

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON
THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL [B26-2013]
THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY AMENDMENT BILL
[B27-2013]
THE NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS AMENDMENT BILL
[B28-2013]

The Law Society of South Africa (LSSA) welcomes these recent proposed amendments to the National Environmental Management Act (NEMA). However, the Second NEMA Amendment Bill is still pending [B13 of 2013] after relatively minor changes have been made to its predecessor, the Amendment Bill B13 of 2012, published on 4 May 2012. Bill B13 introduces substantive amendments to NEMA and it is suggested that it should have been published at the same time as these amendment bills to facilitate clarity and a better understanding of the ultimate effect of these amendments as a whole.

1 NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL [B 26 -2013]

1.1 Environmental mineral resources inspector:

1.1.1 The definition of an "environmental management inspector" (EMI) has been broadened to include an "environmental mineral resources inspector". This, read with the amendment to section 31, will assist in integrating environmental and mining legislation.

1.1.2 The Department of Mineral Resources (DMR) will have to budget for and invest in skills development to ensure that its EMIs can properly enforce the provisions of the National Environmental Management Act, 1998 (NEMA) and the National Environmental Management: Waste Act, 2008 (Waste Act) relating to mining activities.

1.2 Residue stockpile and residue deposit:

- 1.2.1 "Residue stockpile" and "residue deposit" will be removed from the definitions under NEMA and inserted under the Waste Act in order to empower the Minister of Water and Environmental Affairs to develop regulations on the environmental management and control of residue deposits and stock piles for implementation by the Minister of Mineral Resources. This change is welcomed as it ensures proper management of residue deposits and stock piles through regulations developed by the Minister of Water and Environmental Affairs.
- 1.2.2 Corresponding amendments have been proposed for the Waste Act to appoint the Minister of Mineral Resources as the licensing authority for waste management activities involving residue deposits and residue stock piles under the Waste Act.

1.3 Competent authority:

- 1.3.1 The Minister of Mineral Resources will be the competent authority for the prospecting, mining, exploration or production activity on a mining area, as well as all activities related to mining, except for atmospheric emission licences. The Minister of Water and Environmental Affairs will remain the competent authority for all matters unrelated to mining.
- 1.3.2 The Minister of Mineral Resources' main objective (to develop South Africa's mineral and petroleum resources) may be contrary to NEMA's objectives (protecting the environment against degradation and pollution). It may therefore be difficult for the Minister of Mineral Resources to manage both objectives effectively, especially when employees of the DMR may not be properly trained to exercise this authority.

1.4 Consultation period:

1.4.1 The consultation period between State departments when an application for an environmental authorisation is being considered will be decreased from 40 to 30 days for a quicker decision making process and this change is welcomed.

1.5 Appeals:

1.5.1 An appeal lodged against a decision regarding an environmental management programme under the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) will be dealt with in terms of the MPRDA.

1.5.2 After the commencement of the National Environmental Management Amendment Act, 2013, any appeals against a decision taken by the Minister of Mineral Resources will be dealt with under NEMA.

1.5.3 The legal clarity provided by the proposed amendment is welcomed.

2 NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY AMENDMENT BILL [B 27 – 2013]

2.1 Consequences of unlawful conduct:

2.1.1 The consequences of unlawful conduct of a listed activity have been proposed and provides for a rectification process similar to NEMA. This is a rational and welcome change; currently there is no mechanism to rectify such offences. An administrative fine of up to R5 million will be payable under this provision and rectification will not derogate from an EMI or the South African Police Services' power to investigate any transgressions from the National Environmental Management: Air Quality Act, 2004 (AQA) or to institute

criminal proceedings.

2.1.2 The licensing authority will be able to defer a decision to issue an atmospheric emission licence if the applicant is under criminal investigation for the contravention of or failure to comply with section 22 of the Act. This is a rational amendment. Failing this, it is competent for a licensing authority to approve an atmospheric emission licence for someone who may be shown, after the investigation is complete, not to be a fit and proper person to hold it.

2.1.3 The proposed fine and rectification process provides legal certainty regarding consequences of unlawful conduct and is welcomed.

2.2 Pollution prevention plans:

2.2.1 Persons who are required to implement pollution prevention plans relating to controlled fuels will also be required to monitor, evaluate and report on such implementation. The increased control of priority air pollutants is welcomed.

2.3 Licensing authority:

2.3.1 The Minister of Environmental Affairs will be designated as the licensing authority in certain instances, for example, where the activity falls within more than one province or is declared a national priority. The proposed designation of the Minister for matters of national priority is necessary to ensure that such applications are properly considered and this amendment is welcomed.

2.3.2 It will be possible to obtain an integrated environmental authorisation for activities listed under NEMA, the Waste Act and AQA where the Minister of Environmental Affairs is the competent authority for all the activities. This is a very sensible amendment that will improve efficiency of decision making and will make for more integrated and consistent authorisations.

2.4 Environment Conservation Act:

2.4.1 References to the (largely repealed) Environment Conservation Act will be deleted.

2.5 Validity of a provisional atmospheric emission licence:

2.5.1 The amendment will provide certainty regarding the validity of a provisional atmospheric emission licence. An applicant will therefore be required to comply with all the conditions contained in the provisional atmospheric emission licence within the prescribed period to ensure that the licence does not lapse before a final atmospheric emission licence is obtained. This is expected to improve compliance.

2.6 Fit and proper persons:

2.6.1 An applicant will not be "fit and proper" if he employs managers or directors who have previously been employed by a company found to have contravened air quality legislation or had its licence suspended.

2.6.2 This amendment is welcomed and will encourage directors and managers to act diligently and lawfully; and deter companies from employing managers or appointing directors who transgress the air quality laws.

2.7 Controlled fuels:

2.7.1 The unlawful production, sale or use of a controlled fuel will now be an offence under AQA. The inclusion of this offence will encourage compliance with this provision of AQA and is welcomed.

2.8 Regulations:

2.8.1 The Minister will be able to make regulations regarding the procedure and criteria to be followed in determining an administrative fine under the rectification procedure. This will provide guidance as to how administrative fines will be calculated.

3 NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS AMENDMENT BILL [B 28 – 2013]

3.1 Marine protected areas:

3.1.1 "Marine protected area" will be a "national protected area" and enjoy the same protection as national parks and special nature reserves. This is an important amendment in light of recent oil spills.

3.2 Restricted activities:

3.2.1 Certain activities will be prohibited within marine protected areas, including fishing, discharging of waste or the construction any structures over any land or water within a marine protected area.

3.2.2 The Minister may prescribe different zones to regulate different restricted activities within marine protected areas; and may also prescribe activities which require a permit.

3.2.3 The introduction of restricted activities and permitting requirements will ensure better control and protection of our marine protected areas.

3.3 Internal rules:

- 3.3.1 Internal rules made by the management authority of a marine protected area will need to be consistent with any zoning or permitting done (as discussed in paragraph 3.2 above). The internal rules may therefore permit certain restricted activities within marine protected areas.
- 3.3.2 The management authority is required to consult with the Department of Environmental Affairs before making any internal rules. This will ensure that the rules do not contravene any provisions of the Act.