

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Bill of Rights		
Constitution section 24	<p>"Everyone has the right-</p> <p>(a) to an environment that is not harmful to their health or well-being; and</p> <p>(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-</p> <p>(i) prevent pollution and ecological degradation;</p> <p>(ii) promote conservation; and</p> <p>(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."</p>	<p>All parties to the EIA process have a duty not to infringe other persons' rights in terms of section 24.</p> <p>The Applicant must ensure that while the development incorporates measures that prevent or control environmental pollution or degradation, it also maximises the positive environmental impacts.</p> <p>There must be an equitable balance between the rights of the applicant and the broader public. In this regard, the consideration of need and desirability is critical as it requires the strategic context of the development to be considered with the broader societal needs and public interest.</p>
Constitution section 25	Right to property	<p>The Applicant must ensure that his or her development proposal does not unlawfully deprive any person of his or her property.</p> <p>The Applicant must check whether any land claims for the property in question are pending.</p>
Constitution sections 26 and 27	Right of access to adequate housing and to sufficient food and water	If a development proposal involves the relocation of people or affects their access to food and water, the Applicant must take account of these constitutional rights.
Constitution section 32	Right of access to information	<p>This right is given effect to by PAIA which is discussed further below.</p> <p>The Applicant must comply with PAIA if the decision-maker or an I&AP makes a request for information in accordance with PAIA.</p> <p>The Applicant is entitled to request information from the decision-maker provided the procedures set out in PAIA are followed.</p>
Constitution section 33	Right to administrative action that is lawful, reasonable and procedurally fair	<p>All parties are entitled to expect just administrative action.</p> <p>The right is further given effect to by PAJA which is discussed further below.</p>
<i>Functional areas of national, provincial and local government competence</i>		
Constitution sections 44 and 104 and Schedules 4 and 5		The Applicant must ensure that organs of state in other spheres of government are notified of any application that affects that organ of state's mandate. All organs of state whose mandate will be affected by the proposed development must be registered as I&APs. For example, water resources are a national competence and DWA must be notified while the disposal of waste is a local government competence and the relevant municipality must be notified.

LEGISLATION	REQUIREMENTS	IMPLICATIONS
<i>Cooperative governance</i>		
Constitution	Take cognisance of principles of cooperative government and intergovernmental relations in decision-making	No specific implications for Applicant except that Applicant must ensure that all organs of state that are affected by the application are notified and registered as I&APs in terms of the EIA regulations.
Promotion of Administrative Justice Act		
PAJA	Gives effect to constitutional right to just administrative action	Applicant has a right to just administrative action in the course of his or her application.
Section 3	Sets out the requirements for procedurally fair administrative action	An Applicant's rights would be affected in the following circumstances: <ul style="list-style-type: none"> • where adequate notice of the nature and purpose of the proposed administrative action has not been given; • where a reasonable opportunity to make representations has not been given; • where there has been no clear statement of the administrative action; • where adequate notice of the right to a review (or to an internal appeal) has not been given; and • where adequate notice of the right to request reasons has not been given.
Section 6	Sets out the grounds for review of administrative action	An Applicant can approach a court to review any administrative action by either the competent authority or a commenting authority. The grounds for doing so include: <ul style="list-style-type: none"> • the failure of the competent authority to comply with a mandatory and material procedure or condition; • the action was procedurally unfair; and • the action amounts to a failure to take a decision within the prescribed time period or, if no period is prescribed, without an unreasonable delay. <p>If conflicts arise between organs of state during the course of an EIA process (for example, between a competent authority and a commenting authority), these must be resolved through conflict resolution procedures such as mediation, conciliation or arbitration rather than by legal action.</p>

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Promotion of Access to Information Act		
Part 2 of PAIA	Access to records of public bodies	<p>An Applicant can request access to a record (which includes any recorded information regardless of form or medium) held by the decision-maker or any of the commenting authorities or any public body during the course of the application regardless of whether it was created by the authority concerned.</p> <p>An Applicant is not required to give reasons for the request. When requesting information from a public body, the Applicant must comply with the correct form for a request. A request to a public body can even include a record that contains personal information about the requester/ Applicant.</p> <p>Following a request, access to information is not necessarily automatic. For example, the information officer of a public body must refuse a request if:</p> <ul style="list-style-type: none"> • the Applicant would be obtaining the trade secrets of a third party; • the Applicant would be obtaining other information that would cause harm to the commercial or financial interests of a third party, or • the Applicant would be obtaining information that has been supplied by the third party, the disclosure of which could be disadvantageous or prejudicial to negotiations or commercial competition.³³ <p>For example, if an I&AP or competitor of the Applicant has written to the competent authority explaining why its own patented machinery is superior to that envisaged for use in the applicant's own proposal, then the Applicant will not be allowed to use the provisions of the Act to obtain information about the technical specifications of its competitor's machinery.</p> <p>Commercial confidentiality is however not a basis for refusing access to information about the results of environmental tests and investigations that reveal a serious environmental or public safety risk.³⁴</p> <p>In some circumstances the public body has a discretion and may refuse to disclose the information. These include where the disclosure would be likely to prejudice or impair the security of public safety systems, plans or procedures.³⁵ For example, a public body may refuse to disclose information about a National Key Point situated nearby the development if that would be likely to prejudice public safety.</p> <p>If a record contains both information to which the Applicant is entitled and information to which it has no right, the public body must grant access to a record which has had the confidential portions removed.</p>

³³ Section 36(1).³⁴ Section 36(2).³⁵ Section 38(b).

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Promotion of Administrative Justice Act		
Part 3 of PAIA	Access to records of private bodies	<p>The Applicant may request access to records of other private bodies during the course of an application but only where the records are required in order to exercise or protect a right. Similarly the decision-maker or a commenting authority in an application can request information from an Applicant who is a private body.</p> <p>The circumstances in which a request for information from a private body must be refused are set out in Chapter 4 of Part 3 as well as the circumstances in which a request for information may be refused. The latter includes where the record contains commercial or scientific information, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body.³⁶ Such record may however not be refused insofar as it consists of information about the results of any product, environmental testing or investigation carried out by the private body and its disclosure would reveal a serious public safety or environmental risk.³⁷</p> <p>As with public bodies, the fact that a record contains confidential portions does not excuse a private body from granting access to the rest of the record.</p>
<i>Public participation requirements</i>		
<p>Chapter 6 of the EIA Regulations</p> <p>Regulation 56</p> <p>Regulation 57</p>	<p>Identification and notification of I&APs</p> <p>Notice Boards</p> <p>Written Notice</p> <p>Advertisement</p>	<p>One of the most important tasks the EAP must fulfil is to ensure that the required level of public participation takes place. The EAP must ascertain who all the potential I&APs are and ensure that all of these parties have been given notice of the application.</p> <p>The notice requirements are prescribed in Regulation 56. For instance:</p> <ul style="list-style-type: none"> • There must be a notice board conspicuously placed at the boundary of the proposed site and at any alternative site. The board must contain specified information and must be of a certain size. If the activity in question is a linear activity or ocean based activity, the notice board requirements may be inappropriate and other arrangements may be agreed upon with the competent authority. • Written notice must be given to owners or occupiers that are either adjacent or within 100 metres or who may be directly affected by the proposed activity. • Written notice must also be given to the local councillor, the municipality and any organ of state having jurisdiction over any aspect of the activity. <p>An advertisement must be placed in at least one local newspaper or, if the impact of the activity will extend beyond the boundary of the local municipality, in at least one provincial newspaper or national newspaper, or in the Government Gazette.</p> <p>The EAP must undertake advertising for the following: a Basic Assessment, the scoping phase of an EIR, applications for exemption and applications for substantive amendments to authorisations.</p>

³⁶ Section 68(1).³⁷ Section 68(2).

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Regulation 62	<p>Maintain a register of I&APs</p> <p>Inform I&APs of decision</p>	<p>The EAP must open and maintain a register of all I&APs. The people listed on the register will include those who have attended meetings or have submitted written comments as well as those who have requested that their names be included on the list. In addition, all organs of state with jurisdiction in respect of the activity must be listed as I&APs.</p> <p>The Applicant is also obliged to inform the registered I&APs when the authority makes its decision and must provide the reasons for the decision and remind the I&APs that an appeal may be lodged. If the Applicant is going to appeal a decision, a copy of the notice of appeal must be served on each person and organ of state who was a registered I&AP and these parties must also be notified of information regarding where and for what period the appeal submission will be available for inspection.</p>
<p>Regulation 58(2).</p> <p>Regulations 24(b)(ii), 30(a), 32(2)(e)(iv), 58(4).</p> <p>Regulation 59</p> <p>Regulations 23(2)(f)(iv), 29(1)(h)(iv), 32(2)(e)(iii) and 33(2)(i).</p>	<p>Participation by I&APs</p> <p>Written comments from I&APs</p> <p>Attach comments to reports</p> <p>Summaries of issues raised</p>	<p>The EAP has the responsibility to ensure that before any report (compiled in terms of the EIA Regulations), is submitted to the authorities, the registered I&APs have been given access to it and have been given an opportunity to give written comment.</p> <p>Any written comments must accompany the report in question when it is submitted to the authority.</p> <p>Any comments from I&APs on a report which is to be submitted to the competent authority may be attached to the report without recording those comments in the report itself.</p> <p>Summaries of the issues raised during the PPP must however be included in the Basic Assessment Report, scoping and EIA Report as well as in specialist reports and reports on specialised processes.</p>
Regulation 51(2)	Exemptions from public participation procedures	<p>There can be no exemption from a provision requiring or regulating a public participation process unless it can be shown that the rights or interests of other parties are not likely to be adversely affected by the proposed exemption.</p> <p>Furthermore, in terms of the minimum requirements applicable to EIA's in section 24 of NEMA, some level of public participation will always be required.</p>

3.1.2 Legal framework applicable to the decision-maker

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Bill of Rights		
Constitution Section 24	"Everyone has the right- (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that- (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."	The provisions of the Bill of Rights are binding on decision-makers. ³⁸ They must ensure that their decisions are in keeping with the environmental right and promote an environment that is not harmful to health or well-being.
Constitution Section 25	Right to property	A decision may not have the effect of unlawfully depriving any person of property.
Constitution Sections 26 and 27	Right of access to adequate housing and to sufficient food and water	A decision-maker must give effect to the progressive realisation of the rights to adequate housing and food and water within that decision-maker's mandate.
Constitution Section 32	Right of access to information	A decision-maker must disclose information requested by the Applicant or I&APs unless that information is protected by a law such as PAIA (this is discussed further below).
Constitution Section 33	Right to administrative justice	In order to protect the Applicant's right to administrative justice, decisions taken must be lawful, reasonable and procedurally fair and where the Applicant requests reasons for a decision that adversely affects his or her rights, the decision-maker must provide written reasons for the decision. NEMA also requires that decisions be taken in an open and transparent manner, and access to information be provided in accordance with the law. ³⁹
<i>Functional areas of national, provincial and local government competence</i>		
Constitution sections 44 and 104 and Schedules 4 and 5		The decision-maker must ensure that where the development proposal involves functional areas administered by other state departments, whether national or provincial, it consults with those other departments during the course of deciding the application. A decision-maker should also take into account laws administered by other departments in formulating the conditions subject to which the authorisation will be granted.

³⁸ Section 8(1).

³⁹ Section 2(4)(k).

LEGISLATION	REQUIREMENTS	IMPLICATIONS
<i>Cooperative governance</i>		
Constitution Chapter 3	Take cognisance of principles of cooperative government and intergovernmental relations in decision-making	<p>Decision-makers are required to take cognisance of the principles of cooperative government and intergovernmental relations set out in the Constitution in deciding applications for environmental authorisation. In practice this means that decision-makers must consult with and take into account the comments of other organs of state when deciding the application.</p> <p>The constitutional principle that organs of state have a duty to cooperate also means that, to the extent possible, an application for environmental authorisation must be aligned with the application processes for other authorisations that an Applicant is required to obtain (such as approval for re-zoning and subdivision applications), and <i>vice versa</i>.</p> <p>NEMA provides that in preparing environmental implementation plans or environmental management plans, national departments exercising functions which may affect the environment⁴⁰ and national departments exercising functions that involve the management of the environment⁴¹ are required to take into consideration every other such plan already adopted in order to achieve consistency.⁴² Among the purposes of these plans is the coordination and harmonisation of the policies, plans, programmes and decisions of the various national departments and provincial and local spheres of government. Departments are required to exercise their functions in accordance with the environmental implementation plan or the environmental management plan that they have adopted.</p>
EIA Regulations Regulation 6.		The EIA Regulations take the constitutional obligation for cooperative governance further by placing an obligation (in certain circumstances) on the competent authority to enter into a written agreement with other organs of state having jurisdiction. This duty applies where both sets of legislation require an application to be made and the information that must be given or the processes that must be followed are "substantially similar". If this is the case, then steps must be taken to sign a written agreement to co-ordinate the respective requirements and to avoid the duplication of tasks or processes.
NEMA section 2(4)(m)	Actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures	<p>Actual or potential conflicts of interest between organs of state should be resolved without recourse to litigation where possible.</p> <p>The Intergovernmental Framework Relations Act, 13 of 2005 establishes a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations. It also provides for mechanisms and procedures to facilitate the settlement of intergovernmental disputes. In terms of the Act, all organs of state must make every reasonable effort to avoid intergovernmental disputes and to settle intergovernmental disputes without resorting to judicial proceedings.⁴³</p>

⁴⁰ Set out in Schedule 1 of NEMA.

⁴¹ Set out in Schedule 2 of NEMA.

⁴² Section 11(4).

⁴³ Section 40(1).

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Promotion of Administrative Justice Act		
PAJA	Gives effect to the constitutional right to just administrative action.	<p>The decision-maker must ensure that adequate notice of any right of review or internal appeal, where applicable, is given.⁴⁴</p> <p>A person affected by the decision must also be given adequate notice of the right to request reasons in terms of the Act.⁴⁵ Where a person whose rights have been materially and adversely affected by the decision, requests written reasons for the decision, the decision-maker must, within 90 days after receiving the request, give that person adequate reasons in writing for the decision.⁴⁶</p> <p>A decision-maker who fails to furnish adequate reasons will be presumed, when the administrative action is judicially reviewed, to have taken the action without good reason.⁴⁷ Decision-makers must therefore be aware that they may be requested to provide written reasons for any administrative action, and that they will be required to provide the reasons in accordance with the procedure stipulated in PAJA.</p> <p>The decision-maker may however depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances.⁴⁸ In determining whether such departure is reasonable and justifiable, the decision-maker is required to take into account all relevant factors including the object of the empowering provision, the nature, purpose and likely effect of the decision concerned and the importance of the purpose of the departure.⁴⁹</p>

⁴⁴ Section 3(2)(b)(iv).⁴⁵ Section 3(2)(b)(v).⁴⁶ Section 5(2).⁴⁷ Section 5(3).⁴⁸ Section 5(4)(a).⁴⁹ Section 4(b).

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Promotion of Access to Information Act		
Part 2 of PAIA	Access to records of public bodies	<p>The decision-maker in an application for environmental authorisation is a public body and must therefore ensure that a person requesting access is allowed such access provided that the procedural requirements in the Act relating to a request for access are complied with. This includes that the request for access be made to the information officer of the department concerned in the prescribed form at his or her address or fax or electronic mail address. The information officer of the department must as soon as is reasonably possible, but in any event within 30 days, after a request for information is received, decide whether to grant the request and notify the requester of the decision.⁵⁰ A department may refuse a request for access to a record if the request is manifestly frivolous or vexatious or if the work involved in processing the request would substantially and unreasonably divert the resources of the department.⁵¹</p> <p>Information officers of public bodies, such as the decision-maker⁵² are charged with ensuring compliance with the provisions of PAIA, and are assisted by deputy information officers, to be designated for that purpose.⁵³ Persons who make requests for information ("requesters") are entitled to records of public bodies where they comply with the procedural requirements of PAIA and access to the record is not refused in terms of any ground for refusal in terms of PAIA.⁵⁴ Public bodies are obliged to assist requesters to obtain information in accordance with the procedure laid down in PAIA.⁵⁵</p> <p>Various duties are imposed upon public bodies under PAIA, including publishing a manual containing detailed information about the body and the information held by it.⁵⁶</p>
<i>Public participation requirements</i>		
		The decision-maker has a duty to ensure that the Applicant or EAP complies with the requirements of NEMA and the EIA Regulations relating to public participation processes.

⁵⁰ Section 25(1).

⁵¹ Section 45.

⁵² Section 1 (definition of "information officer") specifies who the information officers of public bodies are.

⁵³ Section 17.

⁵⁴ Section 11.

⁵⁵ Section 19(1).

⁵⁶ Section 14.

3.1.3 Legal Framework applicable to: interested and affected parties

LEGISLATION	REQUIREMENTS	IMPLICATIONS
The EIA Regulations		
Regulations 56 and 57	Participation by I&APs	I&APs are entitled to participate in the process of considering and granting the environmental authorisation for a listed activity. Names and addresses of I&APs must be specified in a register and an applicant or EAP must give access to the register to any person who submits a request for access to the register in writing. I&APs may object to a decision to grant or refuse an environmental authorisation.
Bill of Rights		
Constitution section 24	"Everyone has the right- (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that- (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."	I&APs may challenge a decision by a competent authority that they believe infringes their right to an environment that is not harmful to their health or well-being.
Constitution section 25	Right to property	A development proposal must not unlawfully deprive an I&AP of his or her property.
Constitution sections 26 and 27	Right of access to adequate housing and to sufficient food and water	Where a development proposal involves the relocation of people or affects their access to food and water, their constitutional rights must be protected.
Constitution section 32	Right of access to information	An I&AP may request information in accordance with PAIA (discussed below).
Constitution section 33	Just administrative action	I&APs have a right to just administrative action which is guaranteed by the Constitution. This right is also given effect to by PAJA. A decision by a competent authority that is not lawful, reasonable or procedurally fair may be challenged. I&APs have a right to be provided with written reasons for administrative action that has adversely affected their rights. PAJA is further discussed below.

LEGISLATION	REQUIREMENTS	IMPLICATIONS
<i>Functional areas of national, provincial and local government competence</i>		
Constitution sections 44 and 104 and Schedules 4 and 5		All organs of state whose mandate will be affected by the proposed development must be registered as I&APs.
<i>Co-operative governance</i>		
Constitution Chapter 3	Principles of co-operative government and intergovernmental relations in decision-making	A failure by any organ of state to work with another relevant one in mutual trust and good faith during an EIA process may be challenged by I&APs.
Promotion of Administrative Justice Act		
PAJA	Just administrative action.	<p>PAJA provides I&APs with a procedure in terms of which they can request reasons for a decision (administrative action) where their rights have been infringed. A failure to provide these reasons when requested may lead to a presumption (if such a decision is taken on review), that the decision was taken without good reason.⁵⁷</p> <p>PAJA stipulates a number of grounds on which I&APs may bring an application for a judicial review of a decision. The grounds are, amongst others, that the decision maker was biased or not empowered to make the decision, he or she took irrelevant considerations into account when making a decision, and that the decision was not rationally connected to the purpose for which it was taken.⁵⁸</p>
Promotion of Access to Information Act		
Parts 2 and 3 of PAIA	Access to information	<p>I&APs may rely upon the provisions of PAIA to request access to a record (which includes any recorded information regardless of form or medium) held both by the competent authority (a public body) and by the Applicant/EAP (the Applicant may be a private or public body) in an application for environmental authorisation. This applies regardless of whether the record was created by the authority concerned.</p> <p>Following a request, access to information is not necessarily automatic. For example, the information officer of a public body must refuse a request if it involves –</p> <ul style="list-style-type: none"> • the I&AP obtaining the trade secrets of a third party; • other information that would cause harm to the commercial or financial interests of a third party, or • information that has been supplied by the third party, the disclosure of which could be disadvantageous or prejudicial to negotiations or commercial competition.⁵⁹

⁵⁷ Section 5(3).⁵⁸ Section 6(2).⁵⁹ Section 36(1).

LEGISLATION	REQUIREMENTS	IMPLICATIONS
Promotion of Access to Information Act		
Parts 2 and 3 of PAIA	Access to information	<p>Commercial confidentiality is however not a basis for refusing access to information about the results of environmental tests and investigations that reveal a serious environmental or public safety risk.⁶⁰</p> <p>If a record contains both information to which the I&AP is entitled to have access to and information to which it has no right, the public body must grant access to a record which has had the confidential portions removed.</p> <p>I&APs may be refused access to information of a private body in certain circumstances laid down in PAIA, for example, where information is commercially sensitive. However, as is the case with public bodies, commercial confidentiality is not a basis for refusing access to results of environmental tests and investigations that reveal a serious environmental or public safety risk.</p>
<i>Public participation requirements</i>		
EIA Regulations, Chapter 5, 6 & 7	Deals with public participation processes and an appeals process for participation by I&APs.	<p>The decision-maker may reject a basic assessment report if it is based on an insufficient level of public participation.</p> <p>Where there is an application for a substantive amendment of an environmental authorisation, or where a decision-maker intends amending an environmental authorisation or is considering withdrawing an environmental authorisation, the necessary and appropriate public participation processes as set out must be conducted.</p> <p>In considering an application for an exemption, the competent authority must before deciding the application request that the Applicant conduct at least a public participation process in circumstances where the rights or interests of other parties are likely to be adversely affected by the proposed exemption.⁶¹</p> <p>Registered I&APs are entitled to comment in writing on all written submissions made to the decision-maker by the Applicant.⁶² The EAP must ensure that the comments of I&APs are recorded in reports submitted to the competent authority.⁶³</p>

⁶⁰ Section 36(2).⁶¹ Regulation 53(4).⁶² Regulation 58.⁶³ Regulation 59.

4 EIA Process Guidelines for the Sectors

In this section of the guideline practical aspects of the EIA Regulations are addressed. It was determined through consultation with provincial authorities and other state organisations that practical advice on aspects of the EIA process where difficulties have been experienced would be most useful for the purposes of this sector guideline. The focus in this section is on specific aspects or issues in relation to the EIA process that are known to be complex to deal with, that can prove problematic or where an explanation of requirements would be beneficial. Examples from the various sectors are used to illustrate and clarify particular aspects of the EIA process and the requirements of the EIA Regulations.

This section of the guideline covers the following:

1. *Definition of the sectors:* This section provides a description of each of the sectors covered in the guideline.
2. *Determining whether environmental authorisation is needed:* This section provides guidance on how to determine whether an environmental application needs to be made for a proposed project or parts / elements thereof. It also deals with the relationship between other approvals, authorizations or permits that may be required and the EIA process. The question of exemptions is also dealt with in this section.
3. *Fulfilling responsibilities required by the EIA Regulations:* Authorities may fulfil a number of roles in the EIA process. Whilst the competent authority is the decision-maker, other authorities may be an applicant or a commenting authority. This section explains the responsibilities that must be fulfilled within each of these roles to meet legal requirements.
4. *Making use of guidelines in the EIA process:* In this section guidelines that are useful for the EIA process are listed together with a brief explanation of their content. It is a legal requirement to make reference to guidelines that are applicable to the EIA process.
5. *Identifying issues and alternatives:* The identification of issues and alternatives is a critical step in the EIA process. If the identification of issues and alternatives is not comprehensive, this will impact negatively on the impact assessment, since the scope thereof will be incorrectly defined. Practical advice and examples is provided in this section.
6. *Developing Terms of Reference for specialist studies:* It is important to ensure that specialist studies address the correct issues in relation to the project and its location. Thus the questions that specialists need to address must be carefully detailed. The way in which the specialist terms of reference should be approached is explained in this section.
7. *Undertaking public participation:* In this section, the purpose of public participation is briefly described and unique requirements in respect of the different sectors are provided.
8. *Assessing the significance of impacts:* The approach to impact evaluation is discussed in this section with the emphasis on using an objectives-based approach. Criteria that can be applied in this regard are given. The use of the NEMA principles in the assessment is also addressed.
9. *Developing an Environmental Management Plan:* An overview of the purpose and content of the Environmental Management Plan (EMP) is given in this section.

4.1 Definition of the sectors

4.1.1 The Non-Linear Development Category

1. **Large-scale property development:** The large scale property development sector involves activities that are proposed for a sizeable property. This may include residential, commercial, industrial and resort development or any combination of these. The EIA Regulations place a threshold of 20ha whereby developments of this size or larger would be subject to Scoping and EIA. For the purposes of this guideline, this threshold has been applied to define "large scale."
2. **Social infrastructure:** These projects include those related to the provision of basic services and housing specifically to poor communities. Such projects may involve large tracts of land and could also encompass linear developments such as water supply pipelines. The development of a water supply system from groundwater, for example, would constitute a project in this category.
3. **Energy:** This category of project is concerned with the facilities for the production, transmission and distribution of electricity. On the production side, it includes power stations. Both renewable and non-renewable electricity generation facilities are included. Transmission would typically involve power lines and thus this aspect also falls into the category of linear developments. Activities involving fuel retail outlets, the above or below ground storage of fuels and stockpiles of coal are not included.
4. **Agri-industry:** In accordance with the definition in the EIA Regulations, these projects involve the processing, production, manufacture, packaging or storage of agricultural produce. Battery farm operations that are under roof are also included in this category.

4.1.2 Linear development

This refers to any development that takes the form of a line or that "has the form of a line" across the landscape. Thus it includes roads, railway lines, pipelines and power lines. It would also include bulk infrastructure such as water supply lines and sewer lines.

4.2 Determining whether an application is necessary

The first stage in any application process must be to determine whether any identified activities apply to the proposed development and, therefore, whether an application for an environmental authorisation is required. This involves answering three questions:

1. Does the proposed project or development involve any activity that appears in Listing Notice 1 (GN R 386) or Listing Notice 2 (GN R 387)?
2. If the proposed project or development involves a listed activity, does it fall within the applicable threshold provided in the Listing Notice?
3. Does the way that the words are used in describing the listed activity mean that the proposed activity does not fall within the listed activity?

With respect to point 3, it is important to ensure a clear understanding of the meaning of words used in the description of an activity. Some terms are defined in the legislation and therefore reference must be made to NEMA and the EIA Regulations. Definitions are provided in section 1 of NEMA,

the definition of “commence”⁶⁴ being of particular relevance. In respect of the EIA Regulations reference must be made to Regulation 1 - Interpretation and the definitions provided in the Listing Notices. If the words used in describing a listed activity are not defined in any of the above legislation, then the ordinary, dictionary definition of the words would be applicable.

If an Applicant is uncertain about whether the proposal falls within the ambit of the EIA Regulations, he or she should consult the relevant competent authority's guideline documents

or approach the authority for advice. It is important to bear in mind that it is the responsibility of the person or Applicant to which a law applies to ensure compliance with that law. Therefore, if after consulting the competent authority the situation remains unclear, the Applicant should consider obtaining a legal opinion from an environmental legal expert. This information could then be provided to the competent authority with a view to obtaining finality on the matter. The competent authority, if uncertain could also elect to obtain a legal opinion. Whilst other government departments and municipalities may venture an opinion as to whether the EIA Regulations apply or not, their opinion cannot be taken as definitive, as they have no jurisdiction in terms of the EIA Regulations.

It is important to ensure that the application includes all of the listed activities for which authorisation is required. Failure to do so would result in a partially authorised development (assuming authorisation is granted). Furthermore, if the proposed development involves activities from Listing Notice 1 and 2, then the entire application must be subject to the scoping and EIA process.

Essentially the Listed Activities fall into three categories:


1. Those that involve the construction or establishment of a project or facilities: These can be seen as activity based, for example, all of those activities that fall under item 1 in Listing Notices 1 and 2. The Listed Activities that are concerned with decommissioning also fall into this category;
2. Those that involve activities within areas that are particularly environmentally sensitive or valuable: Examples are those listed activities that make reference to the removal of indigenous vegetation or that will take place within a specified distance from the high-water mark of the sea; and

IMPORTANT POINTS TO REMEMBER

- Always check definitions and thresholds to assist in determining whether your proposed project requires environmental authorisation or not.
- If you are uncertain as to whether you need to apply, check with the relevant competent authority. Obtain written confirmation of their opinion. Do not accept the opinion of other government Departments or the municipality about whether you need environmental authorisation as being “the last word.”
- Remember that your proposed project could involve more than one Listed Activity. Only one application needs to be lodged but you must check both Listing Notices to ensure **all** relevant activities are included.
- If your project involves activities from Listing Notice 1 and from Listing Notice 2, your entire application must be undertaken in accordance with the process applicable to Listing Notice 2 activities, namely, Scoping and EIA.
- Environmental authorisation is needed before any Listed Activity may commence!

⁶⁴ Commence when used in chapter 5 of NEMA means: “the start of any physical activity, including site preparation and any other activity on the site in furtherance of a listed activity or a specified activity, but does not include any activity required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity.”

3. Those that require environmental permits: Any activity that requires an environmental permit in respect of pollution, waste or emissions falls into this category.



PRACTICAL EXAMPLES

- If it is necessary to store fuel on site (e.g. for generators, hot water boilers or refuelling of vehicles), this may constitute a Listed Activity, depending on whether it is to be stored in an above ground facility (30 000 litre threshold) or below ground (no threshold).
- If hazardous waste is to be stored on site on a temporary basis, this is a Listed Activity under Listing Notice 1, no matter what volume is involved. A permanent hazardous waste storage facility is a Listing Notice 2 activity.
- If a back-up generator is needed, determine whether this is subject to a permit under air pollution legislation (including municipal bylaws). In the event that a permit is needed, the generator must be included in the application.
- If effluent will be generated and discharged to a sewer, this may be subject to written consent (permit) from the municipality. In the event of discharging effluent to a dam, water course, water body or the sea, a DWA permit will be required. Effluent discharge will therefore constitute a Listed Activity as it is subject to a permit (Activity 1(e) in Listing Notice 2 applies to activities requiring a new permit, whereas Activity 25 in Listing Notice 1 applies to activities that require a change to an existing permit).

Sometimes what appears to be an insignificant or small element of a project may be regarded as a Listed Activity. Examples are given in the box alongside. This demonstrates the need to check all the activities in both Listing Notices to ensure that the application includes all of the relevant activities.

The process of identifying the activities which must be included in the application can be assisted by a systematic analysis of the items that are required for the project to function. For example, flow charts of an industrial process can be useful in determining which Listed Activities are applicable. Similarly, a comprehensive analysis of the project inputs (e.g. raw materials, water, energy etc.) and outputs (wastes, effluent etc.) can also be of assistance in identifying the activities for which application is being made. Infrastructure requirements must also be considered, as these may also be Listed Activities.

Reference should be made to the Activities and Impacts matrices (Annex C-G) as these could assist in identifying the activities that need to be included in the application. It is likely that some of the activities listed in Annex C – Linear Developments will be of relevance to most development proposals where infrastructure (e.g. stormwater pipelines, roads) needs to be provided.

It is important to always check the activities that relate to location, such as whether the project would take place close to a river or wetland or whether the proposed site has indigenous vegetation. If the location for the proposed development is within a coastal area, distance from the high water mark of the sea needs to be determined, since certain activities within 100m of the high water mark are subject to environmental authorisation. Certain activities on coastal dunes and tidal rivers or estuaries are also listed (Refer to GNR 385 of April 2006). An example showing the determination of the activities for which environmental application must be made is given in Table 4 below, for a large-scale property development scenario involving mixed land uses on an undeveloped or “greenfields” site. Reference should be made to the legal matrix (Annex B) and the activities and impacts matrices (Annex C-G) to assist in clarifying whether an application is required and which activities must be included in the application.

TABLE 4: Determining the activities for which application must be made using large-scale property development as an example

QUESTIONS TO CONSIDER	RELEVANT LISTED ACTIVITIES
GN R386 – Listing Notice 1	
<i>Relevant definitions</i>	
<p>“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% abutted by urban development and which can be readily connected to municipal bulk infrastructure services.</p>	
<p>“associated structures or infrastructure” means any building or infrastructure that is necessary for the functioning of a facility or activity or that is used for an ancillary service or use from the facility;</p>	
<p>“construction” means the 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;</p>	
<i>Which listed activities are potentially relevant?</i>	
<p>The most obvious activity is: 16 – if the project will result in the transformation of undeveloped land to residential, mixed, retail, commercial, industrial or institutional use where such development does not constitute infill and where the total area to be transformed is bigger than 1 hectare. (NOTE: refer to GN 387 – Listing Notice 2 if the development will be larger than 20 ha).</p>	
<p><i>What built environment or land use elements will the development comprise?</i></p>	<p>1 (d) – if resorts, lodges, hotels or other tourism and hospitality facilities are to be established in a protected area.</p> <p>1(k) – if the project involves 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</p> <p>1(o) – if storage, recycling or treatment of general waste is needed (e.g. a waste yard on a large residential estate) which has a throughput capacity of 50 tons or more daily average measured over a period of 30 days.</p> <p>1 (p) – if the treatment of effluent, wastewater or sewage with an annual throughput capacity of 15 000m³ or more is needed.</p>
<p><i>What built environment or land use elements will the development comprise?</i></p>	<p>13 – if groundwater is to be abstracted at a volume that exceeds general authorisation. (NOTE: Reference must be made to the General Authorisation issued under section 39 of the National Water Act).</p> <p>18 – if the subdivision of land is involved.</p> <p>15 – if construction of road wider than 4m or with reserve wider than 6m excluding roads that fall within the ambit of another listed activity or which are access roads of less than 30 meters long, is required.</p> <p>19 – if there will be manufacturing, warehousing, bottling, packaging or storage facility outside industrial zone and more than 1000 square metres.</p>
<p><i>Will the project take place over several phases?</i></p>	<p>17- if the development will comprise more than one phase.</p>

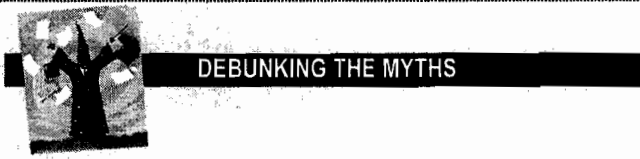
QUESTIONS TO CONSIDER	RELEVANT LISTED ACTIVITIES
GN R386 – Listing Notice 1	
<i>Which listed activities are potentially relevant?</i>	
<i>Where will the project be located?</i>	1(m) – if the project will involve any construction near river or stream. 2, 3, 5 and 6 – if the project will be located within 100m of high-water mark of the sea. 4 – if any part of the project will be located in floodplain, wetland, lagoon, lake or in-stream dam or if there is a river, stream, wetland, lagoon, lake or in-stream dam on the site. 12 – if the development will result in the transformation or removal of indigenous vegetation of 3 hectares or more or any size where the transformation or removal takes place in a critically endangered or endangered ecosystem. 20 – if the transformation of an area zoned for use as public open space or for a conservation purpose is involved 23(c) – if the project will take place on a “brownfields” site where facilities that need to be decommissioned have caused or could potentially have caused contamination of land.
<i>Will any emissions or pollution be generated?</i>	25 – if the project involves expansion to existing facilities that hold a permit (e.g. existing sewage treatment plant) that controls emissions, pollution or waste, where the expansion will require a permit amendment.
GN R387 – Listing Notice 2	
<i>Which listed activities are potentially relevant?</i>	
The most obvious activity is: 2 – if the development is likely to be more than 20ha.	
<i>What built environment or land use elements will be involved?</i>	5 - if involving major road
<i>Where will the project be located?</i>	9 - within 100m of high-water mark 10 process or activity in a listed ecosystem
<i>Will any emissions or pollution be involved?</i>	1 - The construction of facilities or infrastructure, including associated structures or infrastructure, for - (e) any process or activity which requires a permit or license in terms of legislation governing the generation or release of emissions, pollution, effluent or waste and which is not identified in Government Notice No. R. 386 of 2006

4.2.1 Dealing with the need for other authorisations, approvals or permits

Authorisations that may be required under other legislation are discussed in this section. The order or sequence for obtaining these authorisations is also considered, as is the potential for streamlining of application processes. Applicants and EAPs need to look at a project as a whole and decide what authorisations (other than environmental) will be required and which other authorities will need to be approached. Reference should be made to the Legal Matrix (Annex A to this guideline) for assistance in identifying the need for other approvals, permits or authorisations.

Where various authorities are responsible for decision-making for different aspects of the same project, the Constitution requires that they must ensure that their actions are co-ordinated. The NEMA principles reinforce the concept of intergovernmental co-ordination in environmental matters. NEMA requires the competent authority to consult with every State department that administers a law relating to a matter affecting the environment when considering an application for environmental

authorisation.⁶⁵ Furthermore, the Minister or MEC may consult with any organ of state responsible for administering legislation relating to any aspect of an activity that also requires environmental authorisation.⁶⁶ In terms of section 24K, the Minister or MEC may after such consultation enter into



DEBUNKING THE MYTHS

THE MYTH: An approval of a Guide Plan or Structure Plan means that development is a given and it can be assumed that it must be approved.

THE REALITY: In order for a proposed development to proceed, all relevant approvals must be obtained. If any one of these is refused, then the development may not proceed. It is not incumbent on any authority to issue an approval because another authority has done so. Put differently, each authority must apply its mind within the context of its mandate and make the decision accordingly. Land use decisions are based on different criteria to those applied by the environmental authority. All authorities are obliged, in terms of NEMA, to take account of environmental considerations in their decision-making process where there is potential for significant detrimental environmental consequences.

a written agreement with the organ of State in order to avoid duplication in the submission of information or the carrying out of a process.⁶⁷

The EIA Regulations impose a stricter requirement in that Regulation 6 necessitates that where information or processes that are required by other legislation are substantially similar to those required in terms of the EIA Regulations, the Minister or MEC must take steps to enter into a written agreement with the relevant organ of state. Where a Minister or MEC considers an application for environmental authorisation that also

requires authorisation in terms of other legislation, he or she may take account of, any process authorised under that legislation as adequate for meeting the requirements of integrated environmental management in NEMA provided that section 24(4)(a) and where applicable, section 24(4)(b) are given effect to in such process.⁶⁸

If the carrying out of a listed activity or specified activity is regulated in terms of another law or a specific environmental management Act, then both authorities responsible for issuing the authorisations may exercise their powers jointly by issuing separate authorisations or an integrated environmental authorisation.⁶⁹ The competent authority may regard an authorisation in terms of any other legislation that meets all the requirements in section 24(4)(a) and, where applicable, 24(4)(b) to be an environmental authorisation in terms of Chapter 5 of NEMA.⁷⁰

Whilst the legislation requires co-ordination between organs of state, this does not mean that they must all reach the same decision. Each organ of state operates within its own mandate and thus applies decision-making criteria that are relevant in the context of exercising this mandate. For example, land use decisions such as rezoning and sub-divisions should take account of spatial plans (such as the municipal SDP), infrastructure capacity, access, existing use of the site, surrounding land uses and the like.

It is incorrect to suggest that because one decision-maker has issued an approval, that other decision-makers should do the same. This applies even if the decision-makers are located within one government department. For example, the DEA may decide to authorise a major energy development, but the DWA may refuse to issue a water use licence because it has been determined that there is inadequate water available in the system. In this example, it must be noted that the DWA has a narrower or more focussed mandate (i.e. water resources) than the DEA (environment).

⁶⁵ Section 24O(2).

⁶⁶ Section 24K(1).

⁶⁷ Section 24K(2).

⁶⁸ Section 24K(3)(b).

⁶⁹ Section 24L(1).

⁷⁰ Section 24L(4).

Water availability will be one of several factors that the DEA would consider when determining whether to authorise or refuse the development. The DWA would, however, make the decision based on matters directly related to water resources. Another possibility is that both DEA and DWA could decide to refuse the application because it is determined that limited water availability is such a significant issue that it constitutes a "fatal flaw". This decision would be based on considering the sustainability of water resources, the impacts on other water users and ecological issues.

The order in which particular applications should be submitted is not set or specified. In order for an organ of state to fulfil the obligation to take the NEMA principles (section 2) into account when making decisions

that may significantly affect the environment, it makes sense to wait until the EIA process has been concluded or at least until the environmental information is to hand (BAR or EIAR), before making the decision. It would be difficult for those decision-makers to consider the environment meaningfully without the benefit of the information gathered during the EIA process. The competent authority's view on whether the environmental impacts can be successfully mitigated or not should also be considered, which means that decision-makers need to consult each other.

As a general "rule of thumb" the Applicant/EAP must apply for the various authorisations required by a project in an integrated way. The timing for commencing the different applications depends on the requirements of the project cycle. It is important for the professional team to review the approvals, authorisations or permits that may be required against the project programme to clarify what information will be available when. This will enable the appropriate timing for the lodging of various applications to be determined. For example, in the case of an agri-industry development where industrial effluent will be generated and disposed, it makes sense to apply for an effluent permit once it has been determined whether there will be on-site treatment of effluent, what treatment technology will be used and what quality of effluent will be achieved. A number of alternative treatment technologies may be assessed (which should form part of the alternatives assessment in the EIA process) before determining the most favourable option. Once the technology has been selected, it may then be appropriate to commence the effluent permit process. The authority to which the application must be submitted depends on whether the effluent will be discharged to a river, stream, dam or wetland, the marine environment or the municipal sewer.

The EAP must use common sense – for instance, if land needs to be rezoned before a particular industry can operate on the premises this process should be undertaken in parallel with the EIA. If



PRACTICAL EXAMPLES

- **AGRI-INDUSTRY:** These types of developments might require change of land use approval (e.g. rezoning). More importantly, it may be necessary to obtain a number of environmental permits for waste streams or emissions. For example, if there is to be effluent discharge to a river, a permit from DWA is required. If a boiler or furnace this may require a permit from the municipality or from DEA.
- **ENERGY:** Typically such developments would require a range of permits relating to air, liquid and solid pollutants or waste streams. A rezoning approval might also be needed. If agricultural land is involved, the Department of Agriculture will be a primary commenting authority and may also need to give approval if subdivision of agricultural land is required.
- **LARGE-SCALE PROPERTY DEVELOPMENT:** Normally such developments would involve some sort of land use application (e.g. rezoning or subdivision). Where subdivision of agricultural land is involved, approval from the Department of Agriculture is necessary.
- **SOCIAL INFRASTRUCTURE & HOUSING:** Most typically, land use approvals would be required (e.g. rezoning). If agricultural land is involved and this requires subdivision, it will be necessary to obtain approval from the Department of Agriculture.
- **LINEAR INFRASTRUCTURE:** Land use approvals may be required (e.g. rezoning). If agricultural land is to be traversed, it will be necessary to obtain approval from the Department of Agriculture if subdivision is needed. The crossing of streams, rivers or wetlands will in some circumstances constitute a water use, and thus requires DWA's permission.