

**ECONOMIC DEVELOPMENT, ENVIRONMENT, AGRICULTURE AND RURAL DEVELOPMENT PORTFOLIO COMMITTEE**

### NEGOTIATING MANDATE

### ON THE:

**NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL**

**[B14D-2017] (s76)**

**08 October 2020**

1. **INTRODUCTION**

The Chairperson of the Economic Development, Environment, Agriculture and Rural Development Portfolio Committee Ms.Lindi Lasindwa, tabled the Committee’s report on the Negotiating Mandate for the National Environmental Management Laws Amendment Bill [B14D-2017] (s76).

1. **PROCESS FOLLOWED**

The Speaker, Hon. Ntombi Mekgwe formally referred the National Environmental Management Laws Amendment Bill [B14D-2017] (s76) on the 3rd December 2018 to the Portfolio Committee on Economic Development, Environment, Agriculture and Rural Development, in terms of the Gauteng Provincial Legislature Rules 245 (1) read with 246 (1) and 247 and 248 for consideration and reporting.

On the 18August 2020, the Permanent Delegate from the National Council of Provinces (NCOP), Honourable W Ngwenya gave a briefing to the Committee on the Bill. This was followed by a presentation by the National Department of Environment, Forestry and Fisherieson the detail of the National Environmental Management Laws Amendment Bill [B14D-2017] .After that, the Gauteng Department of Agriculture and Rural Development (GDARD) made a presentation on the views of the Executive regarding the National Environmental Management Laws Amendment Bill [B14D-2017].

In the same meeting, a legal opinion on the Bill was presented by the legal unit from the Gauteng Provincial Legislature NCOP unit and a Socio- economic impact analysis was also presented by the research unit. In fulfilling its constitutional mandate, the Committee published adverts in the following newspapers.

* Sowetan – Monday, 14th September 2020
* City press - Sunday, 13th September 2020
* Pretoria Moot Rekord – Tuesday, 8th September 2020
* Alberton Record – Wednesday, 16th September 2020
* Roodeport Record – Friday, 18th September 2020
* Sandton Chronicles – 18th September 2020
* Rosebank , Killarney Gazette – week ending 18th September 2020
* Fourways Review – week ending 18th September 2020

This was to enable the Committee to request members of the public and stakeholders to make comments on the Bill. Following that, the Committee convened a virtual public hearing on Saturday 19 September 2020 and Tuesday 22 September 2020 respectively. The Portfolio Committee deliberated and adopted the report on the Negotiating Mandate of the National Environmental Management Laws Amendment Bill [B14D-2017] (s76) in a meeting that convened on Thursday, 08 October 2020.

1. **PRINCIPLES AND DETAILS OF THE BILL**

The purpose of the National Environmental Management Laws Amendment Bill, 2016 (Bill), is to amend certain provisions under the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003) (NEMPAA); the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEMBA); the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (NEMAQA); the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008) (NEMICMA); the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (NEMWA), and the National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (NEMAA). The main purpose of the Bill is to provide for clarity on certain matters and textual amendments.

1. **OBJECTIVES OF THE BILL**

The main purpose of NEMLA Bill is to amend the following acts:

* National Environment Management Act, 1998 (Act No. 107 of 1998) (NEMA);
* National Environment Management: Protected Areas Act, 2003 (Act No. 57 of 2003) (NEMPAA);
* National Environment Management: Biodiversity Act, 2004 (Act No.10 of 2004) (NEMBA);
* National Environment Management: Air Quality Act, 2004 (Act No. 39 of 2004) (NEMAQA);
* National Environment Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008) (NEMICM);
* National Environment Management: Waste Act, 2008 (Act No. 59 of 2008) (NEMWA).

**5. OVERVIEW OF THE PUBLIC HEARINGS**

Public hearings were attended by stakeholders who engaged on all matters related to the Bill. Various sentiments were echoed and the Bill was supported with amendments.

1. **SUMMARY OF STAKEHOLDERS SUBMISSIONS MADE DURING THE PUBLIC HEARING**

It is the Gauteng Provincial Legislature’s constitutional duty to facilitate meaningful public participation when processing a Bill in accordance with section 118 (1)(a) of the constitution and the LAMOSA judgement. Prior and during the public hearings, stakeholders were encouraged to make oral or written submissions regarding the Bill.

The Committee received numerous written submissions from individuals and organisations such as Magaliesberg Biosphere, Cynthia Sekgobela and other local farmers, The Chemical and Allied Industries’ Association (CAIA) , National Council of SPCAs (NSPCA), Traditional Healers Organization, Youth Organization in Ekurhuleni Mothong and Heritage Project to name a few.

**6.1 Traditional Healers Organisation submitted the following**;

* That they appreciate the effort to realign and clearly define specific roles of the following Minister’s Environment, Mineral Resources and Energy, Water Affairs.
* That the Bill needs assist in defining the following terminologies; **indigenous communities**, **equitable**, **disadvantaged communities, bio-trade, relief, environmental management beneficiation fund** (clarity on who has the right to participate and when this fund accounts to the public on monies collected from bioprospecting permits) and how these monies are disbursed to support conservation. “Amnesty” must also consider according amnesty to Healers (Sec 11: this would also make reference to the demand for the application of both licenses and permits).
* The word “holder” is repeatedly used, this term needs to also be clearly defined. It would also help if the roles of the Minister of environmental affairs is clearly defined aligned with that of the Minister of health.
* That is very risky to accord the police power to assess and audit as they tend to act violently, though their enforcement role and powers are clearly understood.
* There is consensus that permission be denied for mining in conservation areas however, there is need for the government to ensure that job opportunities are available to nearby communities.
* The one major concern raised is that this department seems to be the only one responsible for issuing of licenses and permits and yet, they are not doing anything to look after the bio-traditional and informal traditional medicine industry.
* Traditional Healers Organisation however indicated that they support the Bill.

**6.2 The National Council of NSPCA’s Submitted the following**

* The proposed amendment of Section 34E of NEMA is insufficient as it either states that a seized live specimen may be placed in a facility for its continued care, or in the event that it is deemed perishable, a police official may dispose of it in a suitable manner. From the above the NSPCA is concerned in terms of both the fate and welfare of a live specimen prior to and after the finalisation of a criminal procedure, as the proposed amendment does not afford adequate protection to a seized live specimen. It also does not definitively provide a framework that ensures that the final decision followed a sequential order than results in the best interest of the animal.
* The NSPCA welcomes the long last recognition and indisputable necessity that the concept of animal well-being is proposed to be included in the NEMBA Act. However, at closer inspection, the proposed definition of well-being under Section 1 of NEMBA, i.e. “a state where the living conditions of a faunal biological resource are conducive to its health”, is limited and lacks a comprehensive approach that includes all factors influencing animal wellbeing.
* The NSPCA respectfully proposes that animal well-being be extended to include the utilisation of species not native to South Africa, as animal well-being does not discriminate if the species is indigenous to South Africa or not. Current wildlife exploitative activities in South Africa is extensive, which includes the use of exotics in a range of areas from tourism-related activities, breeding, trade, consumptive use, conservation to research purposes. The use of exotic animals in these areas leaves the animals vulnerable to compromised animal welfare due to a lack of adequate protection under legislation and regulations.

**6.3 Chemical and Allied Industries Association (CAIA) ,submitted the following:**

* **Complex, ever-changing environmental legislation**

Environmental legislation is becoming (has become) too complex and difficult to interpret which places compliance challenges on both the regulated and the regulator. It is a widely held opinion that there are too many changes to environmental legislation and that changes happen too quickly for companies to adapt. CAIA and its members support the current intention of the National DEFF to rationalise environmental legislation, but this needs to be accomplished sooner rather than later. Following the provision of input by CAIA to this rationalisation process that may result in a fifth National Environmental Management Laws Amendment Bill, it would seem that the Department has challenges prioritising the project in the current circumstances.

* **Increased cooperation required**

Government and industry both want to work with each other in a more cooperative spirit. However, in particular, the National Assembly Portfolio Committee’s proposed amendments (discussed below) suggest otherwise – a more command and control approach is the messaging being received with increasing prescriptions. If this approach is as a result of abuses of provisions in legislation (e.g. S24G), those who are abusing the provisions should be targeted rather than blanket provisions being applied.

* **Proposed Amendments to Section 24G**

Section 24G of the NEMA currently provides flexibility where there is an apparent unlawful commencement of activity. Proposed amendments to remove the discretionary nature of the provisions, include the requirement to undergo public participation processes, and increase the administrative fine to a maximum of R10 million.

The proposed amendment from “may” to “must” is an example of how environmental legislation is becoming more prescriptive, where a more cooperative approach is actually needed. The complexity of environmental legislation is such that different experts can even provide different opinions on the same matter. For example, opinions are requested by companies from experts on environmental authorisations, and there is often more than a single view. This places companies at risk of non-compliance, even when taking decisions based on due diligence. A company may commence an activity only to be told that the Department’s interpretation is different, and an authorisation was in fact needed.

The flexibility of the current S24G must be maintained to facilitate the consideration of the level of risk and/or environmental degradation, for example, when making these decisions as there may even have been no environmental impact from the commencement of the activity. These amendments could result in projects ceasing and negative economic and employment impacts; with nothing achieved for the environment. Competitors, for example, may abuse the proposed amendment to halt projects. Regarding the need for public participation, this could be accepted to be required to the same level as conventionally undertaken projects, but the project must not be halted. How an existing project will be managed if the outcome of public participation is unfavourable requires further discussion between the regulator and the regulated from a policy perspective. The proposed amendment should be reconsidered in this light.

* **Proposed Amendments to Section 24P**

The intention to include a wider scope for financial provisioning for environmental damage is not understood. Even though the actual scope is yet to be determined, given that the Minister will make declarations of instances where this is required, it is assumed that the scope will increase over time. What is the motivation for the proposed amendment in circumstances where financial provisioning is already required and being made as a part of environmental authorisations conditions and/or responsible behaviour? Proposed

* **Amendments to Section 28/43**

CAIA reads the proposed amendments as i) increasing the power of compliance officers, and ii) increasing the list of those that have the powers. These intended amendments are not understood as there are sufficient powers already in the legislation. Furthermore, the fact that appeals process will now force activities to stop cannot be supported. Industry can be asked objectively by the Committee for examples of where incorrect compliance notices and/or directives have been issued, mostly as a result of insufficient process knowledge and/or expertise. Amendments such as these could result in company closures and further dire negative economic and employment consequences. CAIA believes there should be a more rational approach to determining which of the existing compliance provisions should be used to achieve a certain objective of the DEFF in specific compliance matters. This approach would be preferred over blanket approaches that try and apply a one-size-fits-all approach

* **Definition of waste**

The current waste definition included in the National Environment Management: Waste Act (NEMWA) does not allow for material to move from the generator to a third party without it being called a waste and the further management or use thereof typically requires a waste management licence. An “Industrial Symbiosis” approach however, advocates for the opposite (facilitated beneficiation) which would require that the material is not deemed a “waste”. It can then be transferred to, and used by, a third party – ultimately for the purposes of beneficiation.

Ongoing discussions regarding the definition of waste have resulted in consensus that the definition should be simple and unambiguous. It is currently far too complex and is causing challenges, different interpretations, uncertainty and court cases. CAIA supports that along with inputs provided previously, if the substance, material, object (etcetera) is unwanted it should be regarded as a waste; to which the waste legislation should then apply. CAIA also reiterates its view that – given the proposed amendments to the definition of waste and Schedule 3 – there will be no value in retaining Schedule 3 in the NEMWA and it should be removed in its entirety. Furthermore, the recent outcome of a legal challenge of the definition of waste points to the need for the definition to allow for rational, risk-based beneficiation of waste without the need for any waste management licence or compliance with the National Environmental Management: Waste Act, as the material in question would not be considered a “waste”.

**6.4 Local Farmers**

Expressed the need for more training and support from the National Department of Environment, Forestry and Fisheries and the Gauteng Department of Agriculture and Rural Development (GDARD) in relation to the planting of Artemisia and other medicinal plants.

The definition of black professionals also includes indigenous knowledge of practitioners.

**6.5 Magaliesberg Biosphere made the following submissions**

**Section 24G:**

The Act makes reference to section 24G Reports being subject to public participation, but this public participation for section 24G is not clearly defined in the Act nor the EIA regulations Section 6, which does not speak to public participation for section 24G applications.

* The result is ambiguity and uncertainty around the 24G process and the rights of I&APs, who are often excluded from participating in the section 24G process. If the public is not given the right to comment on section24G reports, this goes against the regulations which stipulates that any process that forms part of the NEMA, must include public participation.
* Environmental transgressions are often brought to the attention of the competent authority by members of the public (whistle-blowers) who report them, and often request EMI inspections for suspect activities /suspected transgressions. After the initial inspection by the competent authority or EMI, the outcome of these inspections ( pre-compliance and compliance notices / issuing of section 24G directives and/ or fines) are not divulged to the reporting party , and this can support unwanted and unacceptable bribery and corruption.
* Whistle-blowers are the eyes and ears of the competent authority and EMIs, and they help to keep the perpetrator in check as the officials obviously cannot inspect and check every issue of compliance. If the public is not given access to what has been agreed to re compliance, the transgressor is not held to account. Compliance must be transparent in order to create awareness around the consequences of committing an offence under the NEMA and send a message to potential transgressors.
* **Section 31M NEMA –**

Any interested and affected party (e.g. whistle-blower who requests an EMI to conduct an inspection on suspicion of an environmental transgression) should be permitted to object to a notice and terms of a notice.

* What regulations speak to whistle-blowers and stakeholders being provided access to view compliance notices and fines issued, and the requirement of the EMI / competent authority to divulge this information ( either than through PAIA).

* **section 31A – 31Q NEMA**

In some instances an EMI will need the cooperation and assistance of SAPS to

1. support to effect arrests - especially in situations that may be dangerous, where EMIs are outnumbered.
2. Lay a charge for an environmental offence at a police station and make arrangements to detain confiscated material.
* Is there other legislation or policy that guides this cooperation arrangement, and if not there should be a code-of-conduct or guideline provided to the police that defines and creates awareness around environmental transgressions as well as the EMIs responsibilities and duties to carry out compliance, enforcement and protection of the environment.
* This submission is in relation to particular incidents we are experiencing, where SAPS are not cooperating with EMIs, and also that SAPS are not opening cases for Environmental crimes in our area. The only other recourse is private prosecution, which requires legal representation, and is not affordable for the average citizen. (section33)

**7. POSITION BY THE GAUTENG DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT**

In line with the GPL Rule 248 (1) (b) the Committee sought the views of the relevant Member of the Executive on the Bill. The Gauteng Department of Agriculture and Rural Development supports the National Environmental Management Laws Amendment Bill [B14D-2017] Section 76 in that:

* It will eliminate many of the current interpretation issues in the NEMA and the SEMAs.
* The compliance with and enforcement of, the provisions of the NEMA and the SEMAs, will be made easier.
* The NEMA and SEMAs’ alignment with the Constitution will be increased.
* Alignment in between pieces of environmental legislation will also be increased.
* Better protection of SA’s natural infrastructure, which is often taken for granted, and unfortunately, all too often, have been destroyed through “development” and replaced with inferior man-made infrastructure.
* Section 24 of the Constitution thus will be served better.
1. **SOCIO-ECONOMIC FINANCIAL IMPLICATIONS**

The amendment to the Compliance and Enforcement – clause 5 s24G -provides an opportunity to regulate an activity that was unlawfully commenced and is aimed at bringing a greater number of people within the regulatory framework of NEMA. This will ensure that communities are aware of areas that could potentially pose a health risk as perpetrators of these offences will be required to mitigate the risks posed by their activities.

The amendment to Biodiversity and Conservation and Environmental Programs Related Provisions – clause 39 s3 - ensures that the common law *res nullius* associated with wild animals means 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.

The amendment to the Integrated Environmental Management - clause 7 s24O - ensures that government departments and State Owned Entities (SOEs) hold one consultation to reduce the time it takes to finalize the Environmental Impact Assessment (EIA) process, which will benefit the Environmental Assessment Practitioner (EAP) with shortened turnaround times. This will be a most welcome initiative for consultants that conduct EIAs, as this will ensure that the time to conduct work and earn income is shortened.

The amendment to Air Quality Management Related Provisions - clause 48 s36 - ensures that Independent Power Producers (IPPs) are involved in the power producing business and that such matters form part of issues declared as national priority, and as such, the Minister is the Licensing Authority. This ensures that IPPs are able to contribute towards power generation and earn money for themselves.

The amendment to the Environmental System Related – clause 4 - ensures that there is integration of different processes which will reduce the duplication of activities. This ensures that the high costs for the applicants that were associated with these various processes will be reduced and translate to more income saved by such applicants.

1. **RECOMMENDATIONS BY THE COMMITTEE**

The Portfolio Committee recommends that:

* Due to the nature and complexity of environmental legislation, more trainings should be provided to stakeholders so at to ensure compliance with the legislation.
* Definition of Waste should be simplified in order to avoid unnecessary challenges, different interpretation which could lead to unnecessary court cases.
* The public participation as referred to in section 24G should be clearly defined.
* The Cooperative arrangement between SAPS and Environmental Management Inspectors should be regulated .
* Definition of black professionals should include indigenous knowledge practitioners.
* Amnesty concerning application fees for licences and permits should be provided for local practitioners or traditional healers that are struggling financially.

**10 NEGOTIATING POSITION ADOPTED BY THE COMMITTEE**

The Portfolio Committee on Economic Development, Environment, Agriculture and Rural Development supports the principle and details of the National Environmental Management Laws Amendment Bill [B14D-2017] subject to the recommendations being taken into consideration.