EX POST FACTO AUTHORISATION IN SOUTH AFRICAN ENVIRONMENTAL ASSESSMENT LEGISLATION: A CRITICAL REVIEW

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Abstract

One of the fundamental tenets underlying environmental assessment both internationally and in South Africa is that it is anticipatory in nature in that it is essentially an evaluation of the effects likely to arise from a major project or other action significantly affecting the natural or artificial environment. Environmental impact assessment (EIA) is therefore a systematic and integrative process for considering possible impacts prior to a decision being taken on whether or not a proposal should be given approval to proceed.

This article argues that the current legislative basis for environmental assessment in South Africa, namely Part V of the Environment Conservation Act 73 of 1998 (ECA) and regulations made under it, reflects this philosophy. It argues that the phenomenon of *ex post facto* or retrospective environmental authorisation is *ultra vires* and thus not permissible under the current legislative regime.

Finally the article outlines and assesses the environmental assessment regime under the National Environmental Management Act 107 of 1998 (NEMA) and recent amendments to it under the NEMA Amendment Act 8 of 2004, which will in future govern the environmental assessment process. The amending Act introduces a new section 24G into the anticipated environmental assessment regime which will permit *ex post facto* or retrospective environmental authorisation. The authors argue that this is an unwelcome development which will militate against the purposes underlying environmental assessment.

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