

**The  
groundWork  
Report  
2002**

**Corporate  
Accountability  
in  
South Africa**

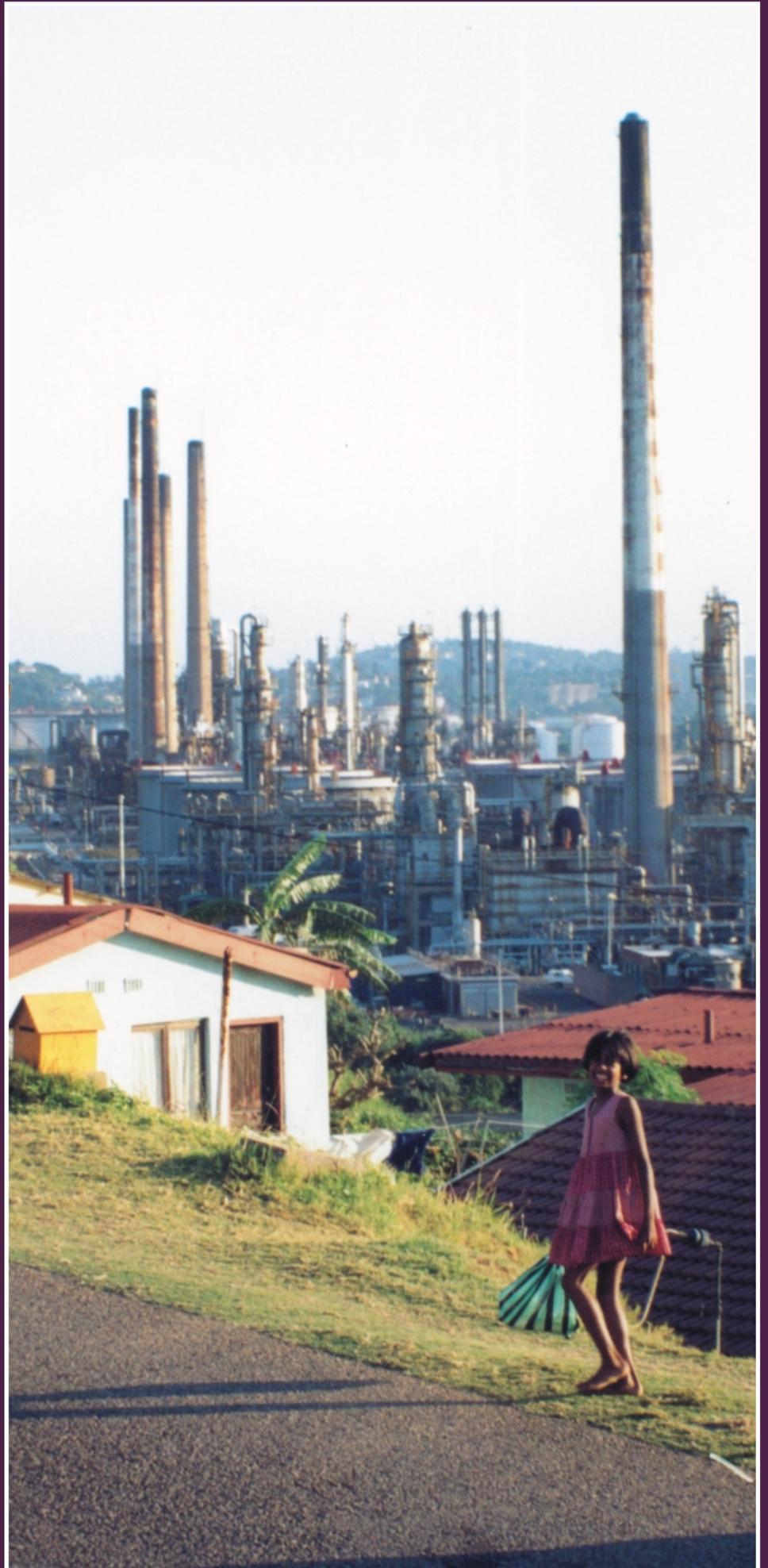
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**CORPORATE ACCOUNTABILITY**



## *The groundWork Report 2002:*

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# **Corporate Accountability in South Africa: The petrochemical industry and air pollution**

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COVER PHOTO:

*A young girl from Merebank (South Durban) walks through her neighbourhood with the Shell and BP refinery just down the hill.*



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## Acronyms

<b>ANC</b>	African National Congress
<b>APPA</b>	Atmospheric Pollution Prevention Act
<b>AQ</b>	Air Quality
<b>AQM</b>	Air Quality Management
<b>BASD</b>	Business Action for Sustainable Development
<b>CAER</b>	Community Awareness and Emergency Response
<b>CAIA</b>	Chemical and Allied Industries Association
<b>CAPCO</b>	Chief Air Pollution Control Officer
<b>CONNEPP</b>	Consultative National Environmental Policy Process
<b>DEAT</b>	Department of Environmental Affairs and Tourism
<b>DTI</b>	Department of Trade and Industry
<b>DWW</b>	Durban Waste Water
<b>EIA</b>	Environmental Impact Assessment
<b>EIP</b>	Environmental Improvement Programme
<b>EMCA</b>	Environmental Management Cooperation Agreement
<b>GEAR</b>	Growth, Employment and Redistribution (macro-economic policy)
<b>IDP</b>	Integrated Development Plan
<b>IDZ</b>	Industrial Development Zone
<b>IMF</b>	International Monetary Fund
<b>MEC</b>	Member of Executive Committee (in a provincial government)
<b>MPP</b>	Multi-point plan
<b>NEMA</b>	National Environmental Management Act
<b>NGO</b>	non-governmental organisation
<b>SEA</b>	Strategic Environmental Assessment
<b>SDCEA</b>	South Durban Community Environmental Alliance
<b>SDEF</b>	South Durban Environmental Forum
<b>tbpd</b>	thousand barrels per day
<b>TNC</b>	transnational corporation
<b>UNCED</b>	United Nations Conference on Environment and Development
<b>UNEP</b>	United Nations Environment Programme
<b>UOS</b>	Umbogintwini Operations Services
<b>UIA</b>	Umbogintwini Industrial Association
<b>VOCs</b>	Volatile organic compounds
<b>WSSD</b>	World Summit on Sustainable Development
<b>WTO</b>	World Trade Organisation



## Introduction

Each year **The groundWork Report** will give an account of the state of environmental justice in South Africa in relation to a focus theme. 'Corporate accountability' is the theme of this first report. It is chosen both as an urgent issue for the environmental justice movement in South Africa and as a key concern of global civil society in the run up to the 2002 World Summit on Sustainable Development (WSSD).

Whilst the WSSD is being held in Johannesburg, it is part of a much longer process which opened 30 years ago at the United Nations (UN) Conference on Human Environments in Stockholm. Held in response to civil society concerns about the degradation of the environment, Stockholm established the United Nations Environment Programme (UNEP). The World Commission on Environment and Development was established 10 years later and produced the Brundtland Report in 1987. In response to its recommendations, the UN Conference on Environment and Development (UNCED) was held in Rio in 1992. Ten years on, the World Summit on Sustainable Development (WSSD) is intended to review Agenda 21, the programme of action agreed at Rio, and devise new ways of making it work.

Apartheid South Africa had little to do with this process. That democratic South Africa is hosting the WSSD is a potent symbol of change within the country. The sustainable development process itself has also been subject to change as it has emerged alongside what we call 'globalisation'. Globalisation is often represented as if it were the force of an impersonal history outside of human control. It is certainly the case that no-one is fully in control of 'history' but this representation obscures the fact that particular social actors are actively promoting and guiding the process of globalisation in their own interests: there is a globalising agenda, it is coherently articulated as the 'Washington consensus', it is actively promoted by the major powers, and the International Monetary Fund (IMF), the World Bank and the World Trade Organisation (WTO) have both formal and informal mandates to make and enforce the rules through which it is implemented. Those rules are rigged in the interests of global capital whose exemplary organisational form is the transnational corporation (TNC).

The consequences of this agenda can be seen in growing world inequality: the richest 1% of people now earn more than the poorest 60% and, while average global incomes rose by 5.7% between 1988 and 1993,



all the gains went to the richest 20%. The poorest actually got poorer. Poverty is now a central issue in the sustainable development process, but the globalisation agenda has infiltrated this process and turned it from its potential as a point of resistance within the orders of globalisation towards an accommodation with the dominant forces of globalisation. TNCs are already privileged participants in setting the global rules of economic management through their access to those governments that have real power and their participation in WTO negotiating fora from which other social actors are excluded. Since the Rio conference, they have been rapidly expanding their influence in the sustainable development process as well, representing themselves as 'partners' in sustainable development while simultaneously ensuring the exclusion of proposals for mechanisms of legal compliance and accountability at the international level.

David Harvey (1996) identifies three discourses of environmental management that have emerged in this context. The **neo-liberal** discourse of the Washington consensus puts growth first and disregards external costs particularly when those costs are imposed on anyone without the power to make a fuss. **Ecological modernisation** was effectively endorsed by governmental negotiators at UNCED and subsequently by the World Bank, though not the IMF or WTO. This discourse allows for state regulation to compensate for 'market failures'. It has also advanced the model of stakeholder participation but in a way that obscures unequal relations of power between social actors. The dominant interest of global capital has, however, substantially shaped the discourse to give increasing prominence to market mechanisms. **Environmental justice** is a rights- or values-based discourse which locates environmental degradation within the relations of power which determine development. It thus marks a point of resistance within the struggle for control of natural and labour resources that is called 'development'.

At a pragmatic level, environmental justice involves an engagement with the powerful - either for immediate relief from, and mitigation of, extreme conditions of injustice or to achieve tactical gains aimed at changing the mechanisms through which environmental injustice is produced. These mechanisms include:

1. The **externalisation** of costs incurred in modern processes of production but not accounted for within the market price. On the one side, they constitute free benefits to the producer. On the other, they appear as uncompensated costs to communities and workers, through the loss of resources damaged by pollution or through their health, or to the broader public who most usually bear the remediation costs.
2. **Enclosure** involves the appropriation of a common resource and the dispossession of those who previously had access to the resource, whether by direct force, by technological superiority (as when modern trawlers compete against traditional fishing techniques), or by commodifying goods which were previously free.
3. **Exclusion** relates to decision-making power in the market and in society and hence to governance. Given the weight of economic forces in shaping broader social institutions and relations, these two aspects of exclusion frequently reinforce each other. The institutions of the market are specifically designed to remove decision making from the public sphere and so exclude all who do not have an

1 - Provided that the call for corporate accountability advances democratic control over 'development' processes, and builds people's power to exercise that control, it is not an 'un-strategic' tactic.



interest in profit. Thus, those who are dispossessed or who carry the externalised costs of production, are prevented from contesting the theft or contamination of their resources. The call for corporate accountability is precisely about challenging this exclusion. **The groundWork Report** for 2002 therefore focuses primarily on this mechanism of environmental injustice.

At a strategic level, environmental justice asserts that another world is possible. It affirms that social and economic equality are necessary conditions for sustainable development and can be achieved only where people recognise each other's environmental rights and conceive development as a positive relationship with the environment.

## ***Corporate Accountability in South Africa: The petrochemical industry and air pollution***

The call for corporate accountability is made at the pragmatic level of the environmental justice agenda. It is a tactical response to the reality of corporate power and abuse which it seeks to regulate by democratic means and in the public interest<sup>1</sup>. Corporate accountability is thus embedded in the broader frame of environmental governance to which government, industry and civil society (including NGOs, labour and communities) variously contribute. In social terms, the balance of power within and between these major stakeholders largely determines the social and environmental outcomes. In formal terms, corporate accountability is concerned with what rules, norms and standards apply to corporate behaviour and who frames them, how that behaviour is monitored and reported and who has access to that information, and how compliance is secured.

This report seeks to describe the present state of governance for corporate accountability in the South African context. It focuses on the petrochemicals sector on the one hand and on air pollution management on the other.

The report is divided into three sections:



## ***Part 1: The regulatory framework***

This section provides a broad description of the historical evolution of some key themes in environmental governance in South Africa, an analysis of the current state of de facto and de jure regulation of industrial air pollution, and a critical review of the most important features shaping its future.

## ***Part 2: The South African experience***

In the next section, these issues are grounded in the actual experience of industrial development, 'regulation' and pollution in South Africa. It opens with a broad overview of air pollution and the petrochemicals sector focussing on the environmental justice issues associated with geographic concentrations of the industry around South Africa.

It then looks more closely at one such area of concentration - namely South Durban - and introduces three case studies in governance so as to review the debates about environmental governance against actual experiences:

1. The AECI CAER (Community Awareness and Emergency Response) Programme, an industry-driven initiative in participation.
2. The SO<sub>2</sub> Steering Committee, an initiative in stakeholder governance.
3. The agreement between the South Durban Community Environmental Alliance (SDCEA) and Engen, a negotiated agreement between refinery neighbours and the refinery.

Finally, it outlines what is emerging in South Durban where South Africa's promised air quality management regime is being piloted at local level.

## ***Part 3: Conclusions***

The concluding section draws out key implications of the report, reviews some fundamental debates that must still be resolved and identifies indicators for real movement towards corporate accountability and environmental justice.



# **Part 1**

## *The regulatory context*

### **1. Introduction**

The current regulatory context for industrial air pollution in South Africa is complex and fluid. A variety of sometimes contradictory pressures are being brought to bear on the state in this regard, and the future shape and efficacy of pollution control are uncertain. Nonetheless these various features must be described and understood. To do so requires some understanding of the pollution control regime inherited from the apartheid era and developments since the democratic transition in South Africa. One reason for the 'fluidity' of current regulation of industrial air pollution is that despite a new overarching environmental policy framework (in both the 1996 Constitution and Bill of Rights, and the National Environmental Management Act (NEMA) of 1998), and despite repeated promises of a new comprehensive law, the applicable law remains the Atmospheric Pollution Prevention Act (APPA) which dates back to 1965!

### **2. Apartheid-era regulation**

Apartheid-era environmental regulation exhibited a number of key flaws. On the one hand, priority was given to 'green' conservation issues defined by the interests of the white minority and at the expense of black people's rights to land and resources. On the other hand, to the extent that 'brown' issues were subject to regulation, enforcement was severely compromised by a deeply fragmented set of laws, inadequate penalties, widely dispersed pockets of enforcement responsibilities - which were consistently under-resourced - and an altogether too cosy relationship between nominal regulators and corporate interests whose production activities generated pollution and environmental degradation. These characteristics are



still evident. As Lazarus et al (1997) observe, “South Africa is not short of environmental law, it is short of effective environmental law” (9). Enforcement is weak, “particularly when it has been delegated to local administrative structures” (16), penalties are not severe enough to deter polluters and prosecution is rare. Whatever the formal regulatory system, industrial activity “all too often remains unregulated in practice” (9).

Apart from land-use controls, the most important body of environmental law affecting industry is that aimed at regulating pollution. Control of air pollution is effected through one comprehensive statute, namely the Atmospheric Pollution Prevention Act (APPA, No. 45 of 1965) which is administered by the Department of Environmental Affairs and Tourism (DEAT).

APPA controls four types of atmospheric pollution: noxious and offensive gases; smoke; dust; and vehicular emissions. 'Noxious and offensive gases' include a large number of compounds resulting from industrial pollution. They are controlled by requiring operators of certain 'scheduled processes' within 'controlled areas' to obtain a registration certificate from the Chief Air Pollution Control Officer (CAPCO) authorising the continuation of that process. Since 1968, the whole of South Africa is declared a 'controlled area'. Most industries that generate significant quantities of aerial emissions are 'scheduled processes'. The CAPCO can grant such a certificate when satisfied that 'best practicable means' are being adopted to prevent or reduce to a minimum the escape of noxious and offensive gases into the atmosphere. 'Best practicable means' clearly involves a subjective evaluation by the CAPCO and “is generally interpreted in collaboration with the industries concerned” (Lazarus et al 1997: 17). The determination of permit conditions 'in collaboration with the industries concerned' is part of a broader culture that has pervaded the regulation of industrial air (and other) pollution. The industrial lobby (and sometimes government) now regularly characterise the APPA approach as an outdated 'command-and-control' regulatory model which industry sometimes suggests should be replaced with an emphasis on self-regulatory and voluntary models. But in practice, and given the relative clout of industry and the weakness of environmental enforcement, it is a moot point as to who exercises actual command or control over whom. *groundWork* describes the APPA as a system of 'negotiated non-compliance' which in practice looks very much like a series of voluntary agreements.

The CAPCO's discretionary powers to establish what degree of industrial air pollution is tolerable means that there are no national or even regional standards for air quality. Instead, guidelines were developed and these are generally incorporated into specific registration certificates at which point they become legally binding on the industrial plant concerned. Thus the certificates function as permits imposing certain conditions for the continuation of certain processes. In 1997, Lazarus et al indicated there were approximately 2000 such certificates in operation for about 1200 industrial plants in South Africa. In the



absence of air quality planning, the permit-setting process has not been informed by any concept of the sustainable carrying capacity of the air-shed or of the end fate of emitted substances.

Enforcement by a small number of over-burdened Air Pollution Control Officers of the APPA regime was weak, and its management fragmented. Non-compliance by certificate holder theoretically brought with it the threat of cancellation of the certificate. However, despite numerous violations of APPA guidelines and 'exceedances' of permit conditions, the CAPCO has preferred negotiation to enforcement.

The only offence sited in the APPA is the failure to operate without a registration certificate. The maximum fine for this offence is R500, which is petty cash for an industry.

Not surprisingly perhaps, the APPA has done little to prevent pollution and air quality in South Africa has steadily declined since the Act's promulgation in 1965.

Notwithstanding the weaknesses of the official regime, including the absence of effective sanctions or incentives, some industries have installed technologies for the control of air pollution. However these are often restricted to electrostatic precipitation to remove particulate matter "so that emissions from stacks become less visible" (Lazarus et al 1997: 19).

In addition, within their internal self-regulatory environmental management processes, some industrial plants have introduced targets for reducing air pollution levels. However, these initiatives are not primarily to avoid legal liability - they are usually driven by international pressures (especially for local industries entering foreign markets which demand higher levels of environmental responsibility), demands from civil society organisations and the public, fear of negative publicity or expectations of increased profit:

*In the face of weak and poorly enforced air pollution legislation it is safe to conclude that industry will not introduce air pollution reduction programmes in response to a fear of increased liability. (Lazarus et al 1997: 19)*

Yet the international experience is clear that "it is the threat of substantial liability that has the most influence on industrial strategy" (Lazarus et al 1997: 28).

Nevertheless, while weak enforcement provides a subsidy to industry in the form of externalised costs, the absence of clear regulatory requirements also poses problems for industry. Industrial planning requires some level of certainty in terms of the legal requirements to be fulfilled and the assurance of efficient and even-handed decision-making and uniformity of enforcement. A coherent and effectively enforced



regulatory regime (including incentives where appropriate) is also required if environmental considerations are to be mainstreamed into industrial production strategies.

The APPA has not yet been replaced although its weaknesses are well-known - and frequently acknowledged by the post-apartheid government. The capacity of its 'enforcement wing', already too thin to be a serious force in 1994 when there were seven Air Pollution Control Officers spread around the country, has continued to dwindle. At last count there were just five officers!

### **3. Post-apartheid policy**

Democratisation in South Africa brought with it the opportunity and obligation for a wide-ranging review of national policies and laws. South Africa now has a constitution and Bill of Rights rated amongst the most progressive in the world. New principles, and some legislative reform, have been enacted with relevance for environmental governance, although Glazewski notes that: "there has been more evidence of legislative reform in the areas of resource management (land, water, forestry) than there has been in pollution control and waste management" (2002:172). The new national framework Act, the NEMA (itself the product of extensive consultation through the Consultative National Environmental Policy Process CONNEPP), includes a principle of 'environmental justice' requiring that adverse environmental impacts are not distributed so as to unfairly discriminate against vulnerable and disadvantaged persons.

The Bill of Rights includes an environmental clause which firstly warrants that "everyone has the right... to an environment that is not harmful to their health and well-being". Secondly, it requires the state to secure individuals' rights to "reasonable legislative and other measures that:

- prevent pollution and ecological degradation;
- promote conservation; and
- secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

Glazewski (2002) notes that the first element has the 'flavour' of a fundamental right and the latter is more akin to a socio-economic right but is nonetheless justiciable. He explores the potential significance of these rights by reviewing a 1996 court case (*Minister of Health and Welfare vs. Woodcarb (Pty) Ltd and Another* 1996 (3) SA 155) where the Minister brought an application in terms of the APPA to stop the operation of an incineration process at a sawmill. Here the judge found that not only were the operations continuing without the required certificate but that the generation of smoke in this case "is an infringement of the rights of the



respondent's neighbours to 'an environment which is not harmful to their health and well-being'. Glazewski comments that:

*In doing so, the presiding judge nudged the traditionally private law maxim ... ('use your property in a way that does not harm another') into the public law realm. This dictum therefore lays the groundWork for further application of the environmental clause to promote environmental justice, particularly where communities are suffering the ill-effects of industrial pollution in their neighbourhoods (2002: 177).*

An important implication of this is that the Bill of Rights "not only binds the state in its relations with individuals, but that individuals may assert their rights against the state and against other individuals" (Lazarus et al 1997: 14).

A Constitutional right to 'administrative justice' is also secured for South Africans. In judicial pursuit of environmental justice, the exercise of administrative decision-making is often central. Whereas previously South African courts would only review administrative decisions where 'systematic unreasonableness' was shown, the new constitutional requirements give significant impetus to including considerations of fairness and equity in decision-making with regard to the environment (Glazewski 2002: 182). Furthermore, the right should affect future environmental legislation by prohibiting wide or unbounded discretionary powers to officials and may therefore require that reasonable standards be set out in legislation against which the exercise of discretion may be measured (Lazarus et al 1997: 15).

Additionally, there is an 'access to information' clause providing everyone with the right of access to any information held by the state and also any information that is held by any other person and that is required for the exercise or protection of any rights. Though certain circumstances warrant exemption, these are significantly trumped by "an imminent and serious public safety or environmental risk".

Rights of access to information are elaborated in the NEMA where, for example, decision making requires openness, transparency, and access to information. Specifically (in Part 2 of Chapter 7 on 'Information, enforcement and compliance') the NEMA outlines two broad approaches:

1. Regarding access to information for citizens and the state, it proclaims that:

... every person is entitled to have access to information held by the State and organs of the state which relates to the implementation of this Act and any other law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling,



transportation, treatment, storage and disposal of hazardous waste ...

and

... organs of state are entitled to have access to information relating to the state of the environment and actual and future threats to the environment ... held by any person ... to enable ... [an] organ of state to carry out their duties in terms of the provisions of this Act or any other law concerned with the protection of the environment ...

2. Regarding the protection of 'whistleblowers' who disclose environmental information, it provides that a whistleblower disclosing information which is evidence of environmental risk cannot be dismissed, disciplined, prejudiced, or harassed provided that the disclosure is made to certain identified state and statutory organs (including, e.g., parliamentary committees, the Human Rights Commission) and is necessary to avoid serious or imminent environmental threat.

Constitutional and legal provisions developed after apartheid also significantly change the situation with regard to legal standing and the enforcement of rights. Previously, South African law only granted standing to those who could show a degree of personal interest in the administrative action being challenged (the 'locus standii' rule).

This position is dramatically changed by the provision in the Bill of Rights which provides that "anyone acting as a member of, or in the interests of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members" can approach a court alleging that a right in the Bill of Rights has been or may be threatened.

The NEMA extends this approach even further. In the first place, NEMA adds that matters for which relief may be sought in this way include

*any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1, or any other statutory provision concerned with the protection of the environment or the sustainable use of natural resources.*

Secondly, NEMA establishes innovative ways to ensure that the awarding of costs in legal cases does not inhibit public-interest environmental cases by providing, for example, that:

- costs need not be awarded against an unsuccessful litigant who acted reasonably out of concern for the public interest or protection of the environment
- costs against a private prosecutor can only be given if it is shown that they did not act out of concern for the public interest or environmental protection or that the prosecution was trivial, unfounded or vexatious



- specific provision is made for private prosecutions for contraventions of environmental law.

Despite the potential and promise of these policies however, “much needs to be done with regard to the implementation and administration of pollution control legislation in South Africa” (Glazewski 2002: 195). Although this has been the focus of numerous contextual, policy and legal reviews,

*there is little evidence that there have been any changes to the status quo, particularly the conditions of poorer communities who experience the brunt of pollution (Glazewski 2002: 196).*

Writing in 1997, Lazarus et al had commented that CONNEPP had the potential to herald a new era for environmental regulation if new laws imposed stringent environmental management and pollution control requirements thus requiring industry to reconsider production processes (Lazarus et al 1997: 10). This has not materialised and while the APPA regime's credibility is badly eroded, it has yet to be replaced.

Thus the question of regulating industrial air pollution sits in something of a paradoxical gap between fine-sounding principle (thanks to Constitutional provisions and NEMA provisions) and the abandonment of active enforcement on the ground.

In that gap, there have been two noteworthy initiatives that concern the regulation of industrial air pollution and which are discussed below:

- the exploration of voluntary agreements between government and polluting industries especially in the negotiation of draft Environmental Management Cooperation Agreements (EMCAs)), and
- the drafting of new legislation (in the form of a draft Air Quality Management Bill).

### **Environmental Management Cooperation Agreements (EMCAs)**

As the discussion below makes clear, EMCAs were a contested outcome of the CONNEPP<sup>2</sup>. In recent years, government and key industrial sectors responsible for air and other pollution have explored and developed, but not finalised, such negotiated agreements.

The chemicals and refinery industries have been leading exponents of self-regulation, and the process of developing the agreements was led by the corporations from 1999 to the present. The key role-players pushing for self-regulation have been the Refineries Manager's Environmental Forum (RMEF) and the Chemical and Allied Industries Association (CAIA). They represent the environmental interests of companies collectively responsible for more than twenty-five percent of South Africa's greenhouse gas

2 - The following discussion of EMCAs is adapted from Albertyn and Watkins (2002).



emissions. These two bodies, supported by their international business lobby counterparts, have aggressively pushed a particular framework and approach to the development of voluntary agreements in South Africa. RMEF and CAIA represent the interests of companies such as Shell, BP, Sasol, Caltex and Petronas. All of these organisations are contributors to the international business lobby, Business Action for Sustainable Development (BASD), which is pushing a global agenda of voluntary agreements and self regulation in the name of sustainable development.

Ultimately two draft framework agreements were produced - one for the refineries and one for other chemicals industries - but the process is now in a state of suspension and government has not accepted the agreements.

Given the parlous state of air pollution regulation alongside the potential threat of new Constitutional and legal principles (which have yet to be tested), part of industry's motivation may well have been to try and achieve some degree of regulatory certainty for their operations and strategic planning interests. At present they are unable to find refuge in an effective regulatory order which would/should map out clearly the operational limits within which they would secure compliance, stay legal and not worry unduly about unpredictable threats to production and planning processes.

Critics point out however that the voluntary, self-regulatory model they pursued reflects industry's interest in avoiding an effective and binding legal framework. Either way, the effect of the process has been to deflect public criticism, absorb the energy of civil society, distract limited government capacity away from legislative priorities, and so ultimately delay the promulgation of legally binding pollution standards.

Ironically, the opportunity for entering into voluntary EMCAs was established through the NEMA of 1998. This Act was (as noted above) the principal legislative outcome of the Consultative National Environmental Policy Process (CONNEPP).

The consultative process was jointly managed by government and delegated representatives of NGOs, trade unions, business and industry, and communities. Throughout the two-year process business representatives persistently kept the matter of voluntary agreements on the agenda. They were even prepared to have the new Act enable communities to hold polluters liable, as long as the Act would also officially recognise and approve voluntary negotiated EMCAs.

Civil society stakeholders, including labour, eventually acceded to the inclusion of voluntary agreements in the Act with the explicit understanding and reassurance that these would be supplementary instruments to take industries beyond compliance with national legislation and standards. Thus, voluntary agreements



could logically only take shape once the foundation of appropriate standards and legislation, and industry compliance thereto, was in place and secured. Government's 1997 White Paper on Environmental Management Policy reflected this: "Government may enter into transparent agreements to promote performance that exceeds minimum standards by encouraging innovation and the development of best practice".

During the national conference closing CONNEPP in January 1997, then Minister of Environmental Affairs, Pallo Jordan, stated bluntly that history had shown business incapable of properly regulating itself, and government was not about to give them a blank cheque to do so. The draft Act recognised the role of voluntary agreements but stipulated that every agreement had to have very clear requirements for:

- multistakeholder participation in design;
- quantifiable targets and indicators of compliance;
- independent monitoring and auditing;
- sanctions mechanisms.

In the space of three months between May and July 1998, following extraordinary behind-the-scenes pressure and lobbying from the corporate sector, final drafts of the Act were quietly changed to remove these prescriptions. The corporate sector waited until all the talking was over and then quietly got its way. When the Act was published in November 1998, all that was left on voluntary agreements was a short chapter comprising twenty-five ill-defined lines to enable the establishment of EMCAs. The purpose of EMCAs, according to the new formulation was not - as agreed in negotiations - to improve on standards as laid down by law, but simply to effect any partnership that would promote compliance with any of the broad principles underpinning the Act.

In 1999 the new Minister of Environmental Affairs, Valli Moosa, repeated an earlier promise of swift action to develop binding pollution and waste management laws. These utterances were clearly of great concern to polluting companies who began to mobilise their self-regulatory voluntary agreement plans. Industry held a series of urgent meetings with the deputy minister and top government bureaucrats where industry proposed to initiate voluntary agreements that would address the problem.

A Sasol document written by the company's environmental law advisor acknowledges that setting up EMCAs was a priority "due in some part to the pressure being exerted by various non-governmental and community-based organisations for improvement of South Africa's air quality" (Farina 2001).

The deputy minister of environment agreed to an industry proposal that a government-industry bilateral committee be established to develop such an agreement. During the three-year process that followed,



industry convened regular meetings and took and recorded key decisions - even in the absence of any government officials. This industry-driven process of designing and defining the nuts and bolts of voluntary agreements (based on the Dutch Covenant system) completely excluded trade unions, NGOs and pollution-affected communities.

A string of serious pollution incidents (as well as the publication of the 'bucket brigade' air pollution sampling results<sup>3</sup>) in 2000 provoked growing media coverage and public disquiet and added to the pressure on both government and industry. The credibility of government and industry on pollution issues was being questioned on the front pages of the press. But despite repeated public commitments, government was still unable to deliver binding and appropriate pollution control laws and standards.

Following a series of chlorine gas leaks from a Sasol Polymers plant which resulted in the hospitalisation of hundreds of people in the city of Durban, the Minister and Deputy Minister issued a number of public statements again announcing their initiative for the development of negotiated voluntary agreements with industry to manage and reduce industrial pollution. But by entering into negotiations for voluntary agreements before addressing the foundations of the regulatory system in terms of laws and standards, the Ministry had inevitably undermined the logic of the negotiated policy. As a result, polluting industries were presented by government as eager 'volunteers' trying to fix the problem when in fact there were no guarantees that this would be the outcome.

After NGOs and pollution-affected communities voiced growing concern over the exclusive way in which the voluntary agreements were being developed, industry began holding a series of individual dialogues with community leaders and trade unions. CAIA established a Voluntary Advisory Forum while the refineries invited civil society representatives to selected meetings. For its part, the DEAT issued a first set of externally written industry-guided draft guidelines for the development of EMCAs.

Government did eventually host a two-day multi-stakeholder dialogue in September 2001 to discuss the possible development of a second set of more detailed guidelines for designing EMCAs. A coalition of civil society groupings presented substantial evidence and constructive criticism of the model and of government's stated intentions. The coalition of organisations told government that, in principle, they accepted the potential value of voluntary agreements as a supplement to established regulations, standards and basic enforcement. They therefore requested government to prioritise expediting the delayed environmental law reform process and to deliver the long-awaited enforceable pollution standards before they proceeded any further in developing voluntary agreements.

3- Discussed in Part 2.



Since the September 2001 “dialogue”, the DEAT appears to have cut off communication with civil society on EMCAs. By the beginning of July 2002, it had not provided a written response to three formal letters from a coalition of civil society organisations seeking to communicate on the matter of EMCAs. At a meeting of the RMEF on 12 December 2001, the DEAT Director responsible for EMCAs “expressed his concern that the broader public had” access to the proposed EMCA agreement between government and the refineries (minutes of RMEF meeting, 12 December 2001). The DEAT has subsequently refused to release the full text of a March 2002 set of new guidelines for the development of EMCAs to civil society.

At the same time, in the light of unspecified difficulties with the proposed refineries and chemicals agreements, the DEAT has decided to put them on hold until after the WSSD. Other national and provincial government departments are, however, proceeding with the development of other voluntary agreements.

It is not entirely clear why the process of formalising these government-industry partnerships has stalled just before they were meant to be showcased at the World Summit for Sustainable Development. While DEAT is still committed to the concept of EMCAs, this delay may be:

- the result of government incapacity due to staff being seconded to work on the priority of the World Summit;
- that government and industry have agreed to formulate and showcase other kinds of partnerships that are even less demanding than the EMCAs;
- because DEAT or other government departments are unhappy with the quality of the particular EMCAs that have been proposed;
- because DEAT has recognised that voluntary agreements are inappropriate until an effective regulatory system is established, including revised laws and binding standards;
- due to differences within the industry associations – perhaps CAIA realised it could not deliver a critical mass of its members to make the agreement worthwhile;
- due to a backlash from sufficient numbers of local and provincial governments who see the particular model and agreements as unworkable and a further onerous burden on their limited resources.

Whatever the reasons, the result is that, as it prepares to host the WSSD, South Africa still does not have any new laws or standards concerning pollution control and nor has it concluded any voluntary agreement with industry to reduce pollution. A great deal of time and effort has however been wasted.

International experience shows clearly that effective and consistent enforcement of pollution control laws and standards is required for voluntary agreements to be taken seriously by industry. The co-existence of green taxes or financial incentives and disincentives also contribute to making voluntary agreements



effective. South Africa does not have integrated pollution control laws and standards, nor does it provide economic incentives to reduce pollution.

In fact it can be argued that poor enforcement provides economic incentives that encourage continued pollution. Companies in industrialised countries also know that if they do not participate in a voluntary agreement, they 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.

A recent global ten-year review of industry and sustainable development by the United Nations Environment Programme was not complimentary on the role of voluntary agreements thus far.

*Most voluntary initiatives are still characterized by problems of effective implementation, monitoring, transparency, and free-riders. ... Few voluntary initiatives are directly linked with government policy and regulatory frameworks in a way that would complement the strengths and weaknesses of both. ... All sector reports highlight the crucial role of governments, combining regulatory, economic, and voluntary instruments, in spurring social and technological innovation, and in ensuring that laggard or negligent companies do not benefit at the expense of those investing in best practices (Griffin 2002).*

The South African experience so far has shown the partners to have made all the recognised big mistakes:

- wrong timing, trying to use voluntary agreements ahead of any legal certainty;
- wrong process, an industry-driven process that has excluded affected communities;
- wrong content, agreements to effect voluntary behaviour that should be required by law.

But even as things stand, without concluding and implementing the agreements, the whole protracted experience has bought time for business as usual. In buying this time, the conclusion of the envisaged voluntary agreements between government and the chemicals and refineries sectors would contribute to:

- Further delaying the development of legally binding standards and enable corporations to maximise profit by polluting as usual;
- Consequently disabling communities from taking legal action as there are no pollution standards which any single industry can be shown to have broken;
- Allowing those free-riders not interested in voluntary agreements to continue polluting without any means of legal sanction against them;
- Giving corporations unchecked control in beginning to selectively collect, compile and analyse data on their own pollution streams;



- Assisting corporate greenwash during pollution crises and incidents by providing “evidence” of concern and cooperative agreements with government to address pollution;
- Allowing corporations to dictate future pollution standards through providing highly technical analysis of their own selected pollution data to poorly paid, incapacitated and sometimes corrupt government officials.

Over the last decade, the business lobby has promoted voluntary self-regulation as a flexible and effective means to secure sustainable development. Institutions such as the World Business Council for Sustainable Development have been successful in convincing some governments and international organisations that these agreements are a viable alternative to regulations that are alleged to stifle business growth.

The strategy employed in South Africa is entirely consistent with the objectives of the global business lobby group BASD: to avoid new restrictive regulations and promote voluntary measures and self regulation<sup>4</sup>.

### ***The draft Air Quality Management Bill***

One outcome of the various legal and policy review processes mentioned by Glazewski, and the subject of repeated promises by government, is the drafting of a new law on pollution control to replace the APPA. The inconclusive process of developing its replacement is located in the complex context described thus far. Government has kept the development of new legislation under wraps and effectively excluded civil society from the process. The following section describes the key features of a proposed new regime as outlined in draft number 6 of a National Air Quality Management Bill (AQMBill), leaked to the authors and marked 'for intergovernmental consultation only'. Government's failure to consult (through at least 6 drafts of key proposed legislation) is objectionable in its own right - and quite possibly unconstitutional. But it creates the further difficulty of hindering open discussion because the status of the document is uncertain. Notwithstanding this rider, it is important to attempt a description of the proposed system of air quality management on the provisional assumption that the draft Bill reflects something of government's intentions.

The overall aims of the proposed Bill are to reduce air pollution, improve air quality, and establish an ambient air quality management approach and compliance thereto. The purposes include: increased public participation; public access to “relevant and meaningful” information; reduced risks to human health; a strengthened regulatory framework; and compliance with South Africa's international obligations.

4 - Corporate Europe Observer (No. 11) records that this objective was told to a BASD meeting in Paris in 2001.



The institutional arrangements are still subject to debate within the intergovernmental consultation so the final form is unclear. The current draft defines roles and responsibilities for national, provincial and local levels of government:

- It establishes DEAT at national government level as the 'lead agent' with ultimate responsibility for establishing the overall regulatory system (including all the requisite standards and procedures) and for ensuring compliance.
- Provincial governments must develop and monitor compliance with provincial AQM plans within the national framework. They are required to intervene on potential AQ hazards and/or in cases of non-compliance. Provinces must also ensure that local governments are resourced and capacitated for their AQM functions and must audit their performance.
- Local governments must develop and implement local AQM plans as part of their Integrated Development Plans (IDPs). The draft bill envisages that local governments will monitor ambient air quality, enforce compliance with all legislation and conduct public awareness campaigns.

The various AQM Plans are to “secure improvement of air quality across the country as a whole”. In addition, 'special priority area plans' may be required by the Minister where ambient standards are, or are likely to be, exceeded<sup>5</sup>.

The proposed framework includes a system of air quality monitoring and information (partly to enable the assessment of compliance with national standards). The monitoring of ambient AQ is primarily the responsibility of local and provincial government though the Minister may require AQ data from private, parastatal or any other source too. Calibration of monitoring instrumentation and monitoring itself (as well as calibration work by laboratories) would be subject to a recognised certification body. Licenses issued for 'controlled processes' (discussed below) would specify the monitoring requirements to be undertaken at the cost of the license holder. The overall information system will be established at national level and 'may' include data concerning ambient AQ, emissions (including greenhouse gases), and the granting of licenses.

National reporting on trends, improvements, exceedences, and compliance must be done at least annually. Provinces would be required to report similarly and submit their reports to national government, and local authorities would be required to report similarly and submit their reports to provincial government. The Bill suggests that access to information would be 'subject to law' and the payment of a 'reasonable charge'.

Marking a significant potential change in the regulation of air pollution, the draft AQM Bill lays out a system of AQ standards. Ambient AQ standards would be set after a Ministerial declaration of 'priority pollutants'

5 - The Minister may withdraw the identification of a priority area when the area complies with ambient air quality standards.



based on their potential adverse health and/or environmental impacts:

*The standard will detail a concentration value for priority pollutants, the specified geographical area of application for the standard, and the means by which ambient air quality measurements will be carried out in order to compare measured air quality to the ambient standard.*

In addition to this general approach, specific ambient standards can be set for specific geographic areas “based on what that particular environment can tolerate without significant deterioration or negative impact on human health and well-being”.

The standards-setting system also includes provision for the specification of emissions standards for 'controlled emitters'. 'Controlled emitters' are defined as processes, appliances or activities producing emissions with possible adverse impacts on health or the environment and must be declared as such by the Minister (i.e., they are not 'controlled' until the Minister declares them to be). It is also important to note that the 'controlled emitters' are clearly distinct from 'controlled processes' (discussed below). After considering factors like the precautionary principle, scientific information, risk and international obligations, emissions standards would be set and Gazetted establishing maximum permissible amounts or concentrations of specified pollutants. These would then be binding on the owners and operators of any such controlled emitters.

A licensing system applies to 'controlled processes' which are distinct from 'controlled emitters' and not subject to emissions standards. These are, in effect, individual plants with emissions that may have significant detrimental impacts and which may be declared 'controlled' by the Minister<sup>6</sup>. Thereafter, such processes would require either national or provincial government approval before being licensed (with an 'Atmospheric Emission License') by a local authority.

A license for a 'controlled process' must specify:

- The property, processes, and person concerned
- The maximum allowed concentration of priority pollutants discharged to the atmosphere (under normal working conditions, as well in start-up and shut-down conditions)
- Point source emissions measurement and reporting requirements
- On-site ambient emissions measurement and reporting requirements
- Penalties for non-compliance.

There are also various other specifications which may be included in the terms of a license. The conditions of a license can be varied by the regulatory authority after consideration of either ambient AQ issues or a

<sup>6</sup> - Operators and processes not subject to licensing are nonetheless required to avoid preventable environmental harm or minimise unavoidable environmental harm, and may be still be subject to prescribed requirements determined by the Minister.



request from the licenseholder and are to be regularly reviewed.

To enable the transition from the current APPA regime to the AQM system, certificates issued in terms of APPA will be deemed provisional Atmospheric Emission Licenses with a validity not exceeding two years. There is a provision that "[t]he Department will provide public access to all information contained in Registration Certificates" but this does not appear to extend to a similar right of access to licenses issued in terms of the new proposed law. Alongside the standards and licensing regime, are various compliance components. Thus for example:

- the regulatory authority may require an independent environmental audit where there has been a contravention;
- license holders may be required to appoint an 'Emission Control Officer' with the requisite technical skills and the responsibility for ensuring compliance - though such a condition does not remove the obligations and liability from directors of an operation;
- the Minister (or the relevant provincial Member of the Executive Council (MEC)) may use pollution charges as part of the regulatory system to encourage behaviour change - such charges may be levied in respect of all 'priority pollutants', and subsidies can be used punitively (i.e., by removing them) or as incentives;
- public awareness campaigns are envisaged to promote and secure compliance.

Enforcement of the proposed system is enabled because parties guilty of contravention or non-compliance are guilty of an offence. However, exemptions may be granted. The Minister, MEC or local authority may apply for a High Court interdict to stop activities that are in contravention of proposed law or to remedy the adverse effects of a contravention.

Enforcement officers must be appointed by the relevant authority whose duty will be to monitor and enforce compliance, and to investigate situations (empowered with rights to enter premises, take samples etc. without a search warrant) where they have a reasonable suspicion of offences or breaches of the law.

On the face of it, the draft AQM Bill appears to have the potential for significant movement toward a more satisfactory regulatory system for the control of air pollution in South Africa. However there are a number of problems with it. Some of the more important ones that need to be addressed include the following:

*The proposed move towards national binding standards could address a key weakness of the current regime. However there is no direction given in terms of the levels of air quality that the standards protect or aim for. This could be addressed by stipulating that standards relate to other forms of international benchmarks e.g., 'best global practice', or World Health Organisation guidelines.*



The current draft Bill still provides for too many loopholes for 'negotiated non-compliance' with standards and this undermines the integrity of the whole system. Thus, the provision for 'special priority area plans' is clearly designed to grant Ministerial discretion to allow non-compliance in areas where ambient standards are, or are likely to be, exceeded. Such areas are surely precisely where enforcement of the national standards is required - and not a special negotiated plan to accommodate non-compliance - otherwise what is the point of the national standards in the first place if their exceedance does not trigger enforcement mechanisms but instead triggers an accommodation plan?

In another example, the draft Bill provides for exemptions to be granted from compliance with "any or all of the provisions of any regulation, notice or direction". Even though it obviously creates the possibility of rendering the entire Bill meaningless, this sort of formulation is a routine feature in legislation of this nature. But in the context of an overall regulatory system which should help establish public confidence, awareness and accountability, such a provision should surely be accompanied at least by a stipulation requiring consultation with affected and interested parties, public notice of all and any such exemptions granted, and the possibility of appeal against such exemptions.

The draft Bill's formulation regarding the 'limitation of liability' may also be an instance of routine legislative pragmatism but is alarmingly inappropriate in a regulatory regime laying down the obligations and expectations of regulators and polluters. Here the Bill proposes that "Neither the State nor any other person is liable for any damage or loss caused by the exercise of [or the failure to exercise] any power or the performance of any duty under this Act" unless the exercise (or failure to exercise) was unlawful, negligent or in bad faith.

Public interest should be strengthened in relation to the provision that the Minister, MEC or local authority may apply for a High Court interdict to stop activities that are in contravention of the law or to remedy the adverse effects of a contravention. The public should also be empowered to make such an application.

Perhaps the most important flaw of the draft AQM Bill concerns the relation between 'controlled processes' and national emissions standards. The drafters quite clearly intend that the conditions stipulated in an 'Atmospheric Emission License' for a 'controlled process' are not to be bound by national standards<sup>7</sup>. Thus

7 - The key sections which demonstrate the intention are as follows:

In the opening chapter regarding 'interpretation and fundamental principles', a 'controlled emitter' is defined as those 'processes, appliances or activities whose emissions will be managed through emission standards', whereas a 'controlled process' means any works or process requiring an Atmospheric Emission License the two are distinct and the standards for the former do not apply to the latter.

In the second chapter about 'institutions', the DEAT's responsibilities as 'lead agent' include facilitating the distinct and separate processes of: setting national ambient air quality standards; identifying 'controlled emitters' and setting emission standards for them; and identifying 'controlled processes'. Here too the intention to separate controlled processes from national emissions standards is clear.

In chapter 5 on 'air quality standards', the Bill defines 'controlled emitters' (i.e., those to whom national emissions standards would apply) as processes "other than a controlled process contemplated in chapter 6".

In chapter 6 where 'controlled processes' are dealt with, the relevant authority dealing with an application for an Atmospheric Emission License is required merely to 'take into account' "any ambient air quality standards" (and this is but one item in a long list of things to be 'taken into account' which do not include emission standards).



despite the impression that source emissions will be regulated in terms of binding national standards, the Bill in fact proposes continuity with the best known weakness of the existing APPA regime - namely that license conditions for significant polluters will not be strictly regulated in terms of national emission standards. In effect the drafters have taken a long and circuitous route to return to the present system of 'negotiated non-compliance'.

Finally, it is also important to locate the draft AQM Bill within the broader air pollution regulatory regime. As noted earlier, the current system has been criticised not only because of weaknesses in the current law. Government's regulation of industrial air pollution is viewed as weakly enforced, under-resourced, and undermined by an altogether too 'cosy' relationship between the regulators and the regulated. Drafting new laws in itself does nothing to address these concerns.

The most obvious indicators of substantial shifts in government's approach to these matters would include:

- increased budgetary allocations to industrial air pollution control,
- extending and empowering the enforcement capacity,
- increased numbers of prosecutions for pollution (with more appropriate stiffer sanctions applied).

On none of these fronts is government's performance encouraging - all continue to decline, along with South Africa's air quality.

The mere act of drafting the AQM Bill obviously reflects government's need to respond to growing pressure for proper control of air pollution. But even the drafting process itself shows signs of a timidity of will. Civil society organisations with a substantial contribution to make have been effectively sidelined.

Despite its long gestation and repeated promises for delivery, the Bill is still only a draft with no clarity on when and if new law will be enacted.

#### ***4. State regulation is dead - long live state regulation***

A fundamental motivation for regulating businesses is to secure public goods and interests which would otherwise be undermined - undermined not only by rogue elements and exceptional cases but by the inevitable working out of business' internal, profit-driven logic. The pursuit of profit inevitably sets up tensions with certain public interest goals.



In the arena of industrial air pollution, whilst some companies may make advances towards cleaner production processes without regulation and direction, the general trend will always be to weigh up options in terms of costs and profitability. (Thus industry's approach to pollution mitigation has been characterised as deploying CATNAP - Cheapest Available Technology Narrowly Avoiding Prosecution.)

Logically, and based on the experience thus far, the business lobby's insistence on voluntary and self-regulatory mechanisms to achieve public interest goals instead of public and enforceable regulation (derided as 'command-and-control' by business) simply lacks credibility. Even though certain sections of industry may genuinely prefer a more coherent regulatory regime than the current incoherence, this is in tension with an aversion to liability and real and effective sanction.

Given the extraordinary power of corporate interests globally it is not surprising that they have won significant ideological ground arguing that 'big government' which regulates effectively is a disincentive to business interests (which interests are usually presented as synonymous with 'economic growth' and held to be self-evidently virtuous). The stronger this 'neo-liberal' argument grows, the weaker the ability of governments to justify the allocation of public resources to defend public interests, e.g., the regulation and control of industrial air pollution. Once in motion, this process can become something of a self-fulfilling prophecy. As governments under-resource, cut back, and sell off their capacities for delivering public-interest goods (e.g., from regulatory regimes to basic services) so the overall efficiency and effectiveness of that delivery diminishes until what is left is precisely the caricature painted by corporate interests in the first place.

Clearly then, effective regulation requires well-defined public interest goals, advocated through strong political leadership, translated into effective legislative regimes which establish real accountability and liability, and secured through sufficiently capacitated and credible public enforcement mechanisms.

Partly because of its role in securing conditions for capital, the state is the one institution that can command (potentially) effective sanction in relation to corporate practice. Once the legally binding minimum standards are established and well-policed, there is surely space for voluntary and negotiated agreements with industries to encourage and reward improved performance.

The definition of the 'public interest' is complex in its own right but it must at minimum imply the involvement of a broad range of actors and especially of public interest civil society organisations. The public interest constitutes a democratic government's mandate and citizens have legitimate expectations to participate in its definition, and that their government acts within that mandate and allocates sufficient public resources to securing its defence. Enforcement of the rules through which the public interest is to be defended is government's responsibility.



With regard to matters of industrial air pollution, the South African government has shown it is not unaware of this imperative (demonstrated for example in its enactment of various environmental and other rights and in its drafting of new air quality legislation). However government's overall performance reveals that responding to the public interest is not the only driver.

While environmental rights in the new Constitution, progressive principles in the NEMA, and repeated statements of intent to clean up industrial pollution are obviously intended to signal their good intentions (or at least to head off public discontent), they stand in stark contrast with the de facto state of regulation where an out-dated and discredited act (APPA) remains the applicable law, and where enforcement capacity has been allowed to deteriorate to almost meaningless levels. The DEAT is responsible for these matters but the evident failure of political will is not simply theirs. The South African government's overarching policy framework responds also to a range of imperatives but has increasingly placed a premium on servicing the interests of corporate capital.

Government's adoption of the Growth, Employment and Redistribution (GEAR) macro-economic strategy signalled acceptance of the basic tenets of a neo-liberal approach which is premised on the fraudulent conflation of business' interests with the national interest - if businesses are encouraged to pursue their interests with support but little interference, then the economy will grow, jobs will be created, more people will be able to pay for more things and so a virtuous cycle is established of generalised prosperity and profitability. In such a policy environment, the obvious reluctance of DEAT to effectively regulate industrial air pollution, its 'purposeful vagueness' and systematic 'non-decision-making', is understandable - even if it is unacceptable - since the golden rule appears to be to avoid sending signals that might possibly be interpreted as 'unfriendly' to corporate investor interests.



## **Part 2**

# *The South African experience*

## **1. People, petrochemicals and pollution**

### **Introduction**

Apartheid's racial planning located black communities “downwind and downstream” (Durning 1990: 17) of polluting industries and poorly managed waste landfill sites. Particular forms of degradation are associated with specific industries and concentrated in particular locations.

Industrial air pollution is most concentrated in urban areas. Hot spots include South Durban, the Vaal Triangle (Vereeniging, Vanderbijlpark and Sasolburg), Secunda and Table View / Milnerton in Cape Town. Smaller centres of industrial pollution include Richards Bay, Newcastle and Rustenburg. In Gauteng, industrial pollution combines with toxic dust blown off mine dumps. Industrial workers often get a double dose - at work and in their nearby homes. But the environment has no strict boundaries. Air pollution from Eskom's power stations in the Eastern Highveld (Mpumalanga province) affects rural as well as urban areas and many mines are located in rural areas and their wastes pollute land, air and water.

The pattern of urbanisation imposed by apartheid created overcrowded and poorly serviced, or unserved, settlements. In formal and informal settlements, the burning of solid and liquid fuels in poorly ventilated houses creates a high level of indoor air pollution. In many areas, domestic pollution combines with industrial and mining pollution to produce a chemical soup with cumulative impacts on people's health.



The effects on health relate primarily to the respiratory system.

*Acute respiratory infections are a leading cause of death in South African children, killing one hundred times more children than in western Europe (Booth, A. et al 1994: 241).*

Many contaminants, particularly from industrial emissions, suppress the immune system cause cancers, allergies and eye, ear and skin infections, disrupt hormonal and reproductive systems, and affect brain function. Particularly vulnerable groups include people who are poor and malnourished, young or infirm. Pollution can also accelerate the onset of AIDS in people infected with HIV.

This section gives an overview of the petrochemical industry, its pollution of the air and the impact on neighbouring communities.

### **South Africa's carbon economy**

The energy sector is the principle source of air pollution and, with an economy that runs on cheap labour and cheap energy, South Africa is an intensive user. Its Gross Domestic Product is the 26th-highest in the world, but its primary energy consumption ranking is 16th. This is above average and only 10 other countries have higher commercial primary energy intensities.

South Africa's per capita carbon emissions are also among the highest in the world - higher than a number of European countries, almost on a par with the average for developed countries and well above the average for developing countries. In 1999, South Africa's energy-related carbon emissions amounted to 99.4 million metric tons, equating to 42% of Africa's emissions and 1.6% of world emissions.

South Africa's high energy intensity results from an economic structure dominated by large-scale, energy-intensive mining and minerals industries. In 1998, industry and mining consumed 57% of total primary energy, thus emitting 66.8 million metric tons of carbon. The chemical and petrochemical industry is the largest industrial sector consumer, accounting for 25%. Cheap energy contributed to this development and policy makers now regard cheap energy as critical to South Africa's international competitiveness.

The transport sector consumes 17.5% of total primary energy and emits 17.9 million metric tons of carbon. Apartheid's segregated cities imposed high transport costs on black people. Public transport was neglected, leaving the middle classes dependent on private cars and the working classes largely dependent on a volatile mini-bus taxi industry.



The residential sector accounts for approximately 10% of South Africa's energy consumption. There has been little material increase in energy consumption over the past decades by this sector as they are largely not recipients of the cheap energy bonanza. Although South Africa supplies electricity across half of Africa, about 49% of its own population is without access and about 3 million South Africans depend on fuel wood, and coal and paraffin are widely used.

Of the primary energy consumed in South Africa in 1999, 74.7% was derived from coal, 21.3% from oil and 1.2% from natural gas. Much of the feedstock for the chemicals industry is also derived from these sources.

South Africa's reliance on coal is founded on massive reserves. The threat of sanctions drove a policy for maximising self-reliance in energy and, in the 1980s, South Africa over-invested in coal-fired power stations creating surplus capacity. It also developed the largest synthetic fuel (fuel from coal or gas) capability in the world, consuming around 41 million tons of coal in the process, to reduce its dependence on imported crude oil.

Post-apartheid, crude oil consumption is rising. In 1997, the country imported 23.6 million tons and this represents its largest import item. South Africa's natural gas reserves amount to 33 billion cubic metres but larger reserves in neighbouring Mozambique are now being developed for import into South Africa.

## **Petrochemicals**

Three methods are used to produce liquid fuels in South Africa: a) crude oil refining; b) coal to liquid fuel; and c) gas to liquid fuel. Sasol also produces gas from coal. There are four crude oil refineries, three in coastal cities. The two largest refineries are located in the port city of Durban where most crude oil is landed. Crude is also pumped 600km inland from Durban to the smaller Natref refinery. The fourth crude oil refinery is in Cape Town. Table 1 lists the refineries.

**Table 1: South Africa's refining capacity (crude and synthetic)**

<b>Refinery</b>	<b>Location</b>	<b>Owned by</b>	<b>Fuel source</b>	<b>Capacity (tbpd*)</b>
Calref	Cape Town	Caltex	Crude oil	110
Engen	Durban	Petronas	Crude oil	125
Sapref	Durban	Shell/BP	Crude oil	165
Natref	Sasolburg	Sasol/Total	Crude oil	90
Secunda	Secunda	Sasol	Coal	150
Mossgas	Mossel Bay	Mossgas	Gas	45
<b>Total</b>				<b>685</b>

*Adapted and updated from: Energy Research Institute 2002.*

*\* thousand barrels per day crude or equivalent*



Refining capacity is constantly growing with expansion plans in place at virtually every refinery. Crude oil refining capacity will likely increase by 45 tbpd by year-end if Sasol and Engen complete expansion plans.

## Emissions

Information on emissions in South Africa is generally poor. The figures given in Table 2 are calculated by the relevant industries and not independently verified. Sasol reports emission and waste data extensively through annual Health, Safety and Environmental Reports. Unfortunately the other refineries do not report in similar detail.

**Table 2: Emission data for selected refining and chemical processes (tons p.a.)**

<b>Atmospheric Emission</b>	<b>Sasol/Total Natref</b>	<b>Sasol Chemical Industries</b>	<b>Sasol Secunda</b>	<b>Caltex Calref</b>	<b>Petronas Engen</b>	<b>Shell/BP Sapref</b>
SO <sub>2</sub>	19,140	26,000	248,000	8,760	4,745	13,140
NO <sub>x</sub>	1,380	22,000	143,000	-	-	-
CO <sub>2</sub>	819,000	7,100,000	49,607,000	-	947,905	1,236,000
Particulates	1,150	3,000	8,000	-	-	-
Ash	-	1,792,000	10,030,000	-	-	-
VOCs	-	42,000	404,000	-	-	-

*Information as reported by industry.*

Refinery expansion plans are accompanied by industry assurances that expansion provides the scale of production necessary to reduce local emissions. Neighbouring communities are sceptical of the claims. Thus, Sasol's plans to use Mozambican gas as a fuel supplement should reduce emissions, but the savings will be off-set by the expansion. Engen's use of Sasol gas (produced from coal) does reduce emissions in Durban but does so by transferring them to the Sasol plant.

Routine refining and associated chemical processes are responsible for air, water and marine pollution while several incidents have also resulted in ground pollution. Carbon, sulphur, nitrogen and particulate pollution is supplemented by a smorgasbord of chemical delights. As long ago as 1989 a study (reproduced in SATS 1998) at Island View, a petrochemicals storage facility at the port of Durban, found over 50 volatile organic chemicals (VOCs)<sup>8</sup> in the air with 20% of them detectable in the garden of a nearby resident.

8 - VOCs are compounds which evaporate to air at room temperature.



The paucity of credible information on emissions has been used both by industry and the regulator to dismiss the concerns of neighbour communities as uninformed. *groundWork* and the US-based Communities for a Better Environment (CBE) therefore introduced the inexpensive 'bucket brigade' air monitoring system to refinery-affected communities<sup>9</sup>. Results (see Table 3 overleaf) showed the presence of multiple pollutants - with 16 chemicals on the official US list of hazardous air pollutants detected at Sasolburg. Readings for benzene, vinyl chloride and methylene chloride were particularly high.

The bucket brigade revealed chemicals on which there was no prior information in South Africa including carbon disulphide, 2-butanone, toluene, ethylbenzene and xylenes. According to CBE, the xylene levels measured under normal operating conditions at Engen in South Durban were four to five times higher than that found during upset conditions at US refineries. Initial results from sampling by the South African Regional Science Initiative, SAFARI 2000, and Leeds University at Sasolburg confirm high concentrations of benzene, toluene and xylenes.

9 - The bucket technology is approved by the US Environmental Protection Agency. Results are valid for the moment and place of sampling - like a snapshot rather than a video.



**Table 3: Toxic cocktail: Bucket Brigade results for 2000**

	Sasolburg sample	Sasolburg sample	Sasolburg sample	Sasolburg sample	Sasolburg sample	Sasolburg sample	Cape Town sample	South Durban sample
	Steam Station 2	Coal Silos SCI	Dannhauser Farm	Dithane & Raphepheng Rd	Library	Steam station 2	Table View	Buldana & Tara Rd
	29-May-00	11-Oct-00	11-Oct-00	11-Oct-00	11-Oct-00	11-Oct-00	17-Jul-00	20-May-00
1,2-dichloroethane				X				
2-butanone (methyl ethyl ketone)	X	X	X	X	X	X	X	X
acetone	X	X	X	X	X	X	X	
benzene	X	X	X		X	X	X	X
carbon disulphide	X	X	X		X		X	X
carbon tetrachloride (tetrachloroethane)	X						X	
carbonyl sulphide		X		X	X			
chloromethane (methyl chloride)	X						X	
ethylbenzene		X					X	X
hydrogen sulphide	X	X						
methylene chloride	X	X					X	X
m- & p-xylene	X	X	X	X	X	X	X	X
o-xylene	X	X					X	X
propene				X				
styrene	X	X					X	
tetrachloroethene (perchloroethylene)				X			X	
toluene	X	X	X	X	X	X	X	X
trichloroethene	X	X						
trichlorofluoromethane							X	
trichlorotrifluoroethane	X						X	
vinyl chloride				X				
methyl tert-butyl ether (MTBE)							X	
2-hexanone							X	

 USEPA air toxics or hazardous air pollutant (is a known or suspect carcinogen)  
 depletes earth's ozone layer



### **The location of pollution**

The pattern of placing black communities downwind and downstream of polluting industries is evident in the location of the major petrochemical installations although there are exceptions. Cape Town's Caltex refinery and Island View, a chemical storage facility within Durban's port, are adjacent to formerly white suburbs. Durban's refineries are located in black areas but also impact directly on a white area.

Sasolburg takes its name from the company and was developed on a greenfields site close to the raw materials supply and to the major market of Johannesburg. The original oil from coal refinery, now replaced by the Natref crude oil refinery, became a hub for a cluster of chemical factories including Sasol Chemical Industries, Sasol Polymers, Karbochem, Dow and AECL. Zamdela township, created to supply black labour, is located downwind of the industrial cluster and adjacent to a coal ash dump.

Sasol's second plant was also a greenfields development near what was then the black town of Driefontein. The town was renamed Secunda after the plant, and rezoned as a white town. The black residents were relocated to eMbalenhle, downwind of the plant, surrounded by Sasol's coal mine and the Harmony gold mine, and adjacent to the town dump. The settlement is poorly serviced and residents rely on coal stoves for cooking and heating, so adding domestic pollution to the mix.

The South Durban Basin stretches south from Durban's docks on land formally occupied by market gardeners, seine netters and small traders. Five industrial belts in the South Durban Basin locate over 120 industrial plants. Chemicals installations include major storage facilities, two refineries, and the AECL Umbogintwini Industrial Complex which is home to 15 companies. A toxic (medium hazard) dump located in the basin was closed in 1997 but is not yet properly rehabilitated. Many residential areas are located between and adjacent to these industrial belts (they include the Bluff, Clairwood, Jacobs, Isipingo, Merebank, Wentworth, Umlazi, Amanzimtoti and Umbogintwini).

Cape Town's Caltex refinery is situated near five communities, ranging from the upper-income suburb of Table View to the informal settlement of DaNoon. These communities are also neighbour to a chemicals storage facility, a high hazard toxic dump, South Africa's only nuclear power station and several smaller industries. Major housing developments for another half million people are planned for the area. Local health regulations requiring an 800 metre buffer between residents and refinery have already been transgressed, with 400 houses within the boundary and more planned.



## **2. South Durban**

The city of Durban is said to have the best environmental monitoring capacity of any of South Africa's local authorities and, under the title of the Multi-Point Plan (MPP), it is piloting local implementation of a new AQM system. This is in some part due to the fact that it is also home to the South Durban Community Environmental Alliance (SDCEA), one of the most active community environmental groups in the country. Hence, more is known about environmental impacts in Durban than elsewhere and it probably presents a best case scenario for local environmental management in South Africa.

This section gives an overview of the situation in South Durban by way of introducing three case studies in environmental governance as it relates to corporate accountability. It ends with a description of the local experience of the MPP.

### **The Setting**

Durban is the sub-tropical home to Africa's busiest port and the primary entry point for imported crude oil and exported refined petroleum and petrochemical products. Petrochemical and chemical industries are concentrated in the South Durban area. In the port itself is the Island View bulk chemical storage which contains an extensive infrastructure of tanks and pipelines, some running inland to Natref while others lead directly, beneath residential streets, to the South Durban refineries - Sapref, which is jointly owned by Shell and BP, and Engen, controlled by Petronas. Island View and the two refineries were designated as 'national key points' of strategic significance to the apartheid government.

As long ago as 1931, the pre-apartheid Durban Town Council started planning to segregate people on lines of colour to provide cheap labour for industry. The plans were initiated at the behest of the local Chamber of Industries and imposed an industrial zone on already settled residential areas. They were later consolidated under the apartheid government's infamous Group Areas Act. In the process, thousands of black people were forcibly removed, restricted and/or resettled in South Durban.

Community environmental protest pre-1994 was viewed as political dissent and silenced by the state. The National Key Point legislation shielded the major petrochemical installations both from concerned local residents and from the local regulators. It was not until July 1997 that national government approved local authority access to information on the chemicals stored at Island View.



Industrialists could thus effectively exempt themselves from environmental and planning laws and paid little attention to environmental safeguards. Today more is known about the chemical and refining processes but the information is far from complete and industry frequently cites 'commercial confidentiality' to avoid disclosure. The KeyPoint Act remains in place and site access remains strictly controlled.

Communities in South Durban have a long history of political activism. They also articulated environmental concerns throughout the period during which the area was industrialised. Despite the history of segregation, local activists recognised that pollution does not respect boundaries and, in 1996, community-based organisations from different communities in the area joined together with local NGOs to form SDCEA.

One, and for a short while two, DEAT air pollution control officers were responsible for the whole of the province of KwaZulu-Natal, including Durban. By the end of 2001, one had died and the other left, and the post is yet to be filled. Durban's Environmental Health Services, the local regulator, has moved into the vacuum but does not have formally delegated powers under the APPA and are not in possession of the scheduled permits because the DEAT is seemingly unable to locate them. Further, their authority is restricted to the city's central zones.

The KwaZulu-Natal provincial government authorises Environmental Impact Assessments (EIAs) in the province. It has had to build the relevant administrative capacity from scratch. For several years the director of pollution control presided over an empty organogram and was able to start filling posts only in 2001. In the year January 2001 to March 2002, there were 65 EIAs in South Durban alone. Twenty nine of these had direct relevance to the concerns of SDCEA and included major infrastructure and plant expansion projects.

## **Atmospheric pollution**

Before 1998, Engen's APPA permit allowed them to emit 72 tons of sulphur dioxide (SO<sub>2</sub>) a day while Shell/BP's Sapref could emit 50 tons a day. Other pollutants were unregulated and the volumes open to speculation. Refineries profess to operate below their SO<sub>2</sub> permit levels and, from calculated<sup>10</sup> emission levels, this appeared to be the case. However, the emission data is not independently verified so its credibility depends on the honesty of the polluter.

In the 1995/1996 period, data provided by eight SO<sub>2</sub> emitting industries, including the two refineries, showed average daily emissions of 95.73 tons. Of this, Sapref claimed 45.48 tons or 48% of the total,

10 - Furnace emissions are calculated on the measured sulphur content in the fuel feed. Process emissions, such as from the 'cat cracker' are more abstract and depend on a number of assumptions.



indicating that they were operating close to their maximum permit level. By contrast Engen was well under its permit contributing 26.6 tons. The following year Sapref stated in their annual environmental report that their emissions were reduced to 37.97 tons/day and that further reductions would be dependent on expansion of the refinery.

At that point, SDCEA was informed by a technical advisor that there was cause to doubt the authenticity of the emission figures but this could not be substantiated. Three years later in March 2000, Sapref admitted they had been under-reporting by as much as 12 tons/day (nearly one third) for the past 5 years, claiming an error in calculation. In effect they had been operating in contravention of their permit for several years. Government reaction was muted. It imposed no penalty for the contravention and did not investigate the matter.

## **Toxic incidents**

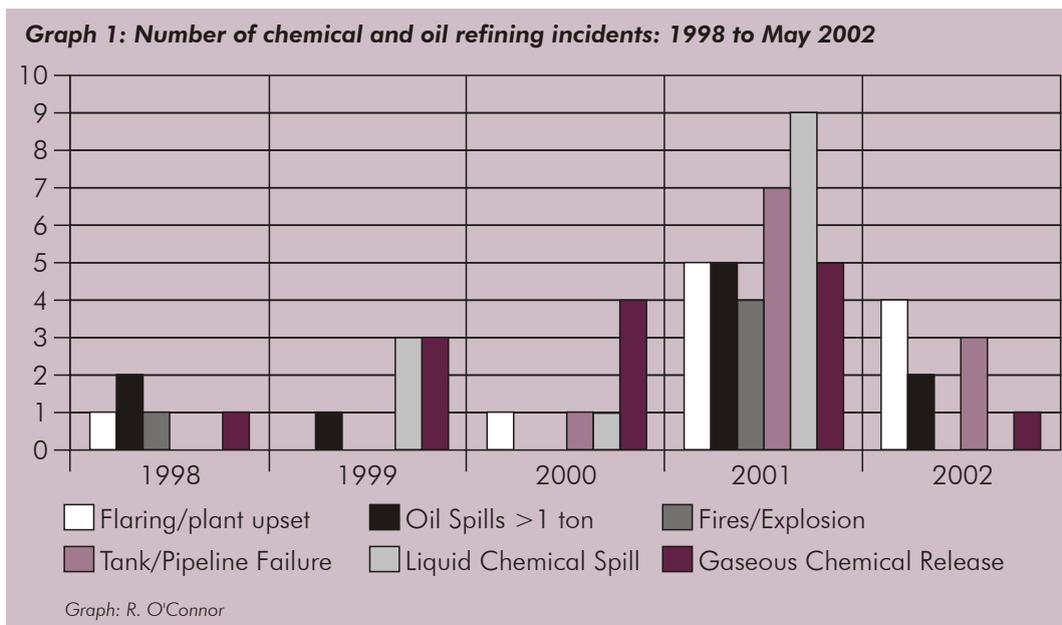
Fires, explosions and leaks have become so common that they can almost be considered a normal operating condition for Durban's industrial plants. Both industry and the authorities have appeared reluctant to inform the community of potential hazards and, as yet, there is no coherent off-site emergency or evacuation plan to cater for this community of approximately 270,000 despite sustained lobbying by SDCEA. There are no buffer zones and people live on the fence-line of their polluting neighbours.

The graph below shows a rapid escalation in hazardous events in 2000 and 2001. Some of them resulted in evacuations and mass hospitalisation and several people have died. A number have involved the release of oil to sea or the saturation of land with petrochemicals. Most constitute gross violations of the archaic APPA guidelines.

**Table 4: Numbers of chemical incidents by company.**

	1998	1999	2000	2001	2002 to May
Sapref	4		1	11	2
Engen			1	5	3
Polifin / Sasol Polymers		2	3		
Other / not attributed		4	2	7	





## Health impacts

In South Durban, members of the local community have consistently complained of high levels of cancer and respiratory illnesses. Studies undertaken within the community concluded that respiratory illnesses were clearly elevated when compared to areas outside of South Durban. These studies did not have official sanction and were dismissed by both the regulator and industry as being 'unscientific'. At a refinery permit review meeting (June 1996) the CAPCO claimed that a Cape Town study at Calref showed that refineries do not pose a health risk.

In 2000, a local journalist wrote a series of articles on the impact of pollution in South Durban, focusing particularly on the incidence of cancer. He asked a medical researcher to review his investigation and the latter concluded that it suggested a leukaemia rate 24 times the national average (Carnie 2001). As a precursor to a larger study, the Universities of Natal and Michigan and the Durban Institute of Technology conducted a health study at the Settlers Primary School situated between the two Durban refineries. The study found that 53.5% of students suffered from some type of asthma, a prevalence higher than any comparable findings reported in the scientific literature. It also found strong evidence that ambient air pollution exposures were associated with acute changes in the health status of pupils with moderate to severe asthma. It concluded that current guidelines may not be adequate to protect the health of susceptible portions of population. Government is still to react to the findings.



### **3. Case studies in participatory governance**

#### **The AECI / Umbogintwini CAER Committee**

In March 1993, a toxic cloud of chlorine gas blew into a busy shopping centre in South Durban and 90 people were admitted to hospital. The chlorine emission resulted from an incident at the Polifin plant jointly owned by South African chemicals giants AECI and Sasol and situated at AECI's complex of chemicals factories at Umbogintwini. Two subsequent, but less serious, incidents at the complex served to increase local concerns about safety and AECI responded by initiating a Responsible Care Programme focused on Community Awareness and Emergency Response (CAER).

#### **Responsible Care**

Responsible Care was introduced to South Africa by the Chemical and Allied Industries' Association (CAIA) which was established in 1993 with several South Durban industries as founding members. It is modelled on the programme developed by Canadian chemical companies in response to international concerns - following the Bhopal incident in India - that the chemical industry was intrinsically dangerous and manifestly irresponsible. It has been criticised as an industry-driven initiative designed to placate public opinion and pre-empt stricter governmental regulation.

These criticisms could be read into CAIA's stated primary goals which are to: promote Responsible Care; earn public trust for the chemical industry; improve advocacy with government and NGOs; support education in science, engineering and technology; and create maximum value for its members. Signing onto the Responsible Care Programme is voluntary for CAIA members and by 1999, 125 of CAIA's 180 members had signed (CAIA2002).

Responsible Care signatories commit themselves to develop "practicable goals" for improving operations which might impact on communities and increase communications and credibility with all stakeholders. The programme aims to ensure the long term growth of the industry and signatories are asked to adopt six 'management practice standards' to demonstrate their responsibility. The standards relate to: health and safety; storage and distribution of chemicals; transportation of chemicals; waste management and pollution control; Community Awareness and Emergency Response; and product stewardship.



Adopting any particular standard is itself voluntary for signatories. CAIA has set a target of 90% compliance by 2004. To date the programme has been monitored through self-assessment surveys conducted every two years. External verification is promised this year.

### **AECI CAER Charter**

AECI's initial implementation of CAER was restricted to putting out information about what to do in the event of an incident. It included such advice as shutting the windows and staying indoors. To facilitate communication with local communities, they invited a variety of stakeholders including labour unions, local communities and environmental organisations to participate with AECI management in a CAER committee. The external stakeholders immediately pushed the boundaries of the CAER model and there followed a period of negotiations on the powers and responsibilities of the committee. This resulted in the signing of a Charter in 1994 by AECI and the civil society organisations.

The Charter constituted the CAER Committee with the aim of reconciling AECI's interest in profitable business with the community interest in 'minimising' the impact of the complex on the surrounding environment and community. The committee is defined primarily as a forum for dialogue, it would advise company management on the complex's impacts and "play a watchdog role in ensuring that ... management strives to improve" environmental performance. It allows the committee access to information on environmental performance and site inspections "specifically related to ... agreed ... standards". The committee can communicate information to the community but the company can restrict information that it defines as "commercially sensitive". The Charter specifically excludes any form of legal liability.

Prior to this agreement, AECI ran the complex as an informational fortress taking full advantage of the secrecy mandated under the Key Points security legislation. Environmental management was lax to the point of gross irresponsibility with little effective oversight from the government regulators. Access to information on any terms therefore represented considerable progress from the perspective of civil society. Having opened the process to participation, AECI was also pressed to expand CAER beyond awareness and emergency response to the prevention of incidents and the remediation of the site. This in turn implied a very considerable expansion in the information to which the committee had access. State regulators were also invited to meetings.

The process, however, remained largely within the company's control for a number of reasons. Firstly, the CAER committee budget was controlled by the company.



Secondly, proceedings were largely defined by discrete issues which, for the most part, were identified by the company. No independent review of the combination of production processes at the site was undertaken and community representatives therefore had little basis on which to propose priorities that might have been different from those identified by the management. Thirdly, community representatives lacked expertise to engage critically on technical issues. They were able to participate in drawing up Terms of Reference for studies on the identified issues and for peer review of the studies. They were also able to identify consultants to undertake peer review. The consultants, however, were paid for by the company and, even within the global pool, are largely dependent on large companies. It may be surmised that their perspective is broadly shaped by that dependency. Finally, the agreement specifically excluded any form of sanction that might then be imposed on the company.

The company could therefore set the pace and the Charter reflects this reality in its use of qualifying phrases such as "as soon as is reasonably practicable". In 1996, Wiley et al found that civil society participants saw information access as the major gain of the CAER process but saw "little, if any, reduction of pollution" while an assessment of the health of neighbouring residents "was deferred" (1996: 89).

## **Remediation**

There has since been a substantial reduction in pollution from the complex. A 'site characterisation' study was commissioned in 1995 and subsequently led to the Umbogintwini Groundwater Project, initiated in 1997, which included a health risk assessment<sup>11</sup> and a study of groundwater contamination from the site. Successive studies found severe contamination of ground and groundwater from spillages, two slimes dams and the dumping of some 100,000 drums, many of which had disintegrated, on site. Contaminants included a heady range of chemicals and heavy metals. In the densely settled KwaMakhutha valley below the site, a number of water springs were found to be contaminated. People in the community had already abandoned the worst affected springs as water sources because of the foul taste and the studies concluded that this reduced their potential exposure.

AECI responded first by supplying free potable water to the community during the time that it took for Durban Metro to extend water reticulation into the area. This was held to reduce exposure to negligible levels although it was recognised that children in particular were still vulnerable to some level of exposure through soil contamination.

In the longer term, a variety of recommendations for remediation were adopted. These included: containment by such means as capping the drum dump site and constructing barriers to prevent seepage and treatment to neutralise contaminants; pumping out and treatment of groundwater; and 'dewatering' the slimes dams.

11 - This does not include an assessment of actual health status.



In 1995, AECl set a number of Safety, Health and Environment (SHE) targets for the site. These cover reporting, occupational health and safety and environment. SHE reporting started in 1997. Environmental targets referred to waste minimisation, reductions in water and energy consumption and site remediation. Waste management systems were also changed. Disposal to the slimes dams was stopped in 1998 and all hazardous and general solid wastes were then removed from the site by contractors while the liquid waste treatment plant was expanded to deal with all liquid wastes before disposal to sea by two marine pipelines. The pipelines themselves have been upgraded over a longer period since 1983 when toxic effluent was poured into the sea without treatment or diffusion.

The environmental targets notably omit any mention of incidents. A plant upgrade at Polifin in 1997 was “expected to reduce the number of chlorine escapes in the future” (AECl 1998) but, between November 1997 and September 2000, there were no less than eight significant ‘escapes’ directly affecting the health of over 250 people. The last of these incidents resulted in over 30 school children being hospitalised, drew tough words from the national minister and resulted in the authorities ordering a temporary closure of the plant. The plant, by then wholly-owned by Sasol, was finally closed in 2001 although Sasol claimed this was for economic rather than environmental reasons. Its closure significantly reduced the risks of high profile incidents at the complex.

### **AECl unbundling**

During the period since the inception of the CAER committee, the structure of ownership at the site has changed radically. In 1993, AECl either owned or had a major stake in all operating companies at the site. Comprehensive unbundling has left it in control of just one operating company (the remaining 14 being sold off) and of Umbogintwini Operations Services (UOS) which serves as site manager and landlord. The sell-off provided one motive for the clean up but also meant that AECl no longer imposed a single set of environmental, reporting and data collection standards on all companies. Thus, whereas AECl’s 1997 SHE report reports against the targets set in 1995, the 2001 report for the complex does not. Second, according to the verification statement attached to the 2001 report, “site-wide approaches and commitment appear to have lost direction”. One symptom of this was the failure to produce a SHE report for 2000.

Subsequently, the companies at the complex have formed the Umbogintwini Industrial Association (UIA) and it is in the name of this body that the 2001 SHE report was produced. Industry representation on the CAER Committee is also through the UIA and all companies have now independently signed the CAER Charter and contribute to the budget in proportion to their pollution and environmental risk profiles. The



UOS provides regular reports to the committee relating to its marine outfall. Only one of the companies at the complex, Huntsman Tioxide, regularly reports its environmental performance as a whole.

### **Evolution of the committee**

The role of the committee has also evolved in relation to two external factors. First, environmental impact assessments (EIAs) became mandatory in 1997. Prior to this, "AECI said it would permit public involvement in EIAs 'as soon as confidentiality considerations allow'" (Wiley et al 1996: 89). While the committee is not taken as a surrogate for public participation, EIAs at the complex are now a major focus. Effectively, the committee remains focused on a series of discrete issues but these issues now tend to be defined by new developments or expansions.

Second, a separate body, the permit advisory panel for the two marine outfalls, has been incorporated into the CAER committee. The establishment of the panel in 1994 was a mandatory requirement of the permit to operate the marine outfalls. It is composed of the regulators, industry and civil society stakeholders and advises on permit conditions and reviews compliance. Reporting to the panel is therefore mandatory. Over time however, panel participants have drifted away. Most of those remaining were also on the CAER committee which has now taken on the functions of the panel. The effect is that the committee is now a hybrid body, functioning as a forum for dialogue in terms of the Charter and having the power of review in terms of the marine pipeline permits.

The CAER committee itself has also lost participants and industries are particularly concerned to attract participation from neighbouring informal settlements. Some industry participants are therefore suggesting that its focus should shift from 'environment' to 'environment and development' so as to reflect what are held to be the most urgent concerns of these communities and to reflect a broader corporate social responsibility agenda.

### **Conclusions**

Nationally, Responsible Care is an initiative in self-regulation by the chemical industries independent of any other stakeholder. Being entirely voluntary, individual members of CAIA can decide whether or not to join and, if they do join, they can set their own pace in adopting 'management practice standards' and apparently have no obligation to report or even to respond to CAIA's surveys. In return they are able to use the Responsible Care logo on their letterheads. The only mechanism for compliance is therefore peer pressure.



Reflecting this at local level, the Umbogintwini Industrial Association itself now constitutes a first point of reference for individual companies. It has agreed that all companies on site must participate in CAER but, beyond that, it works through peer pressure and the collective marketing image of the complex. Reporting to the committee by individual companies is at the discretion of the company. The committee may request information of the companies but this would depend on them knowing what questions to ask. The issue of compliance scarcely arises since committee decisions are taken by consensus which, in theory, would give veto powers to industry. Community participants can disseminate dissenting views and their power thus relates to morality and public relations. In practice, however, it seems that there is little conflict in the CAER committee.

Environmental performance at the complex has improved, albeit off a very low base, and historical problems have been addressed if not redressed. The CAER committee undoubtedly participated in and contributed to producing this outcome. But although it pushed some of the boundaries of CAER in its early period, it was constituted and has effectively been contained within industry's response to the broader societal and economic changes precipitated by the democratic transition.

These changes created major uncertainties for companies, potentially exposing them to public relations disasters, legal liabilities and forms of participation that might ultimately threaten their position as the principle actors in deciding society's choices of technologies and economic development. However, the adoption of GEAR in 1996 confirmed the economic dominance of business while, within the chemicals sector, Responsible Care provided techniques for managing public relations and leaving individual plant managers in control of how, when and even if to improve performance subject primarily to their specific market conditions. More broadly, it provided for what Hamann and Acutt call "legitimation". Thus, the CAER process at Umbogintwini enabled AECI to frame the discourse of environmental accountability by determining what "questions regarding corporate behaviour" are valid and defining the nature of environmental problems and "what answers are feasible and thus open to discussion" (Hamann and Acutt 2002: 8).

Beyond that, the voluntary nature of CAER gives companies considerable power in deciding community representation although this is subject to the requirement of legitimacy. The CAER committee initially included several critical voices but this presence has since declined. By 2000 when the last major chlorine incident occurred, people from the affected area had no effective representation and regarded the committee as moribund and subject to corporate capture. Immediately following the incident, community activists ignored the committee and mounted a campaign addressed directly to Sasol Polymers on the one hand and government ministers on the other. They were, however, later drawn into the committee.



This illustrates the dance around the priority for environmental concerns - the legitimacy both of who represents those concerns and how they are represented. Incidents present clear and immediate issues and give legitimacy to critical voices while raising questions about industries' commitment, management practices and their broader role in society. Chronic problems are more easily contained within corporate discourse as are long term managerial solutions including technical responses - where industry has command of expertise and knowledge - and public relations. Over time, institutional forms such as the CAER committee consolidate industry's framing of the discourse but also alienate critical environmental and community voices. This leads to a new anxiety about the legitimacy of representation and, because industry remains the primary driver, attempts to repair legitimacy reinforce industry's role in soliciting community representation and making judgements on its legitimacy.

Reframing the committee's representation and agenda in terms of a broader 'developmental' definition of corporate social responsibility will further consolidate industry's position irrespective of the commitment or sincerity of its proponents. Firstly, it plays to the priority for 'delivery' within the partnership model espoused by the second African National Congress (ANC)-led government and buys entry and influence within the broader development debate. Second, Responsible Care's aim of supporting science education allows a further level of consolidation in the framing of knowledge. Third, corporate social responsibility within neighbouring communities is tantamount to patronage. If basic amenities are provided directly by local corporations, rather than as rights of citizenship, then the interests of communities will be aligned with those of the corporation. The CAER Committee will then become a forum through which access to resources is mediated while the environmental 'watchdog' contemplated in the Charter will likely fall silent.

Yet CAER provides the only framework for environmental management at the complex. Neither the Department of Water Affairs and Forestry (DWAF), responsible for water pollution, nor the DEAT, responsible for air pollution, played a significant role in driving environmental improvement at the complex and nor have they provided credible verification of industry reports. Air quality regulation has now been abandoned entirely, to the point where industry reports, required in terms of their scheduled process permits, are returned to them unopened. It seems that, having left its regional office vacant, the DEAT has not even put in place a system for handling its post. The global agenda for the roll-back of the state thus meets strangely with the local at Umbogintwini where the failure of the state compels self-regulation.



## **The SO<sub>2</sub> Steering Committee**

### **Context**

What is known as the SO<sub>2</sub> Steering Committee had, until 2002, the formal title of the South Durban Sulphur Dioxide Management System. It is constituted as a Section 21 company - that is a not-for-profit organisation with its own legal identity - but it operates in the context of South Africa's fragmented regulatory regime.

Sulphur Dioxide (SO<sub>2</sub>) is the only pollutant regulated under the Air Pollution Prevention Act (APPA) of 1965. APPA permits for the Durban refineries specify the maximum permissible daily tonnage of sulphur dioxide, include instructions on measurement, and require monthly reports on sulphur emissions. There are no reporting requirements for other pollutants (such as carbon, benzene etc). Despite numerous violations of APPA guidelines and 'exceedances' of permit conditions, refineries have neither been prosecuted nor suffered the withdrawal of operating permits.

Local authorities may also enact by-laws to regulate local industries. This happens independently of CAPCO. Consequently an oil refinery may need two authorising permits that deal with the same subject matter but are not cross-referenced to each other. There is thus little coordination between local and national levels and considerable variance between South Africa's urban centres. Local authority penalties are traditionally very weak with maximum fines as low as R500 for some offences. Responsibility for air pollution was transferred from the City Engineer's Department to Durban Waste Water (which was and remains responsible for water pollution) and has recently been transferred again to the City Health Department.

The manner in which these permits have been issued has been a source of concern to local communities. First, the system produces very little information about pollution volumes for anything other than SO<sub>2</sub>. Second, neither national nor local authorities have developed air quality management plans. The permit setting process has not therefore been informed by any concept of the sustainable carrying capacity of the air-shed or of the end fate of emitted substances. Third, relevant health issues were not investigated. Fourth, communities do not have access to the process of setting conditions in the permits.

### **The committee**

The SO<sub>2</sub> Steering Committee has its origins in the South Durban SO<sub>2</sub> Liaison Committee established during the 1960s by industry and local and national authorities. Since then it has been through several transitions.



In the early 1980s, according to Wiley et al (1996), the Wentworth/Merebank Area Sulphur Dioxide Committee was composed of the Department of National Health and Population Development, the City Engineer's and Health departments and three major SO<sub>2</sub> emitters - the two refineries and the Mondi paper mill. It was subsequently expanded to include industries emitting more than 2 tons per day and by 1995 included Engen, Sapref, AECL, Tioxide, Lever Brothers and Hulett's sugar refinery. It was chaired by the regional air pollution control officer representing first the Department of National Health and then DEAT. City participation also changed with Durban Waste Water (DWW) replacing the City Engineer and chairing a technical sub-committee responsible for ambient monitoring. The Environment Branch established within the Planning Department of the City in 1993 has also participated in the committee.

In 1993, a group of community organisations and NGOs formed the South Durban Environmental Forum (SDEF) to coordinate civil society action on air pollution. The SDEF sought representation on the SO<sub>2</sub> Steering Committee, met with it during 1994 and was finally invited to join it. The SDEF was the forerunner to the South Durban Community Environmental Alliance (SDCEA), which was constituted in 1997 and remains a member of the committee. The SO<sub>2</sub> Steering Committee thus became the first environmental 'stakeholder' body in South Durban.

The primary role of the committee was to monitor and manage SO<sub>2</sub> pollution in South Durban. Over time it has established a network of permanent stations designed to provide close to continuous monitoring (3 minute 'snapshots') of ambient concentrations of SO<sub>2</sub>.

These stations, now operated by consultants, are supplemented by the DWW's mobile stations and 'bubblers', the latter being designed to measure long term patterns of pollution. This network gives Durban the best monitoring capacity of any local authority in South Africa.

The committee also established its own set of guidelines for average ambient SO<sub>2</sub> concentrations for different periods of time from short term (one minute) peaks to yearly averages. These guidelines were considerably tighter than the APPA guidelines and comparable to World Health Organisation guidelines.

However, the system remains dogged by:

- technical difficulties, with two of the five SO<sub>2</sub> Committee stations currently out of action;
- disputes over the location of monitors, with SDCEA taking the view that localised hot-spots are not properly identified and covered;
- arguments about the scope of work, with SDCEA viewing the narrow focus on SO<sub>2</sub> as allowing for the concealment of other pollutants;



- unequal access to information in that industries are connected to monitoring data online while SDCEA has access only to reports; and
- a sense that it has not delivered on managing SO<sub>2</sub> pollution.

### **Technical failings**

In some senses, the committee set itself up for failure. In 1993 it adopted the 'Bluff Valley Model', developed by the University of Natal during the 1980s, to model the dispersion of SO<sub>2</sub> under different weather conditions on the assumption that likely 'exceedances' of ambient guidelines could be forecast and correlated to industry sources. An alert would then be sent to the industries in question who were asked to voluntarily reduce emissions for the period during which the exceedance was forecast by switching to low sulphur fuels or reducing production.

The model was designed to correlate meteorological data, data from ambient monitoring stations, and data on sources such as the height and location of stacks and their presumed emission rates. By 1996, it was beset by technical difficulties. It failed to predict measured SO<sub>2</sub> concentrations at particular sites and the adequacy of the data was subject to doubt. It was thought that there was a possible 20% error in the source emission data from industry and, at that time, there were only two monitoring stations. In June 1996 these stations were found to be reading between 50 and 75% below the actual value of SO<sub>2</sub> concentrations. This invalidated earlier claims by industry and government that there had been no exceedances in that year and further undermined the credibility of the model. These difficulties also confirmed the view expressed by the US Environmental Protection Agency (EPA) that "models are more reliable for estimating longer-term average concentrations than for estimating short-term concentrations at specific locations ..." (cited in Wiley et al 1996: 117).

When Sapref admitted under-reporting of SO<sub>2</sub> emissions four years later, the inadequacy of information on sources was confirmed. On Sapref's account, the error was identified during a test of the technical performance of the 'catcracker' unit which produces both the highest profit and the greatest emissions of SO<sub>2</sub> at the refinery. The admission underlined the reliance on industry reporting and the incapacity of the regulator to verify reports.



### **Voluntary paralysis**

Meanwhile, the management of the model was also disputed. In May 1995, DWW proposed that it would fund the model providing that they were given authority to require emission reductions by companies according to the logic of the model. Industry rejected the notion that they should be 'policed' by the local authority and feared that it might lead to the implementation of the polluter pays principle. Instead a private consulting company was hired to manage the equipment and report exceedances to the DEAT's Air Pollution Control Officer in his capacity as regulator. A management plan drawn up by the DEAT's officer, in his capacity as SO<sub>2</sub> Steering Committee chair, emphasised that the system was based on "voluntary self-regulation" because it "goes outside of current South African environmental law" (cited in Wiley et al 1996: 116). In effect this meant that legal limits on SO<sub>2</sub> emissions were defined in the DEAT's permits and based on the APPA guidelines rather than those of the SO<sub>2</sub> Steering Committee. Regular exceedances of both guidelines did not, however, provoke action by the regulator.

The DEAT officer thus presided over two distinct and uncoordinated systems:

- the legal scheduled process permit system which was and is not open to scrutiny; and
- the 'participatory' South Durban Sulphur Dioxide Management System which had and has no power to manage.

The first addresses itself to source emissions but relies on unverified reporting by industry and deals in gross figures without taking account of upset conditions<sup>12</sup>. The second monitors ambient pollution concentrations and is capable of detecting short-term spikes. It can indicate likely sources but the data is susceptible to multiple interpretations and, to date, companies indicated as sources have pointed to all sorts of variables to explain why it might not be them. Even where sources are acknowledged, it does not follow that the company concerned is exceeding its legal permit conditions. In short, permit control is divorced from ambient monitoring and neither system holds individual polluters accountable.

In the view of regulators and industry, management of air quality through the system of alerts and temporary reductions in emissions was itself a temporary measure pending longer term overall reductions in SO<sub>2</sub> emissions.

Within the committee, however, individual industries were reluctant to commit to reductions. They argued:

1. that there was insufficient evidence as to whose emissions were responsible for exceedances. The refineries in particular, though acknowledging that they were the biggest emitters of SO<sub>2</sub>, felt that they were being unfairly targeted and suggested a range of other sources from the combination of smaller

<sup>12</sup> - Upset conditions refer to breakdowns or malfunctions in the production process.



plants to traffic emissions<sup>13</sup>.

2. that there was insufficient evidence of health impacts. This point was endorsed by the CAPCO himself who claimed that a Cape Town study at the Caltex Refinery showed that refineries do not pose a health risk.
3. that a stricter environmental regime would put Durban based industries at a disadvantage relative to their competitors operating in other localities in South Africa and would deter new investment and provoke industries to relocate.

Finally, the refineries in particular wanted to tie reduced emissions to expanded throughput, arguing both that new technologies associated with expansion were cleaner and that the cost of reducing pollution could only be justified by increased revenue.

### ***Disputed knowledge***

Community representatives viewed the use made of technical data in these arguments, and the requirement for scientific certainty as a precondition for action, as a purposeful tactic designed to delay emissions reduction and stretch the 'longer term' to infinity. They saw the disinvestment and expansion arguments as corporate blackmail aimed at blocking regulatory action on the one hand, while securing bigger profits on the other. And they viewed the regulatory authorities as captive to this corporate agenda.

They concluded that the alert system was in fact the only tool for managing pollution on offer within the committee and suspected that its dysfunction was purposeful. They therefore focussed increasingly on campaigning, both within and outside the SO<sub>2</sub> Steering Committee, for:

- specified time frames for emission reductions;
- mandatory in-stack measurements of emissions combined with credible independent verification and public reporting;
- access to the permit process; and
- a serious study of health impacts.

Diab and Scott (1999) argue that the conflict within the committee was partly attributable to conflicting knowledge bases. Industries and the regulating authorities “employed a scientific and technical knowledge base” (10) reliant on quantitative methodology in contrast to the knowledge base of local residents “derived from locally produced experience” and usually involving “an historical account, in narrative format, and qualitative and anecdotal in nature” (11). They note that, “Scientific knowledge may also be used as a

13 - In fact, the pollution profile of traffic is different to that of industry and DWW's data shows that traffic emissions in the Bluff valley are insignificant compared with industry emissions.



powerful tool to exclude and dismiss contributions by people not having an understanding of the terminology and concepts used" (11). In SDCEA's experience, this was precisely their use. Nevertheless, informed by international experience, community representatives have become increasingly adept at recognising the interested<sup>14</sup> use of technical data and have found resource people to challenge it.

In contrast to the Umbogintwini CAER process, community participation in the SO<sub>2</sub> Steering Committee has constantly challenged industry's framing of the discourse. The committee itself has developed a monitoring capacity that provides data which the SDCEA can and does use to sustain that challenge. In the view of one industry representative, this data has in fact corroborated community arguments on pollution levels and hot-spots as well as the need for source reductions. Thus, the 1998 Environmental Improvement Programme (EIP) agreed by Engen and SDCEA acknowledges the limitations of the Bluff Valley model and commits Engen to reducing emissions. The EIP states that Engen's continuing support of the SO<sub>2</sub> management system would be to improve ambient monitoring, help manage specific pollution incidents and provide information for environmental assessments.

Thus, while the committee has not provided for corporate accountability, it has arguably contributed to its possibility. Its principle weakness lay in the fragmented state regulatory system, its ambiguous incorporation into that system - support for the committee being required by the permits without any link being established between ambient monitoring and permit controls - and the weak application of permit controls.

### **Transition**

The SO<sub>2</sub> Steering Committee is once more in transition, this time in relation to the broader transition in the regulatory regime signalled by the Multi-Point Plan (MPP). It now seems generally accepted that:

- it should become an air quality management committee;
- it should remain a multi-stakeholder forum, and it seems likely to retain ownership of the monitoring equipment;
- its mandate should be extended to include other priority pollutants - though these are yet to be debated and agreed;
- it must therefore include a wider range of industries and will have to be radically restructured to admit coherent representation;
- it will provide the core for a substantially upgraded monitoring capacity currently under development with assistance from Norway; and
- ambient standards will be aligned with national standards defined in the promised Air Quality

14 - 'Interested' may be, but is not necessarily the same as deceitful. Many industry representatives are unaware of the limitations of quantitative methods that require a narrow definition of problems in order to arrive at something measurable. They then tend to equate measurement with objectivity and objectivity with truth. A discourse is defined precisely by which statements it admits as true and which it excludes as false or without meaning



Management Act (AQMA) and, in respect of SO<sub>2</sub>, the APPA guideline values which have already been revised as an interim measure in the absence of a new Act.

It is understood that the AQMA will devolve power to local regulators. This has already been anticipated, albeit by default, within the SO<sub>2</sub> Steering Committee with City Health assuming the chair following the death of the regional DEAT air pollution control officer. And it is intended that, as City Health assumes responsibility for permitting, ambient monitoring will be linked with source controls.

### ***The SDCEA agreement with Engen***

In March 1998, the South Durban Community Environmental Alliance (SDCEA) and Engen mutually agreed an Environmental Improvement Programme (EIP) to be undertaken by the refinery. The agreement set out time-bound targets for reductions of SO<sub>2</sub>, particulates, volatile organic compounds (VOCs), nitrogen oxides (NO<sub>x</sub>), flaring, odours, noise and visual impacts.

It thus moves beyond the single focus on SO<sub>2</sub> to address a range of pollutants of concern to SDCEA. It also specifies that a Community Awareness and Emergency Response (CAER) programme should be “developed with the local community” and “anticipates” that a CAER committee will be established. Finally, it details improved monitoring, with new programmes for ambient ‘fence-line’ monitoring, for in-stack monitoring of NO<sub>x</sub> and particulates, and for improved source monitoring. The agreement had a five year duration and specified a number of significant targets on the way to full implementation by 2003. It stipulates that the DEAT would be requested to append the agreement to the APPA permit thus giving it the force of law.

### ***History***

At the time, the agreement was represented as a major breakthrough in the conflictual relations between local community groups and Engen. The refinery was built in 1954, six years after the accession of the apartheid government, but its location was the consequence of earlier racist planning aimed at developing a modernised industrial zone described above. Engen's neighbours thus have a long experience of removals and resettlements carried out in the interests of industry and they see the refinery as a beneficiary of that process. They also have a long history of resistance to removals implemented in the name of supposedly objective and scientific planning principles.



The refinery was owned by Mobil until 1989 when, under pressure in the US to disinvest, it was sold to the South African company Gencor. In 1993, Gencor unbundled and Engen became an independent company. In 1996 the Malaysian state-owned company Petronas bought a controlling 30% share and has subsequently expanded its holding to 80% while the remaining 20% is held by a black empowerment group, Worldwide Africa Investment Holdings.

Under apartheid, the refinery was designated a National Key Point. According to Engen, this prohibited management from disclosing “any information about any projects or work that was being done on site” (Engen 2002), so provoking the mistrust of local communities. Nevertheless, Mobil's management appeared to take full advantage of the protection from public scrutiny offered by the Act. Decision making was firmly controlled from the US and was indifferent to local concerns. This indifference was largely carried over under Gencor's regime and the refinery only started engaging local communities when Engen itself assumed management.

### **Political opening**

Engen's new “policy of transparency” (Engen 2002) was further stimulated following the democratic elections of 1994 by the prospect of visit from President Mandela<sup>15</sup>. Management decided they should establish a CAER Committee following the example of AECl at Umbogintwini and, during preliminary discussions, told community representatives that they wished to announce its formation ahead of Mandela's visit. Community representatives responded by proposing a detailed 'Good Neighbour Agreement' modelled on community-initiated agreements with companies in the US, rather than on the industry initiated CAER model. The agreement would commit Engen to reporting actual impacts, and to workplace and environmental planning including pollution reduction, improved emergency planning and active affirmative action. The company declined the agreement and members of the Wentworth community decided to demonstrate at the plant during Mandela's visit in March 1995.

Mandela stopped to talk to the demonstrators and later met with community leaders. He then called them to a meeting with cabinet ministers and Engen executives where the latter pledged that they would address the problems of pollution. Talks resumed with Engen agreeing to negotiate a Good Neighbour Agreement but soon deadlocked for two reasons. First, Engen questioned the credentials of community representatives and attempted to intervene in their selection. Second, the company argued that its emissions were within the legal limits set by its DEAT permit, that health impacts were unproven, and that it would therefore reduce only SO<sub>2</sub> emissions and only as required by the Bluff Valley management system. The community in turn responded by threatening to take legal action and to boycott any forum where Engen was present.

15 - The history of negotiations is documented by Wiley et al (1996) and we have drawn on their work.



### **The context of negotiation**

In late 1997, however, the company changed its mind and communicated its readiness to community leaders, by then organised under the umbrella of SDCEA, to negotiate an agreement. Wiley et al (2002) argue that the company would have found reason for holding out on pollution reduction both in the macroeconomic GEAR policy and in government's apparent lack of interest in pollution control, but pressure for change was coming from other directions. Community activism was attracting negative publicity which reflected on the corporate image, civil society demands for national air quality standards were gathering momentum, and other industries within the SO<sub>2</sub> Steering Committee were initiating plans to reduce emissions leaving Engen exposed.

The account by industry sources suggests an internal struggle between old and new styles of management. CAER was an initiative in ecological modernisation but, having launched it, management were taken aback by the strength of feeling within the community and felt that the process was being hijacked by particular community leaders. They reacted defensively and retreated to the familiar style of fortress management within the parameters of neo-liberalism. Internal debate nevertheless continued and the decision for change was made by a newly appointed Managing Director.

What Engen managers experienced as an internal struggle, however, was itself a reflection of globalisation as it relates to local sites of production. Since the early 1990s, the World Bank has been pressing for a consolidation of refining capacity within continental Africa and the closure of smaller refineries. By 1998, it was rebranding its proposal as a clean air initiative and calling for the promotion of unleaded fuels across Africa. While this is desirable in itself, the investments required will favour consolidation with large TNC-owned refineries located in South Africa and Nigeria - which already account for 68% of Africa's refining capacity - expanding production.

Within South Africa, national fuel specifications have been under revision since the mid 1990s to keep pace with new engine technologies requiring fuels without lead and with a lower sulphur content.

The implication is two fold. Engen would have to invest to stay in the game and there would be increased revenues from expanded demand and market share within South Africa and Africa.

At the same time, from about 1996, two parallel planning processes were initiated in Durban. In the first, the national Department of Trade and Industry (DTI) was promoting an Industrial Development Zone (IDZ) - the exemplary form of neo-liberalism on the ground - with the development of a 'world class chemicals cluster' in



the basin enjoying concessions on export and import duties and support for infrastructure development. A key infrastructure development already in progress was the Sasol gas pipeline which, in turn, would link with the development of Mozambican natural gas to which South Africa was committed in terms of an agreement with Mozambique. This development is now in progress. Gas is targeted at the industrial market in South Durban and securing that market to repay capital costs was no doubt a key consideration for government.

In the second planning process, the City of Durban had commissioned a Strategic Environmental Assessment (SEA) as part of its Local Agenda 21 initiative. Unlike the IDZ process, which was consulted with industry but closed to communities, the SEA was advertised as fully participatory<sup>16</sup> - an exemplary initiative in linking domestic democratisation with ecological modernisation. In 1999, this process concluded in favour of combining the proposal for a chemicals cluster with an expansion of port capacity, but it had also confirmed that the assimilative capacity of the South Durban air shed was near exceeded and highlighted community opposition to any expansion of chemical production.

The later Multi-Point Plan (MPP) made the connection clear. One point concerned the elimination of dirty fuels in South Durban production processes - by switching to gas. This might be called a win-win situation from the perspective of the DTI. The MPP<sup>17</sup> promised both a bigger market for gas and a way of legitimising the chemicals cluster option through a process of ecological modernisation.

The EIP agreed by Engen and SDCEA was heavily, though not exclusively, dependent on switching from heavy furnace oil (with a high sulphur content) to gas to fuel the refinery. Engen's decision to come to an agreement with SDCEA was thus taken within a very specific context which linked emission reduction with a set of opportunities for expanded production, profit and global integration. This decision should not, however, be taken as having finally resolved the tension of management styles within Engen. Rather, it has shifted the ground on which these tensions played out.

### **The second round**

Negotiations for a second EIP are currently in progress and are linked to the Environmental Impact Assessment (EIA) process for a major expansion in refining capacity. In September 2001, following an explosion at the Sasol/Total Natref Refinery which precipitated a national fuel-supply crisis, the DEAT granted Engen a temporary permit to increase its throughput (from 105 to 125 tbpd). At the same time, Engen initiated two EIAs - the first to address this expansion and the second for a further expansion to 150 tbpd. Community members were concerned that the expansion would increase emissions and SDCEA

16 - The limitations of participation in the SEA are discussed in O'Connor and Hallows (2002) and in Wiley et al (2002).

17 - The DTI's participation in the MPP contrasted with its non-participation in the governmental Committee for Environmental Coordination, responsible for mainstreaming environmental policy throughout government.



reluctantly agreed to a six month extension in the temporary permit to enable an EIP, demonstrating further reductions, to be negotiated prior to the EIAs.

Engen missed several deadlines in producing a first negotiating draft as well as outstanding technical information to enable verification of compliance with the first agreement. SDCEA, in Engen's view, were slow to respond to issues requiring urgent decision. At the end of the six month period, the EIP was not in place nor had the EIA process started. Without SDCEA's consent - although the DEAT claims that it was given to understand that SDCEA had consented - Engen secured a further extension to the temporary permit. A single EIA for both expansions has now been initiated and will run parallel to the negotiated EIP process.

### ***Tensions in the agreement***

The second round of negotiations has surfaced a number of tensions in the working of the agreement. While Engen has met most of the environmental targets ahead of deadline<sup>18</sup>, the CAER committee was not established and the 'trust' which Engen anticipated as a return on its investment did not materialise. In particular, it was aggrieved at continuing negative publicity citing civil society sources and intermittent calls from various people in the community for the refinery to be shut down. Engen's first draft for negotiating an update agreement expressed the view that the first agreement was unbalanced, "with Engen making numerous commitments and very little in the way of commitments from the community." It proposed that the community formally recognise the refinery's positive role in the community and the South African economy, commit to "living together", actively support fora of communication, agree to go to mediation before contemplating legal action against Engen, agree to raise concerns with Engen before taking them to the media, mandate decision-makers to prevent delays, allow Engen's day-to-day management without interference, and assist in emergency planning.

These demands for reciprocity seem to be predicated on a notion of 'partnership', a word that has been variously applied to the agreement but which seems misleading. SDCEA's response indicates that they view it more as a pragmatic working agreement for securing corporate accountability. They saw Engen's move towards responsible environmental management as a duty rather than an achievement and felt that, if Engen believed it had made a major contribution to improving the South Durban environment, this was only because it had made a major contribution to polluting it. Community action, on the other hand, was in defence of their Constitutional right to a clean environment. Their view was succinctly summarised in a letter

18 - One project is some months behind schedule, largely because technical studies revealed flaws in the original plan. Engen says the revised project will result in better performance than promised. Some aspects of compliance with the agreement are still to be verified.



to Engen (SDCEA 24 May 2002):

*SDCEA ... had not caused the high pollution levels in the South Durban Basin and hence did not have to agree to any control of its objections to pollution whether in the media, through legal channels or any other form.*

They suggested that the relationship issue should be addressed in a separate forum while the EIP should focus on further environmental improvement at the refinery. Engen accepted this and, in May 2002, the parties established a liaison committee - rather than a CAER Committee - which has provided for very open discussion.

In this forum, SDCEA noted that Engen, in its desire for quick responses, did not recognise the dynamics of community decision making. While Engen is a single entity, SDCEA is an umbrella organisation. Engen themselves see this as an advantage in that it gives them a single negotiating partner. SDCEA's decision making, however, is dependent on volunteer activists and must be consulted with all organisations within the alliance and it is not a given that they will all agree. It is also constrained by the need to get technical advice.

Beyond this, processes of participation in themselves result in increased awareness as do perceptions of threat. Far from disciplining new voices in the community, SDCEA sees its role as enabling such voices and this inevitably brings a degree of uncertainty to decision making. This was illustrated in relation to the EIA for the gas pipeline to supply the refinery. While SDCEA had agreed to the EIP which stipulated the conversion to gas, this said nothing about the route of the pipeline. In the event, the EIA concluded for a route which passed several houses. Local opposition resulted in the formation of an entirely new organisation with which SDCEA had to establish a relationship before inviting it to join the alliance.

At the same time, just as Engen's decision making displays the tension between neo-liberalism and ecological modernisation, SDCEA's decision making is held in the tension between a pragmatic response to finding a way to 'live with' polluting industries and mitigate their impacts and a broader view of environmental justice that holds any pollution of neighbours as an injustice. The agreement with Engen necessarily falls within the pragmatic response while calls for its closure reflect people's gut reaction to environmental injustice. The fuller meaning of environmental justice can only be pursued within the wider public debate and in planning processes on the future of the basin<sup>19</sup>.

Both sides believe that a major weakness of the original agreement was that it did not define reporting procedures. In the event, Engen periodically provided technical information on implementation to SDCEA's technical consultant who verified it and reported his findings to the community. There were, however, no regular report backs to the community.

19 - The long term sustainability of petrochemicals and the implications for Durban's planning choices are discussed in O'Connor and Hallows (2002).

Both sides also believe that weakness of state regulation contributes significantly to distrust. For industry, the absence of consistent nationwide regulation leaves them facing competitive pressures which inhibit their ability to implement environmental improvements. Community activists have seen the authorities as complicit with industry and therefore incapable of arbitrating the conflict, let alone defending people's rights.

While the agreement was written into the DEAT permit, the regulator played no role in public reporting or verification and neither side sees it as capable of producing credible information or verification of information provided by industry. This mechanism for ensuring legal compliance was, in the view of community activists, therefore meaningless. Indeed, the agreement as a whole is in some senses a surrogate for dysfunctional state regulation.

## **4. Transition in Durban**

### ***The Multi-Point Plan***

Following the enactment of NEMA, it seemed that the DEAT was winding down its already weak capacity for enforcement. Its small pollution control budget was reduced and it gave priority to development focusing on tourism and wildlife conservation. Doubting government's commitment and frustrated by its inability to answer requests even for basic information, organisations in civil society increasingly turned to protest and the media to get the message out. In 2000, a string of incidents across the country and media attention on health impacts in South Durban provoked an intense public reaction. Civil society's perception that government had lost - or surrendered - regulatory control of polluting industries was fast becoming the public perception.

In December 2000, the national and provincial ministers responsible for the environment, for health and for industrial development, together with the Durban City Mayor, responded with the announcement of a multi-point plan (MPP) for environmental management. It was aimed at addressing industrial pollution by coordinating action at all three levels of government with implementation being devolved to the local level. An overall coordination unit has been set up within the Durban City administration and a stakeholder forum established to enable consultation and dialogue.

The key points in the MPP included: setting national SO<sub>2</sub> standards aligned to World Health Organisation standards; strengthening enforcement by introducing new legislation replacing the APPA; banning the use



of dirty fuel by industry in South Durban; improving air pollution monitoring; identifying and minimising fugitive emissions; and assessing community health impacts. Industry lobbying has since seen government backing off from 'banning' dirty fuels in favour of 'promoting' cleaner fuels<sup>20</sup> while vehicle emissions have been added to the list, thus blurring the focus on industrial pollution<sup>21</sup>. The intention is to use South Durban as a pilot for devolved environmental management and then extend the model to other pollution hotspots. The experience in Durban thus far, however, has been ambiguous.

### **Getting a grip?**

In part, this ambiguity results from the restructuring of governmental roles and functions progressing simultaneously through a number of different processes. The devolution of air quality management is thus paralleled by a restructuring of local government and, in this process, legal authority for air pollution passed from Durban Waste Water (DWW) to City Health in mid 2001. At present, however, DWW continues to operate the City's air monitoring equipment but with reduced capacity. City Health anticipates taking on this function but it would appear that there may be some resistance to the transfer of staff and equipment. As yet City Health has limited experience and expertise on industrial processes. Its underlying skills base and competence have been questioned while its information systems have been described as archaic. It has, however, embarked on a serious programme of building capacity, has dedicated staff to industrial impact management and is in the process of computerising its systems.

Delays in bringing an AQM Bill to parliament has created some ambiguity in the delegation of legal authority to the local level. On the face of it, it is hard to understand how the MPP can be a 'pilot' for a new national approach to AQM when that new approach is still being debated and developed, and has no force in law. City Health nevertheless believe that it has sufficient authority under the NEMA and the Environmental Conservation Act to proceed. They are also developing new air quality by-laws which they anticipate will be passed by the end of the year irrespective of when national legislation is enacted. Indeed, it seems that what happens in Durban may shape the national framework as much as the other way round.

The intention is to create a system which coordinates:

- a comprehensive inventory of emissions and sources,
- an expanded capacity for ambient monitoring and dispersion modelling,
- more rigorous permitting, and
- a credible system of complaints.

20 - Following industry demands, the National Economic Development and Labour Council (Nedlac) will now manage a socio-economic impact study which will be national in scope rather than focused on South Durban. The study has thus been located outside the MPP and beyond the influence of community stakeholders not represented in Nedlac.

21 - Industry have long used vehicle emissions to divert attention from industry emissions.



Theoretically, this will provide the informational basis both for planning to ambient standards and for monitoring industry compliance through reporting and verification as well as through ambient detection.

City Health argues that weaknesses in the current national regulatory system inhibit it from carrying out its own responsibilities. The MPP provides them a framework for action. While City Health apparently still does not have access to the DEAT scheduled process permits, it is developing the City permit system in anticipation of the new licensing system. It is therefore requiring more stringent and comprehensive reporting from individual industries preliminary to renewal of the permits.

Further, community demands for participation in the City permitting process - relating both to permit conditions and the review of industry reports - have now been met. Significantly, this decision was taken on legal advice relating to the Administrative Justice Act of 2000 rather than being required by the terms of the MPP. Industry has accepted this with reluctance. In relation to the Engen-SDCEA agreement, this has already shifted community perceptions concerning verification of Engen's compliance with the first agreement. It implies that SDCEA will no longer have to negotiate information from the refinery itself, but will have access to information required by the state. It may then choose whether to have that information independently verified or whether to rely on the state's verification. This development may therefore presage a shift from participation in informal systems of accountability-by-agreement, to participation in formal systems of accountability-by-requirement and may become applicable to all licensed processes.

Community groups also greeted the news that the City authorities are investigating legal action against Sapref in relation to two incidents - the rupture of a toxic chemicals storage tank and a flaring incident - as a further indication of a more determined approach to enforcement. A stand-off between Sapref and City Health ensued, the former suspending cooperation on a pipeline management programme and the latter withdrawing an extension of Sapref's trading permit. The relationship has since been normalised as issues have been clarified, but the confused unfolding of these events reflected the novelty of legal sanction. It also seems that local regulators may be curbed by their political masters. Responding to the question of legal action, Durban's Mayor is reported to have "said that before taking 'drastic action', the council would normally engage with the stakeholder concerned" (Carnie 2002). The episode thus suggests that enforcement may be subject to the play of power between industry, communities, officials and politicians.

## **Devolution**

Local industry is also concerned that devolution will result in uneven regulation between local authorities. Linking this to the interests of local government in Durban, they have repeatedly argued that stringent local regulation will lead to the relocation of industries and the loss of new investment. In the case of



petrochemicals, the coastal refineries are located within the best resourced local regulatory regimes. This contrasts with weak regulatory capacity at Sasolburg and Secunda. CAIA has consistently opposed the notion that Durban should become the chemicals centre of the country and Mitsubishi has recently committed to a R5 billion investment in a new 'chemicals city' at Sasolburg - the most significant new investment in the sector to date. These arguments implicitly support the view that dirty industries migrate to regions, countries and zones with lax regulation. They also suggest a contradiction between the interests of established plants with major fixed investments located in better regulated areas, and investment capital seeking competitive advantage in lowest-cost locations.

For community activists in South Durban there is a clear implication that devolution presents industry with the opportunity to undermine local regulation. Many towns in South Africa are exposed to high levels of air pollution but, of the 284 local authorities, only 131 performed any air quality monitoring in 2001 and only 97 took steps of any sort towards assuring compliance. Moreover, "central government expects it to take ten years before the new local government system is able to generate sufficient income to manage and deliver basic services" (Albertyn and Watkins 2002: 6) and environmental regulation is not likely to be a high priority on the delivery agenda. For their part, local officials have complained of 'unfunded mandates' - the devolution of responsibilities from the national level without a corresponding devolution of funds.

There is thus strong agreement between South Durban industry and communities in favour of national standards for source emissions as well as ambient concentrations, allowing that local conditions may require a level of variation above the standard.

Beyond this, concerns about devolution point to a flaw in the concept of local level piloting which, in principle, will create an uneven regulatory regime in the short term. However, pilot projects tend to attract big funding while subsequent 'rollouts' tends to be under-funded. This raises the question of how long the short term will be and whether the rollout will maintain the rigour of the pilot in practice. Given that government is committed to devolution, it suggests that civil society needs to demand a coherent rollout plan with time frames and budgets.

## ***Managing dissent***

Industry also argues that both standards and enforcement should be tough but qualifies this in three ways. First, compliance should be calculated in percentage terms to avoid rigid sanctions so that, for example, a given number of exceedances are allowed per month according to substance. Second, transitional arrangements must allow industry to reach compliance with the new standards within specified time frames



and in a way that is sustainable for the South African economy. They see such arrangements being agreed through negotiation and, in one view, EMCAs should be used for this purpose. Third, the overall approach within the regulatory system should be 'cooperative' rather than 'confrontational'.

Community organisations are likely to have a different definition of 'tough' and would not easily accept these qualifications. Specifically, they have argued that EMCAs can only be legitimate if they go beyond compliance and are likely to see a transitional deal as potentially extending the present system of negotiated non-compliance.

Further, the argument for cooperation assumes a broad common interest which communities do not feel. This does not mean that negotiated agreements are not possible but that, from the community perspective, they are better described as pragmatic compromises than cooperation.

The story of South Durban is being played out in the national context described in Part 1. At the national level, there is a profound tension which frames the evolution of a new regulatory approach. On the one hand, with GEAR, government essentially adopted industry's view of economic sustainability and confirmed the dominance of the corporate discourse. At the same time, the project of democratisation has maintained those rights which have cast a regulatory shadow across that discourse. Far from assuring 'cooperation', this tension probably means that critical civil society organisations will use and expand democratic space and continue to voice dissent from the corporate worldview.

The experience thus far is mixed but the emerging governance regime displays several features of ecological modernisation that are aimed at managing dissent from this dominant discourse.

First, the locus of decision-making has become mobile and subject to hijacking or uncertainty. The meaning of the issues for decision also changes along the way. Tracking where real decision-making power resides at any one time requires substantial resources.

Second, the regime gives scope to what O'Riordan (1981) calls 'nondecision-making'. This is a way of holding issues in suspension by pretending to address them but ensuring that decisions are perpetually delayed, and it is used by powerful groups to limit the political process to innocuous issues while holding big issues off the public agenda.

Third, the stakeholder model privileges those with the greatest capacity to participate and, within the MPP, community representatives are troubled by a sense of entrapment. The agenda of the MPP certainly has its origins in the concerns expressed by organisations in civil society but the process itself is subject to more



powerful actors. At the same time, the invitation of multi-stakeholder democracy distances and defuses popular activism as a mechanism for change. For community organisations entering the 'partnership', the problem becomes one of preventing themselves from emerging as compliant activists whose participation provides a democratic stamp to outcomes determined by dominant interests. And as they weigh up the options, they are overwhelmed with calls to participate in multiple processes, from EIAs to national policy, with the subtle sub-titling that absence equals consent to whatever is on the table.

Yet the record of environmental regulation in South Africa suggests that civil society, and particularly local organisations, now carry the critical responsibility for monitoring both the regulator and the polluter. Government has in effect outsourced its responsibilities to the people themselves - and it does so very cheaply since it provides no resources whatever to community groups who take on this responsibility.

In South Durban it is very doubtful that the majority of incidents would have been recorded but for the active monitoring of SDCEA and its constituent organisations. In most other towns, local people are unaware of the connection between pollution and what have become routine ailments.



## **Part 3**

# Conclusions

## **1. South Africa**

### ***The failure to regulate industrial pollution***

South African industries are not being held accountable for their air pollution. Although environmental pollution does not strictly respect geographic boundaries, a history of racist, apartheid-era industrial planning makes black workers and communities in particular bear the brunt. The applicable law (the APPA) is recognised as outdated but has not been replaced; the DEAT's budget allocation for air pollution control is small and getting smaller; and the enforcement capacity (in the number of air pollution control officers) is inadequate and eroding further. These signs of collapse do not indicate that air pollution control is currently in decline after some earlier 'golden era' of effective accountability and control. By the time of South Africa's democratic transition, there was already widespread concern about the failure to hold industries accountable for the health and environmental impacts of their pollution. In response to ongoing pollution incidents and transgressions by industry, the 'regulators' have consistently failed to enforce compliance in terms of available laws and licenses through prosecution or effective sanctions, preferring to 'negotiate' the terms of continued non-compliance.

In democratic South Africa, voices expressing those concerns now have greater potential impact. Black communities, previously denied their human and civic rights, now enjoy full citizenship with a cluster of rights defined and protected by a progressive constitutional order which specifically includes rights to a clean and healthy environment. Citizens and civil society organisations demand and take their rightful place as stakeholders in holding corporations to account through 'multi-stakeholder' fora and through



independent action. A new environmental legal framework (in the NEMA) promises government's adherence to good principles and practice. If effected, these would signal the end of industry's impunity for air pollution.

But, nearly a decade after apartheid, government has failed to deliver a credible regime of corporate accountability. Despite acknowledging the many failures and weaknesses of the current system, despite the promise of a new law for air quality management, despite fine-sounding rhetoric about unacceptable industrial air pollution, government's actual performance is getting worse.

In the meantime, instead of establishing the basic building blocks for effective pollution control, the DEAT has devoted time and resources to negotiating 'voluntary agreements' (EMCAs), without the serious promise of appropriate sanction for non-compliance, with polluting industrial sectors. Not even this process has delivered anything final, and it has certainly not contributed to building an effective system of accountability for pollution. Voluntary agreements with - and self-regulation by - polluting industry are not appropriate in the current South African context. The approach smacks of putting the fox in charge of the hen-house, and the possibility of it being an effective component in an overall regulatory regime can only emerge after compliance with good national standards is guaranteed by independent, consistent, transparent and well-resourced public authority regulation backed by the requisite will and political leadership.

Enforcement by civil society is not a satisfactory substitute for proper public or state regulation. But given government's failures thus far, it is increasingly perhaps the only viable option. People's organisations at the local level, with broader civil society support, will surely be compelled to enforce their considerable rights against the state and industry.

### ***The AQM system - emerging issues***

Acceptable levels of corporate accountability require a regulatory regime which establishes, inter alia:

- corporate duties and obligations;
- citizen and community rights; and
- a compliance regime with national standards, liability and implementation mechanisms, and reporting, monitoring, and verification systems.

Compliance regimes are generally thought of in terms of sticks and carrots - sanctions and incentives. Industry has variously called for incentives and here it is worth noting simply that no national audit has yet



been done on incentives. It is therefore difficult to know if incentives offered for environmental compliance may not be contradicted by existing 'perverse' incentives - that is, incentives which encourage pollution - within the broader workings of the fiscal regime.

Enforcement requires that there is capacity to monitor corporate behaviour and actual emissions, and the capacity and political will to impose sanctions in a consistent and even-handed manner. A first requirement for consistency is that there should be common standards set nationally. The present draft of the AQM Bill allows for emission standards but exempts 'controlled processes' - which will include the most significant polluters - whose emissions will be determined by individual licenses. This exemption indicates an intention to continue the well-established tradition of 'negotiated non-compliance'.

Licensing big polluters is nevertheless a necessary part of the monitoring system and needs to be linked to local area ambient monitoring. But if competitors are subject to different regulatory conditions, then the one enjoys an effective subsidy relative to the other.

Differences in controlled-process licenses will likely relate to geographical location in the context of devolved implementation. There are two reasons for this. First, ambient standards will permit greater latitude in areas where there is a lesser concentration of polluting industry. Second, where there is little capacity to monitor ambient pollution, the lack of information will be used to claim that there is no evidence that ambient standards have been exceeded.

At present, regulatory capacity is weak to non-existent in most local authorities. In Sasolburg, for example, one local official supposedly monitors emissions of everything from local restaurants to the giant refinery and chemical plants. Even in better resourced areas, accurate reporting relies on the integrity of polluters because there is no real capacity for verification. The extent to which polluters have an interest in accurate reporting finally comes down to the likelihood of exposure and liability.

Moreover, South Africa as a whole can muster only a very limited number of suitably qualified people. Various Durban stakeholders have questioned the wisdom of the devolutionary commitment on this ground. A major capacity building programme with national funding will be required if the system of devolved management is to be credible. In the foreseeable future, it will also be necessary that local governments receive central funding for the operational costs of carrying out this mandate.

Thus far, national government has demonstrated little will for environmental regulation and less for enforcement. There is no reason to believe that the majority of local authorities will show greater determination without substantial pressure from civil society. Durban stakeholders broadly agree that the



MPP is located there because of the strength of local community organisation. Present events suggest that liability relating to specific incidents will be determined by the balance between civil society demands for action, industry aversion to prosecution, local government anxieties about investments and national political priorities. The implication is that local regulation and enforcement will reflect the strength of local civil society. At the same time, weak regulation in one area will undermine stronger regulation in other areas.

The Durban experience also suggests that stakeholder governance provides a mechanism for managing dissent from the business worldview. Stakeholders, of course, want government to adopt positions which advance or defend the interests they represent. This is what participation is about. The problem is that dominant interests have the greatest power to participate. However, dominant interests always do participate that is part of the definition of a dominant interest. Formal participation has given communities greater access to decision makers even though it has been endlessly frustrating and what is won in one forum may be lost in another. Stakeholder fora do not put an end to informal participation such as backroom deals between politicians and business or street protests by communities. But stakeholder participation does mean, and this is a second purpose of such bodies, that the stakeholders themselves (including governmental stakeholders) are to some extent subject to mutual scrutiny, both individually and in their relationships with each other. Formal participation is also provided through the legal system. As suggested above, civil society may find this a more promising avenue if government is unable to provide a stable and effective regulatory regime that guarantees people's constitutional rights to a clean environment.

In itself, corporate accountability has a weak purchase on the question of who decides society's technology choices. In so far as the choice is left to business, pressure on polluters is the most effective way of driving innovation for cleaner production. A campaign for corporate accountability could, however, be tactically linked with other initiatives to influence technology choices through campaigns on economic and spatial planning.

## **2. Global dimensions**

### ***The need for global regulation***

People and their environments the world over are increasingly affected by, and implicated in, the globalised web of corporate activities and interests. However, there is too little democratic control over corporations at



the global level, and no coherent regulatory system at the global level within which appropriate social and environmental standards can be effectively enforced in relation to transnational corporations. The lack of accountability and liability for global corporate activity has prompted growing calls for global regulation. Such regulation would be an important step toward building the power of citizen movements in relation to global corporations and establishing the primacy of human rights, environmental protection and democracy over corporate rights.

The increasing scale and mobility of transnational capital and corporations have effectively diminished the ability of citizens and countries to hold them accountable for their actions. Such accountability is necessary for the functioning of democracy. Currently, governments are often serving the interests of corporations, rather than those of people.

Extreme cases of corporate abuse of people and environments can be found from all over the world. The fact that they happen at all, and that subsequent liability for remediation and compensation are difficult to pin down, point to the need for effective global regulation which would help prevent such occurrences, would enable corrective action and hold perpetrators to account when they do nonetheless occur.

However, the need for regulation does not only flow from extreme events and 'bad apples' in the global corporate community. Regulation is required as the reasonable and pragmatic response to the intrinsic characteristics of corporate interests in the contemporary global community and economy.

From the end of legalised slavery, corporations have been required to act in ways deemed to be in a wider public interest. The use of legislation to constrain corporate activity is not new, but new forms of corporate accountability are today more vital than ever. Current legal instruments are not aligned with current realities and whereas corporations benefit from a global market for the development of their business, they are not held globally accountable.

It is not only necessary that the activities of corporations be regulated it is just as important that there is world-wide uniformity of at least the minimum levels and basic standards in terms of which that regulation is accomplished. This is necessary for at least three related reasons:

1. It is a defining feature of current corporate structures and activities that they are present and active across national boundaries and often their production, sales and ownership are in different legal jurisdictions with inconsistent regulations. In combination with the complex structures of subsidiary, intermediary and holding companies within TNCs, this creates:
  - a. opportunity and incentive to exploit comparative weaknesses in the different regulatory regimes in



- order to maximise profit and avoid incurring legal liability or to deploy 'dirty' technologies disallowed elsewhere and so on; and
- b. difficulties for prospective complainants when they try to hold such corporations accountable for environmental, social or other violations.
2. Changes in the legal framework in any one country can have real or perceived impacts on the short-term competitiveness of companies in that country. Some governments, to remain competitive in the international marketplace, have become reluctant to unilaterally introduce rules corporations might consider unattractive.
  3. In the context of a highly competitive global economy, pressure - especially on developing countries and from TNCs, rich countries, and international bodies like the WTO - for policies of economic liberalisation and deregulation have driven labour and environmental standards progressively lower rather than higher.

## **North-South**

Concerns about unequal regulation between localities within South Africa are magnified on the global scale. Southern countries, whose governments are represented through the G77, have consistently resisted global rules on labour and environmental standards. This raises broader issues of equity than can be addressed exclusively through the mechanism of corporate accountability. That northern countries impose free trade on southern countries while maintaining protection for themselves, that they subsidise industries - particularly agriculture - and so ensure that local producers cannot compete within the free market zone defined in the south, that they have engineered debt to put southern countries in perpetual bondage, that much of this debt has been accrued through dubious mega-projects convenient to northern development administrators and profitable to northern engineers, all this is nothing short of scandalous. Any campaign for corporate accountability must therefore be conceived as complimenting other initiatives that address these issues like the Jubilee debt cancellation and the Oxfam Fair Trade campaigns.

Equally scandalous, however, is the G77's devotion to lowering labour and environmental standards. It confirms that a southern life is less valuable than a northern life and so entrenches racism as it is structured by the global economy. It is moreover ultimately self-defeating. The 'race to the bottom' leads to a cul-de-sac at the end of a one way street. Even within the logic of capitalism, suppressing wages to attract industry shrinks local markets leaving the south dependent on the rich northern markets. And the greater that dependency, the greater is the pressure to further lower labour and environmental standards and to police resistance so as to remain globally 'competitive'.



It may be argued that this is a form of southern subsidy (paid for by workers, industry neighbours and the state) to counteract northern subsidies. But in the present situation, this is not really the case. Northern subsidies are about competition between the United States and the European Union, including competition for control of southern markets. Similarly, the southern subsidy is primarily about competition between southern countries to give higher returns to foreign investors and to deliver cheaper products to northern markets<sup>22</sup>. If southern countries are to find a way out of the cul-de-sac, they need to act collectively to reverse the global logic that has seen the north getting richer while the south gets poorer.

Global corporate accountability is already emerging as southern people take legal action against corporate abusers in northern courts<sup>23</sup>. This lays the ground for establishing, by precedent, key components of the legal principle of global corporate accountability. But this groundwork should ideally be consolidated because the uneven development of case law will:

- be based on different legal systems depending on the 'home' location of particular parent companies;
- impose onerous effort, cost and risk to victims and litigants; and
- depend on the variability of local organisational capacities within southern civil society.

It will therefore tend to reproduce precisely those problems that have been raised in the discussion of devolution within the South African context. And while unequal rules may serve the interests of financial and speculative capital, it fails to provide productive capital with the predictability necessary for long term investment.

Corporate accountability is on its way. It is up to southern countries to decide whether to resist it for short term gains at the expense of other southern countries or to support it as an essential element in a broader restructuring of global markets in the common long term interest.

### **3. Indicators for progress towards corporate accountability**

Returning to the South African context of petrochemical industrial air pollution, progress must be clearly established in the near future on at least the following:

- Government must commit itself to clear time-frames for the progressive and speedy realisation of all the benchmarks indicated below.

22 - It is notable that WTO rules permit the northern subsidy and, if proposed investment rules are carried through, will require the southern subsidy while proclaiming that subsidies distort markets.

23 - E.g., Thor chemicals and Cape PLC. (UK); Doe et al v. Unocal et al (U.S.)



- Problems identified in the draft AQM Bill must be corrected before a new law on air quality management is enacted. Already government's delays in this regard make it vulnerable to the charge that it has failed to act reasonably and timeously to secure people's constitutional and environmental rights.
- Implementation of a new law on AQM must be accompanied by at least the following features:
  - Standards in terms of which the law is to be enforced are comprehensive and reflect a commitment to achieving stringent application and the highest AQ standards.
  - Stringent regulation, nationally and at the local level, is demonstrated through provision for, and enforcement of, sufficiently strong sanctions through prosecutions, fines, withdrawal of licenses, interdicts halting polluting processes, and so forth.
  - A dramatic reversal of current enforcement capacity trends:
    - The numbers and qualifications of public regulators are substantially increased; and
    - Regulators are independent, in principle and in practice, and not subject to interference or pressure of any kind which could undermine their ability and determination to act to improve air quality.
- The fiscal implications of a number of these characteristics would be reflected in an increased budgetary allocation for pollution control.
- The South African government should support the call for a global convention establishing corporate accountability and liability.
- There must be a measurable reversal of declining air quality in South Africa both nationally and in local 'pollution hot spots'.



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notes



## **More about groundWork**

*groundWork* is a non-profit environmental justice service and developmental organization working primarily in South Africa but increasingly in Southern Africa.

Our vision is to see communities that are affected by industrial pollution better able to defend and promote their environmental rights at local, national and international level.

*groundWork* seeks to improve the quality of life of vulnerable people in South Africa, and increasingly in Southern Africa, through assisting civil society to have a greater impact on environmental governance. *groundWork* places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.

*groundWork's* current focus areas are: Air Quality; Health care waste and incineration; Industrial landfill waste; and Corporate Accountability- WSSD

### **Trustees**

*groundWork* is constituted as a trust with six trustees. The chairperson of the Trust is Jonathon White, a Pietermaritzburg based attorney. The other members of the trust are:

Farid Esack, a Muslim cleric and gender activist; Patrick Kulati, a committed environmentalist working for the Cape Town Metro on preparations for the WSSD; Richard Lyster, a human rights and labour lawyer; Thuli Makama, Director of a Swaziland NGO Yonge Nawe; and Sandile Ndawonde, Director of Pietermaritzburg CBO, GREEN.



## **Staff**

*groundWork* currently has six permanent staff members. The Director is Bobby Peek, a well-known environmental activist and a recipient of the prestigious Goldman Environmental Prize.

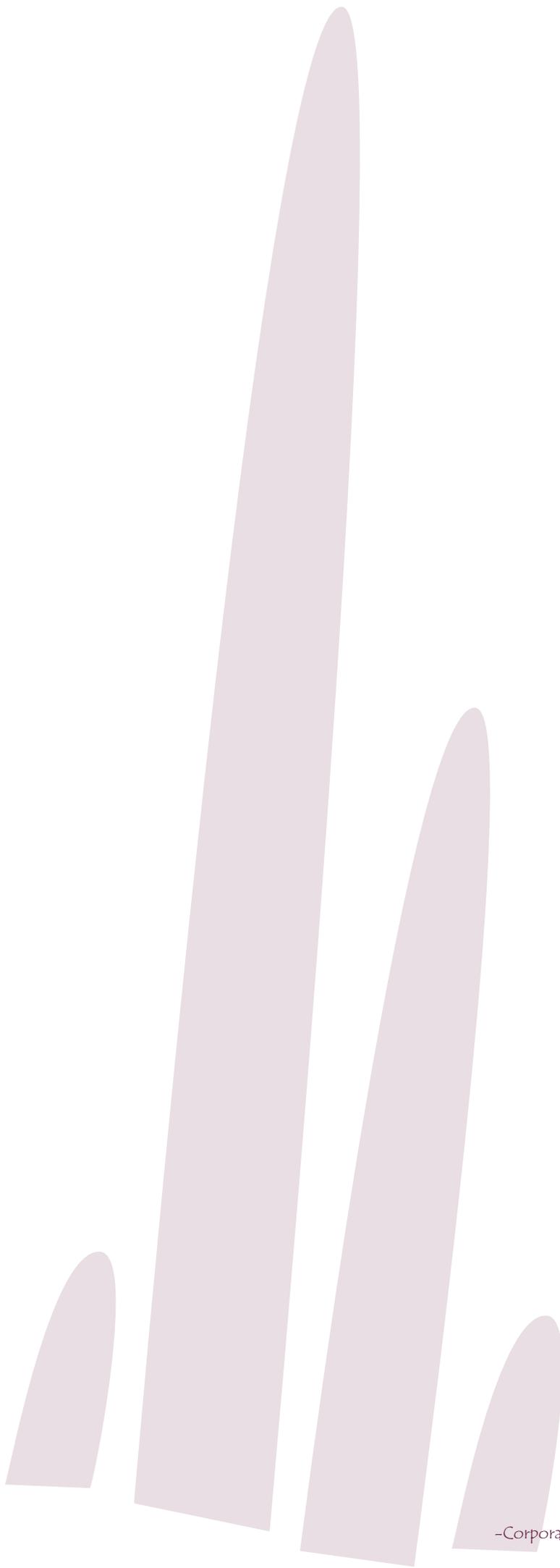
## **Affiliations**

*groundWork* is affiliated to the following international organisations:

- Global Alliance for Incineration Alternatives (GAIA)
- Health Care Without Harm
- International POPs Elimination Network
- Basel Action Network
- Oilwatch International

*groundWork* is also now the Friends of the Earth member for South Africa.







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