



CIRCULAR: EADP 0024/2014

To whom it may concern

INTERPRETATION OF "COMMENCE" IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) ("NEMA")

Since the release of this Department's *NEMA EIA Circular 1 of 2013* dated 2 April 2013, the definition of "commence" have been amended when the National Environmental Laws Second Amendment Act, 2013 (Act No. 30 of 2013) came into effect on 18 December 2013. A number of new scenarios not previously specifically dealt with have been presented and new insights have been gained. As such, ***NEMA EIA Circular 1 of 2013* is hereby replaced by this Circular.**

1. ACTIVITIES WHICH MAY NOT COMMENCE WITHOUT ENVIRONMENTAL AUTHORISATION

- 1.1. In terms of Section 24(2)(a) of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) activities may be identified which "may not commence without environmental authorisation from the competent authority" (emphasis added).
- 1.2. On 18 June 2010 the Minister published three listing notices (Listing Notice 1, Listing Notice 2 and Listing Notice 3) listing activities that have been identified in terms of Section 24(2)(a) of NEMA.
- 1.3. It is well accepted in South African law that there is a *prima facie* rule that a statute, or any amendment or legislative alteration thereto, should not be interpreted as having retrospective effect, unless the contrary is either expressly or by necessary implication clear from a provision or indication to the contrary in the enactment under consideration. The NEMA Listed Activities do not have retrospective effect to the extent that the identification of the listed activities do

not interfere with vested rights if the listed activity in question was commenced with prior to the coming into effect of the requirement to obtain environmental authorisation. In other words, the provisions expressly indicate that it affects activities which have not yet commenced. Broadly the question to determine whether someone had commenced prior to the requirement to obtain environmental authorisation therefore is: Did you have a vested right in terms of which you started physical action that was in furtherance of the listed activity, prior to the requirement to obtain environmental authorisation coming into effect? All the specific aspects to consider are, however, set out in the sections below.

2. DEFINITION OF "COMMENCE"

- 2.1. NEMA originally did not provide a definition of "commence". The National Environmental Management Second Amendment Act of 2004 (Act No. 8 of 2004), however, inserted the following definition of "commence": *"when used in Chapter 5, means the start of any physical activity on the site in furtherance of a listed activity"*.
- 2.2. The National Environmental Management Amendment Act of 2008 (Act No. 62 of 2008) amended the definition of commence to read: *"when used in Chapter 5, means the start of any physical activity, including site preparation and any other activity on the site in furtherance of a listed activity or specified activity, but does not include any activity required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity"*. This amendment came into effect on 1 May 2009.
- 2.3. The definition was again amended by the National Environment Laws Second Amendment Act, 2013 (Act 30 of 2013) to read: *"when used in Chapter 5, means the start of any physical implementation in furtherance of a listed activity or specified activity, including site preparation and any other action on the site or the physical implementation of a plan, policy, programme or process, but does not include any action required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity"*.

3. INTERPRETATION OF "COMMENCE"

- 3.1. Since the promulgation of the definition of "commence" it has been the subject of a number of legal opinions and much debate, as well as litigation. On 2 September 2010 Judge Baartman delivered a judgement in the case of the Joint

Owners of Remainder Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning & Others (Western Cape High Court Case Number: 23635/2009) ("Pansy Cove"). Judge Baartman indicated that "...For an activity to qualify as having been 'in furtherance' of a listed activity, there must be evidence that it advanced the activity i.e. some reasonably direct connection between the physical activity and the listed activity."

3.2. Whether someone has "commenced" will depend on the facts of each specific case, with the following being the subject of the case by case factual consideration:

3.2.1. Is a listed activity involved?

3.2.2. If yes, was any physical action, other than an investigation or feasibility study, started prior to the coming into effect of the requirement to obtain environmental authorisation?

3.2.3. If yes, was the physical action undertaken on the site?

3.2.4. If yes, was the physical action undertaken on the site in furtherance of the listed activity in question?

3.2.5. If yes, then the listed activity was "commenced" with and would not require environmental authorisation.

3.3. The abovementioned factual consideration will involve consideration of the:

3.3.1. nature and location of the listed activity;

3.3.2. nature and location of the physical action; and

3.3.3. nature of the relationship between the physical action and the listed activity.

"...of a listed activity..."

3.4. The starting point for a determination regarding commencement must be the specific listed activity under consideration. The investigation which follows is whether any physical action in furtherance of the specific listed activity occurred before the requirement to obtain environmental authorisation came into effect.

"...the start of any physical implementation..."

3.5. The term "any" on its own is wide and unqualified and imposes no standards for the nature, degree, duration or significance of physical activity which will be regarded as constituting commencement. The nature of physical implementation required to establish commencement is nevertheless qualified

by the definitional requirements that the implementation be "*physical*" and "*on the site*" and "*in furtherance of a listed activity*".

3.6. For "implementation" to be "physical", a physical action had to be undertaken.

Note: The definition also states that "*or the physical implementation of a plan, policy, programme or process*". This refers to the fact that in terms of section 24(2)(a) of NEMA "activities" may be identified which may not "commence" without environmental authorisation and must be subjected to environmental impact assessment. NEMA defined "activity" as "...*policies, programmes, processes, plans and projects identified in terms of section 24(2)(a) ...*". While a policy, programme or plan may therefore be listed, to "commence" with such a policy, programme or plan would require physical implementation through the undertaking of action in furtherance of the said policy, programme or plan. Simply completing the paperwork does not constitute "commencement" with the policy, programme or plan.

3.7. The "*site preparation and any other action on the site*" must also be a physical action.

3.8. Unless it constitutes a listed activity itself, any activity required for the purpose of an "*investigation or feasibility study*" does not constitute the start of any physical action.

3.9. The listed activity itself need not have been "started" with. Any physical action must just have been started with that was in furtherance of the listed activity.

"...on the site..."

3.10. The wording refers to "site" and not to "property". As such the "site" could consist of many different properties (cadastral units) that were all set apart for a particular purpose. For example in a particular case a specific area on the one property was set apart for the access road for the development of residential erven on a specific area set apart on the neighbouring property. The area set apart for the access road together with the area set apart for the erven constitutes the "site".

3.11. The ordinary meaning of "site" is "*a piece of ground or an area set apart for some purpose*".

3.12. Whether a particular area was set apart for a particular purpose must therefore be considered. Anybody wanting to argue that a particular area was set apart for a particular purpose (i.e. a vested right was obtained to use the particular area for a particular purpose) and that there was commencement prior to the requirement to obtain environmental authorisation, must be able to provide

the necessary substantiating information. What right did the person have to use the particular area for the particular purpose? Often the fact that additional rights/approvals must be obtained (e.g. rezoning, departure, consent, ploughing permit, etc.) also means that what is being proposed is something new/in additional and, depending on the extent thereof and/or location, would also require environmental authorisation. Substantiating information related to the obtaining of the right to use the particular area for the particular purpose (the setting apart of the site for the particular purpose) must be provided. For example:

3.12.1. An area zoned with a particular zoning will be set part for a particular purpose with particular parameters by the relevant Zoning Scheme. For example if zoned for residential purposes, the building plan approval and information about when the building works started would indicated when the physical action was started.

3.12.2. A site development plan approved by the municipality as part of a Land Use Planning Ordinance (Ordinance No. 15 of 1985) (LUPO) application would clearly indicate the specific site that was set apart for the purpose of the development that was the subject of the LUPO application. In this regard the site is the original "site" that was set apart for the development and not the subsequent "sites" which might have been created by the development. For example, a farm might have been subdivided and the one portion rezoned to a subdivisinal area for township establishment, with individual erven eventually created on the portion of farm in question. The "site" of the residential development would be the entire portion of the farm in question, and not each individual erf.

3.12.3. On a farm the particular area set apart for ploughing would be clearly indicated by the ploughing permit issued in terms of the Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983).

3.13. For the physical action to have been in furtherance of the listed activity, it had to be undertaken on the "site". As set out in section below dealing with "in furtherance", with a reasonable direct connection to exist between the physical action and listed activity, the physical action to relate to the listed activity in a direct manner, the physical action to be part of the process of engaging in the listed activity, the physical action and listed activity form part of the same integrated "development". The entire area set apart for the particular purpose that was to be covered by all the parts of the integrated development constitutes the "site".

3.14. The start of a physical action anywhere on the area identified for the development, namely on the area set apart for that purpose, will constitute starting that physical action "on the site" – this will be the case even if that action is to be undertaken at a number of places on that site. In other words if the physical action was started on one of the erven, it means it was started on the entire site i.e. on all the erven which form part of the original site.

"...in furtherance..."

3.15. For the physical action to have been "in furtherance" of the listed activity in question there must be some reasonable direct connection between the physical action and the listed activity in that the physical action in question must have helped forward or advanced the listed activity in question.

3.16. Any advancement through the undertaking of a physical action must relate to the listed activity in a direct manner.

3.17. The physical action must be part of the process of engaging in the listed activity, and in some cases could take the form of a necessary preliminary step in order to undertake the listed activity itself.

3.18. Any such preliminary step must however have a reasonably close connection with the listed activity.

3.19. The nature of the physical action relied upon may of itself be determinative of the question whether it was "in furtherance of" a particular listed activity.

3.20. The location of the physical action may also assist in the determination. The "in furtherance" relationship may patently be absent where the distance between the location of the listed activity and the physical action renders such a relationship impossible.

3.21. Just because a specific listed activity was "commenced" with also does not mean that the physical action undertaken was in furtherance of all the listed activities making up a bigger development. Each specific listed activity must have been commenced with, in that the physical action undertaken must have been in furtherance of each specific listed activity. A listed activity will only have "commenced" in accordance with the definition of "commence" where the physical action relied on was in furtherance of that specific listed activity rather than an overall development, another listed activity, or a set of listed activities. The determination whether a listed activity can be said to have "commenced" prior to the coming into effect of the requirement to obtain environmental authorisation therefore requires careful assessment of the nature and location of the prior physical action and all the listed activities, and the relationship between them.

3.22. For example, ordinarily the construction of a fence around a property cannot logically be said to be "in furtherance" of all listed activities to still be undertaken on the site because there is not a reasonable direct connection between an ordinary fence and a particular proposed subsequent listed activity.

4. "CONSTRUCTION", "EXPANSION" AND "CONTINUATION OF..."

- 4.1. The wording of each listed activity must always be carefully considered together with the specific definitions provided.
- 4.2. It is important to note that in terms of the 2006 NEMA EIA listed activities the definition of "construction" read: *"means the building, erection or expansion of a facility, structure or infrastructure that is necessary for the undertaking of an activity, but excludes any modification, alteration or upgrading of such facility, structure or infrastructure that does not result in a change to the nature of the activity being undertaken or an increase in the production, storage or transportation capacity of that facility, structure or infrastructure"* (emphasis added). I.e. "construction" included "expansion".
- 4.3. The 2006 definition of "expansion" in turn read: *"means the modification, extension or alteration of a facility, structure or infrastructure at which an activity takes place in such a manner that the production, treatment, storage or capacity of the facility is increased"*.
- 4.4. In terms of the 2010 NEMA EIA listed activities the new definition of "construction" reads: *"means the building, erection or establishment of a facility, structure or infrastructure that is necessary for the undertaking of a listed or specified activity but excludes any modification, alteration or expansion of such a facility, structure or infrastructure and excluding the reconstruction of the same facility in the same location, with the same capacity and footprint"* (emphasis added). I.e. "construction" no longer includes "expansion".
- 4.5. The new definition of "expansion" in turn reads: *"means the modification, extension, alteration or upgrading of a facility, structure or infrastructure at which an activity takes place in such a manner that the capacity of the facility or the footprint of the activity is increased"*.
- 4.6. It was due to this change in definition of "construction" that the 2010 NEMA EIA listing notices (Listing Notice 1, 2 and 3 of 18 June 2010) list certain construction activities (e.g. the construction of facilities or infrastructure for the storage, or for the storage and handling, of a dangerous good, where such storage occurs in containers with a combined capacity of 80 but not exceeding 500 cubic metres)

(Activity 13 of Listing Notice 1 refers) and also then list a separate construction activity related to the same type of activity (e.g. the expansion of facilities for the storage, or storage and handling, of a dangerous good, where the capacity of such storage facility will be expanded by 80 cubic metres or more) (Activity 44 of Listing Notice 1 refers).

- 4.7. Whereas under the 2006 NEMA EIA listed activities, commencement with the "construction of" activities, also included commencement with expansion of the same activity; under the 2010 NEMA EIA listed activities this is not the case. Unless it can be shown that physical activity was undertaken "on the site" "in furtherance" of a proposed "expansion" that was previously planned/authorised/intended (i.e. it can be shown that the "expansion" itself was commenced with) prior to the requirement to obtain environmental authorisation coming into effect (i.e. prior to 2 August 2010), then environmental authorisation would have to be obtained prior to commencing with the expansion.
- 4.8. In certain cases what was being proposed did in fact not constitute "expansion", but rather the continuation of construction. For example, a site was set apart for a particular purpose and the person then started physical action in furtherance of a construction related listed activity prior to the requirement for environmental authorisation coming into effect. Now the person wants to, within the confines/parameters of the original setting aside of the site for that particular purpose (i.e. other than possible building plan approval, no additional rights or deviations or consents are required), continue with that particular purpose. If the person, however, wanted to do something different to the original purpose for which the site was set apart or beyond the parameters of the original setting aside of the site, additional rights/approvals would in all likelihood have to be obtained (e.g. rezoning, departure, consent, ploughing permit, etc.), which means that what is being proposed is something new/in additional and, depending on the extent thereof and/or location, would also require environmental authorisation.

5. SCENARIOS

Note: These scenarios are provided for illustrative purposes only and do not present a “rule” of when there might have been commencement or not. All the facts of each specific case must always be considered and the Department should rather be consulted to obtain confirmation whether in fact environmental authorisation is required or not.

Scenario 1: “Continuation of...”

5.1. Someone obtained all the approvals needed at the time (including building plan approval) to construct a hotel of 700 square metres in size within 100 metres of the high-water mark of the sea in 1992, and then undertook physical activity on the site during 1994 in the form of building half the hotel (350 square metres in size). The entire property was originally covered in undisturbed vegetation and the remaining portion of the property is still covered by indigenous vegetation that has been identified as a critically endangered ecosystem in terms of section 52 of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEMBA). Now, the person wants to construct the rest of the hotel (350 square metres in size) (which was always intended and was included as part of the original building plan approval). The listed activities under consideration are Activity 16, 18 and 45 of Listing Notice 1, and Activity 12 of Listing Notice 3. The person would, however, not require environmental authorisation for commencing with Activity 16 and 18 of Listing Notice 1 because construction and earth moving activities commenced in 1994 when the first half of the hotel was constructed. The person would also not require environmental authorisation for “expansion” in terms of Activity 45 of Listing Notice 1, because what is being proposed is in fact not expansion, but rather continuation of construction, previously approved, and commenced when the construction of the first half of the hotel commenced. The person would also not require environmental authorisation for Activity 12 of Listing Notice 3, because clearing of vegetation commenced when the construction of the first half of the hotel commence. In other words all the listed activities in question were previously commenced with and the person is simply proposing to continue with that which was commenced with prior to the requirement to obtain environmental authorisation.

5.2. During 1990 the Municipality approved the rezoning of a portion of a coastal farm from Agriculture Zone 1 to Residential Zone 1 and approved a site development plan for the establishment of a residential development consisting of 100 erven,

including an area zoned Open Space on the one side of the site. By 1995 the main access road as well as the internal roads leading to each erf was constructed and houses were built on 94 of the erven by the new individual owners of the 94 erven. In terms of the Municipality's Zoning Scheme and the site development plan the parameters applicable to setting aside the 100 erf residential development included a height restriction of 8 metres, a building coverage limitation on each erf of 50% which equates to not more than 400 square metres, and a building setback line along the coastline of 60 meters from the high-water mark of the sea. The entire property was originally covered in undisturbed vegetation and the remaining portion of the property is still covered by indigenous vegetation that has been identified as a critically endangered ecosystem in terms of section 52 of the National Environmental Management: Biodiversity Act.

Scenario 2: Continuation with construction

5.2.1. Now the owner of erf 100 wants to construct a house of 350 square metres. Erf 100 is situated within 100 metres from the high-water mark of the sea. The house will not exceed the 400 square meter coverage limitation, will not exceed the height restriction, and will be constructed between the coastal building setback line of 60 metres from the high-water mark of the sea. The "site" in question is not erf 100, but the entire residential development consisting of 100 erven which was set apart for residential development in accordance with specific parameters. The listed activities under consideration are Activity 16 and 18 of Listing Notice 1, and Activity 12 of Listing Notice 3. The person would, however, not require environmental authorisation for commencing with Activity 16 and 18 of Listing Notice 1 or Activity 12 of Listing Notice 3 because construction and earth moving activities and the clearing of the vegetation commenced by 1995 when the access road, internal roads and first 94 erven were developed. In other words all the listed activities in question were previously commenced with and the person is simply proposing to continue, within the original parameters determined when the site was set apart for this particular purpose, with that which were commenced with prior to the requirement to obtain environmental authorisation.

Scenario 3: Expansion

5.2.2. Now the owner of erf 99, which is vacant, wants to construct a house of 350 square metres. Erf 99 is situated within 100 metres from the high-water mark of the sea. The house will not exceed the 400 square meter coverage limitation, will not exceed the height restriction, but 70 square metres of the house will fall in front of the 60 metres from the high-water mark building setback line. The "site" in question is not erf 99, but the entire residential development consisting of 100 erven which was set apart for residential development in accordance

with specific parameters. The listed activities under consideration are Activity 16, 18 and 45 of Listing Notice 1, and Activity 12 of Listing Notice 3. While Activity 16 and 18 of Listing Notice 1 and Activity 12 of Listing Notice 3 commenced by 1995 when the access road, internal roads and first 94 erven were developed, the 70 square meters of the building to be undertaken in front of the building setback line, fall outside of the original parameters when the "site" was set apart for residential purposes. As such, the 70 square meters portion is regarded as "expansion" beyond the original parameters and falls within the threshold set out in Activity 45 of Listing Notice 1. The earthmoving associated with the 70 square metres portion will include the moving of soil, sand, shells, shell grit, pebbles or rock of more than 5 cubic metres and as such Activity 18 of Listing Notice 1 will be triggered. Because the 70 square meters extension involves the expansion Activity 45 of Listing Notice 1 is triggered and as such Activity 16 of Listing Notice 1 is not triggered. Because the 70 square meters will involve the clearing of less than 300 square metres of vegetation, Activity 12 of Listing Notice 3 will not be triggered.

Scenario 4: Not expansion, but continuation with construction

5.2.3. Now the owner of erf 98 who in 1995 constructed a 300 square meter house wants to expand his house by 70 square metres. Erf 98 is situated within 100 metres from the high-water mark of the sea. The extended house will not exceed the 400 square meter coverage limitation, will not exceed the height restriction, and the extension of 70 square meters will be done behind the building development setback line of 60 metres from the high-water mark of the sea, but will occur within 100 meters from the high-water mark of the sea. The "site" in question is not erf 98, but the entire residential development consisting of 100 erven which was set apart for residential development in accordance with specific parameters. The listed activities under consideration are Activity 16, 18 and 45 of Listing Notice 1. Activity 16 and 18 of Listing Notice 1 commenced by 1995 when the access road, internal roads and first 94 erven were developed. With the proposed 70 square meter extension to be undertaken within the original parameters when the site was set apart for residential development, it does not constitute expansion, but the continuation of construction. As such, Activities 16 and 18 was already commenced with and Activity 45 of Listing Notice 1 is not triggered.

Scenario 5: Continuation with construction up to the original, and expansion in terms of amended parameters

5.2.4. This scenario is a slight variation on the scenario above. As set out in 5.2 above the 100 erf property was set apart for residential development in 1990 and by 1995 the access road, internal roads and 94 of the erven were

developed in accordance with the original parameters set out in the Municipality's Zoning Scheme applicable at the time and the site development plan approved in 1990 which set apart the 100 erf residential development namely a height restriction of 8 metres, a building coverage limitation on each erf of 50% which equates to not more than 400 square metres, and a building setback line along the coastline of 60 metres from the high-water mark of the sea. In July 2014 the Municipality, however, amended their Zoning Scheme. The amended Zoning Scheme adjusted the parameters applicable to any property zoned Residential Zone 1. The building coverage limitation on each erf of 50% was adjusted to 60% which equates to not more than 480 square metres. Now the owner of erf 98 who in 1995 constructed a 300 square meter house wants to expand his house by 180 square metres. Erf 98 is situated within 100 metres from the high-water mark of the sea. The extended house will not exceed the adjusted parameter of 480 square meter coverage limitation, will not exceed the height restriction, and the extension of 180 square meters will be done behind the building development setback line of 60 metres from the high-water mark of the sea, but will occur within 100 meters from the high-water mark of the sea. The listed activities under consideration are Activity 16, 18 and 45 of Listing Notice 1. Activity 16 and 18 of Listing Notice 1 commenced by 1995 when the access road, internal roads and first 94 even were developed but only to the extent allow by the original parameters. As such, Activity 16 and 18 can continue up until the original parameters are reached namely 400 square meters, but the expansion by an additional 80 square meters beyond the original parameter of 400 square meters constitute expansion and would trigger Activity 45 of Listing Notice 1. If more than 5 cubic meters of earthmoving will occur as part of the 80 square meter expansion, Activity 18 of Listing Notice 1 will also be triggered.

Scenario 6: Demolition and redevelopment - Continuation with construction

5.2.5. Now the owner of erf 97 who in 1995 constructed a 400 square meter house wants to demolish his house and build a new house of 400 square metres on a different portion of the erf. Erf 97 is situated within 100 metres from the high-water mark of the sea. The new house will not exceed the 400 square meter coverage limitation, will not exceed the height restriction, and will still be located behind the building development setback line of 60 metres from the high-water mark of the sea, but will occur within 100 meters from the high-water mark of the sea. The listed activities under consideration are Activity 16 and 18 of Listing Notice 1. Activity 16 and 18 of Listing Notice 1 commenced by 1995 when the access road, internal roads and first 94 even were developed. With the proposed new house to be built within the original

parameters when the site was set apart for residential development, it constitutes the continuation of the construction and earthmoving activities commenced with in the past and will not require environmental authorisation.

Scenario 7: Demolition and “reconstruction” and continuation of earthmoving activities

5.2.6. Now the owner of erf 96 who in 1995 constructed a 400 square meter house wants to demolish his house and build a new house of 400 square metres in the same location on the erf. Erf 96 is situated within 100 metres from the high-water mark of the sea. The new house will not exceed the 400 square meter coverage limitation, will not exceed the height restriction, and will still be located behind the building development setback line of 60 metres from the high-water mark of the sea, but will occur within 100 meters from the high-water mark of the sea. The listed activities under consideration are Activity 16 and 18 of Listing Notice 1. Activity 16 and 18 of Listing Notice 1 commenced by 1995 when the access road, internal roads and first 94 erven were developed. Activity 16 of Listing Notice 1 will not be triggered because “reconstruction of the same facility in the same location, with the same capacity and footprint” has been excluded from the definition of “construction” provided in the Listing Notices. With the proposed new house to be built within the original parameters when the site was set apart for residential development, it constitutes the continuation of earthmoving activities commenced with in the past and as such Activity 18 of Listing Notice 1 was commenced with and will not require environmental authorisation.

Scenario 8: Subdivision to divide the existing rights

5.2.7. Now the owner of erf 95, which is vacant, wants to subdivide his erf into two portions and build a house on each portion. A title deed restriction will, however, be placed on the title deed of each of the two newly created erven to limit the building on each of the erven to 200 square meters. All the other original parameters will still apply: the height restriction of 8 meters, the coverage limitation of 50%, and the building setback line of 60 meters from the high-water mark of the sea. Erf 95 is situated within 100 metres from the high-water mark of the sea. The listed activities under consideration are Activity 16 and 18 of Listing Notice 1. Activity 16 and 18 of Listing Notice 1 commenced by 1995 when the access road, internal roads and first 94 erven were developed. With the title deed restrictions limiting the buildings to 200 square meters, any construction or earthmoving activities to be undertaken on the two newly created erven will still occur within the parameters of the original setting aside of the 100 erven for residential development. While the person would have to obtain approval from the Municipality for the proposed subdivision, environmental authorisation would not be required because the

construction and earthmoving activities (Activity 16 and 18 of Listing Notice 1) already commenced, and what is being proposed will constitute the continuation of construction and earthmoving activities.

Scenario 9: Creation of an additional erf

5.2.8. Now the original developer wants to apply for subdivision of the area zoned Open Space into two portions and rezoning of the one portion of 900 square meters to Residential Zone 1 in order to create erf number 101 and to build a house of 350 square meters on the new erf. The 900 square meter portion is located more than 100 meters from the high-water mark of the sea. Because the portion is located more than 100 meters from the high-water mark of the sea, Activities 16 and 18 of Listing Notice 1 will not be triggered. The activity in question is Activity 12 of Listing Notice 3. The clearing of vegetation commenced when the original access road, internal roads and the 94 erven were developed by 1995 and within the parameters of the original setting apart of the "site" the clearing of vegetation may continue without environmental authorisation. The area zoned Open Space was, however, never set apart for the purpose now proposed, and the change now proposed is something new that could not have been commenced with in the past. To the extent that the proposed change falls within the ambit of listed activities, it would therefore require environmental authorisation prior to commencement. With 350 square meters of vegetation to be cleared to construct the proposed new house, Activity 12 of Listing Notice 3 will be triggered.

Scenario 10: Continuing with activities in a road reserve

5.3. In 1993 a route was determined, the road reserve proclaimed and the road constructed by 1995. In one section of the road a bridge was constructed across a watercourse. Now the proposal is to widen the bridge. In the proposed widening of the bridge more than 5 cubic meters of material will also be moved in the watercourse. Under consideration is Activity 18 and 39 of Listing Notice 1. The proposed widening of the bridge will occur inside the proclaimed road reserve and within the ambit of the original parameters when the "site" was set apart for the construction of the road and bridge. The proclamation of the road reserve at the time simply stated that an area of 12.5 meters wide on both sides of the road, measured from the centre of the road is proclaimed for the purpose of road construction and associated infrastructure. As such, earthmoving activities (Activity 18 of Listing Notice 1) have already commenced and can continue within the road reserve area. The widening of the bridge within the road reserve will constitute the continuation of the construction of the bridge, rather than the expansion of the bridge. Only to the extent that the proposed extension to the

bridge will exceed the ambit of the original parameters will the extension constitute expansion. As such, Activity 39 of Listing Notice 1 will not be triggered. It, however, depends on how the site was set apart for the purpose of road and bridge construction. If the setting apart included detailed design and layout, then the road and bridge may only be constructed within these original detailed parameters.

Scenario 11: Started with an investigation/feasibility study but did not commence

5.4. Someone prior to the coming into effect of the requirement to obtain environmental authorisation, dug a number of soil profile holes and in the process cleared 200 square metres of vegetation. Now, on the same site, the person wants to cultivate half a hectare of virgin soil and in the process will have to clear an area of 300 square metres or more of vegetation where 75% or more of the vegetative cover constitutes indigenous vegetation within a critically endangered ecosystem listed in terms of section 52 of the National Environmental Management: Biodiversity Act. Any action required for the purposes of an investigation or feasibility study, which does not itself constitute a listed activity or specified activity (in this instance less than 300 square meters of vegetation was cleared as part of the process of digging the soil profile holes) have in the definition of "commence" been specifically excluded as actions physical action which would be seen as being in furtherance of a listed activity. In other words the investigation/feasibility study does not constitute the start of physical action in furtherance of a listed activity. As such, the clearing of vegetation have not commenced and environmental authorisation would be required prior to commencement with Activity 12 of Listing Notice 3.

Scenario 12: Wants to do an investigation/feasibility study

5.5. Someone wants to cultivate half a hectare of virgin soil and in the process will have to clear an area of 300 square metres or more of vegetation where 75% or more of the vegetative cover constitutes indigenous vegetation within a critically endangered ecosystem listed in terms of section 52 of the National Environmental Management: Biodiversity Act. In order to test the feasibility of the project the person wants to first dig a number of soil profile holes and in the process will clear 200 square metres of vegetation. Any action required for the purposes of an investigation or feasibility study, which does not itself constitute a listed activity or specified activity (in this instance less than 300 square meters of vegetation was cleared as part of the process of digging the soil profile holes) have in the definition of "commence" been specifically excluded as actions physical action which would be seen as being in furtherance of a listed activity. In other words the investigation/feasibility study does not constitute the start of physical action in

furtherance of a listed activity. As such, the person would be able to dig the soil profile holes without having to obtain environmental authorisation.

Scenario 13: Did not start with the listed activity itself, but started with physical action which was in furtherance of the listed activity

5.6. Someone, prior to the coming into effect of the requirement to obtain approval for the construction of infrastructure of 50 square metres or more within 100 metres of the high-water mark of the sea (Activity 16 of Listing Notice 1) obtained approval from the relevant Municipality in terms of the Land Use Planning Ordinance (LUPO) to construct a resort. The site development plan was approved and construction of a road, which was part of the original proposal, was started and completed up until 110 metres from the high-water mark of the sea. The original approval was for sections of the road to also be constructed within 100 metres of the high-water mark. Now the person wants to continue with the rest of the road. Although the listed activity in question (Activity 16 of Listing Notice 1) was itself not started with, the completion of the road up until the 110 metre line, constituted the start of a physical action on the site which was in furtherance of the listed activity now in question. The listed activity in question was therefore commenced with. As such, the rest of the road can be constructed within 100 metres of the high-water mark without having to obtain environmental authorisation.

Scenario 14: Did not start with the listed activity itself, but started with physical action which was in furtherance of the listed activity (scenario related to clearing of vegetation)

5.7. Someone obtained approval in terms of LUPO in 1996 to construct a residential development consisting of 100 erven and associated infrastructure. Some of the 100 erven are within 100 metres of the high-water mark of the sea and some of the erven contain vegetation which has been identified as a critically endangered ecosystem listed in terms of section 52 of the National Environmental Management: Biodiversity Act. The person constructed part of the road in accordance with the approved site development plan at the end of 1996. The section of road constructed stretched over previously transformed areas (cultivated land) and parts also fall within 100 metres of the high-water mark. No indigenous vegetation was cleared to construct the road. Because the construction of the road was in furtherance of the remaining sections of road to be constructed and the erven to be developed (which would include the clearing of vegetation), the start of the road constituted commencement with Activity 12 of Listing Notice 3 and Activities 16 and 18 of Listing Notice 1. Even though the clearing of vegetation was not previously started, the construction of the road was the start of physical action which was in furtherance of the clearing of the vegetation.

Scenario 15: Continuation of clearing of vegetation

5.8. A farmer in 1996 obtained a permit in terms of the Conservation of Agricultural Resources Act (Act No. 43 of 1983) (CARA) to cultivate a 2 hectare piece of land. The farmer at the end of 1996 cultivated one and a half hectares, and now wants to cultivate the remaining 5 000 square metres. The cultivation of the 5 000 square metres will entail the clearing of an area of 5 000 square metres of vegetation where 75% or more of the vegetative cover constitutes indigenous vegetation within a critically endangered ecosystem listed in terms of section 52 of the NEMBA. With the 2 hectare area set aside (in terms of the CARA permit) for the cultivation, and with the clearing of the one and a half hectares constituting the start of physical action on the site in furtherance of the listed activity now in question (Activity 12 of Listing Notice 3), the listed activity was commenced with prior to the coming into effect of the need to obtain environmental authorisation and environmental authorisation would not be required to clear the remaining 5000 square metres. In other words, the farmer simply wants to continue with the clearing of vegetation commenced with in 1996.

Scenario 16: Reclearing of vegetation which again considered to consist of indigenous vegetation

5.9. A farmer, in terms of a CARA permit he obtained, ploughed 20 hectares of virgin land in 1996. The land has been lying fallow for the last 11 years and pioneer indigenous species has re-established. The farmer now wants to again plough the land to re-establish a vineyard. The site is situated within an area that has been identified as a critical endangered ecosystem in terms of Section 52 of NEMBA. The NEMA EIA Regulations defines "indigenous vegetation" as "vegetation where topsoil has not been lawfully disturbed during the preceding 10 years". As such, the area that has been laying fallow for the last 11 years is again considered "indigenous vegetation". Activity 5 of Listing Notice 3 (clearance of more than 5ha of vegetation where 75% or more of the vegetative cover constitutes indigenous vegetation) would therefore be triggered. In terms of the definition of "indigenous vegetation", an area can be cleared and then after 10 years again become indigenous vegetation if it was laying fallow for 10 years or longer and indigenous species re-established on the site. In other words, areas laying fallow for 10 years or longer that again contain indigenous species will again require environmental authorisation prior to any new clearing of vegetation if the thresholds are triggered.

6. CONSULTATION WITH THE DEPARTMENT

Considering the serious implications of commencing with a listed activity without environmental authorisation, and the need for the facts of each case to be carefully considered, it is **recommended that the Department be consulted with and confirmation obtained** from the Department if there is a need to determine whether or not someone has commenced with a listed activity prior to the requirement to obtain environmental authorisation coming into effect or whether environmental authorisation is required.

Please bring the contents of this circular to the attention of all concerned.

Yours faithfully



P. VAN ZYL

HEAD OF DEPARTMENT

DATE: 09.12.2014