

EIA Regulations and EA Validity Period Explanatory Document

2018

A. Background

The 2014 EIA Regulations provide for the date by which certain authorised listed and / or specified activities must be completed. This explanatory document attempts to explain this provision in some detail. Should the reader, after consulting this document, have any further queries in this regard, such can be forwarded to ig@environment.gov.za.

B. Legal Provisions

The 2014 EIA Regulations provide as follows:

Table 1:

Regulation 26(d)(ii):	An environmental authorisation must specify the conditions subject to which the activity may be undertaken, including conditions determining— a distinction between the portions of the environmental authorisation that deal with operational and non-operational aspects respectively and the respective periods for which the distinct portions of the environmental authorisation is granted, where the environmental authorisation contains operational and non-operational aspects;
Regulation 27(3):	Where an environmental authorisation granted in terms of these Regulations does not include operational aspects and the activity has been commenced with, the period for which such environmental authorisation is granted may only be extended for a maximum further period of 5 years.
Regulation 34(1):	The holder of an environmental authorisation must, for the period during which the environmental authorisation and EMPr, and where applicable the closure plan, remain valid— (a) ensure that the compliance with the conditions of the environmental authorisation and the EMPr, and where applicable the closure plan, is audited; and (b) submit an environmental audit report to the relevant competent authority.
Regulation 54A(3):	Where an environmental authorisation issued in terms of the ECA regulations or the previous NEMA regulations is still in effect by 8 December 2014, the EMPr associated with such environmental authorisation is subject to the requirements contained in Part 3 of Chapter 5 of these Regulations and the first environmental audit report must be submitted to the competent authority no later than 7 December 2019 and at least every 5 years thereafter for the period during which such environmental authorisation is still in effect.

Appendix 1: Paragraph 3(1)(q)	<p>A basic assessment report must contain the information that is necessary for the competent authority to consider and come to a decision on the application, and must include—</p> <p>where the proposed activity does not include operational aspects, the period for which the environmental authorisation is required, the date on which the activity will be concluded, and the post construction monitoring requirements finalised.</p>
Appendix 1: Paragraph 3(1)(r)	<p>An environmental impact assessment report must contain the information that is necessary for the competent authority to consider and come to a decision on the application, and must include—</p> <p>where the proposed activity does not include operational aspects, the period for which the environmental authorisation is required and the date on which the activity will be concluded and the post construction monitoring requirements finalised.</p>

C. Explanation

The 2014 EIA Regulations, as amended ¹ provide, since 7 April 2017, for one period, namely the date by which authorised activity(ies) must be completed. **Prior to the 2017 amendments, the 2014 EIA Regulations**, provided for two (2) different periods:

- the date the authorised activity(ies) must commence; and
- the date by which certain authorised activity(ies) must be completed.

The reference to a date of commencement (e.g. authorised activity must commence within 7 years of date of signature of the EA) has been deleted since 7 April 2017.

The implication of the validity period on the EA is that the EA has a limited lifespan. The rationale for this amendment is that the assessment, based on which an environmental authorisation (EA) is issued, would have considered the life span of the proposed activity and would have considered the authorisation in the context of such life span. It is assumed that activities authorised by means of EA will be commenced with as soon as practically possible. There is no need to force the holder of the EA to commence, but rather to conclude the proposed activities, within a prescribed timeframe.

¹ GNR 326, Government Gazette 40772, Pretoria, 07 April 2017
ENVIRONMENTAL AUTHORISATION VALIDITY PERIOD EXPLANATORY DOCUMENT

Explaining the validity period (period for which environmental authorisation is granted):

Application / EA content	Validity period applicable to EA, BAR, EIAR?
With operational component only	No
With no operational component	Yes
With both	Yes, for non-operational parts only

The need to include a validity period in the relevant reports and subsequent EA, if issued, is a legal requirement and applicants / competent authorities cannot elect not to include such a validity period. The validity period put forward by the applicant must be based on proposed development timeframes as planned for by the applicant.

Competent authorities must inform applicants of the requirement to include a validity period in relevant reports when providing assistance to applicants and when providing comments on draft reports. In the absence of a validity period, the competent authority may need to advise the applicant that the report does not meet the requirements of the EIA Regulations, including possible consequences of failure to include this period (e.g. the competent authority to decide the period).

D. Frequently Asked Questions

Scenario 1: The validity period of the EA lapses before the authorised development is finished. What now?	<ul style="list-style-type: none"> • The EA lapses, including its conditions and associated EMPr. • The 'continuation' of such a development without a valid environmental authorisation is an offence as he /she unlawfully commenced with a listed activity (activity 32 of LN 1). • In order to avoid unlawfulness, an application for amendment of the EA can be submitted by following a Part 2 amendment process, provided that the EA is still valid at the time of submitting the application. Where an environmental authorisation granted in terms of these Regulations does not include operational aspects and the activity has been commenced with, such an EA may be extended for a maximum period of 5 years [Regulation 27(3)]. • If the EA has lapsed, an application for environmental authorisation for activity 32 of LN1 can be submitted (where the continued development meets the threshold of any activity or activities listed in LN 1, LN2 or LN 3). Activity 32 of Ln 1 lists the following: <i>The continuation of any development where the environmental authorisation has lapsed and where the continuation of the development, after the date the environmental authorisation has lapsed, will meet the threshold of any activity or activities listed in this Notice, Listing Notice 2 of 2014 or Listing Notice 3 of 2014</i>".
Scenario 2: The validity period does not seem to make sense as most developments have an	<p>Where the identified activity requiring environmental authorisation specifically includes the term 'and related operation', it has an operational component, and the requirement for a validity period is not relevant.</p>

operational component. How do I determine for which listed and specified activities the operational component apply and do not apply?	Only when the activity includes such an operational component, the relevant basic assessment report, environmental impact assessment report, the environmental authorisation (including any conditions thereto) and the EMPr can include aspects regarding the operation scope of the activity/ies e.g. mitigation actions for the operational phase.
Scenario 3: Can the validity period provided for in an environmental authorisation be amended (shortened or extended)?	<p>Yes</p> <p>A Part 2 amendment must be followed [Regulation 26(d)(ii)]: provided that the EA is still valid at time of submitting the application. If the EA is no longer valid, the EA cannot be amended. If the EA has already been extended for 5 years and lapses, application for activity 32 of LN1 can be submitted</p> <p>A Part 1 amendment application is not possible.</p> <p>Where an environmental authorisation granted in terms of these Regulations does not include operational aspects and the activity has been commenced with, such an EA may be extended for a maximum period of 5 years [Regulation 27(3)].</p>
Scenario 4: An EA contains a commencement period, i.e. a period within which the authorised activity/ies must be commenced with. Can this commencement period be amended?	<p>Yes</p> <p>A Part 1 or Part 2 amendment process, for an amendment of the condition, can be used, depending on the specifics of the case at hand. In most cases a Part 1 amendment is likely to be adequate, but some scenarios may require a Part 2 amendment process as it may be deemed to be a change of scope (e.g. the surrounding environment has changed significantly and it has been 20 years since EA was issued).</p>

Other Scenarios	Responsibility of applicant	Responsibility of CA
<p>Reports and EMPRs for activities without an operational component submitted to CAs exceed the scope of the identified activity by the inclusion of operational aspects. What now?</p> <p>Example: An application is submitted for the development of a shopping centre on land previously used for agricultural purposes where the only activity triggered is activity 28 of LN1. The bulk of the information contained in the reports focuses on the operational aspect of the shopping centre (e.g. lighting, shopping hours and waste management). What can a</p>	<p>Must refrain from including operational aspects in Basic Assessment Reports. Environmental Impact Assessment Reports and EMPRs for activities not containing the words “and related operation”.</p>	<p>Must refrain from including operational aspects in EAs.</p> <p>Must, when commenting on reports, inform the applicant of the relevant requirements of the EIA Regulations, including to inform the applicant should their application and reports go beyond the scope of the activity/ies applied for.</p> <p>Must decide an application by remaining with the scope of activity/ies.</p> <p>Must take note that section 24E of NEMA requires that every EA must ensure that adequate provision is made for the ongoing management and monitoring of impacts of the activity on the environment throughout the life</p>

competent authority do in such events?		cycle of the activity. The life cycle of the activity is determined by the scope of the activity. If the activity requires EA for development only, the development phase is the scope of the activity. If the activity requires EA for development and operation, the development and operational phases make up the scope of the activity.
Many applications for environmental authorisation would include activities with and some without an operational component. It is very complicated to draft reports, EMPs and environmental authorisations making provision for both scenarios. How can applicants, EAPs and competent authorities deal with this difficult task?	<p>Must clearly distinguish between activities with and without an operational component.</p> <p>The EMP may e.g. have two separate sections:</p> <ul style="list-style-type: none"> ✓ Section A: Mitigation actions and outcomes for activities with an operational component; and ✓ Section B: Mitigation actions and outcomes for activities without an operational component. 	<p>Must clearly distinguish within environmental authorisations between activities with and those without an operational component.</p> <p>The EA could have two separate sections:</p> <ul style="list-style-type: none"> ✓ Section 1: Activities with an operational component and relevant conditions; and ✓ Section 2: Activities without an operational component and relevant conditions including validity period or periods.
Where must validity periods be communicated?	Must include a validity period in an application and relevant reports for activities without an operational component.	Must include a validity period in an EA for activities without an operational component.

E. Validity period applicability to identified activities

Listing Notice 1									
1	9	11	12	13	15	17	18	19	19A
22	23	24	26	27	28	29	30	31	32
34	35	36	44	45	47	50	52	54	55
56	61	62	63	64	66				
67, but only where an operational component does not apply as per the development and expansion listed activities above (and where relevant as per LN 2).									

Listing Notice 2									
1	6	8	9	11	12	13	15	16	23
24	26	27							

Listing Notice 3									
1	2	3	4	5	6	7	11	12	14
15	16	17	18	19	21	23			
26, but only where an operational component does not apply as per the development and expansion listed activities above.									