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LEGAL RESOURCES CENTRE

Centre *for*
Environmental Rights
Advancing Environmental Rights in South Africa

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Dear Advocate de Lange

NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL, 2012

1. In this document, the Centre for Environmental Rights (CER) and the Legal Resources Centre (LRC) jointly submit comments on the National Environmental Management Laws Amendment Bill, 2012 [B13-2012] ("the Bill").

2. The LRC is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances.

3. The CER is a non-profit organisation established in October 2009 by eight prominent civil society organisations (CSOs) in South Africa's environmental and environmental justice sector to provide legal and related support to environmental CSOs and communities. Its mission is to advance environmental rights in South Africa, and its vision is to facilitate civil society participation in environmental governance that is stronger, more streamlined, and better legally and scientifically equipped.

4. The CER and LRC are interested in making submissions on the Bill based on our experience in applying the legislation in question, both in our own name and on behalf of numerous civil society and community clients.

5. Below, we set out only those clauses in the Bill on which we have comments.

Proposed amendments in the Bill to the National Environmental Management Act, 1998 (NEMA)

Clause 1: Amendment of section 1 (Definitions)

6. The inclusion of the National Environment Management: Integrated Coastal Management Act, 2008 (ICMA), the National Environmental Management: Waste Act, 2008 (Waste Act) and the World Heritage Convention Act (WHCA), in the definition of "specific environmental management Act" (SEMA) is supported.

7. The inclusion of these statutes as SEMAs has important implications, including the application of the powers of Environmental Management Inspectors and the provisions of sections 34B-H of NEMA. It is important that the Bill include similar amendments to Schedule 3(a) of NEMA, so that the provisions of section 34 of NEMA also apply to the Waste Act, the ICMA and the WHCA.

Clause 2: Amendment of section 11 (Environmental implementation and management plans)

8. We support the effective amnesty for and extended periods for the submission of environmental implementation and management plans. The problem with the slow or absent submission of these plans is unlikely to be able to be solved through legislative provisions.

9. We note, however, that the Bill proposes that it is the provincial departments responsible for environmental affairs that are required to prepare environmental implementation plans. This section in NEMA currently provides that "every province" must prepare such plan. To aid provincial environment departments in securing participation from their sister departments, the Bill should make it clear that the provincial environmental implementation plan must be based on the inputs and participation of every other provincial department. This would avoid the marginalisation and aid the mainstreaming of crucial environmental issues across provincial departments responsible for the regulation of transport, health, agriculture and other activities with significant environmental impacts.

Clause 4: Amendment of section 24 (Environmental authorisations)

10. We support the principle of giving additional powers to the Minister and MEC to prohibit and restrict the granting of environmental authorisations for certain activities or areas and to develop norms and standards for those activities and areas. This power is essential for giving effect to section 24 of the Constitution of the Republic of South Africa, 1996 (Constitution) and the objectives of NEMA. The proposed clauses also adequately specify the purpose of such declarations ("*necessary in order to ensure protection of the environment, conservation of resources, sustainable development or human health and well-being*") and make adequate provision for consultation to comply with the requirements of cooperative governance under the Constitution.

Clause 5: Amendment of section 24C (Procedure for identifying competent authority)

11. We support the attempt to provide clarity regarding the types of applications to be submitted to the Province and to the Department of Environmental Affairs (DEA).

12. In principle, we favour any measure that expedites decision-making in applications for environmental authorisations, provided that such applications comply with all other requirements in NEMA and the Environmental Impact Assessment Regulations, 2010. The proposed provisions may well incentivise competent authorities at provincial level to make speedy decisions within the time-frames provided.

13. We do, however, reiterate our concerns about the additional administrative burden placed on the National Ministry and the DEA in this regard. If the Minister takes a decision, an appeal against the decision would now also lie against the Minister, further increasing the burden. We assume that these implications were fully considered by the DEA before publication of the Bill.

14. The proposed mechanism also likely constitutes a further domestic or internal remedy that would have to be exercised by an affected party before such party could approach court for an order compelling a decision on an application for an environmental authorisation under section 24 of NEMA, and an application for judicial review under sections 1(i), 6(2)(g) and 6(3) of the Promotion of Administrative Justice Act, 2000 on any failure to make a decision.

Clause 6: Amendment of section 24E (Minimum conditions attached to environmental authorisations)

15. In relation to this proposed amendment, we note that section 24E does not prescribe requirements for the financial and/or technical capacity to take transfer of rights and obligations in terms of an environmental authorisation (or indeed any requirement for being a fit and proper person to take such transfer). Making it even easier to transfer the rights and obligations under an authorisation - as is the effect of the proposed amendment - does not address this fundamental problem.

Clause 7: Amendment of section 24F (Offences related to commencement or continuation of listed activity)

16. We support making the failure to comply with any applicable norm or standard developed in terms of section 24(10) an offence.

17. In our view, section 24F(3) (which provides that it is a defence to a charge of having committed an offence if it is shown that the activity was commenced or continued in response to an emergency so as to protect human life, property or the environment) should include an element of proportionality so that the circumstances that constitute the "emergency" are, in fact, sufficiently serious to warrant committing the offence. In this regard, we propose that a proviso be added to this section to read as follows:

> "(3) It is a defence to a charge in terms of subsection (2) to show that the activity was commenced or continued in response to an emergency so as to protect human life, property or the environment, provided that:
> (a) the activity commenced or continued is proportional to the risk to human life, property or the environment that the activity sought to limit or avoid; and
> (b) the emergency was not caused by the person who wishes to rely on it."

18. We note that the reference to protection of property has not been included in the proposed amendment to section 24G(4), which provides for an exemption from paying the administrative fine attached to an application under section 24G in an emergency response situation. This discrepancy is not explained in the Explanatory Memorandum to the Bill. We would prefer that protection of property be deleted from both provisions.

19. We regret that this clause contains no proposed increase in the maximum criminal fine for contraventions of section 24F(2). A maximum monetary penalty of R5 million, having regard, in particular, to the nature of the offender (corporate or individual) and the benefits that accrued to the offender by the commission of the offence, will, in many cases, be too low to constitute a proper disincentive for illegal activity. This penalty is also not in line with the penalty provided for in the proposed section 28A(1) of NEMA, nor similar offences in the SEMAs.

20. In this regard, please see the detailed recommendations made on the calculation of criminal fines in "1". This is a submission the CER made to the DEA on 12 May 2011 about proposed amendments to sections 24F and 24G of NEMA.

Clause 8: Amendment of section 24G (Rectification of unlawful commencement of activity)

Introductory remarks about section 24G, and caution against expansion of its application

21. When first included in legislation, section 24G was only ever intended to be applicable as a provision applicable to the transition from authorisations under the Environment Conservation Act, 1989 to environmental authorisations under NEMA, for a brief six month period. This section has now morphed into a monster with a range of unintended consequences that are undermining the very environmental management regulatory regime of which it forms part. Its penalty mechanism has also created a system of perverse incentives within the departments implementing it, ensuring that a section 24G application is effectively never refused, and thereby creating a mechanism for violators to buy themselves out of criminal prosecution. The DEA itself has observed and commented on a trend of companies budgeting for the section 24G administrative fine and then commencing with an activity without an environmental authorisation.

22. We refer you to:

    a. a submission made by the CER to the DEA on 12 May 2011. This detailed submission summarises the concerns of various stakeholders – representatives of non-governmental and community organisations, academics, experienced environmental assessment practitioners and other consultants who work with section 24G on a regular basis. This detailed submission (attached at **"1"**) proposed a significant amendment to section 24G to try to address some of the problems raised by civil society; and

    b. a Master's thesis by Lea September, entitled "A critical analysis of the application of s24G provisions of the National Environmental Management Act (NEMA). The Gauteng Province Experience". September's thesis has been accepted by the Northwest University, subject to minor changes, and is submitted with this submission. September found that "*most of the concerns relating to S24G have actually materialised and S24G has in some cases resulted in a big step backwards in terms of sound environmental management and governance*". She found that the section "*has seriously undermined the overall compliance and enforcement effort by opening the door to abuse and providing a mechanism which effectively accommodates environmental crime*."

23. In our view, section 24G must either be amended urgently to attempt to remedy some of these incentives and consequences, or must be scrapped in its entirety - there may already be sufficient existing legislative tools in existence to regularise unlawful activities**.**

24. Against this background, we are concerned that the proposed amendment further expands the scope of section 24G (and there is no explanation provided for why waste management licences are singled out from all other authorisations under the SEMAs), instead of urgently addressing the problems created by this inappropriate provision. If the Parliamentary Committee and/or the DEA intend addressing these issues in the near future, it is imperative that this section should not now be expanded, since this will inevitably create expectations and vested interests that will be difficult to reverse.

Comments on the proposed amendment to section 24G

25. Subject to the concerns set out above, we make the submissions set out below on the proposed amendment to section 24G.

26. There seems to be an oversight in the proposed section 24G(1)(a). It deals with a section 24G application by a person who has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1). Section 24F(1)(b) deals with the offence of commencing and continuing with an activity listed in terms of section 24(2)(d) without compliance with an applicable norm or standard. Section 24(2)(d) activities do not require environmental authorisation, but must comply with prescribed norms and standards. If the intention is to include section 24F(1)(b) under section 24G(1)(a), the latter should, we submit, be amended as follows:

> "(1) On application by a person who-
>
> (a) has **[committed an offence in terms of section 24F(2)(a)]** commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1)(a);
>
> (b) has commenced with a listed activity without compliance with an applicable norm or standard in contravention of section 24F(1)(b);
>
> …."

27. The current section 24G provides two options to the authority once the reports and information have been considered. The authority may either: "direct the person to cease the activity…"; or "issue an environmental authorisation to such person…". We note that the first option – that of directing the person to cease the activity, either wholly or in part" has been replaced in the proposed section 24G with the option of refusing to issue an environmental authorisation. We support this amendment.

28. We believe that it is appropriate to include the proposed section 24G(4), thereby exempting persons who fulfil the requirements of section 24F(3) from the administrative fine under section 24G(2A). We say this because a person who fulfils the requirements of the defence under section 24F(3) of NEMA cannot be found to have committed an offence in terms of section 24F(1) (read with section 24F(2)) and would therefore not fall within the scope of the proposed section 24G(1)(a).

29. As mentioned above, there is a discrepancy between the proposed section 24G(4) and section 24F(3) in that the former does not mention the protection of property. As indicated above, we would prefer that protection of property be deleted from both provisions.

30. We support the proposed increase of the amount of the administrative fine in the proposed section 24G(2A), but please note the detailed recommendations made on the calculation of administrative fines in "1".

Clause 9: Amendment of section 24M (Exemptions from applications of certain provisions)

31. We strongly support the inclusion of the proposed section 24M(1A). The power to grant exemptions from the requirement to obtain an environmental authorisation undermines the comprehensive environmental impact management regime provided for in Chapter 4 of NEMA and the EIA Regulations.

Clause 11: Amendment of section 28 (Duty of care and remediation of environmental damage)

32. We support the amendment of section 28(4), which we believe will expedite and make it easier for authorities to take step against violators of section 28.

33. We are heartened to see that the Bill no longer proposes the deletion of section 28(12). This provision is the only statutory mechanism in NEMA available to individuals, communities and civil society organisations to ensure investigation of and a decision on an alleged violation of section 28 by authorities. This is a crucial provision for civil society.

Clause 12: Insertion of section 28A (Criminal liability of certain persons)

34. We fully support the proposed increase of the penalty for contraventions of these criminal offences. This increase is also in line with the penalties for other similar offences in NEMA, as well as offences in the SEMAs.

35. We are pleased to see that the offence for failing to comply with a section 28 directive has been re-inserted into the Bill.

36. The replacement of the phrase "likely to affect the environment in a significant manner" with "likely to detrimentally affect the environment" is an improvement, and creates consistency with the phrase "detrimentally affects", which precedes it.

Clause 13: Amendment of section 30 (control of emergency incidents)

37. We support the amendment of this clause, which makes clear that failure to comply with section 30(6) is an offence. We are pleased to see that the penalties have been increased.

Clause 18: Amendment of section 48 (State bound)

38. We fully support this proposed introduction to criminal liability for organs of state. Creating this disincentive for organs of state is crucial for reaffirming NEMA's status as framework legislation for the protection of the environment from unlawful activities, including those committed by organs of state with legislative mandates. Importantly, it also means that managers, agents and employees of organs of state can be held liable under section 34.

Proposed amendments in the Bill to the National Environmental Management: Biodiversity Act, 2004 (Biodiversity Act)

General comments

39. In general, the extended provision for public participation regarding the publishing of non-detriment findings, exemptions and listings is supported. The provisions clarifying the Minister's powers of amendment and repeal in respect of listing are also welcome. It is important that the listings be flexible to reflect changing circumstances of species and ecosystems.

Clause 22: Insertion of sections 56(1A) and (1B) (Listing of species that are threatened or in need of national protection)
Clause 23: Insertion of section 57(5) (Restricted activities involving listed threatened or protected species)
Clause 31: Insertion of section 66(4) (Exemptions)
Clause 32: Insertion of section 70(4) (List of invasive species)
Clause 33: Insertion of sections 71(3) and (4) (Restricted activities involving listed invasive species
Clause 34: Insertion of section 71A (Prohibitions)

40. We take note that the Bill proposes various amendments in relation to the refining of invasive species provisions. New sections are proposed allowing the Minister to make notices regarding threatened or protected species and alien and invasive species applicable to different categories of species, persons or areas. In general, this will allow the Biodiversity Act and its regulations to be applied more appropriately. Since the current draft Alien and Invasive Species Regulations (see Chapter 5) and National Lists of Invasive Species already differentiate between different categories of invasive species, they will require amendment if the amendment to section 70 of the Biodiversity Act is not enacted. Failing this, they may be *ultra vires*, as the Biodiversity Act, as currently drafted, does not make provision for the Minister to differentiate between categories of invasive species. It is crucial that the Regulations and the Bill "speak to one another", and that they, together, make suitable provision in regard to these species. In this regard, without an indication of the final content of the Regulations, it is difficult to know whether the Bill makes suitable provision for these species.

41. In relation to the proposed clause 71A(1), it is not clear why this section uses the word "specimen". "Specimen" in the Biodiversity Act refers to an individual thing. It seems that the intention is to allow the Minister to prohibit certain restricted activities involving listed invasive species. In the circumstances, it seems that the words "specimen of a" should be deleted, so that the section reads:

> "*71A(1) The Minister may, by notice in the Gazette, specify a listed invasive species for which a permit to carry out a restricted activity may not be issued in terms of Chapter 7.*"

Clause 38: Amendment of section 85 (Establishment of Bioprospecting Trust Fund)

42. The proposed provision violates constitutional principles of equality, freedom of association, self-determination, the African Charter on Human and Peoples' Rights to development, and international law principles of free, prior and informed consent.

43. Firstly, the proposed provision violates section 9 of the Constitution by creating an unfair distinction between stakeholders who have agreements independent of traditional leaders and those who do not. In the former case, all stakeholders must receive benefits from the Bioprospecting Fund; but, in the latter the funds are paid to the traditional council. Where the funds are paid to the traditional council, it is unclear what the destiny of the money is after that, and whether these structures are managed with a comparable degree of diligence and financial accountability.

44. Secondly, the provision precludes any possibility of a traditional community or a part of such a community concluding an agreement independent of the traditional council, in conflict with protected rights of freedom of association and self-determination. The proposed clause refers merely to the existence of a traditional council, not that it must be included in the agreement. This interpretation would be consistent with the current efforts by traditional leaders to amend the Communal Property Associations Act of 1996 so that such associations cease to be lawful within traditional community boundaries. The provision would encourage parties to such agreements to include traditional councils as stakeholders in such agreements, despite the fact that they will receive the proceeds of such agreements, and this might facilitate investor-friendly agreements to the detriment of ordinary citizens. The implication of the proposed section is that any community that falls within the boundary of a traditional council will see the proceeds of a benefit-sharing agreement going to the council, in violation of the community's right to development.

45. In addition, the proposed amendment violates the principle of free prior informed consent (FPIC) as embodied in the Convention on Biological Diversity (CBD), 1992. Article, 8(j) of the Convention calls on all Contracting States,

"to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities…….and promote their wider application ***with the approval and involvement of the holders of such knowledge, innovation and practices****".*[1] (emphasis added)

46. The Fifth Conference of Parties to the Convention on Biological Diversity, in Decision V/16, reaffirmed its commitment to the principle that communities are entitled to free, prior and informed consent by stating:

> *"access to traditional knowledge, innovation and practices of indigenous and local communities* ***should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices****."* (emphasis added)

47. The proposed amendment violates international law expounded above by entrenching state control over the affairs of communities which are governed by customary law, in conflict with these accepted international principles.

48. While a blanket provision that all moneys raised within the jurisdiction of a traditional council must automatically go to its bank account must be unconstitutional on the grounds mentioned above (and could only be saved by making it optional), there are further practical concerns which we wish to raise with a provision of this nature.

49. No traditional council elections have been held in the province of Limpopo, despite a deadline of 24 September 2011 under the Traditional Leaders Governance and Frameworks Act (TLGFA). The result is that traditional councils or traditional authorities in that province actually do not currently exist in law. Effectively, if the proposed amendment is to be implemented governing the proceeds of benefit-sharing agreements, a legal vacuum will be created. This uncertainty in the management of scarce resources of the most marginalised communities has the risk of increasing rather than addressing existing poverty and lack of access by these communities to capital and economic opportunity.

50. Furthermore, the reliance of this section on traditional councils as defined in the TLGFA attracts all the problems that the TLGFA itself is currently facing. The central concern with the TLGFA has always been that it entrenched the 1951 Bantu Authorities Act boundaries of traditional communities and thus the jurisdictions of the traditional councils. Communities have been resisting these illegitimate boundaries for some time. Recently, in response to this, the Premier of Limpopo gazetted the creation of a special commission established in the province to investigate the more than 550 boundary disputes in that province alone. The National Council of Provinces Select Committee has publicly acknowledged that these boundaries are an issue of major concern. In light of official acknowledgement of the questionable legitimacy of many of these boundaries, a further entrenchment of traditional council governance powers through amendments to the Bill is premature and unreasonable.

51. Another problem created by the boundaries issue is that an agreement with a community might span across different traditional councils, leading to uncertainty over who is entitled to benefit from the proceeds of benefit-sharing agreements. Stakeholders who live outside of the area of authority of any stakeholder who is a traditional council may be prejudiced by this provision - since they fall outside its area of jurisdiction, they might not have the basis to hold such authority to account. They might also not benefit from what the traditional council does with the funds if they fall under a traditional council other than the one which is the beneficiary of the agreement.

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[1] *See also* Tamang, Parshuram, "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices," Presented at Workshop on Free, Prior, and Informed Consent, United Nations, New York, 17-19 Jan. 2005.

52. The proposed amendment notably fails to mention any financial controls and accountability over money paid into the bank accounts of traditional councils. This will only introduce further confusion and opportunities for financial mismanagement. The TLGFA imposes only minimum requirements for financial accountability for funds held by a traditional council. Section 4(2)(b) states that the traditional council must have its financial statements audited, and section 4(3)(b) states that the traditional council "*must meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and levies received by the traditional council.*" No requirements are imposed regarding disbursements to stakeholders or community involvement in decision-making.

53. Each province also has its own version of the TLGFA, which varies province by province and would therefore introduce great variability in the financial accountability and management of funds across provinces. The chart below illustrates this.

Province	**Relevant provisions from Provincial Traditional Leadership and Governance Framework Acts**
Eastern Cape	29 (2) The funds [of a traditional council] must be utilized for such purposes as may be prescribed. 32. Financial control and accountability.— (1) **The Public Finance Management Act, 1999** (Act No. 1 of 1999), applies to the management of the funds referred to in sections 28, 29 and 31. *(emphasis added)* (2) Traditional councils must keep such books of account as may be prescribed, and such books must be audited by the Auditor-General. (3) The person who must account for the funds of the traditional council must be designated by the Premier after consultation with the traditional council concerned.
Free State	Contains minimum requirements of national TLGFA
Kwazulu-Natal	47 (1) [Traditional Councils, the Provincial House of Traditional Leaders, and Local Houses of Traditional Leaders] may . . . establish and administer a trust, funds of which must be used as contemplated in this Act, and as contemplated in the **Public Finance Management Act, 1999** . . . *(emphasis added)*
Limpopo	27. Accounting Officer for finances of traditional councils.—The Director General is the accounting officer for the funds of the traditional councils. 28. Quarterly financial reports.—Every traditional council must in respect of each financial year, within 15 days after the end of each quarter, submit to the Director General, a comprehensive report on income and expenditure for the preceding quarter and annually after the end of the financial year and at the time determined by the Premier, submit to the Director General, a comprehensive report on the traditional council's income and expenditure for the preceding year. 29. Keeping of records.—(1) A traditional council must keep proper records of all its activities and income and expenditure; (2) A traditional council must make the records referred in subsection (1) available to be audited by the Auditor-General.
Mpumalanga	Contains minimum requirements of national TLGFA
North West	30(5) A traditional council shall, in respect of each financial year submit to the Premier for his/her approval estimates of the revenue and expenditure for each traditional community account referred to in subsection (1): Provided that such estimates shall reach the Premier not later than the last day of February of the year preceding such financial

	year. (6) No expenditure shall be incurred and no payments shall be made from an account referred to in subsection (1), except in accordance with the estimates of expenditure from such account approved in terms of subsection (5): Provided that any recurring expenditure, as determined from time to time may be paid as well as such payments which a traditional council may be obliged to make in accordance with any contract, agreement or debt lawfully entered into or incurred or in accordance with an order of any competent court. (7) Notwithstanding the provisions contained in subsection (6) the Premier may authorise the payment of any amount from account referred to in subsection (1) on the submission of any revised estimates of expenditure from such account if the Premier is satisfied that such amount is due, that the payment thereof is necessary and that funds are available.
Northern Cape	s. 30(5)-(7) same as North West

54. Notably, only two provinces, Eastern Cape and Kwazulu-Natal, explicitly provide that funds be managed in accordance with The Public Finance Management Act, 1999. Also, Free State and Mpumalanga only contain the minimum requirements imposed by the national TLGFA. Thus, the proposed amendment's silence on financial accountability over money paid to bank accounts of traditional councils at a minimum sets a very low bar of oversight and subjects such money to varying degrees of accountability depending on the province.

55. The level of oversight over the management of such funds by traditional councils will, in all likelihood, be far less than the level of oversight over a single entity such as the Bioprospecting Fund. Further, the record of these councils in relation to financial management has been dismal. Proper appraisal of this is required before further financial governance can be expected from them.

56. The proposed section 85(5) as it is currently drafted results in an unlawful expropriation without compensation of the proceeds of benefit-sharing agreements by traditional councils, in that there is no provision for payment of such proceeds to the stakeholders in such agreements. Where stakeholders include investors under bilateral investment treaties, such expropriation could result in damages claims against the South African state.

Clause 41: Amendment of section 88 (Application for permits)
Clause 42: Amendment of section 93 (Cancellation of permits)

57. We support allowing the Minister to defer a decision to issue a permit if an applicant is under investigation. However, the Biodiversity Act should go further and expressly allow the Minister to refuse a permit where a person is convicted of an offence under the Act.

58. The proposed new section 93 allows the Minister to cancel existing permits granted to convicted persons. However, where a person is convicted of an offence under the Biodiversity Act before a decision is taken, it is logical that the decision-maker be able to consider whether a subsequent permit should be granted in light of the offence. In the circumstances, it should be made clear in section 88 that a previous contravention of the Biodiversity Act, NEMA or any legislation applicable to biodiversity is a factor to be considered by the decision-maker when deciding whether to grant a permit. This would be in keeping with the criteria for "fit and proper persons" in the Waste Act, and the National Environmental Management: Air Quality Act, 2004.

Clause 44: Repeal of section 94 (Appeals to be lodged with the Minister)
Clause 45: Repeal of section 95 (Appeal panels)
Clause 46: Repeal of section 96 (Decisions)

59. It is understood that the intention of repealing these sections is that there should be a single appeal procedure for all appeals under section 43 of NEMA. This is supported in the interests of simplifying the procedure for the general public (and will be especially useful where integrated authorisations are appealed). However, although the EIA Regulations, 2010 prescribe a procedure for section 43 NEMA appeals, the preamble to these Regulations refer to environmental impact assessments and Regulation 58 indicates that Chapter 7 – which deals with appeals – applies to decisions taken "in the exercise of a power of duty vested by [NEMA] or these regulations in a competent authority". The effect is that the EIA Regulations, 2010 cannot apply to appeals in terms of the Biodiversity Act, and that, if sections 94-96 of the Biodiversity Act are repealed without a new appeal procedure being prescribed, there will be a regulatory gap.

60. For these reasons, it is our view that, if the DEA wishes to align the appeal processes, Chapter 7 should be excised from the EIA Regulations and generic NEMA appeal regulations should be published in order to integrate and align appeal processes in terms of NEMA and the SEMAs.

Clause 50: Amendment of section 102 (Penalties)

61. It is consistent for offences relating to bioprospecting and listed invasive species to be subjected to the "topping up" of fines in the same way that offences relating to threatened or protected species are. We also support this because the effect of these provisions is that fines keep pace with the commercial advantage to be obtained by committing the offence and therefore can have a significant deterrent effect. However, it is not clear why offences relating to alien species (such as the section 65(1) offence) have not been included.

Proposed amendment in the Bill to the National Environmental Management: Air Quality Act, 2004 (AQA)

Clause 52: Amendment of section 55 (General)

62. We support this amendment as it creates consistency between the provisions of section 52 of the AQA - which deals with penalties for offences in terms of the AQA - and the penalty provisions in Regulations under the AQA**.**

General comments, and priorities for law reform

63. Most of the amendments proposed in the Bill represent improvements to the regulatory regime for environmental management and related matters.

64. Having said that, the CER and its partners, and the LRC and the clients it represents, need to draw your attention to the following inadequately regulated matters in NEMA and related legislation. We hope that these matters are already the subject of a further legislative amendment process; if not, we ask that the Portfolio Committee engage with other relevant Portfolio Committees and Departments to ensure that these matters receive priority:

    a. **Integrated permitting**: Although NEMA makes some provision for integrated permitting, those provisions are not yet mirrored in the National Water Act, 1998, nor has the limbo in which the Mineral and Petroleum Resources Development Amendment Act, 2008 finds itself been resolved

to ensure a streamlined permitting process that gives due regard to the exercise of all relevant Constitutional and statutory mandates to regulate activities that impact on the environment.

b. **Administrative penalties:** While we welcome the increase of criminal penalties in this Bill, none of our key environmental legislation makes provision for administrative penalties that will allow for easier enforcement with penalties that take into account both the cost of violations to society, and the benefits gained by violators (see the example of the administrative penalty regime applied to violations of the Competition Act, 1998). Only the real risk of meaningful penalties will significantly improve compliance with environmental legislation.

c. Amendments required to the National Environmental Management: Protected Areas Act, 2003 (Protected Areas Act): These include extended protection of mountain catchment areas; limitations on the Minister and MECs' powers to declare protected environments; and the consequences of cancellation of co-management agreements for protected areas.

d. **Amendments required to the Biodiversity Act, and consequential changes to the 2010 EIA Regulations**: These include provision for MECs and/or heads of provincial environmental departments to conclude biodiversity management agreements; provision for tools to give effect to and incentivise greater implementation of biodiversity management agreements; and clarifying the link between the threatening process provision and the 2010 EIA regulations.

65. We are willing and able to make detailed submissions to the Portfolio Committee and the Department on any of the issues raised above.

66. We thank the Parliamentary Committee for the opportunity to comment on the Bill and hope that our concerns can be addressed.

Yours sincerely

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