

UNPOISON COMMENT ON PROPOSED REGULATIONS UNDER NEMA

The Director-General
Department of Environment, Forestry & Fisheries

Attention: Mr Alvan Gabriel

By Email: agabriel@dffe.gov.za

30 January 2022

Dear Mr Gabriel,

Re: COMMENT ON CONSULTATION ON INTENTION TO AMEND THE SECTION 24H REGISTRATION AUTHORITY REGULATIONS, 2016 (GN 1655 published in GG45703 of 31 December 2021)

These comments are submitted by **UNPOISON**, a civil society collective made up of multi-sector organisations, educational institutions, NPO's, researchers, advocacy groups,, communities, environmental practitioners, scientists, doctors, and concerned citizens, united behind the common goals of preserving our constitutional rights to a healthy, clean, just, and safe South Africa for all.

A. BRIEF OVERVIEW

UNPOISON would like to record its concerns as to the limitations on public participation in environmental decision making under the National Environmental Management Act¹ (NEMA) that will result from the promulgation of these proposed regulations.

If promulgated the proposed regulations will make it impossible for civil society or their lawyers to appeal environmental authorisations granted under NEMA without utilising the services of an EAP. This restriction will raise the cost of appealing and in all likelihood deter appeals, thus discouraging public participation at a critical stage in the environmental authorisation process under section 24 of NEMA. The chilling effect of the increased cost of participation will negatively affect poor communities disproportionately who bear the brunt

¹ Act 107 of 1998 as amended

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of poor decision making in the area of environmental management, and who will not be able to absorb the additional cost of employing EAP's to make their appeals.

The regulations, through proposed regulation 14(1) (d) to (e) will exclude civil society participation (unless submissions are made with the use of EAPs) in applications for atmospheric emission licenses, (reg 14(1)(d)), strategic environmental assessments, environmental management plans or "any other appropriate environmental management instruments introduced through regulations contemplated in the act, in so far as it informs an application contemplated in regulation 2A (a) to (e)..." (reg 14(1)(e)).

As will be concluded from the provisions of NEMA and the Constitution set out below, apart from lacking a rational basis the proposed regulations *by far* exceed the purpose and objective of the appeal provisions set out in section 43 of NEMA and are in conflict with the purpose of NEMA as a whole. NEMA requires administrative officials to promote public participation in environmental decision making, particularly by vulnerable and disadvantaged persons and communities. Because the promulgation of these proposed regulations will result in civil society members incurring increased costs in their quest to protect the environment, they will materially and adversely affect the rights of persons seeking to assert their environmental rights and rights to procedurally fair administrative action under NEMA and the Constitution.

The proposed regulations also curtail the rights of interested and affected parties and members of civil society to utilise lawyers to make submissions to several decision making processes under environmental statutes. Included here are applications for atmospheric licences under the National Environmental Management Air Quality Act, strategic environmental assessments, environmental management plans or "any other appropriate environmental management instruments introduced through regulations contemplated in the act, in so far as it informs an application contemplated in regulation 2A (a) to (e)..."

The curtailment of the right to use legal representation in administrative decision making processes constitutes a violation of the fundamental right under the Constitution to procedurally fair administrative action.

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Unless substantially redrafted to address the concerns raised herein, the proposed regulations stand to be challenged and set aside as unlawful, being *ultra vires* the NEMA (ie. regulations that exceed what is permissible in terms of the statute) and other environmental statutes, and unconstitutional.

The Department is accordingly requested to withdraw or substantially amend the draft regulations so that they in no way infringe on the current rights of civil society to participate in environmental decision making under NEMA.

B. LEGISLATIVE OVERVIEW

The Consultation Notice indicates the intention of the Minister (in the Department of Forestry, Fisheries and the Environment) to amend the s24H Registration Authority Regulations, 2016.

The purpose of the s 24H Regulations includes to:

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

The proposed amendments, by inserting a new Regulation 2A intend to 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*

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- 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).*

Proposed Amendment to regulation 14

The proposed amendments seek to increase the ambit of regulation 14 of the s24H regulations, changing them from:

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.

to:

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).*

Analysis of the proposed amendments

The 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,

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relating to an application, strategic environmental assessment, environmental management programme or any other appropriate environmental instrument, contemplated in paragraphs (a) – (e).

The proposed regulation 14(5) provides exceptions to the stipulation that only a registered EAP may perform the specified tasks, but these exceptions do not extend to proposed regulations 14(1)(d) – (f). These exceptions therefore 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).

As a consequence, these amendments will have the result that 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).

Other decision making processes

The proposed regulations, through proposed regulation 14(1) (d) to (e) will also exclude civil society participation (unless submissions are made with the use of EAPs) in applications for atmospheric emission licenses, (reg 14(1)(d)), strategic environmental assessments, environmental management plans or “any other appropriate environmental management instruments introduced through regulations contemplated in the act, in so far as it informs an application contemplated in regulation 2A (a) to (e)...” (reg 14(1)(e)).

As will be set out below, these proposed regulations are in conflict with the intention of NEMA and stand to be set aside as **ultra vires** (ie. regulations that exceed what is permissible in terms of the statute) and unlawful.

PURPOSE AND OBJECTIVE OF NEMA

The purpose and objective of NEMA is set out in the following provisions:

NEMA PREAMBLE

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The Preamble indicates that the purpose of the statute is to promote public participation in environmental decision making:

“AND WHEREAS it is desirable-

that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance;”

...and..

“that the law should be enforced by the State and that the law should facilitate the enforcement of environmental laws by civil society;”

NEMA PRINCIPLES

The NEMA principles likewise seek to promote participation in decision making, and in particular by those economically marginalized, who in all likelihood would be financially challenged by having to secure the services of a professional in order to appeal or submit comments in compliance with proposed regulation section 14(1) d to f.

Relevant principles include:

“Section 2(2): Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.”

“Section 2(4) (f) The participation of all interested and affected parties 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.”

“Section 2(4) (g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.”

“Section 2(4) (h) Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.”

“Section 2(4) (q) The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.”

Other NEMA provisions are also relevant:

“Section 23 - General objectives

(1) The purpose of this Chapter is to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities.

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*(2) The general objective of integrated environmental management is to-
...(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment.”*

RIGHT TO FAIR ADMINISTRATIVE ACTION

NEMA section 43 states:

Appeals

“(1) Any person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister under this Act or a specific environmental management Act.

“(4) An appeal under subsection (1), (1A) or (2) must be noted and must be dealt with in the manner prescribed and upon payment of a prescribed fee.

It is clear that NEMA provides for appeals and authorises their regulation. The question that arises is whether the proposed regulations have gone too far and limited the right granted in section 43, in a manner which is *ultra vires* (ie. regulations that exceed what is permissible in terms of the statute), in that the exercise of a power has gone beyond what is provided for by the statute?

It is submitted that the proposed regulations if promulgated, far exceed the purpose and objective of section 43 of NEMA, and will entrench procedurally unfair administrative decision making under NEMA.

C. IMPLICATIONS OF THE PROPOSED AMENDMENTS

The fundamental rights of people in South Africa, are enshrined in the Constitution. Section 33 of the Constitution provides for the right to just administrative action, which includes the right to administrative action that is lawful, reasonable and procedurally fair (section 33(1)). Parliament has promulgated the Promotion of Administrative Action Act 3 of 2000 (hereafter PAJA) to give effect to section 33 of the Constitution.

Section 7(2) of the Constitution provides that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

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The following issues arise from the above provisions, from which a conclusion can be drawn that the proposed regulations if promulgated stand to be challenged by judicial review and set aside as unlawful and unconstitutional.

- (a) The proposed regulations generally exclude or limit public participation in environmental decision making under NEMA without any rational basis.
- (b) The proposed regulations will unlawfully remove the right of legal representation by interested and/or affected parties or members of civil society who wish to appeal environmental authorisation decisions made under section 24 of NEMA, and make submissions to various decision making processes.
- (c) Proposed regulation 14(1)(e) is so vague that it stands to be determined to be void.
- (d) The proposed regulations will raise the cost of participation in a wide range of environmental decision making processes under NEMA where public participation is made provision for, by requiring representations to be made through the services of environmental assessment practitioners (EAP's). This will have a disproportionate and discriminatory effect on vulnerable, disadvantaged and mostly black communities, who are generally most affected by environmental degradation, and who face the legacy of past environmental and other discrimination, and who will not be able to afford to employ an EAP to make their submissions.
- (e) Since the consequence hereof will be felt more acutely by less well-resourced communities – the draft regulations if promulgated will violate the principle of environmental justice which requires administrative decisions to reverse environmental discrimination:

NEMA Section 2(4)(c): Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.

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- (f) Apart from lacking a rational basis, the proposed limitations on public participation set out in regulation 14 *by far* exceed the purpose and objective of the appeal provisions set out in section 43 of NEMA. They are in conflict with the purpose of NEMA as a whole which requires administrative officials to promote public participation in environmental decision making, particularly by vulnerable and disadvantaged persons and communities. Because their promulgation will result in civil society members incurring increased costs in their quest to protect the environment, the regulations will materially and adversely affect the rights of persons seeking to assert their environmental rights and rights to procedurally fair administrative action under NEMA and the Constitution.
- (g) The draft regulations if promulgated are arguably administrative action within the meaning of section 33 of the Constitution and PAJA, and stand to be set aside as unlawful by judicial review under PAJA. The state, in promulgating regulations must respect, promote and protect the right to procedurally fair administrative action under the constitution, failing which it can be judicially reviewed under Section 6(2) of PAJA on grounds *inter alia* of being procedurally unfair, or that the regulations are *ultra vires* the empowering provision in the legislation and/or and that the action was irrational or unreasonable or otherwise unlawful or unconstitutional.
- (h) Even if the proposed regulations do not constitute administrative action, this does not mean that they are immune from judicial review. The exercise of all public power must comply with the Constitution and the doctrine of legality, which is part of the rule of law.² Legality requires that the functionary acts within the scope of the power which is conferred. It also requires rational decision making. It is a requirement of the rule of law that the exercise of public power must not be arbitrary. Decisions, and the manner of making them, must be rationally related to the purpose for which the power was given.

² *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 49.

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- (i) One of the key objectives and purposes of NEMA is to promote public participation in environmental decision making, and in particular by vulnerable and disadvantaged communities who have suffered past discrimination. The regulations unreasonably curtail participation in this sector of society and therefore are not rationally connected to the purpose of the statute which is to promote their participation.
- (j) As such, if promulgated they stand to be challenged as unlawful. They should be withdrawn or substantially amended to comply with the Constitution and NEMA.


UNPOISON

Per: Anna Shevel

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Director of Good Food Network

This letter is supported by the following organisations:

	African Centre for Biodiversity	Mariam Mayet	Executive Director
	SAOSO	Colleen Anderson	Secretariat
	PGS SA	Matthew Purkiss	Vice-Chair
	Green Times	Elma Pollard	Editor

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