

REPUBLIC OF SOUTH AFRICA

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# NATIONAL ENVIRONMENT LAWS AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 76); explanatory summary of  
Bill published in Government Gazette No. 31239 of 11 July 2008)  
(The English text is the official text of the Bill)*

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(MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM)

[B 66—2008]

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## GENERAL EXPLANATORY NOTE:

[                      ]      Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_      Words underlined with a solid line indicate insertions in existing enactments.

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# BILL

To amend the—

- Atmospheric Pollution Prevention Act, 1965, so as to adjust the penalties provided for in the said Act;
- Environment Conservation Act, 1989, so as to adjust the penalties provided for in the said Act; and to remove the need to publish directions in the *Gazette*;
- National Environment Management Act, 1998, so as to delete certain definitions; to provide for the establishment of fora or advisory committees; to make provision for increased powers of the courts; to remove the requirement that Environmental Management Inspectors must carry notices of designation with them; to extend the scope of routine inspections to the search of vehicles; and to regulate the jurisdiction of magistrate's courts in instances where the maximum fines have been increased;
- National Environment Management: Protected Areas Act, 2003, so as to provide for increased measures of control over escaped animals; and to adjust the penalties provided for in the said Act;
- National Environment Management: Biodiversity Act, 2000, so as to provide for general surveillance monitoring; to provide further considerations for a biodiversity management plan; to provide that an environment impact assessment must be obtained when genetically modified organisms are involved; to introduce notification requirements in the discovery phase of a bioprospecting project; to take into consideration knowledge of specific individuals when issuing specific bioprospecting permits; to allow the Director-General or a trustee to manage the Bioprospecting Fund; to allow for the renewal or amendment of a permit; to amend the regulations to allow for hunting; and to effect certain textual alterations;
- National Environment Management: Air Quality Act, 2004, so as to provide for a processing fee to review a licence; and to include directors or senior managers in a juristic person for the criteria for a fit and proper person;

and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Substitution of section 46 of Act 45 of 1965, as substituted by section 20 of Act 17 of 1973**

1. The following section is hereby substituted for section 46 of the Atmospheric Pollution Prevention Act, 1965:

**“Penalties**

**46.** Any person convicted of an offence under this Act shall be liable, in the case of a first conviction, to a fine not exceeding [five hundred] two million rand or imprisonment for a period not exceeding [six months] five years, and in the case of a second or subsequent conviction to a fine not exceeding [two thousand] five million rand or imprisonment for a period not exceeding [one year] 10 years.”.

**Amendment of section 29 of Act 73 of 1989, as amended by section 18 of Act of 79 of 1992 and by Proclamation No. 29 of 1995**

2. Section 29 of the Environment Conservation Act, 1989, is hereby amended by the substitution for subsections (4), (5) and (6) of the following subsections, respectively:

“(4) Any person who contravenes a provision of section 20(1), 20[(6)](9), 22(1) or 23(2) or a direction issued under section 20(5) or fails to comply with a condition of a permit, permission, authorisation or direction issued or granted under the said provisions shall be guilty of an offence and liable on conviction to a fine not exceeding [R100 000] R5 million or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment, and to a fine not exceeding three times the commercial value of any thing in respect of which the offence was committed.

(5) Any person convicted of an offence in terms of this Act for which no penalty is expressly provided, shall be liable to a fine not exceeding [R2 000] R100 000 or to imprisonment for a period not exceeding [six] 12 months or to both such fine and such imprisonment.

(6) Any person convicted of an offence in terms of this Act, and who after such conviction persists in the act or omission which constituted such offence, shall be guilty of a continuing offence and liable on conviction to a fine not exceeding [R250] R10 000 or to imprisonment for a period not exceeding [20 days] six months or to both such fine and such imprisonment in respect of every day on which he or she so persists with such act or omission.”.

**Amendment of section 32 of Act 73 of 1989**

3. Section 32 of the Environment Conservation Act, 1989, is hereby amended by—

(a) the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“If the Minister, the Minister of Water Affairs and Forestry, a competent authority or any local authority, as the case may be, intends to—”; and

(b) the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) issue a regulation [or a direction] in terms of the provisions of this Act;”.

**Amendment of section 1 of Act 107 of 1998, as amended by section 1 of Act 56 of 2002, section 1 of Act 46 of 2003, section 1 of Act 8 of 2004, section 60 of Act 39 of 2004 and section 1 of National Environment Laws Amendment Act, 2008, and section 1 of National Environmental Management Amendment Act, 2008**

4. Section 1 of the National Environmental Management Act, 1998, is hereby amended by—

(a) the deletion of the definition of “Committee”; and

(b) the deletion of the definition of “Forum”.

### Repeal of Parts 1 and 2 of Chapter 2 of Act 107 of 1998

5. Parts 1 and 2 of Chapter 2 of the National Environmental Management Act, 1998, are hereby repealed.

### Insertion of section 3A in Act 107 of 1998

6. The following section is hereby inserted in Chapter 2 of the National Environmental Management Act, 1998, after section 3:

#### “Establishment of fora or advisory committees

**3A.** The Minister may by notice in the *Gazette*—

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| <ul style="list-style-type: none"> <li>(a) establish any forum or advisory committee;</li> <li>(b) determine its composition and functions; and</li> <li>(c) determine, in consultation with the Minister of Finance, the basis and extent of the remuneration and payment of expenses of any member of such forum or committee.”.</li> </ul> | 10 |
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### Amendment of section 11 of Act 107 of 1998

7. Section 11 of the National Environmental Management Act, 1998, is hereby amended by the substitution in subsection (5) for paragraph (b) of the following paragraph:

“(b) on application by any organ of state, or on his or her own initiative with the agreement of the relevant Minister where it concerns a national department, **[and after consultation with the Committee,]** amend Schedules 1 and 2.”. 20

### Amendment of section 13 of Act 107 of 1998

8. Section 13 of the National Environmental Management Act, 1998, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The Minister may, **after consultation with the Committee,** make regulations for the purpose of giving effect to **[subsections]** subsection (1)(b) and (c).”.

### Amendment of section 15 of Act 107 of 1998

9. Section 15 of the National Environmental Management Act, 1998, is hereby amended by—

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| <ul style="list-style-type: none"> <li>(a) the substitution for subsection (1) of the following subsection:</li> <li style="padding-left: 20px;">“(1) Every environmental implementation plan and every environmental management plan must be submitted <b>[to the Committee by a date to be set by the Minister]</b> <u>for approval to the Minister or MEC, as the case may be.</u>”;</li> <li>(b) the deletion of subsections (2), (3) and (4); and</li> <li>(c) the deletion in subsection (6) of paragraphs (b) and (c).</li> </ul> | 30<br><br><br><br><br>35 |
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### Amendment of section 16 of Act 107 of 1998

10. Section 16 of the National Environmental Management Act, 1998, is hereby amended by the substitution for subsection (1) of the following subsection:

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| <ul style="list-style-type: none"> <li>“(1) (a) Every organ of state must exercise every function it may have, or that has been assigned or delegated to it, by or under any law, and that may significantly affect the protection of the environment, substantially in accordance with the environmental implementation plan or the environmental management plan prepared, submitted and adopted by that organ of state in accordance with this Chapter: Provided that any substantial deviation from an environmental management plan or environmental implementation plan must be reported forthwith to the Director-General <b>[and the Committee]</b>.</li> <li>(b) Every organ of state must report annually within four months of the end of its financial year on the implementation of its adopted environmental management</li> </ul> | 40<br><br><br><br><br>45 |
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plan or environmental implementation plan to the Director-General [**and the Committee**].

(c) The Minister may[, **after consultation with the Committee,**] recommend to any organ of state which has not submitted and adopted an environmental implementation plan or environmental management plan, that it comply with a specified provision of an adopted environmental implementation plan or submitted environmental management plan.”. 5

#### **Amendment of section 22 of Act 107 of 1998**

**11.** Section 22 of the National Environmental Management Act, 1998, is hereby amended by the deletion in subsection (2) of paragraph (a). 10

#### **Amendment of section 28 of Act 107 of 1998**

**12.** Section 28 of the National Environmental Management Act, 1998, is hereby amended by—

- (a) the substitution for subsection (7) of the following subsection: 15
  - “(7) Should a person fail to comply, or inadequately comply, with a directive under subsection (4), the Director-General or provincial head of department may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief.”;
- (b) the substitution in subsection (8) for the words preceding paragraph (a) of the following words: 20
  - “Subject to subsection (9), the Director-General or provincial head of department may recover all costs incurred, including anticipatory costs, as a result of it acting under subsection (7), which costs may be claimed and recovered before acting under subsection (7), from any or all of the following persons—”; and 25
- (c) the addition of the following subsections: 25
  - “(14) No person may—
  - (a) unlawfully and intentionally or negligently commit any act or omission which causes or is likely to cause pollution or degradation of the environment; 30
  - (b) unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect the environment; or
  - (c) refuse to comply with a directive issued under this section. 35
  - (15) Any person who contravenes or fails to comply with subsection (14) is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years or to both such a fine and such imprisonment.”. 40

#### **Amendment of section 30 of Act 107 of 1998**

**13.** Section 30 of the National Environmental Management Act, 1998, is hereby amended by the addition of the following subsection: 40

“(11) A person who contravenes or fails to comply with subsection (3), (4), (5) or (6) is guilty of an offence and liable on conviction to a fine not exceeding R100 000 or to imprisonment for a period not exceeding 10 years, or to both such a fine and such imprisonment.”. 45

#### **Amendment of section 31 of Act 107 of 1998**

**14.** Section 31 of the National Environmental Management Act, 1998, is hereby amended by the deletion of subsections (1), (2) and (3).

**Amendment of section 31F of Act 107 of 1998, as inserted by section 4 of Act 46 of 2003**

15. Section 31F of the National Environmental Management Act, 1998, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) When exercising any powers or performing any duties in terms of this Act or a specific environmental management Act, an environmental management inspector must, on demand by a member of the public, produce the identity card **[and the notice issued to the inspector in terms of section 31D(3)]** referred to in subsection (1).”.

**Amendment of section 31H of Act 107 of 1998, as inserted by section 4 of Act 46 of 2003**

16. Section 31H of the National Environmental Management Act, 1998, is hereby amended by the substitution in subsection (2) for paragraph (g) for the following paragraph:

“(g) take photographs or make audio-visual recordings of anything or any person that is relevant for the purposes of an investigation or for a routine inspection.”.

**Amendment of section 31K of Act 107 of 1998, as inserted by section 4 of Act 46 of 2003**

17. Section 31K of the National Environmental Management Act, 1998, is hereby amended by—

- (a) the substitution in subsection (1) for the words preceding paragraph (a) of the following words:  
 “An environmental management inspector, within his or her mandate in terms of section 31D, and subject to subsection (2), may[,] at any reasonable time[,] conduct routine inspections and, without a warrant, enter and inspect any building, land or premises or search any vehicle for the purposes of ascertaining compliance with—”;
- (b) the substitution for subsection (5) of the following subsection:  
 “(5) While carrying out a routine inspection, an environmental management inspector may seize anything in or on any business or residential premises, **[or]** land or vehicle that may be used as evidence in the prosecution of any person for an offence in terms of this Act or a specific environmental management Act.”; and
- (c) the substitution for subsection (7) of the following subsection:  
 “(7) An environmental management inspector may exercise on such business or residential premises, **[or]** land or vehicle any of the powers mentioned in section 31H.”.

**Amendment of section 31N of Act 107 of 1998, as inserted by section 4 of Act 46 of 2003**

18. Section 31N of the National Environmental Management Act, 1998, is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) If a person fails to comply with a compliance notice, the environmental management inspector must report the non-compliance to the **[Minister or MEC]** Director-General or Head of Department responsible for environmental affairs in the province, as the case may be, [and the Minister or MEC] who may—
- (a) revoke or vary the relevant permit, authorisation or other instrument which is the subject of the compliance notice; and
  - (b) take any necessary steps and recover the costs of doing so from the person who failed to comply; **and**
  - (c) **report the matter to a Director of Public Prosecutions].**”.

**Amendment of section 31Q of Act 107 of 1998, as inserted by Act 46 of 2003**

19. Section 31Q of the National Environmental Management Act, 1998, is hereby amended by the insertion after subsection (1) of the following subsection:

“(1A) Subsection (1) does not apply to information that pertains to—

- (a) environmental quality or the state of the environment;
- (b) any risks posed to the environment, public safety and the health and well-being of people; or
- (c) compliance with or contraventions of any environmental legislation by any person.”.

**Amendment of section 34 of Act 107 of 1998**

20. Section 34 of the National Environmental Management Act, 1998, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) Whenever a person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order—

- (a) the award of damages or compensation or a fine equal to the amount so assessed; or
- (b) that such remedial measures as the court may determine must be undertaken by the convicted person.”.

**Insertion of section 34H in Act 107 of 1998**

21. The following section is hereby inserted in the National Environmental Management Act, 1998, after section 34G:

**“Jurisdiction**

**34H.** Notwithstanding anything to the contrary in any other law, a magistrate’s court shall have jurisdiction to impose any penalty prescribed by this Act.”.

**Amendment of Schedule 3 to Act 107 of 1998, as amended by section 8 of Act 8 of 2004**

22. Part (a) and Part (b) of the Schedule to this Act are hereby substituted for Part (a) and Part (b) of Schedule 3 to the National Environmental Management Act, 1998.

**Insertion of section 49A in Act 57 of 2003**

23. The following section is hereby inserted in the National Environmental Management: Protected Areas Act, 2003, after section 49:

**“Ownership of and control over animal species occurring in and escaping from protected areas**

**49A.** (1) Subject to section 2 of the Game Theft Act, 1991 (Act No. 105 of 1991), all animals occurring in protected areas are, for as long as they occur in protected areas, deemed to be public assets held in trust by the State for the benefit of present and future generations as part of the public estate.

(2) If an animal in public ownership as contemplated in subsection (1) escapes, the managing authority of a protected area must take all steps reasonably necessary to capture such animal or otherwise deal with it in its discretion in order that the public interest is best served and any danger posed by such animal is averted or minimised.

(3) Subject to subsection (4) no person may in any way hinder or interfere with the management authority in its efforts to give effect to the provisions of subsection (2).



(4) The management authority must implement subsections (2) and (3) in a manner consistent with national legislation and which takes into account the threat posed by such escaped animal to the spread of animal diseases or any other veterinary harm.

(5) (a) Any person who becomes aware of an animal escaping from a protected area is obliged to immediately report this to the management authority of the area concerned.

(b) A failure to comply with paragraph (a) constitutes an offence.

(6) This section does not prevent a person from killing an animal in self-defence where human life is threatened: Provided that any steps taken in this regard is immediately reported to the management authority concerned.

(7) All animals which emanate or escape from a protected area, notwithstanding their escape, the common law or any other legislation providing otherwise, remain at all times thereafter the property of the State as trustee until such animal is lawfully acquired by another party.

(8) Neither a management authority nor any of its members, officers or employees shall be liable for any damage or loss caused by any animal in or escaping from a protected area, unless the damage or loss caused is attributable to any negligent or intentional act or omission of the management authority or any of its members, officers or employees.”.

#### **Amendment of section 82 of Act 57 of 2003**

**24.** Section 82 of the National Environmental Management: Protected Areas Act, 2003, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) If the Minister or MEC fails to reach an agreement with the owner of the property in whose favour the servitude is registered or with the person holding the right, the Minister or MEC may expropriate the servitude or the privately held right in or to State land, in accordance with the Expropriation Act, 1975 (Act No. 63 of 1975), subject to section 25 of the Constitution.”.

#### **Amendment of section 88 of Act 57 of 2003**

**25.** Section 88 of the National Environmental Management: Protected Areas Act, 2003, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Regulations made under section 86 or 87 may provide that any person who contravenes or fails to comply with a provision thereof is guilty of an offence and liable [on] in the case of a first conviction to a fine not exceeding R5 million or to imprisonment for a period not exceeding five years and in the case of a second or subsequent conviction to a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years or in both instances to both a fine and such imprisonment.”.

#### **Amendment of section 89 of Act 57 of 2003**

**26.** Section 89 of the National Environmental Management: Protected Areas Act, 2003, is hereby amended by—

(a) the substitution in subsection (1) for paragraph (a) of the following paragraph: 45

“(a) contravenes or fails to comply with a provision of section 45(1), 46(1), 47(2), [or] (3) or (3A), 48(1), [or] 49A(5)(b), 50(5) or 55(2)(fA).”;

(b) the substitution for subsection (2) of the following subsection:

“(2) A person convicted of an offence in terms of subsection (1) is liable, [on] in the case of a first conviction, to a fine not exceeding R5 million or imprisonment for a period not exceeding five years and, in the case of a second or subsequent conviction, to a fine not exceeding R10 million or imprisonment for a period not exceeding ten years or in both instances to both a fine and such imprisonment.”; and 55



(c) the addition of the following subsections:

“(3) Contravention of or failure to comply with any provision of a regulation made under section 86 or 87 is an offence.

(4) Notwithstanding anything to the contrary in any other law, a magistrate’s court shall have jurisdiction to impose any penalty prescribed by this Act.”. 5

#### **Amendment of section 11 of Act 10 of 2004**

27. Section 11 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph: 10

“(b) must **[monitor]** conduct general surveillance monitoring and report regularly to the Minister on the impacts of **[any]** all categories of genetically modified **[organism that has been]** organisms released into the environment[, **including the impact on non-target organisms and ecological processes, indigenous biological resources and biological diversity of species used for agriculture**];”. 15

#### **Amendment of section 45 of Act 10 of 2004**

28. Section 45 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by—

- (a) the deletion of the word “and” at the end of paragraph (b); 20
- (b) the deletion in paragraph (c) of subparagraph (v); and
- (c) the addition of the following paragraph:

“(d) take into consideration—

- (i) any plans issued in terms of Chapter 3 of the National Environmental Management Act; 25
- (ii) any municipal integrated development plan; and
- (iii) any other plans prepared in terms of national or provincial legislation that is affected.”.

#### **Amendment of section 57 of Act 10 of 2004**

29. Section 57 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the addition of the following subsection: 30

“(4) The Minister may, by notice in the *Gazette*, exempt a person from a restriction contemplated in subsection (1).”.

#### **Substitution of section 58 of Act 10 of 2004**

30. The following section is hereby substituted for section 58 of the National Environmental Management: Biodiversity Act, 2004: 35

##### **“Amendment of notices**

**58.** The Minister may by notice in the *Gazette* amend or repeal any notice published in terms of section 55(1), **[or]** 56(2) or 57(4).”.

#### **Amendment of section 78 of Act 10 of 2004**

31. Section 78 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution for subsection (1) of the following subsection: 40

“(1) If the Minister has reason to believe that the release of a genetically modified organism into the environment under a permit applied for in terms of the Genetically Modified Organisms Act, 1997 (Act No. 15 of 1997), may pose a threat to any indigenous species or the environment, no permit for such release may be issued in terms of that Act unless an environmental impact assessment has been conducted in accordance with Chapter 5 of the National Environmental Management Act as if such release were a listed activity contemplated in that Chapter.”. 45

### Amendment of section 81 of Act 10 of 2004

32. Section 81 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) engage in the commercialisation phase of bioprospecting involving any indigenous biological resources; or”.

### Insertion of section 81A in Act 10 of 2004

33. The following section is hereby inserted in the National Environmental Management: Biodiversity Act, 2004, after section 81:

#### “Notification requirements

**81A.** (1) No person may, without first notifying the Minister, engage in the discovery phase of bioprospecting involving any indigenous biological resources.

(2) A notice referred to in subsection (1) must be in such form and must contain such other particulars as may be prescribed.

(3) A person involved in the discovery phase of bioprospecting must sign a prescribed commitment to comply with the requirements at the commercialisation phase of bioprospecting.”.

### Amendment of section 82 of Act 10 of 2004

34. Section 82 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution in subsection (1)(b) for the words preceding subparagraph (i) of the following words:

“an indigenous community or a specific individual—”.

### Amendment of section 85 of Act 10 of 2004

35. Section 85 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) [must] may manage the Fund in the prescribed manner or appoint a trustee in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988), to administer the fund on the Director-General’s behalf in the prescribed manner and under such terms as the Director-General may consider necessary; and”.

### Amendment of section 86 of Act 10 of 2004

36. Section 86 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) The Minister may by notice in the *Gazette*—
- (a) declare that this Chapter does not apply to indigenous resources specified in the notice or to an activity relating to such indigenous biological resources; **[and]** or
  - (b) declare that this Chapter does not apply to certain categories of research involving indigenous biological resources or commercial exploitation of indigenous biological resources; and
  - (c) amend or withdraw a notice referred to in **[paragraph]** paragraphs (a) and (b).”.

### Amendment of section 92 of Act 10 of 2004

37. Section 92 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“If the carrying out of an activity mentioned in section **[90]** 87 is also regulated in terms of other law, the authority empowered under that other law to authorize that

activity and the issuing authority empowered under this Act to issue permits in respect of that activity may—”.

#### Insertion of section 93A in Act 10 of 2004

38. The following section is hereby inserted in the National Environmental Management: Biodiversity Act, 2004, after section 93:

##### “Renewal and amendment of permits

**93A.** (1) A permit holder may, before the expiry date of a permit, apply to an issuing authority for the renewal or amendment of such permit.

(2) An application for the renewal or amendment of a permit must be in the form, contain such information and be accompanied by such processing fees as may be prescribed.

(3) In considering an application to renew or amend a permit, the issuing authority must have regard to the same matters which it was required to consider when deciding on the initial application for that permit.

(4) A issuing authority may for good reason amend or substitute any condition attached to a permit.”.

#### Amendment of section 97 of Act 10 of 2004

39. Section 97 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by—

(a) the substitution in subsection (1)(b) for subparagraph (iv) of the following subparagraph:

“(iv) the facilitation of the implementation and enforcement of an international agreement regulating international trade in specimens **[of listed threatened or protected species]** of species to which the agreement applies and which is binding on the Republic.”;

(b) the deletion in subsection (1)(b) of the word “or” at the end of subparagraph (vii);

(c) the insertion in subsection (1)(b) of the word “or” at the end of subparagraph (viii);

(d) the addition to subsection (1)(b) of the following subparagraph:

“(ix) the hunting industry.”;

(e) the substitution in subsection (1)(e) for subparagraph (ii) of the following subparagraph:

“(ii) the form and content of, and requirements and criteria for, notification requirements referred to in section 81A and benefit-sharing agreements and material transfer agreements.”; and

(f) the substitution in subsection (1)(f) for subparagraph (i) of the following subparagraph:

“(i) the conditions subject to which issuing authorities may issue, renew or amend permits in terms of this Act;”.

#### Amendment of section 98 of Act 10 of 2004

40. Section 98 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by the substitution in subsection (2) for paragraphs (a) and (b) of the following paragraphs, respectively:

“(a) imprisonment for a period not exceeding **[five] ten** years;

(b) **[an appropriate fine]** a fine not exceeding R10 million; or”.

#### Amendment of section 102 of Act 10 of 2004

41. Section 102 of the National Environmental Management: Biodiversity Act, 2004, is hereby amended by—

(a) the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) A person convicted of an offence in terms of section 101 is liable to a fine not exceeding R10 million, or an imprisonment for a period not exceeding [five] ten years, or to both such a fine and such imprisonment.

(2) **[A fine in terms of subsection (1) may not exceed—**

(a) **an amount prescribed in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991); or** 5

(b) **if** If a person is convicted of an offence involving a specimen of a listed threatened or protected species, **[an amount]** a fine may be determined, either in terms of **[paragraph (a)]** subsection (1) or **[which is]** equal to three times the commercial value of the specimen in respect of which the offence was committed, whichever is the greater.”; and 10

(b) the addition of the following subsection:

“(3) Notwithstanding anything to the contrary in any other law, a magistrate’s court shall have jurisdiction to impose any penalty prescribed by this Act.” 15

#### **Amendment of section 45 of Act 39 of 2004**

**42.** Section 45 of the National Environmental Management: Air Quality Act, 2004, is hereby amended by the substitution for subsections (1) and (2) of the following subsections, respectively: 20

“(1) A licensing authority must review a provincial atmospheric emission licence or an atmospheric emission licence at intervals specified in the licence, or when circumstances demand that a review is necessary, on payment of the prescribed processing fee.

(2) The licensing authority must inform the licence holder and the relevant provincial air quality officer, in writing, of any proposed review, **[and]** the reason for such review and the cost of the prescribed processing fee.” 25

#### **Amendment of section 49 of Act 39 of 2004**

**43.** Section 49 of the National Environmental Management: Air Quality Act, 2004, is hereby amended by the substitution for paragraph (c) of the following paragraph: 30

“(c) that person has been a director or senior manager who is or was a director or manager of a company, a juristic person or firm to whom paragraph (a) or (b) applies; and”.

#### **Amendment of section 52 of Act 39 of 2004**

**44.** Section 52 of the National Environmental Management: Air Quality Act, 2004, is hereby amended by— 35

(a) the substitution for subsections (1) and (2) of the following subsections, respectively:

“(1) A person convicted of an offence referred to in section 51 is liable to a fine not exceeding R10 million, or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment. 40

(2) A fine contemplated in subsection (1)[—

(a) **may not exceed an amount prescribed in terms of legislation regulating maximum fines for criminal offences; and**

(b)] must be determined with due consideration of— 45

[(i)](a) the severity of the offence in terms of its impact, or potential impact, on health, well-being, safety and the environment; [(ii)](b) the monetary or other benefits which accrued to the convicted person through the commission of the offence; and 50

[(iii)](c) the extent of the convicted person’s contribution to the overall pollution load of the area under normal working conditions.”; and

(b) the addition of the following subsection:

“(3) Notwithstanding anything to the contrary in any other law, a magistrate’s court shall have jurisdiction to impose any penalty prescribed by this Act.”.

**Short title and commencement**

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**45.** This Act is called the National Environment Laws Amendment Act, 2008, and comes into effect on a date fixed by the President by proclamation in the *Gazette*.

## SCHEDULE

### *“Part (a): National Legislation*

No and year of law	Short title	Relevant provisions
Act No. 36 of 1947	Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 1947	Section 18(1)(i), in so far as it relates to contraventions of sections 7 and 7bis
Act No. 71 of 1962	Animals Protection Act, 1962	Sections 2(1) and 2A
Act No. 45 of 1965	Atmospheric Pollution Prevention Act, 1965	<b>[Section 9]</b> Sections 7(2)(a) to (d), 9(1)(a) to (c), 14A, 15(1)(a) and (b), 15(2), 17(4), 19(5), 20(11), 23(3), 24(2), 28(3), 29(4), 31(6), 32(2), 34 (4), 37(4), 40(4) and 41(2)
Act No. 63 of 1970	Mountain Catchment Areas Act, 1970	Section 14, in so far as it relates to contraventions of section 3
Act No. 15 of 1973	Hazardous Substances Act, 1973	Section 19(1)(a) and (b), in so far as it relates to contraventions of sections 3 and 3A
Act No. 63 of 1977	Health Act, 1977	Section 27
Act No. 73 of 1980	Dumping at Sea Control Act, 1980	Section 2(1)(a) and (b)
Act No. 6 of 1981	Marine Pollution (Control and Civil Liability) Act, 1981	Section 2(1)
Act No. 43 of 1983	Conservation of <u>Agricultural Resources</u> Act, 1983	Sections 6 and 7
Act No. 2 of 1986	Marine Pollution (Prevention of Pollution from Ships) Act, 1986	Section 3A
Act No. 73 of 1989	Environment Conservation Act, 1989	<b>[Section]</b> Sections 19(1) and 19A read with 29(3), 20(1) and (9) read with section 29(4), 29 (2)(a)[ <b>and (4)</b> ], 31A and 41A read with 29(3)
Act No. 18 of 1998	Marine Living Resources Act, 1998	Section 58(1), in so far as it relates to contraventions of sections 43(2), 45 and 47, and section 58(2), in so far as it relates to contraventions of international conservation and management measures
Act No. 36 of 1998	National Water Act, 1998	Section 151(1)(i) and (j)
<u>Act No. 84 of 1998</u>	<u>National Forests Act</u>	Sections 4(8), 7(1), 10(1), 11(2)(b), 15(1)(a) and (b), 17(3) and (4), 20(3), 21(2), 21(5), 24(8), 63(1)(a), (d), (e) and (f), 63(2)(a) and (b), 63(3) to (5), 64(1) and (2)
<u>Act No. 101 of 1998</u>	<u>National Veld and Forest Fire Act</u>	Sections 10(2), 12(1), 12(2)(b), 12(14)(a), (4), 17(1), 18(1)(a), 18(2), 18(3)(b), 18(4), 18(4)(b), 25(2)(a) to (e), 25(5), (6) and (7)

No and year of law	Short title	Relevant provisions
<u>Act No. 107 of 1998</u>	<u>National Environment Management Act, 1998</u>	Sections 24F(1) and (2), 24G(3), 28(14), 30(11), 31N(1), 31Q and 34A (a), (b) and (c)
<u>Act No. 25 of 1999</u>	<u>National Heritage Resources Act</u>	Sections 27(18) and (22), (23)(b), 28(3), 29(10), 32(13), (15), (16), (17), (19) and (20) 33(1) and (2), 34(1), 35(3), (4), (6) and (7)(a) 36(3), 44(2) and (3), 50(5) and (12) and 51(8)
<u>Act No. 57 of 2003</u>	<u>National Environmental Management: Protected Areas Act</u>	Sections 45(1), 46(1), 47(2), 47(3), 48(1), 50(5), read with sections 89(1), 89(1) (b), (c) and (d) and 50A
<u>Act No. 10 of 2004</u>	<u>National Environmental Management: Biodiversity Act</u>	Sections 57(1) read with 101(1)(a), 65(1) read with 101(1)(a), 67(2) read with 101(1)(a), 71(1) read with 101(1)(a), 81(1)
<u>Act No. 39 of 2004</u>	<u>National Environmental Management: Air Quality Act</u>	Sections 51(10(a) to (h), 51(2) and (3)



*Part (b): Provincial Legislation*

No and year of law	Short title	Relevant provisions
Ordinance No. 8 of 1969	Orange Free State Conservation	Section 40(1)(a) in so far as it relates to contraventions of sections 2(3), 14(2), 15(a), 16(a) and 33
Ordinance No. 9 of 1969	Orange Free State Townships	Section 40(1)(a)(ii)
Ordinance No. 15 of 1974	Natal Nature Conservation	Section 55 in so far as it relates to section 37(1), to section 49 in respect of specially protected game and to section 51 in respect of specially protected game, section 109 in so far as it relates to section 101, to section 102 and to section 104, section 154 in so far as it relates to section 152, section 185 in so far as it relates to section 183, and section 208 in so far as it relates to section 194 and to section 200
Ordinance No. 19 of 1974	<b>[Cape]</b> Nature and Environmental Conservation <u>Ordinance</u>	Section 86(1) in so far as it relates to contraventions of sections <b>[26,]</b> <b>4[4]</b> 1(1)(b)(ii) and (c) to (e), 52(a), 57(a), 58(b) and 62(1)
Ordinance No. 12 of 1983	<b>[Transvaal]</b> <u>Gauteng</u> Nature Conservation	Sections 16A, 17 to 45, <b>[42]</b> , 47, 48, 51, 52, 54, 66, 71 to 78, 79, 80, 81, 83, 84, 85, 87, 88 to 93, 95, 96 <b>[and]</b> 98, 99, 100 and 107
Ordinance No. 15 of 1985	Cape Land Use Planning	Section 46(1) in so far as it relates to sections 23(1) and 39(2)
Ordinance No. 15 of 1986	Transvaal Town Planning and Townships	Sections 42, 93 and 115
Act No. 29 of 1992	KwaZulu Nature Conservation	Section 67 in so far as it relates to sections 59(1), 59(2), 60(1) and 62(1); section 86 in so far as it relates to sections 76, 77 and 82; and section 110 in so far as it relates to section 109
Act No. 5 of 1998	KwaZulu-Natal Planning and Development	Section 48''.

## **MEMORANDUM ON THE OBJECTS OF THE NATIONAL ENVIRONMENT LAWS AMENDMENT BILL, 2008**

### **1. INTRODUCTION**

The Bill seeks to amend a number of laws. The proposed amendments are summarised in paragraphs 1.1 to 1.6 and explained in paragraphs 2.2.1 to 2.2.6.

- 1.1 The Bill provides for increased penalties in respect of the **Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965)**.
- 1.2 The Bill seeks to increase the penalty for offences and seeks to remove the need for the publishing in the *Gazette* of directions issued under the **Environment Conservation Act, 1989 (Act No. 73 of 1989)**. Section 32 of the said Act is also amended by the correction of the reference to the Minister of Water Affairs and Forestry.
- 1.3 The Bill seeks to amend the **National Environment Management Act, 1998 (Act No. 107 of 1998)**, so as to delete the definitions of "Committee" and "Forum"; to repeal the provisions relating to the National Environmental Advisory Forum and Committee for Environmental Co-ordination and replace it with a simpler procedure whereby the Minister may establish fora or advisory committees and to provide for a person who has admitted to having committed an offence to be also subject to the directives of the Minister or the MEC. The Bill proposes new enabling provisions for new criminal offences and the increase of penalties and providing for the jurisdiction of the magistrate's court. The Bill also provides for the removal of the requirement that Environmental Management Inspectors must carry the notices of designation, as well as providing for their increased powers. Sections 31 and 31Q are amended to align their provisions with those of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000). The Bill also seeks to increase the number of Acts and Ordinances to which the powers of the court will apply upon conviction of an offence under these Acts and Ordinances, as well giving the court the power to order that the remediation should be undertaken by the convicted person instead of the state.
- 1.4 The Bill seeks to amend the **National Environmental Management: Protected Area Act, 2003 (Act No. 57 of 2003)**, so as to provide for the ownership and control over animal species occurring in and escaping from protected areas; to extend the right to expropriate servitudes to privately held rights; to increase penalties; and to provide for increased fines.
- 1.5 In respect of the **National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004)**, the Bill makes provision to allow for general surveillance; to align the factors to be taken into consideration with other Acts; that the release of genetically modified organism into the environment requires a full environmental impact assessment; to allow for notification requirements before engaging in the discovery phase of biosprospecting of indigenous biological resources; to expand the definition of "indigenous" to include "specific individuals"; for the Director-General to have the right to appoint a Trustee to administer the Biodiversity Trust fund; and to provide for the renewal and amendment of permits and to increase penalties.
- 1.6 The Bill provides, in respect of the **National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)**, for the review of licences only on payment of processing fees; to include juristic persons when considering whether a director or manager is a fit and proper person; and to provide for increase penalties.

## 2. BACKGROUND AND DISCUSSION

### 2.1 *Atmospheric Pollution Prevention Act, 1956*

#### **Clause 1: Amendment of section 46**

To be consistent with all the other Acts forming part of the amendment, the amount of a fine or imprisonment has been increased.

### 2.2 *Environment Conservation Act, 1989*

#### **Clause 2: Amendment of section 29**

The amount of fines or imprisonment has been increased so as not to limit it to the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), which has not caught up with inflation or the seriousness of the offence.

#### **Clause 3: Amendment of section 32**

At present all directions issued by the applicable Ministers must be published in the *Gazette*. This places an onerous burden on the State and if not carried out will result in the directive being invalid and as such could affect current directives. The amendment seeks to do away with this requirement.

### 2.3 *National Environment Management Act, 1998*

#### **Clause 4: Amendment of section 1**

This amendment is consequential to the amendments proposed in clauses 5 and 6.

#### **Clause 5: Amendment of section 3**

The section dealing with the National Environmental Advisory Forum and Committee for Environmental Co-ordination has been deleted to be in alignment with the new section 3A.

#### **Clause 6: New section 3A**

The Bill now provides for an easier method for the Minister to establish fora and committees as the present set up is cumbersome.

#### **Clauses 7, 8, 9, 10 and 11: Amendment of sections 11, 13, 15, 16 and 22**

These sections of the National Environment Management Act, 1998 (the Act), have been amended to delete all references to the Committee for Environmental Co-ordination as a result of the proposed amendments in clauses 4 and 5.

#### **Clause 12: Amendment of section 28**

This section requires the Director-General or the provincial head of a department to take remedial measures itself to remedy a situation where damage was caused to the environment by pollution or degradation and the person failed to do so. This put a heavy financial burden on the State or province to carry out the necessary remedial works. This has now been rectified by providing that the Director-General or province can apply to the courts for appropriate relief. However, the costs must be claimed and recovered before being recovered as contemplated herein.

This section was held by a recent court judgment not to be retrospective and only applied in respect of any pollution or degradation to the environment from the date the Act came into operation. There was also no provision making the unlawful or intentional act or omission which caused, causes or likely to cause pollution or degradation of the environment an offence.

The proposed amendments seek to remedy the above.

#### **Clause 13: Amendment of section 30**

As the Act reads at present, there was only a moral duty to report emergency incidents. This has now been rectified by making it a criminal offence, carrying a fine of one hundred thousand rand or imprisonment of up to 10 years upon conviction.

**Clause 14: Amendment of section 31**

The Bill seeks to delete certain provisions that now falls under the Promotion of Access to Information Act, 2000.

**Clause 15: Amendment of section 31F**

An environment management inspector is forced to carry with him at all times both his or her identity card, as well as the letter of designation. This has practical implications if inspectors do not have their letter of designation with them. It is the opinion that an identity card was sufficient.

**Clause 16: Amendment of section 31H**

Environment management inspectors do not have the right to take photographs or audio-visual recordings during routine investigations. This causes practical problems which the amendment seeks to remedy.

**Clause 17: Amendment of section 31K**

At present environmental management inspectors cannot conduct routine inspections or search a motor vehicle during such an inspection. The amendment now gives them these powers.

**Clause 18: Amendment of section 31N**

At present non-compliance reports are reported to the Minister or the MEC. As this is a purely administrative rather than an executive function, this can be carried out by the Director-General or Head of Department concerned. Further, it is felt that it is not necessary to report the matter to the Director of Public Prosecutions as this is against public policy and the Public Service Commission Code of Conduct.

**Clause 19: Amendment of section 31Q**

In order to give some form of protection to persons who must disclose information on the environment, new provisions have been included to indicate the type of information that may be disclosed.

**Clause 20: Amendment of section 34**

The current section does not provide for the court to order the convicted person to undertake remedial action. This places a heavy financial burden on the Department if it undertakes the necessary measures, as the cost is invariable not budgeted for and the chances of recovery are sometimes at risk. The amendment seeks to rectify this.

**Clause 21: Insertion of Clause 34H**

Fines were previously limited to the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), which translated to a maximum of R300 000. As the amount of fines under this Act has been increased, this amendment seeks to allow the magistrates' court to have jurisdiction instead of the High Court.

**Clause 22: Amendment of Schedule 3**

Schedule 3 to the Act relating to applicable offences has been updated and now includes other Acts and Ordinances.

**2.4 National Environment Management: Protected Areas Act, 2003****Clause 23: Insertion of section 49A**

The National Environment Management: Protected Areas Act, 2003 (in paragraph 2.4 referred to as "the Act") has no empowering section providing for animals occurring in protected areas where private ownership cannot be proved. The proposed amendments now give ownership in trust to the State. It will also be the State's responsibility to manage escaped animals. This section further provides that a person who becomes aware of an escaped animal is obliged to report this, failing which it will be an offence. Further, the section allows a person to kill an animal if human life is at stake, while exempting the management of authority from liability, except if negligent or acted intentionally.

**Clause 24: Amendment of section 82**

Currently the Act only allows the Minister to expropriate a servitude but excludes a privately held right in State land. This is now rectified to include privately held rights to State land.

**Clause 25: Amendment of section 88**

The amount of fines or imprisonment for contravention of a regulation has been increased so as not to limit it to the Adjustment of Fines Act, 1991, which has not caught up with inflation or the seriousness of the offence.

**Clause 26: Amendment of section 89**

This section has been amended to provide for new offences and to increase the amount of fines or imprisonment so as not to limit it to the Adjustment of Fines Act, 1991, which has not caught up with inflation or the seriousness of the offence.

It is also proposed that a contravention of a regulation is an offence and that the magistrates court will have jurisdiction, instead of the High Court.

**2.5 National Environment Management: Biodiversity Act, 2004****Clause 27: Amendment of section 11**

Monitoring by the South African National Biodiversity Institute should be such that it can identify unforeseen genetically modified organisms. In order to assist the Institute to exercise that function effectively it is proposed that this section be amended to allow for general surveillance and reporting on all categories of genetically modified organism.

**Clause 28: Amendment of section 45**

As this section presently reads, the National Environmental Management Act, 2004 (in paragraph 2.5 referred to as “the Act”) is forced to be compliant to subordinate Acts. The proposed amendment seeks to corrects this.

**Clause 29: Amendment of section 57**

The section does not empower Minister to give exemption for any restricted activity. A new provision has been added to correct this.

**Clause 30: Amendment of section 58**

The purpose of this section is to allow for the amendment or repeal of certain notices. This has now been extended to include the new notice to be issued under section 57(4).

**Clause 31: Amendment of section 78**

It is essential that when genetically modified organisms are released into the environment that a full environmental impact assessment be carried out. The section has been amended to provide for this.

**Clause 32: Amendment of section 81**

The amendment to section 81 of the Act is necessitated by the insertion of a new section 81A (see clause 33 below).

**Clause 33: Insertion of section 81A**

At present the Act does not require notification requirements when a person engages in the discovery phase of bioprospecting indigenous biological resources. The present process results in unnecessary delays in the discovery phase and could create unjustified expectations. The amendment is to make provision for this by now providing for notification requirements.

**Clause 34: Amendment of section 82**

The present wording of this section does not take into account traditional knowledge of indigenous biological resources known only to specific individuals. This section has now been amended to provide for this.

**Clause 35: Amendment of section 85**

At present the Bioprospecting Trust Fund is administered by the Director-General. As this is an administrative burden, this could be managed by a trustee falling within the Trust Property Act, 1998 (Act No. 57 of 1998). An option is now provided for the Director-General to have this discretion. The Director-General still retains accountability for the money in the Fund.

**Clause 36: Amendment of section 86**

This section has been amended to give the Minister powers to exempt certain categories of research involving indigenous biological resources and commercial exploitation.

**Clause 37: Amendment of section 92**

The present cross-reference is incorrect and has been amended accordingly.

**Clause 38: Insertion of section 93A**

The Act does not provide for the renewal and amendment of permits. This has created administrative problems and the amendment seeks to address this shortcoming.

**Clause 39: Amendment of section 97**

This section is at present restrictive to the implementation and enforcement of an international agreement and has now been made applicable to all species to which the agreement applies.

Further, provision has been made that regulations relating to the “hunting industry” can be made and for the requirements of notification in respect of the new section 81A.

**Clause 40: Amendment of section 98**

In line with amendments proposed to other laws, the amount of a fine and period of imprisonment has been increased for contravention of a regulation.

**Clause 41: Amendment of section 102**

The amount of a fine (and period of imprisonment) has been amended so as not to limit it to the Adjustment of Fines Act, 1991, which is below this limit. The section has also been amended to allow the magistrates’ court to have jurisdiction.

**2.6 National Environment Management: Air Quality Act, 2004****Clause 42: Amendment of section 45**

At present there is no provision for the payment of a prescribed processing fee where a licence must undergo a periodic review. As this is the accepted norm, the amendment seeks to remedy this.

**Clause 43: Amendment of section 49**

The present wording of the section excludes reference to a “juristic person”, which was excluded per error. It is important to have it included as its members may fall within the ambit of the section. This has now been remedied.

**Clause 44: Amendment of section 52**

The amount of a fine has been amended so as not to limit it to the Adjustment of Fines Act, 1991, which is below this limit. The section has also been amended to allow the magistrates’ court to have jurisdiction.

### **3. FINANCIAL IMPLICATIONS FOR STATE**

The Bill does not create further financial liabilities to the State.

### **5. PARLIAMENTARY PROCEDURE**

- 5.1 The State Law Advisers and the Department of Environmental Affairs and Tourism are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 76(1) or (2) of the Constitution since it falls within functional areas listed in Schedule 4 to the Constitution, namely “Environment” and “Nature conservation”.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.