**PORTFOLIO COMMITTEE ON ENVIRONMENTAL AFFAIRS PUBLIC HEARINGS ON THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL [B14-2017]**

1. **INTEGRATED ENVIRONMENTAL MANAGEMENT**

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| **1** | Clause 1, section 1 | Chamber of Mines  | **Comment:** The term “*primary processing*” is an undefinedterm “*extraction*” is proposed to be deleted the Minister of Mineral Resources is identified as the competent authority where a listed or specified activity is or is directly related to (i) prospecting or exploration of a mineral or petroleum resource or (ii) primary processing of a mineral or petroleum resource, the terms should accord with the terms which are used in the Mineral and Petroleum Resources Development Act, 2002 (“MPRDA”). Those defined terms in the MPRDA There would need to be consequential amendments to the listed activities relating to mineral and petroleum resources under the 2014 Listing Notices 1 and 2  | It is therefore suggested that the term “*primary processing*” be omitted in the B in favour of use of the above defined terms in the MPRDA.  | The term “primary processing” was included as the definition of mining referred to a mining area, the mining area in the 2012 amendments included structures which were linked by infrastructure to the mine, this could mean that if DMR was the CA for the mine they would be the competent authority for the structure linked as well i.e. Eskom power plant or a beneficiation plant which was not intended to be delegated to DMR. The recent MPRD bill now redefines the mining area and it may now be possible should the MPRD bill be passed to amend the wording to mimic the MRPD. However, until the bill is passed it is not intended to define primary processing or use the terms of the MPRD.  |
| **2** | Clause 1, section 1 | Chamber of Mines  | **Comment:** In definition of “*financial provision*”, the Chamber submits that the reference to the term “*bank guarantee*” in the NEMA definition of “*financial provision*” should be amended to refer to “*financial guarantee*”.  |  | It is proposed that this recommendation be accepted as a bank is only one institution which could provide the guarantee.  |
| **3** | Clause 1, section 1 | Chamber of Mines  | **Comment:** Since latent defects are of their nature unknown and cannot therefore be provided for, the references to “*latent*” impacts. The Chamber submits that for the same reason, wherever reference is made in NEMA to “*latent*” impacts, such references should be deleted. |  | It is proposed that the term “latent environmental impact” be retained and to have the dictionary definition – “existing but not yet developed or manifest, hidden or concealed”. This is intended what was not intended was that it would include acts of God which is now not included in the definition. The change was made due to the incorrect consideration which was not the dictionary definition but rather the MPRD regulations definition which is as follows: *Latent environmental impact means an environmental impact that may result from natural events or disasters after a closure certification has been issued.*Latent defects which manifest over time must be considered in the third plan of the financial provision which is intended for the remediation of latent defects for example acid mine drainage, this plan is based on a risk assessment.  |
| **4** | Clause 4(e)/Section 24C(12) | Chamber of Mines  | **Comment:** Proposed s24C(12) in the context of environmental authorisations required for mineral or petroleum activities, which contemplates simultaneous application for licences or permits (where SEMA listings are triggered), should uniformly refer to environmental authorisations.  While the wording in s24C(12) refers to an environmental authorisation under the NEMA; and permits and licences in respect of SEMA’s, the definition of “*environmental authorisation*” in section 1 of the NEMA includes *“...a similar authorisation contemplated in a specific environmental management Act.”* The use of environmental authorisation as well as licences and permits should be clarified with reference to the definition of “*environmental authorisation*”.  |  | It is agreed that the wording could be improved, the wording current does not refer to other permits and licenses in the specific sentence. “must simultaneously apply for an environmental authorization after the acceptance of the application for a right or permit in terms of the Mineral and Petroleum Resources Development Act”.   |
| **5** | Clause 7 / Section 24O | Chamber of Mines  | **Comment:** **Consultation with State Departments**  In relation to s24 (2), the Chamber requests the deletion of the reference to an Environmental Assessment Practitioner (“EAP”). The responsibility for inter-departmental consultation should be on the competent authority and the fact that the EAP may assist with such consultation should not derogate from the fact that it is and remains the responsibility of the competent authority.   |  | Government should not need to consult on a process for commercial activities on behalf of a developer. In addition, should government need to consult with other government departments and SOEs, Interested and Affected Parties would not have had sight of the comments. A separate consultation process which is to be run by government would add more time to the EIA process. In order to follow a transparent process, governments and SOEs must be part of one EIA process.Currently the Environmental Assessment Practitioner undertakes the consultation with other Government departments and SOEs. The inclusion of the EAP in the amendment was just to explicitly allow for them to undertake that task. The removal of 2A is a consequential amendment.  |
| **6** | Clause 6/ section 24N | Chamber of Mines  | **Comment:** **Content of Environmental Management Programmes** It is submitted that the details being provided for by the legislature in s24N (2) is preferable to leaving such details to prescription by regulation. It is difficult to comment on this without knowing what is wrong with the current legislatively determined content and what is intended to be prescribed.   |  | The content of an EMPR is included in Appendix 4, it contains everything that is in in the current 24N(2) and more detail. It is through that to include them again in the Act duplicates and moves from the principle of the Act providing the enabling provisions and the detail being contained in regulation.  |
| **7** | Clause 8/ section 24P | Chamber of Mines  | **Comment:** **Financial Provision** Throughout, after the word “*resource*”, the word “*or”* falls to be deleted   |  | It is proposed that “Primary Processing” be retained in the reference to mining, therefore the “or” should also be retained.  |
| **8** | Clause 8/ section 24P | Chamber of Mines  | **Comment:** The financial provision should be there to address the final closure measures and for the management of residual post closure impacts and not for “*progressive rehabilitation*”. The word “*progressive*” should be deleted throughout as the funding for progressive rehabilitation is accounted for in the operational budget.   |  | The objective of the Act is to ensure environmental protection, progressive rehabilitation of the impact on the environment from mining operations supports environmental protection through risk reduction. Progressive rehabilitation is an important concept. It is not proposed that this term be removed. In fact it should be checked that there is consistent reference to progressive rehabilitation where required in the Act. Details such as the fact that the funding of annual rehabilitation is to be done through operational budgets, will be included in relevant Regulations. |
| **9** | Clause 8/ section 24P | Chamber of Mines  | **Comment:** The Chamber submits that the insertion of the word “*mitigation*” in Clause 8 is superfluous as mitigation is conceptually included with rehabilitation and remediation   |  | The dictionary meaning of “Mitigation” is to alleviate, reduction. The meaning of “Remediate” is to repair. The intention of the act is to do both – diminish over time and then repair, therefore it is not proposed that the two concepts be removed.  |
| **10** | Clause 8/ section 24P | Chamber of Mines  | **Comment:** The Chamber proposes the insertion of the words “*remediation and management of residual environmental impacts as identified in an environmental risk assessment report*” throughout Clause 8 after the newly inserted words “*...post closure...*” to bring the wording in line with the 2017 Draft FP Regulations.   |  | It was not intended to introduce the term risk assessment report into the act, as the method for assessing the impact could change over time. However, the wording in the proposed amendments to the Financial Provisioning Regulations will be considered and to ensure that there is no meaning lost but that there is not unnecessary detail in the Act.  |
| **11** | Clause 8/ Section 24P(1A) | Chamber of Mines | **Comment:** The reference to “annually comply” seems unnecessary as the obligation is to comply at all times and to do annual assessing for updating which is required in the newly amended s24P(3)(a).   |  | Agree there is duplication, the reference to “annually comply” could be deleted.  |
| **12** | Clause 8/ Section 24P(1A) | Chamber of Mines  | **Comment:** The words “*possible to be undertaken*” could alternatively be replaced by the words “*required to be undertaken in terms of the annual rehabilitation plan, the final rehabilitation and closure plan and the environmental management programme contemplated in section 24N*”.   |  | This is similar to the point made 10. It is not proposed to include the level of detail of the plans in the Act. However, the wording can be re-considered to see if it would add value. However, the principle must be clear, namely that rehabilitation that can be done should not be delayed but should be undertaken. |
| **13** | Clause 8/Section 24P(2) |  | **Comment:** In the existing s24P (2) the failure to rehabilitate or manage any impact should more explicitly be linked to the environmental management programme contemplated in s24N and the annual rehabilitation plan.   |  | This is more or less the same comment as 10, it seems there is a desire to limit the extent of the rehabilitation to what is in the plans. The proposal could be considered noting any possible unintended implications.  |
| **14** | Clause 8/ Section 24P(3) | Chamber of Mines  | **Comment:** The holder or holder of an environmental authorisation must every three years submit an audit report to the Minister responsible for mineral resources on the adequacy of the financial provision from an independent auditor. This is not aligned with regulation 12(4) of the 2017 Draft FP Regulations. The Chamber submits that the aforesaid regulation must be amended to provide for the three-year submission period proposed by s24P (3) (b) of the NEMLA Bill.  |  | The misalignment is known; however, the regulations are being drafted without the enabling provision being in NEMA. The regulations will need to be amended once the change from 1 to 3 years has been effected.  |
| **15** | Clause 8 / section 24P(4) | Chamber of Mines  | **Comment:** In s24P (4) (a), it would be preferable for the words “*independent assessor or reviewer*” to only refer to “*independent assessor*” as contemplated in the 2015 FP and the 2017 Draft FP Regulations. The Chamber submits that an independent assessor could include an independent “*environmental assessment practitioner*”.  |  | 24P(3) only refers to assessment, not review. Because of this, the introduction of the reference to reviewer is not clear in (4). It may however be necessary to include review in 24P(3) as the following on assessment could be considered reviews. The wording can be reconsidered and an amendment affected if found to add value.  |
| **16** | Clause 8 / section 24P(5) | Chamber of Mines  | **Comment:** In s24P (5) (b), the Chamber takes note that a reference to “*latent*” impacts has now been removed from the text.   |  | It is proposed that “Latent” be reintroduced after further discussion and consideration of the comments received from the gazetting of the 2017 FP regulations. It is proposed that the term be defined and the dictionary definition applied. The meaning is “existing but not yet developed or manifest, hidden or concealed”. This is intended what was not intended was that it would include acts of God which is now not included in the definition. See the detailed explanation at 3 above.  |
| **17** | Clause 8 / section 24P(5) | Chamber of Mines  | **Comment:** The reference to “*other environmental impacts*” does not accord with the conceptual division between annual / concurrent, closure, and post-closure rehabilitation and should be deleted. The term “*other environmental impacts*” does also not accord with the aforementioned terms which are similarly used in the 2015 FP and 2017 Draft FP Regulations.   |  | Agree, if the reference to rehabilitation and residual and latent is inserted “any other …” impact could be deleted. This was the wording in MPRD. This could be amended after the implications are understood and it is seen not to change the objectives of the Act.  |
| **18** | Clause 8 / section 24P(5) | Chamber of Mines  | **Comment:** The Chamber proposes the deletion of the words “*...in perpetuity..”* The Chamber supports the wording in s43(6) of the MPRDA, either as it currently exists, or as it is proposed to be amended by clause 31(f) of the MPRDA Amendment Bill B15D-2013. The latter provides for retention “*for such period as the Minister may determine having regard to the circumstances relating to the relevant operation, which portion and period must be determined in the prescribed manner*”.  |  | There is no timeframe related to latent defects as the definition included in 16 above indicates that they are just not manifest. It is known that the impacts of acid mine drainage only manifests after a significant number of years. It is not possible to know when latent defects will manifest therefore the funds must be made available to DMR to manage these impacts in perpetuity.  |
| **19** | Clause 8 / section 24P |  | **Comment:** Some mechanism must be provided for return of the financial provision once it becomes clear that there are no longer any residual impacts (and that pumping of polluted or extraneous water is no longer required), as is provided for in the NEMA and MPRDA.  |  | See comment above, the funds at closure are earmarked for post closure latent impacts which as indicated are not yet manifest. The risk has been determined using the best models and science and they are expected, therefore there can be no return of funds.  |
| **20** | Clause 8 / section 24P(5) |  | **Comment:** The formulation of retention in perpetuity irrespective of the circumstances constitutes an expropriation of money within the meaning of s25 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and for which the State would have to pay compensation in the absence of provision for which s24P(5)(b) will be unconstitutional.   |  | The latent risks are determined through a risk assessment and therefore there is a very real possibility of them occurring. There can be no timeframe associated with the possibility of them occurring. It may well be unconstitutional if the funds were not secured as the state would have to pay for remediation in the future taking funds away from other possible uses.  |
| **21** | Clause 8 / section 24P(5) |  | **Comment:** In the proposed s24P(5)(c): * *the concept of “cession” cannot operate in regard to a guarantee or a trust, nor is it justified in that the guarantee or trust should simply, in respect of the determined portion of the financial provision secured thereby, remain in place;*
* *if there is to be a cession, provision needs to be made for investment of the ceded funds for the benefit of the cedent and there would need to be consequential changes made to the Income Tax Act (“ITA”) to allow for this in the context of trusts or rehabilitation companies as currently it is not permissible;*
* *it also raises the issue as to whether these financial implications do not suggest that such provisions need to be in a money bill and to follow the process of adoption of a money bill in terms of s77 of the Constitution;*
* *since in terms of s24R(1) the holder remains responsible for environmental liabilities notwithstanding the issuing of a closure certificate, there needs to be some mechanism in s24P(5) whereby the holder can draw down on the financial provision which has been retained by and ceded to the Minister in terms of ss24P(5)(b) and (c); alternatively s24R(1) would need to be amended to provide that the holder’s responsibility ceases on the issuing of a closure certificate, leaving it to the Minister to use the portion of financial provision which has been retained by or ceded to the Minister.*
 |  | Through discussions with the insurance industry, the cession of a guarantee or trust seems to be able to be done, more clarity on the concern regarding the inability of guarantees and trust to be ceded may be required. This is understood and discussion are ongoing on the matter, it is not a long process to pass amendments to the Income Tax Act. This matter has not been raised by Treasury or SARS, but the question can be posed and an answer provided. Section 24(5)(d) already provides for consultation with Minister of Finance when regulations are made requiring the setting of financial or other security to cover risks to the State/environment. This has been done and continues to be done. The provisions do not establish a fund nor does it require the payment for services.It is intended that a provision be included to allow for the drawdown of the financial provision in accordance to a 5-year closure plan. This is not yet included as there needs to be agreement on the principle first, therefore at closure it should only be the financial provision for latent defects remaining. It is then anticipated that this should be ceded and DMR would need to facilitate any impacts which become known. However, the polluter will not be off the hook if the amount exceeds what was set aside and and Polluter pays principle always applies.  |
| **22** | Clause 8 / section 24P | Chamber of Mines  | **Comment:** As stated in the explanatory memorandum, clause 8 does not accord with the MPRDA or with the ITA, which, it is submitted, contain provisions which are preferable to those in clause 8 of the Bill.  |  | ITA issue addressed in 21 bullet 3. The cession issue is a new issue not covered under MPRD so cannot use the same provisions, however, this section could be considered again in order to ensure there is consistency  |
| **23** | *Clause 9 / section 24R(2)* | Chamber of Mines  | **Comment:** It is submitted that the formulation in s24R (2) is preferable to that in clause 8 of the Bill, and should therefore be retained except that the word “*latent*” should be deleted.   |  | It is not intended that the portion of the fund identified and calculated to deal with latent impacts will be returned, therefore it is proposed that the clause be deleted.  |
| **24** | Clause 3 / section 24(2) & (5) | Chamber of Mines  | **Comment:** “*spatial tools*” and “*environmental management instruments*”: one or both of these undefined terms are used in clauses 3(a), (bA) and (e) (ss24(2)(c), (5)(bA) and (5)(5A)). * Reference should be made to the existing defined term “*spatial development tool*”.
* The term “*environmental management instruments*” should be defined.
 |  | Agree, it is proposed that the term “spatial development tool” which is defined is used instead of the term spatial tool - in section 24(2)(c). It was not intended that “environmental management instrument” be defined as this restricts the number of instruments that can be applied, and the intention is to be able to use a suite of instruments and tools which will still be developed in future. The instruments need to be gazetted for comment before implementation and the relevant Regulations will be in place soon. Therefore, there is adequate consultation which requires the reason for the instrument to be known at the beginning of the process.  |
| **25** | Clause 1/ section 1: financial provision | Center for Environmental Rights | **Comment:** This definition limits the requirement of Financial Provision to *holders* under the MPRDA and *applicants* for EAs. It needs to include holders of EAs under NEMA and holders of EMPRs and EMPs under the MPRDA.  |  | The definition is worded widely to cover all activities requiring environmental authorization. The relevant Regulations will focus on mining only and intends to cover both an applicant for an environmental authorization (for mining) as well as a holder of an environmental authorisation (for mining). Only holders of MPRDA EMPrs/EMPs relating to the relevant MPRDA rights/permits are to be included, not all EMPrs/EMPs issued in terms of the MPRDA.The Regulation will only deal with mining in order to learn from the experience before opening this up to other activities. Providing for financial provision is proving to be very complex and we should learn from implementation experience first. There will also need to be a social impact assessment done as it will increase the costs of environmental management. The wording can be relooked at to ensure that the intention is there to open up financial provision to other activities but with the making of Regulations which could come at a later date.  |
| **26** | Clause 1/ section 1: financial provision | Center for Environmental Rights | **Comment:** We strongly suggest that the original proposal to include “mitigation and remediation” is revisited as the latter two terms are wider in scope than “rehabilitation” and would include relevant concepts such as biodiversity offsets, if implemented. We argue below that a definition of the term “remediation” be inserted in NEMA. |  | Agreed see 9 above.  |
| **27** | Clause 1 / section 1 | Center for Environmental Rights | **Comment:** The term “primary processing of a mineral or petroleum resource” is used in this Bill. With the insertion of this definition, we are concerned that the definition is too narrow and that there is a range of activities not covered that could, result in environmental impact. We therefore propose that the term “primary processing...” should be abandoned and that instead the current manner of reference is retained, namely: listed or specified activities for, or directly related to, a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit.  |  | It is proposed not to define primary processing. See comment 1Retention permit, reconnaissance permit and technical co-operation permit do not require environmental authorisation.  |
| **28** | Clause 3 / section 24(5A) | Center for Environmental Rights | **Comment:** We support the insertion of this subsection (5A), and submit that it must specifically include that the register shall be publically available.  |  | The intention of the regulation is to help developers and the public at large to know what instruments have been adopted and their implications. The objective of having the register would be negated should they not be publically available. It was not intended to include this type of detail in the Act however, the objective could be re-considered to make sure that the objective indicate that it is for public.  |
| **29** | Clause 4/ section 24C(11) | Center for Environmental Rights | **Comment:** It is not always clear from applications and environmental impact assessment reports what other applications an applicant has submitted (or will submit) for the same development or a related activity. We submit that it is essential for the effective participation of interested and affected parties for them to be aware of all the processes being followed for a particular development or related activity. We therefore recommend the insertion of a phrase dealing with this at the end of the proposed subsection (11). Proposal: A person who requires an environmental authorisation which also involves an activity that requires a licence or permit in terms of any of the specific environmental management Acts must simultaneously submit those applications to the relevant competent authority or licensing authority, as the case may be, indicating in each application, all other licences, authorisations and permits applied for, or which will be applied for the intended development or related activity.  |  | Agreed this could be included - it is already included in many application forms, just need to consider if the inclusion could result in any unintended consequences.  |
| **30** | Clause 6 / Section 24N | Center for Environmental Rights | **Comment:** Removal of the section dealing with the content of the EMPR - The amendment of section 24N is supported provided that Appendix 4 to the EIA regulations is amended to ensure that nothing is lost in the deletion and furthermore that that Appendix is amended as it is currently contingent on s24N(2).  |  | Noted, nothing is to be lost in the deletion. It is proposed that the EIA regulations be amended to align in the future.  |
| **31** | Clause 7 / Section 24O | Center for Environmental Rights | **Comment:** Minister and or now the EAP to engage with Departments and SOE. This amendment is of concern. Firstly, the explanatory Memo on the objects of the Bill states that the amendment seeks to require an Environmental Assessment Practitioner (EAP) to consult with such State departments in addition to the decision-maker’s duty to consult. The proposed amendment indicates that the decision maker ‘*or’* the EAP may consult other departments. This must be incorrect. If, on the other hand, it is intended, we strongly oppose such proposed amendment. It significantly dilutes the decision-maker’s obligations. In addition, we already see in practice that interested and affected parties’ (IAP) concerns and comments on proposed applications are frequently not dealt with adequately or at all by EAPs. What is placed before the decision –maker in these cases is not a proper reflection of the IAP’s stance. Secondly, section 24O is titled, ‘criteria to be taken into account by competent authorities when considering applications’. The proposed amendment (whether “or” or “and” was intended) is at odds with the object of the section.  |  | See the comment at 5 above, it was to improve the process and it is the current process which is applied at present. It is not intended that there should be less information available to the decision maker, and it can be ensured that there are no unintended implications. It is proposed that the Memo of the objectives of the Bill be reconsidered,The competent authority remains responsible to ensure that such consultation has occurred properly. It is proposed that the heading be reconsidered.  |
| **32** | Clause 8 / section 24P(1) | Center for Environmental Rights | **Comment:** Limiting the obligation to comply with financial provision requirements to prospecting and exploration only is not rational, and must be an error. Mining and production at minimum must also require compliance with these provisions. The reach of this provision should extend beyond mineral and petroleum extraction and related activities, to other activities that have the potential to cause environmental damage – coal burning for power generation is but one example. We support the deletion of ‘negative’ in the phrase ‘[negative] post closure environmental impacts’, as remediation should be in regard to all impacts.  |  | Agree - It is not the intention to limit the obligation for financial provision for only prospecting and exploration, it is proposed that this be re-considered to check for an error. It is intended that for any other activities, the requirements will be prescribed in regulations in the future. The intention is to include all listed and specified activities but to be included through legislation. Noted |
| **33** | Clause 8 / section 24P | Center for Environmental Rights | **Comment:** We propose insertion of a provision authorising the Minister responsible for water to access financial provision in the event that the holder or holder of a right or permit fails to rehabilitate or to manage any impact on water resources, or is unable to undertake such rehabilitation or to manage such impact.  |  | The principle of allowing the Minister of DWS to access funds for water remediation is under consideration, however it may be implemented through an internal government process and may not be included in law.  |
| **34** | Clause 8 / section 24P(3)Clause 8 / section 24P(3)(a) | Center for Environmental Rights | **Comment:** The previous version of the Bill included applicants for an Environmental Authorisation in the scope of this subsection. It is suggested that the inclusion of applicants for an Environmental Authorisation is preferable as this is in line with the phrasing in subsection 24(P)(4) below. environmental liability shall be assessed annually, whereas subsection (b) prescribes a three (3) year period for the submission of audit reports. We support the three-year period for audit, and submit that the annual assessment should rather also be three-yearly, as (in line with our comments submitted on the Draft Bill, 2015) an annual period will in many cases be too frequent for a substantive and meaningful assessment of environmental liability.  |  | An applicant becomes a holder and then falls in the scope of this requirement, namely to annually review FP. Applicant is covered in (1). It is proposed that a three-year timeframe is set to ensure consistency, a revision in the regulations may be required depending on timing of the approval of the bill.  |
| **35** | Clause 8 / section 24P(4) | Center for Environmental Rights | **Comment:** We support these amendments. We submit that the Act must make provision for interested and affected parties to initiate inquiries into the accuracy of an assessment or review. We submit that a mechanism should be introduced to enable this in the manner proposed.  |  | Interested and Affected Parties are consulted in the EIA process as to the determination of the financial provision and are able to consider the review in the EMPRs whenever they are updated. It is not intended that Interested and Affected Parties would be able to see the review before being approved by the Minister of Mineral Resources. If there was a protected process of approval the mine could be in non-compliance with the Financial Provisioning Regulations and the sum set aside could be inadequate while the discussions are underway as the amount would not be updated until there is agreement on the amount.  |
| **36** | Clause 8 / section 24P(5) | Center for Environmental Rights | **Comment:** We propose that a listed activity should be triggered for closure, where the Financial Provision is reassessed and any final holdover is recalculated. We are concerned that the responsibility for water resources is that of the Minister of Water and Sanitation. For this reason, the DMR has, historically, failed to require or collect Financial Provision for water treatment. To compound the problem, the DWS does not utilise section 30 of the NWA which empowers it to collect financial provision from applicants for WULs. The NEMA-based definition goes some way to address this as financial provision for pumping and treatment of water is specifically required. Is it correct that the financial provision should be ceded to the Minister of Mineral Resources only? How would the Minister of Water and Sanitation access that provision for water treatment? Would the financial provision ceded to the Minister be ring-fenced? Would it be capable of identification and tied to a particular mine?  |  | An activity requiring environmental authorization for closure is already contained in the EIA Regulations (activity 22 in Listing Notice 1). A closure plan which includes activities and a schedule for draw down at this point is being considered. Allowing the Minister of Water and Sanitation access to the financial provision is also being discussed between DWS and DMR, this may however be affected through an internal intergovernmental process. Discussion are underway to consider a mechanism for the Minister of Water and Sanitation to be able to access funds. Financial provision, when set aside, is already set aside for a particular MPRDA right/permit and specifically for rehabilitation, etc. purposes. The regulations do strengthen the requirement for linking the right/permit with the financial provision  |
| **37** | Clause 8 / section 24P(7) | Center for Environmental Rights | **Comment:** Subsection (7) appears to authorise the Minister of Environmental Affairs or an MEC to require financial provision for activities other than “listed or specified activities for, or directly related to, a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit. We support the retention of this subsection. However, we submit that subsection (7) requires more detailed provision. Moreover, we submit that the proposed deletion of the phrase “or MEC with the concurrence of the Minister” is ill-advised. MECs are the competent authorities for most listed activities, many of which have the potential to have significant and long-lasting impacts on the environment. We therefore recommend that the phrase “or MEC with the concurrence with the Minister” is retained.  |  | See input at 25 above  |
| **38** | Clause 9 / section 24R | Center for Environmental Rights | **Comment:** Section 24R(2) of the NEMA allows the Minister responsible for mineral resources to retain such portion of the funds set aside for any latent and or 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). – this is supported |  | Noted  |
| **39** | Clause 1 / section 1 | Center for Environmental Rights | There is no definition of the term “mitigate” in NEMA. We propose the insertion of a definition of “mitigate” in section 1 of NEMA. Seeing that the South African environmental management system is built on the mitigation hierarchy, and that “mitigate” is an integral step in the mitigation hierarchy, it is crucial that that terms is defined in NEMA. The term “mitigate” is defined in Regulation 1 of the EIA Regulations as follows: “mitigate means to anticipate and prevent negative impacts and risks, then to minimise them, rehabilitate or repair impacts to the extent feasible”. We submit that the definition on “mitigate” in the EIA Regulations is too narrow as it encompasses only rehabilitation and repair and does not remedy, or “making right.” We therefore propose the insertion of a term with a much wider meaning.  | **Suggestion: “Mitigate”** means to anticipate and prevent negative impacts and risks, then to minimise them, rehabilitate or repair impacts to the extent feasible, and compensate or offset remaining significant negative impacts to rectify or remedy harm   | Agree, it is proposed that the term be defined and the dictionary definition be used see comment at 9 above. A subsequent amendment is proposed in the EIA regulations to align once the bill has been passed.  |
| **40** | Clause 1 / section 1 | Center for Environmental Rights | Proposed insertion of a definition for “remedy” There is no definition for the term “remedy “in NEMA. The term “remedy” is the final step in the mitigation hierarchy and therefore also needs to be defined. Seeing that competent authorities are implementing biodiversity offset projects, we propose a definition for “remedy” in section 1 of NEMA that is wide enough to include compensatory and offset methods of remediation.  | **Suggestion: “Remedy”** means to remediate or rectify remaining significant impacts through compensation or offsets after measures to avoid or prevent impacts, then minimize impacts, and then rehabilitate or repair damage, have been exhausted  | Could be considered further  |
| **41** | Clause 1 / section 1 | Center for Environmental Rights | Proposed insertion of a definition for “residual impact” There is no definition of the term “residual impact” in NEMA. We understand that the term may well be defined in the Financial Provisioning Regulations, 2015 in future, but we propose that the term is defined in NEMA so that it has the same meaning when applied under different regulations published in terms of NEMA.  | **Suggestion: “Residual impact”** means the negative impact that remains after measures to avoid or prevent impacts, then minimize impacts, and then rehabilitate or repair damage, have been exhausted  | Could be considered further  |
| **42** | None  | Center for Environmental Rights | The EIA Regulations and NEMA do not contain any provisions authorizing a competent authority to suspend or withdraw environmental authorizations in the event that a holder fails to comply with or contravenes the conditions of an environmental authorisation or if changed circumstances warrant such suspension or withdrawal. Provisions authorising a competent authority to suspend and/or withdraw environmental authorisations in the event of non-compliance with or contraventions of conditions of environmental authorisations or when circumstances lead to potential significant detrimental effects on the environment or on human rights that appeared in previous versions of the EIA Regulations do not appear in the EIA Regulations. The motivation to omit those provisions from the EIA Regulations is not clear to us, especially because there are no equivalent provisions in NEMA and given the indispensable value of such a compliance monitoring and enforcement tool in an environmental management regime.  |  | The provision to suspend or withdraw an environmental authorization would not be useful once the project has commenced. The activities related to the EIA are generally activities which allow for the siting of an activity that has a specific duration. If the activity has an operational phase it will usually have an emissions license either for an emission through the air or water. It would be correct for these licenses to contain a suspension or withdrawal clause which once evoked would suspend the operations. Consider the development of any type of infrastructure, the clearance of vegetation, the erection of a structure etc. These require EA but would have little effect should the EA be withdrawn. It would also in the instance where the activity has commenced allow it to continue without any management what so ever, as it is only an offense to commence an activity without authorisation.  |
| **43** | Clause 1 / section 1: financial provision | Western Cape Province  | **Comment:** Definition of “financial provision” should not be limited to mining activities and should make adequate provision for all impacts. This rationale, i.e. not limited to mining, is supported - it is however not evident in the proposed wording of the draft definition.The definition must be clarified to clearly include applicants for or holders of environmental authorisations for all listed or specified activities, as well as holders of old order mining rights. It is proposed that paragraph (d) of the current definition is amended as follows: “(d) monitoring, mitigation and remediation of latent or residual environmental impacts which become known in the future during post closure monitoring”Also, paragraphs (a) to (f) in the definition lists certain aspects for which the availability of sufficient funds is required, for example, decommissioning and closure of operations. Paragraph (e) should therefore refer to “and” as opposed to “or” which would mean that sufficient funds must be provided to possibly undertake all, and not only one of the activities listed in paragraphs (a) to (f). |  | Agree that the provision allows for other activities to be identified and for regulations to be written for them in time. However, need to gain experience with the implementation of the financial provision for mining first. It is proposed to check that the definition identifies the objective which is to allow the provision to extend to all listed and specified actives in the future but that with each activity that this is supported by a regulation or a listing to allow the activity and the need for the inclusion to be well considered and a socio economic impact assessment to be undertaken to determine the financial impact on the industry It is noted that the Water Act has similarly made provision for seeking financial provision for activities not related to mining, so there is a need to avoid duplicationAgree – proposed that the comment is accepted.  |
| **44** | Clause 1 / section 1: financial provision | Western Cape Province | **Comment:** The inclusion of latent impacts in the scope of financial provisioning must be ensured.It is not apparent from the current definition that adequate provision is being made for post closure impacts of, for example, those in respect of shale gas.Bill proposes the **deletion of the word “latent”** in s24P(5)(b), i.e.*“…must retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of* ***[latent,]*** *residual or any other environmental impacts…”*NEMA does not provide a definition for “latent” or for “residual”. | It is proposed that paragraph (d) of the current definition is amended as follows: *“(d) monitoring, mitigation and remediation of latent or residual environmental impacts which become known in the future during post closure monitoring”* | Agree, it is proposed that latent impacts be included but their reach will be limited to those that can be feasibly determine and for which financial provision can be made. Need to clarify the concern around shale gas specifically.The proposal is not be practical, in order to set aside financial provision for post closure a figure must be calculated before closure and set aside, there will be no company to set aside additional funds should monitoring show additional impacts. This is where the polluter pays principle will have to apply. It is proposed that the term latent be reinstated and the dictionaly definitions for both terms latent and residual be considered. |
| **45** | Clause 4/ section 24C(3) | Western Cape Province | **Comment:** The competent authority for activities related to national priorities should be reconsidered.S24C(3) does however not allow the Minister and a MEC to agree that applications for activities contemplated in s24C(2B), i.e. activities related to matters declared as a national priority, may be dealt with by a MEC.  |  | Subsection (2B) of section 24C is now proposed to be included in section 24C(3) and therefore such agreements will be enabled.  |
| **46** | Clause 75 / Section 12 of NEMA, 2008 | Western Cape Province | **Comment:** Whilst we do not support the principle of converting an environmental management programme (“EMPr”) into an environmental authorisation (“EA”), we will support the proposed amendment, only if the crucial qualifications included are retained.Clause 75 provides a proposed amendment to s12(4), i.e. – *“An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) on or before 8 December 2014, … after 8 December 2014… shall be deemed to have been approved in terms of the National Environmental Management Act, 1998,* ***and an environmental authorisation issued.”.***In summary, an EA evaluates the significance of impacts and identifies mitigation measures, whereas an EMPr is an implementation tool for such mitigation measures. WC will only support if retain the qualification *“….do not apply in the instances where an application for an environmental authorisation in relation to activities ancillary to exploration, prospecting, mining, or primary processing was not obtained, was refused or there was failure to obtain an environmental authorisation”.*  |  | It is proposed that this section will be rewritten and the wording as per the EIA Regulations will be used to clarity the transitional arrangements. It is proposed that the provisions in the EIA regulations be removed once the bill has been passed to avoid duplication.  |
| **47** | Clause 4 / section 24C | Agri SA  | **Comment:** Clause 4 -Agri SA is of the view that the dispensation created by the One Environmental System as referred to in section 50A of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”) which, amongst other things, affords the Minister of Mineral Resources the power to make decisions on applications for prior environmental authorisation in terms of sections 24(2) and 24D of NEMA, is conceptually flawed and incorrect in law. The One Environmental System creates an untoward and unfairly biased environmental governance dispensation for the mining sector alone. Agri SA is furthermore of the view that section 50A of NEMA is Constitutionally flawed with respect to the requirement for concurrence between the Minister of environmental affairs, the Minister responsible for water affairs and the Minister responsible for mineral resources regarding proposed amendments to the provisions relating to prospecting, exploration, mining or production in NEMA, a specific environmental management Act or any other Act of Parliament that may have the effect of amending the provisions of the Agreement in terms of which the One Environmental System was created. Agri SA is accordingly of the view that any reference in the Bill that relates to the current dispensation with regards to mining should be omitted from the Bill.  |  | Comment noted  |
| **48** | Clause 8 section 24P | Agri SA  | **Comment:** Clause 8 - The provisions surrounding financial provisioning for mining-related environmental liability should resort with the Minister of Environmental Affairs instead of the Minister responsible for Mineral Resources.  |  | This is part of the agreement reached under the One Environmental System and not to be amended. |
| **49** | Clause 8 / section 24P | Agri SA  | **Comment:** The powers given to the Minister of Mineral Resources to decide upon the adequacy of the financial provision by the holder of an environmental authorisation in respect of mining (or mining-related) activities, is incorrect. This power should reside with the Minister of Environmental Affairs.  |  | Comment noted  |
| **50** | Clause 8 / section 24P | Agri SA | **Comment:** We are aggrieved proposed amendment of section 24P whereby holders of an environmental authorisations for listed or specified activities for, or directly related to, prospecting or exploration of a mineral, or directly related to the primary processing of a mineral or petroleum resource, must submit an audit report to the Minister responsible for mineral resources on the adequacy of the financial provision from an independent auditor every three years instead of annually.  |  | It is deemed onerous to expect a detailed audit every year. In order to ensure that justice is done to such an audit reconsideration of the regularity thereof must be considered. Other commenting parties have agreed with the proposed less regular timeframe. |
| **51** | Clause 75 & 76/ Section 12 of NEMA, 2008 | Agri SA | **Comment:** Agri SA is of the view that an environmental management plan or programme approved in respect of any mining activity or activity directly related to mining does not equate to an environmental authorisation in terms of NEMA. Agri SA objects to the special dispensation afforded to the mining industry by the proposed amendments in terms of clause 75 and 76 of the Bill.  |  | See response to comment 46 above  |
| **52** |  | Association of Cementitious Material Producers  | **Comment:** The ACMP has noted the proposed draft regulations pertaining to the financial provision for prospecting, exploration, mining or production operations. GN 1228 dated 10 November 2017. Gazette no. 41236 has not yet been finalized. The methodology for computing the provisioning was extensively discussed with the Department of Environment and it is important that the Department publish the final Gazette to provide certainty to the mining sector, and particularly more so for the small mines classified as other mines. It is also important that the revised NEMA Financial Provision is aligned with the National Environmental Management Act as amended through NEMLA4   |  | Noted and intended to be done. |
| **53** | Clause 1 / section 1: financial provision | Association of Cementitious Material Producers | **Comment:** “financial provision”**:** The definition clarifies that financial provision is limited to activities including prospecting, exploration, extraction or primary processing.  |  | Noted  |
| **54** | Clause 7 / section 24O | Association of Cementitious Material Producers | **Comment:** It is recommended that s24(2) be deleted as it is inappropriate to place the burden on the environmental assessment practitioner to consult with other government departments. The competent Authority should include mechanisms and procedures in place to ensure comments are received from relevant government departments within set timeframes. This would ensure a more efficient process to finalise applications |  | See response to comment 5 above  |
| **55** | Clause 8 / section 24P | Association of Cementitious Material Producers | **Comment:** Subsections (a) and (b) add uncertainty as (a) refers to ***listed and specified activities*** and (b) refers to ***listed and specified activities***. The current amendment implies that listed activities outside the mining sphere such as blending facilities off site will also be required to provide financial provisioning. The text should be unambiguous in its intent as it is our understanding that the provisioning is only related to listed activities directly related to, prospecting or exploration of a mineral, or directly related to petroleum resource or primary processing of a mineral or petroleum resource. It is to be noted that s24P of Act 107 of 1998 is linked only to the listed activities directly related to prospecting and/or mining (see items 20/21 of GN 327 and 17/18/19 of GNR 325 of 7 April 2017 EIA regulations) and specifically excludes facilities related to secondary processing (i.e., post-mining processing). It is recommended that the inclusion of *specified activities*be deleted to avoid subjective interpretation. Furthermore, there is no definition of *specified activities* included in the Bill.  |  | Relevant regulations clarify the scope of the requirements. In future expansion of these provisions to other listed/specified activities may be done. As a result, it is proposed that the current wording be retained. |
| **56** | Clause 8/ section 24P | Transnet | **Comment** - 24P: who is the reviewer. Role and functions of assessor and reviewer to be clarified. Cost to be carried by the applicant/holder is not fair |  | Details are provided in the relevant Regulations. If an assessment or review of financial provision is not done sufficiently a revision thereof must be for the account of the holder, this is in line with the polluter pays principle |

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| **ADDITIONAL AMENDMENTS PROPOSED FOR INCLUSION INTO THE NEMLA BILL AS REQUIRED THROUGH THE AMENDMENTS TO THE FINANCIAL PROVISION REGULATIONS** |
| **NO.** | **CLAUSE/SECTION** | **ORGANIZATION** **(STAKEHOLDER NAME)** | **AMENDMENT REQUIRED**  | **REASON FOR THE PROPOSED AMENDMENT**  |
| **1** | Section 1: Definitions  | DEA  | Need to retain the word “extraction” | It was an oversight to remove the word “extraction”, as this is the trigger that brings mining into NEMA. Section 24C (b) should read:‘‘The Minister responsible for mineral resources must be identified as the competent authority in terms of subsection (1) where the listed or specified activity is, or is directly related to—’’; *(b)*by the substitution in subsection (2A) for paragraph *(b)* of the following paragraph: 5  ‘‘*(b) extraction and*primary processing of a mineral or petroleum resource.’’;   |
| **2** | Section 1: Definitions | DEA  | Under the definition of “financial provision” there is a need to include an old order right holder (shouldn’t need a permit as there are issued for a limited time i.e. maximum of 5 years) | It has been determined that there are several old order rights holders still in existence. In order to ensure that these right holders are brought under the financial provision requirements of NEMA they must be identified in the definition of person who must set aside financial provision.  |
| **3** | Section 1: Definition  | DMR/Treasury | Depending on the decision of the discussions between DMR and Treasury may need to amend the definition of financial provision to include parent company for oil and gas industry.  | Currently the vehicles in which to provide for financial provision are not suited to the oil and gas industry where the risks and investments are so high that South African banks and insurers are not able to accommodate the risk.  |
| **4** | Section 1: Financial provision definition  |  | It is requested that the definition of “financial provision” include a new vehicle “rehabilitation company” -  | There are currently such companies registered with Treasury and the Act should allow them to continue to fulfil that role.  |
| **4** | Section 24(P)Section 49A: Offences | DEA, DMR & Treasury  | Add a provision that financial provision can only be used for rehabilitation and not for other purposes. Add a provision to indicate that it is an offense to use the funds for any other purpose than rehabilitation.  | It must be clear that financial provision can only be used for the purposes of rehabilitation. currently in order to receive a tax rebate, the Income Tax Act makes provision for the funds in the mining rehabilitation trust /company to be used solely for rehabilitation. As a result, if the funds from the mining rehabilitation trust/ company have been utilised for something other than rehabilitation, the Income Tax Act makes provision for a tax penalties. In 2017, further changes were made in the Income Tax Act to curb the abuse of these provisions. However, a prohibition is now also proposed through NEMA. It must be an offence to use the financial provision for any other purpose. This is to protect the State and provide clarity to the industry on the sole purpose of the financial provision.  |
| **5** | Section 24P(3) | DEA, DMR  | Review and reassessment every three years and the audit for mining right required every 5 years and for a mining permit every 3 years.  | The 5 and 3-year period for the audit was proposed to coincide with the EIA EMPR requirement for a five-year audit.  |
|  | Section: 24P(3) & (5) | DEA  | Need to change the work “cede” as a mining permit cannot be ceded. Could use the term “access”  | This is to ensure that the funds set aside for latent defects for permits can also be transferred to DMR on the closure certificate being issued. The holder of the right or permit must provide access to the Minster of Mineral resources to access the funds and deposit them in an account in the name of the mine to draw interest until the funds are required to be spent to address latent and residual impacts. |
| **6** | Section: 24P(5)(a) and (b) | DEA, DMR | In (a) delete “and retain”, and replace the word “retain” with access in (b).  | The Minister of Mineral Resources did not have the funds to retain. |
| **7** | Section 24P(7) | DEA | This section allows the Minister or the MEC in concurrence with the Minster to make the financial provision applicable to any other activity identified in the Act. This should be allowed only through legislation.  | Ensuring that additional activities are identify through a transparent process will ensure certainty in the industry, will allow comment on the prescription to ensure that the cost impacts are understood and there are regulations covering the manner of calculating and drawing down etc. the financial provision. |
| **8** | Sections 24R(1) and 24R(3) | DEA | Add holder of environmental authorization for mining or directly associated | Currently this provision covers only MPRDA holders and not holders of environmental authorizations for mining related activities. Must be inclusive of all as environmental authorizations are now required for mining.  |
| **9** | Sections 24P(5)(b) (c) and 24R(4) | DME & DWS | Depending on the decision between DWS and DMR regarding the Minister of Water and Sanitation being able to access the financial provision directly, there may be a need for the Minister of Water and Sanitation to be identified.  | Currently only the Minister of Mineral Resources may access the trust fund, it may be necessary for the Minister of Water and Sanitation to similarly access the funds to remediate water related aspects.  |
| **10** | Section 24R | DEA, DMR | A provision must be added to allow for a drawdown of the financial provision for the purposes of closure and in relation to an approved closure and drawdown plan  | Currently there is no mechanism to allow for a drawdown of the financial provision to allow for the undertaking of rehabilitation and final closure for which part of the fund has been provided. This must be rectified and a procedure put in place to manage the draw down before actual closure of mining operations and issuance of closure certificates. This procedure is still under discussion although the principle is agreed. Only the amounts for the remediation of latent impacts should be retained by the DMR.  |
| **11** | Section 24P | DEA, DMR | In general, section 24P does not suit the oil and gas industry, the nature of gas and oil exploration and production does not allow annual rehabilitation, does not require annual review or audit and it will not be possible for the oil and gas industry to cede funds to DMR for latent impacts. A separate dispensation should be included to accommodate this industry to allow them to comply.  | The oil and gas industry is being prioritized for growth in the country. The nature of the activities and scale of risk does not fit with the current financial provision dispensation. A separate provision will need to be included to ensure that the oil and gas industry can comply and can be brought under the management of NEMA.  |
| **12** | General  | DEA, Treasury | In general, when drafting there is a requirement to ensure the consistent use of terms in Section 24P of the Act, the definitions, the powers of the Minister to make regulations and the financial provisioning regulations themselves**.** There is also a need to ensure there is no duplication between the regulations and the Act, with the principle being the Act contains the enabling provisions and the regulations provide the detail and process.  | There is currently inconsistency in terms between different sections of the Act and the regulations as well as some duplication. In the final drafting attention must be paid to aligning the various section and regulations as well as removing any duplication without changing principle issues.  |

**2. COMPLIANCE AND ENFORCEMENT RELATED PROVISIONS**

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|  | **Supported/Partially Supported** |
|  | **Not supported** |

| **No.** | **Clause/****section** | **Act comments related to** | **FROM** | **COMMENT** | **Recommendation** | **RESPONSE** |
| --- | --- | --- | --- | --- | --- | --- |
| **1.** | **1(b)** | **Section 1 NEMA** | **Centre for Environmental Rights** | EMRI change to EMPI is not consistently applied throughout the Bill | Ensure that change is consistently applied throughout | Supported: EMPI should replace EMRI throughout the entire Act |
| **2** | **None** | **Section 1 NEMA** | **Chamber of Mines** | Insert the definition of a municipality, municipal manager and municipal council that is aligned to the Municipal Systems Act, 2000 | Insert the definition of a municipality, municipal manager and municipal council that is aligned to the Municipal Systems Act, 2000 | Supported: NEMA defines the Director General and the Provincial Head of department. For consistency, municipality, municipal manager and municipal council should also be defined:**'municipal council'** means a municipal council referred to in section 157 (1) of the Constitution;'**municipality**', when referred to as-(a) an entity, means a municipality as described in section 2; and(b) a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998);'municipal manager' means a person appointed in terms of section 82 of theMunicipal Structures Act; |
| **3** | **None** | **Section 1 NEMA** | **Chamber of Mines** | The term, “Minister responsible for water affairs” needs to be defined | The term, “Minister responsible for water affairs” needs to be defined | **Not supported:** the term ‘Minister’ is defined, however, the Minister responsible for mineral resources is not defined – the term is self-explanatory |
| **4** | **5** | **Section 24G NEMA** | **Centre for Environmental Rights** | S24G should be abolished due to the fact that it is abused and provides a perverse incentive for a person to obtain an environmental authorisation after the fact, in a simpler, faster and less expensive manner. | Delete S24 from NEMA | **Not supported**: The aim of S24G is to provide an opportunity to regularise an activity that was unlawfully commenced – it is thus aimed at bringing a greater number of people within the regulatory framework of NEMA.The Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of section 24G in GNR 698 in GG 40994 of 20 July 2017 (S24G Fine Regulations). These Regulations are aimed at addressing the previous abuse of the section by*, inter alia,* providing for the compliance history of the applicant to be included as a criteria in determination of the quantum of the fine; as well as requiring the maximum fine of R5million where the applicant is a ‘repeat’ contravener – this should provide an effective deterrent against the abuse of S24G. The Department has also commenced with an initiative to assess the feasibility of introducing an administrative penalty system into NEMA, which will incorporate a review of S24G. |
|  |  |  |  | Section 24G, in its current form does not require reasonable public participation; and is therefore unconstitutional, unlawful and invalid; and the amnesty that it provides is not in accordance with sections 1©, 7 and 24 of the Constitution. S24G was inserted in 2004 as a transitional provision to encourage greater compliance – the 14 year period is more than sufficient. |  | **Not supported**: Section 24G (1)(vii) empowers the Minister or MEC to direct the applicant to compile a report containing, inter alia, a description of the public participation followed during the course of compiling the report, including all comment received from interested and affected parties (I&AP). In addition, the S24G Fine Regulations provide for the publication of a mandatory preliminary advert prior to the submission of an application that is intended to inform I&AP’s that an application is about to be submitted and that they should register should they wish to comment. |
| **5** | **None** | **GNR 698 in GG 40994 of 20 July 2017 (S24G Fine Regulations)** | **Centre for Environmental Rights** | S24G Fine Regulations do not adequately regulate the process to be followed in the submission of the S24G applications. | The S24G fine Regulations be amended to expressly provide for the submission of a report required in terms of 24G (1)(vii) (public participation) and that public participation is a mandatory requirement in all S24G applications; and that the publication of the application form; and all assessments conducted. The CER contends that these documents are being withheld by EAP’s as they are not legally obliged to disclose them. | **Not supported:** these comments are on the S24G fine Regulations and not related to the NEMLA Bill.However, in response to the comments provided:* The stated purpose of the S24G Fine Regulations are to provide for the procedure and criteria to be followed in determining the quantum of the fine – they are not intended to regulate the entire application process.
* DEA has developed a standard S24G application form template that includes a standard clause in which it is stated: *“Unless protected by law, all information contained in and attached to this application form may become public information on receipt by the competent authority. Upon request, any interested and affected party must be provided with the information contained in and attached to this application form.”*
* In terms of the S24G Fine Regulations, the fine committee must take into consideration the information submitted by an applicant in terms of section 24G(1)(b)(vii)-(viii) – this includes the report on the public participation followed.
 |
| **6** | **5** | **Section 24G NEMA** | **Chamber of Mines** | The intended expansion of the S24G application to include not only persons that commenced with listed or specified activities, but also “successors-in-title or persons in control of” is conceptually flawed, as S24G is a “truth and reconciliation” process for those that unlawfully commenced.There is no legal justification for requiring that “successors-in-title or persons in control of”, who are potentially without fault a) to submit an application and b) to pay an administrative fineThe concept of ‘control is open ended and undefined in NEMA cannot serve as a trigger on which unlawful conduct is premised.  | Clause 5(b) and 5(c) is deleted | **Not supported:**The submission of a S24G application is a voluntary process and provides a mechanism for a person to obtain ex-post facto authorisation after a listed, specified or waste management activity is commenced. The competent authority cannot force the person who ‘commenced, successors-in-title or persons in control of’ to apply. Nor is it guaranteed that an approval will be issued at the end of the S24G process. The aim of the clause is to expand the categories of persons that are provided with an opportunity to regularise an activity that was unlawfully commenced – it is thus aimed at bringing a greater number of people within the regulatory framework of NEMA.Although a “successors-in-title or persons in control of” may not carry the same degree of fault as an applicant, who, themselves unlawfully commenced with an activity, it is assumed that any reasonable prospective purchaser of land would conduct a due diligence exercise to ascertain whether there are any liability in respect of the property.The concept of a ‘person in control of’ is already used in section 28 of NEMA. It is submitted that this is not an open ended concept and can be determined through a reasonable legal and factual enquiry. |
| **6** | **None** | **GNR 698 in GG 40994 of 20 July 2017 (S24G Fine Regulations)** | **Chamber of Mines** | If S24G is expanded to include “successors-in-title or persons in control of”, then the EMI Fining Regulations should be amended to provide for a “0” fine for these types of applicants. | If S24G is expanded to include “successors-in-title or persons in control of”, then the EMI Fining Regulations should be amended to provide for a “0” fine for these types of applicants. | **Not supported:**There are two primary considerations in the determination of the quantum of the fine; as provided for in the S24G Fining Regulations, namely, the a) potential, cumulative and/or actual impact on the environment and b) the compliance history of the applicant.The fact that the “successors-in-title or persons in control of” is faultless does not impact on the potential, cumulative and/or actual impact on the environment, however, they are free to make any other representations that the fine committee must take into consideration, including that they were not at fault for commencing with the activity unlawfully.However, it must be noted that these categories of persons would still benefit from the submission of a S24G application; as their activity would be ‘regularised’ i.e. become lawful from the date on which an authorisation is issued – this has financial/commercial value for them; and it is therefore reasonable that they should pay an administrative fine. These successor-in-title; and the person in control of should not be able to obtain a free benefit from someone else’s unlawful conduct. |
| **7** | **5** | **Section 24G NEMA** | **Transnet** | The intended expansion of the S24G application to include not only persons that commenced with listed or specified activities, but also “successors-in-title or persons in control of” has major legal ramifications for organs of state that own vast tracts of land throughout the country.Much of this land is in obscure areas, which makes ongoing monitoring and access control impossible – as a consequence, there are many illegal activities occurring on the land by persons who are not sanctioned by the landowner. | S24G applicants should be confined to those that commenced with the activity; and not be expanded to “successors-in-title or persons in control of” | **Not supported:**The risk anticipated by the expansion of S24G applicants to landowners, such as Transnet is misconceived.S24G is a process in which categories of persons that are provided with an opportunity to regularise an activity that was unlawfully commenced, these include persons who commenced unlawfully; and it is proposed to be expanded to “successors-in-title or persons in control of”. It is these category of persons (as the applicants) who would be liable to the payment of the administrative fine; and not necessarily the landowners.In fact, it would be in the interests of landowners, such as Transnet, to expand the category of persons who could apply for S24G applications; as it would mean that there would be an opportunity to decrease the number of illegal activities occurring on their properties. As landowners, Transnet would have a duty of care in terms of S28 to take reasonable measures to prevent, minimise and rectify pollution or degradation occurring on their property. This is a stand-alone duty apart from S24G. |
| **8** | **5** | **Section 24G NEMA** | **Association of Cementitious Material Products** | The intended expansion of the S24G application to include not only persons that commenced with listed or specified activities, but also “successors-in-title or persons in control of” should be omitted, as it allows for applications by categories of persons that did not commit an offence.  | S24G applicants should be confined to those that commenced with the activity; and not be expanded to “successors-in-title or persons in control of” | **Not supported:**S24G is a voluntary and not a mandatory application process. In addition, it not only has possible punitive outcome (administrative fine) but also provides the applicant to obtain an environmental authorisation after the fact.One of the aims of S24G is bring a greater number of persons under the regulatory framework of Chapter 5 of NEMA and the EIA Regulations; and provide them with an opportunity to regularise unlawful activities; and any infrastructure that may have been developed as a result thereof.The current category of persons permitted to apply for a S24G authorisation is persons that commenced with to a listed, specified or waste management activity, and thereafter wish to obtain ex-post facto authorisation; and not a person who committed an ‘offence’.Only a court of law can find someone guilty of having committed an offence; and there elements other than mere conduct, such as causation, lawfulness, fault that need to be proved. The submission of a S24G application is therefore not an admission of guilt, but could form part of the evidence in a separate criminal investigation by EMIs, in which they would be required to prove all of the abovementioned elements beyond a reasonable doubt in order to secure a conviction. |
| **9** | **5** | **Section 24G NEMA** | **AfriForum** | Support the amendment and recognise the need for it, on condition that the successor-in-title or person in control of legalises the activity, without absolving the offender. | No additional amendment proposed | **Supported,** the persons who actually unlawfully commenced with the activity will still fall under the ambit of S24F of NEMA and may be investigated/prosecuted for this offence |
| **10** | **11** | **Section 28 NEMA** | **Centre for Environmental Rights** | Generally the amendment is supported. However, suggest that:* Section 28(4A)(a) should provide an opportunity to affected persons to inform them of their interests;
* I&AP’s should be taken into account in the context of S28(7)(8)(9)(11)
 | Require the DG,HOD or municipal manager to give advance notice of a directive to the recipient as well and other impacted or affected persons; and allow such persons a reasonable opportunity to make representations.In the event that the recipient of a S28 directive fails to comply with the directive, allow an interested and affected party to undertake the remedial action; and recover the costs incurred. | **Not supported:**The objective of a section 28(4) directive is to provide environmental authorities with a legislative mechanism to enforce the polluters pays principle, by empowering them to issue a directive instructing persons causing pollution or degradation to cease, investigate and evaluate the impacts, commence and complete remedial measures.In certain situations, the pollution or degradation may be serious and imminent; and environmental authorities need to act swiftly, while still ensuring compliance with just administrative action. The *audi alteram partem* rule (right to be heard) only applies to a persons whose rights may be directly adversely affected by the administrative action .i.e. the recipient of the directive. It is therefore proposed that providing the recipient with an opportunity to make representations before the final administrative action/directive complies sufficiently with PAJA.The amendment is also intended to align the ‘right to representation’ provisions of S28 with those that are applicable to a S31L compliance notice for the sake of consistency. It is also considered appropriate that only those environmental authorities empowered to issue the S28 directive are provided with the follow on powers to undertake the necessary remedial action and recover the costs from those responsible for the pollution/degradation.  |
| **11** | **11** | **Section 28 (4) NEMA** | **Chamber of Mines** | The category of persons upon whom a section 28(4) directive may be served should include any person who causes the pollution/degradation; as well as the list of specific responsible persons i.e. landowners, persons on control of land/premises or a person who has the right to use land/premises | In relation to the category of persons upon whom a section 28(4) directive may be served, refer specifically to the category of responsible persons in 28(2), rather than the ambiguous term of any other person of whom the duty of care exists. | **Supported:**For the purposes of clarity and certainty, it is preferable to include a cross reference in 28(4) to 28(2) rather than refer to *“any other person to whom the duty of care applies.”*This would make it clear that a directive may be issued to:*“ 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—**(a) any activity or process is or was performed or undertaken; or**(b) any other situation exists,**which causes, has caused or is likely to cause significant pollution or degradation of the environment.”* |
| **12** | **11** | **Section 28 (4) NEMA** | **Chamber of Mines** | The word advanced notice in writing i.e. a S28 pre-directive, should be aligned to ss3(2)(b)(a) of PAJA and be replaced by adequate notice, which is a broader term. | The word advanced notice in writing i.e. a S28 pre-directive, should be aligned to ss3(2)(b)(a) of PAJA and be replaced by adequate notice, which is a broader term. | **Supported:**In order to align with the wording of PAJA that requires that **“***In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-(i)* ***adequate notice*** *of the nature and purpose of the proposed administrative action;”;* theword advance notice be replaced with adequate notice. |
| **13** | **11** | **Section 28 (9) and (11) of NEMA** | **Chamber of Mines** | The Bill seeks to replace proportional liability with joint and several liability in the event that the environmental authorities are required to undertake reasonable remedial measures themselves, should the recipient of the directive fail to comply with the directive.The principle of proportionality was favoured by the courts in AngloGold Ashanti v Monambi &Others in relation to an order suspending mining operations in terms of the Mines health and safety Act; and s28 (8) liability should be treated similarly.Joint and several liability would constitute expropriation of money within the me25 of the Constitution, for which the State would have to pay compensation in relation to any excess recovered from a particular person.Even though it may be difficult to determine the exact degree of responsibility where there are multiple polluters impacting on the environment, this is no reason to impose joint and several liability. This principle is not in accordance with the adoption of causality, on which the statutory duty of care is premised. Proportionality is inherent to the concept of causality on which the statutory duty of care is premised. | The principle of proportionality linked to the degree of responsibility identified, should be retained and that the reference to joint and several liability be removed from S28(9). | **Supported:**Section 28(8) of NEMA sets out the categories of persons against whom environmental authorities may claim/recover costs for reasonable remedial measures and includes a person responsible for the pollution, degradation; the owner of land (or their successor in title), person in control of land; person who has a right to use land; and a person that negligently failed to prevent the activity, process or situation.However, in order for them to be held liable for these remedial measures, they must have “failed to take the reasonable measures required of him or her under (1). This proviso implies that the liability of these responsible persons depends on their degree of fault/blameworthiness i.e. failure to take the reasonable measures to prevent, minimise or rectify the pollution or degradation. Due to the fact that the liability under s28(8) is ‘fault-based’, it is fair and reasonable to hold the category of persons liable on a proportional basis, depending on their degree of fault in causing the pollution or degradation, rather than on a joint and several basis.However, this still leaves environmental authorities with a complex and potentially costly duty to determine the degree to which each responsible person is liable for their respective failures to take reasonable measures.  |
| **14** | **11** | **Section 28 of NEMA** | **Transnet** | The addition of a municipal manager to the DGs and HODs that are empowered to issue S28 directives is inappropriate, due to the fact that municipalities under compliance and enforcement through their own bylaws. The NEMA, being a national piece of legislation, should confer enforcement powers only on national and provincial organs of state.  | The inclusion of the municipal manager as an authority empowered to issue a section 28 NEMA directive should be reviewed and reconsidered. | **Not supported:**The implementation of national environmental legislation, namely NEMA and the SEMAs, is a shared competence between national, provincial and local authorities.A prime example of a function that is executed by local authorities is the implementation of the Air Emission Licensing system in terms of NEM:AQA, in terms of permitting, compliance and enforcement. This is an original duty allocated to local authorities in terms of Parts B of Schedules 4 and 5 of the Constitution. In addition, there is already a similar administrative enforcement mechanism provided to the Minister, provincial and local authorities existing in the statute books under section 31A of ECA, however, this is an outdated piece of legislation; and the enforcement mechanisms available to local authorities to enforce national environmental legislation needs to be aligned to those available to national and provincial for the sake of consistency. |
| **15** | **11** | **Section 28 of NEMA** | **Commission for Gender Equality** | Before issuing a directive, the DG, HOD or municipal manager must give adequate notice to any affected person or community in order to provide them with an opportunity to make representations. | Before issuing a directive, the DG, HOD or municipal manager must give adequate notice to any affected person or community in order to provide them with an opportunity to make representations. | **Not supported:** The objective of a section 28(4) directive is to provide environmental authorities with a legislative mechanism to enforce the polluters pays principle, by empowering them to issue a directive instructing persons causing pollution or degradation to cease, investigate and evaluate the impacts, commence and complete remedial measures.In certain situations, the pollution or degradation may be serious and imminent; and environmental authorities need to act swiftly, while still ensuring compliance with just administrative action. The audi alteram partem rule (right to be heard) only applies to a persons whose rights may be directly adversely affected by the administrative action .i.e. the recipient of the directive. It is therefore proposed that providing the recipient with an opportunity to make representations before the final administrative action/directive complies sufficiently with PAJA.The amendment is also intended to align the ‘right to representation’ provisions of S28 with those that are applicable to a S31L compliance notice for the sake of consistency. |
| **16** | **11** | **Section 28 of NEMA** | **The Banking Association of South Africa** | The amendments do not make it clear:* Who is responsible for the pollution or degradation;
* Who is considered a beneficiary against whom the costs may be recovered;
* Who is responsible for the degradation of land under section 28(1)?

Is it suggested that financial lenders should not be held liable in circumstances in which, although they have provided the funding for the project, have no control over the activities carried out by the property owner/lessee. | The wording within section 28(4) of NEMA “*and any other person to whom the duty of care applies, to…” t*o be amended to read “*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 performed or undertaken, to-…*”.The proposed definition in respect of “the responsible person” as detailed above for section 28 (4) should be used in respect of “a beneficiary”.  | **Partially Supported:**For the purposes of clarity and certainty, it is preferable to include a cross reference in 28(4) to 28 (2) rather than refer to *“any other person to whom the duty of care applies.”*This would make it clear that a directive may be issued to:*“ 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—**(a) any activity or process is or was performed or undertaken; or**(b) any other situation exists,**which causes, has caused or is likely to cause significant pollution or degradation of the environment.”***Not supported:**S28(9) empowers the environmental authorities to claim the costs of reasonable remedial measures from any other person that benefitted from measures undertaken by subsection (7). The use of the word other indicates that this clause applies to persons other than those responsible persons referred to in S28(2). |
| **17** | **11** | **Section 28 of NEMA** | **Business Unity South Africa**  | The expansion of the environmental authorities to local authorities is of concern and may lead to the duty of care provisions being enforced by more than one regulator.If the powers is provided to local authorities, it must be to an appropriately graded EMI, after consultation with national and provincial departments.Expansion to local authorities does not meet the legal requirements of either the Constitution or the Municipal Systems Act (MSA).This expansion would have unforeseen consequences in relation to exhausting internal remedies and potentially conflicting decisions, since the MSA provides for appeals against decisions by municipal officials. | All references to municipalities throughout the Bill, but especially in respect of S28, must be removed. | **Not supported:**The implementation of national environmental legislation, namely NEMA and the SEMAs, is a shared competence between national, provincial and local authorities.A prime example of a function that is executed by local authorities is the implementation of the Air Emission Licensing system in terms of NEM:AQA, in terms of permitting, compliance and enforcement. This is an original duty allocated to local authorities in terms of Parts B of Schedules 4 and 5 of the Constitution. In addition, there is already a similar administrative enforcement mechanism provided to the Minister, provincial and local authorities existing in the statute books under section 31A of ECA, however, this is an outdated piece of legislation; and the enforcement mechanisms available to local authorities to enforce national environmental legislation needs to be aligned to those available to national and provincial for the sake of consistency.In addition, there is the principle of *Generalia specialibus non derogant* that means that “the general does not detract from the specific.” This maxim suggests that courts prefer specific provisions over provisions of general application where the provisions are in conflict. It is submitted that local authorities would therefore refer to the provisions of NEMA in relation to the execution of compliance and enforcement functions in terms of national environmental legislation, rather than the MSA, which is an Act of general application to local authorities. For example, the Bill proposes that S43 of NEMA be amended to include an appeal against a directive issued by the municipal manager. |
| **18** | **11** | **Section 28 of NEMA** | **Afri-Forum** | In relation to the expansion of the S28 directive to municipal managers, the co-operative governance mechanisms triggered must be recognised, as well as the potential lack of capacity of municipal managers to fully understand their mandate; and use it in line with just administrative action. The effective use of this provision hold great potential for pollution prevention within the municipal sphere.  | No amendments to the Bill proposed | **Supported:**Comment noted – DEA, together with the provinces have developed a National Guideline for the development of EMI capacity at local authority, which deals with, inter alia, the mandate of local authority EMIs in relation to compliance and enforcement with national environmental legislation.It is assumed that municipal managers have a sufficient level of knowledge and experience in executing their functions in line with just administrative actions; as they would undertake this on a daily basis in respect of other spheres of operation. |
| **19** | **12** | **Section 31BB of NEMA** | **Chamber of Mines** | Not agree with empowering the Minister of Mineral Resources to appoint as an EMPI, a staff member from any organ of state.The definition of ‘organ of state’ is very wide and may include institutions that are not regulatory authorities e.g. Lebowa Mineral trust, Iscor, Petro SA and the African Exploration Mining and Finance Corporation Limited (EMFCL). The EMFCL cannot be both a regulator and the regulated. | The Minster of Mineral Resources be confined to designating as EMPIs only officials that are staff members of DMR | **Partially Supported:**In principle, the designation of EMIs and EMPIs should only be executed by the Ministers/MEC in relation to organs of state that play a role in the execution of a regulatory function in terms of NEMA and the SEMAs. This amendment was requested specifically by the DMR, who requested that the Petroleum Agency of South Africa (PASA) be included in those organs of state that would validly require EMPIs to undertake compliance and enforcement in relation to petroleum resources. It is suggested that S31B,BA,BB and C be amended to refer to “*any relevant organ of state”* to cater for the comment made. This would require the designating authorities to apply their minds in relation to which organs of state should be included. |
| **20** | **12** | Section 31BB of NEMA | **AgriSA** | Agri SA is concerned with the fact that NEMA provides for environmental mineral and petroleum inspectors to be appointed by the Minister of Mineral Resources to enforce the provision of NEMA.  | Agri SA is of the view that only the Minster of Environmental Affairs should have the power to designate and appoint environmental management inspectors | **Not supported:**The empowering of the Minister of Mineral Resources to designated EMPIs is a necessary component of the One Environmental System, which resulted in the Minster of MR becoming the competent authority for EA and Waste activities related to mining and prospecting activities. It is a necessary follow-on that EMPIs be designated to undertake compliance and enforcement in relation to these authorisations, which are issued under the framework of NEMA.The EMPIs would be designated with a very specific mandate in relation to for EA and Waste activities related to mining and prospecting activities – they would not have the same broad mandate of EMIs in respect of general environmental compliance and enforcement.  |
| **21** | **13** | **Section 31D of NEMA** | **Centre for Environmental Rights** | The intention of section 31D (4)(5)(6)(7)(8) and (9) is to provide for procedure in which the Ministers of Environmental Affairs and Mineral Resources can agree that EMIs can undertake the compliance and enforcement work, in circumstances where the EMPIs are unable to adequately fulfil the compliance and enforcement functions.However, the proposed amendment does not achieve the intended result | Add an additional trigger in which a complainant can write to the Minister of Environmental Affairs to request EMIs to undertake compliance and enforcement functions that would otherwise be the mandate of EMPIs:1. Where s/he is not satisfied with the response from the Minister of MR (existing) AND
2. In the event that the Minister of MR does not respond within a reasonable period of time;

Add a new sub paragraph that provides that the Minister of EA, after consultation with the Minister of MR, direct EMIs to undertake EMPI compliance and enforcement activities, where the complainant has provided prima facie evidence of unlawful activities or of an existing or imminent adverse risk to the environment.The Minister must, within a reasonable time, inform the complainant of the steps taken in response to the complaint. If no steps are taken in response to the complaint, the Ministers of EA and MR must provide reasons for this to the complainant. | **Not supported:**DEA has several complaints that have been referred to the Minister of MR through the process provided in S31D(4) – (8), however, no response is received in relation to these referrals – this leaves the Minister of EA unable to provide support/assistance or direct the EMIs to act, as the concurrence of the DMR Minister is required. It also leaves the Minister unable to report any progress on the matter until the Minister of MR responds.There are 3 options that can be followed:1. Leave the provisions as they stand and improve intergovernmental relations between DEA and DMR to try and improve the responsiveness to these types of referrals;
2. Replace the current requirement of “in concurrence with” and “with the concurrence of” with the “after consultation with”. This wording would provide greater leeway for the Minister of EA to act in circumstances where there is prima facie evidence of unlawful activities or of an existing or imminent adverse risk to the environment.
3. Provide the Minister of MR with a specific timeframe with which to respond to the referral from the Minister of EA, failing which the Minister of EA may direct the EMIs to undertake, support or assist in the compliance and/or enforcement activities required.

DEA is of the view that option a) is preferable at this stage, in order to provide for a transitional period for the One Environmental Systems procedures become effective prior to undertaking any legislative amendments. |
| **22** | **13** | **Section 31D of NEMA** | **Chamber of Mines** | The Chamber supports that the EMPI acting under the authority of the DMR have powers over enforcement over the mining industry, however, the remit of what is intended here by the new inclusion of a reference to provincial legislation will make this role extremely wide and undeterminable. The principle should be applied that there are not overlapping powers of enforcement that can be applied by different enforcement agencies over the same activities. The principle should be applied throughout NEMA and insofar as duties and functions are assigned to local authorities**.** | The Bill should provide a clear, distinct and separate mandate for national EMIs, provincial EMIs, local authority EMIs and national EMPIs.Where local authority EMIs are not executing an original function, the specific assignment of functions must be clarified. | **Not supported:**The Act as it currently stands makes it clear that the MEC may designate as an EMI in terms of NEMA and/or the SEMAS only those provisions that are administered by the MEC; or in terms of which an assigned or delegated function is exercised.The Minister of MR may designate EMPIs to undertake compliance and enforcement activities of NEMA and the SEMAs which have been conferred upon him or her in terms of the One Environmental System.The amendment seeks to empower the MEC to designate officials to undertake compliance and enforcement, not only with NEMA and/or the SEMAs, but also in terms of any provincial Act that substantively deals with environmental management, for example, the new round of environmental conservation Bills currently being developed by the provinces. The rationale is to create consistency in the compliance and enforcement powers and duties of compliance and enforcement officials, irrespective of whether they are dealing with national or provincial legislation. This in no way impacts on the mandate of EMPIs to undertake compliance and enforcement in respect of their mandate.In addition, the “environment” falls within the concurrent competence of national and provincial organs of state in terms of the Schedules to the Constitution, meaning there is a measure of overlap in legal mandates. |
| **23** | **13** | **Section 31D of NEMA** | **Western Cape Department of Environmental Affairs and Development Planning** | S31D(8) requires that the Minister of EA to obtain the concurrence of the Minister of MR before providing support or assistance; or directing EMIs to undertake the C&E activities that would otherwise have fallen under the mandate of EMPIs | Delete S31D(4) (7) and (8) insofar as they require the Minister of EA to obtain the concurrence of the Minister of MR before assistance, support can be provided.  | **Not supported:**DEA has several complaints that have been referred to the Minister of MR through the process provided in S31D(4) – (8), however, no response is received in relation to these referrals – this leaves the Minister of EA unable to provide support/assistance or direct the EMIs to act, as the concurrence of the DMR Minister is required. It also leaves the Minister unable to report any progress on the matter until the Minister of MR responds.There are 3 options that can be followed:1. Leave the provisions as they stand and improve intergovernmental relations between DEA and DMR to try and improve the responsiveness to these types of referrals;
2. Replace the current requirement of “in concurrence with” and “with the concurrence of” with the “after consultation with”. This wording would provide greater leeway for the Minister of EA to act in circumstances where there is prima facie evidence of unlawful activities or of an existing or imminent adverse risk to the environment.
3. Provide the Minister of MR with a specific timeframe with which to respond to the referral from the Minister of EA, failing which the Minister of EA may direct the EMIs to undertake, support or assist in the compliance and/or enforcement activities required.

DEA is of the view that option a) is preferable at this stage, in order to provide for a transitional period for the One Environmental Systems procedures become effective prior to undertaking any legislative amendments. |
| **24** | **14** | **Section 31E of NEMA** | **Centre for Environmental Rights** | The proposed insertion of subsection (3) is supported. We are of the opinion that a code of conduct for all EMIs and environmental mineral and petroleum inspectors is necessary to raise the standards of compliance monitoring and enforcement of environmental legislation, especially by EMRIs. We therefore submit that the proposed code of conduct must be a legislative imperative that must be performed within a given timeframe. | The Minister **[may]** must within 1 year of the commencement of the National Environmental Management Laws Amendment Act, 2018 (Act No. ### of 2018) prescribe a Code of Conduct applicable to all designated environmental management inspectors and environmental mineral and petroleum inspectors**[.]**, which code of conduct must include at least the following items: (a) Responsiveness: giving feedback, within reasonable time, on progress on a particular investigation to complainants when such feedback is requested; and (b) Transparency: reporting of all complaints, directives/ compliance notices issued and the details of those directives/notices | **Not supported:**It is not considered necessary to stipulate the principles that must be included in the proposed Code of Conduct – responsiveness and transparency are only two principles that would need to be included.There is already a baseline EMI Code of Conduct that has been agreed to on a MINTECH WGIV level, however, the amendment requires an updated EMI/EMPI Code of Conduct to be prescribed the Minister in order to be legally binding on all EMI Institutions. |
| **25** | **14** | **Section 31E of NEMA** | **Commission for Gender Equality** | Amend the wording of S31E (3): The Minister may prescribe a code of conduct , including a training programme which is necessary and appropriate for designated EMIs and EMPIs | Amend the wording of S31E (3): The Minister may prescribe a code of conduct , including a training programme which is necessary and appropriate for designated EMIs and EMPIs | **Not supported:**This wording would be a duplication of S31E(1) and (2) which already provides that the Minister may prescribe qualification criteria and training to be completed by EMIs, after consultation with the Minister of Safety and Security.  |
| **26** | **16** | **Section 31E of NEMA** | **Chamber of Mines** | Section 31E would empower the Minister of Environmental Affairs to prescribe standards and a code of conduct also for environmental mineral and petroleum inspectors. The Chamber submits that given the role of the Minister of Mineral Resources in terms of s24C(2A), these functions should be allocated to the Minister of Mineral Resources. | Empower the Minister of MR rather than the Minister of EA to prescribe qualification criteria and training; and code of conduct for EMPIs | **Not supported:**The rationale behind empowering the Minister of EA to prescribe qualification criteria and training; and code of conduct for EMPIs is to give effect to the One Environmental System and to align with the existing standards required of Environmental Management Inspectors. There has been significant collaboration between DEA and DMR is relation to ensuring that both training programmes are aligned and of the same standards – this is important to ensure that all compliance and enforcement officials appointed in terms of NEMA (DEA, DMR, DWS local authorities, provinces) receive the same standard of training so as to achieve national consistency, irrespective of their different employing institution  |
| **27** | **16** | **Section 31G of NEMA** | **Chamber of Mines** | Section 31G (1)(b) currently empowers an investigation on “reasonable suspicion”, which words are intended to be deleted.In the explanatory memorandum reference is made to the practical challenge whereby an investigation can turn a mere suspicion into a reasonable suspicion. That is however contrary to the right to privacy in terms of s14 of the Constitution whereby everyone has the right to privacy which includes the right not to have their person, home or property searched or their possessions seized. That is indeed the reason why in the Criminal Procedure Act, 1977, searches can take place only on the authority of a warrant issued by a magistrate. | The reference to a reasonable suspicion needs to be retained. It is therefore submitted that clause 16(b) should be deleted. | **Supported:**Chapter 7 of NEMA provides for the compliance and enforcement functions and powers of EMIs. As it currently stands, Chapter 7 provides for routine inspections (aimed at ascertaining compliance with permits/authorisations) and criminal investigations based on a reasonable suspicion. There is currently no power for an EMI to respond to undertake a ‘reactive inspection’ or ‘preliminary enquiry’ to confirm, for example, an anonymous tip-off of a contravention of a NEMA and/or the SEMAs, without sufficient accompanying information to justify a reasonable suspicion of an offence.In such circumstances, the EMI needs to be empowered to follow up on this anonymous tip-off in order to confirm the information provided.In order to avoid confusion, it is proposed that the requirement of a reasonable suspicion be retained for an investigation under S31G(1)(b), however, a new sub-section be inserted after (a) stating the:An EMI within his or her mandate in terms of section 31D*… “may enter and inspect any building, land or premises, vehicle, vessel, aircraft, pack-animal, container, bag box or item for the purposes of ascertaining compliance with the legislation for which that inspector has been designated in terms of section 31D; or a term or condition of a permit, authorisation or other instrument issued in terms of such legislation.”*If a reasonable suspicion is triggered through this ‘reactive inspection’ or ‘preliminary enquiry’, then all the safeguards provided by the CPA would become applicable, for example, warning the suspect of their right to remain silent and to apply for a search warrant. |
| **28** | **17(a)** | **Section 31H of NEMA** | **Chamber of Mines** | The proposed amendment to section 31H (1)(a) of NEMA seeks to remove the requirement for a reasonable suspicion from the power of an EMI to question a person about an act or omission that may constitute an offence, breach of a law, breach or a permit or authorisation.In the explanatory memorandum reference is made to the practical challenge whereby an investigation can turn a mere suspicion into a reasonable suspicion. That is however contrary to the right to privacy in terms of s14 of the Constitution whereby everyone has the right to privacy which includes the right not to have their person, home or property searched or their possessions seized. That is indeed the reason why in the Criminal Procedure Act, 1977, searches can take place only on the authority of a warrant issued by a magistrate. | The reference to a reasonable suspicion needs to be retained in section 31H(1)(a). | **Not supported:**See response above, the omission of the requirement of a reasonable suspicion is to allow EMIs to ask questions during a ‘reactive inspection’ or ‘preliminary enquiry’. At this stage, the EMI only has a mere suspicion that a contravention may have occurred, but requires powers to ask questions in order to further the query; and ascertain whether there are facts that would sustain a reasonable suspicion. As stated above, at this early stage of enquiry, the EMIs cannot be said to have commenced with a criminal investigation; due to the fact that their reasonable suspicion has not been triggered.If a reasonable suspicion is triggered through this ‘reactive inspection’ or ‘preliminary enquiry’, then all the safeguards provided by the CPA would become applicable, for example, warning the suspect of their right to remain silent and to apply for a search warrant. |
| **29** | **17 (a)(i)****17(b)(b)** | **Section 31H of NEMA** | **Commission for Gender Equality** | “…question a person about any act or omission, including a request to produce a document, certificate or authorisation”“upon reasonable suspicion, issue a written notice to a person who refuses to answer questions or produce any document, certificate or proof of any authorisation where such questions or request that was required in terms of that paragraph.” | “…question a person about any act or omission, including a request to produce a document, certificate or authorisation”“upon reasonable suspicion, issue a written notice to a person who refuses to answer questions or produce any document, certificate or proof of any authorisation where such questions or request that was required in terms of that paragraph.” | **Not supported:**Both of these proposed amendments are unnecessary, as they would, in effect, be a duplication of an existing EMI power under S31P that states that “”*any person to whom a permit, licence, permission, certificate, authorisation or any other document has been issued in terms of this Act or a specific environmental management**Act, must produce that document at the request of an environmental management inspector.”* |
| **30** | **19** | **Section 31J of NEMA** | **Cox Attorneys** | Mr Cox has expressed concerns on the constitutionality of sections 31K and 31J of NEMA. In particular, Mr Cox raises the Constitutional Court judgement of The Minister of Police and Others v Kujana [2016] ZACC 21, where the court found sections 11(1)(a) and (g) of the Drugs and Drugs Trafficking Act 140 of 1992 to be unconstitutional, *for, inter alia,* failing to meet the requirements of a reasonable and justifiable limitation as provided for by section 36 of the Constitution. | An EMI should be required to obtain a search warrant prior to the exercising the powers in S31J to stop, enter and search vehicles, vessels and aircraft; and the seizure of items concerned in the commission of an offence. | **Not supported:**Section 31J of NEMA states that an EMI, *inter alia:**“…within his or her mandate in terms of section 31D, may, without a warrant, enter and search any vehicle, vessel or aircraft, or search any pack-animal or any other mechanism of transport, on reasonable suspicion that that vehicle, vessel, aircraft, pack animal or other mechanism of transport…” and;**“… without a warrant, seize a vehicle, vessel, aircraft, pack-animal or any other mechanism of transport or anything contained in or on any vehicle, vessel, aircraft, pack-animal or other mechanism of transport.” and;**“An environmental management inspector may apply to the National or Provincial Commissioner of Police for written authorisation in terms of section 13( 8) of the South African Police Service Act, 1995 (Act No. 68 of 1995), to establish a roadblock or a checkpoint.”*The trigger for these search and seizure powers replicates the exact wording of section 20 of the CPA in that the EMI must have reasonable suspicion that that vehicle, vessel, aircraft, pack animal or other mechanism of transport:*(a) is being or has been used, or contains or conveys anything which is being or has been used, to commit -**(i) an offence in terms of the law for which that inspector has been designated in terms of section 31D; or**(ii) a breach of such law or a term or condition of a permit, authorisation or other instrument issued in terms of such law…;”* In contrast to section 31K, which deals with the execution of regulatory inspections for the purposes of ascertaining compliance with environmental legislation, section 31J seeks to empower EMIs to stop, enter and search any vehicle, vessel or aircraft, or search any pack-animal or any other mechanism of transport, on reasonable suspicion that they may contain evidence of a criminal offence or other breach of a law within the EMIs mandate. A typical example of where EMIs would be required to exercise this power is in relation to section 101 of National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004) that makes provision for the following criminal offences: possession, exercising physical control over, conveying, moving or otherwise translocating any specimen of a listed threatened or protected species, without the requisite permit. An EMI who develops a reasonable suspicion, through visual observation or other means, that a vehicle, vessel or aircraft or pack-animal may contain a listed threatened or protected species (for example, cycads) requires a legislative provision to empower him or her to stop, enter and search. In these set of circumstances, the EMI is required to act immediately and urgently in order to ensure that vital evidence is not lost or destroyed.Due to the fact that the EMIs is dealing with a mobile means of transportation (vehicle, vessel or aircraft or pack-animal) and given the current scourge of illegal activities related to the country’s wildlife species, for example, the illegal possession and transport of rhinoceros horn and other wildlife specimens/derivatives, it is suggested that the delay in applying for a search warrant would, given the abovementioned circumstances, in every instance, defeat the object of the entry and search. In this respect, the context in which EMIs are required to execute their section 31J powers is significantly different from that of the Kujana case, where the judge stated that:*“The fundamental problem in section 11(1)(a) and (g) is that it allows police officials to escape the usual rigours of obtaining a warrant in all cases, including those cases where urgent action is not required and that the delay occasioned in obtaining a warrant will not result in the items or evidence sought being lost or destroyed. Surely police officials can prevent and prosecute offences under the Drugs Act in a less restrictive fashion than what is contemplated in this section.”(Emphasis added)*It is proposed that without the inclusion of section 31J, EMIs would be left without a legislative mechanism to act swiftly and on the spur of the moment, (i.e. stop, enter, search and seize without a warrant) in responding to environmental contraband being possessed or transported in or on any vehicle, vessel, aircraft, pack-animal. The delay that would be caused by requiring them to obtain a search warrant would allow perpetrators to leave the scene of engagement, and effectively extinguish their ability to execute their constitutional mandate to protect the country’s natural resources and allow potential offenders to continue with their illegal activities unabated. |
| **31** | **20** | **Section 31K of NEMA** | **Cox Attorneys** | 31K of NEMA empowers Environmental Management Inspectors (EMIs) to execute what you deem to be “warrantless searches” that amount to an unjustified impingement of the rights of citizens to privacy and human dignity. | An EMI should be required to obtain a search warrant prior to the exercising the powers in S31K in relation to the conducting of routine inspections | **Not supported:**Section 31K confers powers on inspectors to undertake routine inspections for purposes of ascertaining compliance with environmental laws. They may, *“without a warrant enter and inspect any building, land or premises or search … any vehicle, vessel, aircraft, pack-animals, container, bag, box or item”* as long as it is done for the purpose of ascertaining compliance with the environmental laws. This section provides for the proper inspection and regulation of facilities or premises on which activities are conducted that impact or have the potential to impact negatively on the environment or the health and well-being of the community. The critical role of these “regulatory inspections” was recognised in the case of *Mistry Interim Medical and Dental Council of South Africa1998 (7) BCLR 880 (CC)* (“Mistry”). Although, in this matter, certain provisions of the Medicines and Related Substances Control Act 101 of 1965 were ultimately declared as unconstitutional, the court confirmed that people who are involved in any regulated enterprise, have a weakened expectation of privacy due to the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of compliance regulation. That said, however, the following safeguards have been built into section 31K in due recognition of a facility/ enterprises right to privacy:4.1 Purpose of section 31K: Ascertaining Compliance As stated above, the purpose of section 31K is to empower EMIs to undertake regulatory inspections for the purposes of ascertaining compliance with legislation that they are mandated to enforce, or any term or condition of a permit, authorisation or instrument issued in terms of such legislation. This objective, it is submitted, is very different from that provided for in sections 11(1)(a) and (g) of the Drugs and Drugs Trafficking Act 140 of 1992, being the contested provisions in the Kujana case. These provisions allow for police officials to enter, search and seize on the basis of a reasonable suspicion of an offence committed or about to be committed; and clearly indicate a power aimed at the gathering of evidence as part of a criminal investigation for the purposes of prosecution in a court of law.In order to reinforce the distinction between regulatory inspections, as provided for in section 31K, and criminal investigation types of powers, the draft National Environmental Laws Amendment Bill published in October 2015 (NEMLA, 2015) proposed that the word “search” is deleted from section 31K, confining the powers of EMIs in terms of section 31K(1) to enter and inspect.4.2 Section 31K (3) Compliance Warrant: Section 31K(3) requires an EMI to obtain a warrant from a magistrate if they are required to inspect a residential premise unless the person in control of the residential premises consents to the entry and inspection; or there are reasonable grounds to believe that a warrant would, on application be issued, but that the delay in applying for such warrant would defeat the object of the entry or inspection.It is critical to distinguish the S31K NEMA warrant from the standard criminal investigation type of warrant provided for in sections 20 and 21 of the Criminal Procedure Act 1977 (Act 51 of 1977) (CPA) in that the former requires an EMI to set out *“under oath or affirmation that it is necessary to enter and inspect the specified residential premises for the purposes of ascertaining compliance…” (emphasis added).* This requirement therefore prevents an EMI from infringing on the “inner sanctum” of a home without a judicially considered “compliance” warrant issued by a magistrate. Once again, the scenario contemplated in section 31K is clearly distinguishable from the Kujana case where the SAPS received information from an informant that illegal drugs were being kept at two premises in Kenilworth and Wynberg, which provided the basis for their further criminal investigation activities.4.3 Time, Place and Scope of the S31K Inspections: The judge in *Magajane v Chairperson, North West Gambling Board 2006 (10) BCLR 1133 (CC) (Magajane)* emphasized the importance of the search warrant in governing the time, place and scope of the search in limiting the intrusion on the right to privacy; and guiding the State in its conduct. Although stated in the context of the collection of evidence from unlicensed gambling premises as part of a criminal investigation; and not a regulatory inspection as provided for in section 31K, it is suggested that these same safeguards are built into the NEMA, in that it requires that the inspection be conducted at a *“reasonable time” (time),* on any “*building, land or premises or search, including but not limited to, any vehicle, vessel, aircraft, pack-animals, container, bag, box, or item”(place)* but only for the purposes of ascertaining compliance with *”the legislation for which that inspector has been designated in terms of section 31D; or a term or condition of a permit, authorisation or other instrument issued in terms of such legislation.”(scope).* |
| **32** | **22** | **Section 31M of NEMA** | **Chamber of Mines** | The Minister of Mineral Resources is not an appeal authority in terms of s43 (save in respect of a directive in terms of s28(4)). Since an appeal in terms of s43 would lie against a compliance notice in terms of s31L, it is not clear how s31M regarding objections, and s43 regarding appeals, interrelate. The Chamber disagrees with an objection to be lodged with a Municipal Council since the matters which are dealt with in s31M do not fall within the functional areas of competence of local authorities in Part B of Schedule 4 or in Part B of Schedule 5 to the Constitution and may therefore be unconstitutional**.**  | Clarify the inter-relationship between an objection to a CN ito S31M; and the appeals itoS43 of NEMA.Omit the municipal council as an authority against whom an objection to a compliance notice may be issued. | **Not supported:**In terms of the current version of NEMA, in the event that the power to consider an objection to a compliance notice is delegated from the Minister/MEC to the Director-General/HOD, then a person who feels aggrieved by the DG’s/HOD’s decision could still appeal to the Minister ito section 43.If the power is has not been delegated by the Minister or MEC, then an appeal against the objection decision ito s43 is not possibleAn example of an EMI function that is executed by local authorities is the implementation of the Air Emission Licensing system in terms of NEM:AQA, in terms of permitting, compliance and enforcement. This is an original duty allocated to local authorities in terms of Parts B of Schedules 4 and 5 of the Constitution; as “air pollution” meaning that local government has exclusive administrative functions in relation to this area. Local authority EMIs will utilise the compliance notice as a necessary enforcement tool in relation to fulfilling their duties in terms of NEM:AQA. |
| **33** | **28** | **Section 42B of NEMA** | **Chamber of Mines** | Not agree with empowering the Minister of Mineral Resources to appoint as an EMPI, a staff member from any organ of state. Therefore, delegation of a Ministerial power should not be permitted to an organ of state.The definition of ‘organ of state’ is very wide and may include institutions that are not regulatory authorities e.g. Lebowa Mineral trust, Iscor, Petro SA and the African Exploration Mining and Finance Corporation Limited (EMFCL). The EMFCL cannot be both a regulator and the regulated. | Remove an organ of state as an authority to whom the Minister of MR could delegate a power in terms of NEMA and the SEMAs | **Partially Supported:**In principle, the designation of EMIs and EMPIs should only be executed by the Ministers/MEC in relation to organs of state that play a role in the execution of a regulatory function in terms of NEMA and the SEMAs. This amendment was requested specifically by the DMR, who requested that the Petroleum Agency of South Africa (PASA) be included in those organs of state that would validly require EMPIs to undertake compliance and enforcement in relation to petroleum resources. It is suggested that S31B,BA,BB and C be amended to refer to any relevant organ of state to cater for the comment made . This would require the designating authorities to apply their minds in relation to which organs of state should be included. |
| In addition to the Minister also be empowered to amend, withdraw or substitute the decision taken by the delegate or sub-delegate; |  | **Supported:**The power to amend, withdraw or substitute the decision taken by the delegate or sub-delegate; subject to any rights that may have accrued is given to Minister of EA in terms of S42(2B), the MEC ito S42A(3) – for the sake of consistency, there is no reason why it should not be given to the Minister of MR |
| **34** | **28** | **Section 42B of NEMA** | **Agri-SA** | The provisions included in the Bill entrench the powers of Minister of Mineral Resources to exercise functions in terms of NEMA. Clause 28 (the proposed amendment of 42B of NEMA) allows for certain delegations of powers in terms of NEMA by the Minister of Mineral Resources. This situation is untoward and highly biased in favour of the mining sector. It should also be noted that this provision may arguably be unconstitutional because it assigns a competence which resides with provincial and national government to a Department which operates solely in the national sphere of government (i.e. the Department of Mineral Resources). | Omit the power of the Minister of MR to delegate his/her power to another functionary. | **Not supported:**The management (including compliance and enforcement) of mineral resources is a national function under the administration of DMR. In terms of the One Environmental System, the authorisations function in respect of EA and Waste listed activities triggered by a mining or prospecting activity is now with the DMR, utilising the provisions and procedures of NEMA.This delegation power is a consequential amendment related to the power of the Minister of MR to designate EMPIs. In principle, s/he should be in a position to delegate this power to an official in DMR. |
| **35** | **29** | **Section 42C/D of NEMA** | **Chamber of Mines** | Not agree with empowering the Minister of WS, and Municipal Manager to appoint as an EMI, a staff member from any organ of state. Therefore, delegation of a Ministerial/municipal manger’s power should not be permitted to an organ of state.The definition of ‘organ of state’ is very wide and may include institutions that are not regulatory authorities e.g. Lebowa Mineral trust, Iscor, Petro SA and the African Exploration Mining and Finance Corporation Limited (EMFCL). The EMFCL cannot be both a regulator and the regulated. | Remove an organ of state as an authority to whom the Minister of WS and Municipal Manager could delegate a power in terms of NEMA and the SEMAs | **Supported:**This recommendation reflects the current status in the BillSection 42C and D (Delegation by the Minister of DWS/Municipal Manager) does not allow for the delegation of powers to other organs of States (as opposed to the power provided to the Ministers of EA and MR) – therefore, this comment reflects the current status quo in the proposed amendment.This is due to the fact that it is not envisaged that the Minister of WS would need to delegate his/her power to designate EMIs to anyone else other than an official employed in the DWS.Likewise, it is not envisaged that the municipal manager would need to delegate the power to issue a section 28 directive to anyone else other than an official in the municipality. |
| **36** | **30** | **Section 43 of NEMA** | **Centre for Environmental Rights** | We agree that it is inappropriate for directives and compliance notices issued in terms of NEMA to be suspended pending the outcome of appeals against those directives or compliance notices. Directives and compliance notices must often be immediately effected for them to be effective, especially when the activities that are the subject of directives or compliance notices can cause significant and irreversible harm to the environment. | No amendment proposed | **Supported** |
| **38** | **30** | **Section 43 of NEMA** | **Business Unity South Africa** | Inclusion of the phrase ‘other administrative enforcement notice issued in terms of this Act’ is poor drafting and undermines the rule of law principle. The rule of law requires that administrative action by state officials be based on clear and unambiguous powers contained in a law of general application. In NEMA, these take the form of directives, any ‘other administrative enforcement notices’ will not have the requisite legal backing and will be ultra vires. It is therefore problematic to include a ‘catch-all phrase’ in the enforcement mechanism as it is an attempt to provide legal recognition to notices that do not have the requisite legal backing in the first place. | Instead of referring to ‘other administrative enforcement notices issued in terms of this Act’, rather list the specific notices in NEMA and/or the SEMAs that should be exempted from automatic suspension on submission of an appeal | **Partially supported:**The Department does not agree that the proposed amendment undermines the rule of law. In addition to directives issued in terms of NEMA i.e. S28, there are other various administrative enforcement mechanisms provided in NEMA, NEM: Biodiversity Act, NEM: Integrated Coastal Management Act. These other notices have just as much legal weight/backing as a section 28 directive.For the sake of fairness, however, it should only be those directives and other administrative enforcement mechanisms that are aimed at addressing significant harm to the environment, that should not be automatically suspended pending the outcome of the appeal; as the instructions contained in these types of notices require immediate compliance in order to protect the environment.It is therefore proposed that the section be amended as follows… *except for a directive, or other administrative enforcement notice issued in**terms of this Act or any other specific environmental management Act* *aimed at addressing significant harm to the environment.* |

**3. ONE ENVIRONMENTAL SYSTEM RELATED PROVISIONS**

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| --- | --- | --- | --- | --- | --- | --- |
| **No.** | **Clause/section** | **Act comments related to** | **FROM** | **COMMENT** | **Recommendation** | **RESPONSE** |
| **1.** | **4** | **NEMA** | **Agri SA** | Agri SA is not in support of the One Environmental System, and submit that One Environmental System creates an untoward and unfairly biased environmental governance dispensation for the mining sector alone. In this regard, Agri SA argue that section 50A of NEMA is constitutionally flawed with respect to the concurrence between the Ministers of Environmental Affairs, Water and Sanitation and Mineral Resources.  | The provisions in the current Bill relating to the current dispensation regarding mining should be omitted from the Bill. Agri SA further recommend that the Department should embark on a total revision of the NEMA and NEMWA and bring the environmental authorization regarding mining into line with the environmental authorization dispensation applicable to all other sectors of the society.  | Exploration, prospecting, mining and production activities (mining activities) were previously excluded from the scope of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA). The environmental management provisions in relation to mining related activities were contained in the Mineral and Petroleum Development Resources Act, 2002 (Act No. 28 of 2002) (MPRDA). In addition, the mining activities require approval in terms of the MPRDA, a water use licence in terms of the National Water Act, 1998 (Act No. 36 of 1998), environmental authorization under NEMA, and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008).The above-mentioned laws each have their own process and information requirements and there was lack of integration of the different processes. As a result, there were high costs for applicants due to duplication of activities and studies. The Ministers, in 2008 and 2012, agreed that it is not desirable that there were different environmental management systems for mining activities. It was accordingly agreed that there should be one environmental system, and that this system should be prescribed in NEMA by the environmental authority. The agreement implied that environmental issues resulting from mining, prospecting, production and related activities will in future be regulated in terms of the NEMA whilst Minister of Mineral Resources will be the competent authority in terms of NEMA. At the core of the agreements in 2008 and 2012 is the undertaking that there should minimal disruptions to the regulated in the transition from the MPRDA regime to the NEMA regime. |
| **2.** | **4** | **NEMA** | **AfriForum** | 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. |  | Comment is noted. |
| **3.** | **4(e)** | **NEMA** | **Centre for Environmental Rights** | We support the insertion of subsections (11), (12) and (13) as they will serve to align application processes in NEMA, the NWA and other SEMAs. It is not always clear from applications and environmental impact assessment reports what other applications an applicant has submitted (or will submit) for the same development or a related activity. We submit that it is essential for the effective participation of interested and affected parties for them to be aware of all the processes being followed for a particular development or related activity. | Proposed insertion of subsections (11), (12) and (13) is supported, with the addition of the following phrase at the end of subsection (11):“, indicating in each application, all other licences, authorisations and permits applied for, or which will be applied for the intended development or related activity.”  | The proposal is accepted.  |
| **4.** | **4(e)** | **NEMA** | **Chamber of Mines** | Proposed s24C(12) in the context of environmental authorisations required for mineral or petroleum activities, which contemplates simultaneous application for licences or permits should uniformly refer to environmental authorisations. While the wording in s24C(12) refers to an environmental authorisation under the NEMA; and permits and licences in respect of SEMAs, the definition of “*environmental authorisation*” in section 1 of the NEMA includes *“…a similar authorisation contemplated in a specific environmental management Act.”* | Clarity is sought on the use of environmental authorisation as well as licences and permits with reference to the definition of environmental authorisation under NEMA.  | If the terminology “environmental authorisation” as defined would be used in the proposed text, there is a risk that the intention of the section may be misinterpreted. For the sake of clarity the terminology used to describe the permits, authorisations and licences is used as in the NEMA and SEMAs. The intention is that all the required permits, authorisations and licences should be applied for simultaneously. |
| **5.** | **75-76** | **NEMAA** | **Agri SA** | Agri SA is of the view that an environmental management plan or programme approved in respect of any mining activity or activity directly related to mining does not equate to an environmental authorisation in terms of NEMA. |  | The Department agrees in principle that an EMPR is not equal to an EA. However, this was the only type of authorisation”, with environmental conditions, that was previously issued under the MPRDA.The current provision in NEMLA is aligned with the section 38B in the 2008 MPRDA Amendment Act (not in effect) and the amendment to section 38B in the MPRDA Bill currently in Parliament.    The intention was not to legalise ancillary activities for which no EA was obtained prior to 8 December 2014, hence the Department provided the clarity in the NEMLA Bill.  Due to the fact that the transitional provisions in respect of the implementation of the One Environmental System in terms of the primary legislation were always inadequate, it lead to many different interpretations.  To provide clarity the Department added the transitional provisions. The Department also provided clarity in respect of the transition in the EIA Regulations, which may perhaps be clearer worded than in the NEMLA Bill.  The transitional provisions in Regulations 54 and  54A reads as follows:“54(1) An application submitted in terms of the previous MPRDA regulations and which is pending when these Regulations take effect must despite the repeal of those regulations be dispensed with in terms of those previous MPRDA regulations as if those previous MPRDA regulations were not repealed.(2) An application submitted after the commencement of these Regulations for an amendment of an Environmental Management Programme or Environmental Management Plan, issued in terms of the Mineral and Petroleum Resources Development Act, 2002, must be dealt with in terms of Part 1 or Part 2 of Chapter of these Regulations. (this process refers to the amendment of an EA process – depending whether minor or substantive).“(3) Application” for the purpose of sub-regulation (1) means an application for a permit, right, approval of an Environmental Management Programme or Environmental Management Plan or amendment of such permit, right or Environmental Management Programme or Environmental Management Plan.”“54A(1) Where, prior to 8 December 2014-(a) environmental authorisation was required for activities directly related to-(i) prospecting or exploration of a mineral or petroleum resource; or(ii) extraction and primary processing of a mineral or petroleum resource; and such environmental authorisation has been obtained; and(b) a right, permit or exemption was required in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) for-(i) prospecting or exploration of a mineral or petroleum resource; or(ii) extraction and primary processing of a mineral or petroleum resource;and such right, permit or exemption has been obtained, and activities authorised in such environmental authorisation, right, permit or exemption commenced after 8 December 2014, such environmental authorisation, right, permit or exemption is regarded as fulfilling the requirements of the Act: Provided that where an application for an environmental authorisation was refused or not obtained in terms of the Act for activities directly related to prospecting, exploration or extraction of a mineral or petroleum resource, including primary processing, this sub-regulation does not apply.” |
| **6.** | **75-78** | **NEMAA & NEMWA** | **Chamber of Mines** | These transitional arrangements should be transformed so as to constitute new sections under NEMA and NEMWA respectively. This in order to ensure readily accessibility of these transitional arrangements to members of the public. | It is recommended that the Bill provides for repeal of section 12 of NEMAA, and insert into NEMA and NEMWA a consolidated version of the transitional provisions as it appear in clauses 75 to 78, since this approach will make for clarity, certainty, and accessibility for all the applicable transitional provisions.  | The Department supports in principle that the transitional provisions can be comprehensively covered in the main NEMA and Waste Acts, should the State Law Adviser agree to such an approach, but one should consider that if the transitional arrangements are amended to cater for the 2008 NEMAA transitional arrangements, such an approach may create confusion to the regulated community. The National Environmental Management Laws Amendment Act, 2014 (Act No. 25 of 2014) dealt with the major amendments to sections 12, 13 and 14 of the 2008 NEMAA.  |
| **7.** | **75** | **NEMAA** | **AfriForum** | The amendments are noted and supported. |  | Comment is noted. |
| **8.** | **75(a)** | **NEMAA** | **Western Cape Provincial Department of Environmental Affairs and Development Planning** | We do not support the principle that an environmental management plan or programme can be equated to an environmental authorisation. An EMPr is not an EA and the two have different roles and functions. There is a marked difference between an EA issued in terms of the NEMA and an EMPr issued in terms of the MPRDA.The requirements for the assessment of the environmental impacts of a listed activity in terms of the NEMA are far more stringent than the requirements which were provided for in the MPRDA. An EA evaluates the significance of impacts and identifies mitigation measures, whereas an EMPr is an implementation tool for such mitigation measures. | Whilst we do not support the principle of converting an EMPr into an EA, we will support the proposed amendment, only if the crucial qualification mentioned in section 12(4B), is retained. | Please refer to the response in paragraph 4 above. |
| **9.** | **75(a)** | **NEMAA** | **Chamber of Mines** |  | The last line should be clarified to read “*1998, and shall be deemed to be an environmental authorisation issued in terms of the National Environmental Management Act, 1998.”* | The amendment may have unintended consequences.  |
| **10.** | **75(a) and (b)** | **NEMAA** | **Centre for Environmental Rights** | We object to the amendment of section 12(4) and the insertion of subsection (4A). The proposed amendments will result in entrenching old order EMPs and EMPRs that do not comply with the provisions of NEMA and inappropriately blurring the distinction between environmental impact assessment and environmental management.It is inappropriate to equate EMPRs approved under the MPRDA with environmental impact assessments conducted under NEMA. The EMPR regime created in terms of the MPRDA under the “old” system was in itself not adequate to ensure that the impact of mining on the environment is properly mitigated. The IEM system, for instance, requires applicants to consider not only the “environmental, social and cultural” impacts of a specific mine, as required under MPRDA, but also the “biological, physical and geographical” impacts of mining. Furthermore, the IEM system requires a decision maker to consider a range of information, and also enjoins a decision maker to take into account provisions of specific environmental management Acts, guidelines, policies and environmental management instruments, such as biodiversity management plans, environmental management frameworks, etc. these requirements were not explicitly required under the MPRDA, or where required, where not considered. Moreover, an EMPR is by nature a mitigation tool. It prescribes the manner in which the environmental impacts of and pollution caused by extractive activities must be mitigated. By contrast, EIAs are essentially assessment and planning tools.  We therefore submit that all EMPs and EMPRs issued under the MPRDA should be upgraded within 18 months of the coming into force of NEMLAB4 to ensure that they comply with NEMA. | A proposal to insert the following wording in section 12(4) and subsection (4A):“[and an environmental authorisation issued], provided that within 18 months of the coming into force of this Act, the holder of the environmental management plan or environmental management programme has submitted an application for an environmental authorisation in which such holder has upgraded its environmental management plan or environmental management programme to address any deficiencies in such environmental management plan or environmental management programme to meet the requirements in Chapter 5 of the National Environmental Management Act, 1998.” | Not supported. This process will create a costly administrative burden for both the mining companies and DMR. |
| **11.** | **75(b)** | **NEMAA** | **Chamber of Mines** |  | The wording of section 12(4A) must be clarified to read as follows:*“4A. An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 after 8 December 2014 in terms of an application in terms of that Act shall be deemed to have been approved in terms of the National Environmental Management Act, 1998 and shall be deemed to be an environmental authorisation issued in terms of the National Environmental Management Act, 1998.*” | The amendment may have unintended consequences. |
| **12.** | **75(b)** | **NEMAA** | **Chamber of Mines** | The problem with the 4B is that it does not resolve the problem of mining companies with approved EMPs and EMPRs which may not specify or have specified each and every listed activity directly associated with the mining in the same way as the terminology used in the various listing notices. The wording of 4B does not accord with section 38B(1) of the MPRDA Amendment Act, 2008 which deemed an EMP and EMPR approved in terms of the MPRDA as approved, and an environmental authorisation issued in terms of the NEMA, without qualification as to the types of activities included or excluded in such approval. The proposed 4B also does not take into account the historical fact that environmental regulations in mining operations was exclusively undertaken under Minerals Act and MPRDA as well as uncertainty of the applicability of listed activities under ECA and NEMA to mining operations. | The Chamber submits that section 12(4B) be removed and that approved EMPs and EMPRs be deemed to be environmental authorisations issued in terms of the NEMA. | The 2008 MPRDAA and NEMAA and 2014 NEMLA were not intended to legalise any activity that was not assessed and approved under any existing EMPR. Any activity undertaken illegally remains illegal and subject to the penalties under NEMA.The proposed section 12(4B) is therefore intended to provide that clarity.   |
| **13.** | **75(c)** | **NEMAA** | **Chamber of Mines** |  | In section 12(6), last line, “*has*” should be “*had*”. | The proposal is accepted.  |
| **14.** | **76** | **NEMLA BILL** | **AfriForum** | The amendment are noted and supported. |  | Comment is noted. |
| **15.** | **76(1), (2), (3) & (4)** | **NEMLA BILL** | **Centre for Environmental Rights** | Clauses 76(1) and (2) appear to be a duplication of the proposed section 12(4) and (4A). Similar comments and proposals for section 12(4) and subsection (4A) are also submitted here.Clause 76(3) places an indirect, vague and likely unenforceable obligation on the Minister. | Clause 76(3) - we submit that the onus should be on the holder of the EMPR or EMP to ensure that it is upgraded and brought in line with the requirements of Chapter 5 of NEMA – within a defined and reasonable transitional period. We propose 18 months from the coming into effect of the Bill. | The proposal will place a costly administrative burden on both the mining companies and DMR. |
| **16.** | **76** | **NEMLA BILL** | **Chamber of Mines** | This clause duplicates section 12 of NEMAA, 2008 hence the suggestion for consolidation (and therefore harmonisation) of these provisions. |  | In our view, clause 76 provides for a transitional provisions regarding mining application approved on or before and pending after 8 December 2018 under the NEMA regime. To merge the transitional provisions in section 12 of the 2008 NEMAA and the transitional provisions in this Bill might result in some matters being lost through the cracks.  |
| **17.** | **76(3)** | **NEMLA BILL** | **Chamber of Mines** |  | In clause 76(3), third line, “*is*” should be “*are*”. | The proposal is accepted.  |
| **18.** | **76(3A)** | **NEMLA BILL** | **Chamber of Mines** |  | A new clause 76(3A) should reflect the content of section 12(5)(b) of NEMAA, 2008. | In our view, the 2008 NEMAA dealt with the transition from the MPRDA regime, including the holders of old order rights under the MPRDA, to NEMA regime based on the 2008 Ministers Agreement. The 2014 NEMLAA amended the 2008 NEMAA in order to strengthen the NEMA regime and to give effect to the 2012 Ministers Agreement.  |
| **19.** | **76(4)** | **NEMLA BILL** | **Chamber of Mines** |  | The wording of clause 76(4) should also be put into section 12(4A) of NEMAA, 2008. | The 2008 NEMAA does not contain a section 12(4A), nor does the 2014 NEMLAA inserted a section 12(4A). In this regard, the 2008 NEMAA only contains section 12(4).  |
| **20.** | **76(5)** | **NEMLA BILL** | **Chamber of Mines** |  | In clause 76(5), second line, after “*residue*” remove the word “and” between residue and “*stockpiles”.* | The proposal is accepted. |
| **21.** | **76(6)(a)** | **NEMLA BILL** | **Chamber of Mines** |  | In clause 76(6)(a), third line, after “*mining*” insert*, “exploration*”. | The proposal is accepted.  |
| **22.** | **76(6)(b)** | **NEMLA BILL** | **Chamber of Mines** |  | In clause 76(6)(b), third last line, it is suggested that reference be made to the actual notices, gazettes and dates which pertain to the relevant new regulations. | The proposal is accepted.  |
| **23.** | **77** | **NEMLA BILL** | **Chamber of Mines** | Clarity is sought on the wording of this clause. Taking into consideration that a waste management licence issued under NEMWA is an environmental authorisation in terms of the definition of an environmental authorisation under NEMA. |  | The intention of the transitional arrangements are to ensure that waste management licences relating to residue deposits and residue stockpiles that were issued while the residue deposits and stockpiles were regulated under the NEMWA, remain valid under the provisions of NEMA. For purposes of consistency and clarity we are using the wording of the NEMWA. |
| **24.** | **77** | **NEMLA BILL** | **AfriForum** | The amendment is noted and supported. |  | Comment is noted. |
| **25.** | **78** | **NEMLA BILL** | **AfriForum** | The amendment is noted and supported. |  | Comment is noted. |
| **26.** | **78(1)** | **NEMLA BILL** | **Chamber of Mines** | Clarity is sought on the wording of this clause. Due to the uncertainty as to whether the ostensibly repealed ss38, 39, 41 and 42 of the MPRDA, the associated definitions in s1 of the MPRDA and the associated regulations made in terms of the MPRDA, nevertheless survive their ostensible repeal with effect from 7 June 2013 by virtue of the MPRDA Amendment Act, 2008 until 8 December 2014 when the corresponding provisions in NEMA took effect. | It is suggested that a further transitional provision be inserted in terms of a further clause in the Bill into NEMA to that effect. | Clause 78 provide for transitional provisions regarding the Waste Management Bureau. This Bill intends to change the legal status of the Bureau to a public entity governed by a Board of Directors as the accounting authority. This clause is not intended to deal with the repeal of sections 38, 39, 41 and 42 of the MPRDA. These sections were repealed by the 2008 NEMAA, and that Amendment Act inserted in NEMA the following sections 24N, 24O, 24P, 24Q and 24R. |

**4. BIODIVERSITY AND CONSERVATION AND ENVIRONMENTAL PROGRAMMES RELATED PROVISIONS**

| **No.** | **Clause/section** | **Act comments related to** | **FROM** | **COMMENT** | **Recommendation** | **RESPONSE** |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Clause 35** | **NEMPAA****section 57** | **AfriForum** | 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 is noted and supported | Support of the amendment is noted. |
|  | **Clause 36** | **NEMPAA** **section 89** | **AfriForum** | 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 | The amendment is noted and supported | Support of the amendment is noted. |
|  | **Clause 37** | **NEMBA****section 1** | **AfriForum** | 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. | The amendment is noted and supported | Support of the amendment is noted. |
|  | **Clause 38** | **NEMBA section 2** | **AfriForum** | 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.The section now aligns better with Section 24 of the Constitution. It is 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.** | This amendment is noted and supported.  | Support of the amendment is noted.**Clarification:**Well-being of faunal biological resources refers to wild animals being “comfortable” and “healthy”, but does not intend to regulate the general welfare of wild animals, as this is done through the Animals Protection Act, 1962 (Act No. 71 of 1962). This provision intends to enable the Minister to develop standards/ regulations in terms of NEMBA for the manner in which wild animals are kept in captivity. |
|  | **Clause 39** | **NEMBA** **section 3** | **AfriForum** | 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 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. | This amendment is noted and supported. | Support of the amendment is noted. |
|  | **Clause 40** | **NEMBA****section 13** | **AfriForum** | 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. | This amendment is noted and supported. | Support of the amendment is noted. |
|  | **Clauses 41 and 42** | **NEMBA****sections 73 and 75** | **AfriForum** | Read together, the clauses empower the Minister to develop regulations on the steps to be undertaken to control or eradicate listed invasive species. | This amendment is noted and supported. | Support of the amendment is noted. |
|  | **Clause 43** | **NEMBA****section 97** | **AfriForum** | 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.See comment under clause 38 above | This amendment is noted and supported. | Support of the amendment is noted.**Clarification:**Well-being of faunal biological resources refers to wild animals being “comfortable” and “healthy”, but does not intend to regulate the general welfare of wild animals, as this is done through the Animals Protection Act, 1962 (Act No. 71 of 1962). This provision intends to enable the Minister to develop standards/ regulations in terms of NEMBA for the manner in which wild animals are kept in captivity |
|  | **Clauses 44 and 45** | **NEMBA** **sections 99 and 100** | **AfriForum** | 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. | This amendment is noted and supported. | Support of the amendment is noted. |
| **1.** | **Clauses 37 – 45**  | **NEMBA** | **Agri-SA** | Agri SA is highly concerned with the Department of Environmental Affairs propensity towards over-regulating South Africa’s biological resources. The Bill, as well as other proposed amendments to the National Environmental Management: Biodiversity Act, 10 of 2004 (NEM:BA) concentrates far-reaching, unenforceable and unnecessary decision-making powers in the Department of Environmental Affairs. It is submitted that the proposed amendments to the NEM:BA currently under consideration lose sight of the principle requirement to avoid the consequences of environmentally significantly harmful human actions. Agri SA is of the view that the Department’s propensity to over-regulate (particularly in terms of the NEM:BA) creates a danger of stifling economic activity and growth, which may ultimately result in undermining the sustainable development goals of government.  | It is recommended that the provisions of the Bill in respect of the management of South Africa’s bio-diversity be omitted from the Bill and that the current governance and legislation in respect of this matter be reviewed.  | The recommendations are not supported.These are broad statements on the NEMLA Bill:Comments:“It is submitted that the proposed amendments to the NEM:BA **currently under consideration lose sight of the principle requirement to avoid the consequences of environmentally significantly harmful human actions.** Agri SA is of the view that the Department’s propensity to over-regulate (particularly in terms of the NEM:BA) creates a **danger of stifling economic activity and growth**, which may ultimately result in undermining the sustainable development goals of government”Response:Agri-SA fails to detail exactly how the relevant clauses have the stated effect. On the contrary, the amendments to NEMBA on the AIS provisions has the opposite effect to what the commenter is proposing. The only amendment to NEMBA in respect of AIS is to clarify the use of 2 terms, “control” and “eradicate”. The definitions of ‘control’ and ‘eradicate’ are clarified and separated to make it easier for landowners and industry to implement. At present “control” is defined as: **“control”**, in relation to an alien or invasive species, means-(a) to combat or eradicate an alien or invasive species; or(b) where such eradication is not possible, to prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species;”The term “eradicate” is not defined at all.Control is meant to refer to an incremental removal of an invasive species, to curtail its propagation and spread. Many of these widespread species are impossible to eradicate. What we have to do is systematically manage them, so that their impacts are reduced to as low a level as possible, and certainly to inhibit their spread and growth. It is akin to managing a disease, rather than eradicating it – e.g. cholera, HIV, anthrax, etc.Eradication refers to complete removal of a species in the country. The present provisions in NEMBA do not capture these meanings and create difficulties. For example, section 73 of NEMBA requires a landowner to take steps to **“control and eradicate”** listed invasive species. Section 75 similarly uses the terms together when describing actions to be taken to prevent the spread of invasives. These concepts are conflated and has caused much confusion. You cannot control and eradicate at the same time. The industry has consistently criticised this definition, and the Department agreed that it needs to be corrected. This amendment seeks to do that.Control measures are put in place when permitting economically viable invasive species in certain areas, to *allow* economic activity without compromising biological integrity and the threat posed by invasive species. In these cases, eradication is certainly not expected. Eradication on the other hand is an uncompromising solution for species that pose a high risk. It is not appropriate to eradicate economically viable species. By clearing up the confusion, the amendment is facilitating sustainable economic development rather than undermining it. |
| **2** | **Clause 37** | **NEMBA** | **Business Unity South Africa (BUSA)** | Certain categories of fish and wildlife have recently been listed as ‘invasive species’ in terms of the NEMBA and this amendment now places an obligation to eradicate these species as part of the ‘control measures’ required to be implemented. In aquaculture for example, economically important species such as trout have been declared as invasive.Trout farming is a highly regulated activity and practitioners are subject to strict standards with regards to a number of elements including water quality and measures to prevent possible escape of live specimens or propagating material. In this sense ‘control’ measures are taken to prevent farmed fish from escaping man-made tanks and entering into natural watercourses. The change in definitions however now oblige practitioners to eradicate listed species as a control measure. In other words, they are required by law to destroy their entire stock as a ‘control’ measure. These amendments fundamentally blur the distinctions between rational control measures and the destruction of all listed species, irrespective of their beneficial use and value to humans as well as the circumstances under which they are kept. An eco-centric approach which disregards the social and economic consequences is not in line with the fundamental premise of NEMA which seeks to balance environmental, social and economic considerations. Detailed submissions from the industries affected can be obtained. | No recommendations | The fish species proposed for listing are proposed to be categorised as species requiring a permit. There is no obligation to eradicate. In fact, at the moment in Chapter 5 there is an obligation to “control and eradicate”, which we cannot implement because it is not appropriate to eradicate economically viable species. We are forced to overlook the legal uncertainty and ambiguity of the use of the current terms in the Act when we manage permitting of invasive species and give it its widest and most favourable interpretation. To overcome this difficulty we must separate “control” and “eradicate” so that the term eradicate does not apply to economically viable species. This is helpful to industry and the Department.In addition, the amendment of these definitions do not require practitioners to eradicate species as a control measure. In fact separating control and eradication allows us to be clear about what measures must be applied to specific species. The proposal in both the regulations and the draft lists (referred to in BUSA’s comments is to *permit* the activity and NOT to prohibit or eradicate the species in the relevant areas.Thus, trout will be permitted to be farmed or fished in the demarcated areas, and there will be no obligation to eradicate them (within the conditions of the Permit). This is a false assertion.What needs to be confronted is the fact that brown trout and rainbow trout are invasive. There is no doubt about that. If we do not regulate a known invasive like trout, then there will be legitimate comments about regulating other species. Why would we say that trout need not be regulated, but small-mouth bass must be regulated, when both are invasive? If we were to allow trout to be introduced into a water body without a permit, then how can we refuse people the right to do so with other species, like small-mouth bass? And, as every trout fisher knows, small-mouth bass eat trout. So then the trout fraternity would be powerless to stop people putting bass into so-called “trout waters”. There is no logic to the arguments being put forward here.  |
| **E 3** | **Clause 11/s28** | **NEMBA** | **Commission for Gender Equality**  | Only made recommendations | The CGE recommends an amendment to Clause 42 by way of insertion of a new sub-clause (4) that reads as follows:(4) The education and support of affected local communities to ensure that they participate in the control and eradication of any alien and invasive species as well as the protection of biotic resource or species | Advocacy is an essential component of any intervention. It can be supported, but provided that the clause does not become an impediment to control. There are a number of situations where fundamentalist positions by certain groups of people make effective advocacy very difficult to undertake. This should not deter the necessary actions to control or eradicate the specimens. The concern is also on invasive species, and not alien and invasive species. For alien species, it is prevention from being introduced without a permit (to ensure it is not potentially invasive). Education and awareness is a mandatory function of any Department when implementing their legislation and where appropriate communities and members of the public are included in work programmes to assist with implementation. This does not need to be written into legislation as it is a day to day function which happens within the Department, particularly relating to AIS within its working for water and working for fire programmes.  |
|  | **Clause 44** | **NEMBA** **section 99**  | **Commission for Gender Equality**  | Only made a recommendation | The CGE recommends an amendment to Clause 44(1)(a) by way of insertion of the following words (highlighted in red) to read as follows:‘‘(1) Before exercising a power which, in terms of a provision of thisAct, must be exercised in accordance with this section and section 100,the Minister or MEC for Environmental Affairs must follow anappropriate and meaningful consultative process in the circumstances.’’ | Not supportedSection 100 is aligned with the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) (PAJA), which is an act that derives its mandate from the Constitution of the Republic of South Africa. Section 100 of NEMBA does not prevent the Minister from doing more than the minimum requirements in respect of public participation.  |
|  | **Clause 45** | **NEMBA****section 100** | **Commission for Gender Equality**  | Only made a recommendation | * The CGE recommends an amendment to Clause 45 by way of a deletion at paragraph (4)(d) (deleted text indicated in bold square brackets) to read as follows:

(4) The Minister or MEC for Environmental Affairs must give dueconsideration to all representations or objections received or presented**[before exercising the power]**.’’* The CGE recommends an amendment to Clause 45 by way of the insertion of a new subparagraph (5) to read as follows:

(5) The Minister or MEC for Environmental Affairs must give the relevant community feedback on how the issues raised in objections received or presented made before exercising the power. | * Not supported

The problem that needs to be addressed through the proposed deletion is not clear, as no explanation has been provided for the proposal.Furthermore, the text “before exercising the power” binds the Minister to at what stage the representations or objections must be considered.* Not supported

The proposal relates to a procedural matter rather than a legal matter. Although the proposal is not supported, the Department could agree as a standard procedure that the assessment of all comments should be made available on the Departmental website. |
|  | **No clause****(new proposed amendment)** | **NEMPAA****Section 48(1)(b)** | **Centre for Environ-****mental Rights** | Firstly, it is not clear that the prohibition in subsection (1) includes the prohibition on directional drilling or underground mining beneath the protected areas named in subsections (a)-(c). Given that underground drilling or mining can have big environmental impacts on ecosystems, including surface ecosystems, NEMPAA must clarify that underground drilling or mining beneath protected areas must be prohibited to ensure the ecological integrity of those areas. Secondly, under NEMPAA, anyone may conduct commercial prospecting, mining, exploration or production activities in protected environments if that person obtains the written consent of the Minister of Environmental Affairs and the Minister responsible for mineral resources. The section renders protected environments vulnerable to significant environmental impacts of extractive activities. We therefore propose that subsection (b) is amended so that there is an outright prohibition against all extractive activities in protected environments. If, despite our comment, it is decided that prospecting mining, exploration or production may still take place in protected environments with the written permission of the Minister of Environmental Affairs and the Minister of Mineral Resources, we submit that (a) the mining, prospecting, exploration or production may only be considered in a protected environment in exceptional circumstances; and (b) it should be an explicit requirement for the person requesting written permission in terms of section 48(1)(b) to conduct a public participation process. A decision by the Minster responsible for environmental affairs and the Minister responsible for mineral resources in terms of that section constitutes “administrative action” as envisaged by section 1 of PAJA. It is a decision taken by an organ of state5 when exercising a public power in terms of legislation6 which adversely affects the rights of any person7 and has a direct, external legal effect.8 Furthermore, such a decision does not fall within a class of decisions explicitly excluded from the scope of “administrative action” in items (aa) to (ii) of section 1 of PAJA. Thirdly, in terms of section 48(1), prospecting, mining, exploration and production is prohibited in protected areas. However, as there is no reference to mountain catchment areas, as contemplated in the Mountain Catchment Areas Act, 1970, in that section, those areas are not given the same protection as other protected areas. We submit that there is no reason why mountain catchment areas should not enjoy the same level of protection as other protected areas from extractive activities. We therefore submit that subsection (1)(c) should be amended by including explicit reference to mountain catchment areas.  | **Recommendation A** (1) Despite other legislation, no person may conduct commercial prospecting, **[or]** mining, exploration**[,]** or production or **[related]** activities related to prospecting, mining, exploration or production - (a) in, or beneath, a special nature reserve, national park or nature reserve; (b) in, or beneath, a protected environment **[without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs]**; or (c) in, or beneath, a protected area referred to in section 9(b), (c), **[or]** (d) or (e). **Recommendation B**(1) Despite other legislation, no person may conduct commercial prospecting, **[or]** mining, exploration**[,]** or production or **[related]** activities related to prospecting, mining, exploration or production - (a) in, or beneath, a special nature reserve, national park or nature reserve; (b) in, or beneath, a protected environment without the written permission of the Minister and the **[Cabinet member]** Minister responsible for mineral**[s]** and **[energy affairs]** petroleum resources; or (c) in, or beneath, a protected area referred to in section 9(b), (c), **[or]** (d) or (e). **…** (5) The Minister and the Minister responsible for mineral and petroleum resources may only give written permission contemplated in subsection (1)(b) if the person requesting permission – (a) can show that there is an insufficient amount of the mineral or petroleum resource sought to be prospected or explored for, or mined or produced outside of the relevant protected environment for the Republic to meet its strategic national goals; (b) has followed the prescribed public participation process prescribed in subsections (6) and (7).(6) The person requesting consent from the Minister and the Minister responsible for mineral resources in terms of subsection (1)(b) must give notice to all interested and affected parties by – (a) fixing a notice board at a place conspicuous to and accessible by the public at the boundary, on the fence or along the corridor of the relevant protected environment; (b) giving written notice, in any of the manners provided for in section 47D of the National Environmental Management Act, 1998 (No. 107 of 1998), to— (i) all owners of land constituting the relevant protected environment; (ii) all occupiers of land constituting the relevant protected environment; and (iii) the management authority of the relevant protected environment; (iv) the MEC, if the protected areas is a provincial protected environment; (v) the relevant provincial authority responsible for conservation; (vi) the municipal councillor of the ward in which the protected environment is situated and any organisation of ratepayers that represent the community in the area; (vii) the municipality which has jurisdiction in the area; and (viii) any organ of state having jurisdiction in respect of any aspect of the management of the relevant protected environment; (c) placing an advertisement in— (i) one local newspaper; or (ii) any official *Gazette* that is published specifically for the purpose of providing public notice of the request; (d) placing an advertisement in at least one provincial newspaper or national newspaper, if the protected environment straddles provincial boundaries;(e) placing an advertisement in a national newspaper, if the protected environment is an area of strategic environment, water or soil significance; and() using reasonable alternative methods, as agreed to by the Minister, in those instances where a person is desirous of but unable to participate in the process due to— (i) illiteracy; (ii) disability; or (iii) any other disadvantage. (7) (6) A notice, notice board or advertisement referred to in subsection (5) must— (a) give details of the proposed prospecting, mining, exploration or production activity which is subjected to public participation, including – (i) a summary of the proposed prospecting, mining, exploration or production operation and its likely impact on the relevant protected environment; (ii) that a copy of the environmental management programme for the proposed prospecting, mining, exploration or production operation is accessible to public; (iii) where a copy of the environmental management programme for the proposed prospecting, mining, exploration or production.  | The proposal is noted.A process of substantial amendment of NEMPAA is currently underway. This proposal will be considered as part of the afore-mentioned process. |
|  | **No clause****(new proposed amendment)** | **NEMPAA****Section 48B** | **Centre for Environ-****mental Rights** | We propose the insertion of a section regulating the use of land in the buffer zones of protected areas. The buffer zones around protected areas are not adequately protected. We appreciate that the DEA has already published the Biodiversity Policy and Strategy for South Africa: Strategy on Buffer Zones for National Parks (2012) (Buffer Zones Policy), which is an important step in ensuring better protection for national parks. However, the Buffer Zones Policy does not appear to be binding and it only applies to national parks. We therefore submit that a Buffer Zone Policy developed for all national parks, world heritage sites, special nature reserves and nature reserves in South Africa and that all Buffer Zone Policies are binding.  | The insertion of a section comprehensively dealing with the management of buffer zones around national parks, world heritage sites, special nature reserves and nature reserves. The section should set out – (a) a definition of “buffer zone” (b) that a buffer zone policy must be developed for each national park, marine protected area, world heritage site, special nature reserve and nature reserve; (c) the minimum content for buffer zone policies; (d) that the buffer zone must be managed in accordance with buffer zone policies and that buffer zone policies are binding.  | The proposal is noted.A process of substantial amendment of NEMPAA is currently underway. This proposal will be considered as part of the afore-mentioned process. |
|  | **Clause 38 and Clause 43** | **NEMBA****section 2(a)(ii) and section 97(1)** | **Centre for Environ-****mental Rights** | The terminology is problematic (“faunal biological resource”). Classifying living wild animals as resources entrenches their primary use and value from the get-go and completely disregards the individual nature of the animals. The codification of such unfairly biased terminology in the primary environmental conservation legislation cannot by any means be accepted and will be opposed. The conservation and well-being of the animals must be the primary objectives, rather than their economic exploitation – the latter should be only the third objective (i.e., emphasis / hierarchy of the three (sub-) objectives is incorrect and unacceptable). This incorrect terminology necessitates that if an animal is not economically valuable as a resource, then the well-being of that animal does not matter. Such a situation is not justifiable, as conservation, all-round biodiversity and healthy welfare are independent from and necessarily trump economic use, even in a developing country. Without biodiversity, development is impossible.  | Insert definition of ‘well-being’. Clarity is required regarding how well-being will be measured and whether/how it differs from measurement of animal welfare. Without clear, identifiable and acceptable parameters, this amendment will be incapable of enforcement.  | Not supportedWell-being of faunal biological resources refers to wild animals being “comfortable” and “healthy”, but does not intend to regulate the general welfare of wild animals, as this is done through the Animals Protection Act, 1962 (Act No. 71 of 1962). This provision intends to enable the Minister to develop standards/ regulations in terms of NEMBA for the manner in which wild animals are kept in captivity |
| Amend ‘faunal biological resource’ to include all wild ‘fauna’ (clarify whether the latter includes non-indigenous wild animals – which is recommended).  | Not supportedThe terminology in NEMBA is consistent with the terminology used in the text of the Convention on Biological Diversity (CBD), which is one of the key international agreements that inform domestic legislation in South Africa. The objectives of the CBD are set out in Article 1 of the text of the Convention, and are the following:1. the conservation of biological diversity;
2. the sustainable use of its components; and
3. the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate.

The CBD uses the term “biological resources”, which is defined in Article 2 of the text of the Convention as meaning to include *“genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with**actual or potential use or value for humanity.”*Since NEMBA also deals with non-indigenous species (i.e. alien species), it is not necessary to specify whether the specific objective also applies to non-indigenous wild animals. By referring to faunal biological resources, it does not exclude either indigenous or non-indigenous faunal biological resources. |
| Clarify what is meant by ‘taking into account’ – clarity on factors and process must be provided in this section.  | Not supportedThis level of detail (process and factors to be considered) is not provided in a primary Act. Clause 43 amends section 97 of NEMBA, which provides the Minister the power to make regulations relating to the protection of the well-being of faunal biological resources during the carrying out of a restricted activity – the process and factors can be addressed in regulations. |
|  | **Clause 38 and Clause 43** | **NEMBA****Section 2(a)(ii) and 97(1)** | **EMS Foundation** | The language in 38-s2(a)(ii) and 43 s97 needs to be changed to reflect a more caring position, i.e.one which indicates a duty of care and which will correctly and accurately point to what is the intention of these 2 amendments. The words “biological resources” and “faunal biological resources” do not reflect the intrinsic value or sentience of wild animals and are in contradiction with the need to protect or consider their welfare and protection – the very *raison d'être* of these proposed amendments. Moreover, this kind of utilitarian language does not reflect the values of the South African Constitution or sentiment expressed by the Constitutional Court on this matter.  | Amend ‘well-being’ to ‘welfare’ and ‘protection’. Welfare and protection are normative terms that have common, accepted guidelines in law, while ‘well-being’ is open to too much interpretation, adaptation and exploitation, and will not pass legislative muster.  | Not supportedWell-being of faunal biological resources refers to wild animals being “comfortable” and “healthy”, but does not intend to regulate the general welfare of wild animals, as this is done through the Animals Protection Act, 1962 (Act No. 71 of 1962). This provision intends to enable the Minister to develop standards/ regulations in terms of NEMBA for the manner in which wild animals are kept in captivity. |
| Amend ‘faunal biological resource’ to ‘fauna’, wild animals and wildlife’. | Not supportedThe terminology in NEMBA is consistent with the terminology used in the text of the Convention on Biological Diversity (CBD), which is one of the key international agreements that inform domestic legislation in South Africa. The objectives of the CBD are set out in Article 1 of the text of the Convention, and are the following:1. the conservation of biological diversity;
2. the sustainable use of its components; and
3. the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate.

The CBD uses the term “biological resources”, which is defined in Article 2 of the text of the Convention as meaning to include *“genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with**actual or potential use or value for humanity.”* |
|  | **Clauses 37 – 42 of the NEMLA BILL** | **NEMBA** | **Associated comments from:****Consortium of interested and affected parties and Cox Attorneys Presented/ submitted by:****Mr. Nigel Doward;****Dr Gert Dry; and** **Mr. Ian Cox** | **Nigel Doward (Consortium)**NEMBA is being implemented unlawfully in ways that harm and impede rather than enable justifiable sustainable development in the bio resources sector. That this harmful and unlawful action is being legitimised, after the fact, by incremental changes to NEMBA that move the law away from its constitutional imperatives.That the proposed changes to NEMBA in the 2017 NEMLA Bill is such a change.The Constitution and NEMA are anthropocentric and conservationist: People are part of nature.Justifiable sustainable development – **NEMA Principles People first – “for present and future generations”.**South Africa's environmental authorities adopt a **biocentric and preservationist approach:** **Nature first.**Preserve species inside their “natural distribution ranges”  (NDR) – anti alien “precautionary approach”.People are alien to nature.•Draft white paper prepared in 1997 – never finalised.•Prepared by like-minded “experts”  - Homophily  or Group Think.•Prioritises nature first preservation of native species in the wild. – biotic nativism.•Conflicts with people first NEMA Principles.•Conflict of cultures never resolved – no final policy adopted.•Resultant policy vacuum that compromises implementation. **Seeds of Failure**•Lack of transformation in thinking and values.•DEA adopts a nature first preservationist approach regardless of what the Constitution or the law requires.•Overambitious and impractical.**Some Manifestations of Failure**•SECTION 100: Public Participation•Chapter 4: Threatened and Protected Species•Chapter 5: Alien and Invasive Species**Draft AIS Lists****•**No compliance with section 100 – Public consultation process non-compliant.  •No Social and Economic Impact Assessment.•No concern about the effect on important values chains.•Contempt for the public, human rights and the rule of law.  **2017 NEMBA Bill****•**Explanatory Memorandum misleading.–Misrepresents effect of proposed change to the meaning of control–Does not refer to proposed amendments to section 73 of NEMBA•No compliance with the Social and Economic Impact Assessment System Guidelines.–Ignores adverse effects on sustainable use of biological resources.–No alternatives considered.–No prior engagement or consultation with stakeholders.**PROPOSED AMENDMENTS TO CHAPTER 5 OF NEMBA**•List as invasive because alien species harm the economy, human health or the ecosystem services that contribute to human health and wellbeing. •Must eradicate and/or control (systematic removal or prevention) to avert this harm.•Don’t need to take steps to eradicate or control listed invasive species.•In conflict with the CBD which requires eradication or control.•Irrational, contradictory and unworkable permitting regime. •Does not address reasons for the failure of the present law - SANBI AIS Status Report.•The CBD says that practical steps must be taken to eradicate or contain and control invasive species;•NEMBA, even, if amended, will not cure the **fundamental contradiction** of permitting “harmful species” for sustainable use;•But only invasive species that cause negligible harm to biodiversity can be permitted for beneficial use;•So why list useful species as invasive at all?We find an effective and practical solution by following constitutionally aligned and legally compliant public participation and engagement processes to consider and synthesise a diversity of thinking and interests that will effectively guide policy implementation rather than defend the group thinking of officials.•Good policy making and the regular review of policy makes for effective laws.•The opposite = NEMBA and the proposed Biodiversity Bill.•Good policy underpins human rights enjoys public support and promotes rule of law and justifiable sustainable development.•A lack of policy is destructive of rights and results compromised accountability, unlawful processes, impeded development and diminished public support.**Mr. NIGEL DOWARD****Aquaculture Value Chain**NEMLA impacts on aquaculture in that  DEA is trying to use NEMBA to restrict the growth of aquaculture through regulation either because:• The aquaculture species is alien and which means that according to DEA it must be regulated as “invasive”.•The aquaculture species is indigenous and thus must regulated as  if it is wild and in ways which confine that species to what DEA believe to be its historic natural distribution range. Both initiatives are unrealistic because:•In the case of  “invasive species” DEA’s approach ignores current realities and the benefits that flow from utilising these species•In the case of indigenous species DEA ‘s backward looking NDR’s are incompatible with the present day situation and  the fact of a rapidly changing environment.PHAKISA RED TAPE REDUCTIONThe various Phakisa Labs recommended rationalisation and harmonisation of laws to create an enabling environment for the growth of these sectors.The reality experienced by value chain members is contra to these expectations with a drastic increase in compliance costs and extended time frames.The changes proposed by NEMLA with increased discretionary powers, added policy uncertainty, and arbitrary decision making result in increased business risk, operational difficulties and a total failure to create an enabling environment.All of this acts as an impediment to new entrantsBiocentric values underlining NEMLA changes to NEMBA is not congruent with a successful Phakisa outcome.•Nile tilapia (NT) the only viable tilapia culture species .•But  the NT is listed as invasive because it  breeds with the indigenous Mossambicus tilapia.•Farming Nile tilapia as a category 2 invasive species is not economically viable because adverse regulatory requirements applicable to invasive species.•Farming Mossambicus tilapia  is not economically feasible.**•**Clear Policy that reconciles the conflict between DAFF’s desire to grow tilapia production with DEA’s desire to control Nile Tilapia as an invasive species. •As a priority the introduction of:•A zonal system where fish sanctuaries are created to protect  Mossambicus  Tilapia•The identification of areas where Nile Tilapia and hybrids already occur and where Nile Tilapia should not therefore be listed as invasive | We submit that the amendments to NEMBA need to be postponed pending:•A thorough independent review of the current legal framework.•A proper policy development process that involves the wider public and all stakeholders.•Thereafter a new legal framework, SEIA and compliant public consultation.  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_We respectfully request that: proposed amendments to NEMBA be postponed pending the completion of a proper policy development process; the 2015 NEMLA Bill be postponed pending proper compliance with the SEIAS guidelines; and thereafter, the NEMLA Bill be subjected to a new and compliant public consultation process.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_This emphasises the importance of halting further changes to NEMBA until processes are put in place to:1. undertake a proper and inclusive policy making process is undertaken; and2. remedy the unlawfulness of laws that are already in place. | **Response from Biodiversity and Conservation to general statements:*** A number of issues raised during the presentations are relevant and relate to NEMBA in general, but are not relevant to specific provisions of the NEMLA Bill. The Department has started a process of substantial amendments to NEMBA, as well as amendments to NEMPAA. Issues not relevant to the NEMLA Bill can be raised during these processes.
* General response to processes and philosophical orientation of NEMBA:
* The Department is being accused of being both biocentric and also anthropocentric. The reality is that section 24 of the Constitution is clear on what is required – promote conservation and secure sustainable utilisation of biological resources. Depending on the context, the Department takes both approaches – hence there is a NEMPAA and a NEMBA, both being specific environmental acts under NEMA. Both these acts provide for conservation as well as sustainable use and beneficiation.
* With regards to the biodiversity economy and sustainable use – the Biodiversity Economy Lab strongly illustrates an anthropogenic approach, but we have to protect and conserve in order for people to derive benefits
* We have progressive laws aligned with the Constitution.
* We are conscious of the transformation that needs to take place.
* With regards to over-regulation and regulating all biological resources through NEMBA:
* The Department has no intention at all to use permit systems to block any benefits arising from the use of biological resources. The current TOPS Regulations are in place, and the revised TOPS Regulations will introduce a number of exemptions.
* The TOPS Regulations make provision for self-administration
* With regards to natural distribution ranges and distribution maps:
* There have been so many engagements, and it was made clear that there is no intention to keep species within their historical ranges only – what is intended is to manage the risks, genetic, etc.
* With regards to game ranching and non-alignment of legislation:
* The Department acknowledges that game ranchers are not homogenous – some are intensive and others are extensive systems – the Department is working with the Department of Agriculture, Forestry and Fisheries, e.g. on the game value chain.
* Game ranchers are regarded as important contributors to conservation – if there are specific provisions that seem to be blocking development, they need to be dealt with
* Regarding the Red Listing and recognition of species:
* Wild animals on game farms (extensive wildlife systems) within their natural distribution ranges are acknowledged in determining the conservation status of species
* All information provided and available to the assessment team was considered when the conservation status of sable was determined. If the current status is not an accurate reflection, game ranchers must ensure that they participate in the next assessment process
* South Africa has a diverse system with elements of consumptive and non-consumptive use, allowing for sustainable use without compromising the ecological integrity of the environment

**Response from Environmental Programs:****Draft AIS lists:****“•**No compliance with section 100 – Public consultation process non-compliant.  •No Social and Economic Impact Assessment.•No concern about the effect on important values chains.•Contempt for the public, human rights and the rule of law.”These aspects do not relate to any of the clauses proposed in the bill currently before Parliament but to proposed amendments to the current AIS regulations. We nonetheless respond for transparence and as a matter of record as follows: Discussions on the listing of trout have been ongoing with Mr. Cox and various members of the Consortium as far back as 2006. Trout was not listed when the regulations were first promulgated in February 2014 because there was no agreement on the areas. There are in excess of probably over 100 e-mails to the trout lobby, for example. And many e-mails to the game industry. That is on top of many meetings, as well. Discussion continued and every time we thought we were reaching agreement, discussions would break down. Every compromise the Department would attempt was resisted and we eventually reached a stalemate. It seemed that they would only be happy if trout were not listed at all. The Department had to make a call after a decade of discussion around the issue. It is important to note that consultation does not mean acquiescence.A socio economic impact assessment was conducted for the draft AIS the regulations. **NEMBA BILL**The draft Bill is in the process of being approved for publication for public comment and the criticisms of it is pre-mature when the bill has not even been published yet. There were prior stakeholder consultations The Department has not yet published for comment and there are still further stakeholder workshops planned. **NEMLA AMENDMENTS**“List as invasive because alien species harm the economy, human health or the ecosystem services that contribute to human health and wellbeing. •Must eradicate and/or control (systematic removal or prevention) to avert this harm.•Don’t need to take steps to eradicate or control listed invasive species.•In conflict with the CBD which requires eradication or control.•Irrational, contradictory and unworkable permitting regime. •Does not address reasons for the failure of the present law - SANBI AIS Status Report.•The CBD says that practical steps must be taken to eradicate or contain and control invasive species;•NEMBA, even, if amended, will not cure the **fundamental contradiction** of permitting “harmful species” for sustainable use;•But only invasive species that cause negligible harm to biodiversity can be permitted for beneficial use;•So why list useful species as invasive at all?”There is no contradiction because control is essential for economically viable species so as to avoid unintended spread and propagation and to ensure responsible ecologically sustainable activities Control measures are put in place when permitting economically viable invasive species in certain areas, so as to *allow* economic activity without compromising biological integrity and the threat posed by invasive species. Eradication on the other hand is an uncompromising solution for species that pose a high risk. It is not appropriate to eradicate economically viable species. By clearing up the confusion, the amendment is facilitating sustainable economic development rather than undermining it.With many – most – of these species, eradication is not possible. An argument can be made, then, in such areas, to allow the farming of Nile tilapia – whilst still trying to prevent its invasion and hybridization in other areas.So why list? -Our timber industry is based on species that have the greatest impact on water security. Should we say that they cannot be used? Conversely, do we say that they are not listed, and accept that they will destroy water security, cause wild fires, loss of biological diversity, cause erosion, siltation of dams, flooding and the destruction of the productive use of land. These are not practical suggestions.**Aquaculture value chain and Game**“•Nile tilapia (NT) the only viable tilapia culture species .”Response:This is disputed. It is about 20% more profitable than the Mozambique tilapia. The question of margins is difficult terrain. We and the industry have agreed that, in areas where the Nile tilapia has invaded, it should be allowed to be farmed with a Permit. Outside of those areas, it should not be allowed. This is contrary to what is being claimed here.Comment:•But the NT is listed as invasive because it  breeds with the indigenous Mossambicus tilapia.•Farming Nile tilapia as a category 2 invasive species is not economically viable because adverse regulatory requirements applicable to invasive species.Response:This is not accurate as there are long term permits to farm with Nile Tilapia in areas that have already been invaded.“•Farming Mossambicus tilapia  is not economically feasible.”Response:Many have been farming with Mossambicus for decades •Clear Policy that reconciles the conflict between DAFF’s desire to grow tilapia production with DEA’s desire to control Nile Tilapia as an invasive species. Response:DAFF are in agreement with DEA on the way forwardComment“•The identification of areas where Nile Tilapia and hybrids already occur and where Nile Tilapia should not therefore be listed as invasive”Response:They are invasive. There can be a permit in such demarcated areas, but they remain invasive. The permit demarcates where it can be farmed.**Responses to specific comments by Dr Dry:*** With regards to the new insertion of subsection (2) to section 3 of NEMBA:
* Although the provision had not been included in the version of the NEMLA Bill that was published in the *Gazette* for public participation, the public has the opportunity to comment during the Parliamentary consultation processes, as these public hearings are part of the public consultation process.
* Common law can be changed by statutory (written) law, as was done by the Game Theft Act, 1991 (Act No. 105 of 1991) in protecting ownership of game by private game owners
* Section 3(2) is necessary to change the common law, as the Game Theft Act aims to protect the ownership of game of commercial game farms, and not the custodianship of wild animals kept for conservation purposes in protected areas under jurisdiction of the state
* The subsection does not intend to specify circumstances that would be in conflict with the Game Theft Act or the SCA judgment as far as it relates to adequate enclosure.
* With regards to the Red List process- see general response above
* With regards to NEMBA not containing an enabling provision for farmed game – the revised TOPS Regulations contain provisions and exemptions specifically aimed at game farms. These regulations will be implemented as soon as the appropriate approval processes have been concluded.
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| **Dr Gert Dry – Game Industry****General statements:**Policy uncertainty •Draft Biodiversity Bill: Preservation (biocentric) ideology•Subordinate legal instruments: •Regulations, Norms & Standards, Guidelines and Permits•Policy Incoherence: •DEA gazetted 33 “draft legal instruments” (2005 – 2018) which have not been promulgated into law•Insurmountable differences•Historic distribution ranges & maps•Extra-limital•Indigenous species definitions•Single AIS definition for mammals, plant & vegetation•Sub-speciation ecological approach vs Biological Species Concept (BSC)•Biocentric ideology on Institutional Mindset•Hybridization, genetic bottlenecks etc.HOWEVER•Successes of farmed game totally ignored•DEA Jurisprudence not “enabling” for farmed game•Preservation ideology and legislation do not save a specie from declining / extinction•Illogical / arbitrary distribution ranges across biomes ignores specie composition on game ranches**Specific statements:*** Insertion of subsection (2) to section 3 of NEMBA:
* It has been inserted after the public participation process had closed, and was thus not subject to stakeholder engagement
* The provision is contrary to the common law and the recent judgment of the Supreme Court of Appeal in the Medbury case
* The provision introduces one law for the state and another for private citizens
* DEA wants the right to legislate special rules for itself that conflict with established law
* The Red List process does not count farmed game (specific reference is made to sable and roan)
* NEMBA does not contain an enabling provision for farmed game

AIS•Listings now extremely off-track•Ignores Socio-economic benefits•Humanity not seen as a part of Environment•Insufficient Information•Ignores SANBI Draft AIS Report •CoP17, CITES, IUCN, NEMBA do not count farmed game, given their definition of “wild animals” in the “wild”.•Not self-correcting without Body Politics intervention•Insufficient weight in respect of Biodiversity Economy and Sustainable Use.•“*There are loud complaints from a number of developing countries that the rich countries are only interested in making Third World countries into a natural history museum.  They are* *not giving food to their people”* |
| **MR COX:****Mr. Cox’s presentation was the same as Mr. Doward’s first presentation on behalf of the Consortium and will not be repeated** |
|  | **Clauses 37 - 45** | **NEMBA** | **Cox Attorneys** | **Mr. Cox also submitted written comments as detailed below:*** **Submission dated 4 April 2018**

This representation pertains to:1. The amendment to sections 31 J and K of the NationalEnvironmental Management Act, 1998 (“NEMA”) which are set out in sections 19 and 20 of the 2015 NEMLA Bill.Sections 31 J and K of NEMA are unconstitutional as they authorise environmental management inspectors to carry out what are in effect warrantless searches. That this is the case was clearly stated by the Constitutional Court in the Minister of Police and Others v Kunjana (CCT253/15) [2016] ZACC 21.The effect of these sections is that an environmental management inspector may enter upon and search orseize property at any time on the pretext of carrying out a routine inspection. This is a gross invasion of privacy and is inherently oppressive.2. The proposed amendments to the National Environmental Management Biodiversity Act 2004 (“NEMBA”) which are set out in sections 37 to 45 of the 2015 NEMLA Bill.I point out that NEMBA is a failing law as is evidenced by:1. The Draft SANBI report (referring to the draft National Status Report on Biological Invasion in South Africa Draft 1 for comment2. The fact that DEA has been unable to update or amend the TOPS regulations insofar they apply to terrestrial species since 2007.3. The failure of attempts to implement the bioprospecting regulations.The above failure is further evidenced by the fact that DEA is now seeking to replace this law with a new Biodiversity Act.* None of the laws promulgated by the Minister in terms of NEMBA are lawful:
* This is because they were all implemented in terms of processes that do not comply with sections 99 and 100 of NEMBA.
* The fact that NEMBA was introduced into law without a completed green and white paper policy making process and thus lacks the policy coherence that is essential to effective law making.
* The Minister has compounded this by publishing Notices suggesting amendments the AIS Lists and Regulations that also do not comply with sections 99 and 100 of NEMBA.
* This failure to comply with the prescribed consultation process is now the subject of court action.
* An application for an order declaring these notices unlawful will shortly be filed in court
* **Submission dated 18 April 2018:**

I submitted my comments on the 2015 NEMLA Bill in a letter 4 April 2018. It has since emerged that amendments to the definition of control, which I thought were cosmetic, could fundamentally alter the purpose of Chapter 5 of National Environmental Management Biodiversity Act 2004 (“NEMBA”). My original submission did not take this possibility into account. The purpose of this supplementary submission is correct this oversight.My original submission still stands in that:1. My submissions regarding 31 J and K of the National Environmental Management Act, No.107 of 1998 (“NEMA”) which are set out in sections 19 and 20 of the 2015 NEMLA Bill remain unchanged.2. My submissions regarding the proposed amendments to the NEMBA which are set out in sections 37 to 45 of the 2015 NEMLA Bill also remain save that I want to weave into them the additional concerns that arise as a result of the change in the definition of control and the addition of a new definition of “eradication”.I was party to the preparation of the submission of the Consortium of Interested and AffectedParties (the Consortium) that was sent to you yesterday. I make also make common cause that submission and in particular what the Consortium has to say about noncompliance with the SEIAS1 guidelines.**Changing what is meant by eradication and control**.Note:[] Words in bold type in square brackets indicate omissions from existing enactments. Words underlined with a solid line indicate insertions in existing enactments. The following amendments are proposed in relation to the meaning of “control”:“control”, in relation to [and alien or] invasive species, means-(a) [to combat or eradicate an alien or invasive species] the systematic removal of all visible specimens of an alien or invasive from within a specified area or the of or the whole of the Republic; or(b) where such systematic removal [eradication] is not possible, to prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species.The following new definition of eradicate is inserted in section 1 of NEMBA:"eradicate” means the complete removal of an alien or invasive species from within the Republic, including all living parts of that species.When I looked at these new definitions originally I thought that they were minor amendments of a technical nature intended to more closely align the definition of the meaning of control and 32 eradicate with what is set out in COP 6 Decision VI/232 of the United National Convention on Biological Diversity. This interpretation was reinforced by:1. The explanatory memorandum to the 2015 Draft NEMLA Bill which said the following of the proposed changes to the definitions:“This clause provides textual amendments to the definition of “control”, and insertsa new definition of “eradicate” in order to provide clarity on the actions, measuresor methods to be undertaken when dealing with listed invasive species.”2. The absence of any reference in the so called Final Impact Assessment 30 June 2015 to the massive socio economic impacts that will result from this amendment. I thus interpreted the reference to “alien or invasive from within a specified area” as being to the area within which a species had been listed as invasive. I according concentrated on the impact on the proposed changes to section 73 of NEMBA which were not dealt with in the explanatory memorandum at all.It was only when I participated in a workshop arranged by the Consortium that I realised that the amendment to the definition of control could allow the Minister:1. not only to list a species as invasive in an area; but 2. also enable the Minister to specify areas in which listed invasive species must be either controlled or eradicated.This fundamentally changes the purpose of Chapter 5.1. Presently MBA obliges landowners to take steps to eradicate and control all listed invasive.3 species. This complies with South Africa’s obligations in term of the CBD2. If amended landowners will no longer have to take steps to eradicate or control all listed invasive species. They will only have to be eradicated or controlled in areas specified by the Minister. This will mean that South Africa will no longer comply with its obligations in term of the CBD. Landowners who make beneficial use of species that should not be listed as invasive under NEMBA as presently drafted will if NEMBA is amended be in the uncertain position of having to apply for a permit to use these species. But section 91(c) of NEMBA states that such permits can only be granted if “the relevant species has been found to have negligible or no invasive potential”. This begs the following questions:1. If a species has been listed in an area as invasive, how can it be said that it has

invasive potential in that area?2. How can the Minister lawfully list a species as invasive in an area if it has a negligible or no invasive potential in that area?It also belies the statement that the proposed changes to NEMBA were minor that Dr Guy Preston made to me in an e mail to me 14 December 20164.It is difficult to reconcile the scope and effect of this amendment with what was said by Dr Preston or what is contained in the explanatory memorandum or in the impact assessment. However as incredible as this may sound, this interpretation does assist DEA in its attempts to legitimise its improper and unlawful application of Chapter 5 of NEMBA.This is very worrying. DEA is seeking additional discretionary powers to enforce what areincreasingly harsh penal laws but cannot comply with its own obligations when making laws. Any system that allows the State to act outside of the law but requires the people to comply with the law is inherently unjust. So if this is correct, and it seems increasingly likely that it must be true, then it means that:1. DEA has deliberately set about misleading and even deceiving the people of South Africa and indeed Parliament itself.2. The process that has brought the 2015 NEMLA Bill to Parliament is fatally flawed and thus any laws that follow are liable to be set aside as unlawful.3. Urgent remedial action is required to redress the resultant failure of government. | **Recommendations contained in Mr Cox’s submission of 4 April 2018:**I respectfully ask that Parliament put a halt to this slide back into tyranny and:1. Instruct DEA to redraft section 31J and K of NEMA having regard to the Kunjana judgement and tothe approach adopted in the 2017 amendment to the comparable section 45B of the FinancialIntelligence Centre Act, 2001.2. Remove all sections pertaining to NEMBA from the 2015 NEMLA Bill recommending instead that aPage 5 of 26proper policy making process is put in place in order that future changes to NEMBA are in formedby a proper law making process rather than the ad hoc attempt at fitting square pegs in roundholes that is presently taking place. | Not supportedSome of the comments in the submission of 4 April 2018 relate to process matters or to the NEMBA Bill; comments on the latter need to be submitted during the applicable public participation process. With regards to the failure to amend or update the TOPS Regulations in so far as it applies to terrestrial species – amendments to the TOPS Regulations were published for implementation on 6 occasions since its implementation in 2007.With regards to the failure to implement the BABS Regulations – the latter has been operational since 01 April 2008. Further, amendments to the BABS Regulations were promulgated on 19 May 2015. In terms of compliance of the BABS Regulations with section 99 and 100 of NEMBA, the BABS Regulations were taken through WG1, MINTECH and MINMEC before there were gazetted an Responses to the comments on AIS and control and eradicate:The only amendment to NEMBA in respect of AIS is to clarify the use of 2 terms, “control” and “eradicate”. The definition of ‘control’ and ‘eradicate’ are clarified and separated to make it easier for landowners and industry to implement. At present “control” is defined as: **“control”**, in relation to an alien or invasive species, means-(a) to combat or eradicate an alien or invasive species; or(b) where such eradication is not possible, to prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species;”The term “eradicate” is not defined at all.Control is meant to refer to an incremental removal of an invasive species, to curtail its propagation and spread. many of these widespread species are impossible to eradicate. What we have to do is systematically manage them, so that their impacts are reduced to as low a level as possible, and certainly to inhibit their spread and growth. It is akin to managing a disease, rather than eradicating it – e.g. cholera, HIV, anthrax, etc.Eradication refers to complete removal of a species in the country.For example, section 73 of NEMBA requires a landowner to take steps to **“control and eradicate”** listed invasive species. Section 75 similarly uses the terms together when describing actions to be taken to prevent the spread of invasives. These concepts are conflated and has caused much confusion. You cannot control and eradicate at the same time. The industry and Mr. Cox in particular, has consistently criticised this definition, and the Department agreed that it needs to be clarified. This amendment seeks to do that.Control measures are put in place when permitting economically viable invasive species in certain areas, so as to *allow* economic activity without compromising biological integrity and the threat posed by invasive species. Eradication on the other hand is an uncompromising solution for species that pose a high risk. It is not appropriate to eradicate economically viable species. By clearing up the confusion, the amendment is facilitating sustainable economic development rather than undermining it.“Landowners who make beneficial use of species that should not be listed as invasive under NEMBA as presently drafted will if NEMBA is amended be in the uncertain position of having to apply for a permit to use these species. “Mr Cox contends that trout as an example should not be listed as invasive. Firstly, there is ample scientific evidence of the invasiveness of trout. Secondly, as stated in response to Mr Doward’s comments, control is essential for economically viable species so as to avoid unintended spread and propagation and to ensure responsible ecologically sustainable activities Control measures are put in place when permitting economically viable invasive species in certain areas, so as to *allow* economic activity without compromising biological integrity and the threat posed by invasive species. Eradication on the other hand is an uncompromising solution for species that pose a high risk. It is not appropriate to eradicate economically viable species. By clearing up the confusion, the amendment is facilitating sustainable economic development rather than undermining it.Landowners who make beneficial use of species that should not be listed as invasive under NEMBA as presently drafted will if NEMBA is amended be in the uncertain position of having to apply for a permit to use these species. “But section 91(c) of NEMBA states that such permits can only be granted if “the relevant species has been found to have negligible or no invasive potential”. This begs the following questions:1.If a species has been listed in an area as invasive, how can it be said that it has invasive potential in that area?2. How can the Minister lawfully list a species as invasive in an area if it has a negligible or no invasive potential in that area?”Response:The reference is probably to section 91 (b) rather than (c).Section 91 provides as follows:***“91.     Additional requirements relating to alien and invasive species****An issuing authority may issue a permit for a restricted activity involving a specimen of an alien species or of a listed invasive species only if-**(a)     adequate procedures have been followed by the applicant to assess the risks and potential impacts associated with the restricted activity;****(b)     the relevant species has been found to have negligible or no invasive potential;****(c)     the benefits of allowing the activity are significantly greater than the costs associated with preventing or remedying any resultant damage to the environment or biodiversity; and**(d)     it is satisfied that adequate measures have been taken by the applicant to prevent the escape and spread of the species.”*This section is being incorrectly interpreted.The Minister’s power to list is independent and unrelated to section 91(b) - Her power to list is in section 70 as stated above. Section 91 refers to the factors to consider when deciding to issue a permit for a species that is already listed. In other words, the species has already been determined to be invasive (otherwise it wouldn’t have been listed), and 91 (b) in this context means invasive in that area that is being permitted**.**  |
|  | **Clause 37(a)** | **NEMBA****section 1** | **Western Cape Government (written submission)** | Reference to “systematic removal” in the definition for “control” is too vague; e.g. if a person tried to remove an invasive species twice, would that be systematic?It is further not clear why the draft definition refers to “visible specimens”. |  | Controlling a species does not happen overnight and requires a planned and systematic approach to the task. The term has its ordinary dictionary definition and is intended to denote the programmatic and consistent effort to removing and controlling invasive species. In many instances this may result in the same area being cleared over and over again as plants for example reseed so it is a constant obligation.There is no reference to visible specimens in the definition so it is unclear what this comment relates to. It seems the province was looking at the version of the bill published for comment a couple of years ago and not the final version tabled in Parliament. |
| The “or” between paragraphs (a) and (b) of the definition for “control” means that a person can allege that it is not possible to systematically remove an alien or invasive species and may simply prevent the recurrence, as set out in paragraph (b). |  | That is precisely the intention. There are some species which cannot be completely destroyed and removed and so we had to provide for this possibility otherwise the obligation would not be implementable by the public. In most cases control will be guided by programmes published by the Department and control plans which landowners will be required to compile to manage the process. The Department’s experts will guide what is possible with each species. |
| It is not clear what “as far as it may be practicable” means. This is vague and diminishes the effect of the duty in section 76. |  | See above response - it means that in some cases landowners can only go so far and take all practical steps but this may not be enough. We can only reasonably expect people to take measures to a point beyond which it would be unreasonable to expect action as the species is so extremely competent at spreading for example, so we expect the best possible measures in the circumstances – which will vary depending on location, species, and size of land etc. |
| The definition for “control” seems to be in conflict with the definition for “biological control” in the Alien and Invasive Species Regulations, 2014, which defines it as “*the use of specimens of one species for the purpose of preying on, parasitising on, damaging, killing, suppressing or controlling a specimen of another species;”.* |  | The definition of biological control has a very specific meaning and is not the same term as control. It is also not used in the same context as the term control. Any word which is defined must be read in the context of the section where it is used. Where “control” is used then it has the meaning assigned to it in the bill and where “biological control” is used it has the meaning assigned to it in the regulations and is clearly intended to refer to using natural predators to control species for example introducing cats onto an island to kill invasive mice species. |
|  |  |  |  | Reference to “…within a specified area of or the whole of the Republic…” should also be amended to read “…specified area within the Republic”. |  | This is not supported as it would change the intended meaning which is to provide for the option of control only in one area or controlling the species throughout the Republic as a whole**.** |
|  | **Clauses 41 and 42** | **NEMBA****sections 73 and 75** | **Western Cape Government (written submission)** | Given the above, clauses 41 and 42 are equally vague and unclear. | No recommendation made | See above answers – without specific indications of how it is vague this comment cannot be dealt with in detail**.** |
|  | **Clause 44** | **NEMBA****Section 99** | **Western Cape Government (written submission)** | The proposed amendment amends the introductory paragraph of section 99(2) of NEMBA. The effect is that an MEC for environmental affairs exercising a power in terms of NEMBA, must, *inter alia*, consult all Cabinet members whose area of responsibility may be affected. The MEC would be exercising his or her power at provincial level. It is not clear why the MEC must consult other Cabinet members  | It is proposed that the clause is re-considered and re-drafted.It is proposed that the MEC should instead consult the Members of the Executive Counsel whose areas of responsibility may be affected | Not supportedA power exercised by an MEC may affect the area of responsibility of e.g. the Minister of Agriculture, Forestry and Fisheries  |
|  | **Clause 45** | **NEMBA****section 100** | **Western Cape Government (written submission)** | Support the proposal that the MEC exercising the power, must publish the notice in the provincial *Gazette* |  | Noted |

**4. AIR QUALITY MANAGEMENT RELATED PROVISIONS**

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| --- | --- | --- | --- | --- | --- | --- |
| **No.** | **Clause/section** | **Act comments related to** | **FROM** | **COMMENT** | **Recommendation** | **RESPONSE** |
| **1.** | **Clause 48****Section 36** | **NEM:AQA** | **Western Cape Provincial Government** | S36(8) provides for a possible agreement between the Minister and the licencing authority, or the MEC and the licencing authority regarding identification of the licencing authority. * + Possible agreement does not apply matters where the Minister is identified as the licencing authority for national priorities.
	+ The challenge with this is although the concept of national priorities, the practical application thereof must be specific, transparent and reasonable.
 | The notion that only national government is competent to make decisions on such national priorities, is flawed primarily because Ito Schedule 4 of the Constitution “air pollution” is a municipal competence.* + The Bill proposes that s36(8) of NEMAQA be expanded to also allow for agreements between the Minister and MEC/Municipalities for matters of national priority.
	+ This is supported as a second option and is not preferred solution as it does not adequately acknowledge the constitutional allocation of “air pollution” as a municipal function.

Preferred option is the deletion of s36(5)(c) of NEMAQA. This will allow district and metropolitan municipalities to be the licensing authorities, even for matters of national priority, but still allow the Minister and licensing authority to reach an agreement based on the facts of a specific application for the Minister to become the licensing authority. | **Not Supported. The objective is to expedite the issuing of this critical projects at National level, however the proposed amendments caters for the agreements to be reached between Minister, MEC and licensing authority in all the matters.** |
| **2** | **No clause** | **NEM:AQA** | **City of Ekurhuleni** | **Request new amendment – insert power to suspend or revoke a provisional atmospheric licence or an atmospheric emission licence** | **“46A Revocation and suspension of provisional atmospheric emission licences or atmospheric emission licences**(1)A licensing authority may, by written notice to the holder of a provisional atmospheric emission licence or an atmospheric emission licence, revoke or suspend that licence if the licensing authority is of the opinion that the licence holder has contravened a provision of this Act or a condition of the licence and such contravention may have, or is having a significant effect on health or the environment.” | **Not supported. This is a new amendment and not included when discussed at WGs and will require more considerations. Section 51(1)(e) of NEM:AQA provides that a person is guilty of an offence if the person contravenes or fails to comply with a condition or requirement of an atmospheric emission license and section 52 provides that A person convicted of an offence referred to in section 51 is liable to a fine not exceeding five million rand, or to imprisonment for a period not exceeding five years and in the case of a second or subsequent conviction, to a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years or in both instances to both a fine and such imprisonment.****.** |
| **3** | **Clause 46/ Section 13(1)** | **NEM:AQA** | **CER**  | Given that many areas in South Africa are currently not meeting the health-based NAAQS including the designated Highveld Priority Area (see the Medium-Term Review of the 2011 HPA: Air Quality Management Plan (Dec. 2015)), it is clear that air quality management requires further intervention and dedication of resources. If the NAQAC could fulfil a role on this regard, then it is important that a duty be placed on the Minister to establish such a committee.  | We propose that section 13 remains as is, and that the “must” remains in place. The establishment of the NAQAC should not be discretionary. In fact, it should be established and appropriate members recommended. Urgent steps are needed to ensure that improvements are made in levels of high air pollution, especially in priority areas. | **Not supported. It is important for the section be amended to a “may” and not a “must” for a number of reasons. Firstly, the use of “may” in this clause ensures alignment with the provision of section 3A(a)of NEMA which provides that the Minister may by notice in the gazette establish any forum or advisory committee.****Secondly, the use of a “may” means that the Minister can establish the committee only when there is a need. Not on a permanent basis. If the committee is to exist on permanent basis, it becomes a permanent cost to the Department. The department will have to allocate resources continuously for the functioning of the committee. Whereas if the committee is established only when there is a need (may), the resources will only be allocated based on need and therefore become fruitful.****Thirdly, There are other structures established in terms of the NEMAQA e.g. Mutistakeholder Reference Group, etc to address specific issues especially in the Priority Areas** |
| **4** | **Clause 47** **Sec 22A**  | **NEM:AQA** | **CER** | The section 22A proposed in NEMLA has been heavily simplified from the section 22A in the current NEMAQA. The relevant changes are the following: 1. Section 22A no longer provides that: “(1) Section 24G of the National Environmental Management Act, 1998, as amended, applies to the commencement, without an environmental authorisation, of a listed activity or the activity specified in item 2 in Listing Notice 1 and items 5 and 26 in Listing Notice 2, relating to air quality in terms of Chapter 5 of the National Environmental Management Act, 1998”. 2. The proposed section 22A now simply reads that upon application by a person who operated a scheduled process under the Atmospheric Pollution Prevention Act (APPA) or conducted a listed activity under AQA without the necessary registration certificate or atmospheric emission licence (AEL), respectively, the relevant licensing authority must fine the applicant an administrative penalty which may not exceed R5 million, before the application for the AEL is eligible for consideration; and the application must be submitted in terms of the requirements set out in section 37;-. 3. Section 22A(3) now provides that “On application contemplated in subsection (1), the licensing authority may direct the applicant to, *inter alia*, immediately cease the activity; investigate, evaluate and assess the impacts of the activity; remedy any adverse effects; eliminate the sources of atmospheric emission, or compile a report with relevant information in relation to the activity, the need and desirability for the information and a description of the public participation process followed in relation to the compiling of the report. 4. Section 22A(5) of NEMAQA, which sets out the options for the licensing authority, having considered the reports and information provided on application, has been deleted. This deletion should not have been effected, and section 37 of NEMAQA (to which reference is made in the proposed s22A(2)) does not fill this gap as it only deals with the submission of an application for an atmospheric emission licence. 5. The proposed section 22A effectively removes the duplication that previously existed between it and section 24G of NEMA in instances where a NEMA-listed activity commences without an environmental authorisation and where an AQA listed activity commences without an AEL. As explained in previous submissions by the CER, requiring an AEL is already a NEMA-listed activity, with the consequence that, commencing an activity without an AEL is already covered by section 24G of NEMA.  | In the event that section 22A is to remain in place, we propose the following changes: 1. that it is made clear that the persons contemplated in subsections 1(a) and (b) are required to apply for an AEL (alternatively, that the section be amended to make provision for the issuing of a section 22A fine, even in instances where an application for a licence is not made to the licensing authority); 2. the current subsection 22A(5) of NEMAQA should remain - as a new section 22A(3A). This would also address the concern that subsection 22A(5) of the Bill refers to the issuing of a licence in terms of “this section” without any reference being made in the Bill's proposed section 22A to the issuing of a licence; 3. provision must be made for public consultation on the quantum of a fine; and 4. the maximum amount of the fine should be R10 million instead of R5 million, for the same reasons set out in our comments on section 24G of NEMA.  | **Sec 22 of AQA covers the instances of operating without a licence and that is the competence of the EMI. The licensing authority will only issue a section 22A fine on the application that have been received****CER’s suggestion of a need for public participation on the determination of s22A administrative fine should be dismissed.** **Firstly, it should be noted that currently DEA has, in extensive consultation with the local authorities) promulgated regulations that determine how fines should be charged and the process is straight forward and easy to follow. Thus public participation in this regard will not make any difference on the value of the promulgated fine structure.** **Secondly, there is no precedence in any legislation (at any sphere of government and in any sector) where the determination of a fine is done in consultation with the public.****Lastly, on the magnitude of the fine (5 million vs 10 million) it should be noted that the main objective of S22A is to bring all industries in to compliance while giving them a small punishment. The fee of R5million is reasonable in bringing all industries in to compliance – ensuring that industries have AELs.****An additional fine (up to 10 million) can also be imposed to the same facility that operated without an AEL in accordance with section 51.** **Thus, CERs concern that the fine is small is misled.** |
| **5** | **Clause 48****Sec 36** | **NEM:AQA** | **CER** | We wish to point out that there does not appear to be clarity as to the licensing authority for independent power producer coal-fired power station atmospheric emission licence applications - in certain cases it is the province, and in others, it is the DEA or the municipality. It is not clear on what basis this is determined. In some instances the licensing authority has changed from the province to the municipality, causing confusion and inconsistency. This situation should be rectified.  |  | **The AQA is clear in this regard. Since IPPs are involved in the power producing business, such matters form part of issues declared as national priority and as such the Minister is the Licencing Authority.** |
| **6** | **No clause/ Section 45** |  |  | There is no express provision in section 45, which deals with a review of an atmospheric emission licence “at intervals specified in the licence, or when circumstances demand that a review is necessary”, which stipulates that a review must be subject to public participation or that further investigations in relation to the licence can be conducted, or information requested, by the relevant authority. It is submitted that PAJA and the Constitution require that there be public participation in relation to a review of an atmospheric emission licence.  | We propose the addition of a new subsection (4) to make clear that sections 38 and 40 – which include provision for public participation – apply to the review of an atmospheric emission licence, as follows:Sections 38 and 40, read with the necessary changes as the context may require, apply to the review of a licence, which must also require public participation.  | **Not supported. The review does not require any public participation as it is only looking at the compliance of the facility. The consultations will only be required if the license is going to be varied after the review.** |
| **7** | **No clause****Section 46** |  |  |

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| Public consultation is only required in certain limited circumstances, for instance section 46(3) currently only requires a licence holder to bring a variation request to the public’s attention if the variation results in all three conditions being met, namely if it: 1) will authorise an increase environmental impact, 2) increase the atmospheric emissions and 3) has not been the subject of an authorisation in terms of any other legislation and public consultation. |

 | Public consultation should be applicable to all variation applications. In any event, as an air emission licence is a separate process and to ensure the public has an adequate opportunity to be consulted – particularly where an increase in impact and emissions is concerned, we recommend that section 46(3)(c) (which only requires consultation for a variation if the proposed variation has not, for any reason, been the subject of an authorisation in terms of any other legislation and public consultation) be deleted as it is unduly restrictive. | **Not supported. Section 38 already covers for public participation and it’s applicable in the Variation application. Section 46(3)(c) refers to variation that has not gone through the public consultation to be brought to the attention of the interested persons and public** |
| **8** |  |  |  | It is not clear from section 47, which deals with renewals of atmospheric emission licences, that public participation is required. It is submitted that PAJA and the Constitution require that there be public participation in the renewal of an atmospheric emission licence.  | We propose the amendment of subsection (5) to refer to the requirement for there to be public participation in renewal applications, as follows:Sections 38, 39, 40 and 43, read with the necessary changes as the context may require, apply to an application for the renewal of a licence, which must also require public participation. | **Not supported. Section 38 already covers the public participation it’s applicable in the renewal application** |
| **9** | **Clause 47****Section 22A** | **NEM:AQA** | **Chamber of Mines**  | Reference in the proposed s22A(1)(a) to “*operated*” should also include the words *“…or is operating…”* to align with ss 22A(1)(b) |  | **The section 22A(1)(a) is making reference to the facilities that operated before the commencement of the AQA whereas 22A(1)(b) is referring activities that happened after AQA came into operation.** |
|  |  |  |  | The existing s22A approximates to the formulation in s24G of NEMA and is preferred to the proposed s22A. section 24G of the NEMA serves as a general tool to rectify the commencement and undertaking of unlawful listed activities in the NEMA and listed waste management activities of the NEMWA and by virtue of the fact that the NEMA, NEMWA and the NEM:AQA are SEMA’s  | The inclusion of the rectification of the unlawful undertaking of scheduled processes and listed air emission activities into section 24G of the NEMA should be considered | **Not supported. These are two different contraventions from two different pieces legislations. For the section 22A it’s the operation of a listed activity without an AEL whereas for 24G it’s for the commencement of an activity without an environmental authorisation** |
|  |  |  |  | The environmental management programme as referred to in s22A(1)(f)(v) of the NEM:AQA is not defined | The Chamber proposes that a definition be inserted in section 1 of the NEM: AQA that defines an environmental management programme with reference to the definition of such a programme in section 1 and section 24N of the NEMA. Section 22A(4)(c) needs to be amplified by the addition at the end thereof of words indicating that the appeal or review was dismissed | **Already defined under NEMA.****The words “the applicant has in respect of the conviction exhausted****all the recognised legal proceedings pertaining to appeal or review” has covered that.** |
|  | **Clause 48** **Section 36(2A)** |  |  | s36(2A) should expressly indicate that the respective municipalities *delegate their functions* to the provincial organ of state and agree thereto in writing Since “*Air pollution*” is a functional area of municipalities |  | **Proposed Section 36(2A) provides that , a provincial organ of state must be regarded as the licensing authority if a listed activity falls within the boundaries of more than one metropolitan municipality, or within the boundaries of more than one district municipality, and the relevant municipalities agreed thereto in writing.’’****The comment is covered in the section above.** |

**5. WASTE MANAGEMENT RELATED PROVISIONS**

| **REF.** | **COMMENT** | **DEA RESPONSE** | **ACTION TAKEN** |
| --- | --- | --- | --- |
| **GENERAL COMMENTS** |
| **ACMP** | **Waste management:** Our members are of the view that the intention of providing clarity on interpretation and implementation has not been achieved. For example, the need for the inclusion of Schedule 3 in the Bill adds no value as the definition of waste is adequate to inform when a material is considered a waste or not. The challenge is to ensure appropriate interpretation thereof to support best environmental practice in the context of beneficiation and the circular economy. | Comment noted. | The current Bill is improving on the link to Schedule 3 and will consider removing it in future amendments of the Waste Act. |
| **Banking Association of SA** | At a meeting of 1 December 2010, we met with your executive team (representation headed by Ms N Cobbinah). At the meeting, The Banking Association, on behalf of its members was invited to compile a draft motivation for the financial sector to be exempted from Part 8 of Chapter 4 of the Waste Act, in respect of contaminated land, as this would allow executives within the Department to engage with this document as well as ourselves prior to The Waste Act Regulations being promulgated. We are of the view that financial institutions can and should play a meaningful role in helping to shape the future of our country and moreover, that as a responsible sector we can play a role in supporting the successful implementation of the Waste Act. There are however a number of material consequences that this will have for the economy, consumers and government, as well as the financial institutions, which we believe warrants financial institutions being exempted from this part of the Act as outlined in this submission. We believe that this submission will demonstrate why it would create significant economic challenges to hold financial institutions liable in foreclosure and “work out” scenarios for contaminated land. We submit that it would be reasonable and appropriate for financial institutions to be granted exemption or a “safe harbour” where they have had no day to day management of a site or control over a site. Further, we submit that given time constraints, that financial institutions be given exemption in terms of Part 8 of Chapter 4 of The Waste Act, based on the “safe harbours” proposition and that in the longer term legislation is amended in order to achieve a more definitive position.From a lender perspective, the introduction of NWMS and the forthcoming Regulations pose the following challenge to financial institutions:Greater clarity is sought in respect of Page 43, first paragraph of the NWMS, which states that “Financial institutions that accept land as security against loans are expected to exercise due diligence in terms of their potential liability for any contamination of that land”. Although the NWMS remains in draft, the statement on the responsibility is central to understanding the Department's position on the potential liability of financial institutions. Questions related to this issue:* Is it saying that if financial institutions exercise "due diligence" in accepting land as security, they will be exempt or immune from prosecution or from receiving remediation orders?
* Alternatively, is this a warning to financial institutions that they will in all instances be held liable upon foreclosure and they should therefore act cautiously? If the latter is the case, should a financial institution foreclose on a property which is contaminated, the responsibility for remediation of the contaminated land will pass to the lender. Further, should a lender become involved in decision making in the management of a problematic account and it is deemed that the lender played an active role in directing the actions of borrowers whose operations have the potential to cause significant environmental harm, the responsibility for remediation of the contaminated land could also pass to the lender.

In particular, as both The Waste Act and the NWMS are to apply retrospectively to existing contaminated land, these clauses are therefore of grave concern to our members. Accordingly, it is our intention once the Regulations are promulgated, to apply for exemption from Part 8 of Chapter 4 of the Waste Act, in respect of lender liabilities created by their providing loan facilities to customers as follows:* Retrospective perspective: exemption from this part of the Act as we have no ability to exercise retrospective control (Annexures A and B refer);
* Progressive perspective: exemption from this part of the Act provided lenders fulfill the provisions of “safe harbour” in respect of their lending arrangements with their clientele base (Annexures A and B refer).

Attached, please find documentation which details the position as well as some of our actions taken in support of The Waste Act:Annexure A: International Perspective;Annexure B: South African Perspective and their Implications; Annexure C: Responsible sector initiatives facilitated through The Banking Association;Annexure D: Code of Conduct for managing Environmental and Social Risk; Annexure E: Waste Management Guideline. | Other tools such as due diligence investigations are available to eliminate risks of contaminated land.No, they will not be exempted or immune from prosecution or from receiving remediation orders.Yes |  |
| **SPECIFIC COMMENTS** |
| **ACMP** | **4. Mine Residues and stockpiles**The Bill has addressed the challenges regarding the undesirable consequences of regulating mine residues and stockpiles in terms of the Waste Act by ensuring it’s management by NEMA. This is appreciated by our members. However, it is noted that the consequential amendment in Schedule 3 has not been effected.It is recommended that the following is deleted should Schedule 3 be retained in the final Bill:**1**. EXPLORATION, MINING, QUARRYING AND PHYSICAL AND CHEMICALTREATMENT OF MINERALS**(a)** mineral excavation;**(b)** physical and chemical processing of metalliferous minerals;**(c)** physical and chemical processing of non-metalliferous minerals; and**(d)** drilling muds and other drilling waste | Paragraph 1 about mining should be taken out of Schedule 3 in line with section 4 of NEMWA which does not regulate these. | The comments can be considered and refinements on Schedule 3 be done.  |
| **ACMP** | **1. Definition of waste**It is appreciated that the current legislation allows for reuse, recycling and recovery to inform when a material ceases to be a waste but the interpretation thereof is subjective which results in a lack of common understanding between the different role-players.While it is recognised that the Department of Environment is currently drafting Regulations to address exclusions of various materials from the definition of waste, it is important to note that the key driver for addressing exclusions was to overcome the challenges with regards to the interpretation of the waste definition and associated administrative processes. This was also re-affirmed at the Waste Phakisa.It is thus recommended that the Bill must provide certainty to the different stakeholders should the exclusions regulations not be finalised or if it does not achieve the desired outcome with regards to providing an enabling environment for job creation and support to the circular economy.**The challenge experienced by the cement sector**:In the case of the cement sector, it is abundantly evident that materials considered to be waste by some are in fact recovered materials and when used as raw materials are managed through environmental best practice and has a positive impact as it reduces mining of non-renewal resources as well as energy consumption and consequently utilisation of landfill space* Has positive mitigating outcomes to GHG emissions.
* Gives effect to sustainable development principles.
* Creates employment across the value chain
* Contributes greening the environment

Examples of such materials include fly ash, synthetic gypsum and granulated blast furnace slag from different industrial processes. As an example the current Department of Environment building in Pretoria is considered a Green building and the contribution of cement composed from the use of such materials contributes to the overall green rating of the building.It is thus not clear why such materials are considered a waste in South Africa and does not cease to be a waste as is the case internationally. The recovery of such materials from industrial processes for utilisation in cement production in our view confirms that the materials must be considered as raw materials for different uses. It is noteworthy that the cement production process is regulated by records of decision based on EIAs and the final cement product conforms to both international and SABS specifications.***It is thus recommended that* Section 4 of the National Environmental Management:****Waste Act, 2008, be amended by the insertion in subsection (1) after paragraph (d)****of the following paragraph:****(e) “alternate resources for the production of SABS compliant cement”**Many countries in the world have adopted such an approach to ensure that there is a sound understanding of when a substance ceases to be a waste (Eg.EU, UK). Key internationally accepted criteria to inform the status of such materials include thefollowing:The material is Produced as an integral part of a production process  Commonly used for specific purposes; Further use of the substance or object is certain. The beneficial use of materials must not be constrained by the requirement to obtain a waste license, particularly in cases where the industrial process possesses an EIA record of decision for their activities. Fulfills the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products Market or demand exists. Can be used directly without any further processing other than normal industrialpractice Further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use Use of the substance or object will not lead to overall adverse environmental consequences.I s commonly used internationally for the purpose. Supports circular economy**2. Other definitions**:**a. 30(c) The definition of Domestic Waste**The definition only refers to waste that is generated from premises that are used wholly or mainly for residential, educational, health care, sports or recreation purposes. This definition excludes domestic waste generated at factory sites, offices etc.It is recommendedthat such waste streams at commercial and industrial sites also be considered as domestic waste rather than business waste unless there is a clear rationale for the distinction.**b. 30(f) - inert waste**.The words significant and insignificant is used and is a deciding factor in determining whether a waste is inert or not. It is recommended that: The definition of significant and insignificant should be included. Clarification to inform whether all three criteria or some needs to be met in order for a waste to be considered inert (i.e. a, b and c)Amendment of s43 of the Act 59 of 2008 economy and beneficial use approach Our members are of the view that application for waste licence for such materials would add no additional benefit to the environment and only poses unnecessary cost to business. The cement sector is already regulated through the EIA process.Furthermore, many of these materials are incorrectly considered as a waste.It is thus recommended that **Section 4 of the National Environmental Management: Waste Act, 2008, be amended by the insertion in subsection (1) after paragraph (d) of the following paragraph.****(e) “alternate resources for the production of SABS compliant cement”** | The Exclusion Regulations are currently being considered by the Department for approval and may be published for implementation in 2018.Comments noted.The Waste Exclusion Regulations were drafted to address these cases.Commercial and industrial waste is included in the definition of “business waste” as defined in the Bill. Combining the 2 parts of the Schedule will address the concern.Dictionary definition is applicable.All three criteria must be met in order to be “inert”.The process available to apply for exclusion of waste is prescribed in the Waste Exclusion Regulations. | No changes as the current Schedule 3 proposes the list of sources of waste which include industrial waste. |
| **AgriSA** | Clause 69 and furtherAgriSA is opposed to the granting of any decision-making powers in terms of the NEM:WA to the Minister of Mineral Resources. We are of the view that the special dispensation created in favour of the mining industry is untoward and unconstitutional. Please refer to our comments above.It is recommended that the powers granted in terms of the NEM:WA currently, as well as the powers proposed by the Bill whereby the Minister of Mineral Resources (or his delegated officials) is granted any special dispensation in favour of the mining industry, should be removed and/or omitted from the Bill. | The bill provides clarity that the Minister of Mineral Resources is responsible for activities that are related to prospecting, exploration, primary processing of mineral resource and the Minister of Environmental Affairs will be the appeal authority. | No changes in the Bill. |
| **Banking Ass of SA** | In our view, these proposed amendments do not adequately define who is the responsible person is for the pollution or degradation of the environment. Nor does it adequately define who is considered to be a beneficiary against whom costs may be recovered. Similarly, Section 28.(1) of the National Environment Management Act,1998 does not adequately clarify who is responsible for the degradation of land. It was on this basis that in 2011 we applied for exemption from Part 8 of Chapter 4 of the NEMA: Waste Act, 2008, seeking clarification concerning who can be held responsible for the contamination of land. Given that the definitions in NEMA/NEMLA and the Waste Act are ambiguous, this could potentially imply that lenders have indirectly contributed to the pollution or degradation of land by providing funding to the responsible person/beneficiary, despite their having no control over the activities carried out by the property owner/lessee. Efforts by the banking sector to obtain lender exemption (subject to certain responsible lending behaviours) under NEMA: Waste Act, 2008, were unfortunately unsuccessful and we now wish to re-raise this matter. Our motivation as to why these clauses should be amended in order to provide lender certainty is contained within our Application for Exemption from Part 8 of the Waste Act, 2008, to yourselves of 10 March 2011 (attached for ease of reference). In summary we proposed: • Retrospective perspective: exemption for lenders from this part of the Act as we have no ability to exercise retrospective control;• Progressive perspective: exemption for lenders from this part of the Act provided lenders fulfil the provisions of “safe harbour” in respect of their lending arrangements with their clientele base. We would welcome further engagement on our attached submission.Recommendations 1. The wording within section 28.(4) of NEMA “and any other person to whom the duty of care applies, to…”To be amended to read “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 performed or undertaken, to-…”. 2. The proposed definition in respect of “the responsible person” as detailed above for section 28.(4) should be used in respect of “a beneficiary”.3. We further recommend that Part 8 of the waste Act, 1998 should be amended, as detailed in our abovementioned Application for Exemption | The comment is noted. Lenders and banking institutions cannot be exempted. | No changes. |
| **Banking Ass of SA** | Clause 60:Section 41.(1), is amended to read “the Minister must keep a national contaminated land register of [investigation] contaminated land areas that includes information on-…”The Department of Rural Development and Land Reform is responsible for the Deeds Registry in South Africa. They are in the process of implementing a strategic project which will convert the Deeds Registry into an e-cadastre system. Included within the scope of this project is an electronic interface to the various state departments in order to effect the transfer of a property. We are of the view that the Department should seek to ensure that this key strategy is not diluted through information relating to a property being stored outside of the Deeds Registry. This includes the various land registers (water, mining licences, contaminated land, land claims etc.). The quantum of registers which reside outside of the Deeds Registry prejudices consumers, intermediaries, the legal fraternity and mortgagees alike, as invariably these self-standing registers are either inaccurate/outdated or not made available to the public. To have to pursue the Promotion of Access to Information Act, 2000 to obtain public information on a particular property is not a viable solution. There are a number of advantages to the storage of such registers within the Deeds Registry, namely:o cost effectiveness;o single source of entry for consumers, the legal fraternity, property intermediaries, mortgagees and the State;o increased levels of data integrity (data validation and the upgrading of information at transaction level) can be better controlled;South Africa has a world class deeds registry system. The value of this being converted to an electronic system and the retention of all material information within such a registry is we believe of paramount importance for it to retain its status.The unavailability of information which could negatively impact on the security provided to lenders in support of loans provided is problematic for lenders. In terms of Regulation 225 of the Banks Act, 1990, mortgagees are required to value a property at market value. Should a property be contaminated and remediation be required (as per a remediation plan), the cost of such remediation needs to be deducted from the security value of that property as mortgagees need to comply with local and global regulatory frameworks in respect of the reliance they can place on such assets in respect of impairments and hence expected losses that they may incur upon realization of the asset as supporting security. Given that there are almost 2 million mortgages in South Africa, mortgagees are unable to accurately determine the security value of their property portfolios which they are required to revalue annually in terms of the banks Act, unless they have ready access to any detracting valuation factor, i.e. contaminated land which requires remediation. Similarly, consumers face similar constraints when they are seeking to purchase a property, as contamination would influence their decision to either purchase the property and/or the purchase price they would be prepared to make. It follows therefore that if the Department seeks to create a contaminated land register, as a minimum requirement, mortgagees, estate agents, the legal fraternity and purchasers should be able to source this information from the Deeds Registry. In 2011, we engaged with the Law Society of South Africa, the national Deeds Office and the Department of Environmental Affairs (DEA) on this matter. Such engagements highlighted that through an indicator system, the Deeds Registry would be able to create a data base of all contaminated properties. This, coupled with a bespoke external register linked to the Deeds Registry which contains increased levels of detail pertaining to a property which has been contaminated, including details of remediation plans, is we believe achievable.**Recommendation:**We would like to engage with DEA on a solutions-based approach to this matter in order that this long outstanding material issue be resolved.**Conclusion:**We are of the view that the NEMLA before us is incomplete unless the issues as highlighted above in respect of clauses 11 and 60 are addressed. | Refer to Section 40 of NEMWA makes provision for the recommendation.  | DEA to engage with the Banking Association of SA as proposed. |
| **CER** | CL 58 Sec 37(1) and (2)

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| These clauses amend section 37 of the NEMWA to provide clarity that a site assessment report must be submitted together with a remediation plan.We have no objection to the replacement of “cause” with “require”, as this provides for further clarity in terms of the powers of the Minister of MEC. The inclusion of “and submit a site assessment report and a remediation plan” is, however, misleading as it implies that the obligation to submit the report and plan lies with the Minister or MEC, which cannot be correct.We recommend that this provision be amended further, to specify the time period within which the site assessment report and remediation must be submitted. In this regard we are aware that no time period has been set for ArcelorMittal (AMSA) to conduct a site assessment in respect of its Vanderbijlpark works, in terms of a notice issued by the Department on 14 April 2015. It took approximately 2 and admitted together with a remediation plan. half years for AMSA to submit its site assessment report, which was only submitted in November 2017 despite various follow-ups with AMSA and DEA, and still: there are numerous inconsistencies in the report; and DEA has yet to make a finding on the contamination of the land i.e. a remediation order This despite the fact that the site assessment reveals that contamination is moving from AMSA’s plant and urgent measures are required to address the contamination. This is an omission which must be urgently addressed. Delays such as in the AMSA case cannot be tolerated in instances where contamination is continuously posing risks of harm to human health and the environment and this could not have been the intention of the legislature in enacting section 37.**Proposed amendments:**1) The Minister or MEC, as the case may be, may in respect of an investigation area contemplated in section 36, after consultation with the Minister of Water Affairs and Forestry-(a) require a site assessment to be conducted in respect of the relevant investigation area, and that [submit] a site assessment report and a remediation plan, if applicable, be submitted to the Minister or the MEC, as the case may be within a stipulated time period, which cannot be more than 90 days;(b) in a notice published under section 36(1) or issued under section 36(6)- …(ii) direct the person who has undertaken or is undertaking the high risk activity or activity that caused or may have caused the contamination of the investigation area, to [cause] require a site assessment to be conducted by an independent person, at own cost, and to submit a site assessment report, and a remediation plan, if applicable, to the Minister or MEC within a period specified in the notice which period cannot be more than 90 days  |  |

 | Comment notedComment on 1 considered and acceptable.On the 90 days, studies usually takes longer than the proposed 90 days. E.g. about 24 months currently.Hence, the proposal cannot be accepted. | Changes suggesting the addition of “be submitted” be effected in the Bill. |
|  | Cl 59 Sec 38(1)These clauses amend sections 37 and 39 (sic) of the NEMWA to provide clarity that a site assessment report must be submitted together with a remediation plan.Although we welcome the inclusion of the requirement for a remediation plan in addition to a site assessment report in sections 37 and 38 of NEMWA, the words “if applicable” that follow create ambiguity. The remediation plan is required if the land is contaminated, but the definition for “contaminated” is ambiguous and unclear. See our comments under “general concerns” below. Proposed amendments:On receipt of a site assessment report and a remediation plan, if applicable, contemplated in section 37, the Minister or MEC, as the case may be, may, after consultation with the Minister responsible for water affairs and any other organ of state concerned, decide that— | Comment noted. The submission of a remediation plan is required only if land is contaminated. Consider a wording that indicates a need for report where applicable in order to remove the ambiguity.  | On receipt of a site assessment report and if applicable, a remediation plan, contemplated … |
| **CER** | Cl 60 Sec 41This clause amends section 41 of the NEMWA. This clause provides clarity that the Minister must only keep a national register of all contaminated land.This proposed amendment is problematic in that it would mean that investigation areas are no longer required to be reflected on the NCLR. Having a NCLR which reflects investigation areas is important in that it will –(a) enable the public to know whether there is a likelihood of land being contaminated - which may have risks and harmful implications for their own health;(b) enable the public to track the progress of the investigation;(c) ensure that the land owner or user conducting the site assessment can be held to account and will ensure that the investigation is concluded efficiently and transparently, in line with the constitutional right to an environment not harmful to health or wellbeing; and(d) limit government’s abilities to track the progress of land investigation and reporting, which would, in turn, hinder government in the exercise of its obligations and for the protection of the health and wellbeing of those who might be impacted by the contamination.We accordingly do not support the proposed amendment as this would result in a less transparent process. It is not in the best interests of the public to only be notified of contamination at such a late stage, thereby depriving the public of the opportunity to take any necessary precautions and preventative measures and to hold those potentially liable to account.

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| The CER has, through a PAIA request, previously been given access to the NCLR, and was alarmed to note how few areas it contained – none of which had yet been remediated. We were also concerned by the absence of many mining companies and large industrial facilities from the NCLR. If land is only required to be reflected once it is found to be contaminated, there is likely to be even less transparency and accountability from persons/entities with potentially contaminated land.  |

Proposed amendment/insertion:The Minister must keep a national contaminated land register of investigation areas – which must be publicly available on DEA’s website - that includes information on—(1)(a) the owners and any users of investigation areas;(b) the location of investigation areas;(c) the nature and origin of the said contamination;(d) whether an investigation area—(i) is contaminated, presents a risk to health or the environment, and must be remediated urgently;(ii) is contaminated, presents a risk to health or the environment, and must be remediated within a specified period; or(iii) is contaminated, does not present an immediate risk, but measures are required to address the monitoring and management of that risk; or(iv) is not contaminated;(e) the status of any remediation activities on investigation areas; and(f) restrictions of use that have been imposed on investigation areas.(2) The Minister may change the status of an investigation area contemplated in subsection (1)(d)(i) or (ii) as provided for in subsection (1)(d)(iii) or (iv) if a remediation order has been complied with or other circumstances eventuate that justify such a change.(3) An MEC who has identified an investigation area must furnish the relevant information to the Minister for recording in the national contaminated land register.  | The NCLR will be made public, but investigation areas will not be part of the register. The words “investigation area” were replaced with “contamination area”.This is because making an investigation area publicly available will prejudice the person notifying the Department. Only once it is confirmed that an area is contaminated will the Department make this information available.It was never the intention of the Department to include the investigation areas on the NCLR, hence the proposed NEMLA 4 amendments.  |  |
| **CER** | CL1 Sec 1In the current Waste Act, the definition of “contaminated” in section 1 is ambiguous and unclear, with the risk that interpretation disputes will result in the exclusion of land that was intended to fall within the purview of this section (and vice versa).Various steps in Part 8 depend on whether or not there is contamination. This is a crucial definition for the successful implementation of these provisions.Furthermore the soil screening values set out in the National Norms and Standards for the Remediation of Contaminated Land and Soil Quality make arbitrary distinctions between different land uses, particularly between standard residential and informal residential and specify different values for each. This potentially over-complicates the process and would allow for lower levels of contamination to be overlooked, even though they may pose a risk to human health and the environment.Should the above norms and standards remain unchanged, it should be in line with the National Framework for the Management of Contamination Land, 2010, and make clear that anyone within 1km of water sources (irrespective of zoning), and who is required to produce a land contamination site assessment report, is prohibited from using soil screening value (SSV) 2CER Proposal:We propose that the definition of “contaminated” in section 1 be clarified to make clearer in which circumstances the definition would apply.The threshold should always be whether or not levels of contamination exist which pose a risk for the environment and human health. Provision should also be made for the sampling of groundwater as a means to indicate contamination in the surrounding soil. | There is no ambiguity.The definition is not being revised.Mining contaminated sites is contained in the Department of Mineral Resources database of derelict and ownerless mine sites as it is their mandate to rehabilitate them. |  |
| **CER** | No ClSec 36(5)An owner of land that is significantly contaminated, or a person who undertakes an activity that caused the land to be significantly contaminated, must notify the Minister or MEC of that contamination as soon as that person becomes aware, of that contaminationThe provision for notification in terms of section 36(5) is not practical, as it requires notification of a significant contamination to be given prior to a site assessment being conducted, and it is unlikely to result in proper disclosure or acknowledgement of accountability by landowners.NEMWA provides that the Minister or MEC may, by notice in the Gazette, identify investigation areas (See section 36(1) of NEMWA), Persons are unlikely to give notice to a person identifying land under section 36 (5) or to acknowledge that their land is significantly contaminated before a site assessment being conducted.Despite section 36(1), the Minister or MEC may issue a written notice to a person identifying land as an investigation area, and an owner of land that is significantly contaminated must notify the Minister or MEC of the contamination as soon as they become aware of it, in terms of s36(5). It is assumed that after such a notification by a landowner, the land becomes an investigation area after the Minister or MEC issues a written notice to the person or publishes a notice in the Gazette.However, we are aware that companies are wary of exposing themselves and their land to potential liability or in any way acknowledging that their land is significantly contaminated. AMSA notified DEA in terms of section 35(6) NEMWA by completing and submitting the pro forma Part 8 NEMWA notification form. But in its cover letter, AMSA stated that it is “currently not in a position to make any statements/assessments pertaining to the significance of any contamination as referred to in s36(5)” it stated further that “Vanderbijlpark Works are of the opinion that the land, as identified … may not fall within the ambit of contaminated land for purposes of s36(5) NEMWA” and that “legislation may be open to various interpretations by different stakeholders and as a result difficulties are being experienced in achieving the objectives as envisaged in the NEMWA in a sustainable manner”. This shows a clear intention to avoid liability in terms of the provisions of Part 8 NEMWA, despite the fact that notification under s 36(5) was given. The Minister or the MEC must expressly identify the land as an investigation area in terms of s 36(1) and/or s 36(6). Once an owner or other person has given notification of contamination in terms of s 36(5), it is for the Minister or MEC to identify the land as an investigation area. | Consider removing significantly from S36(5).Comment noted.Consider removing significantly from S36(5). | Removal of the word significant from S36(5) to read “An owner of land that is contaminated, or a person who undertakes an activity that caused the land to be contaminated, must notify the Minister and MEC of that contamination as soon as that person becomes aware, of that contamination.” |
| **CER** | **No CL Sec 40(1)**No person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the Minister or MEC, as the case may be. Section 40(1) broadly states that no person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated. This is not subject to a requirement of a remediation order, and it therefore places a very broad obligation on all landowners. While we do welcome this obligation, it opens the door to much uncertainty around the question of when land is contaminated and the additional responsibilities and obligations of landowners | Noted. This is also indicated as condition in the remediation orders issued by the Department. | No changes in the Bill. |
| **CER** | No ClRemediation in terms of directive – Transitional provisions in National Norms & Standards for the Remediation of Contaminated Land & Soil**Comment:**A person remediating land in terms of a directive, compliance notice or waste management licence (WML) must, in terms of the transitional provisions of the National Norms and Standards for the Remediation of Contaminated Land and Soil Quality, comply with the conditions set out in the directive, compliance notice or WML.It is, however, unclear how, on completion of remediation in terms of such conditions, the remediation is to be verified and confirmed. In terms of NEMWA, the Minister may change the status of an investigation area if a remediation order is complied with, and there is an incentive to verify and confirm that the land has been remediated in order to have it removed from the contaminated land register. This is not the case where land is remediated in terms of a WML, directive or compliance notice and there is a fair amount of uncertainty regarding, when, how and whether remediation has in fact been completed. This should be corrected.  | This aspect not included in NEMLA 4 Bill, and hence does not require amendments or changes in the Bill. | No changes in the Bill.  |
| **Chamber of Mines** | Clause 56 (ss34G(1), 34H(1), and 34 I(1) and (4)(a), National Environmental Management: Waste Act): Members of the Board24.1 Given that other waste such as general and hazardous wastes (other than residue stockpiles, residue deposits, and also historic residues) will be governed by the Waste Act, at least one member of the Board should be a person with appropriate qualifications and experience in the mining industry.24.2 Consequently also s34 I(4)(a) should oblige the Minister when making appointments to the Board to consult with the Minister of Mineral Resources.24.3 Alternatively, the above provisions should provide for the Minister of Mineral Resources (rather than the Minister of Environmental Affairs) to appoint at least one member of the Board. | The role of the Bureau and its governing board concerns waste management, mining capacity can assist on processing of mining wastes. Section 34I(5) requires that the board be composed of persons covering a broad field of expertise in waste management.  | 1. To look at it as part of industry representatives and as part of the nomination process.
2. Minister of Mineral Resources to be included as part of the MECs (Competent Authorities).
3. DMR participation to be considered as part of the Government Departments.
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| **Chamber of Mines** | Clause 57 (s34U, National Environmental Management: Waste Act): DelegationsSection 34U(4) provides for revocation of decisions of a delegate. However, there should be an additional section (perhaps s34U(5)) providing for withdrawal of delegations. 25.2 Provision should be made (perhaps in s34U(6)) for delegations to be published in the Government Gazette. | The delegation is an administrative function, may not require Gazetting | 34U4 to be updated to include withdrawal.(4) The Board may withdraw the delegation, confirm, vary or revoke any decision taken … |
| **Chamber of Mines** | Clause 61 (s43, National Environmental Management: Waste Act): Minister of Mineral Resources as licensing authority26.1 In s43(1A), the terminology suffers from the same defects as are mentioned in Part B, paragraph 1 above, and should be corrected in similar fashion. Although the explanatory memorandum refers to a definition of primary processing, there is no such definition, nor for the reasons in Part B, paragraph 1 above, would such definition be correct. Definitions of concepts such as reconnaissance, prospecting, exploration, mining, production and processing need to be included in s1 of the Waste Act as in s1 of NEMA. | The term “primary processing” was included as the definition of mining referred to a mining area, the mining area in the 2012 amendments included structures which were linked by infrastructure to the mine, this could mean that if DMR was the competent authority for the mine they would be the competent authority for the structure linked as well i.e. Eskom power plant or a beneficiation plant which was not intended to be delegated to DMR.The recent MPRD Bill now redefines the mining area and it may now be possible should the MPRD Bill be passed to amend the wording to mimic the MRPD. However, until the Bill is passed it is not intended to define primary processing or use the terms of the MPRDA. |  |
| **Chamber of Mines** | The proposed amendments to s43(1B) are not correct in that the Minister of Mineral Resources is responsible not only for the licensing system in chapter 5, but indeed, as currently provided, has responsibility for all the provisions in the Waste Act which relate to the matters in s43(1A). See for example also the proposed s74(1)(b). It is submitted that clause 61(c) should be deleted. The explanatory memorandum offers no reason for these proposed amendments.26.3 Section 43(1) should be prefaced by the words “subject to subsections (1A) and (1B),”.26.4 Section 43(2) should additionally be subordinated to subsections (1A) and (1B). | Clause 61(c) is a consequential amendment.The proposal to create linkages will be negative in case one aspect is not requirement. |  |
| **Chamber of Mines** | Clause 69 (s74, National Environmental Management: Waste Act): Exemptions27.1 The introductory wording to s74(1) refers only to persons (not to Organs of State), whereas ss74(1)(b) and (c) refer both to persons and to Organs of State. These provisions should be aligned.27.2 The Chamber disagrees with the concluding two lines of s74(1) since it should be possible, as is currently the case, for a person to be exempted from having to obtain a licence. The explanatory memorandum offers no explanation for the need for this proposed restriction. | Alignment to be made in the different provisions. | S74(1) to be amended to include the organ of State as follows;Any person or organ of state … |
| **Chamber of Mines** | **Clause 74 (Schedule 3, National Environmental Management: Waste Act): Sources of waste** 28.1 Paragraph 1 of Schedule 3 should be deleted since all of the sources relates to residue stockpiles, residue deposits or historic residue stockpiles, all of which will henceforth be governed by NEMA and no longer by the Waste Act; alternatively if paragraph 1 is retained, it needs to be qualified by a proviso indicating that paragraph 1 does not apply to residue stockpiles, residue deposits and historic residue stockpiles. 28.2 In schedule 3, paragraph 1, if paragraph 1 is retained, the terminology needs to be corrected so as to accord with the terminology in the MPRDA, as suggested in Part B, paragraph 26.1 above read with Part B, paragraph 1 above. | Schedule 3 amended to be sources of waste. |  |
| **Chamber of Mines** | Clauses 75 to 78 (Transitional provisions)29.1 The Chamber recommends that clauses 75 to 78 be transformed so as to constitute new sections in NEMA and in the Waste Act, respectively. The reasons for this suggestion are the following.(1) Chamber members have not readily been able to find the transitional provisions in s12 of the National Environmental Management Amendment Act, 2008 (“NEMAA, 2008”) for the very reason that they are not contained in NEMA itself but rather in the NEMAA, 2008 which is generally not produced in loose leaf legislation services produced by publishers such as LexisNexis or Juta. This difficulty is compounded by the fact that s12 of NEMAA, 2008 was amended by the National Environmental Management Laws Amendment Act, 2014, which again is not readily accessible. (2) The present retention (with amendments as in clause 75) of s12 of NEMAA, 2008 will result in s12 (as proposed to be amended) not according with the new transitional arrangements in clause 76 in all respects, as demonstrated in greater detail below. (3) There are already transitional provisions in: (a) Sections 50 and 51 of NEMA, and (b) Sections 81 and 82 of the Waste Act, and with which the separate transitional provisions in s12 of NEMAA, 2008 and as now proposed in clauses 75 to 78 of the Bill will need to be reconciled. 29.2 The Chamber therefore suggests that the Bill provide for the repeal of s12 of NEMAA, 2008 and the insertion into NEMA and into the Waste Act, respectively, of a consolidated version of the transitional provisions which currently appear in the said s12 and in clauses 75 to 78 of the Bill, since this will make for clarity, certainty, and accessibility, for all the applicable transitional provisions. In s12(4) of NEMAA, 2008 the last line should be clarified to read “1998, and shall be deemed to be an environmental authorisation issued in terms of the National Environmental Management Act, 1998.”. 29.4 The wording of s12(4A) of NEMAA, 2008 should be clarified to read: “(4A) An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 after 8 December 2014 in terms of an application in terms of that Act shall be deemed to have been approved in terms of the National Environmental Management Act, 1998 and shall be deemed to be an environmental authorisation issued in terms of the National Environmental Management Act, 1998.”.In relation to s12(4B): (1) the terminology needs to be corrected, as discussed in Part B, paragraph 1 above; (2) the problem with the proposed s12(4B) is that it is limited and does not resolve the problem of mining companies with approved EMPs and EMPRs which may not specify or have specified each and every listed activity directly associated with the mining in the same way as the terminology used in the various listing notices. The wording of the proposed s12(4B) does not accord with section 38B(1) of the Mineral and Petroleum Resources Development Amendment Act, 2008 which states that an EMP and EMPR approved in terms of the MPRDA shall be deemed to have been approved and an environmental authorisation issued in terms of the NEMA, without qualification as to the types of activities included or excluded in such approval.The proposed s12(4B) does also not account for the historical fact that environmental regulation within the mining sector was initially exclusively undertaken in accordance with an approved EMP or EMPR issued under the Minerals Act and subsequently the MPRDA as well as the uncertainty as to the applicability of the listed activities in the Environment Conservation Act and the NEMA to prospecting and mining operations. (4) The regulatory regime comprising EMPs and EMPRs approved in terms of mining legislation was not activity driven but rather concerned the identification and management of environmental impacts by way of general management measures and actions couched as EMP and EMPR commitments. The commitments were legally binding. Therefore, while an EMP or EMPR would be deemed to be environmental authorisations, mines could be prejudiced by the wording in s 12(4B) which leaves the door open to challenges that an authorisation for a particular listing in terms of the Environment Conservation Act and the NEMA was not separately obtained. The Chamber submits that section 12(4B) be removed and that approved EMPs and EMPRs be deemed to be environmental authorisations issued in terms of the NEMA. In s12(6), last line, “has” should be “had Clause 76 in part duplicates s12 of NEMAA, 2008 but with some differences, e.g. that it omits s12(5)(b), and conversely the proposed clause 76(4) should also appear in s12(4A): hence the above suggestion for consolidation (and therefore harmonisation) of these provisions. 29.7 The wording in the last two lines of clause 76(1) should be clarified as in paragraph 29.4 above. 29.8 In clause 76(3), third line, “is” should be “are”. 29.9 A new clause 76(3A) should reflect the content of s12(5)(b) of NEMAA, 2008. 29.10 The wording of clause 76(4) should also be put into s12(4A) of NEMAA, 2008. 29.11 In clause 76(5), second line, after “residue” remove the word “and” between residue and “stockpiles”. Also see the Chambers comments in paragraph 29.5 above with regard to ancillary activities to be processed in terms of the NEMA and the ”Waste Act. 29.12 In clause 76(6)(a), third line, after “mining” insert “, exploration”In clause 76(6)(b), third last line, it is suggested that reference be made to the actual notices, gazettes and dates which pertain to the relevant new regulations. 29.14 It is suggested that the wording of clause 77 be clarified as follows: “77. (1) Despite the repeal of the relevant provisions in relation to residue stockpiles and residue deposits in the National Environmental Management: Waste Act, 2008, by the National Environmental Management Laws Amendment Act, 2017, any approval granted or waste management licence issued in relation to residue stockpiles and residue deposits remains valid until it lapses or is replaced under the provisions of the National Environmental Management Act, 1998 and shall be deemed to be an environmental authorisation issued in terms of the National Environmental Management Act, 1998.(2) Despite the repeal of section 69(iA) of the National Environmental Management: Waste Act, 2008, the regulations pertaining to the management of residue stockpiles and residue deposits made in terms of that section remain operational and shall be deemed to have been made under the National Environmental Management Act, 1998 until they are replaced by new or amended regulations made in terms of the National Environmental Management Act, 1998.”. 29.15 It should be noted that in accordance with the definition of an “environmental authorisation” in the NEMA, a waste management licence issued in terms of the Waste Act is an environmental authorisation. See paragraph 3 in Part B. 29.16 It is suggested that the wording of clause 78(1) be clarified as follows: “78. (1) Anything done under the repealed provisions in Part 7A of Chapter 4 of the National Environmental Management: Waste Act, 2008 remains valid until anything done under the provisions that substitute the provisions in the said Part 7A overrides it.”.Due to the uncertainty as to whether the ostensibly repealed ss38, 39, 41 and 42 of the MPRDA, the associated definitions in s1 of the MPRDA and the associated regulations made in terms of the MPRDA, nevertheless survive their ostensible repeal with effect from 7 June 2013 by virtue of the MPRDA Amendment Act, 2008 until 8 December 2014 when the corresponding provisions in NEMA took effect, it is suggested that a further transitional provision be inserted in terms of a further clause in the Bill into NEMA to that effect. Although there has been some reliance in that regard on s11 of the Interpretation Act, 1957, which provides that when a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation, there has been some doubt and uncertainty as to whether s11 in fact applies, which uncertainty could now be cured by an express provision to be inserted into NEMA by the Bill. | The Department does not have in principle a problem if the transitional provisions are comprehensively deaIt with in the main NEMA and Waste Acts, should the State Law Adviser agree to such an approach, but one should consider that if the transitional arrangements are amended to cater for the 2008 NEMAA transitional arrangements, such an approach may create confusion to the regulated community. The National Environmental Management Laws Amendment Act, 2014 (Act No. 25 of 2014) dealt with the major amendments to sections 12, 13 and 14 of the 2008 NEMAA. Alignment to be done in order to avoid contradictions.Comment considered and an amendment to be made. | **Anything done under** in the middle of 78(1) to be deleted. |
| **Chamber of Mines** | **Schedule 3** With the amendment of the Waste Act to shift the regulation of residue stockpiles and deposits from the Waste Act into NEMA, it is recommended list 1of the sources of waste be deleted in order to effectively exclude the regulation of this material as waste. | Comment to be considered in the long term. | List in Schedule 3 revised. |
| **Commission for Gender Equality**  | Clause 52The CGE recommends an amendment to Clause 52 by way of an insertion of the following words at sub-paragraph (f)(e) to read as follows:“hazardous waste” means any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, have a detrimental impact on the health of any biological species and the environment. Clause 56The CGE recommends an amendment to sub-clause 34l.(1) by way of an insertion of the following words at 34(l)(5) to read as follows:(5) Appointments must be made in such a way that the Board is composed of a broad range of appropriate expertise in the field of waste management and an equitable gender representation. | Biological species forms part of the environment.Comment on incorporation of gender requirements has been considered.Equitable gender representation to be considered as part of the nomination process. |  |