



To whom it may concern:

NEMA EIA CIRCULAR 1 OF 2013:

- **INTERPRETATION OF "COMMENCE" IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 107 (ACT NO. 107 OF 1998) ("NEMA")**
- **PUBLICATION OF EIA GUIDELINES IN TERMS OF SECTION 24J OF NEMA**

This circular must be read together with the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA"), the Environmental Impact Assessment Regulations, 2010 ("2010 EIA Regulations"), the relevant Specific Environmental Management Acts ("SEMAs") and is not intended to be a substitute for the provisions of the NEMA, the 2010 EIA Regulations or the SEMAs, in any way.

1. INTERPRETATION OF "COMMENCE" IN TERMS OF NEMA

- 1.1. In terms of Section 24(2)(a) of NEMA activities may be identified which "*may not commence without environmental authorisation from the competent authority*" (emphasis added).
- 1.2. In terms of Section 24F of NEMA it is an offence to "*commence*" with a listed activity without first obtaining the required environmental authorisation from the relevant competent authority. A person convicted of this offence is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.
- 1.3. On 18 June 2010 the Minister published three listing notices (Listing Notice 1, Listing Notice 2 and Listing Notice 3) listing activities that have been identified in terms of Section 24(2)(a) of NEMA (Government Notice No. R. 544, R. 545 and R. 546 in Government Gazette No. 33306 of 18 June 2010 refer).

- 1.4. With the exception of Activities 19¹ and 20² of Listing Notice 1 and Activities 20³, 21⁴, 22⁵ and 23⁶ of Listing Notice 2, all the activities identified in Listing Notice 1, 2 and 3 came into effect on 2 August 2010⁷.
- 1.5. On 30 July 2010⁸ and on 10 December 2010⁹ corrections to the Listing Notices were published. These corrections all came into effect on 2 August 2010.
- 1.6. The requirement to obtain environmental authorisation for a listed activity is not retrospective in that it does not apply to a listed activity that "commenced" prior to the requirement to obtain environmental authorisation coming into effect. All listed activities that did not "commence" prior to the requirement to obtain environmental authorisation coming into effect, must, however, obtain environmental authorisation before the listed activity may be commenced with.
- 1.7. While NEMA originally did not provide a definition of "commence", the National Environmental Management Second Amendment Act of 2004 (Act No. 8 of 2004), however, inserted the following definition of "commence": "*when used in Chapter 5, means the start of any physical activity on the site in furtherance of a listed activity*".
- 1.8. The National Environmental Management Amendment Act of 2008 (Act No. 62 of 2008)¹⁰, which came into effect on 1 May 2009¹¹, amended the definition of commence to read: "*when used in Chapter 5, means the start of any physical activity, including site preparation and any other activity on the site in furtherance of a listed activity or specified activity, but does not include any activity required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity*".

¹ Any activity which requires a prospecting right or renewal thereof in terms of section 16 and 18 respectively of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).

² Any activity requiring a mining permit in terms of section 27 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) or renewal thereof.

³ Any activity which requires a mining right or renewal thereof as contemplated in sections 22 and 24 respectively of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).

⁴ Any activity which requires an exploration right or renewal thereof as contemplated in sections 79 and 81 respectively of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).

⁵ Any activity which requires a production right or renewal thereof as contemplated in sections 83 and 85 respectively of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).

⁶ Any activity which requires a reconnaissance permit as contemplated in section 74 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002), excluding where such reconnaissance is conducted by means of a fly over.

⁷ Government Notice No. R. 661, R. 662 and R. 663 in Government Gazette No. 33411 of 30 July 2010 refer).

⁸ Government Notice No. R. 660 in Government Gazette No. 33411 of 30 July 2010 refers.

⁹ Government Notice N No. R. 1159 in Government Gazette No. 33842 of 10 December 2010 refers.

¹⁰ Government Notice No. 22 in Government Gazette No. 31789 on 9 January 2009 refers.

¹¹ Government Notice No. 27 in Government Gazette No. 32156 of 21 April 2009 refers.

- 1.9. On 2 September 2010 Judge Baartman delivered a judgement in the case of the **Joint Owners of Remainder Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning & Others (Western Cape High Court Case Number: 23635/2009)** ("Pansy Cove"). Judge Baartman indicated that "...For an activity to qualify as having been 'in furtherance' of a listed activity, there must be evidence that it advanced the activity i.e. some reasonably direct connection between the physical activity and the listed activity."
- 1.10. While the term "commence" has been defined and the Pansy Cove judgement provided additional guidance, there seem to still be a lack of clarity amongst some parties on how to interpret the definition of "commence".
- 1.11. Whether someone has "commenced" will depend on the facts of each specific case, with the following being the subject of the case by case factual consideration:
 - 1.11.1. Is a listed activity involved?
 - 1.11.2. If yes, was any physical activity started prior to the coming into effect of the requirement to obtain environmental authorisation for the listed activity in question?
 - 1.11.3. If yes, was the physical activity undertaken on the site?
 - 1.11.4. If yes, was the physical activity undertaken on the site in furtherance of the listed activity in question?
 - 1.11.5. If yes, then the listed activity was "commenced" with and would not require environmental authorisation.
- 1.12. The abovementioned factual consideration will involve consideration of the:
 - 1.12.1. nature and location of the listed activity;
 - 1.12.2. nature and location of the physical activity; and
 - 1.12.3. nature of the relationship between the physical activity and the listed activity.

“...the start of any physical activity, including site preparation and any other activity...but does not include any activity required for the purposes of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity...”

- 1.13. The term “any” is on the face of it wide and unqualified and imposes no standards for the nature, degree, duration or significance of physical activity which will be regarded as constituting commencement.
- 1.14. The nature of physical activity required to establish commencement is nevertheless qualified by the definitional requirements that the activity be “physical”, “on the site” and “in furtherance of a listed activity”.
- 1.15. The “site preparation and any other activity” must also be a physical activity.
- 1.16. Unless they constitute listed activities, any activity required for the purpose of an “investigation or feasibility study” does not constitute the start of any physical activity.
- 1.17. The listed activity itself need not always to have been “started” with. Any physical activity must just have been started with on the site that was in furtherance of the listed activity.

“...on the site...”

- 1.18. The ordinary meaning of “site” is “a piece of ground or an area set apart for some purpose”.
- 1.19. Whether a particular area was “set apart for some purpose” must therefore be considered. For example a site development plan approved by the municipality as part of a Land Use Planning Ordinance (Ordinance No. 15 of 1985) (“LUPO”) application would clearly indicate the specific site that was set apart for the purpose of the development that was the subject of the LUPO application. In this regard the site is the original “site” that was set apart for the development and not the subsequent “sites” which might have been created by the development. For example, a farm might have been subdivided and the one portion rezoned to a subdivisinal area for township establishment, with individual erven eventually created on the portion of farm in question. The “site” of the residential development would be the entire portion of the farm in question, and not each individual erf that was created.
- 1.20. The start of a physical activity anywhere on the area identified for the development, namely on the area set apart for that purpose, will constitute

starting that physical activity “on the site” – this will be the case even if that activity is to be undertaken at a number of places on that site.

- 1.21. The “site” is therefore an identifiable area that was set apart for a particular purpose on which physical activity was started and on which a listed activity will take/have taken place – i.e. the physical activity and listed activity must both be on the “site”.

“...in furtherance of a listed activity...”

- 1.22. For the physical activity on the site to have been “in furtherance” of the listed activity in question there must be some reasonable direct connection between the physical activity and the listed activity in that the physical activity in question must have helped forward or advanced the listed activity in question:
 - 1.22.1. Any advancement through the undertaking of a physical activity must relate to the listed activity in a direct manner.
 - 1.22.2. The physical activity must be part of the process of engaging in the listed activity, and in some cases could take the form of a necessary preliminary step in order to undertake the listed activity itself.
 - 1.22.3. Any such preliminary step must however have a reasonably close connection with the listed activity.
 - 1.22.4. The nature of the physical activity relied upon may of itself be determinative of the question whether it was “in furtherance of” a particular listed activity.
 - 1.22.5. The location of the physical activity may also assist in the determination. The “in furtherance” relationship may patently be absent where the distance between the location of the listed activity and the physical activity renders such a relationship impossible.
 - 1.22.6. Just because a specific listed activity was “commenced” with also does not mean that the physical activity undertaken was in furtherance of all the listed activities making up a bigger development. Each specific listed activity must have been commenced with, in that the physical activity undertaken must have been in furtherance of each specific listed activity. A listed activity will only have “commenced” in accordance with the definition of “commence” where the physical activity relied on was in furtherance of that specific listed activity rather than an overall development, another listed

activity, or a set of listed activities. The determination whether a listed activity can be said to have "commenced" prior to the coming into effect of the requirement to obtain environmental authorisation therefore requires careful assessment of the nature and location of the prior and listed activities, and the relationship between them.

1.22.7. For example, ordinarily the construction of a fence around a property cannot logically be said to be "in furtherance" of all listed activities to still be undertaken on the site because there is not a reasonable direct connection between the fence and a particular proposed subsequent listed activity.

1.23. Considering the serious implications of commencing with a listed activity without environmental authorisation, and the need for the facts of each case to be carefully considered, it is recommended that the Department be consulted with and confirmation obtained from the Department if there is a need to determine whether or not someone has commenced with a listed activity prior to the requirement to obtain environmental authorisation coming into effect or whether environmental authorisation is required.

2. PUBLICATION OF EIA GUIDELINES IN TERMS OF SECTION 24J OF NEMA

2.1. The Department has since the coming into effect of the first EIA Regulations in 1997 released guidelines to provide guidance to its officials, other organs of state, applicants, environmental assessment practitioners, and the public.

2.2. On 1 May 2009 the National Environmental Management Amendment Act (Act No. 62 of 2008) came into effect which inserted a new Section 24J:

24J. Implementation guidelines

The Minister or an MEC, with the concurrence of the Minister, may publish guidelines regarding-

(a) listed activities or specified activities; or

(b) the implementation, administration and institutional arrangements of regulations made in terms of section 24(5).

2.3. Following the coming into effect of the 2010 EIA Regulations in terms of NEMA on 2 August 2010, the Department released a draft set of guidelines and information documents in terms of the 2010 NEMA EIA Regulations consisting of the following documents:

- Guideline on Transitional Arrangements (August 2010)
- Guideline on Alternatives (August 2010)
- Guideline on Public Participation (August 2010)
- Guideline on Exemption Applications (August 2010)
- Guideline on Appeals (August 2010)
- Guideline on Need and Desirability (August 2010)
- Information Document on the Interpretation of the Listed Activities (August 2010)
- Information Document on Generic Terms of Reference for EAPs and Project Schedules (August 2010)

2.4. The following updated drafts of the Department's EIA guidelines and information documents were released in October 2011:

- Guideline on Transitional Arrangements (October 2011)
- Guideline on Alternatives (October 2011)
- Guideline on Public Participation (October 2011)
- Guideline on Exemption Applications (October 2011)
- Guideline on Need and Desirability (October 2011)
- Guideline on Appeals (October 2011)
- Guideline on the Interpretation of the Listed Activities (to be released before the end of 2011)
- Guideline on Generic Terms of Reference for EAPs and Project Schedules (October 2011)
- Information Document on the Guidelines, Policies and Decision-Making Instruments Relevant to EIA Applications in the Western Cape (October 2011)
- Information Document on Biodiversity Offsets (October 2011)

2.5. Having received concurrence from the national Minister, the Department in March 2013 has **formally published the following EIA Guidelines in terms of Section 24J:**

- Guideline on Transitional Arrangements (March 2013)
- Guideline on Appeals (March 2013)
- Guideline on Alternatives (March 2013)
- Guideline on Public Participation (March 2013)
- Guideline on Exemption Applications (March 2013)

- Guideline on Need and Desirability (March 2013)
- Guideline on Generic Terms of Reference for EAPs and Project Schedules (March 2013)


2.6. While not formally published in terms of Section 24J of NEMA, the following information documents must also be taken into account:

- Information Document on the Guidelines, Policies and Decision-Making Instruments Relevant to EIA Applications in the Western Cape (October 2011)
- Information Document on Biodiversity Offsets (October 2011)

2.7. All the guidelines and information documents are available on the Department's website: www.westerncape.gov.za/eadp

Your interest in the future of our environment is much appreciated.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a long, wavy horizontal line.

ANTHONY BARNES

ACTING HEAD OF DEPARTMENT

Date: 2-4-2013