



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

The Director-General
Department of Forestry, Fisheries and the Environment
Attention: Mr Alvan Gabriel
Private Bag X447
Pretoria
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Our ref: EAPASA Regs
Date: 28 January 2022

Dear Director General

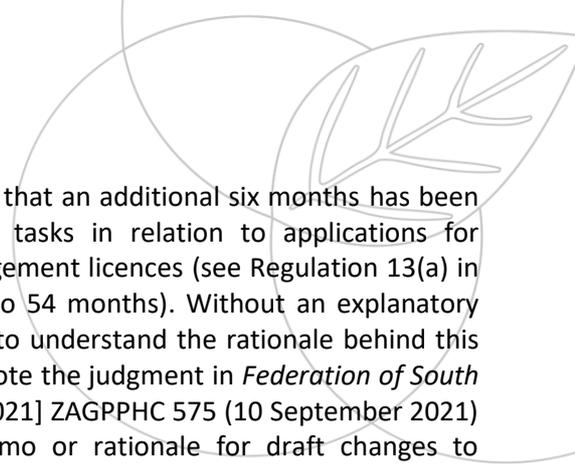
COMMENTS ON PROPOSED AMENDMENTS TO THE SECTION 24H REGISTRATION AUTHORITY REGULATIONS

1. We refer to Minister Creecy's invitation to submit comments on the proposed changes to the Section 24H Registration Authority Regulations (the "EAPASA Regulations") published in GN 1655 in GG 45703 of 31 December 2021. Our comments are below.
2. The Centre for Environmental Rights (CER) is a non-profit organisation and firm of environmental rights lawyers who help communities and civil society organisations in South Africa realise our Constitutional right to a healthy environment by advocating and litigating for environmental justice.
3. As far back as 2011, the CER welcomed the launch of the Environmental Assessment Practitioners Association of South Africa (EAPASA), recognizing its establishment as a long-awaited and necessary step towards improving the quality of environmental impact assessments in South Africa. We welcomed, in particular, the introduction of a mechanism for the environmental assessment practitioners' profession to hold their peers to account for unprofessional or unethical conduct, in a similar manner to the attorneys' profession.

Concerning delays with the requirement for EAPs to register with EAPASA

4. We have noted with concern regular delays in the requirement for environmental assessment practitioners (EAPs) to register with EAPASA. The EAPASA Regulations were originally published in July 2016 following a lengthy drafting process in which many opportunities for comment were provided to interested parties including industry professionals.
5. When originally published, the EAPASA Regulations gave EAPs two years from formal appointment of EAPASA in which to register with the body. EAPASA was formally appointed on 8 February 2018 which meant that EAPs had until 8 February 2020 in which to register – already 4 years since promulgation of the EAPASA Regulations. In an amendment to the Regulations on 21 August 2020, EAPs were provided with an additional two years in which to register with EAPASA, with the registration deadline now 8 February 2022 – almost 6 years since the Regulations were published.

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6. We note in the latest proposed amendment to the EAPASA Regulations that an additional six months has been proposed for EAPs to register with EAPASA and conduct specified tasks in relation to applications for environmental authorisation, section 24G applications and waste management licences (see Regulation 13(a) in GN 1655 of 31 December 2021 where 48 months has been changed to 54 months). Without an explanatory memorandum for the latest proposed amendment, it is difficult for us to understand the rationale behind this continued delay in the requirement for registration. In this regard, we note the judgment in *Federation of South African Fly Fisheries v Minister of Environmental Affairs* (62486/2018) [2021] ZAGPPHC 575 (10 September 2021) which emphasized the importance of publishing an explanatory memo or rationale for draft changes to environmental regulations.
 7. We strongly object to the continued delay in the requirement for EAPs to register with EAPASA. Should this amendment be made, industry professionals would have had over six years in which to get their affairs in order and to register with the body specifically tasked with regulating the very affairs of assessment practitioners.
 8. EAPASA has the potential to play an extremely important role in ensuring the protection of our environment and the sustainable development of our country. It promotes the advancement of the practice and quality of environmental assessment in South Africa in the public interest, in the interest of the environment, and in terms of relevant legislation. It has established criteria for EAPs and developed a comprehensive Code of Ethical Conduct and Practice as well as disciplinary procedures and sanction mechanisms.
 9. It is well known that the environmental assessment industry is in desperate need of regulation. For example, 2021 saw the Green Scorpions recommend that an EAP face criminal charges¹ for intentionally misleading the Department of Forestry, Fisheries and the Environment. Another example of the urgent need for the regulation of EAPs is that of a recent appeal lodged by an appellant against the granting of an environmental authorisation for a prospecting right to Buchuberg Resources (ref: WC30/5/1/1/2/1/10353PR). The focus of the appellant's appeal were concerns raised against the EAP who authored and signed off the environmental assessment report for this project. These concerns related to the credibility and conduct of the EAP and contraventions of the Natural Scientific Professions Act, the South African Council for Natural Scientific Professions (SACNASP) Council rules as well as the code of conduct. The concerns included that the EAP was not accredited to sign off on the report as an EAP, as she is registered as a geologist with the SACNASP and is therefore not permitted to work as an EAP in terms of the SACNASP Council rules and code of conduct; that she was not supervised as required by the Natural Scientific Professions Act; and that instances of plagiarism have been detected in the EAP's work on this project. The appellant also notes that his complaint against the EAP is not limited to this project – the EAP has signed off two annual Environmental Audit Reports and nine BARs & EMPs in the concerned area since 2019. The same concerns are present in all of these reports.
 10. Without the legal duty for EAPs to register with EAPASA, it has no power to exercise its vital oversight role. It is in light of this extremely valuable role that we object to the continued delay of the requirement for EAPs to register with EAPASA.

Clarification with regards to the restriction on the ability of I&APs to appeal in terms of section 43

11. The CER has been inundated with requests from concerned members of the public who have interpreted the proposed amendment as restricting the ability of interested and affected parties to lodge an internal appeal in terms of section 43 of NEMA.
12. We note the wording of Regulation 6 in the proposed amendment which extends the application of the EAPASA Regulations to section 43 appeals, and Regulation 7 which substitutes a new Regulation 14 of the EAPASA Regulations and in particular the new Regulation 14(1)(f) which members of the public have expressed concern

¹ See eg <https://www.news24.com/fin24/companies/green-scorpions-close-in-as-karpowership-tries-to-save-r225-billion-deal-20210715>.

about in that it could be interpreted to mean that only EAPs registered with EAPASA may perform tasks in connection with a section 43 appeal (i.e. restricting the ability of the public or interested and affected parties to lodge an appeal of an environmental authorisation under section 43 of NEMA).

13. Should the intention of this amendment be to restrict the lodging of a section 43 appeal to only registered EAPs we object on the strongest terms. Such an amendment would unlawfully restrict the wording of section 43 of NEMA, negate much of the National Appeal Regulations, 2014, and unlawfully curtail the ability of those seeking to challenge an environmental authorisation through appeals and judicial review.

14. While the CER does not interpret the proposed amendment to restrict the lodging of appeals in this way, we believe that the Department should clarify this aspect – either by means of inserting wording in the amendment to this effect, or through the formal issuing of a statement stipulating that interested and affected persons may still lodge an appeal under section 43 of NEMA and that the proposed amendment seeks only to require that any EAPs who are involved in such an appeal process, be registered with EAPASA.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

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