National Environmental Management Laws Amendment Bill, 2017 [B14D-2017]
Supplementary Table of comments by the Centre for Environmental Rights
31 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 Act, 1998				
Clause /Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**
Cl 1(e) Sec 1	**'environmental mineral [resource] and petroleum inspector'** means a person designated as an environmental mineral **[resource]** and petroleum inspector in terms of section 31BB	The clause corrects EMRI to include 'petroleum' in the designation.	EMRI change to EMPI is not consistently applied throughout the Bill	Ensure that change is consistently applied throughout.
Cl 1(f) Sec 1	**'financial provision'** means the amount which is to be provided in terms of this Act, guaranteeing the availability of sufficient funds to undertake progressive rehabilitation, decommissioning, closure and post closure activities for listed and specified activities to ensure the mitigation, remediation and rehabilitation of adverse environmental impacts including latent environmental impacts and residual environmental impacts as well as the pumping and treatment of extraneous and polluted water, where relevant;'	The clause amends the definition of "financial provision" in section 1 of the NEMA to clarify that the definition applies to an applicant for environmental authorisation, a holder of an environmental authorisation or a holder of a right or permit granted in terms of the Mineral and Petroleum Resources Development Act.	This definition does not correlate with the explanation provided. This explanation was used for the previous definition which has since been changed by this version of the draft bill.	
Cl 1 (i) Section 1	'**mitigate'** means to alleviate, reduce or make less severe;''	The new definitions of ''audit'', ''latent environmental impacts'', ''mitigate'', rehabilitate'', ''remediate'', ''residual environmental impacts'' are applicable to the revised section 24P	The term "mitigate" is defined in Regulation 1 of the EIA Regulations as follows: "mitigate means to anticipate and prevent negative impacts and risks, then to minimise them, rehabilitate or repair impacts to the extent feasible". We point out that the proposed definition of "mitigate" in the Bill and the definition in the EIA Regulations are inconsistent and that this creates	**'Mitigate**' means to anticipate and prevent negative impacts and risks, then to minimise them, rehabilitate or remediate impacts to the extent feasible, and compensate or offset remaining significant

			uncertainty. Both definitions respectively are also too narrow. The EIA Regulations' definition encompasses only rehabilitation and repair and does not expressly provide for remedy, or "making right." The proposed NEMA definition neglects the notions of anticipation and prevention.	negative impacts to rectify or remedy harm
Cl 1 (i) Section 1	'**rehabilitate**' means to restore to the approved end use of land	The new definitions of ''audit'', ''latent environmental impacts'', ''mitigate'', rehabilitate'', ''remediate'', ''residual environmental impacts'' are applicable to the revised section 24P	Rehabilitation should include water and air, and not be limited to land.	**'rehabilitate'** means *to restore to the approved sustainable end use of land, water and air*
Cl1(i)	'**remediate'** means to repair or reverse damage; and '**residual environmental impacts**' means impacts remaining after all actions to mitigate, rehabilitate and remediate have been undertaken	As above	We support the proposed definition of 'remediate'. However, if 'remediate' suggests achieving the pre-mining environmental state of the area concerned, then for remediation to have been achieved, no residual environmental impacts should remain in an area. The proposed definition of "*residual environmental impacts*" suggests that there will be residual environmental impacts after remediation has been undertaken. These definitions thus contradict one another. We accordingly propose an alternative definition of 'residual environmental impacts'.	'**residual environmental impacts'** means impacts remaining after all efforts to avoid, minimise and rehabilitate have been exhausted
No clause			Given its use in NEMA, we suggest that 'remedy' is defined.	'**remedy'** means make right
No clause			As biodiversity offsets are being used in practice, it is important that their nature, scope and place in the mitigation hierarchy is regulated. We therefore propose they are defined in NEMA.	**'offset'** means those outcomes that counterbalance the residual environmental impacts of an activity, after every effort has been exhausted to anticipate and avoid, minimise and then rehabilitate those

				impacts, and which are achieved through protecting and appropriately managing additional, ecologically equivalent areas elsewhere.
Cl 3(e) Sec 24 (5A)	The Minister must keep a register of all environmental management instruments adopted in terms of this Act and make it publicly available.	The clause also requires the Minister responsible for environmental affairs to keep a national register of all environmental management instruments adopted in terms of the NEMA.	We support the insertion of this new subsection (5A).	
Cl 4(d) Sec 24C (11), (12) and (13)	"(11) A person who requires an environmental authorisation which also involves an activity that requires a licence or permit in terms of any of the specific environmental management Acts must simultaneously submit those applications to the relevant competent authority or licensing authority, as the case may be indicating in each application, all other licences, authorisations and permits applied for. (12) A person who wishes to apply for an environmental authorisation for listed or specified activities for, or directly related to, prospecting or exploration of a mineral or petroleum resource or primary processing of a mineral or petroleum resource which also	The clause also inserts new subsections to provide for the simultaneous submission of environmental authorisation application and any other related licence or permit required under any of the specific environmental management Act. Where the competent authority or licensing authority is the same authority for the NEMA and specific environmental management Act (SEMA) applications, an integrated decision must be issued. This can still take the form of multiple decisions, but it will force the process of reaching that decision to be consolidated and used to its full extent, namely using one process for information gathering to inform all decisions related to that proposed development.	We support this insertion of subsections (11), (12) and (13) as they will serve to align application processes in NEMA, the NWA and other SEMAs.	

	involves an activity that requires a licence or permit in terms of any of the specific environmental management Acts, must simultaneously apply for an environmental authorisation after the acceptance of the application for a right or permit in terms of the Mineral and Petroleum Resources Development Act, 2002. (13) If the competent authority or licensing authority contemplated in subsections (11) and (12), as the case may be, is the same authority to consider and decide the application for an environmental authorisation under this Act and the application under a specific environmental management Act, an integrated decision must be issued in accordance with section 24L.			
Cl 5 Sec 24G	Section 24G of the National Environmental Management Act, 1998, is hereby amended— *(a)* by the substitution in subsection (1) for paragraph *(b)* of the following paragraphs: ''*(b)* has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20*(b)* of the National Environmental	Section 24G of the NEMA provides for consequences of unlawful commencement of listed or specified activities. However, there is currently no provision to enable a person who has taken ownership or control of property on which an unlawful structure or development has been built to have such structure or development legalised and also for a person who has commenced, undertaken or conducted a waste management	We argue that the section may continue to operate as a perverse incentive to commence without environmental authorisation as it is simpler and faster and may be less expensive to do so, and then obtain environmental authorisation after the fact. Section 24G was initially envisaged as a kind of amnesty provision following the commencement of NEMA, but has morphed into a section frequently abused and budgeted for by developers. We argue that the 16 year period to 'transition' to a state of compliance with NEMA's licensing requirements has been more than reasonable.	(**H**) undertake public participation as prescribed; and

	Management: Waste Act, 2008 (Act No. 59 of 2008)**[,]**; *(c)* is in control of, or successor in title to, land on which a person— (i) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1); (ii) has commenced with, undertaken or conducted a waste management activity in contravention of, section 20*(b)* of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008), the Minister, Minister responsible for mineral resources or MEC concerned, as the case may be**[,]**— *(aa)* **[may]** must direct the applicant to— **[(i)]**(A) immediately cease the activity pending a decision on the application submitted in terms of this subsection, except if there are reasonable grounds to believe the cessation will result in serious harm to the environment; **[(ii)]**(B) investigate, evaluate and assess the impact of the activity on the environment; **[(iii)]**(C) remedy any adverse effects of the activity on the environment;	activity without a waste management licence. This clause amends section 24G of the NEMA to allow a successor in title or person in control of the land to lodge a section 24G application for such structure or development. The clause further makes it mandatory for the Minister or MEC to direct an applicant to undertake certain actions, including undertaking public participation as prescribed under the environmental impact assessment regulations. The clause further increases the administrative fine to a maximum of R10 million.	However, if section 24G is retained, we support the increase of the administrative penalty from R5 million to R10 million and the inclusion of mandatory public participation. The numbering of the subsection which relates to public participation should be changed from (F) to (H). We refer, in addition, to the comments made on s22A of the National Environmental Management: Air Quality Act, 2004 (AQA) on 24 January 2020.	

	[(iv)](D) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation; **[(v)]**(E) contain or prevent the movement of pollution or degradation of the environment; **[(vi)]**(F) eliminate any source of pollution or degradation; **[(vii)]**(G) compile a report containing— **[*(aa)*]**(AA) a description of the need and desirability of the activity; **[*(bb)*]**(BB) an assessment of the nature, extent, duration and significance of the consequences for, or impacts on, the environment 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; **[*(cc)*]**(CC) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for, or impacts on, the environment of the activity; **[*(dd)*]**(DD) 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 the issues raised have been addressed, if applicable; and **[*(ee)*]**(EE) compile an environmental management programme; **[or]** and (F) undertake public participation as prescribed; and **[(viii)]***(bb)* may direct the applicant to provide such other information or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.''; and *(b)* by the substitution for subsection (4) of the following subsection: ''(4) A person contemplated in **[subsection]** subsections (1) and (1A) must pay an administrative fine, which may not exceed **[R5]** R10 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection (2)*(a)* or *(b)*.''.			

	(4) A person contemplated in subsections (1) and 1(A) must pay an administrative fine, which may not exceed R10 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection (2)(a) or (b).			
Cl 6 Sec 24N (2)	The environmental management programme must contain **[**–**]** <u>information that is prescribed.</u> **[*(a)* information on any proposed management, mitigation, protection or remedial measures that will be undertaken to address the environmental impacts that have been identified in a report contemplated in subsection (1A), including environmental impacts or objectives in respect of—** **(i) planning and design;** **(ii) pre-construction and construction activities;** **(iii) the operation or undertaking of the activity in question;** **(iv) the rehabilitation of the environment;** **(v) closure, if applicable;** ***(b)* details of—** **(i) the person who prepared the environmental**	Section 24N(2) of the NEMA lists the information that must be contained in the environmental management programme. This clause amends section 24N(2) to provide clarity that such information must be prescribed through regulations.	The amendment of section 24N is supported provided that Appendix 4 to the EIA regulations is amended to ensure that nothing is lost in the deletion and furthermore that that Appendix is amended as it is currently contingent on s24N(2).	

	management programme; and **(ii) the expertise of that person to prepare an environmental management programme;** ***(c)* a detailed description of the aspects of the activity that are covered by the environmental management programme;** ***(d)* information identifying the persons who will be responsible for the implementation of the measures contemplated in paragraph *(a)*;** ***(e)* information in respect of the mechanisms proposed for monitoring compliance with the environmental management programme and for reporting on the compliance;** ***(f)* as far as is reasonably practicable, measures to rehabilitate the environment affected by the undertaking of any listed activity or specified activity to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and** ***(g)* a description of the manner in which it intends to—** **(i) modify, remedy, control or stop any action, activity or process which causes**			

	pollution or environmental degradation; **(ii) remedy the cause of pollution or degradation and migration of pollutants; and** **(iii) comply with any prescribed environmental management standards or practices.]**".			
Cl 7 (a) Sec 24O (2)	(2) The Minister, the Minister responsible for mineral resources **[or],** an MEC or an environmental assessment practitioner must consult with every State department that administers a law relating to a matter affecting the environment when such Minister, the Minister responsible for mineral resources or an MEC considers an application for an environmental authorisation."	Clause 24O(2) of the NEMA requires the Minister responsible for environmental affairs, Minister responsible for mineral resources or an MEC to consult every State department that administers a law relating to a matter affecting the environment when processing an application for an environmental authorization. This clause seeks to amend section 24O(2) to also require an environmental assessment practitioner to consult such State department.	This amendment is of concern. Firstly, the explanatory Memo on the objects of the Bill suggests that the amendment seeks to enable an Environmental Assessment Practitioner (EAP) to consult with such State departments in addition to the decision-maker's duty to consult. The proposed amendment indicates that the decision maker '*or'* the EAP must consult those departments. This must be incorrect. We strongly oppose such proposed amendment – in either instance. In the former instance, it jeopardises impartiality and invites undue influence and in the latter instance it significantly dilutes the decision-maker's obligations, jeopardises impartiality and invites undue influence. In addition, we already see in practice that interested and affected parties' (IAPs) concerns and comments on proposed applications are frequently not dealt with adequately or at all by EAPs. What is placed before the decision–maker in these cases is not a proper reflection of the IAP's stance. Secondly, section 24O is titled, 'criteria to be taken into account by competent authorities when considering applications'. The proposed amendment (whether "or" or "and" was intended) is at odds with the object of the section.	(2) The Minister, the Minister responsible for mineral resources or, an MEC, must consult with every State department that administers a law relating to a matter affecting the environment when such Minister, the Minister responsible for mineral resources or an MEC considers an application for an environmental authorisation.
Cl 8 Sec 24P	24P (1) In this section, ''review'' means a formal assessment of the	Clause 8 seeks to amend section 24P to provide clarity that an	Given the new 24PA, "Financial provision for mining" it is not clear whether 24P remains applicable to	(4)…….and residual environmental impacts.

	financial provisioning with the intention of instituting change, if necessary. (2) The Minister, or an MEC in concurrence with the Minister, may prescribe the instances for which financial provision must be determined and provided for listed or specified activities. (3) Where prescribed, an applicant, must, before the competent authority issues an environmental authorisation, determine the financial provision which is required for undertaking progressive rehabilitation, decommissioning, closure and post closure activities including the pumping and treatment of extraneous and polluted water where relevant. (4) Where prescribed, the applicant, holder of an environmental authorisation, holder, holder of an old order right is required to provide financial provision for progressive rehabilitation, decommissioning, closure and post closure activities, including the pumping and treatment of extraneous and polluted water where relevant, to ensure the mitigation, remediation and rehabilitation of adverse environmental impacts, including latent environmental	applicant, a holder, holder of an old order right or a holder of an environmental authorisation relating to listed or specified activities for or directly related to mining activities must set aside financial provision for progressive rehabilitation, decommissioning, closure and post closure activities. The clause also set out the financial provisioning vehicles. The clause further provides for financial provision to only be utilised for progressive rehabilitation, decommissioning, closure, post closure.	mining. Although it refers to holders and holders of old order rights and to the Minister responsible for mineral resources, clarity is required. If 24P is not applicable to mining related financial provision, then the references throughout 24P to holders, holders of old order rights, the Minister responsible for mineral resources, etc must be deleted. If both 24P and 24PA are applicable to mining-related financial provision, then that should be stipulated in the interests of certainty. 24P(4) contains a typographical error in the last line which may affect certainty. We propose that following the word "and," the words "environmental" and "residual" are reversed as suggested. 24P(6): as the financial provisioning vehicles are prescribed in regulations, we propose that reference is made to such prescription. 24P(8)(a): this subsection should include reference to the Minister responsible for water affairs. 24P(8): we submit that the Act must make provision for interested and affected parties to initiate inquiries into the adequacy of an assessment or review. We submit that a mechanism should be introduced to enable this in the manner proposed. 24P(9) omits an initial reference to the Minister and a second reference to the Minister responsible for water affairs	(6) The financial provisioning vehicles which must be used when providing the financial provision are prescribed and include-…. (8)(c) Where the Minister, the Minister responsible for mineral resources, the Minister responsible for water affairs or the MEC is not satisfied with the determination of the financial provision, the Minister, the Minister responsible for mineral resources, the Minister responsible for water affairs or the MEC may appoint an independent party to conduct an assessment for the determination or review on their behalf. (8)(c) At the request of an interested and affected party, the Minister, the Minister responsible for mineral resources, the Minister responsible for Water Affairs or the MEC may appoint an independent assessor or reviewer to conduct an assessment

	impacts and environmental residual impacts. (5) A holder of an environmental authorisation, holder or holder of an old order right must annually undertake, as prescribed, the mitigation, remediation and rehabilitation measures. (6) The financial provisioning vehicles which must be used when providing the financial provision include— (a) cash deposited into an account administered by the Minister responsible for mineral resources; (b) insurance from an institution that is registered in terms of the applicable insurance sector legislation; (c) a financial guarantee from an institution that is registered in terms of the applicable financial sector legislation; (d) a trust fund established for the sole purposes of subsection (4); and (e) any other vehicle, including any condition applicable to such a vehicle, identified by the Minister by notice in the Gazette in concurrence with the Minister of Finance and the Minister responsible for mineral resources, and including, but not limited to— (i) a closure rehabilitation company, (ii) a parent company guarantee; and			or review and determine the financial provision. (d) Should the Minister, the Minister responsible for mineral resources, the Minister responsible for water affairs or the MEC decline/refuse/ignore a request contemplated in subsection (c) above, then that interested and affected party may appoint an independent assessor or reviewer to conduct the assessment or review and determine the financial provision. (e) Should the financial provision be found to be inadequate, the interested and affected party shall notify the Minister, the Minister responsible for mineral resources, the Minister responsible for water affairs or the MEC, who may accept the independent assessment or review. In that event, any cost in respect of such assessment or review shall be borne by the applicant, holder of an environmental

	(iii) an affiliate company guarantee. (7) The financial provisioning vehicles contemplated in subsection (6) may be used in combination as required. (8) (a) Where the Minister, Minister for mineral resources or the MEC is not satisfied with the determination or review of the financial provision, the Minister, the Minister responsible for mineral resources or the MEC may appoint an independent party to conduct an assessment of the determination or review on their behalf. (b) Any costs in respect of such assessment must be borne by the applicant, holder of the environmental authorisation, holder or holder of an old order right. (9) If any holder of an environmental authorisation, holder or holder of an old order right fails to undertake such mitigation, remediation and rehabilitation of such impact, as prescribed, the Minister responsible for mineral resources, the Minister responsible for water affairs or MEC may, upon written notice to such holder, use all or part of the financial provision contemplated in this section to			authorisation, holder, holder of an old order right. (9) If any holder of an environmental authorisation, holder or holder of an old order right fails to undertake such mitigation, remediation and rehabilitation of such impact, as prescribed, the Minister, the Minister responsible for mineral resources, the Minister responsible for water affairs or MEC may, upon written notice to such holder, use all or part of the financial provision contemplated in this section to undertake mitigation, remediation and rehabilitation as the Minister responsible for mineral resources, the Minister, the Minister responsible for water affairs or MEC deems appropriate.

	undertake mitigation, remediation and rehabilitation as the Minister responsible for mineral resources, the Minister or MEC deems appropriate. (10) The financial provision may only be used for the purposes of progressive rehabilitation, decommissioning, closure, post closure, as prescribed, to ensure mitigation, remediation and rehabilitation of adverse environmental impacts for which it was provided and shall not be used for any other purposes. (11) The Insolvency Act, 1936 (Act No. 24 of 1936), does not apply to any form of financial provision contemplated in subsection (2) and all amounts arising from that provision.''			
Cl 9 Sec 24PA	24PA. (1) A holder of an environmental authorisation for listed or specified activities for, or directly related to, prospecting or exploration of a mineral or petroleum resource or extraction and primary processing of a mineral or petroleum resource, a holder or holder of an old order right must— (a) maintain and retain a financial provision until a closure certificate is issued by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources	Clause 9 of the Bill inserts a new section 24PA providing for financial provision for mining. The clause require a holder of an environmental authorisation relating to listed or specified activities for or directly related to mining activities, a holder or holder of an old order right to maintain and retain financial provision for progressive rehabilitation, decommissioning, closure and post closure activities; to review their environmental liability and adjust their financial provision every three	We support the timeframes for review and independent audit. We also support the new provisions for publication of the review decision. We suggest that the review must also be published on the holder's website. We support the provision stipulating that the Minerals Minister may approve a drawdown in consultation with the Minister responsible for water affairs. We also support the empowerment of the Minister responsible for water affairs in subsection (5) given the significant impact of mining on water resources. We note that Section 24PA has not been afforded any protection against the Insolvency Act, whereas section 24P, under subsection (11) has been afforded	(6) "The Insolvency Act, 1936 (Act No. 24 of 1936), does not apply to any form of financial provision contemplated in subsection (1)(a) and all amounts arising from that provision.'' (2) The Minister responsible for mineral resources may, in consultation with the Minister, the Minister responsible for water affairs and the Minister

	Development Act, 2002; (b) every three years review the environmental liability as prescribed and adjust, where required, the financial provision accordingly to the satisfaction of the Minister responsible for mineral resources; (c) every three years subject the financial provision and the basis of the calculations to an independent audit, as prescribed; (d) every five years, or in the case of a mining permit every three years, submit to the Minister responsible for mineral resources, an audit report; (e) publish, within five days of being notified by the Minister responsible for mineral resources of the review decision, the decision in a provincial newspaper as well as a newspaper distributed within the municipal area within which the mining operation is located, and indicate where the review can be obtained; and (f) annually undertake the mitigation, remediation and rehabilitation measures, as prescribed. (2) The Minister responsible for mineral resources may, in consultation with the Minister and Minister responsible for water affairs, approve an annual	years; and to submit an audit report every five years to the Minister responsible for mineral resources. This clause also empowers the Minister responsible mineral resources in consultation with the Minister responsible for water affairs to approve an annual drawdown of the financial provision subject to certain requirements. The clause further empowers the Minister responsible for mineral resources to access the financial provision on issuing of closure certificate if the financial provisioning vehicle used is an insurance. The Minister responsible for mineral resources or Minister responsible for water affairs is also empowered to use the financial provision to rehabilitate or manage the environmental impacts, if a holder of an environmental authorisation relating to mining activities fails to mitigate, remediate and rehabilitate environmental impacts.	this protection. Given the rule of interpretation that the specific provision must be applied in favour of the general provision, if 24P is not applicable to mining, we propose an additional provision articulating that financial provision under this section is protected from the Insolvency Act. However, in order to ensure that the money is in fact properly ring-fenced, the Insolvency Act requires amendment. We also note that a definition of 'review' has been included under section 24P, but no definition has been provided under section 24PA. If 24P is not applicable to mining, we propose an addition of a definition of 'review' under this section for purposes of clarity. We suggest that section 24PA(2) is amended to require consultation with the Minister of Finance.	of Finance, approve an annual drawdown of the financial provision in the prescribed manner to support final decommissioning and closure for a period not exceeding 10 years before the final decommissioning and closure.

	drawdown of the financial provision in the prescribed manner to support final decommissioning and closure for a period not exceeding 10 years before the final decommissioning and closure. (3) The financial provision provided in respect of latent environmental impacts or residual environmental impacts, including the pumping and treatment of extraneous and polluted water, must be transferred to the Minister responsible for mineral resources upon the issuing of a closure certificate, unless otherwise prescribed. (4) Where the financial provisioning vehicle used for the financial provision in respect of latent environmental impacts or residual environmental impacts, including the pumping and treatment of extraneous and polluted water, is insurance, the Minister responsible for mineral resources must access the funds on issuing the closure certificate. (5) If any holder of an environmental authorisation contemplated in subsection (1) fails to mitigate, remediate and rehabilitate environmental impacts as prescribed, the Minister responsible for mineral			

	resources or the Minister responsible for water affairs may, upon written notice to such holder, use all or part of the financial provision contemplated in this section to rehabilitate or manage the environmental impact in question.'			
Cl 10 Sec 24R	(1) Every holder, holder of an environmental authorisation for listed or specified activities for, or directly related to, prospecting or exploration of a mineral or petroleum resource or extraction and primary processing of a mineral or petroleum resource, holder of an old order right and owner of works remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted and extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act, 2002, to the holder or owner concerned. (2) (deleted) (3) Every holder, holder of environmental authorisation for listed or specified activities for, or directly related to, prospecting or	Section 24R(2) of the NEMA allows the Minister responsible for mineral resources to retain such portion of the funds set aside for any latent and or residual environmental impact that may become known in the future. A similar provision is also contained in section 24P(5) of the NEMA. This clause repeals section 24R(2). This clause further ensures that a holder of an environmental authorisation related to mining activities remains responsible for environmental liability notwithstanding the issuing of a closure certificate, and that such a holder must plan, manage and implement such procedures and requirements in respect of the closure of the mine.	We highlight that the version of s.24P(5) referred to in the explanatory note no longer pertains to closure certificates and retention of financial provision. Retention of financial provision on the issue of a closure certificate is now dealt with in the proposed draft sections 24PA(1)(a) and (3). However, under these sections, there is no retention by the Minister responsible for mineral resources. It is the holder who must maintain and retain the financial provision until a closure certificate is issued and then such funds must be transferred to that Minister. We support retention of the position that environmental impacts of mining related activities may only become known many years after cessation of the operations and that the holder remains responsible notwithstanding the issuing of a closure certificate by the Minister of Mineral Resources. We underline that this principle is grounded in section 24 of the Constitution, is prescribed in section 28 of NEMA and aligns with Section 19 of the National Water Act, 1998.	

	exploration of a mineral or petroleum resource or extraction and primary processing of a mineral or petroleum resource, holder of an old order right or owner of works must plan, manage and implement such procedures and requirements in respect of the closure of a mine as may be prescribed.'			
Cl 11 Sec 24S	repealed	Clause 11 of the Bill repeals section 24S of the NEMA which provides that residue stockpiles and residue deposits must be managed in terms of the provisions of the NEMWA. In this regard, the residue stockpiles and deposits will be managed in terms of the provisions of the NEMA.	We note that this amendment (and the consequential amendments of NEMWA), while removing the management and depositing of residue stockpiles and residue deposits from NEMWA, does not provide for the management and depositing thereof in terms NEMA. In addition, the provisions dealing with the regulation of activities related to residue stockpiles and residue deposits are not worded consistently. Given the broad range of activities related to residue stockpiles and residue deposits, we recommend that the wording providing for the regulation of residue stockpiles and residue deposits in terms of NEMA be broader.	"The following section is hereby substituted for section 24S of the National Environmental Management Act, 1998: "***Residue stockpiles and residue deposits*** **"(1) Residue stockpiles and residue deposits must be planned, established**, deposited, managed**, reclaimed, mined, processed and controlled in the prescribed manner** on any site demarcated for that purpose in the **environmental authorisation, including** in the environmental management plan and/or environmental management programme**, for that**

				prospecting, mining, exploration or production operation. **(2) No person may temporarily or permanently deposit any residue stockpile or residue deposit on any site other than on a site contemplated in subsection (1)."**
No cl Environmental Impact Assessment Regulations: Listing Notice 2 of 2014 (Listing Notice 1) and Environmental Impact Assessment Regulations: Listing Notice 2			In terms of the Regulations regarding the Planning and Management of Residue Stockpiles and Residue Deposits, 2015 published under the GN R632 in GG 39020 of 24 July 2015 (Mining Residue Regulations) in terms of NEMWA, Regulation 3(1) prescribes that the identification and assessment of environmental impacts arising from the establishment of residue stockpiles and residue deposits must be done as part of the environmental impact assessment conducted in terms of NEMA (and consequently the EIA Regulations). It is unclear which environmental assessment this would relate to, given that the requirement for a waste management licence for residue stockpiles and residue deposits (and the accompanying environmental impact assessment) will no longer be required. It is also unclear which residue stockpile and residue deposit related activities require a basic assessment, and which would require a scoping and environmental impact reporting process set out in the EIA Regulations.	Listing Notice 1 be amended as follows: 1. By the insertion of the following definitions: 'residue deposits' means any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or old order right, including historic mines and dumps created before the implementation of the MPRDA.; 'residue stockpile' means any debris, discard, tailings, slimes,

of 2014 (Listing Notice 2)			We are also of the view that environmental authorisation for residue stockpiles and residue deposits are not sufficiently catered for in the listed activities conducted pursuant to the MPRDA. For purposes of clarity, we recommend that Listing Notices 1 and 2 be amended to specifically include activities related to residue stockpiles and residue deposits. In addition, given that historic mines and dumps created before the implementation of the MPRDA do not fall within the definition of residue stockpiles and residue deposits as currently defined in the MPRDA, and accordingly the environmental impact of reclaiming those historic mines and dumps are not regulated, we recommend including an extended definition of residue stockpiles and residue deposits in the Listing Notices. We note that the wording adopted in the List of Waste Management Activities That Have, or Are Likely to Have, a Detrimental Effect on the Environment published under Government Notice 718 in Government Gazette 32368 of 3 July 2009 in terms of section 19(2) of NEMWA (Waste Management Activities List), read with the current definition of residue stockpiles and residue deposits in NEMWA, deal with these issues sufficiently, and accordingly we recommend that this be adopted.	screening, slurry, waste rock, foundry sand, mineral processing plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated within the mining area for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or, production right or an old order right, including historic mines and dumps created before the implementation of the MPRDA. 2. By the insertion of the following listed or specific activity in Appendix 1: “ Any activity, including but limited to the establishment, reclamation, management, and/or control of a residue stockpile or residue deposit resulting from activities which require a

				prospecting right or mining permit" Listing Notice 2 be amended as follows: 1. By the insertion of the following definitions: 'residue deposits' means any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or old order right, including historic mines and dumps created before the implementation of the MPRDA.; 'residue stockpile' means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, mineral processing plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated within the

				mining area for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or, production right or an old order right, including historic mines and dumps created before the implementation of the MPRDA. 2. By the insertion of the following listed or specific activity in Appendix 1: "Any activity, including but limited to the establishment, reclamation, management and/or control reclamation of a residue stockpile or residue deposit resulting from activities which require a mining right, exploration right or production right"
Cl12 Sec 28(4), (4A), (5), (7), (8), (9), (11)	(4) The Director-General, the Director-General of the department responsible for mineral resources **[or]**, a provincial head of department or a municipal manager of a municipality may**[, after having**	Clause 12 of the Bill amends section 28 of the NEMA. The scope of person to whom section 28(4) of the NEMA directive can be issued currently does not include those persons listed in section 28(2) ("an owner of land or	We support the proposed amendments. We submit that section 28(4A)(a) should also provide that adequate opportunity is also given to affected persons to inform of their relevant interests.	(4A)(a) Before issuing a directive contemplated in subsection (4), the Director-General, the Director-General of the Department responsible for mineral resources, or

	given adequate opportunity to affected persons to inform him or her of their relevant interests,] direct any person **[who is causing, has caused or may cause significant pollution or degradation of the environment]** <u>referred to in subsection 2</u> to— (a) cease any activity, operation or undertaking; (b) investigate, evaluate and assess the impact of specific activities and report thereon; (c) commence taking specific measures before a given date; (d) diligently continue with those measures; and (e) complete those measures before a specified reasonable date[: **Provided that the Director-General or a provincial head of department may, if urgent action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable]** <u>(4A)(a)Before issuing a directive contemplated in subsection (4), the Director-General, the Director-General of the Department responsible for mineral resources, or a provincial	premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment"). These persons however, are required to comply with the duty of care. There may be circumstances where the environmental authority may have to issue a section 28(4) directive on these categories of persons. This clause ensures that those persons are included in the categories of persons that a section 28(4) directive may be issued by the environmental authorities. The clause also amends section 28 to empower a municipal manager of a municipality to also issue a section 28(4) directive. The clause further insert a new subsection (4A) to ensure that the person to be issued with a section 28(4) directive is consulted and provided with an opportunity to make any representation before a final section 28(4) directive is issued. In addition, section 28 places a duty of care on a wide range of responsible persons, including	In a similar vein, we submit that interested and affected parties should be taken into account in the context of sections 28(7), (8), (9), and (11), as set out in the adjacent column. Section 28(11) currently limits the powers of environmental authorities to recover the costs for remedial measures undertaken or to be undertaken by the State proportionally according to the degree to which each was responsible for the harm. Firstly, this is not in line with the duty of care provisions that place an independent and autonomous duty of each and every responsible person. In addition, it may be impossible to determine exactly the degree to which each was responsible for the harm; thereby impeding effective cost recovery by the State. Finally, it is not in line with the liability regime provided for in other legislation, such as section 19(5) of the National Water Act, 1998. This subsection (11) should be amended to provide for joint and several liability in respect of the responsible persons listed in section 28(8).	a provincial head of department or a municipal manager of a municipality must give advanced notice in writing to the person to whom the directive is intended to be issued <u>and other impacted or affected persons</u>, of his or her intention to issue the directive and provide such person(s) with a reasonable opportunity to make representations in writing. (7) Should a person fail to comply, or inadequately comply, with a directive issued under subsection (4), the Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality **<u>or an interested and affected party</u>** may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief

	head of department or a municipal manager of a municipality must give advanced notice in writing to the person to whom the directive is intended to be issued, of his or her intention to issue the directive and provide such person with a reasonable opportunity to make representations in writing. (b) Provided that the Director-General, the Director General of the Department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality may, if urgent action is necessary for the protection of the environment, issue the directive referred to in subsection (4), and give the person on whom the directive was issued an opportunity to make representations as soon as thereafter is reasonable (5) The Director-General, the Director-General of the department responsible for mineral resources **[or]**, a provincial head of department or a municipal manager of a municipality, when considering any measure or time period envisaged in subsection (4), must have regard to the following	every person who causes, has caused or may cause significant pollution or degradation; and an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises. It further empowers the Director-General, the Director-General of the department responsible for mineral resources or provincial head of department to issue a directive on each category of responsible persons, thus making them independently liable for the undertaking of reasonable measures.		(8) Subject to subsection (9), the Director-General, the Director-General of the department responsible for mineral resources, provincial head of department or a municipal manager of a municipality **or an interested and affected party** may recover costs for reasonable remedial measures undertaken or to be undertaken under subsection (7), before or after such measures are taken and all costs incurred as a result of acting under subsection (7), from any or all of the following persons— (9) The Director-General, the Director-General of the department responsible for mineral resources, provincial head of department or a municipal manager of a municipality **or an interested and affected party** may in respect of the recovery of costs under subsection (8) claim proportionally from

	(7) Should a person fail to comply, or inadequately comply, with a directive issued under subsection (4), the Director-General, the Director-General of the department responsible for mineral resources **[or],** a provincial head of department or a municipal manager of a municipality may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief (8) Subject to subsection (9), the Director-General, the Director-General of the department responsible for mineral resources **[or],** provincial head of department or a municipal manager of a municipality may recover costs for reasonable remedial measures undertaken or to be undertaken under subsection (7), before or after such measures are taken and all costs incurred as a result of acting under subsection (7), from any or all of the following persons— (9) The Director-General, the Director-General of the department responsible for mineral resources **[or],** provincial head of department or a			any other person who benefited from the measures undertaken under subsection (7) (11) **If more than one person is liable under subsection (8), such liability shall be joint and several, the one paying the other to be absolved.**

	municipal manager of a municipality may in respect of the recovery of costs under subsection (8) **[, claim proportionally from any person who benefited from the measures undertaken under subsection (7).]** claim proportionally from any other person who benefited from the measures undertaken under subsection (7) (11) If more than one person is liable under subsection (8), **[the liability must be apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment resulting from their respective failures to take the measures required under subsections (1) and (4)]** the Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality may, at the request of any person to whom a directive under subsection (4) has been issued, and after providing other persons referred to in subsection (8) with an opportunity to be heard, apportion the liability, but			

	the apportionment does not relieve any of them of their joint and several liability for the full amount of costs (12) Any person may, after giving the Director-General, the Director-General of the department responsible for mineral resources **[or],** provincial head of department or a municipal manager of a municipality 30 days' notice, apply to a competent court for an order directing the Director-General, the Director-General of the department responsible for mineral resources **[or],** any provincial head of department or a municipal manager of a municipality to take any of the steps listed in subsection (4) if the Director-General, the Director-General of the department responsible for mineral resources **[or],** provincial head of department or a municipal manager of a municipality fails to inform such person in writing that he or she has directed a person contemplated in subsection **[(8)]** (4) to take one of those steps, and the provisions of section 32(2) and (3) shall apply to such proceedings, with the necessary changes			

Cl 17 Sec 31D	Section 31D of the National Environmental Management Act, 1998, is hereby amended by the substitution in subsection (1) for paragraphs *(d)* and *(e)* of the following paragraphs, respectively: "*(d)* this Act and all specific environmental management Acts; **[or]** **[any combination of those Acts or provisions of those Acts.] (e)** any provincial Act that substantively deals with environmental management; or"; *(b)* by the addition in subsection (1) of the following paragraph: (f) any combination of the Acts contemplated in this subsection or combination of the provisions of the said Acts."; by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words: "An MEC may designate a person as an environmental management inspector for the enforcement of only those provisions of this Act **[or]**, any specific environmental management Act or any provincial Act that substantively deals with environmental management—"; and	**Clause 17** Section 31D of the NEMA requires environmental management inspectors as well as environmental mineral resource inspectors to perform their powers within their respective mandates. This clause amends section 31D to empower environmental management inspectors to monitor compliance and enforce any provincial environmental management legislation. The clause also insert a new subsection (3A) to provide clarity that environmental management inspectors and environmental mineral resource inspectors must exercise their respective powers in accordance with any applicable duty.	We support the proposed amendments to this section and the expressed intention of the amendment as appears in the explanatory memo. We propose small but important edits to subsections (3A), (4), (6), (7) and (9) as indicated adjacent, to achieve the purpose of the section.	(3A) An environmental management inspector and **an** environmental mineral and petroleum inspector must exercise any power bestowed on them in terms of this Act in accordance with any applicable duty provided for in this Act. (4) Despite the provisions in subsections (2A)**,** (3) **and (3A)**, the Minister may, after consultation with the Minister responsible for mineral resources, , if it is necessary to address significant harm to the environment caused by prospecting, exploration, mining or production activities, direct the environmental management inspectors to implement or support the implementation of these functions in terms of this Act or a specific environmental management act **or any provincial Act that substantively deals with environmental management**, in respect

	(d) by the insertion after subsection (3) of the following subsection: "(3A) An environmental management inspector and environmental mineral and petroleum inspector must exercise any power bestowed on them in terms of this Act in accordance with any applicable duty provided for in this Act.". (e) by the substitution for subsection (4) of the following subsection: "(4) Despite the provisions in subsections (2A) and (3), the Minister may, after consultation with the Minister responsible for mineral resources, if it is necessary to address significant harm to the environment caused by prospecting, exploration, mining or production activities, direct the environmental management inspectors to implement or support the implementation of these functions in terms of this Act or a specific environmental management Act in respect of which powers have been conferred on the Minister responsible for mineral resources.";			of which powers have been conferred on the Minister responsible for mineral resources. (6) In the event that the complainant is not satisfied with the response from the Minister responsible for mineral resources, **or in the event that the Minister responsible for mineral resources does not respond within a reasonable period of time,** the complainant may submit, in writing, such information to the Minister with substantiating documentation, including details of the engagement with the Minister responsible for mineral resources. (7) On receipt of such information referred to in subsection (6), the Minister must consult with the Minister responsible for mineral resources, on his or her response to the **complaint**.

	(f) by the substitution in subsection (8) for the words preceding paragraph (a) of the following words: "Subsequent to subsection (7), the Minister may, after consultation with the Minister responsible for mineral resources, within a reasonable period of time and where appropriate, direct the environmental management inspectors to-".			(9) The Minister must, within a reasonable period of time, inform the complainant of the steps taken in response to the complaint. If no steps are taken in response to the complaint, the Minister and the Minister responsible for mineral resources must provide reasons for this to the complainant.
Cl 18, Sec 31E	Section 31E of the NEMA is hereby amended- (a) by the substitution in subsection (1) for the paragraphs (a) and (b) of the following paragraphs respectively: (a) qualification criteria for environmental management inspectors and environmental mineral and petroleum inspectors; and (b) training that must be completed by environmental management inspectors and environmental mineral and petroleum inspectors."; and (b) by the addition of the following subsection: "(3) The Minister may prescribe a Code of Conduct	This clause amends section 31E to ensure that the environmental mineral and petroleum inspectors will receive the same standard of approved training as is received by the EMIs, before designation. The clause also add subsection (3) to empower the Minister responsible for environmental affairs to prescribe through regulations the Code of Conduct applicable to environmental management inspectors and environmental mineral and petroleum inspectors.	The proposed amendments are supported. The insertion of subsection (3) is supported. We submit that a code of conduct for all EMIs and environmental mineral and petroleum inspectors is necessary to raise the standards of compliance monitoring and enforcement of environmental licences and legislation, especially by EMPIs. We therefore submit that the proposed code of conduct is a legislative imperative that must be delivered within a specified timeframe. We also recommend that the code of conduct should include at least the following items: • Responsiveness: giving reasonably regular feedback on progress to complainants when such feedback is requested; • Transparency: reporting of all complaints, directives/compliance notices issued and the details of those directives/notices	(a) (3) The Minister **[may]** must within 1 year of the commencement of the National Environmental Management Laws Amendment Act, 2020 (Act No. ### of 2020) prescribe a Code of Conduct applicable to all designated environmental management inspectors and environmental mineral and petroleum inspectors**.**

	applicable to all designated environmental management inspectors and environmental mineral and petroleum inspectors"			
Cl 27 Sec 31O			We support the proposed amendment but submit that the powers of the SAPS should also be those of the EMPIs and not limited to those of the EMIs.	"(1) A member of the South African Police Service has, in respect of an offence in terms of this Act, a specific environmental management Act or a provincial Act that substantively deals with environmental management, all the powers of an environmental management inspector and/or an environmental mineral and petroleum inspector in terms of this part……"
Cl 33 Sec 42C and 42D	[Insertion of new sections 42C and 42 D of NEMA: the power of delegations for the Minister responsible for water affairs and the Municipal Manager]	Clause 33 of the Bill inserts new sections 42C and 42D to the NEMA. These new sections empower the Minister responsible for water affairs and municipal manager of a municipality to delegate his or her powers under the NEMA to an official in the Department responsible for water affairs or municipality, respectively.	The proposed insertion is supported.	
Cl 34 (a) Sec 43(1C)	''(1C) Any person may appeal against a decision made by the licensing authority contemplated		We note that the explanatory memorandum for clause 34 contains no reference to this proposed amendment's intention expressed in the Bill's	(1C) Any person may appeal against a decision made by the licensing

	in section 36(1) or 47A of the National Environmental Management: Air Quality Act, 1998 (Act No. 39 of 2004), in the case of municipalities, to the executive committee or executive mayor, or if the municipality does not have an executive committee or an executive mayor, such person may appeal to the municipal council.''		preamble which is "to provide for appeal against a decision made by a licensing authority in terms of the National Environmental Management: Air Quality Act". Following email correspondence and a telephone conversation with Ms Garlipp of the Department of Environment, Forestry and Fisheries (DEFF or "the Department"), we understand that an intention of this proposed amendment is indeed also to bring all appeals of decisions made by municipal licensing authorities in terms of AQA under NEMA's section 43. The current position, as per Regulation 3(3) of the National Appeal Regulations, 2014; is that "(a)n appeal against a decision by an official or municipal manager acting under delegated authority from a metropolitan, district or local municipality must be submitted, processed and considered in terms of section 62 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000)". This position has created a wealth of problems and limitations, particularly for interested and affected parties wishing to participate in appeals; including in relation to their standing and to the effectiveness of any remedy that can be provided on appeal. More details can be provided in this regard, should this be helpful. We understand from DEFF that it is for these reasons that such appeals will, in future, be decided in terms of NEMA, rather than the Local Government: Municipal Systems Act, 2000 ("the Systems Act"), and that a process is underway to ensure that the National Appeal Regulations, 2014, are also duly amended to make this clear. As a result, all of our comments in relation to this aspect of the proposed amendment to s 43 are made on the basis that this is	authority contemplated in section 36(1) **[or 47A]** of the National Environmental Management: Air Quality Act, 1998 (Act No. 39 of 2004), in the case of municipalities, to the executive committee or executive mayor, or if the municipality does not have an executive committee or an executive mayor, such person may appeal to the municipal council.

			what is intended. We have not made submissions in relation to the inter-play between the Systems Act and the new envisaged appeal procedure for these decisions (under NEMA) – on the understanding that the proposed amendment will result in the Systems Act no longer applying to appeals of AQA licensing authority decisions. We also assume that appropriate transitional provisions will be drafted to deal with such appeals as may be pending when these amendments come into force. It is not clear from (1C) whether "contemplated" refers to the "decision" or to the "licensing authority". If the former – i.e. referring to the appeal of a *decision contemplated* in s 36(1) or 47A of AQA: • S 36(1) decisions include all municipal licensing authority functions as set out in AQA;[1] such as, for example: deciding atmospheric emission licence (AEL) applications; renewals; transfers; variations; and review. • S 47A of AQA is an intended addition to make provision for a licensing authority to revoke or suspend AELs in certain circumstances. It is planned to fall within chapter 5 – dealing with the "licensing of listed activities" – and clearly already falls within the scope of decisions referred to in s 36(1) where a municipality is the licensing authority.	

[1] "*Metropolitan and district municipalities are charged with implementing the atmospheric emission licensing system referred to in section 22, and must for this purpose perform the functions of licensing authority as set out in this Chapter and other provisions of this Act, subject to subsections (2), (3) and (4)".*

			<u>If the latter</u> – i.e. referring to the appeal of a decision by the *licensing authority contemplated* in s 36(1) or s 47A of AQA: • the licensing authority contemplated in s 36(1) is clear: "metropolitan and district municipalities" (subject to (2)-(4)), and this does not change insofar as s 47A is concerned. In other words, s 47A does not "contemplate" a different situation regarding licensing authorities. For these reasons, and irrespective of whether "contemplated" is intended to refer to the decision or the licensing authority, there is no need to make reference to s 47A at all. This reference obscures the intended meaning and creates substantial confusion. Decisions in terms of s 47A would already be covered by the reference in s 43(1C) of NEMA to s36(1) of AQA. As a result, the reference to s 47A should be deleted. The provision then confirms the appeal procedure for all decisions made in terms of AQA by municipal licensing authorities. We note that subsection (1C) does not propose that the municipal manager be the appeal authority in circumstances where someone other than the municipal manager made the decision. In terms of the current procedure – in terms of which the Systems Act governs appeals of municipal licensing authority AQA decisions, s 62(4)(a) of the Systems Act provides that the municipal manager is the appeal authority in relation to decisions made by a staff member other than the municipal manager.	
No Cl Sec			Since the amendments contemplated are intended to bring appeals of decisions made by municipal licensing authorities in terms of AQA also under the	(4) An appeal under subsection (1), (1A), **<u>(1C)</u>** or (2) must be noted and

(43)(4)-(6)			ambit of NEMA's s 43, consequential amendments are required to include: a reference to the new provision (in s 43(4)); and to the municipal appeal authorities (in s 43(5) and (6)).	must be dealt with in the manner prescribed and upon payment of a prescribed fee. (5) The Minister**, [or]** an MEC, **or an executive committee, executive mayor, or municipal council,** as the case may be, may consider and decide an appeal or appoint an appeal panel to consider and advise the Minister**, [or]** MEC**, executive committee, executive mayor, or municipal council** on the appeal. (6) The Minister**, [or]** an MEC, **or an executive committee, executive mayor, or municipal council**, as the case may be, may, after considering such an appeal, confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision, including a decision that the prescribed fee paid by

				the appellant, or any part thereof, be refunded.
Cl 34 (b) Sec 43(7)	(7) An appeal under this section suspends an environmental authorisation, exemption **[,directive,]** or any other decision made in terms of this Act or any other specific environmental Act, or any provision or condition attached thereto, except for a directive or other administrative enforcement notice that is aimed at addressing significant harm to the environment, issued in terms of this Act or any other specific environmental management Act.	Clause 34 of the Bill amends section 43 of the NEMA, which allows any person to appeal against an environmental decision issued by national or provincial departments responsible for environmental affairs. Section 43 do not appear to allow for a person to lodge an appeal in a situation where the power to issue a section 28(4) directive was delegated by the Director General or head of department to an official within their respective departments. This clause amends section 43 to ensure that a person may also appeal a section 28(4) directive issued by a delegated official. The amendment further clarifies that the submission of an appeal will not automatically suspend a section 28(4) directive or other administrative enforcement.	The proposed amendment is supported. We agree that it is inappropriate for directives and compliance notices issued in terms of NEMA to be suspended pending the outcome of appeals against those directives or compliance notices. Directives and compliance notices must often be immediately effected for them to be effective, especially when the activities that are the subject of directives or compliance notices can cause significant and irreversible harm to the environment.	
Cl 34(b) Sec 43(8)	(8) A person who receives a directive in terms of section 28(4) may lodge an appeal against the decision made by the Director-General or any person acting under his or her delegated authority, the Director-General of the department responsible for mineral resources or any person acting under his or her delegated authority, **[or]** the provincial head of department or		The proposed amendment is supported, subject to the amendments we propose. We note that, insofar as appeals of directives issued by the municipal manager or his delegate are concerned, the proposed amendment to s 43(8) only contemplates appeals to the municipal council and not to the other municipal appeal authorities identified in (1C). We assume this was an oversight and that reference to the executive mayor or executive committee was not deliberately excluded in	(8) A person who receives a directive in terms of section 28(4) may lodge an appeal against the decision made by … the municipal manager of a municipality or any person acting under his or her delegated authority, to the … MEC**, executive committee,**

	any person acting under his or her delegated authority or the municipal manager of a municipality or any person acting under his or her delegated authority, to the Minister, the Minister responsible for mineral resources **[or]**, the MEC or the municipal council, as the case may be, within thirty days of receipt of the directive, or within such longer period as the Minister, the Minister responsible for mineral resources **[or]**, MEC or municipal council may determine.		the case of such appeals. As a result, reference to the executive mayor and committee should be included.	**executive mayor,** or the municipal council, as the case may be…
Cl 34(b) Sec 43(9)	(9)**[Notwithstanding]** Despite subsection (7) **[and]**, pending the finalisation of the appeal, the Minister, Minister responsible for mineral resources **[or]**, the MEC or municipal council, as the case may be, may, on application and on good cause shown, direct that **[any part or provision of the directive not be suspended, but only strictly in exceptional circumstances and where there is an imminent threat to human health or the environment.]**— *(a)* the environmental authorisation, exemption or any other decision made in terms of	None given	The proposed amendment is not supported. In fact, it is vigorously opposed and will likely be subject to legal challenge. Based on our experience and expertise, it would always be inappropriate, pending the outcome of an appeal, to uplift the suspension of a decision contemplated in proposed subsection (a). The National Water Act, 1998 (NWA), provides for the automatic suspension of a water use licence (WUL), pending an appeal of the WUL. It also provides, in s 148(2)(b) for the relevant Minister to "direct otherwise" – in other words to uplift the suspension of the WUL pending an appeal. In our experience, the relevant Minister always exercises his or her discretion to uplift the suspension, irrespective of the potential impact on the water resource and other circumstances favouring the suspension. Our experience was confirmed by the Minister in Parliament:	

	this Act or any other specific environmental management Act, or any provision or condition attached thereto may wholly or in part, not be suspended; or *(b)* the directive or any administrative enforcement notice that is aimed at addressing significant harm to the environment, issued in terms of this Act or any other specific environmental management Act or part thereof, be suspended.''		On 14 August 2017, a Member of Parliament asked the Minister of Water and Sanitation (Minister) what factors she or the person delegated in this regard consider when taking a decision in terms of section 148(2)(b) of the NWA to uplift the suspension of a WUL pending the outcome of an appeal to the Water Tribunal. The Minister's answer, given on 28 September 2017, was as follows: *The Minister of the Department of Water and Sanitation lifts a suspension of a license pending the outcome of the appeal made to the Water Tribunal when a petition is made indicating any of the following:* *(a) that the granting of all authorisations or a water use licence followed all relevant due processes;* *(b) that the suspension is highly prejudicial and detrimental to a lawfully obtained authorisations;* *(c) that the suspension will derail the entire project timelines and create uncertainties;* *(d) that the suspension will put hundreds of millions of investments at risks as well as forego much needed jobs and community development projects;* *(e) that the issues raised by the Appellants in the appeal should be decided upon by the Water Tribunal, and the Appellants will not be prejudiced by the lifting of the suspension; and* *(f) if the reasons provided by the person who is affected by the suspension are persuasive.*[2]	

[2] https://pmg.org.za/committee-question/6771/

			It is clear from the Minister's answer that the possibility of irreparable environmental harm from the licenced activity pending the outcome of an appeal is never considered, despite the fact that the statutory discretion of the Minister to uplift the suspension of a water use licence must be understood and exercised in the context of the objects of the NWA and the national environmental management principles in NEMA. As a result of this calamitous situation, our client, groundWork, has instituted litigation in the High Court (under case number 74377/19) in terms of which it seeks, *inter alia*: the review of a decision to uplift the automatic suspension of a WUL; an order that the relevant Minister, in reconsidering the upliftment application, consider all relevant circumstances (including, *inter alia*, the s 2 NEMA Principles, s24 of the Constitution and ss2-3 of the NWA; whether exceptional circumstances exist to justify the upliftment; the harm that may be caused to the broader environment; the negative socio-economic impacts that may arise; and climate change impacts); and a declaratory order regarding the general exercise of this discretion. Uplifting a suspension of an environmental authorisation under appeal is effectively dismissing the appeal without considering the merits of that appeal, as it is unlikely that an appeal authority would ever uphold an appeal if the activity or activities authorised in the impugned decision has or have already commenced. Any prejudice an applicant may suffer as a result of a suspension of a decision contemplated in subsection	

			(7) is offset by the short appeal timeframes provided for in the Appeal Regulations.	
Cl 35 (a), (b) and (c) Sec 49A (1)(bA), (m), (n), (o), (p), (q) and (r)	(1)(bA) fails to comply with any provision identified as an offence in such applicable norm or standard, in which case paragraph (b) does not apply (1)(m) hinders or interferes with an EMI or EMPI in the execution of that inspector's official duties; (n) pretends to be an EMI or EMPI, or the interpreter or assistant of such an inspector; (o) furnishes false or misleading information when complying with an instruction of an EMI or an EMPI; (p) fails to comply with an instruction from an EMI or an EMPI. (q) fails to comply with section 24P(3), (4), (5), (6), or (10); (r) fails to comply with section 24PA(1) or (3).	This clause provides that where a norm and standard specifically provides for a provision to be an offence, then those specific provisions will be considered to be offences, rather than the generic clause currently provided in section 49A(1)(b) ……	The proposed insertions and amendments are supported.	
Cl 36 Sec 49B	(1) A person convicted of an offence in terms of section 49A(1)(a), (b), (bA), (c), (d), (e), (f), (g), (q), or (r) is liable to a fine not exceeding R10 million or imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment (3)a person convicted of an offence in terms of section 49A(1)(h), (l), (m), (n), (o), or (p) is	Section 49B(3) of NEMA provides that a person convicted of an offence in terms of section 49A(1)(h), (l), (m), (n), (o) or (p) is liable to a fine or to imprisonment for a period not exceeding one year, or to both a fine and such imprisonment. The fact that the monetary penalty is not specified makes the provision subject to the Adjustment of Fines Act, which in effect provides for a ratio of 1 year	The proposed amendments are supported.	

	liable to a fine not exceeding R1 million or imprisonment for a period not exceeding one year, or to both a fine and such imprisonment	of imprisonment to R20 000. Some of the offences could be serious, for example, failing to comply with a condition of an exemption, hindering or interfering with an EMI in the execution of their duties etc. It is therefore proposed that the maximum monetary penalty for these offences be specified as R1 million, as is the standard ratio in NEMA and SEMAs. The clause also provides for penalties relating to the non-compliance with sections 24P(3), (4), (5), (6) or (10) and 24PA(1) and (3) (sic).		
No Cl			Proposed insertion of a provision in NEMA authorising a competent authority to suspend or withdraw an environmental authorisation in the event of non-compliance with or contravention of a condition or conditions of an environmental authorisation. The EIA Regulations and NEMA do not contain any provisions authorising a competent authority to suspend or withdraw environmental authorisations in the event that a holder fails to comply with or contravenes the conditions of an environmental authorisation or if changed circumstances warrant such suspension or withdrawal. Provisions authorising a competent authority to suspend[3] and/or withdraw[4] environmental authorisations in the event of non-compliance with or contraventions of conditions of environmental authorisations or when circumstances	**The suspension or withdrawal of environmental authorisations** The Minister, Minister responsible for mineral resources, or an MEC, or Municipal Manager, may suspend or withdraw an environmental authorisation if: (a) the holder of that environmental authorisation is in contravention of –

[3] Regulations 47-49 of the 2010 EIA Regulations
[4] Regulations 47-50 of the 2006 EIA Regulations

			lead to potential significant detrimental effects on the environment or on human rights that appeared in previous versions of the EIA Regulations do not appear in the EIA Regulations. The motivation to omit those provisions from the EIA Regulations is not clear to us, especially because there are no equivalent provisions in NEMA[5] and given the indispensable value of such a compliance monitoring and enforcement tool in environmental management. The power to suspend and/or withdraw an environmental authorisation is an extremely effective environmental compliance monitoring and enforcement tool. The mere possibility that non-compliance with or contravention of the conditions of an environmental authorisation may lead to the suspension or withdrawal of environmental authorisation may well improve compliance with environmental authorisations, as the suspension or withdrawal of an environmental authorisation may result in a holder suffering significant financial losses. The deterrent effect of a provision authorising a competent authority to suspend or withdraw an environmental authorisation in the event of non-compliance with the conditions of that environmental authorisation is particularly significant where the authorised activities involve ongoing operations, such as mines. It is also an appropriate remedy for non-compliance with conditions that must be met prior to the commencement of activities authorised in an	(i) condition or conditions of the environmental authorisation; (ii) a term or terms of the environmental management programme; or (iii) any provision of this Act, regulations made in terms of section 24(5) or a specific environmental management Act; or (b) changed circumstances and/or further impact assessment warrant the suspension or withdrawal of the environmental authorisation.

[5] Regulation 38 of the EIA Regulations makes provision for the suspension of environmental authorisation, but only when "… the competent authority has reason to believe that the authorisation was obtained through fraud, nondisclosure…"
of material information or misrepresentation of a material fact."

			environmental authorisation, such as securing biodiversity offset projects.[6] We therefore strongly recommend that the provisions authorising a competent authority to suspend or withdraw an environmental authorisation in the event of non-compliance with or contravention of the conditions of environmental authorisations be reinstated, and that provision be made to suspend or withdraw such authorisation when changed circumstances – such as a further impact assessment – warrant such suspension or withdrawal. We suggest that a section providing for that power is inserted after section 24S of NEMA (and if section 24S is deleted, after section 24R of NEMA), in the terms proposed in the column to the right. We are of the opinion that the provision does not have to set out the process to be followed in detail. However, it is recommended that the implementation of our proposed section is guided by the principles of fair administrative action.	

Proposed amendments to the National Environmental Management: Protected Areas Act, 2003				
Clause /Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**
Cl 38 S48(1)(b), (4), (5) and (6)	(1) Despite other legislation, no person may conduct commercial prospecting, mining, exploration production or activities related to prospecting, mining, exploration or production—''	Section 48(1)(b) allows commercial mining (inter alia) in a protected environment provided the Minister issues written permission. The clause further amends subsection (4) to provide for the criteria under which the written permission contemplated in	We support these amendments and insertions. We submit, however, that it should be made explicit that the prohibition in subsection (1) includes directional drilling, underground mining and related activities in protected areas	(1) Despite other legislation, no person may conduct commercial prospecting, mining, exploration or production or activities related to prospecting, mining, exploration or production, **which activities include directional drilling and**

[6] See page 42 of the Draft National Biodiversity Offset Policy published for comment in GG 40733 of 31 March 2017 under GN 276.

	(b) in a protected environment without the written permission of the Minister **[and the Cabinet member responsible for mineral and energy affairs]** (4) A person who wishes to apply for permission under subsection (1)(b) to conduct commercial prospecting, mining, exploration production or activities related to prospecting, mining, exploration or production, must immediately on receipt of an environmental authorisation in terms of the (NEMA), submit his or her application in the prescribed form to the Minister, together with- (a) any information, reports, studies conducted, or consultation done for the environmental impact assessments process in respect of the activities under consideration in terms of Chapter 5 of the (NEMA); and (b) any appeal lodged in respect of the environmental authorisation. (5) The Minister, when exercising his or her power in terms of subsection (1)(b)- (a) must take into account-	section 48(1)(b) may be issued by the Minister. The Minister may require any further information that he or she may deem necessary before making a decision.	named in subsections (a)-(c). Given that underground drilling and mining can have significant environmental impacts on ecosystems, including surface ecosystems, NEMPAA must be explicit that underground drilling or mining in protected areas is prohibited to ensure the ecological integrity of those areas. We submit that the section should specify that Ministerial consent under the section may only be given in exceptional circumstances: Given that many of South Africa's biodiversity hotspots, important ecological infrastructure and strategic water source areas occur on private land, the declaration of a protected environment in respect of those areas is often the only available option to secure the ecological protection of those areas. It is therefore crucial that exceptional circumstances be present before permission is given. Such exceptional circumstances might be where there is evidence that there are insufficient amounts of the mineral or petroleum resource for which permission is sought outside of the relevant protected environment to enable the Republic to achieve its national strategic goals.	**underground mining and related** activities - (a) in a special nature reserve, national park or nature reserve; (b) in a protected environment without the written permission of the Minister; or (c) in a protected area referred to in section 9(b), (c)**, [or]** (d) **or (e)**. **…** (5) The Minister, when exercising his or her power in terms of subsection (1)(b)— (a) must take into account— (i) the principles contained in section 2 of the National Environmental Management Act; (ii) any information, reports, studies conducted or consultation done for the environmental impact assessments process in respect of the activities under consideration in terms of chapter 5 of the National Environmental Management Act; (iii) any appeal contemplated in subsection (4)(b); (iv) the ecological integrity of the protected environment **and the purpose/s for which it was declared**; **(v) whether the protected environment is a Critical Biodiversity Area;**

	(i) the principles contained in section 2 of the (NEMA); (ii) any information, reports studies conducted or consultation done for the environmental impact assessments process in respect of the activities under consideration in terms of Chapter 5 of the (NEMA); (iii) any appeal contemplated in subsection (4)(b); (iv) the ecological integrity of the protected environment; (b) may, amongst others, take into account- (i) the potential impact on ecological functioning and ecosystems services provided by the protected environment to society (ii) whether the protected environment is a biodiversity priority area for species; and (iii) whether the protected environment is a strategic water source area; (6) Despite subsection (4), the Minister may require the person who applies for the permission under subsection (1)(b), to provide any further information as he or she may deem necessary before making a decision.		We also submit that prohibition against prospecting, mining, exploration or production must be extended to mountain catchment areas: In terms of section 48(1), prospecting, mining, exploration and production is prohibited in protected areas, including world heritage sites, marine protected areas, specially protected forest areas and the like. However, there is no similar protection for mountain catchment areas, as contemplated in the Mountain Catchment Areas Act, 1970. We submit that there is no reason why mountain catchment areas should not enjoy the same level of protection as other protected areas from the impacts of extractive activities. We therefore submit that subsection (1)(c) should be amended by including explicit reference to mountain catchment areas (s.9(e)). We submit that it seems arbitrary, in proposed section 48(5)(a) to specify certain but not all purposes for which protected areas are declared under section 17. We submit that the purposes articulated in section 17 must be considered by the Minister under s. 48(5)(a) and that s. 48(5)(b) be amended accordingly.	**(vi) whether exceptional circumstances exist for permission to be given, such as need and desirability of the resource for which permission is sought , and whether that mineral resource for which permission is sought is available outside the protected environment;** **(vii) the potential negative impact of the activity for which permission is sought on the area, in particular its ecological integrity and functioning and ecosystem services provision;** **(viii) whether the protected environment contains strategic water resources and** **(ix) any other relevant consideration.**

No Cl S48B			We propose the insertion of a section regulating the use of land in the buffer zones of protected areas. The buffer zones around protected areas are not adequately protected. We have seen high impact development applications (particularly prospecting, mining, exploration and production) in buffer zones of important protected areas being accepted and granted. For example, an environmental authorisation was granted for mining-related activities in the buffer zone of the Mapungubwe National Park in Limpopo Province. We therefore submit that it is necessary to confer better protection upon those areas in order to ensure meaningful protection of protected areas. We appreciate that the DEA has already published the Biodiversity Policy and Strategy for South Africa: Strategy on Buffer Zones for National Parks (2012) (Buffer Zones Policy), which is an important step in ensuring better protection for national parks. However, the Buffer Zones Policy does not appear to be binding and it only applies to national parks. We therefore submit that a Buffer Zone Policy developed for all national	The insertion of a section comprehensively dealing with the management of buffer zones around national parks, world heritage sites, special nature reserves and nature reserves. The section should set out – (a) a definition of "buffer zone" (b) that a buffer zone policy must be developed for each national park, marine protected area, world heritage site, special nature reserve and nature reserve; (c) the minimum content for buffer zone policies; (d) that the buffer zone must be managed in accordance with buffer zone policies and that buffer zone policies are binding.

			parks, world heritage sites, special nature reserves and nature reserves in South Africa and that all Buffer Zone Policies are rendered binding.	

Proposed amendments to the National Environmental Management: Integrated Coastal Management Act, 2008				
Cl 56 Sec 60	(1)The Minister or MEC, may issue a written repair or removal notice to any person responsible for a structure on or within the coastal zone if that structure either prior to or after the commencement of this Act— (e) has had, is having or is likely to have, an adverse effect on the coastal environment by virtue of its existence, because of its condition or because it has been abandoned;	Section 60 of the NEMICMA has been amended to allow for the issuing of notices for the removal of structures that were erected prior to the commencement of the Act. This amendment clarifies the retrospective effect of section 60. Currently retrospectively is implied, and its application may leave some doubt. This is also in line with section 59 of the Act and section 28 of NEMA, which expressly enables retrospective application.	Clarification on the retrospective effect of a written repair or removal notice is a welcomed amendment.	The proposed amendment is supported.
Cl 57 Chapter 9 (sections 74 – 78)	Chapter 9 of the National Environmental Management: Integrated Coastal Management Act, 2008, is hereby repealed.	Chapter 9 of the NEMICMA deals with appeals under this Act. It is the only Specific Environmental Management Act (SEMA) under the umbrella NEMA that has its own appeal provisions, despite the NEMA appeal provisions, specifically apply to all SEMAs. To streamline and avoid duplication, the Appeal chapter in the NEMICMA is being repealed.	The proposed amendment is supported.	

Proposed amendments to the National Environmental Management Amendment Act, 2008				
Clause/ Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**
Cl 82 Sec 12	12. (1) Where, prior to 8 December 2014— (a) an environmental authorisation or a waste management licence was required for activities directly related to— (i) prospecting or exploration of a mineral or petroleum resource; or (ii) extraction and primary processing of a mineral or petroleum resource, and such environmental authorisation or waste management licence has been obtained; and (b) a right, permit or exemption was required in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) for— (i) prospecting or exploration of a mineral or petroleum resource; or (ii) extraction and primary processing of a mineral or petroleum resource, and such right, permit or exemption has been obtained, and activities authorised in such environmental authorisation, waste management licence, right, permit or exemption commenced after 8 December 2014, such environmental authorisation, waste management licence, right,	It appears that there is legal uncertainty whether an environmental management plan or environmental management programme approved and issued in terms of the Mineral and Petroleum Resources Development Act, prior to the implementation of the One Environmental System on 8 December 2014 is deemed an environmental authorisation under the National Environmental Management Act, 1998. The clause amends section 12 to provide legal clarity that an environmental management plan or programme applied for and approved in terms of the Mineral and Petroleum Resources Development Act, 2002, on or before 8 December 2014, is deemed to have been approved and issued in terms of National Environmental Management Act, 1998. The clause also provides clarity that environmental management plan or programme approved under the Mineral and Petroleum Resources Development Act, 2002 after 8 December 2014, if	We agree that uncertainty in section 12 must be eliminated. However, we point out that the proposed amendments to section 12 are ambiguously drafted and fail to eliminate the uncertainty. Even the explanatory memorandum is ambiguous. (For example, is it intentional in the memorandum to provide that MPRDA based EMPRs and EMPs approved prior to 8 December 2014 are deemed "approved and issued" under NEMA, whereas MPRDA-based EMPRs and EMPs approved after 8 December 2014 are deemed both "to have been approved and an environmental authorisation issued" under NEMA? That is, is it intended that the former are not deemed to be EAs under NEMA?) We stress that we continue to oppose any move to deem MPRDA-approved EMPRs and EMPs as environmental authorisations (EAs) under NEMA. (While we believe this is the	**12(2) An environmental management plan or environmental management programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) shall be deemed to have been approved in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998), provided that within 18 months of the coming into force of this Act, the holder of the environmental management plan or environmental management programme has submitted an application for an environmental authorisation in which such holder has upgraded its environmental management plan or environmental management programme to address any deficiencies in such environmental management plan or environmental management programme to meet the requirements in Chapter 5 of the**

	permit or exemption is regarded as fulfilling the requirements of the Act: Provided that where an application for an environmental authorisation or waste management licence was refused or not obtained in terms of the Act for activities directly related to prospecting, exploration or extraction of a mineral or petroleum resource, including primary processing, this subsection does not apply. (2) Despite subsection (1), the Minister responsible for mineral resources may direct the holder of a right, permit or any old order right, if he or she is of the opinion that the prospecting, mining, exploration and production operations are likely to result in unacceptable pollution, ecological degradation or damage to the environment, to take any action to upgrade the environmental management plan or environmental management programme to address the deficiencies in the plan or programme. (3) The Minister responsible for mineral resources must issue an environmental authorisation if he or she is satisfied that the deficiencies in the environmental management plan or environmental management programme referred to in subsection (2) have been addressed and that the requirements contained in Chapter 5 of	the application for the exploration, prospecting, or mining right, permits or licence was received before that date, is deemed to have been approved and an environmental authorisation issued under the National Environmental Management Act, 1998. This clause further provides clarity that an environmental appeal lodged in terms of a decision made under the Mineral and Petroleum Resources Development Act, must be finalised in terms of the Mineral and Petroleum Resources Development Act, regardless whether the decision was made before or after 8 December 2014.	intention in the proposed amendments, we reiterate that this remains ambiguous.) Such deeming will entrench old order EMPRs and EMPs that do not comply with the provisions of NEMA and inappropriately blur the distinction between environmental impact assessment and environmental management. Entrenching old order EMPRs and EMPs It is inappropriate to equate EMPs and EMPRs approved under the MPRDA and its Regulations with environmental impact assessments (EIA) conducted in terms of NEMA and the EIA Regulations. The EMPR regime created in terms of the MPRDA under the pre-One Environmental System (including the MPRDA Regulations) was in itself not adequate to ensure that the impact of mining on the environment is properly mitigated. The Integrated Environmental Management (IEM) system established in terms of Chapter 5 of NEMA was always a necessary supplement to this regime. The IEM system, for instance, requires applicants to consider not only the “environmental, social	**National Environmental Management Act, 1998.** **12(4) Where, prior to 8 December 2014 an environmental authorisation or a waste management licence was required for activities ancillary to (i) prospecting or exploration of a mineral or petroleum resource; or (ii) extraction and primary processing of a mineral or petroleum resource, and such environmental authorisation or waste management licence was not obtained and such activities were commenced or continued, the provisions of sections 24F and 24G of this Act apply.**

	the National Environmental Management Act, 1998, have been met.		and cultural" impacts of a specific mine, as required under MPRDA, but also the "biological, physical and geographical" impacts of mining. Moreover, EIAs conducted under the IEM system must contain information relating to the probability of the occurrences of impacts and whether or not they can be effectively mitigated, which was not explicitly required by the MPRDA. Moreover, the IEM system enjoins decision-makers to take into account provisions of specific environmental management Acts, guidelines, policies and environmental management instruments, such as biodiversity management plans, environmental management frameworks, etc. Under the MPRDA, the Department of Mineral Resources notoriously approved EMPRs and EMPs without taking these into account. The range of information that needs to be considered by the decision-maker under the IEM system is therefore much wider than under the MPRDA. NEMA also has more detailed provisions related to public participation processes and contains more	

			effective and clearer remedies for non-compliance with the provisions of NEMA. The proposed amendment therefore has the effect of lowering the standard of the ongoing environmental management of extractives operations approved before or on 8 December 2014. In addition, NEMA requires that EIAs are prepared by independent environmental assessment practitioners, whereas the MPRDA had no such requirement. Many approved EMPRs and EMPs were prepared in-house by the applicants for those rights. <u>Blurring the distinction between environmental impact assessment and environmental management</u> An EMPR is by nature a mitigation tool. It prescribes the manner in which the environmental impacts of and pollution caused by extractive activities must be mitigated. The environmental impact assessment that is conducted as part of an EMPR merely dictates the extent to which impacts have been properly identified and adequate mitigation measures have been	

			recommended. Its emphasis is on the management of the direct impacts of extractive activities on the environment. By contrast, EIAs are essentially assessment and planning tools. EIAs provide decision-makers with information necessary for making an assessment on, *inter alia*, the need and desirability of an extractive activity in a specific area; i.e. whether or not an extractive activity is appropriate in a specific environment. This enquiry requires the assessment of a wider range of environmental attributes and more specific information about the impacts of an extractive activity on a specific environment than EMPRs do. We therefore submit that the way forward should be that all EMPs and EMPRs issued under the MPRDA must be upgraded within 18 months of the coming into force of NEMLAB4 to ensure that they comply with the provisions of NEMA and have proposed a clause to this effect in the adjacent column. <u>Proposed s12(1)</u> This clause is particularly ambiguous:	

			• Why would the EA (or waste management licence (WML)) referred to in (1)(a) need to be "regarded as fulfilling the requirements of the Act" when presumably such EA (or WML) would not have been approved to begin with had it not fulfilled those requirements on application? • Why is the clause limited to licences under which activities commenced only after 8 December 2014? What of similar licences under which activities commenced prior to 8 December 2014? • Why does the clause purport to deal with applications for EAs (or WMLs) that were refused when presumably nothing came of these applications anyway? • Does (1)(b) contemplate and include MPRDA-approved EMPRs and EMPs and if so, why are these not specified? • If those EMPRs and EMPs are contemplated and included, is the phrase "regarded as fulfilling the requirements of the Act" intended to mean something other than "deemed to be EAs issued under the Act"?	

			<u>Proposed section 12(2)</u> This proposed section places an obligation on the Minister responsible for mineral resources that is indirect, vague and likely unenforceable. We submit that the onus must be on the holder of the EMPR or EMP to ensure that it is upgraded and brought in line with the provisions of Chapter 5 of NEMA – within a defined and reasonable transitional period. We propose 18 months from the coming into effect of NEMLAB 4. We have proposed a clause to this effect in the adjacent column. In our experience, there is a fairly widespread problem of mining companies operating with MPRDA-approved EMPRs but without EAs under NEMA, despite the triggering of listed activities, in the flawed/opportunistic belief that their EMPRs "cover the field". (The problem is captured in, but not by any means limited to, the *Le Sueur*[7] and *Maccsand*[8] cases. That it is an ongoing problem is evident from the case of *Global Environmental Trust and others v Tendele Coal*	

[7] Le Sueur v eThekwini Municipality [2014] PER 20; [2013] ZAKZPHC 6 (30 January 2013) [2014];

[8] Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012)

			Mining (Pty) Ltd and others[9], currently on appeal to the SCA.) We submit that the environmental rights in section 24 of the Constitution of South Africa will be jeopardised should section 12 inadvertently serve as an amnesty provision for those mining companies that are in violation of NEMA. We therefore propose the insertion of a section 12(4) requiring such companies to comply with section 24G of the Act.	

[9] The CER is amicus curiae in this case. Our submissions appear at paragraphs 46 to 94 of our application for leave to be admitted and can be accessed here: https://cer.org.za/wp-content/uploads/2019/03/CER-Amicus-application.pdf