

A Summary for EAPs on the 2017 Changes to the NEMA 2014 EIA Regulations and Listing Notices

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On 3 April 2017, a slew of amendments to the National Environmental Management Act 107 of 1998 (“**NEMA**”) 2014 Environmental Impact Assessment (“**EIA**”) Regulations and Listing Notices came into effect. In this article, we set out some of the more significant amendments.

Amendments to the EIA Regulations

By way of background, the EIA Regulations, as the name suggests, regulates environmental impact assessments which need to be undertaken in order to obtain an environmental authorisation (“**EA**”) so as to then lawfully commence with certain environmentally impactful activities, such as the construction of a mine or large development.

General amendments

- A closure plan may be combined with the financial provision plan,¹ provided both requirements are met.² This amendment corresponds with what practically already takes place;
- Regulation 26(d)(i) has been deleted. This previously provided that the period within which commencement of a listed activity must occur was ten years, i.e. an EA was valid up to ten years. This amendment is welcome as EA timeframes should rather be development-specific; and
- A number of processes and reports must now comply with gazetted “*protocols or minimum information requirements*”.³ These have not yet been gazetted, although the Gauteng department has advised that these will relate to compliance with spatial development tools.⁴ For example, in Gauteng, a development may now also have to comply with the Gauteng Environmental Management Framework which regulates different land uses in different areas.

Environmental management programmes (“**EMPrs**”)

- An EMPr must contain the “*information set out in Appendix 4 to the EIA Regulations **or be a generic EMPr***” as gazetted by the Minister of Environmental Affairs.⁵ Generic EMPrs have not yet been gazetted. We hope that the intention here is to ensure that generic

¹ Reg 19(7A).

² Appendix 5 to the EIA Regulations and the Financial Provision Regulations, 2015 in GNR 1147 of 20 November 2015, as amended.

³ Regs 10(b), 16(3)(a), 17(c), 18, 19(3), 19(8), 21(3), 22(b)(ii), 23(3), 23(5), Appendices 2, 3 and 6.

⁴ See draft Listing Notice 4 (which deals with spatial development tools) in GNR 737 of 29 August 2014.

⁵ Reg 19(4), 23(4) & Appendix 4.

form EMPs are of a certain (higher) standard and are compiled by the Department of Environmental Affairs (as opposed to other Departments); and

- Regulation 37(1)'s 60-day EMP amendment notification has been deleted.

EA amendment applications

- An Environmental Assessment Practitioner ("**EAP**") is no longer required to compile an EA amendment application where no EIA or part thereof was required for such amendment.⁶ Minor amendments to an EA (such as a transfer of ownership of a development's EA) can now be done internally;
- "Holder" has been deleted in the amendment provisions,⁷ which, on a wide interpretation, means that any third party (as opposed to only the EA holder) may apply for an amendment of an EA. We suggest that, to the extent these new provisions are relied on, the consent of the EA holder must still be obtained and attached to the application;
- For both Part I and II amendments, the EA must now be valid when the amendment application is received by the competent authority,⁸ and the EA remains valid pending finalisation of the amendment application.⁹ To the extent the application is submitted late, the competent authority is not empowered to process the application but may consider an application for an EA for the same development.¹⁰ In our view, where this takes place, a new EA application may be expedited in light of the original EA being granted. Prior to 3 April 2017, the EA holder had to submit the amendment application at least three months prior to the expiry of the EA and failure to lodge within this timeframe resulted in the lapsing of the EA; and
- There has been a broadening of the scope of what constitutes a Part II amendment, namely that this process must be followed "*where the change will result in an increased level **or change in the** nature of impact*".¹¹

Transitional arrangements

- If, prior or 8 December 2014 (the date of commencement of the One Environmental System),¹² an EA and a mining right were granted, and after this date, such authorised activities commenced, then such EA and mining right are regarded as fulfilling the requirements of NEMA;¹³ and

⁶ Reg 12(1).

⁷ Regs 30 and 32.

⁸ Reg 28(1).

⁹ Reg 28(1B).

¹⁰ Reg 28(1A).

¹¹ Reg 31.

¹² The transition of environmental management of mining activities from the Mineral and Petroleum Resources Development Act 28 of 2002 to NEMA.

¹³ Reg 54A(1).

- If a mining right and its associated EMPr or Environmental Management Plan (“**EMP**”) are both still in effect after 8 December 2014, then two things occur: Firstly, Part 3 of Chapter 5 of the NEMA EIA Regulations applies (provisions relating to the auditing and amendment of an EA/EMPr and closure plan) and secondly, the first audit report is due on **7 December 2019** and every five years thereafter.¹⁴ The same applies for an EA issued in terms of previous NEMA Regulations and its associated EMPr, both of which are still in effect after 8 December 2014.¹⁵ The date of 7 December 2019 for the first audit report should be duly noted for affected projects.

Appendices to the EIA Regulations

- Appendix 3 (EIA process) refers to the “**approved site**” in the accepted scoping report.¹⁶ This terminology is concerning as the project site should only be approved after detailed EIA reports have been conducted and considered; and
- There have been a number of amendments to Appendix 6 (specialist reports) which should be noted by the various specialists involved in developments.

Amendments to the Listing Notices

By way of background, the Listing Notices comprise of three lists of environmentally impactful activities for which an EA must be obtained. Listing Notice 1 sets out “less impactful activities” and prescribes a basic assessment process. Listing Notice 2 sets out “more impactful activities” which requires that a scoping process *and* an environmental impact assessment process be undertaken. Listing Notice 3 sets out activities vis-à-vis geographical areas, and provides for the basic assessment process where an activity falls within a geographically sensitive area, such as a development within a protected area.

Key definitions

- The definition of “*linear activity*” now also includes canals, channels and firebreaks,¹⁷ the construction of which do not require an EA;¹⁸ and
- Reservoirs are excluded from the definition of a “*dam*”.¹⁹ An EA is now only required for a reservoir when it is in a geographically sensitive area (Listing Notice 3)²⁰ as reservoirs form part of government’s service delivery obligations.

¹⁴ Reg 54A(2).

¹⁵ Reg 54A(3).

¹⁶ Appendix 3, 2(c).

¹⁷ Listing Notices 1 and 2; Listing Notice 2 refers to a “linear development activity”; Reg 1 of the NEMA EIA Regulations has also included “*firebreaks*”.

¹⁸ Activity 27 in Listing Notice 1 and Activity 15 in Listing Notice 2.

¹⁹ Listing Notices 1 and 2.

²⁰ Activity 2 in Listing Notice 3.

Energy activities

- Renewable energy activities which take place on “existing infrastructure” are now excluded. I.e., an EA is not required;²¹ and
- There are a number of new exclusions for bypass infrastructure for the transmission and distribution of electricity, including temporary maintenance of such infrastructure, infrastructure which is less than two kilometres in length or which takes place within an existing transmission line servitude.²² The intention here is for Eskom to do the above (maintenance etc.) without having to obtain an EA.

Dams and other structures (canals, bridges, marinas, jetties, boardwalks etc.)

- There is a new exclusion for “temporary infrastructure” with respect to the construction of dams or other structures (with “structures” including the previously listed canals, bridges, marinas, jetties, boardwalks etc).²³ Temporary infrastructure denotes that such will be removed within six weeks and no indigenous vegetation will be cleared. In other words, an EA is now not required for the development of a dam or other structure provided this is temporary.

Sea, seabed and watercourse developments

- There is now a reference to coral vegetation in addition to indigenous vegetation with respect to developments in the sea or seabed.²⁴ This is pertinent to the exclusions in these activities, and essentially imposes a higher degree of protection for vegetation in the sea;
- Activity 19 in Listing Notice 1, which deals with the depositing, removal or moving of soil, sand, rock etc., has been divided into two activities: in coastal areas, the threshold remains five cubic metres of soil (Activity 19), but for a watercourse, the threshold has been increased to ten cubic metres (Activity 19A); and
- The above activities (depositing, removal or moving of soil, sand, rock etc.)²⁵ will not trigger an EA requirement if such occurs within a port or harbour and the development footprint of the port or harbour isn't increased. This carve-out for ports and harbours recurs throughout the Listing Notices and reflects Transnet's desire to undertake certain activities within its ports without having to obtain an EA.

Railway line reserve exclusion

²¹ Activities 1 and 36 in Listing Notice 1 and Activity 1 in Listing Notice 2.

²² Activity 11 in Listing Notice 1 and Activity 9 in Listing Notice 2.

²³ Activity 12 in Listing Notice 1.

²⁴ Activities 15 and 17 in Listing Notice 1 and Activity 14 in Listing Notice 2.

²⁵ Activities 19 and 19A in Listing Notice 1.

- There is a new exclusion for a number of listed activities where these developments take place within a railway line reserve (in addition to a road reserve).²⁶

Road developments

- An EA is now not required for roads shorter than one kilometre (both Listing Notice 1 and 2's road activities)²⁷ and for roads within an urban area (Listing Notice 2).²⁸

Residential, mixed, retail, commercial, industrial or institutional developments

- An EA is required where any one of the above developments take place on land previously used for "agriculture, **game farming, equestrian purposes** or afforestation".²⁹ The scope of this listed activity has therefore been expanded.

Petroleum and mining activities

- In terms of petroleum activities,³⁰ an activity requiring an exploration or production right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA")³¹ now includes primary processing of a petroleum resource (previously included in the now-deleted Activity 22 in Listing Notice 2) and excludes secondary processing of a petroleum resource;³²
- In terms of mining activities,³³ an activity which requires a mining right or involves the removal and disposal of minerals in terms of the MPRDA³⁴ now includes primary processing of a mineral resource (previously included in the now-deleted Activity 21 in Listing Notice 2) and excludes secondary processing of a mineral resource;³⁵ and
- The reference to exempted activities in terms of section 106 of the MPRDA has been deleted with respect to activities which require a mining right or involve the removal and disposal of minerals.³⁶ In short, the previous section 106 inclusion meant that when a landowner or lawful occupier took sand from his/her land for purposes of effecting improvements on such land, despite not triggering the need for a mining right, they nonetheless had to obtain an EA in terms of Listing Notice 2. This is no longer the case.

Phased activities

²⁶ Activities 9, 10, 12, 45, 46 and 48 in Listing Notice 1.

²⁷ Activity 24 in Listing Notice 1 and Activity 27 in Listing Notice 2.

²⁸ Activity 27 in Listing Notice 2.

²⁹ Activity 28 in Listing Notice 1.

³⁰ There are a number of interlinked amendments: see Activities 5, 18, 20 & 22 in Listing Notice 2.

³¹ Activities 18 and 20 in Listing Notice 2.

³² In which case Activity 5 in Listing Notice 2 applies.

³³ There are a number of interlinked amendments: see Activities 6, 17, 19 & 21 in Listing Notice 2.

³⁴ Activities 17 and 19 in Listing Notice 2.

³⁵ In which case Activity 6 in Listing Notice 2 applies.

³⁶ Activities 17 and 19 in Listing Notice 2.

- An EA is needed where there is a phased activity, namely an activity developed in phases but which together constitutes a listed activity.³⁷ A number of activities in Listing Notice 2 have now been excluded in this respect; and
- The definition of “*phased activities*” has further been clarified to exclude previously authorised activity.³⁸

Deleted listed activities

- The development of facilities for marine telecommunication is no longer a listed activity.³⁹ This reflects government's imperative to expedite such developments so as to bring broadband costs down; and
- Activities requiring an atmospheric emissions licence under the National Environmental Management: Air Quality Act 29 of 2004 have been deleted.⁴⁰ This amendment isn't material though as these activities would be triggered in any event by Activity 6 in Listing Notice 2 (development of facilities which requires a licence in terms of emissions legislation) or Activity 34 in Listing Notice 1 (expansion activity).

³⁷ Activity 67 in Listing Notice 1.

³⁸ Listing Notices 1 and 3.

³⁹ Activity 10 in Listing Notice 2 and Activity 62 in Listing Notice 1.

⁴⁰ Activity 28 in Listing Notice 2.