

MEMORANDUM ON THE OBJECTS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL, 2011

1. PURPOSE OF THE BILL

The purpose of the National Environmental Management Laws Amendment Bill, 2011 amends certain provisions under National Environmental Management Act, 1998 (Act No. 107 of 1998), the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004), the National Environment Management Laws Amendment Act, 2009 (Act No. 14 of 2009) and the National Environment Management Laws Amendment Act, 2009 (Act No. 15 of 2009).

2. BACKGROUND

2.1 The National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) is environmental framework legislation which provides for environmental management. Other specific environmental management Acts were promulgated to deal with specific mediums of the environment, namely the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003) (NEM: PAA), the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEM: BA), the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (NEM: AQA), the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008) (NEM: ICM) and the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (NEM: WA).

2.2 The National Environmental Management Laws Amendment Bill, 2011 proposes amendments to certain provisions under NEMA, the NEM: BA and the NEM: AQA. Most of the amendments were identified through the implementation of the legislation and some originated from the Department of Cooperative Governance and Traditional Affairs (COGTA) process of identifying legislation that hampers service delivery.

3. OBJECTS OF THE BILL

3.1. *National Environmental Management Act, 1998*

Clause 1: Amendment of section 1

This amendment seeks to revise certain definitions to provide clarity.

Clause 2: Amendment of section 11

The amendment will change the timeframes for the preparation of environmental implementation plans and environmental management plans from 4 years to 5 years.

Clause 3: Insertion of section 16A

This amendment inserts a new section requiring national department responsible for environmental affairs, provincial departments responsible for environmental affairs and all metropolitan and district municipalities to prepare and publish state of environment reports, within 4 years of coming into operation of the Bill and at least every 4 years thereafter. The amendment further requires the Minister responsible environmental affairs to publish in the *Gazette* the procedure to compile the report, the format of the report and content of the report.

Clause 4: Amendment of section 23

This amendment will insert a new subsection allowing the Minister or MEC, with the concurrence of the Minister, to develop norms and standards for sensitive environmental areas.

Clause 5: Amendment of section 24

This amendment inserts a new subsection which empowers the Minister to restrict or prohibit certain developments in certain geographical areas for a certain period of time on certain conditions.

Clause 6: Amendment of section 24C

This amendment will provide legal clarity on the environmental impact assessment applications that must be considered by the National Department.

A new subsection has been inserted which provides that in instances where the MEC responsible for environmental affairs fails to take a decision within the prescribed timeframes, an applicant for an environmental authorization may approach the Minister to take the decision.

Clause 7: Amendment of section 24F

This amendment will replace the name of the Minister of Minerals and Energy with Minister responsible for mineral resources. The amendment is necessitated by the name change in the Ministry of Mineral Resources.

Clause 8: Amendment of section 24G

This amendment will substitute the former Minister of Minerals and Energy with Minister of Mineral Resources. The amendment will also increase the section 24G administrative fine from R1 Million Rand to R5 Million Rand. This amendment will further provide for an exemption from section 24G administrative fine for a person undertaking a listed activity without an environmental authorisation in emergency response situation.

Clause 9: Amendment of section 24M

This amendment will insert a new subsection reaffirming that no exemptions may be granted from the requirements to obtain an environmental authorisation when intending to undertake a listed activity in terms of section 24 of NEMA.

Clause 10: Amendment of section 28

This amendment will allow for easier implementation of the section 28 directive by the Director-General of environmental affairs, provincial head of Department responsible for environmental affairs as well as an administrative head of any relevant organs of state.

Clause 11: Insertion of section 28A

This amendment will ensure that a person causing detriment or degradation to the environment is criminally liable for his or her actions.

Clause 12: Amendment of section 30

This amendment will clarify that it is an offence for any person that does not comply or inadequately comply with a directive issued in terms of section 30(6) of NEMA.

Clause 13: Amendment of section 31J

This amendment will allow an environmental management inspector to seize, without a warrant, a vehicle, vessel, aircraft or any other transport mechanism which may afford

evidence of the commission or suspected commission of an offence. The amendment will ensure alignment with section 20 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

Clause 14: Amendment of section 44

This amendment will provide the Minister with a legal mandate to develop regulations to control products that may have a detrimental effect on the environment.

Clause 15: Amendment of section 47

This amendment will require the Department to table Environmental Impact Assessment Regulations at Parliament before final publication in the Gazette for information. The amendment is merely to clarify the interpretation of subsection (3).

Clause 16: Amendment of section 47D

This amendment will allow for the use of other mechanisms of delivering documents under the NEMA, namely, by fax or e-mail.

Clause 17: Amendment of section 48

This amendment will reiterate that the NEMA is applicable to the State without any exceptions.

Clause 18: Insertion of section 49A

This amendment will allow authorised staff members of the Department, provincial department responsible for environmental affairs or any relevant organ of state to enter upon private property when performing certain functions under the NEMA or any specific environmental management Act.

Clause 19: General amendment

This is a general amendment necessitated by the name changes in the Ministries of Water Affairs and Forestry and Minerals and Energy. This amendment will update the Ministries name change wherever it appears in the NEMA.

3.2. *National Environmental Management: Biodiversity Act, 2004*

Clause 20: Amendment of section 1 of Act 10 of 2004

This amendment adds a new definition on “amnesty”. The amendment also seeks to revise certain definitions to provide clarity. The revision of the definition of “bio-prospecting”, and “commercialization” will close a regulatory gap in regulating the bio-trading industry. The revision of the definition of “genetic resources” will give national effect to the obligations of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity.

Clause 21: Amendment of section 51

This amendment will clarify that the intention of Chapter 4 is also to ensure that the threatened or protected species (TOPS) are sustainable utilised.

Clause 22: Amendment of section 56

This amendment will provide the Minister with a legal mandate to also regulate those species that are not of high conservation value in order to ensure that their utilization in the ecosystem is sustainable.

Clause 23: Amendment of section 57

This amendment will ensure that permits are required for species to which an international agreement regulating international trade applies. The amendment will also ensure that specimens in transit through the Republic are always accompanied by the necessary documentation.

Clause 24: Amendment of section 58

This amendment will provide the Minister with a legal mandate to, in respect of TOPS, to further categorise when amending notices in terms of section 56(1), 57(2) or 57(4) of NEM: BA.

Clause 25: Amendment of section 60

This amendment will provide the scientific authority with a legal mandate in assisting the Department on the scientific work regarding the regulation of species to which an international agreement on international trade is applicable.

Clause 26: Amendment of section 61

This amendment will provide clarify that the legal mandate of the scientific authority is to make recommendations to the Minister on non-detrimental findings.

Clause 27: Amendment of section 62

This amendment will provide for the Minister with a legal mandate to publish the annual non-detrimental findings in the Gazette on recommendations from the scientific authority. The amendment will also broaden the scope of the non-detrimental findings to international agreement regulating international trade.

Clause 28: Insertion of section 62A

This amendment will provide the Minister with a legal mandate to amend or repeal a notice published in terms of section 62(1) of NEM: BA.

Clause 29: Amendment of section 63

This amendment will require that the non-detrimental findings must first be published for public comments before final publication in the Gazette.

Clause 30: Amendment of section 66

This amendment will allow the Minister to exempt any person from the risk assessment requirements (section 65(2)).

Clause 31: Amendment of section 71

This amendment will provide the Minister with a legal mandate to exempt a person subject to certain conditions from permit and risks assessment requirements (section 71(1) or (2)).

Clause 32: Insertion of section 71A

This amendment will provide the Minister with a legal mandate to prohibit the carrying out of certain restricted activities involving certain listed invasive species.

Clause 33: Amendment of section 72

This amendment will provide the Minister and MEC with a legal mandate to amend or repeal a notice in terms of section of sections 70(1), 71(3), or 71A(1).

Clause 34: Amendment of section 79

This amendment will require notices to exempt or prohibit invasive species to be published for public comments before final publication in the Gazette.

Clause 35: Amendment of section 80

This amendment will provide the Department with the legal mandate to ensure proper regulation of bioprospecting involving indigenous genetic and/or biological resources.

Clause 36: Amendment of section 85

This amendment will allow changing the current provisions to allow the Department to keep all moneys arising from bioprospecting agreements in a separate Bioprospecting Fund for the benefit of communities. The amendment will also allow communities with established trust accounts to receive benefits from the permit holder (bioprospector).

Clause 37: Amendment of section 86

This amendment will provide the Minister with a legal mandate to exempt persons using indigenous biological resources for domestic use or subsistence purposes from the provisions of Chapter 6. The amendment will also provide the Minister with a legal mandate to exempt certain categories of commercial or industrial exploitation of indigenous biological resources from the provisions of sections 82 and 84 of NEM: BA (Benefit-sharing and Material transfer agreements).

Clause 38: Amendment of section 87

This amendment will ensure that permits are required for species to which an international agreement regulating international trade applies.

Clause 39: Amendment of section 91

This is a consequential amendment as a result of the exemption notices that the Minister may publish in terms of sections 65(2) and 71(2). The amendment will ensure proper cross-referencing.

Clause 40: Amendment of section 94

This amendment will repeal the appeals provision under the NEM: BA and appeals under the NEM: BA will be processed in terms of section 43 of NEMA. The amendment will ensure a single and aligned appeal process under section 43 of NEMA.

Clause 41: Amendment of section 95

This amendment will repeal the appeals provision under the Act and appeals under the Act will be processed in terms of section 43 of NEMA. The amendment will ensure a single and aligned appeal process under section 43 of NEMA.

Clause 42: Amendment of section 96

This amendment will repeal the appeals provision under the Act and appeals under the Act will be processed in terms of section 43 of NEMA. The amendment will ensure a single and aligned appeal process under section 43 of NEMA.

Clause 43: Amendment of section 97

This amendment will correct cross referencing within NEM: BA. The amendment will also provide the Minister with a legal mandate to develop regulations on self-administration within the wildlife industry; to control and eradicate invasive species; and on system for the registration of institutions, ranching operations, nurseries, captive breeding operations and other facilities. The amendment will further repeal references to the repealed appeal provisions.

Clause 44: Amendment of section 98

This amendment will delete references to the repealed appeal provisions. The amendment will also provide the Minister with a legal mandate to differentiate between the penalties for the contravention of the different provisions in the regulations made in terms of section 97 of NEM: BA.

Clause 45: Amendment of section 101

This amendment will make it an offence for any person to engage in bioprospecting discovery phase without proper notification to the Minister. The amendment will also make it an offence

for any person who is involved in an illegal restricted activity but who does not physically carry out the restricted activity.

Clause 46: Amendment of section 102

This amendment will ensure that heavy penalties are imposed against large national and multinational industries found guilty of bioprospecting related offences. The amendment will also ensure the imposition of a fine equivalent to the recovery costs associated with the control and eradication of invasive species.

Clause 47: Insertion of section 105A

This amendment will insert a new section providing the Minister with a legal mandate to declare an emergency intervention for the control or eradication of alien species or listed invasive species, if the Minister is satisfied that species constitutes a significant threat to the environment.

Clause 48: Insertion of section 105B

This amendment will insert a new section providing the Minister with a legal mandate to declare amnesty from prosecution for the purposes of facilitating compliance with the provisions of NEM: BA.

Clause 49: General amendment

This amendment will replace the “bio-prospecting trust fund” with the “bio-prospecting fund” wherever it appears in the Act.

3.3. *National Environmental Management: Air Quality Act, 2004*

Clause 50: Amendment of section 55 of Act 39 of 2004

This amendment will adjust penalties that may be imposed in terms of any regulations developed under the Act. The amendment will ensure that penalties are in line with penalties imposed in terms of other specific environmental management Act.

3.4. *National Environment Management Laws Amendment Act, 2009*

Clause 51: Amendment of Short title of Act 14 of 2009

This amendment will rectify the incorrect citation of the National Environment Management Laws Amendment Act, 2009 (Act No. 14 of 2009).

3.5. *National Environment Management Laws Amendment Act, 2009*

Clause 52: Amendment of Short title of Act 15 of 2009

This amendment will rectify the incorrect citation of the National Environment Management Laws Amendment Act, 2009 (Act No. 15 of 2009).

4. DEPARTMENTS / BODIES / PERSONS CONSULTED

The national Departments were consulted Agriculture, Forestry and Fisheries, Cooperative Governance and Traditional Affairs, Defence and Military Veterans, Energy, Health, Human Settlements, Labour, Mineral Resources, Rural Development and Land Reform, Trade and Industry, Transport and Water Affairs. These Departments are identified in schedules 1 and 2 to NEMA as national Departments exercising functions which may affect the environment or that involve the management of the environment.

5. IMPLICATIONS FOR PROVINCES

All provincial environmental affairs departments.

6. FINANCIAL IMPLICATIONS FOR STATE

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

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Environmental Affairs 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”.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this 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 custom of traditional communities.