
GENERAL NOTICE

NOTICE 654 OF 2010

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998, AS AMENDED) PUBLICATION OF IMPLEMENTATION GUIDELINES FOR COMMENT

The Minister of Water and Environmental Affairs hereby gives notice of her intention to publish under section 24J of the National Environmental Management Act, 1998 (Act No. 107 of 1998, as amended) the following Implementation Guidelines attached hereto for general public comments

(a) Sector Guidelines for Environmental Impact Assessment Regulations

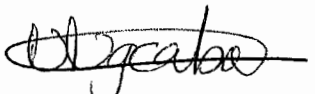
The Sector Guidelines were developed in terms of 2006 Environmental Impact Assessment Regulations. When commenting, members of the public are kindly requested to take cognisance of the recent amendments to these regulations as the final document will be finalized in terms of the 2010 EIA Regulations. Members of the public are invited to submit written representations or comments to the Director-General: Department of Environmental Affairs, within 30 days of the publication of the notice in Gazette, to the following addresses:

By post to: The Director-General: Department of Environmental Affairs
Attention: Mr S. Zondi
Private Bag X447
Pretoria, 0001

Hand delivered to: The Department of Environmental Affairs
Attention: Mr S. Zondi
Fedsure Forum Building
South Tower (Room 519)
315 Pretorius Street
Pretoria, 0001

By fax to: (012) 310 3688, and email to szondi@environment.gov.za

Comments received after the closing date may not be considered.



NOSIPHO NGCABA
DIRECTOR-GENERAL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS



environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

**NATIONAL ENVIRONMENTAL MANAGEMENT ACT (ACT 107 OF 1998)
IMPLEMENTATION GUIDELINES**

**SECTOR GUIDELINES FOR ENVIRONMENTAL IMPACT ASSESSMENT
REGULATIONS**

TABLE OF CONTENTS

ACRONYMS AND ABBREVIATIONS	i
1 INTRODUCTION.....	1
1.1 Structure of the guidelines	2
1.2 Purpose of guidelines	2
1.3 Target audience	3
2 OVERVIEW OF THE EIA PROCESS	4
2.1 Purpose of the EIA Process.....	4
2.2 Key stages of the EIA process.....	5
3 OVERVIEW OF THE LEGAL FRAMEWORK	8
3.1 Key Applicable Legislation	8
3.1.1 Legal framework applicable to the Applicant / EAP	14
3.1.2 Legal framework applicable to the decision-maker	20
3.1.3 Legal Framework applicable to: interested and affected parties	24
4 EIA PROCESS GUIDELINES FOR THE SECTORS	27
4.1 Definition of the sectors	28
4.1.1 The Non-Linear Development Category.....	28
4.1.2 Linear development.....	28
4.2 Determining whether an application is necessary.....	28
4.2.1 Dealing with the need for other authorisations, approvals or permits.....	32
4.2.2 Dealing with the question of exemptions	38
4.3 Fulfilling responsibilities that apply to organs of state	40
4.4 Making use of guidelines in the EIA process.....	43
4.4.1 Reliance on Draft Policies.....	55
4.5 Determining the scope of the impact assessment	56
4.5.1 Scoping the issues	57
4.5.2 Determining "reasonable" alternatives.....	59
4.6 Developing Terms of Reference for specialist studies	64
4.7 Undertaking public participation.....	66
4.7.1 Categories of I&APs.....	67
4.7.2 Using dispute resolution methods	69
4.7.3 Dealing with the question of expropriation	69
4.8 Assessing the significance of impacts	69
4.9 Approaching the Environmental Management Programme (EMP).....	75
5 ASSESSMENT OF JOB WELL DONE.....	77
5.1 Quality assurance criteria	77
5.2 Legal compliance	80
REFERENCES.....	81
ANNEXES	85

ACKNOWLEDGEMENTS

The input of Working Group 4 participants and a Review Panel comprising representatives from various state organisations was invaluable in preparing this guideline. Working Group 4 includes the provincial environmental departments. The Review Panel participants were drawn from all relevant government departments and organisations. Transnet, Eskom, the Department of Water Affairs (then DWAF), the Department of Human Settlements (formerly Housing) participated in workshops on the guideline.

In addition, the team obtained specialist input from the following organisations:

- Agama Energy and Catherine Fedorsky on energy-related matters
- Bergstan on engineering related issues with respect to linear developments, social infrastructure.
- AgriInformatics on issues relating to agri-industry.
- MCA Planners on planning issues particularly with respect to large-scale property developments and social infrastructure.

ISSUED BY:

The Department of Environmental Affairs
Private Bag X447
Pretoria
0001
South Africa

This document is the copyright of the Department of Environmental Affairs. Any form of use of this document, including its reproduction or transmission in any form by any means, is prohibited except for the purposes of private study, research or teaching.

PREPARED BY:

EnAct International, Cape Town
70 Rosmead Road, Kenilworth (Tel: (021) 671 7002)

OU Environmental Services, Cape Town
6 Sandpiper Place, Hout Bay (Tel: (021) 790 5793)

Principal Authors:

Laila Mahomed (EnAct International)
Sarah Kvalsvig (EnAct International)
Ingrid Coetzee (EnAct International)
Mary-Jane Morris (OU Environmental Services)

Department of Environmental Affairs Project Leader:

Ms Sibusisiwe Hlela (email: SHlela@deat.gov.za; Tel: (012) 310 3911)

Acronyms and Abbreviations

Applicant	The person who makes an application for an environmental authorisation.
BAR	Basic Assessment Report.
Competent authority	The organ of state responsible for deciding whether or not to grant an environmental authorisation.
Constitution	The Constitution of the Republic of South Africa, 1996.
DEA	Department of Environmental Affairs (formerly the Department Environmental Affairs and Tourism – DEAT).
DFA	Development Facilitation Act, 67 of 1995.
DWA	Department of Water Affairs (formerly the Department Water Affairs and Forestry – DWAF).
EAP	Environmental assessment practitioner.
ECA	Environment Conservation Act, 73 of 1989.
Ecosystem	A dynamic complex of plant, animal and micro-organism communities and their non-living environment, interacting as a functional unit.
EIA	Environmental impact assessment: A process by which the environmental consequences of a proposed activity or project are evaluated and alternatives are analysed. EIA is an integral part of the planning and decision-making processes.
EIA regulations	Environmental impact assessment regulations made under section 24 of the National Environmental Management Act, 107 of 1998.
EIAR	Environmental Impact Assessment Report.
EMP	Environmental Management Programme.
Environment	The surroundings within which humans exist and that are made up of: (a) the land, water and atmosphere of the earth; (b) micro-organisms, plant and animal life; (c) any part or combination of the above, and the interrelationships between them; and (d) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.
Environmental authorisation	Authorisation in terms of section 24 of the National Environmental Management Act to commence a listed activity.
Environmental Right	The right set out in section 24 of the Constitution.
IA	Impact Assessment.

I&AP	Interested and affected party.
IDP	Integrated Development Plan.
Judicial review	A review by a judge, on application to court by an affected party, of the procedural (as opposed to substantive) correctness of an administrative decision.
Listed activities	Activities identified in terms of section 24 of the National Environmental Management Act which may not commence without environmental authorisation.
MHI	A Major Hazard Installation in terms of the Major Hazard Installation Regulations made under the Occupational Health and Safety Act, 85 of 1993 and published in GN. R. 692 of 30 July 2001.
NEMA	National Environmental Management Act, 107 of 1998.
NEMBA	National Environmental Management: Biodiversity Act, 10 of 2004.
NHRA	National Heritage Resources Act, 25 of 1999.
NWA	National Water Act, 36 of 1998.
Organ of state	Any department in the national, provincial or local sphere of government, and any institution that exercises a public power or performs a public function in terms of any legislation (e.g. South African National Parks, ESKOM, National Roads Agency)
PAIA	Promotion of Access to Information Act, 2 of 2000.
PAJA	Promotion of Administrative Justice Act, 3 of 2000.
Precautionary principle	A principle of national and international environmental law that states that lack of full scientific certainty must not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
PPP	Public participation process.
PRO	Primary Responsible Officer.
SAHRA	South African Heritage Resources Agency.
SANParks	South African National Parks Board.
SDF	Spatial Development Framework.
SEA	Strategic Environmental Assessment.
SR	Scoping Report.
Sustainable development	The integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.
TOR	Terms of Reference.

1 Introduction

The Department of Environmental Affairs (DEA) determined that a guideline on the Environmental Impact Assessment (EIA) process would be of value in respect of particular types of developments. These are referred to as “sectors”, and the DEA identified 5 sectors that required attention, namely agri-industry projects, energy projects, large-scale property developments, social infrastructure and housing projects and linear developments.

These sectors were selected since they typify developments that include a variety of activities and usually involve large tracts of land, often on the fringe or outside of established urban areas. This means that ordinarily these types of developments require a complexity of issues to be addressed in the EIA process. Typical issues that arise in these sectors are, amongst others:

- difficulties in aligning the EIA process to the project planning cycle, particularly as regards the detail required for EIA documentation. Typically, project design information is not fixed at an early stage, which can create difficulties in identifying issues. Also, changes in project design can be confusing in the context of the public participation process or may even be viewed with suspicion by Interested and Affected Parties (I&APs);
- uncertainties related to legal requirements both in terms of interpretation of the EIA Regulations and in respect of other legislation. Typically projects that fall within the sectors that are the subject of this guideline require more than one approval, permit or authorisation involving various authorities. Thus, there are commenting authorities in the context of the EIA process that may also be decision-makers in respect of another approval or permit that the project requires;
- difficulties in ensuring that all activities within the project that are listed in the EIA Regulations (Listing Notice 1 and Listing Notice 2) are included in the application. The fact that projects within the sectors under consideration are typically large and complex has already been mentioned. Consequently there is a risk that if all of the activities that are subject to environmental authorisation are not identified, there is a risk that elements of the project will not be authorised and could not be commenced; and
- complexities in relation to identifying all relevant issues and assessing these effectively to ensure that adequate information is provided to decision-making authorities. Given the range of potential environmental issues associated with developments within these sectors, the assessment of impacts is complex. This is due to the range of links and cause-and-effect relationships between impacts. It is seldom that there would be a single and linear relationship between an element or aspect of a project and the environmental impact.

This guideline has been developed to assist the various roleplayers in the EIA process when faced with issues such as those described above. Thus the focus is on considering these and other typical difficulties or stumbling blocks, using the five sectors (agri-industry projects, energy projects, large-scale property developments, social infrastructure and housing projects and linear developments) to demonstrate how to deal with them within the EIA process. Whilst this guideline is aimed primarily at addressing these sectors or categories of development, it should also be of value in a broader context since it addresses both generic and sector-specific aspects of the EIA process.

1.1 Structure of the guideline

The guideline is structured as follows:

- **Section 1** provides the context for the guideline. It sets out the purpose of the guideline and who should use it (target audience).
- **Section 2** provides an overview of the EIA process.
- **Section 3** provides an overview of the legal framework, with particular consideration given to legislation that is of relevance to the manner in which the EIA process is conducted. It therefore covers more than the requirements of the National Environmental Management Act; 107 of 1998 (NEMA) and the regulations made under it (the EIA regulations). Legislative provisions in respect of administrative justice, access to information, decision-making roles and co-operative governance are also addressed.
- **Section 4** provides a “how to” guide in respect of the EIA process in respect of:
 - determining the need to apply;
 - identifying and dealing with applicable legal requirements;
 - identifying issues and alternatives;
 - developing the Terms of Reference for specialist studies;
 - conducting public participation;
 - evaluating the significance of impacts; and
 - dealing with mitigation measures;
- **Section 5** provides information to assist Environmental Assessment Practitioners (EAPs) and Applicants to evaluate whether the information being provided is adequate and whether the EIA process requirements have been met, based on both legal and best practice criteria.

A list of references can be found at the end of the document.

1.2 Purpose of guideline

The purpose of this guideline is as follows:

- to provide guidance on how to compile EIAs with information and analysis of a high quality and sufficiently comprehensive to enable the decision-maker to make a well-informed decision;
- to assist EAPs and Applicants in meeting the requirements of the EIA Regulations;
- to provide practical guidance and tools for the EIA process;
- to promote best practice approaches to EIA;
- to strengthen the application of the NEMA principles in the EIA process;
- to encourage an integrated approach in the EIA process, since all elements of the environment are linked or related;
- to guide the assessment of the effects of development proposals with a view to avoiding, minimising or offsetting significant adverse impacts and enhancing benefits;
- to assist developers and consultants through introducing a level of consistency into the EIA process for agri-industry, energy, large-scale property developments, social infrastructure and housing projects; and linear developments, so that requirements are clear.
- to assist the public to become better informed regarding their rights and responsibilities, in an effort to promote more active and responsible public participation; and
- to support the production of clear, objective and quality Basic Assessment, Scoping and EIR (Environmental Impact Report) documents;

Legal Status of Guideline:

The EIA Regulations empower both the Minister and the MEC in a province to make guidelines.¹ Whilst such guidelines are not binding, they must be taken into account when preparing, submitting, processing or considering any application made under the EIA Regulations. This guideline is not a substitute for the EIA Regulations. Reference must be made to the Regulations to ensure that the process is legally compliant. Additional detail on the legal status of guidelines is given in Section 4.4 of this document.

1.3 Target audience

This guideline should be used by:

1. *Applicants/Developers* in formulating their development proposals and in ensuring that land use planning and EIA applications take account of the requirements set out in this document;
2. *EAPs* in undertaking the EIA procedures and investigations;
3. *Professional Consultants* involved in assisting the Applicant (e.g. planners and engineers) in the planning and design of the proposed project;
4. *Environmental decision-making authorities* in evaluating applications, particularly in determining the key factors that should inform the decision and whether the EIA process meets legal and accepted professional standards;
5. *Other decision-making authorities* since this guideline is relevant to any decision-maker that is concerned with regulating the use of land and other resources;
6. *Any party that has an interest in or is affected by such developments (I&APs)* in providing clarity on the EIA process and information requirements; and
7. *Commenting authorities* when fulfilling their commenting role. These authorities include, but are not limited to:
 - the Department in the Province responsible for planning matters;
 - the provincial heritage authority;
 - South African Heritage Resources Agency (SAHRA);
 - the Department of Water Affairs (DWA);
 - the Department of Health;
 - the Department of Transport;
 - the Department of Human Settlements;
 - the Department of Public Enterprises ;
 - the Department of Agriculture, Forests and Fisheries (DAFF);
 - the Department of Mineral Resources;
 - the national (South African National Parks - SANParks) and / or provincial conservation authority; and
 - all municipalities (A, B and C)² – particularly those departments concerned with environmental management, nature conservation, spatial planning, land use and zoning, transport planning and control of emissions and waste (e.g. air pollution, effluent/wastewater).

¹ Regulations 73 and 74, respectively.

² "A" refers to metropolitan municipalities, "B" to district municipalities and "C" to local municipalities

2 Overview of the EIA Process

Environmental Impact Assessment has existed as an environmental management tool for over 30 years. It is applied internationally and is a legal requirement in many countries. Project-specific environmental assessment is referred to as the “first generation EIA”. As a result of limitations in the project-specific approach, impact assessment methodologies evolved, with Strategic Environmental Assessment (SEA) becoming prominent in the 1990s. SEA has been prominent in addressing environmental concerns in relation to policies, programmes or plans and is referred to as the “second generation” of environmental assessment. In recent years, there has been increasing recognition of the need for environmental assessment tools to be adapted so as to become effective in contributing to sustainable development objectives. Thus, Sustainability Assessment has emerged as the “third generation” of environmental assessment.

In South Africa, EIA became a legal requirement in 1997 with the promulgation of regulations under the Environment Conservation Act (Act 73 of 1989) (ECA). Subsequently, NEMA was passed and new EIA Regulations were formulated. These EIA Regulations, which were promulgated in terms of Chapter 5 of NEMA, came into effect on 3 July 2006 (Government Notice No. R. 385, 386 and 387 in *Government Gazette* 28753 dated 21 April 2006). The EIA regulations under the ECA have been repealed but continue to apply to applications started before the new regulations came into effect.

Any activity which is listed in Listing Notice 1 or Listing Notice 2 of these EIA Regulations is subject to environmental authorisation. The difference between Listing Notices 1 and 2 is in the process that needs to be followed, with Listing Notice 1 activities being subject to Basic Assessment and those in Listing Notice 2 to Scoping and Impact Assessment (IA). For ease of reference, the term EIA process is used in this guideline when the information provided is relevant to both processes (i.e. Basic Assessment and Scoping and Impact Assessment).

2.1 Purpose of the EIA Process

The overarching purpose of the EIA process is to determine, assess and evaluate the consequences (positive and negative) of a proposed development, activity or project. Thus the EIA must consider the strategic context of a development proposal along with broader societal needs, the natural resource base and the public interest. Ways to avoid negative impacts and enhance benefits must be addressed. Where negative impacts cannot be avoided, measures to minimise these must be sought. Consideration must be given to the probable significance or “acceptability” of the effects or consequences, based on clear criteria. The criteria that are used to determine the significance of impacts are a critical component of the EIA and a suggested approach in this respect is provided in Section 4.8 of this guideline.

For the purposes of NEMA, an environmental impact means, in essence, any impacts on land, water, the atmosphere or living organisms, or on the inter-relationships between them, and impacts on their physical, chemical, aesthetic and cultural properties and conditions that influence human health and well-being. These impacts may be both positive (in the sense that they improve the integrity and health of an ecosystem or human health and well being) or negative. This means that virtually any significant impact on the surroundings within which we live, including impacts on the built environment and socio-economic impacts that affect human health or well-being, must be assessed during the EIA process.


An iterative approach is appropriate for the purposes of the EIA process. This is required in order to achieve the key purpose of EIA, which is to identify solutions, approaches or options for development that best meets sustainability objectives. Throughout the EIA process there are opportunities to constantly refine and adapt the development proposal to respond to these issues or concerns, in relation to the natural, social and economic factors.

2.2 Key stages of the EIA process

The assessment process, whether it is a Basic Assessment or Scoping and IA, is made up of the following three steps (see Figure 1):

1. *Application or notification phase:* This involves completion of information in an application form (in the case of scoping and EIA) or a notification form (in the case of Basic Assessment) for submission to the competent authority. This step in the process is largely for administrative purposes, since it is the means for registering the project (which will then be allocated a reference number and case officer). It is advisable for the Applicant and the EAP to confirm the activities for which application is being made, particularly when the final documentation is submitted (i.e. Basic Assessment Report (BAR) or EIR). Projects can change and evolve during the EIA process.

2. *Scoping phase:* The aim of the scoping phase is to address the question: "What issues and alternatives need further investigation?" While the scoping phase culminates in a scoping report in the scoping/EIA process, it is done in preparation for and prior to the compilation of the BAR in the basic assessment process. The scoping



IN A NUTSHELL

Scoping should ask and answer the question:

- Which issues and alternatives need to be considered and assessed?

EIA should ask and answer the questions:

- What are the possible consequences of this development?
- How significant are these consequences?
- What can be done to avoid significant harmful negative environmental impacts and where these cannot be avoided, what can be done to minimise them?
- What can be done to enhance positive impacts?

stage involves two key activities. Firstly, environmental issues and concerns that require investigation need to be identified and secondly, feasible alternatives³ that require assessment need to be determined. This information is then used to determine the scope of the EIA. Environmental issues and feasible alternatives are identified through consultation with the authorities, I&APs and specialists. In addition, the project team must use its knowledge and experience to identify issues and alternatives. The applicant or developer must also provide input on potential issues and alternatives, particularly where they have constructed or operate similar facilities elsewhere in South Africa.

³ Alternatives are defined in the EIA regulations as follows: "**alternatives**", in relation to a proposed activity, means different means of meeting the general purpose and requirements of the activity, which may include alternatives to –

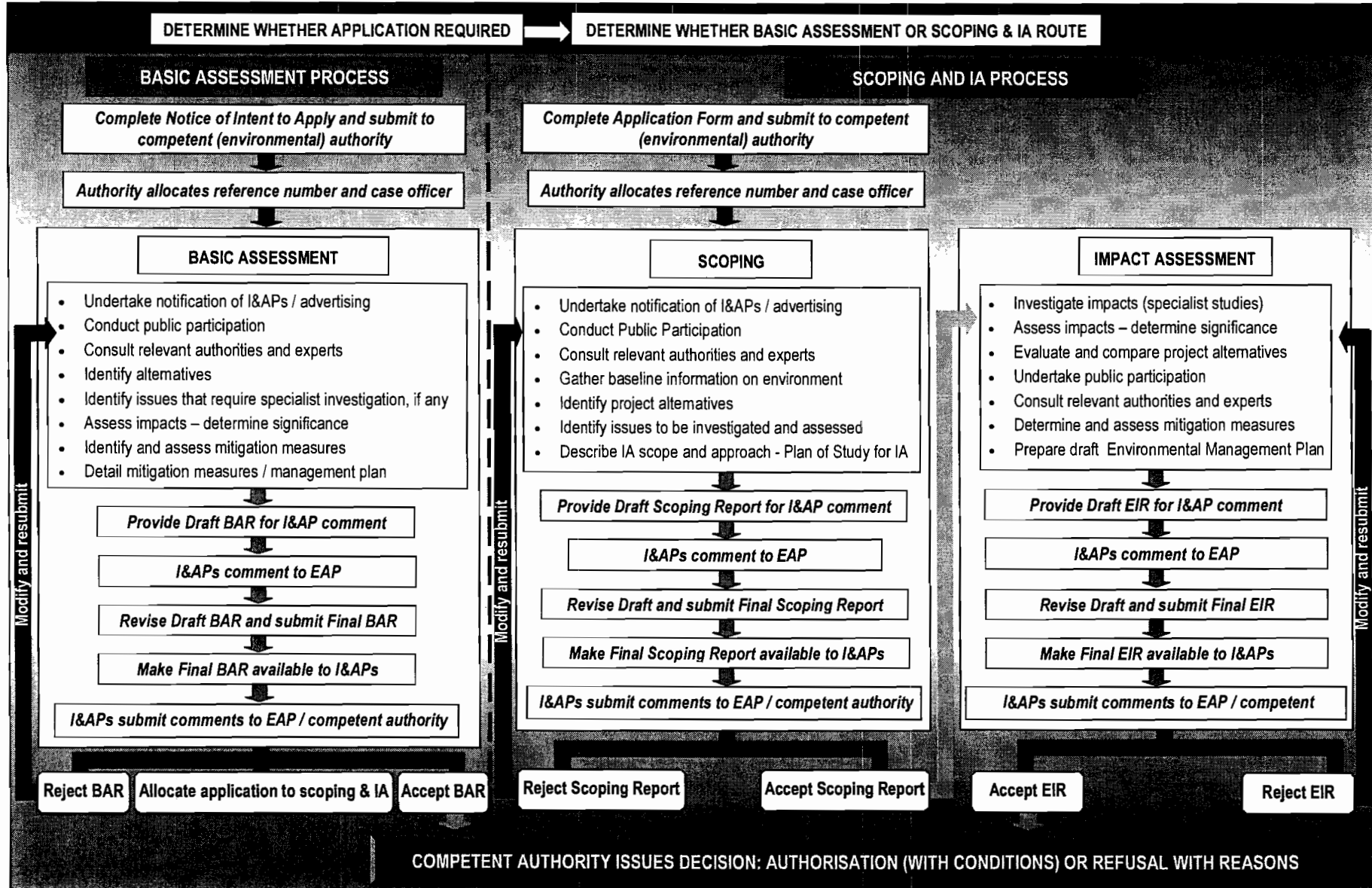
- (a) the property on which or location where it is proposed to undertake the activity;
- (b) the type of activity to be undertaken;
- (c) the design or layout of the activity;
- (d) the technology to be used in the activity; and
- (e) the operational aspects of the activity."

In summary, scoping serves four key purposes:

- to determine the scope of work for the EIA, namely the issues and alternatives that need to be investigated and assessed;
 - to initiate a public participation process to inform I&APs about the project and to obtain their input on issues and concerns that they may have about the project;
 - to identify, based on existing information and knowledge, whether there are any potential negative environmental impacts that could preclude the development proceeding; and
 - to determine, based on existing information and knowledge, what changes should be made to the project design or plan to resolve (i.e. avoid) or reduce potential negative environmental impacts or to enhance potential positive impacts.
3. *Impact Assessment phase:* The basic questions that must be addressed during this phase are:
- Will the proposed development contribute to or result in the achievement of sustainable development?
 - What are the potential positive and negative environmental effects of this proposed development?
 - How can any significantly harmful impacts be avoided or reduced (i.e. mitigated) and positive impacts be enhanced?, and
 - What is the level of certainty that mitigation measures will be implemented and that they will be effective?

In general, determining the significance of impacts involves the undertaking of a number of specialist studies – a specialist study is conducted for each issue where there may be significant impacts (e.g. an air quality study may be carried out because of potentially significant impacts associated with stack emissions). Both the positive environmental impacts and the measures to avoid or minimise significantly harmful impacts (i.e. mitigation measures) need to be considered. Impacts must be assessed for all the alternatives that have been identified, with a view to identifying the most environmentally appropriate option. Public participation activities take place throughout the impact assessment phase.

FIGURE 1: Overview of the EIA Process



3 Overview of the Legal Framework

Apart from the provisions of NEMA and the EIA regulations, applicants, decision-makers and I&APs must also take into account other laws and legal principles applicable to the EIA process. A description of the legal requirements of the EIA process is provided in this section, followed by a brief overview of the other key applicable laws and principles. The section is structured as follows:

- A description of the applicable legislation or principle is provided (Section 3.1).
- The implications of the applicable legislation are considered for the key roleplayers, namely Applicant and EAP, the decision-maker and I&APs.

It is important to bear in mind that while the Applicant is the person who intends to submit an application and in whose name the application is made, it is the EAP who manages the content and process of the application. He or she must be appointed by the Applicant before an application is made. In most cases, legal rights and duties apply directly to the EAP, acting on behalf of the Applicant, but in some instances, rights and duties also rest independently on the Applicant. Where the latter is the case the distinction is described in this guideline.

The EIA process comprises the following activities:

- determining whether an application for an environmental authorisation is required; and if so:
- determining who the competent authority is;
- determining whether the Basic Assessment process or the scoping and EIA process must be undertaken;
- lodging the application in accordance with the relevant competent authority's application form;
- completing the required assessment, including public participation, and submitting it to the competent authority for consideration; and
- issuing of a decision by the competent authority (authorisation or refusal).

There is a statutory appeal period, whereby notification of the intention to appeal must be lodged with the Minister or MEC concerned within 10 days of receiving notification of the decision. The appeal itself must be submitted within 30 days thereafter and no one may submit an appeal unless the required notification was lodged. The Minister, MEC or delegated organ of state may however extend the period within which notice of intention to appeal or the appeal itself must be submitted.

3.1 Key Applicable Legislation

The requirement to obtain environmental authorisation for certain development proposals or projects is legislated in NEMA. The EIA Regulations make provision for two types or levels of assessment, namely Basic Assessment and Scoping and EIA. The EIA regulations specify that:

- all activities that appear in Listing Notice 1 (GN No. R. 386 of 21 April 2006) require a Basic Assessment;
- all activities that appear in Listing Notice 2 (GN No. R. 387 of 21 April 2006) are subject to scoping and EIA; and
- where an application involves activities from both Listing Notices, scoping and EIA must be undertaken.

Furthermore, the EIA regulations make provision for an application to also be subjected to the scoping and EIA process on the basis of the results of the Basic Assessment.⁴ If an applicant intends to undertake an activity to which basic assessment must be applied and based on the advice of the EAP is of the view that is unlikely that the competent authority will be able to reach a decision based on the information contained in the basic assessment report, the applicant may apply for permission to apply scoping instead of basic assessment to the application.

Minimum Requirements in Terms of Section 24 of NEMA

Section 24 of NEMA sets out the minimum requirements that every application for an environmental authorisation must comply with. They are:

Co-operative Governance

- Where the activity concerned falls under the jurisdiction of more than one organ of state, there must be coordination and cooperation between the relevant organs of state, when considering the assessment.
- Reference should be made to the principles of cooperative governance.
- When making decisions, organs of state must consider the findings and recommendations flowing from an investigation, the general objectives of integrated environmental management laid down in NEMA as well as the section 2 principles for environmental management contained in NEMA. There must be an indication that the decision-maker has applied his or her mind to these considerations.

Investigation and Assessment

- Where it is determined that the environment is likely to be significantly affected by the proposed activity in an application for an environmental authorisation, that environment must be clearly and accurately described, the potential consequences for the environment must be properly investigated, and thereafter the significance of each of the potential consequences / impacts must be assessed.

Public Participation

- There must be full and proper public information and public participation procedures.
- All I&APs, including all spheres of government that have jurisdiction over the activity in question must be given a reasonable opportunity to participate in the information and public participation procedures.

Alternatives and Mitigation Measures

- All applications for environmental authorisation must include an investigation of alternatives to the proposed activity, which must consider the potential consequences or impacts of each alternative.
- The "no go option" must be assessed, which involves investigating the environmental impacts of not undertaking the activity.
- Mitigation measures to avoid, minimise or remedy adverse impacts must also be investigated.

Gaps in Knowledge

- It is a further requirement that gaps in knowledge be reported upon, as well as the adequacy of the predictive methods and underlying assumptions used in the assessment of the potential impacts.
- It is important to report any uncertainties that were encountered while compiling the information.

Monitoring and Management of Consequences

- Arrangements for the monitoring and management of consequences for, or impacts on the environment must be investigated and formulated.
- There must be follow up in that the effectiveness of the monitoring and management arrangements must be evaluated during the implementation (construction and operation) of the activity.

Compilation of Information and Maps

- NEMA makes provision for the Minister or an MEC with the concurrence of the Minister to compile information and maps⁵ that specify the attributes of the environment in particular geographical areas. The information or maps may include the sensitivity, extent, interrelationship and significance of such attributes. Where such information or maps exist, the environmental attributes specified therein must be taken into consideration in compiling the application.

⁴ Regulation 25 of GN R 385.

⁵ This provision relates to the Environmental Management Frameworks that are provided for in the EIA Regulations.

Other Legal Requirements

- The application must make provision for adherence to requirements that are prescribed in any specific environmental management act that is relevant to the listed or specified activity in question.
- There must be investigation, assessment and evaluation of the impact of any proposed listed or specified activity on any national estate referred to in section 3(2) of the National Heritage Resources Act (excluding the National Estate contemplated in section 3(2)(i)(vi)(vii) of that Act).

Overview of the EIA Regulations and their purpose

Chapter 5 of NEMA focuses on promoting the use of appropriate environmental tools, primarily environmental and social impact assessment procedures, as a means to achieve the goal of integrated environmental management. The EIA Regulations, made under section 24 of NEMA, are intended to integrate and facilitate environmental impact management with development activities or processes, in line with sustainable development objectives. They provide a method for the investigation, assessment and communication of the potential consequences or impacts of listed activities. The EIA process must not only provide the competent authority with all the information necessary to make an informed decision, but it should also provide the applicant with sufficient information to enable him to decide to amend or withdraw his application where the activities will result in unacceptable environmental impacts.

The purpose of the EIA Regulations is therefore to ensure that the impacts of activities for which environmental authorisations are necessary are properly assessed; so that the positive environmental impacts are enhanced; the activities which may have an unacceptable, negative effect on the environment are not authorised and those which are suitable for authorisation are approved, with conditions to avoid or mitigate possible detrimental effects. In essence, the goal of the EIA process is that it is an objective process that contributes to the goal of sustainable development.

Bill of Rights

The Constitution of the Republic of South Africa, 1996 ("the Constitution") is the supreme law in South Africa. Chapter 2 of the Constitution contains the Bill of Rights including section 24 which provides that:

"Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Other rights protected by the Constitution are relevant to an application for environmental authorisation. Those rights include the right to administrative justice⁶ and to information⁷, and some rights, known as "socio-economic rights", such as access to adequate housing.⁸ In general, the State has a duty to ensure the progressive realisation of socio-economic rights.

The right to administrative justice is relevant to applications for environmental authorisations because decisions made by the competent authority in the course of the EIA process (such as the decision to accept a scoping report) as well as a final decision on the application fall into the definition of "administrative action" in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).⁹ This is discussed in more detail below.

⁶ Section 33.

⁷ Section 32.

⁸ Section 26.

⁹ Section 1.

Functional areas of national, provincial and local government competence

The environment is included in Schedule 4 to the Constitution as a functional area of concurrent national and provincial legislative competence. This means that both national and provincial government have the power to make legislation that affects the environment. Where a conflict exists between national and provincial legislation, national legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the conditions set out in section 146 of the Constitution are met. The conditions include where the national legislation is necessary for the protection of the environment and where a matter requires uniformity across the nation and the national legislation is necessary to maintain security or economic unity. Other functional areas relevant to this guideline are also listed in Schedule 4. They include agriculture, soil conservation, nature conservation, housing, public transport, regional planning and development, urban and rural development and pollution control.

Schedule 5 of the Constitution contains matters of exclusive provincial legislative competence. They include provincial planning and provincial roads. The national government has exclusive legislative competence in respect of matters not listed in Schedules 4 and 5; these matters include energy and water (other than sanitation and potable water systems).

Local government (municipalities)

Municipalities have specific responsibilities in terms of ensuring sustainable development. The Local Government: Municipal Systems Act, 32 of 2000, for example defines development to mean:

“sustainable development, and includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at – improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and ensuring that development serves present and future generations;”¹⁰

The Act specifically requires that municipal services be environmentally sustainable.¹¹ “Environmentally sustainable” in relation to the provision of a municipal service, means the provision of a municipal service in a manner aimed at ensuring that –

- the risk of harm to the environment and to human health and safety is minimised to the extent reasonably possible under the circumstances;
- the potential benefits to the environment and to human health and safety are maximised to the extent reasonably possible under the circumstances; and
- legislation intended to protect the environment and human health and safety is complied with.

The Act further provides that the national Minister responsible for Local Government may make regulations or issue guidelines for incentives and penalties to encourage the efficient use of resources when providing services, the recycling of waste and other environmental objectives.¹²

Cooperative governance

The principle that different organs of state and spheres of government must cooperate with one another is a fundamental feature of the Constitution. Chapter 3 of the Constitution sets out principles of cooperative government and intergovernmental relations which must be applied by all spheres of government. Among these principles is the requirement that organs of state must cooperate with one another in mutual trust and good faith by, among other things, informing one another of, and consulting one another on matters of common interest¹³ and co-ordinating their actions with one another.¹⁴

The principles of cooperative governance are, to some extent, given effect to in NEMA and the EIA regulations. The NEMA principles require intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.¹⁵ NEMA provides that a competent authority must consult

¹⁰ Section 1.

¹¹ Section 73(2)(d).

¹² Section 86A(e).

¹³ Section 41(1)(h)(iii).

¹⁴ Section 41(1)(h)(iv).

¹⁵ Section 2(4)(l).

with every state department that administers a law relating to a matter affecting the environment when considering an application for environmental authorisation.¹⁶ NEMA and the EIA regulations also provide for consultation and written agreements between the Minister or MEC and any organ of state responsible for administering the legislation relating to any aspect of an activity that also requires environmental authorisation under NEMA. This is discussed in more detail in the section dealing with establishing whether other authorisations or approvals are necessary (Section 4.2.1).

Promotion of Administrative Justice Act

This Act gives effect to the Constitutional right to administrative action that is lawful, reasonable and procedurally fair. It also gives effect to the right to written reasons for administrative action as contemplated in section 33 of the Constitution. The Act aims to promote an efficient administration and good governance and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function by giving effect to the right to just administrative action. In terms of the Act, administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

WHAT IS ADMINISTRATIVE ACTION?

"Administrative action" as defined in section 1 of PAJA means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, excluding certain classes of executive, legislative and quasi-judicial functions set out in the Act.

A "decision" is:

"Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

- making, suspending, revoking or refusing to make an order, award or determination;
- giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- imposing a condition or restriction;
- making a declaration, demand or requirement;
- retaining, or refusing to deliver up, an article; or
- doing or refusing to do any other act or thing of an administrative nature, and a reference to failure to take a decision must be construed accordingly."

What is regarded as fair administrative procedure depends on the circumstances but PAJA provides guidance in this regard. In the case of administrative action that affects "any person", a person undertaking the administrative action is obliged to:

- give notice of the nature and purpose of the action;
- afford involved persons a reasonable opportunity to make representations about the action;
- give a clear statement of the administrative action;
- give adequate notice of the right of review or appeal; and
- give adequate notice of the right to request reasons.¹⁷

Departures from these provisions are allowable only where "reasonable and justifiable in the

¹⁶ Section 24 O(2).

¹⁷ Section 3(2)(b). An administrator also has a discretion to give people an opportunity to obtain assistance, including legal representation, to present and dispute legal arguments and to appear at hearings in person (section 3(3)).

circumstances”,¹⁸ or where a law, agreement or other instrument lays down a different, but fair, procedure.¹⁹

PAJA makes a distinction between administrative action which “materially and adversely affects the rights or legitimate expectations of any person” (Section 3) and administrative action that “materially and adversely affects the rights of the public” (Section 4). Where administrative action could be said to affect the public, the action-taker has a discretion to decide what steps to follow to give effect to fair procedure, including holding public enquiries, following notice and comment procedures or following other fair procedures.²⁰

Right to reasons

PAJA also fortifies the constitutional right to request reasons for administrative action, by providing for a procedure in terms of which a person can request written reasons where his or her rights have been adversely and materially affected.²¹

Judicial review

PAJA provides numerous grounds on which administrative action may be reviewed by a court.²² The grounds include that:

- the decision-maker was not empowered to take the decision, or was biased;²³
- he or she took into account irrelevant considerations or failed to consider relevant ones;²⁴
- the action was not rationally connected to the purpose for which it was taken;²⁵ and
- that the action was unreasonable.²⁶

Courts have wide powers to grant remedies when undertaking review of administrative action, including setting aside the administrative action.²⁷ Consequently any person responsible for making an administrative decision must ensure that this is done in a manner that does not create grounds for review.

Promotion of Access to Information Act (PAIA)

This Act gives effect to Section 32 of the Constitution by providing mechanisms to ensure access to certain information held by a public body as well as to information held by private bodies (in the latter case, as long as this information is required in order to exercise or protect any rights). The Act allows for access to records, regardless of when such records came into existence.²⁸ The Act specifically retains Sections 31 (1) and (2) of NEMA which also deal with access to information from a public or private body. While the Act confers specific rights of access to information, I&APs should not forego the normal public participation process and only try to obtain information through the PAIA provisions. As registered I&APs, they have specific rights (and responsibilities) in terms of being afforded an opportunity to “access” all the information, to provide comments and to be informed of the outcome.

¹⁸ Section 3(4)(a).

¹⁹ Section 3(5).

²⁰ Section 4(1).

²¹ Section 5.

²² Section 6.

²³ Section 6(2)(a).

²⁴ Section 6(2)(e)(iii).

²⁵ Section 6(2)(f)(ii)(aa).

²⁶ Section 6(2)(h).

²⁷ Section 8(1)(c).

²⁸ Section 3.

3.1.1 Legal framework applicable to the Applicant / EAP

LEGISLATION	REQUIREMENTS	IMPLICATIONS
The EIA Regulations		
GN No. R. 385 of 21 April 2006		The purpose of the EIA Regulations from the Applicant's point of view is to set out the steps that the Applicant must take, and the time frames within which the Applicant must take them, before an application for authorisation can be considered and granted or refused.
Regulation 17	Appointment of an EAP	The steps which an Applicant must take include the appointment of an EAP to manage the application process. For the purposes of the EIA regulations the role of the EAP and Applicant become virtually synonymous.
Regulation 15	Combined applications	Where two or more activities will occur on one site or more than one activity of the same type will occur on two or more sites, the Applicant must follow the steps in regulation 15.
Regulations 37 and 38 read with regulation 81	Conditions of approval	The Applicant (as distinct from the EAP), is required to ensure that the conditions subject to which the application is granted are met, both during the construction phase and once the listed activity commences. (For instance, as a condition of authorisation, the Applicant may have to provide periodic audit reports, indicating the current level of compliance and describing any action that may need to be taken to mitigate the effects of any non-compliance.) ²⁹ The Regulations therefore also ensure that compliance by holders of environmental authorisations with environmental conditions imposed on them is monitored and can be enforced using powers in NEMA. Failure to comply with a condition is a criminal offence. ³⁰
Chapter 4	Amendments	An Applicant may apply for an authorisation to be amended. ³¹ If the amendment is non-substantive, then the Applicant can expect the authority to decide on the application promptly. If it appears to be a substantive amendment and it appears that public participation is warranted, the Applicant must undertake a public participation process. If it appears that there will be a significant impact on the environment, then the Applicant may be directed to submit an entirely new application. ³²
Chapter 5	Exemptions	An Applicant who wishes to apply for an exemption from a provision of the regulations must follow the steps prescribed in Chapter 5. An applicant may be exempted from a provision relating to the PPP only if the rights or interests of other parties are unlikely to be adversely affected.
Chapter 7	Appeals	An Applicant may appeal, either against the refusal to grant an authorisation or against the conditions upon which the authorisation was granted. The Applicant must comply with the procedures and time-frames set out in Chapter 7.

²⁹ Regulation 38.

³⁰ Regulation 81.

³¹ Regulation 40.

³² Regulation 42.