



**Western Cape
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EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

MARCH 2013

INDEX

CONTENTS

- PART 1:** Guideline on Transitional Arrangements
- Part 2:** Generic Terms of Reference for EAPs and Project Schedules
- Part 3:** Generic TORs for EAPs and Project Schedules: Annexure: Generic Project Schedules
- Part 4:** Guideline on Public Participation
- Part 5:** Guideline on Alternatives
- Part 6:** Guideline on Need and Desirability
- Part 7:** Guideline on Exemption Applications
- Part 8:** Guideline on Appeals



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EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

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GUIDELINE ON TRANSITIONAL ARRANGEMENTS

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- Guideline on Transitional Arrangements (March 2013)
- Generic Terms of Reference for EAPs and Project Schedules (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Need and Desirability (March 2013)
- Guideline on Exemption Applications (March 2013)
- Guideline on Appeals (March 2013)

The EIA Guideline & Information Document Series, the relevant legislation and DEA&DP's applications forms are available on the DEA&DP website: <http://www.westerncape.gov.za/eadp>

Please note: This guideline must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA"), the EIA Regulations, the relevant Specific Environmental Management Act(s) ("SEMA") (e.g. Environment Conservation Act, 1989 - Act No. 73 of 1989, National Environmental Management: Air Quality Act, 2004 - Act No. 39 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 - Act No. 24 of 2008, and the National Environmental Management: Waste Act, 2008 - Act No. 59 of 2008, and the SEMA's Regulations), and is not intended to be a substitute for the provisions of the NEMA, the EIA Regulations or the SEMAs, in any way. Adherence to the requirements in terms of the NEMA, the EIA Regulations, and the SEMAs does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

Enquiries and Comments: All enquiries and comments should be addressed to - The Chief Director: Environmental and Land Management, Department of Environmental Affairs & Development Planning, Private Bag X9086, Cape Town, 8000, South Africa.

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CONTENTS

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

1. INTRODUCTION

2. DEFINITIONS

3. TRANSITIONAL ARRANGEMENTS

- 3.1 Activities not previously listed, but now listed in terms of the 2010 NEMA notices.
- 3.2 Authorisation in terms of ECA or the 2010 NEMA regulations, and Amendments.
- 3.3 Lapsed authorisation granted in terms of ECA or the 2006 NEMA regulations.
- 3.4 Continuation of things done under ECA.
- 3.5 Pending applications and appeals in terms of ECA.
- 3.6 Continuation of things done under the 2006 NEMA regulations.
- 3.7 Pending applications and appeals in terms of the 2006 NEMA regulations.
- 3.8 Appeals against decision in terms of ECA or the 2006 NEMA regulations submitted after 2 August 2010
- 3.9 Continuation of regulations regulating authorisations for activities in certain coastal areas.
- 3.10 Transitional Arrangements in terms of applications in terms of Section 24G of NEMA.
- 3.11 Existing Policies and Guidelines.
- 3.12 Transitional Arrangements in terms of the NEM: Waste Act.
- 3.13 Transitional Arrangements in terms of the NEM: Air Quality Act.
- 3.14 Transitional arrangements in terms of Prospecting and Mining.

ACRONYMS

DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act No. 73 of 1989)
EIA	Environmental Impact Assessment
I&AP	Interested and Affected Party
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
NEMAA	National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008)
NEM: AQA	National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)
NEM: WA	National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)
SEMA	Specific Environmental Management Act

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

1. INTRODUCTION

On 18 June 2010 the Minister responsible for Environmental Affairs promulgated new Environmental Impact Assessment (“EIA”) Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹. From the date of effect of these EIA Regulations, 2 August 2010, these EIA Regulations replaced the previous EIA Regulations² that were promulgated in terms of NEMA on 21 April 2006³, , and introduced new provisions for EIAs. On 30 July 2010⁵ and on 10 December 2010⁶ corrections on the 2010 EIA Regulations were published. These corrections all came into effect on 2 August 2010.

The National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (“NEMAA”), was promulgated on 9 January 2009⁷ and came into effect on 1 May 2009⁸. The NEMAA made a number of significant amendments to the general provisions applicable to EIAs. The definition of “environmental authorisation” in terms of NEMA was amended and now reads “when used in Chapter 5 means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. This means that, inter alia, the following are considered to be an “environmental authorisation”: an environmental authorisation issued for an activity listed in Listing Notice 1, 2 or 3⁹; an atmospheric emissions licence in terms of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (“NEM: AQA”); and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (“NEM: WA”). As such, the general provisions of NEMA that apply to an application for environmental authorisation, apply to all of these applications.

It must further be noted that as part of an application for a waste management licence or an atmospheric emissions licence, the application must also be subjected to the EIA process as stipulated in the EIA Regulations promulgated in terms of NEMA. While a number of different authorisations might therefore be required (an environmental authorisation, a waste management licence and/or an atmospheric emissions licence), the assessment process to be followed must be in accordance with the requirements stipulated in the EIA Regulations, with the specific requirements of the relevant specific environmental management Act (“SEMA(s)”) to also be adhered to over and above the requirements of the EIA Regulations¹⁰.

In light of the above, this guideline, which forms part of the Environmental Impact Assessment Guideline and Information Document Series (available on the Department’s website at <http://www.westerncape.gov.za/eadp>) provides information and guidance for applicants, authorities and interested and affected parties (“I&APs”) on the transitional arrangements in terms of NEMA, the EIA Regulations, the NEM: AQA, and NEM: WA.

¹ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

² Government Notice No. R. 385, R. 386, and R. 387 in Government Gazette No. 28753 of 21 April 2006 refer.

³ Government Notice No. R. 612, R. 613, R. 614, R. 615, and R. 616 in Government Gazette No. 28938 of 23 June 2006 refer.

⁵ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁶ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

⁷ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

⁸ Government No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

⁹ Government Notice No. R. 544, R. 545, and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer.

¹⁰ Section 24(4)(b)(vii) of NEMA refers.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

1. (CONTINUED)

This guideline must be read together with the NEMA, the EIA Regulations, the relevant SEMA(s) and its Regulations, and is not intended to be a substitute for the provisions of the NEMA, the SEMAs or the Regulations, in any way. Adherence to the requirements in terms of the NEMA and the EIA Regulations, the SEMAs and its Regulations does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

2. DEFINITIONS

“2010 NEMA notices” means the listing notices (Listing Notice¹, 2 and 3) published in terms of NEMA, by Government Notice No. R. 544, R. 545 and R. 546 of 18 June 2010 and corrected by Government Notice No. R. 660 of 30 July 2010 and Government Notice No. R. 1159 of 10 December 2010.

“2010 NEMA regulations” means the Environmental Impact Assessment Regulations, 2010, published in terms of NEMA, by Government Notice No. R. 543 and R. 547 of 18 June 2010 and corrected by Government Notice No. R. 660 of 30 July 2010 and Government Notice No. R. 1159 of 10 December 2010.

“Commence” means the start of any physical activity, including site preparation or any other activity on the site in furtherance of a listed activity or listed waste management 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 listed waste management activity¹¹.

“Department” means the Western Cape Department of Environmental Affairs and Development Planning which have in terms of NEMA and the EIA Regulations been delegated by Provincial Minister to administer and decide EIA applications.

“ECA notice” means the listing notice published in terms of ECA, by Government Notice No. R. 1182 as amended by Government Notice No. R. 1355 of 17 October 1997, Government Notice No. R. 448 of 27 March 1998 and Government Notice No. R. 670 of 10 May 2002.

“ECA regulations” means the regulations published in terms of sections 26 and 28 of the ECA, by Government Notice No. R. 1183 of 5 September 1997.

¹¹ From the definitions of “commence” provided in NEMA and in the NEM: WA.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

2. (CONTINUED)

“NEM: WA notice” means the waste management activities listing notice published in terms of section 19 of the NEM: WA, by Government Notice No. R. 718 in the Government Gazette of 3 July 2009.

“2006 NEMA notices” means the previous listing notices published in terms of section 24(2) of NEMA, by Government Notices No. R. 386 and R. 387 in the Government Gazette of 21 April 2006.

“2006 NEMA regulations” means the previous Environmental Impact Assessment Regulations published in terms NEMA, by Government Notice No. R. 385 in the Government Gazette of 21 April 2006.

3. TRANSITIONAL ARRANGEMENTS

3.1. Activities not previously listed, but now listed in terms of the 2010 NEMA notices

An activity listed in terms of the 2010 NEMA notices requires written environmental authorisation in terms of the NEMA EIA regulations, unless the activity was commenced prior to the coming into effect of the 2010 NEMA regulations on 2 August 2010..

Note: It must be noted that the above is true even if –

- an application in terms of the Land Use Planning Ordinance (Ordinance No. 15 of 1985) (“LUPO”) or any other law was lodged prior to the 2010 NEMA Regulations coming into effect on 2 August 2010; or
- an application in terms of LUPO or any other law was decided prior to the 2010 NEMA notice coming into effect on 2 August 2010.

3.2. Authorisation in terms of ECA or the 2006 NEMA regulations, and Amendments

An environmental authorisation issued in terms of the ECA regulations or the 2006 NEMA regulations which was in force when the 2010 NEMA regulations came into effect on 2 August 2010, is regarded to be an environmental authorisation issued in terms of the 2010 NEMA regulations, and remains in force as long as the activities authorised are still listed in terms of the 2010 NEMA notices or the NEM: WA notice, and as long as the validity period has not expired. If an activity has therefore already been authorised in terms of ECA or the 2006 NEMA regulations, and the activity has been commenced with, a new environmental authorisation in terms of the 2010 NEMA regulations will not be required for the activities listed in terms of the 2010 NEMA notices or NEM: WA notice if those activities have been commenced with. If, however, the activity(ies) authorised under ECA or the 2006 NEMA regulations are no longer listed in terms of the 2010 NEMA notices or the NEM: WA notice, then the environmental authorisation issued in terms of ECA or the 2006 NEMA regulations are considered null and void.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

Note: Non-compliance with an environmental authorisation that is still in force is an offence. As such, it is recommended that the status of an environmental authorisation be confirmed, in writing, with the Department before deciding on how to proceed.

The date when the environmental authorisation became of no force and effect is the date on which the activity was delisted. Therefore, if the proponent failed to comply with one or more of the conditions of the environmental authorisation prior to the date of delisting, such non-compliance constituted an offence and enforcement action may still be considered.

It must be noted that the holder of an authorisation in terms of the ECA Regulations or the 2006 NEMA regulations (or the 2010 NEMA regulations), may apply for an amendment of the authorisation in terms of the 2010 NEMA regulations, but the amendment must be applied for prior to the lapsing of the environmental authorisation.

3.3. Lapsed authorisation granted in terms of ECA or the 2006 NEMA regulations

Any activity authorised in terms of the ECA Regulations or the 2006 NEMA regulations that has not been commenced within the specified validity period i.e. that has lapsed, and that are listed in the 2010 NEMA notices must apply for and obtain written environmental authorisation in terms of the 2010 NEMA regulations prior to commencement.

3.4. Continuation of things done under ECA

Anything done in terms of the ECA regulations and which can be done in terms of a provision of the 2010 NEMA regulations must be regarded as having been done in terms of the provision of the 2010 NEMA Regulations¹².

Any regulation or direction made in terms of a provision of ECA repealed by the NEM: WA that was in force immediately before the date of the coming into effect of the NEM: WA on 1 July 2009, remains in force and is considered to have been made under the NEM: WA until anything done under the NEM: WA overrides it¹³. Anything lawfully done under a provision repealed by the NEM: WA remains valid until anything done under the NEM: WA overrides it¹⁴.

3.5. Pending applications and appeals in terms of ECA

An application for environmental authorisation submitted in terms of the ECA notice and which was pending when the 2010 NEMA Regulations came into effect on 2 August 2010, must despite the repeal of the ECA regulations be dispensed with in terms of the ECA regulations as if the ECA

¹² Regulation 73(1) of GN No. R. 543 refers.

¹³ Section 80(2) of the NEM: WA refers.

¹⁴ Section 80(3) of the NEM: WA refers

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

regulations were not repealed¹⁵. If a situation, however, arises where activities listed under the ECA notice are not listed similarly under the 2010 NEMA notices or in terms of the NEM: WA notice and where a decision on an application submitted under the ECA regulations is still pending, the application will be considered withdrawn¹⁶.

Where an application for environmental authorisation submitted in terms of the ECA regulations was pending when the 2010 NEMA regulations came into effect on 2 August 2010, and a component of the development which was not listed under the ECA notice, became listed in terms of the 2010 NEMA notices, the competent authority must dispense of such pending application in terms of the ECA regulations, as if the ECA regulations were not repealed, but may authorise the activity listed in terms of the 2010 NEMA notices as if it was applied for, on condition that all impacts of the newly listed activity have been assessed and the requirements of the 2010 NEMA regulations have been considered¹⁷.

An application for a permit in terms of section 20 of ECA that was pending when the NEM: WA came into effect on 1 July 2009, must be proceeded with in terms of the NEM: WA as if that application was an application for a waste management licence in terms of the NEM: WA¹⁸.

An appeal lodged against a decision issued in terms of the ECA regulations, which was pending when the 2010 NEMA regulations came into effect on 2 August 2010 must despite the repeal of the ECA regulations be dispensed with in terms of the ECA regulations as if the ECA regulations were not repealed¹⁹.

3.6. Continuation of things done under the 2006 NEMA regulations

Anything done in terms of the 2006 NEMA regulations and which can be done in terms of a provision of the 2010 NEMA regulations must be regarded as having been done in terms of the provision of the 2010 NEMA Regulations²⁰.

3.7. Pending applications and appeals in terms of the 2006 NEMA regulations

An application submitted in terms of the 2006 NEMA regulations and which was pending when the 2010 NEMA regulations came into effect on 2 August 2010 must, despite the repeal of the 2006 NEMA regulations, be dispensed with in terms of the 2006 NEMA regulations as if the 2006 NEMA regulations were not repealed²¹.

¹⁵ Regulation 74(1) of GN No. R. 543 refers.

¹⁶ Regulation 74(2) of GN No. R. 543 refers.

¹⁷ Regulation 74(3) of GN No. R. 543 refers.

¹⁸ Section 81(6) of NEM: WA refers.

¹⁹ Regulation 74(4) of GN No. R. 543 refers.

²⁰ Regulation 75(1) of GN No. R. 543 refers.

²¹ Regulation 76(1) of GN No. R. 543 refers.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

Note: If an applicant has lodged a Notice of Intent to apply for an environmental authorisation and has already commenced with the process contemplated in regulation 22(a) to (f) of the 2006 NEMA regulations, but has not submitted the application form or the Basic Assessment Report before 02 August 2010, the application must be dispensed with in terms of the 2006 NEMA regulations as if those 2006 NEMA regulations were not repealed unless:

- otherwise agreed to between the applicant and the Department; or
- an application has been submitted in terms of the 2010 NEMA regulations and the Notice of Intent submitted in terms of the 2006 NEMA regulations has been withdrawn;

and, where applicable, on condition that the application form and Basic Assessment Report in terms of the 2006 NEMA regulations was submitted before 1 April 2011²².

If a situation arises where activities listed under the 2006 NEMA notices, are not listed similarly under the 2010 NEMA notices and where a decision on an application submitted under the 2006 NEMA regulations is still pending, the application will be considered to be withdrawn²³.

Where an application submitted in terms of the 2006 NEMA regulations, was pending when the 2010 NEMA regulations came into effect on 2 August and a component of the development was not listed under the 2006 NEMA notices, but became listed in terms of the 2010 NEMA notices, the Department must dispense of such pending application in terms of the 2006 NEMA regulations, but may authorise the activity listed in terms of the 2010 NEMA notices as if it was applied for, on condition that all impacts of the newly listed activity have been assessed and that the requirements of the 2010 NEMA regulations have been considered²⁴.

An appeal lodged in terms of the 2006 NEMA regulations, and which was pending when the 2010 NEMA regulations came into effect on 2 August 2010, must despite the repeal of the 2006 NEMA regulations be dispensed with in terms of the 2006 NEMA regulations as if the 2006 NEMA regulations were not repealed²⁵.

3.8. Appeal against decisions in terms of ECA or the 2006 NEMA regulations submitted after 2 August 2010

Appeals against decisions in terms of ECA or the 2006 NEMA regulations submitted after 2 August 2010 must be submitted and considered in terms of the 2010 NEMA regulations.

²² Regulation 76(5) of GN No. R. 543 refers.

²³ Regulation 76(2) of of GN No. R. 543 refers.

²⁴ Regulation 76(3) of GN No. R. 543 refers.

²⁵ Regulation 76(4) of GN No. R. 543 refers.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

3.9. Continuation of regulations regulating authorisations for activities in certain coastal areas

It must be noted that the 2010 NEMA Regulations do not affect the continued application of the Regulations published in terms of Sections 26 and 28 of the ECA in Government Notice R. 1528 of 27 November 1998, which regulate authorisations for activities in certain coastal areas²⁶.

Note: In the Western Cape the Outeniqua Sensitive Coastal Area Regulations (“OSCA”) are the only set of regulations which “regulate authorisations for activities in certain coastal areas”²⁷.

3.10. Transitional Arrangements in terms of applications in terms of Section 24G of NEMA.

A person who, prior to the coming into effect of the 2006 NEMA regulations on 3 July 2006, unlawfully commenced (i.e. without first having obtained environmental authorisation) with an activity listed in terms of the ECA notice, may apply for rectification in terms of Section 24G of NEMA, if on the day of the application such activity is still listed in terms of the 2010 NEMA notices (Listing Notices 1, 2 and 3) or the NEM: WA notice²⁸.

A person who unlawfully commenced (i.e. without first having obtained environmental authorisation) with an activity listed in terms of the 2006 NEMA notices, may apply for rectification in terms of Section 24G of NEMA, even if the activity that was commenced with is no longer listed in the 2010 NEMA notices (Listing Notices 1, 2 and 3). If at the time of the commencement the activity was listed in terms of the 2006 NEMA notices, an offence was committed in terms of Section 24F(2) of NEMA. Even if the activity is no longer listed in terms of the 2010 NEMA notices, it remains an offence, and as such the person who committed the offence may apply for rectification in terms of Section 24G.

3.11. Existing Policies and Guidelines

Guidelines adopted by the Department before the coming into effect of the 2006 NEMA Regulations or the 2010 NEMA regulations must, to the extent compatible with the NEMA and the 2010 NEMA regulations, be regarded to be provincial guidelines issued in terms of NEMA.

It must further be noted that of applications that were pending when the 2010 NEMA regulations came into effect on 2 August 2010, the guidelines applicable at the time of application would apply to the application and not the guidelines issued in terms of the 2010 NEMA EIA Regulations. If, however, activities listed in terms of the 2010 NEMA notices are to be included in the environmental authorisation then the content of the guidelines applicable in terms of the 2010 NEMA regulations must be considered.

²⁶ Regulation 77 of of GN No. R. 543 refers.

²⁷ Government Notice No. R. 879, R. 880 and R. 881 in Government Gazette No. 17213 of 31 May 1996 refer.

²⁸ Section 12(3) of the NEMAA refers.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

3.12. Transitional arrangements in terms of the NEM: Waste Act

If a proposed activity constitutes a waste management activity and the activity has not yet commenced, then a written waste management licence in terms of the NEM: WA must be obtained prior to commencement.

Note: It must be noted that the above is true even if –

- an application in terms of the Land Use Planning Ordinance (Ordinance No. 15 of 1985) (“LUPO”) or any other law was lodged prior to the NEM: WA notice coming into effect on 3 July 2009; or
- an application in terms of LUPO or any other law was decided prior to the NEM: WA notice coming into effect on 3 July 2009.

A permit issued in terms of section 20 of ECA which is in force when the NEM: WA came into effect on 1 July 2009 remains in force and is regarded to be a waste management licence, until such time as the licensing authority in terms of the NEM: WA requires of the person to apply for a waste management licence within a stipulated period²⁹. The section 20 permit lapses if the holder of the permit did not apply for a waste management licence within the stipulated period, or if the licensing authority refuses the waste management licence³⁰.

Note: It must be noted that the holder of a permit in terms of section 20 of ECA, may apply for a variation of the permit in terms of the NEM: WA or for a renewal of the permit, if the request for variation or renewal is submitted while the permit is still in force³¹.

A person operating a waste disposal facility that was established before the coming into effect of ECA and that was operational on the date of the coming into effect of the NEM: WA, 1 July 2009, may continue to operate the facility until such time as the Minister, by notice in the Gazette, calls upon that person to apply for a waste management licence³².

Any regulation or direction made in terms of a provision of the ECA repealed by the NEM: WA and in force immediately before 1 July 2009, remains in force and is considered to have been made under the NEM: WA until anything done under the NEM: WA overrides it, and anything lawfully done under a provision repealed by the NEM: WA remains valid until anything done under the NEM: WA overrides it³³.

²⁹ Section 81(1) and (2) of NEM: WA refers.

³⁰ Section 81(3) of NEM: WA refers.

³¹ Section 54(1) and 55(2) of NEM: WA refer.

³² Section 80(4) of NEM: WA refers.

³³ Sections 80(2) and (3) of the NEM: WA refers.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

Any criminal proceedings instituted under ECA in terms of littering, the removal of litter, and waste management, that have not been finalised by 1 July 2009, must be finalised as if the relevant sections of ECA had not been repealed³⁴.

3.13. Transitional arrangements in terms of the NEM: Air Quality Act

Anything done or deemed to have been done under a repealed provision of the Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965) ("APPA") which can be done in terms of a provision of the NEM: AQA must be regarded as having been done under the relevant provision of the NEM: AQA³⁵.

Anything done or deemed to have been done under a provision of APPA repealed by the NEM: AQA which can be done in terms of the constitutional or statutory powers of a municipality remains in force in the area of a municipality until repealed by the municipality of that area³⁶.

Despite the repeal of APPA, a provisional registration certificate issued in terms of APPA which was a valid certificate immediately before 1 April 2010, continues to be valid for a period of two years from 1 April 2010³⁷, unless a provisional atmospheric emission licence or an atmospheric emission licence is issued to the holder of the provisional registration certificate during the two year period, which would result in the provisional registration certificate expiring on the date of issue of the provisional licence or licence in terms of the NEM: AQA³⁸.

During the period for which a provisional registration certificate continues to be valid, the provisions of the NEM: AQA, read with the necessary changes as the context may require, apply in respect of the holder of such a certificate as if that person is the holder of a provisional atmospheric emission licence issued in terms of the NEM: AQA for the activity for which the certificate was issued; and the provisions of the NEM: AQA, read with the necessary changes as the context may require apply in respect of the certificate as if the certificate is a provisional atmospheric emission licence in terms of the NEM: AQA³⁹.

Despite the repeal of APPA, a registration certificate issued in terms of APPA which was a valid certificate immediately before 1 April 2010 continues to be valid for a period of four years from 1 April 2010, but the holder of the registration certificate must within the first three years of the four year period lodge a renewal application in terms of the NEM: AQA with the licensing authority of the area

³⁴ Section 80(5) of NEM: WA refers.

³⁵ Section 60(2) of NEM: AQA refers.

³⁶ Section 60(3) of NEM: AQA refers.

³⁷ Section 61(1)(a) of NEM: AQA refers.

³⁸ Section 61(1)(c) of NEM: AQA refers.

³⁹ Section 61(1)(b) of NEM: AQA refers.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

in which the activity for which the certificate was issued is carried out⁴⁰. If the holder of a registration certificate fails to lodge a renewal application within the first three years, the certificate expires at the end of the three years⁴¹. If during the four-year period referred an atmospheric emission licence is issued to the holder of a registration certificate following an application for renewal in terms of the NEM: AQA, the certificate expires on the date of issue of the licence⁴². If during the period before the holder of a registration certificate lodges an application for renewal in terms of the NEM: AQA an atmospheric emission licence issued to the holder of the certificate following a revision in terms of the certificate in terms of NEM: AQA, the certificate expires on the date of issue of the licence in terms of the NEM: AQA⁴³.

During the period for which a registration certificate continues to be valid, the provisions of the NEM: AQA, read with the necessary changes as the context may require, apply in respect of the holder of such a certificate as if that person is the holder of an atmospheric emission licence issued in terms of the NEM: AQA for the activity for which the certificate was issued; and apply in respect of the certificate as if the certificate is an atmospheric emission licence issued in terms of the NEM: AQA⁴⁴.

Despite the repeal of the APPA, any application for a registration certificate made in terms of APPA which was not decided by 1 April 2010, must be proceeded with in terms of the NEM: AQA as if such application was an application for an atmospheric emission licence in terms of the NEM: AQA⁴⁵.

3.14. Transitional arrangements in terms of Prospecting and Mining

With the empowering provisions in NEMA in terms of the provisions relating to prospecting, mining exploration and production and related activities not yet having come into effect, the provisions of the NEMA EIA Regulations 2010⁴⁷ and Listing Notices⁴⁸ and the activities in the Listing Notices relating to prospecting, mining exploration and production and related activities will also only come into operation 18 months after the date of commencement of the Mineral and Petroleum Resources Development Amendment Act, 2008 (Act No. 49 of 2008)⁴⁹.

Until such time as these provisions come into effect, the prospecting and mining activities per se are for all intents and purposes not (yet) listed. However, any operation related to prospecting and

⁴⁰ Section 61(2)(a) and (b) of NEM: AQA refers.

⁴¹ Section 61(2)(d)(i) of NEM: AQA refers.

⁴² Section 61(2)(d)(ii) of NEM: AQA refers.

⁴³ Section 61(2)(d)(iii) of NEM: AQA refers.

⁴⁴ Section 61(2)(b) of NEM: AQA refers.

⁴⁵ Section 61(3) of NEM: AQA refers.

⁴⁶ Section 14(2) of NEMAA refers.

⁴⁷ GN No. R. 543 & R. 547 refer.

⁴⁸ GN No. R. 544, R. 545 & R. 546 refer.

⁴⁹ The Mineral and Petroleum Resources Development and Amendment Act (Act No. 49 of 2008) was promulgated on 21 April 2009.

⁵⁰ Activities 19 and 20 in GN No. R. 544 and Activities 20 to 23 in GN No. R. 545 refer.

GUIDELINE ON TRANSITIONAL ARRANGEMENTS

3. (CONTINUED)

mining that constitutes listed activities in terms of the EIA Listing Notices (Listing Notice 1, 2, and 3)⁵¹ and/or a waste management activity⁵² and/or an atmospheric emission licence activity⁵³ will require environmental authorisation in terms of NEMA and the EIA Regulations and/or the Waste Act and/or the Air Quality Act. Therefore, if a mining company's proposed activities trigger listed activities in terms of the NEMA EIA Regulations and/or the Waste Act and/or the Air Quality Act, the mining company must obtain the necessary approvals in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) and the NEMA and/or the 2010 NEMA regulations and the Waste Act and/or the Air Quality Act.

The fact that the relevant activities may be in line with an approved EMPR has no relevance to legality thereof in terms of the EIA regulations. Authorization obtained from another authority is not granted in terms of the EIA regulations. A mining or prospecting permit issued and / or approved EMPR does not negate the need for an environmental authorisation in term of the NEMA and the EIA regulations. Section 24(8) of NEMA confirms this by stating that authorisations or permits obtained under any other law for an activity listed or specified in terms of that law does not absolve the applicant from obtaining authorisation under NEMA.

⁵¹ GN No. R. 544, R. 545 & R. 546 refer.

⁵² GN No. 718 published in Government Gazette No. 32368 of 3 July 2009 refers.

⁵³ GN No. 248 published in Government Gazette No. 33064 of 31 March 2010 refers



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EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON GENERIC TERMS OF REFERENCE FOR EAPS AND PROJECT SCHEDULES

MARCH 2013

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

Published in terms of Section 24J of NEMA by: Western Cape Department of Environmental Affairs & Development Planning (DEA&DP) Private Bag X9086, Cape Town, 8000, South Africa.

EIA Guideline & Information Document Series: This guideline forms part of the DEA&DP's Environmental Impact Assessment Guideline and Information Document Series. This guideline is formally published in terms of Section 24J of NEMA. The published versions of the guidelines available in this series consist of the following guidelines –

- Guideline on Transitional Arrangements (March 2013)
- Generic Terms of Reference for EAPs and Project Schedules (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Need and Desirability (March 2013)
- Guideline on Exemption Applications (March 2013)
- Guideline on Appeals (March 2013)

The EIA Guideline & Information Document Series, the relevant legislation and DEA&DP's applications forms are available on the DEA&DP website: <http://www.westerncape.gov.za/eadp>

Please note: This guideline must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”), the EIA Regulations, the relevant Specific Environmental Management Act(s) (“SEMA”) (e.g. Environment Conservation Act, 1989 – Act No. 73 of 1989, National Environmental Management: Air Quality Act, 2004 – Act No. 39 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 – Act No. 24 of 2008, and the National Environmental Management: Waste Act, 2008 – Act No. 59 of 2008, and the SEMA's Regulations), and is not intended to be a substitute for the provisions of the NEMA, the EIA Regulations or the SEMAs, in any way. Adherence to the requirements in terms of the NEMA, the EIA Regulations, and the SEMAs does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

Enquiries and Comments: All enquiries and comments should be addressed to – The Chief Director: Environmental and Land Management, Department of Environmental Affairs & Development Planning, Private Bag X9086, Cape Town, 8000, South Africa.

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CONTENTS

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

- 1. INTRODUCTION**
- 2. DEFINITIONS**
- 3. GENERAL REQUIREMENTS FOR EAPS**
- 4. GENERAL REQUIREMENTS FOR PERSONS COMPILING A SPECIALIST REPORT OR UNDERTAKING A SPECIALISED PROCESS**
- 5. SCOPE OF WORK**
 - 5.1 Project Description
 - 5.2 Primary Responsibility
 - 5.3 Anticipated Inputs
 - 5.4 Key steps in the process
 - 5.5 Timeframes

ANNEXURE

Generic Project Schedules

ACRONYMS

DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act No. 73 of 1989)
EIA	Environmental Impact Assessment
I&AP	Interested and Affected Party
LUPO	Land Use Planning Ordinance, 1985 (Ordinance No. 15 of 1985)
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
NEMAA	National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008)
NEM: AQA	National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)
NEM: WA	National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)
NHRA	National Heritage Resources Act, 1999 (Act No. 25 of 1999)
SEMA	Specific Environmental Management Act

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

1. INTRODUCTION

On 18 June 2010 the Minister responsible for Environmental Affairs promulgated new Environmental Impact Assessment (“EIA”) Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹. From the date of effect of these EIA Regulations, 2 August 2010, these EIA Regulations replaced the previous EIA Regulations² that were promulgated in terms of NEMA on 21 April 2006³, and introduced new provisions for EIAs. On 30 July 2010⁵ and on 10 December 2010⁶ corrections on the 2010 EIA Regulations were published. These corrections all came into effect on 2 August 2010.

The National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (“NEMAA”), was promulgated on 9 January 2009⁷ and came into effect on 1 May 2009⁸. The NEMAA made a number of significant amendments to the general provisions applicable to EIAs. The definition of “Environmental authorisation” in terms of NEMA was amended and now reads “when used in Chapter 5 means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. This means that, inter alia, the following are considered to be an “Environmental authorisation”: an Environmental authorisation issued for an activity listed in Listing Notice 1, 2 or 3⁹; an atmospheric emissions licence in terms of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (“NEM: AQA”); and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (“NEM: WA”). As such, the general provisions of NEMA that applies to an application for environmental authorisation, applies to all of these applications.

It must further be noted that as part of an application for a waste management licence or an atmospheric emissions licence, the application must also be subjected to the EIA process as stipulated in the EIA Regulations promulgated in terms of NEMA. While a number of different authorisations might therefore be required (an Environmental authorisation, a waste management licence and/or an atmospheric emissions licence), the assessment process to be followed must be in accordance with the requirements stipulated in the EIA Regulations, with the specific requirements of the relevant specific environmental management Act (“SEMA(s)”) to also be adhered to over and above the requirements of the EIA Regulations¹⁰.

This guideline must be read together with the NEMA, the EIA Regulations, the relevant SEMA(s) and its Regulations, and is not intended to be a substitute for the provisions of the NEMA, the SEMAs or the Regulations, in any way. Adherence to the requirements in terms of the NEMA and the EIA Regulations, the SEMAs and its Regulations does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

¹ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

² Government Notice No. R. 385, R. 386, and R. 387 in Government Gazette No. 28753 of 21 April 2006 refer.

³ Government Notice No. R. 612, R. 613, R. 614, R. 615, and R. 616 in Government Gazette No. 28938 of 23 June 2006 refer.

⁵ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁶ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

⁷ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

⁸ Government No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

⁹ Government Notice No. R. 544, R. 545, and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer.

¹⁰ Section 24(4)(b)(vii) of NEMA refers.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

2. PURPOSE

This guideline forms part of this Department's Environmental Impact Assessment Guideline and Information Document Series (available on the Department's website at <http://www.westerncape.gov.za/eadp>) and provides a generic terms of reference for an Environmental Assessment Practitioner ("EAP") for both Basic Assessment and Scoping and Environmental Impact Reporting, as well as for Basic Assessment and Scoping and Environmental Impact Reporting where an atmospheric emission licence in terms of the NEM: AQA and/or waste management licence in terms in terms of the NEM: WA are also required. Appended to this guideline are generic project schedule for the different processes.

While the requirements of each EIA might be different, this generic terms of reference and generic project schedules are of general application and are based on the minimum legislative requirements and legislated timeframes. Based on the specific requirements of each EIA, it might be necessary to add to the generic terms of reference and generic project schedules.

Note: The generic project schedules reflect the schedule as per a well-run EIA process. Unnecessary delays caused by Application Forms or Reports being rejected or requests for additional information are therefore not provided for.

It must further be noted if an application for exemption must first be decided prior to proceeding with the application for environmental authorisation it could further delay the process.

The authority might also decide that an appeal suspends an Environmental authorisation, and as such the time necessary to decide an appeal must also be considered. A separate schedule which indicates the time necessary to consider appeals is therefore also included. If it is anticipated that a proposed EIA process will be more complicated than the generic EIA process, it is, however, always advisable to arrange for a pre-application meeting with the Department to clarify process requirements.

3. GENERIC REQUIREMENTS FOR EAPS

The term "environmental assessment practitioner", is defined in the NEMA and means "the individual responsible for the planning, management and coordination of environmental impact assessments, strategic environmental assessments, environmental management plans or any other appropriate environmental instruments introduced through regulations".

An EAP appointed in terms of the NEMA EIA Regulations to manage an EIA application process, inter alia, must¹¹-

- be independent;

¹¹ Regulation 17 of GN No. R. 543 of 18 June 2010 refers.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

3. (CONTINUED)

Note: The NEMA EIA Regulations defines “Independent” as “in relation to an EAP or a person compiling a specialist report or undertaking a specialised process or appointed as a member of an appeal panel, means—

- (a) that such EAP or person has no business, financial, personal or other interest in the activity, application or appeal in respect of which that EAP or person is appointed in terms of these Regulations other than fair remuneration for work performed in connection with that activity, application or appeal; or
- (b) that there are no circumstances that may compromise the objectivity of that EAP or person in performing such work”.

- have expertise in conducting EIAs, including knowledge of the NEMA, the EIA Regulations and any guidelines that have relevance to the proposed activity;

Note: “Expertise” means “expert knowledge and skill in a particular subject”. “Knowledge” in turn means “the information, understanding and skills that you gain through education or experience”. A combination of relevant education and experience in EIA are therefore required. The requirements for registration of an EAP will also require the EAP to meet the registration requirements in terms of a combination of education and experience.

- and once the registration authority for EAPs have been legislated, be registered;
- perform the work relating to the application in an objective manner, even if this results in views and findings that are not favourable to the applicant and/or EAP;
- comply with the NEMA, the EIA Regulations and all other applicable legislation;
- take into account all relevant factors, to the extent possible, which include the following matters:
 - o any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;
 - o measures that may be taken-
 - to protect the environment from harm as a result of the activity which is the subject of the application; and
 - to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;
- the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;
- any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment and maximise the benefits which may result from the activity;

¹² Ordinary dictionary meaning.

¹³ Ordinary dictionary meaning.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

3. (CONTINUED)

- any information and maps compiled in terms of section 24(3), including any prescribed environmental management frame-works, to the extent that such information, maps and frame-works arc relevant to the application;
- information contained in the application form, reports, comments, representations and other documents generated in connection with the application;
- any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and
- any guidelines, departmental policies and decision making instruments that have been developed or any other information that are relevant to the application;
- assist with/facilitate coordination and cooperation between different organs of state where an activity falls under the jurisdiction of more than one organ of state;
- ensure that the the findings and recommendations flowing from an investigation, the general objectives of integrated environmental management laid down in Section 23 of NEMA and the principles of environmental management set out in Section 2 of NEMA are taken into account during the EIA process;
- describe the environment likely to be significantly affected by the proposed activity;
- investigae the potential consequences for or impacts on the environment of the activity and assess the significance of those potential consequences or impacts; and
- ensure public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures;
- investigate the potential consequences or impacts of the alternatives to the activity on the environment and assess the significance of those potential consequences or impacts, including the option of not implementing the activity;
- investigate mitigation measures to keep adverse consequences or impacts to a minimum;
- investigate, assess and evaluate the impact of any proposed listed or specified activity on any national estate referred to in Section 3(2) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999), excluding the national estate contemplated in section 3(2)(i)(vi) and (vii) of that Act;
- report on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information;
- investigate and formulate arrangements for the monitoring and management of consequences for or impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation;consider the need for and desirability of the activity;
- disclose to the applicant and the Department all material information in the possession of the EAP that reasonably has or may have the potential of influencing –
 - o any decision to be taken with respect to the application by the competent authority in terms of the NEMA EIA Regulations; or
 - o the objectivity of any report, plan or document to be prepared by the EAP in terms of the NEMA EIA Regulations for submission to the competent authority.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

3. (CONTINUED)

- Note:** If the Department at any stage of considering an application has reason to believe that the EAP does not comply with any of the requirements set out in Regulation 17 and the Department, after having investigated the matter, remains unconvinced of the EAP's compliance with the requirements, the Department may in terms of Regulation 18 :
- o refuse to accept any further reports or input from the EAP in respect of the application in question;
 - o request the applicant to -
 - commission, at own cost, an external review by an independent person or persons of any reports prepared or processes conducted by the EAP or person compiling a specialist report or undertaking a specialised process in connection with the application;
 - to redo any specific aspects of the work done by the previous EAP in connection with the application; and
 - to complete any unfinished work in connection with the application; or
 - o request the applicant to take such action as the competent authority requires to remedy the defects.

An EAP must manage the EIA process, including -

- giving advice on whether or not the Department would be able to reach a decision on the basis of information provided in a Basic Assessment Report or whether permission should be applied for to apply Scoping-EIR instead of Basic Assessment to the application¹⁷;
- ensuring that the requirements in terms of NEMA and the EIA Regulations are met and that the application does not lapse¹⁸;
- coordinating and integrating any specialist inputs or studies that might be required, and also ensure that the specialists appointed meet the requirements in terms of independence, objectivity and expertise¹⁹;
- ensuring proper consultation with the applicant in terms of process and content²⁰;
- managing and ensuring the integrity of the public participation process; and
- ensuring EIA best practice and clearly communicate the methodologies used, and the assumptions, uncertainties and gaps in knowledge²¹.

4. GENERAL REQUIREMENTS FOR PERSONS COMPILING A SPECIALIST REPORT OR UNDERTAKING A SPECIALISED PROCESS

A person appointed in terms of the NEMA EIA Regulations to compile a specialist report or undertake a specialised process, inter alia, must in relation to the specialist input to be provided or specialised process process to be performed²² -

- be independent;

Note: The NEMA EIA Regulations defines "Independent" as "in relation to an EAP or a person compiling a specialist report or undertaking a specialised process or appointed as a member of an appeal panel, means—

- (a) that such EAP or person has no business, financial, personal or other interest in the activity, application or appeal in respect of which that EAP or person is appointed in terms of these Regulations other than fair remuneration for work performed in connection with that activity, application or appeal; or
- (b) that there are no circumstances that may compromise the objectivity of that EAP or person in performing such work".

¹⁷ Regulation 20(3) of GN No. R. 543 of 18 June 2010 refers.

¹⁸ Regulation 67 of GN No. R. 543 of 18 June 2010 refers.

¹⁹ Regulation 17 of GN No. R. 543 of 18 June 2010 refers.

²⁰ This includes having to facilitate proper intra-institutional consultation (e.g. having to consult with all the different Departments within the City of Cape Town when the City is the applicant).

²¹ Section 24(4)(b)(iv) of NEMA and Regulations 22(2)(m), 28(1)(n)(iii) and 31(2)(h) and (m) of GN No. R. 543 of 18 June 2010 refer.

²² Regulation 17 of GN No. R. 543 of 18 June 2010 refers.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

4. (CONTINUED)

- have expertise in conducting EIAs, including knowledge of the NEMA, the EIA Regulations and any guidelines that have relevance to the proposed activity;

Note: “Expertise” means “expert knowledge and skill in a particular subject”. “Knowledge” in turn means “the information, understanding and skills that you gain through education or experience”. A combination of relevant education and experience in EIA are therefore required. The requirements for registration of an EAP will also require the EAP to meet the registration requirements in terms of a combination of education and experience.

- perform the work relating to the application in an objective manner, even if this results in views and findings that are not favourable to the applicant and/or EAP and/or specialist;
- comply with the NEMA, the EIA Regulations and all other applicable legislation;
- take into account all relevant factors, to the extent possible, which include the following matters:
 - o any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;
 - o measures that may be taken-
- to protect the environment from harm as a result of the activity which is the subject of the application; and
- to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;
- the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;
- any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment and maximise the benefits which may result from the activity;
- any information and maps compiled in terms of section 24(3), including any prescribed environmental management frame-works, to the extent that such information, maps and frame-works are relevant to the application;
- information contained in the application form, reports, comments, representations and other documents generated in connection with the application;
- any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and
- any guidelines, departmental policies and decision making instruments that have been developed or any other information that are relevant to the application;
- assist with/facilitate coordination and cooperation between different organs of state where an activity falls under the jurisdiction of more than one organ of state;
- ensure that the the findings and recommendations flowing from an investigation, the general objectives of integrated environmental management laid down in Section 23 of NEMA and the principles of environmental management set out in Section 2 of NEMA are taken into account during the EIA process;
- describe the environment likely to be significantly affected by the proposed activity;

²³ Ordinary dictionary meaning.

²⁴ Ordinary dictionary meaning.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

4. (CONTINUED)

- investigate the potential consequences for or impacts on the environment of the activity and assess the significance of those potential consequences or impacts; and
- ensure public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures;
- investigate the potential consequences or impacts of the alternatives to the activity on the environment and assess the significance of those potential consequences or impacts, including the option of not implementing the activity;
- investigate mitigation measures to keep adverse consequences or impacts to a minimum;
- investigate, assess and evaluate the impact of any proposed listed or specified activity on any national estate referred to in Section 3(2) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999), excluding the national estate contemplated in section 3(2)(i)(vi) and (vii) of that Act;
- report on gaps in knowledge, the adequacy of predictive methods and underlying assumptions, and uncertainties encountered in compiling the required information;
- investigate and formulate arrangements for the monitoring and management of consequences for or impacts on the environment, and the assessment of the effectiveness of such arrangements after their implementation; consider the need for and desirability of the activity;
- disclose to the applicant, EAP and the Department all material information in the possession of the specialist that reasonably has or may have the potential of influencing –
 - o any decision to be taken with respect to the application by the competent authority in terms of the NEMA EIA Regulations; or
 - o the objectivity of any report, plan or document to be prepared by the specialist in terms of the NEMA EIA Regulations for submission to the competent authority.

Note: If the Department at any stage of considering an application has reason to believe that the specialist does not comply with any of the requirements set out in Regulation 17 and the Department, after having investigated the matter, remains unconvinced of the specialist's compliance with the requirements, the Department may in terms of Regulation 18 :

- o refuse to accept any further reports or input from the specialist in respect of the application in question;
- o request the applicant to –
 - commission, at own cost, an external review by an independent person or persons of any reports prepared or processes conducted by the specialist in connection with the application;
 - to redo any specific aspects of the work done by the previous specialist in connection with the application; and
 - to complete any unfinished work in connection with the application; or
 - o request the applicant to take such action as the competent authority requires to remedy the defects.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

5. SCOPE OF WORK

While the requirements in terms of NEMA, the EIA Regulations, the relevant SEMA(s) and the relevant guidelines must be met, the following specifically must also be included in the Scope of Work:

5.1 Project Description

A detailed project description must be provided. The description must, inter alia, provide details about:

- the specific activities that require environmental authorisation that are to be applied for (note: the activities that will ultimately form part of the application will be informed by the outcome of the EIA process);
- the details of the property on which the project is to be undertaken (including the zoning, servitude details, availability of services, possible environmentally sensitive attributes, existing infrastructure) and including a locality map and site map (note: the final layout should be informed by the outcome of the EIA process); and
- the specific aspects that form part of the application (e.g. that exemption from certain provisions of the public participation requirements should be applied for, or that a public meeting will specifically be required, or that specific stakeholders must be consulted with, etc.).

5.2 Primary Responsibility

The primary responsibilities of an EAP include:

- To ensure that the provisions of the NEMA and the EIA Regulations, the NHRA (if applicable), and NEMWA (if applicable) are adhered to. This will include ensuring that the relevant statutory procedures are followed and to apply for the required authorisations in terms of the aforementioned legislation.
- To liaise with, and co-ordinate the activities and inputs of any other consultants appointed to the project team, insofar as their inputs may have a bearing on the application(s) to be managed by the EAP. This would include ensuring the coordination of relevant procedures such as advertising and public participation with the requirements of LUPO and any other relevant legislation, wherever possible.
- To provide environmental input to the planning and design process such that sustainability principles are recognized and employed as appropriate. This would include relevant features of the proposed site and surroundings which create both opportunities and constraints to development, as well as promoting a sustainable development model appropriate to the receiving environment, incorporating key energy, water, waste, public space, mobility and biodiversity design features.

Any specialist input or specialist studies proposed must be specifically mentioned in the proposal submitted by the EAP.

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

5. (CONTINUED)

5.3 Anticipated Inputs

The EAP's input to the project would include, inter alia:

- Attending all scheduled project meetings and site visits as may be necessary.
- Preparing and placing notices in the press about the proposed project to satisfy the requirements of the EIA Regulations.
- Coordination of all public participation required in terms of the EIA and HIA regulations, including notification of interested and affected parties (including the organs of state), preparing press notices (in the required languages), placing reports in all relevant libraries, facilitating meetings, producing minutes and tracking all correspondence.
- Preparing all the required reports and process documentation.
- Attending all scheduled project team meetings, and any other meetings with third parties, as may be necessary.
- Liaison with the public and other stakeholders (note: a preliminary list of the relevant stakeholders and reason for their involvement should be specified in the scope of work), including the media, for the duration of the EIA process (note: media liaison will however be subject to the relevant policies and media procedures of the relevant municipality). The appointed service provider must be available to answer questions of direct relevance to the EIA process.
- Compiling all the relevant reports.
- Making all relevant reports available to the public and stakeholders, including placing these reports as electronic documents on an accessible web site. Two copies of each report must be placed in all relevant libraries as identified by the applicant in consultation with the appointed service provider.

5.4 Key steps in the process

The procedures required for an Application for Authorisation to the Department would involve, amongst others, the following key steps –

- site visit(s) and the collection of relevant site information needed for the Application;
 - coordination of pre-application meetings with relevant authorities, including the Department and HWC (if applicable), in order to establish their requirements;
 - public participation, including advertising, the erection of notice boards and the notification of adjacent and/or directly affected property owners;
 - coordination of specialists' input or studies required;
 - submission of relevant completed application forms;
 - completion of draft reports including draft Environmental Management Programmes for public review;
 - completion of final reports (including a Comments – Response Report and final draft of the EMP) for public review;
 - submission of the reports to the relevant authorities for consideration;
 - notification of all I&APs of the outcome of the application.
-

GUIDELINE ON GENERIC TORS FOR EAPS AND PROJECT SCHEDULES

5. (CONTINUED)

5.5 Timeframes

The generic project schedules for Basic Assessment, Scoping-EIR, Basic Assessment where a waste management licence and/or atmospheric Emission Licence is also required, Scoping-EIR where a Waste Management Licence and/or atmospheric emission licence is also required, as well as a schedule indicating the timeframe to consider appeals are attached herewith as an Annexure.

While the EAP must ensure that best practice and due process is followed, that must, inter alia, allow for a reasonable opportunity for participation by the interested and affected parties, the EAP must complete the above scope of work in the shortest time possible within the ambit of NEMA and the EIA regulations. In this regard it must be noted an application lapses if for a period of six months there was failure to comply with a requirement in terms of the EIA Regulations²⁶ (e.g. the application was accepted, but more than six months have since passed and no public participation has yet occurred); unless written reasons for the failure was communicated to the Department prior to the expiry of the six months and accepted by the Department.

²⁶ Regulation 67 of GN No. R. 543 of 18 June 2010 refers.



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EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GENERIC TORS FOR EAPS AND PROJECT SCHEDULES:
ANNEXURE: GENERIC PROJECT SCHEDULES FOR ANNEXURE: GENERIC PROJECT
SCHEDULES FOR IMPACT REPORTING (S&EIR)
MARCH 2013

ENVIRONMENTAL IMPACT ASSESSMENT GUIDELINE

GUIDELINE

Appended to every Application Form for Environmental Authorisation (as well as an application for a Waste Management Licence and an Atmospheric Emissions Licence) must be a proposed project schedule that must include, inter alia, details of target dates for: public participation (dates for advertisements, workshops and public meetings; obtaining comment from organs of State incl. State departments); the commencement of parallel application processes required in terms of other statutes and where relevant, the alignment of these application processes with the EIA process; the submission of key documents (e.g. Basic Assessment Report or Scoping Reports and Plan of Study, and EIA Report); and planned commencement of the activity if Environmental Authorisation were to be obtained.

All of the above dates must consider the statutory timeframes for authority review and responses as stipulated in the EIA regulations. The authority might also decide that an appeal suspends an Environmental Authorisation, and as such the time necessary to decide an appeal must also be considered. Find attached herewith generic project schedules for Basic Assessment (Sheet 2);

Scoping & Environmental Impact Reporting S&EIR (Sheet 3); Basic Assessment where a Waste Management and/or Atmospheric Emissions Licence is also required (Sheet 4); Scoping & Environmental Impact Reporting S&EIR where a Waste Management and/or Atmospheric Emissions Licence is also required (Sheet 5); & Appeals (Sheet 6).

ENVIRONMENTAL IMPACT ASSESSMENT GUIDELINE

Basic Assessment where a Waste Management and/or Atmospheric Emissions Licence

Project Schedule for Basic Assessment where a waste management/atmospheric emission licence is also required																																	
Tasks to be performed	Number of days	Month 1				Month 2				Month 3				Month 4				Month 5				Month 6				Month 7				Month 8			
		Week				Week				Week				Week				Week				Week				Week							
		1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4
EAP to complete Application Forms and submit to Department & Licensing Authority.	7	1	2	3	4																												
If in order, the Department & Licensing Authority to acknowledge the applications.	14																																
EAP to notify I&APs (incl. the State departments) (incl. placing notice(s) in the media) of the application & calling for people to register & provide initial comments.	21																																
EAP to compile the draft Basic Assessment Report (BAR) (including a draft EMP).	30																																
EAP to notify the registered I&APs (incl. the State departments) of the availability of the draft BAR & EMP for comments.	7																																
Department & Licensing Authority to request comments from the relevant State departments.	7																																
Commenting period of 40 days for I&APs and State departments.	40																																
EAP to consider the comments received and complete the final BAR (including the final draft of the EMP).	14																																
EAP to make the final BAR (including the final draft of the EMP) available to the registered I&APs for a 21-day commenting period.	21																																
Following the commenting period the EAP to submit the BAR together with any comments received on the final BAR to the Department & Licensing Authority.	14																																
The Department & Licensing Authority to acknowledge receipt of the BAR.	14																																
If in order, the Department & Licensing Authority to accept the BAR	30																																
If the application is for a waste disposal facility and a licence is also required in terms of the National Water Act, the Department of Water Affairs must submit a copy of the licence to the Department and Licensing Authority.	60																																
After having accepted the BAR, and after having received a copy of Water Affairs licence, the Department to decide whether or not to grant or refuse Environmental Authorisation.	30																																
The Department to inform the applicant and the licensing authority of its decision.	2																																
Applicant/EAP to notify I&APs of outcome of the authorisation application and if authorised may commence once the required licence also issued.	20																																
If a waste management licence must also be decided, after having accepted the BAR and having received a copy of the Water Affairs licence, and considering the decision issued by the Department, the licensing authority to decide whether or not to grant or refuse the waste management licence.	30 (waste)																																
The licensing authority to inform the applicant and the Department of its decision in terms of the waste management licence.	2																																
Applicant/EAP to notify I&APs of outcome of the licence application and if authorised and licence issued may only commence 20 days after the date of the licence.	20																																
If an atmospheric emission licence must also be decided, after having accepted the BAR and having received a copy of the Water Affairs licence, and considering the decision issued by the Department and the waste management licence, the licensing authority to decide whether or not to grant or refuse the atmospheric emission licence.	60 (air)																																
The licensing authority to inform the applicant and the Department of its decision in terms of the atmospheric emission licence.	2																																
Applicant/EAP to notify I&APs of outcome of the licence application and if authorised and licence issued may only commence 20 days after the date of the licence.	20																																

ENVIRONMENTAL IMPACT ASSESSMENT GUIDELINE

Scoping & Environmental Impact Reporting S&EIR where a Waste Management and/or Atmospheric Emissions Licence

Project Schedule for Scoping-EIR, where a waste management/atmospheric emission licence is also required.

Tasks to be performed	Number of days	Month															
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
EAP to complete Application Form and submit to Department & Licensing Authority.	7	1															
If in order, the Department & Licensing Authority to acknowledge the application.	14	1	1														
EAP to notify IAPs (incl. the State departments) (incl. granting indication) in the context of the application & visiting for people to register & provide initial comments.	21	1	1	1													
EAP to compile the draft Scoping Report (SR) (incl. the Plan of Study for EIA).	30	1	1	1	1												
EAP to notify the registered IAPs (incl. the State departments) of the availability of the draft SR.	7	1															
Department & Licensing Authority to request comments from the State departments.	7	1															
Commenting period of 40 days for IAPs and State departments to comment & Licensing Authority.	40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
EAP to consider the comments received and complete the final SR.	14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
EAP to make the final SR available to the registered IAPs for a 21-day commenting period.	21	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Following the commenting period the EAP to submit the final SR together with any comments received on the final SR to the Department & Licensing Authority.	14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Department to acknowledge SR & Plan of Study for EIA.	14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
If in order, the Department to accept the SR & Plan of Study for EIA.	21	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
EAP to undertake the EIA and compile the draft EIA Report ("EIR") (including the draft EMP).	40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
EAP to notify registered IAPs (incl. the State departments) of the availability of the draft EIR for comment.	7	1															
Department & Licensing Authority to request comments from the State departments.	7	1															
Commenting period of 40 days for IAPs and State departments.	40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
EAP to consider the comments received and complete the final EIR.	14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
EAP to make the final EIR available to the registered IAPs for a 21-day commenting period.	21	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Following the commenting period the EAP to submit the final EIR together with any comments received on the final EIR to the Department.	14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Department & Licensing Authority to acknowledge EIR.	14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
If in order, the Department & Licensing Authority to accept the EIR.	40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
If the application is for a waste disposal facility and licence is also required in terms of the National Water Act, the Department of Water Affairs must submit a copy of the licence to the Department and Licensing Authority.	40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
After having accepted the EIR, and after having received a copy of Water Affairs licence, the Department to decide whether or not to grant or refuse Environmental Authorisation.	40	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
The Department to inform the applicant of its decision.	7	1															
Applicant/EAP to notify IAPs of outcome of environmental application and if authorised may only commence 30 days after the date the required licence is issued.	14	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
If a waste management licence must also be decided, after having accepted the EIR, and considering the decision issued by the Department, the Licensing Authority to decide whether or not to grant or refuse the licence.	30 (week)	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
The Licensing Authority to inform the applicant and the Department of its decision on terms of the waste management licence.	7	1															
Applicant/EAP to notify IAPs of outcome of the licence application and if authorised and licence issued may only commence 30 days after the date of the licence.	20	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
If an atmospheric emissions licence must also be decided, after having accepted the EIR, and considering the decision issued by the Department the Licensing Authority to decide whether or not to grant or refuse the licence.	40 (day)	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
The Licensing Authority to inform the applicant and the Department of its decision.	7	1															
Applicant/EAP to notify IAPs of outcome of the licence application and if authorised and licence issued may only commence 30 days after the date of the licence.	20	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

ENVIRONMENTAL IMPACT ASSESSMENT GUIDELINE

Appeals

		Project Schedule for Appeals																											
Tasks to be performed	Number of days	Month 1				Month 2				Month 3				Month 4				Month 5				Month 6				Month 7			
		Week				Week				Week				Week				Week				Week							
		1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4	1	2	3	4
The applicant must within 12 days of the date of the Department's decision notify the registered I&APs of the decision, the reasons and their right to appeal.	12	█	█																										
Appellants (whether the applicant or I&APs) must lodge their Notice of Intent to Appeal within 20 days of the date of the Department's decision and copy the other parties (I&APs must copy the applicant, and the applicant must copy the I&APs within 10 days of having lodged the notice). The copy of the Notice of Intent to Appeal must also be accompanied by a notice indicating that the appeal submission will be made available from the date of lodging with the Minister.	20	█	█	█																									
Appeal submissions must be submitted within 30 days after the lapsing of the 20 days during which the Notice of Intent to Appeal had to be submitted.	30					█	█	█	█																				
The appeal authority will acknowledge receipt of the appeal within 10 days of receipt.	10																												
A Responding Statement to the appeal may be submitted by the other parties (if the applicant is the appellant by the I&APs, if an I&AP is the appellant by the applicant) to the Minister (and copied to the appellant within 10 days) within 30 days from the date the appeal submission was lodged with the Minister.	30									█	█	█	█																
The appeal authority will acknowledge receipt of the statement within 10 days of receipt.	10																												
If the Responding Statement deals with matters not raised in the appeal, then the other parties may submit to the Minister (and copy the appellant within 10 days) an Answering Statement to the Responding Statement within 30 days of receipt of the copy of the Responding Statement.	30													█	█	█	█												
The appeal authority will acknowledge receipt of the statement within 10 days of receipt.	10																												
Once the Appeals, Responding Statement(s) and Answering Statement have been received the Minister can consider and decide on the appeals and inform the appellant of the outcome.	90																	█	█	█	█	█	█	█	█	█	█	█	█



**Western Cape
Government**
Environmental Affairs &
Development Planning

BETTER TOGETHER.

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON PUBLIC PARTICIPATION

MARCH 2013

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON PUBLIC PARTICIPATION

Published in terms of Section 24J of NEMA by: Western Cape Department of Environmental Affairs & Development Planning (DEA&DP) Private Bag X9086, Cape Town, 8000, South Africa.

EIA Guideline & Information Document Series: This guideline forms part of the DEA&DP's Environmental Impact Assessment Guideline and Information Document Series. This guideline is formally published in terms of Section 24J of NEMA. The published versions of the guidelines available in this series consist of the following guidelines -

- Guideline on Transitional Arrangements (March 2013)
- Generic Terms of Reference for EAPs and Project Schedules (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Need and Desirability (March 2013)
- Guideline on Exemption Applications (March 2013)
- Guideline on Appeals (March 2013)

The EIA Guideline & Information Document Series, the relevant legislation and DEA&DP's applications forms are available on the DEA&DP website: <http://www.westerncape.gov.za/eadp>

Please note: This guideline must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA"), the EIA Regulations, the relevant Specific Environmental Management Act(s) ("SEMA") (e.g. Environment Conservation Act, 1989 - Act No. 73 of 1989, National Environmental Management: Air Quality Act, 2004 - Act No. 39 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 - Act No. 24 of 2008, and the National Environmental Management: Waste Act, 2008 - Act No. 59 of 2008, and the SEMA's Regulations), and is not intended to be a substitute for the provisions of the NEMA, the EIA Regulations or the SEMAs, in any way. Adherence to the requirements in terms of the NEMA, the EIA Regulations, and the SEMAs does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

Enquiries and Comments: All enquiries and comments should be addressed to - The Chief Director: Environmental and Land Management, Department of Environmental Affairs & Development Planning, Private Bag X9086, Cape Town, 8000, South Africa.

Referencing: When referencing this guideline, it must be cited as follows -
DEA&DP (2013) Guideline on Public Participation, EIA Guideline and Information Document Series. Western Cape Department of Environmental Affairs & Development Planning (DEA&DP), March 2013.

CONTENTS

GUIDELINE ON PUBLIC PARTICIPATION

- 1. INTRODUCTION**
- 2. DEFINITIONS**
- 3. PUBLIC PARTICIPATION ALWAYS REQUIRED**
- 4. WHEN TO CONDUCT PUBLIC PARTICIPATION AND NOTICE TO THE OWNER OR PERSON IN CONTROL OF THE LAND**
- 5. NOTIFICATION OF INTERESTED AND AFFECTED PARTIES**
 - 5.1 Method of Notification
 - 5.2 Proof of Notification
 - 5.3 Format of Notice
 - 5.4 Format of Notice for a Joint Public Participation Process
 - 5.5 Minimum Information to be provided in a Notice
 - 5.6 Commenting Periods and Consultation with State Departments and other I&APs
 - 5.7 Minimum size of notice boards and newspaper notices
 - 5.8 Identifying and approaching specific stakeholders
 - 5.9 Broadening participation, capacity building & special needs
- 6. GUIDANCE ON THE LEVEL OF PUBLIC PARTICIPATION**
- 7. INTERESTED AND AFFECTED PARTIES (“I&APS”)**
 - 7.1 Access and opportunity to comment on all written submissions
 - 7.2 Responding to comments received: feedback to I&APs
 - 7.3 Disclosure of I&APs’ interests
 - 7.4 Notifying I&APs of the Department’s Decision
- 8. REPORTING ON THE PUBLIC PARTICIPATION PROCESS CONDUCTED**
- 9. APPLICATIONS FOR EXEMPTION(S) AND DEVIATIONS**
- 10. AMENDMENTS OF ENVIRONMENTAL AUTHORISATIONS**
- 11. SUSPENSION, LAPSING OR DELAYS**
- 12. PUBLIC PARTICIPATION IN TERMS OF THE SPECIFIC ENVIRONMENTAL MANAGEMENT ACTS**

ACRONYMS

BAR	Basic Assessment Report
DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act No. 73 of 1989)
EIA	Environmental Impact Assessment
I&AP	Interested and Affected Party
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
NEMAA	National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008)
NEM: AQA	National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)
NEM: WA	National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)
SEMA	Specific Environmental Management Act
S&EIR	Scoping and Environmental Impact Assessment Report/ing
SR	Scoping Report

GUIDELINE ON PUBLIC PARTICIPATION

1. INTRODUCTION

On 18 June 2010 the Minister responsible for Environmental Affairs promulgated new environmental impact assessment (EIA) Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA)¹. From the date of effect of these EIA Regulations, 2 August 2010, these EIA Regulations replaced the previous EIA Regulations² that were promulgated in terms of NEMA on 21 April 2006³, , and introduced new provisions for EIAs. On 30 July 2010⁴ and on 10 December 2010⁵ corrections on the 2010 EIA Regulations were published. These corrections all came into effect on 2 August 2010.

The National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (“NEMAA”), was promulgated on 9 January 2009⁷ and came into effect on 1 May 2009⁸. The NEMAA made a number of significant amendments to the general provisions applicable to EIAs. The definition of “environmental authorisation” in terms of NEMA was amended and now reads “when used in Chapter 5 means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. This means that, inter alia, the following are considered to be an “environmental authorisation”: an environmental authorisation issued for an activity listed in Listing Notice 1, 2 or 3⁹; an atmospheric emissions licence in terms of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (NEM: AQA); and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (NEM: WA). As such, the general provisions of NEMA that apply to an application for environmental authorisation, apply to all of these applications.

It must further be noted that as part of an application for a waste management licence or an atmospheric emissions licence, the application must also be subjected to the EIA process as stipulated in the EIA Regulations promulgated in terms of NEMA. While a number of different authorisations might therefore be required (an environmental authorisation, a waste management licence and/or an atmospheric emissions licence), the assessment process to be followed must be in accordance with the requirements stipulated in the EIA Regulations, with the specific requirements of the relevant specific environmental management Act (SEMA(s)) to also be adhered to over and above the requirements of the EIA Regulations¹⁰.

In light of the above, this guideline, which forms part of the Environmental Impact Assessment Guideline and Information Document Series (available on the Department’s website at <http://www.westerncape.gov.za/eadp>) provides information and guidance for applicants, authorities and interested and affected parties (“I&APs”) on the public participation requirements in terms of NEMA and the EIA Regulations.

¹ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

² Government Notice No. R. 385, R. 386, and R. 387 in Government Gazette No. 28753 of 21 April 2006 refer.

³ Government Notice No. R. 612, R. 613, R. 614, R. 615, and R. 616 in Government Gazette No. 28938 of 23 June 2006 refer.

⁵ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁶ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

⁷ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

⁸ Government No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

⁹ Government Notice No. R. 544, R. 545, and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer.

¹⁰ Section 24(4)(b)(vii) of NEMA refers.

GUIDELINE ON PUBLIC PARTICIPATION

1. (CONTINUED)

This guideline must be read together with the NEMA, the EIA Regulations, the relevant SEMA(s) and its Regulations, and is not intended to be a substitute for the provisions of the NEMA, the SEMAs or the Regulations, in any way. Adherence to the requirements in terms of the NEMA and the EIA Regulations, the SEMAs and its Regulations does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

2. DEFINITIONS

“Applicant”, means a person who has submitted or who intends to submit an application.

“Competent Authority”, means the authority that in terms of the provisions of the NEMA and the EIA Regulations is identified as the authority that must consider and decide on an application in respect of a specific listed activity.

Note: The “Competent Authority”¹¹ in terms of an application for environmental authorisation for an activity listed in Listing Notice 1, 2 or 3, is not necessarily the same authority as the “Licensing Authority” in terms of the NEM:WA¹² or NEM: AQA¹³.

“Days” means calendar days.

Note: When a period of days must in terms of these Regulations be reckoned from or after a particular day, that period must be reckoned as from the start of the day following that particular day to the end of the last day of the period, but if the last day of the period falls on a Saturday, Sunday or public holiday, that period must be extended to the end of the next day which is not a Saturday, Sunday or public holiday. The period of 15 December to 2 January must be excluded in the reckoning of days. Where a timeframe is affected by the 15 December to 2 January period, the timeframe must be extended by the number of days falling within the 15 December to 2 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.

¹¹ Section 24C of NEMA refers.

¹² Section 43 of the NEM: WA refers.

¹³ Section 36 of the NEM: AQA refers.

GUIDELINE ON PUBLIC PARTICIPATION

2. (CONTINUED)

“Department”, means the Western Cape Department of Environmental Affairs and Development Planning which have in terms of NEMA and the EIA Regulations been delegated by Provincial Minister to administer and decide EIA applications.

“Environmental Assessment Practitioner” (EAP), means the individual responsible for planning, management and coordination of environmental impact assessments, strategic environmental assessments, environmental management programmes or any other appropriate environmental instrument introduced through the Regulations.

Note: If exemption from the appointment of an EAP has been applied for, the applicant must perform the tasks required of an EAP, as indicated in this guideline.

“Environmental authorisation”, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act.

EIA Regulations”, mean the Environmental Impact Assessment Regulations promulgated in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA)¹⁴.

“Interested and Affected Party” (I&AP), for the purposes of Chapter 5 of the NEMA and in relation to the assessment of the environmental impact of a listed activity or related activity, means an interested and affected party contemplated in Section 24(4)(a)(v), and which includes-

- any person, group of persons or organisation interested in or affected by such operation or activity; and
- any organ of state that may have jurisdiction over any aspect of the operation or activity.

“Organ of State”, means -

- any department of State or administration in the national, provincial or local sphere of government; or
- any other functionary or institution -
 - o exercising a power or performing a function in terms of the Constitution or a Provincial Constitution;
 - or
 - o exercising a public power or performing a public function in terms of any Legislation
 but does not include a court or a judicial officer.

Note: Examples of organs of State are: Municipalities (both the District and Local Municipality), Heritage Western Cape, CapeNature, the Department of Water Affairs, ESKOM, etc.

“Previous regulations” means the Environmental Impact Assessment regulations published in terms of:

- sections 26 and 28 of the ECA, by Government Notice No. R. 1183 of 5 September 1997; or
- NEMA, by Government Notice No. R. 385 in the Government Gazette of 21 April 2006.

“Public Participation Process”, means a process by which potential interested and affected parties are given an opportunity to comment on, or raise issues relevant to, an application.

¹⁴ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

GUIDELINE ON PUBLIC PARTICIPATION

2. (CONTINUED)

“State department”, means any department or administration in the national or provincial sphere of government exercising functions that involve the management of the environment or that administer a law relating to a matter affecting the environment.

Note: Examples of State departments are: the Department of Water Affairs, Department of Agriculture, etc. Whilst all State departments are organs of State, not all organs of State are State departments (e.g. Municipalities are organs of State, but not State departments).

“Registered interested and affected parties” means

- all persons who, as a consequence of the public participation process conducted in respect of an application, have submitted written comments or attended meetings with the applicant or EAP;
- all persons who, after completion of the public participation process, have requested the applicant or the EAP managing the application, in writing, for their names to be placed on the register; and
- all organs of state which have jurisdiction in respect of the activity to which the application relates.

Note: The Department also requires that if the applicant is not the owner or person in control of the land on which the activity is to be undertaken, the person who owns or is in control of the land must also be included in the register of interested and affected parties and consulted with throughout the public participation process. To be registered as an interested and affected party the persons referred to in (a) and (b) above must provide their names, contact details and addresses to the EAP managing the application process. Registered I&APs must ensure that they notify the EAP if their contact details and/or address changes during the application process. A Registered I&AP is entitled to comment, in writing, on all written submissions made to the Department by the applicant or the EAP, provided that comments are submitted within the specified timeframes and the I&AP discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application. Comments on draft and amended reports must be submitted to the EAP and may be copied to the Department, but copies on final reports must be submitted to the Department and copied to the EAP.

3. PUBLIC PARTICIPATION ALWAYS REQUIRED

In terms of NEMA¹⁶ procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must, inter alia, ensure, with respect to every application for environmental authorisation:

- coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state;
- that the findings and recommendations flowing from an investigation, the general objectives of integrated environmental management laid down in the NEMA and the principles of environmental management set out in Section 2 of the NEMA are taken into account in any decision made by an

¹⁶ Section 24(4)(a) of NEMA refers.

GUIDELINE ON PUBLIC PARTICIPATION

3. (CONTINUED)

organ of state in relation to any proposed policy, programme, process, plan or project; consequences or impacts; and

- public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures.

The general objectives of integrated environmental management laid down in the NEMA, inter alia, calls for “adequate and appropriate opportunity for public participation in decisions that may affect the environment”¹⁷. The National Environmental Management Principles include the principle that “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 to achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured”.

Note: With public information and participation procedures being specified as a minimum requirement in terms of NEMA¹⁸, exemption from having to undertake public participation cannot be applied for in terms of either NEMA or the EIA Regulations¹⁹. In this regard it must also be noted that an exemption application itself, must also be subjected to public participation. Exemption can, however, be applied for in terms of the extent and level of public participation to be undertaken. It must, however, be noted that in terms of the extent and level of public participation to be undertaken, permission may be granted to deviate from some of the specific requirements in terms of the EIA Regulations related to the public participation steps to be taken (in terms of the different notices to be given in terms of Regulation 54(2) of GN No. R. 543 – as indicated in the Application Form for Environmental Authorisation)²⁰. If permission to deviate from a specific requirement is granted, then exemption from that requirement is not required.

4. WHEN TO CONDUCT PUBLIC PARTICIPATION AND NOTICE TO THE OWNER OR PERSON IN CONTROL OF THE LAND

If the applicant is not the owner or person in control of the land on which the activity is to be undertaken, the person who owns or is in control of the land must first be notified of the intended application and the opportunity to participate during the public participation process²⁰. In instances where the owner of the property requires special means of notification due to illiteracy, disability or any other disadvantage, the proposed alternative means of notification to the owner of the land must be agreed upon with the Department. Proof of the notice to the owner or person in control of the land must then be submitted

¹⁷ Section 23(2)(d) of NEMA refers.

¹⁸ Section 24(4)(a) of NEMA refers.

¹⁹ Section 24M(1) of NEMA refers.

²⁰ Regulation 54(4) of GN No. R. 543 refers.

²³ Regulation 15(1) of GN No. R. 543 refers.

GUIDELINE ON PUBLIC PARTICIPATION

4. (CONTINUED)

together with the application. The EIA Regulations²⁴ do, however, allow for permission to be granted by the Department to deviate, to the extent appropriate, from the requirement to notify the owner or person in control of the land.

When applying for environmental authorisation that must be subjected to basic assessment (BA) or to scoping and environmental impact reporting (S&EIR), the EAP managing the application must conduct at least a public participation process after the application has been accepted by the Department.

When applying for exemption, the EAP must first submit to the Department a notice of the intended exemption application or the exemption application, as well as the proposed method of notifying the interested and affected parties (I&APs) of the intended exemption application/exemption application. The EIA Regulations²⁵ specify that the notice to I&APs of the intended exemption application must be in the form of a site notice, written notice to the different parties, or placing an advertisements in newspapers, or a combination thereof as agreed to by the Department, including having to notify the owner or person in control of the land if the applicant is not the owner or person in control of the land²⁶. After the Department has agreed to the method of notification of the I&APs, the EAP must give notice of the intended exemption application to the I&APs in accordance with the agreed to method²⁷. A notice of the intended exemption applications and exemption application form, as well as the proposed method of notifying the I&APs of the intention to apply for exemption, has also been incorporated into the Application Form for Environmental Authorisation.

If it seems as if the exemption applied for/to be applied for might be appropriate, the DEA&DP will allow an integrated process to be followed for the exemption and environmental authorisation applications (i.e. the applicant will be allowed to continue with both the exemption application process and the environmental authorisation process – through an integrated process e.g. through both the notice of the application for exemption and the notice of the application for environmental authorisation being included in the same public participation notice to the I&APs – with both applications being decided at the end of the process). An applicant must bear in mind that should an exemption application be refused by the Department, the applicant will be required to meet the requirements of the provision(s) for which exemption was applied for. If it, however, seems as if the exemption applied for/to be applied for might not be appropriate, DEA&DP will require separate sequential processes to be followed for the exemption and environmental authorisation applications (i.e. the exemption process must first be concluded and the exemption application decided before the application process for the environmental authorisation may be proceeded with).

²⁴ Regulation 15(5) of GN No. R. 543 refers.

²⁵ Regulation 51(3) of GN No. R. 543 refers.

²⁶ Regulation 15(1) of GN No. R. 543 refers.

²⁷ Regulation 51(3) of GN No. R. 543 refers.

GUIDELINE ON PUBLIC PARTICIPATION

4. (CONTINUED)

If an applicant intends to deviate from the specific I&AP notification requirements, the EAP must first submit the request for permission to deviate to the Department. After the Department has agreed to the deviation, the EAP can then proceed with the public participation process in accordance with the permission to deviate. The notices to the I&APs must, however, indicate the permission to deviate that has been granted. A request for deviation has also been incorporated into the Application Form for Environmental Authorisation.

Note: All exemption applications and deviations must be clearly communicated to I&APs including the relevant organs of state.

5. NOTIFICATION OF I&APs

A person conducting the public participation process must give notice to potential I&APs of the application.

5.1. Method of Notification

Notice must be given by²⁸:

- fixing a notice board at a place conspicuous to the public at the boundary, or on the fence of the site where the activity to be undertaken and any alternative sites being considered (see 5.6 below);

Note: The site notice must be displayed for the duration of the commenting period.

- giving written notice to:
 - o the owner or person in control of the land and of any alternative land where the activity is to be undertaken if the applicant is not the owner or person in control of the land;
 - o the occupiers of the site where the activity is to be undertaken and of any alternative site where the activity is to be undertaken;
 - o the owners and occupiers of land adjacent to the site where the activity is to be undertaken and to any alternative site where the activity is to be undertaken;
 - o the municipal councillor of the ward in which the site and any alternative site are situated and any organisation of ratepayers that represents the community in the area;
 - o the relevant officials (e.g. Health Officer, Planner, Environmental Manager, Engineer, etc.) of the municipality who has jurisdiction in the area within the site and any alternative site are situated;

Note: Take note that it must be determined, in consultation with the relevant municipality, which officials (e.g. Health Officer, Planner, Environmental Manager, and Engineer)

²⁸ Regulation 54(2) of GN No. R. 543 refers.

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

within the municipality must all be given an opportunity to comment. Both the Local Municipality and the District Municipality must be notified.

- o any organ of state having jurisdiction in respect of any aspect of the activity (e.g. Department of Water Affairs for dam applications; the Department of Agriculture for agricultural activities, etc.); and
- o any other party as required by the competent authority.

- placing an advertisement in:
 - o the local newspaper circulating in the area where the site and any alternative site is located; or
 - o any official Gazette that is published specifically for the purpose of providing public notice of applications or other submissions made in terms of the EIA Regulations; and

- placing an advertisement in at least one provincial newspaper or national newspaper, if the activity has or may have an impact that extends beyond the boundaries of the metropolitan or local municipality in which it is or will be undertaken: Provided that this paragraph need not be complied with if an advertisement has been placed in an official Gazette (referred to in (c)(ii) above); and

Note: With no Gazette specifically concerned with publications in respect to the EIA Regulations currently existing, all applications for activities where it is anticipated that the impacts will not extend beyond the boundaries of the local municipality, an advertisement must be placed in the local newspaper. For such applications, applicants may, however, decide to also place an advertisement in a provincial or national paper. In this regard it must further be noted that the requirements specified in the EIA Regulations constitute the minimum requirements, and depending on the facts and circumstances of each application, additional public participation measures might be required. In terms of the NEM: WA and NEM: AQA a notice must be placed in at least two newspapers circulating in the area in which the activity applied for is to be carried out.

- using reasonable alternative methods as agreed to by the competent authority, in those instances where a person desiring of but unable to participate in the process due to –
 - o illiteracy;
 - o disability; or
 - o any other disadvantage

Note: This proposed use of alternative methods of notification must be included in the request for deviation and must be agreed to by the Department prior to the commencement of the public participation process.

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

5.2. “Proof” of Notification

The EIA Regulations²⁹ require “proof that notice boards, advertisements and notices notifying potentially interested and affected parties in relation to the application have been displayed, placed or given”. In terms of the required “proof” the following must be submitted to the Department:

- a copy of the newspaper advertisement (“newspaper clipping”) that was placed, indicating the name of the newspaper and date of publication (of such quality that the wording in the advertisement is legible);
- a site map showing where the site notice was displayed, a dated photographs showing the notice displayed on site and a copy of the text displayed on the notice;
- in terms of the written notices given, a copy of the written notice sent, as well as:
- if registered mail was sent, a list of the registered mail sent (showing the registered mail number, the name of the person the mail was sent to, the address of the person and the date the registered mail was sent);
- if normal mail was sent, a list of the mail sent (showing the name of the person the mail was sent to, the address of the person, the date the mail was sent, and the signature of the post office worker or the post office stamp indicating that the letter was sent);
- if a facsimile was sent, a copy of the facsimile report;
- if an electronic mail was sent, a copy of the electronic mail sent; and
- if a “mail drop” was done, a signed register of “mail drops” received (showing the name of the person the notice was handed to, the address of the person, the date, and the signature of the person).

As already indicated, proof³⁰ that the owner or person in control of the land on which the activity is to be undertaken, was notified of the intended application and the opportunity to participate during the public participation process must also be submitted together with the application for environmental authorisation.

²⁹ Regulations 22 (2)(f)(ii) and 28 (1)(h)(ii) of GN No. R. 543 refers.

³⁰ Regulation 15(3) of GN No. R. 543 refers.

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

5.3. Format of Notice

The following format should be used for the introductory section of a notice:

EIA PUBLIC PARTICIPATION PROCESS

DEA&DP Reference No(s): #####³¹

Project title: e.g. Klapmuts Township Development.

Project proposal: Short description of proposed development (e.g. Klapmuts Township Development consisting of approx. 200 erven and associated infrastructure).

Location(s): e.g. Erf / Farm No. ##, Town, Municipality³²

Application for environmental authorisation to undertake the following activities:

EIA activities: LN 1: #; LN 2: # & LN 3: # (GN No. R. 544, R. 545 and R. 546 refer.)

Waste management activities: Category A: #; Category B: # (GN No. 718 refers).

Atmospheric emission activities: # (GN No. 248 refers)

Exemption: Application for exemption from the provision to put up a site notice is also applied for (Exemption Reference Number: ###)

The minimum information to be provided in the notice (see 5.5 below) must then be included below the above introductory section.

5.4. Format of the Notice for a Joint Public Participation Process

In certain instances an application in respect of any activity requiring environmental authorisation in terms of the EIA Regulations might also require approvals in terms of other legislation. In the spirit of co-operative governance³³ and in order to avoid duplication, a joint public participation process must be followed that meets the regulatory requirements of all the authorities concerned. If a joint process is proposed, prior consultation with the relevant authorities is however important.

³¹ In terms of all the applications: environmental authorisation, exemption, waste management licence, and/or atmospheric emission licence.

³² All alternatives to be highlighted.

³³ To give effect to Chapter 3 of the Constitution, section 24(4)(g) of NEMA and Regulation 6 of the EIA Regulations.

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

The following format should be used for the introductory section of a combined notice:

NOTICE FOR A JOINT PUBLIC PARTICIPATION PROCESS

DEA&DP Reference No(s): #####³¹

DEA&DP REFERENCE NO(S): #####

Project title: e.g. Klapmuts Township Development.

Project proposal: Short description of proposed development (e.g. Klapmuts Township Development consisting of approx. 200 erven and associated infrastructure, including the mining of sand to prepare the site).

Location(s): e.g. Erf / Farm No. ##, Town, Municipality³⁴

Notice is hereby given of a joint public participation process in terms of:

- the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA);
- the National Environmental Management: Waste Act (Act No. 59 of 2008) (NEM:WA)
- the National Environmental Management: Air Quality Act (Act No. 39 of 2004) (NEM:AQA)
- the National Environmental Management: Integrated Coastal Management Act (Act No. 24 of 2008) (NEM: ICM)
- the Land Use Planning Ordinance, 1985 (Ordinance No. 15 of 1985) (LUPO);
- the National Heritage Resources Act, 1999 (Act No. 25 of 1999) (NHRA); and

Application for environmental authorisation to undertake the following activities:

EIA activities: LN 1: #; LN 2: # & LN 3: # (GN No. R. 544, R. 545 and R. 546 refer.)

Waste management activities: Category A: #; Category B: # (GN No. 718 refers).

Atmospheric emission activities: # (GN No. 248 refers)

Exemption: Application for exemption from the provision to put up a site notice is also applied for (Exemption Reference Number: ###)

The minimum information to be provided in the notice (see 6.5 below) must then be included below the above introductory section.

³⁴ All alternatives to be highlighted.

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

5.5. Minimum Information to be provided in a Notice

Apart from the information to be included in the introductory section, a notice must also contain the following minimum information:

- how to register as an interested and affected party (highlighting that I&APs must provide their name, contact details (indicating their preferred method of notification, e.g. e-mail or fax, etc.) and must disclose any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application);
- the manner in which representations on the application may be made (highlighting that I&APs should refer to the department's reference number(s) in their comments);
- reasonable timeframes for responses to notice (see 5.6 below);
- where further information on the application or activity can be obtained; and
- the contact details of the person(s) to whom representations may be made.

If applicable, the following must also be indicated in the notice:

- an indication if permission has been granted by the competent authority to apply S&EIR instead of BA to the application or visa versa;
- an indication of the intended application for exemption from certain provisions; and
- an indication if certain deviations from the public participation requirements have been agreed to by the Department.

Example of notice:

EIA PUBLIC PARTICIPATION PROCESS	
(DEA&DP reference number: E13/2/3/1-F3/8-0228/07; E12/2/3/1-F3/8-0228/07; E12/2/3/5-F3/8-0228/07)	
Proposed Klapmuts Township Development	
Project Proposal:	Proposed Klapmuts Township Development consisting of approx. 200 erven and associated infrastructure.
Location:	Erf 223 located approx. 1km south of Klapmuts.
Application for environmental authorisation to undertake the following activities:	EIA activities: LN 1: 1 & 12; LN 2: 15 & 16 & LN 3: 18 GN No. R. 544, R. 545 and R. 546 refer.) Waste management activities: Category A 1, 12 & 15; Category B:16 & 18 (GN No. 718 refers). Atmospheric emission activities: Category 1 Sub-category 1.4 (GN No. 248 refers)
Exemption:	The intention is to apply for exemption from the following provision: <ul style="list-style-type: none"> • provision to put up a site notice.
Opportunity to participate:	Interested and affected parties (I&APs) are invited to provide written comments. I&APs should refer to the all the relevant DEA&DP reference number(s) above, and must provide their comments together with their name, contact details (preferred method of notification, e.g. e-mail address or fax number) and an indication of any direct business, financial, personal or other interest which they have in the application to the contact person indicated below within 40 days from the date of this notice.
For more information contact:	Mr Koos Jooste, EnviroConsulting, PO Box 6015, Stellenbosch, 7612, tel & fax: 021-8891234, e-mail: KJooste@kingsley.co.za

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

5.6. Commenting Periods and Consultation with State Departments and other I&APs

In accordance with the EIA Regulations, potential I&APs must be provided with a reasonable³⁵ opportunity to make representations on proposed applications and all written submission made to the Department by the applicant or the EAP³⁶. In this regard it is important that notices to I&APs explicitly indicate the duration of the commenting period. The requirements of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA) further highlights the need for I&APs to be afforded a reasonable opportunity to make representations.

21-day Registration and Initial Commenting Period

In terms of the EIA Regulations the EAP must, after the application has been accepted, first notify the I&APs of the application (i.e. first allow for a period during which I&APs can register and provide initial comments). A minimum of 21 days must be allowed for I&APs to respond to such an initial notification.

40-day Commenting Period on Draft and Amended Reports

Following the closing of this registration period and initial commenting period, the draft Basic Assessment Report (BAR)/Scoping Report (SR) (which must include details of the initial notification³⁷), must then be sent to the Department, and then made available, for a minimum of 40 days, to all Registered I&APs, including all the relevant state departments, to make representations on the draft BAR/SR. A 40-day commenting period must also be provided for on environment impact reports ,as well as amended BAR/SR/S&EIR). The EAP/applicant must notify this Department of the state departments (name and contact details of the official) which have received or will be receiving the relevant reports and on which date such reports have been or will be made available to those State departments. This Department will then request written comment from the relevant State departments to be submitted within 40 days of such request having been made by this Department. Comments by the state departments must be submitted to this Department and copied to the EAP.

Note: In the case of a waste disposal facility identified as a waste management activity in terms of the NEM: WA which also requires a water use licence from the Department of Water Affairs, the Department of Water Affairs must be afforded 60 days within which to submit their comments on a draft or amended report. When a state department is requested by the competent authority to comment, such state department must, within 40 days, or within 60 days in the case of a waste disposal facility identified as a waste management activity in terms of the NEM: WA which also requires a water use licence from the Department of Water Affairs, of being requested to comment by the Department, provide comments to the Department.

If a state department fails to submit comments within the 40/60 day period, it will be regarded that there are no comments.

³⁵ Regulation 54(7) of GN No. R. 543 refers.

³⁶ Regulation 56(1) of GN No. R. 543 refers.

³⁷ Regulation 22(2)(f) and 28(1)(h) of GN No. R. 543 refers.

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

Commenting Period on Additional Information

If a BAR is rejected because the Department requires additional information³⁸, or if in response to the submission of a Scoping Report additional information is requested³⁹, then the Registered I&APs must be afforded, unless otherwise indicated by the Department, at least 21 days to comment on the additional information. Only once the commenting period has closed, must the additional information, together with the comment received, be submitted to the Department.

21-day Commenting Period on Final Reports

Prior to submission of a final report to the Departments, the Registered I&APs must be afforded, unless otherwise indicated by the Department, at least 21 days to comment on the final report. Only once the commenting period has closed, may the final report together with the comment be submitted to the Department.

A minimum notice period of 14 days must be provided for a public meeting.

As stated earlier: “Days” refers to calendar days. When a period of days must, in terms of the EIA Regulations, be reckoned from or after a particular day, that period must be reckoned as from the start of the day following that particular day to the end of the last day of the period, but if the last day of the period falls on a Saturday, Sunday or public holiday, that period must be extended to the end of the next day which is not a Saturday, Sunday or public holiday.

The period of 15 December to 2 January must be excluded in the reckoning of days. Where a timeframe is affected by the 15 December to 2 January period, the timeframe must be extended by the number of days falling within the 15 December to 2 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.

5.7. Minimum Size of Notice Boards and Newspaper Notices

The EIA Regulations specify the minimum size for notice boards (at least 60cm by 42cm, in lettering with a format that may be indicated by the competent authority). It is recommended that consideration be given to the unique circumstances of each application. In some instances larger and more prominent the notices might be required.

A notice in a newspaper must be of such a size and in the relevant section of the newspaper where it will be noticeable and can be clearly read and understood.

5.8. Identifying and Approaching Specific Stakeholders

Over and above the placement of general notices in the media calling for I&APs to participate, certain stakeholders should be specifically approached. The following means of identifying stakeholders should be used when appropriate:

- Social profiles or probes provide a comprehensive summary of the key characteristics of the people of a community or area and can serve as a starting point for identifying stakeholders.
- Brainstorming sessions with the proponent and/or authorities, based on previous experience, to identify key stakeholders who may be interested or affected by the proposal.
- Established lists and databases, held by consultancies, authorities or research institutions, may hold additional contact details of residents, Non-Government Organisations, Community Based Organisations or constituents.

³⁸ Regulation 24(2)(a) of GN No. R. 543 refers.

³⁹ Regulation 30(1)(b) of GN No. 543 refers.

GUIDELINE ON PUBLIC PARTICIPATION

5. (CONTINUED)

- Network or chain referral systems according to which key stakeholders are asked to assist in identifying other stakeholders.

5.9. Facilitation, Broadening Participation, Capacity Building & Special Needs

The person responsible for conducting the public participation process must ensure that participation by potential interested and affected parties is facilitated in such a manner that all potential interested and affected parties are provided with a reasonable opportunity to comment on the application⁴⁰.

Appropriate participation measures should be put in place to deal with the range of cultural and language requirements of I&APs. The language used by the I&APs must be taken into account when serving a notice, selecting a newspaper, holding a public meeting and writing a report.

Note: Where environmental reporting is done in a specific official language, executive summaries in the other official languages should be made available, on request.

Where I&APs include historically disadvantaged communities or people with special needs (e.g. a lack of skills to read or write, disability, or any other disadvantage), the following must, inter alia, be considered:

- the project and public participation process could be announced on an appropriate local radio station in a local language, at an appropriate time;
- Participatory Rural Appraisal (PRA) and Participatory Learning and Action (PLA) approaches and techniques could be used to build the capacity of these stakeholders to engage and participate more effectively (see references below);
- existing community structures, committees and leaders must specifically be approached;
- public meetings could be held at times and venues suitable to the community;
- determine the need for separate meetings with vulnerable and marginalised groups;
- appropriate access to information must be provided; and
- reasonable assistance to people with special needs must be provided.

6. GUIDANCE ON THE LEVEL OF PUBLIC PARTICIPATION

The minimum requirements for public participation outlined in the Regulations will not necessarily be sufficient for all applications. This is mainly due to the fact that the circumstances of each application are different, and it may be necessary in some situations to incorporate additional steps in the public participation process. This section provides guidance for deciding on the required level of public participation.

Three categories of variables need to be taken into account when deciding on the level of public participation and the process to be followed:

the scale of anticipated impacts of the proposed project;
the sensitivity and the degree of controversy of the project; and
the characteristics of the potentially affected parties.

⁴⁰ Regulation 54(7) of GN No. R. 543 refers.

GUIDELINE ON PUBLIC PARTICIPATION

6. (CONTINUED)

The following aspects need to be considered in this regard:

Scale of anticipated impacts:

Are the impacts of the project likely to extend beyond the boundaries of the local municipality?

Are the impacts of the project likely to extend beyond the boundaries of the province?

Is the project a greenfields development (a new development in a previously undisturbed area)?

Does the area already suffer from socio-economic problems (e.g. job losses) or environmental problems (e.g. pollution), and is the project likely to exacerbate these?

Is the project expected to have a wide variety of impacts (e.g. socio-economic and environmental)?

Public sensitivity of the project:

Is widespread public concerns expected about the potential negative impacts of the project?

Is there a high degree of conflict among I&APs?

Will the project impact on private land other than that of the applicant?

Does the project have the potential to create unrealistic expectations (e.g. that a new factory would create a large number of jobs)?

Potentially affected parties:

Has very little previous public participation taken place in the area?

Did previous public participation processes in the area result in conflict?

Are there existing organisational structures (e.g. local forums) that can represent I&APs?

What is the literacy level of the community in terms of their ability to participate meaningfully during the public participation process?

Is the area characterised by high social diversity (i.t.o. socio-economic status, language or culture)?

Were people in the area victims of unfair expropriations or relocation in the past?

Is there a high level of unemployment in the area?

Do the I&APs have special needs (e.g. a lack of skills to read or write, disability, etcetera)?

GUIDELINE ON PUBLIC PARTICIPATION

6. (CONTINUED)

Based on the above, the use of the following public participation mechanisms, over and above the requirements, should also be considered (see 6.9 above):

- Public meetings and open days
- Conferences
- Press releases
- Questionnaires or opinion surveys
- Information desks and/or info lines (helplines)
- Meetings/workshops with constituencies (e.g. National Standing Committees, Non-Government Organisations / Community Based Organisations)

As already highlighted, the person conducting the public participation process must give notice by reasonable alternative methods, as agreed to by the Department, in those instances where a person is desiring of but unable to participate due to illiteracy, disability, or any other disadvantage⁴¹. A request for the Department's agreement to an alternative method of notification must be agreed to by the Department prior to following the alternative method.

7. INTERESTED AND AFFECTED PARTIES (I&APs)

In terms of the regulations "registered interested and affected parties" means:

- all persons who, as a consequence of the public participation process conducted in respect of an application, have submitted written comments or attended meetings with the applicant or EAP;
- all persons who, after completion of the public participation process, have requested the applicant or the EAP managing the application, in writing, for their names to be placed on the register; and
- all organs of state which have jurisdiction in respect of the activity to which the application relates.

Note: To be registered as an interested and affected party the persons referred to (a) and (b) above must provide their names and contact details (postal address or facsimile or email or all three) to the EAP managing the application process. The preferred method of notification should be indicated. Registered I&APs must ensure that they notify the EAP if their contact details change during the application process. Seeing as all people that attend meetings are automatically registered as an I&AP, attendance registers that contain the name, contact details, preferred method of notification, and an indication of the person's interest in the application must be kept by the EAP and submitted to the Department.

The Department also requires that if the applicant is not the owner or person in control of the land on which the activity is to be undertaken, the person who owns or is in control of the land must also be included in the register of interested and affected parties and consulted with during the public participation process.

⁴⁰ Regulation 54(2)(e) of GN No. R. 543 refers.s.

GUIDELINE ON PUBLIC PARTICIPATION

7. (CONTINUED)

7.1. Access and opportunity to comment on all written submissions

A Registered I&AP is entitled to comment on all written submissions made to the competent authority by the applicant or the EAP managing an application, and to bring to the attention of the competent authority any issues which the Registered I&AP believe may be of significance to the consideration of the application, provided that:

- comments are submitted within the specified timeframes or any extension of a timeframe agreed to by the applicant or EAP;
- a copy of comments submitted directly to the competent authority is served on the applicant or EAP; and
- the I&AP discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application.

Draft reports must be submitted to the Department before it is made available to interested and affected parties, including the relevant organs of State and State departments which have jurisdiction with regard to any aspect of the activity, for a 40-day commenting period. With regard to State departments, the 40-day period commences the day after the date on which the Department as the competent/licensing authority requests such state department in writing to submit comment. The applicant/EAP is therefore required to inform this Department in writing when the draft report will be made available to the relevant State departments for comment. Upon receipt of the draft report and this confirmation, this Department will in accordance with Section 24O(2) and (3) of NEMA request the relevant State departments to comment on the draft report within 40 days.

All initial comments of I&APs (given during the registration period) must be included in a Comments and Response Report to be included in the draft report. All comments of I&APs on a draft report must be recorded, responded to and included in the Comments and Responses Report to be submitted with the final report. If necessary, any amendments in response to comments received must be effected in the report itself. The Comments and Responses report must also include a description of the public participation process followed.

Final reports must be made available to registered interested and affected parties for comments before submitting it to the Department for consideration. Unless otherwise indicated by the Department, a final report must be made available to the Registered I&APs for comments for a minimum of 21 days. Comments on a final report do not have to be responded to, but the comments must be attached to the final report.

Only Registered I&APs:

- will be notified of the availability of reports and other written submissions made (or to be made) to the Department by the applicant, and be entitled to comment on these reports and submissions;
- will be notified of the outcome of the application, the reasons for the decision, and that an appeal may be lodged against a decision; and
- will be notified of the applicant's intention to appeal the decision of the competent authority, together with an indication of where and for what period the appeal submission will be available for inspection.

GUIDELINE ON PUBLIC PARTICIPATION

7. (CONTINUED)

7.2. Responding to comments received: feedback to I&APs

All comments received from I&APs must be acknowledged by the EAP, with the EAP indicating how the comments received will be/have been responded to (even if just referring to the fact that a response will be contained in the “Comments & Response Report”). Comments and responses must be indicated in the Comments & Response Report (submitted with the BA or S&EIR).

Note: The EAP is responsible for ensuring that the issues raised by I&APs are addressed in an objective manner. Where issues are not addressed, the reasons for this must be provided in the Comments & Response Report. Simply indicating “noted” is not adequate.

7.3. Disclosure of I&APs’ interests

I&APs must disclose any direct business, financial, personal or other interests which they may have in the approval or refusal of an application.

Note: In terms of the EIA Regulations,⁴² Registered I&APs are entitled to comment on all written submissions made to the Department and to bring to the attention of the Department any issues which they believe may be of significance to the consideration of the application, but I&APs must disclose any direct business, financial, personal or other interest which they may have in the approval or refusal of the application.

7.4. Notifying I&APs of the Department’s Decision

The Guideline on Appeals (August 2010) must also be considered with regard to the specific requirements in this regard.

The applicant must, in writing, within 12 days of the date of the decision (i.e. within 12 days after the date the decision was made by the Department and not within 12 days of having been notified of the decision) notify the Registered I&APs of the outcome of the decision, refer to the Department’s reasons for the decision as contained in the copy of the Department’s decision to be attached to the notice, and draw their attention to the fact that an appeal may be lodged against the decision. In addition to the notice to the Registered I&APs, the applicant must also within 12 days of the date of the decision place a notice in the same newspaper(s) used for the placing of notices during the public participation process that was undertaken, informing I&APs of the Department’s decision, where the I&APs can access a copy of the Department’s decision (note that the applicant must give access to a copy of the decision to I&APs), and draw their attention to the fact that an appeal may be lodged against the decision, and the manner in which to lodge an appeal against the decision.

⁴² Regulation 54(2)(e) of GN No. R. 543 refers.s.

GUIDELINE ON PUBLIC PARTICIPATION

8. PUBLIC PARTICIPATION PROCESS REPORT

A basic assessment report, scoping report and environmental impact assessment report must include details of the public participation process conducted (during the basic assessment, scoping phase and environmental impact assessment phase respectively) including –

- a list of all the potential interested and affected parties that were notified;
- the steps that were taken to notify potentially interested and affected parties;
- proof that notice boards, advertisements and notices notifying potentially interested and affected parties, and (if applicable) the owner or person in control of the land, of the application have been displayed, placed or given;
- a list of all persons, organisations and organs of state that were registered as interested and affected parties in relation to the application;
- a Comments and Response Report containing a summary of the issues raised by interested and affected parties, the date of receipt of and the response of the EAP to those issues (or the reason for not addressing an issue); and
- copies of all the comments received from interested and affected parties.

Note: As already stated, all comments of interested and affected parties on a draft report must be recorded, responded to and included in the Comments and Responses Report to be submitted with the final report. If necessary, any amendments in response to comments received must be effected in the report itself. The Comments and Responses Report must also include a description of the public participation process followed. Comments on a final report must be submitted to the Department and copied to the EAP, but do not have to be responded to, but the comments must be attached to the final report. The EAP must inform the I&APs accordingly.

GUIDELINE ON PUBLIC PARTICIPATION

9. APPLICATIONS FOR EXEMPTION(S) AND DEVIATIONS

As stated earlier, with public information and participation procedures being specified as a minimum requirement in terms of NEMA⁴³, exemption from having to undertake public participation cannot be applied for in terms of either NEMA or the EIA Regulations⁴⁴. Exemption can, however, be applied for in terms of the extent or level of public participation to be undertaken. It must be noted that in terms of the extent and level of public participation to be undertaken, deviation from some of the specific requirements in terms of the EIA Regulations related to the public participation steps to be taken (in terms of the different notices to be given in terms of Regulation 54(2) of GN No. R. 543 – as indicated in the Application Form for Environmental Authorisation) can, however, be requested⁴⁵. Requests for deviation must be well motivated and the Department will consider the merits of each request for deviation. If a deviation is agreed to, then exemption is not required. Permission may also be requested to deviate, to the extent appropriate, from having to notify the owner or person in control of the land, if the applicant is not the owner or person in control of the land. Any notices to potential interested and affected parties must clearly describe the deviation, the reasons for the deviation and the Department's agreement/permission in this regard. The information on the deviation (description, reasons and the Department's agreement) and any responses by I&APs to the deviation must also be recorded in Comments and Responses Report.

Note: A more detailed explanation of the exemption application process is provided in the Department's Guideline on Exemption Applications (May 2011).

10. AMENDMENTS OF ENVIRONMENTAL AUTHORISATIONS

If a holder of an environmental authorisation applies for an amendment of an authorisation as, the applicant must, to the extent appropriate depending on the nature of the amendment application, and as required by the competent, conduct a public participation process. While a new public participation process might be required for the amendment, depending on, amongst other factors, the time that has passed since the issuing of the original authorisation, the I&APs that registered during the original process might also have to be notified of the proposed amendment and given an opportunity to comment. The requirement to notify the original Registered I&APs must be confirmed with the Department.

11. SUSPENSION, LAPSING OR DELAYS

If a process⁴⁷ or a decision has been suspended⁴⁸ or an application has lapsed (if the applicant after having submitted the application fails for a period of six months to comply with a requirement of the EIA Regulations), an EAP (or in the case of the submission of an appeal suspending a decision – the applicant) must inform the Registered Interested and Affected Parties accordingly.

⁴³ Section 24(4)(a) of NEMA refers.

⁴⁴ Section 24M(1) of NEMA refers.

⁴⁵ Regulation 54(4) of GN No. R. 543 refers.

⁴⁸ Section 43(7) of NEMA and Regulation 47 of GN No. R. 543 refer.

GUIDELINE ON PUBLIC PARTICIPATION

12. PUBLIC PARTICIPATION IN TERMS OF THE SPECIFIC ENVIRONMENTAL MANAGEMENT ACTS

12.1. National Environmental Management: Waste Act, Act No. 59 of 2008

The public participation process as discussed in this guideline is also applicable to an application for a waste management licence in terms of the NEM: WA. As highlighted earlier, the NEM: WA, however, requires that advertisements are placed in two separate circulating in the area in which the activity is to be undertaken.

12.2. National Environmental Management: Air Quality Act, Act No. 39 of 2004

The public participation process as discussed in this guideline is also applicable to an application for an atmospheric emission licence in terms of the NEM: AQA. As highlighted earlier, the NEM: AQA, however, requires that advertisements are placed in two separate circulating in the area in which the activity is to be undertaken.



**Western Cape
Government**
Environmental Affairs &
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**EIA GUIDELINE AND INFORMATION
DOCUMENT SERIES**
GUIDELINE ON ALTERNATIVES

MARCH 2013

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON ALTERNATIVES

Published in terms of Section 24J of NEMA by: Western Cape Department of Environmental Affairs & Development Planning (DEA&DP) Private Bag X9086, Cape Town, 8000, South Africa.

EIA Guideline & Information Document Series: This guideline forms part of the DEA&DP's Environmental Impact Assessment Guideline and Information Document Series. This guideline is formally published in terms of Section 24J of NEMA. The published versions of the guidelines available in this series consist of the following guidelines –

- Guideline on Transitional Arrangements (March 2013)
- Generic Terms of Reference for EAPs and Project Schedules (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Need and Desirability (March 2013)
- Guideline on Exemption Applications (March 2013)
- Guideline on Appeals (March 2013)

The EIA Guideline & Information Document Series, the relevant legislation and DEA&DP's applications forms are available on the DEA&DP website: <http://www.westerncape.gov.za/eadp>

Please note: This guideline must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA"), the EIA Regulations, the relevant Specific Environmental Management Act(s) ("SEMA") (e.g. Environment Conservation Act, 1989 – Act No. 73 of 1989, National Environmental Management: Air Quality Act, 2004 – Act No. 39 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 – Act No. 24 of 2008, and the National Environmental Management: Waste Act, 2008 – Act No. 59 of 2008, and the SEMA's Regulations), and is not intended to be a substitute for the provisions of the NEMA, the EIA Regulations or the SEMAs, in any way. Adherence to the requirements in terms of the NEMA, the EIA Regulations, and the SEMAs does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

Enquiries and Comments: All enquiries and comments should be addressed to – The Chief Director: Environmental and Land Management, Department of Environmental Affairs & Development Planning, Private Bag X9086, Cape Town, 8000, South Africa.

Referencing: When referencing this guideline, it must be cited as follows –
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CONTENTS

GUIDELINE ON ALTERNATIVES

1. INTRODUCTION

2. DEFINITIONS

3. IDENTIFICATION, INVESTIGATION AND ASSESSMENT OF ALTERNATIVES

- 3.1 Alternatives: the key consideration of EIA
- 3.2 Alternatives and Exemptions
- 3.3 Identifying and Investigating Alternatives, and Comparatively Assessing Alternatives
- 3.4 Alternatives and Public Participation

4. TYPES OF ALTERNATIVES

- 4.1 Alternatives and Modifications and Changes to activities
- 4.2 Types of Alternatives

5. ROLES OF THE VARIOUS PARTIES

- 5.1 Environmental Assessment Practitioner
- 5.2 Applicant
- 5.3 Interested and Affected Parties

ACRONYMS

DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act No. 73 of 1989)
EIA	Environmental Impact Assessment
I&AP	Interested and Affected Party
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
NEMAA	National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008)
NEM: AQA	National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)
NEM: WA	National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)
SEMA	Specific Environmental Management Act

GUIDELINE ON ALTERNATIVES

1. INTRODUCTION

On 18 June 2010 the Minister responsible for Environmental Affairs promulgated new Environmental Impact Assessment (“EIA”) Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹. From the date of effect of these EIA Regulations, 2 August 2010, these EIA Regulations replaced the previous EIA Regulations² that were promulgated in terms of NEMA on 21 April 2006³, and introduced new provisions for EIAs. On 30 July 2010⁵ and on 10 December 2010⁶ corrections on the 2010 EIA Regulations were published. These corrections all came into effect on 2 August 2010.

The National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (“NEMAA”), was promulgated on 9 January 2009⁷ and came into effect on 1 May 2009⁸. The NEMAA made a number of significant amendments to the general provisions applicable to EIAs. The definition of “environmental authorisation” in terms of NEMA was amended and now reads “when used in Chapter 5 means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. This means that, inter alia, the following are considered to be an “environmental authorisation”: an environmental authorisation issued for an activity listed in Listing Notice 1, 2 or 3⁹; an atmospheric emissions licence in terms of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (“NEM: AQA”); and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (“NEM: WA”). As such, the general provisions of NEMA that apply to an application for environmental authorisation, apply to all of these applications.

It must further be noted that as part of an application for a waste management licence or an atmospheric emissions licence, the application must also be subjected to the EIA process as stipulated in the EIA Regulations promulgated in terms of NEMA. While a number of different authorisations might therefore be required (an environmental authorisation, a waste management licence and/or an atmospheric emissions licence), the assessment process to be followed must be in accordance with the requirements stipulated in the EIA Regulations, with the specific requirements of the relevant specific environmental management Act (“SEMA(s)”) to also be adhered to over and above the requirements of the EIA Regulations.

In light of the above, this guideline, which forms part of the Environmental Impact Assessment Guideline and Information Document Series (available on the Department’s website at <http://www.westerncape.gov.za/eadp>) provides information and guidance for applicants, authorities and interested and affected parties (“I&APs”) on requirements for the consideration of alternatives in terms of NEMA and the EIA Regulations.

¹ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

² Government Notice No. R. 385, R. 386, and R. 387 in Government Gazette No. 28753 of 21 April 2006 refer.

³ Government Notice No. R. 612, R. 613, R. 614, R. 615, and R. 616 in Government Gazette No. 28938 of 23 June 2006 refer.

⁵ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁶ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

⁷ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

⁸ Government No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

⁹ Government Notice No. R. 544, R. 545, and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer.

¹⁰ Section 24(4)(b)(vii) of NEMA refers.

GUIDELINE ON ALTERNATIVES

1. (CONTINUED)

This guideline must be read together with the NEMA, the EIA Regulations, the relevant SEMA(s) and its Regulations, and is not intended to be a substitute for the provisions of the NEMA, the SEMAs or the Regulations, in any way. Adherence to the requirements in terms of the NEMA and the EIA Regulations, the SEMAs and its Regulations does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

2. DEFINITIONS

“Alternatives”, in relation to a proposed activity, means different means of meeting the general purposes and requirements of the activity, which may include alternatives to –

- o the property on which, or location where, it is proposed to undertake the activity;
- o the type of activity to be undertaken;
- o the design or layout of the activity;
- o the technology to be used in the activity;
- o the operational aspects of the activity; and
- o the option of not implementing the activity.

“Applicant”, means a person who has submitted or who intends to submit an application.

“Competent Authority”¹¹, means the authority that in terms of the provisions of the NEMA and the EIA Regulations is identified as the authority that must consider and decide on an application in respect of a specific listed activity.

Note: The “Competent Authority” in terms of an application for environmental authorisation for an activity listed in Listing Notice 1, 2 or 3, is not necessarily the same authority as the “Licensing Authority” in terms of the NEM: WA¹² or NEM: AQA¹³.

“Days” means calendar days.

Note: When a period of days must in terms of these Regulations be reckoned from or after a particular day, that period must be reckoned as from the start of the day following that particular day to the end of the last day of the period, but if the last day of the period falls on a Saturday, Sunday or public holiday, that period must be extended to the end of the next day which is not a Saturday, Sunday or public holiday. The period of 15 December to 2 January must be excluded in the reckoning of days. Where a timeframe is affected by the 15 December to 2 January period, the timeframe must be extended by the number of days falling within the 15 December to 2 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.

¹¹ Section 24C of NEMA refers.

¹² Section 43 of the NEM: WA refers.

¹³ Section 36 of the NEM: AQA refers.

GUIDELINE ON ALTERNATIVES

2. (CONTINUED)

“Department”, means the Western Cape Department of Environmental Affairs and Development Planning which have in terms of NEMA and the EIA Regulations been delegated by Provincial Minister to administer and decide EIA applications.

EIA Regulations”, mean the Environmental Impact Assessment Regulations promulgated in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹⁴.

“Environmental Assessment Practitioner” (EAP), means the individual responsible for planning, management and coordination of environmental impact assessments, strategic environmental assessments, environmental management programmes or any other appropriate environmental instrument introduced through the Regulations.

Note: If exemption from the appointment of an EAP has been applied for, the applicant must perform the tasks required of an EAP.

“Environmental authorisation”, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act.

“Interested and Affected Party” (I&AP), for the purposes of Chapter 5 of the NEMA and in relation to the assessment of the environmental impact of a listed activity or related activity, means an interested and affected party contemplated in Section 24(4)(a)(v), and which includes-

- any person, group of persons or organisation interested in or affected by such operation or activity; and
- any organ of state that may have jurisdiction over any aspect of the operation or activity.

“No-Go Option” means the option of not implementing the activity;

“Organ of State”, means -

- any department of State or administration in the national, provincial or local sphere of government; or
- any other functionary or institution -
 - o exercising a power or performing a function in terms of the Constitution or a Provincial Constitution; or
 - o exercising a public power or performing a public function in terms of any Legislation but does not include a court or a judicial officer.

Note: Examples of organs of State are: Municipalities (both the District and Local Municipality), Heritage Western Cape, CapeNature, the Department of Water Affairs, etc.

¹⁴ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

GUIDELINE ON ALTERNATIVES

2. (CONTINUED)

“Previous regulations” means the Environmental Impact Assessment regulations published in terms of:

- sections 26 and 28 of the ECA, by Government Notice No. R. 1183 of 5 September 1997; or
- NEMA, by Government Notice No. R. 385 in the Government Gazette of 21 April 2006.

“Public Participation Process”, means a process by which potential interested and affected parties are given an opportunity to comment on, or raise issues relevant to, an application.

“State department”, means any department or administration in the national or provincial sphere of government exercising functions that involve the management of the environment or that administer a law relating to a matter affecting the environment.

Note: Examples of State departments are: the Department of Water Affairs, Department of Agriculture, etc. Whilst all State departments are organs of State, not all organs of State are State departments (e.g. Municipalities are organs of State, but not State departments).

“Registered interested and affected parties” means

- all persons who, as a consequence of the public participation process conducted in respect of an application, have submitted written comments or attended meetings with the applicant or EAP;
- all persons who, after completion of the public participation process, have requested the applicant or the EAP managing the application, in writing, for their names to be placed on the register; and
- all organs of state which have jurisdiction in respect of the activity to which the application relates.

Note: The Department also requires that if the applicant is not the owner or person in control of the land on which the activity is to be undertaken, the person who owns or is in control of the land must also be included in the register of interested and affected parties and consulted with throughout the public participation process.

To be registered as an interested and affected party the persons referred to in (a) and (b) above must provide their names, contact details and addresses to the EAP managing the application process. Registered I&APs must ensure that they notify the EAP if their contact details and/or address changes during the application process. A Registered I&AP is entitled to comment, in writing, on all written submissions made to the Department by the applicant or the EAP, provided that comments are submitted within the specified timeframes and the I&AP discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application. In terms of the EIA Regulations it is offence for a person to provide incorrect or misleading information in any document submitted in terms of the EIA Regulations¹⁶ to the Department.

¹⁶ Regulation 71 of GN No. R. 543 of 18 June 2010 refers.

GUIDELINE ON ALTERNATIVES

3. IDENTIFICATION, INVESTIGATION AND ASSESSMENT OF ALTERNATIVES

3.1 Alternatives: the key consideration of EIA

The NEMA prescribes that the procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must, inter alia, with respect to every application for environmental authorisation –

- ensure that the general objectives of integrated environmental management laid down in NEMA and the National Environmental Management Principles set out in NEMA are taken into account¹⁷; and
- include an investigation of the potential consequences or impacts of the alternatives to the activity on the environment and assessment of the significance of those potential consequences or impacts, including the option of not implementing the activity¹⁸.

The general objective of integrated environmental management is, inter alia, to “identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management”¹⁹ set out in NEMA.

The National Environmental Management Principles, inter alia, state that “Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option”²⁰. The NEMA defines the “best practicable environmental option” as “the option that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term”.

In terms of the NEMA, if the Department considers an application for an environmental authorisation, the Department must take into account all relevant factors, which may include, inter alia, “...any feasible

¹⁷ Section 24(4)(a)(ii) of NEMA refers.

¹⁸ Sections 24(4)(b)(i) and 24(4A) of NEMA refer.

¹⁹ Section 23(2)(b) of NEMA refers.

²⁰ Section 2(4)(b) of NEMA refers.

GUIDELINE ON ALTERNATIVES

3. (CONTINUED)

and reasonable alternatives to the activity which are the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment”²¹.

The NEM: WA also specifies that when considering an application for a waste management licence, the licensing authority must take into account all relevant matters, including the “...need for, and desirability of, the waste management activity and alternatives...”²².

The NEM: Air Quality Act also states that when considering an application for an atmospheric emission licence, the licensing authority must also take into account “the best practicable environmental options available that could be taken”²³.

Ultimately an EIA is a decision-making process with the specific aim of selecting the option that will provide the most benefit and cause the least damage in the short and long term. The quality of an EIA, as with all decisions, therefore “depends on the quality of alternatives from which to choose”²⁴.

In light of the above, the very consideration of a development in terms of EIA is about the consideration of alternatives related to the development – the consideration of alternatives being the key consideration of EIA. Although the NEMA refers to “must include” “where applicable” when referring to the requirement to consider alternatives, the NEMA states that where an EIA has been identified as the environmental instrument to be utilised in informing an application for environmental authorisation, the consideration of alternatives, is applicable²⁵. All EIAs must therefore consider alternatives.

3.2 Alternatives and Exemptions

While the NEMA EIA Regulations make provision for an application for exemption from any provision of the Regulations²⁷, the requirement to consider alternatives is prescribed by the provisions of the NEMA itself²⁸. Section 24M of the NEMA does, however, allow for exemptions from any provision of the NEMA, except from a provisions of section 24(4)(a). While it is therefore possible to apply to be exempted from the requirement to consider alternatives, the fact that the consideration of alternatives is the key consideration of EIA, makes it unlikely that the authority will grant such exemption. It is, however, important to understand exactly what the legislation requires in terms of having to consider alternatives, and specifically the difference between having to investigate and having to comparatively assess alternatives. The next section provides more detail in this regard.

²¹ Section 24O(1)(b)(iv) of NEMAA refers.

²² Section 48 of NEM: WA refers.

²³ Section 39 of NEM: AQA refers.

²⁴ Steinemann, A. (2001) Improving Alternatives for Environmental Impact Assessment, in: Environmental Impact Assessment Review, vol 21, no. 1, New York: Elsevier Science Inc, pp.3-21.

²⁵ Section 24(4)(b) of NEMA refers.

²⁶ Section 24(4A) of NEMA refers.

²⁷ Regulation 50 of GN No. R. 543 of 18 June 2010 refers.

²⁸ Sections 24(4)(b) and 24(4A) of NEMA refer.

GUIDELINE ON ALTERNATIVES

3. (CONTINUED)

3.3 Identifying and Investigating Alternatives, and Comparatively Assessing Alternatives

In terms of the NEMA EIA Regulations all Basic Assessment Reports²⁹, Scoping Reports³⁰ and Environmental Impact Reports³¹ must contain a description of any feasible and reasonable alternatives that have been identified, including a description and comparative assessment of the advantages and disadvantages that the proposed activity and alternatives will have on the environment and on the community that may be affected by the activity. Every EIA process must therefore identify and investigate alternatives, with feasible and reasonable alternatives to be comparatively assessed. If, however, after having identified and investigated alternatives, no feasible and reasonable alternatives were found, no comparative assessment of alternatives, beyond the comparative assessment of the preferred alternative and the option of not proceeding, is required during the assessment phase. What would, however, have to be provided to the Department in this instance is proof that an investigation was undertaken and motivation indicating that no reasonable or feasible alternatives other than the preferred option and the no-go option exist³².

Note: If an applicant intends applying for exemption from the requirement to investigate alternatives, the reasoned motivation why no alternatives exist and why exemption should be granted from having to investigate alternatives, would consist of information on the consideration given to alternatives (i.e. the investigation) – meaning that the same information required by the provisions from which exemption is sought, will have to be provided as part of the exemption application – nullifying the reason for the exemption application. Furthermore, if the exemption application is decided prior to proceeding with the process and appealed, the appeal may suspend the process until the appeal is decided.

It must, however, be remembered that information generated during the assessment phase, might require that further alternatives be considered. Alternatives must be identified as early as possible in the process. It must, however, be remembered that alternatives are to be considered throughout the process. (See 4.1 below dealing with alternatives and modifications and changes to activities.) The identification of alternatives should be broad, objectively done and well documented. Key criteria when identifying and investigating alternatives are that they should be “feasible” and “reasonable”. The alternatives identified must serve to achieve the triple bottom-line of sustainability i.e. they must meet the social, economic and ecological needs of the public³³. The alternatives must also aim to address the key impacts of the proposed project by maximising benefits and avoiding or minimising the negative impacts. The primary objective must be to avoid all negative impacts, rather than to minimise them. **Detailed information on the consideration of alternatives must, however, be provided in the relevant reports.**

²⁹ Regulation 22(2)(h) of No. R. 543 of 18 June 2010 refers.

³⁰ Regulation 28(1)(c) and (j) of No. R. 543 of 18 June 2010 refers.

³¹ Regulation 31(2)(g) and (i) of No. R. 543 of 18 June 2010 refers.

³² Regulations 22(4), 28(3) and 31(3) of No. R. 543 of 18 June 2010 refer.

³³ DEA&DP Guideline on Need & Desirability (March 2013)

GUIDELINE ON ALTERNATIVES

3. (CONTINUED)

In this regard (a) the methodology, (b) criteria used to identify, investigate and assess alternatives (these must be consistently applied to all alternatives), and (c) a reasoned explanation why an alternative was or was not found to be reasonable and feasible must be provided. While all identified alternatives must be comparatively considered, only those found to be “feasible” and “reasonable” must be comparatively assessed. Interested and affected parties must specifically be afforded an opportunity to provide inputs into the consideration of alternatives.

Alternatives are defined in the NEMA EIA Regulations as “different means of meeting the general purpose and requirements of the activity”. The “feasibility” and “reasonability” of and the need for alternatives must be determined by considering, inter alia, **(a) the general purpose and requirements of the activity, (b) need and desirability, (c) opportunity costs, (d) the need to avoid negative impact altogether, (e) the need to minimise unavoidable negative impacts, (f) the need to maximise benefits, and (g) the need for equitable distributional consequences.**

Note: Also refer to the Department’s Guideline on Need and Desirability (March 2013).

When deciding on an application, the competent authority may approve an alternative, and to the extent that authorisation is granted for an alternative, such alternative will be regarded as having been applied for³⁴.

3.4 Alternatives and Public Participation

Interested and affected parties must be notified of a proposed activity and the alternatives being considered and must be afforded an opportunity to provide inputs into the consideration of alternatives. Refer to the Department’s Guideline on Public Participation (March 2013), which forms part of the Department’s Environmental Impact Assessment Guideline and Information Document Series, for further information in this regard.

4. TYPES OF ALTERNATIVES

4.1 Alternatives and Modifications and Changes to Activities

Although alternatives are to be considered as early as possible in the process, the necessity to consider modifications and changes, in order to prevent and/or mitigate environmental impacts identified during the assessment process, may also arise. Whereas discrete alternatives are therefore generally identified during the early stages of a project (pre-feasibility and feasibility) and comparatively assessed during the assessment phases (Basic Assessment and Scoping&EIR processes); incremental modifications and changes to activities might also have to be considered when a development proposal is amended in an incremental manner throughout the EIA process to address impacts and issues, as and when they are identified. Both the identification, investigation, and assessment of alternatives, and the generation and consideration of modifications and changes to activities must be well documented.

³⁴ Regulations 25(2) and 35(2) of No. R. 543 of 18 June 2010 refers.

GUIDELINE ON ALTERNATIVES

4. (CONTINUED)

4.2 Types of Alternatives

“Alternatives” are defined in the Regulations as different means of meeting the general purpose and requirements of the activity, which may include alternatives to: (a) the property on which or location where it is proposed to undertake the activity; (b) the type of activity to be undertaken; (c) the design or layout of the activity; (d) the technology to be used in the activity or process alternatives; (e) the operational aspects of the activity; and (f) the option of not implementing the activity. However, a range of alternatives exist, not all of which are necessarily appropriate for each EIA. Further to the types of alternatives below, alternatives that maximise resource use efficiency (e.g. energy and water-use efficiency) and minimise waste production must be sought.

TYPE OF ALTERNATIVE	EXPLANATION/EXAMPLES
Location	Refers to both alternative properties as well as alternative sites on the same property. Note: In terms of the Minimum Requirements for Waste Disposal by Landfill, location alternatives must be considered during the EIA process.
Activity	Incineration of waste rather than disposal at a landfill site/ Provision of public transport rather than increasing the capacity of roads.
Design or Layout	Design: E.g. Different architectural and or engineering designs Site Layout: Consideration of different spatial configurations of an activity on a particular site (e.g. Siting of a noisy plant away from residences).
Technological	Consideration of such alternatives is to include the option of achieving the same goal by using a different method or process (e.g. 1000 megawatt of energy could be generated using a coal-fired power station or wind turbines).
Demand	Arises when a demand for a certain product or service can be met by some alternative means (e.g. the demand for electricity could be met by supplying more energy or using energy more efficiently by managing demand).
Input	Input alternatives are applicable to applications that may use different raw materials or energy sources in their process (e.g. Industry may consider using either high sulphur coal or natural gas as a fuel source).
Routing	Consideration of alternative routes generally applies to linear developments such as power line servitudes, transportation and pipeline routes.
Scheduling and Timing	Where a number of measures might play a part in an overall programme, but the order in which they are scheduled will contribute to the overall effectiveness of the end result.
Scale and Magnitude	Activities that can be broken down into smaller units and can be undertaken on different scales (e.g. for a housing development there could be the option 10, 15 or 20 housing units. Each of these alternatives may have different impacts).
“No-Go Option”	This is the option of not implementing the activity.

GUIDELINE ON ALTERNATIVES

4. (CONTINUED)

Note: The No-Go Option - The assessment of alternatives must at all times include the “no-go” option as a baseline against which all other alternatives must be measured. The option of not implementing the activity must always be assessed and to the same level of detail as the other feasible and reasonable alternatives. The “no-go” option is taken to be the existing rights on the property and this includes all the duty of care and other legal responsibilities that apply to the owner of the property. For example, one cannot state that the “no-go” option for a vacant piece of land will result in further degradation or alien plant invasion, as the Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983) requires that the landowner keeps their land clear of alien invasive plants, and Section 28 of the NEMA, “Duty of Care”, states that reasonable measures must be taken to prevent pollution or degradation from occurring, continuing or reoccurring. All the applicable permits must be in place for a land use to be an existing right (the no-go/default) e.g. the zoning of Agriculture does not mean land can be cultivated as the no-go option, as other approvals must first be obtained.

5. ROLE OF THE VARIOUS PARTIES IN THE CONSIDERATION OF ALTERNATIVES

If exemption from the appointment of an EAP has been applied for, the applicant must also perform the tasks required of an EAP, as indicated below.

5.1 The role of the EAP according to the Regulations, inter alia, is to:

- consider the strategic planning and environmental context within which the development and alternatives are to be considered;
- identify, investigate and assess alternatives;
- afford opportunities for interested and affected parties to provide input into the identification, investigation and assessment of alternatives;
- disclose all information relevant to the consideration of alternatives to the applicant and competent authority;
- document the process of identification, investigation and assessment of alternatives (including providing the methodology and criteria used, and how the level of investigation applied to each alternative was established); and
- provide a comprehensive consideration of the impacts of each of the alternatives assessed.

5.2 The role of the Applicant in terms of the Regulations, inter alia, is to:

- consider the strategic planning and environmental context within which the development and alternatives are to be considered;
- consider all feasible and reasonable alternatives (not only the preferred option); and
- provide the EAP with access to all information at the disposal of the applicant regarding the application.

5.3 The role of I&APs in terms of the Regulations, inter alia, is to:

- declare their interests;
- assist in the identification, investigation and assessment of alternatives, particularly where local knowledge is required;
- within the specified timeframes, provide comment on the consideration of alternatives.



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Environmental Affairs &
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EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON NEED AND DESIRABILITY

MARCH 2013

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON NEED AND DESIRABILITY

Published in terms of Section 24J of NEMA by: Western Cape Department of Environmental Affairs & Development Planning (DEA&DP) Private Bag X9086, Cape Town, 8000, South Africa.

Note: While this guideline is being published by DEA&DP, the original version of this guideline was developed in 2008 by the National Department of Environmental Affairs and Tourism (“DEAT”) in collaboration with representatives of the Provincial Departments responsible for Environmental Affairs. The published version of the guideline is based on an updated version of the guideline that the National Department is intending to publish.

EIA Guideline & Information Document Series: This guideline forms part of the DEA&DP’s Environmental Impact Assessment Guideline and Information Document Series. As soon as concurrence has been obtained from the National Department of Environmental Affairs, the final versions of the documents will be formally published in terms of Section 24J of NEMA. The latest versions of the documents available in this series consist of the following drafts –

- Guideline on Transitional Arrangements (March 2013)
- Generic Terms of Reference for EAPs and Project Schedules (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Need and Desirability (March 2013)
- Guideline on Exemption Applications (March 2013)
- Guideline on Appeals (March 2013)

The EIA Guideline & Information Document Series, the relevant legislation and DEA&DP’s applications forms are available on the DEA&DP website: <http://www.westerncape.gov.za/eadp>

Please note: This guideline must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”), the EIA Regulations, the relevant Specific Environmental Management Act(s) (“SEMA”) (e.g. Environment Conservation Act, 1989 – Act No. 73 of 1989, National Environmental Management: Air Quality Act, 2004 – Act No. 39 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 – Act No. 24 of 2008, and the National Environmental Management: Waste Act, 2008 – Act No. 59 of 2008, and the SEMA’s Regulations), and is not intended to be a substitute for the provisions of the NEMA, the EIA Regulations or the SEMAs, in any way. Adherence to the requirements in terms of the NEMA, the EIA Regulations, and the SEMAs does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

Enquiries and Comments: All enquiries and comments should be addressed to – The Chief Director: Environmental and Land Management, Department of Environmental Affairs & Development Planning, Private Bag X9086, Cape Town, 8000, South Africa.

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CONTENTS

GUIDELINE ON NEED AND DESIRABILITY

- 1. INTRODUCTION**
- 2. STRATEGIC CONTEXT FOR THE CONSIDERATION OF NEED AND DESIRABILITY**
- 3. STATUTORY CONTEXT FOR THE CONSIDERATION OF NEED AND DESIRABILITY**
- 4. QUESTIONS TO BE ENGAGED WITH WHEN CONSIDERING NEED AND DESIRABILITY**
- 5. THE CONSIDERATION OF NEED AND DESIRABILITY DURING THE DIFFERENT STAGES OF AN EIA PROCESS**
- 6. CONCLUSION**

ACRONYMS

DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act No. 73 of 1989)
EIA	Environmental Impact Assessment
I&AP	Interested and Affected Party
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
NEMAA	National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008)
NEM: AQA	National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)
NEM: WA	National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)
SEMA	Specific Environmental Management Act

GUIDELINE ON NEED AND DESIRABILITY

1. INTRODUCTION

On 18 June 2010 the Minister responsible for Environmental Affairs promulgated new Environmental Impact Assessment (“EIA”) Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹. From the date of effect of these EIA Regulations, 2 August 2010, these EIA Regulations replaced the previous EIA Regulations² that were promulgated in terms of NEMA on 21 April 2006³, and introduced new provisions for EIAs. On 30 July 2010⁵ and on 10 December 2010⁶ corrections on the 2010 EIA Regulations were published. These corrections all came into effect on 2 August 2010.

The National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (“NEMAA”), was promulgated on 9 January 2009⁷ and came into effect on 1 May 2009⁸. The NEMAA made a number of significant amendments to the general provisions applicable to EIAs. The definition of “environmental authorisation” in terms of NEMA was amended and now reads “when used in Chapter 5 means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. This means that, inter alia, the following are considered to be an “environmental authorisation”: an environmental authorisation issued for an activity listed in Listing Notice 1, 2 or 3⁹; an atmospheric emissions licence in terms of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (“NEM: AQA”); and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (“NEM: WA”). As such, the general provisions of NEMA that apply to an application for environmental authorisation, apply to all of these applications.

It must further be noted that as part of an application for a waste management licence or an atmospheric emissions licence, the application must also be subjected to the EIA process as stipulated in the EIA Regulations promulgated in terms of NEMA. While a number of different authorisations might therefore be required (an environmental authorisation, a waste management licence and/or an atmospheric emissions licence), the assessment process to be followed must be in accordance with the requirements stipulated in the EIA Regulations, with the specific requirements of the relevant specific environmental management Act (“SEMA(s)”) to also be adhered to over and above the requirements of the EIA Regulations¹⁰.

In light of the above, this guideline, which forms part of the Environmental Impact Assessment Guideline and Information Document Series (available on the Department’s website at <http://www.westerncape.gov.za/eadp>) provides information and guidance for applicants, authorities and interested and affected parties (“I&APs”) on the consideration of need and desirability in terms of NEMA and the EIA Regulations.

This guideline must be read together with the NEMA, the EIA Regulations, the relevant SEMA(s) and its Regulations, and is not intended to be a substitute for the provisions of the NEMA, the SEMAs or the Regulations, in any way. Adherence to the requirements in terms of the NEMA and the EIA Regulations, the SEMAs and its Regulations does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

¹ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

² Government Notice No. R. 385, R. 386, and R. 387 in Government Gazette No. 28753 of 21 April 2006 refer.

³ Government Notice No. R. 612, R. 613, R. 614, R. 615, and R. 616 in Government Gazette No. 28938 of 23 June 2006 refer.

⁵ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁶ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

⁷ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

⁸ Government No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

⁹ Government Notice No. R. 544, R. 545, and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer.

¹⁰ Section 24(4)(b)(vii) of NEMA refers.

GUIDELINE ON NEED AND DESIRABILITY

2. STRATEGIC CONTEXT FOR THE CONSIDERATION OF NEED AND DESIRABILITY

Whilst it is essential that growth in the economy addresses national policies and strategies, it is also essential that the implementation of social and economic policies takes cognisance of strategic concerns such as climate change, food security, as well as the sustainability in supply of natural resources and the status of our ecosystem services. In other words, to achieve our Constitutional goal of a better quality of life for all now and in future, through equitable access to resources and shared prosperity, it is essential that society improves on the efficiency and responsibility with which we use resources, and improve on the level of integration of social, economic, ecological and governance systems.

The environmental right in the Constitution also acknowledges that the relationship between different forms of capital¹³ (i.e. social, human and man-made and natural capital) is not one of “substitutability”, but a relationship of “interdependency” and “complementarity”, especially the dependence of other forms of capital on maintaining natural capital¹⁴.

Consistent with national priorities, environmental authorities must support “increased economic growth and promote social inclusion”, whilst ensuring that such growth is “ecologically sustainable”. In the National Spatial Development Perspective (NSDP) (2003 and updated in 2006) it is highlighted that, to achieve the goal of stimulating sustainable economic activities and to create long-term employment opportunities, it is required that spending on economic infrastructure is focused in priority areas (“spatial targeting”) with potential for economic development, with development to serve the broader societies’ needs equitably.

The New Growth Path (NGP) (2010) in turn highlights the need to focus on facilitating growth in sectors (“sectoral targeting”) able to create employment on a large scale, while not neglecting more advanced industries that are crucial for sustained long-run growth, and encouraging stronger investment by the private and public sectors to grow employment-creating activities rapidly while maintaining and incrementally improving South Africa’s core strengths in sectors such as capital equipment for construction and mining, metallurgy, heavy chemicals, pharmaceuticals, software, green technologies and biotechnology. In this regard the NGP aims to lay out a dynamic vision for how South Africa can collectively achieve a more developed, democratic, cohesive and equitable economy and society over the medium term, in the context of sustained growth. NGP highlights the need for the simultaneous achievement of the different sustainability objectives:

¹³ “Social capital”, referring to social networks, democracy, culture, and institutions, “human capital”, referring to investment in education and health, “built, man-made” or “manufactured capital”, referring to infrastructure such as houses, roads, or factories, and “natural capital”, referring to ecosystems and its ecosystem services

¹⁴ The relationship between natural and man-made capital as one of “complementarity” and dependence rather than “substitution” and that the significant loss of natural capital cannot be compensated (or substituted) by an accumulation of manufactured capital

GUIDELINE ON NEED AND DESIRABILITY

2. (CONTINUED)

“In essence, the aim is to target our limited capital and capacity at activities that maximise the creation of decent work opportunities. To that end, we must use both macro and micro economic policies to create a favourable overall environment and to support more labour-absorbing activities. The main indicators of success will be jobs (the number and quality of jobs created), growth (the rate, labour intensity and composition of economic growth), equity (lower income inequality and poverty) and environmental outcomes.”

The National Development Plan 2030 (NDP) (2012) stresses that the threat to the “environment and the challenge of poverty alleviation are closely intertwined” and as such environmental policies should not be framed as a choice between the environment or economic growth. The NDP states that:

“The 20th century was a period of unparalleled growth for humanity’s population and socioeconomic development. During this period, environmental constraints to human activity were often not fully recognised. The world is now experiencing a growing number of undesirable consequences as continued economic expansion and resource exploitation threatens the stability of natural systems.

...

Market and policy failures have resulted in the global economy entering a period of “ecological deficit”, as natural capital (ground water, marine life, terrestrial biodiversity, crop land and grazing) is being degraded, destroyed, or depleted faster than it can be replenished. Waste and carbon-equivalent emissions per capita are climbing faster every year in an ecosystem with finite limits.

...

South Africa faces urgent developmental challenges in terms of poverty, unemployment and inequality, and will need to find ways to “decouple” the economy from the environment, to break the links between economic activity, environmental degradation and carbon-intensive energy consumption.”

While the NDP therefore calls for policy in the short term to “respond quickly and effectively to protect the natural environment and mitigate the effects of climate change”, it also calls for “spatial transformation across all geographic scales”, and for “policies, plans and instruments” to, inter alia, “reduce travel distances and costs, especially for poor households”, “prevent further development of housing in marginal places”, increased urban densities to support public transport and reduce sprawl”, and to create vibrant settlements. The NDP further highlights that “developments that have serious environmental or social effects need to be offset by support for improvements in related areas”.

The NDP formulated the following principles to guide “the transition to an environmentally sustainable low-carbon economy, moving from policy, to process, to action”:

GUIDELINE ON NEED AND DESIRABILITY

2. (CONTINUED)

“Just, ethical and sustainable. Recognise the aspirations of South Africa as a developing country and remain mindful of its unique history.

Global solidarity. Justly balance national interests with collective action in relation to environmental risks and existential threats.

Ecosystems protection. Acknowledge that human wellbeing is dependent on the health of the planet.

Full cost accounting. Internalise both environmental and social costs in planning and investment decisions, recognising that the need to secure environmental assets may be weighed against the social benefits accrued from their use.

Strategic planning. Follow a systematic approach that is responsive to emerging risk and opportunity, and which identifies and manages trade-offs.

Transformative. Address the structural and systemic flaws of the economy and society with strength of leadership, boldness, visionary thinking and innovative planning.

Managed transition. Build on existing processes and capacities to enable society to change in a structured and phased manner.

Opportunity-focused. Look for synergies between sustainability, growth, competitiveness and employment creation, for South Africa to attain equality and prosperity.

Effective participation of social partners. Be aware of mutual responsibilities, engage on differences, seek consensus and expect compromise through social dialogue.

Balance evidence collection with immediate action. Recognise the basic tools needed for informed action.

Sound policy-making. Develop coherent and aligned policy that provides predictable signals, while being simple, feasible and effective.

Least regret. Invest early in low-carbon technologies that are least-cost, to reduce emissions and position South Africa to compete in a carbon-constrained world.

GUIDELINE ON NEED AND DESIRABILITY

2. (CONTINUED)

A regional approach. Develop partnerships with neighbours in the region to promote mutually beneficial collaboration on mitigation and adaptation.

Accountability and transparency. Lead and manage, as well as monitor, verify and report on the transition.”

In the National Framework for Sustainable Development (“NFSD”) (2008) it is stated that “[T]he achievement of sustainable development is not a once-off occurrence and its objectives cannot be achieved by a single action or decision. It is an ongoing process that requires a particular set of values and attitudes in which economic, social and environmental assets that society has at its disposal, are managed in a manner that sustains human well-being without compromising the ability of future generations to meet their own need.” The NFSD further continues to emphasise that South Africa’s current development path in certain instances reflects signs of being unsustainable in the long-term. It highlights that a large percentage of growth in economic activity (measured in terms of its contribution to the GDP) is achieved by “consuming natural resources and degrading our habitat at accelerating rates with the inevitable consequence that future economic growth and development objectives will be prejudiced. “

The National Strategy for Sustainable Development and Action Plan 2011 – 2014 (NSSD 1) (2011) states the following:

Although the concept of sustainable development has been on the international agenda since the United Nations Conference on the Human Environment in Stockholm in 1972, the terms ‘sustainability’ and ‘sustainable development’ have been used and interpreted in widely different ways. In developing this strategy for sustainable development, a fixed definition of these terms has been accepted in a South African context.

Sustainability (or a sustainable society) is seen as the overall goal of the NSSD 1. Sustainability in this context implies ecological sustainability. In the first instance, it recognises that the maintenance of healthy ecosystems and natural resources are preconditions for human wellbeing. In the second instance, it recognises that there are limits to the goods and services that can be provided. In other words, ecological sustainability acknowledges that human beings are part of nature and not a separate entity.

Sustainable development is the process that is followed to achieve the goal of sustainability. Sustainable development implies the selection and implementation of a development option, which allows for appropriate and justifiable social and economic goals to be achieved, based on the meeting of basic needs and equity, without compromising the natural system on which it is based.

GUIDELINE ON NEED AND DESIRABILITY

2. (CONTINUED)

What is needed and desired for a specific area should firstly be strategically and democratically determined beyond the spatial extent of individual EIAs. The strategic context for informing need and desirability must therefore firstly be addressed and determined during the formulation of the sustainable development vision, goals, objectives, strategies and plans of Municipal Integrated Development Plans (“IDPs”) and Spatial Development Frameworks (“SDFs”) during which collaborative and participative processes play an integral part, and are given effect to, in the democratic processes at local government level. In this regard the SDF, which forms a core component of a Municipality’s IDP, must, in terms of the Municipal Planning and Performance Management Regulations, specifically “set out objectives that reflect the desired spatial form of the municipality (...) contain strategies and policies regarding the manner in which to achieve the objectives (...) which strategies and policies must (...) indicate desired patterns of land use within the municipality (...) provide strategic guidance in respect of the location and nature of development within the municipality (...) provide a visual representation of the desired spatial form of the municipality, which representation (...) must indicate desired or undesired utilisation of space in a particular area”.

When formulating project proposals and when evaluating project specific applications, the strategic context of such applications and the broader societal needs and the public interest must be considered. In an effort to better address these considerations and its associated cumulative impacts, the NEMA also provides for the compilation of information and maps that specify the attributes of the environment in particular geographical areas, including the sensitivity, extent, interrelationship and significance of such attributes which must be taken into account. The Environmental Management Framework (“EMF”) Regulations of 2010 state that EMFs must, inter alia, “specify the attributes of the environment in the area, including the sensitivity, extent, interrelationship and significance of those attributes (...) state the environmental management priorities of the area (...) indicate the kind of developments or land uses that would have a significant impact on those attributes and those that would not (...)and indicate the kind of developments or land uses that would be undesirable in the area or in specific parts of the area”.

It is, however, important to realise that a plan, framework or strategy for an area does not ultimately determine if an EIA is refused or granted. When “need and desirability” must be considered as part of an EIA process, the content of the IDPs , SDFs, EMFs and other relevant plans, frameworks and strategies must be taken into account when considering the merits of each application. Whether a proposed activity will be in line with or deviation from the plan, framework or strategy per se is not the issue, but rather the ecological, social and economic impacts that will result because of the alignment or deviation. As such, the EIA must specifically provide information on these impacts in order to be able to consider the merits of the specific application. Where a proposed activity deviates from a plan, framework or strategy, the burden of proof falls on the applicant (and the Environmental Assessment Practitioner) to show why the impacts associated with the deviation might be justifiable. The need and desirability of development must be measured against

GUIDELINE ON NEED AND DESIRABILITY

2. (CONTINUED)

the abovementioned contents of the IDP, SDF and EMF for the area, and the sustainable development vision, goals, objectives, strategies and plans formulated in, and the desired spatial form and pattern of land use reflected in, the area's IDP and SDF. While project-level EIA decision-making therefore must help us stay on course by finding the alternative that will take us closer to the desired aim/goal, it is through Integrated Development Planning (and the SDF process) that the desired destination is firstly to be considered and the map drawn of how to get there.

Financial viability must be considered within the context of justifiable economic development, measured against the broader societal short-term and long-term needs. While the financial viability considerations of the private developer might indicate if a development is “do-able”, the “need and desirability” will be determined by considering the broader community's needs and interests as reflected in an IDP, SDF and EMF for the area, and as determined by the EIA. While the importance of job creation and economic growth for South Africa cannot be denied, the Constitution calls for justifiable economic development. The specific needs of the broader community must therefore be considered together with the opportunity costs and distributional consequences in order to determine whether or not the development will result in the securing of ecological sustainable development and the promotion of justifiable social and economic development – in other words to ensure that the development will be socially, economically and environmentally sustainable.

In the South African context, developmental needs (community needs) must firstly be determined through the above planning processes (IDP, SDF and EMF). The need may be at the local, regional or national level. For example, at the local level, a shopping mall site may be a key need for the local community. As such the particular local municipality may, in its IDP, identify a particular site for the location of a shopping mall. For the construction of such a shopping mall, the developer will have to submit an application for environmental authorisation with the relevant competent authority (EIA authority) if a listed activity is triggered. While the Municipality therefore will decide the “need and desirability” of the shopping mall from a municipal planning perspective, the competent authority in terms of the EIA must decide whether the proposed shopping mall is considered needed and desired from an EIA perspective. It might therefore happen that a Municipality decides that the shopping mall should be approved considering “need and desirability” from a municipal planning perspective, while the competent authority decides to refuse environmental authorisation for the shopping mall considering “need and desirability” from an EIA perspective.

3. THE STATUTORY CONTEXT FOR THE CONSIDERATION OF NEED AND DESIRABILITY

In terms of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (“PAJA”) all administrative action must be based on the “relevant considerations”. NEMA and the EIA Regulations highlights specific considerations that must be taken into account for every application for environmental authorisation,

GUIDELINE ON NEED AND DESIRABILITY

3. (CONTINUED)

including the principles set out in section 2 of NEMA, the general objectives of Integrated Environmental Management set out in section 23 of NEMA, the minimum requirements set out in section 24(4) of NEMA, the criteria set out in section 24O of NEMA and in regulation 8 of the EIA Regulations.²² In terms of the EIA Regulations, when considering an application, the relevant competent authority must have regard to a number of specific relevant considerations, including specifically having to consider “the need for and desirability of the activity”²³. The EIA Regulations specify that the basic assessment report, scoping report and environmental impact report²⁴ must provide a description of the need for and desirability of the proposed activity and identified potential alternatives to the proposed activity. It requires that both need and desirability must be considered by the developer, his/her independent environmental assessment practitioner (EAP), the specialists, and the competent authority. Interested and affected parties must also be afforded an opportunity to make representation in terms of their views in terms of the need and desirability considerations.

The consideration of “need and desirability” during an application process (Basic Assessment or Scoping and Environmental Impact Reporting), must consist of a preliminary description of the relevant considerations, as highlighted below, in relation to the feasible and reasonable alternatives. During the actual assessment stages of an EIA process the need and desirability must be specifically assessed and evaluated, including specialist input/studies as required.

While NEMA (and its predecessor the Environment Conservation Act, 1989 (Act No. 73 of 1989)) does not specifically refer to “need and desirability”, the Constitutional Court in the Fuel Retailers case²⁵ in 2007 already confirmed that “need and desirability” is a relevant consideration and the Constitutional Court at that time equated it to the socio-economic considerations. Since then the EIA Regulations²⁶, as highlighted above, has specifically included the requirement that the “need for and desirability of the proposed activity” must be considered. With the EIA Regulations specifically calling for the consideration of how the “geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity”²⁷, “need and desirability” relates to all of these considerations and not only to socio-economic considerations.

NEMA defines “evaluation” as “the process of ascertaining the relative importance or significance of information, in the light of people’s values, preferences and judgements, in order to make a decision.” In evaluating each impact (negative and positive) in terms of each of the aspects of the environment, “need and desirability” must specifically be considered in the analysis of each impact of the proposed activity

²² Section 2, 23, 24(4) and 24O of NEMA as well as Regulation 8 of Government Notice No. R. 543, inter alia, refer.

²³ Regulation 8 of Government Notice No. R. 543 of 18 June 2010 (as corrected) refers.

²⁴ Regulations 22(2)(g), 28(1)(i) and 31(2)(f) of Government Notice No. R. 543 of 18 June 2010 (as corrected) refers.

²⁵ Fuel Retailers Constitutional Court Case – 2007 (6) SA 4 (CC), decided on 7 June 2007.

²⁶ Government Notice No. R. 543 of 18 June 2010 (as corrected) refers.

²⁷ Regulations 22(2)(d) and 31(2)(d) of Government Notice No. R. 543 of 18 June 2010 (as corrected) refer.

GUIDELINE ON NEED AND DESIRABILITY

3. (CONTINUED)

(during all the stages of an EIA process: screening, “scoping”, and assessment). However, to determine if the proposed activity is the best option when considering “need and desirability”, must also be informed by the sum of all the impacts considered holistically. In this regard “need and desirability” also becomes the impact summary with regard to the proposed activity.

In considering the impact summary it must be remembered that ultimately the aim of EIA is to identify, predict and evaluate the actual and potential risks for and impacts on the geographical, physical, biological, social, economic and cultural aspects of the environment, in order to find the alternatives and options that best avoid negative impacts altogether, or where negative impacts cannot be avoided, to minimise and manage negative impacts to acceptable levels, while optimising positive impacts, to ensure that ecological sustainable development and justifiable social and economic development²⁸ outcomes are achieved.

Consistent with the above aim and purpose of EIA, the concept of “need and desirability” relates to, amongst others, the nature, scale and location of development being proposed, as well as the wise use of land. While essentially, the concept of “need and desirability” can be explained in terms of the general meaning of its two components in which need primarily refers to time and desirability to place (i.e. is this the right time and is it the right place for locating the type of land-use/activity being proposed?), “need and desirability” are interrelated and the two components must be considered collectively in an integrated and holistic manner.

In order to properly interpret the EIA Regulations’ requirement to consider “need and desirability”, it is necessary to turn to the principles contained in NEMA, which serve as a guide for the interpretation, administration and implementation of NEMA and the EIA Regulations. With regard to the issue of “need”, it is important to note that this “need” is not the same as the “general purpose and requirements”²⁹ of the activity. While the “general purpose and requirements” of the activity might to some extent relate to the specific requirements, intentions and reasons that the applicant has for proposing the specific activity, the “need” relates to the interests and needs of the broader public. In this regard the NEMA principles specifically inter alia require that environmental management must:

- “place people and their needs at the forefront of its concern” and equitably serve their interests;
- “be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option;

²⁸ Section 1 and 23 of NEMA, Regulation 2 of Government Notice No. R. 543 of 18 June 2010 (as corrected), and Section 24 of the Constitution refer.

²⁹ The definition of “alternative” under Regulation 1 of Government Notice No. R. 543 of 18 June 2010 (as corrected) refer.

GUIDELINE ON NEED AND DESIRABILITY

3. (CONTINUED)

- pursue environmental justice “so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person”;
- ensure that decisions take “into account the interests, needs and values of all interested and affected parties”; and
- o ensure that the environment is “held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people’s common heritage”.

The consideration of “need and desirability” in EIA decision-making therefore requires the consideration of the strategic context of the proposed activity along with the broader societal needs and the public interest. The government decision-makers, together with the environmental assessment practitioners and planners, are therefore accountable to the public and must serve their social, economic and ecological needs equitably. Ultimately, development must not exceed ecological limits in order to secure ecological integrity, while the proposed actions of individuals must be measured against the short-term and long-term public interest in order to promote justifiable social and economic development³⁰ – i.e. ensuring the simultaneous achievement of the triple bottom-line. Considering the merits of a specific application in terms of the need and desirability considerations, it must be decided which alternatives represent the “most practicable environmental option”, which in terms of the definition in NEMA and the purpose of the EIA Regulations are that option that provides the most benefit and causes the least damage to the environment as a whole, at a cost acceptable to society, in the long-term as well as in the short-term.

4. QUESTIONS TO BE ENGAGED WITH WHEN CONSIDERING NEED AND DESIRABILITY

In light of the above, the need for and desirability of an proposed activity must specifically and explicitly be addressed throughout the EIA process (screening, “scoping”, and assessment) when dealing with individual impacts and specifically in the overall impact summary by taking into account the answers to inter alia the following questions:

“securing ecological sustainable development and use of natural resources”³⁷

- How will this development (and its separate elements/aspects) impact on the ecological integrity of the area?³⁸
- How were the following ecological integrity considerations taken into account?:
 - o Threatened Ecosystems,³⁹

³⁰ Section 24 of the Constitution call for the securing of “ecological sustainable development and use of natural resources” and the promotion of “justifiable economic and social development”.

³⁷ Section 24 of the Constitution refers.

³⁸ Section 24 of the Constitution and Section 2(4)(a)(vi) of NEMA refer.

³⁹ Must consider the latest information including the notice published on 9 December 2011 (Government Notice No. 1002 in Government Gazette No. 34809 of 9 December 2011 refers) listing threatened ecosystems in terms of Section 52 of National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004).

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

- o 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,⁴⁰
- o Critical Biodiversity Areas (“CBAs”) and Ecological Support Areas (“ESAs”),
- o Conservation targets,
- o Ecological drivers of the ecosystem,
- o Environmental attributes and management proposals contained in relevant Environmental Management Frameworks,
- o Environmental attributes and management proposals contained in relevant Spatial Development Framework, and
- o Global and international responsibilities relating to the environment (e.g. RAMSAR sites, Climate Change, etc.).⁴¹
- How will this development disturb or enhance ecosystems and/or result in the loss or protection of biological diversity? What measures were explored to firstly avoid these negative impacts, and where these negative impacts could not be avoided altogether, what measures were explored to minimise and remedy (including offsetting) the impacts? What measures were explored to enhance positive impacts?⁴²

The Impact Mitigation Hierarchy

NEMA and the EIA Regulations call for a hierarchical approach to impact management.

- Firstly, alternatives must be investigated to avoid negative impacts altogether.
- Secondly, after it has been found that the negative impacts cannot be avoided, alternatives must be investigated to reduce (mitigate and manage) unavoidable negative impact.
- Thirdly, alternatives must be investigated to remediate (rehabilitate and restore).
- Fourthly, unavoidable impact that remain after mitigation and remediation must be compensated for through investigating options to offset the negative impacts.
- While throughout, alternatives must be investigated to optimise positive impact.

In this regard, the EIA regulations states that the purpose of the EIA regulation is “... to regulate the procedure and criteria as contemplated in Chapter 5 of the Act relating to the submission, processing and consideration of, and decision on, applications for environmental authorisations for the commencement of activities in order to avoid detrimental impacts on the environment, or where it cannot be avoided, ensure mitigation and management of impacts to acceptable levels, and to optimise positive environmental impacts, and for matters pertaining thereto.”

The effectiveness of the EIA depends on the implementation of the impact mitigation hierarchy. For example, it is not acceptable to simply motivate for the mitigation of impacts without first considering alternatives that could avoid these impact.

⁴⁰ Section 2(4)(r) of NEMA refers.

⁴¹ Section 2(4)(n) of NEMA refers.

⁴² Section 24 of the Constitution and Sections 2(4)(a)(i) and 2(4)(b) of NEMA refer.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

- How will this development pollute and/or degrade the biophysical environment? What measures were explored to firstly avoid these impacts, and where impacts could not be avoided altogether, what measures were explored to minimise and remedy (including offsetting) the impacts? What measures were explored to enhance positive impacts?⁴³
- What waste will be generated by this development? What measures were explored to firstly avoid waste, and where waste could not be avoided altogether, what measures were explored to minimise, reuse and/or recycle the waste? What measures have been explored to safely treat and/or dispose of unavoidable waste?⁴⁴
- How will this development use and/or impact on non-renewable natural resources? What measures were explored to ensure responsible and equitable use of the resources? How have the consequences of the depletion of the non-renewable natural resources been considered? What measures were explored to firstly avoid these impacts, and where impacts could not be avoided altogether, what measures were explored to minimise and remedy (including offsetting) the impacts? What measures were explored to enhance positive impacts?⁴⁵
- How will this development use and/or impact on renewable natural resources and the ecosystem of which they are part? Will the use of the resources and/or impact on the ecosystem jeopardise the integrity of the resource and/or system taking into account carrying capacity restrictions, limits of acceptable change, and thresholds? What measures were explored to firstly avoid the use of resources, or if avoidance is not possible, to minimise the use of resources? What measures were taken to ensure responsible and equitable use of the resources? What measures were explored to enhance positive impacts?⁴⁶
- Does the proposed development exacerbate the increased dependency on increased use of resources to maintain economic growth or does it reduce resource dependency (i.e. de-materialised growth)? (note: sustainability requires that settlements reduce their ecological footprint by using less material and energy demands and reduce the amount of waste they generate, without compromising their quest to improve their quality of life)
- Does the proposed use of natural resources constitute the best use thereof? Is the use justifiable when considering intra- and intergenerational equity, and are there more important priorities for which the resources should be used (i.e. what are the opportunity costs of using these resources for the proposed development alternative?).

⁴³ Section 24 of the Constitution and Sections 2(4)(a)(ii) and 2(4)(b) of NEMA refer.

⁴⁴ Section 24 of the Constitution and Sections 2(4)(a)(iv) and 2(4)(b) of NEMA refer.

⁴⁵ Section 24 of the Constitution and Sections 2(4)(a)(v) and 2(4)(b) of NEMA refer.

⁴⁶ Section 24 of the Constitution and Sections 2(4)(a)(vi) and 2(4)(b) of NEMA refer.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

Intra- and inter-generational equity in the context of sustainability”

The report by the World Commission on Environment and Development, Our Common Future, issued in 1987 (also referred to as the “Brundtland Report”), is widely regarded as the key point in the evolution of the concept of “sustainability” and “sustainable development”. The Brundtland Report defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (WCED, 1987). Two key concepts conveyed in this definition are the notion of “needs” with a particular focus on the disadvantaged portion of current societies, and the sense of limits on the ability of the environment to meet the needs of current and future generations.

The Strategic Framework for Sustainable Development (SFSD) emphasises that South Africa’s current development path in many respects are not sustainable in the long-term. It highlights that economic growth in South Africa is achieved by “consuming natural resources and degrading our habitat at accelerating rates with the inevitable consequence that future economic growth and development objectives will be prejudiced. “ (DEAT 2007).

Intra-generational equity also refers to equitable access to, or distribution of opportunities, resources, (positive and negative) impacts between individuals and between current societies. Inter-generational equity refers to the equitable distribution of opportunities, resources, (positive and negative) impacts between current and future societies. As such, the manner in which resources are used to address the needs of current societies, must not demise the options of future societies to experience the same opportunities.

- Do the proposed location, type and scale of development promote a reduced dependency on resources? For example, can the development be located more appropriately to reduce the dependency of resources needed for service infrastructure?
- How were a risk-averse and cautious approach applied in terms of ecological impacts?⁴⁷:
- What are the limits of current knowledge (note: the gaps, uncertainties and assumptions must be clearly stated)?
- What is the level of risk associated with the limits of current knowledge?
- Based on the limits of knowledge and the level of risk, how and to what extent was a risk-averse and cautious approach applied to the development?

A risk averse and cautious approach

A risk averse and cautious approach (the precautionary principle) in the context of the protection of environmental rights is essentially about the assessment and management of risk.

South Africa has given effect to the precautionary principle in the NEMA. The NEMA in section 2 contains a principle that development must be socially, environmentally and economically sustainable, and requires the consideration of all relevant factors including that:

“a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions”

Section 2(4)(a)(vii) of NEMA applies to any organ of state that takes a decision in terms of a statutory provision connected to the protection of the environment. It must apply a risk-averse and cautious approach that takes into account the limits of current knowledge about the

⁴⁷ Section 24 of the Constitution and Section 2(4)(a)(vii) of NEMA refer.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

consequences of decisions and actions. The precautionary principle is about decision-making in the face of uncertainty and gaps in knowledge. When there is a threat of serious or irreversible environmental damage, and a scientific uncertainty, the precautionary principle places the burden of proof in terms of the acceptability of a development/application on the applicant,

The application of the precautionary principle and the associated need to take precautionary measures are triggered by the satisfaction of two conditions precedent or thresholds:

- a threat of serious or irreversible environmental damage; and
- scientific uncertainty as to the nature and scope of the threat of environmental damage.

It is important to note that if a proponent of a plan, programme or project fails to discharge this burden of proof, this does not necessarily mean that the plan, programme or project must be refused. It merely requires that the decision-maker in making his/her decision must, if no information has been presented to indicate otherwise, assume that there shall be serious or irreversible environmental damage..

- How will the ecological impacts resulting from this development impact on people's environmental right in terms following⁴⁸:
- Negative impacts: e.g. access to resources, opportunity costs, loss of amenity (e.g. open space), air and water quality impacts, nuisance (noise, odour, etc.), health impacts, visual impacts, etc. What measures were taken to firstly avoid negative impacts, but if avoidance is not possible, to minimise, manage and remedy negative impacts?
- Positive impacts: e.g. improved access to resources, improved amenity, improved air or water quality, etc. What measures were taken to enhance positive impacts?
- Describe the linkages and dependencies between human wellbeing, livelihoods and ecosystem services applicable to the area in question and how the development's ecological impacts will result in socio-economic impacts (e.g. on livelihoods, loss of heritage site, opportunity costs, etc.)?
- Based on all of the above, how will this development positively or negatively impact on ecological integrity objectives/targets/considerations of the area?
- Considering the need to secure ecological integrity and a healthy biophysical environment, describe how the alternatives identified (in terms of all the different elements of the development and all the different impacts being proposed), resulted in the selection of the "best practicable environmental option" in terms of ecological considerations? ⁴⁹
- Describe the positive and negative cumulative ecological/biophysical impacts bearing in mind the size, scale, scope and nature of the project in relation to its location and existing and other planned developments in the area? ⁵⁰

Cumulative effects

In terms of the EIA Regulations "cumulative impact", in relation to an activity, means the impact of an activity that in itself may not be significant but may become significant when added to the existing and potential impacts eventuating from similar or diverse activities or undertakings in the area;

⁴⁸ Section 24 of the Constitution and Sections 2(4)(a)(viii) and 2(4)(b) of NEMA refer.

⁴⁹ Section 2(4)(b) of NEMA refer.

⁵⁰ Regulations 22(2)(i)(i), 28(1)(g) and 31(2)(l) in Government Notice No. R. 543 refer.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

Cumulative effects can be:

- Additive: the simple sum of all the effects (e.g. fertilizer inputs to a river from farms in the catchment);
- Synergistic: effects interact to produce a total effect greater than the sum of individual effects. These effects often happen as habitats or resources approach capacity (e.g. fragmentation of habitat for a species can have limited effect until additional fragmentation makes areas too small to support that species at all);
- Time crowding: frequent, repetitive impacts on a particular resource at the same time (e.g. small-scale mining within a particular ecosystem).
- Neutralizing: where effects may counteract each other to reduce the overall effect (e.g. infilling of a wetland for road construction, and creation of new wetlands for water treatment).
- Space crowding: high spatial density of impacts on an ecosystem (e.g. rapid expansion of urban sprawl).

In terms of the EIA Regulations “cumulative impact”, in relation to an activity, means the impact of an activity that in itself may not be significant but may become significant when added to the existing and potential impacts eventuating from similar or diverse activities or undertakings in the area.

Crucial to the identification of cumulative implications of an activity or project, is to have an understanding of the context within which the impact will occur. For example, if the context (goal/vision) for an area is to protect its agricultural land use potential and its associated landscape character, the anticipated cumulative implications associated with the establishment of an industrial plant may be significant.

“promoting justifiable economic and social development”⁵¹

- What is the socio-economic context of the area, based on, amongst other considerations, the following considerations?:
 - o The IDP (and its sector plans’ vision, objectives, strategies, indicators and targets) and any other strategic plans, frameworks of policies applicable to the area,
 - o Spatial priorities and desired spatial patterns (e.g. need for integrated or segregated communities, need to upgrade informal settlements, need for densification, etc.),
 - o Spatial characteristics (e.g. existing land uses, planned land uses, cultural landscapes, etc.), and
 - o Municipal Economic Development Strategy (“LED Strategy”).
- Considering the socio-economic context, what will the socio-economic impacts be of the development (and its separate elements/aspects), and specifically also on the socio-economic objectives of the area?
 - o Will the development complement the local socio-economic initiatives (such as local economic development (LED) initiatives), or skills development programs?

⁵¹ Section 24 of the Constitution refers.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

- How will this development disturb or enhance landscapes and/or sites that constitute the nation's cultural heritage? What measures were explored to firstly avoid these impacts, and where impacts could not be avoided altogether, what measures were explored to minimise and remedy (including offsetting) the impacts? What measures were explored to enhance positive impacts? ⁵³
- How will this development address the specific physical, psychological, developmental, cultural and social needs and interests of the relevant communities?
- Will the development result in equitable (intra- and inter-generational) impact distribution, in the short- and long-term? Will the impact be socially and economically sustainable in the short- and long-term?
- In terms of location, describe how the placement of the proposed development will⁵⁵ :
 - o result in the creation of residential and employment opportunities in close proximity to or integrated with each other,
 - o reduce the need for transport of people and goods,
 - o result in access to public transport or enable non-motorised and pedestrian transport (e.g. will the development result in densification and the achievement of thresholds in terms public transport),
 - o compliment other uses in the area,
 - o be in line with the planning for the area,
 - o for urban related development, make use of underutilised land available within the urban edge⁵⁶,
 - o optimise the use of existing resources and infrastructure,
 - o consider opportunity costs in terms of bulk infrastructure expansions in non-priority areas (e.g. not aligned with the bulk infrastructure planning for the settlement that reflects the spatial reconstruction priorities of the settlement),
 - o discourage "urban sprawl" and contribute to compaction/densification,
 - o contribute to the correction of the historically distorted spatial patterns of settlements and to the optimum use of existing infrastructure in excess of current needs,
 - o encourage environmentally sustainable land development practices and processes,
 - o take into account special locational factors that might favour the specific location (e.g. the location of a strategic mineral resource, access to the port, access to rail, etc.),
 - o result in investment in the settlement or area in question that will generate the highest socio-economic returns (i.e. an area with high economic potential),
 - o impact on the sense of history, sense of place and heritage of the area and the socio-cultural and cultural-historic characteristics and sensitivities of the area, and

⁵² Section 24 of the Constitution and Sections 2(4)(a)(iii) and 2(4)(b) of NEMA refer.

⁵³ Section 2(2) of NEMA refers.

⁵⁴ Sections 2(2) and 2(4)(c) of NEMA refers.

⁵⁵ Section 3 of the Development Facilitation Act, 1995 (Act No. 67 of 1995) ("DFA") and the National Development Plan refer.

⁵⁶ "urban edge" in this guideline refers to a credible urban edge delineated as part of a credible municipal Spatial Development Framework.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

- o in terms of the nature, scale and location of the development, promote or act as a catalyst to create a more integrated settlement?
- How were a risk-averse and cautious approach applied in terms of socio-economic impacts?⁵⁷:
 - o What are the limits of current knowledge (note: the gaps, uncertainties and assumptions must be clearly stated)?⁵⁸
 - o What is the level of risk (note: related to inequality, social fabric, livelihoods, vulnerable communities, critical resources, economic vulnerability and sustainability) associated with the limits of current knowledge?
 - o Based on the limits of knowledge and the level of risk, how and to what extent was a risk-averse and cautious approach applied to the development (and its alternatives)?
- How will the socio-economic impacts resulting from this development impact on people's environmental right in terms following:
 - o Negative impacts: e.g. health (e.g. HIV-Aids), safety, social ills, etc. What measures were taken to firstly avoid negative impacts, but if avoidance is not possible, to minimise, manage and remedy negative impacts?
 - o Positive impacts. What measures were taken to enhance positive impacts?
- Considering the linkages and dependencies between human wellbeing, livelihoods and ecosystem services, describe the linkages and dependencies applicable to the area in question and how the development's socio-economic impacts will result in ecological impacts (e.g. over utilisation of natural resources, etc.)?
- What measures were taken to pursue the selection of the "best practicable environmental option" in terms of socio-economic considerations?⁵⁹
- What measures were taken to pursue environmental justice so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons (who are the beneficiaries and is the development located appropriately)?⁶⁰
- Considering the need for social equity and justice, do the alternatives identified, allow the "best practicable environmental option" to be selected, or is there a need for other alternatives to be considered?
- What measures were taken to pursue equitable access to environmental resources, benefits and services to meet basic human needs and ensure human wellbeing, and what special measures were taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination?⁶¹

⁵⁷ Section 2(4)(a)(vii) of NEMA refers.

⁵⁸ Section 24(4) of NEMA refers.

⁵⁹ Section 2(4)(b) of NEMA refers.

⁶⁰ Section 2(4)(c) of NEMA refers.

⁶¹ Section 2(4)(d) of NEMA refers.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

- What measures were taken to ensure that the responsibility for the environmental health and safety consequences of the development has been addressed throughout the development's life cycle? ⁶²
 - o What measures were taken to ensure that the interests, needs and values of all interested and affected parties were taken into account, and that adequate recognition were given to all forms of knowledge, including traditional and ordinary knowledge?⁶³
- Considering the interests, needs and values of all the interested and affected parties, describe how the development will allow for opportunities for all the segments of the community (e.g.. a mixture of low-, middle-, and high-income housing opportunities) that is consistent with the priority needs of the local area (or that is proportional to the needs of an area)?⁶⁴

Opportunity Cost

Opportunity costs refer to the process of considering and comparing the ecological, social and economic costs, implications and opportunities of different alternatives. Choosing a specific option, alternative or path may result in other options (and its associated opportunities) being foregone - the loss of these opportunities are referred to as the opportunity cost of the preferred option. Assessing the opportunity costs of different options will also assist in the search for alternatives that will result in -

- the understanding the value of the foregone opportunities;
- the achievement (or at least contribute most to the achievement) of the desired aim/ goal for the specific area;
- optimising positive impacts;
- minimising negative impacts;
- the equitable distribution of impact (negative and positive); and
- the maintenance of ecological integrity and environmental quality.

The above is also linked to the positive duty to find the “best practice environmental option”, which is defined in NEMA as “the option that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term”

The need to consider the opportunity costs of different options are particularly relevant in instances where resources are limited, environments that are under stress.

Examples where the consideration of opportunity cost is relevant include the option of redeveloping and public open space into a parking area. Another example is where it is confirmed that there are adequate water resources to service a development proposal. Applying the “opportunity cost” principle would change the question being asked, by placing a positive duty to consider if the proposed development will constitute the best use of the available water resources (i.e. the best practicable environmental option).

- What measures have been taken to ensure that current and/or future workers will be informed of work that potentially might be harmful to human health or the environment or of dangers

⁶² Section 2(4)(e) of NEMA refers.

⁶³ Section 2(4)(g) of NEMA refers.

⁶⁴ Section 2(4)(g) of NEMA refers.

GUIDELINE ON NEED AND DESIRABILITY

4. (CONTINUED)

Opportunity Cost

associated with the work, and what measures have been taken to ensure that the right of workers to refuse such work will be respected and protected? ⁶⁵

- Describe how the development will impact on job creation in terms of, amongst other aspects:
 - o the number of temporary versus permanent jobs that will be created,
 - o whether the labour available in the area will be able to take up the job opportunities (i.e. do the required skills match the skills available in the area),
 - o the distance from where labourers will have to travel,
 - o the location of jobs opportunities versus the location of impacts (i.e. equitable distribution of costs and benefits), and
 - o the opportunity costs in terms of job creation (e.g. a mine might create 100 jobs in the short and medium term, but impact on 1000 permanent agricultural jobs, etc.).
- What measures were taken to ensure:
 - o that there were intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment, and
 - o that actual or potential conflicts of interest between organs of state were resolved through conflict resolution procedures?
- What measures were taken to ensure that the environment will be held in public trust for the people, that the beneficial use of environmental resources will serve the public interest, and that the environment will be protected as the people's common heritage? ⁶⁶
- Are the mitigation measures proposed realistic and what long-term environmental legacy and managed burden will be left? ⁶⁷
- What measures were taken to ensure that the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects will be borne by those responsible for harming the environment? ⁶⁸
- Considering the need to secure ecological integrity and a healthy bio-physical environment, describe how the alternatives identified (in terms of all the different elements of the development and all the different impacts being proposed), resulted in the selection of the best practicable environmental option in terms of socio-economic considerations? ⁶⁹
- Describe the positive and negative cumulative socio-economic impacts bearing in mind the size, scale, scope and nature of the project in relation to its location and other planned developments in the area? ⁷⁰

GUIDELINE ON NEED AND DESIRABILITY

5. THE CONSIDERATION OF NEED AND DESIRABILITY DURING THE DIFFERENT STAGES OF AN EIA PROCESS

Answering all the above-mentioned questions, consistent with the environmental management principles contained in section 2 of NEMA, will ensure that all the relevant considerations have been taken into account. As states previously need and desirability considerations must be addressed during all the different stages of the EIA process (screening, “scoping”, and assessment). During screening and “scoping” the abovementioned questions must be used to identify the key issues to be addressed as well as to identify alternatives that will better respond to the considerations (i.e. that will firstly avoid the negative impact or better mitigate the negative impact, or that will better enhance the positive impact). The “scoping” process might find that many of the questions have clear answers and that no further information has to be gathered related to the specific question. In this regard would be required is for the relevant report (first part of the Basic Assessment Report or the Scoping Report) to clearly answer all the questions including a clear indication which questions do not require further information to be generated during the assessment. During the assessment part of the report all the questions must again be considered, but for those questions for which the “scoping” found that no further information were required, it can simply be reported how the questions were dealt with during “scoping”, with the remaining questions having to be considered in terms of the additional information generated during the assessment stage.

The incorporation of the above-mentioned questions into the basic assessment, scoping and environmental impact reports of EIA applications will ensure that all the relevant considerations are taken into account in order to adequately consider need and desirability. The requirement to consider need and desirability as part of an EIA does, however, also highlight the importance of credible IDPs and SDFs, in terms of providing an adequate framework for the consideration of need and desirability.

In terms of collectively considering ecological, social and economic impacts it is important to remember that while there might be some trade-offs between the considerations, in South Africa all development must in terms of Section 24 of the Constitution be ecologically sustainable, while economic and social development must be justifiable. There are therefore specific “trade-off rules” that apply – this specifically refer to the constitutional imperative that ecological integrity may not be compromised and the social and economic development must take a certain form and meet certain specific objectives (reflected by the questions posed in this guideline) in order for it to be considered justifiable. EIAs are about the search for the best practicable option that will best ensure the maintenance of ecological integrity while promoting justifiable social and economic development. In this regard it is also vital to follow the “mitigation hierarchy”, where alternatives must firstly be considered to avoid negative impacts altogether, but if avoidance is not possible to considered alternatives that will better mitigate and manage negative impacts, while search for alternatives to better enhance the positive impacts.

GUIDELINE ON NEED AND DESIRABILITY

6. CONCLUSION

The Need and Desirability guideline provides information and guidance for applicants, authorities and interested and affected parties when considering need and desirability in terms of NEMA, the EIA Regulations, the NEM: AQA, and NEM: WA.

The guideline also aims to assist applicants and their environmental assessment practitioners to prepare a well-structured and complete application and reports in order, and to assist the competent authorities to ensure that need and desirability are given due consideration during every EIA application, to expedite and ensure well-informed decision-making.

This guideline will be updated when necessary. The user is, however, reminded that the guideline is not intended to be a substitute for the relevant legislation. If any conflict should arise between this guideline and the legislation, the provisions of the legislation will prevail.



**Western Cape
Government**
Environmental Affairs &
Development Planning

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EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON EXEMPTION APPLICATIONS

MARCH 2013

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON EXEMPTION APPLICATIONS

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- Guideline on Transitional Arrangements (March 2013)
- Generic Terms of Reference for EAPs and Project Schedules (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Need and Desirability (March 2013)
- Guideline on Exemption Applications (March 2013)
- Guideline on Appeals (March 2013)

The EIA Guideline & Information Document Series, the relevant legislation and DEA&DP's applications forms are available on the DEA&DP website: <http://www.westerncape.gov.za/eadp>

Please note: This guideline must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA"), the EIA Regulations, the relevant Specific Environmental Management Act(s) ("SEMA") (e.g. Environment Conservation Act, 1989 – Act No. 73 of 1989, National Environmental Management: Air Quality Act, 2004 – Act No. 39 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 – Act No. 24 of 2008, and the National Environmental Management: Waste Act, 2008 – Act No. 59 of 2008, and the SEMA's Regulations), and is not intended to be a substitute for the provisions of the NEMA, the EIA Regulations or the SEMAs, in any way. Adherence to the requirements in terms of the NEMA, the EIA Regulations, and the SEMAs does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

Enquiries and Comments: All enquiries and comments should be addressed to – The Chief Director: Environmental and Land Management, Department of Environmental Affairs & Development Planning, Private Bag X9086, Cape Town, 8000, South Africa.

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CONTENTS

GUIDELINE ON EXEMPTION APPLICATIONS

1. INTRODUCTION
2. DEFINITIONS
3. EXEMPTION FROM THE PROVISIONS OF NEMA AND/OR THE EIA REGULATIONS
4. WHEN TO SUBMIT EXEMPTION APPLICATIONS: Integrated process or separate processes?
5. INFORMATION TO BE SUBMITTED AS PART OF EXEMPTION APPLICATIONS
6. PUBLIC PARTICIPATION PROCESSES FOR EXEMPTION APPLICATIONS
7. PROCESSING OF EXEMPTION APPLICATIONS

ACRONYMS

DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act No. 73 of 1989)
EIA	Environmental Impact Assessment
I&AP	Interested and Affected Party
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
NEMAA	National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008)
NEM: AQA	National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)
NEM: WA	National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)
SEMA	Specific Environmental Management Act

GUIDELINE ON EXEMPTION APPLICATIONS

1. INTRODUCTION

On 18 June 2010 the Minister responsible for Environmental Affairs promulgated new Environmental Impact Assessment (“EIA”) Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹. From the date of effect of these EIA Regulations, 2 August 2010, these EIA Regulations replaced the previous EIA Regulations² that were promulgated in terms of NEMA on 21 April 2006³, and introduced new provisions for EIAs. On 30 July 2010⁵ and on 10 December 2010⁶ corrections on the 2010 EIA Regulations were published. These corrections all came into effect on 2 August 2010.

The National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (“NEMAA”), was promulgated on 9 January 2009⁷ and came into effect on 1 May 2009⁸. The NEMAA made a number of significant amendments to the general provisions applicable to EIAs. The definition of “environmental authorisation” in terms of NEMA was amended and now reads “when used in Chapter 5 means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. This means that, inter alia, the following are considered to be an “environmental authorisation”: an environmental authorisation issued for an activity listed in Listing Notice 1, 2 or 3⁹; an atmospheric emissions licence in terms of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (“NEM: AQA”); and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (“NEM: WA”). As such, the general provisions of NEMA that apply to an application for environmental authorisation, apply to all of these applications.

It must further be noted that as part of an application for a waste management licence or an atmospheric emissions licence, the application must also be subjected to the EIA process as stipulated in the EIA Regulations promulgated in terms of NEMA. While a number of different authorisations might therefore be required (an environmental authorisation, a waste management licence and/or an atmospheric emissions licence), the assessment process to be followed must be in accordance with the requirements stipulated in the EIA Regulations, with the specific requirements of the relevant specific environmental management Act (“SEMA(s)”) to also be adhered to over and above the requirements of the EIA Regulations¹⁰.

In light of the above, this guideline, which forms part of the Environmental Impact Assessment Guideline and Information Document Series (available on the Department’s website at <http://www.westerncape.gov.za/eadp>) provides information and guidance for applicants, authorities and interested and affected parties (“I&APs”) on exemption applications in terms of NEMA and the EIA Regulations.

¹ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

² Government Notice No. R. 385, R. 386, and R. 387 in Government Gazette No. 28753 of 21 April 2006 refer.

³ Government Notice No. R. 612, R. 613, R. 614, R. 615, and R. 616 in Government Gazette No. 28938 of 23 June 2006 refer.

⁵ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁶ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

⁷ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

⁸ Government No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

⁹ Government Notice No. R. 544, R. 545, and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer.

¹⁰ Section 24(4)(b)(vii) of NEMA refers.

GUIDELINE ON EXEMPTION APPLICATIONS

1. (CONTINUED)

This guideline must be read together with the NEMA, the EIA Regulations, the relevant SEMA(s) and its Regulations, and is not intended to be a substitute for the provisions of the NEMA, the SEMAs or the Regulations, in any way. Adherence to the requirements in terms of the NEMA and the EIA Regulations, the SEMAs and its Regulations does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

2. DEFINITIONS

“Applicant”, means a person who has submitted or who intends to submit an application.

“Competent Authority”, means the authority that in terms of the provisions of the NEMA and the EIA Regulations is identified as the authority that must consider and decide on an application in respect of a specific listed activity.

Note: The “Competent Authority”¹¹; in terms of an application for environmental authorisation for an activity listed in Listing Notice 1, 2 or 3, is not necessarily the same authority as the “Licensing Authority” in terms of the NEM: WA¹²; or NEM: AQA¹³;

“Days” means calendar days.

Note: When a period of days must in terms of these Regulations be reckoned from or after a particular day, that period must be reckoned as from the start of the day following that particular day to the end of the last day of the period, but if the last day of the period falls on a Saturday, Sunday or public holiday, that period must be extended to the end of the next day which is not a Saturday, Sunday or public holiday. The period of 15 December to 2 January must be excluded in the reckoning of days. Where a timeframe is affected by the 15 December to 2 January period, the timeframe must be extended by the number of days falling within the 15 December to 2 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.

“Department”, means the Western Cape Department of Environmental Affairs and Development Planning which have in terms of NEMA and the EIA Regulations been delegated by Provincial Minister to administer and decide EIA applications. “EIA Regulations”, mean the Environmental Impact Assessment Regulations promulgated in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹⁴.

¹¹ Section 24C of NEMA refers.

¹² Section 43 of the NEM: WA refers.

¹³ Section 36 of the NEM: AQA refers.

¹⁴ GN No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

GUIDELINE ON EXEMPTION APPLICATIONS

2. (CONTINUED)

“Environmental Assessment Practitioner” (EAP), means the individual responsible for planning, management and coordination of environmental impact assessments, strategic environmental assessments, environmental management programmes or any other appropriate environmental instrument introduced through the Regulations.

Note: If exemption from the appointment of an EAP has been applied for, the applicant must perform the tasks required of an EAP.

“Environmental authorisation”, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act.

“Interested and Affected Party” (I&AP), for the purposes of Chapter 5 of the NEMA and in relation to the assessment of the environmental impact of a listed activity or related activity, means an interested and affected party contemplated in Section 24(4)(a)(v), and which includes-

- any person, group of persons or organisation interested in or affected by such operation or activity; and
- any organ of state that may have jurisdiction over any aspect of the operation or activity.

“Organ of State”, means -

- any department of State or administration in the national, provincial or local sphere of government; or
- any other functionary or institution -
 - o exercising a power or performing a function in terms of the Constitution or a Provincial Constitution;
 - or
 - o exercising a public power or performing a public function in terms of any Legislation

but does not include a court or a judicial officer.

Note: Examples of organs of State are: Municipalities (both the District and Local Municipality), Heritage Western Cape, CapeNature, the Department of Water Affairs, ESKOM, etc.

“Public Participation Process”, means a process by which potential interested and affected parties are given an opportunity to comment on, or raise issues relevant to, an application.

“Registered interested and affected parties” means

- all persons who, as a consequence of the public participation process conducted in respect of an application, have submitted written comments or attended meetings with the applicant or EAP;
- all persons who, after completion of the public participation process, have requested the applicant or the EAP managing the application, in writing, for their names to be placed on the register; and
- all organs of state which have jurisdiction in respect of the activity to which the application relates.

GUIDELINE ON EXEMPTION APPLICATIONS

2. (CONTINUED)

Note: The Department also requires that if the applicant is not the owner or person in control of the land on which the activity is to be undertaken, the person who owns or is in control of the land must also be included in the register of interested and affected parties and consulted with throughout the public participation process.

To be registered as an interested and affected party the persons referred to in (a) and (b) above must provide their names, contact details and addresses to the EAP managing the application process. Registered I&APs must ensure that they notify the EAP if their contact details and/or address changes during the application process. A Registered I&AP is entitled to comment, in writing, on all written submissions made to the Department by the applicant or the EAP, provided that comments are submitted within the specified timeframes and the I&AP discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application.

“State department”, means any department or administration in the national or provincial sphere of government exercising functions that involve the management of the environment or that administer a law relating to a matter affecting the environment.

Note: Examples of State departments are: the Department of Water Affairs, Department of Agriculture, etc. Whilst all State departments are organs of State, not all organs of State are State departments (e.g. Municipalities are organs of State, but not State departments).

3. EXEMPTION FROM PROVISIONS OF NEMA AND/OR THE EIA REGULATIONS

An applicant to whom a provision of NEMA or the EIA regulations applies may apply for exemption from such a provision, except from the provisions to obtain the required approval(s) and the requirements in terms of section 24(4)(a) of NEMA¹⁶. NEMA¹⁷ also makes it clear that the Department may only grant exemption from a provision of NEMA if:

- the granting of the exemption is unlikely to result in significant detrimental consequences for or impacts on the environment;
- the provision cannot be implemented in practice in the case of the application in question; or
- the exemption is unlikely to adversely affect the rights of interested or affected parties.

¹⁶ Section 24M of NEMA, Regulation 50 of GN No. R. 543, Section 59, and Section 74 of the NEM: WA refer.

¹⁷ Section 24M(4) of NEMA refers.

GUIDELINE ON EXEMPTION APPLICATIONS

4. WHEN TO SUBMIT EXEMPTION APPLICATIONS: Integrated process or separate processes?

When applying for exemption, the EAP must either:

- first submit to the Department a notice of the intended exemption application as well as the proposed method of notifying the interested and affected parties (“I&APs”) of the intention to apply for exemption; or
- submit to the Department the application for exemption, on the Department’s official Application Form for Exemption, as well as the proposed method of notifying the interested and affected parties (“I&APs”) of the intention to apply for exemption.

Note: The Department’s Application Form for environmental authorisation also incorporates a section on application for exemption.

In the Western Cape the following process will be followed¹⁸:

If it seems as if the exemption applied for/to be applied for might be appropriate, the DEA&DP will allow an integrated process to be followed for the exemption and environmental authorisation applications (i.e. the applicant will be allowed to continue with both the exemption application process and the environmental authorisation process – through an integrated process e.g. through both the notice of the application for exemption and the notice of the application for environmental authorisation being included in the same public participation notice to the I&APs – with both applications being decided at the end of the process). An applicant must bear in mind that should an exemption application be refused by the Department, the applicant will be required to meet the requirements of the provision(s) for which exemption was applied for.

If it, however, seems as if the exemption applied for/to be applied for might not be appropriate, DEA&DP will require separate sequential processes to be followed for the exemption and environmental authorisation applications (i.e. the exemption process must first be concluded and the exemption application decided before the application process for the environmental authorisation may be proceeded with).

5. INFORMATION TO BE SUBMITTED AS PART OF EXEMPTION APPLICATIONS

The application for exemption must be submitted to the Department on the official Application Form for Exemption and must be accompanied by:

- an explanation of the reasons for the application for exemption;
- a description of any consequences the exemption may have on the environment;
- a description of any impacts the exemption may have on the right of interested and affected parties;
- an explanation of why the provision which is the subject of the exemption application cannot be implemented in practice;
- any applicable supporting documents; and
- the prescribed application fee (if applicable).

¹⁸ Please note that this might not be the process adopted by any of the other competent authorities/in another Province.

GUIDELINE ON EXEMPTION APPLICATIONS

6. PUBLIC PARTICIPATION PROCESSES FOR EXEMPTION APPLICATIONS

A person must always conduct a public participation process for any exemption application. The extent of such public participation may vary and must be agreed to by the Department in writing. The person conducting the public participation process must take into account any guidelines applicable to public participation. The Department's Guideline on Public Participation (March 2013) must be referred to for a further explanation of the minimum requirements for public participation.

The Department must first agree to the method of notification of the I&APs (which must be indicated when the notice of the intended exemption application or application is submitted), before the I&APs may be notified of the exemption application. The EIA Regulations²⁰ specify that the notice to I&APs of the intended exemption application (in terms of 4(a) above) or of the exemption application already submitted (in terms of 4(b) above) must be in the form of ²¹ a site notice, written notice to the different parties, or placing an advertisements in newspapers, or a combination thereof as agreed to by the Department in writing, including having to notify the owner or person in control of the land if the applicant is not the owner or person in control of the land ²².

The Department may require that the applicant or EAP conducts at least a public participation process which may include²³:

- a site notice board; and/or
- written notices (including having to notify the owner or person in control of the land if the applicant is not the owner or person in control of the land²⁴); and/or
- advertisements in local/provincial/national newspapers; and/or
- a combination of the above as agreed to by the Department; and
- opening and maintaining a register of all interested and affected parties in respect of the exemption application; and
- submission of any comments received from interested and affected parties and responses thereto following such a public participation process, to the Department.

The notice to the I&APs must also specify the provisions from which exemption is intended to be applied for/has been applied for, the manner in which and the person to whom comments on the application for such exemption must be submitted, and, the date on which comments on the application for exemption must be submitted.

The notice of the intended exemption application or the exemption application should be submitted together with the application for environmental authorisation, so that, if considered appropriate and allowed by DEA&DP (see 4 above), an integrated process can be followed for the exemption and

¹⁹ Regulation 54(2) of GN No. R. 543 refers.

²⁰ Regulation 51(3) of GN No. R. 543 refers.

²¹ Regulation 54(2) of GN No. R. 543 refers.

²² Regulation 15(1) of GN No. R. 543 refers.

²³ Regulation 54(2) of GN No. R. 543 refers.

²⁴ Regulation 15(1) of GN No. R. 543 refers.

GUIDELINE ON EXEMPTION APPLICATIONS

6. (CONTINUED)

environmental authorisation applications (e.g. through both the notice for the exemption application and for the application for environmental authorisation being included in the same public participation notice to the I&APs).

If, however, the notice or exemption application is not submitted together with the application for environmental authorisation, or if considered not appropriate, a separate public participation process for the exemption application will be required.

7. PROCESSING OF EXEMPTION APPLICATIONS

- The DEA&DP will acknowledge receipt of an application within 14 days of receipt thereof.
- The DEA&DP will also in the acknowledgement letter indicate whether an integrated process or separate sequential processes must be followed for the exemption application and the application for environmental authorisation.
- The DEA&DP will also in the acknowledgement letter indicate whether the method of notification of the I&APs proposed by the applicant/EAP is agreed to.
- Following the public participation and assessment process the DEA&DP will either:
- first decide on the exemption application (if separate sequential processes were followed); or
- issue the decision on the exemption application and the decision on the application for environmental authorisation at the same time.
- The applicant will be informed of the decision within 2 days.

If an exemption is granted, the Department may stipulate conditions and the period for which the exemption is granted (if the exemption is granted for a period). All decisions taken by the Department on exemption applications may be appealed. See the Department's Guideline on Appeals (March 2013).

Note: In terms of an exemption granted from a provision of the NEM: WA²⁵, the Department may suspend, review, transfer, withdraw or amend an exemption. In terms of an exemption granted from a provision of the NEM: AQA²⁶, the Department may review and withdraw an exemption.

Considering the possible risks and delays in the process associated with exemption applications, it must be stressed that exemption applications should be made with extreme caution and discretion.

²⁵ Section 77 of the NEM: WA refers.

²⁶ Section 59 of the NEM: AQA refers.



**Western Cape
Government**
Environmental Affairs &
Development Planning

BETTER TOGETHER.

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON APPEALS

MARCH 2013

EIA GUIDELINE AND INFORMATION DOCUMENT SERIES

GUIDELINE ON APPEALS

Published in terms of Section 24J of NEMA by: Western Cape Department of Environmental Affairs & Development Planning (DEA&DP) Private Bag X9086, Cape Town, 8000, South Africa.

EIA Guideline & Information Document Series: This guideline forms part of the DEA&DP's Environmental Impact Assessment Guideline and Information Document Series. This guideline is formally published in terms of Section 24J of NEMA. The published versions of the guidelines available in this series consist of the following guidelines -

- Guideline on Transitional Arrangements (March 2013)
- Generic Terms of Reference for EAPs and Project Schedules (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Need and Desirability (March 2013)
- Guideline on Exemption Applications (March 2013)
- Guideline on Appeals (March 2013)

The EIA Guideline & Information Document Series, the relevant legislation and DEA&DP's applications forms are available on the DEA&DP website: <http://www.westerncape.gov.za/eadp>

Please note: This guideline must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA"), the EIA Regulations, the relevant Specific Environmental Management Act(s) ("SEMA") (e.g. Environment Conservation Act, 1989 - Act No. 73 of 1989, National Environmental Management: Air Quality Act, 2004 - Act No. 39 of 2004, the National Environmental Management: Integrated Coastal Management Act, 2008 - Act No. 24 of 2008, and the National Environmental Management: Waste Act, 2008 - Act No. 59 of 2008, and the SEMA's Regulations), and is not intended to be a substitute for the provisions of the NEMA, the EIA Regulations or the SEMAs, in any way. Adherence to the requirements in terms of the NEMA, the EIA Regulations, and the SEMAs does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

Enquiries and Comments: All enquiries and comments should be addressed to - The Chief Director: Environmental and Land Management, Department of Environmental Affairs & Development Planning, Private Bag X9086, Cape Town, 8000, South Africa.

Referencing: When referencing this guideline, it must be cited as follows -
DEA&DP (2013) **Guideline on Appeals**, EIA Guideline and Information Document Series. Western Cape Department of Environmental Affairs & Development Planning (DEA&DP), March 2013.

CONTENTS

GUIDELINE ON APPEALS

1. INTRODUCTION

2. DEFINITIONS

3. APPEAL APPLICATIONS

3.1 Types of appeal applications

- 3.1.1 Decision by the Department to grant or refuse environmental authorisation
- 3.1.2 Decision by the Department to amend an environmental authorisation
- 3.1.3 Decision by the Department to amend an environmental management programme
- 3.1.4 Decision by the Department to suspend an environmental authorisation
- 3.1.5 Decision by the Department on an exemption application

3.2 Notification of a decision made by the Department

3.3 Lodging a Notice of Intention to appeal

3.4 Submitting an appeal

3.5 Responding and Answering Statements

3.6 Processing of Appeals

3.8 Validity of an Appeal

APPENDICES

A Notice of Intention to Appeal Form

B Appeal Form

ACRONYMS

DEA&DP	Western Cape Department of Environmental Affairs and Development Planning
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 1989 (Act No. 73 of 1989)
EIA	Environmental Impact Assessment
I&AP	Interested and Affected Party
NEMA	National Environmental Management Act, 1998 (Act No. 107 of 1998)
NEMAA	National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008)
NEM: AQA	National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004)
NEM: WA	National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008)
SEMA	Specific Environmental Management Act

GUIDELINE ON APPEALS

1. INTRODUCTION

On 18 June 2010 the Minister responsible for Environmental Affairs promulgated new Environmental Impact Assessment (“EIA”) Regulations in terms of Chapter 5 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹. From the date of effect of these EIA Regulations, 2 August 2010, these EIA Regulations replaced the previous EIA Regulations² that were promulgated in terms of NEMA on 21 April 2006³, and introduced new provisions for EIAs. On 30 July 2010⁵ and on 10 December 2010⁶ corrections on the 2010 EIA Regulations were published. These corrections all came into effect on 2 August 2010.

The National Environmental Management Amendment Act, 2008 (Act No. 62 of 2008) (“NEMAA”), was promulgated on 9 January 2009⁷ and came into effect on 1 May 2009⁸. The NEMAA made a number of significant amendments to the general provisions applicable to EIAs. The definition of “environmental authorisation” in terms of NEMA was amended and now reads “when used in Chapter 5 means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act”. This means that, inter alia, the following are considered to be an “environmental authorisation”: an environmental authorisation issued for an activity listed in Listing Notice 1, 2 or 3⁹; an atmospheric emissions licence in terms of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004) (“NEM: AQA”); and a waste management licence in terms of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) (“NEM: WA”). As such, the general provisions of NEMA that apply to an application for environmental authorisation, apply to all of these applications.

It must further be noted that as part of an application for a waste management licence or an atmospheric emissions licence, the application must also be subjected to the EIA process as stipulated in the EIA Regulations promulgated in terms of NEMA. While a number of different authorisations might therefore be required (an environmental authorisation, a waste management licence and/or an atmospheric emissions licence), the assessment process to be followed must be in accordance with the requirements stipulated in the EIA Regulations, with the specific requirements of the relevant specific environmental management Act (“SEMA(s)”) to also be adhered to over and above the requirements of the EIA Regulations¹⁰.

In light of the above, this guideline, which forms part of the Environmental Impact Assessment Guideline and Information Document Series (available on the Department’s website at <http://www.westerncape.gov.za/eadp>), provides information and guidance for applicants, authorities and interested and affected parties (“I&APs”) on appeals in terms of NEMA and the EIA Regulations.

This guideline must be read together with the NEMA, the EIA Regulations, the relevant SEMA(s) and its Regulations, and is not intended to be a substitute for the provisions of the NEMA, the SEMAs or the Regulations, in any way. Adherence to the requirements in terms of the NEMA and the EIA Regulations, the

¹ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010 refer.

² Government Notice No. R. 385, R. 386, and R. 387 in Government Gazette No. 28753 of 21 April 2006 refer.

³ Government Notice No. R. 612, R. 613, R. 614, R. 615, and R. 616 in Government Gazette No. 28938 of 23 June 2006 refer.

⁵ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁶ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

⁷ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

⁸ Government No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

⁹ Government Notice No. R. 544, R. 545, and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer.

¹⁰ Section 24(4)(b)(vii) of NEMA refers.

GUIDELINE ON APPEALS

1. (CONTINUED)

SEMA's and its Regulations does, however, not absolve the applicant from also adhering to the requirements of any other legislation applicable to the undertaking of the activity.

2. DEFINITIONS

“Applicant”, means a person who has submitted or who intends to submit an application.

“Competent Authority”, means the authority that in terms of the provisions of the NEMA and the EIA Regulations is identified as the authority that must consider and decide on an application in respect of a specific listed activity.

Note: The “Competent Authority”¹¹ in terms of an application for environmental authorisation for an activity listed in Listing Notice 1, 2 or 3, is not necessarily the same authority as the “Licensing Authority” in terms of the NEM: WA¹² or NEM: AQA¹³.

“Days” means calendar days.

Note: When a period of days must in terms of these Regulations be reckoned from or after a particular day, that period must be reckoned as from the start of the day following that particular day to the end of the last day of the period, but if the last day of the period falls on a Saturday, Sunday or public holiday, that period must be extended to the end of the next day which is not a Saturday, Sunday or public holiday. The period of 15 December to 2 January must be excluded in the reckoning of days. Where a timeframe is affected by the 15 December to 2 January period, the timeframe must be extended by the number of days falling within the 15 December to 2 January period. Where a timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.

“Department”, means the Western Cape Department of Environmental Affairs and Development Planning which have in terms of NEMA and the EIA Regulations been delegated by Provincial Minister to administer and decide EIA applications.

“Environmental Assessment Practitioner” (EAP), means the individual responsible for planning, management and coordination of an environmental impact assessment, strategic environmental assessment, environmental management programme or any other appropriate environmental instrument introduced through the Regulations.

Note: If exemption from the appointment of an EAP has been applied for, the applicant must perform the tasks required of an EAP.

¹¹ Section 24C of NEMA refers.

¹² Section 43 of the NEM: WA refers.

¹³ Section 36 of the NEM: AQA refers.

GUIDELINE ON APPEALS

2. (CONTINUED)

“Environmental authorisation”, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act.

“Interested and Affected Party” (I&AP), for the purposes of Chapter 5 of the NEMA and in relation to the assessment of the environmental impact of a listed activity or related activity, means an interested and affected party contemplated in Section 24(4)(a)(v) of NEMA, and which includes-

- any person, group of persons or organisation interested in or affected by such operation or activity; and
- any organ of state that may have jurisdiction over any aspect of the operation or activity.

“NEMA EIA Regulations”, means the Environmental Impact Assessment Regulations promulgated in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“NEMA”)¹⁴.

“Organ of state”, means -

- any department of state or administration in the national, provincial or local sphere of government; or
- any other functionary or institution -
 - o exercising a power or performing a function in terms of the Constitution or a Provincial Constitution; or
 - o exercising a public power or performing a public function in terms of any Legislation

but does not include a court or a judicial officer.

Note: Examples of organs of state are: Municipalities (both the District and Local Municipalities), Heritage Western Cape, CapeNature, the Department of Water Affairs, etc.

“Public Participation Process”, means a process by which potential interested and affected parties are given an opportunity to comment on, or raise issues relevant to, an application.

“State department”, means any department or administration in the national or provincial sphere of government exercising functions that involve the management of the environment or that administer a law relating to a matter affecting the environment.

Note: Examples of state departments are: the Department of Water Affairs, Department of Agriculture, etc. Whilst all state departments are organs of state, not all organs of state are state departments (e.g. Municipalities are organs of state, but not state departments).

3. APPEAL APPLICATIONS

3.1 Types of appeal applications

The provisions of the NEMA EIA Regulations¹⁵ give effect to the appeal right afforded by the provisions of NEMA¹⁶. No appeal is available if the Provincial Minister responsible for Environmental Affairs took a decision

¹⁴ Government Notice No. R. 543, R. 544, R. 545, R. 546 and R. 547 in Government Gazette No. 33306 of 18 June 2010, as well as Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 and Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refer.

¹⁵ Chapter 7 of GN No. R. 543 refers.

¹⁶ Section 43 of NEMA refers.

GUIDELINE ON APPEALS

3. (CONTINUED)

himself in his capacity as the competent authority. An appeal may, however, be lodged with the Provincial Minister responsible for Environmental Affairs against a delegated decision taken by the Department on an application, which may include a:

3.1.1 Decision by the Department to grant or refuse environmental authorisation

Any person may appeal against the decision taken by the Department to grant or refuse environmental authorisation to undertake a listed activity in terms of the NEMA EIA Regulations.

3.1.2 Decision by the Department to amend an environmental authorisation

In terms of the NEMA EIA regulations¹⁷ either an applicant may apply to or the Department on its own initiative may decide to amend an environmental authorisation. The amendment decision taken by the Department may be appealed.

3.1.3 Decision by the Department to amend an environmental management programme

In terms of the NEMA EIA regulations¹⁸ either an applicant may apply to or the Department on its own initiative may decide to amend an environmental management programme. The amendment decision taken by the Department may be appealed.

3.1.4 Decision by the Department to suspend an environmental authorisation

In terms of the NEMA EIA Regulations¹⁹ the Department may suspend an environmental authorisation. The Department's decision to suspend an environmental authorisation may be appealed.

3.1.5 Decision by the Department on an exemption application

NEMA²⁰ and the EIA Regulations²¹ allow an applicant to apply for exemption²¹ from certain provision of NEMA and any provision of the EIA Regulations. Any person may appeal the decision taken by the Department to grant or refuse the exemption applied for.

3.2 Notification of a decision made by the Department

On having decided on an application, the Department must, in writing and within 2 days of the date of the decision, notify the applicant of the outcome of the decision, give reasons for the decision, and draw the attention of the applicant to the fact that an appeal may be lodged against the decision.

The applicant must, in writing, within 12 days of the date of the decision (i.e. within 12 days after the date the decision was made by the Department, and not within 12 days of having been notified of the decision)

¹⁷ Regulation 39 and 43 of GN No. R. 543 of 18 June 2010 refers.

¹⁸ Regulation 46 of GN No. R. 543 of 18 June 2010 refers.

¹⁹ Regulation 47 of GN No. R. 543 of 18 June 2010 refers.

²⁰ Section 24M of NEMA refers.

²¹ Regulation 40 of GN No. R. 543 of 18 June 2010 refers.

GUIDELINE ON APPEALS

3. (CONTINUED)

notify the registered I&APs of the outcome of the decision, provide the Department's reasons for the decision, draw the attention of all registered I&APs to the manner in which they can access a copy of the decision (note: it is recommended that a copy of the Department's decision be attached to the notice), and draw their attention to the fact that an appeal may be lodged against the decision, and the manner in which to lodge an appeal against the decision. In addition to the notice to the registered I&APs, the applicant must also within 12 days of the date of the decision place a notice in the same newspaper(s) used for the placing of notices during the public participation process that was undertaken, informing I&APs of the Department's decision, where the I&APs can access a copy of the Department's decision (note that the applicant must give access to a copy of the decision to I&APs), and draw their attention to the fact that an appeal may be lodged against the decision, and the manner in which to lodge an appeal against the decision.

Note: An appeal may suspend an environmental authorisation and/or an exemption.²² If it has been decided that an appeal will suspend an environmental authorisation and/or an exemption, the effect of the environmental authorisation and/or exemption will be suspended until such time as the appeal is decided.

3.3 Submitting a Notice of intention to Appeal (see attached the Notice of Intention to Appeal Form)

A person who wishes to appeal against a decision of the Department, must submit a Notice of Intention to Appeal with the Provincial Minister responsible for Environmental Affairs within 20 days after the date of the decision (i.e. within 20 days after the date the decision was made by the Department the Notice must reach the Provincial Minister and not within 20 days of having been notified of the decision).

If the appellant is the applicant, the appellant must provide each registered I&AP, within 10 days of having submitted the Notice of Intention to Appeal with the Provincial Minister, with a copy of the Notice of Intention to Appeal as well as a notice indicating that a copy of the appeal submission will be made available for inspection for a 30-day period starting on the day of lodging the appeal submission with the Provincial Minister²³ (i.e. the notice to the registered I&APs must reach the registered I&APs within 10 days of having submitted the Notice of Intention to Appeal with the Provincial Minister, while notice of the lodging of the appeal submission must happen either prior to the lodging of the appeal submission or on the same day, with access to the appeal submission to be provided from the day of lodging of the appeal submission with the Provincial Minister).

If the appellant is a person other than the applicant, the appellant must provide the applicant, within 10 days of having submitted the Notice of Intent to Appeal with the Provincial Minister, with a copy of the Notice of Intent to Appeal as well as a notice indicating that a copy of the appeal submission will be made available for inspection for a 30-day period starting on the day of lodging the appeal submission with the Provincial Minister (i.e. the notice to the applicant must reach the applicant within 10 days of having submitted the Notice of Intention to Appeal with the Provincial Minister, while notice of the lodging of the appeal submission must happen either prior to the lodging of the appeal submission or on the same day, with access to the appeal submission to be provided from the day of lodging of the appeal submission with the Provincial Minister).

²² Section 43(7) of NEMA refers.

²³ Regulation 60(2)(b) of GN No. R. 543 refers.

GUIDELINE ON APPEALS

3. (CONTINUED)

3.4 Lodging of an appeal submission (see attached the Appeal Form)

Following the lodging of the Notice of Intent to Appeal, the appeal submission must be submitted, on the official Appeal Form (see attached), to the Provincial Minister (see the address in the Appeal Form attached) within 30 days after the lapsing of the 20 day period allocated for the submission of the Notice of Intention to Appeal (i.e. within 50 days after the date of the decision the appeal submission must reach the Provincial Minister). An appeal submission must be accompanied by:

- a statement setting out the grounds of the appeal,
- supporting documentation that is referred to in the appeal but is not in the possession of the Provincial Minister (i.e. new information),
- a statement by the appellant confirming that copies of the Notice of Intent was given to the registered I&APs/applicant and that the appeal submission was made available for inspection,
- proof of the fact that a copy of the Notice of Intention to Appeal was given to the registered I&APs/applicant (e.g. a list of the registered mail sent or a copy of the facsimile report or a copy of the electronic mail sent), and
- proof of the fact that notice of the lodging of the appeal submission and access to the appeal submission was given to I&APs/applicant, must accompany the appeal submission when it is lodged with the Provincial Minister (e.g. a copy of the notice with a list of the registered mail sent or a copy of the facsimile report or a copy of the electronic mail sent).

Note: Proof of the fact that notice of the lodging of the appeal submission and access to the appeal submission was given to I&APs/applicant, if not submitted with the appeal submission, must be submitted within 10 days of the lodging of the appeal submission with the Provincial Minister.

3.5 Responding and Answering Statements

A person who has received a copy of a Notice of Intention to Appeal from an appellant may make a submission called a Responding Statement to the Provincial Minister within 30 days from the date the appeal submission was lodged with the Provincial Minister. The respondent must, within 10 days of having submitted the responding statement, serve a copy of the statement on the appellant. The Responding Statement must also clearly indicate whether the Responding Statement introduces new information not dealt with in the appeal submission of the appellant.

Note: Proof of the fact that a copy of the Responding Statement was also served on the appellant, must be submitted to the Provincial Minister either on same day that the Responding Statement is submitted to the Provincial Minister or within 10 days of the submission of the Responding Statement to the Provincial Minister (i.e. a list of the registered mail sent, or list of signatures of hand delivered copies received).

GUIDELINE ON APPEALS

3. (CONTINUED)

Only if the Responding Statement introduces any new information not dealt with in the appeal submission of the appellant, is the appellant entitled to submit an Answering Statement to such new information to the Provincial Minister, within 30 days of the submission of the Responding Statement to the Provincial Minister. The appellant must, within 10 days of having submitted the Answering Statement to the Provincial Minister, serve a copy of the Answering Statement on the respondent who submitted the new information. The Answering Statement must also clearly indicate what new information not dealt with in the appeal was introduced by the Responding Statement.

Note: There is a difference between simply “to notify” or to “provide a copy”, and having to “serve on”. While some one can be notified or provided with a copy via registered mail, hand delivery with signature as proof of receipt, facsimile, or e-mail, a notice or copy can only be served on someone via registered mail, or hand delivery with signature of receipt as proof of receipt.

Proof of the fact that a copy of the Answering Statement was also served on the respondent who submitted the new information must be submitted to the Provincial Minister on the same day that the Answering Statement is submitted to the Provincial Minister or within 10 days of the submission of the Answering Statement to the Provincial Minister (i.e. a list of the registered mail sent, or list of signatures of hand delivered copies received).

Note: With 30 days being available to submit a Responding Statement and another 30 days being available to submit Answering Statements (if new information not dealt with in the appeal is introduced by the Responding Statement), an applicant (who is not an appellant) may choose to shortly after consideration of the appeal submission(s), decide to send a short written letter to the Provincial Minister, and on the same day serve a copy on the appellants, confirming that the applicant will not be submitting a Responding Statement and that no opportunity to submit an Answering Statement will therefore exist, and that the Provincial Minister may therefore immediately proceed with the consideration of the appeal(s).

3.6 Processing of appeals

An appeal lodged in terms of the previous ECA EIA regulations or in terms of the 2006 NEMA EIA regulations, which was pending on 2 August 2010 when the 2010 NEMA EIA regulations took effect, must despite the repeal of the ECA EIA regulations or the 2006 NEMA EIA regulations be dispensed with in terms of the ECA

GUIDELINE ON APPEALS

3. (CONTINUED)

EIA regulations or the 2006 NEMA EIA regulations respectively as if the ECA EIA regulations or 2006 NEMA EIA regulations were not repealed²⁴.

All appeals lodged after 2 August 2010 must be lodged and considered in terms of the 2010 NEMA EIA regulations, even if the decision to be appealed was issued in terms of the ECA EIA regulations or the 2006 NEMA EIA regulations.

The processing of appeals in terms of the 2010 NEMA EIA regulations will be as follows:

- Receipt of an appeal submission, Responding Statement, and Answering Statement will be acknowledged by the Provincial Minister within 10 days of receipt.
- The Provincial Minister may request the appellant or a respondent to submit such additional information in connection with the appeal as the Provincial Minister may require.
- The appellant and each respondent will be notified if -
 - o a directive in terms of section 43(7) of NEMA was issued suspending the environmental authorisation and/ or exemption;
 - o an appeal panel has been or will be appointed in terms of section 43(5) of NEMA.

Note: If an appeal panel is appointed, the panel will be furnished with a written instruction concerning the issues in respect of which the panel must make recommendations and, the period within which the panels' recommendations must be submitted. If an appeal panel introduces any new information not dealt with in the appeal submission of the appellant or in the statements of the respondents, both the appellant and each respondent are entitled to submit to the panel, within a period determined by the panel, any additional statements rebutting or supporting such new information. Recommendations made by the panel will be submitted to the Provincial Minister in writing.

- Only once the appeal submission, any Responding Statement, Answering Statement, any additional information requested and (if applicable) the appeal panel's recommendations are received will an appeal be finally processed and the appeal decided within 90 days of receipt of all the relevant information.
- Within 10 days of the decision on the appeal being reached, the appellant and any respondents will be notified, in writing, of the extent to which the decision appealed against is upheld or overturned, together with reasons for the appeal decision.

3.7 Validity of Appeals

An appeal may be considered invalid if:

- the Notice of Intention to Appeal is not lodged with the Provincial Minister within 20 days of the date of the decision that is to be appealed; or

²⁴ Regulations 74(4) and 76(4) of GN No. R. 543 refer.

GUIDELINE ON APPEALS

3. (CONTINUED)

- a copy of the Notice of Intention to Appeal was not provided to the registered I&APs/applicant as required; or
- the appeal submission is not submitted to the Department within 30 days of the lapsing of the 20-day period allocated for the submission of the Notice of Intention to Appeal; or
- the appeal submission was not made available to the registered I&APs/applicant as required.

Note: The Provincial Minister may, in writing, on good cause extend the period within which a Notice of Intention to Appeal, an appeal submission, Responding Statement or Answering Statements must be submitted.



NOTICE OF INTENTION TO APPEAL FORM (March 2013)

(A digital copy of this form may be obtained from the Department's website at <http://www.westerncape.gov.za/eadp>).
(Note: Please consult the Department's Guideline on Appeals, March 2013, which is available on the Department's website)

A. DECISION BEING APPEALED

1. Departmental Reference Number of the Decision being appealed:

2. Brief Description of the Decision: _____

3. Date of the decision being appeal (i.e. date on which the decision was made): _____

4. Please indicate how and when you were notified of the decision and attach a copy of the notice you received.

B. APPELLANT'S INFORMATION (PLEASE PRINT)

Name: _____

Address: _____

Tel. _____ Cell. _____

Fax. _____ Email. _____

NOTICE OF INTENTION TO APPEAL FORM (March 2013)

D. COPIES OF THE NOTICE OF INTENT TO APPEAL TO THE OTHER PARTIES (CONTINUED)

Note: In other words, the notice to the registered I&APs/applicant must reach the registered I&APs/applicant within 10 days of having submitted the Notice of Intent to Appeal with the Provincial Minister, while notice of the lodging of the appeal submission must happen either prior to the lodging of the appeal submission or on the same day, with access to the appeal submission to be provided from the day of lodging of the appeal submission with the Provincial Minister.

Proof of the fact that a copy of the Notice of Intent to Appeal was given to the registered I&APs/applicant (e.g. a list of the registered mail sent or a copy of the facsimile report or a copy of the electronic mail sent) must accompany the appeal submission when lodged with the Provincial Minister.

Proof of the fact that notice of the lodging of the appeal submission and access to the appeal submission was given to the registered I&APs/applicant must either be submitted with the appeal submission or must be submitted within 10 days of the lodging of the appeal submission with the Provincial Minister.

E. SIGNATURE OF THE APPELLANT

Appellant signature

Date



APPEAL FORM (March 2013)

(A digital copy of this form may be obtained from the Department's website at <http://www.westerncape.gov.za/eadp>).
(Note: Please consult the Department's Guideline on Appeals, March 2013, which is available on the Department's website)

A. DECISION BEING APPEALED

1. Departmental Reference Number of the Decision being appealed:

2. Type of Decision being appealed (please tick the appropriate box below):

- | | |
|--|--|
| Environmental Authorisation or refusal <input type="checkbox"/> | Suspension of Environmental Authorisation <input type="checkbox"/> |
| Amendment of Environmental Authorisation <input type="checkbox"/> | Exemption Notice <input type="checkbox"/> |
| Amendment of Environmental Management Programme <input type="checkbox"/> | Waste Management Licence <input type="checkbox"/> |
| | Atmospheric Emission Licence <input type="checkbox"/> |

3. Briefly Describe the Decision being appealed: _____

4. Date of the Decision being appealed (i.e. date on which the decision was made): _____

APPEAL FORM (March 2013)

B. APPELLANT'S INFORMATION

5. Appellant's information (PLEASE PRINT):

Name: _____

Address: _____

Tel. _____ Cell. _____

Fax. _____ Email. _____

C. APPEAL NOTICE INFORMATION

6. On what date you were notified of the Department's decision? _____

7. Did you lodge a Notice of Intention to Appeal within 20 days of the decision being appealed?

Yes / No (If "Yes", attach a copy herewith.)

8. On what date was your Notice of Intention to Appeal lodged? _____

9. Has a copy of the Notice of Intention to Appeal been served on the Applicant/all Registered I&AP's?

Yes / No

10. Please indicate the date on which a copy of the Notice of Intent to Appeal was served on the Applicant/all Registered I&APs. _____

Note: Proof of the fact that a copy of the Notice of Intent to Appeal was provided to the registered I&APs/applicant, must be attached to this appeal submission (e.g. a list of registered mail sent, or a copy of the facsimile report, or a copy of the electronic mail sent).

11. Did the Notice indicate where and for what period the appeal submission will be available for inspection?

Yes / No

12. Please indicate where and for what period the appeal submission has been made available for inspection by the Applicant/all Registered Interested and Affected Parties.

Where is the appeal submission available for inspection? (NOT Ministry)

For what period will the appeal submission be available for inspection?

From: _____ To: _____

APPEAL FORM (March 2013)

C. APPEAL NOTICE INFORMATION (CONTINUED)

Note: Proof of the fact that notice of the lodging of the appeal submission and access to the appeal submission was given to the registered I&APs/applicant (e.g. a list of registered mail sent, or a copy of the facsimile report, or a copy of the electronic mail sent), together with copies of the relevant notices, must be submitted with this appeal submission or must be submitted within 10 days of the lodging of the appeal submission with the Provincial Minister.

D. GROUNDS FOR APPEAL

13. Provide a statement setting out the grounds of your appeal.

14. Is your appeal based on factors associated with the process that was followed by the applicant/Environmental Assessment Practitioner/the Department that culminated in the decision?

Yes / **No** (Circle the appropriate response). Please provide details.

15. Is your appeal based on factors associated with unacceptable environmental impacts/extenuating circumstances that were not taken into account by the competent authority?

Yes / **No** (Circle the appropriate response). Please provide details.

APPEAL FORM (March 2013)

D. GROUNDS FOR APPEAL (CONTINUED)

16. Have your appeal issues been raised previously in the public participation process?

Yes / **No** (Circle the appropriate response). Please provide details.

17. Are you fundamentally opposed to the decision or will you be in favour of the decision if your concerns will be addressed by rectifying the process or by mitigating or eliminating the impacts associated with the proposed activity?

Fundamentally opposed / Will be in favour if issues addressed / Not applicable

(Circle the appropriate response). Please provide details.

18. Please indicate what measures you propose to have your concerns remedied.

APPEAL FORM (March 2013)

D. GROUNDS FOR APPEAL (CONTINUED)

19. Does your appeal contain any new information that was not submitted to the Environmental Assessment Practitioner (EAP) / or Registered I&AP's/ or the Department prior to its decision?

Yes / No (Circle the appropriate response). If the answer above is "Yes" please explain what this information is and why it should be considered by the Provincial Minister and why it was not made available to the EAP/ or I&AP/ or the Department prior to the decision. (Please ensure that the new information is attached hereto.)

20. Please clearly list your appeal issues.

21. Please provide an explanation of why you listed each issue in section 21 above.

APPEAL FORM (March 2013)

D. GROUNDS FOR APPEAL (CONTINUED)

22. Please provide details of how you will be or have been affected by each issue listed under 20 above.

E. SUBMISSION DATE AND ADDRESS

This appeal submission must reach the Provincial Minister at the address listed below within 30 days after the lapsing of the 20 days after the date of the decision being appealed (i.e. within 50 days after the date of the decision):

By post: Attention: Jaap de Villiers
 Western Cape Minister of Local Government, Environmental Affairs & Development Planning
 Private Bag X9186, Cape Town, 8000

OR

By facsimile: (021) 483 4174 (Attention: Jaap de Villiers)

OR

By hand: Attention: Jaap de Villiers (Tel: 021-483 3721)
 3rd floor Leeusig Building (entered via the Utilitas Building)
 1 Dorp Street, Cape Town, 8001

Note: Appeal notices not submitted to the above address will not be regarded as valid.

F. SIGNATURE OF THE APPELLANT

Appellant signature

Date