environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL [B13-2012]

COMMENTS AND RESPONSE TABLE			
SUBMISSIONS	**PROPOSALS**	**DEA RESPONSES**	**PORTFOLIO COMMITTEE**
PROPOSED AMENDMENTS TO THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998			
Clause 1: Amendment to section 1 (Definitions)			
WESTERN CAPE PROVINCIAL GOVERNMENT (a) It is proposed that the term "in the proposed definitions "Department" and "Minister" should be drafted in small letters, as the term refers to a functional area not a title. (b) It is proposed that the word "Environmental" before the word "Legislation" in the proposed definition for "Minister" should be deleted, as the Minister is responsible for all environmental matters. Therefore, the Minister cannot exclude himself with regards to the implementation of environmental legislation for which he or she is responsible for the implementation.		(a) Disagree. (b) Disagree. The Minister of Mineral Resources will implement environmental legislation insofar as it relates to mining.	The Committee indicated that the long title must be amended to correctly capture that there is no exemptions from obtaining an environmental authorisation. Technical amendment. Needs to be considered. The Committee raised a concern regarding the proposed amendment to change the designation of the "Minister of Minerals and Energy" to "Minister responsible for Mineral Resources". The Committee raised a concern regarding the 2008 Amendment which are not in operation yet as far as it relates to the mining provisions. Is it proper to amend now or should the proposed amendment wait for the conclusion of the current negotiations around the environmental

The definition currently reads: "**competent authority**', in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity;". The reference to "listed activities" in the definition is problematic because "**listed activities**" is defined as "when used in Chapter 5, means an activity identified in terms of section 24(2)(a) and (d)". The definition of "**specified activities**" in turn reads "when used in Chapter 5, means an activity as specified within a listed geographical area in terms of section 24(2)(b) and (c)". The definition of **"environmental authorisation"**, reads "when used in Chapter 5, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act". In others words, although the EIA process is the process to be used to inform a waste management licence and atmospheric emission licence, the Licencing Authorities in terms of the	The definition should be amended to read "in respect of activities which require environmental authorisation, means the organs of state charged with reviewing or deciding an application for environmental authorisation."	Disagree. Although the NEMA process is used, licences are issued in terms of the NEM: WA and NEM: AQA and not in terms of NEMA.	management function. The Department was requested to provide a briefing document explaining the commencement dates of the MPRDA Amendment Act, 2008 and NEMA Amendment Act, 2008. (An explanation was submitted.) The Department should assess whether the definition of competent authority should be amended to refer to air quality licences or waste management licences. The definitions of environment, sustainable development and listed activities should be considered under the next round of amendments to NEMA. The comprehensive amendment of the definition of waste must be assessed and dealt with under NEMWA Amendment Bill. However, the technical amendment in the waste definition to change the word "and" to "or" should be considered under the current Bill, unless the Committee could be convinced otherwise.

Waste Act and Air Quality Act are not included in the definition of competent authority. The definition should be amended, in line with the proposed amendments to Section 28 of NEMA, to read "in respect of activities which require environmental authorisation, means the organs of state charged with reviewing or deciding an application for environmental authorisation." Clarity should also be provided to indicate that pending the commencement of the Mineral and Petroleum Resources Development Amendment Act, 2008 environmental authorisation must be granted in respect of non-mining-specific activities listed in the NEMA 2010 EIA Listing Notices (Listing Notice 1, 2, and 3) (e.g. removal of indigenous vegetation within a critically endangered or endangered ecosystem). This abovementioned clarification is sought to prevent further litigation between organs of state pending any discussions to amend the current procedure which is to come into force after the date of commencement of the Mineral and Petroleum Resources Development Amendment Act, 2008. In this regard, it is noted that the provincial departments of		The Department of Environmental Affairs and the Department of Mineral Resources are currently in discussion and all ambiguities in terms of the two pieces of legislations will be removed in the near future.	

environmental affairs have not been party to any discussions with regard to law reform relating to this issue. *Definition of "environment", "sustainable development" and section 23* While the "environment" consists of the social, economic and ecological environment, the wording in the NEMA at times implies that the "environment" is separate from social and economic aspects. For instance the definition of "**sustainable development**" reads "means the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations". This should read "...social, economic and ecological factors...". Similarly, the reference in s2(4)(i) to "The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment." should read "social, economic and ecological impacts...". In addition to the above, the reference in s23(2)(b) to "identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural	Amend the definition of **"environment"** to read: "means the surroundings within which humans exist which consist of the ecological, social and economic environment, and that are made up of - (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing. Also amend the definition of "**sustainable development**" and s2(4)(i) and s23(2)(b).	The NEMLA Bill is not amending the definitions of "environment" and "sustainable development". It is suggested that this proposal should be considered in the NEMA Amendment Bill, 2013.	Should be considered under the next round of amendments.

heritage...". This should read "...impacts on the ecological conditions, socio-economic conditions and cultural heritage...". While the abovementioned sections should be amended, the definition of "**environment**" should also be amended to read ""means the surroundings within which humans exist which consist of the ecological, social and economic environment, and that are made up of - (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing." *Definition of "listed activities"* The definition of "**listed activities**" reads "when used in Chapter 5, means an activity identified in terms of section 24(2)(a) and (d)". This definition excludes the other listing notices in terms the Waste Act and Air Quality Act. The definition should be amended to read "when used in Chapter 5, means an activity identified in terms of this Act or any of the specific environmental management Acts as an activity which	The definition of "listed activity" should be amended to read "when used in Chapter 5, means an activity **[identified in terms of section 24(2)(a) and (d)]** identified in terms of this Act or any of the specific environmental management Acts as an activity which requires environmental authorisation."	The NEMLA Bill is not amending the definitions of "listed activities". It is suggested that this proposal should be considered in the NEMA Amendment Bill, 2013.	Should be considered under the next round of amendments.

requires environmental authorisation." *Definition of "specific environmental management Act"* The proposed amended definition of "specific environmental management Act" incorrectly refers to "Environmental Conservation Act, 1989 (Act No. 73 of 1989)". A clause could also be inserted to highlight that other Acts may also in future be added to the list of Acts regarded as SEMAs.	This must simply read "Environment Conservation Act, 1989 (Act No. 73 of 1989)". A clause could also be inserted to highlight that other Acts may also in future be added to the list of Acts regarded as SEMAs.	Agree reference to the Environment Conservation Act, 1989 should be changed. Disagree. We are not sure what value such clause will add. It is suggested that this proposal should be considered in the NEMA Amendment Bill, 2013.	Agree reference to the Environment Conservation Act, 1989 should be changed as suggested. Disagree.
ERASMUS ATTORNEY The extension of the definition of "Specific Environmental Management Act" to include the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008), the National Environmental Management: Waste Act, 2008 (Act 59 of 2008) and the World Heritage Convention Act, 1999 (Act 49 of 1999) is necessary for the integration of the overall framework for environmental governance and welcomed. It is noted, however, that there has been no concomitant proposed		In terms of section 34(10) the Schedule can be amended by notice in the *Gazette*. The notice required to amend Schedule 3 has been approved by the Minister, after a period of publishing for public comment, and will imminently be gazetted for final implementation.	The Committee noted the amendment of schedule 3(a) of NEMA by the Department.

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amendment to Schedule 3(a) of NEMA and assume that this omission will be addressed before the final version of the Bill serves before Parliament.			
ACMP *Definition of waste* In addition to providing legal clarity on the applicability of section 24G to the unlawful commencement of a waste management activity under the National Environmental Management: Waste Act, 2008, it is recommended that a provision be included to clarify when a substance assumes waste status to prevent illegal commencement/undertaking of a waste activity. The definition of waste is clear but it is important to allow for a matrix to direct interpretation. The matrix could also assist in clarifying when a substance assumes waste status and/or ceases to be waste during the industrial process. This is particularly important because increasingly cleaner production principles as well as emerging technologies are being embraced by industry resulting in ambiguity in interpretation when a substance should be considered waste vs a resource.	It is to be noted that the Waste Act only allows for substances to cease as a waste if it undergoes recover, reuse or recycle processes. It is important that the NEMA be amended to allow for innovative approaches, emerging technologies, cleaner production and resource recovery through EIA, norms and standards, etc. An example of a provision that could be considered for inclusion under section 44(1) of NEMA could be as follows: 44(1) The Minister may make regulations regarding- (a) a waste protocol that confirms when a substance assumes waste status and/or an end of waste status for materials, objects or substances that have an imminent beneficial use supporting the principles of the hierarchy of waste principles and/or sustainable development.	The Department is of the view that any proposed amendment to the definition of waste must be carefully considered as the current definition determines the scope of the Act and forms the basis for most of the provisions of the NEMWA. The Department is currently in the process of identifying implementation challenges with an objective of compiling a discussion document on the areas to be amended. The process of amending the NEMWA may begin at the next financial year. It is suggested that this proposal be included in the discussion document that will inform any potential amendments to the NEMWA.	The Committee indicated that the comprehensive amendment of the waste definition must be considered in the broader Departmental legislative review process.
Clause 2: Amendment of section 11 (Environmental implementation and management plans)			
CENTRE FOR ENVIRONMENTAL RIGHTS The Bill proposes that it is the provincial departments responsible for	The Bill should make it clear that the provincial environmental	Disagree, the provincial departments for environmental affairs coordinates	The Committee indicated that the relevant department of environmental

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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	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.	the inputs from the province.	affairs in every province must ensure that inputs from affected department are included in the EIP.
RAND WATER The amendment of section 11 (1) and (2) of NEMA is not aligned to section 11 (4) of NEMA. Section 11 (4) impliedly requires organs of state to submit environmental plans within one year of the promulgation of NEMA as amended and every four years thereafter.	Rand Water suggests that the time period required for organs of state to submit environmental plans must also be increased to 5 years after promulgation of the amended version of the NEMA and at the interval of not more than 5 years thereafter. This will align with the time period required of the organs of state's Executive Authority.	Disagree. Subsection (4) does not indicate the period.	The Committee indicated that the comment is not correct in that subsection (4) does not refer to any timeframes.
WESTERN CAPE PROVINCIAL GOVERNMENT Why are municipalities not included on the preparation of an environmental implementation plan, because they also exercise this function, which may affect the environment	Include a section where a municipality must prepare an environmental implementation plan within one year of the Act taking effect and at least every five years thereafter. The plan must be aligned to the provincial implementation plan.	The Legislature avoided duplication in plans. The municipality's IDP contains an environmental chapter and the Department is given the opportunity to comment on those plans.	The Committee agrees with this comment. The Committee wanted to know why are municipalities not required to compile such a plan. The Committee raised this matter to be included in the resolution. Therefore, the Department was requested to submit a report on the practical implementation of section 11 of NEMA, and such a report will determine whether this section should also include municipalities. (An explanation was provided)

WESTERN CAPE PROVINCIAL GOVERNMENT The wording of the Act itself should not change to refer to the "Amendment Act".	Should amend to say "...one year or any other period the Minister may, by notice in the *Gazette* determine....".	Disagree. The intention was to refer to the Amendment Act.	The Committee indicated that Bill correctly refers to the Amendment Act.
AFRIFORUM AfriForum would like to oppose the timeframe in this amendment. With the current situation in South Africa and more water problems arising, we need a sense of urgency concerning our environment and natural resources. Plans must be compiled efficiently and effectively but it must be done in a shorter timeframe and implemented! The provincial department for environmental affairs must prepare an environmental implementation plan within three years coming into operation of the NEMA Laws Amendment Act, 2012, and at intervals of not more than four years thereafter.		Disagree. The intention of the proposed amendment is to align the cycle with the MTEF period which runs for 5 years. This will thus enable the plans to be informed and aligned to the government priorities.	The Committee asked what happens after the first 5 years, and the Bill should clearly makes provision for a procedure.
ERASMUS ATTORNEY As is confirmed by the list of Departments contained in Schedule 1 to NEMA, responsibility for environmental governance on a national level does not rest only with the Department responsible for environmental affairs. This is no different at a provincial level where several departments exercise	Section 11(1) of NEMA be amended to include a reference to every provincial Department exercising functions which may affect the environment; and Schedule 1 to NEMA be extended to	We do not agree with the proposal as it is not the intention of the Legislature to ensure that every provincial department exercising functions which may affect the environment prepares an environmental implementation plan. However, it is envisaged that the provincial department responsible for environmental affairs will prepare the document in consultation with provincial departments with functions affecting the environment.	The Committee indicated that the relevant department of environmental affairs in every province must ensure that inputs from affected department are included in the EIP.

functions which may affect the environment. It is consequently unclear as to why the Bill proposes only that "every provincial Department responsible for environmental affairs" must prepare an environmental implementation plan and omits reference to other provincial Departments that exercise functions which may affect the environment. The simple fact of the matter is that the provincial Departments responsible for environmental affairs do not have the capacity, data or institutional knowledge with which to prepare comprehensive provincial environmental implementation plans that relate to all departmental functions that may affect the environment that are exercised throughout the province.	include a list of such provincial Departments	In order to strengthen compliance with the environmental implementation plan, it is further suggested that section 16(4) be amended to open with the wording: ***"Each provincial department responsible for environment must ensure that - ..."*** and also with an insertion of paragraph (c) that reads: ***16(4)(c) every provincial department which exercises functions which may affect the environment adhere to the relevant environmental implementation and management plans, and the principles contained in section 2 in the preparation of any policy, programme or plan.***	
ACMP In addition to the adjustment of timeframes it is to be noted that the responsibility has shifted from the Provincial Government to a single Provincial Department. Hence comment for both timeframe and responsible Department would be addressed as follows: **a) Timeframe** It is noted that timeframe has been adjusted as follows: • EIP/EMP: prepare an environmental implementation plan within **[one year]** five years from publishing of National Environmental Management Laws	It is recommended that the Authorities prepare an environmental implementation/management plan within two years and not 5 years of publication of the National Environmental Management Laws Amendment Act as the period since the last publication may render the current EIP/EMP irrelevant in many instances. It is recommended that the amendment include that the Provincial Government's Director General approve the EIP as the Provincial Accounting Officer for the entire provincial government to ensure	Disagree. The intention of the proposed amendment is to align the cycle with the MTEF period which runs for 5 years. This will thus enable the plans to be informed and aligned to the government priorities. It is our view that the EIP must be prepared by the MEC responsible for environmental affairs, because in terms of the Constitution the Premier of a Province assign different portfolios to the relevant MEC who	The Committee indicated that the relevant department of environmental affairs in every province must ensure that inputs from affected department are included in the EIP.

Amendment Act • and **[at least every four]** at intervals of not more than five years thereafter." In light of the fact that the last EIP/EMPs were published in mid 2010, we are of the view that preparing an updated environmental implementation plan after five years of publication of the National Environmental Management Laws Amendment Act is a rather lengthy period. The delay in publication has various consequences. For example, there may be consequential delay in the finalization of air quality management plans as per requirements of Section 15 of the Air Quality Act (Act 39 of 2004).	compliance to the EIP by all Departments. This Person should also, as is the case with the Occupational Health and Safety Act, be accountable for non-compliance to commitments made in the EIP. This is particularly important as the State will now be criminally liable for non-compliance based on the amendments included in the NEMLA and clarity in terms of accountability is important.	then takes responsibility for such portfolios. Therefore, the compilation, approval and submission of the EIP falls within the responsibilities of the relevant MECs responsible for environmental affairs.	
Clause 3: Inserts S16A in Act 107 of 1998: Environment outlook report			
<u>WESTERN CAPE PROVINCIAL GOVERNMENT</u> (a) The sectional heading refers to the national and provincial state of environment reports. This is in contrast with the National Environmental Management Act, 1998 (Act 107 of 1998), as it refers to an organ of state which has to be preparing an environmental report. It is proposed that the reference to *national and provincial* in the sectional heading should be deleted and the sectional heading should be drafted as follows: - "State of environmental reports"		Disagree – The sectional heading in the Bill refers to *<u>"Environment Outlook Report"</u>*. Section 16A(2) refers to "*<u>a national environment outlook report"</u>* S16A(3) refers to *<u>"provincial environment outlook report"</u>*	These comments are already addressed in the Bill.

(b) it is proposed that word "the" before the word "state" in the introductory sentence of the proposed section 16A(1) should be replaced by the word "a", as the state of the environment reports has not been specified.		Section 16A(1) refers to *"the environment outlook report"* and not *"state of the environment reports".*	
(c) It is proposed that the word "promulgation" in subsections (2) and (3)(b) should be replaced with the phrase "come into effect". This would be line with the *short life*. The term "promulgation" is not clear as to whether it means when the bill was passed or when the act comes into operation. The constitution uses the terms "comes into effect" or "comes into operation".		Subsection (2) and (3)(b) refers to " *the coming into operation of this Amendment Act"* and no word *"promulgation".*	
It is not clear why strict adherence to these reports being submitted within 4 years (s16A(3)(b)) is necessary in respect of municipalities when submission of such a report is voluntary.		The environmental outlook report will form the basis of the EIP's and EMPs, hence they are submitted a year earlier before the compilation of the EIPs and EMPs.	
(c) It is proposed that the word "prescribes" in subsection (3)(a) and (4)(a) should be replaced by the word "determine" as subsection (1) empowers the Ministers to determine the procedures for compiling the report, the format and the content of the report. Legislative drafting practice requires that the word in legislation should be used consistently. If the intention is to use the word "prescribed" it must be noted that the		Section 16A uses the words *"determine"* and not *"prescribed".*	

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word is defined in the National Environmental Management Act, 1998, to mean "prescribe by regulation in the Gazette". Practically this would mean that the Minister would determine certain issues (in section 16A (1)) by means of notice and other issues (sections 3(a) and 4(a)) by way of regulations. These are also issues which one would expect to see in the same instrument. (e) It is proposed that the proposed section 16A should also provide for a purpose of the state of the environment report, and for an action that should be taken after publishing such report. The proposed section 16A does not state what the Minister, the MEC or the municipalities should do after publishing the state of the environment report. Concerns have been raised that s16A(2) requires an MEC to "prepare and publish a provincial environment outlook report which must contain the information determined by the Minister in terms of subsection (4)". Such a report is required to be submitted within 4 years of the coming into operation of the National Environmental Laws Amendment Act, 2012, but there are no time periods within which the Minister is required to determine the information required to be submitted in respect of such report ito subsection (4).	Consider including a time period within which the Minister must publish the information required ito subsection (4). Alternatively, change "must" into "may" in subsection (4).	The content of the environment outlook report will be outlined in the notice to be published by the Minister in the Gazette (see subsection (4)). The notice will describe the procedure for compiling the report, the format and the content of the report.	

"National and provincial state of environmental reports" Reference made to the MEC responsible for environmental function must be replaced with "*the MEC responsible for environmental affairs*" to ensure consistency. Also refer to section 5 which stipulates "MEC responsible for environmental affairs"	Replace MEC responsible for environmental function with "*MEC responsible for environmental affairs*".	Disagree. Section 16A refers to MEC and an MEC is defined in section 1 of NEMA as the Member of the Executive Council to whom the Premier has assigned responsibility for environmental affairs.	
WESTERN CAPE PROVINCIAL GOVERNMENT Again the wording should not refer to "this Amendment Act", but should be amend to say "...any other period the Minister may, by notice in the *Gazette* determine....".	Again the wording should not refer to "this Amendment Act", but should be amend to say "...any other period the Minister may, by notice in the *Gazette* determine...".	S16A(1) does not have wording *"this Amended Act"*, however (2); 3(b) and 4(b) refers to *"within four months of the coming into operation of this Amended Act"*.	The Committee indicated that Bill correctly refers to the Amendment Act.
AFRIFORUM A sense of urgency needs to be adopted and this plan must be finished in two years and in intervals of not more than three years thereafter.		The reporting cycle for the Environment Outlook Reports is aligned to that of the Environmental Implementation Plans (EIPs) and Management Plans (EMPs). The information contained in the Environment Outlook Reports will inform the content of the EIPs and EMPs. It might also be challenge to adhere to the proposed timelines due to capacity constraints and the fact that compiling such a report takes a minimum of a year and half.	The Committee indicated that the compilation of such report requires enough time. However, the Committee indicated that the clause should also cater for the publication of such report for information purposes.
ERASMUS ATTORNEY The preparation and publication of environmental outlook reports at national, provincial and municipal		Comment is noted.	The Committee indicated that these reports and plans are necessary to inform policy.

levels is supported in principle. The introduction of this requirement does, however, place an even greater burden on Departments that already suffer from capacity constraints and we have serious doubts as to whether the imposition of this obligation at this time is sensible.		The degree at which our environment is deteriorating outweighs the capacity challenges which are common in all sector related issues. The need to have constant reliable environment data is crucial for the country to be able to monitor environmental performance. Interventions to enhance capacity will be undertaken together with all other capacity enhancing initiatives that are underway. The full and effective implementation of the "Human Capital Development" (HCD) strategy is central to this.	
ACMP It is noted that the: • Minister and MEC must prepare this report while there is no obligation on the metropolitan and district municipalities. • There is no reference to the current State of Environmental reports being published by the different spheres of Government. • There is no clarification of how this report would enhance the environmental management regime in South Africa.	It is recommended that: • The obligation be extended to Metropolitan and District Municipalities due to their concurrent environmental function in terms of the Constitution (Schedule 4 and 5) as well as in terms of land use planning, air quality management, environmental management tools as reflected in Chapter 5 of NEMA, etc. • The report should be integrated with the EIP and EMP reports to ensure alignment of both content and timeframe. • The integrated report should also include the monitoring of compliance to previously published EIP/EMP commitments. It is further recommended that the outlook report improve alignment between the different processes as	The reporting cycle for the Environment Outlook Reports is aligned to that of the Environmental Implementation Plans (EIPs) and Management Plans (EMPs). The information contained in the Environment Outlook Reports informs the content of the EIPs and EMPs. In addition, it is important to note that all municipalities in terms of the Local Government: Municipal Systems Act, 2000 compile Integrated Development Plans, which requires the inclusion of chapters on environmental management function, namely, a chapter on waste management, a chapter on air quality management and a chapter on sustainable development, etc. In terms of alignment, the IDPs forms part of the provincial EIPs and EMPs.	The Committee agrees with this comment. The Committee wanted to know why are municipalities not required to compile such a report. The Committee raised this matter to be included in the resolution. Therefore, the Department was requested to submit a report on the practical implementation of section 11 of NEMA, and such a report will determine whether this section should also include municipalities. (the explanation was provided.)

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	the preparation of additional reports places a burden on stakeholders to comment. There are examples of many reports and strategies presently being published. Examples include: • National strategy on sustainable development • National climate change strategy • State of Environment Reports published by different spheres of Government, • Environmental management framework (EMF) • Integrated development plans • Integrated waste management plans • Air quality report in terms of the Air quality Act/Air quality Framework • etc		
Clause 4: Amendment of section 24 (Environmental authorisations)			
CENTRE FOR ENVIRONMENTAL RIGHTS 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*		Noted	The Committee indicated that the clause provides for consultation with relevant Ministers and MECs.

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.			
BUSINESS UNITY SOUTH AFRICA **Insertion of 2A(a)** The reason for this extensive enabling provision is not understood. All authorisations are subject to extensive and often onerous conditions, which are considered sufficient to deal with any situation without prohibiting or restricting the granting of an environmental authorization, in the first place. The possibility of not granting an authorization is already well established. BUSA does not agree with the motivation in the Memorandum which states that the current provisions of the section 24 do not allow the Minister to manage and conserve those areas of the environment requiring further protection. Section 24 contains a range of instruments that could be used for this purpose.	It is proposed that this provision be reconsidered	Disagree.	The Committee disagrees. The Committee will consider the Department's suggestion that a subsection may be considered to indicate that no application may be accepted for the specific activities and in the specified geographical areas. The Committee added that consideration should be given to a clause that indicates what the consequence would be of issuing an environmental authorization despite the prohibition.
BUSINESS UNITY SOUTH AFRICA Where proper consideration is given to all relevant factors applicable to an	It is proposed that if the Department still intends to set terms and	Noted	The Committee indicated that this clause will enable the Minister to protect the sensitive areas of our environment.

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application for environmental authorization, there should be no necessity for declaring the prohibition or restriction of activities in geographical areas.	conditions attaching to a listed or specified activity in identified or specified geographical areas, the over arching criteria should be sustainable development.		
BUSINESS UNITY SOUTH AFRICA While the prohibitions or restrictions will not affect the undertaking of activities authorized by means of previous environmental authorisations, it is not clear whether those prohibitions or restrictions will override other decisions made or permits already granted by other authorities other than environmental authorisations and moreover, how this will impact on mining activities approved in terms of an environmental management programme (EMP) in the period pending the authorization of and the transitional arrangements consequent upon the amendments to the Mineral and Petroleum Resources Development Act (more particularly those where no environmental authorization may have been necessary for such mining activities). For mining this amendment suggests that the Minister of Environmental Affairs may issue a notice in the Gazette or prohibiting or restricting the granting of an environmental authorization by the competent authority, which would imply that the Minister can override decision made by other authorities, including decisions made by the Minister of	It is proposed that this section be expanded to confirm that prohibitions and restrictions will not impact on amendments to existing authorisations or expansions to activities already subjected to existing legislative regimes including i.e. environmental issues for mining and related activities are regulated in terms of the MPRDA and its regulations, until such time the two departments have reached an agreement on the environmental function.	It will not be possible to override any other decisions in terms of other legislation, because the mandate provided by NEMA is specific to listed activities for which an environmental authorization is required.	The Committee asked what happens if another competent authority does not comply with the notice? In such instances, the Committee indicated that the clause should be included regarding consequences for non-compliance with the Minister's notice.

Mineral Resources in terms of the MRPDA.			
BUSINESS UNITY SOUTH AFRICA Although the comment period for members of the public is welcomed, given the significant potential for impacting on a person's entitlement to the use and enjoyment of their property, landowners and other right holders should be specifically consulted in circumstances where restrictions and prohibitions will be placed on geographical areas. This would be in line with other specific environmental management acts where provision is specifically made for affected persons to be consulted.	It is proposed that landowners and other right holders should be specifically consulted in circumstances where restrictions and prohibitions will be placed on geographical areas.	The PAJA requirements are the minimum, therefore no need to repeat them here.	The Committee indicated that the clause provides for consultation with members of the public and relevant Ministers and MECs. The Committee also indicated that there are different views as to whether PAJA in fact applies to the making of subordinate legislation.
BUSINESS UNITY SOUTH AFRICA **Substitution in 10(1) a) (i)** While the extension of the potential for norms and standards beyond listed activities may have some merit, the slow pace of adoption of such norms and standards for listed activities is already of concern. The original insertion of this provision in Act 62 was intended to reduce the number of EIA required where a listed activity was being replicated in a number of locations. The provision	It is proposed that the Committee ask for a report on the norms and standards adopted in terms of this section and that the Department confirm that it has the necessary capacity for the extended task. In addition it is recommended that the Committee ascertain more clearly what type of non listed activities need this treatment.	Development of standards is currently underway and since this is new work and not done before, it is a time-consuming exercise. Different aspects require consideration such as the different biophysical and socio-economic scenarios that may fall within the ambit of such standards. These must be carefully considered, especially if they are to replace EIA requirements.	The Committee raised a concern regarding the progress on implementation of environmental management tools developed in terms of section 24. The Department was requested to provide a briefing document to the Committee in this regard.

was not intended to prescribe a set of requirements for different applications. It is not at all clear what types of non-listed activities are contemplated here. Regulations in terms of section 24 which list activities do so on the basis of the risk of specific activities may pose to the environment.			
BUSINESS UNITY SOUTH AFRICA No provision exists to regulate non listed activities in the manner contemplated.	It is proposed that the Committee request a report in this regard.	Section 24(10) aims to provide for non-listed activities to also fall within the scope of standards as the reference to only listed activities is too narrow.	The Committee raised a concern regarding the progress of the implementation of environmental management tools developed in terms of section 24. The Department was requested to provide a briefing document to the Committee on the progress on implementation of the environmental management tools.
BUSINESS UNITY SOUTH AFRICA It is also of concern that limited progress has been made in implementing the provisions of 24 (5)(Ba) which enable the prescription of environmental management instruments including (i) Environmental management frameworks; (ii) Strategic environmental assessments; (iii) Environmental impact assessments; (iv) Environmental management programmes; (v) Environmental risk assessments; (vi) Environmental feasibility		A few Environmental Management Frameworks have been developed. Development of standards is currently underway and since this is new work and not done before it is a time-consuming exercise. Different aspects require consideration such as the different biophysical and socio-economic scenarios that may fall within the ambit of such standards. These must be carefully considered, especially if they are to replace EIA requirements.	The Committee raised a concern regarding the progress on the implementation of the environmental management tools to be developed in terms of section 24. The Department was requested to provide a briefing document to the Committee on the progress of the implementation of the environmental management tools.

assessments; (vii) Norms or standards; (viii) Spatial development tools; or (ix) Any other relevant environmental management instrument that may be developed in time; In BUSA's view adoption of some of these instruments could have addressed whatever concerns are the cause of this proposed prohibition.			
WESTERN CAPE PROVINCIAL GOVERNMENT It is recommended that a new provision be inserted under Section 23 to create an enabling provision for requesting entities to undertake environmental and social reporting. Amend "and" in section 24(10)(a) to an "or" towards the end of the sentence.	"(i) develop or adopt norms or standards for activities, sectors, geographical areas, listed activities, **[or]** for any part of an activity, sector, geographical area or listed activity or for a combination of those activities, **[contemplated in terms of subsection (2)*(d)*]** sectors, geographical areas **[and]**or listed activities.".	The purpose of this comment is not explained. Would these reports merely be submitted to authorities with no follow up required? If any follow up is required it may require additional capacity. Agree, amend "and" in section 24(10)(a) to an "or" towards the end of the sentence.	The Committee indicated that the proposed amendment to section 23 should be considered in the next round of amendments of the Department. Agree, amend "and" in section 24(10)(a) to an "or" towards the end of the sentence.

ACMP It is appreciated that the amendment would promote efficient decision making within the stipulated timeframes. However, the new provision does not provide clarity on timeframe for the Minister to take a decision. It is noted that norms and standards would apply to both listed and non-listed activities. It is not clear why *non listed activities* require inclusion and what criteria would be used to inform requirements to develop norms and standards for non-listed activities. Section 24 however previously failed to allow for usage of instruments such as norms and standards that do not fall within the scope of the definition of "norms and standards" as provided for in section 23(1) Chapter 5 of NEMA. The inclusion in 24F: "*(f)* any applicable norm or standard developed in terms of section 24(10)" is appreciated and we trust that implementation thereof will be prioritized. An example is the adoption of a waste protocol to facilitate the outcomes of innovation or cleaner production or implementation of the hierarchy of waste principles. This may also require a focus on sectoral approaches	It is recommended that in the interest of co-operative governance the Department consider appropriate intervention of decision making by the relevant Authority in the first instance as the proposed amendment is reflected as follows: " 24C(6) Before taking a decision contemplated in subsection (4), the Minister must consult with the MEC concerned"	Comment is noted. Section 24(10) aims to provide for non-listed activities to also fall within the scope of standards as the reference to only listed activities is too narrow. Development of standards is currently underway and since this is new work not done before it is a time-consuming exercise. Different aspects require consideration such as the different biophysical and socio-economic scenarios that may fall within the ambit of such standards. These must be carefully considered, especially if they are to replace EIA requirements.	The Committee raised a concern regarding the progress on implementation of environmental management tools developed in terms of section 24. The Department was requested to provide a briefing document to the Committee in this regard.

particularly in industry.			
ERASMUS ATTORNEY The change to the heading of this Section is supported. The general import of the proposed amendment by the insertion of Section 2A(a) is supported. Section 24(a) of the Constitution, 1996 provides for "human health **or** well-being" whereas the proposed Section 2A(a) of NEMA refers to "human health **and** well-being". This anomaly must be corrected to resonate with the Constitutional provision as it has far-reaching implications. The proposed public participation provided for in the envisaged Section 2A(d) namely publication in the Government Gazette is inadequate and, in our submission, not compliant with the requirements of the Promotion of Administrative of Justice Act, 2000 (Act 3 of 2000) (hereinafter referred to as "PAJA") which requires that persons that stand to be affected by administrative decisions must be informed thereof and afforded an opportunity to make representations in respect thereof.		Agree. Clause 4(b) to be reworded to be in line with section 24(a) of the Constitution. The PAJA requirements are the minimum, therefore no need to repeat them here.	The Committee agrees with the proposed amendment to clause 4(b) as suggested. The Committee indicated that the clause provides for consultation with members of the public.

Publication in only the Gazette will not come to the attention of the vast majority of those that stand to be affected. It is, consequently, proposed that Section 2A(d) be amended to ensure that notice of the proposed prohibition or restriction also be brought to the notice of the broader public.			
Clause 5: Amendment of section 24C (Procedure for identifying competent authority)			
CENTRE FOR ENVIRONMENTAL RIGHTS 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.	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.	This is an environmental function that is delegated to the MEC by the Minister in terms of section 24C of NEMA read with the EIA Regulations. In this regard, the Minister still retains the accountability on how the function is performed. Agreed that section 24C(3) can be used although this has to happen as early on in the application process as possible whereas the new provision provides for the Minister to step in when the MEC fails to take a decision.	The Committee agrees with the Chief State Law Adviser that this clause may be unconstitutional, unless it is linked with section 125(2)(b) and a few steps be built in. The desirability of the clause could be debated.
BUSINESS UNITY SOUTH AFRICA The proposed amendment, which will allow an applicant to apply to the Minister in circumstances where an MEC (provincial) fails to take a decision within the prescribed time	Effective decision making should be strived for so that an applicant does not have to waste time and resources in approaching another authority. It is proposed that the time periods within	If a time period is added, additional capacity will be needed and the implementation of this section could be seriously hampered.	The Committee agrees with the Chief State Law Adviser that this clause may be unconstitutional, unless it is linked with section 125(2)(b) and a few steps be built in. The desirability of the clause could be debated.

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periods, is welcomed. However efficient decision making by the competent authority is preferred to a situation where the applicant has to refer the matter to the Minister.	which the Minister must make a decision in these circumstances should be specified.		
WESTERN CAPE PROVINCIAL GOVERNMENT The deletion of the "exclusion" raised concerns about a very wide interpretation of "will take place within an area protected by means of an international environmental instrument" because the definition of "international environmental instrument" is widely defined as "means any international agreement, declaration, resolution, convention or protocol which relates to the management of the environment". Could it for instance be argued that some of the things regulated in a biosphere reserve (proclaimed in terms of UNESCO agreements) will now have to be decided by National. In addition to this, most of the Western Cape falls inside the Cape Floral Kingdom a proclaimed world heritage site.	The implications for this removal should be considered.	The Department agrees that the amendment should be reconsidered and be removed from the current Bill.	The Committee also questioned the practical implementation of clause 5(a), in that all EIA applications in those areas will be processed by the national department. The clause must be clear on the applications that will be processed by the national department or provinces. The Department was requested to provide a briefing document to the Committee on the current practical implementation of section 24C by national department and provinces if the clause is to be retained.
WESTERN CAPE PROVINCIAL GOVERNMENT The proposed reworded subsection (f) reads "will take place 150 metres or further, as measured seawards from the high-water mark". The reference to "as measured" and the placing of the comma are problematic.	This should be amended to read "will take place 150 metres or further seawards from the high-water mark".	The Department is of the view that the amendment should be reconsidered and be removed from the current Bill.	The proposed amendment will be determined after the review of clause 5(a).

WESTERN CAPE PROVINCIAL GOVERNMENT The insertion of the proposed provision that will empower the Minister to take a decision away from an MEC if an MEC missed timeframes raises concerns about unnecessary impeding of Provinces concurrent powers. Nothing stops an MEC and Minister reaching an agreement in terms of Section 24C (3) that the Minister may deal with (take over an application) and finalise it if a Province is battling to finalise it.		This is an environmental function that is delegated to the MEC by the Minister in terms of section 24C of NEMA read with the EIA Regulations. In this regard, the Minister still retains the accountability on how the function is performed. Agreed that section 24C(3) can be used although this has to happen as early on in the application process as possible whereas the new provision provides for the Minister to step in when the MEC fails to take a decision.	The Committee agrees with the Chief State Law Adviser that this clause may be unconstitutional, unless it is linked with section 125(2)(b) and a few steps be built in. The desirability of the clause could be debated.
ERASMUS ATTORNEY The proposed addition of Subsections 24C(4), (5) and (6) is an aberration that *must* be removed in its entirety. The mechanism envisaged with this addition is ill-conceived, misguided, unworkable, inherently administratively unjust and, in our submission, demonstrably unconstitutional. In this regard: The fact that an addition of this nature is even being contemplated confirms decision-making dysfunction within the Provinces. To try to superimpose the Minister as		This is an environmental function that is delegated to the MEC by the Minister in terms of section 24C of NEMA read with the EIA Regulations. In this regard, the Minister still retains the accountability on how the function is performed.	The Committee agrees with the Chief State Law Adviser that this clause may be unconstitutional, unless it is linked with section 125(2)(b) and a few steps be built in. The desirability of the clause could be debated.

an alternative deciding official in instances where an MEC and/or his/her Department are incapable of taking a decision would, even if it were permissible (which it is not), merely be to paper over the cracks of an already deeply flawed system. The practical problems that will result from the inclusion of this addition are manifold and include the following: The information and documentation on which such a decision *must* be based are held by the MEC and his/her Department and not the Minister, the national Department or the Applicant with the result that any decision taken by the Minister without reference to all relevant information and documentation is, by definition, taken in contravention of Section 6(2)(e)(iii) of PAJA. The proposed addition makes no provision for the participation in this referred decision-making process by parties interested in and affected by the decision the Minister is called upon to make. Without such participation, the proceedings would be contrary to the mandatory provisions of Section 3(2)(b)(ii) of PAJA. Even though the decision in question is taken by the Minister, it would be a decision taken by her in the MEC's			

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stead, in respect of a provincial competence in terms of Schedule 5 of the Constitution in response to an application made to the provincial authority and an appeal against the Minister's decision would, consequently, presumably have to be directed to the MEC who failed, refused and/or neglected to take the decision in the first place. In terms of Section 47B of NEMA the Minister would be deemed to have consulted the MEC if she directed a letter to the MEC irrespective of whether an answer was ever received or not. This cannot be considered to be satisfactory under any circumstances. The purpose of the proposed addition is clearly to foreshorten the decision-making delays to which Applicants are presently subjected. The effect of the proposed addition would, however, be to exacerbate the problem: In terms of Section 1(1)(v)(g) of PAJA a failure to take a decision is deemed to be a decision; At present an EIA Applicant may rely on Section 43 of NEMA to appeal the aforementioned failure of a Department to take a decision on an application for an authorisation to the MEC;			

In the absence of a decision by the MEC on such an appeal, an EIA Applicant is presently entitled to approach the High Court for appropriate relief without further delay; If the proposed addition is included in NEMA it would mean that before such an Applicant could seek appropriate relief from the Courts it would now have to apply to the Minister to take the decision and be subjected to whatever delay that procedure entails. The failure of an applicant to do so may well be deemed by the Courts to be a failure to exhaust internal remedies. In terms of Section 41 of the Constitution, 1996, all spheres of government and all organs of State within each sphere must respect the institutional status, institutions, powers and functions of government in the other spheres, and exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. Section 44(2) of the Constitution, 1996 specifies the instances in which the National Parliament may intervene by passing legislation with regard to a matter falling within a functional area			

of provincial government. The Constitutional Court of South Africa has expressed itself in this regard and particularly the following two judgements appear to be relevant: *Ex parte President of the Republic of South Africa: In re constitutionality of the Liquor Bill* (Case CCT 12/99). In this Case Parliament sought to provide for the National Minister concerned to take licencing decisions in the stead of the MEC. The attempt to vest provincial licencing competence on the National Minister was held to be unconstitutional. In the Case of Premier, Western Cape v President of the Republic of South Africa and Another (CCT26/98) [1998] ZACC 2; 1999 (3) SA 657; 1999 (4) BCLR 383 (29 March 1999), it was held that an Act which allows a National Minister to transfer the implementation of provincial legislation to a national level infringes on and is an encroachment on the functional and constitutional integrity of provincial government as provided for in Section 21 of the Constitution, 1996. In view of the aforegoing it is submitted that the proposed addition of Subsections 24C(4), (5) and (6) is			

unconstitutional and *ultra vires* the Constitutional competence of Parliament and ought to be removed in its entirety.			
Clause 6: Amendment of section 24E (Minimum conditions attached to environmental authorisations)			
CENTRE FOR ENVIRONMENTAL RIGHTS 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.		Section 24E merely recognizes the fact that transfer of rights/obligations occur not only when ownership transfers but also in other circumstances. The amendment is focusing on providing for such other circumstances as well. Currently it is limited to ownership changes. Section 24E merely contains minimum requirements for EAs to be issued. These are elaborated and expanded by the provisions contained in the EIA regulations. For a competent authority to determine whether someone is a fit and proper person will add to the workload of already strained existing capacity. The EIA regulations provide that every EA should provide for the transfer of EAs and conditions appropriate to this. Therefore no amendment to this section is supported.	The Committee indicated that the proposed amendment deals with the minimum conditions that must be contained in the environmental authorisation.
ERASMUS ATTORNEY The proposed amendment to Section 24E(c) of NEMA is unsatisfactory in the extreme: Whereas providing for the amendment of authorizations to enable the transfer of rights and obligations is, self-		Transfer of an EA will require an amendment of an EA, something for which a process is prescribed in the EIA regulations, including public participation where the amendment is regarded as a substantive	The Committee indicated that the proposed amendment deals with the minimum conditions that must be contained in the environmental authorisation.

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evidently, necessary, such a transfer has potentially far-reaching implications and the circumstances in which it may be effected need to be more adequately circumscribed. Parties interested in and affected by the transfer of rights and obligations in terms of an environmental authorization are dependent on the holder of an authorization for compliance with the conditions therein contained and potentially for the rectification of non-compliance. It is, consequently, necessary to provide for a process of public participation as well as culpability and lifetime responsibility in the event of such a transfer.		amendment.	
AFRIFORUM AfriForum believes that it is not clear that provision can be made for the transfer of rights and obligations if required; the previous section mentioned when there is a change of ownership in the property. This new amendment will enable the transfer of rights to someone who is not the owner of the property which is unconstitutional.		See comments above. Transfer does not occur in a vacuum but is reliant upon an amendment application.	The Committee indicated that the proposed amendment deals with the minimum conditions that must be contained in the environmental authorisation.
WESTERN CAPE PROVINCIAL GOVERNMENT "(c) provision is made for the transfer of rights and obligations **[when there**	Consider omitting the words "if required".	The Department prefers the current wording as this requirement will be	The Committee indicated that the words "if required" should be deleted.

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is a change of ownership in the property], if required.". Concerns have been raised that the words "if required" will create confusion.		informed by the needs of the applicants.	
Clause 7: Amendment of section 24F (Offences related to commencement or continuation of listed activities)			
CENTRE FOR ENVIRONMENTAL RIGHTS 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.	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."	The Department is of the view that necessity as a defence is well-established in Criminal Law. Alternatively, this defence should be omitted from section 24F as this is a restatement of common law principles (including private defence).	The Committee indicated its support for the text provided by the Centre for Environmental Rights.
CENTRE FOR ENVIRONMENTAL RIGHTS We note that the reference to protection of property has not been included in the proposed amendment to section 24G(4), which provides for	We would prefer that protection of property be deleted from both	Section 24 of the Constitution refers to an environment that is not harmful to health and well-being; and the protection of the environment. If "property" were included in section	The Committee is of the view that property should be included in section 24G and requested the the Department to consider it.

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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.	provisions.	24F(3) and (4), it would mean that the protection of an essentially commercial interest (i.e. property) would constitute a valid emergency defence to the section 24F offence, plus an exemption for the payment of a section 24G fine. This protection of commercial interests is not within the mandate of the sector as set out in S24 of the Constitution. It is proposed that "property" be excluded from both sections 24F(3) and 24G(4) as recommended. If property is included in subsection (4), we suggest that it is limited in order to avoid abuse of this section as follows: '(4) Subsection (2A) is not applicable to a person contemplated in subsection (1)(a) who has commenced, undertaken or conducted a listed, specified or waste management activity in an emergency response situation in order to protect human life, property or the environment provided that: (a) the activity commenced, was necessary to prevent, mitigate or contain the emergency response situation; and (b) the activity commenced, undertaken or conducted was proportional to the	

		risk to human life or the environment that the activity sought to prevent, mitigate or contain; and (c) the emergency response situation was not caused by the fault of the person who wishes to rely on it."	
CENTRE FOR ENVIRONMENTAL RIGHTS 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.	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.	The Department is in the process of trying to standardize all maximum criminal penalties in all criminal offences in terms of NEMA, SEMAs and subordinate legislation. This standard is R5 million and/or 5 years imprisonment for a first offence; and 10 million and/or 10 years for a subsequent offence. This is in line with the penalty provided for in section 28A of NEMA. It is proposed that section 24F(4) be amended to align itself to the abovementioned standard of maximum penalties.	The Committee agrees with the increase of the maximum penalty in section 24F(4) to be in line with other penalties under the Act.
BUSINESS UNITY SOUTH AFRICA It appears from the memorandum that government wishes to bring compliance with a norm and standard, in respect of listed activities in line with the alternative requirements in this regard. This is welcomed. However it	It is proposed that the text be amended to include "or adopted"	The Department prefers reference to adopted standards.	The Committee agrees that the word "developed" must be replaced with the word "adopted".

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should be noted that the wording refers only to norms and standards being "developed" rather than the "developed or adopted" used in section 24 (10(a)(i).			
BUSINESS UNITY SOUTH AFRICA The Act does not clarify under what circumstances the proposed standards would become mandatory.	It is proposed that the circumstances which may require such mandatory standards should be made clear in the Bill.	Please refer to section 24(2)(d) which states that the Minister may identify activities that may commence without an environmental authorization, but which must comply with norms and standards by notice in the Gazette. The existing section 24(10) indicates the process for development/adoption of standards. The standard itself will be a regulatory tool (similar to regulations) and will indicate in which instances it would be mandatory.	The Committee indicated that these will be standards developed and adopted under the Act.
WESTERN CAPE PROVINCIAL GOVERNMENT Waste management listed activities have been expressly included, thus there is no longer the need to rely on the legal interpretation of section 5 of the NEM: WA. However, we note that NEM: AQA has not been similarly included. This will prevent someone who has committed an offence in terms of NEM: AQA from applying for s24G rectification.	Section 24G(1) On application by a person who has committed an offence in terms of section 24F(2)(a), (b) or (c), (include offences i.t.o NEM:AQA)	As an application for a NEM:AQA listed activity is preceded by an EIA authorization, the feeling was that the section 24G process would be followed in respect of the EIA contravention and making section 24G applicable to NEM: AQA would largely be a duplication. The capacity at local authority level to issue section 24G fines at this stage is also questionable.	The Committee accepted that as the EIA process is also undertaken for the waste activities and air quality activities, then the section 24G process might be applicable. However, if it is a separate licensing process from the EIA process then the section 24G process is not applicable.
WESTERN CAPE PROVINCIAL GOVERNMENT If Section 24G is to also be applicable to all the SEMAs then, Section 24F should be amended to do this. S24F(1) and (2) should be amended to not only		The Department prefers "specified activity", not "specific activity". This is the word consistently used in the NEMA. Section 24G is only applicable to the commencement of activities in	The Committee indicated that it make sense that the Bill provides for one procedure dealing emergency situations. Such procedure can either be linked with the section 30 emergency incidents procedure or not. The proposal by CER must also be considered by the

refer to the listed activities in terms of Section 24(2)(a) and (b). With the proposed amendment to the definition of "listed activity", proposed above, as well as the proposed amendments to the wording of Section 24(2)(d), proposed above, Section 24F(1)(b) does not need to be amended, but (1)(a) should be amended to read "commence with a listed activity or specific activity unless the competent authority has granted environmental authorisation". The proposed section 24G states that the administrative fine is excluded if the person has commenced or continued with a listed or specified activity in an emergency response situation so as to protect human life, property or the environment. It should be considered whether a similar exclusion for criminal liability should be included in s28A when s28 or s30 directive is issued. It should be possible to direct someone who wants to responsibly proceed ito s28 to take measures to avoid significant harm and the potential breach of their duty of care and associated criminal liability ito s28A to take those measures without it resulting in a further offence being committed. In other words, it should be possible to direct someone to commence with a listed activity ito a s28 and/or 30 directive. Such a person		contravention of section 24F (1) and activities for which a waste management licence is required in terms of the NEM: WA. It is not applicable to other SEMAs (e.g. NEM: AQA / ICM Act / NEM: BA / NEMPAA). The emergency response situation is included to avoid payment of fine. Not necessary to include in section 28A, as this would be a restatement of common law principles.	department. The department must provide a detailed briefing document on the linkages between emergency response situation and emergency incidents procedure, or whether such a detailed amendment must be addressed in the next round of amendments.

may still be liable for an offence ito s28A for negligence. It must be determined whether a section 31L compliance notice can be issued for non-compliance with a norm or standard. This will have implications for whether or not there are any administrative enforcement mechanisms available to enforce compliance.	Ensure that the current wording of section 31L(1)(a) will permit a compliance notice to be issued for non-compliance with a norm or standard for non-listed activities.	S31L(1)(a) will be applicable.	
ERASMUS ATTORNEY The inclusion of a reference to norms and standards is sensible. It is a cause for concern that no amendment to Section 24F(3) has been proposed: Section 24F(3) refers to "an emergency so as to protect human life, property or the environment" while the proposed amendment to Section 24G(4) contains no reference to the protection of "property".		Refer to comment above. The Department is in the process of trying to standardize all maximum criminal penalties in all criminal offences in terms of NEMA, SEMAs and subordinate legislation. This standard is R5 million and/or 5 years imprisonment for a first offence; and 10 million and/or 10 years for a subsequent offence. This is in line with the penalty provided for in	The various provisions in NEMA/NEMLA that relate the management of emergencies should, if possible, be consolidated and aligned. Where exceptional circumstances exist that cannot be covered by a general provision, these should be provided for in an exception, proviso. The additional requirements of "proportionality" and "causation" should be added to the requirements for a valid defence of commencing

In our submission, the wording of Section 24F(3) remains extremely problematic: As the section now stands *any* action that is intended to protect human life, property or the environment is considered to be an "emergency" irrespective the cause or scale of the emergency or the consequences of the activity commenced or continued in response thereto. The retention of this wording in our submission places the environment at unnecessary and unacceptable risk and opens the door for wide-scale abuse. In our submission Section 24F(3) needs to be amended to include: A link between the nature of the response and the scale of the emergency; and The exclusion of "emergencies" that are deliberately caused by the party who thereafter claims to be taking emergency action. It is unclear why the penalty provisions as contained in Section 24F(2) have not been amended in a similar manner		section 28A of NEMA. It is proposed that section 24F(4) be amended to align itself to the abovementioned standard of maximum penalties.	with a listed or specified activity without an environmental authorisation. There should be an increased penalty for those who commence with a listed/specific activity without an environmental authorisation; as the current maximum monetary penalty of R5million may not be a sufficient deterrent for high-income corporate entities.

to the amendments to those proposed in *inter alia* Section 28A(1) and have not been increased: The need for consistency with regard to penalties throughout NEMA and specific environmental management Acts, appears to be self-evident; While a fine of R5 million may seem immense to mere mortals, it is insignificant in relation to many proposed large-scale activities; In the circumstances it is proposed that, in addition to ensuring consistency throughout NEMA, an approach similar to that contained in the Competitions Act be adopted namely that the maximum fine be stated as a proportion of the turnover of offending corporate parties.			
Clause 8: Amendment of section 24G (Rectification of unlawful commencement of activities)			

CENTRE FOR ENVIRONMENTAL RIGHTS 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.	We refer you to: 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) 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.*"	The Department had already identified various challenges with section 24G and based on an instruction from Mintech, commenced a comprehensive process to review s24G and recommend various options for amendment. As the NEMLA Bill was aimed at providing a mechanism to urgently close certain gaps in the legislation, the decision was to only amend certain critical provisions of s24G, and thereafter to propose a more substantial amendment to the section taking into account all the inputs from stakeholders. In relation to expanding section 24G to the waste management activities, it should be noted that the intention of the legislature when section 24G was first introduced into NEMA was to cover waste-related activities that commenced without the necessary authorization (at the time these were all covered under one list in terms of the ECA and thereafter NEMA). When the waste activities moved from NEMA to NEMWA, the intention remained that section	The Committee indicated that the comprehensive review and amendment of section 24G could be considered under the next round of amendments, but certain amendments should be included in this amendments.

	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. 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.	24G should be applicable in circumstances where a waste activity commenced without a WML. If section 24G is not applicable to NEMWA, this would mean that a person could possibly go through a normal application process to "conduct" or "undertake" the waste management activity and no fine would be issued for the illegal commencement. The commencement of activities (listed in NEMA) that may be far less damaging than waste activities would then attract a fine of up to R1 million.	
CENTRE FOR ENVIRONMENTAL RIGHTS 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.	The latter should 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	Disagree. Section 24G provides an opportunity for a person that commenced without an environmental authorization to obtain one. It does not apply to the contravention with norms and standards.	The Committee agrees that section 24G should not be made applicable to the contravention of Norms and Standards.

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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)	24F(1)(b);		
CENTRE FOR ENVIRONMENTAL RIGHTS 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). 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".	As mentioned, 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.	Refer to comments above.	Refer to comments above.

PAPER MANUFACTURES ASSOCIATION OF SOUTH AFRICA With regard to the amendment of **section 24G of Act 107 of 1998,** as substituted **by section 6 of Act 62 of 2008**, we again propose the inclusion of the National Water Act. The inclusion of that Act could incorporate both a failure to have obtained a water use licence and also instances where measures are taken under emergency situations to protect human life, property or a water resource. While we understand that the National Water Act is not legislatively included under the suite of National Environmental Management Acts, it does appear to us to be a serious omission, and a way forward to include it in **section 24G** (and elsewhere) should be investigated. After all, the Minister or MEC responsible for mineral resources has been included under **section 24G** – why not the Minister responsible for water resources?	We suggest that exemptions should be permitted in instances where an integrated process is to be followed, or in circumstances where an equivalent authorisation and process is required for the same activity e.g. a water use licence for a stream flow reduction activity required under the National Water Act.	The intention of the proposed amendments to section 24G is to extend the applicability of section 24G to the waste management activities under NEM: WA because of the assessment process undertaken in terms of NEMA. Therefore, the amendment is meant to provide legal clarity that section 24G is applicable to illegal waste management activities.	The Committee indicated that the section 24G process should not be extended to deal with the licensing process under the National Water Act, because this are two separate licensing processes.
BUSINESS UNITY SOUTH AFRICA Notes with concern that the amendment of this section still does not respond to the need to provide for activities which are regulated by other specific environmental management acts as there is no other mechanism for rectifying those activities. This is particularly relevant in those instances	It is proposed that this provision be reviewed to cover all specific environmental management acts. It is recommended that section 24G amendment makes it clear that it does not apply to completed activities, but refers to	See comment in above in relation applicability of s24G to the NEMAQA. Section 24G is a provision that was introduced in order to address a practical problem with the implementation of the EIA legal requirements. Prior to section 24G (and in the	Refer to comments above.

where, for example, a licence (such as an atmospheric emission licence) is required following upon the grant of an environmental authorisation to conduct a particular activity. S24G is focused on failures to obtain the environmental authorizations before commencement of an activity – not licences. In respect of completed activities, there are other remedies, e.g. remediation order if the activity caused any environmental harm. There are no timeframes as to when authorities should reach a decision on application.	the failure to obtain authorisation to commence construction. It is proposed that a provision be added to ensure that the competent authority makes a decision within a certain period and the consequences of a failure to make a decision are set out. Furthermore, it is proposed that Section 24G should incorporate a provision which immunes the regulated community from prosecution once an application has been done and especially where the applicant has been successful in bringing the application	absence of section 24G) if a person commences with an activity in the absence of the required authorization, no legal mechanism existed to authorize the activity after the illegal commencement. Section 24G was never aimed at providing a mechanism to transform behavior that had been unlawful into lawful behavior. It merely provided a tool by which a person could obtain authorization for an activity *ex post facto* which would only be effective from the date when that authorization was issued. Accordingly, the submission of a section 24G application and even a positive outcome in the form of an authorization, should not result in an immunity from prosecution. As section 24G presupposes that a person has commenced illegally, these applications will be processed in a reasonable time (preference being given to normal EIA applications in which parties are complying with the law) and timeframes will not be prescribed.	

BUSINESS UNITY SOUTH AFRICA It is BUSA's view that the increased fine (as well as the prospect of potential criminal sanction) is enough to deter an abuse of this process. A balancing of rights must be conducted in the determination of an appropriate fine.		ere will be an opportunity to appeal the fine to the Minister or MEC and thereafter if the person would like further recourse it is possible to apply for a review to court.	The Committee raised a concern that the current section 24(2A) appears not to allow the Minister to review and determine the section 24G administrative fine. An enabling provision for regulations needs to be drafted in relation to S24G providing for the following: - The procedure to be followed in the determination of the quantum of the fine (including an opportunity to make representations); - The criteria that the competent authority must take into account when considering the quantum of the fine; - The compilation of a national S24G fine register, including the number of applications received, the authorisations granted or refused, and the quantum of the fines issued; This will ensure accountability and transparency in the S24G process.
BUSINESS UNITY SOUTH AFRICA BUSA is concerned that a fine up to R5 million could be imposed administratively without a judicial process.	It is proposed that fines of this magnitude should not be imposed administratively.	In terms of PAJA, there will be an opportunity to appeal the fine to the Minister or MEC and thereafter if the person would like further recourse it is possible to apply for a review to court.	See comment above.
WESTERN CAPE PROVINCIAL GOVERMENT The current proposed wording of s24G and s24(10)(a) would not permit someone who has commenced with an activity in contravention with a norm or	"(1) On application by a person who— *(a)* has **[committed an offence in terms of section 24F(2)*(a)*]** commenced with a listed	Disagree. No environmental authorization is required. Therefore section 24G does	Refer to comments above.

standard developed for non-listed activities to apply for rectification. Section 24F(1)(a) relates to commencement with a listed or specified activity without environmental authorisation and s24F(1)(b) deals with a listed activity which does not require environmental authorisation when done in terms of an applicable norm or standard. The proposed amendments to s24(10)(a) read with the proposed s24F(2)(f) mean that it would be an offence for someone to commence with a norm or standard developed for non-listed activities but s24G does not permit them to apply for rectification. The proposed insertion of section 24G(1)(b) is not needed if the abovementioned amendments to Section 24F are made so as to include the listed activities in terms of all the SEMA's. We have also noted that NEM:AQA was not similarly included in both the previous and current draft. This will prevent someone who has committed an offence ito NEM:AQA from applying for s24G rectification. Has a policy decision been made not to permit s24G authorisations to be granted by the relevant competent authority (which in most cases will be the relevant municipality)? Consider including the words "or	or specified activity without an environmental authorisation in contravention of section 24F(1) or commenced with an activity in contravention with a norm or standard developed in terms of section 24(10);	not apply. Section 24G is meant to deal with the rectification of illegal listed activities under NEMA. Any decision regarding section 24G must be performed in terms of NEMA. Our responses above in relation to inclusion of all SEMA's in relation to s24G are applicable.	It should be explored whether there are circumstances where a person should be directed to undertake a listed or specified activity without the need for an environmental authorisation, for example, in an emergency response situation.

continued" after commenced in s24G(1)(a). This would allow for a subsequent owner of a property in respect of which a listed activity was previous commenced with and themselves continue with the listed activity without authorisation to apply in terms of section 24G. There is no definition of "emergency response situation". This will make it extremely difficult for enforcement officials as they will have to refute claims from members of the public claiming that they commenced with a listed activity in order to protect human life or the environment. Having regard to the above, it is foreseeable that this provision will be manipulated by transgressors in order to avoid having to pay the administrative fine. Consider amending the wording so that the s24G administrative fine will not be payable when someone is directed to undertake a listed activity in terms of s30 of the NEMA. This will ensure that members of the public contact the relevant authority in order to ascertain whether they regard the situation to be an emergency in terms of which a directive can be issued which would direct certain activities to occur without environmental authorisation. This procedure would also ensure that only those activities that are required to be undertaken to	"(4) Subsection (2A) is not applicable to a person contemplated in subsection (1)(a) who has commenced with a listed or specified activity when directed to do so in terms of section 30 **[in an emergency response situation in order to protect human life or the environment]**.".	The intention of section 24G is to deal with a listed activity commenced without an environmental authorization. The Department view is that the emergency response situations envisaged in this clause cannot be equated to the section 30 emergency incidents.	

address the emergency situation are undertaken and not the whole development.			
ERASMUS ATTORNEYS The failure of NEMA to provide a mechanism with which to appropriately deal with the unlawful commencement of listed activities was a major shortcoming in the South African framework for environmental governance for a long time. While Section 24G of NEMA was initially intended to provide for the transition to a new regulatory regime, it was, in our submission, sensibly extended to all listed activities that have been unlawfully commenced. That listed activities are being and will in future be unlawfully commenced is an unhappy reality that needs to be provided for. Section 34 of NEMA deals with criminal proceedings where a person has been convicted of an offence in terms of NEMA. The consequences of such a conviction are set out in some detail and are quite different from the consequences of making application for rectification in terms of Section 24G of NEMA in terms of intention, procedure and substance. In our submission it would be helpful if the Bill were amended to clarify the following:		See our response above relating to section 24G.	The Committee supported the comments by Erasmus Attorney on this issue. The clause should be reviewed to include a provision that the imposition of the administrative fine does not prevent the criminal prosecution. Consider proposed wording by Erasmus Attorneys. The section 24G should also be reviewed and amended to provide the Minister with a legal power to issue a directive providing for situations that section 24G must deal with. The Committee further requires section 24G to be amendment to deal with second or habitual offenders. The proposed review must (1) allow for bigger administrative fines for second or habitual offenders; (2) compulsory referral to NPA for prosecution; (3) provide for circumstances that the authorisation may be granted; and (4) create a mechanism for the Minister to report to parliament on the authorisations issued in terms of section 24G; (5) legal requirement for the Minister to compile a register or records of all application granted and the report must be reported to parliament. The section 24G administrative procedure to determine the fine and processing of such applications must be set out in the regulations developed in

That an application for rectification in terms of Section 24G and the concomitant imposition of an administrative fine is an administrative procedure unrelated to the prosecution of such parties for offences committed in terms of NEMA which is a judicial process; That payment of an administrative fine in terms of Section 24G is no defence to a charge in terms of Section 24F(2) of NEMA. The increase in the maximum administrative fine payable for the opportunity to make application for the authorisation of activity that was unlawfully commenced is appropriate and supported. You are, however, referred to our comments above with regard to the definition of an "emergency" and to the inclusion or exclusion of a reference to "property". Additionally, in this regard we would submit that it is appropriate to retain a reference to "property" especially as the property in question may be of significant national, strategic or other value and livelihoods may be dependent thereon. There are certain difficulties with the wording of the proposed amended Section 24G: It is unclear why Section 24G(1)(b)			terms of section 44 of NEMA.

singles out waste management licences issued in terms of Section 20(b) of the National Environmental Management: Waste Act, 2008 (Act 59 of 2008) without a similar reference to all authorisations provided for by Specific Environmental Management Acts. We would propose that this Section be amended to refer to all such authorisations. As it now stands the proposed amended Section 24G does not provide for the rectification of activities unlawfully commenced with in contravention of an applicable norm or standard in contravention of Section 24F(1)(b) for which no authorisation is required. This needs to be provided for.			
Clause: S24N(1A) **Clause 9: Amendment of section 24M (Exemptions from applications or certain provisions)**			
WESTERN CAPE PROVINCIAL GOVERMENT Section 24N(1A) currently reads: "(1A) Where environmental impact assessment has been identified as the environmental instrument to be utilised in informing an application for environmental authorisation, or where such application relates to prospecting, mining, exploration, production and related activities on a prospecting, mining, exploration or	It should be reworded to read "Where environmental impact assessment has been identified as the environmental instrument to be utilised in informing an application for environmental authorisation, or where such application relates to prospecting, mining, exploration, production and related activities on a prospecting, mining, exploration or production area, [the Minister, the Minister of Minerals and Energy, an MEC or identified	These proposals will be considered in the next round of NEMA amendments to be undertaken by the Department.	The Committee disagrees with the proposal to amend section 24N(1A).

production area, the Minister, the Minister of Minerals and Energy, an MEC or identified competent authority must require the submission of an environmental management programme before considering an application for an environmental authorisation." While it is supported that an EMP should be required, the wording "authority must require the submission" is problematic because it does not allow for discretion.	competent authority must require the submission of] the applicant must submit an environmental management programme [before considering an application for an environmental authorisation] as part of the application process for environmental authorisation. This proposed amendment still calls for an EMP, but it does allow for discretion in that the authority will be able to consider granting exemption from this requirement in certain instances. The current wording does not allow for such exemptions - i.e. the current provision is applicable on the competent authority, not the applicant, making it impossible to grant exemptions.		
BUSINESS UNITY SOUTH AFRICA An applicant who has a strong case for exemption is within his/her rights to bring an application for exemption. If the Department were to refuse the application on the basis of section 24M(1A) and not consider the application, the Department would expose itself to review application for rigid adherence to policy which is a form of unlawfulness. The proposed amendment will result in less environmental significant activities not subjected to exemption. Thus, a heavy burden which is costly is imposed upon the regulated	In this regard, a careful consideration of GNR.543 which prescribes the manner in which an exemption should be done is proposed. In some instances, less environmental significant activities might be ancillary to the main authorized activities and this may result in duplication of studies which were done for the main activity	With respect to exemption, the intention of the proposed amendment is to legally clarify that no person may be granted an exemption from the requirements of obtaining an environmental authorisation. However the Department agrees that there may be instances where an exemption may be required from an environmental authorization.	The Committee supports the clause in the Bill.

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community and may result in project delays.			
WESTERN CAPE PROVINCIAL GOVERMENT Section 24M(4) unnecessarily fetters the discretion of the relevant competent authority when it states "The Minister, the Minister of Minerals and Energy or MEC may only grant an exemption contemplated in subsection (1) or (2), as the case may be, if- (a) the granting of the exemption is unlikely to result in significant detrimental consequences for or impacts on the environment; (b) the provision cannot be implemented in practice in the case of the application in question; or (c) the exemption is unlikely to adversely affect the rights of interested or affected parties." While the intent to qualify the empowering provision is supported, the current wording is problematic. The current (a) and (c) should be amended and "(b)" should be deleted.	If not deleted in its entirety, then the wording should be amended to read "The competent authority may grant an exemption contemplated in subsection (1) or (2), as the case may be, if – (a) the granting of the exemption is unlikely to result in unacceptable detrimental consequences for or impacts on the environment; or (b) the exemption is unlikely to result in unacceptable negative impacts on the rights of interested and affected parties."	Refer to our response above.	The Committee disagrees. The Committee raised a concern that section 24M(1) appears to allow the Minister of Mineral Resources to exempt certain environmental management requirements under the NEMA. This provision should be reconsidered by the Department Therefore, clause 9 must be reviewed and amended to insert in section 24M(1) reference to section 24(1A).
ACMP It is not clear why the blanket inclusion as the outcome of 24(4) (a) would result in the matters being considered listed and hence 24(4) (a) would apply	It is recommended that the competent Authority be allowed some discretion with regards to exemptions from ***some*** provisions listed under 24(4) (a).	The intention of the proposed amendment is to legally clarify that no person may be granted an exemption from the	The Committee supports the clause in the Bill.

to both section 24(2)*(a) and* section 24(2) *(b)*. Exemptions should be allowed in some instances. For example, some provisions of 24(4) (a) may already have been complied to base on environmental management tools such as policies, EMFs, norms and standards, etc.		requirements of obtaining an environmental authorisation.	
PAPER MANUFACTURERS ASSOCIATION OF SOUTH AFRICA The draft bill provides that *no* exemption may be granted from the requirement to obtain an environmental authorisation as contemplated in **section 24(2)(a) and (b)** We believe that removal of exemptions is premature.		We agree that there may be circumstances that may warrant an exemption of an environmental authorization.	The Committee supports the clause in the Bill.
Clause 10: Amendment of section 240 (Criteria to be taken into account by competent authorities when considering applications)			
BUSINESS UNITY SOUTH AFRICA Compliance with such instruments which may not be known to the applicant is impossible. Failure to make such requirements known up front details the process.	Where new internal instruments are published within a national or provincial department and such instruments will be considered by that department as part of an application for environmental authorisation, these instruments must be made public and further an applicant must be properly advised at the preliminary stage of the application of the instruments that will be considered. Such instruments must be gazetted for public comment before implementation.	Section 24(10) sets out the process of developing and adopting norms or standards.	The Committee indicated that the clause provide clarity that only adopted environmental management instruments must be considered during the assessment of the EIA application. The Committee also indicated that the latter part of this clause should be a separated criteria ((ix) any other information in the possession of the competent authority that are relevant to the application; and)
WESTERN CAPE PROVINCIAL GOVERNMENT			

While Section 24O(1)(c) refers to "*organ of state charged with the administration of any law which relates to the activity in question*" subsection (2), (3) and (4) only refers to state departments. This should be amended to organ of state so as to include Municipalities.	Firstly subsection 24O(1)(b)(vii) should also be amended to read take into account the comments of any "organ of state **[that have jurisdiction over any aspect of the activity which is the subject of the application]** charged with the administration of any law which relates to the activity in question. " Secondly subsections (2), (3) and (4) should also be amended to refer to organs of state charged with the administration of any law which relates to the activity in question" rather than "State department that administers a law relating to a matter affecting the environment"	The NEMLA Bill does not amend section 24O(1)(b)(vii) of NEMA. It is suggested that the proposal should be considered in the next round of amendments.	The Committee indicated that the proposed amendment should be considered in the next round of amenments.
Clause 11: Amendment of section 28 (Duty of care and remediation of environmental damage)			
BUSINESS UNITY SOUTH AFRICA It is noted that any relevant organ of state may issue a directive. That organ of state is not specifically required to consult with the Director-General or a provincial head of department. It is not clear why the current requirement for consultation with a relevant organ of state is replaced with regulatory power with no requirement to consult with the relevant head of department. This particular insertion gives a room for any sphere of government to regulate environmental issues. To have an open ended list like "head of any relevant organ of state" will present significant challenges for the regulated community because there is no	It is proposed that the reason for this change be motivated and if the motivation is considered sufficient, at least consultation with the Director General or Provincial Head of Department should be required as appropriate	The expansion of the authorities that are empowered to issue directives under S28, is aimed at providing administrative mechanisms to other administrative heads that are responsible for undertaking compliance and enforcement in terms of NEMA and the SEMAs (for example, municipal managers for air quality issues, the CE of Sanparks for protected areas issues). In these circumstances, it would be more efficient for these administrative heads to be allowed to issue directives, rather than having to refer the	The Committee raised a concern around the proposed amendments on the expansion of the organs of state to issue a section 28 directive. The Department must review current clause to limit or list the organ of state. The clause should also limit the powers provided to the organs of state.

objective criterion to identify if the power to enforce duty of care is being carried out by the relevant authority. This proposal is particularly problematic where a provincial competent authority may seek to issue directive in respect of an activity which is a national competence.		matter to province (HOD) or national (DG). It is suggested that we include a definition of "relevant organ of state" or list them in a schedule to the Act.	
BUSINESS UNITY SOUTH AFRICA The directive referred to in subsection (4) is intended to address a situation where the "reasonable measures" to address "significant pollution" referred to in subsection (1) are not taken. It is not intended to be used in any case where an EMI observes pollution that may not be significant.	The introduction of this provision must be reviewed to address the following : • Conditions of cessation and subsequent reinstatement of activities Clarity that this extremely serious step will only be taken as a last resort.	The threshold of significance is still retained as a requirement for a section 28(4) directive. The omission of the trigger of "reasonable measures" allows the authority to take immediate and direct action, rather than having to engage in a lengthy argument on what "reasonable measures" constitute.	The Committee indicated that the directive is performed within the provisions of the PAJA, which requires such action to be reasonable.
BUSINESS UNITY SOUTH AFRICA The power to direct the cessation of an activity, operation or undertaking in addition to the current obligations that may be directed, does not take the following considerations into account: • Absence of timeframe or conditions on cessation implies forever. • Impossibility of ceasing activities and then still taking measures as is implied by the use of the term "and" at the end of the list of obligation.		There may be situations where the harm is serious and imminent; and it may not be effective to leave the "cessation" as the last resort. In order to build flexibility in the clause, one may need to consider adding a "or" between the various follow up steps in order to give the authority the discretion what and when to require these steps to be taken. It should be noted that the	The Committee indicated that the directive is performed within the provisions of the PAJA, which requires such action to be reasonable.

It is not reasonable to require cessation of activities and the application of any measures without making a clear link between the two. The intention of the regulator is surely only to require cessation if no other remedy is possible while operations continue and to allow a reinstatement of activity once measures have been introduced to remedy "significant pollution".		authority that issues the notice will, in any event, be bound by reasonableness (as required by PAJA and the Constitution) as the issuing of the directive is an administrative decision.	
BUSINESS UNITY SOUTH AFRICA In addition subsection clearly refers to "reasonable measures" while proposed subsection (c) refers only to "measures".	It is proposed that the reference to "measures" include "reasonable" as required in terms of subsection (1). Subsection (4) refers to failure to comply with (1). The language must therefore be the same.	The trigger for the issuance of a directive is no longer failure to comply with subsection (1) but rather the causing of or potential to cause significant pollution / degradation. Therefore no need to keep the language the same.	The Committee indicated that the directive is performed within the provisions of the PAJA, which requires such action to be reasonable.
WESTERN CAPE PROVINCIAL GOVERNMENT Section 28(5) of the "Duty of care and remediation of environmental damage" Include the word "and" after section 28(5)(e).	Amend section 28(5)(e) to read: "*the desirability of the State fulfilling its role as custodian holding the environment in public trust for the people; and*"	The NEMLA Bill is not proposing amendments to section 28(5)(e) of NEMA.	The Committee indicated that this is technical amendment that should be considered.
WESTERN CAPE PROVINCIAL GOVERNMENT The proposed new section 28A which provides for criminal liability repeats section 28(14)(a), (b) and (15), except section 28(14)(c). It is proposed that the amendment be incorporated in section 28, unless the intention is to		These comments are already addressed in the NEMLA Bill.	These comments are already addressed in the Bill. The various provisions in NEMA/NEMLA that relate the management of emergencies should, if possible, be consolidated and aligned. Where exceptional circumstances exist that cannot be covered by a general provision, these should be provided for in an

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create a new section. Section 28A "Criminal liability" Delete "Rand after "R10 million". Include the word "a" in section 28A(2) before the word "period". The proposed amended s24G(4) states that the administrative fine is excluded if a person has commenced with a listed or specified activity in an emergency response situation in order to protect human life or the environment. It should be considered whether a similar exclusion for criminal liability should be included in s28A when a directive is issued in terms of s28 or s30. There is an interpretation that permits a directive issued in terms of s28 (and/or s30 with the necessary changes to these comments) to direct someone who has caused or may cause significant pollution or degradation of the environment and wants to responsibly proceed to take the measures without having to obtain environmental authorisation if those measures will trigger a listed activity. In such situations only those measures	Amend section 28(A)(2) to read: "*Any person who contravenes or fails to comply.... Fine not exceeding R10 million or imprisonment for a period not exceeding 10 years...*"		exception, proviso.

which are required to remedy the on-going significant pollution or degradation will be permitted without obtaining prior environmental authorisation. The remainder of the steps to be taken in terms of the directive (i.e. non-urgent steps) should follow either a section 24 or section 24G application route depending on the circumstances. The issue then arises as to whether the person directed to undertake such measures will be committing an offence in terms of section 24F(1) {commencement with listed activity without environmental authorisation} in addition to potentially contravening the proposed s28A(1) {breach of their duty of care}. The matter is further complicated in that if the person does not comply with the directive they will be committing an offence in terms of the proposed section 28A(2) {failure to comply with section 28 directive}. In other words, it should be possible to direct someone to commence with a listed activity in terms of a section 28 and/or s30 directive without such person being criminally liable. Such a person should still be liable for an offence in terms of section 28A for negligence, if applicable. Accordingly, it should be made clear that it will not be an offence in terms of			

s24F if someone commenced with a listed or specified activity in accordance with a directive issued in terms of section 28 or section 30. Given the proposed amendments to s24G which enables someone to apply once they have 'commenced' with a listed activity and not upon 'committing an offence' in terms of section 24F(2)(a), a decision will have to be made whether the legislation should allow the person to apply in terms of section 24G(as amended by this Bill) in respect of those activities they were directed to undertake. Alternatively, whether an exclusion should be made from paying the section 24G(2A) administrative fine in respect of those activities they were directed to undertake (see proposed changes with respect to s24G(4) above). A further change may also be needed to section 30 and the definition of "emergency incident".			
RAND WATER The word "relevant organ of state" may present ambiguity in that it could mean organs of state whose primary duty is the management of natural resources, on the other hand it might impliedly include organs of state that indirectly manage the natural resources like Rand Water.		See comment above on organ of state. It is suggested that we include a definition of "relevant organ of state" or list the organs of state in a schedule to the Act.	The Committee raised a concern around the proposed amendments on the expansion of the organs of state to issue a section 28 directive. The Department must review current clause to limit or list the organ of state as per the Chief State Law Adviser opinion. The clause must also limit the powers provided to the organs of state.

PAPER MANUFACTURES ASSOCIATION OF SOUTH AFRICA Comment as above.			
ERASMUS ATTORNEY The proposed amendments constitute a significant clarification and improvement. It is with no small measure of relief that it is noted that the Bill no longer proposes the deletion of Section 28(12) of NEMA which remains the primary mechanism enabling civil society to compel the upholding of Constitutionally enshrined environmental rights.		Comment noted.	The comment was also noted by the Committee.
PAPER MANUFACTURES ASSOCIATION OF SOUTH AFRICA We note the proposed amendments to **Section 28 – the duty of care**. Our previous comment is still valid although we note the removal of the word "significant". While the meaning of "significant" may be contentious, we urge that it not be omitted as the implications can be far reaching. Significant can at least identify that the pollution or degradation of the environment is likely to cause irreversible impacts or serious health risks, and some attention could be paid to perhaps the issuing of a guidance note or advice note on how		"Significance" is not omitted in section 28, it is still contained in clause 11(a) of the Bill.	The Committee noted that the comment was already addressed in the Bill.

the use of the term "significant" translates into practice on the ground. Otherwise, the simple act of driving one's car to work causes "pollution" of the environment! Alternatively We note the proposed amendments to **Section 28 – the duty of care**. Out previous comment is still valid although we note the removal of the word "significant". While the meaning of "significant" may be contentious, we urge that it not be omitted as the implications can be far reaching. Significant can at least identify that the pollution or degradation of the environment is likely to cause irreversible impacts or serious health risks, and some attention could be paid to perhaps the issuing of a guidance note or advice note on how the use of the term "significant" translates into practice on the ground. Otherwise, the simple act of driving one's car to work causes "pollution" of the environment! Alternatively, it is submitted that the term "significance" should be properly regulated in order to ensure compliance with administrative law requirements.			
ACMP The need for strong urgent action to protect the environment is highly appreciated. However, we would like to caution that there may be instances		Comment is noted.	The Committee indicated that the directive is performed within the provisions of the PAJA, which requires such action to be reasonable.

where a directive to cease an activity may have unintentional consequences resulting in further environmental degradation. Hence, it is recommended to retain, under certain circumstances, the ability to investigate, evaluate and assess the impact of specific activities and report thereon prior to ceasing the activity as per discretion of the Authority.			
Clause 12: Insertion of section 28A (Criminal liability of certain persons)			
BUSINESS UNITY SOUTH AFRICA This provision criminalises behaviour, which is not contemplated in the current legislation. The Act refers to "significant pollution" and any reference to an offence must be aligned with that.	It is proposed that this provision be reviewed to accurately reflect the provisions of section 28(1).	Agreed. The word "significant" should be inserted before the word "pollution" in section 28A(1) in the Bill.	The Committee indicated that the word "significant" must be inserted before the word "pollution". The Committee also indicated that the Bill must provide for a separate section on all offences under the Act. The new section must be inserted in Chapter 10 of the Act.
WESTERN CAPE PROVINCIAL GOVERNMENT We note that sub-section (12) has been deleted. We note that sub-section (13) in the current Act relates specifically to sub-section (12). Sub-section (12) cannot be deleted leaving sub-section (13) on its own. Certain officials within the Department have raised concerns regarding the deletion of this sub-section and the	Include the current s28(12) into the proposed s28.	Section 28(12) is not deleted, and still contained in clause 11(g) of the Bill.	The Committee indicated that the comments were already addressed in the Bill.

implications for the rights of the public to just administrative action.			
WESTERN CAPE PROVINCIAL GOVERNMENT In addition to the above, we note that non-compliance with a directive is no longer a criminal offence, as sub-section 14(c) has not been included in s28A Criminal liability. This Department is strongly against this omission. The effect of which is that the only way to enforce an s28 directive is by way of a court order. The threat of criminal prosecution for non-compliance with a directive is often seen as why most individuals comply or respond to a directive. Therefore this omission will negatively affect enforcement of environmental legislation.	Insert the current section 14(c) into the proposed s28A.	In terms of clause 12 of the Bill, it is still an offence not to comply with a directive issued in terms of section 28.	The Committee indicated that the comments were already addressed in the Bill.
ERASMUS ATTORNEY This addition is essential to provide for activities that have a detrimental impact on the environment but are not activities listed in terms of section 24. It is unclear why the wording of section 24F(4) has not been amended to provide for escalated penalties for repeat offenders as is the case in the proposed section 28A(4) and section 30(1).		The alignment of the penalties can be considered.	The Committee indicated that penalties under the Act must be aligned.

SECTION 43(7) (FAILURE OF THE BILL TO PROPOSE THE AMENDMENT OR DELETION OF)			
ERASMUS ATTORNEYS Section 43(7) of NEMA which provides that an appeal against an authorisation does not suspend that authorisation is unconstitutional and administratively unjust by definition. The principle that an appeal suspends the administrative decision being appealed is a cornerstone of South African administrative law for obvious reasons: It makes no sense and serves no useful purpose to give effect to a decision that stands to be set aside only to have to undo all the consequences once the decision has been set aside. This is especially true when it comes to the issuing of authorisations for the undertaking of listed activities that will have significant impacts on the environment: What Section 43(7) of NEMA provides for, by way of hypothetical example, is that: The holder of a contested authorisation to undertake a destructive activity in a highly vulnerable environment can proceed with the activity pending an appeal against that authorisation.		The NEMLA Bill does not amend section 43(7) of the NEMA. However, the purpose of section 43(7) of NEMA is to allow appellants to request the Minister, through application, to suspend the authorisation issued pending the finalization of the appeal.	The Committee indicated that the Bill is not amending section 43(7) of NEMA. However, the Department should consider the proposed amendment in the next round of amendments.

Should the appeal succeed, it would mean that the damage would already have been done and would have been done lawfully with the result that the environment would have been significantly degraded with no mechanism with which to compel rectification. The damage would have been done and the right to appeal rendered worthless. This provision, as it stands, rides roughshod over the environmental rights enshrined in Section 24 of the Constitution, 1996 and is anathema to the principles and provisions of NEMA, especially with regard to the mandatory requirement that caution must always be applied. In our submission it is only a matter of time before the Constitutionality of this Section of NEMA is subjected to Court challenge and we would suggest that it would be far preferable for it to rather be amended or removed by legislative amendment. It is again strongly proposed that Section 43(7) the deleted or, preferably, replaced with a provision stating unequivocally that an appeal in terms of section 43 of NEMA suspends the authorisation/ decision being appealed.			

Clause 13: Amendments to section 30 (Emergency incidents)

PAPER MANUFACTURES ASSOCIATION OF SOUTH AFRICA **Section 30**, specifically "a person who fails to comply with a directive" is too subjective to justify an offence. Some legislative guidance on what constitutes "failure" should be incorporated. A directive may contain many requirements – does failure to meet one of those requirements automatically constitute an offence, no matter how trivial?		The Department looks objectively whether there is substantive compliance with the directive. The NPA will in any event not prosecute in trivial matters.	The Committee indicated that the directive is performed within the provisions of the PAJA, which requires such action to be reasonable.
WESTERN CAPE PROVINCIAL GOVERMENT The definition of "incident" should be amended to read as "a progressive or sudden, widespread or localized, natural or human-caused occurrence which– (a) causes or threatens to cause– (i) death, injury or disease; (ii) damage to property, infrastructure or the environment; or (iii) disruption of the life of a community". Subsection (b) which deals with "responsible person" should be amended by inserting an additional subsection which reads "(iii) any other person directed in terms of subsection (6) to urgently take steps to address the incident." This is to allow that even the land owner or the person in control of the land can be directed in terms of section 30 to take urgent steps e.g. if		The NEMLA Bill is not proposing substantial amendments to section 30 of NEMA. There is currently a process underway to look critically at section 30 and obtain input from stakeholders in relation to how this section is currently being implemented. As a result of this process (which includes a series of workshops with industry) proposals will be made to amend various provisions of section 30. It is suggested that these proposals should be dealt with in the NEMA Amendment Bill, 2013.	The various provisions in NEMA/NEMLA that relate the management of emergencies should, if possible, be consolidated and aligned. Where exceptional circumstances exist that cannot be covered by a general provision, these should be provided for in an exception, proviso.

there was a flood. The above amendment will create the appropriate level of flexibility to respond to emergencies. The fact that such action is still subject to being directed, will prevent inappropriate actions from being taken. This must also be read in conjunction with the other proposed amendments.			
Clause 14: Amendment of section 31J (Powers of EMIs)			
ACMP Extending the powers to transport is appreciated. However, the powers should be more generic to ensure that the EMIs are able to take action against those driving vehicles in cases such as: • Monitoring vehicle exhaust emissions to manage ambient air quality- transport has been identified a major source of pollution and GHG emitter. • Transporting waste in heavy duty vehicles that do not comply with responsible safety precautions. It is a common occurrence to witness debris falling off such vehicles which results in environmental pollution and at times consequential health and safety impacts.		The comment is noted, but not supported.	The Committee indicated that clause 14(b) must be structured differently to exclude reference to "this Act or a specific environmental management Act" in every paragraph.
Clause 15: Amendment to section 44 (Regulations)			
PAPER MANUFACTURES ASSOCIATION OF SOUTH AFRICA		Comment is noted. The	The Committee agreed with the Department proposal to delete the words "human health".

Amendment of **section 44 of Act 107 of 1998**, envisages the adding of the power to make regulations dealing with the prohibition, control, sale, distribution, import or export of products that may have a substantial detrimental effect on the environment or human health. PAMSA submits that this power be limited to the extent that publication of such Regulations will *not* result in duplication of process or activity. There are regulations already in existence which regulate certain products (Hazardous Substances Act) or organisms (Conservation of Agricultural Resources Act and NEM: Biodiversity Act).		Department proposes that the words "or on human health" be removed".	The Committee also indicated that the clause must include the word "production" before the word "prohibition", and the insertion of an empowering provision in the Bill. The Committee further required the insertion of a clause that will require Minister's intention to exercise the power to be table in parliament before implementation.
ACMP It is appreciated that the amendment of s44 requires consultation with the Minister responsible for Trade and Industry. However, the provision has to be harmonized with international practice. There is currently some conflict. An example to illustrate this could be GBFS (granulated blast furnace slag) which is classified as a product internationally and sold accordingly while some quarters in South Africa views it as a waste in terms of the current Waste Act. This has major implications for competiveness in South Africa and can also contribute negatively to carbon leakage in terms of our national climate change strategy.		Comment is noted. The consultation process between the Minister and Minister of Trade and Industry is meant to deal with trade issues before such regulations may be published and implemented.	The Committee requested the Department to check other Departments that must be directly consulted before the exercise of the power by the Minister.

Clause 17: Amendment of section 47D (Delivery of documents)			
ACMP Section 47D: The inclusion of the use of alternate technologies would contribute to dealing with the matter urgently. It is appreciated that notices etc could be electronically issued. However, due to complying with strict timeframes for a response, it may be inappropriate to regard as having come to the notice of the responsible person.	It is recommended that electronic communications be supported with telephonic confirmation as it is possible that the responsible person may be out of office or engaged elsewhere and the Administration officer receiving the notice may not appreciate the urgency of the matter at hand.	Comment is noted. However the intention of the proposed amendment is only include those methods of delivery set out in the clause.	The Committee raised a concern regarding the removal of the words "unless the contrary is proved". The Committee requested the Department to review this clause and reinstate the original wording.
Clause 18: Amendment of section 48 (State bound)			
WESTERN CAPE PROVINCIAL GOVERNMENT Please note that we are in agreement with the proposed changes to section 48 of the NEMA.		Comment is noted.	The Committee raised concerns about the intention of the amendment to provide for criminal liability, especially in relation to national and provincial departments and municipalities as they are spheres of government. The current clause is very broad, and may require limitation on the types of State Owned Enterprises that may be held criminally liable. The Committee agrees with the opinion of the Chief State Law Adviser on this clause. The Committee requested the Department to provide justification on the proposed criminal liability of departments, provinces and municipalities.
ACMP It is noted that s48 the Act would be binding on the State and *will be*		Comment is noted.	See Committee's comment above.

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criminally liable. This is an important development and it is important that direction be taken from the Occupational Health and Safety Act by confirming who the Accounting Officer would be to ensure that any enforcement action taken is addressed to the correct Person. Environmental management spans across various departments and it is noted that the EIP responsibility has shifted from the Province to the Environment Department. In the case of local government, clarity is also required between the Municipal and District Municipal Accountable Officer. The amendment must specify who the accounting Officers are to inform job descriptions.		It is our view that the Public Service Act already sets out the relevant Directors-General who are accounting officers of the relevant Departments. Therefore, it is not necessary to repeat it here again.	
PROPOSED AMENDMENTS TO THE NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERISTY ACT, 2004			
Clause 32: Insertion of sections 56(1A) and (1B) (Listing of species that are threatened or in need of national protection) Clause 33: Insertion of section 57(5) (Restricted activities involving listed threatened or protected species) Clause 34: Insertion of section 66(4) (Exemptions) Clause 35: Insertion of section 70(4) (List of invasive species) Clause 36: Insertion of sections 71(3) and (4) (Restricted activities involving listed invasive species			
Clause 34: Insertion of section 71A (Prohibitions)			
CENTRE FOR ENVIRONMENTAL RIGHTS 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		The Department reduced the draft AIS Regulations to fall within the scope of the existing Act.	The Committee takes note that the AIS regulations were reduced to be implemented within the current provisions of NEMBA. The expansion of certain matters within the AIS regulations will only be implemented after the comprehensive NEMBA Amendment Bill.

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.			
CENTRE FOR ENVIRONMENTAL RIGHTS 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	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*	The interpretation provided by CER is noted, but the proposed wording will change the intention of the provision. If the intention was to prohibit all restricted activities involving listed invasive species in any circumstances, reference to "specimen" should be deleted, but that was not the intention.	The Committee agreed with the proposed wording by the Department.

involving listed invasive species.	*which a permit to carry out a restricted activity may not be issued in terms of Chapter 7."*	The intention is to prohibit the carrying out of restricted activities involving certain specimens of listed invasive species in certain areas only, or in certain circumstances only, the prohibition cannot relate to the listed species in its entirety. In this case reference to "specimen" should therefore be retained. Proposal: The wording "*and subject to such conditions as the Minister may specify in the notice*" may need to be included to make the provision of section 71A(1) consistent with those of sections 57(2), 57(4), 66(1) and 71(3).	
Clause 38: Amendment of section 85 (Establishment of Bioprospecting Fund)			
CENTRE FOR ENVIRONMENTAL RIGHTS 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. Firstly, the proposed provision violates section 9 of the Constitution by creating an unfair		The intention of this amendment to section 85(5) is to expedite payment to beneficiaries that have established systems in place (including traditional council or structures established and recognised in terms of the Republic's Traditional Leadership and Governance legislation). In addition, the proposed amendment aims to	The Committee agreed with the proposed revised wording by the Department. In addition, the Bill must also provide for an enforcement mechanism with respect to the non-compliance with the payment of the monetary benefits within 30 days.

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 Bio prospecting 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. 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.		provide protection against the vulnerable communities or stakeholders that do not have those established systems by allowing the monetary benefits to be paid to the Fund in terms of section 85(2) for the Director-General to transfer to the relevant beneficiaries. The Department only has a supervisory role in monitoring that the monetary benefits arising from any bioprospecting benefit-sharing or material transfer agreements are paid to the relevant communities or stakeholders. Therefore, the overall intention of the proposed amendments is to ensure speedily payment of monetary benefits to the non-vulnerable communities or stakeholders; and at the same time protect the vulnerable communities or stakeholders. In order to maintain subsection 85(5), the following alternative proposal is submitted: "(5) Notwithstanding subsection (2), where a stakeholder in terms of a benefit-sharing agreement has a bank account, all money arising from such benefit-sharing agreement may be	

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) 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) 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.		transferred directly to the bank account of the stakeholder and proof of transfer of the benefits arising from the benefit sharing agreement must be submitted to the Department by the permit holder within 30 days of such transfer." 	

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. 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 marginalized communities has the risk of increasing rather than addressing existing poverty and lack of access by these communities to capital and economic opportunity. 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 gazette 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. 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. 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.

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.

1. 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)*

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	(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			

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	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			
CENTRE FOR ENVIRONMENTAL RIGHTS 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.			The response set out above is also applicable to this comment.	See Committee's comment above.
Clause 39: Section 86 (bioprospecting, access and benefit-sharing exemptions)				
AFRIFORUM Section 86 poses a threat and needs to be elaborated to ensure understanding. AfriForum supports the permit system. This will ensure that sustainable utilisation of indigenous biological resources are used by communities.			Section 86 only enable exemption of activities that are linked to bioprospecting, which by its definition are conducted for commercial gain. This provision does not hinder other applicable legislations to be enforced.	The Committee accepted the explanation by the Department on this comment.

Overutilization will occur if no measures are implemented. Traditional healers and traders of medicinal plants can through this system develop a business through growing and producing these plants instead of just harvesting from natural resources. This can enable economic growth through farming. The debate mentions that a Doctor buys medicine from a pharmaceutical consultancy or supplier, which buys it from the product developer which buys these raw materials from the farmer. A major issue in South Africa today, is rural communities over utilising trees for fire wood and even selling the wood on the side of the road. This is not sustainable and an amendment like this can result in bush encroachment.		The business of growing and producing raw materials from indigenous species with medicinal properties for utilization by the bioprospectors is regulated by these provisions, whether by traditional healers or traders. The issue of over utilization trees for firewood and selling of such woods is outside the scope of bioprospecting provisions. There are other applicable legislations in this regards, such as the National Forest Act No. 84 of 1998 which deals with forests and trees. This Act emphasizes sustainable forest management and it is administered by the Department of Agriculture, Fisheries and Forestry.	
Clause 41: Amendment of section 88 (Application for permits) **Clause 42: Amendment of section 93 (Cancellation of permits)**			
CENTRE FOR ENVIRONMENTAL RIGHTS We support allowing the Minister to defer a decision to issue a permit if an applicant is under		Proposal supported. The Biodiversity Act should expressly make provision for the Minister to refuse permits in certain circumstances, and not	The Committee is of the view that an amendment is required.

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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.		merely to defer a decision to issue the permit. Proposal: Either section 93 can be expanded to refer to cancellation or refusal of permits, or a separate section could be inserted as section 92A to make provision for refusal of permits. If section 93 is not expanded, it is proposed that the wording *"the applicant"* in subsections 93(b) and 93(c) be deleted, as this section deals with cancellation of existing permits, in which case an applicant will not be relevant.	
CENTRE FOR ENVIRONMENTAL RIGHTS 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		Comment noted (i) The consideration of previous contraventions as a factor when deciding on a permit, would only apply to, contraventions in terms of the Biodiversity Act. (ii) Previous contraventions of the Biodiversity Act should not be included in section 88 as merely a factor to be considered when a decision has to be made as to whether a permit can	The Committee accepted the proposal by the Department.

National Environmental Management: Air Quality Act, 2004.		be issued. This factor should be included in a separate section, that the Minister may refuse a permit in this circumstance as discussed above. Wording to be proposed or should be linked to the amendment support relating to the refusal of permits.	
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)**			
CENTRE FOR ENVIRONMENTAL RIGHTS 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	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.	Comment noted. The Department is in the process of drafting national appeals regulations applicable to appealable decision taken in terms of NEMA (EIA decisions) and NEMBA (TOPS, CITES and Bioprospecting). The draft regulations will be consulted with the provinces as well as members of the public.	The Committee noted and supports the Department in the development of national appeals regulations.

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the Biodiversity Act are repealed without a new appeal procedure being prescribed, there will be a regulatory gap.			
Clause 47: Amendment of section 97 (Regulations)			
THE ENDANGERED WILDLIFE TRUST We are concerned with the proposed inclusion of section (*fA*) which will provide that the Minister may make regulations relating to **self-administration within the wildlife industry**. We acknowledge that such regulations have not been drafted yet and that we will be afforded an opportunity to comment on the specific content of the proposed regulations, as part of the required public participation process. We are however concerned with the principle of allowing self-administration within the sector. We further note the contents of Clause 47 in the explanatory memorandum on the objectives of the Bill. Neither the Bill, nor the explanatory clause, however, provides an adequate clarification or definition on the meaning of '*wildlife industry*' or '*self-administration*'. It is not clear whether **self-administration,** as envisaged, could potentially equate to **self-regulation.** It is not clear whether the proposed regulations will in fact, once they are drafted, add to the current legal requirements applicable to the wildlife-industry, or whether they will reduce the industry's existing obligation to comply with the current legal framework. It is further not clear which stakeholders will fall within the ambit of the '*wildlife industry*', as envisaged in the Bill.		Agreed that "*self-administration*" would need to be defined, as the intention is not to allow for "*self-regulation*". However, if the matter is being dealt with in the regulations, and self-administration is defined in the regulations, it would not have to be defined in the Act. There may be a need to include a provision relating to the recognition of associations in the wildlife industry, because that will enable Minister to link self-administration to persons that are members of associations. This will enable the associations to assist in terms of oversight of self-administration, while government will remain responsible for all authorisations, compliance and enforcement. The term wildlife industry could be defined, but a broad definition would be required to ensure all potential sub-sectors are included. The intention is to place more responsibility on the various sub-sectors	The Committee accepted the Department's proposals regarding the principle underlying regulations self-administration. The Committee also accepted the proposal by the Department regarding the definition of self-administration, and revised wording.

		(hunting, translocation, game farms, and breeders) to promote and facilitate compliance within the sub-sectors. It is recommended that the provision be amended to refer to the "biodiversity sector" rather than the "wildlife industry". A definition for biodiversity sector should be included. Comments with regards to the adding or reducing of legal obligations, and to which stakeholders the principle of self-administration will apply are noted. The intention is to reduce the administrative burden experienced by the wildlife industry (biodiversity sector), in certain circumstances and based on certain authorisations already obtained. This intention and the scope of the sector that it will apply to, will be dealt with in the regulations.	
Clause 50: Amendment of section 102 (Penalties)			
CENTRE FOR ENVIRONMENTAL RIGHTS It is consistent for offences relating to bio prospecting and listed invasive species to be subjected to the "topping up" of fines in the		Comment is supported. The Department propose the following wording: Proposal:	The Committee agreed with the proposed wording by the Department.

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.		If a person is convicted of an offence involving a specimen of a listed threatened or protected species, or an alien species or commencing the commercialisation phase of bioprospecting without a permit issued in terms of Chapter 7, a fine may be determined, either in terms of subsection (1) or equal to three times the commercial value of the specimen or activity in respect of which the offence was committed, whichever is the greater.	
GENERAL COMMENTS (Air Quality Officer's Forum)			
WESTERN CAPE PROVINCIAL GOVERMENT Section 42 (1) must be amended as follows to allow for the incorporation of the Atmospheric User Charge into NEM:AQA Atmospheric User Charge: This is an annual charge to be paid by industries that are identified as those that require an Atmospheric Emission Licence to operate.	The holder of a provisional atmospheric emission licence is entitled to an atmospheric emission licence when: (a) the facility has been in full compliance with the conditions and requirements of the provisional atmospheric emission licence for a period of at least six months; and (b) Payment of the applicable atmospheric user charge has been made or an acceptable payment arrangement entered into with the relevant licensing authority.	The NEMLA Bill does not amend section 42(1) of the NEMAQA.	The Committee requested the Department to review the air quality comments and determine whether technical or substantial.

The definition of the Atmospheric User Charge and Atmospheric Emission License Processing Fee must be explicitly defined in NEM: AQA.	The following are suggested definitions: Atmospheric Emission Licence Processing Fee: This is the administrative charge to be paid by industries for the processing of its application for an Atmospheric Emission Licence.	Our response above is also applicable to this comment.	See Committee comment above.