National Environmental Management Laws Amendment Bill, 2017 [B 14D-2017]

Table of comments by the Centre for Environmental Rights on proposed amendments to the National Environmental Management: Air Quality Act, 2004 and the National Environmental Management: Waste Act, 2008.

24 January 2020

Abbreviations	
AMSA	Arcelor Mittal South Africa Ltd
Appeal Regulations	National Appeal Regulations, 2014
AEL	Atmospheric emission licence
Constitution	Constitution of the Republic of South Africa, 1996
Draft Bill	Draft National Environmental Management Laws Amendment Bill, 2015
DEA	Department of Environmental Affairs
DMR	Department of Mineral Resources
EAP	Environmental assessment practitioner
EIA report	Environmental impact assessment report
EIA Regulations	Environmental Impact Assessment Regulations, 2014
EMI	Environmental management inspector
EMPR	Environmental management programme
EMRI	Environmental management resource inspector
FP Regulations	Financial Provisioning Regulations, 2015
HPA	Highveld Priority Area
MPRDA	Mineral and Petroleum Resources Development Act, 2002
NAAQS	National Ambient Air Quality Standards
NAQAC	National Air Quality Advisory Committee

NCLR	National Contaminated Land Register
NEMAQA	National Environmental Management: Air Quality Act, 2004
NEMBA	National Environmental Management: Biodiversity Act, 2004
NEMICMA	National Environmental Management: Integrated Coastal Management Act, 2008
NEMLAA	National Environmental Management Laws Amendment Act, 2014
NEMPAA	National Environmental Management: Protected Areas Act, 2003
NEMWA	National Environmental Management: Waste Act, 2008
PAJA	Promotion of Administrative Justice Act, 2000
SEMA	Specific environmental management Act

Proposed amendments to the National Environmental Management: Air Quality Act, 2004 (NEMAQA)				
Clause/ Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**
Cl 51 Sec 13(1)	The Minister **[must]** <u>may</u>, by notice in the Gazette, establish the National Air Quality Advisory Committee in terms of this Act.	Section 13 of the NEMAQA deals with the establishment of the National Air Quality Advisory Committee. This clause amends section 13 of the NEMAQA to provide the Minister with a discretion to establish a National Air Quality Advisory Committee.	NEMAQA states that the role of the Advisory Committee is to advise the Minister on any air quality-related matter as the Minister may determine from time to time. Such an advisory body with a national mandate, could and should fulfil a role in addressing the issues around widespread non-compliance both with national ambient air quality standards (NAAQS) and emission standards, resulting in severe health impacts; and facilitate the	The Minister **<u>must</u>**, by notice in the Gazette, establish the National Air Quality Advisory Committee in terms of this Act. No amendment should be made to current wording of the provision in NEMAQA.

			proper implementation and enforcement of the various tools under NEMAQA in order to respect, protect, promote and fulfil a number of Constitutional rights dependant on clean air. South Africa's NAAQS, although health-based, are weak and outdated. Notwithstanding this, many areas in South Africa are in non-compliance with them. This includes the three designated Priority Areas, which require specific emission reduction actions to rectify the high levels of air pollution. It is clear that air quality management requires co-operative and prioritised governance, dedication of human and financial resources, more effective implementation and enforcement of, and compliance with existing laws, policies and plans. However, to date, such actions as have been taken are wholly inadequate to ensure the realisation of the Constitutional environmental right. For example, see the *draft* Medium-Term Review (MTR) of the 2012 Highveld Priority Area (HPA) Air Quality Management Plan	

			(AQMP), dated December 2015, but only made available in February 2017, and, to date, still not finalised. A *full-term* review should have been completed within 5 years of the AQMP's promulgation – i.e. by March 2017; and a medium-term review 2-and-a-half years prior to that. The draft MTR indicates negligible – if any - improvement in the HPA air quality; with the majority of the AQMP interventions far from completion despite deadlines either having passed or requiring completion by 2020. This draft MTR and the failure of the HPA are at the centre of a High Court application (Case No.39724/19)[1] against the Government for its failure to protect the health of people in the HPA, and the former Minister of Environmental Affairs' unlawful refusal to develop implementation regulations, in terms of section 20 of NEMAQA, in order to properly enforce the HPA AQMP. The existence of air quality and emission standards, plans and	

[1] The Court papers are available at https://cer.org.za/programmes/pollution-climate-change/litigation/litigation-in-relation-to-the-highveld-priority-area-hpa and can also be made available on request.

			strategies alone is not sufficient: consistent implementation and enforcement of these laws, backed by government capacity, financial support and meaningful sanctions are required to improve the air quality. The above litigation demonstrates that there is a Constitutional obligation placed upon the Minister to develop section 20 NEMAQA implementation regulations. Similarly, It is important that a duty be placed on the Minister to establish such an advisory committee. We propose that section 13 remains as is, without the proposed amendment, and that the "must" remains in place. The establishment of the Advisory Committee should not be discretionary. In fact, it should be established and appropriate members recommended. Urgent steps are needed to ensure that improvements are made in levels of high air pollution, especially in the priority areas already declared in South Africa.	

Cl 52 **Sec 22A**	**[22A. Consequences of unlawful conduct of listed activity resulting in atmospheric emission** **(1) Section 24G of the National Environmental Management Act, 1998, as amended, applies to the commencement, without an environmental authorisation, of a listed activity or the activity specified in item 2 in Listing Notice 1 and items 5 and 26 in Listing Notice 2, relating to air quality in terms of Chapter 5 of the National Environmental Management Act, 1998.** **(2) Subsections (4) to (10) are applicable to the operating, without a provisional registration or registration certificate, of a scheduled process in terms of the Atmospheric Pollution Prevention Act, 1965, at any time prior to the commencement of this Act.** **(3) Subsections (4) to (10) are applicable to the conducting, without a provisional atmospheric emission licence or an atmospheric emission licence, of an activity listed in terms of section 21 of this**	Clause 47 of the Bill amends section 22A of the NEMAQA. This clause seeks to substitute section 22A to provide clarity on the consequences of unlawful commencement of a listed activity. The clause will address two scenarios, namely, to provide for those activities that were operated without the registration certificate under the Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965), and those activities that have an environmental authorisation under the Environmental Impact Assessment Regulations, 2014, but no atmospheric emission licence under NEMAQA. This clause provides for the process and procedures to be followed in addressing the non-compliance with the law.	The s 22A proposed in the Bill has been heavily simplified from the 22A in the current NEMAQA. The relevant changes are the following: 1. S 22A no longer provides that: "(1) Section 24G of the National Environmental Management Act, 1998, as amended, applies to the commencement, without an environmental authorisation, of a listed activity or the activity specified in item 2 in Listing Notice 1 and items 5 and 26 in Listing Notice 2, relating to air quality in terms of Chapter 5 of the National Environmental Management Act, 1998"; 2. The proposed s 22A now simply reads that upon application by a person who operated a scheduled process under the Atmospheric Pollution Prevention Act (APPA) or conducted a listed activity under NEMAQA without the necessary registration certificate or	In the event that section 22A is to remain in place, we propose the following changes: (1) **<u>Any</u>** [**Upon application for an atmospheric emission licence by a**] person who— *(a)* operated, at any time prior to the commencement of this Act, a scheduled process in terms of the Atmospheric Pollution Prevention Act, without a provisional registration or registration certificate; or *(b)* conducted or is conducting, without a provisional atmospheric emission licence or an atmospheric emission licence, an activity listed in terms of section 21 which results in atmospheric emission**<u>s</u>**, **<u>must apply for an atmospheric emission licence</u>** **[the relevant licensing authority must fine the applicant an administrative fine which may not exceed R5 million before the application for an atmospheric emission licence may be considered]**.

	Act which results in atmospheric emission. **(4) On application by a person who conducted an activity contemplated in subsection (2) or (3), the licensing authority may direct the applicant to—** **(a) immediately cease the activity pending a decision on the application submitted in terms of this section;** **(b) investigate, evaluate and assess the impact of the activity on the environment, including the ambient air and human health;** **(c) remedy any adverse effect of the activity on the environment, including the ambient air, and human health;** **(d) cease, modify or control any act, activity, process or omission causing atmospheric emission;** **(f) compile a report containing—** **(i) a description of the need and desirability of the activity;** **(ii) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment, including the ambient air, and human health of the activity, including the cumulative effects and the manner**		atmospheric emission licence (AEL), respectively, the relevant licensing authority must fine the applicant an administrative penalty which may not exceed R10 million, before the application for the AEL is eligible for consideration; and the application must be submitted in terms of the requirements set out in s 37; 3. Subsection (3) now provides that "On application contemplated in subsection (1), the licensing authority must direct the applicant to, *inter alia*, immediately cease the activity; conduct public participation; investigate, evaluate and assess the impacts of the activity; remedy any adverse effects; eliminate the sources of atmospheric emission, or compile a report with relevant information in relation to the activity, the need and desirability for the information and a description of the public participation process followed in relation	**(1A) The relevant licensing authority must, subject to subsection (1B), fine the applicant an administrative fine, which may not exceed R10 million, before the application for an atmospheric emission licence may be considered.** **(1B) The relevant licensing authority must, before issuing a fine in terms of subsection (3A),** – **(a) publish a notice in the *Gazette* calling for comments on a proposed fine;** **(b) consider all comments received on the proposed fine; and** **(c) publish the final fine issued in the *Gazette*.** … (3) On application contemplated in subsection (1), the licensing authority must direct the applicant to— … (aA) undertake public participation, as prescribed **in section 38 of the Act**;

	in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity; **(iii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment, including the ambient air, and human health of the activity;** **(iv) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;** **(v) an environmental management programme; or** **(g) provide such other information or undertake such further studies as the licensing authority may deem necessary.** **(5) The licensing authority must consider any reports or information submitted in terms of subsection (4) and thereafter may—**		to the compiling of the report. 4. Subsection (5) of the current NEMAQA, which sets out the options for the licensing authority, having considered the reports and information provided on application, has been deleted. <u>This deletion should not have been effected,</u> and section 37 of NEMAQA (to which reference is made in the proposed s22A(2)) does not fill this gap as it only deals with the submission of an application for an AEL – not the relevant information that the licensing authority must consider or the licensing authority's powers, having considered the application. The proposed section 22A effectively removes the duplication that previously existed between it and section 24G of the National Environmental Management Act, 1998 (NEMA) in instances where a NEMA-listed activity commences without an environmental	… **<u>(3A) The licensing authority must consider any reports or information submitted in terms of subsection (3) and thereafter may—</u>** **(a) <u>refuse to issue an atmospheric emission licence;</u>** **(b) <u>issue an atmospheric emission licence to such person to conduct the activity subject to such conditions as the licensing authority may deem necessary, which atmospheric emission licence shall only take effect from the date on which it has been issued; or</u>** **(c) <u>direct the applicant to provide further information or take further steps prior to making a decision in terms of paragraphs (a) or (b).</u>** …

	(a) refuse to issue an atmospheric emission licence; **(b) issue an atmospheric emission licence to such person to conduct the activity subject to such conditions as the licensing authority may deem necessary, which atmospheric emission licence shall only take effect from the date on which it has been issued; or** **(c) direct the applicant to provide further information or take further steps prior to making a decision in terms of paragraphs (a) or (b).** **(6) The licensing authority may as part of the decision contemplated in subsection (5), direct a person to—** **(a) rehabilitate the environment within such time and subject to such conditions as the licensing authority may deem necessary;** **(b) prevent or eliminate any source of atmospheric emission from the activity within such time and subject to such conditions as the licensing authority may deem necessary; or** **(c) take any other steps necessary under the circumstances.**		authorisation and where an NEMAQA listed activity commences without an AEL. As explained in previous submissions by the CER, requiring an AEL is already a NEMA-listed activity, with the consequence that, commencing an activity without an AEL is already covered by section 24G of NEMA. However, if it is the intention that s 22A remains in place, recommendations are made in the column to the right, to address concerns in relation to the proposed section 22A wording, including the fact that – as it currently stands – the penalty may only be imposed, and the section 22(A)(3) options are only available to the licensing authority, in instances where an application for an AEL is made by the person operating unlawfully (but not in other instances where a person operates unlawfully but does not apply for an AEL). The proposed s22A <u>fails to indicate what consequences will follow the unlawful conduct of a</u>	

	(7) A person contemplated in subsection (4) must pay an administrative fine, which may not exceed R5 million and which must be determined by the licensing authority, before the licensing authority may act in terms of subsection 5(a) or (b). **(8) In considering a decision contemplated in subsection (5)(a) or (b), the licensing authority may take into account whether or not the applicant complied with any directive issued in terms of subsections (4) or (5)(c).** **(9) The submission of an application in terms of subsection (4) or the issuing of an atmospheric emission licence in terms of subsection 5(b) or the payment of the administrative fine in terms of subsection (7) shall—** **(a) in no way derogate from the environmental management inspector's or the South African Police Services' authority to investigate any transgression of this Act; or** **(b) in no way derogate from the National Prosecuting Authority's**		listed activity resulting in atmospheric emissions in instances where no application is brought by a person who operated a scheduled process under the APPA, or conducted a listed activity (as referred to in subsections 22A(1)(a) and (b) of AQA) without an AEL. Would the administrative penalty referred to in s 22A(1) and the s 22A(3) directions from the licensing authority still be applicable, or would only criminal penalties and other administrative enforcement measures be available? This must be clarified. We have proposed that such persons are required to apply for an AEL. We support the inclusion of (aA), which requires the licensing authority to direct the applicant to "undertake public participation, as prescribed". However, this provision is vague and should provide clarity on the public participation process and requirements. In this regard, we note that the Explanatory Memorandum indicates that what is intended here is public participation in terms of the	

	legal authority to institute any criminal prosecution; and **(c) not indemnify the applicant from liability in terms of section 51(1)(a) for having contravened section 22.** **(10) If, at any stage after the submission of an application in terms of subsection (4), it comes to the attention of the licensing authority, that the applicant is under criminal investigation for the contravention of or failure to comply with section 22, the licensing authority may defer a decision to issue an atmospheric emission licence until such time that the investigation is concluded and—** **(a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;** **(b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or** **(c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the**		NEMA Environmental Impact Assessment Regulations, 2014. We further note that s 38 of NEMAQA confirms that NEMA's s24 applies to AEL applications and that s 38(3) sets out the minimum public participation requirements. We recommend that, as result, reference be made to the s 38 process. In the event that section 22A is to remain in place, we propose the following changes: 1. that it is made clear that the persons contemplated in subsections 1(a) and (b) are required to apply for an AEL, alternatively, that the section be amended to make provision for the issuing of a section 22A fine, even in instances where an application for an AEL is not made to the licensing authority; 2. the current subsection 22A(5) of NEMAQA should remain - as a new s 22A(3A). This would also address the concern that subsection 22A(5) of the Bill refers to the	

	applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.] **22A.** (1) Upon application for an atmospheric emission licence by a person who— *(a)* operated, at any time prior to the commencement of this Act, a scheduled process in terms of the Atmospheric Pollution Prevention Act, without a provisional registration or registration certificate; or *(b)* conducted or is conducting, without a provisional atmospheric emission licence or an atmospheric emission licence, an activity listed in terms of section 21 which results in atmospheric emission, the relevant licensing authority must fine the applicant an administrative fine which may not exceed R10 million before the application for an atmospheric emission licence may be considered. (2) An application contemplated in subsection (1) must be submitted in accordance with the requirements contained in section 37.		issuing of a licence in terms of "this section" without any reference being made in the Bill's proposed section 22A to the issuing of a licence; 3. s22A(3)(aA) must explicitly refer to the s38 NEMAQA public participation process and requirements. Express provision must also be made for public participation, as a separate process, in relation to the fine and its quantum; and 4. subsection 22A(5) refers to the issuing of an AEL or provisional AEL "in terms of this section", but section 22A does not provide for or regulate the issuing of an AEL or provisional AEL – as such this wording should be rectified – if the recommendation of paragraph 2 above is not implemented.	

	(3) On application contemplated in subsection (1), the licensing authority must direct the applicant to— *(a)* immediately cease the activity pending a decision on the application submitted in terms of this section; (aA) undertake public participation, as prescribed; *(b)* investigate, evaluate and assess the impact of the activity on the environment, including the ambient air and human health; *(c)* remedy any adverse effect of the activity on the environment, including the ambient air and human health; *(d)* cease, modify or control any act, activity, process or omission causing atmospheric emission; *(e)* eliminate any source of atmospheric emission; *(f)* compile a report containing— (i) a description of the need and desirability of the activity; (ii) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment, including the ambient air, and human health of the activity, including the cumulative effects and the manner			

	in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity; (iii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for, or impacts on, the environment, including the ambient air, and human health; (iv) a description of the public participation process followed during the course of compiling the report, including all comments received from the interested and affected parties and an indication of how issues raised have been addressed; and (v) an environmental management programme; and *(g)* provide such other information or undertake such further studies as the licensing authority may deem necessary. (4) If it comes to the attention of the licensing authority that the applicant is under criminal investigation for the contravention of, or failure to comply with section 22, the licensing authority may defer a decision to issue a			

	provisional atmospheric emission licence or an atmospheric emission licence until such time that the investigation is concluded and— *(a)* the National Prosecuting Authority has decided not to institute prosecution in respect of the contravention of, or failure to comply with, section 22; *(b)* the applicant concerned is acquitted or found not guilty after prosecution in respect of the contravention of, or failure to comply with, section 22; or *(c)* the applicant concerned has been convicted by a court of law of an offence in respect of the contravention of, or failure to comply with, section 22 and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review. (5) The submission of an application or the issuing of a provisional atmospheric emission licence or an atmospheric emission licence in terms of this section, or the payment of an administrative fine in terms of subsection (1) must— *(a)* in no way derogate from the authority of the environmental			

	management inspector or the South African Police Services, to investigate any transgression of this Act; *(b)* in no way derogate from the National Prosecuting Authority's legal authority to institute any criminal prosecution; or *(c)* not indemnify the applicant from liability in terms of section 51(1)*(a)*.			
Cl 53 **Sec 36**	(2A) A provincial organ of state must be regarded as the licensing authority if a listed activity falls within the boundaries of more than one metropolitan municipality, or within the boundaries of more than one district municipality, and the relevant municipalities agreed thereto in writing. (5) Notwithstanding subsections (1) to (4), the Minister is the licensing authority and must perform the functions of the licensing authority if— (d) the listed activity relates to the activities listed in terms of section 24(2) of the National Environmental Management Act, 1998, or in terms of section 19(1) of the National Environmental Management: Waste Act, 2008, **[or]** and the Minister has	The clause amends section 36 to provide clarity that a provincial department responsible for environmental affairs is the licensing authority where a listed activity falls within the boundaries of more than one metropolitan municipality or more than one district municipality Section 36(5) identifies the Minister as the licensing authority, in five instances, to issue atmospheric emission licences for air quality activities. Section 36(5)(d) is intended to facilitate the issuing of an integrated environmental authorisation where the Minister is also a competent authority for the environmental impact assessment activities, and licensing authority for the	We wish to point out that there does not appear to be clarity as to the licensing authority for independent power producer coal-fired power station AEL applications - in certain cases it is the province, in some, it is the municipality, and in others, it is the Department. These concerns, around the current lack of certainty, and resultant lack of accountability, have been brought to the attention of the Department of Environment, Forestry and Fisheries (DEFF or "the Department") and the National Assembly in previous submissions and in our letter of	

	been identified as the competent authority (8) The Minister and the licensing authority contemplated in subsections (1) to (4), or the MEC and the licensing authority contemplated in subsections (1) to (5), may agree that an application for an atmospheric emission licence with regard to any activity contemplated in section 22 may be dealt with by the Minister, MEC or the relevant licensing authority contemplated in subsections (1) to **[(4)]** (5)."	waste management activities. The current provision appears to suggest that the Minister will always be the licensing authority, whereas the intention is to provide that the Minister is only the licensing authority if the Minister is also identified as such in terms of NEMA and NEMWA. The clause amends section 36(5)(d) to provide for textual amendments to clarify that the Minister is only the licensing authority if the Minister is identified as such in terms of NEMA, NEMWA and NEMAQA. Section 36(8) has been amended to extend the scope to also allow for co-operative agreement to be reached between the Municipality, MEC and the Minister, on who the licensing authority will be on any application.	June 2018.[2] This situation should be rectified, and the necessary legislative guidance provided.	
Cl 54 Sec 47A	(1) The licensing authority may, by written notice to the holder of an	Clause 54 inserts a new section 47A to provide the licensing authority with the legal power	We welcome the inclusion of this provision, subject to proposed amendments.	(1) The licensing authority may, by written notice to the holder of an atmospheric

[2] CER letter to the Department of Environmental Affairs "Provisional Submissions regarding the review of the 2012 National Framework for Air Quality Management in the Republic of South Africa" (29 June 2018) available at https://cer.org.za/wp-content/uploads/2018/07/CER-submissions-on-the-draft-amendments-to-the-Framework-for-AQM_29-June-2018.pdf

	atmospheric emission licence, revoke or suspend that licence if the licensing authority has evidence that the licence holder has contravened a provision of this Act or a condition of the licence and such contravention may have, or is having, a significant detrimental effect on the environment, including health impacts. (2) The licensing authority must before exercising the power in terms of subsection (1), in writing— (a) consult organs of state whose areas of responsibility may be affected by the exercise of the power; and (b) afford the holder of the atmospheric emission licence an opportunity to make a submission in respect of the intended revocation or suspension, which submission must be accompanied by an atmospheric impact report as contemplated in section 30 of this Act. (3) The licencing (sic) authority, when consulting in terms of subsection (2), must indicate the time period within which—	to revoke or suspend an atmospheric emission licence subject to the legal requirements set out in the section. The clause also sets out the process and procedure to be followed before a licensing authority may revoke or suspend the licence.	A contravention of NEMAQA or an AEL alone should be sufficient for the suspension or revocation of an AEL. A licensing authority should not have to overcome the additional hurdle of showing (or having "evidence") that the contravention is having or may have a "significant detrimental effect on the environment, including health impacts". This not only sets the bar too high, but would be unduly burdensome, particularly given capacity constraints of many licensing authorities (and particularly municipal licensing authorities). We propose that "significant" be deleted, especially if the revocation or suspension is only discretionary. Furthermore, what constitutes a "significant detrimental effect" is unclear. The onus should not be on the licensing authority to have to establish that an effect is significantly detrimental for the environment and/or health, in order to be able to revoke or suspend an AEL. We propose that "is of the opinion" (or "suspects")	emission licence, revoke or suspend that licence if the licensing authority **is of the opinion [has evidence]** that the licence holder has contravened a provision of this Act or a condition of the licence and such contravention may have, or is having a **[significant]** detrimental effect on the environment, including health impacts. (2) The licensing authority must before exercising the power in terms of subsection (1) **[, in writing]**— (a) consult organs of state whose areas of responsibility may be affected by the exercise of the power; **[and]** (b) afford the holder of the atmospheric emission licence an opportunity to make a **written** submission in respect of the intended revocation or suspension, which submission must be accompanied by an atmospheric impact report as contemplated in section 30 of this Act;

	(a) the organs of state must submit comments; and (b) the holder or the atmospheric emission licence must make his or her submission to the licencing (sic) authority.		is a more appropriate threshold; especially if such revocation or suspension is only discretionary. "Is of the opinion" is also the phrase used in relation to suspension or revocation of waste management licences under the Waste Act. The words "in writing" in subsection (2) are unnecessary and we propose they are deleted and replaced by the amendment we suggest. Also in relation to subsection (2), provision must also be made for consultation with stakeholders and other interested and affected parties. Communities whose health may be affected by non-compliance must be notified and provided with an opportunity to make submissions for consideration by the licensing authority. This would be in accordance with the legal requirements for a fair process and just administrative action under the Promotion of Administrative Justice Act, 2000 (PAJA). We also refer you, in this regard, to our comments in relation to the proposed	(**c) publish a notice in the Gazette calling for comments on the proposed revocation or suspension;** **(d) consider all comments and submissions received; and** **(e) publish the revocation of suspension decision in the *Gazette*.** (3) The licen**[c]s**ing authority, when consulting in terms of subsection (2), must indicate the time period within which— (a) the organs of state must submit **written** comments; **[and]** (b) the holder o**[r]f** the atmospheric emission licence must make his or her submission to the licen**[c]s**ing authority; **and** **(c) interested and affected parties must submit comments.**

			amendment of section 43 of NEMA, to refer also to this proposed new section of NEMAQA.	
No clause Sec 45			There is no express provision in s 45 - which deals with a review of an AEL "at intervals specified in the licence, or when circumstances demand that a review is necessary"- which stipulates that a review must be subject to public participation or that further investigations in relation to the licence can be conducted, or information requested, by the relevant authority. It is submitted that PAJA and the Constitution of the Republic of South Africa, 1996 ('the Constitution") require that there be public participation in relation to a review of an AEL. We propose the addition of a new subsection (4) to make clear that sections 38 and 40 – which include provision for public participation – apply to the review of an AEL.	**45. Review of provisional atmospheric emission licences and atmospheric emission licences** …. **(4) Sections 38, 39, and 40, read with the necessary changes as the context may require, apply to the review of a licence, which must also require public participation.**
No clause			Public consultation is only required in certain limited	46. Variation of provisional atmospheric emission licences

Sec 46			circumstances, for instance s 46(3) currently only requires a licence-holder to bring a variation request to the public's attention if the variation results in all three conditions being met, namely if it: 1) will authorise an increase environmental impact, 2) increase the atmospheric emissions, and 3) has not been the subject of an authorisation in terms of any other legislation and public consultation. Public consultation should be applicable to all variation applications, or at least to those that will authorise an increase in the environment impact or in atmospheric emissions. In any event, as an AEL is a separate process and to ensure the public has an adequate opportunity to be consulted – particularly where an increase in impact and emissions is concerned, we recommend that section 46(3)(c) (which only requires consultation for a variation if the proposed variation has not, for any reason, been the subject of an authorisation in terms of any other legislation and public consultation) be deleted as it is unduly restrictive.	and atmospheric emission licences … (3) If a licensing authority receives a request from the holder of a licence in terms of subsection (1)(d), the licensing authority must require the holder of the licence to take appropriate steps to bring the request to the attention of relevant organs of state, interested persons and the public if— (a) the variation of the licence will authorise an increase in the environmental impact regulated by the licence; **or** (b) the variation of the licence will authorise an increase in atmospheric emissions**. [; and** **(c) the proposed variation has not, for any reason, been the subject of an authorisation in terms of any other legislation and public consultation.]** …

No clause Sec 47			It is not clear from section 47, which deals with renewals of AELs that public participation is required. It is submitted that PAJA and the Constitution require that there be public participation in the renewal of an AEL. We propose the amendment of subsection (5) to make clear the requirement for there to be public participation in renewal applications.	47. Renewal of provisional atmospheric emission licences and atmospheric emission licences … (5) Sections 38, **39,** 40 and 43, read with the necessary changes as the context may require, apply to an application for the renewal of a licence**, which must also require public participation.**

Proposed amendments to the National Environmental Management: Waste Act, 2008 (NEMWA)(contaminated land provisions)				
Cl 64 Sec 36	(5) An owner of the land that is **[significantly]** likely to be contaminated, or a person who undertakes an activity that caused the land to be significantly contaminated, must notify the Minister and MEC of that contamination as soon as that person becomes aware, of that contamination.	This clause amends section 36(5) to provide clarity that an owner of the land that is likely to be contaminated has a legal obligation to notify the Minister of such contamination as soon as that owner becomes aware.	We support the proposed amendment to subsection (5). However, we note that there are still gaps and arbitrary ambiguities. It is not clear why a person undertaking activities on land has a higher threshold for notification than an owner (in whose case there must merely be a likelihood of contamination). In the case of a person simply conducting an activity on land,	(5) An owner of the land that is likely to be contaminated, or a person who undertakes an activity on land that **has likely** caused the land to be **[significantly]** contaminated, must notify the Minister and MEC of that contamination **or potential contamination** as soon as that person becomes aware, of that **contamination or potential** contamination.

			there would have to be knowledge of significant contamination by the person conducting the activity – prior to a site assessment being conducted. This is arbitrary and unreasonable. It would also allow many big polluters, who perhaps do not own the land on which activities are being conducted, to escape accountability. Instead the requirement must be one of likely contamination for all parties, which should trigger the requirement for a site assessment. Persons are unlikely to give notice under section 36(5) or to acknowledge that their land is significantly contaminated before a site assessment has been conducted. We are aware that companies are wary of exposing themselves and their land to potential liability or in any way acknowledging that their land might be contaminated. We refer to ArcelorMittal (AMSA) as an example. AMSA notified the Department of Environment Forestry and Fisheries (DEFF or	

			"the Department") in terms of section 35(6) of NEMWA by completing and submitting the pro forma Part 8 NEMWA notification form. But in its cover letter, AMSA stated that it is "*currently not in a position to make any statements/ assessments pertaining to the significance of any contamination as referred to in s 36(5)"* it stated further that "*Vanderbijlpark Works are of the opinion that the land, as identified … may not fall within the ambit of contaminated land for purposes of s36(5) NEMWA*" and that "*legislation may be open to various interpretations by different stakeholders and as a result difficulties are being experienced in achieving the objectives as envisaged in the NEMWA in a sustainable manner*". This shows a clear intention to avoid liability in terms of the provisions of Part 8 of NEMWA, despite the fact that notification under s 36(5) was given. Further, we have noted in practice the incorrect assumption that after a notification by a	

			landowner or person undertaking an activity in terms of s 36(5) is given, the land becomes an investigation area. NEMWA (as currently worded) requires there to be written notice to the person or a published notice in the Gazette, by the Minister or MEC. The Minister or the MEC must expressly identify the land as an investigation area in terms of s 36(1) and/or s 36(6) in order for it to become an investigation area. Once an owner or other person has given notification of contamination in terms of s 36(5), it is for the Minister or MEC to identify the land as an investigation area. We have raised this issue with the DEFF many times before, but it appears that this misconception persists.	
Cl 65 **Sec 37(1) and (2)**	(1) The Minister or MEC, as the case may be, may in respect of an investigation area contemplated in section 36, after consultation with the Minister of Water Affairs and Forestry- (a) **[cause]** require a site assessment to be conducted in respect of the relevant	These clauses amend section 37 of the NEMWA to provide clarity that a site assessment report must be submitted together with a remediation plan.	We have no objection to the replacement of "cause" with "require", as this provides for further clarity in terms of the powers of the Minister or MEC. The inclusion of "and submit a site assessment report and a remediation plan" is, however, misleading as it implies that the obligation to submit the report	(1) The Minister or MEC, as the case may be, may in respect of an investigation area contemplated in section 36, after consultation with the Minister **[of] responsible for** Water Affairs and **[Forestry]**

	investigation area, and submit a site assessment report and a remediation plan, if applicable, to the Minister or the MEC, as the case may be (b) in a notice published under section 36(1) or issued under section 36(6)- … (ii) direct the person who has undertaken or is undertaking the high risk activity or activity that caused or may have caused the contamination of the investigation area, to **[cause)** require a site assessment to be conducted by an independent person, at own cost, and to submit a site assessment report, and a remediation plan, if applicable, to the Minister or MEC within a period specified in the notice (2)(a) A site assessment report and a remediation plan, if applicable, must comply with any directions that may have been published or given by the Minister or MEC in a		and plan lies with the Minister or MEC, which cannot be correct. We recommend that this provision be amended further, to specify the time period within which the site assessment report and remediation plan must be submitted. In this regard we refer again to AMSA as an example. It was required to conduct a site assessment in respect of its Vanderbijlpark works, in terms of a notice issued by the Department on 14 April 2015. It took approximately 2-and-a-half years for AMSA to submit its site assessment report, which was only submitted in November 2017 despite various follow-ups with AMSA and the Department, and still: there were numerous inconsistencies in the report; and the Department has yet to make a finding on the contamination of the land i.e. a remediation order. This despite the fact that the site assessment revealed that contamination was moving from AMSA's plant and urgent measures required to address the contamination. This is an omission which must be urgently	**any other organ of state**- (a) require a site assessment to be conducted in respect of the relevant investigation area, **and that [submit**] a site assessment report and a remediation plan, if applicable**, be submitted** to the Minister or the MEC, as the case may be within a stipulated time period, **which cannot exceed 90 days**; or (b) in a notice published under section 36(1) or issued under section 36(6)- … (ii) direct the person who has undertaken or is undertaking the high risk activity or activity that caused or may have caused the contamination of the investigation area, to **[cause] require** a site assessment to be conducted

	notice contemplated in section 36(1) or (6) and must at least include information on whether the investigation area is contaminated.		addressed. Delays such as in the AMSA case cannot be tolerated in instances where contamination is continuously posing risks of harm to human health and the environment. This could not have been the intention of the legislature in enacting section 37, nor is it in line with the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Furthermore, as the Bill intends to do away with a contaminated land register of investigation areas, provision should be made for public notice under s 37 where land has been identified as an investigation area. This is important information, the publication of which is in the public interest and which may impact human health and/or the environment. In addition, see our comments below regarding remediation plans.	by an independent person, at own cost, and to submit a site assessment report, and a remediation plan, if applicable, to the Minister or MEC within a period specified in the notice **which period cannot exceed 90 days**. **37(1A) Where the Minister or MEC as the case may be, requires or directs a site assessment to be conducted, such requirement or direction must be published in the Gazette for public information.**
Cl 66 **Sec 38(1)**	On receipt of a site assessment report and a remediation plan, if applicable, contemplated in	These clauses amend sections 37 and 39 (sic) of the NEMWA to provide clarity that a site	Although we welcome the inclusion of the requirement for a remediation plan in addition to a	**…**

	section 37, the Minister or MEC, as the case may be, may, after consultation with the Minister **[of Water Affairs and Forestry]** <u>responsible for water affairs</u> and any other organ of state concerned, decide that—	assessment report must be submitted together with a remediation plan	site assessment report in sections 37 and 38 of NEMWA, the words "if applicable" that follow create ambiguity. The remediation plan is required if the site assessment finds that the investigation area is contaminated and that the area should be remediated or any other measures should be taken to manage or neutralise the risk, but the definition for "contaminated" is ambiguous and unclear. Furthermore, the amended provisions provide no clarity on what a remediation plan is required to contain and when it would be required and applicable. It is inappropriate and unhelpful for the subsection to provide that a remediation plan should be provided "if applicable", but then provide no clarity as to when a remediation plan is and is not applicable. This uncertainty should be addressed to make clear the circumstances in which a remediation plan is required and what it should contain. S 38 must expressly state that the Minister or MEC's decision made under this provision must be	**<u>38(6) A decision taken in terms of section 38(1), (2) and/or (3) must be published in the Gazette and made available on the Department's website</u>.**

			published in the Gazette and made available online. Clearly it is in the public's interest to know whether or not an investigation area is contaminated and the plan to address this. This is information that has the potential to impact human health and/or the environment.	
Cl 67 **Sec 41**	The Minister must keep a national contaminated land register of **[investigation]** contaminated land areas that includes information on— *(a)* the owners and any users of **[investigation]** contaminated land areas; *(b)* the location of **[investigation]** contaminated land areas; *(c)* the nature and origin of the said contamination; *(d)* whether **[an investigation]** a contaminated land area— (i) **[is contaminated,]** presents a risk to health or the environment, and must be remediated urgently; (ii) **[is contaminated,]** presents a risk to health or the environment, and must be remediated within a specified period; or (iii) **[is contaminated,]** does not present an immediate risk, but	This clause amends section 41 of the NEMWA. This clause provides clarity that the Minister must only keep a national register of all contaminated land.	This proposed amendment is problematic in that it would mean that investigation areas are no longer required to be reflected on the National Contaminated Land Register (NCLR) – and there can be no way for the public to ascertain potential risks as a result of potentially contaminated land. Having a NCLR – which should, in any event, be publicly available and updated regularly to reflect investigation areas - is important in that it will – 1. enable the public to know whether there is a likelihood of land being contaminated - which may have risks and harmful implications for their own health and/or for the environment;	The Minister must keep a national contaminated land register of investigation areas – **which must be publicly available on the Department's website** - that includes information on— (a) the owners and any users of investigation areas; (b) the location of investigation areas; **and** **(c) the status of the investigation.** **(1A) Once a decision in terms of section 38(1) is made, the National Contaminated Land Register must state:** **(a)** the nature and origin of **any** contamination **if there**

	measures are required to address the monitoring and management of that risk; **[or]** and **[(iv) is not contaminated;** **(e) the status of any remediation activities on investigation areas; and]** (f) restrictions of use that have been imposed on the **[investigation]** contaminated land areas. (2) The Minister may change the status of **[an investigation]** the contaminated land area contemplated in subsection (1)(d)(i) or (ii) as provided for in subsection (1)(d)(iii) or (iv) if a remediation order has been complied with or other circumstances eventuate that justify such a change. (3) An MEC who has identified **[an investigation]** a contaminated land area must furnish the relevant information to the Minister for recording in the national contaminated land register.		2. enable the public to track the progress of the investigation; 3. ensure that the land owner or user conducting the site assessment can be held to account and will ensure that the investigation is concluded efficiently and transparently, in line with the constitutional right to an environment not harmful to health or wellbeing; and 4. enhance government's abilities to track the progress of land investigation and reporting, which would assist government in the exercise of its obligations and for the protection of the health and wellbeing of those who might be impacted by the contamination. We accordingly do not support the proposed amendment as this would result in a less transparent process. It is not in the best interests of the public for potentially harmful contamination to only be tracked and registered at such a late stage, thereby depriving the public of the opportunity to take	**is a finding in terms of section 38(1)(a), (b) or (c);** **(b)** whether an investigation area— (i) is contaminated, presents a risk to health or the environment, and must be remediated urgently; (ii) is contaminated, presents a risk to health or the environment, and must be remediated within a specified period; or (iii) is contaminated, does not present an immediate risk, but measures are required to address the monitoring and management of that risk; or (iv) is not contaminated; (**c**) the status of any remediation activities on contaminated land areas; and (**d**) restrictions of use that have been imposed on contaminated land areas. (2) The Minister may change the status of an investigation area contemplated in subsection (**1A)(b)**(i) or (ii) as provided

			any necessary precautions and preventative measures and to hold those potentially liable to account. If the provision is to remain as is, then additional provision must be made for public notification of land being identified as an investigation area under s 36 and of any processes being conducted in terms of s 37. The CER has, through a PAIA request, previously been given access to the NCLR, and was alarmed to note how few areas it contained – none of which had yet been remediated. We were also concerned by the absence of many mining companies and large industrial facilities from the NCLR. If land is only required to be reflected once it is found to be contaminated, there is likely to be even less transparency and accountability from persons/entities with potentially contaminated land.	for in subsection **(1A)(b)**(iii) or (iv) if a remediation order has been complied with or other circumstances eventuate that justify such a change. …
No Cl **Sec 1**			In the current Waste Act, the definition of "contaminated" in s 1 is ambiguous and unclear, with	

			the risk that interpretation disputes will result in the exclusion of land that was intended to fall within the purview of this section (and vice versa). Various steps in Part 8 depend on whether or not there is contamination. This is a crucial definition for the successful implementation of these provisions. Furthermore, the soil screening values set out in the National Norms and Standards for the Remediation of Contaminated Land and Soil Quality make arbitrary distinctions between different land uses, particularly between standard residential and informal residential and specify different values for each.[3] This potentially over-complicates the process and would allow for lower levels of contamination to be overlooked, even though they may pose a risk to human health and/or the environment.	

[3] See Table 1, p6 at https://cer.org.za/wp-content/uploads/2010/03/national-environmental-management-waste-act-59-2008-national-norms-and-standards-for-the-remediation-of-contaminated-land-and-soil-quality_20140502-GGN-37603-00331.pdf.

			Should the above norms and standards remain unchanged, it should be in line with the National Framework for the Management of Contamination Land, 2010,[4] and make clear that anyone within 1km of water sources (irrespective of zoning), and who is required to produce a land contamination site assessment report, is prohibited from using soil screening value (SSV) 2 measuring its land contamination site assessment report, as indicated in the National Framework. As an example, the AMSA land contamination site assessment used both SSV1 and 2, despite being within 1km of water resources and sensitive receptors, thereby resulting in inconsistencies in the report, possible skewed findings and inadequate remediation measures being proposed. We propose that the definition of "contaminated" in section 1 be clarified to make clearer in which circumstances the definition	

[4] At http://sawic.environment.gov.za/documents/562.pdf. See Mining Sector Workshop Summary of Events, December 2009, p18

			would apply. The threshold should always be whether or not levels of contamination exist which pose a risk for the environment and/or human health. Provision should also be made for the sampling of groundwater as a means to indicate contamination in the surrounding soil.	
No cl Sec 38(4)			S 38(4) simply says a remediation order must be complied with at the costs of the person against whom the order is issued. Unless otherwise directed, a remediation order under subsection (2), an order under subsection (3) or a directive under s 37(1) must be complied with at the cost of the person against whom the order or directive is issued. It is still unclear who will be responsible for and must bear the costs of the remediation. Naturally, this will be subject to extensive dispute by land occupiers or owners who have inherited land with a legacy of pollution, or who otherwise argue	

			that they are unable to pay the costs of remediation. Part 8 also fails to require that financial provision be made for remediation.	
No Cl **Sec 40(1)**			No person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the Minister or MEC, as the case may be. S 40(1) broadly states that no person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated. This is not subject to a requirement of a remediation order, and it therefore places a very broad obligation on all landowners. While we do welcome this obligation, it opens the door to much uncertainty around the question of when land is contaminated and the additional responsibilities and obligations of landowners.	

No Cl Remediation in terms of directive – Transitional provisions in National Norms & Standards for the Remediation of Contaminated Land & Soil			A person remediating land in terms of a directive, compliance notice or waste management licence (WML) must, in terms of the transitional provisions of the National Norms and Standards for the Remediation of Contaminated Land and Soil Quality, comply with the conditions set out in the directive, compliance notice or WML. It is, however, unclear how, on completion of remediation in terms of such conditions, the remediation is to be verified and confirmed. In terms of NEMWA, the Minister may change the status of an investigation area if a remediation order is complied with, and there is an incentive to verify and confirm that the land has been remediated in order to have it removed from the contaminated land register. This is not the case where land is remediated in terms of a WML, directive or compliance notice and there is a fair amount of uncertainty regarding, when, how and whether remediation has in fact been completed. This should be corrected.	