



PORTFOLIO COMMITTEE

18 AUGUST 2020

THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998)



**environment, forestry
& fisheries**

Department:
Environment, Forestry and Fisheries
REPUBLIC OF SOUTH AFRICA



NATIONAL ENVIRONMENTAL MANAGEMENT ACT FOCUS AREAS

- NEMA context within Constitution
- Environmental planning
- Environmental impact management
- Integrated environmental management
- One environmental system
- Financial provisioning



ACRONYMS

NEMA	National Environmental Management Act, 1998 (Act No. 17 of 1998)
EIA	Environmental Impact Assessment
CA	Competent authority
DEFF	Department of Environment, Forestry and Fisheries
DMRE	Department of Mineral Resources and Energy
EA	Environmental authorisation
MEC	Member of Executive Council
NEMLA	National Environmental Laws Amendment Bill [B14D-2017]
SEMAS	specific environmental management Acts

NATIONAL ENVIRONMENTAL MANAGEMENT ACT CONSTITUTION AND NEMA SEMA FRAMEWORK

- **Supreme** law of the land;
- **Bill of Rights** (including S24 Environmental Right);
- **Limitation** of Rights;
- **Separation** of powers (legislative, judicial and executive);
- **Schedules 4 & 5**: Functional areas - competence
- **Co-operative governance** principles

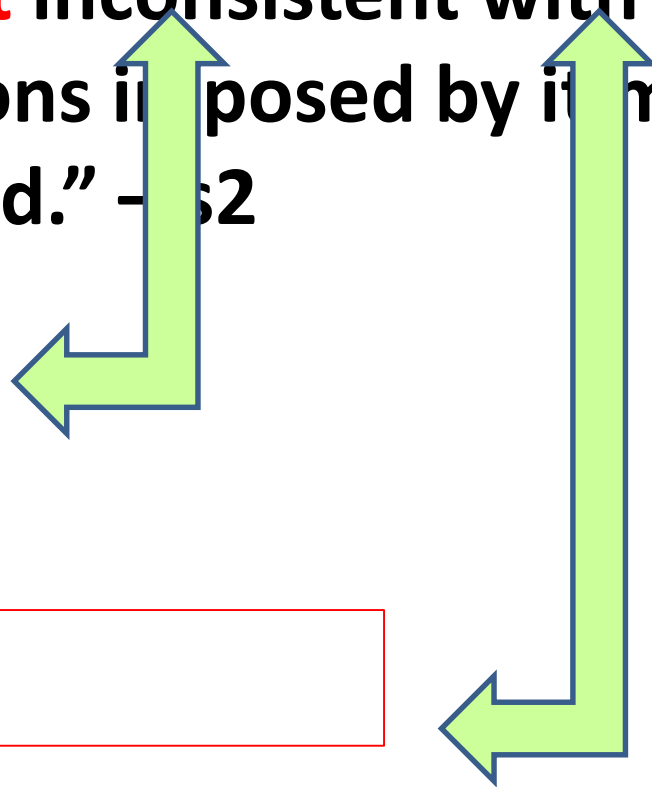


Supreme law of the land

“This Constitution is the supreme law of the Republic; **law or **conduct** inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” – s2**

NEMA & SEMAs
+ subordinate legislation

All actions taken by government



Bill of Rights

“The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” – s8



applies between all organs of State



applies as between the State and all people

Bill of Rights

- **Equality**
- **Human dignity**
- **Life**
- **Freedom and security of the person**
- **Slavery, servitude and forced labour**
- **Privacy**
- **Freedom of religion, belief and opinion**
- **Freedom of expression**
- **Assembly, demonstration, picket and petition**
- **Freedom of association**
- **Political rights**
- **Citizenship**
- **Freedom of movement and residence**
- **Freedom of trade, occupation and profession**

- **Labour relations**
- **Environment**
- **Property**
- **Housing**
- **Health care, food, water and social security**
- **Children**
- **Education**
- **Language and culture**
- **Cultural, religious and linguistic communities**
- **Access to information**
- **Just administrative action**
- **Access to courts**
- **Arrested, detained and accused persons**
- **Limitation of rights**

Section 24 – Environmental Right

Everyone has the right -

- to an environment that is not harmful to **health** or **well-being**; and
- to have the environment **protected**, for the benefit of **present and future generations**, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 – Environmental Right

“Everyone has the right...”



Section 24 is written in anthropocentric terms. It is not the environment itself that gains any rights; the right is vested in the individual. It is therefore a human right of all persons to have the environment protected.

NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998

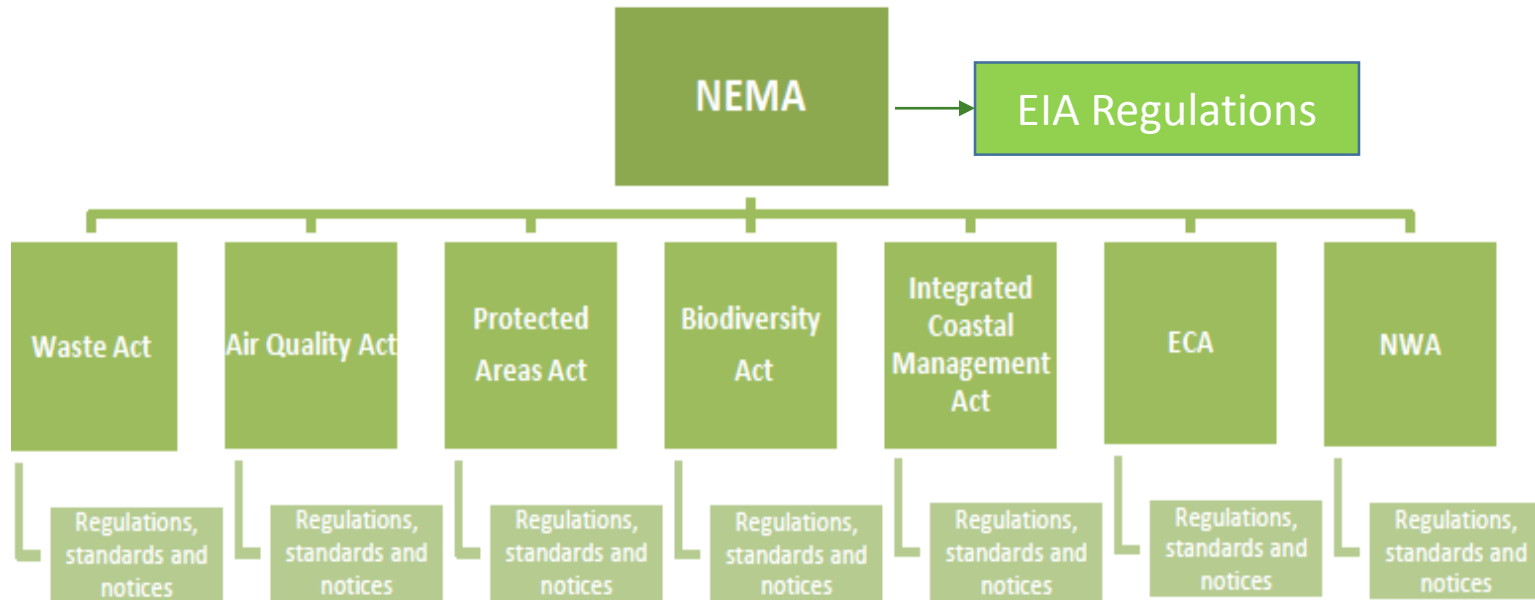
- **Creates the legal framework** to give effect to the environmental right guaranteed in S 24 of the Constitution - proactive and reactive interventions and management measures.
- Confirms that State is the **trustee of the environment** on behalf of the inhabitants.
- Sets out the **fundamental principles** that apply to environmental decision making – especially to avoid negative impacts on the environment, manage, minimise, mitigate to be within acceptable levels.
- Provides for **compliance and enforcement of NEMA and all SEMAs**
- Introduces a general duty of care to prevent, control and rehabilitate the effect of significant pollution and environmental degradation.
- Replaces EIA regime (previously under ECA)

National Environmental Management Act

- **NEMA**
 - Promulgated in 27 November 1998
 - Came into effect on 29 January 1999
 - NEMA amended 10 times:
 - Act 28 of 2002
 - Act 56 of 2002
 - Act 46 of 2003
 - Act 8 of 2004
 - Act 44 of 2008
 - Act 62 of 2008
 - Act 14 of 2009
 - Notice 731 of 2012
 - Act 30 of 2013
 - Act 25 of 2014



NATIONAL ENVIRONMENTAL MANAGEMENT ACT



The NEMA Family of Environmental Laws

NATIONAL ENVIRONMENTAL MANAGEMENT ACT

ENVIRONMENTAL PLANNING

- Environmental implementation plans and management plans provided for in Chapter 3 of NEMA with Schedule 1 and 2 lists of national departments to compile these
- In preparation, must consider other plans and aim for consistency
- Purpose to coordinate and harmonise the environmental policies, plans, programmes and decisions of the various national departments, minimize duplication and secure the protection of the environment across the country as a whole and give effect to the cooperative governance principles of the Constitution
 - Plans should identify policies, plans and programmes that may significantly affect the environment
- So what?
- Every organ of state **must exercise every function it may have**, or that has been assigned or delegated to it, by or under any law, and **that may significantly affect the protection of the environment**, substantially **in accordance with the environmental implementation plan or the environmental management plan** prepared, submitted and adopted by that organ of state
- Departments affected include Agriculture, Land Reform, Tourism, Transport, Water, Defence, Public Enterprises, Trade/Industry, Human Settlements, Mineral Resources, Health, Labour
- SPLUMA and ability to influence land use planning through early consideration of environmental aspects



NATIONAL ENVIRONMENTAL MANAGEMENT ACT INTEGRATED ENVIRONMENTAL MANAGEMENT

- Chapter 5 of NEMA
- “The purpose of Chapter is **to promote the application of appropriate** environmental management **tools** in order **to ensure** the **integrated environmental management** of activities”
- In order to promote or facilitate integrated, environmentally sustainable and sound management the Minister may provide for a **range of instruments** which should at least **integrate environmental considerations into decision-making**
- The potential consequences for or impacts on the environment of **listed activities or specified activities** must be considered, investigated, assessed and reported on
 - Environmental authorisation regime
 - Environmental Impact Assessment Regulations 1989, 2006, 2010, 2014
 - Require **environmental authorisation** prior to commencement or not
 - Environmental impact assessment
 - Environmental management instruments



NATIONAL ENVIRONMENTAL MANAGEMENT ACT ENVIRONMENTAL IMPACT ASSESSMENT

- Section 24(2)(a) and (b) of NEMA:
 - Minister/MEC may identify **activities** that **may only commence with environmental authorisation** and **geographical areas** within which specified activities may only commence with EA
- Section 24(5) of NEMA
 - Power of Minister to make regulations related to **applications for environmental authorisation**
- **EIA Regulations** identify activities that may result in substantial negative impacts on the environment.
- Regulations further require that an environmental impact assessment (EIA) process be followed in respect of these identified activities and applications be submitted to the competent authority for consideration.
- Process includes specialist work, consultation, investigation and decision-making
- In order to prevent substantial detrimental impacts, Minister may identify activities subjected to EIA prior to commencement.
- Activity's ability to impact on environment determined by:
 - Nature of the activity
 - Extent of the activity.
 - Nature of the receiving environment (location)
- Environmental Management Programme to guide mitigation during construction through operation and closure

NATIONAL ENVIRONMENTAL MANAGEMENT ACT ENVIRONMENTAL IMPACT ASSESSMENT

Assessment of environmental impacts

**Assessment of risks, nature, significance, consequence,
extent, duration, probability**

Identification of no-go areas and impact avoidance

Identification of mitigation measures

Can impacts be reversed?

NATIONAL ENVIRONMENTAL MANAGEMENT ACT ENVIRONMENTAL IMPACT ASSESSMENT

Identification of alternatives

Report upon need and desirability: location context

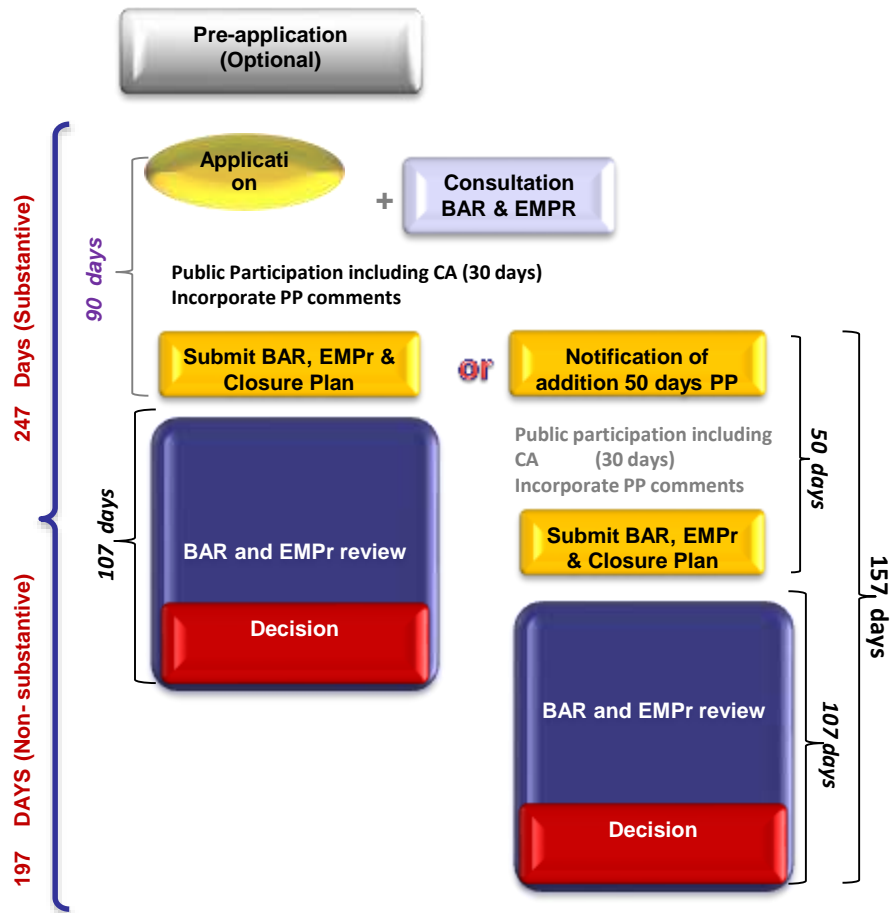
Sustainability of development

Enable CA to conclude informed decision



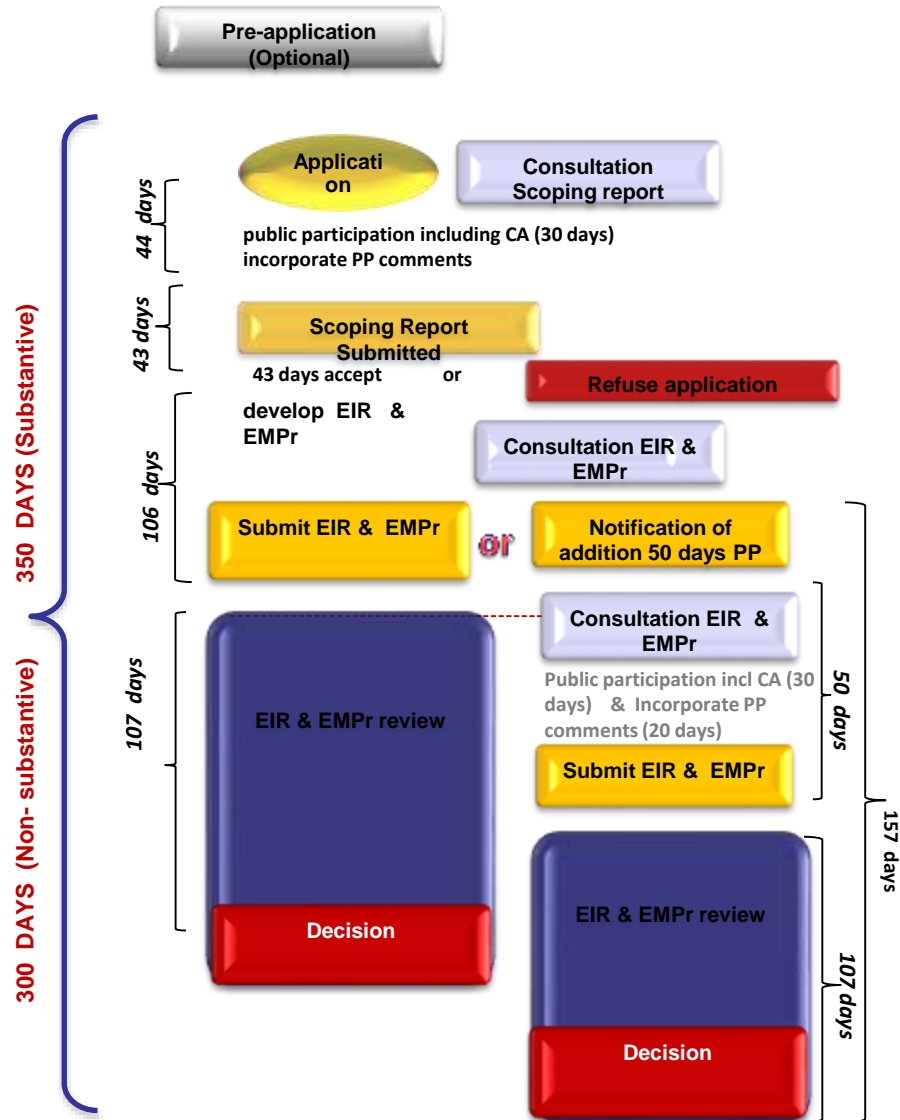
EIA Process

Basic Assessment



EIA Process

S&EIR



Specialist assessments: e.g. Flora



Specialist assessments: e.g. Fauna



Specialist assessments: e.g. biodiversity risk







EIA identifies Risks

NATIONAL ENVIRONMENTAL MANAGEMENT ACT ENVIRONMENTAL IMPACT ASSESSMENT

- Limitations of EIA
 - ✓ CAs **seldom** refuse environmental authorisation.
 - ✓ Cumulative impacts inadequately considered: Decision-making in absence of bigger picture (medium to long term developments).
 - ✓ **Very few EIAs actually change the initial development proposed** (e.g. technology, location).
- Balancing act



NATIONAL ENVIRONMENTAL MANAGEMENT ACT INTEGRATED ENVIRONMENTAL MANAGEMENT

- NEMA provides for variety of environmental management instruments and associated powers
 - environmental management frameworks;
 - strategic environmental assessments;
 - environmental impact assessments;
 - environmental management programmes;
 - environmental risk assessments;
 - environmental feasibility assessments;
 - norms or standards;
 - spatial development tools; etc.
- Section 24(2):
- The Minister, or an MEC with the concurrence of the Minister, may identify-
 - geographical areas based on environmental attributes, and specified in spatial tools in which specified **activities may be excluded from the requirement to obtain an EA**

e.g. Activities x, y and z excluded within this area



NATIONAL ENVIRONMENTAL MANAGEMENT ACT INTEGRATED ENVIRONMENTAL MANAGEMENT

Section 24(2):

The Minister, or an MEC with the concurrence of the Minister, may identify-

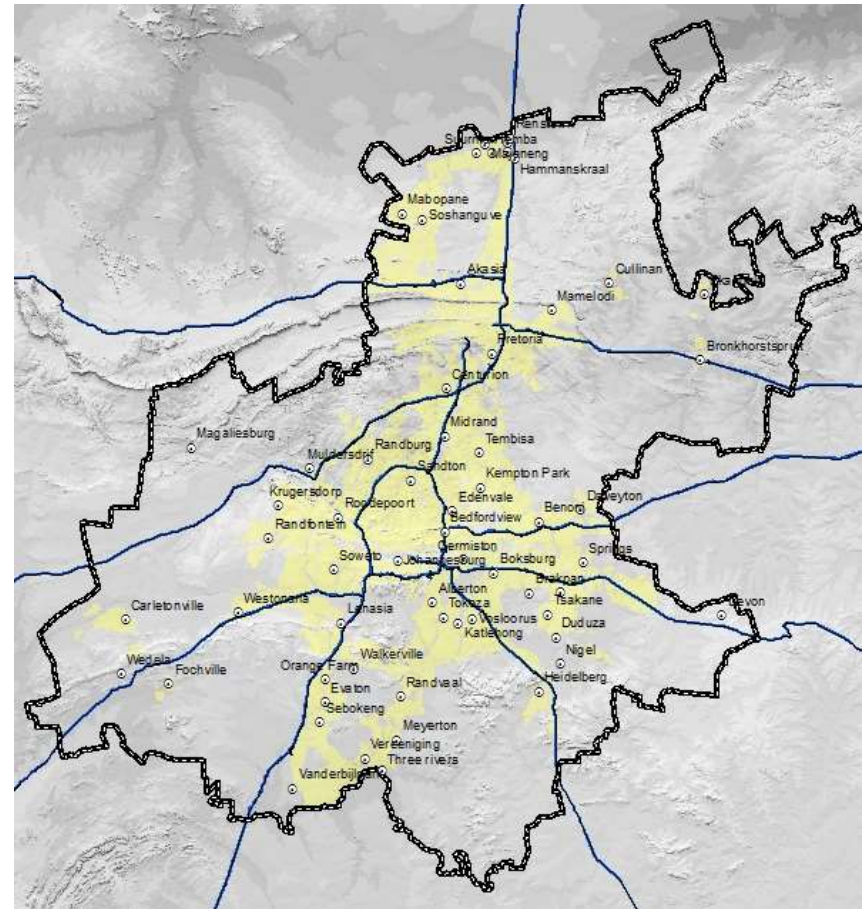
- (c) geographical areas based on environmental attributes, and specified in spatial tools in which specified activities may be excluded from the requirement to obtain an EA
- (d) activities that may be excluded from the requirement to obtain an environmental authorisation but **that must comply with prescribed norms or standards**; or

e.g. Gauteng EMF: Zones 1 & 5: Proposed Standards for certain activities

Intention

Zone 1: Urban Development Zone:

The intention with Zone 1 is to streamline urban development activities in it and to promote development infill, densification and concentration of urban development in order to establish a more effective and efficient city region that will minimise urban sprawl into rural areas.



environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

NATIONAL ENVIRONMENTAL MANAGEMENT ACT ONE ENVIRONMENTAL SYSTEM

Section 24(2):

The Minister, or an MEC with the concurrence of the Minister, may identify-

- (c) geographical areas based on environmental attributes, and specified in spatial tools in which specified activities may be excluded from the requirement to obtain an EA
- (d) activities that may be excluded from the requirement to obtain an environmental authorisation but that must comply with prescribed norms or standards; or
- (e) activities, based on an environmental management instrument, that may be excluded from the requirement to obtain an EA

e.g. SKA: No EIA or EA, subject to EMPr compliance



NATIONAL ENVIRONMENTAL MANAGEMENT ACT INTEGRATED ENVIRONMENTAL MANAGEMENT

Section 24(2A):

The Minister may by notice in the Gazette **prohibit or restrict** the granting of an EA for a listed or a specified activity in a specified geographical area, if it is necessary to ensure the protection of the environment, the conservation of resources or sustainable development.

- ☐ A CA would subsequently not accept any further applications for EA in the identified geographical area until such time that the prohibition has been lifted.
- ☐ All pending applications would be deemed as withdrawn.
- ☐ Not retrospectively to EAs already issued.



NATIONAL ENVIRONMENTAL MANAGEMENT ACT ONE ENVIRONMENTAL SYSTEM

- Historically, mining activities were primarily regulated in terms of an EMPR approved by the Minister of Mineral Resources under the MPRDA
- Mining activities required a mining permit /mining, prospecting, production or exploration right, including an EMPR (Mineral Petroleum Resources Development Act; Dept Mineral Resources), water use licence (National Water Act; Dept Water), and, for any listed/specified activities forming part of the mining operation, an environmental authorisation and/or waste management licence (NEMA & NEM: Waste Act; DEFF/province)
- Different dispensation was in place for mining (environmental aspects)
- 3 respective departments had own process and information requirements with lack of integration
- The application and approval process was cumbersome, uncoordinated, misaligned and resulted in litigation in some instances



NATIONAL ENVIRONMENTAL MANAGEMENT ACT ONE ENVIRONMENTAL SYSTEM

- Clear need for a unified system
- As a result, the One Environmental System (OES) was introduced on 8 December 2014 to streamline processes for mining, environmental authorisations and water use licences
- Amendments were made to NEMA, NEM: Waste Act, NEM: Air Quality Act, National Water Act, Mineral Petroleum Resources Development Act to give effect to the OES
- Environmental issues resulting from exploration, prospecting, mining and production to be regulated in terms of the NEMA

NATIONAL ENVIRONMENTAL MANAGEMENT ACT ONE ENVIRONMENTAL SYSTEM

- Section 50A of NEMA
- Mining activities are subjected to an environmental authorisation process in terms of NEMA;
- The Minister of Environmental Affairs prescribes the environmental legislative framework and is the appeal authority for appeals in respect of mining related environmental authorisations;
- The Minister of Mineral Resources is the competent authority who issues environmental authorisations and waste management licences under NEMA and the NEM: Waste Act in respect of mining activities and activities directly ancillary thereto;
- The Minister of Mineral Resources appoints Environmental Mineral Resource Inspectors, with all the powers of an environmental management inspector to enforce environmental laws as far as it relates to mining;

NATIONAL ENVIRONMENTAL MANAGEMENT ACT ONE ENVIRONMENTAL SYSTEM

- All licences or authorisations under NEMA, NEM: Waste Act, NEM: Air Quality Act and National Water Act must be simultaneously processed and issued within a period of 300 days. Appeals in respect of environmental authorisations, waste management licences, atmospheric emission licences, permits in terms of the Biodiversity Act and water use licences have to be finalised within 90 days from the date of the receipt of the appeal. Only thereafter, the mining right or permit is considered.



NATIONAL ENVIRONMENTAL MANAGEMENT ACT ONE ENVIRONMENTAL SYSTEM

Laws giving effect to OES

NEMAA 2008

NEMLA 2014

EIA Regs and Listing Notices 2014

Fees Regs 2014

Financial provisioning 2015

Appeals Regs 2014

Exemption Regs 2014

Residue stockpiles and deposits 2015

NWA, WULA Regs 2017

MPRDA



NATIONAL ENVIRONMENTAL MANAGEMENT ACT ONE ENVIRONMENTAL SYSTEM

- Perceived benefits
 - Improved cooperation between respective departments
 - Reduction in overlapping legal and procedural requirements
 - Public service – one department to deal with
 - Timeframes for decision-making aligned
- Realities:
 - Financial provisioning
 - IPIC
 - Reporting systems
 - Compliance and Enforcement
 - Appeals
- Portfolio Committee colloquium 2018



NATIONAL ENVIRONMENTAL MANAGEMENT ACT FINANCIAL PROVISIONING

- Rationale linked to one environmental system and environmental impacts of mining specifically
- Mineral and Petroleum Resources Development Act (MPRDA)
- NEMA One Environmental System
- NEMA section 24P and 2015 Financial Provisioning Regulations
- (1) An applicant for an environmental authorisation relating to prospecting, exploration, mining or production must, before the Minister responsible for mineral resources issues the environmental authorisation, comply with the prescribed financial provision for the rehabilitation, closure and ongoing post decommissioning management of negative environmental impacts.
- (3) Every holder must annually-
 - (a) assess his or her environmental liability in a prescribed manner and must increase his or her financial provision to the satisfaction of the Minister responsible for mineral resources
- Definition “financial provisioning”
 - means the insurance, bank guarantee, trust fund or cash that applicants for an environmental authorisation must provide in terms of this Act guaranteeing the availability of sufficient funds to undertake rehabilitation, remediation, decommissioning and closure

NATIONAL ENVIRONMENTAL MANAGEMENT ACT FINANCIAL PROVISIONING

- NEMLA4 and amendments to 2015 FP Regulations in process
 - Extension of compliance date for MPRDA holders
 - 24P general requirements and 24PA mining specific
- ‘financial provision’ means the amount which is to be provided in terms of this Act, guaranteeing the availability of sufficient funds to undertake progressive rehabilitation, decommissioning, closure and post closure activities for listed and specified activities to ensure the mitigation, remediation and rehabilitation of adverse environmental impacts including latent environmental impacts and residual environmental impacts as well as the pumping and treatment of extraneous and polluted water, where relevant;”;
- Challenge that term is potentially still too limiting
- E.g. transfer of mining rights pose huge environmental risk and loophole as it is not a listed /specified activity
- Doesn’t lend itself smoothly to the EA process



NATIONAL ENVIRONMENTAL MANAGEMENT ACT FINANCIAL PROVISIONING

- Some principles currently lacking
 - Power to prescribe instances when FP is required
 - Leave detail to regulations to be developed over time as required
 - Compulsory to provide/determine/set aside financial provisioning for progressive rehabilitation
 - Compulsory to annually undertake rehabilitation, remediation, mitigation measures
 - FP may only be used for these purposes
 - Certain financial vehicles to be used
 - Minister mineral resources may undertake measures if holder fails to, may use FP



NATIONAL ENVIRONMENTAL MANAGEMENT ACT FINANCIAL PROVISIONING

- Makes it a requirement to make financial provision – its an offence not to
- Scope of the financial provision
 - Annual rehabilitation – annual rehabilitation plan
 - Final rehabilitation, decommission and closure at end of life of operations – rehabilitation, decommissioning and closure plan
 - Remediation of latent defects – risk assessment report
- Specialists must undertake the determination of the financial provision as well as the sum and the annual review – specialist is an independent person or persons who is qualified by virtue of his or her knowledge, qualifications, skills or expertise in the mining, environmental, resource, economy and financial fields
- Must maintain and retain FP until closure certificate is issued, review environmental liability every 3 years and adjust FP, audit independently every 5 years

NATIONAL ENVIRONMENTAL MANAGEMENT ACT FINANCIAL PROVISIONING

- Minister mineral resources in consultation with water Minister may allow an annual drawdown of FP 10 years or less prior to closure to support final decommissioning and closure
- FP remaining at closure that was set aside for latent and residual environmental impact must be transferred to mineral resources Minister on closure
- MPRDA holders to convert to NEMA regime



NATIONAL ENVIRONMENTAL MANAGEMENT ACT CONCLUDING REMARKS

- One Environmental system victory or not?
- 11 competent authorities implementing one system
- Developmental pressures versus environmental realities
- Lack of sufficient strategic environmental context
- Environmental influence on planning



THANK YOU!

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Thank You



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