

The National Environmental Management Act: 2017 amendments to the Environmental Impact Assessment Regulations

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Introduction

The National Environmental Management Act 107 of 1998 (NEMA) requires that an environmental authorisation is obtained before activities, which have been listed in terms of NEMA, are commenced with.¹ The failure to obtain such an environmental authorisation, before commencing with listed activities, could result in administrative sanctions, including compliance notices or directives ordering the cessation of the operations until authorised; and fines of up to ZAR10 million for each such contravention.²

The Environmental Impact Assessment Regulations (EIA Regulations) set out the process to be followed in applying for an environmental authorisation, while the listing notices, list the activities that require authorisation (the Listing Notices). Various versions of and amendments to the EIA Regulations and Listing Notices have been published over the years, first published in 1997,³ and thereafter in 2006, 2010 and 2014.⁴ There have also been further amendments to specific listed activities during this period.

Considering the many changes to the environmental authorisation regime over the years, one has to be careful to apply the law in effect at the time of the commencement of a listed activity. In principle, laws do not operate retrospectively. Thus, it is **essential** to ensure that the correct version of the law is applied at the time of commencement of such an activity. A mistake in such an assessment could mean the difference between the activity being in compliance or non-compliance with the law, whether it is perceived or actual non-compliance. This could expose a business to significant risks.

The 2017 changes to the EIA regulations

The most recent changes to the environmental authorisation regime were published by the Minister of Environmental Affairs on **7 April 2017**.⁵ These amendments appear to give further effect to the implementation of the 'One Environmental System', being the agreement between the Ministers of Mineral Resources, Environmental Affairs and Water Affairs and Sanitation on an integrated environmental management system for mining.⁶ The generally accepted position being that the One Environmental System took effect on 8 December 2014.⁷

The High Court remarked that provisions giving effect to the One Environmental System were confusing.⁸ The **2017** amendments, through the transitional provisions, attempt to clarify the position post 8 December 2014 in respect of environmental authorisations and Environmental Management Programmes (EMPrs) for mining. The transitional provisions include that:

- If an environmental authorisation was required and obtained prior to 8 December 2014 in respect of mining activities,⁹ and a mining right granted in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), the requirements of the NEMA had been met.
- Post 8 December 2014, EMPrs for mining activities, which were approved under the MPRDA, are now subject to the provisions of the EIA Regulations. This includes that the first environmental audit

¹ Section 24, 24D of NEMA.

² Section 24F, 24G, 31L of NEMA.

³ In terms of the Environmental Conservation Act 73 of 1989.

⁴ In terms of NEMA.

⁵ Government Notices 324 to 327 in Government Gazette 40772 of 7 April 2017.

⁶ Minutes of the meeting of the Portfolio Committee on Environmental Affairs of the Implementation of the one environmental system in respect of mining activities held on the 14th of February 2017. The shift to an integrated system was necessitated by high costs, duplication of assessments and non-alignment of time periods for approval due to the separate approval processes under NEMA and the MPRDA, respectively. See T. Humby "One environmental system": Aligning the laws on the environmental management of mining in South Africa" (2015) 33(2) *Journal of Energy and Natural Resources Law* 111. These problems posed unnecessary barriers to investment in the mining sector.

⁷ There is of course some debate on the exact date when considering the wording of the relevant Amendment Acts, including section 14 of Act 62 of 2008, the commencement of section 2 of Act 25 of 2008 or 49 of 2008 etc. In this regard see the explanation in *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and others* [2017] 2 All SA 599 (WCC) particularly paragraph 21 read with footnote 1[A].

⁸ Paragraphs 33 to 37 of *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal and Others* - Case No: 18701/16, referring to Regulation 54 of the 2014 EIA Regulations.

⁹ We refer to 'mining activities' generally, although it is in fact referred to as activities in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (**MPRDA**), which also includes prospecting or exploration, or extraction and primary processing, of a mineral or petroleum resource.

in respect of the EMPr must be submitted to the competent authority by **7 December 2019** and at least every five years thereafter.

An aspect not currently covered by the EIA Regulations' transitional provisions is the status of an approved EMPr in relation to the requirements of section 5A(1) of the MPRDA, which requires an environmental authorisation prior to conducting mining activities. The transitional aspects of the amendments of NEMA and the MPRDA, in giving effect to the One Environmental System, have presented interpretational difficulties. The section of the MPRDA that provides that an EMPr approved in terms of the MPRDA is deemed to be approved, and is also considered to be an **environmental authorisation** in terms of NEMA, is not yet in effect.¹⁰ Although the latter provision has not commenced it has been accepted that an EMPr approved prior to the One Environmental System amendments, is considered an environmental authorisation.¹¹ An approved EMPr would thus be sufficient for purposes of section 5A(1) of the MPRDA. See this [article link](#), which discusses these aspects of the 'One Environmental System' further, including with reference to the recent National Environmental Management Laws Amendment Bill which intends to clarify this.

Some of the other changes to the EIA Regulations include:

1. Protocol and minimum information requirements: The amendments include that the Minister may gazette **protocols or minimum information requirements** in respect of an application.¹² This amendment has been introduced in various sub-regulations, particularly in the regulations containing the '*criteria to be taken into account by competent authorities when considering applications*'.¹³ Where the competent authority considers the need for and desirability of the particular activity, it must have regard to a **protocol or minimum information requirements** relevant to the application **or** any relevant guideline.¹⁴ This may contemplate, for example, projects with larger-scale environmental impacts, such as projects that affect the national commitment to reduce greenhouse gas emissions or requiring climate change impact assessments for certain types of projects, such as considered in the *Thabametsi* case.¹⁵
2. Basic Assessment process could be required (instead of an EIA): The Minister may gazette instances where a basic assessment must be applied to an application.¹⁶ An example of this may be the notice published on 13 April 2017¹⁷ of the Minister's intention to require, subsequent to a strategic environmental assessment for wind and solar energy, a basic assessment for these projects in Renewable Energy Development Zones.¹⁸ This is notwithstanding the activities triggering a Listing Notice 2 activity which generally requires the more extensive EIA process to be followed. The 13 April notice also intends to provide for a shortened decision-making timeframe of 57 days.
3. Closure plan may include financial provisions: A practical amendment appears to allow a combination of a closure plan with the financial provisions for rehabilitation, closure and post closure. The submission of a basic assessment report requires the submission of a number of other documents / information such as an EMPr; closure plan; financial provisions for rehabilitation, closure and post closure. The 2014 EIA Regulations included a number of Annexures with requirements for the basic assessment, scoping and EIA; content of an EMPr; closure plan and other specialist assessments. The 2014 EIA regulations provided that a closure plan could be combined with the EMPr, provided the requirements in the appendices were met. The 2017 amendment takes this further by allowing that a closure plan could also be combined with the financial provisions for rehabilitation, closure and post closure, provided the requirements in the Appendices to the Regulations are met.

¹⁰ Section 38B inserted by s. 32 of Act 49/2008 w.e.f. a date to be proclaimed.

¹¹ *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and others* [2017] 2 All SA 599 (WCC), para 17 and the Editor's summary which states that "Prior to 8 December 2014, section 23(5) of the Mineral and Petroleum Resources Development Act 28 of 2002 provided that a mining right came into effect on the date on which the applicant's environmental management programme ("EMP" or "Mining EMP") was approved. Before 8 December 2014, therefore, the Mining Minister's decision to approve an applicant's Mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity." (emphasis added).

¹² Regulations 10(b) of the EIA Regulations.

¹³ Regulation 18 of the EIA Regulations.

¹⁴ Published in terms of section 24J of NEMA.

¹⁵ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017), paragraph 21 states that an argument raised by Thabametsi that "...the regulatory regime does not require the conduct of a climate change impact assessment as a mandatory prerequisite to the grant of an environmental authorisation."

¹⁶ Regulation 15(2) of the EIA Regulations.

¹⁷ Notice of identification in terms of section 24(5) of the National Environmental Management Act, 1998, of the procedure to be followed in applying for environmental authorisation for **large scale wind and solar photovoltaic** development activities identified in terms of section 24(2)(a) of the National Environmental Management Act, 1998, when occurring in **geographical areas of strategic importance** identified in terms so section 24(3) of the National Environmental Management Act, 1998, namely renewable energy development zones and associated strategic transmission corridors, published in Government Notice 350 in Government Gazette 40785 of 13 April 2017. Comments to this notice were due in 30 days, i.e. by 13 May 2017.

¹⁸ The boundaries of the renewable energy development zones and associated strategic transmission corridors referred to in this Schedule are as indicated on the map, available from the Department of Environmental Affairs at <http://egis.environment.gov.za>

4. Conditions regarding commencement: Environmental authorisations have long contained conditions requiring the commencement of the activities within a particular timeframe. The 2014 EIA Regulations introduced a maximum timeframe of 10 years within which activities had to commence. The reason for the inclusions is unclear and this has now been removed in the 2017 amendments.¹⁹ The requirement now further limits the ambit of the 'commencement' requirement to authorisations which '*do not include operational aspects*'. Thus, it seems to contemplate that only activities where construction is the activity authorised, and not continued operation, will have limits imposed in respect of the timing to commence.
5. Lapse of authorisation: The 2014 EIA Regulations introduced the notion that an authorisation would lapse if the authority did not amend the authorisation prior to its expiry date.. It required the application for an extension of an authorisation's validity three months prior to expiry of the authorisation. The 2017 amendments introduce a more practical approach in that, as long as an application for such an extension is pending, the authorisation remains valid.²⁰
6. It is now specified that it is not necessary to appoint an EAP for a non-substantial amendment to an environmental authorisation, (i.e. an amendment that would not require an EIA).²¹

Listing Notices

Changes to the listing notices were also published on 7 April 2017.²² These must be considered carefully where activity triggers are determined, particularly where an activity has not commenced but the parameters of the listed activity have now been amended. The changes seem to have taken cognizance of maintenance activities, which may have technically required authorisation in the past, but have now been excluded. Some of the changes to Listing Notices 1 and 2 include:

- o There is now an exclusion from requiring a basic assessment for transmission and distribution infrastructure where it is temporary 'bypass infrastructure' for maintenance purposes, shorter than 2km in length, to be removed in 18 months and within an existing transmission servitude.²³
- o Activities which impact watercourses²⁴ have been truncated and somewhat simplified by referring to more general 'infrastructure' instead of specified categories of infrastructure (e.g. bridges, weirs, canals, marinas, slipways, jetties, etc.). Temporary infrastructure that will be removed in six weeks and which does not affect indigenous vegetation is also excluded from the activity.²⁵
- o The threshold of dredging activities within a watercourse was increased from five cubic metres to ten cubic metres. Dredging within existing ports or harbours, which will not increase the development footprint, are now excluded from the activity trigger.²⁶ Where a port or harbour is developed – a separate listed activity is triggered.²⁷
- o Primary mineral processing triggers the activity relating to the 'mining' listed activity,²⁸ whereas secondary processing is excluded from that activity but potentially triggers other activities regarding processing, refining or beneficiation²⁹ or the activity where a permit or licence is required which governs the release of emissions, pollution or effluent.³⁰

Conclusion

¹⁹ Regulation 26(d)(i) has been deleted.

²⁰ Regulation 28 of the EIA Regulations.

²¹ Regulation 12(1) of the EIA Regulations.

²² Including Listing Notice 1 in GN 327, Listing Notice 2 in GN 325 and Listing Notice 3 in GN 324 of 7 April 2017. We have not set out changes to Listing Notice 3, at face value the amendments appear to entail a complete overhaul of Listing Notice 3, but one would have to consider it on a case by case basis.

²³ Activity 11 of Listing Notice 1 and activity 9 in Listing Notice 2.

²⁴ Or undertaken 'in front of development setback lines'.

²⁵ Activity 12 of Listing Notice 1.

²⁶ Activity 19 in Listing Notice 1.

²⁷ Activity 26 in Listing Notice 2.

²⁸ Activities 20 and 21 in Listing Notice 1 and activities 17, 18, 19 in Listing Notice 2. Again, we refer to 'mining' as a general term which includes other activities contemplated under the MPRDA.

²⁹ Activity 5 in Listing Notice 2.

³⁰ Activity 6 of Listing Notice 2.

The amendments to the EIA Regulations and Listing Notices change the parameters of the compliance regime. Thus, these should be carefully considered when applied in each case, particularly in an enforcement context, as the incorrect application could mean the difference between compliance and non-compliance.