



ELA Secretariat
NWU Potchefstroom Campus
Tel: 018 299 1568
Fax: 018 299 1923

31 January 2022

The Director-General;
Department of Forestry, Fisheries and the Environment

Attention: Mr Alvan Gabriel
By email: agabriel@environment.gov.za

Dear Mr Gabriel

**COMMENTS ON DRAFT NOTICE TO AMEND THE SECTION 24H
REGISTRATION AUTHORITY REGULATIONS, 2016**

1. On 31 December 2021, the Minister of Forestry, Fisheries and the Environment published a notice ("**Amendment Notice**") of her intention to amend the Section 24H Registration Authority Regulations, 2016, gazetted under GNR 849 of 22 July 2016, as amended ("**Section 24H Regulations**").
2. The Amendment Notice proposes to introduce various amendments to the Section 24H Regulations including the following new provisions:

Regulation 6 of the Amendment Notice –

'Regulation 2A. Application of these Regulations

These Regulations apply to –

(a)

(f) an appeal contemplated in section 43 of the Act relating to an application, strategic environmental assessment, environmental management programme or nay other appropriate environmental instrument, contemplated in paragraphs (a) - (e) (Our own emphasis)

Regulation 7 of the Amendment Notice –

'14. Requirement to register as environmental assessment practitioner

(1) No person other than a registered environmental assessment practitioner may perform tasks in connection with –

(a)

(f) an appeal contemplated in section 43 of the Act relating to an application, strategic environmental assessment, environmental management programme or any other appropriate environmental instrument, contemplated in paragraphs (a) - (e)' (Our own emphasis)

("together the Proposed Amendments")

3. The primary implication of the Proposed Amendments is that no other person other than an Environmental Assessment Practitioner ("**EAP**") registered with the Environmental Assessment Practitioners Association, is legally entitled to prepare or lodge an appeal in terms of section 43 of the National Environmental Management Act 107 of 1998 ("**NEMA**"), which is implicit from the wording of the Proposed Amendments.
4. It is therefore seemingly proposed in terms of the Proposed Amendments that only registered EAPs may prepare and lodge appeals against decisions taken in terms of the following legislation –
 - 4.1. the Environmental Conservation Act 73 of 1989
 - 4.2. NEMA;
 - 4.3. the National Environmental Management: Biodiversity Act 10 of 2004;
 - 4.4. the National Environmental Management: Protected Areas Act 57 of 2003;
 - 4.5. the National Environmental Management: Integrated Coastal Management Act 24 of 2008;
 - 4.6. the National Environmental Management: Air Quality Act 39 of 2004; and
 - 4.7. the National Environmental Management: Waste Act 59 of 2008.
5. The Proposed Amendments impose severe limitations on the right to lodge an appeal against a decision taken in terms of the legislation indicated in paragraph 4, which opportunity ought to be available to all interested and affected persons ("**I&APs**") without the strict involvement of a registered EAP, in accordance with the environmental right enshrined in section 24 of the Constitution and the right to just administrative action that is procedurally fair enshrined in section 33 of the Constitution.
6. Since no Explanatory Summary was published with the Proposed Amendments to the regulations it is difficult to understand the harm that the Proposed Amendments are seeking to address by excluding legal practitioners and members of the public from preparing and submitting appeals themselves or on behalf of clients. As will appear from the comments below, we do not believe that this harm could outweigh the potential harm to the interests of I&APs of the proposed regime.
7. We wish to place on record as part of the public comment process on the Amendment Notice, the following comments:

7.1. First implication

- 7.1.1. It appears at first glance that Regulation 7 quoted above may be interpreted as limiting the power of appeal to a registered EAP, and hence exclude the right of interested and affected parties to appeal. One would assume that it is not the intention of the proposed regulations in GN 1655 to limit the power of 'any person' in terms of section 43 of NEMA to bring appeals in the circumstances envisaged by section 43. That would not be legally permissible, without amendment (by the legislature) of section 43 itself.
- 7.1.2. This ought to be redrafted to make it clear that the right in section 43 is not being limited and to make it clear what the new Regulation 14(1)(f) is seeking to achieve.

7.2. Second implication

- 7.2.1. It is an established principle that an appeal in terms of section 43 of NEMA is deemed to be a 'wide appeal' in the sense that, it is a complete re-hearing and fresh determination on the underlying decision with or without additional evidence or information. An appellant is therefore entitled to draw on diverse resources to support its grounds of appeal, which often entails the inclusion of legal experts to assess the legality of an underlying decision, if necessary.
- 7.2.2. The limitations posed by the Proposed Amendments may therefore have the effect of excluding this input which at times consists of complex legal arguments from the context of an appeal, which may in some instances, compromise the integrity of the entire appeal submission.
- 7.2.3. Furthermore, NEMA section 43 appeals form the basis for a judicial review application, in the event that the appeal is unsuccessful. A review application constitutes a limited re-hearing with or without additional evidence and is premised on the review grounds prescribed in section 6 of the Promotion of administrative Justice Act 6 of 2000 ("**PAJA**"). The PAJA review grounds are typically informed by the appeal grounds, which may include key legal submissions which underpin the review application. The exclusion of legal experts therefore poses unintended consequences in respect of both an appeal and related judicial review process.
- 7.2.4. The limitation of legal (and other) experts' participation in appeal processes also poses knock-on effects in that a larger proportion of appellants will likely seek judicial recourse to challenge appeal decisions, which position could be avoided if appeal submissions are supported by an adequately diverse level of expertise (which also includes EAPs) in the first instance. Furthermore, access to the courts remains a challenge generally due to litigation costs which situation is compounded by protracted lead times for the finalisation of litigation matters, as a result of the already constrained court system. If more appellants are forced to resort to the High Court as a result of restrictions in the Proposed Amendments, this is also a waste of public funds.

- 7.2.5. The authorisations listed in paragraph 4 above all have the potential to affect adversely the rights of members of the public. In restricting the access of such people to robustly argued and decided administrative appeals processes in respect of those authorisations, the Proposed Amendments are inimical to the fundamental principle that access to justice must be facilitated and promoted, not restricted.
- 7.2.6. From a practical perspective, we anticipate that appellants are likely to engage the services of legal practitioners “behind the scenes” when preparing and submitting appeals, rendering this aspect of the Proposed Amendments ineffectual and, as argued above, forcing appellants to effectively engage two professionals (a legal advisor and an EAP) when this is not necessary under the current regime.
- 7.2.7. Finally, non-compliance with Regulation 14 is a criminal offence. Does the Minister really believe that members of the public should be prosecuted for obtaining legal advice when preparing and submitting an administrative appeal?

7.3. Third implication

- 7.3.1. A general reading of the Proposed Amendments seemingly implies that an EAP is entitled to oversee any appeal in terms of section 43 of NEMA, which may also include an appeal against a decision where that EAP was involved in the underlying application process (e.g. environmental authorisation ("EA")). The Amendment Notice does not contain any provisions or indication to the contrary.
- 7.3.2. This position creates an inevitable conflict of interest for EAPs, who are legally obligated, in the context of EA applications¹, to be independent and objective in administering an Environmental Impact Assessment process. The required degree of independence would be materially eroded in the event that an EAP is tasked with preparing and lodging an appeal which challenges the outcome of the underlying application decision.
- 7.3.3. A registered EAP's input in an appeal process must in no way be discounted especially where the EAP has been involved in the underlying application process and possesses key knowledge which may augment the appeal submission. However, I&APs as well as any relevant experts must also be allowed an opportunity to undertake tasks relating to the preparation and submission of an appeal, with the view of the arm's length principle in respect of EAPs involvement in such processes.

7.4. Fourth implication

- 7.4.1. In the ordinary course, EAPs charge a fee for the provision of professional services rendered e.g., for administering an EIA process. It is naturally anticipated that professional fees will be charged for the

¹ Regulation 13(1)(a) of the Environmental Impact Assessment Regulations (GNR 982 of 4 December 2014)

administration of appeals or related processes as contemplated in terms of the Proposed Amendments. This position may pose complications for I&APs who lack resources to engage an EAP for the purposes of preparing or lodging an appeal.

- 7.4.2. With reference to the First Implication, EAPs may need to engage with other external experts in order to obtain guidance and or input for inclusion in an appeal submission. This imposes a further potential cost implication for an appellant which would be obligated pay professional fees for the additional experts (including the EAP) involved in the appeal submission.
- 7.4.3. We submit that I&APs' right to just administrative action that is procedurally fair is protected by the current appeal regime in terms of which any person may prepare and lodge an appeal without the mandatory involvement of a third party. The current regime encourages a wider degree of participation in appeals which in some instances relate to public interest matters and contribute towards broader environmental conservation objectives e.g. an appeal against an EA which authorise a detrimental development project.

7.5. Conclusion

- 7.5.1. The Minister is implored to take the factors set out in this submission into account in view of the Proposed Amendments.
- 7.5.2. Kindly confirm receipt of this submission and address further correspondence to the following ELA email address enviro.association.sa@gmail.com.
- 7.5.3. We look forward to receiving a response to this submission and remain available to engage on any queries, comments, concerns which you may have in respect of the submission.

Yours sincerely,

ENVIRONMENTAL LAW ASSOCIATION

Parliamentary Commentary Sub-committee

Per: Sarah Kvalsvig, Tendai Bonga and Lerato Molefi (with input from Kate Handley and Melanie Murcott)