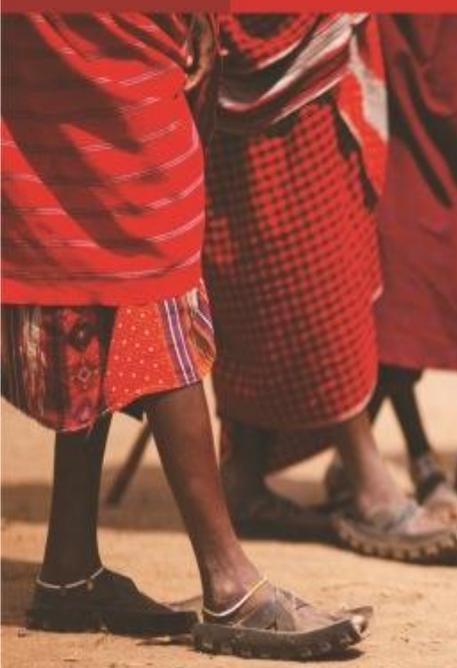




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Review of the National Environmental Management Laws Amendment Bill, 2017 ("The NEMLA Bill, 2017")

**An Overview by Lucy Koeslag,
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1 Introduction

The Bill together with an explanatory summary was initially published in Government Gazette 40733 Notice Number 245 of 31 March 2017. The Bill was introduced into the National Assembly by the Minister of Environmental Affairs on 24 May 2017.

The main purpose of the Bill is to amend certain provisions of the environmental suite of acts listed below, in order to further strengthen the one environmental system. Several amendments to these acts are proposed in the Bill, some with significant consequences for the mining industry, including but not limited to the overview below:

Legislation	Proposed Amendments
National Environmental Management Act 107 of 1998 (NEMA):	<ul style="list-style-type: none"> ■ Inclusion of a new environmental management principle promoting diversity in the environmental sector which requires the sector to advance and promote the full participation of black professionals. ■ Provision for the simultaneous submission of approval applications in terms of the National Environmental Management Act and the other specific environmental management acts in order to enable integrated environmental authorisation as part of the implementation of the one environmental system, clarifying the position regarding the lodging of section 24G applications relating to an environmental authorisation or waste management licence by a successor in title or person in control of the land, financial provision, clarity on section 28(4) directives, the management of residue stockpiles and deposits, environmental management and mineral and petroleum inspectors, legal liability, directives and offences and penalties.
National Environmental Management: Protected Areas Act 57 of 2003:	<ul style="list-style-type: none"> ■ Include the Chief Financial Officer of the South African National Parks as a member of the board ■ Create a new offence for non-compliance with section 48A which prohibits certain activities in marine protected areas and to rectify incorrect references to offences.
National Environmental Management: Biodiversity Act 10 of 2004:	<ul style="list-style-type: none"> ■ Clarity on the meaning of "control" and "eradicate" is proposed. ■ Clarity on measures to be undertaken to eradicate listed invasive species is proposed, including the steps, actions or methods to be undertaken and ensuring that the MECs responsible for environmental affairs follow the consultation process set out in sections 99 and 100 before exercising a power in terms of a provision under the Act.
National Environmental Management: Air Quality Act 39 of 2004:	<ul style="list-style-type: none"> ■ Provide clarity on the consequences of the unlawful commencement of a listed activity ■ Provide clarity that a provincial department responsible for environmental affairs is the licensing authority where a listed activity falls within the boundaries of more than one metropolitan municipality or more than one district municipality, ■ To ensure alignment with respect to the implementation of one appeal process under the National Environmental Management Act 107 of 1998 and with regard to certain provisions regarding the grant or refusal of exemptions.
National Environmental Management: Integrated Coastal Management Act 24 of 2008:	<ul style="list-style-type: none"> ■ To allow for the removal of structures erected prior to commencement of the Act and to provide clarity that an appeal against a decision issued by delegated official must be lodged at the appropriate sphere of government and appeal authority.
National Environmental Management: Waste Act 59 of 2008 (NEMWA):	<ul style="list-style-type: none"> ■ Move all definitions from Schedule 3 to section 1. Schedule 3 will also be substituted with a new Schedule. ■ To provide for textual amendment to the definitions of "residue deposits" and "residue stockpiles" and "waste" ■ To provide for the exclusion of residue stockpiles and residue deposits from the provisions of the Act. ■ To provide for the simultaneous submission of the site assessment report and remediation plan relating to a contaminated land and to provide clarity that the Minister responsible for mineral resources is responsible for the implementation of the waste management system in so far as it relates to a waste management activity that is directly related to prospecting, exploration, primary processing of a mineral or petroleum resource. ■ Increases to the fines that could be imposed in terms of regulations made under the Act are also proposed, as well as clarity that there will be no exemptions provided from obtaining a waste management licence.
National Environmental Management Amendment Act 62 of 2008:	<ul style="list-style-type: none"> ■ To clarify that an environmental management programme or plan approved in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 on or before and after 8 December 2014 is valid under NEMA and to provide clarity that an appeal against an environmental management programme or plan lodged in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) must be finalised under that Act. ■ Amendments are also proposed to provide for, amongst others, the transitional provisions regarding the environmental management programme or plan approved in terms of the MPRDA on or before and after 8 December 2014, to clarify that environmental regulations developed under the MPRDA continue until the development and publication of such regulations under NEMA and the NEMWA and to provide for transitional provisions regarding residue stockpiles and residue deposits approved in terms of the NEMWA.



2 One Environmental System:

The Bill also seeks, inter alia, to consolidate some of the issues associated with the 'One Environmental System', which was implemented on 8 December 2014, which is intended to create a legislative transition with regard to environmental issues associated with mining and related activities from the MPRDA to NEMA.

There have been other legislative amendments in this regard, namely the revisions made to the NEMA EIA Regulations (GN 324, GN 325, GN 326 and GN 327 in GG 40772) which came into effect on 7 April 2017 and further changes proposed in the Mineral and Petroleum Resources Development Amendment Bill (GG 36523 of 31 May 2013), with some of the changes intended to be applied retrospectively from 8 December 2014, which is the implementation date for the 'One Environmental System'.

2.1 Regulation of residue stockpiles and deposits:

One of the issues addressed by the proposed changes in the Bill is the duplication of the existing environmental regulatory framework when it comes to residue deposits and residue stockpiles. With effect from 2 September 2014 the National Environmental Management Laws Amendment Act 25 of 2014 brought all tailings facilities, waste stockpiles, discard dumps and slurry ponds etc. into the realm of waste management licencing under NEMWA. Licencing of residue deposits and stockpiles were also required in terms of Section 21(g) of the NWA and in addition to the licencing requirements, residue deposits and stockpiles were regulated in terms of the provisions of the MPRDA Regulations GN R527 (GG 26275 of 23 April 2004) as well as NEMWA Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits GN R632 (GG 39020 of 24 July 2015).

In terms of the Bill the regulation of residue deposits and residue stockpiles will be removed from NEMWA and will now be regulated under NEMA. Section 4 which deals with the waste types that are excluded from the provisions of the NEMWA, in addition to radioactive waste and the disposal of explosives, the Bill once promulgated will not be applicable to residue deposits and residue stockpiles. The Bill also repeals section 24S of the NEMA which provides that residue stockpiles and residue deposits must be managed in terms of the provisions of the NEMWA. In order to give effect to the exclusion of residue deposits and stockpiles transitional provisions have been proposed in the Bill, including:

- Waste management licenses issued in respect of residue stockpiles and deposits under the NEMWA will remain valid until they lapse, or until they are replaced under the provisions of the NEMA.
- The NEMWA Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits GN R632 (GG 39020 24 July 2015) will remain in force and be deemed to have been promulgated under NEMA.



In terms of these proposed changes a waste management licence will no longer be required to authorise residue stockpiles and deposits, although a water use licence will still be required in terms of Section 21(g) of the NWA.

Residue stockpiles and deposits will instead be regulated in terms of the Bill through an environmental authorisation and approved Environmental Management Programme, which will be approved as part of the main environmental authorisation process in terms of the Bill, thus reverting to the pre 4 September 2014 position for tailings facilities and discard dumps.

Residue stockpiles and deposits will still be required to comply with the existing Regulations Regarding the Planning and Management of Residue Stockpile and Deposit GN R632. These regulations will however have to be aligned with the changes proposed by the Bill and will therefore have to be replaced or amended in due course. Changes will also be required in this regard to the National Environmental Management Laws Amendment Bill EIA Regulations and the listed activities.

The changes proposed by the Bill will therefore help to consolidate and simplify the current costly and onerous environmental approval process for the mining industry and the regulation of all residue stockpiles and deposits, including those approved in terms of the MPRDA and should also be considered for the planning and management of residue stockpiles and deposits.

3 Status of EMPr approvals before and after 8 December 2014

The Bill proposes to amend Section 12 of the National Environmental Management Amendment Act, 2008 to once and for all provide that 8 December 2014 is the implementation date of the one environmental system by substituting the confusing provisions "immediately before the date on which this Act came into operation must be regarded as having been approved in terms of the principal Act as amended by this Act" to read that "An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) on or before 8 December 2014 shall be deemed to have been approved in terms of the National Environmental Management Act, 1998, and an environmental authorisation issued."

In addition the Bill provides by insertion of subsection 4A "An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002, after 8 December 2014, for an application received in terms of the Mineral and Petroleum Resources Development Act, 2002, shall be deemed to have been approved in terms of the National Environmental Management Act, 1998, and an environmental authorisation issued.

It is important to note that neither the provisions above will provide a mining company with "blanket" environmental authorisation for activities ancillary to exploration, prospecting, mining, or primary processing that was not obtained, was refused or there was failure to

obtain an environmental authorisation for listed activities as defined by the following applicable acts and notices:

- Activities listed in GN R 1182 (5 September 1997) as activities identified under section 21 of Environment Conservation Act, 1989 (Act No. 73 of 1989),
- Activities identified or specified under section 24(2) of National Environmental Management Act, 1998 including:
 - List of activities included in GN R 386 and GN R 387 of 21 April 2017;
 - Listing Notices 1, 2 and 3 in GN R 544, 545 and 546 of 18 June 2006; and
 - Listing Notices, 1,2 and 3 in GN R 983, 984 and 985 of 4 December 2014 (as amended)
- Waste management licence has not been obtained, was refused or not obtained for any activity listed in terms of section 19 of the National Environmental Management: Waste Act, 2008.' Including:
 - GN R718 under Government Gazette 32368 dated 3 July 2009, and
 - GN R921 in Government Gazette 37083 of 29 November 2013.

It seems that the shortcoming an EMP which was approved in terms of the MPRDA before 8 December and those pending approval on and after 8 December and are now deemed environmental authorisation approvals under NEMA, can be upgraded if the Minister of Mineral Resources is of the opinion that the mining or prospecting operation is likely to result in unacceptable pollution, ecological degradation or damage to the environment.

The rest of the listed activities under ECA, NEMA and NEMWA should be corrected with a S24G rectification application in terms of NEMA.

4 NEMA Section 24G Rectification Applications:

Another significant proposed change in the Bill is to the section 24G rectification applications under NEMA. Section 24G of NEMA provides for applications to be submitted to the environmental authorities for rectification of the unlawful commencement of listed activities, namely for commencing the listed activity where the required authorisation under NEMA or NEMWA was not obtained.

Under the current position only the person who actually commenced the listed activity without the required authorisation can proceed with a section 24G rectification application under NEMA. This is problematic in certain circumstances, such as where the premises or property where an unauthorised listed activity commenced or took place has been sold and the seller and transgressor is either no longer in existence or refuses to proceed with the section 24G application. This reluctance on the part of the seller is due to the fact that the rectification process is a lengthy process and can take several months to finalise and can also result in an administrative fine of up to five million rand along with other potential adverse consequences.



The changes proposed by the Bill now also allow for the section 24G rectification application to be submitted by the successor in title to or the person in control of the land on which the non-compliance with NEMA or NEMWA occurred.

The NEMA section 24G rectification process is lengthy and an administrative fine of up to five million rand may be imposed along with other potential adverse consequences. Accordingly this proposed amendment highlights the importance of conducting a thorough environmental due diligence investigation at the time of the sale of the premises or property to ensure that any historical omissions, transgressions and associated risks are identified before the sale is finalised.

5 NEMA Section 28 Directives:

The Bill also proposes noteworthy amendments to section 28 of NEMA, which deals with the general duty of care in the context of significant pollution or degradation of the environment, imposing an obligation on "every person who causes, has caused or may cause significant pollution or degradation of the environment" to take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring.

The relevant environmental authorities are empowered to issue a directive to, inter alia, cease any activity, operation or undertaking, to investigate the impact of activities and report on them, and to commence taking specific measures and complete those measures. In terms of the Bill this power to issue a directive will also be extended to a municipal manager of a municipality. The current position contained in section 28(4) of NEMA provides that such a directive may only be issued against "any person who is causing, has caused or may cause significant pollution or degradation of the environment".

The proposed changes in the Bill expand the category of persons who may be the subject of a directive by the authorities by the addition of the wording "and any other person to whom the duty of care applies" This must be read with section 28(2) which stipulates that the persons on whom the general duty of care imposes an obligation to take reasonable measures "include an owner of land or premises, a person in control of land or premises or a person who has the right to use the land or premises on which or in which (a) any activity or process is or was performed or undertaken; or (b) any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment".

This proposed change provides for an extended liability arising from the administrative provisions allowing for directives, under section 28 of NEMA, to also include owners, users and persons in control of land who are not responsible for the pollution or degradation. These persons may in future find themselves being held responsible by the relevant authorities for clean-up or other measures even though they have not actually caused or contributed to the significant pollution or degradation of the environment that forms the subject of the directive.

The proposed changes also provide for joint and several liability with regard to the recovery of costs from certain categories of persons where the relevant authorities undertake the clean-up operations in circumstances where a directive is not acted upon.

Accordingly this proposed amendment also highlights the importance of conducting a thorough environmental due diligence investigation at the time of the sale or lease of premises or property to identify any existing historical contamination and pollution and associated risks.

In conclusion, the Bill will have a major impact on the approval, management, regulation and planning procedures of various operations, particularly the mining industry and the proposed changes must be taken into account and considered and the status of the Bill and any further amendments that may be proposed to the Bill and related legislation should be closely monitored.