19 April 2018

Dear Ms T Madubela

COMMENTS ON THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL

The following comments are made in term of the legislative analysis provided within the National Environmental Management Laws Amendment Bill 2017. The format of the commentary will be the extract as provided, and then the comments thereunder.

Clause 1: Clause 1 of the Bill seeks to amend the definitions of the ‘‘Constitution’’ to correct the citation of the Act and ‘‘environmental mineral resource inspector’’ to include ‘‘petroleum’’ in the designation. The clause also amends the definition of ‘‘financial provision’’ in section 1 of the NEMA to clarify that the definition applies to an applicant for environmental authorisation, a holder of an environmental authorisation or a holder of a right or permit granted in terms of the Mineral and Petroleum Resources Development Act

Clause 2: This clause provides an additional NEMA principle, namely that the environment sector must advance and promote the full participation of black professionals.

The insertion of this amendment is noted, however it is not clear how it will be implemented and the achievement thereof measured. A reading of the clause suggests that participation by black professionals must be advanced and promoted within the environment sector. It is not clear what the environment sector is in terms of the amendment. It can only be surmised that it refers to not only the private industry comprised of EAPS and specialists, but also competent authorities. Professional bodies in the sector, such as IAIAsa have already identified the need for transformation and have adopted such initiatives. Furthermore it is not clear exactly what promotion and advancement means and how it will be implemented and measured.

Clause 3 This clause seeks to amend section 24(2)(c) of the NEMA to facilitate more flexibility in the use of spatial tools or environmental management instruments and how they cater for the impact management.

The amendment and the rationale behind it is noted. Although being supportive of a mechanism to strengthen the EIA system, through the use of additional spatial tools and environmental management instruments for certain listed activities, it is strongly recommend that before such amendments are made, certainty and clarity is provided in terms of what is envisaged by the Department in terms of spatial or environmental management instruments. Does this provision infer the use of EMFs and SDFs, or EMPs to replace project level EIA? We fear that this amendment might lead to at best the erosion and at worst the scrapping of the most well developed and well established environmental management instrument in South Africa if abused. Further concern is raised around Draft Regulations for the Adoption

of Environmental Management Instruments, which are procedural in nature and provide no guidance as to what these instruments may be and what it is that they seek to achieve. Until clarity and certainty is provided as to the nature of scope of these additional instruments, the above amendment cannot be supported. The ad hoc development and adoption of regulatory instruments is contrary the basic understanding of how regulatory systems work. It is feared that that these amendments might create a scenario whereby all environmental authorisation decisions will be dealt with through strategic instruments with a disregard of the need for project level assessment and authorisation. The flawed thinking on over reliance of spatial and strategic instruments is well researched and published. To reiterate the major concerns raised by this potential amendment, a call is made to substantially expand on the justification for this amendment with reference to peer reviewed research and consultation so as to fully understand the implications, unintended consequences and potential abuses that might arise, potentially including inter alia: a whole new administrative system of applying for, managing, approving, appealing and repealing new management instruments, administrative uncertainty, regulatory uncertainty, implications in terms of the right to administrative justice, erosion of public participation and compliance and enforcement. It is also not certain whether South Africa has the expertise to deal with and give effect to a range of new instruments. It is also concerning that discussion around the adoption of these types of instruments, has no relation to the functioning and mandate of existing registration and professional bodies such as EAPASA and IAIAsa. Their views on this matter would also be crucial.

Section 24(2A)(b)(i) has been amended to align the subparagraph with the rest of the section as it has to apply to both prohibitions and restrictions.

Noted, no comment.

The clause amends section 24(5)(bA), (bB) and inserts a new subsection (5A) in NEMA to provide clarity that the Minister responsible for environmental affairs or an MEC may develop regulations setting out the procedure to be followed for the preparation, evaluation, adoption and review of prescribed environmental management instruments, including any minimum requirements for information and any conditions set in such instrument. The clause also requires the Minister responsible for environmental affairs to keep a national register of all environmental management instruments adopted in terms of the NEMA.

This amendment needs to be read with the comments raised above under clause 3 relating to 24(2)(c).

Clause 4 This clause provides clarity that the Minister responsible for mineral resources is the competent authority for listed or specified activities that are directly related to prospecting or exploration of a mineral or petroleum resource or primary processing of a mineral or petroleum resource.

The clause also inserts new subsections to provide for the simultaneous submission of environmental authorisation application and any other related licence or permit required under any of the specific environmental management Act. Where the competent authority or licensing authority is the same authority for the NEMA and specific environmental management Act (SEMA) applications, an integrated decision must be issued. This can still take the form of multiple decisions, but it will force the process of reaching that decision to be consolidated and used to its full extent, namely using one process for information gathering to inform all decisions related to that proposed development.

We support the above amendment in pursuit of improved efficiency in the EIA system. We do however recognise that the effective implementation of this amendment will require significant changes to current administrative systems within and across spheres of government.

Clause 5 Section 24G of the NEMA provides for consequences of unlawful commencement of listed or specified activities. However, there is currently no provision to enable a person who has taken ownership or control of property on which an unlawful structure or development has been built to have such structure or development legalised and also for a person who has commenced, undertaken or conducted a waste management activity without a waste management licence. This clause amends section 24G of the NEMA to allow a successor in title or person in control of the land to lodge a section 24G application for such structure or development. The clause further provides for textual amendment.
We support the amendment and recognise the need for it with the understanding that the person whom commenced the illegal activity still attracts the legal liabilities associated with the offence committed and that the successor in title etc only legalises the activity without absolving the offender.

Clause 6 Section 24N(2) of the NEMA lists the information that must be contained in the environmental management programme. This clause amends section 24N(2) to provide clarity that such information must be prescribed through regulations.

Noted and supported.

Clause 7 Section 24O(2) of the NEMA requires the Minister responsible for environmental affairs, Minister responsible for mineral resources or an MEC to consult every State department that administers a law relating to a matter affecting the environment when processing an application for an environmental authorisation. This clause seeks to amend section 24O(2) to also require an environmental assessment practitioner to consult such State department.

Noted. However, the historic consultation is now being transferred to the EAP. This is contrary to the view that government is best paced to facilitate interaction and comments between government department sin line with the principles of cooperative governance. This appears to be an attempt to externalise the co-operative governance mandate.

Clause 8 Clause 8 seeks to amend section 24P to clarify that an applicant and a holder of an environmental authorisation relating to mining activities must set aside financial provision for progressive rehabilitation, mitigation, remediation, mine closure and the management of post closure environmental impacts. The section has been amended to clarify that the provision also applies to a holder of a right issued or a permit granted in terms of the Mineral and Petroleum Resources Act, 2002. Section 24P(3) has been amended to clarify that the environmental liability must be assessed annually, but that the audit report only needs to be submitted to the Minister responsible for environmental affairs every three years. Section 24P(5) has been amended to stipulate that the requirement to maintain and retain the financial provision remains in force until a closure certificate is issued and that the portion of financial provision as may be required to rehabilitate residual or any other environmental impacts of the closed mine must be ceded to the Minister responsible for mineral resources and that the Minister responsible for mineral resources must retain such portion in perpetuity . This amendment will also require an amendment to the current section 37A of the Income Tax Act and had been discussed with National Treasury and the Mineral and Petroleum Resources Amendment Bill, which is currently in Parliament, if that Bill is signed into law. These provisions will not be brought into effect, until such time that the other Acts have been amended.

Noted. These amendments support current thinking around mine closure and rehabilitation funding. The only concern is the financial provision which is ceded to the Minister for residual impacts of closed mines. It is not certain how such funds will be administered to ensure that they are used for the intended purpose of rehabilitation. To this end a provision stipulating the ring fencing of the funds for specific rehabilitation purposes will be supported to avoid funds being re-directed and misallocated for other purposes.

Clause 9 Section 24R(2) of the NEMA allows the Minister responsible for mineral resources to retain such portion of the funds set aside for any residual environmental impact that may become known in the future. A similar provision is also contained in section 24P(5) of the NEMA. This clause repeals section 24R(2)

Noted in line with comments made under clause 8 above.

Clause 10 Clause 10 of the Bill repeals section 24S of the NEMA which provides that residue stockpiles and residue deposits must be managed in terms of the provisions of the NEMA.

Noted, to be addressed when dealing with amendments to the Waste Act below.

Clause 11 Clause 6 of the Bill amends section 28 of the NEMA. The scope of person on whom a section 28(4) of the NEMA directive can be issued currently does not include those persons listed in section 28(2) (‘‘an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the

environment''). These persons however, are required to comply with the duty of care. There may be circumstances where the environmental authority may have to issue a section 28(4) directive on these categories of persons. This clause ensures that those persons are included in the categories of persons that a section 28(4) directive may be issued by the environmental authorities.

This amendment and broadening of the scope for the issuance of directives is noted and supported.

The clause also amends section 28 to empower a municipal manager of a municipality to also issue a section 28(4) directive.

We note the amendment and support it in principle, however we recognise the cooperative governance requirements triggered thereby, as well as the potential lack of capacity within municipalities to effectively utilise this provision. It is cautioned that municipal managers fully understand the mandate and its use in line with just administrative action. The effective use of this provision holds great potential for pollution prevention within the municipal sphere.

The clause further inserts a new subsection (4A) to ensure that the person to be issued with a section 28(4) directive is consulted and provided with an opportunity to make any representation before a final section 28(4) directive is issued.

This amendment is noted and supported in light of the right to just administrative action.

In addition, section 28 places a duty of care on a wide range of responsible persons, including every person who causes, has caused or may cause significant pollution or degradation; and an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises. It further empowers the Director-General, the Director-General of the department responsible for mineral resources, provincial head of department or municipal manager of a municipality to issue a directive on each category of responsible persons, thus making them independently liable for the undertaking of reasonable measures. However, section 28(11) cur-rently limits the powers of environmental authorities to recover the costs for remedial measures undertaken or to be undertaken by the State proportionally according to the degree to which each was responsible for the harm. Firstly, this is not in line with the duty of care provisions that place an independent and autonomous duty of each and every responsible person. In addition, it may be impossible to determine exactly the degree to which each was responsible for the harm; thereby impeding effective cost recovery by the State. Finally, it is not in line with the liability regime provided for in other pieces of legislation, such as section 19(5) of the National Water Act, 1998.

This amendment is noted and supported.

This clause further amends sections 28(9) and (11) to provide for joint and several liability in respect of the responsible persons listed in section 28(8).

This amendment is noted and supported.

Clause 12: Section 31BB of the NEMA only empowers the Minister responsible for mineral resources to designate as an environmental mineral resources inspector, any staff member of the Department of Mineral Resources. This clause amends section 31BB to further empower the Minister responsible for mineral resources to designate as an environmental mineral resources inspector any staff member of the Department of Mineral Resources or any organ of state, subject to the conclusion of an agreement between the Minister and the relevant organ of state.

Noted and supported.

Clause 13: Section 31D of the NEMA requires environmental management inspectors as well as environmental mineral resource inspectors to perform their powers within their respective mandates. This clause amends section 31D to empower environmental management inspectors to monitor compliance and enforce any provincial environmental management legislation. The clause also inserts a new subsection (3A) to provide clarity that environmental management inspectors and environmental mineral resource inspectors must exercise their respective powers in accordance with any applicable duty.
This amendment is noted and supported.

Clause 14: Clause 14 amends section 31E of the NEMA, which sets out the regulatory power of the Minister to approve training for environmental management inspectors before designation. The current provisions do not cater for same with respect to environmental mineral resources inspectors. This clause amends section 31E to ensure that the environmental mineral resources inspectors will receive the same standard of approved training as is received by the environmental management inspectors before designation. The clause also adds subsection (3) to empower the Minister responsible for environmental affairs to prescribe through regulations the Code of Conduct applicable to environmental management inspectors and environmental mineral resources inspectors
This amendment is noted and supported.

Clause 15: Clause 15 clarifies that environmental management inspectors who exercise powers and perform duties in terms of the NEMA are issued, and on request produce, identity cards as proof of their designation. The amendment seeks to include environmental mineral resources inspectors as well as provincial legislation in the exercise of powers and performance of duties.

This amendment is noted and supported

Clause 16 Section 31G(1)(a) of the NEMA deals with the functions of the environmental management inspectors. The section currently allows the environmental management inspectors to initiate an investigation only if there is a reasonable suspicion of an offence. The practical challenge is that environmental management inspectors who receive a complaint alleging non-compliance are often required to gather further information that will turn a mere suspicion into a reasonable suspicion. The amendment to section 31G(1)(a) allows them to do so.

This amendment is noted and supported.

Clause 17 Section 31H of the NEMA deals with the general powers of the environmental management inspectors. This clause amends section 31H(1)(a) to allow the environmental management inspectors to question persons without the requirement of a reasonable

suspicion. This is required in order to allow the inspectors to gather information of an alleged non-compliance through the asking of relevant questions prior to a reasonable suspicion being formed. The clause also amends section 31H(1)(c)(ii) to ensure that environmental management inspectors are also empowered to monitor compliance and enforce not only national pieces of environmental legislation, but also any provincial environmental management legislation. The clause further amends section 31H to empower environmental management inspectors to issue lawful instructions.

This amendment is noted and supported.

Clause 18 Section 31I of the NEMA deals with seizure of items. Clause 18 is a consequential amendment to ensure that environmental management inspectors allow them to issue lawful instructions, rather than mere requests, in accordance with the provisions of the NEMA.

This amendment is noted and supported

Clause 19 Section 31J of the NEMA deals with environmental management inspectors powers to stop, enter and search vehicles, vessels and aircraft. Clause 19 is a consequential amendment to ensure that environmental management inspectors are also empowered to monitor compliance and enforce any provincial environmental management legislation.

This amendment is noted and supported.

Clause 20 Clause 20 amends section 31K of the NEMA, which provides for routine inspections, without a warrant, by environmental management inspectors, and certain powers that may be executed during routine 48 inspections. The clause amends section 31K to provide clarity that the conducting of a ‘‘search’’ is not the primary purpose of undertaking a routine inspection, but rather the entry onto certain premises for the purposes of ascertaining compliance. In addition, the amendment extends the power to environmental mineral resources inspectors to apply for a warrant to enter residential premises for the purposes of conducting an inspection. In addition, an environmental management inspector is often required to detain an item for a temporary period of time in order to conduct further analysis or verification as to whether or not such item complies with the relevant legal requirements. For example, a consignment of plant or animal specimens or any derivatives thereof being shipped in a container through a national port of entry or exit. An environmental management inspector may be required to detain the container in order to verify the exact nature and scope of the consignment.

This amendment is noted and supported

Clause 21 Section 31L of the NEMA deals with the environmental management inspector’s power to issue compliance notices. This clause amends section 31L(1) to clarify that an environmental management inspector as well as an environmental mineral resources

inspector must issue a compliance notice which substantially comply with the prescribed form.

This amendment is noted and supported.

Clause 22 Section 31M of the NEMA deals with objections to compliance notice. Clause 22 is a consequential amendment to clarify that a person who wants to object to a compliance notice may do so, by making representations, to the relevant appeal authority, namely the Minister responsible for environmental affairs, the Minister responsible for mineral resources, the Minister responsible for water affairs or a municipal council.

This amendment is noted and supported.

Clause 23 Section 31O of the NEMA provides the members of the South African Police Service's routine inspection powers in terms of section 31K of the NEMA. Clause 23 is a consequential amendment to ensure that the members of the South African Police Service are also empowered to monitor compliance and enforce any provincial environmental management legislation.

This amendment is noted and supported.

Clause 24 Section 31P of the NEMA imposes a duty on a holder of a permit, licence, permission, certificate, authorisation or any other document to produce such documents as and when requested by the environmental management inspector. Clause 24 amends section 31P to clarify that such a person must produce such documents on the lawful instruction by the environmental management inspector and an environmental mineral resources inspector. The documentations include those issued in terms of provincial environmental management legislation.

This amendment is noted and supported.

Clause 25 Section 31Q of the NEMA deals with confidentiality of information. Clause 25 is a consequential amendment to clarify that the confidentiality is also applicable to provincial environmental management legislation.
This amendment is noted and supported

Clause 26 Section 34E of the NEMA deals with the treatment of seized live specimens. Clause 26 amends section 34E to provide that live specimens ''may'', instead of ''must'', be deposited with a suitable institution, rescue centre or facility, as the circumstances require. It further provides clarity that seized live specimens may be disposed of in terms of section 30(a) of the Criminal Procedure Act, 1977. The latter section of the Criminal Procedure Act provides legal mechanisms on how to dispose of a seized perishable item.

This amendment is noted and supported.

Clause 27 Clause 27 of the Bill amends section 34G of the NEMA, which sets out regulatory power of the Minister responsible for environmental affairs to specify offences and prescribe the amount for purposes of admission of guilt fines. The clause amends section 34G to ensure that Minister's regulatory power contextualises section 57(5) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

This amendment is noted and supported.

Clause 28 Section 42B of the NEMA deals with the delegation by Minister of mineral resources. Clause 28 amends section 42B to provide clarity that the Minister of mineral resources may also delegate his or her powers under NEMA to an organ of state subject to an agreement between the Minister responsible for environmental affairs and the organ of state. The clause further provides clarity that the delegation may be sub-delegated and also withdrawn.

In principle this amendment is noted and supported.

Clause 29 Clause 29 of the Bill inserts new sections 42C and 42D to the NEMA. These new sections empower the Minister responsible for water affairs and municipal manager of a municipality to delegate his or her powers under the NEMA to an official in the Department responsible for water affairs or municipality, respectively.

This amendment is noted and supported.

Clause 30 Clause 30 of the Bill amends section 43 of the NEMA, which allows any person to appeal against an environmental decision issued by national or provincial departments responsible for environmental affairs. Section 43 does not appear to allow for a person to lodge an appeal in a situation where the power to issue a section 28(4) directive was delegated by the Director-General or head of department to an official within their respective departments. This clause amends section 43 to ensure that a person may also appeal a section 28(4) directive issued by a delegated official. The amendment further clarifies that the submission of an appeal will not automatically suspend a section 28(4) directive, unless there is good cause shown to the satisfaction of the Minister.

This amendment is noted and supported.

Clause 31 Section 47(2) and (2A) of the NEMA require the Minister responsible for environmental affairs or MEC to table all regulations developed in terms of the Act in Parliament or relevant provincial legislature. However, section 17 of the Interpretation Act, 1957, also requires the Minister to table all subordinate legislation to Parliament. Clause 31 repeals section 47(2) and (2A) of the NEMA to avoid duplication of legal requirements.

This amendment is noted and supported.

Clause 32 This clause provides that where a norm and standard specifically provides for a provision to be an offence, then those specific provisions will be considered to be offences, rather than the generic clause currently provided in section 49A(1)(b). In terms of section 49A(1)(p) of NEMA, it is a criminal offence not to comply with a request of an environmental management inspector. However, the dictionary meaning of a request is ‘‘an instance of asking for something, especially in a polite or formal manner’’—this implies that being requested has a discretion whether or not to meet the request. The dictionary definition of ‘‘instruction’’ on the other hand means ‘‘A making known to a person what he is required to do; a direction, an order, a mandate’’. In the context of Chapter 7 of NEMA and the powers of environmental management inspectors, section 49A(1)(o) and (p) meant to refer to instruction rather than a request.

This amendment is noted and supported.

Clause 33 Section 49B(3) of NEMA provides that a person convicted of an offence in terms of section 49A(1)(h), (l), (m), (n), (o) or (p) is liable to a fine or to imprisonment for a period not exceeding one year, or to both a fine and such imprisonment. The fact that the monetary penalty is not specified makes the provision subject to the Adjustment of Fines Act, which in effect provides for a ratio of 1 year of imprisonment to R20 000. Some of the offences could be serious, for example, failing to comply with a condition of an exemption, hindering or interfering with an EMI in the execution of their duties etc. It is therefore proposed that the maximum monetary penalty for these offences be specified as R1 million, as is the standard ratio in NEMA and SEMAs.

This amendment is noted and supported.

Clause 34 Section 34 read with Schedule 3 provides a legal framework for the State to request a court of law to enquire and assess the monetary value of any loss or damage caused to the environment as a consequence of the offence committed. The assessment may result in a court order either awarding damages or compensation or a fine equal to the amount so assessed, or remedial measures to be undertaken by a convicted person. This clause amends Schedule 3 to provide for textual amendments to ensure the citation of appropriate offences listed in certain national and provincial legislation.

This amendment is noted and supported.

National Environmental Management: Protected Areas Act, 2003

Clause 35 Currently, section 57 of the NEMPAA only allows for the Chief Executive Officer of the South African National Parks to be on its Board. However, in line with the recommendations of the third Report on Governance in South Africa, 2009 (King III), the Chief Financial Officer should also be on the Board. The amendment to section 57 is 51 intended to provide clarity that the Chief Financial Officer must be a member of the Board.

This amendment is noted and supported.

Clause 36 Section 48A of the NEMPAA restricts certain activities in a marine protected area. However, section 89 of the NEMPAA, which provides for offences and penalties, does not make it an offence where a person undertakes a restricted activity in contravention of NEMPAA. The clause amends section 89 to insert section 89(1)(e) and (2A), and thus creating an offence for any person to undertake a restricted activity in contravention of NEMPAA. The clause also rectifies incorrect references to offences within NEMPAA
This amendment is noted and supported.

National Environmental Management: Biodiversity Act, 2004

Clause 37 This clause amends the definition of ‘‘control’’, and inserts a new definition of ‘‘eradicate’’ in order to provide clarity on the actions, measures or methods to be undertaken when dealing with listed invasive species.

This amendment is noted and supported.

Clause 38 The clause amends section 2 which provides for the objects of the Act. The clause seeks to amend section 2(a)(ii) to extend the scope of the objects of the Act to clarify that the object of the Act is to provide that the use of indigenous biological resources in a manner that is ecologically sustainable, including taking into account the well-being of any faunal biological resource.

This amendment is noted and supported. It no aligns better with Section 24 of the Constitution. Its however noted that reference is made to the wellbeing of faunal biological resources. It is not certain what is meant by faunal wellbeing, especially when considered against the difficulties encountered with determining wellbeing within humans.

Clause 39 Clause 39 amends section 3 which provides for the State’s trusteeship of biological diversity. In terms of common law, all wild animals are regarded as res nullius, meaning it belongs to everybody but belongs to nobody in particular. The implication of this common law principle is that, once a wild animal escapes from the land on which it was kept, the owner of such land loses ownership of the wild animal that has escaped. The Game Theft Act, 1991 (Act No. 105 of 1991), changed the common law status of wild animals, in that it makes provision for a person to retain ownership of a wild animal that escapes from land that is adequately fenced, and in respect of which a certificate of adequate enclosure has been issued by the Premier of the province in which the land is situated. However, the provisions of the Game Theft Act only apply to land where game is kept for hunting or commercial purposes—it does not apply to land where wild animals are kept for conservation purposes. The implication is that where wild animals escape from state-owned land, the State is no longer the custodian of those animals. The proposed amendment to section 3 seeks to address this anomaly and clarify that in order for the State to give full effect to section 24 of the Constitution of the Republic of South Africa, the State must be in a position to remain the custodian of wild animals that escape from land under its control. The proposed amendment also gives effect to the judgement in Eastern Cape and Tourism Agency v Medbury (Pty) t/a Crown River Safari and Another (1466/2012) [2016] ZAECGHC

26, in which the High Court held that this issue must be legislated and not be relied on by developing the common law by way of jurisprudence.

This amendment is noted and supported.
Clause 40 Currently, section 13 of the NEMBA only allows for the Chief Executive Officer of the South African National Biodiversity Institute to be on its Board. However, in line with the recommendations of King III, the Chief Financial Officer should also be on the Board. The amendment to section 13 is intended to provide clarity that the Chief Financial Officer must be a member of the Board.

This amendment is noted and supported.

Clauses 41 and 42 Clauses 41 and 42 of the Bill amend sections 73 and 75 of the NEMBA, respectively. Read together, the clauses empower the Minister to develop regulations on the steps to be undertaken to control or eradicate listed invasive species.

These amendments are noted and supported.

Clauses 43 Clause 43 amends section 97 which provides for the power of the Minister for Environmental Affairs to make regulations. The proposed amendment extends the power of the Minister to provide that the Minister may make regulations in relation to the protection of the well-being of a faunal biological resource during the carrying out a restricted activity involving faunal biological resource.

Noted and supported however see comment under clause 38 above.

Clauses 44 and 45 Clauses 44 and 45 of the Bill amend sections 99 and 100 of the NEMBA, respectively. These clauses provide clarity that the MEC for environmental affairs in each province must also follow the consultative process set out in sections 99 and 100 of the NEMBA when exercising a power under the Act.

These clauses are noted and supported.

National Environmental Management: Air Quality Act, 2004

Clause 46 Section 13 of the NEMAQA deals with the establishment of the National Air Quality Advisory Committee. This clause amends section 13 of the NEMAQA to provide the Minister with a discretion to establish a National Air Quality Advisory Committee.

This amendment is a regression on the requirement that the minister must establish an advisory committee. It would be vitally important for the minister to receive technical inputs into a complicated and complex legislative instrument. The fact that she has the discretion to appoint such a committee, instead of being compelled to do so , may create the situation where no committee is established and vital capacity is lost.

Clause 47 Clause 47 of the Bill amends section 22A of the NEMAQA. This clause substitute section 22A to provide for the consequences of unlawful conducting of listed activities. The clause will address two scenarios, namely to provide for those activities that were operated without the registration certificate under the Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965), and those activities that have an environmental authorisation under the Environmental Impact Assessment Regulations, but no atmospheric emission licence under NEMAQA. This clause provides for the process and procedures to be followed in addressing the non-compliance with the law.

This amendment is noted and supported.

Clause 48 The clause amends section 36 to provide clarity that a province must be regarded as a licensing authority where a listed activity falls within the boundaries of more than one metropolitan municipality or more than one district municipality. Section 36(5) identifies the Minister as the licensing authority, in five instances, to issue atmospheric emission licences for air quality activities. Section 36(5)(d) is intended to 53 facilitate the issuing of an integrated environmental authorisation where the Minister is also a competent authority for the environmental impact assessment activities, and licensing authority for the waste management activities. The current provision appears to suggest that the Minister will always be the licensing authority, whereas the intention is to provide that the Minister is only the licensing authority if the Minister is also identified as such in terms of NEMA and NEMWA. The clause amends section 36(5)(d) to provide for textual amendments to clarify that the Minister is only the licensing authority if the Minister is identified as such in terms of NEMA, NEMWA and NEMAQA. Section 36(8) has been amended to extend the scope to also allow for co-operative agreement to be reached between the Municipality, MEC and the Minister on who the licencing authority will be on any application.

This amendment is noted and supported.

Clause 49 Section 53(k) of the NEMAQA appears to limit Minister's scope to the development of appeal regulations to process appeals against decisions of officials in the performance of their functions in terms of regulations. Most of the decisions are taken in terms of the Act itself or in terms of subordinate legislation other than regulations. Whereas the empowering provision for the development of appeal regulations under section 43 of the NEMA appears to be wider (appeals against a decision taken by any person acting under a power delegated by the Minister or MEC under NEMA or a SEMA). This clause deletes paragraph (k) in section 53 to ensure that appeal regulations developed under section 43 of NEMA are also applicable to appeals against air quality decisions.

This amendment is noted and supported.

National Environmental Management: Integrated Coastal Management Act, 2008

Clause 50 Section 60 of the NEMICMA has been amended to allow for the issuing of notices for the removal of structures that were erected prior to the commencement of the Act. This amendment clarifies the retrospective effect of section 60. Currently retrospectively is implied, and its application may leave some doubt. This is also in line with section 59 of the Act and section 28 of NEMA, which expressly enables retrospective application.

In principle the amendment is supported, however, it is not clear how the regulator will implement in view of existing rights especially historical property rights in instances where property is deemed to be having an adverse effect on the coastal environment. It is also noted that this provision significantly expands the mandate of the regulator and the abuse of power should be cautioned against. Learning should be taken form the experiences with the retrospective application of section 28 of NEMA.

Clause 51 Section 74(1) makes provision for an appeal to the Minister if the decision is taken by an MEC and to the MEC if the decision is taken by a municipality. This approach creates legal challenge for one sphere of government to reconsider the decision taken by another sphere of government. The clause amends section 74 to provide legal clarity that an appeal against a decision issued by delegated officials must be lodged at the appropriate sphere of government and appeal authority.

This amendment is noted and supported.

National Environmental Management: Waste Act, 2008

Clause 52 The clause inserts the definitions of ‘‘building and demolition waste’’, ‘‘business waste’’, ‘‘domestic waste’’, ‘‘general waste’’, ‘‘hazardous waste’’, ‘‘inert waste’’ that were contained in Schedule 3 to the Act. These definitions are removed from Schedule 3 and inserted in section 1 of the Act. This clause also inserts new definitions of ‘‘residue deposit’’ and ‘‘residue stockpile’’ in alignment with NEMA and the Mineral and Petroleum Resources Development Act, 2002. The clause provides for textual amendments to the definition of ‘‘waste’’ so as to provide legal clarity on the interpretations and to prevent unintended consequences.

The inclusion of these definitions into section 1 of the Act is noted and supported. It is also noted that the definition of “waste” has been amended to provide more certainty. It is also noted that sub paragraph (b)(iii) has been deleted. The implication being tat the waste or portion of waste is still considered to be waste, even though exemption form the application of the act has been granted. It is also a further concern that schedule 3 merely lists potential sources of wastes, and seems to muddy the waters. Surely the definition of waste and the test against it would suffice as to whether a substance, material or object constitutes a waste or not. It is not clear what the purpose of schedule 3 is in this context other than to state that these are potential sources of waste.

Clauses 53 This clause provides clarity that residue stockpiles and residue deposits are no longer regulated under NEMWA, but under NEMA.

The amendment is noted and supported.

Clause 54 This clause provides clarity that the Waste Management Bureau is established as a juristic person with a Board, and that in absence of a functional board, the powers and duties of the Board revert to the Minister responsible for environmental affairs.

The amendment is noted and supported.

Clause 55 Clause 53 substitutes section 34C of the NEMWA and sets out the Minister's supervisory powers.

The amendment is noted and supported.

Clause 56 This clause amends sections 34F, 34G, 34H, 34I, 34J, 34K and 34L of the NEMWA. The clause sets out the general powers of the Waste Management Bureau, governing Board of the Waste Management Bureau, composition and membership, qualifications for members of the governing Board, appointment procedure for members of the governing Board, term of office of members of the Board and conditions of appointment of members of the governing Board.

Clause 57 This clause inserts new sections 34M-34Z. These sections set out the governance matters of the Board.

The amendment is noted and supported.

Clauses 58 and 59 These clauses amend sections 37 and 39 of the NEMWA to provide clarity that a site assessment report must be submitted together with a remediation plan.

These amendments are noted and supported.

Clauses 60 This clause amends section 41 of the NEMWA. This clause provides clarity that the Minister must only keep a national register of all contaminated land.

These amendments are noted and supported.

Clause 61 Section 43 of the NEMWA identifies the licensing authorities for different waste management licences. The Minister responsible for mineral resources is identified as one of the licensing authorities to issue waste management licences in so far as the waste management activities are directly related to prospecting or exploration of a mineral or

petroleum resource and primary processing of a mineral or petroleum resource. This clause amends subsection (1B) to ensure that the Minister, responsible for mineral resources as the identified licensing authority, is responsible for the implementation of the waste management licensing system in so far as the waste management activities are directly related to prospecting or exploration of a mineral or petroleum resource and primary processing of a mineral or petroleum resource. The clause also amends subsection (3) to facilitate an agreement between the licensing authorities on the implementation of the licensing system. The amendment also seeks to add new subsection (4) to section 43. The addition propose that in instances where the MEC responsible for environmental affairs fails to take a decision to issue a waste management licence within prescribed timeframes, an applicant may request the Minister to take the decision. The intention of this amendment is therefore to make provision for exceptional circumstance in instances where the MEC unreasonably fails to take a decision within the prescribed timeframes. When considering this amendment, the Department was mindful of section 125(2)(b) of the Constitution of the Republic of South Africa, 1996, which provides that the Premier, together with other members of the Executive Council has the power to implement all national legislation within the functional areas listed in Schedule 4 or 5 of the Constitution, except where the Constitution or an Act of Parliament provides otherwise.

The amendment is noted and supported.

Clause 62 This is a consequential amendment. This clause repeals section 43A of the NEMWA to provide clarity that residue stockpiles and residue deposits are no longer regulated under NEMWA, but under NEMA.

The amendment is noted and supported.

Clause 63 The NEMWA was amended to include the Minister responsible for mineral resources as one of the licensing authorities. The term licensing authority, collectively, include the Minister, Minister responsible for mineral resources and MECs. This clause provides for the consequential textual amendment in section 52(5).

The amendment is noted and supported.

Clause 64 Currently, the variation of a waste management licence is not subject to the payment of a prescribed processing fee. Practically, it has been established that the variation of a waste management licence involves a lot of work. This clause provides for the payment of a processing fee for the variation of a waste management licence.

The amendment is noted and supported.

Clause 65 This clause is a consequential amendment deleting the offence regarding residue stockpiles and residue deposits. These stockpiles and deposits are no longer regulated under NEMWA, but under NEMA. The clause also creates an offence if a person contravenes a provision of a norm or standard.

The amendment is noted and supported.

Clause 66 This clause is also a consequential amendment deleting the Minister's power to develop regulations. Residue stockpiles and residue deposits are no longer regulated under NEMWA, but under NEMA.

The amendment is noted and supported.

Clause 67 Section 69A has been repealed as it is no longer necessary for the Minister to make regulations pertaining to the Waste Management Bureau as it will now be a fully-fledged public entity.

The amendment is noted and supported. However it is not clear what the implications will be for different stakeholders in the waste sector if the Bureau is a fully fledged public entity.

Clause 68 The fines that can be imposed in terms of regulations under this Act have been amended to be in line with fines that can be imposed in terms of the National Environmental Management Act, 1998 and the other specific environmental management Acts.

The amendment is noted and supported.

Clauses 69, 70, 71 and 72 The provisions of section 74 do not provide the Minister responsible for mineral resources with legal power to issue exemptions in so far as such exemptions relate to provisions administered by the Minister responsible for mineral resources. The scope for exemption applications also appears to be wide. Clauses 69, 70, 71 and 72 amend sections 74, 75, 76 and 77 to provide for the consequential textual amendment empowering the Minister responsible for mineral resources to issue an exemption in so far as such an exemption relates to a provision administered by the Minister responsible for mineral resources. The clauses also provide clarity that there will be no exemptions provided from obtaining a waste management licence.

The amendment is noted and supported.

Clause 73 The clause replaces the expression of the ''Minister of Water Affairs and Forestry'' with the Minister responsible for water affairs.

The amendment is noted and supported.

Clause 74 This clause replaces Schedule 3 with a new Schedule on sources of waste. This Schedule is read with the definition of ‘‘waste’’ contained in section 1 of the Act. 3.7 National Environmental Management Amendment Act, 2008

The amendment is noted and supported.

Clause 75 It appears that there is legal uncertainty whether an environmental management plan or environmental management programme approved and issued in terms of the Mineral and Petroleum Resources Development Act, prior to the implementation of the One Environmental System on 8 December 2014 is deemed an environmental authorisation under the National Environmental Management Act, 1998. The clause amends section 12 to provide legal clarity that an environmental management plan or programme applied for and approved in terms of the Mineral and Petroleum Resources Development Act, 2002, on or before 8 December 2014, is deemed to have been approved and issued in terms of National Environmental Management Act, 1998. The clause also provides clarity that environmental management plan or programme approved under the Mineral and Petroleum Resources Development Act, 2002, after 8 December 2014, if the application for the exploration, prospecting, or mining right, permits or licence was received before that date, is deemed to have been approved and an environmental authorisation issued under the National Environmental Management Act, 1998.

The amendment is noted and supported.

This clause further provides clarity that an environmental appeal lodged in terms of a decision made under the Mineral and Petroleum Resources Development Act, must be finalised in terms of the Mineral and Petroleum Resources Development Act, regardless whether the decision was made before or after 8 December 2014.

The amendment is noted and supported.

Clause 76: Clause 76 provides for transitional provisions for mining applications approved on or before and pending after 8 December 2014. In terms of the One Environmental System the Minister responsible for mineral resources is the licensing authority for environmental authorisations in so far as the listed activities are directly related to prospecting or exploration of a mineral or petroleum resource and primary processing of a mineral or petroleum resource.

This clause inserts a new section to provide clarity that an environmental management plan or programme issued and approved in terms of the Mineral and Petroleum Resources Development Act, before or after 8 December 2014, is deemed to have been approved and an environmental authorisation issued in terms of NEMA, excluding ancillary activities not authorised in terms of the NEMA or NEMWA.

The amendment is noted and supported.

The clause empowers the Minister responsible for mineral resources to instruct a holder of a right or permit to take action to upgrade any deficiencies in the environmental management plan or programme.

The amendment is noted and supported.

The clause also provides clarity that all pending applications and appeals lodged in terms of the Mineral and Petroleum Resources Development Act, before 8 December 2014 must be processed in terms of the relevant provisions of the Mineral and Petroleum Resources Development Act, and any ancillary activities must be processed in terms of NEMA or NEMWA.

The amendment is noted and supported.

The clause further provides for the continuation of the environmental regulations (regulations pertaining to the financial provision for the rehabilitation, closure and post closure of prospecting, mining or production operations and regulations pertaining to the management and control of residue stockpiles and residue deposits from a prospecting, mining, exploration or production operation) developed under the Mineral and Petroleum Resources Development Act, until such time that similar regulations are developed under NEMA or NEMWA.

The amendment is noted and supported.

Clause 77: Clause 77 provides for transitional provisions regarding residue stockpiles and residue deposits approvals issued in terms of the National Environmental Management: Waste Act, 2008. The clause provides for clarity that the residue stockpiles and residue deposits approvals or waste management licences issued in terms of the National Environmental Management: Waste Act, 2008, remain valid until they lapse or are replaced under National Environmental Management Act, 1998.

The amendment is noted and supported.

The clause further provide clarity that the regulations pertaining to the management and control of residue stockpiles and residue deposits from a prospecting, mining, exploration or production operation developed under the National Environmental Management: Waste Act, 2008, remain valid and regarded as being developed under NEMA.

The amendment is noted and supported.

Clause 78: Clause 78 provides for transitional provisions for the Waste Management Bureau. The clause provides clarity that anything done by the Waste Management Bureau under the repealed Part 7A of the National Environmental Management: Waste Act, 2008, remains valid until any subsequent new provisions override it.

The amendment is noted and supported.

Chris Boshoff
Coordinator: Environmental Affairs
AfriForum
Cell 081 206 1434
Email: chris.boshoff@afriforum.co.za