the court to make an inquiry and assess the monetary value of any advantage gained or likely to be gained from the contravention. Subsequently, the court may then order an award of damages or compensation or a fine equal to the amount assessed. Against the foregoing, it can be inferred that it is not conclusive that the *ex post facto* environmental application process is not shorter, less rigorous or cheaper.

127 See s 24G(6) of NEMA.
128 See s 49B of NEMA.

6 Conclusion

This article has aimed to provide a critical analysis of the practical application of section 24G of NEMA to distil the current theoretical and practical challenges of section 24G. The article has discussed the background of section 24G of NEMA and highlighted that it was inserted to rectify the *lacuna* that occurred in both in ECA and NEMA at the time. The author has argued that although section 24G brought certainty of whether *ex post facto* environmental authorisation is permitted, the section had several unintended consequences and that there were practical and theoretical challenges in section 24G. While legislative amendments addressed some of these challenges, some remain. They include, amongst others, interpretation challenges, the alleged abuse of section 24G process and administrative fine. The author then discussed a qualitative empirical survey undertaken to determine the application of section 24G of NEMA and to identify any further challenges that may not have been discussed in the literature.

An empirical study undertaken in the Western Cape, Gauteng and Northwest as well as with officials of the DFFE, environmental assessment practitioners and environmental managers of parastatals considered the theoretical challenges in the light of the practical application of section 24G. The findings are limited to the views of these participants and do not necessarily indicate the general view of all officials, environmental assessment practitioners and environmental managers in these provinces. It was found that the officials consider the sustainable development and environmental management principles in section 24G applications to be adequate. However, the fact that a development may already have impacted on the environment may indicate that the preventive and precautionary principles could have been undermined.

Additionally, the study found that criticism that *ex post facto* environmental authorisation is shorter, less rigorous and cheaper may no longer be valid. The duration of processing the application, and the rigour and cost of *ex post facto* environmental authorisation application depend on different circumstances. Concerning the abuse issue, it could not be concluded with certainty that this criticism is still valid. Additional challenges that came to the fore include interpretation challenges and a lack of uniformity. Some officials argued that some developers abuse the section 25G procedure, while the environmental managers and environmental assessment practitioners indicated that larger corporations have legal advisors who assist them in ensuring that they apply for environmental authorisation as needed. Section 24G does not set out the public participation procedure. However, the section 24G Fine Regulations has more details. However, these Regulations should

be amended to align with the publication participation procedure set out in the 2014 EIA Regulations.

The study also reveals some differences in interpretation between the DFFE and the provinces. These include, amongst others, that some activities require authorisation for commencement while others require authorisation for commencement and operations. This has implications for whether a developer who is responsible for unlawful activity must apply for section 24G authorisation or not. Seemingly, the person responsible for the commencement of the unlawful activity, which requires environmental authorisation only for commencement, not the operational phase, does not need section 24G environmental authorisation.

Therefore, the challenges of interpretation, uncertainty on the nature of the administrative fine, and undermining the environmental management principles are still relevant. There is some evidence that the abuse of section 24G, short and lesser process, and public participation are no longer valid, also in light of the 2022 NEMA amendments.

Against the foregoing, the author recommends that section 24G is still relevant in the South African legislation as some developers (especially small-scale developers) do not always know about the listed activities and the need to apply for an environmental authorisation. The Western Cape provides more leeway to the officials to decide what type of assessment needs to be undertaken. They base their decision on the inspection and various other information. Section 24G allows for alternative types of instruments to be used, and it may be that a basic assessment or full EIA procedure is not necessary for each section 24G application. There seems to be a need, however, for the provinces and the DFFE to jointly develop the standard operation procedures or guidelines for section 24G applications that may apply across the country concerning the practical application of section 24G in order to standardise its application.

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National Environmental Management Second Amendment Bill [B56B-2003]

List of Abbreviations

COGTA	Cooperative Governance and Traditional Affairs
DEA	Department of Environmental Affairs
DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
DFFE	Department of Forestry, Fisheries and the Environment
DREAD	Northwest Department of Rural, Environment, Agriculture and Development
EAP	environmental assessment practitioner
ECA	Environment Conservation Act 73 of 1989
EIA	environmental impact assessment
EMI	environmental management inspector
EMPr	environmental management programme
FAQs	frequently asked questions
GDARD	Gauteng Department of Agriculture and Rural Development
I&APs	interested and affected parties
MEC	member of the executive council
NEMA	National Environmental Management Act 107 of 1988
NECER	National Environmental Compliance and Enforcement Report
PELJ	Potchefstroom Electronic Law Journal
RoD	record of decision

SAJELP	South African Journal of Environmental Law and Policy
SALJ	South African Law Journal
SOP	standard operating procedure