National Environmental Management Laws Amendment Bill, 2017
Table of comments by the Centre for Environmental Rights

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(b) 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(c) Sec 1	**"financial provision"** means the insurance, bank guarantee, trust fund or cash that **[applicants for an environmental authorisation]** an applicant for environmental authorisation and a holder must provide in terms of this Act, guaranteeing the availability of	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	This definition limits the requirement of Financial Provision to *holders* under the MPRDA and *applicants* for EAs. It needs to include holders of EAs under NEMA and holders of EMPRs and EMPs under the MPRDA. In our comments on the Draft Bill, 2015 we submitted that, given the purpose of financial provision, "… it is a step backwards and inappropriate to limit financial provision to environmental authorisation for, or directly related to, mineral/ petroleum resources prospecting, exploration, extraction, primary processing, production… Financial provision must be required from applicants for and holders of environmental authorisations for listed activities that will bring about significant pollution or degradation of the environment and substantive impacts which have material cost implications." The proposed amendment is ambiguous on this score.	**"financial provision"** means the insurance, bank guarantee, trust fund or cash an applicant for environmental authorisation, a holder of an environmental authorisation, a holder of an EMPR or EMP **[and]** or a holder must provide in terms of this Act, guaranteeing the availability of sufficient funds to undertake the-

	sufficient funds to undertake the- (a) rehabilitation of the adverse environmental impacts of the listed or specified activities; (b) rehabilitation of the impacts of the prospecting, exploration, mining or production activities, including the pumping and treatment of polluted or extraneous water; (c) decommissioning and closure of the operations; (d) remediation of latent or residual environmental impacts which become known in the future; (e) removal of building structures and other objects; or	right or permit granted in terms of the Mineral and Petroleum Resources Development Act.	The Draft Bill, 2015 also proposed that the references in subsections (a) and (b) to "rehabilitation" be changed to "mitigation and remediation," which we commended in our comments. However, that proposal has been abandoned. We strongly suggest that the original proposal to include "mitigation and remediation" is revisited as the latter two terms are wider in scope than "rehabilitation" and would include relevant concepts such as biodiversity offsets, if implemented. We argue below that a definition of the term "remediation" be inserted in NEMA.	(a) <u>mitigation, remediation</u> and rehabilitation of the adverse environmental impacts of the listed or specified activities; (b) <u>mitigation, remediation and</u> rehabilitation of the impacts of the activity or activities [the prospecting, exploration, mining or production activities], including the pumping and treatment of polluted or extraneous water; (c) decommissioning and closure of the operations; (d) remediation of latent or residual environmental impacts which become known in the future; (e) removal of building structures and other objects; or (f) remediation of any other negative environmental impacts;

	(f) remediation of any other negative environmental impacts;			
No clause	The Draft Bill, 2015 proposed an insertion as follows: "**primary processing"** includes any process of the mining, recovering, extracting, concentrating, crushing, screening, stripping or washing of a mineral resource or petroleum resources."	None	The term "primary processing of a mineral or petroleum resource" is used in this Bill. With the insertion of this definition, we are concerned that the definition is too narrow and that there is a range of activities not covered that could, result in environmental impact. We therefore propose that the term "primary processing…" should be abandoned and that instead the current manner of reference is retained, namely: listed or specified activities for, or directly related to, a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit.	
Cl 3(e) Sec 24 (5A)	The Minister must keep a register of all environmental management instruments adopted in terms of this Act.	The clause also requires the Minister responsible for environmental affairs to keep a national register of all environmental management instruments adopted in	We support the insertion of this subsection (5A), and submit that it must specifically include that the register shall be publically available.	The Minister must keep a register of all environmental management instruments adopted in terms of this Act, which register shall be publically available.

		terms of the NEMA.		
Cl 4(e) 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. (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	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	We support the insertion of subsections (11), (12) and (13) as they will serve to align application processes in NEMA, the NWA and other SEMAs. We submit that the applicant must clearly state in all of its applications specifically which permits, rights, authorisations or licences it is applying for under which Acts. It is not always clear from applications and environmental impact assessment reports what other applications an applicant has submitted (or will submit) for the same development or a related activity. We submit that it is essential for the effective participation of interested and affected parties for them to be aware of all the processes being followed for a particular development or related activity. We therefore recommend the insertion of a phrase dealing with this at the end of the proposed subsection (11).	(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, or which will be applied for the intended development or related activity.

	or primary processing of a mineral or petroleum resource which also 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	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.		

	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 (1A), (4)	(1A) An application in terms of subsection (1) may also be submitted by a person in control of, or successor in title to, land which a person– (a) has commenced with a listed activity or specified activity without an environmental authorisation in	Section 24G of the NEMA provides for consequences of unlawful commencement of listed activities. However, there is currently no provision to enable a person who has taken ownership or control of property on	We reiterate comments made on previous draft amendments of section 24G which argue that the section operates as a perverse incentive to commence without environmental authorisation as it is simpler and faster and 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. In addition, but related to the above, we have commented previously that a maximum monetary penalty of R5 million, regardless particularly of the nature of the offender (corporate or individual) as well as the benefits accrued by the offender, is in many cases too low to constitute a proper disincentive for illegal activity. If section 24G is retained, and in its present form without reasonable public participation (as required by PAJA and the Constitution), we submit that	(4) A person contemplated in subsections (1) and 1(A) 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).

	contravention of section 24F(1); (b) has commenced with, undertaken or conducted a waste management activity without a waste management licence in contravention of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008). (4) A person contemplated in subsections (1) and 1(A) must pay an administrative fine, which may not exceed R5 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources	which an unlawful structure or development has been built to have such structure or development legalized and also for a person who has commenced, undertaken or conducted a waste management 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	section 24G is unconstitutional, unlawful and invalid. In addition, the amnesty that section 24G envisaged is no longer consistent with sections 1(c), 7 and 24 of the Constitution. Section 24G was initially inserted in 2004 and a 14 year period to 'transition' to a state of compliance with NEMA's licencing requirements has been more than reasonable. We reiterate our previous comments in these respects. However, if section 24G is retained, we support the substitution of subsection (1)(b)(vii) for item (ee) and the insertion of subsection (1A).	

	or MEC concerned may act in terms of subsection (2)(a) or (b).	further provides for textual amendment.		
No clause			The CER proposes the amendment of s24G and the *Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of section 24G* (GNR 698 of 20 July 2017). NEMA and GNR 698 do not adequately regulate the process to be followed in the submission of s24G applications. If s24G is retained, the CER recommends that s24G and GNR 698 be amended to expressly provide for the submission of a report as contemplated in s24G(1)(vii) of NEMA, and that public participation be included as a mandatory requirement in all s24G applications (as required by the Constitution and the Promotion of Administrative Justice Act (PAJA)). Furthermore, express provision needs to be made for the publication and dissemination of the s24G application form, and all assessments conducted as part of the application process, as effective public participation cannot occur without access to all relevant documentation. The CER has witnessed the abuse of the s24G process. Environmental Assessment Practitioners are refusing to provide access to section 24G application forms, and to impact assessments conducted as part of the s24G process, to interested and affected parties – claiming that s24G of NEMA and GNR 698 does not require that these documents be made available as part of the public participation process. This undermines effective public participation, PAJA and the NEMA principles. This approach also results in the continued abuse of s24G, as it is perceived as a quicker, and cheaper alternative to obtaining environmental authorisation before commencement of listed activities.	Amendment of s24G of NEMA and GNR 698 to provide expressly for the compilation of a report assessing the impacts of the unlawful activities in ALL s24G applications, and to provide expressly for public participation and public access to all relevant documentation in ALL s24G applications.

			We continue to advocate for a proper system of administrative penalties in South Africa's environmental law. (see, for example: https://cer.org.za/wp-content/uploads/2011/11/Fourie-M-SAJELP-Paper-June-2009-Final.pdf and https://open.uct.ac.za/bitstream/item/13240/thesis_law_2014_hugo_re.pdf?sequence=1).	
Cl 6 Sec 24N (2)	The environmental management programme must contain **[–]** information that is prescribed. **[*(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—**	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).	

	(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 management programme; and** **(ii) the expertise of that person to prepare an environment**			

	al 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 <u>or an environmental assessment practitioner</u> must consult with every State department that administers a law relating to a matter affecting the environment when such Minister, the Minister	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	This amendment is of concern. Firstly, the explanatory Memo on the objects of the Bill states that the amendment seeks to require 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 '*<u>or</u>*' the EAP may consult other departments. This must be incorrect. If, on the other hand, it is intended, we strongly oppose such proposed amendment. It significantly dilutes the decision-maker's obligations. In addition, we already see in practice that interested and affected parties' (IAP) 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.

	responsible for mineral resources or an MEC considers an application for an environmental authorisation."	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.		(2B) An EAP may consult with every State department that administers a law relating to a matter affecting the environment …
Cl 8(a) Sec 24P (1)	An applicant for an environmental authorisation for listed or specified activities for, or directly related to, prospecting or exploration of a mineral, or directly related to petroleum resource or extraction and primary processing of a mineral or petroleum resource must, before the	Clause 8 seeks to amend section 24P to provide clarify that an applicant and a holder of an environmental authorisation relating to mining activities must set aside financial provision for progressive rehabilitation,	Limiting the obligation to comply with financial provision requirements to prospecting and exploration only is not rational, and must be an error. Mining and production at minimum must also require compliance with these provisions. The reach of this provision should extend beyond mineral and petroleum extraction and related activities, to other activities that have the potential to cause environmental damage – coal burning for power generation is but one example. We support the deletion of 'negative' in the phrase '[negative] post closure environmental impacts', as remediation should be in regard to all impacts.	An applicant for an environmental authorisation for listed or specified activities for, or directly related to, a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit **[prospecting or exploration of a mineral, or directly**

	Minister responsible for mineral resources issues the environmental authorisation, comply with the prescribed financial provision for **[the]** progressive rehabilitation, mitigation, remediation, mine closure and **[ongoing post decommissioning]** the management of **[negative]** post closure environmental impacts	mitigation, remediation, mine closure and the management of post closure environmental impacts.		**related to petroleum resource or extraction and primary processing of a mineral or petroleum resource]** must, before the Minister responsible for mineral resources issues the environmental authorisation, comply with the prescribed financial provision for progressive rehabilitation, mitigation, remediation, mine closure and the management of all post closure environmental impacts
Cl 8(b) Sec 24P (1A)	A holder or an holder of an environmental authorisation for listed or specified activities for, or directly related to, prospecting or exploration of a mineral, or directly related to petroleum resource	The section has been amended to clarify that the provision also applies to a holder of a right issued or a permit granted in terms of the MPRDA.	Same comment as above (for clause 8(a)).	A holder or an holder of an environmental authorisation for listed or specified activities for, or directly related to, a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-

	or extraction and primary processing of a mineral or petroleum resource must annually comply with the prescribed financial provision for progressive rehabilitation, mitigation and remediation, mine closure and the management of post closure environmental impacts			operation permit **[prospecting or exploration of a mineral, or directly related to petroleum resource or extraction and primary processing of a mineral or petroleum resource]** must annually comply with the prescribed financial provision for progressive rehabilitation, mitigation and remediation, mine closure and the management of post closure environmental impacts
No Cl			We propose insertion of a provision authorising the Minister responsible for water to access financial provision in the event that the holder or holder of a right or permit fails to rehabilitate or to manage any impact on water resources, or is unable to undertake such rehabilitation or to manage such impact. The Minister responsible for mineral resources is currently the only competent authority who may access the financial provision made by a holder or holder of a right or permit in the event that that holder or holder of a right or permit fails to rehabilitate or to manage any impact on the environment, or is unable to undertake such rehabilitation or to manage such impact (subsection 2). However, financial provision must include	(2A) If any holder or any holder of an old order right fails to rehabilitate or to manage any impact on any water resource, as contemplated in the National Water Act, 1998 (Act No. 32 of 1998) or is unable to undertake such rehabilitation or to

			sufficient funds to undertake the rehabilitation of the impacts of the prospecting, exploration, mining or production activities, including the pumping and treatment of polluted or extraneous water Accordingly it is critical that the Minister responsible for water affairs, is authorised to access financial provision when a holder or the holder of a right or permit fails to rehabilitate or to manage any impact on water resources, or is unable to undertake such rehabilitation or to manage such impact. We therefore propose the insertion of a subsection (2A) after subsection (2).	manage such impact, the Minister responsible for water affairs may, upon written notice to such holder, use all or part of the financial provision contemplated in subsection (1) to rehabilitate or manage the impact in question.
Cl 8(c) Sec 24P (3)	Every holder or holder of an environmental authorisation for listed or specified activities for, or directly related to, prospecting or exploration of a mineral, or directly related to petroleum resource or extraction and primary processing of a mineral or petroleum resource, must **[annually]**— *(a)* annually assess his or her	Section 24P(3) has been amended to clarify that the environmental liability must be assessed annually, but that the audit report only needs to be submitted to the Minister responsible for environmental affairs every three years	The previous version of the Bill included applicants for an Environmental Authorisation in the scope of this subsection. It is suggested that the inclusion of applicants for an Environmental Authorisation is preferable as this is in line with the phrasing in subsection 24(P)(4) below. 24(P)(3)(a) indicates that environmental liability shall be assessed annually, whereas subsection (b) prescribes a three (3) year period for the submission of audit reports. We support the three year period for audit, and submit that the annual assessment should rather also be three-yearly, as (in line with our comments submitted on the Draft Bill, 2015) an annual period will in many cases be too frequent for a substantive and meaningful assessment of environmental liability.	Every applicant for or holder or holder of an environmental authorisation for listed or specified activities for, or directly related to, a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit **[prospecting or exploration of a mineral, or directly related to petroleum resource or extraction and primary**

	environmental liability in a prescribed manner and must **[increase]** adjust his or her financial provision accordingly to the satisfaction of the Minister responsible for mineral resources; and *(b)* every three years submit an audit report to the Minister responsible for mineral resources on the adequacy of the financial provision from an independent auditor			**processing of a mineral or petroleum resource**,] must **[annually]**— *(a)* every three years assess his or her environmental liability in a prescribed manner and must adjust his or her financial provision accordingly to the satisfaction of the Minister responsible for mineral resources; and *(b)* every three years submit an audit report to the Minister responsible for mineral resources on the adequacy of the financial provision from an independent auditor
Cl 8(d) Sec 24P (4)	*(a)* If the Minister responsible for mineral resources is not satisfied with the assessment or review and financial provision contemplated in this section, the		We support these amendments. We submit that the Act must make provision for interested and affected parties to initiate inquiries into the accuracy of an assessment or review. We submit that a mechanism should be introduced to enable this in the manner proposed.	(c)At the request of an interested and affected party, the Minister responsible for mineral resources may appoint an independent assessor or reviewer to conduct the assessment or review

	Minister responsible for mineral resources may appoint an independent assessor or reviewer to conduct the assessment or review and determine the financial provision. *(b)* Any cost in respect of such assessment or review must be borne by the applicant or the holder of the environmental authorisation in question			and determine the financial provision. (d) Should the Minister responsible for mineral resources 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 responsible for mineral resources, 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 or the holder of the environmental

				authorisation in question
Cl 8(e) Sec 24P (5)	*(a)* The requirement to maintain and retain the financial provision contemplated in this section remains in force **[notwithstanding the issuing of]** until a closure certificate is issued by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act, 2002, to the holder or holder of an environmental authorisation for listed or specified activities for, or directly related to, prospecting or exploration of a mineral, or directly related to	Section 24P(5) has been amended to stipulate that the requirement to maintain and retain the financial provision remains in force until a closure certificate is issued and that the portion of financial provision as may be required to rehabilitate latent, residual or any other environmental impacts of the closed mine must be ceded to the Minister responsible for mineral resources and that the Minister responsible for	There are a number of issues raised by this provision. We propose that a listed activity should be triggered for closure, where the Financial Provision is reassessed and any final holdover is recalculated. We are concerned that the responsibility for water resources is that of the Minister of Water and Sanitation. For this reason, the DMR has, historically, failed to require or collect Financial Provision for water treatment. To compound the problem, the DWS does not utilise section 30 of the NWA which empowers it to collect financial provision from applicants for WULs. The NEMA-based definition goes some way to address this as financial provision for pumping and treatment of water is specifically required. Is it correct that the FP should be ceded to the Minister of Mineral Resources only? How would the Minister of Water and Sanitation access that provision for water treatment? Would the FP ceded to the Minister be ring-fenced? Would it be capable of identification and tied to a particular mine?	

	petroleum resource or extraction and primary processing of a mineral or petroleum resource, or owner concerned. **[and the]** *(b)* The Minister responsible for mineral resources **[may]** must retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of latent, residual or any other environmental impacts, including the pumping of polluted or extraneous water in perpetuity **[, for a prescribed period]**. (c) The financial provisioning set aside in respect of	mineral resources must retain such portion in perpetuity. This amendment will also require an amendment to the current section 37A of the Income Tax Act and had been discussed with National Treasury and the Mineral and Petroleum Resources Amendment Bill, which is currently in Parliament, if that Bill is signed into law. These provision will not been brought into effect, until such time that the other Acts have been amended.		

	latent, residual or any other environmental impacts, including the pumping of polluted or extraneous water must be ceded to the Minister responsible for mineral resources upon the issuing of a closure certificate.			
Cl 8(f) Sec 24P (7)	(a) The Minister**[, or an MEC in concurrence with the Minister,]** may in writing make subsections (1) to (6) with the changes required by the context, applicable to any other application in terms of this Act		Subsection (7) appears to authorise the Minister of Environmental Affairs or an MEC to require financial provision for activities other than "listed or specified activities for, or directly related to, a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit. We support the retention of this subsection. However, we submit that subsection (7) requires more detailed provision. Moreover, we submit that the proposed deletion of the phrase "or MEC with the concurrence of the Minister" is ill-advised. MECs are the competent authorities for most listed activities, many of which have the potential to have significant and long-lasting impacts on the environment. We therefore recommend that the phrase "or MEC with the concurrence with the Minister" is retained.	(7) The Minister, or an MEC in concurrence with the Minister, may **[in writing make subsections (1) to (6) with the changes required by the context, applicable to any other application in terms of this Act]**, require that an applicant for an environmental authorisation, or a holder of an environmental authorisation, for a listed activity other than a listed activity

				referred to in subsection (1) complies with the prescribed financial provision for progressive rehabilitation, mitigation, remediation, closure and the management of post closure environmental impacts. (8) When exercising his or her discretion in terms of subsection (7), the Minister or MEC, as the case may be, must take into account the – (a) scale of the proposed activity or activities; (b) nature of the proposed activity or activities; (c) duration and severity of the impacts resulting from the activity or activities; and

				(d) impacts of the proposed activity or activities, including, but not limited to, residual impacts, impacts related to public health, water, the receiving environment, and type of technology used.
Cl 9 Sec 24R (2)	**[When the Minister responsible for mineral resources issues a closure certificate, he or she must return such portion of the financial provision contemplated in section 24P as the Minister may deem appropriate to the holder concerned, but may retain a portion of such financial provision referred to in subsection (1) for any latent, residual or any other**	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	The proposed deletion is supported.	

	environmental impact, including the pumping of polluted or extraneous water, for a prescribed period after issuing a closure certificate]	repeals section 24R(2).		
CL 11(a), (b), (c), (d) Sec 28(4), (4A), (5), (7), (8), (9), (11)	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 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,	Clause 6 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 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	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. 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.	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 direct any person who is causing, has caused or may cause significant pollution or degradation of the environment, and any other person to whom the duty of care applies, to— (a) cease any activity, operation or undertaking; (b) investigate, evaluate and assess the impact of specific

	and any other person to whom the duty of care applies, 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**	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		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 (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 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 and other impacted or affected persons, of his or her intention to issue the directive and provide

	environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable] (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 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	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)		such person(s) 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

	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	directive is issued. In addition, section 28 places a duty of care on a wide range of responsible persons, including 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		resources, 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 (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 *or an interested and affected party* may take reasonable measures to remedy the situation or apply to a competent court for appropriate relief

	(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 (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 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. However, 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		(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

	department <u>or a municipal manager of a municipality</u> 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]**<u>,</u> provincial head of department <u>or a municipal manager of a municipality</u> may recover costs for reasonable remedial measures <u>undertaken or</u> to be undertaken under subsection (7), before <u>or after</u> such measures are	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		of a municipality <u>*or an interested and affected party*</u> may in respect of the recovery of costs under subsection (8) claim— (a) jointly and severally from the persons specified in subsection (8); and (b) 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 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, at the request of any person to whom a directive under subsection (4) has been issued, and

	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 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— (a) jointly and severally from the	pieces of legislation, such as section 19(5) of the National Water Act, 1998. This clause further amends sections 28(9) and (11) to provide for joint and several liability in respect of the responsible persons listed in section 28(8).		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, 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, any provincial head of department or a municipal manager of

	persons specified in subsection (8); and (b) 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			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, 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 (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

	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 13 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	**Clause 13** Section 31D of the NEMA requires environmental management inspectors as well as environmental mineral resource inspectors to perform their powers within their respective	While we support the proposed amendments to this section and the expressed intention of the amendment as appears in the explanatory memo, we submit that the proposed amendments do not achieve the result and need to be supplemented as suggested in the adjacent column.	"(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

	management Acts; **[or]** **[any combination of those Acts or provisions of those Acts.]** any provincial Act that substantively deals with environmental management; or"; *(b)* by the addition in subsection (1) of the following paragraph: 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	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.		subsections (2A)**,** **[and]** (3) and (3A), the Minister may, with the concurrence of the Minister responsible for mineral resources, or in accordance with subsection 8A, if the environmental mineral resource inspectors are unable or not adequately able to fulfil or have not adequately fulfilled their **[the]** compliance monitoring and enforcement functions, designate environmental management inspectors to implement 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. (6) In the event that the complainant is not

	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 *(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			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 **[complainant]**. (8A) The Minister may, after consultation with the Minister

	any applicable duty provided for in this Act.".			responsible for mineral resources, direct the environmental management inspectors as contemplated in subsection (4) to undertake compliance monitoring and enforcement functions where the complainant has provided prima facie evidence of unlawful activities or of an existing or imminent adverse risk to the environment. (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 14(b) Sec 31E (3)	The Minister may prescribe a Code of Conduct applicable to all designated environmental management inspectors and environmental mineral and petroleum inspectors	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 insertion of subsection (3) is supported. We are of the opinion 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 legislation, especially by EMRIs. We therefore submit that the proposed code of conduct must be a legislative imperative that must be performed within a given timeframe. We also recommend that the code of conduct should include at least the following items: • Responsiveness: giving 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	The Minister **[may]** must within 1 year of the commencement of the National Environmental Management Laws Amendment Act, 2018 (Act No. ### of 2018) prescribe a Code of Conduct applicable to all designated environmental management inspectors and environmental mineral and petroleum inspectors**[.]**, which code of conduct must include at least the following items: (a) Responsiveness: giving feedback, within reasonable time, on progress on a particular investigation to complainants when such feedback is requested; and

				(b) <u>Transparency: reporting of all complaints, directives/compliance notices issued and the details of those directives/notices</u>
Cl 29 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 29 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. By authorising the Minister responsible for water affairs and municipal managers to delegate their powers under NEMA, the proposed insertions may well facilitate the designation of EMIs at the DWS and municipalities. In addition, the proposed insertions may well make the issuing of directives and compliance notices easier for EMIs designated by the Minister responsible for water affairs and municipal managers.	
Cl 30	An appeal under this section	Clause 30 of the Bill amends	The proposed amendment is supported.	

Sec 43(7)	suspends an environmental authorisation, exemption**[, directive,]** or any other decision made in terms of this Act or any other specific environmental management Act, or any provision or condition attached thereto<u>, except for a directive, or other administrative enforcement notice issued in terms of this Act or any other specific environmental management Act</u>	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.	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 30 Sec 43(9)	**[Notwithstanding]** <u>Despite</u> subsection (7) **[and]**<u>,</u> pending	This clause amends section 43 to ensure	We object to the proposed amendment in so far as it authorises the appeal authority to uplift a suspension of an environmental authorisation, exemption or any other decision made in terms of NEMA or any other	<u>Recommendation A</u>

	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 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 this Act or any other specific environmental management Act, or any provision or	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, unless there is good cause shown to the satisfaction of the Minister.	SEMA, or any provision or condition attached thereto (as contemplated in subsection (a)) pending the outcome of an appeal against the decision to grant environmental authorisation or amendment to an environmental authorisation. We submit that it would always be inappropriate to uplift the suspension of a decision contemplated in subsection (a) pending the outcome of an appeal against such a decision. By uplifting such a suspension, an appeal authority is effectively dismissing the appeal without considering the merits of that appeal as it is very unlikely that an appeal authority would ever uphold an appeal against a decision contemplated in subsection (a) 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 the suspension of a decision contemplated in subsection (a) is offset by the short appeal timeframes provided for in the Appeal Regulations. Moreover, there is no requirement for the applicant to advise the appellant and the relevant interested and affected parties that it has made an application to the appeal authority for the upliftment of the suspension a decision contemplated in subsection (a) and therefore no opportunity for the appellant and interested and affected parties to make representations to the appeal authority regarding the applicant's application for the upliftment of the suspension of a decision contemplated in subsection (a). The absence of such a provision flies in the face of the *audi alternam partem* principle of administrative law. We therefore submit that the proposed part (a) is not inserted in NEMA (Recommendation A in the adjacent column). If, despite our comment, part (a) is inserted in NEMA, we propose that an additional subsection is inserted after the proposed subsection (b) making provision for the appellant or interested or affected parties to make representations to the appeal authority regarding the applicant's request to uplift a decision	Despite subsection (7), pending the finalisation of the appeal, the Minister, Minister responsible for mineral resources, the MEC or municipal council, as the case may be, may, on application and on good cause shown, direct that - **[(*a)* the environmental authorisation, exemption or any other decision made in terms of this Act or any other specific environmental management Act, or any provision or condition attached thereto may either wholly or in part, not be suspended; or]** *(b)* the directive or other administrative enforcement notice issued in terms of this Act or any other specific environmental management Act or

	condition attached thereto may either wholly or in part, not be suspended; or *(b)* the directive or other administrative enforcement notice issued in terms of this Act or any other specific environmental management Act or part thereof, be suspended.".		contemplated in subsection (a) (Recommendation B in the adjacent column).	part thereof, be suspended. Recommendation B (9A) An application contemplated in subsection (9)(a) must be made in the prescribed form and must – (a) contain a statement giving reasons why an appeal should be uplifted; and (b) be issued, together with the statement contemplated in subsection (a), to the appellant and all interested and affected parties with a notice stating that the appellant or interested and affected parties may, within 20 days of receipt of the application, make representations to

				the appeal authority. (9B) The Minister, Minister responsible for mineral resources, the MEC or municipal council, as the case may be, may only after considering an application contemplated in subsection (9) and any representations contemplated in subsection (9A), make a decision on whether or not to uplift a suspension pending the outcome of an appeal.
Cl 31 Sec 47(2) and (2A)	**Amendment of section 47 of Act 107 of 1998, as amended by section 5 of Act 8 of 2004, section 11 of Act 62 of 2008 and section 22 of Act 30 of 2013** **31.** Section 47 of the National Environmental	**3.1.31 Clause 31** Section 47(2) and (2A) of the NEMA require the Minister responsible for environmental affairs or MEC to table all regulations developed in	We strenuously oppose the proposed amendment. Sections 47(2 and 47(2A) of NEMA must be retained. There is NO DUPLICATION of legal requirements • Sections 47(2) and 47(2A) of NEMA prescribe the tabling of regulations in Parliament BEFORE final publication. Section 17 of the Interpretation Act deals with information submitted to Parliament AFTER final publication in the Government Gazette.	Sections 47(2) and 47(2A) of NEMA must be retained.

	Management Act, 1998, is hereby amended by the deletion of subsections (2) and (2A).	terms of the Act in Parliament or relevant provincial legislature. In terms of section 17 of the Interpretation Act, 1957 also require the Minister to table all subordinate legislation to Parliament. Clause 31 repeals section 47(2) and (2A) of the NEMA to avoid duplication of legal requirements.		
Cl 32(a) Sec 49A (1)(bA)	(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	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	The proposed insertion is supported.	

		be offences, rather than the generic clause current provided in section 49A(1)(b)		
Cl 33(b) Sec 49B (3)	A person convicted of an offence in terms of section 49A(1)(h), (l), (m), (n), (o) or (p) is liable to a fine <u>not exceeding R1 million</u> or imprisonment for a period not exceeding one year, or to both a fine and such imprisonment	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		The proposed insertion is supported.

		provides for a ratio of 1 year 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.		
No Cl			There is no definition of the term "mitigate" in NEMA. We propose the insertion of a definition of "mitigate" in section 1 of NEMA. Seeing that the South African environmental management system is built on the mitigation hierarchy, and that "mitigate" is an integral step in the mitigation hierarchy, it is crucial that that terms is defined in NEMA.	**"Mitigate"** means to anticipate and prevent negative impacts and risks, then to minimise them, rehabilitate or repair impacts to the

			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 submit that the definition on “mitigate” in the EIA Regulations is too narrow as it encompasses only rehabilitation and repair and does not remedy, or “making right.” We therefore propose the insertion of a term with a much wider meaning.	extent feasible, and compensate or offset remaining significant negative impacts to rectify or remedy harm
No Cl			Proposed insertion of a definition for “remedy” There is no definition for the term “remedy “in NEMA. The term “remedy” is the final step in the mitigation hierarchy and therefore also needs to be defined. Seeing that competent authorities are implementing biodiversity offset projects, we propose a definition for “remedy” in section 1 of NEMA that is wide enough to include compensatory and offset methods of remediation.	**“Remedy”** means to remediate or rectify remaining significant impacts through compensation or offsets after measures to avoid or prevent impacts, then minimize impacts, and then rehabilitate or repair damage, have been exhausted
No Cl			Proposed insertion of a definition for “residual impact” There is no definition of the term “residual impact” in NEMA. We understand that the term may well be defined in the Financial Provisioning Regulations, 2015 in future, but we propose that the term is defined in NEMA so that it has the same meaning when applied under different regulations published in terms of NEMA.	**“Residual impact”** means the negative impact that remains after measures to avoid or prevent impacts, then minimize impacts, and then rehabilitate or repair damage, have been exhausted

No Cl			Proposed insertion of a provision in NEMA authorising a competent authority to suspend or withdraw environmental authorisations in the event of non-compliance with or contravention of a condition or conditions of environmental authorisations. 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[1] and/or withdraw[2] environmental authorisations in the event of non-compliance with or contraventions of conditions of environmental authorisations or when circumstances 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[3] and given the indispensable value of such a compliance monitoring and enforcement tool in an environmental management regime. The power to suspend and/or withdraw environmental authorisations is an extremely effective environmental compliance monitoring and enforcement tool. The mere possibility that non-compliance with or contravention of the conditions of environmental authorisations may lead to the suspension or withdrawal of environmental authorisation may well improve compliance with environmental authorisations, as the suspension or withdrawal of an	**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 – (i) condition or conditions of the environmental authorisation; (ii) a term or terms of the environmental management programme; or

[1] Regulations 47-49 of the 2010 EIA Regulations

[2] Regulations 47-50 of the 2006 EIA Regulations

[3] 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 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 environmental authorisation, such as securing biodiversity offset projects.[4] 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, 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.	(iii) <u>any provision of this Act, regulations made in terms of section 24(5) or a specific environmental management Act; or</u> (b) <u>changed circumstances and/or further impact assessment warrant the suspension or withdrawal of the environmental authorisation.</u>

Proposed amendments to the National Environmental Management: Protected Areas Act, 2003				
Clause /Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**

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

No Cl S48(1)(b)	None		It is not clear that the prohibition in subsection (1) includes the prohibition on directional drilling or underground mining beneath the protected areas named in subsections (a)-(c). Prohibition against prospecting, mining, exploration or production must be extended to mountain catchment areas. Given that underground drilling or mining can have big environmental impacts on ecosystems, including surface ecosystems, NEMPAA must clarify that underground drilling or mining beneath protected areas must be prohibited to ensure the ecological integrity of those areas.	**Recommendation A** (1) Despite other legislation, no person may conduct commercial prospecting**,** **[or]** mining, exploration**[,]** or production or **[related]** activities related to prospecting, mining, exploration or production - (a) in, or beneath, a special nature reserve, national park or nature reserve; (b) in, or beneath, a protected environment **[without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs]**; or (c) in, or beneath, a protected area referred to in section 9(b), (c)**,** **[or]** (d) or (e). **Recommendation B** (1) Despite other legislation, no person may conduct commercial prospecting**,** **[or]** mining, exploration**[,]** or production or **[related]** activities related to prospecting, mining, exploration or production -
			Under NEMPAA, anyone may conduct commercial prospecting, mining, exploration or production activities in protected environments if that person obtains the written consent of the Minister of Environmental Affairs and the Minister responsible for mineral resources. The section renders protected environments vulnerable to	

			significant environmental impacts of extractive activities. We therefore propose that subsection (b) is amended so that there is an outright prohibition against all extractive activities in protected environments. If that is not acceptable to the legislature, then we submit that the section should specify that Ministerial consent under the section may only be given in exceptional circumstances. The ideal in section 24 of the Constitution that environmental laws must promote conservation cannot be obtained if South Africa's protected areas are not afforded proper protection against activities that have major environmental impacts, such as prospecting, mining, exploration and production. Section 48(1)(b) makes it possible for any person to conduct commercial prospecting, mining, exploration or production in protected environments with the consent of the Minister of Environmental Affairs and the	(a) in, or beneath, a special nature reserve, national park or nature reserve; (b) in, or beneath, a protected environment without the written permission of the Minister and the **[Cabinet member]** Minister responsible for mineral**[s]** and **[energy affairs]** petroleum resources; or (c) in, or beneath, a protected area referred to in section 9(b), (c), **[or]** (d) or (e). **…** (5) The Minister and the Minister responsible for mineral and petroleum resources may only give written permission contemplated in subsection (1)(b) if the person requesting permission – (a) can show that there is an insufficient amount of the mineral or petroleum resource sought to be prospected or explored for, or mined or produced outside of the relevant protected environment for the Republic to meet its strategic national goals; (b) has followed the prescribed public participation process

			Minister of Mineral Resources. We submit that it is not in South Africa's best interests for protected environments to be destroyed or degraded by extractive activities. 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 protection of those areas. It is therefore crucial to ensure at least the same amount of protection to those areas as other types of protected areas. We therefore submit that subsection (1)(b) must be amended by deleting the phrase "without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs." If, despite our comment, it is decided that prospecting mining, exploration or production may still take place in protected environments with the written permission of the Minister of	prescribed in subsections (6) and (7). (6) The person requesting consent from the Minister and the Minister responsible for mineral resources in terms of subsection (1)(b) must give notice to all interested and affected parties by – (a) fixing a notice board at a place conspicuous to and accessible by the public at the boundary, on the fence or along the corridor of the relevant protected environment; (b) giving written notice, in any of the manners provided for in section 47D of the National Environmental Management Act, 1998 (No. 107 of 1998), to— (i) all owners of land constituting the relevant protected environment; (ii) all occupiers of land constituting the relevant protected environment; and (iii) the management authority of the relevant protected environment; (iv) the MEC, if the protected areas is a provincial protected environment;

			Environmental Affairs and the Minister of Mineral Resources, we submit that (a) the mining, prospecting, exploration or production may only be considered in a protected environment in exceptional circumstances; and (b) it should be an explicit requirement for the person requesting written permission in terms of section 48(1)(b) to conduct a public participation process. A decision by the Minster responsible for environmental affairs and the Minister responsible for mineral resources in terms of that section constitutes "administrative action" as envisaged by section 1 of PAJA. It is a decision taken by an organ of state[5] when exercising a public power in terms of legislation[6] which adversely affects the rights of any person[7] and has a direct,	(v) the relevant provincial authority responsible for conservation; (vi) the municipal councillor of the ward in which the protected environment is situated and any organisation of ratepayers that represent the community in the area; (vii) the municipality which has jurisdiction in the area; and (viii) any organ of state having jurisdiction in respect of any aspect of the management of the relevant protected environment; (c) placing an advertisement in— (i) one local newspaper; or (ii) any official *Gazette* that is published specifically for the purpose of providing public notice of the request; (d) placing an advertisement in at least one provincial newspaper or national

[5] In terms of section 1 of PAJA, "organ of state" bears the same meaning assigned to it in section 239 of the Constitution. Section 239 of the Constitution provides that an "organ of state" is, *inter alia*, "(a) any department of state or administration in the national, provincial or local sphere of government…" The Ministers responsible for environmental affairs and mineral resources both fall within the ambit of that definition.

[6] As the state is custodian over the environment in terms of NEMA and has the obligation of promoting conservation in terms of Constitution there can be no question about the public nature of a decision in terms of section 48(1)(b).

[7] A decision to permit mining, prospecting, exploration or production in a protected environment will result in an impact on the environment and will therefore adversely affects the rights of everyone who enjoys the right enshrined in section 24 of the Constitution. The decision to refuse to permit mining, prospecting, exploration or production in a protected environment may well adversely impact on the rights of a person holding a right in terms of the MPRDA in respect of protected environment.

			external legal effect.[8] Furthermore, such a decision does not fall within a class of decisions explicitly excluded from the scope of "administrative action" in items (aa) to (ii) of section 1 of PAJA. In terms of section 33(1) of the Constitution, everyone has the right to administrative action that is procedurally fair. Section 3 of PAJA, administrative action affecting the any person must be procedurally fair. Section 4 of PAJA provides that administrative action affecting the public must also be procedurally fair. We submit that there are no circumstances which would ever render it reasonable or justifiable to department from the requirements of fair procedure as contemplated in sections 3 and 4 of PAJA. We therefore submit that decisions taken in terms of section 48(1)(b) therefore may not be made without prior public participation. However, it is desirable for NEMPAA to make explicit provision for public participation in relation	newspaper, if the protected environment straddles provincial boundaries; (e) placing an advertisement in a national newspaper, if the protected environment is an area of strategic environmental, water or soil significance; and () using reasonable alternative methods, as agreed to by the Minister, in those instances where a person is desirous of but unable to participate in the process due to— (i) illiteracy; (ii) disability; or (iii) any other disadvantage. (7) (6) A notice, notice board or advertisement referred to in subsection (5) must— (a) give details of the proposed prospecting, mining, exploration or production activity which is subjected to public participation, including – (i) a summary of the proposed prospecting, mining, exploration or production operation and its

[8] A decision taken in terms of section 48(1)(b) is final and has a determinative effect on the rights of individuals and the public. It is not a preliminary or interlocutory step whose impact is not confined to the internal affairs of the Ministries responsible for environmental affairs and mineral resources.

			to decisions in terms of section 48(1)(b) and for the public participation process to be prescribed. We further submit that the public participation process must be conducted by the person requesting consent in terms of section 48(1)(b) so that the burden of conducting public participation is not borne by the Minister and the Minister responsible for mineral resources. If, despite our comment, it is decided that prospecting, mining, exploration or production may still occur in protected environments with the written permission of the Minister and the Minister responsible for mineral resources, it is submitted that the discretion to allow those activities in protected environments should at least be fettered to some degree. We submit that extractive activities should only be allowed in a protected environment when the person requesting permission can show that there is insufficient amounts of the mineral or petroleum resource sought to be	likely impact on the relevant protected environment; (ii) that a copy of the environmental management programme for the proposed prospecting, mining, exploration or production operation is accessible to public; (iii) where a copy of the environmental management programme for the proposed prospecting, mining, exploration or production.

			prospected or explored for, or mined or produced, outside of the relevant protected environment to enable the Republic to achieve its national strategic goals.	
			In terms of section 48(1), prospecting, mining, exploration and production is prohibited in protected areas. However, as there is no reference to mountain catchment areas, as contemplated in the Mountain Catchment Areas Act, 1970, in that section, those areas are not given the same protection as other protected areas. We submit that there is no reason why mountain catchment areas should not enjoy the same level of protection as other protected areas from extractive activities. We therefore submit that subsection (1)(c) should be amended by including explicit reference to mountain catchment areas.	
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	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 –

			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 parks, world heritage sites,	(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.

			special nature reserves and nature reserves in South Africa and that all Buffer Zone Policies are binding.	

Proposed amendments to the National Environmental Management: Biodiversity Act, 2004				
Clause /Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**
Cl 38 Sec 2(a)(ii)	The objectives of this Act are- (a) within the framework of the National Environmental Management Act, to provide for… (ii) the use of indigenous biological resources in a [sustainable] manner <u>that is ecologically sustainable, including taking into account the well-being of any faunal biological resource involved</u>	The clause amends section 2 which provides from the objects of the Act. The clause seeks to amend section 2(a((ii) to extend the scope of the objects of the Act to clarify that the object of the Act is to provide that the use of indigenous biological resources in a manner that is ecologically sustainable, including taking into account the well-being of any faunal biological resource	The terminology is problematic ("faunal biological resource"). Classifying living wild animals as resources entrenches their primary use and value from the get-go and completely disregards the individual nature of the animals. The codification of such unfairly biased terminology in the primary environmental <u>conservation</u> legislation cannot by any means be accepted and will be opposed. The conservation and well-being of the animals must be the primary objectives, rather than their economic exploitation – the latter should be only the third objective (i.e., emphasis / hierarchy of the three (sub-) objectives is incorrect and unacceptable). This incorrect terminology necessitates that if an animal is not economically valuable as a	Insert definition of 'well-being'. Clarity is required regarding how well-being will be measured and whether/how it differs from measurement of animal welfare. Without clear, identifiable and acceptable parameters, this amendment will be incapable of enforcement. Amend 'faunal biological resource' to include all wild 'fauna' (clarify whether the latter includes non-indigenous wild animals – which is recommended). Clarify what is meant by 'taking into account' – clarity on factors and process must be provided in this section.

			resource, then the well-being of that animal does not matter. Such a situation is not justifiable, as conservation, all-round biodiversity and healthy welfare are independent from and necessarily trump economic use, even in a developing country. Without biodiversity, development is impossible.	
Cl 43 Sec 97	The Minister may make regulations relating to- <u>(aA) the protection of the well-being of a faunal biological resource during the carrying out a restricted activity involving such faunal biological resource</u>	Clause 43 amends section 97 which provides for the power of the Minister for Environmental Affairs to make regulations. The proposed amendment extends the power of the Minister to provide that the Minister may make regulations in relation to the protection of the well-being of a faunal biological resource during the carrying out a restricted activity involving a faunal biological resource.	See comment re Cl 38 Sec 2(a)(ii) above.	See comment re Cl 38 Sec 2(a)(ii) above.

Proposed amendments to the National Environmental Management: Air Quality Act, 2004				
Clause/ Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**

Cl 46 Sec 13(1)	The Minister **[must]** <u>may</u>, by notice in the Gazette, establish the National Air Quality Advisory Committee in terms of this Act.	Section 13 of the NEMAQA deals with the establishment of the National Air Quality Advisory Committee. This clause amends section 13 of the NEMAQA to provide the Minister with a discretion to establish a National Air Quality Advisory Committee.	Given that many areas in South Africa are currently not meeting the health-based NAAQS including the designated Highveld Priority Area (see the Medium-Term Review of the 2011 HPA: Air Quality Management Plan (Dec. 2015)), it is clear that air quality management requires further intervention and dedication of resources. If the NAQAC could fulfil a role on this regard, then it is important that a duty be placed on the Minister to establish such a committee. We propose that section 13 remains as is, and that the "must" remains in place. The establishment of the NAQAC should not be discretionary. In fact, it should be established and appropriate members recommended. Urgent steps are needed to ensure that improvements are made in levels of high air pollution, especially in priority areas.	The Minister must by notice in the Gazette, establish the National Air Quality Advisory Committee in terms of this Act.
Cl 47 Sec 22A	**[22A. Consequences of unlawful conduct of listed activity resulting in atmospheric emission**	The explanation provided in the explanatory memorandum does not accord with the actual changes proposed in the Bill.	The section 22A proposed in NEMLA has been heavily simplified from the section 22A in the current NEMAQA.	In the event that section 22A is to remain in place, we propose the following changes

	(1) Section 24G of the National Environmental Management Act, 1998, as amended, applies to the commencement, without an environmental authorisation, of a listed activity or the activity specified in item 2 in Listing Notice 1 and items 5 and 26 in Listing Notice 2, relating to air quality in terms of Chapter 5 of the National Environmental Management Act, 1998. **(2) Subsections (4) to (10) are applicable to the operating, without a provisional registration or registration certificate, of a scheduled process in terms of the Atmospheric Pollution Prevention Act, 1965, at any time prior to the commencement of this Act.** **(3) Subsections (4) to (10) are applicable to the conducting, without a provisional atmospheric emission licence or an atmospheric emission licence, of an activity listed in terms of section 21 of this Act which results in atmospheric emission.** **(4) On application by a person who conducted an activity**	The description in the explanatory memorandum appears to describe the current legislative provision, rather than the Bill's proposed amendment. The memorandum states that "Clause 47 of the Bill amends section 22A of the NEMAQA. This clause seeks to substitute section 22A to provide for the consequences of unlawful conducting of listed activities. The clause will address two scenarios, namely, to provide for those activities that were operated without the registration certificate under the Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965), and those activities that have an environmental authorisation under the Environmental Impact Assessment Regulations, 2014, but no atmospheric emission licence under NEMAQA. This clause provides for the process and procedures to be followed in addressing the non-compliance with the law."	The relevant changes are the following: 1. Section 22A no longer provides that: "(1) Section 24G of the National Environmental Management Act, 1998, as amended, applies to the commencement, without an environmental authorisation, of a listed activity or the activity specified in item 2 in Listing Notice 1 and items 5 and 26 in Listing Notice 2, relating to air quality in terms of Chapter 5 of the National Environmental Management Act, 1998". 2. The proposed section 22A now simply reads that upon application by a person who operated a scheduled process under the Atmospheric Pollution Prevention Act (APPA) or conducted a listed	(1) Any [**Upon application for an atmospheric emission licence by a**] person who— *(a)* operated, at any time prior to the commencement of this Act, a scheduled process in terms of the Atmospheric Pollution Prevention Act, without a provisional registration or registration certificate; or *(b)* conducted or is conducting, without a provisional atmospheric emission licence or an atmospheric emission licence, an activity listed in terms of section 21 which results in atmospheric emission, must apply for an atmospheric emission licence **[the relevant licensing authority must fine the applicant an administrative fine which may not exceed R5 million before the application for an atmospheric emission licence may be considered]**. (1A) The relevant licensing authority must, subject to subsection (1B), fine the applicant an administrative fine, which may not exceed R10

	contemplated in subsection (2) or (3), the licensing authority may direct the applicant to— **(a) immediately cease the activity pending a decision on the application submitted in terms of this section;** **(b) investigate, evaluate and assess the impact of the activity on the environment, including the ambient air and human health;** **(c) remedy any adverse effect of the activity on the environment, including the ambient air, and human health;** **(d) cease, modify or control any act, activity, process or omission causing atmospheric emission;** **(f) compile a report containing—** **(i) a description of the need and desirability of the activity;** **(ii) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment, including the ambient air, and human health of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;**		activity under AQA without the necessary registration certificate or atmospheric emission licence (AEL), respectively, the relevant licensing authority must fine the applicant an administrative penalty which may not exceed R5 million, before the application for the AEL is eligible for consideration; and the application must be submitted in terms of the requirements set out in section 37;-. 3. Section 22A(3) now provides that "On application contemplated in subsection (1), the licensing authority may direct the applicant to, *inter alia*, immediately cease the activity; investigate, evaluate and assess the impacts of the activity; remedy any adverse effects; eliminate the sources of	million, before the application for an atmospheric emission licence may be considered. (1B) The relevant licensing authority must, before issuing a fine in terms of subsection (1), – (a) publish a notice in the *Gazette* calling for comments on a proposed fine; (b) consider any comments received on the proposed fine; and (c) publish the final fine issued in the *Gazette* for public information. …. (3A) The licensing authority must consider any reports or information submitted in terms of subsection (3) and thereafter may— (a) refuse to issue an atmospheric emission licence;

	(iii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment, including the ambient air, and human health of the activity; **(iv) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;** **(v) an environmental management programme; or** **(g) provide such other information or undertake such further studies as the licensing authority may deem necessary.** **(5) The licensing authority must consider any reports or information submitted in terms of subsection (4) and thereafter may—** **(a) refuse to issue an atmospheric emission licence;** **(b) issue an atmospheric emission licence to such person to conduct the activity subject to such conditions as the licensing**		atmospheric emission, or compile a report with relevant information in relation to the activity, the need and desirability for the information and a description of the public participation process followed in relation to the compiling of the report. 4. Section 22A(5) of NEMAQA, which sets out the options for the licensing authority, having considered the reports and information provided on application, has been deleted. This deletion should not have been effected, and section 37 of NEMAQA (to which reference is made in the proposed s22A(2)) does not fill this gap as it only deals with the submission of an application for an atmospheric emission licence.	(b) issue an atmospheric emission licence to such person to conduct the activity subject to such conditions as the licensing authority may deem necessary, which atmospheric emission licence shall only take effect from the date on which it has been issued; or (c) direct the applicant to provide further information or take further steps prior to making a decision in terms of paragraphs (a) or (b). …

	authority may deem necessary, which atmospheric emission licence shall only take effect from the date on which it has been issued; or **(c) direct the applicant to provide further information or take further steps prior to making a decision in terms of paragraphs (a) or (b).** **(6) The licensing authority may as part of the decision contemplated in subsection (5), direct a person to—** **(a) rehabilitate the environment within such time and subject to such conditions as the licensing authority may deem necessary;** **(b) prevent or eliminate any source of atmospheric emission from the activity within such time and subject to such conditions as the licensing authority may deem necessary; or** **(c) take any other steps necessary under the circumstances.** **(7) A person contemplated in subsection (4) must pay an administrative fine, which may not exceed R5 million and which must be determined by the licensing authority, before the licensing**		5. The proposed section 22A effectively removes the duplication that previously existed between it and section 24G of NEMA in instances where a NEMA-listed activity commences without an environmental authorisation and where an AQA listed activity commences without an AEL. As explained in previous submissions by the CER, requiring an AEL is already a NEMA-listed activity, with the consequence that, commencing an activity without an AEL is already covered by section 24G of NEMA. However, if it is the intention that it remains in place, recommendations are made in the column to the right, to address concerns in relation to section 22A, including the fact that – as it currently stands – the penalty may only be imposed, and the section 22(A)(3) options are only	

	authority may act in terms of subsection 5(a) or (b). **(8) In considering a decision contemplated in subsection (5)(a) or (b), the licensing authority may take into account whether or not the applicant complied with any directive issued in terms of subsections (4) or (5)(c).** **(9) The submission of an application in terms of subsection (4) or the issuing of an atmospheric emission licence in terms of subsection 5(b) or the payment of the administrative fine in terms of subsection (7) shall—** **(a) in no way derogate from the environmental management inspector's or the South African Police Services' authority to investigate any transgression of this Act; or** **(b) in no way derogate from the National Prosecuting Authority's legal authority to institute any criminal prosecution; and** **(c) not indemnify the applicant from liability in terms of section 51(1)(a) for having contravened section 22.**		available to the licensing authority, in instances where an application for an AEL is made by the person operating unlawfully, and no provision has been made for public participation on the quantum of a fine. Further comments are the following: 1. Subsection 22A(5) refers to the issuing of an AEL or provisional AEL "in terms of this section", but section 22A does not provide for or regulate the issuing of an AEL or provisional AEL. 2. It is unclear what consequences will follow the unlawful conduct of a listed activity resulting in atmospheric emissions in instances where no application is brought by a person who operated a scheduled process under the	

	(10) If, at any stage after the submission of an application in terms of subsection (4), it comes to the attention of the licensing authority, that the applicant is under criminal investigation for the contravention of or failure to comply with section 22, the licensing authority may defer a decision to issue an atmospheric emission licence until such time that the investigation is concluded and— **(a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;** **(b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or** **(c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.]**		APPA, or conducted a listed activity (as referred to in subsections 22A(1)(a) and (b) of AQA) without bringing the application referred to in section 22A(1). Would the administrative penalty referred to in section 22A(1) and the section 22A(3) directions from the licensing authority still be applicable, or would only criminal penalties and other administrative enforcement measures be available? This must be clarified. We have proposed that such persons are required to apply for an AEL. In the event that section 22A is to remain in place, we propose the following changes: 1. that it is made clear that the persons contemplated in subsections 1(a) and (b) are required to apply for an AEL (alternatively, that the	

	22A. (1) Upon application for an atmospheric emission licence by a person who— *(a)* operated, at any time prior to the commencement of this Act, a scheduled process in terms of the Atmospheric Pollution Prevention Act, without a provisional registration or registration certificate; or *(b)* conducted or is conducting, without a provisional atmospheric emission licence or an atmospheric emission licence, an activity listed in terms of section 21 which results in atmospheric emission, the relevant licensing authority must fine the applicant an administrative fine which may not exceed R5 million before the application for an atmospheric emission licence may be considered. (2) An application contemplated in subsection (1) must be submitted in accordance with the requirements contained in section 37. (3) On application contemplated in subsection (1), the licensing authority may direct the applicant to—		section be amended to make provision for the issuing of a section 22A fine, even in instances where an application for a licence is not made to the licensing authority); 2. the current subsection 22A(5) of NEMAQA should remain - as a new section 22A(3A). This would also address the concern that subsection 22A(5) of the Bill refers to the issuing of a licence in terms of "this section" without any reference being made in the Bill's proposed section 22A to the issuing of a licence; 3. provision must be made for public consultation on the quantum of a fine; and 4. the maximum amount of the fine should be R10 million instead of R5 million, for the same reasons set out in our comments on section 24G of NEMA.	

	(a) immediately cease the activity pending a decision on the application submitted in terms of this section; *(b)* investigate, evaluate and assess the impact of the activity on the environment, including the ambient air and human health; *(c)* remedy any adverse effect of the activity on the environment, including the ambient air and human health; *(d)* cease, modify or control any act, activity, process or omission causing atmospheric emission; *(e)* eliminate any source of atmospheric emission; *(f)* compile a report containing— (i) a description of the need and desirability of the activity; (ii) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment, including the ambient air, and human health of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity;			

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

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

	(b) in no way derogate from the National Prosecuting Authority's legal authority to institute any criminal prosecution; or *(c)* not indemnify the applicant from liability in terms of section 51(1)*(a)*.			
Cl 48 Sec 36	(2A) A provincial organ of state must be regarded as the licensing authority if a listed activity falls within the boundaries of more than one metropolitan municipality, or within the boundaries of more than one district municipality, and the relevant municipalities agreed thereto in writing. (5) Notwithstanding subsections (1) to (4), the Minister is the licensing authority and must perform the functions of the licensing authority if— (d) the listed activity relates to the activities listed in terms of section 24(2) of the National Environmental Management Act, 1998, or in terms of section 19(1) of the National Environmental Management: Waste Act, 2008, **[or]** and the Minister has been identified as the competent authority (8) The Minister and the licensing authority contemplated in	The clause amends section 36 to provide clarity that a province must be regarded as a licensing authority where a listed activity falls within the boundaries of more than one metropolitan municipality or more than one district municipality. Section 36(5) identifies the Minister as the licensing authority, in five instances, to issue atmospheric emission licences for air quality activities. Section 36(5)(d) is intended to facilitate the issuing of an integrated environmental authorisation where the Minister is also a competent authority for the environmental impact assessment activities, and licensing authority for the waste management activities. The current provision appears to suggest that the Minister will always be the licensing authority, whereas the intention is to provide that the Minister is only the licensing authority if	We wish to point out that there does not appear to be clarity as to the licensing authority for independent power producer coal-fired power station atmospheric emission licence applications - in certain cases it is the province, and in others, it is the DEA or the municipality. It is not clear on what basis this is determined. In some instances the licensing authority has changed from the province to the municipality, causing confusion and inconsistency. This situation should be rectified.	

	subsections (1) to (4), or the MEC and the licensing authority contemplated in subsections (1) to (5), may agree that an application for an atmospheric emission licence with regard to any activity contemplated in section 22 may be dealt with by the Minister, MEC or the relevant licensing authority contemplated in subsections (1) to **[(4)]** (5).".	the Minister is also identified as such in terms of NEMA and NEMWA. The clause amends section 36(5)(d) to provide for textual amendments to clarify that the Minister is only the licensing authority if the Minister is identified as such in terms of NEMA, NEMWA and NEMAQA. Section 36(8) has been amended to extend the scope to also allow for co-operative agreement to be reached between the Municipality, MEC and the Minister, on who the licensing authority will be on any application.		
No clause Sec 45			There is no express provision in section 45, which deals with a review of an atmospheric emission licence "at intervals specified in the licence, or when circumstances demand that a review is necessary", which stipulates that a review must be subject to public participation or that further investigations in relation to the licence can be conducted, or information requested, by the relevant authority. It is submitted that PAJA and the Constitution	**45. Review of provisional atmospheric emission licences and atmospheric emission licences** .... (4) Sections 38 and 40, read with the necessary changes as the context may require, apply to the review of a licence, which must also require public participation.

			require that there be public participation in relation to a review of an atmospheric emission licence. We propose the addition of a new subsection (4) to make clear that sections 38 and 40 – which include provision for public participation – apply to the review of an atmospheric emission licence.	
No clause Sec 46			Public consultation is only required in certain limited circumstances, for instance section 46(3) currently only requires a licence holder to bring a variation request to the public's attention if the variation results in all three conditions being met, namely if it: 1) will authorise an increase environmental impact, 2) increase the atmospheric emissions and 3) has not been the subject of an authorisation in terms of any other legislation and public consultation. Public consultation should be applicable to all variation applications. In any event, as an air emission licence is a separate process and to ensure the public has an adequate	We recommend that section 46(3)(c) be deleted.

			opportunity to be consulted – particularly where an increase in impact and emissions is concerned,we recommend that section 46(3)(c) (which only requires consultation for a variation if the proposed variation has not, for any reason, been the subject of an authorisation in terms of any other legislation and public consultation) be deleted as it is unduly restrictive.	
No clause Sec 47			It is not clear from section 47, which deals with renewals of atmospheric emission licences, that public participation is required. It is submitted that PAJA and the Constitution require that there be public participation in the renewal of an atmospheric emission licence. We propose the amendment of subsection (5) to refer to the requirement for there to be public participation in renewal applications.	**47. Renewal of provisional atmospheric emission licences and atmospheric emission licences** … (5) Sections 38, 39, 40 and 43, read with the necessary changes as the context may require, apply to an application for the renewal of a licence, <u>which must also require public participation</u>

Proposed amendments to the National Environmental Management: Integrated Coastal Management Act, 2008

Cl 50 **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 51 **Sec 74**	**[(1) A person to whom a coastal protection notice or coastal access notice in terms of section 59 or a repair and removal notice in terms of section 60, has been issued, may lodge a written appeal against that notice with-** **(a) the Minister, if the notice was issued by an MEC or by a person exercising powers which have been delegated by the Minister to such person in terms of this Act; or** **(b) the MEC of the province concerned, if the notice was issued by a municipality in that province or**	Section 74(1) makes provision for an appeal to the Minister if the decision is taken by an MEC and to the MEC if the decision is taken by a municipality. This approach creates legal challenge for one sphere of government to reconsider the decision taken by another sphere of government. The clause amends section 74 to provide legal clarity that an appeal against a decision issued by delegated officials must be lodged at the appropriate sphere of government and appeal authority.	The amendment clarifies that the competent appeal authority against coastal protection notice or coastal access notice or repair and removal notice.	The proposed amendment is supported.

	by a person exercising powers delegated by the MEC in terms of this Act.] (2) A person who is dissatisfied with any decision taken to issue, refuse, amend, suspend or cancel **[an]** a coastal authorisation or a decision to issue a notice in terms of sections 59 or 60, as the case may be, may lodge a written appeal against that decision with— (3) An appeal made under subsection **[(1) or]** (2) must—			
	There is currently lack of integration and alignment between NEM: ICMA, 2008 on the one hand and the Draft MSP Bill, 2016 and Draft MSP Framework. Clarity is required in relation to planning areas between ICM and MSP; and mechanisms for coordination/alignment between institutional structures for ICM and proposed institutional structures for MSP.			

Proposed amendments to the National Environmental Management: Waste Act, 2008

Clause/ Section	Proposed amendment/insertion	Explanation	CER Comment	CER proposed amendment/insertion
Cl 58 Sec 37(1) and (2)	(1) The Minister or MEC, as the case may be, may in respect of an investigation area contemplated in section 36, after consultation with the Minister of Water Affairs and Forestry- (a) **[cause]** require a site assessment to be conducted in respect of the relevant investigation area, and submit a site assessment report and a remediation plan, if applicable, to the Minister or the MEC, as the case may be (b) in a notice published under section 36(1) or issued under section 36(6)- … (ii) direct the person who has undertaken or is undertaking the high risk activity or activity that caused or may have caused the contamination of the investigation area, to **[cause]** require a site assessment to be conducted by an	These clauses amend section 37 of the NEMWA to provide clarity that a site assessment report must be submitted together with a remediation plan.	We have no objection to the replacement of "cause" with "require", as this provides for further clarity in terms of the powers of the Minister of MEC. The inclusion of "and submit a site assessment report and a remediation plan" is, however, misleading as it implies that the obligation to submit the report and plan lies with the Minister or MEC, which cannot be correct. We recommend that this provision be amended further, to specify the time period within which the site assessment report and remediation must be submitted. In this regard we are aware that no time period has been set for ArcelorMittal (AMSA) to conduct a site assessment in respect of its Vanderbijlpark works, in terms of a notice issued by the Department on 14 April 2015. It took approximately 2 and a	(1) The Minister or MEC, as the case may be, may in respect of an investigation area contemplated in section 36, after consultation with the Minister of Water Affairs and Forestry- (a) require a site assessment to be conducted in respect of the relevant investigation area, and that [submit] a site assessment report and a remediation plan, if applicable, be submitted to the Minister or the MEC, as the case may be within a stipulated time period, which cannot be more than 90 days; (b) in a notice published under section 36(1) or issued under section 36(6)- … (ii) direct the person who has undertaken or is undertaking the high risk activity or activity that caused or may have caused

	independent person, at own cost, and to submit a site assessment report, and a remediation plan, if applicable, to the Minister or MEC within a period specified in the notice (2)(a) A site assessment report and a remediation plan, if applicable, must comply with any directions that may have been published or given by the Minister or MEC in a notice contemplated in section 36(1) or (6) and must at least include information on whether the investigation area is contaminated.		half years for AMSA to submit its site assessment report, which was only submitted in November 2017 despite various follow-ups with AMSA and DEA, and still: there are numerous inconsistencies in the report; and DEA has yet to make a finding on the contamination of the land i.e. a remediation order This despite the fact that the site assessment reveals that contamination is moving from AMSA's plant and urgent measures are required to address the contamination. This is an omission which must be urgently addressed. Delays such as in the AMSA case cannot be tolerated in instances where contamination is continuously posing risks of harm to human health and the environment and this could not have been the intention of the legislature in enacting section 37.	the contamination of the investigation area, to **[cause]** require a site assessment to be conducted by an independent person, at own cost, and to submit a site assessment report, and a remediation plan, if applicable, to the Minister or MEC within a period specified in the notice which period cannot be more than 90 days
Cl 59 Sec 38(1)	On receipt of a site assessment report and a remediation plan, if applicable, contemplated in section 37, the Minister or MEC, as	These clauses amend sections 37 and 39 (sic) of the NEMWA to provide clarity that a site assessment report must be	Although we welcome the inclusion of the requirement for a remediation plan in addition to a site assessment	On receipt of a site assessment report and a remediation plan, **[if applicable,]** contemplated in section 37, the Minister or MEC,

	the case may be, may, after consultation with the Minister **[of Water Affairs and Forestry]** responsible for water affairs and any other organ of state concerned, decide that—	submitted together with a remediation plan.	report in sections 37 and 38 of NEMWA, the words "if applicable" that follow create ambiguity. The remediation plan is required if the land is contaminated, but the definition for "contaminated" is ambiguous and unclear. See our comments under "general concerns" below.	as the case may be, may, after consultation with the Minister responsible for water affairs and any other organ of state concerned, decide that—
Cl 60 Sec 41	The Minister must keep a national contaminated land register of **[investigation]** contaminated land areas that includes information on— *(a)* the owners and any users of **[investigation]** contaminated land areas; *(b)* the location of **[investigation]** contaminated land areas; *(c)* the nature and origin of the said contamination; *(d)* whether **[an investigation]** a contaminated land area— (i) **[is contaminated,]** presents a risk to health or the environment, and must be remediated urgently; (ii) **[is contaminated,]** presents a risk to health or the environment, and must be remediated within a specified period; or (iii) **[is contaminated,]** does not present an immediate risk, but	This clause amends section 41 of the NEMWA. This clause provides clarity that the Minister must only keep a national register of all contaminated land.	This proposed amendment is problematic in that it would mean that investigation areas are no longer required to be reflected on the NCLR. Having a NCLR which reflects investigation areas is important in that it will – (a) enable the public to know whether there is a likelihood of land being contaminated - which may have risks and harmful implications for their own health; (b) enable the public to track the progress of the investigation; (c) ensure that the land owner or user conducting the site assessment can be held to account and will ensure	The Minister must keep a national contaminated land register of investigation areas – which must be publicly available on DEA's website - that includes information on— *(a)* the owners and any users of investigation areas; *(b)* the location of investigation areas; *(c)* the nature and origin of the said contamination; *(d)* whether an investigation area— (i) is contaminated, presents a risk to health or the environment, and must be remediated urgently; (ii) is contaminated, presents a risk to health or the environment, and must be remediated within a specified period; or

	measures are required to address the monitoring and management of that risk; **[or]** and **[(iv) is not contaminated;** ***(e)* the status of any remediation activities on investigation areas; and]** *(f)* restrictions of use that have been imposed on the **[investigation]** contaminated land areas. (2) The Minister may change the status of **[an investigation]** the contaminated land area contemplated in subsection (1)*(d)(i)* or *(ii)* as provided for in subsection (1)*(d)*(iii) or (iv) if a remediation order has been complied with or other circumstances eventuate that justify such a change. (3) An MEC who has identified **[an investigation]** a contaminated land area must furnish the relevant information to the Minister for recording in the national contaminated land register.		that the investigation is concluded efficiently and transparently, in line with the constitutional right to an environment not harmful to health or wellbeing; and (d) limit government's abilities to track the progress of land investigation and reporting, which would, in turn, hinder government in the exercise of its obligations and for the protection of the health and wellbeing of those who might be impacted by the contamination. We accordingly do not support the proposed amendment as this would result in a less transparent process. It is not in the best interests of the public to only be notified of contamination at such a late stage, thereby depriving the public of the opportunity to take any necessary precautions and preventative measures and to hold those potentially liable to account.	(iii) is contaminated, does not present an immediate risk, but measures are required to address the monitoring and management of that risk; or (iv) is not contaminated; *(e)* the status of any remediation activities on investigation areas; and *(f)* restrictions of use that have been imposed on investigation areas. (2) The Minister may change the status of an investigation area contemplated in subsection (1)*(d)(i)* or *(ii)* as provided for in subsection (1)*(d)*(iii) or (iv) if a remediation order has been complied with or other circumstances eventuate that justify such a change. (3) An MEC who has identified an investigation area must furnish the relevant information to the Minister for recording in the national contaminated land register.

			The CER has, through a PAIA request, previously been given access to the NCLR, and was alarmed to note how few areas it contained – none of which had yet been remediated. We were also concerned by the absence of many mining companies and large industrial facilities from the NCLR. If land is only required to be reflected once it is found to be contaminated, there is likely to be even less transparency and accountability from persons/entities with potentially contaminated land.	
No Cl Sec 1			In the current Waste Act, the definition of "contaminated" in section 1 is ambiguous and unclear, with the risk that interpretation disputes will result in the exclusion of land that was intended to fall within the purview of this section (and vice versa). Various steps in Part 8 depend on whether or not there is contamination. This is a crucial definition for the successful implementation of these provisions.	We propose that the definition of "contaminated" in section 1 be clarified to make clearer in which circumstances the definition would apply. The threshold should always be whether or not levels of contamination exist which pose a risk for the environment and human health. Provision should also be made for the sampling of groundwater as a means to indicate contamination in the surrounding soil.

			Furthermore the soil screening values set out in the National Norms and Standards for the Remediation of Contaminated Land and Soil Quality make arbitrary distinctions between different land uses, particularly between standard residential and informal residential and specify different values for each. This potentially over-complicates the process and would allow for lower levels of contamination to be overlooked, even though they may pose a risk to human health and the environment. Should the above norms and standards remain unchanged, it should be in line with the National Framework for the Management of Contamination Land, 2010, and make clear that anyone within 1km of water sources (irrespective of zoning), and who is required to produce a land contamination site assessment report, is prohibited from using soil screening value (SSV) 2	

			measuring its land contamination site assessment report, as indicated in the National Framework . The AMSA land contamination site assessment used both SSV1 and 2, despite being within 1km of water resources and sensitive receptors, thereby resulting in inconsistencies in the report, possible skewed findings and inadequate remediation measures being proposed.	
No cl Sec 38(4)		Section 38(4) simply says a remediation order must be complied with at the costs of the person against whom the order is issued.	Unless otherwise directed, a remediation order under subsection (2), an order under subsection (3) or a directive under section 37(1) must be complied with at the cost of the person against whom the order or directive is issued. It is still unclear who will be responsible for and must bear the costs of the remediation. Naturally, this will be subject to extensive dispute by land occupiers or owners who have inherited land with a legacy of pollution, or who otherwise	

			argue that they are unable to pay the costs of remediation. Part 8 also fails to require that financial provision be made for remediation.	
No Cl Sec 36(5)			An owner of land that is significantly contaminated, or a person who undertakes an activity that caused the land to be significantly contaminated, must notify the Minister or MEC of that contamination as soon as that person becomes aware, of that contamination The provision for notification in terms of section 36(5) is not practical, as it requires notification of a significant contamination to be given prior to a site assessment being conducted, and it is unlikely to result in proper disclosure or acknowledgement of accountability by landowners. NEMWA provides that the Minister or MEC may, by notice in the Gazette, identify investigation areas (See section 36(1) of NEMWA), Persons are unlikely to give	

			notice to a person identifying land under section 36 (5) or to acknowledge that their land is significantly contaminated before a site assessment being conducted. Despite section 36(1), the Minister or MEC may issue a written notice to a person identifying land as an investigation area, and an owner of land that is significantly contaminated must notify the Minister or MEC of the contamination as soon as they become aware of it, in terms of s36(5). It is assumed that after such a notification by a landowner, the land becomes an investigation area after the Minister or MEC issues a written notice to the person or publishes a notice in the Gazette. However, we are aware that companies are wary of exposing themselves and their land to potential liability or in any way acknowledging that their land is significantly	

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

			must expressly identify the land as an investigation area in terms of s 36(1) and/or s 36(6). Once an owner or other person has given notification of contamination in terms of s 36(5), it is for the Minister or MEC to identify the land as an investigation area.	
No Cl Sec 40(1)			No person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the Minister or MEC, as the case may be. Section 40(1) broadly states that no person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated. This is not subject to a requirement of a remediation order, and it therefore places a very broad obligation on all landowners. While we do welcome this obligation, it opens the door to much uncertainty around the question of when land is	

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

			terms of a WML, directive or compliance notice and there is a fair amount of uncertainty regarding, when, how and whether remediation has in fact been completed. This should be corrected.	

Proposed amendments to the National Environmental Management Amendment Act, 2008				
Clause/ Section	**Proposed amendment/insertion**	**Explanation**	**CER Comment**	**CER proposed amendment/insertion**
Cl 75(a) and (b) Sec 12(4) (4A) and (4B)	(4) An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002)**[; immediately before the date on which this Act came into operation must be regarded as having been approved in terms of the principal Act as amended by this Act]** on or before 8 December 2014 shall be deemed to have been approved in terms of the National Environmental Management Act, 1998, and an environmental authorisation issued "(4A) An environmental management plan or programme approved in terms of the Mineral	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	We object to the amendment of section (4) and the insertion of subsection (4A). For the reasons set out below, we submit that the proposed amendment to section 12(4) and the proposed insertion of section 12(4A) will result in entrenching old order EMPs and EMPRs that do not comply with the provisions of NEMA and inappropriately blurring the distinction between environmental impact assessment and environmental management. Entrenching old order EMPRs and EMPs	(4) 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) on or before 8 December 2014 shall be deemed to have been approved in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) **[and an environmental authorisation issued]**, provided that within 18 months of the coming into force of this Act, the holder of the environmental management plan or environmental

	and Petroleum Resources Development Act, 2002 after 8 December 2014, for an application received in terms of the Mineral and Petroleum Resources Development Act, 2002, shall be deemed to have been approved in terms of the National Environmental Management Act, 1998 and an environmental authorisation issued. (4B) Subsections (4) and (4B) does not apply in the instances where an application for an environmental authorisation in relation to activities ancillary to exploration, prospecting, mining, or primary processing was not obtained, was refused or there was failure to obtain an environmental authorisation in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989), for activities that required such an environmental authorisation in terms of that Act, or for activities identified or specified under section 24(2) of National Environmental Management Act, 1998, or a waste management licence has not been obtained, was refused or not obtained for any activity listed in	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 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.	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 "old" 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 a necessary supplement to this regime. The IEM system, for instance, requires applicants to consider not only the "environmental, social 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	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 National Environmental Management Act, 1998. (4B) An environmental management plan or an environmental management programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) after 8 December shall be deemed to have been approved in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) **[and an environmental authorisation issued]**, provided that within 18 months of the coming into force of this Act, the holder of the environmental management

	terms of section 19 of the National Environmental Management: Waste Act, 2008		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	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 National Environmental Management Act, 1998.

			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 environmental management of extractives operations approved before or on 8 December 2014 below the standards prescribed in NEMA, its regulations and the notices published under NEMA. 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.	

			We therefore submit that all EMPs and EMPRs issued under the MPRDA should be upgraded within 18 months of the coming into force of NEMLAB4 to ensure that they comply with NEMA.	
Cl 76(1), (2), (3), (4)	(1) An environmental management plan or environmental management programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002, on or before 8 December 2014, or after 8 December 2014 in the case of applications that were pending on that date, shall be deemed to have been approved and an environmental authorisation issued in terms of the National Environmental Management Act, 1998. (2) Subsection (1) does not apply in the instances where an application for an environmental authorisation in relation to activities ancillary to exploration, prospecting, mining, or primary processing was not obtained, was refused or there was failure to obtain an environmental authorisation in terms of the Environment Conservation Act,	This clause inserts a new section to provide clarity that an environmental management plan or programme issued and approved in terms of the Mineral and Petroleum Resources Development Act, before or after 8 December 2014, is deemed to have been approved and an environmental authorisation issued in terms of NEMA, excluding ancillary activities not authorised in terms of the NEMA or NEMWA. The clause also empowers the Minister responsible for mineral resources to instruct a holder of a right or permit to take action to upgrade any deficiencies in the environmental management plan or programme.	Clauses 76(1) and (2) appear to be a duplication of the proposed sections 12(4) and (4A) of NEMA (Cl 75(a) and (b)). We therefore reiterate our objection and motivation therefore made on the proposed amendment to section 12(4) and insertion of section 12(4A) of NEMA. Clause 76(3) places an indirect, vague and likely unenforceable obligation on the Minister. As reflected in our comments on the previous clause, we submit that the onus should be on the holder of the EMPR or EMP to ensure that it is upgraded and brought in line with the requirements of Chapter 5 of NEMA – within a defined and reasonable transitional period. We propose 18 months from	See comments on clause 75 above.

	1989 (Act No. 73 of 1989) for activities that required such an environmental authorisation in terms of that Act, or for activities identified or specified under section 24(2) of National Environmental Management Act, 1998, or a waste management licence has not been obtained, was refused or not obtained for any activity listed in terms of section 19 of the National Environmental Management: Waste Act, 2008. (3) 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 is 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. (4) The Minister responsible for mineral resources must issue an environmental authorisation if he or		the coming into effect of NEMLAB 4.	

	she is satisfied that the deficiencies in the environmental management plan or environmental management programme in subsection (3) have been addressed and that the requirements contained in Chapter 5 of the National Environmental Management Act, 1998, have been met.			