

The Director-General
Department of Forestry, Fisheries & Environment

Attention: Mr Alvan Gabriel

By Email: agabriel@environment.gov.za

30 January 2022

Dear Mr Gabriel

**Re: COMMENT ON CONSULTATION ON INTENTION TO AMEND THE SECTION 24H
REGISTRATION AUTHORITY REGULATIONS, 2018 (GN45703 of 31 December 2021)**

1.

A. INTRODUCTION

These comments are submitted on behalf of the Southern African Faith Communities' Environment Institute (SAFCEI) and Earthlife Africa – Johannesburg (ELA-JHB).

2.

SAFCEI is a registered non-profit organisation that was established by multi-faith environmental and social justice advocates to, among other things, confront environmental and socio-economic injustices, and to support and encourage faith leaders and their communities in Southern Africa to take action on eco-justice, sustainable living and climate change issues. SAFCEI includes an Energy and Climate Justice Programme that focusses on climate change and energy.

3.

ELA-JHB is a non-governmental non-profit voluntary association established by

environmental and social justice advocates to mobilise civil society around environmental issues in relation to people, and includes a Sustainable Energy and Climate Change Project that works to promote local and global environmental and social justice on sustainable energy and climate change issues. ELA-JHB is an autonomous branch of Earthlife Africa.

4.

These comments are endorsed by the following organisations:

- The Green Connection;
- groundWork;
- Project90by2030; and
- Kobush Ontwikkelingsvereniging.

5.

On 31 December 2021 the Minister of Forestry, Fisheries and the Environment ('the Minister') published a notice in the *Gazette* of her intention to consult on her intention to amend the section 24H Registration Authorities Regulations, 2016. Members of the public were invited to submit written comments or inputs to the Minister within 30 days of publication of this notice, namely by 30 January 2022.

6.

B. THE PROPOSED AMENDMENTS

B.1. Powers

The Consultation Notice indicates that the Minister proposes to amend the s24H Registration Authority Regulations, 2016 in terms of sections 24(5)(e), s24H and s44 of the National Environmental Management Act, 1998 (NEMA), read with regulation 1(2) of the EIA Regulations, 2014.

7.

Section 24 of NEMA deals with environmental authorisations. Section 24(5) empowers the Minister to make regulations consistent with section 24(4) (which prescribes mandatory

requirements relating to procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment):

- (b) laying down the procedure to be followed in respect of:
 - ...
 - (v) appeals against decisions of competent authorities;
 - ...
- (e) specifying that specified tasks performed in connection with an application for an environmental authorisation may only be performed by an environmental assessment practitioner registered in accordance with the prescribed procedures;

8.

Section 24H deals with registration authorities, and empowers the Minister to appoint or refuse an application by an association proposing to register its members as environmental assessment practitioners (EAPs).

9.

Section 44 provides the Minister with general regulation-making powers, including regulations dealing with any matter which under NEMA must be dealt with by regulation¹ and generally, to carry out the purposes and provisions of NEMA.²

10.

B.2. Purpose and Application of these Regulations

The current s24H Registration Authority Regulations, 2016 describe their purpose as follows:

The purpose of the Regulations is to:

- (1) prescribe the manner in which an association proposing to register its members as environmental assessment practitioners may apply to the Minister to be appointed as a registration authority in terms of section 24H (1) of the Act;
- (2) specify tasks performed by an environmental assessment practitioner in connection with an application for environmental authorisation, where environmental impact assessment has been identified as the environmental instrument to be utilised in informing such application for environmental

¹ Section 44(1)(a).

² Section 44(1)(b).

authorisation, that may only be performed by a registered environmental assessment practitioner; and

- (3) prescribe the criteria for registration and renewal of registration of environmental assessment practitioners and associated procedures for such registration or renewal of registration.

11.

The proposed amendments seek to insert a new Regulation 2A, which if implemented would broaden the scope of the s24H Registration Authority Regulations, 2016 to apply to:

- (a) an application for an environmental authorisation contemplated in the Act and the Environmental Impact Assessment Regulations;
- (b) an application submitted in terms of section 24G of the Act;
- (c) an application for a waste management license contemplated in the National Environmental Management: Waste Act, 2008...;
- (d) an application for an atmospheric emission license contemplated in the National Environmental Management: Air Quality Act, 2004...;
- (e) strategic environmental assessments, environmental management programmes or any other appropriate environmental management instrument introduced through regulations, contemplated in the Act, in so far as it informs an application contemplated in paragraphs (a) – (d); and
- (f) an appeal contemplated in terms of 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).

12.

B.3. Proposed Amendment to regulation 14

The proposed amendments seek to amend regulation 14 of the s24H Registration Authority Regulations, 2016. Regulation 14 currently reads as follows:

Requirement to register as environmental assessment practitioner

No person other than a registered environmental assessment practitioner, registered with a registration authority, may hold primary responsibility for the planning, management, coordination or review of environmental impact assessments and associated EMPs.

13.

The proposed amendments seek to extend the ambit of regulation 14, and reads as follows:

Requirement to register as environmental assessment practitioner

- (1) No person other than a registered environmental assessment practitioner may perform tasks in connection with:
- (a) an application for an environmental authorisation contemplated in the Act and the Environmental Impact Assessment Regulations;
 - (b) an application submitted in terms of section 24G of the Act;
 - (c) an application for a waste management license contemplated in the National Environmental Management: Waste Act, 2008..., read with the Environmental Impact Assessment Regulations;
 - (d) an application for an atmospheric emission license contemplated in the National Environmental Management: Air Quality Act, 2004...'
 - (e) strategic environmental assessments, environmental management programmes or any other appropriate environmental management instruments introduced through regulations, contemplated in the Act, in so far as it informs an application contemplated in paragraphs (a) – (e); and
 - (f) an appeal contemplated in terms of 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).

14.

Proposed regulation 14(2) elaborates on the tasks contemplated in regulation 14(1)(a), proposed regulation 14(3) elaborates on the tasks contemplated in regulation 14(1)(b), and proposed regulation 14(4) elaborates on the tasks contemplated in r14(1)(c).

15.

Curiously, the proposed amendments do not elaborate on the tasks contemplated in regulation 14(1)(d) – (f).

16.

Proposed regulation 14(5) provides exceptions to the stipulation that only a registered EAP may perform the specified tasks:

Notwithstanding subregulation (1), (2), (3) and (4), a person that:

- (a) takes the final decision, based on recommendations received, on an application contemplated in subregulation (1)(a) – (c) or any delegated authority in respect of subregulation (1)(a) – (c);
- (b) prepares and submits comments on documents forming part of an application contemplated in subregulation (1)(a) – (c); and
- (c) investigates, assesses, prepares and submits specialist reports contemplated in regulation 19(8) and 23(5) of the Environmental Impact Assessment Regulations;

is not required to be a registered environmental assessment practitioner.

17.

The proposed amendments do not provide similar exceptions relating to proposed regulations 14(1)(d) – (f).

18.

Regulation 20 of the proposed s24H Registration Authority Regulations, 2016 (which is not earmarked for amendment) provides that a person who contravenes regulation 14 is guilty of an offence (and if convicted liable to the penalties contemplated in s49B (3) of NEMA, namely a fine and/or imprisonment not exceeding a year).

19.

Regulation 22 of the proposed indicates, among other things, that regulation 14(1)(d) to (f) takes effect on a date to be published in the *Gazette*.

20.

C. IMPLICATIONS OF THE PROPOSED AMENDMENTS

C.1. Appeals

As has been explained above, proposed regulation 14(1)(f) stipulates that no person other than a registered EAP may perform tasks in connection with an appeal contemplated in terms of section 43 of NEMA, relating to an application, strategic environmental assessment, environmental management programme or any other appropriate environmental instrument, contemplated in paragraphs (a) – (e).

21.

While the proposed amendments elaborate upon the tasks contemplated in proposed regulation 14(1)(a) to (c), they are silent on the tasks contemplated in proposed regulation 14(1)(f).

22.

In addition, while proposed regulation 14(5) provides certain exceptions to the stipulation

that no person other than a registered EAP may perform tasks in connection with applications for environmental authorisation,³ applications submitted in terms of s24G of NEMA,⁴ and applications for waste management licenses,⁵ these exceptions do not extend to appeals contemplated in terms of section 43 of the NEMA relating to an application, strategic environmental assessment, environmental management programme or any other appropriate environmental instrument, contemplated in paragraphs (a) – (e).

23.

It follows that, as the proposed amendments are currently worded, no person other than a registered EAP may perform tasks in connection with an appeal contemplated in terms of section 43 of the NEMA, relating to an application, strategic environmental assessment, environmental management programme or any other appropriate environmental instrument, contemplated in paragraphs (a) – (e).

24.

This formulation is very wide and vague, and gives rise to significant legal uncertainty. In particular, the wording ‘appeal contemplated in terms of section 43 of NEMA relating to an application’ is so wide that it is capable of being interpreted as prohibiting any person other than a registered EAP from performing the task of preparing and submitting appeals against decisions on applications for environmental authorisation, s24G decisions, waste management license decisions and AEL decisions, as well as prohibiting any person other than a registered EAP from submitting an appeal relating to decisions relating to an SEA, EMPr or any other appropriate environmental instrument contemplated in NEMA in so far as it informs an application contemplated in regulation 2A(a) to (e).

25.

For example, reference to an appeal contemplated in terms of section 43 of NEMA relating to an application for environmental authorisation can readily be construed as ‘relating to’ the competent authority’s decision on the application. The decision on the application (i.e. the

³ Proposed regulation 14(1)(a).

⁴ Proposed regulation 14(1)(b).

⁵ Proposed regulation 14(1)(c).

environmental authorisation) is integrally linked to the application for authorisation. An application itself is not appealable in terms of s43 of NEMA: the right to appeal arises from a decision made to authorise or refuse the application for environmental authorisation. This is supported by having regard to regulation 4 of the NEMA EIA Regulations,⁶ which deals with notifications of decisions on environmental authorisation applications. Regulation 4(3) provides that, for the purpose of this regulation, the decision includes the complete environmental authorisation granted or refused and (in accordance with the maxim *expression unius est exclusion alterius*) would on the face of it exclude other preliminary decisions taken in a multistage EIA process. Based on our experience of multistage EIA decision-making processes, interested and affected parties (I&APs) are not notified of any right of appeal against preliminary decisions, but are informed of their right to appeal against an environmental authorisation granted relating to the application.

26.

Assuming that this is not the Minister's intention to require I&APs to engage registered EAPs to prepare and submit appeals in terms of s43 of NEMA (and to prohibit I&APs preparing and submitting such appeals themselves, or instructing their legal representatives to do so on their behalf), it is respectfully submitted that:

- (a) the proposed amendments should be revised to clearly indicate what the tasks contemplated in regulation 14(1)(f) are that may only be performed by a registered EAP; and
- (b) regulation 14(5) should be revised to clearly provide that, notwithstanding regulation 14(1), a person that prepares and submits an appeal against a decision on authorisation or licensing arising from the various applications and decision-making processes contemplated, is not required to be a registered EAP. This should necessarily include grounds of appeal that relate to earlier decisions made in multi-stage decision-making processes, as well as grounds of appeal that relate to the adequacy of various reports submitted by registered EAPs in the authorisation process and upon which various

⁶ GNR.982 of 4 December 2014 (as amended).

decisions are made, as well as recommendations on authorisation made by the EAPs who prepared these reports.

27.

In the event that it is the Minister's intention to require that only registered EAPs may 'perform any tasks' in connection with appeals against the applications and environmental management instruments referred to in regulation 14(1)(a) to (e), this should also be clearly stated.

28.

In such an event, or in the event that the proposed amendments are promulgated as proposed, it is respectfully submitted that proposed regulation 14(1)(f) would be vulnerable to being challenged and set aside on High Court Review. It is submitted that, among other things, proposed regulation 14(1)(f) is:

- inconsistent with the recognition in the preamble to NEMA that it is desirable that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance;
- inconsistent with various environmental management principles set out in s2 of NEMA, and in particular the principle that the participation of all I&APs in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured;⁷
- inconsistent with the general objective of integrated environmental management to ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;⁸
- susceptible to challenge as being void for vagueness;

⁷ Section 2(4)(f) of NEMA. Other relevant principles include section 2(2); section 2(4)(g), section 2(4)(h) and section 2(4)(q).

⁸ Section 23(2)(d).

- in conflict with the Constitutional right to administrative action that is lawful, reasonable and procedurally fair;⁹
- susceptible to challenge as being not rationally connected to the purpose for which the power was given in the enabling provisions of NEMA, and in particular s24(5) read with s24(4).

29.

C.2. Atmospheric Emission License Applications

As has been explained above, proposed regulation 14(1)(d) stipulates that no person other than a registered EAP may perform tasks in connection with an application for an AEL contemplated in the National Environmental Management: Air Quality Act, 2004 (NEMA: AQA).

30.

While the proposed amendments elaborate upon the tasks contemplated in proposed regulation 14(1)(a) to (c), they are silent on the tasks contemplated in proposed regulation 14(1)(d).

31.

In addition, while proposed regulation 14(5) provides certain exceptions to the stipulation that no person other than a registered EAP may perform tasks in connection with applications for environmental authorisation, applications submitted in terms of s24G of NEMA and applications for waste management licenses, these exceptions do not extend to AEL applications.

32.

This means that if the proposed regulations are promulgated in their current form, the regulations are capable of being interpreted as stipulating that only a registered EAP may in relation to AEL applications prepare and submit comments on documents forming part of the AEL application. The effect of the above relating to public participation is I&APs would be

⁹ Constitution of the Republic of South Africa, 1996, section 33(1).

required to appoint a registered EAP to prepare and submit comments on documents forming part of the AEL application.

33.

It is difficult to imagine that it is the Minister's intention to undermine public participation in this manner, and to effectively make it an offence for I&APs to prepare and submit their own comments on documents forming part of an AEL application.

34.

Assuming that this is not the Minister's intention, it is respectfully submitted that the proposed amendments should be revised to clearly indicate what the tasks contemplated in regulation 14(1)(d) are, and that regulation 14(5)(b) should be revised to include reference to regulation 14(1)(d).

35.

In the event that the amendments are promulgated as proposed, it is respectfully submitted that proposed regulation 14(1)(d) would be vulnerable to being challenged and set aside on High Court Review on the same or similar grounds as described in paragraph C.1 of these comments above.

36.

C.3. SEAs, EMPRs and other Environmental Management Instruments

As has been explained above, proposed regulation 14(1)(e) stipulates that no person other than a registered EAP may perform tasks in connection with SEAs, EMPRs or any other appropriate environmental management instruments introduced through regulations, contemplated in the Act, in so far as it informs an application contemplated in paragraphs (a) – (e).

37.

While the proposed amendments elaborate upon the tasks contemplated in proposed regulation 14(1)(a) to (c), they are silent on the tasks contemplated in proposed regulation 14(1)(e).

38.

In addition, while proposed regulation 14(5) provides certain exceptions to the stipulation that no person other than a registered EAP may perform tasks in connection with applications for environmental authorisation, applications submitted in terms of s24G of NEMA and applications for waste management licenses, these exceptions do not extend to SEAs, EMPRs or any other appropriate environmental management instruments introduced through regulations, contemplated in the Act, in so far as it informs an application contemplated in paragraphs (a) – (e).

39.

This means that if the proposed regulations are promulgated in their current form, the regulations are capable of being interpreted as stipulating that only a registered EAP may prepare and submit comments in relation to SEAs, EMPRs or any other appropriate environmental management instruments introduced through regulations, contemplated in the Act, in so far as it informs an application contemplated in paragraphs (a) – (e).

40.

The effect of the above relating to public participation is that I&APs would be required to appoint a registered EAP to prepare and submit comments in relation to SEAs, EMPRs or any other appropriate environmental management instruments introduced through regulations, contemplated in the Act, in so far as it informs an application contemplated in paragraphs (a) – (e).

41.

Again, it is difficult to imagine that it is the Minister's intention to undermine public participation in this manner, and to effectively make it an offence for I&APs to prepare and submit their own comments in relation to SEAs, EMPRs or any other appropriate environmental management instruments introduced through regulations, contemplated in the Act, in so far as it informs an application contemplated in paragraphs (a) – (e).

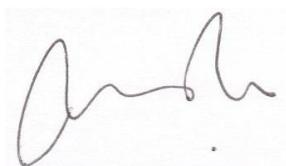
42.

Assuming that this is not the Minister's intention, it is respectfully submitted that the proposed amendments should be revised to clearly indicate what the tasks contemplated in regulation 14(1)(e) are, and that regulation 14(5)(b) should be revised to include reference to regulation 14(1)(e).

43.

In the event that the amendments are promulgated as proposed, it is respectfully submitted that proposed regulation 14(1)(e) would be vulnerable to being challenged and set aside on High Court Review on the same or similar grounds as described in paragraph C.1 of these comments above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Adrian Pole', written over a light grey rectangular background.

Adrian Leonard Pole

Acknowledgement:

The valuable contribution of environmental lawyer Angela Andrews is hereby acknowledged with thanks.