



Submission on the Amendments to National Environmental Management Act of 1998

Natural Justice: Lawyers for Communities and the Environment
(NJ)

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1. Introduction

The Department of Environment, Forestry and Fisheries has invited the public to comment by 31st January 2022 on proposed amendments to the s24H Registration Authority Regulations, 2016 under National Environmental Management Act (NEMA)

Natural Justice (NJ) welcomes this opportunity to make a submission in accordance with the invitation to submit written comments by the Department of Forestry, Fisheries and the Environment for public comment.

NJ has read and considered the implications of the amendments to the National Environmental Management Act and submits the following comments and recommendations to Department of Forestry, Fisheries and the Environment. NJ's submission sets out a) background to the organisation and its work; b) comments on the amendment and c) makes recommendations.

2. Background

The amendment seeks to correct the omission of activity 11 from the Environmental Impact Assessment Listing Notice 1 of 2014. This amendment explicitly targets paragraph 5 as it previously only applied to activity 9 in relation to the requirements of the submission process of routes for large scale electricity transmission and distribution facilities. Given South Africa's Just Energy transition ambitions, this amendment will hold far reach implications for large-scale solar and wind energy projects currently in the pipeline.

An examination of the proposed amendments thus far indicates that they would effectively bar the public from appealing certain NEMA decisions. As a result, they would undermine the spirit and purpose of NEMA, which is to encourage public participation in environmental decision making, as well as the effectiveness of Section 43. This would render the regulations procedurally unfair and violate the constitutional right to procedurally fair administrative action. As such, they would be illegal.

3. Introduction of Natural Justice

Natural Justice, is a non-profit organization of Lawyers for Communities and the Environment, registered in South Africa since 2007. Our vision is the conservation and sustainable use of biodiversity through the self-determination of Indigenous peoples and local communities.

Our mission is to facilitate the full and effective participation of Indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage.

Natural Justice works at the local, national, regional, and international levels with a wide range of partners. We strive to ensure that community rights and responsibilities are represented and respected at the broader scales and that gains made in international fora are fully upheld at lower levels.

Given the importance of the NEMA Amendment, also within the context of climate change and environmental degradation, NJ wishes to submit its comments to the Department of Forestry, Fisheries and the Environment. We further express our request to make a verbal submission or participate in any meaningful engagements with the Department of Forestry, Fisheries and the Environment when an opportunity arises.

4. Commentary

As previously stated, proposed regulation 14(1)(f) states that no one other than a registered EAP may perform tasks in connection with an appeal contemplated in terms of section 43 of NEMA, relating to an application, strategic environmental assessment, environmental management program, or any other appropriate environmental instrument, as contemplated in paragraphs (a) – (c) (e). While the proposed amendments expand on the tasks contemplated in proposed regulation 14(1)(a) to (c), they remain silent on the tasks contemplated in proposed regulation 14(1). (f).

4.1 Proposed Amendment will exacerbate instead of ameliorating public participation inequalities

The current public participation process allows for interested and affected parties to appeal an Environmental Authorisation (EA) and if an Appeal is dismissed to have the right to a judicial review of the decision by the Minister of Forestry, Fisheries and Environment.

However, the Amendment proposes to allow “a person” to “prepare and submit comments on documents forming part of an application contemplated in subregulation (1)(a) – (c)”⁷ without being required to be a registered environmental assessment practitioner.

In terms of the proposed amendments, a person who is not a registered EAP is disallowed from preparing and submitting comments in terms of subregulation (1)(d), (1)(e) and (1)(f) on an application for an atmospheric emission license in terms of the NEM:Air Quality Act; strategic environmental assessments, environmental programmes or other appropriate environmental management instruments; and “an appeal contemplated in section 438 of the Act, relating to an application, strategic environmental assessment, environmental management programme or other appropriate environmental instrument, contemplated in paragraphs (a) – (e)”.

It logically follows that if affected parties do not have the capacity to appeal an EA or if the requirements to appeal an EA are too onerous, it will automatically sterilise interested and affected parties’ right to a judicial review.

The proposed Amendment will exacerbate instead of ameliorating the above-mentioned inequities and will place an onerous obligation on interested and affected parties, in particular communities who are characterised by widespread poverty, to appoint and fund, an EAP to appeal an EA and to prepare the Appeal within the prescribed time period. The costs of an EAP to appeal an EA will be in most instances prohibitive for most interested and affected parties.

4.2 The Importance of the Provision for an Appeal

Internal appeals are currently more expeditious and cost-effective than litigation, which is a significant advantage. This benefit will be nullified by the proposed Amendment.

According to Section 33 of the Constitution of the Republic of South Africa's Bill of Rights, "everyone has the right to lawful, reasonable, and procedurally fair administrative action," and "everyone whose rights have been adversely affected by administrative action" has the right to have administrative action reviewed by a court.

A person must follow the rule of exhaustion of internal remedies, according to the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In the case at hand, interested and affected parties cannot seek judicial review unless they have filed an appeal against a competent authority's environmental authorization.

If an Appeal against an EA is therefore out of reach for interested and affected parties due to onerous legal requirements (such as the appointment of an EAP at prohibitively high financial cost to interested and affected parties), their right to judicial review is also stifled.

The proposed Amendment, in our opinion, does not meet the requirements of administrative justice as required by the Promotion of Administrative Justice Act and is not aligned with the NEMA principles.

The proposed Amendment, in the form of the audi alteram partem, effectively eliminates procedural fairness.

4.3 Coordination with other Laws

Because NEMA serves as a framework instrument, there is a need for greater coordination with other laws. These amendments must be inclusive and recognize certain laws, including the National Environmental Management Act, the Integrated Coastal Management Act, the Waste Act, the Protected Areas Act, the Biodiversity Act, the National Forest Act, the Criminal Procedure Act, and the Mineral and Petroleum Resources Development Act. There is a requirement that any environmental law be read "in a manner consistent with" the Act, and that the Act take precedence in the event of a conflict. NJ is concerned that the proposed amendments do not align with existing legislation.

4.4 Rationale for Proposed Amendment

Although Natural Justice objects to the proposed Amendment, Natural Justice also requests the rationale for the proposed Amendment to make it impossible for interested and affected parties to appeal an Environmental Authorisation unless they are represented by a registered EAP.

Because the rights that flow from a prospecting and mining right are so broad, and because the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) does not require the consent of the surface owner, occupiers of the land, or affected communities, and because the environmental impacts of mining are so severe, the law provides for a wide range of balancing mechanisms aimed at reducing and managing mining.

The public participation process, as well as the right of interested and affected parties to appeal Environmental Authorisations (EAs) and seek judicial review, is one of the most important of these balancing mechanisms.

These balancing mechanisms are also in line with participatory democracy and active citizenship principles.

5. Conclusion

Environmental impact assessments (EIAs) will be much more difficult to appeal under NEMA as a result of the proposed amendments. Landowners and occupiers, communities, and civil society organizations will no longer be able to make their own submissions to environmental decision-making processes like NEMA appeals and AEL license applications. They will now have to hire a registered Environmental Assessment Professional (EAP) to handle some appeals on their behalf. The requirement to appoint an EAP for certain additional 'tasks' makes the processes more complicated, time-consuming (given the time constraints), potentially more expensive, and frustrates rather than encourages public participation.

In light of this, Natural Justice rejects the proposed amendments.

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