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[DRAFT: FOR DISCUSSION PURPOSES ONLY]

M E M O R A N D U M

LEGAL IMPLICATIONS OF (AND CERTAIN INSIGHTS REGARDING) THE NATIONAL ENVIRONMENTAL MANAGEMENT SECOND AMENDMENT BILL AND PROPOSED AMENDMENTS TO THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT'S *ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS* OF 3 JULY 2006

29 May 2007

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TABLE OF CONTENTS

1. **INTRODUCTION 1**

2. **NATIONAL ENVIRONMENTAL MANAGEMENT SECOND AMENDMENT BILL, 2007 .. 3**
   - *2.1 Introduction 3*
   - *2.2 Amendment of section 1 of NEMA, as amended by section 1 of Act 8 of 2004 .... 4*
   - *2.3 Amendment of section 24 of NEMA 5*
   - *2.4 Substitution of section 24C of NEMA 10*
   - *2.5 Substitution of section 24D of NEMA 11*
   - *2.6 Substitution of section 24F of NEMA 11*
   - *2.7 Substitution of section 24G of NEMA 12*
   - *2.8 Substitution of section 24H of NEMA 13*
   - *2.9 Proposed amendment of section 24 of NEMA 13*
   - *2.10 Proposed amendment of section 24 of NEMA 14*
   - *2.11 Amendment of section 24 of NEMA 14*
   - *2.12 Substitution of section 43 of NEMA 15*

3. **DRAFT FIRST AMENDMENT TO THE NATIONAL ENVIRONMENTAL MANAGEMENT EIA REGULATIONS, 2006 .... 17**
   - *3.1 Introduction 17*
   - *3.2 Substitution of regulation 5 of the Regulations 17*
   - *3.3 Substitution of regulation 9 of the Regulations 17*
   - *3.4 Substitution of regulation 15 of the Regulations 18*
   - *3.5 Substitution of regulation 16 of the Regulations 19*
   - *3.6 Amendment of regulation 22 of the Regulations 20*
   - *3.7 Amendment of regulation 23 of the Regulations 20*
   - *3.8 Amendment of subregulation (1) of regulation 29 of the Regulations 20*
   - *3.9 Amendment of subregulation (3) of regulation 53 of the Regulations 20*
   - *3.10 Substitution of paragraph (d) of subregulation (2) of regulation 54 of the Regulations 21*
   - *3.11 Amendment of subregulation (2) regulation 56 of the Regulations 21*
   - *3.12 Substitution of regulation 61 of the Regulations 21*
   - *3.13 Substitution of subregulation (1) of regulation 62 of the Regulations 22*
   - *3.14 Substitution of subregulation (1) of regulation 63 of the Regulations 22*
   - *3.15 Substitution of subregulation (1) of regulation 64 of the Regulations 22*
   - *3.16 Substitution of paragraph (b) of subregulation (2) of regulation 65 of the Regulations 23*
   - *3.17 Substitution of subregulation (1) of regulation 68 of the Regulations 23*
   - *3.18 Amendment of regulation 79 of the Regulations 23*
   - *3.19 Short title and commencement 24*

4. **AMENDMENT TO THE LIST OF ACTIVITIES AND COMPETENT AUTHORITIES IDENTIFIED IN TERMS OF SECTIONS 23(2) AND 24D OF NEMA 25**
   - *4.1 Definitions 26*
   - *4.2 Schedule of activities requiring Basic Assessment 30*

5. **AMENDMENT TO THE LIST OF ACTIVITIES AND COMPETENT AUTHORITIES IDENTIFIED IN TERMS OF SECTIONS 24(2) AND 24D OF NEMA 51**
   - *5.1 Definitions 51*
   - *5.2 Schedule of activities requiring Scoping and EIA 52*

1. INTRODUCTION

The National Environmental Management Act ("NEMA")[1] is South Africa's pre-eminent environmental legislation. It provides (among other things), for: Co-operative environmental governance (by establishing principles for decision-making on matters affecting the environment); institutions that will promote co-operative governance; and procedures for coordinating environmental functions exercised by organs of state. NEMA commenced on 29 January 1999.

Chapter 5 of NEMA, entitled "Integrated Environmental Management", founds and regulates South Africa's currently applicable statutory environmental impact assessment ("EIA") regime. Section 24 of NEMA provides for both the Minister of Environmental Affairs and Tourism (the "Minister") and the Member of the Executive Council of the various provincial departments of environmental affairs (the "MEC") to identify activities or areas in which certain activities may not be undertaken in the absence of environmental authorisation.

Between 6 January 2005 and 3 July 2006 the commencement and implementation of the NEMA EIA provisions as *per* section 24 of that Act were effectively in a state of suspension in anticipation of the promulgation of EIA regulations by the Minister under that Act.[2] Following an extensive public participation process, regulations under section 24 of NEMA (the "NEMA EIA Regulations") were published by the Minister on 21 April 2006.[3] Save for certain provisions relating to mining activities, the NEMA EIA Regulations entered into force on 3 July 2006.

South Africa has in recent years experienced a period of significant and rapid economic growth. The cost, time and effort associated with conducting EIAs as well as the perceived uncertainty with regard to the finalisation and outcome of the authorisation process have been criticised by certain industry and governmental sectors as posing an obstacle to much-needed economic growth in the country. The NEMA EIA Regulations were therefore intended both to streamline and to expedite the EIA process in South

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[1] Act 107 of 1998.

[2] During that period, EIA in South Africa was governed by the provisions of the Environment Conservation Act, 73 of 1989 and the Regulations promulgated in terms of that Act.

[3] The NEMA EIA Regulations were published in Government Notices R. 385, 386 and 387 in *Government Gazette* 28753 of 21 April 2006. Until the commencement of the NEMA EIA Regulations on 3 July 2006, the applicable statutory provisions regulating EIA in South Africa were to be found in the Environment Conservation Act, 73 of 1989 read with the *Regulations under Section 21 of the Environment Conservation Act 73 of 1989 – Identification of activities which may have a substantial detrimental effect on the environment* (the "ECA activities regulations") (promulgated in GN R1182 in *Government Gazette* 18261 of 5 September 1997 (as amended)) read with the *Regulations regarding activities identified under Section 21(1) of the Environment Conservation Act 73 of 1989 – General EIA Regulations* (the "General ECA EIA Regulations") which were promulgated in Government Notice R1183 in the same edition of the *Gazette*.

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Africa. The drafters of the Regulations adopted an approach whereby certain types or classes of environmentally harmful activities were listed in two schedules - a truncated "basic assessment" process prescribed for certain potential lesser environmentally-harmful activities, and a more extensive "scoping and environmental impact assessment" process prescribed for the assessment and authorisation process for potentially more significant environmentally harmful activities. The NEMA EIA Regulations also requires adherence to a system of prescribed mandatory time periods to be followed during the various stages throughout the course of the EIA process.

Although certain features of the NEMA EIA Regulations were welcomed as being an improvement on the previous EIA system in South Africa,[4] they have been criticised by many stakeholders as still remaining unwieldy, and costly and time-consuming from the perspective of achieving compliance.

In response to the perceived need for further supplementation and amendment of the EIA legislative regime in South Africa, the Minister gazetted the following draft legislative documents for comment, on 4 May 2007:

- The first draft National Environmental Management Second Amendment Bill, 2007 (which provides for the further regulation of EIAs, environmental authorisations and incidental matters);[5]
- a draft first amendment to the NEMA EIA Regulations (which provides for further regulation of EIAs, environmental authorisations and incidental matters);[6]
- a draft first amendment to the *List of Activities and Competent Authorities Identified in terms of sections 23(2) and 24D of the National Environmental Management Act, 1998* published in Government Notice No. R. 386 of 21 April 2006;[7] and
- a draft first amendment to the *List of Activities and Competent Authorities Identified in terms of sections 24(2) and 24D of the National Environmental Management Act, 1998* published in Government Notice No. 387 of 21 April 2006.[8]

This memorandum aims to provide a considered view and evaluation of the aforementioned draft legislative publications. The comments contained in this memorandum are based on a desk-top review of the draft legislative documents and are supplemented by the views expressed by members of the Environmental Lawyers Association (the "ELA"), the Western Cape Chapter of the South African branch of the

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[4] Prescribed by the Environment Conservation Act, 73 of 1989 read with the Regulations promulgated in terms of that Act.

[5] Government Notice No. 392 in *Government Gazette* 29862 of 4 May 2007.

[6] Government Notice No. 393 in the same edition of the *Gazette*.

[7] Government Notice No. 394 in the same edition of the *Gazette*.

[8] Government Notice No. 395 in the same edition of the *Gazette*.

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International Association for Impact Assessment ("IAIA")[9] and explanations to the proposed amendment provided by the Department of Environmental Affairs and Tourism's ("DEAT") Ms. Lize McCourt during a public information seminar held in Cape Town on 14 May 2007, which seminar was attended by a representative of Smith Ndlovu & Summers Attorneys.

Please note that this memorandum does not purport to reflect all relevant substantive amendments as well as insights regarding those amendments contained in the draft legislation gazetted on 4 May 2007. Please also note that the insights contained in this document do not purport to amount to comprehensive legal advice. They also do not amount to all insights that we might develop between the date of this draft (28 May 2007) and for example, the end of the currently applicable comment period (which closes on 4 June 2007). The reader of this memorandum should bear this in mind and should obtain appropriate advice on the consequences for them and/or their clients of the proposed amendments insofar as they have queries that go beyond the extent of the insights provided in this document.

The approach adopted in this memorandum is to replicate the text of the proposed amendments in the form in which they were gazetted:

- **"[ ]"** Words in **bold type in square brackets indicate omissions from existing enactments**; and
- **"___"** Words underlined with a solid line indicate insertions to existing enactments.

Comments as to the legal and practical effect of the most significant proposed amendments and/or omissions and/or insertions are provided throughout this memorandum. Certain typographical errors in the proposed amendments have also been highlighted throughout this document. The form of this memorandum is to follow the sequence of the relevant draft amendments as those were gazetted and to include (highlighted in boxes in the text) relevant insights and/or further improvements proposed to the draft amendments in their current form.

2. NATIONAL ENVIRONMENTAL MANAGEMENT SECOND AMENDMENT BILL, 2007

2.1 Introduction

The proposed amendments to NEMA itself are probably the most significant of the intended amendments to the legislative enactments discussed in this memorandum. The significance of the proposed amendments to NEMA is also reflected in the more onerous process required to be followed for the amendment of primary legislation in terms of the

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[9] In this regard, in particular, the efforts and contributions of the Mr. Charl de Villiers of the Botanical Society of South Africa and Ms. Karen Shippey of Ninham Shand Consulting Services are acknowledged and appreciated.

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Constitution[10] which requires a relatively protracted process including, *inter alia*, assent by the National Assembly as well as approval by the National Council of Provinces, signature by the President and publication of the proposed amendment in the *Government Gazette*, *inter alia*, for purposes of public comment.[11] In the event of amendment of the NEMA EIA Regulations, such an amendment is effected through promulgation of such amendments by the Minister in the *Government Gazette*.

According to the explanatory memorandum attached to the Second Amendment Bill, the purpose of the proposed amendments to NEMA is to:

- Amend NEMA so as to substitute certain definitions and to make certain textual alterations to others;
- make certain textual alterations regarding environmental authorisations; and
- substitute certain provisions relation to appeal procedures.

2.2 Amendment of section 1 of NEMA, as amended by section 1 of Act 8 of 2004

Section 1 of NEMA is proposed to be amended as follows:

(a) The substitution for the definition of **"commence"** with the following definition:

"'**commence**' when used in Chapter 5, means the start of any physical activity on the site in furtherance of a listed activity and specified activity;"

Insights with regard to this proposed amendment

- This definition is open to potential criticism because it only refers to the commencement of the project phase of a development on a site and not to the planning phase.
- DEAT has indicated that the issue of the delineation of a road and the construction thereof in this context will be further addressed.
- For the sake of completeness, we mention that the only addition to the proposed amended definition is the inclusion of the words 'and specified' to the definition as currently articulated in NEMA.

[10] Constitution of the Republic of South Africa, 1996.

[11] Chapter 4 of the Constitution sets out the legislative process for the enactment and national legislation by Parliament.

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Possible improvements to this proposed amendment[12]

- The question as to what "commencement" of a listed and specified activity would entail is not dealt with in the definition. It has been suggested that an explanation as to what "commencement" of an activity means would be of significant assistance in the practice of performing EIAs. In the event that the drafters intend "commencement" to bear the same meaning as "commence" then the proposed amendment should be explicit in that regard.

(b) The substitution for the definition of 'environmental authorisation' of the following definition :

"'**environmental authorisation**', when used in Chapter 5, means the authorisation by a competent authority of a listed and specified activity in terms of this Act;".

Insights with regard to this proposed amendment

- Like the definition of 'commence', the definition of the expression "environmental authorisation" has merely been supplemented by the inclusion of the words "…and specified".

2.3 **Amendment of section 24 of NEMA**

Section 24 of NEMA is proposed to be amended as follows:

"Environmental authorisations

24. (1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed and specified activities must be considered, investigated, assessed and reported on to the competent authority charged by this Act with granting the relevant environmental authorisation.

(2) The Minister, and every MEC with the concurrence of the Minister, may identify-

(a) activities which may not commence without environmental authorisation from the competent authority;

(b) geographical areas based on environmental attributes in which specified activities may not commence without environmental authorisation from the competent authority;

(c) geographical areas based on environmental attributes, including those attributes based on municipal or provincial Spatial Development Frameworks where such Spatial Development Frameworks have been officially accepted by the provincial authority, in which specified

[12] Comment supplied by Ms. Karen Shippey, Ninham Shand Consulting Services.

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activities may be excluded from authorisation by the competent authority;

Possible improvements with regard to this proposed amendment[13]

- This section should be rephrased to read: "including environmental attributes mapped" in municipal or provincial Spatial Development Frameworks.
- Sub-section (c) should be expanded to include mapped 'environmental attributes' reflected in:
  - Environmental Management Frameworks (Regulations 70 & 72, GN R. 385 21 April 2006);
  - Protected Environments (s 28, NEMPA 57/2003);
  - Bioregional plans (s 40, NEMBA 10/2004); and
  - Similar, spatially-explicit environmental informants provided for in law.

(d) individual or generic existing activities, which may have a detrimental effect on the environment and in respect of which an application for an environmental authorisation must be made to the competent authority:

Provided that where an activity falls under the jurisdiction of another Minister or MEC, a decision in respect of paragraphs *(a)* to *(d)* must be taken after consultation with such other Minister or MEC.

(3) The Minister, and every MEC with the concurrence of the Minister, may compile information and maps that specify the attributes of the environment in particular geographical areas, including the sensitivity, extent, interrelationship and significance of such attributes which must be taken into account by every competent authority.

(4) Procedures for the investigation, assessment and communication of the potential impact of activities **[must ensure]** may include, **[as a minimum,]** with respect to every application for an environmental authorisation-

Insights with regard to this proposed amendment

- Note that the amended wording of this sub-section is significantly more permissive in relation to the investigation, assessment and communication procedures to be applied by the development proponent/EAP with regard to an application for environmental authorisation. In summary, the so-called "minimum requirements" are no longer peremptorily stated and therefore they allow for the exercise of discretion in regard to the procedures for investigation, assessment and communication of the potential impact of activities that require authorisation.
- The procedures followed during the investigation, assessment and communication of the environmental consequences of particular activities are therefore left to be decided upon at the discretion of a development proponent / EAP, and the relevant authority responsible for a particular application for environmental authorisation.

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[13] Suggestion submitted by Mr. Charl de Villiers, Botanical Society of South Africa.

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- A possible consequence would be that a decision-maker could be required to explain why it allowed a development proponent/EAP to exercise his/her discretion in the investigation, assessment and communication of the potential impact of an activity with respect to an application for environmental authorisation. Another consequence might be that a decision-maker who decides on particular compliance requirements in regard to investigation, assessment and/or communication procedures may have to justify the basis on which they reached a decision to require (or not, as the case may be) compliance with a particular standard in regard to the assessment process.

(a) investigation of the environment likely to be significantly affected by the proposed activity and alternatives thereto;

(b) investigation of the potential impact of the activity and its alternatives on the environment and assessment of the significance of that potential impact;

(c) investigation of mitigation measures to keep adverse impacts to a minimum, as well as the option of not implementing the activity;

(d) public information and participation which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity with a reasonable opportunity to participate in such information and participation procedures;

(e) reporting on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information;

(f) investigation and formulation of arrangements for the monitoring and management of impacts, and the assessment of the effectiveness of such arrangements after their implementation;

(g) coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state;

(h) that the findings and recommendations flowing from such investigation, the general objectives of integrated environmental management laid down in this Act and the principles of environmental management set out in section 2 are taken into account in any decision made by an organ of state in relation to the proposed policy, programme, plan or project; and

(i) that environmental attributes identified in the compilation of information and maps as contemplated in subsection (3) are considered.

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(5) The Minister, and every MEC with the concurrence of the Minister, may make regulations consistent with subsection (4)-

(a) laying down the procedure to be followed in applying for, the issuing of and monitoring compliance with environmental authorisations;

(b) laying down the procedure to be followed and the institutional arrangements in respect of-

(i) the efficient administration and processing of environmental authorisations;

(ii) fair decision-making and conflict management in the consideration and processing of applications for environmental authorisations;

[(iii) the preparation and evaluation of environmental impact assessments, strategic environmental assessments, environmental management plans and any other relevant environmental management instruments that may be developed in time;]

Insights with regard to this amendment

- Although this provision has been excised without any particular explanation or justification for its removal, a similar 9although expanded) provision has been added as sub-regulation (5)(c).

(iii) applications to the competent authority by any person to be exempted from the provisions of any regulation in respect of a specific activity;

(iv) appeals against decisions of competent authorities.

(c) laying down procedures and institutional arrangements to be followed for the preparation and evaluation of prescribed environmental management instruments including-

(i) environmental management frameworks;

(ii) strategic environmental assessments;

(iii) environmental impact assessments;

(iv) environmental management plans;

(v) environmental risk assessments;

(vi) environmental feasibility assessments; and

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(vii) any other relevant environmental management instruments that may be developed in time;

Insights with regard to this proposed amendment

- The inclusion of sub-section (5)(c) effectively provides the Minister (and every MEC with whom the Minister agrees regarding this aspect) to lay down further procedures and institutional arrangements to be followed in preparing and evaluating prescribed environmental management instruments including environmental management frameworks, strategic environmental assessments, EIAs, environmental management plans, environmental risk assessments, feasibility assessments, and any other relevant environmental management instrument (or tool) that may be developed in the future.

(d) prescribing fees to be paid for-

(i) the consideration and processing of applications for environmental authorisations-

(ii) the review of documents, processes and procedures by specialists on behalf of the competent authority;

(e) requiring the provision of financial or other security to cover the risks to the State and the environment of non-compliance with conditions attached to environmental authorisations;

(f) specifying that environmental impact assessments, or other specified tasks performed in connection with an application for an environmental authorisation, may only be performed by an environmental assessment practitioner registered in accordance with the prescribed procedures:

(g) requiring that competent authorities maintain a registry of applications for, and records of decisions in respect of, environmental authorisations;

(h) specifying that a contravention of a specified regulation is an offence and prescribing penalties for the contravention of that regulation;

(i) prescribing minimum criteria for the report content for each type of report and for each process that is contemplated in terms of the regulations in order to ensure a consistent quality and to facilitate efficient evaluation of reports;

(j) prescribing review mechanisms and procedures including criteria for and responsibilities of all parties in, the review process;

(k) prescribing any other matter necessary for dealing with making and evaluating applications for environmental authorisations.

(6) An MEC may make regulations in terms of subsection *(5)* only in respect of listed and specified activities or areas in respect of which the MEC is the competent authority.

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(7) Compliance with the procedure laid down by the Minister or an MEC in terms of subsection (4) does not remove the need to obtain an authorisation, other than an environmental authorisation, for that activity from any organ of state charged by law with authorising, permitting or otherwise allowing the implementation of the activity.

(8) Authorisations or permits obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act and any such other authorisations or permits may only be considered by the competent authority if they are in compliance with subsection (4)(d).

(9) Only the Minister may make regulations in accordance with subsection (5) stipulating the procedure to be followed and the report to be prepared in investigating, assessing and communicating potential impacts for the purpose of complying with subsection (1) where the activity will affect-

(a) more than one province or traverse international boundaries; or

(b) compliance with obligations resting on the Republic under customary international law or a convention".

(10) The Minister may identify-

(a) norms and standards identified for specified activities;

(b) the process to be followed in determining which norms and standards may be published as prescribed norms and standards as contemplated in subsection (a);

(c) activities which may be excluded from the application of regulations promulgated in terms of section 24(5) based on prescribed norms and standards;

(d) specific monitoring and enforcement conditions relating to prescribed norms and standards."

Insights with regard to this proposed amendment

- The consequences of this addition seem to indicate the possible further exclusion of certain specified activities (see sub-section (c) in particular). That exclusion must be based properly on "prescribed norms and standards". It follows that the identification of those norms and standards should precede the possible exclusion of further activities in terms of section 24(10)(c).

2.4 Substitution of section 24C of NEMA

The following section is hereby substituted for section 24C of the principal Act:

"Procedure for identifying the competent authority

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24C. (1) When listing or specifying activities in terms of section 24(2) the Minister, or the MEC with the concurrence of the Minister, must identify the competent authority responsible for granting environmental authorisations in respect of those activities.

(2) The Minister must be identified as the competent authority in terms of subsection (1) if the activity-

…

(b) will take place within an area protected by means of an international environmental instrument, excluding **[identified in terms of section 24(2)(b) or (c) as a result of the obligations resting on the Republic in terms of any international environmental instrument, other than any]** areas falling within the sea-shore, a conservancy, a protected natural environment, a proclaimed private nature reserve, a natural heritage site, or the buffer zone or transitional area of a biosphere reserve or a world heritage site.

2.5 **Substitution of section 24D of NEMA**

The following section is hereby substituted for section 24D of NEMA:

"Publication of list

24D. The Minister or MEC, as the case may be, must publish in the relevant *Gazette* a notice, listing activities or specifying activities or areas identified in terms of section 24(2) and listing the competent authorities identified in terms of section 24C and the date on which the list is to come into effect."

2.6 **Substitution of section 24F of NEMA**

The following section is hereby substituted for section 24F of NEMA:

24F. (1) Notwithstanding the provisions of any other Act, no person may commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority has granted an environmental authorisation for the activity, and no person may continue an existing activity listed or specified in terms of section 24(2)(d) if an application for an environmental authorisation is refused.

(2) It is an offence for any person to contravene subsection (1) or the conditions applicable to any environmental authorisation granted for a listed or specified activity.

(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.

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(4) A person convicted of an offence in terms of subsection (2) is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.

2.7 Substitution of section 24G of NEMA

The following section is hereby substituted for section 24G of NEMA.

Rectification of unlawful commencement or continuation of listed activity

24G. (1) On application by a person who has committed an offence in terms of section 24F(2) the Minister or MEC, as the case may be, may direct the applicant to-

(a) compile a report containing one of the following-

Insights with regard to this proposed amendment[14]

- This section could be viewed be a duplication of the investigating and reporting requirements of s 28 of NEMA.
- Section 28(3) of the Act provides an excellent platform from which to determine precisely what type, scope and intensity of investigation and reporting is required to understand either potential or actual environmental harm.
- The authority's discretion captured in the second "may" at 24G(1) is seen as providing sufficient flexibility in terms of prescribing what actually needs to be done in terms of sub-section (a).

Possible improvements to this proposed amendment

- This proposed amendment could be improved to state "one or more of the following-" in section 24G(1)(a) (proposed addition emphasised by underlining).

(i) an assessment of the nature, extent, duration and significance of the impacts of the activity on the environment, including the cumulative effects;
(ii) a description of mitigation measures undertaken or to be undertaken in respect of the impacts of the activity on the environment;
(iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;
(iv) an environmental management plan; and

(b) provide such other information or undertake such further studies as the Minster or MEC may deem necessary.

(2) Upon the payment by the person of an administration fine not exceeding R1 million as determined by the competent authority, the Minister or MEC

[14] Insights provided by Mr. Charl de Villiers, Botanical Society of South Africa.

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concerned must consider **[the report]** any other reports or information submitted in terms of **[contemplated in]** contemplated in subsection (1) and thereafter may-

(a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary; or

(b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.

(3) A person who fails to comply with a directive contemplated in subsection (2)(a) or who contravenes or fails to comply with a condition contemplated in subsection (2)(b) is guilty of an offence and liable on conviction to a penalty contemplated in section 24F(4).

Insights with regard to this proposed amendment

- This addition does not address the requirement for the Minister or MEC to be placed in a position where he/she can fully understand the nature of the impact of the committed offence.
- A vacuum seems to exist with regard to punitive provisions being in place where an offence which is sought to be rectified falls outside a possible "amnesty" period granted in terms of this section.

2.8 Substitution of section 24H of NEMA

The following section is hereby substituted for section 24H of NEMA:

"(6) The Minister may use his discretion in determining the number of registration authorities to be authorized as contemplated in subsection 1, including the decision to limit the number of registration authorities to a single registration authority."

Insights with regard to this proposed amendment[15]

- The basis for this proposed amendment, i.e. assigning the Minster the discretion to limit the number of registration authorities to one, needs to be elaborated. The practical implications of this proposed amendment for developing and establishing a register (and registration administration) of EAPs are not clear.

2.9 Proposed amendment of section 24 of NEMA

The following section is inserted after subsection 24I of NEMA:

"24J. The Minister may, after consultation with every MEC, publish guidelines regarding the implementation, administration and institutional arrangements of regulations promulgated in terms of section 24(5) of this Act."

[15] Insights provided by Mr. Charl de Villiers, Botanical Society of South Africa.

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2.10 **Proposed amendment of section 24 of NEMA**

The following section is inserted after subsection 24J of NEMA:

"Consultation between competent authorities and consideration of legislative compliance requirements of other organs of state having jurisdiction

24K. (1) The Minister or MEC may consult with any organ of state responsible for administering the legislation of any aspect of an activity or process which also requires environmental authorisation under this Act, in respect of the co-ordination of the requirements of the legislation and any regulations promulgated under the Act, to avoid duplication in the submission of such information or the carrying out of such processes.

(2) The Minister or MEC may, for purposes of the environmental authorization requirements provided in this Act, consider any aspect of the authorization process undertaken by any other organ of state having jurisdiction over any aspect of an activity or process which also requires environmental authorization under this Act."

2.11 **Amendment of section 24 of NEMA**

The following section is inserted after subsection 24K of NEMA

"Exemption to persons, local authorities and government institutions from application of certain provisions

24L. (1) Any person, local authority or government institution may in writing apply to the Minister and every MEC, as the case may be, with the furnishing of reasons, for exemption from the application of any provision of section 23 or 24 of this Act.

(2) The Minister and every MEC, as the case may be, may after considering an application lodged in terms of sub section 1-

(a) refuse to grant exemption;

(b) in writing grant exemption from compliance with any of or all the provisions of section 23 or 24 of this Act.

(3) If any condition referred to in subsection (3)(b) is not being complied with, the Minister may in writing withdraw the exemption concerned or at his discretion determine new conditions.

(4) The Minister and every MEC, as the case may be, may from time to time review any exemption granted or condition determined and if he deems it necessary withdraw such exemption or delete or amend such condition."

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Insights with regard to this proposed amendment

- This proposed amendment aims to allow greater flexibility for DEAT and provincial MECs with regard to their competence (and presumably, the competence of their officials to whom the Minister or relevant MEC might delegate their powers) to exempt persons, local authorities and government institutions from the application of certain provisions of NEMA.
- It confers a wide discretionary power on the Minister or relevant MEC to allow such applications for exemptions.
- Numerous concerns have been voiced with regard to this proposed amendment, including: That the discretion to grant exemptions as currently framed is far too wide; the possible delegation of this power by the Minister to lower level functionaries may lead to decisions to exempt where those decisions have the effect of not ensuring proper EIA; and concerns regarding public participation in an exemption application that might be made in terms of these provisions (see however Regulation 53(3) and (4) in regard to competent authorities' public participation obligations before a decision to exempt can lawfully be taken).

Possible improvements with regard to this proposed amendment

- Sub-section (3) in section 24L is non-sensical. The provisions regarding imposing conditions on exemptions require re-drafting

2.12 Substitution of section 43 of NEMA

The following section is substituted for section 43 of NEMA:

"Appeals

43. (1) Any affected person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under this Act or a specific environmental management Act.

(2) Any affected person may appeal to the relevant MEC against a decision taken by any person acting under a power delegated by the MEC under this Act or a specific environmental management Act.

[(3) Any affected party may appeal to the Minister or MEC, as the case may be, against-

***(a)* any decision to issue or to refuse to issue an environmental [authorisation]**[16]

***(b)* any provision or condition of an environmental authorisation or**

***(c)* any directive issued in terms of Chapter 5.]**

[16] Although sub-section 3 as captured between square brackets and in bold type is proposed to be excised, we mention for the sake of completeness that the words "authorisation or exemption issued or granted in terms of Chapter 5" have been omitted from section 43(3)(a) as it currently reads and in addition, that sub-section 54(3)(b) is incorrectly captured in the current draft amendments. Given that this sub-section is proposed to be excised and replaced, this comment is not of direct relevance to the proposed amendments.

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(3) An appeal under subsections (1) to (2) must be noted and must be dealt with in the manner prescribed and upon payment of a prescribed fee.

(4) The Minister or MEC, as the case may be, may consider and decide an appeal or appoint an appeal panel to consider and advise the Minister or MEC on the appeal.

(5) The Minister or MEC may, after considering such an appeal, confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate order , including an order that the prescribed fee paid by the appellant, or any part thereof, be refunded.

(6) An appeal under this section does not suspend an environmental authorisation or exemption, or any provisions or conditions attached thereto, or any directive, unless the Minister or MEC directs otherwise."

(7) Notwithstanding the provisions of subsections 1-6, any person whose interests are affected by an decision of an administrative body under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the decision within 30 days after receiving the request.

Insights with regard to this proposed amendment

- This proposed amendment conflicts with the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") which allows for a period of 90 days within which a person whose interests have materially and adversely been affected by a decision or administrative action may request that the administrator concerned furnish written reasons for the action.
- The proposed amendment should be brought in line with the requirements under PAJA.

(8) Within 180 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period with which the reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision."

Insights with regard to this proposed amendment

- This proposed amendment does not accord with the provisions regarding the procedure for instituting judicial review proceedings in terms of section 7 of PAJA.
- The proposed amendment should be brought in line with the procedural stipulations in regard to time limits under PAJA.

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3. DRAFT FIRST AMENDMENT TO THE NATIONAL ENVIRONMENTAL MANAGEMENT EIA REGULATIONS, 2006

3.1 Introduction

Proposed amendments to the Regulations made in terms of section 24(5) of NEMA (which Regulations contain further procedural and substantive requirements for applications for environmental authorisation) range from purely editorial corrections and the augmentation of certain definitions, to specific amendments with regard to certain listed activities in order to clarify which activities should undergo an assessment process, or the exclusion of certain listed activities which should not undergo an assessment process.

3.2 Substitution of regulation 5 of the Regulations

The following regulation is hereby substituted for regulation 5 of the Regulations:

"Assistance by competent authorities to applicants

5. A competent authority may, on its own initiative, or on request by an applicant or an EAP managing an application, and subject to the payment of any reasonable charges-

(a) give the applicant or EAP access to any guidelines and information on practices that have been developed or to any other information in the possession of the competent authority that is relevant to the application; or

(b) advise the applicant or EAP, either in writing or by way of discussions, of the nature and extent of any of the processes that must be followed in order to comply with the Act and these Regulations.

3.3 Substitution of regulation 9 of the Regulations

The following regulation is hereby substituted for regulation 9 of the Regulations:

"Timeframes for competent authorities

9. (1) A competent authority must strive to meet timeframes applicable to competent authorities in terms of these Regulations.

(2) A competent authority may consider the reasonable extension of a timeframe applicable to the issuing or refusal of an environmental authorization or an appeal submitted in terms of these regulations where the applicable timeframe fall within an extended holiday period or festive season.

Insights with regard to this proposed amendment

- This proposed amendment requires clarification due to its vagueness. For example, what is meant by a "festive season"?

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Possible improvements with regard to this proposed amendment

- Grammatical error in proposed Regulation 9(2), which should read: "applicable timeframe falls within an extended holiday period or festive season" (emphasis supplied).

(3) If the competent authority is an organ of state acting under delegated powers and duties in terms of section 42 or 42A of the Act and that organ of state is unable to meet any timeframe set by a provision of these Regulations, the delegated organ of state must notify the Minister or MEC.

(4) The applicant or EAP managing the environmental assessment process must give consideration to applicable timeframes, which fall within an extended holiday or festive season period."

3.4 Substitution of regulation 15 of the Regulations

The following regulation is hereby substituted for regulation 15 of the Regulations:

"Combination of applications

15. (1) If an applicant intends undertaking two or more activities as part of the same development, a single application on one application form must be submitted in respect of all those activities.

(2) If an applicant intends undertaking more than one activity of the same type at different locations in the same province, different applications in respect of the different locations must be submitted, but the competent authority may, at the written request of the applicant, grant permission for the submission of a single application in respect of all those activities, whether or not the application is submitted on one or more application forms.

(3) If the competent authority grants permission in terms of sub regulation (2), the application must be dealt with as a consolidated process in respect of all the activities covered by the application, but the potential environmental impacts of each activity must be considered in terms of the location where the activity is to be undertaken.

(4) If an applicant intends undertaking a development which has a single component that is a listed or specified activity, the entire development must be assessed as part of the relevant environmental assessment process."

Insights with regard to this proposed amendment

- The proposed inclusion of a new regulation 15(4) seems to be included in the incorrect place. We say this because proposed sub-regulation (4) does not appear to relate to the primary subject-matter of this regulation, which relates to the possibility of combining applications under certain circumstances.

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Possible improvements to this proposed amendment[17]

- The term 'development' may require a definition in the General Regulations as it may be unreasonably wide, and could be interpreted to trigger unnecessary environmental assessment processes. This would result in inefficiencies for both the applicant as well as the state.
- A crude example would be an existing department store that is to be refurbished internally and, in the process, the proponent seeks in addition to erect a mast on the roof to cater for the need of its electrical appliances' division. Would the whole project have to undergo an assessment "as part of the relevant environmental assessment process"?

3.5 Substitution of regulation 16 of the Regulations

The following regulation is hereby substituted for regulation 16 of the principal Regulation:

"Activities on land owned by person other than applicant

16. (1) If the applicant is not the owner of the land on which the activity is to be undertaken, the applicant must, before applying for an environmental authorisation in respect of that activity, **[obtain the written consent of the landowner to undertake the proposed activity on that land]** give written notice of the proposed activity to the owner of the land on which the activity is to be undertaken, and inform the owner of the land that he may participate in the public participation process as contemplated in regulation 56.

(2) A written **[consent]** notice contemplated in sub regulation (1) must be in a form agreed to or determined by the competent authority and such form must be submitted to the competent authority as proof that sub regulation (2) has been complied with.

[(3) Sub regulation (1) does not apply in respect of a linear activity, provided the applicant has given notice of the proposed activity to the owners of the land on which the activity is to be undertaken as soon as the proposed route or alternative routes have been identified.]"

Insights with regard to this proposed amendment

- Although it is understood that this amendment may have been proposed in order to accommodate big infrastructure projects, the proposed amendment requires clarification due to its vagueness and unclarity as to what the *rationale* is for the proposed amendment.
- Also, there are concerns regarding the potential effect of the proposed amendment to Regulation 16(1). As regulation 16(1) was previously drafted, there was a peremptory obligation on an applicant seeking to undertake a listed activity on a third party's property, first to obtain the written consent of that landowner to undertake the proposed activity. The effect of the proposed amendment is to create an entirely different situation, where the applicant is simply obliged to give written notice of the proposed activity to the owner of the land and to inform the owner that in the context of the proposed application, the latter person may participate in the public participation process obliged in the NEMA EIA Regulations.

[17] Insights provided by Mr. Charl de Villiers, Botanical Society of South Africa.

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3.6 **Amendment of regulation 22 of the Regulations**

Regulation 22 is hereby amended by-

(a) the deletion of paragraph (b) of subregulation (1); and

(b) the addition of the following subregulation (2):

"(2) If basic assessment must be applied to an application, the applicant or EAP managing the application must before submitting the application to the competent authority give notice, in writing, of the proposed application to-

(a) the competent authority; and

(b) any organ of state with has jurisdiction in respect of any aspect of the activity."

3.7 **Amendment of regulation 23 of the Regulations**

The addition of subregulation (3) after subregulation (2) of the principal Regulation:

"(3) In addition, a basic assessment report must take into account-

(a) any relevant guidelines; and

(b) any **[practices]** departmental policies and decision making instruments that have been developed by the competent authority in respect of the kind of activity which is the subject of the application."

3.8 **Amendment of subregulation (1) of regulation 29 of the Regulations**

Subregulation (1) of regulation 29 of the Regulations is amended by the addition of the following paragraph after paragraph (h):

"(i) a description of the need and desirability of the proposed activity and identified potential alternatives to the proposed activity, including advantages and disadvantages that the proposed activity or alternatives may have on the environment and the community that may be affected by the activity."

3.9 **Amendment of subregulation (3) of regulation 53 of the Regulations**

The following subregulation is substituted for subregulation (3) of regulation 53 of the Regulations:

"(3) The competent authority must, within 30 days of the acknowledgement of the receipt of the application, **[promptly]** decide the application if the rights or interests of other parties are not likely to be adversely affected by the proposed exemption."

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3.10 Substitution of paragraph (d) of subregulation (2) of regulation 54 of the Regulations

The following paragraph is substituted for paragraph (d) of subregulation (2) of regulation 54 of the Regulations:

"2(d) the conditions subject to which exemption is granted, **[,]** including conditions relating to the transfer of the written exemption notice; and"

3.11 Amendment of subregulation (2) regulation 56 of the Regulations

The following regulation is hereby substituted for subregulation (2) of regulation 56 of the Regulations:

"(2) The person conducting a public participation process must take into account any guidelines applicable to public participation and must give notice to all potential interested and affected parties of the application which is subjected to public participation by-

(a) fixing a notice board at a place conspicuous to the public at the boundary or on the fence of-

(i) the site where the activity to which the application relates is or is to be undertaken; and

(ii) any alternative site mentioned in the application;

(b) giving written notice to-

(i) the owners and occupiers of land adjacent to the **[site]** locality where the activity is or is to be undertaken or to any alternative locality where the activity is to be undertaken; and **[site]**

(ii) any other party as instructed by the competent authority.

[(ii) the owners and occupiers of land within 100 metres of the boundary of the site or alternative site who are or may be directly affected by the activity;]"

Insights with regard to this proposed amendment

- The proposed amendments in this section of the Regulations do not accord with the existing provisions contained in the Regulations contained in Government Notice No. 385 of 21 April 2006.

3.12 Substitution of regulation 61 of the Regulations

The following regulation is substituted for regulation 61 of the Regulations:

"Jurisdiction of Minister and MEC to decide appeals

61. An appeal against a decision must be **[lodged]** submitted with-

(a) the Minister, if the Minister is the competent authority for the activity in relation to which the decision was taken;

(b) the MEC, if the MEC is the competent authority for the activity in relation to which the decision was taken; or

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(c) the delegated organ of state, where relevant."

3.13 **Substitution of subregulation (1) of regulation 62 of the Regulations**

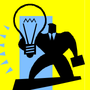
The following subregulation is substituted for subregulation (1) of regulation 62 of the Regulations:

"(1) A person affected by a decision referred to in regulation **60**(1) who wishes to appeal against the decision, must **[lodge]** submit a notice of intention to appeal with the Minister, MEC, or delegated organ of state, as the case may be, within 10 days after that person has been notified in terms of these Regulations of the decision."

3.14 **Substitution of subregulation (1) of regulation 63 of the Regulations**

The following subregulation is substituted for subregulation (1) of regulation 63 of the Regulations:

"(1) An appeal **[lodged]** submitted to [with]-
(a) the Minister for all decisions taken by the **[must be submitted to the]** Department of Environmental Affairs and Tourism;
(b) the MEC for all decisions taken by the **[must be submitted to the]** provincial department responsible for environmental affairs in the relevant province; or
(c) the delegated organ of state, where relevant, for all decisions taken by **[the]** **[must be submitted to the]** that delegated organ of state.



Possible improvements to this proposed amendment

- As the proposed amendment currently stands, it is nonsensical. It appears to lack the words "must be" between the words "an appeal" and the word "submitted" in regulation 63(1).
- In addition, proposed regulation 60(1)(c) should be addressed in more detail – on the face of it, it appears to suggest (although it clearly does not mean to do so) that the delegated organ of state that made the initial decision would somehow also be the appellate authority. In fact, it would be a different decision-maker within that organ of state (for example, in the case of a decision taken by a local municipality that is properly delegated to do so, the appeal would be heard by the council of that municipality) (see section 62 of the Local Government: Municipal Systems Act, 2000).

3.15 **Substitution of subregulation (1) of regulation 64 of the Regulations**

The following subregulation is substituted for subregulation (1) of regulation 64 of the Regulations:

"(1) An appeal must be submitted to the relevant department within 30 days of the submitting **[lodging of]** the notice of intention to appeal referred to in regulation **62**(1)."

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3.16 Substitution of paragraph (b) of subregulation (2) of regulation 65 of the Regulations

The following paragraph is substituted for paragraph (b) of subregulation (2) of regulation 65 of the Regulations:

"(b) If a respondent introduces any new information not dealt with in the appeal submission of the appellant, the appellant is entitled to submit an answering statement to such new information to the Minister, MEC or delegated organ of state, as the case may be, within 30 days of being served a copy as per sub regulation (2). **[receipt of the responding statement.]**"

3.17 Substitution of subregulation (1) of regulation 68 of the Regulations

The following subregulation is substituted for subregulation (1) of regulation 68 of the Regulations:

"1. The Minister, MEC or delegated organ of state, as the case may be, must reached a final decision, in writing, on an appeal submitted, within 180 days of receipt of all relevant information, including any statements, supporting documentation, reports or any other additional information requested, or recommendations or an appeal panel which may assist the Minister, MEC or delegated organ of state, as the case may be, in the decision making process."

Insights with regard to this proposed amendment

- The possibility exists for this provision to be manipulated by decision-makers charged with dealing with an appeal, who wish to delay having to make a final decision on appeal, which can be done simply by invoking the entitlement to request the submission of further information.
- The parameters of what is to be deemed "all relevant information" is unclear.

Possible improvements with regard to this proposed amendment

- Grammatical error: "… must reach a final decision …" (rather than "reached, as is referred to in the draft amendment).

3.18 Amendment of regulation 79 of the Regulations

Regulation 79 of the Regulations is amended by the addition of the following subregulation:

"(7) Subregulations (1), (2), (3), (4), (5) and (6) must be read together with the provisions of chapter 7 of the principal Act."

Insights with regard to this proposed amendment

- It is important to bear in mind that regulation 79 in the NEMA EIA Regulations (and particularly subregulations 1 to 6, which are unchanged by the proposed amendments) must now be read with the provisions of Chapter 7 of NEMA (which Chapter is titled "Compliance, enforcement and protection". In that regard it is important to bear in mind that Part 2 of Chapter 7 has been significantly strengthened and broadened in the recent past to

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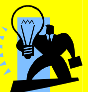
include specific provisions regarding (among others) the designation of environmental management inspectors; the mandates of those inspectors; their functions; general powers that inspectors have; and specific powers including those of search, seizure, and the issue of compliance notices.)

3.19 Short title and commencement

19. These Regulations shall be cited as Environmental Impact Assessment Amendment Regulation, 2007 and take effect on a date determined by the Minster by notice in the Government Gazette.



Possible improvements with regard to this proposed amendment

- "Regulation" should read "Regulations".

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4. AMENDMENT TO THE LIST OF ACTIVITIES AND COMPETENT AUTHORITIES IDENTIFIED IN TERMS OF SECTIONS 23(2) AND 24D OF NEMA

Insights with regard to the proposed amendments to the listed activities generally

- It appears that the primary thrust of the proposed amendments to the respective lists of activities contained in Government Notice R386 and R387 is to simplify the lists and wherever possible, to excise (or create more significant thresholds for) activities that have required approval in the form of an environmental authorisation since 3 July 2006 but which (on the face of it) are not significantly detrimental from an environmental, economic or social perspective. A simple example will suffice: If one has regard to the current jurisdictional facts that trigger the requirement to hold an environmental authorisation for the undertaking of the activity listed at item 1(k) in the basic assessment list, a comparison with the activity as it is proposed to be amended shows that there will be significantly fewer of these types of activities that would trigger the requirement to hold environmental authorisation.

- As the legislation is currently drafted, item 1(k) reads as follows: "The construction of facilities or infrastructure, including associated structures or infrastructure, for the bulk transportation of sewage and water, including storm water, in pipelines with (i) an internal diameter of 0,36 metres or more; or (ii) a peak throughput of 120 litres per second or more."

- The proposed amendments to that item (which would be renumbered item 1(l) if the amendments proposed are enacted and commenced in the form currently proposed) would read as follows: "The construction of facilities or infrastructure, for the bulk transportation of sewage and water, including storm water, in pipelines exceeding 100 metres in length, situated outside urban areas, with (i) an internal diameter of 0,36 metres or more; or (ii) a peak throughput of 120 litres per second or more.

- What is clear from an analysis of the activity both in its current form and in its proposed amended form, is that there will be a further two jurisdictional facts that would have to be triggered before an environmental authorisation must be sought and obtained for this activity. They are respectively to do with the extent of the pipeline (it must be over 100 metres in length) and in addition, situated outside the urban area. The expression "urban areas" is sought to be included in the amended regulations and is defined in the current draft to mean "… areas situated within the urban edge (as defined by the relevant competent provincial authority), or in instances where no urban edge/boundary has been officially demarcated, it refers to areas situated within the edge of built-up areas."

- The proposed amendments in regard to this type of activity are to be welcomed – one of the difficulties with implementing and enforcing the current NEMA EIA Regulations is that the activities as currently drafted require approval for a multiplicity of activities which have little or no environmental significance (particularly when undertaken within urban areas). The nature and ambit of the proposed amendments gives effect to attempt to limit the requirement to hold authorisation to situations where there may well be a detrimental environmental impact if such a pipeline were to be installed.

- **A fundamental issue in regard to activities that required approval between the date of commencement of this list (3 July 2006) and the date on which (if accepted in this form) the proposed amendments become law, relates to how the authorities intend dealing with activities that no longer require approval after the commencement date of the proposed amendments. In other words what will occur in the situation where an applicant triggers the requirements to hold an environmental authorisation as the regulations are currently framed, but where that obligation would no longer be triggered by the amended itemised activity. For example, there will be situations in**

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which authorisation has been sought for a listed activity such as that to do with the installation of pipelines with certain dimensions and/or flow rates, and where (after the proposed amendments become law, and in the event that they do in the form currently proposed) that activity would no longer require approval. In the event that the drafters of the amendments do not regulate this situation, then the well-established rule will apply, to the effect that unless a contrary intention appears from the amending statute, any pending administrative application for environmental authorisation must be decided in accordance with the law as it was when the application was made even if that entails the administrative body exercising powers which it no longer has under the amended or repealed law. (See section 12(2)(c) of the Interpretation Act 33 of 1957.)[18]

4.1 Definitions

The following definitions have been amended as indicated or are included as proposed new definitions:

'agri-industrial' means an undertaking involving the beneficiation of primary agricultural produce; **[production, processing, manufacture, packaging or storage of agricultural produce and includes battery farm operations that are under roof;]**

'construction' means the <u>building, erection or establishment of a facility, structure or infrastructure that is necessary for the undertaking of an activity</u>; **[building, erection or expansion of a facility, structure or infrastructure that is necessary for the undertaking of an activity, but excludes any modification, alteration or upgrading of such facility, structure or infrastructure that does not result in a change to the nature of the activity being undertaken or an increase in the production, storage or transportation capacity of that facility, structure or infrastructure;]**

<u>Insights with regard to this proposed amendment</u>

- Although the definition of "construction" has been shortened considerably to exclude the expansion of a facility, structure or infrastructure, the provisions regarding such expansion have been incorporated into the "new" item 24 in the list of activities requiring basic assessment.

<u>**'cultivate'** in relation to land, means any act by means of which the topsoil is disturbed mechanically;</u>

<u>Insights with regard to this proposed amendment</u>

- It is unclear why the definition of this expression is limited to mechanical disturbance of topsoil. Presumably, this relates to one of the primary imperatives of the proposed draft amendments, which is to capture environmentally significant activities and in that context, the thinking presumably is that mechanical disturbance of topsoil is likely to be more environmentally significant than disturbances undertaken by hand.

[18] Various decisions of the High Court and the Supreme Court of Appeal support this contention – see for example *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) and *Chairman, Board on Tariffs & Trade v Volkswagen of South Africa (Pty) Ltd and Another* 2001 (2) SA 372 (SCA).

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'decommissioning' means to take out of active service, permanently or dismantling partly or wholly, or closure of a facility to the extent that it can not be readily re-commissioned.

Insights with regard to this proposed amendment

- The inclusion of a definition of this expression is to be welcomed, as it throws further light on the nature and extent of the activity of decommissioning a particular facility. In that regard, it is important to note that the activity listed as item 11 (to do with the decommissioning of dams) and the activity listed at item 23 (to do with decommissioning of certain types of facilities and/or infrastructure) are likely to be clearer, in the context of the requirement to undertake an assessment and obtain environmental authorisation. There will be a question of fact in each case as to whether a facility has been taken out of active service, or dismantled or closed in a manner that makes it difficult readily to recommission that particular facility or structure.

Possible improvements with regard to this proposed amendment

- The placement of the first comma contained in this definition may lead to difficulties of interpretation. In addition, the use of "dismantling" is inappropriate in this context and the expression "dismantle" should instead be used.

'derelict land' means abandoned land or property where the lawful/legal right has not been exercised during the preceding ten year period.

'development setback' means a building line in terms of zoning scheme regulations or a building line determined in terms of development approval conditions or a building line determined in terms of approval conditions included in previous authorisations, rezoning or subdivision approvals and which must be scientifically motivated;

Insights with regard to this proposed amendment

- This definition requires further explanation and possible amendment. The rider "and scientifically motivated" creates a range of potential difficulties.
- A view has been expressed that this addition could lead to a situation where developers could unintentionally be benefited through the promulgation of these amended regulations by merely obtaining approval of setback-lines.

'floodplain' means the area below the 1:10 year floodline or if the floodline is not determined, **[1:10 year flood line,]** 32m from the bank of the river; **[a discernable flat landscape feature next to a river or stream that was created by weathering and sedimentation over time;]**

'indigenous vegetation' means *de facto* indigenous and invasive vegetation, which has not been transformed or cultivated at no time during the preceding ten years;

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Insights with regard to this proposed amendment[19]

- This definition has been criticised for not being scientifically founded and should be either deleted or be agreed upon in consultation with SANBI.

'infill development' means urban development, including residential, commercial, retail, institutional, educational and mixed use development, but excluding industrial development, in a built up area which is at least 50 percent abutted by urban development **[and which can be readily connected to municipal bulk infrastructure services;]**

'resort" means overnight tourism accommodation of more than 15 beds, excluding conversion of existing structures, on a site separate from an established homestead footprint, and where such accommodation is associated with tourism activities;

Insights with regard to this proposed amendment

- This definition has been criticised for not being specific enough and for the fact that it could be abused for that reason.

'slaughter unit' in relation to a quantity standard for determining throughput, means the definition as defined in Regulation `1028 of the Animal Slaughter, Meat and Animal Product Hygiene Act, 1967;

['South African Manual for Outdoor Advertising Control' means the Department of Environmental Affairs and Tourism and the Department of Transport publication titled 'South African Manual for Outdoor Advertising Control', published by the Department of Environmental Affairs and Tourism, April 1998, ISBN: 0-621-27343-0;]

Insights with regard to this proposed amendment

- This proposed excision must be read with Item (1)(w) in the proposed amendments to the Basic Assessment List.

'temporary storage of hazardous waste' means the storage of hazardous waste for a period of 90 days or less;

'transformation' means physically altering the structure, function or current use;

Insights with regard to this proposed amendment

- This definition has been criticised for not being clear and for the fact that it could be abused for that reason.

Possible improvements to this proposed amendment[20]

- The definition of 'transformation' should be amended so that it reads "means irreversibly altering the structure, composition or function of indigenous vegetation or an ecosystem".

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[19] Insights provided by Mr. Charl de Villiers, Botanical Society of South Africa.

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'undeveloped' means that no installations or construction has been affected upon and below ground, consistent with the lawful land use right, during the preceding ten year period;

'urban areas' means areas situated within the urban edge (as defined by the relevant competent provincial authority), or in instances where no urban edge/boundary has been officially demarcated, it refers to areas situated within the edge of built-up areas;

'vacant' means not occupied for the purpose of its lawful land use right namely residential, mixed, retail, commercial, industrial or institutional use during the preceding ten year period;

'virgin soil' means land which has at no time during the preceding ten years been cultivated; and

'wetland' means land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil.

Comment with regard to this proposed amendment

- The definition of "wetland" accords exactly with that used in the National Water Act, 36 of 1998.

[20] Suggested by Mr. Charl de Villiers, Botanical Society of South Africa.

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4.2 Schedule of activities requiring Basic Assessment

SCHEDULE

ACTIVITIES IDENTIFIED IN TERMS OF SECTION 24(2)(a) AND (d) OF THE ACT, WHICH MAY NOT COMMENCE WITHOUT ENVIRONMENTAL AUTHORISATION FROM THE COMPETENT AUTHORITY AND IN RESPECT OF WHICH THE INVESTIGATION, ASSESSMENT AND COMMUNICATION OF POTENTIAL IMPACT OF ACTIVITIES MUST FOLLOW THE PROCEDURE AS DESCRIBED IN REGULATIONS 22 TO 26 OF THE ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, *2006*, PROMULGATED IN TERMS OF SECTION 24(5) OF THE ACT –

General introductory comments

- The proposed amendments to the listed activities requiring basic assessment before the issue of environmental authorisation under section 24 of NEMA contain some significant additions and/or amendments and/or excisions. There are 14 wholly new definitions contained in the definitions section to the schedule to the amendment notice. They are respectively the defined terms: "decommissioning"; "derelict land"; "development setback"; "indigenous vegetation"; "resort"[21]; "slaughter unit"; "temporary storage of hazardous waste"; "transformation"; "undeveloped"; "urban areas"; "vacant"; "virgin soil"; and "wetland".
- There are various wholly new additions to the itemised list of activities (see the activities listed respectively as items 1(e) and 1(x); as well as activity 24(a) to (w), principally regarding the expansion of certain types of facilities and/or infrastructure); 25; 26; 27; and 28.
- Two activities are proposed to be excised from the list. They are respectively the activities listed at item 7 and item 18. The activity previously listed as item 7 is effectively replaced by the activity proposed to be listed as item 1(x), which is the "construction of facilities or infrastructure, for the storage and handling of a dangerous good, including petrol, diesel, liquid petroleum gas or paraffin, where such storage occurs in containers with a combined capacity of more than 20 but less than 1000 cubic metres."

Activity number	**Activity description**	**Identification of competent authority**
1	The construction of facilities or infrastructure, **[including associated structures or infrastructure]**, for- *(a)* the generation of electricity where: (i) the electricity output is more than 10	

[21] It should be noted that there are also now three categories of resort-related activities, respectively in item 1(d); item 1(e); and item 27 on the proposed basic assessment list.

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megawatts but less than 20 megawatts;

(ii) where the output is less than 10 megawatts but the total extent of the facility covers an area in excess of 1ha;

(b) the above ground storage of 1 000 tons or more but less than 100 000 tons of ore;

(c) the storage of 250 tons or more but less than 100 000 tons of coal;

(d) resorts, lodges, hotels or other tourism and hospitality facilities in a protected area contemplated in the National Environmental Management: Protect Areas Act, 2003 (Act 57 of 2003);

(e) resorts, excluding where such resorts are located in urban areas;

Possible improvement with regard to this proposed amendment

- To render this activity slightly more clearly worded, this item might be amended to read as follows: “resorts, excluding resorts located in urban areas”.

(f) any purpose where lawns, playing fields or sports tracks covering an area of more than three hectares, but less than 10 hectares, will be established outside urban areas;

(g) for sport spectator purposes [facilities] with the capacity to hold 8 000 spectators or more;

Possible improvements with regard to this proposed amendment

- This activity has been amended to replace the word “facilities” with “purposes”.
- The use of the word “for” to introduce this activity is superfluous and should therefore be excised.

(h) the slaughter of:

(i) poultry exceeding 50 poultry per day

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	slaughter units per day; [animals with a product throughput of 10 000 kilograms or more per year;] **<u>Possible improvements with regard to this proposed amendment</u>** ▪ This activity has been amended to omit the words "animals with a product throughput of 10 000 kilograms or more per year". ▪ The regulations as published do not reflect this amendment. *(i)* the concentration of animals for the purpose of commercial production in densities that exceed- (i) 20 square metres per head of cattle and more than 500 head of cattle per facility per year; (ii) eight square meters per sheep and more than 1 000 sheep per facility per year; (iii) eight square metres per pig and more than 250 pigs per facility per year excluding piglets that are not yet weaned; (iv) 30 square meters per crocodile at any level of production, excluding crocodiles younger than 6 months; (v) <u>15 birds per square meters and more than 500 chickens per facility at any time, excluding chicks younger than 20 days or 5 birds per square meters and more than 500 other poultry per facility at any time, excluding chicks younger than 20 days</u>; **[three square metres per head of poultry and more than 250 poultry per facility at any time, excluding chicks younger than 20 days;]**	

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Possible improvements with regard to this proposed amendment

- The use of "meter<u>s</u>" is grammatically incorrect and should be replaced with this word in the singular (i.e. "meter").

(vi) three square metre per rabbit **[at]** and more than 250 rabbits per facility at any time; or

(vii) 100 square metres per ostrich <u>or emu</u> and more than 50 ostriches <u>or emus</u> per facility per year or 2500 square metres per breeding pair;

(j) aquaculture production, including mariculture and algae farms, with a product throughput of 10 000 kilograms, <u>design capacity and wet weight,</u> or more per year;

(k) agri-industrial purposes <u>relating to beneficiated produce</u>, outside areas with an existing land use zoning for industrial purposes, that cover an area of 1 000 square metres or more;

(l) the bulk transportation of sewage and water, including storm water, in pipelines <u>exceeding 100 metres in length, situated outside urban areas,</u> with-

(i) an internal diameter of 0,36 metres or more; or

(ii) a peak throughput of 120 litres per second or more;

Insights with regard to this proposed amendment

- This inclusion of the *proviso* that this activity must be intended to be undertaken outside urban areas (and then only in respect of pipelines of the specifications described, including the specification proposed to be added in regard to the length of the pipeline) <u>before</u> it triggers the requirement to hold an environmental authorisation will have invariably has the effect of limiting the

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	requirement to perform a basic assessment and to obtain environmental authorisation for activities to be undertaken outside the defined urban edge or outside built-up areas where no urban edge is defined. ▪ The consequence of this amendment being accepted is that far fewer activities in this category would now require assessment. ▪ In this instance, the pipe diameter must exceed 0,36 metres, or must have a peek throughput of 120 litres per second or more, and must exceed 100 metres in length, and must be outside an urban area.	
	(m) the transmission and distribution of electricity above ground with a capacity of less **[more]** than **[33]** 131 kilovolts **[and less than 120 kilovolts]**;	
	Possible improvements with regard to this proposed amendment ▪ The threshold set in this listed activity is apparently incorrect and requires amendment. (Comment supplied by Ms. Karen Shippey of Ninham Shand Consulting Services).	
	(n) any purpose in the one in ten year flood line of a river, **[or]** stream or wetland, or within 32 metres, whichever is the greater, from the bank of a river; **[or]** stream or wetland **[where the floodline is unknown]** where the flood line is unknown, excluding purposes associated with existing residential use, but including- (iii) canals; (iv) channels; (v) bridges; (vi) dams; **[and]** (vii) weirs; and (viii) stormwater outlet structures	

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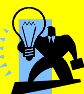
<u>Possible improvements with regard to this proposed amendment</u>

- The numbering of the items in this activity is incorrect and must be amended.

(o) the off-stream storage of water, including dams and reservoirs, with a capacity of 50 000 cubic metres or more, unless such storage falls within the ambit of the activity listed in item 6 of Government Notice R387 of 2006;

(p) the recycling, re-use, handling, temporary storage or treatment of general waste with a throughput capacity of 20 cubic metres or more daily average measured over a period of 30 days, but less than 50 tons daily average measured over a period of 30 days;

(q) the temporary storage of hazardous waste <u>for less than 90 days</u>;



<u>Insights with regard to this proposed amendment</u>

- Given the definition of the expression "temporary storage of hazardous wastes" and specifically the meaning ascribed to this expression, the addition of the words "for less than 90 days" is superfluous in item 1(q).

(r) **[the landing, parking and maintenance of aircraft including-]**

helicopter landing pads, excluding helicopter landing facilities and stops used exclusively by emergency services, or aircraft landing strips shorter than 1,4km;

[(i) helicopter landing pads, excluding helicopter landing facilities and stops used exclusively by emergency services;

(ii) unpaved aircraft landing strips shorter than 1,4km;

(iii) structures for equipment and aircraft

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storage;

(iv) structures for maintenance and repair;

(v) structures for fuelling and fuel storage; and

(vi) structures for air cargo handling;]

(s) the recreational use and outdoor racing , excluding on temporary tracks, of motor powered vehicles **[outdoor of motor powered vehicles]** including-

(i) motorcars;

(ii) trucks;

(iii) motorcycles;

(iv) quad bikes;

(v) boats; and

(vi) jet skis;

(t) the treatment of effluent, wastewater or sewage with an annual throughput capacity of more than **[2]**5 000 cubic metres but less than **[15]**50 000 cubic metres;

(u) marinas and the launching of watercraft on inland fresh water systems;

(v) above ground cableways and funiculars;

(w) advertising purposes exceeding 1,8 square metres in size, outside urban areas; **[advertisements as defined in classes 1*(a)*, 1*(b)*, 1*(c)*, 3*(a)*, 3*(b)*, 3*(l)* of the South African Manual for Outdoor Advertising Control.]**

Insights with regard to this proposed amendment

- This inclusion of the *proviso* that this activity must be intended to be undertaken outside urban areas and then only in respect

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of advertising boards exceeding certain dimensions (1,8 square metres in size) before that activity triggers the requirement to hold an environmental authorisation will invariably have the effect of limiting the requirement to perform a basic assessment and to obtain environmental authorisation for activities to be undertaken outside the defined urban edge or outside built-up areas where no urban edge is defined.

- The consequence of this amendment being accepted is that far fewer activities in this category would now require assessment.

(x) the storage and handling of a dangerous good, including petrol, diesel, liquid petroleum gas or paraffin, where such storage occurs in containers with a combined capacity of more than 20 but less than a 1000 cubic metres.

Possible improvements with regard to this proposed amendment

- The item should conclude with "… but less than 1000 cubic metres".

Insights with regard to this proposed amendment

- It should be noted that the inclusion of the activity listed as a new item 1(x) effectively replaces the activity currently listed as item 7, and which amendments propose to remove. The latter item (described as the "above ground storage of a dangerous good, including petrol, diesel, liquid, petroleum gas or paraffin, in containers [of certain specifications]") was inappropriately set out in the context of what it sought to trigger. It is not so much the storage of the relevant dangerous good but the construction of infrastructure in which to contain that substance that may have environmental impacts. In addition, the manner in which item 7 is currently drafted allows entities to construct infrastructure but only to seek authorisation for the storage of certain dangerous goods therein. It has the practical effect of allowing the construction or erection-related activity to proceed before authorisation is sought and achieved in regard to the storage of substances in those containers. In that context, it is more appropriate for the activity in this regard to be itemised as one relating to construction of

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	facilities or infrastructure. This amendment is therefore to be welcomed.	
2	Construction or earth moving activities in the sea or within 100 metres inland of the high water mark of the sea, in respect of- *(a)* facilities for the storage of material and the maintenance of vessels; *(b)* fixed or floating jetties and slipways; *(c)* tidal pools; *(d)* embankments; *(e)* stabilising walls; *(f)* buildings; **[or]** *(g)* infrastructure; or; *(h)* rock revetments and other stabilising structures, but excluding construction on erven within existing urban areas if such construction will occur behind an approved development setback line. **Insights with regard to this proposed amendment** ▪ The possibility exists for abuse of this provision in that a potential applicant will only have to have a development setback line approved in order to avoid having to obtain environmental authorisation.	
3	The prevention of the free movement of sand, **[including]** erosion **[and]** or accretion, by means of planting vegetation, placing synthetic material on dunes and exposed sand surfaces within a distance of 100 metres inland of the high water mark of the sea, excluding where the prevention of free movement of sand will occur on erven within existing urban areas if such prevention will occur behind an approved development setback line. **Insights with regard to this proposed amendment** ▪ The possibility exists for abuse of this provision in that a potential applicant will only have to have a development setback	

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	line approved in order to avoid having to obtain environmental authorisation.	
4	The dredging, excluding maintenance dredging, excavation, infilling, removal or moving of soil, sand or rock exceeding 5 cubic metres **[from a river, tidal lagoon, tidal river, lake, in-stream dam, floodplain or wetland]** in the one in ten year flood line of a river, stream or wetland, or within 32 metres, whichever is the greater, from the bank of a river, stream or wetland.	
5	The removal or damaging of indigenous vegetation or more than 10 square metres within a distance of 100 metres inland of the high water mark of the sea, but excluding where such removal or damage will occur on vacant erven within existing urban areas behind an approved development setback line. **Insights with regard to this proposed amendment** ▪ The possibility exists for abuse of this provision in that a potential applicant will only have to have a development setback line approved in order to avoid having to obtain environmental authorisation. ▪ This proposed amendment would potentially result in the loss of habitat forming part of coastal ecological corridors or connective 'stepping stones' between vegetated or other areas important for the conservation of biodiversity. Any disturbance to indigenous vegetation within the littoral active zone or sediment corridors must be treated with the greatest degree of circumspection, especially in circumstances where poorly-informed planning decisions in the past have resulted in the inappropriate location of fixed infrastructure and housing in inherently dynamic and unstable environments.[22] ▪ The removal of indigenous vegetation in the coastal area is referred to in the NEM: Coastal Management Bill, but no references are made in the Bill as to the size of the area to be cleared or the distance from the high-water mark.	
6	The excavation, moving, removal, depositing or compacting of soil, sand, rock or rubble covering an area exceeding 10 square metres in the sea or within	

[22] (*Comment supplied by Charl de Villiers of the Botanical Society of South Africa.)

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	a distance of 100 metres inland of the high-water mark of the sea, but excluding where such excavation, moving, removal, depositing, or compacting will occur or erven within existing urban areas behind an approved development setback line. **Insights with regard to this proposed amendment** ▪ The possibility exists for abuse of this provision in that a developer will only have to have a development setback line approved.	
[7]	**[The above ground storage of a dangerous good, including petrol, diesel, liquid petroleum gas or paraffin, in containers with a combined capacity or more than 30 cubic metres but less than 1 000 cubic metres at any one location or site.]**	The competent authority for this part of the schedule is the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act, as amended.
7**[8]**	Reconnaissance, prospecting, mining or retention operations as provided for in the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002), in respect of such permissions, rights, permits and renewals thereof.	
8**[9]**	In relation to permissions, rights, permits and renewals granted in terms of 8 above, or any other similar right granted in terms of previous mineral or mining legislation, the undertaking of any prospecting or mining related activity or operation within a prospecting, retention or mining area, as defined in terms of section of 1 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002).	The competent authority in respect of the activities listed in this part of the schedule is the environmental authority in the province in which the activity is to be undertaken unless it is an application for an activity contemplated in section 24C(2) of the Act, in which case the competent authority is the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act, as amended.
9**[10]**	The establishment of cemeteries and the expansion thereof with more than 500 square metres. **Possible improvements with regard to this proposed amendment** ▪ The word "with" when used in this item should be replaced by the word "by".	
10**[11]**	The decommissioning of a dam where the highest part of the dam wall, as measured from the outside toe of the wall to the highest part of the wall, is 5 metres or higher or where the high-water mark of the dam covers an area of more than 10 hectares.	
11**[12]**	The transformation or removal of indigenous vegetation of 3 hectares or more or of any size where the transformation or removal would occur	

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	within a critically endangered or an endangered ecosystem listed in terms of section 52 of the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004). **Insights with regard to this proposed amendment** ▪ Although this section has not been amended, this activity still presents a problem in that no list of endangered ecosystems has been published in terms of section 52 of the Biodiversity Act. ▪ This situation leaves most of South Africa threatened biodiversity without and statutory protection.[23]	
12[**13**]	The abstraction of groundwater at a volume where any general authorisation issued in terms of the National Water Act, 1998 (Act 36 of 1998) will be exceeded.	
13[**14**]	The construction of masts of any material or type used **[and of any height, including those used]** for telecommunication broadcasting or **[and]** radio transmission: **[, but excluding-]** *(a)* is to be placed on a site not previously used for this purpose, or *(b)* will exceed 15 metres in height. **[*(a)* masts of 15 metres and lower exclusively used** **(i) by radio amateurs; or** **(ii) for lighting purposes** ***(b)* flag poles; and** ***(c)* lightning conductor poles.]**	
14[**15**]	The construction of a road with a reserve wider than 6 metres by less than 30 metres, and the construction of roads for which an environmental authorisation was obtained in terms of Listing Notice 387, activity number 5, excluding roads	

[23] (*Comment supplied by Mr. Charl de Villiers, Botanical Society of South Africa).

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	situated within urban areas. **[that is wider than 4 metres or that has a reserve wider than 6 metres, excluding roads that fall within the ambit of another listed activity or which are access roads of less than 30 metres long.]** **Insights with regard to this proposed amendment** ▪ The inclusion of the words "… and the construction of roads for which an environmental authorisation was obtained in terms of Listing Notice 387, activity number 5, excluding roads situated within urban areas" is an important addition to this activity. It now captures the construction of roads of significant scale and/or environmental impact in situations where previously only the determination of the relevant route (and basic assessment for construction where the scale of the proposed road on the proposed route fell within the specifications that are currently captured by this activity) was obliged. In summary, it is not just route determination but also the actual construction of roads that now requires assessment and approval. ▪ This proposed amendment does not address the issue of roads and tracks in sensitive areas and could possibly capture an unintended action. ▪ This inclusion of the *proviso* that an activity has to occur outside urban areas invariably has the effect of limiting the requirement to perform a basic assessment and to obtain environmental authorisation for activities to be undertaken outside the defined urban edge or outside built-up areas where no urban edge is defined. ▪ The consequence of this amendment being accepted is that far fewer activities in this category would now require assessment.	
15**[16]**	The transformation of undeveloped, vacant or derelict land to- *(a)* establish infill development covering an area of 5 hectares or more, but less than 20 hectares; or *(b)* residential, mixed, retail, commercial, industrial or institutional use where such development does not constitute infill and	

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	where the total area to be transformed is bigger than 1 hectare; or *(c)* cultivation of virgin soil where the total area to be transformed is bigger than 5 hectares.	
16**[17]**	Phased activities, which commenced after 3 July 2006 but excluding regulation 386 activities 1(a)-(c), 1(e)-(j), 1(n), 1(o), 1(s), 7 and 19 and the counterparts of each of these activities included in this notice, where any one phase of the activity may be below a threshold **[specified in this Schedule]** but where a combination of the phases, including expansions or extensions, will exceed a specified threshold.	
[18]	**[Subdivision of portion of land 9 hectares or larger into portions of 5 hectares or less.]** **Insights with regard to this proposed amendment** ▪ The removal of this item from the Basic Assessment List of activities creates some concern around the effect thereof on development densification. ▪ The question also arises as to whether this item confers any rights on a property owner with regard to the subdivision of his or her property.	
17**[19]**	The development of a new facility or the transformation of an existing facility for the conducting of manufacturing processes, warehouse, bottling, packaging, or storage, which, including associated structures or infrastructure, occupied an area of 1 000 square metres or more outside an existing area zoned for industrial purposes.	
18**[20]**	The transformation of an area zoned for use as public open space or for a conservation purpose to another use.	
19**[21]**	The release of genetically modified organisms into the environment in instances where assessment is required by the Genetically Modified Organisms Act, 1997 (Act 15 of 1997) or the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004).	
20**[22]**	The release of any organism outside its natural area of distribution that is to be used for biological pest control.	

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21**[23]**	The decommissioning of existing facilities or infrastructure, other than facilities or infrastructure that commenced under an environmental authorisation issued in terms of the Environmental Impact Assessment Regulations, 2006 made under section 24(5) of the Act and published in Government Notice R385 of 2006, for- *(a)* electricity generation with a threshold of 10MW; *(b)* nuclear reactors and storage of nuclear fuel; *(c)* industrial activities where the facility or the land on which it is located is contaminated or has the potential to be contaminated or has the potential to be contaminated by any material which may place a restriction on the potential to re-use the site for a different purpose; *(d)* the disposal of waste; *(e)* the treatment of effluent, wastewater and sewage with an annual throughput capacity of 15 000 cubic metres or more; *(f)* the recycling, handling, temporary storage or treatment of general waste with a daily throughput capacity of 20 cubic metres or more; or *(g)* the recycling, handling, temporary storage or treatment of hazardous waste.	
22**[24]**	The recommissioning or use of any facility or infrastructure, excluding any facility or infrastructure that commenced under an environmental authorisation issued in terms of the Environmental Impact Assessment Regulation, 2006 made under section 24(5) of the Act and published in Government Notice R385 of 2006, after a period of two years from closure or temporary closure, for- *(a)* electricity generation; *(b)* nuclear reactors and nuclear fuel storage; or *(c)* facilities for any process or activity, which	

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	require permission, authorisation, or further authorisation, in terms of legislation governing the release of emissions, pollution, effluent or waste prior to the facility being recommissioned.	
23**[25]**	The expansion of or changes to existing facilities for any purpose or activity, which requires an amendment of an existing permit or licence required in terms of national or provincial legislation governing the release of emissions, pollutant, effluent **[The expansion of or changes to existing facilities for any process or activity, which requires an amendment of an existing permit or license [sic] or a new permit or license [sic] in terms of legislation governing the release of emissions, pollution, effluent.]** **Possible improvements with regard to this proposed amendment** ▪ The final portion of this addition should read "the release of emissions, pollutant or effluent".	
24	The expansion of facilities for: *(a)* the generation of electricity where: (i) the electricity output of the original facility was more than 10 megawatts; (ii) where the output of the original facility was less than 10 megawatts or where the original facility covered an areas in excess of 1ha. *(b)* the above ground storage of ore where the capacity of the original facility exceeded a 1000 tons **Possible improvements with regard to this proposed amendment** ▪ The word "a" is superfluous and should be excised from this activity's description. *(c)* the above ground storage of coal where the capacity of the original facility exceeded 250 tons;	

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	(d) agri-industrial purposes, outside areas with an existing land use zoning for industrial purposes, that cover an area of 100 square metres or more, if the indented expansion will cover more than 500 square metres; **Possible improvements with regard to this proposed amendment** ▪ The word "indented" appears in the proposed amendment instead of the word "intended". This amendment should be made. *(e)* any purpose in the one in ten year flood line of a river, stream or wetland, or within 32 metres, whichever is the greater, from the bank of a river, stream or wetland, excluding purposes associated with existing residential use, but including- (i) canals; (ii) channels; (iii) bridges; (iv) dams; (v) weirs; and (vi) stormwater structures; *(f)* the treatment of effluent, wastewater or sewage with an annual throughput capacity of more than 2 000 cubic metres; *(g)* the storage and handling of a dangerous goods, including petrol, diesel, liquid petroleum gas or paraffin, where such storage occurs in containers with a combined capacity of more than 20 cubic metres; *(h)* masts of any material or type and of any height, including those used for	

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	telecommunication broadcasting and radio transmission, where the intended expansion of the mast will result in a change to the existing height or type of the mast; *(i)* earth moving activities in the sea or within 100 metres inland of the high-water mark of the sea, in respect of- (i) facilities for the storage of material and the maintenance of vessels; (ii) fixed or floating jetties and slipways; (iii) tidal pools; (iv) embankments; (v) stabilising walls; (vi) buildings; (vii) infrastructure; (viii) rock revetments and other stabilising structures, but excluding construction on erven within existing urban areas if such construction will occur behind an approved development setback line; **Insights with regard to this proposed amendment** ▪ The possibility exists for abuse of this provision in that a developer will only have to have a development setback line approved. ▪ This proposed amendment would potentially result in the loss of habitat forming part of coastal ecological corridors or connective 'stepping stones' between vegetated or other areas important for the conservation of biodiversity. Any disturbance to indigenous vegetation within the littoral active zone or sediment corridors must be treated with the greatest degree of circumspection, especially in circumstances where poorly-informed planning decisions in the past have resulted in the inappropriate location of fixed infrastructure and housing in inherently	

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	dynamic and unstable environments. (*Comment supplied by Mr. Charl de Villiers, Botanical Society of South Africa.) ▪ The removal of indigenous vegetation in the coastal area is referred to in the NEM: Coastal Management Bill, but no references are made in the Bill as to the size of the area to be cleared or the distance from the high-water mark. *(j)* the refining of gas, oil and petroleum products; *(k)* the recycling, re-use, handling, temporary storage or treatment of general waste with a throughput capacity of 50 tons or more daily average measured over a period of 30 days; *(l)* the use, recycling, handling, treatment, storage beyond 90 days or final disposal of hazardous waste; *(m)* the manufacturing, storage or testing of explosives, including ammunition, but excluding licensed retail outlets and the legal end use of such explosives; *(n)* the extraction or processing of natural gas including gas from landfill sites, but excluding from marine environments; *(o)* the bulk transportation of dangerous goods, outside an industrial complex or zone, using pipelines, funiculars, or conveyors with a throughput capacity of 50 tons or 50 cubic metres or more per day; *(p)* landing, parking and maintenance of aircraft, excluding helicopter landing pads, but including- (i) airports; (ii) runways; (iii) waterways; (iv) structures for engine testing; or	

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	(v) unpaved landing strips which were originally longer than 1,4 kilometres in length; *(q)* the transmission and distribution of above ground electricity with a capacity of 132 kilovolts or more; *(r)* marine telecommunications; *(s)* the transfer of 20 000 cubic metres or more water between water catchments or impoundments per day; *(t)* the final disposal of general waste covering an area of 100 square metres or more or 200 cubic metres or more of air space; *(u)* the incineration, burning, evaporation, thermal treatment, roasting or hear sterilisation of waster effluent, including the cremation of human or animal tissue; *(v)* the microbal deactivation, chemical sterilisation or non-thermal treatment of waste or effluent; *(w)* any purpose where lawns, playing fields or sports tracks will be established, where the original facility covered and area of 10 hectares or more. **Insights regarding this proposed amendment** ▪ The activity of expanding certain types of infrastructure (of which 23 categories are now regulated) has now been separated from initial construction activities.	
25	The expansion of a road where the original reserve was wider than 6 metres but less than 30 metres; and the expansion of roads which obtained an environmental authorisation in terms of Listing Notice 387, activity number 5.	
26	The expansion of a dam where the highest part of the dam wall, as measured from the outside toe of the wall to the highest part of the wall, was	

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	originally 5 metres or higher or where the high-water mark of the dam originally covered and area of 10 hectares or more.	
27	The expansion of resorts, lodges, hotels or other tourism and hospitality facilities in a protected area contemplated in the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003), where the total existing development footprint will be expanded.	
28	The expansion of earth moving activities in the sea or within 100 metres inland of the high-water mark of the sea, excluding an activity listed in item 2 of Government Notice No. R. 386 of 2006 but including construction or earth moving activities in respect of- (1) facilities associated with the arrival and departure of vessels and the handling of cargo; (2) piers; (3) inter- and sub-tidal structures for entrapment of sand; (4) breakwater structures; (5) coastal marinas; (6) coastal harbours; (7) structures for draining parts of the sea; (8) tunnels; (9) underwater channels, but excluding construction on erven within existing urban areas if such construction will occur behind and approved development setback line. **Insights regarding proposed items 24 to 28** ▪ It should be noted that all of the items included from item 24(a) to (w) as well as items 25, 26, 27 and 28 are new additions to the basic assessment list.	

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5. AMENDMENT TO THE LIST OF ACTIVITIES AND COMPETENT AUTHORITIES IDENTIFIED IN TERMS OF SECTIONS 24(2) AND 24D OF NEMA

5.1 Definitions

The following definitions have been amended as indicated:

'construction' means the building, erection or establishment of a facility, structure or infrastructure that is necessary for the undertaking of an activity;**[building, erection or expansion of a facility, structure or infrastructure that is necessary for the undertaking of an activity, but excludes any modification, alteration or upgrading of such facility, structure or infrastructure that does not result in a change to the nature of the activity being undertaken or an increase in the production, storage or transportation capacity of that facility, structure or infrastructure;]**

Insights with regard to this proposed amendment

- Although the definition of "construction" has been shortened considerably to exclude the expansion of a facility, structure or infrastructure, the provisions regarding such expansion have been incorporated into the "new" item 10 in the schedule of activities ordinarily requiring scoping and EIA before environmental authorisation can be issued.

'cultivate' in relation to land, means any act by means of which the topsoil is disturbed mechanically;

'development setback' means the building line in terms of zoning scheme regulations or a building line determined in terms of development approval conditions or a building line determined in terms of approval conditions included in previous authorisations, rezoning or subdivision approvals and which must be scientifically motivated;

'temporary storage of hazardous waste' means the storage of hazardous waste for a period of 90 days or less;

'virgin soil' means land which has at no time during the preceding ten years been cultivated.

Insights with regard to this proposed amendment

- "Urban areas" is (correctly) not defined nor used in the definitions forming part of the list of activities for scoping and EIA.
- There are four wholly new definitions in the amended definitions provisions in this Government Notice. They are respectively: "cultivate"; "development setback"; "temporary storage of hazardous waste"; and "virgin soil".

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5.2 Schedule of activities requiring Scoping and EIA

SCHEDULE

ACTIVITIES IDENTIFIED IN TERMS OF SECTION 24(2)*(a)* AND *(d)* OF THE ACT, WHICH MAY NOT COMMENCE WITHOUT ENVIRONMENTAL AUTHORISATION FROM THE COMPETENT AUTHORITY AND IN RESPECT OF WHICH THE INVESTIGATION, ASSESSMENT AND COMMUNICATION OF POTENTIAL IMPACT OF ACTIVITIES MUST FOLLOW THE PROCEDURE AS DESCRIBED IN REGULATIONS 27 TO 36 OF THE ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, 2006, PROMULGATED IN TERMS OF SECTION 24(5) OF THE ACT-

Insights regarding the proposed amendments to this list

- Primary substantive additions to the list of activities include the addition of further wording for the activity listed at item 9, and the inclusion of a wholly new activity as item 10. The latter specifically relates to proposed expansion of facilities either for electricity generation (where certain outputs are anticipated or the surface area of the facility is of a certain extent); nuclear reaction; and the extraction or processing of natural gas from the marine environment.

Activity number	Activity description	Identification of competent authority
	The construction of facilities or infrastructure, including associated structures or infrastructure, for- *(a)* the generation of electricity where- (i) the electricity output is 20 megawatts or more; or (ii) the elements of the facility cover a combined area in excess of 1hectare; *(b)* nuclear reaction including the production, enrichment, processing, reprocessing, storage or disposal of nuclear fuels, radioactive products and waste; *(c)* the **[above ground]** storage and handling of a dangerous good, including petrol, diesel, liquid petroleum gas or paraffin, in containers with a combined capacity of 1 000 cubic metres or more at any one location **[or site]** including the storage of one or more dangerous goods, in a tank	The competent authority in respect of the activities listed in this part of the schedule is the environmental authority in the province in which the activity is to be undertaken unless it is an application for an activity contemplated in section 24C(2) of the Act, in which case the competent authority is the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act, as amended.

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	farm; *(d)* the refining of gas, oil and petroleum of the Act, products; *(e)* any process or activity which requires a permit or license in terms of national or provincial legislation governing the generation or release of emissions, pollution, effluent or waste and which is not identified in Government Notice R386 of 2006; *(f)* the recycling, re-use, handling, temporary storage or treatment of general waste with a throughput capacity of 50 tons or more daily average measured over a period of 30 days; *(g)* the use, recycling, handling, treatment, storage beyond 90 days or final disposal of hazardous waste; *(h)* the manufacturing, storage or testing of explosives, including ammunition, but excluding licensed retail outlets and the legal end use of such explosives; *(i)* the extraction or processing of natural gas including gas from landfill sites; *(j)* the bulk transportation of dangerous goods, outside an industrial complex or zone, using pipelines, funiculars or conveyors with a throughput capacity of 50 tons or 50 cubic metres or more per day; *(k)* the landing, parking and maintenance of aircraft, excluding helicopter landing pads and [unpaved] landing strips shorter than 1,4 kilometres in length, but including- (i) airports;	

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(ii) runways;

(iii) waterways; **[or]**

(iv) structures for engine testing; or

(v) landing strips longer than 1,4 kilometres in length

(l) the transmission and distribution of above ground electricity with a capacity of **[120]** 132 kilovolts or more;

(m) marine telecommunications;

(n) the transfer of 20 000 cubic metres or more water between water catchments or impoundments per day;

(o) the final disposal of general waste covering an area of 100 square metres or more or 200 cubic metres or more of airspace;

(p) the treatment of effluent, wastewater or sewage with an annual throughput capacity of **[15 000]** 50 000 cubic metres or more;

(q) the incineration, burning, evaporation, thermal treatment, roasting or heat sterilisation of waste or effluent, including the cremation of human or animal tissue;

(r) the microbial deactivation, chemical sterilisation or non-thermal treatment of waste or effluent;

(s) rail transportation, excluding railway lines and sidings in industrial areas and underground railway lines in mines, but including-

(i) railway lines;

(ii) stations; or

(iii) shunting yards;

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	(t) any purpose where lawns, playing fields or sports tracks covering an area of 10 hectares or more, will be established.	
2	Any development activity, including associated structures and infrastructure, where the total area of the developed area is, or is intended to be, 20 hectares or more excluding the cultivation of virgin soil of any size.	
[3]	**[The construction of filling stations, including associated structures and infrastructure, or any other facility for the underground storage of a dangerous good, including petrol, diesel, liquid petroleum gas or paraffin.]** **Insights with regard to this proposed amendment** ▪ The removal of this activity from the list of activities requiring scoping and EIA is one of the most significant changes to the NEMA EIA Regulations; ▪ Although the expansion of facilities for the storage and handling of fuel is included in the activities requiring basic assessment (item non 24(g) on the basic assessment list), this does not cover the construction of petrol filling stations. ▪ This omission requires explanation from the Department.	
3**[4]**	The extraction of peat.	
4**[5]**	The route determination of roads, where the road reserve is wider than 30 metres, and design of associated physical infrastructure, or the construction of such roads that have not yet been built for which routes have been determined before the publication of **[this]** notice 386 of 2006 and which has not been authorised by a competent authority in terms of the Environmental Impact Assessment Regulations, 2006 made under section 24(5) of the Act and published in Government Notice R385 of 2006, where- *(a)* it is a national road as defined in section 40 of the South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998);	

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	(b) it is a road administered by a provincial authority; ***(c)*** **[the road reserve is wider than 30 metres; or** ***(d)*** **the road will cater for more than one lane of traffic in both directions.]**	
5**[6]**	The construction of a dam where the highest part of the dam wall, as measured from the outside toe of the wall to the highest part of the wall, is 5 metres or higher or where the high-water mark of the dam covers an area of 10 hectares or more.	
6**[7]**	Reconnaissance, exploration, production and mining as provided for in the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002), as amended in respect of such permits and rights.	The competent authority for this part of the schedule is the Minister or an organ of state with delegated powers in terms of section 42(1 of the Act, as amended.
7**[8]**	In relation to permits and rights granted in terms of 7 above, or any other right granted in terms of previous mineral legislation, the undertaking of any reconnaissance exploration, production or mining related activity or operation within a exploration, production or mining area, as defined in terms of section of 1 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002).	
8**[9]**	Construction or earth moving activities in the sea or within 100 metres inland of the high-water mark of the sea, excluding an activity listed in item 2 of Government Notice R386 of 2006 but including construction or earth moving activities in respect of- *(a)* facilities associated with the arrival and departure of vessels and the handling of cargo; *(b)* piers; *(c)* inter- and sub-tidal structures for entrapment of sand; *(d)* breakwater structures; **[*(e)*** **rock revetments and other stabilising**	The competent authority in respect of the activities listed in this part of the schedule is the environmental authority in the province in which the activity is to be undertaken unless it is an application for an activity contemplated in section 24C(2) of the Act, in which case the competent authority is the Minister or an organ of state with delegated powers in terms of section 42(1) of the Act, as amended.

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	structures;] *(f)* coastal marinas; *(g)* coastal harbours; *(h)* structures for draining parts of the sea; *(i)* tunnels; or *(j)* underwater channels but excluding construction on erven within existing urban areas if such construction will occur behind an approved development setback line.	
9**[10]**	Any process or activity identified in terms of section 53(1) of the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004).	
10**[11]**	The expansion of facilities for- *(a)* the generation of electricity where- (i) the electricity output is 20 megawatts or morel or (ii) the elements of the facility cover a combined area in excess of 1 hectare; *(b)* nuclear reaction including the production, enrichment, processing, reprocessing, storage or disposal of nuclear fuels, radioactive products and waste; and *(c)* the extraction of processing of natural gas from the marine environment.	

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