



**Western Cape
Government**

Environmental Affairs and
Development Planning

BETTER TOGETHER.

REVIEW OF EIA APPEALS WITHIN THE COASTAL ENVIRONMENT OF THE WESTERN CAPE, SOUTH AFRICA

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Introduction: NDP 2030

- Aims to eliminate poverty and inequality,
- The protection of the *environment, economic development and social development* are closely related,
- Human health or wellbeing is dependent on the health of the environment,
- SA's development challenge should not be framed as a choice between the environment or economic growth,
- calls for the “**sharpening**” & “**retooling**” of the instruments,
- Such instruments include **EIAs and their Appeals**.

Introduction: Operation Phakisa Project

- President Zuma introduced Operation Phakisa in response to 2014 SONA,
- To address NDP priorities including poverty, inequality and unemployment,
- Project is implemented in two sectors: oceans economy and health (especially clinics),
- “to implement policies and programmes better, faster and more effectively”,
- These policies include **implementation of EIAs and Appeals legislation.**

EIA: Pressure & Perceptions

- “...causing development **delays**...”
- “...quite considerable **slowing down** of economic activity...”

(President Thabo Mbeki, 2008)

- “...housing delivery will no longer be **held hostage** by butterfly eggs...”

(Minister Lindiwe Sisulu, 2006)

Review of Effectiveness & Efficiency of EIA in SA, 2008

- Reviewed nationally:
502 EIAs (ECA = 148; NEMA = 354)
- “Overall there was a **significant improvement in effectiveness & efficiency** of EIA from the ECA regulations to the 2006 NEMA regulations.”
- Many aspects still not adequately considered,
- Notably, no appeals review was conducted.



Review of Effectiveness & Efficiency of EIA in Western Cape (IAIA Conference 2013)

- **Reviewed** 684 EIAs finalised (670 approvals & 14 refusals)
- **Sample size:** 71 EIAs (10%) (69 BA; 2 S&EIR)
- ***“Overall quality of EIA in the Western Cape has improved from the 2006 EIA Regulations to the 2010 EIA Regulations”,***
- ***“although there are concerns that need further improvement..”***
- **Again: No appeals review was conducted.**



Legislative changes and new focus

- The current 2010 EIA Regulations repealed the 2006 EIA Regulations due to the concerns with the South African EIAs and their appeal processes (DEA 2010),
- The 2006 also repealed the 1997 EIA Regulations,
- The Integrated Coastal Management Act was promulgated in 2008 to, *inter alia*:
 - to promote the conservation of the coastal environment
 - to ensure sustainable coastal development
- Operation Phakisa is piloted in the oceans economic sector.
- Renewed focus on the efficacy of EIAs.

Western Cape Coastal Environment

- Stretch of approx. 1000km from Olifants River on the north, through to the Blaaukrantz River in the south east coast,
- Rich in biodiversity due to the warmer Agulhas currents and cold Benguela currents which causes upwelling of nutrients.
- Provides for extensive fishery resources which are contributing to South Africa's commercial fishing industry,
- Human activities therefore exert pressure on the coastal environment, *inter alia*:
 - disturbance of natural processes such as energy flows and nutrient cycles;
 - introduction of alien invasive species and the impacts of discharging waste and toxins into the sea;
 - sea level rise; and
 - habitat modification through coastal development.



Problem statement

- Review of EIA Appeals within the **coastal environment** of the Western Cape, South Africa.
- Renewed focus on the efficacy of EIAs:
 - NDP's call for the “**sharpening**” & “**retooling**” of the instruments
 - Perception about the EIA process
 - Repetitive repeal of the EIA Regulations;
 - Ocean economy sector;
 - No review of the EIA appeals in WC- took place before.
- **Study aims** to analyze the appeals lodged in the WC in terms of the 1997, 2006 and current 2010 EIA Regulations.
- Review of the appeals- part of the a bigger project.

Review of EIA Appeals within the coastal environment of the Western Cape, South Africa

Methodology

● Literature review:

effectiveness of EIA practice & review methods of EIA appeals.

● Reviewed EIA reports and their appeals in terms of:

- which EIA decisions were appealed against?
- who appealed against the EIA decisions?
- what aggrieved the persons to appeal against EIA decisions?
- what are the trends of appeals under the different EIA Regulations?

Sample size

Western Cape

- Appeals period January 1998 - 30 June 2014:
 - 779 Appeals finalised
- Appeals finalised within the coastal environment
 - 40 Appeals
- Sampling size
 - 33 Appeals (82% of 40 appeals of finalised coastal appeals)

(1997 Appeals = 10, 2006 Appeals = 15 and 2010 Appeals = 6)

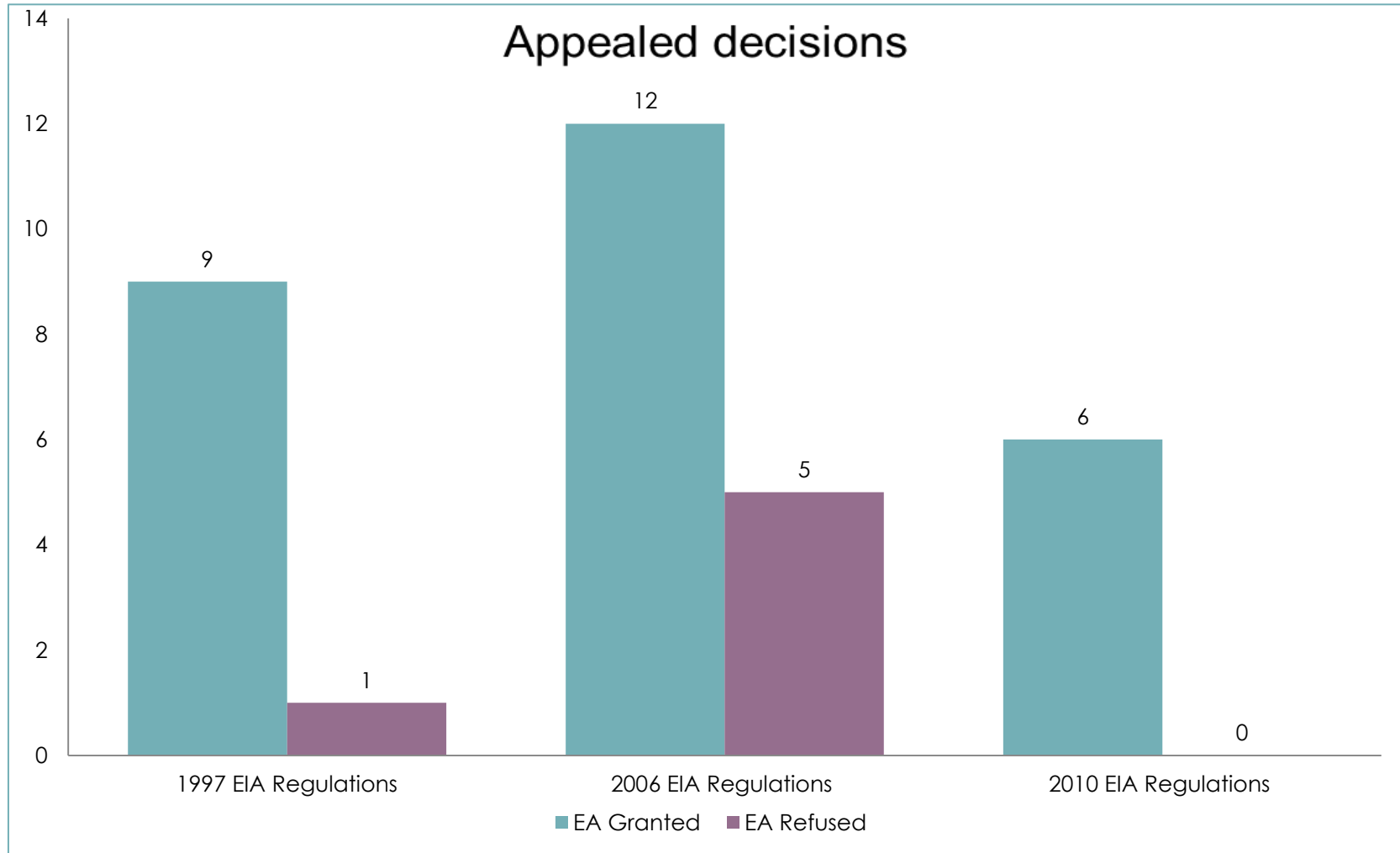
 - 27 EAs (including partial authorisations) & 6 Refusals of EAs.

Sample Selection

- Appeals finalised within the coastal environment were selected based on the following listed activities:
 - Listed activities within 100m of the high water of the sea.
 - Whether the activities fall within the 1km of the high water of the sea.
- The sample is considered representative of the coastal zone appeals finalised: 1998 to 2014.

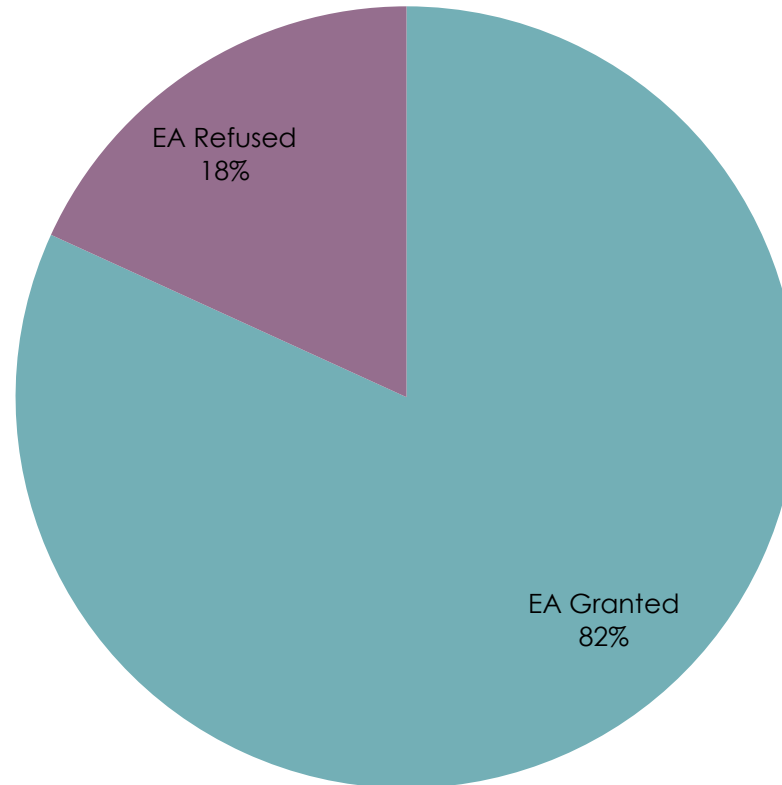
The Findings

EIA decisions were appealed



Total % of EIA decisions appealed (1998 to June 2014)

Total Appealed Decisions



EIA decisions were refused due to: (1)

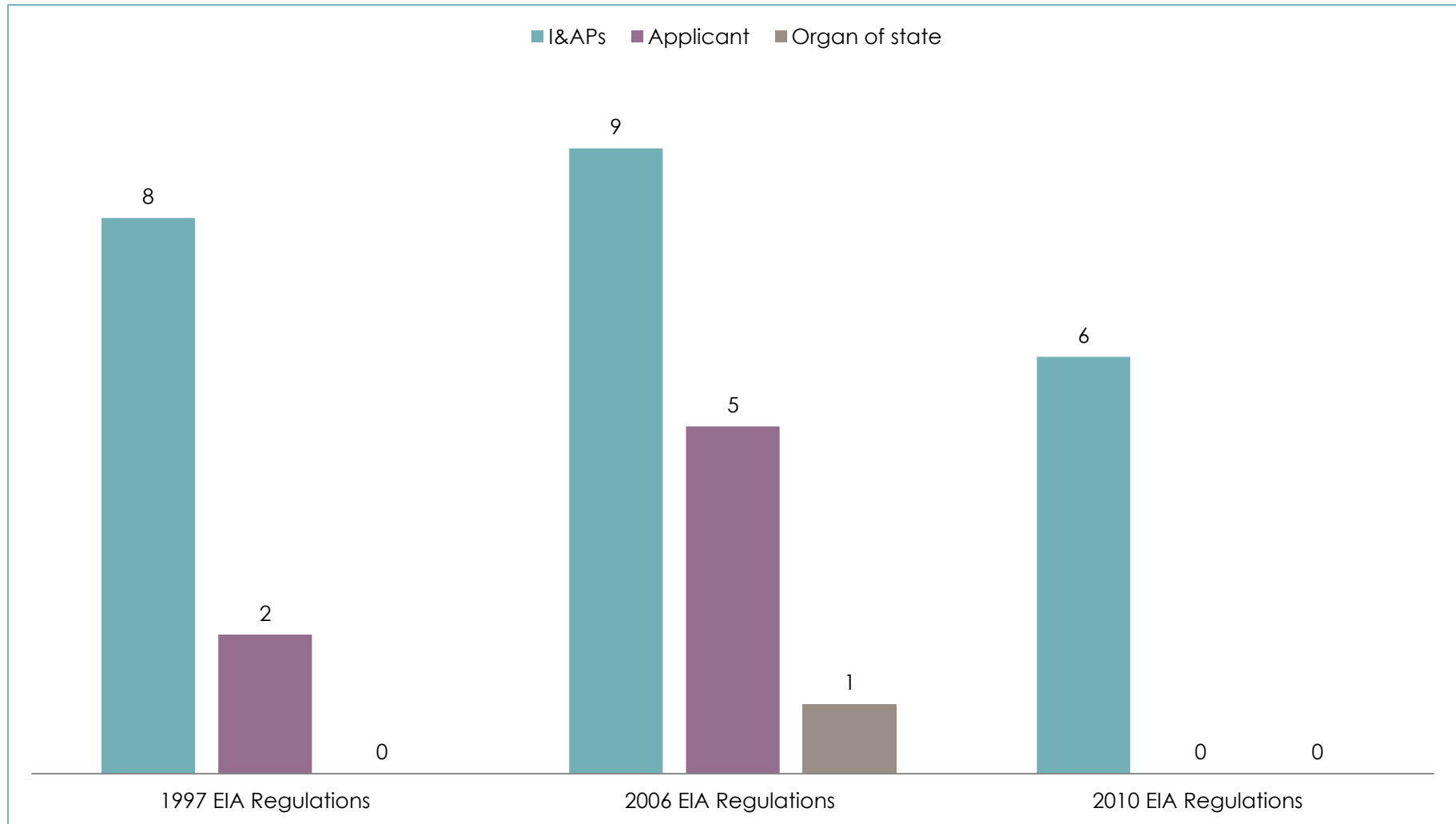
● Developments were:

- considered inappropriate based on the “*Need and Desirability*” aspects.
- not considered in the public interest and ecologically justifiable, socially equitable and economically viable.
- perpetuating urban sprawl and apartheid spatial planning of disintegrated settlements.
- not in line with the priorities of the IDP.
- not encouraging infill developments within the urban edges through the consolidation and development of vacant properties.

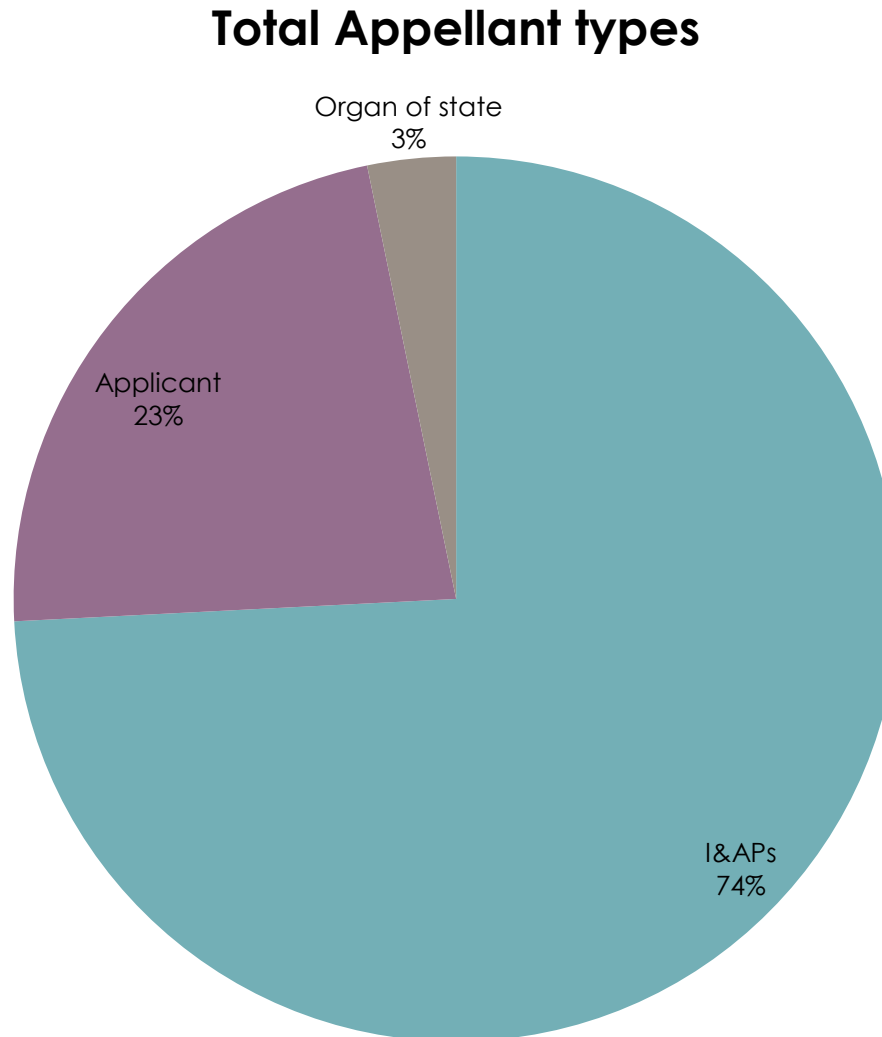
EIA decisions were refused due to: (2)

- Properties that were earmarked for agricultural purposes and situated in ecologically sensitive areas.
- SDFs were not considered appropriate by the Department.
- Developments were resource intensive and would require the municipalities to service them.
- Deferring decision-making on associated components to a future date which constituted conditional and piecemeal (incremental) decision-making.

Who appealed?



Who appealed? (1998 to June 2014)



Trend of appellants:

- I&APs are majority appellants and their issues varied depending on each application.
- Applicants mainly appealed against the Refusal issued against their developments.
- Only one Organ of state appealed, merely to include its proposed mitigation as conditions of approval.

Why applicants appealed?

Applicants often **appointed lawyers to appeal on their behalf** and stated that:

- Department failed to recognise the property's land use planning status.
- Municipalities have executive powers in respect of and right to administer municipal planning.
- Department's reliance on municipal spatial planning policy to justify its refusal to grant EA was done without any plausible explanation.
- The urban edge was determined in a manner that aims to meet the short and long term needs of the local community.

Why applicants appealed?

- Department's decisions amounted to a recital of law and policy without linking it at all to the application at hand, the specialists' reports or findings in the EIA Report.
- Department did not explain its conclusions in that the decisions are in conflict with the specialist reports and the recommendations in the EIA report.
- Selective quotation from the EIA reports and/or specialist reports should be avoided because it portrays an incorrect picture.

- Department's decisions to refuse the applications concluded that the socio-economic negatives outweigh the positives although the specialist socio-economic report outlined numerous socio-economic benefits.
- Department acknowledged the continued reassurance by the Municipality that adequate services capacity exists but concluded that those services could better be used elsewhere.

What aggrieved the persons to appeal

No.	Appeal Issues	1997 EIA Regulations	2006 EIA Regulations	2010 EIA Regulations
1	Biodiversity impacts	3	5	1
2	Consideration of alternatives	6	10	1
3	Visual impacts	3	7	1
4	Desirability	3	11	1
5	Heritage impacts	1	3	1
6	Socio-economic impacts	4	5	1
7	Site visits	0	1	1
8	Traffic impacts	1	6	1
9	Compliance with Integrated Coastal Management Act, 2008	4	8	1
10	Conditions of authorisation	2	2	2
11	Owner's consent	0	0	1
12	Services infrastructure	3	0	0
13	Cumulative impacts	1	6	0
14	NEMA principles	1	0	0
15	Listed activities	1	0	0
16	Public participation process	5	5	0
17	Pollution (water, odour and noise) and potential pollution of beaches	3		0
18	Authorised activities	0	2	0
19	Stormwater management	0	2	0
20	Ex post facto consideration of impacts	0	1	0
21	Independence of EAP/Specialist	0	3	0
22	Detraction of value	0	1	0
23	Dust impact	0	1	0
24	Service infrastructure	0	5	0

5 Main Appeal Issues (1998 to June 2014)

No.	Appeal Issues	1997 EIA Regulations	2006 EIA Regulations	2010 EIA Regulations
1	Consideration of alternatives	6	10	1
2	Desirability	3	11	1
3	Socio-economic impacts	4	5	1
4	Compliance with ICMA	4	8	1
5	Public participation process	5	5	0

Consideration of alternatives:

- No reasonable and feasible alternatives were considered.
- Partial approvals of developments were based on assumptions of the Department based on site visits.
- Developments were partially approved against EIA reports and specialist studies that recommended full authorisation.
- Alternatives are merely changes to the layout of the development, do not meet minimum requirements.
- Opportunity cost question of transforming agricultural land to residential development.
- Preferred alternatives were considered a wasted opportunity for everybody except the developer.

Desirability:

- **Outdated Municipal Structure Plans were superseded by recently approved SDFs.**
- **Consistency of the development with PSDF and Municipal SDFs (primary planning policy for the Municipality).**
- **Developments fall outside of the urban edge.**
- **Sites are zoned for agriculture but agriculture will not be a viable activity.**
- **Planning considerations far greater emphasised than the mandatory provisions under the NEMA.**
- **Department may not exercise powers or perform functions that encroach upon the functional terrain of Municipalities.**

Socio-economic impacts:

- Randomly determined setback lines by the Department resulted in developments not being economically viable or sustainable.
- The issue of the whether or not the development should occur at this point in time.
- Job creation, skills development and seasonal nature of tourism job opportunities.
- Need considerations arose from NEMA EIA Regulations but not from the ECA.
- Socio-economic benefits outweigh development costs.
- Department's prime and only focus is to protect the environment but not for poverty alleviation.

Compliance with ICMA:

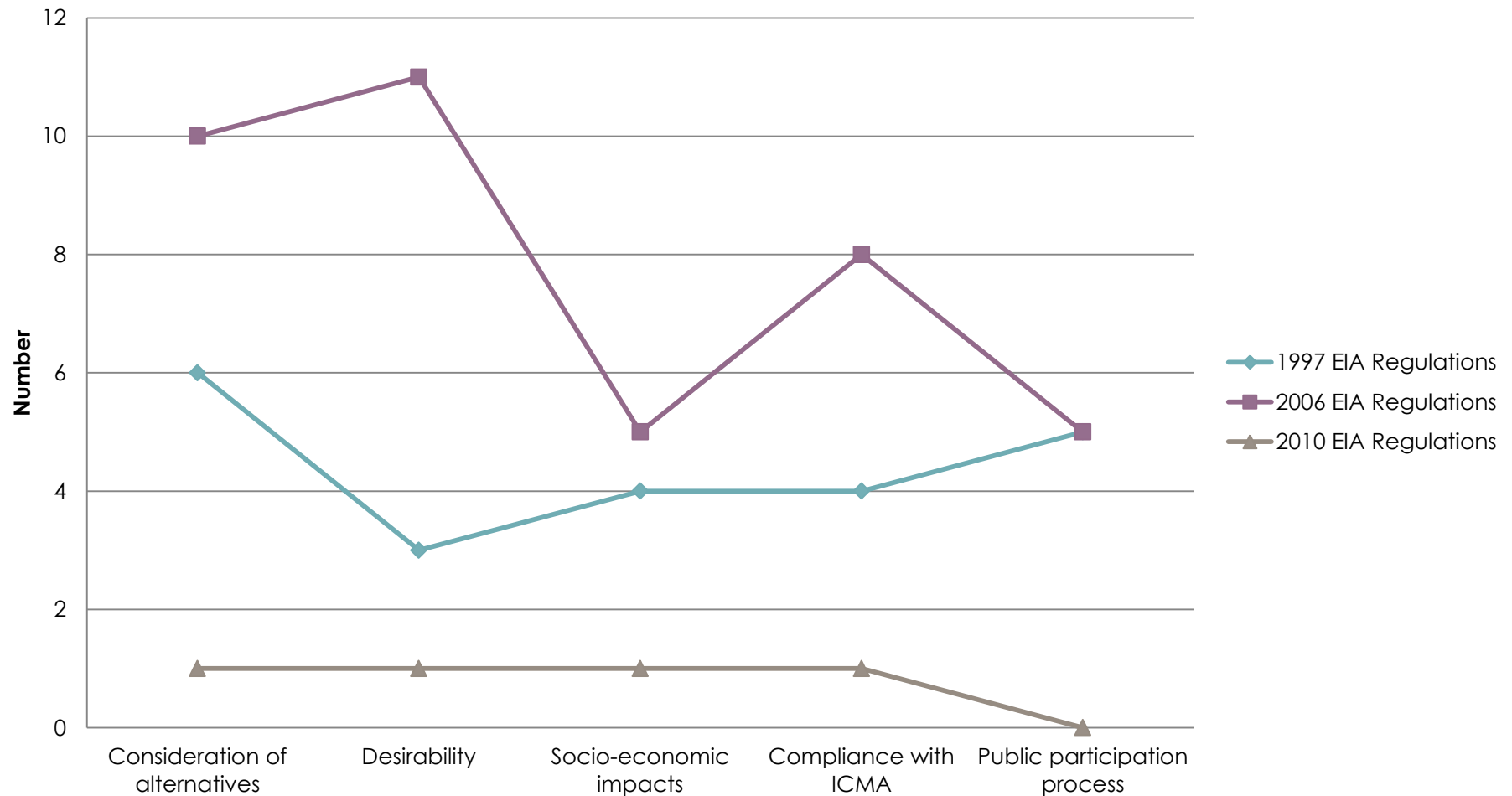
- Development will impact on natural rocks which prevent high waters during high tides and severe weather conditions.
- Impact on the dune systems.
- Randomly determined setback lines from the highwater mark of the sea by the Department against setback lines determined by specialists.
- Continuous access to the beach by the public.

Public participation process (PPP):

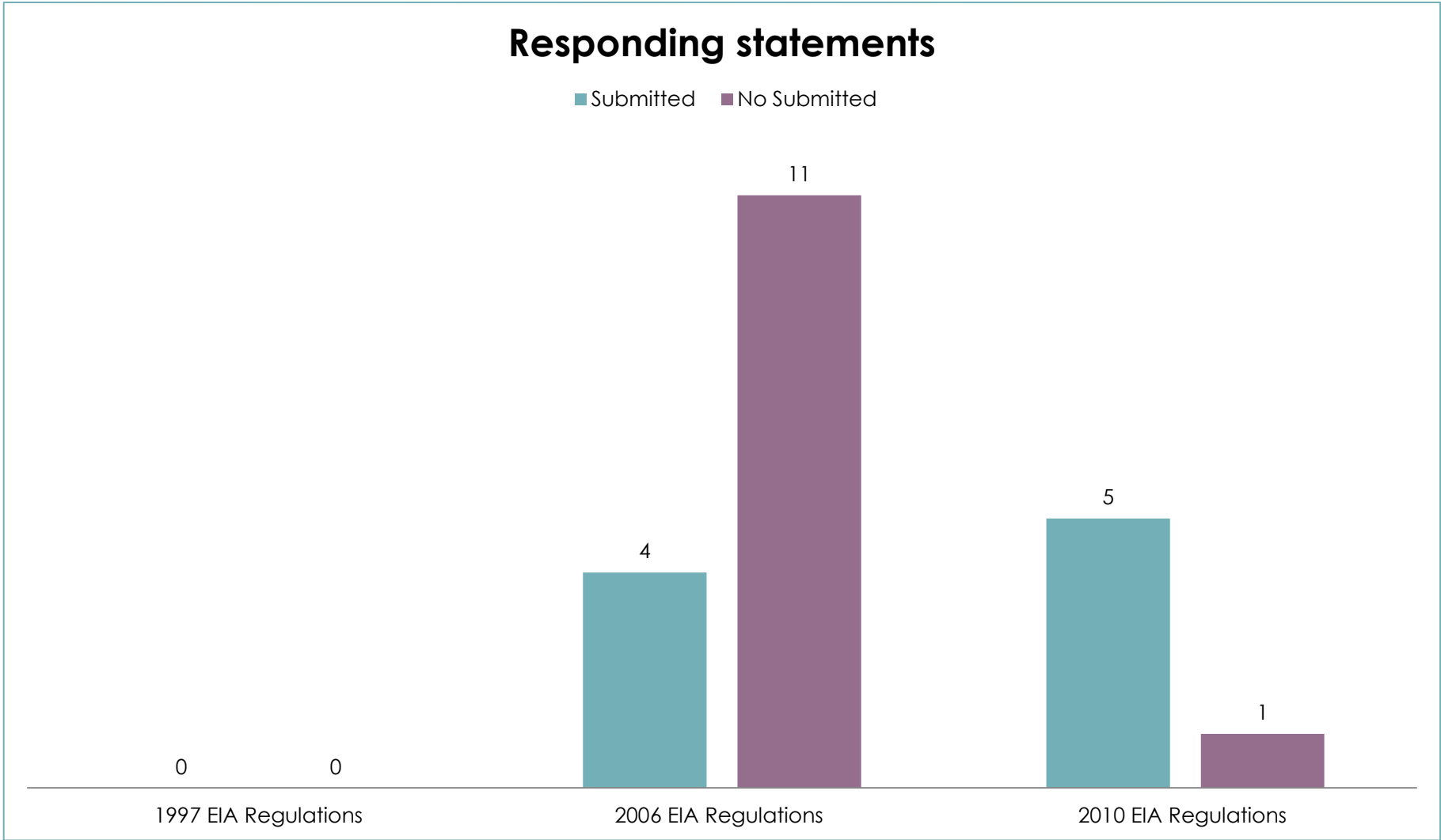
- Issues that were raised by I&APs were not addressed in the decision as agreed with I&APs during the PPP.
- Latest information which influenced the decision was not made available for PPP.
- Department quotes selectively in its decisions made by commenting authorities to paint a negative picture.
- Inadequate involvement of the vulnerable persons in the PPP.

Findings: Trends of appeals

5 Main Appeal Issues



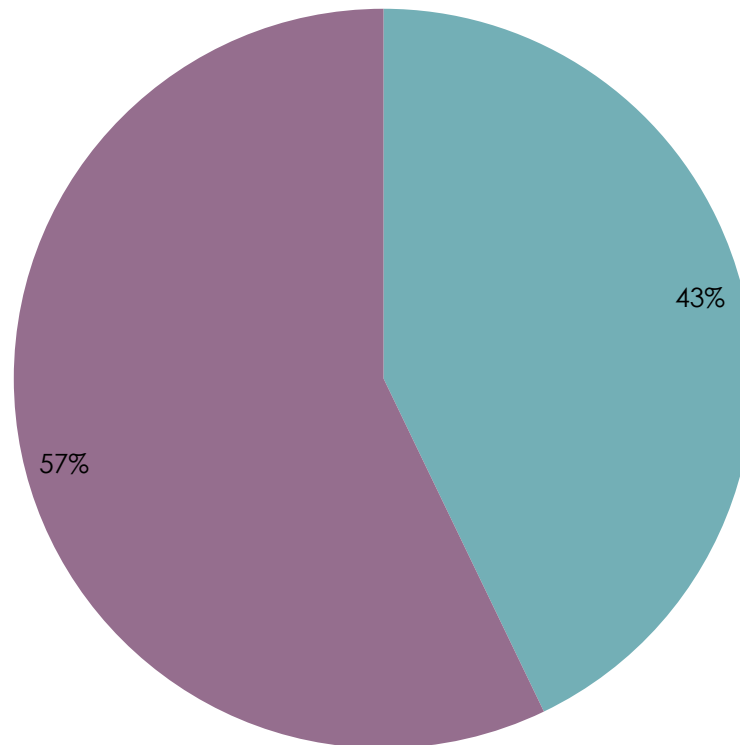
Number of responding statements submitted per EIA Regime



% of submitted responding statements (1998 to June 2014)

Total Responding statements

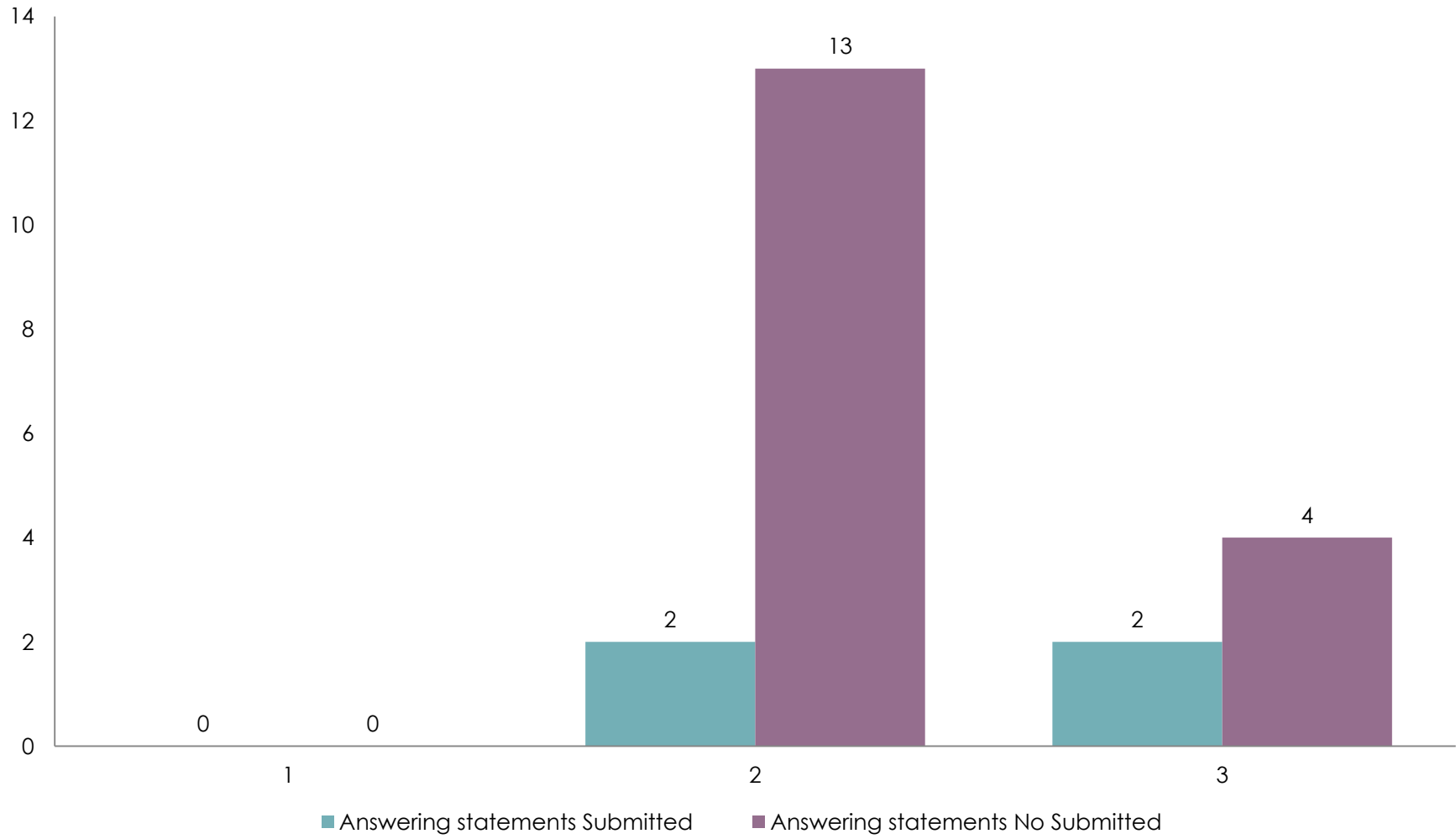
Submitted No Submitted



Responding statements

- Responding statements could not be lodged under 1997 EIA Regulations.
- Under the 2006 EIA Regulations, only a miniature of responding statements were lodged.
- Under the 2010 EIA Regulations, the number of respondents has increased.
- Overall, in 57% of EIAs no responding statements were lodged.

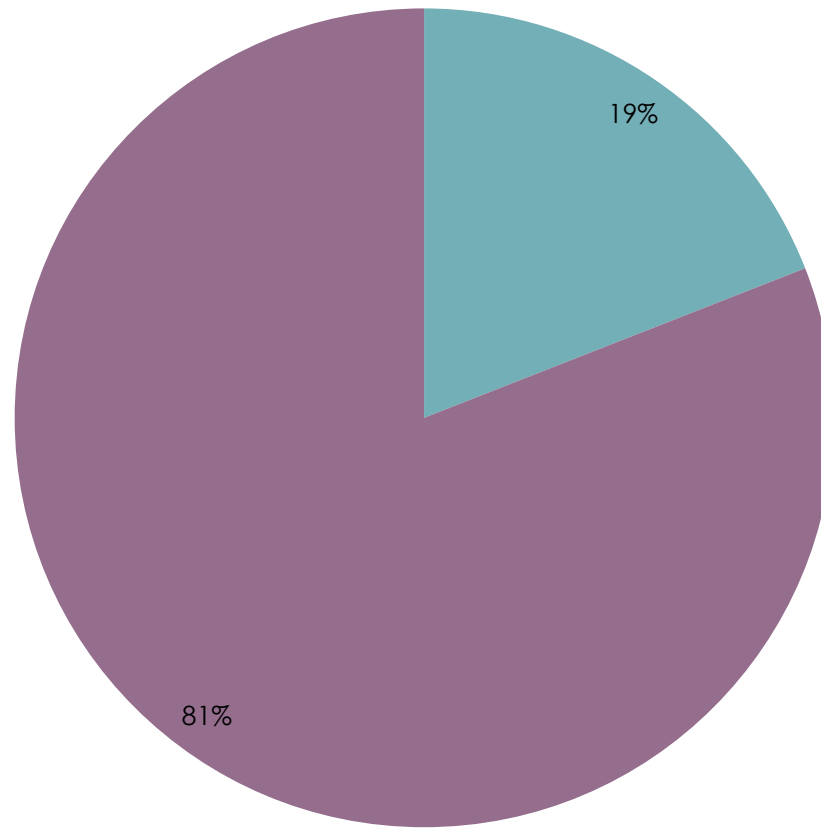
Number of Answering statements submitted per EIA Regime



Total % of submitted answering statements (1998 to June 2014)

Total Answering Statement

Submitted No Submitted



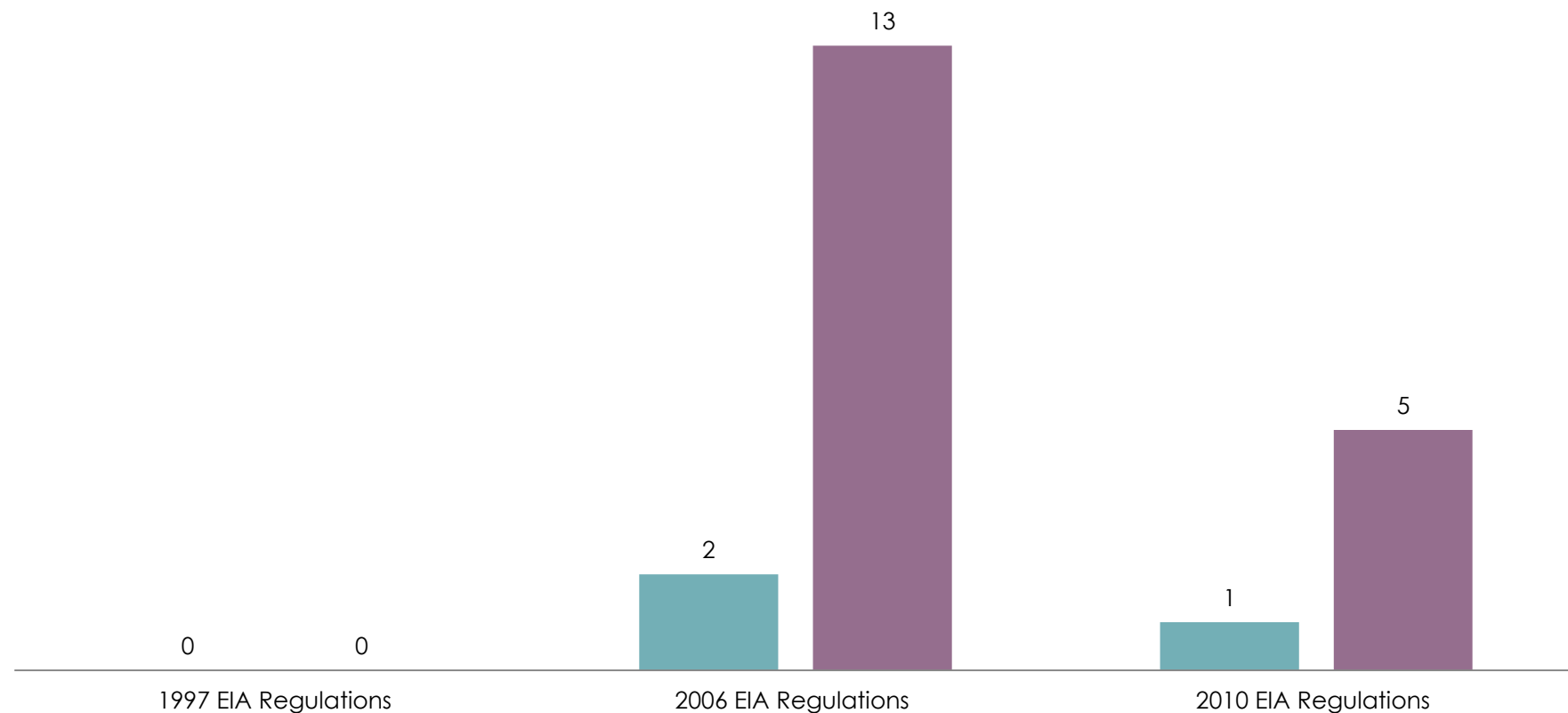
Answering statements

- **Answering statements could also not be lodged under 1997 EIA Regulations.**
- **Answering statements were not frequently lodged.**

Requests for Additional Information

Number of Requests for Additional Information

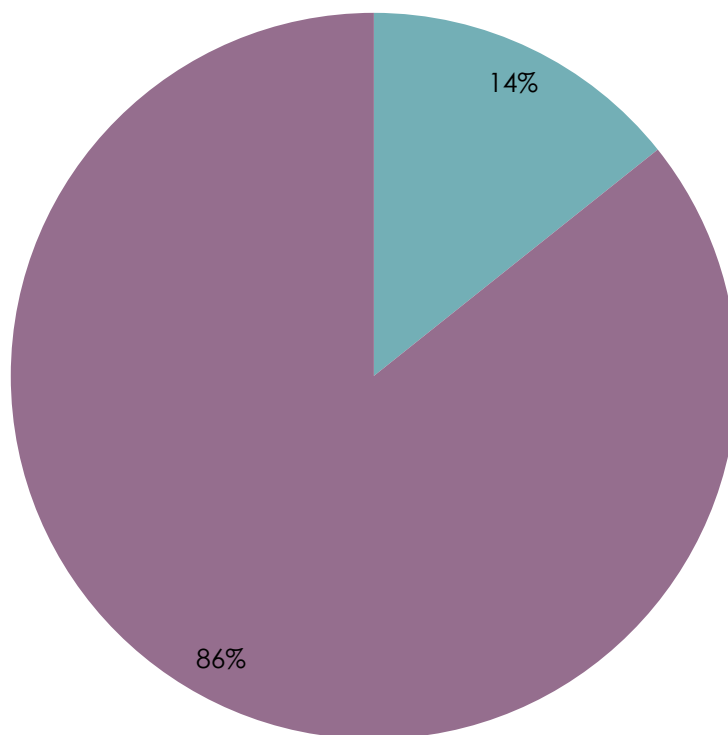
Requested Not Requested



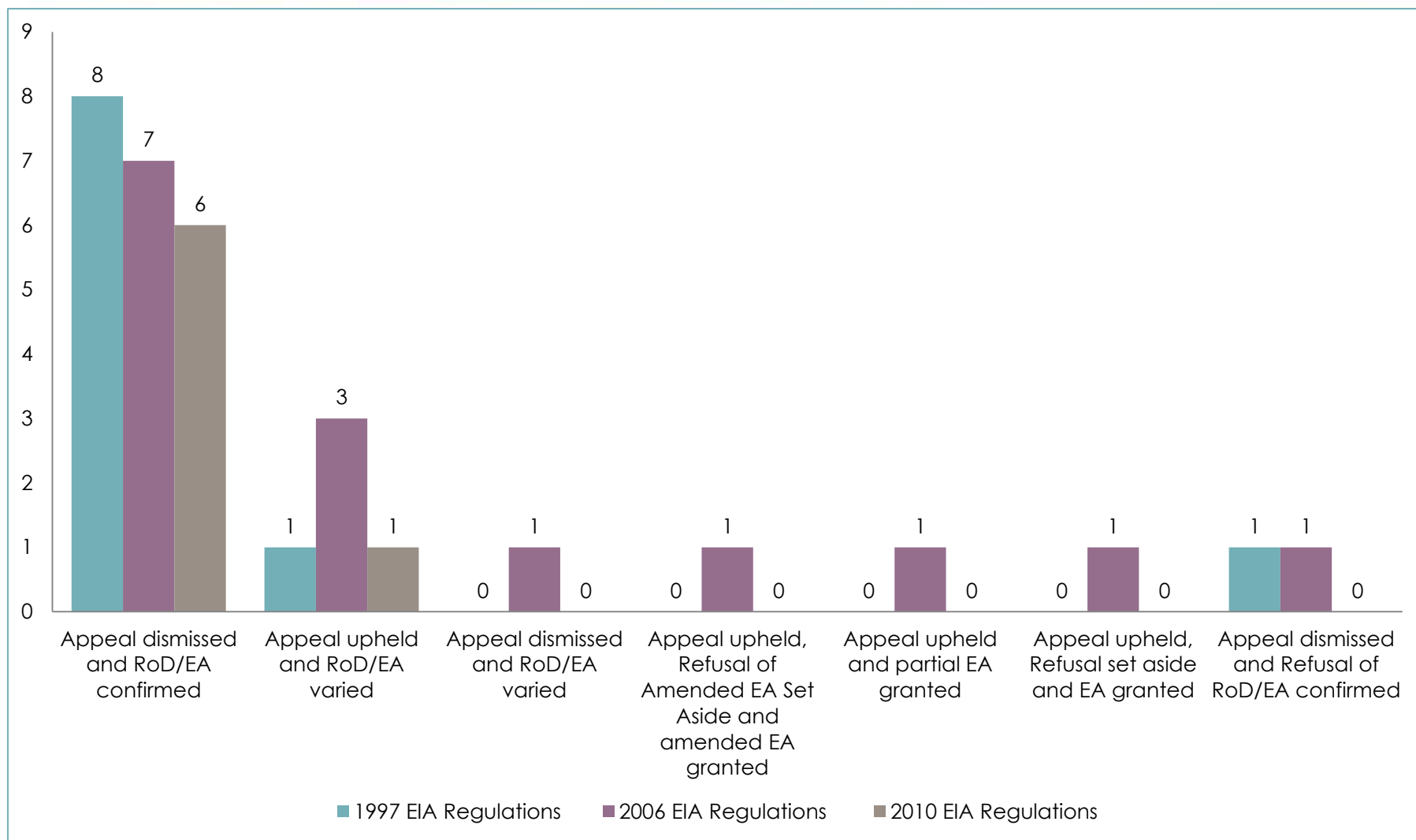
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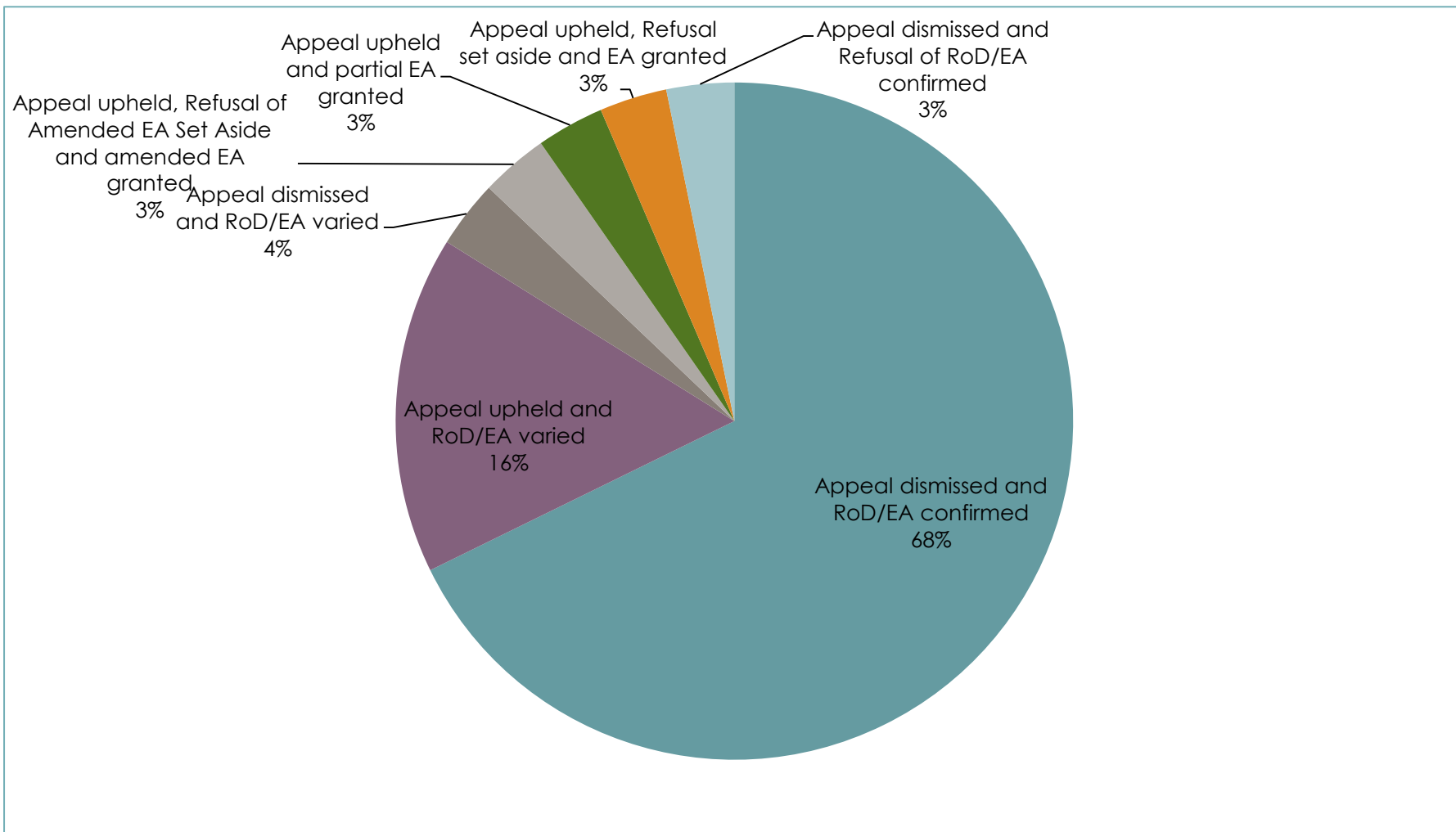
Requested Not Requested



Number of Appeal Decisions



Total % of Appeal Decisions (1998 to June 2014)



Appeal decisions

- In 75% of EIAs, appeals dismissed and EAs/Refusals confirmed.
 - Appeal authority satisfied with decisions.
- In 25% of EIAs, appeals were upheld and EAs varied & Refusals set aside and EA granted.
 - Appeal process contributed to the EIA process.
- Majority of appeals were dismissed and RoDs/EAs confirmed during all the regimes of EIA Regulations.

Conclusions & Recommendations

Conclusions (1)

- **Overall improvement** in EIA appeal practice in the WC i.t.o. the 2010 EIA Regulations compared to the practice under ECA & the 2006 EIA Regulations.
- Appeal issues raised during the 1997 and 2006 EIA Regulations disappeared during the current 2010 EIA Regulations.
- As much as majority of appeal decisions are in favour of delegated officers, there are still issues that need to be addressed.
- **Main appeal issues raised from 1997 to 2006 EIA Regulations need special attention:**
 - Consideration of alternatives
 - Desirability
 - Socio-economic impacts

Conclusions (2)

- **Compliance with ICMA**
- **Public participation process**
- **Visual impacts**
- **Appeals ratified the decisions of delegated officers;**
- **The public wants to protect their environment and ensure sustainable development;**
- **The public has confidence on environmental governance;**
- **Increase of environmental consciousness;**
- **Proactive public participation will minimise conflict between public and project proponent; and**
- **Appeals have lessened judicial reviews- avoided delays in development projects.**

Recommendations

● **further** aspects that require attention:

- **Cumulative impacts**
- **Biodiversity impacts**
- **Availability of service infrastructure**

Some Recommendations (2)

- **Continued review** of efficiency & effectiveness
- Need for **Continuous Learning**:
 - Guidance, training, engagement (joint learning)
- Legislative changes should be encouraged.
- On 3 Sept 2014, as an example, an appeal will automatically suspend an EA (NEMLA, Act No. 25 of 2014).
- Proposed National Appeals Regulations require a review in future.

Thank You



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