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Comments on the

National Environmental Management Laws Amendment Bill (Version B 14D–2017)

and the

National Forests Amendment Bill (Version B 11B–2016)

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Friends of Stellenbosch Mountain (FSM) has been active in Stellenbosch since 2008, working mainly on environmental and governance issues. FSM is part of the WESSA affiliate network and is a SARS-accredited Public Benefit Organisation.

Contents

Abbreviations used in these comments

NEMLA-AB	National Environmental Management Laws Amendment Bill, Version B 14D–2017
NFA-AB	National Forests Amendment Bill, Version B 11B–2016
NEMA	National Environmental Management Act 107 of 1998, as previously amended
NEMAQA	National Environmental Management: Air Quality Act 39 of 2004, as previously amended
NEMA-2008	National Environmental Management Amendment Act 62 of 2008, as previously amended
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004, as previously amended
NEMICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008, as previously amended
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003, as previously amended
NEMWA	National Environmental Management: Waste Act 59 of 2008, as previously amended
NFA	National Forests Act 84 of 1998, as previously amended
EAP	Environmental Assessment Practitioner as defined in Section 1 of the NEMA

1 NEMLA-AB: Delegation to EAPs

1.1 FSM is strongly opposed to the proposed amendment of subsection (2) of Section 24O of NEMA, as set out in Clause 7(b) of the NEMLA-AB. The proposed amendment reads[1]:

> *(2) The Minister, the Minister responsible for mineral resources,* [or] *an MEC or an environmental assessment practitioner must consult with every State department that administers a law relating to a matter affecting the environment when such Minister, the Minister responsible for mineral resources or an MEC considers an application for an environmental authorisation.";*

1.2 Below, we first discuss the technical legalities and will conclude that this proposed amendment is probably unlawful and unconstitutional. We restate in Item 1.10 below that the structural problem underlying the above proposed amendment is the same problem which has led to state capture in South Africa in the past. In Section 2 below, we conclude that the corresponding section in the 2017 EIA Regulations is also probably unlawful.

1.3 An *environmental assessment practitioner* (EAP) is a commercial juristic person and not an organ of state: Section 1 of the NEMA defines an EAP as *the individual responsible for the planning, management, coordination or review of environmental impact assessments, strategic environmental assessments, environmental management programmes or any other appropriate environmental instruments introduced through regulations.*

[1] As usual, proposed amendments are shown as underlined text, proposed exclusions shown in [square brackets]

1.4 The above proposed amendment would therefore, if passed, **delegate powers and competencies to a juristic person who is not an executive organ of state and not employed by such organ of state nor directly answerable to an organ of state.**

1.5 The separation of powers between organs of state and juristic entities outside of the state is sacrosanct in law. **The proposed amendment would therefore seem to be unlawful and unconstitutional.** In particular:

1.5.1 Section 238 of the Constitution of the Republic of South Africa grants powers of delegation only by one organ of state to another organ of state:

> ***238 Agency and delegation*** *An executive organ of state in any sphere of government may — (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.*

1.5.2 Unlike the proposed amendment, Section 99 of the NEMBA does maintain the clean distinction between organs of state and non-state personae:

> *(1) Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this section and section 100, the* ***Minister*** *must follow an appropriate consultative process in the circumstances. (2) The* ***Minister*** *must, in terms of subsection (1) – (a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power; (b) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and (c) allow public participation in the process in accordance with section 100.*

Note the absence of reference to non-state personae. Clearly, it is the ***Minister*** and his department who are to carry out consultations. *Section 99 of the NEMBA makes no provision for delegation to entities which are not organs of state.* Put differently, an environmental assessment practitioner is not a *competent authority* as per Section 1 of the NEMBA.

1.5.3 Also relevant are Sections 42, 42A and 42B of NEMA itself dealing with powers of delegation. All three sections make no mention delegation of powers to non-organs of state. **Under the entire NEMA suite of laws, delegations of power are limited strictly to the hierarchy of state departments and governmental entities.**

1.6 Related reasons for FSM opposition to the proposed amendment are:

1.6.1 The separation of powers between organs of state and private commercial entities must necessarily imply prohibition of delegation of state powers to non-state juristic persons: decisions must be based on legislation and policy as approved by Parliament and not directly influenced by commercial interest of private entities.

1.6.2 That general principle must, of course be applied also to the specific instantiation at hand, the *environmental assessment practitioner* (EAP). An EAP is a freelance commercial agent who has to earn his keep. While he may sign statements of moral or intellectual independence (see e.g. S1 and S13(1)(a) in the 2017 EIA Regulations), he is in practice dependent economically on those commercial entities which engage him, the so-called *proponent* and *applicant*. Both the EAP and subcontracted *specialists* are paid by the applicant for an environmental authorisation and is therefore beholden to the applicant,

even to the extent that the implicit threat exists that an EAP who recommends that the environmental authorisation be denied would not be employed again.

1.6.3 In practical terms, consultations performed by an EAP would hence run the multiple risks of

i. significant narrowing of the *scope of consultations*, as determined by the whims and needs of the EAP,
ii. *filtering by the EAP of questions asked and responses obtained* from other State departments, and
iii. *reduced insight* on the part of the Minister, MEC and his state employees of the underlying issues involved in a particular application for environmental authorisation.

1.6.4 As already stated, however, the practicalities and economics of involving EAPs in conducting intergovernmental consultations are irrelevant once the main problem of delegation of governmental powers to nongovernmental entities are recognised.

1.7 The proper way to address a shortage of capacity in governmental departments is not to involve EAPs but to **increase the capacity of governmental environmental agencies** by appointing competent persons, even former EAPs, to serve in governmental departments where they may lawfully carry out the intrastate consultations and delegations laid out by the law.

1.8 To repeat and to anticipate possible misunderstandings: The problem lies not in the consultation itself, not in the fact that an EAP may and should consult various organs of government; of course he should. The problem lies in the blurring of powers and responsibilities, in the fact that the EAP is not an organ of state himself and has neither then legal mandate nor the authority nor the responsibility of an organ of state. For this reason, the "internal" consultations *between* different organs of state and the "external" consultations between an EAP and different organs of state are qualitatively different. Both "internal" and "external" modes of consultation are acceptable and legal, but "external" bodies may not be granted the powers of "internal" organs of state. **"External" consultations may not replace "internal" ones.**

1.9 To anticipate yet another misinterpretation: Of course organs of state may and should make use of *external consultants*. Such external consultants, including EAPs, have valuable contributions to make. However, they may not become a cog in the machinery of intra-state consultations themselves. **The boundaries between intra-state and consultant-state consultations are important. They may not be blurred.**

1.10 **State capture**, as experienced by South Africa in the past ten years and now being investigated, is based on exactly the same mechanism as that being proposed in the amendment to Section 24O of the NEMA: a private for-profit entity insiduously becomes part of the state machinery itself rather than being kept at arm's length.

2 EIA Regulations Section 7(2) also unconstitutional

2.1 The objections and criticisms pertaining to the proposed amendment of subsection (2) of Section 24O of NEMA, as set out in Clause 7(b) of the NEMLA-AB, have implications also for the corresponding Environmental Impact Assessment Regulations.

2.2 Section 7(2) of the 2017 EIA Regulations (GN 326, Govt Gazette 40772) reads (emphasis is ours):

> *7(2) The* ***competent authority or EAP must consult with every organ of state that administers a law*** *relating to a matter affecting the environment*

relevant to that application for an environmental authorisation when such competent authority considers the application and ***unless agreement to the contrary has been reached the EAP will be responsible for such consultation.***

2.3 Note the close resemblance in wording between the EIA Regulation 7(2) and the proposed NEMA Section 24O amendment. Note that this wording is not problematic as long as it pertains to strictly "external" consultations between an organ of state and an EAP, but that it becomes state capture if it is interpreted as empowering the EAP to insert himself into the mandatory intra-state consultation process. **The EAP may talk to everyone, but the organs of state must by law carry our their own independent consultations anyway, without the EAP in attendance or copied into emails.**

2.4 It now becomes important that the proposed amendments to the NEMA in the form of NEMLA-AB fall into the same year 2017 as the 2017 EIA Regulations. It is therefore clear that the above Section 7(2) of these Regulations was approved **years before** the relevant amendment of the NEMA itself had been tabled in the House and NCOP in 2019 and 2020.

2.5 In this light, it would now appear as if the proposed amendment of the NEMA is an attempt at a **post facto justification** of the above Regulation S7(2). In other words, the Regulations appear to be motivating the Act amendment, and not the other way around. The tail is wagging the dog.

2.6 As we have demonstrated in Section 1, the delegation of state powers and responsibilities to an EAP is probably unconstitutional and certainly in conflict with good governance. **We conclude that Section 7(2) of the 2017 EIA Regulation or any successor is likewise unconstitutional and must be amended as soon as possible to clarify the distinctions.** For example, a sanitised Section 7(2) could read

7(2) The competent authority ~~or~~ and EAP must consult with every organ of state that administers a law relating to a matter affecting the environment relevant to that application for an environmental authorisation when such competent authority considers the application ~~and unless agreement to the contrary has been reached the EAP will be responsible for such consultation~~.

3 NEMLA-AB: Control versus eradication of listed invasive species

3.1 FSM supports the revised definitions of the terms *control* and *eradicate* in Section 1 of the NEMBA, as per amendments set out in Clause 41 of NEMLA-AB.

3.2 In its Clause 46, NEMLA-AB proposes to amend Section 73 of the Biodiversity Act as follows:

73 (2) A person who is the owner of land on which a listed invasive species occurs must – . . . (b) take steps to control [and] *or eradicate the listed invasive species* [and to prevent it from spreading] *as prescribed by the Minister*;

FSM opposes the amendment of the existing text, reading *control AND eradicate*, to *control OR eradicate* for the following reasons:

3.2.1 As defined in the amended Section 1 of NEMBA (see above), **eradication** of a species, that is, *the complete removal from the Republic of South Africa of such species*, is the goal of all alien invasive combat measures; *eradication* is therefore goal-oriented. **Control** is a weaker term which is merely process-oriented, emphasising the efforts made, not the final results achieved.

3.2.2 Naturally the ultimate goal of eradication is hard to achieve. That does not, however, justify the substitution of effort or process for that goal. Colloquially, "It is not good enough just to try; you have to succeed." Control without aiming for eradication aims too low. *Control* therefore cannot be placed on an equal footing with *eradication* but must be subordinated to it.

3.2.3 The proposed amendment of Section 73(2)(b) of the Biodiversity Act from the existing "control AND eradicate" to "control OR eradicate" would result in the unintended consequence of leading to cessation of efforts at eradication since eradication would no longer be required but optional.

3.2.4 Once eradication as a goal is no longer taken seriously, all efforts towards combatting listed invasive species are doomed to fail. Once incomplete *control* ceases, any residual specimens of an invasive species will simply multiply again. Such *control* would therefore have to be maintained forever, and the corresponding permanent fiscal burden would never cease. **The proposed amendment would therefore in the long run sabotage the goal of eradication.**

3.3 In its Clause 47, NEMLA-AB also proposes to amend the *and* by an *or*. In this Clause 47, the distinction is not all that important, since the prescribed methods will apply to both cases anyway, i.e. both to the goal and to the process. It would do no harm to keep the *and* rather than amend it to a meaningless *or*.

4 NEMLA-AB: Appeals against directives issued by municipal managers

4.1 The proposed amendment contained in Clause 34 of NEMLA-AB inserts, as elsewhere, the municipal manager of a local authority as empowered to issue directives in terms of NEMA Section 43. That seems fine. However, the amendment also specifies the *municipal council* as the appeal authority: see Lines 43, 46 and 49 on Page 21 of NEMLA-AB. **FSM submits that most local authority councils do not have the capacity and are not equipped to act as appeal authorities in environmental appeal matters.** Furthermore, due to the close working relationship between a municipal council and the corresponding hierarchy of officials, which include the directive authority (the Municipal Manager or his/her delegated official), Council does not have the necessary arms-length distance needed for independent adjudication of an environmental appeal.

4.2 FSM notes that municipal councils are not normally designated as appeal authorities in terms of other legislation.

4.3 FSM therefore proposes that the amendment proposed in Clause 34 of NEMLA-AB be modified to propose that reference to *municipal council* Section 43(8) of NEMA **should not be inserted**, so that the amended amendment would read as follows (compare to Lines 35–50 on Page 21 of NEMLA-AB). Text to be omitted from the amendment is shown as ~~strikethrough text~~:

> *43(8) A person who receives a directive in terms of section 28(4) may lodge an appeal against the decision made by the Director-General or any person acting under his or her delegated authority, the Director-General of the department responsible for mineral resources or any person acting under his or her delegated authority, [or] the provincial head of department or any person acting under his or her delegated authority* ~~*or the municipal manager of a municipality or any person acting under*~~

~~his or her delegated authority~~, to the Minister, the Minister responsible for mineral resources [or], the MEC ~~or the municipal council~~, as the case may be, within thirty days of receipt of the directive, or within such longer period as the Minister, the Minister responsible for mineral resources [or], MEC or municipal council may determine.

43(9) [Notwithstanding] Despite subsection (7) [and], pending the finalisation of the appeal, the Minister, Minister responsible for mineral resources [or], the MEC ~~or municipal council~~, as the case may be, may, on application and on good cause shown, direct that [any part or provision of the directive not be suspended, but only strictly in exceptional circumstances and where there is an imminent threat to human health or the environment.] —

4.4 Instead of designating municipal councils as NEMA Section 43 appeal authorities, the above amendment should be extended by inserting a new Section 43(9A) with a text to the effect that

43(9A) In the case of appeals lodged against the decision made by the municipal manager of a municipality or any person acting under his or her delegated authority, the appeal authority shall be the MEC of the province within which the municipality is located.

5 Comments on the NFA-AB

5.1 It is unclear why the new Section 2A set out in Clause 2 of the NFA-AB is necessary or what it should achieve. It reads

Public trusteeship of nation's forestry resources: *(2A) The National Government, as the public trustee of the nation's forestry resources, acting through the Minister, must ensure that these resources, together with the land and related ecosystems which they inhabit, are protected, conserved, developed, regulated, managed, controlled and utilised in a sustainable and equitable manner, for the benefit of all persons and in accordance with the constitutional and developmental mandate of government.*

5.1.1 The content of this proposed Section 2A duplicates principles already set out elsewhere in the NFA (eg Chapter 2).

5.1.2 It also juxtaposes possible actions (*protected, conserved, developed, regulated, managed, controlled and utilised*) which may be in conflict with each other without indicating on what basis such conflicts should be resolved. For example, a need to protect may conflict with a need to develop. Such conflicts are not resolved by the vague wording of Section 2A.

5.1.3 The generic power, responsibility and duty of National Government is already established, so the text *The National Government ... must ensure ...* is just repetition.

5.2 As the proposed Section 2A seems to serve no positive purpose, it should therefore be deleted.

5.3 The other amendments proposed in the NFA-AB seem reasonable and are supported.

6 Some Support, but caveats on energy, minerals and mining

6.1 FSM is in support of many proposed amendments, but not all of them. Time does not permit more detailed comments on those amendments not explicitly addressed below.

6.2 **Energy, minerals, mining:** The proposed amended Section 24P and new Section 24PA of NEMA appear to be a step in the right direction. There remain, however, significant grounds for concern for splitting powers and functions relating to environmental matters between the national department responsible for the environment and the department responsible for energy, minerals and mining. In particular, Section 38A of the Mineral and Petroleum Resources Development Act, 2002 as amended, states that

> *38A. (1) The Minister* [of Minerals and Energy] *is the responsible authority for implementing environmental provisions in terms of the National Environmental Management Act, 1998 (Act No. 107 of 1998) as it relates to prospecting, mining,exploration, production or activities incidental thereto on a prospecting, mining, exploration or production area.*

Environmental issues should be adjudicated and enforced on the basis of environmental science and environmental criteria in all spheres of life. The capacity for environmental science and envirnomental criteria exists in the Department of Environment, Forestry and Fisheries. Excluding environmental issues pertaining to energy, minerals and mining from this sole adjudication authority, or even splitting authority on such matters, must lead in the long run to environmental degradation and destruction as non-environmental criteria which prevail in energy, minerals and mining overrule environmental ones. This matter cannot be addressed in these amendments, of course, but would have to be addressed in a fundamental overhaul of all legislation in this regard.