

## THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL, 2008

### RELEASED FOR COMMENT

The National Environmental Management Laws Amendment Bill, 2008 ("the Bill") was published on 20 May 2008 in General Notice 648 of 2008. The Minister of Environmental Affairs and Tourism, Marthinus van Schalkwyk, has called for comments to be submitted within 30 days from the date of publication.

The Bill provides for the amendment of the National Environmental Management Act 107 of 1998 ("NEMA") and the following additional Acts dealing with environmental matters: the Environment Conservation Act 73 of 1989, the National Environmental Management: Protected Areas Act 57 of 2003, the Atmospheric Pollution Prevention Act 45 of 1965, the National Environmental Management: Air Quality Act 39 of 2004 and the National Environmental Management: Biodiversity Act 10 of 2004. This note sets out certain of the key changes to these Acts that are proposed to be effected by the Bill in its current form.

#### PRINCIPAL PROPOSED AMENDMENTS TO NEMA

The purpose of NEMA is set out in the preamble as to "*provide for cooperative environmental governance by establishing principals for decision making on matters affecting the environment, institutions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith*".

#### Proposed amendments relating to committees and fora

Currently, Part 1 and Part 2 of Chapter 2 in NEMA provides for the establishment of a National Environmental Advisory Forum and a Committee for Environmental Co-ordination, together with their functions, compositions and objects, however clause 2 of the Bill proposes that Part 1 and Part 2 of Chapter 2 be repealed. The Bill also proposes in clause 3, the insertion of section 3A regarding the establishment of fora or advisory committees, giving the Minister the power to establish such fora or advisory committees and to determine their composition and functions. Should Part 1 and Part 2 be replaced by the proposed section 3A, the Minister will be able to convene fora and committees made up of experts on an "*ad hoc*" basis, ensuring that the people with the necessary expertise are present to give their expert opinions. Currently, the members of the Environmental Advisory Forum and the Committee for Environmental Co-ordination are a set number and therefore might not have the expertise to deal with every matter that requires their input. The proposed amendment will enable the Minister to ensure that the best possible advice is given to the Minister regarding whatever matter is before the forum or committee convened by the Minister.

### Proposed amendments to section 24G - Rectification

An important substitution to section 24G of the NEMA is proposed in clause 9 of the Bill. Section 24G of the current NEMA provides for the rectification of an unlawful commencement or continuation of a listed activity. Clause 9 proposes the extension of section 24G to cover the situation where a person has admitted to committing an offence under section 24F(2) (that is, commencing with a listed activity without authorisation, continuing with a listed activity where authorisation has been refused or not complying with any conditions applicable to the authorisation). Clause 9(a) also proposes giving the Minister or the MEC the power to direct an applicant, or possibly any person, on the initiative of the Minister or the MEC, to compile a report regarding the activity containing any of the stated categories of information at the discretion of the Minister or the MEC (as opposed to the prescriptive statement of information to be included in the report as currently exists in NEMA). Clause 9(b) proposes a further departure from the status quo in that a person who has committed an offence or has admitted to committing an offence can only apply for rectification in terms of section 24G if the Minister or the MEC directs such a person to submit an application in terms of section 24G(1).

However, it is important to point out that there does appear to be a possible loophole in clause 9. It seems to suggest that a person can circumvent the authorisation requirements set out in section 24, and apply for rectification under the proposed amendment to section 24G, after commencing with the listed activity. Fortunately, the proposed amendment in clause 9(b) seeks to rectify this by providing that a person can only submit the necessary reports upon the direction of the Minister or the MEC. It is suggested that the proposed amendment to section 24G be re-worded to remove the confusion that can result from clause 9, to ensure that it is very clear that applying for rectification after the fact is only allowed with the permission of the Minister or the MEC.

### Proposed amendment to section 28 – The Duty of Care

Of the numerous proposed amendments to the NEMA, possibly the most far-reaching and significant amendments are those envisaged relating to section 28 under clause 10 of the Bill. Section 28 of the current NEMA deals with the duty of care and remediation of environmental damage and section 28(1) provides that “(e) *very person who causes, **has caused** or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment*” (own emphasis). In the event that the reasonable measures as set out in section 28(3) are not taken, section 28(4) provides for the Director-General or the provincial head of department to issue a directive ordering the responsible person to undertake the actions provided for in section 28(4).

Should the directive not be complied with, section 28(7) and section 28(8) are applicable. Section 28(7) currently provides that where a person fails to comply with a directive issued under section 28(4) the Director-General or the provincial head of department can take reasonable measures to remedy the situation, however does not make specific provision for applying to a court for appropriate relief. The Bill proposes an amendment to section 28(7) in clause 10(a) that the Director-General or the provincial head of department could apply to a competent court for appropriate relief.

A further amendment is proposed to section 28(8). Section 28(8) currently provides that when the Director-General or the provincial head of department acts in terms of section 28(7), they are entitled to recover all costs incurred from various people. This means that the State or Province has to bear a potentially heavy financial burden to carry out remedial work. A proposed amendment in clause 10(b) seeks to counter this by providing that the Director-General or the provincial head of department is entitled to claim all costs incurred, including "anticipatory costs", as a result of it acting under section 28(7), which costs may be claimed and recovered before acting under section 28(7).

A further 3 new subsections have been proposed for insertion after subsection 28(13) of NEMA, mainly aimed at criminalising the causing of pollution or degradation of the environment and failing to comply with a directive (issues that currently do not attract direct criminal sanctions under NEMA). The proposed subsection 28(14) provides that no person may unlawfully and intentionally or negligently commit any act or omission which caused, causes or is likely to cause pollution or degradation of the environment or which detrimentally affects or is likely to "affect the environment", and that no person may fail to comply with a directive issued under section 28. With regard to the proposed subsection 28(15), please see the section below dealing with the proposed amendments relating to offences.

The proposed new subsection 28(16) relates to the "retrospectivity" of section 28. The proposed subsection 28(16) states that "*Section 28, except for subsections (14) and (15), applies retrospectively to any activity or process that was performed or undertaken, or any other situation that existed prior to the coming into effect of this Act, which causes, has caused or is likely to cause significant pollution or degradation of the environment*". It is understood that this amendment is in response to a recent judgment, *Chief Pule Shadrack VII Bareki NO and Another v Gencor Ltd* 2005 JDR 1185 (T), with the Background and Discussion document of the Bill stating on page 102 that section 28 was held "*...not to be retrospective and applied only in respect of any pollution or degradation to the environment from the date the Act came into operation. The proposed amendments seek to remedy the above*".

#### Proposed amendments to section 30 of NEMA – Emergency Incidents

A similar step is proposed to criminalise non-compliance with certain of the emergency incident provisions of section 30 of NEMA. Clause 11 proposes that any person who fails to comply with the provisions as set out in subsections 30(3), 30(4) and 30(5) will be guilty of an offence punishable

upon conviction of fine not exceeding R100 000.00 or imprisonment not exceeding 10 years or both such fine and imprisonment. Currently, section 30 provides for the control of emergency incidents and the reporting thereof and other steps to be taken by the responsible person. However, the failure to report an emergency incident or take the necessary additional steps does not constitute a criminal offence. The proposed clause 11 seeks to amend this by criminalising non-compliance with section 30 and especially subsections 30(3), 30(4) and 30(5). Currently, subsection 30(3) relates to the reporting of the incident as soon thereafter as is reasonably possible and sets out what is to be reported and to whom the incident and related information is to be reported to. Subsection 30(4) provides that the responsible person must as soon as is reasonably possible *inter alia* take reasonable measures to contain and minimise the effect of the incident. Subsection 30(5) provides for the reporting of the incident after 14 days regarding the measures taken and the status of the incident.

#### Proposed amendments relating to Environmental Management Inspectors

Regarding Environmental Management Inspectors (“EMI”), clauses 13, 14 and 15 of the Bill are relevant. The Bill proposes the removal of the requirement that the EMI must carry notices of designation, providing that an identification card is sufficient. The Bill further proposes an increase in the EMI’s powers to allow the searching and attachment of vehicles for the purposes of routine inspections and to take photographs and audio-visual recordings during routine inspections. The reasons behind these amendments are to apparently strengthen the power of the EMI’s and for reasons of practicality, as currently sections 31H and K of NEMA do not allow for the search and seizure of vehicles or the taking of photographs, and section 31F further requires all EMI’s to produce their identity cards as well as the notice provided for in section 31D(3). There is a proposed amendment to section 31Q relating to confidentiality. Clause 17 of the Bill proposes the insertion of a subsection after subsection 31Q(1) to reflect that subsection 31Q(1) does not apply to information that pertains to the environmental quality or the state of the environment, any risks posed to the environment, public safety, and the health and wellbeing of people, and the compliance with or contraventions of any environmental legislation by any person. What is important to note about the proposed increase in the EMI’s powers, is that these powers are not limited to NEMA and have the effect of including all of the NEM related Acts as well as the Environment Conservation Act within the ambit of the powers of the EMI’s.

#### Proposed amendments to section 34 – Criminal Proceedings

There is also an important proposed amendment to section 34 of NEMA through the insertion of section 34H (contained in clause 18 and 19 of the Bill). Currently, section 34 provides for criminal proceedings relating to the so-called Schedule 3 offences. Clause 18 proposes an amendment to subsection 34(3) to include that when a person is convicted of an offence under any provision listed under Schedule 3 of the Act, the court may, *inter alia*, “order that the remedial measures to be implemented be undertaken by the convicted person”. Clause 19 proposes the inclusion of section

34H relating to the jurisdiction of the magistrates' court to impose any penalty prescribed by the Act. There is also a proposed amendment to Schedule 3 in clause 54 of the Bill. Schedule 3 read with section 34 currently provides for various major offences under various other Acts to attract additional criminal sanctions under section 34 of NEMA.

Clause 54 proposes the amendment of references to various sections and numerous additional offences under other legislation are proposed to be included in Schedule 3 of NEMA. These include offences in terms of the National Forest Act, National Heritage Resources Act, National Environmental Management: Protected Areas Act, National Environmental Management: Biodiversity Act and the National Environmental Management: Air Quality Act.

#### PRINCIPAL PROPOSED AMENDMENTS TO THE ENVIRONMENT CONSERVATION ACT

The most important proposed amendment to the Environment Conservation Act is provided in clause 20 of the Bill, intending to substantially increase the penalties imposed by section 29 of the Environment Conservation Act. These amendments are discussed in the section dealing with penalties. Clause 21 also proposes an amendment to section 32 by removing the requirement for a "direction" in terms of the Environment Conservation Act to be first published in a draft notice.

#### PRINCIPAL PROPOSED AMENDMENTS TO THE NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT

Regarding the National Environmental Management: Protected Areas Act, the Bill proposes in clause 24 that the management of national parks must be assigned to the South African National Parks by the Minister. An amendment of section 47 regarding flying corridors over national parks, heritage sites and specific areas requiring the previous permission of the management authority is proposed by clause 25.

Regarding mining activities, in clause 26 the Bill seeks to extend the Act's application to mining activities conducted in areas designated in terms of subsection 48(2) which were declared as such **before** the commencement of the Act and to prescribe conditions under which those activities may continue in order to reduce or eliminate the impact of those activities on the environment and to mitigate the environmental impacts of the activity.

The Bill also proposes State ownership and control of animals in protected areas and those that have escaped, and related matters (clause 27), as well as providing measures for dealing with the winding up and dissolution of the South African National Parks (clause 28).

Clause 29 proposes numerous amendments to the functions of South African National Parks as set out in section 55. Currently, section 55 provides, *inter alia*, for the management of national parks and other protected areas. Clause 29 seeks, *inter alia*, to extend the range of areas that fall under the management of the South African National Parks. These proposed amendments include the

management of world heritage sites assigned by the Minister, the management of any protected area, other than a national park, special nature reserve, national nature reserve or national protected environments, and the power to impose traffic rules in such national parks, world heritage sites or other protected areas.

#### PRINCIPAL AMENDMENTS TO THE NATIONAL ENVIRONMENTAL MANAGEMENT: AIR QUALITY ACT

With regard to the National Environmental Management: Air Quality Act, the Bill proposes in clauses 35 for the review of licences only on payment of processing fees.

Clause 36 proposes the amendment of section 49 to include the term “a juristic person” into the criteria for the determination of whether a person is “fit and proper” for the purposes of an application in terms of the Act.

#### PRINCIPAL AMENDMENTS TO THE NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT

Numerous amendments to the National Environmental Management: Biodiversity Act have been proposed in the Bill. An amendment to section 11 regarding the functions of the South African National Biodiversity Institute has been proposed in clause 38 to include the general surveillance on all genetically modified organisms. What is important to note at this juncture is that currently, the responsible Department is only the Department of Agriculture. If the proposed amendment is enacted, there could be a possible limitation to the Department of Agriculture's powers in this regard.

Regarding bioprospecting, the Bill proposes the insertion of section 81A after section 81 to provide for notification requirements regarding bioprospecting. Clause 44 proposes the notification of the Minister before engaging in the discovery phase of bioprospecting. Furthermore, clause 45 proposes to include the phrase “specific individual” into section 82(b). The Bill further proposes the provision of a section dealing with the renewal and amendment of permits to be inserted after section 93 in clause 49.

#### PROPOSED AMENDMENTS RELATING TO OFFENCES UNDER NEMA, THE ENVIRONMENT CONSERVATION ACT AND OTHER NEM RELATED ACTS

One of the most important outcomes of the various amendments, is the amendment of penalties across NEMA, the Environment Conservation Act, as well the NEM Acts referred to above. In all of the amendments, the penalties that can be imposed, either a fine or imprisonment, upon conviction of an offence under a particular Act, have been increased substantially.

With regard to NEMA, it is proposed through subsection 28(15) that any person who contravenes subsection 28(14) will be guilty of an offence and will be liable for a fine of a maximum of R10 million or imprisonment for a maximum of 10 years (or both such fine and imprisonment).

Under the Environment Conservation Act, section 29 is the relevant section regarding offences and penalties. There are three proposed amendments to subsections 29(4), 29(5) and 29(6), by clause 20

of the Bill. Clause 20 proposes an amendment to section 29(4) to provide for a fine not exceeding R5 million, as opposed to the current R100 000.00. The proposed amendment to section 29(5) is to provide for a fine not exceeding R100 000.00 or imprisonment not exceeding 12 months. The proposed amendment to section 29(6) is to provide for a fine not exceeding R10 000.00 or imprisonment not exceeding 6 months.

With regard to the National Environmental Management: Protected Areas Act, there are two proposed amendments regarding penalties for offences. Clause 32 proposes the amendment of section 88(2) to provide for a fine not exceeding R5 million in the case of a first conviction, and for a fine not exceeding R10 million or imprisonment not exceeding 10 years, or both, in relation to a second conviction. Clause 33 proposes two major amendments to section 89. The penalty imposed in terms of a conviction of an offence in terms of subsection 89(1) is proposed to be amended to provide for a fine not exceeding R5 million upon a first conviction and a fine not exceeding R10 million or imprisonment not exceeding 10 years, or both, in the case of a second or subsequent conviction. Clause 33 further proposes the addition of a subsection, subsection 89(4), to provide for the jurisdiction of the magistrates' court to impose any penalty prescribed by the Act.

Clause 34 proposes substantially increased penalties in terms of section 46 of the Atmospheric Pollution Prevention Act, increasing penalties on conviction to a fine not exceeding R2 million or imprisonment of no more than 5 years in relation to a first offence and, in the case of a subsequent conviction, to a fine not exceeding R5 million or imprisonment not exceeding 10 years.

With regard to the National Environmental Management: Air Quality Act, clause 37 proposes the increase of penalties to a fine of not more than R10 million as well as proposing the jurisdiction of the magistrates' court for the purpose of imposing any penalty prescribed by the Act.

There is a further proposed amendment by clause 51 to section 102 of the National Environmental Management: Biodiversity Act for the increase of penalties for the contravention of a regulation to a fine not exceeding R10 million and imprisonment not exceeding 10 years. Clause 52 proposes the provision for the jurisdiction of the magistrates' court to impose any penalties prescribed by the Act.

The proposed amendments are a possible attempt to standardise the offences for non-compliance across NEMA, all the NEM related Acts and the Environment Conservation Act. Furthermore, the amendments propose substantial increases in the penalties that can be imposed upon conviction for various offences. These increases are to ensure greater compliance with the legislation and to severely punish those who fail to comply.

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