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# ENVIRONMENTAL ALERT

## IN THIS ISSUE

### NEMLA IV PROPOSES FURTHER CHANGES TO ENVIRONMENTAL LAWS

The National Environmental Management Laws Amendment Bill [B14D-2017] (NEMLA IV) was passed by the National Assembly on 27 November 2018 and was submitted to the National Council of Provinces (NCOP) for concurrence. Last month, the NCOP's Select Committee on Land and Mineral Resources invited comments on the latest version of NEMLA IV and these comments are being processed. If approved by the NCOP, the Bill will be sent for assent and signed into law.

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If enacted, NEMLA IV's proposed amendments will extend the financial provision requirement beyond mineral activities to include certain listed activities. It will also require the cessation of unlawful operations in an application for rectification of the activity. This will have significant financial implications, especially in instances where the regularisation process is stayed pending the outcome of criminal proceedings. Additionally, the potential for enforcement action will increase since directives to take steps to address pollution can now be issued to a wide range of parties, including parties who were not directly involved in causing the pollution (such as landowners and successors-in-title).

## **Financial provision requirement to extend beyond mineral activities**

One of the most significant new proposed amendments that was not included in the previous version of the NEMLA is the extension of the financial provision requirement.

If NEMLA IV is enacted, the Minister, or a Member of the Executive Committee may prescribe additional activities for which financial provisioning must be provided. An applicant for an EA for such activities would then be required to set aside financial provisioning for progressive rehabilitation, decommissioning and

closure and post closure activities, to ensure the mitigation, remediation and rehabilitation of the adverse environmental impacts (including latent and residual impacts (which extends to pumping and treatment of extraneous and polluted water where relevant)).

NEMLA IV doesn't contain a definition of progressive rehabilitation but "rehabilitate" means to restore to its "approved end use of land" and "remediate" to repair or reverse damage. The inclusion of progressive rehabilitation is generally not welcomed, as many believe that the funding for progressive rehabilitation is already accounted for in operational budgets.

It is anticipated that regulations will be published for the computation of the financial provision required. Based on the Financial Provision Regulations for mineral activities it is however anticipated that the amount required will be substantial.

## **Section 24G rectification application**

### *No longer an escape route*

The National Environmental Management Act, No 107 of 1998 (NEMA) presently affords the Minister of Environmental Affairs (Minister) a discretionary power in an application for an environmental authorisation (EA) or waste management

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licence (WML) where an activity has unlawfully commenced without these authorisations (24G Application) to order the cessation of the unlawful activity pending the 24G Application's outcome (Cession Order) and to undertake other measures (including compiling an assessment report regarding the activity, conducting a public participation process and implementing mitigatory measures for any resultant environmental impacts or environmental degradation which may have occurred). This is similarly the position under the National Environmental Management Air Quality Act, No 29 of 2004 (AQA) for the undertaking of a listed activity without an atmospheric emission licence (AEL).

If NEMLA IV is enacted, proposed changes to NEMA and AQA will make such orders *mandatory*, including importantly the Cession Order. The proposed amendments to NEMA include an exception to a Cession Order, if it can be proved that there are reasonable grounds to believe that ceasing the activity will result in serious environmental harm. No such exception is included in the proposed amendments to AQA.

This amendment would mean that entities who rely on the regularisation of their activities after unlawfully commencing them would need to think twice, especially since, if enacted, NEMLA IV will significantly increase the administrative fine payable by an applicant in a 24G Application from R5 million to R10 million.

## *Abmit of potential applicants increased*

The ambit of who can submit a 24G Application under NEMA may be increased to include successors-in-title or a person in control of land (Landowners) and not only a person who commenced an activity without the required WML or EA. Currently there is no recourse for Landowners where a listed activity has commenced without either a required EA or a WML on their property. The proposed amendments would allow for such Landowners to submit a 24G Application for the rectification of such activities. This is important where a Landowner wishes to proceed further with a development that was commenced with by another party.

If Landowners submit a 24G Application, an administrative penalty may still be levied against them, but it appears (from parliamentary discussions around the issue) that Landowners can raise the defence that they did not commence with the activity and make a submission for a reduced fine.

## **Extended scope for directives to be issued to parties that did not cause pollution**

Under NEMA, a directive may be issued to a person who is causing, has caused or may cause significant pollution or environmental degradation to cease operations and commence taking certain measures within a specified period. NEMLA IV proposes an amendment to allow a directive to be issued to any other person to whom the duty of care in NEMA applies, including a landowner, or a person

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*NEMLA IV seeks to change this position and proposed amendments empowering the licensing authority to revoke or suspend an AEL if it has evidence that the AEL holder has contravened AQA or an AEL condition.*



in control of land or who has a right to use the land, on or in which: (i) any activity or process is or was performed or undertaken; or (ii) any other situation exists, which causes, has caused or is likely to cause significant pollution or environmental degradation.

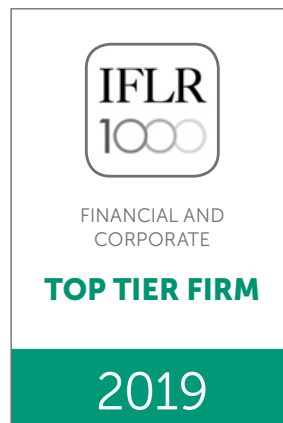
This is significant because the competent authority will be empowered to issue directives to parties in control of land to take reasonable measures to prevent or remediate the pollution, despite not causing the pollution.

**Revocation and suspension risks to operations for failure to comply with AQA or conditions of an AEL**

Whilst the conditions in an AEL may provide for it, AQA does not generally authorise a revocation or suspension of an AEL.

NEMLA IV seeks to change this position and by empowering the licensing authority to revoke or suspend an AEL if it has evidence that the AEL holder has contravened AQA or an AEL condition and such contravention *may have*, or is having, a significant detrimental environmental effect, including health impacts. The AEL holder will be afforded the opportunity to make representations, which must include submitting an atmospheric impact report.

Unlike the implications of revocation or suspension of a WML or EA, where other activities in the facility may continue, an AEL's revocation may result in the shutdown of the entire facility, which could have significant socio-economic impacts including costs to restart the facility once the enforcement procedures are finalised.





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CONTINUED

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## **Environmental ministerial licensing authority**

In keeping with integrated environmental authorisations, AQA currently provides that the Minister is the competent authority to issue AELs where they are part of a licence that is integrated with an EA or WML. NEMLA IV seeks to amend this position to provide that the Minister is the licensing authority only where the Minister is identified as such expressly in the NEMA, NEMWA or AQA.

## **Fines**

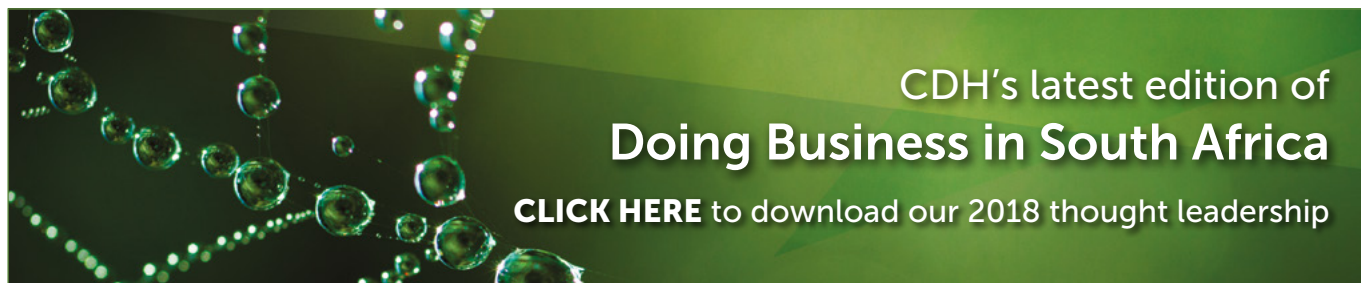
NEMLA IV also proposes clarifications to the fine payable for non-compliances relating to the failure to comply with a compliance notice or interfering with an environmental management inspector's duty as a fine not more than R1 million or one-year imprisonment.

## **Conclusion**

Despite criticism regarding inaction by the environmental enforcement authorities, the National Environmental Compliance and Enforcement Report 2017/2018 reflects the contrary. It notes that the number of criminal dockets handed to the National Prosecuting Authority for environmental transgressions has increased sizeably from 293 in 2015/16 to 416 in 2016/17 and 446 in 2017/18. The proposed changes to be introduced by NEMLA IV will impact these enforcement statistics.

NEMLA IV will have a major impact on the approval, management, regulation and planning procedures of various operations. The proposed changes and the status of NEMLA IV should therefore be considered by parties in their environmental management planning, to avoid costly mandated stoppages and increased liability risks.

*Sandra Gore, Valencia Govender and Azelle Park*



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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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