



## RESPONSES TO ISSUES RAISED BY THE PORTFOLIO COMMITTEE ON WATER AND ENVIRONMENT DURING

### THE CLAUSE BY CLAUSE ANALYSIS OF NEMLA, 2012 (AUGUST, SEPTEMBER 2012)

| Comment from PC   | Relevant section/s in Act                | Relevant section in Bill | Department Response   | Proposed additional amendments   |
|---|--|--------------------------|---|--|
| 1. 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. | Emergency: S24 F(3), S30, S24G(4) - Bill | Clause 8                 | The current provisions in NEMA/NEMLA that relate to emergencies provide for 2 distinct situations: <ul style="list-style-type: none"> <li>Section 30 deals with the management of "emergency incidents", which are human-caused sudden or unexpected occurrences, for example, a fire or explosion from the premises of a specific facility. The section provides for a process of compulsory reporting, issuing of directives and remediation in such an event.</li> <li>S24F(3) and S24G(4) deal with a broader type of "emergency" than S30 and may include a natural disaster, such as an earthquake or flood. In these situations, people commencing with listed activities should not be held criminally liable, and should not be required to pay an administrative penalty under S24G.</li> </ul> | New definition of "emergency response" under section 24F as follows: <p><i>In this section:</i></p> <p><b>"emergency response"</b> means a necessary and proportionate response to a natural or human-caused situation or occurrence that poses an imminent and significant threat to the environment, human life or property.</p> |
| 2. The additional requirements of "proportionality" and "causation" should be added to the requirements for a valid defence of commencing with a listed or specified activity without an environmental authorisation.   | S24 F(3)                                 | Clause 7                 | The addition of these requirements are supported; and therefore contained in the definition of an "emergency response" as proposed above. In addition, an amendment to S24F(3) is proposed that excludes an emergency caused by the fault of the person wishing to rely on it as a defence.   | Proposed amendment to S24F(3) as follows: <p>(3) It is a defence to a charge in terms of subsection (2) to show that the activity was commenced or continued as part of [in response to] an emergency response provided that the</p>   |

| Section in<br>Act  | Department Response | Comments |
|--|---------------------|----------|
| <p>3. 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 (comment from the Western Cape).</p> <p><b>Clause 7</b></p> <p>It is supported that in valid emergency response situations, that the competent authority should be empowered to direct the person undertaking the listed or specified activity, without the need for an environmental authorisation. However, there needs to be a compulsory duty of reporting by such persons prior to the parties commencing with such activity so that the competent authority can make an informed decision whether it is a valid emergency response or not.</p> <p>It is important that this new provision applies to listed activities that have not yet commenced. In relation to activities that have already commenced, these activities would only be able to go through a section 24G process and if it is a legitimate emergency then that person would be exempted from paying a fine. The authorities would then also be able to use a compliance notice if it was necessary to stop the activity from continuing.</p> <p><b>Proposed new subsection (5) as follows:</b></p> <p>(5) (a) Any person who intends to commence with a listed or specified activity referred to in section 24F(1)(a) as part of an emergency response, must report to the relevant competent authority, as soon as the commencement of that listed or specific activity is reasonably foreseen. The report must, at least, include the following information:</p> <ul style="list-style-type: none"> <li>(i) The nature, scope and impact of the situation that requires an emergency response;</li> <li>(ii) The listed or specified activities that will be commenced with or have commenced as part of the emergency response;</li> <li>(iii) The cause of the situation that requires an emergency response;</li> <li>(iv) An environmental management plan.</li> </ul> <p>(b) The relevant competent authority may, after having considered the report, including a consideration of whether the situation was caused by the fault of the person:</p> <ul style="list-style-type: none"> <li>(i) direct the person to commence with that activity without the need to comply with section 24F(1)(a) in line with</li> </ul> |                     |          |

| Section | Relevant Directive | Relevant Bill | Proposed Response   |
|---------|--------------------|---------------|---|
|         |                    |               | <p><u>prescribed requirements as set out in the directive:</u></p> <p>(ii) a directive in terms of (b)(ii) above will be issued without the need to first issue a pre-directive;</p> <p>(c) Should the competent authority decide not to issue a directive as provided for in section 24F(4)(b) above, the activity cannot commence in the absence of an environmental authorisation.</p> |
|         | S24F(4)            | Clause 7      | Agreed  |
|         | S24G               | Clause 8      | <p>Proposed amendment to S24F(4) as follows:</p> <p>(4) A person convicted of an offence in terms of subsection (2) is liable to a fine not exceeding R[5] 10 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.</p>  |
|         |                    |               | <p>Agreed. While S24G is under a long-term review in respect of its desirability, abuse etc., there are certain minor amendments that can be made to S24G to support this comment. These minor amendments will also clarify that S24G does not provide for "rectification" of previous illegal conduct; and that the authorisation granted will only take effect prospectively.</p>       |
|         |                    |               | <p>Proposed amendment to the heading of S24G:</p> <p>24G.<b>[Rectification]</b> Consequences of unlawful commencement of activity</p>   |
|         |                    |               | <p>Proposed amendment to S24G(2)(b):</p>  |
|         |                    |               | <p>"...issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary, which environmental authorisation shall only take effect from the date on which it has been issued."</p>   |
|         |                    |               | <p>Proposed addition of S24G(4):</p>  |

| Department Response  |                  |  |
|--|------------------|--|
|  |                  | "The submission of an application in terms of (1) or the granting of an environmental authorisation in terms of (2) (b) is no defence to a charge in terms of S24F(2)"   |
| 6. Where there has been a significant transgression of S24F(2), then the provision should state that the application of a criminal sanction is the appropriate enforcement response. | S24G<br>Clause 8 | <p>The proposed wording of the amendment to S24G above will make it absolutely clear that the imposition of a criminal sanction is available, even though a S24G application has been submitted; or an environmental authorisation granted.</p> <p>However, the choice of enforcement mechanism (criminal, administrative, civil) should remain with the enforcement official, based on the facts of each case. There are internal guidelines on when the criminal sanction is the appropriate enforcement mechanism included in the EMI Operating Manual, for example, where:</p> <ul style="list-style-type: none"> <li>• There must be sufficient, admissible and reliable evidence available to prove the charges against an accused, and therefore a realistic prospect of conviction; and</li> <li>• Where the carrying out of any activity was intentionally done without the necessary licenses, permits or authorisations and no reasonable steps were taken to obtain such authorisation;</li> </ul> |
| 7. Permitting an application for a S24G should be permitted only in limited and/or exceptional circumstances   | S24G<br>Clause 8 | The present provision is open to application by any person who has commenced with a listed or specified activity without an environmental authorisation. A possible way to limit this is to provide that the application can only be made upon direction from a competent authority; or through the issuing of a compliance notice by an EMI, however, this  |

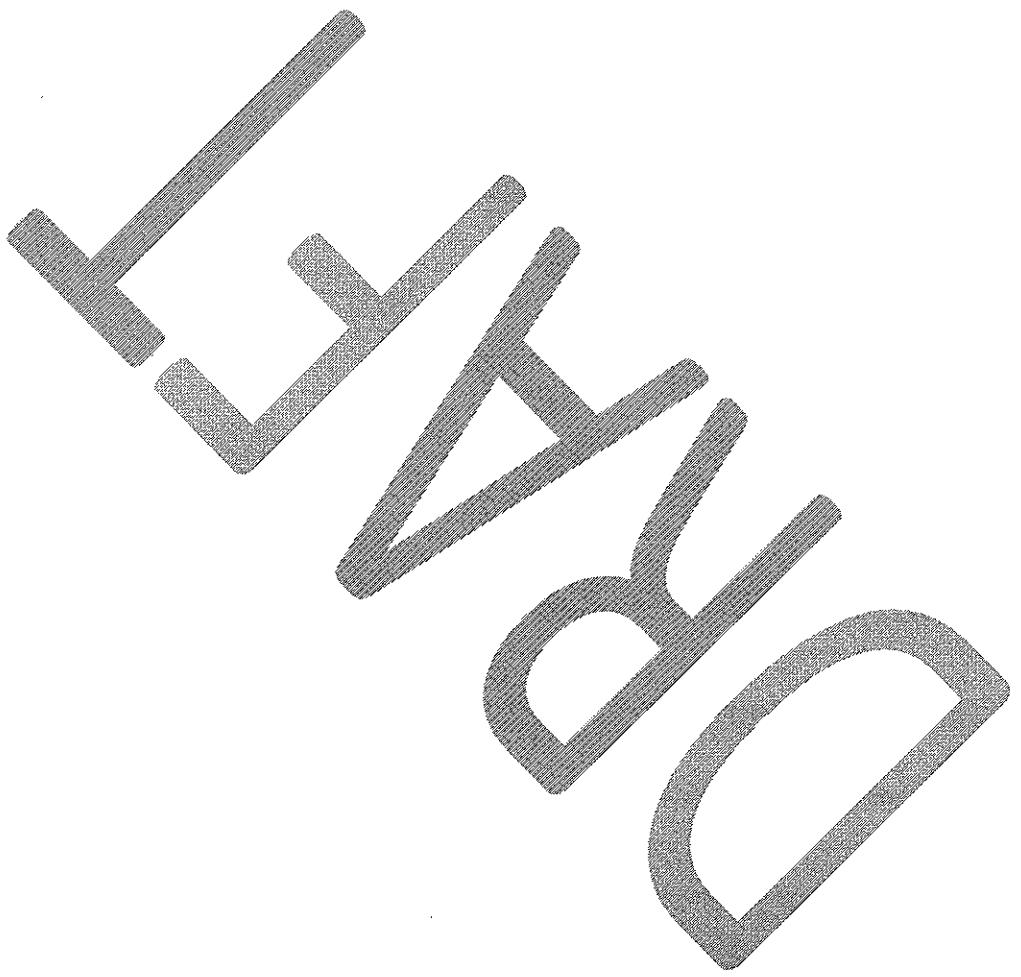
| Amendment   | Relevant section of the Bill | Relevant section of the Bill | Proposed response   |
|---|------------------------------|------------------------------|---|
| 8. An escalated S24G fine should be considered for second time offenders  | S24G                         | Clause 8                     | <p>represents a radical departure from the current system and may have widespread consequences; and it is suggested that it be deferred to the long-term assessment of S24G. Another option may be to amend the legislation to allow for the suspension of the processing of the section 2G application in the event that the NPA has decided to initiate a criminal prosecution. This also has implications that may need to rather be assessed as part of the long term S24G process.</p> <p>Agreed, the escalated S24G fine for second time applicants will deter persons from intentionally using and budgeting for S24G.</p> |
| 9. In the event that the Minister/MEC is empowered to vary the quantum of the S24G fine on appeal, the empowering provision must be identified. | S24G                         | Clause 8                     | <p>S43 of NEVA provides that any person may appeal to the Minister or MEC against a decision taken by any person acting under a power that has been delegated. After having considered such appeal, the Minister or MEC may vary that decision; or make any other appropriate decision.</p> <p>No clause proposed.</p>  |
| 10. A regulation needs to be drafted in relation to S24G providing for the following:   | S24G                         | Clause 8                     | <p>The procedure to be followed in the determination of the quantum of the fine (including an opportunity to make representations);</p> <p>The criteria that the competent authority must take into account</p> <p><b>Proposed amendment of S44 as follows:</b></p> <p><b>44. Regulations in general</b></p> <p>(1) The Minister may make regulations</p> <p>(a) dealing with any matter which</p>  |

| Department Response                   |  | Proposed changes to the Bill  |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
|---------------------------------------|--|---|--|-----------------|--------|---------------------------------------|--|-----------|--|-----------------------------------|--|-----------------|--|------------------|--|---------------------|--|
| Clause                                | Section  | Proposed change   | Impact   |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| 11.                                   | S24G   | <p>when considering the quantum of the fine;</p> <ul style="list-style-type: none"> <li>- 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.</li> </ul> | <p>under this Act must be dealt with by regulation;</p> <p>(aa) prohibiting, restricting or controlling activities which are likely to have a detrimental effect on the environment; and</p> <p>(aaa) relating to the procedure and criteria to be followed in the determination of an administrative fine in terms of S24G.”</p>  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| 11.                                   | S28  | <p>See table in next column</p>   | <table border="1"> <thead> <tr> <th>Proposed change</th> <th>Impact</th> </tr> </thead> <tbody> <tr> <td>NEMA – listed or specified activities</td> <td>Chapter 5 NEMA (environmental authorisation)</td> </tr> <tr> <td>Waste Act</td> <td>Chapter 5 NEMA (environmental authorisation)</td> </tr> <tr> <td>Integrated Coastal Management Act</td> <td>Chapter 5 NEMA (environmental authorisation)</td> </tr> <tr> <td>Air Quality Act</td> <td>Air Emission Licence – different process</td> </tr> <tr> <td>Biodiversity Act</td> <td>Various permits, including Threatened and Protected Species Permit – different process</td> </tr> <tr> <td>Protected Areas Act</td> <td>various permits required from management authority – different process</td> </tr> </tbody> </table> | Proposed change | Impact | NEMA – listed or specified activities | Chapter 5 NEMA (environmental authorisation) | Waste Act | Chapter 5 NEMA (environmental authorisation) | Integrated Coastal Management Act | Chapter 5 NEMA (environmental authorisation) | Air Quality Act | Air Emission Licence – different process | Biodiversity Act | Various permits, including Threatened and Protected Species Permit – different process | Protected Areas Act | various permits required from management authority – different process |
| Proposed change                       | Impact   |   |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| NEMA – listed or specified activities | Chapter 5 NEMA (environmental authorisation)   |   |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| Waste Act                             | Chapter 5 NEMA (environmental authorisation)   |   |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| Integrated Coastal Management Act     | Chapter 5 NEMA (environmental authorisation)   |   |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| Air Quality Act                       | Air Emission Licence – different process   |   |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| Biodiversity Act                      | Various permits, including Threatened and Protected Species Permit – different process |   |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| Protected Areas Act                   | various permits required from management authority – different process                 |   |  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |
| 12.                                   |  | <p>See table in next column: it is proposed that this table be set out in a notice gazetted to NEMA and the Bill amended as follows:</p> <p>“...or an administrative head of any relevant organ of state as prescribed...”</p>  | <p>For any breach of S28(1) of NEMA related to air quality or waste that occurs with their jurisdiction</p>  |                 |        |                                       |  |           |  |                                   |  |                 |  |                  |  |                     |  |

| Proposed legislation   |  | Relevant section of the Bill | Proposed response  |
|--|--|------------------------------|--|
| CE: Sanparks   | For any breach of S28(1) of NEMA related to protected areas/biodiversity that occurs within a national park                      |                              |  |
| CE: Isimangaliso WPA   | For any breach of S28(1) of NEMA related to protected areas/biodiversity that occurs within Isimangaliso                         |                              |  |
| CE: KZN Wildlife   | For any breach of S28(1) of NEMA related to protected areas/biodiversity that occurs within a protected area in KZN              |                              |  |
| CE: Mpumalanga Parks and Tourism Agency  | For any breach of S28(1) of NEMA related to protected areas/biodiversity that occurs within a protected area in Mpumalanga       |                              |  |
| CE: Eastern Cape Parks and Tourism Agency  | For any breach of S28(1) of NEMA related to protected areas/biodiversity that occurs within a protected area in the Eastern Cape |                              |  |
| CE: Cape Nature  | For any breach of S28(1) of NEMA related to protected areas/biodiversity that occurs within a protected area in the Western Cape |                              |  |
| 13. The requirement of "significance" should be added to S28A in order to align it to S28(1) duty of care. | S28(14) and S28A<br>(5)  | Agreed                       | <p>Propose an amendment to S28A of the Bill:</p> <p>28A. (1) No person may—<br/>           (a) unlawfully and intentionally or negligently commit any act or omission which causes <u>significant</u> pollution or degradation of the environment or</p> |

|  |                  |      |  |
|--|------------------|------|--|
|  |                  |      |  |
| 14. The various criminal offence clauses, including S28A, should be consolidated under a single section in the Act | S28(14) and (15) | S28A | <p>Agreed: propose the insertion of S49A and AA as follows:</p> <p><b><u>"S49A Offences:</u></b></p> <p>(1) A person commits an offence if that person-</p> <p class="list-item-l1">(a) Contravenes or fails to comply with the provisions of section 24(F) (1) (a), (b) or, 24 (F)(2), (c), (d) or (e);</p> <p class="list-item-l1">(b) Fails to comply with a directive contemplated in section 24G (2)(a), or contravenes or fails to comply with a condition contemplated in subsection 24(G)(2)(b);</p> <p class="list-item-l1">(c) Contravenes or fails to comply with a provision of section 28A(1) or (2);</p> <p class="list-item-l1">(d) Contravenes or fails to comply with a provision of section 30 (3)(4) or (5) or fails to comply with a directive issued in terms of subsection (6);</p> <p class="list-item-l1">(e) Fails to comply with a compliance notice in terms of section 31(N)(1);</p> <p class="list-item-l1">(f) Discloses information about any other person if that information was acquired while exercising or performing any power or duty in terms of section 31Q(1);</p> <p class="list-item-l1">(g) Contravenes the provisions of section 34(A)(a), (b), (c) or (d).</p> <p><b><u>S49AA Penalties:</u></b></p> <p>(1) A person convicted of an offence in terms of section 49A(1)(a),(b) is liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment;</p> <p>(2) A person convicted of an offence in terms of section 49A(1) (c) and (d) is liable to a fine</p> |

| Proposed amendment  | Relevant section of the Bill   | Relevant section of the Bill  |
|---|--|---|
| <p><i>(3) A person who contravenes or fails to comply with section 49A(1) (e) (f) or (g) is guilty of an offence and liable on conviction to a fine not exceeding R1 million or to imprisonment for a period not exceeding 1 year or to both such a fine and such imprisonment.</i></p> | <p><i>not exceeding R5 million or to imprisonment for a period not exceeding five years, and in the case of a second or subsequent conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, and in both instances to both such fine and such imprisonment.</i></p> | <p>15. The clause relating to search and seizure of vehicles, vessels aircraft etc. and the items contained therein needs to be streamlined so as not to repeat "in terms of this Act or a specific environmental management Act."</p>  |
| <p><b>Clause 14<br/>Agreed</b></p>  | <p>S31J</p>  | <p>Proposed amendment to Clause 14 of the Bill as follows:</p> <p>"...or other mechanism of transport—<br/>(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission of an offence [in terms this Act or a specific environmental management Act];<br/>(b) which may afford evidence of the commission or suspected commission of an offence [in terms of this Act or a specific environmental management Act]; or<br/>(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence [in terms of this Act or a specific environmental management Act];"<br/>in terms this Act or a specific environmental management</p> <p><u>Act.</u></p> |



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