

Environmental Law

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SOUTH AFRICA

Significant changes proposed to waste exclusion legal regime



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Significant changes proposed to waste exclusion legal regime

The Minister of Forestry, Fisheries and the Environment (Minister) recently published draft regulations (Draft Regulations) that propose to amend the Regulations regarding the Exclusion of a Waste Stream or a Portion of a Waste Stream from the Definition of Waste, 2018 (Exclusion Regulations), as published under the National Environmental Management: Waste Act: 59 of 2008 (NEMWA).

With the re-use, recycling and recovery of waste as one of its objects, NEMWA forms the primary legal basis for South Africa's circular economy, which envisages the utilisation of waste as a resource for purposes of establishing a secondary resources economy. One of the regulatory mechanisms aimed at realising this objective is the Exclusion Regulations, which came into effect on 18 July 2018 and *inter alia* prescribe the manner in which a person may apply to the Minister for the exclusion of a waste stream or a portion thereof from the definition of waste for beneficial use.

Generally, an application may be submitted to the Minister by a waste generator, or group of persons generating the same waste, and must be accompanied by a risk assessment and risk management plan compiled in accordance with the Exclusion Regulations' requirements. The Minister may only grant the application following a public consultation process, as prescribed under NEMWA and insofar as the applicant demonstrates that the waste will be used for a beneficial purpose locally or internationally. Since the publication of the Exclusion Regulations, the Minister has published for consultation and granted several such applications.

The following material amendments are proposed under the Draft Regulations:

Timeframes

While the Exclusion Regulations currently only prescribe a timeframe for acknowledging receipt of the application, the draft amendments set additional timelines for decision-making and notifications. From public notices of past applications, it is evident that the process would generally take 6–12+ months following conclusion of the public participation process. The Minister is now required to reach a decision within 90 days of being provided with a compliant exclusion application that includes all the prescribed information.

Consultation process

Currently, the Exclusion Regulations require a consultation process to be undertaken in accordance with sections 72 and 73 of NEMWA, which places the responsibility on the Minister to consult with responsible Cabinet members and MECs and to conduct a public participation process by way of publication in the *Government Gazette*. The Draft Regulations propose a significant shift from this position, as they place the responsibility of conducting a consultation process on the applicant. Deviating from other environmental laws as well, the consultation process is not allowed to be conducted during the month of December. Applicants must take note of the additional costs that will be incurred and the need for the involvement of consultants to conduct a compliant participation process.



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**Trial project**

Completely novel is the proposed introduction of registration of a trial project, which will allow for an applicant to apply to exclude a waste or portion of a waste from the project. This will enable applicants to conduct the necessary tests on a waste stream to determine their viability to produce a product without having to apply for a waste management licence or follow the full application process as prescribed under the Exclusion Regulations.

Minimum criteria for applications

The minimum application criteria are proposed to be extended to also include a product beneficiary list, evidence of a public participation and, if applicable, lab or trial results. Some of the requirements of a risk management plan will instead have to be included under a risk assessment report, with the need for a South African National Standards compliant safety data sheet to be scrapped. A risk management plan will also more appropriately cater for identified risks and associated mitigation measures, becoming the standard against which compliance can be assessed – something which is currently absent from the Exclusion Regulations.

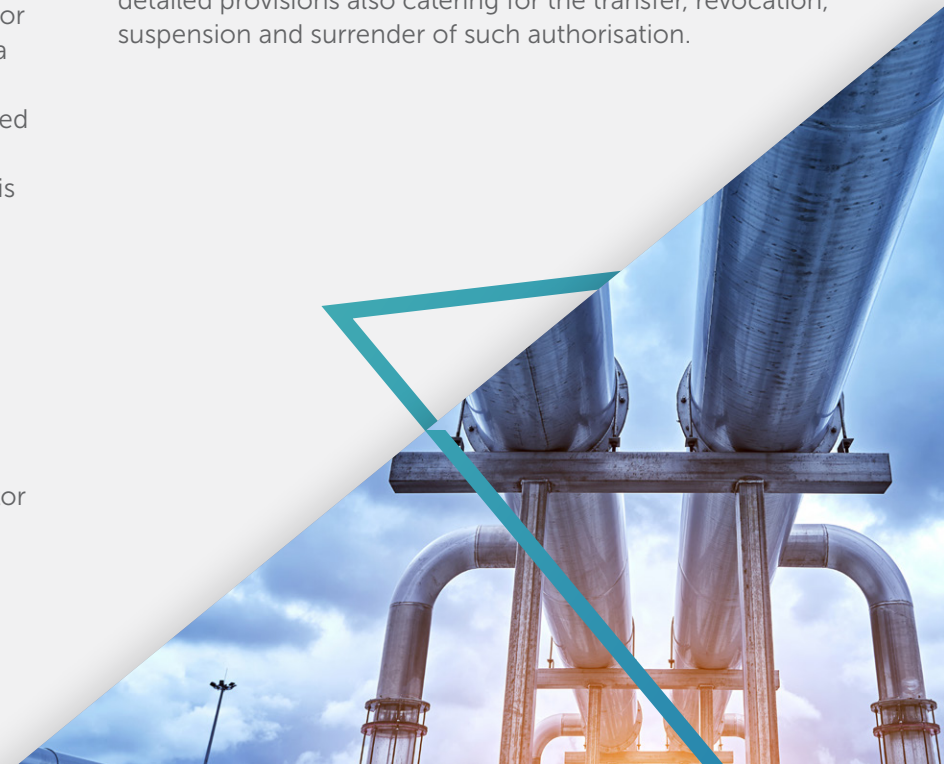
Reporting and auditing

The current reporting requirements under the Exclusion Regulations are rather light and somewhat vague, generally requiring “any” reports that may arise from the risk management plan to be submitted on an annual basis. The Draft Regulations introduce a more stringent reporting standard, which requires that an external auditor

be appointed to conduct an annual audit assessing compliance with the risk management plan and, speaking more to the ideals of South Africa’s circular economy, the volumes of waste diverted through beneficiation; jobs created; small, medium and micro enterprises established or supported; and the extent to which previously disadvantaged individuals have been supported. This raises the bar for industry, which has, to date, only been required to develop a mechanism to effect such change but has not necessarily been monitored in terms of implementation and tangible change that is being effected.

Transfer, variation, revocation, suspension and surrender

While the current Exclusion Regulations do allow the Minister to, subject to a review, amend or withdraw an exclusion authorisation, the Draft Regulations introduce detailed provisions also catering for the transfer, revocation, suspension and surrender of such authorisation.



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Offences and penalties

The Draft Regulations also propose to amend the offences and penalty provisions, the most significant being that the penalties will be adjusted to imprisonment not exceeding 15 years, an appropriate fine, or both a fine and imprisonment. The current provisions allow for, upon first conviction, a fine not exceeding R5 million and/or up to 5 years' imprisonment, and, upon second conviction, a fine not exceeding R10 million and/or up to 10 years' imprisonment.

No amendments are proposed to the transitional arrangements as they currently stand under the Exclusion Regulations.

Industry is encouraged to assess the proposed amendments and submit feedback to the Department of Forestry, Fisheries and the Environment before or by 5 May 2025.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

PLEASE NOTE

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