Re-thinking *Ex Post Facto* Environmental Authorisation in South Africa: Insights from 2022 NEMA Amendment

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SUMMARY

In 2004, section 24G on ***ex post facto*** environmental authorisation was introduced into the National Environmental Management Act (NEMA) of 1998 (as amended) to enable developers to get back into the regulatory loop. However, this introduction raised controversies among South African scholars and practitioners alike, despite some adjustments in subsequent amendments - 2008, 2013, and 2014. The argument has been that section 24G is a ***fait accompli***, provides leverage for abuse by potential developers, facilitates environmental non-compliance, and therefore should be considered an anomaly to the constitutional right to an environment that is not harmful to health and well-being. In 2022, the National Environmental Management Laws (NEMAL) Amendment Bill, introduced significant changes to section 24G to drive South Africa's environmental compliance and enforcement regime.

In this article, I revisit the question of ***ex post facto*** environmental authorisation under section 24G to advance substantive normative and theoretical insight that will attempt to clarify 'the controversial' debate about section 24G. This unique insight is achieved through the methodological combination of systemic analysis of the 2022 amendment of section 24G against previous criticisms of section 24G in tandem with existing literature. I articulate these controversies to provide conceptual direction in academic discourse that earlier criticisms about section 24G are no longer tenable. From these theoretical and analytical understandings, I argue that, unlike previous amendments, the 2022 amendment provides a fundamental radical shift in South Africa's environmental law. Along this line, I advocate for rethinking the "contentious" debate about section 24G and the issue of ***ex post facto*** environmental authorisation underpinning it. The legal doctrinal research methodology is used in this article.

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1 Introduction: A paradigm shift from dogmatic thinking?

One of the innovations embedded in South Africa's transformative environmental constitutionalism[1] is the premise that section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution) underscores that, unlike previous environmental injustices in the apartheid era, past environmental injustices would not be tolerated.[2] This constitutional provision spawned optimism for living in harmony with an environment conducive to human health and well-being. In keeping with the constitutional requirement of the need to protect the environment through reasonable legislative and other measures, over the years, various laws, policies, and other measures have been adopted by the State to keep up with this constitutional environmental mandate. One such legislative measure was the enactment of the National Environmental Management Act 107 of 1998 (NEMA, as amended).[3] In 2004, section 24G was inserted into NEMA to provide a mechanism for regulating unauthorised or unlawful activities that have commenced and may otherwise have a detrimental environmental impact. It prescribes South Africa's environmental administrative fine, replicating as it does, the wording of section 22A of the National Environmental Management: Air Quality Act 39 of 2004 (Air Quality Act). Section 24G also required a developer to apply for an ***ex post facto*** environmental authorisation for any listed activity that had commenced without the requisite environmental authorisation. It was to be read with section 24F which provided for an administrative fine. It must be clarified that section 24G has had a sordid history. It has been amended several times: 2008, 2013, and 2014. Since 2004, the issue of ***ex post facto*** environmental authorisation and the administrative fine has brought about unprecedented confusion and controversy among South African academics and practitioners regarding the country's environmental compliance and enforcement regime. This particularly concerns the case of whether the administrative fine could change people's perception of environmental protection such that environmental offences will be less serious as they start budgeting for the fine. Along this line, critics have variously criticised and categorised section 24G as a ***fait accompli***, constituting leverage for abuse by potential developers, which is divergent from the constitutional environmental right and the ideals of

1 For details on transformative environmental constitutionalism, see Murcott "Transformative environmental constitutionalism response to the setting aside of South Africa's moratorium on Rhino horn trade" 2017 ***Humanities for Environment*** 1-15; Murcott ***Transformative Environmental*** Constitutionalism (2022).

2 Hall "Facing the music through environmental administrative penalties: Lessons to be learned from the implementation of section 24G?" 2022 ***Potchefstroom Electronic Law Journal*** 2.

3 See the preamble of the NEMA. It must be noted that NEMA has been amended several times in 2002, 2003, 2004, 2008, 2013, 2014, and 2022. This article focuses on the 2022 amendment.

sustainable development.[4] Although it would be hypocritical to ignore the validity and seriousness of some of these criticisms at the time of the previous amendments of NEMA, they do not hold much water with the 2022 amendment that has attempted to address these concerns.

However, it is a fact that the punishment, usually in the form of a fine, does not render the activity legal nor does it mitigate the ensuing environmental harm nor stop the continuation of the activity. In instances where the transgressors wish to continue with the activity, it is necessary to consider regularising the activity through an *ex post facto* medium as in other jurisdictions like the United Kingdom.[5] Yet, the question has been whether an *ex post* facto application is not contrary to the constitutional environmental imperatives and whether in the interest of the environment, it is legal to do so.

On 24 June 2022, the National Environmental Management Laws (NEMLA)[6] Amendment Bill became an Act of Parliament. It introduced many amendments to existing environmental laws and regulations. One such law is NEMA whose section 24G was amended.[7] Unlike previous amendments, the 2022 NEMLA put the obligation to apply for an *ex post facto* environmental authorisation on those in control of, or successors in title to land where the previous owners commenced the listed activity without first obtaining an environmental authorisation.[8] It introduces new offences and increases fines and administrative penalties for defaulters.[9] Admittedly, the changes introduced by NEMLA under section 24G typify what some have termed as the long-awaited positive shift in environmental compliance and enforcement in South Africa.[10]

It is, therefore, imperative to (re)consider a shift from the dogmatic thinking about section 24G as the antithesis of the constitutional right to an environment that is not harmful to health and well-being.[11] Rethinking section 24G in this way makes it crucial for advancing its awareness and epistemic relevance in the environmental protection debate, particularly

4 See Kohn "The Anomaly that is section 24G of NEMA: An impediment to Sustainable Development" 2012 *South African Journal of Environmental Law and Policy"* 1-28 https://www.laurenkohn.co.za/wp-content/uploads/2015/12/The_anomaly_that_is_section_24G_of_NEMA.pdf (last accessed 2024-04-20); September *A Critical Analysis of the Application of S24G Provisions of the National Environmental Management Act (NEMA) – the Gauteng Province Experience* (Master's thesis 2012 NWU) 1-78.

5 See, Rantlo & Viljoen "A critical appraisal of *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 (5) SA 275 (GP" 2020 *Impact Assessment and Project Appraisal* 441-445.

6 B 35B–2007. For details, see *National Environmental Management Amendment Act* 2 of 200 in GG 46602 of 24 June 2022.

7 See Act 2 of 2022: National Environmental Management Laws Amendment Act, 2022.

8 See s 24G(1)(b) by substitution in ss (1) of the 2022 amendments.

9 The fine has been increased from R5 million to R10 million.

10 Also see Rapson, Kilner, & Roussouw "NEMLA IV will tighten rectification processes" 2022 *Civil Engineering* 10-11.

11 Kohn (2012) 1-28.

on the extent to which it is or can be used as a useful environmental compliance tool to promote and harness environmental protection in South Africa. The reason is that although the new amendment of section 24G is designed to address issues of environmental non-compliance that could result in environmental damage, its use in this context could potentially serve as a tool to ensure and promote environmental compliance since it obliges developers to comply with prescriptive compliance measures on environmental authorisations.

In this article, I revisit the question of *ex post facto* environmental authorisation under section 24G to attempt to clarify its controversial debate by advancing substantive normative, theoretical, and conceptual insights. The normative insight is enabled through a methodological combination of systemic analysis of the 2022 amendment of section 24G against previous criticisms of earlier amendments of section 24G. I articulate these controversies to provide conceptual direction in academic discourse that earlier criticisms about section 24G are no longer tenable. As far as I have been able to establish, no jurisprudence has dealt with the new amendment of section 24G.

The rest of the article is structured as follows: section 2 below provides a brief historical account underpinning the rationale for the introduction of 24G. Section 3 critically reviews earlier criticisms of section 24G to provide a re-thinking of the issue and the controversies surrounding it. The last section contains the conclusion.

2 Tracing the Origin of Section 24G

The fundamental problem with the South African environmental compliance regime under the Environmental Conservation Act 73 of 1989 (ECA) was how to adequately deal with listed activities that had commenced without the required authorisation. It should be noted that before the enactment of NEMA, ECA which is still relevant today (albeit NEMA has repealed some of its provisions) governed South Africa's environmental impact assessment (EIA) regime. Section 26(2) empowered the Minister to make regulations on environmental impact reports and the relevant procedures to be followed. Through this power, a list of identified activities and EIA regulations were promulgated in 1997, providing procedures to be followed by prospective developers seeking environmental authorisation. This list contained ten broad categories of activities which were amended several times by Government Notice R1182 in GG 18261 of 5 September 1997. ECA did not provide for *ex post facto* environmental authorisation for unlawful listed activities; had limited provisions for the cessation of such illegal activities; made no provision for the prosecution of environmental offenders; made no provision for restoration of the environment; and

had no provisions for environmental offences or penalties.[12] The preceding must not be interpreted to mean that ECA provided leeway to environmental degradation. Section 21 of ECA required the Minister of Environmental Affairs and Tourism, as it then was, to identify listed activities that would have a potentially detrimental effect on the environment, and which may not be undertaken without the necessary environmental authorisation. The ECA Regulations[13] required for the first time that potential environmental impacts of development activities are considered proactively and addressed before they happen.[14] This could be done either by refusing an application for environmental authorisation or by imposing mitigation measures to manage the development's potential impacts as intrinsic conditions of the authorisation. The ECA Regulations also provided the basis for these applications to incorporate social and environmental justice as a public participation process had to be conducted as part of the EIA process. This process enables the public to express their views on a proposed development. Hall argues that

> the Regulations accordingly represented a significant shift away from past decision-making approaches. They provided a powerful environmental management tool that is still at the heart of the government's legislative response to South African environmental rights and protection. The requirements to obtain authorisation before commencing a listed activity and to offer the public an opportunity to participate have remained central to all of the several subsequent EIA amendment regulations and listing notices.[15]

The authorisation will only be made after properly considering "reports concerning the impact of the proposed activity and alternative proposed activities on the environment".[16]

Even when NEMA was enacted in 1998, it failed to provide a substantive normative compass on how to adequately address or rectify consequences of listed activities that had unlawfully commenced until the introduction of ***ex post facto*** authorisation in 2004 with section 24G. The absence of this ***ex post facto*** authorisation left a serious legal lacuna in South African environmental governance that witnessed rather disappointing conflicting and contradictory decisions by the courts in ***Valley Coalition v Sybrand Van Der Spuy Boerdery***[17] (***Silvermine Valley's*** case), and ***Eagles Landing Body Corporate v Molewa***[18] (***Eagle Landing's*** case). In ***Silvermine Valley's case,*** the court considered an application for

12 Erasmus "An analysis of section 24G of the National Environmental Management Act" 4 https://static.pmg.org.za/docs/120828analysis_0.pdf (last accessed 2024-05-26).
13 GNR 1182, 1183, and 1184 in GG 18261 of 5 September 1997.
14 Hall (2022) 4.
15 Hall (2022) 5. See, for example, GNR 385, 386, and 387 in GG 28753 of 21 April 2006; GNR 543, 544, 555, and 546 in GG 33306 of 18 June 2010; and GNR 982, 983, 984, and 985 in GG 38282 of 4 December 2014.
16 S 21(2) of ECA.
17 2002 1 SA 478 (C).
18 2003 1 SA 412 (T).

environmental authorisation after the commencement of a development inappropriate because the EIA would not serve its intended purpose: being a useful catalyst to determine the likely impact the development will have on the environment and people's health and well-being. However, in ***Eagles Landing's*** case, the court considered retrospective authorisation to be requested or sought after the commencement of an identified activity, but before the completion of the project,[19] which in the opinion of the court, was implausible for the legislature to have intended partially that the constructed building be demolished, authorised, and rebuilt.[20] It was in keeping with the spirit of section 24 constitutional environmental rights, that section 24G was introduced to address these shortcomings and to shape South Africa's environmental governance paradigm.

As indicated above, in 2004, NEMA was amended with subsequent amendments in 2006, 2008, 2013, and 2022. Only the 2004 amendment "introduced" section 24G. The subsequent amendments changed the content of section 24G but did not introduce it. As indicated above, the focus here is on the 2022 amendment. It should be noted that while previous amendments of section 24G brought about changes to the treatment of environmental authorisations, it is not clear how they brought about changes to actual EIA procedures. This change narrowed the substantive scope of activities requiring authorisations, which was rather wide.[21] As indicated earlier, if and where a developer commences with a listed activity without an environmental authorisation, section 24G of NEMA allows a prospective developer to apply for ***ex post facto*** environmental authorisation. An application in terms of section 24G constitutes an open admission of guilt by a developer, that ought, as required by law, to have applied for authorisation before the commencement of the listed activity but failed to do so. In other words, the crux of section 24G deals with developers who have admittedly and consciously acted in breach of applicable environmental legislation, for which section 24G provided a potential developer with the possibility, based on its application, to obtain an ***ex post facto*** authorisation. Section 24G of the 2004 amendment of NEMA required a development that contravened section 24F to apply for rectification. The verb "to rectify" means to "correct something or make something right",[22] and in this context, it refers to the commencement of a listed activity without due authorisation. Rectification involves four processes: (i) applying for authorisation; (ii) requiring the applicant to undertake an EIA; (iii) requiring mandatory payment of an "administration fine" before the

19 Kidd, Retief, & Alberts "Integrated environmental assessment and management" in King, Strydom, & Retief (eds) ***Environmental Management in South Africa*** 3 ed (2018) 1229; Oosthuizen, Van der Linde, & Basson "National Environmental Management Act 107 of 1998 (NEMA)" in King, Strydom, & Retief (eds) ***Environmental Management in South Africa*** 3 ed (2018) 161-162.

20 Paras 101-102.

21 Also see Kidd ***Environmental Law*** (2011) 239; Kidd ***et al*** (2018) 1227-1228.

22 Cambridge Advanced Learner's Dictionary (2018).

authorities consider the application; and (iv) the authority making the decision either grant or reject the application. Nevertheless, the introduction of section 24G seemed to have enabled, on the one hand, prospective developers who had commenced their activities without the necessary authorisation to fall back into the regulatory loop, and on the other, to permit administrative authorities to evaluate activities that have bypassed EIA processes.[23] Section 24G (2) required that the Minister or MEC, as the case may be, after consideration of the filed report ***may*** direct the concerned person either to wholly or in part cease the activity or to rehabilitate the environment or issue an environmental authorisation; such conditions to be determined by the Minister or MEC. However, in 2013, the Gauteng High Court in ***Supersize Investment 11 CC v MEC of Economic Development, Environment and Tourism, Limpopo Provincial Government***[24] wrongly held that section 24G would be applicable only after a person has been convicted in terms of section 24F. The wrongness of the decision is premised on the fact that section 24G was used or relied on as "an alternative to, not a consequence of, prosecution".[25] This, notwithstanding, a 2013 amendment of NEMA clarified this position and made it clear that section 24G was not or should not be perceived as an alternative to section 24F, but should instead be used in addition, to criminal prosecution under section 24F, which was entitled: Prohibitions relating to commencement or continuation of listed activities. This section provided that:

(1) Notwithstanding any other Act, no person may –
(a) Commence an activity listed or specified in terms of section 24(a) or (b) unless the competent authority or the Minister of Mineral Resources, as the case may be, has granted an environmental authorisation for the activity; or (b) commence and continue an activity listed in terms of section 24 (2)(d) unless it is done in terms of an applicable norm or standard.
(2) It is an offence for any person to fail to comply with or to contravene – (a) subsection (1)(a); (b) subsection (1)(b); (c) the conditions applicable to any environmental authorisation granted for a listed activity or specified activity; (d) any condition applicable to an exemption granted in terms of section 24M; or (e) an approved environmental management programme.
(3) It is a defence to a charge in terms of subsection (2) to show that the activity was commenced or continued in response to an emergency so as to protect human life, property, or the environment.
(4) A person convicted of an offence in terms of subsection (2), is liable to: (a) a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment, if that person is a natural person; and (b) a fine not exceeding the greater of 10% of the person's annual turnover in the Republic and its export from the Republic during the person's preceding financial year, or R10 million, if that person is not a natural person.

23 Kidd ***et al*** (2018) 971-1047.
24 [2013] ZAGPHC 98 11 April 2013.
25 Kidd ***et al*** (2018), 1258.

(5) When determining the penalty under subsection (4), a court must have regard to all relevant factors, including the following:
(a) the extent of the intention or negligence of the person who committed the offence in terms of section 24F(2)(a); (b) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety, and the environment; (c) the degradation of the environment caused by the commission of the offence; (d) the behaviour of the person who committed the offence; (e) the monetary or other benefits which accrued to the convicted person through the commission of the offence; (f) the degree to which the person who committed the offence has cooperated with authorities; (h) whether the person who committed the offence has previously been found in contravention of this act or any specific environmental management Act; and (i) the amount of any administrative fine paid in terms of section 24G(3)(b).

Distinctly the 2013 amendment addressed some of the legislative incongruities discussed above. The next section examines previous criticisms of section 24G.

3 Earlier Criticisms of Section 24G and the Current Position of Section 24G

3.1 The issue of administrative fines

Administrative fines under section 24G (2A) of the previous amendments of NEMA have been heavily criticised by academics for sanctioning environmental non-compliance.[26] Positing as they do that it is a leverage for perpetrating deviation from environmental compliance,[27] given its potential to enable developers to budget for the administrative fines while undertaking illegal economic listed activities that could otherwise have significant environmental pollution and ecological degradation with dire consequences to human health and well-being. Paschke and Glazewski contend that section 24G under the 2004 amendment of NEMA runs the risk of persuading prospective developers who did not adhere to relevant legislation, to quickly undertake a listed activity without the necessary environmental authorisation, simply on the pretext of paying the R1 million.[28] According to Du Toit, this fine was relatively "too low to constitute an effective deterrent"[29] compared to the cost of the resultant environmental damage. Paschke and Glazewski shared this view and considered it not to be a sufficient disincentive, which in their opinion "R1 million may be a relatively small amount in

26 Kohn (2012) 8; Paschke & Glazewski "Ex post facto authorisation in South Africa environmental assessment legislation: A critical review" 2006 *Potchefstroom Electronic Law Journal* 145.
27 Kohn (2012) 8.
28 Paschke & Glazewski (2006) *I* 145.
29 Du Toit *A critical evaluation of the National Environmental Management Act (NEMA) section 24G: retrospective environmental authorisation* (Master' thesis 2016 SU) iii; 22; Paschke & Glazewski (2006) 24.

the context of a large commercial development"[30] and supposedly so, not a sufficient deterrence measure. The authors further argued that section 24G is ambiguous if ***ex post facto*** authorisation would apply retroactively where an activity that had already commenced could be "legitimated as an incident result of the authorisation granted".[31] Others like Kidd ***et al*** viewed the issue of administrative fines differently and argued that it "will continue to be used as an alternative to criminal prosecution"[32] – one that is more attractive to environmental authorities. They claim that in so far as the primary purpose of the 2004 section 24G was not punitive, but to deal with the question of how and to what extent to deal with environmental impacts, that ought to have been considered in EIA, this purpose has now been subverted by the apparent punitive effect of an administrative fine.[33] It is important to emphasise that the administrative fines that were imposed (if any) were the sole discretionary prerogative of the Minister or MEC of the Department of Environmental Affairs (DEA) regarding the use of an administrative fine. Conversely, it is customarily that where a listed activity commences without prior authorisation transgressors are often punished for this.

In consideration of these criticisms, section 6 of Act 62 2008 and section 9 of Act 30 2013 increased the fine from R1 million to R5 million, respectively, which suggested that the fine has acquired the status of a punitive measure. As if this was not enough, section 5(b) of Act No 2 of 2022 substituted section 24G(4) of the 2013 amendment and increased the fee from R5 million to R10 million. This new fine must be determined by the "competent authority, before the Minister, Minister responsible for mineral resources or MEC."[34] I argue that this (new) fee has not disincentivised environmental compliance measures although irreparable damage to the environment and human health and well–being cannot be compensated or remediated through a fine. In other words, no amount of money can compensate for ecological destruction. Even so, the new amount is a welcome approach to forewarn prospective developers about the potential financial implications of failing to obtain the requisite environmental authorisation before the commencement of their activity. As with the previous amendments to section 24G, this should not be wrongly interpreted to mean that developers will simply budget for the fine. They risk losing a substantive amount of money (an issue every prudent business entity would strive to avoid) for non-compliance with legislative prescriptions. Logically, therefore, the 2022 amendment has practically settled the contention created by the previous amendments, about administrative fines. It is hoped that prospective developers would strive to avoid paying this fine and comply with the mandatory requirement of environmental authorisation. The 2022 section 24G provides the basis for halting illegal and supposed

30 Paschke & Glazewski (2006) 145.
31 As above.
32 Kidd ***et al*** (2018) 1260.
33 As above.
34 See s 24G(4) of 2022 amendment.

environmentally harmful activities with the intent to foster environmental compliance[35] and should be celebrated as a useful addition to the South African environmental compliance regime. The new amendment has gone a long way to addressing some of the controversy.[36]

3.2 The issue of abuse by developers and circumvention of environmental compliance

The issue of abuse by developers and circumvention of environmental compliance were levelled at the 2004, 2006, 2008, and 2013 amendments. Critics warned that the precise adverse effect of section 24G created by these amendments, was to enable developers to exploit the entire environmental compliance regime as a quick fix to secure short-circuited environmental authorisation as a ***fait accompli***, instead of adhering to the requirement of environmental authorisation.[37] According to Kohn, the implicative effect of this abuse is premised on the fact that it "has been the subversion of the purpose of the EIA as a crucial planning tool to anticipate and prevent (potential) environmental harm before it ensues."[38] Kohn emphasised that section 24G provided developers the opportunity to understand and rely on the fact that it is more cost-effective to break the law than to adhere to it.[39] September shared this view and argued that section 24G provided an overtly open escape route for developers who have contravened compliance with the requirement for environmental authorisation.[40] What follows from the preceding, is the claim that to allow for post-authorisation after the harm to the environment has occurred, is overtly anathema to environmental compliance measures espoused in NEMA. According to the Centre for Environmental Rights, the "application of the rectification mechanisms in section 24G has had unfortunate unintended consequences for environmental management and has been a thorn in the flesh of civil society organisations for some years".[41] It is argued that ***ex post facto*** environmental authorisations have been the norm rather than the exception, which in Kohn's view, was:

> an apparent reticence on the part of environmental authorities to endorse a rigorous ex-ante EIA process. Instead, it is suggested that authorities seem to

35 S 24G(2) of amended NEMA.
36 It is important to emphasise that s 24G is supplemented by s 24G standard operational procedure, an internal document guiding environmental authorities on how to better deal with s 24G applications and, more particularly, the issue of fines. See GN R 698 in GG 40994 of 20 July 2017.
37 Kohn (2012) 1. Paschke & Glazewski (2006) 145.
38 Kohn (2012) 1.
39 Kohn (2012) 10.
40 September (2012) 2. https://static.pmg.org.za/docs/120821leaseptember_0.pdf (last accessed 2024-05-17).
41 Centre for Environmental Rights ***Concerns about and suggestions for Amendment of section 24F and 24G of the National Environmental Management Act, 1998 (Act 107 of 1998)***, Submission to the Department of Environmental Affairs (2011) 1.

> favour the '24G approval process' which, in practice, is typically less burdensome and less transparent.[42]

September argued that section 24G provided an "attempt to circumvent the prescribed EIA process and may have effectively provided an escape route for criminals thus, suggesting that blatant disregard of the law and the environment may be tolerated."[43] The author further argued with specific reference to environmental projects in Gauteng Province that, section 24G reduced the foundation of environmental compliance, such that it became open for abuse by developers who saw it as "a mere formality or rubber-stamping exercise"[44] for project approval. According to the author's observation, environmental authorities are often presented with a ***fait accompli,*** with no choice but to approve potentially detrimental economic activities, thereby being more lenient towards developers because of their contribution to the economy through job creation.[45] Paschke and Glazewski argued that through the possibility of quick-fix approval, section 24G afforded "over-hasty developers to undertake (prohibited listed) activities which may have a substantially detrimental effect on the environment."[46] This means that a listed activity that would normally not have received authorisation would be authorised in the face of 24G, particularly in situations where environmental harm has already occurred.

For Van der Linde, section 24G "has proved to be controversial and frustrating in its scope, its application and its operating to both applicants and decision-makers alike."[47] According to the author, it was safe and important for all practical intents and purposes that section 24G be interpreted as thoroughly undermining the underlying aim of environmental assessment and the use of EIA as an effective planning tool to ensure effective environmental compliance. The author further argued that section 24G undermined the principles of integrated environmental management and sustainable development that are at the core of environmental protection and the fundamental right to an environment that is not harmful to health and well-being.[48]

On his part, Kidd argued that the normativity of section 24G provided no novelty for addressing environmental harm other than replicating the concept of an administrative fine, the only administrative penalty provided in South African environmental law.[49] Even though the title of

42 Kohn (2012) ***Policy*** 1.
43 September (2012) 2.
44 September (2012) 67; Burford ***The impact of retroactive authorisation of listed activities on sustainable development in South Africa*** (LLM thesis 2019 UP) iv.
45 September (2012) 66; 67.
46 Paschke & Glazewski (2006) 134.
47 Van der Linde "National Environmental Management Act 107 of 1988 (NEMA)" in Strydom & King (eds) ***Fuggle & Rabie's Environmental Management in South Africa*** 2 ed (2009) 207.
48 As above.
49 Kidd (2011) ***Environmental Law in South Africa*** 279.

section 24G – consequences of unlawful commencement of the activity, provided the safeguard for the off chance that non-compliance happens, it also suggested that section 24(G) addressed environmental non-compliance rather than environmental compliance, and consequently, opened the door for the further violation of the environment, instead of protecting it.

Even if it is possible that these concerns were tangible at the time of the previous amendments to NEMA, they are inconsequential to the 2022 NEMLA for the following reasons. First, the new scope of section 24G is wider. According to section 5(a) of Act 2 of 2022 which substituted section 24G(b) of the 2013 amendment, section 24G now encompasses not only the developer but also those in control of, or successors in title to land upon which a previous owner had commenced the unlawful activity without the requisite authorisation in contravention of section 24F,[50] to also apply section 24G. The same applies to the unlawful commencement of waste management activity. This is a welcome addition to adequately strengthen environmental compliance measures as opposed to the rather restrictive scenario under the previous amendments which only required the guilty party – the developer, to apply for rectification. Within the current context of this new amendment, Rapson ***et al*** suggest that successors in title will be required or empowered to clean up any inherited historic irregularities from their previous owner.[51] It is submitted that the new amendment under NEMLA "will tighten rectification processes"[52] and accordingly, helps to supplement environmental protection even if it does not incentivise innocent successors in title to clean up someone else's unlawful conduct.[53] This means in practical terms (although unfair) that innocent successors in title will remain vulnerable to having operations shut down pending the finalisation of the rectification application and to pay administrative fines.[54] However, whether NEMLA would have made exemptions for successors in title, to encourage clean-up operations, is beyond the reach of this article. Furthermore, unlike with the previous amendments, competent authorities are now obligated ("***must***" as used in NEMLA) to direct the applicant to immediately cease the unlawful activity pending a decision on the rectification application; investigate, evaluate and assess the impact of the activity on the environment; remedy any adverse effects of the activity on the environment; cease, modify or control any act, activity, process or omission causing pollution or environmental degradation; contain or prevent the movement of pollution or degradation of the environment and; eliminate any source of pollution or degradation on the environment.[55] Although some can argue that the small change in the words ***must*** – as opposed to ***may*** in the

50 See s 24G(1)(c)(i) of the 2022 amendment.
51 Rapson, Kilner, & Rossouw (2022) 11.
52 Rapson, Kilner, & Rossouw (2022) 10-11.
53 As above.
54 As above.
55 Ss 24G(A)-(F). Emphasis added.

NEMLA is insignificant, I argue that keeping the rules of legal interpretation aside, the meaning of these two words is markedly different. It is, however, important to bear in mind, as argued by Gray ***et al***, that "stopping a contravener's operations may have an enormous if not disastrous, financial effect on its business."[56] The rationale here is that it would be economically erroneous to stop a multi-million rand project's operations (either during construction or operation phases), as this could balloon the costs.[57] Consequently, it is apposite under the present circumstance that prospective developers would be wise to conduct proper due diligence and determine what authorisations are required before commencing a project. This will help ensure that their submitted applications are robust and all-inclusive of all listed activities required.[58]

Second, the purpose of section 24G is to identify, assess, and manage the environmental harm that has already occurred together with any future damage arising from an unlawful activity that has commenced. The fact that an assessment of damage is required "triggers" the legislature to provide legislation and/or policies to address this issue.

It is important to note here that the 2018 amendment changed the title from "Rectification of unlawful commencement or continuation of listed activity" to "Consequences of unlawful commencement of activities." I concur with Kohn,[59] that the former title alone was erroneously problematic, "should have been enough of a forewarning of the adverse consequences that would ensue from such anomalous provision," and has in principle been the source of confusion among academics and environmental practitioners alike. The 2022 amendment changed this to "regularisation of unlawful commencement or continuation of listed activity" and reflects an effective compliance tool. I argue that the new title of section 24G is free from any ambiguity and should not be wrongly interpreted as its predecessors. The wording of the provision is self-explanatory and conveys the overall legislative intent, which is to align the provision with the section 24 constitutional mandate of the right to an environment that is not harmful to human health and well-being. The amendment also changed the sequence in which the competent authority can issue a directive to suspend an activity and to receive reports assessing the activity. Contrary to the old requirement, where competent authorities were required to wait for reports and information before directing an activity to be ceased, they are now required to simultaneously direct that an activity must be ceased, and the necessary reports are undertaken.

It must be borne in mind that section 24G, must be initiated on application by someone who acknowledges contravention of section 24F,

56 Rapson, Kilner, & Rossouw (2022) 11.
57 As above.
58 As above.
59 Kohn (2012) 2.

on which basis, section 24G(1) obliges the person to cease the "illegal" activity while awaiting the decision on the application, or to remedy any (environmental) adverse effects, prevent pollution or degradation of the environment, or compile an EIA report.[60] This detailed report must among others contain the need and desirability of the "illegal" activity, the nature and extent, duration, and significance of the adverse impacts of the activity on the environment.[61] Section 24G(2) obliges the MEC to either refuse to issue the environmental authorisation or if it is issued, to do so subject to conditions deemed fit by the MEC. The authorisation will only take effect from the date on which it has been issued,[62] which means that the authorisation is void of any retrospective effect. On the other hand, section 24G(2)(c) empowers the MEC to direct the person to provide further information or take further steps before making the relevant decision. Section 24G(3) further requires the MEC to direct anyone who contravenes section 24F to rehabilitate the environment subject to satisfactory conditions to the MEC or take any other steps necessary under the circumstance.[63] This new addition to the amended section 24G demonstrates its willingness to ensure that prospective developers, as were with the previous amendments, do not abuse the EIA processes and the entire approach to integrated environmental management. Finally, subsection 24G(5) obligates the MEC to consider whether a developer has complied with any of the directives issued in terms of the first/second subsection, despite its failure to require the consideration of the section 2 principles of NEMA in this regard.

Even if the reason why developers refused to obtain authorisation is the same way they prefer to pay an administrative fee. Perhaps the problem with section 24G, was that it is wrongly placed under Chapter 5 of NEMA dealing with environmental authorisation instead of a chapter under compliance and enforcement. It must also be clarified that despite the criticisms relating to section 24G, its overall intent is not to deviate from environmental protection. The problem at the time with previous amendments of section 24G seems to be that environmental authorities and developers were not applying section 24G correctly. It would, therefore, be disingenuous not to accept that environmental compliance in South Africa, and globally, is generally problematic and no solution such as those espoused by the amended section 24G could provide a holistic solution.

3.3 The issue of non-alignment with the principle of sustainable development and constitutional environmental mandate

The general view by critics was that section 24G is ill-disposed to the objectives of EIA which is a useful tool in promoting environmental

60 Ss 24G (1)(b)(i), (iii), and (vii).
61 Ss 24G (1)(b)(vii)(aa) and (bb).
62 Ss 24G (2)(a) and (b).
63 Ss 24G (3)(a) and (b).

protection and achieving sustainable development.[64] As claimed by Paschke and Glazewski, any conduct by competent authorities that encourages and permits ***ex post facto*** environmental authorisation undermines section 24 of constitutional environmental rights.[65] Kohn argued that section 24G impedes the ideals of sustainable development, as it introduced a system of make-up EIA process as exemplified by the after-the-fact assessment process available to the developer who has cautiously breached the law.[66] In her opinion, the discretionary power given to the MEC in terms of section 24G(1) when compared with the minimum requirements of environmental protection under section 24 of the Constitution, highlights that the nature of section 24G ***ex post facto*** report, is thinner than the real EIA procedure. It is also argued that section 24G does not incorporate the section 2 principles of NEMA and particularly, the sustainable development principle in its ***ex post facto*** application.[67] From this perspective, it is safe to assert that section 24G is unconstitutional as the schizophrenic character of section 24G is at the heart of the divergence, rather than convergence with environmental protection measures and does not pragmatically, as initially contemplated, give (any) substantive meaning to section 24 of the constitutional environment right. This view is corroborated by Van der Linde, who posits that the issue of ***ex post facto*** environmental authorisation underpinning section 24G has undermined the purpose and foundational values of environmental assessment, the principles of integrated environmental management and the principle of sustainable development,[68] which is an important integral part of section 24 constitutional environmental right. This dissipates the claim that section 24G is contrary to the section 2 principles of NEMA.

Despite these criticisms, it would be erroneous to claim that the previous amendments of section 24G were an antithesis of section 2 principles of NEMA. The reason is that the prime rationale of these principles is to ensure that the interpretation of environmental decision-making processes such as those concerning ***ex post facto*** environmental authorisation must be guided by and not deviate from these principles which according to Murcott are "justice-oriented principles of environmental governance in South Africa", that purposively apply to "the actions of all organs of states (including decisions by MEC as the case may be) that may significantly affect the environment".[69] Indeed, South African courts have been firmed in the pronouncement of these principles and their usefulness in environmental protection. Even so, the 2022 amendment has provided more clarity on this controversy by also providing for public participation, which is crucial in bringing to the attention of interested and affected persons and providing them with the

64 Paschke & Glazewski (2006) 143.
65 Paschke & Glazewski (2006) 130-132.
66 Kohn (2012) 19.
67 As above.
68 Van der Linde (2009) 207.
69 Murcott ***Transformative Environmental Constitutionalism*** (2022) 78.

opportunity to comment on, an application for the unlawful commencement, undertaking or conduction of a listed activity. The competent authority is obliged to compile a report containing a description of the need and desirability of the activity; an assessment of the nature, extent, duration and significance of the consequences for, or impacts on, the environment of the activity, including the cumulative effects and how the geographical, physical, biological, social, economic, and cultural aspects of the environment may be affected by the proposed activity; description of mitigation measures under-taken or to be undertaken in respect of the consequences for, or impacts on, the environment of the activity; and a description of the public participation process followed when compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed, if applicable.[70]

It must be emphasised that section 24G is primarily designed to restore environmental compliance measures and proactively eliminate illegal or unauthorised listed activities, even though it is imperfect in lucidity. This is achieved either through compelling competent authorities to issue the required authorisation for the lawful activity to enable its legal continuation, or to order for the complete cessation of the activity and rehabilitation of the environment. Through this mechanism, illegal listed activities are rendered legal and the potential of their detrimental impacts on the environment and human health and well-being are properly addressed. Therefore, it makes sense to argue that section 24G has brought about an increased level of continuous environmental compliance measures. It should be viewed as the game changer to South Africa's environmental compliance regime for addressing the (problematic) issue of criminal sanction under amended 24F and the issue of environmental authorisation experienced under ECA. Even if one may be compelled to think that previous amended sections of 24G changed the ***status quo*** of South Africa's environmental impact assessment regime, it is nevertheless correct, to affirm that its normative provision and legislative intent have been wrongly followed and adhered to by competent authorities when considering EIA applications. While this may not have been the legislature's intention, it doesn't change the fact that section 24G was abused, thereby negatively impacting the environment and, by extension, the constitutional mandate to a safe environment. If this was not the case, then the amendments to section 24G would not have been necessary. Although indeed, section 24G does not explicitly provide for section 2 principles, it is argued that potential economic activities must be guided by and implemented following the principle of sustainability to the extent that they promote, ensure, and fit the categorisation of the concept and need to "secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".[71] This means that these principles, and particularly the sustainable development principle, are

70 S 24G (AA)-(DD) of the 2022 amendment.
71 S 24(b)(iii) of the Constitution.

considered by competent authorities when making their decisions for issuing retrospective authorisation, to determine whether it is in the interest of the environment to permit the continuation of unlawful listed activity.

3.4 The issue of the legality of offences and unlawfulness

The wrongful interpretation of the issue of an administrative fine has raised concerns relating to the principle of legality, which prohibits a person from being convicted more than once for the same crime, as it is unfair or inappropriate for a lawful activity to follow from unlawful administrative conduct. Along these lines, critics have argued that section 24G is unconstitutional.[72] Commentators are divided over the issue of whether section 24G imposes an administrative fine or criminal measure. Van der Linde, Kohn, Paschke, and Glazweski have argued that section 24G constitutes a fine, that is similar to an acknowledgement of guilt fine and consequently would for all practical purposes and intents be considered a criminal sanction necessary to stay the operation of section 24F.[73] Others, like Fourie,[74] pointed out that section 24G is not a punitive measure in the conventional sense, because the rationale for paying the administrative fine is to trigger the consideration of section 24G applications, with the understanding that listed activities would be properly regulated. In other words, as previously indicated, it brings violators back into the regulatory loop.

I hold a contrary view to these interpretations and posit that a correct interpretation is necessary to avoid the issue of ***autrefois convict*** in situations where a sanction of section 24F – now section 49B, were to be followed. The normative provisions of section 24G and section 24F are fundamentally different and should not be misinterpreted to suit unfounded claims that the administrative fine under section 24G(2A) instead of the criminal sanction in terms of section 24F. While section 24G (2A) explicitly refers to administrative fines, section 24F(4) provides for penalties. I agree with Kidd's submission that section 24G refers and applies to persons "who have committed an offence" in terms of section 24F, and not (to) a person who has been "charged and/or convicted of an offence" suggesting that the application of section 24G is appropriate and relevant whether an applicant has been prosecuted. In addition, section 24G(2A) is imposed by an official – the competent authority and is used here by the South African legislature to give effect to the polluter pays principle. On the other hand, section 24F is imposed by the courts and denotes a conventional criminal sanction measure against offenders who fail to comply with relevant provisions of NEMA. Section 24J of the 2008 amendment in conjunction with section 5.15 of the (then) Department of

72 Kidd ***Environmental Law*** (2011) 245.
73 Van der Linde (2009) 208; Kohn (2012) 2; Paschke & Glazweski (2006) 124.
74 Fourie "How civil and administrative penalties can change the face of environmental compliance in South Africa" 2009 ***South African Journal of Environmental Law and Policy*** 1-25.

Environmental Affairs and Tourism Guidelines 3, provides that ***ex post facto*** environmental authorisation applications will only be considered after payment of the required administrative fine that is separate or different from any imposed criminal penalty, clarified this issue. I share Erasmus' view that the best interpretation of the 2004, 2006, 2008 section 24G(2A) is that "the administrative fine is a mechanism to cover the administrative costs to the competent authority."[75] I concur with Kidd that section 24G was never intended to be used as an alternative to criminal prosecution, but it is now the case, since, it is "undoubtedly less of a burden than pursuing a criminal prosecution" expressing the hope that "appropriate cases, will in future, be referred for criminal prosecution."[76] I argue that section 24(G)(6) of NEMAL is explicit and does not criminalise the offender for the same offence, thereby correcting the misconception that section 24G suspends the sanctions in section 49A. Instead, it requires that the granting of an authorisation does not derogate the police or environmental officers from investigating another transgression by a developer in terms of NEMA or related laws.[77] Section 5(c) of Act No 2 of 2002 has substituted paragraph (a) of section 24G(6) and included "environmental mineral and petroleum inspectors" in the categories of officials required to investigate any transgression of NEMA or any specific environmental management act. Furthermore, section 24(G)(7) requires the MEC whenever an applicant is under criminal investigation to defer a decision to issue an environmental authorisation until the National Prosecuting Authority has decided not to institute prosecution relating to such contravention; the applicant is acquitted after prosecution relating to the contravention or the applicant has been convicted by a court of law of an offence relating to the contravention.[78]

4 Conclusion

By its very nature, section 24G was created to retrospectively correct environmental non-compliance, an action which, in itself, is controversial and open to criticism. In this article, I have attempted to conceptualise how we should re-think the debate about ***ex post facto*** environmental authorisation in South Africa, which previous studies and commentaries have focused on, namely that it is an anomaly to environmental compliance and enforcement. Even though these studies have rightly highlighted the legislative structure of environmental authorisation under the previous amendments of section 24G, it was shown that the corrective substantive provision of the new amendment to section 24G, promotes, ensures, and aligns with the fundamental objectives of environmental authorisation. As argued in this article, it is probably more accurate to say that the amendment has gone a long way

75 Erasmus (n.d) 11.
76 Kidd ***Environmental Law*** (2011) 395.
77 S 24(G)(a).
78 Ss 24(G)(7)(a)-(c).

towards addressing some of the concerns expressed. This new amendment should possibly put the debate about its anomaly to rest. The proximate controversy about section 24G since 2004 is the failure of the courts to develop jurisprudence on the matter, which is akin to the situation under ECA. In as much as, ***ex post facto*** environmental authorisation is used in South Africa, as a useful approach to ensure environmental protection, it is my view that it remains useful in circumstances where a potential developer has not obtained an unfair or improper advantage. It was argued that section 24G is a persuasive solution to the problem of environmental authorisation and should be applauded. The recent changes introduced by NEMLA in section 24G are innovative and consistent with the legislature's attempt to tighten the rectification process and proactively combat abuse and environmental degradation. It is therefore time to re-think and settle the contentious debate about section 24G and the issue of ***ex post facto*** environmental authorisation in South Africa.