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International Association for Impact Assessment South Africa

Comment on the Draft Environmental Impact Assessment Regulations, 2014 & Listings Notices 1 - 4 in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998)

29 September 2014

The Director-General
Department of Environmental of Affairs
Private Bag X447
Pretoria
0001

Attention: Mr Neo Nkotsoe
Email: NNkotsoe@nvironment.gov.za

Dear Sir,

The South African Affiliate of the International Association for Impact Assessment (IAIAsa) is a voluntary association comprised of members active in the consulting, government, industry and academic sectors of Integrated Environmental Management (IEM).

With reference to the **Draft Environmental Impact Assessment Regulations, 2014 and Listings Notices 1 - 4 in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998)** that were gazetted on 29 August 2014, IAIAsa would like to comment on behalf of its members as follows:

1. Environmental Impact Assessment ("EIA") Regulations, 2014

1.1. General comments

1.1.1. Many of our members are environmental assessment practitioners and specialists with extensive experience in environmental impact assessment and other environmental management tools. They, through direct application of assessment processes and interaction with applicants, interested and affected parties, competent authorities and other organs of state, have an extremely good idea of what practically works and can work and what is unlikely to work. Thus, ignoring these well considered comments from key role players regarding the implementation of the EIA Regulations would be extremely short-sighted and will undoubtedly result in impracticable regulations that do not fulfil Section 24 of the Constitution, and Sections 2, 23 and 24 of NEMA.

1.1.2. While we welcome the fact that mining activities are finally being brought under "One Environmental System", we are concerned that the concessions that have been made to the Department of Mineral Resources in doing so, make negative inroads on best practice that has developed over the past 17 years since EIA Regulations were first published under the Environment Conservation Act on 5 September 1997.

1.1.3. The most prevalent concerns raised by our members pertain to the prescribed maximum time periods allowed for the basic assessment process and scoping and environmental impact reporting ("S&EIR") process which, based on their extensive experience, are considered to be too short to allow for adequate investigation, assessment and consideration of the potential consequences for or impacts on the environment, particularly sensitive environments, and adequate opportunity for public comment.

1.1.4. Thus, we contend in so far as the inadequacy of these prescribed timeframes, the regulations are inconsistent with the Section 2 principles of NEMA, in particular:

Section 2(4)(f): "*The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured*".

Section 2(4)(i): "*The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment*".

Section 2(4)(r): "*Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure*".

1.1.5. We also contend that these prescribed timeframes are inconsistent with section 23(2) of NEMA which sets out the general objective of integrated environmental management to include the following:

(c) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;

(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment"

1.1.6. We also contend that these prescribed timeframes are inconsistent with section 24(4)(a) and (b) of NEMA which prescribes the requirements for the "procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment", and with section of 3(1) of Appendix 3 of the draft EIA Regulations which themselves require the environmental impact assessment process to "*comprehensively*" assess and quantify "*environmental impacts, mitigation and closure outcomes as well as the residual risks of the proposed activity*".

1.1.7. In fact, the question has to be asked why the legislature feels the need to prescribe maximum time periods for submission of reports instead of prescribing minimum periods that would allow for adequate investigation, assessment and consultation of environmental impacts.

1.1.8. We acknowledge that regulations 19(1)(b) and 23(1)(b) allow for limited extension periods. We also acknowledge that further provision for extensions is made in regulation 3(7). However, as currently worded, regulation 3(7) is discretionary and not peremptory if the criteria contained therein are met. Practically what is likely to happen if longer timeframes are not provided for in the regulations, or if no other mechanism is provided to stay a process, the competent authorities are going to be inundated by regulation 3(7) applications for extensions, and if these applications are refused, by repetitive submission of applications which will frustrate the administrative process further.

1.1.9. We are also concerned that the date of "receipt" of an application is used to trigger the respective time periods in the regulations. It is recommended that the date of "acknowledgement of receipt" is used as the date from which time periods are calculated as the date of receipt as currently defined in regulation 1(1) is not readily available to the applicant until acknowledgement is provided.

1.1.10. Comments on specific regulations are provided below.

1.2. Interpretation

1.2.1. **Regulation 1(1):** it is recommended that the phrase "*prepared by an external independent person with the relevant expertise*" which is part of the meaning assigned to "**environmental audit report**", be replaced with "*prepared by a person with the relevant expertise*". This is to allow the competent authority the discretion provided for under regulation 26(1) to determine the level of expertise and independence required for a particular activity depending on nature, scale and sensitivity of the receiving environment.

1.2.2. Further the reach of an "**environmental audit report**" as currently defined is considered too wide and is inconsistent with Regulation 32(3) and (5) and Appendix 7 which restrict such an audit to the provisions of environmental authorisation, EMPr and where applicable, the closure plan.

1.2.3. **Regulation 1(1):** it is recommended that a definition for "**minimum requirements**", as referred to in regulation 16(3) paragraph (a) and 17(1) paragraph (c), is included under regulation 1(1) in order to provide certainty to applicants, Environmental Assessment Practitioners ("EAPs") and competent authorities as to which minimum requirements must be taken into account and how these relate to minimum requirements and other related concepts and terminology referred to in Section 24 of NEMA.

1.2.4. **Regulation 1(1):** it is recommended that a definition for "**minimum information requirements**", as referred to in regulation 10(b) and 18, is included under regulation 1(1), if there is a difference in meaning to the term "**minimum requirements**". If there is no difference in meaning, then it is recommended that there is consistent use of one or the other phrase and that it be defined under regulation 1(1).

1.2.5. **Regulation 1(1):** it is recommended that a definition for "**public participation process**" as referred to in sub regulation 3(8) is included under regulation 1(1) in order to provide legal certainty to applicants, Environmental Assessment Practitioners ("EAPs") and competent authorities as to whether a public participation process as referred to in other regulations that follow means the entire process collectively or whether, for example, notification of the application or the opportunity for comment on a report can be interpreted as processes in their own right. This has significant bearing on the timeframes that are being imposed.

1.3. Timeframes

1.3.1. **Regulation 3(4):** the requirement for State departments to submit their comments

within 30 days from the date they are requested to submit comments is wholly supported as currently many assessments are delayed due to outstanding comment from State departments.

1.3.2. **Regulation 3(6):** the requirement for the competent authority to "*acknowledge receipt of all applications .... contemplated in regulations 16..... within seven days of receipt thereof*" is inconsistent with the prescribed maximum period of ten days in **regulation 17(2)** in so far as it overlaps with acknowledging receipt.

1.3.3. **Regulation 3(7):** it is recommended that "may" is replaced with "must" in the following provision to ensure that where the specified criteria are met, the timeframes are adjusted to allow for due process and not left to the discretion of the competent authority:

"(7) In the event where the scope of work must be expanded based on the outcome of an assessment done in accordance with these Regulations, which outcome could not be anticipated prior to the undertaking of the assessment, or in the event where the applicant can demonstrate exceptional circumstances, the competent authority must ~~may~~, prior to the lapsing of the relevant prescribed timeframe, in writing, extend the relevant prescribed timeframe and agree with the applicant on the length of such extension".

1.3.4. It is further recommended that in relation to **regulation 3(7)**, a provision is also inserted to make clear that such an extension is in addition to the extension of time provided for in regulations 19(1) and 23(1)(b).

1.4. Notification of decision on application

1.4.1. **Regulation 4(2):** it is recommended that this regulation be amended as follows: "The applicant, must in writing, within eight days of the date ~~of the decision on the application~~, on which the applicant receives the decision on the application ....". This will avoid the very likely scenario of the applicant only having three days to notify all registered and affected parties of the decision if the competent authority takes the full five days to provide the applicant with the decision allowed for in regulation 4(1) or the applicant not being able to comply with regulation 4(2) at all if the competent authority takes longer than eight days to provide the applicant with the decision. It is our member's experience that it is not uncommon for an applicant to be sent a decision weeks after it has been signed by the competent authority.

1.5. Consultation between competent authority and State departments administering a law relating to a matter affecting the environment

1.5.1. **Regulation 7(2):** it is recommended that the wording is amended to resolve the uncertainty created in Regulation 7(2) regarding the nature and extent of the

responsibility to consult with every such State department on the part of EAPs and the competent authority and that such amendment is consistent with the relevant provisions of Section 24 of NEMA. This same comment applies to **regulation 46(2).**

1.5.2. **Regulation 7(4):** it is recommended that the alignment of application processes to run concurrently is not prescribed but left to the discretion of the applicant and according to the agreement of the competent authority and any other authority as provided for in Section 24L of NEMA, particularly in view of the timeframes that are imposed in the EIA regulations which do not necessarily bind authorities other than the competent authority. This comment also applies to **regulation 17(3).**

1.6. Guidance by competent authority to applicant

1.6.1. **Regulation 8(4):** IAIAsa objects to the power granted to the competent authority to charge a fee for advice or instructions which should be implicit duties of State, especially when application fees are already being charged.

1.7. Decision on basic assessment application

1.7.1. **Regulation 20** only allows for the granting or refusal of environmental authorisation and does not provide the competent authority the discretion to request additional information after receipt of the basic assessment report and EMPr, or where relevant the closure plan, and before making a decision. Thus, if insufficient information is submitted or a formal step omitted, which could easily and quickly be remedied, there is no provision that allows for this remedy. It will in all likelihood result in the whole costly and lengthy application process having to be repeated, thereby frustrating what we understand to be the legislature's attempt to streamline the EIA process. It is thus recommended that a mechanism be provided for in the regulations to allow for timeframes to be put on hold and for the competent authority to be given the power to direct for certain steps or information to be provided within specified timeframes to allow it to properly consider the application.

1.8. Submission of scoping report to competent authority

1.8.1. **Regulation 21(1):** The prescribed maximum 44 day period within which to satisfy Regulation 44 (as required in Appendix 2 which sets out the process for Scoping and content of the Scoping Report); prepare a Scoping Report (again, as per Appendix 2); subject the Scoping Report "to a public participation process of at least 30 days"; and then to incorporate "the comments received" is simply unachievable.

1.8.2. Further, the Scoping Report that is submitted to the competent authority must incorporate "the comments of the competent authority". This is consistent with the provisions in regulation 43(1) which requires the "*public participation process .....*

must give all potential or registered and affected parties, including the competent authority, a 30 day opportunity to comment". However, nowhere in the regulations does it make it mandatory for the competent authority to comment nor does it specify what it must comment on. If the competent authority fails to provide comment, can it raise the failure to provide certain information as a reason to refuse environmental authorisation when it considers the application upon submission? The regulations give no guidance as to this comment process by the competent authority.

1.8.3. **Regulation 21(2)** does not make immediate sense and is likely to cause interpretation problems in its application for the simple reason that the only obvious way a scoping report can be accepted is if it is submitted to competent authority for consideration as provided for in regulation 22. If this is the case, then there is no way that an applicant can avoid the submission requirements set out in regulation 21(1).

1.9. Consideration of scoping report

1.9.1. **Regulation 22(1):** As per the comment on Regulation 20, Regulation 22(1) only allows for the granting or refusal of environmental authorisation and does not provide the competent authority the discretion to request additional information before making a decision, granted that 22(1)(a) does allow for the scoping report to be accepted with conditions. Whether this allows for any inadequacies in the scoping report to be remedied without the application for environmental authorisation being refused, is unclear.

1.9.2. **Regulation 22(1)(b):** it is recommended that inclusion of non-compliance to "the policy directives of government" as a grounds for refusal of environmental authorisation be deleted. By its very nature, policy is not law and has to allow for a degree of discretion in its application. It is also not clear why this provision only applies to scoping reports and not other submissions.

1.10. Decision on S&EIR application

1.10.1. **Regulation 24(1):** As per the comment on regulations 20 and 22(1), regulation 24(1) only allows for the granting or refusal of environmental authorisation and does not provide the competent authority the discretion to request additional information before making a decision.

1.11. CHAPTER 5: AMENDMENT, SUSPENSION, WITHDRAWAL AND AUDITING OF COMPLIANCE WITH ENVIRONMENTAL AUTHORISATION AND ENVIRONMENTAL MANAGEMENT PROGRAMME

1.11.1. **Regulation 27(3)(a):** It recommended that the "change of the scope of the

activity/development" and "increase the level or nature of the impact" be qualified by the word "significant" to allow for amendments where the change of scope and the associated impacts are minor.

1.11.2. We also strongly recommended that provision be made in regulation 27(3) that allows an amendment to be made under certain circumstances for change of ownership or transfer of rights and obligations where construction or expansion has already commenced or completed in order to reduce the overly inclusive scope of Activity 29 of Listing Notice 1 as currently worded (see our paragraph 2.1 which discusses this issue further)

1.11.3. **Regulation 27(4) and (5):** it is recommended that the wording of these provisions be amended to provide clarity on the meaning thereof.

1.12. Auditing of environmental authorisation, environmental management programme and

1.12.1. **Regulation 32(1):** It is recommended that provision be made to allow for the competent authority to exercise discretion in terms of the requirement for environmental auditing, the frequency of auditing, information required in the audit report as per the discretion already provided for in regulation 26(1), as well as the requirements in respect of the person undertaking the audit. It is offered that not all activities warrant the same intensity of auditing and that in some instances, the current regulations may become unintentionally onerous for small-scale, low impact activities.

1.12.2. **Regulation 32 read with Regulations 53(2) and 56(2):** Currently there exists the implicit requirement for auditing of environmental authorisations, including exemptions, issued under the ECA and of environmental authorisations issued in terms of the previous NEMA Regulations based on the wording of these provisions. It is recommended that the necessary amendments are made to avoid unintended application to environmental authorisations issued historically.

1.13. Register of interested and affected parties

1.13.1. **Regulation 45(2):** The requirement for an applicant to give access to the public participation register to any person who requests it in writing has the potential to conflict with the Protection of Personal Information Act 4 of 2013. It is recommended that a provision be added to reduce this potential for conflict.

1.14. APPENDIX 2: Scoping Process

1.14.1. **Section 1:** The ability to commence the scoping process before the submission of the application for environmental authorisation is limited by the requirement in regulation 21(3) which states that a "scoping report must contain all information set

out in Appendix 2 to these Regulations. Section 3(f)(ii) of Appendix 2, requires that a scoping report must contain "*the details of the public participation process …. in terms of regulation 44*" and regulation 44(3)(b)(i) requires that "a notice, notice board or advertisement referred to in subregulation (2) must - ..... state that the application has been submitted to the competent authority in terms of these Regulations". Subregulation (5) allows for a deviation, but only from the requirements of subregulation (2).

2. Listing Notices 1 to 4

2.1. Our main concern regarding the listing notices is Activity No. 29 in Listing Notice 1 which pertains to the transfer of rights and obligations. If we understand it correctly, we believe the current wording of this activity casts too wide a net and will be unnecessarily triggered every time there is change of ownership or transfer of rights and obligations, regardless of the circumstance. Consider for example, a sectional title development where the developer holds the rights until 50% of the development has taken place at which time these are transferred to a Body Corporate. It does not make sense for each subdivision owner to have to go through another basic assessment process subsequent to the developer already having obtained environmental authorisation.

2.2. While we believe there is merit in targeting larger developments or developments with significant operational impacts, actual or potential, in this way, we recommended that the circumstances are narrowed to avoid targeting developments where this is not the case. Thus, we recommend that the amendment process provided for in Chapter 5 of the Draft EIA Regulations be amended to allow for such an amendment rather than having to seek environmental authorisation afresh (as discussed in our paragraph 1.11.2).

2.3. If Activity No. 29 has indeed been introduced as a means of assessing whether a person is sufficiently fit and proper to continue a listed activity already commenced and authorised in the name of another, we do not believe that submitting that person to an environmental authorisation process is the correct mechanism. Rather, we recommend that Section 29(1)(a) of the EIA Regulations be used for this purpose which allows the competent authority to request the applicant to furnish additional information.

2.4. Our members also submitted a number of comments on the definitions and descriptions of listed activities which are likely to cause interpretational challenges once the listing notices are published. This is especially so where these terms rely or overlap with other legislation, or where they have been defined in one listing notice but not in the others but the terminology is used in the activity descriptions. The following examples were identified as being potentially problematic:

2.4.1. Indigenous vegetation

2.4.2. Urban edge

2.4.3. Coastal public property

2.4.4. Development footprint

2.4.5. Infrastructure

2.5. In order to provide more substantial and constructive comment on the listing notices, we believe that we require further engagement with the Department to better understand the rationale behind many of the listed activities, which in many instances is not obvious and likely to cause problems, either because the wording is not clear or because the activities will be triggered unintentionally by types developments that should not have to be regulated by way of environmental authorisation We thus request that prior to the finalisation of these regulations and listing notices, further engagement is facilitated between IAIAsa, its members and the Department (including the provincial departments) to draw more fully on our direct and practical experience in applying environmental legislation, especially environmental impact assessment. We also request that in future, consultation initiated by the State around draft legislation follows a more robust and participatory process and does not create or leave the impression that the draft texts are *fait accompli*.

2.6. Lastly, we raise the concern regarding the direct or implied references in the draft EIA Regulations and listing notices to a number of other pieces of planning and environmental legislation which are also in the process of being amended or introduced. This staggered piecemeal approach to regulating environmental management is likely to result in legal uncertainty, conflicting laws and an unnecessary additional administrative and economic burden on the State and development respectively.

2.7. Trusting that these comments submitted by IAIAsa will be received in the spirit of improving practice in which they are intended.

Yours faithfully

Sue George
IAIAsa President 2014/2015